

FROM 'FORBIDDEN' CONJUGAL LOVE TO INFIDELITY.  
*ADULTERY IN ITALIAN SUMMAE CONFESSORUM (14TH-16TH CENTURY)*

Gigliola di Renzo Villata  
Università degli Studi di Milano  
Gigliola.diRenzoVillata@unimi.it

**Abstract:** In Italy, as in most of the civilized world, adultery is no longer considered criminally relevant behavior. Its decriminalization had long been a goal, and although that goal has largely been achieved, civil law continues to provide for it today. Yet in the age when adultery was punishable by canon and civil law – which included it as a criminal act – both morality and religion played leading roles in mutually influencing legal norms. Specifically, this article shall examine the stance on adultery expressed in the *Summae confessorum* published in the Italian area between the fourteenth and sixteenth centuries.

**Keywords:** adultery; marriage; separation; *Summae confessorum* (14th-16th century)

**Table of contents:** 1. Introduction. – 2. Adultery in the early Italian *Summae confessorum*. – 3. Adultery in Italian *Summae confessorum* from the late Middle Ages to the early modern period (15th-16th century): the 'rise' of law. – 4. A brief conclusion.

## 1. *Introduction.*

In Italy, as in most of the civilized world, adultery is no longer considered criminally relevant behavior. Its decriminalization had long been a goal – for centuries in fact – and that goal has largely been achieved. Nonetheless, civil law still provides for adultery today, while infidelity within a marriage is interpreted differently based on the many variables involved, and leads to different outcomes in different cultures.

Yet in the age when adultery was punishable by canon and civil law – which included it as a criminal act – morality and religion were influenced by law (and vice versa) in a mutually beneficial relationship, as will be seen in the pages that follow. Indeed, I would like to focus on the ways that law contributed to moral and religious thinking on the issue, because my research has uncovered certain ‘curious’ details in sources that are not often thoroughly examined. Indeed, these aspects offer a telling perspective on the customs of a period which, in some ways, still retains its fair share of mystery.

It might be useful to cite the etymology of the term *adulterium* as contained in Huguccio of Pisa’s *Derivationes*<sup>1</sup>. Adultery was described therein as «quasi alterum violans thorum vel alienum uterum tenens, vel adulter, quasi ad alter, idest ad alterius uxorem accedens: ethimologia est, non compositio». Subsequently, the following was stated: «Et inde adulterinus-a-um, qui natus est de adulterio, et hoc adulterium, idest illa prava actio, scilicet illusio (rectius?: illisio, according to another manuscript expert) alieni coniugii; et est adulterium in nupta, stuprum in virgine vel

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<sup>1</sup> Huguccio is well-known as a great canon law scholar: yet the depth of his character has not been fully explored by historians because of the less-than-fortunate fate of his masterpiece, the *Summa Decretorum*, which has not, to date, had the fortune of enjoying a complete edition in print. However, he enjoyed better luck as a grammarian, even though there is no absolute certainty – indeed, according to Wolfgang P. Müller, there is no evidence at all – that the *Derivationes*, «una pietra miliare nella storia della lessicografia» (Cortese<sup>1</sup>), were indeed his own. They have been recently published, and therein lies the *derivatio* of our topic (see especially W. P. Müller, *Huguccio of Pisa: Canonist, Bishop, and Grammarian*, in «Viator», 22 (1991), pp. 121-152; Id., *Huguccio. The Life, Works and Thought of a Twelfth-Century Jurist*, Washington D.C. 1994); and recently, A. Fiori, *Uguccio da Pisa*, in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)*, by I. Bircocchi - E. Cortese -A. Mattone – M.N. Miletti, Bologna 2013, pp. 1997-1999).

moniali, incestum in parente vel vidua»<sup>2</sup>. Isidore of Seville had expressed the same concept in his *Etymologiae* – which was likely Huguccio’s source – by defining adultery as follows: «adulterium [...] inlusio alieni coniugii, quod, quia alter alterius torum commaculavit, adulterii nomen accepit», and then «adulter, violator maritalis pudoris, eo quod alterius torum polluat»<sup>3</sup>. The integral part of the term is made up of the adjective *alter*, and it seems to refer only to the fact that a man stains – almost contaminates – the (marriage) bed of another through his transgressive behavior.

At least a part of the aforementioned etymology was consistently referred to in the literature of the *Summae confessorum*, which shall be the primary focus of the present paper.

While there are other sources that could prove helpful in introducing this topic – which has numerous cultural ties to both medieval and modern society, to the point where it can be considered a sort of mirror of the value systems of each – this is not the proper place to mention them<sup>4</sup>.

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<sup>2</sup> Huguccio of Pisa, *Derivationes*, II, E. Cecchini, G. Arbizzoni, S. Lanciotti, G. Nonni, M. G. Sassi, A. Tontini edd., Firenze 2004, p. 9, *Derivationes*, I, *op. cit.*, pp. XXI ss. (and the authors therein mentioned).

<sup>3</sup> Isidore of Seville, *Etymologiarum sive Originum libri 20*, lib. V, 26.13; lib. X, 10, in *Isidori Hispalensis Episcopi Etymologiarum sive Originum libri 20*, I, recognovit brevisque adnotatione critica instruxit W. M. Lindsay., Oxford 1962, I ed. Oxonii 1911, n.p.; with slight variants in J.-P. Migne, PL 82, Paris 1850, Turnhout 1990, col. 210 («Adulterium est illusio alieni coniugii, quod quia *alter alterius* torum commaculavit, *adulterii* nomen accepit », 369 («*Adulter*, violator maritalis pudoris, eo quod *alterius* thorum polluat.»).

<sup>4</sup> In his *Dictionarium iuris tam civilis quam canonici*, Albericus de Rosate enriched the notion of *adulterium* by taking his cue from the most esteemed texts of juridical culture at the time: despite his secular education, he was also open-minded to the spiritual side of the issue, and he did not restrict himself to these texts. Indeed, he referred to Genesis, canon law and the Decretals, which became more numerous in the *Additiones* (not of his own) on the topic (Albericus de Rosate, *Dictionarium iuris tam civilis quam canonici*, Venetiis, apud Guerreos fratres et socios, 1573, anastatic reprint, Torino 1971, pp. 28-29. Civil law experts and canonists wrestled with the topic. Angelus de Gambilionibus devoted a paragraph to adultery in his treatise *De maleficiis: Che hai adulterato la mia donna*, in which he came up with different questions and provided them with what he believed to be the best solution at that time: see Angelus Aretinus, *De maleficiis*, in Angeli Aretini, *De maleficiis De inquirendis animadvertendisque criminibus opus ... cui contractus nonnulli tum Alberti de Gandino, tum Bonifacij de Vitalinis, una cum apostillis Augustini Ariminiensis: et Hieronymi Chucalon, vt*

## 2. *Adultery in the early Italian Summae confessorum.*

It is a well-known fact that the Church has always been interested in the sexual conduct of its believers, and that it has even managed to regulate said conduct within married life in accordance with its own objectives. A few short Gospel passages suffice to shed light on the effects of holy matrimony, which leads to a union of bodies: the *una caro*. In his first letter to the Corinthians, St. Paul explicitly stated: «The wife does not have power over her body, but her husband does, and likewise the husband does not have power over his body, but his wife does»<sup>5</sup>. Or again, when addressing the Ephesians, in a way that I believe is even more meaningful: «and they two shall be one flesh»<sup>6</sup>. The latter is a recurring statement in the Old and New Testament, where it can be found in Genesis 2:24, Matthew 19:5 and Mark 10:8.

Thus, canon law has dealt with these relationships on more than one occasion throughout history, and contemporary canonists have interpreted them accordingly<sup>7</sup>. Even the penitentials written in the early Middle Ages –

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*apendiceo subieciimus. Quod cum antea (nescio quo fato) ita depravatam foret, ut recti nihil prae se ferret, studiosorum laboribus magno pretio emptis primaevio nitori restitutum offerimus*, Lugduni, [Compagnie des Libraires de Lyon], 1551 (Lugduni, excudebat Dionysius Harsaeus, 1550), especially ff. 71v-78v (in the paragraph *Che hai adulterato la mia donna*), and ff. 34v-35r. The list of jurists who committed themselves to deepening the regime surrounding adultery is very long, but a reconstruction of their contributions is not the aim of my research at this time: for more information and an overall look at the doctrinal work on this topic, and moreover, on the Italian sources of *statuta*, see M.G. di Renzo Villata "Crimen adulterii est gravius aliis delictis...". *L'adultera tra diritto e morale nell'area italiana (XIII-XVI secolo)*, "Crimen adulterii est gravius aliis delictis...". *L'adultera tra diritto e morale nell'area italiana (XIII-XVI secolo)*, in *Le donne e la giustizia fra Medioevo ed età moderna. Il caso di Bologna a confronto*, a cura di M. Cavina-B. Ribémont- D. Hoxha, Bologna 2014, pp. 11-45.

<sup>5</sup> Paul, *Cor*, 7.4.

<sup>6</sup> Paul, *Ephesians*, 5.31. The Pauline text influenced the following penitential literature: see, e.g., Penitenziale di Vinniano, 46 (ed. by F. W. H. Wasserschleben, *Die Bussordnungen der abendlandischen Kirche*, Halle 1851, p. 118), E. Grillo, *Il matrimonio nei penitenziali*, in L. Musselli, E. Grillo, *Matrimonio, trasgressione e responsabilità nei penitenziali*, Padova 2007, especially p. 67.

<sup>7</sup> See J. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, Chicago 1987, especially pp. 179 ss., on adultery pp. 207-209; and Id., *Sex, Law and Marriage in the*

which some scholars, myself included, consider to be the basis for what would go on to become criminal law<sup>8</sup> – attested to such ‘interference’. It

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*Middle Ages*, Aldershot, Variorum, 1993, *passim*, especially I. *Carnal delight: Canonistic theories of sexuality*, pp. 361-385; IV *Sexuality, Marriage, and the Reform of Christian Society in the Thought of Gregory VII*, pp. 69-73, especially p. 72 on the seriousness of adultery, compared to homicide and perjury; V. *Sex and Canon Law: A Statistical Analysis of Samples of Canon and Civil Law*, pp. 89-101, 247-249: cf. also (not only for the above-mentioned pages in Brundage), L. Bullough & J. Brundage, *Sexual Practices and the Medieval Church*, New York 1982. Thanks to their interpretations, the canonists went ‘hand in hand’ with the *Corpus iuris canonici* on the topic.

<sup>8</sup> Cf. A. Pertile, *Storia del diritto italiano dalla caduta dell’Impero Romano alla codificazione* (II ed.), V, Torino 1892, especially pp. 35.36; nonetheless, for a highly critical opinion, see V. Manzini, *I Libri penitenziali e il diritto penale medievale*, Venezia 1925, offprint from *Atti del Reale Istituto veneto di scienze, lettere ed arti*, 85, part 2 (1925-26), pp. 139-182. His interest in legal history emerges quite clearly in some of his works: cf., above all, *Le varie specie di furto nella storia e nella sociologia*, 1. *Parte storica*, Torino 1912. See also G. Le Bras, *Pénitentiels*, in *Dictionnaire de Théologie Catholique*, t. XII, I, Parigi 1933, pp. 1160-1179 (see also the Italian translation in M. G. Muzzarelli, *Una componente della mentalità occidentale: i Penitenziali nell’alto medioevo*, Bologna 1980; T. P. Oakley, *Alleviations of Penance in THE Continental Penitentials*, in «*Speculum*», 12 (1937), pp. 488-502 (see also Id., *Medieval Penance and the Secular Law*, in «*Speculum*», 7 (1932), pp. 15-25; *Cultural Affiliations of Early Ireland as seen in the Penitentials*, in «*Speculum*», 8 (1933), pp. 489-500; and before that, *English Penitential Discipline and the Anglo-Saxon Law* (Columbia University Studies in History 107), New York 1923; H. J. Schmitz, *Die Bussbücher und die Bussdisciplin der Kirche*, 2. *Die Bussbücher und das kanonische Bussverfahren*, Düsseldorf, 1898, anastatic reprint Graz 1958; P. Legendre, *Aux sources de la culture occidentale: l’ancien droit de la pénitence*, in *La cultura antica nell’Occidente latino dal VII all’XI secolo*, Atti della XXII Settimana di studio del Centro italiano di studi sull’Alto Medioevo, Spoleto 1975, pp. 575-595, trad. M. G. Muzzarelli, *Una componente della mentalità occidentale* cit.; C. Vogel, *Les "Libri paenitentiales"* (Typologie des sources du Moyen Âge occidental 27), Turnhout 1978 (the attached fascicle and an update to 1985 are by A. J. Frantzen); Id., *En rémission des péchés: recherches sur les systèmes pénitentiels dans l’Eglise latine*, éd. A. Faivre, Aldershot, Hampshire-Brookfield, Variorum Reprints, 1994; G. Motta, G. Piana, G. Picasso, *A pane e acqua.. Peccati e penitenze nel Medioevo. Il penitenziale di Burcardo di Worms*, Novara 1986; R. Kottje, *Buße oder Strafe? Zur "Iustitia" in den "Libri Paenitentiales"*, in *La giustizia nell’alto medioevo (secoli V-VIII)*, I, 7- 13 aprile 1994, Spoleto 1995, pp. 443-468 (see also the same author’s essays on the topic, such as *Die Bußbücher Halitgars von Cambrai und des Hrabanus Maurus. Ihre Überlieferung und ihre Quellen* (= *Beiträge zur Geschichte und Quellenkunde des Mittelalters*. Bd. 8), Berlin u. a. 1980, and lastly, *Das älteste Zeugnis für das Paenitentiale Cummeani*, in *Deutsches Archiv für Erforschung des Mittelalters*. Bd. 51, 2005, pp. 585–590); furthermore, L. Körntgen,

was a means to discipline sexuality and combat fornication, and in some cases they even went so far as to preach continence within a marriage, as «marriage without continence is not lawful but sin, and [marriage] by the authority of God is permitted not for lust but for the sake of children»<sup>9</sup>.

In keeping with this deep-rooted tradition, the *Summae confessorum*<sup>10</sup> are yet another token of the persistent interest in sexual

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*Kanonisches Recht und Busspraxis: zu Kontext und Funktion des Paenitentiale Excarspus Cummeani*, in *Medieval Church Law and the Origins of the Western Legal Tradition. A Tribute to Kenneth Pennington*, Washington 2006, pp. 17-32; A. Padoa Schioppa, *Il diritto nella storia d'Europa, Il medioevo*, parte prima, Padova 1995, pp. 105-107; Id., *Storia del diritto in Europa*, Bologna 2007, p. 34.

<sup>9</sup> *Penitenziale di Vinniano*, 46 (ed. in F. W. H. Wasserschleben, *Die Bussordnungen der abendlandischen Kirche*, Halle 1851, p. 118): on this subject, see E. Grillo, *Il matrimonio nei penitenziali*, in L. Musselli, E. Grillo, *Matrimonio, trasgressione e responsabilità nei penitenziali*, Padova 2007, especially p. 67.

<sup>10</sup> Cf. E. Dublanchy, *Casuistique, Dictionnaire de théologie catholique*, II-2, Paris 1932, col. 1859-1877; T. Deman, *Probabilisme, ibidem*, XII, 1936, coll. 418-419; P. Michaud-Quantin, *Sommes de casuistique et manuels de confession au moyen âge (XIIe- XVIe siècles)*, Louvain-Lille-Montréal 1962 (Analecta Mediaevalia Namurcensia, 13), especially p. 38: see Id., *La conscience individuelle et ses droits chez les moralistes de la fin du Moyen Âge*, in P. Wilpert (ed.), *Universalismus und Particularismus im Mittelalter*, Berlin 1968, pp. 42-55; and T.N. Tentler, *The Summa for Confessors as an instrument of social control*, in C. Tirnkau-H.A. Oberman (edd.), *The Pursuit of Holiness in Late Medieval and Renaissance Religion. Papers from the University of Michigan Conference*, Leyden 1974, pp. 103-126, 131-137 (*Response and Retractatio* to Boyle's critical analysis, the citation of which follows); L. E. Boyle, *The Summa for Confessors as a genre, and its religious intent*, in *The Pursuit of Holiness (supra)*, pp. 126-130; Id., *Les genres littéraires dans les sources théologiques et philosophiques médiévales. Définition, critique et exploitation* (Université Catholique de Louvain. Publications de l'Institut d'Études Médiévales, 2<sup>e</sup> série, 5), Louvain-la-Neuve 1982, pp. 227-237 and further, G. de la Bussière, *Pratiques de la confession. Des pères du désert à Vatican II. Quinze études d'histoire*, Paris 1983; and J. Dietterle, *Die «Summae confessorum (sive de casibus conscientiae)» von ihren Anfängen an bis Sylvester Prierias*, in «Zeitschrift für Kirchengeschichte», 1903, pp. 353-374, 520-548; 1904, 248-272; 1905, pp. 59-81, 350-364; 1906, pp. 70-83, 166-187, 296-310, 431-442; 1907, p. 401-431; P. Grossi, *Somme penitenziali, diritto canonico, diritto comune*, s.l., s.m., 1963, ed. sep. but see also in «Annali della Facoltà di Giurisprudenza dell'università di Macerata», n.s., 1966, pp. 95-134. Many Anglo-Saxon historians have recently focused their research on this type of work: cf. E. Leites (ed.), *Conscience and casuistry in early modern Europe*, Cambridge-Paris 1988; A. R. Jonsen, Stephen Toulmin (ed.), *The abuse of casuistry: a history of moral reasoning*, Berkeley 1988; L. Gallagher, *Medusa's gaze: casuistry and conscience in the Renaissance*,

conduct. The European area saw numerous redactions of these texts over the centuries – from the Middle Ages to the early modern period – and it was not uncommon for each one to be inextricably linked in some way. Indeed, they represented a process of accumulation, a sort of chain between theologians that allowed them to ‘perfect’ and develop a discipline on this subject, which could then be provided to confessors. At times, the *Summae* were so similar to each other that they lacked any originality, and were judged negatively as a result. Nonetheless, despite their often farraginous composition, they revealed themselves to be remarkably practical.

In this paper, I will concentrate on the *Summae confessorum* that appeared in Italian territory. These were widely circulated and could often be found in both Latin and Italian editions and ‘versions’: in this way, any clergy – even the uneducated ones – could understand and assimilate the content, and the confessors could be duly educated on the attitudes that were gradually emerging in religious and civil society at the time.

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Stanford 1991; J.F. Keenan-T.A. Shannon (ed.), *The context of casuistry*, Washington 1995; H.A. Bedau, *Making mortal choices: three exercises in moral casuistry*, Oxford-New York 1997; among Italian historians, see particularly M. Turrini, *La coscienza e le leggi: morale e diritto nei testi per la confessione della prima età moderna*, Bologna 1991; Ead., *Giordano Bruno e il sapere della coscienza tra i domenicani nella seconda metà del Cinquecento*, in N. Pirillo (ed.), *Autobiografia e filosofia. L'esperienza di Giordano Bruno. Atti del Convegno (Trento, 18-20 maggio 2000)*, Roma 2003, pp. 231-262, especially pp. 246-253; and also E. Brambilla, *Alle origini del Sant'Uffizio. Penitenza, confessione e giustizia spirituale dal medioevo al XVI secolo*, Bologna 2000, *passim*; recently, among French historians, see P. Hurtubise, *La casuistique dans tous les états: de Martin Azpilcueta à Alphonse de Ligori*, préface de J. Delumeau, Ottawa, Novalis, 2006; S. Boarini, *Introduction à la casuistique: casuistique et bioéthique*, Paris 2007 (also Id., *La casuistique classique: genèse, formes, devenir*, Saint-Étienne 2009); M.-F. Renoux-Zagamé, *Lois du ciel et lois des hommes selon les Manuels des confesseurs. Le pouvoir du pouvoir invisible dans la France classique*, in *Mélanges en l'honneur d' Anne Lefebvre Teillard. Textes réunis par Bernard d'Alteroche, Florence Demoulin-Auzary, Olivier Descamps, Franck Roumy*, Paris 2009, pp. 867-888 (by the same author, see also *Du droit de Dieu au droit de l'homme*, Paris 2003, especially pp. 248 ss. on the links between theological and political-juridical thought. See also F. Buzzi, *La teologia secondo Erasmo da Rotterdam*, in I. Biffi-C. Mirabelli (edd.), *Figure moderne della teologia nei secoli XV-XVII*, Milano 2007, especially pp. 21-22, where it was highlighted that Erasmus knew of these *Summae confessorum*, though he ‘cordially disdained’ them.

It is my opinion<sup>11</sup> that the *Summae confessorum* warrant reflection on the part of a jurist-historian, as law can be found ‘making noise’ in the background of many of them. There is no denying that the way the reasoning was structured in these texts had features in common with legal reasoning, and it is quite clear that theology and law were closely interwoven therein. This mutual influence and assimilation was more apparent in some *Summae*, while in others it lay underneath the surface; others still lacked it almost entirely.

*a) The Summa de poenitentia et matrimonio by Raymond of Peñafort*

In order to reconstruct the origins of the set of rules that were developed in the *Summae*, there is no better place to start than with Raymond of Peñafort’s *Summa de poenitentia et matrimonio*. Its role, function, influence and diffusion are well-known, and this is especially clear in the case of the *Summae*. Peñafort’s text focused on the legal aspects of the matter, and as such it offered a different perspective than that provided by John of Freiburg, who had authored another seminal *summa* of this kind that was more theological in nature. The Spanish ecclesiastic took adultery as it was most commonly understood and examined it as grounds for marital separation. In addition, he classified as adulterous conduct that of a husband who was «in suam uxorem amator ardentior». In doing so, he was setting out on a path traced by C. 32. q. 4, c. 5 (incipit *Origo*) of the *Decretum Gratiani* and by the philosophy of St. Jerome – a path which, as we shall see, other Summists would end up following to a large extent. St. Jerome in particular was a source of disagreement between the stricter theologians and those who were more ‘open-minded’ about this issue, as the former considered lustful passion in marriage a mortal sin, while to the latter it was merely venial: William of Rennes was careful to mention this in his meticulous gloss on the relevant passage in *Summa Raymundina*<sup>12</sup>.

<sup>11</sup> An important study on the topic was previously carried out half a century ago by P. Grossi, *Somme penitenziali, diritto canonico, diritto comune* (not. 10).

<sup>12</sup> Cf. Raymond of Peñafort, *Summa de poenitentia et matrimonio cum glossis Ioannis de Friburgo*, lib. IV. *De matrimonio*, § 13, Farnborough, 1967 (reprint of the ed. Romae, sumpt. Ioannis Tallini, 1603), pp. 519-520. See C. 32. q. 4, c. 5: specifically Jerome [contra



Returning to the matter at hand, it was understood that adultery, both as a sin and as a crime (it seems appropriate to observe this conduct from two points of view: that of the internal forum and that of the external forum<sup>13</sup>), was «difficilis probationis», that is, difficult to prove.

Therefore, there were some cases of circumstantial evidence that, if strung together, were thought to be able to give rise to at least a strong suspicion of adultery – enough to prove fornication – based on the brocard «*quae singula non prosunt collecta iuvant*». If there was proof that the two suspected adulterers were «*solus cum sola, nudus cum nuda in eodem lecto, iacens loco et hora secretis, ad hoc commodis*» (in particular, this case was included in a decretal of Alexander III that was incorporated in the *Liber Extra*<sup>14</sup>, which would be influential for the centuries to come<sup>15</sup>),

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lovinianum, lib. I] «... Origo quidem honesta erat amoris, sed magnitudo deformis. § I. Nihil autem interest ex qua honesta causa quis insaniat. Unde et Sextus in sententiis ‘Adulter est,’ inquit, ‘in suam uxorem amator ardentior.’ In aliena quippe uxore omnis amor turpis est, in sua nimius. Sapiens iudicio debet amare coniugem, non affectu. Non regnat in eo inimpetus voluptatis, nec preceps fertur ad coitum. Nihil est fedius quam uxorem amare quasi adulteram...». Substantial content can be found in the gl. *nihil foedius* to the *Summa de poenitentia et matrimonio*, lib. IV *De matrimonio*, § 13, p. 520. On the authorship of Guillaume de Rennes (Guillermus Redonensis) rather than John of Freiburg, according to the attribution on the title page, see J. Ochoa-L. Diez (a cura di), Raimundus de Pennaforte, *Summa de poenitentia*, Roma 1976 (Universa bibliotheca iuris, curate Instituto iuridico Claretiano, I), pp. LXXVII- LXXXI, XCIV-XCVI.

<sup>13</sup> For a recent examination of these two spheres of competence, see G. Minnucci, *Foro della coscienza e foro esterno nel pensiero giuridico della prima età moderna*, in *Gli inizi del diritto pubblico 3. Verso la costruzione del diritto pubblico tra Medioevo e modernità/Die Anfänge des öffentlichen Rechts 3. Auf dem Wege zur Etablierung des öffentlichen Rechts zwischen Mittelalter und Moderne* by G. Dilcher- D. Quagliani, *Annali dell’Istituto storico italo-germanico in Trento*, Contributi/Beiträge 25, Bologna 2011, pp. 55-86; see also P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, Bologna 2000, especially pp. 176-177.

<sup>14</sup> X.2.22.12: «*Literis tuae fraternitatis receptis ex tenore illarum nobis innotuit, quod, quum P parochianus tuus ab A. muliere, quam in uxorem acceperat, tuo iudicio peteret separari, solum cum sola, accusatores matrimonii produxerunt testes firmiter asserentes, quod, postquam praedicta mulier cum praedicto viro contraxerat matrimonium, consanguineum viri eiusdem nudum cum nuda, in eodem lecto, iacentem, ea, ut credebant, intentione ut eam cognosceret carnaliter, viderunt, sed et in multis secretis locis, et latebris ad hoc commodis, et tam horis electis, quam locis saepe praesentibus eis hoc contigisse dixerunt*».

then that was enough to justify marital separation, which in this specific case meant that the husband had the authority to obtain a separation. Nonetheless, there were still some cases in which the *Summa de penitentia* forbade a husband from accusing his wife of adultery: if he himself had been *convictus* of adultery; if he had prostituted his wife; if the woman had remarried because she believed her husband to be dead; if the carnal intercourse had taken place in the dark and the woman believed that she had been lying with her husband (this may have been a theoretical case more than anything...though it was often repeated in the sources); if the marital relationship was violent; if the couple had reconciled after adultery, or had resumed married life; and lastly, if one infidel spouse had repudiated the other infidel spouse, who subsequently remarried.

When future authors, legislators and judges would come to wrestle with the issues dealt with by the Catalan theologian and jurist, they would largely conform to this 'platform' of principles, cases and exceptions – given the authoritativeness of the sources alone, it would be unreasonable to think otherwise. Nonetheless, alternative solutions to these issues were not lacking: for example, in the case of a husband that committed adultery after a sentence of *divortium quoad thorum* had been delivered, Raymond himself categorically denied the possibility of retracting the sentence, but at the same time he believed the judge was required to force the husband to reunite with his wife<sup>16</sup>.

b) *From the Summa De casibus conscientiae by Astesanus of Asti to the Summa Pisana by Bartholomew of San Concordio.*

Raymond traced a path that would be followed by many others: on Italian territory, one must look no further than the Franciscan Astesanus of

<sup>15</sup> Cf. M.G. di Renzo Villata, *Il lungo cammino verso la depenalizzazione. L'adulterio dal Codice Zanardelli al Codice Rocco*, in *Codice Rocco, rist. anast., con scritti di Brunelli, S. Vinciguerra, R. Isotton ecc.*, Padova 2010, pp. CLV-CXCVIII: the old cases of 'circumstantial evidence' «solus cum sola, nudus cum nuda in eodem lecto, iacens loco et hora secretis, ad hoc commodis» – which were considered very compelling reasons to deduce a presumption of guilt in suspected adulterers – were very often produced, even in more recent times.

<sup>16</sup> Cf. Raymond of Peñafort, *Summa de poenitentia et matrimonio cum glossis Ioannis de Friburgo*, lib. IV. *De divortio propter fornicationem*, Farnborough, 1967 (anastatic reprint of the ed. Romae, sumpt. Ioannis Tallini, 1603), p. 575.

Asti, who wrote a *Summa De casibus* around 1317. In keeping with Peñafort's model, Astesanus' work was well-organized into eight books; it also kept with a widespread custom in science at the time – one that jurists noticeably adhered to – in that it was based on, and revolved around, three different lines of argumentation: *auctoritates*, *rationes*, and *iura*. Michaud-Quantin was of the opinion that the orderly method used in composing the work had lent it a degree of solidity that accounted for its lasting success, as evidenced by its regular citations and appearances in late-fifteenth-century manuscripts and incunabula, in addition to reprints in the sixteenth century and in the centuries that followed, up until the eighteenth century. The fact that it was reprinted in Rome also helped prolong its influence<sup>17</sup>.

While the Franciscan did in fact partially reproduce the structure of argumentation used in *Summa de poenitentia et matrimonio*, his discourse also added new issues to consider – which would only increase in number in the *Summae* to follow – in order to provide confessors with a case study of potential problems they would have to deal with while practicing their ministry. The first book was dedicated to the Ten Commandments, whereby the sixth, *Non mechaberis*, presented the opportunity to classify adultery as *illicitus coitus*: on a scale that went from the most minor to the most serious of transgressions, adultery was placed above fornication and prostitution, but below rape, fornication with someone who had vowed continence (i.e. with a nun or priest), and lastly, sodomy. I have included all of the cases in Astesanus' order, which was the typical order that many

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<sup>17</sup> Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 57 ss.; also Dietterle, *Die «Summae confessorum»* (not. 10), II *Die «Summa de casibus conscientiae» des Astesanus de Ast*, pp. 350-362. See also E. Mangenot, *Astesanus*, in *Dictionnaire de théologie catholique*, I, 2, Paris 1923, col. 2142; R. Abbondanza, *Astesano*, in *Dizionario biografico degli Italiani*, 4, Roma 1962, pp. 463-465, and P. Fiorelli, *Vocabolari giuridici fatti e da fare*, in «Rivista italiana per le scienze giuridiche», n.s., 1 (1947), pp. 293-327, especially 297 s.; J. Goering, «The Internal Forum and the Literature of Penance and Confession», in W. Hartmann - K. Pennington (edd.), *The History of Medieval Canon Law in the Classical Period, 1140-1234. From Gratian to the Decretals of Pope Gregory IX*, (Washington D.C. 2008), pp. 379-428, especially 419 ss. I consulted the amended (also «circa iuris cotationes») Lyonese edition «sumptibus et iussu probi viri Stephani Gueynard alias Pinet opera magistri Guilhelmi Huyon impressoris... 1519 die. .. IIII maii», as well as the incunable edition Venezia, Giovanni da Colonia e Johann Manthen, 18. III. 1478, n.n.: the quotation is from the last column of the 1519 edition.

canonists used to represent the gravity of sins. The origin of the term was then provided, in keeping with a trend that almost all writers followed: «adulterium vero est inordinatus concubitus quo coniugalis thorus violatur. Unde adulterium dicitur quasi accessus ad alienum thorum». The friar even included marital intercourse among the *inordinati coitus*: it could be justified if its purpose was *causa suscitande prolis ad cultum dei, vel causa reddendi debitum, vel causa fornicationis vitande*; it was wrong if the sexual intercourse was *fragilis*, that is, if the husband sought short-lived pleasure in his wife, with aims that were different than those listed above; it was a mortal sin if a husband loved his wife more than God, while a venial sin if God was still loved more than the spouse; and Astesanus defined it *impetuosa* «qui ex sola libidine proveniens metam honestatis et rationis transcendit», when sexual intercourse took place «causa faciande libidinis per meretricias blanditias» (or when it was against nature, or at prohibited times or places, or when the husband's pregnant wife was near childbirth, or if she was «in fluxu mestruo»).

Similar expressions were used in referring to dissolute lust in conjugal relations, which was included under adultery in many manuals for confessors; however, it was clear that the consequences in this case were only relevant in the internal forum. Such 'severity' can once again be traced back to C. 32. q. 4, c. 5 (incipit *Origo*) of the *Decretum Gratiani* («... Adulter est... in suam uxorem amator ardentior. In aliena uxore omnis amor turpis est, in sua nimius... Nichil est fedius quam uxorem amare quasi adulteram»), which was elaborated on by St. Jerome in his *Origo quidem honesta erat amoris, sed magnitudo deformis*. St. Jerome was influenced by teachings attributed to Sextus the Pythagorean, whose school of thought was defined decades ago as 'para-Christian in its entirety' (the sentence referred to read: «Adulter etiam propriae uxoris omnis impudicus»)<sup>18</sup>. As previously

<sup>18</sup> On C. 32. q. 4, c. 5 in *Decretum*, see *supra* nt. 12. Cf. F. De Paola (a c. di), *Le sentenze di Sesto, con introduzione e versione*, Milano 1937, p. 25 (sent. 232), but see also *Introduzione* on the dating of the work. On the quotations, see F. Haase, *L. Annaei Senecae opera quae supersunt*, XIII *De matrimonio* 2, 3, *Fragm. 84*, Lipsiae, sumptibus et typis B. G. Teubneri, 1895, p. 434 (on this, see C. Torre, *Il matrimonio del Sapiens. Ricerche sul De matrimonio di Seneca*, Dipartimento di archeologia filologia classica e loro tradizioni, 2000, pp. 155-156). On such Stoic sexual doctrine and its influence on Saint Jerome's writings (and also on Saint Augustine), see J.A. Brundage, *Sex, Law and Marriage*

mentioned, several authors of *Summae confessorum* would come to view this case of adultery in the same way, as it was condemned by Catholicism<sup>19</sup>.

In any case, there was the impression that whether a woman or a man, the adulterer was judged by the same 'standard' «quia non ad imparia iudicantur circa matrimonium et sponsalia»; yet as will become clear in the pages that follow, there was in fact a certain level of discrimination<sup>20</sup>.

There was a title specifically dedicated to adultery in the second book, where Astesanus dealt with still other cases: while these were only briefly touched upon, and while he made it clear that it was not his intention to discuss the actual legal aspects of the matter («caetera vero relinquuntur iurisperitis»), it nonetheless evidenced his awareness of deeper issues. Moreover, as one can read in the introduction of his work, the literature which he drew upon was not only theological in nature, but also abundant in canonists (such as Bernard of Parma, Hostiensis, Geoffrey of Trani, Innocent IV, William Durand, the Spanish canonist Johannes Garsias<sup>21</sup>, Johannes Andrea, Bartholomew of Brescia and Raymond of Peñafort); civil law experts, specifically Azo and his *Summa Codicis*; and experts in *ars notarie*, such as Rolandinus with his *Summa* (which included a guide to its interpretation, in accordance with Astesanus' express wish). Indeed, the

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*in the Middle Ages* (not. 7), especially II 'Allas! That Evere Love Was Synne': *Sex and Medieval Canon Law*, pp. 1-13; furthermore, see C. Fayer, *La Familia romana. Aspetti giuridici ed antiquari. Sponsalia, matrimoni, dote. Parte seconda*, Roma 2005, p. 561. Cf. P. Frassinetti, *Gli scritti matrimoniali di Seneca e Tertulliano*, in «Rendiconti Istituto Lombardo Scienze e Lettere», 88 (1955), pp. 155-188.

<sup>19</sup> *Summa de casibus conscientiae*, I Pars, lib. I, tit. 31 *De sexto praecepto. Non mechaberis*, f. XLIIv (ed. 1478, n.n.)

<sup>20</sup> *Ibidem*, II pars, lib. VIII, tit. 2 *A quibus per quos et quibus verbis sponsalia contrahuntur*, f. CLXXXIXr.

<sup>21</sup> On this author, who worked in Bologna between 1277 and the end of the thirteenth century, cf. J. F. Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts*, I, Stuttgart 1875, anastatic reprint Graz 1956, pp. 160-162. He wrote *Commentarii in decretales Gregorii X*, composed between 1280 and 1282, as well as an *Apparatus ad constitutionem Nicolai III* and *Quaestiones disputatae*, all of which were characterized by a relatively rich manuscript tradition: cf. e.g. Roma, Biblioteca apostolica Vaticana, ms. Pal. Lat. 62 (on this subject, see M. Medica, *Jacopino da Reggio (Jacopino di Gerardo da Reggio)*, in *Dizionario biografico degli Italiani*, 62, Roma 2004, p. 22 ).

friar's cultural background was rich in the 'juridical', as demonstrated by the various references found throughout the *sedes materiae* pertaining to adultery (Bartholomew Bellati, editor of the incunable of 1478, defined him as «minus theologus quam abstrusi iuris acutus interpres»<sup>22</sup>; this would be even more evident in the title *De accusatione matrimonii propter fornicationem*<sup>23</sup>.

In that *sedes materiae*, canon law provided the basis for a 'juridically'-oriented approach to regulating the matter; indeed, it acted as a guiding light for the regulation of all marriage-related issues, which Astesanus did not fail to point out elsewhere («matrimonia iure poli non fori reguntur»).

Astesanus was interested in identifying and examining more closely the problem of who had the right to accuse adultery when it came to marital separation. He recognized that this right lay with both the husband and the wife, and he used Hostiensis to help him supersede a dictate that stated otherwise, as he considered it *littera falsa*. At the same time, however, he conceded that «vir tamen facilius auditur»; this in addition to the fact that the husband was in a privileged position, as evidenced by the fact that he could lay an accusation based on mere suspicion. In this regard, Geoffrey of Trani's opinion is worth mentioning: he called for at least strong suspicion when accusing, as there was no *lex talionis* for baseless accusations, and calumny was only punished if there was no doubt as to its occurrence<sup>24</sup>.

<sup>22</sup> Astesanus, *Summa de casibus conscientiae*, Venezia, Giovanni da Colonia e Johann Manthen, 18. III. 1478, f. [1] (numbered in pencil): therein the dedication to the cardinal Mark Barbo, 'patriarch' of St. Mark's Basilica.

<sup>23</sup> *Ibidem*, II pars, lib. VIII, tit. 36 *de divortiis propter fornicationem vel propter consanguinitatem vel affintatem*, f. CCXXXI r.

<sup>24</sup> *Ibidem*, Proemium, f. III r v; I pars, lib. II, tit. 47 *De adulterio et lenocinio*, f. XCV-XCI r; II pars, l. VIII, 35 *De accusatione matrimonii propter fornicationem*, f. CCXXX r (the opposing canons referred to are C.32.q. 7, c. 16 e 17). See Hostiensis, *Summa aurea*, ad X. 4. 19 *De divortiis Venetiis*, apud Iacobum Vitalem 1574, Torino 1963, col. 1402 (worthy of note was the fact that Astesanus was in deep agreement with Hostiensis); Id., *Eximia: copiosa atque admiranda lectura in quinque Decretalium Gregorianarum libros*, Parisius, per ... Bertholdum rembolt ..., 1512, ad X. 4. 19.8 *De divortiis c. Gaudemus § Sane*, f. XLIII v; Goffredus Tranensis, *Summa... in titulos Decretalium*, ad X. 4. 18 *Qui matrimonium accusare possunt*, ed. Venetiis, apud Iohannem Baptistam Hugolinum, f. 183 r v.

The equal status of husband and wife in matters of adultery was a sensitive issue for Astesanus, and he discussed it in *De bono sacramenti*.

While both may have held the same right to ask for *divortium* (i.e. marital separation) due to adultery («ad aequalia iudicantur vir et uxor»), the same could not be said when considering the extent of the blame («non tamen iudicentur ex aequali causa»): the wife ‘sinned’ against both the *bonum prolis* and the *bonum fidei*, while the husband only violated the obligation of fidelity.

Astesanus wanted to compare the gravity of each adulterous spouse’s sin, as both were guilty of fornication and violation of their conjugal duties. In making that comparison, the inherent nature of both spouses was assessed as well.

A recurring cliché was to equate women with *bruta animalia*: their unstable nature «plus est de humore: et ideo mulieres sunt plus ductibiles a concupiscentiis» (Chrysostom and Aristotle considered women at once lustful and incontinent, as well as quite prone to concupiscence, and St. Thomas followed their teachings<sup>25</sup>).

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<sup>25</sup> St. Thomas, *Summa theologiae*, Suppl. q. 62, art. 4 (= St. Thomas, *In quattuor libros Sententiarum, In quartum*, dist. 35, q. 1, art. 4 ed. R. Busa, *Sanctae Thomae Aquinatis Opera omnia*, I, *In quattuor libros Sententiarum*, ed. R. Busa, Stuttgart-Bad Canstatt 1980, p. 606), wherein reference is made to Chrysostom («propria passio mulieris, proprie loquendo luxuria est») and Aristotle («mulieres non dicuntur incontinentes, proprie loquendo, propter facilem inclinationem in concupiscentiam: quia nec bruta animalia possunt continere propter hoc quod non habent aliquid quod concupiscentiis obviare possit...»); and subsequently: «in muliere est plus de humore, et ideo sunt magis ducibiles a concupiscentiis: sed in viro plus de calore qui concupiscentiam excitat. sed tamen simpliciter loquendo, ceteris paribus, vir in simplici fornicatione plus peccat quam mulier: quia habet plus de rationis bono, quod praevalet quibuslibet motibus corporalium passionum...»), taken from the *De animalium generatione*, 4, 6 *Quare viviperorum alia perfectum alias imperfectum animal pariunt*: see for instance the Latin edition Venetiis, aere et impensis haeredum quondam Octaviani Scoti, f. 68rv. The *Supplementum* q. 62, art. 4 can be consulted in the easily accessible edition: S. Tommaso, *La Somma Teologica*, trad. e commento a cura dei Domenicani italiani, testo latino dell’edizione leonina, XXXI, pp. 370-373. More recently, on misogynist prejudices over the centuries, analyzed in accordance with the above-mentioned paradigms, and on women who were slaves to sexual compulsion and prone to lust – a recurrent term in classical Greek culture to indicate feminine behavior – see A. Cavarero, *Inclinazioni. Critica della rettitudine*, Milano 2013.

Men were portrayed as having «plus ... de calore qui concupiscentiam excitat» in addition to less sense of shame, greater concupiscence, and more *bonum rationis* (a recurring theme at that time) «quod praevallet quibuslibet motibus corporalium passionum».

To this point, it seemed that men and women were almost on equal footing; yet there was no doubt that if a woman caused 'harm to the good of the marriage', it was a much more serious sin, not least because a woman's sin subjected both spouses to *infamia*.

Matters became more 'pragmatic' when it came to providing guidelines on the possibility of a husband to *dimittere* his adulterous wife. In keeping with a sentiment expressed by other authors, there was a clear desire to save the marriage: therefore, if the woman mended her ways, or was prepared to do so, then there was no obligation to divorce «quia non est necessarium penam apponere graviorem ad corrigendum delictum quod mitiori potest expiari modo». If, however, she was presumed to be incorrigible – whether it was due to her stubborn refusal to mend her ways or an unkept promise to do so – then Astesanus believed the best course of action was for the husband to separate himself from her, so as not to seem complicit. In that regard, he took care to specify that Matthew's dictate, which was usually invoked in order to justify *divortium* in cases of adultery, only concerned the permission to separate, not the obligation to do so<sup>26</sup>.

An even closer interconnection between theological, moral and legal aspects could be found in the title *de divortiis propter fornicationem vel consanguinitatem vel adfinitatem*. In examining the legal procedure in place for cases of *divortium propter fornicationem*, the author went to the heart of the matter: in great detail, he set forth all the possible circumstances that would have to be proven. In this way, any judge who had to decide on a petition for *divortium* could find these indications useful in order to maintain a keen awareness of the rules of evidence and the founding principles thereof.

He also expanded upon evidence collection, with a special focus on the examination of witnesses; from there, he developed a series of paradigmatic examples for the case of adultery, which were to be used as

<sup>26</sup> *Ibidem*, II pars, lib. VIII, tit. 11 *De bono sacramenti*, Art. *tertius*, f. CCVIIv.



*adminicula*. Taken together, these examples fell under the maxim *quae singula non prosunt collecta iuvant*:

si vidit nudum cum nuda in eodem lecto, si se agitantes, si uterque apte etatis ad actum illum, et si que secretiora putet inquirenda; si de nocte vidit eos intrare cameram et mane exire, si pluries hoc contigit, si fama loci hoc habet, si strepitum carnalem audivit distans tenui pariete cum eos vidit intrare, si solus erat et tunc non probatur, vel si aliquis cum eo erat et tunc probatur dummodo et ille alius in hoc ipso iuratus concordet; si per obscura loca et suspecta vidit eos simul sepe conversari, vel vagari solus cum sola, si fama loci hoc habet: haec enim adminicula sunt, licet non faciant plenam probationem.

He went on to conclude that «omnia insimul collecta sufficienter probant quia que non prosunt singula iuvant insimul considerata» and that «Ex his autem omnibus iudex discretus firmabit motum animi sui»<sup>27</sup>.

The title *De his in quos clavium usus exerceri potest* was dedicated to the sins for which clerics held the power of the keys, in the sense that they could grant absolution or penance to sinners. It was thus debated whether an adulterous woman who had conceived a child could be granted penance or absolution even if she had kept her husband in the dark about the child's true origin.

The answer was in the affirmative: since a newborn child was presumed legitimate, an adulterous woman's 'truthfulness' risked being for naught, «quia hoc esset periculosum: possent enim inde homicidia et plura alia mala consequi». Fearing bloodshed, the Franciscan was led to recommend caution in revealing the child's true origin – indeed, caution seemed to lie at the basis of many of the opinions recommended to

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<sup>27</sup> *Ibidem*, II pars, lib. VIII, tit. 36 *De divortiis propter fornicationem vel propter consanguinitatem vel affinitatem*, f. CCXXXIV. Cf. I. Rosoni, *Quae singula non prosunt collecta iuvant. La teoria della prova indiziaria nell'età medievale e moderna*, Milano 1995, *passim*; see also A. Padoa Schioppa, *Sur la conscience du juge dans le jus commune européen* and A. Cavanna, *La conscience du juge dans le stylus iudicandi du Sénat de Milan*, entrambi in J.-M. Carbasse-L. Depambour Tarride (edd.), *La conscience du juge dans la tradition juridique européenne*, Paris 1999, pp. 95-129; 229-262, respectively.

confessors when it came to women. At the same time, in a society such as that of the Middle Ages, in which *fama*<sup>28</sup> was excessively influential, the danger of defamation was not to be underestimated. To that end, it was again recommended to exercise caution, or rather, instill ‘good sense’ into the adulterine child, so that he might not derive too many benefits in terms of inheritance, now that he had usurped legitimate status: several ‘compromises’ were developed to meet this need<sup>29</sup>.

A special effort on the part of the cleric was needed if the married couple was to resume living together. If the wife had requested *restitutio* in order to return to her husband, the husband could refuse on the grounds of adultery – the *exceptio adulterii* – but there were seven cases that the petitioner could plead which would nullify this exception. These cases have already been mentioned above, in the list provided by Peñafort in *Summa de penitentia et matrimonio*<sup>30</sup>.

Was it a wife’s duty to return to her husband if he desired reconciliation? The answer took an innocent husband’s situation into account. It was assumed that separation from his wife because of adultery was to his advantage, but if it would somehow harm him, then a different approach was taken in answering this question.

In keeping with a trend that would be followed by the *Summae confessorum* to come, Astesanus made sure to address the matter of

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<sup>28</sup> Cf. F. Migliorino, *Fama e infamia : problemi della società medievale nel pensiero giuridico nei secoli XII e XIII*, Catania, 1985.

<sup>29</sup> *Ibidem*, II pars, lib. V, tit. 39 *De his in quos clavium usus exerceri potest*, f. XLVv-XLVIIr, especially XLVlv.

<sup>30</sup> I.e.: i) if the plaintiff is also ‘convictus’ of adultery; ii) if he prostituted his wife; iii) if the wife remarried, convinced that her husband was dead, provided that the wife did not cohabit with the second husband after knowing that the first husband was still alive; iiiii) when the adultery is committed «cum quis falso simulans se virum alicuius mulieris, lectum eius intravit et eam cognovit» (I have already mentioned this theoretical case, which was slightly changed in the *Summa Astesana*, though at first sight it still seems to have been an unlikely and rare occurrence); v) when the wife was the victim of violence; vi) if the husband, fully aware of his wife’s adultery, reconciles with her and takes her again in married life; vii) if one infidel spouse divorces the other infidel spouse, who then remarries.

inheritance, among other issues such as the policy of *favor matrimonii*, which once again played a major role<sup>31</sup>.

He also examined the right of a husband to kill his adulterous wife. This was a 'thorny' issue, and Astesanus thought that the law responded to it in two ways. The first recognized the husband's right to accuse his wife *in iudicio civili*, as long as he was not motivated by «livore vindicte vel odii» but rather «zelo iusticie»: in this case the woman could be sentenced to death if so requested by her husband. Capital punishment would be carried out by the civil authority, as the ecclesiastical authority «non habet gladium materiale scilicet quantum ad executionem».

On the other hand, a husband might murder his wife if he caught her in the act of committing adultery. Astesanus made sure to point out that this was forbidden by canon law, the law of conscience, and even civil law, but the latter only provided for a mitigation of the penalty:

Sed illa lex loquitur quantum ad pene interficientis mitigationem non quasi non prohibens, sed quasi huiusmodi penam non infligens propter maximum incitamentum. Sed ecclesia ad hoc non est stricta legibus humanis ut iudicet eum sine reatu<sup>32</sup> pene eterne vel pene ecclesiastico iudice infligende; et ideo in nullo casu licet uxorem occidere viro propria auctoritate<sup>33</sup>.

In the author's view, it was acceptable to recognize a husband's right to correct his wife's behavior, but

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<sup>31</sup> *Ibidem*, II pars, l. VIII, tit. 33 *Quomodo agitur ad matrimonium coniungendum*, especially § *Circa tertium* 35 *De accusatione matrimonii propter fornicationem*, 36 *De divortio propter fornicationem vel propter consanguinitatem et affinitatem*, f. CCXXVlr-CCVIIIv, particularly CCXXVIIv; CCXXXr-CCXXXlv.

<sup>32</sup> On the use of this term, which was quite unusual in legal lexicon up until a certain point in the development of criminal law, cf. F. Bambi, *Reato 'fatto criminoso'. E scusate l'errore*, in *Iuris quidditas. Liber amicorum per Bernardo Santalucia*, Napoli 2010, pp. 1-19.

<sup>33</sup> On this, see M. Cavina, *Nozze di sangue: storia della violenza coniugale*, Roma-Bari 2011, *passim*, especially pp. 70 ss.: wherein there are insights on the theological, moral and legal sources, including the *ius corrigendi*.

non verberando quia illa sunt ab ingenuis aliena ... unde potest eam temperate castigare cum sit de familia eius, sicut dominus servum sed non potest eam in foro iudicare quia nullus potest sibi vel suis ius dicere.

This was the *moderata correctio*, which had long been acceptable in civil law. While this parallel between the power of a husband over his wife and that of a *dominus* over his slave might somehow be ‘justifiable’ in the eyes of a jurist-historian, I believe that the reader will agree that in today’s world, it is shocking to hear.

Moreover, Astesanus clarified that if a husband beat his wife under circumstances not permitted by law, then he would lose one third of the *donatio propter nuptias*, and if he had not provided this wedding gift, then he would lose one fourth of his entire wealth: these rules were derived from the Code of Justinian and the Auth. *Ut liceat matri et aviae*<sup>34</sup>. He provided a brief summary of all powers held by a husband at that time, with the aid of canon law and civil law texts (the *Decretum Gratiani*, as well as the Code of Justinian and the updated *Authenticae*).

A father who caught an adulterer with his daughter had more extensive rights to kill with impunity, provided that the adulterer had been caught in his house or in his son-in-law’s house; a husband had a similar right if his adulterous wife’s companion was of humble station<sup>35</sup>. The application of the law in both of these cases was unequivocal.

Another masterpiece of this kind was the *Summa Pisana*, which enjoyed similar success in terms of its circulation. In this work, the topics were organized alphabetically, which was common custom at the time and practical for the purposes that it sought to achieve<sup>36</sup>. In addition, it featured a similar style of exposition.

Raymond of Peñafort served as a guide: first among the most sensitive issues to deal with was that of the birth of an adulterine child, as

<sup>34</sup> Auth. *Ut liceat matri et aviae* to C. 5.35.2 (Nov. 118.5).

<sup>35</sup> *Ibidem*, II pars, lib. VIII, tit. 20 *De impedimento criminis*, § *Sequitur videre de quarto, scilicet de crimine uxoricidii*, f. CCXVIr-CCXVIIrv, especially CCXVIIrv.

<sup>36</sup> On this matter, see R. H. Rouse, M. A. Rouse, *Statim invenire. Schools, Preachers and New Attitude to the Page*, in R. L. Benson, G. Constable (eds.), *Renaissance and Renewal in the Twelfth Century*, Oxford, 1982, pp. 201-225.

well as the child support provided by the real husband and inheritance rights among individuals who were somehow ‘touched’ by the adulterous relationship. Recommendations were made by Bartholomew of San Concordio, a Dominican friar in the friary of St. Catherine of Pisa and *armarium scripturarum* in his day: a ‘living library’ so to speak. Having studied law and theology at the universities of Bologna and Paris, he boasted a level of ecclesiastical learning that was able to blend knowledge of theology with that of the trivium. In his opinion, an adulterous woman was to confess her guilt, «in penitentia», to an expert priest or bishop, or to both. In that way, they could then inform the child of the truth in the presence of the mother if they deemed it beneficial, provided that the child was God-fearing and knew how to keep the secret. In addition, the child was advised to enter religion or to go far away, so as not to receive anything from the putative father’s assets<sup>37</sup>.

However, was a child to believe the words of his mother alone? There was no obligation to do so ‘thanks’ to a widely held belief at the time, namely that *muliebris fallacia* was not only plausible, it was assumed.

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<sup>37</sup> Cf. Bartholomaeus de Sancto Concordio, *Summa Pisana*, entry *adulterium*, Venetiis, per Nicolaum Girardengum, 1481, ff. [10v-11r] : numbered in pencil in the copy held at the Biblioteca Nazionale Braidense (I also read another incunable edition of 1473, «XII Kallendas novembres», n.n., in the same library). On the author (1262-1347) and his works, see P. Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 60 s.; C. Segre, *Bartolomeo da San Concordio (Bartolomeo Pisano)*, in *Dizionario biografico degli Italiani*, 6, Roma 1964, pp. 768-770; M. Ascheri, *Diritto medievale e moderno: problemi del processo, della cultura e delle fonti giuridiche*, Rimini 1991, especially p. 106, where Ascheri mentions Bartholomew’s works – not only the *Pisana* but also his treatises on grammar and philosophy – as well as the vulgarization of Sallust’s work. The latter is remarkable for the Latinistic nature of the lexicon and the sentence structure used, which are a testimony to his openness to Humanism and to the breadth of his culture; more recently, on Bartholomew’s thirteenth-century compilation entitled *Compendium moralis philosophiae*, which was derived from Egidio Romano’s *De regime principum*, see Ch. F. Briggs, *Moral Philosophy and Dominican Education: Bartolomeo da San Concordio’s Compendium moralis philosophiae*, in R. B. Begley, J. W. Koterski (eds.), *Medieval Education*, New York 2005, pp. 182-196; S. Vecchio, *Quasi armarium scripturarum. Bartolomeo da San Concordio come biblioteca vivente*, in «Doctor Virtualis», Italia, 0, May. 2012, available online at the following address: <<http://riviste.unimi.it/index.php/DoctorVirtualis/article/view/2175/2397>> .

In choosing not to believe his mother's revelation, the child could maintain a clear conscience about his own legitimacy, thus exempting him from any liability for what he had received or what he was to receive from his putative father. Nevertheless, if the presumed mother's *honestas*, together with other circumstances, seemed to support her declaration, then the child was advised to cease receiving anything at all. In fact, Raymond of Peñafort believed that the child should return what he had received or 'settle' the issue, despite the fact that, being a possessor in good faith, he was not required to do so. While legitimate children were still defined as forced heirs, a mother could also appoint adulterine children as heirs.

As far as the husband was concerned, he too was considered a reliable 'keeper' of his wife's secret if he had somehow supported her adultery («sustinent scientes adulterium uxorum»), or if he had agreed to her infidelity because he was afflicted with *impotentia generandi* (which, I might add, he would have done to rectify the problem). In these cases, it was explicitly stated that absolution was to be sought in the internal forum.

The *Pisana* covered up to this point, and Nicholas of Osimo – author of the widely read *Liber qui dicitur Supplementum*, which was written to bridge the gaps and erase the doubts raised by the *Pisana* itself – supplemented it further in order to better discipline the matter (his additions were incorporated directly into some incunabular editions of the work, without any clear indication of authorship). He addressed the potential detriment to legitimate children's rights as forced heirs in the event that an adulterine child was born (or a child from incestuous relations, which was the other possibility considered), as well as the rights of other entitled parties who would be excluded from succession in such a situation. In terms of *auctoritates*, he invoked some *authenticae* from the Code of Justinian as well as a Gregorian decretal, though both sources 'preserved' the adulterine child's right to child support. In any case, he made sure to provide for exceptions to this aforementioned right – as well as to the right of a mother to appoint her adulterine child as an heir – in light of *consuetudo regionis*<sup>38</sup>.

<sup>38</sup> Cf. Nicholas of Osimo, *Liber qui dicitur supplementum*, entry *adulterium*, Venetiis, per Franciscum de Hailbrium et Nicolaum de Frankfordia, 1474 (the parts that Nicholas of Osimo wrote are interposed in *Pisana* and recognizable by the inclusion in the text of the

In the end, remarkable care was taken to address the legal aspects of the issue. Basic, common principles formed the foundation of Nicholas of Osimo's approach, and 'simple' moral (and religious) duties were necessarily adapted to the realm of law. The goal was to distinguish legal values from moral values, yet at the same time recognize that a religious man was to submit to a combination of both<sup>39</sup>.

3. *Adultery in Italian Summae confessorum from the late Middle Ages to the early modern period (15th-16th century): the 'rise' of law.*

The *Summae confessorum* taken into consideration up to this point were able to unite theology and law into one discourse, utilizing consistent cultural references as a basis and without placing excessive focus on legal aspects. Such an approach differed from other sources which, despite having similar objectives, were full of teachings that lacked cultural depth, so to speak.

One of the many examples of this could be found in the *Prediche volgari*, written by St. Bernardino of Siena in 1426. This text was full of good advice for future spouses on the topic of marriage, in order to ensure a beneficial, successful, «fair and honest» marriage, in which each consort fulfilled his or her duties and refrained from seeking pleasure elsewhere. If conjugal fidelity was violated, the consequence would be that «both of you go to hell, if you do not confess and repent with the thought that you will never fall into that trap again». It was even encouraged to love one's

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letter «A» at the beginning of the addition, and the letter «B» at the end, as stated in the work's opening pages.

<sup>39</sup> The entry *Matrimonium* goes on to examine the topic more in depth, and there is a discussion of how to deal with both a criminal charge before a secular judge as well as a separation trial before an ecclesiastical judge, with equal status enjoyed by husband and wife («in tali casu non ad imparia iudicantur»): the evidence required for separation is also not neglected, and reference is made to the list of the seven preclusive cases already mentioned here, with the additional inclusion of the vice of sodomy and spiritual fornication. The author then focuses on many other aspects related to the right and duty of the husband to *dimittere* his adulterous wife in the variety of potential situations that called for it, and holds that he is indeed obliged to do so if she persists in her unlawful conduct and does not mend her ways: Bartholomaeus de Sancto Concordio, *Summa Pisana* (not. 37), entry *Matrimonium octavo*, ff. [202r-204r], but see also the entry *Divortium*, f. 77r.

spouse with all one's heart, «as God loved the Holy Church», and «not with the rage of lust but moderately...with equality and honesty»<sup>40</sup>.

There are still other works that could be cited, which could be accurately described as manuals for confessors though less likely to focus on purely legal aspects. One such example was *Confessionale «Curam illius habe»: medicina dell'anima*<sup>41</sup> by St. Antoninus of Florence.

<sup>40</sup> S. Bernardino da Siena, *Prediche volgari... per la prima volta messe in luce*, VI *Come il marito die amare la donna, così la donna il suo marito*, Siena 1853, pp. 141-178.

<sup>41</sup> S. Antoninus, *Confessionale «Curam illius habe»*, Bononie, [Baldassarre Azzoguidi], 1472, § *Sexto comandamento*. *Mechus*, f. 20v-21r (see also, with variants in the vernacular, ed. Firenze, Francesco Didino fiorentino, x luglio 1481, f. 32v-34r, available online at the following address: [http://digital.wlb-stuttgart.de/digitale\\_sammlungen/seitenansicht/?id=4870&tx\\_dlf%5Bid%5D=500&tx\\_dlf%5Bpage%5D=71](http://digital.wlb-stuttgart.de/digitale_sammlungen/seitenansicht/?id=4870&tx_dlf%5Bid%5D=500&tx_dlf%5Bpage%5D=71)). See also S. Antoninus, *Summa theologica*, Venetiis 1480 (this is the edition I consulted: see *infra*). Cf. Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 73 s.; and R. Morcay, *Saint Antonin, fondateur du couvent, archevêque de Florence*, Tours, Paris 1914; P. Mandonnet, *Antonin (Saint)*, in *Dictionnaire de Théologie catholique*, I.2, Paris 1931, pp. 1450-1454; R. Morcay, *Antonin (Saint)*, in *Dictionnaire d'Histoire et Géographie ecclésiastique*, 3 (1924), pp. 856-860; S. Orlandi, *Bibliografia antoniniana: descrizione dei manoscritti della vita e delle opere di S. Antonino O. P. Arcivescovo di Firenze, e degli studi stampati che lo riguardano*, Città del Vaticano 1962, pp. 295-331; R. Rusconi, *Manuali milanesi di confessione editi tra il 1474 e il 1523*, in «Archivum Franciscanum Historicum», 65 (1972), pp. 107-156 (on 'confessionals' in broad terms, see also Id., *Dal pulpito alla confessione. Modelli di comportamento religioso in Italia fra 1470 e 1520 circa*, in P. Prodi-P. Johanek (eds.) *Strutture ecclesiastiche in Italia e Germania prima della Riforma*, Bologna 1984, pp. 259-315); Turrini, *La coscienza e le leggi* (not. 10), *passim* (the list of editions, starting from the 1474 Venetian edition, can be found on p. 359); and more recently, *S. Antonino e la sua epoca. Atti del convegno tenutosi a Firenze 21-23 settembre 1989*, Firenze, Convento di San Marco, in *Rivista di ascetica e mistica*, 1990, n° 3/4; A. Spicciani, *Capitale e interesse tra mercatura e povertà nei teologi e canonisti dei secoli XIII-XV*, Roma 1990, especially pp. 143-222 (wherein there is a vast bibliography). On St. Antoninus' pastoral work in the Florentine diocese, cf. D. S. Peterson, *Archbishop Antoninus: Florence and Church in the Earlier Fifteenth Century*, Ph.D. Dissertation, 1985, and Id., *An Episcopal Election in Quattrocento Florence*, in *Popes, Teachers, and Canon Lawyers in the Middle Ages* ed. by J.R. Sweeney and S. Chodorow, Ithaca 1989, pp. 300-325. On St. Antoninus' penitentials, see especially G. Aranci, *I "confessionali" di S. Antonino Pierozzi e la tradizione catechistica del '400*, in «Vivens Homo», 3 (1992), pp. 273-292; more recently, cf. M.P. Paoli, *Antonino da Firenze O.P. e la direzione dei laici*, in G. Filoramo (dir.), *Storia della direzione spirituale*, III. G. Zarri (a cura di), *L'età moderna*, Brescia 2008, pp. 85-130; O. Bazzichi, *Antonino da Firenze*, in *Il*



In this work, the author examined the sixth commandment of the Mosaic precepts, and lust in particular. He urged the confessor to use all of his discretion when dealing with a penitent, especially if it was a woman, as women were considered more susceptible to shame and thus more likely to return home without mentioning the sins of this kind that they had committed («accioche per suo domandare incauto non insegna fare il male e quando domanda di simili peccati non guardi in viso il peccatore maximamente donna»). To St. Antoninus, this topic required study, though he recognized that it was dangerous territory at the same time. As he went more in depth, he described the different manifestations of lust in all their complexity and down to the most sensitive detail. Adultery was in third place, after fornication and rape but before abduction, incest and other sins:

Tertio se chiama adulterio : Et questo e: quando luno: o latro almancho: o tuti doi sono in stato de matrimonio : et cum altri se impaza che cum la sua legitima compagnia.

This same order could also be found in other works by St. Antoninus: in his *Summa confessionis* for example, which stated that if *adulterium* was committed by a free man who «cognovit uxorem alterius, vel ipse uxoratus cognovit solutam, quod dicitur adulterium, et est duplex quando uterque est coniugatus», then it was to be included in the cases of *luxuria actualis*<sup>42</sup>; in his *Confessionale Specchio di conscientia «Omnis mortalium cura»*<sup>43</sup>; or in his *Summa theologica*, which enjoyed a great amount of

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*contributo italiano alla storia del pensiero-Economia*, Roma 2012, pp. 91-93 (see the bibliography on p. 93: the bibliography on the author is extremely vast).

<sup>42</sup> S. Antoninus, *Summa Confessionis, I pars interrogatorii seu II tract., sextum praeceptum de luxuria actuali et speciebus eius, de VI praecepto capitulum unicum*, Lugduni, apud Benedictum Boyerium, 1564, pp. 189-190.

<sup>43</sup> In this regard, there were not many differences in *Confessionale Specchio di coscienza «Omnium mortalium cura»*, written by the same author. I read the Milanese incunabular editions composed circa 1470 and circa 1490: the seventh deadly sin – that against the Commandment *Non mechaberis* – was a matter that the author described as «bruta» («Qui me convien scrivere bruto perche la materia in si è bruta, la quale se conviene dichiarare per utile da chi ne avesse bisogno. Ma el bon fine fara la materia honesta»). In

success upon publication, and which severely criticized the customs of the time despite being rooted in prudence and scrupulousness<sup>44</sup>.

his discussion thereof, adultery is considered a fourth kind of lust, after fornication, rape, and the abduction of women, and before incest, *sacrilegium*, *molice*, sodomy and sexual acts against nature, which are considered very serious. Adultery itself is deemed a very serious sin, and it can be classified as 'simple' or 'double'; in the latter case (wherein both sinners are married), it is considered «molto piu grave e punito anchora da le leze humane»: S. Antoninus, *Confessionale intitolato Specchio di coscienza «Omnium mortalium cura»*, Milano, ca. 1470 (in the copy conserved in the Biblioteca Apostolica Vaticana), f. 49v; see also ed. Milano, Antonio Zarotto, c. 1490, f. 42r.

<sup>44</sup> He discussed adultery as it related to Mosaic law, and to the Sixth Commandment in particular, as well as presenting a broader discussion of its relation to 'lust'. As regards the latter, his treatment of the issue was more profound, as it was interwoven with biblical references to the Old and the New Testament, to canon law and to the Auth. *Ut liceat matri*. He was following the path traced by St. Thomas' and Peter Lombard's teachings, in order to emphasize the enormous seriousness of such conduct, as it was directly self-destructive (it was the *una caro* from the Gospel of Matthew), worthy of the death penalty, second only to murder, and more serious than theft, robbery, forgery and many other sins; his goal was also to stigmatize *omnis illicitus coitus atque illorum membrorum non legitimus usus*, though not without recalling, as it were, moderation in marital intercourse, as Sextus taught «philosophus ut allegat Hieronimus» (as we have seen, this was a fairly constant quotation). Yet it was also a list of the (possible – I might add) consequent evils: from numerous murders («Quot homicidia inde sequuntur et quanta; et non solum in corpore sed in anima») to the effects on the legitimate children's 'stolen' inheritance; from incest in the case of forbidden relations between blood relatives to the 'extermination' of kingdoms («Quot regna exterminata sunt. Nonne Troia civitas illa tam famosa propter adulterium perpetratum a Paride cum Helena totaliter destructa est»). All this with an eye to the *magna exempla* of the past, as well as to the present, which was made up of men who were not ashamed of adultery committed «ex maxima cecitate quia non cognoscunt gravitatem mali», when on the contrary, St. Antoninus believed that they were to feel more ashamed than women. Once this blindness was removed, «summe confusio patebunt»; and *summa confusio... coram toto mundo* – a great shame on the people – was a pain that was hard to bear: St. Antoninus, *Summa theologica*, II pars, tit. V, cap. III *de adulterio*, Venezia, ex inclita atque famosa officina Nicolai Jenson Gallici, 1480, ff. [178r-180r], but also tit. V, cap. I *de luxuria* e II *de simplicibus fornicatione*, ff. [171v-178r] on lust *in genere*: numbered in pencil in the copy at the Biblioteca Nazionale Braidense. In the same library there are many other incunabula of the same work (see *Indice Generale degli Incunaboli, ad nomen*). See St. Thomas, *Summa theologiae*, II-2, q. 154, art. 8.2 (ed. R. Busa, ed. R. Busa, *Sanctae Thomae Aquinatis Opera omnia*, II, *Summa theologica*, Stuttgart -Bad Canstatt 1980, p. 712, online at <http://www.corpusthomicum.org/sth3146.html#45131>); see also Peter Lombard, *ad Quartum Sententiarum*, dist. 35, art. 4.

The potential damage caused by an adulterous relationship – especially due to extramarital births – was a thorny issue, and I think it was only right for St. Antoninus to express caution. The presumed legitimacy of an adulterine child meant that he was to be raised and supported by the putative father, in addition to being considered his heir, to the detriment of the ‘real’ legitimate children. A widespread *topos* at the time held that men possessed a greater faculty of reason, and thus they were considered more ‘blameworthy’ from some points of view; nonetheless, women’s actions could cause more victims. For this reason, St. Antoninus’ found himself once again repeating his mantra: action was to be taken only after a careful examination of the complex situation<sup>45</sup>.

In terms of a husband’s power to *dimittere* or accuse his wife of adultery, the *Archiepiscopus florentinus* added an eighth case to the list of exceptions that had previously been described in the *Summa Raimondina*: that of a husband who refused to pay the conjugal debt, *contra voluntatem uxoris*, and hence his wife committed adultery. However, St. Antoninus presented five situations that would exempt a husband from an obligation to separate from his wife, which were related to such matters as the scandal that would result, the behavior of the adulteress (how willing she was to mend her ways), and the threat of his incontinence<sup>46</sup>.

The same great preacher wrote another ‘confessional’, called the *Defecerunt*, in which he focused on the issue of restitution as it pertained to the putative father who had supported a child who was not his – a child who was nonetheless a potential beneficiary of all or part of his inheritance. Of course, the matter was examined along the same lines that had been explored by other Summists up to that point, yet St. Antoninus’

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<sup>45</sup> St. Antoninus shared the opinions of Raymond of Peñafort and Hostiensis, with the aim being not to harm others: the choice whether or not to disclose the origin of the adulterine child depended on the actual situation, as well as on the couple’s relationship (which may or may not have been dominated by the wife), on the husband’s knowledge of the facts, and on the inherent dangers (of death, infamy or scandal) in the revelation. But it was the responsibility of the wife and her child to return the stolen goods «quia furtum commisit quantum possibile est»; St. Antoninus, *Summa theologica*, II pars, tit. I, cap. XVIII *de multiplici falsificatione*, § VIII, f. [72v]; tit. II, cap. VII, § IIII, ff. [107v-108r]. See also III pars, tit. I, cap. XX, § IX; cap. XXI, § V-VI.

<sup>46</sup> *Ibidem*, II pars, tit. I, cap. XXII § *Casu autem*, ff. [26r-27r]; cap. XXI § *Nonus*, ff. [23rv].

insistence on the topic attested to his great concern about the potential consequences should an adulterous wife/mother reveal the truth to her cuckolded husband. Indeed, such a revelation was deemed opportune only if there were no risks in stating the truth; but given that such risks were «valde probabilia et in pluribus evenientia», the confessor's advice was to refrain from 'being truthful'.

In addition, there was the very real threat of a number of disastrous situations coming to pass. A woman who was once in good standing would inevitably be maligned as *pessime ac turpissime*, and thus (great) shame (*infamia*) would befall her, bringing with it personal, familial and social ramifications: «et sic innumerabilia et irrecuperabilia inter eos orientur mala». An adulteress also risked being killed, as did her illegitimate child and her adulterous partner. Lastly, there was the risk of *improbabilitas*, which meant that all those involved, including the judge, did not believe the woman's revelation, as it could only be proven *per infallibilia signa aut per violentas probationes, sive per testes idoneos* – a woman's word alone was not enough. And we know just how difficult it was to prove adultery, which was considered *difficilioris probationis*<sup>47</sup>.

There was also an element of the juridical to be found in the coetaneous *Summa pacifica*, which, according to its prologue, was written in 1473. The author was Blessed Pacific Ramati of Cerano, a Franciscan from the province of Novara<sup>48</sup> who had graduated from the Sorbonne. While his recurring sources were largely the Bible and the master theologians<sup>49</sup>, his work was not entirely devoid of legal references, which

<sup>47</sup> The negative results also affected the husband; the threat of scandal would fall, so to speak, on his social sphere, thus preventing him from maintaining his usual peaceful relations with his circle of acquaintances. Antoninus also hypothesized the risk of marital abandonment, or of repeated acts of adultery on the part of both spouses, as they were perhaps incapable of continence: St. Antoninus, *Summula confessionis 'Defecerunt'*, cap. VII *De modo restituendi...*, *Quomodo debeat fieri restitutio uxoris concipientis filium per adulterium*, ff. CXXXIIIr-CXXXVIv.

<sup>48</sup> On the Franciscan friar (1424-1482), see Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 75-76. According to Michaud-Quantin, the title derived from the author's name, while according to others, it derived from the author's aim, namely the achievement of peace that he pursued.

<sup>49</sup> Some examples of the *auctoritates* mentioned are the following: Alexander Halensis,

could be gleaned in the background (for example, references to the *Decretum Gratiani* or to the opinion of Panormitanus, the ‘Abbas Siculus’). Indeed, before delving into each issue, a major canonical text was cited near the beginning of the treatment in order to establish the illicit nature of each act being deplored. Thus, there is no choice but to agree with the opinion of Michaud-Quantin, who considered the *Pacifica* «une formule mixte entre les manuels de confession et les sommes de caractère juridique»; it was no coincidence that many other works like this would follow<sup>50</sup>.

The author provided extremely detailed advice to confessors regarding the questions to ask penitents (though there was also an abbreviated line of questioning), and in doing so he emphasized – albeit cautiously – how marriage was an exclusive sexual relationship, the sole purpose of which was procreation. Any other sexual relations were denounced as mortal sins each time they were committed: this included the ‘deliberate’, constant desire to engage in illicit carnal intercourse, if the offender persisted with such forbidden conduct. If a husband had engaged in carnal intercourse with his wife for the sake of pleasure or lust, it was considered a venial sin if such pleasure or lust was not put before one’s love for God («non preponendo tal dilectatione o libidine al amore de Dio»). Once again, reference was made to the same distinction that could be found in the sources, and which has already been mentioned in the present article<sup>51</sup>.

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*Summa theologiae*, pars II, q. 143 *De luxuria, membrum II*; q.146 *De fornicatione*, cap. *De adulterio*, Venetiis, apud Franciscum Franciscum, 1572, ff. 359r-360 and ff. 167r ss. respectively: wherein reference was made to St. Augustine, including as concerned the rejection of carnal relations in marriage that were not meant for procreation. More recently, see J.M. Wierzbicki, *Alexander de Hales. Quaestiones disputatae de gratia. Editio critica. Un contributo alla Teologia della Grazia nella prima metà del secolo XIII*, Roma, 2008; see also S. Delmas, *Alexandre de Hales et le studium franciscain de Paris. À l’origine de la question des chaires franciscaines et de l’exercice quodlibétique*, in A. Sohn-J. Verger (Hg/éds.), *Les collèges réguliers en Europe au Moyen Âge et à la Renaissance*, Winkler de Bochum, 2012, pp. 37-47 ; Ead., *Les franciscains et l’Université*, in *Études franciscains*, n.s., 2012, 2. See also Scotus, or Peter Lombard, or S. Thomas, *Summa theologiae*, II-2, q. 154: this is the place in the *Summa Theologiae* that was also referred to in other *Summae confessorum* (see *passim* and note 43).

<sup>50</sup> Michaud-Quantin, *Sommes de casuistique* (not. 10), p. 75.

<sup>51</sup> *Summa confessionis intitulata Pacifica conscientia*, cap. IX *De sexto et nono praecepto et*

Other *summae confessorum* would appear in print at about the same time, as well as in the decades to follow in the sixteenth century. These works were more complex, having been structured to cover the realm of

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*de luxuria*, Venetiis 1509 (die XXVI Marcii), ff. lIir-LIVv, but see also cap. *Interrogatio ad coniugatos*, ff. XCIVv-XCVr. Additionally, the *Interrogatorio volgare compendioso e copioso*, which was recently published from a manuscript (the ms. Aldini 24 at the University Library in Pavia), took just as much care to provide the confessor with the right advice so as to carry out his task well. It was probably written in the years just prior to St. Antoninus' 'confessional' *Defecerunt*. Among the questions the confessor was to ask the penitent, it included: «Se ha adulterato, zoè cum persona maritata, et se luy è uxorato, è dopio adulterio», especially considering the husband's adultery. His wife was even allowed to 'make herself up' if it could deter the husband from adultery («Se la donna per lascivia (see *supra* note 25) de vanagloria, o de altri provocare a luxuria, s'è imbelletata, è mortale peccato, ma no se ha facto per retrahere lo marito da lo adulterio»); while for the woman, he considered her paying the conjugal debt a sin if she did so knowing that «l suo consorte pubblicamente è in adulterio cum altri e che la ghiesia questo a luy veta», or even simply her asking it of her husband «che pubblicamente sta in adulterio» (*Interrogatorio volgare compendioso e copioso. Documenti sulla confessione nel secolo XV dal ms. Aldini 24 della Biblioteca Universitaria di Pavia*, Pavia 1994, particularly pp. 70, 114-115, 144, 150). Girolamo Savonarola adopted a similar view in the *Eruditorium confessorum*, in the chapter entitled *De luxuria et eius speciebus*. In a discussion that focused on the most serious sins of lust, and which utilized a scale of severity that went from the least to the most severe, the well-known preacher placed adultery – which he assessed harshly nevertheless – after lust *contra naturam*, which he considered very serious (an exemplification of which was sodomy); it was followed by incest, considered *non contra naturam sed contra naturalem reverentiam*, and then the *tertium genus* of the sins of lust *contra rationem*, of which adultery was a manifestation. According to the fairly common classification at the time, the latter included: in first place, simple fornication with a non-virgin unmarried woman; in second place, the same act with a virgin, which was considered rape, and as such an even more serious act of adultery; and lastly, *sacrilegium*, or carnal sin committed with a religious person. Savonarola was very committed to providing confessors with effective and complete rules of conduct, and did not hesitate to dwell on the most embarrassing of details in order to suggest the range of questions to ask during the interrogation of the penitent. The latter was obliged to answer by giving a description of all the circumstances of the act, specifying whether it was inspired by the simple pursuit of sexual pleasure (in this case it was a mortal sin), or by simple sensuality, and thus a venial sin (*Eruditorium confessorum*, cap. *De luxuria et eius speciebus*, ed. 1511). More recently, on Savonarola's work, see D. Weinstein, *Il profeta come medico di anime. Il «Manuale per confessori» del Savonarola*, in «Memorie domenicane», n.s., 29 (1998), pp. 21-38: see also P. Scapecchi (ed.), *Catalogo delle edizioni di Gerolamo Savonarola (secc. XV-XVII)*, Firenze 1998, pp. 7-11.

law in greater detail, and they could also be characterized as more 'sapiential' in nature; nonetheless, they would enjoy widespread acclaim.

One such example was provided by the «professor integerrimus»<sup>52</sup> Battista Trovamala de Salis, a Franciscan who published two successive editions of his work between 1480 and 1490: the *Summa baptistina* and the *Rosella casuum* or *Summa Rosella*.

Once the customary definition was provided, Battista Trovamala followed the example set by his predecessors in adopting a practical point of view: was a mother of an adulterine child to reveal her sin, or refrain from doing so? Panormitanus was immediately cited as a reliable guide<sup>53</sup>, as he established various hypothetical situations that were to be considered based on the potential *periculum* of each: if there was no *periculum*, and the 'confession' of one's guilt was deemed credible, then it was a woman's duty to be truthful; if the revelation would not come off as credible, and if there was no plausible evidence supporting it, then the advice given was to do penance in silence «ne potius inducat scandalum quam aliam utilitatem». In addition, even if there was evidence *prompta*, silence was deemed preferable if confessing meant putting the woman's life in danger: the only risk with not telling the truth was a *periculum rerum*, while revealing the misdeed could lead to a *periculum animarum et corporum*, and as Panormitanus noted, a woman «inter hec duo mala

<sup>52</sup> Cf. Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 98-99; and A. Teetaert, *Baptiste de Sale(de Salis) ou Baptiste Trovamala*, in *Dictionnaire de droit canonique*, II, Paris 1937, pp. 202-203; more recently, see E. Bellone, *Appunti su Battista Trovamala di Sale e la sua 'Summa casuum'*, in «Studi francescani», 74 (1977), pp. 375-402; L. Babbini, *Tre 'summa casuum' composte da tre francescani piemontesi della provincia di Genova*, in «Studi francescani», 78 (1981), pp. 159 ss.; J.A. Brundage, *The Rise of Professional Canonists and Development of the 'Ius Commune'*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung», 81 (1995), pp. 26-63; G. Dolezalek, *Lexiques de droit et autres outils pour le 'Ius commune'*, in J. Hamesse (éd.), *Les manuscrits des lexiques et glossaires de l'Antiquité tardive à la fin du Moyen Age*, [Textes et études du Moyen Age, 4 (Louvain-la-Neuve-Turnhout, 1996)], pp. 353-376. (the title *Rosella* evoked the well-known metaphor of the flower garland, where the examined *casus* were arranged in alphabetical order).

<sup>53</sup> Abbas Panormitanus, *In Quartum et Quintum Decretalium*, Lugduni 1550, to X 5. 38.9 *De poenitentiis* c. *Officii*, f. 155v.

debet eligere minus malum et sic tacere». If one was to properly balance the risk of scandal – which, like the risk of death, was to be avoided at all costs – with respect for the truth, then it was important to remember that scandal and death carried more weight. It was stated, however, that the duty to the truth would prevail as it pertained to a judge or witness, as they were obligated to *iudicare veritatem*. This was an acceptable solution from a ‘pragmatic’ point of view, as it carefully took into consideration all the interests in play: indeed, some interests could outweigh others, meaning that the truth might have to be sacrificed at times.

One concern that seemed to take on great importance was that of the unjust enrichment of an adulterine child in terms of child support and inheritance rights, if this was to the detriment of the legitimate heirs (law and ethics would converge in arriving at a fair compromise for this delicate issue). In order to avoid injustice, the advice given was for the mother to use her own possessions to fulfill any obligations towards heirs *ab intestato*, as well as towards anyone who would have plausibly been appointed as an heir by the husband (assuming he had known the truth); otherwise, if there were any doubts, a valid alternative was to leave everything to the poor. On the other hand, if the adulterous mother’s financial situation was such that she could not fulfill those obligations, then she was to repent, and her confession would lead to forgiveness. Once again, however, a potential *scandalum corporum et animarum* was cited as good cause for not carrying out any obligations expected of her<sup>54</sup>.

The accusation of adultery was treated more extensively under the title *Matrimonium*. After citing the familiar seven exceptions provided by Raymond of Peñafort, Trovamala turned to well-established canonical doctrine, as represented by such illustrious sources as Laurentius Hispanus,

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<sup>54</sup> Baptista Trovamala, *Rosella casuum...*, *adulterium*, Venetiis, Georgius Arrivabenis Mantuanus, 1495, ff. 27v-28v. On the notion of scandal, see R. Naz, *Scandale*, in *Dictionnaire de droit canonique*, VIII, Paris 1965, p. 877. Cf. C. Nemo Pekelman, *Scandale et vérité dans la doctrine canonique médiévale (XIIe-XIIIe siècle)*, in *Revue historique de droit français et étranger*, 85 (2007), pp. 491-504; L. Bryan, *From Stumbling Block to Deadly Sin. The Theology of Scandal*, in G. Jaritz (ed.), *Scandala (Medium Aevum Quotidianum, Sonderband XXII, 2009)*; R. Helmholz, *Scandalum in Medieval Canon Law in the English Ecclesiastical Courts*, in «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung», 127. 258 (2010), pp. 258-274.



Geoffrey of Trani<sup>55</sup>, Hostiensis and Panormitanus. The cases to consider grew in number thanks to this influential combination of *auctoritates*, but nonetheless, there were still limited circumstances under which a separation could be 'granted' by the system. Thus, while separation was not permitted by Panormitanus if a spouse committed a crime – though he did make an exception for carnal or spiritual fornication, including sodomy, as long as it was not committed with one's spouse (in that case, then only if the husband persisted with his vice) – the right of a secretly adulterous husband to ask for a separation from an openly adulterous wife was also restricted<sup>56</sup>.

In that same period, Angelo Carletti of Chivasso – the noble-born lawyer and senator turned Franciscan and «holy soldier» – wrote a *Summa de casibus conscientiae*, the *Summa Angelica*. Given his background, he had all the attributes needed to tackle the issue from a legal, moral and religious point of view<sup>57</sup>.

Like the *Rosella*, the *Angelica* was organized alphabetically, and the title *adulterium* was introduced with the sin's now-familiar definition. The source of reference was the *Decretum Gratiani* in the *Cum ergo* canon: hence, it was considered a very serious mortal sin, but not as serious as incest or sodomy<sup>58</sup>. This was then followed by the usual examination of the

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<sup>55</sup> Goffredus Tranensis, *Summa... in titulos Decretalium* (nt. 24), ad X. 4. 19 *de divortiis*, f. 184r.

<sup>56</sup> Baptista Trovamala, *Rosella* (not. 55), entry *matrimonium*, ff. 343v.344r.

<sup>57</sup> Michaud-Quantin, *Sommes de casuistique* (not. 10), pp. 99-103; and M. Bessone, *Il Beato Angelo Carletti da Chivasso*, Cuneo 1950; see also O. Capitani (a c. di), *Frate Angelo Carletti osservante: nel 5. centenario della morte (1495-1995)*, *Atti del Convegno: Cuneo, 7 dicembre 1996, Chivasso, 8 dicembre 1996*, Cuneo 1998 and particularly the essay by M. C. De Matteis, *Il panorama storico del '400 nell'opera di Carletti*, pp. 141-155; see also S. Pezzella, *Carletti Angelo*, in *Dizionario biografico degli Italiani*, 20, Roma 1977, pp. 137-139. As has been stated by historians, this was a work of great value, evidenced by the fact that it was burned by Martin Luther – along with other works expressing what in his opinion were Roman abuses – when he gave his revolt against the Church the solemn form of an auto-da-fé (the ceremony took place on 10 December 1520). In the *Diabolica* – he called it so – Luther saw an example of all the vices of the Catholic penitential discipline.

<sup>58</sup> C.36.q.1.c. 2 § 3: «adulterium vero est alieni thori violatio. Unde adulterium dicitur quasi ad alterius thorum accessio». Therein the various kinds of lust are listed, starting with

various ways in which such conduct could manifest itself – which covered the cases that have already been described in the present article – and went so far as to include an ‘anomalous’ case as well, «secundum quendam iuris interpretationem»: that of a husband who loved his wife with such burning desire that he wanted to lie with her as if she were not his wife, and similarly, that of a wife who felt the same rapturous lust for her husband<sup>59</sup>.

In examining the penalties inflicted upon adulterers and adulteresses, the author took the occasion to cite traditional Roman law, under which adultery was even punishable by death. He then immediately cited more recent punitive action that had been put in place following a regulatory reform of the Code of Justinian (the Auth. *Sed hodie*<sup>60</sup>): this called for the adulterous woman to be confined in a convent and to lose her dowry, while the adulterous man would lose his wedding gift (*donatio propter nuptias*). Indeed, the *Angelica* was characterized throughout by numerous references to the doctrines of civil law and canon law. In that regard, the Lyonese edition of 1520 featured an introductory epistle to Angelo Carletti of Chivasso in which he was defined «tamquam alter Iustinianus», as well as the author of a work that was imbued with the «fundamenta iuris civilis» and ‘up-to-date’ canon law<sup>61</sup>.

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fornication – less serious but nonetheless *coitus illicitus* – and followed by rape, adultery and incest. The notion of adultery given in the *Angelica* was as follows: «adulterium est alieni thori violatio, unde dicitur adulterium quasi ad alienum thorum accessio».

<sup>59</sup> Angelus de Clavasio, *Summa Angelica de casibus conscientialibus... cum additionibus quam commodis R.P.F. Iacobi Ungarelli Patavini eiusdem ordinis*, Venetiis, apud Iac. Sansovinum Venetum, 1569, ff. 17rv (I also consulted the incunable edition «impresa per Georgium de Rivabenis Mantuanum», 1487 (entry *adulterium*), and the Lyonese 1520 edition (entry *adulterium* at f. VIIIv-IXv). Adultery could be classified as ‘simple’ if one of the adulterers was married, or ‘double’ if both were married; it was committed in various ways: firstly, when a man had sexual relations with a married woman, or when a married man had sexual relations with an unmarried woman, in addition to the above-mentioned ‘anomalous’ case.

<sup>60</sup> Auth. *Sed hodie* to C. 1.48.1 (Nov. 134.9).

<sup>61</sup> Angelus de Clavasio, *Summa Angelica, Epistola*, ed. Lugduni, Antonius du Ry., 1520, f. aajj. The entry *divortium* was a brief summary of the topic, clearly aimed at emphasizing the illicitness of divorce/marriage dissolution under canon law: though brief, the entry is

Around 1506, the Dominican Silvestro Mazzolini wrote his own *Summa Summarum* (the author had entitled his work thusly, though it would go on to be known as *Summa Sylvestrina*; it was reprinted more than forty times during the sixteenth century). The purpose of his work was to supersede all works of a similar nature that had come before it, which ranged from the *Pisana* to the *Rosella* and included the renowned treatises on the subject by St. Antoninus.

The work began no differently than previous *Summae*: it started with the definition, which included the traditional etymology of the term and reference to the *Decretum Gratiani*, and then moved on to a classification of the various types of adultery. With regard to the latter, it included the case «secundum quandam iuris interpretationem»

quando non sistitur intra limites matrimonii, sed libidinis fervore tendit in suam, etiam si esset aliena, vel econverso mulier respectu viri. Unde secundum Thomam Ardentior in suam est aliquo magis adulter quam cum aliena.

The opinion provided by the celebrated theologian – who made reference to Saint Jerome<sup>62</sup> – was imbued with such urgency and so strongly

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full of references to civil law scholars, from Bartolus to Baldus, Paulus de Castro and Alexander Tartagnus (ed. 1520, ff. LXXIrv); see also the entry *Matrimonium, quartum* (ed. 1520, ff. CCXXXVr), under which adultery was regarded as grounds for separation *quoad thorum et cohabitationem*.

<sup>62</sup> See Sylvester Prierias, *Summae, quae Summa Summarum merito nuncupatur pars prima*, entry *adulterium*, ed. Lugduni, apud Mauricium Roy & Ludovici Pesnot, sub insigni Salamandrae, 1553, pp. 30-32; entry *divortium*, especially nrr. 9-12, pp. 258-259; entry *matrimonium IX*, pp. 220-221: there was *adulterium simplex*, which was subdivided further if only one of the adulterers was married; *duplex*, if both were married; or a third case «secundum quandam iuris interpretationem». See St. Thomas, *Summa theologiae*, II-2, q. 154, art. 8.2 (nt. 43). Silvestro Mazzolini da Priero (1456/57-1523), theologian and Dominican, taught in both Bologna (he did not teach in Padua, probably because of hostility on the part of conventual friars) and Rome, where he was called by Pope Julius II. He would go on to become 'Master of the Holy Palace' in 1515. The *Sylvestrina* was first circulated in manuscript form, and then published in 1514 or 1515, which led to success for him. He wrote many other works, such as the *Compendium dialecticae* (Venezia, O. Luna, 1496); *In praesumptuosas Martini Lutheri conclusiones de potestate Papae dialogus*,

worded that the type of adultery he described almost ended up being deemed more serious than that committed outside of marriage.

Overall, this work produced a positive result: in my opinion, there was even more of a legal slant to this text when compared to previous *Summae confessorum* that had tackled the same issues. Needless to say, Mazzolini cited the foremost sources in formulating his stance: there were the usual canon law texts, from the *Decretum* to the *Liber Extra* and *Liber Sextus*, as well as the commentaries thereon, especially those of Hostiensis, Innocent IV, the Archdeacon, Johannes Andrea, and the *Abbas*, Panormitanus, an unquestionable *auctoritas*; not to be neglected, other *Summae confessorum* were referred to as well, such as the *Rosella*; and even civil law figured prominently, as it was very frequently cited along with the doctrine that had developed around it, which at the time was best represented by its pre-eminent jurist, Bartolus of Sassoferrato.

One of the most sensitive issues had to do with the consequences of an adulterous act that had led to the birth of a child: this was a recurring theme that had already been explored in great detail by earlier *Summae*, as we have seen in those reviewed up to now. Nonetheless, the *Sylvestrina* extensively revisited the issue of inheritance and that of disciplinary sanctions for the people involved; regarding the latter, in light of the fact that the death penalty had fallen into disuse, confinement in a monastery was cited as an up-to-date form of punishment («hodie vero prius verberata retrudetur in monasterium»)<sup>63</sup>.

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(Romae, M. Silber, 1518); *De juridica et irrefragabili veritate Romanæ Ecclesiæ Romanique Pontificis* (Romae, 1520); the *Epitoma responsionis ad Lutherum* (Perugia, G. Cartolari, 1519); and the *Errata et argumenta M. Lutheri recitata, detecta, repulsa et copiosissime trita* (Romae, A. Blado, 1520), in which he showed himself to be one of the first opponents of Lutheran doctrines: see S. Feci, *Mazzolini Silvestro (Silvestro da Prierio, Prierias, Prieriate)*, in *Dizionario biografico degli Italiani*, 72, Roma 2009, pp. 678-681.

<sup>63</sup> See Sylvester Prierias, *Summae, quae Summa Summarum merito nuncupatur pars prima* (not. 62). Raymond of Peñafort – who was often the *auctoritas* of reference on the topic – recommended a prudent approach, which did not prevent the secret from being disclosed to an expert priest or bishop, or both of them, so that they could in turn reveal the truth to the adulterine child in front of his mother (provided that this seemed useful, and that he was God-fearing and could keep the secret). The child would then be urged to join a monastery or to go far away, so as not to obtain any advantages from the putative father's

Other *Summae* would be published alongside the *Sylvestrina*, as the intense activity of the previous two and a half centuries continued to build upon itself and find new expression.

One such work published around the same time was the *Summa Tabiena*, written by the Dominican Giovanni Cagnazzo of Taggia<sup>64</sup>. This text covered more ground than the *Sylvestrina*, and it was influenced by the *Angelica* and the *Rosella*. Furthermore, it contained more citations, and to Michaud-Quantin it was without a doubt much too vast in scope: indeed, he claimed it was excessive<sup>65</sup>. The treatment of the issue became more and more complex as well: on the one hand, the sin of adultery was analyzed from a moral and religious point of view, with reference made to a wider array of biblical, theological and philosophical sources. It was an evident hybrid of the profane and the religious that was not uncommon for the time (the *auctoritates* invoked were Peter Lombard, St. Thomas, St. Jerome, Sextus the Pythagorean and Raymond of Peñafort). On the other hand, there was more of a purely legal point of view, where sources from the *Decretum* and the *Liber Extra* were used to develop a set of rules similar to that already outlined in the present paper, but which went into even greater detail and widened the range of issues to be resolved. In addition, there were contributions from both Hostiensis and Panormitanus<sup>66</sup>, as well as previous *Summae confessorum* (the *Pisana* and the *Rosella* in particular, and St. Antoninus, the *Archiepiscopus Florentinus*).

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inheritance. These are the same words that can be found in the *Pisana* and in the *Sylvestrina*. Similarly, the same prominence was given to the threat of scandal, and it was still the child's decision to believe his mother's revelation, as he was not obliged to do so: Abbas was the *auctoritas* (Abbas Panormitanus, *Secunda in Secundum Decretalium*, Lugduni 1550, ad X 2.19.10 *de probationibus* c. *Per tuas*, especially nr. 4, f. 26r.

<sup>64</sup> See L. Sinisi, *Un sommista ligure del primo Cinquecento: prime note su Giovanni Cagnazzo e la sua Summa Tabiena*, *Atti Società Ligure di Storia patria*, 2007 ( n.s., XLVII/1 (CXXI): *Presenza e cultura domenicana nella Liguria medievale*), pp. 91-114.

<sup>65</sup> Michaud-Quantin, *Sommes de casuistique* (not. 10), p. 104.

<sup>66</sup> Cf. particularly Hostiensis, *In quintum Decretalium Librum Commentaria*, ad X 5. 11 *De poenitentiis* c. *Officii*, ed. Venetiis, apud iuntas, 1581, ff. 100v-101r; Nicoaus de Tudeschis (Panormitanus), *In Quartum et Quintum Decretalium*, Lugduni 1550, ad X 5. 11 *De poenitentiis* c. *Officii*, f. 155v; ad X 4.20.4 *De donationibus inter virum et uxorem* c. *Plerumque*, ff. 50v-51r.

Meanwhile, the *legistae* were essentially relegated to the background, where they were called upon whenever a certain approach needed validation: at times it was to support the presumption of legitimacy as it pertained to the adulterine child, provided he was born during the subsistence of a legitimate marriage; at other times, it was to justify the child who, in all honesty, did not believe his mother's revelations and thus did not return what he had received from his putative father<sup>67</sup>.

Another *Summa de casibus conscientiae* that was similar to the above was the *Summa Aurea Armilla*, which was first published in Piacenza in 1549 and met with great success in terms of its circulation (a good twenty-seven editions in Latin and in the vernacular appeared between 1549 and 1602). The text – which was organized in alphabetical order and would eventually be published in Italian – was the work of Bartolomeo Fumi, a noted Dominican author<sup>68</sup>.

In the title *Adulterium*, he retraced the path that other literature of this genre had already traveled down. He made frequent reference to St. Thomas, who seemed to act as his constant guide, and he immediately made clear the deplorable nature of such conduct in his introduction to the subject: it was a sin because such licentiousness contained «specialem deformitatem circa actus venereos» from two points of view, being both

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<sup>67</sup> Iohannes Tabiensis, *Summae Tabienae quae Summa Summarum merito appellatur pars prima*, Venetiis, apud Gasparum Bindonum, 1569, pp. 72-75 (entry *adulterium*: on p. 72 reference is made to St. Thomas II-2, q. 154 (v. not. 44), to Exodus 20.14 and to Ezekiel 23; on p. 73 n. 3 reference is made to Peter Lombard and to St. Thomas, especially in Peter Lombard's commentary *ad Quartum Sententiarum*, dist. 35, art. 4; as for the equal judgment of an adulterous husband and an adulterous wife, reference is made to the *Rosella*, which was an oft-cited reference throughout the work; on p. 75, reference is made to the *Pisana*). The entry *divortium*, p. 471, did not deal with adultery; Id., *Summae Tabienae quae Summa Summarum merito appellatur pars secunda*, Venetiis, apud Gasparum Bindonum, 1569, pp. 363-367 (entry *Matrimonium IIII*). .

<sup>68</sup> Cf. S. Giordano, *Fumi Bartolomeo*, in *Dizionario biografico degli Italiani*, 50, Roma 1998, pp. 731-732; see also Turrini, *La coscienza e le leggi* (not. 10), pp. 65, 97-98, 100, 112, 153, 423-426 (wherein there is a list of the 29 editions in Latin and in the vernacular); see G. Manfredi, *Uno scrittore piacentino da ricordare: Bartolomeo Fumi*, in «Bollettino Storico Piacentino», 50 (1955), pp. 16-21; A. Prosperi, *Di alcuni testi per il clero nell'Italia del primo Cinquecento*, in «Critica storica», 7 (1968), pp. 162-163; J. Theiner, *Die Entwicklung der Moraltheologie zur eigenständigen Disziplin*, Regensburg 1970, pp. 79-80.

«contra castitatem» and «contra bonum proles educandae»<sup>69</sup>. As doctrine stood, if both husband and wife had sinned against conjugal infidelity to the same extent, then greater blame would be laid on the woman, due to the (potential) scandal and the (potential) uncertainty surrounding the adulterous couple's alleged children. Once again, however, Fumi availed himself of the *auctoritas* of St. Thomas, this time to argue that most of the blame should be borne by the husband, as he was a sinner «quantum ad dominium rationis»<sup>70</sup>. An even more 'original' contribution could be found in the title *Matrimonium*, in which Fumi interpreted a passage from the Gospel of Matthew («Quicumque dimiserit uxorem suam nisi ob fornicationem et aliam duxerit meatur...»). In so doing, he briefly reconstructed the differences that had arisen among theologians as a result of a disputed statement by St. Ambrose which seemed to grant husbands of adulterous wives the possibility of contracting a new marriage. He contested the truthfulness of such an affirmation in light of St. Thomas («sed miror quod Ambrosius pro se adducat, cum magister ibi dicat, quod haec verba non sunt Ambrosii sed a falsariis in libris Ambrosii creduntur posita»)<sup>71</sup>.

Towards the end of the sixteenth century, when the prevailing point of view was of a moralistic and theological nature, Mauro Antonio Berarducci wrote the *Summa confessorum Corona*. A secular clergyman, theological scholar and master, and coadjutor to the Bishop of Bisceglie,

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<sup>69</sup> Bartholomeus Fumus, *Summa quae aurea Armilla inscribitur*, Placentiae 1549, ff. 14v-15r (entry *adulterium*), but also f. 86r (entry *Divortium*) e ff.221r-222r (entry *Matrimonium*); see also Id., *Summa Armilla... di tutti i casi che sogliono occorre nella cura dell'anime già tradotta in lingua volgare dal Rever. P. Mestro Remigio dell'istesso Ordine, & dal R.M. Gio. Maria Tarsia... et hora in questa nuova impressione ricorretta, ordinata, & à più facile, & spedita lettione ridotta*, rubr. *Dell'adulterio*, Venetia, presso Domenico Nicolini, 1588, ff. 15r-16v (*Dell'adulterio*); ff. 84r-85v (*Del divortio*), especially 85r; f.221rv (*Del matrimonio*). Adultery was more serious than simple fornication – in accordance with the scale that was typically adopted by other authors, and which has been previously cited in this paper – because it violated conjugal fidelity, while less serious than incest, *sacrilegium* and the «vitium contra naturam».

<sup>70</sup> St. Thomas, *Summa theologiae*, Suppl. q. 62, art. 4 (available online at the following address: <http://archive.org/stream/operaomniaiussui12thom#page/126/mode/2up>).

<sup>71</sup> Bartholomeus Fumus, *Summa quae aurea Armilla* (nt. 68), entry *Matrimonium*, nr. 72, ff. 221rv.

Berarducci once again classified adultery as a sin of lust. It occupied the second-to-last position on his list of lustful offenses – a degree of seriousness above simple fornication – and it was divisible into four subcategories, in keeping with what at that point had become a long-standing tradition<sup>72</sup>.

Primary importance was placed on the violation of marital fidelity, which was considered a major sin if committed against the «most excellent» of spouses, namely Christ. Nonetheless, treatment of the issue began by condemning sexual intercourse for any other purpose other than procreation<sup>73</sup>, while at the same time it was regarded as something natural and «indeed necessary for the preservation of the species».

In any case, legal aspects were overshadowed in this work. Only rarely was reference made to canon law and canonists (the civil law perspective was excluded entirely): specifically, in those parts of the text that dealt

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<sup>72</sup> M.A. Berarducci, *Somma Corona de Confessori*, Venetia, appresso Gio. Battista. Viscio, 1588, especially pp. 77-78: «la seconda specie si chiama adulterio, qual'altro non è, che violare l'altrui toro, cioè letto maritale, che perciò si domanda adulterio, quasi un'andar al toro d'altrui... e questo sarà di quattro sorti, cioè un maritato con una donna soluta; over un soluto con una donna maritata o pur quando amendue sono maritati; e questo è più grave delli due primi; perché ha due difformità, cioè macchia la fede alla moglie; e fa ingiustizia al prossimo, togliendoli la sua donna... Quarto si può ridurre alla specie d'adulterio il congiungersi con una Religiosa, perché quella sua professione, è molto più nella sua sacratione, e fatta spirituale sposa di Cristo, dedicandoli la sua virginità, benché più propriamente questa si dica specie di sacrilegio... il toro della quale, violandosi, tanto peggior adulterio chiamar si può; quanto il suo sposo sarà più eccellente, a cui si rompe la fede». On Berarducci, see Turrini, *La coscienza e le leggi* (not. 10), pp. 112, 117; for an earlier work on Berarducci, see Mazzuchelli, *Gli scrittori d'Italia*, II/2, Brescia, presso a Gianbatista Bossini, 1760, pp. 914-915. For example, he was described as «Dottore e maestro di theologia» on the title page of the Italian version of the *Somma Corona de Confessori*, which is mentioned above.

<sup>73</sup> Berarducci, *Somma Corona de Confessori* (not. 72), especially pp. 77-78: «quando allhora si fa contra l'ordine della ragione, quando di quell'atto non se ne serve a quel fine che è stato ordinato dalla natura; anzi da Dio autor della natura, e anco a quel modo debito e conveniente da Dio comandato. Il fine di questo atto venereo è la procreatione de figliuoli...per quel che si dice (con modo debito e conveniente) si esclude ogn'altra donna, che la sua; come fu instituito da Dio nel principio del mondo: nel quale il matrimonio incominciò ad essere officio di natura, e nel tempo della gratia, Sacramento; benché avesse pur intentione di far figliuoli, come fanno i Concupinari».



with incest, where the authors cited were Aristotle, Galen, Panormitanus, the author of the *Sylvestrina* (under the title *matrimonii, nr. 8*), Pierre de La Palude<sup>74</sup> and «Federigo nel consiglio 190» (the reference was to Fridericus Petruccius)<sup>75</sup>.

#### 4. *A brief conclusion.*

One characteristic shared by the *Summae confessorum* that I have discussed herein is that they all clearly drew inspiration from a variety of sources. On the one hand, they examined adultery as sin, which included conjugal sexuality that was too passionate in the eyes of the Church; on the other hand, they examined adultery and its harmful consequences, which was a matter of law, especially if the act had resulted in the birth of an adulterine child. The role of the family was relegated to the background, but its presence was nonetheless distinguishable: above all, it was the family's responsibility to decide whether to prosecute the offender or to resort to other means in order to bring the offender's conduct back in line with custom and redeem both personal and family honor.

As the Counter-Reformation progressed, the Church 'did its job' by reinforcing the disciplinary authority of the family and of public institutions. It accomplished this by exercising its power of persuasion, which it wielded thanks to its influence and authoritativeness, as well as by exploiting the obedience of its faithful, who felt morally obliged to abide by

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<sup>74</sup> Pierre de la Palude, esteemed Dominican theologian and author of a commentary on Peter Lombard's *In quartum sententiarum*, which discussed adultery in various ways, among other issues.

<sup>75</sup> Berarducci, *Somma Corona de Confessori* (not. 72), especially p. 80, which offers an extensive treatment of incest (pp. 78-84). «Federigo nel consiglio 190» was probably the Sienese Federico Petrucci, who dealt with incest in his *consilium* 167, according to the numbering of the edition of his *Consilia, sive Responsa, Quaestiones et Placita*, Venetiis, apud Franciscum Ziletum, 1570, f. 82v: «Parcendum est ergo mulieri, quae putavit fornicationem simplicem esse adulterium maxime cum haec nomina fornicatio, adulterium, incestum, stuprum, et similia fiant de subtilitate iuris...»: the case concerned a woman who had confessed to committing adultery: the discussion was about whether it was possible to revoke the confession, given that there were rumors that the husband was probably dead at the moment of the sexual act. In other *consilia* from the same collection, the topic was not even briefly touched upon.

the Church's teachings. As an institution that was to act as an intermediary between heaven and earth, it provided advice and rules of conduct through confessors (and manuals that tended to standardize the Church's teachings). The goal was to ensure the *salus animarum*, but given the close connection between religion and politics, the Church established behavioral norms that were applicable to the mundane world as well<sup>76</sup>.

Meanwhile, as the Protestant Reformation moved forward and new ways of interpreting Church doctrine were introduced, adultery became a sort of 'battleground' of opinion: different ideas were expressed...and the possibility of divorce came under more serious consideration.

The value of sexual continence would appear here and there in the background: the Church preached that it was a means of reaching a spiritually superior state, and it was also considered a principle to be followed within marriage itself, in order to prevent dissolute conjugal relations that were not aimed at procreation<sup>77</sup>.

The *Summae* of the fourteenth century presented norms of reference that were derived from canon law and decretal-based doctrine; the *Summae* of the centuries to follow featured a more prominent role for civil law (and the interpreters thereof) alongside canon law, although at times doctrinal writers were not specifically cited, but rather 'grouped', so to speak, under a generic category of *legistae*. The separation between the internal and external forum – between ecclesiastical and civil jurisdiction –

<sup>76</sup> Cf. Renoux-Zagamé, *Lois du ciel et lois des hommes* (not. 10), especially pp. 867 ss.

<sup>77</sup> Cf. G. Minnucci, *Alberico Gentili tra mos italicus e mos gallicus. L'inedito Commentario Ad legem Juliam de adulteriis*, Bologna, Monduzzi, 2002; and Id., *Un inedito di Alberico Gentili regius professor di diritto civile nell'Università di Oxford*, in *Alberico Gentili nel quarto centenario del De Jure Belli. Atti del Convegno. Ottava Giornata Gentiliana*, Milano, Giuffrè, 2000, pp. 219-244 (see also Id., *La nuova metodologia di Alberico Gentili nel I Libro del 'De nuptiis' (1601)*, in *L'uso della forza nel diritto internazionale. Atti del Convegno. Undicesima Giornata Gentiliana*, Milano 2006, pp. 399-431; Id., *Alberico Gentili: un protestante alle prese con il Corpus iuris canonici*, in *Alberico Gentili e la salvaguardia dei beni culturali nel diritto internazionale. Atti del Convegno. Dodicesima Giornata Gentiliana*, Milano 2008, pp. 185-211; D. Quaglion, *L'edizione del Commento alla «L. Julia de adulteriis» di Alberico Gentili*, in *Alberico Gentili. L'ordine internazionale in un mondo a più civiltà. Atti del Convegno. Decima Giornata Gentiliana*, Milano, Giuffrè, 2004, pp. 251-263. See also the essays collected by G. Ciappelli, S. Luzzi, M. Rospocher, *Famiglia e religione in Europa nell'età moderna. Studi in onore di Silvana Seidel Menchi*, Roma 2011.

remained in the background, but as the various elements of these realms were explored individually, it was almost as if they merged through a sort of harmonization process, in a sort of game that separated them in order to unite them: the past (Roman legislation and biblical sources that were to be interpreted) was set aside, so as to focus on the present.

In my opinion, there was a logical reason for the fact that the *Summae* herein analyzed repeatedly cited a core set of statements and referenced the *auctoritates*, and it was not necessarily the obvious one that can be found in many fields of knowledge over the centuries: meaning it was not merely an attempt to fall back on the works of predecessors in the same genre. Rather, it was to ensure and standardize, so to speak, the ‘orthodoxy’ of the doctrines that confessors inculcated in penitents.

Therefore, the goal was to examine the law of heaven and the law of man in the field of adultery: this meant a progressive, widespread and invasive rise in the importance of the issue’s legal aspects, which, in my opinion, acted as a continual source of inspiration for the *Summae* as they delved more deeply into the matter<sup>78</sup>. Adultery was considered a mortal sin, but not one of the most serious among the sins of lust.

The most important thing was to avoid scandal. If there was a real threat that scandal could break out, then it was better to keep the sin and its consequences – the most evident of which was the birth of an adulterine child – a secret. It was also important, then, to ensure that the penitent and the ‘fruits of the sin’ themselves were aware of the potential economic damage they could bring upon the cuckolded husband, upon the married couple’s legitimate children and upon their legitimate heirs: it was this aspect, which was largely legal in nature, that took root in the minds of the Summists.

Even in the face of adultery, the reconciliation of couples was still a goal worth striving for at all times. Indeed, the Summists made it clear that they were wholeheartedly in favor of it, whether it was the husband or the

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<sup>78</sup> Cf. Turrini, *La coscienza e le leggi* (not. 10), p. 285. The separation between morality and positive laws is considered harmful, with devastating consequences, by W. Daniel, *The purely penal law theory in the Spanish theologians from Vitoria to Suarez*, Roma 1968, pp. 50, 76; but see also T.E. Davitt, *The nature of Law*, London 1951, p. 104. There are differing opinions: see, e.g., E.T. Dunn, *In defense of the penal law*, in «Theological Studies», 18 (1957), pp. 41-59.

wife to have committed the sin. Being among the highest of values, the marriage bond was to be unremittingly defended and preserved, and it deserved to overcome moments of difficulty...even if that meant relaxing certain rigid customs.