

XX. LAW

A. GENERAL

The adoption of Christianity as the state religion of the late Roman empire introduced a pattern of criminalizing male homosexuality that persisted until the 18th century. Even today the effects of centuries of legal stigmatization remain difficult to eradicate. While criminal sanctions for adult homosexual conduct have disappeared from the law codes of most advanced industrial countries (though this is the case in only half of the American states), they linger in some Marxist nations and are even spreading in the Third World. In the light of this mixed picture, a careful study of the premises of sexual law and law reform is necessary.

4063. BARNETT, WALTER. **Sexual Freedom and the Constitution: An Inquiry into the Constitutionality of Repressive Sex Laws.** Albuquerque: University of New Mexico Press, 1973. 333 pp.

A valuable, if somewhat longwinded study of the history of homosexual criminalization (chiefly in English-speaking countries), stressing the case for reform. The extensive notes are useful for bibliographical references; for others, see Vern Bullough et al., **An Annotated Bibliography of Homosexuality.** (New York: Garland, 1976), vol. 1, pp. 278-316.

4064. BECCARIA, CESARE BONESANA, MARQUIS. **Dei delitti e delle pene.** Edited by Franco Venturi, with a collection of related letters and documents. Turin: Einaudi, 1965. 680 pp.

This scholarly edition of Beccaria's epochal contribution (1764) to Enlightenment reform of the criminal law is recommended because of the complementary material, showing the impact of his ideas throughout Europe. See chapter 31 (36 in some editions) discussing *l'attica venere* (Greek love). Several English translations exist.

4065. BENTHAM, JEREMY. "Offenses against One's Self: Paederasty," *JH*, 3:4 (Summer 1978), 389-405; 4:1 (Fall 1978), 91-107.

This is the first publication, edited by Louis Crompton, of the arguments for law reform developed by the English utilitarian thinker, ca. 1785. See also Bentham, **The Theory of Legislation.** Edited by C. K. Ogden. (London: Kegan Paul, 1931), pp. 476-97 (essay "Offenses against Taste," 1814-16). Like the material published in 1978, this essay drew extensively on continental thinkers of the Enlightenment.

4066. BLACKBURN, CATHERINE E. "Human Rights in International Context: Recognizing the Right of Intimate Association," *Ohio State Law Journal*, 43 (1982), 143-63.

Assesses recent progress of the right of privacy both within the United States and internationally (the latter with particular reference to article 8 of the European Convention on Human Rights).

4067. DEVLIN, PATRICK, LORD. **The Enforcement of Morals.** London: Oxford University Press, 1965. 25 pp. British jurist's critique of the Wolfenden Committee proposals for law reform; advocates continuing repression of homosexual conduct in obeisance to "sound public sentiment." See esp. H. L. A. Hart's rebuttal, below.

4068. DWORKIN, RONALD. **Taking Rights Seriously.** Second ed. Cambridge, MA: Harvard University Press, 1978. 371 pp. Chapter 10, "Liberty and Moralism" (pp. 240-58) offers a sharp critique of Devlin's restrictivist arguments.

4069. DYNES, WAYNE. "Privacy, Sexual Orientation and the Self-Sovereignty of the Individual: Continental Theories, 1762-1908," *Gay Books Bulletin*, 6 (Fall 1981), 20-23. Traces the development of the Enlightenment tradition of control over one's body from Beccaria to Hiller.

4070. FILANGIERI, GAETANO. **The Science of Legislation.** Translated from the Italian by Richard Clayton. London: T. Ostell, 1806. 2 vols. This work, regarded as a classic of jurisprudential theory, is unfortunately obsessed with the pronatalist notion that celibacy is opposed to the "progress of population" (cf. e.g., vol. 2, p. 4).

4071. GREY, THOMAS C. **The Legal Enforcement of Morality.** New York: Knopf, 1983. 212 pp. Textbook with many short quotations from legal opinions and articles. See "Sexual Freedom and the Constitution," pp. 37-102.

4072. HARRIS, ROBERT N. "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality," *UCLA Law Review*, 14 (1966-67), 581-603. Society is seen as dominated by a "condemn or condone" syndrome with regard to sexual law reform. Argues that there is no criminal harm in homosexual behavior in private between consenting adults, as long as there is no underlying need to increase the population.

4073. HART, HERBERT LIONEL ADOLPHUS. **Law, Liberty and Morality.** Stanford: Stanford University Press, 1963. 88 pp.

Concurring with the ideas of J. S. Mill and the Wolfenden Report, Hart (a major English legal philosopher) refutes Lord Devlin's arguments for enforcing morality through legal sanctions. On Hart see: Neil MacCormick, **H. L. A. Hart** (Stanford: Stanford University Press, 1981; 184 pp.; esp. pp. 150-53); and the bibliographical surveys of C. F. Cranor, **Criminal Justice and Ethics**, 2 (1983), 59ff., and Stephen W. Ball, *ibid.* (1984), 68ff.

4074. HEASMAN, D.J. "Sexuality and Civil Liberties," **Political Quarterly**, 48 (1977), 313-37.

Opposes gay rights on campus, questioning the value of "legally coerced acceptance." See reply by Rodney Barker, *ibid.*, 49 (1978), 99-102.

4075. HILLER, KURT. **Das Recht über sich selbst: eine strafrechtsphilosophische Studie.** Heidelberg: Carl Winter, 1908. 114 pp.

In this pathfinding work (the author's doctoral dissertation), the concept of the right to control one's body is examined with reference to suicide, abortion, incest, duelling, homosexuality, and bestiality. See "Homosexualverkehr," pp. 67-89.

4076. INTERNATIONAL GAY ASSOCIATION. **IGA Pink Book 1985.** Amsterdam: COC, 1985. 192 pp.

This collective volume offers a series of essays on the legal situation for homosexuals and lesbians in several European countries, followed by a world survey of laws.

4077. KLARE, RUDOLF. **Homosexualität und Strafrecht.** Hamburg: Hanseatisches Verlags-Anstalt, 1937. 172 pp.

This monograph by a Nazi legal scholar defends the repressive legislation of the "Nordic tradition" as progressive. Despite much offensive, and fortunately dated material, this book does offer a world survey of relevant laws, updating the tables found in Magnus Hirschfeld, **Die Homosexualität des Mannes und des Weibes.** Second ed. (Berlin: Louis Marcus, 1920), pp. 841-69, which display the situation as of January 1, 1913.

4078. MACFARLANE, L. J. **The Theory and Practice of Human Rights.** London: Temple Smith, 1985. 193 pp.

This book contains much information on human rights practices and violations. The author also provides a number of personal opinions, including the assertion that the state may ban the promotion of a homosexual lifestyle on grounds of morality.

4079. MILL, JOHN STUART. **On Liberty.** London: J. W. Parker and Son, 1859. 207 pp.

Although this fundamental essay by the English thinker does not deal directly with sexual expression, its powerful and lucid advocacy of individual liberty has exercised a continuing and beneficial influence. There

are several modern editions with useful commentary.

4080. MONTESQUIEU, CHARLES LOUIS DE SECONDAT, BARON DE. **De l'esprit des loix**. Geneva: Barillot, 1748. 2 vols.

In this many-sided and perennially influential Enlightenment work on the foundations of law, see IV, 4; VI, 13; VII, 9; VIII, 12; XII, 4, 6, and 21; XXXIII, 17; XXIV, 15; and XXVI, 3. There have been many subsequent editions and several English translations.

4081. PRAETORIUS, NUMA (pseud. of Eugen Wilhelm). "Die strafrechtlichen Bestimmungen gegen die gleichgeschlechtliche Verkehr historisch und kritisch dargestellt," *JfsZ*, 1 (1899), 97-158.

Though uneven, this article is the earliest historical survey of antihomosexual legislation from ancient times to the time of writing. See also F. Wachenfeld, below.

4082. RICHARDS, DAVID A. J. **The Moral Criticism of Law**. Encino, CA: Dickenson, 1977. 278 pp.

See "Deviant Sexual Conduct and the Right of Privacy" (pp. 77-134), which discusses the problem of the unnatural; the constitutional right of privacy; love as a primary good; and the constitutionality of prohibiting sexual deviation.

4083. RICHARDS, DAVID A. J. **Sex, Drugs, Death and the Law: An Essay on Human Rights and Overcriminalization**. Totowa, NJ: Rowan and Littlefield, 1982. 316 pp.

Applies interdisciplinary perspectives to the problem of overcriminalization, suggesting a new approach grounded in a basic respect of the rights of persons and the foundations of American constitutional law. An impressive plea for decriminalization and legislative reform.

4084. RUBINSTEIN, AMNON. "The Enforcement of Morals in a Secular Society," *Israel Yearbook on Human Rights*, 2 (1972), 57-98.

On the Wolfenden Report, the Hart-Devlin controversy, and related matters.

4085. **Sexual Behaviour and Attitudes and Their Implications for Criminal Law: Reports Presented to the Fifteenth Criminological Research Conference (1982)**. Strasbourg: Council of Europe, 1984. 207 pp. (Collected Studies in Criminological Research, 21)

Six papers by Western European scholars treating national differences, changes in public opinion and scientific knowledge, "pressure groups" (including homosexuals), the age of consent, etc.

4086. SZASZ, THOMAS S. **Law, Liberty and Psychiatry**. New York: Macmillan, 1963. 281 pp.

One of a number of polemical libertarian works by this prolific author, who argues against the alliance of law and psychiatry to regulate personal conduct.

4087. WACHENFELD, FRIEDRICH. **Homosexualität und Strafgesetz: Ein Beitrag zur Untersuchung der Reformbedürftigkeit des 175 St.G.B.** Leipzig: Weicher, 1901. 148 pp.

German jurist's examination of the background of criminalization of homosexuality in canon, Roman and Germanic law. See the detailed review and critique by Numa Praetorius in: *JfsZ*, 4 (1902), 670-775.

B. ANCIENT, CIVIL, AND CANON LAW

Roman law, as codified at the behest of the Emperor Justinian in the 6th century, is the source of the civil law tradition which came to prevail on the European continent and, ultimately, through much of the world (with the major exception of the English-speaking countries; see XX.D-M). Canon law is the legal tradition of the Roman Catholic church, which came--in the sexual sphere as in others--to have a symbiotic relationship with the medieval civil law tradition.

4088. BIENER, FRIEDRICH AUGUST. **Geschichte der Novellen Justinian's.** Berlin: Ferdinand Dummler, 1824. 621 pp.

On Justinian's Novellae 77 and 141 and his persecution of sodomites in Byzantium, see pp. 23, 27, 44-46, 455-56, 470-71, 518, 526, 583-84.

- 4088A. CARPZOV [CARPZOVIUS], BENEDICT. **Practica nova imperialis Saxonica rerum criminalium.** Wittenberg and Leipzig, 1652.

The influential leader (1595-1666) of the German Practical School of legal scholars held that sodomites incur divine vengeance in the form of famines, plagues, wars, earthquakes, floods and "other general scourges of this kind" (Pars 11, Quaestio LXXVI, 5).

4089. CHRIST, JOHANNES FRIEDRICH. **Historia legis Scatiniae.** Halle: Johannes Christoph Krebsius, 1727. 27 pp.

To date the only comprehensive treatise (in Latin) on the obscure law of the Roman republic, the Lex Sca(n)tinia. See now, however, Saara Lilja, **Homosexuality in Republican and Augustan Rome** (Helsinki: Societas Scientiarum Fennica, 1983), 112-21.

4090. DAMHOUDER, JOOS DE. **Praxis rerum criminalium.** Antwerp: Beller, 1601.

One of several editions of a treatise first issued in 1554 in Louvain. See pp. 390-97 (chapter 98), where the learned author (1507-81) extends the boundaries of sodomy to include bestiality, demonism, necrophilia, and relations with heretics.

4091. D'AVACK, PIETRO AGOSTINO. "L'omosessualità nel diritto canonico," *Ulisse*, 3:18 (1953), 680-97. Well-documented study by a canonist on the history of church law.

4092. FLORENCE. REPUBLIC. **Statuti della Repubblica Fiorentina**. Edited by Romolo Caggese. Florence: Comune, 1910-21. 2 vols. See Chapter LIV (2, pp. 218-19), for a law of 1325 which prescribes castration for active sodomites and a fine for passive ones (if under age). An unusual provision in this otherwise typical Italian law of the period is the prohibition on composing or singing sodomite songs.

4093. GAUTHIER, ALBERT. "La sodomie dans le droit canonique médiéval," in: Bruno Rey (ed.), *L'érotisme au moyen âge*. Montreal: Aurore, 1977, pp. 111-22. Brief account of the canon law tradition; inferior to P. A. D'Avack, above.

4094. GOODICH, MICHAEL. "Sodomy in Medieval Secular Law," *JH*, 1 (1976), 295-302. Shows that in 13th and 14th century Europe kings and lawmakers strove to make secular law conform with Christian moral theology.

4095. LOBINGIER, CHARLES SUMNER. "Lex Christiana: The Connecting Link Between Ancient and Modern Law," *Georgetown Law Journal*, 20 (1931-32), 1-43, 160-95. Places in context the process whereby "the whole province of sex crimes was annexed by the church courts" (pp. 6, 160, 181).

4096. ORBACH, WILLIAM. "Homosexuality and Jewish Law," *Journal of Family Law*, 14 (1975), 353-81. On the whole an uncritical traditionalist compilation of Jewish law in relation to homosexuality from the Bible to contemporary responsa, but useful for the many references to traditional and modern sources.

4097. SABELLUS, MARCUS ANTONIUS (MARCO ANTONIO SAVELLI). **Summa diversorum tractatum**. New ed. Venice: Paulus Balleonium, 1707. 6 vols. The crime of sodomy is discussed with many learned references (4, pp. 128-32).

4098. SCHURIG, MARTIN. **Gynaecologia historico-medica, hoc est congressus muliebris: Consideratio physico-medico-forensis qua utriusque sexus**