



Prostitution in the Medieval Canon Law

James A. Brundage

Signs, Vol. 1, No. 4. (Summer, 1976), pp. 825-845.

Stable URL:

<http://links.jstor.org/sici?sici=0097-9740%28197622%291%3A4%3C825%3APITMCL%3E2.0.CO%3B2-D>

Signs is currently published by The University of Chicago Press.

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/about/terms.html>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/journals/ucpress.html>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

The JSTOR Archive is a trusted digital repository providing for long-term preservation and access to leading academic journals and scholarly literature from around the world. The Archive is supported by libraries, scholarly societies, publishers, and foundations. It is an initiative of JSTOR, a not-for-profit organization with a mission to help the scholarly community take advantage of advances in technology. For more information regarding JSTOR, please contact support@jstor.org.

Prostitution in the Medieval Canon Law

James A. Brundage

Prostitution has been called the oldest human profession,¹ and it is certainly true that virtually every known system of positive law has had something to say about the prostitute, the pimp, the procurer, and the conduct of their business.² My purpose here is to examine the treatment of the harlot and her trade by the lawyers and lawgivers of the medieval church.

One difficult question must be faced at the outset: the definition of the term itself. What is prostitution, so far as the medieval canonists were concerned? The answer to this fundamental question involves two

1. It has even been suggested that prostitution may be older than humanity: investigators have characterized some forms of sexual behavior among chimpanzees and other primates as prostitution (see Vern L. Bullough, *The History of Prostitution* [New Hyde Park, N.Y.: University Books, 1964], p. 4, and the literature cited there). The antiquity and ubiquity of prostitution among human societies has often been remarked upon, although Bullough points out (p. 14) that just how universal it may be depends upon one's definition of what behavior prostitution includes. It is clear that sexual promiscuity may be discovered in virtually every human society. Promiscuity and prostitution, however, are not necessarily synonymous, although the medieval canonists tended to identify the one with the other.

2. Thus although forbidden in the Mosaic law (Lev. 19:29, 21:7), prostitution obviously was practiced in ancient Israel (e.g., Gen. 38:12-26, Judges 11:2, 1 Kings 3:16-28, etc.). Sacral prostitution is implied, though not explicitly described, in the laws of Hammurabi (see *The Babylonian Laws*, ed., with translation and commentary, G. R. Driver and Sir John C. Miles, 2 vols. [Oxford: Clarendon Press, 1955], 1:360-61, 366-67). Throughout the paper I have used synonyms for "prostitute" such as "harlot," "whore," "tart," "trollop," and the like. "Prostitute" is a relatively neutral, almost clinical term, while the other terms carry a certain amount of judgmental freight. Since the sources I have used employ terms which are more judgmental than neutral, it seemed appropriate to try to convey some sense of that fact by using English terms of a similar sort. The word *meretrix* in Latin, for example, carries about as much judgmental weight as "whore" does in English; it is certainly less neutral than "prostitute."

strands of thought. Prostitution may be treated as a moral category, in which case the element of sexual promiscuity will be prominently emphasized in the definition. Or prostitution may be treated primarily as a legal category, a type of trade which has implications for public order and policy. In this case, the element of gain, the cash nexus of the transaction, will tend to be emphasized. The moralist will mainly be concerned about the ethical problems of indiscriminate intercourse for the sake of gain; while the jurist will tend to analyze prostitution in terms of the hire-sale situation, will be concerned about the quasi contract established between the harlot and her customer, will have something to say about the property rights conveyed in the transaction, the price paid, and the value received in the exchange.

This contrast in viewpoints is particularly intriguing in the treatment of prostitution by the canonists, the lawyers of the medieval church. The canonists constructed an elaborate and closely reasoned system of jurisprudence to regulate all the branches of human activity that touched upon the moral interests, the business activities, and the social concerns of the church in medieval Europe. Since the church was far and away the largest and most intricate institutional structure in medieval society, its legal system was immensely influential in shaping the attitudes and dictating the limits of action and policy of medieval people at every level of society. Monarchs, monks, and merchants; bishops, businessmen, and bureaucrats; popes, princes, and pimps—all needed to know how to comply with or, if necessary, to evade, the legal sanctions devised by the canonists. Consequently, canon lawyers played critically important roles in determining the ways in which medieval society functioned. Partly for this reason, no doubt, the ranks of the canonists included some of the ablest and most powerful minds of the twelfth and thirteenth centuries. The ingenuity and originality of their work is not always easy to perceive because of the technical medium in which they worked. Their insights and ideas tend to be embedded in lengthy and often tortuous legal treatises. Thus the ideas of a canonist are neither so immediately perceptible nor so pleasurable to read as, say, those of a poet. On the whole, though, the ideas of the canonists often had far greater impact on the functioning of governments, the enforcement of social policy, and the workings of business than the ideas of any comparable group of writers.

The canon law in its origins was an offshoot of moral theology and never wholly escaped its moralistic heritage. Yet the canonists also drew upon the Roman law as a major source of their arcane science, and they employed both legal and moral concepts in their writing. This duality accounts for some of the peculiarities in their treatment of prostitution.³

3. Prostitution is, in fact, extremely difficult to define satisfactorily. The problem is discussed by Bullough, pp. 1–2. A classic definition is given by Iwan Bloch, *Die Prostitution*, 2 vols. Handbuch der gesamten Sexualwissenschaft (Berlin: Louis Marcus, 1912–25), 1:38.

How, then, did the canonists define prostitution? As one might expect, both of the basic criteria, promiscuity and gain, were involved. The fundamental definition which they employed was coined by Saint Jerome (ca. 342–420): “A whore is one who is available for the lust of many men.”⁴ In the mid-twelfth century, when the canon law first began to take coherent shape, its founding father, the monk Gratian, incorporated Saint Jerome’s definition in his *Decretum* (ca. 1140). Gratian thereby set the framework within which later canonists were to deal with the whole problem of prostitution. For Gratian and the later lawyers of the medieval church, then, promiscuity was the controlling factor in determining who was a prostitute. There is much sense in this: it may be possible to be promiscuous without being a prostitute; but it is hardly possible to be a prostitute without being sexually promiscuous. The notion of promiscuity was further clarified by the decretists, the writers who commented on Gratian’s *Decretum*. The ordinary gloss, which became the standard exposition of the *Decretum* used in the universities as a textbook, defined the notion through a biological analogy: “Promiscuous: that is, she copulates indifferently and indiscriminantly, as in canine love. Dogs indeed copulate indifferently and indiscriminantly.”⁵ Other canonistic writers mentioned some additional considerations in their discussions of what prostitution meant. One of the most prominent thirteenth-century canonists, Cardinal Hostiensis (d. 1271) stressed the element of notoriety: a prostitute was not only sexually promiscuous, she was openly and publicly promiscuous.⁶ Both Hostiensis and an equally

Fernando Henriques, *Prostitution in Europe and the Americas*, 2 vols. (New York: Citadel Press, 1962), 1:17, attempts a slightly more explicit definition. A common-law definition of prostitution was set down by Justice Darling in *Rex v. de Munck*, [1918] 1 K.B.635: “We are of the opinion that prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return”; cited by T. E. James, *Prostitution and the Law* (London: Heinemann, 1951), p. 2.

4. D. 34 c. 16, citing Saint Jerome, *Epist.* 64.7 ad Fabiolem: “Vidua est, cuius maritus mortuus est. Eiecta, que a marito uiuente proicitur. Meretrix, que multorum libidini patet.” The conventional canonistic citation system is employed throughout this paper. For explanations, see Javier Ochoa Sanz and Aloisio Diez, *Indices canonum, titulorum et capitulorum corporis iuris canonici*, *Universa Bibliotheca Iuris, Subsidia*, vol. 1 (Rome: Commentarium pro Religiosis, 1964), pp. iv–v. The texts of the various parts of the *Corpus* are cited from the standard edition by Emil Friedberg, 2 vols. (Leipzig: B. Tauchnitz, 1879; reprint ed., Graz: Akademische Druck- und Verlagsanstalt, 1959). The *glossa ordinaria* will be cited from the Venice, 1605, edition in 4 vols.

5. C. 27 q. 1c. 41 *glos. ord.* ad v. *promiscuum*: “Promiscuum, id est, indifferenter et indistincte comisceret scilicet canino amore. Canes enim indifferenter et indistincte comiscerentur.” Also Rolandus (later Pope Alexander III), *Summa* to C. 27 q. 1 c. 41 ad v. *promiscuum*, ed. Friedrich Thaner (Innsbruck: Wagner, 1874), p. 125.

6. Hostiensis (Henricus de Segusio), *In quinque Decretalium libri commentaria* (= *Lectura*) to X 4.1.20, no. 4; 5 vols. in 2 (Venice: apud Iuntas, 1581; reprint ed., Turin: Bottega d’Erasmio, 1965), vol. 4, fol. 6^{vb}: “Publicas id est meretrices, que multorum libidini patent, et melius xxxiiii dist. vidua [D. 34 c. 16], vel quarum publice venalis est turpitudine, xxxii q. iiii meretrices [C. 32 q. 4 c. 11].”

renowned canonistic writer of the next generation, Joannes Andrea (ca. 1270–1348), agreed that an element of deception is also involved in prostitution: the harlot systematically deceives those whom she serves.⁷ The deception that these lawyers had in mind was presumably the simulation of love or at least of emotional intimacy between the prostitute and her client.

When the canonists dealt with the element of gain in prostitution, they drew heavily upon the Roman law. The classical Roman law had defined prostitution as the offering of the body for sexual intercourse in return for money or other remuneration, at least so long as the woman made herself available to more than one or two lovers.⁸

The widespread practice of concubinage also complicated the attempts both of canonists and of medieval writers on the Roman law to define prostitution. The ancient Roman jurists, whose ideas were heavily relied upon by medieval lawyers, had assigned the concubine a status quite distinct from that of the prostitute. They considered the concubinage relation a relatively stable one, in contrast to the transient relationship of the prostitute and her customers. Thus the status of the concubine was closely related to that of the married woman in the Roman law, and concubinage might be treated as an informal type of marriage. The concubine and her lover were considered bound to one another, not simply by lust and sexual attraction, but also by “marital affection.”

7. Joannes Andrea, *In quinque Decretalium libros novella commentaria* to X 3.2.6, no. 2; 5 vols. in 4 (Venice: apud Franciscum Franciscum, 1581; reprint ed., Turin: Bottega d'Erasmus, 1963), vol. 3, fol. 8^{rb}, following Hostiensis, *Lectura* to X 3.2.6, no. 2 (vol. 3, fol. 6^{rb}): “Fornicarias, dicitur fornicaria, quasi carens forma nitida, unde versus: ‘nec meretrix munda, nec cornix alba sit unda.’ Et dicitur concubina quasi simul cubans. Et meretrix quasi mere, id est vere tricans, vel quasi merens quando non tricat, id est decipit.”

8. Esp. Ulpian in *Dig.* 23.2.43; cf. also Modestinus in *Dig.* 23.2.24 and Marcellinus in *Dig.* 23.2.42. The conventional Roman law citation system is employed throughout this paper. For explanations, see Javier Ochoa Sanz and Aloisio Diez, *Indices titulorum et legum corporis iuris civilis*, Universa Bibliotheca Iuris, Subsidia, vol. 2 (Rome: Commentarium pro Religiosis, 1965), pp. x–xi. The texts of the *Corpus* are cited from the standard critical edition by P. Kruger, T. Mommsen, R. Schoell, and G. Kroll, 3 vols. (Berlin: Weidmann, 1872; many times reprinted). The *glossa ordinaria* will be cited from the Lyons, 1584, edition in 5 vols. The basic definitions set forth in the Roman law texts cited here identify as prostitutes the inmates of brothels, those who offer their bodies for hire in taverns and elsewhere, those who make their living by furnishing sex for pay, and other promiscuous women in general, whether they take remuneration for their services or not. Public display was an important ingredient in the Roman jurists’ notions about prostitution. The medieval jurists tended to identify certain occupations with prostitution and to take the view that actresses, for example, could be presumed to be prostitutes (see *Cod.* 5.4.23.1 *glos. ord. ad v. scenicis*). This was not a view to which the classical jurists necessarily subscribed (see Riccardo Astolfi, “Femina probrosa, concubina, mater solitaria,” *Studia et documenta historiae et iuris* 31 [1965]: 15–60, at 20). The theologians sometimes attempted to define how many men a woman must have intercourse with to merit classification as a prostitute. Bloch, 1:18, mentions opinions ranging from a low minimum of forty to a high minimum of 23,000.

The lawyers used this latter term to signify either an intention eventually to contract marriage or else an emotional quality, not wholly unlike the concept of love.⁹ Marital affection, in fact, was treated in Justinian's legislation as excluding promiscuity, which was essential to the definition of prostitution.¹⁰ Thus concubinage and prostitution were mutually exclusive.

The medieval canonists, although conscious of these Roman law texts, faced a theological problem in adopting wholesale the Roman law definitions. By the lights of Western theology in the twelfth century, all extramarital sexual relations involved fornication, which was a species of sin. Concubinage, from this viewpoint, was an aggravated type of fornication, since it implicitly involved a long-term, continuing, nonmarital sexual relationship.¹¹ On the other hand, some of the decretists preferred to treat concubinage as a type of marriage,¹² a temporary marriage, perhaps, as Bishop Rufinus (d. 1192) called it,¹³ or an informal, clandestine marriage, as the law professor Huguccio (d. 1210) thought of it.¹⁴ The canonistic doctrine on concubinage, in short, was not wholly clear or consistent. Yet although the canonists clearly thought concubinage undesirable, it was less undesirable than prostitution, and they felt it necessary to draw a sharp distinction between prostitution and concubinage. The distinction that they drew was based on the element of promiscuity, not on the element of gain in the relationship.¹⁵

9. Dig. 25.7.1, 3, 4; 34.9.16.1; 50.16.144; Cod. 5.26. The various senses of the term *maritalis affectio* are discussed by John T. Noonan, Jr., "Marital Affection in the Canonists," *Studia Gratiana* 12 (1967): 482-89.

10. Nov. 89.12.4-5; Noonan, p. 489.

11. Adhémar Esmein, *Le mariage en droit canonique*, 2 vols. (Paris: L. Larose & Forcel, 1891; reprint ed., New York: Burt Franklin, 1968), 2:114-15; J. A. Brundage, "Concubinage and Marriage in Medieval Canon Law," *Journal of Medieval History* 1 (1975): 1-17.

12. D. 34 d.a.c. 4.

13. *Summa decretorum* to D. 33 d.p.c. 1 and D. 34 d.a.c. 7 ad v. *Certum si non talis*, ed. Heinrich Singer (Paderborn: F. Schöningh, 1902; reprint ed., Aalen: Scientia Verlag, 1963), pp. 77, 81.

14. Huguccio, *Summa* to D. 34 c. 3 (Paris, Bibliothèque Nationale, MS lat. 3892, fol. 41^{vb}; hereafter cited as B.N.): "Sed concubina dicitur illa uxor quam quis clandestine, non adhibita preterita sollempnitate maritali affectu sibi copulat." Also his *Summa* to D. 33 d.p.c. 1 (ibid., fol. 41^{ra}): "Concubina: hic similiter distinctio [scil.: ab uxore] nullius est momenti quia potes . . . intelligere concubina uulgariter, sed grauius intelligit concubinam uxorem clandestine post uel ante aliam ductam." Again, *Summa* to D. 33 c. 6 ad v. *concubinam relicet* (ibid., fol. 41^{rb}): "Ego uulgariter intelligo, sed grauius intelligit concubinam scilicet uxorem clandestine ductam ante uel post aliam uxorem." See also the *Summa 'Elegantius in iure diuino' seu Coloniensis*, pt. 2, sec. 36, ed. Gérard Fransen and Stephan Kuttner, *Monumenta Iuris Canonici, Corpus Glossatorum*, vol. 1 (New York: Fordham University Press, 1969), pp. 58-59.

15. *Summa Coloniensis*, pt. 2, sec. 37 (ed. Fransen and Kuttner, p. 59); *Summa Parisiensis* to D. 33 pr., ed. Terence P. McLaughlin (Toronto: Pontifical Institute of Mediaeval Studies, 1952), p. 32; Joseph Freisen, *Geschichte des kanonischen Eherechts bis zum Verfall der Glossenliteratur*, 2d ed. (Paderborn: F. Schöningh, 1893; reprint ed., Aalen: Scientia Verlag, 1963), p. 58.

When one looks beyond the matter of definition, one finds other anomalies in the ways in which the canonists dealt with prostitution. On the one hand, they flatly disapproved of prostitution. It was morally offensive, theologically repugnant, and ought to be repressed. For these views they could find adequate basis in the Scriptures,¹⁶ in the natural law,¹⁷ and in the Roman law.¹⁸ Yet the medieval canonists' treatment of prostitution was strangely ambivalent. Although they disapproved of it in principle and thought that it should be prohibited, still in practice they were prepared to tolerate prostitution and to justify its toleration in a Christian society.

The origin of this policy of practical toleration seems to go back to Saint Augustine (354–430), who observed that if prostitutes were not available, established patterns of sexual relationship would be endangered. Therefore, he thought, it was better to tolerate prostitution, with all of its associated evils, than to risk the perils which would follow the successful elimination of the harlot from society.¹⁹ In Augustine's attitude one can arguably find the wellsprings of later medieval and even modern attitudes toward prostitution, the notion that it is a necessary evil and that its elimination, if possible at all, would disturb and dislocate the social order.²⁰ Augustine's views on prostitution, as on other matters of sexual conduct, were accepted by theologians as well as by the canonists. Some of them even made the argument that prostitution was necessary for the public good.²¹

16. Esp. in the Mosaic law, e.g.; Deut. 23:17, Lev. 19:29, 21:7, 9. Cf. the scriptural *glossa ordinaria* to Deut. 23:17: "Non erit meretrix a filiabus Israel, et non erit fornicans a filiis Israel. Manifeste prohibet viros et feminas fornicari, etiam cum non alienis conjugibus suis, quando et meretrices esse, et ad eas prohibet accedere, quarum publice venalis est turpitudine" (*Biblia sacra, Pentateuchus cum glossis interlineari et ordinaria, Nicolai Lyrani Postilla et Moralitates* [Lyon, 1545], fol. 358^{ra}). Also Huguccio, *Summa* to C. 32 q. 4 c. 11 (B.N. lat. 3892, fol. 313^{va}): "Ubi dicitur, non erit meretrix de filiabus Israel, neque scortator de filiis Israel . . . cum dicitur 'non erit meretrix,' prohibi meretrices esse; cum enim dictum 'non erit scortator,' prohibi accedere ad meretrices."

17. D. 1 c. 7 *glos. ord.* ad v. *ius naturale*.

18. *Dig.* 48.5.11(10); *Cod.* 1.4.14, 33; *Nov.* 14.1.

19. Augustine, *De ordine*, 2.4, in J. P. Migne, ed., *Patrologiae cursus completus . . . series latina*, 221 vols. (Paris: Garnier, 1844–64), 32:1000, (hereafter cited as *PL*): "Aufer meretrices de rebus humanis, turbaveris omnia libidinibus: constitue matronarum loco, labe ac dedecore dehonestaveris."

20. Bloch, 1:640. See e.g., N. M. Haring, "Peter Cantor's View on Ecclesiastical Excommunication and Its Practical Consequences," *Mediaeval Studies* 11 (1949): 101; Saint Thomas, *Summa Theologica* 2^a 2^{ae} q. 10 a. 11; Hostiensis, *Lectura* to X 4.1.20, no. 7 (vol. 4, fol. 6^{vb}).

21. Nicholas of Lyra, *Postilla* to Matt., proem., quoted by Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton, N.J.: Princeton University Press, 1964), p. 553, n. 151. Similar views were current in the sixteenth century (see Joost de Damhouder, *Subhaustationum compendiosa exegesis*, c. 5, in Benvenuto Straccha, *De mercatura decisiones et tractatus varii* [Lyon, 1610; reprint ed., Turin: Bottega d'Erasmus, 1971], p. 763; A. W. Small, *The Cameralists: The Pioneers of German Social Policy* [Chicago, 1909; reprint ed., New York: Burt Franklin, 1967], p. 37).

But there is more to it than this. The practical toleration of prostitution, coupled with the moral condemnation of it, was also rooted in medieval notions about the nature of sexuality itself. The medieval lawyers construed sexual intercourse as a part of the natural law, a notion which stemmed from the Roman jurists.²² Although they knew that sexual urges are strong and universally shared, the canonists were also aware that sexual desire could lead to sin—and usually did. Few adults are not guilty of fornication, they observed,²³ and the ordinary gloss to the *Decretum* noted that people are commonly more inclined to fornicate than to steal.²⁴ The canonists also suspected that sexual desires might be of diabolical origin, a product of original sin and man's subsequent fallen state.²⁵ While they taught that the only legitimate outlet for sexual desire was to be found in marriage, some canonists believed that even in marriage sexual pleasure was sinful.²⁶ The major differences of opinion among them on this matter concerned the question of the sinfulness of intercourse if the reason for the sexual act was enjoyment rather than the procreation of children. Huguccio, an influential twelfth-century canonist, thought that even procreative sex was morally wrong; his more liberal brethren allowed that sexual relations might be morally admissible between married persons when the object of their relations was to beget offspring.²⁷ There was general agreement, however, that excessive intercourse, even within marriage, was sinful, although there was some dispute as to whether the sin involved should be equated with simple fornication or with the more serious sin of adultery.²⁸ Sex outside of marriage, however, was clearly wrong, and intercourse with a prostitute compounded the wrong: it involved the bad use of an evil thing, as the ordinary gloss put it.²⁹

22. *Dig.* 1.1.1; *D.* 1 c. 7; cf. *Summa Parisiensis* to *D.* 1 c. 7 ad v. *coniunctio* (ed. McLaughlin, p. 2); *Summa Coloniensis*, pt. 1, sec. 5 (ed. Fransen and Kuttner, 1:2).

23. *D.* 50 c. 16; *C.* 15 q. 8 c. 1 *glos. ord.* ad v. *caetera*; Huguccio, *Summa* to *D.* 25 d.p.c. 3 ad v. *sine peccato* (B.N. lat. 3892, fol. 29^{va}): "Immo pauci adulti inueniuntur sine carnali delicto, scilicet fornicationis, ut di. 1 quia sanctitus [*D.* 50 c. 16], et ita nullus potest eligi sine peccato, unde patet quod non sic accipitur ibi in epistola Pauli nomen criminis, sed sensus est ibi."

24. *D.* 2 de pen. c. 5 *glos. ord.* ad v. *ex qua minus*.

25. *D.* 13 c. 2 *glos. ord.* ad v. *nervi, testiculorum*; *C.* 32 q. 2 d.p.c. 2 *glos. ord.* ad v. *sine ardore*; cf. Peter Lombard's views in his *Sententiae* 2.20.1 (*PL*, 192:692).

26. *D.* 5 c. 2; *Summa Parisiensis* to *C.* 32 q. 4 c. 14 (ed. McLaughlin, p. 244); see also Rudolf Weigand, "Die Lehre der Kanonisten von den Ehezecken," *Studia Gratiana* 12 [1967]: 443–78).

27. *D.* 13 d.a.c. 1 *glos. ord.* ad v. *item adversus*; *D.* 13 c. 2 *glos. ord.* ad v. *et quia*; *D.* 25 d. p. c. 3 and *glos. ord.* ad v. *excepto*; *C.* 27 q. 1 c. 20 *glos. ord.* ad v. *peiores*; *C.* 27 q. 2 c. 10 *glos. ord.* ad v. *non poterat*; *C.* 33 q. 4 c. 7 *glos. ord.* ad v. *voluptate*; *Summa Parisiensis* to *D.* 5 c. 4 ad v. *prava* (ed. McLaughlin, p. 5). For the view of Saint Thomas, see *Summa Theologica* 3 Supp. q. 49 a. 2 ad 1.

28. *C.* 32 q. 7 c. 11; the *Summa Parisiensis* to *C.* 32 q. 2 d.p.c. 2 ad v. *item immoderatus* (ed. McLaughlin, p. 241), equates it with adultery, while *D.* 13 c. 2 *glos. ord.* ad v. *maiora* treats it as fornication.

29. *C.* 32 q. 1 c. 11 *glos. ord.* ad v. *usus mali*.

The canonists were quite aware that the sexuality of women differed from that of men. For this they found a theological reason: woman was not created in the image of God, as man was.³⁰ The chastity of women, particularly young women, they held, was always suspect,³¹ and women, they observed, are always ready for sexual intercourse. Cardinal Hostiensis illustrated his comments on these points with the story of a priest who was journeying with two girls, one riding in front of him, the other behind. The priest, said Hostiensis, could never swear that the girl in back was a virgin.³² Young girls were thought to be particularly susceptible to the call of sexual desire: the less they knew about it, the sweeter they thought it, as Saint Jerome put it.³³ Since women were considered so susceptible to sexual temptations, great care had to be taken to confine their sexual activities within a properly structured marriage relationship. Women usually sigh when their men are not available, Hostiensis observed,³⁴ and so husbands had a moral obligation to keep their wives sexually satisfied, lest they be tempted to stray to other beds.³⁵ The canonists treated this obligation as a debt, and, like other debts, it was enforceable at law.³⁶ Nonetheless, women commonly

30. X 1.33.12 *glos. ord. ad v. iurisdictionis*: "[S]ed contra videtur quod mulier iudicare non potest. . . . Praeterea mulier non debet habere talem potestatem, quia non est facta ad imaginem Dei, sed vir, qui est imago et gloria Dei, et mulier debet subesse viro, et quasi famula viri esse, cum vir caput sit mulieris, et non econverso. . . ." Cf. Andrea, *Novella* to X 1.33.12, no. 6 (vol. 1, fol. 267^{vb}): "Et ibi, imago: sicut enim a deo procedit omnis creatura, sic et ab Adam omnis humana et ab eo solo, et non ab Eva sola, cum ipsa Eva processerit ab Adam et sic ipsa non est imago Dei in creatione."

31. X 3.32.18 *glos. ord. ad v. talis etas de qua suspicio*.

32. Hostiensis, *Lectura* to X 4.13.11, no. 1 (vol. 4, fol. 27^{ra}): ". . . hoc ex parte mulieris, cuius vas semper paratum est. secundum Gof. Unde et consuevit dici vulgariter adeo magnum rostrum habet pericula sicut pica. Exemplum de sacerdote qui portabat duas filias, una ante se et aliam retro, qui dixit, quod de illa, quem retro deferebat, nullatenus iuraret, quod virgo esset; secus in viro, qui non potest tanto tempore pervenire, salvo eo, quod narrat Gregorius in dialogo, de puero ix annorum qui impregnavit nutricem suam. Etiam hoc idem reperi ego de puero xi vel xii annorum in castro sancti Michaelis systaricensis diocesis. Et idem legitur de Salamone, scilicet quod in xi anno genuit filium." Andrea, *Novella* to X 4.13.11, no. 5 (vol. 4, fol. 42^{vb}) follows Hostiensis virtually word for word.

33. Quoted in C. 27 q. 1 c. 2 *glos. ord. ad v. viae sunt*: "Dicit Hieronymus: Libido in virginibus maiorem patitur famem, dum dulcius esse putant quod nesciunt."

34. Hostiensis, *Lectura* to X 3.34.7, no. 15 (vol. 3, fol. 127^{rb}): "Suspira. Loquitur per similitudinem, cum enim mulier, propter recessum et absentem viri consueverit suspirare, vult dicere quod idem facit Trecen. ecclesia, que est sponsa sua, supra de translatione episcoporum ca. ii [X 1.7.2] et repete. in contrarium allegabant."

35. Thus, e.g., C. 33 q. 5 c. 3.4.11, d.p.c. 20; D. 5 c. 4 *glos. ord. ad v. ablactetur*. This was an especially acute problem for Crusaders, whose extended absence might expose their wives to sexual temptations. On the canonists' treatment of this problem, see my study, "The Crusader's Wife: A Canonistic Quandary," *Studia Gratiana* 12 (1967): 425-42.

36. This usage is common form, based on 1 Cor. 7:3-6 (see Esmein, 1:84, 110; 2:8-13; John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic*

yielded to stray sexual desires, for a variety of reasons: they were overly trusting and put faith in the dubious promises of unworthy men; they were ignorant, sometimes so ignorant that they were unaware that adultery was sinful; or they might be separated from their spouses and despair of their return.³⁷ Moreover, they were fickle and inconstant creatures by nature.³⁸ They were soft of heart,³⁹ moreover, and susceptible to sensual stimulation, which easily led them into sexual sins.⁴⁰ In addition, the canonists were aware that females reach the age of sexual readiness earlier than males: girls are *viripotent*es from age twelve, according to Hostiensis, who cited the Roman law to prove his point.⁴¹ They reach sexual maturity earlier than males, he thought, because they are warmer and quicker by nature than men and hence attain their natural perfection at an earlier age. Hostiensis also observed, rather ungallantly, that women are like weeds, which mature earlier than desirable plants—he quotes Plato to prove this point—but also die earlier.⁴²

Despite all these handicaps—and one might have thought from some of the discussions that chastity in a woman was virtually impossible—women were nonetheless expected to observe a more austere standard of sexual conduct than were men, as at least some of the canonists were quite aware. They taught a double standard of sexual morality: they were aware of it and they had reasons for it, mainly

Theologians and Canonists [Cambridge, Mass.: Harvard University Press, Belknap Press, 1965], pp. 283–85). Peter Herde, *Audientia litterarum contradictarum: Untersuchungen über die päpstlichen Justizbriefe und die päpstliche Delegationsgerichtsbarkeit vom 13. bis zum Beginn des 16. Jahrhunderts*, 2 vols., Bibliothek des deutschen historischen Instituts in Rom, vols. 31–32 (Tübingen: Max Niemeyer, 1970), 2:304, gives the form for delegation of trial on such a complaint.

37. Hostiensis, *Lectura to X* 4.15.6, no. 6 (vol. 4, fol. 33^{ra}).

38. Hostiensis, *Lectura to X* 5.40.10 (vol. 5, fol. 125^{vb}).

39. Hostiensis, *Lectura to X* 3.33.2, no. 10 (vol. 3, fol. 124^{rb}).

40. C. 27 q. 1 c. 4; C. 32 q. 5 c. 11 *glos. ord.* ad v. *aliam*; Hostiensis, *Lectura to X* 2.13.10, no. 13 (vol. 2, fol. 51^{rb}).

41. Hostiensis, *Lectura to X* 4.2.1, no. 3 (vol. 4, fol. 10^{ra}): “Duodecim vero anni in muliere expectantur [*scil.*: ad contrahendum matrimonium], infra eodem continebatur [X 4.2.6]. Unde versus: ‘Iam matura thoro plenis adoleverat annis’ [cf. Aeneid 7.53; 12.428]. Nunc ergo dicitur viripotens, ff. ut in possessionem legatorum, 1. pen. [Dig. 36.4.16] et si quandoque ante hos annos cognoscatur, sed tunc dicitur immatura, ff. de iniuriis, si stuprum [Dig. 47.10.25].”

42. Hostiensis, *Lectura to X* 4.2.4, no. 2 (vol. 4, fol. 11^{rb}): “Si quaeretur ratio quare mulier citius quam homo pubescat? Respondeo quia ingeniosior et calidior est, unde et citius impetrat venam etatis, quam masculus: quia mulier in 18 anno masculus vero in 20, C. de his qui veniam aetatis impetraverunt, omnes adolescentes [Cod. 2.44(45).2]; sed et naturaliter debilior est sexus muliebris, unde communiter minus vivit: quia et minus habet caloris naturalis, ideo quanto citius finitur, tanto citius naturaliter perfici debet. Et sicut etiam dicunt aliqui naturales in xii anno omnino apta est mulier ad concipiendum. Plato vero dixit, quod hoc ideo est: quia citius crescit mala herba, quam bona, sed et dici potest quod facilius est mulieri pati quam homini agere, unde et semper mulier est parata, non idem in homine. . . .”

theological.⁴³ Modesty, they taught, was woman's glory.⁴⁴ Therefore a woman who was sexually desirous and ardent, who did not blush at sex, was at heart a whore, though she need not legally be classified as one so long as she remained faithful to her husband.⁴⁵ The adulteress, on the other hand, was more reprehensible than her partner in sin, and sexual promiscuity was considered more detestable in women than in men, according to Joannes Teutonicus in the ordinary gloss on the *Decretum*.⁴⁶ Even within the marriage relationship a woman should not use the sexual wiles of a prostitute, and a matron who dressed like a tart could legally be classed as one.⁴⁷

As for male sexuality, it was no secret to the canonists that men have a natural appetite for carnal relations with women.⁴⁸ The lawyers were also aware that casual conversation with members of the opposite sex might easily lead to greater intimacy,⁴⁹ an outcome which became even more likely when conversation was enlivened by intemperate drinking.⁵⁰

43. Innocent IV, *Apparatus toto orbe celebrandus super V libris Decretalium* to X 1.21.5, sec. 3 (Frankfurt, 1570), fol. 112^v: "Sed quare magis exigitur in uxore quam in viro? Nam maritus corrupte promoveri non potest, 34 dist. curandum [D. 34 c. 4] praecipimus. Sicut si vir: ille autem qui post uxorem habuit concubinam promoveri potest, 34 dist. Fraternitatis [D. 34 c. 7]. Ugolinus dicit, quod vir significat ecclesiam, quae saepe adulteratur exorbitando a fide et ita non deest significatio sacramenti, licet vir adulteretur; uxor autem significat Christum, qui nunquam ecclesiam dimisit: ipse enim est fons vivus, cui non communicat alienus. Ego credo quod vir significat Christum quo sibi copulavit synagogam, et post ecclesiam, et ideo non nocet, si vir dividit carnem suam in plures; uxor autem ecclesiam, quae semper virgo permansit saltem mente: unde despondi enim vos uni viro, et cap. 27 quaestio i nuptiarum [C. 27 q. 1 c. 41]; unde si uxor in plures carnem suam dividat deficit in ea sacramentum, 33 dist. Valentino [D. 33 c. 20]."

44. Andrea, *Novella* to X, prol., no. 7 (vol. 1, fol. 6^{ra}).

45. Hostiensis, *Lectura* to X 4.13.11, no. 2 (vol. 4, fol. 27^{ra}), followed *ad litteram* by Andrea, *Novella* to X 4.13.11, no. 1: "Carnis stimulis: frons meretricis sibi facta est, noluit erubescere. Hie. iii b., quamvis nec propter hoc meretrix sibi caste vivit, dummodo ab aliis absteineat, 31 di. nicena [D. 31 c. 12], alioquin non excusaretur, licet diceret se rem naturalem passam esse, in Auth. de restitutionibus et ea quae parit xi mense, sec. unum siquidem, col. iiii [Nov. 39.1, 1 in c. = *Auth.* 4.6.1]; neque pretextu paupertatis, ut patet in his que no. supra eodem distinctionem."

46. C. 12 q. 2 d.p.c. 58 *glos. ord.* ad v. *capitali*: "Sed numquid servus potest accusare dominam suam si cum alio servo adulteratur? Respondeo quod non, quia de proprio tantum servo; similiter nec domina virum suum potest accusare, si cum ancilla sua iacet vel cum aliena, cum hoc cautum non invenio hoc immo, quia detestabilius est hoc crimen in muliere quam in viro. Jo. Maledicit Jo., quia accusari potest mulier, et vir, si cum ancilla sua fornicetur, aut femina si adulterium committat, ut extra de divor., ex litteris [X 4.19.5]. B."

47. Rufinus, *Summa* to C. 32 q. 2 d.p.c. 2 (ed. Singer, p. 479); X 5.39.25 *glos. ord.* ad v. *meretricali*.

48. E.g., Huguccio, *Summa* to D. 1 c. 7 ad v. *ut uiri et femine coniunctio* (B.N. lat. 3892, fol. 2^{va}): "Mouetur enim homo quodam naturali appetitu sensualitatis ut carnaliter commisceatur femine."

49. *Cod.* 5.27.1.1 *glos. ord.* ad v. *venenis*: "Ut veneno occiditur corpus, sic animas istarum conversatione. Accursius."

50. *Cod.* 9.9.28(29) *glos. ord.* ad v. *intemperantia vina*: "Id est ex quibus oritur intemperantia et incontinentia unde illud, 'Nolite inebriari vino, in quo est luxuria.' [Eph. 5:18] Venter enim mero affluens, facile despumat in libidinem" (cf. Eccles. 19:2).

So rampant was male attraction to women that the ordinary gloss to the *Decretum* observed that some scholars even went to church services more in order to ogle the women who attended than to worship God.⁵¹ It was obvious to the canonists, too, that religion and sex did not mix well together: a man who had sexual gratifications readily available could not give his whole attention to God.⁵² This being so, clerics were especially exhorted not to have dealings of any kind, even the most innocuous conversations, with women whose morals were suspect. Those who did so were liable to excommunication.⁵³ Still, the canonists cautioned their students to give a benevolent interpretation to the association of clerics with members of the opposite sex. A cleric found embracing a woman is presumed to be blessing her, according to the ordinary gloss⁵⁴—to which a later commentator jestingly added: “God save us from such blessings!”⁵⁵

Given such views of male and female sexuality, with a far higher standard of sexual conduct demanded from women than from men, it may seem somewhat surprising to find that the lawyers generally, both civilians and canonists, wasted very little time detailing punishments to be dealt out to prostitutes. The prostitute, in the eyes of the canonists, was culpable, but not severely culpable, for her conduct. She was, after all, simply acting in accord with her sexual character, as the canonists viewed it. When it came to punishments, they gave most of their attention to the penalties to be inflicted upon those who used the prostitute's services and upon the pimps, procurers, and brothel keepers who made those services regularly available.⁵⁶

The canonists saw financial need as one root cause of prostitution,

51. C. 24 q. 1 c. 28 *glos. ord.* ad v. *sed suas*: “Argumentum contra scholares, qui vadunt ad ecclesiam ut videant dominas: quia ibi potius attendunt causam suam quam Dei.”

52. Hostiensis, *Lectura* to X 2.23.15, no. 3 (vol. 2, fol. 124^{va}).

53. X 3.2.2 (= *Comp. I* 3.2.3); cf. D. 81 c. 22.

54. C. 11 q. 3 c. 14 *glos. ord.* ad v. *sinistrum*: “Si ergo clericus amplectitur mulierem, interpretabitur quod causa benedicendi eam hoc faciat, ut 96 dist. in scripturis [D. 96 c. 8].”

55. Hippolytus de Marsiliis, *Tractatus de fideiussoribus*, in Straccha, p. 689: “Et facit glossa in ca. absit 11 quaest. 3 [C. 11 q. 3 c. 14], quae dixit, quod si clericus osculatur mulierem, praesumitur causa benedictionis hoc facere, quam glossa ad hoc refert Angelus de Aretinis in tractatu maleficio in verbo, *Che hai adulterata a la mia donna*, versi, an patri liceat: ubi iocose subdit, quod a tali benedictione clericorum liberet nos Deus.”

56. Punishment for those who frequented harlots, especially for clerics who did so, is frequently prescribed: e.g., D. 28 c. 9; D. 33 c. 6; D. 51 c. 5; Rufinus, *Summa* to D. 33 pr. (ed. Singer, p. 77); D. 32 *glos. ord.* ad v. *audiet*; Gulielmus Durantis, *Speculum iuris*, lib. 4, partic. 4, De adulteriis et stupro, no. 5; 2 vols. in 1 (Frankfurt a/M.: Sumpitibus heredum A. Wechli & J. Gymnici, 1592), 2:477. The law dealing with pimps, procurers, and brothel keepers is extensive. See, *inter alia*, Dig. 3.2.4.2, 13.7.24.3, 48.5.2.6; *Cod.* 1.4.12, 14, 33; 4.56.1.2.3; 7.6.1.4; 9.9.2; 11.41.6; *Nov.* 14 (= *Auth. coll.* 3 tit. 1); Rolandus, *Summa* to C. 32 q. 1 c. 4 (ed. Thaner, p. 60); Goffredus de Trani, *Summa super titulis Decretalium* to X 5.16.4 (Lyon: Roman Morin, 1519; reprint ed., Aalen: Scientia Verlag, 1968), fo. 216^{ra}; X 5.16.3 *glos. ord.* ad v. *reus sit*; Hostiensis, *Summa aurea una cum summaris et adnotationibus Nicolai Superantii*, lib. 5, De adulteriis et stupro, no. 14 (Lyon, 1537; reprint ed., Aalen: Scientia Verlag, 1962), fol. 245^{ra}.

but they did not consider poverty or economic necessity as mitigating circumstances.⁵⁷ No matter how hungry she might be or how desperate her situation, a woman was not justified in turning to prostitution in order to earn even the necessities of life.⁵⁸ Although poverty and desperation might excuse a man who committed theft, for example, and under certain circumstances even homicide could be justified, the canonists admitted no circumstances to excuse fornication and prostitution.⁵⁹ Nor was a natural craving for sexual gratification a mitigating circumstance;⁶⁰ some theologians indeed taught that the more pleasure a prostitute derived from her sexual encounters, the more serious was her offense.⁶¹ Some authors tended to link prostitution with greed and saw an inordinate desire for wealth and opulence as a cause of harlotry, but this was not a theme on which the legal writers had much to say.⁶² The only mitigating situation which the canonists would admit for the prostitute occurred if the girl had been forced into prostitution by her parents or someone who exercised legitimate control over her actions.⁶³ In such a situation, the prostitute herself was not accountable for her actions, and those who forced her into a life of sin bore the guilt for any actions which she was forced to perform.⁶⁴

Perhaps the principal disability felt by the medieval prostitute was her inability to attain any form of significant social status. This she shared in common with her predecessors in Roman antiquity.⁶⁵ It has

57. X 4.1.20 *glos. ord. ad v. publicas*; the opinions of Laurentius and Vicentius are given by Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX*, *Studi e testi*, vol. 64 (Vatican City: Biblioteca Apostolica Vaticana, 1935; reprint ed., 1961), p. 298, n. 1.

58. Hostiensis, *Lectura* to X 4.1.20, no. 6, and 4.19.4, no. 3 (vol. 4, fol. 6^v, 43^vb).

59. Hostiensis, *Lectura* to X 5.18.3, nos. 2–4, 9 (vol. 5, fol. 55^{ra-rb}).

60. Hostiensis, *Lectura* to X 4.19.4, no. 3 (vol. 4, fol. 43^vb).

61. Leopold Brandl, *Die Sexualethik des heiligen Albertus Magnus: Eine Moralgeschichtliche Untersuchung*, *Studien zur Geschichte der katholischen Moraltheologie*, vol. 2 (Regensburg: F. Putest, 1955), p. 244; Dennis Doherty, *The Sexual Doctrine of Cardinal Cajetan*, *Studien zur Geschichte der katholischen Moraltheologie*, vol. 12 (Regensburg: F. Putest, 1966), pp. 102–3.

62. Saint Thomas Aquinas, *Summa Theologica*, 2^a 2^{ae} q. 118 a. 8 ad 4; Jacques de Vitry, *Historia occidentalis*, c. 18, ed. John F. Hinnebusch, *Spicilegium Friburgense*, vol. 17 (Friburg: University Press, 1972), p. 99. Some modern writers have suggested that avarice is a factor in modern marriage and that the principal economic difference between marriage and prostitution lies in the nature of the return: prostitution involves the rendering of sexual services for a specified fee, while marriage provides continuous support in return for assured availability of sexual gratification (*Max Weber on Law in Economy and Society*, ed. Max Rheinstein, *Twentieth Century Legal Philosophy Series*, vol. 6 [Cambridge, Mass.: Harvard University Press, 1954], p. 134).

63. *Dig.* 13.7.24.3; *Cod.* 1.4.12, 14, 33; 4.56.1–3; 7.6.1.4; 11.41.6; Azo, *Summa super Codicem* to *Cod.* 11.41, *Corpus glossatorum iures civilis*, vol. 2 (Pavia: Per Bernardinum et Ambrosius fratres de Rouellis, 1506; reprint ed., Turin: Bottega d'Erasmus, 1966), p. 437.

64. *Summa Parisiensis* to C. 32 q. 5 c. 1 ad v. *tolerabilis* (ed. McLaughlin, p. 245).

65. Hans Herter, "Die Soziologie der antiken Prostitution im Lichte des heidnischen und christlichen Schrifttums," *Jahrbuch für Antike und Christentum* 3 (1960): 70–110; *Dig.* 9.9.28(29) *glos. ord. ad v. et stupri et adulterii*; *Dig.* 23.2.47.

been suggested that even in modern societies the harlot's loss of social status remains one of the major disabilities of the prostitute's role, and that the fees she receives should be interpreted as compensation not only for her sexual services but also for her impaired social standing.⁶⁶ Certainly the medieval canonists considered the harlot's status debased: it was so vile, according to Hostiensis, that she was not even required to obey the law—the inference being that she was beneath the law's contempt.⁶⁷ She was so base that she was canonically debarred from accusing others of crimes, according to one conciliar canon,⁶⁸ save for the crime of simony, which the canonists considered a particularly depraved offense.⁶⁹ The Roman law doctrine that prohibited a harlot from inheriting property was still considered applicable law in the Middle Ages.⁷⁰ Likewise, the harlot who had charges brought against her was not allowed to answer them in person but had to employ a representative to respond to them, just as did madmen and monsters.⁷¹

When it came to dealing with the property and property rights of prostitutes, the canonists followed very closely the doctrine of the classical Roman lawyers, which was still current law in many secular jurisdictions in the Middle Ages. Money given to a prostitute could not be reclaimed by the donor, according to this doctrine: the client had no right to take back the money he had paid for her sexual services. She, for her part, committed no wrong in accepting the money. What she did in return for her fee might be wrong, but the taking of money for it was no crime.⁷² The customer who paid the harlot her fee might be held wrong to give money to her; but her acceptance was perfectly legal.⁷³ Once she had taken the fee, it became her property outright and her rights to it were legally valid, a validity which at least one medieval lawyer sustained because of the harlot's "usefulness."⁷⁴ Cardinal Cajetan, incidentally,

66. Vern L. Bullough, "Problems and Methods for Research in Prostitution and the Behavioral Sciences," *Journal of the History of the Behavioral Sciences* 1 (1965): 247.

67. Hostiensis, *Lectura* to X 3.30.23, no. 3 (vol. 3, fol. 100^{vb}) and 4.1.20, no. 5 (vol. 4, fol. 6^{vb}); *Cod.* 9.9.28(29).

68. C. 4 q. 1 c. 1.

69. C. 6 q. 1 d.a.c. 1, *glos. ord.* ad v. *quod autem*: "In simonia quilibet auditur accusans contra laicum, etiam meretrix, ut 89 dist. si quis papa [*recte*: D. 79 c. 2] et ext. de simonia, tanta [X 5.3.7] . . . secus si accusatus sit clericus et bonae famae. . . ."

70. *Dig.* 29.1.41.1; 37.12.3 pr.

71. X 2.1.14 *glos. ord.* ad v. *factum proponat*: "Item universitas per alium respondet. . . . Item furiosi, prodigi, et mulier luxuriosa, ff. de curatoribus furioso, l. et mulieri [*Dig.* 27.10.15]. Ber."

72. *Dig.* 12.5.4, quoting Ulpian, who relies on the doctrines of Labeo and Marcellus in this passage.

73. Huguccio, *Summa* to C. 14 q. 5 d.a.c. 1 (B.N. lat. 3892, fol. 119^{ra}): "Unde dicit lex meretrix turpiter facere in eo quod est meretrix, sed nec turpiter accipit cum sit meretrix, ut ff. de con. ob tur. c. idem esti quotiens [*Dig.* 12.5.4.2]"; cf. D. 86 c. 7 *glos. ord.* ad v. *talibus*; Hostiensis, *Lectura* to X 3.30.23, no. 7 (vol. 3, fol. 100^{vb}).

74. Azo, *Summa Codicis* to *Cod.* 4.7 (p. 115): "Turpitudinem enim meretricis non dignatur lex respicere propter utilitatem sui, ut infra ad legem iuliam de adulteriis, l. que

stipulated that a prostitute, in order to be entitled lawfully to retain what she earned, must charge only a just price for her services. He did not specify how this was to be determined. He also considered it unlawful for a prostitute to practice deception in the display of her wares.⁷⁵

If a whore was legally entitled to retain what had been paid to her, she was on shakier ground in seeking fulfillment of promises made to her. The customer who paid in cash could not reclaim what he had paid to her. The wiler customer, who paid in promises of future gifts, could renege on his promises and the prostitute could not legally secure enforcement of them.⁷⁶

Another vexing question concerned the liability of prostitutes for the payment of the tithe. On this matter opinions were divided. Some canonists held that since the harlot lawfully possessed the money she received for her services, she must pay tithes from her earnings.⁷⁷ Hostiensis, however, thought otherwise: the earnings of the whore, although lawfully held, were nonetheless the wages of sin, and tithes could not legally be collected from them.⁷⁸ Saint Thomas (1224–74), as usual, distinguished: the harlot must be required to pay the tithe from her earnings—but the church might not accept the payment until she had reformed.⁷⁹

If the harlot's liability for payment of the tithe was disputed, her

ad adulterium [*Cod.* 9.9.28(29)], nec obstat quod legitur ff. de furtis, l. verum [*Dig.* 47.2.25], quia ibi non meretricis turpitudinem spectat licet eius qui accessit ad eam."

75. Doherty, p. 102, no. 35.

76. *Cod.* 5.3.5 glos. ord. ad v. non potes; Azo, *Summa Codicis* to *Cod.* 4.7 (p. 115).

77. The solution of Joannes Teutonicus, *Apparatus* to *Comp.* III 3.23. 5 (= X 3.30.28) is particularly ingenious: "Set numquid meretrix uel ystrio dabit decimam? Non uidetur, quia ut dixi honorandus est dominus de iustis laboribus, et decime tantum de licitis dantur, ut supra eodem ex transmissa lib. ii [*Comp.* II 3.17.7 = X 3.30.23]. Item quia scriptum est non accipies mercedem prostibuli [*Deut.* 23:18] et est arg. ad hoc xliii q. v. elemosina [c. 7] et xxxii q. iiii sic non sunt [c. 10]. Nam illicite quesita non sunt in bonis nostris, ut ff. pro socio cum duobus sec. ult. [*Dig.* 17.2.52.18]. Ad hoc dicunt quidam quod a talibus non est sumenda decima, ne ecclesia uidetur approbare delictum eorum, arg. ad hoc xxiii q. i. Paratus, in fine [c. 2], ff. de inoffic. testa, si pars, in fine [*Dig.* 5.2.10]. Alii dicunt quod decima sumenda est potius ab eis quam apud eos remaneat, arg. xxii q. i. Considera [c. 8]. Melius dicas quod si transfertur dominium in aliquos ita quod non competit repetitio licet ille peccent, tamen tenentur dare decimas. Et licet ecclesia petat decimam a talibus, non tamen approbat officium eorum quia conuenit eos tamquam quemlibet possessorem lucris, unde de iustis spoliis danda est decima exemplo Abrahe, ut xxiii q. v. Dicat [c. 25]. Jo" (Admont, Stiftsbibliothek, MS 22, fol. 209^r. I wish to thank Professor Kenneth J. Pennington, Jr., for calling this passage to my attention and for his transcription of the manuscript). Cf. the argument of Panormitanus, *Commentaria*, 9 vols. (Venice: Apud Iuntas, 1588) to X 3.30.23 (vol. 6, fol. 231^{rb}).

78. Hostiensis, *Lectura* to X 3.30.23, no. 2 (vol. 3, fol. 100^{vb}): "De omnibus quae licite, etc. Ergo uidetur quod de illicite acquisitis non tenetur quis solvere decimam, ar. i q. i. Non est putanda [c. 27] et sic meretrix de meretricio suo ad decimam non tenetur: *Deut.* xxiii, 'Non offeres mercedem protibuli nec pretium carnis in domum domini Dei tui [*Deut.* 23:18]; Prouer. iii, 'Honora dominum tuum de tua substantia' [*Prov.* 3:9]."

79. Saint Thomas Aquinas, *Summa Theologica* 2^a 2^{ae} q. 87 a. 2 ad 2.

ability to give freewill alms was likewise in doubt: most canonistic authorities agreed with Huguccio that the church could not accept alms from ill-gotten goods, such as the gains derived from usury, the earnings of actors, the stipends of *mathematici*, the profits of extortioners, or the fees of prostitutes.⁸⁰ Others distinguished between various types of ill-gotten gains, commonly on the grounds that some were wrongly acquired by force or the threat of force (e.g., the profits of robbers, extortioners, or advocates, who prey on the poor and ignorant), while other ill-gotten gains were derived from more-or-less generous, if misdirected impulses; the earnings of prostitutes and actors fell into this class.⁸¹ The ordinary gloss distinguished on still other grounds. According to this view, alms should not be given from ill-gotten gains if ownership of the goods was retained by the original giver, with mere possession passing into the hands of the receiver but if both ownership and possession passed to the recipient (as was the case with fees given to prostitutes) then alms could be given and received from such goods.⁸²

Hostiensis posed a particularly tantalizing case—that of the Crusading harlot. What would the legal situation be if a whore took the Cross? She would surely be followed by many men, since nothing is stronger than love; and this would clearly bolster the defensive forces of the Holy Land. Should the Crusading harlot therefore be obliged to fulfill a Crusading vow? Hostiensis thought not: the motivation of her followers, after all, was not likely to be a spiritual one. Should she then be allowed to redeem her vow by making an offering for the defense of the Holy Places? Hostiensis thought that this, too, would be unacceptable.⁸³ The appropriate conclusion seemed to be that harlots should not take Crusading vows.

Although prostitutes were acknowledged to have some property rights, their power to protect those rights was extremely limited, so far as the canonists were concerned. A prostitute could not denounce a criminal, nor were the courts to hear a harlot's complaints about wrongs done to her.⁸⁴ This attitude was consistent with the teaching of the Roman

80. Huguccio, *Summa* to C. 14 q. 5 d.a.c. 1 (B.N. lat. 3892, fol. 119^{ra}): "Et indistincte dicunt quod in nulla re illicite acquisita potest fieri elemosina, ergo nec de acquisita per furtum, uel per rapinam, uel per usuram, uel symoniam, uel lusum, uel meretricium, uel per opus ystrionicum, uel mathematicum, uel per extorsionem sicut sepe fit a rusticis, et his ius ar. infra eodem questione elemosina [C. 14 q. 5 c. 7]." Cf. the *glossa ordinaira* to Deut. 23:18 ad v. *non offeres* (fol. 358^{ra}): "De mercede meretricis videtur repulisse, quia superius prohibuit esse meretricem de filiabus Israel, aut quenque filiorum Israel uti meretrice, et ne quis posse hoc expiari si aliquid in templum offeret, dicendum fuit, quod domino abominatio sit."

81. Rufinus, *Summa* to C. 14 q. 5 pr. (ed. Singer, pp. 342–43).

82. D. 90 c. 2 *glos. ord.* ad v. *dona*, ad fin.; C. 1 q. 1 c. 27 *glos. ord.* ad v. *ex illicitis rebus*; C. 14 q. 5 d.a.c. 1 *glos. ord.* ad v. *quod vero*.

83. Hostiensis, *Summa aurea*, lib. 3 tit. De voto et voti redemptione, no. 11 (fol. 177^{rb}).

84. X 5.1.20 and *glos. ord.* ad v. *concubinarios*.

lawyers.⁸⁵ Alberto dei Gandini (ca. 1245–ca. 1310) discussed this situation in the context of a case which is said to have occurred at Mantua. One Armanius, clearly no gentleman, entered the house of a woman and attempted to have intercourse with her, against her will. Charged with this offense, Armanius proved in his own defense that the woman he had assaulted was a public prostitute, of bad condition, ill famed, and known by many men. Indeed, Armanius himself was one of her regular customers and frequently had intercourse with her. Under these circumstances, could he be punished for attempting to rape her? The subtlety of the question taxed the wits of lesser lawyers, and a famous jurist, Dino Mugellano, was consulted on the matter. Dino gave it as his opinion that if it were proved that the woman had put her body up for hire, then Armanius could not be punished for an attempt to rape her.⁸⁶ Alberto cited another case: an unnamed man broke down the door of a harlot's house, *libidinis causa*. Thieves subsequently entered the house through the broken door and made off with the furnishings. Was the sex-crazed door breaker liable for damages for the stolen goods? Alberto thought not—his motive was lust, not theft and he could not be held responsible for what he had not intended.⁸⁷

If whores abounded everywhere in medieval Europe—and the available evidence strongly suggests that they did—one problem which faced public authorities was how to distinguish them visibly and clearly from respectable women. The canonists tended to think that distinctive dress was the best solution to the problem.⁸⁸ Municipal authorities commonly reverted to ancient practice by sequestering their prostitutes in specified portions of their cities and establishing quasi-public control over the practice of their trade.⁸⁹ The whores of Paris are said even to have founded a guild—perhaps in an attempt to restrain competition, as other guilds commonly did.⁹⁰

Attempts at regulation, identification, and isolation were made easier for the authorities by the fact that prostitution in medieval Europe was most commonly practiced in the setting of a brothel.⁹¹ Streetwalkers were not unknown, but brothels were everywhere, even in small towns

85. *Dig.* 47.2.39; 47.10.15.15; *Cod.* 9.9.22.

86. Alberto dei Gandini, *Tractatus de maleficiis*, ed. H. Kantorowicz, in *Albertus Gandinus und das Strafrecht der Scholastik*, 2 vols. (Berlin: J. Gutentag, 1907–26), 2:360–61. In contrast, the monarchs of Sicily protected prostitutes in their kingdom from such attacks (see Frederick II, *Constitutiones regni Siciliae* [= *Liber Augustalis*] 1.21[24], ed. J. L. A. Huillard-Bréholles, *Historia diplomatica Friderici II*, 6 vols. in 12 [Paris: Plon, 1852–61; reprint ed., Turin: Bottega d'Erasmus, 1963], 4, pt. 1: 23–24.

87. Gandini, 2:214.

88. E.g., Hostiensis, *Lectura to X* 5.6.15, no. 4 (vol. 5, fol. 32^vb).

89. Bullough, *History of Prostitution*, pp. 113–14; Richard Lewinsohn, *A History of Sexual Customs*, trans. A. Mayco (New York: Harper & Bros., 1958), p. 145.

90. Bullough, *History of Prostitution*, p. 112.

91. Bloch (n. 3 above), 1:690.

and large-sized villages.⁹² In many towns the local brothels were acknowledged civic corporations, regulated minutely by local ordinances, even supervised by public officials: often enough the local executioner doubled as supervisor of whorehouses in his off hours.⁹³

Despite sporadic local efforts to outlaw brothels and prostitution,⁹⁴ whorehouses apparently flourished everywhere, often under the guise of bathhouses and frequently under the supervision of barbers.⁹⁵ For this reason, canonists frequently warned Christians in general and clerics in particular not to frequent bathhouses, since they were apt to be morally dangerous.⁹⁶ Bathhouses and barbershops might not be the only occasions of sin. Jacques de Vitry, writing in the first quarter of the thirteenth century, gives a vivid description of the Parisian prostitutes of his day. They were everywhere in the city, soliciting passing clerics to sample their delights and crying out, "Sodomite!" after those who passed up the invitation. Both a brothel and a scholar's hall might occupy the same premises: while the master delivered his lectures in an upper room, the trollops exercised their trade below. It is likely that the twain sometimes met, as the arguments between the harlots and their pimps rose to mingle with the disputations of the schools.⁹⁷

Bold and brazen though she might be, the medieval law viewed the prostitute as a largely powerless person, socially degraded, but in actual practice tolerated and allowed to exercise some limited property rights in her earnings. Still she could redeem her situation through reform. For this there were illustrious examples—had not Jesus himself said to the Pharisees of his time that repentant tax collectors and whores would take precedence over them in the kingdom of heaven?⁹⁸ And the example of Saint Mary Magdalene demonstrated that the believing and repentant harlot could achieve salvation.⁹⁹ In some circumstances the

92. Ibid., 1:740–45, lists seventy-five towns and cities in Germany which had brothels between the thirteenth and fifteenth centuries.

93. Ibid., 1:670. For a more detailed account of a slightly later period, see Ruth Pike, *Aristocrats and Traders: Sevillian Society in the Sixteenth Century* (Ithaca, N.Y.: Cornell University Press, 1972), pp. 195, 203–6.

94. E.g., Jean de Joinville, *The Life of St. Louis*, trans. René Hague (New York: Sheed & Ward, 1955), chap. 36, sec. 171, p. 66; Gandini, 1:243–44 (Urk. 30), 252–54 (Urk. 35); Bullough, *History of Prostitution*, p. 113. There were older—and equally ineffectual—precedents (see Nov. 14.1 [= *Auth. coll.* 3, tit. 1]).

95. Bullough, *History of Prostitution*, p. 115; also his *The Development of Medicine as a Profession: The Contribution of the Medieval University to Modern Medicine* (New York: Hafner Publishing Co., 1966), p. 88; Lewinsohn, p. 148. Bloch, 1:747–50, gives a lengthy—and eloquent—list of words used to designate brothels in the middle ages.

96. D. 81 c. 28 glos. ord. ad v. *omnino*; C. 24 q. 1 c. 24 glos. ord. ad v. *balneas*; Rufinus, *Summa* to D. 81 c. 20 (ed. Singer, p. 172).

97. *Historia occidentalis*, c. 7 (ed. Hinnebusch, p. 91); cf. the harlots at the door of the tent of meeting: 1 Sam. 2:22 (= 1 Kings 2:22).

98. Matt. 21:31–33.

99. Luke 7:37.

church stood ready to assist girls to leave a life of sin. Involuntary prostitutes (i.e., girls who had been sold into prostitution by their parents or masters) could petition the local bishop or other authority to liberate them from their carnal bondage.¹⁰⁰ Other harlots could also look to the church for help in efforts at self-reform. Still the canonists recognized realistically that the chances of successful reform were slim and that a repentant strumpet might continually be tempted to take up her former life.¹⁰¹

Nonetheless the hope of reform was there. Two major avenues of reform were contemplated. The favorite with most reformers was to induce the repentant harlot to enter the religious life, to become a nun. From at least the twelfth century onward, religious houses were established with the particular purpose of serving as havens for reformed prostitutes.¹⁰² In 1224 an effort began to create a special religious order of penitential nuns to harbor reformed whores, and in 1227 Pope Gregory IX (1227–41) gave the highest ecclesiastical sanction to the Order of Saint Mary Magdalene, which subsequently established convents in numerous cities. The sisters wore a white habit, whence they were sometimes known as “the White Ladies.”¹⁰³ Subsequent official patronage and encouragement was given to the Magdalenes by the fourteenth-century popes.¹⁰⁴ Similar convents, not necessarily affiliated with the Magdalene order, received endowment and support from monarchs, such as the pious Louis IX of France (1226–70), who was subsequently elevated to the altars of the church for this and other saintly actions.¹⁰⁵

For the harlot who wished to reform but who was not inclined to embrace the religious life, there was another alternative: marriage. The canonists required, however, that a number of conditions be fulfilled before a prostitute might marry. In this area of the law, a gradual change of attitude and policy took place. The doctrine of the early church had tended to discourage such marriages: one of the canons in Gratian's *Decretum* characterized the man who kept a whore as his wife as idiotic and unreasonable.¹⁰⁶ Even the reformed prostitute, who had done solemn public penance for her sins, might be forbidden to marry,

100. Durantis, *Speculum iuris*, lib. 4, partic. 4, De adulteriis et stupro, no. 8–9 (2:377) gives examples of such petitions.

101. D. 34 d.p.c. 8; C. 32 q. 1 d.p.c. 13.

102. *Historia occidentalis*, c. 8 (ed. Hinnebusch, pp. 99–100); Milton R. Gutsch, “A Twelfth-Century Preacher—Fulk of Neuilly,” in *The Crusades and Other Essays in Honor of Dana C. Munro*, ed. L. J. Paetow (New York: Appleton-Century-Crofts, 1928), pp. 190–91; Bullough, *History of Prostitution*, p. 115.

103. Max Heimbucher, *Die Orden und Kongregationen der katholischen Kirche*, 3d ed., 2 vols. (Munich: F. Schöningh, 1965) 1:646–48.

104. Bernard Guillemain, *La Cour Pontifical d'Avignon, 1309–1376: Etude d'une société* (Paris: E. de Boccard, 1966), pp. 485–86.

105. De Joinville, p. 210.

106. C. 32 q. 1 c. 1, taken from an apocryphal work ascribed to Saint John Chrysostom. Gratian, in his *dictum* before this canon, appears to equate harlotry with adultery.

unless she first obtained a special dispensation for this purpose,¹⁰⁷ a provision which was consistent with Roman imperial law on the subject.¹⁰⁸ Still, marriage to a prostitute, although dubious, was not held to be actually sinful.¹⁰⁹ And a man who married a prostitute, believing her to be a chaste virgin, was held to be validly married, according to the leading theologian of the twelfth century.¹¹⁰

Gratian was inclined to take a cautiously more permissive view of the matter, although he observed gloomily that one could not trust the word of a harlot.¹¹¹ He distinguished between the situation in which a man married a whore who continued her trade and that in which a man married a whore in order to reform her. In the first situation the marriage was not allowed; in the second it was permitted.¹¹² The decretist commentators accepted Gratian's distinction. They also commonly insisted that the reformed prostitute must demonstrate her intention of changing her ways by doing penance prior to the marriage.¹¹³ Rolandus, a famous twelfth-century canonist who later became Pope Alexander III, remarked that in his day it was considered praiseworthy to marry reformed prostitutes.¹¹⁴ Pope Innocent III (1198–1216), in a decretal issued during the first year of his pontificate, confirmed Rolandus's observations. The pope lauded those who married harlots in order to reform them and described their actions as "not least among the works of charity." Further, he assured those who rescued public prostitutes and took them to wife that their actions would count for the remission of their own sins.¹¹⁵ Bernardus Parmensis, the author of the ordinary gloss to the thirteenth-century canonical code known as the *Decretals*, was apparently more dubious about this matter than was the pope: "This [decretal] concerns her who freely wishes to be chaste—if someone can be found who wishes to take her as a wife."¹¹⁶ Other commentators on the *Decretals* also insisted that corrigibility was an essential criterion: the incorrigible prostitute was not allowed to marry, and the man who kept such a one as his wife was classified as a pimp.¹¹⁷

107. C. 33 q. 2 c. 11-12; Esmein, 1:210.

108. *Cod.* 5.4.29.6; 9.9.20.

109. C. 32 q. 1 c. 14.

110. Peter Lombard, *Sententiae* 4.30 (*PL*, 192:917); Esmein, 1:312–13.

111. C. 32 q. 1 d.p.c. 13.

112. C. 32 q. 1 c. 10, again equating whores with adulteresses; C. 32 q. 1 d.p.c. 13; Freisen (n. 15 above), pp. 621–22.

113. E.g., Paucapalea, *Summa* to C. 32, ed. J. F. von Schulte (Giessen: E. Roth, 1890), p. 125; *Summa Parisiensis* to C. 32 q. 1 c. 1 ad v. *sicut crudelis* (ed. McLaughlin, p. 240); Rufinus, *Summa* to C. 32 q. 1 pr. (ed. Singer, p. 475); Rolandus, *Summa* to C. 32 q. 1 (ed. Thaner, pp. 158–59); Huguccio, *Summa* to C. 32 q. 1 d.a.c. 1 (B.N. lat. 3892, fol. 308^{ra}).

114. Rolandus, *Summa* to C. 32 q. 1 (ed. Thaner, p. 162).

115. X 4.1.20 (= *Comp. II* 4.1.5).

116. X 4.1.20 *glos. ord.* ad v. *in uxores*: "Hic de ea, quae continere libenter vellet, si invenerit qui eam ducere vellet in uxorem. Ber."

117. E.g., Innocent IV, *Apparatus* to X 4.1.20 (fol. 465^v); Hostiensis, *Lectura* to X 3.32.19, no. 3, and X 4.1.20, no. 8 (vol. 3, fol. 121^{vb}; vol. 4, fol. 6^{vb}).

The man who wished to marry a prostitute, even one who had reformed her life, also faced certain problems. If he had previously had intercourse with her himself, there was some question whether he could marry her at all: Gratian raised the matter at two points in the *Decretum*, but left the solution unclear. He apparently believed that such a marriage would be licit, but that the woman must do penance.¹¹⁸ Once the marriage had been contracted, she could be put aside only if she reverted to her old ways and refused to do penance.¹¹⁹ If the husband were a cleric, he was further penalized for his choice of a wife: he could not be ordained to major orders even after the death of his wife,¹²⁰ and he was barred from any sort of promotion in the ecclesiastical hierarchy,¹²¹ although presumably it was possible to receive dispensation in such cases.¹²² Even after Innocent III's approval of marriage with harlots for purposes of reform, for ecclesiastical purposes¹²³ the ordinary gloss to the *Decretals* continued to classify men who married harlots as bigamists.

What does this survey of the canonistic jurisprudence tell us about the theory and practice of medieval prostitution?

The writings of the canonists underscore what other sources indicate about the prevalence of prostitution in medieval society. It is also clear that one reason for the frequency of prostitution in a society which was heavily influenced, not to say dominated, by ecclesiastical institutions and the doctrinal attitudes of the church, may well have been a fundamental ambivalence in the church's own law about prostitution. Although theologically denounced, prostitution was viewed by the lawyers as an evil which had to be tolerated in order to avert the greater evils which would follow from the abolition of prostitution. Further, medieval notions about male and female sexuality, as reflected in the lawyers' writings, led the church's legal functionaries to require women (whom they thought highly susceptible to sensual stimuli) to adhere to a higher standard of sexual morality than men. Conversely, however, the woman who fell into a life of prostitution was not overtly punished by harshly repressive measures, while men who frequented prostitutes were subject to more numerous and more severe punishments than were the ladies of joy whom they patronized. Ironically, then, the lawyers treated the pros-

118. C. 31 q. 1 c. 1-7; C. 32 q. 4 d.a.c. 1; Esmein, 1:208-10.

119. C. 32 q. 1 c. 1 *glos. ord. ad v. patronus*.

120. D. 33 c. 2; D. 34 c. 11, d.p.c. 14, c. 15.

121. Rufinus, *Summa* to D. 33 c. 2 (ed. Singer, p. 77); D. 33 d.a.c. 1 *glos. ord. ad v. sed queritur*; D. 34 d.p.c. 8 *glos. ord. ad v. meretricari*.

122. Rufinus, *Summa* to D. 34 pr. (ed. Singer, pp. 79-80).

123. X 1.21.1 *glos. ord. ad v. in bigamis*. Bigamy in the ecclesiastical law had a number of peculiarities (see Stephan Kuttner, "Pope Lucius III and the Bigamous Archbishop of Palermo," in *Medieval Studies Presented to Aubrey Gwynn, S.J.*, ed. John A. Watt, J. B. Morrall, and F. X. Martin [Dublin: Colin O'Lochlainn, 1961], pp. 409-53).

titute as a necessary evil, to be tolerated and dealt with rather leniently, while at the same time they looked upon the use of her services as a relatively serious crime, subject to stringent repressive measures.

The canonistic jurisprudence dealing with prostitution also points up another characteristic of the canon law rather generally, namely, the way in which it accommodated moral principles to the realities of human behavior. This was, after all, the basic service which the canonist performed for the medieval church and for society at large. The canonist attempted to translate the abstract principles of the theologian into practical, workable, behavioral norms. The canonistic treatment of prostitution illustrates this function of the canon law, I think, very well indeed. Without abandoning the moral principle that prostitution was an undesirable form of sexual behavior, the canonists tried to work out a functional system of norms which also took into account the existing structures of society and the family, and the nature of male and female sexuality as they understood them. Many of their fundamental ideas about the nature and function of sexual relations in society are not ones which are nowadays shared by most people in the Western world. But given the data and the assumptions with which the canonists of the twelfth and thirteenth centuries worked, one can hardly fail to admire the ingenuity with which they reconciled reality with high principles in dealing with one of the most intimate and most difficult of all human behavioral situations.

University of Wisconsin—Milwaukee