Reading between the lines: Old Germanic and early Christian views on abortion

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Chapter 3

ABORTION IN THE EARLY MEDIEVAL LATIN PENITENTIALS

*De machina mulierum* - ‘On the devices of women’¹

INTRODUCTION

This chapter is concerned with abortion in the early medieval Latin penitentials. The questions I will try to answer are: do the penitentials provide information on abortion, is there any evidence in the penitentials that early medieval women actually resorted to abortion as a means of fertility regulation, and, if so, did women make their own decisions regarding abortion.

Penitentials are catalogs of sins that serve as guidelines for confessors.² Confessors set penances for the penitents as punishment for their sins. In the penitentials ‘penance’ usually means that the sinner must fast during an appointed period. Fasting implies a diet of bread and water during the day, sometimes on certain days of the week, abstaining from meat, wine and other luxury foods, and probably also abstention from sex. The fact that the penitentials were written in Latin may seem to be a barrier, but the priest-confessors probably translated the most important parts of the penitential articles plus the penance set for the penitent into the regional vernacular, just as they had to translate Latin sermons.³

The oldest penitentials are Irish, and date from the sixth century (*Paenitentiale Ambrosianum*, *P. Vinniani*). The *P. Columbani*, a penitential ascribed to the Irish missionary Columbanus, was probably written on the continent in the late sixth century (c. 590). The seventh-century *P. Theodori*, also called *Iudicia Theodori* or *Canones Theodori*, is an Anglo-Saxon penitential ascribed to Theodore of Canterbury († 690). Both insular penitential traditions influenced the continental penitentials. Frankish penitentials start to appear in the early eighth century, and most of them include articles on abortion from the *P. Columbani*. The first tripartite penitentials were compiled in the eighth and ninth centuries. The authors combined Irish, Theodorian and Frankish penitential materials into new penitentials that contain articles from all three sources, often also adding articles from Church council canons. Penitentials written by prominent churchmen, such as abbot Hrabanus Maurus († 856) and bishop Halitgar of Cambrai († 831), start to appear in the course of the ninth century after the Carolingian reform councils.⁴ Important tenth- and eleventh-century penitentials were written by abbot Regino of Prüm (†

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⁴ Cf. chapter 2. On penitentials in the vernacular, that is, the Old English penitentials, cf. Raith 1933 and Spindler 1934. See also: Elsakkers 2001, pp. 88-90 and Elsakkers 2008, pp. 405-409. [articles I and IX]

915) and bishop Burchard of Worms († 1025), and, as we will see below, the early medieval penitential tradition seems to come to a close with bishop Ivo of Chartres (1040-1116).

Most early medieval penitentials contain articles on abortion, contraception and infanticide. These articles are found in the sections on fornication and adultery (De fornicatione, De fornicatione mulierum), on magic and poisoning (De maleficiis), on homicide and anger (De homicidii, De homicidio mulierum, De capitalibus principalium crimini, De occistione, De ira), on abortion and infanticide (De avorsis, De oppressis infantibus vel abortus, De muliere quae infan tem suum necat), on miscellaneous subjects (De diversis causis), and in sections on sins associated with women that are labelled De mulieribus, ‘On women’, or De machina mulierum, ‘On the Devices of Women’, De penitentia nubentium specialiter, ‘On the penance for special irregularities in marriage’, De interfecetricibus mulieribus, ‘On murderous women’, and Inquisitio de mulieribus, ‘Questionnaire for women’.

IRISH PENITENTIALS

Article 20 in the Irish P. Vinniani (c. 525-550) - a penitential ascribed to the Irish abbot Finnian of Clonard (c. 470 - c. 550) - is probably the oldest early medieval penitential article on abortion. It punishes a woman who helps another woman (alicuius femine) ‘destroy her partus (fetus)’ with maleficia, ‘poisons’ (or ‘magic’).6

P. Vinniani

18. Si quis clericus maleficus vel si qua mulier malefica, si aliquem maleficio suo deciperat, inmane peccatum est, sed per penitentiam redemti potest, VI annis penitentiam agat, III annis cum pane et aqua per mensuram et in residuis annis abstineat se a vino et a carnibus.7

19. Si autem non deciperat aliquem sed pro inlecebroso amore dedera t alicui, annum integrum peniteat cum pane et aqua per mensuram.8

20. Si aliqua mulier maleficio suo partum alicuius femine deciperit [perdiderit, perdidit], dimidium annum peniteat cum pane et aqua per mensuram et II annos abstineat se a vino et a carnibus et VI quadragesimas jejunet cum pane et aqua.9

5 Notable exceptions are the P. Ambrosianum, the P. Ps. Egberti, and the P. Cummeani.

Cf. also: chapter 3, note 77.

6 The words maleficium and veneficium, ‘poison’ - ‘magic’, are ambiguous. In the penitentials the words maleficium and veneficium are used interchangeably. We often cannot tell if one or both of the meanings are meant, and the ambiguity of these words often interferes with our understanding of the text. Translators frequently choose a translation that is associated with ‘magic’ - which is not always necessary. See also: chapter 3, note 412.

Maria Muzzarelli argues that the Irish (and Iro-Frankish) article on abortifacient maleficia can refer to either abortion or contraception (Muzzarelli 1987, p. 172). It can, in my opinion, also be argued that partus means ‘neo-nate’ here, because the word partus is used both in the meaning ‘fetus’ and ‘neo-nate’, so that the article is concerned with infanticide; I am not sure whether a case can be made for contraception.

7 Bieler & Binchy 1963, p. 78. Bieler & Binchy’s edition has Si quis clericus vel si qua mulier, malifica vel malificus. McNeill & Gamer 1938 translate: ‘18. If any cleric or woman who practices magic misleads anyone by the magic, it is a monstrous sin, but [a sin that] can be expiated by penance. Such an offender shall do penance for six years, three years on an allowance of bread and water, and during the remaining years he shall abstain from wine and meats’ (McNeill & Gamer 1938, p. 90). For ‘mislead’ we should read ‘destroy’ or ‘kill’. See also: Schmitz 1883, vol. 1, p. 504.

8 Bieler & Binchy 1963, p. 78. ‘19. If, however, such a person does not mislead anyone but gives [a potion] for the sake of wanton love to some one, he shall do penance for an entire year on an allowance of bread and water (McNeill & Gamer 1938, p. 90). For ‘mislead’ we should read ‘destroy’ or ‘kill’. See also: Schmitz 1883, vol. 1, p. 504.

9 Bieler & Binchy 1963, pp. 78, 80. ‘20. If any woman through her maleficia destroys the fetus of any other woman, she shall do penance for half a year with an allowance of bread and water and abstain for two years from wine and meats and fast for six forty-day periods with bread and water’. See also: Schmitz 1883, vol. 1, p. 504.

Bieler & Binchy translate ‘20. If a woman by her magic destroys the child she has conceived of somebody, (…)’ (Bieler & Binchy 1963, pp. 78-81), whereas McNeill & Gamer 1938, p. 90, translate: ‘20. If some woman by her magic misleads any woman with respect to the birth of a child (…)’. The article that follows the article on abortifacient maleficia punishes a woman who has fornicated and keeps the child, thus indicating that article 20 must deal with abortion: 21. Si autem genuerit, ut diximus, filium et manifestum peccatum eius fuerit, ui. annis, sicut indicatum est de clerico (…)’ (Bieler & Binchy 1963, p. 80); ‘21. But if, as we have said, she bears a child and her sin is manifest, she shall do penance for six years as is the judgment in the case of a cleric (…)’ (McNeill & Gamer 1938, p. 90; Bieler & Binchy 1963, p. 81).

Some translators hesitate in their interpretation of partum decipere. McNeill & Gamer 1938 render this phrase as ‘misleads any woman with respect to the birth of a child’, a translation that might be interpreted as either abortion or infanticide. Cf.
Finnian’s article on abortion is part of a group of articles on *maleficia* (articles 18-20). Article 18 is a general article that forbids the use of *maleficia*, and also explicitly names women as *maleficae*, ‘poisoners’ (or ‘magicians’). If someone dies due to *maleficia*, the guilty party must do penance for six years. Articles 19 and 20 are examples of the use of *maleficia*. They forbid supplying and administering love potions and abortifacients, and, if no one dies, these sins are considered less serious with only a penance of one to two years. All three articles imply that *maleficia* are dangerous, potentially lethal poisons. The *P. Vinniani* is roughly contemporary with recensions A and C of the *Pactus Legis Salicae* (early, late sixth century), a law that also punishes supplying poisonous substances. In both texts women seem to be knowledgeable about *maleficia*, love potions and abortifacients. Article 20 in Finnian’s penitential forbids women to supply or administer abortifacient *maleficia*, that is, dangerous poisons. The pregnant woman is not punished for committing abortion.

Versions of the Finnian articles on *maleficia* (arts. 18-20), were incorporated into the *P. Columbani* (c. 590).

**P. Columbani**

B.6 [a] Si quis maleficium suo aliquem perdidere, iii annis paeniteat cum pane et aqua per mensuram et iii aliis annis abstineat se a uino et carnibus et tunc demum in septimo anno recipiatur in communionem.13

B.6 [b] Si autem pro amore quis maleficus sit et neminem perdidere, annum integrum cum pane et aqua clericus ille paeniteat, laicus dimidium, diaconus duo, sacerdos tres.14

B.6 [c] maxime, si per hoc [= *maleficium*] mulieris partum quisque [quisquam] deceperit, ideo vi quadragesimas unus quisque insuper augeat, ne homicidii reus sit.15

The differences are minimal. The main difference between *P. Vinniani* 20 and *P. Columbani* B.6 [c] is that the Columban articles on *maleficia* no longer specify the gender of the *maleficus*, ‘poisoner’ (or ‘magician’). This means that the accomplice or helper could also be a man.

THEODORIAN PENITENTIALS

The *Iudicia Theodori* or *P. Theodori* is a seventh-century Anglo-Saxon penitential ascribed to Theodore of Canterbury that survives in five different recensions (B, D, G, Co and U). It was probably not written by Theodore

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16 These recensions survive in at least fifty manuscripts: the *Canones Basilienses* (B), the *Capitula Dacheriana* (D), the *Canones Gregorii* (G), the *Canones Cottoniani* (C), and the *Discipulus Umbrensis* (U). The oldest extant manuscripts date from the eighth century. It was edited by Wasserschleben 1851 [1958], pp. 145-219, Finsterwalder 1929, pp. 239-252.
himself, but based on his views on penance and sin. Theodore’s penitential was well-known on the continent. It contains the oldest articles that punish the pregnant women for committing abortion. There are two different articles on abortion; two of the recensions contain both articles (U, Co). Both are two-tier articles that distinguish between early term and late term abortion, and consider late term abortion to be murder. The dividing lines between early term and late term abortion in U.1.14.24 are defined as antequam animam habeat, ‘before it is alive or ensouled’, and post XL dies accepti seminis, ‘forty days after accepting the seed’; in U.1.14.27 they are ante XL dies, ‘within 40 days [after conception]’ and post XL dies, ‘after forty days’. The punishment for abortion is one or three years depending on the stage of fetal development.

\[ \text{Iudicia Theodori (P. Theodori)} \]


U.1.14.27. Mulier quae concepit et occidit infantern suum in utero ante XL dies I annum peniteat. Si vero post XL dies ut homicida peniteat.\(^{19}\) (Co.114; D.114; G.105)

In recensions G, Co, D and U we find articles on infanticide near the article(s) on abortion.\(^{20}\) G, Co and U contain a second article on infanticide that mitigates the penance for infanticide, if the woman concerned is a paupercula or ‘poor woman’.

\[ \text{Iudicia Theodori (P. Theodori)} \]

U.1.14.25. Mater si occiderit filium suum si homicidium facit XV annos peniteat et nunquam mutat nisi in die dominico.\(^{21}\) (Co.11.139; D.90; G.102)

U.1.14.26. Mulier paupercula si occidit filium suum VII annos peniteat in canone dicitur si homicida sit X annos peniteat.\(^{22}\) (Co.11.140; G.103)

The Iudicia Theodori is the first penitential to show compassion for poor women who commit infanticide because they lack the means to support their children. At the same time this penitential tells us that economic reasons and despair can drive a woman to kill her own child. We will see below that the ‘paupercula’ clause was extended to abortion in the P. Ps. Bedae and other penitentials.
The phrases *hoc secundum canones decennium iudicatur* at the end of U.1.14.24 and *in canone dicitur si homicida sit X annos penitent* in U.1.14.26 are references to canon 21 of the Council of Ancyra (314), an early Church council canon on abortion and infanticide. The Ancyrian canon reduces the penance for infanticide and abortion ordained by the Council of Elvira (c. 300-306) to ten years with the *humanius* clause: *humanius autem nunc definimus ut eis decem annorum tempus praefixos gradus poenitentiae largiamur*, ‘we have however now determined a more humane penalty so that for them a period of ten years penance is ordained according to fixed degrees’. The *humanius* clause reappears in many of the younger penitential articles on abortion.

The *Judicia Theodori* punishes the woman who commits abortion. The fact that *mulier* is the sentence subject in all the redactions of the Theodorian articles on abortion and infanticide suggests that women are the decision makers and that abortion and infanticide are women’s business.

**FRANKISH PENITENTIALS**

The majority of the anonymous Frankish penitentials, also called *Paenitentialia Simplicia*, were compiled in the eighth and ninth centuries and contain two articles on abortion. One punishes the supplier or accomplice, the other the pregnant woman. The early-eighth-century *P. Burgundense* is probably the oldest or one of the oldest Frankish penitentials.

*P. Burgundense*

9. *Si quis beneficium (maleficiu) suo aliquem perderiderit, VII annos penetet, III ex his in pane et aqua.*

10 [a]. *Si quis pro amore ueneficus (quis maleficus) sit et n Recommend si clerucus, annum integrum cum pane et aqua penetet, si diaconus III, unum ex his in pane et aqua, si sacerdous V, duos ex ipsis in pane et aqua.*

10 [b]. *Maxime si per hoc [= maleficium] mulieres partum quis decidipet V quadragisimis auget unusquisque (tres auget annos) in pane et aqua, ne homicidii reus sit.*

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23 Ancyra canon 21. *De mulieribus, quae fornicantur et partus suos necant, sed et de his quae agunt secum ut uterum conceptus exculant, antiqua quidem definitio usque ad exitum vitae eas ab ecclesia remouit; humanius autem nunc definitus, ut eis decem annorum tempus poenitentiae tribuat* (Martinez Diez & Rodriguez 1982, p. 101); ‘On women who fornicate and kill their partus, or who do something to themselves so that they expel that which was conceived in the womb. By an ancient law they are excluded from the church (excommunicated) until the end of their lives. We, however, have decided to soften their punishment, and condemned them to do penance during a period of ten years’. This council canon is sometimes referred to as canon 20. See also: chapter 2.

24 The phrase *antiqua quidem definitio* (…) in the Ancyrian canon is a reference to canon 63 of the Council of Elvira, which decreed that penance for abortion and infanticide had to be done until the sinner was at death’s door. *Elvira c. 63. De uxoribus quae filios ex adulterio necant. Si qua per adulterium absente marito suo conceperit, idque post facinus occiderit, placuit nec in finem dandum esse communionem eo quod gaminaverit sclus* (Vives 1963, p. 12), ‘On wives who kill children conceived in adultery. If a woman, during the absence of her husband, conceives [a child] in adultery, and kills it after the crime, it is so ordained that she may not receive communion unless she is at the end of her life, because she has committed a double crime’. See also: chapter 2.

The Theodorian article U.1.14.24 is even more lenient than the Ancyrian council, because it punishes abortion with *only* a penance of three years at the most.

25 Eight so-called *Paenitentialia Simplicia* were edited by Kottje (*Paenitentialia Simplicia: P. Burgundense, P. Bobbiense, P. Parisiense Simplex, P. Sletstatense, P. Oxionense I, P. Floriacense, P. Hubertense, and P. Sanguallense Simplex*), cf. Kottje 1994, pp. 1-121. These penitentials incorporated material from Irish penitentials, from the *Judicia Theodori* and from *Judicia canonica* or Church council canons. The *P. Sanguallense Simplex* does not contain any articles on abortion; the text that has come down to us is probably incomplete (Kottje 1994, pp. 119 ff.). Kottje dates the *’postulierte Vorlage’* to the first half of the eighth century (Kottje 1994, p. xxiv-xxv). For translations of some of the Frankish penitentials, see: McNeill & Gamer 1938, pp. 273 ff.

26 Kottje 1994, pp. 17, 63; ‘*P. Burgundense* 9. If by his magic anyone destroys anybody, he shall do penance for seven years, three of these on bread and water’ (McNeill & Gamer 1938, p. 274).

27 Kottje 1994, pp. 17, 63-64; ‘*P. Burgundense* 10 [a]. If anyone is a magician for love and destroys nobody, if he is a cleric, he shall do penance for an entire year on bread and water; if a deacon, three [years], one of these on bread and water; if a priest, five, two of these on bread and water’ (McNeill & Gamer 1938, p. 274).

28 Kottje 1994, pp. 17, 21, 63-64; ‘*P. Burgundense* 10 [b]. Especially if by this someone destroys a woman’s partus, each [of the above] shall increase [the penance] by five forty-day periods on bread and water, lest he be charged with homicide’.

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The Theodorian article U.1.14.24 is even more lenient than the Ancyrian council, because it punishes abortion with *only* a penance of three years at the most.

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27 Kottje 1994, pp. 17, 63-64; ‘*P. Burgundense* 10 [a]. If anyone is a magician for love and destroys nobody, if he is a cleric, he shall do penance for an entire year on bread and water; if a deacon, three [years], one of these on bread and water; if a priest, five, two of these on bread and water’ (McNeill & Gamer 1938, p. 274).

28 Kottje 1994, pp. 17, 21, 63-64; ‘*P. Burgundense* 10 [b]. Especially if by this someone destroys a woman’s partus, each [of the above] shall increase [the penance] by five forty-day periods on bread and water, lest he be charged with homicide’.
Articles 9-10 were taken from the *P. Columbani*, and, as in their Irish source, they are part of a group of articles on *maleficia* or *ueneficia*. Article 10[b] punishes aiding and abetting, that is, the accomplice - man or woman - who administers an abortifacient *maleficium* or provides a woman with one.\(^{29}\)

The second Frankish article on abortion (article 35) punishes the pregnant woman who commits voluntary (*uoluntarie*) or intentional abortion with a penance of three years.

*P. Burgundense*

35. Si quis mulier auorsum fecerit voluntarie, III annus peneteat cum pane et aqua.\(^{30}\)

The *P. Burgundense* is the first early medieval text I know of that uses the word *uoluntarie* in connection with abortion.\(^{31}\) Later we also find the word *sponte* to denote ‘intentional’ abortion. The difference between the Frankish and Theodorian articles on intentional abortion is that the Frankish article is a one-tier article that punishes abortion whatever the stage of development of the fetus and that the Theodorian articles are two-tier articles.

The late eighth- or perhaps early ninth-century Frankish penitential called *P. Floriacense* has two articles on abortion under the heading *Sinodus Anquirinensis* (articles 64-65). These articles show us that the author was familiar with the Ancyrian Church council canon on abortion and infanticide.\(^{32}\) Both articles are also in the *P. Martenianum*, a younger tripartite penitential written in north-eastern France in the second quarter of the ninth-century after the Carolingian reform.\(^{33}\) The first so-called ‘Ancyrian’ article is a combination of the two Theodorian articles on abortion:

*P. Floriacense*

64. Mulieres, qui abortiuum faciunt <an>tequam animam habeant et postea, id est post qudraginta dies accepti se<nmi>nis, ut homicide peneteat, id est III <annus> in IIII feria et VI et in tribus quadragesimus; <si ante> XL dies, I annum peneteat.\(^{34}\)

*P. Martenianum*

43. In alio loco. Sinodus Anquirinensis. Mulieres quae abortivum faciunt antequam animam habeat et postea id est post XL dies accepti seminis ut homicidae peniteant id est III annos in IIII feria et VI et in tribus XL mis si ante XL dies I annum peniteant.\(^{35}\)

The core text is based on article U.1.14.24, but leaves out the penance for early term abortion. This is remedied by the inclusion of the clause on early term abortion from U.1.14.27 at the end of the article - *si ante XL dies, I annum peneteat*.

The second ‘Ancyrian’ article in the *P. Floriacense* and the *P. Martenianum* punishes abortion and infanticide. It is a free adaptation of the Ancyrian canon 21 on abortion and infanticide.

*P. Floriacense*

65. Quaecumque mulier a<u>t partu<m suum> disperdit aut filius negauit [read: necavit], homicidium perpetrauit.\(^{36}\)

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\(^{29}\) Note that the *laicus* was omitted in article 10; perhaps because the intended audience of this penitential was clerical or monastic.

\(^{30}\) Kottje 1994, pp. 53, 65; ‘35. If any woman intentionally brings about abortion, she shall do penance for three years on bread and water’ (McNeill & Gamer, p. 277).

\(^{31}\) An earlier instance of the usage of the word *uoluntarie* in a penitential is in an article on fornication and deliberate murder in the Irish *P. Ambrosianum* (art. 2.6), cf. Seebass 1896-1897, p. 30; Körntgen 1993, p. 260-261.

\(^{32}\) The *P. Floriacense* also contains the two standard Frankish articles on abortion: article 10 (the Irish article on abortifacient *maleficia*) and article 32 (the Frankish article on voluntary abortion), cf. Kottje 1994, pp. 98, 100.


\(^{34}\) Kottje 1994, p. 103; ‘*P. Floriacense* 64. Women who commit abortion before [the fetus] is alive or ensouled [penance missing], and after, that is, after 40 days after accepting seed [conception], should do penance as murderers’.

\(^{35}\) Cf. Hörmann 1914, p. 379.
P. Martenianum
45. Augustinus. Quaecunque mulier aut partum suum disperdit, aut filium necavit homicidium perpetravit. Mulier sive vir consentientes in hoc peccato VII. annos peniteant.37

The word partus, ‘fetus’ or ‘new born baby, neo-nate’, is ambiguous, as it often is in the penitentials. I have interpreted partus as ‘fetus’, and partum suum disperdit as ‘commits abortion’, so that the article condemns both abortion and infanticide (aut filius negauit, ‘or kills her child’), as in the Ancyrian canon alluded to in the heading.38 The P. Martenianum adds a clause that explicitly punishes both men and women if they agreed (consentientes) to either abortion or infanticide, and it ascribes the article to an authoritative source, Augustine, as in its source the Collectio Hibernensis.39

In the Frankish P. Hubertense (first half ninth century) we find an article that condemns contraception, abortion and coitus interruptus as equally sinful sins under the heading De potionibus mulierum. It awards the harsh Ancyrian penance of ten years for all three methods of fertility regulation.

P. Hubertense
56. Si quis potiones acceperit, ut mulier non concipiat, aut conceptos occiderit, aut uir semen effuderit a coitu mulieris, ut non concipiat, sicut filii Iudae fecerunt in Thamar, ieiunet unusquisque annos X.40

The P. Hubertense explicitly states that contraceptives and abortifacients were potions, and it is one of the first penitentials - perhaps the first - to mention contraception.41 The word conceptus is used for ‘fetus’, as in the Ancyrian canon.

The articles on abortion in the Frankish P. Floriacense, the P. Hubertense and the P. Martenianum show us that its authors were acquainted with Church council canons and other penitentials, such as the Iudicia Theodori, and, although the P. Floriacense and the P. Hubertense are not tripartite penitentials in the strict sense of the word, they were certainly influenced by the new tripartite penitentials.

TRIPARTITE PENITENTIALS

Tripartite penitentials start to appear in the eighth and ninth centuries. The tripartite is a new type of penitential that combines Irish, Theodorian (Anglo-Saxon) and Frankish penitentials traditions, often supplementing them with articles taken from canonical sources.42 The paenitentialia tripartita all contain more than one, usually three or four, different articles on the same subject, cf. the penitentials quoted in tables 3.1a - 3.1b and 3.2a -

36 Kottje 1994, p. 103; ‘P. Floriacense 65. Any woman who either destroys her partus or kills her child has committed murder’.
38 It is also possible to interpret partus as ‘neo-nate’ and filius as ‘fetus’.
39 The articles in the P. Floriacense and the P. Martenianum were taken from the Collectio Hibernensis, an early eighth-century Irish collection of canons that was also known on the continent. We find this canon in book 45 De quaestionibus mulierum: Collectio Hibernensis 45.4b. Agustinus ait in homeliis: Quae mulier aut partum suum disperdit, aut filium suum necavit, homicidium perpetravit; mulier sive vir consentiens ei in hoc peccato VII annis distriente peniteat (Wasserschleben 1885 [1966], p. 181). Note that only the younger P. Martenianum adds a reference to Augustine.
40 Kottje 1994, p. 114. ‘P. Hubertense 56. If someone takes potions, so that a woman does not conceive, or kills the conceptus, or a man spills [his] seed during coitus with a woman, so that she does not conceive, as the sons of Juda did to Thamar, each of them must do penance for ten years’. Sicut filii Iudae fecerunt in Thamar is a reference to Genesis 38:1-30. Cf. also: Noonan 1986 [1965], p. 162.
41 There is a slightly different version of this article in the late eighth- or early ninth-century Frankish P. Merseburgense B: Si quis potiones acceperit mulier, ut non concipiat, aut conceptus occiderit aut uir semen effuderit a coitu mulieris, ut non concipiat, sicut filii lude fecerunt in Thamar, ieiunet unusquisque annos II in pane et aqua (Kottje 1994, p. 174). The heading De potionibus mulierum is missing, and the penance is two years instead of ten years - which is probably a scribal error.
42 On the phrase ut non concipiat, see below and chapter 3, note 90.
43 The Church council canon quoted most is canon 21 of the Council of Ancyra.
3.2b. Some of the tripartite penitentials have a more or less chronological or historical structure. In these penitentials articles from the same source are grouped together, which means that we find articles on abortion scattered over the penitentials (cf. the P. Remense, the Excursus Cummeani and P. Sangallense tripartitum in tables 3.1a - 3.1b below). Other penitentials have a more systematic structure. They group articles on the same subject together, cf. the P. Capitula Iudiciorum in table 3.1b, where almost all the articles on abortion are in book three.

Tables 3.1a and 3.1b contain the articles on abortion in four eighth-century tripartite penitentials: the P. Remense, the Excursus Cummeani, and the slightly younger Capitula Iudiciorum and P. Sangallense tripartitum. These four penitentials are simple, not too complicated tripartites, especially when compared to the more complex ninth-century tripartites in tables 3.2a - 3.2b.

The penitentials in tables 3.1a - 3.1b all contain versions of the Ancyrian Church council canon on abortion (canon 21) except the P. Sangallense tripartitum.43 In the Excursus we find two variant versions of this canon (3.23, 6.3); the first is a shortened version that omits both the Ancyrian reference to the antiqui patres (or antiqua quidem definitio) and the humanius clause with its more lenient penance of ten years.

Most tripartite penitentials contain a version of the second Theodorian article with the abortion criterion ante-post XL dies (U.1.14.27).44 Of the four tripartites in tables 3.1a and 3.1b only the P. Remense incorporates both Theodorian articles (U.1.14.24 and U.1.14.27). The criterion ante-post XL dies may have been the favorite choice of these penitential authors because this abortion criterion seems to be easy to apply and more clearly defined.45 However, it is also possible that the Theodorian source text did not offer a choice. In this case the recension used was not U (Discipulus Umbrensium) or Co (Canones Cottonianus) - the only two recensions with two two-tier articles on abortion, but D (Capitula Dacheriana) or G (Canones Gregorii), the recensions that only have the ante-post XL dies criterion.46 The case for G as the source for the Theodorian articles on abortion in many tripartite penitentials is strong: not only were manuscripts of the Canones Gregorii available all over early medieval western Europe, but the use of filium suum (G.105) instead of infantem suum (U.1.14.27) also points in this direction.47 Some tripartite penitentials have variant versions of the XL dies criterion. For instance, the Excursus Cummeani (6.11) has XL dies post conceptionem, ‘forty days after conception’ (cf. table 3.1b).48

44 See: table 3.5 below.
45 On the tripartite preference for U.1.14.27, see: Meens 1994, pp. 287-289. I do not agree with him that the stricter article was chosen, and that U.1.14.27 is stricter than U.1.14.24, because the former punishes abortion ut homicida, ‘as a murderer (or murderess)’, and the latter punishes it with only a three years’ penance. Article U.1.14.24 also punishes abortion as homicide, and it explains that three years’ is the punishment for homicide (ut homicidae peniteant, id est III annos). Moreover, younger penitentials with the ante-post XL dies criterion (based on U.1.14.27) often add III annos as an explanation of ut homicida, for example, Excursus Cummeani (6.11), P. Merseburgense A (164), and the late eighth-century P. Vindobonense B (33.9).
46 The Canones Basilienses (B) cannot have been used, because the only article on abortion in B is similar to U.1.14.24 using the abortion criteria antequam animam and post conceptionem semen.
47 Meens’s analyses of the sources used by the tripartite authors prove that recension G was used by the authors of P. Sangallense tripartitum and the P. Capitula Iudiciorum (cf. Meens 1994, pp. 175, 566).
48 Cf. table 3.5 below.
### Table 3.1a: The articles on abortion in two eighth-century tripartites: *P. Remense* and *Excarpsus Cummeani*

<table>
<thead>
<tr>
<th>Source</th>
<th>Article</th>
<th>Excerpt</th>
<th>Square</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>P. Remense</em> 497</td>
<td>3.23. Mulieres vero, quae fornicantur et partus suos necant, sed et eis, que agunt secum, utero conceptos discutiant, X annos poeniteant.51</td>
<td>Council of Ancyra (canon 21)</td>
<td></td>
</tr>
<tr>
<td><em>Excarpsus Cummeani</em> 457</td>
<td>6.3. Mulieres, que fornicantur et partus suos necant et eas, que agunt ut uteros conceptos excutiant, antiqui patres instituerunt usque ad exitum vitae; nunc humanius definitum est, X annos poeniteant.53</td>
<td>Council of Ancyra (canon 21)</td>
<td></td>
</tr>
<tr>
<td><em>Irish</em></td>
<td>9.2. (…) maxime si per hoc mulieris partum quisque deciperit III annos peniteat; unusquisque superaugeat in pane et aqua ne homicidii reus sit.61</td>
<td>Irish (maleficia)</td>
<td></td>
</tr>
</tbody>
</table>

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49 The *P. Remense* was edited by Asbach 1975, Anhang, pp. 1-77.
50 The *Excarpsus Cummeani* was edited by Wasserschleben 1851 [1958], pp. 460-493.
51 Wasserschleben 1851 [1958], pp. 473-474.
52 Asbach 1975, Anhang, p. 54.
53 Wasserschleben 1851 [1958], p. 478.
54 Asbach 1975, Anhang, p. 52.
55 Asbach 1975, Anhang, p. 53.
56 Wasserschleben 1851 [1958], p. 479.
57 Asbach 1975, Anhang, p. 51. The articles were copied from *Iudicia Theodori* U.1.4.7, cf. chapter 3, note 112.
58 Wasserschleben 1851 [1958], p. 479.
59 Asbach 1975, p. 55.
60 Wasserschleben 1851 [1958], p. 478. Article 6.9 punishes infanticide, and article 6.10 reduces the penance for a poor woman who has committed infanticide.
61 Asbach 1975, Anhang, p. 56. Article 9.1 is the general article on *maleficia*, and the first part of article 9.2 punishes the *veneficus* who uses *veneficia* as an aphrodisiac.
62 Wasserschleben 1851 [1958], pp. 480-481. Article 7.1 is the general article on *maleficia*, and the first part of article 7.2 punishes the *veneficus* who uses *veneficia* as an aphrodisiac.
The most recent edition is Meens 1994, pp. 326-353 with a facing translation; on the date, cf. Meens 1994, pp. 103, 175. The *P. Sangallense tripartitum* consists of three parts: 1. canons from the *Judicia canonica*, that is, the Frankish penitentials and council canons, 2. canons from the Theodorian penitentials and 3. canons from the Irish *P. Cummeani*.


Meens 1994, p. 438; ‘3.1d. Vrouwen die ontucht plegen en hun pasgeboren doden en zij die in dat geval abortus plegen, moeten volgens de oude vaders tot aan het einde van hun leven (boete doen). Nu is echter een menselijker boete vastgesteld van tien jaar’ (Meens, pp. 439, 441).

Meens 1994, p. 436; ‘2.5. Een vrouw die zwanger raakt en binnen veertig dagen abortus pleegt, moet een jaar boete doen; als ze na veertig dagen de vrucht doodt, moet zij als een moordenaar boete doen’ (Meens, p. 437).

Meens 1994, p. 440; ‘5.2a. Een vrouw die ontvangen heeft en die het kind in haar schoot doodt vóór de veertigste dag, moet een jaar boete doen; doet zij dit na de veertigste dag, dan moet zij boeten als een moordenaar’ (Meens, p. 441).

Meens 1994, p. 334; ‘1.28. Als een vrouw uit eigen wil abortus pleegt, moet zij drie jaar boete doen en als het tegen haar zin gebeurt, moet zij drie vastenperioden boete doen’ (Meens, p. 335).

Meens 1994, p. 438; ‘3.1c. Als een vrouw vrijwillig een abortus ondergaat, moet zij drie jaar boete doen; gebeurt dit zonder dat zij het wil, dan drie perioden van veertig dagen’ (Meens, p. 439).


Meens 1994, p. 436; ‘1.2f. Als iemand met behulp van een gifdrank of een andere kwade list iemand doodt, moet hij zeven jaar of meer boeten (Meens, p. 437).

Meens 1994, p. 332; ‘1.18. Als iemand de vrucht van een vrouw afdrijft, moet hij twee jaar en vijf vastenperioden op water en brood vasten’ (Meens, p. 438). The general Irish article on *maleficia* and the article on aphrodisiacs are missing in the *P. Sangallense tripartitum*.

Meens 1994, p. 438; ‘3.1b. Als iemand de vrucht van een vrouw wegneemt, moet hij een jaar boete doen op water en brood’ (Meens, p. 439). The general Irish article on *maleficia* and the article on aphrodisiacs are in chapter 16 *De maleficis, veneficis, sortilogis, ariolis vel divinis*, where the Irish article on abortion is repeated using the word *partus instead of conceptus for ‘fetus’ (Meens, pp. 458-461).

Meens 1994, p. 458; ‘16.1b (...) Als iemand op deze wijze een ongeboren vrucht bij een vrouw doodt, moet ieder de boete met drie jaar op water en brood vermeerderen opdat hij niet schuldig is aan moord (Meens, p. 459). The general Irish article on *maleficia* is in article 16.1a, and the first part of article 16.1b punishes the *veneficus* who uses *veneficia* as an aphrodisiac.
The penitentials in tables 3.1a - 3.1b all include the Frankish article on ‘voluntary’ abortion with its three years’ penance. The two younger penitentials in table 3.1b add a small, interesting clause on ‘involuntary’ abortion: si nolens tribus quadragisimis peniteat, ‘if she did not wish [it], she shall do penance for three forty-day periods’. 75 This text may have been added in response to a real life situation, because the two words si nolens show us that the author knew that miscarriages and abortion happen for many different reasons and under many different circumstances, and that it is not always at the request of the pregnant woman. Si nolens makes us wonder what circumstances the author had in mind: a miscarriage, an accident, perhaps a fight as described in Exodus 21: 22-23, a husband who wanted no more children, or a lover who wanted proof of the affair removed? 76

The Irish articles on abortion in the tripartite penitentials punish supplying and administering abortifacient maleficia. In the tripartite penitentials articles from Irish sources are often directly or indirectly derived from the P. Cummeani. 77 However, the P. Cummeani does not contain any articles on abortion or maleficia. 78 This means that the Irish articles on maleficia in the tripartite penitentials were either directly taken from other Irish penitential sources (P. Vinniani, P. Columbani), or introduced indirectly through the Frankish penitentials or the early eighth-century Excarspus Cummeani. We find the Iro-Frankish articles on maleficia in most of the tripartite penitentials. 79 The P. Remense and the Excarspus Cummeani both retain the original group of three articles on maleficia we found in the P. Vinniani and the P. Columbani. In other tripartites the general article on maleficia and the article on love potions are sometimes left out, and sometimes the articles on maleficia are split up and put into different sections. 80 The punishment is often a penance of three years, as in the Frankish articles on voluntary abortion. The P. Sangallense tripartitum (1.18) and the P. Capitula Iudiciorum (3.1b) have conceptus instead of partus. 81 Use of the word conceptus for ‘fetus’ removes the ambiguity of the word partus in these versions of the Irish article.

Many different tripartite penitentials were composed in the early medieval period using the source material discussed above. We find a great deal of variant versions of the Irish, Theodorian, Frankish and canonical articles, and many new articles as well. A few examples.

75 This clause does not appear in any of the other early medieval penitentials. Only the Italian P. Vallicellianum C.6 37 adds a comparable clause to the Frankish article on abortion, cf. below.

76 On the biblical condemnation of abortion, cf. Elsakkers 2005, passim. [article III]

77 The P. Cummeani was edited by Zettlinger (1902) and by Bieler & Binchy (1963).

78 P. Cummeani 2.22 may refer to abortion; this article is concerned with fornication and sanguinem effundendo, ‘shedding blood’ (Zettlinger 1902, p. 510), and derived from P. Vinniani 35. What is meant by ‘shedding blood’ in connection with fornication is not clear. There is no real evidence for interpreting it as ‘abortion’.

Most tripartites contain a version of P. Cummeani 2.22: Laicus fornicando et sanguinem effundendo conuersus tribusannis peniteat; in primo et in tribus xlmis reliqurorum cum pane et aqua et in totis sine uino, sine carne, sine armis, sine uxore; ‘2.22. A layman repenting of fornication and the shedding of blood shall do penance for three years; in the first, and in three forty-day periods of the others, with bread and water, and in all (three years) without wine, without meat, without arms, without his wife’ (Bieler & Binchy 1963, pp. 116-117).

79 Noteworthy exceptions are the younger Italian and Spanish penitentials discussed below.

80 For instance: the P. Sangallense tripartitum leaves out the general article on maleficia and the article on love potions. The P. Capitula Iudiciorum has two different versions of the article on abortifacients, one by itself in the section on abortion (3.1.b), and one in the section De maleficiis with the other two Irish articles on maleficia (16.1a-16.1b). The P. Vindobonense B has two series of three articles on maleficia. The first series was split up between section 12 (12.6; the article on abortion) and section 18 (18.1-18.2; the other two articles), and the second series has all three articles together in section 34 (De maleficiis); on the P. Vindobonense, cf. Meens 1994, pp. 378, 384, 412.

The Irish (P. Cummeani, P. Vinniani, P. Columbani) and Frankish sources were used by the tripartite authors and often emended. Occasionally, one of the tripartite articles betrays a direct Irish source. For instance article 18.1 in P. Vindobonense B must have been taken from the P. Vinniani, because it retains the subject si quis clericus uel si qua mulier malificacus that was changed into a genderless subject in the P. Columbani; its companion article on abortion in 12.6 also follows Finnian: Sì mulier maleficio suo partum aliquauit perdiderit (…), cf. Meens 1994, p. 384, 378.

81 See also: P. Mistix 15.2, below.
The tripartite *Poenitentiale Merseburgense A* survives in three manuscripts (Me1, V23 and W10), and was probably compiled in northern Italy in the late eighth or early ninth century. Manuscript Me1 contains versions of the Theodorian, Irish, Frankish and Ancyrian articles on abortion. The Theodorian and Ancyrian articles are missing in manuscripts V23 and W10. Some of the source texts are recognizable, and some are not immediately recognizable. The Theodorian article on abortion in the appendix of Me1 was probably based on the G redaction of the *Iudicia Theodori* (G105), and uses the abortion criterion *XL dies*:

**P. Merseburgense A (Me1)**
164. Mulier si occiderit filium in utero ante XL dies, annum I peneteat, si post XL dies conceptionis, ut humicida III annos peneteat.83

The Irish articles on *maleficia* and abortifacients in the *P. Merseburgense A* use the word *veneficium* and *veneficus* instead of *maleficium* and *maleficus*.84 Manuscript Me1 contains the standard text that punishes the accomplice or supplier of the *maleficia: maxime si mulieris partum per hoc [= venericum] quis deceperit*. The editors of the variant versions in V23 and W10 made an interesting change.85 The sentence subject was changed (back) to *mulier*, and the verb was disambiguated (*occidere* is used instead of *deceperere*), so that the article now punishes the pregnant woman who commits abortion, and perhaps also the accomplice.86

**P. Merseburgense A (V23, W10)**
10. Si mulier per hoc [= veneficum] partum occiderit (...). 87

The revision of the Ancyrian canon on fornication, abortion and infanticide in Me1 is recognizable by the ten years’ penance and the word *fornicantur*. The text was simplified and shortened, and the *humanius* clause was omitted.

**P. Merseburgense A (Me1)**
46. Si qua de mulieribus que fornicantur, occiderit, quod nascitur, aut abortiatum facere festinat, X annos peneteat.88

The Frankish article on abortion in MS Me1 was not changed (art. 33).89 However, the other two manuscripts of the *P. Merseburgense A* seem to have combined the Frankish article on abortion and the shortened version of the Ancyrian canon on fornication, abortion and infanticide in *P. Merseburgense A (Me1)* into a new article that also adds a clause on contraception: *ut non concipiat*, ‘so that she does not conceive’.90

**P. Merseburgense A (W10)**

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82 Manuscripts Me1 and V23 are from the ninth century, and manuscript W10 is from the early tenth century. In his edition of the Frankish *P. Simplicia* Kottje includes editions of three more eighth- and ninth-century penitentials: the *P. Merseburgense A* (Kottje 1994, pp. 123-169), the *P. Merseburgense B* (Kottje 1994, pp. 171-177; late eighth century or early ninth), and the *P. Oxoniense II* (Kottje 1994, pp. 179-205; early ninth).

83 Kottje 1994, p. 166. Article 164 is preceded by the Theodorian articles on infanticide, including the *paupercula* clause (articles 162-163). Article 161 is a shortened version of the Theodorian article on methods of homicide (U.1.4.7) that evolved into an article on abortifacient *maleficia* in the *P. Ps. Egberti*, see: below.

84 Kottje 1994, p. 128; articles 9-10.

85 Because it reads *partum occiderit* and not *partum suum occiderit*.

86 Kottje 1994, pp. 128-129; ‘If a woman kills a *partus* by this means [*maleficia*] (...).’

87 Kottje 1994, pp. 140-141; ‘If any of the women who have committed fornication, kill that which is born or hasten to commit abortion, she must do penance for ten years’.


89 *Ut non concipiat* is the standard Latin clause on contraception. We find it in Church council canons (Council of Braga II, canon 77), penitentials (cf. *P. Hubertense, P. Ps. Gregorii, P. Merseburgense A (V23)*), in secular law, and in many late antique and early medieval recipes, cf. Elsakkers, unpublished. [article XI]
Si quis mulier voluntariae aborsum fecerit, ut non concipiat aut conceptos occidat, III annos in pane et aqua peniteat. Et si fornicauerit et occiderit, X annos peniteat.  

P. Merseburgense A (V23)  
Si quis mulier voluntarie aborsum, id est qualecunque causa sibi aut aliis fecerit, ut non concipiat aut conceptos occidat, III annos in pane et aqua peniteat. Et si fornicauerit et occiderit, quod nascitur, X annos peniteat.

The addition of the clause on contraception makes the text confusing: ‘If a woman intentionally commits abortion so that she does not conceive, or kills her conceptus (…)’. We should probably explain *ut non concipiat* as an anacoluthon, a hastily inserted prohibition of contraception that was not completely thought through. The textual confusion also seems to indicate that the boundary between contraception, miscarriage and early term abortion was - understandably - felt to be fuzzy or blurred. MS W10 omits *quod nascitur*, ‘that which is born’, in the second sentence, turning *si fornicaverit et occiderit* into a reference to abortion and infanticide. MS V23 clarifies the clause on abortion: *id est qualecunque causa sibi aut aliis fecerit*, ‘that is, for any reason did [it] to herself or to another [woman]’, thus explaining that voluntary abortion is ‘doing it to herself’, and that women help other women (*aut alii fecerit*). MSS V23 and W10 differentiate the penance in article 38: they demand three years for (contraception and) abortion as in the Frankish articles, but the Ancyrian penance of ten years, if the woman is guilty of fornication plus infanticide or abortion.

The late ninth- or early tenth-century Italian *P. Vallicellianum I* is a systematic version of the *P. Merseburgense A (Me1)*. We find the following articles on abortion:

**P. Vallicellianum I (MS E.15)**
24. Si quis cum mulieribus fornicaverit et occiderit quod nascetur aut aborsum facere festinat, XX annos peniteat.
29. Si qua mulier aborsum fecerit voluntarie, III annos peniteat in pane et aqua.
83. (…) Maxime si mulieris partum per hoc [= veneficium] quis deciperit, V XL mas unusquisque agat in pane et aqua, ne homicidii reus sit.

Hägele has demonstrated that the *P. Vallicellianum I* was based on the *P. Merseburgense A (Me1)*. However, *P. Vallicellianum I* does not include the two-tier Theodorian article on abortion that is in the appendix of the *P. Merseburgense A (Me1)*. The Ancyrian and Frankish articles on abortion (articles 24 and 29) are part of a group of articles on sexual offenses, and the Irish article on abortifacient *maleficia* (article 83) is part of a series of articles on superstitious practices. The penances for abortion in articles 24 and 29 are harsher than those in the *P. Merseburgense A Me1*. There is one remarkable difference between the versions of the Ancyrian canon in these two penitentials: *P. Vallicellianum I* emended *si qua de mulieribus que fornicantur* (*P. Merseburgense A Me1 46) to: *si quis cum mulieribus fornicaverit*, ‘if anyone has fornicated with women’ (article 24). The subtle change in the wording of this clause alter the article’s scope completely. The *P. Vallicellianum I* now punishes men who fornicate and try to cover up the ‘evidence’ by committing infanticide or persuading the woman involved to have an abortion. Perhaps the emendation is the reason that the punishment was doubled.
The *P. Merseburgense A Me₁* and the *P. Vallicellianum I* also have an interesting article on unwanted pregnancy, forcible abduction and abortion that was probably based on an article in the eighth-century *P. Oxoniense II* (northeastern France). It is the first time we come across the words *invitus*, ‘unwilling’, ‘unwanted’, and *proicere*, ‘expel’, in penitential articles on abortion. 98

**P. Oxoniense II**

33. *De eam, qui in hostem inuitum proicit infansem. Si autem mulier inuitus proicit infansem siue quia non potuit eum portare uel nutrire, illa non est culpanda, sed tamen ieiunet ebdomada III.* 99

The word *(h)ostes* is not easy to translate. Its core meaning is ‘enemy, guest, stranger’. Here it probably refers to an ‘abduction’. 100 In combination with *inuitum(s)* and *infans* it probably indicates that the abduction was not consensual and that the woman was raped. 101 Two motives are given for abortion after rape: *quia non potuit portare uel non potuit nutrire*, ‘because she cannot carry it or she cannot feed it’. The first motive probably denotes a situation in which carrying the child to full term means disgrace (‘shame and scandal in the family’), and the second refers to poverty (probably the poverty that will befall her if she raises the child on her own). The *P. Merseburgense A Me₁* and the *P. Vallicellianum I* add the word *rapta*, ‘raped’; ‘abducted’, and change the words around. The word *invitus* now more clearly belongs to the word *infans*.

**P. Merseburgense A (Me₁)**

115. *Si mulier ab hoste rapta infansem suum inuitum proicit uel que non potest stare aut nutrire, non est culpanda, sed tamen III ebdomadas peneteat.* 102

**P. Vallicellianum I (MS E.15)**

40. *Si qua mulier ab hoste rapta infansem suum invitum projicit, sive quae non potest stare aut nutrire, non est culpanda, sed tamen III ebdomadas peneteat.* 103

Both penitentials now explicitly mention rape as a reason to commit abortion: *si mulier ab hoste rapta infansem suum inuitum proicit*, ‘if a woman who was raped by an abductor (in an abduction) expels her unwanted child’. The motives for abortion, besides forcible abduction and rape, now read: *si (...) non potest stare aut nutrire*, ‘if she cannot sustain or feed [it]’.

We find a shortened and slightly emended version of this article in the late-tenth or early eleventh-century *P. Casinense*, an Italian penitential that was partly based on the *P. Vallicellianum I*. 104 It only mentions rape as a motive for abortion. The same light penance is imposed.

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98 The verb *proicere*, ‘expel’ is also used in medieval medical texts on abortion and miscarriage; we find it in an early medieval recipe for a purgative in the ninth-century *St. Gall Receptarium I* (recipe A60), cf. Jörriann 1925, p. 18. See also: Elsakkers, unpublished. [article XI]

99 Kottje 1994, p. 196: ‘About a woman who in (a situation of) abduction expels (or aborts) her unwanted child. If, however, the woman expels the unwanted child either because she cannot carry it or because she cannot feed it, she is not guilty, but nevertheless she must do penance for three weeks’. The *P. Oxoniense II* does not have any other articles on abortion.

100 The word *hostis* denotes an outsider (guest, enemy), and the expression *in hostem* is related to the verb *(h)ostare* (<-ab-stare), ‘capturer en route par un guet-apens - to capture by waylaying’ (Niermeyer 1976, p. 749). Although the meaning ‘abduction’; ‘abductor’ is not mentioned in many dictionaries, we find *osto, ostare*, ‘capturer en route’, in Parisse & Goullet 2006, p. 482, and *ostes, osteae*, ‘seisme brutal’, in Gaffiot & Flobert 2005, p. 1111.

101 The word *hostis* denotes an outsider (guest, enemy), and the expression *in hostem* is related to the verb *(h)ostare* (<-ab-stare), ‘capturer en route par un guet-apens - to capture by waylaying’ (Niermeyer 1976, p. 749). Although the meaning ‘abduction’; ‘abductor’ is not mentioned in many dictionaries, we find *osto, ostare*, ‘capturer en route’, in Parisse & Goullet 2006, p. 482, and *ostes, osteae*, ‘seisme brutal’, in Gaffiot & Flobert 2005, p. 1111.

102 Kottje 1994, pp. 158-159. Muzzarelli 1986, p. 176, also notes that this article deals with rape: ‘ma i Penitenziali riportano anche il caso di una donna rapita dal nemico che si rifiuta di dare alla luce un figlio’. She indicates that *hostis* must be translated as ‘enemy’. This translation is possible. If we adopt this translation *in hoste(m)* in the articles in the *P. Oxoniense II* becomes difficult to translate. Cf. chapter 3, note 100.


104 Gaastra 2007, p. 46.
12.21. Si qua mulier ab hoste rapta infante insito proicit, III ebdomadas peniteat.\textsuperscript{105}

These for the most part Italian penitentials are the first to explicitly speak of unwanted pregnancy as a result of forced sexual intercourse. The penitential authors apparently took pity on women who were forcibly abducted and raped, and this must be the reason that only a small token penance of three weeks is imposed. The \textit{P. Oxoniense II}, the \textit{P. Merseburgense A Me\textsubscript{1}} and the \textit{P. Vallicellianum I} explicitly state that the woman is not guilty or responsible: \textit{non est culpanda}. As far as I know, this article on rape and abortion does not occur in any of the other early medieval penitentials. Note that in all these articles it is the woman who decides!

**BEDAE-EBERTI PENITENTIALS**

Sometimes the development of a simple penitential into a more complex penitential can be followed thanks to penitentials that escaped the ravages of time. Between the late eighth century and the second half of the ninth century two relatively short penitentials, the \textit{P. Ps. Bedae} (late eighth century; Lorsch?) and the \textit{P. Ps. Egberti} (early ninth century; England?) fused.\textsuperscript{106} First a ‘Vorstufe’ developed (early ninth century), then the \textit{P. Additivum Ps. Bedae-Egberti} (825-850), and finally the process culminated in the innovative penitential called \textit{P. Mixtum Ps. Bedae-Egberti} (850-875) or \textit{P. Mixtum} (cf. table 3.2a).\textsuperscript{107} These penitentials are interesting because older penitential material was reused creatively, and because the \textit{P. Additivum} and the \textit{P. Mixtum} influenced later penitentials. The first stage, the \textit{P. Ps. Bedae}, contains only one article on abortion, the two-tier article with the abortion criterion \textit{XL dies} that was taken from the seventh-century \textit{Iudicia Theodori} (U.1.14.27).\textsuperscript{108} We find it in the section \textit{De occisione}, ‘On manslaughter’.

\begin{itemize}
\item **P. Ps. Bedae**
\item 4.12. Mulier qui occidit filium suum in utero ante dies XL, I annum peniteat. Si vero post dies XL, III annos. Sed distat multum, utrum paupercula pro difficultate nutriendi an fornicaria causa sui sceleris celandi faciat.\textsuperscript{109}
\end{itemize}

The addition of the \textit{paupercula} clause to an article on abortion is new.\textsuperscript{110} The \textit{paupercula} clause argues for lenience for ‘poor women’: \textit{Sed distat multum, utrum paupercula pro difficultate nutriendi an fornicaria causa sui sceleris celandi faciat}, ‘But it makes a great difference whether a poor woman does it on account of the difficulty of feeding [her child] or a fornicatress for the sake of concealing her sin’. We find long or short versions of the \textit{paupercula} clause in all the Bedae-Egberti articles on abortion.

The second stage of development, the \textit{P. Ps. Egberti}, does not seem to have any articles on abortion. However, there is an article plus companion article on ‘women, \textit{maleficia} and murder’ in the section \textit{De machinatione mulierum}, ‘On the machinations of women’, that probably implicitly also includes abortion.

\begin{itemize}
\item **P. Ps. Egberti**
\item 7.7. Mulier si aliquos interimit arte maleficia sua, id est per poculum aut per artem aliquam, VII annos peniteat.
\item 7.8. Si paupercula, IV annos.\textsuperscript{111}
\end{itemize}

\textsuperscript{105} Gaastra 2007, p. 244; ‘12.21. If a woman who was raped by an abductor expels the child - that is unwanted, she must do penance for three weeks’. I have interpreted \textit{invito} as an adverb that refers to \textit{infans}; perhaps a scribal error?

\textsuperscript{106} Although the \textit{P. Ps. Bedae} and \textit{P. Ps. Egberti} may be insular in origin, the fusion of these two penitentials and their subsequent development occurred on the continent (north-eastern France?).

\textsuperscript{107} On the five stages of development of these penitentials, cf. Haggenmüller 1991, passim.

\textsuperscript{108} \textit{Iudicia Theodori} G.105 and Co 143-144 have \textit{filius (suus) in utero}.

\textsuperscript{109} Wasserschleben 1851 [1958], p. 225. Note that the \textit{P. Ps. Bedae} does not have any articles on \textit{maleficia}.

\textsuperscript{110} The long \textit{paupercula} clause we find here is new. We first find the short version of the \textit{paupercula} clause in the Theodorian articles on infanticide (U.1.14.26).

\textsuperscript{111} Wasserschleben 1851 [1958], p. 239; ‘7.7. A woman who kills others with her \textit{maleficia}, that is, with a potion or by any other means, must do penance for seven years; 7.8. If she is a poor woman, four years’. These articles are followed by an
Article 7.7 punishes a woman who kills others by means of maleficia, and article 7.8 reduces the penance for a ‘poor woman’ from seven to four years. P. Ps. Egberti 7.7 is a new article that was ultimately based on Iudicia Theodori U.1.4.7, an article that lists methods of murder, but probably more directly influenced by the early eighth-century Excarpsus Cummeani.\textsuperscript{112}

\textbf{Excarpsus Cummeani}

6.8. Si per poculum vel per artem aliquam malam, VII annos peniteat aut plus.\textsuperscript{113}

Excarpsus Cummeani 6.8 is in the section on ‘homicide and abortion’; it summarizes the methods of murder in three words: \textit{artem aliquam malam}, ‘any bad (or devious) method.\textsuperscript{114} Although the article in the \textit{Excarpsus Cummeani} is part of a group of gender-neutral articles on murder, the fact that it is preceded by an article on abortion (6.3), and followed by articles on infanticide (6.9-6.10), and abortion (6.11, 6.21) suggests that women who commit abortion could also be punished under this article (cf. table 3.1a).

\textit{P. Ps. Egberti} 7.7 changes the indefinite subject of the articles in the \textit{Iudicia Theodori} and the \textit{Excarpsus Cummeani} to \textit{mulier}, and it puts the article into a section that is only concerned with sins committed by women: \textit{De machina mulierum}. It adds the word \textit{maleficia} and mentions only one method of murder: \textit{per arte maleficia sua}, ‘by means of her knowledge of poisons’ (or ‘magical art’), and it explains \textit{arte maleficia} with the words: \textit{per poculum aut per artem aliquam}, ‘by means of potions or any other method’. The article in the \textit{P. Ps. Egberti} is concerned with special cases of homicide committed by mulieres who are knowledgeable about \textit{maleficia}. All this, along with the addition of a short \textit{pauperula} clause (7.8), and the fact that the following article punishes infanticide (7.9) seems to suggest that the \textit{maleficia} condemned in \textit{P. Ps. Egberti} 7.7 could also be used for fertility management, and that they may include abortifacients (or contraceptives).\textsuperscript{115} Note that these changes (the introduction of the phrase \textit{ars maleficia}, the change of the subject to \textit{mulier}, and the section change) indicate that the author of the \textit{P. Ps. Egberti} associated women with \textit{maleficia}, that is, ‘poison’ and/or ‘magic’.

Stages three (‘Vorstufe’) and four (\textit{P. Additivum}) of the Bedae-Egberti penitentials contain the same group of articles on ‘women, maleficia and murder’, poor women and infanticide.\textsuperscript{116} In the \textit{P. Mixtum}, the last stage of the \textit{Bedae-Egberti} penitentials, these articles were reedited (cf. table 3.2a). The article on infanticide remained

\textsuperscript{112} \textit{Iudicia Theodori} U.1.4.7 is a general, gender neutral article on homicide in the section \textit{De occisione hominum} that does not mention \textit{maleficia} as a means of murder: U.1.4.7, \textit{Si per iarum III annos si casu I annum si per poculum vel per artem aliquam VII annos aut plus si per rixam X annos peniteat} (Finsterwalder 1929, p. 295); ‘If through anger, he shall do penance for three years; if by accident, for one year; if by a potion or any trick, seven years or more; if as a result of a quarrel, ten years (McNeill & Gamer 1938, p. 187). The version of U.1.4.7 in the \textit{P. Ps. Bedae} is extremely short: \textit{P. Ps. Bedae} 4.4. \textit{Qui per iarum et rixam subitam, IIII annos} (Wasserschleben 1851 [1958], p. 225).


\textsuperscript{114} The title of this section in the \textit{Excarpsus Cummeani} is very long and includes any kind of murder or murderous attack, but especially sins that are concerned with killing small children: 6. \textit{De homicidio et sanguinis effusione sine morte et parvalos oppressos, hi qui sine baptismum moriuntur et abortus et qui membrar sua abs cidunt et qui praebent ducatum barbaris} (Wasserschleben 1851 [1958], p. 478).

\textsuperscript{115} This suspicion is confirmed in the versions of this Bedae-Egberti article in the Spanish \textit{P. Vigilantum} 50, the \textit{P. Silense} 83 and the \textit{P. Cordubense} 147, discussed below.

\textsuperscript{116} Cf. \textit{P. Additivum} 7.9. \textit{Mulier si aliquem interimit arte maleficia sua, id est per poculum aut per artem aliquam, VII annos peniteat}. 9.8. \textit{Si pauperula III annos. 9.9. Mulier si occidit filium suum per homicidium X annos peniteat} (Albers 1901, p. 410). These articles are also in the section \textit{De machina mulierum}; they are preceded by an article on divination and incantation (9.6) that was taken from the \textit{Iudicia Theodori} (see: note 117). For a slightly different version probably containing scribal errors, cf. PL 94:0573C.
in the section *De mulieribus* (P. Mixtum 14.2), but the article on ‘women, maleficia and murder’, plus its companion article on *pauperculae* were moved to a new section called *De his qui aliquos interimunt arte maleficia*, ‘On those who kill someone by means of arte maleficia’:

**P. Mixtum**

15.3. Mulier si aliquos interimit arte maleficia sue, id est per poculum aut per aliquam artem, VII annos peniteat. Si paupercula fuit, III annos. Mulier si divinationes vel incantationes diabolicas fecerit, annum unum peniteat vel III quadragesimas, sive XL dies juxta qualitatem culpe peniteat.117

P. Mixtum 15.3 combines *P. Additivum* 9.7 - 9.8 (women, maleficia and murder) and *P. Additivum* 9.6, an article on divination and incantation, thus emphasizing the association of women with magical or superstitious practices (*artes maleficiae, divinationes* and *incantationes*).118 The *Bedae-Egberti* article on ‘women, maleficia and murder’ appears in a number of the younger penitentials, where it explicitly linked to abortion (and infanticide).119

Haggenmüller divides the ‘Vorstufe’ of the *Bedae-Egberti* penitentials into a ‘deutsche Gruppe’ and a ‘romano-nische Gruppe’. The former contains the same two-tier Theodorian article on abortion as the *P. Ps. Bedae*, including the *paupercula* clause, and the latter adds the word *sponte*, ‘intentionally’ - *mulier partum suam ante dies XL sponte perdens* - the first time the word *sponte* is used in connection with abortion.120 The *P. Additivum* (stage four) is innovative; it inserts a third clause after *post XL dies* that survives in two versions: *postquam animatus fuerit* and *postquam natus fuerit*.121

**P. Additivum**

[2.11] Mulier partum suum [in utero] ante dies XL sponte perdens annum I peniteat, si vero post XL dies III annos. Si vero postquam animatus fuerit, quasi homicida; sed distat multum, utrum paupercula fuit, praeterea pro causa sui sceleris celandi faciat.122

This insertion either constitutes a third stage of fetal development that is punished *quasi homicida* and labelled *postquam animatus fuerit*, ‘after animation or ensoulment’, or a clause on infanticide, if we read *postquam natus fuerit*, ‘after birth’.123 It is not possible to decide which version is the original text without more manuscript re-

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117 Wasserschleben 1851 [1958], p. 266. Article 15.3 is preceded by an article on infanticide due to negligence: *P. Mixtum*. 15.1. *Si quis vel si qua infan tem suum incaute oppresserit aut vestimentorum poneret dum in utero, post baptismum, XL dies peniteat in pane et aqua et holeribus et a marito se abstineat*. Postea tres annos per legitimas ferials peniteat et in IV° anno quadragesimas observe*rt. Quod si ante baptismum evenerit, XL dies peniteat, postea quinquennium ob-

118 Albers 1901, p. 410; *P. Additivum* has more examples of *Bedae-Egbert* penitentials with *postquam animatus* and labelled *postquam animatus fuerit*, ‘after animation or ensoulment’, or a clause on infanticide, if we read *postquam natus fuerit*, ‘after birth’.123 It is not possible to decide which version is the original text without more manuscript re-

119 See, for instance, the Spanish penitentials discussed below.


121 The version in Albers 1901, p. 404 has *postquam animatus* and the version in PL 94: 567A-675B at 573C has *postquam natus*. The *P. Ps. Bedae* article with *postquam natus* has more examples of *Bedae-Egbert* penitentials with *postquam natus*. However, all the younger texts that are related to the the *P. Additivum* (or the *P. Mixtum*) have *postquam animatus*.

122 Albers 1901, p. 404; ‘*P. Additivum* [2.11] A mother who kills her child intentionally before the fortieth day shall do penance for one year. If it is after forty days, three years. If it is after the child has become alive (or ensouled) she shall do penance as a murderess. But it makes a great difference whether a poor woman does it on account of the difficulty of supporting [the child] or a harlot for the sake of concealing her wickedness’ (McNeil & Gamer, p. 225). The translation ‘harlot’ for *fornicatrix* should read ‘fornicatrice’. McNeil & Gamer missed the differences between this article and its source in the *Judicia Theodori*, that is, the introduction of the word *sponte*, and the fact that the article in the *P. Additivum* is a three-tier article on abortion. Their omissions have been added between parentheses in the translation.

123 Another possibility is that *postquam animatus* was (originally) inserted as an explanation of *post XL dies*. This agrees with the three years’ punishment for killing a fetus we find in the Theodorian and Frankish articles on abortion. Both ‘forty days’ and *animatus*, ‘alive; ensouled’, are often associated with formation and/or movement. The version in the *P. Ps. Theodori*, discussed below, adds ‘ten years’ as the punishment for homicide, thus clearly defining three stages of fetal development. See below, and Elsakkers 2008. [article IX]
search, because at first glance, both variants seem possible. However, the younger derivatives all have postquam animatus, thus apparently opting for a three-tier article on abortion instead of the two-tier Theodorian article. The P. Additivum is the first continental penitential to distinguish three stages of fetal development in an article on abortion: ante XL dies, ‘before 40 days’, post XL dies, ‘after 40 days’, and postquam animatus fuerit, ‘after animation or ensoulment’. 

**P. Mixtum**

14.1. Si qua mulier partum suum ante XL dies in utero sponte perdiderit, I annum peniteat. Si vero post XL dies eum occiderit, III annos peniteat; si vero postquam animatur fuerit eum perdiderit, quasi homicida peniteat, sed distat multum utrum paupercula pro difficultate nutriendi aut fornicaria causa sit aut pro suis sceleribus celandi faciat.

The P. Mixtum, the last stage in the development of the Bedae-Egberti penitentials, has the same three-tier article on abortion with postquam animatus fuerit (cf. table 3.2a).

The P. Ps. Theodori is a penitential that has recently been redated to the early ninth (‘the early 820s or 830s’) century (cf. table 3.2a). It, too, contains the three-tier article on abortion with the abortion criteria: ante XL dies, post XL dies, and postquam animatus. Its new, earlier date of composition suggests that the three-tier article on abortion must have been a very early borrowing from the P. Additivum. If this is true, it also implies an early date for the P. Additivum, perhaps earlier than the date postulated by Höggenmüller (825-850).

**P. Ps. Theodori**

6.4. Mulier partum suum ante XL dies sponte perdens, annum poeniteat. Si vero post XL dies, III annos poeniteat. Si vero postquam animatur fuerit, quasi homicida, id est, X annos, sed distat multum utrum paupercula pro difficultate nutriendi, an fornicaria causa sui sceleris celandi faciat.

The only difference between the P. Ps. Theodori 6.4 and P. Additivum 2.11 (and P. Mixtum 14.1) is the addition of id est X annos, ‘that is ten years’. This addition shows us that the phrase postquam animatus fuerit can only be interpreted as a third stage of fetal development, because the penance for abortion committed postquam animatus fuerit, that is, quasi homicida, has now been specified to ten years, a different and much harsher penance than the penance for abortion post XL dies (three years).

The author of the P. Ps. Theodori seems to have consciously edited and reorganized older penitential material, for it groups articles on the same subject together systematically (cf. table 3.2a). Almost all the articles on abortion are in the section on homicide (De homicidiis). This section contains a version of the Ancyrarian canon on abortion (6.3), the new three-tier Theodorian article (6.4), the Frankish article (6.5), and the Bedae-Egberti article on ‘women, maleficia and murder’ that probably includes abortion (6.6). The Irish article that punishes the supplier of abortifacient maleficia is in section twelve (De idolatria et sacrilegio, et qui angelos colunt, et maleficos, ariolos, veneficos, sortilecos, divinos etc.), where the three Irish articles on maleficia are quoted in

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124 Only a few penitentials have a three-tier article on abortion, cf. also P. Mixtum 14.1, P. Ps. Theodori 6.4, article 2.65 in Regino of Prüm’s Sendbuch, and the Italian P. Vaticanum 5.6.

125 Early Old Irish penitentials, some of which were written in the vernacular, have articles on abortion that distinguish more fetal stages, for example, the Old Irish Penitential (c. 800) and the Bigotian Penitential (700-725), see also: chapter 3, note 341 and Elsakkers 2008, pp. 405 ff. On the meaning of post XL dies and animatus, see: Elsakkers 2008, passim. [article IX]

126 Wasserschleben 1851 [1958], pp. 265-266. Article 14.1 is in the section De mulieribus; it is followed by the Theodorian article on infanticide without the paupercula clause.

127 Van Rhijn & Saan 2006, passim. The P. Ps. Theodori was probably composed in north-eastern France or the eastern Rhineland.

128 Or perhaps that the P. Ps. Theodori itself was the source used for the three-tier article with postquam animatus in the P. Additivum.


130 The phrase id est, X annos is not in the P. Mixtum either.

131 For other systematic penitentials, cf. table 3.1b.
full (12.9 - 12.10). We find the *paupercula* clause in the articles on abortion (6.4), ‘women, *maleficia* and murder’ (6.6), and infanticide (6.8). The inclusion of this clause in so many articles that have to do with fertility management - especially compared to earlier penitentials - seems to indicate that this penitential author really took pity on poor women and understood why they sometimes resorted to abortion and infanticide.

The *P. Mixtum* is younger than the *P. Ps. Theodori*, but its articles are not arranged systematically. They are scattered over four different sections (cf. table 3.2a). The *P. Mixtum* looks like a conventional tripartite with Theodorian, Frankish, Irish and Ancyrian articles on abortion, but it is not. The Theodorian article in the *P. Mixtum* (14.1) is the new three-tier article discussed above that we also found in the *P. Additivum* and the *P. Ps. Theodori* (14.1). The wording of the traditional Irish article on abortifacient *maleficia* was changed significantly:

**P. Mixtum**

15.2. Si quis conceptum mulieris deceperit, annum I in pane et aqua peniteat.135

The Irish article (15.2) has *conceptum mulieris* instead of *partum mulieris*, as in the *P. Sangallense tripartitum* (1.18) and the *P. Capitula Iudiciorum* (3.1b), and it no longer mentions or refers to *maleficia*.136 The Frankish article is still recognizable (39.2), but its subject has been changed from *mulier* to the genderless *si quis*, so that anyone can be punished for intentional abortion. We will see below that there is one more important innovation in the *P. Mixtum*: the questionaire or interrogatory.

Whereas the *P. Additivum* and the *P. Ps. Theodori* both contain articles that distinguish either one or three stages of fetal development, the *P. Mixtum* has one tier, two-tier and three-tier articles on abortion. Having so many different articles on abortion, often with different penances, makes these penitentials contradictory and inconsistent, a quality they share with the tripartite penitentials and the tenth-century penitential written by Regino of Prüm that will be discussed below. These inconsistencies must have caused confusion, and it is this confusion that the early-ninth-century Carolingian reform councils criticized.137

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132 Wasserschleben 1851 [1958], pp. 596-597.
133 Cf. table 3.2a. The articles on infanticide are as follows: *P. Ps. Theodori* 6.7. *Si mater filium suum occiderit, XV annos poeniteat, et nunquam mutet, nisi die domenico, et festis diebus;* 6.8. *Si mulier paupercula filium suum occiderit, VII annos poeniteat* (Wasserschleben 1851 [1958], p. 587). The *P. Ps. Theodori* seems to have reintroduced the *paupercula* clause in the articles on infanticide, cf. the Bedae-Egberti articles on infanticide. These Bedae-Egberti articles in the *P. Ps. Theodori* (6.4 and 6.6) were probably taken from the *P. Additivum*.
134 Meens 1994, p. 58 calls the *P. Mixtum* systematic; however, this does not apply to the articles on abortion.
135 Wasserschleben 1851 [1958], p. 266.
136 Cf. table 3.1b.
137 Cf. above.
### Table 3.2a: Articles on abortion in ninth-century penitentials: *P. Ps. Theodori* and *P. Mixtum*

<table>
<thead>
<tr>
<th><strong>P. Ps. Theodori</strong></th>
<th><strong>P. Mixtum Ps. Bedae-Egberti</strong></th>
<th><strong>Source</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>18. Fecisti sacrilegium, id est, quos aruspices vocant et augurias faciunt, et sortilegos vel vota, quae ad arbores seu ad fontes seu ad cancellos aut per ullam ingenium fovisti, aut sortitus fuisti, aut avorsum fecisti, V annos vel III poenitetas.140</td>
<td>31. Necasti partus tuos? X annos, et si filium aut filium occidisti, XII annos poenitetas, et si in utero ante conceptum, annum I poenitetas, si post conceptum, III annos.141</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
</tbody>
</table>

6.3. Mulieres, quae fonicantur et partus suos necant, et eas quae agunt secum, ut utero conceptus excitant, antiqua quidem diffinitio usque ad exitum vitae eas ab ecclesia removet, nunc humanius diffinitum est, ut X annos poenitentiae.142

6.4. Mulier partum suum ante XL dies sponte perdens, annum poeniteat. Si vero post XL dies, III annos poeniteat. Si vero postquam animatus fuerit, quasi homicida, id est, X annos, sed distat multum, utrum multum utrum paupercula pro difficultate nutriendi, an fornicaria causa sui sceleris celandi faciat.144

6.5. Mulier si voluntarie abortum fecerit, X annos poenititiae.146

6.6. Mulier si aliquem interemerit malitia [= maleficio] sua, id est, per poculum aut per artem aliquam, VIII annos poenitentiae. Si paupercula est, V annos.148

12.10. (...) Si autem per hoc [= maleficium] mulieris partum quis deceperit, III annos poenitentiae unusquisque superaegat in pane et aqua, ne homicidi reus sit.149

15.3. Mulier si aliquos interimit arte maleficiae suae, id est per poculum aut per aliquam artem, VII annos peniteat. Si paupercula fuit, III annos. (...)149

15.2. Si quis conceptum mulieris deceperit, annum I in pane et aqua peniteat.151

**Council of Ancyra:**

#### Footnotes:

138 The only edition is Wasserschleben 1851 [1958], pp. 566-622; a new one is being prepared at the University of Utrecht.


140 Wasserschleben 1851 [1958], p. 254. Regino of Prüm’s penitential contains exactly the same question without avorsum fecisti (Regino of Prüm, 1.304.18, Hartmann 2004, p. 164.

141 Wasserschleben 1851 [1958], p. 255.

142 Wasserschleben 1851 [1958], p. 586.

143 Wasserschleben 1851 [1958], p. 274.

144 Wasserschleben 1851 [1958], pp. 586-587.

145 Wasserschleben 1851 [1958], pp. 265-266.

146 Wasserschleben 1851 [1958], p. 587.

147 Wasserschleben 1851 [1958], p. 274.

148 Wasserschleben 1851 [1958], p. 587.

149 Wasserschleben 1851 [1958], p. 266.

150 Wasserschleben 1851 [1958], p. 597. *P. Ps. Theodori* 12.9 condemns killing a person with maleficia, and the first part of article 12.10 forbids a person to be a veneficus pro amore, that is, someone who prepares aphrodisiacs.

151 Wasserschleben 1851 [1958], p. 266. The *P. Mixtum* does not contain versions of the two Irish companion articles on maleficia. According to Wasserschleben this article was added at a later point in time, because it is missing in the other manuscripts.
Penitentials written after the Carolingian reform councils, that is, from the first quarter of the ninth century onwards, are often more conservative. Penitential authors were encouraged to use authoritative sources, such as Church council canons. However, tripartite penitentials continued to be written, and most penitentials still contain versions or adaptations of the traditional Irish, Theodorian and Frankish penitential articles on abortion. Besides adding the Ancyrarian canon on abortion, the younger penitentials now also often quote canons from the Council of Elvira (c. 300-306), the Council of Lerida (524) and the Council of Braga II (572). But new articles were also devised, and even a new format was invented.

The new format in the ninth-century penitentials is the questionnaire or interrogatory - a genre that reminds us of the catechism. As far as I know, the P. Mixtum Ps. Bedae-Egberti (850-875) is the first penitential to include canons in the form of ‘questions’ (cf. table 3.2a). In the ninth and following centuries, the questionnaire form seems to have become popular, to my mind thus indicating that penitentials were still used in a pastoral context. In the interrogatories penitents are addressed in the second person singular. They are asked in person whether they have committed a sin, for instance: *fecisti sacrilegium*, ‘did you commit a sacrilege’ or *bibisti ullam maleficium*, ‘did you drink any maleficium’. The first mention of abortion in the P. Mixtum is just two words at the end of a series of questions on divination and superstition: *avorsum fecisti*, ‘did you commit abortion’ (question 18). The inclusion of this short question on abortion in a context of ‘superstition’ suggests a connection between superstitious practices and abortion, but perhaps it was merely an impulsive scribal interpolation.

Question 31 in the P. Mixtum is on abortion and infanticide; it contains elements taken from the Ancyrarian council canon (the ten years’ penance) and the Iudicia Theodori (the two stages of fetal development plus corresponding penances).

P. Mixtum

31. Necasti partus tuos? X annos, et si filium aut filiam occidisti, XII annos poeniteas, et si in utero ante conceptum, annum I poeniteas, si post conceptum, III annos.156

The first part of the necasti question punishes post-partum infanticide (*necasti partus tuos, ‘did you kill your new-born child?’*) and infanticide of an older, probably baptized child (*si filium aut filiam occidisti*). The last part of the necasti question differentiates between early term and late term abortion using the abortion criteria: *ante conceptum* and *post conceptum* instead of *ante XL dies* or *antequam animam habeat* and *post XL dies* or *post XL dies accepti seminis* (cf. Iudicia Theodori U.1.14.24 and U.1.14.27). The word *conceptus* usually means ‘fetus’ as in the Ancyrarian canon, but here it stands for *conceptus spiritus*, ‘ensouled fetus’.

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152 On the use of the questionnaire in the penitentials, see, for instance, Köntgen 2006, passim.
153 Wasserschleben 1951 [1958], p. 254; cf. table 3.2a.
154 Most of the superstitious practices mentioned in P. Mixtum, question 18, were already mentioned in older penitentials, such as the Iudicia Theodori and the Bedae-Egberti penitentials.
155 There is no mention of ‘fornication’ as in the Ancyrarian canon; the article does, however, use the same words as the Ancyrarian canon: *partus* and *necare*.
156 Wasserschleben 1951 [1958], p. 255. ‘P. Mixtum 31. Did you kill your new-born child? Ten years, and if you killed your son or daughter, you must do penance for twelve years, and if in the uterus before ensoulment, you must do penance for one year, if after ensoulment, three years’.
157 The difference between ‘regular’ infanticide and ‘post-partum’ infanticide in P. Mixtum 31 is probably that the neo-nate was not yet baptized. We find the same article in Regino of Prüm’s penitentials (1.304.29 Int.). Note that killing a baptized infant is a more serious sin than killing a neo-nate. On the meaning of the word *partus* in P. Mixtum question 31 and P. Mixtum 14.1 (see also: below).
The *necasti* question on abortion in the *P. Mixtum* is preceded by an interesting question on contraception that defines the word *maleficium*. Both questions seem to be intended for women.158

**P. Mixtum**

30. Bibisti ullam maleficium, id est herbas vel alias causas, ut non potuisses infantes habere, aut alio donasti, aut hominem per pocionem occidere voluisti, aut de sanguine vel semine mariti tui, ut majorem de te haberet amorem, aut gustasti aut chrisma bibisti? VII annos vel V aut III poeniteas.159

Question 30 forbids contraception and murdering another person using *maleficia*, and goes on to condemn a number of superstitious practices, such as drinking your husband’s blood or semen to excite his love. It also punishes the supplier (*aut alio donasti*) of the *maleficia*. Question 30 defines the word *maleficium* as: *id est herbas vel alias causas*, ‘that is, herbs or other substances’. The words *bibisti* and *pocionem* indicate that *maleficia* were administered orally. As we saw above, *P. Mixtum* 15.3 defines *arte maleficiae* as ‘a potion or any other method’. Together the two definitions in the *P. Mixtum* describe *maleficia* as dangerous, poisonous and deadly herbal concoctions, and both articles indicate that other substances (*causas*) and methods (*artem*) can also be referred to as *maleficia*.

HALITGAR, *P. PS. ROMANUM*, HRABANUS MAURUS, *P. PS. GREGORII*

Bishop Halitgar of Cambrai (Kamerijk) is one of the first reformists (cf. table 3.2b). His book on penance, *De vitiis et virtutibus* (<830), includes the standard version of the Ancyrian canon 21 on abortion and infanticide in book four (4.3).160 Halitgar added the *P. Ps. Romanum* as book six of his book on penance. The *P. Ps. Romanum* is an ‘old-fashioned’ tripartite penitential that was probably written in France in the late eighth or early ninth century.161 It contains three articles on abortion: a second shorter and slightly emended version of the Ancyrian canon (6.21), the Irish article (6.32), and the Frankish article (6.46).162 The subject of the Frankish article is *si quis* instead of *mulier*, thus punishing anyone involved in the abortion. Note that neither of the Theodorian articles was included in the *P. Ps. Romanum*. This suggests that some penitential authors did not subscribe to the ‘lenient’ view that awards a lighter punishment for early term abortion.

Halitgar’s contemporary Hrabanus Maurus, a conservative bishop and abbot, wrote two penitentials - the *P. ad Otgarium* (841-842) and the *P. ad Heribaldum* (853-856). Hrabanus cites the Ancyrian, Leridian and Elvirian Church council canons on abortion in both penitentials, but he completely ignores the Irish, Theodorian and Frankish penitential articles on abortion.163

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158 See also: P. Mixtum 15.3.
159 Wasserschleben 1851 [1958], p. 255. For a translation, see: Regino of Prüm’s version of this article (1.304.28) below, chapter 3, note 187.
161 Cf. table 3.2b, and Schmitz 1898, vol. 2, pp. 290 ff. The *P. Ps. Romanum* was probably written in Gaul in the late 8th or early 9th century; it seems to have circulated widely in Italy, cf. Meens 1994, pp. 50-52. For a translation, see: McNeill & Gamer 1938, pp. 295-297. See also: Kottje 1980.
162 The version of the Ancyrian canon in 6.21 is different from the one in book 4 (4.3), but practically the same as article 39.1 in the younger *P. Mixtum Ps. Bedae-Egberti* (cf. tables 3.2a and 3.2b).
Although Halitgar, the *P. Ps. Romanum* and Hrabanus Maurus leave out the two-tier Theodorian articles on abortion with their distinction between early term and late term abortion, other penitentials written after the Carolingian reform do include one of the Theodorian articles on abortion.164

The mid ninth-century *P. Ps. Gregorii* groups material on the same subject together systematically. The author compiled one long article with subarticles that discusses various forms of fertility regulation (cf. table 3.2b).165

The first part of article 17 contains the text of canon 77 of the Council of Braga II, a Spanish council canon on contraception (*ut non concipiat*), abortion (*quod conceptum est necare*) and infanticide (*infantem occiderit*). It punishes fornicatresses, adultresses and married women (*ex legitimo coniugio*) who engage in fertility regulation; most other articles only punish fornicatresses and adultresses.166 The Braga council canon is followed by half of the Theodorian article on infanticide, that is, the half with the *paupercula* clause (U.1.14.26), the two-tier Theodorian article on abortion with the criteria *ante XL dies - post XL dies* (U.1.14.27, G. 105), an article on negligence regarding baptism, and one on child suffocation. The Theodorian article on abortion has *filius aut filiam*, ‘son or daughter’, for ‘fetus’, which is interesting, because the gender of a fetus can only be determined after the abortion, and if the fetus was ‘formed’. Note that the *P. Ps. Gregorii* uses the word *filius* in the meaning ‘son’ and ‘fetus’ in articles that follow each other directly, indicating that the word *filius* probably has a much broader meaning here. The author of the *P. Ps. Gregorii* did not just compile canons from older material, he expanded, adapted and reorganized his sources, and apparently also chose to leave out material that may have been considered confusing or obsolete. In this case the Frankish and Irish canons on abortion were omitted.

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164 Meens 1994 (p. 44) says that the *P. Ps. Romanum* used the *P. Oxoniense II* (Kottje 1994, pp. 179-205) instead of the *Iudicia Theodori*. However, the *P. Oxoniense II* does not have any articles on abortion, except the new article on *raptus* discussed above; this means that the articles on abortion were copied from other sources.


166 It does not punish the men involved.
### Table 3.2b: Articles on abortion in ninth-century penitentials: Halitgar and the P. Ps. Gregorii

<table>
<thead>
<tr>
<th>Halitgar</th>
<th>P. Ps. Gregorii</th>
<th>Source</th>
</tr>
</thead>
</table>
| *De vititi et virtutibus; P. Ps. Romanum*  
books 1-5; book 6; (c. 830; northern France; late 8th - early ninth century, northern France??) | (mid ninth century; Germany, Trier, Cologne (?)), source 4.3. |  
Council of Ancyra (canon 21) |
| 4.3. De his qui partus suos ex formatione diversis modis intermitterat.  
Mulier quae aborsum ediderit vel natum occiderit, X ann. poeniteat. | 17. De mvlierivss fornicariss et avorsvm facientibus.  
Si qua mulier fornicauerit et infantem occiderit, qui exinde fuerit natus et quae studuerit abortum facere et quod conceptum est necare aut certe, ut non concipiat, elaborare, siue ex adulterio siue ex legitimo coniugio: Has tales mulieres in morte recipere communionem prioris canones decreuerunt. Nos tamen pro misericordia siue tales mulieres siue conscias scelerum ipsarum X annos agere penitentiam iudicamus. | Council of Braga II (canon 77) |
| 6.21. Si qua de mulieribus quae fornicatæ sunt, interfecerit, quæ nascuntur, aut festinat abortivos facere, primum constitutum usque ad exitum vitae, id quod verum definitum humanius aliquid consequitur, constituitam eos decennii tempore secundum gradus quae sunt constituta, poeniteat. | [17. continued]  
Si mulier paupercula occiderit filium suum, in canone VII annos dict poenitentiam eius.  
Mulier que concepit et occidit filium aut filiam in utero ante XL dies, I annum poeniteat. Si post XL dies quasi homicida peniteat.  
| 6.46. Si quis avorsum fecerit voluntarie, tres annos poeniteat, unum in pane et aqua. | 6.32. (…) Si autem per hoc [maleficium] mulieres partus quis deceperit, sex quadragesenas unusquisque insuper augeat, ne homicidii reus sit.  
[De Maleficio] | Irish (maleficia) |

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170 Schmitz 1898 [1958], vol. 2, p. 295; PL 105: 0698C-D. ‘Halitgar - P. Ps. Romanum 6.21. If anyone of the women who have committed fornication slays those who are born or attempts to commit abortion, the original regulation forbids communion to the end of life. What is actually laid down they may mitigate somewhat in practice. We determine that they shall do penance for a period of ten years, according to rank, as the regulations state (McNeill & Gamer 1938, p. 304).’  
172 Kerff 1992, pp. 177-178. MS O has *auortiuum facere* instead of *aborsum (abortum) facere*.  
173 Schmitz 1898 [1958], vol. 2, p. 297; PL 105: 0700B. ‘Halitgar - P. Ps. Romanum 6.46. If anyone intentionally brings about abortion, he shall do penance for three years, one year on bread and water’ (McNeill & Gamer 1938, p. 307).  
174 Schmitz 1898 [1958], vol. 2, p. 296 ; PL 105: 0699B. ‘Halitgar - P. Ps. Romanum 6.32. (…) But if by this means anyone deceives a woman with respect to the birth of a child, each one shall add to the above six forty-day periods, lest he be accused of homicide’ (McNeill & Gamer 1938, p. 305). Article 6.32 includes all three components of the Irish article on maleficia.  
175 Section 23 on maleficia does not have any articles on abortion. We do find Theodorian articles on superstitious practices, such as putting your child on a roof or in an oven in order to cure a fever, cf. *Iudicia Theodori* U.1.15.2.
REGINO OF PRÜM

Regino of Prüm († 915) was abbot of Prüm until 899. He wrote his (Libro duo) De Synodalibus Causis et Disciplinis Ecclesiasticis or Sendhandbuch in the late ninth or early tenth century (cf. tables 3.3a - 3.3c). It is not a penitential in the strict sense of the word, but rather a handbook for bishops who travelled around the country holding court. Like Hrabanus Maurus, Regino included versions of the Ancyrian, Leridian and Elvirian canons on abortion. Regino explicitly condemns intentional abortion by the mother using three different words to denote intentionality: sponte (2.65), voluntarie (1.304.29) and propria voluntate (2.5.5).

Regino borrowed the two-tier ‘question’ on abortion in book one (1.304.29) from the P. Mixtum (P. Mixtum 31). The penance for abortion is one to three years, depending on whether the fetus is ensouled or not. Again ante (post) conceptum should be interpreted as ante (post) conceptum spiritum, ‘after conception of the spirit’, that is, ‘after ensoulment’. New in Regino’s version is the addition of the word voluntarie, ‘intentionally’, a word first used in the Frankish articles on abortion. In article 1.304.29 the word partus is used for post-partum infanticide, and filius - filia in other cases of infanticide.

Regino of Prüm

1.304.29 Int.: Necasti voluntarie partus tuos? Decem annos poeniteat; et, si filium vel filiam occidisti, duodecim. Et, si in utero ante conceptum, unum annum; si post conceptum, tres annos. (…). 178

2.65. Si qua mulier partum suum excusser it. Ex Poenitentiali. Si qua mulier partum suum ante XL dies in utero sponte perdiderit, annum unum poeniteat. Si vero post XL dies eum occiderit, tres annos poeniteat. Si vero, postquam animatus fuerit, eum perdiderit, quasi homicida poeniteat. (…).179

Regino’s three-tier article on abortion in book 2 (2.65) was also taken from the P. Mixtum (P. Mixtum 14.1). He adds the heading: Si qua mulier partum suum excusserit, ‘If a woman expels her fetus’. Regino distinguishes the same three stages of abortion with corresponding penances - ante XL dies (one year), post XL dies (three years), and postquam animatus fuerit, ‘after ensoulment’ (homicide), and awards a lighter penance to a paupercula or ‘poor woman’.

Regino and the P. Mixtum include both a two-tier and a three-tier article on abortion with different descriptions of the various stages of fetal development, and conflicting penances - something that would not have made matters easy for the priests using these penitentials. Both penitentials use the word partus in the meaning ‘neonate’ in one article (P. Mixtum 31, Regino 1.304.29) and in the meaning ‘fetus’ in the other (P. Mixtum 14.1, Regino 2.65).

Question 2.5.5 in Regino’s Sendbuch is new. It punishes the person - man or woman - who helps a woman expel her fetus, and the pregnant woman who commits abortion of her own free will (propria voluntate). 182

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176 Regino of Prüm’s penitential was edited by Wilfried Hartmann in 2004.
177 As in P. Mixtum 31, this article differentiates between post partum or neo-nate infanticide (a ten years’ penance) and ‘regular’ infanticide (a 12 years’ penance). Cf. chapter 3, note 157.
178 Hartmann 2004, p. 164; ‘Regino of Prüm 1.304.29. Did you intentionally kill your new-born child? Ten years, and if you killed your son or daughter, you must do penance for twelve years, and if [it is] in the uterus before ensoulment, you must do penance for one year, if after ensoulment, three years’. See also: table 3.3a.
180 The penance for homicide is probably ten years as in the Ancyan canon.
181 Others explain that Regino left the choice up to his readers, cf. Austin 2009, p. 40, and chapter 3, note 229.
182 The editor, Wilfried Hartmann, says that its origin is unknown; his remark ‘Herkunft unbekannt’ refers to the whole interrogatio in 2.5 (Hartmann 2004, p. 236).
Regino of Prüm
2.5.5. Est aliquis vel aliqua, qui alterius partum excusserit vel, si ipsa femina propria voluntate suum partum excusserit et abortivum fecerit.183

Again Regino stresses the fact that we are dealing with intentional abortion. Although no penance is mentioned, it can probably be deduced from other articles in Regino’s Sendbuch. The first part may have been inspired by local Old Germanic laws on abortion that punish ‘aiding and abetting’, that is, supplying poisonous abortifacient maleficium.184

As in the P. Ps. Gregorii, the traditional Frankish and Irish articles on abortion were not incorporated into Regino’s Sendbuch, and abortifacient maleficium are not mentioned explicitly. However, Regino incorporated two articles on maleficium from the P. Mixtum that probably both implicitly also refer to abortion: a version of the Bedae-Egberti article on ‘women, maleficium and murder’ (P. Mixtum 15.3), and the ‘question’ that forbids drinking maleficium for contraceptive purposes (P. Mixtum 30). Both contain definitions of the word maleficium.185

Regino of Prüm
2.81. De femina, quae virum per maleficium interficit. Ex Poenitenciali, cap. XV. Mulier, si aliquos interimit arte maleficia, id est per poculum aut per aliquum artem, VII annis poeniteat; si paupercula fuerit, III annis poeniteat.186 1.304.28. Bibisti uestum maleficium, id est herbas vel alias causas, ut non potussus infantes habere, aut ali di donasti, aut hominem per mortiferam potionem occidere voluisti, aut alium hoc facere docuisti aut de semine viri gustasti, ut in amorem tuum exardesceret, aut chrisma bibisti, aut ad subvertendum Dei iudicium alteri dedisti? Si quid huiusmodi operatus es, septem annos poeniteas.187

Article 1.304.28 prohibits contraception and also punishes the person who supplies maleficium or contraceptives: aut alii donasti, ‘or did you give it to anyone’. New is Regino’s penance for the person who teaches others how to prepare maleficium: aut alium hoc facere docuisti, ‘or did you teach others to prepare it’. We find more prohibitions of contraceptives - that probably implicitly include abortion - in articles 2.5.9 and 2.88. The first is a short question that includes a condemnation of aiding and abetting, and the second is a detailed version of the same text in the indicative form:

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183 Hartmann 2004, p. 238; ‘Regino of Prüm 2.5.5. Is there a man or woman who expelled a fetus for someone else, or did the woman herself of her own free will expel her fetus and commit abortion?’ Cf. Hartmann’s translation in table 3.3a. The articles that precede and follow 2.5.5 all have to do with fertility management and murder. Article 2.5.4 is on infant suffocation, 2.5.6 is on infanticide, 2.5.7 is on murdering one’s wife, article 2.5.8 is on poisoning one’s husband or any other person, and article 2.5.9 is on contraception. Burchard of Worms copied Regino’s whole Senten alia. Article 2.5.8 is interesting, because it tells us that women were knowledgeable about herbal poisons (herbas venenat as): Regino of Prüm 2.5.8. Est aliqua femina, quae virum suum vel aliquum hominem per herbas venenatas vel mortiferas potiones interfecerit vel alium hoc facere docuerit? (Hartmann 2004, p. 238); ‘2.5.8. Gibt es eine Frau, die ihren Mann oder einen anderen Menschen durch vergiftete Kräuter oder toodbringende Tränke getötet hat oder die einen anderen geleert hat, dies zu tun?’ (Hartmann 2004, p. 239).

185 Cf. chapter 1 and Elsakers 2003b on Salic law. Old Germanic law usually only punishes the person who supplies the poison or the aggressor who causes a woman to miscarry. Only one law actually punishes the mother for committing abortion. [article IV]

186 The definitions of the word maleficium help us understand more about the abortifacient maleficium mentioned in the Irish penitentials. Women are often associated with poisons, maleficium and murder in Regino’s Sendbuch. Articles 2.82 and 2.93 are general articles on maleficium and murder, and articles 2.5.8 and 2.84 are about using poison (venenum) to kill one’s husband. Article 2.5.8 is interesting, because it tells us that women were knowledgeable about herbal poisons (herbas venenat as): Regino of Prüm 2.5.8. Est aliqua femina, quae virum suum vel aliquum hominem per herbas venenatas vel mortiferas potiones interfecerit vel alium hoc facere docuerit? (Hartmann 2004, p. 238); ‘2.5.8. Gibt es eine Frau, die ihren Mann oder einen anderen Menschen durch vergiftete Kräuter oder toodbringende Tränke getötet hat oder die einen anderen geleert hat, dies zu tun?’ (Hartmann 2004, p. 239). Hartmann 2004, p. 164; ‘Regino of Prüm 1.304.28. Hast du irgendeinen Zaubertrank getrunken, das heißt Kräuter oder andere Wirkstoffe, um keine Kinder haben zu können? Oder hast du ihn (= den Zaubertrank) einem anderen gegeben? Oder wolltest du einen Menschen durch einen toodbringenden Trank töten, oder hast einen Dritten unterwiesen, dies zu tun? Oder hast du von einem Mannes gekostet, damit er in Liebe zu dir entbrenne? Oder hast du Salböl getrunken oder es, um ein Gottesurteil umzukehren, einem anderen gegeben? Wenn du irgende etwas von dieser Art getan hast, sollst du sieben Jahre Buße tun’ (Hartmann 2004, p. 165). Note that Regino has mortiferam potionem instead of potionem. As in the P. Mixtum, the bibisti article on contraception (1.304.28) is preceded by the ‘necasti question’ on abortion and child murder (Regino of Prüm 1.304.29).
**Regino of Prüm**

- 2.5.9. Est aliquis vel aliqua qui hoc fecerit vel alium facere docuerit, ut vir non possit generare aut femina concipere?\(^{188}\)
- 2.88. De eadem re. Unde supra. Si aliquis causa explendae libidinis vel odii meditatione, ut non ex eo sofoles nascatur, homini aut mulieri aliquid fecerit vel ad potandum dederit, ut non possit generare aut concipere, ut homicida teneatur. Hoc totum idcirco ex lege Romana posuimus, ut sacerdos ex lege perpendat modum poenitentiae in talibus transgressionibus. Canonica enim auctoritas cum lege Romana ex permaxima parte concordat.\(^{189}\)

We know article 2.88 was also associated with abortion, because Burchard of Worms included the same article in his penitential (17.57) under the (new) heading *De illis qui conceptum excutiunt*, ‘on those who expel the fetus’, thus indicating that he meant for the article to refer to both abortion and contraception; the punishment - *ut homicida*, ‘as a murderer’ - confirms this. Both Regino and Burchard add references to authoritative sources in order to give their articles *auctoritas* or ‘authority’, and both of their sources are false.\(^{190}\) The conventional motives for abortion - adultery and fornication - are not mentioned in this article. Regino and Burchard mention two motives we do not find in the older penitentials: *causa explendae libidinis*, ‘to satisfy lust’, and *causa odii meditatione*, ‘out of hate’.\(^{191}\) The former probably denotes sexual excesses and illicit or excessive sexual acts done by mutual consent, and the latter probably has to do with any kind of forced sex and/or domestic violence. The penitentials do not often mention men in connection with adultery, fornication and fertility regulation. However, articles 2.5.9 and 2.88 punish anyone (*aliquis*), man or woman, who tries to prevent men from procreating and women from conceiving. There are very few texts that explicitly tell us that contraceptives were also available for men. The methods mentioned in 2.5.9 and 2.88 are vague. Article 2.5.9 speaks of *hoc fecerit*, ‘did or caused this’, and article 2.88 has *hominia aut mulieri aliquid fecerit vel ad potandum dederit*, ‘did something to a man or woman, or gave [something] to drink’. Article 2.88 says that potions were used, and both articles indicate that ‘something’ could be ‘done’. Although the connection with abortion is vague, and article 2.88 is only explicitly associated with abortion by Burchard, article 2.88 later became part of official Church law on abortion under the name *si aliquis*.\(^{192}\)

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\(^{188}\) Hartmann 2004, p. 238; ‘Regino of Prüm 2.5.9. Gibt es einen (Mann) oder eine (Frau), die bewirkt haben oder einen anderen gelehrt haben zu bewirken, dass ein Mann nicht zeugen oder eine Frau nicht empfangen kann?’ (Hartmann 2004, p. 239).

\(^{189}\) Hartmann 2004, p. 292; ‘Regino of Prüm 2.88. If anyone in order to satisfy lust or out of hate, so that no offspring are born from him [or her], did something to a man or woman or gave [something] to drink, so that he cannot generate or [she] cannot conceive, he [or she] should be held as a murderer’, see also: Hartmann 2004, p. 293.

\(^{190}\) The phrases *De eadem re* and *Unde supra* in Regino’s article 2.88 refer to article 2.85. This article contains a reference to the *Pauli Sententiae*, a third-century Roman commentary on the *Lex Cornelia de Sicariis et Veneficis*, the Roman law on murder and poisoning. Cf. chapter 1. Whereas Regino says that he got the canon from Roman law, Burchard claims that the article is a canon from a Council held in Worms. Cf. table 3.3c.

\(^{191}\) *Odii meditatione*, literally ‘hateful thoughts’ or ‘contemplation of hate’ is translated as ‘premeditated hate’ by Connery 1977, p. 80. In other penitentials we find the phrase *odii meditatione* in articles on homicide, for instance, *P. Sangallense tripartitum 3.1a* and *P. Casinense 1.10: Si quis odii meditatione homicidium fecerit (...), and P. Vallicellianum C.6, article 2: (...) Si presbyter odii meditatione homicidium fecerit* (Meens 2004, p. 342, Gaastra 2007, pp. 238, 274). It is often translated as ‘with malice aforethought’.

\(^{192}\) Cf. Connery 1977, pp. 80-82. Connery also argues that Regino’s canons can also be interpreted to include abortion.
Table 3.3a: Articles on abortion in tenth- and eleventh-century penitentials: Regino of Prüm and Burchard of Worms

<table>
<thead>
<tr>
<th>Regino of Prüm, <em>De Synodalibus Causis et Disciplinis Ecclesiasticis</em> (late 9th-early 10th century; Prüm, Germany)</th>
<th>Burchard, <em>Decretum</em> (between 1008 and 1012; Worms, Germany)</th>
<th>source</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.5.5. Est aliquis vel aliqua, qui alterius partum excusserit vel, si ipsa femina propria voluntate suum partum excusserit et abortivum fecerit?</td>
<td>1.94. Interrogatio 5. Est aliquis vel aliqua qui alterius partum excusserit, vel si ipsa femina propria voluntate suum partum vel conceptum excusserit, et abortivum fecerit?</td>
<td>Council of Ankyra (canon 21)</td>
</tr>
<tr>
<td>2.62. De mulieribus, quae partus suos necant. Ex Concilio Ankyro. De mulieribus, quae fornicantur et partus suos necant vel quae agunt secum, ut utero conceptus excutiant, antiqua quidem definitio usque ad exitum vitae eam ab ecclesia removet; humanius autem nunc definitio, ut eis decem annum tempus secundum praefixos gradus poenitentiae largiatur.</td>
<td>17.54. De eadem re. De mulieribus quae fornicantur, et partus suos necant, vel quae agunt, secum, ut utero conceptus excutiant, antiqua quidem definitio usque ad exitum vitae eam ab Ecclesia removet. Humanius autem nunc definitio, ut eis X annum tempus, secundum praefixos gradus poenitentiae largiatur.</td>
<td>Council of Ankyra (canon 21)</td>
</tr>
<tr>
<td>19.5.159. [19.147.] Fecisti quod quaedam mulieres facere solent, quae, dum fornicantur et partus suos necare volunt, agunt ut utero conceptus excutiant suis maleficis et suis herbis, ita ut aut conceptum interficiant aut excutiant, vel si nondum conceperunt, faciunt ut non concipiant?</td>
<td>Council of Ankyra (canon 21)</td>
<td></td>
</tr>
</tbody>
</table>

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193 The article numbers between square brackets are the numbers used by Wasserschleben.
195 Hartmann 2004, p. 165; ‘19.5.161. [19.5.149.] Donasti vel ostendisti alicui, ut conceptum suum vel excuteret, aut occideret? Si fecisti, septem annos per legitimam ferias poenitentiam requirit.’
196 Hartmann 2004, p. 238; ‘2.5.5. Gibt es einem (Mann) oder einer (Frau), die die Leibesfrucht einer anderen abgetrieben hat? Oder hat eine Frau aus eigenem Willen ihre Leibesfrucht abgetrieben und eine Fehlgeburt eingeleitet?’ (Hartmann 2004, p. 239).
197 Hartmann 2004, p. 165; ‘19.5.165. Confectisti aliquam mortiferam potionem, et cum ea aliquem occidisti? Si fecisti, carinam [= quadragena] unum cum septem sequentibus annis jejunare debes, et nunquam sis sine poenitentia; ‘Did you prepare a deadly potion and kill anybody with this? If you did this, you must do penance for a period of forty days plus the seven following years’. Hartmann 2004, p. 165; ‘19.5.165. Confectisti aliquam mortiferam potionem, et cum ea aliquem occidisti? Si fecisti, carinam [= quadragena] unum cum septem sequentibus annis jejunare debes, et nunquam sis sine poenitentia; ‘Did you prepare a deadly potion and kill anybody with this? If you did this, you must do penance for a period of forty days plus the seven following years’.
198 Hartmann 2004, p. 238; ‘2.5.5. Gibt es einem (Mann) oder einer (Frau), die die Leibesfrucht einer anderen abgetrieben hat? Oder hat eine Frau aus eigenem Willen ihre Leibesfrucht abgetrieben und eine Fehlgeburt eingeleitet?’ (Hartmann 2004, p. 239).
200 PL 140: 0931C-0931D.
### Table 3.3b: Articles on abortion in tenth- and eleventh-century penitentials: Regino of Prüm and Burchard of Worms

<table>
<thead>
<tr>
<th>Regino of Prüm, <em>De Synodalibus Causis et Disciplinis Ecclesiasticis</em> (late 9th-early 10th century; Prüm, Germany)</th>
<th>Burchard, <em>Decretum</em> (between 1008 and 1012; Worms, Germany)</th>
<th>source</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.5.159, [19.147.] continued. Si fecisti, aut consensisti, aut docuisti, detem annos per legimtas ferias poenitere debes. Sed antiqua definitio usque ad exitum vitae tales ab Ecclesia removet. Nam quoties [= quotiens] conceptum impedierat, tot homicidiorum rea erit. Sed distat multum, utrum utrum paupercula sit, et pro difficultate nutriendi, vel formicaria causa, et pro sui sceleris caelandi faciant.</td>
<td>2.63. De eadem re. Ex Concilio Ilerdensi. Si qua mulier absente marito per adulterium conceperit, idque post facinus occiderit, placuit vix in fine dandum communionem, eo quod gminaverit scelas.</td>
<td>Lerida (canon 2)</td>
</tr>
<tr>
<td>17.52. De illis mulieribus, quae male conceptos necare studuerint. (Ex concilio Hilerden., capite 5.)</td>
<td>19.5.160, [19.148.] In concilio autem Hilerdensi de supradictis qui infantes suos ex adulterio susceperint vel editos necare studuerint, vel in ventribus matrum potionibus aliquibus colliserint, in utroque sexu adulteris post septem annorum curricula communio tribuatur, ita tamen, ut omni tempore vitae suae fletibus et humiliati insistant.</td>
<td>Lerida (canon 2)</td>
</tr>
</tbody>
</table>

201 PL 140: 0972B-0972C; Wasserselehe 1851 [1958], p. 659; ‘Burchard of Worms, *Decretum*, 19.5.159. Have you done what some women are accustomed to do when they fornicate and wish to kill their *partus*, [that is] do [something] with their *maleficia* and their herbs in order to expel the *conceptus* in the womb, so that they either kill or expel, or, if they have not yet conceived, contrive that they do not conceive? If you have done so, or consented to this, or taught it, you must do penance for ten years on legal *feriae*. But an ancient determination removed such from the Church till the end of their lives. For as often as she impeded a conception, so many homicides was a woman guilty of. But it makes a big difference whether she is a poor woman and acted on account of the difficulty of feeding, or whether she acted to conceal a crime of fornication’ (Noonan 1986 [1965], p. 160, emended translation).


203 PL 140: 0931B.

204 PL 140: 0972C-0972D; Wasserselehe 1851 [1958], p. 659.


206 PL 140: 0931A-B.
Table 3.3c: Articles on abortion in tenth- and eleventh-century penitentials: Regino of Prüm and Burchard of Worms

<table>
<thead>
<tr>
<th>Regino of Prüm, <em>De Synodalibus Causis et Disciplinis Ecclesiasticis</em> (late 9th-early 10th century; Prüm, Germany)</th>
<th>Burchard, <em>Decretum</em> (between 1008 and 1012; Worms, Germany)</th>
<th>source</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2.88. De eadem re. Unde supra. (Si aliquis)</strong> Si aliquis causa explendae libidinis vel odii meditatione, ut non ex eo soboles nascatur, homini aut mulieri aliquid fecerit vel ad potandum dederit, ut non possit generare aut concipere, ut homicida teneatur. Hoc totum idcirco ex lege Romana posuimus, ut sacerdos ex lege perpendat modum poenitentiae in talibus transgressionibus. Canonica enim auctoritas cum lege Romana ex permaxima parte concordat. 207</td>
<td><strong>17.57. De illis qui conceptum excutiant. (Ex concilio Worma., capite 30.) (Si aliquis)</strong> Si aliquis causa explendae libidinis, vel odii meditatione, ut non ex eo soboles nascatur, homini aut mulieri aliquid fecerit, vel ad potandum dederit, ut non possit generare, aut concipere, ut homicida teneatur. 208</td>
<td>Theodorian, ≈ U.1.14.24</td>
</tr>
<tr>
<td>**2.65. Si qua mulier partum suum excusserit. Ex Poenitentiali. Si qua mulier partum suum ante XL dies in utero sponte perdididerit, anum unum poenitent. Si vero post XL dies eum occiderit, tres annos poenitent. Si vero, postquam animatus fuerit, eum perdiditer, quasi homicida poenitent. Sed distat multum, utrum paupercula pro difficile nutriendi aut fornicaria causa sit, et pro sui sceleris celandi faciat causa. 209</td>
<td><strong>17.60. De illis feminis quae abortum fecerint. (Ex Poenitentiali Romano.)</strong> Si qua mulier abortum fecerit voluntarie, tribus annis poenitent. 210</td>
<td>Frankish</td>
</tr>
<tr>
<td>**2.81. De femina, quae virum per maleficium interficit. Ex Poenitentiali, cap. XV. Mulier, si aliquos interimit arte maleficia, id est per poculum aut per aliquam artem, VII annis poenitent; si paupercula fuerit, III annis poenitent. 211</td>
<td><strong>19.104. De illis qui per amorem venefici fiunt. (Ex Poenitentiali Theodori.)</strong> (…) maxime si per hoc [veneficium] mulieris partum quisque deceperit, tres annos unusquisque superaugeat in pane et aqua, ne homicidiis reus sit. 213</td>
<td>Irish (maleficia)</td>
</tr>
</tbody>
</table>

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208 PL 140: 0933B.


210 PL 140: 0934B.

211 Hartmann 2004, p. 290; ‘2.81. Über die Frau, die einen Mann durch Zauberei tötet. Aus einem Bußbuch, Kapitel 15. Wenn eine Frau jemanden durch zauberische Kunst beseitigt, also durch einen Trank oder durch eine andere Zauberei, so soll sie sieben Jahre büßen; wenn sie einearme Frau ist, soll sie drei Jahre büßen’ (Hartmann 2004, p. 291).

212 Regino’s *Sendbuch* contains a few articles on *maleficia*, for instance, we find the general Irish article on *maleficia* in 2.83 (Hartmann 2004, p. 290) and the *bibisti* article on contraceptive *maleficia* that is also in the *P. Mixtum* in 1.304.28.

213 PL 140: 1004C-1004D. The first part of article 19.104 forbids the use of aphrodisiacs and uses the word *veneficus*, ‘poisoner’.
BURCHARD OF WORMS

Bishop Burchard of Worms (950-1025) probably wrote his Decretum or Libri Decretorum in the first quarter of the eleventh century between 1012 and 1023 (or 1015 and 1020). Book 19 is also called Corrector et Medicus. We find penitential canons in books one, seventeen and nineteen (cf. tables 3.3a, 3.3b, 3.3c). Regino of Prüm was one of Burchard’s main sources, but Burchard also used traditional penitential and conciliar sources, and added material from patristic sources. Burchard emends and expands his source texts, and he often turns older penitential articles and conciliar canons into questions. This suggests that he really meant for his penitential texts to be used. His intended audience probably consisted of parish priests, (arch)bishops, but also of students of canon law, and it seems to have been meant both as a teaching manual and reference work.

Burchard’s question on accomplices in the interrogatio in book one (1.94.5) is an almost word for word copy of the question 2.5.5 in Regino’s Sendbuch (cf. table 3.3a). Both punish the accomplice (aliquis vel aliqua) and the woman (ipsa femina) who commits intentional abortion. There is one small interesting difference between Regino and Burchard’s articles, and that is, the addition of vel conceptum by the latter, so that Burchard’s article reads suum partum vel conceptum excusserit, ‘expelled her partus or conceptus’, thus indicating that the word partus is considered a synonym of conceptus, ‘fetus’, in this article.

Like Hrabanus and Regino of Prüm, Burchard quotes many council canons on adultery, fornication, abortion and infanticide (Elvira, Lerida, Ancyra and Worms). All in all we find six council canons on abortion in books 17 and 19, including the spurious canon from the council of Worms (17.57). The Leridian and Ancyrian canons were both quoted twice (17.52, 19.5.160; 17.54, 19.5.159).

Burchard turned the version of the Ancyrian canon in book 19 into a long interrogation (19.5.159). His redaction of the Ancyrian canon includes the reference to the ancient canons, but it leaves out the humanius clause.

Burchard prefixed the canon text with the rather blunt clause he uses to introduce articles that deal with sins associated with women, especially superstitious practices: Fecisti, quod quaedam mulieres facere solent?, ‘Have you done what some women are accustomed to do?’. The fecisti clause is followed by a shortened version of the Ancyrian canon on infanticide and abortion: quae dum fornicantur et partus suos necare volunt, agunt ut utero conceptus excutiant (...), ‘when they fornicate and wish to kill their new-born child [or], act in such a way that...”


216 Cf. Austin 2009, pp. 81, 164.

217 My interpretation of partus and conceptus as synonyms with the meaning ‘fetus’ is based on the fact that the verb excutere, ‘expel’, is always used in reference to abortion; it is possible that a difference in fetal development is meant here, or that Burchard is simply trying to be clear by mentioning both Latin words for ‘fetus’. The word partus is regularly used in the meaning ‘neo-nate’, for instance, in the Ancyrian canon (cf. 19.5.159), but partus also means ‘neo-nate’ in the rather shocking article on infanticide we find both in Regino’s Sendbuch and Burchard’s Decretum: Burchard of Worms 17.53. De mulieribus, quae partus suos occulte interficiunt. (Ex concilio Arelatensi, capite 6.) Mulieres quaedam, ut audimus, quae ex fornicaione concipientes, metuente ne scelus quod occulte perpetraverant, manifestum fieret, infants quos pepererunt, occiderunt, et terrae congerie coopererunt, aut in aquas prope concierunt. Quod quantum nefas sit, canones Ancirani, Illiberitani, atque Hilardensis concilii, testes sunt. His itaque vix in fine dandam esse communionem decernunt, sed humanius tractantes, post decennem poenitentiam tales placuit ad communionem recepit. The article describes the desperation of women who have to devise a place to dispose of the baby’s body; in this case they bury it or throw it into the water. For Regino of Prüm’s slightly longer version plus a German translation, cf. article 2.67 in Hartmann 2004, pp. 282-285. Burchard says it was originally a council canon from the Council of Arles and Regino attributes it to the Council of Rouen. See also: the short questions in Regino of Prüm 2.5.6 (Hartmann 2004, p. 238) and Burchard 1.94.6 (PL 140: 0573C-0573D).

218 The version in 17.54 contains the humanius clause.
they expel the fetus from the uterus (...). Burchard then inserts a long interpolation. First he specifies the methods of abortion and infanticide: *suis maleficiis et suis herbis,* ‘with her maleficia and her herbs’ [or: ‘her maleficia, that is, her herbs’], and then he explains that this canon also refers to contraception: *ita ut aut conceptum interficiant aut excutiant, vel si nondum conceperunt, faciant ut non concipiant,* ‘so that they kill or expel the fetus, or, if they have not yet conceived, they do [something] so that they do not conceive’. Next Burchard adds the clause: *si fecisti aut consensisti aut docuisti,* ‘if you did [this], or consented [to it], or taught [it]’, intimating that anyone involved in abortion, contraception or infanticide, including accomplices who provide instruction, should be punished. The word *consensisti,* ‘consented’, may also indicate that others - such as the man involved - pressured the pregnant woman into consenting to an abortion. Burchard underscores his interpolation with a version of Caesarius’s well-known *quantoscumque* formula, shaking his finger as it were, and threatening to punish those who contracept (or abort) as murderers. Article 19.5.159 closes with the long version of the *paupercula* clause that we first found in P. Ps. Bedae 4.12. Burchard turned the Ancyrian Church council canon in book 19 into a text that can be used in confession, thus explicitly expanding its intended audience. His version reads like a vehement sermon against infanticide, abortion and contraception.

Burchard also copied Regino’s article on contraception (2.88) - later called *si aliquis* in canon law on abortion (17.57). He explicitly expanded its meaning and scope to include abortion by adding a heading on abortion to Regino’s article. Burchard wrongly ascribed article 17.57 to the Council of Worms (868), and omitted Regino’s reference to Roman law (cf. table 3.3c). As we saw above in Regino’s version, usage of the word *aliquis,* ‘someone’ and the reference to male contraceptive methods indicates that men could also be involved in fertility management. Two other texts that are also in Regino’s *Sendbuch* contain explicit references to men: the Lerician council canon on abortion (17.52; 19.5.160) which punishes both men and women (*in utroque sexu*) who commit adultery, and question 1.94.5, which punishes *aliquis vel aliqua,* ‘the man or a woman’, who helps a woman abort.

Burchard was well aware of the fact that there were people - usually women - who specialized in supplying abortives and contraceptives. He considers ‘aiding and abetting’ a sin (cf. 19.5.159, 17.57, and 1.94.5), and explicitly includes teaching others methods of fertility management (19.5.159). In book 19 there is a separate article on ‘aiding and abetting’ that may have been written by Burchard himself.

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219 In the Ancyrian canons *partus suos necare volunt* is regularly interpreted as a passage on infanticide, as in the *necasti* questions (P. Mixtum 31 and Regino of Prüm 1.304.29).

220 Burchard is not the first to include Caesarius’s *quantoscumque* formula in a penitential. We also find it in the *P. Vallicellianum C.6:* <68.> Si qua mulier herbas ne concipiatur biberit, quantoscumque concipere uel parere debuerat, tantorum homicidiorum rea erit et ita iudicetur, ‘If any woman drinks herbs in order not to conceive, as many times as she should have conceived or given birth, so many murders she shall be guilty of, and thus she will be judged’ (Gaastra 2007, p. 279), and in two Spanish penitentials: P. Silense 87 Mulier quoque que potionem acceperit, quantoscumque concipere uel parere debuerat tantorum homicidiorum ream se esse cognoscat (Körntgen & Bezler 1998, p. 25) and P. Vigilianu 60 Mulier quoque que potionem acceperit, quantoscumque concipere uel parere debuerat, tantorum homicidiorum rea esse cognoscat (Körntgen & Bezler 1998, p. 8); *P. Vigilianum* 60. A woman, also, who takes a potion shall consider herself to be guilty of as many acts of homicide as the number of those she was due to conceive or bear’ (McNeill & Gamer 1938, p. 291).

221 Church council canons were originally meant to be used by bishops in Church gatherings and in Church tribunals. The Ancyrian canon on abortion is often included in early medieval penitentials, but this is the first time that it was turned into a question - thus indicating its usage in confession.

222 See: chapter 3, note 192.

223 Burchard refers to canon 30 of the Council of Worms in article 17.57 - a canon that does not seem to exist. Canon 35 in Mansi 1759-1927 (vol. 15, sp. 876) is about abortion and (accidentally) suffocating a child, and we find the same text in canon 18 of Hartmann’s edition of the Council of Worms (Hartmann 1998, p. 260).

224 Cf. Regino of Prüm 2.63 and 2.5.5.
Burchard of Worms

19.5.161. [19.5.149.] Donasti vel ostendisti al iucui, ut conceptum suum vel excuteret, aut occideret? Si fecisti, septem annos per legitimas ferias poenitere debes.225

Article 19.5.161 punishes supplying or administering (donasti) ‘something’ that can be used to expel or kill a conceptus, ‘fetus’, and showing or teaching (ostendisti) someone how to commit abortion with a penance of seven years.

Burchard’s *Decretum* contains remnants of the traditional Frankish, Irish and Theodorian articles on abortion. The Frankish article on abortion is in book 17 (17.60), and a version of the Irish article on abortifacient maleficia is in book 19 (19.104).226 The Theodorian article on abortion underwent an almost complete metamorphosis. It was turned into a question and incorporated into the *interrogatio* in book 19.

Burchard of Worms

19.5.162. [19.5.150.] Excussisti conceptum tuum antequam vivificaretur? Si fecisti, unum annum per legítimas ferias poenitere debes: fecisti post conceptum spiritum, tres annos per legítimas ferias poenitere debes.227

Article 19.5.162 distinguishes between early term and late term abortion, but Burchard uses a completely different set of concepts. Instead of ante XL dies - post XL dies, or antequam animam habeat - post XL dies accepti seminis (cf. *Iudicia Theodori* U.1.14.27 and U.1.14.24), Burchard uses the abortion criteria antequam vivificaretur, ‘before the conceptus became alive’, and post conceptum spiritum, ‘after the spirit was conceived’, that is, ‘after ensoulment’.228 The penances are the same as in Theodore’s articles. Note that Burchard’s omission of the three-tier article on abortion in Regino’s *Sendbuch* probably means that he rejected it, and that he was trying to maintain some form of consistency by only including one article on early term and late term abortion.229

Burchard’s *Decretum* contains many innovations, such as a new article on ‘aiding and abetting’ (19.5.161) and a long list of sins that ‘women usually commit’ under the heading: *Fecisti, quod quaedam mulieres facere solent?*230 We also saw that Burchard expanded and revised texts he took from canon law collections and penitential sources. Like Hrabanus Maurus and Regino of Prüm he adds more conciliar legislation than the older tripartite penitentials. Two of Burchard’s articles on abortion explicitly condemn intentional abortion by the mother using the words *voluntarie* or *propria voluntate* (17.60; 1.94.5). New is the fact that Burchard’s penitential canons are embedded in a larger work on canonical legislation that also contains a great deal of material that was taken from other sources. One of these texts indirectly has to do with abortion. Article 20.1 was taken from

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225 PL 140: 0972D; Wasserschleben 1851 [1958], p. 659. ‘Did you give [something] or show someone, how to expel or kill their fetus? If you did this, you must do penance for seven years on the appointed fast days’.

226 Burchard says that he got the Frankish article on abortion (17.60) from a Roman penitential (*Ex poenitentiali Romano*), that is, the *P. Ps. Romanum*. However, Burchard’s version corresponds to the version in the older Frankish penitentials rather than to the version in the *P. Ps. Romanum* (cf. table 3.2b). The subject in Burchard’s article is *mulier* as in the Frankish penitentials, and not *quis* as in the *P. Ps. Romanum* (6.46). The difference can, of course, also be due to manuscript variants. Burchard attributes the Irish article on maleficia (19.104 in table 3.3c) to Theodore of Canterbury; see, however, *Excarpus Cummeani* 7.2 (table 3.1a).

227 PL 140: 0972D; Wasserschleben 1851 [1958], p. 659. This article on abortion (19.5.162) is followed by articles on infanticide (19.5.163), negligence concerning the death of an unbaptized child (19.5.164), and preparing deadly potions with the intent to kill someone (19.5.165).

228 Burchard equates ‘aliveness’ and ‘ensoulment’. For a discussion of early medieval terms for the various stages of fetal development, cf. Elsakkers 2008. [article IX]

229 Austin 2009 notes that Regino and Burchard “take different approaches to the question of conflicting canons and of the user’s expertise. Because Regino expected his reader to be learned and because Burchard assumed at least some of his readers to be in need of training. (…) Thus, Regino included a wide variety of canons and included discordant texts, so that the reader could select among them” (Austin 2009, p. 40).

230 In book 19.5 there are at least twenty-two articles with *fecisti, quod quaedam mulieres facere solent?*
**De Ecclesiasticis Dogmatibus**, a work that was long attributed to Augustine, but is now generally ascribed to Gennadius Massiliensis or Gennadius of Marseille (fl. c. 470).\(^{231}\)

**Burchard of Worms**

20.1. Quod animae humanae inter caeteras creaturar ab initio non sint creatae.

(August. dicit.) Animas hominum non esse dicimus ad [ab] initio inter caetera intellectuales naturas, nec semel creatas, ut Origenes fingit: neque cum corporibus per coitum seminari, sicut Luciferiani et Cyrilus, et aliqui Latinorum praescientes affirmant, quasi naturae consequentia serviente: sed dicimus corpus tantum per conjugi copulam seminari, Dei vero judicio coagulari in vulva, et fingi, atque formari. Formato jam corpore, animam creari, et infundi, ut vivat in utero homo ex anima constans, et corpore, egrediaturque vivus ex utero, plenus substantia. Creationem vero animae, solum creatorem omnium nosse.\(^{232}\)

This pseudo-Augustinus text discusses the time of ensoulment of the fetus and is quoted by many younger theological and philosophical authors.\(^{233}\)

It is clear that Burchard’s *Decretum* was intended as a reference work for bishops, priests working in his diocese and other ecclesiastics. They could use it to brush up on their theoretical knowledge, but it could also be used for practical purposes, such as hearing confessions. Burchard’s *Decretum* is more than a penitential, it seems to herald change in penitential theory, because, although we find many penitential canons in his work, Burchard also devotes space to important theoretical topics of discussion.\(^{234}\)

**PAENITENTIALE FULBERTI and P. PARISIENSE COMPOSITUM**

Burchard’s contemporary Fulbert (c. 960-1028), bishop of Chartres, wrote a very short penitential that is older than Burchard’s *Decretum*. Kerff dated it to circa 1000.\(^{235}\) It has only one article on abortion. This article differentiates between early term and late term abortion, and explicitly punishes voluntary abortion, using the word *sponte*. Fulbert employs the innovative and pragmatic abortion criteria *vivus* - *non vivus*, ‘alive’ - ‘not yet alive’.

Both Fulbert and Burchard (19.5.162) use abortion criteria that have to do with ‘vivification’ or ‘aliveness’ instead of the older criteria that refer to *XL dies* or ensoulment (*antequam* - *postquam animam habeat*). Perhaps they were influenced by patristic texts that discuss ‘aliveness’ like the pseudo-Augustinus text quoted above (Burchard of Worms 20.1), or maybe they thought that their parishioners would more easily understand these more pragmatic criteria.

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\(^{231}\) Cf. Gennadius Massiliensis, *De Ecclesiasticis Dogmatibus*, book 14, PL 42: 1215-1216. This passage is also quoted in Hrabanus Maurus’s *De Universo or De Rerum Naturis* (Liber 4.10; PL 111: 98D-99A), and in Ivo’s *Decretum* (17.12). The subject - in much the same words - is also discussed by the first-century Roman poet Statius (email correspondence with Rob Brouwer, January 2010).

\(^{232}\) PL 140: 1017B - 1017C; ‘Burchard of Worms 20.1. That the souls of men [alone] among other creatures are not created from the beginning. Augustine says: We say that the souls of men [alone] among the other rational natures do not exist from the beginning, nor were they created previously, as Origen imagines, nor are they sown together with the bodies through intercourse, as the adherents of Lucifer and Cyril and other Romans dare to state - as if such a consequence should follow [directly] from nature; but we say that only the body is sown through conjugal intercourse, [and] coagulated, molded and formed by God’s decision, only after the body is formed is the soul created and infused, so that the human being in the uterus is alive, consisting of a soul and a body and it comes forth from the uterus alive, a complete human being (substance). Indeed the creation of the soul is something only known to the creator of everything.’ This translation was made with the help of Wilken Engelbrecht and Rob Brouwer. We find the same text in Ivo of Chartres’s *Decretum* 17.12, cf. below.

\(^{233}\) Younger authors who quote the same text include Iohannes Pecham, Iohannes Maxentius, Petrus Abaelardus, and Petrus Lombardus.

\(^{234}\) Greta Austin distinguishes four different subject areas in Burchard’s *Decretum*: “the Church’s structure and organization; the nature and administration of sacraments (such as the Eucharist); the nature of morality as applied to lay behavior; and the Church’s rights in regard to secular rulers” (Austin 2007, p. 15).

\(^{235}\) The *P. Fulberti* was edited by Wasserschleben 1851 [1958], pp. 623-624, Schmitz 1883 [1958], vol. 1, pp. 773-774, and Kerff 1987, pp. 30-33. The *P. Fulberti* has articles on superstitions, but not on *maleficia*. 
Fulbert demands much harsher penances than Burchard: six years for early term abortion and twelve years for late term abortion, whereas Burchard retains the original penances of one to three years.

The relatively young *P. Parisiense Compositum* (c. 1025-1075; northern France) contains two two-tier articles on abortion (articles 57-58). Both are related to the *Iudicia Theodori*. Article 57 is nearly identical to article nine in Fulbert’s penitential. However, it increases the penance for early term abortion from six to seven years, and requires a twelve year’s penance, if the fetus is alive. It also introduces a more humane (humanius) or lenient punishment for late term abortion (seven or three years).

Both the *P. Fulberti* and the *P. Parisiense Compositum* use the verbs *necare* and *excutere*, verbs that are reminiscent of the verbal phrases partus necare, ‘kill a neo-nate’, and conceptus excutere, ‘expel a fetus’ in the Ancyrian council canon on infanticide and abortion. The short humanius clause in the *P. Parisiense Compositum* (humanius VII uel III) is also a reference to the Ancyrian council canon. The articles in the *P. Fulberti* and the *P. Parisiense Compositum* are interesting, because, besides referring to the Ancyrian canon, they include a two-tier article on abortion with the word partus, ‘fetus’, plus a new abortion criterion (vivus - non vivus). Perhaps the author of the original article decided to combine the Ancyrian canon on infanticide and abortion with a ‘modernized’ version of the Theodorian article on abortion, and perhaps he intended for this penitential article to be a prohibition of both infanticide and abortion. If this is true, we must interpret *partus* as ‘neo-nate’ and ‘fetus’ (partus necare aut [partus] excutere). In other words, it is possible that usage of the verbs necare and excutere indicates that partus has the broader meaning ‘offspring’ in *P. Fulberti* 9 and the *P. Parisiense Compositum* 57.

Article 58 in the *P. Parisiense Compositum* is a copy of the Theodorian article with the abortion criterion XL dies.

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236 Wasserschleben 1851 [1958], p. 624 (article 4), Schmitz 1883 [1958], vol. 1, p. 773 (article 4), and Kerff 1987, pp. 30-31 (article 9). We also find Fulbert’s article on abortion in the *P. Parisiense Compositum* (article 57) and Ivo of Chartres’s *Decretum* (article 15.188); see also: Kerff 1987, pp. 20-21.


238 The clause humanius VII uel III does not seem to make sense, and perhaps it was inserted in the wrong place. It we insert it at the end of article 57, it can be interpreted it as referring to both late term (seven years’ penance) and early term (three years’ penance) abortion.

239 Meens 1994, p. 494; *P. Parisiense Compositum* 57. Als zij [een vrouw] haar vrucht doodt of moedwillig uitdrijft, moet zij als de vrucht leeft twaalf jaar boete doen; milder is een boete van zeven of drie jaar, als de vrucht niet leeft zeven jaar en altijd op vrijdag’ (Meens 1994, p. 495). Meens translates partus as ‘fetus’ on p. 494, but as ‘neo-nate’ on p. 202, thus illustrating the difficulty we have in translating the word partus in the *P. Fulberti* and the *P. Parisiense Compositum*.

240 Meens argues that the *P. Fulberti* and the *P. Parisiense Compositum* have a common ancestor (Meens 1994, p. 202).

241 Cf. the G and Co redactions of the *Iudicia Theodori* (G105; Co 143) discussed above.

242 Meens 1994, p. 494; *P. Parisiense compositum* 58. Als een vrouw haar kind in de moederschoot doodt vóór de veertigste dag, moet zij een jaar boete doen; na de veertigste dag drie jaar als een moordenaar’ (Meens 1994, p. 495 and p. 185).
to explain. The *P. Parisiense Compositum* also contains a version of the Frankish article on abortion with *sponte* instead of *voluntarie*. It demands the traditional three years’ punishment for abortion, as in article 58.

**P. Parisiense Compositum**

63. *Si mulier sponte abortu fecerit III annis.*

The articles on abortion in the eleventh-century *P. Parisiense Compositum* show us that the old-fashioned articles on abortion were still being copied, and that the post-reform penitentials still contain contradictory penitential articles.

**SPANISH PENITENTIALS**

Three Spanish penitentials were edited by Körntgen and Bezler in 1998; they are all post Carolingian reform penitentials. They contain more Church council canons than the older tripartites, and they were all influenced by the *Bedae-Egberti* penitentials. The authors often simplify the text, but otherwise they are not substantially different from the older penitentials, including penances that seem erratic at times. The oldest Spanish penitential, the *P. Vigilanum sive Albeldense*, dates from the second half of the ninth century. It has five articles on abortion in the section: *De interfectricibvs mvlieribvs*, ‘On murderous women’ (section 10).

**P. Vigilanum**

55. *Si quis aborsum fecerit uoluntarie, III annos peniteat.*
57. *Si mulier occiderit filium in utero antequam animam habeat, III annos peniteat.*
58. *Si post, ut homicida iudicetur.*
50. *Si mulier per poculum aut per quamlibet artem occiderit filium in utero, XV annos peniteat. Similiter et <pro filiis> qui denati sunt hoc serbandum est.*
51. *Mulier autem pauperina si in hoc inruerit, VII annos peniteat.*

Article 55 is a version of the Frankish article. It has the subject *quis*, ‘anyone’, instead of *mulier*, as in the *P. Mixtum*, thus also implicitly punishing accomplices of both genders. The *P. Vigilanum* also has a version of the *Theodorian* article with the abortion criteria *antequam animam habeat - post quam animam habeat* (articles 57-58), and a version of the *Bedae-Egberti* article on ‘women, maleficia and murder’ (articles 50-51) without the reference to *arte maleficia sua*. The latter now explicitly states that the article is concerned with abortion: *occiderit filium in utero*, ‘killed a child in utero’, whereas the versions in the *Bedae-Egberti* penitentials only

243 A possible explanation for the excessive, and seemingly inconsistent penances in the *P. Fulberti* and the *P. Parisiense Compositum* may be due to the association of both *P. Fulberti* 9 and *P. Parisiense Compositum* 57 with the Ancyrian Council canons which punishes fornication, infanticide and abortion. Perhaps these articles implicitly also punish fornication.


251 Körntgen & Bezler add references to the articles on ‘maleficia and murder’ and infanticide in the *Excursus Cummeani* (6.8 - 6.9) in their notes to all three Spanish versions of this article (*P. Vigilanum* 50-51, *P. Cordubense* 147 and *P. Silense* 83-84). See also: chapter 3, note 112 and table 3.1a. It is more likely that these three articles were borrowed from the *Bedae-Egberti* articles on ‘women, maleficia, and murder’ (*P. Additivum* 9.7, *P. Mixtum* 15.3 or *P. Ps. Theodori* 6.6), rather than the *Excursus Cummeani*. The subject in *Excursus Cummeani* 6.8 is indefinite, whereas both the *Bedae-Egberti* and the Spanish articles have *mulier* as the sentence subject. Moreover, the article text is different, and two of the three articles on ‘women, maleficia, and murder’ have a companion article on *pauperaulae* as in the *Bedae-Egberti* articles. In the *Excursus* the companion article on ‘poor women’ belongs to the article on infanticide (6.10).
suggest as much. Article 50 adds an extra clause that probably refers to infanticide: *similiter et pro filiis qui denati sunt hoc serbandum est*, ‘likewise this is also applicable for children who are deceased’. Note that the word *filius* probably means ‘fetus’ in the first part of article 50, and ‘neo-nate’ or ‘child’ in the second part. Again, we have a Latin word for ‘fetus’ that means ‘offspring’ rather than ‘fetus’ or ‘neo-nate’. The fifteen years’ penance for abortion is excessive, but not an unusual penance for infanticide. Article 51 reduces the punishment to seven years, if the woman involved (*si in hoc inruerit*) is a *pauperina* or ‘poor woman’.

The early eleventh-century *P. Cordubense* has only two articles on abortion. Article 135 is in the section entitled *De observatione baptismi*, ‘On the observation of baptism’ (section 8), and article 147 is in the section *De ebrietate*, ‘On drunkenness’ (section 9). The traditional Frankish, Theodorian and Irish articles on abortion were not included in the *P. Cordubense*.

*P. Cordubense*

135. *Si qua mulier per adulterium conceperit et occiderit filium in utero aut iam natum, <nec> in finem accipiat communionem, quia geminabit scelus.*

147. *Si mulier concepta fuerit et per poculum occiderit filium, aut per qua<m>liuet art<m>, XXI annos peniteat.*

Article 135 is an abridged and at the same time expanded rendering of canon 63 of the early fourth-century Spanish council held in Elvira - the strictest council canon on abortion and infanticide. This article punishes abortion (*occiderit filium in utero*) and infanticide (*filium iam natum*), and it forbids the woman involved to receive communion until she is at death’s door. Again, as in *P. Vigilanum* 50, we see that the word *filius* is used in the double meaning ‘fetus’ - ‘neo-nate’ (‘offspring’) in one and the same article.

Article 147 is a simplified version of the *Bedae-Egberti* article on ‘women, maleficia and murder’ that explicitly condemns abortion, just as the *P. Vigilanum* does. It punishes a pregnant woman (*mulier concepта fuerит*) who commits abortion (*occidere filium [in utero]*) and infanticide (*filium [iam natum]*) by means of a potion or any other method (*per poculum aut per quamliuet artem*), and it demands the extremely harsh penance of twenty-one years.

The youngest Spanish penitential in Körntgen and Bezler’s edition, the *P. Silense* (1060-1065), contains a great deal of articles on abortion. They are all in the section on murder: *De diversis homicidiis* (section 6).

*P. Silense*

92. *Quecumque mulieres que fornicantur et partus suos necant, XV annos peniteant.*

Article 92 seems to be a condensed version of half of the Ancyrian canon - the half that condemns infanticide. It is possible to interpret the ambiguous word *partus* (‘fetus’, ‘neo-nate’) in a broader sense, so that it means ‘offspring’ or ‘progeny’, as in *P. Parisiense Compositum* 57, and refers to both abortion and infanticide - the origi-
nal subject matter of the Ancyrian canon. We can, however, not be certain because the verb *excutere*, that is, the reference to abortion, is missing in *P. Silense* 92.  

**P. Silense**  
93. Si qua mulier per adulterium, absente marito suo, conceperit, idque post facinus occiderit, nec in finem dandum esse communionem, eo quod geminauerit scelus, et XVII annos peniteat.  
94. Hi qui aborsum faciunt ul natos suos extinguerunt, post septem annorum curricula communio tribuatur. Ita tamen ut omni tempore uite sue flEtibus <et> humili<ti>ati insistant.

Article 92 is followed by two versions of ancient Spanish council canons on abortion. Article 93 was based on the Elvirian council canon, and demands a penance of seventeen years for adultery and abortion (and/or infanticide), plus exclusion from communion until death. Article 94 seems to be a concise and almost completely rewritten version of the Leridian council canon on abortion and infanticide. Instead of the wordy and not always easily intelligible text of the Leridian canon, the *P. Silense* is direct and to the point: "hi qui aborsum faciunt ul natos suos extinguerunt, ‘those who commit abortion or kill their new-born babies’ must be punished."

The *P. Silense* also contains versions of most of the traditional articles on abortion except the Irish article on abortifacient *maleficia*. We find the Frankish article in article 65, and the *P. Silense* is one of the few penitentials, besides the *P. Sangallense* and the *P. Capitula Iudiciorum*, that adds an extra clause on involuntary abortion (article 66) to the Frankish article.

**P. Silense**  
65. Qui aborsum fecerit voluntarie, III annos peniteat.  
66. sine voluntate, II annos peniteat.

*Sine voluntate II annos peniteat*, ‘against her will, she must do penance for two years’, in article 66 indicates that the woman is punished even if the abortion was involuntary. This extra clause at the same time implies that the woman could also have been forced or coerced into having an abortion. By a strange coincidence - or perhaps it was deliberate - the subject of the Frankish article in the *P. Silense* is *qui* (*quis*), and not *mulier*, the usual subject of the Frankish article (cf. also *P. Vigilanum* 55 above). This means that anyone involved in the abortion, whether male or female, including accomplices, can be punished.

**P. Silense**  
83. Si mulier per poculum aut per quaerarit arm occiderit filium uel qui denati sunt, XV annos peniteat.  
84. Si mulier autem pauperrima, X annos peniteat.

Articles 83-84 are similar to the expanded versions of the *Bedae-Egberti* article on ‘women, *maleficia* and murder’ in *P. Vigilanum* 50-51 and *P. Cordubense* 147 - again without the reference to *maleficia*. *P. Silense* does not include the words *in utero* (*P. Vigilanum* 50) or *mulier concepta fuerit* (*P. Cordubense* 147), but it does

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261 Two of the Italian penitentials (*P. Vaticanum* and *P. Vallicellianum E.62*) have a similar, shortened version of the Ancyrian canon. See below.
264 At first sight this article does not seem to have anything to do with canon 2 of the Council of Lerida (cf. tables 3.3b and 3.4a). However, it contains a few elements that were clearly taken from this council canon: the (wording of the) seven years’ punishment and the phrase *ita tamen ut omni tempore uite sue flEtibus et humili<ti>ati insistant.*
265 For a more complete version of the Leridian canon, cf. table 3.3b.
266 The *P. Sangallense* and the *P. Capitula Iudiciorum* have *si nolens*, cf. table 3.1b.
include a shortened version of the extra clause on infanticide we also found in the *P. Vigilanum: uel qui denati sunt*, ’or those who are deceased’. It seems logical to interpret *filium* in the first part of article 83 as *filium [in utero]*, ‘fetus in utero’ and *qui as filii*, ‘neo-nates’.271 If we do this *filius* again means ‘offspring’, and, as in *P. Vigilanum* 50 and *P. Cordubense* 135, it has the double meaning ‘fetus’ - ‘neo-nate’. *P. Silense* 83 then also punishes abortion and infanticide. The ten years’ penance for the *pauperrima* in article 84 is harsh compared to the penance of seven years demanded by *P. Vigilanum* 51.272

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**P. Silense**

85. *Si antequam animam habeat, III annos peniteat.* 273  
86. *Si post, ut homicida iudicetur.* 274

Articles 85 and 86 should be read together as an ultra-short version of the Theodorian article on abortion with the abortion criteria *antequam animam habeat* and *post [quam animam] habeat*. The missing, but implied, object is probably *filium* (cf. *P. Silense* 83 and *P. Vigilanum* 57-58).

If we look at the nine articles on abortion in the *P. Silense* we see that its author was apparently well acquainted with the various penitential traditions, including the *Bedae-Egberti* penitentials, and that he abridged and rephrased the texts, and sometimes even added small explanatory notes.

All three Spanish penitentials omit the Irish article on abortifacient *maleficia*, and leave out the word *maleficia* in their versions of the *Bedae-Egberti* article on ‘women, *maleficia* and murder’.275 Both versions of the Frankish article on abortion (*P. Vigilanum* 55 and *P. Silense* 65-66) replace the sentence subject *mulier* with the gender neutral subject *qui(s)*. The Theodorian articles in the *P. Vigilanum* and the *P. Silense* both have the abortion criteria *antequam - postquam animam habeat*, as in the *Iudicia Theodori* (B 62, Co 147 and U.1.14.24). However, the B, Co and U redactions of the *Iudicia Theodori* do not use the word *filius* for ‘fetus’, as in the *P. Vigilanum* and the *P. Silense*. *Filius* seems to have been the Spanish choice for ‘fetus’, because all three Spanish penitentials consistently use the word *filius* for ‘fetus’. In a number of the Spanish articles *filius* has the double meaning ‘fetus’ - ‘neo-nate’, that is, ‘offspring’ (cf. *P. Vigilanum* 50, *P. Silense* 83 and *P. Cordubense* 135). The words *partus* and *natus* are used in the meaning ‘neo-nate’ (*P. Silense* 92, 94), and in the Ancyrian article in the *P. Silense* (article 92) it is possible to read *partus* as ‘fetus’, ‘neo-nate’ or both (‘offspring’).

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**ITALIAN PENITENTIALS**

The Italian post-reform penitentials, too, are not very different from the traditional tripartites. Five eleventh-century penitentials written in mid- and southern Italy were recently edited by Gaastra.276 Two of them were probably devised after the mid-eleventh-century Gregorian reform movement.277 Four of these Italian penitentials contain versions of the familiar articles on abortion.

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271 A fifteen years’ penance is usually associated with infanticide.  
272 The *P. Cordubense* does not add a provision for ‘poor women’. (Cf. *P. Vigilanum* 50-51 and *P. Silense* 83-84).  
275 The *P. Silense* does include an article that forbids murdering a person by means of *maleficia*. It resembles the general Irish article on *maleficia*, but the punishment - exclusion from communion - is canonical: *P. Silense* 96. *Si quis maleficio interficit alterum, nec in finem accipiat communionem* (Körntgen & Bezler 1998, p. 26).  
276 Gaastra 2007 contains editions of the *P. Casinense* (pp. 236-249), the *P. Vaticanum* (pp. 250-258), the *P. Vallicellianum* *E.62* (pp. 259-273), the *P. Vallicellianum* *C.6* (pp. 274-281) and the *P. Lucense* (pp. 282-289). The *P. Lucense* is extremely short and it does not contain any articles on abortion.  
277 The *P. Vallicellianum* *C.6* (late eleventh century) and the *P. Lucense* (probably late eleventh or early twelfth century), cf. Gaastra 2007, pp. 119-120.
The late tenth or early eleventh-century *P. Casinense* contains versions of the Theodorian (7.5) and Ancyrian (7.7) articles on abortion in a section called *inquisitio de mulieribus*, ‘questionnaire for women’. The Theodorian article uses the abortion criterion *XL dies*.278

**P. Casinense**

7.5. Si qua mulier postquam concipiet occidit filium suum in utero ante XL dies, annum I peniteat. Si post quadraginta, ut homicida iudicetur.

7.7. Mulieres qui partu suo necant, et ille quae agunt ut utero conceptos discutiant, antiqui patres constituerunt usque ad exitum uite; nunc uero humanius definitum est, X annos peniteat, III ex his in pane et aqua.279

Article 7.7 contains the standard version of the Ancyrian canon on infanticide (*partu suo necant*) and abortion (*utero conceptos discutiant*). The Frankish article on abortion was omitted, and there are two versions of the Irish articles on *maleficia* (8.4, 12.23). However, the article on abortifacient *maleficia* was not included.280 The article on rape and abortion (12.21) was discussed above.281

The *P. Vaticanum* is also from the late tenth or early eleventh century, and it has three articles on abortion. The Frankish article is in the section on homicide (1.12), the condensed version of the Ancyrian article is in the section *De fornicatione mulierum* (4.8), and the Theodorian article (5.6) is in a section on female homicide (*De homicidio mulierum*). Again the Irish article on abortifacient *maleficia* is missing.

**P. Vaticanum**

1.12. si qua mulier voluntarie patet aborsum fecerit, vi annos peniteat.282

4.8. mulier qui fornicat et partu suo negat, iungentes homicidium et adulterium, x annos peniteat.283

5.6. si qua mulier hocciderit filium suum sponte in utero ante xl, i annum peniteat, si uero postquam animatum fuerit, quasi homicida; si uero post quadraginta dies, iii annos peniteat in pane et aqua.284

The Ancyrian article (4.8) contains a reference to the double crime mentioned by the council of Elvira (*quod geminaverit scelus*, ‘because she doubled the crime’), albeit that different words are used: *iungentes homicidium et adulterium*, ‘together [for] murder and adultery’.285 Like article 92 in the Spanish *P. Silense*, *P. Vaticanum* 4.8 seems to contain only half of the Ancyrian canon on abortion and infanticide. As in some of the other articles discussed above, it seems possible to interpret the ambiguous word *partus* as ‘offspring’ or ‘progeny’ here, so that *partu suo negat* refers to both infanticide and abortion (cf. also *P. Vallicellianum E.* 62 38 below). However, we cannot be sure of this interpretation.

The Theodorian article 5.6 is a three-tier article on abortion. Although the stages were changed around, the text was probably taken from stage four of the *Bedae-Egberti* penitentials, that is, *P. Additivum* 2.11.286 The *P. Vaticanum* is to my knowledge the only ‘southern’ penitential with the three-tier article on abortion.

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278 The G and Co redactions of the *Iudicia Theodori* have both *filius* and *XL dies* (G105; Co 143).

279 Gastra 2007, p. 241. Gastra has demonstrated that the *P. Capitula Iudiciorum* and the *P. Vallicellianum I (MS E.15)* were the main sources of the *P. Casinense*, cf. Gastra 2007, pp. 19-47, at pp. 36-37.

280 Section 8 (*Item capitula quae dicendae sunt ad uirorum seu ad mulieres*) contains a version of the general article on *maleficia*: *P. Casinense* 8.4. *Si quis per maleficio suo aliquem perdiderit, VII annos peniteat, III in pane et aqua* (Gastra 2007, p. 242). Section 12 (*De hereticis et ordinibus malis*) contains a second version of the general article on *maleficia* plus the article on aphrodisiacs: *P. Casinense* 12.23. *Si quis maleficio aliquem perdiderit, annos VII peniteat in pane et aqua; et si neminem perdiderit et pro anorem fuerit beneficis: Si quis presbiter est, VII annos peniteat in pane et aqua. Si diaconus VI. Subdiaconus V. Si clericus est I. Si laicus est III* (Gastra 2007, p. 244).

281 Cf. above.


283 Gastra 2007, p. 255.

284 Gastra 2007, p. 256.

285 Cf. chapter 2.

286 Gastra notes that a number of Italian manuscripts with copies of the *P. Additivum* were available (Gastra 2007, p. 61 plus notes 3 and 4). See: the discussion of the three-tier articles on abortion above.
The eleventh-century *P. Vallicellianum E.62* was based on the *P. Vaticanum*, but not copied uncritically. It contains versions of the Theodorian (15) and Ancyrian (38) articles on abortion; both are in the section *De muliere quae infantem suum necat*, ‘about a woman who kills her child’.

**P. Vallicellianum E.62**

15. Si quis occiderit paruulum in utero post XL dies, ut homicida peniteat III anni aut octo XLgesime in penitentia.  
38. Mulier qua fomicatur et partu suo necat iungentes omicidium cum adulterium, X anni peniteat.

The Frankish article in the *P. Vaticanum* was omitted, and the *P. Vallicellianum E.62* did not incorporate the three-tier article on abortion in the *P. Vaticanum* either. Moreover, article 15 in the *P. Vallicellianum E.62* has only half of the two-tier Theodorian article. The abortion criterion is *XL dies*, the same criterion as in the *P. Vaticanum*, but the *P. Vallicellianum E.62* omitted the word *sponte*, substituted *paruulum in utero*, ‘little one in utero’, for *filium suum in utero*, and changed the subject from *mulier* to *si quis*, so that now anyone can be punished for (causing a) late term abortion. It is the only version of the Theodorian article that I know of that leaves out the clause on early term abortion.

The Ancyrian article 38 was copied from the *P. Vaticanum*, and here, too, *partu suo necat* can probably be interpreted as a reference to both abortion and infanticide.

The late eleventh-century *P. Vallicellianum C.6* has a Theodorian and a Frankish article on abortion, that is, a two-tier and a one-tier article on abortion.

**P. Vallicellianum C.6**

34. Mulier quae conceptum filium suum in utero ante XL dies occiderit, annum I peniteat. Si uero post XL dies, ut homicida peniteat.  
37. Si qua mulier abortiuum fecerit voluntari, III annos peniteat in pane et aqua. Si autem inuit, tres quadragesimas peniteat.

The Theodorian article 34 again uses the abortion criterion *XL dies*. Article 37 contains the original version of the Frankish article and adds a new clause: *si autem inuit, tres quadragesimas peniteat*, ‘if in fact she was asked (forced?) [to do this], she must do penance for three forty day fasting periods’. The penance is reduced considerably, if the abortion was not completely voluntary. The *P. Vallicellianum C.6* does not contain a version of the Irish article on abortifacient *maleficia*, but it does have a version of the general Irish article on *maleficia*. It is possible that this article implicitly includes a prohibition of abortifacient *maleficia*, because it is followed by an article that prohibits the use of herbs for contraceptive purposes.

Like the Spanish penitentials discussed above, none of the eleventh-century Italian tripartites includes a version of the Irish article on abortifacient *maleficia*. All the younger ‘southern European’ penitentials seem to ignore this Irish article on abortion. The Spanish and Italian abortion criteria are different. Whereas the two-tier Spanish articles use the abortion criteria *antequam animam* - *postquam animam*, the Italian articles - including the article in the *P. Merseburgense A* discussed above - all use the criterion *XL dies*. The Italian *P. Vaticanum* is the

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288 Gaastra 2007, p. 269.  
289 See: *P. Silense* 92 and *P. Vaticanum* 4.8.  
290 Both articles are in a section with a heading that is apparently illegible; Gaastra has *De* (...) (cf. Gaastra 2007, p. 276). The heading should probably read *De mulieribus*.  
294 *P. Vallicellianum C.6*. 68. *Si qua mulier herbas ne concipiat biberit, quantoscumque concipere vel parere debuerat, tantorum homicidiorum rea erit et ita iudicetur* (Gaastra 2007, p. 279). Articles 67 and 68 are both in the section *De Maleficis*. Article 68 contains a version of Caesarius of Arles’s famous *quantoscumque* formula (cf. chapter 2).
only ‘southern’ penitential with a version of the three-tier article on abortion. Most of the Spanish and Italian penitentials include (abridged) versions of the Ancyrian canon on abortion and infanticide, but only the Spanish penitentials also include versions of Spanish council canons on abortion. In three versions of the Ancyrian canon the prohibition of infanticide and abortion was shortened to partus suas necant (partu suo negat, partu suo necat), leaving us in dubio whether the provision on abortion was simply scratched, or if the word partus has the much broader meaning ‘offspring’ here - thus punishing both abortion and infanticide. As we saw above, the word filius can be interpreted as ‘offspring’, thus denoting ‘fetus’ and ‘neo-nate’, in some of the Spanish articles. In the Italian articles the word filius only occurs in the unambiguous phrase filius in utero. An important difference between the Italian and Spanish penitentials on the one hand and the traditional tripartite penitentials on the other is the fact that the authors of the former regularly condensed and creatively edited and expanded their sources.

IVO OF CHARTRES

With Ivo of Chartres or Ivo Carnotensis (1040-1116) the early medieval penitential tradition comes to a close (cf. tables 3.4a - 3.4b). However, the end was already in sight even before the mid-eleventh-century Gregorian reform. Hrabanus Maurus, Regino of Prüm and Burchard of Worms already focus on more authoritative sources such as Church council canons, demonstrating this by adding canons from the councils of Elvira, Lerida and Braga II that we do not find in the older penitentials. Moreover, Burchard’s Decretum also contains texts on moral issues that were based on patristic sources. Despite the reform councils and their criticism of the penitentials, Regino and Burchard’s penitentials still contain many of the traditional penitential canons, and their articles are still often contradictory and confusing. Ivo of Chartres marks a break with the past. For him Church Fathers, papal decrees and conciliar councils are the most important authorities. Ivo’s Decretum and Panormia are learned, theological handbooks that were intended as reference books for priests, bishops and other ecclesiastics, whereas Regino and Burchard’s penitentials were also meant for their parish priests. The latter were written in relatively simple language, and the penitential canons in the form of ‘questions for penitents’ indicate that they were part of practical Christianity. Ivo, on the other hand, obviously had a completely different audience in mind. Besides repeatedly quoting familiar Church councils canons on abortion (cf. table 3.4a), Ivo also includes quotations from the Church Fathers that would hardly have been intelligible to a man or woman who simply wanted to confess his or her sins (cf. table 3.4b).

Neither Ivo’s Decretum nor his Panormia qualifies as a penitential, but Ivo did not completely reject or ignore the traditional penitentials (cf. table 3.4a). We find remnants of the Irish and Theodorian penitential articles on abortion in book 15 of his Decretum. Ivo quotes the Irish article on maleficia that punishes using a maleficium

295 However, it must be admitted that two of the Italian penitentials contain references to the Council of Elvira (P. Vaticanum and P. Vallcellianum E. 62).
296 Cf. P. Silense 92, P. Vaticanum 4.8 and P. Vallcellianum E.63 38.
297 Ivo’s works are in volume 161 of Migne’s Patrologia Latina. The internet site for Ivo of Chartres, is maintained by Martin Brett, Christof Roller, Bruce Brasington, Przemyslaw Nowak and others (http://project.knowledgeforge.net/ivo/index.html). The texts from the Decretum are at http://project.knowledgeforge.net/ivo/decretum.html; the Decretum text on the internet is based on PL 161: 0047B-1036C. The Panormia is at http://project.knowledgeforge.net/ivo/panormia.html. Some of the articles in tables 3.4a - 3.4b are also in Ivo’s Collectio Tripartita, cf. http://project.knowledgeforge.net/ivo/tribartita.html. The sites were last accessed on January 22, 2010. See also: Kery 1999, pp. 244-250.
as an aphrodisiac or an abortifacient from Burchard’s penitential (19.104), including the latter’s mistaken attribution of this canon to Theodore of Canterbury.298

Ivo of Chartres, Decretum 15.116

De illis qui per amorem venefici fiunt. Ex penitentiali Theodori. Si quis per amorem veneficus fit (…) maxime si per hoc mulleris partum deceperit quisque, tres annos unusquisque superaugeat in pane et aqua, ne homicidii reus sit.

Theodore’s two-stage article on abortion survives - albeit transformed - in Decretum 15.188. It is an almost word for word copy of the article written by Fulbert of Chartres, one of Ivo’s predecessors in Chartres.299

Ivo of Chartres, Decretum 15.188

Penitentia mulierum. (…) Si qua partum necat, aut excutit sponte, si iam vivit 12 annos peniteat, si non vivit, sex annos peniteat, et semper sexta feria ieiunet. (…).

Burchard (19.5.162), Fulbert (article 9) and Ivo (15.188) chose to include a two-stage article with abortion criteria that have to do with ‘aliveness’ (non vivus, antequam vivificaretur and vivus, post conceptum spiritum). Although article 15.188 indicates that Ivo was lenient to a certain extent, his penances show us that he was much stricter and more uncompromising than Burchard. Like Fulbert, Ivo demands an extremely harsh punishment for abortion, whether it is done at an early stage (a six years’ penance) or at a late stage (a twelve years’ penance). Ivo underscores his choice for a two-tier article on abortion by quoting from Augustine’s commentary on Exodus 21: 22-23 in book 10 of his Decretum (10.56) and in book 8 of the Panormia (8.12). Ivo’s omission of the one-tier Frankish article on abortion that does not distinguish stages of fetal development, and only demands a three years’ penance shows us that he opted for consistency.

The patristic texts on abortion Ivo quotes are in book 10 of the Decretum and book 8 of the Panormia. They are all well-known texts on abortion that later became part of official canonical legislation on abortion (cf. table 3.4b).300 Ivo includes the Aliquando text on abortion from Augustine’s De Nuptiis et Concupiscencia (Decretum 10.55), Quod vero from Augustine’s Quaestiones Exodi (Decretum 10.56; Panormia 8.12), a canon from Ambrosiaster’s Questionum de Veteri et Novo Testamento that is also known as Moyses (Decretum 10.57; Panormia 8.13), and the Sicuti semina passage in Jerome’s letter to Alcagia (Decretum 10.58; Panormia 8.14). The Aliquando text forbids abortion and punishes both the man and the woman who engage in ‘lustful’ sex without the intention of conceiving children.301 Quod vero and Moyses explain that the biblical text on violent abortion in Exodus 21: 22-23 only considers killing a formed and ensouled fetus murder, and Jerome’s Sicuti semina discusses the gradual development of the fetus in the uterus. Ivo also includes canons on more philosophical issues such as the time of ensoulment and the resurrection of an aborted or miscarried fetus, for instance:

Ivo of Chartres, Decretum 17.10

Augustinus in Enchiridion. Unde primo occurrunt de abortivis fetibus questio, qui iam quidem nati sunt in uteris matrum, sed nondum ita ut iam posseint renasci. Si enim resurrecturos eos dixerimus, de his qui iam formati sunt tolerari potest utcumque quod dictur. Informes vero abortus quis non proculiuis perire arbitretur, sicut semina que concepta non

298 Burchard’s article (19.104) is in table 3.3c.
299 Cf. above.
300 Connery lists the texts and the names by which the texts are referred to (Si aliquis, Aliquando, Quod vero, Moyses and Sicuti semina), cf. Connery 1977, pp. 53, 55, 57, 58 and 80-81 plus note 46. Ivo includes versions of all these texts except the Si aliquis text, which we find in both Regino and Burchard’s penitentials (cf. above and table 3.3c).
301 Connery comments on this passage: “Augustine complains that lust for pleasure mixed with cruelty drives some people to the point where they use sterilizing drugs, and if these do not work, in one way or another destroy the fetus while still in the womb, willing its destruction before it begins life, or if it is already alive, putting it to death before it is born. If both partners act in this way, they are really not acting like married people. And if they were in this way from the beginning, they did not come together for marital union, but rather for concubinage. If only one or the other acts in this way, either the woman is the mistress of the man, or the man is the adulterer of the woman” (Connery 1997, p. 55).
fuerint? Sed quis negare audeat, etsi affirmare non audeat, id acturam resurrectionem, ut quicquid forme defuit impleatur? Atque ita iam non desit perfectio que accessura erat tempore, quemadmodum non erunt vita que accessorant tempore, ut neque in eo quod [aptum et congruum dies allatur fuerant natura fraudetur, neque in eo quod] adversum atque contrarium dies attulerant, natura turpetur, sed integretur quod nondum erat integrum, sicut instaurabitur quod fuerat vitiatum.302

Ivo of Chartres, Decretum 17.12

Augustinus dicit. Animas hominum non esse dicimus ab initio inter ceteras intellectuales naturas, nec simul creatas, ut Origenes fixit, neque cum corporibus per coitum seminari, sicut Luciferiani, Cirillus et aliqui Latinorum presupentes affirmant, quasi nature consequentia serviente; sed dicimus corpus tantum per coniugii copulam seminari, Dei vero iudicio coagulari in vulva, et compingi atque formari; formato iam corpore, animam creari atque infundi, ut vivat in utero homo ex anima constans et corpore, cgrediatuque vivus ex utero plenus humana substantia; creationem vero anime solum Creatorem omnium nosse.303

Ivo of Chartres marks the end of six centuries of penitentials. His inclusion of patristic texts on important issues shows us that theoretical discussions are becoming more and more important, and in this respect Ivo seems to herald the age of scholasticism.

302 Ivo took this text from Augustine’s Enchiridion 23.85 (CLCLT: Cl. 0295, cap. : 23, linea : 9-14; Cetedoc last accessed January 24, 2010); ‘Augustine, Enchiridion, Handbook on Faith, Hope and Love, 23.85. And first the question arises of the aborted (miscarried) fetuses that already were born in the mother’s womb, but not yet in a way that they could be reborn [resurrect]. If we would indeed say that they shall resurrect, this can be tolerated concerning those who are already formed, at any rate this can be said about them. Regarding the unformed abortions (miscarriages) - indeed who is not inclined to argue that they perish like seeds that were not conceived? But who would dare to deny even though he does not dare to confirm [it] that on resurrection day anything that was missing in the form will be supplied? And thus perfection will now not be lacking - that would have been reached in time, just as the deficiencies that had come with time will not be present, so that nature will not [be cheated of anything suitable and harmonious that time had brought, nor will nature] be defiled by that which is wrong or bad that time had brought, but that will be completed which was not yet complete, just as that will be restored which had become deformed’. The translation was made with the help of Wilken Engelbrecht (for other translations of the same passage, cf. http://www.ecel.org/ccel/augustine/enchiridion.html and http://www.ecel.org/ccel/schaff/npmf-103.iv.ii.lxxxvii.html (both last accessed January 24, 2010). The text between brackets was omitted by Ivo.

303 The text is in De Ecclesiasticis Dogmatibus a work now ascribed to the fifth-century writer Gennadius Massiliensis. This canon is also in Burchard’s Decretum (20.1). For a translation, cf. above (chapter 3), note 232.
Table 3.4a: Ivo of Chartres, late eleventh century

<table>
<thead>
<tr>
<th>Ivo of Chartres, Decretum</th>
<th>source</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Decretum 8.314.</strong> De mulieribus que fornicarte partus suos necant. Cap. 21. De mulieribus que fornicantur, et partus suos necant, sed et de his que agunt secum ut utero conceptos excitiant, antiqua quidem definitio usque ad exitum vite eas ab ecclesia removet. Humanius autem nunc definimus ut eis decem annorum tempus secundum prefixos gradus penitentiae largiatur.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 9.103a.</strong> De eadem re. Ex concilio Warmantiensi cap. 10. De mulieribus que fornicantur et partus suos necant, vel que agunt secum ut utero conceptos excitiant, antiqua quidem definitio usque ad exitum vite eas ab ecclesia removet. Humanius autem nunc definimus ut eis decem annorum tempus secundum prefixos gradus penitentiae largiatur.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 10.181.</strong> Anciranum concilium, cap. 2. De mulieribus que fornicantur et partus suos necant, vel que agunt secum ut utero conceptos excutiant, antiqua quidem definitio usque ad exitum vite eas ab ecclesia removet; humanius autem nunc definimus, ut eis decem annorum tempus secundum prefixos gradus penitentiae largiatur.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 9.102.</strong> De mulieribus que absente marito conceperint. Ex concilio Heliberritano, cap. 3. Si qua mulier per adulterium, absente marito, conceperit, idque post facinus occiderit, placuit vix in fine dandam esse communi-</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td></td>
<td>colonia; et quia malam conceptam et malis antonam fœnum conceperit, nos tamen pro misericordia, eis decem annis agere penitentiam iudicamus.</td>
</tr>
<tr>
<td><strong>Decretum 10.182.</strong> Hilerdense concilium, cap. 2. Qui male conceptos ex adulterio fetus vel editos necare studuerint vel in matrum ventribus potionibus aliquibus colliserint, in utroque sexu adulteris post septem annorum curricula communio tribuatur, ita tamen ut omni tempore vite sue fletibus et humilitati insistant. Si vero clerici fuerint, officium eis ministrandi recuperare non liceat.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 8.331.</strong> De mulieribus fornicariis, et abortum facientibus. De eodem concilio cap. 78. Si qua mulier fornicaverit, et exinde infantem qui fuerit natus occiderit, et que studuerit abortum facere, et quod conceptum est necare, aut certe ne concipiat elaborare, sive ex adulterio sive ex legitimo coniugio, has tales mulieres in morte recipere communionem priores canones decreverunt, nos tamen pro misericordia, sive tales mulieres, sive conscias scelerum ipsorum, decem annis agere penitentiam iudicamus.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 15.188.</strong> Penitentia mulierum. (…) Si qua partum necat aut excutit sponte, si iam vivit 12 annos peniteat, si non vivit, sex annos peniteat, et semper sexta feria ieiunet. (…).</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 15.164.</strong> is similar to the Frankish article on abortion, but concerned with infanticide.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
<tr>
<td><strong>Decretum 15.116.</strong> De illis qui per amorem venefici fiunt. Ex penitentiali Theodori. Si quis per amorem veneficus fit, et neminem perdiderit, si clerici est, unum annum peniteat in pane et aqua; si subdiaconus, duos; si diaconus, tres, unum ex his in pane et aqua. Et laicos dimidium annum peniteat, maxime si per hoc mulieris partum deceperit quisque, tres annos unusquisque superaugeat in pane et aqua, ne homicidii reus sit.</td>
<td>Council of Ancyra (canon 21)</td>
</tr>
<tr>
<td>Council of Ancyra</td>
<td>(canon 21)</td>
</tr>
</tbody>
</table>

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304 Cf. chapter 3, note 297.
305 PL 161: 0652C-D. Cf. also: Collectio Tripartita 2.2.10. Cf. Burchard, Decretum 17.54.
306 PL 161: 0744C-D. Cf. also: Collectio Tripartita 2.2.10, Burchard, Decretum 17.54.
307 PL 161: 0655B. Cf. also: Burchard, Decretum 17.51-17.52.
308 PL 161: 0744D. Cf. also: Collectio Tripartita 2.34a; 3.20.58.
309 PL 161: 0655A-B. Cf. also: Collectio Tripartita 2.47.76.
310 PL 161: 0745A. Cf. also: Collectio Tripartita 2.47.77.
311 PL 161: 0897C-D. Cf. Collectio Tripartita 3.28.15. The text quoted is part of a larger article on women’s sins that was taken from the P. Fulberti (articles 9, 10, 11, 12, 18). The article includes (accidental) suffocation of an infant and negligence regarding baptism, cf. Kerff 1987, p. 30.
312 PL 161: 0894A. Cf. also: Burchard, Decretum 19.156.
313 PL 161: 0886B. See also: Burchard, Decretum 19.104 in table 3.3c.
### Table 3.4b: Ivo of Chartres, late eleventh century

<table>
<thead>
<tr>
<th>Decretum 10.55 (Aliquando)</th>
<th>Not in Panormia.</th>
<th>Augustine 317</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Augustinus de nuptiis et concupiscencia.</em> Aliquando eo usque pervenit hec libidinosa crudelitas vel libido crudelis, ut etiam sterilitatis venena procuret, et si nihil valuerint, conceptos fetus aliquo modo intra viscera extinguat ac fundat, volendo suam prolem prius interire quam vivere, aut si in utero vivebat, occidi antequam nasci. Prorsus si ambo sunt, coniuges non sunt, et si ab initio tales fuerunt, non per connubium, sed per sturpm potius convenerunt. Si autem ambo non sunt tales, audie dicere, Aut illa est quodammodo mariti meretrix, aut ille adulter uxoris.316</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Decretum 10.56 (Quod vero)</strong></td>
<td>= Panormia 8.12</td>
<td>Augustine 319</td>
</tr>
<tr>
<td><em>Augustinus in Exodo quest. cap. 42.</em> Quod non formatum puerperium noluit ad homicidium pertinere, profecto nec hominem deputavit, quod tale in utero geritur. Hic de anima quosquid solet agitari, utrum quicquid formatum non est, nec animatum quidem possit intelligi, et ideo non sit homicidium, quia nec exanimatum dici potest, si adhuc animam non habebat. Item. Si illud informe puerperium iam quidem fuerat, sed adhuc quodammodo informiter animatum, quoniam magna de anima quosquid non est precipitanda indiscussa tenterite sententie, ideo lex noluit ad homicidium pertinere, quia non dicit animam vita in eo corpore, quod sensu caret.318</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Decretum 10.57 (Moyses)</strong></td>
<td>= Panormia 8.13</td>
<td>Pseudo-Augustinus = Ambrosiaster 321</td>
</tr>
<tr>
<td><em>August. Questionum de Veteri et Novo Testamento, cap.2.</em> Moisæ tradidit, Si quis percusserit mulierem in utero habentem, et abortiverit [Panormia: abortivum fecerit], si formatum fuerit, det animam pro anima; si autem in formatum fuerit, multetur pecunia, ut probaret non esse animam ante formam. Itaque si iam formatum corpori datur, non in conceptu corporis nascitur, cum semine et anima, multe anime quotidie pereunt, cum semen fluxu quodam non proficit nativitati. Sed si pius respiciamus, videbimus quid sequi debeamus. Contemplemur facturam Ade, in Adam enim exempulum datum est, ut ex eo intelligatur, quia iam formatum corpus accepit animam. Nam potuerat animam limento terre admissere et sic formare corpus, sed ratione inomnatur, quia primum oportebat domum compaginari, et sic habitatorem induci. Anima certe quia spiritus est, in sicco habitare non potest, ideo in sanguine fertur. Cum ergo lineaentera compacta non fuerint, ubi erit anima.320</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Decretum 10.58 (Sicuti semina)</strong></td>
<td>= Panormia 8.14</td>
<td>Hieronymus 323</td>
</tr>
<tr>
<td><em>Hieronium ad Gasium de questione.</em> Sicuti semina paulatinum formantur in utero, et tamdum non reputatur homicidium, donec elementa confecta suas imagines membraque suscipiant, ita sensus ratione conceptus, nisi in opera proruperit, adhuc ventre retinetur, et cito ab hostio [read: abortio] perit.322</td>
<td></td>
<td></td>
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</tbody>
</table>

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314 Cf. chapter 3, note 297.
315 The text of Ivo of Chartres’s *Panormia* is in PL 161: 1037-1345, and at [http://project.knowledgeforge.net/ivo/panormia.html](http://project.knowledgeforge.net/ivo/panormia.html) (last accessed January 22, 2010).
316 PL 161: 0706C-D. Cf. also: Collectio Tripartita 3.20.15. For a translation, see: chapter 2, note 38.
318 PL 161: 0706D-0707A. Cf. also: Collectio Tripartita 3.20.16.
322 PL 161: 0707C. Cf. also: Collectio Tripartita 3.20.18. Ivo’s text has *confecta* instead of *confusa*.
SUMMARY AND DISCUSSION

The penitentials discussed above use a great deal of different terms and phrases to denote ‘the act of committing abortion’. We find:

- *aborsum (avorsum, abortivos) facere*, *abortivum facere*, *aborsum edere*, *conceptum interficere*, *conceptos occidere*, *uterus conceptus excutere*, *conceptum (suum) excutere*, *quod conceptum est necare*, *occidere filium suum in utero*, *occidere infantem suum in utero*, *partum decipere* (decepere), *partum perdere*, *partum suum disperdere*, *partus interimere* and *partum occidere*. If we compare these phrases to some of the phrases for infanticide, such as: *filius negare (= necare)*, *filium occidere*, *infantem occidere*, *infantem suum necare*, *natum occidere*, *occidere filium suum*, *occidere quod nascitur*, *partus (partum) necare*, and *partus suos necare* we see that it is easy to misinterpret the articles on abortion and infanticide. Sometimes we cannot even be sure whether the article is about infanticide, abortion or both.

Terms for ‘fetus’

The difficulty in interpretation has to do with the ambiguity of four nouns with the meaning ‘fetus’: *conceptus*, *filius*, *infans* and *partus*. *Conceptus* means ‘fetus’, ‘ensouled fetus’, ‘conceived’, or ‘conception’. The other three nouns - *filius*, *infans*, *partus* - have the meaning ‘fetus’ and ‘neo-nate’ or ‘infant’. An extra complication is the fact that the verbs *necare* and *occidere* are used for both abortion and infanticide.324 The verb *excutere*, ‘to expel’, is used exclusively to denote expulsion of a fetus. The four recensions of the second article on abortion in the *Iudicia Theodori* (U.1.14.27) provide an excellent example of the use of the different terms for ‘fetus’: *mulier perdens partum* (D.114), *mulier qui concepit (et occidit) filium (suum) in utero* (G.105; Co.143-144), and *mulier quae concepit et occidit infantem suum in utero* (U.1.14.27). In each recension only the meaning ‘fetus’ is possible, because the word for ‘fetus’ is followed by *in utero* (in three out of four recensions), and because it is a two-tier abortion article. Interpreting penitential articles on abortion and infanticide is often difficult, because all four words for ‘fetus’ can be ambiguous, but it can be especially difficult when one term is substituted for another term. Substitutions, as in the example given above, are also interesting because they indicate that the early medieval authors, readers, scribes, and copyists also felt these words to be ambiguous. I will give an overview of the meanings of *conceptus*, *partus*, *filius* and *infans* I found in the early medieval penitentials.

The word *conceptus* usually means ‘fetus’. It occasionally takes on the meaning ‘ensouled or animated fetus’. The Church council canons on abortion incorporated in the penitentials often use the word *conceptus*. The *Ankyrian* canon 21 has the word *conceptus*, ‘fetus, that which was conceived in the womb’, in the phrase *utero conceptos excutiant*, ‘they expel fetuses in the uterus’.325 The council canons of Lerida and Braga II have: *male conceptos necare*, ‘kill that which was conceived in sin’, and *quod conceptum est necare*, ‘kill that which was conceived’.326 Burchard’s question on abortion uses the word *conceptus* twice, once as a past participle (*post conceptum spiritum*, ‘after the spirit was conceived’), and once in the meaning ‘fetus’ (*excssiti conceptum

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324 Many of the verbs for abortion with the meaning ‘to kill’ are also used for infanticide. Only *excutere*, ‘expel’, is used exclusively for abortion.


conceptum impedierat one of Caesarius of Arles’s sermons on contraception: P. Vindobonense B in connection with infanticide, thus allowing only the interpretation ‘abortion’: occurs as part of the abortion criterion conceptus and Regino of Prüm’s penitential (1.304.29) the word ritus P. Vaticanum maleficia. The substitution was probably done in order to disambiguate the text, because conceptus is not used in connection with infanticide, thus allowing only the interpretation ‘abortion’: si quis conceptum mulieris deceperit.328 We find conceptum filium, ‘conceived child’, in the P. Vallicellianum C.6: Mulier quae conceptum filium suum in utero (...) occiderit (34).

Conceptus means ‘ensouled or animated fetus’ in some of the articles that are related to or derived from the two-tier Theodorian articles on abortion. In the ‘necasti’ questions on infanticide and abortion in the P. Mixtum (31) and Regino of Prüm’s penitential (1.304.29) the word conceptus occurs as part of the abortion criterion ante conceptum - post conceptum; in these two-tier questions on abortion conceptus is equivalent to conceptus spiritus, ‘ensouled fetus’. We find conceptum instead of conceptio, ‘conception’, in a clause Burchard took from one of Caesarius of Arles’s sermons on contraception: conceptum impedierat, ‘prevent conception’, and in the P. Vindobonense B, where we find post XL dies conceptus (33.9) instead of post XL dies conceptionis.329 The word partus can take on the meaning ‘fetus’, ‘neo-nate, new-born infant’ or both in the penitentials. It is often difficult to decide its meaning. Partus always means ‘fetus’ when it is part of the description of one of the stages of fetal development in the two- or three-tier articles on abortion, and when accompanied by in utero and/or excutere.330 We find partus with the meaning ‘fetus’ in the two-tier and three-tier articles on abortion in the Bedae-Egberti penitentials and their derivatives.331 These articles were probably based on the two-tier article on abortion in the D recension (D114) of the Iudicia Theodori, where we find perdens partum.

Partus is also used in the meaning ‘fetus’ in the ‘aliquis vel aliqua’ articles in Regino and Burchard’s penitentials that punish the accomplice and the pregnant woman for committing abortion (2.5.5; 1.94). Partus can only mean ‘fetus’ in the ‘aliquis vel aliqua’ articles, because it is accompanied by the verb excutere. An extra indication that ‘fetus’ is meant is provided by Burchard who inserts conceptum as a synonym of partus (suum partum vel conceptum excusserit) in article 1.94.

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327 Burchard 195.162.
328 Cf. P. Capitula Iudiciorum 3.1b, P. Sangallense tripartitum 1.18, P. Mixtum 15.2.
329 Burchard 195.159. We usually find the word conceptio for ‘conception’.
331 The word partus is not always accompanied by the words in utero. P. Additivum 2.11 and P. Ps. Theodori 6.4 do not have in utero, but P. Mixtum 14.1 and Regino of Prüm 2.65 do.
332 Cf. the Vorsteufe, P. Additivum 2.11, and P. Mixtum 14.1. Only the P. Ps. Bedae has filium suum in utero. P. Additivum 2.11 and P. Mixtum 14.1 are three-tier articles on abortion. The three-tier articles in P. Ps. Theodori (6.4), and Regino’s Sendbuch (2.65) were both derived from the Bedae-Egberti penitentials. The fifth three-tier article on abortion in the Italian P. Vaticanum (5.6) has filium suum in utero.
In the Irish articles on *maleficia* the word *partus* is regularly used in the meaning ‘fetus’: *partum deceperit*, ‘destroyed or killed the fetus’. It can, however, be argued that *partus* means ‘neo-nate’ or ‘new born baby’ in these articles. On the other hand *partus* could just as well have both meanings, so that we must translate it as ‘offspring’ (that is, ‘fetus or neo-nate’). The fact that the word *partus* is occasionally replaced by the unambiguous word *conceptus*, ‘fetus’, seems to indicate that penitential authors considered this an article on abortifacient *maleficia*.

We also find the word *partus* with the meaning ‘neo-nate’. The most important attestation of this meaning in the early medieval penitentials is the Ancyrian council canon on infanticide and abortion. We find the core text or parts of it in many of the early medieval penitentials: *De mulieribus, quae fornicantur et partus suos necant, sed et de his quae agunt secum ut utero conceptos excutiant*, ‘On women who fornicate and kill their new born babies, or who do something to themselves so that they expel that which was conceived in the womb’. The shortened versions, derivatives and adaptations of the Ancyrian canon are usually recognizable by their use of the verbs *necare* and *excutere*, and the ten years’ penance. Some of the pseudo-Ancyrian articles on infanticide and abortion are very difficult to interpret.

The ‘*necasti*’ question in the *P. Mixtum* (31) and Regino’s *Sendbuch* (1.304.29) contains three different terms for ‘neo-nate’ and ‘fetus’ in one article: *partus, filius, and conceptus*, ‘ensouled fetus’. The first part - *necasti partus tuos?*, ‘did you kill your new born baby?’, and the ten years’ penance are reminiscent of the Ancyrian canon, but the rest of the article seems to have incorporated part of the Theodorian article on infanticide and a two-tier Theodorian article on abortion, so that there are two clauses on infanticide with different penances. This suggests that the penitential author differentiated between post-partum infanticide (*necasti partus tuos*) and infanticide of an infant or older child that was already baptized (*occidisti filium aut filiam*). The *P. Floriacense* and the *P. Martenianum* both have an article on abortion and infanticide that they claim is based on the Ancyrian council canon. Again it is an article with two components: *partum disperdit* and *filium necavit*, one refers to infanticide and the other to abortion. However, it is difficult to decide which is which. I have chosen to interpret *partus* as ‘fetus’ and *filius* as ‘neo-nate’, because the main meaning of *filius* is ‘child’ and the verb *necare* is usually used in connection with infanticide. The order of the condemnations, however, conflicts with the order in the Ancyrian canon (infanticide - abortion), and there is no real reason not to interpret *partus* as ‘neo-nate’ and *filius* as ‘fetus’, except perhaps the fact that the verb *disperdere* is usually used for abortion.

The relatively young articles in the *P. Fulberti* (9), the *P. Parisiense Compositum* (57), and Ivo of Chartres’ *Decretum* (15.188) again combine the Ancyrian canon and a (modernized) two-tier Theodorian article with the abortion criteria *vivus - non vivus*. They all open with *si qua partum necat aut excutit*, ‘if any woman kills or expels a *partus*’. The verb *excutere* indicates that the word *partus* must be associated with abortion, but the verbs

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334 There are many articles that punish negligence regarding the baptism of small children, for instance, *Iudicia Theodori* 1.14.28 -1.14.30. Articles on baptism are frequently near articles on abortion and infanticide, and infanticide of a baptized child is often considered a more serious crime than infanticide of a new-born, as in the *necasti* question (cf. also U.1.14.25 with a 15 years’ penance for infanticide and U.1.14.30, which requires a ten years’ penance for killing an unbaptized child).
necare and excutere point to the Ancyrian canon and suggest that both infanticide and abortion are condemned. Perhaps if we should read partus necare aut [partus] excutere, ‘kill a neo-nate or expel a fetus’, and translate partus as ‘offspring’, thus rendering both meanings.

It seems as if the word partus is slowly taking on the new, broader meaning ‘offspring’ or ‘progeny’. Three articles in the tenth- and eleventh-century Spanish and Italian penitentials that are also reminiscent of the Ancyrian canon also suggest a broader meaning for partus. These articles in the P. Vaticanum, the P. Silense and the P. Vallicellianum E.62 are extremely condensed versions of the Ancyrian canon, but still recognizable by the words partus and necare and the penances.\textsuperscript{335} The strange thing is that they contain the references to fornication that were left out in the articles discussed above.

If we look closely at these three articles, we see that it seems as if the second half of the Ancyrian canon, that is, the part that refers to abortion was left out. If this is true, partus means ‘neo-nate’, but it seems odd that half of the article was omitted, and perhaps we must ask ourselves if the other half was ‘understood’, in other words, whether partus means ‘offspring’ here. The answer to this puzzle cannot be given, and as in so many of the penitential articles, we can guess, assume and formulate hypotheses, but we cannot be sure.

One last piece of evidence. Again an article originally based on the Ancyrian canon, but now we have a concise version of the ‘necasti’ question in an Ordo poenitentiae in a twelfth-century manuscript that also reintroduces the references to fornication and adultery: De Mulieribus. Mulier, fornicasti? Necasti partum tuum vel conceptum? X annos peniteat. Es adultera? VII annos peniteat (…)

The word partus is not always easy to understand. In the texts above the word partus (‘neo-nate’ or ‘fetus’) seems to be able to take on both meanings. Sometimes the text can only be understood, if we interpret partus as ‘offspring’, so that partus in fact means ‘fetus’, ‘neo-nate’ and ‘offspring’. On the other hand, we should try to have the courage to stop striving for consistency, and resign ourselves to penitential texts that are inconsistent, contain conflicting texts and penances, use the word partus in two different meanings in one and the same penitential, and sometimes even leave us with puzzles.\textsuperscript{338}

The main meaning of the words filius and filia is ‘infant, child, son, daughter’, as in the Theodorian articles on infanticide (U.1.14.25-U.1.14.26), and their derivatives: mulier (mater) si occiderit filium suum (…), ‘a woman (mother) if she kills her child (…)’. Filius is also used in the meaning ‘child, infant’ in the ‘necasti’ questions: si filium aut filiam occidisti, ‘if you killed your son or daughter’ (P. Mixtum 31; Regino of Prüm 1.304.29).

\textsuperscript{335} Only the P. Silense 92 increased the penance from ten years to fifteen years.
\textsuperscript{336} Schmitz 1883 [1958], vol. 1, pp. 751-752, at p. 755. The Ordo poenitentiae is in Codex Parisiense ms. lat 3880.
\textsuperscript{337} But again, it is also possible to read partus as a synonym of conceptus, cf. above, where Burchard added vel conceptum as a synonym of partus in article 1.94. The difference between the two articles is that Burchard uses the verb excutere, so that partus means ‘fetus’.
\textsuperscript{338} For instance: P. Mixtum 31 and Regino of Prüm 1.304.29 (partus, ‘neo-nate’) and P. Mixtum 14.1 and Regino of Prüm 2.65 (partus, ‘fetus’), or Burchard of Worms 2.55 (partus, ‘fetus’) and 19.5.159 (partus, ‘neo-nate’).
Occasionally we find *filius*, and even *filius aut filia*, with the meaning ‘fetus that was aborted’. The oldest articles with *filius*, ‘fetus’, are in the *Iudicia Theodori*. We find *filium (suum) in utero* in the G and Co recensions (G.105, Co 143-144) of the two-tier article on abortion. There are many variant versions of the Theodorian article on abortion with *filius* in the younger penitentials. The *P. Vallicellianum C.6* has the variant *conceptum filium suum in utero*, ‘conceived child in utero’.

Article 17 of the *P. Ps. Gregorii* contains both a Theodorian article on infanticide with the word *filius*, and a Theodorian article on abortion with *filius aut filia in utero*. Because we have both meanings of the word *filius* in one article, the translation ‘offspring’, which includes both meanings, seems to be more appropriate. This is not the only example where the word *filius* means either ‘fetus’ or ‘neo-nate’ or both. In the version of the Elvirian canon on abortion in the Spanish *P. Cordubense* (135) we have *filium in utero aut [filium] iam natum*, and in two of the Spanish penitentials (*P. Vigilum* and *P. Silense*) the *Bedae-Egberti* article on ‘women, maleficia and murder’ (*P. Mixtum 15.3*) was altered in order to explicitly condemn both abortion and infanticide.

*P. Mixtum 15.3* Mulier si aliquos interimit arte maleficiae suae, id est per poculum aut per aliquam artem (…).

*P. Vigilum* 50 Si mulier per poculum aut per quamlibet artem occiderit filium in utero (…).

*P. Silense* 83 Si mulier per poculum aut per qua<~m~>libet artem occiderit filium uel qui denati sunt (…).

*Aliquos* was replaced by *filium in utero*, and at the same time a clause on infanticide with the word *filius* was added, and, interestingly, the phrase *arte maleficiae suae* was omitted. In all three Spanish articles *filius* is best translated as ‘offspring’.

*Filius* is the only term that allows for gender distinction. Its meaning hardly ever poses a problem, because, when *filius* means ‘fetus’, it is (almost) always followed by *in utero*.

The word *infans* usually means ‘infant, child’. It is seldom used in the meaning ‘fetus’ in articles on abortion. Penitential authors writing on abortion seem to avoid the word. We find *infans*, ‘fetus’, in the U recension of the *Iudicia Theodori*: *occidit infan tem suum in utero*, ‘killed her child in utero’ (U.1.14.27); again the words *in utero* indicate that only the interpretation ‘fetus’ is possible. Burchard uses *infans*, ‘fetus’, in a heading he added to his version of the Leridian council canon on infanticide and abortion: *qui infantes suos ex adulterio suspectos excutitum, *‘those who expel their children begotten from adultery’ (19.5.160). Here usage of the verb *excutere* indicates that *infans* means ‘fetus’. We also find *infans in utero*, ‘fetus’, in the Irish *Bigotian Penitential: penticentia perditionis liquoris materiae infantis in utero mulieris .iii. anni in pane et aqua; ‘the penance for the destruction of the embryo (liquid material) of a child in the mother’s womb, three years on bread and water’ (4.2.2).

339 See, for instance, *P. Remense 8.46; P. Sangallense tripartitum 2.5; P. Ps. Bedae 4.12.; P. Capitula Iudiciar um 3.2a; P. Merseburgense A- Me, 164; P. Parisienne Compositum 58; P. Casinense 7.5; P. Vaticanum 5.6; P. Vallicellianum C.6 34; P. Vindobonense B 33.9* (Meens 1994, p. 408). There are also versions that combine the two two-tier Theodorian articles on abortion, or use variant abortion criteria, cf. *Excarpsum Cummani 6.11* and *P. Vigilum 57*.

340 Cf. *P. Ps. Gregorii*, table 3.2b. Note that *filium aut filiam* is in the part on abortion (not the part on infanticide). This may be an indirect reference to the gender differentiation we occasionally come across in secular Old Germanic law. See: chapter 1 and table 3.3a. See also: Elsakkers 2003b on Salic law, and Elsakkers 2004 on late medieval Old Frisian abortion law. [articles IV and VI]

341 An exception is *P. Silense* 83.

342 Bieler & Binchy 1963, pp. 228-229. The Irish Bigotian penitential (c. 700-725) is in a class of its own. It has its own set of criteria and its own explanation of the difference between a formed and an unformed fetus. This penitential was known on the continent, but apparently not very influential. The *P. Bigotianum* distinguishes two different stages of fetal development: a stage when the fetus in the mother’s womb consists of liquid material (4.2.2), and the stage when the fetus has acquired
Infans is used in connection with infanticide in canon 77 of the Council of Braga II, a canon that was incorporated into the P. Ps. Gregorii (17) and Ivo of Chartres’s Decretum (8.331, 10.183); we find: *infantem occiderit*, ‘killed the child’, *infantem qui fuerit natus occiderit*, ‘killed the child that was born’, or *infantem habuerit et illum occiderit*, ‘had a child and killed it’. The word *infans*, ‘child’, is also used in connection with contraception instead of *ut non concepiat*, for instance, in the articles on poisonous herbal drinks or maleficia (*ut non potuisses infantes habere*, ‘so that you cannot have children’) in P. Mixtum 30 and Regino of Prüm 1.304.28. The only text where *infans* perhaps has a double meaning is the section heading in the P. Vallicellianum E.62: *De muliere quae infantem suum necat*, ‘On a woman who kills her child’. The section contains articles on abortion and infanticide.

Not many other words are used for ‘fetus’. The word *foetus*, ‘fetus’, hardly ever occurs in the penitentials. I found only one attestation in the heading Burchard of Worms added to his version of the Elvirian council canon on abortion: *De mulieribus, quae absente marito conceperint, et foetum sustulerint*, ‘On women who become pregnant when their husband is away and destroy the fetus’ (17.51). Once the word *filius*, ‘fetus’, was replaced by *parvulus* (P. Vallicellianum E.62 15). The problem with most of the nouns with the meaning ‘fetus’ is deciding whether we are dealing with abortion or infanticide. An analysis of the words for ‘fetus’ shows us that we can usually unravel their meaning by looking at the context. The two-tier articles on abortion present no difficulties, and the word *conceptus* is never used for infanticide. *Filius* and *infans* are regularly accompanied by *in utero* or the verb *excutere* when they mean ‘fetus’, otherwise their meaning is ‘neo-nate’. Sometimes *filius* means ‘offspring’, because we find two meanings of *filius* in one and the same article. There is only one example where *infans* might have a double meaning. This leaves us with the word *partus*. If accompanied by the verb *excutere*, or the words *in utero* or *XL dies* its meaning is clear - we are dealing with abortion, often a two-tier article on abortion. However, there are a few cases where we cannot be sure of its interpretation, and where it could be translated as ‘offspring’. When we are speaking of a penitential tradition that covers five or six centuries and almost all of western Europe including Ireland and England, we cannot hope for consistency, and we must therefore accept inconsistencies, and penitentials with articles that are sometimes difficult to interpret.

**Fetal development**

Most of the penitential articles on abortion are one-tier articles like the Frankish, Irish and Ancyrian articles. They condemn and punish abortion without making any difference between early term and late term abortion. The Theodorian articles on abortion and their derivatives are two-tier articles that assign a lighter penance for early term abortion. There are also a few penitentials with three-tier articles. We find many variant versions of these articles in the early medieval penitentials. Most penitentials contain both a one-tier and a two-tier article...
on abortion. A few penitentials have two two-tier articles, and two penitentials contain both a two-tier and a three-tier article.345

The criteria for abortion we find in the two-tier and three-tier penitential articles are all ultimately derived from one of the seven articles we find in the five recensions of the seventh-century Iudicia Theodori.346

<table>
<thead>
<tr>
<th>Recension</th>
<th>Criteria</th>
<th>Notes</th>
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<tbody>
<tr>
<td>1. Iudicia Theodori Co 143-144</td>
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<td>post quadraginta dies</td>
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<tr>
<td>2. Iudicia Theodori G 105</td>
<td>ante XL dies</td>
<td>post XL dies</td>
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<tr>
<td>3. Iudicia Theodori U.1.14.27</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>4. Iudicia Theodori D 114</td>
<td>ante XL dies conceptionis</td>
<td>post XL</td>
</tr>
<tr>
<td>5. Iudicia Theodori B 62</td>
<td>antequam animam habeat</td>
<td>postea id est XL diebus post conceptionem seminis</td>
</tr>
<tr>
<td>6. Iudicia Theodori Co 147</td>
<td>antequam animam habeat</td>
<td>postea id est post XL dies acceptatione seminis</td>
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</table>

There are two groups of Theodorian articles, and the abortion criteria derived from them can be divided into five groups (cf. table 3.5). In the first group the first stage of fetal development is called ante XL dies in the Theodorian articles Co 143-144, G 105, and U.1.14.27; D 114 adds the word conceptionis (ante XL dies conceptionis, ‘before forty days [after] conception’). In the second group (B 62, Co 147 and U.1.14.24) the fetal stage linked to early term abortion is described as antequam animam habeat, that is, ‘before life or ensoulment’ or ‘before it is alive or ensouled’.347 The fetal stage linked to late term abortion is defined as ‘after forty days’ in all seven versions. In the versions with antequam animam habeat a phrase with the word semen, ‘seed’, was added as an extra explanation of the second stage: XL diebus post conceptionem seminis, ‘forty days after conception of the seed’ (B 62), post XL dies acceptatione seminis, ‘after forty days [after] the acceptance of the seed’ (Co 147), and post XL dies accepti seminis (U.1.14.24).

Most of the two-tier articles in the early medieval penitentials use the criteria ante XL dies - post XL dies (table 3.5, nr. 1). Relatively few penitentials choose the abortion criteria with antequam animam habeat in the first stage (cf. table 3.5, nr. 2). The Theodorian variants with the word conceptio (D 114, B 62) may have inspired younger penitential authors to devise abortion criteria with the word conceptio and conceptus (cf. table 3.5, nr. 3). The Excarspus Cummeani 6.11, P. Merseburgense A, Me 164, and P. Vindobonense B 33.9 have conceptio or conceptus in the second stage. The ‘necasti’ questions in the P. Mixtum and Regino of Prüm’s penitential have ante conceptum and post conceptum without XL dies, which makes it impossible to translate conceptus as ‘conception’. Conceptus can only be interpreted as ‘ensouled’, which means that we must supply the word spiritus, and read ante conceptum [spiritum] and post conceptum [spiritum], that is, ‘before [it is] ensouled’ and ‘after [it is] ensouled’.

Burchard was greatly influenced by Regino of Prüm and incorporated many articles from his penitential into his Decretum. However, he skipped the two-tier ‘necasti’ questions we found in the P. Mixtum and in Regino’s Sendbuch, and devised a two-tier question of his own that defines late term abortion as post conceptum spiritum, thus adding the word spiritus that was lacking in the P. Mixtum and in Regino’s Sendbuch (table 3.5, nr 4). Early stage abortion is defined as antequam vivificaretur, ‘before the fetus became alive’, using a verb that expresses ‘aliveness’. Burchard’s near contemporary Fulbert, the P. Parisiense Compositum and Ivo of Chartres

345 We find two two-tier articles on abortion in the U and Co recensions of the Iudicia Theodori, the P. Remense and the P. Parisiense Compositum. The P. Mixtum and Regino of Prüm’s penitential have both a two-tier and a three-tier article on abortion.

346 Cf. above.

347 We cannot determine with certainty whether ‘aliveness’ or ‘ensoulment’ is meant by anima. I suspect that ‘aliveness’ was originally meant, but that the double meaning of the word anima, ‘life’ and ‘soul’, probably caused confusion early on.
also chose ‘aliveness’ to describe the difference between an early term and late term abortion, using the simpler terms *vivus* - *non vivus* and *vivit* - *non vivit* (table 3.5, nr. 4).

The first penitential with a three-tier article is the *P. Additivum*. It distinguishes the stages *ante XL dies, post XL dies* and *postquam animatus* (table 3.5, nr. 5). Only a few other penitentials have a three-tier article on abortion: *P. Mixtum*, *P. Ps. Theodori*, Regino’s *Sendbuch* and the *P. Vaticanum*.348 The second and third phases, *post XL dies* and *antequam animatus* differentiate between a ‘formed’ and a ‘living or ensouled’ fetus. One wonders how the two could be distinguished in practice. The *P. Mixtum* and the penitential written by Regino of Prüm contain both a two-tier and a three-tier article on abortion, an inconsistency which further complicates their interpretation, and perhaps also their usage in confession. Perhaps these inconsistencies and interpretative difficulties are one of the reasons that there are so few penitentials with three-tier articles.

The criteria used in the majority of the two-tier penitentials - *ante XL dies* and *post XL dies* - sound like criteria that are easy to maintain and explain. In medieval embryology a fetus is considered ‘formed’ at forty days. In the embryological texts we learn that a ‘formed’ fetus is considered to be ‘alive’. It probably ‘moves’ and can also already be ‘ensouled’.349 Although the various sets of terms used for early term and late term abortion seem to differ, each set of criteria probably denotes the same or approximately the same stage of fetal development (cf. table 3.5). Only the three-tier articles are out of line, because they differentiate between a fetus that is forty days old and an ensouled fetus.

The penitential texts tell us that the age of the fetus was calculated from the day of conception. This means that a woman carrying a forty-day-old fetus is not even two months pregnant yet, and that she has missed only one or two periods.350 It does not seem likely that anybody - besides the pregnant woman, her friends, neighbors or helper, and perhaps her husband or lover - could really determine exactly how far along the woman was when she aborted her child. Of course, knowledgeable women could examine an aborted fetus and determine approximately at what time it was aborted. The Old Frisian laws even appoint women to examine the fetus after a violent abortion.351 But for the uninitiated - among whom we should probably include many of the men who devised and wrote down the penitential articles on abortion - the boundary lines between contraception and early term abortion, between miscarriage and abortion, between early term and late term abortion, and perhaps sometimes even between late term abortion and infanticide (if, for instance, an aborted fetus was born alive) would not have been very clear. If early term abortion is defined as abortion before the fortieth day of pregnancy, that is, forty days after ‘accepting the seed’, we cannot even be sure we are talking about abortion. If the woman’s cycle was irregular, and the abortifacient was taken shortly after intercourse, it may have worked as a contraceptive, or some sort of ‘morning after’ treatment. The rather obscure text in two of the recensions of the *P. Merseburgense A* is perhaps an illustration of these vague boundaries: *Si quis mulier voluntarie aborsum fecerit, (…) ut non concipiat aut conceptos occidat (…)* (*P. Merseburgense A W* 10, V 23, article 38).352 Perhaps the author of this passage in the *P. Merseburgense A* was smarter than we think, perhaps he understood that it

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348 See the discussion of the *P. Merseburgense A*.  
350 Cf. Elsakkers 2004, passim. [article VI].  
351 Even if we allow for ‘delayed conception’ (King 1998, p. 134) and menstrual periods that could be more spaced than thirty days, ‘40 days’ could at the most be reinterpreted as sixty days.  
352 Cf. Elsakkers 2004, passim. [article IX].
Table 3.5: List of abortion criteria in the two- and three-tier articles in the early medieval penitentials

1. ante XL dies - post XL dies

<table>
<thead>
<tr>
<th>Penitential</th>
<th>stage 1</th>
<th>stage 2</th>
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<tbody>
<tr>
<td>Iudicia Theodori Co 143-144</td>
<td>ante XL dies</td>
<td>post quadraginta dies</td>
</tr>
<tr>
<td>Iudicia Theodori G 105</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>Iudicia Theodori U.1.14.27</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>Capitula Iudiciorum 3.2a</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>Casinense 7.5</td>
<td>ante XL dies</td>
<td>post</td>
</tr>
<tr>
<td>Mediolanense 5.15 (16th century)</td>
<td>ante quadraginta dies</td>
<td>post quadraginta dies</td>
</tr>
<tr>
<td>Parisiense Compositum 58</td>
<td>ante XL dies</td>
<td>post XL</td>
</tr>
<tr>
<td>Ps. Bedae 4.12</td>
<td>ante dies XL</td>
<td>post dies XL</td>
</tr>
<tr>
<td>Ps. Gregorii 17</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>Remense 8.46</td>
<td>ante XL diebus</td>
<td>post XL dies</td>
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<tr>
<td>Sangallense tripartitum 2.5</td>
<td>ante XL dies</td>
<td>post dies XL</td>
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<tr>
<td>Vallicellianum C.6. 34</td>
<td>ante XL dies</td>
<td>post XL dies</td>
</tr>
<tr>
<td>Vallicellianum E.62 15</td>
<td>---</td>
<td>post XL dies</td>
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2. antequam animam habeat

<table>
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<tr>
<th>Penitential</th>
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</thead>
<tbody>
<tr>
<td>Iudicia Theodori B 62</td>
<td>antequam animam habeat</td>
<td>postea id est XL diebus post conceptionem seminis</td>
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<tr>
<td>Iudicia Theodori Co 147</td>
<td>antequam animam habeat</td>
<td>postea id est post XL dies acceptatione seminis</td>
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<tr>
<td>Iudicia Theodori U.1.14.24</td>
<td>antequam animam habeat</td>
<td>post id est post XL dies accepti seminis</td>
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<td>Remense 8.26</td>
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<td>post quadraginta dies a conceptione seminis</td>
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<tr>
<td>Floriacense 64</td>
<td>antequam animam habeat</td>
<td>postea id est post quadraginta dies accepti seminis</td>
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<tr>
<td>Martenianum 43</td>
<td>antequam animam habeat</td>
<td>postea id est post XL dies accepti seminis</td>
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<tr>
<td>Vigilanum 57-58</td>
<td>antequam animam habeat</td>
<td>post</td>
</tr>
<tr>
<td>Silense 85-86</td>
<td>antequam animam habeat</td>
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3. conceptio - conceptus

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<tr>
<th>Penitential</th>
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</thead>
<tbody>
<tr>
<td>Iudicia Theodori D 114</td>
<td>ante XL dies conceptionis</td>
<td>post XL</td>
</tr>
<tr>
<td>Excarpus Cummeani 6.11</td>
<td>ante XL dies</td>
<td>XL dies post conceptionem</td>
</tr>
<tr>
<td>Merseburgense A, Me 164</td>
<td>ante XL dies</td>
<td>post XL dies conceptionis</td>
</tr>
<tr>
<td>Vindobonense B 33.9</td>
<td>ante XL dies</td>
<td>post XL dies conceptus</td>
</tr>
<tr>
<td>Mixtum Ps. Bedae-Egberti 31</td>
<td>ante conceptum [spiritum]</td>
<td>post conceptum [spiritum]</td>
</tr>
<tr>
<td>Regino of Prüm 1.304.29</td>
<td>ante conceptum [spiritum]</td>
<td>post conceptum [spiritum]</td>
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4. vivus - non vivus

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<tr>
<th>Penitential</th>
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<tbody>
<tr>
<td>Burchard 19.5.162</td>
<td>antequam vivificaretur</td>
<td>post conceptum spiritum</td>
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<tr>
<td>Fulberti 9</td>
<td>non uiuum</td>
<td>uiuum</td>
</tr>
<tr>
<td>Parisiense Compositum 57</td>
<td>non uiuum</td>
<td>uiuum</td>
</tr>
<tr>
<td>Ivo of Chartres, Decr. 15.188</td>
<td>non vivit</td>
<td>vivit</td>
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5. three-tier articles

<table>
<thead>
<tr>
<th>Penitential</th>
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<th>stage 3</th>
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</thead>
<tbody>
<tr>
<td>Additivum Ps. Bedae-Egberti 2.11</td>
<td>ante dies XL</td>
<td>post XL dies</td>
<td>postquam animatus</td>
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<tr>
<td>Mixtum Ps. Bedae-Egberti 14.1</td>
<td>ante XL dies</td>
<td>post XL dies</td>
<td>postquam animatus</td>
</tr>
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<td>Ps. Theodori 6.4</td>
<td>ante XL dies</td>
<td>post XL dies</td>
<td>postquam animatus</td>
</tr>
<tr>
<td>Regino of Prüm 2.65</td>
<td>ante XL dies</td>
<td>post XL dies</td>
<td>postquam animatus</td>
</tr>
<tr>
<td>Vaticanum 5.6</td>
<td>ante XL</td>
<td>post quadraginta dies</td>
<td>postquam animatum</td>
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</tbody>
</table>
was difficult, sometimes almost impossible, to determine the difference between contraception and early term abortion.

All in all we can question the usefulness of the criteria in the two-tier, and certainly the three-tier, articles on abortion in penitential practice. But perhaps all these criteria simply mean to say that it would not be hard to determine if an abortion was ‘late term’, because in many cases it would be obvious to all that the woman was no longer pregnant, if she was already ‘far along’. Other abortions, if known, would then by default be ‘early term’.

The confusion caused by the different criteria for abortion, the existence of one-tier, two-tier and three-tier articles on abortion, and the difficulties that must have arisen in interpreting the penitential articles on abortion are probably the reason why Burchard of Worms and Ivo of Chartres included authoritative texts written by or ascribed to the Church Fathers on questions such as the time of ensoulment, the resurrection of aborted or miscarried fetuses, and whether malformed or nearly formed fetuses acquire a ‘formed’ body at the resurrection.

**Punishment - Penance**

Punishment in the penitentials consists of a penance and means that the sinner must fast during an appointed period. Usually only the woman who commits abortion receives a penance. Men are hardly ever mentioned in connection with the penances for abortion, but there are a few exceptions. The Leridian council canon on abortion and infanticide punishes *in utroque sexu adulteris*, ‘adulterers of both sexes’. Regino of Prüm and Burchard of Worms add *id est patri vel matri*, ‘that is, the father or the mother’, to their version of the Leridian canon, thus clearly punishing both adulterers for illicit sex and abortion. The *P. Martenianum* has a canon on abortion taken from the *Collectio Hibernensis* that penalizes men if they were involved in the decision to abort: *mulier sive vir consentientes in hoc peccato*, ‘the woman, also the man, who agreed to this sin’. The version of the Anlyrian canon in the *P. Vallicellianum I* (MS E.15) is new and now punishes men for abortion. The Iro-Frankish penitentials and some of the other penitentials punish accomplices or helpers severely; often they receive the same or a harsher penance than the woman who committed intentional abortion.

The various penances for abortion we find in the early medieval penitentials seem erratic at first sight. However, although far from consistent there is a certain amount of consistency. The standard penance for abortion is three years as in the one-tier Frankish penitentials; it is the penance for homicide. The Theodorian penitentials demand the same penance, but are more lenient, because they require a lighter penance - only one year - for early term abortion. The three years’ penance is labelled *ut homicida*, ‘as a murder(ess)’, so that these penitentials clearly consider abortion to be equivalent to homicide, which means that a ‘formed fetus’ was regarded as a living human being. Abortion is also regarded as murder in the Church council canons. The ten years’ penance...

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353 Men are only occasionally punished for fornication. The *P. Ps. Romanum* punishes men who fornicate and beget a child, cf. *P. Ps. Romanum* 6.7 (Schmitz 1898 [1958], p. 294; McNeill & Gamer 1938, p. 302), and *P. Ps. Romanum* 6.87 punishes men who fornicate and do not know “the number of women with whom they have committed fornication” (Schmitz 1898 [1958], p. 299; McNeill & Gamer 1938, p. 311.

354 The Leridian council canon is cited by Hrabanus Maurus (*P. Heribaldum*, caput 9 and *P. Otgarium*, caput 11), Regino of Prüm 2.63, Burchard of Worms, *Decretum* 17.52 and 19.5.160, and Ivo of Chartres, *Decretum* 9.102, 10.182.

355 Regino of Prüm 2.63 and Burchard of Worms 19.5.160.

356 *P. Martenianum* 45.

357 See: above.

358 See, for instance, Burchard of Worms 19.5.159 (ten years), and Burchard’s slightly more lenient article 19.5.161 (seven years). See also: below.
we come across in many penitentials is the punishment for abortion and infanticide that is considered ‘humane’ in the Ancyrian canon.

The Theodorian penitentials have compassion for the *paupercula* or ‘poor woman’ who commits infanticide, and they reduce her punishment from fifteen years to seven years. The *P. Ps. Bedae* and its derivatives extended Theodore’s ‘extenuating circumstances’ to *pauperculae* who commit abortion. The *paupercula* clause does not always specify the penance reduction for poor women, but it was probably common knowledge or left to the discretion of the confessor.

The younger penitentials are sometimes much stricter, and they often increase the standard penances considerably. For instance, the late tenth- or early eleventh-century *P. Vaticanum* increased the three years’ penance for abortion in the Frankish penitentials to six years, and in the *P. Fulberti*, the *P. Parisiense Compositum* and Ivo of Chartres’s *Decretum* late term abortion is punished with a penance of twelve years, which is extremely harsh compared to earlier penances for the same crime. The Italian *P. Vallicellianum I* (MS E.15) increases the penance in the Frankish article from three to four years, and it increases the Ancyrian penance of ten years to twenty years, but this may be due to the fact that this redaction punishes the man involved and not the woman. The three Spanish penitentials edited by Körntgen and Bezler in 1998 have a version of the *Bedae-Egberti* article on ‘women, maleficia and homicide’ with penances that range from fifteen to twenty-one years.

In general the penance for (late term) abortion is regarded as a penance for murder. This means that the penitentials consider the fetus to be a person or human being. However, many penitentials created ‘loopholes’ by reducing the penance for abortion, if it was early term or if the woman was a *paupercula*.

**Motives**

Most early medieval penitentials do not tell us why women commit abortion. Fornication and adultery, that is, the concealment of an illicit sexual relationship, are mentioned in the Church council canons that were incorporated into the penitentials. Fornication is probably implied as a motive for abortion in the Theodorian articles, because they contain a reference to the Ancyrian punishment for abortion. The long *paupercula* clause gives us two important reasons for abortion: fornication and poverty: *Sed distat multum, utrum paupercula pro difficultate nutriendi an fornicaria causa sui sceleris celandi faciat*, ‘But it makes a great difference whether a poor woman does it on account of the difficulty of feeding [her child], or a fornicatress for the sake of concealing her sin’. Women who fornicate and commit abortion to hide the result of their illicit sexual relationship, that is, the child conceived out of wedlock, are not pardoned. However, the penance for women who are driven to abortion for economic reasons, because they are poor and have many mouths to feed, is reduced. We find short and long versions of the *paupercula* clause in many of the early medieval penitentials especially those derived from the Theodorian and *Bedae-Egberti* penitentials. Even the strict pastor Burchard of Worms adds the *paupercula* clause to one of his articles on abortion.

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360 Cf. *P. Vaticanum* 1.12, *P. Fulberti* 9, *P. Parisiense Compositum* 57, Ivo of Chartres, *Decretum* 15.188.
361 Cf. above.
362 *P. Ps. Bedae* 4.12. McNeill & Gamer 1938 translate *fornicaria* with ‘harlot’; I think fornication is a broader concept that obviously includes prostitution, but is not restricted to prostitution.
363 Burchard of Worms 19.5.159.
Other reasons for abortion are mentioned sporadically. Regino of Prüm and Burchard of Worms speak of *causa explendae libidinis*, ‘to satisfy lust’ and *causa odii meditatione*, ‘out of hate’, as reasons for abortion and contraception.\(^{364}\) *Causa explendae libidinis* probably refers to sexual promiscuity and sexual obsession, and *causa odii meditatione* may be a reference to forced sexual intercourse, rape, incest, domestic violence, an unwanted pregnancy after divorce, or such hatred or spite towards the spouse that the wife wants to deny him progeny.\(^{365}\)

*Raptus*, that is forcible abduction and rape, is mentioned in four of the penitentials discussed here, three of them are Italian in origin.\(^{366}\) Abduction and rape are considered extremely extenuating circumstances, and some penitential authors even explicitly state that a woman is ‘not guilty’, if she commits abortion after being raped: *illa non est culpanda*.\(^{367}\) However, the woman must still do penance, albeit that only a small penance is demanded. Besides rape, three of these penitentials also speak of not being able to ‘carry or feed’ (*non potuit portare vel nutrire*), and not being able to ‘sustain or feed’ (*non potest stare aut nutrire*) the child that is on the way. This shows us that social circumstances, including a lack of financial means to raise the child, may also have influenced the woman’s decision to abort.\(^{368}\)

The late ninth or early tenth-century *P. Arundel* gives two motives for abortion, *pro sua levitate* and *pro utilitate necessaria*, that seem to summarize all the others.

**P. Arundel**

20. Si qua mulier pro sua levitate avorsum fecerit, uno anno peniteat; si pro utilitate necessaria, XL diebus more quadragesimali.\(^{369}\)

*Pro sua levitate*, ‘for her own convenience’, includes all the motives that have to do with lust, illicit sex, fornication and adultery, and *pro utilitate necessaria*, ‘for a necessary reason’, describes the motives of women who resort to abortion because of outside circumstances that are beyond their control, such as poverty, rape or (sexual) abuse. The *P. Merseburgense A* (MS V\(_{23}\)) condemns voluntary abortion *qualecunque causa*, ‘for whatever reason’ - thus not differentiating between ‘convenience’, ‘necessity’ and other reasons for abortion. The *P. Arundel* has one more article on ‘motive’ that is interesting, because the article must have been devised with real-life situations in mind. It forbids contraception.

**P. Arundel**

18. Mulier si aliquo maleficio ad occultandum libidinem suam obtinet, se numquam consciupere posse, eodem modo X annos poeniteat. Quae vero ad vitandam mortem vel partus augustiam hoc faciunt triennio poeniteant.\(^{370}\)

*P. Arundel* 18 punishes a woman who tries to conceal (that is, restrain) her libido with any kind of *maleficia* so that she cannot ever conceive. The second part of this article rudely reminds us of the fact that women often did

\(^{364}\) Regino of Prüm 2.88, Burchard of Worms 17.57; cf. table 3.3c.

\(^{365}\) Denying the husband progeny is also mentioned as a reason to punish abortion in later Roman law. Cf. chapter 1, appendix 1.


\(^{367}\) On the various meanings of the word *raptus*, cf. Elsakkers 1999. [article V]

\(^{368}\) The *P. Casinense* does not mention any of these reasons to abort.

\(^{369}\) Schmitz 1883 [1958], vol. 1, p. 444. The *P. Arundel* was edited by Schmitz 1883 [1958], vol. 1, pp. 437-465. It is a fragmentary penitential that survives in a thirteenth-century manuscript, but it must probably be dated to the late ninth century (cf. Schmitz 1883 [1958], vol. 1, pp. 432-436).

\(^{370}\) Schmitz 1883 [1958], vol. 1, p. 443. ‘A woman, if she contrives with any kind of *maleficia* in order to conceal (= restrain) her libido that she cannot ever conceive, in the same way must do penance for ten years. Those women who, however, do this in order to escape death or breech birth, must do penance for three years’. Schmitz intimates that this article is related to the Irish articles that forbid supplying and administering *maleficia*. Cf. Muzzarelli 1986, p. 174 for a more correct explanation of this article, although she interprets the second part as therapeutic abortion instead of contraception to avoid difficult birth.
not survive complications in childbirth. It punishes contraceptive measures to avoid death in childbirth or death due to breech birth.

To sum up, the most important motives for abortion mentioned in penitentials that punish abortion seem to be sexual promiscuity and poverty.

**Intentional and involuntary abortion**

Intentionality, that is, intentional, voluntary or deliberate abortion by the mother, is not often mentioned explicitly. However, the word *mulier* and feminine (relative) pronouns, such as *qua*, are almost always in subject position in the penitentials articles on abortion. This clearly indicates that the pregnant woman is the actor, and that the woman involved is making her own decisions.

The words *agunt secum*, ‘do [something] to themselves’, in the Ancyrian council canon also seem to indicate intentionality on the part of the pregnant woman. We find a variant version of this phrase in *P. Merseburgense A* (V23): ‘(…) *sibi aut alii fecerit*, ‘did [it] to herself or to another [woman]’ (38). Sometimes intentionality is made explicit when adverbs like *voluntarie*, *sponte*, or *propria voluntate* are inserted. By using these words the penitential authors are telling us that women make their own decisions regarding abortion. The Frankish articles on abortion are the oldest articles that mention intentionality. They use the word *voluntarie*, ‘voluntarily’, and are included in almost all the tripartite penitentials. Later the *Bedae - Egberti* tradition introduces the word *sponte*, ‘intentionally’, in the *Vorstufe* and its derivatives. We find these words in many other penitentials, and sometimes one is substituted for the other, as in article 63 of the *P. Parisiense Compositum*.372 Regino of Prüm and Burchard of Worms have *propria voluntate*, ‘of her own will’, a variant version of *voluntarie* that emphasizes the fact that it is the pregnant woman herself who decided to abort.373

or phrases like *si autem invitę* (*P. Vallicellianum C.6 37*).

Perhaps *propria voluntate* also suggests that some women did not abort of their own free will. There is another reference to involuntary abortion in Burchard’s expanded version of the Ancyrian canon.374 Burchard adds the phrase *si (…) consensisti*, ‘if (…) you consented [to it]’, in the middle of his text, again a faint suggestion that the pregnant woman could have been forced or pressured into committing abortion. *P. Vallicellianum C.6 37* has the phrase *si autem invitę*, ‘if in fact she was asked (forced?) [to do this]’. The phrase *mulier sive vir consentientes in hoc peccato* in the *P. Martenianum* may also be a vague indication that sometimes the woman or man involved did not agree to the abortion.375 The *P. Vallicellianum I (E.15)* contains a remarkable emendation of the Ancyrian canon on abortion that is more direct: *si quis cum mulieribus fornicaverit et occiderit quod nascetur aut aborsum facere festinat*.376 Instead of punishing women who fornicate and commit abortion, this variant punishes men who wish to conceal the evidence of their illicit sexual activities. This article implies that on occasion men *did* pressure women to abort. The *P. Sangallense tripartitum* and the *P. Capitula Iudiciorum* add the

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371 Cf. above.
372 We find the word *sponte* in *P. Additivum 2.11, P. Mistum 14.1, P. Ps. Theodori 6.4, P. Fulberti 9, P. Parisiense Compositum 57, P. Parisiense Compositum 63, P. Vaticanum 6, Regino of Prüm 2.65, Ivo of Chartres, Decretum 15.188. The word *voluntarie* is used in *P. Remense 8.20, Excarpsus Cummeani 6.21, P. Sangallense tripartitum 1.12, P. Capitula Iudiciorum 3.1c, P. Ps. Theodori 6.5, P. Mistum 39.2, P. Merseburgense A 38, Halitgar - P. Ps. Romanum 6.46, Regino of Prüm 1.304.29, 2.5.5, Burchard of Worms 1.94.5, 19.5.159, 17.60, P. Vaticanum 12, P. Vallicellianum C.6 37, etc.
373 Regino of Prüm 2.5.5, Burchard of Worms 1.94.5, cf. table 3.3a.
374 Burchard of Worms 19.5.159.
375 *P. Martenianum 45.*
376 *P. Vallicellianum I (MS E.15)* 24.
short clause *si nolens*, ‘if she did not wish [it]’, to the Frankish article on abortion.\(^{377}\) Here, too, the words *si nolens* clearly indicate that not all abortions were voluntary or intentional. Most of the articles punish the pregnant woman, even if the abortion was *nolens*, that is, not at her request.

On the whole, the evidence for involuntary abortion is meager. The prominent role afforded to women in the penitential articles on abortion seems to prove that in most cases we are dealing with voluntary and deliberate abortion by and at the request of the pregnant woman.

**Violent abortion**

Violent abortion as in the biblical law on abortion in Exodus 21: 22-23 is not mentioned in the early medieval penitentials.\(^{378}\) Perhaps *si nolens* or one of the other references to involuntary abortion discussed above indirectly also refers to violent abortion, but if they do, the reference is vague. At the end of the penitential tradition in the late eleventh century, at the beginning of the scholastic age, when patristic sources seem to be becoming more important than day-to-day penitential practice, we find excerpts from Augustine’s *Quaestiones Exodi* and his *Quaestiones veteris et novi testamenti* in two of Ivo of Chartres’s works.\(^{379}\) The first text explains the difference between early term and late term abortion, and why only late term abortion is punished as murder, and the second text discusses violent abortion, formation, and when abortion should be punished as murder. Both texts became important condemnations of *intentional* abortion in canon law.

The early medieval penitentials have articles on incest and rape, but not on violent abortion. However, the penitentials contain enough articles on violence and homicide to be able to set a penance for violence towards a pregnant woman. It is strange that, although women are punished for aborting their fetus, there are no articles that demand a penance for causing a woman to miscarry, nor is any kind of retribution demanded for the child in the womb that was killed as a result of violence. Violent abortion is punished in secular Old Germanic law.\(^{380}\) It does demand compensation for the fetal life that was lost. Perhaps the subject was not dealt with in the penitentials, because it was covered by penitential articles on injuries and violence, and by the injury tariffs in secular law. However, there seems to be a strange double standard regarding the status of the fetus. The early medieval penitentials do not seem to demand penance or retribution from the aggressor in situations of violent abortion, but when the fetus is deliberately aborted by the mother, she must be punished for homicide of her child.\(^{381}\)

**Accomplices and instructors**

Early medieval penitentials punish the person who commits abortion. Only a few penitentials mention accomplices, helpers and teachers, but nevertheless ‘aiding and abetting’ and giving instruction are usually considered just as serious sins as committing abortion - occasionally the penance is harsher. The oldest penitential article on abortion, one of the Irish articles on *maleficia*, is an article on ‘aiding and abetting’ that punishes the accomplice for endangering another person’s life by supplying or administering poisonous abortifacient concoctions. The

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\(^{377}\) *P. Sangallense tripartitum* 1.28 and *P. Capitula Iudiciorum* 3.1c.

\(^{378}\) They are dealt with by many of the Church Fathers and by other more theoretical writers, such as Hrabanus Maurus.


\(^{380}\) Cf. chapter 1, passim.

\(^{381}\) An exception is Old Frisian law, but these laws are centuries younger and, moreover, we find Church law and secular law in the same manuscripts.
Irish article on abortifacient *maleficia* or *veneficia* was incorporated into the Frankish penitentials. These articles punish the accomplice or supplier, not the pregnant woman. We find the Iro-Frankish article on abortifacients in most of the early medieval penitentials. There are a number of variant versions of the Iro-Frankish articles. In the oldest article in the *P. Vinniani* the helper is a woman. The author of the *P. Columbani* apparently knew that there were also male abortionists and changed the subject to the indefinite, genderless pronoun *quisque*, ‘anyone’. This is the version we find in the Frankish penitentials and most of the younger penitentials. Some variant versions leave out the *maleficia*, and thus also the possible reference to magic and superstition. The *P. Merseburgense A* (*V*23, *W*10) has a simplified version with *maleficia* that reintroduces the subject *mulier*. The association of women with *maleficia* and *veneficia* seems to be persistent.

Manuscript *V*23 of the *P. Merseburgense A* expanded the Frankish article on abortion with an explanation of the word ‘voluntary’ that contains a tiny reference to the accomplices who help a woman commit voluntary abortion: *sibi aut alii fecerit*, ‘she did [it] to herself or to another [woman]’. If we read this article closely, we see that the sentence subject is *mulier* and that the helper must also be a woman. The *bibisti* article in the *P. Mixtum* and Regino’s *Sendbuch* adds a small, gender neutral clause on accomplices: *aut alio donasti*, ‘or did you give [*ullum maleficium*] to another person’. Although the article refers to contraceptives, it is likely that abortifacients were also included.

Regino’s version of the *bibisti* article adds a clause on teaching others about *maleficia*: *aut alium hoc facere docuisti*, ‘or did you teach others how to do (or make) this’. The penitentials of Regino of Prüm and Burchard of Worms have a number of articles in common that punish accomplices and instructors. One of these articles - probably devised by Regino - punishes *aliquis vel aliqua*, ‘anyone, male or female’, *qui alterius partum excusserit*, ‘who expels another person’s fetus’. Here, too, supplying an abortifacient is apparently not restricted to women. The article on ‘lust and hate’ in Regino and Burchard’s penitentials punishes *aliquis*, ‘anyone’, man or woman, as a murderer who for reasons of ‘lust or hate’ tries to prevent a man or woman from having children. Burchard punishes the suppliers of contraceptives and abortifacients (*donasti*, ‘did you give’), and those who instruct others (*ostendisti alicui*, ‘did you show anyone’) in article 19.5.161. In his version of the Anycrion canon we find a short interpolation that gives those who teach (*docuisti*) others how to contracept or abort the same ten years’ penance: *Si fecisti, aut consensisti, aut docuisti, decem annos per legitimas ferias poenitere debes*. Burchard’s opening sentence *Fecisti quod quaedam mulieres facere solent* indicates that the accomplices, too, were women. ‘Aiding and abetting’ and teaching women about abortion is mentioned in four of Burchard’s penitential articles, which is a lot, if we take into consideration that eleven articles in Burchard’s *Decretum* discuss abortion.

A few penitentials mention the professional accomplice, the *(h)erbarius* or *(h)erbaria*, ‘herbalist’ or ‘person skilled in plants’, that is, the supplier or retailer whose business it is to sell herbs and herbal concoctions, probably one of the possible suppliers of abortifacients and contraceptives. In the *P. Merseburgense B* and the *P.
Hubertense we find the *herbarius* in a list of magicians, sorcerers or charlatans, that is, people who are involved with the supernatural, and should not be consulted: *(h)arioli, ‘soothsayers, sortilegi, ‘fortune-tellers’, and precantatores, ‘enchanters’.*

The articles in the *P. Oxoniense II* and the *P. Ps. Romanum* are more specific. They call the *herbarius or herbaria* an *interfector infantium*, ‘a murderer of children’, because he or she supplies the poisonous herbs and herbal concoctions that can be used for abortion and infanticide.392

### P. Oxoniense II
43. De erbario. Siue uir siue mulier, interfectoris infantium, in extremis, quando fuerit iam ab ipsos mortem, si qui egerit penitentiam cum luctum et fetum et gemitum, si cessauerit, suscipiat eum et ieiunet ebdomada L.393

### P. Ps. Romanum
97. Herbarius vir aut mulier interfectores infantum in extremum vitae cum venerint, si quaesierint poenitentiam cum luctu ac fletu lacrymarum. Si cessaverit, suscipere eum, jejunet hebdomadas XXX.394

*Interfectoris infantium* probably refers to contraception, abortion and infanticide, that is, killing children that could have been conceived, children that were conceived, and children already born - as in Caesarius of Arles’s (469–543) condemnation of the work of female herbalists (*illam erbariam*) in sermon 52.5.

### Caesarius Arelatensis, Sermones
52.5. Sed dicunt sibi: Illum ariolum vel divinum, illum sortilegum, illam erbariam consulamus; vestimentum infirmi sacrificemus, cingulum qui in speci vel mensurari debeat; offeramus a liquos caracteres, aliquid praecantationes adpendamus ad collum. Inter haec una diaboli persuasio est: aut per avorsum occidere crudeliter filios, aut per caracteres sanare crudelius.395

If we look at the early medieval penitentials, we see that the Iro-Frankish articles punish the suppliers of abortifacient *maleficia*, and that only a few of the other penitentials explicitly mention accomplices, suppliers and teachers. The accomplice can be a man, but the conviction that women help other women with abortion is strong.

### Methods of abortion, *maleficia* and superstition

The penitentials do not provide much information about the methods used for abortion. The method mentioned most is *maleficium* or *veneficium*, words with the double meaning ‘poison’ - ‘magic’. None of the penitentials is very specific, and only a few tell us that *maleficia* are usually herbal concoctions. What follows is a summary of the various methods of abortion mentioned in the penitentials.

The Iro-Frankish articles on abortion are part of a group of articles on homicide and *maleficia*.396 These articles emphasize the potentially lethal properties of *maleficia*, and indicate that some *maleficia* can be used as abortifa-

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392 Female *herbaria* are also mentioned in Alamannic laws, cf. chapter 1.

393 Kottje 1994, p. 198.

394 Schmitz 1898 [1958], p. 300; *P. Ps. Romanum* 97. ‘A quack (*herbarius*), man or woman, slayers of children, when they come to the end of life, if they seek penance with mourning and the shedding of tears, - if he desists, receive him: he shall fast for thirty weeks’ (McNeill & Gamer 1938, p. 313). The translation ‘quack’ should be emended to ‘herbalist’.

395 Sermon 52.5, CLCLT: CL. 1008, SL. 1013, sermo : 52, cap. : 5, linea : 11-15 (Cetedoc accessed December 28, 2009); ‘However, they say to themselves: Let us consult that soothsayer, seer, oracle or witch. Let us sacrifice a garment of the sick person, a girdle that can be seen and measured. Let us offer some magic letters, let us hang some charms on his neck. In all this the Devil has one aim: either cruelly to kill children by abortion, or to heal them still more cruelly with charms’ (Mueller, vol. 1 (1956 [1977]), pp. 262-262; Flint 1990, p. 150). Note that Mary Magdeleine Mueller and Valerie Flint both translate *herbaria* as ‘witch’, thus focussing on the meaning ‘magic’ and not on the ‘knowledge of herbs’. On Caesarius, see also: chapter 2.

396 Cf. *P. Vinniani* 18-20, *P. Columbani* B.6 [a-c], *P. Burgundense* 9-10 [a-b].
cients. Most penitentials contain a version of this set of articles. Some penitentia
ls try to explain what a maleficium is. In the Bedae-Egberti and related penitentials we find a definition of maleficium in an article that forbids
women to use their maleficia as a means of murder: arte maleficia sua, id est per pocium aut per artem aliqua, ‘her maleficia, that is, with a potion or by any other means’. Variant versions in the younger Spanish
penitentials prove that the article also condemns abortifacient and contraceptive maleficia. The definition of
the word maleficium is vague, but it tells us that maleficia can be administered in a drink. Per artem aliquam indi-
cates that there are also other kinds of maleficia besides potions.

The P. Mixtum and Regino of Prüm’s penitential have a question on maleficia and contraception that provides
more information: Bibisti ullam maleficium, id est herbas vel alias causas, ut non potuisse infantes habere (…) aut hominem per (mortiferam) pocionem occidere voluisti (…), ‘Did you drink any maleficiun, that is, herbs or other substances, so that you cannot have children (…), or did you want to kill a person with a (deadly) potion’. The bibisti article tells us that maleficia are potions that consist of a deadly herbal concoction or other substances. Burchard also links maleficia and herbs, when he adds women’s methods of abortion and contraception in his version of the Ancyrarian canon: suis maleficiis et suis herbis, ‘with her maleficia and her herbs’ (or: ‘with her maleficia, that is, her herbs’). The P. Arundel associates maleficia with herbal potions: aliquo maleficio vel herbarum potione excutiunt, ‘they expel [their partus] with any kind of maleficiun or herbal potion’. There are also penitential articles that do not mention maleficia as a means of fertility management - perhaps some even avoid the word maleficium, because of its association with magic. The P. Laurentianum (c. 1200) has si herbam bibit aut aliam causam, ‘if she drinks a herb or some other substance’ in a passage on contraception. The P. Hubertense only tells us that contraceptives and abortifacients are potions (si quis potiones accepserit), and the P. Vallicellianan C.6. mentions a ‘herbal drink’ (herbas biberit) that works as a contraceptive. As we saw above, the word herbaria (or herbarius), also suggests that the main ingredients of the anti-
fertility ‘medicines’ herbalists supplied were herbs. The heading Halitgar devised for the Ancyrarian canon - de his qui partus suos ex fornicatione diversis modis interimunt, ‘about those who destroy their partus in different ways’ - vaguely indicates that there are many different ways to commit abortion and infanticide. The methods of contraception and abortion Regino of Prüm and Burchard of Worms mention in their article on ‘lust and hate’ are equally vague: homini aut mulieri aliquid fecerit vel ad potandum dederit, ‘did something to a man or wo-
man, or gave [something] to drink’.

Maleficia and veneficia are often associated with magic and superstition in medieval texts. The association of
maleficia with magic is understandable, because the effects of the poisons, herbs and medicines called maleficia were probably unpredictable, and only the initiated knew how they worked or were supposed to work. The reci-

397 P. Ps. Egberti 7.7. Cf. also: P. Additivum 7.9, P. Mixtum 15.3, P. Ps. Theodori 6.6 and Excarspus Cummeani 15.3, but not the P. Ps. Bedae.
398 Cf. above.
399 P. Mixtum 30, Regino of Prüm 1.304.28. Regino’s version has per mortiferam potionem, ‘with a deadly potion’.
400 Burchard of Worms, Decretum 19.5.159.
403 P. Hubertense 56; P. Vallicellianan C.6. 68, cf. chapter 3, note 294.
404 Halitgar 4.3, cf. table 3.2b.
405 Regino of Prüm 2.88, Burchard of Worms, Decretum 17.57. Cf. table 3.3c.
pes were probably a secret, only known to a small select group, and passed on by word of mouth. Reason enough for the unininitiated to associate maleficia with magic.

Women are frequently associated with maleficia, magic and superstitious practices in the penitentials. For instance, Theodore of Canterbury forbids women to perform diabolical incantations or divinations (U.1.15.4).\(^{406}\) P. Mixtum 15.3 incorporated Theodore’s article on divination and incantation into the Bedae-Egberti article on ‘women, maleficia and murder’ discussed above.\(^{407}\) The Iudicia Theodori contains many articles that associate women with magic and superstition, and many of these articles were copied into the younger penitentials.\(^{408}\) Burchard of Worms seems to be preoccupied with the sins of women, and many of his fecisti questions deal with women and superstition.\(^{409}\)

Herbs are often regarded as magical and linked to superstitious practices, and there are a number of penitential articles that forbid herb gathering, using herbal amulets, and chanting (magical) incantations or charms over herbs.\(^{410}\) Some of these articles link women to herbal magic and superstition, as in article 19.5.194 in

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\(^{406}\) Iudicia Theodori U.1.15.4. Si mulier incantationes vel divinationes diabolicas fecerit I annum vel III XI. mas vel XL iuxta qualitatem culpae peniteat. (Finsterwalder 1929, p. 311); ‘U.1.15.2. If a woman performs diabolical incantations or divinations, she shall do penance for one or the three forty-day periods, or forty days, according to the nature of the offense’ (McNeill & Gamer 1938, p. 198). Other versions of this article are gender neutral, see, for instance, Regino of Prüm’s version in article 2.356 (Hartmann 2004, pp. 412-413).

\(^{407}\) On P. Mixtum 15.3, see above.

\(^{408}\) For instance, article U.1.15.2 forbids a woman to put her feverish daughter on a roof or in an oven: Iudicia Theodori U.1.15.2. Mulier si qua pont filiam suam supra tectum vel in fornacem pro sanitate febris VII annos peniteat (Finsterwalder 1929, p. 310); ‘Iudicia Theodori U.1.15.2. If any woman puts her daughter upon a roof or into an oven for the cure of a fever, she shall do penance for seven years’ (McNeill & Gamer 1938, p. 198). We find this article in many other penitentials.

\(^{409}\) For instance, articles 19.5.180 and 19.5.185 in Burchard’s Decretum punish women for conducting pagan (?) burial rituals for their dead babies:


\(^{410}\) On herbal amulets and incantations, see, for instance: P. Additivum [10.4] (…) filasteria etiam diabolica vel herbas vel sucinos suis vel sibi impedire (…) (Albers 1901, p. 411); ‘(…) [by] attaching diabolical amulets whether herbs or of amber to their relatives or to themselves (…)’ (McNeill & Gamer 1938, p. 229; slightly emended translation), or: P. Merseburgense A 36. Si quis legatura (ligaturas) fecerit in erbas vel qualibet ingenio malo incantabatur et super christianum ligabatur, (…) (Kottje 1994, p. 136); ‘Whoever made amulets with herbs or in any way chanted with malignant, and attached them to a Christian (…)’. See also: Burchard of Worms 19.5.63 and 19.5.92 for two more articles on incantations, amulets, and herbal magic (PL 140: 0961A-B and 0964B-C; McNeill & Gamer 1938, pp. 330, 334).

For a condemnation of herb gathering and incantations, see, for instance: Burchard of Worms 19.5.65. Collegistis herbas medicinales, cum alis incantationibus cum symbolo et Dominica oratione, id est cum Credo in Deum et Pater noster cantando. Si aliter fecisti, decem dies in pane et aqua poeniteas (PL 140: 0961B-C); ‘Hast thou collected medicinal herbs with evil incantations, not with the creed and the Lord’s Prayer, that is, with the singing of the ‘credo in Deum’ and the paternoster? If thou hast done it otherwise ‘than with the Christian formulae mentioned] thou shalt do penance for ten days on bread and water’ (McNeill & Gamer 1938, pp. 330-331). See also: Elsekakers 1997, passim.
Burchard’s *Decretum*. 411 The connection between women, superstition and herbal magic is probably the reason that herbarii and herbariae were associated with magic.

Although women are associated with superstition, magic and herbal lore, and we sometimes find articles on abortion near articles on magic and superstition, not one of the articles on abortion actually implies that the abortion was caused by mysterious or magical forces. Most of the penitential articles on abortion are straightforward condemnations of abortion. Their main link with magic is the word *maleficium* (or *veneficium*), which to my mind means ‘dangerous, deadly poisonous drug’ in this context, as in secular law. 412 Usually the translators of law texts, sermons, council canons and penitentials put more ‘magic’, especially black magic into the texts than there is, and there is also a tendency to call women involved in supplying *maleficia* ‘witches’. 413 In secular law abortifacients and aphrodisiacs are often called *maleficia*, and the reason Roman and Old Germanic laws on poisoning prohibit *maleficia* is because these potentially lethal drugs can endanger another person’s life. 414 There is no direct reason to assume that the abortifacient *maleficia* mentioned in the early medieval penitentials were associated with (black) magic.

Whether abortifacients are called *maleficia* or not, the penitential articles indicate that the potions, *maleficia* and ‘other means’ used for contraception, abortion and infanticide are usually lethal drugs that contain herbs and/or other substances. What exactly is meant by *alias causas, per artem aliquam, diversis modis or aliquid fecerit*, or the other kinds of *maleficia* is not explained. It is, however, clear that women must have been knowledgeable about these things, especially medicinal herbs and plants, and that the main method of abortion was the abortifacient potion.

411 Burchard of Worms 19.5.194. *Fecisti quod quaedam mulieres facere solent? Dum pluviam non habent, et ea indigent, tunc plures puellas congregant, et unam parvulam virginem quasi ducem sibi praeponunt, et eamdem denudant, et extra villam ubi herbam jusquantum inventunt, quae Teutonice belisa vocatur, sic nudatam deducunt, et eamdem herbam, eamdem virginem sic nudam minimo digito dextrae manus eruere faciunt, et radicitus erutam cum ligamine aliquo, ad minimum digitum dextri pedis ligare faciunt. Et singulae puellae singulas virgas in manibus habentes, supradictam virginem herbam post se trahentem in flumen proximum introducunt, et cum eisdem virgis virginem flumine aspergent, et sic suis incantationibus pluviam se habere sperant. Et post eandem virginem sic nudam transpositis et mutatis in modum cancri vestigii, a flumine ad villam, inter manus poenitere (PL 140: 0976C-D); ‘Burchard of Worms 19.5.194. Hast thou done what some women are wont to do? When they have no rain and need it, then they assemble a number of girls, and they put forward one little maiden as a leader, and strip her, and bring her thus stripped outside the village, where they find the herb hebbane which is called in German ‘belisa’; and they make this nude maiden dig up the plant with the little finger of her right hand, and when it is dug up they make her tie it with a string to the little toe of her right foot. Then while each girl holds a twig in her hand, they bring the aforesaid maiden, dragging the plant behind her, to a nearby river and with these twigs sprinkle her with the water and thus they hope that by their charms they shall have rain. Afterwards they bring back the nude maiden from the river to the village between their hands, her footsteps being turned about and changed into the manner of a crab. If thou hast done or consented to this, thou shouldst do penance for twenty days on bread and water’ (McNeill & Gamer 1938, p. 341).

412 *Maleficium* and *veneficium* have the double meaning ‘poison’ - ‘magic’. Throughout this text I have chosen to stress the fact that these words also - sometimes mainly or only - have the meaning ‘poison’. This was done for two reasons. First because the substances named and used were often known to be dangerous poisons, and secondly because in the past many scholars have completely ignored the meaning ‘poison’ and translated both words as ‘magic’. See the note below.

413 Translators often choose a meaning that has to do with ‘magic’ for words like *maleficium, veneficium and herbarius, -a*, focussing on the ‘magical’ component of these words. Unwittingly these words are demonized, but at the same time women are also demonized. The bias some translators burden us with makes it difficult to interpret the early medieval texts they translated. A few examples: the translation ‘quack’ for *herbarius* and ‘witch’ for *herbaria* instead of ‘herbalist’, and ‘Zaubertrank’ for *maleficium*, or ‘Zauberkunst’ for *venenum*, ‘poison’. See also: Muzzarelli 1908, McNeill & Gamer 1938, Hartmann 2004, Meens 1994 (translations of penitentials), Drew 1949, 1973, 1991, Rivers 1977, 1986, Amundsen 1971, Niederhellmann 1983 (translators of Old Germanic law, cf. chapter 1), Mueller 1956-1973 (early medieval sermons) and Flint 1990 (early medieval magic).

414 The *Breviarium Alarici* gives a summary of the *Lex Cornelia de Sacratiis et Veneficiis* in BA PS 5.25.1 (PS 5.23.1); abortifacients and love potions are forbidden in BA PS 5.25.8 (PS 5.23.14), cf. Maria Bianchi Fossati Vanzetti (ed.), *Pauli Sententiae; testo e interpretatio*, Padova: Cedam, 1995, p. 134, 136 and chapter 1. Salic law on abortion and poisoning is discussed in Elsakkers 2003b, passim. [article IV]
Actors

In the sections above we saw that women are the main actors in the early medieval penitential articles on abortion. *Mulier* or a pronominal reference to *mulier* is the subject in most of the articles on abortion, and the questions on abortion in the interrogatories address women personally by means of phrases such as: *conceptum tuum* or *partum tuum*. The word *tuus* seems to suggest that it is the mother’s prerogative to decide over the life and death of her child. Men can be involved in the abortion procedure. They are sometimes explicitly, sometimes implicitly mentioned in connection with aiding and abetting, supplying abortifacients, giving their consent or agreeing to an abortion, sexual promiscuity, using contraceptive procedures, or pressuring or forcing a woman to have an abortion. Men occasionally participate, but, although their role is not entirely negligible, abortion is not really their business. Burchard, for instance, knows that the suppliers of abortifacients can be men or women, but his vehement accusation of women in article 19.5.159 indicates that he knew that abortion was women’s business: *Fecisti quod quaedam mulieres facere solent, quae, dum fornicantur et partus suos necare volunt, agunt ut utero conceptus excutiant suis maleficiis et suis herbis (...)*. Abortion is about women, and done by women to women, and the penitential authors are well aware of this.

Women’s business

It is evident from the material presented in this chapter that the early medieval penitentials have a lot to say about abortion. The four words for ‘fetus’ discussed above do not always make it easy to interpret the penitential articles on fertility management, because three of the four words have a second meaning (‘neo-nate’) that makes it hard to decide what meaning is meant. Almost every penitential contains at least one article on abortion, usually more, and they are often in separate sections on women’s sins. Some condemn abortion whatever the stage of fetal development, others consider late term abortion a more serious sin. Abortion is usually punished as murder, and this means that the fetus was considered to be a ‘person’ *in statu nascendi*. Some penitentials contain so many articles on abortion that the choice of the penance is apparently left up to the confessor. If the amount of articles has anything to do with the occurrence of a sin - and I think it does - we can safely conclude that early medieval women committed (or tried to commit) abortion. Another indication that abortion happened is the compassion the penitentials have for poor women, the *pauperculae*. This compassion also shows us that the sins they describe reflect real-life situations, and that the penitentials must have been part of practical Christianity.

The main method of abortion in the penitentials is the poisonous herbal potion or *maleficium*. When reading between the lines, we see that women were knowledgeable about herbs and herbal concoctions, and that women probably knew that taking abortifacient drugs was dangerous. This in turn means that women who resorted to abortion must have been extremely desperate. The penitentials also show us that women were the ones who were punished for abortion, even if the abortion was done to conceal an illicit sexual relationship. The fact that women were punished and men are only occasionally mentioned in connection with abortion means that women were held responsible, but also that women were responsible. This not only shifts the blame to women, it also indicates that men were not in control, and that they may not have known that their wife, lover or one night stand had committed abortion. This at the same time implies that the penitentials are concerned with intentional or voluntary abortion, a fact the penitentials corroborate when they use words like *voluntarie* and *sponte*. All this evidence plus the fact that the *mulier* is the main actor in by far the majority of the articles on abortion, both when deciding to abort and when assisting others, points in one direction. Abortion seems to be women’s busi-
ness. Yes, there is evidence that men on occasion forced women to abort, but the bulk of the evidence points to women as the decision makers - even though the evidence is indirect and we never hear women’s voices directly in the penitentials.