

1-1-1964

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## Recommended Citation

Rodes, Robert E., "The Canon Law as a Legal System - Function, Obligation, and Sanction" (1964). *Natural Law Forum*. Paper 82.  
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# THE CANON LAW AS A LEGAL SYSTEM — FUNCTION, OBLIGATION, AND SANCTION\*

*By Robert E. Rodes, Jr.*

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THE SCHOLARS and prelates who accomplished the vast intellectual articulation of the canon law during the twelfth and thirteenth centuries brought to their task a highly developed set of value commitments but only a meager supply of administrative resources. This unique combination of constituent elements gives the system they produced — in addition to its intrinsic historical interest — a special claim to the attention of students of legal theory. In this essay, I shall attempt to give some account of the basic character and typical problem-solving techniques of this system, in the hope of shedding some light both on certain aspects of the history of the medieval Church and on certain perennial problems of legal theory.

For this purpose, I have tried to consider afresh the appropriate categories of analysis for dealing with the system. Consequently, I have dealt as much as possible with the raw data of legislative and administrative practice in isolation from the analytical framework with which the system was approached by its own proponents. It is possible that a fuller treatment of the subject along a similar line would require assigning a larger role to the work of the commentators who played so large a part in the systematic elaboration of the canons. I have neglected them because my object is in a sense to stand in their shoes and substitute my analysis for theirs.

Because it was a study of certain English problems that led to the present inquiry, I have drawn much of my legislative and administrative material from English sources. Hence, a number of the details of my account will not be applicable to conditions on the Continent. It seems established today, however, that the basic nature and obligation of the canon law were not differently understood in England than elsewhere in Western Europe.<sup>1</sup>

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\* I wish to express my thanks to the Ford Foundation for the grant that made possible the work of which this article is a part.

1. See ERIC W. KEMP, *AN INTRODUCTION TO CANON LAW IN THE CHURCH OF ENGLAND* 11-32 (London, 1957).

## I. CONTENT

THE CANON LAW may be characterized as Christian theology structured by Roman law, and brought to bear on the institutional necessities of the Church. The juxtaposition of these three elements — Christian theology, Roman law, and institutional necessity — provides the content of the system, and the tension among them provides the problematic of the system. Let us consider briefly the contribution of each of these elements to the content, then turn to what seem to me the three most serious problems raised by the tension among them — the problems of function, of obligation, and of sanction.

A. *Christian Theology*.—Theology furnished the root principles of the system<sup>2</sup> — the means of salvation and the corporate and juridical character of the Christian people to whom and through whom the means of salvation were revealed. In addition, it afforded the rudimentary structural elements — the orders of the clergy, the primacy of the Roman Pontiff, the claims of the Church to competence over against the state. Much of the substantive content was also theological. The celibacy of the clergy, the indissolubility of marriage, the suppression of simony are examples; all of them, although they are developed in legal enactments, were in origin developments of scriptural or doctrinal themes. Spiritual and pastoral experience added other theological elements to the substantive content, such as the form of electing bishops<sup>3</sup> or the payment of tithes.<sup>4</sup>

In addition to these substantive elements, theology contributed at more than one level to the procedural development of the system. The basic sanction of excommunication was derived from the scriptural attribution of the power of the keys. At another level, the principle that requires a hearing before the sentence of excommunication can be pronounced was formulated with scriptural justifications.<sup>5</sup> At still another level, the late technical development of the *denunciatio evangelica*, whereby a remedy is afforded for

2. THE CANON LAW OF THE CHURCH OF ENGLAND, BEING THE REPORT OF THE ARCHBISHOPS' COMMISSION ON CANON LAW. . . 21-2 (London, 1947). See CHARLES MUNIER, *LES SOURCES PATRISTIQUES DU DROIT DE L'ÉGLISE* (Mulhouse, 1957) for a careful and instructive analysis of one form of the theological input into the system.

3. F. Claeys-Bouuaert, *Évêques*, 5 *DICIONNAIRE DE DROIT CANONIQUE* 569, 575 (Paris, 1935-62). [Hereafter cited as DDC]

4. G. Lepointe, *Dime*, 4 DDC 1231-2.

5. Can. 8, 4 Lateran (1215), 22 *SACRORUM CONCILIIUM NOVA ET AMPLISSIMA COLLECTIO* 994 (J. Mansi and others, eds., facsimile edition, Paris, 1903) [hereafter cited as *MANSI*], c. 34, X, V, 1. In citing the *Corpus Juris Canonici*, I have used the form adopted in the source notes to the 1918 Code. The form there given for citations from the *Decretals* is the symbol "X," preceded by the number of the canon, and followed by those of the book and title. See T. LINCOLN BOUSCAREN & ADAM ELLIS, *CANON LAW, A TEXT AND A COMMENTARY* 11-13 (Milwaukee, 1947), for a key to these citations.

private wrongs, was derived directly from the Lord's admonition to "tell the Church."<sup>6</sup>

B. *Roman Law*.—While the canonists drew freely on the store of rules and terminology afforded by contemporary Roman law scholarship,<sup>7</sup> the major contribution of the Roman law to the canonical system is its structure. It was to the Roman law that the canonists looked for the forms and categories of legal analysis. Their descriptions of how the law operates, their theoretical speculations on the nature of law, their manner of classifying legal enactments as to subject matter or source were all taken directly or indirectly from the Roman jurists.<sup>8</sup> The great codifications that make up the *Corpus Juris Canonici* were patterned on those that make up the *Corpus Juris Civilis*.<sup>9</sup> Perhaps most important of all, the crucial theological principle of the primacy of the Pope was given its juridical form of the *plenitudo potestatis* through the analogy of the place of the Emperor in the Roman law.<sup>10</sup>

C. *The Institutional Necessities of the Church*.—The institutional necessities on which this legal system was brought to bear were in great part the simple housekeeping ones of allocating the available personnel and resources to the task at hand. The development of benefices and parishes, the rules against wandering from one diocese to another, and the rules regarding moral and intellectual qualifications for ordination are examples of principles developed to meet these housekeeping needs.

Over and above these, there was the necessity of maintaining both the material resources and the prestige of the institutional church as against the

6. Matthew 18. 15-18; Ch. Lefebvre, *Évangélique (Dénonciation)*, 5 DDC 557.

7. For the use of particular texts in the canonical collections, see C. deClercq, *Corpus Juris Civilis*, 4 DDC 644, 661-80. A. ESMEIN, *LE MARIAGE EN DROIT CANONIQUE* 101-19 (2nd ed., 1929) shows an interesting example of a dialectic between a theological deduction and a rule of the Roman law in the development of a canonical rule. The Roman law, which quite clearly provided that the essential for the marriage relation was consent (*Nuptias consensus non concubitus facit*), ran counter to the deduction of the theologians made from the scriptural analogy of the physical union of Christ and the Church. As a result, the medieval canon law vacillated a great deal between consent and marital intercourse as the effective consummation of the marriage. For a general discussion of the place of Roman law in the canon law of marriage, see HERBERT JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 141-60 (Oxford, 1957).

8. JEAN GAUDEMET, *LA FORMATION DU DROIT SÉCULIER ET DU DROIT DE L'ÉGLISE AUX IV<sup>e</sup> et V<sup>e</sup> SIÈCLES* 163-76 (Paris, 1957); JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW passim* (Oxford, 1957).

9. *THE CANON LAW OF THE CHURCH OF ENGLAND, BEING THE REPORT OF THE ARCHBISHOPS' COMMISSION ON CANON LAW*. . . 33-4 (London, 1947).

10. WALTER ULLMANN, *PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES* 32-7 (New York, 1961). It was also Roman law that formed the theory of the manner of the Pope's succession to the prerogatives of Peter. *Id.* at 37-9.

other institutions of society. Much of the legislation originating in the Gregorian reform was directed in one way or another to this purpose.<sup>11</sup>

Finally, an institutional necessity at once more subtle and more fundamental than these others imparted to the canonical system a certain sub-surface dynamism uniquely its own. That was the necessity, inherent in the nature of the Church, of maintaining at once a corporate witness and a personal apostolate. It is to this necessity that we owe on the one hand the existence of the canon law in the first place, and on the other hand its often excruciating failure to live up to one or another of the criteria we set for a secular legal system. There must be a canon law because the Church is an institution, the new Israel, gathered by a corporate reception of the Word. An institution must be governed, a people must have its laws; and government cannot be arbitrary nor can laws be unjust. At the same time, the rule of law as secular jurisprudence conceives it — a government of laws and not of men — cannot be fully implemented in the Church because Christ has entrusted His message to men and not to laws. We cannot expect to see clearly defined limits of authority because it is man to man, whole man to whole man, that the Word of God must be proclaimed.

The dynamism imparted to the system by this twofold necessity was not articulated by the medieval canonist, or in the materials on which he drew. But we can see it at work in the air of mutual encouragement and moral exhortation that permeates the legislative work of the councils. We can see it in the format of the papal decretals that constitute the great bulk of the medieval additions to the canon law. We can see it in the attitude of the canonical lawgiver toward his predecessors — the canons of councils held in other times and places, the traditions of earlier shepherds of the flock. All of these forms have their counterparts in the Roman law, but there is something in them that harks back to another tradition — that of the chain of epistles that linked together the pastoral wisdom and experience of the primitive church, the words of doctrine and exhortation that passed continually from one shepherd to another that the whole flock of Christ might be nourished with the same spiritual food.

The same dynamism may be discerned in the efforts to insure a single priest for every parish — the very name of parson, *persona ecclesiae*, is suggestive — and to insure that he be instituted by and in due subordination to the bishop. This man carries in his person the personal presence of Christ. But he must enter the sheepfold by the door: otherwise he is a thief and robber. His personal presence is the presence of the Universal Church.

11. GERD TELLENBACH, *CHURCH, STATE AND CHRISTIAN SOCIETY AT THE TIME OF THE INVESTITURE CONTEST* 115-121 and *passim* (Bennet trans., Oxford, 1940).

The same dynamism appears in the machinery of visitation and pastoral correction.<sup>12</sup> The involved procedures with which offenses are inquired into, the pastoral solicitude with which offenders are corrected, the public penances with which they are reconciled, seem to involve a delicate — if not always successful — balancing of the personal character of the pastorate with the juridical expression of the interest of the Christian community in its exercise.

## II. THE FUNCTIONAL PROBLEM

IN THE WORKING out of a legal system, the problem we may characterize as functional is that of introducing into the system elements based on an awareness of what the system hopes to accomplish, and of what resources are available for the task. In the medieval canon law, this problem took the form of a relating of the Roman-law and theological elements in the system to the institutional necessities of the Church in the context of the social and political realities of the time, plus the relating of the institutional necessities themselves to one another according to their relative importance in the light of the limited means available. As they were articulated by the canonists, neither the Roman law nor the theology lent itself to the adequate establishment of such relationships.

In the first place, the Roman law was developed for a society bearing little relation to the society in which it was revived by the jurists of the eleventh and twelfth centuries. Early medieval Roman law scholarship had, therefore, a strongly academic character.<sup>13</sup> This character was manifested both in an emphasis on internal verbal consistency and in an emphasis on first principles. All of this accorded well enough with the philosophizing tendency of the times, and contributed to the ethos which the canonists took from the legists.

Another element in the academic approach of the legists was inherent in their material. That was the *plenitudo potestatis* of the Emperor — a

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12. The personal character of the pastorate may, incidentally, offer some clue to the reason for the rule that visitation involves a complete supersession of the authority of the person visited by that of the visitor. The rule has nothing practical in its favor, and I have found no rationale offered for it. It is tempting also to attribute to the ethos of the personal pastorate the phenomenon noted by Professor Jacob of the failure of Archbishop Chichele's register to note in which of his several capacities — diocesan, metropolitan, papal legate — the Archbishop does his various acts. 1 THE REGISTER OF HENRY CHICHELE lix-lxi (Canterbury and York Society, v. 45-47, E. F. Jacob ed., 1943-7).

13. PAUL VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 48-50 (1909). This is perhaps more true of the Bolognese school than of some of the others. *Id.* 32-58. Nevertheless, it seems a fair characterization of the whole tenor of the Roman law revival; in any event, it was in Bologna that Gratian did his work.

power which the canonists took over for the Pope, as we have seen. *Plenitudo potestatis*, when attributed to anyone but God is necessarily an academic concept. A perusal of the Theodosian Code will indicate just how academic it was in the late imperial period, and how much it bemused the emperors and diverted them from measures that might have brought actual resources to bear on the problems of the Empire. Here are examples:

[A.D. 353] We learn that certain veterans, unworthy of that name, are committing brigandage. We command, therefore, that veterans of good character shall either till the fields or invest money in honorable business enterprises and buy and sell goods. But capital punishment shall immediately rise up against [*mox in ipsos capitaliter exsurgendum*] those veterans who neither till the land nor spend useful lives in business. . . .<sup>14</sup>

[A.D. 403] We grant by law to provincials the right to overpower deserters, and if the deserters should dare to resist, We order that punishment be swift everywhere. . . .<sup>15</sup>

[A.D. 412] We order that all the tribunes who have assumed the duty of searching out vagrants and deserters throughout Africa shall be removed that they may not devastate the province under a pretext of this kind. In the future, moreover, We decree that this unholy title and office must not exist at all throughout Africa, and if anyone should attempt to aspire to the forbidden rank of this office for the sake of plunder, he shall be subjected to the severity of capital punishment. . . .<sup>16</sup>

The desperate spiral of severity and anarchy which these enactments bespeak is another part of the canonists' inheritance from the Roman law.

The canonists, despite the formidable practical concerns with which their system was faced, not only absorbed the academic tendencies of the legists, but added to them through an ill-considered didacticism in their theological inputs. Let us take, as an example, the most commonly mentioned instance of their modification of the Roman law in the interest of a higher conception of justice. This is the rule concerning the requirement of good faith for prescription.<sup>17</sup> The Roman law required good faith at the beginning of the period of prescription — a rule which Gratian was content to follow. To the later canonists, however, this position seemed to be a condonation of bad faith during the rest of the period.<sup>18</sup> Accordingly,

14. THE THEodosian CODE 7:20:7 (Pharr ed. and trans., Princeton, 1952).

15. *Ibid.*, 7:18:14.

16. *Ibid.*, 7:18:17.

17. RUDOLF SOHM, INSTITUTES sec. 26 (Ledlie trans. p. 139, Oxford, 1907); Charles Lefebvre, *Natural Equity and Canonical Equity*, 8 NATURAL LAW FORUM 122, 130 (1963).

18. R. Naz, *Préscription*, 7 DDC 178, 194.

a decretal of Alexander III adopted the rule that there must be good faith throughout the period.<sup>19</sup> Finally, at the Fourth Lateran Council of 1215, an attempt was made to amend the civil law rule as well, on the ground that "every constitution or custom is to be done away with which cannot be observed without mortal sin."<sup>20</sup> The attempt to modify the civil law was unsuccessful, but the modification of the canon law was maintained, and the two systems continue to differ on the point.<sup>21</sup>

Now, the role of prescription in a legal system, as the Roman juriconsults evidently knew well enough, is not to render abstract justice between competing claims, but to preserve the generality of legal interests against the uncertainties of litigation:

Prescription was brought in for the public good, lest the titles to certain things be long or well nigh permanently uncertain, whereas the time laid down in the law would have been sufficient to allow the owners to seek their property.<sup>22</sup>

Whether the requirement of good faith at the outset is consistent with such a value is debatable — rights will still be subject to the vicissitudes of judicial proof involving matters long past. But the inquiry is at least confined to a point of time, and will in many cases involve transactions of some notoriety. The canonical rule, expanding the inquiry over a period of many years, must vastly increase the uncertainty of the outcome, and therefore the insecurity with which rights are enjoyed.

The possibilities of the wrong side winning a lawsuit, particularly a lawsuit that turns on obscure and often forgotten matters of fact, are such that this insecurity must affect the just and the unjust alike. This risk is the very *raison d'être* of any principle of prescription, and it was just this that was ignored by the didacticism of the canonists. To put it another way, the abstract pursuit of justice was allowed to overshadow the necessities of the concrete pursuit of justice through the mechanics of a legal system.

The same didacticism affected other aspects of the canonical system, albeit not always in as obvious ways. We see it, for instance, in the area of appellate procedure where the canon law seems to show less concern than either the Roman law or the medieval English law with using appeals to elicit the best decision the system is capable of affording, more with using

19. C. 5, X, II, 26.

20. Can. 41, 4 Lateran 1215, 22 MANSI 1027, c. 20, X, II, 26.

21. Naz, *loc. cit. supra* note 18.

22. Gaius in DIGEST bk. 41, title 3, law 1.



it for the utopian purpose of affording a decision that is abstractly right.<sup>23</sup>

The combination of this didacticism with the *plenitudo potestatis* put at the apex of the canonical system an image that made it impossible to distribute power effectively between central and local agencies. On the one hand, the acceptance of the *plenitudo potestatis* (which, we must note, is rather an oversimplification of the relation between papal and episcopal authority in Catholic theology)<sup>24</sup> thrust into the background the theological claims of decentralized authority by giving them no satisfactory juridical formulation. On the other hand, the strictly practical claims of decentralization were vitiated by the image of the Pope as Peter. Peter was not the head of the largest administrative organization in Europe; he was the Prince of the Apostles, the Shepherd of the Sheep. If a sheep came to Peter hungry, how could Peter not feed him?<sup>25</sup>

It seems to be a principle of this kind that Barraclough has discerned at work in the proliferation of papal provisions to benefices.<sup>26</sup> He insists that this development stemmed from no set purpose of the popes to increase their authority as against the local episcopate, but was rather their response to the importunity of those seeking provisions — a response motivated in great part by the maxim *provisio clericorum opus in se continet pietatis*. Barraclough seems to consider it, if anything, to the credit of the popes that their undermining of the episcopal authority was unintentional.

23. For a good example of the ambivalent attitude of the canonists toward appeals, see can. 6, 3 Lateran 1179, 22 MANSI 220-1, c. 26, X, II, 28. For the difficulties encountered in their attempts to control appeals in the light of this ambivalent attitude, see A. Amanieu, *Appellatione Remota*, 1 DDC 827. It is presumably due to the utopian aspirations of the canonists that they never developed an appellate procedure that would focus on the proceeding appealed from rather than on the merits of the case. See CALENDAR OF ENTRIES IN THE PAPAL REGISTERS RELATING TO GREAT BRITAIN AND IRELAND 34-5 (1448) (Bliss and others, eds., London, 1893-1912) [hereafter cited as CAL. PAPAL REG.], where the Pope, even though his authority is invoked for improper motives, takes over a case from the local ordinary, and deals with it through judges delegate.

24. It is well established theologically that the power of the bishop to govern his diocese is of divine law. The relation between this principle and the equally well-established principle of the primacy of the pope has given rise to some fine-spun controversies in its time. For a description of one of them, see Claeys-Bouuaert, *Evêques*, 5 DDC 569, 571-3. There continues to be no really satisfactory way of structuring the theological relation juridically. The *plenitudo potestatis* of the pope is, as I say, an oversimplification. Maitland's analogy of a federal system will not do, because there is no allocation of powers or functions between central and local authority. I suspect that the analogy actually used was that of the relation between the Roman people and the other peoples of the Empire.

25. See DECRETUM c. 4, 8, 10, C II, q. 6, especially c. 8 (attributed by Gratian to Pope Zephyrinus [199-217]):

To the Roman Church everyone — but especially those who are oppressed — may appeal, may run as to a mother, to be nourished at her breasts, to be defended by her authority, to be relieved of his oppression, for a mother neither can nor should forget her son.

26. GEOFFREY BARRACLOUGH, *PAPAL PROVISIONS* ch. 12 (Oxford, 1935).

But that so profound a change could be effected without anyone in control of it does not speak well for the system.

We could multiply examples of the same kind, but let one more suffice. A canon enacted at Amalfi in 1089 and again at Rome in 1099 reads as follows:

Let no layman presume to offer his tithes, any church, or anything else of ecclesiastical right to monasteries or canons without the consent of the bishop or the permission of the Roman Pontiff. If the bishop refuses his consent through avarice or improbity, let the Roman Pontiff be informed, and let whatever is to be offered be offered with his permission.<sup>27</sup>

As the Pope is obviously not able to read the interior dispositions of the bishop, the practical meaning of this provision can only be that the Pope stands ready to substitute his judgment for that of the bishop in cases of this kind, and invites the laity to bring such cases to his attention so that he may do so. The effect, in short, is to add one more piece to the pattern of centralization without any articulated purpose of doing so.<sup>28</sup>

To sum up what I have said thus far, it seems that the Roman law inputs into the canonical system tended to be academic, and the theological inputs tended to be didactic, so that both militated against an effective allocation of administrative resources for institutional needs. Turning next to the institutional inputs into the system, we find that these were articulated in terms of a "High Church" ethos, which tended to regard the upholding of the rights and position of the institutional Church as an end in itself, rather than as a means of disseminating the Gospel and administering the sacraments. This point of view put solid theological props under the diversion of resources from the pastoral ministry to other institutional goals, while the academic and didactic character of the rest of the system militated against the giving of effective consideration to the competing claims of the ministry.<sup>29</sup>

For an example of this process at work, let us consider the subject of

27. Can. 5, Amalfi 1089, 20 MANSI 723; can. 15, Rome 1099, 20 MANSI 963.

28. See also the discussion *infra* p. 71 of Ottobuono's canon on monastic appropriations.

29. A by-product of the same "High Church" approach was a tendency to divert the pastoral ministry itself to internal institutional objects, i.e., preaching and ecclesiastical censures used for the purpose of collecting ecclesiastical revenues and maintaining clerical immunity, rather than for disseminating the Gospel message. The extent to which an institution devotes its resources to its own maintenance rather than to the task it is being maintained in order to perform is a test of its efficiency — and a test by which the medieval church was seriously deficient. But to the extent one adopts the High Church ethos, one regards the institutional Church, representing as it does the presence of Christ in the community, as having its mere existence as one of its goals. Under this criterion, it cannot be accused of inefficiency by reason of the high proportion of its resources devoted to the furtherance of this goal.

monastic appropriations. The law on this subject as it ultimately developed<sup>30</sup> was that a monastery or other clerical body that held the right of patronage of a parish church could not under the general law serve the parish cure through one of its own number, but would have to present a suitable cleric to be parson — just as a lay patron would have to do. With a license from the bishop or the Pope, however, the monastic or collegiate patron could “appropriate” the parish church. When this was done, there would be provided out of the sources of revenue of the parish benefice a sufficient endowment to maintain a “vicar” to serve the cure, and the rest of the revenues would go to the appropriating body. The endowment of the vicar would be sufficient to afford him a “*congrua sustentatio*” — a minimum amount sufficient for decent if frugal living.<sup>31</sup> A license of this kind was not to be given as a matter of course; it required a showing of poverty on the part of the monastery or college seeking to appropriate.

At first blush these rules look reasonable enough. They fail, however, to focus our attention on the crucial questions of what resources are available and how they can be distributed to do the most good. If we look separately at the requirements of the parish ministry and at the requirements of the monastery, we will find that we have a standard for evaluating each. But we entirely lack a standard for looking at both and deciding between them.

Let us see how the elements we have been considering contributed to this state of the law. In the first place, it was “High Church” concern with institutional dignity that gave content to the two criteria to be applied: for a monastery to be impoverished was an affront to religion, and the revenues of the church might appropriately be applied to alleviating it;<sup>32</sup> for a parish priest to lack a *congrua sustentatio* was an affront to the clerical order.<sup>33</sup>

Next, it was didacticism that made it a pious work to grant the petition of the monastery if the requisite poverty was shown.<sup>34</sup> It was didacticism also that led to requiring the vicar to content himself with a *congrua sustentatio*.

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30. J. R. H. MOORMAN, *CHURCH LIFE IN ENGLAND IN THE THIRTEENTH CENTURY* 37-48 (Cambridge, 1946); see R. A. R. HARTRIDGE, *VICARAGES IN THE MIDDLE AGES* (Cambridge, 1930).

31. This concept is discussed at length in PHILIP HANNAN, *THE CANONICAL CONCEPT OF *Congrua Sustentatio* FOR THE SECULAR CLERGY* (Washington, 1950).

32. MOORMAN, *op. cit. supra* note 30, at 39; A. H. THOMPSON, *THE ENGLISH CLERGY AND THEIR ORGANIZATION IN THE LATER MIDDLE AGES* 110 (Oxford, 1947). [Hereafter cited as THOMPSON]

33. See can. 15, Oxford 1222, 22 MANSI 1156.

34. See Ottobuono's canon on the subject, cited *infra* note 85.

One who has chosen Christ for his portion must partake sparingly of the things of this world.<sup>35</sup>

Finally, it was the academic approach that prevented an evaluation of these rules in the light of what they were actually doing in the Church — of what kind of man would actually be willing to serve for the sum fixed upon as a *congrua sustentatio*;<sup>36</sup> of whether the poverty of the monastery could be as well alleviated by cutting down its commitments as by increasing its revenues. In fact, low pay had a good deal to do with drawing the best trained priests out of the parish ministry, and the monasteries were so faithful to Parkinson's Second Law (expenditure rises to meet income)<sup>37</sup> that by the end of the Middle Ages they had appropriated over one-third of the parishes in England<sup>38</sup> without being significantly better off financially — to say nothing of spiritually — than they were before.

In general, then, the academic and didactic propensities of the canonists led them to consider their system in terms of the articulation of consistent principles, when they would have done better to consider it in terms of choice between conflicting principles in the light of available resources. This approach hampered the functional development of the system at a number of points. It also gave to the "High Church" zeal for institutional status more scope than it would have had if it had been squarely faced with the competing claims of the parish ministry. The canon law in its formative period was not without its functional successes — cases in which the available resources and techniques were effectively marshalled for the achievement of the task at hand. But it had its great failures also, and these resulted in no small part from the inadequacies in the canonists' approach to the problem of function.

### III. THE PROBLEM OF OBLIGATION

TO RAISE the question of the nature of the obligation imposed by the law

35. See can. 15, Oxford 1222, 22 MANSI 1156; cf. 7 LOUIS THOMASSIN, *ANCIENNE ET NOUVELLE DISCIPLINE DE L'ÉGLISE* 385-429 (André ed., Paris, 1867). [Hereafter cited as THOM.]

36. Can. 32, 4 Lateran 1215, 22 MANSI 1019, c. 50, X, III, 5 seems to recognize that the lack of a *congrua sustentatio* may produce an illiterate ministry. But to recognize this is not to recognize that there may be a scale of literary attainments available in proportion to the amount we are willing to pay, and that it is our business to strike a balance at some particular point on the scale. The existence of such a scale was so far recognized that a number of the medieval commentators taught that higher pay was to be given for higher attainments (i.e., that a *congrua sustentatio* for a better man might be higher than for a worse) (HANNAN, *op. cit. supra* note 31, at 54), but they did not draw from this fact the logical deduction that higher pay would elicit a more highly qualified man for a given post.

37. C. PARKINSON, *THE LAW AND THE PROFITS* 4 (Boston, 1960).

38. DAVID KNOWLES, *THE RELIGIOUS ORDERS IN ENGLAND* 291 (Cambridge, 1955).

in a given system is ultimately to raise the question of the definition of law, or as some modern authors would have it, the question of what we mean when we assert that such-and-such is the law.<sup>39</sup> The answers given to this age-old question tend to fall into three main categories. The first — the earliest in point of time, and perhaps the most prevalent even today — would answer in terms of some moral claim to obedience: the law imposes a moral obligation on the subject, because it represents the command of someone whom a relevant principle of morality requires us to obey.<sup>40</sup> The second category of answer — one that gained currency in its present form around the end of the last century, and continues to exert a powerful hold on legal scholars in America — would reduce legal principles to empirical predictions. Thus, the statement that such-and-such is the law is a prediction that certain public officials will react in a certain way to the situation envisaged: the statement that the law requires me to do such-and-such is a prediction that certain consequences will be visited upon me if I do not.<sup>41</sup> The third category of answer, articulated for the most part by a school of contemporary English philosophers, would have it that statements about the law are not reducible to statements about anything outside the legal system to which they apply. Thus, although from a statement that such-and-such is the law there may in some cases be deduced a statement about moral obligations, or a prediction about the behavior of public officials, the statement itself is not identical with either of these.<sup>42</sup>

The arguments advanced by each of these schools of thought against the others are many and complicated; I shall not attempt to follow them here. But let us note that the inherent characteristics of a secular legal system are such as to give some measure of support to each. The law does carry with it a certain moral suasion. It is by and large brought home to the subject through predictable actions of public officials. It does have an internally

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39. H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW QUARTERLY REVIEW* 37 (1954).

40. A number of opinions having this approach in common are collected in THOMAS DAVITT, *THE NATURE OF LAW* (St. Louis, 1951). This school of thought would generally impose some moral limitation on the substantive content of law, as well as on the authority of its author. While it is theoretically possible to hold that the mandates of one morally authorized to make laws are morally binding regardless of content, there seems to be no responsible Western jurist who does so hold. Thomas Broden, *The Straw Man of Legal Positivism*, 34 *NOTRE DAME LAWYER* 503 (1959). To say that the moral suasion of the law is limited by its content is, of course, a far cry from saying that the moral suasion of the law is derived from its content — that a legal principle must in some way restate a moral principle.

41. O. W. Holmes, *The Path of the Law*, 10 *HARVARD LAW REVIEW* 457 (1897), is generally regarded as the cornerstone of this school.

42. Hart, *supra* note 39. Kelsen's "pure theory of Law" seems to amount to rather the same thing.

consistent formal structure that may extend to cases where moral suasion or public enforcement are lacking.

To some extent, the canonical system lends itself to similar kinds of analysis. It too has elements of moral suasion, official enforcement, and formal structure. Yet the character of the obligation imposed by the canon law is not easily expressed within the framework of these theories developed to define the secular law. With these secular theories in mind, an analysis of obligation in the canonical system may yield some insight into its unique character.<sup>43</sup>

As a vehicle for such an analysis, let us consider the canon *De multa* of the Fourth Lateran Council of 1215. This canon deals with an important subject — the holding of plural benefices — and therefore forms part of a substantial course of legislation and administration addressed to the same subject.<sup>44</sup> It also gathers in one place an unusually large collection of the typical devices of the canonical legislation of the period; thus, it will give us a convenient starting point for studying these devices in context. I will begin by setting forth a translation of the whole canon; then, under certain of the key phrases of the canon, I will take up one by one the various devices of which it makes use, setting each in a context that may shed some light on the nature of the obligation this canon — and, inferentially, the whole system — sought to impose. Our concern here, it should be noted, is not with the interpretation of the canon, and therefore not with the work of those commentators who concerned themselves with delineating the exact scope of what it commanded and what it forbade. The question before us is the nature of the obligation it imposed on the subject to do what it commanded or to refrain from what it forbade, and the consequences it boded for him if he did otherwise. For this purpose, it is on the course of legislation and administration, rather than on the course of interpretation and comment, to which the canon gives rise that I have focused.

Here, then, is a translation of the canon in question:

With much foresight [*De multa providentia*] it was forbidden in the [Third, 1179] Lateran Council that anyone should receive different ecclesiastical dignities and several parish churches, contrary to what was

43. For the basic recognition that the methods and purposes of canon law differ inherently from those of secular law, I am indebted to E. W. KEMP, *op. cit. supra* note 1. See also R. C. MORTIMER, *WESTERN CANON LAW* 75-90 (Berkeley, 1953).

44. The fullest treatment of this topic is A. H. Thompson, *Pluralism in the Medieval Church*, 33 *ASSOC. ARCHITECTURAL SOC. REP. AND PAPERS* 35 (1915). For more accessible material, see THOMPSON 11-12; W. H. PANTIN, *THE ENGLISH CHURCH IN THE FOURTEENTH CENTURY* 36-8 (Cambridge, 1955) [hereafter cited as PANTIN]. For the continuity of the problem in England after the Reformation, see NORMAN SYKES, *CHURCH AND STATE IN ENGLAND IN THE XVIII<sup>TH</sup> CENTURY* 147-9, 215-20 (Cambridge, 1934).

laid down in the sacred canons [*contra sacrorum canonum instituta*]. Otherwise, the person receiving such dignities and churches was to lose them, and the person bestowing them was to lose his right of conferring them. Since, however, because of the cupidity and presumption of certain persons, this statute has thus far borne little or no fruit, we, wishing more openly and expressly to oppose this practice, establish by the present decree that whoever receives any benefice having cure of souls annexed to it, shall be deprived by the law itself of any such benefice that he may have obtained earlier. If by chance he should strive to retain the earlier benefice, he shall be deprived [*spolietur*] of the second as well.

Furthermore, he to whom the bestowal of the earlier benefice belongs, may, as soon as the second is received, freely bestow the first on anyone he considers deserving of it. If he puts off bestowing it for longer than six months, not only shall the collation of it devolve upon another in accordance with the statute of the Lateran Council [not the canon referred to in the preamble], but he whose benefice it is shall be compelled to assign for the use of the church so much of the fruits as he is found to have received during the time it was vacant.

We order that the same rule be observed in the case of parsonages [*personatibus* = prebends?], adding that no one is to have more than one prebend or dignity in the same church, even if he does not have cure of souls.

As to sublime and literate persons, however, who ought to be honored with greater benefices, a dispensation can be had from the Apostolic See when reason demands.<sup>45</sup>

A. *With much foresight it was forbidden in the Lateran Council . . . contrary to what was laid down in the sacred canons.*—Not only do the fathers, in framing this canon, appeal for support to the provision of the 1179 council on the same subject, they also quote directly the words by which the framers of the latter provision appeal in their turn to the authority of those who have gone before. The principle that an old law is better than a new law was traditional and pervasive in the canonical system. It can be seen at work in the first synod of the English Church, assembled by Theodore of Tarsus in 673.<sup>46</sup> In the early medieval canons it takes the form sometimes of lifting canons verbatim from one synod to another, more often of referring to earlier canons for justification or authority: “Following in the footsteps of the holy fathers, we command. . .”<sup>47</sup> “As is provided in the holy canons, let the bishop have. . .”<sup>48</sup> “That which was laid down in the

45. Can. 29, 4 Lateran 1215, 22 MANSI 1015, c. 28, X, III, 5.

46. BEDE, ECCLESIASTICAL HISTORY OF ENGLAND bk. IV, ch. 5.

47. Can. 5, Rheims 1157, 21 MANSI 844.

48. Can. 7, 1 Lateran 1123, 21 MANSI 283, c. 11, C. XVI, q. 7.

holy Council of Chalcedon, we order to be unswervingly adhered to, to wit, that. . .”<sup>49</sup>

In context, it seems fairly clear that the purpose of these references to the past is justification — by them the proposed disposition is grounded in the tradition and experience of the Church.

*B. Because of the cupidity and presumption of certain persons . . .* The moral vituperation of those who have acted otherwise in the past is another form of justification which the canons frequently offer for themselves. This vituperation may be simple, as it is here, or fortified by reasons as in the 1179 canon on the same subject:

Whereas many, not setting a limit to their avarice, attempt to acquire diverse ecclesiastical dignities and several parish churches, contrary to what was laid down in the sacred canons, so that, being scarcely sufficient for one office, they assume the emoluments of several . . .<sup>50</sup>

There may be a reference to scripture:

If anyone goes against this rule (for it is against the doctrine of the Apostle who says that no soldier of God concerns himself with secular things) and behaves in a secular way, let him be put out of the ministry, since, neglecting his clerical office he immerses himself in the currents of worldly things in order to please the powers of the world.<sup>51</sup>

Sometimes the reasons given are fanciful:

It is good for seed to be multiplied to the sower, but ridiculous to reap where one has not sown, therefore . . .<sup>52</sup>

Usually, as in the instant canon and in the 1179 one, there is a vice to which the behavior in question is attributed:

Many . . . have been led by levity, or, what is worse, by cupidity to . . .<sup>53</sup>

Prefatory material of this kind is, of course, part and parcel of the

49. Can. 5, 2 Lateran 1139, 21 MANSI 527.

50. Can. 13, 3 Lateran 1179, 22 MANSI 225, c. 3, X, III, 4.

51. Can. 12, 3 Lateran 1179, 22 MANSI 225, c. 4, X, III, 50. See also can. 7 of the same council, 22 MANSI 221-2: “Should anyone presume to violate this, let him know that he shall have his lot with Giezi whose deed he imitates by his wicked exaction.”

52. Can. 19 of Ottobuono’s, London 1268, 23 MANSI 1234. The subject is the acceptance of procurations by a visitor when he has not visited.

53. Can. 5, Rheims 1157, 21 MANSI 844.



didactic tendency I have already referred to as a major element in the canons of the period. This didacticism is peculiar to the canon law, and goes considerably beyond the moral element that is necessarily present in any viable legal system. Consider by way of contrast the preamble to the first secular statute enacted in England on the subject of plural benefices:

For the more quiet and virtuous increase and maintenance of divine service, the preaching and teaching the word of God, with godly and good example, the better discharge of curates, the maintenance of hospitality, the relief of poor people, the increase of devotion, and good opinion of the lay-fee toward the spiritual persons, be it enacted . . .<sup>54</sup>

This too is an attempt to build a statute on a moral foundation, but here the moral basis is not the sinfulness of the behavior the statute is going to forbid; rather, it is the right ordering of the whole society. This difference between the secular legislator and the canonical legislator in the moral justifications they advance for what they enact is fairly constant. There are exceptions in both cases, but generally the canons look for justification to some immorality or vice involved in what they forbid, whereas the secular laws look for justification to the good social consequences of what they command or the evil social consequences of what they forbid. Specifically, one would have to search the canons at length to find one on plural benefices that took the social evils of the practice more seriously than the avarice of the cleric that engaged in it.<sup>55</sup>

54. 21 Henry VIII c. 13 (1529). This, to be sure, is relatively late, as the secular authorities did not address themselves to the subject of pluralism before Henry VIII's time. The rhetorical style, however, does not differ from that of earlier English secular statutes.

55. Sometimes the references to social evils are inextricably intertwined with moral vituperations. Here is the introduction to Ottobuono's canon on pluralism, can. 30, London 1268, 23 MANSI 1241:

The truth of the Christian religion has so far forsaken many in their self-exaltation that, whereas each man is scarcely sufficient for the care of his own soul, these deceitfully think themselves equal to more than one. Not only do they rashly undertake the cure of many souls in one benefice — where they do not reside, nor do they receive the orders the cure requires — but they also impudently gather to themselves innumerable additional cures. Walking in the ways of falsehood, foolishness and vanity, they neglect the necessities of the miserable souls whose cure they have undertaken — for, by the very impossibility of the thing, they cannot fulfil such an obligation. Indeed, the constitutions, ancient and modern of the holy fathers, the Roman Pontiffs, and of others in authority, have labored with great solicitude to extricate from such perils these men who thus align themselves with the flesh against the spirit, against God, and against neighbor; men who, as if of set purpose, turn their backs on God and openly precipitate themselves into the hands of the devil; men who bear away souls from Christ; men who with unspeakable perversity divert the sustenance of the poor to superfluous, not to say evil, uses.

The author then points out that these efforts to combat the practice, meritorious as they were on the part of those who engaged in them, have not succeeded in checking the cupidity of the pluralists, who continue to amass plural benefices, without papal dispen-

C. *Since . . . this statute has thus far borne little or no fruit we, wishing more openly and expressly to oppose this practice, establish by the present decree . . .* The interrelation of the different canons that make up a series of provisions on the same subject is probably the most difficult question that faces us in attempting to subject the canon law to any systematic legal analysis.

Let us note in the first place that the crucial consideration for us — the change made in the previous law — appears from the wording of the canon to be of secondary concern to the legislator. Indeed, by omitting a significant portion from his paraphrase of the 1179 canon, he has made it look more like his own than it actually is.<sup>56</sup> This result accords very well with his stated purpose, which is to add his own authority to that of his predecessor because the latter has not received the attention it deserves. He has added a sanction, but that seems to be only by way of pointing up his renewal of the basic prohibition.

This approach explains, if anything can, a puzzling incident recorded in the Register of Hugh of Wells, who held the see of Lincoln at the time of the Fourth Lateran Council. Hugh appears to have been particularly zealous in inquiring into the qualifications of persons presented to benefices in his diocese. So it is that we find him inquiring of the papal legate Gualo whether a certain pluralist was ineligible. The legate replied that he was

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sation, and often without the institution of their own prelates. He then proceeds to explore more at large the evils of the practice:

We are not adequate to recount how many evils arise from this practice. For the honor of the Church is stained, her authority brought to nought. The faith of Christ is thrown to the ground. Charity is driven into exile. The hope of the poor perishes as they see every benefice which they might enter when it falls vacant open to the rich or to the powerful. Some blind and miserable sinner, proclaiming himself rector, receives, or rather steals, what is not his own. Furthermore, among the rich themselves scandals arise, hatred and litigation are nourished.

Here too, it seems fair to say that the predominant theme is one of moral condemnation of the pluralist, rather than practical undesirability of pluralism. Furthermore, the social evils complained of seem to be evils in the internal functioning of the institutional Church, rather than in its ability to do its work. In other words, the main social evil complained of is a deterioration of the moral character of the institution, rather than a deterioration of its practical effectiveness. Finally, it is particularly interesting to note that the purpose attributed to the earlier legislation is not the more effective discharge of the cure, but the moral rehabilitation of the pluralist. Thus it would seem that the social evils of the practice are conceived of as aggravating the moral offense of those who engage in it, rather than as in themselves justifying the legislation.

56. The 1179 canon, cited *supra* note 50, provides that benefices are to be committed to such persons as will reside and serve the cures in person. The sanction referred to in the 1215 paraphrase applies to violators of this clause, and not to violators of the prohibition against pluralism as the paraphrase would indicate. It should be noted in this regard that when the Decretals were compiled the 1215 canon was inserted in the title *De Prebendis*, to serve as the canon on pluralism, whereas the 1179 one was inserted in the title *De Clericis non Residentibus*, to serve as the canon against nonresidence, although in fact it dealt with both topics.

not ineligible because he was presented before the Council — the implication being that no law that would make him ineligible was enacted until that council.<sup>57</sup> What is curious about this is that our 1215 canon — which must be the one to which the legate refers — does not make a beneficed cleric ineligible to receive a new benefice; it provides that his acceptance of the new benefice will automatically oust him from the old. On the other hand, the 1179 canon, although not perfectly clear on the point, would seem to be rather good authority for not instituting a man into a second benefice.<sup>58</sup> Presumably, then, it was considered unduly harsh to enforce the 1179 canon at this late date, but a person subject to the 1215 canon could not complain if the means adopted for dealing with him was different from that laid down in the canon.<sup>59</sup>

The legate Ottobuono attempted in 1268 to regularize the enforcement device adopted by Hugh, and to integrate it with the 1215 canon. He provided that before a man was instituted into a benefice there should in every case be an inquiry as to whether he held any other benefice with cure of souls.<sup>60</sup> If it appeared that he had such a benefice, he was not to be instituted into the new one unless he showed a valid dispensation. Any institution in violation of these provisions was to be automatically void.

These provisions were integrated with the 1215 canon by means of an exception whereby the cleric could be instituted into the new benefice if he would take an oath not in any way to concern himself with his old benefice or benefices after institution into the new. For breach of this oath, he was to be automatically deprived of both old and new benefices.

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57. 1 ROTULI HUGONIS DE WELLES (1209-35) 26 (Canterbury and York Soc. v. 1, W. P. W. Phillimore ed., 1905).

58. Under the 1179 canon, instituting a man into a second benefice would make him *de jure* as well as *de facto* a pluralist — which he is not allowed to be — whereas under the 1215 canon institution into the second benefice would automatically deprive him of the first, so that he would not be in violation of any law unless he attempted to hold onto the first as well. Note also that the 1179 canon would seem to call for refusing institution to a man who does not plan to reside. See note 56 *supra*. It is so interpreted by Alexander III in c. 4, X, III, 4. As a man who already has another benefice would seem more than likely to be not planning to reside on this one, this principle might support refusing institution to the pluralist.

59. A mystery comparable to that discussed in text is presented by Hugh's treatment of a presentee who kept a concubine, but had been presented before the promulgation of the council. ROT. HUGH OF WELLS, *supra* note 57, at 87. A case could be made out for attributing the different treatment of persons presented after the 1215 council to can. 30 of that council, 22 MANSI 1018, which seems to be the first express recognition by a general council of the bishop's right to refuse a person duly presented to a benefice on the ground that he is not fit. But as this canon has some rather harsh things to say about bishops who have been admitting unfit men, we will raise more problems than we resolve if we suggest that the bishops thus castigated had no authority to do otherwise. In any event, the 1179 canon on pluralism would seem to authorize refusing pluralists regardless of the law on other undesirable presentees.

60. Can. 30, London 1268, 23 MANSI 1241.

Again, from a contemporary standpoint, we would look at this enactment as calculated to plug loopholes by the addition of new sanctions. But this view of the legislation is not what emerges from a reading of the preamble. This preamble is too long to quote in full,<sup>61</sup> but the following may give an idea of what the legate conceived himself to be about. He describes the evils, moral and to some extent social, of the practice condemned, refers to the unremitting efforts of Roman pontiffs and others in authority to combat it, expresses fear lest it bring down the wrath of God on whole kingdoms, then says:

Wishing, therefore, to exert our authority diligently against this pestilent and almost incurable disease, and, as much as it is in our power, to cure it, following also in the footsteps of the said legate [Otto in 1237]<sup>62</sup> strengthening [*adjuvantes*] his constitution on this subject, and adding to it, we command. . .

Certainly the new enforcement procedures are for the author of this canon an important part of what he has accomplished with it. It seems, however, an oversimplification to say that he has simply added new enforcement procedures to a canon that previously lacked them. For him, the most important thing he has done is to add his efforts to those of his predecessors, and strike one more blow in the never-ending battle against avarice.

This appears to be the way Archbishop Pecham looks at the work of Ottobuono when he comes to enact his own legislation on the subject at Reading in 1279.<sup>63</sup> Pecham begins in the usual way by vituperating the practice of pluralism and by referring to the canons that have addressed themselves to the subject in the past without success. He then points out that the 1215 and 1268 canons taken together would deprive the pluralist of all his benefices—the 1215 canon reaching all but the last and the 1268 canon reaching that one.<sup>64</sup> He determines, however, to temper justice with mercy, and allow those who presently hold plural benefices to keep the last

61. A good deal of it is quoted *supra* note 55.

62. Otto had contented himself with a reference to the 1215 canon and those who presumed to imperil their salvation by violating it, saying that it seemed to him to be more a matter of enforcing what had been laid down than of setting forth new sanctions. Can. 13, London 1237, 23 MANSI 454.

63. Can. 1, Reading 1279, 24 MANSI 257.

64. A literal reading of the two canons in question would seem not to yield this result. The deprivation of the first benefice under the 1215 canon appears to depend on a *de jure* institution into the second benefice, which the 1268 canon would prevent from taking place if the requisite inquiries are not made. If, on the other hand, the requisite inquiries are made, but fail to disclose the existence of the first benefice, the 1268 canon appears not to invalidate the institution into the second. Rather, the first is lost by force of the 1215 canon, and the second is legitimately held. In fact, however, no analyses of this kind seem to have been applied to these canons. This fact provides some additional evidence that their provisions as to sanctions were not to be literally carried out.

one taken, although he promises to be less lenient in the future. He adds also an automatic excommunication for those who continue to attempt to hold onto their plural benefices.

In 1281, however, we find Pecham temporizing again. In a canon promulgated at Lambeth in that year,<sup>65</sup> he refers to the threats he made at an earlier time (presumably in 1279) and states that he means by God's help to carry them out, so that by God's help the evil of pluralism will gradually be driven out of his province. In support of his policy of gradualism, he quotes Deuteronomy 7.22:

He will consume these nations in thy sight by little and little and by degrees. Thou wilt not be able to destroy them altogether; lest perhaps the beasts of the earth should increase upon thee.

For the implementation of his policy, he refers to those pluralists who, smitten with terror or remorse by his previous enactment, have turned in their excess benefices, and orders all others to do the same within six months. If they fail to do so, he will "proceed canonically" against them. Even if they do submit, they must make satisfaction for their past violations, "so that their character may be understood by the churches they have thus defrauded."<sup>66</sup>

Without carrying any farther the involved history of the canons against pluralism, we may perhaps find some basis for generalizing about the interrelation of the canons in the series. The following general principles seem to be those that emerge:

1. The most important role of the canons of earlier times is in constituting a tradition on the subject, to which tradition the current legislator can appeal.
2. A canon that has been widely disregarded for a period of time requires some kind of renewal before it can properly be put into effect. This principle is not reducible to the rule that a law can be abrogated by contrary custom,<sup>67</sup> because the principle obtains even where the contrary custom is grievously sinful, and even where it has not been followed for the period prescribed by the rule.
3. This renewal is generally accompanied by some kind of advance

65. Can. 25, Lambeth 1281, 23 MANSI 419.

66. ". . . *ut eorum status patitur ecclesiis sic fraudatis.*" The provision as to satisfaction for past violation seems to be an innovation.

67. See A. Van Hove, *Coûtume*, 4 DDC 731, for a discussion of the circumstances under which canonists, medieval and modern, will allow a custom to have the force of law in their system.

warning, so that those who have violated it with impunity in the past may be given an opportunity to mend their ways. The same principle is presumably responsible for the provision some canons make for being read from time to time to those to whom they apply.<sup>68</sup>

4. The renewal is accomplished through a renewed exercise of personal leadership, of which the promulgation of a new canon or the devising of new enforcement procedures is only evidentiary. This principle seems to represent an irreducible element in the Christian pastorate, breaking through the juridical forms with which it is surrounded; it explains much that is perplexing in the canon law. To it may be attributed not only the attrition of canons in the course of time and the secondary importance of the sanctions adopted from time to time, but also such seeming superfluities as a bishop coming home from a general council and enacting its canons in his diocesan synod,<sup>69</sup> or a pope issuing a special indult for the application of a general law.<sup>70</sup>

These principles, like so much else in the medieval canon law, relate finally to the characteristic didacticism of the system. They form the basis for the imposition of a moral ideal through the exercise of pastoral solicitude.

D. *Shall be deprived by the law itself.*—We have already noticed that

68. See, e.g., can. 5, Reading 1279, 24 MANSI 263-4:

Since the vice of incontinence stains and lamentably dishonors the clergy, to the scandal of many, we order that the statute of the lord Ottobuono against concubinary clerics be inviolably kept in all its rigor. And lest vicious minds be darkened by the contagion of crime, and lest such men be enabled to excuse themselves by ignorance or forgetfulness, we command all archdeacons . . . that they have the said constitution carefully and openly recited . . . in the four principal rural chapters of the year, before the entire chapter, with the laity excluded. This recitation we wish to have taken as a monition, so that all those who are given to this vice may be freely proceeded against, and when proceedings are taken to execute the sentence of deprivation to which the statute automatically subjects them, they may not seek to defend themselves on the ground that they have not been warned.

69. On this process as regards the dissemination in England of the canons of the Fourth Lateran Council of 1215, see MARION GIBBS & JANE LANG, *BISHOPS AND REFORM 1215-1272* (Oxford, 1934).

70. The indult says, "to be sure, it may seem superfluous to seek a special concession concerning that which is conceded by the common law. Since, however, it is customary to stand more in awe of that which is conceded by special indulgences than of what is disposed of by general law . . ." This is an indult of Innocent IV to the Dean and Chapter of Lincoln, dated 1247, and authorizing them when their churches are visited to furnish no procurations for the visitor's retainers beyond the number allowed by the canon issued on the subject in the Third Lateran Council of 1179. 1 *REGISTRUM ANTIQUISSIMUM* 213, Document No. 260 (Lincoln Record Society v. 27, Foster and Major, eds., 1931).

the prelates who addressed themselves to the subject of pluralism on the scene in England preferred other sanctions to the automatic one laid down in the 1215 canon.<sup>71</sup> It remains for us to consider the subject of automatic effect a little more at large. It was a favorite — and not usually very felicitous — device of the medieval canonical legislators.

The first thing we must note about this kind of legislative device is its metaphorical quality. In sober fact the law itself deprives no one of anything. There is a particular man drawing down the fruits of a particular benefice, and he will go on doing so until someone persuades or compels him to stop. Whether or not the law purported to have automatic effect, the task of persuasion or compulsion would in the ordinary course of events devolve upon the bishop or the archdeacon or someone exercising authority under them.

This work would sometimes be hampered by lack of zeal — for pluralism was the lifeblood of the clerical bureaucracy of which the bishop and the archdeacon were a part<sup>72</sup> — and would always be hampered by lack of information. The record-keeping techniques of the day did not furnish any regular means whereby a pluralist might be expected to come to the attention of the authorities. Generally speaking, a document respecting a man's affairs would be in the possession of the individual concerned. An important technical advance, rather widespread by the time we are considering, was the keeping of a copy of the document in its chronological order in the records of the official who issued it. But the only person in a position to furnish a dossier of all the documents affecting a particular cleric would be that cleric himself. If he had been instituted into two different benefices, the ecclesiastical authorities would have no record of this fact except that represented by two entries in the registers, completely isolated from one another. The inquest envisioned by Ottobuono's canon on the subject was presumably calculated to make up for this lack of records by the eliciting of live evidence. But the inquest would not have served the purpose unless the inquirer knew

71. It should be noted also that the provision for automatic effect did not prevent the papacy itself from making use of other sanctions on occasion. Note in this regard the retention in the Decretals of a decision of Alexander III (c. 7, X, III, 5) allowing the pluralist to choose which of his benefices he will keep. See also 1 CAL. PAPAL REG. 247 (1247) containing a papal mandate to the Bishop of Bath and Wells to compel certain pluralists to resign their excess benefices. The case of Richard Tittesbury, cited *infra* note 75, suggests that resignation and automatic deprivation were not considered mutually exclusive, as we would consider them. Evidently the modern distinction between *de jure* and *de facto* tenure was not fully worked out at the time.

72. See PANTIN 30-46. Presumably, as the system of plural benefices for members of the bureaucracy was brought more thoroughly under the central direction of the papacy, the pluralist who lacked the necessary papal dispensation would be more apt to be a stranger to the bureaucratic elite represented by the authorities charged with bringing him to book. Cf. THOMPSON 12, and *op. cit. supra* note 44, at 59-60.

where to look for the evidence, and even this much information he had no reliable way of obtaining.<sup>73</sup>

It is against this background of administration that we have to consider the uses of a provision purporting to have automatic effect: what could it add to the ability of the authorities to deal with offenders in general, and with pluralists in particular?

In the first place, it might add significantly to the moral suasion of the rule it sought to implement. It seems likely that this was the case with those rules of clerical discipline to which the canons attached the sanction of automatic irregularity for the exercise of the ministry. A priest who became irregular through some momentary lapse added sin to sin as long as he continued to minister, and also jeopardized his tenure of any preferment that might come his way before he was absolved.<sup>74</sup> These were consequences he might well have taken more seriously than he did the rule of conduct to which they were attached.<sup>75</sup>

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73. If the cleric presented to a benefice were to appear in person to respond to an inquiry of this kind, he would have to give some account of how he had been supported in the past. Such an account might have given a chance of turning up any other benefices he held, albeit not a foolproof chance, as he might have some other source of income to show. Furthermore, a practice evidently grew up of allowing a cleric to be instituted into a benefice through his proctor, without showing up in person. This was denounced at a 1460 Council in Canterbury. 35 MANSI 136. Another way in which the ordinary course of administration might have turned up a pluralist was through discovering on a routine visitation of one of his churches that he did not reside there. This was not very satisfactory either, as there might be a number of reasons, legitimate or illegitimate, besides pluralism, for not residing. As the nonresident would have on his own person any documents relevant to his reasons for not residing, it would be necessary to find him before passing on them — a task of considerable difficulty in the case of a nonresident. Then, the nonresident when found might exhibit a valid reason — such as the royal service — for not residing on any of his benefices. This, of course, would tell us nothing about how many benefices he held.

74. G. Oesterlé, *Irrégularités*, 6 DDC 42, 54-5.

75. See for instance, the case of Richard Tittesbury, 5 CAL. PAPAL REG. 88-9 (1398). Richard sought and received absolution from irregularities incurred on ten different grounds, some dating back to his student days: (1) He told persons pursuing certain robbers which way the robbers had gone, thereby assisting in bringing about their apprehension and consequent death. (2) While a student at Oxford, he went with drawn sword to assist the chancellor in putting down a riot, in which affray a scholar was killed. (3) Without consulting physicians, he gave certain food as medicine to a sick friend, who thereafter died. (4) He received gifts from persons undergoing visitation, and advised others to do so. (5) He made use of secular authority to impede appeals to Rome. (6) He fought with other ecclesiastics, even to bloodshed, and even in consecrated places. (7) He spoke certain words tending to reveal secrets of the confessional. (8) He took orders and benefices despite the foregoing irregularities. (9) He received the diaconate simoniacally, and the priesthood from a bishop simoniacally promoted. (10) He said mass for five months in unconsecrated places and places under interdict. Tittesbury, according to A. B. EMDEN, 3 A BIOGRAPHICAL REGISTER OF THE UNIVERSITY OF OXFORD TO A. D. 1500, at 1880 (Oxford, 1959), was ordained in 1395, so at the time of this extraordinary baring of his soul he was a young priest with a foot already firmly planted on the ladder of preferment. It may have been an increase of sobriety due to his burgeoning responsibilities that moved him to rectify his situation in this way, or it may have been fear for his career if he were to be found out at a later stage. In any event,



On the other hand, where the automatic effect in question related not to a man's personal status, but to his tenure of a benefice he ought not in any event to have, it is difficult to see how the automatic effect could rise any higher in moral suasion than the rule it sought to implement. Thus it is that the moral reproaches leveled at pluralists in most of the canons on the subject — they are avaricious, and they assume responsibilities they are unable to discharge — took no additional force from the provision for automatic deprivation.

The one canon that seems to make automatic deprivation an independent ground for persuading the pluralist to mend his ways is the 1279 enactment of Archbishop Pecham. The automatic deprivation meant that, in addition to drawing down revenues he ought not to have, the pluralist was purporting to exercise a cure of souls that had not been delegated to him:

For those who knowingly invade these benefices in this way are putting their sickles into other men's harvests; by the same token, since they do not enter by the door they are not shepherds but thieves and robbers. Furthermore, they impudently cozen miserable souls, having no power to bind them or to loose them.<sup>76</sup>

This argument seems rather persuasive, but there is no indication that it had any different effect from other forms of rhetoric in other canons. Pecham reports in 1281 that his efforts did indeed lead a certain number of pluralists to submit themselves.<sup>77</sup> It does not appear, however, that there were enough of them to make a real dent in the practice. Furthermore, in all probability they were moved by the strictures against pluralism as such rather than by the automatic deprivation, for Pecham says they gave up only their excess benefices, whereas his legislation purported to deprive them of all.

Besides furnishing an additional source of moral suasion, a provision for automatic effect might furnish an additional set of procedures. This was expressly done in the language of the 1215 canon which refers to the earlier provisions for the filling up of vacant benefices. Since the pluralist is automatically deprived of the earlier benefice, that benefice is automatically vacant. Since it is vacant it may be filled up in the same way it would have

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all ended happily for him. Although he was required to resign his preferment as a condition for being absolved, he was immediately restored to it by papal provisions. 5 CAL. PAPAL REG. 174. The provision recited that it was long vacancy that had given the pope the power to provide to the benefice in question. The vacancy is presumably attributable to the preexisting irregularity of the person instituted into the benefice — most canonists considered such institution invalid. Oesterlé, *loc. cit. supra* note 74.

76. Can. 1, Reading 1279, 24 MANSI 257.

77. Can. 25, Lambeth 1281, 23 MANSI 419.

been if the incumbent had died or resigned. Since, however, the machinery set in motion by the canon referred to was developed with a view to filling benefices notoriously vacant and kept so through malice or neglect,<sup>78</sup> it cannot have helped much in the case of the typical pluralist who held onto his multiple benefices by escaping the attention of the authorities.

The provisions invoking the procedures for filling vacant benefices became effective against pluralism, therefore, only when they began to elicit the attention of a class of people more able or more willing than the ordinary administrative authorities to set the procedures in motion. This, the third and most important of the benefits to be hoped for from a provision having automatic effect, came to pass when the automatic deprivation of pluralists began to mesh with the proliferating machinery for bestowing benefices through papal provision.<sup>79</sup>

The exact workings of this system, which, by the midfourteenth century had probably become the usual avenue of preferment for clerics, need not concern us here.<sup>80</sup> Suffice it to say that after the papal decree *Execrabilis* of 1317, which reserved to the Pope the right to fill any benefice made vacant through the pluralism of the holder,<sup>81</sup> it became possible for a cleric who discovered a case of pluralism to file a petition in Rome reciting that such-and-such benefice had become vacant on account of pluralism, and requesting that he himself be provided to it. Given the record-keeping techniques to

78. Can. 8, 3 Lateran 1179, 22 MANSI 222, c. 2, X, III, 8; 3 THOM. 528-9.

79. At first blush, it would seem that the automatic deprivation of the incumbent of a benefice would be of interest to two other classes of people — the patron who was entitled to appoint someone else to the benefice, and the parishioners, who would be entitled to withhold their tithes and other payments if the person claiming them were not de jure the holder of the benefice. Neither of these groups materialized under the laws against pluralism. Perhaps neither was in a very good position to learn about either the fact of plurality or the law imposing deprivation. Furthermore, the patron, as the one responsible for the man being in the benefice in the first place, might not be much interested in putting him out. As for the tithes, the law was that the bishop, through his sequestrators, could collect them during the vacancy of the benefice. *Vacation*, in RICHARD BURN, 2 ECCLESIASTICAL LAW 472 (London, 1763). While a parishioner with litigious inclinations might well put off the payment of tithes for some time by attacking the right of the person seeking to collect them, he could probably foresee that the ecclesiastical authorities would ultimately prevail.

80. It is set forth in detail in GEOFFREY BARRACLOUGH, PAPAL PROVISIONS (Oxford, 1935).

81. C. un. Title III in Extravag. Ioan. XXII. After a sufficiently long vacancy, the right to collate to a benefice devolved upon the Pope under the earlier legislation. C. 3, X, 1, 10. This rule presumably continued to apply except in cases covered by *Execrabilis*. While in theory this devolution did not take place unless the ordinary had known of the vacancy for the stipulated period (*ibid.*; G. Mollat, *Bénéfices Ecclésiastiques en Occident*, 2 DDC 406, 414-5), it seems likely that the popes provided to such benefices on petitions reciting that they had been vacant for the required period, without knowing whether or not the ordinary had been aware of the vacancy. Richard Tittesbury's case, *supra* note 75, is evidently an example of this; so, perhaps, is the case at 10 CAL. PAPAL REG. 400-1 (1448).

which I have already alluded, it was quite usual for the popes, as well as other persons with large amounts of ecclesiastical patronage, to learn in this way of the vacancy of benefices in their gift, and, if the informant had any claim to their good will, to reward him by bestowing the benefice as requested.<sup>82</sup> Thus, a cleric with any reasonable ground to hope for a papal provision might well expect to succeed to the benefice of any pluralist he brought to light. It is through giving scope to importunities of this kind that *Execrabilis* became — quite by accident, I suspect — the most effective, or the least ineffective, of the measures taken against pluralism in the medieval church.<sup>83</sup> What this boils down to, of course, is administration through the use of paid informers, a device that has never been in very good repute. We may question whether informers as a class can have made better parish priests than pluralists.

The crucial point in this discussion of automatic effect is that no law can achieve an administrative effect beyond the confines of its power to elicit the relevant facts and bring them to the attention of the authorities. When a law purports to apply automatically to a state of facts that has not been authoritatively determined, the result is to introduce a debilitating uncertainty into the structure of the law, without any corresponding advantage in effective enforcement. This effect is well illustrated in the passage quoted above from Pecham's 1279 canon, in which he accuses the pluralist of cozening "miserable souls, having no power to bind them or to loose them." If we are to take Pecham at his word, the laws against pluralism, developed for the sake of a more effective use of the power of the keys, are in fact leading multitudes of the faithful to seek the exercise of that power from men who do not have it to exercise. Fortunately for the deceived parishioners, Pecham is not altogether correct. There is a principle of "common error,"

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82. Ann Deeley, *Papal Provisions and Royal Rights of Patronage in the Early Fourteenth Century*, 43 ENGLISH HISTORICAL REVIEW 497 (1928). See 25 Edward III, St. 3, c. 3 (1350) for a statute directed at abuses due to the King's clerics seeking preferment from him in the same way. It appears, incidentally, that persons seeking preferment through royal, rather than papal, bounty also made use of *Execrabilis* to establish a vacancy of the benefices they sought. The royal courts gave effect to *Execrabilis* as making the benefice vacant, then refused to recognize the reservation to the Pope, that being contrary to royal statutes against papal provisions. Thus the right to fill such benefices devolved upon the King. Frederic Maitland, *Execrabilis in the Court of Common Pleas*, in ROMAN CANON LAW IN ENGLAND ch. 5 (1898).

83. THOMPSON 12 n. says that the extravagant accumulation of multiple benefices was effectively checked by *Execrabilis*. See also his longer work cited *supra* note 44. My own guess is that by regularizing the distribution of plural benefices through a series of legislative and administrative expedients of which *Execrabilis* was only a minor part, the papacy succeeded in turning into channels of respectability the economic and bureaucratic pressures that had led to the practice of pluralism.

whereby in a case like this the canons can restore the power of binding and loosing as secretly as they took it away.<sup>84</sup>

Where, however, the uncertainty introduced into the law concerns this world rather than the next, the consequences are not so easily escaped. Let us consider, for example, Ottobuono's canon on the subject of bishops who allow monasteries to appropriate the revenues of parish churches. The bishop is forbidden to permit such an appropriation:

unless he to whom he confers it be so manifestly oppressed by poverty, or unless there be some other lawful cause, so that the appropriation may be rather esteemed agreeable to piety than contrary to law.<sup>85</sup>

Otherwise, the appropriation is to be automatically void. Obviously, no religious superior able to do otherwise would allow the revenues of his house to rest on so ephemeral a foundation as this. The result was a regular practice of resorting to Rome for confirmation of appropriations made by local ordinaries.<sup>86</sup>

This is only one example of the uncertainty introduced into the law through the use of dispositions having automatic effect — uncertainty which often found no resolution except by wholesale papal confirmations of transactions tainted or possibly tainted with invalidity. There are a number of confirmations in the papal registers even in cases where no definite ground of invalidity appears.<sup>87</sup> The possible sources of invalidity that surrounded so many legal transactions introduced into the entire system a climate of nervousness which only an exercise of the *plenitudo potestatis* could allay.

Even the papacy, however, was not a sure refuge against the possible impact of laws having automatic effect. Among the most important of such laws were those dealing with papal rescripts. Much of the business of the papacy — and by the close of the Middle Ages this had come to touch on

84. É. Jombart, *Erreur Commune*, 5 DDC 441. From Jombart's account it appears that the principle that jurisdiction will be supplied in cases of common error is traditional in the Roman law, and was recognized by the canonists from respectably early times, although there is no reference to it in official canonical texts until the 1918 Code. In the Code, it is embodied in can. 209, without any source note.

85. Can. 23, 23 MANSI 1237-8. The translation quoted in text is from 1 A COLLECTION OF THE LAWS AND CANONS OF THE CHURCH OF ENGLAND 236 (John Johnson, ed., new ed., London, 1850-1) except for the word "manifestly," which I have added.

86. For examples of papal confirmations of appropriations already approved by local ordinaries, and where no ground of invalidity is apparent, see 1 CAL. PAPAL REG. 240 (1248); 5 *id.* 157 (1398); 5 *id.* 176 (1398). See also 3 *id.* 305 (1348) for a papal faculty to a bishop to make appropriations.

87. Besides the appropriations listed *supra* note 86, see validations of collations to benefices at 3 *id.* 282 (1348), 5 *id.* 165, 188 (1398); an election of a prior at 5 *id.* 151 (1398); an ordination of a vicarage at 5 *id.* 189 (1398); a foundation of chantry at 3 *id.* 300 (1348).

the distribution of most of the ecclesiastical offices in Europe — was done through these papal rescripts issued at the request of someone involved in the transaction. In the usual case, the pope would have no knowledge of the affair beyond what appeared in the petition. The rescript would therefore be based on the allegations of the petition, and would contain a summary of these allegations. The general teaching of the canonists was that if these allegations had been deliberately falsified the rescript was invalid, and that if false allegations had been made in good faith the rescript would be invalid if the false allegations were those that actually moved the pope to grant the rescript.<sup>88</sup> This rule meant, of course, that the canonical administration was to be troubled by all manner of documents emanating from the highest source in the system, entirely authentic, but not worth the paper they were written on. Nor was there any way, aside from going into the facts of their original issuance, to tell the valid from the invalid.<sup>89</sup>

This persistent state of uncertainty is attributable, as I have already suggested, to the law's propensity to outrun its capacity to elicit the relevant facts on which effective administration depends. This propensity in turn seems attributable to the academic and didactic tendencies in the system — tendencies which, as we have seen, had the general effect of diverting the canonical legislator from the functional problem of effectively marshalling his administrative resources for the achievement of a desirable result. Thus it appears to be of set purpose that the legislator attempted by the use of automatic effect to project his activities beyond the reach of his administrative resources. This point is borne out by the language adopted by Gregory X in dealing with underage clerics and clerics who fail to take orders:

Even though a canon laid down by our predecessor Alexander III of

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88. WILLIAM O'NEILL, *PAPAL RESCRIPTS OF FAVOR* 117-34 (Washington, 1930); R. Naz, *Rescrit*, 7 DDC 607, 618-24. The doctrine set forth in text is greatly ramified by such matters as the distinction between rescripts *motu proprio* and other rescripts, or that between "subreption" or concealment of a material fact, and "obreption" or setting forth as true something that is false.

89. In some cases, the rescript would have to be presented to some local authority for execution. He might or might not — depending on the form of the rescript — be required to investigate the truth of the allegations of the petition. O'NEILL, *op. cit. supra* note 88, at 167-76. Other rescripts required no executor. After the Council of Trent most of these had to be submitted to the local ordinary for verification, but there was evidently no such requirement in earlier times. Naz, *supra* note 88, at 627. It would appear also that the principle of *res judicata* did not extend to an administrative investigation like that involved in the execution of a rescript, so that a favorable finding on such an investigation would not prevent the subsequent invalidation of the rescript. Naz, *Chose Jugée*, 3 DDC 695. For the extent of the uncertainty introduced into the processes of the papacy by this kind of thing, see the Bishop of Dunkeld's case in 10 CAL. PAPAL REG. 20 (1448), where a bishop in full possession of his see requires a firming up of his title because the papal letters under which he was originally provided referred to him as a Doctor of Canon Law, whereas he has only a licentiate.

happy memory provided among other things that no one should undertake the governance of a parish unless he had attained the age of twenty-five years, and was of commendable learning and conversation, and that if anyone, having undertaken such governance, were not, after warning, ordained to the priesthood within the time prescribed by the canon, he should be removed from it and replaced by another; *since, however many show themselves negligent in the observance of the canon we refer to, we wishing to make up for their perilous negligence by the execution of the law, provide by the present decree that no one shall be taken into the governance of a parish unless he shall be suitable in morals, learning, and age, and we order that any collation hereafter made to a parish church of anyone who has not attained the age of twenty-five years shall be entirely without effect. Furthermore, he who is taken into such governance . . . shall have himself promoted to the priesthood within a year's time. If he is not promoted within that time, he shall be deprived of the church committed to him, without any previous warning, by authority of the present constitution.*<sup>90</sup>

In other words, the law itself is stepping into the gap created by the negligence of its ministers. It does not appear with equal clarity that Innocent III regarded his 1215 canon on pluralism as improving on the 1179 canon in the same way, but, as we have seen, there is not much basis for saying it improved on it in any other way. In general, the use of automatic effect in the canons indicates that it is regarded as a device of especial severity to be used when other devices have failed. The administrative problem is not wholly ignored, but no one seems to have taken it very seriously. Here once more is the legate Ottobuono, speaking this time of clerics who occupy posts in the secular bureaucracy:

Since indeed with men of ill will prohibitions do not prevent misdeeds unless they are fortified with punishments, we order that whoever presumes to violate the foregoing shall be suspended ipso facto from his office and benefice. Once suspended, should he be so rash as to inject himself into them, he will not escape canonical punishment.<sup>91</sup>

Why he will not escape canonical punishment is not made to appear. Perhaps we are not supposed to ask.

90. C. 14, I, 6, in VI°. (Emphasis added) The automatic deprivation provided in this canon seems to have been caught up in the system of papal provisions in much the same way as that provided in *Execrabilis*. See cases in 5 CAL. PAPAL REG. 103, 104 (1398). Here, however, as the vacated benefice was not reserved to the Pope, the patron had a space of time to fill the benefice. See *id.* 166 (1398) for a case of a priest who came by his benefice in this way but received a papal collation to the same benefice because he was unsure of his title.

91. Can. 7, London 1268, 23 MANSI 1223.

E. *As to sublime and literate persons, however, who ought to be honored with greater benefices, a dispensation can be had from the Apostolic See when reason demands.*—The practice of dispensation, referred to in this passage, seems to be one of the institutional forms imposed by the early medieval canonists on the ancient pastoral practice of permitting in a particular case a deviation from a general rule.<sup>92</sup> This practice dates back to the earliest times and seems responsive to a recognition that the subtle and personal work of saving souls is not to be fully encompassed in the framework of a set of general principles.<sup>93</sup> Attempts have been made to reduce primitive manifestations of the practice to juridical formulations, but they are not very convincing.<sup>94</sup> The most that can be said with any confidence is that the bishops felt free on occasion to authorize departures from the general principles in which the pastoral experience of their colleagues and predecessors was embodied, but that they did so with more confidence when fortified with the opinions of their fellows, and later of the popes.<sup>95</sup>

The canonists who first set themselves the task of imposing a Roman law structure upon the administrative practices of the Church, found nothing in the Roman system that quite corresponded to the practice in question. While the Roman sources admitted of departing from the letter of the law under certain circumstances, the circumstances were determined by general equitable principles inherent in the legal system itself, and not by an ad hoc exercise of authority.<sup>96</sup> In fact, the fourth century emperors expressly provided that their private rescripts should not be availing against the general law.<sup>97</sup> Thus, the canonists were left to their own devices in developing a terminology and a justification to integrate into their system the prevailing practice in the Church.

To give the practice a name, they chose the term *dispensatio*, whose basic meaning was household management or something of the kind, and which in more recent times had been used to refer to what we would call administration.<sup>98</sup> The term corresponds to the Greek "economy," which has some

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92. Naz, *Dispense*, 4 DDC 1283. The practice of dispensation applies only to those rules which can be assigned a human, rather than a divine, origin. R. C. Mortimer, *Historical Introduction*, in *DISPENSATION IN PRACTICE AND THEORY, BEING THE REPORT OF A COMMISSION APPOINTED BY THE ARCHBISHOP OF CANTERBURY IN 1935*, at 8-10 (London, 1944). [Hereafter cited as *DISPENSATION REPORT*]

93. *DISPENSATION REPORT* 1-4; Hamilcar S. Alivisatos, "Economy" from the Orthodox Point of View, in *DISPENSATION REPORT* 27, 30-34.

94. *DISPENSATION REPORT* 1-8; Naz, *Dispense*, 4 DDC 1283, 1286-7.

95. *DISPENSATION REPORT* 4-8, 11-12.

96. Naz, *supra* note 94, at 1285; Charles Lefebvre, *Natural Equity and Canonical Equity*, 8 *NATURAL LAW FORUM* 122, 123-8 (1963).

97. *THEodosian CODE* 1:2:2.

98. Naz, *supra* note 94, at 1283.

patristic usage in this context, and is still used for the counterpart of dispensation in the Greek Church.<sup>99</sup>

For justification, the canonists drew upon the ancient documents themselves, with their talk about necessity, utility, special circumstances and the like, and on the doctrine of the *plenitudo potestatis*, which placed the Pope above the canons, and therefore gave him an unlimited power to depart from them.<sup>100</sup> The two lines of justification could not be fitted together without a certain amount of effort, especially as a number of papal documents expressed the importance of guarding intact the salutary dispositions of the Fathers.<sup>101</sup> Gratian's solution was to hold that the popes adhered to the law not because they were bound by it, but in order to set a good example to their subjects — following in this the example of Christ, who allowed Himself to be circumcised, and otherwise complied with the Jewish Law, although He was not bound by it.<sup>102</sup>

The important articulations of the theory of dispensation subsequent to Gratian were concerned with the grounds on which dispensations might be granted, and the nature of the dispensing authority (if any) of prelates subordinate to the Pope. The first of these inquiries went not to the power of the Pope — which, as we have seen, was considered unlimited — but to the traditional and canonical framework within which that power was exercised. Since by strict logic the power to dispense from the law must be related to the power to make the law in the first place, and since the prevailing doctrine would call for the exercise of that power for the common good, there was some argument for requiring that dispensations be granted only for the common good of the Church.<sup>103</sup> Our 1215 canon, by referring to the merits of the petitioner, seems to have clinched the argument that the dispensing power could also be exercised for the private good of the person dispensed. An exercise of this kind was attributed to benevolence,

99. Alivisatos, "Economy" from the Orthodox Point of View, in DISPENSATION REPORT 27-43.

100. DISPENSATION REPORT 4-5, Naz, *supra* note 94, at 1286-7.

101. C. 1-9, 16, C. XXV, q. 1. See especially c. 7, taken from a letter of Pope Zosimus in 410: "Nor, indeed, can the authority of this see change what is laid down by the holy Fathers or concede anything against it. For with us there lives a firmly rooted antiquity, which the decrees of the Fathers have guarded in due reverence [*cui decreta Patrum sanxere reverentiam*]"; and c. 16, from Pope Leo IV in the midninth century: "By the divine permission we are so far made shepherds of men that we ought by no means to go outside what our Fathers have established, whether in the holy canons or in worldly laws, and we do indeed act against their most salutary dispositions if we do not conserve inviolate what they, by divine counsels, have laid down."

102. Dictum to C. XXV, q. 1.

103. DISPENSATION REPORT 16-17; Naz, *supra* note 94, at 1290.



mercy, kindheartedness or the like, and was regarded as a legitimate use of the *plenitudo potestatis*.<sup>104</sup>

As to the power of subordinate prelates to dispense, the strict logic of the position taken would allow them that power only with respect to laws that they themselves had made. We have already seen, however, that they felt free to deviate from papal or conciliar decrees if occasion demanded. The canonists drew on equity, custom, implicit delegation, and whatever other concepts they found at hand to bring their theory into accord with the prevailing practice, but they were never altogether successful.<sup>105</sup>

Against this background, we may suppose the quoted language from the 1215 canon to be serving three purposes: that of justifying the granting of dispensations from this canon in certain cases, that of denying to prelates other than the Pope the power to dispense from this canon, and that of setting standards of self-restraint in the exercise of that power by the Pope himself. Underlying these uses of a legislative formula, we may discern a certain dialectical tension between formal and personal elements in the canonical system. This dialectical tension was manifested at the local level by a certain informal tolerance of pluralism by local ordinaries in particular cases, never extending to the grant of a formal dispensation, and evidently never conferring complete security of tenure in one's plural benefices.<sup>106</sup> On the papal level, the same dialectical tension was found in the relation between the benevolent exercise of the *plenitudo potestatis* and the limitations imposed by canonical practice on the common forms of papal dispensations. These limitations were continually being themselves dispensed from, the dispensation from them being reduced to another common form, the common

104. Naz, *supra* note 94, at 1290-1. Thomassin disagrees, holding that extra compensation for noble or learned clerics was for the common good of the Church. 5 THOM. 108.

105. DISPENSATION REPORT 11-12, 17-18; Naz, *supra* note 94, at 1278; Thomassin suggests that as long as all was done in charity and for the good of the Church there was no debate between bishops and popes over who might dispense. 5 THOM. 105-6. To say that there was no debate among bishops and popes is not, of course, to say that there was no debate among canonists.

106. In addition to the temporizing, already referred to, on the part of Archbishop Pecham, see W. W. Capes, *Introduction*, REGISTRUM THOME DE CANTILUPO (1275-82) xxxv-xxxvii (Canterbury and York Society, v. 2, R. G. Griffiths & W. W. Capes, ed., 1907). See also PANTIN 39-40. Pantin is addressing himself to the practice of pluralism as such, rather than to the existence or nonexistence of the requisite papal dispensations, but the quotations he uses seem to bespeak men who are used to the holding of pluralities without papal dispensation. Note also that Thomassin attributes the proliferation of exceptions in the application of the rule against pluralism — particularly in the area of sinecures — to the difficulty of enforcing the law. 4 THOM. 621. It would seem also that the constitution *Ordinarii Locorum* of the Council of Lyons (1274), c. 3, I, 16, in VI<sup>o</sup>, was responsive to a certain tolerance of pluralists on the part of local bishops. See W. T. Waugh, *Archbishop Pecham and Pluralities*, 28 ENGLISH HISTORICAL REVIEW 625 (1913).

form subjected to new limits, and the process repeated again.<sup>107</sup>

In sum, despite the efforts of the canonists to impose their forms and categories on dispensation and kindred practices, these practices can be best understood not through those forms and categories, but through two principles we have observed in connection with other parts of the canon we are considering. These principles are that the typical canon embodies a moral judgment upon the practice it forbids, and that its enforcement involves an exercise of personal leadership. Under particular circumstances, the one whose personal leadership is required for the execution of the canon may determine in the exercise of his pastoral discretion that there exists a moral and spiritual context in which it is better not to follow what the canon requires. The possibilities for abuse in so broad a discretion as this are obvious, and the canonists attempted to hedge the discretion around in such a way as to limit the possibilities for abuse without limiting the discretion itself. From the dilemma thus created arose the law concerning dispensations.

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We began this discussion of obligation with a brief summary of the three approaches to the definition of law that have commended themselves to students of secular jurisprudence — one in terms of moral suasion, one in terms of prediction of physical coercion, and one in terms of pure internal analysis. We saw that all of these had a certain support in the realities of a secular legal system. We should now be able to note by way of contrast that none of them has much support in the realities of the medieval canon law.

1) The *moral suasion* of the canons lay, as we have seen, not so much in the canons themselves as in the moral principles that led to their enactment. Any just law has a certain basis in morality, but in the secular systems the legal disposition has a moral life of its own, making a bid for the conscience of the subject even in a case not covered by the underlying moral principle. In other words, obedience to the law is regarded as a virtue in its own right, dis-

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107. See Charles Lefebvre, *Privilège*, 7 DDC, 225, 228. See c. 1, 2, I, 11, in VI° for examples of limitations on the effect of common forms; see 5 CAL. PAPAL REG. 87-8 (1398) for an example of a dispensation from such limitations. The indult, 1 CAL. PAPAL REG. 246 (1248), to the Bishop of Bath and Wells to be free from papal provisions even if they contain a *non obstante* clause seems to bespeak a comparable sequence at an earlier date. At pages 244 and 249 of the same volume of papal registers are examples of provisions notwithstanding indults of exemption; it is presumably against these that the Bishop of Bath and Wells is protected. In some cases a papal privilege is armed with a clause to the effect that no subsequent rescript shall be effective against it unless the privilege is expressly mentioned in the subsequent rescript, e.g., *id.* at 246 (1248). It is, however, quite possible for a rescript to contain a clause making it effective against all contrary privileges, even those entitled to special mention.

tinct from whatever virtue may lie in the particular conduct enjoined by the law in question. The canons, because of their moralizing preambles, because of the didactic tendencies that affected their content, and, above all, because of the system of dispensations and other elements of pastoral selectivity that limited their enforcement, never quite achieved this independent moral life. Just as it was always considered necessary to appeal to the underlying moral principle to justify the framing or enforcing of a canon, so it was always possible to appeal to the same moral principle to justify not obeying the canon after it was made. Thus, as late as 1366, after all the legislation that had been enacted on the subject of pluralism, a pluralist still found it possible to defend himself by invoking moral principles extrinsic to the law:

And it is laid down in the sacred canons that a good and industrious and literate person can govern two or even ten churches better than another can govern one; and both he who resides and he who does not reside are understood to serve the altar, so long as they live a good life and expend well the income they derive.<sup>108</sup>

2) In predicting when some form of *physical coercion* will be applied, the canons seem to have been a good deal less serviceable than we expect secular enactments to be. We have seen that a renewed exercise of personal leadership was considered necessary to the enforcement of a rule however firmly it was embodied in older canons. Every medieval bishop who showed any zeal for the administration of his diocese seems to have had the same old problems to contend with, and to have addressed himself to them, sometimes via the enactment of new canons, sometimes via the enforcement of old ones, with an élan that depended far more on his personality than on the content of the canons. Thus, by consulting the canons, one could predict how his bishop would try to get him to behave, but not what, if anything, would be done to him if he did not behave that way.

3) The same idea of renewal that makes it so difficult to predict the coercive application of the canons makes it all but hopeless to approach them from a standpoint of *internal analysis*.<sup>109</sup> For instance, pluralism was made unlawful for the Universal Church in 1179, yet it was forbidden again in

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108. PANTIN 40. The broad reference to the sacred canons in this case seems to reinforce the conception advanced in text that they are basically conceived of as formulations of moral principles. PANTIN 39 quotes one other passage in defense of the pluralist, this one rather more than a century earlier, which makes still clearer the extralegal character of the arguments advanced. See *infra* note 114.

109. I say this despite the fact that internal analysis in the modern sense seems to have been an important part of the work of the late medieval canonists. See the discussion in Waugh, *supra* note 106, of Lyndwood's treatment of the canon *Ordinarii Locorum*.

1215, and treated as having been lawful before. The pluralist was deprived ipso jure of his excess benefices by the 1215 canon, yet in 1247 he was being compelled to resign them.<sup>110</sup> Prelates coming home from a general council would enact some of its canons locally, and let others go by the board.<sup>111</sup> In short, there was much important legislation that did not affect the internal analytical content of the law, while much of what any analysis would include in the law was in fact not treated as such. The dynamics of the system are far more remote than are those of any secular system from what can be encompassed within a series of analytical statements that such-and-such is the law.

If, then, the various definitions elicited from the systems of secular jurisprudence will not avail to define the nature of the obligation imposed by the canons, is there a key element in the canons themselves that will open to us the mystery of their obligation? The question bears more investigation, but I would tentatively suggest that this key element is to be found in the teaching office of the Church. It is this that unites these two elements of didacticism and personal leadership that have appeared as the common threads in the detailed analysis we have just completed. The canons present themselves to the individual Christian as the corporate witness of the Church to the guiding principles governing her interior life, and to the shepherds of the Christian people as the collected experience of the Fathers in bringing those principles home to their flocks.

The obligation imposed by the canons, then, is less juridical than pedagogical: it is the obligation of a wise man to allow himself to be governed by the counsels and experience of those wiser and more experienced than himself. The peculiarities we discern in the enforcement of the canons are explained by noticing that the obligation is to be guided — neither to follow unthinkingly nor to innovate rashly. “Therefore every scribe instructed in the kingdom of God is like to a householder who brings forth from his treasure new things and old.”

The canons as thus conceived have no small appeal as an instrument for ordering the interior life of the Church, the corporate existence of the people of God. Yet, for that very reason the canonical system displayed serious defects in meeting the temporal administrative burdens of the medieval church. For even the monumental achievement of the canonists in giving

110. See note 71 *supra*.

111. MARION GIBBS & JANE LANG, *BISHOPS AND REFORM, 1215-72* (1934), is devoted, especially in the latter part, to an examination of the manner in which the decrees of the Fourth Lateran Council of 1215 were disseminated in England. Of particular interest is the concluding discussion, which deals with attitudes moving the decision of the local bishops as to which of the canons of the general council were the most important.

their system a juridical structure could not impose on it that orientation toward external order that is required of a legal system if it is to deal successfully with temporal affairs.

#### IV. THE PROBLEM OF SANCTION

THE MOST FUNDAMENTAL part of the structure of canonical sanctions is bound up with the same magisterial and pastoral elements we have discerned in the rest of the canon law. Here, the sanction — excommunication is the most usual and the most typical — constitutes an institutionalized and personalized denunciation of a moral failing, calculated to induce in the Christian community a dread of the divine wrath of which this is a foretaste, and in the offender himself a change of heart, signified by the acceptance of a salutary penance imposed by the pastoral authority. The penance, in turn, was calculated to consummate the repentance of the sinner with an outward sign, both for the edification of the community and for the spiritual well-being of the sinner.

Against the background of this fundamental conception of canonical sanction, let us consider that quintessentially hard-shelled character introduced into legal analysis by Justice Holmes — the bad man:

You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a great deal to avoid being made to pay money, and will want to keep out of jail if he can.<sup>112</sup>

We have, to be sure, already rejected Holmes' attempt to make of this bad man and his affairs a defining criterion of the legal system as far as the canon law is concerned. There remains for him, however, an important subordinate role in the analysis of the system. He appears in the ambit of the medieval church in at least such force that ability to cope with him can be one gauge of the administrative effectiveness of the system.

With the bad man, *suae salutis immemor*, envisaged by Holmes, we will have to include also a rather more frequently occurring type, the good man who is not persuaded in conscience that the behavior denounced by a given canon is actually wrong. We have seen that the didactic tendency of the canons encouraged the belief that violating a canon was morally all of a

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112. *The Path of the Law*, 10 HARVARD LAW REVIEW 457 (1897).

piece with violating the purported moral principle on which the canon was based, so that the canon would have little moral suasion for one not convinced of the underlying moral principle. By the same token, one who was not convinced of the sinfulness of violating the canon would tend not to think himself affected by the spiritual censures directed against the violator of the canon. Such a one, therefore, as regards the efficacy of the canonical sanction, would be in the same case as the bad man.<sup>113</sup>

From the standpoint, then, of the bad man or the convinced nonconformist, let us consider the main sanctions which the canonical system brought to bear on the violator.

A. *Excommunication*.—Insofar as excommunication was automatic, it may have had some effect in cutting off the culprit from the society of those who knew he had incurred it, but we may doubt if this had more than minimal effect except on those who were disposed to be his enemies in the first place. Where the excommunication was officially pronounced and applied to a specific person, this effect may have been more pronounced. Here too, however, the culprit would be apt to have partisans of the same mind with himself, who would receive him and insure that the deprivation of the society of faithful Christians did not sit too heavily on him.<sup>114</sup>

The most important effect of excommunication from the standpoint we are considering was provided by the civil processes that could be invoked in support of it. In England, upon proper notice to the secular authorities, a writ *de excommunicato capiendo* would issue, under which the excommunicate would be seized by the sheriff and kept in confinement until absolved,

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113. Gerard Moran, *General Administrative Law*, 9 RUTGERS LAW REVIEW 40 (1954), develops a conceptual figure he christens Hardhead, who embodies rather well the kind of person I have in mind:

At times Hardhead will seem to be an alias for Holmes' bad man; but generally it will be best to conceive of him as either unusually self-centered or as a man of high principle. The verbal commands of law either do not apply to him or are "unconstitutional" in the sense of wrong.

With the picture of the doggedly pre-Roosevelt businessman evoked by this description, compare the "young men, ferocious and strenuous" referred to by Bishop Walter Cantilupe in the passage quoted in PANTIN 39, men who "would face the greatest dangers, sooner than let themselves be deprived of their benefices and reduced to a single benefice." 114. See THOMPSON 234-5 for the 1446 case of William Wrauby, vicar of the church of Brampton, who was denounced in the records of the Bishop's court as having incurred automatic excommunication for knowingly harboring and admitting to divine services a priest who had just been deprived and excommunicated in the same court for his manifold contumacies. It appears that a man who regarded himself as innocent in the matter on which his excommunication was founded would be apt to regard himself as not bound by the excommunication. Rosalind Hill, *Theory and Practice of Excommunication in Medieval England*, 42 HISTORY (N.S.) 1, 5-6 (1957). See THOMPSON 237 for a case of a priest who continued to say mass, although excommunicated and denounced as such.

or until he gave bond to abide the judgment of the Church — that is, to appear before the ecclesiastical court, and do whatever was required of him in order to be absolved.<sup>115</sup>

This made of excommunication a reasonably effective form of mesne process, but did not give it any value as a sanction on the substantive law, since anyone who sought absolution and was prepared to abide by the judgment of the court must needs be absolved. Furthermore, its effectiveness even as mesne process depended on the intervention of the secular authorities, which the bishops seem often to have been reluctant to invoke.<sup>116</sup>

B. *Irregularity*.—The sanction of irregularity was attached as an automatic effect to a number of forms of clerical misbehavior, chiefly those involving bloodshed. It entailed for those not yet in orders a disability to be ordained, and for those already ordained a disability to carry out the sacramental function attached to their order. As most of the benefices of the church required the possession and exercise of orders, a person who became irregular stood in danger of losing his benefices if he were found out. This danger must have had some effect in leading offenders to make themselves known and seek absolution, rather than face continuing insecurity in the tenure of their positions.<sup>117</sup>

While irregularity of its own nature was a permanent condition of the person affected by it, it was so freely dispensed from that it cannot have had more than a limited effect as a temporal sanction upon the conduct to which it was attached.<sup>118</sup> Rather, its role must have been that of another form of mesne process, leading certain types of offenders to present themselves for the imposition of other kinds of sanctions.<sup>119</sup>

115. POLLOCK & MAITLAND, 1 *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 478 (2nd ed., Cambridge, 1898). The release of such persons on bond was regarded as an abuse, and the prelates included it from time to time among their lists of grievances, e.g., *REGISTRUM JOHANNIS DE PONTISSARA* (1282-1304) 771 ff. (Canterbury and York Society, v. 19, 30, C. Deedes, ed., 1915-24). The prelates also protested the failure of the kings to supervise adequately the sheriffs to whom these writs *de excommunicato capiendo* were addressed. Art. 11, London 1257, 23 *MANSI* 956. Pecham in 1279 attempted to formulate a general excommunication of sheriffs who neglected to seize excommunicates, or who let them go before they were absolved, but he was forced to withdraw this on the king's insistence that the punishment of his officials must be left to him. FREDERICK POWICKE, *THE THIRTEENTH CENTURY 1216-1307*, at 476 (Oxford, 1953).

116. Rosalind Hill, *Public Penance: Some Problems of a Thirteenth-Century Bishop*, 36 *HISTORY* (N.S.) 213, 216 (1951).

117. See notes 74 and 75, and accompanying text, *supra*.

118. CHRISTOPHER ST. GERMAIN, *THE ADDICIONS OF SALEM AND BYZANCE* fol. 5 (London, 1534), suggests a further source of ineffectiveness in that the grounds of automatic irregularity are so numerous that no priest can hope to avoid them all. This seems an exaggeration.

119. It should be noted also that the forms of misbehavior to which irregularity was attached were not ones that a reasonably sober-minded cleric in middle life would find it particularly difficult to renounce. See note 75 *supra*.

C. *Monition*.—A monition is a kind of official warning. It may emerge from various judicial or pastoral situations, including an official inquiry into the conduct of a cleric:

Sir John Marshall, rector of Hamerton, is reported for having absented himself from that church for a long time without cause. On the fourth day of November, 1446, . . . he appeared, and admits that he has absented himself: he alleges fear, however. Therefore he is assigned the following day . . . in the same place to prove in legal form that which he has alleged. On which day . . . he appeared and was deficient in his proof; therefore he is warned that he reside henceforward and minister in person in his church.<sup>120</sup>

The chief effect of the monition is to pave the way for more severe penalties if the offending conduct is continued or resumed. Thus, it is what might be called a "one-bite" sanction.<sup>121</sup> It can readily be seen, for instance, that if this is the usual way of proceeding against nonresident rectors, a rector may with impunity absent himself until such time as he is caught and proceeded against canonically.<sup>122</sup>

In fact, this one-bite approach seems to have been all but universal in dealing with a number of classes of offense,<sup>123</sup> including, in the case of the clergy, nonresidence,<sup>124</sup> forbidden employments,<sup>125</sup> and even concubinage.<sup>126</sup> Indeed, as we have seen, it was generally considered preferable to give some advance warning before moving even against those offenders whose punishments were supposed to have automatic effect. The object of this use of the monition was evidently to give the offender a chance to reform. Thus understood, it relates to the didactic orientation we have already discerned animating the substantive provisions of the canons.

D. *Penance*.—For those sins brought to light in the external forum — that is, outside the confessional — a symbolic expiation in the form of a

120. THOMPSON 235-6.

121. See WILLIAM PROSSER, *THE LAW OF TORTS* 325 (2nd ed., St. Paul, 1955) for the principle of legal liability that gives rise to the oversimplified statement that "every dog is entitled to one bite."

122. THOMPSON 237 has a case of a man who has been absent five years.

123. Generally, there was supposed to be a monition before a person was excommunicated. Can. 47, 4 Lateran 1215, C. 48 X, V. 39.

So also in many cases there was supposed to be a monition before he was deprived of a benefice. G. Mollat, *Bénéfices Ecclésiastiques en Occident*, 2 DDC 406, 433.

124. In addition to the case quoted above, see 3 REG. CHICHELE, *supra* note 12, at 381. There is, however, a case in THOMPSON 231 of a man put to penance for not residing. In this case, the accompanying monition threatened excommunication, rather than deprivation, if the monition were not obeyed.

125. C. 16, X, III, 1.

126. C. 3, 4, X, III, 2.



public penance was exacted. The sinner who neglected or refused to accept and perform such a public penance was excommunicated for his contumacy, with the consequences already discussed. Penances of this kind were regularly imposed on those guilty of violence, sexual offenses, and the like.<sup>127</sup>

We have seen a canon of Pecham's which appears to threaten pluralists with the imposition of penances, but in general this sanction seems not to have been used in cases involving the tenure of benefices and the discharge of the duties attached to them. This is perhaps because some action involving the benefice itself was thought to serve better in such cases. While the canons say nothing expressly on the subject, it appears not to have been considered appropriate to visit a single offense with two kinds of punishment, such as penance and deprivation.<sup>128</sup>

The character of the penance imposed when that sanction was resorted to has been perceptively analyzed by Rosalind Hill, with examples taken from the register of Oliver Sutton, a late twelfth century bishop of Lincoln.<sup>129</sup> The midfifteenth century material appended by Hamilton Thompson to his *The English Clergy* seems to bear out Miss Hill's analysis.<sup>130</sup> Miss Hill points out that each penance was tailor-made to the individual case, and sets forth the governing principles as follows:

In devising a penance the ecclesiastical authority had to bear in mind three points. The penance must be salutary, that is to say that it must be designed to bring the individual to a proper state of grace and to keep him there. It must be deterrent, or sufficiently painful to mind and body to ensure that other people were prevented from committing similar offenses. Finally, in the widest sense of the word, it must be decent, and conducive to public order. It must not expose a person holding a responsible position to such humiliation that it would henceforward be impossible for him to exercise his authority.<sup>131</sup>

The goal of salutariness seems well implemented in the examples. The ex-

127. E.g., THOMPSON 206-19 (violence), 221 (sorcery); REGISTRUM JOHANNIS DE TRILLEK (1344-60) 98 (Canterbury and York Society v. 8, J. H. Parry, ed., 1911-12) (adultery). See also the cases referred to in Hill, *supra* note 116, at 217-19.

128. C. 12, 13, D. 81, both taken from the Apostolic Canons, seem to be inconsistent on this point. 12 says that a priest or deacon who commits certain offenses is to be deposed, but not deprived of communion, since he should not be judged twice for the same offense: "*Non judicat Deus bis in idipsum.*" 13 says that a bishop, priest, or deacon guilty of fornication or adultery is to be deposed, and expelled from the church to do penance among the laity. The same ambiguity presents itself in the medieval period, in that the practice proposed by Henry II for dealing with clerical felons, and rejected by Becket under the rubric "*non bis in idipsum*" became the regular practice in cases of heresy. R. Laprat, *Bras Séculier (Livraison au)*, 2 DDC 981.

129. *Supra* note 116.

130. THOMPSON 206-46.

131. *Supra* note 116, at 216. The examples that follow are all taken from *id.* at 217-24.

pressions of contrition and the forms of reparation required are ingenious and often moving. One who causes "a great effusion of blood" in the church is required to provide branches and candles for decorations, and rushes to cover the floor. Two clerics who quarrel on consecrated ground are to stand at opposite sides of the chancel steps and chant the psalter to one another.

This goal of salutariness was also ingeniously interwoven with that of decency and good order. Thus, where a group of men fortify and defend a church, they are made to come in procession into the church in question and offer their weapons and armor at the altar. This is salutary. But one among them is a knight, and he may bring his squire with him to carry his weapons and armor for him. This is decent, and insures proper respect for the order of knighthood. "The same desire for public decorum," says Miss Hill,

causes Sutton to take great care to ensure that the penances which he imposed upon members of the clergy were not such as to impair their authority in the eyes of lay persons. Clerks, even those who were young, were rarely beaten in public and then only by a cleric of senior standing. As a rule, when they received a beating, only members of the clergy were allowed to be present.<sup>132</sup>

This brings us to the subject of deterrence, the second of the goals Miss Hill enumerates, and the one of most interest to us from the bad-man standpoint we are considering. In Miss Hill's examples, the deterrent effect was achieved partly by corporal punishment, usually beating, and partly by some form of humiliation, such as appearing barefooted or otherwise incompletely clothed. In the case of the clergy and highly placed laymen, the humiliation was necessarily mitigated by the goal of decorum, as we have already seen.

Beatings and ancillary humiliations, then, done in a form suited to the offender's station in life, constituted the staple of deterrent sanctions in the imposition of penance. We may question whether in the more serious cases they were sufficient to deter:

A clerk who had joined in a particularly brutal and sacrilegious attack upon the clergy and parish church of Thame was commanded to beg the pardon of every individual whom he had wronged and forbidden to enter his parish church for five months. Every Sunday during this period he was to come as far as the church door, where he was to remain intoning litanies and penitential psalms while the mass was going on.<sup>133</sup>

132. *Id.* at 223.

133. *Id.* at 219.

We may wonder whether anyone who was inclined to make a "particularly brutal and sacrilegious attack" on another would be very much deterred by the prospect of having to perform such a penance as this if caught. We may wonder equally whether the example of John of Heyford, beaten three times in the market place for debauching a nun, would have done much to deter a man minded to the same offense. That deterrents of this kind did not sufficiently deter is borne out by the witness of the clergy themselves in the case of violence to their persons. Their pleas for royal protection against such violence reach the point of desperation by the fifteenth century.<sup>134</sup>

The penances actually imposed, then, seem to have been insufficient to deter, or at least insufficient to deter the bad man we are considering. The question that naturally arises, then, is why they were not made more severe. The answer would seem to be that, given the ethos of the system, they could not have been. We have already remarked that the actual practice met the goal of salutariness rather well. Many a sinner, walking barefoot into church with a candle in his hand, must have been led to reflect on the offense he had done to God and neighbor and to resolve to mend his ways, whereas the cruder punishments meted out by the secular authorities would only have hardened him. Thus, the system of penance in many cases served the purpose for which it was designed, and could not have been radically altered without being false to that most important purpose.<sup>135</sup>

When we turn from the types of offense for which penances were customarily imposed to the myriad administrative violations that sapped the organizational efficiency of the church in so many ways, we come to a still more serious obstacle to the expansion of the system of penance to afford a deterrent. As long as the system is articulated in terms of sin, the severity of the penance must be proportionate to the moral guilt involved, rather than to the need for deterring the offense as determined by its effect on the work and witness of the church. Pluralism, nonresidence, ordination outside the diocese — these were vices which the church was under an urgent necessity of deterring, but morally they were not to be compared with shedding blood in church or with debauching nuns, and it would have been scandalous to visit them with a comparable penance. Generally, then, as a sanction addressed to the effective administration of the canon law, the system of penance must be considered at best peripheral.

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134. 3 REG. CHICHELE, *supra* note 12, at 76-8.

135. See J. H. Parry, *Introduction*, REG. TRILLEK, *supra* note 127, at iii-v; W. H. Hale, *Introduction*, in PRECEDENTS AND PROCEEDINGS IN CRIMINAL CAUSES 1475-1640 (London, 1847).

E. *Imprisonment*.—The ordinary use of a prison in the canonical system, as in the secular systems of the time, was for the custody of an accused person pending the final disposition of his case. A decretal of Boniface VIII, however, allowed an ordinary, if he found it expedient in a particular case, to send one of his own clergy to prison to do penance.<sup>136</sup> Earlier, Gratian had collected a few documents allowing the assignment of a "*locus penitentiae*"; these texts, however, seem to envisage a monastery rather than a prison.<sup>137</sup>

Whether physical confinement was in a monastery or in a prison, it seems clear from the canonical texts that such confinement was conceived as a form of penance, rather than as a distinct kind of punishment. We may suppose that its imposition was affected by the considerations already discussed which limited the severity of penances. In any event, the only persons generally imprisoned under canonical processes in England were clerics who had been previously convicted of felony by the secular courts. The use of this sanction in cases of this kind seems to be the result of a complicated church-state dialectic, rather than of an independent determination by the ecclesiastical authorities of the appropriate sanction in such cases.<sup>138</sup> The prelates were under continual pressure from the secular authorities to make the imprisonment of felonious clerics more certain and more burdensome than they customarily did.<sup>139</sup>

F. *Money Payments*.—There were three ways in which the canonical system provided for the exaction of money. One was as a civil remedy, corresponding to contract or tort damages in our own secular system, one was as a punishment, corresponding to a fine in our system, and one was as an administrative device.

The first, the civil remedy, was available wherever the jurisdiction of the Church extended by reason of the sin of one man against another. Thus, one who had pledged his faith to the payment of a sum of money could be admonished to pay it on pain of excommunication,<sup>140</sup> and one who had wronged another could be compelled in connection with the process of

136. C. 3, V, 9, in VI°.

137. C. 7-11, D. 81. See also c. 6, X, V, 37. It would seem also that the *locus penitentiae*, being connected with the discipline of penance, would have to be voluntarily submitted to. Refusal so to submit, however, would be ground for excommunication, whereby the offender could be imprisoned until absolved.

138. LEONA GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* 92-115 (Northampton, 1928); 1 POLLOCK AND MAITLAND, *op. cit. supra* note 115, at 439-57.

139. See Archbishop Islip's constitution on this, 26 MANSI 295 (1351).

140. 1 POLLOCK & MAITLAND, *op. cit. supra* note 115, at 128-9; 2 *id.* 197-8.

penance and absolution to make due restitution in money or in kind.<sup>141</sup> In England the secular authorities regarded the availability of these remedies in the church courts as a trespass upon the secular jurisdiction, and issued writs of prohibition against proceedings in which such remedies were sought.<sup>142</sup> Nevertheless, these remedies must have been more or less effective, as they continued to be sought and granted throughout the Middle Ages, albeit in cases pretty much peripheral to the main administrative necessities of the church.<sup>143</sup>

The second form of financial exaction, that which corresponds to the secular fine, was used frequently enough as a form of penance, but it seems to have had less bite to it than the personal or bodily penances did. The requirement of public decorum in the imposition of penances, as outlined by Miss Hill, may well furnish the explanation for this weakness. Financial returns in medieval society were attached to functions of public importance. A man who had money used it to maintain the prestige necessary to do his job, and the assistants he required in doing it efficiently. Thus, a large sum of money taken from him would be felt in his public function rather than in his private comfort.

Conversely, if, as was often the case, the financial exaction took the form of a requirement that the sinner establish some concrete memorial of his penitence — an endowed mass, a chapel or something of the kind — the prestige gained from the good work might well be so advantageous to the sinner as to outweigh the financial cost. Under such circumstances, the financial expenditure might be edifying as a tangible pledge of contrition and reform, but it would not be so burdensome as to afford a deterrent from the sin in question.

Even in the realm of edification, however, the money payment proved infelicitous. Since it was, or appeared to be, less burdensome to the penitent than personal or bodily penances would have been,<sup>144</sup> it gave almost inevitably the impression of being a kind of bribe by which the rich could avoid the penances visited upon the poor.<sup>145</sup> This impression was heightened by a fairly common abuse whereby the pious contribution enjoined as a penance would redound to the material benefit of the authority imposing

141. Hill, *supra* note 116, at 217.

142. POLLOCK & MAITLAND, *op. cit. supra* note 115, at 199-203.

143. BRIAN WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* 87-92, 107-108 (Oxford, 1952).

144. Note the request of the clergy to the bishops that corporal penances be imposed — presumably instead of pecuniary — in cases of notorious and repeated adultery. Art. 8, London 1399, 26 *MANSI* 924.

145. See Ottobuono's language in can. 20, London 1268, 23 *MANSI* 1235-6.

the penance.<sup>146</sup> Under the circumstances, the imposition of money penances fell rather early into a disrepute from which it has never recovered.<sup>147</sup>

The third use of money payments — as an administrative device — involved an exercise of control over the money itself or the source of it, rather than over the person of the one possessed of it. Under the name of sequestration, such an exercise of control was regularly resorted to in order to preserve the subject matter of a suit *pendente lite*.<sup>148</sup> As a device for the achievement of substantive administrative results, it has just enough recognition in the canons to raise a tantalizing question as to why it was not put into general use. It appears in the Decretals in the form of a letter from Gregory IX to the Patriarch of Antioch, ordering him to recall his clergy to residence, and if they do not return, to use the fruits of their benefices to provide for the service of their cures as long as they remain absent.<sup>149</sup> This would seem a rather practical approach to the problem of nonresidence, as it spared the bishop the necessity of finding the elusive incumbent before proceeding against him. In fact, however, it seems to have assumed an ancillary role in a proceeding fundamentally directed at the personal correction of the nonresident.<sup>150</sup>

Another example of controlling revenues for administrative purposes is presented by one of Ottobuono's English canons of 1268, on the subject of dilapidations. It provides that if an incumbent after a monition is issued fails for two months to make necessary repairs to a building for which he is responsible the bishop may himself have the repairs made, and pay for them

146. This practice is denounced by Alexander III in C. 3, X, V, 37, and in an English synod of 1295. REG. PONTISSARA, *supra* note 115, at 207-39.

147. The prevalence of money commutation was a constant ground of Puritan denunciation of the entire medieval penitential apparatus, as carried over into post-Reformation Anglicanism. See, e.g. (Anon.), *The Proctor and Parator their Mourning*, Bodleian Pamph., D40 (34) (1641): "Country wenches would sell their petticoats rather to pay us then to endure a white sheet [the customary garment worn in the performance of public penances]; how have wee thriven by their wantonnesse?"

148. Naz, *Séquestre*, 7 DDC 973.

149. C. 16, X, III, 4.

150. C. 28, X, II, 28 seems to treat this as a means of providing for the cure *pendente lite*; so does Can. 2168 of the 1918 Code. Title IV of Book III of the Decretals, dealing with nonresidence, has only one canon, c. 11, which expressly addresses itself to the eventuality that the incumbent cannot be found. It provides not for sequestration, but for deprivation six months after a citation is made public for the third time. Cf. REG. TRILLEK, *supra* note 127, at 46-8. This is to be followed by personal sanctions and excommunication if the ousted cleric does not return to the obedience of his ordinary. Canon 2381 of the 1918 Code provides for depriving a nonresident of the fruits of his benefice, but so far from using the benefice as a means of reaching the incumbent, it uses the incumbent as a means of reaching the benefice — calling upon him to forward his receipts to the ordinary. Thus, neither medieval nor modern Catholic canon law arrived at the use of sequestration to coerce the nonresident in the manner of the nineteenth century Anglican practice initiated with 43 George III, c. 84 (1803).

out of the fruits of the benefice.<sup>151</sup> This provision has no counterpart in the general canon law; the only provision in the Decretals envisages personal correction of the incumbent who fails to make repairs,<sup>152</sup> and the canons collected by Gratian say nothing about procedure.<sup>153</sup>

One other use of a comparable device in England is found in the procedure by which a bishop might sequester a benefice to pay the debts of the incumbent. This, however, was in response to a royal writ,<sup>154</sup> and there is no indication the canons authorized it.<sup>155</sup>

Sanctions of this kind, involving the exercise of control over the physical facilities of a diocese, rather than over the persons of the clergy, could have given the ecclesiastical authorities a great deal of increased administrative flexibility, and made up for many of the gaps in the system of personal correction. It is difficult to fathom, therefore, why such sanctions were not given anything like the scope of which they were capable. There is no real answer to such a question as this, but it is possible to guess. My own guess is that administrative techniques that operated on things rather than persons presented an alien appearance in the canonical structure because the canonical structure was founded on personal moral leadership.<sup>156</sup> We, in our own time, distinguish so readily between the pastoral and the administrative functions of a prelate that it is hard for us to empathize an attitude that would regard them as one. Yet there is much in the canonical materials to warn us that in the mind of a medieval bishop the work of administering his diocese in accordance with the canons is the heart of his pastoral work, and ought to be carried out in a manner becoming a shepherd of souls.<sup>157</sup>

151. Can. 18, London 1268, 23 MANSI 1233-4. For an example of a sequestration for dilapidation, see REG. TRILLEK *supra* note 127, at 109.

152. C. 4, X, III, 48 ("*cogi debeant*"). C. 1 of the same title calls for the assistance of the beneficed clergy in the repair of their church, but sets up no sanction.

153. C. 10, C. X, q. 1; c. 3, D. 1, *de cons.*

154. *Sequestration*, in RICHARD BURN, 2 ECCLESIASTICAL LAW 329-30 (London, 1763). For examples of the royal writ involved see REG. TRILLEK *supra* note 127, at 256-7. It appears that the kings used this process to reach clerics for other purposes as well as the collection of debts. *Id.* 326. A more general use of *in rem* sanctions by ecclesiastical authorities on their own is suggested by a letter in REG. T. CANTILUPE, *supra* note 106, at 149, ordering his deans to warn the beneficed clergy not to store tithes elsewhere than on glebe land — as some have done to avoid ecclesiastical distraint — on pain of immediate sequestration. I can find no indication of the nature or use of the ecclesiastical distraint to which Cantilupe refers. The English bishops developed in a few cases procedures patterned after those of the royal administration; this may represent an abortive step in the same direction.

155. The 1918 Code (Can. 1673) provides for a comparable process, but the compilers give no source for their enactment in the previous law.

156. ULLMAN, *op. cit. supra* note 10, at 74: "The pope's jurisdiction and law were concerned with the conduct and actions of Christians, not with their (dead) possessions."

157. I am not so much taking issue with Thompson's description of the medieval conception of the episcopal office, THOMPSON 40-2, as stating the other side of the coin. The confounding of pastoral and administrative functions is no better for the administration than it is for the pastorate.

G. *Suspension and Deprivation*.—A number of punishments in the canonical system related to the cleric's tenure of his benefices and his clerical status. They ranged from a short period of suspension from benefice or other source of income to permanent reduction to the lay state. It appears that these should not be regarded as another form of penance, but rather as a distinct sanction. Unless the offender failed to appear when summoned, neither excommunication nor absolution formed any part of the procedure leading up to them: the moral rehabilitation of the offender punished in this way was evidently left to the ordinary processes of private confession.

Except in the case of short suspensions inflicted on account of relatively minor infractions, it was not customary to inflict punishments of this kind until the offender had been given a monition and an opportunity to reform.<sup>158</sup> Even where the canons purported to inflict the punishment automatically, as we have seen, the tendency was to give the offender a chance to rehabilitate himself before exposing him to their full rigor. This leniency seems to be another product of the moralizing tendency of the whole system.<sup>159</sup>

The moralizing tendency evidently affected the severity of this class of punishments as it did that of penances. Miss Hill tells us that the cleric who procured ordination outside his diocese without the requisite letters dimissory was "usually punished by a short period of suspension from celebrating mass or from holding a cure of souls."<sup>160</sup> This punishment was probably reasonably proportioned to the moral guilt involved in failing to abide by a technical rule of this kind. From an administrative standpoint, however, the rule was of considerable importance. Wholesale failure to abide by it placed the efforts of a bishop to improve the quality of his ordinands at the mercy of the least responsible of his colleagues. This was not the kind of consideration likely to occur spontaneously to the mind of a young man aspiring to ordination; thus, the moral guilt of the violator could scarcely have been expected to correspond to the importance of the law. In this context, apportioning the punishment to moral guilt overlooked an important educative function of the law: the severity of the punishment plays a significant part in teaching the importance of the law. Punishing one offender

158. Mollat, *supra* note 123. It appears that this principle was departed from in order to reward the zeal of informers in search of papal provisions. See 5 CAL. PAPAL REG. 98, 173 (1398) for mandates ordering the trial of a beneficed cleric for an offense, the accused to be deprived if found guilty and the informer put into his benefice.

159. See in this connection C. 11, X, I, 2, an interpretation by Innocent III of a statute of the University of Paris providing for the dismissal of a member who violates the statutes after three monitions. Innocent says that unless the statute expressly provides otherwise, the person so dismissed is to be reinstated upon his repentance and promise to reform.

160. Hill, *supra* note 116, at 218. C. 1, C. XXI, q. 2 seems more severe.



lightly because he did not think the violation very important might well lead the next man to think the violation was not very important because it was punished so lightly.

Coordinate with the use of suspension and deprivation as a punishment for the moral lapses of the clergy was the failure to use it as an administrative measure. It appears not to have been possible to remove a man from his benefice on the mere ground that he was unable to do effectively the job for which the benefice was provided. Such a one might be assigned a coadjutor to do the work, and required to assign him a "*congrua sustentatio*" out of the fruits of the benefice. This procedure is provided for in the Decretals in the case of a person suffering from some physical disability,<sup>161</sup> and there is a record of its being done in the case of a person unable to speak the language of his parishioners.<sup>162</sup> Under some circumstances, a beneficed cleric might be allowed to resign if he were willing to, although he might instead be accused of proposing a cowardly desertion of his flock — Innocent III dealt with this subject at a great length.<sup>163</sup> But in no case could he be deprived of his benefice for mere incompetence or disability. As a canon, taken from Gregory the Great, that heads up the title of the Decretals on sick or debilitated clergy puts it:

Since, when one is stricken in body, we cannot know whether in the judgment of God it was for his punishment or for his purgation we ought not to add to the affliction of those who have been thus scourged. . . .<sup>164</sup>

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When we speak of the sanctions in a legal system, we refer to the sum total of the measures it takes for imposing upon society the standards it envisages. These measures include motivating desirable behavior, deterring undesirable behavior, and reshaping affairs when undesirable behavior has taken place in order to mitigate its consequences as much as possible. The

161. C. 3, 5, 6, X, III, 6. C. 4 of the same title seems at first blush to envisage his removal on a pension, but in the light of the other canons, I would not so interpret it.

162. ROTULI ROBERTI GROSSETESTE (1235-53) 499-500 (Canterbury and York Society, v. 10, F. N. Davis, ed., 1913).

163. C. 10, X, I, 9.

164. C. 1, X, III, 6. The provisions of can. 2147 of the 1918 Code, allowing the ordinary to remove a man from his benefice in the interest of an effective ministry, rather than by way of punishment, are modern in origin. Naz, *Offices Ecclésiastiques*, 6 DDC 1074, 1100. The circumstances authorizing such a procedure seem to be drawn from the traditional grounds for appointing a coadjutor (which procedure is preserved in can. 475, and is to be used instead of privation unless it appears that the good of souls cannot be served in that way), and from the grounds listed by Innocent III, C. 10, X, I, 9 as warranting the resignation of a benefice.

canonical system sought to accomplish all these aims by a powerful and subtle moral witness calculated to instill in the hearts and consciences of men the vision of order on which the system was based. It is because of this concentration on moral witness that the system seems hopelessly ineffective from the standpoint of the determined and incorrigible bad man we have been considering. The sanctions that were regularly imposed were not sufficiently burdensome to deter him, and the sanctions that were sufficiently burdensome were used only as a last resort — deferred for long periods in the hope that the culprit might yet reform. Nor was any effort made while his reform was awaited to mitigate the harm he was doing to the fabric of the Christian society or to the work and witness of the Church.

In short, pastoral solicitude was the keynote of the sanction structure of the medieval canon law, as pastoral instruction and exhortation were the keynote of its substantive content. A system of this kind showed a good deal of capacity for governing the Christian community at a time when it was a live option in the society whether to belong to that community or not. But a system that is to order a whole society must check in some way the bad man as well as the good, because a whole society will exhibit an important number of such men.

## V. CONCLUSION

WHAT SEEMS to emerge from the foregoing analysis is that the highly developed juridical structure given the canon law by its early medieval theorists did not turn the system from its basic orientation toward the support and guidance of the personal pastorate by the corporate witness of the Church. This orientation led the system to its characteristic stresses on formal articulation at the expense of functional application, on pastoral leadership at the expense of legal obligation, and on moral correction at the expense of physical coercion.

This close connection with the pastorate imposed on the canonical system an eschatological understanding of its goals: where secular systems aim at the establishment and maintenance of a concrete and realizable external social order, the canon law aimed at the ultimate establishment of the Kingdom of God over the hearts of men. By the same token, since the goal was eschatological, there could be no question of marshalling available resources for its foreseeable achievement: where secular systems work through the available means of social control, the canon law worked through a personal and corporate witness to the underlying eschatological vision.

The difference between the canon law as animated by these pastoral and

eschatological commitments and a secular legal system was obscured by the theoretical elegance and practical unreality of the late Roman secular law — all the more so as that system received renewed theoretical vigor from the medieval legists after it had ceased to be living law in any existing society. But if we look for an example of a secular system not in the Roman law, but in the early medieval secular systems as they painfully shaped their scant resources of social control for the achievement of a rudimentary order in society, the contrast is apparent enough. The churchmen were not unaware of this contrast, but they tended to see it in eschatological rather than practical terms; they found their law superior to the world's law as the Kingdom of God is superior to the kingdoms of the world.<sup>165</sup> This formulation of the contrast between the two systems is, of course, very wide of the mark.

What I am suggesting here is not so much that the canon law was bad as that it was not in the usual sense a legal system. The pastoral and eschatological orientation of the canon law as I have described it arises out of the basic commitment of the Church as a religious institution, and is far more important to the Church than a legal system is. But the fact remains that if a legal system is — as most modern jurists would conceive it to be — necessarily oriented toward the imposition and maintenance of a desirable social order through the efficacious application of the available means of social control, the medieval canon law was not essentially a legal system. *Dum colitur Maria, expellitur Martha*. Given the responsibilities assumed by the medieval church, together with its great resources in material and personnel, the canon law had necessarily the work of a legal system to do. This work, by and large, it did badly, precisely because its guiding vision was fixed on higher and better things.

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165. This spirit is by no means dead among canonists. See the dedication to MATTHEW RAMSTEIN, *A MANUAL OF CANON LAW* (Hoboken, 1948): "Pagan Rome once said: *Salus REIPUBLICAE Suprema Lex* but Christian Rome replied: *Salus ANIMARUM Suprema Lex* and Christian Rome survived."