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## Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?

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# CHURCH, STATE, AND SEX CRIMES: WHAT PLACE FOR TRADITIONAL SEXUAL MORALITY IN MODERN LIBERAL SOCIETIES?

*John Witte, Jr.\**

## ABSTRACT

*Historically, sexual morality and criminal law overlapped, and churches and states enforced sundry sex crimes. Today, new constitutional liberties and new reforms to family law and criminal law have dramatically reduced the roll of sex crimes and the roles of churches in maintaining sexuality morality. But sexual misconduct remains a perennial reality in modern societies, including notably within churches, and sex crimes inflict some of the deepest scars on their victims. Modern liberal states must thus maintain a basic standard of sexual morality in its criminal law as a restraint on harmful behavior and as a bulwark against a sexual state of nature where life is often “brutish, nasty, and short” for the most vulnerable. And liberal societies should encourage its citizens and churches to pursue a higher morality of aspiration that views sex and the sexual body as a special gift for oneself and others.*

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## INTRODUCTION

Sex has long excited an intimate union between theology and law in the “Western legal tradition.”<sup>1</sup> For two millennia, both churches and states issued detailed private laws and guidelines to define and facilitate licit sex within an enduring and exclusive marital bed. They also issued elaborate penal laws and procedures to prohibit and punish illicit sex.<sup>2</sup> Church and state officials periodically fought over whose laws governed sex, marriage, and family life, and periodically shifted the line between sexual *sins* that remained under church law alone, and sexual *crimes* that were punished by the state (as well).<sup>3</sup> Nonetheless, until the twentieth century, churches and states alike played formidable roles in defining and regulating “licit and illicit” sex.<sup>4</sup>

A typical alphabetical list of pre-modern sex offenses—in civil law and common law lands alike—included abduction, abortion, adultery, bestiality, buggery, child abuse, concubinage, contraception, feticide, fornication, homosexual acts, illegitimacy, incest, infanticide, malicious desertion, masturbation, obscenity, polygamy, pornography, prostitution, rape, seduction, and sodomy.<sup>5</sup> Sometimes more exotic offenses were added, such as castration, transvestism, mixed bathing, public nudity, sexual contact by or with clerics or monastics, secret efforts to hide a new pregnancy or birth, and others.<sup>6</sup> Sometimes defendants were charged with catchall sex crimes like “perversion,”

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<sup>1</sup> While the terms “West” and “Western” now have strong ideological connotations in some circles, this Article uses the phrase “Western legal tradition” as a conventional historical description of the law that emerged out of ancient Jewish, Greek, and Roman sources, and spread throughout Latin Christendom and its extension overseas to the Americas. *See generally* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

<sup>2</sup> *See generally* JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* (1987).

<sup>3</sup> *See generally* JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION* (2d ed. 2012).

<sup>4</sup> *See* *LAW AND THE ILLICIT IN MEDIEVAL EUROPE* 6–7, 13 (Ruth Mazo Karras et al. eds., 2008).

<sup>5</sup> For civil law analogues, see *Constitutio Criminalis Carolina* [Criminal Constitution of Carolina] (1532) [Excerpts], arts. 116–23 (Ger.), in JOSEF KOHLER & WILLY SCHEEL, *DIE PEINLICHE GERICHTSORDNUNG KAISER KARLS V. CONSTITUTIO CRIMINALIS CAROLINA* 62–64 (1900); PAUL JOHANN ANSELM VON FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GELTENDEN PEINLICHEN RECHTS* §§ 413–36, 484–508 (1801). For common law examples, see 4 WILLIAM BLACKSTONE, *COMMENTARIES* 64 (listing in the chapter titled “Of Offenses Against God and Religion” acts of lewdness, prostitution, grossly scandalous and public indecency, pornography, exposure, obscenity, defilement of a young woman); *id.* at 205, 208, 210, 212 (listing in the chapter titled “Of Offenses Against the Persons of Individuals” acts of abduction, rape, statutory rape, seduction, abortion, and “unnatural crimes”—in which were included rape as well as “the infamous crime against nature, committed either with man or beast . . . a crime not fit to be named; . . . [which] the voice of nature and of reason, and the express law of God, determined to be capital”).

<sup>6</sup> *See supra* notes 4–5; *see also* 3 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 117–18 (Cambridge Univ. Press 2014).

“indecency,” “lewdness,” “abomination,” or “unnatural sex.”<sup>7</sup> Many of these sex crimes had shifting and sometimes eliding definitions over time and across legal systems, and were variously classified as “offenses against God,” “religion,” “morality,” “nature,” “public order,” or “persons.”<sup>8</sup> Until a century ago, many of these sex crimes had serious consequences. Brazen or repeat sex offenders often faced severe criminal punishment—execution in egregious cases.<sup>9</sup>

Today, most of these traditional sex crimes have been eclipsed by a dramatic rise of new constitutional laws and cultural norms of sexual liberty. Traditional crimes of contraception, abortion, fornication, and sodomy have been struck down as antiquated and unconstitutional.<sup>10</sup> Prohibitions on adultery, concubinage, and non-marital sex and cohabitation have become dead letters, and modern law no longer visits “the sins of the fathers” or mothers upon children born “out of wedlock.”<sup>11</sup> Free speech laws protect all manner of sexual expression, short of obscenity, although the wildest unregulated frontiers of prurience are now only a mouse click away.<sup>12</sup> Privacy laws protect most forms of sexual conduct among consenting adults, and a growing number of

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<sup>7</sup> See, e.g., Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 48–50, 53–57, 59, 61 (Eng.) (prohibiting rape, abduction, and defilement of women and children, bigamy, abortion, and “unnatural offenses”); the “abominable crime” of “buggery . . . either with mankind or with any [a]nimal”).

<sup>8</sup> See *supra* notes 5–7; see also CODE PÉNAL [C. PÉN.] [PENAL CODE] arts. 330–40 (Fr.) (listing sexual assault of children, rape, prostitution and pimping, adultery, and polygamy as “moral offenses”); *id.* at arts. 316–17 (generally listing castration and abortion as “felonies against persons”); *id.* at arts. 283–90 (prohibiting “offenses against morals by press and print”).

<sup>9</sup> See, e.g., *The Proceedings of Old Bailey, 1674–1913*, DIGITAL HUMAN. INST. U. SHEFFIELD, <http://www.oldbaileyonline.org/> (last visited Mar. 26, 2019) (providing transcripts and many facsimiles of all the criminal cases reported in the *Old Bailey Proceedings* from 1674 to 1913, and of the *Ordinary of Newgate’s Accounts* between 1676 and 1772). For an analysis of the punishment of sex crimes in the pre-modern period, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 22–25, 31–32 (1993) (noting the Puritanical values inherent in the colonial-era United States); JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE* (1974) (describing the history of criminal prosecutions under the Marian and Carolina legal traditions); WILLIAM NAPHY, *SEX CRIMES: FROM RENAISSANCE TO ENLIGHTENMENT* 42–43 (2002) (noting *inter alia* various penalties for sex crimes).

<sup>10</sup> See e.g., *Windsor v. United States*, 570 U.S. 744, 769–70 (2013) (striking down the federal Defense of Marriage Act as a violation of constitutional due process and equal protection rights); *Lawrence v. Texas*, 539 U.S. 558, 564, 578–79 (2003) (striking down a Texas sodomy law as unconstitutional); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that absolute state law restraints on abortion are unconstitutional without proper balancing of state interests); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (striking down a Massachusetts law prohibiting the offering of contraceptives to an individual); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (striking down a Connecticut contraceptives law).

<sup>11</sup> For a detailed discussion, see generally JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* (2009).

<sup>12</sup> Geoffrey R. Stone, *Sexual Expression and Free Speech: How Our Values Have (D)evolved*, ABA, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/sexual-expression-and-free-speech/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/sexual-expression-and-free-speech/) (last visited Mar. 26, 2019).

democratic countries now allow prostitution among adults.<sup>13</sup> The classic sex crimes of incest and polygamy still remain on the books, but they are now the subjects of growing constitutional and cultural battles.<sup>14</sup> Only one traditional sex crime has strengthened in recent decades: the crime of rape, now elaborated in strong new prohibitions against sexual assault, battery, violence, stalking, and harassment, as well as the sexual abuse and statutory rape of children.<sup>15</sup> The sex crimes that remain, however, are now usually labeled as crimes against “persons,” “dignity,” or “sexual autonomy,” rather than crimes against God, morality, or nature.<sup>16</sup>

This radical reduction of traditional sex crimes over the past century reflects not only the rise of modern constitutional liberty but also the shift of modern criminal law away from a “fault-based” to a “harm-based” system of liability.<sup>17</sup> Traditional fault-based logic swept in many consensual and victimless sex acts that were considered to be just wrong (*malum in se*)—adultery, fornication, sodomy, bestiality, and other such “sexual taboos.”<sup>18</sup> Modern harm-based logics ignore most such acts and instead focus on crimes that inflict involuntary harm, particularly on vulnerable victims like young children or rape victims.<sup>19</sup> To be sure, some traditional crimes remain hard to classify today: scholars debate whether pornography, prostitution, and polygamy, for example, are *harm* crimes that should stay on the books or *morality* crimes that need to be removed.<sup>20</sup> But many other traditional sex crimes based on moral fault have fallen aside.

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<sup>13</sup> Prostitution remains illegal in the United States (save for Nevada) and the United Kingdom, but countries such as Sweden, Norway, the Netherlands, and Switzerland have legalized the practice and subjected it to regulation. See, e.g., HOME AFFAIRS COMM., PROSTITUTION: THIRD REPORT OF SESSION 2016–17, HC 26, at 22–23, 29 (UK); JAY SHAPIRO, THE PROSECUTION AND DEFENSE OF SEX CRIMES § 6.01 (2018); Corrine Isler & Marjut Jyrkinen, *The Normalization of Prostitution in Switzerland: The Origin of Policies*, 3 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE, Apr. 2018, at 1, 4.

<sup>14</sup> See, e.g., ANGELA CAMPBELL, SISTER WIVES, SURROGATES AND SEX WORKERS: OUTLAWS BY CHOICE? 2–4 (2013); Tatjana Hörnle, *Consensual Adult Incest: A Sex Offense?*, 17 NEW CRIM. L. REV. 76, 77–78 (2014). For further analysis, see generally JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (2015).

<sup>15</sup> See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 33 (1998); Dana Hayward & Ross E. Cheit, *Child Sexual Abuse*, in THE OXFORD HANDBOOK OF SEX OFFENCES AND SEX OFFENDERS (Teela Sanders ed., 2017); Lisa L. Sample & Emily C. Radar, *Rape and Domestic Sexual Assault*, in THE OXFORD HANDBOOK OF SEX OFFENCES AND SEX OFFENDERS, *supra*.

<sup>16</sup> For examples, see MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 608–09, 616 (2014).

<sup>17</sup> For a discussion of these distinctions, see generally 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING, at xix–xx (1988).

<sup>18</sup> GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 186 (1978).

<sup>19</sup> See *supra* note 15.

<sup>20</sup> See *supra* note 14; see also DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 11, 69–72, 75–97, 118–40, 149–54 (2009).

The reduction of sex crimes also reflects a change in how modern democratic states draw the line between licit and illicit sex. When “Christianity was part of the common law”<sup>21</sup> and civil law, biblical moralists helped draw these lines for church and state authorities alike. When natural law was a universal foundation for positive laws, unnatural sex was a major category of sexual sin and crime. But, in our post-modern day, the decision about what is “moral” and “natural” about sexual activities and relationships is now left largely to private choice and consensual agreement, not to state criminal law, let alone church law.

Finally, the reduction of sex crimes reflects “the transformation of family law” over the past half century.<sup>22</sup> Historically, Western family law promoted the integration of marriage, sex, procreation, and child-rearing within an enduring and exclusive marital household; criminal law, in turn, prohibited sexual conduct that threatened or undermined this integrative domestic ideal.<sup>23</sup> Today, family law embraces a far wider range of sexual activities and domestic relationships. And, in Don Browning’s apt phrase, it accommodates “the multiple separations that now beset the sexual field”<sup>24</sup>: separations between (1) marriage and sex; (2) marriage and childbirth; (3) marriage and child-rearing; (4) childbirth and parenting; (5) sex and physical contact, given the advent of cybersex; and (6) childbirth, sexual intercourse, and biological filiation, given the rise of artificial reproductive technology, sperm banks, and surrogacy. This new family law regime has far less room and need for many traditional sex crimes.

Modern Christians living in Western liberal societies have variously celebrated or lamented all of these changes. Some Christians have been at the forefront of the sexual revolution and advocated and embraced at least some of these new sexual norms, while offering innovative theological arguments in support of them.<sup>25</sup> Some churches have largely gone with the cultural flow on

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<sup>21</sup> Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 29 (1998) (citing *R. v. Taylor* (1676) 86 Eng. Rep. 189 (KB)).

<sup>22</sup> See generally CHRISTIANITY AND FAMILY LAW: AN INTRODUCTION (John Witte, Jr. & Gary S. Hauk eds., 2017); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY* (1989).

<sup>23</sup> See JOHN WITTE, JR., *CHURCH, STATE, AND FAMILY: RECONCILING TRADITIONAL TEACHINGS AND MODERN LIBERTIES* (2019).

<sup>24</sup> Don S. Browning, *The Best Love of the Child? An Integrational View*, in *THE BEST LOVE OF THE CHILD: BEING LOVED AND BEING TAUGHT TO LOVE AS THE FIRST HUMAN RIGHT* 347–48 (Timothy P. Jackson ed., 2011); see also Don S. Browning, *Family Law and Christian Jurisprudence*, in *CHRISTIANITY AND LAW: AN INTRODUCTION* 165–68 (John Witte, Jr. & Frank S. Alexander eds., 2008).

<sup>25</sup> See, e.g., MARK D. JORDAN, *THE ETHICS OF SEX* 2, 157, 164, 170 (2002); GENE ROBINSON, *GOD BELIEVES IN LOVE: STRAIGHT TALK ABOUT GAY MARRIAGE* 192–96 (2012); EUGENE F. ROGERS, JR., *SEXUALITY AND THE CHRISTIAN BODY: THEIR WAY INTO THE TRIUNE GOD* 204–05, 210–11, 213 (1999); ADRIAN THATCHER, *REDEEMING GENDER* 161–62, 169 (2016).

issues of sexuality and sexual liberty, with or without much change to their official teachings.<sup>26</sup> Some churches have retained or reemphasized strict standards of traditional sexual morality,<sup>27</sup> with internal church laws holding their congregants to these standards as a condition for leadership, if not membership.<sup>28</sup> Many churches have also been deeply challenged—and some have become sharply divided—over pressing new legal and moral issues about abortion, contraception, artificial reproductive technology, women’s rights, children’s rights, same-sex marriage, no-fault divorce, remarriage, and more.<sup>29</sup> Finally, several churches have been roiled by massive scandals and criminal prosecution for clerical pedophilia and cover-ups by church leaders,<sup>30</sup> as well as sexual and psychological abuses by pastors, counselors, teachers, and charity workers in religious organizations.<sup>31</sup>

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<sup>26</sup> See examples in AMERICAN RELIGIONS AND THE FAMILY: HOW FAITH TRADITIONS COPE WITH MODERNIZATION AND DEMOCRACY 4, 8, 10–11 (Don S. Browning & David A. Clairmont eds., 2007); *Religious Landscape Study*, PEW RES. CTR., <http://www.pewforum.org/religious-landscape-study/> (last visited Mar. 26, 2019).

<sup>27</sup> See, e.g., 1983 CODE cs.277, 1055–65, 1311–63; NORMAN DOE, CHRISTIAN LAW: CONTEMPORARY PRINCIPLES 254–65 (2013); *On Abuse*, SOUTHERN BAPTIST CONVENTION (2018), <http://www.sbc.net/resolutions/2285/on-abuse>; see also W. BRADFORD WILCOX, SOFT PATRIARCHS, NEW MEN: HOW CHRISTIANITY SHAPES FATHERS AND HUSBANDS 27–31 (2004).

<sup>28</sup> See, e.g., David Wright & Phoebe Natanson, *Former U.S. Cardinal Theodore McCarrick Defrocked by Vatican over Sex Abuse Claims*, ABC NEWS (Feb. 16, 2019, 7:26 AM), <https://abcnews.go.com/US/us-cardinal-theodore-mccarrick-defrocked-vatican-sex-abuse/story?id=61017455>.

<sup>29</sup> See generally HELEN M. ALVARÉ, PUTTING CHILDREN’S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY: WITH POWER COMES RESPONSIBILITY (2018); R. MARIE GRIFFITH, MORAL COMBAT: HOW SEX DIVIDED AMERICAN CHRISTIANS AND FRACTURED AMERICAN POLITICS (2017).

<sup>30</sup> See, e.g., *Testimony by His Excellency Carlo Maria Viganò*, <http://online.wsj.com/media/Viganos-letter.pdf> (last visited Mar. 26, 2019) (detailing Archbishop Viganò’s blistering indictment of the papacy concerning the pedophilia of Cardinal McCarrick and the cover-up by the Vatican); see also Robert Downen et al., *Abuse of Faith: 20 Years, 700 Victims: Southern Baptist Sexual Abuse Spreads as Leaders Resist Reforms*, HOUS. CHRON. (Feb. 10, 2019), [https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-sexual-abuse-spreads-as-leaders-13588038.php?utm\\_campaign=chron&utm\\_source=article&utm\\_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php](https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-sexual-abuse-spreads-as-leaders-13588038.php?utm_campaign=chron&utm_source=article&utm_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php); Lise Olsen et al., *Preying on Teens: More than 100 Southern Baptist Youth Pastors Convicted or Charged in Sex Crimes*, HOUS. CHRON. (Feb. 13, 2019), [https://www.houstonchronicle.com/news/investigations/article/All-too-often-Southern-Baptist-youth-pastors-13588292.php?utm\\_source=article&utm\\_campaign=chron&utm\\_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php](https://www.houstonchronicle.com/news/investigations/article/All-too-often-Southern-Baptist-youth-pastors-13588292.php?utm_source=article&utm_campaign=chron&utm_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php); John Tedesco, *Offend, Then Repeat: Southern Baptist Churches Hired Dozens of Leaders Previously Accused of Sex Offenses*, HOUS. CHRON. (Feb. 12, 2019), [https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-churches-hired-ministers-accused-13588233.php?utm\\_source=article&utm\\_campaign=chron&utm\\_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php](https://www.houstonchronicle.com/news/investigations/article/Southern-Baptist-churches-hired-ministers-accused-13588233.php?utm_source=article&utm_campaign=chron&utm_medium=https%3A%2F%2Fwww.chron.com%2Fnews%2Finvestigations%2Farticle%2FAbuse-of-Faith-series-concludes-shedding-by-light-13611623.php); *infra* note 181 (describing further sources and discussion).

<sup>31</sup> See, e.g., Diana R. Garland & Christen Argueta, *How Clergy Sexual Misconduct Happens: A Qualitative Study of First-Hand Accounts*, 37 SOC. WORK & CHRISTIANITY 1, 2–3 (2010) (analyzing forty-six firsthand accounts of clergy sexual misconduct by figures of various ranks in Jewish and Christian

I touch lightly on these latter difficult topics at the end of this Article, knowing that they deserve much fuller treatment. My main aim is to set our modern debates about old and new sex crimes in a longer historical perspective. Parts I and II review some of the main historical teachings on sex crimes, first in the Bible and then in the Western legal tradition. Part III explores whether some forms of traditional sexual morality may still be viable, even valuable, for modern liberal democracies that prize and protect sexual liberty and equality and that separate church and state.

## I. SEX CRIMES IN THE BIBLE

A good number of traditional Western sex crimes were rooted in the Hebrew Bible or Old Testament, which grounded its sexual prohibitions in religious narratives of personal purity and communal fidelity to God's covenant.<sup>32</sup> The Mosaic law treated bestiality,<sup>33</sup> homosexual acts,<sup>34</sup> and most forms of incest<sup>35</sup> as capital crimes. Adultery was a capital crime, too, although the sexual double standard of the day restricted this offense to extramarital intercourse by the wife, not her husband, who remained free to consort with impunity with other single women.<sup>36</sup> Similarly, it was a capital offense for a betrothed woman, but not her fiancé, to have consensual sex with another.<sup>37</sup> The Mosaic law prohibited castration,<sup>38</sup> sex during menstruation,<sup>39</sup> harm to a fetus,<sup>40</sup> and child sacrifice,<sup>41</sup>

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congregations).

<sup>32</sup> See generally LOUIS M. EPSTEIN, *SEX LAWS AND CUSTOMS IN JUDAISM* (1967); HILARY B. LIPKA, *SEXUAL TRANSGRESSION IN THE HEBREW BIBLE* 248–54 (2006); Carolyn Pressler, *Sexual Legislation*, in 2 THE OXFORD ENCYCLOPEDIA OF THE BIBLE AND LAW 290 (Brent A. Strawn ed., 2015) [hereinafter OXFORD ENCYCLOPEDIA]; THE PRINCIPLES OF JEWISH LAW (Menachem Elon ed., 1975); RALPH W. SCOTT, *A NEW LOOK AT BIBLICAL CRIME* (1979); Tikva Frymer-Kensky, *Law and Philosophy: The Case of Sex in the Bible*, 45 SEMEIA 89, 94–95, 97–98 (1989).

<sup>33</sup> E.g., *Deuteronomy* 27:21; *Exodus* 22:19; *Leviticus* 18:23, 20:15–16.

<sup>34</sup> *Leviticus* 18:22, 20:13. These are male offenses; there is no explicit prohibition against lesbian sex. See *id.*

<sup>35</sup> *Deuteronomy* 22:30, 27:20, 27:22–23; *Leviticus* 18:6–18, 20:17, 20:19–21. On the elaboration and differentiation of incest crimes in ancient Israelite society, see EPSTEIN, *supra* note 32; OXFORD ENCYCLOPEDIA, *supra* note 32, at 296–300.

<sup>36</sup> *Deuteronomy* 22:22; *Leviticus* 20:10. The innocent husband killing his wife and paramour were also contemplated. *Proverbs* 6:32–35; see also *Deuteronomy* 22:20–27. Other Hebrew Bible texts repeatedly condemned adultery. *Deuteronomy* 5:18, 22:23–27; *Exodus* 20:14; *Genesis* 12:11–20, 20:2–18, 26:7–11, 39:6–20; *Hosea* 4:13–14; *Jeremiah* 7:9, 29:23; *Leviticus* 18:20; *Proverbs* 5:3, 5:20, 7:1–27, 22:14; 2 *Samuel* 11:2–27. For a general discussion of the topic, see OXFORD ENCYCLOPEDIA, *supra* note 32, at 291–95.

<sup>37</sup> *Deuteronomy* 22:20–24. But if a betrothed woman was raped, only her rapist was to be killed. *Id.* at 22:25–27.

<sup>38</sup> *Id.* at 23:1.

<sup>39</sup> *Leviticus* 18:19.

<sup>40</sup> *Exodus* 21:22.

<sup>41</sup> *Leviticus* 18:21, 20:1–5.

joining pre-Mosaic customs that condemned men for spilling their seed “on the ground” after sexual contact.<sup>42</sup> The Mosaic law further prohibited harlotry,<sup>43</sup> interreligious marriage,<sup>44</sup> and sex between divorcees.<sup>45</sup> It called for variant punishments of rape and seduction of a woman. If the victim was married, her innocent husband or the authorities could mete out (capital) punishment.<sup>46</sup> If the victim was single, the rapist had to pay a dowry to her father; marry the victim if she and her father would have him; and waive his right to divorce.<sup>47</sup> In most other cases, a husband could divorce his wife for her “indecent,” leaving both parties free to remarry another.<sup>48</sup> A husband could also take multiple wives, and was obliged to do so in some cases of seduction, enslavement, famine, childless marriage, or premature death of his married brother.<sup>49</sup>

The Mosaic law, and the later Prophets of the Hebrew Bible, repeatedly called God’s chosen covenant people of Israel to a higher plane of sexual morality than the Gentiles around them.<sup>50</sup> “Do not defile yourselves by any of these things,” reads Leviticus 18 after a lengthy recitation of sins of the flesh.<sup>51</sup>

[F]or all of these abominations the men of the land did, who were before you, so that the land became defiled”; [and it] “vomited out the nation that was before you. For whoever shall do any of these abominations, the persons that do them shall be cut off from among their people. So keep my charge never to practice any of these abominable customs which were practiced before you, and never to defile yourselves by them: I am the LORD your God.<sup>52</sup>

The New Testament echoed some of these Mosaic prohibitions on sexual immorality, but sometimes also called for greater equitable and egalitarian application of them.<sup>53</sup> For example, the Gospel of Matthew reports that Joseph

<sup>42</sup> *Genesis* 38:8–10.

<sup>43</sup> *Deuteronomy* 23:17–18; *Leviticus* 19:29.

<sup>44</sup> *Deuteronomy* 7:3–4.

<sup>45</sup> *Id.* at 24:4; see OXFORD ENCYCLOPEDIA, *supra* note 32, at 291–95.

<sup>46</sup> See *Deuteronomy* 22:22–27; see also *Proverbs* 16:32–33.

<sup>47</sup> *Deuteronomy* 22:28–29; *Exodus* 22:16–17; see also *Genesis* 34 (detailing the rape of Dinah); *2 Samuel* 13 (detailing the rape of Tamar).

<sup>48</sup> *Deuteronomy* 24:1–4.

<sup>49</sup> *Deuteronomy* 17:17, 21:15–16, 22:28–29 (also detailing *inter alia* polygamous unions); *Exodus* 21:7–12, 22:16–17 (detailing *inter alia* polygamous unions); *Isaiah* 4:1, 13:12; *1 Kings* 11:4; *Leviticus* 20:10, 20–22; *Ruth* 4:5–6, 13–21. For a detailed discussion on these ancient laws in action, see WITTE, JR., *supra* note 14, at 37–49.

<sup>50</sup> See WITTE, JR., *supra* note 3, at ch. 2.

<sup>51</sup> *Leviticus* 18:24.

<sup>52</sup> *Id.* at 18:27–29.

<sup>53</sup> See Gary S. Hauk, *Jesus and St. Paul*, in CHRISTIANITY AND FAMILY LAW, *supra* note 22, at 36, 39–

had the right under Mosaic law to have Mary, his fiancé, stoned for her presumptive premarital adultery, but he endeavored to break the engagement quietly without dishonoring her.<sup>54</sup> Jesus rescued an adulterous woman sentenced to death. “[He] who is without sin among you be the first to throw a stone,” Jesus challenged her accusers, before ordering her to sin no more.<sup>55</sup> Jesus called his followers to live by the letter and spirit of the laws on sexual purity. “You have heard that it was said, ‘You shall not commit adultery.’ But I say to you that everyone who looks at a woman lustfully has already committed adultery with her in his heart.”<sup>56</sup> He also ordered men to rein in divorce: “Every one who divorces his wife, except on the ground of unchastity, makes her an adulteress; and whoever marries a divorced woman commits adultery.”<sup>57</sup> “What therefore God has joined together, let not man put asunder.”<sup>58</sup>

St. Paul offered similar teachings in his New Testament letters to early Christian communities. While encouraging celibacy for the single and widowed,<sup>59</sup> and repeating conventional norms about male headship,<sup>60</sup> Paul also insisted that “the husband should give to his wife her conjugal rights,”<sup>61</sup> and told husbands “to ‘love your wives, as Christ loved the church, and gave himself up for her.’”<sup>62</sup> Paul also glossed Jesus’s prohibitions on adultery and lust with denunciations of incest, sodomy, prostitution, polygamy, seduction, immoderate dress and grooming, and other forms of sexual “immorality” and “perversion.”<sup>63</sup> “Flee fornication” was Paul’s most famous admonition, which he directed to men and women alike.<sup>64</sup> “Do you not know that he who joins himself to a prostitute becomes one body with her?” Paul challenged his male readers.<sup>65</sup> “For, as it is written, ‘The two shall become one flesh.’ . . . Every other sin which a man commits is outside the body; but the immoral man sins against his own body. Do you know that your body is a temple of the Holy Spirit within you? . . . So glorify God in your body.”<sup>66</sup>

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<sup>54</sup> *Deuteronomy* 22:13–21, 24:1–4; *Matthew* 1:18–19.

<sup>55</sup> *John* 8:3–11.

<sup>56</sup> *Matthew* 5:27–28.

<sup>57</sup> *Id.* at 5:32.

<sup>58</sup> *Id.* at 19:6.

<sup>59</sup> *1 Corinthians* 7:8–9.

<sup>60</sup> *Id.* at 11:3; *Ephesians* 5:23.

<sup>61</sup> *1 Corinthians* 7:3–4.

<sup>62</sup> *Ephesians* 5:25.

<sup>63</sup> *Colossians* 3:5–6; *1 Corinthians* 5:1, 6:9, 15–20; *Ephesians* 5:3–4; *Hebrews* 13:4; *Romans* 1:24–27; *1 Thessalonians* 4:3–8; *1 Timothy* 2:9–10, 3:2.

<sup>64</sup> *1 Corinthians* 6:18.

<sup>65</sup> *Id.* at 6:16.

<sup>66</sup> *Id.* at 6:16–20.

While repeating this general call for bodily purity and spiritual chastity, both the Talmudic Rabbis and early Church Fathers offered further biblical rationales for specific sex crimes.<sup>67</sup> Bestiality, they argued, defied the differences between species that God had separated at creation; after all, Adam could find no beast in Paradise like him, which had led God to create Eve with whom Adam could join in “one flesh.”<sup>68</sup> Homosexual sex acts confused the “male and female” genders that God had separated from the beginning of creation.<sup>69</sup> Sex during menstruation, *coitus interruptus*, and masturbation were lustful acts that defied the primal divine command to “be fruitful and multiply.”<sup>70</sup> Contraception, abortion, feticide, and infanticide also defied the primal command of procreation and raising up the next generation of God’s people.<sup>71</sup> Rape, fornication, and adultery brought harm and shame to the innocent victim and her family, and could produce “bastards” who suffered significant legal disabilities, beginning with the Mosaic injunction: “No bastard shall enter the assembly of the Lord.”<sup>72</sup> Incestuous marriages corrupted the blood, commingled the property, weakened the family tree, and compromised the legacy and inheritance of the marital family and the strength of its alliances with other families and communities.<sup>73</sup> These biblical sex crimes were incorporated into early Christian canon laws and penitential books,<sup>74</sup> and into later Christianized Roman law as well.<sup>75</sup>

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<sup>67</sup> See EPSTEIN, *supra* note 32, at XII–XIII; MARRIAGE IN THE EARLY CHURCH (David G. Hunter ed. & trans., 1992); PHILIP LYNDON REYNOLDS, MARRIAGE IN THE WESTERN CHURCH: THE CHRISTIANIZATION OF MARRIAGE DURING THE PATRISTIC AND EARLY MEDIEVAL PERIODS (1994). Leading English jurist, John Selden (1584–1654) collected these earlier rationales in his rich natural law teachings on sex, marriage, and family life. See JOHN SELDEN ON JEWISH MARRIAGE LAW: THE UXOR HEBRAICA 37–78, 93–95 (Jonathan R. Ziskind trans., 1991); see also G.J. TOOMER, 2 JOHN SELDEN: A LIFE IN SCHOLARSHIP 502–05, 548–62 (2009).

<sup>68</sup> *Genesis* 2:18–25.

<sup>69</sup> *Id.* at 1:27.

<sup>70</sup> *Id.* at 1:28.

<sup>71</sup> *Id.*

<sup>72</sup> *Deuteronomy* 23:2.

<sup>73</sup> *Deuteronomy* 22:30, 27:20–23; *Exodus* 20:11, 14, 19–21; *Leviticus* 18:6–18, 20:12, 17; see also EPSTEIN, *supra* note 32, at XII–XIII; OXFORD ENCYCLOPEDIA, *supra* note 32, at 291–95, 299–300.

<sup>74</sup> See generally PIERRE J. PAYER, SEX AND THE NEW MEDIEVAL LITERATURE OF CONFESSION, 1150–1350 (2009); PIERRE J. PAYER, SEX AND THE PENITENTIALS: THE DEVELOPMENT OF A SEXUAL CODE 550–1150 (1984).

<sup>75</sup> See BRUNDAGE, *supra* note 2, at 1–2, 7–8; Peter Sarris, *Emperor Justinian*, in CHRISTIANITY AND FAMILY LAW, *supra* note 22, at 100–15.

## II. SEX CRIMES IN THE WESTERN LEGAL TRADITION

### A. *Thomas Aquinas and Medieval Teachings*

At the height of the Middle Ages, the Dominican friar Thomas Aquinas (1225–1274) integrated these biblical teachings into a natural law theory of sex crimes that became axiomatic in the Western legal tradition.<sup>76</sup> Aquinas had at his disposal the Roman law of sex crimes and the medieval civilian jurisprudence it had inspired.<sup>77</sup> Emperor Justinian’s sixth century collection of laws, for example, outlawed as “contrary to nature itself”<sup>78</sup> all forms of bestiality, sodomy, adultery, incest, rape, prostitution, seduction of virgins; sex with nuns, slaves, and minors; and sex in groups or in public places, like baths. These crimes Justinian variously branded as “abominable,” “wicked,” “execrable,” and “insane” forms of “debauchery” that were “hateful to God” and God’s laws. Any children born of such unions, he declared, were “bastards” who were “irredeemable” and “non-heritable.”<sup>79</sup>

Aquinas also knew the church’s canon laws on sex offenses. By his thirteenth century day, the scholastics had arranged these offenses in a hierarchy. Most began from the baseline of simple fornication, and then added crimes of escalating gravity: prostitution, concubinage, seduction, bigamy, adultery, rape, and incest.<sup>80</sup> Graver still were “unnatural” sexual acts (gay and lesbian relations, bestiality, oral sex, anal sex, and sex with children).<sup>81</sup> Gravest of all were non- or anti-procreative sex acts (masturbation, contraception, sterilization, abortion, and infanticide).<sup>82</sup> Each of these offenses was worse, still, when committed by

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<sup>76</sup> The next three paragraphs are drawn from John Witte, Jr., *The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment*, 64 EMORY L.J. 591, 604–05, 608–13 (2015).

<sup>77</sup> See BRUNDAGE, *supra* note 2, at 122–23; WITTE, JR., *supra* note 11, at 49–72. For Aquinas’s development of positive law, see Anton-Hermann Chroust, *The “Ius Gentium” in the Philosophy of Law of St. Thomas Aquinas*, 17 NOTRE DAME L. REV. 22, 22, 26–27 (1941).

<sup>78</sup> NOV. 141 (559); see also BRUNDAGE, *supra* note 2, at 113–23.

<sup>79</sup> See, e.g., CODE JUST. 5.27.2 (Constantine 336) (noting the non-heritability of “unnatural children”); CODE JUST. 6.57.5.1 (Justinian 529) (same); NOV. 74; NOV. 77.1; NOV. 89.5 (539); NOV. 141 (559); see also JILL HARRIES, *LAW AND CRIME IN THE ROMAN WORLD* 96–97 (2007) (laws on abortion, rape, adultery, incest, and other unlawful sex); O.F. ROBINSON, *THE CRIMINAL LAW OF ANCIENT ROME* 54–73 (1995) (providing sample cases and context); Judith Evans Grubbs, *Infant Exposure and Infanticide*, in *THE OXFORD HANDBOOK OF CHILDHOOD AND EDUCATION IN THE CLASSICAL WORLD* 85 (Judith Evans Grubbs & Tim Parkin eds., 2013); Thomas A.J. McGinn, *Roman Children and the Law*, in *THE OXFORD HANDBOOK OF CHILDHOOD AND EDUCATION IN THE CLASSICAL WORLD*, *supra*, at 347.

<sup>80</sup> BRUNDAGE, *supra* note 2, at 207; see also VERN L. BULLOUGH & JAMES BRUNDAGE, *SEXUAL PRACTICES & THE MEDIEVAL CHURCH* 132 (1982).

<sup>81</sup> BRUNDAGE, *supra* note 2, at 212, 250.

<sup>82</sup> BULLOUGH & BRUNDAGE, *supra* note 80, at 132, 142–43.

ordained clergy, avowed monastics, or recidivists, whether clerical or lay; or when aggravated by the commission of other crimes like battery, theft, kidnapping, or homicide.<sup>83</sup>

To sort out this legal inheritance and to devise his theory of sex crimes, Aquinas premised his arguments on several observations about the nature of human sexuality and reproduction. First, he observed, humans crave sex all the time, especially when they are young and most fertile. Unlike other animals, humans do not have a short rutting or mating season, followed by a prolonged period of sexual inactivity.<sup>84</sup> Second, human babies are born weak, fragile, and utterly dependent for many years. Unlike most other animals, they cannot run, swim, or fly away on their own upon birth or shortly thereafter. They need protection, food, shelter, clothing, and education in order to survive, let alone thrive.<sup>85</sup> Third, most human mothers have difficulty caring fully for their children on their own, especially if they already have other children. They need help, especially from fathers and their kin networks.<sup>86</sup> Fourth, however, most human fathers will bond and help care for children only if they are certain of their paternity.<sup>87</sup> Once assured of their paternity, however, most men will bond deeply with their children, help with their care and support, and rescue and defend them at great sacrifice. For they will see their children as a continuation and extension of themselves—of their being, name, property, and filial heritage.<sup>88</sup>

Given these facts of human nature, Aquinas continued, rational humans have developed enduring and exclusive marital unions as a good and advantageous form of sexual bonding and reproductive success.<sup>89</sup> Such unions serve the ongoing sexual needs and desires of husband and wife. They ensure that both a

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<sup>83</sup> See BRUNDAGE, *supra* note 2, at 207, 212–14, 225–26, 241–51 (providing detailed sources); see also BULLOUGH & BRUNDAGE, *supra* note 80, at 89–101, 129–60, 176–86. For recent studies of the administration of these laws, see TREVOR DEAN, *CRIME AND JUSTICE IN LATE MEDIEVAL ITALY 10–11* (2007); MARTIN INGRAM, *CARNAL KNOWLEDGE: REGULATING SEX IN ENGLAND, 1470–1600*, at 13–14 (2017). For particular crimes, see SARA MCDUGALL, *BIGAMY AND CHRISTIAN IDENTITY IN LATE MEDIEVAL CHAMPAGNE* (2012); JOHN T. NOONAN, JR., *CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS* 312 (1965).

<sup>84</sup> 1 THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. I, question 99, art. 1 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) [hereinafter AQUINAS, ST]; *id.* at vol. 3, supplement question 41, art. 1.

<sup>85</sup> 3 THOMAS AQUINAS, *SUMMA CONTRA GENTILES: PROVIDENCE*, pt. II, ch. 122 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975) [hereinafter AQUINAS, SCG]; AQUINAS, ST, *supra* note 84, at vol. 3, supplement question 41, art. 1.

<sup>86</sup> AQUINAS, SCG, *supra* note 85.

<sup>87</sup> *Id.* at ch. 124.

<sup>88</sup> *Id.*; AQUINAS, ST, *supra* note 84, at vol. 3, supplement question 41, art. 1; *id.* at question 49, arts. 1–6.

<sup>89</sup> AQUINAS, SCG, *supra* note 85, at ch. 123; AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 26, art. 8; *id.* at vol. 3, supplement question 49, arts. 1–2.

father and mother are certain that a baby born to them is theirs. They ensure that both parents will care for, nurture, and educate their children until they mature. And, these unions deter both spouses from dangerous sex outside the marital bed.<sup>90</sup>

But Aquinas was aware that nature creates only a wobbly normative framework, given our perennial human sex drives and temptations.<sup>91</sup> Both church and state thus need to enact firm and clear positive laws to guide and govern its members. The church must offer comprehensive spiritual direction about sexual vices and virtues, drawing not only on natural law but also on sacramental, moral, and biblical teachings. Accordingly, the church's confessional books and canon laws contain more detailed and expansive instructions about sex than what appears in the state's criminal law.<sup>92</sup> The state has a more limited jurisdiction over sex based on natural law and natural justice alone, making its roll of sex crimes shorter and more focused.<sup>93</sup>

Aquinas worked through these sex crimes, one by one, often leavening his arguments from nature with prudential and practical considerations that would remain commonplace in the Western legal tradition. "Simple fornication" between a single man and a single woman, he said, was criminal because it "tends to injure the life of the offspring to be born of this union."<sup>94</sup> If a fornicating woman becomes pregnant, she may well be left alone to care for her child, which is risky for her and her children. While a wedding could be hastily arranged before birth, this risks a nonconsensual marriage. The woman may be suspected of fornication with others, too, making it harder to determine the father of her child, and less likely that he will provide vital care when the infant child needs it most. While an unmarried father or a stepfather might still provide child support and education to his illegitimate child, doing so is not typical of most males. So, Aquinas concluded, "human nature rebels against an indeterminate union of the sexes" in fornication, and the state must prohibit it clearly, though punish it quite lightly through fines or forms of public shaming or community service.<sup>95</sup>

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<sup>90</sup> AQUINAS, SCG, *supra* note 85, at ch. 123.

<sup>91</sup> See Philip L. Reynolds, *St. Thomas Aquinas*, in CHRISTIANITY AND FAMILY LAW, *supra* note 22, at 179–94.

<sup>92</sup> *Id.*

<sup>93</sup> AQUINAS, SCG, *supra* note 85, at chs. 122, 126; AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 12; see also JAMES BERNARD MURPHY, THE PHILOSOPHY OF POSITIVE LAW: FOUNDATIONS OF JURISPRUDENCE 48–116 (2005) (detailing Thomas's view of positive law).

<sup>94</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 2.

<sup>95</sup> *Id.* On the medieval punishment of this offense, see BULLOUGH & BRUNDAGE, *supra* note 80, at 132, 142–43.

Aquinas was surprisingly tolerant of prostitution. He considered it a necessity of social order, given the realities that some men will always be unattached and will inevitably seek sex somewhere.<sup>96</sup> Prostitution was rather like a “sewer” in a castle, Aquinas said; without it, the castle would be filled with filth.<sup>97</sup> Similarly, a society without prostitution would be filled with fornication, adultery, “sodomy,” and other sex crimes, and sometimes with violence, too, born of rape or seduction of innocent women.<sup>98</sup> It was better, on balance, to allow prostitution to continue discreetly and allow prostitutes to keep their fees instead of banning the practice and imposing higher risks and costs on all others.<sup>99</sup>

For Aquinas, it was a graver offense when an unmarried man seduced a virgin, or manipulated or tricked her into bed. Not only did this sexual encounter carry the same risk of harm to any child born of the union, but an additional “two-fold injustice attaches to it,” he wrote.<sup>100</sup> The victim was now hindered from contracting a lawful marriage and likely put on the road to “a wanton life,” since a non-virgin in that day had a much harder time finding a husband.<sup>101</sup> The seduction was also unjust to the father, guardian, or fiancé of the victim, whose love was betrayed and whose investment in and relationship with her was damaged.<sup>102</sup> The crime was even worse, other scholastics argued, when committed against a younger girl who could be more easily manipulated, or a kept woman like a maid, ward, patient, or passenger who had no real choice but to yield to a man’s sexual predations.<sup>103</sup> Seduction was a serious offense in Aquinas’s day, punishable by heavy fines and seizure of the criminal’s property, sometimes banishment from the community, too.<sup>104</sup>

Rape was worse than fornication and seduction, Aquinas argued, because it involved violence against the woman or against her family and was often accompanied by other violent crimes like abduction or aggravated battery. Such violence exacerbated the harm and constituted an additional crime against the body of the victim and against the property and other interests of her family.<sup>105</sup>

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<sup>96</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 10, art. 2; *id.* at question 60, art. 2; *id.* at question 87, art. 2; *id.* at question 154, art. 2; *see* BULLOUGH & BRUNDAGE, *supra* note 80, at 36–37, 149–61.

<sup>97</sup> BULLOUGH & BRUNDAGE, *supra* note 80, at 36–37, 149–61.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 6.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> BULLOUGH & BRUNDAGE, *supra* note 80, at 36–37, 149–61.

<sup>104</sup> *Id.*

<sup>105</sup> AQUINAS, SCG, *supra* note 85; AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 7.

Rape was a major capital crime in the medieval world, on the same order of gravity as assassination and treason; brazen or repeat offenders could face execution.<sup>106</sup>

“[A]dultery is more serious than seduction,” Aquinas continued, and even worse when “aggravated by the use of violence.”<sup>107</sup> When either the husband or the wife gained “access to another’s marriage-bed,” it breached marital fidelity and trust and caused harm to the entire family. It brought in sexual diseases that affected the innocent spouse and future offspring. It risked illegitimate children, who were either cast out of the home with slender chances of success or left in the home to become rivals to legitimate children and their mother.<sup>108</sup> Adultery often led to separation of the married couple, yielding further dissipation of parental resources and care for children, and still greater temptation for both spouses to test the neighbor’s bed. Even worse, it could lead to private revenge by the betrayed spouse, or murder of the betrayed spouse by the adulterous lovers.<sup>109</sup> Adultery was thus a capital crime, Aquinas argued. An innocent husband could testify against his adulterous wife leading to her execution. He could also kill her or her lover if caught in the act. Such “wife murder” was not a crime that the state should punish, even though it was a sin that the church could punish through penitential discipline or by prohibiting the man from remarrying.<sup>110</sup>

Plural or polygamous marriages constituted serial adultery, Aquinas believed, and were serious capital crimes.<sup>111</sup> Polyandry (one female with multiple male partners), though rare, was naturally unjust to children. A woman having sex with several husbands would undermine paternal certainty and investment in the children’s care.<sup>112</sup> The children would suffer from neglect, and the wife would be overburdened trying to care for them and to tend to her multiple husbands and their sexual needs.<sup>113</sup> Polygyny (one male with multiple

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<sup>106</sup> BULLOUGH & BRUNDAGE, *supra* note 80, at 143. On the medieval punishment of adultery, see BRUNDAGE, *supra* note 2, at 207, 246–47, 252, 388–89.

<sup>107</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 12.

<sup>108</sup> *Id.* at art. 8; *id.* at vol. 3, supplement question 68, art. 1.

<sup>109</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 160, art. 2; *id.* at vol. 3, supplement question 64, arts. 1–2, 4.

<sup>110</sup> *Id.* at vol. 3, supplement question 60, art. 1. Thomas said nothing about the innocent wife’s rights against her adulterous husband.

<sup>111</sup> AQUINAS, SCG, *supra* note 85, at ch. 123–24; AQUINAS, ST, *supra* note 84, at vol. 3, supplement question 44, art. 1; *id.* at vol. 1, pt. II, question 49, art. 2; *id.* at vol. 1, pt. II, question 65, arts. 1–2; *see also* 2 THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS bk. VIII, at 761–69 (C.I. Litzinger trans., 1964).

<sup>112</sup> AQUINAS, SCG, *supra* note 85, at ch. 124.

<sup>113</sup> *See id.* at chs. 123–24.

female partners) was naturally unjust to wives as well as children.<sup>114</sup> Polygyny did not necessarily erode paternal certainty, Aquinas allowed.<sup>115</sup> So long as his multiple wives were faithful to him alone, a man could feel assured of being the father of children born in his household.<sup>116</sup> But this would require a man to pen up his wives like cattle, isolating them from other roving males, even when his own energies to tend to them were dissipated over the several women and children in his household.<sup>117</sup> While locked up at home, the wives would be reduced to servants and set in perpetual competition with each other and with their rivals' children for resources and access to their shared husband.<sup>118</sup> This is not marriage but “somewhat servile,” said Aquinas.<sup>119</sup>

So, if it is not lawful for the wife to have several husbands, since this is contrary to the certainty as to offspring, it would not be lawful, on the other hand, for a man to have several wives, for the friendship of husband and wife would not be free, but somewhat servile. And this argument is corroborated by experience, for among husbands having plural wives the wives have a status like that of servants.<sup>120</sup>

“Natural justice” thus calls for monogamy alone and severe punishment of intentional polygamists.<sup>121</sup>

Incest was an “unnatural” sex crime, too, Aquinas argued. “There is something essentially unbecoming and contrary to natural reason in sexual intercourse between persons related by blood.”<sup>122</sup> If allowed, it would obstruct the proper relationships of authority and obedience between parents and children, elders and youth.<sup>123</sup> It would heighten the temptations to lust and produce an “excessive ardor of love” among relatives who lived together or near each other.<sup>124</sup> It would also “hinder a man from having many friends” beyond his relatives,<sup>125</sup> and in a peaceful society “it is most necessary that there be

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<sup>114</sup> *Id.*; see *supra* note 111.

<sup>115</sup> AQUINAS, SCG, *supra* note 85, at ch. 124.

<sup>116</sup> AQUINAS, ST, *supra* note 84, at vol. 3, supplement question 44, art. 1; see *id.* at vol. 1, pt. II, question 49, art. 2.

<sup>117</sup> *Id.* at vol. 3, supplement question 65, art. 1.

<sup>118</sup> *Id.*

<sup>119</sup> AQUINAS, SCG, *supra* note 85, at ch. 124.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; see *supra* note 111.

<sup>122</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 9.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

friendship among many people.”<sup>126</sup> Even animals, with only natural instincts to guide them are “horrified” by sexual contact with their “close” blood relatives, Aquinas added.<sup>127</sup> Rational human beings have built on this natural instinct to develop more refined impediments of consanguinity and affinity to avoid sex and marriage among even distant relatives.<sup>128</sup>

The gravest offenses of all were what Aquinas called “unnatural” acts of masturbation, sodomy, bestiality, and “effeminacy.”<sup>129</sup> Aquinas treated them only briefly as scandalous violations of the natural use of the sexual body and the natural procreative ends of sexual interaction.<sup>130</sup> Even worse, these were offenses against God himself and the natural order of creation. Aquinas quoted favorably St. Augustine’s harsh instructions: “Those foul offenses that are against nature should be everywhere at all times detested and punished,” with the state emulating God’s fiery wrath against “the people of Sodom.”<sup>131</sup>

### *B. Later Western Teachings on Sex Crimes*

Aquinas’s wide-ranging arguments to encourage and enforce exclusive and enduring marriages while prohibiting and punishing extramarital sex remained a staple for the Western legal tradition until the twentieth century. I have explored this ongoing tradition at length elsewhere,<sup>132</sup> so let me illustrate with a few statements by leading architects of Anglo-American common law and political liberalism.

Many of these later writers started with the same facts about human nature, sexuality, and enduring pair-bonding strategies of reproduction that Aquinas had articulated. Leading Scottish philosopher David Hume (1711–1776) put it concisely: “The long and helpless infancy requires the combination of parents for the subsistence of their young; and that combination requires the virtue of chastity or fidelity to the marriage bed.”<sup>133</sup> “The God of nature has enforced

<sup>126</sup> AQUINAS, SCG, *supra* note 85, at ch. 125.

<sup>127</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 9.

<sup>128</sup> *Id.* For St. Thomas Aquinas’s detailed account of impediments, see *id.* at vol. 3, supplement questions 54–55.

<sup>129</sup> *Id.* at vol. 1, pt. II, question 154, art. 12.

<sup>130</sup> AQUINAS, SCG, *supra* note 85, at chs. 122, 126; AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 12.

<sup>131</sup> AQUINAS, ST, *supra* note 84, at vol. 1, pt. II, question 154, art. 12.

<sup>132</sup> See WITTE, JR., *supra* note 23, at 151–83; WITTE, JR., *supra* note 3, at 287–324; WITTE, JR., *supra* note 11, at 135–66; Witte, Jr., *supra* note 76.

<sup>133</sup> DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 206–07 (L.A. Selby-Bigge ed., Clarendon Press 2d ed. 1902) (1748); see also DAVID HUME, ESSAYS: MORAL, POLITICAL, AND LITERARY (Eugene F. Miller ed., Liberty Fund rev. ed. 1987).

conjugal society, not only by making it agreeable, but by the principle of *chastity* inherent in our nature” as rational humans, Scottish judge Henry Home (1696–1782) expounded.

To animals that have no instinct for pairing, *chastity* is utterly unknown; *and* to them it would be useless . . . . But *chastity and mutual fidelity* [are] essential to . . . the continuation of the human race. As the carnal appetite is always alive, the sexes would wallow in pleasure, *and* be soon rendered unfit for procreation, were it not for the restraint of *chastity* [born of the natural law].<sup>134</sup>

Both family law and criminal law underscore this natural reality, echoed leading common law jurist William Blackstone (1723–1780): “The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”<sup>135</sup> “The duty of parents to provide for the maintenance of their children is a principle of natural law . . . .”<sup>136</sup> Family law facilitates that duty; criminal law enforces it, Blackstone concluded.

Indeed, criminal law must prohibit and punish all sex crimes that harm this natural configuration of sex, marriage, and family life, these and other writers continued. English political philosopher John Locke (1632–1704)—a leading liberal architect of natural rights and equality, and of the separation of church and state—argued forcefully that the state must punish sex crimes that threaten the rights and interests of wives and children, or that erode a man’s natural “obligation to continue in conjugal [s]ociety with the [s]ame woman.”<sup>137</sup> Locke called for firm punishment of the “[d]ishonesty and [d]ebauchery” of prostitution, concubinage, “simple [f]ornication,” incest, rape, and other such abuses in order to protect “the welfare and safety” of the victims and to avoid the “greater inconveniences” a community will face if charged with the care of violated women and their children.<sup>138</sup> Locke also castigated rape, adultery, polygamy, corporal discipline of wives, and sexual harm to children as violations of the natural rights of wives and children.<sup>139</sup> Religious groups, he said pointedly, are not “exempt from the magistrate’s power of punishing” such sex crimes just because they regard these activities as “articles of faith, or ways

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<sup>134</sup> See 1 HENRY HOME, *SKETCHES OF THE HISTORY OF MAN* 264–70 (James A. Harris ed., 2007).

<sup>135</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* 446–47, 454–55.

<sup>136</sup> *Id.* at 447.

<sup>137</sup> 2 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 264 (1764).

<sup>138</sup> John Locke, *A Third Letter Concerning Toleration*, in *A LETTER CONCERNING TOLERATION AND OTHER WRITINGS* 69, 84 (Mark Goldie ed., Liberty Fund 2010).

<sup>139</sup> *Id.* at 69, 84, 111.

of worship.”<sup>140</sup> “[A] toleration of men in all that which they pretend out of conscience they cannot submit to, will wholly take away all the civil laws and all the magistrate’s power.”<sup>141</sup>

Other writers further developed the logic of individual sex crimes. English philosopher William Paley (1743–1805), influential among common law judges on both sides of the Atlantic, defended the criminalization of simple fornication in order to encourage marriage.<sup>142</sup> “The male part of the species will not undertake the encumbrance, expense, and restraint of married life, if they can gratify their [sexual] passions at a cheaper price; and they will undertake anything rather than not gratify them.”<sup>143</sup> Paley recognized that he was appealing to general utility, but he thought that decriminalization of fornication would lead to forms of sexual libertinism that exploited and harmed women and children:

The libertine may not be conscious that these irregularities hinder his own marriage, . . . much less does he perceive how *his* indulgences can hinder other men from marrying, but what will he say would be the consequence, if the same licentiousness were universal? or what should hinder it becoming universal, if it be innocent or allowable in him?<sup>144</sup>

Fornication can furthermore lead one or both parties to prostitution, Paley went on, with its accompanying degradation of women, erosion of morals, transmission of disease, and further irregularities and pathos.<sup>145</sup> Fornication is no better if it devolves into concubinage—the “kept mistress,” who can be dismissed at the man’s pleasure, or retained “in a state of humiliation and dependence inconsistent with the rights which marriage would confer upon her” and her children.<sup>146</sup> It is best to cut all this sexual pathos off at the root, Paley concluded, by prohibiting sex outside the marital bed and encouraging fit and capable couples to marry instead.<sup>147</sup>

Adultery is even worse than fornication, said Paley, because it not only insults the goods of marriage in the abstract; it injures an actual marriage, leaving

<sup>140</sup> *Id.*; see also John Locke, *Of Other Relations*, in 2 THE WORKS OF JOHN LOCKE 96 (1823).

<sup>141</sup> John Locke, *An Essay Concerning Toleration*, in A LETTER CONCERNING TOLERATION AND OTHER WRITINGS, *supra* note 138, at 105, 110–11.

<sup>142</sup> WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 169 (2002).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 171–72.

<sup>147</sup> *Id.* at 172.

the innocent spouse and children as victims.<sup>148</sup> To the betrayed spouse, adultery is “a wound in his [or her] sensibility and affections, the most painful and incurable that human nature knows.”<sup>149</sup> To the children of an adulterous parent it brings shame and unhappiness as the vice is inevitably detected and discussed. To the adulterous party it is a form of “perjury” that violates the marital vow and covenant.<sup>150</sup> To all parties in the household, adultery will often provoke retaliation and imitation—another step in the erosion of marriage and endangerment of children and society. Adultery is thus a serious crime.<sup>151</sup>

This same concern for mutual fidelity and security informed the criminal prohibition on polygyny. Scottish philosopher Francis Hutcheson (1694–1746) argued that polygamy has no place in a modern liberal society dedicated to protection of the natural rights and equality of men and women, and to the perpetual pursuit of happiness for all. Hutcheson reasoned that polygamy “destroys all friend[s]hip in marriage; mu[s]t be the cau[s]e of perpetual contention[s]; mu[s]t tempt women [s]o injuriou[s]ly treated into adulterie[s]; mu[s]t corrupt the mind[s] of men with wandering lu[s]t, de[s]troying their natural affection to their children; and mu[s]t occa[s]ion to [s]ome an off[s]pring too numerous, which therefore will be neglected, and be void of all [sense] of duty to [s]uch di[ss]olute parent[s].”<sup>152</sup> Moreover, given the roughly equal numbers of men and women, polygamy would tend to exclude many men from the institution of marriage, “which chiefly civilize[s] and unite[s] men in [s]ociety.”<sup>153</sup> Society will suffer gravely if too many men cannot marry because most of the eligible women have been hoarded into the harems of men who may or may not be virtuous or capable of maintaining them and their children.<sup>154</sup>

The crime of incest has a more straightforward argument, wrote utilitarian philosopher and jurist Jeremy Bentham (1748–1832). “Every people pretend to follow in this respect, what they call the law of nature, and they look with a sort of horror upon everything not conformed to the matrimonial laws of their own country” or with the laws of the Bible or the church.<sup>155</sup> But state prohibitions on incest are better rooted in four interrelated principles of utility, Bentham argued: (1) to reduce real or suspected rivalry among family members at the cost of

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<sup>148</sup> *Id.* at 176.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 177.

<sup>151</sup> *Id.* at 176–80.

<sup>152</sup> FRANCIS HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY 260 (1747).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 248–53.

<sup>155</sup> JEREMY BENTHAM, THEORY OF LEGISLATION 256 (R. Hildreth trans., 1840).

household harmony; (2) to avoid seduction of young girls within the home which will prevent them from forming “permanent and advantageous” marriages when they grow up; (3) to avoid confusions in domestic relations “between those who ought to command and those who ought to obey”; and (4) to avoid physical injury from “premature indulgences” in sex.<sup>156</sup> Utility was the best judge of incest laws, Bentham insisted. Worries about sexual taboos, “natural repugnance,” “vulgar morality,” weakened blood, and fewer alliances are all just “pious frauds.”<sup>157</sup> It is worth noting, however, that almost all of Bentham’s utilitarian arguments against incest echoed Thomas Aquinas’s natural law arguments from five centuries earlier.<sup>158</sup>

While Western jurists and philosophers differed in their rationales for criminalizing fornication, prostitution, concubinage, adultery, incest, rape, and abuse of wives and children, few writers before the twentieth century argued for the relaxation or expulsion of these crimes. Iconoclastic reformers like Martin Madan (1726–1790) and John Stuart Mill (1806–1873) as well as early experimenters in “sexual communism” and “free love radicalism” were the exception, not the rule.<sup>159</sup> This is less true about the traditional “crimes of bestiality, sodomy, masturbation, contraception, polygamy, obscenity, and other prohibited forms of “unnatural” conduct, “perversion,” “indecent,” “lewdness,” and “abomination.” These crimes remained on the books in common law and civil law lands. Even the new liberal penal codes inspired by the French and American revolutions and by early modern liberal reformers like Beccaria, Napoleon, Jefferson, Feuerbach, and others made few changes to them.<sup>160</sup> But, a growing number of early modern detractors began to press for their reform, if not removal, anticipating modern developments that struck many of these crimes for good.<sup>161</sup>

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<sup>156</sup> *Id.* at 257–58.

<sup>157</sup> *Id.* at 256–61.

<sup>158</sup> See *supra* notes 122–128 and accompanying text.

<sup>159</sup> See generally MARTIN MADAN, *THELYPHTHORA; OR, A TREATISE ON FEMALE RUIN, IN ITS CAUSES, EFFECTS, CONSEQUENCES, PREVENTION, AND REMEDY* (1781); 21 COLLECTED WORKS OF JOHN STUART MILL (John M. Robson ed., Univ. of Toronto Press 1984); JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* (Mary Warnock ed., 1968). On sexual radicals, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 68–71, 107–12 (2000); FARAMERZ DABHOIWALA, *THE ORIGINS OF SEX: A HISTORY OF THE FIRST SEXUAL REVOLUTION* 108 (2012).

<sup>160</sup> See WITTE, JR., *supra* note 11; sources cited *supra* notes 5–9.

<sup>161</sup> See, e.g., DABHOIWALA, *supra* note 159.

## III. CHURCH, STATE, AND SEXUAL MORALITY TODAY

In 1955 the American Law Institute declared that its new *Model Penal Code*

does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the private actor. Such matters are best left to religious, educational, and other social influences.<sup>162</sup>

This striking statement about the limits of modern criminal law is now commonplace in modern pluralistic liberal societies. This statement seems especially apt for the sexual field, where a half-century of sexual liberty jurisprudence has strengthened the perceived separation of sin and crime, morality and liberty, tradition and modernity. Many modern liberal countries have also firmly committed to *laïcité* or the “disestablishment of religion,” yielding a further separation of the roles of church and state in dealing with sex.<sup>163</sup> Sexual morality is now commonly thought to be for private actors to work out for themselves, drawing as they wish “on religious, educational and other social influences.”<sup>164</sup> Even if one wanted to pursue a neo-Puritan sexual path today—I, for one, do not!—a new state criminalization of a number of traditional sex offenses could not pass constitutional or cultural muster in modern liberal societies.

But this does not mean that all the sex crimes listed in the Bible and articulated by the Western legal tradition are now by definition superstitious relics of a bygone age. It is too simple to say that traditional moral standards have no place in modern criminal law. Some of the most serious crimes that liberal states actively prosecute today—murder, theft, rape, kidnapping, treason, conspiracy, perjury, and others—are, in fact, deeply rooted in the moral teachings of the Bible and other religious texts, even if they now have other logics.<sup>165</sup> Moreover, many traditional sex crimes were not only inspired by

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<sup>162</sup> MODEL PENAL CODE art. 207 (AM. LAW INST., Tentative Draft No. 4, 1955); see also PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963); David Flaherty, *Law and the Enforcement of Morals in Early America*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 53 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988).

<sup>163</sup> See, e.g., NORMAN DOE, *LAW AND RELIGION IN EUROPE: A COMPARATIVE INTRODUCTION* (2011); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 249–75 (4th ed. 2016).

<sup>164</sup> MODEL PENAL CODE art. 207.

<sup>165</sup> See *supra* notes 32–73 and accompanying text.

divine imperatives of sexual morality, bodily purity, and Godly chastity, but also infused with prudential and practical concerns that remain important for criminal law still today. These included, as we saw, concerns about harms or threats to the person, property, or reputation of victims and other third parties; about the rights, liberties, and interests of defendants, victims, and their families; about the health, safety, and welfare of the community; and more. Traditional sexual morality is part of modern criminal law on sex, whether we like it or not.

A more helpful distinction is between “the morality of duty” and “the morality of aspiration,” as Harvard legal philosopher Lon Fuller once put it.<sup>166</sup> The morality of *duty* guides and even coerces humans to avoid their worst inclinations. It “lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain goals” of protecting life, liberty, and property or pursuing justice, peace, and rule of law “must fail of its mark.”<sup>167</sup> By contrast, the morality of *aspiration* encourages humans to ascend to “the Good Life, of excellence, of the fullest realization of human powers.”<sup>168</sup> It is directed to the Jekyll who sits alongside the Hyde within each of us. The morality of aspiration not only coerces persons against acts of violence and violation, it also cultivates in them virtues of charity, justice, and love. It not only punishes harmful acts of murder and theft; it also discourages evil thoughts of hatred and covetousness.<sup>169</sup> The morality of duty is like the rules of grammar. Without them, there could be no coherent speech and literature. The morality of aspiration is like the quest for eloquence. With it, we get Shakespeare and Martin Luther King, Jr.

### A. *The Role of the State*

This simple framework gives us a different way to think through the distinctions between crime and sin, tradition and modernity, and the respective roles of state and church in the sexual field. At the most elementary level, the state does and should use criminal law to enforce a baseline sexual morality of duty—laying down “the basic rules without which an ordered society is impossible”<sup>170</sup> and without which basic goods of life, liberty, and property, justice, peace, and rule of law are imperiled. Included in most liberal penal codes

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<sup>166</sup> LON L. FULLER, *THE MORALITY OF LAW* 3–32 (rev. ed. 1969).

<sup>167</sup> *Id.* at 5–6.

<sup>168</sup> *Id.*

<sup>169</sup> On this “teaching” function of law, see CATHLEEN KAVENY, *LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY* 97–110, 219–42 (2012); JOHN WITTE, JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 263–94 (2006).

<sup>170</sup> FULLER, *supra* note 166, at 5–6.

today are prohibitions against the traditional sex crimes of abduction (now usually called kidnapping), castration (now punished along with involuntary sterilization as aggravated battery), incest, infanticide (now usually a form of homicide), malicious desertion (now including failure to pay child support), obscenity, polygamy, prostitution, rape, and sexual assault and battery.<sup>171</sup> Each of these offenses, if not prohibited and punished, would indeed harm the basic individual and collective goods of life, liberty, and property, justice, peace, and rule of law. Most of these offenses still appear in most modern penal codes of Western democracies, though several of them are now under sharp attack from the liberal left and libertarian right as undue encroachments on sexual liberty and domestic self-determination.<sup>172</sup> There are other critical goods of social order, alongside liberty and self-determination, however—not least, the concern for the rights and liberties of vulnerable victims—that justify the continued criminalization of these actions.<sup>173</sup>

The modern liberal state can, and in my view should, use other tools, besides criminal law, to “nudge” and “channel” its citizens toward a higher sexual morality of aspiration. “Nudging” is now a common legal strategy of promoting desirable public and private goods in many areas of life.<sup>174</sup> It occupies the soft normative middle between the hard “thou shalt” and “thou shalt not” commands of the past. The modern liberal state facilitates, licenses, encourages, and sometimes even pays for or rewards all kinds of desirable behavior: think of voting in a state election, getting a free vaccine, or going to college on a state scholarship. The state imposes taxes or fines or withholds state benefits or opportunities for those who indulge in undesirable behavior: think of smoking, not wearing seat belts, or dropping out of high school. The theory of “nudging”

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<sup>171</sup> See sources *supra* notes 5–11.

<sup>172</sup> See sources *supra* notes 5–11. For further recent liberal critiques of traditional sex, marriage, and family norms, see SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY* (2013); CLARE CHAMBERS, *AGAINST MARRIAGE: AN EGALITARIAN DEFENSE OF THE MARRIAGE-FREE STATE* (2017). For a strong recent libertarian statement, see, for example, LIBERTARIAN NATIONAL COMMITTEE, 2018 PLATFORM § 1.4 (2018) (“Sexual orientation, preference, gender, or gender identity should have no impact on the government’s treatment of individuals, such as in current marriage, child custody, adoption, immigration or military service laws. Government does not have the authority to define, promote, license or restrict personal relationships, regardless of the number of participants. Consenting adults should be free to choose their own sexual practices and personal relationships. Until such time as the government stops its illegitimate practice of marriage licensing, such licenses must be granted to all consenting adults who apply.”).

<sup>173</sup> WITTE, JR., *supra* note 14, at 442–65; see also John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy Over Polygamy*, 64 EMORY L.J. 1675 (2015).

<sup>174</sup> See, e.g., RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); *SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW* (Eric A. Posner ed., 2007); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

or “legal channeling” stipulates that, over time, the desirable behavior encouraged by the state will become more customary, even natural or reflexive among citizens, and the undesirable behavior will be viewed as aberrant and perhaps even stigmatized.<sup>175</sup>

Without encroaching on sexual liberty, the modern liberal state can “nudge” citizens to pursue sexual actions, habits, and relationships that aspire to higher private and public goods.<sup>176</sup> The state can provide much stronger tax and social benefits for married couples, straight and same-sex alike. It can tighten its marital formation and dissolution rules to discourage an easy-in/easy-out marital culture. It can provide better comprehensive sex and family-planning education as a matter of public and private health and safety. It can offer free contraceptives to vulnerable populations especially among the youth, gathered, say, in high school proms or mixed college dormitories. It can provide more expansive pregnancy and maternal care and financial services, and more efficient and humane adoption options. It can create a much more sophisticated system of bio- and information-technology to find and hold fathers accountable for the children they produce. It can do much more to put all “children’s interests first”<sup>177</sup> and to help protect and vindicate the fundamental rights of children.<sup>178</sup> It can do much more to encourage better elder and intergenerational care. State officials can, and should, model and promote responsible sex, marriage, and family norms and habits in their own lives as a vital form of political and legal pedagogy.

But, in the end, the state and its laws can only do so much in the sexual field. Human families also need broader communities and narratives to stabilize, deepen, and exemplify the natural inclinations and rational norms human beings have about responsible sex and procreation. Human families need models and exemplars of love and fidelity, trust and sacrifice, commitment and community, to give these natural teachings further content and coherence. They need the help of stable institutions beyond the state—churches, schools, charities, hospitals, neighborhoods, and others. They need the help of service professionals beyond judges, lawyers, and state workers—preachers, teachers, doctors, mentors, counselors, therapists, accountants, coaches, and others. As Robert Bellah

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<sup>175</sup> CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS, AND PERSPECTIVES 211–21, 507–09 (3d ed. 2006); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498, 503–04 (1992).

<sup>176</sup> Schneider, *supra* note 175, at 495–532.

<sup>177</sup> See *supra* note 29.

<sup>178</sup> See sources and discussion in WITTE, JR., *supra* note 23, at 238, 273; see also John Witte, Jr. & Don S. Browning, *Christianity’s Mixed Contributions to Children’s Rights: Traditional Teachings, Modern Doubts*, 61 EMORY L.J. 991 (2012).

reminds us, while it takes a marriage to make a family, and a village to raise a child, “it takes a society to raise a family.”<sup>179</sup>

### *B. The Role of the Church*

Among many other non-state and religious associations, the modern church can and should play a vital social role in “raising a family” and promoting healthy sexual morality in society. At minimum, the modern church must be at least as zealous as the modern state in protecting a basic sexual morality of duty, and making state-prohibited sex crimes a condition for church leadership, if not membership. Some churches now do so more clearly in their canons of ordination and contracts of employment in sanctuaries, schools, charities, and service organizations.<sup>180</sup> But all churches should have clear, detailed, and enforceable “sexual morality” clauses with corresponding procedures for adjudicating complaints and cases.

This need has become doubly imperative today given the grim reality of serial sexual abuse by some clergy and cover-ups by some of their superiors in Catholic, Protestant, and Evangelical circles alike.<sup>181</sup> This fundamental “sacrilege” and betrayal of ordination vows has destroyed the lives of untold thousands of victims, and has gravely harmed the moral standing and witness of the modern church throughout the world.<sup>182</sup> Churches must root out and drive out all clergy and other religious leaders who abuse their wives, children, students, clients, patients, or parishioners, as well as their accomplices after the fact among the higher clergy or other supervisors who cover up these grave offenses. These are serious sex crimes whose perpetrators should find no refuge behind constitutional walls or sacramental veils. Clerical pederasts, in particular, should remember that Jesus has reserved a special place in hell for those who harm children.<sup>183</sup> This biblical teaching merits regular repetition in churches and

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<sup>179</sup> See Robert N. Bellah, *Epilogue: It Takes a Society to Raise a Family*, in *FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE* 286–98 (Steven M. Tipton & John Witte, Jr. eds., 2005).

<sup>180</sup> See DOE, *supra* note 27, at 77–112, 154–87.

<sup>181</sup> See sources cited *supra* notes 28–31; see also *Catholic Church Child Sexual Abuse Scandal*, BBC NEWS (Feb. 26, 2019), <https://www.bbc.com/news/world-44209971>; *German Catholic Church Reveals Scale of Sexual Abuse*, DW NEWS (Sept. 25, 2018), <https://www.dw.com/en/german-catholic-church-reveals-scale-of-sexual-abuse/a-45624102>; Joshua Pease, *The Sin of Silence: The Epidemic of Denial About Sexual Abuse in the Evangelical Church*, WASH. POST (May 31, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/?utm\\_term=.8c58104fd580](https://www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/?utm_term=.8c58104fd580).

<sup>182</sup> Dominic Legge, “*Cleansing the Church of Clerical Sacrilege*,” FIRST THINGS (Aug. 16, 2018), <https://www.firstthings.com/web-exclusives/2018/08/cleansing-the-church-of-clerical-sacrilege>.

<sup>183</sup> *Luke* 17:2; *Mark* 9:42; *Matthew* 18:6.

seminaries and ample elaboration in the church's law books and disciplinary codes.

Rather than just following the secular status quo, or seeking to establish its spiritual norms by state positive law, modern churches in liberal societies may go further to teach a higher sexual morality of aspiration for its own voluntary members, setting out the norms and habits of sexual purity, bodily integrity, and marital fidelity taught by Scripture and tradition. Among the most likely moral standards to consider are the repeated biblical injunctions against adultery, bestiality, buggery, fornication, and sodomy. Some churches might also wish to add other longstanding sex prohibitions in the Christian tradition, such as abortion, contraception, prostitution, and concubinage. Some modern churches support the continued enforcement of these sexual prohibitions within the church—although same-sex intimacy and relationships have been under hot theological dispute and elaborate hermeneutical systems are now at hand that both expand and shrink certain biblical sex crimes.<sup>184</sup>

A church may view this aspirational sexual morality as essential or optional for church life and membership. It may have formal or informal methods of adjudication and enforcement of those rules.<sup>185</sup> In a liberal society, no citizen may be compelled to be part of a church, nor barred from leaving it. But a church is free to maintain internal norms and procedures for its voluntary members without interference from the state, so long as there is no harm or threat to life and limb.<sup>186</sup> Spiritual discipline in the form of fines, mandatory charity, public confessions, bans from the Eucharist, removals from church benefits or offices, shunning or ostracism from the community, and the like can pass muster in a liberal society. But hard coercive power against life or limb is reserved to the state alone under strict due process constraints.

Churches need not, and in my view should not, banish from the pew, pulpit, lectern, keyboard, or choir bench every person who falls short of their community's sexual standards. Nor should churches indiscriminately shun modern science and new insights about sex and sexuality. But churches do have a right and responsibility to teach, counsel, and facilitate members to follow biblical teachings in their sex lives, and to set realistic benchmarks for the

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<sup>184</sup> See sources cited *supra* notes 25–27, 29; see also WILLIAM STACY JOHNSON, *A TIME TO EMBRACE: SAME-GENDER RELATIONSHIPS IN RELIGION, LAW, AND POLITICS* (2d ed. 2012); MARK D. JORDAN, *BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE* (2005); MARK D. JORDAN, *THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY* (1997).

<sup>185</sup> See DOE, *supra* note 27.

<sup>186</sup> WITTE, JR. & NICHOLS, *supra* note 163, at 1–2.

spiritual growth of each member, with encouragement and appropriate consequences for those who fall short. This is doubly imperative for clergy and other religious leaders who are called to be faithful stewards of Scripture and tradition, and moral exemplars and teachers in their communities.

Sexual liberty is a hard-won prize of modern liberal life whose protection has allowed liberal citizens to escape some of the patriarchy, paternalism, and plain prudishness of the past. But sexual violation and abuse remains a perennial reality of modern life, and sex crimes inflict some of the deepest scars on their victims. A liberal society must thus maintain minimum standards of sexual morality in its criminal law as a restraint on deviant and destructive “devices and desires” and as a bulwark against a society’s slide into a sexual state of nature where life can be “brutal, nasty, and short” for the most vulnerable. And a liberal society would do well to encourage its citizens and its communities of faith to pursue a higher morality of aspiration that views sex and the sexual body as a special gift for oneself and for others.