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Book Review

JUDGING HOMOSEXUALS: A HISTORY OF GAY PERSECUTION IN QUEBEC AND FRANCE, by Patrice Corriveau, translated by Käthe Roth¹

ROBERT LECKEY²

SCHOLARS OF THE LAW'S CHANGING TREATMENT of those who engage in same-sex intimacy often trace progress in terms of movement from the decriminalization of sodomy or “unnatural acts,” through the enactment of anti-discrimination measures, to the recognition of same-sex marriage. At a recent conference on human rights, sexual orientation, and gender identity, however, a fellow panelist of mine argued rightly that the journey starts higher upstream, so to speak, with the abolition of the death penalty for same-sex sexual activities. At least five countries continue to impose the death penalty for at least some form of same-sex intercourse, while dozens more—many of them members in good standing of the Commonwealth—continue to imprison individuals for it.³ Patrice Corriveau's *Judging Homosexuals: A History of Gay Persecution in Quebec and France* traces the full trajectory of the journey in Quebec and France. Happily, writing about the abolition of the death penalty for sodomy in those jurisdictions is necessarily historical.

Judging Homosexuals is a translation of *La répression des homosexuels au Québec et en France: Du bûcher à la mairie*,⁴ a sociological and criminological study of the legal system's handling of homosexuality and same-sex conduct in

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1. (Vancouver: UBC Press, 2011) 226 pages.
 2. Associate Professor and William Dawson Scholar, Faculty of Law and Paul-André Crépeau Centre for Private and Comparative Law, McGill University.
 3. Eddie Bruce-Jones & Lucas Paoli Itaborahy, *State-Sponsored Homophobia: A World Survey of Laws Criminalizing Same-Sex Sexual Acts Between Consenting Adults* (Brussels: International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2011), online: <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2011.pdf>.
 4. (Sillery: Septentrion, 2006).

Quebec and France over the past four centuries. Corriveau explores the criminal law's "complete reversal ... through which the 'homosexual' went from pariah par excellence, his behaviour punishable by the death penalty, to citizen recognized by and protected under the law."⁵ He insists, reasonably, that the book is "not a historical study of homosexuality per se."⁶ Corriveau undersells the book, however, when he suggests that its contribution is limited to "a better understanding of the legislative changes that have occurred in Quebec and France with regard to the social reaction to homosexuality."⁷ While there is a focus on legislation, Corriveau's book also attends to administrative and judicial elements of state regulation, including police, prosecution, and sentencing practices. Moreover, his presentation of the changing discourses about homosexual conduct—including the major shift from religion to science or medicine—illuminates social attitudes more widely.

Corriveau's book is divided into five substantive chapters, organized chronologically, and a conclusion. Chapter one surveys—a bit dizzily—the treatment of same-sex conduct from ancient Greece to the seventeenth century. For the remaining chapters, the geographical scope narrows to the areas of present-day France and Quebec. Chapter two covers the period from 1670 to the British Conquest of New France in 1759, during which time the prohibitions of sodomy reflected religious doctrine. Chapter three traces the thread from the Conquest through the nineteenth century, a journey captured as "From the Sodomist to the Invert, or From the Priest to the Physician," when scientific discourse replaced religious discourse in pride of place. Chapter four moves from the late nineteenth century to the sexual revolution, "From Invert to Homosexual." Chapter five, going from the 1970s to the present, has as its subtitle "From Prison to City Hall." In the conclusion, Corriveau wonders provocatively whether pedophiles have replaced homosexuals as the objects of a vilifying discourse that produces them as sexual perverts. The book's starting point is that "it is the law that creates the crime," and Corriveau portrays the history of the legal repression of homosexuality as "a spectacular example of social deconstruction that presents the evolutionary and constructed nature of what society has defined as 'crime' and 'criminal.'"⁸

The comparison of France and Quebec is interesting because, despite these jurisdictions' "cultural roots in common," legal regulation and the prevailing

5. *Supra* note 1 at xii.

6. *Ibid* at xi.

7. *Ibid*.

8. *Ibid* at 6.

discourses in each place changed at different times.⁹ Same-sex conduct was decriminalized in revolutionary France at the end of the eighteenth century, but it remained criminalized in Canada until Pierre Elliot Trudeau's omnibus bill of 1969.¹⁰ At a time when Lower Canada retained the religious characterization of "sodomist," the prevailing discourse in France had switched to legal or medical terms (respectively, "pederast" and "invert").¹¹

While any reader will learn much about the discursive and material regulation of same-sex conduct from Corriveau's book, it also holds valuable methodological lessons for legal scholars. When studying the changing legal treatment of homosexuality, legal scholars are tempted by two errors of exaggeration. The first is to exaggerate the influence of legal arguments and judicial precedents in bringing about change. English-language narratives of the gay legal movement in Canada typically make much of the Supreme Court's recognition of "sexual orientation" as an analogous ground of discrimination for the purposes of section 15 of the *Canadian Charter of Rights and Freedoms*.¹² The implication is that the Court's inclusion of gay men and lesbians in the *Charter* was the critical causal factor for much that followed. Corriveau's two case studies provide helpful counter-examples of legislative change not propelled by identity claims advanced under a bill of rights. He addresses the omission of "crimes against nature" from France's penal law following the Revolution.¹³ He situates that change in a broader "laicization of the public order, which put nonviolent sexual practices performed in private beyond the field of legal intervention."¹⁴ Corriveau also notes that in 1977, Quebec added sexual orientation to the list of prohibited grounds of discrimination in section 10 of its *Charter of Human Rights and Freedoms*.¹⁵ That

9. *Ibid* at 3.

10. *Ibid* at 123-24; *Criminal Law Amendment Act, 1968-69*, SC 1968-69, c 38. As Corriveau notes, Trudeau's bold reforms did not effect a full decriminalization. Instead, they carved out exceptions to the criminalization of same-sex conduct. Even today, anal intercourse remains an indictable offence, punishable by imprisonment for up to ten years. Exceptions apply to a husband and wife or to any two persons at least eighteen years old who, in both cases, engage consensually in anal intercourse "in private." *Criminal Code*, RSC 1985, c C-46, s 159. Corriveau also mentions that s 159 has been declared unconstitutional by two provincial appellate courts as unjustifiable discrimination, as it imposes a higher age of consent for anal intercourse than for other sexual activity. *Ibid* at 126-27, citing *R c Roy*, [1998] RJQ 1043, 161 DLR (4th) 148 (CA); *R v CM* (1995), 23 OR (3d) 629, 41 CR (4th) 134 (CA).

11. *Supra* note 1 at 4.

12. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15(1) [*Charter*]; *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

13. *Supra* note 1 at 54.

14. *Ibid*.

15. *Ibid* at 128; see *Charter of Human Rights and Freedoms*, RSQ c C-12, s 10 [*Quebec Charter*].

legislative initiative contrasts with the addition of sexual orientation to other human rights statutes by constitutional compulsion as the result of litigation under the Canadian *Charter*, the best-known instance of which was *Vriend v Alberta*.¹⁶ The history of sexual orientation and the Quebec *Charter*, which may not be familiar to English readers outside Quebec, might shift the focus of gay rights narratives away from constitutional litigation and illuminate the abiding potential in political efforts to advance agendas in the legislative forum.¹⁷

The second exaggeration, noted by socio-legal scholars, concerns the extent to which the enactment of a law leads to its consistent enforcement. The author's attention to discourse—including reliance on Michel Foucault's *History of Sexuality*¹⁸—might characterize a book located anywhere in the social sciences or humanities, including in law. His distinctive criminological perspective is evident, however, in the sources he deems relevant. They include archival data relating to prosecutions, convictions, and other police interventions. At times, his attention to such sources reveals a gap between the formal prohibitions on same-sex conduct and its actual punishment. One example is the contrast between the “strongly repressive criminal doctrine” of the *ancien régime* in France and the on-the-ground “practice of leniency, with cases often settled out of court.”¹⁹ A review of the literature on punishments for sodomy reveals that it often functioned as an aggravating, rather than the sole, factor responsible for an exemplary sentence such as death by hanging.²⁰ Data on the number of

16. [1998] 1 SCR 493, 156 DLR (4th) 385; see *Human Rights, Citizenship and Multiculturalism Amendment Act, 2009*, SA 2009, c 26.

17. In a way appropriate for his criminological focus on the repression of homosexuality, Corriveau weaves back and forth between the Parliament of Canada, for matters concerning the criminal law and marriage, and the legislature of Quebec, for matters concerning private law and social programs. Other disciplinary perspectives would, complementarily, add the complexities of federal-provincial interaction to the story. For an inscription of Quebec's policy on sexual minorities in the larger nationalist project, see Carl F. Stychin, “Queer Nations: Nationalism, Sexuality and the Discourse of Rights in Quebec” (1997) 5:1 *Fem Legal Stud* 3.

18. Michel Foucault, *The History of Sexuality: Volume I – An Introduction*, translated by Robert Hurley (New York: Pantheon Books, 1978).

19. *Supra* note 1 at 32. One punishment for those convicted of sodomy was enlistment in the army, an obvious irony given that, across the ocean in New France, all of the reported cases of sodomy came from the military, “a milieu characterized by the physical proximity of the militiamen” (*ibid* at 33, 49). On tortuous efforts to regulate same-sex conduct in the United States army, see Janet E. Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Durham: Duke University Press, 1999).

20. *Supra* note 1 at 33-34. Men found guilty of sodomy who were put to death in seventeenth-century France had also committed other crimes: poisoning and rape in one case; child abduction, rape, blasphemy, and resisting justice in another (*ibid* at 33).

convictions for sodomy or bestiality in Quebec provide another example. From 1946–1969, a total of 1,162 people were found guilty. The numbers spiked in 1954—from 97 the previous year to 212—and Corriveau rightly does not suppose that same-sex activity shot up in that year. One causal factor he considers is amendments to the *Criminal Code*, which reduced the penalties for sodomy and might have led judges to find more accused persons guilty. It would be natural to expect that legal scholars, who often focus—to their detriment—on written law, should address this possibility. The criminological perspective is evident from other factors mentioned by Corriveau, such as the election of Jean Drapeau as mayor of Montreal on a promise “to fight the social scourge of homosexuality.”²¹ Similarly, Corriveau connects the increased police interrogation of homosexuals in 1960s Montreal with the 80 per cent increase in the number of police officers in the city.²² Criminological inquiry also yields insights with respect to the repression of homosexuality in New France. Remarkably, although the criminal law prohibited same-sex conduct, Corriveau found only three cases of conviction for unnatural acts under the French regime in Quebec prior to the British Conquest.²³ Corriveau connects that low rate of prosecution to the difficulty, for the forces of order, of controlling such a wide territory, as well as to self-regulation by the rural population.²⁴ These findings and many others in Corriveau’s work will warn legal scholars against inferring too much about on-the-ground practices from the statute book.

Beyond the methodology, the fluctuation in the repression of homosexual conduct illustrates how many factors condition attitudes towards homosexuality. The story in Quebec is of a long, gradual liberalization of the law, with fluctuations in prosecution and punishment under given laws. By contrast, France shows a radical turning back from liberalism, repudiating its policy of 150 years by intensifying repression during the Second World War. Corriveau writes that France’s change in legal policy occurred in the context of “economic, demographic, and political losses” together with the reclamation of Christian values.²⁵ The criminal law was reformed “to respond to the prerogatives of the pro-birth and nationalist policies in force since the end of the First World War,” imposing an

21. *Ibid* at 98. A larger context, including a dose of police perfidy, surrounded Drapeau’s platform promise “to rid the city of its vice and corruption.” D’Arcy O’Connor, *Montreal’s Irish Mafia: The True Story of the Infamous West End Gang* (Mississauga: John Wiley & Sons Canada, 2011) at 44.

22. *Supra* note 1 at 100.

23. *Ibid* at 40–41.

24. *Ibid* at 40, 47.

25. *Ibid* at 167.

age of consent of twenty-one for “indecent or unnatural acts.”²⁶ Moreover, in 1960 Charles de Gaulle “placed homosexuality on the list of social evils.”²⁷ While the decriminalization of sodomy in Revolutionary France appears anomalous, France’s intensified repression during times of crisis in the twentieth century is a sobering reminder that sexual minorities in the global North should neither take their currently enjoyed freedoms for granted nor assume that the graph of permissiveness moves only upward.

Given the inattention of many Canadian scholars working in English to research published in French, UBC Press should be applauded for its initiative in publishing an English translation of this book. One may also credit the Press for its prudent choice to prioritize the text’s fluidity and accessibility by selecting a literary translator, Käthe Roth. Nevertheless, a couple of choices in translating key notions merit mention. While a translation may often lack the vividness of the original, or resonate differently for readers in the destination language, the translation of the subtitle could have been more faithful to the original. There is a big difference between “A History of Gay Persecution in Quebec and France” and “Du bûcher à la mairie.” Admittedly, “à la mairie” may have resonances for French readers that “to city hall” would fail to convey to readers of the English text.²⁸ An avoidable semantic loss occurs when relegating “from the stake to the town hall” from title to text.²⁹ Presumably, the change was driven by marketing considerations, including the need to foreground the key geographical indicators.

The original text is complex and translating it was unquestionably challenging. It is therefore regrettable that the translation appears not to have passed by a jurilinguist for a final read. For example, it overlooks a distinction in the law’s treatment of family life outside marriage. *Judging Homosexuals* states that France has since 1999 defined “cohabitation.”³⁰ The term in the French original is not “cohabitation,” which is also a word in French, but “concubinage,” which is itself also a word in English.³¹ As proof that the terms are not interchangeable, consider that the legislature of Quebec in 2002 replaced the term “concubinary” with “*de facto* spouse.”³² Furthermore, the lexical distinction accompanies different

26. *Ibid* at 106.

27. *Ibid* at 167.

28. See discussion of civil marriage as “un sacrement civil, républicain par excellence, la gloire des municipalités, une institution fondatrice” in Jean Carbonnier, *Flexible droit: pour une sociologie du droit sans rigueur*, 10th ed (Paris: LGDJ, 2001) at 310.

29. *Supra* note 1 at xii, 168.

30. *Ibid* at 151.

31. *Supra* note 4 at 184.

32. *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6.

legislative policies on conjugal matters; a prominent Quebec family law scholar characterizes Quebec's policy as one of "neutrality" in contrast with the French legislators' refusal to recognize the legitimacy of de facto spouses.³³ In a few unhappy instances, the translation is simply wrong and risks misleading readers. In fairness, the translation from French to English of words derived from the Latin terms *juridicus* and *judicialis* is not straightforward. It depends on the context. Given the author's Foucauldian sensitivity to multiple regulatory discourses and sites of governance, the most regrettable instance is the translation of "juridique" as "judicial," thus rendering "la répression juridique" as "judicial repression."³⁴ The appropriate translation here, *juridical* repression, would have focused not only on judges and courts, but also on the broader legal apparatus.³⁵

Beyond the challenges of legal translation, Corriveau's book occasions reflection on the complexity of lexical choices regarding sexual minorities. For example, in a language with no equivalent term for it, "queer" may be used as less challenging and confrontational than "lesbian" and "gay."³⁶ *Judging Homosexuals* reminds readers of English that the protocols around the use of words move at different paces in different languages. The term "homosexuel" remains more widely and less pejoratively used in French than is "homosexual" in English. Corriveau is alert to the distinct socio-political contexts of homosexuality;³⁷ given the book's focus on the changing discursive construction of those who engage in same-sex activities, it would have been unthinkable to apply the term "gay" anachronistically. That term's connotations of late twentieth-century identity politics and Pride parades preclude it from use in reference to past centuries. Yet some readers will stumble at the repeated use of "homosexual" as adjective and noun.³⁸ Perhaps some variation on "same-sex" might have been used.

33. Alain Roy, "L'union de fait en droit français et belge: une politique législative aux antipodes du droit québécois" in Générosa Bras Miranda & Benoit Moore, eds, *Mélanges Adrian Popovici: Les couleurs du droit* (Montreal: Thémis, 2010) 143 at 146-47.

34. *Supra* note 4 at 15, 102; *supra* note 1 at 6, 81.

35. See also the rendering of "pensions alimentaires" as "food allowances," a term suggestive of a public distributive program, rather than of spousal support under the private law of the family. *Supra* note 4 at 160; *supra* note 1 at 130.

36. Jon Binnie, "Queer Theory, Neoliberalism and Urban Governance" in Robert Leckey & Kim Brooks, eds, *Queer Theory: Law, Culture, Empire* (Abingdon: Routledge, 2010) 21 at 22.

37. *Supra* note 1 at 5.

38. For example, *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577, is characterized as concerning "homosexual common-law unions," and contemporary popular television programs in Quebec are said to deal on a weekly basis with "the homosexual issue" ("la question homosexuelle" in the original French). *Supra* note 1 at 138, 141; *supra* note 4 at 173.

Thanks to this translation published by UBC Press, Patrice Corriveau's book will undoubtedly find a new audience, as it richly deserves. While it is published in the Sexuality Studies series, it might equally have appeared in Wesley Pue's exciting Law and Society Series. *Judging Homosexuals* invites those interested in law's construction of deviance and recognition of difference to take a long-term view, to expand the set of relevant sources, and to remain alert for the complex interaction between legislated and unlegislated norms in multiple sites.