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ORIGINAL ARTICLE

Lucretia (and Lucia) and the Medieval Canonists: Guilt, Consent, and Chastity in the Early Canonistic Jurisprudence of Rape: Submission for Law and History Review

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Abstract

This essay explores a key stage in the legal history of the concepts of consent and guilt in cases of rape, namely in twelfth-century canon law in the work of Gratian and the early canonists who commented on his *Decretum*. It substantially revises the account that currently exists in scholarship and explains that confusion between *raptus* and rape and a limited read of the *Decretum* have combined to provide a problematic picture in which, it has been claimed, neither Gratian nor broader medieval canon law took rape seriously as an offence. The essay focuses on the underexplored Causa 32 in the *Decretum* and discusses how Gratian very directly addressed forced coitus in that section of his text, both condemning it and exonerating women of all guilt who are forced to have sex without their consent. Gratian and the decretists ended up changing the discourse on rape, in part through their treatment of both Lucretia of Roman legend and an early Christian martyr, Lucia. Their considerations, which intersected with theology, resulted in a legal principle that a raped wife cannot be charged with adultery. Since their considerations could also be applied to any rape victim, their work is important for the development of rape law and legal notions of consent.

Keywords: Gratian; consent; rape; medieval canon law; Lucretia; St. Lucia (or Lucy)

The tale of Lucretia, no matter which one you take, is tragic. A virtuous married woman of high standing, she is compelled to have sexual intercourse with Sextus Tarquinius, a man who is not her husband. The outrage and conflict that ensued brought on the collapse of the Roman kingdom and the birth of the Republic. For her part, Lucretia takes her own life. The story was told and re-told, most influentially early on in the historical work of Livy and in the

poetry of Ovid in the Augustan Age.[1] Hailed as a heroine by many, including many early Christians, who took her to be a pagan female exemplar choosing to die rather than to live with a loss of chastity, Lucretia has been the subject of poems, plays, paintings, novels, and films, not to mention the object of intense debate about the ethics of suicide and questions of culpability in states of duress.[2]

Her story has also played a significant role in discussions surrounding laws on rape and legal considerations of consent and guilt in relationship to coerced activity. This essay focuses on one key episode in the history of western legal thinking on those topics, that of the mid-twelfth century in the work of Gratian, the so-called "Father of the Science of Canon Law." The specific portion of the *Decretum* of greatest relevance to the topic of rape and consent has all but been ignored in scholarship to date, along with the substantial body of early commentary on it. That section of text is the fifth question of *Causa* 32 (C.32 q.5), where Lucretia's tragic story converges with that of two other women: an early Christian martyr named Lucia and the fictional woman around whom Gratian built C.32.

This essay provides a deep exploration of the ethical, theological, and legal issues connected to the stories of Lucretia and Lucia, and hence the fictional woman at the center of C.32, in the canonists' minds. These issues come into relief against the backdrop of earlier western legal systems and some key collections of canon law just prior to Gratian. Those various issues—ethical, theological, and legal—were so intertwined in the canonists' mind that they have to be taken into consideration by the scholar collectively. As should become clear below, the sources dictate that an investigation into this episode in legal history also takes into account theology, biblical exegesis, and other aspects of religion, including literature concerning saints (hagiography). As with so many legal topics under rapid development in the twelfth century within the realm of canon law, legal norms and ideas germinated in the soil of the Christian tradition, and legal historians today cannot understand how and why those norms and ideas took the shape they did without understanding something of the theological and religious assumptions, texts, and arguments behind them.

On the particular topic of rape and guilt, I argue that Gratian and the early canonists considered the stories of Lucretia and Lucia to be bound up with much larger questions about virtue and chastity, the guilt or innocence of the will in relationship to bodily force, the reward of virgins in heaven, and the nature of human will and consent. Moreover, these theological considerations influenced an adamant adherence to a legal principle that a married woman who is forced against her will to have sex with another man cannot be charged with adultery.

[1] Livy, *Ab urbe condita* (completed after 9 B.C.); Ovid, *Fasti* (c. 3-8 A.D.).

[2] Ian Donaldson, *The Rapes of Lucretia: A Myth and its Transformations* (Oxford: Clarendon Press, 1982). On the Renaissance humanist reception of Lucretia, Stephanie Jed, *Chaste Thinking: The Rape of Lucretia and the Birth of Humanism* (Bloomington: University of Indiana Press, 1989). On Lucretia in medieval English literature, Corinne Saunders, *Rape and Ravishment in the Literature of Medieval England* (Cambridge: D.S. Brewer, 2001), 152–77.

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Our modern jurisprudence on force and sexual violence emphasizes the opposing will and lack of consent on the part of the victim; these things in fact constitute the victim as victim rather than consensual participant. It seems worth exploring, then, this missing piece in the historical development of this notion. First, to set the stage, we must understand how Gratian has typically been understood in the history of rape law and the complications in the sources for investigating the topic; these complexities and the neglect of scholarship on C.32 q.5 explain the persistence of several misconceptions within modern scholarship on rape that warrant scrutiny and revision.

The Scholarship on Gratian and Rape

In the wake of the sexual revolution and second-wave feminism, historians and literary scholars of the medieval period began researching to an unprecedented degree matters of sex, sexuality, and gender; the fruits of this labor began to appear in the late 1970s, with the 1980s and early 1990s producing many works that remain widely cited in scholarship today. One example is Kathryn Gravdal's 1991 book on rape in medieval French literature. A literary scholar who laudably wanted to include medieval law in her efforts to understand literary and real responses to rape, she wrote this about canon law:

> Canon laws on *raptus* underwent major revision [in the twelfth century]. While secular law in France continued to maintain the death penalty for forced coitus (following Roman law), the Christian church began to promote a new attitude and new legislation. Gratian, the canonist and jurist, was chiefly responsible for the new policy, in his *Decretum* (c. 1140). The act of forced intercourse was not considered a canonical problem. Pure and simple rape was not a crime in Church law.... It is startling to realize that while the Church devoted vast pages to the codification of sexual behavior in canon law, it did not study, comment on, or codify simple rape.... Forced coitus, while it may have been a crime, was not a sin.[3]

From this passage and her broader overview of Roman and French laws, an unassuming reader looking for information on the history of rape law would be led to believe that Roman law and early and high medieval French law punished rape—understood as forced coitus or sexual intercourse against the will of one of the persons—with the most serious penalty possible. Meanwhile, "the Church," with an effort spearheaded by a man named Gratian, objected to this serious take on rape. Sexual violence was not its or his concern. Rape was not a crime, but, then again, half a page later, it might have been a crime, but the Church and Gratian certainly did not consider rape to be morally problematic or an offence God cares about (a sin).

[3] Kathryn Gravdal, *Ravishing Maidens: Writing Rape in Medieval French Literature and Law* (Philadelphia: University of Pennsylvania Press, 1991), 8, 10–11.

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Couched within the above quotation is a further section of Gravdal's introduction where she observed with apparent disdain that Gratian was obedient to the law of the Church when he did not stipulate death as the penalty for *raptus*, thereby "making an eloquent appeal for the softening of ravishment laws, in the name of Christian love." "Now," she continued—that is, now in the twelfth century in distinction from earlier Roman law which was tough on rape—lay rapists receive excommunication while priestly rapists "fall from their rank," which, Gravdal said, is a vague sentence. Then she sardonically asserted, "The softening influence of Christian love appears to soften only the fate of the *raptor*."[4] This is because the woman might end up married to her *raptor*, and the Church legitimized such marriages. The Church did not care for the woman but only about preventing possible feuds among families.[5]

Time does not permit unpacking all of the problems with Gravdal's characterization—dare I say caricature—of medieval canon law's treatment of rape.[6] But even the most misguided characterizations may include elements of truth, and it is worth being clear on what is true in Gravdal's provocative account and also why and how certain elements of truth could have been combined and twisted into such a misleading one. (That it is misleading should, I hope, become clear in the pages that follow.) What certainly is true is that rape did not receive anywhere near the attention in medieval canon law as all manner of other sexual activity did, including sexual offences within and outside of marriage. Studies of medieval penitentials, or books listing various sins and appropriate penances for priests to assign for them, have shown that these penitentials contain a surprising dearth of attention to sexual assault or forced coitus, even if it is discernible in some places.[7] It is also true that Gratian should be viewed as an important figure in the history of rape law, but this is not primarily on account of his treatment of *raptus*, but, as I will show, for his direct discussion of forced coitus.

Gravdal, as many others, acknowledged a difference between *raptus* and what we mean by the modern word "rape" (or *viol* in French). Many scholars have provided clear accounts of the difference between the two.[8] While "rape"

[4] Gravdal, *Ravishing Maidens*, 9.

[5] Gravdal, *Ravishing Maidens*, 9–10.

[6] Others have implied that treatment like Gravdal's is problematic. Hiram Kümper, "Did Medieval Canon Marriage Law Invent our Modern Notion of Rape? Revisiting the Idea of Consent before and after 1200," in *Law and Marriage in Medieval and Early Modern Times*, ed. Per Andersen and Ditlev Tamm (Copenhagen: DJØF Publishing, 2012), 127–38, noted the vigor of research by literary scholars on rape-narratives but the fact that "only a few of them have successfully combined questions and sources for both legal and literary history" (128). Better handling of the legal material, along with literary texts, is found in Saunders, *Rape and Ravishment*.

[7] Pierre J. Payer, *Sex and the Penitentials: The Development of a Sexual Code, 550-1150* (Toronto: University of Toronto Press, 1984); idem, *Sex and the New Literature of Confession, 1150-1300* (Toronto: Pontifical Institute of Mediaeval Studies, 2009). With much greater attention to rape and abduction in penitentials, in all their ambiguity, but also the clear reference to rape in some instances, see Saunders, *Rape and Ravishment*, 100–109. There is more in those sources on rape proper than is suggested in Payer's work.

[8] Nancy E. Virtue, "Another Look at Medieval Rape Legislation," *Mediaevalia* 22(1) (1998), 79–94, at 80; Hiram Kümper, "Learned Men and Skillful Matrons: Medical Expertise and Forensics of Rape in

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denotes forced coitus, *raptus* in Roman law and well into the medieval period usually denoted instead the removal of a woman from her home and, more importantly, her legal protectors, often for the purpose of marrying her. Such seizing, a form of *rapina*, was unlawful because it violated the rights of the woman's parents, and especially the *paterfamilias* (or the woman's guardian, if her father was dead), to engage in discussions and negotiations about marriage, and grant their consent to a marital union. In some cases, a woman was seized violently, against her will and with the man accompanied by coconspirators in the act; in others, she went willingly with her lover or desired lover, with the whole episode amounting to what today we would call "elopement." If the woman went unwillingly, it could certainly have been the case that the man also overpowered her and raped her, but this sexual violence was not essential to the definition of *raptus* in Roman law.

Scholars have also traced the development of the terminology, in both Latin and in vernaculars, such that forms of the Latin *raptus* and *rapere* eventually did come to mean "rape" in our sense of the word by the end of the medieval period.[9] As Dunn has helpfully mapped out in *Stolen Women in Medieval England*, the sources in the high and later Middle Ages themselves use the term *raptus* and *rapere* ambiguously. For some of her court records, forced coitus was in view or at least a component part of the offence; in others, the abduction of women, perhaps with their complicity in the act, was in view; in others, she remains uncertain—the terseness of the record does not permit the scholar to discern the precise nature of the offence. Such terminological ambiguity in the later Middle Ages adds to confusion for modern scholars.

While most scholars who discuss rape acknowledge these distinctions and developments, the challenge seems to be maintaining a proper distinction between *raptus* and rape even when the sources do not have this ambiguity and when the sources' usage of *raptus* does not necessarily imply physical intercourse, forced or other. They mix up concepts in their translations or rely on a bewildering array of English terms or revert to a single, problematic translation. Payer, for instance, gave up on coming up with a good English equivalent for *raptus* and consigned himself to using "rape," resulting in a very confusing treatment for English-speaking readers. Without saying he was going to use "rape" for the Latin *raptus*, Brundage often did the same. Others have used "abduction" or fluctuated between "abduction," "rape," *raptus*, "ravishment," "kidnapping," and "elopement," depending on the context.

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the Middle Ages," in *Law and Medicine in the Middle Ages*, ed. Wendy Turner and Sara Butler (Leiden: Brill, 2014), 88–90; James A. Brundage, "Rape and Seduction in the Medieval Canon Law," in *Sexual Practices in the Medieval Church*, ed. Vern L. Bullough and James Brundage (Buffalo, NY: Prometheus Books, 1982), 141–42 (also partly duplicated in "Rape and Marriage in Medieval Canon Law," *Revue de droit canonique* 28 (1978), 62–75); Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), 47–48; Gwen Seabourne, "Rape and Law in Medieval Western Europe," in *A Companion to Crime and Deviance in the Middle Ages*, ed. Hannah Skoda (Leeds: Arc Humanities Press, 2023), 343.

[9] Gravdal, *Ravishing Maidens*, 2–6; Kümper, "Learned Men and Skillful Matrons," 93–94; Caroline Dunn, *Stolen Women in Medieval England: Rape, Abduction, and Adultery, 1100-1500* (Cambridge University Press, 2013), 2, and chapter 1.

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But the frequent pairing of the Latin *raptus* with the English "rape," or the reliance on the latter to translate the former, is particularly problematic. Note above in the quotation from Gravdal her identification of a text by Gratian on *raptus* followed by her condemnation of the Church's stance on or neglect of "rape." It is in this way that readers of many modern scholarly works on this topic are misled. Seeing the word "rape," they reasonably assume they are dealing with the modern concept of rape, but the law in question often concerned instead *raptus*, and did not necessarily have anything to do with forced coitus.

The conflation of terminology in the scholarly accounts is further exacerbated when the language of the original sources is not taken into account or translated carefully. Take as one example the section in Brundage's massive *Law, Sex, and Christian Society in Medieval Europe* on the Roman law of *raptus*. The section of text bears the subheading *Raptus*. Brundage then proceeds to talk about how, the further one goes into the period of the Republic, one sees the Romans taking more seriously "sex by force," and "during the early imperial period forcible ravishment became a serious offense." He cites a portion of the Digest to assert that "the law imposed punishment upon those who 'ravished a boy or a woman or anyone through force'."[10] But what is the Latin term for "ravished"? And does this passage have in view *raptus* or rape? In fact, what is in view is what we would call rape and not what the Romans called *raptus*, but Brundage's translation of "ravished" in combination with the section subheading of *Raptus* is not helpful. The Latin, which Brundage does not quote, refers to those who engage in illicit sexual relations by force (*per vim stupraverit*).[11] Such an offense could also in Roman law be identified with terminology of sexual *violentia* or a woman having been *oppressa*.[12] In short, *per vim stuprum* and *raptus* constituted two different offences within Roman law, even if the latter might sometimes or often also involve the former. Unfortunately, some texts related to *per vim stuprum* have been spoken of as if they refer to *raptus*, and laws related to *raptus* have been spoken of as if they refer to "rape."

Gratian himself very much worked within the Roman law framework of *raptus* as a crime distinct from (although potentially overlapping with and suggestive of) *per vim stuprum*.[13] But unfortunately, as the above suggests, the main scholar of canon law whom all subsequent scholars have cited on questions of sex and rape, Brundage, never discussed directly the section of Gratian's *Decretum* where Gratian actually does treat a clear case of rape unrelated to *raptus*, although bits of the decretist commentary on that section appear within his *Law, Sex, and Christian Society* (but never in a

[10] Brundage, *Law, Sex, and Christian Society*, 47, where the footnote does not reproduce the Latin original.

[11] Dig. 48.6.3.4 (Marcianus): "Praeterea punitur huius legis poena, qui puerum vel feminam vel quemquam per vim stupraverit."

[12] Dunn, *Stolen Women*, 24-25; Diana C. Moses, "Livy's Lucretia and the Validity of Coerced Consent," in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki E. Laiou (Washington DC: Dumbarton Oaks Research Library and Collection, 1993), 39–81, at 46.

[13] Already recognized in Virtue, "Another Look," 85.

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sustained way.)[14] When Brundage discussed rape in Gratian, he drew upon only two sections of the *Decretum*, C.36 q.1 and portions of C.27 q.2, but these deal with *raptus*.[15] Scholars have followed his lead, quoting and referring to the same limited passages on *raptus*, often not appreciating how the texts cited fit within Gratian's arguments and legal analysis. This applies to Gravdal and to Corinne Saunders.[16] It applies to Caroline Dunn.[17] This even applies to the scholar, Hiram Kümper, who has come closest to asserting what I will argue in this essay, that Gratian's work and his emphasis on consent are central to changes in the medieval law of rape.[18]

It is true that Gratian's case statement in C.36 set up the question with hypothetical facts of a case involving rape and then asking whether this scenario constituted *raptus*. For the course of events imagined in C.36, nonconsensual intercourse is part of what happens to the *rapta*, after she has been lured with gifts to a banquet and without her parents' knowledge. It is also true that Gratian cites some texts, including by Isidore of Seville, that link the Latin *raptus* with a sexual corrupting (*corruptio*) as a way to trace the etymology of *raptus*. But this does not mean, as has been claimed, that, for Gratian, sexual intercourse or forced coitus is one of four necessary elements of *raptus*.[19] Gratian differentiates *raptus* from other sexual offences, thereby acknowledging its frequent sexual dimension, but he also recognizes that the force involved in *raptus*, which absolutely is necessary for an action to be counted legally as *raptus*, may be against the girl alone or against the parents alone or against both. Thus, Gratian acknowledges that *raptus* might not involve forced sexual coitus but rather could occur when a young woman sneaks away with a man with the intent to marry, perhaps engages willingly in sexual relations with him, but is not forced upon in any way, and only her parents are "forcibly" denied their parental rights in the marriage negotiation process. Meanwhile, the focus of this particular question in his *Decretum* is on determining when a man is a *raptor* and, subsequently (in C.36 q.2), whether, after penance, after the offence has been redeemed, it is conceivable for a lawful marriage between *raptor* and *rapta* to take place.

[14] See, e.g., *Law, Sex, and Christian Society*, 396–97.

[15] Brundage, "Rape and Marriage," 64-65; Brundage, "Rape and Seduction," 142–44. It is important to note that C.27 q.2 c.48 and surrounding texts constitute a very small portion of the question, whose primary concern is the status of a marriage where a woman was previously betrothed to someone else. Abduction or *raptus* emerges in this argument as Gratian chooses to differentiate betrothal from *raptus*: a betrothed individual who chooses to marry someone else freely is one matter, and she should not be compelled to return to her original fiancée; a betrothed individual who is abducted, however, should be returned to her original fiancée.

[16] Saunders, *Rape and Ravishment*, 77–87, which includes a brief treatment on Gratian's C.36 on *raptus* followed by the best available discussion of canonistic commentary on *raptus* for the remainder of the Middle Ages.

[17] Dunn, *Stolen Women*, 28.

[18] Kümper, "Did Medieval Canon Law Invent our Modern Notion of Rape?"

[19] Brundage, "Rape and Seduction," 142–43, beginning with a discussion of *raptus* in C.36, identifies four components that after Gratian "gradually" became definitive for "rape," including sexual intercourse. Virtue, "Another Look," 85 says that Gratian himself maintained that "*raptus* necessarily involved [these] four elements." She here is replicating Gravdal, *Ravishing Maidens*, 8–9.

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In short, for all the debates and the literature citing C.36 for Gratian's work on rape, it actually does not provide much to the modern scholar for understanding Gratian's views on forced coitus. A few scholars have seen inklings even here though of something more positive and consequential in the development of rape law. By combining this treatment with Gratian's emphasis on consent in marriage formation, Kümper theorized that Gratian and twelfth-century canon law might be responsible for the shift he has documented toward a much more overt concern with the will in legal definitions of rape beginning in the thirteenth century.[20] Many years earlier, because of Gratian's argument in C.36 asserting that women are "owners" of their own bodies with the power to determine when it gets to be "used" (Gratian was drawing on the Roman law distinction between *dominium* and *usus*), Virtue had seen in C.36 "a new notion of female sexual integrity and self-possession."[21] But others have ignored Gratian altogether in the development of rape law, as Gwen Seabourne has recently done, perhaps wisely leaving C.36 aside.[22] Nonetheless, what Kümper and Virtue detected traces of in C.36 rushes forward boldly in C.32. Gratian did address rape, and he did so in a way inextricably bound to the question of the woman's will, consent, and integrity of body and character.

Rape and Consent in Earlier Roman and Canon Law

To appreciate Gratian's contribution to rape law with his emphasis on consent, we have to consider very briefly how earlier laws, above all Roman law and earlier canon law, addressed women in a situation akin to that of Gratian's wife of C.32. Of relevance here is not just the question of rape as opposed to *raptus*. Of relevance is also to what extent earlier laws addressed the rape of married women and women with sexually promiscuous or dubious pasts, and the question of consent and coerced consent.

The story of Lucretia is central to these concerns. Diana C. Moses masterfully situated Livy's account of her ordeal in the context of developments in Roman law and society during the period of Caesar Augustus' moral reform of the new Empire.[23] Moses pointed out that the Roman law jurisprudence around sexual offences or *stuprum* was anything but clear, especially in cases of married women. On the one hand, legislation under Augustus seemed to recognize a difference between consensual *stuprum* and forced or coerced *stuprum*. On the other hand, the same legislation permitted charges of adultery to be brought against wives who had engaged in sex with another man, but the only exception jurists explicitly named was a situation of potential adultery or *stuprum* in situations of war, so that the captive woman or woman confronted with an

[20] Kümper, "Did Medieval Canon Law Invent our Modern Notion of Rape?"; also Kümper, "Learned Men and Skillful Matrons."

[21] Virtue, "Another Look," 80. The relevant passage is C.36 q.1 d.p.c.3.

[22] Seabourne, "Rape and Law in Medieval Western Europe," focuses on the later Middle Ages and secular jurisdictions, particularly English common law, but does nothing with canon law.

[23] Diana C. Moses, "Livy's Lucretia and the Validity of Coerced Consent," in *Consent and Coercion to Sex and Marriage*, 39–81.

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invading army was not to be charged if an enemy soldier had forced himself upon her. The context of civil war nevertheless seemed to push further thinking and legal distinctions between "women who had been forced to commit *stuprum*" from those who committed it consensually.[24] But as for whether a married woman could be charged with adultery or dismissed merely because of the pollution resulting from the *stuprum* is not clear.[25] In Livy's account of Lucretia's plight, Lucretia does give her consent to sexual relations with Sextus Tarquinius, but it is clearly coerced consent—her attacker threatened otherwise to kill her and lay her body next to that of a slave, impugning her honor while giving her no chance to defend herself against charges of adultery and *stuprum*. Nonetheless, "Roman law expresses no 'unified theory' of coerced consent,"[26] and so Lucretia's legal standing remains dubious even if Ovid considered her to be morally innocent. Thus, according to Moses, Roman law of the early centuries was beginning to grow more complex in considering matters of consent, force and fear, and other subjective factors, and yet it did not create categories that clearly would have protected a wife from charges of adultery from her husband in a situation where the bare facts of a case were that she had had sexual intercourse with another man. And, even if she was not culpable morally, some sort of legal punishment ought still to follow.

Angeliki E. Laiou touched upon some eastern Roman and canon law material that demonstrate that, in the Byzantine empire, "consent was not of capital importance in the legal approach to [adultery]."[27] The question of war-time captivity and sexual intercourse between a captive woman and her captor, which Roman law had noted, recurs in Byzantine canon law. Commentary on the first canon of St. Gregory of Neocaesaraea (Gregory Thaumaturgus, 213-270 AD) emphasized the moral status of the woman prior to the captivity: to determine whether the woman was coerced into sex, the main thing to consider is whether "she was known to have led a virtuous life." If so, she is presumed innocent, to have suffered rape under duress. If, however, she was "suspected of a propensity to fornication," that same suspicion would apply to events in her captivity.[28] Reputation and your former life could come back to haunt you.

As far as simple rape, Roman law did forbid it, with severe consequences. Rape does not make up a substantial portion of Justinian's *Corpus iuris civilis*, but there are references to it. As noted above, the jurist Marcianus commented on the *Lex Julia* pertaining to public force, which covered many varieties of violence. He noted that the same penalty of the law applied to those who raped (*per vim stupraverit*) a woman or boy or anyone. In the context of the rest of the section, it is reasonable to assume that situations of public rioting or unrest in particular were in view. A law originally issued in 290 is more explicit about consent and the lack of guilt to those who were taken into illicit sex through

[24] Moses, "Livy's Lucretia," 69.

[25] Besides Moses, note Saunders, *Rape and Ravishment*, 35: again, the only explicit exception given to clearing the woman of all guilt is in cases of warfare.

[26] Moses, "Livy's Lucretia," 79.

[27] Laiou, "Sex, Consent, and Coercion in Byzantium," n *Consent and Coercion to Sex and Marriage*, 133.

[28] Laiou, "Sex, Consent, and Coercion," 188–89.

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force. Maintained in the civil law as Cod. 9.9.20, it reads, "The laws punish the detestable wickedness of those who prostitute their modesty to the lust of others, but not those who are seduced by force and whose thoughts are free from blame, and it has been justly considered that the latter's reputation should remain spotless and no one is forbidden to marry them."[29] The concern here rests in marital eligibility, but it is a place where brute force and the matter of one's will (*voluntas*) play a notable role.

Many scholars have referred to Justinian's revisions to *raptus* legislation. Justinian had *raptus* or abduction for the sake of marriage, without parental consent, in view here.[30] He named free-born virgins and widows; of additional concern were women affiliated with the church, namely "virgins or widows dedicated to God" (identified as *sanctimonialia*). While some portions of the text imply sexual intercourse, perhaps forcibly obtained, as a component of the act, the consent or lack thereof of the women to the whole enterprise is irrelevant to the punishment that ensues (death and loss of property). In fact, the severe punishment is meant not only to deter men from this crime but thereby to prevent any "opportunity for sinning" to the woman, "willing or unwilling, since her very wish to sin is induced by the wiles of the wicked man who contemplates ravishment."[31] Consent emerges here, but not considered in direct relation to the question of nonconsensual sexual intercourse but more so to differentiate what we would call "abduction" from "running away together." Brundage has cited this law to assert that Roman law prohibited rape by husbands of their wives, but that makes little sense for a law entirely devoted to the *raptus* of the as-yet unmarried.[32] The translation of the *Codex* by Fred H. Blume sensibly translates the relevant section in terms of a man ravishing his betrothed by force.[33] This could refer merely to a man forcibly taking his betrothed from her father's home, not in a way according to planned arrangements; sexual force is not necessarily in view and is legally irrelevant for determining the crime of *raptus*. Once again, then, we are left with a small number of laws that address rape or forced coitus directly, and the material on *raptus* focuses on other concerns, without much attention to the female will or the role of coercion. Hints are present, but nothing substantial or sustained.

[29] Cod. 9.9.20: "Foedissimam earum nequitiam, quae pudorem suum alienis libidinibus prosternunt, non etiam earum, quae per vim stupro comprehensae sunt, inreprehensam voluntatem leges ulciscuntur, quando etiam inviolatae existimationis esse nec nuptiis earum aliis interdici merito placuit." Translation by Fred H. Blume.

[30] Cod. 9.13.1. Brundage's treatment is problematic; much clearer is Saunders, *Rape and Ravishment*, 34–35.

[31] Cod. 9.13.1.3b: "Si enim ipsi raptores metu atrocitatis poenae ab huiusmodi facinore temptaverint se, nulli mulieri sive volenti sive nolenti peccandi locus relinquetur, quia hoc ipsum velle mulieri ab insidiis nequissimi hominis qui meditatur rapinam inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non facit eam velle in tantum dedecus sese prodere."

[32] Brundage, "Rape and Seduction," 144.

[33] Cod. 9.13.1.1b: "Quibus connumerabimus etiam eum, qui saltem sponsam suam per vim rapere ausus fuerit." See the translation by Blume, edited by Timothy Kearley, and hosted by the University of Wisconsin at https://www.uwyo.edu/lawlib/blume-justinian/_files/docs/Book-9PDF/Book9-13.pdf (March 4, 2025).

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Prior to Gratian, major Latin canon law collections were inconsistent with how much they addressed rape, and sometimes they only concerned themselves with *raptus*. Such is the case with Regino of Prüm in the early tenth century. Regino included several texts from early Christian councils and popes denouncing *raptus* but did not directly address rape.[34] A century later, Burchard of Worms repeated many of these canons.[35] Farther on in his collection, his penitential questionnaire instructs the priest to ask about committing fornication with a woman religious or corrupting a virgin, but the question of the woman's consent does not arise. It next inquires about *raptus*, regardless of whether it occurred "without the will of the woman or the parents." The man receives the severest, seven-year term of penance, without permission to marry (the same judgment murderers receive). If the woman did not consent to the enterprise, she is cleared to marry.[36]

With the collections associated with Ivo of Chartres (c.1040-1115), historians can see a distinctive difference. This is because those collections devote entire sections to religious and include passages addressing sexual violence against women religious, not just *raptus* canons. These sections served as one of the sources for Gratian in C.32 q.5, including for the various canons that are most relevant for the issue of chastity in relationship to consent and rape.[37] The texts ultimately stem from patristic sources, primarily from Ambrose, Jerome, and Augustine, that speak of consecrated Christian virgins or other women religious.[38] *Collectio tripartita* 3.14 is entitled *De uirginibus* and deals with what constitutes one's status as a virgin. Based on the patristic texts selected, virginal status is more a question of a state of mind than whether the flesh had ever been corrupted. The entire section actually focuses on the question of whether coerced sex corrupts someone so that they are no longer considered a virgin. The Ivonian *Decretum* includes most of the same canons that Gratian also later copied from the *Tripartita*. In that collection, they appear in book 7 in a large section on monks, nuns, and the penance for those who transgress their vow of continence. A total of nine canons on the sexual assault of virgins in the

[34] Regino of Prüm, *Duo libri de synodalibus casibus et disciplinis ecclesiasticis* 2.154-161, in *Sendhandbuch*, ed. Wilfried Hartmann, MGH Collectiones canonum 1 (Wiesbaden: Harrassowitz, 2023), 2.478–82. English translation: Regino of Prüm, *Two Books on Synodal Causes and Ecclesiastical Disciplines*, trans. Giulio Silano (Toronto: Pontifical Institute of Medieval Studies, 2021), 202–204. Much more sustained investigation of rape and *raptus* in early medieval canonical material, beyond what Payer and Saunders have done, is warranted.

[35] Burchard, *Decretum* 9.32-39. A new online edition is in progress; meanwhile consult PL 140:819-21.

[36] Burchard of Worms, *Decretum* 19.5 (PL 140:958D).

[37] Historians connect three canonical collections with Ivo, Bishop of Chartres; recent work has determined that Ivo is likely the compiler of the *Decretum* but not the *Tripartita* and the *Panormia*. See the introductory materials for the online edition at https://ivo-of-chartres.github.io/. See also Christof Rolker, "The Age of Reforms: Canon Law in the Century Before Gratian," in *The Cambridge History of Medieval Canon Law*, ed. Anders Winroth and John C. Wei (Cambridge: Cambridge University Press, 2022), 62–78.

[38] On consecrated virgins, see René Metz, *La consécration des vierges: Hier, aujourd'hui, demain*, Droit canonique (Paris: Éditions du Cerf, 2001).

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Tripartita then appear in Gratian's treatment of the sexual assault of a married former prostitute in recension R2 of C.32 of his *Decretum*.[39] Among those canons are three from Augustine's *City of God* 1.19, where Lucretia is discussed, which make up two canons in the vulgate *Decretum Gratiani*. In short, the context for these texts in the Ivonian collections comprises a set of canons and patristic texts elicited to speak about continence and whether women religious, either perpetual virgins or those practicing a kind of second virginity through chastity and celibacy, lose their status as virgins or as "chaste" when they are sexually assaulted. While Gratian utilized this source material from Ivo, he radically altered their context and application by composing a case statement about a prostitute who later suffers rape by a man hired by her husband to provide grounds for divorce.

The Case Statement in Gratian's *Decretum* C.32

Gratian's *Decretum* is famous for being constructed in its second main section around hypothetical cases, cases that are realistic yet sometimes so outrageous that one has a hard time imagining that any of them could stem from actual events.[40] They have just enough of the plausible to make the legal questions arising from them worthy of attention and just enough of the outlandish to make for attention-grabbing classroom exercises. Reviewing the hypothetical case in Gratian's mind when Lucretia is named illuminates much of what is new and distinctive in his usage of her story. As a result, we must begin with the background case that Gratian formulates for this section of the *Decretum*, namely Causa 32.

[39] The following abbreviations are used: Trip. = *Collectio tripartita*; ID = Ivo's *Decretum*; *Decr. Gr.* = *Decretum Gratiani*; Augustine, *CD* = *De civitate dei* by Augustine. Canons in Gratian are marked as appearing already in R1 or being an R2 addition. I prefer the terminology of "R1" and "R2" to Anders Winroth's "first recension" and "second recension" for describing different stages of development of Gratian's text. The foundational work for describing the two main recensions is Anders Winroth, *The Making of Gratian's* Decretum (Cambridge: Cambridge University Press, 2000); the Appendix remains essential for a quick reference to see which texts belong in which of the two main recensions. For the rationale for the terminology R1 and R2, with the possibility for R2a, etc., see Atria A. Larson, "Gratian's *De penitentia* in Twelfth-Century Manuscripts," *Bulletin of Medieval Canon Law* 31 (2014): 57–110."

The nine canons in Trip. that also show up in the *Decretum* are as follows: (1) Trip. 3.14.1 = Ambrose, ID 7.137, *Decr. Gr.* C.32 q.5 c.1 [R1]; (2) Trip. 3.14.2 = Ambrose; ID 7.138; *Decr. Gr.* C.32 q.5 c.2 [R2]; (3) Trip. 3.14.3 = Augustine, *CD* 1, ID 7.139a, *Decr. Gr.* C.32 q.5 c.3 [R1]; (4) Trip. 3.14.4 = Augustine, *CD* 1, ID 7.139b, *Decr. Gr.* C.32 q.5 c.4a [R2]; (5) Trip. 3.14.5 = Augustine, *CD* 1, ID 7.139c, *Decr. Gr.* C.32 q.5 c.4b [R1]; (6) Trip. 3.14.6 = Augustine, *De libero arbitrio*, ID 7.140, *Decr. Gr.* C.32 q.5 c.6a [R1]; (7) Trip. 3.14.7 = Jerome on Romans, not in ID, *Decr. Gr.* C.32 q.5 c.6b [R2]; (8) Trip. 3.14.8 = Isidore, ID 7.142a, *Decr. Gr.* C.32 q.5 c.8a [R2]; (9) Trip. 3.14.9 = Isidore; ID 7.142b, *Decr. Gr.* C.32 q.5 c.8b [R2].

[40] John Noël Dillon, "Case Statements (*themata*) and the Composition of Gratian's Cases," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 92 (2006): 306–39. John C. Wei, *Gratian the Theologian*, Studies in Medieval and Early Modern Canon Law 13 (Washington DC: Catholic University of America Press, 2016), 191–225. On the *Decretum*'s structure, see Peter Landau, "Gratian and the Decretum Gratiani," in *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington, History of Medieval Canon Law 6 (Washington DC: The Catholic University of America Press, 2008), 22–54.

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Causa 32 is not short on drama. The relevant portions of the distressing case Gratian set before his students read as follows:

> A certain man, since he did not have a wife, joined to himself in marriage a certain prostitute. She was infertile, granddaughter of a freeman, and daughter of a servile land-tenant. While her father wanted to hand her over to another man, her grandfather joined her to this [first] man, for the sole cause of sexual gratification. Then this man, motivated by repentance, began to seek children for himself from his own female slave. Then he felt convicted and worthy of punishment on account of his adultery, and so he solicited a certain man to force himself upon his wife so that he might therefore send her away [in divorce]. … It is first asked whether a prostitute can licitly be taken in marriage. In the second place, whether she is properly to be called a wife who is taken purely for sexual gratification. … Fourth, if a man is permitted to seek children from a slave when his wife is still alive. Fifth, if a woman who is sexually assaulted is proven to have lost her modesty (*Quinto, si ea, que uim patitur, pudicitiam amittere conprobetur*)….[41]

Here is a man who takes a prostitute as his wife only because he cannot remain chaste and, in accord with what he understands of Christian teaching, finds a legitimate outlet for his libido by marrying the prostitute and not just hiring her for sex. But he thinks he should be having children and so begins an affair with his slave.[42] His guilt leads him to try to find a way to produce grounds for divorce so that his other union might become legitimate. The fifth question will be our focus, and, in terms of its relationship to the case scenario, its answer would determine whether the dismissal the husband attempts is to any degree legitimate. The husband wants his wife to be charged with adultery, and he thinks that would validate his divorce of her so that he would be free to marry another (on this point of canon law, he will be shown to be in error).

[41] C.32 case statement; all translations of Gratian are my own based on the Latin edition in Emil Friedberg, *Decretum Gratiani*, vol. 1, *Corpus iuris canonici* (Leipzig: Tauchnitz, 1879; repr. Graz, 1956). Readers can also consult the useful translations of John T. Noonan, Jr., "Marriage Canons from the *Decretum* of Gratian and the *Decretals*, *Sext*, *Clementines*, and *Extravagantes*" (1967), supplemented by Augustine Thompson, O.P., online at http://legalhistorysources.com/Canon%20Law/MARRIAGELAW.htm (January 18, 2024.

[42] In Roman society, bearing legitimate children was considered the goal of marriage to such a degree that the official taking a census, the censor, was required to exact oaths from citizens about their marital status and how many children they had and even to ask if they had "married for the purpose of procreating children." See Annalyze Jacobs, "Carvilius Ruga v Uxor: A Famous Roman Divorce," *Fundamina* 15(2) (2009), 96–97. This is not to say that Romans conceived of no other purpose or benefit to marriage; see Suzanne Dixon, *The Roman Family* (Baltimore: Johns Hopkins University Press, 1992), 67–71. Procreation was one of the "goods of marriage" in the Christian tradition, but Christianity affirmed the validity of marriage even if procreation did not occur, or even was not a goal, recognizing other "goods" that marriage wrought; Philip L. Reynolds, *How Marriage Became One of the Sacraments: The Sacramental Theology of Marriage from its Medieval Origins to the Council of Trent*, Cambridge Studies in Law and Christianity (Cambridge: Cambridge University Press, 2016), 99–154.

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For our considerations, what is most important for setting up q.5 is Gratian's insistence in the treatment of the first two questions that the marriage between the man and prostitute is legitimate, in spite of her status as a prostitute and in spite of the fact that the man wants her only to fulfill his sexual desires. For the first question, whether someone can marry a prostitute, Gratian treated the biblical example of the prophet Hosea, whom God instructed to take a prostitute as his wife; for the second question, on the legitimacy of a union existing for sexual gratification, even though ideally marriage should also be for procreation, sexual intimacy is another valid component of marriage, something "licit on account of the good of marriage (*bonum coniugii*)."[43] The main point is not to be missed: this pitiable woman is, according to canon law, a full-fledged wife and thus possesses all the rights and protections that attend to that status. As such, for Gratian, her former status as a prostitute means nothing in terms of the canonical consideration of her plight as a wife against whom her husband commits adultery and, most relevant for the questions of consent and rape, as a wife who becomes a rape victim in her husband's twisted machinations to rid himself of an infertile spouse.

Gratian's Juxtaposition of Lucretia and Lucia in C.32 q.5

In Gratian's case, full of tawdry details and shady figures, in q.5, "Is a woman who is sexually assaulted proven to have lost her modesty (*pudicitia*)?", Gratian cuts through the mire with a laser focus on a single point. At the end of the day, the question is not about the woman's former or current status and reputation and/or about whether she is at home or in captivity, whether a war is going on or not, or whether she is the public's concern or not since she already belongs to a man. The question is simply and purely the following: did the woman consent in her heart and mind to the act? If so, she is guilty of adultery; if not, she is innocent.

In boiling down the matter to that question, Gratian worked within the framework of the patristic sources he cited, including Augustine's treatment of Lucretia in *The City of God* 1.19, which appears at C.32 q.5 c.4.[44] Whereas Lucretia had been a married woman, Augustine famously compared her to the Christian virgins and matrons who had been raped by the Goths and other barbarians and who decided not to kill themselves in the wake of the violence suffered.[45] For Augustine, this was because they had confidence that, since they had not consented to the act, they were innocent before God. As so often in the *City of God*, Augustine was not interested in attacking a single individual (here,

[43] C.32 q.2 d.p.c.4.

[44] The name for this essay is a play on Wolfgang P. Mueller, "Lucretia and the Medieval Canonists," *Bulletin of Medieval Canon Law* 19 (1989), 13–3; Mueller's essay focuses mostly on the question of suicide and how canonists in and after Gratian's work evaluated the morality of Lucretia's final act. C.32 q.5 c.4 has two parts; c.4b, beginning "Lucretiam, matronam nobilem," was already in R1.

[45] Many harsh assessments of Augustine's treatment of Lucretia may be found. A more balanced read is found in Donaldson, *The Rape of Lucretia*, 28–31.

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Lucretia) but rather in exposing the inconsistencies and moral failures he saw in Roman society. Here was a woman praised by the Romans, whom they asserted had not committed adultery; she was not tried, not convicted of anything, so how could it be just or right that she die? If it was not just that she die, why did the Romans praise her for inflicting punishment on herself in the form of death? For Augustine, the Christian women were more praiseworthy because of their faith in their standing before God, and, since they were innocent (as Lucretia also was), they should not suffer punishment. Augustine was arguing that Christianity is therefore more consistent than pagan Roman culture in administering justice, determining innocence, and practicing virtue.

Central to Augustine's position lay a rather profound assertion of the nature of chastity. It was profound because it countered prevailing ideals that maintained that a virtuous woman who lost her virginity by force and no longer possessed that most prized quality of Roman women, viz. *pudicitia*, are commendable if they commit suicide, or that those facing rape who commit suicide to avoid that fate are virtuous.[46] Christian writers of Augustine's own day held to this view, which suggested that the woman's honor and chastity indeed could be removed by physical force, thus rendering her life not worth living in her shame. This is why many of them upheld Lucretia as a paragon of virtue. But this would also mean that *castitas* and *pudicitia* first and foremost reside in the body. Augustine rejected this view. Locating virtue and chastity ultimately in the will and not in the body, Augustine affirmed that what is committed against a person's body without his or her consent does nothing to blemish their soul. They remain pure. Although Augustine's argument in part served his argumentation against suicide, it rested more fundamentally on an ethical framework emphasizing will and consent and one that opposed the shame-and-honor code of Roman society. For him, this Christian philosophy brought freedom, and, as a bishop and a pastor, he encouraged the women who had suffered physical violence in the Germanic invasions not to be ashamed of what had been perpetrated against them.

Gratian was not operating in the same historical context as Augustine, but he was operating through a similar theological lens, and that theological lens utilized a person's standing before God as the ultimate gauge of a person's proper standing among humans, including in the courts of the Christian church. As Gratian progressed through his discussion of q.5, the theological question of whether the woman in his case had lost her modesty or purity (*pudicitia*) through rape was foundational for the consideration of the legal question of whether she could be charged with adultery. Such a focus is clear in the earlier

[46] Dennis Trout, "Re-Textualizing Lucretia: Cultural Subversion in *The City of God*," *Journal of Early Christian Studies* 2(1) (1994): 53–70; Kyle Harper, *From Shame to Sin: The Christian Transformation of Sexual Morality in Late Antiquity* (Cambridge, MA: Harvard University Press, 2013), 41 (on *pudicitia*), 172–73. To see Augustine's whole argument lying behind his rhetorical trial of Lucretia in *CD* 1.19, return to *CD* 1.16-18, edited in Aurelius Augustinus, *De civitate dei Libri XXII*, ed. Bernard Dombart and Alfons Kalb, 5th edition (Stuttgart: B. G. Teubner, 1981), 1.27–31, where Augustine argues that *pudicitia* is a *virtus mentis* and that a will or *voluntas* that remains resolute bears no guilt for the sufferer no matter what happens to the body.

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recension of the work.[47] If her *pudicitia* had been lost through force, then her husband would have had grounds for *diuortium a thoro et mensa* (something like our permanent separation).[48] In contrast to most other places in the *Decretum*, Gratian did not even bother arguing both sides of the question. He simply cited numerous authorities to argue that a woman who is raped and in no way consents to the sexual violation of her is innocent. He opened with this claim: "That *pudicitia* cannot be violently snatched away is proven by the authorities of many."[49] He pointed to the example of St Lucia, an early Christian virgin who was threatened with forced prostitution and gang-rape, to make the claim even stronger. Gratian was familiar with a version of Lucia's *passio* narrative that was similar to what Jacobus Voragine, more than a century later, included in his blockbuster *Legenda Aurea*, a collection of saints' lives and martyrdom accounts.[50] In that narrative, Lucia engages her interrogator, Paschasius, with firmness, theological and logical acumen, and faith not only in her God but in her own innocence, even if she were hauled off to a brothel against her will or subjugated to rape in the town square. It is this hagiographical heroine, whom Gratian expected all of his students to know about, whom Gratian cited as his first authority in defense of his argument. He wrote,

> Even if the body is violently corrupted, if the *pudicitia* of the mind is preserved inviolate, chastity is doubled. Just as Blessed Lucia is purported to have said to Paschasius, 'If you cause me to be violated unwillingly, chastity will be redoubled upon me for a crown'. After all, God judges concerning dispositions and wills.[51]

Lucia affirms that, regardless of what might happen to her body, her purity resides in her will, and no one can violate her chastity if she has not consented to its loss. With that, Gratian proceeds to quote numerous textual authorities that support these claims.

The reference to Lucia serves to bolster Gratian's argument about the woman of C.32, a married, barren, former prostitute, for one reason: it excuses any woman who suffers sexual assault against her will from being considered complicit in any way in the sin. As a result, the married woman cannot be

[47] R1 C.32 q.5 includes: d.a.c.1, c.1, c.3, c.4b (Augustine on Lucretia), c.6a, c.6c, d.p.c.14, c.15, c.16, d.p.c.16, c.17, c.18, c.19, c.20. Up through d.p.c.14, the focus is on the purity of the will as determining chastity; after d.p.c.14, the shift is to establishing adultery—equally applicable to men and women—as the only grounds for *divortium*.

[48] Sara McDougall, "Marriage, Law and Practice," in *The Cambridge History of Medieval Canon Law*, 453–74. *Divortium a thoro et mensa* is not akin to modern divorce or to annulment in the Catholic Church. The marriage bond still holds, and therefore each partner is still bound to the other and cannot marry someone else. Nevertheless, it permits the two spouses to live separately.

[49] C.32 q.5 d.a.c.1.

[50] For more on Lucia and the hagiographical source for Gratian's quotation, see Atria A. Larson, "A Note on a Hagiographical Source for Gratian's *Decretum*: The Quotation attributed to St. Lucy in C.32 q.5," *Traditio* 80 (2025) [forthcoming].

[51] C.32 q.5 d.a.c.1. Saunders, *Rape and Ravishment*, 93 does quote this passage but does not do more with it in Gratian; she goes on to discuss the story of Lucia in English literature (127–31).

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adjudged an adulteress and dismissed. Later in the *causa*, he stated: "Therefore, since this woman who suffered violence cannot be proven to have lost her *pudicitia*, in no way is she convicted of having incurred the crime of fornication or adultery."[52] And, in his final *dictum* of the question, he specified, "Because she was joined to another man, not because of the impulse of her own lust, and not with her consent to the other, and not in a situation where her husband was sick or absent or desiring to live continently, but rather suffered force by being violently oppressed by the lust of another (*uiolenter aliena libidine oppressa uim pertulit*), it is apparent that she can be called neither a fornicator nor an adulterer. Hence she cannot under any circumstance be dismissed."[53] In other words, the church would sanction no divorce in such a case.[54]

The Commentary of the Decretists

The early decretists and the *Glossa ordinaria* approached the questions of rape and consent in C.32, as was typical, in a way that confirmed Gratian's basic points but elaborated on them with definitions, taxonomic schema, and examples and potential objections and counter-examples. In short, they added nuance, sometimes in ways that are comfortable to modern ears and sometimes not. Always, their reflections played within a larger intellectual and religious tradition that integrated interpretation of biblical and patristic sources, Roman law categories, and the church's canons.

As regards C.32 q.5, first, they reflected on virginity and *pudicitia* and did so in a way that explicitly associated the virtue with women of any status: unmarried virgins, wives, and widows. Virtue is, after all, a *virtus mentis*, *habitus mentis*, or *qualitas mentis*, as one of the earliest commentators on the *Decretum*, Rolandus, noted, as did the *Summa Parisiensis*.[55] The loss of integrity of the flesh through the bare act of coitus does not mean the loss of that quality of the mind. This latter author cited Magister P. as noting three species of virginity, "namely virginity in virgins, continence in widows, and chastity in the married, which is one and the same virginity (*unam eamdem virginitatem*)."[56] Although the editor of the text took "Magister P." to be Peter Lombard, the more likely referent in this case is Peter the Chanter (d. 1197), whose *Distinctiones Abel* contained a very similar distinction, which seems to have been derived from Ambrose's thought.[57] The *Summa*

[52] C.32 q.5 d.p.c.14 [R1].

[53] C.32 q.5 d.p.c.16 [R1]. Contra Gravdal, with this language, Gratian clearly identifies rape as a sin and a crime.

[54] "Divorce" or "dismissal" here means, as indicated earlier, *divortium a thoro et mensa*. The question of remarriage, which the man of C.32 has in mind, was another legal question altogether.

[55] Rolandus, *Summa magistri Rolandi*, ed. Friedrich Thaner (Innsbruck: Wagner, 1872), 176, ad C.32 q.5 d.a.c.1.

[56] *Summa Parisiensis on the Decretum Gratiani (ca. 1160)*, ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Medieval Studies, 1952), 244 (ad C.32 q.5); hereafter *SP*.

[57] Peter the Chanter, *Distinctiones Abel*, littera C a.140 (CCCM 288A, p. 136 l. 1489): "Continentia tres habet species: virginalem, quam habent uirgines; coniugalem, quam habent boni coniugati; vidualem, quam habent bone uidue." On Ambrose, see Marcia L. Colish, "Ambrose of Milan on Chastity," in *Chastity: Ideals, Perceptions, Opposition, Presenting the Past*, ed. Nancy van Deusen (Leiden:

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Parisiensis concluded: "If therefore the *pudicitia* of the mind is preserved inviolate (*illaesa*), even if a woman is corrupted [physically], she will not be held guilty before God (*rea apud Deum*)."[58] Others, such of Simon of Bisignano, repeated the emphasis, already noted in Gratian's *Decretum*, on virginity as a quality of the mind,[59] while the *Summa 'Omnis qui iuste iudicat'* observed that there are two kinds of *pudicitia*, one a chastity of the mind and one an integrity of the body, but the former cannot be removed without the will since it is a virtue of the mind that cannot be snatched away through physical force (*per uiolentiam*).[60] The famous and influential Huguccio repeated the distinction noting that three kinds of women—virgins, wives, and widows—can all possess the virtue of virginity.[61] Laurentius Hispanus's so-called *Glossa palatina* and, borrowing much from that work, the *Glossa ordinaria* on the *Decretum* made the interpretation permanent in canonistic discourse.[62] What this discourse ultimately did against the background of Gratian's *causa* featuring a prostitute-turned-wife to whom Gratian applied patristic texts about virgins was to affirm that these texts could pertain to any woman of any status because virginity or chastity or *pudicitia* is a virtue rooted in one's disposition and mind, not the body, and, as the canonists pointed out, one does not always have power or control over what happens to one's body.[63]

Second, the decretists entered into extended considerations of a more theological and liturgical bent regarding the reward for virgins in heaven. The

Brill, 2008), 37–60; repr. in Marcia L. Colish, *The Fathers and Beyond: Church Fathers between Ancient and Medieval Thought* (Ashgate: Variorum, 2008), no.VII, 1–22. Colish dismantled previous, simplistic presentations of Ambrose's thought on chastity, showing that he viewed chastity of the mind as more important than chastity of the body and therefore believed that married women, widows, and virgins can all be exemplary models of chastity understood as purity in virtue in selfless service to God and others.

[58] *SP* ad C.32 q.5.

[59] Simon of Bisignano, *Summa in Decretum*, ad C.32 q.5, ed. Pier V. Aimone, 458-59; PDF available at https://www.unifr.ch/cdc/fr/assets/public/summa_simonis_BAND_I%2014%2010%202007.pdf (September 19, 2024).

[60] *Summa 'Omnis qui iuste iudicat' sive Lipsiensis*, vol. 4, ed. Waltraud Kozur, *et al.*, MIC Ser. A, vol. 7 (Vatican City: Biblioteca Apostolica Vaticana, 2018), 229, ad C.32 q.5 pr. s.v. *pudicitia*.

[61] Huguccio, *Summa* ad C.32 q.5 (Lons-le-Saunier, Bibl. mun. Jura 16, fol. 367va; BAV, Vat. lat. 2280, fol. 284rb): "Pudicicia uero animi per uiolenciam sine uoluntate auferri non potest. Est enim uirtus animi qui per uiolenciam pati non potest inuito, ut infra c. 'Ita de pudicicia'. Et nota quod hec uirtus est in uirginibus et coniugatis et uiduis. Sed in uirginibus proprie dicitur uirginitas; in coniugatis pudicicia, uel pudicicia coniugalis; in uiduis continentibus, castitas, uel continencia uidualis."

[62] *Glossa palatina*, Città del Vaticano, Biblioteca Apostolica Vaticana, Pal. lat. 658, fol. 82vb: "Et dic quod duplex est pudicicia: animi, corporis. Pudicicia corporis, que integritas dicitur, bene amittitur per uiolentiam… Et nota quod hec uirtus est uirginibus et in coniugatis et in uiduis. Sed in uirginibus, quia pellatur uirginitas; in coniugatis, pudicicia, C.27 q.1 'Nuptiarum'. In continentibus, 'castitas'." *Gl. Ord.* ad C.32 q.5 d.a.c.1 s.v. *Quod autem* (ed. Roma, 1582): "Pudicitia autem animi cum virtus sit, non aufertur per vim: quia animo non infertur vis, ut infra, eadem 'ita ne'. Et nota quod hec eadem virtus est in virginibus, in coniugatis, et in uisuis; sed in virginibus appellatur virginitas; et in coniugatis pudicitia, C.27 q.1 'nuptiarum'; et in continentibus castitas, D.30 'haec scripsimus'." *Glossa ordinaria* texts from the *Editio romana* (1582) of the *Corpus iuris canonici*, available online at https://digital.library.ucla.edu/canonlaw/table_of_contents (September 19, 2024).

[63] As Simon of Bisignano put it (ed. Aimone, 458), "in potestate nostra non est quid de carne nostra fiat."

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considerations enabled a simultaneous acknowledgment of chastity across all the faithful and a special distinction for consecrated virgins. St. Lucia had specifically referred to her chastity and to a *corona*; she is also identified as a virgin (although not a consecrated virgin, since she was betrothed) in addition to being a martyr, and virgins often appear in crowns in artistic representations.[64] A fairly technical discussion emerged in canonistic commentary about a *corona* as opposed to a *coronula* or *corona aureola* (little golden crown), language used in Bede and taken up in the *Glossa ordinaria* on the Bible.[65] The references to crowns in relationship to virgins appear in numerous liturgical texts in the Christian tradition, such as the Roman Missal, the Ambrosian breviary's prayers during Lucia's feast, and its texts for the birth and martyrdom of any virgin.[66] Within this liturgical context, what applies especially to virgins becomes exemplary for what is true of all the faithful: God will crown his own, identifying them as heirs of his kingdom for all eternity.[67] As Laurentius Hispanus noted, "The mind given over to the good will be crowned by God the Judge."[68] While it would be easy to dismiss these conversations as tangential to the main question at hand, I would argue that it is important for revealing the general, integrated mentality of the decretists to questions of canon law, which urges canon law, when it can, to imitate God's law and court.

The question of virgins receiving a crown, and the connection of virginity to the faithful as a whole, point to the eschatological question of how God will assess humans on Judgment Day. The *Glossa ordinaria* on 2 Corinthians 11:2 ("since I betrothed you to one husband, to present you as a true virgin to Christ") reads as follows:

[64] See, for instance, on the visual representation of the wise and foolish virgins of Matthew 25, Francesca Pomarici, "Misericordia, letizia, sapienza: alcuni aspetti delle vergini sagge e stolte del vangelo di Matteo," *Quaderni di storia religiosa medievale* 26(1) (2023), 57–102. Her Figure 6 (p. 85), from Darmstadt, Universitäts- und Landesibliothek, 2505, fol. 51, is an excellent example: the wise virgins have crowns; the foolish ones do not.

[65] See *Glossa ordinaria* on Ex. 25:25, quoting from Bede on *coronam*, making reference to Revelation 14:3-4, the song of the virgins to God in heaven. Edition: Adolf Rusch, *Biblia latina cum glossa ordinaria. Facsimile reprint of the editio princeps: Adolph Rusch of Strassburg 1480/81*, with introductions by Karlfried Froehlich and Margaret T. Gibson, 4 vols (Turnhout, 1992), available online: https://gloss-e.irht.cnrs.fr/php/livres-liste.php.

[66] Not every early printed edition of the Roman Missal includes a similar text. The closest appears in the Venice edition of 1558 by L.A. de Iunta and the Lyons edition of 1516 by printers J. Moylin (alias de Cambray). This is according to the variants given in volume 2 of ed. Robert Lippe, *Missale Romanum, Mediolani,* Henry Bradshaw Society 33 (London: The Boydell Press, 1899, repr. 1907), p. 271. One addition reads: "*Alter tractus.* Ueni sponsa christi: accipe coronam, quam tibi dominus preparauit in eternum: pro cuius amore sanguinem tuum fudisti." *Breuiarium iuxta institutionem sancti Ambrosii archiepiscopi* (ed. Venice, 1539), fol. 796vb and 798vb.

[67] *Breuiarium iuxta institutionem sancti Ambrosii archiepiscopi* (ed. Venice, 1539), fol. 796vb (choral chant within the *Commune* section *In natiuitatem unius virginis et martyris*): "Ornauit me ornamento suorum, posuit coronam capiti meo rex meus et deus meus."

[68] *Glossa palatina* ad C.32 q.5 c.12 s.v. lingua (Pal. lat. 658, fol. 83rb): "Sicut et animus ad bonum deditus deo iudice coronatur."

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> [Paul] descends from the plural to the singular, wanting the whole Church to be understood to be a virgin and to preserve in all true members a virginity of the mind, even if not of the body. For virginity of the flesh is a body intact, which is the virginity of the few. The virginity of the heart is an incorrupt faith, which belongs to all the faithful. [And a little later, on the text 'to present you to Christ'] That is, for this end, that I may present [you] on the day of judgment.[69]

The decretists thought along the same lines, and it is noteworthy that at least one decretist, Rufinus, explicitly referenced 2 Corinthians 11:2 within his commentary on C.32 q.5, identifying all Gentiles joined to Christ through faith and love as both virgin and spouse on the basis of that Pauline text.[70] Simultaneously, this line of thinking bolstered the viewpoint that a woman, no matter whether a consecrated virgin or not, is to be judged more on the basis of an interior disposition than on whether the flesh in and of itself has been corrupted. Within this panoply of thoughts interlinking consecrated virgins, virgins defiled against their will, and the identity of all the faithful as spiritual virgins through an incorrupt faith, the decretists, just like the biblical commentators, looked to the eschaton to guide the present. They thought about God's court, and the question of whether a raped virgin (or wife or widow) can still be considered innocent before God's court should shape whether the court of the church should judge a rape victim to be in some sense tainted and guilty or not.[71] The interlinking of these levels is evident in the succinct gloss of Laurentius Hispanus on the short c.2 ("Indeed, the flesh cannot be corrupted unless the mind will have been corrupted first"): "that is, the corruption of her

[69] Gl. Ord. ad 2 Cor. 11:2 s.v. *virginem castam*: "A plurali ad singulare descendit, volens intelligi totam Ecclesiam virginem esse, et in omnibus veris membris virginitatem mentis etsi non corporis servare. Virginitas carnis corpus est intactum que virginitas paucorum est. Virginitas cordis fides est incorrupta que est omnium fidelium. Unde in Apocalypsia: 'Hi sunt qui cum mulieribus non sunt coinquinati virgines enim sunt' (Rev. 14:3-4) etc." And s.v. *exhibere Christo*: "Id est, ad hoc ut exhibeam in die iudicii."

[70] Rufinus of Bologna. *Die Summa Decretorum des Magister Rufinus,* ed. Heinrich Singer (Paderborn, 1902; repr. Aalen: Scientia, 1963). *Summa* ad C.32 q.5 c.11 s.v. *post oscula fratrueles et sponsi* (ed. Singer, 489–90): "Fratrueles sunt filie duorum fratrum; duo fratres duo populi, scilicet iudaicus et gentilis. Filius fratris prioris Christus fuit: unde dilectus dicitur, quemadmodum filius unicornium (Ps. 28:6); filius vel filia posterioris fratris quelibet fidelis femina de gentili opulo nata. Huius ergo fratruelis Christus est et sponsus iuxta illud Pauli (2 Cor. 11:2): 'Despondi enim vos uni viro virginem castam exibere Christo'. Post oscula ergo fratrueles et sponsi, i.e.: postquam fide et dilectione Christo fuit coniuncta." Parts of this gloss appear in the *Apparatus Antwerpiensis* (1179–1191) on the *Decretum*, Antwerp, Mus. Plantin-Moretus M.13, fol. 161vb, bottom margin.

[71] A good example of the line of thinking is found in Simon of Bisignano, *Summa* ad C.32 q.5 c.4 (ed. Aimone, 459): "4. *Proposito* usque *sanctitatem*. Cum enim uirgo corruptori non consentit uirginitatis premium non amittit. Vnde credimus quod suprema illa coronula qua sola uirginum corpora uelut diademate coronabuntur, talibus non debeat denegari, que non propria uoluntate sed furentium libidine castitatis lilia amiserunt. Vsque *uel corpore*. Si enim tunc decederent nec anima gloriam nec corpus haberet fulgorem. Vsque *unus commisit*. Hinc collige in una eademque re secundum intentionis diuersitatem unum peccare et non alium."

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[cannot] be imputed to her for guilt, or unto eternal damnation [God's court], nor can she be rendered guilty of corruption [human court]."[72]

Third, the decretists narrowed in on consent as the factor that determined guilt or innocence, with a correlated emphasis on the mind, will, and intention in determining culpability in an act. They even identified additional patristic texts that could make this point in relationship to female victims of sexual assault; the *Apparatus Antwerpiensis* includes in the margin what later became the *palea* following C.32 q.5 c.6, the closing line of which reads, "Not force but the will taints the body of women."[73] As Stephan Kuttner explained many decades ago in his study of canonistic thinking about guilt, the canonists, beginning with Rufinus in his commentary on a different *causa* and question, distinguished degrees of force or *coactio*.[74] *Coactio* could be either modest (*modica*) or extreme (*violenta*). The former would not compel a "constant man" (*vir constans*) and did not excuse from guilt, although it lessened the guilt. The latter was subdivided into *coactio absoluta* and *coactio conditionalis*. The former could also be termed *passiva*, because the one compelled was a completely passive recipient and did not consent in any way to the act compelled. This absolute coercion excused the person so compelled from any guilt. The latter could also be termed *activa*. In a certain sense, under circumstances of conditional coercion, their will did consent; a person so compelled is given an unattractive option: do X or be killed (or face loss of property). Under this condition, the person's will assents, albeit reluctantly, to the act compelled to avoid what is threatened. Canonists soon developed the rather harsh maxim, "Coacta voluntas voluntas est" (compelled will is [still] a will), but they did teach that *coactio conditionalis* minimized guilt.[75]

Gratian did not utilize these distinctions—they post-date him—and did not himself give an extended analysis of Lucretia's plight; his commentators, after working with these distinctions in C.22 q.5, then applied them to their analysis of Lucretia in C.32 q.5. As Wolfgang Müller has pointed out, most still viewed coerced consent as consent and thus sinful, and so they judged Livy's Lucretia

[72] *Glossa palatina* ad C.32 q.5 c.2 s.v. reuera caro (Pal. lat. 658, fol. 82vb): "id est, eius corruptio ad reatum imputari, uel ad dampnationem eternam, uel corruptionis rea effici."

[73] The text is from Augustine: "Corpus mulierum non uis maculat sed uoluntas." It appears in the left-hand margin of Antwerp, Mus. Plantin-Moretus M.13, fol. 161v.

[74] Kuttner, *Kanonistische Schuldlehre*, 300–307.

[75] In theological and philosophical discourse of the High Middle Ages, the issue of coercion arises in the context of the nature of freedom (*libertas*). See Tobias Hoffmann, "Freedom without Choice: Medieval Theories of the Essence of Freedom," in *The Cambridge Companion to Medieval Ethics*, ed. Thomas Williams (Cambridge: Cambridge University Press, 2019), 194–216. Thomas Aquinas asserted that the will cannot undergo coercion in the strict sense (if one's will does not consent to what one's body is forced to do, the body is being forced, but not the will). As Hoffmann explains, one can also speak of coercion more broadly, and "when one acts under duress, one still acts voluntarily, but one is not fully free, for one acts not by one's will, but against it, only to avoid a greater evil" (200). This is consonant with the canonists' *coacta voluntas voluntas est* in situations of conditional coercion.

The maxim came to be applied to questions of conversion from and reversion to Judaism in situations where Jews accepted baptism under duress. See Jessie Sherwood, "*Coacta voluntas est voluntas*: Baptism and Return in Canon Law," *Medieval Encounters* 28 (2022), 447–84.

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to be not entirely innocent, believing she should have accepted death rather than consent (conditionally) to Tarquinius's proposition.[76] Yet this extreme view did not entail a corresponding insistence on canonical prosecution of women in such a situation. The *Summa Parisiensis* argued, "If the mind of the victim does not consent to or grant permission to the lust of the perpetrator, guilt belongs to the perpetrator alone [here repeating a phrase in the text quoted from Augustine in the *Decretum*], and violent corruption will not be reputed to her as a sin any more than if she had sustained a wound in her body."[77] Simon of Bisignano observed that sin instigated by someone else becomes yours if you consent to it, but the natural corollary is that, as Augustine argued in *De ciuitate dei*, if you do not give consent, there is no way that someone else's guilt and pollution gets ascribed to you. And so, "when a virgin does not consent to her corruptor, she does not lose the reward for her virginity."[78]

Huguccio wrote much on the topic and interrogated Lucretia's state. He emphasized that one cannot be polluted by the sin of another person, "unless one consents to it." Of course, at that point, one is not properly being polluted by the sin of another but one's own sin in consenting to evil.[79] Huguccio specified that such is the case in situations of absolute coercion.[80] As Müller noted, Huguccio judged Lucretia harshly because, in the account he had, she clearly had a choice not to engage in sex with Sextus Tarquinius but chose to do so rather than be killed. She faced "conditional coercion," not "absolute coercion." Huguccio thought Lucretia had in fact committed adultery, then, and a mortal sin, although not so grievous a sin as if she had consented freely to the act.[81] Laurentius Hispanus agreed, although his evaluation seems somewhat less

[76] See various passages quoted in Müller, "Lucretia and Medieval Canonists."

[77] *SP* ad C.32 q.5 c.7 (ed. McLaughlin, 245).

[78] Simon of Bisignano, *Summa*, ad C.32 q.5 c.3 and c.4: "*Ita ne* usque *non aliena erit*, immo tua per consensum. Et nota quod rem alienam et peccatum alterius possumus nostrum facere per consensum, ut C.23 q.3 c.1…. *Proposito* usque *sanctitatem*. Cum enim uirgo corruptori non consentit uirginitatis premium non amittit." The *Summa 'Omnis qui iuste iudicat'* (ed. Kozur, 229) similarly contains the gloss "immo tua per consensum" on C.32 q.5 c.3 and a corollary "id est, non tue per consensum" on c.4.

[79] Huguccio, *Summa*, ad C.32 q.5 c.3 (Lons-le-Saunier, Jur. 16, fol. 367vb; BAV, Vat. lat. 2280, 284vb): "Et hoc uerum est generaliter, nisi quis consenciat alieno peccato, ut C.23 q.4 'si quis acha ita'. Sed tunc etiam non polluitur alieno, sed proprio, sed dicitur pollui alieno, id est, consensu ad alienum peccatum." Rolandus had made the same point on the same canon (ed. Thaner, 177): "Sed notandum, quod aliorum peccata obsunt quandoque non ad vitae meritum sed ad consecrationis signaculum. Si vero quantum ad vitae meritum nocuerint, non aliena erunt, quod, scilicet ut obsint, non fit nisi proprio interveniente consensu."

[80] Huguccio, *Summa*, ad C.32 q.5 c.3 (Lons-le-Saunier, Jur. 16, fol. 367vb; BAV, Vat. lat. 2280, 284vb): "*non sua*, Id est, cui ipse uel ipsa non consentit, non enim ibi agit sed patitur, et hoc contingit ubicumque est absoluta coactio, scilicet, quod tunc dicitur quis pati et non agit, et ideo non inputantur ea que per talem coactionem fiunt."

[81] Huguccio, *Summa*, ad C.32 q.5 c.4 (Lons-le-Saunier, Jur. 16, fol. 368ra; BAV, Vat. lat. 2280, 284vb): "Et nota quod hic Augustinus loquitur de Lucrecia quasi ipsa fuisset coacta absoluta coactione, et ita non peccasset. Tamen ut ueritas ystoria habet, non absolute set conditionaliter fuit coacta. Unde dico quod mortaliter in illo coitu peccauit et adulterium commisit. Talis enim coactio non excusat a peccato mortali licet a grauiori."

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harsh. On the debated question of whether Augustine rightly or beneficially brought up the case of Lucretia to defend the innocence of victims of rape, Laurentius Hispanus explained how the Lucretia reference contributes to Augustine's argument:

> It seems Augustine made a poor choice in mentioning the example of Lucretia, for, in truth, according to that case, she committed adultery, whether her will was direct or indirect, although, according to Lucretia, it was committed only by the one. But Augustine named this example as [an argument], as it were, *a minori* (from the lesser), as if to say, on the basis of the fact that she who was conditionally forced is, according to Lucretia, excused from adultery, how much more is she who was forced absolutely.[82]

In short, in terms of dialectical argumentation, Augustine employed the common argument *a minori*, which shows all the more that a woman compelled utterly against her will, such as the woman of C.32, is not guilty of adultery. Lucretia may have borne some guilt, but he did not dwell on the point. The *Glossa ordinaria* might have intended to soften Huguccio's evaluation even more, for it gave a reading that set conditional coercion against absolute coercion but then gave an alternative reading of the term *uis*: "or say [simply] that force cannot be inflicted on the mind; this is true for the one who does not give consent."[83] In other words, one could make a distinction between absolute and conditional force, or one can leave that distinction behind in these situations and simply note that physical force by a person does nothing to taint the mind of the one on whom the force is inflicted. Finally, consent is very clearly connected to the will.[84] Where there is no will or desire to commit an act, as the texts about St. Lucia would support, there is no sin, there is no consent, and thus there is no culpability.

Fourth, and concomitantly, the canonists agreed, to a person, that women who had been raped, defined as having suffered sexual assault without consent on their part, could in no way be charged with adultery. Often they make the point utilizing the terminology of imputation and *reatus* or *rea*: guilt or the guilty act/crime of adultery cannot or is not *imputed* to such a person; they cannot be rendered *guilty* in a judicial sense. Such terminology appears as early

[82] *Glossa palatina* ad C.32 q.5 c.4 (Pal. lat. 658, fol. 83ra): "Videtur Augustinus male inducere exemplum Lucretie, nam in ueritate, secundum causam, adulterium commisit, siue directa siue indirecta fuerit uoluntas, licet secundum Lucretiam, non comittitur nisi solo. Sed Augustinus inducit hoc exemplum quasi a minori, quasi dicat ex quo ea que conditionaliter fuit coacta excusatur secundum Lucretiam ab adulterio, multo magis ei que absolute."

[83] *Glossa ordinaria* ad C.32 q.5 d.a.c.1 s.v. *vis*: "absoluta, que non potest animo inferri, sed conditionalis potest, ut supra C.23 q.6 'vides'. Vel dic non potest inferri animo vis: verum est non consentienti."

[84] *Glossa ordinaria* ad C.32 q.5 c.6, c.7, and c.9 (ed. Roma, 1582), col. 2134: "cum nullum peccatum committatur nisi voluntate… *nec commisit*, per consensum volendo… Nam pudicitia mentis non amittitur, quae etiam dicitur in carne seruari nisi uoluntate consentiat."

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as Rolandus.[85] The *Summa 'Omnis qui iuste iudicat'* simply asserted, in connection with the statement that "a virgin cannot be adulterated," "that is, cannot be rendered guilty when she is unwilling."[86] The *Summa Parisiensis*'s commentary, referring to a line stating that one cannot commit adultery without first having committed adultery in the heart, made clear that this applies to people being accused of the crime of adultery and having guilty standing as adulterers before God.[87] Huguccio reflected on how there are in fact two acts within what we talk about as one act, such that one person has committed a sin (the perpetrator of rape) while the other person has not committed a sin (the woman in Gratian's C.32).[88] Huguccio elsewhere explicitly noted, then, that the woman cannot be convicted of adultery, unless, again, she consents or wants to engage in the act.[89] The *Glossa ordinaria* noted that a woman could be prostituted out by force (just as had been threatened to St. Lucia) and not have committed adultery, that is, could not be held guilty of adultery, unless she consented.[90] In short, without consent to the sexual intercourse, one is not guilty before God and cannot be charged with adultery before the Church; as result, the husband of a rape victim has no grounds to dismiss his wife.[91]

[85] Rolandus, *Summa* C.32 q.5 c.1 s.v. *vi sed adulterari non potest* (ed. Thaner, 177): "id est, non potest constitui rea adulterii, nisi consenserit"; ad C.32 q.5 c.7 s.v. *solius erit culpa facientis* (ed. Thaner, 178): "i.e., tantum imputabitur facienti."

[86] *Summa 'Omnis qui iuste iudicat'* ad C.32 q.5 c.1 s.v. *adulterari* (ed. Kozur, 229): "id est non potest rea effici inuita."

[87] *SP* ad C.32 q.5 c.6 (ed. McLaughlin, 245): "Ad hoc ut reputetur pro crimine adulterii vel adultera reas quantum ad Deum."

[88] Huguccio, *Summa*, ad C.32 q.5 c.4 (Lons-le-Saunier, Jur. 16, fol. 368ra; BAV, Vat. lat. 2280, 284vb): "Uno et eodem facto alter peccat et alter non secundum diuersitatem intentionum." Then it gets more complicated: "Hoc tamen sophistice colligitur, quia diuersa sunt ibi facta et diuerse actiones et diuersi coitus et diuersa adulteria, scilicet aliud uiri, aliud mulieris. Unde sepe in ibi unus peccat et non alter, sed quia illi actus similes sunt et simul fuerunt et ad idem et unus non potest esse sine alio de facili, ideo quandoque dicuntur esse unus actus et unum opus." In a similar though simpler fashion, the *Summa 'Omnis qui iuste iudicat'* ad C.32 q.5 c.4 s.v. *Duo fuerunt…unus commisit adulterium* (ed. Kozur, 299) reads, "idest reatum adulterii commisit. Hinc collige in una eademque re secundum intentionum diuersitatem unum peccare et non alium."

[89] Huguccio, *Summa*, ad C.32 q.5 c.1 (Lons-le-Saunier, Jur. 16, fol. 367va; BAV, Vat. lat. 2280, 284vb): "*adulterari non potest* inuita, id est rea adulterii constitui non potest, nisi consentiat et uelit, quasi [dicitur] uirgo contra uoluntatem suam uiolenciam corporis pati potest, sed rea adulterii fieri non potest."

[90] *Glossa ordinaria* ad C.32 q.5 c.1: "Et quod dicitur ibi, *prostitui potest*, per vim, sed *adulterari non potest*, ita quod fit rea adulterii, nisi consentiant."

[91] Saunders noted theologians beginning with Peter Lombard (d. 1160) and found many in the late twelfth and early thirteenth centuries who espoused the views I have outlined above within the canonistic discourse on C.32 q.5. She even mentioned Gandulph of Bologna, a man who wrote both canonistic and theological works. In his *Sentences*, "Gandulph adopts unconditionally Peter [Lombard's] view that virginity cannot be lost against the will, 'id est virgo violentiam corporis pati potest, sed contra voluntatem suam rea adulterii fieri non potest' ('that is, the virgin can suffer violence of the body, but cannot become guilty of adultery against her will')" (*Rape and Ravishment*, 91). It was indeed Peter's view, although he is quite weak on the subject. Gandulph was instead relying on Gratian (as did Peter), and he is yet another example of a thinker within the early years of decretist literature holding to the same view.

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Conclusion

In comparison with earlier Roman law, eastern canon law, and earlier canon law, the western canon law tradition of the twelfth and early thirteenth centuries addressed consent and coercion in sexual encounters directly and did so in relationship to an evaluation of a woman's chastity, understood in terms of a *pudicitia* that could apply to any woman: virginal maid, married woman, widow, and even former prostitute. Ambiguities of circumstances surrounding the rape of virgins or wives, such as whether the act occurred in a situation of war or whether the woman had a disreputable background, faded out of consideration as the canonists concentrated their attention on the heart of the question. In their minds, the question was first and foremost one of consent to the act itself. While they failed to develop fully considerations on the nature of conditionally coerced consent or a logical connection between their notions of force and fear, *uis metusque*, and free consent to sexual intercourse, they nevertheless established without a shadow of a doubt that a legitimate wife, no matter what her past condition or reputation, cannot be dismissed on the grounds of adultery when she suffers rape. She is a victim, pure and simple, and bears no guilt, and her chastity or *pudicitia* as a faithful wife—again, regardless of pre-marital sexual experiences—suffers no damage. Lucretia was not guilty before God and did not need to die; Lucia could not have been tainted, even if her attackers had been successful in raping her; and the woman of C.32 suffered no corruption of her mind and soul and could not be discarded as a wife based on the violence that her body endured.

Contrary to many assumptions and claims about the medieval church and about the man whose work became central to the teaching of church law for centuries, medieval canon law asserted that women who did not consent to forcible sex were blameless, even if they only resisted in their minds. Gratian's sad story about a woman abused in a number of ways instigated scholarly conversations across Europe that opened the way to foreground consent or the lack thereof in all cases of rape. To be sure, later laws or lawyers or judges did not always live up to the theory espoused in Gratian and the decretists' work, but the same remains true for our own modern efforts. We still struggle to define consent, and to provide legal and social recourse to victims of rape. But if we do not understand this historical theory of rape and consent and give it its due, we will never properly understand what came after. Investigating carefully how this theory of rape and consent was subsequently adopted, ignored, supplemented, applied, or manipulated will be a critical step for scholars in years to come.

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