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THE SOCIOLOGICAL BASIS OF THE LAWS
RELATING TO WOMEN SEX OFFENDERS
IN MASSACHUSETTS (1620-1860)*

BETTY B. ROSENBAUM†

INTRODUCTION

Five years for adultery! Two years for being a lewd, wanton and lascivious person in speech and behavior! Two years for common night walking! These and like sentences are imposed upon the woman classed under our social system as a sex delinquent. Such women make up the majority of those sent to the Reformatory for Women at Framingham, Massachusetts. The origin of the laws determining these sentences merits examination.

To understand the code of sex morality which characterizes the State of Massachusetts, it is necessary to inquire into the social equipment brought to this country by the founding fathers and the conditions which directed that equipment along very definite channels.

Our Puritan ancestors came to the new continent endowed with a concept of marriage well-moulded by the Hebrew patriarchs and firmly formulated by the Christian Church.

The economic struggle for existence, the preservation of property within the family group under complete male control, the need for populating vast stretches of territory all placed a marked emphasis on family unity and stability for the colonial settlers just as they had earlier in the pastoral stage of Hebrew civilization.¹

Dr. Goodsell summarizes these functions of the family succinctly when she says, ". . . that marriage and patriarchal family organization were designed in large measure for the protection of private property, and for its control and inheritance by males. Other ends were doubtless served by these institutions, but the *economic purpose* [italics mine] was fundamental from the dawn of history to the latter half of the nineteenth century."²

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¹ Goodsell, Willystine, *A History of Marriage and the Family*, The Macmillan Co., 1934, (revised edition), pp. 366-367, pp. 53-54, 56, 359.

² *Ibid.*, p. 317.

It is not, therefore, surprising to find the moral code of the ancient Hebrews applied practically in its entirety to the early New England family. In line with this moral code, the early Courts of Assistants issued their decrees against those who did not conduct themselves according to the accepted social pattern, and as early as 1631 we find a "Court of Assistants holden att Boston, October 18th" ordering "that if any man shall have carnall copulacon with another man's wife, they both shalbe punished by death."³ This differs from and intensifies the Hebraic code in which only the woman suffered death. Thus the tradition was early established in colonial history in which morals became a subject of court legislation.⁴

The men responsible for the particular brand of family life established in the New England colonies were the Puritans, a small religious minority who had been struggling in England not for toleration but control, and who became a "New England oligarchy."⁵ The unconditioned will of God, derived from the Bible, was the basis from which they regulated all activities, including family life. "[The old Testament] . . . never failed to provide them with justification for their most inhuman and bloodthirsty acts."⁶

We shall examine the legal code into which the Puritans translated their moral standards to learn their attitude toward sex relationships, and we shall attempt to tie these morals and the resulting laws to enforce them to the economic and social base from which they grew.

Adams points out that the geographical nature of New England produced a population which was largely middle class,—the class in which Puritanism, as a fanatical protest against the immorality of the decadent and hostile nobility, found fertile soil for growth.⁷ Even so, not a few of the early colonists rebelled against a morality characterized by "repression and conformity," and underneath the

³ *Records of the Governor and Company of the Massachusetts Bay in New England*, edited by N. B. Shurtleff, printed by the Press of William White, 1853, vol. 1, p. 92.

⁴ *Cases and Materials on the Development of Legal Institutions*, edited by Julius Goebel, Columbia University, 1931, p. 538. Goebel also tells us that "The very circumstance that certain types of behavior should be punished is closely connected with the whole Christian morality and the function of the church in propagating and guarding its moral standards," p. 536.

⁵ Adams, James T., *The Founding of New England*, Little, Brown and Co., 1927, p. 71, 111-112.

⁶ *Ibid.*, p. 80.

⁷ *Ibid.*, pp. 112-113, 85.

blanket of Puritan morality many then unmentionable activities were prevalent.⁸

It is important to note that until 1634 the Courts of Assistants, in close alliance with the clergy,⁹ turned out the colonial enactments. In 1634 the freemen in the General Court (who made up but a small fraction of the entire population) took over the legislative functions.

Thus was the ground prepared for the installation and development of the social, ethical and moral concepts embodied in Puritanism, a whole vividly described by Adams as a “. . . wild fruit that grew steadily more gnarled and bitter . . .”¹⁰ for the next two centuries.

The same two centuries, however, witnessed a change in the economy of the New England states from one primarily agricultural in nature with commerce and industry as supplementary occupations to one largely commercial in form. And concurrently with and out of the commercial development emerged the stage of industrial capitalism which has continued to grow to vast proportions and which dominates our society today.¹¹ This tremendous change in the economic structure was bound to affect social institutions, and among these the family was profoundly influenced. The modern apartment-dweller, Mr. and Mrs. Jones with their one, two or three children (or none at all) each seeking and finding the fulfillment of their life needs in the larger social groups, differ radically from the Mr. and Mrs. Smith (the latter often succeeded after early death by one or two other Mrs. Smiths) of the Massachusetts colony with their dozen or so children, and their lives completely encompassed by the family hearth.

Just as the character of the family and family life have changed with the new industrial base, so have the functions which the family has to perform in society changed. Many of its old functions have vanished leaving only an occasional, nostalgic trace,—these are protection, religion, education, food-production and clothing-production. One basic function, reproduction, has lost considerable ground. What is left of this latter function plus the rearing of children and the supplying of affection appear to be the main-springs on which our family life rests today.

⁸ *Ibid.*, p. 111.

⁹ *Ibid.*, p. 160, 162-163, 171-172, 121.

¹⁰ *Ibid.*, p. 174.

¹¹ Bimba, Anthony, *The History of the American Working Class*, International Publishers, 1927, third edition, p. 30.

The role and function of the family have changed. The moral code of the early Puritans still remains,—written in black and white into the law books of Massachusetts; written in tragedy and misery into the lives of unfortunate human beings.

With this introduction, let us proceed to explore the details of the economic and social structure of the Commonwealth of Massachusetts in each of the main periods of its development until the Civil War, the laws of these periods dealing with "sex offenders," and the possible relationships which might exist between the two. The periods are: (1) the colonial period from 1620 to 1692, (2) the period from 1692 to 1763, and (3) the period from 1763 to 1860.

THE COLONIAL PERIOD FROM 1620-1692

The primary unit of society in colonial New England—socially, economically and culturally—was the family group. The concept of a strong family unit was introduced by settlers who had a long heritage of family solidarity; and in the unyielding soil of the New England frontier, this institution took firm root. "The family was . . . closely connected with another fundamentally important institution, land, which provided its economic base and to a large extent molded its social and legal aspects."¹² The fact that ninety per cent of the New England population was tied to land held on a freehold basis further militated to strengthen the patriarchal family unit which proved to be a most efficient agency for the development of small land holdings.¹³

The first New Englanders were starting literally from "rock-bottom" in their efforts at establishment of the new continent. Because of its glacial origin and the preponderance of boulder clay, only intensive, diligent and skillful efforts on the part of many hands could make the soil produce. This urgent need for land productive power coupled with the basic necessity of filling ones daily subsistence requirements (cooking, spinning, sewing, etc.) made family life the *sine qua non* of colonial existence. The labor market was so under-supplied that it was most desirable and least expensive to raise ones own labor by having many children. And this was done on an extensive scale. Families of 30, 27, 23, 20, 17 and 13 offspring were far from rare occurrences according to Cotton

¹² Adams, J. T., *Provincial Society, 1690-1763* (A History of American Life, vol. 3), The Macmillan Co., 1927, p. 11.

¹³ Weeden, William B., *Economic and Social History of New England, 1620-1789*, Houghton, Mifflin & Co., vol. 1, p. 53. Also Beard, C. A. and M. R., *The Rise of American Civilization*, The Macmillan Co., 1927, vol. 1, p. 55.

Mather,¹⁴ and nine persons per family (including servants) was the average.¹⁵ The size of a man's family was taken into account in the dispensation of the land of a town.¹⁶

In addition to the basic house-hold duties,¹⁷ the government-encouraged domestic manufacture of linen and wool (prompted by the colony's unfavorable balance of trade) assumed important proportions in the colonial home.¹⁸

A further important influence in shaping the colonial family was the emphasis on the well-established concept of private property. Marriage transactions followed a rigid business-like procedure.¹⁹

Painting a word picture of colonial New England in 1690, Adams describes²⁰

" . . . a widely scattered and mainly agricultural population leading a hard-working narrow, parochial and sometimes dangerous existence in solitary farms, tiny hamlets, or at most in what would now be considered small villages. . . . It was a society in which *all the conditions tended greatly to emphasize the solidarity of family life* [italics mine] and that of the smaller political units."

It is not to be wondered, therefore, that the institution of matrimony so essential to all the economic processes in the colonies, was carefully safe-guarded in the laws.²¹ Included in the necessary legal measures in establishing this civil contract were: (1) securing parental consent; (2) publication of banns or receiving the Governor's license; (3) legal solemnization by a magistrate, and (4) registration in the court.²²

In 1639, the General Court meeting in Boston on September 4th, ruled as follows:²³

¹⁴ Wertenbaker, T. J., *The First Americans, 1607-1690* (A History of American Life, vol. 2), The Macmillan Co., 1927, pp. 182-183.

¹⁵ Goodsell, *op. cit.*, p. 398.

¹⁶ Wertenbaker, *op. cit.*, p. 568.

¹⁷ *Ibid.*, pp. 83-85, describes a typical dawn-to-dusk routine for the colonial family.

¹⁸ In 1640 and again in 1656 the Court ordered the enlistment of various members of the family group in the pursuits of spinning and weaving, setting a definite quota in the latter year and penalizing its non-fulfillment by a fine. See Weeden, *op. cit.*, vol. 1, pp. 170, 171, 197-198.

¹⁹ *Ibid.*, pp. 219-220 describes such a transaction.

²⁰ Adams, *op. cit.*, p. 23.

²¹ Contrary to the general conception, the Puritan elect did not accept the English common law as the basic rule of the new commonwealth. They incorporated it only as supplementary to their own original code, the law of God. *Ibid.*, p. 14.

²² Goodsell, *op. cit.*, pp. 382-383.

²³ *Records of the Governor and Company, op. cit.*, p. 275.

‘For pventing of all vnlawfull marriages . . . it is ordered, that, after dewe publication of this order, noe psons shalbee ioyned in marriage before the intention of the pties pceeding therein hath bene 3 times published at the time of publike lecture or town meeting, in both the townes where the pties, or either of them, do ordinarily reside; & in such townes where no lectures are, then the same intention to bee set vp in writing vpon some poast standing in publike viewe, and vsed for such purpose . . . onely, & there to stand, so as it may easily bee read, by the space of 14 dayes.’

Responsible for many of the pre-marital sex relationships that troubled the colonial authorities was the practice of bundling, a Dutch courting custom especially prevalent among the lower economic strata of the colony.²⁴ However, this custom cannot take the entire blame for sex irregularities, for Calhoun points out that the higher circles practicing different methods of courtship were accused of erring even more frequently.²⁵

Another early custom responsible for frequent pre-marital sex relations was the pre-contract or official engagement embodied in the publication of banns declaring ones intention to marry.²⁶ This “half-way married” state gave couples the basis for relations, which they later confessed in church meetings under the overwhelming fear of infant damnation. Calhoun is of the opinion that much of the incontinence of early New England was not promiscuous.²⁷

The extent of pre-marital sex relations may be gleaned from the early church records. Charles F. Adams found the following entry, similar to many others, among the records of the First Church of Quincy (1673-1773):²⁸

“Temperance, the daughter of Brother F———, now the wife of John B———, having been guilty of the sin of Fornication with him that is now her husband, was called forth in the open Congregation, and presented with a paper containing a full acknowledgment of her great sin and wickedness—publicly bewayled her disobedience to parents, pride, unprofitableness under the means of grace, as the cause that might provoke God to punish her with sin, and warning all to take heed of such sins, begging the church’s prayers, that God would humble her, and give

²⁴ This custom, the by-product of a fuel and candle shortage, permitted the suitor to get into bed with his sweetheart without undressing. Calhoun, A. W., *A Social History of the American Family From Colonial Times to the Present*, vol. 1, The Arthur H. Clark Co., 1917, p. 129.

²⁵ *Ibid.*, p. 130.

²⁶ See above, p. 819.

²⁷ *Ibid.*, p. 135.

²⁸ Adams, C. F., “Some Phases of Sexual Morality and Church Discipline in Colonial New England,” *Proceedings of the Massachusetts Historical Society*, second series, vol. 6, 1890-1891, Published by The Society, 1891, pp. 480-481.

a sound repentance, etc. Which confession being read, after some debate, the brethren did generally if not unanimously judge that she ought to be admonished; and accordingly she was solemnly admonished of her great sin, which was spread before her in divers particulars, and charged to search her own heart wayes and to make thorough work in her Repentance, etc., from which she was released by the church vote unanimously on April 11th, 1698."

These fifteen years of doing penance was a penalty of a different nature from those dealt out in the earlier years by the Courts.

In the Records of the Governor and Company of the Massachusetts Bay in New England²⁹ we learn that

"A Court, holden att Boston, November 7th, 1632. . . . It is ordered, that Robert Huit and Mary Ridge shalbe whipt for committing fornicacōn together, of wch they are convicted."

Ten years later, a law promulgated on May 18, 1642, provides that:³⁰

"If any man shall comit fornication wth any single woman, they shall bee punished either by enioyning to marriage, or fine, or corporal punishmt, or all or any of these, as the judges shall appoint, most agreeable to the work; and this order to continue till further order bee taken in it."

In 1665, disfranchisement was added to the punishment of any freeman "legally convicted of that [fornication] or any other shameful & vitious crime."³¹

In contrast with this penalty for having sex relations with a *single* woman (i. e. fornication), let us examine the punishment meted out to those whose cohabitation involved a *married* woman (adultery).

The Courts of Assistants meeting in Boston October 18, 1631 (just a year before the first instance cited above) ruled as follows: "It is ordered, that if any man shall have carnall copulacōn with another man's wife, they both shalbe punished by death."³² So important, then, was the integrity of the family in the colonial structure, that any in-road upon it was a capital offense. The graveness of the transgression to the early magistrates can be more fully appreciated when one considers their demand for the death penalty in

²⁹ *Records of the Governor and Company, op. cit., vol. 1, p. 102.*

³⁰ *Ibid., vol. 2, p. 21.*

³¹ *Ibid., vol. 4, part 2, p. 143.*

³² *Ibid., vol. 1, p. 92.*

connection with the scarcity of individuals and their indispensability to the settlement.

The Records cite no cases of persons convicted under this statute. But on March 12, 1637 or 1638, at "A Generall Court, held at Newetowne," it is ordered ". . . that the 3 adulterers, John Hathaway, Robrt Alen, & Margaret Seale, shalbee severely whiped, & banished, never to returne againe, vpon paine of deathe."³³ At the same time the Court confirmed and ordered promulgated the previous law against adultery (October, 1631).

This sentence, then, would seem to be a modification of the original, despite the confirmation of the latter by the Court, since it did not call for death in the first instance (unless the combination of a severe whipping and banishment meant almost certain death), but only on the return of the "sinners" to the fold of civilization.

The seeming contradiction in the position of the Court in penalties pronounced for adultery is resolved a few years later when, on October 7, 1640, the Court rules that³⁴

"The first law against adultery, made by the Courte of Assistants @ 1631, is declared to bee abrogated; but in the other, made the first mo. 1637 or 1638, by the Generall Court, to stand in force."

A sequel to this law was enacted on October 16, 1660, by the General Court³⁵ when it ordered that any person remaining in the community after a sentence of banishment on pain of death had been pronounced ". . . shall . . . have a legall triall . . . & . . . shall accordingly be sentenced to death . . . vnless . . . reprived in the meane time."

Some of the adultery cases, as would be expected, were difficult of decision, and the responsibility of them was passed from the Court of Assistants to the General Court. One such case was decided on November 1, 1654.³⁶

One case,³⁷ decided earlier in the same year (May 14, 1654) did not find the woman involved

". . . guilty of the fact according to lawe, but finding hir guilty of much shamefull and vnchast behaviour, sentence hir to be seriously admonished, and to stand tjed . . . the whipping post, at least one hower and then discharge hir, that shee may repaier home to hir husband; and

³³ *Ibid.*, vol. 1, p. 225.

³⁴ *Ibid.*, p. 301.

³⁵ *Ibid.*, vol. 4, part 1, p. 433.

³⁶ *Ibid.*, pp. 212-213.

³⁷ *Ibid.*, vol. 3, p. 349. (The case of Daniell Gunne and Alise Cheater.)

that the said Gunne, when he is recouered, & is capable of it, shallbe whipt."

Strange, indeed, must have been the reaction of the native Indians to whom the benefits of the Puritan code were generously extended. We read of the following case in point under the date of October 23, 1668:³⁸

"Whereas, Sarah Ahaton, an Indian squa, is now in prison for adultery, & there being seuerall considerations about it, wherein much difficulty appears, it is ordered, that this case be heard by the Generall Court on 27 instant October, at one of ye clocke. The Court at ye time sent for the sajd Sarah Ahaton out of prison, & being at the barr, & hearing what was produced agt her, vpon the question relating to the said Sarah Ahatons confession of committing adultery wth Joseph, an Indian, whither on what hath been heard, as the case is circumstaned, she should be put to death, it was resolved on the negative; and it is further ordered, that the sajd Sarah Ahaton shall, on the 29th instant, stand on the gallows after the lecture in Boston, wth a roape about hir necke one hower, that then the marshall generall shall cause her to be tooke doune & returned to prison, & comitted to the Indian constable of Naticke, who, on a publick day, by order from Capt. Gookin, shall severly whip hir, not exceeding thirty stripes, & yt she pay all charges for the prosecution, to be allowed by Capt. Gookin, (hir whipping to be deferred till after the time of hir deliuary, if she be wth child, as is reported)."

A court decision of 1673³⁹ in the case of Ruth Read indicates a modification in the penalty for adultery, for in this instance it is ruled that if the woman refuses to remain banished, her lot will not be death upon legal trial, but rather public announcement of her deed plus a severe whipping. This decision injected a new note in the penalty for adultery,—that of wearing a label in public view. The inscription was to read "THVS I STAND FOR MY ADVLTEROVVS AND WHORISH CARRIAGE."

We find a similar digression from the penalty of banishment under pain of death, as far as the woman is concerned, in the case of Mary Gibbs in the year 1675.⁴⁰ The codefendant received a multiple punishment,—

" . . . to goe from hence to ye prison & thence to be Carried to the Gallows & there wth a Roape about his necke to stand half an hower & thence tjed to the Carts tajle & whipt seuerely wth thirty . . . nine . . .

³⁸ *Ibid.*, vol. 4, part 2, pp. 407-408.

³⁹ *Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692*, vol. 1, Published by the County of Suffolk, 1901, p. 10.

⁴⁰ *Ibid.*, pp. 56-57.

stripes and that he be banished this Jurisdiction & kept in prison till he be sent away paying the prison chardges. . . .”

Mary, on the other hand, for the same deed (“Adultery . . . contrary to the peace of our Soueraigne Lord the king his Crowne & dignitye the lawes of God & of this Jurisdicon”) received the same penalty, “banishment excepted.”

This case, together with that of Daniell Gunne and Alise Cheater,⁴¹ presents the first evidence of discriminatory “justice,” in which one sex receives more favorable consideration than the other. The action favoring the female sex in 1654 and 1675 has since undergone a complete turn-about, however, for today legislation in this realm is more severe in its impositions on the woman than it is on the man.⁴²

The modern court practice of returning a verdict of not guilty of the charge with which the individual is indicted, but rather of finding him guilty of a lesser offense, was not unknown to the early Courts of Assistants. This practice was indicative of a growing “leniency” in contrast with the earlier verdicts. A case in point is that of Elizabeth Broune, decided on September 5, 1676:⁴³

“Elizabeth Broune the wife of Wm. Broune . . . was alike Indicted . . . for not hauing the feare of God before hir eyes & being instigated by the Divil . . . did Comitt adultery with Thomas Daus Contrary to the peace of our Soueraigne Lord the King his Crowne & dignitje the lawes of God & of this Jurisdiction . . . the Jury brought in their verdict they find hir not legally Guilty according to Indictment but doe find hir Guilty of Prostituting hir body to him to Comitt Adultery.”

Her punishment consisted of standing on the gallows with a rope about her neck, a severe whipping not exceeding thirty-nine stripes, a sojourn in prison, a second whipping (thirty stripes), and payment of prison fees.

One further illustration is the decision *in re* Sarah Bucknam, September 13, 1676.⁴⁴

“Sarah Bucknam . . . found by the Jury . . . not Guilty according to Indictment Adultery but Guilty of like vncivill Accompanying with Peter Cole being in bed together had the like sentenc pronounc agt hir . . . stand on Gallows one hour with halter, be tied to carts taile, whipped 39 stripes, and pay prison fees.”

⁴¹ See footnote 37.

⁴² Reference will be made to this phase of the subject later. See footnote 115.

⁴³ *Ibid.*, pp. 70-71. See also the case already mentioned of Daniell Gunne and Alise Cheater, footnote 37.

⁴⁴ *Ibid.*, p. 74.

This practice of evading severe punishment by punishing the defendant for a lesser offense than that charged in the original indictment, gradually gave way to inflicting the lesser punishment for the original charge. To wit, on March 5, 1677, Abigaile Johnson, found guilty of adultery, was punished by standing on the gallows for one hour with a rope about her neck, by being tied to the carts tail and whipped 39 stripes "on naked body . . . well layd on," and by a sojourn in prison.⁴⁵

A new note is injected into Puritan justice with the calling for a license to return to the community after banishment upon conviction of "whoredome & of hauing a Bastard child in hir husbands absence." The case is that of Elinor May,⁴⁶ and the punishments *in toto* consisted of being

" . . . tyed to a Carts Tayle & whipt vpon hir naked body from the Prisson to the place of hir aboad not exceeding thirty nine stripes well & seuerely layd on, and also to depart out of the Toun of Biston wth in tenn dayes . . . after hir Correction [sic!] and not to returne againe without licence from the Gounor or two magistrates. . . ."

Undoubtedly one cause of many of the unorthodox sex relations current in the colonial community was the separation of husbands and wives, when only the husband or wife journeyed to the new land, and the other preferred to remain or was deserted in England. So great a problem did these separated parties raise, that the General Court at Boston on November 11, 1647, felt obliged to order them back to their mates under penalty of fine, unless, of course, they were arranging to send for their families or were in the colony on temporary business.⁴⁷

Until 1632 there existed in the Massachusetts commonwealth no institutions in which individuals could be confined whose aberrations from the straight and narrow path brought them to the magistrates' eye. The punishments inflicted were all of a non-institutional nature, consisting of public whippings, banishment, sitting on the gallows with a rope about the neck, fines, being tied to a whipping post, etc. On October 3, 1632, the Court of Assistants ordered to be built a "Howse of Correction." And in May, 1656, they authorized the erection of similar "Howses of Correction" in each county. The philosophy of treatment in these early "correctional" institutions was plainly stated in the court order which cre-

⁴⁵ *Ibid.*, p. 115.

⁴⁶ *Ibid.*, p. 138.

⁴⁷ *Records of the Governor and Company*, op. cit. vol. 2, pp. 211-212.

ated them.⁴⁸ "Correction," in the sense used by the magistrates, meant plain and simple whippings and hard labor.

In determining the possible relationships which might exist between the social and economic structure and the above-mentioned laws, one is impressed by several outstanding facts.

The first of these is that the institution of the family was basic and indispensable in meeting the pioneer problems of production and consumption, and that production was subject to governmental compulsion in those branches of activity where it tended to wane. The colonial family developed its peculiar patriarchal form and nature as the result of the free-hold land tenure system of early New England. Marriage was, in many cases, a plain and simple "business proposition" in which economic considerations were paramount.

Colonial marriage was thoroughly enshrouded in a multitude of legal straight-jackets, all for the purpose of maintaining it intact. The Puritan clergy reacted violently to any inroads upon family unity in their special and private interpretation of "God's will," in their translation of moral standards into a criminal code. Their progressive punitive demands for the offense of adultery were: death (1631), banishment upon pain of death (1637 or 1638), prison and whipping (1668), public announcement and whipping (1673), prison, exposure and whipping (1675). There is, then, a gradual softening of the harshness of the law with the corresponding softening of the rigours of pioneer life. At the same time there is a gradual lessening of the originally complete political and spiritual control by the Puritan clergy. This, too, could not help but influence the nature of the legislation along more humane lines.

From these beginnings, then, spring the Massachusetts laws with reference to sex offenders. Modifications of these laws occurred early in colonial history, and we shall trace still further modifications as the colony grew. But nothing has altered the underlying puritanical concept embodied in these laws—namely, that anyone who digresses from their moral code is a criminal.⁴⁹

THE PERIOD FROM 1692-1763

The period of Massachusetts history dating from 1690 to 1713 saw little change in the social and economic characteristics of the

⁴⁸ *Ibid.*, vol. 3, p. 399.

⁴⁹ See Glueck, S. and E. T., *Five Hundred Delinquent Women*, Alfred A. Knopf, N. Y., 1934, p. 98, for a statement of this problem.

period already described. For the bulk of the population the home remained the prime economic force in the colony's existence.⁵⁰

The family institution as a social unit received additional strengthening as a result of the existence of a limited supply of free land which offered asylum to the poor. Although the available supply of free land was decreasing rapidly because of the accumulation of large holdings by a few speculators or wealthy individuals, and the danger of Indian attacks too far from the settlement, nevertheless it was able to offer an outlet to many needy farmers. Adams tells us that this supply of free land "had prevented the growth of a distinct wage-earning class."⁵¹ We will see later that the development of the factory system with its wage-earning class exerted a sharp influence in breaking up the unity of the colonial family.⁵²

As for manufacturing, whatever little there was existed on a very small scale, most of it being carried on within the home. The combination of scarcity of skilled labor, poor transportation facilities and lack of sufficient accumulated capital all worked together to postpone the establishment of factories. The household industries received added stimulus from the wars with the Indians and the French which brought economic depression, increased taxes, and decreased business to the colony.

However, there were at this early period forces at work which created a tendency away from the original family unity. One of these was the passage of laws in Massachusetts confirming the division of the land of an individual who died intestate among *all* his survivors.⁵³

After the formal declaration of peace in the Treaty of Utrecht, 1713 (up until which time the colonists led a hand-to-mouth existence) Massachusetts, in common with the rest of the colonies, entered upon a twenty-year period of expansion, inflation and speculation, largely in the commercial realm. This period saw the laying of the ground-work for many colonial fortunes and gave birth to a "get-rich-quick" aristocracy of merchants and land-owners. The increased wealth of one group in society was paralleled by a

⁵⁰ Adams, J. T., *Provincial Society*, pp. 10-11.

⁵¹ *Ibid.*, p. 16.

⁵² See below, p. 836.

⁵³ *Ibid.*, p. 16. "History makes plain that the unbroken existence through generations of a family homestead and family lands has acted as a strong bond holding the family members together and deepening family sentiment." Goodsell, *op. cit.*, p. 462.

corresponding decline in the status of the masses of indentured servants on the other end of the scale.⁵⁴

Not yet greatly affected by these new influences already working important changes on two groups in colonial society, the small farmer still existed as a domestic unit of production and consumption. However, we have already cited the tendency toward land accumulation which was limiting the available land supply. Then, too, the land grant policy of the colony was undergoing a transformation from one of free-holding to one of "granting or selling large tracts to individuals or companies who held them for speculation."⁵⁵ Similarly, the growing (though not yet predominant) system of long-term leases instead of sales worked away from the original free-holding system.

As the result of colonial legislation, shipping tended to be concentrated in large centers and urban populations increased rapidly. Competition resulting from the increasing population on the same territory "forced into lower economic rank, even if not into abject poverty, large numbers of those who proved less well able to take care of themselves under the harder test."⁵⁶

The most important change in the manufactures of New England in the first half of the eighteenth century was in the field of rum distilling, bringing with it an expanding slave trade, and tremendous profits.⁵⁷ One social consequence of the flourishing slave trade was to reduce the Negro to the status of ordinary merchandise.

The by-products of the wars up to the year 1763, were increasing commerce, more ships and larger cargoes for the Massachusetts colony. This same period saw the rise of speculation and mercantile business together with its control of local politics. The all-powerful combination of lawyers, capitalists and land-owners was taking shape. But these same years saw little change in manufacturing.

Meanwhile democratic forces were at work aiming at a separation of the church and state, and the extension of the franchise to a still very limited group. The church had failed to establish itself in the hearts and life of the colonists as an indispensable institution, and in this period its teachings were losing weight. "The separation between close church life and scattered economic life concentrated in families—depreciated by Governor Bradford in the beginning—had accomplished itself."⁵⁸

⁵⁴ Adams, J. T., *Provincial Society*, p. 100.

⁵⁵ *Ibid.*, p. 110.

⁵⁶ *Ibid.*, p. 250.

⁵⁷ Weeden, *op. cit.*, vol. 2, pp. 456, 459, 472, 501.

⁵⁸ *Ibid.*, p. 548.

This separation of church and state⁶⁰ had far-reaching and important effects in the field of education which became largely secularized. It also had its repercussions in the business world. Secular careers, promising much in the material realm, were now attracting the most capable men just as the ministry had drawn the cream of the colony in earlier years. The clergy's position in society fell rapidly after 1700.⁶⁰

This same period witnessed the germination of the rationalistic and scientific spirit which, following the trend of the times, was to spring up in the native American population, replacing the former theological approach.

But much as the influence of the church was being shaken in government, education and philosophy, the Puritan influence succeeded in leaving its permanent mark on the legal concepts of this era. This influence asserted itself in the form of emphasis on the *individual*, his rights and acts and property, in contrast to an emphasis on society as a whole. "Rugged individualism" received its flying start under this aegis. Further, a new concept in which legal principles were believed to arise from immutable laws of nature became widespread, so that laws suitable for the passing agricultural economy of the colony were regarded as unchangeable for all future time.⁶¹

Did the rigid religious teachings of New England breed a superior morality among its citizens? That there was no correlation between moral precepts taught and those practiced in eighteenth century Massachusetts was evident. Adams describes a "peculiar standard" which arose among the people of New England in this period "according to which fornication if followed by marriage, no matter how long delayed, was considered a very venial sin, if sin at all."⁶² And the question of the morality versus the immorality of this practice was the subject of a Harvard debate in 1722! A minister who preached against the custom was forced from his pulpit.⁶³ It is in the church records that one learns the extent of

⁶⁰ However, this divorce between church and state probably did not become absolute for some time if we can rely on Weeden's authority. He tells us that "The ecclesiastical and political machinery of the time ran in close contact. Worcester, in 1724, holds a town meeting to see if in choosing a minister the 'town will concur with the church's choice.' The good Puritans generally preferred ecclesiastical to civil law." *Ibid.*, p. 515.

⁶⁰ Adams, *op. cit.*, p. 63.

⁶¹ *Ibid.*, pp. 277-278.

⁶² *Ibid.*, p. 159.

⁶³ *Ibid.*, p. 159.

this custom. Churches were lenient with parties involved who made public confession of their actions.

An examination into the legal records of the Massachusetts Bay Province for the years 1692-1714 reveals first of all a series of acts passed in 1692 dealing with the "murthing of bastard children," fornication, incest, adultery and polygamy.

On June 8, 1692, it was ruled:⁶⁴

"That if any man commit fornication with any single woman, upon due conviction thereof they shall be fined unto their majesties not exceeding the sum of 5 pounds, or be corporally punished by whipping, not exceeding 10 stripes apiece, at the discretion of the sessions of the peace who shall have cognizance of the offense."

On May 13, 1694, *An Act Against Adultery and Polygamy* was passed:⁶⁵

"Whereas, the violation of the marriage covenant is highly provoking to God and destructive to families—Be it therefore enacted . . .

[Sect. 1] That if any man be found in bed with another man's wife, the man and woman so offending, being thereof convicted, shall be severely whip'd, not exceeding thirty stripes, unless it appear upon tryal that one party was surprized and did not consent, which shall abate the punishment as to such party.

[Sect. 2] And if any man commit adultery, the man and woman that shall be convicted of such crime before their majesties' justices of assize and general goal delivery, shall be set upon the gallows by the space of an hour, with a rope about their neck, and the other end cast over the gallows; and in the way from thence to the common goal shall be severely whip'd, not exceeding forty stripes each. Also every person and persons so offending shall for ever after wear a capital A, of two inches long and proportionable bigness, cut out in cloth of a contrary color to their cloaths, and sewed upon their upper garments, on the outside of their arm, or on their back, in open view. And if any person or persons, having been convicted for such offence, shall at any time be found without their letter so worn, during their abode in this province, they shall, by warrant from a justice of peace, be forthwith apprehended and ordered to be publicly whip'd, not exceeding fifteen stripes, and so from time to time, *toties quoties*.

[Sect. 3] That if any person and persons within this their majesties' province, being married, or which hereafter shall marry, do, at any time after the first of July in this present year, . . . presume to marry any person or persons, the former husband or wife being alive, or shall continue to live so married, that then every such offense shall

⁶⁴ *The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay*, Wright and Potter Printing Co., 1869, vol. 1, p. 52.

⁶⁵ *Ibid.*, pp. 171-172. Section 3 of this act did not apply if the husband or wife had been absent seven years or were divorced.

be felony. And the person and persons so offending shall suffer death, as in cases of felony. And the party or parties so offending shall receive such and the like proceeding, tryal and execution, in such county where such person or persons shall be apprehended, as if the offense had been committed in such county where such person or persons shall be taken or apprehended."

The desirability of putting to work the poor and less fortunate members of society was early recognized by the colonial law-makers who had already instituted "houses of correction" in which to keep the "undesirables" at work and punished. Now, in 1699 an act was passed⁶⁶ for "The Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and Other Lewd, Idle and Disorderly Persons; and also for Setting the Poor to Work." Each county which had not yet built a house of correction was ordered to do so. Until such new building was provided, the common jail was to serve. Once committed, the master of the institution has the authority to put them

" . . . to work and labour (if they be able) for such time as they shall continue and remain in said house; and to punish them by putting fetters or shackles upon them, and by moderate whipping not exceeding ten stripes at once, which (unless the warrant of commitment shall otherwise direct) shall be inflicted at their first coming in, and from time to time, in case they be stubborn, disorderly or idle and do not perform their task. . . ."

Among the individuals committed under these conditions were "common night walkers . . . [and] wanton and lascivious persons, either in speech or behaviour."

A similar act passed in 1703⁶⁷ to extend for a three-year period, "for the better preventing of idleness, and loose and disorderly living" authorized the selectmen, overseers of the poor and justices of the peace to set to work all idle persons who have no livelihood. It also prohibited women of ill fame from receiving lodgers in their homes. A similar act was passed again in 1710 to extend to 1717.⁶⁸

Fornication, as we have seen, was punishable in 1692 by a five pound fine or a whipping not exceeding ten stripes. This same act, however, when it involved a Negro or mulatto man and an English woman, meant permanent slavery out of the Province for the man, and enforced servitude in the Province for the woman should she be unable to provide for the care of the child, if one were born.

⁶⁶ *Ibid.*, p. 378.

⁶⁷ *Ibid.*, p. 538.

⁶⁸ *Ibid.*, pp. 654-655.

Both parties were also severely whipped. A law to this effect was passed in 1705 "for the better preventing of a spurious and mixt issue."⁶⁹ Section two of the same law presents a still more revealing commentary on the racial inequalities in force at this time. For if any Englishman commits fornication with a Negro or mulatto woman, his penalty consists of a whipping, a five pound fine, and support of the child if any should result. As for the Negro or mulatto woman involved, she "shall be sold, and be sent out of the province."

At the same court session, a ruling was handed down prohibiting marriage between the English (or any other "Christian" people) and Negroes and mulattoes.⁷⁰

The years 1720, 1730 and 1731 saw the passage of acts entitled "an act for the explanation of, and supplement to, an act referring to the poor" which extended the provisions of the already mentioned law of 1710.⁷¹

In 1722 the court passed "An act to enable the Overseers of the Poor and Selectmen to take care of idle and disorderly persons" to extend for a period of five years.⁷² This act was continued in 1736⁷³ and in 1746⁷⁴ for ten year periods. In 1756, this act having "been found useful and beneficial," it was again given a further five year extension.⁷⁵ The same year saw the passage of "an act in addition to the several acts and laws of this province now in force respecting poor and idle, disorderly and vagrant persons" which would indicate that the amount of space available in the "houses of correction" was insufficient to accommodate all the unfortunates eligible to them:⁷⁶

"[Sect. 3] Persons liable to house of correction may be bound to service . . . for a term not exceeding one year. Such persons may apply to the court of general sessions to annul the contract. Upon court order the contracts may be dissolved. Earnings of persons bound out shall go to support of their families."

In 1758 an act was passed which would guarantee to the town officials any expenditures they might make in caring for an unmarried woman giving birth to a child, and in the care of the child

⁶⁹ *Ibid.*, p. 578.

⁷⁰ *Ibid.*, p. 578.

⁷¹ *Ibid.*, vol. 2, pp. 182-183, 579-580.

⁷² *Ibid.*, p. 242.

⁷³ *Ibid.*, p. 795.

⁷⁴ *Ibid.*, vol. 3, p. 326.

⁷⁵ *Ibid.*, p. 1027.

⁷⁶ *Ibid.*, pp. 926-927.

after birth. For expenses involved, they were entitled to bind her out to service for up to five years.⁷⁷

For the first time since 1694 a change was made in the penalties for adultery and polygamy in the year 1763.⁷⁸ This law set a new penalty for all those guilty of committing adultery under Section 1 of the law of 1694. This penalty called for a fine not exceeding 100 pounds, "and in default thereof to be imprisoned not exceeding 6 months, or be whipped not exceeding 30 stripes." This is the first time a fine is introduced for adultery and, in this practice, the law discriminates in favor of the more wealthy individuals of the province.

The most telling link in this period of colonial history between the social and economic developments and the laws dealing with individuals whose sex activities do not conform to the decreed pattern may be found in the treatment of fornication and adultery.

Fornication is punishable in this period (1692) by the payment of a fine not exceeding five pounds or by a whipping not exceeding ten stripes. This differed from the very first ruling (1632) which called solely for corporal punishment, and from the second ruling (1642) which called for either marriage, or a fine, or a whipping, or all three. Thus, it becomes no longer compulsory to marry someone with whom one has been sexually intimate, nor on the other hand to suffer physical pain for ones actions. It is now only necessary to pay a fine, if one has the money, and then he has righted himself with authority and government. But if the individual is poor, he must endure the whipping.

And similarly with adultery, an act originally punishable by death, and later by banishment, whippings, and public debasement of all varieties is now (1763) made punishable by a fine not exceeding 100 pounds, or imprisonment not exceeding six months, or a whipping not exceeding 30 stripes.⁷⁹

It is interesting, and significant, that the new law dealing with adultery was promulgated in 1763, that arbitrary point which marks

⁷⁷ *Ibid.*, vol. 4, pp. 178-179.

⁷⁸ *Ibid.*, p. 622.

⁷⁹ Persons convicted under Section 2 of the 1694 law, however, are still subject to the penalties therein called for. The above penalty applies only to those convicted under Section 1 of the 1694 law.

Unless it can be argued that six months in prison under shocking conditions (see Cantor, Nathaniel, "Measures of Social Defense," *Cornell Law Quarterly*, vol. 22, no. 1, Dec., 1936, p. 18; and McMaster, J. B., *A History of the People of the United States*, vol. 1, pp. 98-102), when imprisonment is inflicted instead of the whipping, is a less severe punishment than the whipping, it is difficult to find a lessening of severity in the new law for those unable to pay the fine.

the drawing to a close of a distinct period in colonial history. That period in the history of Massachusetts was characterized basically by increasing commercialization, the accumulation of wealth in the hands of a small mercantile group, and a small land-holding group, and more marked economic class distinctions than previously. What is the significance of this coincidence? Is it purely accidental? The interpretation of this combination of circumstances that occurs to the writer is that the changing economic base impelled a change in the legal code. Gone were the critical pioneer days in which the entire economy of the colony was dependent on the family. Although the family group is still indispensable to the Province (since it is the seat of the bulk of the manufacturing), there is a growing group whose economic existence is not dependent upon the patriarchal family. This group, no longer under the pioneer necessity of an intact family, and exercising the dominant position in the local government, secures corresponding legislative changes. One hundred pound fines have no place in a "hand-to-mouth" early colonial existence, but they do have a very definite place in an expanding commercial economy.

We have mentioned above⁸⁰ the large part played by the slave traffic in the commerce of Massachusetts, and the light in which Negroes were regarded (i. e., as commodities). Seen against this background we can better understand the *raison d'être* of the laws inflicting the penalty of servitude on Negroes or Mulattoes found guilty of fornication. A commodity on the market, the members of this racial group become a commodity to be sold when they violate a law which inflicts only a minor punishment on the members of the caucasian race. Here we see distinctly the warp and woof of economic base and legal superstructure.

THE PERIOD FROM 1763-1860

The period from 1763 to 1808 witnessed the political revolution of the colonies and the very beginnings of an even more overwhelming economic revolution. The colonists intensified their home manufacturing under patriotic stimulation. Trading, too, with its human merchandise, was making great strides in the direction of the French West Indies. And shipbuilding was a flourishing industry.

The period following the revolution witnessed a considerable development in the establishment of joint enterprises, in the building of a strong navy and in a constant branching out and diversi-

⁸⁰ See above, p. 827.

fication of industry. About 1783 Massachusetts reflected the tendency in England for labor to be taken from the farm and placed in textile factories. In 1785 Congress protected the infant industries by heavy import duties.

Throughout this period there was little change in social customs. The family remained the basic social and economic unit in Massachusetts. ". . . each home contained within itself 'almost all the original and most necessary arts.'"⁸¹ "Among the lower classes the standard of both manners and morals was not advancing."⁸² Bundling was still a common practice. That the population was still imbued with much of the Puritan ideology can be learned from an incident in Randolph in the year 1777 described by Charles F. Adams.⁸³ Dr. Moses Baker, and a certain woman resident of that town were threatened with tarring and feathering by a "vigilante" citizen group who were under the impression that these two individuals were having improper relations. They took it upon themselves, supported by public opinion, to enforce the idea of decent morals, and only Dr. Baker's threat to fire deterred them from carrying out their plan.

With the firm establishment of the new republic, commerce and manufacturing gained new headway, the latter to the extent of importing skilled laborers from England.⁸⁴ Under the aegis of laws passed by the new American Congress in 1789, 1792, and 1817, by which foreign vessels were discriminated against in American trade, commercial interests in America leaped forward. "The tonnage of the foreign trade rose from 123,893 in 1789 to 981,019 in 1810, and the proportion of the foreign trade carried in American vessels increased from 24 to 92 per cent during the same period. By 1860 the total tonnage of the United States vessels had reached 2,807,000."⁸⁵ With the development of the steamship, the opening of canals and the laying of railroads, the period of United States history from 1790 to 1860 was one of "remarkable commercial development."⁸⁶

Meanwhile, manufacturers, anxious for protection against keen English competitors (who were "dumping" their accumulated woolens, cotton cloths and iron goods in America) secured from

⁸¹ Weeden, *op. cit.*, vol. 2, p. 805.

⁸² *Ibid.*, p. 739.

⁸³ Adams, C. F., *op. cit.* pp. 511-513.

⁸⁴ Weeden, *op. cit.*, vol. 2, p. 857.

⁸⁵ Bimba, *op. cit.*, p. 61.

⁸⁶ Bimba, *op. cit.*, p. 62, quoting Lippincott, *Economic Development of the United States*, p. 263.

Congress a tariff on all imported industrial products, which netted the government \$4,000,000 in 1791.⁸⁷

Under this protection, industry began to expand with extraordinary speed and with such profits as to attract capital from commercial pursuits. In 1815 there were 62 times as many spindles humming in the cotton mills as in 1807 and 19 times as many workers employed at them as in 1811. In 1860 there were over ten times as many spindles in the cotton mills as in 1815.⁸⁸ Similarly, the woolen, steel and iron industries expanded by leaps and bounds. Although the above figures are for the country as a whole, they may be taken as representative of Massachusetts' industrial development, since this state was one of the leaders.

Among the concomitants of this mushroom growth of industry were an increase in the number of workers employed in factories (from 349,000 in 1820 to 1,311,000 in 1860⁸⁹), an increase in the population of the country, and the growth of large urban areas.

The tendency already cited⁹⁰ for land to become acquired by a small group of speculators now increased with a rapidity corresponding to that in the commercial and industrial branches of activity.

This enormous expansion was accompanied by economic crises in 1819 and 1837-1842. "Hundreds of enterprises were prostrated, factories closed, thousands of workers thrown out of employment, the streets of the industrial cities became crowded with destitute men and women."⁹¹

We have described earlier⁹² the colonial home as a unit of production and the strong unity of the family which resulted from fulfilling this function along with others. In the period now under discussion one important item in family production was being taken from it and transported into factories and mills—the process of spinning and weaving. And many of the women and children who had formerly engaged in these occupations in their homes, now left their homes and entered the factories in the attempt to support themselves and their families. "The textile industry was in the beginning and to a very great extent still remains the stronghold of our women workers. In 1814 there were 30,000 working women in this industry, while in 1848 their number increased to 78,000."⁹³

⁸⁷ *Ibid.*, p. 62.

⁸⁸ *Ibid.*, p. 62.

⁸⁹ *Ibid.*, p. 63.

⁹⁰ See above, pp. 827, 828.

⁹¹ *Ibid.*, p. 65.

⁹² See above, p. 818.

⁹³ *Ibid.*, p. 67.

Other industries, too, drew women and children from their homes to work for long hours and small wages. Mary Beard states that in 1837 women could be found in about one hundred occupations outside the home. In the shoe industry of Massachusetts alone, 15,000 women were employed at unbelievably low wages.⁹⁴ A few years earlier (1832) it had been estimated by the New England Association of Farmers, Mechanics and Other Working Men that two-thirds of all factory workers were children under sixteen years.⁹⁵ Mrs. Beard estimates that women without children engaged in the needle trades of New England could earn a maximum of \$58.50 annually, and women with children, not more than \$36.40 a year.⁹⁶

In 1855 Lucy Stone wrote, "Someone in Philadelphia has stated that women make fine shirts for twelve and a half cents a piece; that no woman can make more than nine a week, and the sum thus earned, after deducting rent, fuel, etc., leaves her just three and a half cents a day for bread. Is it a wonder that women are driven to prostitution?"⁹⁷ Although this particular quotation is descriptive of Philadelphia, it would probably be equally applicable to the New England section and Massachusetts.

According to Calhoun, in 1830 women's wages were lower than starvation wages.⁹⁸ Binding shoes, sewing rags, folding and stitching books, making sheets and trousers at 8 or 10 cents each were common occupations. Shirt-making could be done at home. Nine shirts a week at the most gave 90 cents. Fifty cents a week was the average.⁹⁹ Out of the maximum of \$2.50 that a factory girl earned, she must provide her own maintenance, contribute to her family's support, and set aside something for times of unemployment! No wonder Calhoun says it was not possible to live honestly and decently on their wages.¹⁰⁰

The industrialists making use of this cheap labor rationalized their exploitation by claiming to benefit the women and children socially and financially. Matthew Carey wrote that girls of 10 to 16 years "too young or too delicate for agriculture" would now be of value in a factory instead of being exposed as heretofore to "vice

⁹⁴ *Ibid.*, p. 68, quoting Beard, Mary, *A Short History of the American Labor Movement*, pp. 47-48.

⁹⁵ *Ibid.*, p. 67, quoting Commons, *op. cit.*, pp. 173-174.

⁹⁶ *Ibid.*, p. 70, quoting Beard, M., *op. cit.*, p. 48.

⁹⁷ Calhoun, *op. cit.*, vol. 2, p. 121.

⁹⁸ *Ibid.*, p. 182.

⁹⁹ *Ibid.*, pp. 182-183.

¹⁰⁰ *Ibid.*, p. 186.

and immorality" in a career of idleness.¹⁰¹ But Calhoun states, to the contrary, that outrages were committed among the factory women whose pay was at a subsistence point.¹⁰² A Massachusetts House Committee on Education in 1836 reported, "Causes are operating to deprive young females particularly of means and opportunities of mental and moral improvement essential to their becoming good citizens."¹⁰³

In addition to the purely economic forces disrupting the family group, there were many closely related sociological factors working toward the same end. Population shifts from country to city concomitant with the processes of industrialization caused a decrease in the number of marriages since, ". . . city life tends to discourage marriage."¹⁰⁴ Then, too, the growing economic independence of women gave them greater freedom of choice in the matter of marriage, many remaining single who, under stress of economic necessity, might otherwise have sought security in marriage. Marriages once contracted often could not stand the strain when a husband became resentful of his wife's successful career, and broke up when the wife insisted on maintaining her work. Although these additional sociological factors were of considerable influence in molding the shape assumed by the family, space will not permit an elaboration upon them here.

In tracing our way through the laws of this period, from 1765 to 1779, every few years saw the revival of the old laws or the enactment of new enabling the overseers of the poor, and selectmen to take care of idle and disorderly persons, vagrants and the poor.¹⁰⁵ The law enacted in 1770¹⁰⁶ would indicate that the number of persons who might be incarcerated was reaching beyond the bounds of the Province's house of correction facilities. This law allowed the justices to "otherwise punish them by setting in the stocks, not exceeding 3 hours, or by whipping not exceeding 10 stripes" at their discretion.

In the compilation of laws of the free Commonwealth of Massachusetts after the Revolution, we find a law passed in 1784 entitled

¹⁰¹ *Ibid.*, p. 172.

¹⁰² *Ibid.*, p. 179.

¹⁰³ *Ibid.*, p. 180.

¹⁰⁴ Groves, E. R. and Ogburn, W. F., *American Marriage and Family Relationships*, New York, 1928, p. 299.

¹⁰⁵ *The Act and Resolves, Public and Private, of the Province of the Massachusetts Bay*, Wright and Potter Printing Co., 1881, vol. 4, pp. 324, 766, 920; vol. 5, pp. 46, 87, 460, 1123 (1886).

¹⁰⁶ *Ibid.*, vol. 5, p. 46.

"An Act against Adultery, Polygamy and Lewdness."¹⁰⁷ The section dealing with adultery placed it at the discretion of the justices to inflict one or all of four penalties—an hour on the gallows with a rope about ones neck, a public whipping of not more than 39 stripes, imprisonment, and fine. After the penalty was paid, the violator was "bound to the good behavior." The aggravation of the offense was the determining factor in the justice's choice of punishment.

Polygamy carried a similar discretionary punishment, except that the whipping was not to exceed 30 stripes. Nor did this law apply in cases where the husband or wife had been absent seven years.

Section 3, pertaining to lewdness, reads as follows:

"That if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit together, or if any man or woman married or unmarried shall be guilty of open gross lewdness and lascivious behaviour, and being thereof convicted before the Justices of the Supreme Judicial Court,"

they shall be punished by sitting in the pillory, or a whipping, or fine, or imprisonment or all four.

In 1786¹⁰⁸ a law was passed for the punishment of fornication. The man, if he was unable or neglected to pay a fine ranging from 30 shillings to five pounds, was whipped not exceeding 10 stripes. This made possible the imposition of a smaller fine than the five pounds of the 1692 statute, and to this extent represented a lightening of the punishment. The woman was to pay a fine of from six shillings to three pounds, or spend two to 30 days in prison or the house of correction. The lesser fine for the woman and the substitution of incarceration for the whipping would indicate that she received less blame than the man. This is of considerable interest, especially in light of a later reversal in this principle.¹⁰⁹

Moreover, if the woman voluntarily confessed her sin before a Justice of the Peace, and paid him six shillings as the fine for the first offense and 12 shillings for each offense thereafter (and filed her receipt with the clerk of court), she freed herself from further prosecution on that count.

The year 1787 saw the enactment of further legislation for

¹⁰⁷ *The General Laws of Massachusetts From the Adoption of the Constitution to Feb., 1822*, edited by Theron Metcalf, vol. 1, p. 176.

¹⁰⁸ *Ibid.*, pp. 237-238.

¹⁰⁹ See footnote 115.

dealing with "Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons."¹¹⁰ Section 2 enumerates among those who are to be committed to the houses of correction: stubborn servants or children, common night-walkers, wanton and lascivious persons in speech, conduct or behavior.

In 1797 another law was passed dealing with these same categories¹¹¹ empowering the overseers of the houses of correction to let out the inmates under contract to nearby employers and in 1802 there was further legislation requiring that the keepers of houses of correction see that materials are furnished by the county to keep the inmates occupied, and that towns, parents or masters cannot send in such material without the keeper's consent.¹¹²

We see the beginning of the exodus of the pillory, the gallows and the whip as tools of punishment when it was enacted by the Senate and House of Representatives meeting in a General Court in 1813 that:¹¹³

" . . . for any crime or misdemeanor . . . now punishable by whipping, standing in the pillory, sitting on the gallows, or imprisonment in the common gaol of the county . . . [the Supreme Judicial Court of the Commonwealth] . . . may, at their discretion, in cases not already provided for, in lieu of the punishments aforesaid, order and sentence such convict or convicts to suffer solitary imprisonment, for a term not exceeding 3 months, and to be confined to hard labour, for a term not exceeding 5 years, according to the aggravation of the offense."

In the same year, a special law was made with regard to the punishment of women in light of the above ruling.¹¹⁴ This law stated that when a woman was convicted of any crime for which she might be sentenced to solitary punishment and confinement at hard labor, the court could, at its discretion, sentence her to the solitary imprisonment *only*. Here again, then, is a functioning of the law to favor the women and inflict a lighter punishment upon them than upon the men.

When the Revised Statutes of the Commonwealth of Massachusetts were passed in 1835, they embodied penalties for adultery, lewd and lascivious cohabitation and fornication which have remained identical (with but one change in the latter offense) to the present day.¹¹⁵

¹¹⁰ *Ibid.*, p. 322.

¹¹¹ *Ibid.*, pp. 557-558.

¹¹² *Ibid.*, vol. 2, pp. 63-64.

¹¹³ *Ibid.*, p. 329.

¹¹⁴ *Ibid.*, pp. 338-339.

¹¹⁵ However, by an enactment in 1903 (*Supplement to the Revised Laws of the*

For adultery¹¹⁶ that penalty was and is not more than three years in the state prison, or not more than two years in the county jail, or a fine not exceeding \$500.

For lewd and lascivious cohabitation the law reads:¹¹⁷

"If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, shall be guilty of open or gross lewdness, and lascivious behavior, every such person shall be punished by imprisonment in the state prison, not more than 3 years, or in the county jail, not more than 2 years, or by a fine not exceeding \$300."

In the case of fornication¹¹⁸ the penalty was not more than two months in the county jail or a fine not exceeding \$30. In the General Statutes of 1860 this was changed, however, to call for not more than three months in jail or the \$30 fine.¹¹⁹

In 1783 the free commonwealth of Massachusetts gave equality to her Negro citizens. Yet, it was not until 60 years later, 1843, that Negroes were legally free to marry white persons.¹²⁰

Among the Statutes of 1860 was one dealing with ". . . stubborn children, . . . common night walkers, lewd, wanton, and

Commonwealth of Massachusetts, 1902-1908, Wright and Potter Printing Co., 1910, pp. 1459-1460) these harsh penalties became translated into still longer terms for women offenders. It was ruled that a woman who is sentenced to the reformatory prison (the construction of which was authorized in 1874, *Supplement to the General Statutes of the Commonwealth of Massachusetts*, edited by William A. Richardson and G. P. Sanger, Rand, Avery and Co., 1882, vol. 2, 1873-1881, pp. 295-299) for a felony may be held therein for not more than 5 years; or if sentenced for a longer term than 5 years, may be held for such longer term. And further, it was ruled that a woman who is sentenced to said reformatory prison for a misdemeanor may be held therein for not more than 2 years.

In 1907, in an act relating to sentences to the reformatory prison for women, it was stated: "A prisoner who is sentenced to the reformatory prison for women for drunkenness, for simple assault, for being a nightwalker, for fornication, for being idle and disorderly, for keeping a disorderly house, for lewdness, for stubbornness, for being a vagrant, or for unlawful taking, may be held therein for not more than two years. A prisoner who is sentenced to said reformatory prison for any offense not named in this section may be held therein for not more than 5 years, unless sentenced for a longer term, in which case she may be held for such longer term." (*Supplement to the Revised Laws, op. cit.*, pp. 1460-1461.)

¹¹⁶ *The Revised Statutes of the Commonwealth of Massachusetts* passed Nov. 4, 1835, edited by Theron Metcalf and Horace Mann, Dutton and Wentworth, 1836, p. 739.

¹¹⁷ *Ibid.*, p. 739.

¹¹⁸ *Ibid.*, p. 740.

¹¹⁹ *The General Statutes of the Commonwealth of Massachusetts, 1860*, William White, 1860, p. 818.

¹²⁰ *Supplements to the Revised Statutes, Laws of the Commonwealth of Massachusetts Passed Subsequently to the Revised Statutes, 1836 to 1849, inclusive*, edited by Theron Metcalf and Luther S. Cushing, Dutton and Wentworth, 1849, p. 248.

lascivious persons in speech or behavior . . . and all other idle and disorderly persons," stating that they might be committed for not more than six months to the house of correction or workhouse, or that they may have the alternative of paying a fine not exceeding \$20.¹²¹

It was also ruled in the same year that individuals convicted for the third time as common night walkers may be sentenced to the house of correction or workhouse not exceeding five years.¹²²

In the Revised Statutes of 1835 it was declared that:¹²³

" . . . when the sentence of confinement at hard labor, for any term of time, is awarded against a female convict of whatever age [the court] shall order such sentence to be executed, either in the house of correction or in the county jail, and not in the state prison."

Dr. Goebel states that the pronouncements of the United States courts after the Revolution were colored by three elements—a changed psychology, a changed political philosophy, and an aversion to the past. "The substitution of new theories consonant with the underlying political philosophy of the state made historical considerations undesirable or even impossible."¹²⁴ However much this principle of change may have been at work in other phases of the law, it only superficially influenced the laws under discussion here, which remained fundamentally the same.

In the early part of the period under discussion, one can see the steadily increasing trek of society's discards making their painful way through the wretched jails and houses of correction of the Commonwealth. That it became desirable in 1770 to punish them by the stocks or whip instead of incarceration, and in 1797 to bind them out to work, would show that accommodations were quite insufficient for all. They would indicate the existence at this time of a "standing army of misfits."

The law of 1784 dealing with adultery discarded one link with the past when it no longer included the grotesque use of the letter A worn openly on ones clothing. Otherwise it clung tenaciously to the pre-revolutionary penalties of 1763.

The reduction in fines in 1786 for those found guilty of fornication, and the substitution of imprisonment in place of a whipping for the women, show a lessening of the severity of punishment for

¹²¹ *The General Statutes, 1860, op. cit.*, p. 820.

¹²² *Ibid.*, p. 821.

¹²³ *The Revised Statutes, 1835, op. cit.*, p. 782.

¹²⁴ *Cases and Materials, op. cit.*, edited by Goebel, J., p. 330.

this offense. And the initial trend away from whipping as a penalty, applied at first to women only, indicated the path that would be taken at a later date (1813) when whippings were abolished for all. These, then, represent steps in the direction of liberalization of the law which went hand in hand with the very beginnings of our industrial system.

One of the outstanding developments of this period was the section of the above-mentioned law dealing with fornication, in which a woman voluntarily confesses, pays a small fine, and is freed from prosecution. The attitude of the court toward fornication as judged by this section is certainly not one of grave seriousness. The smallness of the fine and the provision made for larger fines for frequent offenders, would indicate a widespread and oft-repeated occurrence.

In 1860 the state of Massachusetts found it necessary to deal with persons who were repeatedly convicted for common night walking. A maximum term of five years in the house of correction or workhouse for third offenders was established.

An examination into the social and economic history of the years preceding 1860 reveals the conditions which gave rise to the repeated occurrence of "common night walking." The starvation wages of factory workers, the miserable housing conditions, the inferior social and intellectual status of women, and the absence of educational facilities, all combined to drive women into any line of activity which would help them supplement their income. Conditions of this sort, without alleviation, drove girls onto the street and kept them there in an effort to subsist. And the Massachusetts law dealt harshly with those unlucky enough to get "picked up" three times.

The penalties for adultery and lewd and lascivious cohabitation as set forth in 1835, although omitting the gallows and whipping of the preceding rulings, could scarcely be called less severe. In fact, Professor Fish says, ". . . the code of the thirties and forties was exceptionally strict."¹²⁵ Nor could these laws be called in harmony with the changing economy of the period. Certainly they reflect no "aversion to the past," but, on the contrary, they bring to light the tendency of the legislature to retain the ideology of the past in dealing with these matters.

That the English theological influence was still existent can be

¹²⁵ Fish, Carl R., *The Rise of the Common Man, 1830-1850* (A History of American Life, vol. 6), The Macmillan Co., 1927, p. 152.

gathered from a court decision made in 1839 in the case of the *Commonwealth v. Call*.¹²⁶

“Whatever, therefore, may have been the original meaning of the term adultery, *it is very obvious that we have in this Commonwealth adopted the definition given to it by the English ecclesiastical courts* [italics mine] and this not merely in relation to divorces, *but also as descriptive of a public crime* [italics mine].”

THE ABSENCE OF LEGISLATION SINCE 1860

That the 1835 laws dealing with adultery and lewd and lascivious cohabitation and the 1860 laws pertaining to fornication, common night walkers, lewd, wanton and lascivious persons in speech and behavior should have remained unchanged to the present day (except for the lengthening of sentences for women offenders in 1903) is a telling commentary on the laws of the state.

A century of tremendous economic, commercial and industrial expansion and development has changed the nature of our social institutions and brought into existence behavior patterns which reflect the need of a new morality. Yet the persons molded by these new conditions can be penalized by laws which popular opinion continues to accept as the traditional code.

DIGEST

When the Massachusetts colony got its start on the new continent, two main factors shaped the attitude taken toward sex morality. First, was the necessity of protecting the family as the essential economic unit of society. Secondly, the theological bent of the leaders' minds determined the peculiar translation of moral code into criminal offense. When the economic necessity of the initial colonization period vanished, with an upsurge of commercial activity in the eighteenth century and one of industrial activity in the late eighteenth and throughout the nineteenth centuries, one would logically expect to see a harmonious change in the character of these same laws. Two of the factors which had combined to give rise to them originally had quite disappeared—the colonial economy and the Puritan elect. The home, which they had aimed to maintain intact, was now being broken up by a multitude of moving social and economic forces.

To be sure, with the change and development of the economy of Massachusetts, there have been some modifications in these laws. But, the new moral code which has sprung up as a result of the economic developments of the past three centuries has failed to

¹²⁶ *Cases and Materials, op. cit.*, p. 534.

replace the obsolete colonial moral code as interpreted into the legal statutes. Thus, the revisions of the laws dealing with female sex offenders from colonial days to the present have been *changes in degree of punishment*, rather than in a *re-statement* of what may be considered "sex offenses." At the same time, the new economic and social conditions have brought changing relations between men and women, and a changing morality in their wake.

Thus, the change in the base has been one of *substance*; that in the laws one of *degree*. But even the change in degree has been scant. The tempo of today, economically, socially and morally, is distinctly twentieth century; these laws are seventeenth (or the eighteenth and nineteenth century modifications of the seventeenth) in form and spirit. It is queer, and indeed an indictment against our culture, that today's laws in this realm still echo the original Puritan terminology.

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