

# COMMENT

## Sanctuary: The Legal Institution in England

### I. INTRODUCTION

Within the Minster of Beverley, at its liturgical center next to the high altar, sits a stone chair that once bore the inscription, "Haec sedes lapidea Freedstoll dicitur i.e. pacis cathedra, ad quam reus fugiendo perveniens omnimodam habet securitatem."<sup>1</sup> On these words the sanctuary seeker relied as he made his desperate way to the refuge that would protect him from the penalties that the Common Law would enforce against him.<sup>2</sup> If he could reach the sanctuary limits of the church, confess his crime to the clergy, and invoke the clergy's protection, the fugitive escaped the reach of the criminal law. For a time,<sup>3</sup> the walls erected by the clergy against the outside world held the process of the king's law in suspense.

This Article discusses the institution of sanctuary that was recognized under the Common Law of England from at least the early Middle Ages until the Jacobean period, that is, from

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1. J. C. COX, *THE SANCTUARIES AND SANCTUARY SEEKERS OF MEDIEVAL ENGLAND* 128 (1911) (citing Camden and the glossaries of Du Cange and Spelman) [hereinafter COX]. The inscription can be translated, "This stone seat is called the Freedstoll, that is, the chair of peace. Any fugitive who reaches it has complete safety." (Author's trans.).

2. Although the statistics are not definite, estimates of how many felons sought sanctuary in medieval England put the number at about 1,000 per year. COX, *supra* note 1, at 33. The records of St. Cuthbert's in Durham, a major sanctuary since the ninth century, show that 332 persons sought sanctuary for 243 different crimes between the years 1464 to 1524. I. BAU, *THIS GROUND IS HOLY* 149 (1985) [hereinafter BAU]. Most (195) of these sanctuary seekers were wanted for homicide; sixteen were debtors. Similarly, the Minster of Beverley received 469 sanctuary seekers between the years 1478-1539. Most (200) of the fugitives were escaping prosecution for debt; 173 for murder; the rest for sundry crimes. *Id.*

3. The length of the sanctuary period ranged anywhere from seven days under the laws of Alfred the Great to forty days under later medieval enactments and charters. Permanent asylum was a rare grant and differs in kind from the institution of sanctuary considered in this article. The latter kind of sanctuary suspended the normal operation of law; the former altered the fugitive's status such that the law had no further effect on him. See Riggs, *Criminal Asylum in Anglo-Saxon Law*, 18 *SOCIAL SCIENCES* 4 (1963) [hereinafter Riggs].

about the seventh to the seventeenth centuries A.D. This Article will not include a specific discussion of the modern American idea of sanctuary as the term is applied to the act of aiding an alien to remain illegally in the United States to escape political persecution in the alien's own country. However, a consideration of the historical institution of sanctuary may shed light on the contemporary issue in two ways. First, history reveals that sanctuary as an ideology has deep roots in the consciousness of our modern society, which has been shaped by English and Christian heritages. Old notions that religious values should prevail over civil values (such as immigration control) are surfacing in the arguments of modern sanctuary advocates. Second, the contrast between historical sanctuary and present-day sanctuary should become clear. The main contrast, of course, is that in the Middle Ages sanctuary was part of the legal structure while now it is not.<sup>4</sup> Medieval secular law permitted the practice of sanctuary because English lawmakers, the kings and Parliament, deferred in certain matters to the authority of the Church. Today, U.S. federal courts, interpreting the first amendment of the federal Constitution, have rejected the argument that secular authority should defer to a higher moral authority or to church law so as to allow the illegal harboring of aliens.<sup>5</sup> Hence, sanctuary offered for religious

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4. BAU, *supra* note 2, at 90, 92, 123.

After examining many references to sanctuary in American cases, Bau concludes that "the legal privilege of sanctuary has never been directly considered by the American courts . . . [and] remains one of the critical but unresolved questions raised by the sanctuary movement." *Id.* at 90, 123.

Before 1985, the general concept of sanctuary had been addressed by American courts, however, and had been held to lack any legal basis. Maryland Penitentiary v. Hayden, 387 U.S. 294, 321 (1967) (Douglas, J., dissenting) ("The right of privacy protected by the Fourth Amendment relates to the precincts of the home . . . or office. But it does not make them sanctuaries where the law cannot reach. [Although] [t]here are such places in the world . . . [w]e have no sanctuaries here."); Osborn v. United States, 385 U.S. 323, 346 (1966) ("A home is still a sanctuary . . . [but] [t]his does not mean [one] can make his sanctuary invasion-proof against government agents. The Constitution has provided a way whereby the home can lawfully be invaded, and that is with a search warrant."); Steagald v. United States, 451 U.S. 204, 217-20 (1981) (if officers are in hot pursuit, a suspect may not take sanctuary in the home of another); Michigan v. Doran, 439 U.S. 282, 287 (1978) (U.S. CONST. art. IV, § 2, cl. 2 (the Extradition Clause) was meant to protect against the balkanization of the criminal justice system by preventing any state from offering sanctuary to fugitives from another state); Ker v. California, 374 U.S. 23, 47-55 (1963) (Brennan, J., dissenting) (if government agents comply with statutory requirements, the house is no sanctuary).

5. *U.S. v. Merkt*, 794 F.2d 950, 954 (1986) (free exercise of religion is limited when it violates regulation for the protection of society); *U.S. v. Elder*, 601 F. Supp. 1574 (1985).

reasons presently receives no legal recognition in the United States.<sup>6</sup>

Whether or not the sheltering of illegal aliens ought to be immune from prosecution under the first amendment of the Constitution is a consideration beyond the scope of this Article. However, the historical perspective presented here may help the reader to discover why sanctuary as a legal institution in England became extinct. This perspective may also help the reader to consider whether the legal and social structures of today could support the re-establishment of sanctuary as a legal institution.<sup>7</sup>

## II. SANCTUARY IN ENGLAND: THE BEGINNINGS

Sanctuary was already an ancient and respected convention at the time it became legally recognized in England in the seventh century A.D.<sup>8</sup> The Old Testament tells us that God directed Moses to "set apart three cities to the east, beyond the Jordan, where a man might find refuge who had killed his fellow unwittingly and with no previous feud against him; by taking flight to one of these cities he could save his life."<sup>9</sup> The Greek mind, too, conceived that some places should offer protection to the fugitive from justice. Thus, for example, Orestes in Aeschylus' tragedy, *The Eumenides*,<sup>10</sup> although guilty of matricide, found safety at the sanctuary of Delphi under the patronage of the god, Apollo. The Romans adopted the Greek institution of temple asylum, although the typical trend during the Roman period was to limit the use of sanctuary so as to preserve it from abuse.<sup>11</sup>

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6. BAU, *supra* note 2, at 111-23; *see supra* note 4.

7. Because of its non-ecclesiastical nature, the constitutional power in the Executive to suspend the process of law by a grant of pardon, reprieve, or commuted sentence is also not discussed in this article. For a discussion of the pardoning power vested in England's monarchs and the United States' presidents, *see* Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. OF LEGAL HISTORY 51 (1963); HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 14-15 (1941); 3 ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 27 (1939).

8. The time at which the sanctuary institution received legal recognition in England is determined from written historical records. Sanctuary may have been recognized under unrecorded law from an earlier period in one or more of the pre-Norman English kingdoms.

9. *Deuteronomy* 4:41-43 (THE JERUSALEM BIBLE, Darton, Longman & Todd ed. 1968).

10. One of the seven surviving plays written by Aeschylus, 525-456 B.C.

11. The limitations that Roman emperors placed on the sanctuary privilege included (1) requiring temples to produce legal proofs of their right to exercise the

The first legislation recognizing Christian churches as sanctuaries was promulgated by Emperor Theodosius the Great in 392 A.D. Theodosius' law did not introduce the privilege, but merely explained and regulated the right of sanctuary attaching to churches. There is a strong suggestion, then, that Christian churches operated as sanctuaries earlier than 392 and probably from the time that Constantine declared Christianity the official religion of Rome in 303 A.D.<sup>12</sup> In the fifth century, the papacy confirmed the decrees of Theodosius the Younger who in 450 extended the sanctuary protection from the church building itself to the surrounding churchyard and precincts.<sup>13</sup> In about the year 620, Pope Boniface V released legislation again declaring the sanctuary privilege valid throughout Christendom.<sup>14</sup>

In 693, shortly after the sanctuary right was officially promulgated by Boniface V, King Ine, the Christian ruler of the West Saxons, introduced it into English secular law:<sup>15</sup>

If any one be guilty of a capital crime, and flee to the church, let him have his life; but let him make satisfaction, as right directs. If anyone forfeit his hide, and flee to the church, let his lashes be forgiven him.<sup>16</sup>

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privilege, (2) restricting the privilege to only a temporary immunity from prosecution, and (3) requiring the sanctuary seeker to present his legal defense before being admitted to the sanctuary. These limitations responded to abuses of the sanctuary practice, in an effort to "limit the protection of the sanctuary privilege for the unfortunate and needy who would be unable to endure the often harsh and merciless application of the criminal law." BAU, *supra* note 2, at 130.

12. COX, *supra* note 1, at 2-3; BAU, *supra* note 2, at 131.

13. COX, *supra* note 1, at 3; BAU, *supra* note 2, at 131.

14. *Preface to SANCTUARIUM DUNELMENSE ET SANCTUARIUM BEVERLACENSE* at xi (Surtees Society ed. 1836) (citing *Glossary in voce Sanctuarium*, Sir Henry Spelman, *Concilia* (1639): "Delinquentibus hic [Bonifacius V] templa et aras asyla constituit" [hereinafter SANCTUARIUM]).

This historical outline of sanctuary as it developed from Biblical times through the early Christian period is not intended to be exhaustive. For a broader discussion of the ancient tradition of sanctuary before its introduction in England, see, e.g., BAU, *supra* note 2, at 124-133.

15. King Ethelbert of Kent had released legislation confirming the sanctity of the church in 597 A.D. However, Ethelbert's law did not treat sanctuary specifically. Rather, the law set out penalties for anyone who violated the Church's peace (*frith* or *fryth*) by robbing the clergy or creating mischief within the church. The regulation did not address the sanctuary situation, where a fugitive could invoke the Church's protection against prosecution. Therefore, Ine's was the first sanctuary legislation in England.

See COX, *supra* note 1, at 6; BAU, *supra* note 2, at 134-35; 1 A COLLECTION OF THE LAWS AND CANONS OF THE CHURCH OF ENGLAND 84-85 (J. Johnson trans. 2d ed. Oxford 1850) (1st ed. London 1720) [hereinafter LAWS AND CANONS].

16. LAWS AND CANONS, *supra* note 15, at 133.

Sanctuary was legally instituted in England in a time when the ends of both ecclesiastical and secular governments were indistinct. King Ine's advisory council was composed partly of bishops,<sup>17</sup> who promoted the objectives of the Church. The early kings of England who embraced these ecclesiastical objectives believed that their duty to serve God and their duty to govern were coextensive. Moreover, church law provided for them a ready model that could be adopted for achieving political and other governmental ends.

Royal dedication to ruling according to Christian precepts is evident in the codes of Alfred the Great, issued in 877 A.D., about two centuries after Ine's sanctuary law, which transferred the bulk of the Book of Exodus into secular law.<sup>18</sup> Promulgating his codes "out of that tenderness which Christ taught towards the greatest crimes whatsoever decreed,"<sup>19</sup> Alfred granted fugitives the right of sanctuary:

4. We also decree, That every church hallowed by a bishop have this privilege, viz., If a foe run thither, that no man for seven nights draw him from thence; if any man do, he incurs the penalty of breaking the king's protection, and the Church's peace (if he take more [men] from thence, the [penalty] is the greater,) . . .<sup>20</sup>

Thus, Alfred and other early English monarchs gave legislative effect to the Scriptural ideal of granting pardon to the person who makes his peace with God and men. At this stage in English legal history, then, the care of men's souls was clearly a governmental as well as an ecclesiastical concern.

Apart from its religious effectiveness, however, the sanctuary institution was also a practical tool that early English kings used to help keep the peace. The ancient Saxon law of bloodfeud gave injured parties the right to retaliate with force against the offender or his family. To curtail the feuds, however, the communal law adopted a system whereby the offender could pay damages (*bot*) to the injured party to buy off the threat of feud. The greatest injuries could be offset only by *wergeld* redemption (the value set on a man's life, increasing with his rank).<sup>21</sup> Later, the English kings rein-

17. SANCTUARIUM, *supra* note 14, at xii.

18. LAWS AND CANONS, *supra* note 15, at 312-14.

19. *Id.* at 316.

20. *Id.* at 320.

21. See Miller, *Choosing the Avenger: Some Aspects of the Bloodfeud in Medieval*

forced the prior communal efforts to prevent retaliatory conflicts. The law against robbery promulgated by King Ine around 690 A.D. sought to eliminate feuds by specifying the amount of money damages to be paid by the criminal to the injured party or his relatives to make them whole.<sup>22</sup> Similarly, King Wihtred of Kent enacted a law in 696 A.D. that set out a variety of penalties for thievery, including money damages.<sup>23</sup> These laws forestalled the feud by removing the administration of justice from the hands of the injured parties and by granting them a compensation other than blood for blood, life for life. Further, the laws protected the thief-catcher from retaliation by coloring his efforts with royal approbation: the thief-catcher was rewarded with a portion of money damages owed by the criminal.<sup>24</sup> Of course, the laws did not always successfully deter aggressive injured parties from taking the law into their own hands. But as early as the seventh century the secular government was taking innovative steps to bring under its own control the means for distributing justice and keeping the peace.

The practice of sanctuary dovetailed into the kings' peace-keeping scheme. Sanctuary removed the felon from the reach of the injured party's retaliation. While in asylum, the felon could negotiate amends with those seeking his blood by offering either *wergeld* redemption or debt slavery (reduction of the criminal to the status of a dependent in bond to the injured party). The negotiations were customarily conducted by the clergy in charge of the sanctuary. Acting for the felon in an intercessionary role, the clergy facilitated a *quid pro quo* settlement with the party seeking revenge.<sup>25</sup> Thus, by preventing a feud, the settlement achieved the king's political purpose of keeping the peace.

The legal institution of sanctuary, then, originated in England through the medium of the Church. The early English kings, with the bishops in council, incorporated Scriptural precepts and church law into secular codes to achieve Christian ideals and political goals. With sanctuary legislation, the Eng-

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*Iceland and England*, 1 LAW AND HISTORY REV. 159, 160-74 (1983); Riggs, *supra* note 3, at 10.

22. See Riggs, *supra* note 3, at 10-11.

23. LAWS AND CANONS, *supra* note 15, at 152.

24. Riggs, *supra* note 3, at 17-18; LAWS AND CANONS, *supra* note 15, at 152 § 26: "Let him that takes and overpowers [the thief] have half [the value of] him . . ."

25. Riggs, *supra* note 3, at 22-23, 34.

lish kings realized their Christian duty of leniency toward penitents and encouraged peace by providing an alternative to bloodfeud.

### III. THE TWO POWERS

In the later Middle Ages, the sanctuary institution did not escape the political tensions that developed between the pope and the king. As strong central governments developed in late medieval England and on the Continent, and as the popes became temporal rulers often in political opposition to European princes, the interests of civil and ecclesiastical authorities diverged. Inevitably, civil rulers attempted more and more to prevent the papacy from interfering in their internal political affairs. Medieval thinkers, trying to reconcile the duality between the Church and the State, began to articulate a kind of territorialism that gave each authority its own place in a universal order. Even as late as the mid-thirteenth century, Thomas Aquinas<sup>26</sup> found it necessary to reclarify the relationship between the separate secular and ecclesiastical powers in his *Scriptum super Sententiis*: the Church had jurisdiction over things concerning the salvation of souls, princes had power over things concerning the civil good.<sup>27</sup> Each power was autonomous in its own order. Under this dualistic thesis, any attempt by the king to regulate for the moral or spiritual improvement of his subjects infringed on the autonomy of the Church's spiritual authority. The reverse was also true; popes were not empowered to regulate the strictly political lives of Christians.

However, the separation of powers in the Middle Ages was not complete either in concept or in practice. The idea of a hierarchical order was still very much alive in the later Middle Ages giving priority to the Church's authority when issues of the salvation of souls and the civil good overlapped:

A king, the *De regno* holds, rules over his kingdom as a priest (pope) rules over the kingdom of God; but he is sub-

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26. Thomas Aquinas, 1225-1274, was a Dominican friar and theologian. He authored several treatises and lesser works on theology and philosophy, among which are his *Commentaries* on the works of Aristotle, *Summa Theologica*, *Summa Contra Gentiles*, *On Essence and Existence*, *Disputed Questions*, and *Scriptum Super Sententiis* and *De regno* cited in the text *infra*. See BASIC WRITINGS OF ST. THOMAS AQUINAS (A. Pegis ed., New York 1945).

27. Boyle, *The "De regno" and the Two Powers*, PASTORAL CARE, CLERICAL EDUCATION AND CANON LAW, 1200-1400, at 238 (1981).

ject to the priest (pope) whenever there is a question of the 'dominium et regimen quod administrator per sacerdotis officium' [citation omitted], that is, the salvation of souls, the end or good that is extrinsic to that of the secular power.<sup>28</sup>

Thus, a king theoretically was obligated to defer to the sovereignty of the Church in an affair like sanctuary where the felon, presumptively, had not only sought the refuge to escape criminal penalties, but also to place himself under the authority of the clergy to rectify his relationship with God.

In England, the transition from an ideological unanimity towards a deferential coalition between secular and ecclesiastical governments, and its attendant effect on sanctuary, began in the eleventh century. In the year 1018, King Cnute enacted a law that recognized the differentiation between church and secular law and, at the same time, subjected the secular judiciary to the precepts preached by the Church:

This is the secular provision, which I command, with the advice of my wise men, to be observed over all England.

[c.1 omitted.]

2. We Charge, that though a man commit such a crime, as to have forfeited himself to the last degree, yet let judicature be so regulated, that it be moderate in respect to God, tolerable in respect to the world. And let him that presides in judicature consider very seriously what he desires [of God] when he thus says, "Forgive us our trespasses, as we forgive them that trespass against us:" and that . . . the judicature be tempered with gentleness, for the public benefit.<sup>29</sup>

Although the ecclesiastical and secular priorities were clear in Cnute's law, secular government was beginning to take shape apart from the administration of the Church universal.

As the Church and the secular authorities acquired separate purposes and identities, the civil power took the next step. From the Norman Conquest on, English kings began to restrict the Church's prerogative in civil affairs that involved the welfare of souls. Among the changes that William the Conqueror imposed on Saxon society was legislation concerning sanctuary.

Around the year 1070, William enacted, among other laws relating to the rights and privileges of the Church, a regulation concerning "Criminals fleeing to the Church."<sup>30</sup> With this law,

28. *Id.* at 241.

29. LAWS AND CANONS, *supra* note 15, at 512.

30. "Et si more solito latro taliter egerit, et si forte fortuitu ad ecclesias vel ad



William reshaped the sanctuary privilege. The law specified that if a criminal sought sanctuary in a church or priest's house several times, he had to leave the province, and no one in the province could again receive the criminal without the express permission of the king. This enactment set clearer boundaries around the sanctuary privilege by limiting the number of times a felon could invoke the privilege, by setting out where the criminal could find asylum, and by prescribing a punishment to deter sanctuary seekers from abusing the privilege. Most important, however, was the limit that the law placed on the Church's power to intervene in the execution of the secular legal process: once the fugitive had been banished, the provincial church lost its jurisdiction over the fugitive unless the king lifted the ban. Thus, King William began to set restrictions on the Church's prerogative to offer sanctuary to the fugitive.

Nevertheless, William should not be perceived as an enemy of the sanctuary institution. On the contrary, he wholeheartedly subscribed to the basic principle of sanctuary.<sup>31</sup> Like his seventh century predecessors, Ine and Wihtrred,<sup>32</sup> William recognized the political value of the sanctuary institution as a tool for keeping the peace during unsettled times. Often, however, the pacification function of sanctuary did not succeed during William's reign because, unlike the more parochial disputes during Ine's and Wihtrred's reigns, the grievous Norman-Saxon conflicts militated against settlement during the relatively short cooling-off period.<sup>33</sup> Without hope of conciliation with his Norman prosecutors, the Saxon fugitive often refused to submit to the secular arm for trial after the sanctuary

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sacerdotis domus frequenter evaserit, ablacione restituta, provinciam foris juret; et nisi reddat, nullus presumat eum hospitari, nisi a rege data licentia."

SANCTUARIUM, *supra* note 14, at xiii.

31. William chartered several sanctuaries during his reign. He granted some of the broadest authorizations ever given as illustrated by his charter to Battle Abbey, built after the Battle of Hastings to fulfill a vow. He established the abbey as a sanctuary, specifically endowing it with the *leuga*, or league (one and a half miles), of land that extended in all directions from the abbey's center. According to the Chronicle of Battle Abbey, translated by M.A. Lower in 1851, "if any person guilty of theft, manslaughter, or any other crime should, through fear of death, take refuge in this abbey (that is, within the Leuga), he should receive no injury, but depart entirely free. And if the abbot should chance, anywhere throughout the realm of England, to meet any (capitally) condemned thief, robber, or other criminal, he should be at liberty to release him from punishment." COX, *supra* note 1, at 196-97.

32. See *supra* notes 22-25 and accompanying text.

33. See *supra* note 3.

period had elapsed.<sup>34</sup>

To make the sanctuary system work more effectively, William enacted the provision mentioned above,<sup>35</sup> requiring a criminal who abused the sanctuary privilege to quit his province and his clergy's protection, or else submit to the process of law. This requirement was the precursor of the later prescription, abjuration of the realm, under which the fugitive could choose exile from Britain over the execution of criminal process against him.<sup>36</sup>

The revolutionary character of William's seemingly minor modification of the sanctuary convention to effect his political purposes cannot be appreciated without a brief digression to explain the institutional strength of the papacy that prevailed from the early Middle Ages, through the time of William, and beyond. Although the scope of this Article prevents a thorough analysis of papal influence over medieval kings, the theory of the papacy's power that compelled the kings' deference to the authority of the Church can be briefly stated.

Medieval church doctrine taught that the pope, the bishop of Rome, was the successor to the chair of Peter, the seat of authority.<sup>37</sup> In the mid-fifth century, Pope Leo I expanded the doctrine of apostolic succession, expressing the pope's right to primacy in "exclusively juristic terms" taken from Roman law.<sup>38</sup> Leo I characterized the pope as *heir*, "indignus haeres," of Peter. Under Roman law, the heir assumed all the assets and liabilities of the deceased, and thus had the legal duty to function exactly as his predecessor had done in relation to others.<sup>39</sup> In his official capacity as Peter's heir, the pope assumed the power to govern the faithful that had been conferred by Christ upon Peter.<sup>40</sup> When exercising his plenary

34. COX, *supra* note 1, at 11.

35. See *supra* note 30 and accompanying text.

36. The right to abjure the realm dates from the twelfth century. An early statute of King Henry II declared at Clarendon in 1164 provided:

And if [the fugitive] confess a mortal offence, and desire to depart the realm without desiring the tuition of the Church, he is to go from the end of the sanctuary ungart in pure sackcloth, and there swear that he will keep the straight path to such a port . . . never to return during the King's life without leave, so help him God and the good Evangelists . . .

COX, *supra* note 1, at 24.

37. See ULLMAN, *Leo I and the Theme of Papal Primacy*, THE CHURCH AND THE LAW OF THE EARLIER MIDDLE AGES § IV, 29 (1975).

38. *Id.* at 33.

39. *Id.* at 33-36.

40. *John* 21: 15-17.

Petrine powers, the pope's juristic decisions were binding on the whole Church; kings were no exception. In light of this theoretical papal authority, any interference with established church practice would have required the pope's sanction.

In the eleventh century, then, when King William placed tighter restrictions on the use of sanctuaries, he was stepping into the province of ecclesiastical jurisdiction, challenging the juristic control that the Church had heretofore exercised over the sanctuary seeker. William's challenge to the Church on sanctuary exemplifies his readiness to stretch the boundaries of his own legal control. In contrast to the period just before the Conquest when the law was Christianized,<sup>41</sup> brought into conformity with ecclesiastical principles, William's reign was marked by an increasing tension between civil and church authorities. This tension pervaded the Middle Ages from William's time on. It ended in the sixteenth century when Henry VIII polarized the conflict between pope and English king. The ensuing schism between England and Rome, which will receive further treatment in part IV below, terminated the simultaneous reign of the two powers. Henry VIII's predecessors, however, had dealt with the tension through more conciliatory means, working to establish through appropriate legislation and extra-legal accommodations the congruity between civil and church governance that medieval thinkers like Thomas Aquinas had described.<sup>42</sup> To a significant extent, then, the sanctuary convention owed its continuation after the Norman Conquest to the peculiarly medieval sense of duty that called English rulers to defer to the authority of the pope in spiritual matters.

A specific illustration of how the sanctuary process worked in the later Middle Ages will clarify the extent to which the fifteenth century English king allowed abrogation of his jurisdiction over a fugitive. It will also give an idea of the sociological ramifications of sanctuary in that period.

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41. Riggs, *supra* note 3, at 50-54.

42. See *supra* note 27 and accompanying text. One manifestation of the Church's governmental presence in England was the existence of church courts. In general, these courts had jurisdiction over legal issues with moral ramifications, such as divorce, sexual crimes, breach of faith and petty debt, probate, and, of course, violations of religious obligations, e.g., tithing. For a discussion of the operation of Church courts in London in the early sixteenth century, see R.M. WUNDERLI, *LONDON CHURCH COURTS AND SOCIETY ON THE EVE OF THE REFORMATION* (1981) [hereinafter WUNDERLI]. For a study of earlier medieval church courts, see S. BROWN, *THE MEDIEVAL COURTS OF THE YORK MINSTER PECULIAR* (1984).

In the register of St. Cuthbert's Shrine at Durham Abbey, a sanctuary recognized since the ninth century,<sup>43</sup> is the following account of a certain fugitive named Colson:

Memorandum, That on 13 May, 1467, one Colson, of Wolsingham, co. Durham, who had been detected in theft, and for that reason apprehended and lodged in [jail], managed at length to escape, and fled to the cathedral church of Durham on account of its immunity of rest. Whilst standing near the shrine of St. Cuthbert, he prayed that a coroner<sup>44</sup> might be assigned to him. On the arrival of John Raket, coroner of the ward of Chester-le-Street, Colson made confession of his felony, and standing there took his corporal oath of abjuring the realm of England with as much dispatch as possible and of never returning. This oath he took at the shrine of St. Cuthbert before George Cornforth, sacristan of the Cathedral church of Durham, Ralph Bows, knight and sheriff of co. Durham, John Raket, Robert Thrylkett, undersheriff, Hugh Noland, Nicholas Dixson, and many others. By reason of which renunciation and oath all Colson's accoutrements were forfeited by right to the aforesaid sacristan as pertaining to his office. Therefore Colson was ordered to take off his clothes to his shirt and to deliver them to the sacristan for his disposal; and when the sacristan had received them all, he freely gave them up and restored to the fugitive all the clothes which he had up to then been wearing. After that Colson departed from the church, and was delivered by the Sheriff to the nearest constables, and so on from constables to constables, holding a white cross made of wood, as a fugitive, and was thus conducted to the nearest seaport, there to take ship and never to return.<sup>45</sup>

In the above account, there appear several procedural elements that were common to every sanctuary action in the later Middle Ages. First, the fugitive had to reach the sanctuary location. The area protected at Durham was "all the Church yard, and all the circuyte therof."<sup>46</sup> Because Colson had arrived at the church itself, he was protected under the cathedral's sanctuary charter.

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43. COX, *supra* note 1, at 96-97.

44. The Oxford English Dictionary defines coronor as: "An officer of a county, district, or municipality (formerly also of the royal household), originally charged with maintaining the rights of private property of the crown; . . ." OXFORD ENGLISH DICTIONARY 562 (Compact ed. 1971).

45. SANCTUARIUM, *supra* note 14, at 30-31; COX, *supra* note 1, at 113-14.

46. COX, *supra* note 1, at 119 (citing the RIGHTS OF DURHAM (1593)).

Second, the fugitive had to confess his guilt and then choose whether to negotiate his sentence or to abjure the realm.<sup>47</sup> Colson chose the latter.

Third, upon abjuration, the fugitive was granted passage under the supervision of the civil authorities to the port of the coroner's choice, usually the one nearest to the sanctuary. The coroner's participation in the sanctuary process is an important point because it demonstrates that the civil authorities cooperated fully with the fugitive's exercise of his sanctuary right. Also evident, however, is the civil authorities' readiness to reclaim their suspended jurisdiction over the fugitive if he terminated his sanctuary right through misconduct.<sup>48</sup>

Last, the fugitive had to assume a penitential attitude during his time in sanctuary. As a sign of repentance of his crime, Colson gave up his worldly possessions and his clothing to the clerics attending him. In Colson's case, the clerics returned his clothing to him for an unidentified reason.<sup>49</sup> In other accounts, however, sanctuary seekers were given special clothes to wear that gave the public notice of their protected (although criminal) status:

[A]nd everyone of them [was] to have a gowne of blacke cloth maid with a cross of yeallowe cloth, called Sancte Cuthbert's cross, sett on his lefte shoulder of his arme, to th' intent that every one might se that there was such a prelige graunted by God and Sancte Cuthbert, for every such offender to flie unto for succor and safegard of there lyves  
 . . .<sup>50</sup>

Even though Colson did not wear the abjurator's special dress, he did carry a "white cross made of wood" on his way to the seaport, thus complying with the procedural requirement of making his protected status publicly known.

In general, so long as the sanctuary seeker observed the formalities of the convention, the king also observed sanctuary formalities, temporarily shielding the sanctuary seeker from the secular legal process. The king also protected the sanctu-

47. *Id.* at 118.

48. The sanctuary privilege could terminate if the fugitive left the protected area or if the sanctuary period peculiar to the asylum church or house expired without the fugitive taking the abjuration oath. See *supra* notes 3, 31, 46 and accompanying text.

49. The ritual of giving up clothing and having it returned may have symbolized that the abjurator no longer had any rights or public privileges and was now solely dependent on the Church for his welfare. BAU, *supra* note 2, at 147.

50. COX, *supra* note 1, at 119-20 (citing the RIGHTS OF DURHAM (1593)).

ary seeker from retaliation by injured parties—severely punishing violators of the privilege under the secular law.<sup>51</sup> The Church, too, often imposed even harsher sanctions on violators.<sup>52</sup> Thus, in spite of the growing tension between the two powers, the sanctuary institution survived throughout the later Middle Ages.

#### IV. THE END OF THE SANCTUARY INSTITUTION IN ENGLAND

Eventually, the tension between the two powers, the pope and the English government, became so strained that sanctuary as an institution ended.<sup>53</sup> The decline of sanctuary began when Henry VII instigated legal reforms that prevented a felon from invoking sanctuary when the crime involved was treason or suspicion of treason. Henry VIII continued his father's efforts to weaken the institution by introducing harsh penalties for the sanctuary man, thus making the exercise of the sanctuary right less desirable to the felon. Finally, James I repealed the right of sanctuary altogether toward the end of his reign. The reasons why the Tudor kings and James I found it necessary to phase out the sanctuary institution will be discussed more fully below. First, however, it is important to look at (in a general way at least) some of the factors that displaced the centrality of the Roman Church in England during the fifteenth and sixteenth centuries, opening the door for the

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51. The following entry in the Close Rolls at the Public Records Office, London, illustrates that the violators of the sanctuary right were subject to criminal prosecution:

1309, April 4. — To the sheriff of Berkshire. Order to cause jurors to appear before Henry Spigurnel and Richard de Wyndesor, whom the king has appointed to enquire what malefactors and breakers of the peace dragged certain prisoners lately detained in the king's prison of the town of Windsor for larcenies and other trespasses charged against them, who had escaped from the same prison and fled to the churchyard of Windsor for sanctuary, from the said churchyard by force of arms, and led them back to the same prison, slaying and beheading certain of them on the way back, and to inquire the names of those thus slain and of the survivors, and all the circumstances of the same.

COX, *supra* note 1, at 264.

52. In the year 1200, the bishop of Lincoln Cathedral excommunicated the bailiff and his accomplices who had dragged a fugitive thief from the sanctuary church and hanged him. To reinstate themselves in the Church's favor, the bishop gave the offenders a shocking penance. They had to carry the decaying corpse of the hanged fugitive on their bare shoulders for almost a mile to the church of Brackley, bear it round the church while being scourged, and then give the corpse an honorable burial. *Id.* at 211.

53. See *supra* text at 687.

kings' legal reforms.<sup>54</sup>

The "secularization" of Continental and English societies during the early modern period was one of the primary characteristics of a new, post-medieval age.<sup>55</sup> The term "secularization" does not imply that Renaissance men were any less concerned with religion or theological inquiries than their medieval predecessors. Rather, the term connotes a change in attitude that liberated theological thinking from a slavish conformity with the doctrines and hierarchical model that had been the hallmark of Thomistic scholasticism<sup>56</sup> and the Danteque cosmological<sup>57</sup> view. The attitudinal change had its basis in a new skepticism<sup>58</sup> that arose out of humanism, the classical academic discipline that stressed learning through close observation and that developed a strong sense of civic virtue aimed at building a perfect society. Different modalities of

54. A thorough study of the factors that brought on the transition from the Middle Ages to the Renaissance is far beyond the scope of this article. Nevertheless, any consideration of legal reform that was conditioned upon such a fundamental shift in sociological, philosophical, and theological perception would be incomplete without some discussion of the transition, however brief.

55. WUNDERLI, *supra* note 42, at 1.

56. THE OXFORD ENGLISH DICTIONARY 2665 (Compact ed. 1971). *Scholasticism* . . . 1. The doctrines of the schoolmen, the predominant theological and philosophical teaching of the period A.D. 1000-1500, based upon the authority of the Christian Fathers and of Aristotle and his commentators. . . .

*Id.* Thomas Aquinas' contribution to scholastic thought can be observed, e.g., in his *Commentaries* on Aristotle's *Metaphysics*, *On the Soul*, *On the Sensed*, and *On Reminiscences*; *Summa Theologica*; *Summa Contra Gentiles*; *On Essence and Existence*; and *Disputed Questions*. (Thomas Aquinas, like other scholastic thinkers, endeavored to harmonize the philosophy of Aristotle with the Christian Fathers and to synthesize moral and political sciences. His writings represent mainstream medieval thought.)

57. Dante Alighieri, the Florentine poet and political activist, is best known for his work, *La Divina Commedia* (*The Divine Comedy*), completed shortly before Dante died in 1321. As systematic in its form as it is in its message about the way to salvation, the *Commedia* presents a cosmos completely organized, both physically and metaphysically, according to the theocentric vision of his age. Regarding Dante's representation of thirteenth century thought, John D. Sinclair, in the *Preface* to his translation of the *Inferno*, the first of the books of the *Commedia*, writes:

Dante did not merely inherit the theology and cosmology of the Middle Ages along with his generation and then take them for granted; he re-imagined them and peopled them . . . He was a great interpreter and a supreme imaginer, bodying forth the abstractions of scholastic thinking . . . and it is only as we provisionally accept the ethical and theological system and standards of the thirteenth century and hold in mind its conceptions of the world and life and eternity that we can enter into the mind and imagination of the poet.

J. Sinclair, *Preface* to Dante's *Inferno* 10-11 (1961).

58. J. PLUMB, THE PENGUIN BOOK OF THE RENAISSANCE 29 (1964).

reasoning replaced the medieval method of rationalization that deduced particular truths from general axioms. Within this fresh intellectual environment, thinkers introduced new approaches to government (e.g., Niccolo Machiavelli), to art (e.g., Leonardo da Vinci), and to religion (e.g., Martin Luther).

The Church, as it had existed throughout the Middle Ages, was subjected to close scrutiny, not only by iconoclasts such as Martin Luther, but by those who wished to work within the existing structure towards reform. Erasmus, the great Dutch humanist, was welcomed to England by Thomas More (who was later to be Henry VIII's chancellor and who was loyal to Rome). Like More, Erasmus was no Protestant,<sup>59</sup> but he was a critic of the conservatism of the Church. At the suggestion of Thomas More, Erasmus wrote *Encomium Moriae* (*The Praise of Folly*) in 1509, a scathing satire of the Church's abuses and stodginess.

Whether reform was encouraged by moderates like More and Erasmus or by strident Protestants like Luther, the traditional role of the Church as the supreme arbiter of men's spiritual affairs and governor of men's souls lost its force. Replacing the institutional absolutism of the papacy was the growing sense that each person could find his way to sanctity through his own spirituality and mystical experience. Hence, the function of the pope as intermediary between Christ and the Church faded in importance; for Protestants, the pope's function became altogether superfluous.

English secularization and disaffection for the papacy that contributed to sanctuary's eventual demise not only had ideological (humanistic) roots, but also sociological and political ones. First, and perhaps most obvious, Rome was a long distance from England and it lay in a country that was culturally very different from England. The combination of distance and cultural difference prevented the common, non-academic Englishman from closely identifying with the papacy, a creature of southern European culture. Second, the papacy had acquired a reputation for manifest corruption that was exploited by reformers throughout Europe.<sup>60</sup> Fervent reformers in England, seeking to renew the purity of the Church, were anxious to dissociate themselves from a corrupt religious authority. Third, the pope demanded from his clergy financial

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59. *Id.* at 302.

60. THE POPES, A CONCISE BIOGRAPHICAL HISTORY 284 (E. John ed. 1964).



support for launching military campaigns and administering the government of the papal territories. The clergy's source for these funds was the laity; the funds were collected through excessive taxes and tithes.<sup>61</sup> The Reformation environment presented laymen with an opportunity to relieve themselves of their fiscal obligation to Rome by denying the authority of the pope. Last, and probably most important from a legal point of view, English laymen perceived that church courts, at least in many parts of the country, had ceased to provide a system of procedural and substantive justice that could compete effectively with the secular courts.<sup>62</sup> Aggrieved laymen, therefore, had no incentive to prolong, through use, the life of abusive ecclesiastical institutions. Against this backdrop of lay disaffection, described above, the Tudors and James I would find the eventual abolition of church institutions a relatively easy task. Among the institutions that they targeted for elimination was sanctuary.

In 1485, Henry VII, the first Tudor king, laid claim to the English throne, thereby ending the long struggle between the partisans of Lancaster and York called the War of the Roses. Assuming power as a *de facto* king,<sup>63</sup> Henry's chief interest was to establish his supremacy in England and ensure the legitimate succession of his line. To accomplish this purpose, Henry assumed the power needed to immunize him from the potential challenges to his kingship from rival political sources. In so doing, Henry VII acquired

the mass of powers, rights, and immunities which distinguished a king from a private individual. In him was centered that popular belief in the sanctity and the miraculous

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61. R. RODES, JR., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND* 197-200 (1977); WUNDERLI, *supra* note 42, at 108.

62. WUNDERLI, *supra* note 42, at 1-5.

There was . . . a move away from—and a disenchantment with—church court jurisdiction . . . and a corresponding appeal . . . to secular authorities to hear "spiritual" suits. . . . Church courts seem to have appeared . . . after the 1490s lax and incapable of bringing wrongdoers to justice. . . . Secular justice in the mayor's court was much harsher than church court justice. . . . [L]itigants seem to have come to expect the immediate results which the secular courts could provide. Hence, there was a shift in the "dynamic center" of overlapping legal systems, from ecclesiastical to secular—and with this shift a "reformation" of laymen's loyalties, a secularization of attitudes [citation omitted].

*Id.* at 2.

63. D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 8 (9th ed. 1969).

powers of kingship which had always been connected with the royal office. Into his hands fell all the property, and the dues payable from the property of the subject, which formed the estate of the Crown. All that kingship implied was Henry's, to make of it what use he could.<sup>64</sup>

Insecure as he was about his claim to the throne, Henry VII adopted as a political imperative the prevention of treason and the uninhibited punishment of traitors. In 1487, Henry VII sought and obtained a papal bull from Pope Innocent VIII that precluded traitors and those suspected of treason from invoking the sanctuary privilege. Innocent's successors, Popes Alexander VI and Julius II, confirmed this preclusion for Henry in 1493 and 1504, respectively.<sup>65</sup> Having succeeded in placing this limitation on the sanctuary practice, Henry VII entered the St. Martin's Sanctuary in 1495 to drag forth four persons who had been accused of publicly and seditiously maligning him.<sup>66</sup> Three of the four accused were hanged in February, 1496; the fourth plead for restoration to the sanctuary and was reprieved until the next judicial term.<sup>67</sup> Thus, Henry VII began to revise the sanctuary institution, eliminating its application to a certain class of felons. But it was not until Henry VIII's reign (1509-1547), when the anti-ecclesiastical sentiments had reached a peak,<sup>68</sup> that greater restrictions were enforced.

Soon after Henry VIII took the throne, he began to materially alter the sanctuary privilege. Henry VIII's reasons for the alterations were the same as his father's had been: to ensure the political supremacy of the king and the swift execution of legal process against offenders threatening the tranquility of the land. In addition to these reasons, however, was Henry's contest with the institutional Church, which directly opposed his political scheme to divorce Catherine of Aragon and marry Anne Boleyn in hopes of producing a male heir. When Henry VIII declared his divorce in spite of Rome's objections, the schism between Rome and England began. Henry's ultimate act of defiance toward the pope was to divest the pope of authority in England by declaring himself the head of the English church.<sup>69</sup>

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64. *Id.* at 10.

65. COX, *supra* note 1, at 93; SANCTUARIUM, *supra* note 14, at xxi.

66. COX, *supra* note 1, at 92-93.

67. *Id.*

68. See *supra* text at 690-93.

69. Statute 26 Henry VIII, c.1 (1534):

Henry VIII's earliest legislation regarding sanctuary dates from 1512. Entitled, "How Plea of Sanctuary in a foreign shire shall be tried," the statute denied the sanctuary immunity to a felon asyumed in a foreign county when the king's attorney or any other person would swear that the felon had been seized at large in the same shire where he was arraigned.<sup>70</sup> Since such testimony was easily had, given the state of criminal investigative process in the sixteenth century, the sanctuary privilege was effectively denied to any felon asyumed in a foreign county.

In 1529, Henry VIII promulgated another statute that required all sanctuary men and abjurors to be branded with the letter "A" on the thumb, or else lose all sanctuary privileges.<sup>71</sup> The statute 22 Henry VIII, c. xiv (1530-31) effectively abolished the former right of felons to abjure the realm. Fearful that skilled archers and mariners and those privy to state secrets would abjure and pass on their knowledge to foreigners, Henry prescribed that the abjurator be taken to a sanctuary place within the kingdom to be kept there for the rest of his life unless pardoned by the king. Any abjurator who attempted to leave the sanctuary was subject to trial for his offense or to death.<sup>72</sup>

Statute 26 Henry VIII, c. xiii (1534) proscribed the sanctuary privilege for any person accused of high treason.<sup>73</sup> Statute 32 Henry VIII, c. xii (1540) abolished all special sanctuaries (those chartered by the king) except Wells, Westminster, Northampton, Norwich, York, Derby, Manchester, and Lancaster. The statute left intact the immunity of parish churches and churchyards, cathedral churches, hospitals, collegiate churches, and dedicated chapels. Additionally, the law eliminated sanctuary for criminals guilty of rape, murder, burglary, robbery, arson, sacrilege, and for accessories to such crimes.<sup>74</sup>

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[B]e it enacted by authority of his present parliament that the king our sovereign lord, his heirs and successors kings of this realm, shall be taken, accepted and reputed the only supreme head in earth of the Church of England called Anglicana Ecclesia . . .

*Id.* (cited in M. EVANS AND R.I. JACK, *SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY* 244 (1984)).

70. COX, *supra* note 1, at 320-21.

71. *Id.* at 321.

72. *Id.*; SANCTUARIUM, *supra* note 14, at xii.

73. COX, *supra* note 1, at 322; SANCTUARIUM, *supra* note 14, at xxii.

74. COX, *supra* note 1, at 326; SANCTUARIUM, *supra* note 14, at xxii-xxiii.

The above enactments collectively all but ended the institution of sanctuary as it had existed in England since the seventh century A.D. The rest of the Tudor monarchs, except Mary Tudor, maintained Henry VIII's statutes without substantial modification. The brief attempts of Mary Tudor to restore the sanctuary privilege (and Catholicism) in England were quickly repealed when Elizabeth I came to power.<sup>75</sup> Nevertheless, the enactments finally abolishing the sanctuary institution altogether were not passed until the reign of James I. In 1604, the statute 1 James I, c. 25 eliminated the eight remaining chartered sanctuaries:

And be it also enacted by the Authoritie of this present Parliament, That so much of all Statutes as concerneth abjured Persons and Sanctuaries, or ordering or governing of Persons abjured or in sanctuaries, made before the five and thirtieth yeere of the late Queene Elizabeth's Reigne, shall also stand repealed and be voide.<sup>76</sup>

By 1624, sanctuary immunity that had attached to all other places, such as parish churches and their yards, was repealed by 21 James I, c. 28.<sup>77</sup>

James I's absolute proscription of the sanctuary privilege was the final step in removing the ecclesiastical power to suspend the process of secular criminal law. James' reasons were identical to those of his predecessors: he desired to consolidate in himself, as *lex loquens*<sup>78</sup> all "divine power on earth."<sup>79</sup> Therefore, he would not share any prerogative of a legal or governmental character with the Church.

## V. CONCLUSION

In England, the sanctuary institution's legal validity depended on the vitality of the Church as a sovereign governmental authority having jurisdiction over the welfare of men's souls. During the early Middle Ages, kings saw their duty to govern as coextensive with the Church's charter to bring all men to God. In that period, the sanctuary privilege was so

75. COX, *supra* note 1, at 328.

76. *Id.* at 329.

77. *Id.*; SANCTUARIUM, *supra* note 14, at xxxiii.

78. Literally translated "the speaking law." The more idiomatic sense is that James' every word was law. JAMES I, WORKS 530 (1616) (cited in M. EVANS AND R.I. JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 304).

79. *Id.* at 528 (cited in M. EVANS AND R.I. JACK, SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL HISTORY 303).

interwoven into the social fabric that only the barest statutory reference was required to give it legal effect. During the later Middle Ages, as the political agendas of kings and popes diverged, the sanctuary institution survived in an atmosphere of tension where the two powers vied for governmental supremacy. With the arrival of the Renaissance and the Reformation in England, the kings succeeded in throwing off their reliance on the papacy for normative approbation. Once independent of papal control, and asserting their own primacy in divine affairs, the kings abolished the sanctuary institution and thereby perfected their jurisdiction over the felon.

The critical question for the English kings was whether or not they could tolerate the presence of a foreign authority that limited the sovereignty of the civil government. On that issue, the survival of the sanctuary institution turned. In the end, the kings decided that the sacrifice of sovereignty was too great; they expelled the pope from England, and sanctuary along with him. Seen in the light of sanctuary's history in England, modern proponents of sanctuary seem to be trying to reinstate the institution that Henry VIII and his successors abolished. Contemporary sanctuary advocates ask whether a moral imperative (as perceived by those sheltering illegal aliens) can abrogate the federal government's jurisdiction over immigration affairs. Thus far, the courts' basis for disallowing sanctuary has been that the practice would interfere with the federal power to regulate for the protection of society.<sup>80</sup> Thus, one can conclude that the historical and modern limits on sanctuary are directed toward the same end, ensuring the exercise of the civil government's power through the uninhibited process of the criminal law. So far, it seems, American courts have travelled the path laid down by Henry VIII. Nevertheless, the sanctuary idea survives, if not as a legal alternative, at least as a relic of a more synthetic age.

*Steven Pope*

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80. See *supra* note 5.