

Accidental Parricide during the *Ius Novissimum* How Canonical Commentary Mitigated Rigorous Law

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INTRODUCTION

King Solomon's greatest display of wisdom was occasioned by a mother who inadvertently lay on her baby one night and killed it. The distraught woman attempted to substitute her dead child for another's living newborn, and the ensuing dispute between the two women came before the great monarch. Ingeniously, Solomon discovered the truth of the matter and returned the child to its rightful mother (see 1 Kings 3,16-28). Scripture does not tell us what became of the first woman, whose grief can hardly be imagined, but for a long time under later canon law, she might well have faced criminal prosecution, not for the kidnapping of another's child, but for the negligent homicide of her own.

It is not illegal under the 1983 Code of Canon Law to sleep with a baby, nor was it illegal to do so under the 1917 Code¹. But for several centuries preceding the promulgation of the Pio-Benedictine Code – that is, during those great periods in canonical history known as the *Ius Novum* and the *Ius Novissimum*² – a three year penalty (including one year on bread and water) was applicable against parents who slept with an infant where the death of the child occurred. Pope Lucius III (reigned 1181-1185), in a letter to the archbishop of Paris, had directed a three-year penalty for

1. See *Codex Iuris Canonici*, auctoritate Ioannis Pauli PP. II promulgatus, in *Acta Apostolicae Sedis* 75/2 (1983) 1-320, as corrected and revised, and *Codex Iuris Canonici*, Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, in *Acta Apostolicae Sedis* 9/2 (1917) 3-521. There is no prohibition against parent-child bed-sharing in the Eastern Code of Canon Law.

2. The period *Ius Novum* opened with the publication of Gratian's *Concordia discordantium canonum* (c. 1140) and ran to the Council Trent (1545-1564). That council in turn inaugurated the period *Ius Novissimum* which continued until the advent of the Pio-Benedictine Code (1917). See generally Pietro GASPARRI, *Prefatio* [to the 1917 Code] available in all monographic printings of the Pio-Benedictine Code, or Raoul NAZ, *Droit canonique*, in *Dictionnaire de Droit Canonique* 4 (1949) coll. 1446-1495, esp. coll. 1467-1478 (*Sources historiques and Histoire de cette science*). Notwithstanding a few observations on *Ius Novum* canonistics, I focus here on the *Ius Novissimum* because it was during that period that the canonical issues raised by parent-child bed-sharing reached their most articulate forms and were finally resolved.

those found guilty of this form of parricide³, and fifty years later Lucius' decretal, known by its incipit *De infantibus*, was given universal force as a result of St. Raymond Peñafort's decision to include it in the *Quinque Libri Decretalium* (1234) of Pope Gregory IX. Furthermore, many decretalist commentators on *De infantibus* believed that it was consistent with, if not supplementary to, a still earlier provision against parent-child bed-sharing issued by Pope Stephen V in the ninth century, and Lucius himself apparently believed that support for his sanction could be found as far back as the fourth century at the Council of Ancyra. Canonical authors subsequent to *De infantibus* regarded the Luco-Gregorian sanction as an active part of canonical jurisprudence until at least the 18th century and liturgical law, of all things, expressly required pastors to discourage parent-child bed-sharing until the second half of the 20th century. All of these points will be explored in this study.

At the same time, however, I will suggest that the canonical criminalization of parent-child bed-sharing which was in place not later than the late 12th century was heavy-handed. Drafted in what today would be called "strict-liability" language⁴, *De infantibus* suffered all the deficiencies of such statutes, chiefly, that it disregarded the wide range of factors that could impact on parental culpability for such deaths⁵. Thus, I will argue, it fell to canonists to develop the tempering interpretations that strict liability laws usually need if justice is to be served in cases which, by their very nature, would already be fraught with emotion. Canon lawyers accomplished this mitigation, as we shall see, chiefly by reasserting the

3. While etymologically "parricide" suggests a child killing a parent, in canon law parricide encompassed any killings in the direct line of consanguinity (whether ascending or descending) and, often enough, killings within closely related degrees in collateral lines as well. See, e.g., Francis FIRTH (ed.), *Robert of Flamborough, Liber Poenitentialis: A Critical Edition with Introduction and Notes*, Toronto, Pontifical Institute of Medieval Studies, 1971, at iii. *De Parricidio*, p. 217, where one reads: "Parricidium dicitur non solummodo patris vel matris interfectio, sed et fratris et sororis et filii et filiae, avi, patruli, avunculi, matererae et amitae et reliquorum qui valde affines parentes sunt" (my emphasis); or Lucius FERRARIS, *Poena*, in *Prompta Bibliotheca canonica, juridica, moralis, theologica* [7 vols.], Typis Abbatiae Montis Casini, 1844-1847 [rev. ed.], vol. 4, p. 175, nn. 128-135, esp. nn. 130-131.

4. See generally *Black's Law Dictionary*, St. Paul, MN, West, 1979, p. 1275.

5. "For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*'" (Wayne LAFAYE - Austin SCOTT, *Handbook on Criminal Law*, St. Paul, MN, West, 1972, p. 222, in turn quoting Herbert PACKER's famous article, *Mens Rea and the Supreme Court*, in *Supreme Court Review* 107 [1962], p. 107).

requirement of personal culpability prior to one's being penalized. But before examining those papal laws and the canonical commentaries thereon, an overview of the circumstances associated with the death of children sleeping with parents would be helpful for understanding some of the factors a law in this area would have to accommodate⁶.

First, the very notion of "sleeping with a baby" is not as easily described in law as one might at first imagine. For example, parents, especially mothers, might not have "put the baby to bed" with them, but instead, could simply have fallen asleep with a baby in a bed or on a couch or in recliner while nursing the child or while resting from the extensive demands of newborn care. Thus, although one's falling asleep while, say, in control of an automobile, might not engender the sympathy of jury hearing a consequent manslaughter case, a young mother falling asleep as she cradled her newborn might evoke such compassion, complicating the enforcement of a law that would usually be invoked only against shattered parents in the first place, all of which raises the obvious question, *cui bono*? At the same time, other factors might have contributed to an infant's death while sleeping with parents (e.g., parental intoxication at the time of the child's death) yet such factors would already seem to fall within the purview of a negligent homicide prosecution without having to criminalize parent-child bed-sharing itself. Additionally, the improper sleep-positioning of a baby or unsuitable clothing or blankets might have played a crucial role in a death that happened to occur while a baby was sleeping with a parent, and still other variables (e.g., unavailability of separate beds, lack of adequate heating or cooling in the home, tobacco smoke, and so on) when considered in court, could result in unreliable standards being asserted for imposing criminal responsibility. Finally, the risks associated with infants sleeping *apart* from parents are also real – though these factors are also difficult to measure in particular cases – suggesting, at a minimum, that the possible good of saving at least some lives by banning bed-sharing might be diminished by other lives being lost though legally imposing separated sleeping arrangements. In short, there is more to these sad cases than meets the eye and, recalling Holmes' dictum that "hard cases make bad law"⁷, the attempt to anticipate the ambiguous fact patterns associated with these deaths can make for tortuous legislation.

Nevertheless, two (and possibly three) popes did attempt to impose legal consequences for sleeping with children, at least where the death of a child

6. For a recent study of the wide variety of factors impacting sleeping-infant death statistics, see James KEMP, *et al.*, *Unsafe Sleep Practices and an Analysis of Bedsharing Among Infants Dying Suddenly and Unexpectedly: Results of a Four-Year, Population-Based, Death-Scene Investigation Study of Sudden Infant Death Syndrome and Related Deaths*, in *Pediatrics* 106/3 (September 2000), on-line version: <http://pediatrics.aappublications.org/cgi/content/full/106/3/e41>.

7. *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904), HOLMES, J., dissenting.

apparently resulted⁸, and these canonical sanctions remained on the books for several centuries. It is to these norms we may now turn.

CONSULUISTI: PROCEDURAL PRECURSOR TO DE INFANTIBUS

Although our focus in this article is the Luco-Gregorian norm *De infantibus*, we need to begin this study somewhat earlier in order to understand the canonical context in which *De infantibus* arose. Well before *De infantibus* in the 12th century, some kind of negative canonical consequences were apparently in place against parents whose children died while sleeping with them. We know this from a ninth century reference, albeit a procedural and not a substantive one, that was included in Gratian's *Concordia discordantium canonum* (c. 1140). Over time, this procedural norm was parlayed by commentators into a substantive provision against parent-child bed-sharing with which child death was associated.

In Part II, Case II of his *Concordia*, Gratian explores various questions concerning the kinds of evidence that could be admitted in canonical trials. Question V of Case II looks at problems raised by the lack of witnesses in trials and, in part III of that fifth question, the Bolognese master asks about the admissibility of pagan purification rites as a source of canonical evidence in cases where witnesses are lacking. In canon XX of Question V Gratian offers the following excerpt from a letter of Pope Stephen V.

You have consulted about [cases involving] infants who, sleeping in one bed with the parents, are found dead, [and asked] whether hot iron or boiling water or some other technique can be used to evaluate the claim of the parents not to have been the ones crushing [the child]. For parents should be warned and discouraged from putting tender children in the same bed with them lest by some negligence [a child] be suffocated or crushed and [the parents] be found guilty of a homicide⁹.

8. One may observe that, under modern penal systems, while a penalty for the violation of a law might be increased if harm actually resulted from the violation of the law, one does not normally see activity punishable *only* if harm arises therefrom. For example, drunk driving is a crime that is punishable regardless of whether any harm was actually caused by one's drunk driving. If harm was caused, then the penalty for the violation might be higher, but modern penal law takes as sufficient for response the fact that a prohibited action was committed, and does not as a matter of principle wait until harm arises from some action to exercise its coercive force.

9. "Consuluit de infantibus, qui in uno lecto cum parentibus dormientes mortui reperiuntur, utrum ferro cadente, aut aqua feruente, seu alio quolibet examine parentes se purificare debeant eos non obpressisse. Monendi namque sunt et protestandi parentes, ne tam tenellos secum in uno collecent lecto, ne negligentia qualibet proueniente suffocentur uel opprimantur, unde ipsi homicidii rei inueniantur" (Aemilius FRIEDBERG [ed.], *Corpus Iuris Canonici editio Lipsiensis secunda post Aemilii Ludouici Richteri: Pars Prior. Decretum Magistri Gratiani*, Graz, Akademische Druck u. Verlagsanstalt, 1959, pp. 462-463).

Happily, Gratian's *dictum post* rejects the idea that such superstitious methods may be applied in gathering canonical evidence. But what is of interest to us is the implication that parents could face prosecution for the death of a child whose demise occurred while the child was sleeping with them. The particular evidentiary problem associated with such cases which Gratian discussed (i.e., the lack of unbiased witnesses in a trial) would obviously require resolution only if these kinds of negligent homicide cases were being prosecuted in the first place. Still, *Consuluisti* does not itself seem to penalize parent-child bed-sharing. One might conclude, then, either that a substantive penalty against parent-child bed-sharing was already in place and for that reason was not repeated in *Consuluisti*, or that Pope Stephen was merely taking the occasion to admonish parents against a practice he considered excessively dangerous, though the terms of *Consuluisti* themselves do not seem sufficient to criminalize parent-child bed-sharing¹⁰. Consequently, one cannot tell with certainty whether the question later posed by the archbishop of Paris to Pope Lucius III fell within specific legislation with which that pope was already familiar (in virtue of its inclusion in Gratian), or whether the archbishop's question simply arose during a prosecution for negligent homicide whose fact pattern happened to be that of parent-child bed-sharing. In any event, and despite its apparent limitation to procedural issues, *Consuluisti* was, as we shall see below, picked up by several later commentators and cited as the basis for directly penalizing parent-child bed-sharing. For now, though, it suffices to observe that, under canon law as early as the 9th century, it was possible for criminal liability to result from a child's death if it occurred in the context of parent-child bed-sharing. But we need still to examine whether such liability could be traced back even earlier (to as early as the fourth century). To do that, we will first move forward in time and examine *De infantibus* itself.

10. In fact, the earliest commentators on Gratian saw in *Consuluisti* nothing more than an interesting if, to our eyes, a rather easily resolved evidentiary question. See, e.g., J. VON SCHULTE (ed.), *Die Summa des Paucapalea über das Decretum Gratiani*, Giessen, Emil Roth, 1890, p. 60; *Id.*, *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, Giessen, Emil Roth, 1891, pp. 169-172; F. THANER (ed.), *Die Summa Magistri Rolandi nachmals Papstes Alexander III*, Innsbruck, Wagner'Schen, 1874, p. 17; H. SINGER (ed.), *Rufinus von Bologna (Magister Rufinus) Summa Decretorum*, Paderborn, Ferdinand Schöningh, 1963, pp. 248-251; and Terence McLAUGHLIN (ed.), *The Summa Parisiensis on the Decretum Gratiani*, Toronto, Pontifical Institute of Mediaeval Studies, 1952, pp. 106-107. The ordinary gloss on *Consuluisti* confirms that the question before Gratian was evidentiary in nature and briefly alludes to the substantive question of parental-child bed-sharing: "But parents should be warned against having children with them in bed, though if [a child] is crushed under occult circumstances, let [the parents] not be punished unless they are convicted or they have freely confessed; whereupon, let them be punished, for they are homicides". Literally: "... sed monēdi sunt parētes vt filios suos fecum nō habeāt in lecto: f3 cū occultū fit eos op[p]ffiffe puniri non debēt: nisi de hoc cōvincan[t] vel fuerint spōte cōfeffi [et] tūc punian[t]: qr sunt homicide ..." (*[D]ecretorum opus [Gratiani]*, Franci Fradin, Aymon de Porta, 1519, fo. cxxxvi [reverso]). This gloss clearly begs the larger question, however, as to how much evidence of parental culpability *is* needed for a conviction in these cases.

DE INFANTIBUS:
12th CENTURY ENACTMENT OF SUBSTANTIVE LAW

Perhaps Parisian ecclesiastical officials in the 12th century felt ill at ease treating as a substantive law against parent-child bed-sharing what seemed to be only a fact pattern mentioned in a 9th century procedural law query. In any event, an inquiry from the archbishop of Paris about a similar case resulted in a papal response that, within a few decades, became part of universal law. Pope Lucius III wrote to the archbishop as follows:

Regarding those children who are found dead with the father and mother, if it cannot be determined whether they were crushed by the father or the mother, or suffocated, or died on their own, [that ambiguity] must not be considered sufficient to clear the parents [of liability], nor should they go without a penalty. For some acknowledgment of piety must be made even where an accident, and not a choice, was the cause of death. Thus, where it is not obvious who caused the death, they should know that they have seriously offended *as is proven by the Council of Ancyra*. Therefore, they must be sentenced to three years of penance, one year of which they will undergo on bread and water¹¹.

By its own terms, *De infantibus* is clearly a substantive, not a procedural, legal norm. In it, Pope Lucius III directs that, where a child's death occurred in the presence of sleeping parents, the parents necessarily bear some kind of responsibility for it. The pope, moreover, asserts this liability even in the face of his explicit recognition that other factors might have led to the (inculpable) death of the child. In other words, Pope Lucius has enacted here a "strict-liability" offense, that is, as we have seen, a law that imposes criminal liability to an action (here, sleeping with a child, albeit one who is later found dead) without any showing of culpability or intent to do wrong on the part of the accused. We continue our examination of *De infantibus* by looking at, first, the plausibility of Pope Lucius' appeal to the Council of Ancyra for support for his law and second, Pope Gregory's (or St. Raymond's, as the case may be) reticence about retaining the conciliar reference.

Of the two ancient councils convened in Ancyra, Pope Lucius undoubtedly had in mind the first held in 314, not simply because the second (358)

11. "Liber V, Titulus X, *De his qui filios occiderunt*, cap. III. De infantibus autem, qui mortui reperiuntur cum patre et matre, et non apparet, utrum a patre, vel a matre oppressus sit ipse, vel suffocatus, vel propria morte defunctus, non debent inde securi esse parentes, nec etiam sine poena; sed tamen consideratio debet esse pietatis, ubi non voluntas, sed eventus mortis causa fuerit. Si autem eos non latet, ipsos interfectores esse, scire debent, se graviter deliquisse, *quod Ancyritano concilio probatur*. Quidam autem poenitentiam trium annorum iudicant esse debere, quorum unum peragant in pane et aqua" (Aemilius FRIEDBERG [ed.], *Corpus Iuris Canonici editio Lipsiensis secunda post Aemilii Ludouci Richteri: Pars Secunda. Decretalium Collectiones, Decretalium D. Gregorii Papae IX Compliatio*, Leipzig, Officina Bernhadi Tauchnitz, 1981, p. 793 – Friedberg's italics, discussed below).

was colored by semi-Arianism¹², but because only the first contained any canons related to homicide. Three canons of that earlier council are potentially relevant to our study.

Canon 21 – Women who prostitute themselves, and who kill the children thus begotten, or who try to destroy them when in their wombs, are by ancient law excommunicated to the end of the lives. We, however, have softened their punishment, and condemn them to the various appointed degrees of penance for ten years.

Canon 22 – As to willful murders, they must be *substrati*, and allowed to receive communion only at the end of their life.

Canon 23 – As to unpremeditated murder, the earlier ordinance allowed communion (to the homicide) at the end of a seven years' penance; the second required only five years¹³.

Canons 21 and 22 are minimally relevant to our inquiry, as both deal with deliberate homicides, and no one suggests that deaths occurring under parent-child bed-sharing conditions are intentional. But is Ancyra's Canon 23, the only candidate left as the pope's referent, really a foundation for Lucius' later law? Consider: the accidental crushing of a baby in one's sleep is not the first example of "unpremeditated murder" that comes to mind upon hearing the phrase used in Canon 23. The notion of "unpremeditated murder" rings more of killings committed in a rage or in drunkenness or through the careless performance of inherently dangerous activities (e.g., hunting), and not by going to sleep with a baby safely at one's side, only to wake up the next morning and finding the little body lifeless¹⁴. Thus, the connection between, on the one hand, two ancient canons dealing with deliberate homicides and one on general unpremeditated homicides and, on the other, Pope Lucius' later imposition of a sanction against parents who *might* have inadvertently killed small children by sleeping with them, is thin. But then, perhaps we are not the first to question the relevance of Ancyra's norms to Pope Lucius' law. Pope Gregory IX (or at

12. For the acts of the semi-Arian council at Ancyra, see Joannes MANSI (ed.), *Sacrorum Conciliorum Nova et Amplissima Collectio* [5 vols.], Veneti, 1901, vol. 3, pp. 266-290.

13. English translation from Charles HEFELE (ed.), *A History of the Christian Councils*, Edinburgh, T&T Clark, 1872, pp. 220-221. For Greek text, see MANSI, *Sacrorum* (n. 12), vol. 2, pp. 522-540, esp. pp. 533-534.

14. Bernardus Papiensis, commenting in the late 12th century on the general law of homicide in canon law, offered some examples of unintended homicides for which a degree of culpability might attach: "... casu, ut dum alii operi instas, casu aliquis superveniens occiditur, ut dum arbor, quam praecidis, ruit super aliquem et eum occidit, vel dum iacis lapidem ad avem et interficis hominem" (E. LASPEYERS [ed.], *Bernardi Papiensis Faventini Episcopi Summa Decretalium*, Graz, Akademische Druck u. Verlagsanstalt, 1956 [reprint of 1860 edition], p. 221). See also Laura DIETZ, *Homicide*, in *American Jurisprudence 2nd 40A*, 1999, pp. 429 et seq., esp. §106, where hunting mishaps are offered as a prime example of accidents that might be prosecuted as a species of murder.

least St. Raymond who prepared the Decretals for Gregory's promulgation) might have also been unconvinced of the connection.

Aemilius Friedberg, building on the efforts of earlier scholars, caused to be printed in italics those passages that, though found in the original documents, St. Raymond omitted in compiling the *Decretals*¹⁵. Friedberg's setting of the words "*as is proven by the Council of Ancrya*" in italics indicates that this phrase was excised by St. Raymond before submitting the work as a whole to Pope Gregory. Now, even a cursory glance at the *partes decisae* restored by Friedberg is enough to show that many of the passages excised by Raymond were removed either for the sake of brevity or because they dealt with topics unrelated to the specific purposes to which St. Raymond wanted to apply the document. But in some cases, I suggest, something more significant than merely saving space might have occasioned the omission. In light of the questions we raised about the relevance of Ancrya's provisions on infanticide and general negligent homicide to the accidental death of babies sleeping with parents, it seems possible that Raymond omitted from Pope Gregory's *Decretals* Pope Lucius' invocation of Ancrya because he, Raymond, or Gregory, harbored misgivings about the council's relevance to the decretal and wanted to avoid making what would become universal law in this area seem overly dependent on ancient norms of but slight connection.

In any event, to the degree that Canon 23 of the Council of Ancrya penalizing unintentional homicides might have been Pope Lucius' primary referent in *De infantibus*, the medieval papal sanction against parents suspected in the death of a child mitigated the ancient council's rigor in this area. Where the ancient assembly called for five or seven years' penance, the pope's letter imposes only three, though one of these was to be spent on bread and water. Thus, the first indication that a child's death occurring at the sides of sleeping parents ought not to be treated as harshly as other forms of negligent killings is implied within the text of *De infantibus* itself¹⁶. But Lucius' approach, even though it represented

15. See R. NAZ, *Partes Decisae*, in *Dictionnaire de Droit Canonique* 4 (1949) col. 1248, or more generally P. TORQUEBIAU, *Corpus Iuris Canonici ... II. Les Décrets de Grégoire IX*, in *Dictionnaire de Droit Canonique* 4 (1949) coll. 627-632, esp. p. 632.

16. One would be remiss not to mention, in the context of mitigating ancient penalties for parricide, that *any* penalty the Church might have imposed here would have been a dramatic relaxation of the ancient Roman sanction against parricide, a sanction that today can only be described as bizarre. Consider: "[A parricide] is not put to the sword, nor to the fire, nor to any other custom-hallowed death, but is sewn into a [leather] sack with a dog, a cock, a snake, and a monkey; and, sealed in with those bestial inmates, he is thrown, as the nature of the place allows, into a nearby sea or river. In this way while he still lives he loses the use of every element; the sky is taken from him before he dies, and the earth is denied him when he is dead" (Peter BIRKS – Grant MCLEOD [trans.], *Justinian's Institutes*, Latin text of Paul KRUEGER, Ithaca, NY, Cornell University, 1987, vol. 4.18, p. 145; described also in FERRARIS, *Poena* [n. 3], n. 128, and in Andreae VALLENSIS, *Paratitla sive summaria et methodica explicatio Decretalium D. Gregorii Papae IX: Opus novum, Scholae*

a mitigation of ancient law, was itself still fundamentally unnuanced, asserting, as it did, penal liability not only where there was no evidence of evil intention on the part of an alleged malefactor, but even where it was expressly acknowledged that factors other than parental ones could have resulted in the death of the child! And it was Lucius' law, absent its recital of Ancyran authority, that was promulgated for the universal Church by Pope Gregory IX in 1234. Because no further universal enactments (i.e., *in Sexto, Clementinae*, and the *Extravagantes*) were made in this area, it is to subsequent canonical commentary that one must turn to see how *De infantibus*, which held for strict liability in the case of a child's death during parent-child bed-sharing, came to be interpreted more benignly. I suggest that, in a way plainly not envisioned according to the terms of *De infantibus*, canonists did this by reintroducing the requirement of personal culpability prior to the application of penalties.

BRIEF REMARKS ON *IUS NOVUM* COMMENTARY
ON *DE INFANTIBUS*

Although the focus of this paper is on *Ius Novissimum* canonistics, it should be noted that at least some *Ius Novum* canonists seemed to indicate some discomfort with the strict liability language of *De infantibus*. Multiple approaches seem reflected within, e.g., the *glossa ordinaria* on *De infantibus*¹⁷. One approach held for no penalty in cases where it could not be shown that a child found dead had been killed by the father or mother, but recommended nevertheless that a penance be undertaken lest insufficient care has been taken by the parents¹⁸. But the gloss went on to state that if parents

had freely performed the action, then a most grave penance should be imposed on them, one more strict than would be applied in [other] homicide cases, for it seems that they have offended more in that they killed their own child¹⁹.

ac Foro, & Decretis Concilii Tridenti, Lovanii, apud viduam Bernardini Masii, 1667 [rev. ed.], p. 517).

17. The standard commentary on the Decretals of Gregory, known as the *Glossa Ordinaria*, was composed by Bernard of Parma († 1266) and revised by Johannes Andreas (c. 1270-1348). See generally P. OURLIAC, *Bernard de Parme ou de Botone*, in *Dictionnaire de Droit Canonique* 2 (1937) coll. 781-782. All quotations from the *Glossa Ordinaria* used here are taken from the *Decretales d[omi]ni pape Gregorij noni acurata diligentia nouissime*, Impressas Uenetijs, Sūma cū diligētia i[n] edib[us] Luce Antonij de Giōta florentini, 1514, folio 464.

18. "Si non [con]stat eos interfectos a patre vel matre: sed euētus fuit cā mortis non debet eis penitentia imponi. quia non peccauerūt ...".

19. "Si vero f̄ponte hoc fecerūt: tunc grauiſſima p̄n̄a debet eis imponi: aliquātuluꝝ maior [quam pro] alio homicidio: q̄r magis peccare vidētur [pro]p̄riū filiūꝝ occidendo".

After recalling the Roman law treatment of parricides, the gloss continued:

If this was not an accident, but rather came from grave fault, then penance is in order ... but if light fault preceded [the case], then there can be imposed a penance of three years as it states here²⁰.

The gloss concluded:

But if no fault or negligence at law preceded, then they should not be punished ... but a penance should be imposed for a precaution, as it is said, according to the uncertainty of their duplicity and considering all the circumstances²¹.

Throughout these remarks, a rubric for deciding precisely the crucial question of fault was not provided.

Gottofredo of Trani, writing about the same time that the *glossa ordinaria* was being laid down, seemed at first to favor a careful inquiry into the actual degree of parental fault in these tragic cases, for he wrote: "But when a child is found crushed in the bed of the parents it must be determined whether this occurred as result of parental care or negligence"²². Moreover, if it was determined that parental negligence lay behind the death, then a penance suited to the circumstances should be imposed²³. But Gottofredo added that "in case of doubt [about fault] it should be presumed that death occurred as a result of parental fault"²⁴. In effect, this seemed to reassert the strict-liability tenor of *De infantibus*, and only allowed proof of parental care to be plead as an affirmative defense.

Finally, the great lay canonist Lancelotti (1522-1590), writing in the final years of the *Ius Novum*, would have retained the substance of *De infantibus* in his proposed codification of decretal law and, while treating the death of children sleeping in parental beds as accidental, he would

20. "Si non casu sed culpa graui precedēte: tunc penitētia ... sed tamē ad cautelꝫ tutius est [quod] inde penitentiam agant. qꝫ forfitā minorem diligentiam illis adhibuerunt".

21. "Si aut nulla [pre]cessit culpa vel negligentia de iure in nullo sunt puniendi ... sed ad cautelam vt dictum est debet imponi propter ambiguum duplicitatis confideratis omnibus circumstantiis".

22. "Cum vero in lectis parentum filij inveniunt[ur] oppressi distinguitur ut[rum] parentibus pro curātibꝫ aut negligētibus hoc euenerit" (Gottofredo DA TRANO, *Summa perutilis et valde necessaria domini Goffredi de Trano super titulis decretalium nouissime cum Repertorio et numeris principalium et emergentium questionum* [1245], Lugduni, in edibus Magistri Ioannis moytin alias decambray, 1519; facsimile reprint, Berlin, Scientia Verlag, 1992, at fo. 210, Aalen, p. 421). For information about Gottofredo, see R. NAZ, *Geoffroyde Trani ou de Trano*, in *Dictionnaire de Droit Canonique* 5 (1953) col. 952.

23. *Ibid.*

24. "In dubio aut [prae]fumit[ur] qd' ex incuria hoc p[ro]ueuerit" (*ibid.*).

nevertheless have imposed strict liability on parents²⁵. Lest Lancelotti's position be seen, though, as a plain retreat from the expressions of concern some earlier *Ius Novum* authors had about strict liability for parents in these cases, Lancelotti would have the consequences for such parents seen as penitential in nature and would attune them to the particular circumstances of the case (as opposed to the period of penance being uniformly fixed at three years).

THE MITIGATION OF *DE INFANTIBUS*
UNDER *IUS NOVISSIMUM* COMMENTARY

Canon lawyers writing during the *Ius Novissimum* differed on how to interpret *De infantibus*, but more than that, they split over whether *De infantibus* was, some three to four centuries after its promulgation by Pope Gregory IX, still good law. The prominence of Engel, Pirhing, Reiffenstuel, and Schmalzgrueber in *Ius Novissimum* canonistics being well established²⁶, we may turn directly to them to illustrate the different approaches taken among authors.

The Benedictine canonist Louis Engel († 1674), writing a generation before the *Ius Novissimum* giants Reiffenstuel and Schmalzgrueber, observed that, while cases of death occurring during parent-child bed-sharing were not unusual, the rigor of the Luco-Gregorian norm against such conduct was being mitigated in practice. His words, first published in the mid-1670s, were to be quoted often:

4. It not rarely happens that mothers place small children in bed with them and while sleeping crush them. Given the frequency of this offense (*peccati*), in some dioceses this kind of crushing of children is [a case] reserved to the bishop. Now the penalty [established in *De infantibus*] reflects the rigor of the law and consists of three years' penance, the first of which must be spent on bread and water ... but in practice the penalty is individually determined and it is typical that a lighter penalty is imposed in accord with fault. Indeed, it sometimes happens that a crushing entirely lacks fault

25. See [Giovanni Paulo] LANCELOTTI, *De Homicidio in Institutiones Iuris Canonici quibus ius pontificum singulari methodo libris quatuor comprehenditur*, Lyon, Gulielmum Rovillium, 1579, pp. 193b-194b "Alia ratio": "*Pœnitentia certorum annorum est iniungenda parentibus opprimentibus filios. Alia ratio est eorum qui proprios filios oppreffiffe reperiuntur. Cū enim hos grauitur deliquiffe non fit dubiū certorū annorū erit illis iniungēda pœnitētia*". See also NAZ, *Dictionnaire de Droit Canonique* 6 (1957) col. 333.

26. See generally G. LEPOINTE, *Engel ou Engl (Hanns-Ludwig)*, in *Dictionnaire de Droit Canonique* 5 (1953) coll. 342-343; R. NAZ, *Pirhing (Enric)*, in *Dictionnaire de Droit Canonique* 6 (1957) col. 1504; ID., *Reiffenstuel (Anaclet)*, in *Dictionnaire de Droit Canonique* 7 (1965) coll. 547-548; and ID., *Schmalzgrueber (François)*, in *Dictionnaire de Droit Canonique* 7 (1965) col. 788.

... as can occur when the bed was sufficiently large, and the child was inconsolable, or because there was no other way to protect [the baby] from the cold²⁷.

Thus, according to Engel, *De infantibus* should be tempered in practice and, despite the canon's plain wording suggesting strict liability, some showing of personal parental culpability should be made before any penalty is imposed. Engel set forth three examples of factors that parents could plead as "affirmative defenses" to escape or at least mitigate liability for the death of a child who was sleeping with them, namely, that the bed was sufficiently large to accommodate such persons without undue risk, that an inconsolable child needed this close form of parental presence, or that environmental conditions made bed-sharing a necessity in a particular case. It seems hardly challenging for an advocate to cast his client's decision to share a bed with a child under one of these three headings as they stand, and there is no suggestion by Engel that this listing is taxative.

The Jesuit Enricus Pirhing (1606-1679) also publishing in the early 1670s struck a similarly nuanced tone, but made explicit reference to *Consuluisti* as he did so.

8. Finally, in *De infantibus*, the same Pope Lucius III replied concerning [cases of] children who are found lying dead in bed with the father and mother, and it is not apparent whether they were crushed by the father or mother, or suffocated, or died of natural causes; for all this [uncertainty], the parents must not feel secure nor go without some penalty. But if it is not hidden from them that that they are killers, they should know that they have sinned gravely, and indeed some think that a penance of three years should be imposed on them one of which is passed on bread and water. Similarly in *Consuluisti* it is set out that parents should be warned and discouraged from placing small children in bed with them lest by some supervening negligence [the children] be suffocated or crushed, whereupon [the parents] would be found guilty of homicide. But henceforth if this kind of sleeping arrangement

27. "4. Praeterea etiam istud non raro accidit, ut matres parvulos infantes secum in lectis suis ponant, et inter dormiendum opprimant. Quare ob frequentiam hujus peccati in quibusdam Dioecesibus oppressio infantum est casus reservatus Episcopo. Ejus poena de rigore Juris est poenitentia trium annorum: quorum primus debet agi in pane et aqua ... sed de consuetudine poena arbitraria, et levior infligi solet pro qualitate culpae. Immo aliquando talem oppressionem prorsus carere culpa refert Barbosa ... si silicet lectus sit satis amplius, et infans implacabilis, vel quia aliter a frigore defendi non possit" (Ludovico ENGEL, *Collegium Universi Juris Canonici* [1671-1674], Bettinelli, ⁷1733, p. 419. Citations omitted, spelling modernized). Engel seems, by the way, to be the only commentator who specified that the year on bread and water must be undertaken at the outset of the penance. Arnoldus Corvinus à Beldern († c. 1608) also held for some showing of culpability before imposing a penalty, but he did not take time to set out examples of exculpatory factors. See Arnoldus CORVINUS, *De parricidio*, in *Jus Canonicum per aphorismos strictim explicatum* [1643], Elzevirium, 1651, p. 307: "siquidem cupla, vel negligentia eorum praecesserit; si non, nec sunt puniendi".

between parent and child lacks fault, the penalty also should cease, and for that matter where it falls into desuetude, the penalty to be enjoined should be left to the discretion of the Priest²⁸.

Notice that Pirhing's language about *Consuluisti* implies that Pope Stephen's 9th century norm was admonitory in nature, and that the logical question as to how an advisory norm had been parlayed into a substantive provision was mooted in this case by recognizing that some degree of fault needed to be shown before imposing any penalty.

Unfortunately, the *Synopsis Pirhingiana*, compiled by an anonymous Jesuit about 20 years after Pirhing's death in order to make the latter's work more accessible, did not do justice to the nuance that Pirhing himself showed in admitting that mitigating factors should play a part in determining the sanction for accidental parricide. The *Synopsis* simply states:

The pope says in *De infantibus* that parents do not avoid a penance if children in their care and lying in the same bed with them are found dead, even if it is unknown whether they died a natural death or were crushed by the parents, since in *Consuluisti*, it is prohibited for parents to place delicate babies in the same bed with themselves²⁹.

Indeed, not only are Pirhing's factors mitigating the penalty not referenced here, but the tenor of the passage places a heavier burden on *Consuluisti* than I think it can bear, for, as we have seen, *Consuluisti* itself relied on earlier but unidentified norms against bed-sharing and the cases that arose under them to make points about evidentiary and procedural matters. Reiffenstuel, who, as we shall see, was able to cite to Pirhing's original work in support of his arguments for mitigating penalties for a

28. "VIII. Denique in c. *De infantibus* ... rescribit idem Papa Lucius III. de infantibus, qui mortui reperiuntur, cum patre, et matre jacentes in lecto, nec apparet, utrum a patre vel matre obpressi sint, vel suffocati vel propria morte naturali defuncti, quod non debent parentes esse omnino securi, nec sine poena aliqua: in quare tamen considerari debet, utrum non voluntas, sed eventus mortis causa fuerit. Si vero eos non latet, se interfectores esse, scire debent, se graviter deliquisse: quidam autem censent, poenitentiam trium annorum ipsis imponendam esse, quorum unus fit in pane, et aqua. Similiter in c. *Consuluisti* ... dicitur, monendi sunt, et protestandi parentes, ne tenellos infantes secum in lecto collocent, ne qualibet negligentia proveniente suffocentur, vel opprimantur, unde ipsi homicidii rei inveniuntur. Porro si cubatio hujusmodi parentum cum infante in lecto culpa careat, poena quoque triennalis cessabit, quamvis illa jam in desuetudinem abierit, et poenitentia injungenda arbitrio discreti Sacerdotis relinquatur" (Enricus PIRHING, *Jus Canonicum nova methodo explicatum* [4 vols.], Joannis Caspari Bencard, 1674-1678, vol. 4, p. 163. Citations omitted, spelling modernized).

29. "In c. *De infantibus* ... dicit pontifex, quod parentes non debeant esse sine poenitentia, si penes illos in eodem lecto iacentes infantes mortui reperiantur, neque tamen sciatur, an morte naturali defuncti fuerint, vel a parentibus obpressi, cum in can. *Consuluisti* ... prohibitum sit parentibus, tenellos infantes in eodem secum lecto collocare" (ANON., *Synopsis Pirhingiana seu SS. Canonum Doctrina ex fusiorebus quinque libris Henrici Pirhing*, Typis S. Congregationis de Propaganda Fide, 1849, p. 670. Citations omitted).

child's death resulting from parent-child bed-sharing, could not have so cited the *Synopsis* of the same work.

Both Pirhing and Engel wrote from Germany about the same time, so it is interesting that one finds cases of death during parent-child bed-sharing to be "frequent" while the other believes the law (or at least its strict-liability character) had fallen, or was falling, into desuetude. In any case, as is shown above, Pirhing accepted the same mitigating factors as outlined by Engel and certainly urged that, should such tragic cases come before ecclesiastical officials, the penalty, if any, should be thoughtfully imposed in accord with the circumstances, and not merely administered uncritically. We may now look at Reiffenstuel's remarks.

Anacletus Reiffenstuel (1641-1703), a German Capuchin writing about 1700, accepts that parent-child bed-sharing is prohibited by canon law and holds that personal culpability should be weighed before imposing any penalty, but surprisingly he cites primarily to *Consuluisti* which, as we have seen above, does not itself establish such a prohibition. Reiffenstuel writes:

11. *Ordinarily it is prohibited that parents sleep in the same bed as small children.* – It should be noted that it is prohibited by canon law that parents sleep in the same bed with small children, as set forth in *Consuluisti* ... wherein: Parents should be warned and discouraged from putting tender children in the same bed with them lest by some negligence [a child] be suffocated or crushed and [the parents] be found guilty of a homicide. But if with parents acting against this prohibition an infant is found dead, and it is not known [whether there was fault] they must undergo three years [of penance] with one full year being under bread and water, even if they did not intend the death of the child or foresee it, for they exposed the child to danger. See Vallensis, [*hoc titulo*] n. 2 ... But this form of the penance is not in use any longer, and the penalty to be imposed is left to the discretion of the judge, ... Indeed, such a sleeping arrangement might lack all fault ... this can happen if, e.g., the bed was large, or the child was inconsolable, or there was no way to protect the baby from the cold, or the mother was accustomed to keeping her own place and position. See Pirhing, [*hoc titulo*] n. VIII.

12. *Penalty for those acting contrarily.* – But if a parent is shown, or confesses himself, to be guilty of this sort of homicide by culpably keeping the above described [practice of] sleeping in the same bed, he [or she] should certainly be punished according to the sacred canon as set out in *Consuluisti*. But [regarding] those who are shown to be, or who confess themselves, guilty in this regard, your moderation should so punish them because if one who destroys what is conceived in the womb by abortion is a homicide, all the more so the one who would deprive a child of at least one day cannot excuse himself of homicide³⁰.

30. "11. *Prohibitum est ordinarie, ne parentes in eodem lectotenentes tenellum infantem, dormiant.* – Illud etiam ad propositum notandum, quod a jure canonico prohibeatur, ne parentes tenendo secum in eodem lecto tenellos infantes dormiant, can. *Consuluisti*: Monendi atque protestandi parentes, ne tam tenellos secum in illo lecto collocent, ne negligentia

Reiffenstuel offers in the above passage a basis for parental liability in cases that goes beyond the strict liability position of the law, namely, that parent-child bed-sharing should be discouraged because it is an inherently dangerous activity³¹. This claim can hardly be doubted. Of course, that an action is inherently dangerous is insufficient basis for outlawing it, lest an innumerable number of actions, including most domestic activities, be outlawed as well. The question is not whether an action is dangerous, but rather whether the dangers can be mitigated or responsibly tolerated for the sake of greater goods. This is what various commentators' inclusion of factors such as, say, an infant's protection from the cold or comfort for a crying baby accomplishes in the canonical penal context.

Finally, the Austrian Jesuit Francis Schmalzgrueber (1663-1735), who vies only with Reiffenstuel and Pirhing as the outstanding decretalist of the *Ius Novissimum*, wrote as follows:

Parents who place fragile children in their bed, and crush them, even if they did not intend or foresee the crushing, are adjudged by Lucius III (in the final caput of this title) to three years of penance one of those on bread and water because they took them into the bed and thus exposed [the children] to the danger of crushing. This penalty is still administered today, and in several German dioceses the case is reserved, while in others it is assessed by decision of the judge³².

qualibet proveniente suffocentur aut opprimantur, unde ipsi homicidii rei inveniantur. Quod si contra hanc prohibitionem agentibus parentibus infans mortuus reperiatur, et nesciatur, per tres annos, et quidem uno integro in pane et aqua transigere debent ... quod licet mortem infantis non intenderint, nec praeviderint, mortis tamen periculo eundem exposuerint, Valensis, h.t. num. 2... Verum hanc quoque poenitentiam non amplius in usu esse, et poenam arbitrio iudicis injugendam esse... Immo so talis cubatio omni culpa caret ... contingere potest, si v. g. lectus est latus, et puer implacabilis, qui aliter a frigore defendi no possit, et mulier in somno suum retinere soleat situm ac locum, omnis poena cessabit. Pirhing, h.t. num. VIII. 12. *Poena contrarium facientium*. – E contra vero si parens aliquis hujusmodi homicidii ex memorata simultanea cubatione in lecto culpabiliter reus probetur, aut talem se fateatur, jubente sacro canone utique puniri debet: arg. cit can. *Consuluisti* ... Hi autem, qui probantur, vel confitentur talis reatus se noxios, tua eos castiget moderatio quia si ille, qui conceptum in utero per abortum deleverit, homicidia est; quanto magis, qui unius saltem diei puerulum peremerit, homicidium se esse excusare nequibit” (Most citations omitted. Anacleto REIFFENSTUEL, *Jus Canonicum Universum complectens Tractatum de Regulis Juris* [6 vols.], rev. by BOLARD – PELLETIER, Paris, Apud Ludovicum Vivès, 1864-1869, vol. 6, pp. 334-335.

31. Reiffenstuel's citation to Vallensis was sound. The Louvain professor of canon law, writing a century before Reiffenstuel, had justified the imposition of a penalty on parricides in terms that sounded like negligence: "... siquidem peccasse in eo intelliguntur, quod infantem in communem lectum recipiendo, periculo oppressionis vel suffocationis exposuerint" (VALLENSIS, *Paratitla* [n. 16], p. 517).

32. "Parentes, qui tenellos adhuc infantes, in suo lecto collocatos, opprimunt, etsiamsi oppressionem illorum nec intenderint, nec praeviderint, quia tamen eos in lectum communem recipiendo, periculo oppressionis exposuerunt, a Lucio III *cap. fin. hoc tit.* iubentur tres annos agree in poenitentia, et horum unum in pane, et aqua, quae poena hodie sublata est, testibus ... Ejus loco in plerisque dioecibus Germaniae est casus reservatus, in aliis pro arbitrio iudicis puniendus ..." (Francisco SCHMALZGRUEBER, *Jus Ecclesiasticum Universum* [12 vols.], Typographia Rev. Cam. Apostolicae, 1844 [rev. ed.], vol. 10, p. 380).

In writing thus, Schmalzgrueber, like Engel a generation earlier, acknowledged that Luco-Gregorian enactment of the 13th century is still good law in the early 18th century. Moreover, he states that "this case is reserved in many German dioceses". One does not, I suggest, bother to reserve a case that is not, at least occasionally, being raised in actual pastoral and legal practice. And Schmalzgrueber states that such cases are reserved in "many" German dioceses. Moreover, it seems that enough cases under *De infantibus* had arisen to enable Schmalzgrueber to identify two (possibly distinct) manners of treating them, one, by reservation of the penalty, the second by leaving assessment of the penalty to the judge³³. In either case, though, canonical commentary turns the rigor of the law. Schmalzgrueber continues:

It still needs to be understood, however, that [for punishment to apply] the crushing was culpable, and that sometimes culpability is entirely lacking, as when the bed was quite large, or the child was implacable, or there was no other way to protect [the child] from the cold. In such cases the one crushing is liable to no penalty³⁴.

Thus, once again, according to Schmalzgrueber, an exercise in balancing the dangers of parent-child bed-sharing against the risks associated with *not* sharing a bed under certain circumstances is necessary lest the law impose a penalty where at least some degree of personal fault has not been demonstrated.

DESUETUDE OF *DE INFANTIBUS* UNDER THE CANON LAW OF THE 19th CENTURY

The question that persisted throughout the first two-thirds of the *Ius Novissimum* about the continued applicability of *De infantibus* seems to have been answered by the time non-codified canon law entered its final century: Pope Lucius' penalty, made applicable throughout the Catholic

33. It is not clear whether "reservation" in this case means "reservation to the diocesan bishop" or "reservation to ecclesiastical authority", nor whether the "judge" who is authorized in the alternative to hear such cases was ecclesiastical or civil. Adam Huth, who frequently draws on his Jesuit confrere Schmalzgrueber, is no guidance here, for he hardly mentions *De infantibus*. See Adamo HUTH, *Jus Canonicum ad Libros V Decretalium Gregorii IX Explicatum et per Quaestiones ac Responsum in methodum brevem et claram redactum*, Wolfe, 1732, vol. 5, p. 46, wherein "Cui paena subiaceant parentes, qui in eodem secum lecto proles collocant, easque sine dolo malo, non tamen sine culpa opprimunt". But however one wishes to resolve Schmalzgrueber's ambiguity, it seems clear that cases of accidental parricide were being treated in at least two different procedures.

34. "Quod intelligendum, si oppressio talis culposa sit; nam quandoque culpa prorsus caret, si videlicet lectus sit amplius, et infans alias implacabilis, vel aliter a frigore defendi nequeat; tunc ergo opprimens etiam nulli poenae erit obnoxius..." (SCHMALZGRUEBER, *Ius* [n. 32], vol. X, p. 380).

world by Pope Gregory IX, had fallen into desuetude, even though at least a few authors seemed to regret that fact³⁵.

Franciscus Santi († 1885), e.g., publishing originally in 1884, provides a good summation of the canonical attitude toward parent-child bed-sharing at the close of the *Ius Novissimum*. He writes:

In the final caput of this title there are treated parents who sleep in bed with delicate children without adequate safeguards [*repagulo*] or due diligence and later on that account are culpable for suffocating their children. Against [such parents] in [*De infantibus*] and in *Consuluisti* there is established a three year penance and similarly it is directed that the greatest care be applied [in such circumstances]. But this canonical penalty has been supplanted. The Church's precept to parents that they observe due diligence remains, in order that the danger of suffocation of their children be removed; see *Rit. Rom.* tit II, cp. 2, n. 32. But even though *von Olfers* in his *Pastoralmedizin* page 37, argues that the danger of crushing, at least by a mother, seems remote, that opinion seems to us unsound; for experience testifies that sometimes children are crushed by their own mothers, especially when they are exhausted from their daily labors. Therefore the admonition in the Roman Ritual seems most opportune. Moreover, among the cases reserved to the bishop in some dioceses there are listed those involving the culpable suffocation of children³⁶.

35. Note that whatever the state of *De infantibus* in the 19th century, it would have remained untouched by the great reorganization of sanctions effected by Pope Pius IX in 1869. The constitution *Apostolica Sedis moderationi* (12 October 1869, *Acta Sanctae Sedis* V [1869] 287-312, or P. GASPARRI – J. SERÉDI, *Codicis Iuris Canonici Fontes* [9 vols.], Typis Polyglottis Vaticanis, 1923-1949, vol. 3, pp. 24-31) impacted only *latae sententiae* censures, whereas the penalty imposed by *De infantibus* had long been recognized by commentators as being *ferendae sententiae*.

36. "In c. ult. h. t. agitur de parentibus qui cubantes in lecto cum teneris filiis absque repagulo et debita diligentia, et proinde ex facto culpabili eosdem filios suffocarunt. Contra istos in cit. c. ult. h. t. et in [*Consuluisti*] c. 20, C. 2, q. 5, statuitur triennalis poenitentia, et simul praecipitur ut maxime diligentia adhibeatur. Verum canonica poena in ejus locum suffecta est. Remanet praeceptum etiam Ecclesiasticum de observanda debita diligentia a parentibus, ut periculum suffocationis filiorum removeatur; cfr. *Rit. Rom.* Tit II, cp. 2, n. 32. Quodsi *von Olfers* in sua *Pastoralmedizin* pag. 37 opinatur periculum oppressionis saltem respectu matris longe abesse ob acutissimos erga infantem sensus, nobis non probatur; etenim teste experientia nonnunquam opprimuntur infantes ab ipsis matribus, praesertim talibus qui interdiu laboribus defatigabantur. Ideo monitio *Rit. Rom.* opportunissima manet. Immo inter casus Episcopo reservatos in nonnullis Dioecesibus accensentur etiam factum culpabile suffocationis filiorum" (Franciscus SANTI, *Praelectiones Juris Canonici quas juxta ordinem Decretalium Gregorii IX* [3 vols.], Regensburg, Pustet, 1905, vol. 3, pp. 115-116. The medical book cited by Santi is E.W.M. VON OLFERS, *Pastoralmedizin. Die Naturwissenschaft auf dem Gebiete der katholischen Moral und Pastoral: Ein Handbuch für den katholischen Clerus*, Freiburg, Herder, 1881).

See also Michael LEGA (1860-1935) discussing Liber V Title X of the *Decretals* and making express reference to *Consuluisti*, asserts desuetude expressly: "54. Ecclesia usque sollicita fuit ne christiani homines crimina perpetrantes graviora, praeter iacturam corporum, animarum etiam sibi pararent discrimen aeternam; quare in tit 10 cit. lib. V, agitur "De his qui filios occidunt" ubi parracidium severe compecitur. Tunc temporis in omnia crimina

Santi's reference to the *Roman Ritual* as a source that discouraged parent-child bed-sharing seems unexpected, but it is accurate. The pre-Conciliar norms on Baptism stated:

The Pastor shall take care to warn parents of infants against having them in bed with them or nursing little ones there, because of the danger of crushing; instead they should diligently care for the child and instruct him appropriately in Christian discipline³⁷.

Why bed-sharing should be singled out for special warning (amid the vast range of dangerous domestic activities to which parents expose children, e.g., bathing them, cooking around them, having stairs in the home or an unfenced yard, using electric appliances, playing tumbling games, and so on) is not explained, nor is a reason given for why the *Roman Ritual* offers parent-child bed-sharing as the paradigmatic opposite of "instructing a child appropriately in Christian discipline". Although this language may be found in versions of the *Roman Ritual* published as late as 1953, the 1964 *Collectio Rituum* approved for use specifically in the United States dropped most instructions to pastors that did not deal directly with the rites and ceremonies of baptism, including the direction to advise parents against parent-child bed-sharing³⁸.

To judge from Santi's remarks, by the late 19th century *De infantibus* and *Consuluisti* had, for all practical purposes, merged into a single norm³⁹,

Ecclesia exercebat censuram, ob competentiam qua pollet in eisdem coercendis, *ratione peccati*... Progressu aetatis in plura delicta animadversionem sibi vindicavit, veluti privativam, societatis civilis, et Ecclesia non refragata est, quum *indirecte* curaverit, per apposita media, respicientiam eorum qui poenas luunt civiles ... Ex primo capite inter Ecclesiasticos canones adhuc refertur praescriptio canonis *Consuluisti* ... Contra istos in [cap. *De infantibus*] statua est triennialis poenitentia, quae hodie in desuetudinem abiit; at iure merito in nonnullis dioecesibus ex statutis *synodalibus*, suffocatio puerorum est casus Episcopo reservatus, alicubi etiam cum censura" (Michael LEGA, *Praelectiones in Textum Iuris Canonici, De Delictis et Poenis* [2 vols.], Ex Typographia Pontificii in Instituto Pii X, 21910, vol. 2, pp. 78-79. Original emphasis, citations omitted). See also Philippus DE ANGELIS (1824-1881), *Praelectiones Iuris Canonici* [5 vols.], Ex Typographia della Pace, 1877-1891, vol. 4 (1880), pp. 220-221, suggesting that civil authorities were better equipped to investigate and prosecute these kinds of cases.

37. "Curet Parochus parentes infantis admoneri, ne in lecto secum ipsi, vel nutrices parvulum habeant, propter oppressionis periculum; sed eum diligenter custodiant, et opportune ad Christianam disciplinam instituant" (*Rituale Romanum Pauli V Pontificis Maximi jussu editum et a Benedicto XIV auctum et castigatum*, Pustet, 1898, tit. 2, cap. 2, n. 32). This language can be traced at least as far back as 1614. See Manlio SODI *et al.* (eds.), *Rituale Romanum editio princeps* [1614] (*Monumenta Liturgica Concilii Tridentini*, 5), Rome, Libreria Editrice Vaticana, 2004, p. 26, mss. p. 18, no. 95 [72].

38. See Walter SCHMITZ (ed.), *Collectio Rituum pro diocesibus civitatum foederatarum Americae Septentrionalis*, Milwaukee, WI, Bruce, 1964, esp. pp. 4-25. Parochial admonitions on parent-child bed-sharing are not included in the new Rite of Baptism.

39. This melding of *Consuluisti* and *De infantibus* remains surprising at several levels: the former is a procedural norm, the latter substantive; the former makes only a parenthetical reference to parent-child bed-sharing, the latter makes direct; the former speaks of

one that was presented as operating, moreover, only in the face of some showing of parental negligence for having sharing a bed with a small child. The canonical penalty enacted (whether in *De infantibus* and *Consulisti* no longer being important) had fallen into desuetude, and survived, if at all, in some local legislation (in mitigated form, of course). Parent-child bed-sharing had become a topic for admonition by pastors in a sacramental preparation context involving parents of small children. Curiously, the personal opinion of a canonist (amounting to little more than "accidents can happen") is weighed equally with the opinion of a physician (who holds that these kinds of accidents happen rarely).

The final word, although it might be more accurate to say the *lack* of a final word, we leave to the last great commentator on Pope Gregory's *Decretals*, the Jesuit Francis Xavier Wernz (1842-1914)⁴⁰ who, when treating of the crime of parricide, and despite making explicit reference to Book V, Title X of Gregory's *Decretals*, simply made no mention of the child homicide in connection with parental bed-sharing⁴¹.

The disappearance of *De infantibus* from canonistics is complete. With it went a problematic attempt to impose strict liability on parents performing a natural action with benign motives, but which action, admittedly, sometimes ended in tragedy. For the rest, the example of canonical scholars bringing their interpretative skills respectfully to bear on and effectively mitigate such a hard law seems worth recalling today.

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admonitions, the latter of penalties, and so on. Interestingly, GASPARRI – SERÉDI (*Fontes* [n. 35], pp. 23-91) cite *Consulisti* as a source for four Pio-Benedictine canons and they cite *De infantibus* as a source for four Pio-Benedictine canons, but in not one case did both *Consulisti* and *De infantibus* support the same canon.

40. R. NAZ, *Wernz (François-Xavier)*, in *Dictionnaire de Droit Canonique* 7 (1965) coll. 1635-1638.

41. See Francisco WERNZ, *Ius Decretalium ad Usus Praelectionum in Scholis Textus Canonici sive Iuris Decretalium* [6 vols.], Prati, ²1905-1913, vol. 6, pp. 366-367, nn. 367-368. See also, in script form, [Francisco WERNZ], *Ius Decretalium* [5 vols.], no publisher, 1907, vol. 5, pp. 531-533. A survey of other late *Ius Novissimum* authors, e.g., Laurentius (Holland), Tilloy (France), and Smith (United States), confirms the lack of interest in parent-child bed-sharing issues among late decretal canonists. See [Joseph] LAURENTIUS, *Institutiones Iuris Ecclesiastici quas in usum scholarum*, Herder, ²1908, p. 377, n. 453; Anselme TILLOY, *Traité Théorique et Pratique de Droit Canonique* [2 vols.], Savète, 1895, vol. 2, pp. 279-280, nn. 3034-3035; and Sebastian Bach SMITH, *Compendium Iuris Canonici ad usum cleri et seminariorum hujus regionis accomodatum*, New York, Benziger, ⁴1890, p. 390, n. 1192.