AD AGENDAM PENITENTIAM PERPETUAM DETRUDATUR
MONASTIC INCARCERATION OF ADULTEROUS WOMEN IN THIRTEENTH-CENTURY CANONICAL JURISPRUDENCE

By EDWARD A. RENO III

Medieval canon law recognized detrusion (detrusio in monasterium) *as a sentence for women convicted of adultery. Civil law had made adultery a capital crime, so that* detrusio *was a milder action. This article traces the history of* detrusio *in canon law, especially in the thirteenth century, and treats further questions that* detrusio *raised.* Detrusio *was originally a pastoral provision, meant to provide a woman rejected by her husband for adultery an opportunity to enter religious life. But in the hands of the jurists* detrusio *became a coercive ecclesiastical penalty for adultery. The practice raised further concerns, for example: how the woman's property was to be treated; whether the woman sentenced to* detrusio *became a religious; whether a monastery should be a site of confinement for the laity; and, under what conditions a husband could take his adulterous wife back. The case was also raised of a man who accused his wife of adultery so that he could dissolve his marriage and enter a monastery.*

Recorded among the early sixteenth-century decisions of the Royal Council of Naples is the case of Cassandra, a woman otherwise unknown to history, who had been brought up on charges of adultery.[1] The male malefactor in the proceedings was Bartholomaeus de Corrado, identified only by his profession as barber (*barbitonsor*). The case had been initiated through an accusation by Cassandra's husband, but now the Court had arrived at an impasse because he had since decided to reconcile with his wife and no longer wished to pursue the matter legally. What animated the Council's discussion — and what was presumably the reason why this case was singled out among hundreds of others for publication in an edited volume of its decisions — was the question of whether the Council could now proceed *ex officio* in default of an accuser. As one of the Council

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[1] The decision (no. 31) is among those edited by a member (and later Vicar) of the *Sacra Regia Consilia*, the jurist Tommasso Grammatico (1473–1556), in *Decisiones sacri regii consilii neapolitani* (Frankfurt, 1600), 53–54. On Grammatico's life, see Viviana Ventura, "Profilo di Tommasso Grammatico, giurista e letterato," in *Scritti di storia del diritto offerti dagli allievi a D. Maffei*, ed. M. Ascheri (Padua, 1991), 353–75. For the operations of the Neapolitan Royal Council, see M. N. Miletti, *Tra equità e giustizia: Il Sacro Regio Consiglio e le "decisiones" di V. De Franchis* (Naples, 1995).

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members reasoned, did not Christ himself say to the adulteress a stone's throw away from her punishment: "Woman, where are thine accusers? No one has condemned thee; neither, then, shall I."[2] Other members of the Council, however, argued to continue the prosecution of the case, despite the husband's change of heart. Citing a number of precedents from both Roman and canon law, they reasoned that adultery was by definition a public crime (*crimen publicum*) because it carried with it the death penalty, and therefore it demanded *ex officio* prosecution. In the case of an adulterer this penalty was actual death (*mors naturalis*). In the case of an adulteress, even though she would not be executed, her sentence would be a kind of civil death (*mors civilis*), because following a round of corporal punishment she would be forced into a monastery and removed from the world, a punishment Council members labeled monastic detrusion (*detrusio in monasterium*).[3]

Despite these arguments, the Council remained hesitant about establishing a precedent whereby the judicial machinery of the kingdom would be forced into action against the sexual transgressions of its subjects in the absence of claims of injury by family members or spouses. They ultimately did settle on a way forward, however, and proceeded with the judgment and sentencing of Cassandra without setting a precedent that would bind them to pursue adultery charges *ex officio* in the future. Having been caught in the house where the adultery was committed, and having confessed to it in court, Cassandra had made her crime notorious (*notorium*), and therefore it behooved the Council to render judgment for the sake of public order. Cassandra was indeed beaten and handed over for monastic confinement (though she later successfully appealed for a transfer to a *hospitale incurabilium*). To the relief of the compiler of the case, Tommasso Grammatico, the beating had been administered *minime*, assuaging his worries that a severe

[2] John 8:10–11. The decision uses a slightly elided version of the Vulgate text: "mulier nemo te condemnavit, nec ego te condemno."

[3] "Adultera punitur etiam si maritus sibi parcat, quia est de casibus in quibus procedi potest ex officio sine accusatore, cum sit crimen publicum, d. l. 2 § Si publico [Dig. 48.5.2.5]. Accedit bene litera arbitralis, ne turorum, virtute cuius potest procedi ex officio in omnibus casibus in quibus imponi potest poena mortis civilis, vel naturalis, vel membri abscissionis… . Sed in viro poena adulterii est mortis naturalis, et in muliere detrusionis in monasterium, ut d. l. Quamvis, in fi., C. de adulteriis [Cod. 9.9.29], et per constitionem regni Asperitatem, etiam flagellis affici sic videtur, ne dum poena corporis afflictiva, sed certo modo morti civili aequiparata. Et plus subdit Andr. in dicta constitutione Asperitatem, quod eo casu adultera puniri debet, etiam si maritus sibi parcat, ex quo est de casibus ubi proceditur ex officio absque accusatore, ex quo est crimen publicum," Grammatico, *Decisiones*, 53. The royal constitution referred to is Frederick II's *Legum asperitatem*, along with the commentary of Naples University law professor Andrea d'Isernia (1230–1316) in III.84 of the Constitutions drawn up for the Kingdom of Sicily: *Constitutiones regni utriusque Siciliae* (Lyon, 1568), 276.

application of corporal punishment would discourage any respectable convent from receiving her.[4]

The Neapolitan Kingdom was not the only place in the early sixteenth century where monastic detrusion was being newly applied as a penalty for wives convicted of adultery.[5] As Sara McDougall has recently demonstrated, the punishment was also being revived contemporaneously by French royal courts, which represented a shift in the enforcement practices of the prior century — at least in northern France — that instead tended to prioritize prosecution of adulterous husbands, and with only an amercement.[6] In the case of France, the family and gender relations became a battlefield for the assertion of French royal justice over local jurisdictions and the formidable competing apparatus of ecclesiastical courts.

The focus of the present study is not on the particular reasons why early modern courts turned to a form of punishment that ultimately went back to the Roman emperor Justinian but rather on the vectors of transmission through which the precedents for its application regained currency.[7] In some ways we are confronted with another chapter in the history of the *ius commune* — the shared body of texts drawn from Roman, canon, and feudal law, as well as the common jurisprudential methodology studied in law schools and applied in courts

[4] She would later appeal the case and be transferred to a hospital: "ex quibus condemnata fuit pauperrima mulier, ut flagellis caesa in monasterium detrudatur iuxta regni Constitutionem. A qua poena dissentire mihi fuit visum, cum fuerit fustigata per civitatem, et sic notorie infamis effecta, impossibile foret reperire monasterium, imo nec domum honestam, quae ipsam introduceret et sic cum non turpis aspectus esset, de facili meretrix evaderet, quod permittendum non est. Sed bene conclusi esse in monasterium detrudendam, sed minime fustigatam, et ab huiusmodi condemnatione appellatum fuit, et demum transmissa fuit ad hospitale incurabilium per eandem magnam Curiam, et minime fustigata." Ibid., 54.

[5] The terminology used to describe the monastic confinement was not always consistent and included variants such as *retrusio*, *relegatio*, *remissio*, and *inclusio*. Since the most frequent term was *detrusio/detrudere*, the practice will simply be translated as "detrusion."

[6] "The Transformation of Adultery in France at the End of the Middle Ages," *Law and History Review* 32 (2014): 491–524.

[7] The main proof text for the practice of detrusion in Roman Law was included in the *Novellae* among the rest of Justinan's supplementary legislation later added to the *Corpus iuris civilis*: Nov. 134.10. As will be discussed below, this text was also known in the medieval period in a different, truncated form due to its appearance as several *authenticae*, which were excerpts from the *Novellae* keyed to the appropriate titles in the *Codex* by medieval jurists. Unless otherwise noted, all references and quotations of the *Corpus iuris civilis* (the *Digest*, *Codex*, and *Institutes*) and the *Novellae* will be from the Mommsen-Krueger edition: *Corpus Iuris Civilis*, ed. Theodore Mommsen and Paul Krueger, 3 vols. (Berlin, 1892–1912). When cited by a medieval jurist, the *Novellae* allegations will be rendered according to the form in which they were accessible to these jurists in the *Authenticum*, e.g., Nov. 134.10 = Auth. 127.10 or as one of the *authenticae* inserted into the *Codex*, e.g., Nov. 134.10 = auth. post Cod. 9.9.29. On the *Authenticum* and the *authenticae*, and the differences between them, see below, nn. 30 and 31.

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throughout Europe from the thirteenth century well into the Reformation period.[8] In the specific case of detrusion, however, there is a crucial part of the story that unfolds in the thirteenth century that deserves particular scrutiny, where we find canonists grappling with the propriety of more coercivce forms of punishment in the ecclesiastical forum, as well as the use of institutions like the monastery as a site for disciplining the laity. The arguments that arose in the thirteenth century over detrusion would largely set the parameters for future debates of the practice.

This study originated as a textual problem related to the first official collection of canon law prescribed for exclusive use within the Catholic Church in 1234: the *Decretals of Gregory IX*, also known as the *Liber extra*.[9] The *Decretals* was the culmination of a shift that had begun during the Gregorian Reform whereby the Roman Curia now claimed the central role in directing (and in many ways creating) the institutional life of the Church, not only serving as the Church's highest adjudicative and legislative authority but also defining the corpus of legally acceptable precedents as they were now embodied in this canonical collection. In addition to culling material from the so-called *Quinque compilationes antiquae*, the five canon law collections assembled between 1190 and 1226 that, along with Gratian's *Decretum*, formed the foundation of the university curriculum in canon law, the compiler of the *Decretals*, the Dominican St. Raymond of Penyafort (1175–1275), inserted material from Gregory IX himself.[10] Raymond's principal

[8] For a general account of the development of the *ius commune*, see Manlio Bellomo, *The Common Legal Past of Europe, 1000–1800*, trans. Lydia Cochrane, Studies in Medieval and Early Modern Canon Law 4 (Washington, DC, 1995).

[9] The most recent edition of the *Decretals* appears in the second volume of: *Corpus iuris canonici*, ed. Emil Friedberg, 2 vols. (Leipzig, 1879–81; repr., Union, NJ, 2000). Friedberg's edition has the benefit of a critical apparatus and the inclusion of the so-called *partes decisae* — portions of the original that were excised when the papal letter, conciliar canon, or whatever the underlying source happened to be was edited for inclusion in a canonical collection. Friedberg's text for all of the collections that make up the *Corpus iuris canonici* — Gratian's *Decretum*, the *Decretals*, the *Liber sextus*, the *Constitutiones Clementinae*, and the *Extravagantes Communes* — is that of the so-called *Editio Romana*, the version that was revised, published, and given Vulgate status under Pope Gregory XIII in 1582 (available in facsmile online at: http://digital.library.ucla.edu/canonlaw). As the *Editio Romana* [= *ER*] also includes the Ordinary Gloss, it will be the version cited in this article. For a study of the fascinating revision process that led to the *ER*, which was carried out by the commission of scholars and ecclesiastical officials known as the *Correctores Romani*, see Mary Sommar, *The Correctores Romani: Gratian's* Decretum *and the Counter-Reformation Humanists* Pluralisierung und Autorität 19 (Berlin, 2009).

[10] On the *Liber extra*, see the author's forthcoming study: "Gregory IX and the *Liber extra*," in *Pope Gregory IX (1227–1241)*, ed. C. Egger and D. Smith (Farnham, 2017); and Martin Bertram, "Die Dekretalen Gregors IX.: Kompilation oder Kodification?" in *Magister Raimundus: Atti del Convegno per il IV Centenario della Canonizzazione di San Raimondo de Penyafort, 1601–2001*, ed. Carlo Longo, Institutum historicum fratrum praedicatorum: Dissertationes historicae 28 (Rome, 2002), 61–86. The other contributions to these conference *acta* provide the best introduction to Raymond's long and impactful life and career. For

source for this material was Gregory's papal registers.[11] This affords historians the opportunity to compare the often highly edited *Decretals* version of the Gregorian capitula with the original, thus enabling judgments about the legislative intent of the pontiff both for his own contributions and for the collection as a whole. As it turns out, one of Gregory's letters, X 3.32.19 *Gaudemus*, which recommended placing into convents women left by their husbands over adultery, came to occupy the center of legal debates over the practice of detrusion in the thirteenth century. An examination of the enregistered original and its historical context shows that it was meant as a pastoral provision, intended to provide women with few other opportunities the chance to partake in religious life.[12] Yet in the hands of canon law jurists, whose commentary was a crucial component for the interpretation and implementation of the law, *Gaudemus* came to be a coercive prescription for detrusion as the appropriate ecclesiastical sentence for adultery, not a voluntary, penitential measure. What caused this disjuncture between original intent and later interpretation?

In seeking to understand the origins of this shift, the present study uncovers a largely unexamined debate among thirteenth-century canon law jurists over the practice of detrusion as a penalty for adultery. The origins of the debate are familiar enough. Along with a myriad other penalties and procedures, detrusion for adultery was one of the many legal innovations made by the emperor Justinian following the promulgation of the *Corpus iuris civilis* that the twelfth-century Glossators sought to integrate within their revived system of Roman law. Although there is textual evidence suggesting that it drew some extra scrutiny, in the main the Glossators were little concerned with the penalty itself and rather with the implications it had for marital property or how it might alter the judicial procedures used in an adultery case. It was initially these procedural questions — such as the respective rights of men and women to bring an adultery charge, the permissibility of representation by an advocate (*procurator*), or whether spouses could be liable for calumny according to the law of retribution (*poena talionis*) if they failed to prove the charge — that first drew the attention of canonists like Huguccio of Pisa to the detrusion penalty. Although there were

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the *Quinque compilationes antiquae* (hereafter referred to individually as 1Comp [=*Compilatio prima*], 2Comp [=*Compilatio secunda*], etc.), see the version of Émil Friedberg, which must be used in conjunction with his edition of the *Decretals*: *Quinque compilationes antiquae* (Leipzig, 1882; repr., Graz, 1956).

[11] Vatican City, ASV, Reg. Vat. 14–20. Edition: Lucien Auvray, *Les registres de Grégoire IX*, 4 vols., Bibliothèque des Écoles Françaises d'Athènes et de Rome, ser. 2, vol. 9 (Paris, 1896–1955). Although he gives no indication of this in his preface, Auvray occasionally resorted to printing versions of letters as they appeared in prior document collections rather than the enregistered text, so caution must be exercised when using his edition.

[12] Auvray 110; Vatican City, ASV, Reg. Vat. 14, fol. 17v. See below, n. 64 for the full text of the letter.

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many regional variations, adultery had generally been met by the Church with some form of public penance or, for particularly egregious cases, excommunication. There came a turning point around two decades prior to the promulgation of the *Liber extra* when some canonists began treating detrusion — for reasons that remain obscure — as an appropriate sentence for adultery not just in secular courts but also in the ecclesiastical forum. Gregory IX's *Gaudemus* was thus received into a tradition that had recently developed a punitive reading of monastic life for women convicted of adultery. It was *so* recent, in fact, that it was not undisputed, and for the remainder of the century canonists went back and forth arguing about the appropriate use of detrusion by the Church, along with the status of those subject to it. In the process, the original, pastoral purpose of *Gaudemus* was largely forgotten, but the resultant debate provides a fascinating window onto the emergent use of punitive incarceration, which by the end of the century would receive formal legal recognition through Pope Boniface VIII's *Quamvis*, published in the *Liber sextus* (VI 5.9.3).

Although scholarly interest in the varieties of medieval incarceration goes back several decades, there has recently been more attention to the specific use of the monastery as a site of confinement for the laity.[13] Guy Geltner, in a survey of detrusion focused mainly on the period prior to the thirteenth century, has brought together a wealth of prescriptive evidence recommending the penalty for a whole range of lay offenses, suggesting the practice was more widespread than the rare mentions in narrative sources would lead one to believe.[14] In recognition that the medieval monastery as a site for lay punishment and penance belies the notion that rehabilitative incarceration is a post-Enlightenment development, an entire volume was recently devoted to exploring the variety of social, institutional, and intellectual currents that intersect in this phenomenon.[15] Yet there has been little discussion of the specific application of detrusion for adultery and what it might reveal about the larger practice of lay monastic confinement as well as the growth of punitive incarceration in the high-medieval period. Part of

[13] On medieval imprisonment generally, see Jean Dunbabin, *Captivity and Imprisonment in Medieval Europe* (Basingstoke, 2002); Edward Peters, "Prison before the Prison," in *Oxford History of the Prison*, ed. Norval Morris and David Rothman (Oxford, 1995), 3–47. When the documentary base permits it, local and regional studies provide an excellent opportunity for investigating the social history of the prison, as in the case of England: Ralph Pugh, *Imprisonment in Medieval England* (London, 1968); and the Italian cities: Guy Geltner, *The Medieval Prison: A Social History* (Princeton, 2008).

[14] Idem, "*Detrusio*: Penal Cloistering in the Middle Ages," *Revue Bénédictine* 118 (2008): 89–108. This article is largely a survey of the penitential and other prescriptive sources, but in a follow up study Geltner has found specific recourse to the practice in medieval Italy: "A Cell of Their Own: The Incarceration of Women in Late Medieval Italy," *Signs* 39 (2013): 27–51.

[15] *Enfermements: Le cloître et la prison (VIe–XVIIIe siècle)*, ed. Isabelle Heullant-Donat, Julie Claustre, and Elisabeth Lusset, Homme et société 38 (Paris, 2011).

this has to do with a subject matter that theoretically occurs at the intersection but more often falls within the interstices between the canon law treatment of marriage, religious life, and criminal penalties.[16] There are also formidable source issues involved. The limited court records documenting marriage litigation in the thirteenth century give no direct proof that detrusion was sought as punishment for adultery.[17] When it comes to the canonistic debate itself, the majority of the commentary literature from the thirteenth century remains unedited, and the early modern editions of important canonists like Hostiensis and Bernard of Parma have obscured an evolving position on detrusion evident in earlier recensions of their glosses.[18] A major component of this study will thus be an excursus into the manuscript tradition of the commentary literature on thirteenth-century decretal collections, both as necessary precursor to the presentation of their arguments and as demonstration of how the multiple recensions of these works may be profitably exploited to reconstruct the legal debates of the period.

The Detrusion Legislation of Emperor Justinian

In the years following the promulgation of the *Corpus Iuris Civilis*, Justinian enacted a series of laws prescribing monastic detrusion as a criminal sentence for both clerical and lay offenders, laws that were later collected in the *Novellae*,

[16] In *Law, Sex and Christian Society* (Chicago, 1987), which remains foundational for understanding the regulation of sexual practices in medieval canon law, James Brundage does not discuss X 3.32.19 *Gaudemus* or a decretal found in the title on advocates (*De procuratoribus*) with which it was often paired in canonistic discussions, X 1.38.5 *Tuae* (on which, see below). For a recent survey of the canon law construction of religious life, see Lars-Arne Dannenberg, *Das Recht der Religiosen in der Kanonistik des 12. und 13. Jahrhunderts*, Vita Regularis 39 (Berlin, 2008); for canon law and criminal sanctions, see Lotte Kéry, *Gottesfurcht und irdische Strafe* (Cologne, 2006); and the still important: Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.*, Studi e Testi 64 (Vatican City, 1935).

[17] Richard Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 2007); Charles Donahue, *Law, Marriage, and Society in the Later Middle Ages: Arguments about Marriage in Five Courts* (Cambridge, 2007); Caroline Dunn, *Stolen Women in Medieval England, 1100–1500* (Cambridge, 2013). Dunn's study reveals another difficulty in uncovering how adultery was punished since it was often prosecuted in England as wife abduction. This taxonomical hurdle extends beyond England and into the later Middle Ages. Sara McDougall's important study of marriage litigation in northern France in the fifteenth century demonstrates how bigamy became an expansive category that could subsume what other jurisdictions treated as adultery: *Bigamy and Christian Identity in Late Medieval Champagne* (Philadelphia, 2012).

[18] The canon law commentators used for this study are as follows: (pre-1234) Huguccio, Bernard of Pavia, Laurentius Hispanus, Johannes Teutonicus, Vincentius Hispanus (on 3Comp), Apparatus "Servus appellatur," Tancred of Bologna; (post-1234) Raymond of Penyafort, Guillelmus Naso, Vincentius Hispanus, Gottfried of Trani, Bernard of Parma, Innocent IV (Sinebaldus Fieschi), Hostiensis, Petrus Sampson, Bernardus de Montemirato (Abbas Antiquus), Guillelmus Durantis, Boatinus.

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the volume of his supplementary legislation to the *Corpus*.[19] When applied to the clergy, it was used to punish a variety of moral infractions as well as the misuse and abuse of ecclesiastical office. For the laity, however, detrusion was invoked exclusively for acts that broke the marriage bond. It was applied to either husband or wife (or both) for initiating an unlawful divorce (Nov. 117.13; 127.4; 134.11), but, for adultery, the penalty was reserved for the woman alone (134.10; 134.12).[20] Since the precise wording of Nov. 134.10 and the provisions it inspired will become a subject of later discussion among medieval jurists, it is worthwhile to reproduce the text here:

> Adulteram vero mulierem competentibus vulneribus subactam in monasterio mitti. Et si quidem intra biennium recipere eam vir suus voluerit, potestatem ei damus hoc facere et copulari ei, nullum periculum ex hoc metuens, nullatenus propter ea quae in medio tempore facta sunt nuptias laedi. Si vero praedictum tempus transierit, aut vir prius quam recipiat mulierem moriatur, tondi eam et monachicum habitum accipere, et habitare in ipso monasterio in omni propriae vitae tempore.
>
> [We order], however, that an adulterous woman, after undergoing the appropriate corporal punishment, be sent to a monastery. And if within two years her husband should wish to take her back, we give him leave to do so and reunite with her without fearing any negative consequences as a result, nor fearing that the marriage may have been damaged by anything he did in the interim. But if the allotted time passes, or the husband should die before he is able to take back his wife, let her be shorn of her hair and receive the monastic habit, and dwell in that monastery for the entirety of her natural life.

Nov. 134.10 ends by specifying how the woman's dowry and property should be divided up between the monastery and her surviving family. In the same novella (134.12), Justinian also ordered lifelong detrusion for a woman who ended up marrying the man with whom she had committed adultery. While seemingly draconian to modern eyes, the Justinianic provision was actually conceived as an amelioration of previous penalties, a fact that medieval commentators on

[19] On the legal aspects of the provision, see Francesco Gloria, "La Nov. 134,10; 12 di Giustiniano e l'assunzione coattiva dell'abito monastico," in *Studi in onore de Giuseppe Grosso* 6 (Turin, 1974), 55–76. For a broader discussion of the provision in the context of Justinian's efforts to reshape the elite culture of the Byzantine court, see Julia Hillner, "Monastic Imprisonment in Justinian's Novels," *Journal of Early Christian Studies* 15 (2007): 205–37. Hillner's conclusions in this article and in others cited below are now part of a comprehensive examination of imprisonment in Late Antiquity: *Prison, Punishment and Penance in Late Antiquity* (Cambridge, 2015).

[20] Nov. 117.3 and 134.11 prescribed detrusion for both husbands and wives (either separately or together) for initiating an unlawful divorce. Nov. 134.10, to be discussed shortly, ordered detrusion for women who had committed adultery. Nov 134.12 leveled penalties for adulterous couples who had fled justice and subsequently gotten married, with capital punishment prescribed for the man and detrusion for the woman.

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the law hardly ever failed to note.[21] Adultery had been a public crime in Roman law since Augustus's *Lex Iulia de adulteriis et de stupro*, which compelled the father and/or husband of an adulterous woman to bring a charge against her (following a mandatory divorce) and permitted any Roman citizen to institute proceedings if the family failed to do so.[22] It is generally assumed that emperor Constantine I subsequently made adultery a capital offense, though the older penalties of exile and/or loss of citizenship prescribed by the *Lex Iulia* continued as penal options after his reign.[23] While Justinian ultimately retained capital punishment for male adulterers, by summoning the penitential discipline of the monastery as an adjunct to criminal enforcement, he introduced "the unprecedented concept of corrective imprisonment" into the Western legal tradition.[24]

The impact of Justinian's detrusion legislation in the Western provinces was limited to Italy, but, as it was mediated through the Roman bishops, it would leave a footprint in canon law. This had important consequences for later discussions of detrusion among medieval canonists because it provided canonical precedents once the Justinianic legislation came back into circulation. Answering a request from one of his subdeacons for advice on an adultery case, Pope Pelagius I (556–61) directed that the female malefactor — if her husband refused to accept her back — should be relocated to a place where she would not be permitted to

[21] Some commentators actually drew an interesting parallel between the rigors of pre-Justinianic Roman law and Mosaic law, on the one hand, and the mercy of Justinian's reforms and the law of the Gospel, on the other hand. Alanus Anglicus (fl. 1190–1215) uses this trope in his comments on Pope Celestine III's *Si matrimonii causa* (2Comp 1.18.2), which advised that marriage litigation is best conducted with the principles present whether proceeding criminally or civilly: "ad sanguinis effusionem secundum iura ueterem, C. ad l. iul. de adulter. Castitati [Cod. 9.9.9]. Similiter secundum legem mosaycam, ut xxxiii. q. v. Hec ymago [C. 33 q. 5 c. 13]. Sed mansuetudine noue legis detruditur hodie in monasterium, C. ad l. iul. de adulter. auth. Sed hodie [auth. post Cod. 9.9.29]. a[lanus]." *ad* 2Comp 1.18.2 *s.u.* questio, Admont, SB 22, fol. 92v[a]. In some manuscripts, albeit ones where gloss attributions are mostly lacking, this particular gloss has no attribution to any jurist (e.g., Paris, BNF, lat. 3932, fol. 75[b]). For the text of *Si matrimonii causa*, see below, n. 51.

[22] Adultery, of course, applied only when the act involved a married woman who was considered a *materfamilias*. Roman law took little to no interest in the sexual purity of slaves or women of low social standing: "cum ab his feminis pudicitiae ratio requiratur, quae iuris nexibus detinentur et matris familias nomen obtinent. Hae autem immunes ab iudiciaria severitate praestantur, quas vilitas vitae dignas legum observatione non credidit," Cod. 9.9.28. The adultery laws were analyzed extensively by Roman jurists at Dig. 48.5. Modifications to the law by pre-Justinianic emperors were compiled in the Codex under the title on adultery and fornication (Cod. 9.9).

[23] For a general study of Constantine's regulation of marriage, see J. Evans Grubbs, *Law and Family in Late Antiquity: The Emperor Constantine's Marriage Legislation* (Oxford, 1995).

[24] Hillner, "Monastic imprisonment," 206.

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"misbehave" (*locum in quo ei non liceat male vivere*).[25] Pelagius's formulation borrows directly from Justinian's language, including the proviso that the husband who chooses to receive back his adulteress wife should do so only if he perceives no danger (*periculum*) of a similar occurrence in the future. Given these echoes, it is safe to assume that his final circumlocution about the proposed residence for the woman refers to a monastic environment. *De Benedicto*, as later canonists referred to Pelagius's letter, would eventually make its way to Gratian's *Decretum* (C. 32 q. 1 c. 5), and would be one of the primary proof texts used to justify detrusion in the late-twelfth and thirteenth centuries.

At the turn of the seventh century we also find Pope Gregory I (590–604) using monastic confinement in an almost programmatic fashion for cases falling under both his episcopal and his expanded civil jurisdiction, as Julia Hillner has shown in a study of his correspondence.[26] Amidst this record there is no instance of Gregory ever having delivered a detrusion sentence for a laywoman convicted of adultery. There is, however, an unusual case where he ordered openended penitential monastic confinement for an unmarried male offender who had committed fornication (*stuprum*) with a young woman — if he refused to take her as his wife. Although this letter would also wend its way through the canonical tradition into the *Liber extra* (X 5.19.1), it curiously never played a large role in canonistic discussions of detrusion, perhaps because it dealt with non-clerical male fornication rather than female adultery, or perhaps because the use of the monastery in this case was more as a temporary holding cell and did not involve any change in status of the subject.[27]

[25] The text is given according to the version in Gratian's *Decretum* (C. 32 q. 1 c. 5): "de Benedicto quoque, quem uxorem alienam indicasti facinoroso substulisse spiritu, et in suum hactenus praesumere detinere consortium, si hoc rerum veritas habet, iubemus experientiae tuae, ut eum cum ipsa quoque adultera districte mactare non differas, et calvatos ab invicem separare, et illum quidem ad Lucium defensorem in Apuliae provinciae patrimonium sine dilatione fac migrare. Illam vero, si quidem maritus suus sine dolo aliquo forte accipere voluerit, tua ordinatione sub cautela recipiat, nullum ei nihil duntaxat de cetero simile committenti periculum illaturus. Si vero omnino eam recipere noluerit, in alium quemdam locum in quo ei non liceat male vivere, provida eam dispensatione constitue." *ER* (n. 9 above), vol. 1, coll. 2097–98.

[26] Julia Hillner, "Gregory the Great's 'Prisons': Monastic Confinement in Early Byzantine Italy," *Journal of Early Christian Studies* 19 (2011): 433–71. Justinian had granted additional civil competence to bishops in the recently retaken Western provinces. As Hillner points out (434, and *passim*), Gregory was probably influenced just as much by the growing use of monastic confinement for the clergy in the late antique Church — evidenced first in early sixth-century Merovingian conciliar legislation — as he was by imperial precedents.

[27] Text from the *Liber extra*: "pervenit ad nos quod Felix nepos tuus quandam virginem, quod nefas est dici, stupro decepit. Quod si verum est, quamvis esset gravi de lege poena plectendus, nos tamen aliquatenus legis duritiem mollientes hoc modo disponimus, ut aut quam stupravit uxorem habeat, aut certe si renuendum putaverit, districtius ac corporaliter castigatus excommunicatusque in monasterio in quo agat poenitentiam retrudatur, de quo ei

Transmission of the Detrusion Legislation in the Glossators

As they did with the other Justianianic material in the *Novellae*, the twelfth-century Glossators incorporated the detrusion legislation into their reading of the Codex's provisions on adultery.[28] The process of incorporation is revealing insofar as it shows an evolving interest in the issue along with a recognition that certain aspects of it might not be compatible with canon law as currently practiced. Roman-law jurists were mainly concerned with the property consequences of detrusion, but in the thirteenth century — when detrusion came under scrutiny from canon lawyers as well — they also began to debate the monastic status of the woman and ultimately denied her any formal recognition as a nun.

There were two vectors for the transmission of the detrusion provision in the twelfth century.[29] One was through the *Authenticum*, a collection of the full text of the majority of the *Novellae* in Latin translation.[30] Commentaries on the *Authenticum* did not emerge until the late twelfth century, however. Even then the collection remained less well attended than the traditional books of the *Corpus iuris civilis*, perhaps because they did not offer as ready a framework for the systematic treatment of a single subject owing to each Novella usually treating a variety of disparate issues. The second and ultimately more common allegation of the detrusion provision was as one of the *authenticae* (not to be confused with *Authenticum*) inserted as an addendum to the relevant title in the Codex.[31]

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nulla sit egrediendi sine praeceptione licentia." *ER*, vol. 2, coll. 1720–21. Gregory's exercise of jurisdiction went even further in this case, since Roman law did not recognize marriage between partners whose initial union had been fornicatory. For an extensive analysis of this case, see Kristina Sessa, *The Formation of Papal Authority in Late Antique Italy* (Cambridge, 2014), 188–90.

[28] On the rediscovery of Roman law, see Hermann Lange, *Römisches Recht im Mittelalter*, vol. 1, *Die Glossatoren* (Munich, 1997).

[29] A collection of 124 Latin summaries of the *Novellae* was also available in the so-called *Epitome Juliani*, which was made during Justinian's lifetime by an otherwise anonymous cleric in Constantinople. A summary of Nov. 134, however, was not part of the mainline tradition of the *Epitome*, appearing only in certain manuscripts. The modern edition of the *Epitome*, thus, only includes it in an appendix (Epitome CXXXIV *De Vicariis*, cap. XVI): *Iuliani epitome latina novellarum Iustiniani*, ed. Gustav Haenel (Leipzig, 1873), 195.

[30] There is still no consensus about the precise date of the *Authenticum* or whether it was even an official compilation. Some have ascribed it to Justinian himself as the vehicle by which he transmitted his most important legislation to the western provinces. Others, noting that there are no manuscripts of the collection prior to the twelfth century and that the name itself, *Authenticum*, is a twelfth-century appellation, have pushed the compilation date to the time of the rediscovery of Roman law in the West starting in the eleventh century. For an overview of the medieval reception of the collection and the difficulties of dating it, see Lange, *Römisches Recht*, 82–85.

[31] The formulation of the *authenticae*, which were short summaries indicating a change to the law introduced by Justinian, has traditionally been ascribed to Irnerius (ca. 1050–ca.

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There were, in fact, five *authenticae* added to the title on adultery (Cod 9.9),[32] two of which dealt directly with the detrusion penalty (*Sed hodie* and *Sive novo iure*).[33] This shows a marked interest in Justinian's contributions to marriage law, given that there were less than 250 *authenticae* in total that were copied into the margins of pre-Accursian Codex manuscripts.[34]

The earliest reference to the detrusion provision among the Glossators was by the author of the *Summa Trecensis* (generally assumed now to have been the jurist Rogerius), considered the first *Summa* devoted to the Codex (ca. 1150).[35] At the

1140), the founding father of the Roman law revival in the West. For the complexities and jurisprudential valence of distinguishing between a medieval citation of the *Authenticum* and one of the *authenticae*, see Tammo Wallinga, "*Authenticum* and *authenticae* — What's in a Name? References to Justinian's Novels in Medieval Manuscripts," *Legal History Review* 77 (2009): 43–59.

[32] The five *authenticae* are: post Cod. 9.9.11 *Sed novo iure* (Nov. 117.8); post Cod. 9.9.15 *Si vero criminis* (Nov. 134.5); post Cod. 9.9.29 *Sed hodie* (Nov. 134.10); post Cod. 9.9.29 *Si quis ei* (Nov. 117.15); post Cod. 9.9.29 *Sed novo iure* (Nov. 134.12). To see the *authenticae* in their proper place in the Codex, one has to consult a pre-Mommsen edition of the *Codex*, such as *Corpus iuris civilis*, ed. Émil Hermann, pars altera (Leipzig, 1858). For our texts, the Kriegel edition has to be supplemented with the collection of *authenticae* assembled in the *Scripta anecdota glossatorum*, as one of the detrusion-specific items is not contained in the former (auth. post Cod. 9.9.29 *Novo iure*): "Authenticarum collectio antiqua," ed. Johann Palmieri, in *Scripta Anecdota Glossatorum*, vol. 3, ed. Augustus Gaudentius (Bonn, 1901), no. 216, 95.

[33] Post Cod. 9.9.29 *Sed hodie*: "[sed] hodie licet ut adultera verberata in monasterium mittatur: quam intra biennium viro recipere licet. Biennio transacto vel viro, priusquam reduceret, mortuo, adultera tonsa, habitu monachali suscepto, ibi dum vivit, permaneat; duabus partibus proprie substantie liberis, si habet, applicandis, tertia monasterio. Sed si liberos non habet, parentibus existentibus, huiusmodi iniquitati non consentientibus, tertia pars applicabitur, due monasterio. Quibus non exstantibus, omnis eius substantia monasterio queratur, pactis dotalium instrumentorum in omni casu viro servandis." *Scripta Anectoda Glossatorum*, no. 215, 95. Post Cod. 9.9.29 *Novo iure*: "novo iure licet solus vir fugerit, a iudice comprehensus, post tormenta ultimo supplicio subdetur, nulla eius excusatione audita. Sed mulier castigata in monasterium mittetur, ibi mansura dum vixerit, utriusque substantia secundum ordinem predictum in alia authentica sub hoc eodem titulo, dividetur periculo tam comitis rerum privatarum quam iudicis loci." Ibid., no. 218, 95. Interestingly, it was not simply the case of one or the other when it came to the two detrusion *authenticae*, and one finds them copied together, as in Munich, BSB, Clm 22, fol. 197r (*Sed hodie*) and fol. 199v (*Novo iure*).

[34] For a comprehensive list and analysis of pre-Accursian manuscripts, i.e., manuscripts of the Codex copied prior to the drafting of Accursius's ordinary gloss (ca. 1230), see Gero Dolezalek, *Repertorium manuscriptorum veterum Codicis Iustiniani*, 2 vols., Ius Commune Sonderheft 23 (Frankfurt am Main, 1985).

[35] For the torturous editorial history and controversy over the authorship of the *Summa Trecensis*, see Lange, *Römisches Recht*, 403–5; André Gouron, "L'auteur et la patrie de la Summa trecensis," *Ius Commune* 12 (1984): 1–38; repr. in idem, *Études sur la diffusion des doctrines juridiques mediévales*, Collected Studies Series 264 (Aldershot, 1987), III; idem, "L'Élaboration de la Summa Trecensis," in *Sodalitas; Scritti in onore di Antonio Guarino*, vol. 3, ed. Vincenzo Giuffrè, Biblioteca di Labeo 8 (Naples, 1984), 3681–96; repr. in idem,

end of his discussion of Cod. 9.9, the author tersely notes — using words that seem to be a hybrid of both detrusion *authenticae* — that the punishment for women adulterers has been altered to bodily castigation and monastic confinement, with a two-year timeframe given to husbands to take them back.[36] When a later author revised the work a couple of decades later, he was apparently not satisfied with the brevity of this notice and so reproduced the *Sed hodie authentica* in full.

Despite Rogerius's having integrated the Justinianic additions to the Roman Law on adultery, civil law commentators were initially circumspect about these changes, when they even chose to mention them. Though his brief statements on the subject of adultery indicate he was familiar with some of the Justinianic additions, Richard of Pisa (fl. 1160s), author of a Provençal commentary on the Codex that relied on Rogerius, made no mention of the detrusion provision and refrained from giving a more thorough treatment of divorce, since it was now, according to him, the province of canon law.[37] Unlike Richard, William of Cabriano (fl. 1150s–60s) was able to integrate Justinian's detrusion penalty into the discussion of adultery in his *Casus Codicis*, though perhaps a less than thorough

Collected Studies Series, IV; Hermann Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge, 1938; repr., Aalen, 1969), 146–80.

[36] The italicized portions in the following quotation represent text from the revised version of the *Summa* printed in the 1914 edition that is not found in the 1888 edition: "pena convictorum hoc crimine est capitis amissio quum sacrilegos nuptiarum gladio puniri opportet; de deprehensis vero quemque sine iudice vindicta sumitur … [intervening discussion of when it is permitted to kill a male adulterer and how he may be otherwise handled when discovered in the act]… . Novo iure aliter super his invenies, scilicet ut adultera verberata in monasterium mittatur, quam inter biennium viro recipere licet, *et cetera que diligenter exposita invenies, cum omnibus ad hanc partem pertinentibus, in libro authenticorum sub hoc titulo, ut nulli iudicum* [Auth. 127]," "Summa Codicis," ed. Johann Palmerius, in *Scripta Anecdota Glossatorum*, ed. Augustus Gaudentius, vol. 1 (Bologna, 1888), 165 [215–16 in 1914 edition].

[37] "Set quia non est in consuetudine hodie quod matrimonium diuidatur nisi per canones, sicuti propter parentelam uel per adulterium quod facit femina, ideo non est necessarium ut inde aliquid dicamus," *Lo Codi: Eine Summa provenzalischer Sprache aus der Mitte des XII. Jahrhunderts*, ed. Hermann Fitting and Hermann Suchier (Halle, 1906), 171. The Fitting/Suchier edition is of a contemporaneous Latin translation made of this relatively popular work, composed in the second half of the twelfth century for non-specialists. Richard's knowledge of some of the Justinianic provisions can be inferred from a comment earlier in the chapter containing the passage above (XVII. *Per quas causas maritus potest se diuidere ab uxore sua uel uxor a marito*) where he asserts that women are able to sue for divorce on the same grounds as their husbands, a change Justinian had introduced in Nov. 117.10. Additionally, Richard alludes to the limitations Justinian placed on the accepted grounds for divorce and notes — without naming either Justinian or the detrusion punishment specified by Nov. 134.11/Auth. 127.11 — that an illegal divorce will be met with a heavy penalty: "similiter et mulier potest dimittere maritum suum sine pena propter illas easdem raciones, quamuis non uelit hoc maritus. Et si aliquis de istis diuidit matrimonium alio modo, hoc est nisi sicut leges precipiunt, debet inde habere grandem penam sicuti est ordinatum." Ibid., 171. For more on Richard, see Lange, *Römisches Recht*, 415–21.

familiarity is betrayed by his miscitation of the text in the *Authenticum*. Yet William was obviously uncomfortable with the full implications of the provision and noted that the law's forcible monasticization of women after two years was contrary to canon law.[38]

As the twelfth century rolled on into the thirteenth, jurists became more willing to uphold the detrusion penalty without noting any discordance with the canonical tradition. The discussion in Azo of Bologna's *Summa Codicis* (ca. 1210), for example, which betrays a familiarity with, if not a direct reliance on, that of William of Cabriano, simply dropped William's editorial comment that the woman's forced monasticization would be a violation of canon law.[39] Azo was of the opinion that the main beneficiary of the detrusion provision was actually the husband. It gave him up to two years to decide whether he wished to reconcile with his wife, whereas pre-Justinianic law did not even offer reconciliation as an option, and compelled that he make an accusation or be charged as a panderer.[40] To the extent that the penalty provoked scrutiny, it arose from a concern over the integrity of the marital property. Johannes Bassianus seems to have been the first

[38] "Sacrilegi autem nuptiarum gladio puniuntur, set hodie penis adulter competentibus subicitur. Adultera vero competentibus uerberibus pro motu iudicis subacta in monasterium mittitur, quam intra biennium uir sine pena reducere potest. Biennio uero transacto uel uiro intra biennium mortuo 'adultera tonsa' — quod sacris canonibus aduersatur — 'monastico habitu suscepto' ibi uitam finiat, substantia quidem eius sic diuisa ut duas partes liberi habeant, tertia monasterio competat. Liberis autem non existentibus parentes qui crimini non consenserint tertiam partem habeant, due monasterio competant. His autem non existentibus — id est neque liberis neque parentibus iniquitati tamen consentientibus — omnis eius substantia ad monasterium deuoluatur, ut auth. collat. ix. § Necessarium [Auth. 127.9]." *Casus Codicis*, ed. Tammo Wallinga, Studien zur europäischen Geschichte 182 (Frankfurt am Main, 2005), 639–40. William incorrectly cites Auth 127.9 (§ Necessarium), which immediately precedes the detrusion provision, and was instead concerned with limiting the use of monasteries for women as pre-trial jails. The *Casus Codicis* purportedly reflects many of the lecture room *sententiae* of William's more famous master, Bulgarus, though it is impossible in this case to tell whether the adultery discussion is William's own or that of his teacher. On William and the *Casus Codicis*, see Wallinga's introduction.

[39] "Et imponitur pena mortis mari quasi pro sacrilegio. Nam sacrilegos nuptiarum gladio puniri oportet, ut infra, eodem, l. Quamvis adulterii [Cod. 9.9.29]; femina autem adultera verberata iure autenticorum in monasterium mittitur, quam infra biennium recipere viro licet. Biennio transacto, vel viro priusquam reduceretur mortuo adultera tonsa monastico habitu suscepto ibi dum vivit permaneat." *Summa Azonis* (Venice, 1498), fol. 219v[b]. On Azo, see Lange, *Römisches Recht*, 255–71.

[40] *Ad* Cod. 9.9.29 *s.v.* gladio puniri oportet: "et ita imponitur poena capitis in adultero, secus in adultera, et ita lege authent. Sed hodie, quia debet tonderi etc., sed ibi dicit quod intra biennium 'viro recipere licet.' Ergo multo magis si antequam in monasterium mittatur, velit ei remittere illam poenam, et eam recipere sine poena potest. Nec erat contra deum, quia poena illa in favorem mariti inducta est, unde si non accusatur uxor ab aliquo, non patietur poenam; et maritus si vult retinebit, cum post biennium quam in monasterium mittitur possit, et ideo hic hodie non habebit locum poena lenocinii." *Azonis ad singulas leges XII. librorum Codicis Iustinianei commentarius* (Paris, 1577; repr., Turin, 1966), 690.

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to notice how the detrusion penalty wreaked havoc with the way the marital property should normally have been apportioned if the divorce were due to a woman's transgressions. One would expect, according to Johannes, at least the dowry to go to the husband, yet the language of the full *Authenticum* not only divided the wife's property between the children and the monastery itself but also kept in place the prenuptial agreements (*pacta dotalia*) that gave the woman the right to specify control over the dowry if she were to predecease her husband.[41] The fact that the prenuptial agreement persisted even after the woman was placed in the monastery indicated to Johannes that she was not a religious nor ever would take formal religious vows. The denial of full monastic status to the women subject to the detrusion penalty, which would also become a flashpoint of debate among the canonists, became the consensus position of Roman-law jurists when Accursius entered Johannes's position into the Ordinary Gloss on the Codex.[42]

Detrusion for Adultery in the Canonical Tradition through 1234

At some point in the last quarter of the twelfth century, canonists began to include the Justinianic provision in their discussions of adultery. The initial use of it was quite narrow, however. Canonists were fond of contrasting the *mansuetudo* of the *canones* with the *rigor* of the *leges* when it came to marriage law. Not

[41] We do not possess a full version of Johannes Bassianus's original *Codex* commentary and so have to read it through the work of his student, Azo, who normally appended Johannes's siglum (Io.) to his master's opinions: "hodie tamen videtur quod habeat necesse maritus inscribere, si adulterio uxoris velit lucrari dotem, ut Auth. ut liceat mat. et avi. § Quia vero plurimas [Auth. 112.8]. Item per alium Authen. videtur applicari monasterio ut Auth., ut nulli iudic. lic. hab. § Adulteram [Auth. 127.10]. Sed hoc cum non est reclusa in monasterio. Alioqui[n] oneri monasterii subvenitur per substantiam, ut ibi. Vel illud in alia substantia uxoris non de dote respiciendum est, licet huic solutioni repugnet quod est in fine illius Authen., ponit pactum, etc. Si enim ex auctoritate legis lucratur maritus, cur diceret pacta dotalia servari? Nam et sine pacto lucraretur. Et ideo dic quod pactum factum fuerat de dote lucranda vel adulterio commisso, ac si pactum interpositum esset, habet dotem. Io.," *Lectura ad* Cod. 5.17.8 *s.v.* si habere seu vendicare, 407–8. On Johannes, see Lange, *Römisches Recht*, 215–26.

[42] *Ad* auth. post Cod. 9.9.29 *s.v.* habitu: "non tamen est monacha, secundum Io. Quod placet, quia pacta dotalia non statim, sed demum naturaliter mortua valent, ut in fine huius §. Sed si esset monacha, statim valerent; supra, de episc. et cleri. l. Deo nobis § 1 [Cod. 1.3.54.1];" and *s.v.* servandis: "patet ergo quod prius non fuit facta monacha, licet fuerit tonsa. Sed nonne probato adulterio maritus etiam sine pacto dotem lucratur, ut supra, de repud. l. Consensu § Vir quoque [Cod. 5.17.8.3]; et in Auth. ut lic. ma. et avis. § Quia vero plurimas, coll. 8 [Auth. 117.8]? Respondeo illud corrigi secundum quosdam. Vel dic, cum est civiliter convicta, maritus dotem lucratur, sed cum accusata et damnata criminaliter, substantia dividitur, ut hic. Vel hoc cum extranei accusant, illud cum maritus." *Corpus iuris civilis Iusinianei*, vol. 4 (Lyon, 1627), col. 2352.

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only were the punishments more humane in the ecclesiastical forum, there was — at least in theory — equality with respect to gender in terms of who could bring an action as well as the consequences attendant upon conviction, resulting in an informal maxim often cited among canonists that *uxor et maritus non ad imparia iudicantur*.[43] The Justinianic changes to marriage law could thus be summoned to demonstrate how even Roman law had moved away from its earlier draconian stances on such things as the death penalty for adultery or a concern only with the misbehavior of the woman within marriage.

The first canonical citation of the detrusion provision seems to have been made by Huguccio of Pisa (d. 1210) in his *Summa* on the *Decretum*.[44] Ironically, Huguccio initially summons the provision as support for the one text in the canonical tradition that it directly influenced, Pope Pelagius's *De Benedicto* (C.32 q.1 c.5).[45] Without giving any specific information as to its provenance, Huguccio cites it to argue that Pelagius's order of monastic confinement for the adulteress has precedent in Roman law, thus proving the larger point he is trying to make in his commentary, that husbands cannot be forced to take back their adulterous wives.[46] Huguccio would again summon the provision in his commentary a few capitula later but simply as an aside that capital punishment for adultery had been superseded even within Roman law.[47] Both these references show that Huguccio was not particularly interested in the provision other than as an illustration of what canon law already taught. Its marginal nature is also evident from

[43] The source of this formula was Gratian himself in a canon attributed to John Chrysostom: C. 32 q. 1 c. 4.

[44] On the *Summa* in the context of the development of Decretist literature, see Kenneth Pennington and Wolfgang Müller, "The Decretists: The Italian School," in *The History of Medieval Canon Law in the Classical Period, 1140–1234*: *From Gratian to the Decretals of Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington, DC, 2008), 121–73, at 142–60. On Huguccio generally, see Wolfgang Müller, *Huguccio: The Life, Works, and Thought of a Twelfth-Century Jurist*, Studies in Medieval and Early Modern Canon Law 3 (Washington, DC, 1994).

[45] When they did not simply skip over this canon altogether, earlier decretists took *De Benedicto* simply as a proof text allowing adulterous wives to be received back by their husbands after the performance of penance. So, for example, Rolandus: "adulteram vero in matrimonium posse teneri vel assumi, auctoritatibus probari posse videtur, unde Pelagius: De Benedicto etc. Hoc capitulo adulteram recipi posse monstratur." *Summa magistri Rolandi*, ed. Friedrich Thaner (Innsbruck, 1874), 160. On *De Benedicto*, see above, n. 25.

[46] "Ut di. lxxxi. Sacerdos, Dictum [D. 81 c. 7 et 8]. Hoc idem dicitur in autentico, nam pro pena decapitationis siue deportationis hodie successit retrusio in monasterium. Ex hoc capitulo [C. 32 q. 1 c. 5] aperte colligitur quod casus est in quo quis non tenetur recipere uxorem adulteram, etiam penitentem." *Summa decretorum ad* C. 32 q. 1 c. 5 *s.v.* in alium locum, Admont, SB 7, fol. 367v[b]. See above, n. 27, for the letter of Pelagius.

[47] *Ad* C. 32 q. 1 c. 7 *s.v.* debere ignoscere: "et nota canones preiudicare legibus qui dicunt adulteros interfici. Nam et ipsum authenticum corrigit leges in quo dicitur quod si uir noluerit sibi reconciliare adulteram debet retrudi in monasterium." Admont, SB 7, fol. 368v[b].

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how he does not even give the source of the text other than its being from the *Authenticum*.[48]

Despite his limited concern with the secular punishment of adultery, Huguccio did display a marked interest in procedural questions about marriage litigation. At the root of his concern was a polemic against Gratian's teaching on whether there was an equal right of accusation for both husbands and wives in adultery. Gratian had used the special privileges accorded to husbands in adultery accusations, the so-called *ius mariti*, as an example of exceptions to the normal requirement that accusers could incur the penalty of calumny (according to the *poena talionis*) if they failed to prove the charges and thus suffer the punishment the accused would have undergone if convicted of the crime.[49] Huguccio was deeply read in the Roman-law Glossators' discussions of the subject, and so his first tack was to complicate the issue.

After Huguccio it became standard for canonists to identify detrusion as the penalty prescribed for adultery within Roman law, as per Justinian's modifications. Bernard of Pavia, whose *Compilatio prima* made the decretal collection

[48] That this was not a case of lack of knowledge but rather of interest on Huguccio's part can be seen in the contrast with how he gives a very specific allegation when he cites another of Justinian's marriage law reforms (Nov. 117), which instituted penalties for calumny, i.e., when husbands failed to prove accusations of adultery, and also set forth grounds on which a wife could sue her husband for divorce. In a lengthy discussion of the respective rights of accusation for adultery within marriage and that in ecclesiastical cases spouses were not obliged to make a formal inscription (*inscriptio*) and thus bind themselves to suffer the consequences of calumny according to the *poena talionis*, Huguccio cites Justinian's constitution to show the difference between Roman and canon law on the *poena talionis*, giving a very specific reference to the location of the text within the corpus of the *Authenticum*: "dicitur enim in lege [Romana] quod debet adimplere sollempnia inscriptionis et porrigere libellum, ut ff. de adulter. Miles § Quidam, et § ix [Dig. 48.5.12.5 et 9]. Ipsum iure nouo exprimitur in aut. ut liceat mat. et aui. coll. viii § Quia uero plurimas [Auth. 112.10]," *Ad* C. 4 q. 4 c. 2, Admont, SB 7, fol. 189v[a].

[49] Although it was an offhand reference, it was made in one of Gratian's *dicta* and so was taken to reflect his actual teaching. In this particular *dictum* [post C. 4 q. 4 c. 2] Gratian used extracts from several titles from the Codex, including Cod 9.9 *De adulteriis*: "aliquando etiam sine inscriptione accusatio fieri potest. Ea enim, que per officiales presidibus nunciantur, et citra solempnia accusationem posse perpendi incognita non est. Item si maritus iure mariti, hoc est infra sexaginta dies utiles, adulterium uxoris suae accusare voluerit, quam ex suspicione sola ream facere valet, non continetur vinculo inscriptionis." *ER* (n. 9 above), vol. 1, coll. 1027–28. Gratian also included a pseudo-Augustinian text that used the Deuteronomic prescription that men who accused their wives of adultery, for which the penalty was death by stoning, would only be forced to remain with their wives in perpetuity should their accusation be proven false. The text in question is C. 33 q. 5. c. 14 *Satis hinc*, though according to its arrangement in many *Decretum* manuscripts, canonists usually alleged it in their commentaries as part of the previous c. 13, *Haec imago*. For the purposes of this study, it is not necessary to draw a distinction between recensions of the *Decretum*, as outlined in Anders Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000).

into a central component of the university canon law curriculum, included the provision in his discussion of the title on adultery and fornication in his own commentary on 1Comp. As it had for Huguccio, the provision gave Bernard the opportunity to distinguish the canonical and legal penalties for adultery. Although he provided more specific locating information than Huguccio had, Bernard's unusual allegation of the text at Nov. 134.12 betrays a continued lack of familiarity with the provision.[50]

Canonists began to take a greater interest in the detrusion provision during the pontificate of Innocent III. It is unclear whether this reflected simply the growing sophistication of canonical jurisprudence, which now confidently engaged questions arising from the conflict of laws, or whether it corresponded to some genuine rethinking of the penalties applied to adultery, perhaps resulting from the enhanced jurisdiction claimed by the Church in marital affairs since the twelfth century. The occasion for this interest had to do with whether marriage litigation should adopt elements of criminal procedure if during the case criminal charges were alleged by one of the parties. Under normal civil procedure, which marriage litigation in Church courts followed, parties could conduct the suit through an advocate (*procurator*). But what if in the middle of the proceedings one of the spouses suddenly charged the other with criminal wrongdoing, say, adultery or murder? Would that not obligate the suit now to be conducted in person with the accuser also binding himself through the oath of calumny to suffer retribution (*poena talionis*) should he fail to prove the accusation, as was standard for any criminal case? The decretists had already been arguing the issue for some time, but the papacy continued to field questions from bishops asking for guidance, and their answers often created more confusion.[51] Where

[50] The parenthetical citations are those added by the editor, Laspeyers, though note the author's correction to the last citation, to be discussed after the quotation: "poena adulterii alia canonica, alia legalis. Canonica poena est, ut si clericus fuerit, deponatur, si laicus, excommnnicetur ut Di. LXXXI. Si quis clericus (c. 10), Clericus (c. 20) et ar. C. VI. qu. 1 llli qui (c. 3) et C. XXII. qu. 1 Praedicandum (c. 17) et de cons. Di. II. Si non sunt (c. 15), Si quis intrat (c. 18). Poena vero legalis est, ut adulter capite puniatur, ut Cod. eod. Quamvis (L. 19), adultera verberetur et in monasterium retrudatur, ut in Authent. ut nulli iudicum liceat habere § Si quando vero (Nov. 127.10) [*immo*, § Si quis vero (Nov. 134.12)]." *Summa decretalium*, ed. E. Laspeyers (Regensburg, 1860; repr., Graz, 1956), 229. In a footnote to the text (n. 60: "in Codd. omnibus falso *si quis vero*"), Laspeyers noted that all of the manuscripts mistakenly gave the section citation of the Authenticum as § *Si quis vero* (Nov. 134.12), so he decided to change the text to § *Si quando vero* (Nov. 134.10), presumably because in the later tradition Nov. 134.10 would become the *locus classicus*. Since the detrusion provision is, in fact, mentioned in Nov. 134.12 (*Si quis vero*) — the larger concern of this text being directed towards those who escaped punishment and went on to marry their adulterous partners — it is almost certain that this was the allegation intended by Bernard.

[51] For the decretists' discussion in the second half of the twelfth century, see Brundage, *Law, Sex, and Christian Society* (n. 16 above), 319–23. On the papacy muddying the waters, see, for example, Celestine III's response to a solicitation for advice from the archbishop of

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the detrusion provision fit into all of this was in creating the very strange hypothetical of a man, desirous of leaving his wife to enter into religious life, falsely accusing her of adultery, and when the accusation was proved calumnious he would suffer the penalty of becoming a monk! Since the deployment of the detrusion provision in this instance would have important consequences for its later interpretation, it is worthwhile to spend some time examining the canonists' debate over what might at first glance just seem like academic hairsplitting.

Stuffed within a grab bag of clarifications directed by Innocent III to a set of legal inquiries from the bishop of Brescia was a guideline for the use of advocates in adultery cases that would become the definitive statement within thirteenth-century decretal law.[52] The bishop apparently thought that both Roman and canon law forbade the use of advocates when husbands brought formal adultery charges against their wives, though he had decided to check with the pope to be certain. Innocent conceded that normal criminal procedures had to obtain — that is, the accuser must be present in court and bind himself through inscription to the *poena talionis* — when an adultery charge was brought before a secular judge.[53] Before an ecclesiastical judge, however, when the legal judgment

Canterbury on whether it was permissible for litigants to use an advocate (*procurator*) in marriage litigation, especially since in other civil cases advocates were a normal part of the process (JL 17615). The letter is known only from its inclusion in decretal collections, the latest one being 2Comp 2.18.2, whence the following text was taken: "hic autem decernimus distinguendam, quod si in causa ipsa matrimoniali questio criminaliter ventilatur, et ob eandem ab adversa parte criminaliter sit agendum, non per interpositam personam, sed per ipsam principalem, causam matrimonii terminari oportet, cum sicut iura testantur, presens presentem accusare debet et se talionis vinculo obligare. Secus autem in causa matrimoniali, in qua non criminaliter agitur, credimus procedendum. Securius tamen ageretur si cum haberi possit principalium presentia personarum, ipsis presentibus in utroque ad diffinitionis calculum procedatur." *Quinque compilationes antiquae* (n. 10 above), 71. That adultery would be the *quaestio criminaliter ventilata* is made clear by one of Alanus's glosses to the text, as given above, n. 21.

[52] *Die Register Innocenz III*, ed. O. Hageneder and A. Somerlecher, vol. 8, Publikationen des österreichischen Kulturinstituts in Rom, II. Abteilung: Quellen, 1. Reihe (Vienna, 2001), no. 190, 324–27. In addition to the conduct of marriage cases, the letter set forth guidelines on the validity of marriages, the administrative procedures for awarding prebends, court summonses, and the repayment of loans. Its importance was immediately recognized by canonists and so the letter was sliced up for inclusion in decretal collections, eventually resulting in five separate capitula in the *Liber extra*: X 1.38.5; 2.6.3; 3.5.20; 4.1.25; 4.13.10.

[53] "Consuluit insuper nos fraternitas tua, utrum vir per procuratorem valeat super adulterio coniugem accusare, cum videantur illud tam leges quam canones inhibere. Ad quod fraternitati tue taliter respondemus. quod si vir accuset uxorem de crimine adulteri coram iudice seculari ad penam legitimam infligendam. quia tunc inscriptionis vinculum debet arripere seque ad penam astringere talionis, non per procuratorem sed per se ipsum presentem oportet presentialiter accusare. Si vero vir accusare velit uxorem de adulterio coram ecclesiastico iudice. ut ab eius cohabitatione discedat, quia tunc — etsi forsan oporteat ipsum inscribere, ut designet in scriptis crimen, locum et tempus et alia, que comprehenduntur in lege

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sought was separation, the *poena talionis* could not be in effect, lest the accusing husband engineer some sort of heads-I-win-tails-you-lose situation. Adultery cases constituted a kind of hybrid category between civil and criminal (*quasi mixta inter civilem et criminalem*), and therefore elements of criminal procedure were still appropriate, such as the drawing up of a formal accusation in writing (*inscriptio*). As such, it was safer, according to Innocent, for the parties to be present at court rather than litigate through advocates, though, if necessity demanded, a charge could be filed through an advocate. This final recommendation is the reason why this text was placed by canon law compilers in the title on advocates (*De procuratoribus*) rather than in one related to marriage or adultery.

Even though Innocent did not specify the penalty associated with an adultery conviction in a secular court, the commentators on the text immediately associated it with detrusion now that Justinian's reforms had become generally known through their recovery by the Roman-law Glossators and the decretists. The earliest commentators on the text at 3Comp 1.22.2 *Tuae*, like Laurentius Hispanus and the anonymous compiler of the gloss apparatus known as *Servus appellatur*, simply equated the secular penalty for adultery with detrusion without further comment, though notably they were the first to begin citing the text according to its form as one of the *authenticae* inserted into the Codex with the *Sed hodie* incipit.[54] In Vincentius Hispanus's commentary we see the growing complexity of the detrusion question. When commenting on the *poena talionis*, Vincentius brought up the fact that there existed disagreements among the *legistae* [Roman-law Glossators] as to whether the husband would now be subject to calumny in the wake of the Justinianic modifications to marriage law.[55]

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civili ad talionem tamen non debet se aliquatenus obligare, ne forte, cum etiam in probatione deficeret, intentionis sue consequeretur effectum, sustineri potest, si necessitas id postulaverit, ut per procuratorem accuset, quoniam huiusmodi accusatio, etsi de crimine fiat, non tamen est criminalis, sed quasi mixta inter civilem et criminalem, quamvis in presentia principalium personarum securius procedatur." Ibid., 326. There are no substantive differences between the enregistered version of the letter and the text that circulated in decretal collections.

[54] Laurentius Hispanus *ad* 3Comp 1.22.2 *s.v.* legitimam: "intrusionis secundum monasterium, supra, C. de adult. auth. Set hodie." "*The Ecclesiology of Laurentius Hispanus (c. 1180–1248) and His Contribution to the Romanization of Canon Law Jurisprudence, with an Edition of the Apparatus Glossarum Laurentii Hispanii in Compilationem Tertiam*," ed. Brendan McManus (PhD diss., Syracuse University, 1991), 323. The gloss in *Servus appellatur* was similarly laconic: "C. ad. l. ult. [sic] de adulter. auth. Sed hodie," *ad* 3Comp 1.22.2 *s.v.* penam legitimam. Paris, BNF, lat. 3932, fol. 128v[a].

[55] *Ad* 3Comp 1.22.2 *s.v.* penam talionis: "si accusat post xl. dies ante autem iure mariti accusans ad talionem non astringatur, ut C. de adulter. Iure mariti [Cod. 9.9.6]. Sed hoc nouo iure authenticorum uidetur immutatum, infra [word missing in margin] ut liceat matri et auie § Si uir de adulterio [Auth. 112.9], quod quidam legiste uolunt. Alii istud intelligunt [quando] accusat ut quilibet non ut maritus. Credo quod tam per illud in Auth. coll. viii. ut liceat ma. et auie § Causas [Auth. 112.9], tam per illud [tam per illud: *sic*] quam per

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Vincentius ultimately sides with those who felt that calumny was now the law and asserts that Innocent himself was taking that side in the decretal, thus correcting previous Roman law and canonical assertions that men had a special right of accusation. Anticipating what a credulous reader would ask as an immediate follow-up to this assertion, Vincentius spells out quite clearly in his concluding remark to the gloss that a husband failing to prove his accusation would not only break up the marriage and lose the marriage gift (*donatio propter nuptias*), he would also be forced to enter a monastery since this is what the wife would have suffered (*quia hoc pateretur mulier*).

Up until now all of this could be dismissed as a debate over the penal structure of a theoretical legal system since by this point the Church had successfully claimed the right to hear marriage cases in ecclesiastical courts. Things suddenly got confused, however, with the appearance of Johannes Teutonicus's apparatus on 3Comp, which would have a wide impact due to his reprisal of these remarks in the commentary on some related texts in his Ordinary Gloss to the *Decretum*.

According to Johannes, the detrusion penalty is by definition ecclesiastical and therefore can be applied in church courts.[56] How Johannes arrived at this position is unclear, but it appears to be original to him given the lack of precedent in prior commentaries we have seen on the text. That Johannes did not simply misstate himself is shown by his reiteration of the remarks in his commentary on Gratian. Johannes brings up 3Comp 1.22.2 *Tuae* in a discussion of the alleged inequality between men and women in adultery accusations, the same place where Huguccio had spilled so much ink in disagreement with Gratian.[57] In the middle of asserting, as Vincentius had done, that Innocent had upheld the use of the *poena talionis* in secular adultery cases, Johannes suddenly breaks into an exasperated rebuke of the pope for not understanding how adultery cases are handled: "I am, however, astonished why Innocent should say that inscription is necessary when before a secular judge because these days the secular punishment [for adultery] has been commuted into an ecclesiastical one according to the *Sed hodie* authentica."[58]

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hanc decretalem corriguntur leges que uidentur contrarium dicere, iiii. q. iiii. § Aliquando [dictum post C. 4 q. 4 c. 2]. Sed que pena infligetur uiro deficienti? Mittet ei repudium et perdet donacionem propter nuptias et retrudetur in monasterium, quia hoc pateretur mulier, ut in eodem Auth. causas continentur [*sic*]." Paris, BNF, lat. 14611, fol. 40r[a].

[56] *Ad* Comp 1.22.2 *s.v.* iudice seculari: "hodie coram ecclesiastico potest, si agat ad penam canonicam, scilicet intrusionem monasterii." *Johannis Teutonici Apparatus glossarum in Compilationem tertiam*, ed. Kenneth Pennington, Monumenta Iuris Canonici, Series A: Corpus Glossatorum, vol. 3 (Vatican City, 1981), 146.

[57] The discussion will focus on Johannes's remarks on Gratian's dictum post C. 32 q. 1 c. 10, but he also brought up *Tuae* for the same purpose in his commentary on C. 33 q. 5 c. 14, the Pseudo-Augustinian capitulum outlining the Deuteronimic affirmation of inequality between men and women in adultery accusations.

[58] *Ad* dictum post C. 32 q. 1 c. 10 *s.v.* accusationem: "sed quod hic dicitur [*viz.*, by Gratian] non videtur tenere secundum iura nostra. Nam sicut maritus uxorem, sic uxor

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Johannes's meaning is somewhat obscure. His terminology in reference to the detrusion penalty as a *poena canonica* (3Comp) or *ecclesiastica* (*Decretum*) would suggest he thought of this punishment as reserved for church courts, as it would be odd to speak of a secular court applying an ecclesiastical penalty. If we widen the lens, though, to include not just the penalty itself but the procedures by which it was administered, he still clearly envisions a scenario where the detrusion penalty is being applied in a secular court. There seems no other way to make sense of his extended discussion of whether the *poena talionis* applied in these cases, given that he categorically ruled out the *poena talionis* for adultery accusations in the ecclesiastical forum.[59] Indeed, a good portion of Johannes's commentary on adultery accusations in both his *Decretum* and his 3Comp glosses concerns the mechanics of the *poena talionis*. Even if his discussion is largely theoretical — assuming he imagines the detrusion penalty as an issue now for ecclesiastical courts — his comments about forced monasticization reveal an interesting shift in canonists' thinking about the monastery as a site for lay punishment. In addition to the standard argument against the *poena talionis* in adultery cases — that it could be used as a loophole for men seeking to circumvent their wives' permission to enter monastic life — Johannes also brings up as a potential objection that the monastic vocation, like consent to marriage, has to be voluntary to be valid.[60]

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maritum licite accusat, et inscribit contra eum, et obligat se ad poenam talionis, et hoc quando coram saeculari iudice agit. Sed si agit coram ecclesiastico, non inscribit, ut extra, de procurat. Tuae [3Comp 1.22.2]. Et lex idem videtur dicere in Auth. ut lic. matr. et aviae § quia vero, et § causas, coll. 8 [Auth. 112.8 et 9]. Miror tamen quare dicat Innocentius quod coram saeculari iudice sit inscribendum, cum hodie poena saecularis commutata sit in ecclesiasticam poenam, ut C. de adult. auth. Sed hodie [auth. post Cod. 9.9.29]. Unde etiam secundum leges dico quod uxor possit accusare virum, cum tantum ecclesiastica sit poena adulterii." *ER*, vol. 1, col. 2101. All of Johannes's *Decretum* glosses employed for this study have been checked against the earlier version of the text (as represented in Troyes, BM, 192) prior to its updating by Bartholomew of Brescia to bring it into conformity with the *Liber extra*. No inconsistencies between the earlier version and the text of the *Editio Romana* have been found.

[59] See previous note for the passage where Johannes rules out the application of the *poena talionis* when adultery is tried before an ecclesiastical judge. Another possible solution — though one not mutually exclusive of detrusion still being meted out in secular courts — is that Johannes thought the *poenam talionis* could be applied in an ecclesiastical court, but only when the criminal penalty of detrusion was sought and not when what the husband desired was simple separation. This might explain the distinction Johannes draws when discussing the *poena talionis* in another gloss between separation and criminal penalties: "sed nec hodie cum agit vir ad separationem substinet talionem. Secus si agatur ad poenam adulterii criminaliter; extra, de procurat., Tuae [3Comp 1.22.2]," *ad* C. 33 q. 5 c. 14 *s.v.* demonstraretur, *ER*, vol. 1, col. 2394.

[60] *Ad* 3comp 1.22.2 *s.v.* penam legitimam: "set qualiter potest uir se obligare ad penam talionis secundum hodiernum ius, quia si uir non probans debet puniri pena talionis, ergo uir debet detrudi in monasterium, et sic consecutus est id quod forte uir libenter uolebat? Ex hoc sequitur quod quilibet qui non potest habere licentiam uxoris accusabit ipsam, et si non

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Johannes dismisses this concern, however, by citing a number of precedents from the *Decretum* where forced monasticization is used as punishment (though he neglects to mention that these cases involved persons of clerical status).[61]

Whether intentionally or not, Johannes Teutonicus's commentary introduced into the canonical tradition the idea that detrusion was an appropriate punishment for women convicted of adultery — not just in the past, within that model of all legal systems, Justinianic Roman law, but in the present and before an ecclesiastical judge. It would not be too long before this shift in the tradition would become evident. What was needed to catalyze the shift, however, was a more direct pronouncement recommending the detrusion penalty and not simply the inferences in a set of marginal glosses dealing with legal procedures. This catalyst would be provided — and it should be added, unwittingly — by Pope Gregory IX and Raymond of Penyafort through the inclusion of X 3.32.19 *Gaudemus* in the *Liber extra*.

The Origins of X 3.32.19 *Gaudemus*

X 3.32.19 *Gaudemus* was derived from Gregory's June 1227 letter to Rudolph, a canon of the church of St. Moritz in Hildesheim who had been the chaplain of cardinal bishop of Porto and S. Rufina, Conrad of Urach, during the latter's legatine mission in Germany to reform the German church and preach a new crusade

probat crimen, poterit intrare monasterium. Preterea secundum hoc erit iam alia causa quam causa fornicationis que separat uirum ab uxore. Item ex hoc sequitur quod aliquis cogitur esse monachus qui numquam uouit, quod esse non debet, ut xxxii. q.i. Integritas [C. 32 q. 1 c. 13], et xx. q.i. Sicut [C. 20 q. 1 c.9]. Preterea hoc solum deberet uiro esse pro pena: quod cogitur ei adherere perpetuo, qua perpetuo carere uoluit, ut xxxiii. q.v. Hec ymago [C. 33 q. 5 c. 13–14]. Preterea uir et mulier non censentur pari iure quantum ad penam adulterii, ut xxxii. q.i. § Hoc in mulieribus [dicta post C. 32 q. 1 c. 10]. Ad hoc dico quod uir potest se obligare ad penam talionis, et si succumbit, debet detrudi in monasterium eodem modo quo mulier intraret si crimen esset probatum. Set mulier non intrat monasterium nisi uiro placuerit, quia uir eam inuitam potest retinere, ut C. de adult. auth. Set hodie [auth. post Cod. 9.9.29]. Ergo, etsi uir sit conuictus de calumpnia debet ingredi monasterium, mulier tamen, si uult, potest eum retinere inuitum. Hoc tamen scias quod nisi euidens sit calumpnia uiri, non debet puniri pena talionis, ut C. de adul. Iure mariti [Cod. 9.9.6]. Nec est hoc inconueniens quod aliquis inuitus fit monachus, tum quia ad hoc se obligauit, tum quia pro delicto aliquis fit monachus, ut xvi. q.vi. De lapsis [C. 16 q. 6 c. 4] et l. di. Si ille [D. 50 c. 58]." *Johannis Teutonici Apparatus*, 146–47.

[61] In addition to the canons cited in his 3Comp commentary (C. 16 q. 6 c. 4 and D. 50 c. 58), Johannes provides in his *Decretum* gloss an even fuller catalog of instances for when "propter delictum … cogitur quis intrare monasterium," including: D. 81 c. 8 *Dictum*, and c. 10 *Si quis clericus*; and C. 33. q. 2 c. 8 *Admonere*. The last example, *Admonere*, did concern a lay person, though it was the high profile case of a pope imposing monasticization on an uxoricide ruler.

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(1224–27).[62] Contemporaneous with his service under Conrad, Rudolph was building a pastoral ministry to prostitutes. He provided those whom he had persuaded to leave their profession with dowries and assistance in finding husbands and set up a community where those who sought a more formal conversion could make a profession of vows and take up residence.[63] *Gaudemus* gave Rudolph additional powers to provide pastoral oversight and to make the religious community — now a convent — a kind of center of evangelization for women in similarly difficult circumstances.[64] The section of the letter that would ultimately appear in the

[62] See below for the text of the letter. On Conrad's legatine mission, see Paul Pixton, *The German Episcopacy and the Implementation of the Decrees of the Fourth Lateran Council, 1216–1245: Watchmen on the Tower*, Studies in the History of Christian Thought 64 (Leiden, 1995), 321 and *passim*. Details on the life of Rudolph, who is occasionally also referred to as Rudolph of Worms, are scant.

[63] In a separate letter on the same date Gregory approved the constitution of the house as a new religious order, the Penitential Order of St. Mary Magdalene, also known to contemporaries as the *Weisse Frauen* or *Reuerinnen*. For a study of their origins, see André Simon, *L'Ordre des Pénitentes de Ste-Marie-Madeleine en Allemagne* (Freiburg, 1918).

[64] Auvray 110; Potthast 7926 (*italics* indicate sections left out of the *Liber extra*): "Gaudemus in Domino *et tue sollicitudinis studium commendamus, quod quasi vocatus a Domino, de mandato venerabilium fratrum nostrorum C. Portuensis episcopi, tunc apostolice sedis legati, et archiepiscopi Maguntini, ad sancte predicationis officium te convertens, et hominum piscator effectus rete plenum piscibus extrasisti. Dum illas miserrimas mulieres, que humani generis hostis suggestione seducte in lutum ceciderunt, fete libidinis involute de lacu miserie, ne ipsas desperationis absorberet, puteus eduxisti. Sicque factum est, quod multis ex ipsis nuptui traditis, alie facte de meretricibus moniales, et de prostibulo fugientes, ad claustrum servare voverunt Domino castitatem. Potes inquam et tu letari in Domino, cum et ipse chorus angelicus gaudeat ex hoc facto, sed ut tantum a te gaudium nemo tollat, indefessa vigilare sollicitudine te oportet, ac instare viriliter, ne hostis ille antiquus et callidus conversionem mulierum ipsarum penitentiam agentium sue possit calliditatis astutia impedire. Quocirca discretionem tuam monendam duximus et hortandam per apostolica tibi scripta mandantes, et in remissionem peccaminum iniugentes, quia sumens intrepidus auctoritate nostra tam pium predicationis officium ad conversionem mulierum talium prudenter intendas, et conversas salubribus monitis in castitate ac religione conrobores et confortes, ut autem comissum tibi a nobis predicationis officium possis liberius et utilius exercere, auctoritate presentium tibi concedimus potestatem, ut confessiones huiusmodi mulierum audire valeas et eis de comissis iniungere penitentiam salutarem. Illos vero qui mulieres huiusmodi causa lucri tamquam patroni turpidinis manutenent et fovent, quod eas ad audiendum vocem predicationis tue libere venire permittant, et conversionem et salutem earum nullatenus impedire presumant, diligenter moneas et inducis*. Mulieres vero, que relicto maritali thoro, lapsu carnis ceciderunt, si mariti earum a te diligenter commoniti, eas ad frugem melioris vite conversas noluerint recipere, propter Deum in claustris *ipsis* cum praedictis conversis mulieribus studeas collocare, ut perpetuam penitentiam ibi agant. *Prius tamen viris ipsis iniungens in remissionem peccaminum, ut easdem uxores suas recipiant, divine intuitu pietatis. Alias autem viros solutos salubribus exhortationibus moneas et inducas, et eis, si expedire videris, in remissionem peccatorum iniungas, ut aliquas ex huiusmodi mulieribus, que castitatem servare nequiverint, dummodo solute fuerint accipiant in uxores. Ad hec quia, sicut audivimus, quidam clerici et laici de pretio scorti lucrum captantes, ex quadam prava consuetudine vel potius corruptela, questum accipere turpitudinis non verentur, licentiam tibi concedimus, ut sub*

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Liber extra comes towards the end, where Gregory is discussing Rudolph's related efforts to rehabilitate women who had committed adultery but whose husbands were reluctant to take them back. Once their husbands had definitively rejected resuming cohabitation, Gregory advised Rudolph to relocate such women to his convent for converted prostitutes where they would live out the rest of their lives in penance.

Raymond took this local, *ad hoc* penitential provision and made it into a general recommendation that women convicted of adultery should be placed in convents:

Original Letter from Papal Register
Auvray 110; Reg. 14, fol. 17r–v: an. 1, no. 110

Gaudemus in Domino. … Mulieres vero, que relicto maritali thoro, lapsu carnis ceciderunt, si mariti earum a te diligenter commoniti, eas ad frugem melioris vite conversas noluerint recipere, propter Deum in claustris ipsis cum praedictis conversis mulieribus studeas collocare, ut perpetuam penitentiam ibi agant.

Gaudemus in Domino. … But those women, who, having abandoned the marriage bed, have fallen away due to the sinfulness of the flesh — if their husbands, after having been repeatedly exhorted by you, should still not wish to take them back even after they have turned to a better way of life — you should, for the sake of God, endeavor to place them in those convents with the aforementioned converted women, so that there they may perform perpetual penance.

X 3.32.19 Gaudemus
ER, vol. 2, coll. 1271–72

Gaudemus in Domino (*et infra*) Mulieres vero, que relicto maritali thoro, lapsu carnis ceciderunt, si mariti earum a te diligenter commoniti, eas ad frugem melioris vite conversas noluerint recipere, propter Deum in claustris cum religiosis mulieribus studeas collocare, ut perpetuam penitentiam ibi agant.

Gaudemus in Domino (*et infra*). But those women, who, having abandoned the marriage bed, have fallen away due to the sinfulness of the flesh — if their husbands, after having been repeatedly exhorted by you, should still not wish to take them back even after they have turned to a better way of life — you should, for the sake of God, endeavor to place them in convents with religious women, so that there they may perform perpetual penance.

pena excommunicationis inhibeas, ne quisquam decetero exigat vel recipiat huiusmodi turpem questum. Tu igitur tamquam vir prudens ita modeste concessa tibi potestate utaris, quod opera tua, divina favente gratia, Deo et hominibus sint accepta, securus utique quod si viam mandatorum nostrorum cucurreris, eterne felicitatis bravium dante domino comprehendes. Datum Anagnie, VI Idus Iunii, anno primo." Reg. Vat. 14, fol. 17v. The text of the letter was edited most recently in Carl Rodenberg, *Epistolae saeculi XIIIe Regestis pontificum Romanorum selectae*, vol. 1, MGH *Epistolae* (Berlin, 1883; repr., Munich, 1982), no. 358, 273.

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While it is not unusual to find a decretal incorporated into the *Liber extra* shorn of its case history and narrative elements, something that applies as equally to Gregory IX's own decretals as to those of his predecessors, here the removal is so complete as to leave intact only the dispositive statement of law.[65] Other than the *partes decisae* — the term canonists applied to the sections of the text left out by Raymond — the substantive transformation of the letter was achieved through the smallest of edits: the elimination of the demonstrative adjective *ipsis* and the substitution of *religiosis* for *praedictis conversis*. The remaining text is thereby disassociated from Rudolph of Hildesheim's convent for reformed prostitutes and expanded to include, presumably, any female religious community as an appropriate site for perpetual penitential residence.

Did Gregory intend that these women could enter a religious order and make a full profession of vows, as opposed to just residing there in perpetual, penitential confinement? The placement of *Gaudemus* in the title on the religious profession of spouses (X 3.32 *De conversione coniugatorum*) suggests that he did think of it as a pastoral provision, providing women who would otherwise have little opportunity or resources to join a religious community. If *Gaudemus* were meant instead as a coercive or punitive measure, one would expect to find it in the title on adultery (X 5.16) or perhaps in that on penance (X 5.38). Unfortunately, however, counterfactuals do not provide evidence of legislative intent, especially for the type of case-law system that the *Liber extra* operated as, where decretals could be used to establish precedents in areas of the law loosely or wholly unrelated to their original context.[66] To the extent that we can peer inside Raymond's head to divine his intent when he put together the *Liber extra*, we are reliant upon his other canonical works, which include a general *Summa de iure canonico*, a *Summa de matrimonio*, and a *Summa de paenitentia*.[67] While all three were compiled prior to 1234, Raymond's penitential *Summa* was revised almost immediately after the *Liber extra* was promulgated and thus reflects the changes and updated

[65] For a discussion of Raymond's editing, see the author's forthcoming study: "Gregory IX and the *Liber extra*," in *Pope Gregory IX (1227–1241)*, ed. C. Egger and D. Smith (Farnham, 2017).

[66] One of the best examples of this is X 4.17.3 *Per venerabilem*, located in the title on the legitimation of children (*Qui filii sint legitimi*), which became one of the primary loci for the discussion of papal authority, insofar as it articulated a strong claim for the *plena potestas* of the pope to cancel out the natural impediments to children of an illegitimate or adulterous union. On the interpretation of *Per venerabilem*, see Kenneth Pennington, "Pope Innocent III's Views on Church and State: A Gloss to *Per venerabilem*," in *Law, Church, and Society: Essays in Honor of Stephan Kuttner*, ed. Kenneth Pennington and Robert Somerville (Philadelphia, 1977), 1–25; repr. in iidem, *Popes, Canonists, and Texts, 1150–1550*, Variorum Collected Studies Series 412 (Aldershot, 1993), IV.

[67] All three were given a modern edition as the inaugural and only works of the *Universa Bibliotheca Iuris* (vol. 1, pts. A–C), edited by Xavier Ochoa Sanz and Alfonso Diez (Rome, 1975–78).

interpretations that were introduced through Gregory's collection. There is a single citation of *Gaudemus* in the *Summa de paenitentia* that occurs in the title on vows but in an entirely new section that was added as part of Raymond's post-1234 revisions using language that essentially mirrors the text of the decretal. Raymond's text is framed as an affirmative answer to the question of whether women like those referred to in *Gaudemus* — that is, women who have committed adultery whose husbands refuse to take them back — can enter religion (*religionem intrare*), the usual formula for taking monastic vows.[68] It is clear, therefore, that when he was shaping the original *Gaudemus* decretal into what would be placed at X 3.32.19, Raymond — and by extension Gregory — imagined this as a pastoral and penitential prescription to enable the category of women covered by *Gaudemus* to gain admittance to monastic life.

The (Mis)Interpretation of X 3.32.19 *Gaudemus*

The earliest commentary on *Gaudemus*, executed by Guillelmus Naso, supports the pastoral/penitential reading of the text evident in Raymond of Penyafort's own work.[69] Naso asked whether these women might be able to remarry after the death of their husbands. According to his brief reply, they are not supposed to since *Gaudemus* prescribed perpetual penance for their transgression. If by chance they did contract a second marriage, it would remain valid provided, however, that they had not already made a religious profession or taken vows in the convent where they had been placed.[70] That Naso saw a second marriage

[68] "Pone quod uxor, relicto maritali toro, in lapsum carnis ceciderit, et maritus, ab episcopo diligenter commonitus eam, ad frugem melioris vitae conversam, noluerit recipere propter Deum, poterit religionem intrare? Utique, ut perpetuam paenitentiam ibi agat; extra, de conversione coniugatorum, Gaudemus [X 3.32.19]." Raymond of Penyafort, *Summa de paenitentia*, ed. Xavier Ochoa Sanz and Alfonso Diez, Universa Bibliotheca Iuris, vol. 1, pt. B (Rome, 1976), I.8.14, col. 358. This text is absent from the first recension of the *Summa*.

[69] Little is known of Naso's biography other than that he started teaching at Bologna during Gregory's pontificate. His commentary, which in form appears to be a *reportatio* recorded by a student rather than something prepared for formal publication, survives only in one complete manuscript and a few fragmentary copies, though select glosses were included in other apparatus. On Naso, see Johann Friedrich von Schulte, *Die Geschichte der Quellen der Literatur des canonischen Rechts*, vol. 2 (Stuttgart, 1877; repr., Union, NJ, 2000), 88–89; Stephan Kuttner and Beryl Smalley, "The *Glossa ordinaria* to the Gregorian Decretals," *English Historical Review* 60 (1945): 103–5; repr. in Kuttner, *Studies in the History of Medieval Canon Law*, Variorum Collected Studies Series 325 (Aldershot, 1990), XIII, with *Retractiones*, 19–20; "Guillaume Naso," *Dictionnaire de droit canonique*, vol. 5 (Paris, 1953), col. 1079.

[70] *Lectura ad* X 3.32.19 *s.v.* in claustris: "sed numquid iste mulieres possunt contrahere maritis mortuis? Videtur quod non, quia dicitur hic quod debent perpetuo penitere. Sed dici potest quod si contrahant tenebat matrimonium si non fecerint professionem uel non

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as a distinct, albeit unlawful, possibility demonstrates that he distinguished between the penitential aspects of *Gaudemus* — that the women were supposed to live out their lives performing penance — and the allowance that they could join a religious community. The latter was open to them as a particularly suitable means of fulfilling their obligation to repent, but it was not required.

Very soon, though, the interpretation of *Gaudemus* shifted in a punitive direction, which occurred when canonists began to associate *Gaudemus* with Justinian's detrusion provision. At first this association was implicit, as can be observed in Vincentius Hispanus's *Apparatus* to the *Liber extra*.[71] Vincentius's concerns for *Gaudemus* are narrow, focusing exclusively on what happens to the marital goods and making sure that there is some distribution of property to the convent where these women end up lest they become a burden to the institution.[72] Although he never cites *Sed hodie* directly, all of his Roman law allegations are pulled from sections of the *Novellae* where Justinian dealt with the practicalities and implementation of the detrusion provision.[73] Moreover, in his updated commentary on Innocent III's *Tuae*, now X 1.38.5, in addition to transferring over all the glosses from his 3Comp commentary, he also incorporated those of Johannes Teutonicus that prescribed detrusion as an appropriate penalty for an ecclesiastical court and that censured Innocent for misunderstanding adultery procedure.[74] Building off of Vincentius, in his *Apparatus* to the *Liber extra*,

deuouerint se illi religioni, licet ibi collate fuerunt per episcopum." Vienna, ÖNB, cod. vind. pal. 2083, fol. 67r[a].

[71] On Vincentius, see J. Ochoa Sanz, *Vincentius Hispanus: Canonista boloñes del siglo XIII*, Cuadernos de Instituto Juridico Español 13 (Rome, 1960). Since his work straddles the 1234 divide, Vincentius gives us a rare opportunity to track the evolution of canonical jurisprudence in the wake of Gregory IX's reforms.

[72] *Ad* X 3.32.19 *s.v.* collocare: "cum bonis suis ut non sint onerose, xvi. q. vi. De lapsis [C. 16 q. 6 c. 4]. Sed si ipse non habent monasteria beneficient eis, quia et de micis domini etc., de pe. d. i. In perpetuum." Paris, BNF, lat. 3967, fol. 144v[a]. There is no canon *In perpetuum* in the *Decretum*, but any emendation is speculative given that this reading is also found in the Madrid manuscript of Vincentius's *Apparatus* (Madrid, BN, MS 30, fol. 198r[a]).

[73] *Ad* X 3.32.19 *s.v.* ut perpetuam: "uidetur quod bona adulterie applicetur monasteria in quod intruditur, in Auth. ut nulli iudi. § Adulteram [Auth. 127.10]. Sed hoc non intelligitur de dote. Dotem eius lucrabitur maritus auctoritate legis propter adulterium, supra. de consuetu. Ex parte [X 1.4.10]; uel ex pacto ut eodem Auth. in fi. ubi dicitur uiro seruari pacta dotalia. Et uidetur hodie quod maritus habeat neccesitatem de adulterio uxoris libellum conscribere inscriptionis si uelit ex eius adulterio lucrari dotem, in Auth. ut liceat ma. et auie § Quia uero plurimas [Auth. 112.8]." Ibid., fol. 144v[a].

[74] Specifically, Johannes's glosses *s.v.* iudice seculari (see n. 56) and penam legitimam (see n. 60). At the end of Vincentius's gloss *s.v.* legitimam, which otherwise reproduces the text as it stood in his 3Comp commentary, he adds a note directly associating himself with Johannes's comments in the latter's gloss *s.v.* penam legitimam (which has the incipit *per leges*): "intrusionis, scilicet in monasterium, C. de adult. auth. Sed hodie [auth. post Cod. 9.9.9]; per ueteres leges ad penam sanguinis, C. de adult. Castitati [Cod. 9.9.9]; et per legem

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Gottfried of Trani made the link with Justinian's detrusion penalty explicit in the *Gaudemus* commentary, not only citing *Sed hodie* directly but also interpreting the framing of *Gaudemus* to be that of an ecclesiastical sentence.[75] Echoing the spirit, if not the letter, of Johannes's comments on *Tuae*, Gottfried also broadens the scope of discussion of *Gaudemus* by arguing that the forced monasticization implied by the text is in line with canonical precedent and that the women are to become full members of the religious community.[76] Whether Gottfried was the first to broach the subject or whether he was responding to a debate already in progress, the monastic status of the women of *Gaudemus* would soon become fiercely contested among commentators.

The punitive reading of *Gaudemus* was fixed within the tradition through the work of Bernard of Parma, whose commentary would become the Ordinary Gloss to the *Liber extra*. With Bernard we are in the fortunate position of being able to track the evolution of his thinking, owing to the multiple recensions of his gloss.[77] In the case of *Gaudemus*, his thinking evolved significantly in response

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Moysi, xxxiii. q. v. Hec ymago [C. 33 q. 5 c. 13–4]. Dic ut in illa glossa 'per leges etc.' Vic." Ibid., fol. 56v[a].

[75] *Ad* X 3.32.19 *s.v.* recipere: "eas sibi reconciliando, quod fieri potest etiam inuitis adulteris, xxxii. q. i. Non erit [C. 32 q. 1 c. 8], et c. Non autem [*immo*: Quod autem, C 32 q. 1 c.7]; in Auth. ut nulli iud. § Manifesta [*cap. incertum*]; C. de adulter. in auth. Set hodie [auth. post Cod. 9.9.9]. Dummodo adultere desinant adulterium, alias adulteriis insistentes reconciliari non possunt ut xxxii. q. i. c. iii. et iiii [C. 32 q. 1 c. 3 et 4]. G." Vienna, ÖNB, cod. vind. pal. 2197, fol. 102v[b]. *Ad* X 3.32.19 *s.v.* mariti: "non delinquentes ante accusationem nec post ut infra, de adulteriis Tua fraternitas [X 5.16.7]; infra, de diuor. Ex litteris [X 4.19.5]. Videtur ab ipsarum consortiis per iudicia ecclesie separati. G." Ibid., fol. 102v[b]. On Gottfried, see Martin Bertram, "Nochmals zum Dekretalenapparat des Goffredus Tranensis," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 82 (2002), 638–61; repr. in idem, *Kanonisten und ihre Texte, 1234 bis Mitte 14. Jh.*, Education and Society in the Middle Ages and Renaissance 43 (Leiden, 2013), VII, 163–81, with Nachtrag, 489–90.

[76] *Ad* X 3.32.19 *s.v.* collocare: "cum bonis omnibus <ne sint> monasteriis honerose, ut xvi. q. vi. De lapsis [C. 16. q. 6 c. 4]; C. de epis. et clericis l. Raptores [Cod. I.3.53]; xxvii. q. i. Si quis rapuerit [C. 27 q. 1 c. 28]. Et hic est unus de casibus illis in quibus compellitur quis uel aliqua esse in monasterio in <qua> causa compellitur aliquis uel aliqua monachari. Nam cogitur profiteri ut supra eodem tit. Ex parte [X 3.32.9]. G." Vienna, ÖNB, cod. vind. pal. 2197, fol. 102v[b]. The words in brackets < > have been supplied as readings for what appear to be scribal errors. The *Ex parte* referred to in the gloss is a letter of Urban III mandating that a spouse who vowed that he would enter a monastery should, after his first wife dies, be forced to make good on his profession.

[77] The earliest datable manuscript containing Bernard's gloss gives us a 1239 *terminus ante quem* for the first recension: Florence, Laurenziana, S. Croce III sin.9. Initial anlysis by Stephan Kuttner and Beryl Smalley ("The *Glossa Ordinaria* to the Gregorian Decretals") identified four recensions of the gloss, with the final recension completed between 1263 and 1266. Kuttner on his own would later develop the four recension hypothesis further in "Notes on the *Glossa Ordinaria* of Bernard of Parma," *Bulletin of Medieval Canon Law* 11 (1981): 86–93; repr. in idem, *Studies*, XIV. Martin Bertram has questioned, however, whether the differences observed in Bernard's gloss should be classified as discrete recensions, as opposed to

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to other commentators on the text, as can be shown by a collation of the first and final recensions of his commentary (the italicized portions represent material not contained in the first recension of the work):

> in claustris: Et ita mulier de adulterio condemnata, vel publice deprehensa, detruditur in monasterium ad agendam perpetuam poenitentiam, si eam emendatam vir recipere noluerit, tamen infra biennium potest eam recipere si vult. Si vero noluerit eam recipere, vel si prius moriatur quam eam recipiat, *tunc tondeatur, et habitum monachalem recipiat* ibi perpetuo moratura, ut expresse habetur in Auth. ut nulli iudic. li. ha. lo. ser. § Si quando vero adulterii crimen, coll. 9 [Auth. 127.10], unde sumpta fuit haec decretalis, et C. de adul. authen. Sed hodie [auth. post Cod. 9.9.29]; *et cum rebus suis, ne sit onerosa monasteria, ut in Auth. illa, sed hodie continetur. Non propter hoc erit monacha, nisi amplius processum fuerit.* Et sic quandoque propter culpam suam aliquis compellitur intrare monasterium, 50. dist. Si ille [D. 50 c. 58]; et 16. q. 6 De lapsis [C. 16 q. 6 c. 4]; 27. q. 1 Si quis rapuerit [C. 27 q. 1 c. 28]. *Et idem videtur dicere decret. 32. q. 1 De Benedicto* [C. 32 q. 1 c. 5]; et 2. q. 1 In primis, vers. princ. [C. 2 q. 1 c. 7]; et 34. dist. Fraternitatis, in fi. [D. 34 c. 7]. Olim vero alia poena puniebantur adulterae, quia lapidabantur convictae de adulterio secundum legem Mosaicum, 33. q. 5 Haec imago [C. 33 q. 5 c. 13–14]; et C. de adulte. Castitati [Cod. 9.9.9], ubi legitimis poenis subiicitur. *Sed haec poena non imponitur cum non agitur criminaliter, supra, de procurat. Tuae* [X 1.38.5].[78]

Not only does Bernard connect *Gaudemus* with the detrusion legislation — citing both the Novellae and the *Sed hodie* authentica derived from it — he claims that Gregory actually pulled the text of the letter directly from Justinian. This association was further strengthened in Bernard's commentary on *Tuae*, where he alleged *Gaudemus* alongside *Sed hodie* as mandating detrusion.[79] Bernard's focus in the first recension is twofold: first, on whether the conditions for detrusion have been met, that is, that the husbands no longer want their wives back after the specified two-year period (or have died in the interim); and, second, that forced

reflecting a more organic revision process *per viam additionum*: "Zur Entwicklung der Glossa Ordinaria des Bernardus Parmiensis," *Kanonisten*, Exk. IV, 525–27.

[78] *ER* (n. 9 above), vol. 2, col. 1272. The first recension has been collated from the Florentine manuscript, fol. 124r[a] (see previous note) and the second oldest datable copy of the first recension in Oxford, BL, Latin theol. b.4, fol. 132r[b].

[79] *Ad* X 1.38.5 *s.v.* legitimam: "per leges veteres puniebatur mulier convicta de adulterio ad poenam sanguinis, C. de adulte. castitati [Cod. 9.9.9]; et etiam secundum legem Mosaycam lapidatur; 33. q. 5 Haec imago [C. 33 q. 4 c. 13–4]. Hodie vero detruditur in monasterium, C. de adulte. auth. Sed hodie [auth. post Cod. 9.9.29]; et infra, de conver. coniug. Gaudemus [X 3.32.19]. Et potest vir uxorem convictam de adulterio et condemnatam retinere si vult, et uxor virum, ut dicitur in praedicta authentica." *ER*, vol. 2, col. 464. This gloss is essentially the same as Johannes Teutonicus's on the same *lemma*, though in a shortened form attributable to Tancred when he placed it in his own 3Comp *Apparatus*, which Bernard then simply incorporated into his gloss and updated with the addition of the *Gaudemus* allegation.

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monasticization has plenty of canonical precedents.[80] When he revised the commentary, Bernard made three substantive additions. The first, echoing a conventional point that was rooted in the original Justinianic legislation and that had been made by Vincentius and Gottfried, as well as later canonists, was that the monastery should claim a portion of the woman's property lest she be a burden to the institution. Secondly, there is the qualification of the woman's monastic status. Following an initial insertion about their being shorn of their hair and receiving the monastic habit — which on both substantive and grammatical grounds was almost certainly part of the first recension — Bernard clarifies that these women will not be considered nuns without further formal procedures (*nisi amplius processum fuerit*).[81] The final substantive addition specifies that the detrusion penalty only obtains when the case follows criminal procedures (*agitur criminaliter*). As will now be shown, Bernard was compelled to revise his commentary owing to the debates over detrusion that had emerged in the commentary tradition after his first recension.

Some canonists challenged the premise on which Bernard had based his equation of *Gaudemus* with Justinian's detrusion provision. Innocent IV appears to have been the first one to question whether detrusion was actually an appropriate sentence for an ecclesiastical judge to render in a case of adultery.[82] Innocent does not rule out its imposition in Church courts but suggests it should only be for someone over whom the Church exercises coercive jurisdiction (*quae sit de foro et iurisdictione ecclesiastico*), and, by "someone," he means, rather remarkably, both men and women.[83] If the person is normally subject to a secular lord,

[80] Bernard also pins a gloss to an earlier *lemma* in the text *s.v.* ceciderunt, where he simply notes that the adultery conviction has to have been enacted through a formal legal process and that the husbands cannot be compelled to take their adulterous wives back.

[81] The use of the future active participle *moratura* demands that there have been some text there with an active verb. If you remove "tunc tondeatur, et habitum monachalem recipiat," the statement is no longer grammatical. Both the Florentine and Oxford manuscripts concur in the reading "eam recipiat ibi perpetuo moratura." It is fairly easy, however, to see how a copyist would have fallen victim to homeoteleuton and left this phrase out, since the word *recipiat* occurs twice in the sentence, bookending the eliminated phrase. Other copies of the first recension will likely show that "tunc tondeatur, et habitum monachalem recipiat" was part of Bernard's original text. Finally, since the phrase is pulled directly from the language of *Sed hodie*, there would seem little reason for Bernard to have excluded it.

[82] Innocent's commentary was completed by 1245, and owing to a long period of development there have survived multiple recensions of the work. In this analysis only the final recension has been used, as represented by the early modern printed edition. On Innocent's commentary, see Martin Bertram, "Zwei vorläufige Textstufen des Dekretalenapparats Papst Innocenz IV.," in *Juristische Buchproduktion im Mittelalter*, ed. V. Colli, Studien zur europäischen Rechtsgeschichte 155 (Frankfurt, 2002), 431–79; repr. in idem, *Studies*, XI, with Nachtrag, 496–97.

[83] *Ad* X 1.38.5 *s.v.* ad poenam: "quae, scilicet, mulierem per leges veteres puniebat capite; C. de adulte. Castitati [Cod. 9.9.9]; et per legem Moysi, 33. q. 5 Haec imago [C. 33

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then the Church can either delegate the case to a secular judge to try criminally or simply restrict the proceedings to pursuing a normal sentence of separation.

An even stronger objection to Bernard came from Petrus Sampson, a French canonist who composed his *Summa decretalium* sometime in the late 1240s or early 1250s.[84] Petrus argued that Bernard was simply wrong in claiming that *Gaudemus* had been drawn from Justinian's legislation.[85] Detrusion was by definition a coercive penalty. While it certainly could be applied in a secular court, the language of *Gaudemus* — specifically the use of *collocare* rather than *intrudere* — meant that we were dealing with a voluntary choice rather than a coercive one. The Justinianic legislation and *Gaudemus* thus dealt with two different situations. This focus on the language of the statute ironically permitted Petrus to return to the original intent of Raymond and Gregory. Not surprisingly, given that he was Petrus's student, Bernardus de Montemirato (alias Abbas Antiquus) articulated in the early 1260s essentially the same linguistic critique in his own commentary on *Gaudemus*.[86] In a short gloss to the decretal (not linked to any *lemma*), Bernardus dismisses the Ordinary Gloss's classification of detrusion as an ecclesiastical penalty rather than a secular one. The use of *studeas* (as in *studeas collocare*)

q. 5 c. 13–14]. Hodie autem retrudetur in monasterium; C. de adulte. auth. Sed hodie [auth. post Cod. 9.9.29]. Et ibi dicitur maritus potest eam retinere et liberare a poena, unde si coram ecclesiastico iudice accusatur aliqua, quae sit de foro et iurisdictione ecclesiae, hanc poenam retrusionis in monasterium poterit imponere mulieri, et etiam viro, vel etiam aliam quae sibi placuerit. Vel dic quod has causas criminales debent seculares iudices instituti a praelatis audire, si autem mulier non sit de iurisdictione ecclesiae, non debet de adulterio coram ecclesiastico iudice conveniri, sed debet petere alter coniugum matrimonii separationem propter adulterium." *Innocentii quarti Pontificii maximi super libros quinque decretalium* (Frankfurt, 1570), fol. 169r[a]. Notably, these comments are tied to the commentary on *Tuae*, showing how much *Gaudemus* had become linked with that canon.

[84] On Petrus Sampson, see Martin Bertram, "Pierre de Sampson et Bernard de Montmirat: Deux canonistes français du XIIIe siècle," in *L'Église et le droit dans le Midi, XIIIe–XIVe s.*, Cahiers de Fanjeaux 29 (Toulouse, 1994), 37–74; repr. in idem, *Kanonisten*, XIII, 343–74, with Nachtrag, 501–3.

[85] *Ad* X 3.32.19 *s.v.* collocare: "non tamen sunt in hoc casu compellende nisi ipse uelerint quia hic non agebatur criminaliter ex adulterio commisso. Tunc enim bene essent compellende si agetur criminaliter coram iudice seculari, ut in Auth. ut nulli iudic. § Si uero coll. ix. [Auth. 127.10], et C. de adulter. auth. Sed hodie [auth. post Cod. 9.9.29]. Vero non dicit hic intrudere sed collocare, quod dicit non sunt cogende. B. notat contrarium in glo. precedenti, licet quod dixi uerius sit. In glo. et ita mulier id est unde sumpta fuit hec decretalis hoc non est uerum, cum auth. loquitur quando mulier erat accusata criminaliter ad penam legalem, hec decretalis in <casu?> quando est actum ad thori separationem tantum." Vienna, ÖNB, cod. vin. pal. 2083, fol. 37r[b].

[86] On Abbas Antiquus, see Stephan Kuttner, "Wer war der Dekretalist Abbas Antiquus?" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, kan. Abt. 26 (1937): 471–89; repr. in idem, *Studies*, XV, with "Retractiones," 22–24. More recently, with notes on intervening studies: Bertram, "Pierre de Sampson et Bernard de Montmirat."

makes clear for Bernardus that the woman's placement in the monastery is a recommendation rather than a command.[87]

Like Petrus Sampson and Bernardus de Montemirato, the canonist Hostiensis — whose *Lectura* was probably the most influential thirteenth-century commentary on the *Decretals* outside of the Ordinary Gloss — thought the detrusion penalty to be an unprecedented punishment for ecclesiastical jurisdiction over adultery.[88] Unlike these two, however, he took *Gaudemus* as establishing a new penalty at the disposal of ecclesiastical judges. Ironically, this assertion stemmed from the recognition he shared with Petrus and Bernardus that *Gaudemus* had not been drawn from the Justinianic legislation — rather, it was newly promulgated canon law (*ius canonicum de novo promulgatum*). What is fascinating about Hostiensis's claim is that it was clearly something he had thought about deeply during the many years he spent composing and revising his *Lectura*. It appears as a one-off statement in the last gloss to *Gaudemus* in the first recension.[89] In the final version, completed the year of his death (1271), he added language to another gloss on the text that reaffirmed and fleshed out his contention

[87] The following text employs the manuscript version as base, with collations from the early modern printed edition [*Lectura aurea domini Abbatis antiqui super quinque libris Decretalium* (Strasbourg, 1511), fol 170v[b]. = *impr.*]: "pena remissionis [intrusionis: *impr.*] in monasterium non est pena iudicis ecclesiastici, sed secularis, ut dicit glossa. Et hoc innuit uerbum studeas, alias non compelleret, sed amouere [admoneri: *impr.*] posset. De hoc notat Innoc. supra, de procurat. Tue [X 1.35.8] [de hoc … tuae: *deest impr.*]." *Ad* X 3.32.19, Vienna, ÖNB, cod. vind. pal. 2076 (fol. 72v[a]) and cod. vind. pal. 2115 (fol. 61r[a]). The early modern edition diverges dramatically from the manuscript tradition for the entire work due no doubt to the additions Bernardus made to the text over the years.

[88] For a general account of Hostiensis's life and work, see Kenneth Pennington, "Henricus de Segusio (Hostiensis)," in idem, *Popes, Canonists, and Texts, 1150–1550*, Variorum Collected Studies Series 412 (Aldershot, 1993), XVI. For a list of manuscripts and an assessment of the early modern editions of the *Lectura*, see Martin Bertram, "Handschriften und Drucke des Dekretalenkommentars (sog. *Lectura*) des Hostiensis," *Zeitschrift der Savigny-Stiftung für Rechstgeschichte*, kan. Abt. 75 (1989), 177–201; repr. in idem, *Kanonisten*, XII, 319–41, with Nachtrag, 499–500. On the first recension of the *Lectura*, see Kenneth Pennington, "An Earlier Recension of Hostiensis's *Lectura* on the *Decretals*," *Bulletin of Medieval Canon Law* 17 (1987): 77–90; repr. in idem, *Popes*, XVI.

[89] *Ad* X 3.32.19 *s.v.* ut perpetuam: "ergo ex quo ibi collocate sunt sententia divortii lata, cum mariti diligenter moniti ipsas reconciliare noluerint, de cetero ipsas inde extrahere non poterunt. Et hec est nova poena. Olim enim secundum legem Mosaycam adultera lapidabatur, xxxiii. q. v. Haec imago [C. 33 q. 5 c. 14–15]. Secundum legem vero imperialem gladius ultor erat, C. de adul. Quamvis, in fi. [Cod. 9.9.29]. Hodie autem servatur in muliere hoc quod hic dicitur. Vir autem secundum leges ultimo supplicio afficitur, in Auth. ut nul. iudici § Si quando [Auth. 127.10] et § Adulteram [Auth. 127.10.1], coll. ix. Et est hic unus casus in quo cogitur quis religionem intrare. Sunt et alii, xxxiiii. di. Fraternitatis, in fi. [D. 34 c. 7]; l. di. Si ille [D. 50 c. 58]; ii. q. i. In primis [C. 2 q. 1 c. 7]; xvi. q. vi. De lapsis [C. 16 q. 6 c. 4]; xxvii. q. i. Si quis rapuerit [C. 27 q. 1 c. 28]; supra, eodem, Ex parte i. § fi. et c. i. [X 3.32.9 et 1]." *Lectura sive apparatus domini Hostiensis super quinque libris decretalium* (Strasbourg, 1512), fol. 129r[a]. All of the passages of Hostiensis are here collated with the first

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that this was a new penalty and moreover one that could be imposed only by the Church.[90]

As he was revising his commentary, Bernard decided to address the contention over the proper forum for the detrusion penalty by adding a concluding sentence to his gloss. The additional language advised that detrusion could only be applied when the court operated under criminal procedure (see above for gloss *s.v. in claustris*). This rather brief addendum does not shed much light on the range of differing opinions he had at his disposal, and it still leaves open the fundamental question of whether it was even appropriate for an ecclesiastical judge to deliver the penalty.[91] It seems probable, however, that he ended up somewhere close to Innocent IV's position, with the penalty reserved only for when the ecclesiastical judge possessed some sort of criminal jurisdiction. This line of interpretation was still current late into the thirteenth century judging by the *Decretals* commentary of the Paduan canonist Boatinus.[92] Like Innocent, Boatinus

recension text in Oxford, New College, 205 [= *NC*], where the *Gaudemus* commentary is on fol. 152v[a]. In the case of the above gloss, there are no textual differences between recensions.

[90] In the following gloss, the italicized portions represent text not present in the first recension. *Ad* X 3.32.19 *s.v.* in claustris "et ita mulier de adulterio condemnata vel publice deprehensa detruditur in monasterio ad perpetuam penitentiam peragendam, si vir eam reconciliare noluerit. In quo casu, vel si antequam vir ipsam sibi reconciliet moriatur, tondeatur mulier et habitum recipiat monachalem, in Auth. ut nulli iudi. § Si vero quando adulterii crimen, coll. ix. [Auth. 127.10]. Et inde sumpta est hec decretalis, et C. de adulter. auth. Sed hodie [auth. post Cod. 9.9.29], Sive novo iure [auth. post Cod. 9.9.29] secundum Ber. Intelligas autem quod infra biennium ipsam potest reconciliare, si sententia lata non fuerit quo ad torum, et sic sunt intelligende auth. quando sententia quo ad torum non fuit lata. *In hoc etiam casu mulier monasterium intrans non profitetur citra biennium, ne marito volenti eam reconciliare preiudicium fiat, et ita patet quod tempus probationis annale prorogatur ex causa, ut et nota supra, eodem, ex publico* [X 3.32.7]; *et supra, tit. i. Ad apostolicam, et c. Statuimus* [X 3.31.26 et 23]. Sin [Si*: NC*] autem sententia lata sit et maritus sepius monitus ipsam reconciliare noluerit, non auditur maritus volens eam reconciliare, ex quo religionem intravit, et professionem fecit, et sic intellige quod hic dicit. Hoc autem non credas sumptum ex auth. supradictis, que nec in hoc casu loquuntur. *Immo est istud ius canonicum de novo promulgatum, quod et in foro tantum canonico locum habet,* quia nec iudex secularis posset ferre sententiam quo ad torum, hoc tamen quod tales includuntur, ex auth. sumi potest, quod dic ut not. infra, de divort. De illa § fi. [4.19.6]." *Lectura*, fol. 129r[a]. Hostiensis's additions on the issue of the woman's monastic status will be discussed shortly.

[91] The earliest versions of Hostiensis's and Bernardus de Montemirato's commentaries, which have a *terminus post quem* of the early 1260s, were almost certainly inaccessible to Bernard.

[92] Boatinus (also sometimes known as Bovetinus) composed his *Lectura* on the *Decretals* sometime in the last quarter of the thirteenth century. There has been little scholarship on his *Decretals* commentary, and so the essential sources of information remain J.-F. von Schulte, *Geschichte und Quellen der Literatur des kanonischen Rechts*, vol. 2 (Stuttgart, 1875; repr., Union, NJ, 2000), 157–60; and "Bovetino de Bovettini," *Dictionnaire de droit canonique*, ed. R. Naz, vol. 2 (Paris, 1937), coll. 976–80. In the process of examining Boatinus's commentary on the Constitutions of Gregory X, however, Martin Bertram discovered a Bolognese MS

advised that detrusion could be employed by an ecclesiastical judge but only one in possession of dual jurisdiction (*utrimque gladium habens*).[93] As Boatinus's commentary was conceived as ancillary to the Ordinary Gloss, one would imagine him articulating a clearer disagreement if he thought his stance on detrusion departed significantly from Bernard's.

A debate also arose over the monastic status of the women subject to the detrusion penalty. Even after the interpretation of *Gaudemus* shifted in a more punitive direction once the connection to the Justinianic legislation had been made, canonists still thought of these women as entitled to full monastic status. This is the clear implication of Bernard's comments that they are to be shorn of their hair and receive the monastic habit (*tondeatur et habitum monachalem recipiat*), remarks that, for grammatical reasons, as suggested above, should be treated as part of the first recension of his gloss. Yet when Bernard revised his commentary he felt compelled to add that these women would not be considered members of the religious community without a further, formal process. Their admission as nuns was no longer automatic.

More than anyone else, it was Innocent IV who forced this reevaluation of the monastic status of women subject to detrusion for adultery. The entirety of his commentary on *Gaudemus* (which consisted only of two short glosses) is devoted to this problem.[94] According to Innocent, women subject to detrusion do not enter into religious life in any formal sense nor do they take any vows. Rather, they are to be considered penitents.[95] At first glance there might seem

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of the *Lectura*, bringing the surviving total to three: "Zur wissenschaftlichen Bearbeitung der Konstitutionen Gregors X," *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 53 (1973): 459–67; repr. in idem, *Kanonisten*, XV, 393–99, with Nachtrag, 506.

[93] *Ad* X 1.38.5 *s.v.* ne forte: "sed numquid cum maritus agit ad penam legitimam infligendam, que hodie est intrusio in monasterium, debet agere coram iudice seculari uel ecclesiastico. Dic quod ista questio proponenda est coram iudice seculari, et iudex secularis debet infligere hanc penam, nisi iudex ecclesiasticus utrimque gladium haberet, temporalem et spiritualem, quia tunc coram eo potest proponi." Vienna, ÖNB, cod. vind. pal. 2129. Also, like Innocent's, Boatinus's substantive comments about detrusion occur in his commentary on *Tuae* rather than *Gaudemus*. His comments on *Gaudemus* are limited to a cross-reference to *Tuae* and a rather bizarre statement that the *Gaudemus* at X 3.32.19 is part of the same letter as the two other texts sharing that incipit located at X 4.17.8 and X 4.19.8 — bizarre because, while the latter two both deal with marriage law, they are inscribed to Innocent III!

[94] *Ad* X 3.32.19 *s.v.* ad frugem: "non tamen intraverunt religionem, nec fecerunt votum." *Ad* X 3.32.19 *s.v.* collocare: "non tamen erit monachus, sed poenitens, licet non solemniter; 50. dist., Si ille [D. 50 c.58]; in Auth. ut nulli iud. § Si vero quando ad [Auth. 127.10]." *Apparatus*, fol. 427v[a].

[95] The exact juridical valence of Innocent's *caveat* is unclear, viz., that, although penitents, they should not be thought of as performing solemn penance (*non solemniter*), followed by an allegation to a canon in the *Decretum* (D. 50 c. 58) concerning the impediment posed by a previous detrusion to men seeking ecclesiastical orders. When Hostiensis repeated these comments in the revised version of his *Lectura*, he clarified the distinction as meaning they

to be a practical aspect behind Innocent's reclassification of these women. Since he was reading *Gaudemus* through the Justinianic legislation, which set a two-year interim period where a husband could still recall his wife, he would understandably not want to prejudice the rights of the husband to resume cohabitation, something that would not be possible if his wife made a formal profession of vows. This would actually be the *pia interpretatio* that later canonists, like Bernard of Parma, would apply to Innocent's remarks if they wanted to preserve a path for these women to make a religious profession. Yet Innocent himself never hints that there would be any change in their status from *penitens*, and his use of the future tense seems unequivocal (*non tamen erit monacha*). Thus, the effect of Innocent's reclassification is to assign them a permanent, liminal status — confined to the monastery in perpetuity but without the possibility of becoming full-fledged members of the community.

Hostiensis also had to reshape his commentary to account for Innocent's criticism. He had initially just followed Bernard's lead when discussing the women's monastic status, repeating what the Ordinary Gloss said about being shorn of their hair and taking vows after being refused by their husbands.[96] Their monastic status was, therefore, never in doubt. In the later recension of the *Lectura*, however, he added two new glosses to incorporate Innocent's comments verbatim and expressly assigned them to the man whom he typically just referred to as *Dominus noster*.[97] Even more than Bernard, Hostiensis sought to neutralize Innocent's restrictions by tying them to the larger framework of canon law regulating monastic life. Hostiensis revised one of his glosses to grant these women a kind of probational status for the first two years of their residence within the convent as they awaited the final decision of their husbands.[98] The problem, of course, was

would be performing their penance in secret (*occulte*) as opposed to the more public manner usually associated with solemn penance (see below, n. 97 for Hostiensis's gloss *s.v.* cum religiosis). The distinction between solemn and non-solemn penance had been fleshed out considerably over the course of the thirteenth century (cf. Mary Mansfield, *Humiliation of Sinners* [Ithaca, 1995], 21–34 and *passim*) and so additional research might help clarify how detrusion for adultery fit in with Innocent IV's and others' penitential theology. For the role of D. 50 in Gratian's penitential theology, see Atria Larson, *Master of Penance: Gratian and the Development of Penitential Thought and Law in the Twelfth Century*, Studies in Medieval and Early Modern Canon Law 11 (Washington, D.C., 2014), 238–44.

[96] See above, n. 90 for the gloss *s.v.* in claustris for his initial comments about their monastic status. As can be seen in the italicized portions, he would subsequently modify this gloss in response to Innocent IV.

[97] *Ad* X 3.32.19 *s.v.* melioris vitae: "non tamen intrarunt religionem, nec fecerunt votum, dominus noster. Quod dicit penitentes sunt tantum et correcte et de crimine emendatas ut in sequenti glossa." *Ad* X 3.32.19 *s.v.* cum religiosis: "non tamen erit monacha sed penitens, et penitens occulte, non solemniter; l. di. Illud quoque [D. 50 c. 66], secundum dominum nostrum. Tu dic ut in praecedenti et sequenti glossis." *Lectura*, fol. 129r[a].

[98] Ad X 3.32.19 *s.v.* in claustris: "in hoc etiam casu mulier monasterium intrans non profitetur citra biennium, ne marito volenti eam reconciliare praeiudicium fiat, et ita patet quod

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that the normal probationary period for all monastic orders had been standardized to one year by Gregory IX through a statute inserted into the *Liber extra* (X 3.31.23 *Statuimus*).[99] Hostiensis, therefore, took the case of detrusion to be one of the exceptions to this rule. Whereas Bernard had been moved by Innocent's objections to create a *caesura* between the initial detrusion and their later entry into religious life, which would then demand some additional, formal process to effect, Hostiensis linked these two things together, with the first two years of their residence now understood to serve as the required probationary period.

Conclusion

We have seen how, prior to 1234, canon law discussions of adultery prosecution had come to accept detrusion as an appropriate penalty in the ecclesiastical forum. In the process, they were also developing a discourse that identified the monastery as a site of penitential incarceration for the laity. Even though the provenance and Raymond of Penyafort's own interpretation of X 3.32.19 *Gaudemus* demonstrates its pastoral purpose, this became obscured once the letter was enmeshed within this punitive discourse. Debate would continue over the appropriate usage of the penalty in ecclesiastical courts, but, as the contention over the women's monastic status demonstrates, canonists for the most part seemed unwilling to grant them a full membership within the convent.

To conclude this study, we should ask to what degree these debates reflect more the theorizing of the classroom or instead an underlying reality of the actual and/or increased use of detrusion in marriage litigation.[100] Although records of marriage litigation in both ecclesiastical and secular courts are scant from the thirteenth century, those that survive (mostly in England) do not show any use of

tempus probationis annale prorogatur ex causa, ut et nota supra, eodem, Ex publico; et supra, tit. i. Ad apostolicam, et c. Statuimus … ," *Lectura*, fol. 129r[a]. See above, n. 90, for the text of the entire gloss into which this passage was inserted.

[99] The insertion into the *Liber extra* of *Statuimus*, which had begun life as a statute issued by Gregory IX in early 1231 and was recorded into the papal registers (Reg. Vat. 15, fols. 59v–60r), was an example of how Gregory employed the *Liber extra* as a vehicle to promulgate new legislation for the entire Church, as opposed to the collection being just a body of precedents. On *Statuimus* specifically, see the author's doctoral dissertation, "The Authoritative Text: Raymond of Penyafort's Editing of the 'Decretals of Gregory IX' (1234)" (PhD diss., Columbia University, 2011), 384. For the larger role of the *Liber extra* in shaping the canon law of religious life, see Gert Melville, "Zum Recht der Religiosen im 'Liber extra,'" *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, kan. Abt. 87 (2001), 165–90.

[100] There is certainly no shortage of examples where the practice of marriage departed dramatically from the idealized categories of jurists. The most obvious example would be the Church's regulations governing consanguinity and affinity, where if the letter of the law had been scrupulously observed, marriage would have been an exceedingly rare event in Europe.

the detrusion penalty for adultery cases — when they even choose to record a verdict.[101] There is indirect evidence, however, that shows the detrusion penalty went beyond just the imaginings of the canon law *magistri*. Formularies of model *libelli* (the written petitions submitted by an accuser required to initiate a case) that were issued right around the time of the *Liber extra* show that the detrusion penalty had become one of the sentences an accuser could ask for, albeit in a secular court.[102] Yet, a few decades later, we find William Durantis including in his *Speculum iudicale*, which was designed as a guide to the actual practice of canon law for judges and advocates, a model *libellus* that allows for the application of the detrusion penalty *secundum canones*.[103] The only difference in application of the detrusion penalty in this case, according to Durantis, is that the woman sentenced will not be beaten and shorn of her hair prior to her confinement in the monastery *ad perpetuam penitentiam peragendam*.[104] As textual authority for this form of action, Durantis cites both X 1.38.5 *Tuae* and X 3.32.19 *Gaudemus*.

One of the notable features of the commentary literature post-1234 is that the debate over the *poena talionis* in detrusion cases — whether the husband (and sometimes the wife!) who fails in their accusation could themselves be forced

[101] For bibliography, see above n. 17.

[102] Representative is the collection of *libelli* compiled by Roffredus Beneventanus in 1235/36, where detrusion is conceived of solely as a secular penalty. Note the reference to Innocent III's *Tuae* as aligning with the *Sed hodie authentica*: "ego Lucius accuso Bertam uxorem meam coram vobis domine senator, quod ipsa comisit adulterium cum Ticio in urbe Romana in domo ipsius Ticii in prima camera domus ipsius, regnante domino Frederico imperatore etc., hoc anno, mense Februario. Unde peto ipsam secundum iura puniri, scilicet, quod verberata et tonsa monasterio traditur ibi perpetuo moratura… . Quod sic recte concipiatur libellus dicit decretalis extra, de procurat. c. Tuae fraternitatis; in Auth. ut liceat mat. et avi. § Quia quaedam, coll. 8 [*sic.*; Auth. 127.8 *forsan*]. Et est posita C. de adulter. auth. Sed hodie [auth. post Cod. 9.9.29], quia per illam authen. hodie mulieri adultere pena capitalis non imponitur. Si autem maritus accusat uxorem de adulterio coram iudice ecclesiastico, concipiat libellum sic, quia tunc non agitur ad vindictam, sed ad separationem thori … [model libellus follows]." *Libelli super iure pontifico* (Strasbourg, 1502), fol. 44r–v.

[103] What makes Durantis's *Speculum* particularly compelling evidence for actual practice is that he served as governor of the Papal States in the Romagna and so would have been intimately familiar with the operation of Church courts. On Durantis and the dating of the two versions of the *Speculum* (1271–91), see "Guillaume Durand," *Dictionnaire de droit canonique*, vol. 5 (Paris, 1953), coll. 1014–75.

[104] "Eodem modo sic concipiet Ticius secundum antiqua iura contra uxorem verbis competenter mutatis, extra, eodem, Maritue [*immo*: maritis, X 5.16.4]; C. eodem, Iuris mariti [*immo*: Iure mariti; Cod. 9.9.6], et l. Castitati [Cod. 9.9.9]. Hodie tamen sic concludet secundum legem quare peto eam verberatam et tonsam in monasterium ad perpetuam penitentiam peragendam detrudi; C. eodem, auth. Sed hodie [auth. post 9.9.29]; xxxii. q. i. De Beneficio [*immo:* De Benedicto; C. 32 q. 1 c.5]. Vel omitte verba illa 'verberatam et tonsam' secundum canones, ut extra, de conver. coniug. Gaudemus [X 3.32.19]." *Speculum iudicale* (Nuremberg, 1486), fol. 212v[a–b].

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into a monastery — remains a lively one, which would seem less likely if we were simply dealing with a legal hypothetical. Nor was the debate just a rehash of previous opinions but often contained genuinely fresh insights into the problem. Johannes Teutonicus had attempted to thread the needle on the *poena talionis* by claiming that, even if a husband failed in his accusation, that would not mean automatic relegation to a monastery because his wife would still have the final say just as he would still have the option for two years after her conviction to recall her from the monastery.[105] Petrus Sampson appears to have been the first commentator empathic enough to articulate what might seem the most obvious question for a modern reader: what kind of incentive would a wife have for keeping a husband who had falsely accused her of adultery? Since false accusations were a frequent occurence according to Petrus, a judge needed to take this into consideration when deciding how to treat calumny, and it was one of the reasons why there should be no *poena talionis* when adultery came before an ecclesiastcial court.[106] Boatinus was still hashing out the problems of calumny late in the thirteenth century when he offered up one of the more striking analogies for detrusion, one that shows, moreover, that Innocent IV's harshly punitive interpretation was still alive. Responding to the perennial worry that a husband who wanted to enter religious life would simply accuse his wife of adultery, Boatinus rejoined that it is one thing to join a monastery and another to be detruded into one, just as it is one thing to reside in a palace as master of the house and another to live in its dungeons.[107]

[105] See above, n. 60.

[106] *Ad* X 1.38.5 *s.v.* consideravit: "iudex ecclesiasticus considerauit quod mulier de adulterio accusata indignaretur de facili ita quod non libenter repeteret uirum uel sibi reconciliaret, et quia hoc frequentius euenit ut ex calumpniosa accustione periurium intemptata mulieres indigarentur ideo ad hoc retulit se iudex ecclesiasticus quia ad ea que frequentius accidit iura adaptantur, ff. de legib. Nam ad ea [Dig. 1.3.5.5]. iudex autem secularis hoc non considerauit. Preterea in multis casibus soluitur matrimonium secundum leges quam secundum canones, unde coram ecclesiastico non debet se ad talionem obligare, licet hoc fiat secundum leges… ." Vienna, ÖNB, cod. vind. pal. 2083, fol. 16v[a]. As mentioned earlier (see n. 85 above), Petrus Samson disputed the use of detrusion in ecclesiastical courts, so his discussion is geared both towards the use of detrusion in the secular forum and towards ecclesiastical litigation *ad thori separationem*. His student, Bernardus de Montemirato, reproduces this passage almost verbatim in his own *Tuae* commentary.

[107] *Ad*. X 1.38.5 *s.v.* ne forte cum in probatione defecerit intencionis sue consequatur effectus: "sed cum hodie pena uxoris conuicte de adulterio sit intrusio in monasterium, uidetur quod maritus cum accusat ad penam legitimam infligendam non debeat se obligare ad penam tallionis, quia … semper habebit intencionem suam ut si probabit illa ponatur in monasterio, si non probabit iste ponetur, qui forte pro nullo alio accusabat uxorem, nisi ut posset intrare monasterium. Dic quod aliud est ingredi monasterium, et aliud est intrudi, sicut aliud est ascendere pallacium et aliud est carcerari ibi. [Vel: *add. in marg.*] dic quod bene dixit se obligare ad penam tallionis, nec propter hoc consequetur [*sic*] intencionem, quia aliud est intrare monasterium et aliud est intrudi ad penitenciam peragendam,

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Whether or not future studies are able to uncover more direct evidence for the use of the adultery detrusion penalty, the very existence of the canonistic debate speaks to the odd bifurcation that was occuring in the thirteenth century regarding how the monastery was conceived. At the very moment when the cloister wall was figuratively disappearing, whether in the form of the mendicant orders or through more informal associations like the Beguines and Beghards, the monastic cell was being reimagined as a veritable prison for the laity.[108] Adultery detrusion stands at one end of the spectrum, where the incarceration comes close to the complex of punitive and penitential functions we associate with modern penology. It could also be as casual as the kind of short-term thirty day stints we see in Venice, where the monasteries of San Zaccaria and San Lorenzo were used to confine female debtors.[109] Whether *perpetuum* or *ad tempus*, though, the role of the monastery as place of confinement would persist, as we saw at the beginning of the study, into the early modern period. The Neapolitan court officials assembled to deliver sentence on Cassandra were binding the accused with chains that had been forged in the twelfth and thirteenth centuries.

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Keywords: Bernard of Parma, Detrusion (*detrusio in monasterium*), Gregory IX, *Decretals*, Huggucio of Pisa, Innocent III, Johannes Teutonicus, Justinian, *Corpus Iuris Civilis*

quia taliter condempnatur posset uxor retinere si uellet, infra, de diuort. [*sic*] Gaudemus [X 3.32.19], et non consequeretur intencionem suam… ." Vienna, ÖNB, cod. vind. pal. 2129. fol. 132v$^{a–b}$. As he had already linked *Tuae* with X 3.32.19 in an earlier gloss, it seems likely that his reference to another letter with the same incipit under the title on divorce (X 4.19.8) is a mistake — though see above, n. 93, for Boatinus's odd and erroneous linkage of all the *Gaudemus* canons in the *Liber extra* to the same letter.

[108] We should not forget, though, that this bifurcation was gendered. The new openess of the monastic model for male monks stands in stark contrast to what would happen with female religious by the end of the thirteenth century, when Pope Boniface VIII enforced strict enclosure on convents through his *Periculoso* decree. For a thorough study of the decree and its canonical reception, see Elizabeth Makowski, *Canon Law and Cloistered Women:* Periculoso *and Its Commentators, 1298–1545* (Washington, DC, 1997).

[109] Dunbabin, *Captivity and Imprisonment* (n. 13 above), 118.

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