

(b) *With Persons of the Same Sex—Pederasty; Sodomy in its Strict Sense.*

German law takes cognizance of unnatural sexual relations only between men; Austrian, between those of the same sex; and, therefore, unnatural relations between women are punishable.

Among the immoralities between men, pederasty (*immissio penis in anum*) claims the principal interest. Indeed, the jurist thought only of this perversity of sexual activity; and, according to the opinions of distinguished interpreters of the law (Oppenhoff, "Stgsb.," Berlin, 1872, p. 324, and Rudolf and Stenglein, "D. Strafgesb. f. d. Deutsche Reich," 1881, p. 423), *immissio penis in corpus vivum* belongs to the criminal act covered by § 175.

According to this interpretation, legal punishment would not follow other improper acts between male persons, *so long as they were not complicated with offense to public decency, with force, or undertaken with boys under the age of fourteen*. Of late this interpretation has again been abandoned, and the crime of unnatural abuse between men has been assumed when merely acts *similar to cohabitation* were performed.¹

The study of contrary sexual instinct has placed male love of males in a very different light from that in which it, and particularly pederasty, stood at the time the statutes were framed. The fact that there is no doubt about the pathological basis of many cases of contrary sexual instinct shows that pederasty may also be the act of an irresponsible person, and makes it necessary, in court, to examine not merely the deed, but also the mental condition of the perpetrator.

The principles laid down previously must also be adhered to here. Not the deed, but only an anthropological and clinical judgment of the perpetrator can permit a decision as to

¹ How difficult, unpleasant, and dangerous for the jurist judgment of these "coitus-like" acts for the establishment of the objective fact of the crime may be is well shown by an article on the punishableness of male intercourse, in the *Zeitschr. f. d. gesammte Strafrechtswissenschaft*, Bd. vii, Heft 1, as well as by a similar one in *Friedreich's Blätter f. ger. Medicin*, 1891, Heft 6. *Vide*, further, Moll, *Conträre Sexualempfindung*, p. 223 *et seq.*, and Bernhardi, *Der Uranismus*, Berlin, 1882.

whether we have to do with a perversity deserving punishment, or with an abnormal perversion of the mental and sexual life, which, under certain circumstances, excludes punishment. The next legal question to settle is whether the contrary sexual feeling is congenital or acquired; and, in the latter case, whether it is abnormal perversion or moral perversity.

Congenital contrary sexual instinct occurs only in predisposed (tainted) individuals, as a partial manifestation of a defect evidenced by anatomical or functional abnormalities, or both. The case becomes clearer, and the diagnosis more certain, if the individual, in character and disposition, seems to correspond entirely with his sexual peculiarity; and if the inclination toward persons of the opposite sex is entirely wanting, and horror of sexual intercourse with them is felt; and if the individual, in the impulses to satisfy the contrary sexual instinct, shows other anomalies of the sexual sphere, such as more pronounced degeneration in the form of periodicity of the impulse and impulsive conduct, and is a neuropathic and psychopathic person.

Another question concerns the mental condition of the urning. If this be such as to remove the possibility of moral responsibility, then the pederast is not a criminal, but an irresponsible insane person. This condition in congenital urnings is apparently less frequent than another. As a rule, these cases present elementary psychical disturbances, which do not remove responsibility. But this does not settle the question of the responsibility of the urning. The sexual instinct is one of the most powerful organic needs. There is no law that looks upon its satisfaction outside of marriage as punishable in itself; if the urning feels perversely, it is not his fault, but the fault of a condition natural to him. His sexual instinct may be æsthetically very repugnant, but, from his stand-point, it is natural. And, too, in the majority of these unfortunates, the perverse sexual instinct is abnormally intense, and their consciousness recognizes it as nothing unnatural. Thus they fail to have moral and æsthetic ideas to assist them in resisting the instinct. Innumerable normally constituted men are in a position to

overcome the desire for satisfaction of their libido without suffering from it in health. Many neuropathic individuals,—and urnings are almost always neuropathic,—on the contrary, become nervously ill when they do not satisfy the sexual desire, either as Nature prompts or in a way that is for them perverse.

The majority of urnings are in a painful situation. On the one hand, there is an impulse toward persons of their own sex that is abnormally intense, the satisfaction of which has a good effect, and is natural to them; on the other, is public sentiment which stigmatizes their acts, and the law which threatens them with punishment. Before them lies mental despair,—even insanity and suicide,—at the very least, nervous disease; behind them, shame, loss of position, etc. It cannot be doubted that, under these circumstances, states of necessity and compulsion may be created by the unfortunate natural disposition and constitution. Society and the law should understand these facts. The former must pity, and not despise, such unfortunates; the latter must cease to punish them,—at least, while they remain within the limits which are set for the activity of their sexual instinct.

As a confirmation of these opinions and demands concerning these step-children of Nature, it is permissible to reproduce here the memorial of an urning to the author. The writer of the following lines is a man of high position in London:—

“You have no idea what a constant struggle we all—particularly those of us that have the most mind and finest feelings—have to endure, and how we suffer under the prevailing false ideas about us and our so-called immorality.

“Your opinion that the phenomenon under consideration is primarily due to a congenital ‘pathological’ disposition will, perhaps, make it possible to overcome existing prejudices, and awaken pity for poor, ‘abnormal’ men, instead of the present repugnance and contempt. Much as I believe that the opinion expressed by you is exceedingly beneficial to us, I am still compelled, in the interest of science, to repudiate the word ‘pathological’; and you will permit me to express a few thoughts with respect of it.

“Under all circumstances the phenomenon is anomalous; but the word ‘pathological’ conveys another meaning, which I cannot think suits this phenomenon; at least, as I have had occasion to observe it in very many cases. I will allow, *a priori*, that, among urnings, a far