

# ABSENT HUSBANDS, WAITING WIVES: A CASE STUDY IN CIVILIAN INTERPRETATION

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*Abstract:* If your spouse goes missing, may you remarry? What happens if your missing spouse later returns? This paper explores the answers that early thinkers in the civilian tradition—popes and canon lawyers writing from the fifth to the twelfth centuries A.D.—offered to these problems, which were as common and pressing in antiquity and the Middle Ages as they are today. I trace the twin influences of the law of the New Testament and Roman law in their responses, and argue that, over time, canon lawyers increasingly focused on the culpability of the wife who remarried during her husband’s absence: *what* she knew about her absent husband when she remarried and *how* she knew it assumed great importance. I also show how, in their thoughtful struggle to craft a regime that was doctrinally defensible, consistent with prior rulings, and empathetic, civilian thinkers grappled with other, equally significant issues: the equal treatment of men and women in marriage, the relationship between Christian doctrine and classical Roman law, and the deviation from hard legal rules in exceptional circumstances such as war.

## I. INTRODUCTION

The problems posed by absentees—people who go missing, whose life or death are uncertain—have long exercised legal scholars and fascinated the general public.<sup>1</sup> This paper explores the response given by writers in the civilian tradition to a subset of issues that were as common in the ancient world as they are today: what happens when your spouse goes missing and then later returns? In a series of close readings, I analyze the solutions that popes and legal commentators offered to this problem in Late Antiquity and the High Middle Ages. When Pope Leo I confronted the issue in the mid fifth century, he drew on both the Law of the New Testament and Roman law in order to tailor his ruling to the social difficulties that men and women faced as the result of widespread warfare. But Leo’s pragmatic and empathetic solution—which refused to punish women who remarried and their second husbands—created serious doctrinal problems of its own. The great jurists and popes of the twelfth and thirteenth centuries could not simply cast aside Leo’s ruling, which carried great authority because it was issued at an early period in the development of canon law. Instead, they found ways to reinterpret and adapt it, harmonizing contradictions and crafting a sophisticated body of presumptions that might stand the test of time. As this paper argues, over time, canon lawyers increasingly focused on the guilt of the wife who remarried during her husband’s absence: *what* she knew about her absent husband when she remarried and *how* she knew it assumed great importance. But alongside this central focus, I also show how these texts grapple with other issues that are only adumbrated in Leo’s ruling: the equal treatment of men and women in marriage, the relationship of Christian doctrine to rules of classical Roman law, and the deviation from hard legal rules in exceptional circumstances such as war.

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<sup>1</sup> See generally, Robert M. Jarvis & Megan F. Chaney, “*The Living, the Dead, the Undecided*”: An Annotated Bibliography of Law Review Articles Dealing with the Law of Absentees and Returnees, 44 INT’L J. LEGAL INFO. 178 (2016).

This paper is organized as follows. Part II introduces the problem of absent husbands by analyzing Leo the Great's *Letter 159*, one of the first canon law texts to discuss this issue. I argue that Leo's response to Nicetas is shaped by both Roman law and the Church's long-standing teachings on the indissolubility of marriage. I also identify a problem with Leo's solution—the apparent inequality in his treatment of returning husbands and waiting wives—that will play an important role in the later interpretations I discuss. Part III discusses a second phase in civilian approaches to the issue of absent husbands, the twelfth-century *Decretum* of Gratian and contemporary commentary on the *Decretum*. Canon lawyers working in this period were more interested in the guilt of women who remarried, and I show how they retrojected these concerns and other distinctly twelfth-century preoccupations into Leo's fifth-century ruling. In Part IV, I turn to the rulings issued by two popes, Lucius III and Clement III, at the end of the twelfth century. I argue that these rulings represent two very different approaches—one more lenient, the other more severe—to women who had remarried in their husbands' absence. Interestingly, however, both Lucius and Clement traced their rulings back to Leo; and contemporary commentators sought to harmonize all three rulings in a final act of legal interpretation. Part V briefly concludes.

## II. DUELING LEGAL TRADITIONS IN LEO I'S LETTER TO NICETAS (*LETTER 159*)

In AD 458, Nicetas, the bishop of Aquileia, approached Pope Leo I with a serious quandary.<sup>2</sup> The Huns under Attila had invaded Northern Italy and sacked Aquileia.<sup>3</sup> This time they had carried off into captivity not women, but men, leaving their wives behind.<sup>4</sup> When the men eventually returned—whether by escape or ransom, we do not know—they found that their wives had remarried, either because the women believed their husbands to be dead or because they thought their husbands would never be freed.<sup>5</sup> At least as the pope understood the bishop's query (which reached him from Aquileia via the Roman deacon Adeodatus), this situation required the Church to intervene: what was Nicetas to do with these women?<sup>6</sup>

The sixth-century monk Dionysius Exiguus (c.470–c.544), who preserved this letter in his collection of papal constitutions, divided Leo's response into four parts.<sup>7</sup> Leo ruled, first, that the original marriages must be restored, because scripture clearly stated that marriages are made by God

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<sup>2</sup> Date: *Letter 159.7* (“Dated 21st March, in the consulship of Majorian Augustus”); ROGER S. BAGNALL ET AL., *CONSULS OF THE LATER ROMAN EMPIRE 450* (1987). For the full Latin text of *Letter 159.1–4*, see SANCTI LEONIS MAGNI ROMANI PONTIFICIS OPERA (P. & G. Ballerini eds., 1755–57, repr. in *PL* 54). For a full English translation, based on CHARLES LETT FELTOE, *THE LETTERS AND SERMONS OF LEO THE GREAT 102–03* (1895), see Appendix I.

<sup>3</sup> *Letter 159.1*. Cf. Jordanes *The Origins and Deeds of the Goths* 42.221 (“He inflamed the hearts of his soldiers to attack Aquileia again. Constructing battering rams and bringing to bear all manner of engines of war, they quickly forced their way into the city, laid it waste, divided the spoil and so cruelly devastated it as scarcely to leave a trace to be seen.”). Nicetas is said to have fled to the nearby town of Grado.

<sup>4</sup> *Letter 159.1*.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Dionysius' chapter headings do not match the “synopsis” that precedes the letter in the Latin text, nor do they always fully capture the content of Leo's letter. This paragraph follows Dionysius' structure, but deviates from his interpretation of the substance.

and may not be severed by man;<sup>8</sup> second, that the men who took the absent husbands' places were not criminal or blameworthy, but that the wives were to be returned to the husbands, much as property was restored to men who returned from captivity;<sup>9</sup> third, that what had happened in the husbands' absence must be passed over and judged blameless if the returning men still felt affection for their wives and wished them to return to their sides;<sup>10</sup> and fourth, that women who refused to return to their lawful husbands out of love for their second partners were to be punished and excommunicated.<sup>11</sup>

Leo's response is shaped by two distinct traditions. The most obvious influence is, of course, the Church's long-standing doctrine of the indissolubility of marriage:<sup>12</sup> Leo cites Jesus' reply to the Pharisees ("what God hath joined, man may not put asunder," Matthew 19:6) and quotes a passage from Proverbs 19:14 ("a woman is joined to a man by God"). (None of Jesus' *logia* in the New Testament address the ancillary question of whether widows may remarry, but Paul—whom Leo does not cite—states they may, if they cannot exercise self-control (1 Cor. 7:9).)

The other tradition that influences the pope's reply is that of Roman law, specifically the law of *postliminium* ("return behind the threshold").<sup>13</sup> Roman citizens captured in war suffered *capitis diminutio*: their citizen rights were lost, or rather suspended, and they lost all property. A complicated set of fictions governed whether and how the rights and "facts" of captives who subsequently managed to return to Rome were restored: rights, such as ownership, typically revived automatically, legal relationships that required some physical manifestation, such as possession, typically did not.<sup>14</sup> Importantly for our text, it is generally thought that marriage was not automatically restored, at least not under classical law: it ended at capture and did not revive, except by consent.<sup>15</sup>

These twin influences are immediately apparent in Leo's reply. In keeping with the indissolubility of marriage, Leo demands that the compact of the lawful marriage must be renewed;<sup>16</sup> as under the law of *postliminium*, each man should recover what is his own.<sup>17</sup> From the very outset, however, Leo conflates the two approaches. To explain the restoration of the marriage after the husband's return, he draws not only on scriptural statements about the indissolubility of marriage but also on Roman law concepts such as *redintegratio* or *restitutio in integrum*, as his use of the word *redintegranda* ("must be renewed") shows. More importantly, Leo leans heavily on an analogy between

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<sup>8</sup> Letter 159.1.

<sup>9</sup> Letter 159.2.

<sup>10</sup> Letter 159.3.

<sup>11</sup> Letter 159.4.

<sup>12</sup> See generally HENRI CROUZEL, *L'ÉGLISE PRIMITIVE FACE AU DIVORCE* (1971).

<sup>13</sup> See generally W.W. BUCKLAND, *TEXTBOOK OF ROMAN LAW* 67–68 (1921).

<sup>14</sup> OCD s.v. 'postliminium.' See also O. A. WATSON, *THE LAW OF PERSONS IN THE LATER ROMAN REPUBLIC* 237 (1967).

<sup>15</sup> See BUCKLAND, *supra* note 8, at 67. In order for a captive to avail himself of the law of *postliminium*, his capture and return had to meet further conditions. If he was ransomed, as often occurred in the case of the Huns, classical law dictated that he could only avail himself of the law of *postliminium* if the ransomer was repaid the money. See *id.* at 68.

<sup>16</sup> Letter 159.1 ("[W]e are bound to hold that the compact of the lawful marriage must be renewed," *neesse est ut legitimarum foedera nuptiarum redintegranda credamus*).

<sup>17</sup> Letter 159.1 ("[E]ach should recover what is his own," *recipiat unusquisque quod proprium est*).

a returning captive's wife and his property.<sup>18</sup> Perhaps influenced by the Pauline notion that spouses owe their body to each other,<sup>19</sup> he compares the return of the wife to her lawful husband to the restoration by *postliminium* of property that had fallen "into the possession of others" (*in jus alienum*); he also feels the need to rebut the charge that the second "husband" acted as an "invader of another's right" (*pervasor alieni juris*).<sup>20</sup>

It bears emphasizing, however, that even though this property analogy borrows from Roman law principles concerning the restoration of *property* after captivity, it bears almost no resemblance to the Roman-law solution for the return of husbands after captivity. Roman lawyers did not view wives as their husband's property; at least in free (i.e. non-*manus*) marriages, husbands had no legal power over their wives or their property. More importantly, classical Roman lawyers did not accept the fundamental Christian premise of the indissolubility of marriage: Roman marriages could be dissolved in a number of different ways, including by divorce and by captivity.<sup>21</sup>

The unilateral choice of the returning husband marks the greatest departure from both Christian and Roman conceptions. Leo frames the returning husband's resumption of his former marriage as a mere possibility, dependent on his feelings toward his wife.<sup>22</sup> This raises the question: what if, after a long period of captivity, the husband no longer wanted his wife back? Though he does not say so explicitly, Leo appears to permit the returning husband not to resume his marriage, whereas his wife must—under penalty of excommunication—return to her first husband even if she has fallen in love with her second "husband."<sup>23</sup>

If marriage were truly indissoluble, as the Christian tradition seemed to demand, then not only would a woman's second marriage constitute adultery; the returning husband would have to resume his marriage regardless of his feelings for her, unless perhaps he could divorce her under the exception for fornication found in some of the *logia* (e.g. Matthew 5:32). If, on the other hand, marriage could be revived by consent, as Roman law dictated, there was little justification for Leo's view that a woman who did not wish to take back her former husband could be punished. While it does not come as a surprise that Leo does not follow the precepts of Roman law to the letter, it is notable that he appears willing to soften Christian orthodoxy in a number of ways to address the difficult social reality of war and separation, not only by forgiving both wives who remarried and their second "husbands," but also by allowing the original husbands the choice of not returning to their former wives.

Before discussing possible explanations for Leo's solution to the problem of the return of captive husbands, it is worth pointing out another unusual feature of his reply that would cast a long

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<sup>18</sup> Note the repetition at *Letter* 159.1 ("[W]hat each lawfully had must be restored to him; and we must take every pains that each should recover what is his own.").

<sup>19</sup> I Cor. 7:3 ("The wife does not have authority over her own body, but the husband *does*. And likewise the husband does not have authority over his own body, but the wife *does*.").

<sup>20</sup> *Letter* 159.2.

<sup>21</sup> PERCY ELLWOOD CORBETT, *THE ROMAN LAW OF MARRIAGE* 211 (1930).

<sup>22</sup> *Letter* 159.3 ("if husbands who have returned . . . still feel such affection for their wives," *si viri . . . in dilectione suarum conjugum perseverant*) (emphases added).

<sup>23</sup> See *Letter* 159.4 ("[A]ny women are so possessed by love of their later husbands as to prefer to remain with them . . . are deservedly to be branded," *mulieres ita posteriorum virorum amore captae ut malint his cohaerere . . . merito sunt notandae*).

shadow. The idea that “affection” (*dilectio*) played a crucial role in the formation and existence of a marriage has parallels in classical Roman law, where it figured as *maritalis affectio*.<sup>24</sup> Indeed, it is this very conception of marriage as a “fact” that explains the classical rule that capture ends marriage and the requirement of renewed consent to re-establish marriage. And this is the most straightforward way to explain Leo’s insistence on the returning husbands’ affection for their wives. But his understanding of the marriage bond as “affection entered on with God’s sanction” (*affectus ex Deo initus*) suggests a more subjective and mystical conception of marriage founded in passages such as *Ephesians* 5:25-33, a conception that was to enjoy great popularity in the 12<sup>th</sup> century.<sup>25</sup>

Leo’s solution of Nicetas’ problem raises some questions: why single out women like this? why must a husband not take his former wife back? While the answer may in part be misogyny—the stereotype of the socially dangerous woman in the grip of her passions was common throughout antiquity<sup>26</sup>—Leo’s response is attuned to the practical problems this particular situation posed. In the present instance, Leo appears fairly certain that the original husband will wish to return to his wife (the conditional implicit in “if husbands . . . still feel such affection” need not be given too much force). Rather, the pope is concerned primarily with the problem of *women* who refuse to take their husbands back and their new “husbands”: the former are wicked and threatened with excommunication; the latter are blameless. Leo’s more permissive attitude toward both returning and second husbands and his stricter approach to their wives may indicate that he believed that, in this instance, only one party really needed convincing. It also seems clear that the Church treated the reverse case of a *wife* returning from captivity to find that her *husband* had remarried no differently: the first marriage was the only legitimate union.<sup>27</sup>

Given the canonical legitimacy of the first marriage (and the first marriage only), it is also easier to imagine valid reasons—pregnancy by the second “husband” for example—why the first husband would refuse to take back his wife rather than vice versa. The return of captives after a long time posed a clear threat to the social order, since their demands for restoration of property and wives upset social relations established after their capture. From a pragmatic point of view then, Leo may have deemed that the best way to re-integrate these men into society was to grant amnesty to the second “husbands” and to give ex-captives the option of restoring their marriages. In this calculus, there was no place for the objections of their wives.

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<sup>24</sup> See, e.g., Dig. 24.1.32.13.

<sup>25</sup> See K. NICKOLAUS, MARRIAGE FICTIONS IN OLD FRENCH SECULAR NARRATIVES, 1170–1250: A CRITICAL RE-EVALUATION OF THE COURTLY LOVE DEBATE 150 (2002).

<sup>26</sup> See, e.g., Anne Carson, *Putting Her in Her Place: Woman, Dirt, and Desire*, in *BEFORE SEXUALITY: THE CONSTRUCTION OF EROTIC EXPERIENCE IN THE ANCIENT GREEK WORLD* 135, 138–9 (David M. Halperin et al. eds., 1990). The same idea also appears to underlie Paul’s views on widows (*supra*).

<sup>27</sup> See Innocent, *Ep.* 36 (*PL* 20:602–3). Innocent calls the second “marriage” a stain (*naevus*) on the first marriage which was “established through the grace of God” (*gratia divina fundatum*). *Id.*

## III. CAPTIVE HUSBANDS, GUILTY WIVES? GRATIAN C. 34 Q. 1&amp;2 C.1

Almost seven hundred years later, the twelfth-century jurist Gratian quoted Pope Leo's letter to Nicetas in a *causa* that was loosely based on the historical problem that Leo had confronted: a man is taken captive and his wife, hearing that he had died, remarries; when he returns from captivity, he wishes to resume his marriage, but his wife has fallen in love with her second husband and rejects her first marriage. The differences between the two scenarios are instructive. Most obviously, Leo's plural wives and husbands had become a singular couple. This allowed Gratian to eliminate other "noise" from the facts: whereas the wives in Leo *either* think their husbands have died *or* believe that they will never be freed, the wife in Gratian has heard of her husband's death. And while Leo only imagined the possibility that some of the women might refuse to return to their first husbands because they were "possessed by love" (*amore . . . captae*), Gratian took it for granted that the wife "spurns the marital bed of her former husband" (*aspernatur torum prioris viri*).<sup>28</sup> Gratian stripped the messy historical situation of 458 AD of both its ambiguities and, arguably, of Leo and Nicetas' charitable conjectures and distilled from it a clear legal problem.

For Gratian, the legal issues this problem raises were the following: 1) is the woman guilty of adultery? and 2) must she be forced to return to her first husband? Gratian's interests were thus somewhat different from Leo's. For example, Leo clearly felt the need to address the question of the guilt of the second "husband."<sup>29</sup> He was also apparently eager to avoid branding as adulteresses women who had made the best of a difficult situation.<sup>30</sup> Nevertheless, Gratian claimed that Leo's letter "decided" both of his legal questions.<sup>31</sup> Leo's letter and the analogous ruling of Innocent I (378–417 AD), which were both quoted in the "first recension" of Gratian,<sup>32</sup> did in fact provide an answer to Gratian's second question: if the first husband still feels affection for his wife, she must return to him, under penalty of excommunication. But Leo and Innocent hardly resolved Gratian's first question, the issue of whether the wife was guilty of adultery. The "second recension" marshalled eight more

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<sup>28</sup> C.34 q.1&2 c. 1. For the Latin text, see *DECRETUM MAGISTRI GRATIANI* (Emil Friedberg ed., 1879). For an English translation of the material added by Gratian (as opposed to the decretals he quotes), adapted from *MARRIAGE CANONS FROM THE DECRETUM OF GRATIAN AND THE DECRETALS, SEXT, CLEMENTINES AND EXTRAVAGANTES* (John T. Noonan, Jr. trans., 1967), see Appendix II.

<sup>29</sup> *Epist.* 159.2 ("But notwithstanding let him not be held blameable and treated as the invader of another's right, who took the place of the husband, who was thought no longer alive," *Nec tamen culpabilis iudicetur, et tamquam alieni juris perversor habeatur, qui personam ejus mariti, qui jam non esse existimabatur, assumpsit.*).

<sup>30</sup> Note the euphemistic tone of *Epist.* 159.3 ("[T]hat, which necessity brought about, must be passed over and judged blameless," *omittendum et inculpabile indicandum quod necessitas intulit*) and *Epist.* 159.4 ("[N]or let that which a condition of necessity extorted from them be by any means turned into disgrace through evil desires," *neque ullo modo ad opprobrium malae voluntatis trahatur, quod conditio necessitatis extorsit*).

<sup>31</sup> "Both questions are decided by the authority of Pope Leo," *utraque quaestio terminatur auctoritate Leonis Papae*.

<sup>32</sup> Following ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* (2000), scholars have widely accepted that the two surviving groups of manuscripts of Gratian's *Decretum* are evidence of two stages in the work's composition: a first, shorter draft of the work written by a person later called "Gratian" (the "first recension"), and a second, longer draft written by a group of scholars elaborating on the first draft (the "second recension" or "Vulgate").

canons to supply an answer: a wife must not remarry as long as her husband is alive,<sup>33</sup> but she is not an adulteress if she remarries in the mistaken belief that he has died.<sup>34</sup>

The decretists—that is, the scholars who commented on Gratian’s *Decretum*—managed to reach a similar answer from Leo’s text alone, though doing so involved moving quite far from Leo’s original purposes. To provide a roadmap for the following discussion, I quote the text of Leo’s letter in full, underlining words that have glosses:

As you say that through the disasters of war (*cum per bellicam cladem*) and through the grievous inroads of the enemy families have in certain cases been so broken up that the husbands have been carried off into captivity and their wives remain forsaken, and these latter thinking (*credentes*) their own husbands either dead or never likely to be freed from their masters, have contracted another marriage under stress of anxiety (*sollicitudine*), and as, now that the state of things has improved through the Lord’s help, some of those who were thought to have perished have returned, you seem, dear brother, naturally to be in doubt what ought to be settled by us about women thus joined to other husbands. But because we know it is written that “a woman is joined to a man by God (*Prov. 19:14*),” and again, we are aware of the precept that “what God hath joined, man may not put asunder (*Matthew 19:6*),” we are bound to hold that the compact of the lawful marriage must be renewed, and after the removal of the evils inflicted by the enemy (*hostilitas intulit*), what each lawfully had must be restored to him; and we must take every pains that each should recover what is his own.

But notwithstanding let him not be held blameable and treated as the invader of another’s right, who took the place of (*qui personam*) the husband, who was thought no longer alive. For thus many things which belonged to those led into captivity happened to pass into the possession of others, and yet it is altogether fair that on their return their property should be restored. And if this is duly observed in the case of slaves or of lands, or even of houses and personal goods, how much more ought it to be done in the restoration of wives (*in coniugiorum*), that what has been disturbed by the necessities of war may be restored by the remedy of peace?

And, therefore, if husbands who have returned after a long captivity still feel (*perseverant*) such affection for their wives as to desire them to return to partnership, that, which necessity brought about, must be passed over and judged blameless and the demands of fidelity satisfied.

And if any women are so possessed by love of their later husbands as to prefer to remain with them than to return to their lawful partners, they are deservedly to be branded: so that they be even deprived of the Church’s communion; for in a pardonable matter they have chosen to taint themselves with crime, showing (*ostendentes*) that they have sought their own pleasure in their incontinence, when a rightful restitution (*remissio*) could have obtained their forgiveness. Let them return then to their former state and make voluntary reparation, nor let that which a condition (*quod conditio*) of necessity extorted from them be by any means turned into disgrace through evil desires; because, as those women who refuse to return to their husbands are to be held unholy, so they who return to an affection entered on with God’s sanction are deservedly to be praised.

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<sup>33</sup> C.34 q.1&2 c.4.

<sup>34</sup> C.34 q.1&2 c.5.

The casus ascribed to “H.” (Huguccio) laid the groundwork for the reinterpretation of Leo. Commenting on the words *cum per bellicam* (“through the [disasters] of war”), the commentator remarked:

He [Nicetas] had asked about the two groups: some women had married other men while they thought their husbands were dead; others knew that their husbands were alive, but thought they would never be freed from captivity. But later the husbands of these women returned. So he asked what should be done in either case. And the Pope’s response was, in the first case, that the women must be separated from their second men and returned to their first men, and that those who were unwilling to be separated from their second men must be excommunicated. But in the second case he doesn’t seem to give a response because the question was trivial and silly. For as long as a woman either knows or believes or is uncertain whether her husband is alive, she must not marry another, and if she does, she is guilty of adultery, as C.32 q.5 c.16 shows.<sup>35</sup>

Leo had merely given alternate reasons why the women might have remarried in their husbands’ absence, but this disjunction allowed the casus to separate them into two distinct categories, those who thought their husbands had died and those who knew they were alive. Leo’s answer, Huguccio claimed, addressed only the first group of women who thought their husbands had died: they were to return to their first husbands. But Leo did not bother with the second group, for both the women’s excuse—their belief that their husbands would never be freed—and Nicetas’s very question were silly. After all, a woman who knows or believes or is uncertain whether her husband is alive must not marry another or else she is guilty of adultery, as even Augustine knew (or did he?).<sup>36</sup> The commentator’s interpretation does not seem to do justice to Leo, who had seemed prepared to forgive past transgressions provided the wives returned to their former spouses, but it does pave the way for an answer to Gratian’s question about the wife’s culpability.

Since the main issue in determining the woman’s guilt was her knowledge, the glossators expanded on this epistemic requirement, without bothering to anchor their observations in Leo’s text. In order not to be an adulteress, they claimed, she must have a “legitimate reason for believing her husband has died owing to a mistake of fact” (*iustam causam credendi contrarium per ignorantiam facti*).<sup>37</sup> Alternatively, she must have a “credible reason for believing in his death” (*probabilem causam mortis suae*).<sup>38</sup> A false rumor was also apparently sufficient to secure a woman’s innocence, “unless she herself supplied the rumor” (*nisi ipsa procuraverit illum rumorem*).<sup>39</sup> The mere belief that her husband would never

<sup>35</sup> Ord. gl. cum per bellicam col. 2398: De duobus quaesiverat iste quaedam dum putarent viros suos esse mortuos, nupserunt aliis, aliae vero sciebant viros suos vivere, sed credebant numquam eos liberandos de captivitate. sed reversi sunt postea viri istarum. quaesierat ergo iste quid faciendum esset in utroque casu. et respondetur in primo casu, quod separandae sunt a secundis, et reddendae primis. & quae nolunt separari a secundis, sunt excommunicandae. In secundo vero casu nihil videtur responderi: quia nulla et frivola erat quaestio. quamdiu nam aliqua scit vel credit vel dubitat virum vivere, non debet alii nubere, & si nupserit, adultera erit, ut [C.32 q.5 c.16].

<sup>36</sup> C.32 q.5 c.16 does not quite seem to support Huguccio’s proposition, since Augustine merely says that a man may not remarry simply because his wife is sick, absent or unwilling to have sex (full text *infra*, note 6).

<sup>37</sup> Ord. gl. v<sup>o</sup> utraque col. 2397.

<sup>38</sup> Ord. gl. v<sup>o</sup> utraque quaestio col. 2397; cf. also v<sup>o</sup> perseverant col. 2399, *quando certis indicis putatur mortuus esse*.

<sup>39</sup> Ord. gl. v<sup>o</sup> utraque quaestio col. 2397.

be freed, by contrast, which Leo had allowed as a possibility, was dismissed out of hand as “frivolous.”<sup>40</sup>

Even though the glossators, following Gratian’s lead, ultimately seem to have taken a harsher view of the women’s conduct than Leo, they also picked up on some of the pope’s more pastoral concerns. For example, on *sollicitudine* (“anxiety”), an alternate reading for Leo’s *solitudine* (“loneliness”), the gloss gave not only an interpretation consistent with Gratian’s *causa*, explaining the women’s second marriage as a result of a lack of self-control, but also a justification—poverty—that showed greater sensitivity to the plight of single women in times of war.<sup>41</sup> The gloss also reiterated Leo’s principle that necessity provided a full defense for the women’s behavior, citing a ruling of Augustine that excuses perjury in language remarkably similar to Leo’s (a source perhaps?).<sup>42</sup>

The gloss also discussed the difficulty inherent in the conditional that appeared to give returning husbands the option of not taking their wives back:

And it seems like the men themselves are not forced to return to them if they don’t want to. But some here supply “very strongly” (*maxime*), others take this to refer to those women who did not believe their husbands were dead but nevertheless remarried, as is mentioned at the beginning of the chapter.<sup>43</sup>

As discussed above, Leo did seem to suggest that the first husbands were not obliged to return to their wives if they did not wish to. In light of the canonical indissolubility of marriage this was a problem, especially if the men then decided to sleep with another woman, as another glossator who cited Augustine seemed to assume.<sup>44</sup> The glossators offered two solutions: either the text should be amended by adding “very strongly” (*maxime*), presumably to weaken the force of the conditional (“if they still feel very strong affection for their husbands”), or Leo meant only the men returning to wives who had been unfaithful even though they knew full well that their husbands were still alive—to women who in the glossators’ eyes were unequivocally guilty of adultery. Above I suggested that this was probably *not* what Leo meant: Leo’s solution was to offer forgiveness to wives who were willing to leave their second husbands, no matter what they knew when they remarried. But the glossators provided an elegant explanation for Leo’s cryptic discussion of whether husbands still feel affection for their wives when they return.

Nor was the Roman-law subtext of Leo’s letter entirely lost on the glossators. Discussing Leo’s phrase *hostilitas intulit* (“inflicted by the enemy”), the gloss cited a (supposed) ruling of the Second Council of Seville (619 AD) on a petition by one Theodulfus, bishop of Malaga, parts of whose diocese had been annexed by neighboring sees in the hands of the Goths. In its ruling, the Council’s ordered

<sup>40</sup> Ord. gl. v<sup>o</sup> crederent col. 2398, *haec ratio frivola est, & ideo non curat ei respondere*.

<sup>41</sup> Ord. gl. v<sup>o</sup> sollicitudine col. 2398, *incontinentiae, vel paupertatis*.

<sup>42</sup> Ord. gl. v<sup>o</sup> quod conditio, *quod necessitas cogit, non est imputandum*, citing C.22 q.4 c.22 (*Nec enim ullo modo ad obprobrium coacte voluntatis trahitur quod illicita conditio necessitatis extorsit*).

<sup>43</sup> Ord. gl. v<sup>o</sup> perseverant col. 2399: *et ita videtur, quod ipsi non compellantur ad eas redire si noluerint, sed suppleat hic quidam, maxime. alii intelligunt hoc de illis mulieribus, quae viros non credebant mortuos, et tamen contraxerunt. quod notatur in principio capituli*.

<sup>44</sup> C.32 q.5 c.16: *Puto Christianum neminem reluctari, adulterum esse, qui vel diu languente, vel diu absente, vel continenter vivere cupiente sua uxore, alteri commixtus est femine*.

that the parish in question be returned to Theodulfus, and justified its decision by referring to the “secular law” (*mundialis lex*) of *postliminium*.<sup>45</sup> The glossators’ citation to this seventh-century ruling may explain why they were so interested in the scenario that Leo had confronted seven hundred years earlier. Why mention the Roman law of *postliminium*, long after it had ceased to have any currency? A further gloss indicates what may actually have been at stake, at least in the twelfth century:

The argument is that a church must be returned to a cleric who is returning from captivity no matter how long he has been detained, if he proves a legitimate hindrance, because the church is a cleric’s wife. [C.7 q.1 c.39] et [C.7 q.1 c.42]; 13 q.2 unaquaeque.<sup>46</sup>

The principles articulated by Leo and Gratian could be applied not only to literal marriages but also to figurative ones: since the Church could be understood as the priest’s wife, it could be argued that she (the Church) must be returned to him when he returned from captivity, provided he could prove a legitimate hindrance (*iustum impedimentum*). And the canons cited support the corollary arguments that a church must not be given to another bishop as long as “her” bishop is alive (C.7 q.1 c.39) and that a bishop who has fled his church in times of war is bound to return to it once it is safe to do so (C.7 q.1 c.42). While Leo had dealt with the impact of political instability on married couples, the glossators were at least as interested in the consequences it had for the Church and the clergy.

#### IV. WAITING WIVES AND CANONICAL CERTAINTY: LUCIUS III AND CLEMENT III

The problem of absent and captive spouses did not lose any of its urgency as the 12th century progressed, and popes and glossators sought to provide answers that were more definite than those of Gratian and the decretists. The two decretals discussed in this paper, issued by Popes Lucius III (1097–1185) and Clement III (1130–1191),<sup>47</sup> illustrate two different approaches to this problem, a more rigorist one and a less rigorist one. The glossators attempted to harmonize these two approaches and ground them in canonical precedent, including, of course, Leo I’s decretal on the same topic.

At some point during his short papacy (1181–85), Lucius III issued a ruling to Christians in “Saracen” captivity, some of whom had remarried without being certain that their former spouses were dead.<sup>48</sup> Lucius’s response was split into three parts.<sup>49</sup> To begin with, he made it entirely clear that second marriages were not permitted until it was absolutely certain that the original spouses are no longer alive. Nevertheless, if someone who had already remarried was still uncertain of the death of their spouse, they should not deny the “marital debt” (*debitum*) if it was requested, though they could

<sup>45</sup> C.16 q.3 c.13.

<sup>46</sup> Ord. gl. v<sup>o</sup> in coniugiorum col. 2399: arg. quod ecclesia clerico debet restitui de captivitate redeunti per quantumcumque tempus detentus fuerit, si probat iustum impedimentum, cum ecclesia sit uxor clerici. [C.7 q.1 c.39] et [C.7 q.1 c.42]; 13 q.2 unaquaeque.

<sup>47</sup> Lucius III, Dominus ac redemptor, WH 370 (X 4.21.2); Clement III, In presentia nostra, WH 561 (X 4.1.19). Both rulings are preserved in the so called *Liber extra*, a thirteenth-century collection of decretals and conciliar decrees edited by Ramón de Peñafort and promulgated by Pope Gregory IX (c. 1145?–1241). For an English translation of these two decretals (but not the gloss), taken from MARRIAGE CANONS, *supra* note 28, see Appendices III and IV.

<sup>48</sup> X 4.21.2.

<sup>49</sup> See ord. gl. v<sup>o</sup> Dominus (Roma 1582) col. 1570 (*Tria sunt dicta*).

not themselves demand it. If they subsequently learned that their former spouse was alive, they must return to them, leaving the “adulterous embraces” (*adulterinis complexibus*) behind.

Not much later, in 1188, Ramón de Castellazuelo, the bishop of Zaragoza, approached Pope Clement III with a similar problem.<sup>50</sup> Some women in his diocese had been unable to find out whether their husbands, who had been away for more than seven years, were still alive. Because they were too young or too lustful to restrain themselves, they “sought to unite with others in marriage.” What was he to do with them? Clement, like Lucius and Gratian before him, toed the scriptural line of the indissolubility of marriage: until they were certain that their husbands are dead, the women could not remarry in the Church (*canonice*), “no matter how long their condition persisted”; in order to do so, they required “certain news . . . of their husbands’ death” (*certum nuncium . . . de morte virorum*).

It is remarkable that the same question was raised twice within the same decade. As we have seen, neither the Christians in captivity, whom Lucius addressed, nor the bishop of Zaragoza, who wrote to Clement for advice, could rely on a clear answer from the sources at their disposal.<sup>51</sup> (The bishop of Zaragoza is unlikely to have had access to Lucius’s ruling, which had been issued only a few years earlier, when he wrote to Clement.) Leo had equivocated on the state of mind of the wives who remarried, seemingly making no distinction between women who believed their husbands were dead and women who thought they were alive but would never return from captivity.<sup>52</sup> While the Vulgate edition of Gratian clearly stated that a wife was not to remarry while her husband was alive,<sup>53</sup> Gratian had likewise simply assumed that the wife believed or had heard that her husband was dead without going into greater detail.<sup>54</sup> This was acceptable in cases where the spouses had already returned from captivity, as in Leo, Innocent, and Gratian, though it did not clearly resolve the question of whether the wife who had remarried was an adulteress;<sup>55</sup> it also provided no guidance in situations where, as in Lucius and Clement’s cases, the spouses had not returned and their death was uncertain—surely a far more common problem, especially in a world characterized by pilgrimage (*peregrinationis*, X 4.1.19) and repeated captures and recaptures of land by Muslims, both in Spain and the Holy Land. If the absent husbands had not returned, the question of whether the remarrying wives were certain of their first husbands’ death assumed great importance in determining the wives’ guilt, as both the glossators and Lucius and Clement realized.<sup>56</sup>

The situations Lucius and Clement faced were not perfectly alike, a fact that goes some way toward explaining divergences in their rulings. Lucius was writing to the Christian faithful in captivity, while Clement was corresponding with a local bishop; whereas Clement addressed only the issues

<sup>50</sup> X 4.1.19. Early witnesses have this decretal in the first volume of Clement’s register. See WH 561.

<sup>51</sup> As Clement reproduced it, Ramón’s query closely tracked the language of Leo’s letter, especially in its focus on the women and the explanation of their behavior as the result of female “incontinence.” Compare X 4.1.19 (*quid agendum tibi sit de quibusdam mulieribus*) with Letter 159.1 (*quid de mulieribus*); compare also X 4.1.9 (*pro . . . fragilitate carnis nequeunt continere*) with Letter 159.4 (*ostendentes sibi met pro sua incontinentia placuisse*).

<sup>52</sup> Letter 159.1.

<sup>53</sup> C.34 q.1-2 c.4.

<sup>54</sup> C.34 q.1-2 c.1.

<sup>55</sup> The *dicta* at C.34 q.1-2 c.5-6 suggest that a woman who didn’t know that her husband was still alive was not guilty of adultery.

<sup>56</sup> See, e.g., ord. gl. vº utraque questio and vº perseverant (Roma 1582) cols. 2397-98, on C.34 q.1-2 c.1.

raised by absent husbands, Lucius wrote more broadly about absent spouses; and, most significantly, the Zaragozaan wives only planned to unite with others in marriage, but at least some of Christians among the Saracens had already remarried. Accordingly, Lucius, who was required to look backward as well as forward, came up with an answer that avoided declaring all second marriages void and branding all remarrying spouses as adulterers and adulteresses: remarrying spouses who were not certain of their spouses' deaths did not have to leave their second spouses, but were merely required to refrain from demanding sexual intercourse. Clement, by contrast, who needed only look to the future, could reaffirm the more rigid rule: a wife was only permitted to remarry if she had certain information that her husband was dead.

The “decretalists”—as the commentators on the *Liber extra* are known, by contrast with the “decretists” who commented on Gratian’s *Decretum*—did their best to iron out possible contradictions between the two rulings. After all, Clement’s rule, if rigidly applied, would seem to entail that those of Lucius’s addressees who had remarried were guilty of adultery. At least the first part of Lucius’s ruling, which stated that certainty about the spouse’s death was required for remarriage, is perfectly consistent with Clement, as the glossators noted (ord. gl. v<sup>o</sup> Ei constet col. 1571); it was also possible to harmonize it with Roman law. To do so, the gloss cites Justinian’s Nov. 117.11, which laid out a stringent rule for women whose husbands are taking part in a military campaign.<sup>57</sup> No matter how long their husbands were gone, these women were required to hold out; even if they heard that their husbands had died, they were required to double-check with the recordkeepers of the military unit in which their husband served and wait another year.<sup>58</sup>

The second part of Lucius’s ruling, which regulated cases in which wives were not certain of their husbands’ death, required greater explication:

And so on account of doubt, there is a presumption in favor of marriage, as must necessarily be the case. [X 4.1.3] & arg. [X 4.16.1] & [Dig. 34.5.3] & [Dig. 23.3.70]. Except when there is doubt as to whether a marriage has been contracted because the marriage is clandestine: in that case there is a presumption in favor of adultery rather than one in favor of marriage. [C.30 q.5 c.1] & arg. [X 4.3.2].<sup>59</sup>

Clement had forbidden remarriage in cases of uncertainty, but the glossators recognized that, at least in the case of marriages that had already taken place, Lucius operated with a presumption in favor of marriage (*praesumitur pro matrimonio*). Not only did Lucius’s presumption conflict with the spirit of Clement’s ruling, it also posed considerable additional difficulties, as it seemed to be at variance with

<sup>57</sup> For the more lenient rule of Classical Roman law (Dig. 24.2.4), see below.

<sup>58</sup> Neither rule fully accounts for the peculiar mention of a seven-year waiting period in Clement (*ultra septennium praestolatae fuerint*). CD suggests that it may derive from the system laid out in the Novellae, if the consultation of the *chartularii* is thought of as taking an entire year. It has also been suggested that the seven-year period may derive from a non-Roman legal tradition. See Alessandro Bucci, *La Praesumptio mortis nel diritto canonico: l’eredità della decretalistica e la codificazione*, DIRITTIFONDAMENTALI 2 (Jan. 8, 2016), [http://dirittifondamentali.it/wp-content/uploads/2019/04/1\\_2016-bucci\\_la-praesumptio-mortis-nel-diritto-canonico.pdf](http://dirittifondamentali.it/wp-content/uploads/2019/04/1_2016-bucci_la-praesumptio-mortis-nel-diritto-canonico.pdf).

<sup>59</sup> Ord. gl. v<sup>o</sup> Non denegat col. 1571: Et ita propter dubium praesumitur pro matrimonio: quod fieri debet. [X 4.1.3] & arg. [X 4.16.1] & [Dig. 34.5.3] & [Dig. 23.3.70]. nisi quando dubitatur, an contractum sit matrimonium, quia clandestinum est: quo casu potius praesumitur adulterium, quam matrimonium. [C.30 q.5 c.1] & arg. [X 4.3.2].

the established rule for clandestine marriages where the presumption had always run the other way, as citations to the second-century Pope Evaristus (C.30 q.5 c.1) and the twelfth-century Alexander III (no canonical marriages without *legitima probatio*, X 4.3.2) demonstrated.

The two canons the gloss cited in defense of Lucius's presumption do not fully eliminate these difficulties. In X 4.1.3, Eugenius III (1088–1153) had ruled that a young man who had married a girl below the age of consent (seven) must be separated from the girl's cousin whom he had later married. However, Eugenius did not say explicitly that the first marriage was valid, nor could he have said so, since espousals below the age of seven were a nullity in the classical canon law.<sup>60</sup> Instead, what Eugenius seemed to be suggesting, at least as the fifteenth-century Benedictine canonist Panormitanus later understood it, is that such an espousal nevertheless gave rise to the impediment of lack of public honesty (*justitia publicae honestatis*). This is not quite Lucius's presumption in favor of marriage that the gloss sought to support.

The second text the gloss cited, X 4.16.1, provided a closer analogue. In it, Alexander III dealt with the following situation: a woman had been promised in marriage to a man by her brother, accepted marital gifts as was customary and frequently “embraced” him as her husband (she later denied that she had ever slept with him), but when her brother died she was betrothed to her “husband's” brother, even though the local bishop had expressly forbidden it. Alexander ruled that she could marry the man, but must first return to her mother's house to do penance for disobeying the bishop. The glossator's argument seems to be that Alexander, like Lucius, allowed the second marriage to stand, even though it was not certain whether the woman was still married to someone else (since there appears to have been future consent, the issue for Alexander likely turned on whether the first set of putative spouses had had intercourse). Nevertheless, differences remain. At least as Raymond understood Alexander's ruling, the issue there was primarily that the woman had married “in violation of a prohibition by the church or a judge” (*contra interdictum ecclesiae vel iudicis*); perhaps Alexander accepted the woman's assertions that she had not slept with her first “husband.” Moreover, in Alexander's case, it was the *Church* that presumed in favor of, and permitted, the second marriage, whereas in Lucius the spouses themselves entertained doubts about the continuing validity of their second marriage but presumed in favor of validity. Even the liberties taken by Roman lawyers in the interpretation of written instruments, such as testaments (Dig. 34.5.3) and dowries (Dig. 23.3.70), do not fully justify Lucius's adoption of a similar approach to “ambiguities” of fact.

The following gloss attempted to explain the core of the second part of Lucius's ruling, that is, why a spouse who was still in doubt of the death of their spouse should not demand the marital debt:

This is on account of doubtful knowledge based on reasonable grounds. from reasonable. Similarly [X 5.39.44] at the end.<sup>61</sup>

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<sup>60</sup> CHARLES DONAHUE, *LAW, MARRIAGE, AND SOCIETY IN THE LATER MIDDLE AGES* 20 (2008).

<sup>61</sup> Ord. gl. v<sup>o</sup> Nullatenus exigendum col. 1571: Hoc est propter conscientiam dubiam ex probabili causa. Simile [X 5.39.44] in fine.

The glossator expanded on Lucius’s concept of “doubt”: a spouse has only “doubtful knowledge” (*conscientia dubia*) of their spouse’s death if they have “reasonable grounds” for believing that they are not dead (*probabilis causa*). Alexander III went into greater detail in X 5.39.44: a spouse may only render the marital debt if his or her belief that there is an impediment is reasonable and considered, though not clear and apparent; after consulting with their pastor, they may also demand it if their belief is merely unreliable and ill-considered. (If they are certain that an impediment exists, they must “humbly endure the sentence of excommunication.”)

Both Lucius and Alexander thus set out a framework for dealing with uncertain impediments during the course of a marriage. Only the final gloss on Lucius answered the first question that Gratian had posed: were spouses who remarried guilty of adultery? Lucius’s description of the second marriage as “adulterous embraces” (*adulterini complexus*) could be read to suggest as much, which might have permitted the unfortunate inference that his ruling condoned adultery. The glossators were eager to clarify the matter:

Understand it this way: if after she learns with certainty that her former husband is alive, she stays with the second man. Because then it is immediately adultery, and not earlier. C.34 q.1–2 c.1] and the argument is that marriage, which had validity from the beginning, is weakened by the passage of time. [Dig. 5.1.17] & [Dig. 5.1.11]. But in truth there was no marriage from the beginning: because now it is declared that there was no marriage at first, just as, conversely, from a future event it appears that there has been a marriage from the beginning. [X 4.15.6] at the end.<sup>62</sup>

Only if the spouse remained with her second spouse after learning that the first was still alive was she guilty of adultery, “and no earlier” (*et non ante*). Whereas Clement’s ruling rather implied that any remarriage without certain knowledge of the former spouse’s death was impermissible, the glossator here suggested that only the act of remaining with the second spouse was adulterous. While Leo had in fact held that wives who did not return to their former spouses must be excommunicated as the glossator suggests (C.34 q.1–2 c.1), we have also seen that he was prepared to forgive wives who remarried despite knowing that their husbands were still alive in the first place, notwithstanding the doctrine of the indissolubility of marriage.

This interpretation of “adulterous embraces” (*adulterinis complexibus*) made sense when considered alongside the presumptions Lucius permitted captive Christians to use. In spite of his imprecise language, Lucius clearly did not wish to imply that spouses who had remarried were automatically guilty of adultery. Nevertheless, the return or rediscovery of the original spouse raised questions about the earlier use of presumptions: was the second “marriage” truly a marriage, or not? if it was not, what was it if not *adulterium*? The second half of the gloss attempted to solve this problem. It would have been possible, the gloss said, to argue that the second marriage was legitimate from the

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<sup>62</sup> Ord. gl. v<sup>o</sup> Adulterinis col. 1571: Hoc intellige, si postquam intellexerit pro certo de vita prioris mariti, cum secundo remaneat: qui statim est adulterium, & non ante. [C.34 q.1–2 c.1] & est argu. quod matrimonium quod ab initio valuit, tractu temporis infirmatur. [Dig. 5.1.17] & [Dig. 5.1.11] Sed non fuit matrimonium ab initio in veritate: sed nunc primo declaratur matrimonium non fuisse, sicut e converso, & ex futuro eventu apparet matrimonium ab initio fuisse. [X 4.15.6] in fine.

very beginning but invalidated by the passage of time (*tractu temporis infirmatur*). The passages cited suggest that it is not merely time that invalidates marriage, but rather intervening events that change the legal relationship of the people involved: Dig. 5.1.17 held that a judge must recuse himself if one of the parties made him their heir, because it was unjust for a man to act as the judge of his own cause, and Dig. 5.1.11 held that adrogation of one party to a suit by the other party terminated the suit. Accordingly, the discovery that the prior spouse was still alive terminated what was originally a valid marriage.

While this interpretation might make sense if the remarrying spouse did not know that the original spouse was still alive, it seems less persuasive in cases where remarrying spouses were merely uncertain; it also has the unfortunate consequence of producing, at least for a time, two concurrent valid marriages, a logical impossibility in a world where marriage was indissoluble. This likely explains why the glossator opted for a different solution. In truth, the gloss explained, “there was no marriage at all from the beginning” (*non fuit matrimonium ab initio*), even if this is declared “only now for the first time” (*nunc primo*). The passage cited, X 4.15.6, settled the inverse situation: a marriage that was dissolved on account of the wife’s infertility is restored if it later becomes clear that the wife was not infertile. This solution avoided both the problem of concurrent marriages and the problem of adultery by adopting the fiction that the second marriage never took place, and by adopting that fiction only in the moment when the spouse left their second partner. It did not, however, solve the logical problems involved in the use of presumptions: if the marriage was never valid, surely any intercourse that took place under a presumption to the contrary remained adulterous?

If the glossators went to great lengths to harmonize Lucius’s ruling with more rigorist precepts, they sought to soften Clement’s ruling in light of the more forgiving decretals of popes such as Leo and Lucius. The casus paraphrases the problem and Clement’s response and comments:

Note that *praescriptio* does not run in marriage, even though all rights are removed by prescription. Equally, each spouse is regarded as waiting on the other, until they are certain about the death of the other. Equally, this decretal abrogates the laws that say that a woman must wait on her man for five years only.<sup>63</sup>

The glossator first derived an abstract principle from Clement’s remark that a woman may not remarry regardless of how long her husband is absent, that is, that *praescriptio* does not run in marriage. This remark makes clear that the *ius commune* operated with similar fictions as the Roman law of *postliminium*. Just as some legal relationships, for example *potestas*, were thought never to have ended and automatically revived upon the captive’s return, marriage could never end, except by the death of one of the spouses. The comment also confirmed that this duty to wait on one’s spouse was reciprocal, a feature also seen in Lucian and Gratian and going all the way back to Innocent’s letter to Probus. It also added that this decretal overruled (widespread?) laws that followed Justinian’s rule of allowing

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<sup>63</sup> Col. 1433: Nota quod in matrimonio non currit praescriptio, licet omnia iura praescriptione tollantur. Item alter coniugum alterum expectare tenetur, quousque sit certus de morte alterius. Item per hanc decretalem abrogantur leges quae dicunt, mulierem per quinquennium tantum debere expectare virum.

women to remarry after five years even if they were not certain that their husbands had died (cf. Dig. 24.2.6, Nov. 22.7).

The following gloss further explored the tension between Clement’s ruling and Roman law:

Counterargument at [Dig. 24.2.6], where it is said that he must be waited on for five years.

Solution: This law and similar ones are invalid under [Nov. 117.11].<sup>64</sup>

Dig. 24.2.6 had stated that a woman could remarry after five years if she was uncertain whether her husband is captive or dead, but, as we saw above, Nov. 117.11 laid out more a stringent rule for women whose husbands were taking part in a military campaign. This solution is not a bad one, since it manages to trace the certainty requirement back to Roman law. The rule in Nov. 117.11 may not, however, have proved very useful in twelfth-century Palestine or Zaragoza, where locating records of a husband’s death might have been much more difficult; nor did it address the specific problems of captivity and pilgrimage as opposed to the general issue of death in war.

It remained to harmonize Clement’s ruling with other parts of the canon law. The next gloss was an attempt:

Nevertheless, where there is a plausible presumption of death, if the wife marries, she is excused, and upon the return of her husband, unless she freely returns to her husband, the women are deservedly to be branded for adultery: as [C.34 q.1–2]. But if they are in doubt about [their husbands’] death having contracted marriage, let them not demand the debt, but render it. And if later on, they achieve certainty regarding [their husbands’] life, let them immediately return. [X 4.21.2]<sup>65</sup>

The glossator softened Clement’s categorical ruling that a woman could not remarry while her husband was alive with reference to the accepted reading of Leo’s letter (C.34 q.1–2), whereby a woman could remarry if she reasonably believed her husband to be dead, provided that she return to her first husband immediately when he returned (cf. v<sup>o</sup> utraque questio col. 2397). This was not exactly what Leo’s letter said, as we have seen; the mere requirement of “plausible presumption” (*verisimiliter praesumitur*), though popular among the glossators as we have seen, also seems to fall short of Clement’s requirement of “certain news” (*certus nuntius*).

The second part of the gloss offered the same halfway house also found in Lucius and the gloss on Gratian (cf. v<sup>o</sup> utraque questio col. 2397): assuming that the women remarried but came to doubt whether their husbands were really dead, “they should not demand the marital debt, but give it when asked”; if they were certain that their husbands were alive, they should immediately withdraw from their second marriage. It was precisely to avoid the doctrinal messiness created by Lucius’s use

<sup>64</sup> Ord. gloss. v<sup>o</sup> quancocunque col. 1433: Argumentum contra [Dig. 24.2.6], ubi dicitur, quod per quinquennium debet expectari. Sol. Lex illa et consimiles non tenent per [Nov. 117.11].

<sup>65</sup> Ord. gloss. v<sup>o</sup> viris col. 1433: Ubi tamen verisimiliter praesumitur de morte, si mulier nubat, excusatur, et viro reverso nisi sponte redeat ad virum, statim merito sunt notandae de adulterio: ut [C.34 q.1–2]: si vero matrimonio contracto dubitant de morte, non exigant debitum, sed reddant; et si postea certificatae fuerint de vita, statim recedant. [X 4.21.2].

of presumptions that Clement might have chosen to reaffirm the stricter rule without mentioning his predecessor's exceptions.

The final gloss by one Bernard discusses Clement's requirement of "certain news" (*certus nuncius*):

Thus [X 4.21.2] and [Nov. 117.11]. But assume that a man was in the army of the Saracens, or among others, and he has not returned, nor can his wife achieve certainty regarding his death from the master of soldiers, or from anyone else? Then let her send someone to the place if possible, or to neighboring places to make inquiries if possible, otherwise she should wait until she achieves certainty regarding his death. This rule is clear here, and according to the aforementioned laws. Bernard.<sup>66</sup>

On Clement's certainty requirement Bernard compares Lucius's "firm certainty" (*firma certitudine*) and the elaborate procedure of the *Novellae*. The following hypothetical deals with the difficulties involved in using this procedure outlined above: if a woman cannot get certainty about her husband's death from military authorities, she should send (someone) to the place and neighboring places to inquire. It is unclear whether Bernard means that the woman should investigate the place where she suspects her husband has died or embark on a diplomatic mission to seek clarity from the Saracens, but Bernard realizes that there are limits to what might be possible (not his repeated "if possible," *si potest*). Nevertheless, even a broad investigation, if inconclusive, apparently does not free the woman from her marital bond, since she must wait until she is certain that her husband has died. While Bernard thus expands the range of acceptable procedures beyond that outlined in the *Novellae*, he appears to back away from the use of presumptions suggested by Lucius and the previous gloss, leaving the basic doctrinal requirement of certainty intact.

## V. CONCLUSION

The popes and canon lawyers discussed in this paper did not conclusively solve the problem of the "living dead" at canon law: after Lucius, Clement, and the decretalists came Pope Innocent III (1161–1216), who ruled on the curious case of a man purporting to be the long-lost husband of a woman who had remarried, and the Bolognese canon lawyer Laurentius Hispanus (1180–1248), who returned to the five-year presumption of Roman law discussed above.<sup>67</sup> But this case study has shed light on the concerns that drove canon lawyers to develop different solutions to the enduring problem of absent husbands, and on their oscillation between pastoral concerns and a desire for doctrinal clarity and consistency. Surveying this development, from Leo in the fifth century to Clement in the twelfth, what is perhaps most striking is the creativity with which canon lawyers anchored their solutions—

<sup>66</sup> Ord. gloss. vº Donec certum nuncium col. 1433: sic [X 4.21.2] et [Nov. 117.11]. Sed pone quod fuit aliquis in exercitu Sarracenorum, vel etiam in aliis, nec est reversus, nec potest certificari mulier de morte per magistrum militum, vel per alium? Tunc mittat ad locum si potest, vel ad vicina loca, ut inquiret si potest, alias expectet quandiu certificata fuerit de morte. ut patet hic, et per iura praedicta. Ber.

<sup>67</sup> See generally James A. Brundage, *The Crusader's Wife: A Canonistic Quandary*, XII STUDIA GRATIANA 425 (1967); James A. Brundage, *The Crusader's Wife Revisited*, XIV STUDIA GRATIANA 241 (1967). On the treatment of the "living dead" in medieval English law, see Elizabeth Papp Kamali, *Tales of the Living Dead: Dealing with Doubt in Medieval English Law*, 96 SPECULUM 367 (2021).

both more rigid regimes, like that of Clement, and more flexible approaches, such as that of Lucius—in the same source texts, including Leo’s letter. In this ancient decretal, they found what they were looking for: fickle and faithful wives, fictions and presumptions, and blame and forgiveness.

Appendix I: Leo the Great, *Letter 159 to Nicetas, Bishop of Aquileia.*

Leo, the bishop, to Nicetas, bishop of Aquileia, greeting.

My son Adeodatus, deacon of our See, on returning to us has delivered your request, my dear friend, to receive from us the authority of the Apostolic See upon matters which seem indeed to be hard to decide, but which we must make provision for with a view to the necessities of the times that the wounds which have been inflicted by the attacks of the enemy may be healed chiefly by the agency of religion.

Chapter I. *About the women who married again when their husbands were taken prisoners.*

As then you say that through the disasters of war and through the grievous inroads of the enemy families have in certain cases been so broken up that the husbands have been carried off into captivity and their wives remain forsaken, and these latter thinking their own husbands either dead or never likely to be freed from their masters, have contracted another marriage under stress of loneliness, and as, now that the state of things has improved through the Lord's help, some of those who were thought to have perished have returned, you seem, dear brother, naturally to be in doubt what ought to be settled by us about women thus joined to other husbands. But because we know it is written that "a woman is joined to a man by God (*Prov. 19:14*)," and again, we are aware of the precept that "what God hath joined, man may not put asunder (*Matthew 19:6*)," we are bound to hold that the compact of the lawful marriage must be renewed, and after the removal of the evils inflicted by the enemy, what each lawfully had must be restored to him; and we must take every pains that each should recover what is his own.

Chapter II. *Whether he is blameable who has taken the prisoner's wife?*

But notwithstanding let him not be held blameable and treated as the invader of another's right, who took the place of the husband, who was thought no longer alive. For thus many things which belonged to those led into captivity happened to pass into the possession of others, and yet it is altogether fair that on their return their property should be restored. And if this is duly observed in the case of slaves or of lands, or even of houses and personal goods, how much more ought it to be done in the restoration of wives, that what has been disturbed by the necessities of war may be restored by the remedy of peace?

Chapter III. *The wife must be restored to her first husband.*

And, therefore, if husbands who have returned after a long captivity still feel such affection for their wives as to desire them to return to partnership, that, which necessity brought about, must be passed over and judged blameless and the demands of fidelity satisfied.

Chapter IV. *Women must be excommunicated who refuse to return.*

And if any women are so possessed by love of their later husbands as to prefer to remain with them than to return to their lawful partners, they are deservedly to be branded: so that they be even deprived of the Church's communion; for in a pardonable matter they have chosen to taint themselves with crime, showing that they have sought their own pleasure in their incontinence, when a rightful restitution could have obtained their forgiveness. Let them return then to their former state and make

voluntary reparation, nor let that which a condition of necessity extorted from them be by any means turned into disgrace through evil desires; because, as those women who refuse to return to their husbands are to be held unholy, so they who return to an affection entered on with God's sanction are deservedly to be praised.

Appendix II: Gratian, C.34 q.1&2 c. 1

Gratian: A man was taken into captivity. His wife, hearing he was dead, married another. He then returned from captivity and sought his wife back. Taken with love for the second man, she spurned the bed of the first.

1. It is now asked: First, is she guilty of adultery because she married another while her husband was alive?
2. Second, should she be compelled to leave the second man and return to the first?

Question I and II.

Part 1.

Gratian: The authority of Pope Leo decides both questions, when he writes to Nicetas, bishop of Aquileia, [in *Letter* 159, 1-2].

Appendix III: Lucius' Response to Christians in Captivity, X 4.21.2

Lucius III to all Christians placed in the captivity of the Sarracens.

Our Lord and Redeemer [cf. A 4.22.3]. (*And below:*) Concerning the marriages some of you have contracted without certitude as to your spouse's death, we reply to you *with apostolic authority*: Henceforth none *of you* shall presume to enter a second marriage until you know *with complete certainty* that your spouse has passed from this life.

If any have not complied with this and remain in doubt about their spouses' death, they should not deny the debt to the one they have married, if it is sought. But they should know that they cannot demand it.

If one later discovers that the first spouse is *unquestionably* alive, let that one leave adulterous *and unlawful* embraces and return to the first spouse.

Appendix IV: Clement's Letter to the Bishop of Zaragoza, X 4.1.19

You have asked before us what should be done *by you* concerning *certain* women *in your diocese* whose husbands were absent because of captivity or pilgrimage. They waited more than seven years and could not discover whether they were alive or dead, although they had tried diligently to find out. Then, because of their youth or weakness of the flesh, they could not be continent and sought to unite with others in matrimony.

*Since the Apostle says* [cf. 1 Cor. 7:39], "*The wife is bound to her husband as long as her husband is alive,*" we reply thus to your question: No matter how many years this condition persists, they cannot pass canonically to another marriage so long as their husbands are alive. Nor may you permit them by the Church's authority to contract until they are certain that their husbands are dead.