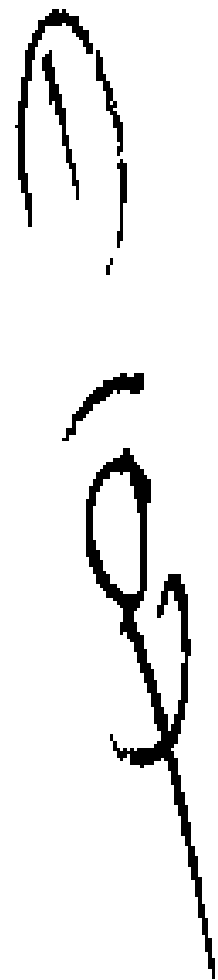

SOCIAL CONTROL OF SEX EXPRESSION

BY THE SAME AUTHOR

MARRIAGE LAWS AND DECISIONS
IN THE UNITED STATES

SOCIAL CONTROL
OF
SEX EXPRESSION

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BOOK III

THE DOCTRINE IN ANGLO-AMERICAN LAW

INTRODUCTION

This is a study of the control exercised by Anglo-American law over voluntary sex expression. Because the repressive rules as to voluntary sexual activity make articulate the affirmative law of marriage, it is in effect a study of the law of marriage, of the forces which have moulded that law.

An account of the English law of sexual morality is an account largely of the difficulties of formulating and, more, of administering the rules prohibiting extra-marital sex expression. The difficulties arise out of the fact that in voluntary sex expression there is, *ex hypothesi*, no conflict of individual interests. In social activity generally the community interferes to harmonize the desires of its members. To the extent that the interests of individuals conflict, show active divergences, it is to the interest of society to reconcile those interests. This is the function of most law.

In the case of the family that conflict may not be present. If two individuals desire the same end, society may yet oppose itself to their united interests, may oppose its will to theirs. The opposition is, in origin, a matter of social defence. The purpose of the family is the benefit of the young. To effect that purpose and guard the family, society has built a legal wall with a single gateway. The gateway is marriage. The gate itself is close-barred with formulas which assure that any who enter into the family relation will not pervert the function of the family institution. They will form no sexual union other than monogamous marriage. Once having entered such union they will observe certain social rules toward each other and toward their children. They will not terminate the relationship except in a strict form approved and supervised by the community.

To enforce its concept of family organization regardless of the desires of the individuals concerned, society has enacted criminal laws. Anyone who violates such laws

and goes contrary to the social concept is to be punished. The concept of monogamous marriage is upheld by laws prohibiting other forms of sexual union. The laws formulating the institution of marriage[1] and the laws controlling voluntary non-marital sex expression are the same law looked at from different sides.

It is the accepted modern theory that the family is not rooted in marriage but rather marriage in the family. As one studies marriage by studying the background of family organization, one must likewise study voluntary sex expression in the frame of family institutions. These institutions antedate the English law by which they were adopted. It was the Church which, during most of English history, administered the laws relating to the family and to morality, and it is in the origins of the Church's doctrines that one must seek the seeds of family institutions which have grown into the English law. These origins are grounded in primitive custom and early Hebrew law, in the conditions, as well, amid which the Christian Church first developed. These doctrines, introduced into England, came into contact with the indigenous Saxon customs, and out of the contact developed a dual system which continued for a time after the Norman Conquest. As the Church became more powerful and her legal institutions crystallized, her jurisdiction over the family, including sexual morality, became increasingly exclusive. The form and expressions of the Church's attitude have survived throughout English history and, paradoxically, in the American institutions which were in origin a revolt against them.

So long as the Church's doctrines of family organization were an integral part of the social fabric, so long were the repressive laws of sex successfully administered. As the Church's moral hold weakened, the Church's legal hold became more difficult. For a time the Crown gave its support through the High Commission. For a time the Puritans tried a system of their own. But for the greater

[1] Meaning the creation of the family, not the organization of the family.

part of the period of the past six hundred years the history of the control of sex expression in England and America has been the history of administrative failures.

This study may make clear some of the specific reasons for this failure. More important, it may throw some light on the relation and non-relation of law and social restraint.

BOOK I

THE DOCTRINE OF SEX REPRESSION

CHAPTER I

AMONG PRIMITIVE PEOPLES

THE savage is popularly conceived to be comfortably free from the trammels of sex repression. As applied to the majority of primitive peoples this idea is, however, untrue. Because the restraint does not express itself in the ways to which a civilized observer is accustomed is no denial of the fact of restraint. Ignoring those tribes which permit pre-pubertal intercourse and those among whom pre-nuptial intercourse is a preliminary to marriage, most of the savage and barbarous peoples emphasize antenuptial chastity as an ideal and attempt, with more or less success, to enforce it in practice.[1]

The ideal of chastity among savages arises from no lofty idealism. Its practice may not even be conscious; it may be a purely physiological lack of sex activity. To the extent that the savage's chastity is conscious, it is not because he believes chastity to be in itself a virtue. The reasons are ulterior and definite. The sacrifice of immediate sensual gratification results from sociological and economic wants.[2]

The absence of sex expression from physiological causes is periodic. In the sexual instinct as in the nutritive there is a law of rhythm. Satisfaction of appetite is followed by a reaction during which the impulse and the organs upon which the impulse depends require rest and recuperation. Gradually the secretions are built up again. Moll and Havelock Ellis have worked out the mechanism of sexual impulse into a process of tumescence and detumescence. At the top of the curve of recuperation detumescence follows like an explosion of gathered forces. Natural chastity is the psychological concomitant of the period of detumescence: its first moment is the strong reaction which follows the violent expression. The foundation of absolute abstinence from sexual activity is the resting period.[3]

[1] Crawley, *Chastity*. This essay is reprinted in Crawley, *Studies*.
[2] Posnett, *Major Art*, II, 517 f. [3] Crawley, *Chastity*.

Besides this physiological basis of sexual periodicity, chastity among savages is founded upon reasons which are sociological and economic. Because the terms are more descriptive, the sociological foundation may best be called the "property basis" of chastity, and the economic foundation the "contamination basis."

Woman, from almost the earliest period, has been considered the property of man.[1] The notion has, of course, expressed itself in many ways of social and political significance. In its sexual significance, however, the expression of female ownership must be either pre-marital or marital. The pre-marital property-right which accrues to the father need not exist in the same social system as the marital property-right accruing to the husband. But usually the two forms of ownership are associated.

Where wife-purchase is the method whereby marriage is effected, it is obvious that the husband may feel a sense of ownership in the chattel for which he has paid. This feeling of ownership, wounded by infidelity on the wife's part, builds up in the husband a sense of jealousy.[2] In New Zealand, for instance, though before marriage a woman may indulge her sexual desires, immediately upon wifehood she becomes taboo to all but her husband. Should she thereafter allow invasion of her husband's property-right, not only she but her paramour as well would be subject to awful and mysterious penalties.[3]

The owner of property may himself make use of it as he sees fit. The wife's liberties with another man are no offence to the husband if they take place with his permission. A generous husband, in Melanesia and among some American Indian tribes, may offer his wife to a friend as an expression of hospitality.[4] Less generous husbands along the Ivory Coast, and among the Bakoks of the Cameroon, exact compensation for the use of their wives.

[1] Westermarck, *Moral Ideas*, I, 619 ff.; Sutherland, I, 8.
[2] Fleetwood, II, 108.
[3] Ibid., II, 173. As to West African natives see *ibid.*, II, 116.
[4] Ibid., II, 150 f., 219 ff. For numerous further examples see *ibid.*, c. 6.

If such compensation is not forthcoming, the husband may exact physical retribution from the offending male. This arrangement for compensation leads to various profitable tricks: among many African tribes the husbands encourage lapses on the part of their wives, swooping down upon the lovers for their dues; among the Kaffirs of the South a co-operative wife may assist her husband therein by seducing unsuspecting males.[1]

Where the husband must acquire his wife by purchase, the woman's father has property of marketable value. The value is the highest price that the father may expect upon sale of his daughter for marriage. If a daughter has lost her chastity, among many peoples she does not fetch so high a bride-price. The reasons for ascribing value to virginity are obscure. Professor Westermarck suggests that this enhancement of value depends upon the subconscious preference of the man for a virgin bride. A man may feel jealousy towards a woman who has had previous relations with other men. There may be an instinctive appreciation of virginal coyness. And, possibly more important, there may be a warmer response from a woman whom the man is the first to satisfy.[2] The late Professor Sumner called this "a singular extension of the monopoly principle."[3]

Whatever the basis for the value ascribed to female virginity, it is the belief among many primitive peoples that chastity is a duty which an unmarried girl owes to her father. Two examples of this widespread practice will suffice as illustrations. Among the Yakuts and among the Tshi-speaking peoples of the Gold Coast chastity *per se* is of no great importance. It is maintained only because of the duty of the daughter not to diminish her father's property-value in her. But when there is no expectation of further profit from a daughter's chastity—as where there is no hope of selling her, or where a man has seduced a girl and in consequence has paid her bride-price without

[1] Haviland, II, 115–118, 208 f., 213 f.
[2] Westermarck, *Moral Ideas*, II, 454 f.
[3] Sumner, § 372.

marrying her—the parents regard with indifference any excesses in which the girl may later indulge.[1]

However the evidence of this proprietary right in women may show itself, whether it be pre-maritally or during the marriage relation, it is clear that the sense of ownership has exerted a strong influence in building up restrictions on promiscuous sexual expression. Less widely recognized than this property basis for chastity is the contamination basis. Though the influence of this contamination basis has persisted only indirectly in our present social concepts, its diffusion was just as widespread, its influence just as real. Contamination we may divide for convenience into its two expressions: contagion which results from direct sexual contact, and infection which, magically, affects distant objects.

With a unanimity which is practically universal, the male sex ascribes to the female a relative inferiority in physical strength. This idea arises, of course, out of the differences in secondary sexual characteristics. In the same way that a comparatively civilized man may fear that an excess of female association will cause effeminacy in him, so more strongly does the savage feel that intimacy of contact with the female will transfer her properties to him and, less important, his properties to her. In the closest form of contact, the sexual, it is natural that this fear should be accentuated.

There is, however, another and a better reason for the primitive man to feel that he is being contaminated with female inferiority in strength. As has been suggested in our passing notice of the physiological process of detumescence, sexual intercourse is followed by a temporary depression resulting from increased blood-pressure. This temporary depression has led to the almost world-wide

[1] Hartland, II, 119, 179 f. There was an interesting survival of this custom in Norman law. If a female heir was unchaste during the period of her custody, she was excluded from her inheritance. Lyttelton observed that this severe penalty arose "not so much from a rigorous sense of the inheritance of the land, as from the notion of no advantage due to the Lord from the marriage of his ward, which he probably might be deprived of by her being dishonoured." Glanville, c. 12, 171 f. and note.

belief that sexual intercourse is weakening. The savage, associating with the act the person acting, has accepted the fact that woman herself is a weakening influence.[1]

It is this supposed weakening effect of sexual relations—and its complement, the belief that male semen is a source of strength—that have led many and divers tribes to enjoin continence on warriors and hunters. Activities which demand strength and fortitude demand, of necessity, chastity.[2]

Besides these dangers of contagion with female characteristics, the fear of contamination from sexual intercourse expresses itself in a notion of diffused infection, a permeation of a deadly disease to things far afield from the sexual act itself. The germ of this infection may in some cases be illicit intercourse; in other cases it may be any sexual connexion, even if matrimonial.

The baneful effects of illicit love may express themselves in serious personal and economic consequences. It is a common notion among savages that the infidelity of the wife at home prevents the husband from killing game and even exposes him to imminent danger of himself being wounded or killed by wild beasts. So, too, is infidelity on the part of Malagasy women in Madagascar thought to lead to the injury or death of a husband who is absent at war. The workings of this sympathetic magic may bring grief as well to the wife at home, because the converse of these statements must likewise be true. Among many tribes, it seems, any mishap to the husband during the chase or during battle is set down to the score of the wife's misconduct at home. It is not unlikely that the husband will return and visit his ill-luck upon the innocent object of his suspicions.[3]

The food prepared by an unfaithful wife is thought among the Wayao and Mang'anja of Lake Nyasa to poison the husband who eats it.[4] According to a belief among the Zulus, if a person who has had illicit connexion

[1] Crawley, *Mystic Rose* 169, 175 f., 187.
[2] *Ibid.*, 187 ff.—numerous examples.
[3] For examples see Frazer, *Psyche's Task*, 48 f.; *Magic Art*, I, 118, 131, 135.
[4] Hartland, II, 121 f.

with the spouse of one who lies sick should thereafter visit the sick-room, the sick person is immediately oppressed with a cold sweat and dies.[1] So it was, too, that the Romans believed that bakers, cooks, and barbers, those in attendance upon the person, should be strictly chaste. After an act of incontinence they should not touch food until after a purification. In self-protection the Romans sought for such duties the services of a boy under puberty or of a young virgin.[2]

More serious in its economic consequences is the effect of illicit sexual commerce in blighting the crops. The notion is so widespread as to exist both in the East Indies and in Africa. In Sumatra the Battas and in Borneo the Dyaks and others punish adultery and fornication with great severity and prescribe elaborate rituals to appease the gods and repair the damage thus done to the crops. Drought and famine are thought by various Negro tribes to follow breaches in the code of sexual morality.[3]

The sympathetic relation supposed to exist between the commerce of the sexes and fertility of the earth expresses itself not only in the effects of illicit intercourse, but of all sexual connexion. And it expresses itself divergently. On the principle of homœopathic or imitative magic some tribes have thought the practice of sexual intercourse to quicken the growth of trees and plants. Some have believed the direct opposite. This opposite belief is based on the notion that the vigour which is saved from the reproduction of the human kind will form, as it were, a store of energy whereby other creatures, whether vegetable or animal, will somehow benefit in propagating their species.[4] Though this notion was magical in inception, at a later time the anger of spiritual beings was thought to be invoked by sexual commerce. This gave a religious sanction to the old taboo.[5]

[1] Frazer, *Psyche's Task*, 49. Incest among the Yahoos is thought to cause blindness: Swift, § 28 (quoting).

[2] Frazer, *Magic Art*, II, 115 f.

[3] For elaboration and further examples, see Frazer, *Magic Art*, II, 104–116; *Psyche's Task*, c. 4.

[4] Frazer, *Magic Art*, II, 117.

[5] Frazer, *Psyche's Task*, 44–47.

Examples are numerous, widespread. Tribes of Central American Indians sleep apart from their wives for some days at sowing time, and in Nicaragua for the whole period from the sowing of maize to the reaping. During the practice of magic rites to make the crops grow, Central Australian headmen refrain from matrimonial intercourse. In Melanesia, in Manipur, in Assam, in Arabia, the belief exists that a breach of continence at a time when the crops require attention would have a profoundly adverse effect upon the success of the produce. For that reason too in ancient Greece the olive crop was gathered by pure boys and virgins.[1]

As crops are affected, so too are the domestic animals. Among the Akamba and Akikuyu of British East Africa intercourse between men and women is strictly forbidden while cattle are at pasture. Such human sex relations would cause injury to the cattle.[2]

Fear of contamination, then, exercises in primitive societies a very real restraint upon sex expression. But not only in a general sense is this true. There are special periods during which sexual connexion constitutes an extraordinary danger. Women during menstruation, pregnancy, and childbirth, and boys and girls at puberty, are regarded by early man as being in a mysterious religious state which necessitates the imposition of restrictions and safeguards, of taboos. At puberty it is a common rule that neither sex may see each other. During pregnancy there is sometimes avoidance between wife and husband. Adultery at that time may even be considered fatal to the child. And the prohibition of intercourse during menstruation is so fundamental an element of savage ritual as to be almost universal.[3]

From even so hurried a discussion as this it may be seen that in the opinion of many peoples sexual irregularities,

[1] Frazer, *Magic Art*, II, 103 ff. The survival of these ideas as expressed in the period of Lent will be discussed *infra*, c. 4.

[2] Frazer, *Folk Lore*, III, 141.

[3] Crawley, *Mystic Rose*, 151; Haviland, II, 114, 173; Ellis, *Psychology of Sex*, I, 59; M'Kenzie, 211 f. For a good summary of the whole subject of chastity as affected by beliefs in magic, see Briffault, III, 515–536.

whether of the married or of the unmarried, are not merely moral offences affecting only the few persons immediately concerned. They are believed to involve the whole people in danger of disaster, either directly by magical influence or indirectly through arousing the wrath of the gods to whom such acts are offensive. The welfare not only of the individuals has become involved, but of the whole community. This fear of social and economic danger transforms an individual sin into a public crime.[1] Among the early Hebrews, more clearly probably than among any other people, can be seen this union of the two concepts, the personal with the communal, the religious with the social.

[1] Frazer thus suggests (Psyche's Task, 42 f.) that when the punishment of sex offences is widely harsh, there is an implication that the original motive for treatment was a superstition of public danger.

CHAPTER II

AMONG THE ANCIENT HEBREWS

The chastity of females was guarded among the early Hebrews by laws which were severe and, according to our standards, cruel. This protection was due in the beginning, however, to no ethical concept of the virtue of chastity. Like the more primitive peoples the Hebrews imposed the restrictions upon sex expression in an effort to protect the individual in his ownership of property and the community in its freedom from the evils, magic or divine, which were thought to result from sexual indulgence. Ancient Hebrew continence rested on the property basis and the contamination basis. But there was among the Israelites another reason for further restriction of sex expression; that was the heresy basis. So strong was their concept of monotheism that any intimate contact with the followers of other gods was looked upon as an injury to the Hebrew god. Where such intimacy was the greatest, in sexual union, the danger was the greatest and added a new and righteous reason for legal severity.

The Hebrew family was patriarchal. The women were under the control of the male head, the husband or the father. Associated with the patriarchal family was the system of wife-purchase. And, as among more primitive peoples, this led among the Hebrews to rules for the maintenance of female chastity.

The property-right of the husband in the wife whom he had purchased was protected by the ultimate penalty, death.[1] Numerous are the Biblical denunciations of adultery[2] and numerous the stories of punishment to be visited on the offenders. Knowing the magnitude of the offence, Joseph many times avoided the seductions of Potiphar's wife, and at length had physically to flee from her attempts upon him.[3]

[1] Leviticus xx. 10; Deuteronomy xxii. 22. The death penalty may never have been enforced in practice: Paterson.

[2] E.g., Exodus xx. 14; Leviticus xviii. 20.

[3] Genesis xxxix. 7–12.

As the husband was protected after purchase, so was the father protected before sale. The man who seduced a virgin was obliged to buy her of her father as his wife, at the price of 50 shekels of silver. If the father utterly refused to give his daughter in marriage to the seducer, the seducer was still bound to pay the same dowry as if he had married her a virgin.[2] This method of protection for the father was the more clearly necessary because, according to the law of Deuteronomy, a father warranted his daughter's chastity. If a husband should complain that his wife was not a virgin at marriage, and this were judicially established, her father had to return to him the bride-price.[3]

That these rules were not meant as a protection of the purity of the woman against a guilty offender, but as a protection only of the property of her guardian against any trespasser,[4] is made obvious by three passages in the Mosaic law. First, the rule of Exodus as to seduction stands not among the laws of personal injury but at the close of a list of cases of pecuniary compensations for injury to property.[5] Second, the seducer's knowledge of the woman's married status was immaterial to the crime of adultery. Though Abimelech was ignorant of the fact that Sarah was the wife of Abraham, God warned him that he must suffer death for his intimacy with her.[6] And third, where no property-right in a woman existed which the Hebrew law wished to protect, infringement upon a woman's chastity was not punishable. If a man had carnal knowledge of a Hebrew woman who was betrothed, he would be punished, as for adultery, by death[7]; the property of her betrothed husband was invaded. But if the woman were not Hebrew but a bondmaid, and therefore incapable of legal marriage with a Hebrew, though

[1] Exodus xxii. 16, 17; Deuteronomy xxii. 28, 29. Dowry here means bride-price: Cross, 93–95.
[2] Deuteronomy xxii. 13–21.
[3] Cross, 134.
[4] Winter, 23 (quoting). One of the objections to incestuous intermarriage was loss of the bride-price.
[5] Genesis xx. 1–7.
[6] Deuteronomy xxii. 23, 24.

she were betrothed, her seducer was not to be put to death.[1]

Among the Biblical Hebrews, as among their savage forebears, the fear of contamination from sexual contacts was as strong a reason for their legal restrictions on sex expression as was their interest in the protection of ownership of women. The contamination was again of two sorts: a contagion from the sexual act itself that would weaken the male, and an infection with which the act might taint the general property and welfare of the community.

Because sexual intercourse causes temporary physical depression, the Proverbs warned against the weakness that would result to man. "He that keepeth company with harlots spendeth his substance."[2] And again, "Give not thy strength unto women."[3] Strength here means not wealth but virility. The advice is directed against such debauchery as is described in the early chapters of the Proverbs.[4] The importance of continence to warriors, probably as conserving their strength, was definitely emphasized by David; women, he said, had been kept from his soldiers for three days.[5] There are other inferences too in the Old Testament that there was a taboo on sexual intercourse to Israelitish warriors.[6]

It is, however, more notably in the belief that sexual expression caused infection that the Hebrews applied the contamination basis and extended it. Not only did sex offences cause a sterilizing effect upon the fruits of the earth and domestic animals, but also upon women.

After warning the Israelites against the practices of Egypt and Canaan, against adultery, incest, sodomy, and other sex crimes, the Lord said, "Defile not ye yourselves in any of these things: for in all these the nations are defiled which I cast out before you: And the land is

[1] Leviticus xix. 20; Sutherland, II, 129.
[2] Proverbs xxix. 3.
[3] Proverbs xxxi. 3.
[4] Toy, 540.
[5] 1 Samuel xxi. 5. For a different explanation see Robertson Smith, 415 f.
[6] Deuteronomy xxiii. 10, 11, compared with 1 Samuel xxi. 4, 5; 2 Samuel xi. 11.

defiled: therefore do I visit the iniquity thereof upon it, and the land itself vomiteth out her inhabitants."[1] The implication is that the land itself became physically tainted by sexual transgressions so that it could no longer support the inhabitants. When Job was accused of adultery he passionately protested his innocence: "For this is an heinous crime; yea, it is an iniquity to be punished by the judges: for it is a fire that consumeth to destruction, and would root out all mine increase."[2] The Hebrew word here translated "increase" commonly means "the produce of the earth." So to translate it, Job affirmed adultery to be destructive of the fruits of the ground.[3]

More explicitly than the Bible states the infectious consequences of sexual transgressions upon productivity of the soil, it states the effects upon the fertility of women. Sarah, Abraham's wife, having been taken into the harem of a king who did not even know her to be the wife of the patriarch, God visited the king and his household with great plagues, especially by closing up the wombs of the king's wives and maid-servants, so that they bore no children. Only when the king had discovered and confessed his sin, and Abraham had prayed God to forgive him, did the king's women again become fruitful.[4]

One finds among the Hebrews again, as among savage peoples, that the same restraints were placed upon sexual intercourse during special periods. Particularly severe and exacting were the restraints during the menstrual period; cohabitation of husband and wife was forbidden on pain of excommunication of both. The separation had to take place a day in advance of the expected period and to continue until after an elaborate purification had been performed.[5] Robertson Smith asserts the Semitic taboo of women during menstruation had nothing to do with respect for gods; it sprang, like the same taboo among savages, from the mere terror of the supernatural influence

[1] Leviticus xviii. 24–28.
[2] Job xxxi. 11–12.
[3] Pruner, *Magyar Akt*, II, 214.
[4] Genesis xx. 1–18; also xii. 10–20.
[5] Friedländer, 417–431; Philo Judæus, III, 311 f.

associated with menstruous blood, one of the strongest of primitive charms.[1]

Of greater import to the early Israelites than to the more barbarous peoples were the restrictions on sex expression during the period of childbirth and thereafter. For the space of seven days after birth of a male child and 14 days after birth of a female child, besides an added seven days in both cases, a woman was unclean and could not be approached by her husband.[2] The Pharisees went so far as to extend this period to 40 and 80 days respectively.[3] A suckling woman also was cautioned not to minister as a wife except at designated intervals from her ministrations as a mother.[4]

These restraints placed by the early Hebrews upon sex expression were, as is obvious from comparison, the very restraints practised by primitive peoples in general. They were basically social; they pertained to the relations of individual to individual, of individual to the community. But morality and law to the Jews meant not merely a control of human relations. The Jews were distinguished above all peoples for the importance that they attached to divine relations. Not only did they raise social morality to the level of a religious observance; they raised religious observances to a position of such paramount importance as to comprehend the whole of morality. Infringement of a social practice became an offence not to an individual alone or even to the community, but to the deity himself.

In its simplest form the importance of the relation of man to god expressed itself in ritual observances. The god must needs be approached carefully, inoffensively, in an acceptable state of grace. This to the Hebrews meant ceremonial cleanness. And of ceremonial cleanness one major element was sexual undefilement. "If any man's seed of copulation go out from him, then he shall wash all his flesh in water, and be unclean until the even." And

[1] Robertson Smith, 447 f. [2] Friedländer, 411 f.
[3] Book of Jubilees iii. 8–14; Charles, *Apocrypha*, II, 16.
[4] Friedländer, 413.

so too the woman.[1] Obviously, then, in the presence of the Lord one had to be sexually clean. Moses, bearing the message that the Lord would reveal himself to the people on Sinai, warned them not to have connexion with their wives.[2] And as in the presence of the divinity himself, so in the presence of material things sacred to him, there could be no unclean expressions. Conjugal intercourse was forbidden in a room which contained a scroll of the divine law. Even sacred writings in general had to be hidden from contact with the venereal act,[3] and consecrated bread could not be eaten by those who had had recent contact with women.[4]

If such restrictions were placed upon the laity in their occasional relations with the divine, it is but natural that greater precautions were taken in the case of the clergy. The Hebrew priest had to avoid unchaste practices: he was not allowed to marry a harlot or a profane nor to marry a divorced wife; the high priest was even forbidden to marry a widow.[5] This salutary restriction went yet a step further: because unchastity in a priest's daughter profaned her father, and thereby the deity, it was to be punished by burning alive.[6]

It must be remembered that at the period of the giving of the Biblical law the Hebrew god Yahveh was far from the universal God. He was but a tribal deity, one among the numerous Semitic gods even as his people were but one of the several tribes of Semites. He was competing with the other gods as the Hebrews were competing with other peoples. A victory for Israel was a victory for Yahveh, a victory for the system, religious and social, with which Yahveh was associated. Because the Israelites conceived their cause to be the right, they conceived their practices and their god to be the right, and other practices, other gods, wrong.

[1] Leviticus xv. 16, 18; see also Deuteronomy xxiii. 10, 11.
[2] Exodus xix. 11, 15. [3] Precilender, 414. [4] 1 Samuel xxi. 5.
[5] Leviticus xxi. 7, 14. [6] Leviticus xxi. 9.

Particularly is this assertion of tribal righteousness important in the realm of sexual practice. Sexual practice was, among the Semitic sects, a basic part of religious ritual. If the sexual practices which a foreign tribe held to be of religious significance were different from the Israelitish practice, a triumph of these foreign practices represented to the Israelites a triumph of a foreign god. As Professor Westermarck has carefully pointed out in relation to homosexual expressions, the excessive sinfulness ascribed to homosexuality by Hebrew law cannot be adequately accounted for either by utilitarian considerations, as the lowering of the birth-rate, or by instinctive disgust.[1] Sodomy and bestiality were punishable by death.[2]

The Hebrews' abhorrence of sodomy largely developed from their hatred of a foreign cult. Unnatural vice was the sin of people who were not the chosen people[3]; it was because of these abominations that the Canaanites were driven out of the land of Israel.[4] Sodomy, we know, was not a social practice among the Canaanites but a religious practice. The Hebrew word *Kadesh*, translated sodomite, properly denotes a man dedicated to a deity. As there were female temple prostitutes, union with whom signified to the worshipper a union with the deity itself, so among the Canaanites there were male devotees who transmitted the blessings of the gods. It is but natural that a Yahveh-worshipper should regard with utmost horror these practices of an idolatrous and competing cult.[5]

The intimate connexion between unnatural sex expression and heresy, as it developed first in Hebrew law, is generally understood. It is strange then that no one should yet have pressed the question further to inquire whether there was a similar confusion between natural sex expression and foreign religious beliefs. To press the

[1] Westermarck, *Moral Ideas*, II, 416.

[2] Leviticus xx. 13, 15; Exodus xxii. 19; see also Leviticus xviii. 22, 23, and Deuteronomy xxvii. 21. The beast too was to be slain.

[3] Westermarck, *Moral Ideas*, II, 487.

[4] Leviticus xx. 23; 1 Kings xiv. 24; xv. 12; xxii. 46.

[5] Westermarck, *Moral Ideas*, II, 487 f.

question brings out the striking reason why the Hebrews asserted with such vigour a condemnation of various normal sexual relationships.

The censure which the Hebrew law expressed of normal sexual intercourse, in so far as it depended upon the rigid maintenance of Yahveh-worship, showed itself in the Bible in three forms. There was condemnation of religious prostitution. There was condemnation of mixed marriages. There was condemnation of ordinary extra-marital relations with non-Hebraic women.

In the religions of many of the peoples who were neighbours of Israel there was a deification of the reproductive forces of nature. Associated with the worship of the Babylonian goddess Ishtar and the sects derived therefrom was the system of sacred prostitution. The sexual connexion with the priestess was in no sense a union for personal gratification. It was solely for religious worship—was, in fact, an approach to the goddess herself. Early the Israelites came into contact with these practices, and early were they condemned by the prophets and lawgivers as contrary to the practices of Yahveh-worship. "After the doings of the land of Egypt, wherein ye dwelt, shall ye not do: and after the doings of the land of Canaan, whither I bring you, shall ye not do: neither shall ye walk in their ordinances. Ye shall do my judgments, and keep mine ordinances, to walk therein: I am the Lord your God."[1] Again, "There shall be no whore of the daughters of Israel, nor a sodomite of the sons of Israel" has been interpreted by modern commentators to have been meant in no general sense but as a specific proscription of immorality practised in the worship of a deity or in the temple precincts.[2]

Notwithstanding these prohibitions the two wicked sons of Eli lay with the women assembled at the door of the tabernacle.[3] Nor were Eli's sons alone in their wickedness. Soon thereafter Yahveh had to curse King Jehoram

[1] Leviticus xviii. 3, 4.
[2] Deuteronomy xxiii. 17. Driver, 264 f.; see also Turner, 25.
[3] 1 Samuel ii. 22.

with an incurable disease of the bowels because he had "made Judah and the inhabitants of Jerusalem go a-whoring, like to the whoredoms of the house of Ahab."[1]

By the eighth century sacred harlotry had become so established among the Hebrews that the energy of the prophets was tuned to restrain it.[2] Hosea, pleading, threatening, noted how the Israelites had gone whoring from under their God, how they sacrificed on the mountain tops and burned incense under the trees, how they worshipped with harlots.[3] Ezekiel gave a long account of the whoredoms of Aholah and Aholibah committed with the Assyrians and Babylonians. Aholah and Aholibah represented Israel and Judah.[4] They defiled themselves with Assyrian idols and did not abandon the whoredoms of Egypt. According to Ezekiel the Lord threatened the most dire punishments of slaying and burning in order to eradicate this lewdness.[5]

The threats could not stem the tide of prostitution. At the local shrines of North Israel the worship of Yahveh was deeply infected with Canaanitish practices.[6] Clan life gave way to life in large cities. In Jerusalem and Alexandria, with their mixed populations, sexual immorality grew and became organised. Prostitutes flocked to the cities. The first nine chapters of Proverbs is a fair representation of conditions in the third and second centuries B.C.[7] The temple was filled with riot and revellings by the heathen, who dallied with harlots, and had to do with women within the sacred precincts.[8]

But not only in this obvious way did the Hebrew prophets realise that men might be seduced from their worship of Yahveh. It was women, they recognized, that established the religious belief of the family. The marriage with an alien woman meant the marriage with an alien god. The Lord warned the Israelites to show no mercy to

[1] 2 Chronicles xxi. 13, 18. [2] Cheyne. [3] Hosea iv. 10–14.
[4] Cook, Old Testament, VI, 97 f. Or literally Samaria and Jerusalem; Spence and Exell, II, 18 (Ezekiel xxiii. 4).
[5] Cheyne. [6] Toy, 45; [7] Ezekiel, c. xxiii. [8] Maccabees vi. 4.

the Hittites, Girgashites, Amorites, Canaanites, Perizzites, Hivites, and Jebusites; "neither shalt thou make marriages with them. . . . For they will turn away thy son from following me, that they may serve other gods: so will the anger of the Lord be kindled against you, and destroy thee suddenly."[1]

All sorts of disorders were said to be born of the marriages contracted with foreigners. The offspring seemed doomed to a bad career. The son of a mixed Israelite and Egyptian marriage blasphemed the name of the Eternal.[2] Zabad, son of an Ammonite, and Jehozabad, son of a Moabite, assassinated Joash.[3] The Chronicles seem to attribute Rehoboam's crime to his origin, for his mother was an Ammonite.[4]

Notwithstanding the precept of Deuteronomy, notwithstanding the disastrous consequences of its violation, the enforcement of this prohibition of intermarriage met with opposition and was, at first, a failure.[5] Nehemiah found the Judeans married to Philistine women and the children unable to speak the language of the Jews. He told what a great transgression against God it was to marry strange women; he punished the offenders severely; he exacted an oath against repetition of the offence.[6]

It was not Nehemiah, however, but Ezra, who set himself seriously the task of eradicating this heretical practice. Though even before the exile Israel's attitude toward other nations had been marked by no great cordiality, Ezra deliberately aimed to cultivate a spirit of exclusiveness.[7] Doubtless he considered the situation serious. He found not only the Israelites, but their Levites and priests as well, married themselves, and marrying their sons, to the daughters of the people of the lands where they lived, mingling their holy seed with the people of those lands and doing according to their abominations. The result

[1] Deuteronomy vii. 1–4. For similar prohibitions see Deuteronomy xxiii. 3, 7, 8; Numbers xxv. 1–18.
[2] Leviticus xxiv. 10, 11.
[3] 2 Chronicles xxiv. 13, 14.
[4] Nehemiah xiii. 23–27.
[5] 2 Chronicles xxiv. 26.
[6] Ezra ix. x.
[7] Bertholet, Genesis.

of Ezra's impressive public prayer, of his pleas and threats, was a wholesale divorce of the Israelites from their alien wives and an abandonment of the children born of such marriages.[1]

Even as mixed marriage was condemned in Biblical law, so was the casual intercourse of a son of Israel with a Gentile, or with a foreign slave with whom there could be no valid betrothal, a serious offence. The reason was the same, the seduction from Yahveh. The Lord warned the people through Moses lest "thou take of their daughters unto thy sons, and their daughters go a-whoring after their gods, and make thy sons go a-whoring after their gods . . . for the Lord, whose name is Jealous, is a jealous God."[2]

The Mishnah named him "who cohabits with a Syrian woman"—*i.e.* a Gentile, an idol-worshipper—among those whom the zealots might strike down. Although this rule was rendered harmless in practice by impossible conditions, according to the Babylonian Talmud the rabbinical courts did consider such an offence deserving of punishment on the ground of implied idol-worship.[3] "For Judah has profaned the sanctuary of the Lord which he loved, and has cohabited with the daughter of a strange god."[4]

The classical example of Yahveh's anger at a violation of this principle is the case of King Solomon, often cited by the later prophets. Solomon loved many strange women, a daughter of Pharaoh, Moabites, Ammonites, Edomites, Zidonians, Hittites, "of nations concerning which the Lord said unto the children of Israel, Ye shall not go in to them, neither shall they come in unto you: for surely they will turn away your heart after their gods." These women did turn away Solomon's heart: he went after Ashtoreth, goddess of the Zidonians, and Milcom, the abomination of the Ammonites; he built a high place for

[1] Ezra ch. ix., x. For the general subject see Lévy, 1 pt. i.
[2] Exodus xxxiv. 14, rd. [3] Deutsch.
[4] Malachi ii. 11 (Hebrew version).

Chemosh and for Moloch, gods of the Moabites and Ammonites. Yahveh was angered. He decided that Solomon was to be the last of his dynasty.[2]

The other example of Yahveh's wrath for a sexual-heretical offence is of more interest and of vastly more importance in our history of the control of sexual expression. When the people of Israel abode at Shittim, they began to commit whoredom with the daughters of Moab. They made sacrifices to Baal-Peor. God therefore visited them with a plague which killed 24,000.[3]

Now it was a general custom at that time that divinity was local, territorial. The god of a country ruled that country. Strangers, visitors in the country, worshipped the local ruling deity. There are then but two possible reasons for Yahveh's anger. Either the territory in question had become Yahveh's by right of conquest, which the context makes doubtful. Or the writer of the chapter had discarded the doctrine that Yahveh could be worshipped only in his own land. Perchance the recollection of the nomadic life of the Israelites served to keep alive and develop a larger view of Yahveh's activity: in the arc or his angel Yahveh accompanied the people from place to place and, being in their midst, demanded that they should worship no other god.[4]

Whatever the reason, we see here as early as the fifteenth century B.C. the tendency to universalize a tribal god, to extend his precepts to foreign lands. It is that extension of Yahveh-worship which, in the sphere of sexual morality as in other social institutions, has proceeded through the media of Christian doctrine into European law.

. . . . . .

The sexual morality of the ancient Hebrews, though possibly high in comparison with the level of the times, was far from exemplary. The Biblical accounts of sexual misconduct begin early. The story of Judah, son of Jacob, and his relations with Tamar,[4] now regarded as

[2] 1 Kings c. xi. See Toy, 47 f.
[3] Gray, 5th.
[4] Numbers c. xxv.
[4] Genesis xxxviii, 14 ff.

largely eponymous, probably reflects with some accuracy the manners and customs of the Hebrews and their Palestinian neighbours. The story makes it clear that chastity in Palestine, among men at least, was the exception rather than the rule.

The practice of ritual prostitution, much as it was condemned by the orthodox, was a potent factor in extra-marital sex expression. In the later days harlots became so numerous among the Jews that they had a market-place all to themselves.[1] The violations of the sexual code were recognized and regretted by the prophets. Jeremiah spoke often the prevalence of adultery.[2] Likewise did Ezekiel.[3] But adultery continued to increase. By the time of the destruction of Jerusalem adulterers abounded to such an extent that the practice of trying women suspected of adultery by the ordeal of "bitter waters"[4] had to be abolished, for the trial was supposed to be effectual only if the husband were himself guiltless of adultery.[5] In discontinuing the practice, Rabbi Johanan ben Zaccai remarked that a bachelor residing in the city who abstained from sin was one of the three objects of proclamation by the Holy One, the others being a poor man who restored lost property, and a rich man who tithed his produce unostentatiously.[6]

With a decadence in moral practice comes generally a reaction of moral attitude, a tightening of moral precept. Among all the ancient Hebrew law as to sex expression there was no punishment provided for voluntary sexual relations between the unmarried. Fornication was not a crime. The Hebrews of Biblical times looked upon sexual morality in its social and religious implications only, not in its purely ethical. If the girl were an adult—that is, over the age of twelve years and six months—the man having intercourse with her not only was guilty of

[1] Pinches.
[2] Jeremiah iv. 1, 2; xxiii. 10, 14; xxix. 23.
[3] Ezekiel xvi. 15–43; xviii. 6; xxii. 10, 11; xxxiii. 26.
[4] Numbers v. 11–31.
[5] A misinterpretation of Hosea iv. 14. Selden, Uxor.; Hales, III, 141.
[6] Pinches.

no crime; he was not even liable to her father for her bride-price.[1]

Not only was a single act of sexual union among the unmarried disregarded, but continued extra-marital cohabitation was not criminally punishable. Selden thought that the provision in Deuteronomy about the whoredom of Israelitish women[2] was directed against such repeated freedom of the body.[3] Upon this passage there has been considerable dispute among Talmudic writers. It is a reasonable conclusion to draw that if the woman gave herself over to only one man, though upon repeated occasions, neither party committed a Scriptural offence.[4] Modern commentators go so far as to declare that the passage had no reference to ordinary sexual immorality but was meant only to prohibit ritual prostitution.[5]

There are, besides, several warnings in the Proverbs against the evils of whoredom. But in one of the passages the man is thought of as married, and in the other the woman against whom he is warned is married.[6] On reaching the age of eighteen it was the duty of a man to take a wife, and in no case should a Hebrew have passed his twentieth year unmarried.[7] Because the Israelites married at an early age, there was little danger of simple fornication. The Biblical passages concerning whoredom may be taken mainly to be warnings against adultery. The sexual connexion of unmarried adults was not thought of as an evil if both participants were Hebrews.

Because the Biblical law seemed inadequate to deal with the increasing tide of sexual immorality toward the beginning of the Christian era, reformers attempted in three ways to make the rules more inclusive: they sought to reinterpret the older statements to make them more restrictive of sexual conduct; they sought to impose new and stricter laws to meet specifically the new situations; or they sought to withdraw entirely from the seemingly hopeless environ-

[1] Selden, *Uxor Ebraica*, Lib. I, c. 16.
[2] Deuteronomy xxiii. 17.
[3] Selden, *De Jure*, Lib. V, c. 4.
[4] Deubler.
[5] Dalman, 264 f. See also Turner, 25.
[6] Proverbs v. 15, 18; vii. 19. See Toy, 103.
[7] Friedländer, 498.

ment and, secluded, to practise among themselves a more stern code of sexual morality.

The reinterpretation of old Hebrew doctrines was somewhat forced to meet the altered conditions. Philo Judæus, for instance, asserted that the sixth commandment of the Decalogue conveyed by implication a command against seduction, unnatural crimes, debauchery, and indulgence in all illicit and incontinent connexions.[1] This was far beyond the conception of the Hebrews of the Mosaic period. Much later, Maimonides epitomized the statement of this tendency: "The object of these precepts is to diminish sexual intercourse, to restrain as much as possible indulgence in lust, and to teach that this enjoyment does not, as foolish people think, include in itself its final cause." Again: the object of the law is "to inculcate the lesson that we ought to limit sexual intercourse, hold it in contempt, and only desire it rarely."[2] A far cry, this, from the early Hebrew encouragement of propagation![3]

Such textual interpretation had, one may suppose, little practical effect. To promote a popular revolution of moral practice, as of political, a movement is necessary. And two movements there were in the last period of Hebrew independence. There were, on the one hand, the Pharisees, and on the other the Essenes, who advocated specific and sharply divergent methods for reform of the low standards of sexual morality.

The Pharisees sought to attain their ends of reform by a return to the strict observance of the old written law. In emphasizing tradition they were particularly scrupulous on questions of purity and non-contamination.[4] The formal expression of Pharisaic teachings may be most readily found in the Pseudepigrapha of the Old Testament. The Testaments of the Twelve Patriarchs, written about a century before the Christian era, contain many passages

[1] Philo Judæus, III, 171.
[2] Genesis i 28; Kohl. 54, 61; Levy, 174 ff.; Westermarck, *Moral Ideas*, II, 440 f.
[3] Philipson.
[4] Kohn, I, 541 f.

directly condemning fornication, a term but rarely used in the Old Testament. To be sure the Pharisees denounced fornication as it was denounced in earlier times, for reasons of heresy, because "separating from God, and bringing near to idols."[1] But they condemned it more generally.[2] The Pharisaic expressions on the subject of sex have a ring almost like those of the later Christian ascetics: "For evil are women, my children. . . . The angel of the Lord told me . . . that women are overcome by the spirit of fornication more than men, and . . . plot against men. . . . Flee, therefore, fornication, my children. . . . And if you wish to be pure in mind, guard your senses from every woman."[3] The Pharisees went so far in their guarding against the expression of sex as to prohibit exposure of the person through improper dress. "And to Adam alone did He give the wherewithal to cover his shame, of all the beasts and cattle. On this account . . . they . . . should not uncover themselves as the Gentiles uncover themselves."[4]

The Pharisees were practical, humanitarian. The Essenes were idealistic, humanistic. They sought not to raise the general level of popular sexual morality; they sought only to perfect themselves, and that in part through a negation of sex.

Among the most marked peculiarities of the Essenian fraternity was their aversion to marriage. Though some of the less rigid of their communities submitted to this as an inevitable evil,[5] those who were of higher pretensions and doubtless of higher estimation maintained inviolable celibacy.[6] Even those who permitted marriage considered only the social need of procreation and repudiated the personal gratification in the union of the sexes. The

[1] Testament of Simeon v. 3: Charles, *Apocrypha*, II, 302; Testament of Reuben iv. 6, 7: Charles, II, 298 *f.*; Testament of Judah xviii. 2, 3: Charles, II, 321.

[2] Testament of Reuben i. 6; vi. 4: Charles, *Apocrypha*, II, 296, 299; Testament of Judah xiv. 2-5; xv. 1, 2: Charles, II, 320.

[3] Testament of Reuben cc. v. and vi.: Charles, *Apocrypha*, II, 299. Fornication is the same in Jewish law as in the common law: Deuteron.

[4] Book of Jubilees iii. 30, 31: Charles, *Apocrypha*, II, 6 *f.*, 27. This was a protest against the evil of nudity as expressed in Greek games.

[5] Josephus, quoted by Moffatt. [6] Philo Judæus, IV, 109–122.

foundation of this condemnation of marriage and sex expression was, in part, a mistrust of woman. Woman was thought licentious, "a selfish creature and one addicted to jealousy in an immoderate degree, terribly calculated to agitate and overturn the natural inclinations of a man, and to mislead him by her continual tricks."[1] But woman was only an example of the attitude which the Essenes sought to shun. They considered all pleasure to be vice. Continence and mastery over the passions constituted virtue.[2]

This hatred of women and denial of pleasure are the two pillars of asceticism. The spirit was to be made pure through a ban on all indulgence of the material body.

There has been considerable debate as to whether Essenic doctrines influenced Christianity directly. The fact that the Pharisees and Sadducees are often denounced in the pages of the New Testament, while the Essenes are never mentioned, might plausibly be interpreted to show that the New Testament emanated from the side of the Essenes. John the Baptist was an Essene, and probably James of Jerusalem, brother of Jesus. Conceivably Jesus himself was trained in the principles of the sect.[3]

Whether or not Essenism had a direct influence on Christianity is unimportant here to decide. The Essenes were practising in Judea the spiritual mysticism which the Therapeutæ or Contemplatists were practising in Egypt, which the Manicheans, the Neoplatonists, and innumerable other sects were to practise throughout the Roman Empire. Their practices were a representation of a far wider expression which, in turn, was profoundly to affect the Christian doctrines of sex.[4]

[1] Philo Judæus, IV, 121 f. [2] Josephus, quoted by Moffatt.
[3] Lea, *Sacerdotal Celibacy*, I, 9 f.; Kirkup and Stock.
[4] Milman, I, 162. See also Sutherland, I, 273–276.

CHAPTER III

AMONG THE EARLY CHRISTIANS

THE virtues lauded by Gospel teachings were love and charity. The virtues lauded by Patristic teachings were chastity and abstinence. Within a period of four centuries Christianity had changed its attitude of emotional expression to an attitude of emotional suppression. Beginning with no new or complete doctrine of morals, the Gospel referred only to pre-existing Hebrew morality, confined itself to corrections in particulars. The influences which converted the simple Nazarene expressions on sex into the elaborate Church formulæ were the influences which changed the whole spiritual atmosphere of the Roman Empire.

The Hebrew society in which Jesus moved had a code of sexual morality which, though decadent in practice, was accepted in theory. The Old Testament doctrines persisted which sought to control sex expression for reasons of property and social protection. Though the Christian Scriptures made but little mention of the property basis and the contamination basis for chastity, they often expressed a definite acceptance of the Hebrew laws governing sexual conduct. The New Testament sought only to prevent violations of the existing Hebrew code.

The basis for the control of sex expression which was most disputed at that time was the heresy basis. The Mediterranean world, restless with religious divergences, was keenly conscious of the ritual expressions of sex. The Disciples were therefore the more aware of their Hebrew beliefs that idol-worship was connected with sexual crime. Both James and Paul reiterated the doctrine that illicit expressions of sex were an evidence of worship of a foreign deity and a turning away from the true God.[1] Most outspoken in his condemnation of sexual violations as heresy was St John the Divine. As to the practices of the church of Thyatira, he said, "Thou sufferest that

[1] Acts xv. 20, 28, 29; 1 Corinthians vi. 9–10.

woman Jezebel, which calleth herself a prophetess, to teach and to seduce my servants to commit fornication." The Son of God, John warned, promised great tribulation to those who committed adultery with her.[1] Jezebel, commentators have thought, was a symbolic name given to a Chaldean Sibyl, to whom there was a temple in Thyatira, a representation of heathenish seduction.[2] Even more clear was the condemnation of the church of Pergamos for holding the doctrine of Balaam and committing fornication during the pagan festivals.[3]

The Gospels themselves laid no special stress on chastity; they offered no new rules concerning unchastity. The passage in Matthew concerning adultery added nothing to the existing Jewish law.[4] And the passage, "There are eunuchs who have made themselves eunuchs for the kingdom of heaven's sake,"[5] in no way implies that the only way in which the kingdom of heaven can be entered is by becoming a eunuch. According to the ordinary view Jesus is represented as having misunderstood or evaded the discussion of the point raised by the Disciples.[6]

It is not Jesus then to whom one must turn for an exposition of a distinctive New Testament doctrine of sex morals. It is to Paul. Paul's attitude is expressed most popularly in the first letter to the Corinthians. "It is good for a man not to touch a woman. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband. For I would that all men were even as myself. But every man hath his proper gift of God. I say therefore to the unmarried and widows, it is good for them if they abide even as I. But if they cannot contain, let them marry: for it is better to marry than to burn. Now concerning virgins I have no commandment of the Lord: yet I give my judgment. If thou marry thou hast not sinned; and if a virgin marry

[1] Revelation ii. 19 ff.
[2] Cook, New Testament, IV, 526 f. See *supra*, Charles, Commentary, I, 50.
[3] Revelation ii. 14. Cook, New Testament, IV, 523 f. As to homosexuality and bestiality, see Romans i. 25–28.
[4] Matthew v. 27, 28. [5] Matthew xix. 12. [6] Northcote, 367, note.

she hath not sinned. Nevertheless such shall have trouble in the flesh: He that is unmarried careth for the things that belong to the Lord, but he that is married careth for the things of the world."[1]

The first eight verses of this chapter were answers to specific questions put to Paul in a letter by the Corinthians. Jesus's words in Matthew, c. xix., may have given rise to a notion in Corinth that Christianity, like other ascetic religions and philosophies of the time, discouraged marriage. This was Paul's answer, his denial.[2]

This chapter with its specific direction and purpose has led Dean Milman and others to consider that Paul's precepts on marriage and virginity were local and temporary, relating only to the special circumstances of those whom he addressed.[3] Paul, though ready himself to admit the highest and hardest claims of self-sacrifice, gave no undue ethical prominence to celibacy. He withheld his assistance, it is said, from the Oriental tendency toward asceticism.[4] His reasons for virginity were purely practical and expedient.

There was, however, an element in Paul's teachings on sex which was more than temporary and specific. This element was his acceptance of the idea of dualism. In his writings Paul emphasized again and again the conflict between the spirit and the flesh. "In my flesh dwelleth no good thing." The mind serves the law of God, the flesh the law of sin.[5] The flesh lusteth against the spirit and the spirit against the flesh, and these are contrary the one to the other. The works of the flesh are adultery, fornication, uncleanness, lasciviousness.[6]

If the flesh is necessarily evil, Paul's conclusion is correct: "Mortify therefore your members which are upon the earth."[7] If the flesh expresses itself in acts of sex, mortification of the flesh demands a suppression of

[1] 1 Corinthians vii. 1, 2, 7, 8, 9, 25, 28, 32, 33.
[2] Robertson and Plummer, 135, 156.
[3] Milman, III, 292, note. [4] Northcote, 373.
[5] Romans vii. 18, 25. [6] Galatians v. 17, 19.
[7] Colossians iii. 5. See also 1 Corinthians vi. 13, 18; 1 Thessalonians iv. 3; Revelation xiv. 4.

sexual activity. In announcing this doctrine Paul planted the Scriptural seeds of an attitude that was to flourish abundantly in later Christian teachings.

The doctrine which Paul implanted was amply nourished from without. The environment in which Christianity developed was particularly favourable to the growth of the hardy seed of asceticism. There was a consciousness of religion and an interest in religious appeal such as Western civilization had never before witnessed. There was an inequality and a restlessness in the social structure of the conglomerate Roman Empire amidst which men sought solution or escape.

The dualism which Paul inducted into Christianity was the pervading principle of all the religious systems of the East. They all proclaimed the antitheses of the moral and the physical, the inherent purity and divinity of mind and spirit, and the inalienable evil of its antagonist, matter.[1] This evil of matter took form in expression of sex. The Gnostics, for instance, considered marriage and sexual propagation as either worthless or absolutely evil and frequently forbade all carnal pleasure.[2] Some of the Encratite sects condemned marriage and denounced sexual relations.[3] The Apostolici, Hieracians, and Eustathians, the Montanists and Novatians, all identified spirit with purity, matter with evil.[4]

Of these Oriental cults two had a considerable influence upon the development of the Christian doctrines of sex. The one was the Persian Manichæism, the other the Alexandrian Neoplatonism. Manes carried the dualistic theory so far as to hold that Adam was created not in the image of God but of Satan; Eve was given him by Satan and represented seductive sensuousness. In Adam, however, was a spark of light which struggled to carry on the process of his distillation, while evil demons sought to blind him by means of sensuality. He was a discordant being.[5]

[1] Milman, II, 24. [2] Bonnet.
[3] Mosheim; Duchesne, I, 371. [4] Bingham, VII, 269–277.
[5] Harnack and Conybeare. See also Vlastos, *Colonial Papers*, II, 443 f.

The elements of Neoplatonism went back, of course, to classic Greek philosophy. Pythagoras had held chastity in great esteem, and so successfully had he inculcated the virtue that ten of his disciples, attacked, died to a man rather than cross a bean-field, because beans had some mystical affinity with the seat of impure desire.[1] Plato himself had condemned extra-marital sex expression so harshly that affection free from physical taint still bears his name. He had considered illicit sexual intercourse a public offence which ought to be punished by civic ostracism.[2] Plato's philosophical idea that sex expression was deleterious spiritually was fortified by his misconceived medical idea that it was injurious physically. Empedocles and Diocles had thought that semen came from the brain and spinal marrow and that excessive copulation injured the senses and the spine. This notion was adopted by Plato.[3]

The Platonic doctrine of sex was but a part of the Platonic principle of dualism.[4] When this principle was merged with elements of Oriental philosophy, the result was a bizarre mysticism. The exponents of this Neoplatonism, Plotinus and Porphyry, denounced all passion as degrading to the soul.[5] Not only illicit sexual indulgence but all pleasure, Porphyry condemned. Horse-racing, the theatre, dancing, marriage, and mutton-chops were equally accursed; those who indulged in them were the servants not of God but of the devil. St Augustine called Porphyry "the most learned of philosophers."[6]

The Roman world into which these dualistic ideas were flung was far from ideal. In large parts of the Empire the population was little above barbarity.[7] At the beginning of the second century Dion Chrysostomus, himself and not ascetic, spoke with indignation of the

[1] Bigg, *Neoplatonists*, 38 f.; Westermarck, *Moral Ideas*, II, 450 f.
[2] Plato, *Laws*, VIII, 841.
[3] Allbutt, 321. For the harm done to biology by Plato's misunderstanding see Singer, 57; Magnus, 101–108.
[4] Mahaffy, II, 90.
[5] Lea, *Sacerdotal Celibacy*, I, 48 f.
[6] Bigg, *Neoplatonists*, 292 f. [7] Bigg, *Origins*, 305.

horrible cancer of sexual impurity which sapped the life of the heathen world.[1]

In Spain unchastity was common: parents would sell their own daughters for immoral uses.[2] Nor was sexual immorality confined to the more remote and uncivilized provinces. In Rome adultery was exceedingly frequent. It burst out like a plague in the highest classes. The grand-niece of the Emperor Augustus, the sister of Caligula, the niece of the Emperor Claudius, were among those of the early Empire who were tried and punished as adulteresses. At the end of the second century the Emperor Septimius Severus attempted energetically to give effect to the laws against adultery. During his reign 3000 processes for adultery were instituted. The war against manners, however, proved unsuccessful; the emperor tired of his efforts; prosecutions stopped.[3]

As among the Hebrews the decay of moral practices had led to the birth of moral principles by the Pharisees and Essenes, so among the Romans there was a revolt against the reigning license which became articulate in Oriental dualism. There was no difficulty in popularizing the precepts of these Eastern cults. Besides the missionaries and solitary preachers who tramped the roads that led to Rome, there was a whole class of wandering students and professors who roamed the country hawking their theories, "patent medicines for the soul."[4]

When the Neoplatonic doctrine was introduced into Rome, powerful Romans harangued great audiences and fascinated them by "Platonism half understood mixed with fanciful Orientalism." When Plotinus himself arrived in Rome in 244, crowds of senators, magistrates, and women of high rank came to listen to the obscure eloquence of the Egyptian mystic who summoned them, in words that moved St Augustine to admiration, "to flee to the dear fatherland of souls, where the Father dwells."[5]

The Manichean doctrine likewise found ready converts,

[1] Bigg, *Neoplatonism*, 67–74. [2] Bigg, *Origins*, 305.
[3] Woolsey, 50 f. [4] Lindsay, I, 88 f. [5] Dill, &c.

especially among the less educated. Its dogma was simplified; a sharp line was drawn between the devil and the flesh on the one hand and God and the spirit on the other. The satanic origin of the universe fitted more easily into the social understanding of the times, formed a more secure basis for asceticism.

Neoplatonism with its lofty ideals, and Manicheism with its popular appeal, were active competitors with Christianity for Roman converts. The Christian Church, still persecuted, had as yet no power to impose its yoke on others. It could expand only by demonstrating in competition its claim to a higher sanctity and virtue. To effect this end, the Church came to phrase its doctrines more and more in the terms of dualism. In the process it came increasingly to accept the idea that mortification of the body constituted a triumph of the soul over the evil principle. The Eastern dualism had outbid Christianity, Dean Milman says, in that austerity, that imposing self-sacrifice, that intensity of devotion, which acts with the greatest rapidity and secures the most lasting authority over rude and unenlightened minds. To embrace within its pale those who would otherwise, according to the spirit of their age, have been carried beyond its sphere by some enthusiasm more popular and better suited to the genius of the time, Christianity coalesced to a certain degree with its antagonists.[1] From that union was born the Christian doctrine of asceticism.

The asceticism that developed in the early Church was in no direct sense Scriptural. Jesus, though in contact with ascetic movements, had manifested indifference toward them. The only sense in which asceticism may even be termed Christian is that the New Testament's emphasis on self-denial must imply a conflict with selfishness.[2] That the conflict with selfishness led to concrete and even extreme manifestations was purely a social phenomenon.

The ascetic movement was not new. It had long been raging like a mental epidemic. Among the Jews the

[1] Milman, II, 94 f. [2] Northcote, 364 f. (quoting).

Essenes, among the Egyptians the Therapeutæ had had their religious communities. Among the Gnostics and Manichæans, the Montanists and Novatians, there had been some who had expressed the logical conclusion of their dualistic beliefs by retiring from social contacts. Among even the Romans, whose practical genius was opposed to monasticism, the Cynics of the later Empire had recommended the complete renunciation of civic and domestic ties in order to spend life wholly in contemplation. And, during the persecutions, there had been individual Christians who had fled to the solitudes of the desert.[1]

It was, however, the Decian persecution that caused the flight of Christians to the desert to begin in earnest. Paul the Hermit was the first. The Great Persecution gave added impetus. Antony, spreading the movement, followed. Egypt was the favourite retreat. Wild vegetation provided sustenance; natural caves afforded shelter. Life could be maintained without great emphasis on the problem of maintenance. Before the end of the fourth century the monastic population of Egypt was nearly equal to the urban population. Even in the time of St Jerome 50,000 monks would sometimes assemble at the Easter festival.[2]

It was Jerome in particular, who, having become imbued with the spirit of monachism in Egypt and Syria, sought to arouse the West to this sublime expression. Through his letters, descriptive of the purity and sanctity of total estrangement from worldly contacts, he succeeded in awakening an emulation of the principle in Rome, especially among the females. Matrons and virgins of patrician families embraced the monastic attitude with religious fervour. Though the neighbourhood of the metropolis was not as satisfactory as the desert for retreat, they attempted to practise in the midst of the city the rigid observances.[3] They succeeded, we shall see, at least to the extent of depriving their husbands of marital intercourse.

[1] Lecky, *European Morals*, II, 108 f.; Milman, III, 296 f.
[2] Lecky, *European Morals*, II, 112. [3] Milman, III, 288.

Persecution, first causing flight, led later to a passionate religious desire to suffer. The Christians wanted hardship. Through suffering they mortified the flesh, magnified the spirit. The religious emphasis on the hereafter made this life of little importance; and suffering here was security for a greater glory after death. When the persecutions ceased, it was only through ascetic retreat that the Christian could express his desire to suffer for God.

Psychologically the movement is understandable. The ideas of social indulgence as expressed in the Roman world in which the converts had been reared, when brought into contact with the newly acquired Christian concept of sin, must have led to severe personal conflict.[1] A seeming solution of the conflict was retreat.

That the emphasis of early Christian asceticism was focused upon the evil of sex may be due to social or to psychological reasons. Christian asceticism was a revolt against the excesses of the pagan Empire. These pagan practices were expressed most obviously in sexual license. A revolt against paganism was a revolt against sexual indulgence.

In a more general sense, however, there is a strong interaction between the religious and the sexual impulses. M'Dougall has pointed out that the intensification of thought and feeling which is caused by the repression of the sex impulse may easily affect religious interests. It is true to-day, for example, that religious conversions are characteristic of adolescence. But the action of sex and religion is reciprocal. Even before its ascetic period Christianity had taught the evil of sex. When the aroused religious sense has once showed sex expression to be evil, the sex instinct gives rise to a "consciousness of sin," an awareness of the powerful temptation to wrong-doing.[2] Because this temptation is not easily combated in ordinary social surroundings, it may lead to ascetic escape.

It was not these social and psychological reasons, however, that consciously pointed out to the Christian ascetics

[1] Ellis, *Psychology of Sex*, VI, 131. [2] M'Dougall, 363.

the business of sex. The reasons for their beliefs, so far as they understood them, were physiological and religious. They felt a certain æsthetic revolt against the physiological processes of sex. They mentally associated the sexual functions with other physical functions. The attitude was unpleasantly summarized by St Augustine, "*Inter fæces et urinam nascimur.*" [1]

The religious reason for the ascetic's hatred of sex was the association of sex with the fall of man. The sin in the Garden of Eden, St Augustine maintained, had caused the sex organs to become the seat of lust. In Paradise the act of generation would have been free from sexual desire and free from shame. These members would have been as pure as other parts of the body. But the original sin was hereditary; because of Adam sexual expression remained an evil.[2]

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The ascetic Christians translated into Church doctrine their condemnation of the sexual impulse. They made all forms of extra-marital sex expression sin, and all actions even vaguely conducive to it. Because they thought virginity the prime virtue, they looked askance at marriage and succeeded in enacting canons against the marriage of a widow or of a member of the sacerdotal class. The doctrines which they imposed fortified and expanded the asceticism of the Church in theory. The practical applications were not always successful.

With the exception of a lifelong union of one man with one woman, the early Church pronounced as mortal sins all forms of sexual relations.[3] Those not united in wedlock were forbidden by the Church so much as to kiss each other. Any sexual desire in the unmarried, even though unaccompanied by an external act, was regarded as sinful.[4] In consequence, anything that would tend to arouse a

[1] Ellis, *Psychology of Sex*, VI, 120.
[2] Augustine, *De Civitate Dei*, Lib. XIII.
[3] For a complete summary of canonical and patristic doctrine see Van Espen, II, 240–247.
[4] Westermarck, *Moral Ideas*, II, 431 f. See *infra*, pp. 64 f.

feeling of sexual excitement or a temptation to lust was condemned. The Church prescribed punishment for the maintenance of harlots, the writing or reading of lascivious books, singing wanton songs, dancing suggestive dances, wearing improper clothing, bathing in mixed company, frequenting the theatre, or permitting suspected vigils or pervocationes of women in churches under pretence of devotion.[1]

Because sexual activity was a complete evil, the absence of sexual activity came to be thought a complete good. Sanctity and virginity were considered almost synonymous. Virginity worked miracles. Because of her chastity, Mary, sister of Moses, was thought by St Ambrose to have led the female band through the sea on foot.[2] For the same reason Thecla was reverenced even by lions; the unfed beasts lying at the feet of their prey underwent a holy fast and neither with sharp claws nor with wanton look ventured to harm the virgin.[3]

The glory of sainthood was reserved for those who, mid dangers, could preserve their virginity. Ursula, who, with her eleven thousand companions, chose death at the hands of the Huns rather than loss of chastity, has become one of the most revered of female saints. And likewise the English Etheldred is revered, who remained always a virgin though married to a king. St Catherine of Alexandria, having rejected many offers of marriage, was taken up to heaven in vision and by the Virgin Mary was betrothed to Christ. The Lord would intervene to preserve the virtue of His virgins. St Agnes, condemned to be delivered to the stews, when stripped naked, "God forthwith giveth her hayre such unwonted thicknes, that she seemeth more comelie attired therewith to the foote, than if she had beene clothed." And even more remarkable was the miracle of St Gorgonia, who, with "all her bodie and members thereof . . . bruised and broken most grievouslie," even in her pain refused the ministra-

[1] Bingham, VI, 519–578.
[2] Migne, XVI, 1198 f.; Epistola, LXIII, 34. [3] Ibid.

tions of a physician because her modesty forbade her being seen or touched by a man. God rewarded her with a miraculous cure.[1]

This exaltation of virginity could but lead to questioning of the propriety of marriage. St Augustine affirmed virginity to be superior to marriage.[2] Even two centuries before that a council had excommunicated the monk Jovinian for denying virginity to be more meritorious than wedlock.[3] Though marriage might be a necessary expedient for the continuation of the species and a restraint on natural licentiousness, the Christian ascetics could not believe that Paul had meant really to approve marriage. St Jerome tolerated marriage because it provided the world with virgins. But he averred, going a step farther than Paul, "It is good to marry simply because it is bad to burn."[4]

Although asceticism led the Church to concede only a very unwilling assent to marriage, it never drove it to a complete denunciation. It was in two comparatively minor ways that the ascetics' scepticism of marriage expressed itself: in the system of sacerdotal celibacy, and in a ban upon second marriages.

The Christian idea of priestly celibacy was not original. Often in primitive societies the priestess had been regarded as married to the god whom she served. As we shall see, the notion was not unusual in early Christianity that a nuptial relation existed between an avowed virgin and the Deity. How, then, argued St Cyprian, could such a woman marry again? "If a husband come and see his wife lying with another man, is he not indignant and maddened? . . . How indignant and angered then must Christ our Lord and Judge be, when He sees a virgin, dedicated to Himself, and consecrated to His holiness, lying with a man! . . . She who has been guilty of this crime is an adulteress, not against a husband, but Christ."[5]

The Scriptures had placed no prohibition on the marriage

[1] *Lives of Women Saints*, 248, 164 f. [2] Augustine, *Works*, VI, 305.
[3] Westermarck, *Moral Ideas*, II, 421.
[4] Jerome, VI, 30, 76. See also Dill, 295 ff.
[5] Westermarck, *Moral Ideas*, II, 413 f (quoting).

of the clergy. Notwithstanding the tendency in later New Testament literature to exalt celibacy, and notwithstanding the obscure relation of the passage in Revelation about the hundred forty and four thousand redeemed,[1] there are passages in the Bible which show clerical celibacy not to have been demanded.[2] To the ascetics, however, who believed virginity to be the one right rule and marriage to be but a concession, it was only logical to expect and require of the priesthood that they live up to the real standard and not down to the conventional compromise. In the fourth century the Church was torn by argument on the marriage of the clergy. Had it not been for the moderating influence of Paphnutius, the demands on the priesthood might have gone much further and, in their turn, have affected the moral conditions and outlook of the laity.[3]

The Christian opposition to second marriages was but an example of the attitude that marriage is at best only a sop to animal passions. The compromise was the more obvious in relation to second marriages. Because of sentiment[4] and because of affection for the children whose interests might be prejudiced by a step-parent, the Romans had honoured persons content with one marriage. The Christians found in the Scriptures, however, a more important basis for their stand. St Paul had made a comparison between the marriage of man and woman and the union of Christ with the Church.[5] This symbolic emblem was emphasized by the later Church Fathers; marriage was to endure regardless of death.[6]

Among the literalists and extremists these doctrines of asceticism led to strange social expressions. They led to physical mutilation and to epidemics of avowed continence and platonic unions.

Believing that the sexual impulse must be conquered

[1] Revelation xiv. 1–5.
[2] Stanley, 168 f. On the whole subject of clerical celibacy see Makower, 212–224; Milman, III, 389–391; J. C. Robertson, I, 177 f., 311 f., 531 f.; and, of course, Lea, *Sacerdotal Celibacy*.
[3] E.g., Dale: Vogel, IV, 11 ff.
[4] Lecky, *European Morals*, II, 341–347.
[5] Ephesians v. 22–28.
[6] 1 Timothy iii. 2.

at all costs, zealots adopted a literal interpretation of the twelfth verse of Matthew, c. xix.[1] Origen was the most famous of those who physically emasculated themselves. But previously St Justin Martyr had chronicled a similar case with thorough approbation.[2] A whole sect, called the Valesians, is said to have obtained proselytes by forcibly mutilating anyone so unfortunate as to fall into their hands.[3] Sextus Philosophus, popularly known as Pope Sextus II, openly advocated mutilation.[4]

Because of the high esteem in which virginity was held among the early Christians, vows of chastity became dangerous in their frequency. The vow might be taken by a married as well as by an unmarried woman. It did not necessitate any withdrawing from life but simply a refusal of sexual connexion. In the case of the unmarried woman, the vow was sometimes romantic: she became thereby the bride of Christ, whose golden-haired beauty and everlasting youth were emphasized by early Christian romances.[5] The vows of continence taken by women already married drove their husbands, who did not share their exuberant piety, into serious sexual irregularities.[6] The situation became so patently deleterious that the Church itself, notwithstanding its theoretical attitude, had to take measures against this expression of asceticism. Women, it warned, were not to take vows but upon great deliberation, not only with the advice of a priest,[7] but with the consent of their husbands as well.[8]

There was, however, another widespread expression of what Havelock Ellis calls "athletic asceticism." This was the system of platonic unions defined by Chrysostom. Men introduced young girls into their houses and kept them there permanently, respecting their virginity. Such rela-

[1] See *supra*, p. 29.
[2] Justin the Martyr, ¶ 29.
[3] Ibid, p. 22, note 3.
[4] Lea, *Sacerdotal Celibacy*, I, 29 f.
[5] Ellis, *Psychology of Sex*, VI, 138 ff. For a discussion of the psychology of this frequent form of religious erotism see Forel, *Sexual Question*, 348 f. Modern cases are to be found in Sanchez, 163–170.
[6] Lecky, *European Morals*, II, 356.
[7] Johnson, II, 141.
[8] *Ibid.*, I, C. Robertson, I, 334; Archbishop Theodore's Penitential, Lib. I, c. XIV, no. 7: Haddan and Stubbs, III, 188.

tions produced a love more ardent, the saint said, than conjugal unions. There was about them none of the anxieties and physical pain of matrimony, nothing that dulled youth and pleasure. The practice of chaste association probably led, nevertheless, to abuses. As Cyprian said, "The feminine sex is weak and youth is wanton." Certainly it came to be condemned by the Church Fathers. But its popular appeal is amply demonstrated by the romantic literature to which it gave rise among the early Christians.[1]

These varying expressions of chastity and restraint may have represented the revolt of women against the inconveniences and bondages of matrimony. Or they may have been basically an expression of romance, the more highly flavoured because of the bounds set upon the materialization of the imagery. They show, however, that the Church, in attempting to suppress eroticism, succeeded only in refining it to greater heights and more delicate expressions. How ascetic Christianity sought in turn to down these more refined expressions will become apparent in the study of Anglo-Saxon laws.

The subtle psychological consequences of Christian asceticism may be illustrated by two of the more obvious sorts of expressions. They are the attitude toward women and the engendering of sexual perversions.

Dualism, and its association of the devil with the flesh, meant that temptation constantly presented itself in the form of sexual desires. Hell contained female constituents, whose mission it was to seduce men from virtue, even the most eminent of saints. At the convent near Subiaco there is still the rose-bush into whose thorns the naked St Benedict threw himself in order to resist this unholy temptation. Even more familiar are the stories of the temptations of the courageous St Antony.

Because temptation of man lay in the direction of woman, woman became *ipso facto* an evil. Tertullian addressed

[1] On the whole subject see Ellis, *Psychology of Sex*, VI, 154-160; Lea, *Sacerdotal Celibacy*, I, 50-52.

women in these words: "Do you not know that you are each an Eve? The sentence of God on this sex of yours lives in this age. . . . You are the devil's gateway. . . . You destroyed God's image, man."[1] In attempting to desexualize the idea of man, ascetic Christianity succeeded only in oversexualizing the idea of woman. If one defines "man to be a male human being and woman to be a female human being . . . what the early Christians did was to strike the male out of the definition of man and human being out of the definition of woman."[2]

The contagion of austere asceticism had driven many enthusiasts to embrace its practices who were incapable of living up to its principles. Many were young; many were unaccustomed to severe sexual restraint. The deserts to which they retreated provided a poor atmosphere in which to conquer the images of sin, which were so often fostered by the heat and physical deprivation. Many were mad; many committed suicide.[3] To the less ardent spirits the need of sexual outlet expressed itself in various secret perversions. How the Church tried to eradicate by law these perverted sexual manifestations will appear more clearly in a study of the Anglo-Saxon Penitentials.[4]

The Christian doctrines of the sixth century, as they were introduced into England, were the result of ages and diversity of development. The Christian attitude had grown out of the Hebrew attitude, which in turn had been an adaptation of the practices of many primitive peoples as to the rights of property and the exactions of superstition. To these widespread practices of earlier peoples the Jews had added a strong concept of monotheism to fortify with laws of heresy their code of sexual ethics. Early Christianity, coming into contact with mystical religions of the East, assimilated so much of their doctrines as would most directly appeal to the society in which it found itself developing. And, as is inevitable,

[1] Tertullian, XI, 504 f.
[2] Lecky, *European Morals*, II, 124 ff.
[3] Donaldson, 181 f.
[4] See *supra*, pp. 65 f.

just as the doctrine converted the society, so did the society convert the doctrine.

Before beginning the study of the Christian doctrines in England in their more purely legal manifestations, it is interesting to note how closely the English conversion is tied up with the whole development of the ascetic attitude in the person of Augustine.

In his early years as a professor of rhetoric Augustine had lived with a woman in an illicit relationship. "Then did I learn by my own experience the difference between the chaste alliance of marriage . . . and the licentious bargain of carnality."[1] In fact, Augustine had had two mistresses and one natural son,[2] when, in reading the books of the Platonists, he was won over to the better life.[3] In his youth Augustine had been one of the Manichaeans: he had lived among them in Africa for nine years.[4] Possibly it was because of this early familiarity with dualism that he more readily accepted Platonism. Certain it is that the acceptance of the dualistic and ascetic attitude expressed in these two cults made Augustine one of the outstanding proponents of the doctrine of the goodness of the spirit, of the evil of the flesh.

Considering the vast indirect effect of Augustine on the succeeding generations through his writings and his vast direct effect on England through his personal leadership in the conversion, it is no exaggeration to say that Neoplatonic dualism, in the cloak of Christian asceticism, was handed down by Augustine to English tradition and English law.[5]

[1] Augustine, *Confessions*, IV, c. 1.
[2] *Ibid.*, VII, cc. 3, 20.
[3] *Ibid.*, VI, c. 13.
[4] Barnard, I, 139.
[5] Duchesne, III, 434

BOOK II

THE DOCTRINE IN ENGLISH LAW

CHAPTER IV

IN THE ANGLO-SAXON PERIOD

TACITUS's praise of the chaste life of the early Teutons has led to misconception as to their laws of sex. Adultery among the ancient Germans, he wrote, was extremely rare.[1] The cause of this may be found in the law. The penalty was death. The woman offender was either scourged through the village by the outraged women of the neighbourhood, eager to avenge the honour of their sex, or she was strangled and her body thrown into the flames, above which was hanged her partner in guilt.[2]

Tacitus added, however, a statement as to premarital continence. "The youths do not early indulge the passion of love, and hence come to manhood unexhausted."[3] Such chastity, if it existed, was not dependent upon law. The ancient Germans made no demand of premarital chastity. Their law required no more than the law of other primitive peoples required, a recognition of a property-right in women.[4] As among savages generally, and as among the ancient Hebrews, chastity was limited by the respect of the rights of the husband in his wife after marriage, of the rights of the father in his daughter before marriage. The Germans, the Saxons, before their conversion, had no conception of the ascetic purity of abstinence from sex expression.[5]

Before considering the effects of Christianity upon the Anglo-Saxons after their migration to England, it is interesting to note what of this primitive Teutonic attitude about chastity survived in their law. It was upon this social basis that the Christian doctrine sought to impose itself. The story will be found to differ not greatly from the application of the ascetic attitude to the Hebraic concept of chastity.

Among the Anglo-Saxons in England the system of wife-purchase was in vogue until the eleventh century.[6]

[1] Tacitus, 18 f.
[2] Tacitus, 19.
[3] Lecky, *European Morals*, II, 360 f.
[4] Aydelotte, 32; Lingard, II, 3 f.
[5] Crawley, *Chastity*.
[6] Lappenberg, II, 158.

The husband, having paid value for his wife, had the exclusive right of possession. If a freeman lay with the wife of another freeman, he had to pay compensation.[1] Because the amount of damage was dependent upon the size of the bride-price and therefore upon the social standing of the injured party, compensation varied roughly in proportion to the husband's wergild: damage to a churl might be only a third as great as that to a freeman.[2]

Like the husband in various primitive societies, the husband among the Anglo-Saxons was not expected necessarily to stand quietly by when his property was being violated and later to accept a compensation for the tort. He might want to exact physical retribution. Should he fight when he discovered another man "under the same blanket" with his wife, the husband did not become liable to a vendetta.[3]

Because female chastity had property value to the father as well as the husband, the father had rights equal to the husband's right in vindicating his ownership. The father who found a trespasser in carnal intimacy with his daughter was protected in any physical punishment he might inflict.[4] Or he might accept a monetary compensation for the loss he suffered which, as in the husband's case, varied widely according to the woman's social class and the consequent size of her bride-price.[5]

Among the Saxons as among the Hebrews the woman's father had, in the contract of betrothal, to warrant her chastity. If there were a breach of warranty, he was bound to return the bride-price to the suitor.[6] This warranty, it seems, was supported by a suretyship agreement, a promise to reimburse the suitor in event of the

[1] Æthelberht, c. 31. He might even have to procure a second wife for the injured husband with his own money. In all citations of the laws of the Anglo-Saxon kings the recent translations of Attenborough and Miss A. J. Robertson have been compared with Thorpe and Liebermann. Wherever there is a difference of substance Liebermann has been relied upon.

[2] Alfred, c. 10. [3] Alfred, c. 42.

[4] Ibid. See also William I, c. 33.

[5] Æthelberht, cc. 10, 12, 14, 16. See also Æthelberht, c. 75, as translated by Liebermann.

[6] Aethelberht, c. 77; Young, 164, note.

woman's loss of chastity. If the prospective bride committed fornication after betrothal and before marriage, it was her duty to see that the surety was compensated for the loss that would accrue to him.[1]

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It was upon this simple basis of property-right that Augustine sought to erect his elaborate structure of asceticism. The story of the conversion is familiar enough: how Gregory had seen the fair-haired Angles in Rome and had himself wished to convert their race, but, upon becoming pope, he had sent Augustine. The way had been made easy because Æthelberht, the king of Kent, had taken as wife a Frankish princess who was a Christian. Upon his landing in 597 Augustine was received by Æthelberht, whom he converted and baptized. By Christmas of that year Augustine had converted 10,000 Kentish men.

Marching these multitudes of converts through rivers, however, did not wash them free from the customs of their forbears nor baptize them into a recognition and acceptance of the subtle doctrines of ascetic Christianity. Augustine wanted something of greater dramatic quality than his own words to add to his teaching the force of a higher authority. He therefore wrote to the pope for an explanation of various Church dictates. He propounded questions, the answers of which would enforce the doctrines upon the consciences of his clergy and people.[2] Gregory's answers contain an explicit declaration of the doctrines of sexual repression which were current in seventh-century Rome. Imbued with the superstitions of the ancient Israelites and the dualism of the Persians and Alexandrians, they made the first specific imprint of Eastern asceticism on English law.[3]

Carnal fecundity, Gregory said, was not a sin, and the Old Testament dictate that a woman needed to go through a long period of purification before she might be churched

[1] Alfred, c. 18. [2] Johnson, I, 63.

[3] Gregory's answers appear in Bede, Bk. I, c. 27; 1569 ed., folios 31 ff., 1640 ed., 45–61; Johnson, I, 66 ff.; Giles and Haddy, 3–9 (part only).

after childbirth was not to be accepted literally.[1] But carnal relations, menstruation, and childbirth did all, nevertheless, have a significance of uncleanness. "A man that has laid with his wife ought not to enter the church till he hath bathed himself in water, nor yet presently after he hath bathed"—not, in fact, until sundown.[2] The holy law, Gregory asserted, inflicted death upon a man who had relations with a menstruous woman. Though a menstruous woman ought not to be forbidden entrance into church, it became a pious mind to acknowledge a fault where there was none; and a woman was therefore to be commended if out of reverence she presumed not to communicate. After childbirth the husband ought not to lie with his wife until the child was weaned.

Gregory was not content to reaffirm these dictates of the old Hebraic law. He felt constrained to put upon the practices an interpretation which went far beyond the dualism of Paul. To Paul's doctrine in Corinthians he added qualifications from Exodus and Samuel[3] in an effort to show that while carnal relations might be tolerated for the purpose of procreation—and that only by way of divine indulgence—"when pleasure, not procreation, bears rule in this matter, husbands and wives have cause to lament their embraces." Incontinence was the reason for violations of the laws of restraint. Thought of sex, he said, was the guilty act of a depraved will. Not conjugal conversation, but the pleasure of it was sin.

The doctrines announced by Gregory had more than an ecclesiastical influence. They became part of the Anglo-Saxon law. Incorporated into the Penitentials of Theodore, of Egbert, and of Bede, as we shall see, they were enforced by all the weight not only of the Church but of the secular power as well.

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The ideal of chastity among the Christianized Saxons

[1] See *supra*, p. 25. The Churching of Women after childbirth and the Feast of the Purification of the Blessed Virgin Mary are still observed in the Church though commemorating ancient Jewish rites.

[2] See *supra*, p. 25. [3] See *supra*, p. 26.

to England was the same as it was among the more civilised Christian converts. Virginity was so esteemed that Queen Etheldred was canonised for her chastity. Though her kingly husband offered the bishop lands and money to persuade her of her marital duty, she remained always a virgin. As proof thereof, upon exhumation of her body 16 years after burial, not only were her flesh and clothes intact and free from corruption, but the gaping wound of which she had died was entirely healed.[1] Similarly rewarded was the model abbess, St Ebbe, who cut off her nose and upper lip and persuaded all the sisters in her convent to do the like that, being odious to the Danes, they might the better keep their virginity. The Danes proved to be unappreciative of the significance of this saintly act.[2]

In the same way as the Arthurian romances, however, painted no accurate picture of chivalry in ancient Britain, these saintly romances gave no true account of the virginity. The kings, far from chivalrous, were, according to St Gildas, tyrannical, and waged unjust wars. Similarly as to moral conditions, married people were in no sense chaste; they were adulterers and whoremongers.[3]

Gildas may have been outspoken. Certain it is, however, that asceticism seemed to find little favour among the first Anglo-Saxon converts. Augustine had difficulty in securing sufficient co-workers among his disciples.[4] A century later St Boniface, himself English, deplored the moral attitude of the Anglo-Saxons, who utterly despised legitimate matrimony. To an English priest he wrote, "It fills us with shame for our race to be told by both Christians and pagans that the English people, scorning the usages of other nations and the apostolic precepts given under God's law, refuse to have legitimate wives, and consume to live in lechery and adultery after the manner of neighing horses and braying asses." Boniface strongly

[1] Bede, Bk. IV, c. 19; Roger de Wendover, Anno 679.
[2] Stowe, *Annales*, 78; Roger de Wendover, Anno 870. See further, Strutt, I, 79.
[3] Gildas, *Epistola Gildæ*, § 27. [4] Lea, *Sacerdotal Celibacy*, I, 186.

urged the English synods to discourage pilgrimages, especially when made by women. Too often they were but an excuse for a wandering and licentious life from which the women never returned. "There is scarcely a town in Italy, or in France, or in Gaul, where English prostitutes are not to be found; which is a scandal and disgrace to your Church."[1]

The corruption was not only among the lower classes. To Ethelbald, king of Mercia, Boniface found it necessary to write a letter of entreaty to reform his standards of living, and to take model from his Saxon forefathers who discountenanced adultery. Ethelbald, it seems, instead of acquiring for himself a legitimate wife, preferred to use the monasteries of holy women as harems.[2]

The next century saw no great improvement. Alcuin of York wrote, "Since the time of King Ælfwold . . . the land has been absolutely submerged under a flood of fornication, adultery, and incest, so that the very semblance of modesty is entirely absent."[3]

Bad as were the sexual vices of the laity, the immorality of the clergy, if not greater, was at least more pronounced. Already in the mid-seventh century John IV reproved the laxity of Saxon monasticism, under which holy virgins did not hesitate to marry. The Venerable Bede, too, complained in 734. The Council of Cloves-hoo in 747 and the Council of Chelsea 40 years later condemned the gross immorality of the nunneries.[4] "Let not . . . nunneries be places of secret rendezvous for filthy talk, jesting, drunkenness, and luxury."[5] Boniface said that the nunneries were no better than brothels.[6]

These conditions are not so much to be ascribed to wilful immorality as to the ignorance of the clergy. A priest who could read Latin was looked upon as a prodigy. It sounds like picturesque exaggeration when Palgrave

[1] Bonifatii, III, 419, 421 (quoting).
[2] Stevens, *Annals*, 69 f.; Bonifatii, III, 419.
[3] Bonifatii, III, 419 (quoting).
[4] Lea, *Sacerdotal Celibacy*, I, 168 ff.
[5] Cuthbert's Canons at Cloves-hoo, no. 20: Johnson, I, 231 f.
[6] Bonifatii, III, 420.

writes: "Scarcely could the priest at the altar, reeking from the debauch, stammer out the words of the Liturgy. Your English clerk was a glutton and a sot: of other vices we will not speak." [1] Unless such conditions were actually existent, however, there would have been no need for the law of King Wihtred: "If a priest consents to an illicit connexion, or if he . . . is too drunk to discharge his duty, he shall abstain from his ministrations, pending a decision from a bishop." [2] Were they not actual, the Pastoral Letter of Ælfric would not have had so carefully to expound to the priests the doctrine of clerical chastity. "You priests . . . have your misdeeds in custom, so that it seems to yourselves, that ye have no sin in living in female intercourse. . . . Beloved, we cannot now forcibly compel you to chastity, but we admonish you, nevertheless, that ye observe chastity." [3]

Of all the English ecclesiastics, however, it was St Dunstan who was not content to express his regrets and hopes in words alone. When Edwy, king of Mercia, had a notorious liaison with a female, Dunstan left his court and later helped to precipitate a rising of the nobles, who drove Edwy into Wessex.[4] Edwy was succeeded in the kingship by his young brother, Edgar. It was Edgar who committed the famous rape of the nun of Wilton, who was later canonized as St Wilfreda. It was this violation of honour and religion that gave Dunstan his chance at reform. Terror-stricken, Edgar sought absolution. Dunstan not only imposed a penance of seven years, during which Edgar was not to exercise the rights of kingship, but exacted from him promises to reform the clergy.

In all England at this time there were only two monasteries inhabited by monks. The remainder were occupied by the secular clergy with their wives or concubines. These priests were far from monogynous: they would put away wives and take new ones at will, or they would live in open adultery. These lewd clergy Dunstan replaced. He

[1] Palgrave, *Normandy and England*, III, 631.
[2] Ælfric's Pastoral Epistle, 9, 10, 32, 33, 43 · Thorpe.
[3] Lingard, II, 274–278.
[4] Wilmot, c. 6.

made harsh rules of penance for priests and monks who should stray from the paths of virtue.[1] He effected, in a word, some temporary reforms.[2]

Edgar, however, died. The priests and women were reinstated in the monasteries. The Saxon kings were weak. Though Canute, as we shall see, made some reforms and probably did put down the polygyny of the clergy, the standard of morality during the century preceding the Conquest was extremely low. When Edward the Confessor and his queen, Edith, took a vow of continence—possibly because of their family hatred—the populace was derisive.[3] Edward's attempts at reform were feeble. When the Anglo-Saxon monarchy fell, the chroniclers affirmed that the ruin was due to the wrath of God, provoked by the vices of the laity and clergy.

> Too much now is virtue falling
> In England, and sin rising;
> Nor can God's long-suffering endure
> That he take not a mighty vengeance. . . .
> Afterwards the prophecy was
> Made clear in the time of Harold,
> When William, Duke of Normandy
> Had the victory. . . .[4]

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Such conditions of immorality were themselves both a cause and a result of the dual legal system under which the Anglo-Saxon law was administered. The secular law of pre-Norman England was never organized into a code. The dooms that the kings issued with the advice of their councils over a period of five centuries were not intended as a comprehensive statement of the law. This is evident from the inconspicuous part played by the rules of procedure in Anglo-Saxon legal writings. The body of the law was customary. In the same way that the customary common law to-day is changed in detail by the acts of Parliament, so was the largely customary Saxon law

[1] Penitential Canons of Edgar, arts. 39, 40, 41: Johnson, I, 417.
[2] Johnson, I, 449; Lea, *Sacerdotal Celibacy*, I, 190–201; Lingard, II, 21: ff.
[3] Lea, *Sacerdotal Celibacy*, I, 204.
[4] *Laws of Edward the Confessor*, 184, 186.

amended by the dooms of the kings. The written law was only interstitial.[1]

The jurisdiction of the Christian Church in Rome had been limited to purely spiritual matters. In England, however, there was no organized body of temporal law to mark out the bounds of spiritual jurisdiction. The Church proceeded with its more highly developed legal system to fill in the gaps in the temporal law.[2] It began to strengthen the temporal law where it was the weakest. The recent Christian converts could not, however, readily assimilate the new Church doctrines into their old customary law. A breach was created between the new customs and the practices, which expressed itself in growing immorality. In order to strengthen the customs and put behind them the force of secular power, the kings began to enact new temporal law. These temporal laws were a legal expression of the Christian doctrines.

More and more did the two systems of legislation become confused. At first the ecclesiastical discipline was enforced by the sanctions of the civil legislature. Later the councils of the Anglo-Saxon clergy were held concurrently with meetings of the witan of the Anglo-Saxon kingdoms. The temporal statutes would state the consent of the lords of the Church; the spiritual canons would be enacted at the same time with the statutes regulating general government.[3] Secular laws contained ecclesiastical provisions; ecclesiastical canons expressed support of secular policy. Because the object of the common or national law to promote public good was affirmed and re-enforced by the aims of the spiritual law, it was to the interest of the kings to support the ecclesiastical rules and punish those who offended against God.[4] As the Church prescribed penance for purely secular crimes, so did the temporal law provide reciprocal punishment for spiritual offences.[5]

On the subjects connected with sexual morality the

[1] Pollock and Maitland, I, 26 f. This was particularly true in the realm of Family Law: Young, 121.
[2] Cf. Holdsworth, *History*, II, 25.
[3] Palgrave, *English Commonwealth*, Pan I, 172; Stephen, II, 237.
[4] Hale, VII.
[5] Pike, *History of Crime*, I, 31.

relation and mutual support of the system is most obvious. To the State sex restraint was important not only to prevent open breaches of the peace but to support the social system which related marriage and morals with property and social control. To the Church sex restraint was important not only to protect the soul of the individual communicant from sin but to extend its power over the daily lives of the semi-barbarous converts and bring them into more direct conformity through its administrative system.

The interaction of the ecclesiastical and temporal law concerning sex repression expressed itself principally in two ways. The temporal law sought by means of its new written enactments to assist the Church in elevating the moral tone of the populace through a conformity to Christian standards. The ecclesiastical laws sought to supplement the State's legislation so as to make a complete administrative code of sexual morality.

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The laws of the Anglo-Saxon kings attempted in several ways to give practical effect to the Church's doctrines on sex expression. They enjoined in general terms the acceptance of Christian sex morality; they provided added force for maintaining the vows of the clergy and religious orders; they supported the Church's specific injunctions as to sexual practices; and they changed the tone of the old temporal laws of sex so as to express the Church's ascetic attitude.

Less than a century after the advent of Augustine the secular law was already to be found supporting the Church in its attempt to eradicate concubinage. King Wihtred ordered men living in illicit unions either to turn to a righteous life or be excluded from the communion of the Church. Foreigners violating the order were to be banished, and subjects were to be fined according to their rank. A *ceorl* was to pay a fine of 30 shillings, a ruinous sum.[1] Æthelred and Canute both reaffirmed this

[1] Wihtred, cc. 3, 4, 5.

denunciation of illicit concubinage. Æthelred ordered amends to be made to the Church for violating its precepts,[1] and Canute recalled the teachings of the bishops that the individual should guard himself from sexual sin.[2] Adulterers were made subject to banishment, and prostitutes who did not leave the land were to suffer death.[3]

Not only among the laity did pre-Norman kings seek to assist the Church in elevating sex morals. Conditions among the clergy, we have seen, were bad. Æthelred noted that the priests, who were supposed to be entirely chaste, were really worse than laymen, putting aside one concubine and taking another without compunction.[4] To remedy these conditions the kings made promises and threats. Priests who preserved their chastity were to have the status and privilege of a thegn.[5] Those, on the other hand, who committed fornication were to make compensation to the injured party and to God; should they not procure surety for the fine they were to go to prison.[6]

To nuns the secular law afforded protection not only from the immoral advances of others but from their own weakness. He who defiled a nun was to make deep amends both to Church and to State.[7] One abducting a nun without the permission of the king or bishop was to pay 120 shillings compensation.[8] Like a homicide, a man who had intercourse with a nun was to be deprived of burial in consecrated ground.[9] The nun too was to suffer for her breach of virtue. She, like her fellow-sinner, might forfeit a hallowed grave and God's mercy. Like him she might be liable in the wer.[10] As a more serious deterrent, she could inherit from her abductor none of his property, neither she nor her child.[11]

[1] VIII Æthelred, c. 4, also V Æthelred, c. 10, c. 24–25; VI Æthelred, c. 11, c. 18, s. 2. [2] Canute 1020, c. 13; I Canute, c. 6a, c. 24.
[3] Edward and Guthrum, c. 11; 2 Canute, c. 44, c. 6.
[4] VI Æthelred, c. 5. Throughout these passages Miss Robertson translates as "marriage" what Liebermann and Thorpe call "concubinage."
[5] *Ibid.*, V Æthelred, c. 9; I Canute, c. 6a.
[6] Edward and Guthrum, c. 5. See also VIII Æthelred, c. 30; II Canute, c. 70, s. 1. [7] VI Æthelred, c. 39. [8] Alfred, c. 8.
[9] I Edmund, c. 4. [10] Law of the Northumbrian Priests, c. 63; Thorpe.
[11] Alfred, c. 8, ss. 1–2.

The way in which the kings sought to support by their secular power the specific teachings of the Church as to abstinence from sex expression is best illustrated by the rules as to Lenten continence. As will be noted under the discussion of penitential discipline, the Church forbade all marital sexual intercourse for the 40-day period preceding Easter. A Lenten fast defiled by the conjugal act was of no avail.[1] The practice was by no means original with the Christians. The vernal equinox had been observed among other religious cults by similar abstinences,[2] and many primitive peoples had practised continence at sowing-time to encourage the growth of the crops.[3] But a period of 40 days' marital continence is somewhat long, and doubtless many of the early English Christians found it unduly arduous. The penance prescribed by the Church was an insufficient bolster to Saxon frailty. In the name of King Edgar, therefore, St Dunstan enacted the injunction in the secular law.[4] A penalty was supplied by Canute. Anyone who broke the fast of Lent by intercourse with woman, he provided, was to pay not ordinary but double compensation.[5]

The acceptance by the kings of the burden of enforcing the Church's doctrines led finally to their acceptance of the doctrines themselves. Under the earlier Anglo-Saxon law adultery and fornication had been punished only as violations of a property-right. From the tenth century onwards, however, the secular law looked upon such sex expression as more than a private wrong to the husband or the father. Chastity was enforced in the name of the State itself.[6] It was enforced not for the safety of property but for the safety of the soul.[7] Retribution was not to be made for the reimbursement of the person injured but for punishment of the person offending. The adulteress was to lose both her nose and her ears. Besides,

[1] Ecclesiastical Institutes, XLIII: Thorpe.
[2] Westermarck, *Moral Ideas*, II, 313. [3] See *supra*, p. 9
[4] Canons of Edgar, c. 15; Thorpe, or Johnson, I, 417.
[5] II Canute, c. 47.
[6] Edward and Guthrum, c. 5, I Canute, c. 7, s. 2.
[7] II Canute, cc. 50, 59, 54.

those guilty of adultery were deprived by the secular law of spiritual benefits: they were denied the right of consecrated burial.[1]

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The support that the spiritual law gave to the secular law in Anglo-Saxon England, and the complete division of jurisdiction to which it later led, were the normal outcome of the division between the Kingdom of Heaven and the earthly State. The Scriptures gave to the Church the power of the Keys. The Church was the outward and visible form of God's government. Those who did not support this government were outside the bounds of divine grace. The Church was authorized, in fact commanded, to gather men into her fellowship by the ceremony of baptism. Should any member so admitted prove unworthy, she had also the right to deprive him of communion with her, temporarily or absolutely.[2] The belief was universal among the early Christians that he who was expelled from the pale of the Church was expelled thereby from the way of salvation: "the sentence which was pronounced by God's church on earth was ratified by Him in heaven."[3]

The New Testament contained the expression of a whole moral system, and so much of a social system as had been necessary in the age when it was propounded. Under the early apostolic government these precepts had constituted all the doctrine that was requisite for salvation. As Christianity spread to more complicated societies, it had itself to expand; the Biblical standards, clear enough in theory, had in application to be regulated by some process other than the will of the individual. From the days of the apostles onwards there were councils and canons, constitutions and books of discipline, all aimed at an authoritative

[1] [Edmund, c. 4.

[2] For Scriptural references of spiritual discipline see: Matthew xviii. 15–18, John xx. 22–23; 1 Corinthians v. 3–5, 2 Corinthians ii. 6, 2 Thessalonians iii. 6, 14; 1 Timothy i. 20, 2 Timothy ii. 17, Titus i. 5–13; ii. 15; iii. 10; Hebrews xiii. 17.

[3] Smith and Cheetham, II, 1587.

expansion of the moral teachings, a definitiveness of dogma, and a uniformity of administration.[1]

The councils, however, were many and diverse. Local customs arose. The disciplinary law became increasingly diverse and disconnected, often discordant. There was no code in any sense generally applicable. The need for such a code constantly increased with the spread of Christianity to pagan lands. Missionary priests required a written guide to supply the deficiencies in their education or in their memory.

This need for a guide was most pronounced in the administration of penance. Penance was the system of Church discipline. To the priest a sinner might come to seek absolution. As a condition thereof, and to re-establish the sinner in the graces of the Lord, the priest might impose acts of atonement. The original meaning of the Latin word *paenitentia* was repentance, implying a change of heart, contrition, amendment. Along with this inward feeling of contrition the Church came to combine an outward expression of it, an act of self-abasement.[2] The need to make these external manifestations of repentance suit the offence and the need to have them the same, no matter where the sin or who the sinner, led naturally to a formulation of the elements of penance.

Even before the conversion of the Anglo-Saxons there had been codifications of penances made in Ireland and in Wales. But it was the second archbishop of Canterbury, Theodore of Tarsus, who gave authority and wide acceptance to a codified penitential. Upon the death of Theodore his disciples collected and arranged with some logic the decisions which he had made in the actual cases of penitence that had come before him. The principles which Theodore applied were not largely original with him. He adopted freely the rules of Church councils and the teachings of Church Fathers, particularly his master, Basil; he borrowed from earlier Irish and Welsh sources.[3]

[1] Stubbs, *Canon Law*, I, 270 f. [2] Smith and Cheetham, II, 1586 f.
[3] Oakley, 109 ff.

The Penitential of Theodore was widely applied not only in England but on the Continent. It was followed in England by two similar penitentials, those of Bede and of Egbert. There were, besides, two other compilations of a penitential character, known as the Excerptions of Ecgbeibt, Archbishop of York, a collection of the canons and sayings of the Holy Fathers, and the Penitential Canons of King Edgar, actually written by St Dunstan when Archbishop of Canterbury.[1] The English Penitentials were compiled, then, over a period of almost three centuries, from the death of Theodore in 690 to the ascendancy of Dunstan in 965.

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The Anglo-Saxon Church Penitentials placed upon matters of sex more emphasis, both in quantity of regulation and in minuteness of detail, than has, probably, any other general code of conduct. Partly this was an outgrowth of the sexual asceticism which so largely occupied the teachings of all the Church Fathers. Had the Church's doctrines as to sex expression been codified in Rome before Augustine's mission, they might have been found to contain many and minute regulations. The reason for the sexual content of the Penitentials was, however, social as well as doctrinal. The transplanting of ascetic doctrines to a partly civilized country brought into sharper contrast the divergence between theory and practice. The ascetic repressions, which to the Christian Fathers were but the outward expression of a firm philosophical conviction, were to the inhabitants of Britain a social and psychological anomaly. To express the ascetic attitude objectively and practically a careful diagnosis was necessary of every sexual manifestation.

The Church's penitential legislation did not meet at that period the difficulty to which criminal legislation is usually held—enforcement. Acts so intimate as private sex expression are naturally difficult of detection and difficult of proof. The penitential discipline surmounted those

[1] Johnson, I, 416.

difficulties *ex hypothesi*. The acts did not need to be discovered and proved against the offender. They were confessed voluntarily. For that reason then the Penitentials could undertake the regulation of private sex acts without absurdity. They could regulate not only acts of persons in conjunction, but solitary acts of an individual, not only overt action, but mere contemplation with no physical manifestation. The offender lost rather than gained by concealment. An unconfessed sin shut the door to future salvation, whereas penance performed here was an insurance against far more rigorous punishment in the after life.[1]

The bases for the penitential rules of sex repression were the Scriptural restrictions as interpreted by the Church Fathers.[2] They condemned adultery and fornication, incest and sodomy. They restricted sexual connection on various occasions, but on many more occasions than did the Scriptures. Sex, they declared, was unclean. In consequence, everything connected with sex, physical or merely mental, was unclean.

In the prohibitions of fornication and adultery there was no evidence of the old Biblical bases of the offence. Voluntary sex expression was no longer considered an injury to the husband or the father, or even to society; it was considered an injury to the offender's chances to attain salvation. For the sinner to re-establish himself with the Deity the penances were varied. The penance imposed by Theodore and Bede for simple fornication was generally one year, but this was increased according to the frequency of the act and the age and discretion of the parties.[3] Attempts to fornicate, too, having a like evil intent, were subject to punishment. Adultery was a far more serious

[1] Psychologically the preoccupation with sex in the Penitentials might be a vicarious expression by the complexes of the sexual instinct itself.

[2] The Excerptions of Egbert and Pseudo-Gal Canons of Edgar are found in Thorpe or Johnson. The Penitentials of Theodore, Bede, and Egbert, in so far as they concern sex, are unprintable in English: Haworth, II, 161. The Latin text here used is Haddan and Stubbs, vol. III.

[3] In the Church's list of misdeeds fornication was sometimes placed above murder: Oakley, 63.

offence, entailing in some cases only a two-year penance and in others as much as a seven-year fast on bread and water.

Sexual connexion with a religious person was to be severely atoned for, and commerce between a monk and a nun even more severely. Dunstan imposed upon the lower orders of the clergy who fornicated with a nun the same penance as for murder, a 10-years' fast and perpetual lamentation and forbearance from meat.

From the feeling that any sexual expression was unclean, there led many restrictions on normal intercourse. Holy places were not to be defiled by association, nor were holy occasions. There was the Old Testament restriction upon entering the church after the sexual act until a purification had been performed,[1] but the period of quarantine was extended to 24 hours. There were the same ancient Hebraic restrictions upon a woman at periods of menstruation and childbirth, but these too had been greatly extended. Pope Gregory, it will be remembered, had considered a woman sinless if she entered church during menstruation and had only suggested the piety of non-communion. Theodore, however, considered such an act a sin and prescribed penance for a woman who entered church or received communion during menstruation. The uncleanness of the period of childbirth was emphasized as well: for 40 days after parturition a woman was not to enter church.

New and more singular was the expression of a feeling of uncleanness about marriage. Though Paul had distinctly explained that marriage was not sin,[2] Theodore prescribed that after marriage the parties must withhold themselves from church for 30 days and thereafter must do penance for 40 days. The married couple might be reconciled with the Church thereafter upon bringing an offering.

The ascetic feeling of the uncleanness of sex expressed itself in another way. The Penitentials prescribed marital continence at all periods with a sacred significance. Before

[1] See *supra*, pp. 15 f.

[2] See *supra*, p. 19.

receiving communion a husband and wife were to withhold themselves from conjugation for three days, the better to prepare themselves by prayer and proper mental attitude. Out of respect of the sacrament also, a couple newly married were enjoined from sexual connexion for the first three nights after marriage.[1]

Not only at these special occasions was marital sex expression forbidden, but at the regular Church festivals. Conjugation on Sunday was punished by 7-days' penance; conjugation on the two fast-days of each week, Wednesdays and Fridays, was likewise punishable. Most arduous, however, were the two annual 40-day fasts, preceding Easter and preceding Christmas. Restraint for so long a period could not have been easy for the hardy Anglo-Saxons. Refraining from conjugal relations was as important an observance of these periods, however, as refraining from certain foods. Hell was thought to contain a special place of torture, consisting of a lake of mingled lead, pitch, and resin, for the chastisement of those married people who had had intercourse on Sundays, fast-days, or during festival periods.[2]

It was not only the desecration of sacred places and sacred occasions that led the Penitentials to restrict marital sex expression. Through sex expression one might be contaminated by particularly unholy things. This was the same set of restrictions as was familiar to Hebraic and primitive law. The periods were menstruation, pregnancy, and childbirth. The Penitentials, however, extended the periods beyond the restrictions of the Hebrews. From the time that the conception became manifest until 40 days after delivery, in the case of a boy as well as of a girl, marital intercourse was forbidden.

The expression of sex was no more an evil than the contemplation of sex. The sin lay in the desire, the passion.

[1] These "Tobias Nights" were a survival of the custom originating in the myth of Tobias and Sarah in the apocryphal Book of Tobit: Power, *Folk-Lore*, I, 497–501.

[2] Westermarck, *Moral Ideas*, II, 417. During the period of penance too the penitent was compelled to abstain from the marriage bed: Lecky, *European Morals*, II, 7.

To the layman whose thought dwelt on fornication, Dunstan allotted a fast of 40 days on bread and water. According to Theodore the atonement for the thought was to be as severe as the atonement for the act; the more excessive the thought, the more severe the penance.

Great as is the emphasis that the Penitentials placed upon the restriction of normal sex expression, it is not comparable in scope or detail to the emphasis on abnormal and perverted expression. The more violent perversions of sodomy and bestiality, we have noted,[1] were explicitly condemned in the Scriptures because of their connexion with heresy. In the later Middle Ages the connexion became even more marked, the offence more condemned.[2] In the Christian doctrine the attitude toward these unnatural expressions had been settled long before the Penitentials. The early Church councils at Ancyra and Elibertis, the early Church Fathers, Basil, Justin, Tertullian, and Cyprian, had considered the offences and their punishment.[3] But it is nevertheless a surprise to find in these five comparatively brief Penitentials the subject of sodomy and bestiality considered in at least 22 distinct paragraphs. The divisions of the offences were various, according to the age and position of the one committing them, the one with whom committed, and the method of commission.

The other more serious perversions of oral and anal connexion were mentioned in the Penitentials not once but numerous times. The penances imposed were, of course, severe—as long, in fact, as 22 years or, for some offences, for life.

It is the milder forms of sexual perversion, however, and the attempts to regulate them that are of greater sociological significance. The amount of concern with auto-erotism is more marked than any single form of sex expression. Omitting the chapters of discipline that apply specifically to the clergy—in which, in fact, there was considerable mention of such perversion—and counting only

[1] See *supra*, p. 17.

[2] For a thorough discussion of the relation of heresy and homosexuality see Wentworth, *Marvel Idea*, II, 489.

[3] Bingham, VI, 253–259.

those rules which are of general application, self-abuse was the subject of 25 paragraphs in the Penitentials. With infinite care the varieties of the offence were differentiated, the persons by whom it was committed, their age, their station—lay or clerical—and dignity, the place where committed, the thoughts connected with the commission. For a layman the penance ascribed was usually 40 days.[1]

This exceptional amount of attention paid to self-abuse has led psychologists to say that Christian asceticism caused an increase of masturbation. The Christian theology condemned all forms of sex expression, and it was auto-erotism that was the weakest point of resistance.[2]

In considering the effects of asceticism as expressed in law, it is of interest to note the amount of ecclesiastical legislation that concerned itself directly with the sex offences of the clergy. Their sexual decency was set out with far greater minuteness than that of the laity. In the Penitentials of Theodore and Egbert there were separate chapters dealing with the lapses of God's servants. Though such chapters were supposedly inclusive of all clerical abuses, of the many crimes enumerated in Egbert's Penitential all but two pertained to sex. Some of these provisions were penances for normal sex expression; a greater number concerned perversions. The penances were severe according to the rank of clergy. They applied not only to the lower orders but to the bishops themselves.

A clerk who, asleep in his bed, was involuntarily guilty of onanism had to rise immediately and sing seven prescribed penitential psalms and, in the morning, 50 more psalms. Or if his involuntary act took place when he inadvertently fell asleep in church, he had to sing the whole psalter. This emphasis on the wickedness of sex, no matter its lack of significance or volition, must have made it difficult to carry out the injunction in Egbert's

[1] Later Catholic theologians, including Aquinas, condemned the offence as worse than fornication.

[2] Ellis, *Psychology of Sex*, I, 178 f. Mohammedans consider auto-erotism a Christian vice.

Penitential that one must do penance for an evil thought until the evil thought was conquered.[1]

The effectiveness of the system of penitential discipline as a legal and social tool has long been debated. It has been suggested that the penitential discipline supplemented the secular law in those matters which the secular law treated too lightly, and thereby assisted in raising the social estimate of women.[2] It has been suggested that the very vagueness of the line between ecclesiastical and temporal jurisdiction enabled the Penitentials to instil ideas of order and decency in the only way that they could be instilled into a rude people.[3] It has been suggested that the very denunciation of passion and the determination to suppress it was a step towards the light.[4]

On the contrary it may be said, however, that the austerity practised by the early Christians for the sake of an ascetic ideal lost its spontaneity and attractiveness by the mechanization of a code of sin. Haddan, who knew the Penitentials better probably than any other scholar, has said: "The exceeding minuteness with which degrees of sin are distinguished; the enormous severity of the penalties; the speedy introduction of commutations of penance;[4] . . . the inevitable externalization of morals resulting from such a minute quantitative measure of outward acts; the temptation arising from the mere bulk and duration and extent of the penances to exalt these into ends and not instruments, into meritorious compensation instead of a discipline to lead the soul more nearly to the Saviour and Judge Himself: all this, apart from any particular question of doctrine, may be truly alleged against the system itself." [5]

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The Penitentials were not a part only of the ecclesiastical discipline; they were a part of the Anglo-Saxon law. In the very early history of the Christian Church if the sinner

[1] English law has never once the Penitentials attempted to regulate the private sexual experience of a solitary individual. [2] Oakley, 195 f.
[3] Lea, *Auricular Confession*, II, 106. [4] Smith and Cheetham, II, 1608.
[5] See *infra*, p. 115. [4] Haddan, 324 f.

would not come voluntarily to the priest to confess his sins and seek absolution, he was convened before the bishop, his officer, or a Church synod. From the time of its first introduction into England the penitential power included the judicial power. Just as the penance might be prescribed by the priest as a voluntary atonement, so it might be prescribed by a judicial officer as a sort of punishment. Refusal of the sinner to submit to the judicial sentence was punishable by excommunication.[1]

Because the penance prescribed was in most cases severe, sins were not eagerly confessed.[2] To effect confession and enforce ecclesiastical laws, the Anglo-Saxon secular law did not leave the Church to her own resources alone. One obvious method which the kings pursued was to enact as the punishment for a temporal crime the penance prescribed in the Church's rules.[3] This they did in some cases of sex offences. More extensively the secular law enforced penitential discipline by providing severe penalties for its neglect and by alleviating temporal penalties for those who performed ecclesiastical atonement.[4] The ecclesiastical Penitentials were in most of their provisions as much a part of the law of pre-Norman England as if they had been enacted by the kings and their councils.

Evidence of the administration of this joint legal system is the scantiest. It is at least certain, however, that before the Conquest there was no separation of the secular and ecclesiastical courts. The two jurisdictions were, in fact, hardly to be distinguished. The bishop, as provided in the laws of Edgar, sat in the county court, and the Church claimed for him an important share in the direction of secular justice. This claim the kings generally allowed, because the bishop was often the only member of the court who possessed any learning or any training in public affairs.[5]

Generally too at the hearings that concerned matters of purely ecclesiastical significance the jurisdictions were not

[1] Marshall, 31; Makower, 391 f. [2] Lea, *Auricular Confession*, II, 129.
[3] Oakley, 141 f. [4] *Ibid.*, 148, 199. [5] Pollock and Maitland, I, 40.

at first separated. The ecclesiastical and the county or hundred courts were combined.[1] Though matters of lay morals were for large part transacted in the ordinary gemots of the hundred and shire,[2] there was toward the end of the period a growing distinction in jurisdiction.[3] The customs of Kent provided that in cases of adultery the king should have the man, the archbishop the woman.[4] There was a territorial episcopate in which the bishops exercised their exclusive judicial powers with the help of archdeacons and deans.[5] Probably too the synodal assemblies often exercised a judicial capacity.[6] The seeds of the separation of jurisdiction were planted which were slowly to germinate in the Norman period.

[1] Stubbs, *Const. Law*, I, 215 f. [4] Ibid.
[2] W. G. F. Phillimore (quoting King Edgar).
[3] Domesday Book of Kent, III, 30; Cokc, 3rd Inst., 206. See also Edward and Guthrum, c. 4.
[5] See, for instance, II Canute, cc. 53, 54.
[6] Makower, 318 f., Stubbs, *Early English History*, 94 f.

CHAPTER V

THE ECCLESIASTICAL JURISDICTION

In the fourth year of his reign, the Conqueror summoned a witan to declare what were the ancient laws of England. He had already decreed the Danish law to govern. The people, however, cried out in one voice for the laws of the good King Edward. William in consequence had the laws of Edward published as the only law of his kingdom. Or so the story goes.[1]

William did not intend to sweep away the Anglo-Saxon law and substitute Norman law. On the contrary, the Conquest made no real change in the fabric of English jurisprudence. There was one exception, however—the acceptance of a distinct canonical jurisdiction.[2] Under the native kings the Church and State in England had been the same thing. Under William the whole tendency was toward a separating of ecclesiastical and temporal power. Perchance this separation was a reaction against the power which Gregory VII sought to assume over the Conqueror. The Pope hoped to adopt the feudal system to the relation of Church and State, to assert over the monarch the authority of a superior lord. This attempted encroachment William firmly resisted: he declined to recognize the Pope as his lord, for, he said, neither he nor his predecessors had ever sworn fealty to the papacy.[3]

The reaction led, however, to a compromise. Though William asserted in his Mandate his unqualified sovereignty and his supreme authority over the clergy, he gave to the Church complete independence in its own sphere. "I command and charge you by royal authority, that no bishop nor archdeacon do hereafter hold plea in the hundred, according to the laws episcopal, nor bring those

[1] Freeman, IV, 324 ff., 768.
[2] Pollock and Maitland, I, 88 *f.*, Palgrave, *English Commonwealth*, Part I, 259.
[3] Pike, *History of Crime*, I, 103 *f.*

causes before the secular judicature, which concern the regimen of souls. But whoever is impleaded by the laws episcopal, for any causes or crime, let him come to the place which the bishop shall choose and name for this purpose, and there make answer concerning his cause and crime; and that not according to the hundred, but according to the canons and laws episcopal, and let him do right to God and the bishop. . . . This also I absolutely forbid, that any sheriff, provost, minister of the king, do any ways concern himself with the laws which belong to the bishop, or bring another man to judgment anywhere but in the bishop's court."[1] The sheriff was even to support the bishop's authority. But the bishop was to inflict only ecclesiastical censures; he was not to punish by fine, imprisonment, or any sort of temporal loss.

The change made by William seems large. It was not. The law which was administered was to remain the same. The administration by the bishop, though made more definite, brought no considerable increase in episcopal power. The bishops as temporal lords were already possessed of baronial courts. The change gave to the bishops the right to decide causes of religion in their courts where, thereafter, none but ecclesiastics were to preside. The powers exercised in Anglo-Saxon times by a mixed tribunal were henceforth to be exercised by a purely ecclesiastical tribunal.[2]

William's edict establishing the ecclesiastical courts stated no boundary to the jurisdiction: it supposed that the proper province was known. The jurisdiction allowed to the bishops was the same as that allowed them in Normandy, the same as was to be made more definite by the council of Lillebonne.[3] But this indefinite division led inevitably to dispute. The Church strove persistently to extend the concessions granted by William and later by Stephen. The State opposed the extension with equal persistence. The Conqueror had planted the seeds of

[1] Johnson, II, 20 f. [2] Hale, XV f.
[3] Pollock and Maitland, I, 73 note.

strife. He had allowed the ecclesiastical body to assert the evidences of independent power which could be used effectively against a weak king. He had reserved to the kingship, on the other hand, an ecclesiastical control which could more readily be perverted by a wicked king into a means of oppression and corruption.[1] Such was to be the history of the ecclesiastical jurisprudence.

Many were the questions left open by the Conqueror's Mandate. So long as the Church courts were guided by the customary laws and traditions of the early English Church, which were of a distinctly national character, the breach with the system of secular laws was not too noticeable. So long, too, as the separation of administration was not in practice complete, as it was not complete until the reign of Stephen, there was no cause for struggle. When, gradually, the Church's administrative system became distinct, and when, with comparative suddenness, the canon law became crystallized,[2] difficulties arose. There was a struggle over the debatable ground.

The quarrel between Henry II and Becket was the outburst of a gradually developed conflict of forces. Henry could well have been jealous. The archdeacons' courts levied each year by their fines more money than the whole revenue of the Crown. Young archdeacons, sent abroad to learn the Roman law, returned to preside over the newly established ecclesiastical courts. To churchmen the study of theology was being superseded by the study of civil and canon law. The power of a foreign system was growing. The breach was widened, too, by misuse of the new power. The canon law, recently developed, did not work smoothly under the hurriedly trained English archdeacons. The mass of business was great, the proceedings rushed and irregular. Even the ecclesiastical authorities were suspicious of the new machinery.[3]

Henry II advertised himself as no originator. He claimed only to want to fix the boundaries already established

[1] Freeman, IV, 438 f. [2] See *supra*, p. 76.
[3] Stubbs, Const. Law, I, 256 f.; Gross, 83 f.

by custom between the ecclesiastical and temporal jurisdiction. Henry sought to exempt from ecclesiastical control all his court officers and those who held from him *in capite*. He sought to prohibit appeals to Rome. He sought also to limit the Church's right to excommunicate laymen who would not appear upon summons of the spiritual court, as, for instance, for sexual offences.[1]

Becket, however, rejected the Constitutions of Clarendon. The murder followed. Henry had, in the compromises of 1172 and 1176, to renounce all his innovations. He did, nevertheless, come out of the struggle with some slight gains. At two points he gave ground: on benefit of clergy and on appeal to Rome. But from that time forward the lay courts rather than the spiritual courts were the aggressors and generally the victors in the fight for jurisdiction.[2]

The borders of jurisdiction were not in any real sense made definite for 150 years after Henry's attempt. Henry's son, John, perpetuated the confusion in accepting the old phrase of his weakest Norman predecessors, Henry I and Stephen, *Quod Anglicana ecclesia libera sit*. The Magna Charta provided, "In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate."[3]

It was custom that gradually clarified the situation, custom that hardened into so-called statutes. From the time of Henry II onward the heads of the Church were in the habit of drawing up series of petitions in which they laid before the king the various points wherein they wished a change in the procedure of temporal courts and the action of executive officers. To these petitions the king would answer directly. Gradually the Church came to act in accordance with these answers.[4] Two of these petitions, called the statutes *Circumspecte Agatis*[5] and *Articuli Cleri*,[6] fixed with some finality the Church's jurisdiction.

[1] Articles of Clarendon, 3, 8, 10: Johnson, II, 32 f.
[2] Pollock and Maitland, I, 124 f. [3] M'Kechnie, 223 f.
[4] Matthew, 395 f. [5] 13 Edward I, st. 4 (1285).
[6] 9 Edward II, st. 1 (1315–16).

In this struggle of Church and State for judicial power one of the main prizes at stake had been the jurisdiction over the sex life of the laity. The opening of the twelfth century had found the administration of sex offences practically the same as it had been under the Anglo-Saxons.[1] The jurisdiction which the Domesday Book showed that the bishops exercised over adultery was only local, and did not relate to incontinence in general.[2] The Conquest had contributed little to marking out the bounds of jurisdiction.

Throughout the post-Conquest period the Church continued to exercise the power she had long possessed to inflict penitential discipline. It was in the Penitentials that were found most of the laws regulating sexual conduct. Whereas, however, the administration of penance had, under the Anglo-Saxons, been in large part within the province of the priest at confession, it became now more and more assimilated to the judicial power of the Church.[3] Sexual conduct became one of the branches of business of the rapidly developing system of ecclesiastical courts. It pertained to "the regimen of the soul." The course of this development did not always flow smoothly. When, at the instigation of the friars, an over-zealous bishop "caused strict inquisition to be made in his bishopric by his archdeacons and deans, concerning the continence and morals of the noble as well as ignoble, to the enormous injury of the good name, and to the scandal of many," Henry III interfered and ordered the sheriff to forbid laymen to appear before the ecclesiastical authorities in causes of moral correction.[4] Such action by the king and many others of a similar nature provoked from the clergy an elaborate list of grievances, "*Articuli pro quibus Episcopi Angliæ fuerunt pugnaturi.*"[5]

Before the end of the thirteenth century, nevertheless, the process of assimilating moral causes to the Church

[1] Laws of Henry I: Thorpe. For criticism of these laws, see Winfield, 49; Stubbs, *Early English History*, 145–165.

[2] Pike, *Y. B.*, 13 *Edward III*, Intro., xxvii. See also *Leges Henrici Primi*, XI, s. 1: Thorpe.

[3] Matthew Paris, Anno 1246.

[4] Makower, 457–458.

[5] Matthew Paris, p. 951, addimenta.

courts was recognized as complete. The statute *Circumspecte Agatis*, providing that the Court Christian was to have jurisdiction over all matters of purely spiritual significance, included in this category the deadly sins of fornication, adultery, and the like. Punishment for them might be either corporal or pecuniary penance, and in no such case was the king's court to issue a prohibition against such proceedings in the ecclesiastical courts. As Coke explained, the jurisdiction so granted over adultery and fornication was meant to be complete and exclusive.[1] Sex offenders, lay as well as clerical, were subject to punishment only by the Church.[2] As Chaucer phrased it, the judge of the ecclesiastical court

> . . . boldely did execucioun
> In punishinge of fornicacioun,
> Of wicchecraft, and eek of bauderye,
> Of diffamacioun [slander] and avoutrye [adultery],
> Of chirche-reves and of testamentes,
> Of contractes, and of lakke of sacramentes,
> And eek of many another manere crymne,
> Which nedeth nat rehercen at this tymne;
> Of usure, and of symonie also.
> But certes, lecheours [fornicators] did he grettest wo.[3]
>
> . . . . . .

As the jurisdiction of the ecclesiastical courts was becoming differentiated and exclusive during the Norman period, so too were the laws which they administered, their judicial system, their legal procedure. So long as pleas were held in the hundred court regardless of their being temporal or ecclesiastical, the nature of the suit did not vary the course of proceeding. With the Conquest, however, this situation changed. Partly the causes were local; more largely they were evidences of a development general in all Christian countries.

Because at the time of the Conquest there was no real system of canon law, the establishment in the English ecclesiastical courts of a distinct method of procedure was

[1] Coke, 2nd Inst., 487 f. See, for instance, *Rotuli Parliamentorum*, I, 154b, 334b. [2] Except for penalties in local courts. See *supra*, pp. 127 ff.
[3] Chaucer, Prose's Tale, 1–12.

dependent upon two fortuitous foreign influences. William brought with him a group of Norman ecclesiastics, some of whom were, like Lanfranc, rather lawyers than theologians. These he substituted for the native bishops. Men learned in Hildebrandine jurisprudence and Roman procedure took the place of those who had administered a purely national and customary procedure.[1] Besides, the carrying appeals to Rome, a practice which survived the Council of Clarendon, almost required that the earlier English proceedings be in conformity with the practice of the Roman courts.[2]

At just the time when the struggle for a separate ecclesiastical system was the strongest in England, two larger legal developments were taking place. The one was the resuscitation of Justinian jurisprudence, and the other was the codification of Gratian's canons. The one supplied the procedure for an independent system; the other supplied the law. Combining the doctrines of early councils and decretal letters, the collections of Dionysius Exiguus and Isadorus Mercator, and the codifications of Gratian and Gregory,[3] the canon law built up a practical system vastly different from the system of the common law. The rapid influence of Roman and canon law upon English law was startling. Shortly after the death of Irnerius, the great Bolognese teacher, at least two Englishmen were already familiar with the Roman law. As early as the reign of William Rufus, the Bishop of Durham had at his finger-tips the so-called Isadorian Decretals, and may have brought into the king's court a book of canon law. From Stephen's reign onward, Roman and canon law were known and studied in England.[4]

The whole of the ecclesiastical law of England did not, however, come from the Roman canons. There were the English provincial and legatine constitutions. The provincial constitutions were the decrees of the synods in the provinces of Canterbury and York, particularly the former, because the Archbishop of Canterbury was a papal legate.

[1] Stubbs, *Const. Law*, I, 256.
[2] Pollock and Maitland, I, 112 ff.
[3] Hale, XXVIII.
[4] *Ibid.*, I, 217 ff.

The legatine constitutions were the decrees of synods presided over by the foreign papal legates, Cardinals Otho and Otboboa, in the time of Henry III.[1]

In no sense, however, could the local canons and constitutions contravene the general law of Rome. They were only explanatory and declaratory of it. Any special rules of the Church in England had hardly a wider scope or less dependent place in relation to the canon law than the customs of Kent or the by-laws of London held in relation to the common law. The English canon law was English only because it was universal.[2]

The codified canon law carried on, of course, the traditions of the Christian doctrine of sexual morality. Like the Roman law, it expressed a spirit of condemnation of sexual violations,[3] but it provided no code of punishment for the specific offences. Knowing no penal code, the courts therefore had authority, without reference to any rule or definition, to punish anything which they regarded under the canon law to be openly immoral or sinful.[4] The consequences were sometime ludicrous. Laymen were haled into court for offences for which no code, no matter its inclusiveness, could provide: for not giving alms to the poor, for folding sheep in church during a great snow, for feeding a dog with holy bread, for rejoicing at seeing priests in trouble, for suffering a minstrel to play at a wedding, for refusing to sing in church ("*quod in cantando penitus luxpers est*"), for not keeping an assigned pew (because a neighbouring occupant had a strong breath).[5] Not only these open expressions of wickedness were punishable in the ecclesiastical courts, but aiding and abetting in them, or even passive encouragement, were considered criminal.[6]

. . . . . .

The exercise of this corrective jurisdiction over the vices of the laity was vested in the bishop, was, in fact, one of

[1] Whitehead, 61 f.; T. E. Smith, 5–7.

[2] Pollock and Maitland, I, 115. Holdsworth, *History*, I, 382 and note. There is no need here to enter into the Stubbs-Maitland controversy as to the applicability of the canon law in England.

[3] Ridley, 19 f.

[4] Stephen, II, 404.

[5] Hale, nos. 535, 538, 584, 142, 398, 429, 511.

[6] E.g., Hale, nos. 647, 797.

the important functions of the episcopal office.[1] It had fallen to the bishop as a consequence of his visitorial power. The bishop had been accustomed to make tours of his diocese, to visit the various parishes and monasteries and investigate the conditions not only of the clergy of the district but of the laity as well. To the bishop would be reported any breaches of the spiritual law, and he would proceed forthwith to hear the cases informally and impose punishment.[2]

As the ecclesiastical power increased, and with it the episcopal duties, the bishops, overwhelmed with labour, committed their authority to some presbyter or to their archdeacons. The archdeacons, first acting as the bishops' agents, came to enjoy a derived, independent jurisdiction to proceed in criminal causes in their own name. The bishops, jealous of this increase in archidiaconal power and finding it impossible to exercise in their own persons the exercise of the authority so delegated, in order to recover their jurisdiction appointed their own vicars or officials to act as judges in their place. Inferior prelates, such as abbots and archdeacons, assumed a similar right of delegation and appointed their own officials and other officers to act in their name.

The situation varied according to local circumstances and followed no uniform principle. Striking differences existed in the constitution of ecclesiastical courts in the various dioceses.[3] The situation was greatly complicated by the number of "peculiars," jurisdictions which exercised judicial powers independent of the bishops' control. There was not in fact the nice step-up system which is usually pictured from the archdeacon's court to the bishop's consistory court, to the archbishop's court—the Arches Court of Canterbury and the Chancery Court of York—and then to the Pope.[4]

[1] Coke, 2nd Inst., 623 f.
[2] Ecclesiastical Courts Commission, vol. 1, pp. xxiii. f.
[3] *Chronicle of Convocation*, IV. Report, 3; Hale, XXIX f. (quoting); Capes, 237–239.
[4] It is not necessary to discuss the courts in relation to appeal because appeal was practically unknown in cases of sexual offences. See *infra*, p. 90.

Formal sessions of the bishop's consistory court were held about once a month, lasting for several days. Though usually held in a part of the cathedral, the court was somewhat itinerant and in some dioceses sat regularly in two or three of the chief towns. The judge was not the bishop but the "official," who was often a canon, and he had an assistant known as a delegate or commissary. Each consistory had advocates who were trained canonists, comparable to the present-day barristers. And each had proctors, licensed by the bishop, comparable to English solicitors. The advocates and proctors were hired by the litigants to present their cases. Attached to the court also were an examiner who took the testimony of witnesses for written presentation to the judge, a registrar, one or two notaries, and an apparitor or summoner, who was among the most hated of medieval characters.[1] The archdeacons' courts were similarly organized.[2] Rarely, however, were the actual proceedings in sex offences as elaborate as this organization would lead one to think.

There were three distinct methods of proceeding against the offender in criminal causes: Inquisition, Accusation, Denunciation. From the reports it is not always easy to determine which method was pursued.[3] Inquisition was probably the usual mode of proceeding before the Reformation. Though under Inquisition the judge was theoretically the accuser and upon his own knowledge cited the suspected offender to appear,[4] it was in fact the apparitors who busied themselves in ferreting out delinquencies and bringing them to the attention of the judge. Sometimes even the archbishop would call the bishop's or archdeacon's attention to suspected persons.[5]

In the second form of indictment, Accusation, any person might come forward and voluntarily undertake the cause. This procedure may have given rise to petty spying and informing by neighbours. There were persons who were known, because of their informal espionage, as

[1] See *supra*, pp. 119 ff.
[2] *E.g.*, Hale, nos. 34, 501, 518.
[3] Deanesly, 198–200.
[4] Burton, 122, 129 f.
[5] Parkhurst, II, 748 f.; III, 119 f., 813 ff.

"tosters."[1] But the method was not particularly popular. The person constituting himself as accuser became subject to conditions and penalties. The risk was a deterrent.

The third method, Denunciation, eliminated this risk. The person giving information did not thereby constitute himself as accuser; the proceeding was brought by the churchwardens or sidesmen of the parish, supposedly on common fame, reputation in the community.[2] Under the cause of Presentment this method became increasingly popular.[3]

The proceedings in criminal causes in the ecclesiastical courts exemplified a principle totally opposed to the common law. In the king's courts no man is bound to accuse himself, no matter the severity of the crime or the hindrance of justice. In the Church courts, however, the whole basis of the proceeding was self-accusation. Until the year 1640 the ecclesiastical judge possessed the power to propose articles of charge to the accused in person and to require him upon oath to admit or deny the accusation. It was upon this use of the *ex-officio* oath that the effectiveness of ecclesiastical jurisdiction depended.

"We establish that, when the prelates and ecclesiastical judges inquire the faults and excesses of their subjects that deserve punishment, the lay be compelled if need require by sentences of excommunication, to give an oath to say the truth; and if any withstand or let this oath to be given, he shall be bridled with the sentence of excommunication and interdiction."[4] To refuse to answer the charge of an offence led to punishment more onerous than the probable punishment for guilt of the offence itself.

If the accused confessed the charge, the cause was concluded and sentence passed. If the accused denied the charge, however, he had to purge himself of guilt.[5] Sometimes, but rarely, the court would accept the accused person's own oath as sufficient purgation.[6] Usually he

[1] See *supra*, p. 212.
[2] Hale, I, VII f.
[3] E.g., Burns, 151; Hale, 20. 750.
[4] Lyndwood, Lib. II, Tit. VI, c. 2, pp. 209 f. (Canon of Boniface).
[5] Hale, 20a. 712, 772.
[6] Hale, 20a. 96, 99.

was obliged to defend his oath by the evidence of two or more compurgators.[1]

1578–9, 8 March. . . . The office of the judge against John Bradley and Helen Hude, servant of Ralph Bailes. They have frequented company together a long tyme, and been suspected of evill life. Appeared. Ordered to purge themselves *per se sexta*.[2]

It was only upon the joint oath of the compurgators to the credibility of the accused and their disbelief of the charge that the party was pronounced innocent and formally restored to his reputation.[3]

Rob. de Boyvill, Rector of Thorsby, accused of incontinency before the Bishop [of Carlisle] receives this certificate, which states that in all points he has purged himself.[4]

The demands of the courts for numerous compurgators became unreasonable. The compurgators would usually be neighbours of the accused. The court might be holding its sitting at a distant place in the diocese. Travel was difficult. And even when the accused had properly assembled his compurgators at the prescribed place and appointed time, the court might delay the hearing. As evidence of attempts to remedy this situation is a canon which forbade ecclesiastical judges to demand for purgation of a priest more than six hands for the crime of fornication and more than 12 for adultery and the more serious sexual offences, and which forbade removal of the cause to another deanery or to a place where sustenance could not be procured.[5]

If, however, the accused failed of purgation, if he could not procure adequate compurgators or the compurgators could not take oath as required, he was convicted.[6] So long as the courts were permitted to make use of the *sacramentale* oath, it was but rarely that witnesses were examined

[1] Hale, nos. 98, 100; Barnes, 114; Peckham, II, 613 f.
[2] Barnes, 114.
[3] Hale, LIX f.; Barnes, 117; Peckham, II, 613 f.
[4] Carlisle, app. 187.
[5] Lyndwood, Lib. V, Tit. XIV, c. 4, pp. 313 f. (Canon of John Stratford).
[6] Kellawe, I, 417 f.; Hale, no. 3.

of depositions taken.[1] The parties cited before the judge seem seldom to have had any legal adviser. They heard the charge at the mouth of the judge; the registrar briefly noted the proceedings and answer. Except for the performance of the sentence the entire hearing was probably unattended by publicity.[2]

Injustice doubtless arose from the system of proof by purgation. Many a hypocrite might have been enabled to escape unpunished by his own perjury and the ignorance of his compurgators. And, conversely, when the accused person, either from want of available friends or from his own general bad character, was unable to obtain compurgators, he might have been condemned as guilty of a specific act which he had, in fact, not committed.

Not all the ecclesiastical proceedings were formal. Much of the legal business was done outside the court by the official or his delegate hearing cases *pro tribunali sedente*, in the presence of witnesses and a notary public.[3] Upon such proceeding any more serious doubts would be reserved and a reappearance ordered before the court at a formal session.[4] Upon such temporary dismissal the defendant had to take oath to reappear again when summoned.[5]

. . . . . .

The sentence of the ecclesiastical courts in sex offences was largely a standardized form of public penance. But there were also other forms of sentence imposed, such as marriage of the guilty parties or endowment of the woman, pilgrimage or other good works, suspension, and in all cases, the possibility of excommunication. More important for its social significance was, as we shall see, the system of purchasing commutation of penance for money.

So commonly was public penance the punishment for incontinence that later courts would simply order "the

[1] E.g., Hale, no. 174. The Peyt Manuscript shows, however, that the written evidence in criminal causes was more extensive than one would suspect from the brief notes in the act-books and bishops' registers.

[2] Hale, LK f. [3] Donnelly, 200. [4] Hale, nos. 169, 193.

[5] Hale, nos. 112, 349.

usual penance."[1] That meant that the penitent would appear bare-legged and bare-headed in the cathedral, parish church, or market-place, clad in a white sheet, and would make confession of his or her crime in a prescribed form of words. The punishment was augmented or modified according to the quality of the fault and the discretion of the judge.[2] Such penance for incontinence was so important a part of the business of the parish that each church kept a sheet or kirtle for that very purpose.[3] Sometimes a woman penitent would be ordered to wear a knotted bridal veil[4] and, we are told, on occasion would have to walk naked.

It happened that one Pers Lenard, a sergeant "on the night delt fleshely with a woman" in church. By a miracle they were "tyed fast togedre that night and the morw alle day." People came to see the miracle and all prayed "that that orible sight might be ended." In consequence of which the offenders were separated. "And they that dede the dede were joyned to penaunce, to go naked afore the procession thre Sondayes, beting hem self and recordyng her synne tofore the peplle. And therefor here is an ensaumple that no body shulde do no suche filthe in the chirche, but kepe it clene and worshipe God there inne."[5]

The usual procedure, however, was for the penitent to precede the procession down the church aisle on three or four Sundays, clad in a sheet, and carrying a candle of some two pounds weight, or of a designated price, which he would place before the principal ikon.[6] The penitent would then confess his sin before the assembled congregation in words prescribed either by the vicar or directly by the court before which he had been convicted. He would declare his crime, ask forgiveness of God and his neighbours, and might lead the congregation in a prayer for his soul.[7] He would then receive a certificate that he had duly performed his allotted penance.[8]

[1] E.g., Blackmore v. Butler, 2 Phillim. 359, 362.
[2] Godolphin, app. 18; Laws Respecting Women, 337; Stephens, I, 883; T. E. Smith, 124 note.
[3] Hale, no. 740.
[4] Hale, no. 41. For significance of such knots see Frazer, Taboo, 293–317.
[5] La Tour-Landry, 51 f.
[6] Hale, nos. 7, 297, 358.
[7] Ibid., nos. 392, 484, 636.
[8] Ibid., no. 484.

Penance, as its name connotes, was not, in theory, punishment. It was not supposed to be social retribution. It was meant as an expression of contrition for an offence against God; it was an attempt at purification, a plea for divine mercy. That its purpose was knowingly perverted will become evident from the study of commutations for money. But, too, the purpose of penance was sometimes unknowingly defeated through the ignorance of the court or the inauspiciousness of the social setting. Thus the bishop's court in Durham ordered public penance in the church and the market-place for fornication, although the offender was *semper mentir*.[1] In the famous case of Jane Shore, mistress of Edward IV, the people who saw her pitiful beauty as she bore the candle and cross outside St Paul's Cathedral, and who knew the malice behind her prosecution, were moved rather to sympathy than to condemnation. So famous a moralist as Sir Thomas More wrote: "Her Lewdness was her only Fault; and tho' that was great enough, yet to have a King for their Bedfellow is such a mighty Temptation, that if no Woman could Condemn her before they have like Trials, it's to be feared, she'd have few to cast a Stone at her."[2]

In the sentence for incontinence the court would often combine other punishment with penance or substitute other punishment in lieu of penance. Most usual as a substitution or combination was a monetary payment. One proper form of expressing contrition for sin was through good works. A money payment was in its effect a form of good works. So long as the money was an expression of reform rather than a substitute for it, its payment was a proper ecclesiastical sentence. Thus the Consistory Court of London, besides sentencing Milo Gerard to a severe penance, ordered him to give a penny alms each Sunday for a year.[3]

More arduous than almsgiving as a form of good works was pilgrimage. Only in exceptional cases of incontinence was it ordered. Thus when Robert, Rector of Hatcliffe,

[1] Barnes, 116. [2] More, I, 496. [3] Hale, no. 297.

who had been convicted of incontinence with divers women, broke his promise to remain continent in the future, Archbishop Peckham ordered as penance that he undertake a three-years' pilgrimage to Rome.[1]

The frequent alternative to penance which the courts allowed in cases of incontinence was the intermarriage of the guilty parties. Such procedure had its origin in the Old Testament injunction. Marriage was an adequate retribution for seduction in ancient Hebrew law because it protected the father's property right in his daughter's chastity.[2] It persisted in medieval English law as a retribution only because the laws of the Old Testament were considered to be the laws of God.[3]

Ordinarily to force the marriage of the convicted persons, the ecclesiastical court would continue the hearings until the marriage could be effected[4] and a certificate of its solemnization presented to the court.[5] But if the parties were already betrothed, the court would sometimes take more direct action and make decree that a marriage be performed.[6] It might even issue a mandate to the parish priest to solemnize the marriage of the incontinent persons.[7] Occasionally too the guilty persons were to perform in addition a modified sort of penance by confessing at the time of the marriage ceremony that they had been previously incontinent.[8] Should the parties not intermarry as directed by the court, they became subject to added punishments for their offence.

"The said Whitclocke was commaunded before the Nativity of Christe laste past to marry the said Elizabeth, and as yet beipithe house suspitionaly togyther, and contemptuouslye, contrarye the said commandement, will not marry." To do penance in the market place during divine service on Sonday next, and to marry.[9]

The most striking method by which marriage was effected as a penalty for fornication was inaugurated by

[1] Peckham, II, 564 f.
[2] It persists still in the laws of most American States: May, under various headings, "Seq Offenses and Marriage."
[3] Hale, MS. 807; Barnes, 115 f.
[4] Barnes, 139 f.
[5] Hale, MS. 577.
[6] See supra, p. 12.
[7] Hale, MS. 574.
[8] Hale, MS. 591.
[9] Barnes, 122.

Archbishop Winchelsey at the Synod of Winchester in 1308. The ecclesiastical judges, it seems, had made it a practice upon conviction for simple fornication merely to oblige the parties to abjure familiarity with each other in the future. This proved ineffective; there was recidivism. The synod forbade abjurations. The parties were to be bound upon oath to submit to corporal punishment upon a second conviction. In case of a third relapse, however, all future breaches were to be precluded by a written contract between the guilty parties, which provided that they were then and thereafter to be husband and wife if, at any future time, they should carnally know each other. There was, in effect, to be a present assumption of the marriage status upon the happening of a condition subsequent.[3]

Following the injunction in the Old Testament again,[4] the ecclesiastical courts would sometimes accept as retribution, instead of marriage, a provision for dowry of the woman with whom the connexion was had.[5] The effect of such sentence must have been much the same as commutation of penance. The offender would pay money in order to escape penitential punishment. The promises of dower sound like an offer of reward to anyone who would marry the woman. The offer of endowment was in fact not a performance of penance but an evasion of it. The Mosaic law was enforced as a form when its reason in substance had long since perished.

Imprisonment, though a possible consequence of excommunication, was not a primary punishment for ecclesiastical offences. Prisons were, in fact, rare, and the temporal courts had evolved as a substitute a system of release on bond, conditioned upon future good behaviour. The ecclesiastical courts adopted this system in part. They exacted promises of good behaviour from offenders, and upon such promises dismissed the action. In support of the promises they required bond.

[3] Johnson, II, 321 f.; Lyndwood (Oxford ed.), pp. 37.
[4] Exodus xxii. 17. [5] Hale, nos. 297, 318, 334, 398.

So long as the pledge or bond were only for a limited period, until the penance or other punishment might be performed, the remedy was a fair and sound one. But the spiritual courts exacted bond for permanent good behaviour. A new offence at a much later period than was not newly prosecuted, but revived the old cause. It constituted a breach of the bond, led to forfeiture of the security and, because of the oath, gave rise to a possible charge of perjury.[1] As early as 1164 the Council of Clarendon took measures to abolish this unfair practice. It enacted that the oath or pledge should be exacted only that the offender stand judgment of the Church as to punishment for the crime of which he had been impleaded, and pledge should not be exacted that he would never again be guilty.[2] Notwithstanding this injunction the unrestrained practice was continuing a century and a quarter later. Walter Bret gave the archbishop a bond [set forth] in 10 l. sterling, binding himself and all his goods not again to commit adultery with Alice Hure.[3]

Short of excommunication and savouring of it was the ecclesiastical punishment of suspension.[4] Suspension deprived the offender of the right to attend church. It was a mild preliminary to excommunication, which cut the person off from the society of all Christians, and differed not greatly from the earliest forms of punishment in the primitive Christian Church. Usually it was imposed as a warning to an accused person, who had not appeared before the ecclesiastical court as directed.[5]

These methods of punishment may, from the point of view of the present, seem mild in comparison with the importance attached by the Church to sexual sins. Whether they seemed mild in their medieval setting can be judged only from the social reactions of the period.[6] But rarely was there a contemporary complaint that these punishments,

[1] Hale, pp. 146. [2] Articles of Clarendon, 5: Johnson, II, 52 f.
[3] Le Neve-yn, Part I, 67 f.
[4] This form of punishment is not to be confused with another of the same name, which deprived a guilty clerk of the profit of his benefice.
[5] Hale, pp. 13, 197. [6] See *infra*, p. 119.

if duly enacted by the ecclesiastical courts, were inadequate. The Knight of La Tour-Landry would have liked to have seen the severity of Mosaic Law restored as punishment for adulterers. "In some places," he noted, "their throats are cut, in some they are burned, in some buried alive. These examples it is good for all women to hear, for tho' there be no justice thereon in this realm, those who do amiss live in blame and slander." [1]

More than blame and slander, however, might result from sexual offences. Excommunication was always a possible penalty for violation of the Church law. It was, until quite recently, a serious penalty, so serious that it was but infrequently applied as the direct punishment for voluntary sexual commerce. When an Englishman had been sentenced to excommunication for incontinence, the Pope wrote to the Bishop of Carlisle urging mercy.[2]

Though excommunication was not a general punishment for the sexual offence itself, it was frequently inflicted upon a sexual offender who failed to carry out properly the dictates of the ecclesiastical court in which his offence was being heard. Excommunication was always a secondary, reserved punishment for sex offences, a sword of Damocles hanging over the sinner. The court would often impose penance and other sentences upon pain of excommunication for non-performance.[3] In the later, post-Reformation period, when the Church observances came to form not so important a part of daily life, and when suspension ceased to have effect as a punishment, excommunication was decreed for non-appearance of an accused person in answer to a summons.[4] This abuse of excommunication to effect appearance in court reached its height, as we shall see, in the High Commission.

The sentence of excommunication was the ultimate resource of the spiritual courts. The lesser kind of excommunication, which deprived a man of all the offices of the Church, was the same as suspension. But under the

[1] La Tour-Landry, xlii (language modernized). [2] Carlisle, app. xlv.
[3] Kellgren, I, 417 f.; Barnes, 123 f.; Petyt MS., folio 40.
[4] Barnes, 123.

greater excommunication, to which one generally refers, the person was not only "cut off from the society of all Christians," but thereby was rendered practically an outlaw. He not only lost all his civil rights; he suffered imprisonment until he should become obedient to the dictates of the Church courts.[1]

It was because mere ecclesiastical censures were sometimes inadequate to effect punishment that the temporal law offered its assistance to the Church. It disabled an excommunicate from doing any act of which a legal person was capable. He could not serve upon juries, could not be a witness in any court, could not receive a legacy, and worse, he could bring no action in the common law courts, either real or personal, to recover lands or money due to him.[2] Nor were such civil disabilities the only temporal penalty of excommunication. If within 40 days after the sentence had been published in the church, the offender did not submit and abide by the sentence of the spiritual court, the bishop might certify such contempt to the king in chancery, whereupon there issued to the sheriff of the county a writ called, from the bishop's certificate, a *significavit*, or, from its effect, a writ *de excommunicato capiendo*. The sheriff was thereupon to apprehend the offender and imprison him in the county gaol until he should be reconciled to the Church. Only upon such reconciliation and its certification by the bishop did the writ *de excommunicato deliberando* issue out of chancery to release the offender from prison.[3]

After the Reformation the temporal law's assistance of the Church courts was continued by statute.[4] In case of disobedience to any definite sentence of an ecclesiastical judge in certain causes, any two Justices of the peace might commit the offender to prison without bail or mainprize,

[1] Whitehead, 148. Since 1813 there has been no civil incapacity for excommunication except imprisonment: 53 George III, c. 127, s. 3.

[2] Littleton, s. 201; Coke, 1st Inst., 133b, 134a; Blackstone, III, 102. An excommunicate could not, of course, take a binding oath.

[3] Fitzherbert, *New Natura Brevium*, 62 N. *et seq.*; Blackstone, III, 102; *Law Reporting Women*, 331 ff.

[4] 27 Henry VIII, c. 20; 32 Henry VIII, c. 7.

there to remain until he entered into a recognizance, with sufficient sureties, to give due obedience to the process and sentence of the spiritual court.[1]

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From such sentences there was in theory a right of appeal, from the archdeacon's court to the bishop's court, from the bishop's to the archbishop's.[2] Occasionally there is note of an appeal from a sentence in case of incontinence,[3] but rarely.[4] Appeal in sex cases was difficult and impracticable. It is probable that the system of trial by purgation did not lead to many convictions which would be likely to give rise to appeal. The person of influence could get compurgators, and one so unfortunate as to be unable to get compurgators would hardly be in a position to bring a difficult appeal.

The difficulty that made appeals impracticable was the expense. Though full costs did not need always to be assessed in the court of original jurisdiction, it was a general principle of the ecclesiastical courts that the expense of correcting an offence should be borne by the offender.[5] When the proceedings went through two courts, the costs therefore mounted. Besides this, appeals were penalized.

Appeals were attended by long and unavoidable delays. In order to take advantage of this situation and postpone the judgment of the Church courts, offenders would often bring unjust appeals in cases of moral correction. As a remedy the general canon law provided that when an appeal was pronounced unjust, the appellant had to pay not simple but quadruple costs. The remedy did not suffice. The Council of Trent forbade all appeal from an interlocutory decree in causes of correction. Notwith-

[1] The temporal courts herein might inflict additional penalty on a person who had been convicted in the ecclesiastical courts for incontinence. See *infra*, pp. 127 f.

[2] 24 Henry VIII, c. 12, s. 3.

[3] Hale, I, 671. Occasionally, too, the king himself would grant pardon for acts of incontinence; see, for instance, Rymer, under dates 23th July 1618, 7th December 1623, 17th December 1627, 16th August 1634, 3rd August 1643, 14th November 1651.

[4] Privy MS., folio 42.

[5] Robert Phillimore, II, 997.

standing the general canon law, the process of appeal was abused in the English courts. The clergy in 1399 urged the archbishop to take measures against unjust appeals in matters of morals, and later Archbishops Parker and Grindal directed their courts to limit in such cases the use of inhibitions. In the sixteenth century Parliament considered abolishing all right of appeal from the sentence of the bishop in cases of correction, or at least imposing a heavy fine and double costs if the appeal should be found unjustifiable.[1]

Appeals in cases of sex offences were rare, therefore, not only because these restrictions were specifically directed at their limitation and abolition, but because the expense of an appeal might be greater than the cost of a commutation of penance for the offence if the conviction stood. Such commutation or indulgence obviated as well as would a vindication of innocence the unpleasant consequences of guilt.[2]

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The product of a mill is not to be ascertained only from a study of the mill-wheel. At least as important is an analysis of the grist. Likewise it is with the product of a social machine. Having the machine in mind, one must know the rough materials with which the machine is supplied. Before one can attempt to evaluate the moral and social product of the medieval ecclesiastical jurisdiction, it is necessary to know what were the situations that came before the courts and what the social background of those situations. First, then, one must study what were the conditions of sexual morality in later medieval and earlier modern England, and thereafter one may judge more fairly the success or failure of the spiritual courts in their attempt to grind out of such conditions an acceptable social product.

[1] Gibson, II, 1031, note c; Eccleshall, II, 326, note 147.

[2] There is one other possible cause for the absence of evidence of appeals in the Court of Arches, the destruction of the records in the fire of St Mary-le-Bow, where the court was held.

General Note

For further cases of sexual offences in ecclesiastical courts consult the bishops' registers, several dozen volumes of which have been published, and others of which are in progress. For a list of registers extant, see Fowler. An assortment of scattered ecclesiastical cases is to be found in H.M. Public Record Office under Exchequer K.R. (Ecclesiastical) and Chancery Miscellanea (Ecclesiastical and County Pleas).

On the general subject of ecclesiastical jurisdiction, see, besides the works specifically cited: Holdsworth, *Ecclesiastical Courts*, II, 233–311; Carter, 143–151; Cornish, *English Church*, Part I, c. 6, 124–134; and the earlier folios of the Petyt MS.

For a discussion of appeals to Rome, see Makower, 225–231; Robert Phillimore, II, 967 f.; W. G. F. Phillimore, *Ecclesiastical Jurisdiction*; J. G. Phillimore, 8 f.; Johnson, II, 52, 57.

CHAPTER VI

THE PROBLEMS OF SEXUAL MORALITY

To the Englishman of the late medieval and early modern period chastity was a virtue esteemed in as lofty words as it was described by the Christian Fathers. "Without chastity no man can be saved."[1] Sexual purity led to communion with God; sexual impurity was sure to kindle the fires of hell. The Knight of La Tour-Landry warned his daughters that "the synne of lechery stinkithe afore God and his angeles. And takithe hede how the virgines had lever be martered rather thanne they wolde do that foule synne . . . as seint Katerine, seint Margarete, seint Luce, elleven thousand virgines, and other mani virgines."[2]

Verbally, at least, virginity was still the primary virtue. "Nor there is nothing that our lorde delyteth more in, than virgines: nor wherein angelles more gladly abyde, and playe with, and talk with."[3] Chastity was a woman's most precious possession.[4] Roger of Wendover, under date of 1125, told a story of a girl of noble birth who forswore luxury and betook herself to the convent. Many were her struggles with the Devil, who sought to lead her from her bridehood with Christ. So complete, however, was the damsel's victory that Satan actually became her servant and himself protected her from a ravisher.[5] No happiness in life awaited one who lost her chastity and no happiness after death.[6] "She shulde abide in the brennyng fere an hundred yere."[7] Not that a maiden should be completely without love. "Wherefore the mayde shal have to love the father almyghty god, her spouse Cryste, and his mother the holy virgine. . . . She hath also her owne father and mother which . . . she ought to . . . love and worshyp."[8]

This attitude built up a theory of asceticism of which

[1] *Vices and Virtues*, 128.
[2] Vives, folio 13.
[3] Roger de Wendover, Anno 1125.
[4] Vives, folio 16; Hali *Meidenhad*, 20.
[5] Vives, folio 53.
[6] La Tour-Landry, 85.
[7] *Ibid.*, folio 18.
[8] La Tour-Landry, 66.

the early Christian ideal was the prototype. Marriage was to be tolerated, to be sure, but only because of St Paul's indulgence. "Hence was wedlock legalized in holy church as a bed for the sick, to sustain the unstrong, so that nothing can stand in the high hill so near to heaven as the virtue of maidenhood." [1]

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This Christian ideal of sexual purity was fostered, supposedly, by chivalry. Chastity and abstinence were the rule of the knight, the protection of weakness and virtue his motive, the hand or the lips of the lady his reward. But the reward of knightly virtue became more important in practice than its ideal. The chief object of the chivalric life came to be love. At home in the castle or abroad in the field of conquest, the expression of love was everywhere present. The difference between love and seduction was apparently slight.[2]

The importance of sex was magnified by the conditions of domestic society. Life in a medieval castle was confined and, but for the intermingling of the sexes, dull. Society of the inmates was close and intimate. During a considerable portion of the day the damoiselles and damoiseaux were engaged in playing together at different amusements and games which, it is evident from their description, were often suggestive of anything but chaste feelings. The language in common use among both sexes was far from delicate. Under the general system a young bachelor was appointed to serve one of the lord's daughters. Their association was almost constant. In romances, such as *Blonde of Oxford*, they might visit each other's bed-chambers and spend the night together. The romances, of course, make known that the association was entirely innocent. It was the custom of the time, however, for both sexes to go to bed entirely naked.[3]

An important feature of chivalry was the institution of love-service. The knight would bind himself to serve a

[1] *Hali Meidenhad*, 20. [2] Westermarck, *Moral Ideas*, II, 452 f.
[3] Wright, *Womankind*, 166 f., Coulton, *Chivalry*, 301 f.; W. S. Davis, 77.

particular lady. To her he had to prove himself brave and daring, patient and discreet. When, however, by performing a service as warrior or hunter in the lady's behalf, he had fulfilled his part of the bargain, the fulfilment of hers became due and owing. The relation was in no sense platonic. The woman who would refuse payment for the love-service performed would have been guilty of a serious breach of form and would have been socially ostracized by men and women alike.[1]

This freedom of sexual commerce was not confined to the unmarried. Married women claimed the right to enjoy a lover as well as a husband. The large majority of medieval romances celebrated illicit love. The violation of the marriage vows was, in such literature, the incontestable privilege of the brave and the fair.[2]

Nor was it only in voluntary sex expression that chivalry did not enact its theory. It was a recognized rule of the code of honour that a knight meeting a damsel accompanied by another knight could give combat to her companion and win her by arms. The lady then became his to do with exactly as he pleased; regardless of her wishes no shame attached to his acts. According to code, on the other hand, if the knight met a damsel alone and unprotected, he could not in honour take liberties against her will.[3] This part of the code was not, however, so well observed. "To judge from contemporary poems and romances, the first thought of every knight, on finding a lady unprotected and alone, was to do her violence."[4] Even the noble King Arthur was amused when a knight carried away by force a screaming and weeping lady.[5]

The chivalric practice of love-service had a more refined expression when, during the Renaissance, it was assimilated to the ideas of Platonism. The renewed study of the classics, the ascetic touch of Christianity, and the romantic

[1] Nott, 240 f.; Cornish, *Chivalry*, 302.
[2] Coulton, *Chaucer*, 227 and c. 17; Hallam, II, 299 f.; Wright, *Womankind*, 168; Cornish, *Chivalry*, 303 f. See further, Sutherland, I, 280–281.
[3] Scoffeld, III, 404 (quoting). [4] Traill and Mann, II, 781.
[5] Malory, Book III, c. 3.

influence of chivalry all combined to create a conception that love aspires toward the beautiful, toward God Himself. The divorce of love from carnal desire was again espoused by the churchmen and given a great impetus by Cardinal Bembo in his treatise *Gli Asolani*. By the end of the fifteenth century it was common for a man of refinement to select a lady and become her servant. To women the idea particularly appealed because by youthful marriages, so often unknown men, they had been deprived of love. Some, doubtless, did live up to the ideal of platonic purity. More, however, found the ideal too ethereal in an age of sexual laxness. The eminent Cardinal Bembo himself, after an association of 22 years with his fair friend Morosina, was the father of three children. Platonism, like its foster-parent chivalry, degenerated into mere artificiality.[1]

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Not only in deed but in appearance as well did the aristocracy of medieval England foster sexual laxity. As far back as the reign of Edward the Confessor, who had been educated in Normandy, the nobles had begun to adopt the fashions of the Franco-Norman court. The immoderate shortness of their garments has been called "shocking and offencive to decency."[2] It was not till after the Black Death, however, that clothing gave rise to considerable scandal. Men wore coats cut so short as to reach only the hips. Their tightness revealed, moralists said, what they should have concealed. Women "wore low-necked blouses and their breasts laced so high 'that a candle-stick could actually be put upon them.' Round the hips the skirts were so tight that with them, too, the forms indicative of sex were distinctly revealed."[3]

> Ye prowd galiottes beetleas,
> With your hyghe cappis witheas,
> And youre schoot gownys thriftleas,
> Have brought this londe in gret bevyneas.

. . . . . .

[1] Goodell, 140–142; *Biographie Universelle*, art. Bembo. On the whole subject see Nott, 140 ff. [2] Strutt, II, 14 f. [3] Nohl, 260 f.

Aweuoid by symony in cetees and towtys,
Make schortet youre taylis and broder your crounys.[1]

Apparel must have become a serious moral issue. Edward IV, in contrast to his own reputation for sexual licence, granted the following petition of the Commons:

Noo Knyght, under th' astate of a Lorde, Squier, Gentilman, nor other persone, use or were . . . eny Gowne, Jaket or Cloke, but it be of such length, as hit, he beyng upright, shall covete his pryve Membres and Buttokkes, uppon the peyn to forfeit to youre Highnes, at every defaute, XXs.[2]

A lord, it would seem, was left unrestricted in his habit.

Fops were to be found not only among the laity. In 1347 Archbishop Zouche had to take action against ecclesiastics who, "contrary to decency," wore clothes ridiculous for their shortness, showing their shapes and the looseness of their manners.[3] The clergy nevertheless continued their affectations, and the authorities continued their condemnations. In the fourteenth century the scandalous garments of the ecclesiastics were "so short as not to come down halfway of the legs, or even to the knees." In the fifteenth century the upper garments were "so short as not to cover their middle parts." The penalty for such apparel was deprivation of ecclesiastical benefice.[4]

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Suggestive apparel was, however, only a comparatively trivial vice of the clergy. Gower in his *Vox Clamantis* and *Mirour de l'Omme*, said that the clergy were mostly ignorant, quarrelsome, idle, and unchaste, and the prelates would not correct them because they themselves were no better. Even worse were the monks and nuns, and the friars were actually a serious menace to family life. The evil example of the ecclesiastics, Gower thought, caused contempt among the better laity, corruption among the worse, and was mainly responsible for the decay of society.[5]

[1] Wright, *Political Poems*, II, 251.
[2] *Rotuli Parliamentorum*, V, 503a.
[3] Archbishop Zouche's Constitutions, art. 33 Johnson, II, 408.
[4] Archbishop Boniface's Constitutions: Johnson, II, 513-517.
[5] Coulton, *Chaucer*, 196 (quoting).

Though Gower was a literary pessimist, each of his statements is to be supported by a mass of social evidence. There was adequate reason for Boucicaut to note in 1502 that to call a layman a cleric or priest or monk was an unpardonable insult.[1]

The reasons for this moral decadence of the clergy were largely two. The one was the type of person who entered the ecclesiastical life, and the other was the condition of sexual restraint placed upon the clergy by the Church law.

Feudal society circumscribed the lives of members of the inferior social classes within narrow limits. Largely to evade these restrictions men and women would seek freedom in the religious life. Uneducated and unrefined, they found in the lower orders of the Church incomparably greater opportunity than in civil life for self-expression. The priests themselves were of a higher type, and, probably, of higher motives, until the Black Death in 1348–49. The mortality among the clergy was then so great that after the plague vacant livings were granted to inexperienced and sometimes quite ignorant clerics.[2] The inevitable consequence was a lowering of the moral type among the priesthood from which it took generations to recover.

The attempt to impose upon an earthly-minded clergy the moral restraints conceived by spiritually-minded ascetics was foredoomed to abuse and failure. For decades the lower clergy had married as of right when finally the many Church councils succeeded in denying to them the right of marriage. Throughout the twelfth and thirteenth centuries the canons and constitutions were numerous which forbade to the clergy the right of marriage.

Denial of marriage led to concubinage. As early as 1108 Anselm sought to prohibit such unlawful cohabitation of the clergy.[3] Church councils and archbishops continued at frequent intervals thereafter to try to make the

[1] Lea, *Rise of Reformation*, 6, 6. [2] Gasquet, *Great Pestilence*, 253 ff.
[3] Anselm's Canons at London: Johnson, II, 31 f.

rule effective.[1] But social habits cannot be changed in a short time. The clergy of York absolutely refused to profess chastity upon ordination.[2] The President of the Synod of London in 1126, the papal legate, John of Crema, was said to have been caught in bed with a prostitute on the night after he had enacted canons against clerical concubinage.[3] The Abbess of Aveslury, during the reign of Henry II, had three children, her nuns more. The Abbot-elect of St Augustine's of Canterbury in 1171 had 17 bastards in one village. Giraldus Cambrensis (died 1220) spoke of the clergy publicly maintaining companions in nearly every parish in England and Wales. They transmitted their benefices to their sons; their daughters married the sons of other priests: an hereditary sacerdotal class was established.[4] The timidity of Archbishop Richard's Canons of 1175 is amazing: "Let not sons be instituted into their fathers' benefices, unless someone succeed between them."[5] A canon of Stephen ordered that the property of dead priests should go to their church and not, by testament, to their concubines.[6]

The attempt to utilize the temporal power in the enforcement of these rules led to the introduction into England of a widespread evil, the cullagium. The cullagium was a tax or tribute levied upon the members of the clergy, often by the temporal authorities, for the privilege of keeping concubines.[7] When in 1129 a Church synod authorized Henry I to execute the laws against the infraction of celibacy by ecclesiastics, the monarch found a new source of income: upon payment of a fee by the offenders

[1] Archbishop Corboyl's Canons (1126), decree 13, and (1127), decrees 1–7; Legatine Canons at Westminster (1138), canon 8, Archbishop Richard's Canons (1175); Hubert Walter's Legatine Canons (1199), canon 18, Archbishop Edmund's Constitutions (1236), arts. 3, 4, 26, Legatine Constitutions of Otto (1237), arts. 13–17; Legatine Constitutions of Otho (1268), art. 8, Archbishop Peckham's Constitution (1279), arts. 5, 11, Archbishop Chichley's Constitutions (1413), art. 2; Johnson, II, 34–45, 45, 60, 80 f., 131 f., 141, 161–164, 221 f., 262, 267, 478 f.; Roger de Wendover, Anno 1125.

[2] Johnson, II, 28.

[3] Ibid., 34–36.

[4] Lea, *Sacerdotal Celibacy*, c. 17.

[5] Johnson, II, 60.

[6] Lyndwood, Lib. III, Tit. XIII, c. 1, p. 166.

[7] It includes also by definition the exactions of ecclesiastical superiors. See "sin taxes," *supra*, pp. 116 f.

he would abandon them to their paramours.[1] Exaction of the cullagium is said to have become thereafter a universal practice.[2]

Even success in enforcing celibacy was in itself an evil. To deprive ecclesiastics of their wives or concubines and of the homes which such women maintained for them, led to other sex expressions. The clergy and the friars were driven to the ale-houses and brothels, or to the homes of hospitable laymen where they corrupted the women of the household. Or they were driven to serious sexual perversions.

By the time of the Reformation there were said to be 100,000 prostitutes in England. Upon the ecclesiastics they were largely dependent for their patronage. "Who is she that will set her hands to work to get three-pence a day, and may have at least twenty-pence a day, to sleep an hour with a friar, a monk, or a priest?"[3] In Waterlane many immoral women had established themselves next to the house of the Carmelite Friars in Fleet Street. In order to afford the friars a decent opportunity to perform their vows of chastity, Coke says that Edward III took action to remove the women.[4]

Homeless priests who were taken into the houses of the gentry, and wandering friars who would put up at the lodgings of the humble, were alike the cause of sexual mischief. It was said that, because of these ecclesiastics, no man could know his own child.[5] Their excesses were commonly celebrated.

> Were I a man that hous helde,
> If any woman with me dwelde,
> Ther is no fiet [friar], bot he were gelde,
> Sholde com within my wones.
> For may he til a woman wynne,
> In priveyté, he wyl not blynne,
> Er he a childe put hir withinne,
> And perchaunce two at ones.[6]

[1] Henry of Huntingdon, Anno 1129. [2] Lea, *Sacerdotal Celibacy*, I, 356.
[3] Beggars' Petition, m. 16, 31: *Harleian Miscellany*, 150–155. See also Bowes, I, 274. [4] Coke, 3rd Inst., 203.
[5] Beggars' Petition, p. 151: *Harleian Miscellany*, 150–155.
[6] Song against the Friars: Wright, *Political Poems*, I, 265, 266.

So generally were the amatory proclivities of the priesthood known that, by the time of the Reformation, clerics had difficulty in obtaining shelter. In desperation the clergy of Bangor petitioned Sir Thomas Cromwell for permission to retain their concubines: "As for gentlemen and substantial honest men, for fear of inconvenience, knowing our frailty and accustomed liberty, they will in no wise board us in their houses." [1]

It was not only with women, however, that the ecclesiastics found an outlet for their sexual expression.

Lat a freer of sum order
Astum pertractare,
Odur thi wyff or thi daughtour
He suld violare;
Or thi sun be weyl prefur,
None fortum fortis
God gyffe sych a freet peyne
In inferni portis! [2]

Sodomy was recognized as a serious vice among the clergy. It had probably persisted since the days of the Penitentials.[3] In 1102 a Church council attempted by direct provision to root out this crime. Any ecclesiastical person found guilty of sodomy was to be deprived of advancement in order and was to be degraded. Profligate, obstinate sodomites were to be struck with anathema.[4]

The vice was so widespread, however, that Anselm had to connive at its practice. He dared not force the publication of the canon as decreed by the council or deal with the offenders as severely as prescribed.[5] Some years later the king assisted in the enforcement of the canons. But sodomy continued to be charged against the clergy because of the rule of continence, and monks were accused of bestiality.[6] When sodomy was made a felony under the temporal law at the time of the Reformation, the statute

[1] Froude, III, 472 (quoting).
[2] Against the Friars: Wright, *Political Poems*, II, 249 f.
[3] See *supra*, p. 63.
[4] Anselm's Canons at Westminster, no. 18: Johnson, II, 18.
[5] *Ibid.*, note; St Anselm, Pars III, Epistola LXII: Migne, CLIX, 93; Pollock and Maitland, II, 556.
[6] Lollard Confessions, nos. 5, 11. Gee and Hardy, 126–131.

recited that the punishment for the offence had been inadequate.[1]

The laity did not condone these sexual vices of the clergy which so closely affected their own convenience and welfare. To the extent that the law of the land allowed, the citizens of London sought in practical ways to put an end to clerical indiscretions. In their ardour they even exceeded the appointed bounds of the temporal jurisdiction. Probably under guise of early customs of the city, the London citizens had been accustomed to arrest fornicating chaplains and throw them in the Tun as night-walkers. The practice became so common that in 1297 Richard, Bishop of London, had to remind King Edward I of the provision in the Magna Charta, *Anglicana Ecclesia libera sit*, and to recall to him the exclusive jurisdiction of the ecclesiastical courts. Edward thereupon wrote to the sheriffs enjoining that ecclesiastics were in the future not to be forcibly arrested on charges of fornication or adultery or confined in the Tun.[2]

During the seventh year of Richard II, nevertheless, when the people had been made by Wycliffe particularly aware of the abuses of the ecclesiastical administration,[3] there was enacted in London an ordinance which would seem likewise to have usurped the spiritual jurisdiction. "If a single woman shall be found in company with a priest, let them both be taken unto the Compter of one of the Sheriffs, and from thence unto the said Tun, there to remain at the will of the Mayor and Aldermen." The fornicating priest might be paraded to the Tun with minstrels, and for a third offence he might be banished from the city for ever. If the woman were married and the offence therefore adultery, the priest's head might be shaved like the head of a false informer.[4]

With no intent to usurp, the temporal law did try to give material assistance to the spiritual courts "for the

[1] St. 23 Henry VIII, c. 6; Pollock and Maitland, II, 356 f.
[2] *Liber Custumarum* (21 Edward I): *Munimenta Gildhalle Londoniensis*, II, Part 1, 214 f.
[3] See *supra*, pp. 105, 216 f.
[4] *Liber Albus*, 356; *Munimenta Gildhalle Londoniensis*, I, 439, f., III, 181 f.

more sure and likly reformacion of Preests Clerkys and religious men culpable or by their demerites openly noised of incontinent lyvyng." Henry VII gave to ecclesiastical courts the power to commit such offending clerics to prison for any period within the courts' discretion.[1]

Stow tells a story of the strenuous methods taken by the courts in the sixteenth century to discourage incontinence among the clergy. A draper had visiting him a priest who was his friend. Leaving the priest for a short time alone with his wife to finish a game of cards, the host returned to find "such play to his misliking." The priest jumped out of the window and over the penthouse. Later arrested, the priest was conveyed through the streets and markets of the city for three days, wearing a placard announcing his crime, seated on a horse with his face to its tail. Basons were rung and proclamations made at every turning. The priest was deprived of his benefice and banished from the city.[2]

So much has been written concerning the immorality in the monasteries and nunneries, and so much have the facts been distorted that a summary of monastic morals may well be avoided. The reports of Leyton and Legh, Thomas Cromwell's inspectors, were, of course, not fair pictures.[3] Nor was the preamble of the statute unbiased, whereunder the monasteries were taken over. The inmates, it announced, have been known for two centuries for their "manifest synne, vicious carnall and abhominable lyvyng."[4] The evidence least likely to adverse prejudice is that of the religious authorities themselves. From the thirteenth century onwards they talked of the corruption of the monasteries, of the unchastity of the monks and nuns. Cases of monastic incontinence were numerous.[5]

Best of all ways to understand the extent of sexual immorality among the clergy is by a study of the actual cases that came before ecclesiastical courts. In Arch-

[1] St. 1 Henry VII, c. 4.
[2] Stow, *Survey*, I, 190.
[3] Gasquet, *Henry VIII*, 95 ff.
[4] St. 27 Henry VIII, c. 28.
[5] Archbishop Peckham's Constitutions, 1279 and 1281; Johnson, II, 267, 293–295; Thompson, 19, 21, 26, 39, 54, 63, 67, 69–71, 83–85, 118; Coulton, *Five Centuries of Religion*, II, 647–654; and Hale.

deacon Hale's volume of cases from the Consistory Court of London there is report of 57 cases in which laymen were accused of incontinent practices. There are 22 cases which concern the incontinence of ecclesiastics. The proportion of clergymen to laymen was one to 100 according to Gasquet, or one to 50 according to Thorold Rogers.[2] If there had been proportionally as many proceedings for incontinence among the laity as among the clergy, instead of 57 proceedings there would have been 1100 or 2100.

The number of cases in Hale is too limited for a fair computation. The records of visitations in Norwich, Ripon, and Southwell, however, are more extensive; they contain 276 presentments for sexual immorality. Considering the proportion of their numbers, the clerical offenders were from five to ten times as numerous as the lay offenders. In Ripon, in fact, again considering the proportion, presentments of clerical offenders were nearly 80 times as frequent as presentments of laymen. Allowing even for the closer supervision of the clergy the disproportion is astonishing. Though many of the clergy purged themselves, the disproportionate number of guilty priests is still evident; in Ripon the convictions were more than 50 times as frequent.[3]

Such a picture of the sexual degradation of the clergy had serious effect upon the laity. The clergy were supposedly spiritual guides, the more so in times when the laymen were untutored and comparatively simple. Thomas Gascoigne, Chancellor of Oxford University in 1450, repeats in his *Liber Veritatum* how the clergy were ruining the Church. Parishioners were known to have believed that adultery and fornication were no longer sins because their rector, though taken in open adultery, had not been expelled by the bishop from his cure.[4]

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Not only indirectly as personal examples of decadence did the English ecclesiastics have a dangerous influence on

[2] Coulton, *Private and People*, 13 f. [3] *Ibid.*, 13 ff.
[4] *Ibid.*, 11 (quoting).

the sexual practices of the laity. Church authorities derived profit from prostitution in London. They have been accused, in consequence, of fostering immorality.[1] Because brothels were forbidden within the city of London, prostitution was carried on largely in licensed stews in Bankside Street, Southwark, close to the palaces of the Bishops of Rochester and of Winchester. The Bishop of Winchester was lord of the manor of Southwark and, as such, had jurisdiction over and a profit from the stews. The women inmates were popularly known as "Winchester Geese." In Shakespeare's *Henry VI*, Humphrey, Duke of Gloucester, reproached the Bishop of Winchester with, "Thou that givest whores indulgences to sin."[2]

It seemed not to disconcert the bishop or the Church that these women from whom they profited were not permitted to receive the rites of the Church whilst they lived, and upon death were refused a Christian burial. There was a cemetery appointed for them far from the parish church, for, as Coke said, brothel-houses were prohibited by the law of God.[3] The inmates, though useful, were not acceptable.

The stews which were not within the jurisdiction of the bishop were at one time owned by Sir William Walworth, the famed Lord Mayor of London. They were burned during the Peasants' Revolt in 1381 by Wat Tyler and his followers. No one has suggested this raid upon his property as one of the reasons why Walworth killed Wat Tyler at the Smithfield Assembly. The stews belonging to Walworth were again raided the next year by Walworth's rival and successor, John of Northampton, the reform mayor. Possibly this was intended by John as a blow at Walworth.[4] More probably, as the chronicler Walsingham says, John's followers were animated by the teachings of Wycliffe, who had accused the clergy of fostering immorality through their negligence and avarice.[5] They were anxious to put

[1] On 12th May 1321 Edward II approved the sale of a bankar to a cardinal who evidently considered it a profitable investment for accidental funds: Rymer, III, 880.

[2] Henry VI, Part I, act 1, scene iii, line 51. See Drake, 263, note.

[3] Coke, 3rd Inst., 205; Bracton, I, 276.

[4] Trevelyan, *Wycliffe*, 279 f.; Drake, 263 note. [5] See *infra*, pp. 106 f.

an expeditious end to the evidences of ecclesiastical neglect and abuse.[1]

The sexual practices of chivalry and of the Church met sympathetic overtones in the whole social instrument. Already in the eleventh century the monk Ordericus Vitalis recorded that the paramour wives of the Norman conquerors of England, left alone at home, sent messages that if their husbands failed to return speedily, they would take new ones. A number of the knights asked leave of absence and, though William offered large rewards to those who remained, hurried back to Normandy to save their lines from the blot of adultery.[2] Though William of Malmesbury asserted that he knew men, lay and clerical, who were both sober and chaste, "the Norman nobility in general were," he said, "given over to gluttony and lechery." When their concubines became pregnant or they tired of them, it was usual for the Normans to establish them as public prostitutes or to traffic their favours amongst their acquaintances.[3]

The English crusaders were no better in their sexual practices than their brethren at home. In 1097 incontinent females were so numerous in the crusading armies that they were forcibly driven out of camp.[4] In 1191, Walter of Hemingberg asserts, there were 14,000 loose women supported by the Templars.[5] When Richard I arrived at Marseilles to embark for the Holy Land, he found his barons, who had preceded him to the port by a few weeks, penniless.[6] It has been said that they had spent on women the money which they had collected from their vassals to redeem the sepulchre of Christ.[7] It was a common superstition to ascribe the reverses of the crusaders to their fornications.[8]

[1] Walsingham, II, 65; similarly Stow, *Survey*, I, 189 f. For further discussion of the law of this period relating to prostitution see Aston, 324 ff.
[2] Ordericus Vitalis, II, 177 f.
[3] William of Malmesbury, II, 303.
[4] Roger de Wendover, Anno 1097.
[5] Walter de Hemingburgh, II, 24.
[6] Benedict of Peterborough, II, 112.
[7] Bielfield, III, 418.
[8] Henry of Huntingdon, xth (Anno 1148). Cf. *supra*, p. 54.

The Church tried by means of its legal enactments to inculcate the ascetic ideal, to eradicate indiscriminate sex expression. Her methods were two—the one indirect and the other direct. "Under pain of anathema, we forbid any physician to give advice for the health of the body which may prove perilous to the soul, which is much more precious than the body."[1] Occasionally, it would seem, a physician would advise familiarity with women as the cure of some ill-humours. It was a debatable point in mediæval medicine as to whether certain cures could be wrought only by this means. Lyndwood strenuously denied it.[2] Most of the published material on the point which is still preserved is sternly opposed to such a medical doctrine. But this may result from the very fact that serious ecclesiastical punishment would follow any expression of such opinion.

The teachings as to sexual hygiene which the Church tolerated and encouraged emphasized the dire consequence of certain expressions of sex. The proscribed expressions were those condemned by the much earlier Christian teachings, those banned by the injunctions of Leviticus. Writing in the fourteenth century, John Acton (or de Athona) explained the dangers of intercourse during the spring period and during menstruation. Contact with menstrual blood, he said, prevents fruits from sprouting and herds from multiplying; plants die, the skies grow black, dogs become mad. From such sexual contamination leprosy and elephantiasis develop and monsters are born.[3] Two centuries later the distinguished physician, Ambroise Paré, in his book on Monsters declared, "Monstrous births which result from God's anger are those which result from disobedience of the laws of sexual hygiene such as are laid down by Moses in Leviticus."[4]

In times of plague sexual practices were thought to be particularly dangerous. During the Black Death all matrimonial intercourse with women, even sleeping in a

[1] Archbishop Wethershed's Constitutions (1229); Johnson, II, 117.
[2] Lyndwood, Lib. V, Tit. XVI, p. 330, note g.
[3] Acton, 42. [4] Paré, 95 f.

woman's bed, was said to be mortal. *In puris Venus partus ferocus* was proverbial.[1]

How widespread was the contrary teaching by medical men, it is impossible to ascertain. The Church kept a tight censorship on all medical practice through its own jurisdiction and enactments. In support of this power an early statute of Henry VIII provided that all physicians and surgeons had to be examined and approved by the ecclesiastical authorities of their district, and any practising without such licence was subject to heavy penalty.[2] Until a comparatively recent period the bishops could still have exercised this power to license medical men, had they chosen to do so.[3]

In a much more direct way, as well, the Church brought her authority to bear to enforce her ideas as to sex expression. She prohibited all sexual connexion between men and women unless "excused by matrimony." Priests were to preach this doctrine to their flocks in sermons and at confessions; if negligent in their denunciation, the priests were themselves to be considered as guilty of a sexual lapse. Simple fornication of an unmarried man with an unmarried woman was declared to be a mortal sin.[4]

The laity, however, seemed to have no conception of the relation of sexual practices and religious morals. When St Hugh, Bishop of Lincoln, was visiting the monastery of Godstowe near Oxford in 1192, he noticed a tomb before the high altar elaborately hung with silks and surrounded by burning tapers. It was not the tomb of a saint or holy man but of Fair Rosamond, mistress of Henry II. It was explained that because of Rosamond the king had made many gifts to this church. The bishop condemned her as a harlot and ordered her body removed as an example to

[1] Nebl, 90, 112. During the plague bathing was also thought dangerous.

[2] 3 Henry VIII, c. 11. Even after the Restoration all scientific publications were subject to Church censorship: 14 Car. 2, c. 33; 16 Car. 2, c. 8; 16 and 17 Car. 2, c. 7; 17 Car. 2, c. 4; 1 Jac. 2, c. 17, s. 23.

[3] Longmore, 28 f. The statute has never been repealed.

[4] Archbishop Stratford's Constitutions, art. 2: Johnson, II, 444; Lyndwood, Lib. V, Tit. XVI, c. 15, p. 349.

ill-disposed women to avoid the sin of adultery and lechery.[1]

So lightly were extra-marital relations looked upon that the title of Bastard was borne not only without reproach but, as in the case of the Conqueror, with dignity. Inferiority of legal status was accompanied by no loss of social caste.

> Though bastardisme can make no title good,
> Yet know a Bastard may have noble blood;
> And challenge kindred with the best.[2]

Nor was it only among the nobles and gentry who bore the title of Bastard that illegitimacy was common. At least nine per cent. of the villeins of one manor in the reign of Edward III were known to be bastards. This was not an exception to the situation at most English manors but an indication of it.[3]

Evidences of the prevalence of sexual laxity are to be found in literature, in law, and in legal and social practice and statistics. In the late fourteenth century Gower, in his *Vox Clamantis*, bewailed the disappearance of chastity. The laws of marriage were no longer kept; chaste love was all but unknown; adultery everywhere prevailed.[4]

> Dormit militia vitiata cupidine rerum,
> Pro quibus in vitia jam pugnat amor mulierum.
> Clerus decrescit, vesanu vulgus olescit,
> Curia ditescit, virtus in vilia crescit.[5]

In a famous chapter of the *Roman de la Rose* a jealous husband accused his wife by words and by blows of amusing herself with other men during his absence.

> A virtuous woman! Nay, I swear
> By good St Denis, that's more rare
> Than is a phœnix.[6]

[1] Higden, VIII, 99.

[2] Hooper, 6 (quoting).

[3] Pike, Y. B., *18–19 Edward III*, Intro. XXX ff.

[4] Gower, *Vox Clamantis*, Lib. VI, c. 21. See also Gower, "On the Corruptions of the Age," *[illegible]*: Wright, *Political Poems*, I, 331–355.

[5] Wright, *Political Poems*, II, 259. See also Wright, *Anglo-Latin Poets*.

[6] Abstracts, 59 (quoting).

Among the most noted of sexual offenders was King Edward IV. His example of promiscuity was followed by his subjects. "No man was sure of his Lif . . . or of his Wif, Doughter or Servaunt, every good Maiden and Woman standing in drede to be ravished and defouled."[1]

Husbands and fathers, knowing the weakness of their women, the ardour of other men, and the impotence of the law, took what personal precautions they could. If chastity was to be maintained only by force, force was to be applied. By the beginning of the thirteenth century, or at least before the Renaissance, the accepted means of guarding female morality was the girdle of chastity.[2] During the absence of her male protector, the woman was locked into a machine, with whose key she was not herself entrusted. The widespread use of the chastity belt is some indication of its need; its need is a commentary on the degeneracy of sex morals.

A more accurate gauge of sexual practices is to be found in the few available legal and social statistics. Unfortunately there is, of course, no complete record of hearings in any of the ecclesiastical courts. In the introduction to his *Precedents*, Archdeacon Hale remarked, "I have almost occasion to regret, that in the following work so frequent notice should have been taken of crimes against chastity: the cases selected bear no proportion whatever to the real number; indeed, it would seem as if lust was always the great prevailing crime. To have less frequently mentioned such cases would have failed to give the reader an adequate notion . . . of the extent of the public profligacy."[3] During the last four years of the fifteenth century, of the 1154 persons cited before the Court of Commissary for London, one half were charged with adultery and other sexual offenses.[4]

Prosecutions of sexual offences depend not only upon the number of offenders but more largely upon the efficiency of legal administration. Not so, however, sexual

[1] *Rotuli Parliamentorum*, VI, 240b, 241a.
[2] Confession; Ellis, *Psychology of Sex*, VI, 163.
[3] Hale, LXII. [4] *Ibid.*, LIII.

disease. Though mildly infectious venereal diseases had long been known in Europe, syphilis did not make its appearance until the end of the fifteenth century, probably introduced from America by Columbus's crew.[1] With incredible speed from Spain, France, Italy, it spread northward. In the first decade of its prevalence, it has been estimated, one-third of the population of Europe died of its effects.[2]

There is ample evidence that during the Tudor and Stuart periods syphilis was rampant in England. The frequent use of the word "pox" in the plays of Shakespeare and Jonson—which, it is clear from the descriptions, applied not to small pox but to "great pox"—is evidence of how familiar the disease and its symptoms must have been to the man of the street.[3] Later in the seventeenth century the notes made by the distinguished physician Richard Wiseman show how common were both the acquired and congenital forms of syphilis.[4]

Syphilis had a eugenic social effect. It caused the most promiscuous sexual offenders to die out. It induced into physical indulgence a fear that led to caution. At the close of the fifteenth century the standard of sexual morality in England had struck its lowest ebb.[5]

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The sex mores of the period had been produced by two conflicting currents of thought. Christian asceticism denounced women as evil and dangerous. Chivalric romanticism praised them as worthy of love and reverence. Both of these sets of ideals were beyond hope of attainment in the comparatively crude society. Both degenerated into folly and vice. Side by side with the exalted idealism of the Church and the exalted formalism of chivalry, the primitive forms of erotic life kept all their force.[6]

[1] Bloch, *Der Ursprung der Syphilis*; Bloch, *Sexual Life*, 537; Ellis, *Psychology of Sex*, VI, c. 2; Morris, V, 169–201. For a summary of the early history of syphilis in Europe, see Bloch and Loewenstein, II, c. 9.

[2] Sutherland, I, 181 f. Though this is a mere guess, the proportion was large. The virulence of the disease was counteracted in previously unaffected countries by no social immunity built up through a long series of social contacts. [3] Morris, V, 24–26.

[4] Wiseman, Book VIII. [5] Denton, 119 [6] Hamilton, 96 ff.

Morality is a question not of attainment alone but of the ideal to be attained. The Church and its law held up to an unenlightened society an ideal beside its inclinations and beyond its potentialities. The Church built up a legal machine adjusted to the social product which it sought to produce and not to the raw materials with which it was supplied. A mill too fine for its grist must grind out poorer and poorer ones.

In more than its construction, however, did the Church's legal machinery prove defective. Its most patent imperfection lay in its operation.

CHAPTER VII

THE ECCLESIASTICAL ADMINISTRATION IN PRACTICE

The administration of the ecclesiastical courts in cases of correction broke down in two ways. One was a question of system. The other was a question of personnel. As always, a corrupt personnel took advantage of the weakness of a deficient system. Before the end of the thirteenth century the procedure of the spiritual courts in criminal cases had already become little better than a farce.[1] The reason was money.[2]

The basis on which the Church rested her jurisdiction over the sexual morals of the laity was the safety of the sinner's soul. Sentence of guilt was in theory not vindictive punishment but spiritual correction. Good works were, we have seen, an effective mode of expiation; giving alms to the poor was an expressive means of working good. As early as the seventh century almsgiving had been accepted in England as a proper method of showing penitence.[3] Theodore himself, according to Archbishop Egbert, permitted the practice.[4]

One of the two great dangers of almsgiving lay in the possibility that the gift itself would come to be considered the expiation rather than the spirit which was supposed to prompt the gift. Less than a century after its introduction this "new invented conceit" had grown into a dangerous custom. In A.D. 747 the Council of Clovesho had to decree that almsgiving, though good, was not so good as to form a substitute for penance. "It is good . . . daily to give alms; yet abstinence is not to be remitted." Almsgiving must be only an addition to abstinence and fasting.[5] It was this necessity to retain in the money exactions made by the Church the spirit of true penitence that constituted one of the main problems of ecclesiastical administration throughout the Middle Ages. It was the

[1] Pollock and Maitland, I, 443. [2] Stubbs, *Constitutional History*, I, 101.
[3] Lea, *Auricular Confession*, II, 133–142. [4] Haddan, 314.
[5] Cuthbert's Canons at Clovesho, art. 16: Johnson, I, 353 f.

failure to retain a spiritual significance in the payments that largely contributed to the downfall of ecclesiastical jurisdiction.

The Church, as represented by its true leaders, was doubtless sincere in the attempt to end the abuses which grew out of money commutations. The constitutions of the papal legate enacted in 1268 that "God accepts no pay. . . . Because the sinner is afraid of no crimes which can be redeemed with money, . . . the malice of the will is not in the least diminished, but authority and license is granted to sin. We therefore . . . do ordain that archdeacons take no money for any crime that is mortal and notorious, or which may occasion scandal, but punish it with a just animadversion."[1] This confirmed the rule of the earlier constitution of Cardinal Otho.[2]

The custom of pecuniary penance continued, however, and was recognized by the temporal law as a proper ecclesiastical punishment.[3] The practice grew. Though "God Almighty demandeth not money for sin, yet certain judges . . . ignore this . . . and remit for a small money-fine the spiritual or corporal penalties fixed by the Canons for sin, and . . . in violation of repeated Canons and Constitutions, take payments of money from the delinquents for mortal and notorious sins."[4]

With the growth of the practice came its more complete acceptance, or at least a greater toleration, by the Church authorities. The earlier rule of Otho and Otbobon was modified, actually altered in principle. Whereas the papal legates in the thirteenth century had absolutely prohibited money penance as constituting an encouragement to sin, during the succeeding century Archbishop Stratford decreed "that no money be in any wise received for notorious sin in case the offender hath relapsed more than twice," and

[1] Legatine Constitutions of Otbobon, art. 19; Johnson, II, 233 f. Even simple fornication was a mortal sin; see *infra*, p. 208.

[2] Legatine Constitutions of Otho (1237), art. 10; Johnson, II, 163 f.

[3] In statutes *Circumspecte Agatis* and *Articuli Cleri*: Coke, 2nd Inst., 489, 619 f.

[4] Coulton, *Middle Ages*, I, 191 (quoting a fourteenth century MS.).

that lest the judges seem rapacious the commutations should be moderate.[2]

Notwithstanding this modification of principle the Church was unable to enforce its rules. The ecclesiastical judges continued to oppress lay sinners by extorting large sums of money for their correction. The king was appealed to. Richard II, and again Henry V, charged the bishops and their judges to adhere to the laws of the Church and not to set improper pecuniary penances.[3]

The charges of the king, like the decrees of the Church, were of no avail. The reason for their failure was the depravity of the spiritual-court judges. Already in 1237 the legate Otho had found it necessary to decree: "As to archdeacons . . . let them not . . . pass sentence on any unjustly in order to extort money from him." Any such vicious extortion by the judge was to be severely punished.[4] During the succeeding years, nevertheless, ecclesiastical writers paid ever increasing attention to the disposition of the money collected by commutations.[5] The reason for this growing concern, as Archbishop Stratford realized, was the deliberate corruption of the judges. His archdeacons, he noted, "that receive the money apply it to the use of themselves, not of the poor, or to pious uses; which is the occasion of grievous scandal and ill example."[6] Herein lay the second great abuse of pecuniary penance.

Of these ecclesiastical outrages the laity, as the chief sufferers, were acutely conscious. Gower declared that the higher clergy encouraged vice among the people in order to gain money and influence for themselves.[7] From *Piers Plowman* we learn:

> Deues and suddenes · drawe zou togideres,
> Erchedekenes and officiales · and alle
> zowre Registreres,

[1] Archbishop Stratford's Extravagants (1343), art. 10. Johnson, II, 372 f.; Lyndwood, Lib. V, Tit. XV, c. 3, pp. 323 ff.
[2] *Rotuli Parliamentorum*, III, 25 (1377); IV, 98 (1415).
[3] Johnson, II, 165 f. [4] Gibson, II, 1044 ff.; Stephens, I, 88; f.
[5] Johnson, II, 372 f. For a careful note as to the Church laws concerning commutations see Gibson, II, 1043 f. [6] Coulton, *Chaucer*, 256 (quoting).

Let sadel hem with sikes · owre synne
to suffre,
As mountrie [adultery] and dyvorces · and
derne werkye,
To bere bischopes aboute · abrode in
vikytynge.[1]

Not only the sinners themselves suffered from the courts' extortions but, what was more dangerous to the Church, the sinners' overlords suffered as well.[2] The tenants on the manor of Lord Robert in Amandale were so frequently incontinent and their names so perpetually appeared on the archdeacon's roll that they were unable to pay their rent to the lord. The lord thereupon ruled that anyone sinning in the future must quit the manor. This strict rule, having forced amendment in the habits of the peasants, caused consequent loss in the archdeacon's revenue and rise in his indignation. The archdeacon demanded by what right the lord trespassed on his spiritual jurisdiction. "Nay," quoth the knight; "for the statute . . . is of mine own land and not of men's sins; but thou, with thy ransom for sin, hast sucked out the revenues of my farms; and now I see that thou wouldst reck little who should take the souls, if thou couldst ever fill thy purse."[3]

Most keenly aware of the anomalous and hypocritical position of the Church was Wycliffe. It was the Church's duty to punish immorality, and yet by this pecuniary form of punishment the Church officials were in fact profiteering. It was to their interest, then, not to discourage sexual breaches but to encourage them. Like Lord Robert he accused the prelates of neglect of men's souls so long as they got their "roten peny." They were, in fact, sorry, he said, "whanne men forsaken here olde synnes and paien nomore here annuel [sin-] rente."[4]

True it was that a practice had grown up more vicious than the mere perversion of money duly paid in commutation of penance. So frequently were many of the sexual

[1] *Piers Plowman*, Text B, Pass. II, ll. 171 ff. [2] See *infra*, p. 117.
[3] *The Lanercost Chronicle* (1276); Coulton, *Middle Ages*, III, 29 f.
[4] Wyclif, 72.

offenders cited before the court, and with such regularity were pecuniary penances imposed, notwithstanding Archbishop Stratford's decree, that an ecclesiastical summons came to mean a money mulct. Why, then, be bothered with a citation and appearance? Why not discount one's sexual sins in advance and insure freedom from molestation?

Wycliffe was supported by the Lollards in his charge that archdeacons and officials would condone incontinence for fixed money payments, the so-called sin-rent.

> For a simple fornication
> Twenty shillings he shall pay,
> And then have an absolution
> And all the year usen it forth he may.

Doubtless the Lollards' statement was a gross exaggeration that sin-rents brought some prelates £2000 a year. However hyperbolic, the charge at least shows the popular conception of ecclesiastical abuses.[1]

Before the end of the fourteenth century these outrages of corrupt officials began to have repercussions against the ecclesiastical jurisdiction itself. Directly and purposely in violation of the Church's jurisdiction the citizens of London took it upon themselves in 1384 to punish men and women guilty of fornication and adultery. They shaved their heads like thieves, paraded them with trumpets, and threw them in the Tun. The citizens "abhorred not onely the negligence of their Prelates, but also detested their avarice, that studying for money, omitted the punishment limitted by law, and permitted those that were found gultie, to live favourably in their sinne (by their fines). Wherefore they would themselues, they sayd, purge their Citie from such filthinesse, least through God's vengeance, either the pestilence or swords should happen to them, or that the earth should swallow them."[2]

Broader and more serious of aim was the petition presented to Edward III by the Commons in 1372 to limit the Church courts in their control over sexual offences.

[1] Wordsworth, II, 117 and note. See also Coulton, *Medieval Agar*, I, 191.
[2] Stow, *Survey*, I, 189 f.

"Whereas the Prelates and Ordinaries of Holy Church take money of clergy and laity in redemption of their sin from day to day, and from year to year, in that they keep their concubines openly . . . to the obvious scandal and evil example of the whole commonality," let both the giver and receiver of such sums for redemption of sin be made to forfeit double the sum, and let the ordinary courts of justice have cognizance of such cases.[1] These lay expressions of discontent had at the time, however, no permanent effect.

It was but natural that the system of commutations of penance should have developed into the system of indulgences. In the eleventh century the popes had already connected the doctrines of penance and purgatory; penance in the next world was supposed to be commuted by penance in this.[2] By a money payment, therefore, one could buy off the punishment for one's sins in the next world. Not only one's own sins could be thus remitted; purchase of an indulgence could pay an already dead person's passage through purgatory to paradise.

England was overrun by "questors," papal pardoners.[3] In the mid-fifteenth century Chancellor Gascoigne, an orthodox and distinguished churchman, wrote: "Sinners say nowadays, 'I care not what or how many evils I do before God, for I can get at once, without the least difficulty, plenary remission of any guilt or sin whatever through an Indulgence granted me by the Pope, whose written grant I have bought for fourpence, or for the stake of a game of ball;' for, indeed, these grantors of letters of Indulgence run about from place to place and sometimes give a letter for twopence, sometimes for a good drink of wine or beer, sometimes to pay their losses at a game of

[1] *Rotuli Parliamentorum*, II, 313b, 314a.

[2] Trevelyan, *Wyclif*, 362; J. G. Phillimore, 18.

[3] Archbishop Nevil's Constitutions (1466), art. 7; Johnson, II, 521 f. Cardinal Gasquet contended that the system of indulgences was never widespread in England: *Reformation*, 439 f. But see, for instance, the collections of indulgences in H.M. Public Record Office: Chancery Miscellanea, Bundle 15, File 6, and Exchequer K.R., Ecclesiastical Documents, Bundle 6; and see Gascoigne, *infra*.

bail, sometimes for the hire of a prostitute, sometimes for fleshly love."[1]

. . . . . .

Where the great fatten from the loaf, the small may at least gather up the crumbs. As the holy see profited by indulgences, as the bishops and officials benefited by the sin-rents and commutations, as the archdeacons exacted their parish dues known as the "archdeacon's pig" or "larder gift," so too did the apparitors and summoners assess their extortions. Because their petty corruption affected the people more closely in their routine living, the popular protests were the loudest against the summoners and apparitors. Their abuses lay in blackmail and in bribery. They were a "hell-pestering rabble"[2] whose heritage was with the devil.[3]

It was the official duty of the summoners and apparitors to search out sin and report it to the ecclesiastical courts. They would then cite the sinners to appear and answer for their offences.

> A somnour is a renner up and doun
> With mandemente for fornicacioun.[4]

Their position made it easy to extort money corruptly. They could wink at offences committed. They could charge offences never committed. They could pocket their exactions. In all this there was but little fear of detection.

Piers Plowman said that a man could sin from day to day so long as his purse would bleed. If his purse was bled dry, his lot was even then not hopeless. He could pay in kind. The summoner would disregard the breaches of a good fellow who gave him a quart of wine.[5] If the sinner happened to be a young woman, the summoner might overlook her misdeeds if she adequately indulged

[1] Gascoigne, *Liber Veritatum*, 121; Coulton, *Priest and People*, 8. See also *Piers Plowman*, Text B, Pass. VII, ll. 168 ff.; A, VIII, 156 ff.; C, X, 319 ff.

[2] Milton, III, 230. [3] Chaucer, *Friar's Tale*, 342 f.

[4] Chaucer, Prologue to *Friar's Tale*, 19 f.

[5] Abram, 50 (quoting). Similarly *Piers Plowman*, Text C, Pass. III, ll. 190 f.; A, II, 134 f.; B, II, 179 f.

his desires.[1] So anxious were the offenders to evade citation into court that they sometimes took the initiative in bribing the apparitor.[2] A guilty person might even buy freedom from his own sin if he would retail to the summoner the sins of others more profitable for extortion. Chaucer's archdeacon

> . . . hadde a Somnour redy to his hond,
> A slyer boy was noon in Engeland;
> For subtilly he hadde his espiall [set of spies],
> That taughte him, wher that him mighte availle.
> He coude wynne of lechcraft coon or two
> To techen him to foure and twenty oon.

He even had harlots as his accomplices who would report to him their fellow sinners.[3]

The summoner and apparitor grew fat not only on the sins of the guilty but on the fears of the innocent. To save the inconvenience of a citation and trial at a distant ecclesiastical court, the possibility of being found guilty for lack of compurgators, and the costs which would be incurred notwithstanding an acquittal, a guiltless person might willingly pay "ransom" to the apparitor. With high airs and on horseback these harpeys would swoop down upon the innocent, live at their expense and, besides, make unwarranted collections. "Damnable presumption," Bishop Quivil of Exeter called it.[4]

In the thirteenth century Archbishop Boniface attempted to remedy the situation, and in the fourteenth century Stratford.[5] "Whereas great grievances are multiplied to our subjects by a burdensome multitude of apparitors, which has nothing reputable in it . . . and these apparitors . . . make collections of lambs, wool, and sheaves . . . and cause such as do not contribute to them to be molested, and maliciously vexed by right or wrong; therefore . . . we ordain that every one of our suffragans have one riding apparitor only for his diocese; and that every archdeacon . . . have . . . but one foot apparitor only for every

[1] Hale, no. 90.
[2] Chaucer, *Friar's Tale*, 13–28.
[3] *Ibid.*, no. 623.
[4] Capes, 141 f.
[5] Hale, LVII f.

deanery, who may not . . . make collections of money, wool, lambs or other things, but thankfully receive what is freely given."[1]

Extortions from the innocent caused hostility. Popular dislike led to popular resistance. The apparitors serving citations were frequently insulted and assaulted.[2] The person resisting would then be guilty of a new offence —contempt of the court's process. There was no law adequate to deal with the abuses of these officers who served summonses out of mere malice. The king promised a remedy,[3] but to no avail.

A great part of the money collected by the apparitors was doubtless never seen by their masters. The lay sinner would seldom know whether or not an official citation had been issued for his appearance by the court. Without making any record of the offence for his superior, an apparitor could demand money "in commutation of penance." As the archdeacons stole from the bishops,[4] so did the apparitors steal from the archdeacons.

> His maister knew nat alwey what he wan.
> Withouten mandement, a lewed man
> He coude somne [summon] on peyne of
> Chaste cure [excommunication].
> And they were gladde for to fille his purs,
> And make him grete festes atte ale [at
> the ale-house].
> And right as Judas haddé purses smale
> And was a theef, right swiche a theef was he;
> His maister hadde but half his duetee.[5]

This system of espionage and graft that flourished under the ecclesiastical jurisdiction was not confined to the designated Church officials alone. Any person could profit by abusing the administrative processes of the courts. Not only were unofficial persons employed as agents by corrupt summoners and apparitors to do their more intimate spying, but many were entrepreneurs in

[1] Archbishop Stratford's Extravagans (1342), art. 9: Johnson, II, 572; Lyndwood, Lib. III, Tit. XXIII, c. 7, pp. 223 f.
[2] For cases see Hale.
[3] Rotuli Parliamentorum, III, 43b (1378).
[4] Capon, 140.
[5] Chaucer, Frere's Tale, 47–54.

business for themselves. Under the methods of citation used in the spiritual courts, any person could implead another. The Norwich Leet Rolls of 1375 and 1591 show that such persons made a profit out of "procuring" cases for the Courts Christian. Inasmuch as they provided business for the ecclesiastical judges, who could exact pecuniary penance, they would deserve a commission for such assistance. Inasmuch too as the fear of impleading by a non-official person might well be as great as the fear of citation by the summoner himself, the sinner could be effectively blackmailed by any neighbourhood spy. Such spies were generally women who would, doubtless, make their pin-money thereby.

Christiana, wife of William Martinhall, is a common trotter of the Dean (12d., arrest).

Mathilda de Paris is a common trotter of the Official Corrector and the Dean, and has caused many men and women to lose their money wrongfully (18d., arrest).

Margery Wonder is a common trotter of the Corrector and the dean (arrest).[1]

The extortions were not always small. In one case the blackmailers demanded £27 as a price for their silence regarding incontinence.[2]

* * * * * *

The causes of an abuse must be sought not only in the person abusing, but in the person abused. It is therefore of importance to ascertain why the English of the later medieval and earlier modern period should have submitted to oppression by the ecclesiastical officers and those who took advantage of the weaknesses in the Church's judicial system.

One reason was habit. "The Middle Ages were pretty well used to the practice of money commutations. Feudalism assessed its duties; the law, its list of crimes; religion, her grades of sin—all had their price. You could buy off everything, from the bailiff's order to go rutting for your

[1] Hudson, XXXVII, 31.

[2] *State Papers*, 1638–39, 211: Petition of George Hudson.

lord, or the disability to advance a villein's son to orders, up to the offended majesty of the King." Why not, then, buy off the wrath of God Himself?[1]

The actual avidity with which the convicted sinners sought to buy off the performance of public penance cannot, however, be ascribed to habit. It was founded probably on a growing sense of personal independence combined, as always, with an inability to withstand public humiliation. The less highly civilized is a being, the more is he spiritually dependent upon his environment. Domestic animals and primitive men cannot easily withstand the ridicule or scorn of their fellows. To undergo public penance, naked but for a sheet, three or four times repeated, and with extended pleas for the mercy of one's neighbours, was a severe ordeal. The ordinary Englishman of the fourteenth or fifteenth century was far from being stoical.

Such public humiliation was the more onerous, the more humbling, in an age in which there was developing a sense of personal freedom. In the earlier period, when God had been more truly known as the lord of the universe, men would more willingly bow down before Him and His earthly representative. The Church had been the real moral authority. At its command the proudest of Norman kings had submitted to a flogging by monks before the tomb of Becket. At its command his subjects would submit to the ignominy of penance. No one suggested two centuries later that John of Gaunt be scourged for the murder of the knight in Westminster Abbey. The gradual breakdown of feudalism and, more, the increasing contempt for the Church had made the layman a less dependent personage. This emancipation from spiritual restraint gave in turn an added impetus to pecuniary mulcts.

By the fourteenth century, the time of the Peasants' Revolt, the age of Wycliffe, a real change had taken place in the ordinary Englishman's view of life. He had

[1] A. L. Smith, 161.

completely abandoned the medieval idea of pardon of sin. He would pay money for absolution. He would purchase commutations and indulgences. He would buy prayers for his own future welfare and the welfare of his dead relatives. He would hire others to make pilgrimages to holy places. When his parish priest would refuse absolution for his sins, he would give fat fees to the less scrupulous friars to accept his confession.[1] Penitence meant not contrition, but payment. Absolution was an exaction not upon the soul but upon the pocket-book.

When the whole spiritual basis of ecclesiastical jurisdiction had thus disintegrated, there was left no disciplinary vigour. The process of externalization of morals, begun by the Penitentials, had become complete. When sin had been a blot on one's communion with God which had to be eradicated, confession of intimate, private actions had made punishment possible. When sin became a mere assessment of the Church, men did not confess. Sin had to be hunted out. Spies could be bought off. Wrongdoing itself could be bought off. The ecclesiastical court had lost its spiritual weapons. It retained one mechanical weapon, the *ex-officio* oath. That, too, it was soon to lose.[2]

As the power of its courts decayed, the Church clung no less tenaciously to its jurisdiction. It precluded a stricter secular discipline. It prevented a healthier public opinion. The evils which the ecclesiastical courts were fighting had gone beyond the power of their machinery to overcome. Yet the Church resisted every interference from outside. Rather than allow intrusion, she acquiesced in failure.[3] Not for the administrative breakdown must the Church be condemned—the causes were, in part, beyond her—but for the power which she exerted in causing the failure to continue.

. . . . . .

The Reformation led to no real change in the ecclesiastical jurisdiction over morals. The local courts were

[1] Trevelyan, *Wycliffe*, 111–114.
[2] Stubbs, *Constitutional History*, c. 719.
[3] See *infra*, p. 130.

in no way affected by the innovations inaugurated by Henry VIII.[1] During the reign of Edward VI there was, to be sure, a general relaxation in discipline. This was caused not by any change in system but by religious dissensions and a disinclination on the part of the king and his advisers. Upon the accession of Mary the authority of the bishops and ordinaries was re-established exactly as it had existed before the Reformation. The jurisdiction of the Courts Christian over lay morals was maintained for another century, until 1640. It was maintained with the same vigilance and the same authority up to the very end.[2]

There were some minor changes in the functioning of the courts. Because of the failure of the summoners and apparitors, the churchwardens and sidesmen came into a more important rôle in connexion with sex morals. In the archdiocese of York they were ordered in 1571 to present semi-annually the names of those in their parish who were "either blasphemers . . . adulterers, fornicators, incestuous persons, bawds, or receivers of naughty and incontinent persons . . . or that be vehemently suspected of such faults, or that be not of good name and fame touching such faults and crimes." [3]

More important at a later period became the system begun by Henry VIII of making felonies of crimes which were previously of spiritual cognizance only. The effect of this was to exclude spiritual jurisdiction.[4]

The loss of power in other spheres of activity of which the priests had been deprived by the Reformation may have led them to seek compensation in the ways still left open to them. From the time that the activities of the Church courts were fully re-established under Mary their abuses continued to grow. Their intrusions into the private lives of the laity became more marked and, in consequence, more resented. From their temporary

[1] St. 24 Henry VIII, c. 12; 26 Henry VIII, c. 1.

[2] Hale, IV, XLV f., LIII. In the court of the archdeacon in London for the year 1639–1640, more than 1500 suits were entered.

[3] Gibdal, 143.

[4] See *supra*, p. 156. Coke, 1st Inst., s. 137.

humiliation the ecclesiastical authorities had learned only a lesson of revenge.[1]

It was this added vigour of the churchmen that caused added resentment of the laymen. When this resentment became too strong for the ecclesiastical authorities to meet alone, their power was strengthened by alliance with the Crown in the form of the High Commission. It was the redoubled resistance to the activity of this allied power that fed the flame of revolt against both Church and Crown and led to the new Puritan experiment in moral control.

[1] Froude, VII (Reign of Elizabeth, I), 1 f.

CHAPTER VIII

THE TEMPORAL JURISDICTION

THE Church had gained jurisdiction over the sexual expression of the laity because acts of sex were considered a violation of man's relation with God. But the same act which violated man's relation with God might simultaneously violate man's relation with man. As the violation of divine interests was dealt with by the spiritual power, so was the violation of human interests dealt with by the temporal powers. The temporal jurisdiction over sexual offenders was not, however, exercised by the king. Ever since the Church had established her exclusive control after the Conquest, the temporal jurisdiction over sex offences had been not national but local.[1] It lay with the lord of the manor and the urban community.

The lord's jurisdiction over the morals of his vassals was in no sense conflicting with the Church's jurisdiction, nor was it even concurrent with it. It was in one case dependent on and resultant from the Church's jurisdiction; it was in the other case the means of vindicating a set of interests totally apart from spiritual interests. In both the cases where the lord could take jurisdiction the lord's own property was at stake.

When the Church had exerted her jurisdiction over a sexual offender, the sentence, we have seen, was usually a pecuniary penance. The size of the commutation was dependent upon the offender's rank and social position, upon the amount of property which he owned. The serf, however, had in theory nothing that did not belong to his master. What he paid the ecclesiastical court or officer in consequence of his unchaste conduct was a direct waste of the lord's property.[2]

To protect this interest in his property the lord examined the degree to which the Church courts profited from the immoral conduct of his vassals. His steward was to make

[1] Ayliffe, 32; Coke, 2nd Inst., 488, Godolphin, Intro., 59.
[2] *Court Baron*, 101, note; *Manorial Courts*, 182, note.

inquest "whether any bond man's unmarried daughter hath committed fornication and been convened in chapter, and what she hath given the dean for her correction." [1] Vassals who had been impleaded in the Court Christian were presented by the tithing-men in the manorial court because "they make fine out of chattels of the lord that they need not do the penance enjoined them, therefore it is commanded that thenceforth they make no such fine and be in mercy." [2]

The regular penalty upon the offending vassal in the lord's court was amercement. Often, however, the amercement was forgiven.[3] This forgiveness was the consequence not of the lord's kindness, but of the vassal's poverty: the Church courts had already made a complete sweep of the offender's earthly goods, and there was nothing left for the lord to assess.[4] To prevent further breaches the lord might then punish the offender in other ways.

> And they say that John Monk still continues his luxury with Sarah Hewen wife of Simon Hewen and is constantly attending divers chapter courts where frequently he loses the lord's goods by reason of his adultery with Sarah, as has often been presented before now, nor will he be chastened. Therefore be he in the stocks. . . . All the said pledges undertake that if the said John at any time hereafter be again convicted of adultery with the said Sarah, they will bring him back and response him to the stocks, there to remain until they have some other command from the lord or his steward.[5]

There was another and more important way in which sex offences deprived the lord of his property rights. It had the same basis as the primitive customs and early Hebrew laws: an unmarried woman was considered the chattel of her guardian who would profit by her marriage. When anyone so interfered with the chattel as to make the guardian's profit less likely or more remote, he ought to compensate for the property loss.

The daughter of a serf was under the guardianship of the serf's lord. So long as she remained unmarried the

[1] *Court Baron*, 102. [2] *Manorial Courts*, 162 f. [3] E.g., *ibid.*, 93.
[4] *Cf.* Coulton, *Medieval Village*, app. 17, 477 f. [5] *Manorial Courts*, 98.

profit from her labours accrued to the manor. When she married, the lord might lose that[1] profit. For the privilege then of giving his daughter in marriage a tenant or bondsman had to pay his overlord a fine known as merchet.[2] If, however, the daughter or sister of a vassal, instead of getting married, engaged in extra-marital sex relation, the lord stood in a fair way to lose his merchet.[3] For this loss the lord had to be recompensed.[4]

The lord's compensation for the loss of merchet was another fine known as legerwite.[4] This fine went back in origin to before the Norman Conquest[5] and continued to be exacted until at least the fifteenth century. So common was its exaction and so rigidly established were the rules governing it, that only by specific grant or legislation could the provisions for the fine be altered or abolished.[6]

To discover the offence on which to assess the fine of legerwite was not easy where there had not been a previous trial in the ecclesiastical court. The lord and his steward or bailiff would not ordinarily know of their own knowledge that such loss had accrued. The process whereby the jurors, in their inquests, presented villeins in the manorial courts[7] was haphazard and incomplete. To remedy this difficulty and assure the lord of his dues, it was made obligatory upon the townships to report to the lord any sexual offences which had occurred within their limits. For concealment the town itself would be punished. On some manors the whole body of tenants of a town were fined for failing to report a case of incontinence.[8]

Of the proceedings of the manorial courts in cases of sexual offences, the notes are brief. There is a mere statement of the fact and of the fine, sometimes with the

[1] Pollock and Maitland, *Hist. Eng. Law*, I, 485–495; Westermarck, *Marriage*, I, 176 f.
[2] Vinogradoff, *Villainage*, 174.
[3] Pike, *Y. B.*, 13 *Edward III*, 331 ff.
[4] Spelled also "larwite," "leyrwite," and "leyrwite."
[4] Pike, *Y. B.*, 13 *Edward III*, Intro., xxvii f.
[5] Leges *Parliamentorum*, I, 587a. See also *Borough Customs*, II, 85.
[6] E.g., *Manorial Courts*, 92 f.
[7] Creighton, *Medieval Village*, 478, 81 note.

name of the surety for the fine. Thus from the Manors of the Abbey of Bec in 1247:

> The following women have been violated and therefore must pay the leyerwite,—Bodild Alfred's daughter (fine, 6d.), Margaret Stephen's daughter (fine 12d., pledge Gilbert Richard's son), Agnes Seaman's daughter (fine 12d., pledge the said Seaman), Agnes Joe's daughter (fine 6d., pledge Geoffrey Franklain), Margot Edith's daughter (fine, 6d.).[1]

If a woman under the lord's guardianship were not a villein's daughter but were, on the contrary, possessed of an inheritance, the legerwite itself was not exacted. The lord was instead protected by the property which he held for the ward. The idea was the same: an advantage was to accrue to the lord from the marriage of his ward, of which he might be deprived if she were dishonoured. An act of incontinence during the period of guardianship led therefore to forfeiture of her inheritance. This was true not only of spinsters, it seems, but, on some manors, of widows as well.[2] As Lord Lyttelton observed, "this was a severe punishment for the frailty of a single woman."[3]

The exaction of legerwite varied in rigorousness, doubtless, according to time and place. Probably the fine was better enforced on monastic manors than on others, because on them the ecclesiastical and temporal jurisdictions were united. To the temporal lord the violations were not so readily known even though the townships were to report, and the assessment which he might make was only a gleaning from a field already reaped by the Church courts.[4] On the manors of the Abbey of Durham, however, the temporal penalties seem to have been regularly enforced. The Account Rolls of the Abbey[5] for the period of 19 years from 1566 to 1584 show 81 cases wherein legerwite was levied on the Durham manors, and in other periods for which the records are published there appear 20 additional cases.[6]

[1] *Manorial Courts*, 12.
[2] Glanville, 179 (note).
[3] Coulton, *Medieval Village*, 477 f.
[4] Abbey of Durham, vols. 99, 100, 103.
[5] *Ibid.*, 19, 161.
[6] Coulton, *Medieval Village*, 81.

As the lord of the manor suffered a loss through the incontinent practices of his villeins, so did the communities of freemen suffer. In neither case was the loss looked upon as spiritual, for spiritual interests were exclusively within the provinces of the Church. In each case it was material. In the urban communities sexual incontinence, especially if widespread and commercialized, was a disturbance of the peace that led to divers serious transgressions. "Whereas thieves and other persons of light and bad repute are often, and more commonly, received and harboured in the houses of women of evil life within the City [of London] than elsewhere, through whom evil deeds and murders . . . do often happen. . . . The King doth will and command that from henceforth no common woman shall dwell within the walls of the City. And if any such shall hereafter be found . . . let her be imprisoned forty days."[3]

To effect this end of "the cleanness and honesty of the said city," the London ordinances enacted strenuous punishment. Female courtesans and male whoremongers were to have their heads shaved except for a two-inch fringe, were to be paraded round the streets with minstrels and set upon the pillory. Repeated offences were to be punished by imprisonment and eventually by banishment from the city.[4]

These ordinances seem to have been sternly enforced. When Wyllyam Hampton, Fyschmonger, was mayor of London in 1472, he "correcned soce bawdes and strumpettes and caused theym to be ladde aboute the towne with ray hodden upon theyr heddes dyuers and many and spared none for mede nor for favour that were by the law attayned not withstandyng that he myghte haue taken XL. pounds of redy money to hym offered, for to haue spared one from the iugement."[5]

. . . . . .

These local customs for the punishment of sex offenders did not remain local. They became a part of the common

[3] *Liber Albus*, 246 f.; *Memorials Gildhalle Londoniensis*, I, 283; III, 103.
[4] *Liber Albus*, 394 f.; *Memorials Gildhalle Londoniensis*, I, 457 ff.; III, 179 ff.
[5] Fabyan's *Chronicle*, II, *folio* cxxxi.

law. The process whereby notorious adultery, prostitution, and scandalous lewdness developed into general indictable offences is illuminating as to the trend of social attitude. The attitude was a growing contempt for ecclesiastical control, engendered by the abuses of the Church's administration and by the inadequacy, in practice, of the Church's punishments. It was this feeling of legal insufficiency that had early fathered the local ordinances. The ordinances themselves were often an encroachment upon the Church's jurisdiction. In London, for instance, in the reign of Richard II, not only were prostitutes and their keepers to be severely punished by the civil authorities, but adulterers as well were to be paraded to gaol, there to remain at the discretion of the mayor and aldermen.[1]

In his *Country Justice* in 1618 Dalton announced as a law of general application:

> Upon Information given to a Constable, that a Man and a Woman be in Adultery or Fornication together (or that a Man and a Woman of evil Report, are gone to a suspected House together in the Night) the Officer may take Company with them; and if he find them so, he may carry them to Prison; or he may carry them before a Justice of the Peace, to find Sureties for good Behaviour.[2]

For this statement Dalton had as authority a dictum from a year-book case. A London constable, having received information that one J. S. was committing adultery with another man's wife, went with others to the house, arrested J. S., and carried him to the compter. J. S. then brought an action of assault, battery, and false imprisonment against the constable, who pleaded in bar a custom of the city of London that a constable in London, hearing that a person within his jurisdiction was committing adultery with any woman, might call the beadle and others of the parish, go to the house, and, finding the man in adultery, might apprehend him. Upon hearing of this civil action it was said that adultery is a thing temporal as well as spiritual,

[1] *Liber Albus*, 596; *Munimenta Gildhalle Londoniensis*, I, 439 f.; III, 181; *Cap Law*, 11 f. [2] Dalton, c. 124.

against the peace of the land, for "every man should be in peace in his own house, with his wife, children, goods, and chattels, and that to do a wrong to the disquiet of any of them is a breach of the peace, and the public weal of the city or borough where they do it: and that the committing of adultery with a man's wife is a greater breach of the peace than entering his house and robbing him." Towards the end of the case it was agreed that at common law this was a breach of the peace.[1]

Regardless of the words used by the judge or counsel, the case concerned only the custom of London. That it had no general application was recognized by Coke.[2] Later prosecutions followed, taking no heed, however, of this limitation. Anne Gilbey, taken in the act of adultery, was committed in 1626 to the house of correction for one year.[3] Evidently such prosecutions increased in number and in their outspoken infringement upon the exclusiveness of ecclesiastical jurisdiction. On the eve of the Puritan revolt civil magistrates were tampering not only with cases of adultery, where there might be a trespass on property and consequent provocation to a breach of the peace. They were haling before them persons suspected of incontinent living and making them give security for future good conduct.[4] Dalton's broad expression of the law was given currency in the actual cases.

A similar extension of the temporal law took place in the jurisdiction over prostitution. The local ordinances for abolishing brothels were founded on the breaches of peace growing out of their evil association.[5] Coke, in the temper of a later time, declared that bawdy-houses were "the cause of many mischiefs, not only to the overthrow of the bodies, and the wasting of their livelyhoods, but to the indangering of their soules." That was the reason, he said, why the common law took jurisdiction.[6]

[1] Y.B., 1 Henry VII, Hilary, fol. 6 and 7, pl. 3.
[2] Coke, 3rd Inst., 206.
[3] Jeaffreson, II, 11.
[4] Anon., 1:18, 121.
[5] See statutes at 11 Henry VI, c. 2.
[6] Coke, 3rd Inst., 205; Godolphin, 474; *Laws Respecting Women*, 199; *Penal Laws*.

He did not explain why the welfare of men's souls was not within the exclusive jurisdiction of the Church.

Coke's statement of the law was accurate to the degree that the law was then established. At the time it rested upon a single reported case in a year-book. A constable, sued for false imprisonment, pleaded in justification that the plaintiff had committed a breach of the peace in resorting to a bawdy-house at night and keeping company with lewd women. The plea was accepted.[1] It is obvious that the justices strongly associated the offence with night-walking, for which one was liable to arrest under the Statute of Winchester.[2] The confusion of the offence of night-walking with frequenting a bawdy-house became obvious in Willow's case in 1616.[3] The tendency so to associate the two and to make bawdry a common-law offence was resisted by Compton in his edition of Fitzherbert. He cited a decision of Chief Justices Wray and Anderson and Chief Baron Manwood, holding that committal for bawdry was limited to London.[4] The generalization of the doctrine was not rapid. In 1678 Godolphin wrote: "Some are of the opinion that Avoutry or Bawdry is an offence Temporal as well as Spiritual."[5] By its very repetition, however, the doctrine expanded, and there were no doubts in the mind of Blackstone that frequenting houses of ill-fame was an indictable offence.[6]

Scandalous lewdness became a common-law offence upon the basis of one unsupported decision. The circumstances of the case were provoking of the court's anger. Sir Charles Sidley had not only exposed himself naked in a balcony in Covent Garden but had disgustingly aggravated the exhibition. Such actions were, according to the court, becoming more frequent. It was high time to punish this profanity against modesty and Christianity.[7] Sir Charles was fined 2000 marks. Sergeant Hawkins explained that the common law took jurisdiction because

[1] *Y.B.*, 13 *Henry VII*, Michaelmas, fol. 12, pl. 12.
[2] 13 Edward I (1285).
[3] Fitzherbert, *Justice of the Peace*, fol. 149.
[4] Blackstone, IV, 64 f.
[5] Latch, 153; Popham, 108.
[6] Godolphin, 474.
[7] Sidesf. 168 (1664), 1 Keb. 620.

such offences "tend to subvert all religion or morality, which are the foundation of government."[1] By the eighteenth century it was recognized that all open and scandalous lewdness of whatever kind might be punished by fine and imprisonment at common law.[2]

. . . . . .

The popular contempt for ecclesiastical jurisdiction over sex offences was shown not only by unauthorized extension of the common law but by private punishment in contravention of all law. Compared with the spiritual punishments the temporal law of the Middle Ages was harsh and cruel in those sexual offences over which it had statutory jurisdiction. Unnatural carnal copulation was punished by either burning or burying alive.[3] Until the time of Edward I the punishment for rape was that the offended woman should tear out her ravisher's eyes and render him incapable of further carnal depredations.[4] By the Statute Westminster II, chapter 34, this punishment was modified to hanging.[5]

Because of this obvious rigour of the king's justice and its obvious effectiveness, the laity sought to assist the Church in its reformation of sex offenders by informal punishments of a more lusty character. When it was reported to Philip, Earl of Flanders, that Walter de Fontibus had committed adultery with the Countess Isabella, he had him beaten to death with the blows of keys tied up in bundles, and his dead body hung in public, head downwards.[6] Even more cruel and unusual punishments have been informally meted out to sexual offenders.[7] Recognizing that such unauthorized punishment was a trespass on ecclesiastical jurisdiction, the kings made attempts to put an end to illegal expressions of revenge. When John

[1] Hawkins, I, c. 5.
[2] *Laws Relating Women*, 229 f.; Blackstone, IV, 64 f.
[3] Hawkins, I, c. 4. *State Trials*, III, 401—Lord Audley's case. These statements of punishment from Bracton and Fleta have been doubted by Stephen, II, 429 f.
[4] *Y.B., Eyre of Kent*, 6 & 7 Edward II, I, 194 f.; Bracton, Bk. III, and Treatise, c. xxvii, fol. 147 (De Corona). [5] *Mirror of Justices*, 141.
[6] Godolphin, Introd., 38. [7] *Flandrense Abbreviatio*, 267, col. 1.

Britton, discovering that a nobleman had had carnal relations with his daughter, deprived him of certain of his members and inflicted besides "whatsoever a father's fury in such a case would prompt him to do," King Henry III, grievously offended, disinherited and banished Britton and made a proclamation against such presumptions.[1]

Such private vengeance was probably committed with no intention of lawlessness but rather in a righteous desire to see the law made effective. It was in such a spirit of righteousness that the reformer, John of Northampton, led his illegal attacks upon the stews of Southwark and made even further excursions into ecclesiastical authority by parading and imprisoning immoral men and women.[2]

As Church abuses magnified and the laity became increasingly ill-content with the uncertainty engendered by the frequent changes of religion and religious attitude, extra-legal punishments became more numerous. The Church had made "a capricious mess" out of its control of marriage and sexual expression.[3] There was an apparent and immediate need for reform. The temporal law was in no sense inclusive in its jurisdiction over sex offences. With the gradual disintegration of the manorial system the legerwites, fines for fornication, ceased. Municipal police regulations of prostitution and adultery were local, and their assimilation by the courts into the general common law occupied a period of centuries. The only rapid method of securing a new system of legal control over sexual morality was legislation. Reformers demanded that Parliament enact more rigid and more effective laws for the control of voluntary sex expression.[4]

To a degree their demands bore fruit. The temporal law did take jurisdiction over certain of the more outspoken sexual vices. Sodomy and bestiality were made felonies by Henry VIII.[5] Bigamy, which had also been a

[1] Britton, *English Laws*, 33.
[2] Pollock and Maitland, II, 544.
[3] Bracton, I, 353.
[4] See *supra*, p. 135.
[5] 25 Henry VIII, c. 6; repealed, 1 Edward VI, c. 12, s. 3; revived, 5 Eliz., c. 17; repealed and re-enacted, 9 George IV, c. 31, ss. 1, 21; again, 24 & 25 Vic., c. 95; 24 & 25 Vic., c. 100, s. 61.

purely ecclesiastical offences, was made a felony by James.[1] The effect of making such offences into temporal felonies, we have noted, was to deprive the spiritual courts of their jurisdiction.

The Church was still too strong, however, to allow the king's courts to take over its entire jurisdiction of family and sexual affairs. The reformers were not yet sufficiently united to effect their demands. They effected not an abolition of the Church administration but a re-enforcement. This re-enforcement was a union of the Church jurisdiction with the Crown. The basis of the organization remained the same; its contours were changed by adding on top of this basis a new pyramidal point. This superimposed peak was the High Commission.

[1] 1 James I, c. 11, repealed and re-enacted, 9 George IV, c. 31, ss. 1, 12; again, 24 & 25 Vic., c. 95, 24 & 25 Vic., c. 100, s. 57

CHAPTER IX

THE HIGH COMMISSION

ELIZABETH, upon her accession to the throne, saw two parties arrayed against each other. She saw supporters of Henry VIII and Edward VI seeking to strengthen the Crown at the expense of the ecclesiastical authority. She saw the supporters of Mary, who had restored the broken ecclesiastical discipline. And she sought to compromise.[1]

The first important step in Elizabeth's reign was the Act under which the Court of High Commission was established.[2] The statute provided that spiritual and ecclesiastical jurisdiction over all offenders is united to the Crown, which shall have authority by letters patent to appoint commissioners to exercise all such spiritual and ecclesiastical jurisdiction within the realm, "to visite reforme redres order correcte and amende all such Errours Heresies Schismes Abuses Offences Contempts and Enormities whatsoever . . . to the Pleasure of Almightye God thencrease of Vertue and the Conservacon of the Peace."[3]

The commissions first issued under this Act were local and only temporary. But after 23 years Elizabeth, in 1583, issued a commission creating a permanent Court of High Commission. This commission gave to the Court, among other things, jurisdiction over moral offences. "And we do further empower you, or any three of you, to punish all Incests, Adulteries, Fornications, Outrages, Misbehaviours and Disorders in Marriage; and all grievous Offences punishable by the Ecclesiastical Laws . . . to devise all such lawful Ways and Means for the searching out of the Premises, as by you shall be thought necessary. And . . . to order and award such punishment by Fine, Imprisonment,[4] Censures of the Church, or by all or any

[1] Berlington, 1; Stephen, II, 415.

[2] For a complete discussion of the history and jurisdiction of the High Commission see Usher. For good brief summaries see Holdsworth, *History*, I, 603–611; Stephen, I, 413–429.

[3] 1 Eliz., c. 1, s. 8 (1559).

[4] In Sir William Chaworth's case in 1610 (12 Coke Rep. 82, 1826 ed., VI, 509) the judges of the King's Bench declared that notwithstanding the words

of the said Ways, as to your Wisdom and Discretions shall appear most meet and convenient." The commissioners were given powers to call suspected persons before them and examine them upon their corporal oath and, if they proved obstinate or disobedient, in not appearing or in not obeying the decrees, to punish them by excommunication or fine or by commitment to ward. They were given power as well to command sheriffs and justices to apprehend offenders, to demand bond, to make commitments, and in other ways to make their decrees sure of performance.[1]

The establishment of this exclusively powerful commission naturally brought into question the jurisdiction of the ordinary ecclesiastical courts. So generally was their power doubted that the Star Chamber had eventually to order an opinion of the justices to be taken as to whether processes could still issue out of ecclesiastical courts in the names of the bishops or whether letters patent under the Great Seal were necessary. The judges decided in favour of a concurrent jurisdiction.[2]

Pictured briefly, the High Commission stood to the ordinary ecclesiastical courts in a relation not unlike that in which the king's court soon after the Conquest came to stand to the local jurisdiction of earlier times.[3] It stood to the Church courts in much the same relation as the Court of Star Chamber stood to the courts of common law, or the Court of Requests to Chancery.[4] Though the two jurisdictions were concurrent, the Court of High Commission stood apart from the regular system and had, or at least exercised, powers which the inferior courts had never claimed; it proceeded against offenders who, because of their importance, might have evaded and even defied the

of the letters patent the High Commission had no power to inflict imprisonment for adultery. The decision seems to have had little deterrent effect on the High Commission.

[1] Neal, I, 410–413. The various commissions varied in detail: Prothero, 217 ff.

[2] See the proclamation made by Charles I on 18th August 1633, preserved in the British Museum, under no 21 b. 1 (46).

[3] Stephen, II, 414. [4] Stubbs, *Const Law*, II, 279.

ordinary ecclesiastical courts. It was only the gleanings which were left to the ordinary courts.[1]

This concurrent yet superior jurisdiction can be well illustrated from the cases touching sex morals.[2] Some of the sex cases which came before the High Commission it would dismiss on three jurisdictional bases. The case might be of too minor importance for it to bother with. The offender might already have been before the ordinary ecclesiastical courts for the same offence. Or the offence might be one cognizable in the king's court. Thus the court finding that Robert Scotley, a bachelor, had committed but simple fornication with an unmarried woman, "it was ordered that that article should be put out, as being more fit for an ordinary court."[3] Simple incontinence was a matter of "mean consequence."[4] Because the commissioners felt that no one ought to suffer twice for the same offence, if the accused had already undergone punishment in the minor ecclesiastical courts for a moral lapse, he was not again punished.[5] Similarly, if the accused had already been punished for his act, which constituted a civil as well as an ecclesiastical offence, such as bigamy, the High Commission might consider that punishment an adequate cause for dismissal.[6]

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The ordinary procedure in the High Commission did not differ widely from the procedure in the minor eccles-

[1] Stephen, II, 414; Stubbs, *Const. Law*, II, 279 f.

[2] Besides the cases cited, manuscript material concerning the Ecclesiastical Commissioners from Elizabeth to Charles I, 1595–1637, is to be found in H.M. Public Record Office (Exchequer K.R., Ecclesiastical Documents, Bundles 12 and 13).

[3] *State Papers*, 1635–36, 301 (12th March 1635–36).

[4] *Ibid.*, 1640–41, 380: case of Rice Wynn (2nd July 1640). Aggravated cases of simple incontinence were, however, punished—e.g., Durham, 20.

[5] Durham, 31; *State Papers*, 1640–41, 344: case of Thomas and Grace Steward (6th Nov. 1640); *ibid.*, 401: case of David Rogers (26th Nov. 1640). Where, however, the High Commission had first taken jurisdiction and the accused was later punished by the ordinary court for the same offence, the High Commission did not willingly surrender its jurisdiction: Durham, 20 f. And notwithstanding a dismissal because of previous punishment, the accused might be forced to pay large costs to the promoter of the lower action against him: case of Rice Wynn, *supra*.

[6] *State Papers*, 1635–36, 475: case of Thomas Hesketh (28th Jan. 1635–36).

astical courts.[1] Suits might be instituted by an individual or by the Court itself. If instituted by the Court, the information might have been gathered by the commissioners in person; more often it was furnished by some outsider who himself refused to prosecute. Articles were framed by the plaintiff's proctor or the proctor of the Court, and a writ, called Letters Missive, was personally served upon the defendant commanding him to answer the charge. Upon his appearance the defendant took the *ex-officio* oath as to his guilt or innocence of the particulars now alleged against him. In some cases the defendant's answers were the only evidence heard. Sometimes the Court required him to support his answers by the oath of compurgators.[2] Sometimes the Court heard witnesses.

Throughout the proceedings the burden of proof was on the defendant. The articles of the plaintiff had raised a presumption against him; it was the defendant's duty to prove his own innocence.[3] This was the more difficult because of the importance which the High Commission attached to rumour and reputation. Often in sex cases the fact of carnal connexion was not even brought into evidence. In defence of one suspected adulterer it was pleaded, "You raise great mountaines of expectation, and at last you bring forth ridiculous thinges, instead of proving an adultery you insist upon a fame. . . . Fame helpeth proofe, but if it has noe ground it is but *ense pepuli nemo*."[4] Almost as if in answer to this condemnation of its methods, the Court said a few months later that boasting about adultery was tantamount to adultery: "that therefore he is to be punished as an adulterer, though it be noe direct proofe of the fact."[5]

[1] See *supra*, pp. 79 ff. This summary of procedure is adopted mainly from Usher, 106–120.

[2] *State Papers*, 1633, 217; 1635–36, 98: case of Francis Wright (11th June and 22nd Oct. 1633); *ibid.*, 1635–36, 103–107, 113: case of Stephen Davidson (22nd and 24th Nov. 1635); *ibid.*, 114, 478, 500, 510: case of William Prynne (12th Nov. 1634—31st May 1638); *ibid.*, 1638–39, 113: case of Robert Rocke (22nd Nov. 1638); *ibid.*, 1639, 182: case of Paul Clapham (16th May 1639).

[3] Usher, 118 f. [4] Gardiner, 246, 250.

[5] *Ibid.*, 304. A fine of £200 and other punishments were imposed. See also *ibid.*, 310 f.: case of Richard Hickman.

The main difficulty with the Commission's theory of procedure was its inability to deal with an obstinate party. The jurisdiction was *in personam* only. It was absolutely necessary that the person of the defendant be before the Court. To be sure, if a defendant evaded service of the Letters Missive he could be constructively served, but until service was complete no process of contempt could issue. If, being served, he refused to appear, an attachment was issued to apprehend him or, instead, an intimation which summoned him to appear under penalty of fine. The penalty was increased in case of repeated failure. But if he still "stood out," the Court could only certify the fine into the Exchequer for collection. There was no way to force appearance by sequestration of property. Once the defendant had appeared the Court might still be blocked by his refusal to take the *ex-officio* oath. Then it could but fine him or imprison him for his contempt; there was no method of facilitating proceedings by *pains forte et dure*, which the temporal courts found so convenient.[1]

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The breadth of powers and the limitations of procedure were the two bases for the failure of the High Commission. The one led to abuse, the other to inefficiency. Like the officers of the minor ecclesiastical courts, the lesser officials of the High Commission were corrupt. There were cases of proctors charged with taking bribes from their client's opponent to delay the suit. Messengers, the High Commission summoners, took money in considerable sums to release men whom they had been sent to arrest.[2] The temptation to bribery was constant.[3] Meddling outsiders usurped official functions.[4] Penances were commuted in a scandalous manner. Respectable people were never free from their early transgressions and were hounded to prosecution as much as 30 years afterwards.[5]

[1] Usher, 111 f. [2] *Ibid.*, 178.
[3] For an example from the minor ecclesiastical courts see Hale, no. 625.
[4] *State Papers*, 1635–36, 91, 483: case of William Hastwell.
[5] *Ibid.*, 1633, 128: case of John Bagge. Though there was in theory a ten-years' limitation, the king would order outlawed cases to be prosecuted.

Collusion was charged in the hearing of suits, in the entering of pleadings, in the referring of cases to other courts.[1] Finally, the *ex-officio* oath was misused to an extent that led to its ultimate fall, carrying with it the whole structure of effective ecclesiastical discipline.

The abuses of the High Commission were greater than those of the minor ecclesiastical courts because its opportunities were greater. Most notable was its wide assortment of punishments. It will be remembered that the commission creating the Court authorised not only ecclesiastical censures, but also punishment by fine and imprisonment "or by all or any of the said ways." Thus, the simple form of ecclesiastical penance could be enjoined by the Court. The offender might be ordered to acknowledge his offence in open congregation in the parish church or in the cathedral, and in the ordinary manner to walk bareheaded and barefooted before the procession, wearing only a sheet.[2] As in the ordinary courts, the case for incontinency might be dismissed upon proof that the parties had subsequently intermarried.[3] But such simple settlements were almost as rare as they were financially unprofitable. Though costs were assessed in almost all cases of penance, the penance was usually combined with a pecuniary mulct of a more onerous sort. The sums exacted were uniformly and inordinately large.[4]

The smallest fine for incontinence that the Act Books show was £20 (plus £8 costs), and this was combined with confession and public penance on four occasions. The woman so penalized was a housekeeper.[5] It is difficult to exaggerate the size of the mulcts assessed by the High

State Papers, 1633, 211; 1633–34, 487; case of Sir Thomas Southwell and Mary Eden.

[1] Usher, 178.

[2] Durham, 20; ibid., 54; ibid., 111–113. William Robson was ordered to do penance and to remain in gaol until he had learned the catechism. Durham, 113 f.

[3] *State Papers*, 1634–35, 112: case of Henry Lovell (29th June 1634).

[4] A commodity price-index based on the price of wheat, considering 1910 as 100, would have stood at 48 in 1600, 62 in 1630: Sauerbeck and Jevons correlated with Rogers. Though at the time of the High Commission's sentences the pound sterling had therefore over twice its present value, the size of the fines is obvious without careful comparison of standards.

[5] Durham, 44–48.

Commission. If a convicted person were not able to pay handsomely—not only in relation to his social and financial condition, but absolutely—he would have to endure a combined punishment of penance and imprisonment as well as fine. Thus George Harris, a mere domestic servant, had to perform public penance because his fine was assessed at only £100 plus costs.[2] Amy Green and Reginald Carew were each ordered to pay a fine of £1000; Robert Brandling, £3000 and costs.[3] Sir Giles Alington was sentenced to a record fine of £12,000.[4] Most of those convicted had as well to submit to full penance and to imprisonment. It seems almost strange that Marmaduke Trotter should have got off so lightly as £10 fine plus costs, three months in gaol, and four public penances for the incontinency for which he confessed himself "heartily sorie."[5]

The basis for assessing the fines was pragmatic. The offender was ordered to pay what the Court considered him able to pay. "The court further resolved that defendant's penance should be commuted for a pecuniary fine to be distributed in pious uses, and declared that he, being a man of great estate in lands, was well worthy to pay £1100, but left the business to the further pleasure of the Archbishop of Canterbury."[6] Sometimes, of course, the Court overrated the defendant's ability to pay. In such cases the Court would eventually reduce the fine and take what it could get in settlement. Thus Robert Hawkins's fine was mitigated,[7] and John South's reduced by 87 per cent.[8] When John Williams's estate

[2] *State Papers*, 1638–39, 100 f.; *Ibid.*, 1640, 494.

[3] *Ibid.*, 1634–35, 176; *Ibid.*, 1635–36, 481, 556; Durham, 55–68. For similar cases see *State Papers*, 1638–39, 73: Nicholas Slater; *Ibid.*, 551: Sir Robert Willoughby; *Ibid.*, 1639, 557: Richard Byford; *Ibid.*, 1639–40, 482: Robert Hawkins; *Ibid.*, 1640, 599: Thomas Hackleton.

[4] *State Papers*, 1632–33, 92 (26th June 1633). The punishment was for incestuous marriage—*Ibid.*, 62 (May 1633)—one, as has been said (Usher, 268), for whiskey.

[5] Durham, 176 f. The fines in Durham seem generally to have been lighter, possibly because of the inferior social standing of the offenders in the remote provinces.

[6] *State Papers*, 1633, 254: case of John South (25th June 1633).

[7] *Ibid.*, 1640, 599 (22nd Feb. 1640).

[8] *Ibid.*, 1633, 140 (25th June 1633).

decayed, the Court accepted, instead of a fine of £500, a paltry £40.[1]

Though on first contact such a practical procedure may seem amusing in its very ingenuousness, it proved not too amusing to the offenders themselves. Behind the veiling statement of the mitigation of fine there appeared occasionally a picture of real suffering caused by the exorbitant demands. To take just a sentence each from two cases that ran through the proceedings of the Court for years:

> Thomas Cotton and Dorothy Thorneton. Their petition read, praying that they might be released from confinement in Stafford gaol, where they had remained these four years in great misery.[2]

> Sir Alexander Cave . . . fined £500. In consideration of his long imprisonment and weak estate, his fine mitigated to £50, and he to be enlarged on bond. . . .[3]

The High Commission had power either to assess temporal fines or to commute spiritual penance to a money payment. In some cases it is obvious that commutation of penance was intended: the uses specified were spiritual. Thus the west end of St Paul's profited well by the industry of the High Commission. To be sure, the large commutations were often allowed to be paid in instalments, at the rate of £50 or £100 a year,[4] but the future payments were carefully protected by bonds, the defendant remaining in gaol until the bonds were entered into.[5] In some cases the money was obviously a fine.

> It is the King's pleasure to grant to the Queen the fine of 12,000 l. imposed on Sir Giles Allington in the High Commission Court for an incestuous marriage. . . . The Attorney General is to take care . . . to draw a bill for granting those fines to the Queen.[6]

[1] *State Papers*, 1634–35, 349 (19th Feb. 1634–35).
[2] *Ibid.*, 1639–40, 282 (21st Nov. 1639).
[3] *Ibid.*, 1634–35, 350.
[4] *Ibid.*, 1633–34, 473, 478, 496, 500: case of Thomas Haskoth.
[5] For one of numerous examples see *State Papers*, 1633–34, 500 f.: case of Sir Ralph Ashton.
[6] *State Papers*, 1631–33, 62 (May 1631).

In most cases, however, the Court made no distinction between fines and commutations. It used the terms interchangeably. It had no conception of the spiritual basis for commutation. Its only considerations were material. Sir Ralph Ashton, for instance, alleged "that he was a gentleman descended of an ancient family, and had a virtuous lady to his wife, and ten children, and that if he were enforced to perform this penance, it would tend to the disparagement of his wife and children, especially divers of the latter standing upon their preferment in marriage." Thereupon the Court commuted his penance into a payment of £300.[1]

Not only had the commissioners lost sight of the spiritual foundation of their duties; they neglected the most elementary basis of their judicial functions.

> Sir John Lamb as referee in this cause, having investigated the pretended crimes of adultery and drunkenness alleged against defendant, with the sanction of Archbishop Laud put an end to this cause. It was therefore ordered by Sir John, that inasmuch as Mr Cortys had given a satisfactory sum of money towards the re-edifying of St Paul's Church, London, that this cause should be dismissed . . . upon payment of the notary's fees.[2]

Here is evidence of the ultimate misuse of the system of commutation. More than that, it is evidence of the worst perversion of the judicial process. There was no penance assessed which could be commuted. There was no conviction upon which to base a penance. There was even no trial. As the Star Chamber said in Dr Barker's case, commutation without a previous penance is "but a meer corruption." Without it, "a Chancellor is no better than a Robber."[3]

Striking as may be these abuses and striking the oppression resulting from them, it is not only because of abuses that the High Commission deserves condemnation. It is because of inefficiency. It was inefficiency that caused more oppression than did all the wilful abuses. It was inefficiency that brought ecclesiastical administration

[1] *State Papers*, 1635–36, 300 f.
[2] *Ibid.*, 1639–40, 289 (13th Dec. 1639); case of Thomas Cortys.
[3] 2 Rolle 514, 518. See also Godolphin, 89; Stephens, I, 813.

generally into contempt. It was inefficiency that led to failure and a justification of the Puritan demand for reform. The ineffectiveness expressed itself in various forms, notably in delay, in expense, in impotency, in triviality.

The case of Sir William Hellwys for adultery is not an unusual example of delays. After unpleasant proceedings in previous years, Sir William's activities first appeared in April 1634. Two years later they still continued. In the meantime the High Commission had taken some action against him upon 22 distinct occasions.[1] Mark Corbold and Susan Copping, cited for suspicion of adultery, were admonished in the course of 15 beatings not to be found privately in each other's company. Three years later the proceedings began afresh and were dismissed only upon paying the promotor £160 costs, whereupon "the court seemed well contented . . . if the composition be performed to the liking of the promotor."[2]

Not only was the Court itself dilatory; its officers were either indolent or corrupt. Ralph Hutchinson was not apprehended for his adultery because the messenger "could not gett into that part of the country by reason of the snowes."[3] John Rutherford was not attached for his adultery because the messenger's horse was stolen. Later Rutherford was reported dead.[4] George Hume, Margaret Mitton, John Blackenbury and Elizabeth Lighton, adulterers all, escaped from the country.[5] Though both William Armestronge and Thomas Armestronge were apprehended by error and charged with adultery, Richard Armestronge, the accused, remained at large.[6] To be sure, Richard Curd was attached on the accusation of adultery, but he was rescued in a violent manner by friends,[7] and Robert Brandling, though once committed for adultery, escaped from gaol.[8]

[1] *State Papers*, 1633–34, 580, 581; *ibid.*, 1634–35, 31, 110, 213, 116, 219, 223, 262, 268, 272, 276, 335, 492, 489, 502, 533, 545, 546, 552, 553; *ibid.*, 1635, 180, 188, 190; *ibid.*, 1635–36, 225.

[2] See indexes of volumes of *State Papers* beginning 1634–35 and ending 1640–41.

[3] Durham, 225.

[4] *Ibid.*, 124.

[5] *Ibid.*, 74 f., 267.

[6] *Ibid.*, 159.

[7] *Ibid.*, 140 f.

[8] *Ibid.*, 53–68.

Absurdities were frequent. Proceedings were allowed to continue against a defendant for adultery though his alleged paramour had already purged herself of the offence.[1] Persons were haled into court upon trivial evidence and tried for adultery. For instance, "Hopper would often cutt hay for Isabell when she went to fodder cattle, with such other like curtesies which he used not to doe to others."[2] The commissioners would give righteous warnings. After acquitting Sir John Astley of the charge of adultery after 18 notations, they had the Archbishop of Canterbury admonish him never again to permit a woman to lodge in his bed-chamber as had formerly been ordered by his wife when he was ill, even though there were a proper chaperon constantly present. Sir John was over 70 years of age and a victim of the gout.[3]

In conclusion, it is interesting to note briefly the case of Thomas Hall, charged with adultery. The whole gamut of High Commission resourcefulness was run in order to effect the defendant's proper appearance: attachments, commitments, bonds, attempts by the messenger and by the sheriff at further attachments, intimations, forfeits, contempt proceedings. The case was pending for four years. The machinery of the Court itself was put into motion 19 separate times, that of its officers numerous intervening times. The result was that the defendant was adjudged innocent.[4]

No matter their abuse and oppression, no matter their delay or absurdity, there lay no appeal from the decisions of the High Commission. By statute appeal might be permitted from the courts of the archbishops to the king's commissioners.[5] But the High Commission itself acted as the king's delegates. There could be no remedy against their sentences other than the appointment of a new commission by virtue of the royal prerogative.[6]

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[1] Dodson, 131–139. [2] Ibid., 2. [3] *State Papers*, 1633, 228 f.
[4] Nevertheless he was charged with costs, for non-payment of which proceedings were renewed; Dodson, 149 f. [5] 25 Henry VIII, c. 19.
[6] Gibson, II, 1037, note 22; Robert Phillimore, II, 972.

In this ill-directed battle the one comparatively effectual weapon of the High Commission was the *ex-officio* oath. It was of this that the Court's opponents sought most strenuously to deprive it. Burleigh remonstrated that this procedure savoured of the Romish Inquisition, and the only reply that Whitgift could muster was that if the Court was to proceed by witnesses and presentment, the evidence would be insufficient for conviction.[1] Upon motion made by the Commons in Parliament, the Lords of Council in 1607 demanded of Coke and Popham, C.J., in what cases the *ex-officio* oath might be used. They replied in part that the oath was not to be administered in accusations of adultery and incontinence.[2] In many cases the courts of common law opposed themselves to the powers that the High Commission assumed in forcing accused persons to incriminate themselves.[3] In fact Coke debated the Archbishop of Canterbury before all the justices of England and many high ecclesiastics on the authority of the High Commission.[4]

No alteration was made in the constitution of the High Commission in consequence of these proceedings. Parliament petitioned against it in 1610—to no avail. To all observation its power increased, was at its height between Charles I's third Parliament in 1628 and the meeting of the Long Parliament in 1640.[5] But these were mere surface rumblings of a far greater storm. By the time of Charles I, Clarendon says, the High Commission had scarce a friend left in the kingdom.[6] It had antagonized and welded together a strange opposition, the precisian and the loose-liver.[7] Though the High Commission itself struck chiefly at great offenders and aggravated causes, its tendency must have been to prod the minor ecclesiastical courts to a greater watchfulness over morals. This more alert guardianship of the layman's soul appeased the more

[1] Stephen, II, 413 f. [2] 12 Coke Rep. 26 (1826 ed., VI, 227).
[3] E.g., 12 Coke Rep. 19 (1826 ed., VI, 217).
[4] 12 Coke Rep. 34 (1826 ed., VI, 311).
[5] For an account of the growth of opposition to the High Commission see Usher, 123–148, 316–334.
[6] Macaulay, I, 90. [7] Trevelyan, *Stuarts*, 174 f.

inquisitional and caused the more friction in an age when the practice of confession had considerably diminished.[1] As the Puritans saw the power which they thought should be exercised by their own ministers exercised through a royal commission, so also did the bishops see their position as bishops ignored. Whereas the churchmen and the moral reprobates held their peace and endured their ignominy, the Puritans suffered and waited their turn to persecute.[2]

The storm broke in 1640. A bare ten days before the Long Parliament assembled, a great crowd of 2000 Brownists attended the session of the Commission at St Paul's and amid much shouting and disorder tore down the benches in the consistory with cries against the bishops and the High Commission. As Archbishop Laud wrote, "I like not this preface to the Parliament."[3] The Archbishop's fears were soon justified. Reciting "the great and insufferable wrong and oppression of the King's Subjects" caused by the High Commission, the statute 16 Charles I, c. 11, repealed the statute of Elizabeth in so far as it allowed the appointment of commissioners to exercise ecclesiastical jurisdiction. It took away from the ordinary ecclesiastical courts, too, all their criminal jurisdiction. And lastly, it rooted out for ever from English law the hated *ex-officio* oath.[4]

The abolition of the High Commission was but an initial thunderclap. The intensity of the storm we shall be able better to measure when we observe what the Puritans themselves sought to erect on the ruins of the structure which they had destroyed.

[1] Ecclesiast, 2 f.
[2] Trevelyan, *Stuarts*, 173; Stubbs, *Const. Law*, II, 280 f.
[3] Usher, 355.
[4] The statute 13 Car. II, c. 12, which re-established the jurisdiction of the ordinary ecclesiastical courts, did not restore the power to enforce the *ex-officio* oath (s. 4).

CHAPTER X

DURING THE INTERREGNUM

THE preamble of the Puritan Act "for the suppression of the abominable and crying sins of incest, adultery, and fornication, wherewith this land is much defiled, and Almighty God highly displeased," was not altogether rhetorical. For some time the popularity and prevalence of vice had been growing. The court of James I had been notoriously corrupt in morals, and the country houses of many great lords, the pattern to the gentry of whole districts, were little better. Coarseness of language was as yet unrestrained by propriety; drunkenness was the acknowledged fault of the nation.[1]

To combat this increasing immorality the king and Parliament had often been urged to take effective legal action. The sometime Bishop of Worcester expressed to Edward VI and his council the wish that adultery might be punished with death.[2] The Archbishop of York preached to Parliament at Westminster: "That vile sin of adultery, in God's commonwealth punished with death, so overfloweth the banks of all chastity, that, if by sharp laws it be not speedily cut off, God from heaven with fire will consume it. Prevent God's wrath: bridle this outrage: so shall you serve the Lord in truth."[3]

For a full century before the development of Puritanism as a political power there had been attempts to express in the civil law a condemnation of sexual laxness.[4] In the reign of Henry VIII a Bill was introduced in the House of Lords concerning "women lawfully proved of adultery"[5] and another concerning incontinency.[6] Bills on the same subjects were considered in Parliament in nearly every

[1] Trevelyan, *Stuarts*, 64. See also Traill and Mann, IV, 214 f.
[2] Latimer, 244.
[3] Sandys, 30. Other divines were more outspoken in their condemnation of conditions: Becon, 41.
[4] A. M. Davis, 7 f. (note). See, much earlier, *Rotuli Parliamentorum*, II, 315b, 317a (1376).
[5] *Journals of House of Lords*, I, 213b (9th March 1542-43).
[6] *Ibid.*, I, 224a (17th April 1543); see also *ibid.*, I, 225a (9th April 1543).

succeeding reign.[1] During the time of Charles I these attempts at legislative enactment became numerous.[2] Extra-marital sexual expression was already the subject of criminal legislation in Scotland. Adultery and incest were punishable with death. Fornication led to fine, imprisonment, public penance, ducking "in the foulest pool in the parish," and possible banishment.[3]

In England it was not until the breach with the king, however, and the establishment of the power of the Long Parliament that the attempts at the legislative repression of sex through the criminal law became determined.[4] After six years spent in consideration of various bills, Parliament finally passed the famous Act of 10th May 1650. It made adultery a felony punishable by death. It made fornication a crime punishable by imprisonment for three months, and until bond were given that such convicted person be of good behaviour for the ensuing year. Jurisdiction over the offences was given to the justices of assize on circuit and to justices of the peace at their general sessions.[5]

No one has made any extensive research into the working of this law. The only method of criticism therefore is a study of the cases as they are preserved.[6] Such a method presents pronounced difficulty because the number of cases, and consequently the effectiveness of enforcement is not to be ascertained. Pike says that the law was "rigorously executed," but in support of his statement

[1] *Journals of House of Commons*, I, 6 (9th Jan. 1548–49); *Journals of House of Lords*, I, 740a (2nd March 1575); D'Ewes, 641; *Journals of House of Lords*, II, 273a, 277a, 279a (April 1604).

[2] *Journals of House of Commons*, I, 813, 830, 839, 865, 880, 886, 922 (1641–2643).

[3] Hume, I, 468.

[4] *Journals of House of Commons*, III, 721, 724; IV, 33; V, 284, 289, 471, 513; VI, 371, 559, 566, 585, 596 f., 604, 608, 610, 615. See also *Parliamentary or Constitutional History*, XIX, 259 f.

[5] Firth and Rait, II, 787–789. See also Sheppard, *New Survey*, 63, 161.

[6] Besides the cases cited there is a vast quantity of manuscript material on the subject in the Session Rolls for London and Middlesex, preserved in the Record Office in Guildhall. Inasmuch as the charges under the Act of 1650 could be removed to the Upper Bench, indictments and appeals appear in the Crown Rape Rolls (Upper Bench Judgment Rolls) and are entered on the Controlment Rolls of the period of the Commonwealth, preserved in H.M. Public Record Office.

adduces no considerable evidence.[1] Best to judge the success one may take the cases that are reported and correlate these facts with the historical consequences as they are known.

The late Mr Inderwick, for instance, searched all the manuscript records of the Western Circuit[2] as they are preserved from 1653 to 1660. He found during that period only three charges of the capital offence of adultery. The results of these he was unable to ascertain. There were, in the same period, 12 cases of the minor charge of incontinence, seven women and five men. One woman was acquitted; in two cases there was no prosecutor; in one case the grand jury found no bill. Four persons were bound over from time to time and then discharged; in three cases there was no record of the result. One woman was convicted.[3] One out of 12!

Even more striking are the records of Middlesex County. Of the 34 persons tried for adultery and fornication only two were found guilty.[4] So glaring did the acquittals become on the part of sympathetic juries that the judges began to inflict in the later cases an indirect sort of punishment. Notwithstanding the verdict of Not Guilty, the persons so acquitted were ordered by the court to give security for their good behaviour in the future. Until they should provide adequate surety they were detained in gaol.[5] The records of the North Riding of Yorkshire, on the other hand, seem to portray quite a different picture.[6] By far the greater number of persons presented for incontinence were convicted. Compared with the three accused who were found not guilty, 16 persons were found guilty and committed.

No matter the varying number of convictions in cases of fornication, however, the story is always the same as to adultery. Not a single case of adultery is to be found

[1] Pike, *History of Crime*, II, 185.
[2] Hants, Dorset, Devon, Somerset, Wilts, and Cornwall.
[3] Inderwick, 33 f. [4] Jeaffreson, III, 183–196. [5] Ibid.
[6] North Riding Record Society, V, 77, 83, 85, 88, 92 f., 119 f., 141, 168, 170, 173, 184, 188 f., 189, 203, 218, 220, 225, 227, 232, 236, 238, 240 f.; VI, 19.

among the comparatively numerous convictions in Yorkshire. There were, to be sure, presentments. In seven cases presented for adultery in the North Riding the bills were ignored; in one no indictment was found. In a single case a bond for appearance was ordered but no further notice taken.[1] The same was true in Middlesex. It was in Middlesex that the one known case was tried wherein a person was ordered to be hanged for the crime of adultery. On 30th August 1652 Ursula Powell was found guilty of adultery by a jury at Old Bailey. Beside the Gaol Delivery Registrar's brief note of the case appears in the margin an "S." The "S" means *supersedeas*. Possibly this sentence was executed, but inasmuch as there is no star upon the record to show execution and no reference to be found in any London newspaper at the time—an item that would not have been ignored—Inderwick concludes that the capital sentence was never carried into effect.[2] Whatever the fate of Ursula Powell, the case left its imprint on the minds of the Middlesex county jurors. She was the last person in the metropolitan district who was convicted of adultery. At subsequent Gaol Delivery Sessions 22 women were tried for adultery; all were found not guilty. It is to be doubted whether so many women could be arraigned on insufficient evidence of guilt.[3]

It was not only in the failure of convictions that the Act ceased to be effective. It was in the growing failure to present offenders. During its early history the Act was enforced with considerable rigour.[4] Gradually this rigour declined. Conceivably the decline was caused by the seeming hopelessness of effecting convictions. Probably the dwindling both of convictions and of presentments was the normal outcome of an increasingly unsympathetic public opinion. Grand juries, no longer truly believing in the law, were unwilling to declare by indictment that a

[1] North Riding Record Society, V, 25, 93, 143, 237.
[2] Jeaffreson, III, pp. 100 f., 287; Inderwick, 57 f.
[3] Jeaffreson, III, pp. 288 f., 287.
[4] E.g., *Depositions from the Castle of York*, 56 ff.

neighbour had engaged in carnal intercourse "not having the feare of God before his eyes but being moved and seduced by the instigation of the divell." [1] In all the printed records there appear but three cases concerning incontinence after the year 1657.[2] The only other legal mention we find of sexual immorality is the occasional report of village constables, demanded under Cromwell's proclamation, that there were no persons in their communities suspected of adultery or fornication.[3]

Of this rapid decline in the effectiveness of the control of morals Cromwell was acutely conscious. In three ways he sought to make material the Puritan dream of the establishment of a moral order. First, on 9th August 1655 he issued a proclamation commanding the due and speedy execution of the laws against the abominable sins of adultery, fornication, and other acts of uncleanness.[4] He accused the officers and justices of want of zeal and care in administration; he directed more vigorous enforcement; he ordered justices of assize to take special note of these cases and make report thereof to him.

A mere proclamation could, of course, accomplish nothing of import. The Protector himself could not assume personal supervision of administration. But there were the Major-Generals. Unpopular as those officers were during their short-lived careers, they provided a central control, responsible to the Protector himself. They were not a part of the local system, not to be swayed by local and personal feelings. To them was given, but a few days after the proclamation, concurrent jurisdiction with justices "to promote godliness and discourage profanity." Moreover, they were to act in a way as spies on the administration of these laws, "to certify justices who are remiss, that they may be dismissed." [5]

Public opinion could not accept the Major-Generals.

[1] Wake, 133.
[2] North Riding Record Society, VI, 19; Jefferson, III, 170, 196.
[3] Wake, 121 f., 172 ff., 228 f., 252, 254.
[4] Preserved in the British Museum, Lodge no. 669, f. 10 (11).
[5] *State Papers*, 1655, 196 (22nd Aug.).

Cromwell argued with his second Parliament that their election was "justifiable to necessity, and honest in every respect." He urged Parliament itself to take a hand in the suppression of debauchery and immorality. "Make it a shame to see men bold in sin and in profaneness, and God will bless you." Not only manners needed reform, he said, but laws, especially the criminal laws.[1] Cromwell's speech availed little. The power of the Major-Generals was withdrawn in January 1656-57. The only fruit of his plea was the appointment of a committee in October 1656 to consolidate and revise the Acts as to moral offences with such alteration as might be necessary. Nothing came of the committee.[2]

At the time when the Act of 1560 was passed, Mr Henry Martin had declared in Parliament that the severity of punishment would lead to greater caution in the committing of these crimes of immorality, and the caution make detection less frequent, the offenders more scornful in consequence, and the offences more widespread.[3] Whether it was this secrecy caused by too great severity of punishment, or whether it was the laxness of administration; whether it was the unsettlement caused by war, or whether it was the general weakening of all authority, certain it is that during the period of the Commonwealth there was a distinct deterioration in manners and morals. The principal results of the laws concerning immorality was the increase of espionage on the part of neighbours, the records showing their depositions in language of exceeding coarseness. The records show, besides, that orders for bastardy were very numerous, cases of incest common, and assaults on women frequent. Drunkenness and immorality seem to have been looked upon as a pleasant method of showing contempt and defiance of authority, civil and ecclesiastical.[4] The spirit that this legal repression engendered became obvious at the time of the Restoration. The *Spectator* portrayed a not impossible

[1] Carlyle, II, 307–317. See also Firth, I, 7, 9. [3] Inderwick, 31.
[2] Whitelock, III, 198. [4] Hone-Harbin, xliv, xlvi.

situation when it mentioned the petition of a supporter of Charles who desired the honour of knighthood for having cuckolded a notorious Roundhead.[1]

The Act for the suppressing of the detestable sins of incest, adultery, and fornication fell, of course, with the fall of the Commonwealth.[2] And even as the corpse of Cromwell was dug up and displayed as an object of hatred, so upon the Restoration was the spirit of this Act held up for ridicule.

[1] *Spectator*, no. 609.

[2] Sheppard, *New Guide*, 460.

CHAPTER XI

SINCE THE RESTORATION

After depicting the severity of the Puritan laws of sexual morality, Blackstone continued: "But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offense of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers."[1]

Blackstone is rather cynical than fair in his ascribed reasons. To the degree that the ecclesiastical control of sex expression after the Restoration was less effective than it had been before its abolition in 1640, it was the fault not of the Church but of Parliament and the people. The jurisdiction restored to the ecclesiastical courts was not the jurisdiction of which they had been deprived. It lacked the one great mechanical weapon of coercion. And when, three decades later, it was deprived of its one great spiritual weapon as well, it was ill-equipped to meet the vast array of social opposition.

The Act of 1660 probably meant to restore to the Church its old authority over sex morals; it meant to rectify the damage done in 1640. The declaratory form of the statute, as an interpretation of the Act of 1640, shows that the new Parliament doubted if any Parliament had the ability to shear the Church courts of their jurisdiction.[2] The former statute, it enacted, was not to be interpreted to take away from bishops and ecclesiastical judges their ordinary power—they might proceed to adjudicate causes and impose penalties under the ecclesiastical law as they had done before the Act of 1640—nor did Parliament confer upon them any new power.

[1] Blackstone, IV, 65. [2] Stephen, II, 418.

So much of the statute, then, was a pedantic revival of the old ecclesiastical procedure. But there had been a lapse of only 20 years since its abolition. Memory of certain abuses remained fresh. They clustered round the High Commission and the practices which it had brought into odium. Specifically, therefore, the Act of 1660 confirmed the abolition of the High Commission. And mindful more of its evil associations than of the emasculation that its deprivation would cause, Parliament tore away from the re-established courts their one distinctive process, the *ex-officio* oath. No *ex-officio* oath, by which a person is compelled to confess or accuse or purge himself, was to be administered, any former usage to the contrary notwithstanding.[1]

The loss of the *ex-officio* oath brought the Church courts face to face with the problem that a temporal court would have to meet in enforcing laws as to private voluntary acts—the problem of proof. The Canons of 1603 required the churchwardens or questmen or sidesmen to present all offenders in adultery, whoredom, incest, and other uncleanness and wickedness of life, even on the basis of common fame. In failing to present such offenders, in violation of their oath of duty, the churchwardens were themselves guilty of perjury.[2]

In practice, however, the churchwardens were unable to bring effective presentments for sexual immorality. Without the use of the *ex-officio* oath a presentment upon suspicion could effect no conviction.[3] The churchwardens were, ordinarily, unable to obtain any evidence beyond suspicions. Their presentments contained a bare delation of the offence and of the offender, without specification of time or place or other circumstance attending it. Should the court admit articles wherein an offence was charged without specification of particulars, an appeal would lie from conviction. As Dr Reynolds, Archdeacon of Lincoln, declared, "Therefore, as it is impossible that

[1] 13 Car. II, st. 1, c. 12, s. 4. [2] Disney, *Sexual Essay*, xviii ff.
[3] *Chronicle of Convocation*, IV, Report, 7 f.

the Articles can be laid more specific than the Presentment, unless the Inferior Court should fish for evidence, which is not a very commendable practice, every Presentment must produce an appeal instead of a sentence. By this means the exercise of Episcopal Government is in a manner wholly extinguished."[1]

Inadvertently also, with thoughts on other desirable ends, Parliament put in the way of effective ecclesiastical action an even greater moral and social impediment. This was the Toleration Act.[2] Section 3 reads, "Nor shall any of the said persons [Protestant Dissenters from the Church of England] be prosecuted in any Ecclesiastical Court for or by reason of their Nonconforming to the Church of England." The Toleration Act did not exempt Nonconformists from being presented in ecclesiastical courts for any cause beyond that of religious belief. It was not meant to exempt them from the Church's corrective jurisdiction over morals. They remained in theory subject to criminal prosecution in the spiritual courts. And occasionally there is note a Nonconformist being tried and convicted in an ecclesiastical court for incontinence.[3] In practical effect, however, the Toleration Act rendered hopeless the general administration of corrective discipline.[4] A large body of the population considered that the Act emancipated them entirely from the dictates of the Church of England. Why then should the members of the Church feel themselves limited in expression where others were free?

Somewhat later the case of Middleton *v.* Crofts[5] created another obstacle for the ecclesiastical jurisdiction over sex morals. This, like the Toleration Act, was inadvertent. Lord Hardwicke merely held that the Canons of 1603 did not bind the laity *proprio vigore*. The canons which were declaratory of the ancient usage and law of the Church of

[1] *Chronicle of Convocation*, IV, Report, 7, note.
[2] 1 Gul. & Mar., c. 18. The debates reveal no suspicion of such a consequence: Grey, IX, 252–254, 256–262.
[3] E.g., Wheatley *v.* Fowler, 2 Lee 576 (1737).
[4] *Chronicle of Convocation*, IV, Report, 7 f.
[5] (1736), 2 Atk. 650; 2 Barn. 109; 1 Barnard. 351; 2 Kel. 148.

England, not creating a new obligation, continued to be of binding force. Such was Canon 109, which provided for the punishment of those who offend by adultery, whoredom, and other uncleanness and wickedness of life. The laity, however, freed from restraint of the specific expression of the canon law, felt itself freed from the law itself.

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A judicial machine as poorly equipped as the post-Restoration ecclesiastical courts would have had difficulty in meeting ordinary moral conditions. But the conditions of the period were far from ordinary. The extravagant austerity of Puritanism had been succeeded by an extravagant licentiousness. This licentiousness emanated from the court of the king. It was the fashion to pay homage to the beauty of women. But, as Macaulay says, the admiration and desire which women inspired were seldom mingled with respect or affection. "In that court a maid of honour, who dressed in such a manner as to do full justice to a white bosom, who ogled significantly, who danced voluptuously, who excelled in pert repartee, who was not ashamed to romp with Lords of the Bedchamber and Captains of the Guards, . . . was more likely to be followed and admired, more likely to be honoured with royal attentions, more likely to win a rich and noble husband, than Jane Grey or Lucy Hutchinson would have been."[1]

This spirit infected in turn the other social classes. The wealthy landowners, adopting the feverish gaiety and low morals of the Court, abandoned their quiet estates for the excitements of fashionable life in London.[2] The lower classes gave evidence of their frivolity in more outspoken ways.

The moral conditions are expressed in the literature of the period. The wits and the Puritans, never on friendly terms, waged open war. It became a war not between wit and Puritanism, but between wit and morality. "The hostility excited by a grotesque caricature of virtue did

[1] Macaulay, c. 3, 1. 395 f. [2] Goodall, 306 f.

not spare virtue herself. . . . The spirit of the Anti-puritan reaction pervades almost the whole polite literature of the reign of Charles the Second."[1]

This decadence expressed itself more actively than in literature and frivolity. The laws were badly enforced; violations were frequent. In 1696 a society was formed "For the Reformation of Manners in the Cities of London and Westminster." In 1703 this society published a list of 858 "lewd and scandalous persons" whose conviction it had effected during the past year. In 1704 there were 863 convictions, in 1707, 706. Thereafter they increased enormously. In 1708, 1235 lewd and disorderly men and women were convicted. During the 54 years of its endeavour this society was responsible for 99,380 prosecutions.[2] When one realizes that this was the work of one organization, confined to one district, occupying itself largely with one class of offences, one begins to compass the scope of the conditions of immorality.

Foreign travellers visiting England in the eighteenth century were surprised at the low state of sexual morality. Archenholtz writes that in his day it was estimated that London harboured 50,000 common prostitutes, of which there were in the parish of Marylebone alone 15,000. Nor does this take account of the mistresses kept by many men of wealth.[3] So outspoken was the practice of extra-marital intercourse that the newspapers of the last half of the eighteenth century carried advertisements not for wives but for mistresses and even advertisements for concealing pregnancies and for preventing scandal by disposing of offspring.[4]

The fashionable masquerades of the later eighteenth century, though supposedly private meetings, were frequently attended by courtesans. The hostesses were even prosecuted for keeping disorderly houses. In 1775 an

[1] Macaulay, c. 3, I, 399 ff.
[2] Ashton, II, 254; Chamberlayne, Part I, 199 f.; Botsford, 201 f.
[3] Archenholtz, 302 ff.
[4] Wright, *History of George*, 154. As examples see the *Morning Chronicle* for 23rd Feb. and 17th March 1786; the *General Advertiser* for 3th Jan. 1786; the *Public Advertiser* for 11th Jan. and 7th Feb. 1788.

attempt by the bishops to interfere and put down the masquerades was unsuccessful. It was only through their eventually extreme indecency that the masquerades fell into contempt.[1]

Though adultery was everywhere patent,[2] respectable wives were supposed to keep their eyes tight closed to it. The Marquess of Halifax, in the late seventeenth century, wrote in his *Advice to a Daughter*: "First then, you are to consider, you live in a time which hath rendered some kind of Frailties so habitual, that they lay claim to large Grains of Allowance." After saying that virtue is its own reward, he counselled that "next to the danger of committing the Fault yourself, the greatest is that of seeing it in your Husband."[3]

The most apparent forms of sexual vice were the outrages committed with impunity on the ill-lit and ill-guarded streets of London in the first half of the eighteenth century. This was probably the consequence of the astounding amount of gin-drinking.[4] Clubs of young men of the higher classes would sally drunk into the streets and commit atrocious abuses on innocent passers-by. One favourite amusement was to set women on their heads and commit various indecencies and barbarities on their limbs thus exposed.[5]

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With manners thus unrestrained, with the temporal courts limited in jurisdiction and the ecclesiastical courts circumscribed in methods of enforcement, the Crown sought by encouragement and threats to lend its prestige to the side of morality and order. Every sovereign but two from Charles II to Victoria issued a proclamation, and sometimes several proclamations, for the encouragement

[1] Wright, *History of Georgia*, 332 ff.

[2] See, for instance, *The Cuckold's Chronicle* (London, 1793) in two volumes, and *Trials for Adultery* (London, 1779–80) in nine volumes.

[3] Halifax, 33–33.

[4] In London in 1750 there were 14,000 cases of serious illness caused by gin-drinking, and more than 100,000 people who drank gin as their principal sustenance." Lecky, *England in the Eighteenth Century*, I, 482.

[5] Lecky, *England in the Eighteenth Century*, I, 482.

of the civic and social virtues.[1] To the extent that such proclamations were out of harmony with the temper of the times, they failed.

Charles II, on 30th May 1660, made a proclamation against "Vicious, Debauch'd, and Prophane Persons . . . who spend their time in Taverns, Tipling Houses, and Debauches, giving no other Evidence of their Affection to Us, but in drinking our Health." The king hoped that all such would "cordially renounce all that Licentiousness, Prophaneness, and Impiety . . . and become examples of Sobriety and Virtue." Three years later, on 22nd August, Charles renewed this proclamation and directed it to be read in all churches once a month for six months.

Charles II was hardly the appropriate person to incite his subjects to virtue. But soon after her accession Mary, on 9th July 1691, recommended that her judges put into effect the laws against all "lewd, enormous and disorderly Practices." The next day the justices of the peace of Middlesex, assembled in Quarter Sessions, in obedience to Her Majesty's letter resolved to put these laws into execution and ordered constables to be diligent in searching out violators.

Because of the limited jurisdiction of the justices in moral offences, Mary's recommendation left much to be desired. Some months later, therefore, she and William made a formal proclamation, dated 21st January 1691–92, "against Vitious, Debauched, and Profane Persons." Impiety and vice, it said, still abounded in the kingdom, and the laws for their punishment had been grossly neglected. The king therefore commanded his judges, justices, and "all other officers, ecclesiastical and civil" to execute the laws against lewdness and other dissolute and immoral practices. This was an attempt on the king's part to make the ecclesiastical courts as well as the civil courts more diligent in their prosecution of moral offenders. That the attempt met with no success is evident from a letter addressed by the

[1] These proclamations are found in their original printing in the British Museum, chronologically classified.

Bishop of London to the clergy of his diocese on 15th December 1697. Because His Majesty's injunctions had not been observed of late, he admonished his clergy of this neglect. "Would it not be a shameful reproach to us (a great part of whose business it ought to be, continually to watch against such sins), to be found tardy in those opportunities, which the laws have given us to warn people of their wicked courses? . . . I could wish with all my heart, that the late silence of those Acts and Proclamations . . . proceeded from so thorow a reformation in manners, that there were no more need to mention them." [1]

William made other proclamations. Their frequency, even without other evidence, makes one suspicious of their effectiveness. On 24th February 1697 the king, warned of the displeasure of God at the existing immorality, proclaimed that he would favour pious persons at court and degrade the vicious. He again ordered civil and ecclesiastical officers to be watchful for lewd and dissolute practices, and he directed the proclamation to be read quarterly in the churches. Some three years later William reiterated this pronouncement.[2]

Anne quickly followed her predecessor's lead. In the first year of her reign [3] she made a proclamation closely following the wording of William's proclamation of 1697. There was no method provided, however, to make such ends legally attainable. On 18th August 1708 the form of proclamation was given teeth. It was ordered "that Clerks Phiscal and other Officers of Court be Nominated for Prosecuting of Persons Guilty of Immorality. . . . And Presbyteries, Ministers and Church-Sessions are required to Nominate fit Persons within their Bounds respectively, to take Notice of Vice and Immorality, and to Delate and Prosecute those Guilty thereof." Judges and justices were ordered to allow such prosecutors, out of fines, not only their expenses but also other rewards. Magistrates and judges were required "to give all due

[1] Malcolm, 512 f. [2] 9th December 1699. [3] 26th March 1702.

Assistance for making the Sentences and Censures of the Church and Judicatories thereof, to be Obeyed or otherwise effectual."

It is to be understood that at this period of English constitutional history a royal proclamation on such a subject of law enforcement, issued by virtue of the prerogative right, probably still had the force of an Act of Parliament duly approved. Anne's direction as to civil assistance of the ecclesiastical courts and as to distribution of fine-money was in effect a law. The system inaugurated in 1708 came as a response to numerous criticisms as to the lax administration of laws against immorality.[1] It instituted a dangerous and seemingly effective method of rewarded spying. The prosecutions for immorality immediately increased to a considerable extent.

Possibly the system of unofficial spying was too effective. Possibly it led to abuses, even as the medieval system of informal accusations had led to abuses. Possibly enthusiasm for the innovation soon waned. When George I made his proclamation for the encouragement of piety and virtue on 5th January 1715, it omitted all provision for rewards to informers and for assistance to the Church courts. It went back to the wording of the proclamations of 1701 and 1697. It contained no provision for effective enforcement. So was it with the proclamations of the succeeding monarchs.[2] The proclamations, according to their provisions, had to be read regularly in churches, long-winded as they were. They were still solemnly read at the opening of the courts of justice as late as 1871[3] and apparently till the death of Queen Victoria. Their effect on the vice and immorality which they condemned and sought to remedy was, it would seem, nil.

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The difficulties and failures of ecclesiastical administration in the late seventeenth and eighteenth centuries do

[1] Disney, *Haup*, preface.
[2] George II, 5th July 1727; George III, 1st June 1787, George IV, 12th February 1820; Victoria, 21st June 1837.
[3] *Chronicle of Convocation*, IV, Report, 10.

not mean, however, that there was no legal punishment for voluntary sex offences. For incest, which was recognized as a more violent breach of social mores than incontinence, there continued to be some criminal proceedings in ecclesiastical courts. As late as 1833 the "usual penance," as we have seen it practised centuries earlier, was ordered by the Consistory Court of London upon conviction for marriage with a deceased wife's sister. But parading in a flimsy sheet was not in keeping with the ideas of health in the nineteenth century. Upon presentation of a medical certificate that this was dangerous to the woman's physical condition, the court remitted the penance.[1]

Adultery also has social implications beyond the will of the two individual participants. To protect the husband of the adulteress in the maintenance of his home and family, the civil law had long recognized the action of criminal conversation, wherein he could sue his wife's paramour for damages accruing from his loss of consortium. In this civil action there was a certain penal aspect. The husband suing in an action *vi et armis* would recover damages from the adulterer which were usually large and exemplary. In Campbell *v.* Hook the damages awarded were £3000; in Walford *v.* Cooke, £3500; in Duberly *v.* Gunning, £5000; in Lord Abergavenny *v.* Lyddel, £10,000.[2] Regardless of the theory of the action, such sizable damages must have been intended by the juries not as compensation for the injury to the outraged spouse alone but as a penalty upon the wrongdoer. It is altogether likely that juries made the penalty the greater in the realization that adultery was attended with no other punishment. Actions for criminal conversation in the common-law courts were increasingly frequent as the number of Parliamentary Acts for divorce increased during

[1] Chick *v.* Ramsdale, 1 Curt. 34 (1835). See also Hands *v.* Hacks, 1 Salk. 548 (1695); Blackmore *v.* Bridal, 2 Phillim. 360 (1818); Griffiths *v.* Reed and Henry, 1 Hagg. 195 (1828); Burgess *v.* Burgess, 1 Hagg. Con. 384 (1824).

[2] *Trials for Adultery; Gentleman's Magazine.*

the eighteenth and early nineteenth centuries.[2] Before judicial divorce was established, a husband's application to Parliament for a divorce Act had to be preceded by a successful suit against the paramour for damages.[3]

Application for a Parliamentary Act of absolute divorce had to be preceded as well by a successful suit in the ecclesiastical court for divorce *a mensa et thoro*. Such decree of separation was granted on the sole ground of adultery. In every case of divorce the spiritual court was therefore presented with minute evidence of adultery. By its decree of separation it recognized the evidence as sufficient to establish the fact. With the fact of adultery so established the ecclesiastical officers could immediately have brought a criminal prosecution in the same court upon the same facts. There was no question of double liability for the same act.[4]

There was no difficulty in obtaining proof. After 1708, as we shall see, the rigid statute of limitation on causes of moral correction in ecclesiastical courts, combined with the protracted procedure in actions for divorce, created a difficulty in bringing later prosecutions for adultery. This slowness is some explanation of the absence of criminal proceedings after civil actions involving adultery; it is not an excuse.

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Notwithstanding this comparative quiescence of the ecclesiastical administration of sex mutuals, abuses evidently did persist. Most oppressive were the actions for ante-nuptial incontinence brought long after the offending parties had intermarried. In one case the prosecution was begun 15 years after intermarriage. In another the woman had not only later married her partner in guilt and lived with him in the married state for nine years, but seven years after her death he was cited by the court for

[2] This, notwithstanding the great expense attendant upon such proceedings. Maule, J., in his famous dictum per the minimum cost at £1000: *The Times*, 29th Jan. 1857.

[3] *Ex Heller.*

[4] Rigaut *v.* Gallaud, 7 Mod. 71 (1700); Mordaunt *v.* Monmouth, L.R. 8 H.L. (Sc. and D. App.) 374, 381 (1674).

such premarital fornication.[1] In one case a woman, unable from pregnancy to attend at court, was excommunicated.[2] Such abuses could not have been frequent. According to the Bishop of Bangor no suit for antenuptial fornication had been brought in Doctors' Commons within the memory of the oldest practitioner.[3] But what abuses there were made audible clamour. The Bishop of Bangor "believed that some irregularities were committed in the inferior jurisdiction: but he did not believe that there were any grounds for the loud complaints which had been made." [4] The Archbishop of Canterbury "had no doubt but that irregularities were committed in the ecclesiastical courts by needy proctors; and what court was free from such irregularities?" [5]

The oppression fell chiefly upon the poor. Many, it was said, were thrown into prison by the arbitrary ecclesiastical courts.[6] To be sure, they had the right of appeal to the Court of Arches, but that was slim protection for those who could not afford the cost of appeal. Their fate was to live in ignominy. The woman who could not vindicate herself was started on the road to the brothel.[7] Complaints were heard not only in Parliament but among the people themselves. The grand jury in one county expressed its earnest wish for a legislative reform of the abuses.[8]

In such circumstances Parliament acted. Its action was backhanded. The Bill introduced into the Commons in 1786 was intended to abolish ecclesiastical jurisdiction over incontinence. It was phrased, however, only to meet the most obvious abuses. It sought to put upon offences of incontinence and fornication a time limitation, after which no action could be brought, and an absolute prohibition of action after the parties had intermarried. The period of limitation proposed was eight months. The Bishop of Bangor expressed the obvious when he said in the House of Lords that the period was too short for the discovery of

[1] *Parliamentary History*, XXV, 1035 f.; XXVI, 624 f.
[2] *Ibid.*, XXVI, 624. [3] *Ibid.*, 126. [4] *Ibid.*, 126.
[5] *Ibid.*, 128. [6] *Ibid.*, 624. [7] *Ibid.*, 624. [8] *Ibid.*, 625.

acts committed in private and kept secret.[1] The Archbishop of Canterbury realised that the Act, "though it recognised ecclesiastical jurisdiction, put it under such restraints that it could scarcely exercise its jurisdiction."[2]

The Bill, rejected by the Lords, was again introduced in the Commons in the next year. During the new debate the whole system of ecclesiastical administration was more openly attacked.[3] Its oppressive action was denounced as a reason for its abolition. Priests themselves were accused of immorality. Penitential punishments were derided. "What is doing penance? It is merely going to church in a masquerade dress, which not one in ten cared two-pence about."

The Bill was enacted in 1788.[4] It justified the fears of its opponents, the hopes of its advocates. Entitled an Act for the prevention of vexatious suits in ecclesiastical courts, its eight-months' period of limitation and its prohibition of proceedings after intermarriage were in fact a prevention of any suits whatever for incontinence.[5] By this statute the ecclesiastical jurisdiction was "finally destroyed."[6] The Royal Ecclesiastical Courts Commission, recognising the hopelessness of prosecutions so unreasonably restricted in time, urged the repeal of the statute.[7] The statute was modified in 1840. In the meantime the Church's jurisdiction in causes of sex morality had expired.

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Even before the enactment of the statute of 1788 Parliament had recognised the practical absence of ecclesiastical administration. The remedy, it was seen even by churchmen, no longer lay in the Church itself. In 1779 the Lord Bishop of Landaff presented to the House of Lords a Bill entitled "An Act for the more effectual Discouragement of the Crime of Adultery." Notwithstanding its title,

[1] *Parliamentary History*, XXVI, 125 f.
[2] *Ibid.*, 128.
[3] *Ibid.*, 1004–1009.
[4] 27 George III, c. 44.
[5] The provisions were held to apply to the clergy as well as the laity, so far as ecclesiastical punishment other than deprivation: *Free v. Burgoyne*, 5 B. and Cress. 400 (1826); aff'd, 2 Bli. (N.S.) 65 (1828).
[6] *Chronicle of Convocation*, IV, Rapon, 1.
[7] Ecclesiastical Courts Commission, I, 204.

the Bill contained no provision as to criminal punishment of the act of adultery. It aimed merely to prevent a person for whose adultery a divorce had been granted from ever marrying with the paramour named in the divorce Act and from marrying any person for a year following the divorce.[1] After some debate and amendment, the Bill was eventually passed by the Lords[2] and sent to the Commons.[3] As to a second reading the Commons voted adversely. It was then ordered that the Bill be read a second time four months from date.[4] Four months from date was during recess. It was the end of the Bill of 1779.

The Lords, however, were not completely discouraged. Some 20 years later, in 1800, a new generation introduced a similar Bill "for the more effectual Prevention of the Crime of Adultery." The original Bill almost duplicated the Bill of 1779 and went no further than to prevent remarriage of the guilty party to a divorce. In the course of proceedings and debate, however, Lord Auckland introduced a new substitute Bill, and to that amendments were made.[5] The Bill, as it passed the Lords, contained three important provisions besides the prohibition of remarriage of the divorced party with the paramour. Adultery of a person with a married woman living under the protection of her husband, it provided, was to be a misdemeanour, punishable by fine and imprisonment at the discretion of the court of King's Bench. But indictment for such crime could be prefirred only by the husband of the adulterous woman. In order to exhibit a Bill for divorce, a husband must first have prosecuted to conviction and judgment the person with whom the adultery was alleged to have been committed. The proposed Act was not to affect the jurisdiction of any court, ecclesiastical or temporal, relating to adultery.[6]

The effect of this Bill would have been to create a new

[1] *Parliamentary Papers*, Bills, X, no. 323 (Public).
[2] *Journals of House of Lords*, XXXV, 624b, 632a, 643b, 671b, 674b, 684a, 687b, 689a, 690a; *Parliamentary History*, XX, 590–601.
[3] *Journals of House of Commons*, XXXVII, 333.
[4] Ibid., XXXVII, 369.
[5] *Journals of House of Lords*, XLII, 426b, 434a, 493b, 447a, 460b, 474a, 495b, 503a, 509, 514b, 515a, 517b, 518a.
[6] *Parliamentary Papers*, Bills, XXII, no. 913 (Public).

temporal crime of adultery, in no way conflicting with the spiritual crime by that name. The same in name, the new crime would have been different in substance. It would have written into the criminal law the elements of the civil law concerning the tort of criminal conversation.

The Bill passed the Lords, 77 to 69. In the Commons it passed its second reading, but the House refused to go into committee of the whole to discuss it. It decided to resolve itself into such committee at a date that fell within its recess.[1]

The debate on the Bill had waged five days in the House of Lords and three in the Commons. These discussions are interesting for the light that they throw on the treatment of adultery in the ecclesiastical courts in 1800. It appears from their speeches that two of the outstanding proponents of the Bill could not have known that the ecclesiastical courts still had jurisdiction to punish adultery. One of these, Lord Auckland, was a diplomat of note. The other was Lord Eldon, then recently appointed Lord Chief Justice of the Common Pleas, later to be known as Lord Chancellor. Eldon understood that adultery was at that time only a civil trespass.[2] This misimpression was, of course, corrected by the spiritual lords, by the Bishops of London and of Rochester. The Bishop of London regretted that "the laws with regard to the detestable crime of adultery, were at present extremely inadequate to check it."[3]

The temporal lords were not so moderate in their opinions of the exercise of ecclesiastical jurisdiction over sex offences. Lord Grenville called the ecclesiastical courts deficient.[4] The Earl of Carlisle dubbed the proceedings in the Church courts vexatious. He recommended that the House "set about cleansing the Augean stable, though that, he confessed, would be an Herculean labour."[5] This characterization by Carlisle the Bishop of Rochester found it necessary to regret. He explained

[1] *Journals of House of Commons*, LV, 570, 577, 600, 610, 631.
[2] *Parliamentary History*, XXXV, 234. This misconception had existed already 70 years earlier: Evelyn, *passim*.
[3] *Parliamentary History*, XXXV, 274. [4] *Ibid.*, 173. [5] *Ibid.*, 280.

that the proceedings in the ecclesiastical courts were as regular and certain as those in temporal courts. But, he admitted, the existing penalties were insufficient and the mode of prosecution ineffectual.[1] In the House of Commons Sir William Scott expressed the situation directly, accurately. With the change of manners, he said, proceedings of ecclesiastical courts had completely lost their efficacy; their punishment had become so obsolete as to be a matter rather of derision.[2]

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The evidence of the ecclesiastical jurisdiction over the sexual offences of the laity during the nineteenth century is evidence not of its gradual ceasing but of its having in fact ceased. "It is competent to institute Criminal Proceedings for Incest, Adultery, and Fornication," the Ecclesiastical Courts Commission found in 1832; "but in the Arches Court and the Consistory of London, no such suit has been brought for a long series of years; in some of the country Courts they have been very rare."[3] A Proctor in Doctors' Commons testified before the Commission that in his 40 years of practice no case of incontinence had been brought before the Court as regards laymen, and there was no trace in his books of such a cause ever having been brought in the courts in London. In 1829 there was one case in the Chancery Court of York for incontinence; in 1830 one for "immoral conduct." In 1871 the Committee on Minor Ecclesiastical Courts and Church Discipline, appointed by the lower house of the Convocation of Canterbury, examined the practice as it existed after the Commissioners' report in 1832. The Committee found "that instances of corrective discipline exercised through the Courts Christian are of the rarest occurrence, and are rather matters of antiquarian curiosity than of efficiency in promoting morality and Christian conduct among lay people."[4]

[1] *Parliamentary History*, XXXV, 184, 186.
[2] Ecclesiastical Courts Commission, I, 107.
[3] *Journals of Convocation*, IV, Report, 11.
[4] *Ibid.*, 307, 317 f.

Two attempts to enforce corrective discipline in the mid-nineteenth century are enlightening. In 1848 the Rev. J. B. Sweet, Perpetual Curate of Woodville, attempted to present a case of adultery. He forwarded the presentment to the Registrar of the Archdeaconry, who sent it to the Chancellor of the Diocese, who decided not to promote the case, but recommended its transfer to the Court of Arches. He tactfully urged the curate not to pursue the inquiry.[1] Similarly when a clergyman and churchwarden made a presentment for adultery to the Bishop of London in 1847, the Bishop informed him that his legal adviser said that the law under which such immorality was punished had been in abeyance for 200 years and could not now be brought into operation.[2]

Churchmen of the later nineteenth century were by no means agreed as to what course they wished to be able to pursue in the future in regard to sexual offenders. Some wanted the temporal law to take jurisdiction. Some wanted the old procedure revived. Some wanted the matter left at rest.

"If once the Legislature will boldly enter on the path of justice, and pronounce adultery to be a felony, . . . it will very soon be regarded as a low vice, only fit for the scum of society." The clergy who thus advocated temporal interference were confident that a Bill to make adultery a felony would pass Parliament.[3] But the Legislature itself gave answer, and adversely. During the debate on the Divorce and Matrimonial Causes Act in 1856 and 1857, amendments were introduced in the House of Lords proposing to make adultery criminally punishable by fine and imprisonment. These amendments were withdrawn before vote.[4] No Bill has since been introduced into Parliament to make private and voluntary acts of normal sex expression punishable by the criminal law.

Some of the clergy did, of course, admonish sexual offenders informally as part of their pastoral duties. In the

[1] *Chronicle of Convocation*, IV, Report, 15 (app. A).
[2] *Ibid.*, 12, note.
[3] *Country Parson*, 41.
[4] *Hansard's Debates*, CXLVII, 571.

Isle of Man, though the ecclesiastical court itself was no longer exercising its corrective power over the laity in 1876, it deputed its authority to the incumbent of the parish of the offender by requiring such offender to attend before the incumbent for admonition. This practice was recognized to be of doubtful legality.[1] It was something of this type of procedure that the committee of the lower house of the Convocation of Canterbury advocated in 1872. It wanted to replace the jurisdiction of the bishop on its primitive basis, "by restoring the Diocesan Courts that measure of efficiency which is required for them to correct vice formally and judicially, and also by providing a method by which the Bishop personally, in a private and paternal exercise of his office, *absque strepitu judicii*, may admonish those who give scandal by open immorality."[2]

In discussing the Ecclesiastical Courts and Registeries Bill then pending in the House of Lords, Dr Fraser said before the Convocation of Canterbury in 1872: "Little by little the privileges of the Clergy have been filched from them, the Church courts have been reduced to nullities, novel tribunals have been created, and now every relic of ecclesiastical power, which, in accordance with Holy Scripture and ancient custom, has been the right of the Clergy is about to be taken away from us."[3]

If there were any question about the accuracy of this lament, the answer was judicially given by Lord Penzance four years later in a criminal suit promoted by the Vicar-General of the Bishop of Lincoln. "It cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by ecclesiastical Courts, would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers where they still exist, if they do exist, is likely to benefit the community.

[1] Ecclesiastical Courts Commission, II, 511.

[2] *Chronicle of Convocation*, IV, Report, 12 f. A similar recommendation was made to the Church Assembly at its summer session, 1926: Archbishop of York, *Ecclesiastical Courts*, 14 f. [3] *Chronicle of Convocation*, IV, 211.

. . . I can only express my surprise that . . . any person should have thought it worth while to make this experiment for the revival of a jurisdiction which, if it has not expired, has so long slumbered in peace."[1]

More than 50 years before this judicial declaration the Ecclesiastical Courts Commissioners had recommended the abolition of Church jurisdiction over voluntary sex expression. "It may be greatly doubted whether any beneficial effects have resulted from these proceedings, or at least so beneficial as to counterbalance the odium they have excited, and the oppression which, in some few instances, has been exercised."[2]

Parliament has never acted to deprive the Church of her jurisdiction over adultery and fornication. The statute law as to those offences stands as it stood one century ago, five centuries ago. But as Archdeacon Hale has long since said, "It cannot be denied that, as respects the conduct of Lay members of our Church, all discipline has ceased; and there is good ground to believe, that if any-one were bold enough . . . to propose the restoration of it, he would encounter hostility. . . . It would not be inconsistent . . . if we expressed a strong doubt, whether the restoration of such a system of Discipline . . . is suitable to our present social condition, or calculated to promote true religion, and to improve public morals. In the present complicated form of society, and above all, in so serious a matter as the punishment of sin by public censure and rebuke, we need not be ashamed to confess the difficulty in which the Church is placed, as a spiritual society in the midst of an opposing world. . . ."[3]

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Where the world does not oppose, where the Church is dealing solely with her own ministers, the ecclesiastical jurisdiction over sex morals continues. Under the Clergy Discipline Act of 1892,[4] a clergyman alleged to be guilty

[1] Phillimore v. Machyn, L.R. 1 P.D. 481 (1876).
[2] Ecclesiastical Courts Commission, I, 103.
[3] Hale, III–V.
[4] 55 and 56 Vic., c. 32, s. 2.

of immoral act, conduct, or habit may be prosecuted and tried in the consistory court of the diocese. Such immorality includes conduct proscribed by Canon 109,[1] whereunder any who offends by adultery, whoredom, or other uncleanness or wickedness is to be presented by the churchwardens and tried as in an ordinary ecclesiastical proceeding.[2] Prosecutions for sexual offences are still brought in Church courts against Anglican ministers, in which the punishment for guilt is deprivation.

Into the legal gap left by the abandonment of the spiritual jurisdiction over lay morals, the temporal law has taken but few steps. Open and notorious lewdness, either by frequenting houses of ill-fame or by some grossly scandalous and public indecency, remains, as we have seen it develop, an offence indictable at the common law.[3] The non-voluntary acts of sex had become matters of temporal cognizance even before the period of Puritan dominance.[4] So, too, had voluntary sex expression of the most violently antisocial sort—sodomy and bestiality.[5] Milder forms of homosexual practice have since come under the civil ban. Male persons committing acts of gross indecency together, even in private, are guilty of a misdemeanour.[6] Likewise was the growing feeling as to the social obnoxiousness of incest finally expressed in the criminal law in 1908.[7] This expression was a tardy acceptance of a recommendation made by the Ecclesiastical Courts Commissioners three-quarters of a century earlier.[8]

Beyond this and beyond the purely commercial aspects of sex,[9] the law of England does not venture to intrude

[1] 35 and 36 Vic., c. 32, s. 12.
[2] See *supra*, p. 134. Rex v. Crundell, 2 Camp. 89 (1809); Blackstone, IV, 64 *f.* The doctrine has been enacted into statutory law by the Vagrancy Act, 1824, 5 George IV, c. 83, s. 3, and Towns Police Clauses Act, 1847, 10 and 11 Vic., c. 89, s. 28.
[3] See *supra*, pp. 135 f. Most recent statutes protect children and youths who, though in fact consenting, are considered incapable of consent.
[4] See *supra*, p. 136.
[5] 48 and 49 Vic., c. 69, s. 11.
[6] 5 Edward VII, c. 42.
[7] Ecclesiastical Courts Commission, I, 103.
[8] 48 and 49 Vic., c. 69, s. 1; 48 and 49 Vic., c. 69, as amended by 2 and 3 George V, c. 20, s. 2, and by 12 and 13 George V, c. 38, ss. 2, 3; 61 and 62 Vic., c. 56, s. 1; 10 and 11 Vic., c. 89, s. 28; 2 and 3 Vic., c. 47, s. 54 (11).
[9] [illegible]

upon private and voluntary sexual expressions. But the English law may rush in where the law of England fears to tread. The institutions which, even in theory almost, are long since dead in England have been transplanted to new surroundings in Anglo-American law.

BOOK III

THE DOCTRINE IN ANGLO-AMERICAN LAW

CHAPTER XII

IN PRE-REVOLUTIONARY AMERICA

THAT New England Puritanism is an outgrowth of English Puritanism is a fair statement in so far as it applies to tradition. It is not true as it concerns law. The Puritans in Plymouth and Massachusetts Bay were translating their moral tenets into law at a time when Charles I and his government were still undisputed in their control over England, almost a decade before the ecclesiastical jurisdiction over morals had ceased. One would expect that the common background and teachings of the English and New England Puritans would lead to a very similar legal summation of moral feelings. The teaching of both was the teaching of Moses. One must expect to find, however, a noticeably more conservative legal expression in New England, not only because the laws were the earlier but, too, because the social and cultural background of the New England Fathers was hardly comparable to that which was represented in the English Parliament.

Legal conservatism in the sphere of sexual morality meant, in the early seventeenth century, an adherence to the only forms that had thus far been known in England in the treatment of sex offenders. It meant an adoption of the more obvious proceedings of the medieval ecclesiastical courts. In punishment the laws adopted by the Massachusetts Puritans bear a striking resemblance to those then in force in England. Standing on the pillory was quite like public penance in the market-place. Wearing a placque announcing one's offence was like wearing a sheet or kirtle in the ecclesiastical cases: both were conventional badges of the sin committed. Fines were so closely adopted from commutation of penance that the sum in the ordinary cases was identical—20 shillings. And, even more apparently similar, there grew up in New England a form of public confession of sin in open congregation that differed nothing from the confession in the English parish church.

The Massachusetts Puritans by no means intended to reconstruct in their new country the forms of the very practices which in England had aroused their hatred. They intended rather to go back to the beginning and adopt their institutions from God.[1] "God gave to Adam," Cotton Mather said, "a law of universal obedience written in his heart. . . . This law, so written in the heart, continued to be a perfect rule of righteousness after the fall of man, and was delivered by God on Mount Sinai."[2] The Hebrew law of procedure had expired, of course, with the Israelite state. When the Court of Assistants of Massachusetts Bay first met, in Charlestown, on 23rd August 1630, they recognized that in civil proceedings equity, according to the circumstances of the case, would have to be their determining rule. They had no authorities to consult other than their own reason and understanding.[3]

In punishing offences, however, they professed to be governed by the judicial law of Moses in so far as those were of a moral nature. The word of God as expressed in the Old and New Testaments they conceived to be a sufficient rule of conduct and one which they were obliged to follow.[4] In framing their punishments they would often, indeed, give the citation of the Scriptural passage on which their law was founded. Their appointed punishments were harsh, not only because they adopted the code of a society then 2000 years dead, but because they chose to regard an act not merely as criminal in proportion to the needs of social safety but as sinful in relation to the offender's soul.[5]

With the sex offences the task of law-making was easy. The Massachusetts Puritans had merely to copy the punishments established in the Old Testament. On 6th September 1631 the question of making adultery punishable was propounded to the Court of Assistants. On 18th October the court ordered, "If any man shall have carnal copulation with another man's wife, they both shall be punished

[1] G. B. Ellis, c. 3, "The Biblical Commonwealth."
[2] Mather, Bk. V, part I, c. 19.
[3] Hutchinson, I, 433.
[4] *Ibid.*, I, 434, 437.
[5] *Ibid.*, I, 439 f.

by death." [1] In this the court was but following the law of Leviticus and Deuteronomy. So too it was with the adoption of the Levitical law concerning bestiality and sodomy.[2] In the former we see a survival of the Hebrew custom of ritual purity: not only the man but the beast as well was to be slain, then buried, and its flesh not eaten.

As to the act of fornication, however, the Mosaic law caused difficulty. The New England social practices did not lend themselves to the reparation enjoined in Exodus xxii. 16, 17.[3] In absence of an appropriate solution from on High, there was a debate as to whether fine or corporal punishment was to be inflicted for fornication.[4] The debate was resolved to the satisfaction of both sides in 1642: "If any man Commit Fornication with any single Woman, they shall be punished, either by enjoyning Marriage, or Fine, or Corporal punishment, or all, or any of these, as the Judges of the Court that hath Cognizance of the Cause shall appoint." [5]

The court had not waited, however, until the enactment of these laws to put into force the Puritan teachings as to sex expression. The law of adultery, in fact, grew out of a sentence of whipping to which the court had condemned a man for enticing an Indian squaw to lie with him.[6] Both the squaw and her Indian mate were present at the execution and were "very well satisfied." [7] And before the delayed enactment of the penalty for fornication there had already been several sentences of fine and whipping. In awarding such extra-legal punishment the court was following its informal interpretation and amendment of Mosaic law.

The right of the court to impose punishment without statutory authority was the subject of heated controversy between the magistrates and the deputies. In 1646 the elders were called in as arbitrators. One of the questions

[1] *Massachusetts, Records*, I, 91 f.
[2] Ibid., *Laws and Liberties*, 24 f. Similarly Plymouth, *General Laws*, 10.
[3] See *supra*, p. 12. [4] Hutchinson, I, 445 note.
[5] *Massachusetts, Records*, II, 21 f.; *Laws and Liberties*, 54.
[6] Ibid., *Records*, I, 91; *Assistants*, II, 19.
[7] Winthrop, I, 260 f.

submitted to them was whether the magistrates "in cases where there is noe particular expresse lawe provided, were to be guided by the word of God till the generall courte give particular rules in such cases?"[1] To this the elders, with caution and yet decision, made answer:

> Wee do not find by the patent they are expressly directed to proceed according to the word of God, but we understand that by a law or liberte of the country they may act in cases wherein as yet there is no expresse law, soe that in such acts they proceed according to the word of God.[2]

Notwithstanding these large discretionary powers of the court, the punishment of the minor sex offences became mostly standardized. For a mere suspicion of incontinency, or for "keeping company," the suspected offenders might be let off with an admonition "to take heede" or with an injunction to forgo further association.[3] The actual conviction of simple fornication usually led to a sentence of whipping or fine. The early cases made no specification as to the amount of whipping. Thus

> It is ordered, that Robt Huitt & Mary Ridge shalbe whipt for committing fornicacon together, of w^ch they are convicted.[4]
>
> It was ordered, that Katherine Gray shalbe whipt for her filthy & vnchast behavr w^th Thomas Elkyn.[5]

Sometimes, however, the sentence provided for the culprit "to bee severely whiped"[6] or to have a prescribed amount and quality of whipping—"20 stripes sharply layd on."[7] The fact that the offender was a woman did not mitigate the chastisement. To accompany the corporal punishment a bond was occasionally required that the culprit would be in the future of good behaviour.[8]

[1] G. B. Ellis, 176 f.
[2] *Massachusetts, Records*, I, 219, 235 (Warren and Bolen); I, 245 (Connah).
[3] Ibid., *Records*, I, 100; *Assistants*, II, 30.
[4] *Massachusetts, Records*, I, 123; *Assistants*, II, 48. See similarly *Records*, I, 297; *Assistants*, II, 93 (Bennet).
[5] *Massachusetts, Records*, I, 246; *Assistants*, II, 79 (Bickenstaffe and Burwoode); *Records*, I, 287; *Assistants*, II, 92 (Pope); *Records*, I, 287; *Assistants*, II, 93 (Rugg).
[6] *Massachusetts, Records*, I, 184; *Assistants*, II, 64 (Robinson).
[7] *Assistants*, II, 32 (Fosscocq).

The fine assessed upon conviction of simple fornication was almost invariably 10 shillings.[1] In the early cases it made no difference in the amount of fine whether or not the parties had intermarried since their act of incontinence; most of the cases, in fact, concerned antenuptial acts of persons already married at the time of prosecution. In cases of aggravated incontinence, accompanied by false pretences in the nature of seduction or inconveniencing important persons, the fine might, however, be far more severe.

> It is ordered, that John Lee, shalbe whipt & fyned XL[s] . . . for abuseing a mayde of the Govrs, pretending love in the way of marriage, when himselfe professes hee intended none; as also for intiseing her to goe with him into the cornefeild, etc.[2]

If the fine was too heavy, the court might in part remit it.[3]

No punishment for fornication was authorized by any Massachusetts law in the seventeenth century except fine, whipping, or injunction to marry. Yet with regularity and frequency the courts of Massachusetts Bay imposed another sort of punishment. Expressed in different outward requirements, these penalties are of a type because they are all characterized by public ignominy. The colonists could not have adopted such unauthorized punishments on the basis of Scriptural dictate. They adopted them, in fact, from the punishments with which they were familiar in England. They put into practice in New England the evidences of the very powers from which they had sought escape in leaving England. They set up in a Puritan community the system of public penance which was an integral part of the procedure of Catholic and Anglican Church courts.

The forms in which sex offenders were condemned publicly to acknowledge their sin were various. Sometimes the sinners were merely exhibited in the public

[1] E.g., Andrews, II, 60 (Galley), 87 (Jones), 121 (Hall), 130 (Wilson).
[2] Massachusetts, *Records*, I, 131 f. See also Andrews, II, 60 (Gyles).
[3] Massachusetts, *Records*, I, 139.

market, and the populace was left to its own knowledge and inquiry as to what their offence had been.

George Palmer having committed folly w^th^ Margery Rugg, through her allurement, because hee confessed volentarily, hee was onely set in the stocks, & so dismissed./[1]

Will: James, being presented for incontinency, knowing his wife before marriage, was sentenced to bee set in the billboes at Boston, the 5th, in the afternoone, & in the stocks at Salem vpon the next Courte day. . . ./[2]

This form of confinement in the stocks, it may be urged, was only a substitute for imprisonment. It is true that imprisonment was, in the early Colonies, an almost impossible form of extended punishment. To maintain a prison adequately for habitation in a severe climate would have been unduly burdensome on a small community. Thus, though Robert Miller was accused of the capital offence of bestiality, "y^e^ coldnes of y^e^ season approaching, fit was ordered, y^t^ his owne hand should be taken for his appearance."[3]

The idea of public exposure was, however, no invention of the New England Puritans. It was one of the early forms of punishment in England. The pillory had been used before the time of Edward I, and its use had been regulated by statute in 1267.[4] The history of the stocks goes back to the Anglo-Saxons, and their use had been specified by statute as early as the fourteenth century.[5] Hundreds of years before the founding of Massachusetts, confinement in the stocks had been prescribed as a punishment for sexual incontinence.[6]

Detention and public display was, moreover, not intended by the Puritans as mere bodily confinement. Seldom was the public exhibition not accompanied by marks of obvious ignominy. One common addition to the display was a rope or halter about the culprit's neck.

Thomas Owen, for his adulterous practices, was censured to bee sent to the gallos w^th^ a roape about his neck, & to sit upon

[1] Massachusetts, Records, I, 287; Assistants, II, 35.
[2] Massachusetts, Records, I, 193; Assistants, II, 63.
[3] Massachusetts, Records, III, 79.
[4] 51 Henry III.
[5] Encyclopædia Britannica, 14th ed., art. "Stocks."
[6] See supra, p. 128.

the luther an houre, the ropes end throwen over the galles, so to returne to prison./[1]

Undifferentiated ignominy was not, however, what the Puritan punishments sought to effect. Open display of the culprit would serve of itself in a small and integrated community to announce the offence committed; it would itself constitute a public confession. As the community grew, not every one would know the nature of his neighbour's violations. To make the punishment equivalent to a public confession, some sort of advertisement became necessary. This was effected with increasing frequency in Massachusetts in three main ways, by a plaque, by oral announcement, by a distinguishing mark on the clothing.

Thomas Scot, & his wife for committing fornication before marriage, were enjoyned to stand an hore vpon the 16th present, in the market place, with each of them a paper with great letters, on their backs.[2]

In this too the Massachusetts judges were but borrowing a familiar English practice. The sixteenth century had already given evidences of such punishments being awarded in England for sins of incontinence.[3] In an ecclesiastical court in Essex in 1572 Nicholas Sutton had been ordered to stand in the market-place of Brentwood in a white sheet when the people were most there, "with a paper uppon his hed & the detection written in the same."[4]

Oral announcement of carnal sin was rare in the earlier records. Henry Leake and his wife, convicted of fornication, were sentenced to appear on the next lecture day at Dorchester and after the lecture openly to acknowledge their faults.[5] It was more largely in the early eighteenth century that this custom of oral public confession became widespread, and we shall reserve its discussion.

The frequent and accepted mode of confessing sexual offences in the seventeenth century was by a distinctive mark on the culprit's clothing which would make clear to

[1] Massachusetts, *Records*, I, 331; *Assistants*, II, 108. See also *Assistants*, II, 121 (Ostick).
[2] See *supra*, p. 103.
[3] Hale, no. 464.
[4] *Assistants*, II, 124.
[5] *Assistants*, II, 151.

any passer-by the nature of his transgression. The first mention of such a mark as a punishment for a sexual offence in Massachusetts was early in the year 1639.

John Davies, for grosse offenses in attempting lewdnes w^th diuers weomen, was censured to bee seuerely whiped, both heere & at Ipswich, & to weare the letter V^L vpon his breast vpon his vppermost garment vntil the Courte do discharge him.[1]

This badge he wore for six months.[2]

Which brings us to the "Scarlet Letter." Hawthorne laid the scene of his novel in Boston about 1630. At that time adultery appeared, as it appeared for 40-odd years longer, on the list of capital crimes. There was no provision in the law of Massachusetts for the badge of sin. Evidently becoming aware of this anachronism during the progress of his work, Hawthorne sought to correct the misimpression by putting these words into the mouth of a townsman speaking in the market-place about adultery: "The penalty thereof is death. But in their great mercy and tenderness of heart, they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life, to wear a mark of shame upon her bosom."[3]

Though Hawthorne had never seen, as he later averred, the record of any such punishment for adultery in Boston at so early a period, the story is yet possible. The law of Massachusetts concerning adultery was unduly stern in comparison with that of neighbouring colonies. In Plymouth, for instance, adultery was never punishable by death. Upon the list of capital offences in the Plymouth Colony Records the word "Adultery" was written and then crossed out. By a statute of 1658 the punishment for adultery was to be a severe whipping on two several occasions and the wearing of two capital letters, "AD," sewed conspicuously on the outer garments.[4] Preceding this formal

[1] Massachusetts, *Records*, I, 248; Anderson, II, 81.
[2] Massachusetts, *Records*, I, 269; Anderson, II, 87.
[3] A. M. Davis, 2-3.
[4] Plymouth, *General Laws*, 21 f.

enactment by almost 20 years there were in Plymouth, however, two cases wherein persons convicted of adultery had been condemned to be whipped and to wear on their garments a badge of their crime.[1] The custom in Plymouth, therefore, long preceded the statute. This law of Plymouth was copied in New Hampshire in 1679–80.[2]

Rhode Island was more humane, prescribing neither death nor the scarlet letter. The punishment was, nevertheless, ignominious: besides a severe public whipping, the adulterer was to be "publickly set on the Gallows in the Day Time, with a Rope about his or her Neck, for the Space of One Hour."[3] The laws of Pennsylvania, Delaware, and Virginia were still more lenient.[4]

The comparative clemency of the laws of other American colonies shows that the Puritan attitude did not wholly support the rigour of the Scriptural punishment for adultery. Massachusetts found early a considerable difficulty in enforcing the death penalty.[5] In 1637 John Hathaway and Robert Allen were indicted for adultery with Margaret Scale. Hathaway was convicted; Allen and the woman confessed.[6] Though the law concerning adultery had actually been enacted seven years before, a discussion arose as to whether the law was in force. After long delay the elders were appealed to as to what was the law concerning adultery. They answered Delphicly that, if the law had been sufficiently published, the penalty was death. Because of the question, the court thought it safest not to inflict the capital penalty. Instead, the three adulterers were ordered to be severely whipped and to be banished, never to return on pain of death.[7] The law of 1631 was thereupon confirmed and published.[8]

Having thus confirmed and publicly promulgated the death penalty for adultery, the court could not but enforce it. Three persons in Massachusetts Bay were sentenced

[1] Plymouth, *Records*, I, 151, II, 28.
[2] Acts of Rhode Island: Howard, II, 173.
[3] Howard, II, 383 f., 510, note 6; 256.
[4] Massachusetts, *Records*, I, 198, note 1; Annotation, II, 66, 70.
[5] Winthrop, I, 273; Massachusetts, *Records*, I, 225.
[6] Massachusetts, *Records*, I, 92, 225, 301.
[7] Howard, II, 172.
[8] Winthrop, I, 73, note.

under the law and paid its penalty. The story of the first is told by Cotton Mather.

> There was a miserable man at Weymouth, who fell into very ungodly practice. . . . This man lived in abominable adulteries; but God at length smote him with a palsie. His dead palsie was accompanied with a quick conscience which compelled him to confess his crimes. . . .
>
> By the law of this country, adultery was then a capital transgression, as it has been in many other countries: and this poor adulterer could not escape the punishment which the law provided.[1]

The other case is of greater importance. It paints a strangely colourful picture on the drab Puritan background. Psychologically interesting, it would seem from the long narration given it by Governor Winthrop in his diary that the case was also of considerable social and legal importance. The official record tells nothing but the bare statement of conviction and sentence.[2] Winthrop relates:

> "Britton had been a professor in England but coming hither he opposed our church government, etc., and grew dissolute, losing both power and profession of godliness." Mary Latham, a girl of eighteen and well brought up, having been rejected by a young man whom she loved, vowed to marry the next man who came to her. Against her friends' advice, she therefore married "an ancient man who had neither honesty nor ability, and one whom she had no affection unto." They did not get on together. Divers young men solicited her chastity and drew her into bad company. At a party at Britton's house there was much drinking, and late at night Britton and the woman were seen on the ground together. Upon examination she confessed to an attempt but not to the commission of the act of adultery. Some of the magistrates thought the evidence not sufficient, because there were not two direct witnesses. "But the jury cast her and then she confessed the fact." She "proved very penitent, and had deep apprehension of the foulness of her sin, and at length attained to hope of pardon by the blood of Christ." Britton was not so much cast down. He petitioned the General Court for his life, and though some of the magistrates questioned the death penalty for adultery, the petition was denied. They were both executed, the woman at her end exhorting all young maids to be obedient to their parents.[3]

[1] Mather, Bk. VI, c. V, spp. (vol. II, 407).
[2] Assistants, II, 139. [3] Winthrop, II, 150 f.

The severity of the Puritan law of adultery in Massachusetts did not have to stand the test that the Puritan law had to stand in England. In England by no means all the people had Dissenters' consciences. Juries were not made up of persons of stern moral belief. To the extent that the laws of sexual morality enacted by a Roundhead Parliament did not harmonize with popular conceptions, juries could make the laws inoperative. In New England in this early period the temper of the juror was the temper of the legislator. Nevertheless, the law prescribing death for adultery was not easy of enforcement. As the magistrates questioned the law in Britton's case, so they continued more and more to question it. In two ways the courts evaded the severity of the law. They would find an insufficiency of evidence to convict.[1] Or, while they acquitted the accused of the capital charge, they would yet inflict punishment for immoral conduct.

The Corte acquit Elias: Pinnion of the capitall offence charged upon her by 2 sev^rall inditments for adultery, but agree that shee be severely whiped for her evill & adulterous behavio^r & swearing, appearing by so many testimonies, first to be whiped at Boston, & again at Linn. . . .[2]

This difficulty of the over-severe penalty for adultery in Massachusetts was remedied after the fall of the Colonial Charter. In 1694 a statute enacted provisions similar to those in force in Plymouth. Adultery was henceforth to be punished by public display—sitting upon the gallows with a rope round the neck, the end of which is thrown over the gallows—by a severe whipping up to 40 stripes, and by perpetually wearing in open view thereafter a two-inch capital A of conspicuous colour. To be found without the letter at any time subjected the offender to further whipping.[3]

Even a sentence to lifelong ignominy was a stern penalty. There are at least five cases on record during

[1] Massachusetts, *Records*, IV, pt. 1, 211 f.
[2] *Ibid.*, II, 249; III, 127. Shurtleff Arrowsmith, I, 251.
[3] Massachusetts, *Acts & Resolves*, 1692-93, c. 3, s. 2.

the eighteenth century wherein the sentence to wear the capital A was carried out.[1] More often, however, juries were reluctant to give a verdict for the extreme offence. In such cases, regardless of the strength and clearness of the evidence, conviction was had only under a less burdensome clause of the same adultery law of 1694. Thereunder a man and a woman who was married to another man, found in bed together, were each subject to a severe whipping of 30 stripes, but to no other or continuing punishment.

In actions for minor incontinence, unlike adultery, there was no difficulty as to convictions. The laws as to fornication and lewdness were actively enforced throughout the whole colonial and provincial period. During the first 17 years of the colony of Massachusetts, 26 persons were tried for fornication, and 16 were convicted, sentenced. Twelve others were convicted of various forms of lewdness, seduction, and bestiality.[2] Convictions increased in regular ratio to the increase in the colony's population. The same was true of Plymouth. Whereas, by Professor Howard's count, there were 24 sentences for antenuptial incontinence during the 28 years from 1633 to 1661, for the 17 years following 1661 there were no less than 41 such judgments.[3] The manuscript records of Suffolk County, Massachusetts, from 1671 to 1680, show the trial of 63 persons for premarital intercourse. From 1702 to 1715 there were in the same county 196 such convictions.[4] Even more striking are the figures from the adjoining County of Middlesex. From 1692 to 1725 there were 290 cases of antenuptial incontinence; from 1726 to 1780 there were 714 cases.[5]

. . . . . .

A large number of trials and convictions of moral breaches is evidence of effective legal machinery. It is

[1] Howard, II, 171 f. [4] By the author's count from printed records.
[2] Howard, II, 186. The early records of prosecutions for sex offenses in Plymouth Colony are too sketchy to cite at length. See, for instance, Plymouth, *Records*, I, 12, 64, 63, 93, 127, 132, 162, 164; II, 28, 33, 36, 37, 54, 83, 96, 109, 114, 133, 137, 138, 163, 165, 170, 172, 174; III, 5, 6, 22, 36, 42, 47, 71, 82, 91, 97, 111, 122, 139, 210, 222, 223.
[3] Howard, II, 287, 291. [5] Ibid., 193 f.

even more clearly evidence of divergent social practice. Without violations of the legal code there can be no prosecutions. In colonial New England the violations were numerous. Notwithstanding the efficiency of law-enforcement, notwithstanding the colonists' unity of professed Puritanism, the standards of sexual morality were not high.[1] Lord Dartmouth, for instance, when Secretary for the Colonies in charge of American affairs, in one of his conversations with Governor Hutchinson referred to the commonness of illegitimate offspring among the young people of New England as a fact of accepted notoriety. Hutchinson, than whom none was better informed as to matters relating to New England, did not controvert the proposition.[2]

In an objective study of sex practices of another period it is difficult to judge of the actual moral tone on the basis of contemporary criticisms. The criticisms are of value only in relation to the standards of the critics. The New England critics who expressed themselves in writings that are still preserved were Puritans with Puritan standards. It is interesting to note that a law of Plymouth speaks of fornication as "the prevailing Evil."[3] It is interesting to know that the ministers of the gospel meeting in Boston in 1694 and 1696 thought sexual conditions so bad that they presented petitions to the Governor and General Court for action against immorality. It is interesting that the General Court considered the ministers' memorials sufficiently accurate to warrant the appointment of a committee to prepare bills against immorality.[4] But such evidence is of less value than the information which comes not from criticism but from action.

From even a casual survey of prosecutions it is obvious in early Massachusetts that sexual expression was not being effectively suppressed. More effectively to attain this

[1] Howard, II, 185.

[2] *Adams*, 296 f. See also Calhoun, I, c. 3, "Sex Sin and Family Failure in Colonial New England." As to New York and Southern colonies, see *ibid.*, I, n. 8, c. 12.

[3] Plymouth, *General Laws*, 23.

[4] Massachusetts, *Acts & Resolves*, VII, 154 f., 357 ff.

suppression, the legislature would experiment with new laws, new punishments. The Massachusetts General Court, recognizing that fornication is "a shameful Sin, much increasing amongst us," tried the severe expedient of adding disenfranchisement to the other punishment of a freeman convicted of the offence.[1] For sex offences free citizens were actually committed into slavery.[2]

The increase of sexual immorality thus recognized may be attributed to three causes which, though having counterparts in other societies, developed out of the peculiar geographical and moral conditions of the American Colonies. New settlements in places difficult of accessibility and of living conditions are generally sought by the more hardy and adventurous in an attempt to better their condition. They do not immediately bring with them the dependent members of their families. These they may intend to return to or, later, to bring over to the new home when they are successfully established. That this was the situation in Massachusetts, and that this situation created difficulties in the maintenance of standards of sexual morality, is apparent from the statute which it was found necessary early to enact.

> Whereas drvs married psons, both men & wemen, living w^ch in y^r Iurisdiction, whose wifes & husbands are in England or elsw^r, by means w^ch of they live vnd^r great temptations, & some of y^m comit leodines & filthines here amongst us, & othe^r make love to wemen . . . some of y^m live vnd^r suspition of vncleanes, & all of y^m great dishonor to God, reproach to religion, common wealth, & churches, it is y^fore ordred . . . y^t all such married psons as aforesaid shall repair to their relations, by y^e first oportunity of shiping, upon y^r paine or penalty of xx^li, except they can shew just cause to y^e contrary. . . .[3]

The strict precautions taken by the Puritans against social intercourse between the unattached of the opposite sexes led to two foreseeable consequences. The one was an exaggerated amount of homosexual expression. Though historians do not comment upon the fact, the early records

[1] *Massachusetts, Laws and Liberties*, 34 f.
[2] Ibid., *Records*, I, 269; Andrews, II, 86 (Camps).
[3] *Massachusetts, Records*, II, 211 f.

of Plymouth Colony show that of the prosecutions for all sex offences, between one-fifth and one-fourth were for various homosexual practices. When one considers the comparative difficulty of discovering sexual intimacy between members of the same sex, this proportion of court actions is a large one. In Massachusetts Bay, except for the few cases of actual sodomy, the records are not so revealing. But numerous are the records of "defiling," of "uncleanness," of "unclean practices," and the like, which may well have been a euphemistic expression of varieties of homosexuality.

The other and more widely recognized result of the Puritan attitude toward sexual expression was bundling. Bundling consisted in two persons of opposite sex, generally completely dressed, occupying the same bed.[1] It was of two sorts: between strangers and between lovers. The first sort was a simple domestic makeshift arising from the necessities of a new country. Where a married couple boasted but one bed, it was a mark of hospitality for the host to allow the visitor, male or female, to use his half of the bed while the host himself slept on the floor. This form of bundling was by no means peculiar to America.

The other expression of bundling, between lovers, was engaged in upon the mutual understanding that innocent endearments should not be exceeded. This form, too, developed originally from limitations of wealth and convenience. To utilize the bed-covering was to save firewood and candle-light.

Bundling was dangerous not to the extent to which it was practised but to the extent to which it was exceeded. It was recognized as an encouragement to further expressions of sex. Even in the earliest colonial records there appear attempts to stamp out the custom. Long before the statute of 1694, which provided punishment for a man being found in bed with another man's wife, there had been prosecutions for such undue intimacy. Governor Winthrop narrates at length one such case of adulterous

[1] For discussion of bundling see Stiles; Adams, 303–310; Calhoun, I, 239–241.

conduct.[1] As between unmarried persons the records contain numerous entries of various forms of lewdness short of actual incontinence. The practice continued nevertheless to develop. It was not limited to those who must needs have exercised economy; it became a recognized concomitant of courtship. In becoming so recognized its bounds were more often transgressed.[2]

Unconsciously the immorality resulting from handling was fostered by the Puritan laws of marriage. "Steeped to the core in Hebraism," the Puritans had adopted throughout New England the custom of pre-contract, of formal betrothal. The consequences of this contract concern us rather than its formalities. Under the system of pre-contract the betrothed woman was put, by law and by social custom, in a position midway between that of a single woman and a married woman. In three of the New England Colonies sexual intercourse of an espoused woman with another man was punishable not as fornication but as adultery. The betrothed couple, like the married couple, was recognized as a unit apart, not to be violated by outsiders without serious consequences. But within the unit, as within the family, greater intimacy was allowed. A couple guilty of incontinence with each other after betrothal was punished generally only half as severely as an uncontracted couple for the same offence. Such was the law in Plymouth, such the practice in Massachusetts Bay.[3] Professor Howard has adduced adequate figures to show that the milder punishment of incontinence among betrothed couples was, in effect, a premium upon wrong-doing committed between espousals and nuptials. The immorality of such offences seemed lessened; the exceeding of the limits of handling was more frequent; the control of sex expression presented an ever-increasing problem for law and administration.

. . . . . .

New England Puritanism was not dependent on the law alone, however, for the enforcement of its tenets of sexual

[1] Winthrop, II, 244 f. [2] Stiles, 76 ff. [3] Howard, II, 180 f., 185 ff.

morality. It had a weapon stronger in some ways than the law: that was the Church. In the provincial period "the whole social and intellectual as well as the religious life of the Massachusetts towns not only centred about the church, but was concentrated in it. The church was practically a club as well as a religious organization. An inhabitant of the town excluded from it or under its ban became an outcast and a pariah." [1] Even the franchise depended upon church membership.[2]

Because any share in the life of the community was dependent upon the acceptance of the church, because a change of community was attended with great physical difficulties in a sparsely settled and sparsely built country, the church had a profound hold upon the members of the community and a profound influence over their acts. Exclusion from the church in provincial New England was almost as serious in social consequences as was excommunication among the early Christians or as outlawry among the early English.[3] Without the authority of law, then, the dictates of the church were almost as binding as the dictates of the government.

Even recognizing this social hold of the church, it is difficult to understand the following note in the diary of Chief Justice Sewall:

1716. "Sept^r. 9. Lord's Day, Mr. Greenwood preached very well. Afternoon call'd William Brown and Elizabeth his wife to present themselves. They stood in the Fore-Ally and were admitted, Confessing their Sin of Fornication. Samuel Peck baptised." [4]

It is obvious that these proceedings took place in church on Sunday. The situation is made more clear by the Records of the First Church of Quincy (then the Braintree North Precinct Church), which contain the following notes among numerous others of a similar character.

[1] Adams, 480 f. For the facts in the following pages, for which there is no other citation, I am indebted to this paper. [2] G. E. Ellis, c. 6.

[3] A law in force for a short time in Massachusetts provided civil punishments for a person under continued ban of the church. G. E. Ellis, 212.

[4] Sewall, III, 102.

August 6, 1732. Ebenezer H—— and wife made their confession of the sin of fornication.

July 2, 1732. Abigail, wife of Joseph C——, made a confession of the sin of fornication, which was well accepted by the Church. . . .

January 21, 1728. Joseph P—— and Lydia his wife made a confession before the Church which was well accepted for the sin of Fornication committed with each other before marriage.

March 10, 1722/3. Joseph, a negro man, and Tabitha his wife made public confession of the sin of fornication, committed each with the other before marriage, and desired to have the ordinance of Baptism administered to them.

The procedure of such confession was not as simple as it appears from such notes. Nor was the punishment as light. The confession was as elaborate as public confession under the English ecclesiastical law; the penance prescribed was even more arduous. In the records of the same church in 1683 is found a more full account.

Temperance, the daughter of Brother F——, now the wife of John B——, having been guilty of the sin of Fornication with him that is now her husband, was called forth in the open Congregation and presented a paper containing a full acknowledgment of her great sin and wickedness,—publickly bewayled her disobedience to her parents, pride, unprofitableness under the means of grace, as the cause that might provoke God to punish her with sin, and warning all to take heed of such sins, begging the Church's prayers, that God would humble her, and give her a sound repentance, &c. Which confession being read, after some debate, the brethern did generally if not unanimously judge that she ought to be admonished; and accordingly she was solemnly admonished of her great sin, which was spread before her in divers particulars, and charged to search her own heart wayes and to make thorough work of her Repentance, &c. from which she was released by the church vote unanimously on April 11th 1698.

Here was a formal trial of a woman who had confessed to a sin of sex, a trial not carried on by special and detached judges in a private court-room but in open congregation by the neighbours and acquaintances. Sentence was passed and punishment enacted over a period of 15 years. The penance thus assessed for simple fornication was longer than any under the canon law, and that although

the woman had married her fellow-sinner and so satisfied the dictates of Scriptural law.

Considering the severity of the punishment and the informality of the proceeding, it becomes pertinent to inquire how the church could come into possession of the facts leading to such trial. In some cases the proof on which conviction was had was obtained solely by the spying of neighbours. With no provocation other than curiosity, animosity, or the dictates of conscience, an entire stranger to the situation could make an accusation.

September 8, 1735. Before the meeting was adjourned Benjamin Web acquainted the brethern with some scandalous reports he had heard of Elisabeth Morse, a member of this Church, when it was unanimously voted to be the duty of this Church to choose a Committee to examine into the truth of them and make a report to the Church. . . .

Memorandum. At the adjournment of the Church meeting September the 19th 1735, Mr. Moses Belcher and Mr. Joseph Neal, two of the committee chosen Sept. the 8th, made report to the brethern, that they had been with Elizabeth Morse, and that she had owned to them she had been delivered of two bastard children . . . and she promised to them to come and make the Church satisfaction for her great offence the latter end of October.

At a church meeting, November 10th 1735, the case of Elisabeth Morse came under consideration. And she having neglected to come and make satisfaction for her offence according to her promise, though she was in Town at that time, the brethern proceeded and unanimously voted her suspension from the communion of this church. And it was likewise unanimously voted that the Pastor should admonish her in the name of the Church in a letter for her great offence.

By no means a large proportion of the confessions and penances in New England churches developed, however, from neighbourly spying. In a case of bastardy like that of Elizabeth Morse the community would be aware of the offence in a way that it could not be aware of simple incontinence. The confessions, instead, were largely voluntary. The reason for voluntary confession is shown by a record from the Church of Groton (Massachusetts).

June 1, 1765. The church then voted with regard to Baptizing children of persons newly married, That those parents that have not a child till seven yearly months after Marriage are subjects of our Christian Charity, and . . . shall have the privilege of Baptism for their Infants without being questioned as to their Honesty.

Baptism was, of course, considered essential to salvation. Quite as the medieval Christians feared the lack of baptism to mean consignment to a Dantesque hell, so did the New England Puritans fear it as a passport to a Calvinistic hell.

Infant damnation was a prospect constantly held up before the sexual transgressor. Taking advantage of this fear, certain ministers would carry the refusal to baptize to a ludicrous extent. It was an old superstition that children born on the Sabbath had been conceived on the Sabbath. Because sexual indulgence on the seventh day was forbidden by Christian law,[1] a birth on Sunday was an omen of sin, a ground to refuse to baptize the child.

In the present state of biological knowledge it is difficult to realize how many were the children conceived in the eighteenth century from premarital intercourse and, consequently, how many were the confessions of sin resulting from fear of non-baptism. Of the 200 persons owning the baptismal covenant in the Groton Church during the 14 years from 1761–1771, no less than 66 confessed to fornication before marriage. One-third of the baptisms were preceded by confessions to sexual incontinence!

Where no conception resulted from illicit intercourse, there were also some confessions. As to those it is necessary to understand the strange moral and physical phenomena that the mid-eighteenth century witnessed in Massachusetts. In 1735 Jonathan Edwards engineered the famous Northampton revival. In 1740 the "Great Awakening," so-called, occurred in Boston when Whitefield preached on the Common to an audience equalling three-fourths of the entire population of the town. "The fervor of excitement showed itself in strong men, as well

[1] See *supra*, p. 64.

as in women, by floods of tears, by outcries, by bodily paroxysms, jumping, falling down and rolling on the ground, regardless of spectators or their clothes."[1] Persons in such mental and physical excitement could not but carry into their other relations of life some morbid reaction.

As in Braintree and Groton, so in other parishes throughout New England, the whole community was in a sensitive condition morally and spiritually. The contagion extended to all classes. Members of the oldest families, alongside Negroes and servants, would get up grotesquely before the congregation to make confession of moral lapses. It need not be said that a state of such unwholesome spiritual excitement would be an inducement to public confessions of an unusual character. Women, young women in particular, would be inclined to brood over things unknown save to them and their partner participant, and would think to find in confession a means to escape from that torment in the hereafter, concerning which they entertained no doubts.

The situation reminds one of the early Christians who, in a similar atmosphere of rigid asceticism 15 centuries earlier, had sought release from the infirmities of the flesh in other forms of self-immolation.

[1] Elliot, *New England History*: Adams, 301.

CHAPTER XIII

IN AMERICA TO-DAY

The laws of the colonial Puritans as to sex expression are, according to the statute books, the law of America to-day. Alteration in form of punishment is practically the only change from the earliest laws to the existing law. Diversity exists between the States because diversity existed between the Colonies: the newer States copied and adopted the legislation of their older neighbours by whose peoples they were in large part settled.

In Massachusetts, for instance, the law of adultery, enacted by the province in 1694, was substantially re-enacted by the Commonwealth in 1784.[1] The adulterer was to sit upon the gallows with a rope about his neck, was to be publicly whipped, and might besides be fined or imprisoned.[2] The punishment was again changed in 1835 to three years in prison, two in gaol, or fine not exceeding $500.[3] So the law stands to-day.[4] The scarlet letter has disappeared, the gallows and whipping-post have become antiquated; but the old social attitude remains crystallized in law, and any infringement upon it is punishable with corresponding vigour.

The history of the Massachusetts law of fornication is similar. Punishment of whipping has been changed to punishment by imprisonment. Punishment by fine remains, with the amount of fine unaltered, as it was enacted in 1692-93.[5] But in two ways the law as to fornication has been made even more stern. The punishment for simple fornication was thought mild for aggravated or long-continued offences. When one considers the decrease in purchasing power of money, the penalty by fine did become lighter. To remedy this lenience, serious breaches of continence, though not amounting to adultery, were made

[1] The law was amended in 1761-63.
[2] Massachusetts, *Laws & Resolves*, 1784, c. 40.
[3] Ibid., *Revised Statutes*, 1835, c. 130, s. 1.
[4] Ibid., *General Laws*, 1921, c. 272, s. 14.
[5] Ibid., *Laws*, 1692-93, p. 18; *Acts*, 1786, c. 27, or *Laws & Resolves*, 1785, c. 66, s. 1; *General Laws*, 1921, c. 272, s. 18.

punishable in 1785 with almost the same penalties as adultery.[1] Continuing to to-day, the law punishes with the severity of adultery any "open and gross lewdness and lascivious behaviour" and any lewd and lascivious cohabitation of a man and woman not married to each other.[2]

The other and recent alteration in the Massachusetts law of fornication is, in theory, an expression of the new reformative spirit of punishment. To the offender herself, however, it must seem like a mere eight-fold extension of the period of imprisonment. Though imprisonment for fornication may be only three months, if the court sentences such an offending woman to the Reformatory for Women, the sentence may be for an indeterminate period up to two years. "It is left to the court to determine on the evidence in each case whether the purely punitive sentence for a specified period, or the indefinite sentence with a reformative purpose, even though invoking longer restraint, is better for the common welfare."[3]

In some States the rigid Puritan laws of sex still persist as they persist in Massachusetts. In California, Connecticut, and Maine, for instance, the punishment for adultery may be as much as five years' imprisonment. In Maryland, on the other hand, the maximum possible punishment for the same offence is a fine of $10. In two States, Louisiana and Tennessee, there is no provision whatsoever for the punishment of adultery; in 18 other States a single act of adultery is not itself a criminal offence, but only habitual incontinent expression.[4]

This lack of uniformity in State laws regulating adultery may, of course, lead to absurd results. Many cities lie across the boundaries of two States where the laws may be widely at variance. In the town of Cardiff, which lies partly in Maryland and partly in Pennsylvania, if a person commits adultery on one side of the street he may be

[1] Massachusetts, *Acts*, 1785, c. 8, or *Laws & Resolves*, 1784-85, c. 40.
[2] Ibid., *General Laws*, 1921, c. 272, s. 16.
[3] Platt v. Commonwealth, 238 Mass. 339 (1921).
[4] American Social Hygiene Association, *Legislative Manual*, charts, pp. 40 ff.; Hoolsat; Worthington, *Social Hygiene*, VI, 365.

punished by no more than a fine of $10, whereas if he commits the same act under the same circumstances on the other side of the street he may be fined $500 or be incarcerated in gaol for a year.[1] In which case the side of the street may become of greater importance than the quality of the act.

The laws relating to fornication, moreover, where the direct interest of no third person is at stake, show an even greater heterogeneity. In 20 States habitual fornication is a crime in the nature of the Massachusetts offence of "lewd and lascivious cohabitation." In 16 other States, the District of Columbia, and Hawaii, a single private act of voluntary sexual commerce between unmarried persons is a criminal offence. The penalties vary widely, from a trifling fine of $10 in some States to a fine of $500 and a year's imprisonment in others. This accounts for 36 States. In the remaining 12 States unmarried persons may engage in any normal act of sexual intimacy, occasionally or habitually, without regard to the criminal law.[2]

The Puritan tradition, as it expresses itself in the laws concerning voluntary sexual conduct, persists in about three-fourths of the American States. That such tradition has not permeated further, that the statutes express no firm consensus of opinion as regards a standardization of sexual conduct, is the plaint of many an American reformer.[3] In an integrated Puritan community the legal control of sex expression was merely an evidence of the social control. The laws expressed a social conviction. But the American communities to-day are neither Puritan nor integrated. The influx of a vast and racially confused population has brought a diversity in social background and in sexual practices. The rapid development of urbanization which followed in consequence of the immigration has increased the confusion.

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Although the laws of the twentieth century remain the laws of the seventeenth in expression, there is a vast differ-

[1] Hooker, 116.

[2] American Social Hygiene Association, *Legislative Manual*, charts, pp. 40 ff.; Hooker, 117; Worthington, *Social Hygiene*, VI, 563; Woolston, 189.

[3] E.g., Hooker, 116 f.

ence in administration. Fornication, for instance, has been a punishable offence since the early years of colonization; it is in some form a crime on the statute books of three-fourths of the American States. Nevertheless it is "practically impossible in most jurisdictions to secure the arrest, much less the conviction of persons of mature age guilty of fornication," unless the offence is accompanied by such repetition or openness as to make it notorious.[1]

Failure of enforcement of a social tradition is not to be remedied by the further enactment of positive law. That has been tried. In 1907 New York was one of the four States of the Union which had no statutory provision for the punishment of adultery. Adultery was only a ground for divorce. The National Christian League for the Promotion of Purity urged that divorce was not a deterrent to an offending spouse, that many wives would not bring action because of the disgrace involved. The League succeeded in having enacted a law which it had framed, making adultery punishable by imprisonment not exceeding six months, by fine of not more than $250, or by both.

The result of this new statutory reform of sex control is expressive. During the 18 months after the law became effective, only 48 cases were tried throughout the State. In these, 12 persons were convicted, representing in fact only eight cases, because in four cases there were two defendants. Of the 12 convicted, four were fined from $25 to $250; two were sentenced to 10 days' imprisonment and one to 30 days'. In the remaining five cases, or 41·5 per cent., the sentences were suspended. It had been the ardent belief of the law's proponents that many convictions might be obtained upon evidence submitted in divorce trials, for in New York the sole ground for divorce is adultery. The belief was unwarranted. As in England more than a century earlier, the numerous civil actions for divorce led to no prosecutions for adultery. After the new law had been in force less than three months,

[1] Woolston, 129.

it was recognized as a dead letter. "Not an effective weapon against immorality,"[1] the adultery law leads but rarely to convictions, still more rarely to prison penalties.[2] In the city of New York in 1916 the total number of prosecutions for adultery was 10.[3] In the city during the same year 1305 divorces were granted.[4]

New York, therefore, with a theoretically good adultery law on the statute book, is practically without a law in administration. In New York, one may say, this is somewhat to be expected. The larger the community the less is the social control exerted by neighbours. The more diverse the population racially and ethically, the more difficult becomes the problem of enforcement. In the small, homogeneous towns of North Carolina prosecutions for sex offences are more numerous. In relatively small cities, such as Camden, New Jersey, even with its mixed population, there are as many prosecutions as in the whole of New York City. In Portland, Maine, there are three times as many.[5]

Size and compactness cannot, however, be the measure of effective legal control of sex expression. In cities relatively comparable in population and background, the figures as to prosecutions vary widely. Communities which show a similarity in enforcement of some sex offences show a wide dissimilarity in others. In the Cleveland Municipal Court from January to June 1924, there were 76 arraignments for adultery, 111 for fornication.[6] In Washington and Cincinnati some years earlier there had been 151 cases of adultery and over 1000 for fornication. But at the same time in Atlanta and Savannah, though there were arrests in 70 cases for adultery, there was not a single arrest for fornication.[7] Georgia, like the District of Columbia, has a statute covering fornication, an even more inclusive statute than Ohio. Judging by the arrests for

[1] Committee of Fourteen, 39 f.
[2] Woolston, 129 f.
[3] Department of Commerce, 44. (There are five counties within the city of New York.)
[4] Johnstone *et al.*
[5] *Ibid.*
[6] Spingarn, 8.
[7] Woolston, 129.

adultery, the police in the Georgia cities were as active as the police in Ohio.

The explanation of these divergences in administration is to be found superficially in the habits of the police and the magistracy. Those habits depend upon the larger outlines of criminal law and a practical adaptation of all those laws to the local problems. But they depend even more largely upon the attitude of the community. In England we have seen a change in the social spirit toward laws controlling voluntary sex expression. There the change led to a complete abandonment of enforcement. In America, too, there has been a change in spirit which has left voluntary sex expression almost as completely free from legal control as in England. Whereas the English law itself became obsolete with the obsolescence of ecclesiastical courts, the American laws persist. But their purpose is no longer to regulate strictly private sexual relationships of a non-commercial character. It is to prosecute cases of commercialized vice.

A necessary element in the crime of prostitution is hire, the payment for the sexual act. The prosecution must prove the actual giving and receiving of money. Often this is difficult. A woman known to the police to be a prostitute may be considered a menace to the community morally or physically. If she could be sent to a reformatory, she could be made a less danger at least to the extent of a course of treatment for venereal disease. To effect this end, where the evidence does not show the actual passage of money, the prosecutor may bring a charge of fornication, or, if either party be married, of adultery. As marked an advantage, from an administrative point of view, to prosecution for adultery or fornication where the offence is actually prostitution, is that the man, who may be the real cause of the offence, can be punished as well as the woman.

Prosecution for adultery or fornication may in some States be an unnecessary subterfuge to attain these social ends. In eight States, for instance, the law is so inclusive

as to make it a criminal offence to give or receive the body for prostitution regardless of the element of hire. In some States the law as to solicitation is considered an adequate social safeguard. In still others it is the practice to convict those guilty of commercialized sexual immorality under the Vagrancy Law as "idle and disorderly persons." The laws vary widely.[1] The practices vary widely.

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Regardless of this perversion of the purpose of the laws relating to adultery and fornication as they are administered, their administration is nevertheless of importance. It shows to what degree it is possible, under existing social conditions, to prohibit by law the private expression of non-conflicting interests. The effectiveness of administration is difficult to gauge. The efficiency of the police, the ratio of offenders arrested to offences committed is, of course, impossible of accurate measure. We must confine ourselves to the effectiveness of the courts. Their efficiency is not, as one might suppose, a ratio between convictions and arraignments. When one discovers that in the three largest cities in Connecticut during the first half of 1924 there were, out of 59 arraignments for fornication, a total of 38 confessions and convictions, one is tempted to consider the administration efficient. The exact opposite may be the truth. It is necessary to inquire not only the number of convictions but the cause of convictions. The less severe the sentence to be imposed, the more likely are confessions and convictions. Of the 38 persons who confessed or were convicted of guilt in Connecticut, about one-fourth were sentenced to confinement. Sixteen were fined less than $10, eight more than $10; others were placed on probation.[2] Inasmuch as the number of convictions, then, in relation to the number of arraignments, cannot be a criterion of administrative

[1] American Social Hygiene Association, *Legislative Manual*, charts, pp. 40 ff.

[2] Johnstone *et al.* The same was true in New Hampshire.

effectiveness, the basis of judgment must be the ratio between the cases tried and the convictions which lead to a punishment commensurate with the severity of the substantive law. Figures from three important American cities are revealing.

The law of Illinois provides for the offence of cohabitation in an open state of adultery or fornication a penalty of $500 fine or one year's confinement in gaol, with double penalty for a second offence and treble for a third. From January to June 1920 there were arraigned in the Morals Court of Chicago 46 persons on the charge of adultery, 74 for fornication. The dispositions became clear from a Table.

	Total Arraigned	Total Dismissed	Transferred to Jury Branch	Nol. Pros.	Dismissed for want of Prosecution	Discharged	Total Convicted	Probation	Fined	Committed to House of Correction
Adultery .	46	34	3	1	11	17	12	8	1	3
Fornication	74	50	7	1	8	34	24	10	10	4

Out of 120 arraignments, therefore, there was a total of seven commitments, or 5.8 per cent.[1]

The Pennsylvania statutes provide for fornication a fine not exceeding $500 and for adultery a fine not exceeding $500, imprisonment not exceeding one year, or both. In Philadelphia the jurisdiction of two divisions of the Municipal Court is concurrent, one proceeding summarily, the other by jury. Of the 14 cases of fornication arraigned in the Women's Misdemeanants' Division (Summary) during the year 1920, eight were discharged, one fined, and five "otherwise disposed of." In the Criminal

[1] Woodington and Topping, *Specialized Courts*, 70.

Division (Jury), during the first six months of 1910, the cases were as follows:—

	Total Arraigned	Total Discharged	Not Pros.	Recognizance Forfeited	Discharged	Total Convicted	Probation	Fined	Committed to County Prison
Adultery .	22	18	3	1	14	4	1	3	1
Fornication	9	8	2	...	6	1	–	1	...

Out of the 31 tried by jury in Philadelphia there was one commitment, or a percentage of 3.2.[1]

The records of the Municipal Court of the city of Boston (Second Sessions) during 1920 are more illuminating because more complete. The severity of the statutory law of Massachusetts as to voluntary sex offences has been already noted. The severity of the law in practice presents a contrast.[2]

	Total Arraigned	Total on Convicted	Defaulted	Dismissed for want of prosecution or [illegible] was declined	Discharged	Total Convicted	Placed on File	Fined	Probation	Committed			Pending and Unknown	Total Appealed
										Gaol	House of Correction	Reformatory for Women		
Adultery . .	70	4	..	1	3	64	3	..	30	5	4	..	2	9
Fornication . .	322	59	27	..	18	188	40	32	114	22	13	1	..	55
Lewd and lascivious cohabitation .	109	32	11	3	17	176	30	2	117	9	21	1	1	11

[1] Worthington and Topping, *Specialized Courts*, 134–136.
[2] *Ibid.*, 234 f. See similarly for year 1913, Woolston, 150.

Unlike the cases in Chicago and Philadelphia most of the arraignments resulted in conviction. Over 87 per cent. convictions is unusually high. Eleven per cent. commitments to penal institutions, though not a considerable amount from an absolute point of view, is comparatively high. Let us see what happened to the offenders who were sentenced to penal institutions.

They appealed. That is, they exercised their right to demand trial *de novo* in the Superior Court, which varies from an appeal in the strict sense in that the decision of the lower court is not reviewed above but the proceedings begin afresh. Three of the 92 persons who were fined for fornication demanded a trial *de novo*. All but five of the 68 who were sentenced to penal institutions took their cases to the Superior Court. In other words, of those committed by the Municipal Court, almost 93 per cent. appealed.

	Total Committed	Total Appealed	Defaulted	Nol. Pros. and Discharged	On File	Fined	Probation	Committed to Gaol	Pending and Unknown
Adultery .	9	9	1	1	1	..	4	..	3
Fornication .	36	35	1	1	8	20	4	..	1
Lewd and lascivious cohabitation . .	25	21	..	3	6	..	8	2	2

From this[1] we see that the total of those who ultimately served sentences in penal institutions was seven, five who failed to appeal from commitments and two who were committed by the Superior Court. Which means seven commitments out of 336 arraignments for these sex offences, or just over one per cent.

[1] Washington and Topping, *Specialized Courts*, 167.

In so emphasizing the small number of penal commitments it has not been the intention to infer that confinement is the only satisfactory punishment for voluntary sex offences. Probation may be a far better means of treatment in theory. That it does not always prove so in practice in these cases may be due not so much to the inherent character of the cases as to defects in the probation system.[1] The emphasis has been meant rather to point out a chain of three important facts in relation to the control of sex expression by American law. The first, already mentioned, is that a severity of punishment in practice which would be commensurate with the severity of punishment authorized by the spirit of the statutory regulation seems, under existing social conditions, to be impossible. Through some legal mechanism that severity will be evaded.

That fact depends upon another: the substantive law no longer expresses the existing attitude of the people as to private, voluntary, non-commercial acts of sex. The situation is expressed emphatically by a commission of the Massachusetts Legislature as to the difficulties which its investigation had sought to remedy. "From the nature of these offenses, usually committed under conditions of secrecy and concealment, it is difficult to secure evidence which is conclusive or even admissible in a court. Circumstances which seem absolutely convincing to an ordinary citizen, if described as evidence in court, do not prove the guilt of the person 'beyond a reasonable doubt.' The rules of evidence and the methods of court procedure, which have been carefully formulated to protect the innocent, require certain specific acts and circumstances to prove a crime against a person. The unsupported testi-

[1] Of ten consecutive cases of sex offenders placed on probation by the Superior Court in Boston early in 1920, the following was the situation on 1st July 1921: one, out of town, was writing regularly; one, in town, reported regularly; one, under medical treatment, was not reporting; one had been re-arrested once; the whereabouts of the remaining six were unknown. Four of these cases had a previous court history in the Municipal Court, not counting the conviction which was appealed. Two were convicted twice; one, four times; one, six times, including a serious charge. Worthington and Topping, *Specialized Courts*, 141 f., note.

many of one police officer is rarely accepted. The parties concerned, the only other witnesses, will not testify against themselves. The average individual is unwilling to be dragged into these cases, even as a witness. Indeed, the average citizen in good standing believes that participation in the prosecution of any phase of prostitution or any form of sex vice is apt to be regarded as rather discreditable or in bad form. It is only too true that such activity often results in ridicule and in personal, business or political detriment to the individual. . . . Whatever may be the intent of the law, the final disposition of these offenses in both the lower and superior courts, and in the variation in the sentences given in the different courts, indicate that this whole class of crimes is treated as though they were much less serious offenses than other crimes."[1]

This attitude in turn calls forth a final observation. The Puritan tradition as to sex expression, dying more slowly by some centuries in America than it died in England, is in practice and social outlook just as really dying. The laws on the statute books remain in wedding the same, even as the English ecclesiastical jurisdiction over morals persists in theory. They are not quite so dead as the English jurisdiction, because, converted to new purposes, their skeleton functions after their flesh has decayed. Till the skeleton is buried and a new body materializes to meet the need which the old forms fail in their attempt to meet, one may still talk of the legal control in America of voluntary sex expression.

[1] Massachusetts, *Report of Commission*, 50 f.

CONCLUSION

Two facts stand out in relief from this study of the law of sexual morality. The one is, that the methods of legal control of sex expression have varied widely throughout Anglo-American history. The other is, that the attitude behind the law, the doctrine of sexual morality itself, has varied not at all. The doctrine is the doctrine of chastity which was developed by the early Christian Fathers out of the customs of primitive peoples and out of their enunciation in ancient Hebrew law. That doctrine, conceived amid the emotional and religious disturbances of the Roman Empire, is the doctrine to which English law has sought again and again to give expression for English peoples. The number of attempts is of itself an indication of the difficulties and the failures.

When the difficulties of legal control are so great and the failures so obvious, why should the law have sought to maintain the doctrine of chastity? Why has the question of morality entered into a voluntary sexual connection which does not injure the two persons taking part in it or any third person, and which, moreover, can do no injury to the child which may be engendered by it?[1] The answer is, that though no individual may suffer by voluntary non-marital sex expression, society conceives itself to be suffering. It is losing potential strength.

The vital statistics support this conception. Parents who indulge in extra-marital sexual activity show a lesser fecundity than married parents, and their offspring are less likely to survive infancy. European averages indicated some years ago that while 100 prostitutes will give birth in their life to 60 children, 100 married women will give birth to between 400 and 500 children.[2] Of families in which there are actions brought for dissolution of marriage on the ground of adultery a noticeable plurality have no

[1] Ferri, *Sexual Ethics*, 45 *f.* See also Ellis, *Task of Social Hygiene*, 262 *ff.*

[2] Mudgett, 93, 494. Though the birth-rate in England at present is much lower than the figures given, the disproportion is still obvious: Registrar-General, 1917, Text, 119.

children and only a very few have more than one child.[1] More important is the disproportion in mortality-rate between legitimate and illegitimate children. The ratio of still-births is much lower among the children of married parents. The deaths of infants born to married parents are much fewer in proportion than the deaths of illegitimate infants. In England and Wales in 1926 for every 100 deaths of legitimate infants, there were over 190 deaths of illegitimate infants.[2] Throughout Europe this disproportion is appreciable and in some countries even greater than in England.[3] It is said also that the childbed mortality of unmarried mothers is twice as great as that of married mothers.[4]

The consequence of these facts is that the persons who indulge in non-marital sex expression have been dying out and breeding themselves out. Unmarried women and divorced parents have few children proportionately who survive infancy. Parents who are living according to the social conventions instil in their children those same conventions. The children who in practice disbelieve those teachings will themselves have less chance of progeny. The conventions of sexual morality have thus maintained themselves.

One must not lose sight of the fact, however, that these statistics are related to time and place. They apply to Christian countries where the Christian doctrine of sex morals is bedded in custom and in law. It is that custom and law which may itself create the conditions on which the statistics are founded. Unmarried mothers may more often die in childbirth because they are improperly cared for. Their children may be still-born because of the unsuccessful attempts at abortion or, born alive, may die in infancy from lack of parental support and the inability of the mother to make material provision for a child to which a social stigma attaches.

Conceivably this social attitude is breaking down. Society no longer benefits so largely from conventional

[1] Registrar-General, 1921, Tables, Part II, Civil, p. 77, table P.
[2] Ibid., 1926, Text, p. 17. [3] Webb, 195. [4] Malthus.

marriage because even within legal marriage proportionally fewer children are born. The correlation between the marriage and birth-rate, once accepted as being in the nature of things, is no longer indisputable. Norway is the only European country where the rates show any proportionate decrease. In England and Wales the birth-rate is decreasing almost four times as rapidly as the marriage rate. In some countries the proportionate decrease is far greater.[1] The spread of information on contraception has made the birth of children more within the control of the parents. Economics may be coming to be more the consideration in propagation than are religion and morals. Medical care has been so extended to the poor that unmarried mothers and illegitimate children receive more scientific treatment. Social service is making provision for the unfortunate, no matter the legality of their birth or the morality of their private lives. These social tendencies may be the basis for the present non-administration of the law relating to sex expression in England and the vicarious administration in America.

Conceivably the modification of attitude toward the laws of sexual morality is but an example of a changing attitude toward all substantive legal control. There have been periods when people were prone to seek by means of legislation a North-west Passage to the millennium. Possibly there is a growing realization of the limits of legal action, a realization that a social penalty is not necessarily a legal penalty, that civil punishment is not a serious deterrent where the offender retains the good opinion of his fellows, and that punishment is not lacking when the offence creates social ostracism. The declaration of the criminality of an act may be coming to be considered a question not of moral righteousness but of social expediency. If the State comes to the conclusion that it costs more to attempt to punish a vicious act criminally than it is worth socially, a failure to prevent it by police regulations is in no sense countenancing it.[2]

[1] Jastrzebski. [2] Fuld, 374.

In the history of English sexual morality there have been rare occasions where the law sufficiently expressed the social attitude of the people to make possible its literal enforcement. Among the Anglo-Saxons and among the early American Puritans the law may thus have met a fair degree of success. But even there the law was not so much expressive as repressive. Harmony is not the same thing as order resting on mere repression. Even where the legal control of sexual activity has been most effective, the stifled impulses have persisted and emerged in other forms. That the emergence was unconscious was none the less dangerous.

The laws restraining voluntary non-marital sex expression served a real purpose in integrating and maintaining family relationships at times when, but for restraint, the benefits of family organization might have had difficulty in developing. Some of those benefits have now been superseded by other social developments; some have been so firmly established as to depend no longer upon the criminal law for their continuance; with the rise of the sciences of psychology and sociology some have ceased to be questions of legal repression and have become questions of medical and social regulation. Though the forms of control have changed, the fact of control, less tangible, still persists.

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