

## THE PHYSICALITY OF (NON-)CONSENT

### SECULAR RAPTUS LAWS

ROSE HERVY WAS a young unmarried woman still living with her father, John, when a local man in the village, Adam de Bassingborn, raped her.<sup>1</sup> Young Rose did not want to notify the authorities; perhaps she was scared or felt guilty for somehow causing her own rape. Either way, Rose didn't want to go to court. Nonetheless, the authorities ordered the indictment of Adam for raping Rose. But Adam was nowhere to be found. So, the judge asked the jurors something along the lines of: "do you think that Rose was a virgin when Adam raped her?" The local men of the community who made up the jury probably heard rumours and scuttlebutt that Rose and Adam were flirtatious with one another. Perhaps the jurors even saw Rose speaking to Adam in the past and thought it looked a little *too* friendly. The jurors told the judge that, with certainty, Rose was not a virgin at the time of the rape, and she even had consensual sex with Adam in the past. The jurors went further, claiming something in the manner of: "Rose and Adam were frequently having sex, everyone knows this." Speculatively, jury deliberations went something like "well, if Rose wasn't a virgin at the time, and if she agreed to have sex with Adam in the past, then this isn't *really* a crime even if she was raped this time around." All charges were dropped.

Rose's case (1285) demonstrates the multiple concerns that the EC took into consideration when distinguishing sex from rape, including past relationships, past consensual sex, and virginal status. The criminal courts cared about consent to coitus, but, as in the case of Rose, past consensual relationships were used as a legally legitimate excuse to drop an indictment of rape against the accused, like Adam. I use this case to begin this chapter on medieval England's secular *raptus* laws, as it is indicative of the multivalent interpretations of licit and illicit coitus. This chapter covers the "golden age of English common law" and the five ages of medieval England's *raptus* laws beginning with two legal treatises, *Glanvill* and *Bracton*, which are followed by three statutes, Westminster I and II and the Statute of Rapes.<sup>2</sup>

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1 TNA, JUST1/242 m93d.

2 For more on the periodization see Bellamy, *Crime and Public Order*, 1–2; Dunn, *Stolen Women in Medieval England*, 18–51; Kelly, "Statute of Rapes and Alleged

The primary aim of this chapter is to not only provide the legal understanding necessary for interpretation of romances and cases, but, more importantly to emphasize the legal inferences of mental and physical (non-)consent.

## **Glanvill**

The legal treatise known as *Glanvill* was composed around 1187–1189.<sup>3</sup> According to this text, the two felony appeals that a married woman could make herself were rape (book 14, chap. 6) and the death of her husband (book 14, chap. 3), because both were assumed to cause injury to her body. Concerning the latter appeal, *Glanvill* states *quia una caro sunt vir et uxor* (because husband and wife are one flesh). This is interpreted both as her own flesh and, through the matrimonial rights of a husband and wife, the flesh of her husband. This *una caro*, or “one flesh,” of husband and wife both enables women to appeal the murder of their husbands while also prohibiting women from appealing rape by their husbands, as a single flesh cannot rape itself. The emphasis that *Glanvill* places on the flesh of the woman becomes especially problematic for the appeal of the crime of rape. *Glanvill* states:

In the crime of rape [*Raptus crimen*] a woman charges a man with violating her by force [*viro vi oppressam*] in the peace of the lord king. A woman who suffers [*patitur*] in this way must go, soon after the [crime]<sup>4</sup> [*maleficium*] is done, to the nearest vill and there show to trustworthy men [*probis hominibus*] the injury [*iniuriam*] done to her, and any effusion of the blood [*sanguinem si quis fuerit effusus*] there may be and any tearing of her clothes [*vestium scissiones*]. She should then do the same to the reeve of the hundred. Afterwards she should proclaim it publicly in the next county court; and when she has made her complaint, the form of proceeding to judgement shall be stated as above. In such a case a woman is allowed to make an accusation just as in every case of injury done to her body [*iniuria corpori suo illata*]. It should be known that in such a case it is for the accused to choose whether he will submit to the burden of the ordeal, or will rely on disproving the accusation of the woman.

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Ravishers of Wives,” 361–419; Musson, *Medieval Law in Context*; Post “Ravishment of Women and the Statutes of Westminster,” 150–64.

**3** I have personally consulted London, British Library (hereafter BL), MS Additional 24066 (ca. 1200) and London, Lincoln’s Inn Library (hereafter LI), MS Misc. 3 (ca. 1200–1225) and compared them to Hall’s edited and translated text which is derived from these manuscripts. I also viewed London, BL, MS Harley 1119.

**4** DMLBS, “maleficium,” article 1a.

Moreover, it should be known that if anyone is convicted in this kind of plea the judgement against him shall be the same as in the crimes discussed earlier. Nor can the wrongdoer escape this by expressing his willingness, after judgement, to marry the [corrupted woman] [*corruptam illam*]. For if he could it would frequently happen as a result of a single defilement [*pollutionis*] that men of servile status [*seruilis conditionis homines*] disgraced [forever] [*perpetuo fedare*<sup>5</sup>] women of good birth, or that men of good birth were disgraced by women of low estate, and thus the fair repute of their families would be [shamefully]<sup>6</sup> blackened [*indecenter denigrari*]. But before judgement is given the woman and the accused can be reconciled to each other by marriage, if they have licence from the king or his justices and the [agreement] [*assensu*] of their families.<sup>7</sup>

The initial definition of the crime is when a “woman charges a man with violating her by force,” and so there are explicitly gendered roles of the female victim and the male rapist. The use of *raptus* in *Glanvill* seems to only imply forcible coitus and not abduction, as the *maleficium*—the sexual crime—leads to *corruptam*—the damaged sexual purity of the woman. The importance of physical domination of the woman’s body, the *viro vi oppressam* (by physical force), is critical to the definition and proof of the crime. Unlike modern interpretations of rape which include the mental non-consent of the victim, *Glanvill* shows that the twelfth-century definition was based on the physical domination of the woman’s body as proof of her non-consent. There is the assumption that if the man violates the woman by force, then she will inevitably have physical scars, bruises, bleeding, or torn clothes. Physical force leading to physical bodily injury of the woman is the critical proof which *Glanvill* states the woman needs to show trusted men. As Kim Phillips argues, *Glanvill* is primarily concerned with the injured female body.<sup>8</sup>

The legal requirement of the woman to immediately display her bloody and bruised body to “trustworthy men” ensures that for her to be believed, she must have physical bodily proof of the rape. Despite Barbara Hanawalt’s claim that the *effusio* (“effusion of blood”) was referring to “the breaking of the hymen,”<sup>9</sup> it is a common phrase used throughout Europe’s medieval criminal courts, and, consequently, it must be cautiously regarded as a legal topos, meaning that it did not necessarily relate to virginal blood associated

5 DMLBS, “fedare (v. foedare).”

6 DMLBS, “indecenter,” article 3b.

7 *Glanvill*, book 14, chap. 6. Translations adapted from Hall.

8 Phillips, “Written on the Body,” 140.

9 Hanawalt, “Whose Story Was This?,” 126.

with the hymen. While blood was associated with loss of virginity in the Middle Ages, virginity was not solely viewed by an intact hymen.<sup>10</sup> *Glanvill* uses *fflojedare* to describe the perpetual “disgrace” that men of servile status inflict upon elite women. However, *foedare* is more accurately translated as to “pollute,” “corrupt, make impure,” or “disfigure, mar the appearance of,” and, subsequently, as to “dishonour, [or] shame.”<sup>11</sup> Here, rape is considered a crime of sexual pollution, physical injury, and shame. Under *Glanvill*, if a woman acquiesces to the rape in fear of her life and she does not physically try to fight off her attacker, then she has no physical bodily proof of injury done to her. As a result, *Glanvill* leads one to suspect that she could be considered a culpable woman, for she did not physically resist her own rape. The “true victim” of rape, according to this analysis of *Glanvill*, has bruising, bleeding, and torn clothes. Here we see the formation of dualistic legal identities which the laws created for women in rape cases; there is this binary construction of the truly innocent victim (with physical bodily injury) and the blame-worthy, culpable woman (with no physical injury to show as proof of resistance).

Once the woman has shown the *probis hominibus* (good men) her bodily injuries, she then must do it again at the court of the hundred. If she misremembers, the appeal fails (as with all felony appeals, not just rape), and the woman could be accused of false appeal and thus be imprisoned or fined. The retelling of the rape to the hundred must be identical, *idem faciat*, word for word, to the statement given to the trustworthy men, such as the local sheriff or coroner, immediately after the assault. If the retelling at the hundred is identical to the initial appeal, then the woman has the duty to make her accusation public at the next court hearing. This was a huge risk for a woman. In a period when a woman’s sexual purity was critical to her marriage prospects, proclaiming sexual defilement publicly in the courts could ruin her marriage potential and the probable income that her marriage would generate for her family. The importance of sexual reputation was brought up specifically in *Glanvill* with regards to the option of concord through marriage. This marriage clause demonstrates that a woman could procure a marriage even though her sexual reputation may have been damaged by the rape. *Glanvill* states that the marriage clause could not be claimed “after judgment.” This was a safeguard, according to *Glanvill*, against low-status

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**10** Kelly, *Performing Virginity*, 28–38. For a discussion on the shape and firmness of breasts to determine sexual experience see Phillips, “The Breasts of Virgins,” 1–19.

**11** DMLBS, “foedare,” article 1a, 1b, 2a, 4a.

women accusing high-born men of rape strictly for the purposes of trapping the accused into marriage. *Glanvill* was careful to protect the reputations of noblemen and noblewomen in stating that only “before judgement” could this marriage clause be claimed. Implicitly, but not so subtly, *Glanvill* warns the reader that frequently (*frequenter*) low-status women (*mulieres ignobiles*) would maliciously claim rape by elite men (*generosos homines*) in the hopes of securing a favourable marriage, and low-status men (*seruilis conditionis homines*) would rape high-status women (*generosissimas mulieres*) to trap them into marriage. When rape claims were made between people of vastly different socio-economic classes, *Glanvill* warns that one should be cautious of false and malicious claims for marriage purposes. The inequity of status between defendant and complainant could, according to *Glanvill*, not only ruin the reputation of the individuals involved but also that of their families and kinship group, as through the rape trial “the fair repute of their families would be shamefully blackened.” Rape allegations held widespread, communal implications.

The marriage clause, with the consent of the king and the families, could theoretically erase the rape. By reason of *uno caro*—when the husband and wife become one flesh through matrimony—the acceptance of marriage between the female complainant and male defendant turned the crime of rape into a consensual sexual encounter. If the marriage clause was not claimed, then the accused could undergo either a trial by ordeal (which was becoming increasingly less popular throughout the high Middle Ages) or opt for a trial jury. The lack of archival records on jurors’ deliberations leaves much speculation as to how jurors reached a verdict. Potentially, disproving the “accusations of the woman” relied on the reputations (sexual, social, economic, and moral among other factors) of both the complainant and the defendant. Speculatively, community policing in terms of the individual’s reputation and the assumed believability of the woman was a large factor contributing to the jury’s verdict.

The appeal process was to be initiated by the woman herself, not her male kin, for she was the victim of the crime because *alia iniuria corpori suo illata solet audiri*—the “injury [is] done to her body.” Rape was considered a physical crime only with no consideration of the mental trauma to the victim.<sup>12</sup> *Glanvill* emphasizes the corporality of the crime by using the word *cor-*

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**12** Of interest, felony proceedings did consider “intentionality” of the alleged offender, considering their “state of mind” both during and after the crime. See Kamali, *Felony and the Guilty Mind in Medieval England*.

*rupta*, defined as “the spoiled parts (of the body)” which are “injured.”<sup>13</sup> The damaged body belongs to the woman, as *Glanvill* writes *corruptam illam* in the feminine accusative singular. Additional definitions of *corrupta* include the “mutilated” or “marred” body, which underlines the physicality of the *viro vi oppressam*. Alternatively, *corrupta* can be defined as “immoral,” which demonstrates the complexity of *raptus* as both a sexual sin and a secular felony. In this reading, the immorality is not the actions of the man, but rather the woman is immoral due to her sexual defilement. We see the binary legal identities of the innocent victim and the culpable woman beginning to form. These legal identities are not necessarily the lived experiences of the female victims. The criminal courts told the women (through verdicts) which “identity” they ought to be: a victim of a crime or guilty of a crime. Such identities are entirely dependent on the physical injuries of the woman, which are visible proof of her non-consent. *Glanvill* implicitly suggests that the truly innocent victim did not consent to the rape, as was evident by the injuries done to her body. On the contrary, *Glanvill* indicates that the blame-worthy woman was scheming and possessed no physical injury to prove her malicious accusations. According to *Glanvill*, it was feared that false accusations of rape were made to trap good honest men into marriage. The lineage of attitudes and assumptions towards rape victims continued from *Glanvill* to *Bracton* and evolved into constructed binary identities of the “true victim” and the “lying woman.” This was dependent on the physical proof of (non-) consent.

### **Bracton**<sup>14</sup>

The legal treatise known as *Bracton*, composed within the first half of the thirteenth century, shifts focus to the rape of virgins.<sup>15</sup> This is explicit in the opening discussion of the appeal of rape, as *Bracton* begins with *appellum de raptus virginum*, or “appeal of the rape of virgins.” The treatise states the definition of the crime in very similar terms as *Glanvill*: “the rape of virgins [*raptus virginum*] is a certain crime accused by a woman to some man, by whom she says that she has been violently overwhelmed [*violenter oppres-*

<sup>13</sup> Lewis and Short, *A Latin Dictionary*, “cor-rumpo.”

<sup>14</sup> I have personally consulted London, LI, MS Hale 135 and compared it to Harvard Law School’s transcription and translation on *Bracton Online*.

<sup>15</sup> For contextual information see McSweeney, *Priests of the Law*, 1–3.

sam] against the peace of the lord king.”<sup>16</sup> Once again the crime is defined using force, or *violenter*, against the woman, as it was in *Glanvill*. *Opprimere* can be broadly defined as to “overpower,” “oppress,” or “molest,” but when coupled with *virginum* and *violenter*, *oppressam* is more accurately read as “rape.”<sup>17</sup> But unlike *Glanvill*, where *raptus* implied forced coitus with any woman, here *raptus* means exclusively the violent rape of virgins.

Next, *Bracton* describes the rationale for the punishment of the man who is convicted of raping a virgin: “the loss of members, that there be member for member, for when a virgin is [corrupted] [*corrumpitur*] she loses her member and therefore let her [seducer]<sup>18</sup> [*corruptor*] be punished in the parts in which he offended.”<sup>19</sup> *Corrumpere* means “to corrupt (morally or doctrinally),” or “to violate” or “harm.”<sup>20</sup> However, the contemporaneous late thirteenth-century philosophical text, *De secretis mulierum*, “Secrets of Women,” describes “corruption” as either the “emission of the [female] seed,” or “a wound in the skin of virginity,” suggesting that “corruption” is the loss of virginity, not moral corruption or harm.<sup>21</sup> It is important to note that *Bracton* states the *oppressam* of the virgin leads to her corruption. This perceived corruption could be her loss of virginity and thus deteriorated marriage market value, her *fama*, or her injured body, but either way it is the woman who is “damaged.”

Next, *Bracton* suggests the assumed causes of rape by its choice of punishment: “let him thus lose his eyes which gave him sight of the maiden’s beauty for which he coveted her. And let him lose as well [his] testicles which excited his hot lust.”<sup>22</sup> In taking away the rapist’s vision, *Bracton* connects the woman’s beauty with the cause of her own rape. The sight of a beautiful young virgin could cause men to become rapists. This is suggestive of the belief that rape is done spontaneously out of passion and lust, and it is not a crime of predetermined violence and domination.<sup>23</sup> As Samantha Katz

<sup>16</sup> *Bracton*, vol. 2, p. 414, ll. 27–29.

<sup>17</sup> DMLBS, “*opprimere*,” articles 4a, 6a, 7a.

<sup>18</sup> DMLBS, “*corruptor*,” article 1c.

<sup>19</sup> Translation adapted from *Bracton*, vol. 2, p. 414, ll. 29–31.

<sup>20</sup> DMLBS, “*corrumpere*,” articles 1a, 2a, 3a.

<sup>21</sup> Lemay, *Women’s Secrets*, 67.

<sup>22</sup> *Bracton*, vol. 2, p. 414–15, ll. 31–34, l. 1: “Oculos igitur amittat propter aspectum decoris quo virginem concupivit. Amittat etiam testiculos qui calorem stupri induxerunt.”

<sup>23</sup> Harris’s analysis of the thoughtful decision-making process to rape within

Seal notes, there is a “simulacrum of consent,” in that the woman’s beauty instigates the man’s seduction and that this all-consuming “male desire, once kindled by female beauty ... cannot be contained.”<sup>24</sup> According to *Bracton*, the man’s “passion of rape,”<sup>25</sup> or “hot lust” (*calorem stupri*), originates in the male testicles, and consequently, every man was susceptible to this all-consuming desire. This meant that “good” men were assumed to have been able to control this impulsive urge for coitus at the sight of a beautiful woman, as it was weaker, less worthy men who were not able to control their impulses and who would succumb to these urges. From the medieval perspective, this illustrates a distinct socio-economic class division in perceptions about “which type of men” rape. It also demonstrates the belief that a potential rapist’s body initiates the desire to rape which could lead to an internal struggle between the mind and body. Depending on the strength of mind to overcome the body’s “hot lust,” as suggested by *Bracton*, a man will or will not rape.

The punitive loss of testicles and vision was a unique punishment imposed on the rapists of the most vulnerable women, according to *Bracton*, while the forcible rape of all other women received a different punishment. *Bracton* states that all women, even concubines and sex workers, are worthy of legal recourse, but there is most definitely a hierarchy of victimhood:<sup>26</sup>

Punishment of this kind does not follow in the case of every woman, though she is oppressed by force [*vi opprimatur*], but some other severe punishment does follow, according as she is married or a widow living a respectable life, a nun or a matron, a recognized concubine or a prostitute plying

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Chaucer’s *Reeve’s Tale* provides us with another medieval perspective as to why men rape. Yet, even within this text Harris notes that John upholds “the myth that men are incapable of preventing themselves from raping when they are tempted by women’s intoxication, revealing clothing, or irresistible beauty,” thus reaffirming *Bracton*’s reasoning as to why men rape. The conflicting ideologies, that is *Bracton*’s assumed loss of control and Chaucer’s detailed passages of “thought and deliberation,” further emphasize the complex (and conflicting) medieval English understandings and ideas about rape victims, rapists, and (non-)consent. See Harris, *Obscene Pedagogies*, 49–50, 54, 59.

**24** Seal, “Chasing the Consent of Alice Chaucer,” 278.

**25** DMLBS, “calor,” article 1c; “stuprum,” article 1a.

**26** In general, common law grouped women together based on several factors beyond marital status, so although it is not surprising to see this type of categorization, it is still worthy of consideration since virginal rape appears to hold a unique place in appeal prosecutions (discussed in Chapter 3). See Seabourne, *Women in the Medieval Common Law*, 12–13.

her trade without discrimination of person, all of whom the king must protect for the preservation of his peace, though a like punishment will not be imposed for each.<sup>27</sup>

The forcible nature of the crime is restated, and if force was applied in the rape and the victim's socio-economic status and *fama* considered, then an appropriate punishment would be applied. The worthiest victim was the raped virgin, followed by nuns and widows (who must be living a respectable, chaste life), married women (who were sexually honest to their husbands), loyal concubines (who slept with only one man), and, lastly, the necessary sex workers. Although *Bracton* states that some other punishment is prescribed to men convicted of raping these holy or non-virginal women, the treatise does not indulge with any further information as to what the punishment is. Even though *Bracton* allowed all women to be victims of rape, there was a clear hierarchy of those who were considered worthy victims. The rationale for the victimhood hierarchy is simple: *virginitas et castitas restitui non possint*, or "virginity and chastity cannot be restored."<sup>28</sup> Virginity was key to the marriage market; there were real economic implications to the rape of virgins. Once gone, virginity could not be restored. The woman was considered forever changed. She was considered corrupted.

In very similar language and procedure to *Glanvill*, *Bracton* explains how the woman could initiate the appeal process and the prescribed proof she must show:

When thus a virgin has been corrupted [*virgo sic corrupta*] and oppressed [*oppressa*] against the peace of the lord king, she must go at once and while the deed is newly done, with the hue and cry [*clamore et huthesio*], to the neighbouring townships and there show the injury done to her [*iniuriam sibi illatam*] to men of good repute, the blood and her clothing stained with blood [*sanguinem et vestes suas sanguine tinctas*], and her torn garments [*vestium scissiones*]. And in the same way she ought to go to the reeve of the hundred, the king's serjeant, the coroners and the sheriff.<sup>29</sup>

The process requires that the woman has physical proof of non-consent in almost identical terms to *Glanvill*: physical bodily injury, blood, and bruising as well as physical signs of force and struggle, such as torn and stained garments. The immediacy of the hue and cry is a further legal requirement echoing *Glanvill*. The woman must not waste any time in telling good, trust-

<sup>27</sup> *Bracton*, vol. 2, p. 415, ll. 1–6.

<sup>28</sup> *Bracton*, vol. 2, p. 415, ll. 8–9.

<sup>29</sup> *Bracton*, vol. 2, p. 415, ll. 15–20.

worthy men of her rape or else it is suspicious that she waited to make it known.<sup>30</sup> If a woman had little physical proof of non-consent to the crime, the likelihood of her reporting the rape to all the men (the neighbouring men, the reeve of the hundred, the king's serjeant, the coroner, and the local sheriff) is significantly diminished, as her reputation could suffer immensely if her plea should fail in court, not to mention the threat of imprisonment and amercement from a failed appeal.

It was the duty of the local coroner to inspect the woman's body and record her accusation for *si raptus virginum* (where there is rape of virgins). First, the coroner had to determine *factum recens fuerit*—that the rape occurred recently “by certain indications.”<sup>31</sup> The *signa praesumptionem inducant*, or the “signs which lead to presumption” of rape, include if the woman diligently raised the hue and cry immediately after the crime, “or her garments are torn, or if not torn, stained with blood.”<sup>32</sup> Here we see the either/or construction of mental and physical non-consent. The immediacy of the hue and cry was verification of mental and verbal non-consent, and the torn and stained clothes were evidence of resistance and thus were used as confirmation of physical non-consent. However, there was still the expectation that the true victim of rape would have physical, bodily proof of their victimization, as *Bracton* states that the woman must “show the injury [*iniuriam*] done to her ... the blood and her clothing stained with blood.”<sup>33</sup> So, while acknowledging the possibility (and necessity) of mental and physical non-consent, *Bracton* upholds the paramount importance of physical proof of non-consent to initiate the appeal process. *Bracton* continues with the words of the woman's appeal by then offering a new definition of the crime of *raptus*: “The said B. [perpetrator] came with his force [*cum vi sua*] and wickedly [*nequiter*] and against the king's peace laid with her [*concubuit*]<sup>34</sup> and took [*abstulit*] from her, her maidenhood (or ‘virginity’) [*pucelagium suum sive virginitatem*] and kept her with him for so many nights (and let

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**30** Raising the hue and cry was not unique to rape cases, as it was included in other English felony laws. The “feminization” of the hue and cry has been noted by scholars as becoming an increasingly womanly activity in the fourteenth century. See Bennett, *Women in the Medieval English Countryside*, 26, 41; Sagui, “The Hue and Cry in Medieval English Towns,” 186–87.

**31** *Bracton*, vol. 2, p. 344–45, ll. 33–34, ll. 1–3.

**32** *Bracton*, vol. 2, p. 345, ll. 3–7: “et ruptum vestimentum, et si non ruptum, sanguine tamen intinctum.”

**33** *Bracton*, vol. 2, p. 415, ll. 17–19.

**34** DMLBS, “concombere,” article 1a.

her thus set out all the facts and the truth).<sup>35</sup> *Bracton* is now explicitly referring to rape and loss of virginity by the inclusion of the words *concubuit*, *abstulit*, and *virginitatem*. *Bracton's* inclusion of the adverb “wickedly” reinforces the assumed intent of the felony, indicating that this was not a crime of accident or “misadventure.”<sup>36</sup> However spontaneous it may be—due to the randomness of seeing beautiful virgins which initiates the “hot lust”—the ultimate choice to rape and abduct the woman was wickedly acted upon.

The use of force (*cum vi*) is once again stated, as the proof of violence must be evident to determine that the woman did not consent to the coitus. It is logical to presume that violence is indicative of resistance and that the application of force is used to overpower the victim. This suggests, according to *Bracton*, that the woman resisted the rape, and the physical injury was proof of her non-consent. This is the most direct definition of rape presented in both *Glanvill* and *Bracton*. The notion of theft—the stealing the maiden’s virginity by force—was crucial to the crime. However, *Bracton* also claims that she must have also been held prisoner (*detinuit*) for an extended period after the rape, *per tot noctes* (for so many nights). This is a shift from *Glanvill's* definition of the crime of *raptus*. Not only does *Bracton* separate the rape of women from the violent rape of virgins, but *raptus* also now includes abduction.

*Bracton* claims that the man could avoid the woman’s appeal entirely under certain “exceptions.”<sup>37</sup> The most obvious exception to the charges is *quia adhuc virgo est*—the woman is still a virgin. The female body was once again placed at the centre of the crime, as *Bracton* states: “in that case let the truth be proven by an examination of her body, made by four legal women sworn to tell the truth as to whether she is a virgin or corrupted.”<sup>38</sup> *Bracton* clearly states that *corrupta* is the opposite of *virgo*—corruption is the opposite of virginity. This is congruent with the definition of corruption in *De secretis mulierum* previously discussed. Here, corruption is apparently visibly evident to these “legal women who make an oath.” *Concubuit* leads to the visible *corruptio* of the woman, and if she is visibly corrupted, she is not a virgin.

<sup>35</sup> *Bracton*, vol. 2, p. 416, ll. 4–7.

<sup>36</sup> Kamali, *Felony and the Guilty Mind in Medieval England*, 50–59.

<sup>37</sup> *Bracton*, vol. 2, p. 416, ll. 13–14.

<sup>38</sup> *Bracton*, vol. 2, p. 416, ll. 18–20: “et quo casu probetur veritas per aspectum corporis, et per quatuor legales feminas iuratas de dicenda veritate utrum virgo sit vel corrupta.”

The inspection of the woman's body was done by other women, and this was a unique legal-medical scenario where men relied on the testimony of law-abiding women in medieval England's criminal courts. It is not surprising that these "legal women" were most often called on to examine the female body for loss of virginity and "the rupture of young children's genitals."<sup>39</sup> But we do not know exactly what these women inspected. They could have, perhaps, looked for ruptured genitals now associated with the breaking of the hymen, but there were numerous methods to determine virginity at this time, including inspecting "the size of the uterus ... whether it seemed open or constricted" as well as urine tests, fumigation tests, position and firmness of breasts, and "behavioural indicators."<sup>40</sup> *De secretis mulierum* states "On the Signs of Corruption of Virginity" that an enlarged vagina or urine tests with "flowers of a lily" demonstrate this corruption, while "shame, modesty, [and] fear" are "Signs of Chastity."<sup>41</sup> Sara Butler correctly warns that despite the popularity of urine tests, we should not assume their use in *Bracton* because the text does not mention it.<sup>42</sup> However, *Bracton* does not tell us anything about the process of inspecting the alleged rape victim. In a different context, on determining the validity of a pregnancy, *Bracton* states that *legales et discretas mulieres*—these "lawful and discreet women"—examine a woman *per ubera et per ventrem*—"by feeling her breasts and abdomen" to determine if she is pregnant.<sup>43</sup> Whatever it was they inspected, the testimony of these "legal women" determined what happened next: "if they say that she is a virgin [*virginem*], the appellee will depart quit of that appeal and the woman be placed in custody [*femina custodiatur*],"<sup>44</sup> meaning that she would be imprisoned for false appeal. Evidently, the testimony of the *legales feminas* chosen to inspect the body of the alleged rape victim was upheld as absolute law. If, however, the women determined that the maiden was corrupted (*corruptam*) then the all-male jury is tasked with determining whether the accused man was responsible for the corruption.<sup>45</sup> The woman's body, as the physical proof of her corruption, relied on the authority of other women, and it is arguable that this was the only time in criminal

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39 Kümper, "Learned Men and Skilful Matrons," 108.

40 Kelly, *Performing Virginity*, 1–38; Phillips, "The Breasts of Virgins," 1–19.

41 Lemay, *Women's Secrets*, 127–28.

42 Butler, "More than Mothers," 376.

43 *Bracton*, vol. 2, p. 202, ll. 3–6.

44 *Bracton*, vol. 2, p. 416, ll. 20–22.

45 *Bracton*, vol. 2, p. 416, ll. 22–24.

trials that female testimony held such legal implications and authority in the king's court.

Alternative exceptions available to the accused were to claim that he did indeed corrupt her (*corruptit*); that is, he took her virginity, but *de voluntate sua et non contra voluntatem*—he did so “of her own will and not against her will.”<sup>46</sup> The question of the woman's will, or *voluntatem*, is thus central to *Bracton's* definition of whether a crime of rape occurred. *Voluntas* in the ablative form translates to “voluntarily, freely, of one's own (free) will.”<sup>47</sup> This appears to offer a glimpse into what we now consider mental or verbal affirmative consent, in that the individual freely and under no coercive pressure agrees to the coitus. However, this is at odds with the expectation that the woman has proof of resistance through physical bodily injury to get this far in the legal process. The inconsistency— that a woman must have physical proof of non-consent (injury) to obtain a trial, but at the trial the man can state that he acted in accordance with the woman's will which (if freely given) should not result in physical injury—is demonstrating two contradictory consent models in *Bracton*. The treatise acknowledges that a woman can have two different types of (non-)consent: mental consent through her *voluntatem* and physical non-consent through her bodily injury. In turn, physical consent was evident through the absence of bodily injury.

If the defendant pleaded that *voluntatem* was given, then *Bracton* concludes that the woman now accuses the man of rape due to “hatred of another woman whom he has as his concubine, or whom he has married, and at the instigation of one of her kinsmen.”<sup>48</sup> The male defendant's claim of the woman's consent clearly held a much higher degree of truth than the accusations of non-consent made by the woman herself. The maliciously false appeal of a woman made to disgrace an honest man out of sexual jealousy and at the provocation of her family is explicitly stated. As a legal treatise with wide circulation, this was devastatingly suspicious of women's accusations of rape. This was not just rhetoric, but rather a legal reality which women faced in the courts.<sup>49</sup> Secular lawmakers were fearful of women's fake rape claims, and when coupled with the belief that women could be nat-

<sup>46</sup> *Bracton*, vol. 2, p. 416, ll. 26–30.

<sup>47</sup> DMLBS, “voluntas,” article 1d.

<sup>48</sup> *Bracton*, vol. 2, p. 416, ll. 30–32.

<sup>49</sup> The case of Isabella de Chadeston (1275) is a prime example of an assumed malicious appeal made by a jealous woman. See TNA, C54/93 m17. Translation available in *Calendar of Close Rolls, Edward I, 1272–1279*, 262.

urally vindictive, simply claiming unfounded rape accusations was a viable avenue for the accused to be acquitted.

In group rape cases,<sup>50</sup> the primary perpetrator of virginal rape ought to “lose their member” and “their abettors suffer severe corporal punishment but without loss of life or members.”<sup>51</sup> The only way a convicted rapist of a virgin could be excused from this punishment was if the woman wished to marry the man who raped her. *Bracton* is restating the marriage clause in *Glanvill*: “unless, before judgement rendered, the woman thus corrupted [*femina sic corrupta*] claims him for her husband, for this lies wholly in her discretion, not in that of the man.”<sup>52</sup> As in *Glanvill*, the woman has the ability to claim her rapist as her husband and thus legally erase the crime of rape, as there was no punishment prescribed once this marriage clause was claimed. This figurative erasure of rape transformed it into premarital consensual coitus by way of the marriage clause.

If the man convicted of rape could, after judgement, choose to marry the woman, *Bracton* echoes *Glanvill* in warning of the evil that would come: “for if this were in the man’s will [*voluntate viri*] this wrongful act [*inconueniens*]<sup>53</sup> would follow, namely, that a villein or a common person [*ignobilem*] might bring perpetual shame [*perpetuo foedare*]<sup>54</sup> upon a noblewoman [*mulierem nobilem*] and good family by a single act of defilement [*pollutionis*] and take her to wife to the disgrace [*opprobrium*] of her family.”<sup>55</sup> The *pollutio* is “defilement caused by physical or moral contamination,” which suggests that the woman has been physically or morally “contaminated” or polluted through the act of rape.<sup>56</sup> As stated in the analysis of *Glanvill*, *foedare* implies pollution, corruption, and disfigurement.<sup>57</sup> The connotations of impurity through rape are connected with physical bodily disfigurement which underpin the notion of physical proof of resistance and non-consent. The language used to describe a rape victim as corrupted and contaminated is

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**50** I have written elsewhere on the difference between “group rape” and “gang rape.” See Cooper, “Let’s Bring the Boys In”; Cooper, “Re-Reading Medieval English Cases of *Raptus*.”

**51** *Bracton*, vol. 2, p. 415, ll. 10–11.

**52** *Bracton*, vol. 2, p. 417, ll. 10–12.

**53** DMLBS, “inconueniens,” article 2b.

**54** DMLBS, “foedare,” article 4a.

**55** Translation adapted from *Bracton*, vol. 2, p. 417, ll. 12–15.

**56** DMLBS, “pollutio,” article 2a.

**57** DMLBS, “foedare,” articles 1a, 1b, 2a.

reinforcing the idea that the victim is the one who should feel shame, for she is the one who is now polluted, disgraced, disfigured, and defiled.

The explicit fear of sexual defilement or pollution of noblewomen by unworthy, lower-class men is once again stated in *Bracton*. The marriage of vastly different social classes was not acceptable in thirteenth-century England, and it imputed a bad reputation not only on the woman but on her entire family. This is an important point: the damaged sexual reputation of the maiden—the young and presumably unmarried daughter of the family—could bring much shame to the entire family group. By including the marriage clause at the sole discretion of the woman, *Bracton* protected noblewomen from rape by opportunistic men seeking social mobility. This implicitly suggests that if men were legally able to choose to marry the women they raped, then rape would be a much more common crime. The narrative logic here is founded on the belief that all men are potential rapists due to their innate “hot lust.” *Bracton* even switches the role of nobility in the following lines: if *vir raptor sit nobilis*, a nobleman rapes an *ignobilis* (a peasant woman), the law remains the same, as the choice of marriage always belongs to the woman.

If, however, the woman decides to continue with the punitive mutilation, *Bracton* describes the appeal process of those who were accessories to the crime, with the careful distinction that one man can be culpable of the rape of a virgin—that is “*corruptio*”—but “many men can be accused of lying [*de concubitu*] with her after”<sup>58</sup> her virginity has been stolen. *Corruptio* is the opposite of virginity, thus once the corruption occurs, the other men are guilty of *concubitus* (having laid with her) but not the corruption of her virginal status. *Bracton* then outlines *de appellatis de forcia*, or the appeal of those accessories to the crime of rape:

The said A. [woman] appeals C. [secondary offender] for that on the same day and the same year etc. on which the aforesaid B [primary offender] [etc.] and at the same hour that the said B. took her maidenhood [*abstulit pucelagium*], the said C. was an accessory [*in forcia*], that is, he held her [*tenuit eam*] while the said B. took her maidenhood [*abstulit ei pucelagium*] (or “he lay [*concubuit*] with her after [*cum ea postquam*] etc.” or aided [*axulio*] in some other way). And that he did this wickedly [*nequiter*] and in felony [*in feloniam*] she offers to prove [*offert probare*] against him as the court may award. The appellee may here be set free by the county [or convicted] though the principal is convicted.<sup>59</sup>

<sup>58</sup> *Bracton*, vol. 2, p. 417, ll. 25–26.

<sup>59</sup> *Bracton*, vol. 2, p. 417–18, ll. 33–34, ll. 1–5.

Presumably the proof is the same bodily proof of non-consent required to make the original appeal against the primary offender. *Bracton* is not concerned about the exact nature of how these people aided in the rape but states that their involvement in any way enables the woman to appeal them directly. *Bracton* notes that the construction of appeals requires the primary offender to be listed first, followed by the “accessory” to the crime, and, finally, by the “instigator.” *Bracton* claims that all these actors have a part to play in the felony:

Giving assistance and instigating are (so to speak) the accompaniments of the principal deed and are so conjoined and connected with it that they are not separable ... for the wound, the assistance and the instigation form a single deed: there would be no wound had there been no assistance, and neither wound nor assistance without the instigation.<sup>60</sup>

This is not unique to rape, as the appeal of other felonies distinguish primary culprits and accomplices, but what is of note is how historians thus far have overlooked accomplices in rape appeals.<sup>61</sup> The collective nature of the sexual violence (what I call “group rape”) is extremely understudied among *raptus* scholars, but *Bracton* makes it clear that even those who are charged as accessories to the crime are still liable for felony rape.<sup>62</sup>

At this point in the treatise there is an *addicio*, as *Bracton* explains the extent of punitive mutilation in “ancient times”:

by the law of the Romans, the Franks and the English, even his horse shall to his ignominy be put to shame upon its scrotum and its tail, which shall be cut off as close as possible to the buttocks. If he has a dog with him, a greyhound or some other, it shall be put to shame in the same way; if a hawk, let it lose its beak, its claws and its tail.<sup>63</sup>

The mutilation of the animals indicates that they were considered accomplices to the crime, which leads to the assumption that the animals were used to aid in “hunting” the woman.<sup>64</sup> *Bracton*’s description of the blatant

<sup>60</sup> *Bracton*, vol. 2, p. 392, ll. 11–12, 16–21.

<sup>61</sup> The “other men” involved in rape appeals are briefly mentioned in Dunn, *Stolen Women*, 62–63 and Gravdal, *Ravishing Maidens*, 125–26. They are not mentioned in Saunders, *Rape and Ravishment*, nor Robertson and Rose, eds., *Representing Rape*. Harris discusses homosociality in literary depictions of rape in *Obscene Pedagogies*, 26–66.

<sup>62</sup> Cooper, “Re-Reading Medieval English Cases of *Raptus*.”

<sup>63</sup> *Bracton*, vol. 2, p. 418, ll. 15–19.

<sup>64</sup> Thank you, Sara Butler, for pointing this out to me.

de-masculinization of the rapist and his animals paints a vivid image of the humiliating and public punishment of men convicted of virginal rape. By taking away the man's genitalia, the rapist was unarmed and his masculinity (and that of his animals) was further degraded. The crime of rape was defined by the physical bodily injury of the woman and the punishment was defined in the physical bodily mutilation of the man (and his horse, dog, or hawk). The anonymous legal commentary *Placita Corone*, composed in 1274–1275, states that a woman married to a convicted rapist may “claim her husband’s testicles as her own property” and thus save him from genital mutilation, and instead he would only be blinded.<sup>65</sup> While the urge to rape derives in the testicle’s “hot lust,” the lust originates from the sight of beautiful women. So, while the rapist’s eyes and testicles could betray his inner reason, it was believed that simply blinding the rapist while leaving his testicles intact would ensure that he will never rape again while still being able to perform the conjugal debt owed to his wife.

*Bracton* further complicates the expectation of physical proof of non-consent, as the so-called ancient laws claimed that even if the woman was a *meretrix* (a sex worker), she was still an equal victim, because *nequitia eius reclamando consentire noluit*, “by protesting against his wickedness she refused to consent.” *Consentire*, or “to consent, agree, [or] comply”<sup>66</sup> is once again central to *Bracton*’s determination of licit or illicit coitus. The woman’s non-consent is evident by her *reclamando*—her crying out in protest.<sup>67</sup> The verbal non-consent, which was understood as as indicative of the woman’s mental non-consent, was apparently all that was needed to prove the rape of sex-workers in these “ancient times,” and yet *Bracton* states earlier that in thirteenth-century England, women must have bleeding, bruising, and torn or stained clothing. While acknowledging the existence of mental (and verbal) non-consent, *Bracton* stresses the importance of physical proof of non-consent and thus undermines the legitimacy of mental non-consent in medieval England’s criminal courts.

Overall, the legal age of *Bracton* generally follows *Glanvill*, wherein there is an emphasis on the physical injuries from the rape. The physical harm (*iniuria et violentia*) done to the woman’s body (*corporis sui illata*) is not only justification for her right to appeal rape,<sup>68</sup> but it is the necessary

<sup>65</sup> Kaye, ed., *Placita Corone*, 9.

<sup>66</sup> DMLBS, “consentire,” article 1a.

<sup>67</sup> DMLBS, “reclamare,” articles 1a and 2a.

<sup>68</sup> *Bracton*, vol. 2, p. 419, l. 26.

proof to show that rape occurred. Despite the acknowledgment of mental non-consent to rape, *Bracton* reiterates the need for proof of resistance, as suggested in *Glanvill*, which ensures that physical non-consent was legally paramount.

## The First Statute of Westminster

Enacted in 1275, the Statute of Westminster I was the first royal statute pertaining to rape and/or abduction, and it was one of King Edward I's first legislative acts. *Glanvill* and *Bracton* were not statutes. The treatises were written commentaries on the laws practiced, and, unlike the statutes, they were not officially approved by the king. Most relevant here is chapter thirteen, "Ravishment of Women," in which the statute states: "And The King prohibits that none do ravish [*ravie*], nor take away by force [*ne prenge a force*], any Maiden [*damoysele*] within Age, neither by her own consent [*grē*] nor without; nor any Wife or Maiden of full age, nor any other Woman, against her Will."<sup>69</sup> The use of *damoysele*, or maiden, is likely referring to an unmarried virgin. The use of force is once again stated in the definition of the crime, as in *Glanvill* and *Bracton*. However, unlike *Glanvill* and *Bracton*, where *raptus* was used to mean forced coitus, *raptus* is more ambiguous under Westminster I.

While the definition of *raptus* under Westminster I was (and still is) a debated point among legal scholars, that is not of concern here.<sup>70</sup> In the first clause of chapter thirteen, there is evidence of the constructed legal identity of a culpable woman, as it states that "the woman may be willing to participate."<sup>71</sup> Previous definitions of *raptus* included *contra voluntatem* (against her will), but here the crime might not be entirely against her will. The fact that the crime still occurred even with the woman's mental and verbal consent shows a shift in the legal understanding of the crime, in that her consent was becoming irrelevant to the courts. J. B. Post argues that this first

<sup>69</sup> Translation from Luders, ed., "Statute of Westminster the First," in *The Statutes of the Realm*, vol. 1, chap. 13, p. 29.

<sup>70</sup> See Cannon, "Raptus in the Champaigne Release," 80; Carter, *Rape in Medieval England*, 46; Coke, *The Second Part of the Institutes of the Laws of England*, 180; Dunn, *Stolen Women*, 30; Kelly, "Statute of Rapes and Alleged Ravishers of Wives," 365–66, 383, 390; Pollock and Maitland, *The History of English Law*, vol. 2, pp. 490–91; Post, "Ravishment of Women and the Statutes of Westminster," 150–64; Walker, "Wrongdoing and Compensation," 286.

<sup>71</sup> Saunders, "A Matter of Consent," 109.

clause effectively makes the consent of minors irrelevant to the fulfilment of the crime, and, as such, he claims that “this may be the first secular prohibition of coition with a minor.”<sup>72</sup> The definition of a minor in medieval England was fluid and differed for boys and girls, ranging from young children to the age of about twelve or fourteen, as suggested by ecclesiastical doctrine. Gwen Seabourne discusses the various considerations of minor age in England’s common law, and she notes that there was a debate about the “capacity to endure penetration and capacity to conceive.” Referencing the treatise *Fleta*, Seabourne indicates that “below 9 ½ was too young for a girl” to perform marital consummation.<sup>73</sup> This first clause, which prohibits sex with minors regardless of their consent, indicates the fallibility of a “consent only” model to determining “what is pleasurable, healthy sex and what constitutes unhealthy, possibly violative sex.”<sup>74</sup> This signals that medieval English laws recognized that consent was not the only thing that mattered when determining licit or illicit coitus, as there could be limitations to one’s ability and capacity to give affirmative consent.

The French verb *ravir* (to ravish) is derived from the Latin verb *rapere*, meaning primarily “to seize and carry off.” Although different from early medieval interpretations of *raptus*, both *ravie* and *raptus* originate from *rapere*, defined as “to seize and carry off; woman carried off for sexual purpose.” However, a third meaning of *rapere* is “to bring to ecstasy,” which further emphasizes medieval suspicions of the woman’s hidden sexual desires within the very word used to define the sexual assault.<sup>75</sup> That is, a woman may have physical enjoyment from the rape despite her mental trauma and non-consent. The statute claims that the crime of being *ravie* is applicable to a maiden (virgin), wife, damsel of full age (that is, available for marriage, likely older than fourteen), or any other woman who is ravished against her will. These first two clauses ensure that a minor cannot give sexual consent, and when a woman of marriageable age does not give consent, it is still a crime. The importance of “will” and age are crucial to the definition of the crime of *ravie* under Westminster I. Here, there is no indication that this

**72** Post, “Ravishment of Women and the Statutes of Westminster,” 150.

**73** Seabourne, *Women in the Medieval Common Law*, 31n100. Cites *Fleta*, bk. 5, chap. 27. Piercy offers an alternative age for consent stating that it was twelve years old for girls and fourteen years old for boys. See Piercy, *Resistance to Love*, 10.

**74** Akard, “Unequal Power and Sexual Consent,” 291.

**75** DMLBS, “rapere” articles 1a, 1b.

is dependent on physical proof of non-consent, but rather the verbal and mental non-consent—the violated will of the victim—is of primary concern.

The statute continues:

and if any do, at his Suit that will sue within Forty Days, the King shall do common right; and if none commence his Suit within Forty Days, the King shall sue; and such as be found culpable, shall have Two Years Imprisonment, and after shall fine at the King's Pleasure; and if they have not whereof they shall be punished by longer Imprisonment, according as the Trespass requireth.<sup>76</sup>

If the women did not appeal, the king could still indict. Speculatively, this could show compassion and protection for women who were afraid of the repercussions of appealing. The social stigma of openly claiming to be a survivor of rape and the potential loss of assumed value on the marriage market are just a few of the deterrents (not to mention the psychological trauma of being inspected by the coroner and of bringing a rapist to trial). These factors among others, such as lack of physical injury or a missed menstrual cycle that may lead to suspicion of pregnancy from rape, could all worked to deter women from reporting rapes, as is evident in the lack of rape appeals in coroners' rolls during the fourteenth century.<sup>77</sup> It is in this way that Westminster I can be interpreted as protecting those women who did not want to publicly go to trial, as it still brought them some sort of justice through the king's suit.

The time limit of forty days to appeal was considerably shorter than that for other felonies, such as homicide, which allowed an appeal to be made anytime within the year of the crime. Sir Matthew Hale, a chief justice in the court of the King's Bench in the late seventeenth century, commented that the forty-day rule was a result of the suspicion that if the woman delayed in bringing the appeal forward, "it carries a presumption that her suit is but malicious and feigned."<sup>78</sup> The forty-day rule could also be pragmatic, in the sense that the woman must still show trusted men the physical proof of non-consent (i.e., her physical bodily injuries and any torn or blood-stained clothing). If she waited any longer than forty days, proof of the crime could disappear, as the wounds and bruises might be healed. However, if the woman consented to the *ravie* and wished to marry the accused man, this clause in the statute eclipsed her consent, as the man could still be indicted

<sup>76</sup> "Statute of Westminster the First," chap. 13, p. 29.

<sup>77</sup> Hanawalt, "Women Before the Law," 182.

<sup>78</sup> Hale, *The History of the Pleas of the Crown*, vol. 1, p. 632.

and tried at the king's suit. This effectively made the woman's consent irrelevant if the king's suit proceeded.

The allowance of the king's indictment gave the crown unprecedented legal power to interfere in the marriage clause. Since the legal ages of *Glanvill* and *Bracton*, the use of marriage as a theoretical erasure of rape was a legal option available to women. Westminster I took that away through the king's indictment, which speculatively suggests—as supported by Frederick Pollock and Frederic William Maitland—that “an appeal of rape was not unfrequently the prelude to a marriage.”<sup>79</sup> Marriage was used as concord between plaintiffs and defendants, and it could be the result of scheming couples or it could be the tragic ending for women who failed to properly appeal and were left with few other options. There were many reasons cases failed, including vagueness of detail, mixed up dates, if the woman did not remember “the door by which her assailant entered, or which member the rape of her virginity had ruptured,” or if a woman was “raped on the road between two named vills [she] had the strict words of the statute cited against her, for failing to specify a single vill.”<sup>80</sup> Although there is evidence that some couples used the marriage clause to form their own marriages without parental consent, there is equally evidence of the opposite in the plea rolls. A woman could have been left in the extremely difficult position of having her appeal fail, being fined by the courts, and potentially having to endure a diminished reputation while facing the threat of imprisonment of one year for false appeal, and her only option out was to marry the very man that raped her.

Following Westminster I, Edward I published the Office of the Coroner sometime between 1275 and 1276. Here the duties of the coroner in the appeal of rape are outlined:

Further, if any be appealed of rape [*raptu*], he must be attached, if the appeal be fresh, and if they see apparent sign of truth [*signum veritatis*] by effusion of blood [*ampnum sanguinolentum*], or an open Cry made [*vel hutesium levatum*]; and such shall be attached by four or six pledges, if they can find them. If the appeal were without cry [*sine hutesio*], or without any manifest sign or token [*sine signo manifesto*], two pledges shall be sufficient.<sup>81</sup>

**79** Pollock and Maitland, *The History of the English Law*, 491.

**80** Post, “Ravishment of Women and the Statutes of Westminster,” 155.

**81** Transcription and translation from Kelly, “Statute of Rapes and Alleged Ravishers of Wives,” 367. See also Luders, ed., “The Office of the Coroner,” in *The Statutes of the Realm*, vol. 1, p. 41.

The physical bodily injury of the woman—the effusion of the blood—is here explicitly connected to the truth that the crime occurred and, in turn, proof of non-consent. Yet the “effusion of blood, *or* an open Cry made” clearly indicates that non-consent was either physical (through bodily injury) *or* verbal and thus mental non-consent (through crying out in protest). The expectation of physical proof of non-consent is following *Glanvill* and *Bracton*, and thus during the legal era of Westminster I, the binary concept of the truly innocent victim (with bodily injury) and the culpable blame-worthy woman (without bodily injury) is once again upheld. Notably, only two pledges were needed if the woman did not make her accusation known right away, if she did not properly raise the hue and cry, or if there were minimal “signs” of truth—that is bodily injury.

Overall, the legal age of Westminster I shows a greater concern for mental non-consent than *Glanvill* and *Bracton*, particularly with minors, and yet the Office of the Coroner indicates that physical bodily proof of non-consent was still legally important. The two consent models were put in opposition to one another: the woman can show either effusion of blood *or* cry out in protest. The binary construction of mental and physical (non-)consent—either this or that, but not both—demonstrates that the mind and body of rape victims can apparently be in conflict.

## The Second Statute of Westminster

Westminster I was evidently considered insufficient, as it was quickly replaced by the Statute of Westminster II just ten years later in 1285. Chapter thirty-four of Westminster II, “Judgement of Life and Member for Rape,” is of concern here.<sup>82</sup> The statute states, in part:

[A1] It is provided that if a man from henceforth do ravish [*ravist*] a woman – married, maid, or other – where she did not [agree] [*assentue*], neither before [*ne avaunt*] nor after [*ne apres*], he shall have judgement of life and of member. [A2] And likewise where a man ravisheth [*ravist*] a woman – married lady, damosel, or other – with force [*a force*], although she [agree] after [*assente apres*], he shall have such judgement as before is said, if he be attainted at the king’s suit, and there the king shall have the suit.<sup>83</sup>

<sup>82</sup> For the subsequent discussion, I follow the designation of sections of the statute as suggested by Henry Ansgar Kelly, “Statute of Rapes and Alleged Ravishers of Wives,” 367.

<sup>83</sup> Transcription and translation from Kelly, “Statute of Rapes and Alleged Ravishers

The first clause defines the victim broadly as any woman, virgin, maiden, or wife. However, the statute's inclusion of her non-consent either before or after the time of the crime is a new addition which works to make the temporality of consent legally important. This enabled the woman to change her mind about her consent. For example, if a woman consented to a fictitious abduction but under family pressure she was forced to publicly declare non-consent after the attack, then the man was still criminally liable even though he may have acted under the pretenses that she was a willing participant. This effectively erases the woman's consent to marriage, as indicated in clause A2, as the king could still indict the man and if he were found guilty, he could be punished with the loss of life or member. By disregarding the woman's consent, her male kin could indict, and thus they were, according to Post, "allowed to override her own [wishes], despite her nominal status as victim, and the time-honoured concord by marriage was removed."<sup>84</sup> However, contrary to Post's argument, the marriage clause was not entirely obliterated.

The anonymously authored, late-thirteenth-century legal treatise *Britton* is useful to historians in understanding how people at the time interpreted the new statute. *Britton* explains that in the crime of *rape*, the laws were applicable to any woman *quele qe ele soit pucele ou autre* (whether she be a virgin or not) who experienced violence (*de violence*) on her body.<sup>85</sup> *Britton* repeated that the crime was a felony regardless of "the suit of the woman by appeal of felony, or at our suit."<sup>86</sup> Men convicted of rape were, according to *Britton*, prescribed the same punitive measures as men convicted of homicide: the death penalty. The punishment was applied to all men convicted of rape, according to *Britton*, "whether the woman have [agreed] [*assentue*] after commission of the felony or not, as is contained in our Statutes of Westminster [*nos estatutz de Westmoster*]."<sup>87</sup> The apparent cohesion between the first and second statute is highlighted by the use of the plural *estatutz*, and it was justified by the continued irrelevance of the woman's consent. *Britton* claims that regardless of whether the woman agrees to the rape after the crime, it is still an indictable felony.

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of Wives," 369. Kelly translates *assentue* as "consent." See also Luders, ed., "The Statute of Westminster Sec.," in *The Statutes of the Realm*, vol. 1, chap. 34, p. 87.

**84** Post, "Ravishment of Women and the Statutes of Westminster," 158.

**85** *Britton*, vol. 1, bk. 1, chap. 15, p. 55.

**86** *Britton*, vol. 1, bk. 1, chap. 15, p. 55.

**87** *Britton*, vol. 1, bk. 1, chap. 15, p. 55. Nicholas translated *assentue* as "consent."

The other major legal treatise known as *Fleta*—written in Latin by an anonymous author around 1290 and heavily influenced by *Bracton*—also emphasizes physical violence in stating *de raptu et violentia copori suo illata* (about *raptus* and violence done to her body).<sup>88</sup> Although *raptus* is still ambiguous here, the heavy influence of *Bracton* and the reiteration of only two appeals married women can make strongly indicates that *raptus* is referring to forced coitus. This analysis of *Britton* and *Fleta* allows various assumptions to be made about medieval men in the legal profession and their interpretations of rape and non-consent. Medieval lawmakers and legal professionals were considering the temporality of non-consent and the legal implications of verbal non-consent after the fact, and yet the treatises are still reiterating that rape is a crime of violence on the woman’s body. Thus, they are upholding the expectation of physical proof of non-consent. Even if physical non-consent was evident immediately after rape, the possibility of changing mental non-consent to consent sometime after the crime was clearly of concern, and the treatises claim that this unsettledness of when and what type of consent occurred was largely irrelevant to the legal prosecution under Westminster II. The statute imposed capital punishment if the man was convicted at the king’s suit, regardless of whether the woman consented before, during, or after the alleged crime.

## The Statute of Rapes

Westminster II gradually eroded the legal importance of the woman’s (non-) consent in favour of her kin’s right to appeal. At the same time, the entire process of appeal was generally in decline in English common law, which came to favour indictments. The legal age of Westminster II lasted nearly one hundred years from 1285 until 1382, when it was replaced by the Statute of Rapes. In this new age, the woman’s legal right to appeal her own rape was taken away from her. Instead, this right was given to her male next of kin—primarily her father or husband. This statute protected the patriarchal wealth of the family by eradicating the marriage clause and legally treating “eloping couples as dead, in order to maintain the integrity of family estates.”<sup>89</sup> Unsurprisingly, this piece of royal legislation came to fruition from the petitions of one angry father, Sir Thomas West, whose daughter Eleanor forged her own independent marriage using *raptus*. It is because of

<sup>88</sup> *Fleta*, trans. Selden, bk. 1, chap. 35.

<sup>89</sup> Post, “Ravishment of Women and the Statutes of Westminster,” 160.

this father's wrath that the new legal age of *raptus* emerged, and thus it is a reminder of the importance of the social community to the legal infrastructure of medieval England.

The Statute of Rapes was initiated with a petition made in the summer of 1382 by Sir Thomas West to John of Gaunt, a royal magnate. This petition includes the retelling of the abduction of his daughter, Eleanor, by Nicholas Clifton. This is the first of two petitions made by West, and it reads:

To the most honourable and dread lord the king of Castile and Leon, duke of Lancaster, Thomas West and Alice his wife humbly pray, that whereas Nicholas Clifton was lately with the retinue of the said Thomas on the last voyage to France and Brittany; and then the said Nicholas was familiar with the said Thomas for some time, until the Sunday after the feast of the translation of Saint Thomas [7 July] last past, on which day he came to the said Alice at her manor of Testwood in the county of Southampton, to ride with the said Alice to a certain place; and upon this the aforesaid Alice, with her son Thomas and her daughter Eleanor and others of their meinie, went towards this same place, by abetment and counsel of the said Nicholas, the said Alice having faith in him; and the said Nicholas led the said Alice to a great wood in the New Forest, where the said Nicholas, who was armed, had several other men at arms and archers by his ordinance and arrangement [*makement*] in ambush with the intention of ravishing [*ravyser*] the said Eleanor; and he went and approached the said ambush, taking them with him, and they made assault upon the said Alice and Eleanor and their meinie with drawn swords, bows and arrows drawn back to the ear, and ravished the said Eleanor, with most evil affray to the said Alice and her company, who thought that the great and treacherous insurrection had been renewed; from which affray the said Alice has taken such illness that it is likely to be the cause of her death; for which they pray remedy.<sup>90</sup>

The petition is focused on the harm done to Alice West, the wife of Sir Thomas, more so than the abduction of his daughter Eleanor. Nicholas Clifton was known to the West family, as he was in the retinue of Thomas West. On August 19, 1382, Thomas received a warrant to arrest Nicholas and his eight accomplices, who were all named, and the goods that were seized during Eleanor's "ravishment" were listed as worth £45.<sup>91</sup> The arrest was based explicitly on the robbery of goods taken, described in the gaol

**90** Translation from Post, "Sir Thomas West and the Statute of Rapes 1382," 25–26. I have viewed both the French translation TNA, PRO31/7/109, and the original Latin petition at TNA, Special Collections: Ancient Petitions SC8/147, no. 7347. The French *ravyser* [*ravisseur*] is the basis of the translation for Post. The Latin petition uses *r[ap]u[er]unt*.

**91** *Calendar of Patent Rolls, Richard II*, vol. 2, p. 197, m. 26d.

delivery roll as *cepit et abduxit* (seized and abducted). Eleanor's name is not mentioned, nor is the term *raptus*.<sup>92</sup> These goods are listed in the *Calendar of Patent Rolls*, and the abduction of Eleanor is mentioned only as an *additio*:

Commission to Thomas West, Ivo Fitz Waryn, John Dauteseye, Thomas Blount the elder, Thomas Blount the younger and John Butusthron to arrest and deliver to the gaol of Winchester Nicholas Clyfton, Philip Oldefrende, Richard Attefelde, servant of Nicholas Pauncefot, John Hobeldod, Roger Bordeaux of London, tailor, John Kelfeld, John Skypton, Goucelyn, servant of Nicholas Clyfton, and William Parkere, who lately rose in insurrection with a great company at Lynhurst, co. Southampton, assaulted Alice the wife of Thomas West, knight, Thomas their son and Eleanor their daughter, and others, at Mallewod in the New Forest, and robbed them of a horse, value 19*l.*, a saddle, value 60*s.*, a silver-gilt girdle, value 60*s.*, pearls and other precious stones, value 13*l.* 6*s.* 8*d.*, and linen and woollen clothes, value 6*l.* 13*s.* 4*d.*, in addition to which Nicholas Clyfton ravished Eleanor.<sup>93</sup>

Fictitious abductions of wealthy women were not uncommon, as wealthy daughters were rarely given their choice in marital partner, and thus the *raptus* marriage clause was an attractive and legally binding alternative.<sup>94</sup> The Statute of Rapes was passed during the next parliament session, in October of 1382, and although it does not specifically name the case of Eleanor West, scholars believe that it undoubtedly was passed because of her elopement and her father's petition. The statute states:

Against the Offenders and Ravishers [*malefactores & raptores*] of Ladies, and the Daughters of the Noblemen, and other Women, in every Part of the said Realm, in these Days offending more violently [*violencius*], and much more than they were wont; It is ordained and stablished, That wheresoever and whensoever Ladies, Daughters, and other Women aforesaid be ravished [*rapiant*], and after such Rape [*et post hic raptum*] do consent [*consenserint*] to such Ravishers [*Raptorib3*], that as well the Ravishers [*Raptores*], as they that be ravished [*quam rapte*], and every of them, be from thenceforth disabled, and by the same Deed be unable to have or challenge all Inheritance, Dower, or Joint Feoffment after the Death of their Husbands and Ancestors; and that incontinently in this Case the next of the Blood of those Ravishers [*sanguine eodem Rapienciū*], or of them that be ravished, to whom such Inheritance, Dower, or Joint Feoffment ought to revert, remain, or fall after the Death of the Ravisher [*repientis*], or of her that is so ravished [*rapte*],

<sup>92</sup> TNA, JUST3/174 m1d.

<sup>93</sup> *CPR, Richard II*, vol. 2, p. 197.

<sup>94</sup> Bellamy, *Crime and Public Order*, 58; Pope and McSheffrey, "Ravishment, Legal Narratives, and Chivalric Culture in Fifteenth-Century England," 818–36.

shall have Title immediately, that is to say, after the Rape [*post raptū*], to enter upon the Ravisher, or her that is ravished [*raptam*], and their Assigns, and Land-Tenants in the same Inheritance, Dower, or Join-Feoffment, and the same to hold in State of Inheritance; and that the Husbands of such Women, if they have Husbands, or if they have no Husbands in Life, that then the Fathers or other next of their Blood, have from henceforth the Suit to pursue, and may sue against the same Offenders and Ravishers [*malefactores & raptores*] in this Behalf, and to have them thereof convict of Life, and of Member, although the same Women after such Rape do consent to the said Ravishers [*mulieres post hujusmodi raptum decis raptoribz consenserint de vita & membro convincendi*]. And further it is accorded, That the Defendant in this Case shall not be received to wage Battle, but that the Truth of the Matter be thereof tried by Inquisition of the Country. Saving always to our Lord the King, and to other Lords of the said Realm, all their Escheats of the said Ravishers, if peradventure they be thereof convict.<sup>95</sup>

The statute was applicable to all women by its inclusion of damsels, daughters, and wives. The patriarchal control of women was greatly extended in this statute by effectively taking away women's economic independence and thus making the marriage clause ever more difficult. This was the likely intent and focus of Thomas West's first petition, as it was not the unwilling abduction of Eleanor that was of primary concern, but rather the violation of her guardian—her mother—and her master—her father.<sup>96</sup> The legal ability to bring an appeal forward—which in previous legal ages was exclusively the right of the woman—was now entirely the right of the woman's male kin. The parliament roll states the reason for the new statute in the opening clause, where it claims that many ravishers were not facing judicial punishment of life and member because women “after such Rape [*et post hic raptum*] do consent [*consenserint*].” Shannon McSheffrey and Julia Pope argue that the “sequential nature of the consent” is at the heart of this statute, as the previous Westminster II only allowed for an indictment if the woman consented after the crime, but this new statute granted the right to appeal to male kin if the woman consented after.<sup>97</sup> Suzanne Edwards agrees that the statute was concerned that women would consent after the alleged crime

<sup>95</sup> Transcription and translation from Luders, ed., “6 Rich. II, Stat. I,” in *The Statutes of the Realm*, vol. 2, chap. 6, p. 27. See Post, “Sir Thomas West and the Statute of Rapes 1382,” 26–27.

<sup>96</sup> For a detailed discussion of this statute and its implications see Kelly, “Statute of Rapes and Alleged Ravishers of Wives,” 361–419.

<sup>97</sup> Pope and McSheffrey, “Ravishment, Legal Narratives, and Chivalric Culture in Fifteenth-Century England,” 821–24.

and “that the *raptus* itself was the sign of her consent,” which “affirms the central importance of consent [and] a mutable feminine will.”<sup>98</sup> This statute thus seems to be primarily concerned with mental and verbal (non-)consent.

This did not necessarily help Thomas West, and thus, sometime before the next parliament sat in February of 1383, Thomas made his second petition directly to King Richard II, in which he asked that the statute be applied to his daughter. This second petition states:

To our most gracious and dread lord the king, and to his lords of this present parliament, we your humble lieges Thomas West and Alice his wife pray, that whereas the said Thomas and Alice, at the last parliament held at Westminster the Monday after Michaelmas last past, showed how Nicholas Clifton, with others, lately made horrible assault upon the said Alice, at Malwood in the New Forest, and feloniously ravished and deflowered [*felouusement ravist et defuissolla*] their daughter Eleanor, and because of their suit a statute was made in the said parliament for punishing severely such rapes [*rapeo fortemet*] in time to come: may it please your most gracious and dread lordship that, because this statute and the penalty therein comprised were ordained because of the said felonious rape [*felonius rap*] and at the suit of the said Thomas and Alice, that the said Nicholas and Eleanor be especially included in the said statute, to bear the penalty of the aforesaid statute prompted by themselves [*comensant en lour persones*], as the intent of our lords was thus in parliament, and that they be disabled from having any manner of estate in land or rent as regards Nicholas, and Eleanor if she [assent] at any time, and that her father, or any other of her blood, can have suit to attain him according to the form of the statute, notwithstanding that the said Eleanor be now covet of the said Nicholas.<sup>99</sup>

Unlike his first petition, which focused almost entirely on the harm done to his wife Alice, Thomas’s second petition includes the rape and loss of virginity of his daughter Eleanor. Thomas admits that his daughter may be the wife of Nicholas Clifton, which—perhaps unknown to him—was in fact true. The ambiguity about Eleanor’s (non-)consent to the marriage and when the defloration occurred—whether it was during the time of the abduction or part of the consummation of the marriage—was likely intentional. Despite the second petition focusing more on the loss of virginity through the rape and abduction of Eleanor, it was the marriage of his daughter, who may have given her consent to Nicholas, that was of primary concern. The inclusion

<sup>98</sup> Edwards, “The Rhetoric of Rape,” 11.

<sup>99</sup> TNA, Ancient Petitions, SC8/146, no. 7252. Translation from Post, “Sir Thomas West and the Statute of Rapes 1382,” 27.

of Eleanor's consent, which can be given "at any time" in her life until she is dead, further ensured that, by the law, Thomas was *himself* the victim. Even if Thomas was not the victim during the time that he wrote the second petition, the inclusion of Eleanor's potential consent at any point in her life ensured that anytime in the future, if and when Eleanor consented, Thomas was the victim of the ravishment. The seizure of the father's property during the abduction, as mentioned in the first petition, was seemingly conflated with the father's ownership over his daughter's virginity and marriage contract.

In May 1384, just over a year after the Statute of Rapes was passed, the Commons debated the harsh penalties of the law and asked for it to be replaced by the less severe punishments in Westminster II. This appeal was refused. The 1382 Statute of Rapes remained in place until the Statute of 31 Henry VI in 1453, which gave women the ability to get out of marriages that they were forced into by their ravishers. The Statute of Rapes was clearly concerned about the apparent fickleness of women's mental (non-)consent while also acknowledging that ravishers are "in these Days offending more violently [*violencius*]."

## Concluding Thoughts

The transition from *Glanvill* to *Bracton* to Westminster I and II and, finally, to the Statute of Rapes, was accompanied by a slow erasure of the woman's legal right to appeal her own rape. By the final legal age, the right to appeal was given to her male kin—primarily her father or husband. As I have shown throughout this chapter, there was a clear indication that rape was a physical crime, with the expectation of force and injury written into the laws and treatises. Such physical injury strongly implies the legal expectation of the woman to physically resist the rape in order to prove her non-consent. Despite the importance of bodily injury, the treatises and statutes recognize the potential of verbal and mental (non-)consent through crying out in protest, raising the hue and cry, and consenting after the crime occurred. The duality of the two consent models is routinely emphasized throughout the secular laws—the woman can show bodily injury or cry out—while at the same time there is the expectation that the woman shows physical injury to initiate the appeal process. Eventually, throughout the course of the thirteenth and fourteenth centuries, there is an increasing worry about the variability of a woman's mental (non-)consent, which becomes the primary legal concern. However, this debate was not confined to the secular courts, as the conflicting consent models were of outmost concern to theologians who were debating the duality of mental and physical (non-)consent.

