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Legal Homophobia and the Christian Church

By REVEREND ELLEN M. BARRETT*

“Consider your verdict,” the King said to the jury. “Not yet, not yet!” the Rabbit hastily interrupted. “There’s a great deal to come before that.”

—Alice in Wonderland¹

Much of the current controversy over the rights of citizens who happen to be homosexuals makes one feel a definite kinship with Alice as she watches the trial. The long influence of the Christian Church on legalized homophobia should probably be analyzed by a priest who is also a lawyer and a sociologist, or perhaps through a collaboration between experts in the three fields. As a priest with a limited knowledge of law and sociology, I can only presume to point out some of the broader aspects of the interrelationship of Church and State on this issue, identify some trends, and make some assumptions based on the general conservatism of human nature in the mass.

Defining Terms

“Legal homophobia” includes both formal and codified sanctions against homosexual activity, applied by Church or State. With respect to the Church² there are both formal canons and penitential practice. Penitential practice refers to the accretion of practices between priest and penitent which in each generation have evolved into compilations of guidelines. The relationship between formal canons and penitential practice is therefore analogous to that between statutory law and common law. With respect to the secular sphere, this Article will briefly

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1. L. CARROL, ALICE IN WONDERLAND 114 (companion ed.).

2. The classic treatment of Christian scripture and tradition remains D. S. BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION (1955) [hereinafter cited as BAILEY]. An excellent, albeit more popular, presentation is H.M. HYDE, THE LOVE THAT DARES NOT SPEAK ITS NAME (1970) [hereinafter cited as HYDE].

examine the evolution of English statutory law regarding homosexual offenses.

The definition of Church is rather more vexed, but one must include, in modern times at least, all the institutionalized variations of the Christian theme. The situation in the United States is particularly complex as the several denominations vary widely in their attitudes toward the homosexual question and in their efforts to influence the position of civil law with regard to homosexual activity and persons. The issue is further obscured by the fact that the American Church and State are ostensibly kept separate by law, thereby masking the considerable interpenetration of the two.

Roots of American Legal Homophobia

The Atlantic crossing served as our founders' baptism, ridding them of the sins of Europe and enabling them to begin building the New Jerusalem on earth. Sociologists have traced much of this reforming Protestant identification with the New Israel into the modern era.³ The resulting "Civil Religion," which is mixed with more secular ideals, forms a guilding American mythos.⁴ Deeply imbedded in the process is a concern for purity and conformity to standards of behavior consonant with America's role as a Chosen People. Its manifestations vary from the recent fundamentalist attacks on homosexual civil rights ordinances to the McCarthy era equation of sexual nonconformity with Communist subversion.⁵ On the American scene, whether the prejudices leading to legal condemnation of homosexual behavior have direct and specific religious origins or emanate from a cultural mix in which religion may constitute only one element is difficult to sort out. Our legal tradition stems from that of England; an examination of that more homogeneous and restricted example provides insight into the Church's role in introducing homophobic laws into our secular context. First, however, we must consider its religious roots.

The Scriptural and Traditional Background to Religious Homophobia

Critical analysis shows that the Bible knows nothing of persons who are homosexual by nature. Its condemnations of same-sex relations are based on the assumption that these are willful perversions of

3. *See generally* R. BELLAH, *THE BROKEN COVENANT* (1975).

4. *Id.*

5. J. KATZ, *GAY AMERICAN HISTORY* 91-100 (1976).

God's natural order indulged in as a deliberate affront to the Creator. The fact that these practices were part of some heathen worship and were accepted in other instances by civilizations, such as the Hellenistic, that made apostasy attractive made Jewish and Christian elders alike concerned to keep their influence away from their flocks. The destruction of Sodom was not related by religious leaders to homosexual activity until the first century of the Christian era. The "homosexual interpretation" was motivated by a desire to keep Israel pure of the decadent influence of Graeco-Roman culture.⁶ Notwithstanding this interpretation, Christianity developed a clear cut condemnation of "homosexuality" and "sodomy" has passed into the language as synonymous with homosexual coitus.

The early and medieval Church was universally homophobic in both theory and practice. Christian emperors and authorities varied in the severity of their treatment of sodomists: Theodosius called for burning alive,⁷ while Justinian merely required confession, amendment of life, and penance under ecclesiastical supervision.⁸ Similarly, a random sample of canons issued by Church councils differ markedly. The Eastern Church worked out penalties roughly equivalent to those for adultery, requiring several years of public penance which would lead to gradual reinstatement as a communicant. Reinstatement, however, might be withheld until the penitent was *in extremis*.⁹ The Council of Elvira which sat in that Spanish town in 305-306 refused even deathbed communion to a confessed sodomite.¹⁰ Indeed, Spain seems to have been a puritan center. Almost four hundred years later the sixteenth Council of Toledo, in its third canon, called for degradation to secular rank for condemned clergy, exile, excommunication, flogging, and shaven heads.¹¹ This punishment was to be carried out *after* the civil authority had executed the sentence of castration required by Visigothic law.¹² Another example of Church and State working hand in glove is provided by the twelfth century Council of Nablouse, called jointly by King Baldwin II and Patriarch Garmund of Jerusalem. Its eighth canon called for the burning of sodomists, whether active or passive, and its tenth called for equal punishment of one who is forced to

6. BAILEY, *supra* note 2, at 1-28. Any other interpretation is inconsistent with a careful reading of the Hebrew text. *Id.* at 2-6.

7. CODE THEOD. 9.7.6.

8. See BAILEY, *supra* note 2, at 75.

9. See generally *id.* at 70-81.

10. *Id.* at 86.

11. *Id.* at 93.

12. *Id.* at 92.

submit to sodomy more than once and fails to report it.¹³

The Irish Penitentials were notable for their balance and moderation, although their prototypical handbooks of morals for confessors were condemned roundly by a variety of ecclesiastics who found their anonymity a challenge to established authority and their prescribed penances lax. Peter Damian harshly condemned them in his mid-eleventh century treatise, the *Liber Gomorrhianus*.¹⁴ What is particularly notable about the Penitentials is their tendency to regard homosexual offenses in much the same light as common adultery and to distinguish degrees of contact and culpability from a one-time only kiss up to habitual intercourse. In this respect, the Celtic Church, often viewed as severe and fanatical, may be seen to reflect the wisdom and compassion of the Eastern Church,¹⁵ rather than the barbarian-encouraged harshness of the Latin West.¹⁶

One particular medieval development of interest is the evolution of the French word "bougre" from its original meaning of Bulgarian heretic, through an intermediate stage meaning one whose heresy involved condemned sexual practices, to the equivalent of the relatively modern term "bugger" as it is used in English law to mean sodomite.¹⁷

Where either heresy or sodomy called for the death penalty the Church handed the convicted criminal over to secular authorities for execution. Although the Church could call for the death penalty as the appropriate punishment for certain crimes, it could not inflict it.¹⁸ This close cooperation between ecclesiastical and secular authority is evident in both conciliar decrees and less obscure cases. Almost every school child remembers Joan of Arc who, having been tried by the Church for heresy, recanted. When she repudiated her recantation the Church required burning, and she was handed over to the secular powers for execution.¹⁹

13. *Id.* at 95-96.

14. *Id.* at 100-11.

15. See text preceding note 9 *supra*.

16. See THE IRISH PENITENTIALS (L. Bieler ed. 1963.).

17. BAILEY, *supra* note 2, at 137-41; HYDE, *supra* note 2, at 36-37.

18. D. HAY, EUROPE IN THE 14TH AND 15TH CENTURIES 329 (1966).

19. The folk etymology of the appellation "faggot" for male homosexual reflects the medieval penchant for burning the "bougre" of whichever category. See 4 OXFORD ENGLISH DICTIONARY 19 (1933). The influence of the canon law upon common law tradition in general was recently examined in Bassett, *Canon Law and the Common Law*, 29 HASTINGS L.J. 1383 (1978).

England

England appears to have had no clear cut policy with regard to homosexual offenders prior to the reign of Henry VIII. In the absence of civil statutes homosexuals were probably dealt with, as elsewhere, by Church courts as sinners before transfer to the civil authority if the extreme penalty was called for.²⁰ What emerges from the chronicles of such commentators on Anglo-Norman society as Odericus Vitalis is a picture of what the chronicler thought ought to be rather than the actual practice of the times.²¹ Commenting on the homosexual practices of the Norman heirs of the Conqueror, he says they "were fit only to be burnt."²² The homosexual William Rufus' fatal hunting accident has been alleged to be an assassination by a homophobe. While the truth of this allegation is uncertain, it is clear that he was denied a Christian burial.²³

The early commentary on English law entitled *Fleta*, published in 1290,²⁴ together with *Britton*, which followed it, are the two major pre-Henrician authorities on the punishment of sodomy in England. *Fleta* states, "[T]hose who have dealings with Jews or Jewesses, those who commit bestiality, and sodomists, are to be buried alive"²⁵ Both Bailey and Hyde agree that this burial is a reference to a punishment for the evil-living (*corpore infames*) mentioned in Tacitus Germania, namely submersion in a swamp held down by a hurdle.²⁶ *Britton* calls for burning as punishment for sorcery, sodomy, heresy, and arson.²⁷ Although this appears consistent with previous Christian practice,²⁸ Hyde notes that:

[A]s the jurist Stephen observes, the statute of Henry VIII is "wholly inconsistent" with the view that *Fleta* and others stated the law correctly, "whereas it is not only consistent with but suggests the notion that the offense was till then merely ecclesiastical."²⁹

Referring to the practice of handing over condemned persons to the secular authorities for execution, Hyde states:

It is extremely improbable that in England they were thus "relinquished" and that their offense was ever punished in this way. Pol-

20. See HYDE, *supra* note 2, at 38.

21. See *id.* at 34.

22. BAILEY, *supra* note 2, at 123.

23. HYDE, *supra* note 2, at 33.

24. BAILEY, *supra* note 2, at 145.

25. *Id.*

26. *Id.*; HYDE, *supra* note 2, at 38.

27. BAILEY, *supra* note 2, at 146; HYDE, *supra* note 2, at 38.

28. See text accompanying note 7 *supra*.

29. HYDE, *supra* note 2, at 38 (footnote deleted).

lock and Maitland agree on this point with Stephen. "The Statute . . . which makes it a felony affords an almost sufficient proof that the temporal courts had not punished it and that no one had been put to death for it for a very long time past."³⁰

The State referred to is 25 Hen. 8, c. 6, which makes the "detestable and abominable Vice of Buggery" a capital felony in the law of the land and causes those found guilty "by verdict confession or outlawry" to be executed and their estates forfeit to the Crown. The wording that leads one to accept Pollock and Maitland's determination that the Church-State cooperation was inoperative is the prologue which states: "forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the Laws of this Realm, for the detestable and abominable Vice of Buggery." Thus it appears that the Crown did not simply make a civil felony out of a sin as in other interrelated places of legislation;³¹ rather it took over from the Church which appeared to have fallen down on the job.

What one must remember is that the years 1533-1534 were rife with Church-State controversies that made Henry II's arguments with Becket over the jurisdictional assignment of criminous clerks pale by comparison. Cobbett's digest of the business in Parliament surrounding 25 Hen. 8, c. 6, is particularly revealing in this regard. After dealing with the previous session's arrangements for the crowning of Anne Boleyn and a complaint for false imprisonment made against the Bishop of London, it goes on to state:

The next session begun [sic] on the 15th of Jan. 1534. The business of the first day was taken up in reading appointments of proxies for the absent lords; and an adjournment took place till the 17th. On which day, complaint being made to the house, that several wicked facts had been committed, every way worthy of death, but by the laws then in being, as the judges declared, were not punishable as they ought to be; it was thought proper to ordain, that whatever person, guilty of such wickedness, should endeavour to skreen [sic] himself from justice, by betaking himself to some consecrated place or sanctuary, he should lose the benefit of the church's protection; and, that all persons found guilty of sodomitical practices should suffer death for them.³²

The report then continues with an account of the annulment of the King's marriage to Katherine of Aragon. The divorce was uppermost in everyone's mind, and the Act of Supremacy and the dissolution of the monasteries were soon to follow. Like his father, Henry VIII fo-

30. *Id.* (quoting II F. POLLOCK & F.W. MAITLAND, HISTORY OF ENGLISH LAW 554-55 (1895)).

31. See text accompanying notes 7-8 *supra*.

32. I. COBBET, PARLIAMENTARY HISTORY OF ENGLAND, col. 520 (1806).

cused his efforts on two objectives—consolidation of power and increase of revenues. His particular area of concentration was the Church, with its parallel and foreign-backed hierarchy, its extensive land holdings, and its bulging coffers. Whether to ease his matrimonial or his financial woes, Henry's desire to undermine the jurisdiction of the Church over affairs, persons, and property was a part of this general campaign.³³ In addition to giving civil courts authority to try cases of buggery, it denied benefit of clergy to anyone in Holy Orders in such cases so that not even criminous clerks may plead that the proper place for them is a Church court. Compulsive heterosexual though Henry was, homophobia was not the principal motive behind 25 Hen. 8, c. 6, however much its passage and its subsequent mutations may have delighted homophobes.³⁴

Following up on this line, it is interesting to trace the fate of the statute during the remainder of the Tudor dynasty, a time in which the question of religious secession from Rome was still unsettled. During the reign of Edward VI the act reappears without forfeit of estates, with a time limit of six months from the date of the alleged offense in which to report it, and with the stipulation that no witness be admitted who would profit by the death of the prisoner.³⁵ Under Mary the act was repealed, and no substitute was entered, the Catholic monarch evidently intending to restore the jurisdiction of the ecclesiastical courts. Elizabeth I revived the original Henrician act in full,³⁶ and it remained in effect until George IV³⁷ revised it to require proof of penetration but not of emission of semen.

Not until 1861 was the penalty for sodomy reduced from life imprisonment to ten years, and attempted sodomy or "indecent assault" treated as a misdemeanor with penalties of three to ten years penal servitude or up to two years hard labor.³⁸ The Criminal Law Amendment Act of 1885³⁹ added procurement and included private consensual acts to the list of misdemeanor offenses. The Act remained in effect in England and Wales until the Sexual Offenses Act,⁴⁰ which embodied the Wolfenden reforms, became law on July 27, 1967.

33. See 25 Hen. 8, c. 6 (1536).

34. See BAILEY, *supra* note 2, at 147-48.

35. 2 & 3 Edw. 6, c. 29 (1548).

36. 5 Eliz. 1, c. 17 (1562).

37. 9 Geo. 4, c. 31, §§ 15, 18 (1828).

38. 24 & 25 Vict., c. 100, §§ 61-62 (1861).

39. 48 & 49 Vict., c. 69 (1885).

40. The Sexual Offenses Act, 1967, c. 60.

Present Day Church Involvement in Laws Concerning Homosexual Behavior

While religious grounds were often used to bolster homophobic laws, the recent Wolfenden Report⁴¹ and the Sexual Offenses Act,⁴² which permit consenting adults privately to engage in sexual activity appropriate to their natures, was wholeheartedly supported by representatives of the Established Church. In the United States distinguished churchmen and women of various denominations have actively championed the repeal of sodomy laws, and, more particularly, favored ordinances guaranteeing the civil rights of homosexuals.⁴³ Unhappily, American churchpeople have also led the opposition to such reforms, as in Dade County, Florida. This division is illustrated by the fact that the support and the opposition to the recent St. Paul, Minnesota, homosexual rights ordinance were said to be led by Baptist clergymen.⁴⁴

Notwithstanding the virtually anticlerical origins of the first English felony statute regarding homosexual offenses, the Church, once accustomed to its new role, for several centuries supported the overt intent of the Act, the punishment of convicted sodomites. In the public mind, the minds of members of Parliament, and the minds of justices presiding over trials from that of the Rev. Nicholas Udall in 1541⁴⁵ to that of his fellow playwright Oscar Wilde⁴⁶ and beyond into our own century, the statute's ironic origin is irrelevant, as its effect was to continue the condemnation of homosexual activity, a Church tradition from St. Paul to the present. Similarly, if most Americans were asked what they believed to be the origins of legal homophobia in this country, they would most likely mention the continuing opposition to homosexuality in the Western Christian tradition. The most erudite might cite English law as the immediate progenitor of our own, but would

41. "The Report of the Committee on Homosexual Offenses and Prostitution," in *THE WOLFENDEN REPORT* (1963). For a commentary on the famous Hart/Devlin debate which centered on the interpretation of the Wolfenden Report, see Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957, 990-93 (1979).

42. The Sexual Offenses Act, 1967, c. 60.

43. See, e.g., Sermon by the Right Reverend C. Kilmer Myers, Sept. 3, 1978 (in archives of Grace Cathedral, San Francisco); The Right Reverend Paul Moore, Jr., *Open Letter to Integrity Members and Friends*, Newsletter of Integrity/Episcopal Gay Society, New York (July 1978).

44. San Francisco Chronicle, April 25, 1978, at 5, col. 1.

45. This was the first instance of official action against a homosexual. HYDE, *supra* note 2, at 41.

46. *Id.* at 138-52.

think it a continuation of the Christian homophobic tradition rather than a small link, through the Henrician act, in the process of the indigenization and secularization of English ecclesiastical jurisdiction.

Notwithstanding these subtleties, the Church is greatly responsible for the legal disabilities suffered by homosexuals throughout history. Yet there have always been Church members who have sought to mitigate the fire-and-brimstone severity of the zealously puritanical, even to the point of specific legal guarantees of homosexual rights as citizens.

The recent controversy in California over the Briggs Initiative is indicative of a number of coming tests for the churches. Will they support laws which prejudice homosexuals? Will they stand aside claiming that politics is not the province of the Church? Will they see their Gospel as a growing and a learning process and apply it even to those whom they have traditionally rejected? Given America's religious diversity, we will most likely see churchpeople taking all these positions. Whatever the outcome, the Church will continue to exert a strong influence on laws concerning homosexuality. One wonders how it could be otherwise, short of disenfranchising all professing Christians.

