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Our Straight-Laced Judges: The Legal Position Of Homosexual Persons In The United States*

By RHONDA R. RIVERA** ***

Purpose and Scope

The purpose of this Article is to provide a comprehensive picture of the legal position of homosexual persons in the United States today. It is hoped that this survey approach will provide, for the legal scholar, the practicing attorney, and the interested layperson, an understanding of the multiplicity of situations in which a person’s sexual orientation interfaces with the law. Secondly, it is hoped that this Article will provide a solid basis from which to begin an in-depth analysis of any legal problem faced by homosexual persons. This survey will examine the judicial response to homosexual issues, primarily focusing on civil matters rather than criminal ones. Where particularly significant, recent legislative actions will be called to the reader’s attention. Every civil case dealing with homosexuality that was available to this researcher is described in this Article. By close attention to the text and particularly the footnotes, the reader can also locate most currently available and pertinent law review articles.

This Article will make no attempt to examine the various theories, either psychological, sociological, or religious, seeking to explain the

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2. See J.H. GAGNON & W. SIMON, SEXUAL CONDUCT: THE SOCIAL SOURCES OF
presence of homosexual individuals in society. It is assumed that there are approximately twenty million\(^4\) homosexual Americans today, and that they come from all walks of life, all racial groups, all ethnic groups, and all religious groups.\(^5\) Moreover, homosexual persons are found among both sexes. It is the basic premise of this Article that the legal problems of such a large group of people, whose very economic and social diversity causes them to intersect with our institutions at all levels, are an important and worthwhile area of concern for the legal scholar, the legal practitioner, and the layperson. While it is the firm belief of the author that homosexual persons are entitled to equal treatment before the law, it will be the deviation from this ideal that is, unfortunately, the focus of this survey Article.

**Definitions**

Because the focus of this Article is the judicial treatment of homosexual individuals, it is important to define precisely the characteristics of a homosexual person. The simplest definition may be that a homosexual person is one who engages in a sexual act with a person of the same sex.\(^6\) This definition causes immediate problems. Do we label a person “a homosexual” if he or she behaves in this manner once? Twice? How often does same-sex behavior have to occur for the actor to earn the label? Does it matter when one engages in this type of conduct? During puberty? While heterosexually married? What kind

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\(^5\) Hooker, Homosexuality, in National Institute of Mental Health Task Force on Homosexuality 11 (1972).

of behavior are we talking about? Strong emotional attachment to a person of the same sex? Holding hands and hugging? Kissing? Fantasies? Mutual masturbation? Fellatio? Cunnilingus? Sodomy? Is a person who announces his or her status but never engages in any same-sex sexual behavior considered “homosexual”? Is a celibate homosexual person really “a homosexual”?

Kinsey recognized some of these problems and, consequently, examined sexual behavior on a continuum. At one end of the continuum is the exclusively heterosexual person (“0” on the Kinsey scale) who fantasizes about and acts sexually only with persons of the opposite sex. A “6” on the Kinsey scale is the exclusively homosexual person who fantasizes about and acts sexually only with persons of the same sex. Varying degrees of heterosexuality and homosexuality characterize persons in between. At the middle of the continuum (rated “3”) are those persons whose erotic arousal or overt experiences are equally heterosexual and homosexual. Kinsey’s rating scheme can be used to describe an entire life span or can be used in reference only to particular periods in a person’s life. Even this superficial discussion should illustrate that labeling a person “a homosexual” is a complex matter, medically or psychologically.

Courts have generally been uninterested in these distinctions. This Article will reveal that courts have treated a wide variety of persons as “homosexual” individuals. For example, the following persons have been labeled as “homosexual” and treated as such:

— a married father who engaged in same-sex behavior in his late teens,
— a man with a single conviction for a same-sex sex crime,
— a woman whose friends were bisexuals,
— a man who said he was a homosexual but never admitted any overt same-sex behavior,
— women in mannish attire,
— persons who exhibited characteristics and mannerisms which evi-
denced homosexual propensities.\textsuperscript{15}

The important point is that courts and judges have treated a variety of people as "homosexuals." Where, in fact, these persons fall on the Kinsey sexual behavior scale is unimportant for the purposes of this Article. If the courts treat a person as a "homosexual," then for the purposes of this Article, that person is a homosexual individual. For the remainder of this Article, the definition of a homosexual person is a person so labeled by the courts.

Homosexual individuals include both men and women. The term "homosexual person" as used in this article applies equally to persons of both sexes. The term "lesbian"\textsuperscript{16} refers specifically to homosexual women. There is no similar nonpejorative term exclusively for the male homosexual.\textsuperscript{17} The term "gay"\textsuperscript{18} is synonymous with the term "homosexual" and these two words will be used interchangeably throughout this Article.

This Article will not discuss the legal position of transsexual individuals.\textsuperscript{19} There is a popular, but incorrect, belief that transsexualism

\textsuperscript{16} D.J. West, Homosexuality 12 (1955); see Reese, The Forgotten Sex: Lesbians, Liberation, and the Law, 11 Willamette L.J. 354 (1975). The term lesbian is allegedly derived from the island of Lesbos, home of the famous Greek poetess Sappho. It is widely believed that Sappho was a homosexual woman.
\textsuperscript{17} Male homosexuals are usually called "faggots" by persons wishing to give offense. The term allegedly arose from the bundles of sticks used to burn homosexual persons alive during the middle ages. "Dyke" is the term of opprobrium for female homosexuals. Like the word "nigger," which is offensive only when used by nonblack persons, the words "fag- got" and "dyke" are offensive when used by nonhomosexual persons but permitted and even used affectionately among some homosexual individuals. The homosexual argot for a nonhomosexual person is a "straight" person.
\textsuperscript{18} There are varying theories as to how the word "gay" came to be synonymous with the word "homosexual." Some persons believe that it came from a story by Gertrude Stein entitled Miss Furr and Miss Skeene.

"She did not find it gay living in the same place where she had always been living. She went to a place where some were cultivating something . . . . She met Georgine Skeene there who was cultivating her voice which some thought was quite a pleasant one. Helen Furr and Georgine Skeene lived together then. Georgine Skeene liked travelling. Helen Furr did not care about travelling. She liked to stay in one place and be gay there. They were together then and travelled to another place and stayed there and were gay there. "They stayed there and were gay there, not very gay there, just gay there. They were both gay there, they were regularly working there both of them cultivating their voices there, they were both gay there. Georgine Skeene was gay there and she was regular, regular in being gay, regular in not being gay, regular in being a gay one who was not being gay longer than was needed to be one being quite a gay one. They were both gay then there and both working there then." Selected Writings of Gertrude Stein 563 (Van Vechten ed. 1962).
\textsuperscript{19} See Wein & Remmers, Employment Discrimination and Gender Dysphoria: Legal
and homosexuality are the same thing. A transsexual person is one whose psychosexual identity differs from his physiological sex. A male transsexual psychologically believes himself to be female, but his genitalia are male. A homosexual person is congruent in his or her psychosexual identity and physiological appearance. For example, a lesbian believes she is a woman and has female genitalia. She desires no change in her physiognomy because it already conforms to her psychosexual identity. The transsexual person deeply desires sexual reassignment surgery to conform body to mind. The erotic preference of a transsexual person is generally for a person of the opposite sex, although this may superficially appear to be a same-sex orientation. For example, since a male transsexual believes himself female, his erotic preference is for a male. Once sexual reassignment surgery conforms external body form to mental gender identity, the preference of most transsexuals is seen clearly as heterosexual. On the other hand, the homosexual woman, for example, knows mentally that she is a woman and wants to remain physically a woman, but her erotic preference is for another woman.

Homosexuality must also be distinguished from transvestism. A transvestite is a person who has a fetish of dressing in the clothing of

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20. A transsexual is an individual anatomically of one sex who firmly believes he or she belongs to the other sex. This belief is so strong that the transsexual is obsessed with the desire to have his or her body, appearance, and social status altered to conform to that of his or her "rightful" gender. Comment, Transsexualism, Sex Reassignment Surgery and the Law, 56 Cornell L. Rev. 963, 963 n.1 (1977) (citing Transsexualism and Sex Reassignment 487 (R. Green & J. Money eds. 1969)). The popular method of describing this situation is that the male transsexual feels like a woman trapped in a man's body. See Wein & Remmers, Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability, 30 Hastings L.J. 1075 (1979).

21. In her current research on matched samples of female transsexuals and lesbians, Dr. Anke Ehrhardt found that the transsexuals had fantasies that they were males while having sex relations with other women. This was not true of the lesbians. L. Scanzoni & V.R. Mollenkott, Is the Homosexual My Neighbor? 14, 144 (1978) (citing report by Dr. Ehrhardt at the Institute for Sex Research Summer Program, Bloomington, Indiana, July 28, 1977).

22. See Holloway, Transsexuality-Their Legal Sex, 40 U. Colo. L. Rev. 281, 282 n.6 (1968).
the opposite sex. The great majority of transvestites are heterosexual in their sexual preference.

Throughout this Article, the author has tried never to refer to anyone as "a homosexual". Rather, phrases such as homosexual individual, homosexual person, homosexual teacher, homosexual doctor, or homosexual sailor have been used. A person's sexual preference is but one part of his or her character, and acting upon it occupies a small part of his or her actual existence. Hence, the author has used the word "homosexual" only as an adjective which describes the sexual orientation of the individual rather than using "homosexual" as a noun which implies a being whose sole dimension is an erotic one.

Methodological Problems

There are a number of methodological problems involved in researching legal decisions dealing with homosexuality. The first and most obvious problem is the variety of legal subdisciplines which are involved. To examine comprehensively the legal position of the homosexual person, the legal researcher must examine labor law cases, domestic relations cases, administrative law cases, criminal cases, and constitutional law cases. Aside from the challenge to the abilities of the researcher, such a search requires familiarity with a large variety of indexes and digests. Dealing with so many areas is even more difficult since many indexes did not in the past, and some still do not, list cases on homosexuality under a separate topical heading. In fact, for years most indexes never had a single topic listing for homosexuality. Thus, the ferreting out of relevant decisions is often difficult.

25. A new study commissioned from the Kinsey Institute by the National Institute of Mental Health was to be published in late August, 1978. This study by Alan P. Bell and Martin S. Weinberg is entitled Homosexualities: A Study of Human Diversity Among Men and Women. Researchers for this new report discovered a wide diversity among gay persons and concluded that gay persons "are best understood when they are seen as whole human beings, not just in terms of what they do sexually." The Advocate, Aug. 23, 1978, at 8. According to Alan P. Bell, the report shows "that homosexuality is not . . . pathological and that all homosexuals cannot be lumped together." The report also indicates that homosexual individuals, like heterosexual individuals, differ widely in their living arrangements, occupations, social activities, and personal relationships. Moreover, the study indicates "that most homosexual persons have come to terms with their sexual orientation and are no more psychologically at odds with the world than heterosexuals." The Citizen Journal (Columbus, Ohio), Aug. 9, 1978, at 1. 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, 727n. 117 (1979). [hereinafter cited as Richards].
Second, the person who is attempting to locate decisions and information on a controversial and emotion-laden subject is often not provided the whole-hearted cooperation that researchers in less controversial fields enjoy. Researching and writing on a subject which many find personally objectionable often causes the researcher and/or writer to be socially stigmatized in a manner which is not conducive to open and free research.  

Third, judges in their opinions for a variety of reasons may choose never to use the word homosexuality.

Lastly, there is some evidence that cases involving homosexual issues are unpublished more often than are cases involving other issues.

Because of the various difficulties involved in the use of regular legal sources, the author has relied at times on information derived from nonlegal periodicals. Wherever possible, however, traditional legal sources have been utilized.

It is hoped that, in addition to gaining factual information, the reader of this Article will gain an understanding of current judicial attitudes toward homosexuality and an appreciation of the tenuous legal position of the homosexual person in the United States.

Employment and Related Occupational Discrimination

I. Private Employment

Although it is generally acknowledged that discrimination against homosexual persons is quite common in the private employment sec-
The exact extent of such discrimination is difficult to ascertain. Because homosexual individuals are not readily identifiable, data collection is difficult. Since presumably only the "known" or "recognizable" homosexual individual is fired, or not hired, it follows that other homosexual persons would do their best to remain unknown.

Despite the difficulties inherent in measuring the extent of employment discrimination against homosexual persons, gay people clearly perceive themselves as being the subjects of discrimination. The common law, reflecting the Anglo-American belief in the freedom to contract, has supported the principle that private persons have a right to hire and fire whomever they wish, and American courts have been firm in the belief that "[a]n employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision is unquestioned." Thus, under the common law the homophobic private employer apparently can fire or refuse to hire any homosexual person in the absence of governmental prohibitions.

The only federal legislation that prohibits discrimination by private employers is Title VII of the Civil Rights Act of 1964, which proscribes discriminatory employment practices based on certain enumerated characteristics. While neither homosexuality, sexual preference nor sexual orientation are among the enumerations, sex is one of the proscribed characteristics.

On at least two occasions, disgruntled employees have unsuccessfully sought to include sexual orientation or transsexualism within the sex discrimination prohibition. In a case of first impression, Smith v.
the court held that Title VII did not forbid employment discrimination based on "affectional or sexual preference" of the applicant, despite the fact that the plaintiff was not characterized as a homosexual person but as "effeminate." The defendant-employer candidly admitted that the plaintiff was not employed in the employer's mailroom because he appeared "effeminate." The plaintiff, however, argued that by hiring a black female instead, the defendant-employer had hired an employee displaying effeminate characteristics and thus had discriminated between two "effeminate" employees on the basis of sex. The court rejected this analysis on the grounds "that the plaintiff, a male, displayed characteristics inappropriate to his sex." This assumption that certain behavior is only appropriate to people of one gender raises a much broader Title VII issue which was not dealt with at all, namely, that one of the purposes of Title VII was to eliminate all stereotyped conceptions about men and women in the hiring process.

The court in Smith went beyond the issue of discriminatory hiring on the basis of appearance and evoked the broader principle of an employer's right to hire and fire by saying that "[i]f the law-making process has yet reserved freedom of action (by not forbidding it) to an employer, it is the duty of the courts to protect it." The court concluded that Congress had not protected the employment rights of homosexuals by forbidding discrimination based on "affectional or sexual preference" and that the freedom traditionally afforded the employer was not circumscribed.

Four months after Smith, another district court reached a similar conclusion. In Voyles v. Ralph K. Davies Medical Center the court held that Title VII does not protect the employment rights of transsexuals, and, in dicta, broadened that lack of protection to cover homosex-
uals and bisexuals as well. The plaintiff in this case was discharged prior to undergoing a sexual-reassignment operation. The defendant-employer discharged her for the admitted reason that such a change might have a potentially adverse effect on both the patients receiving treatment at the medical center and on the plaintiff's co-workers.

The Voyles court took cognizance of legislation pending in Congress that would have amended Title VII to afford protection to homosexuals. The court said that the failure of these amendments made it "clear that in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism." This approach seems to indicate either sloppy jurisprudence or total ignorance of the difference between a homosexual individual and a transsexual individual.

Thus, two federal courts have rather clearly ruled out Title VII as a protection for homosexual employees in the private sector. The Equal Employment Opportunity Commission (EEOC) has been equally unhelpful. In 1975 the EEOC rendered two decisions dealing with homosexual employees. In both decisions, the Commission found that it lacked jurisdiction to deal with either complaint, on the grounds that Congress did not intend to include a person's sexual practices within the meaning of the term "sex."

Given the intransigent attitudes of the courts and the EEOC, it would be fair to conclude that at the present time federal law provides no protection for the privately employed homosexual individual.

State laws are no better. Although nearly all states now have prohibitions against employment discrimination based on characteris-

45. Id.
46. Id. at 456. Legitimate customer preference, related to the manner in which the work will be performed and the manner in which such performance will be received by customers, can provide a basis for an employer to select employees on the basis of their sex. Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559, 569 (S.D. Fla. 1970) (emphasis added).
47. 403 F. Supp. at 457.
48. See notes 19-20 & accompanying text supra. If the judge had known that by far the majority of transsexuals are heterosexually oriented, he might have reached a different result.
49. The EEOC is the agency created by Congress to carry out the goals of Title VII. While the Commission renders decisions based on complaints, it can also issue opinions through its General Counsel. However, such opinions can only be relied on by the addressee(s). 35 Fed. Reg. 18,692 (1970).
50. The General Counsel of the EEOC issued an Opinion holding that an employer did not commit an unlawful employment practice by failing to hire or by discharging a homosexual individual. OP. GEN. COUNSEL EEOC M108-66 (Feb. 2, 1966).
51. [1976] 2 EMPL. PRAC. GUIDE (CCH) ¶¶ 6493, 6495.
tics such as sex and race, there is no state fair employment practices law that specifically protects homosexual individuals. In a recent case, Gay Law Students' Association v. Pacific Telephone and Telegraph Co. (GLSA v. PT& T), gay activists unsuccessfully sought to persuade a California district court to include protection for the homosexual employee under California's Fair Employment Practices Act. The plaintiffs first sought to come under the California Fair Employment Practices Act (FEPA) by claiming that the enumerated characteristics (race, sex, religious creed, color, etc.) were merely illustrative rather than restrictive. The court found not only that the legislature had specifically listed the only characteristics it sought to protect but had refused affirmatively to include sexual orientation by an express refusal to amend the FEPA.

Alternatively, the plaintiffs proffered a rather novel argument derived from the “disparate impact” test of Griggs v. Duke Power Co. They alleged that private employers and PT & T in particular, discriminated more heavily against male homosexuals than female homosexuals and hence this was discrimination based on “sex,” one of the enumerated characteristics of the California FEPA. The court in GLSA v. PT&T, however, dismissed this argument by saying that no showing of disproportionate impact upon one sex had been made. Moreover, the court indicated that even if the showing had been made, the applicability of the Griggs doctrine to men as a class was questionable.

The plaintiffs also argued that discrimination against homosexual individuals is literally discrimination based on gender, since it disqualified individuals on the basis of stereotyped characteristics of the sexes. Rather than confronting the issue of stereotypes, the court disposed of this argument by citing Smith and Voyles to show that federal...
courts do not regard Title VII's "sex" discrimination prohibition as applying to sexual preference.

Lastly, the Gay Law Students' Association argued that the right to work was a "fundamental right" and, consequently, that the refusal of the California State FEP Commission to hear cases of discrimination against homosexuals constituted a denial of homosexual persons' due process and equal protection rights. In answering this contention the court summed up the current situation of the homosexual employee: "There is simply no constitutional right to work for an unwilling employer."60

While neither the federal government nor any state government prohibits employment discrimination against homosexual individuals in the private sector, a number of city61 and county62 ordinances have granted some measure of protection. Many of the ordinances are less than one year old; virtually none are more than three years old. Consequently, their respective effects are difficult to gauge.63

59. Id. at 471 (citing Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975)).
60. Id. at 471.

The following cities and counties were reported by It's Time, the newsletter of the National Gay Task Force, in March, 1977, to have laws prohibiting private employment discrimination against homosexuals: Alfred, N.Y.; Austin, Tex.; Berkeley, Cal.; Cleveland Heights, Ohio; Marshall, Minn.; Portland, Ore.; San Jose, Cal.; Toronto, Ont.; Tucson, Ariz.; Yellow Springs, Ohio; Hennepin County, Minn.; Howard County, Md.; Santa Cruz County, Cal.

Since March 1977, other cities have passed ordinances prohibiting private employment discrimination: San Francisco, Cal., see National Gay Task Force Action Report 3 (May 1978); Aspen, Colo., see The Advocate, Jan. 25, 1977, at 8; Champaign, Ill., see The Advocate, Sept. 9, 1977, at 8; Iowa City, Iowa, see The Advocate, Feb. 8, 1978, at 11; Windsor, Ont., see The Advocate, Feb. 8, 1978, at 11. However, a number of such ordinances recently have been repealed by referendum in Dade County, Fla.; Wichita, Kan.; St. Paul, Minn.; and Eugene, Ore.

See note 153 infra for a list of ordinances and executive orders banning discrimination in public employment.

62. The following counties are reported to have laws forbidding discrimination against homosexual persons in private employment: Santa Cruz, Cal.; Latah, Idaho; Howard, Md; Hennepin, Minn. It's Time, March, 1977.
63. On July 23, 1976, the Municipal Clerk's Office of Anchorage, Ala., reported no complaints under their six-month-old ordinance. In Ann Arbor, Mich., only four complaints were made during the first year of the ordinance's existence. In Seattle, Wash., the
Although advocates of gay rights have received little encouragent from the courts and only questionable relief from statutes enacted by municipal and county subdivisions, persistent efforts are being made to rectify the position of the homosexual person in the private sector. There is a continuing battle by gay rights activists to amend Title VII. However, it is difficult to ascertain the likelihood of success. A strong argument for such a bill was made over seven years ago by Irving Kovarsky in probably the best legal article on employment rights of homosexuals. Kovarsky suggests a novel approach to the question of why the government should protect the homosexual individual from private employment discrimination. First, he notes that "there is a problem of considerable magnitude when anywhere from 4 to 20 percent of our adult male population can anticipate employment difficulty if homosexual behavior is established or suspected." He then argues that eliminating employment discrimination against homosexuals is in the national economic interest and in the self-interest of employers:

Economists, public leaders and others display considerable interest in the gross national product, an indicator of economic well-being, without considering discrimination faced by the homosexual. While the employment rights of minorities are protected by state and federal law as a means of meeting economic objectives, no concern is shown in the income of the homosexual. Public policy in the United States calls for full employment, an unreal goal. Therefore, there is a general consensus of opinion that 4 percent unemployment, or less, is socially tolerable. The unemployment rate of the homosexual may or may not vary from the national averages, but he faces discrimination and reduced income in the more skilled and desirable jobs.

In addition, the failure to provide adequate economic opportunity geared to skill and education has an impact on the male facing antagonism from the employer. The self-interest of the homosexual in employment is evident and needs little comment, but the employer is something else. Given his prejudices and a genuine interest in uplifting morale in the plant, the employer is reluctant to hire the effeminate male or known homosexual. Statistically, however, the

City Clerk could recall two cases since the statute's inception, both won by the complainants. S. Berlin, Private Employment Discrimination Based Upon Sexual Preference (Sept. 26, 1976) (unpublished seminar paper).

66. Id., at 530. Recent estimates are that 13.95% of males and 4.25% of females, or a combined average of 9.13% of the total population, had either extensive or more than incidental homosexual experience. Letter from Paul Gebhard, Director, Institute for Sex Research, Indiana University, to the author (March 18, 1977).
large employer is bound to hire sexually inverted employees since most homosexuals are not effeminate and are unidentified. Thus the homosexual employee who is aware of the employer’s policy toward homosexuals lives in fear knowing that he will lose his job and will be unable to find other employment if discovered. A reasonable assumption is that the “closet” homosexual performs less efficiently because of inner torment (however, the homosexual may perform in a superior fashion so that his employer finds him indispensable). The employer maximizing profit should be interested in the mental well-being of the unknown (and known) homosexual employee.67

Theorists have long argued that nondiscriminatory hiring was economically sound, but Kovarsky was first to point out that the idea applies as much to homosexuals as it does to women and blacks.

In this same article, Professor Kovarsky also suggests that the Taft-Hartley Act could be a useful fair employment tool. He points out that nothing in the Act protected black workers from racial discrimination by an employer or union, until the National Labor Relations Board (NLRB) interpreted the requirement of fair representation and the definition of an unfair labor practice to give the black worker some measure of protection. In 1971, Kovarsky felt that “[i]t [was] within the realm of possibility that the NLRB, faced with a legitimate question of fair representation or an unfair labor practice, might extend a helping hand to the homosexual.”68 However, there has been no indication in labor literature that such developments have occurred.69

Nevertheless, gay activists, realistically facing the lack of government protection in the employment area, have begun negotiations with large employers through the National Gay Task Force (NGTF).70 Basically, these activists have sought and obtained pledges of no discrimination on the basis of sexual preference. To date such employers as AT&T, IBM, Citibank, and NBC have agreed to such pledges.71

Although convincing economic and pragmatic arguments can be made in support of federal relief for the homosexual individual seeking employment in the private sector, such relief has not been forthcoming.

68. Id. at 560.
69. See generally Modjeska, The Uncertain Miranda Fuel Doctrine, 38 OHIO ST. L.J. 807 (1977). However, in a recent speech to the Annual Conference of the National Public Employee Labor Relations Association, Robert Kipp, President of the International City Management Association, alerted public labor negotiators to the needs of gay people, noting that labor “can expect [homosexuals] to press successfully for entry into, and special consideration in, the labor force.” The Advocate, July 12, 1978, at 12.
70. The National Gay Task Force is a national gay civil rights organization founded in 1973. Its address is Room 506, 80 Fifth Avenue, New York, New York, 10011.
Until legislatures and courts squarely recognize the obstacles confronting the homosexual individual, advocates of gay rights must continue to look to the efforts of such groups as the NGTF for needed reforms in the area of private employment.

II. Federal Employment

The largest employer in the United States is the federal government. In 1976 approximately 2.835 million civilians were directly employed by the United States government. Moreover, many workers in private industry under government contract are subject to federal hiring standards. These same federal government standards indirectly affect state and local government employment as well as private employment. Therefore, the federal government's long standing employment policy of discriminating against homosexual individuals affects a large number of United States citizens. Since the federal government is generally regarded as being in the forefront of liberal, nondiscriminatory employment policies, it is ironic that it has for years discriminated against homosexuals. This discrimination has particularly far reaching effects, because a person discharged by the government as a homosexual individual will encounter severe problems in subsequently locating employment in the private sector.

Federal Civil Service employees are considered part of the executive branch but their protection from arbitrary dismissal comes from Congress. Thus, while Congress authorized the President to regulate the Civil Service, it limited the President's authority to remove a civil service employee except for "such cause as will promote the efficiency of the service." The President has delegated these regulatory tasks to the United States Civil Service Commission.

In the past, the policies and regulations of the Civil Service Commission have systematically excluded homosexual persons from government employ. Not only were these antihomosexual policies and

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73. This stigmatization was recognized by Chief Judge Bazelon in Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) when he said: "[T]he dismissal imposes a 'badge of infamy' disqualifying the victim from any further Federal employment, damaging his prospects for private employ, and fixing upon him the stigma of an official defamation of character." Id. at 1164 (footnotes omitted).
75. 5 U.S.C. §§ 7501(a), 7512(a) (1976).
regulations strongly supported by the Congress for a long time, judicial review of the commission's policies was infrequent. Until recently, the courts upheld the view that government employment was a privilege not a right. This idea, coupled with a tradition of judicial noninterference with the executive branch, supplied the courts with a basis for upholding nearly all the administrative decisions of the federal government.

The Early Cases: Judicial Deference to Administrative Findings

With the notable exception of Judge Bazelon's opinion for the Court of Appeals for the District of Columbia in *Scott v. Macy*, federal courts consistently deferred to the finding of the Civil Service Commission that a dismissal was "for cause." As a result, federal courts failed to examine the more substantive issues raised by such dismissals.

*Dew v. Halaby*, decided by the Court of Appeals for the District of Columbia Circuit in 1963, was apparently the first published case of any significance dealing with the homosexuality of a federal employee and clearly illustrates the traditional judicial reluctance to override an administrative finding. William Dew, a civil service employee of the Federal Aviation Agency, had been employed as an air traffic controller. After successfully completing his probationary period, he was notified that he was being discharged because of previous marijuana smoking and four "unnatural sex acts" he had allegedly committed eight years prior to his dismissal and six years prior to his government service. Although at the time of his dismissal Dew was married, a parent and, according to a psychiatric evaluation, "functioning within a normal range," the court upheld his dismissal and avoided any substantive discussion of the issue of Dew's homosexuality.

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80. 349 F.2d 182 (D.C. Cir. 1965).
82. Id. at 586. The court cites two purportedly similar cases: Caplan v. Connally, 299 F.2d 126 (D.C. Cir. 1962) (per curiam), cert. denied, 373 U.S. 915 (1963); Shields v. Sharp, No. 15,666 (D.C. Cir. Nov. 1, 1960), cert. denied, 366 U.S. 917 (1961). These cases, however, reveal nothing about the issue of homosexuality.
83. It is interesting to note that even at this early date in the gay rights struggle, peti-
Rather, the court found the conclusion of the Board of Appeals and Review of the Civil Service Commission "rational and valid," citing with approval the finding of the Appeals Examiner that "[t]o require employees to work with persons who have committed acts that are repugnant to the established and accepted standards of decency and morality can only have a disrupting effect upon the morals and efficiency of any organization."  

While the court recognized that by statute Dew could only be removed if his removal would "promote the efficiency of the service," it deferred to the agency's judgment and required no proof of such impairment other than the above noted conclusion of the government. Thus, the court paid homage to what was then the dominant view of the judicial role vis-à-vis the Civil Service Commission, namely, that the scope of judicial review was severely limited when the removal of a civil servant was challenged on substantive rather than procedural grounds.

Although the United States Supreme Court granted certiorari in *Dew*, the writ was subsequently dismissed by stipulation when the Federal Aviation Agency reinstated the employee and granted him back pay.

Thus, the reinstatement of *Dew* coupled with the consequent failure of the Supreme Court to examine the propriety of this type of dismissal, left the lower courts with no clear guidelines for future resolution of similar cases. As a result, the courts continued to reach unpredictable and disparate results with respect to the issue of homosexuality as grounds for removal from the Civil Service. Among

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84. *Id.*
86. 317 F.2d at 587-89.
87. *Id.* at 589.
90. Chief Judge Bazelon commented on this occurrence in *Norton v. Macy*, 417 F.2d 1161, 1166 (D.C. Cir. 1969), noting that "[i]f these official actions may not be deemed a confession of error, the history of the case at least casts considerable doubt on the authority of what was, in any event, a narrow holding."
these decisions is Scott v. Macy,\textsuperscript{92} in which the Court of Appeals for the District of Columbia revealed a very different attitude toward this type of dismissal than that represented by its previous decision in Dew.

Bruce Scott, a civil service applicant, was twice disqualified for employment on the basis of “immoral conduct”\textsuperscript{93} and was twice ordered qualified by the Court of Appeals for the District of Columbia.\textsuperscript{94} In Scott I, the court was less diffident than it had been in Dew toward the government’s right to hire and fire, noting that the absence of a constitutional guarantee to public employment does not license the government to “‘resort to any scheme for keeping people out of such employment.’”\textsuperscript{95}

Looking to the substantive grounds for Scott’s dismissal, the court recognized that a dismissal under such terms not only stigmatized Scott and disqualified him for government employment but also jeopardized his ability to be employed elsewhere. In light of the grave consequences of dismissal under such circumstances, the court found that the Commission could not rely on a determination of immoral conduct based on such impermissibly vague labels as homosexual and homosexual conduct.\textsuperscript{96}

Less than three years after his victory in Scott I, Bruce Scott was back before the same court, challenging the charges that the Commission had refiled against him. The court again decided in Scott’s favor. Although the charges were basically the same as those disposed of in Scott I, the Commission argued that it was really disqualifying Scott for his refusal to answer questions on his application. The court not only was unconvinced by this argument but arguably indicated in some strong and prescient dicta that even an alleged homosexual possesses a right of privacy:\textsuperscript{97}

\textsuperscript{92} 349 F.2d 182 (D.C. Cir. 1965) (Scott I).
\textsuperscript{93} “Immoral conduct” provided grounds for disqualification of applicants under 5 C.F.R. § 2.106 (1961) and its later counterpart 5 C.F.R. § 731.201 (1968).
\textsuperscript{94} Scott v. Macy (Scott I), 349 F.2d 182 (D.C. Cir. 1965); Scott v. Macy (Scott II), 402 F.2d 644 (D.C. Cir. 1968).
\textsuperscript{95} 349 F.2d at 183.
\textsuperscript{96} Id. at 184-85. The court observed that “these terms have different meanings for different people” and illustrated this remark with quotations from a Senate Subcommittee Report, Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 241, 81st Cong., 2d Sess. 2 (1950) and from Thompson, Changing Concepts of Homosexuality in Psychoanalysis, in 10 Psychiatry 187 (1947).
\textsuperscript{97} It is interesting to note that Justice Burger, now Chief Justice of the Supreme Court, dissented in both Scott I and Scott II. He felt that disqualification from federal service based on homosexual conduct was not arbitrary. Scott I, 349 F.2d at 189-90; Scott II, 402 F.2d at 650, 652.
But it may also be true that federal applicants for employment do not . . . forfeit all rights of privacy accorded to persons generally by the First Amendment, and that the reasonableness of requiring answers to certain questions may be greatly affected by the clarity and rationality of the policies sought to be effectuated by the questions. Where disclosure is required of circumstances of an intensely private and personal nature, the discloser is arguably entitled to know the standards by which his revelations will be assessed.98

Other federal courts have been less willing to override the findings of the Commission and directly confront the substantive issues raised by dismissals on the grounds of homosexual conduct. As long as the Commission has substantially complied with all procedural requirements and the dismissal is neither arbitrary nor capricious, these courts will defer to the judgment of the Commission. In 1967, the Ninth Circuit in *Taylor v. United States Civil Service Commission*99 upheld the discharge of a civil service employee of the Air Force on the grounds that his removal would "promote the efficiency of the service and [was] for the best interest of the Air Force."100 The court noted that its review powers were limited to insuring procedural correctness and guarding against arbitrary or capricious action on the part of the government.

In *Anonymous v. Macy*,101 decided a year later, the court was similarly succinct in rejecting the appellant post office employee's argument that homosexual acts by federal employees were private acts of those employees and did not as such affect the efficiency of the service.102

Another post office employee, an assistant janitor, was also unsuccessful when the Tenth Circuit decided *Vigil v. Post Office Department*103 in January of 1969. The court adhered to the limited scope of review adopted in *Taylor*, noting that all statutory and procedural requirements had been complied with and there was "no plausible basis" for finding that postal officials had acted arbitrarily or capriciously. The court found substantial evidence to support the dismissal on the grounds of "infamous, immoral, or notoriously disgrace-
ful conduct,"\textsuperscript{104} thereby ostensibly distinguishing \textit{Scott I} and \textit{Scott II}, which rejected "vague" charges of immorality as grounds for dismissal.\textsuperscript{105} The court, however, neglected to indicate how the efficiency of the postal service would be impaired by the retention of a homosexual assistant janitor.

\textit{The Norton "Rational Nexus" Test}

The judicial lassitude, evident in many of the earlier cases, did not persist. Six months after \textit{Vigil}, the Court of Appeals for the District of Columbia Circuit decided \textit{Norton v. Macy},\textsuperscript{106} which is usually regarded as the landmark case in protecting the rights of homosexual employees of the federal government. In this important decision, Chief Judge Bazelon,\textsuperscript{107} who wrote the opinion in \textit{Scott I} and concurred in \textit{Scott II}, imposed on the Civil Service Commission for the first time the burden of showing a "rational nexus" between an employee's homosexuality and the lowering of the efficiency of the federal service.\textsuperscript{108}

Underlying the "rational nexus" requirement were constitutional considerations previously stressed by Chief Judge Bazelon in \textit{Scott I}.\textsuperscript{109} While the Commission enjoys a wide discretion in determining what constitutes "cause" for removal of a federal employee, Chief Judge Bazelon noted that due process limits such dismissals and forbids ad-

\textsuperscript{104} Id. at 924 n.5.

\textsuperscript{105} Police had discovered Vigil and another man in the back seat of a parked car with their trousers down. \textit{Id.} at 924. Vigil was consequently convicted under a Denver City ordinance "forbidding any person to commit any indecent or filthy act or to use abusive language or make an obscene gesture to any person publicly." Vigil pled guilty and was fined $50. \textit{Id.} at 922.

\textsuperscript{106} 417 F.2d 1161 (D.C. Cir. 1969).

\textsuperscript{107} In 1967, a task force to study homosexuality was appointed by the Director of the National Institute of Mental Health. One of the task force members was Chief Judge Bazelon, who resigned from the task force on June 3, 1969, less than one month before he decided \textit{Norton}.

\textsuperscript{108} 19 CATH. U.L. REV. 267 (1969). This commentary provides an in-depth discussion of how \textit{Norton} affected the role of the judiciary in reviewing actions of the Civil Service Commission, concluding: "In the past, the Commission has enjoyed great latitude in its policy determinations, and noting that homosexual conduct is contrary to the laws and mores of our society, the Commission determined that homosexuals are not suitable for federal employment. After \textit{Norton}, the Commission may not justify the exclusion of homosexuals on the ground that such conduct is contrary to the dominant conventional norms. Instead, there must be a showing that the individual's conduct has an ascertainable deleterious effect on the efficiency of the service. If \textit{Norton} stands, the following seems clear: (1) the Commission may not sustain the removal of a federal employee who confines his homosexual conduct to off-duty hours, unless he occupies a particularly sensitive position, and (2) the Commission may not exclude every homosexual application (sic) from all federal positions." \textit{Id.} at 275.

\textsuperscript{109} See notes 94-96 & accompanying text \textit{supra}.
ministrative decisions that are arbitrary or capricious. The due process limitations may be even greater where the dismissal, as in Norton, stigmatized the employee and impaired his future employment prospects, or infringed upon the employee's right of privacy.110 Because of the important constitutionally-protected interests at stake, the Commission must not only comply with statutory procedural requirements but "must demonstrate some 'rational basis' for its conclusion that a discharge will promote the 'efficiency of the service'."111

Norton, a budget analyst for the National Aeronautics and Space Administration, was discharged for allegedly "immoral conduct" and for possessing personality traits which allegedly rendered him "unsuitable" for government employment. In applying the "rational basis" test to Norton's dismissal, Chief Judge Bazelon observed that "immoral conduct," as grounds for dismissal, was impermissibly broad, encompassing a "multitude of sins,"112 and that it invited the Commission to indulge in moral judgments that were inappropriate to the proper functions of a federal agency and "at war with elementary concepts of liberty, privacy and diversity."113 The court observed that while a finding of immorality could result in dismissal if those immoral acts had some "ascertainable deleterious effect on the efficiency of the service,"114 no such effect had been demonstrated in the instant case. Norton was a competent employee, who did not meet the public and whose preference was unknown to his colleagues. In fact, the government admitted that it was the "custom" to fire homosexuals and that in Norton's case they were worried that continued employment of Norton "might turn out to be embarrassing to the agency."115 The court stated that "the unparticularized and unsubstantiated conclusion that such possible embarrassment"116 threatened the agency lacked the "reasonably foreseeable, specific connection"117 required to support Norton's dismissal.118

111. 417 F.2d at 1164.
112. *Id.* at 1165.
113. *Id.*
114. *Id.* The court admitted that it was possible for an employee's homosexuality to have an effect on the efficiency of the service. It hypothesized that blackmail might affect security; that homosexuality might be evidence of an unstable personality unsuitable for some jobs; or that offensive overtures on the job or notorious conduct might so affect other employees or the public as to warrant dismissal.
115. *Id.* at 1167.
116. *Id.*
117. *Id.*
118. Although the Norton opinion is most significant for its discussion of the constitu-
Subsequent Applications of the Norton "Rational Nexus" Test

The Norton "rational nexus" test met with varying degrees of approval in other federal courts. Some courts purported to apply the rational-nexus requirement but nevertheless distinguished Norton on its facts; only one court clearly applied the test within the meaning and spirit of Norton.

In Schlegel v. United States,119 decided only three months after Norton, the Court of Claims upheld Schlegel's dismissal from a civilian position with the Department of the Army, on the basis of testimony by three of Schlegel's superiors that the morale and efficiency of the office would be affected adversely by his continued presence. The court concurred in the conclusion of Schlegel's superiors and noted that the four homosexual acts allegedly committed by Schlegel distinguished that case from Norton where "merely a homosexual advance" had been involved.120 In upholding Schlegel's dismissal the court remarked:

Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true. If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.121

While similarly purporting to apply the "rational nexus" test, the court in Richardson v. Hampton122 upheld the Civil Service Commission's rejection of an applicant who refused to answer questions relevant to his fitness for public service.123 Although the court noted that

120. 416 F.2d at 1378.
123. Id. at 609. Richardson was discharged from his prior federal job for emotional
“Courts have increasingly recognized that an individual's private sexual preferences, activities and associations are among those areas protected from governmental inquiry by the First Amendment,” it nevertheless concluded that because both Scott and Norton recognized that homosexuality might bear on efficiency, the government has a need to make inquiries which are “reasonably calculated to elicit information concerning an applicant's private sex life which bears directly on his suitability for Federal employment.”

The first unequivocal application of Norton came in 1973 in Society For Individual Rights, Inc. v. Hampton. In that case, a discharged federal employee was joined by a gay rights group in a class action suit challenging the Civil Service Commission's policy that homosexual persons were not suitable for federal employment because they would bring the government service “into public contempt.” As a threshold determination, the court found a class to which it was capable of giving relief, to wit:

those homosexual persons who the Commission would deem unfit for government employment for the sole reason that the employment of a homosexual person in the government service might bring that service into the type of public contempt which might reduce the government's ability to perform the public business with the essential respect and confidence of the citizens which it serves.

The court further determined that it was proper to grant relief to this class in order “to prohibit the Commission from continuing to ignore the plain holding of Norton” and consequently held that the over-

124. Id. at 608.
125. Id. at 609. The court indicated that the applicant could renew his application if he answered the proper questions and that the burden would then be on the government to show whether his homosexuality would interfere with the performance of his duties.
126. 63 F.R.D. 399 (N.D. Cal. 1973), aff'd on other grounds, 528 F.2d 905 (9th Cir. 1975).
127. Mr. Hickerson, a supply clerk, was discharged from the Agriculture Department upon disclosure of his prior discharge from the Army because of his homosexuality.
128. This policy was explicitly enunciated in the Federal Personnel Manual Supplement, which provided as follows: “Homosexuality and Sexual Perversion—Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases, the Commission will consider arrest records, or records of conviction for some form of homosexuality or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct.” 63 F.R.D. at 400 n.1.
129. Id. at 401.
130. Id.
broad rule found in the *Federal Personnel Manual* could not be enforced.\(^{131}\)

As a result of this case, the Commission altered its regulations as of December 21, 1973 to better comport with the requirements of *Norton*. The Civil Service Regulations relating to suitability disqualifications which became effective on July 2, 1975 were also substantially amended to eliminate "immoral" conduct as a grounds for dismissal and restrict those permissible grounds to "criminal, dishonest, infamous or notoriously disgraceful conduct."\(^{132}\) The "Suitability Guidelines for Federal Employment" was also revised to conform to the new regulation. The amended guidelines for determining "Infamous or Notoriously Disgraceful Conduct" provides in part:

Individual sexual conduct will be considered under the guides discussed above. Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.\(^{133}\)

With this change in federal regulations and policy to reflect the more enlightened approach of many courts, the ability of a homosexual person to obtain or keep a federal job solely on his or her individual merit seemed assured.

Although the Ninth Circuit's opinion in *Singer v. United States Civil Service Commission*,\(^{134}\) upholding the dismissal on grounds of homosexuality of a clerk-typist\(^{135}\) for the Equal Employment Opportunity Commission (EEOC), was vacated by the United States Supreme

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131. *Id.*
132. 5 C.F.R. § 731.202(b) (1975).
135. It is interesting to note that the cases reviewed in this section mainly focus on clerks, typists, and janitors. Somehow one cannot help wondering why managers, lawyers, and other professionals are not the plaintiffs. Is it because only the relatively powerless are discharged under these statutes and regulations? Or are higher ranking officials given the chance to resign rather than face dismissal? Also note the irony of the *Singer* case: Singer was fired by the EEOC, the government agency charged with fighting job discrimination under Title VII.
Court and ultimately remanded to the Civil Service Commission for reconsideration in light of the newly promulgated regulations, it nevertheless illustrates the intransigent attitude of some courts toward the homosexual federal employee.

The Singer case can be seen as representative of the new wave of cases in the federal employment area brought by openly gay persons. Unlike Messrs. Norton, Scott, or Dew, Singer was openly gay and not forced to acknowledge his sexual preference by events subsequent to his hiring. Moreover, Singer was conspicuously engaged in gay political activities.

As a result of the considerable publicity surrounding Singer's political activities and attempted marriage, which linked his name with the EEOC, Singer was discharged for "immoral and notoriously disgraceful conduct." In its letter to Singer the Commission informed

137. On October 13, 1977, the Bureau of Personnel Investigations (BPI) of the Civil Service Commission reaffirmed its 1972 decision with respect to Singer, evidently disregarding the instructions of the remand. On November 4, 1977, Singer appealed to the Federal Employee Appeals Authority (FEAAA), which held that the October 13, 1977 suitability determination did not "clearly set forth reasons for the disqualification which will stand scrutiny" under the 1975 guidelines and remanded the case to the BPI for further investigation. On April 11, 1978, the BPI refused to reinvestigate claiming the lapse of time made it economically impractical and declaring that its October 13, 1977 decision remained "final." On June 13, 1978, the BPI formally reissued its October 13, 1977, decision and on June 21, 1978, Singer appealed once again to the Federal Employee Appeals Authority. As of this writing Mr. Singer is awaiting another decision from the FEAA. Telephone conversation with Lawrence Baker, Esq., of Seattle, Wash. (June 28, 1978). Opinions mentioned on file with the author.
138. Singer was the organizer and leader of the Seattle Gay Alliance. Moreover, Singer attempted to legitimize his private relationship by seeking to marry his lover. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). See the discussion of homosexual marriages at text accompanying notes 450-80 infra. As a result of his attempted marriage and his political activities, Singer was the subject of television, newspaper, and magazine reports, some of which indicated that he was a clerk-typist for the EEOC. Singer alleged that he never authorized the use of his place of employment in media reports and that any such statements were made without his knowledge or consent.
139. The Commission cited specific acts in support of Singer's dismissal, including his attempted marriage and political activities, the "flaunting" of his homosexuality by kissing a man near the place of previous employment, the exposition of sexual preference in an article published in the San Francisco Chronicle, and his dress and demeanor at the EEOC offices which purportedly indicated an intention to stay gay. Singer denied none of the charges, but contended that nothing in any of the acts violated regulations affecting federal employees. 530 F.2d at 249.

The Commission's accusation that Singer "flaunted his homosexuality" is evidently susceptible of several meanings. Webster's Third International Dictionary defines flaunt as: "2a: to display or obtrude oneself to public notice esp. by reason of excessive or gaudy finery or impropriety of behavior: seek to attract attention esp. by appearing or acting brash and brazen . . . b: to make a showy appearance: stand out brightly or distinctly . . . ."
him that his "activities in these matters are those of an advocate for a socially repugnant concept."  

The Commission alleged that such behavior reflected discredit upon the federal government and thus impeded the efficiency of the service by lessening the confidence of the general public.

In his appeal to the courts, Singer claimed that there was no "rational nexus" between his homosexual activities and the efficiency of the Service and hence his dismissal constituted a violation of his due process rights. Singer also claimed he was being denied his first amendment right of freedom of expression.

In rejecting Singer's contentions, the Ninth Circuit noted that while Norton required a "rational nexus," the Norton court had indicated that homosexuality of a federal employee might, under certain circumstances, affect the efficiency of the service. This case, the court concluded, constituted such circumstances where the notorious conduct, open flaunting, and careless display of unorthodox sexual conduct in public would potentially cause embarrassment to the federal government.

After briefly reviewing Gay Students Organization of University of New Hampshire v. Bonner and Acanfora v. Board of Education, both of which were highly protective of the first amendment rights of homosexual individuals, the court concluded that these cases were factually distinguishable from Singer because "[n]either involved the open

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Ster's Third New International Dictionary (1965). Rev. Malcolm Boyd presents this view of "flaunting": "When we walked in, the rector announced that John had a guest to introduce, 'I would like you to meet my friend and lover, Malcolm Boyd,' John said. He perceived love, affection, integrity, and dignity as the natural right of a gay person. Some people stand ready to criticize a natural expression of freedom as 'flaunting'. But in an open and free society there is inevitably too fine a line between a minority's freedom and a majority's attack upon 'flaunting' to let it be erased. Often what is as natural as breathing to a member of the majority—a public sign of affection, a symbol of relationship—is labeled as 'flaunting' when practiced by people who belong to a minority." M. Boyd, Take Off The Masks 147 (1978).

140. 530 F.2d at 250 n.3.
141. Id. at 251.
142. In an evaluation report Singer was rated by his supervisor as "superior" or "very good." Moreover, a letter from his co-workers said he was competent and that their experience with him was "educational" and "positive." Id. at 250 n.4.
143. Id. at 255. The court flatly refused to consider the new regulations adopted since Hampton because they were not in effect when Singer's case arose. Id.
144. 509 F.2d 652 (1st Cir. 1974). See notes 789-99 & accompanying text infra for a discussion of this case.
and public flaunting or advocacy of homosexual conduct." Even assuming that this interpretation of Bonner and Acanfora was correct, the court's decision seems highly repressive, particularly in light of the court's conclusion that the interest of the government as an employer in promoting the efficiency of the public service outweighed the interest of its employee in exercising his first amendment rights by publicly flaunting and broadcasting his homosexual activities.\(^\text{147}\)

The court's balancing of governmental and first amendment interests inevitably restricts a federal civil servant's right to espouse unconventional social ideas.\(^\text{148}\)

On balance, the position of the homosexual individual as an employee of the federal government has significantly improved. Not only are most courts recognizing the important constitutional rights of such employees by requiring a rational nexus between the alleged grounds for dismissal and the purported effect on the efficiency of the employer, but the Civil Service Commission has also incorporated some of these constitutional considerations into its recently promulgated regulations. Other significant protections remain to be achieved, however. In particular, more attention should be given to the first amendment interests of homosexual employees and a more careful balancing of those interests against the interests of the government is warranted.

III. State and Local Government Employment

An examination of state and local government employment policies dealing with homosexual employees is relatively simple compared with a similar examination of federal government employment policies. With the exception of cases involving teachers, discussed separately in a following section, there are few reported state cases.

Such an examination is further complicated by the numerous state and municipal statutes and ordinances which variously promote or protect against discrimination. Some state codes provide that applicants can be excluded from state civil service positions because of their infamous or notoriously disgraceful conduct.\(^\text{149}\) Other state statutes pro-

146. 530 F.2d at 256.
147. Id.
148. See 20 UTAH L. REV. 172 (1976). This comment, which explores in depth the first amendment questions raised by Singer, concludes that "[t]he Singer opinion marks a major reversal in the current trend of cases allowing greater freedom of speech for government employees in general and homosexual employees in particular." Id. at 185.
vide that permanent employees may be disciplined or removed for immoral conduct.\textsuperscript{150}

On the other hand, many recent state and local enactments indicate a growing concern with the dilemma of the homosexual employee. Discrimination on the basis of sexual preference was prohibited in 1975 in Pennsylvania by an Executive Order issued by then Governor Milton Shapp applying to all state offices and positions.\textsuperscript{151} With the notable exception of New York City, where the refusal of the city council to pass a gay rights bill prompted Mayor Koch to issue an Executive Order banning discrimination on the basis of sexual preference in city agencies,\textsuperscript{152} a number of municipalities have ordinances prohibiting discrimination in employment based on sexual preference.\textsuperscript{153}

In addition to the protection increasingly afforded by statutes and ordinances, the procedural rights which have been found to protect federal employees also presumably protect state and municipal employees through the application of the fourteenth amendment due process limitations to the states.\textsuperscript{154} Homosexual employees of state governments or instrumentalities have consequently sought the protection, with varying

\begin{itemize}
\item \textsuperscript{150} Cal. Gov't Code § 19572(l) (West Supp. 1978); Ohio Rev. Code Ann. § 124.34
\item \textsuperscript{151} 3 Sex. L. Rep. 43 (1977).
\item \textsuperscript{152} The Advocate, March 22, 1978, at 37. The Executive Order, issued on January 23, 1978, applies to employment, housing, credit, contracting and the provision of services by all agencies under the control of the mayor.
\item The New York Civil Service Commission has also been relatively progressive in recognizing the rights of homosexual employees. As early as 1966, the Commission announced that known homosexual persons were eligible for employment but not in jobs requiring contact with young people or with people easily influenced. In May 1969, the city decided that homosexual applicants could not absolutely be barred from any job. Kovarsky, Fair Employment for the Homosexual, 1971 Wash. U.L.Q. 527, 535-36 535-36. This later decision seems to have been in response to Brass v. Hoberman, 295 F. Supp. 358 (S.D.N.Y. 1968), in which two men who were denied jobs as social workers on the basis of suspected homosexuality sued in federal district court claiming an abridgement of their due process rights. Prior to a decision on the merits, the New York Civil Service Commission settled with the plaintiffs and issued a statement that "[t]he City of New York does not have a policy of absolute disqualification for homosexuality." N.Y. Times, May 9, 1969, at 1, col. 2. The Commission nevertheless retained the right to exclude homosexual individuals from positions requiring contact with young people or other persons who might easily be influenced.
\item The following cities have ordinances or executive orders banning discrimination against homosexual persons in municipal employment only: Amherst, Mass.; Atlanta, Ga.; Boston, Mass.; Chapel Hill, N.C.; Cupertino, Cal.; Ithaca, N.Y.; Los Angeles, Cal.; Mountain View, Cal.; New York, N.Y.; Ottawa, Can.; Pullman, Wash.; Santa Barbara, Cal.; Sunnyvale, Cal. It's Time, March, 1977, at 3. See notes 61 & 62 supra for cities and counties which offer additional protection to homosexuals in the area of private employment.
\item See Illinois State Employees Union Council v. Lewis, 473 F.2d 561, 572 (7th Cir. 1972) ("[B]asic rights of citizenship survive acceptance of public employment.").
\end{itemize}
degrees of success, of the "rational nexus" standard articulated in *Norton v. Macy*.\(^{155}\)

The first application of the rational-nexus standard to dismissals of homosexuals by state agencies was *McConnell v. Anderson*.\(^{156}\) While James McConnell was awaiting confirmation by the Board of Regents of the state university of his appointment as a university librarian, an action that was usually a rubber stamp of a lower managerial decision, he and another man attempted to marry.\(^{157}\) This action drew a great deal of media interest and prompted the Board of Regents to reject McConnell on the grounds that his personal conduct was not consistent with the best interests of the university. Relying upon *Norton v. Macy*\(^{158}\) and *Morrison v. State Board of Education*,\(^{159}\) both of which required a finding of a rational nexus between the homosexuality of the employee and any alleged diminution of efficiency, the court concluded that the university had not shown an observable and reasonable relationship between McConnell's efficiency on the job and his homosexuality.\(^{160}\)

In emphasizing the constitutional significance of the rational-nexus requirement, Judge Neville made the strongest statement in favor of gay civil rights of any federal judge to date:

> An homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional manner. He is as much entitled to the protection and benefits of the laws, and due process fair treatment as are others, at least as to public employment in the absence of proof and not mere surmise that he has committed or will commit criminal acts or that his employment efficiency is impaired by his homosexuality.\(^{161}\)

Despite Judge Neville's logical interpretation and application of the *Norton* standard, *McConnell v. Anderson* was reversed on appeal by the Eighth Circuit.\(^{162}\) Harking back to the days of excessive judicial deference to the executive branch, the court observed that the discretion of the Board of Regents was broad and could not be overturned.


\(^{157}\) The case generated by the attempted marriage is *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971). See notes 452-60 & accompanying text infra.


\(^{159}\) 1 Cal. 3d 214, 461 F.2d 375, 82 Cal. Rptr. 175 (1969). See notes 377-84 & accompanying text infra.

\(^{160}\) 316 F. Supp. at 814.

\(^{161}\) Id.

\(^{162}\) 451 F.2d 193 (8th Cir. 1971).
unless arbitrary or capricious. Construing McConnell’s conduct as demanding the “right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of the socially repugnant concept upon his employer,” the court concluded that the Board’s decision was not arbitrary, unreasonable or capricious. The court characterized McConnell as a person making “extravagant demands” and indicated a greater tolerance for either latent or closet homosexuals.

In addition to denying McConnell the due process rights protected in Norton and emphasized by Judge Neville in the lower court opinion, the Court of Appeals summarily dismissed McConnell’s first amendment objections.

Safransky v. State Personnel Board, decided by the Supreme Court of Wisconsin in 1974, similarly upheld the dismissal of an avowed homosexual but nevertheless reflects a less cavalier attitude toward the constitutional interests protected in Norton. Safransky was a houseparent in a state institution for retarded teenage boys who was dismissed after discussing his sexual preference with colleagues in front of patients, wearing make-up to work, accusing another employee of being a lesbian and threatening to dress up one of the patients as a “drag queen.” The State Personnel Board dismissed him on the basis of these acts and found that (1) “homosexual activity is contrary to the generally recognized standards of morality” and that (2) Safransky’s activity had a substantial adverse effect on his job performance.

While the state supreme court upheld the dismissal, it noted that whether homosexuality is immoral or not was irrelevant to a determination of “just cause.” Citing to Norton v. Macy, Richardson v.
Hampton\textsuperscript{173} and Morrison v. State Board of Education,\textsuperscript{174} the court observed that the basis for removal must be a "rational nexus" between conduct complained of and deleterious effects on job performance and concluded that Safransky's failure "to represent and project to the patients an appropriate male image consistent with that experienced by the remainder of society"\textsuperscript{175} bore a rational nexus to the efficient performance of his duties as houseparent.

While state and local law with respect to employment of homosexual persons is neither as clear nor as consistent as federal law, it is reasonable to conclude that, in general, homosexual state and municipal employees are better protected from discrimination than their counterparts in private employment. Due process protections coupled with a growing movement to protection by ordinance\textsuperscript{176} seems to provide a modicum of relief to homosexual individuals seeking to obtain or retain employment in state or local governments.

IV. Security Clearances

The need to obtain a security clearance spans both the private and public employment sectors. Certain federal government employees in both the civil service and the military need security clearances, as do certain persons privately employed by a federal government contractor. The denial of a security clearance can deprive a person of his ability to earn a living in his chosen profession for the rest of his life.\textsuperscript{177} Moreover, refusal of a government clearance is clearly stigmatizing.\textsuperscript{178}

\textsuperscript{174} 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). See notes 377-84 & accompanying text infra.
\textsuperscript{175} 62 Wis. 2d at 475, 215 N.W.2d at 384. It is certainly arguable that Safransky's conduct was professionally inappropriate to the houseparent position. However, it is questionable whether even a homosexual houseparent who comport ed with professional standards of behavior could meet the court's standard. This kind of standard seemingly reinforces sex-role stereotypes that may be outdated and inappropriate.
\textsuperscript{176} At least three cities passed ordinances subsequent to the defeat of the Dade County, Fla., ordinance in June 1977. These are Aspen, Colo., The Advocate, Jan. 25, 1978, at 8; Champaign, Ill., The Advocate, Sept. 7, 1977, at 8; and Iowa City, Iowa, The Advocate, Feb. 8, 1978, at 11-12. One county (Ingham County, Mich.) also now prohibits discrimination on the basis of sexual preference in county employment and county services. The Advocate, July 26, 1978, at 11.
\textsuperscript{177} For example, George W. Grimm was a specialist in a highly complex field of space-flight techniques, privately employed by a federal government contractor. He had held a security clearance for some 13 years when his security clearance was revoked. He was subsequently unable to find work despite over 100 job attempts and was ultimately forced to go on welfare. Note, Security Clearances for Homosexuals, 25 STAN. L. REV. 403, 408 n.38 (1973).
mosexuality has been a ground for refusal or revocation of security clearances since the inception of the program in the 1940's.\textsuperscript{179} Although there are some indications to the contrary,\textsuperscript{180} it appears highly unlikely that a known or professed homosexual could obtain a security clearance even today.\textsuperscript{181} One commentator has suggested three basic assumptions about homosexual individuals that make them potential security risks in the eyes of the government: homosexual individuals are open to blackmail, they engage in criminal conduct and, by their very nature, they are unstable, unreliable, and untrustworthy.\textsuperscript{182} To varying degrees, the courts, in reviewing government denials of security clearances, have accepted the validity of these assumptions.

The Industrial Security Clearance Review Office (ISCRO) is the agency currently entrusted with processing security clearances.\textsuperscript{183} The general charge to the ISCRO is to give a security clearance to an individual only when "to do so is clearly consistent with the national interest."\textsuperscript{184} The following criteria for determining eligibility for clearance generally have been used to deny security clearances to homosexual applicants or employees:\textsuperscript{185}

\begin{itemize}
  \item[(h)] Any criminal, infamous, dishonest, or notoriously disgraceful conduct, habitual or episodic use of intoxicants to excess, drug addiction, drug abuse, or sexual perversion.
  \item[(i)] Facts, circumstances or conduct reflecting activity of a reckless, irresponsible or wanton nature which indicates such poor judgment, unreliability or untrustworthiness as to suggest that the applicant might fail to safeguard classified information entrusted to his care and use or might disclose classified information to unauthorized persons or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.
\end{itemize}

\begin{thebibliography}{9}
\bibitem{180} According to 35 Facts on File 107 (1975), on Feb. 1, 1975, the Department of Defense granted the first security clearance to a homosexual. The field examiner granted a secret-level industrial security clearance to Otis F. Tabler, Jr., an admitted homosexual, stating that Tabler "successfully has rebutted any inference that his variant sexual practices tend to show that he is not reliable or trustworthy."
\bibitem{181} On June 9, 1977, the Department of Defense Appeal Board reversed a hearing examiner's decision that granted a security clearance to Roy Fulton, a computer engineer employed by a private company. 3 Sex. L. Rep. 45. Fulton has since initiated suit. The Advocate, Sept. 7, 1977, at 10.
\bibitem{183} ISCRO was created by the Department of Defense in 1960 pursuant to Executive Order No. 10,865, Safeguarding Classified Information Within Industry, 3 C.F.R. 398 (1960), as amended by 3 C.F.R. 691 (1968). For a clear review of the structure and functioning of ISCRO, see Note, Security Clearances for Homosexuals, 25 Stan. L. Rev. 403, 403-08 (1973).
\bibitem{184} 32 C.F.R. § 155.4(a) (1978).
\bibitem{185} 32 C.F.R. § 155.5(h)-(k) (1978).
\end{thebibliography}
Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the applicant with due regard to the transient or continuing effect of the illness and the medical findings in such cases.

(k) Any facts or circumstances which furnish reason to believe that the applicant may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest.186

. . . .

(m) Refusal by the applicant, without satisfactory subsequent explanation, to answer questions before a Congressional Committee, Federal or State court, or Federal administrative body, regarding charges of his alleged disloyalty or other conduct relevant to his security eligibility.187

The process of denying or granting security clearance to an employee, in general, or to a homosexual employee, in particular, does not totally lack procedural safeguards. Even prior to the creation of the ISCRO, the Supreme Court, in Greene v. McElroy,188 recognized that the due process clause of the fifth amendment encompasses the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference."189

Despite the unequivocal mandate of the Court in Greene v. McElroy, the federal courts have been somewhat less protective of the procedural due process rights of homosexual employees denied security clearance. The earlier decisions, in particular, reveal an extremely superficial treatment of the due process issue.

Adams v. Laird,190 decided in 1969, was the first significant challenge by a homosexual employee to the security-clearance process. Adams, employed in private industry as an electronics technician, was given a Secret clearance in 1957 and sought a higher level of clearance in 1962, at his employer's request. When Adams was subsequently interviewed by investigators of the Office of Naval Intelligence, he admitted homosexual acts. As a consequence of this admission, his Secret authorization was suspended and his application for Top Secret clearance denied. Adams was cited for (1) immoral conduct and acts of sexual perversion, (2) behavior which tended to show he was not reliable or trustworthy, (3) acts which indicated poor judgment, suggesting

186. Id. These criteria have had different letter designations at earlier times.
187. 32 C.F.R. § 155.5(m) (1978). Criterion (m) has been used when the other criteria have proven inapplicable.
188. 360 U.S. 474 (1959).
189. Id. at 492.
he might disclose classified information and (4) being in a situation where he might be subject to coercion or pressure to act contrary to the national interest.

Adams challenged the denial of his security clearance as a violation of due process on the grounds that the standard for denial of a security clearance lacked the requisite degree of specificity and that the government had failed to show that the denial was “required in the national interest.” The court quickly disposed of the latter challenge, noting that “the grant or denial of security clearances is an inexact science at best. Those who have that responsibility have to do the best they can with what they have . . . .”

Similarly, the court found that the criteria used by the Department of Defense were sufficiently specific, that they included “ample indications that a practicing homosexual may pose serious problems,” and that “[they refer[ed] expressly to the factors of emotional instability and possible subjection to sinister pressures and influences which have traditionally been the lot of homosexuals living in what is, for better or worse, a society still strongly oriented toward heterosexuality.”

Judge Skelly Wright wrote a strong dissent, demanding that the government show “whether his status as a homosexual related to his [appellant’s] abilities to protect classified information.” His position that the government must establish such a “rational connection” closely parallels the “rational nexus” requirement of Norton v. Macy. Judge Wright pointed out that “generalized assumptions that all homosexuals are security risks cannot outweigh almost eight years of faithful service.”

Three years later in Finley v. Hampton, the Court of Appeals for the District of Columbia again avoided the due process implications of a security-clearance denial, by holding that the aggrieved employee had suffered no cognizable legal injury. While undergoing a security clearance examination Finley was confronted by his supervisor with

191. Id. at 235.
192. Id. at 239. The court seemed surprised at Adams’ objection to this “common sense” standard and said that, after all, “appellant is not being sent to jail.” Id. at 239 & n.7.
193. Id. at 239.
194. Id. at 242.
195. 417 F.2d 1161 (D.C. Cir. 1969). The court here required a showing that the efficiency of the federal government was impaired by an employee’s homosexual status before the employee could be dismissed. See notes 106-18 & accompanying text supra for a discussion of Norton.
196. 420 F.2d at 241.
reports that two of his friends had "homosexual mannerisms." Thus it was not merely the employee's own sexuality that came into play, but the sexual preference of his or her friends and acquaintances. Shortly after this conversation with his supervisor, Finley's position was removed from the sensitive category and he was declared acceptable for the now-nonsensitive position. Finley then began a long and frustrating battle with the Civil Service Commission to discover the source and nature of the information. When efforts in the bureaucracy proved to no avail, Finley petitioned the court to expunge the information. The court of appeals upheld the lower court's summary judgment for the government on the ground that Finley had not demonstrated any cognizable legal injury, and observed that while "Finley may be unhappy about the presence in his file of adverse and perhaps untrue comments," the material could not be expunged unless there was a real threat of injury caused by government action. According to the court, the potential for future use of the material was too speculative to justify the issuance of an order removing the material from the government's files.

Once again Judge Skelly Wright dissented. In the first place, he questioned the government's reluctance to expunge information that had unanimously been deemed irrelevant unless it intended to use that information in the future. Secondly, he concluded that if this was the government's intention then "the harm to appellant is obvious and continuing." The courts' apparently superficial approach to the due process interests of homosexual employees did not persist. The Court of Appeals for the District of Columbia as well as other federal courts adopted, at least in principle, Judge Wright's position in *Adams v. Laird* that the rational-nexus standard should apply to the denial of security clearances.

A diluted version of the rational-nexus standard was applied by the Court of Appeals for the District of Columbia in *Gayer v. Schlesinger*, which represented the consolidation of three security clearance cases. In two of the three cases, the court affirmed respec-

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198. *Id.* at 185.
199. The district court judge called the material "silly," *id.* at 184 n.7, and the majority for the court of appeals recognized that such information derived by the government from informants "has never been given a hallmark of significance," *id.* at 188.
200. *Id.* at 190.
201. See text accompanying notes 194-96 supra.
tive findings that security clearances had been improperly refused or revoked. The distinction drawn by the court involved the degree to which the government could permissibly question the security-clearance applicant about his private sex life, rather than upon the substantive connection between the employee's alleged homosexuality and his ability to protect classified information.

The contention that the government had failed to establish a rational connection between the applicant's homosexuality and ability to protect sensitive information was effectively disposed of with respect to Wentworth, one of the three aggrieved employees.

First, the court disagreed diametrically with the district court and found that Wentworth was not denied his security clearance on a finding of homosexuality per se. However, the court did conclude that the criteria used were intended to consider sexual perversion as relevant to a determination of eligibility and that homosexuality was clearly sexual perversion. Relying on the rational-nexus analysis of Norton v. Macy, the court pointed out that homosexuality "might" affect national security just as it "might" affect the efficiency of the service.

Moreover, the court concluded that "[w]ith respect to the sufficiency of proof of a nexus between the conduct involved and security clearance, Adams does not require, as we construe it, objective or direct evidence." According to the court, each case must be considered on its particular facts and involves basically a judgmental decision based on

The lower court held that Ulrich's security clearance was improperly revoked because the nature of the questions asked by the government also violated Ulrich's right to privacy. In Ulrich v. Laird, No. 203-71 (D.D.C. Sept. 28, 1971), the lower court held that Ulrich's security clearance was improperly revoked because the nature of the questions asked by the government also violated Ulrich's right to privacy.

204. 490 F.2d at 747.
205. See the criteria listed at text accompanying note 186 supra.
206. See note 195 and accompanying text supra.
207. 490 F.2d at 750 (emphasis added). A similar conclusion was reached by the district court in Rock v. Secretary, Department of Defense, No. C-74-1128 (N.D. Cal., March 21, 1975), in upholding the revocation of a Top Secret industrial security clearance, held by a deputy manager of a large defense corporation for eighteen years. The district court agreed with the conclusion of the appeals board that, since Rock chose to participate in acts of sexual perversion, in the face of strong social condemnation and criminal penalties, he was a potentially untrustworthy person.
Despite the court's conclusion that a rational nexus had been established, the court affirmed the district court's holding with respect to Wentworth on the specific grounds that the questions asked the employee went too far. Although the government had a right to ask homosexual applicants and employees about their sex life "to develop the kind of deviant sexual life the applicant lives so to fully consider the application in terms of national security," the court held that the homosexual applicant "is not required to suffer such a severe invasion of personality." The court, however, failed to make explicit the fine line between the two types of questions.

The court similarly affirmed the district court's holding with respect to Mr. Ulrich on the grounds that the questions asked "went beyond the boundaries permissible." However, the denial of a clearance with respect to the third employee, Gayer, was found to be proper because the questions he refused to answer were, in the court's opinion, permissible. The court nevertheless ordered that Gayer be given a chance to answer those questions. However, if he failed to do so, the court would consequently conclude that the denial of his security clearance should be permitted to stand.

Another example of a superficial application of the rational-nexus standard is found in the Ninth Circuit's brief opinion in McKeand v. Laird upholding the denial of McKeand's security clearance. After McKeand had held a security clearance for seven years, an investigation to raise the level of the clearance from Secret to Top Secret revealed that he was a homosexual individual. The court said that because the hearing examiner below had found that McKeand feared disclosure of his homosexuality, such fear made him a potential target for blackmail. This, according to the court, constituted a sufficient "rational nexus" between McKeand's conduct and the government's denial of his security clearance.

In a dissenting opinion, district court Judge Peckham pointed out

208. 490 F.2d at 750.
209. Id. at 752.
210. Id.
211. Messrs. Wentworth's and Ulrich's security clearances were reinstated but the court gave the government the "go-ahead" to initiate new proceedings against them consistent with its opinion. By this time, however, Ulrich was not in a job requiring security clearance. Id. at 754 & n.32.
212. Id. at 754.
213. Id.
214. 490 F.2d 1262 (9th Cir. 1973).
that since McKeand initiated the suit under review, his fear of disclosure could not have been very great. In addition to objecting to the majority's finding of a rational nexus, Judge Peckham suggested a novel solution to the problem: "[T]he Department of Defense can easily cure the danger to national security allegedly posed by all homosexuals. It can abandon its arbitrary system of revoking security clearances solely on a finding of homosexuality and, thus, end homosexuals' fears that public exposure will cost them their security classifications."

The attitude of the court in the subsequent decision of Marks v. Schlesinger illustrates the unrealistic naivete and idealism of Judge Peckham's suggestion. The court in Marks upheld the denial of a federal employee's request for a higher level of security clearance required in conjunction with his civilian job, despite the fact that he had previously held a Top Secret clearance for four years while in the Navy. When confronted with allegations concerning his sexual preference, Marks cooperated with the investigation, answering part of the interrogatories put to him. However, he refused on the grounds that such questions violated his right to keep his intimate sex life private, to answer questions regarding the names of his sexual partners, the types of sexual acts performed, the number of such sexual acts with each partner, the states in which the acts were performed, and whether he intended to continue engaging in homosexual acts.

The court pointed out that persons seeking federal employment have a greater obligation to furnish information about themselves than the average private employment applicant. By failing to answer the questions, Marks made it impossible for the government to make a determination regarding his eligibility. Nevertheless, the court noted that if Marks had answered and had then been denied a security clearance, the burden would have been on the government to show a rational nexus between Marks' homosexual conduct and his ability to safeguard classified material. However, if McKeand is the standard for finding a nexus, the outcome would presumably have been much the same even if Marks had answered.

The most disconcerting common element in the security clearance cases is that not one of the persons denied a clearance had ever abused

215. Id. at 1266 (emphasis added).
217. Id. at 1375.
218. Id. at 1376.
219. See text accompanying notes 214-15 supra.
his privilege and most had held their clearances for a considerable number of years. The equally disheartening result is that the services of many extremely qualified employees were lost to the government or to government projects.

Despite the unquestionably grave results of security clearance denials or revocations, the courts have failed to rigorously defend constitutionally protected interests. Although the applicant’s right to be free from intrusions into the privacy of his or her sex life has been recognized to a limited extent, the courts have been considerably less protective of an applicant’s due process rights.

V. Military

In no area of employment has the homosexual individual been more rigidly discriminated against in the last three decades than in the United States armed forces.220 The current highly repressive policy had its genesis in a Department of Defense directive to all branches of the armed services which stated that “known homosexual individuals were military liabilities and security risks who must be eliminated.”221 Two methods of “eliminating” homosexuals from the military that have been consistently used are court-martial and administrative discharge.

Courts-martial are regulated and governed by the Uniform Code of Military Justice (hereinafter U.C.M.J.) which became effective on May 31, 1951.222 Under the U.C.M.J., homosexual behavior is found to be criminal through the application of any of three articles: Article 125 which prohibits sodomy,223 Article 80 which covers attempts to commit a punishable offense,224 and Article 134, entitled “General Article,” which covers “all conduct of a nature to bring discredit upon the armed forces.”225 Violation of any of these Articles by homosexual behavior will subject the offender to a maximum sentence of five years at hard labor coupled with either a dishonorable or bad-conduct dis-

220. This is in marked contrast to ancient cultures in which homosexual soldiers were prized. For example, “[t]he famous ‘sacred band of Thebes’ was a force of elite shock troops composed of pairs of lovers.” A. KARLEN, SEXUALITY AND HOMOSEXUALITY 27 (1971).
charge and forfeiture of all pay and allowances.\textsuperscript{226}

At the time of its enactment, the U.C.M.J. was considered a remarkably progressive code which provided new and expanded due process safeguards for military persons. Further protection was presumably afforded when, at the same time the U.C.M.J. was enacted, Congress established the Court of Military Appeals for direct review of court-martial decisions.\textsuperscript{227} This court, which is made up of civilians, "has demonstrated deep concern for the constitutional rights of service-

men."\textsuperscript{228} Perhaps because of these developments, as one commentator has suggested,

\begin{quote}
  a pronounced trend developed [in the armed services] to substitute administrative discharge action for trials by court-martial in instances where a major objective was to eliminate a troublemaker from the service. The administrative discharge was speedy, and apparently [at that time] it was not subject to judicial review. Moreover, an undesirable discharge given administratively could subject the recipient to many of the same consequences that would accompany a punitive discharge.\textsuperscript{229}
\end{quote}


\textsuperscript{227} Courts-martial were for years sacrosanct from judicial review. However in 1953, shortly after the U.C.M.J. became effective, the Supreme Court in Burns v. Wilson, 346 U.S. 137 (1953), also approved a limited standard of judicial review of convictions by court-martial. The Court affirmed the right of lower federal courts to review such proceedings, particularly in habeas corpus cases, upon a showing that the petitioner's rights were not fully protected. However, the Court noted that "when a military decision has dealt fully and fairly with an allegation raised in that [habeas corpus] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." \textit{Id.} at 142.

\textsuperscript{228} Everett, \textit{Military Administrative Discharges—The Pendulum Swings}, 1966 \textit{Duke L.J.} 41, 68. Since the emphasis in the 1960's and 1970's has been on administrative discharges, this Article will not deal with judicial review of courts-martial. However, the interested reader might read the following cases to see how homosexuality was and is handled under the U.C.M.J.: United States v. Lovejoy, 41 C.M.R. 777 (N.C.M. 1969) (naval lieutenant convicted on the testimony of an enlisted man with whom he had lived as his lover and who was granted immunity from prosecution); United States v. Yeast, 36 C.M.R. 890 (A.C.M.), \textit{petition for review denied}, 36 C.M.R. 541 (1966) (upholding search and seizure of homosexual photographs and literature); United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417, (1958) (former Rear Admiral Hooper convicted ten years after his retirement on three charges of homosexual conduct that occurred after he had retired); United States v. Vaughn, 20 C.M.R. 905 (A.C.M. 1955), \textit{petition for review denied}, 21 C.M.R. 340 (1956) (serviceman convicted of "an indecent, lewd and lascivious act by placing his hands upon the private parts of [a named boy]" during an expedition with a group of boy scouts and sentenced to a dishonorable discharge and one year at hard labor); United States v. Jones, 13 C.M.R. 420 (C.M. 1953) (serviceman convicted of sodomy and sentenced to a dishonorable discharge (suspended), total forfeiture of pay and confinement at hard labor for two years); United States v. Knudson, 7 C.M.R. 438 (N.C.M. 1951) (a sailor acquitted by a California court of sodomy but retried by Navy and found guilty).

At present, there are five types of discharges from the armed forces, honorable, general, undesirable, bad conduct, and dishonorable. The type of discharge given may have serious effects on the individual’s subsequent civilian life and career. Since over ninety percent of all service personnel leave with honorable discharges, anything less is unusual and calls attention to the holder of such a discharge. Moreover, various veteran’s benefits are dependent upon the type of discharge.

While bad conduct and dishonorable discharges may only be given as a result of a court-martial, the other three types of discharges may be given as a result of an administrative process. An honorable discharge is a “separation from the service with honor” and may be awarded to an enlisted person on the grounds of convenience to the government or unsuitability. A general discharge is similarly a “separation from the service under honorable conditions issued to an individual . . . whose military record is not sufficiently meritorious to warrant an honorable discharge” and may be issued on the grounds of convenience to the government, unsuitability, unfitness or misconduct. An undesirable discharge, on the other hand, is an administrative “separation from the service under conditions other than honorable” and may be issued on the grounds of unfitness or misconduct.

Homosexuality or sexual perversion is specifically included as

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230. There are separate regulations governing administrative discharges for each branch of the service. However, the content is basically the same. Except when reference is made to a particular case, for the purposes of this Article all general references will be to the Navy regulations because the largest number of administrative discharges for homosexuality are issued by the Navy. See C. Williams & M. Weinberg, Homosexuals and the Military 52 (1971).

231. Id. at 38.

232. The armed forces are evidently well aware of the stigma attached to any discharge other than honorable. “Both officers and enlisted men who resign or accept an undesirable discharge must sign a waiver recognizing . . . that they expect to find difficulty in civilian life due to the character of their separation. E.g., SEC NAV Instruction 1900.9(6)(c)(2)(b)(1)(2), 20 April 1964.” Note, Homosexuals in the Military, 37 Fordham L. Rev. 465, 469 n.36 (1969).


234. 32 C.F.R. § 730.2(d)-(e) (1978).

235. 32 C.F.R. § 730.2(a) (1978).


237. 32 C.F.R. § 730.2(b) (1978).

238. Id.

239. 32 C.F.R. § 730.2(c) (1978).

240. Id.
grounds for discharge for unsuitability,\textsuperscript{241} unfitness,\textsuperscript{242} and can be inferred to be grounds for a separation for the convenience of the government\textsuperscript{243} and for misconduct.\textsuperscript{244} These current regulations are predated by special policy statements issued by each service regarding the separation of homosexual military personnel.\textsuperscript{245} In general, these directives classified homosexual personnel into three or four classes and specified how each class was to be treated. A Class I homosexual is a person who, while under military jurisdiction, has engaged in a homosexual act involving force, fraud, or intimidation of a minor. Such a person is usually separated from the armed services by a court-martial under the U.C.M.J. A Class II homosexual is a person who, while under military jurisdiction, has engaged in, or attempted to engage in, or solicited under aggravated conditions, a homosexual act. A Class III homosexual is a person who exhibits, professes or admits homosexual tendencies or who solicits a homosexual act in the absence of aggravated circumstances. Lastly, a Class IV homosexual is a person who engaged in homosexual behavior before entry into the service or who failed to admit his or her homosexuality at the time of entry and thus entered the armed services fraudulently. Administrative separation is considered to be generally appropriate for Classes II through IV.\textsuperscript{246} Most persons separated under Classes II through IV receive general discharges, although some receive undesirable discharges and a few receive honorable discharges.\textsuperscript{247}

Two commentators conclude that between 2000 and 3000 individuals each year are separated from the armed forces with less than honorable discharges for reasons involving homosexuality.\textsuperscript{248} This figure, however, does not accurately reflect the number of homosexual individuals in the armed services because “most homosexuals remain undiscovered by military authorities and complete their service with

\textsuperscript{241} 32 C.F.R. § 730.10(b)(7) (1978).
\textsuperscript{242} 32 C.F.R. § 730.12(b)(5)-(6) (1978).
\textsuperscript{243} 32 C.F.R. § 730.6(a)(11) (1978) provides for separation in the case of “[s]ubstandard personal behavior which reflects discredit upon the service or adversely affects the member’s performance of duty.”
\textsuperscript{244} 32 C.F.R. § 730.13(b)(1) (1978) provides for separation when a member of the armed forces is convicted of a crime involving moral turpitude.
\textsuperscript{245} Note, Homosexuals in the Military, 37 FORDHAM L. REV. 465, 468 (1969).
\textsuperscript{246} SEC NAV Instruction 1900.9A (20 April 1964).
\textsuperscript{247} This review has not dealt with officers, who must be court-martialed to be separated. However, Class II through Class IV homosexuals who are officers are generally given the opportunity “to resign for the good of the service” and avoid trial. C. WILLIAMS & M. WEINBERG, HOMOSEXUALS AND THE MILITARY 28 (1971).
\textsuperscript{248} Id. at 53.
honor." 249 Various studies show that seventy-five percent to eighty percent of all homosexual soldiers, many of whom are officers, 250 successfully complete their terms of service.

The administrative discharge is considered by the armed services to be "one of the indispensible tools of quality control in personnel management." 251 The original popularity of this device stemmed from its apparent insulation from civil court review. However, in Harmon v. Brucker, 252 in 1958, the Supreme Court allowed judicial review of an administrative discharge and opened the door to further attacks. Such attacks are usually brought in the Court of Claims with respect to claims for back pay or in a district court when the plaintiff wishes to enjoin a threatened discharge or seek a judgment voiding a discharge. 253

The published federal court cases challenging administrative separations fall into two broad categories. The first category encompasses a series of similar cases spanning the years 1960 through 1975. In these cases, the persons challenging their separation from the military did not voluntarily admit their homosexuality and, in fact, all but one person consistently denied it. Moreover, all of the cases were basically premised on procedural due process grounds such as failure to follow regulations, insubstantial evidence, arbitrary and capricious government actions, improperly placed burden of proof, or improperly obtained evidence. Finally, many of the cases remained unresolved in the sense that they were dismissed or stayed pending exhaustion of administrative remedies.

The second category of cases runs through the years 1973 to 1977, slightly overlapping the first category of cases chronologically. In marked contrast to the earlier cases, the persons more recently challenging separation from the military are all admitted "gays." Furthermore, these later cases are generally premised on substantive constitutional grounds, such as the impropriety of certain treatment based on a person's status, the protection of private consensual adult acts by a right of privacy, the requirement of a "rational nexus" between behavior and the reasons for punishment, and the first amend-

249. Id. at 60.
250. Id.
ment right of association. Although most of the court decisions hold against the challenger, each contains important liberal changes in military policy.

Only two years after the Supreme Court's decisions in *Brucker,* permitting judicial review of administrative discharge, Fannie Mae Clackum, an Air Force enlisted woman, brought an action in the United States Court of Claims to recover back pay disallowed as a result of an allegedly invalid administrative discharge under "conditions other than honorable." When charges of homosexuality were brought against her, Ms. Clackum refused to resign as requested and demanded a court-martial. The Air Force refused to court-martial her and instead discharged her under an Air Force regulation that provided that *if the evidence indicated that conviction by a general court-martial was unlikely,* the Secretary of the Air Force could order her administratively discharged.

In validating the discharge in *Clackum v. United States,* the court took specific note of the consequences of such a discharge, noting the Air Force's own regulations which observed that "the person so discharged may be deprived of many rights as a veteran under both Federal and State legislation, and may expect to encounter substantial prejudice in civilian life."

While the court admitted that the Air Force could discharge Ms. Clackum at will and without cause, it nevertheless stated that "it is unthinkable that it [the Air Force] should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties." In particular, the court castigated the Air Force for not informing Ms. Clackum of the nature of the evidence against her and for not giving her a meaningful hearing.

Equally arbitrary proceedings were challenged with less success in *Beard v. Stahr.* In that case Beard, a Regular Army officer, sought to enjoin the Secretary of the Army from removing him from the active

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254. See text accompanying note 252 supra. In Harmon v. Brucker, 355 U.S. 579 (1958), the Supreme Court held that the Secretary of the Army had exceeded his authority in issuing less than honorable discharges to two soldiers based on their activities prior to their induction. A serviceman's discharge, the Court felt, should be an accurate reflection of the nature of the service rendered.
256. Id. at 227.
257. Id.
258. Id. at 228.
list, pursuant to a determination by a review board of officers\textsuperscript{260} that Beard was unsuitable for continued service.\textsuperscript{261}

In support of his request for an injunction, Beard claimed that requiring the officer under review to sustain the burden of proving that he should be retained was unconstitutional. The court, however, rejected this contention and observed that "supervision and control over the selection, appointment and dismissal of officers are not judicial functions . . . [and] dismissals of officers are not limited or controlled by the Bill of Rights."\textsuperscript{262} Lt. Col. Beard was ultimately denied an injunction on the ground that he should have first exhausted all his administrative remedies. Until the Secretary had actually removed his name from the list of officers, the court considered Beard's action premature.\textsuperscript{263}

Members of the armed forces have been somewhat more successful in obtaining a stay of administrative discharge proceedings. Such a stay is important because the person in question remains in the service, continues to be paid and retains all his or her benefits until a review and final decision. The armed services always argue against such stays on the grounds that if the Board of Correction finds for the service man or woman, he or she will get rank and pay returned. However, the court in \textit{Schwartz v. Covington}\textsuperscript{264} apparently believed that the temporary stigma of an undesirable discharge was greater than the need to terminate immediately, and consequently granted a stay of administrative proceedings against Covington, an Army enlisted man. The court applied a four point test under which the moving party must establish:

\begin{itemize}
\item \textsuperscript{260} The Secretary of the Army is authorized under 10 U.S.C. § 3781 (1976) to convene a board of officers to review the record of an active commissioned officer and to determine whether he should be required to show cause for his retention on the active list. Such a board might be convened because the officer had allegedly fallen below standards in his performance of duty, because of moral or professional dereliction, or because his retention would not be clearly consistent with the interests of national defense. 10 U.S.C. §§ 3781, 3791 (1976).
\item \textsuperscript{261} The plaintiff's alleged homosexuality was not really an issue before the court, because the court apparently accepted the proposition that the Army could remove a homosexual soldier. 200 F. Supp. at 769 n.1. Moreover, the court did not question the quantum of evidence in support of the Board's conclusion, even though plaintiff's behavior with an undercover policeman in a YMCA bathroom was ambiguous and the Army's own psychiatrist testified that the plaintiff was not a homosexual and should be retained.
\item \textsuperscript{262} Id. at 773.
\item \textsuperscript{263} The Supreme Court agreed \textit{per curiam}. 370 U.S. 41 (1962). Justice Douglas, however, dissented, indicating that the discretion of the Army to dismiss at will should be limited where the dismissal is clearly stigmatizing. Moreover, Justice Douglas argued that Beard was entitled to a hearing that comported with due process. \textit{Id.} at 42-43.
\item \textsuperscript{264} 341 F.2d 537 (9th Cir. 1965), \textit{modifying and aff'g} 230 F. Supp. 249 (N.D. Cal. 1964).
\end{itemize}
(1) a likelihood of probable success on appeal, (2) irreparable injury unless the stay is granted, (3) an absence of substantial harm to other interested persons and (4) absence of harm to the public interest.\textsuperscript{265}

In concluding that the test had been satisfied, the court first determined that the findings of the review board would probably be overturned on appeal. The court suggested that the board had exceeded its authority by giving an undesirable discharge without substantial evidence of homosexual acts committed during the accused's present enlistment or proof that the accused was a Class II homosexual.\textsuperscript{266}

Secondly, the court found irreparable harm to the soldier because of the "stigma" attached to undesirable discharge. Lastly, the court found that there was no substantial harm either to the government or to the public. To the contrary, the soldier's service as an orderly in a hospital had been exemplary.\textsuperscript{267}

In \textit{Unglesly v. Zimny},\textsuperscript{268} decided later the same year, the court applied the \textit{Schwartz}\textsuperscript{269} test but arrived at a different result. In that case, an enlisted man asked for an injunction to prevent his separation from the Navy. The petitioner had been given a general discharge under honorable conditions by reason of "unfitness," namely, his homosexuality. He argued that his due process rights had been violated because his request that three witnesses be present at his hearing was denied.

In applying the \textit{Schwartz} test, the court agreed that Unglesly would suffer irreparable harm if given a general discharge, noting that "[i]n our modern society where the vast majority of the nation's young men must pass through the military services, discharge with anything less than a record of honorable service constitutes a stigma of tremendous impact which will have a lifelong effect."\textsuperscript{270} The court further concluded that Unglesly's continued presence in the Navy did not pose a threat of substantial harm either to other interested persons or to the public interest.\textsuperscript{271} However, Unglesly's petition for an injunction failed

\textsuperscript{265} \textit{Id.} at 538. This four-factored test was first articulated in a different context in \textit{Virginia Petroleum Jobbers Ass'n v. FPC}, 259 F.2d 921, 925 (D.C. Cir. 1958), and has since been applied with respect to a variety of administrative proceedings. \textit{See} \textit{Associated Securities Corp. v. SEC}, 283 F.2d 773 (10th Cir. 1960); \textit{Eastern Air Lines v. CAB}, 261 F.2d 830, 830 (2d Cir. 1958). However, the lower court in the instant case was first to apply the test to armed forces discharge proceedings. \textit{Covington v. Schwartz}, 230 F. Supp. 249, 252 (N.D. Cal. 1964).

\textsuperscript{266} \textit{Id.} at 716-17.

\textsuperscript{267} \textit{Id.} at 717.

\textsuperscript{268} 341 F.2d at 538.

\textsuperscript{269} \textit{Id.} at 714 (N.D. Cal. 1965).

\textsuperscript{269} \textit{Id.} at 538.

\textsuperscript{266} \textit{Id.} at 249, 252 (N.D. Cal. 1964).
because the court was not satisfied that Unglesly was likely to prevail on appeal. In fact, the court found substantial admissible evidence to sustain his separation.

Unglesly was equally unsuccessful with respect to his due process challenge. While admitting that the military must conform to "minimal requirements of constitutional due process"272 and that "it would be a better practice for the military to require the presence of witnesses at administrative discharge hearings,"273 the court nevertheless concluded that an administrative body performing an adjudicatory function is not required to follow all the procedural requisites required of a judicial proceeding.274

The Schwartz test was again applied in Crawford v. Davis275 where an Army sergeant of eighteen years service sought to enjoin his discharge under honorable conditions as a Class II homosexual.276 While the court quickly found that Sgt. Crawford would suffer irreparable harm, it nevertheless denied the injunction because the petitioner had failed to establish the three remaining elements of the Schwartz test.

The court found that the retention of Sgt. Crawford pending final administrative action would cause substantial harm to the Army and hence to the public interest. The court observed that "it would be clearly inappropriate to hobble the Army by forcing it to retain even one soldier, for an indefinite period of time, when there are serious questions concerning his emotional health."277 Because there was nothing in the record about Crawford's emotional health, the court, presumably, characterized homosexuality as equivalent to emotional sickness.278 The court also found that Crawford was unlikely to prevail on appeal. Even though the court admitted that some of Crawford's constitutional rights had been violated, it concluded that those violations were basically irrelevant in the face of plaintiff's admission of homosexuality and the Army's authority to discharge its personnel.279

A similar disregard of a petitioner's constitutional rights was evi-

272. Id. at 718.
273. Id. at 719.
274. Id.
276. Sergeant Crawford admitted his homosexuality, which he characterized as a "problem," after being accused in an anonymous letter of participating in homosexual acts. Id. at 944.
277. Id. at 947.
278. This was not a particularly astonishing viewpoint in its day. For a typical view of homosexuality in the late 1960's see Slovenko, Sexual Deviation: Response to an Adaptational Crisis, 40 U. COLO. L. REV. 222 (1968).
279. 249 F. Supp. at 951.
enced by the court in *Courtney v. Secretary of the Air Force*,\(^{280}\) in which Courtney, a second lieutenant in the Air Force, sought to have a discharge under conditions other than honorable\(^{281}\) upgraded to a more favorable discharge. Lt. Courtney asserted that the Air Force’s refusal to comply with his request was arbitrary and capricious in light of his record, that he was not afforded the right of cross-examination, and that his fourth, fifth and sixth amendment rights had been violated. The court rejected these arguments and held that the procedural guarantees of the fifth and sixth amendments were not necessarily applicable to administrative hearings.\(^{282}\) Deferring to the discretion of the Air Force, the court observed the mandate of the Supreme Court in *Orloff v. Willoughby*\(^{283}\) that “[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.”\(^{284}\)

With respect to the four Schwartz criteria, Messrs. Covington, Unglesly and Crawford were all successful in establishing that irreparable harm would result from a discharge on the grounds of homosexuality. While this might suggest that the courts are not totally insensitive to the plight of the homosexual service man or woman, the adverse decisions in *Unglesly* and *Crawford* nevertheless indicate that the courts will continue to give considerably more weight to the policies of the armed forces in balancing the respective interests.

Moreover, the “harm” often perceived by the courts is the mischaracterization of a heterosexual person as a homosexual person, rather than the involuntary discharge from the armed forces for reasons unrelated to an individual’s ability to perform.

Thus, in *Bray v. United States*,\(^ {285}\) the court found that the Air Force had not followed its own regulations and that Sergeant Bray had not been treated with “basic fairness.”\(^ {286}\) The court observed that “[a]
most severe stigma attaches in our culture to male homosexuality; error in weighing the substantiality of the evidence that supports the Air Force findings could result in grave injustice."

On the other hand, at least two homosexual servicemen were unable to establish that irreparable harm would result from their separation simply because they had received "honorable," but nonetheless involuntary discharges. In *Nelson v. Miller*, a ten-year Navy enlisted man was denied an injunction restraining the Navy from giving him an honorable discharge (for the convenience of the government) because of alleged homosexuality. The appeals court found that the plaintiff had not suffered irreparable harm since the discharge was "honorable" and since he could also be reprieved by a positive decision of the Board for Correction of Naval Records.

Similarly, the court in *Benson v. Holloway* concluded that serviceman Benson suffered no irreparable harm because his discharge was under honorable conditions. Moreover, in refusing to enjoin Benson's separation from the Air Force the court concluded that his temporary retention would cause substantial harm to the Air Force and observed that "[t]he problems of morale, as well as other problems that may arise by having a now known homosexual present in the military, which may confront the Air Force are sufficient to restrain this Court from in any way interfering with the military authority at this juncture."

The second category of military cases marks the beginning of a strong movement by gay persons in the military to challenge the then accepted dogma which is illustrated by many of the preceding cases and is succinctly summed up in a Navy policy statement:

Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct.

Without questioning the basic principle of the Navy's policy, the

287. *Id.* at 1391.
288. Honorable discharges may be awarded on the grounds of convenience to the government or "unsuitability." See text accompanying notes 235-36 supra.
290. *Id.* at 479-80. Subsequent to discharges, all the services have a civilian board of final appeal, which corrects records. 10 U.S.C. § 1552 (1976).
292. *Id.* at 51.
293. SEC NAV Instruction 1900.9(4)(a) (20 April 1964).
court in *Doe v. Chafee* \(^{294}\) nevertheless imposed, for the first time with respect to military proceedings, a requirement similar to the *Norton* "rational nexus" standard.\(^ {295}\) Unless a "nexus" between the service-man's homosexuality and the quality of his military service could be established, the court refused to sustain the separation of an avowed homosexual individual.

However, in a feat of circular reasoning, the court found such a "nexus." Because of his early release from the service, which had been compelled by his homosexuality, the court concluded that the quality of the petitioner's military service was affected adversely and was consequently inferior to the service of those who fulfilled their enlistments.\(^ {296}\) In addition, the court suggested that the quality of his service might be affected because of the tension created by having a shipmate lover.

The constitutionality of the Navy's policy was directly challenged in *Champagne v. Schlesinger* \(^ {297}\) by two women who were given general discharges under honorable conditions.\(^ {298}\) The women challenged their discharges on the grounds that Navy policy as it related to private consensual homosexual conduct between adults was void as unconstitutional.\(^ {299}\)

The court never reached this constitutional question,\(^ {300}\) however,
because the Navy adopted the surprising position that Navy regulations do not require mandatory discharge of homosexuals. Consequently, the court left the women to seek administrative review of their discharges but guaranteed their right to return to the court when their administrative remedies were exhausted.

The constitutionality of a similar Air Force policy was squarely faced by the court in Matlovich v. Secretary of the Air Force. Sgt. Matlovich, an avowed homosexual, sought a declaratory judgment that the Air Force regulation providing for the discharge of homosexuals was an unconstitutional abridgment of his rights to privacy and equal protection. In the alternative, Matlovich alleged that since the decision to discharge him was arbitrary and capricious and constituted a denial of due process, he was entitled to reinstatement in the Air Force.

Judge Gesell delivered an oral opinion in the Matlovich case and, with apparent reluctance, found for the Air Force. On the issue of privacy, Judge Gesell said he was bound by the recently decided case of Doe v. Commonwealth's Attorney for Richmond which clearly indi-
cated that "there is no constitutional right to engage in homosexual activity." The court similarly disposed of Matlovich's claim that he was denied equal protection because the military had failed to adopt a policy, similar to that of the civil service, which required that a "rational nexus" between conduct and efficiency be shown in order to dismiss a federal civil servant.

Neither did the failure to extend the "rational nexus" standard to military proceedings constitute a violation of due process. Again Judge Gesell felt constrained by recent Supreme Court opinions, in particular Kelly v. Johnson, and observed that:

[T]he Armed Forces . . . have a legitimate interest in assuring full readiness for combat and can, of course, act to protect recruitment, security of military information where applicable and over-all efficiency. It may establish standards of acceptable behavior when conduct impinges directly or indirectly on discipline and the fullest achievement of appropriate military objectives.

Given these considerations, Judge Gesell concluded that the Air Force regulation at issue was not so "irrational that it may be branded arbitrary."

Lastly, while the Air Force admitted that it was possible to make rare exceptions, the Air Force argued that the decision as to whether such an exception should be made "is a completely subjective judgment statute, concluding that the constitutionally protected right of privacy must be narrowly drawn to include only marital privacy. Id. at 1202.

308. 2 Sex. L. Rep. 53 (1976). Judge Gesell also noted two other recent cases which supported this position: Singer v. United States Civil Service Comm'n, 530 F.2d 247 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977), which upheld the dismissal of a federal civil servant because he publicly flaunted his homosexuality and State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), in which the Arizona Supreme Court held that statutes forbidding sodomy and lewd conduct as applied to consenting adults did not violate defendants' first amendment right to freedom of expression. At the time of Judge Gesell's opinion, Singer had not yet been remanded by the Supreme Court. See text accompanying notes 134-47 supra.


310. In Kelly v. Johnson, 425 U.S. 238 (1975), the Supreme Court held that the test of the validity of an Air Force's regulation is "not . . . whether the [State] can 'establish' a 'genuine public need' for the specific regulation. It is whether respondent can demonstrate that there is no rational connection between the regulation . . . and [the end served by the affected agency]." Id. at 247.


312. Id.

313. "Exceptions to permit retention may be authorized only where the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised." Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment, and in Opposition to Plaintiff's Motion to Compel Discovery at 1, Matlovich v. Secretary of Air Force, No. 75-1750 (D.D.C. July 16, 1976).
which depends on the facts of each case"\textsuperscript{314} and is solely within the discretion of the military. Judge Gesell found that all issues had been presented openly and fairly to the Air Force authorities and, consequently, did not question the Air Force’s decision not to make such an exception in Matlovich’s case.\textsuperscript{315}

Having concluded that Matlovich could not prevail, Judge Gesell embarked on a remarkable speech, addressed to the Air Force:

This is a distressing case. It is a bad case. It may be that bad cases make bad law. Having spent many months dealing with aspects of this litigation, it is impossible to escape the feeling that the time has arrived or may be imminent when branches of the Armed Forces need to reappraise the problem which homosexuality unquestionably presents in the military context.

The Services are admittedly involved in matters of immediate and clear importance. They not only have problems with respect to performing the obvious military task but there are moral, religious and privacy overtones that cannot and should not be overlooked.

We all recognize that by a gradual process there has come to be a much greater understanding of many aspects of homosexuality. Public attitudes are clearly changing. Some state legislatures have already acted to reflect these changing public attitudes, moving more in the direction of tolerance. Physicians, church leaders, educators and psychologists are able now to demonstrate that there is no standard, no preconceived stereotype of a homosexual which, unfortunately, some of the Air Force knee-jerk reaction to these cases would suggest still prevails in the Department.

The Armed Forces have been in many ways leaders in social experimentation and in their adaptability to changing community standards. . . . Here another opportunity is presented. While the Court has reached its conclusions, as a judge must do, on the law, I hope it will be recognized that after months of intense study of this problem, matters within and without the record, the Court, individually, for what it is worth, has reached the conclusion that it is desirable for the military to reexamine the homosexual problem, to approach it in perhaps a more sensitive and precise way.\textsuperscript{316}

The results of such a reexamination were apparently approved of by Judge Gesell in \textit{Berg v. Clayton},\textsuperscript{317} in which he upheld the honorable discharge of Vernon Berg, graduate of Annapolis, Ensign in the United States Navy and an avowed homosexual. The opinion reveals a

\textsuperscript{314} Id. at 25.

\textsuperscript{315} On December 6, 1978, the Court of Appeals for the District of Columbia Circuit reversed. 47 U.S.L.W. 2361 (Dec. 12, 1978). The court questioned “the absence of articulated standards” and “the absence of any reasoned explanation” that would make it possible for the court “to decide whether or not there has been an abuse of discretion in this instance or whether improper factors have played a material role.” \textit{Id}.

\textsuperscript{316} 2 SEx. L. REP. 53, 56-57 (1976).

significant shift in Navy policy. Instead of contending that it is attempting to maintain moral standards or that acknowledged homosexuals are security risks, the Navy now adopted the position that "homosexuals present an obstruction to efficient operations." The court concluded that "[g]iven the extreme deference" courts pay to military procedures, "the regulation has not been shown to be unconstitutionally irrational."

Shortly after the Matlovich decision, the District Court for the Northern District of California handed down a decision in Saal v. Middendorf representing the first clear-cut victory for gay persons in the military. After successfully obtaining an honorable discharge in lieu of a general discharge, Navy enlisted woman Saal was assigned a reenlistment code which effectively precluded reenlistment. Saal argued that she was deprived of due process by being made ineligible for reenlistment because of her homosexuality. She alleged that Navy policy as enunciated in SEC NAV 1900.9A was unconstitutional on its face because it presumed every homosexual unfit, and that 1900.9A as applied specifically to her was unconstitutional because it deprived her

318. Id. at 80. The court considered the Navy's rationale for this new policy and observed: "First, [the Navy] contends that in a confined situation, such as aboard ship, enlisted men would react to a homosexual officer in such a way as to destroy the officer's credibility and his ability to command. The officer would be subject to ridicule and lack of respect, thus making him an ineffective leader. Second, this situation would compound the already severe pressures faced by all officers aboard ship, putting the homosexual officer in an unusually difficult position, thus further decreasing his effectiveness." Id.

319. The court was not unaware that if sexual preference constituted a "suspect class" or was considered a "fundamental right" its decision might have been different. See id. at 80 n.1. "The Court is aware of the claim that the Navy is acting unlawfully in even considering the reactions of others toward homosexuals. There are problems inherent in burdening a class of people because of the reactions they engender. However, where the class that is burdened is neither 'suspect' nor engaged in constitutionally protected behavior, the Government may take the reactions of third parties into account in setting its policies." Id.


321. Other recent cases indicate an inconsistent attitude toward homosexuals on the part of the armed forces. Following the establishment of President Carter's special Viet Nam discharge-review program, former Radioman Third Class Robert Martin, an acknowledged homosexual, was granted an honorable discharge from the Navy. Martin had originally been separated from the service in 1971 with a general discharge despite a vigorous court battle. The Advocate, Nov. 30, 1977, at 12. A Wave Petty Officer, accused of "homosexual tendencies," was not discharged from the Navy despite an alleged affair with a female airman; the airman, however, was discharged. Lesbian Connection, Aug. 1976, at 9.

322. Saal sought and obtained a preliminary injunction, preventing her separation from the Navy with a general discharge on the basis of her admitted homosexuality. Meanwhile, Saal's enlistment period was running out. Her application for an extension was denied by the Navy and at the end of her enlistment period she was honorably discharged. Id. at 194.

323. See notes 245-47 & accompanying text supra.
of her ability to reenlist despite demonstrated fitness for military service.\textsuperscript{324}

While the court agreed with the Navy that homosexual acts are not a constitutionally protected activity and that the plaintiff had no constitutional right to continued employment by the Navy, the court held that, because of the indisputably stigmatizing effects of the Navy's actions, Saal was entitled to due process protections.\textsuperscript{325} The court paid deference to the Navy's discretion with regard to personnel matters, but pointed out that a person does not surrender his or her constitutional rights upon entering the armed services.

The court rejected the Navy's rationale for the mandatory exclusion of homosexuals,\textsuperscript{326} observing that the same rationale could equally apply to persons other than homosexuals. Yet, the court noted, only homosexuals were classified as "intolerable" and singled out for prompt separation. Moreover, Navy policies provided no procedure for determining if the particular homosexual person did in fact present

\textsuperscript{324} The transparency of the Navy's justification for precluding Saal's reenlistment, her alleged "unfitness," was revealed by the consistently outstanding service evaluations which she attached to her pleadings. The last evaluation, dated 1 Mar. 1975 - 31 July 1975, concluded: "Highly recommended for advancement and reenlistment." Saal v. Middendorf, 427 F. Supp. at 204 app. A.

\textsuperscript{325} Id. at 198-99.

\textsuperscript{326} The Navy's reasons for mandatory discharge without an individualized determination were stated as follows: "It is considered that administrative processing is mandatory. This is because it is perceived that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars.

"(a) Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, especially in the unique close living conditions aboard ships.

"(b) An individual's performance of duties could be unduly influenced by emotional relationships with other homosexuals.

"(c) Traditional chain of command problems could be created, i.e., a proper command relationship could be subverted by an emotional relationship; an officer or senior enlisted person who exhibits homosexual tendencies will be unable to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality, and this would most certainly degrade the individual's ability to successfully perform his duties of supervision and command.

"(d) There would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards.

"(e) A homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive.

"(f) Homosexuals may be less productive/effective than their heterosexual counterparts because of: (1) Fear of criminal prosecution; (2) Fear of social stigmatization; (3) Fear of loss of spouse and/or family through divorce proceedings as a result of disclosure; (4) Undue influence by a homosexual partner." Id. at 201 n.10.
the problems perceived by the Navy.\textsuperscript{327} Therefore, the court concluded that “[p]laintiff's showing in this case—demonstrating a record of service judged outstanding by Navy command even during the period of the pending litigation—establishes that at least as applied to her, the mandatory exclusion policies and regulations are irrational and capricious.”\textsuperscript{328}

The court emphasized that it was not requiring the Navy to enlist or retain gay persons or precluding the Navy from excluding homosexual individuals if their homosexuality renders them unfit for service. Rather, it held that “due process requires plaintiff's fitness to serve to be evaluated in the light of all relevant factors and free of any policy of mandatory exclusion.”\textsuperscript{329}

Despite the decision in \textit{Saal}, homosexual members of the armed forces have been substantially less successful in achieving job security and recognition of their constitutionally protected rights than homosexual employees of the federal or state governments. Even the \textit{Saal} decision does not represent unqualified progress in that direction. The holding is narrowly formulated to prohibit only mandatory exclusion of homosexual service men and women. Moreover, the continued validity of that holding remains questionable since the decision is currently being appealed by the Navy.\textsuperscript{330}

In addition, neither the \textit{Saal} court nor other courts have unequivocally adopted the “rational nexus” due process test with respect to military proceedings.\textsuperscript{331} Although the courts in \textit{Doe v. Chafee}\textsuperscript{332} and \textit{Matlovich v. Secretary of the Air Force}\textsuperscript{333} purported to require some connection between the homosexuality of the serviceman and the quality of his military service, those courts clearly accepted the military's determination that such a connection existed. Consequently, until the courts prove less willing to defer to the traditional autonomy of the

\begin{itemize}
\item \textsuperscript{327} \textit{Id.} at 202.
\item \textsuperscript{328} \textit{Id.}
\item \textsuperscript{329} \textit{Id.} at 203.
\item \textsuperscript{330} Phone conversation of July 13, 1978 with Mary C. Dunlap, Saal's attorney, confirmed that the case is in the Ninth Circuit, consolidated with two other cases involving administrative discharges of homosexual service personnel.
\item In one of these cases, Martinez v. Brown, 449 F. Supp. 207 (N.D. Cal. 1978), the court followed \textit{Saal}, but went further in protecting the rights of homosexual service men and women by requiring the showing of a nexus between homosexual conduct and unsuitability for service. \textit{Id.} at 212.
\item One court explicitly adopted the “rational nexus” standard. That decision, however, is being appealed along with \textit{Saal}. See note \textsuperscript{330} \textit{supra}.
\item See notes \textsuperscript{294-96} & accompanying text \textit{supra}.
\item See notes \textsuperscript{303-16} & accompanying text \textit{supra}.
\end{itemize}
military's quasi-judicial proceedings, homosexual service men and women can presumably expect little relief from the courts in their battle to enter and remain in the armed services.

VI. Professional and Occupational Licensing

Laws requiring a license to practice a particular profession or occupation abound in the United States today and "embrace most of the activities that come readily to mind, running the length of the alphabet from abattoir operators to yacht salesmen." Three states list over 164 licensed occupations and five states list between 130 and 164. Among the remaining states, the number of licensed occupations range from 60 to 129.

The ostensible purpose of such licensing is public protection. In theory, the imposition of various regulations guarantees that only qualified practitioners will exist and the public will be protected. However, the theoretical justification belies less admirable reasons for licensing. Many commentators feel that licensing that limits supply is more protective of the practitioner's economic well-being than of the public's welfare. Moreover, license fees are often a source of income to the state.

Two professions traditionally subject to such regulation are law and medicine. Because these practitioners are at least in theory subject to high ethical standards, an inherently subjective and arbitrary inquiry into the private morality of the applicant occasionally occurs. The denial of entrance into a profession toward which time and money have been invested or the revocation of a license to practice is a severe penalty, especially when the denial or revocation is based upon an administrative determination, which is predictably arbitrary and arguably irrelevant to the individual's ability to practice his or her profession. Applicants to the medical or legal professions, who face charges that their homosexuality renders them unsuitable to practice, are particularly subject to this kind of administrative treatment.

In McLaughlin v. Board of Medical Examiners, the court sus-

337. Teachers, of course, are also licensed in a sense. Their certification is discussed in section on Teaching in Public Schools at text accompanying notes 367-449 infra.
tained the disciplining of a homosexual doctor who had been convicted of the misdemeanor of disorderly conduct for soliciting or engaging in lewd or dissolute conduct in a public place.\textsuperscript{339} In concluding that the medical board's decision was correct, the court considered the appellant-doctor's contention that the alleged conduct bore no relation to his practice of medicine. While distinguishing both \textit{Norton v. Macy}\textsuperscript{340} and \textit{Morrison v. State Board of Education}\textsuperscript{341} on the grounds that those cases involved private, noncriminal acts while this act was both public and criminal,\textsuperscript{342} the court nevertheless sought to establish some connection between the appellant's conduct and the potential effect upon his practice:

\begin{quote}
[A]s an internist he is in intimate physical contact with his patients, and while he may be dedicated to treating them in an exemplary professional manner, the opportunity to falter and his frailty in exercising restraint exist. Unfortunately, appellant's \textit{problem} apparently stays with him most, if not all of the time; and in light of his present conduct, there is little assurance that it will be relegated to isolated places and occasions away from his patients.\textsuperscript{343}
\end{quote}

The court gave great weight to the determination by the licensed physicians on the medical board that his problem might affect his practice.\textsuperscript{344}

In his dissent, Presiding Justice Kaus emphatically attacked the majority, arguing that the record contained no substantial evidence on the vital question of whether this act of "moral turpitude" affected the appellant's ability to practice his profession.\textsuperscript{345} Justice Kaus suspected

\begin{quote}
\textit{McLaughlin} a similar issue reached the California Supreme Court in Lorenz v. Board of Medical Examiners, 46 Cal. 2d 684, 298 P.2d 537 (1956). The court overturned the lower court opinion and the recommendation of the Board of Medical Examiners and restored the license of an allegedly homosexual doctor. However, the license revocation was overturned because of a procedural error, rather than on substantive grounds. \textit{Id.} at 687, 298 P.2d at 539.
\end{quote}

\textsuperscript{339} \textsc{Cal. Penal Code} § 647 (West 1978). The doctor was arrested by a plain-clothes police officer when the doctor allegedly touched the officer's pants around his "private parts."
\textsuperscript{340} 417 F.2d 1161 (D.C. Cir. 1969). \textit{Norton} held that a reasonably foreseeable connection must exist between an employee's "potentially embarrassing conduct and the efficiency of the [civil] service" before he may be dismissed. See text accompanying notes 106-18 supra.
\textsuperscript{341} 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). The court, in an opinion authored by Justice Tobriner, ruled that a school teacher could be dismissed for homosexual activities only if those activities would adversely affect his students or fellow teachers. See text accompanying notes 377-84 \textit{infra} for a discussion of \textit{Morrison}.
\textsuperscript{343} \textit{Id. at} 1015, 111 Cal. Rptr. at 357 (emphasis added).
\textsuperscript{344} \textit{Id. at} 1017, 111 Cal. Rptr. at 358.
\textsuperscript{345} The only evidence Justice Kaus found indicated that the appellant was a fine physician. \textit{Id. at} 1018, 111 Cal. Rptr. at 359.
"that the problem of the oversexed physician—'gay' or 'straight'—is as old as medicine itself." While he interpreted the majority's opinion to mean that any doctor who violated acceptable standards of sexual behavior could be disciplined without proof that his deviation affected his professional competence, he also detected a double standard:

Yet, I cannot bring myself to believe that the court would justify disciplining a doctor on no evidence at all except proof that he violated § 647(b) of the Penal Code by propositioning a policewoman in 'plain clothes,' though we could say with just as much substance that a doctor who seeks sexual gratification by way of a sidewalk pickup, is never without his 'problem' and that his intimate contact with patients of the opposite sex provides him with opportunity to falter.

Lawyers also must deal with professional disciplinary bodies. In most states, possession of a "good moral character" and lack of evidence of "moral turpitude" are prerequisites to admission to the Bar. Many states have special screening committees to pass on a candidate's character. However, because these committees operate far out of the public eye, relatively little is known about how they operate.

In 1957, the Supreme Court of Florida, in its per curiam opinion in State v. Kimball, approved the disbarment of Harris L. Kimball. The opinion does not mention homosexuality but only alludes to an act "contrary to the good morals and law of this State." However, examination of the cases arising out of Kimball's subsequent application to the New York bar reveal that Kimball had been convicted of sodomy, a felony under Florida law.

With respect to that subsequent application, the New York Supreme Court ruled that, despite a favorable recommendation by the Committee on Character and Fitness, Kimball could not be admitted in New York because of his conduct in Florida sixteen years earlier. The Court of Appeals of New York reversed in a one paragraph per

346. Id. at 1019, 111 Cal. Rptr. at 360.
347. Id.
349. In 1971, a graduate of the Ohio State University Law School who was an avowed homosexual sought admission to the Ohio Bar. To make that determination the Supreme Court of Ohio appointed a special committee which ultimately admitted the person in question. However, since the issue was dealt with by special committee, the fact that in Ohio homosexuality is not a reason for denial of admission to the Bar was not made a matter of public record.
350. 96 So. 2d 825 (Fla. 1957).
351. Id.
curiam decision, concluding that since Florida's disbarment was not controlling, the recommendation of the Committee was dispositive.

In 1970, Florida again disbarred an attorney on grounds of his conviction of a crime involving homosexual conduct. In *Florida Bar v. Kay*, the Supreme Court of Florida in a per curiam opinion affirmed the disbarment of a man convicted of indecent exposure while participating in a homosexual act with a consenting adult in a public lavatory. The court did not discuss how his homosexual conduct affected his legal practice but merely agreed with a lower court that "respondent's conduct was blatantly contrary to good morals."

Chief Justice Ervin concurred in the decision on the grounds that disciplinary proceedings were the exclusive responsibility of the Board of Governors of The Florida Bar, but expressed concern as to the absence of a showing that a substantial nexus existed between Kay's "antisocial act" and a manifest permanent inability to practice law responsibly.

Perhaps Chief Justice Ervin's publicly expressed concern prompted the Florida Board of Bar Examiners to request guidance from the Florida Supreme Court with regard to the admission of Robert Eimers. Although Eimers admitted his homosexual status, there was no record of any criminal convictions for homosexual activity nor did Eimers admit any homosexual conduct. The court in *Florida Board of Bar Examiners v. Eimers* ordered Eimers admitted, but specifically limited its ruling to persons having the "status" of homosexual. Despite the narrow holding, the court explicitly recognized the homosexual applicant's due process rights by requiring a showing of a "rational connection with the applicant's fitness or capacity to practice law." The Florida Court's significant change of attitude in the eight years since *Kay* is reflected in the court's statement that "[g]overnmental regulation in the area of private morality is generally

353. 232 So. 2d 378 (Fla. 1970).
354. *Id.* at 379.
355. The chief justice called attention to the "substantial nexus" requirement of *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), and a similar line of cases. In addition, Chief Justice Ervin also indirectly criticized the circumstances of Kay's arrest, noting that "[e]vidence of antisocial behavior ferreted by peeping has never enjoyed widespread legal approval." 232 So. 2d at 380.
357. While Eimers admitted his preference upon questioning, the matter initially was brought to the board's attention when an informer wrote to the board as a form of blackmail. *N.Y. Times*, March 21, 1978, at 20, col. 1.
358. 358 So. 2d 7 (Fla. 1978).
considered anachronistic" without a showing of a rational nexus between private behavior and public welfare.359

In 1976 an American Bar Association subcommittee asked bar associations across the country whether sexual preference was a factor considered in their respective admission procedures. No state bar admitted seeking such information from an applicant. Forty-five state bar associations denied having any policy, formal or informal, with respect to the admission of homosexual individuals. Six state bar associations, including Florida, did not indicate whether or not they adhered to such a policy.360 Such a report would seem to indicate that bar associations try to avoid the issue and only react when forced to by events.361

As previously indicated, the legal and medical professions are only two among many professions and occupations which are state licensed. Not all require good moral character,362 but many require other qualifications that implicate the homosexuality of the applicant. For example, in Doe v. Department of Transportation,363 the court upheld the finding of the National Transportation Safety Board that the applicant had a "character or behavior disorder severe enough to have repeatedly manifested itself by overt acts."364 Such a disorder constituted statutory grounds for denial of the medical certificate necessary for a pilot's license. In reaching its decision, the court considered the testimony of an Air Force psychiatrist365 that the applicant was a "constitutional psychopathic personality," as well as the applicant's conviction of sodomy and several traffic violations. The court justified the severity of the penalty as a necessary incident to its main concern, the safety of the airways.366

The extent to which homosexual persons are denied licenses on the basis of their sexual preference is simply not clear. Since there are few

359. Id. at 10.
361. See note 357 supra.
362. It is surprising how many licensed occupations have morals requirements. In 1962 in California, gross immorality was a ground for disciplinary proceedings against barbers, cosmetologists, funeral directors, embalmers, and pharmacists. Note, Entrance and Disciplinary Requirements for Occupational Licensees in California, 14 STAN. L. REV. 533, 548 (1962). For the current statute, see CAL. BUS. & PROF. CODE § 4350 (West 1978).
363. 412 F.2d 674 (8th Cir. 1969).
364. Id. at 675.
365. The psychiatrist's conclusions were drawn exclusively from the applicant's medical and service records. The psychiatrist did not personally examine the applicant. Id. at 679.
366. Id. at 680.
published decisions, it is most likely that homosexual individuals in licensed professions keep a low profile for fear of potential dismissal or discipline. From those cases which have been published, however, it is evident that the homosexuality of a prospective licensee is often a dispositive factor. While at least one court has adopted the "rational nexus" due process requirement to a limited extent, the courts have generally been less willing to recognize the due process rights of homosexual applicants for licenses than those of their counterparts who are already gainfully employed.

VII. Teaching in Public Schools

Public school teaching is probably the most controversial employment area for the homosexual person. Three factors complicate the employment status of the public school teacher. Teachers are public employees and thus are entitled to the same type of due process protections afforded other government employees. At the same time, teachers are also licensed and are, therefore, subject to licensing requirements similar to other professions. Lastly, teaching is generally singled out as a particularly sensitive and important profession because of its impact on the lives of young persons.

In all fifty states, a teaching certificate, granted by the state, must be obtained in order to teach in a public school system at the elementary or secondary level. The homosexuality of an individual teacher

367. While 56% of a population sample agreed that homosexuals should have equal rights in terms of job opportunities, 65% of the population sample felt homosexuals should not be hired as elementary school teachers. Homosexuals Move Toward Open Life As Tolerance Rises, N.Y. Times, July 17, 1977, at 34, col. 1. See also LaMorte, Legal Rights and Responsibilities of Homosexuals in Public Education, 4 J. LAW-EDUC. 449 (1975). Much of the objection to homosexual persons as teachers is based on a popular though mistaken belief that homosexual individuals are child molesters. Child molestation is not a homosexual phenomenon. See Richards, supra note 25, at 988.


368. This section of the Article will focus entirely on the public elementary and secondary school systems.
may be raised on application for the teaching certificate or on application for a particular teaching position. It can also become an issue as a cause for dismissal from a particular job and, more severely, as a cause for the revocation of the license to teach.

The main legal issues confronting the homosexual teacher are dismissal from a current position and revocation of his or her teaching certificate. While dismissal from a current position is certainly injurious to the teacher, revocation of his or her teaching certificate is a personal catastrophe. Without proper credentials a teacher cannot be hired anywhere in that state and is thus essentially banned from his or her profession. All states have statutes that permit the revocation of teaching certificates (or credentials) for immorality, moral turpitude, or unprofessionalism. Homosexuality is considered to fall within all three categories. Dismissals of homosexual teachers, as differentiated from loss of credentials, have also usually been based on charges of “immorality.”

Revocation of credentials and dismissals under other applicable provisions of the California Education Code have been frequently and often successfully challenged. Two provisions in the California Education Code have been used to remove homosexual teachers. Section 13207 requires mandatory revocation of teaching credentials of anyone convicted of certain sex offenses including rape, molestation, sodomy, oral copulation, indecent exposure and lewd conduct in a public place. Actual conviction is unlikely because quite often sex offenses are plea bargained and the offender pleads guilty to a much lesser offense such as disorderly conduct. In such cases, section 13202 required the State Board of Education to revoke or suspend a teaching credential “for immoral or unprofessional conduct . . . or for evident unfit-

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369. While it is well established that states have the power to set the standards for teaching certificates, Vogulk in v. State Bd. of Educ., 194 Cal. App. 2d 424, 15 Cal. Rptr. 335 (1961); People v. Flanigan, 347 Ill. 328, 179 N.E. 823 (1932); Marrs v. Matthews, 270 S.W. 586 (Tex. Civ. App. 1925), there is no case law and little data on any initial exclusion of homosexual persons from the teaching profession. See Horenstein, Homosexuals in the Teaching Profession, 20 CLEV. ST. L. REV. 125 (1961) for interviews with school officials as to school policy with respect to the applications of homosexual teachers.


371. Former CAL. EDUC. CODE § 13207 (currently codified at CAL. EDUC. CODE §§ 44425, 87335 (West 1978)).

372. These offenses were listed in former CAL. EDUC. CODE § 12912 (currently codified at CAL. EDUC. CODE § 44010 (West 1978)).
ness for service.”373

The California courts first applied section 13202 to a teacher’s homosexual conduct in Sarac v. State Board of Education.374 Sarac, a male teacher pleaded guilty to a charge of disorderly conduct for allegedly soliciting two undercover policemen to engage in a homosexual act. Since this conviction for disorderly conduct did not fall within the purview of section 13207, the State Board sought to remove Sarac’s credentials to teach under section 13202 for “immoral and unprofessional conduct.” Observing that homosexual behavior is “clearly” immoral behavior375 and thus, in effect, declaring that homosexual conduct per se constitutes unfitness to teach, the court upheld the Board’s decision to revoke Sarac’s credentials. The court noted that there was an “obvious rational connection” between Sarac’s homosexual behavior and the revocation of his credentials because of his “statutory duty to ‘endeavor to impress upon the minds of the pupils the principles of morality’ and his necessarily close association with children.”376 The court apparently was less impressed with the testimony of the twenty-three character witnesses who testified as to Sarac’s fitness to teach than it was with the testimony of the two arresting officers.

Two years after the Sarac decision, the California Supreme Court, in Morrison v. State Board of Education,377 sought to clarify the murky standards surrounding teacher credential revocation. Morrison resigned from his teaching position after his homosexuality was disclosed to his superior by a former sexual partner.378 The State Board of Education subsequently conducted a hearing and as a consequence revoked Morrison’s license to teach. In his appeal to the courts, Morrison claimed that the standard of section 13202—“immoral and unprofessional conduct”—was vague and thus legally infirm. While the California Supreme Court said that the statute was not vague as long as it

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373. Former CAL. EDUC. CODE § 13202 (currently codified at CAL. EDUC. CODE §§ 44421, 87331 (West 1978)).
375. Id. at 63, 57 Cal. Rptr. at 72. The court stated: “Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct . . . .” Id. For a view challenging this assertion see Richards, supra note 25, at 988-99.
376. Id. at 63, 57 Cal. Rptr. at 72-73.
378. Morrison engaged in private consensual homosexual acts with another teacher for a one-week period. Id. at 218-19, 461 P.2d at 377, 82 Cal. Rptr. at 177.
was narrowly construed to relate specifically to the particular profession involved, the court observed:

"The private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher. . . . Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline."379

The court held that the Board of Education could not "abstractly characterize" conduct as "immoral," "unprofessional" or "involving moral turpitude" within the meaning of the Education Code unless the conduct indicated that the person in question was unfit to teach.380 Justice Tobriner, writing for the majority, specified factors which should be considered in making such a determination:

[T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.381

Applying this standard to Morrison's particular situation, the court found that the record contained no evidence that his conduct indicated unfitness to teach and, consequently, the revocation of his teaching license was improper. In arriving at this conclusion, the court specifically disapproved the simplistic equation, found in Sarac, that homosexuality equals unfitness to teach. Moreover, the court noted that "[i]n determining whether discipline is authorized and reasonable, a criminal conviction has no talismanic significance,"382 and rejected the idea that conviction of a sex crime automatically indicated unfitness to teach.

379. Id. at 224, 461 P.2d at 382, 82 Cal. Rptr. at 182 (quoting Jarvela v. Willoughby—Eastlake City School District, 12 Ohio 288, 233 N.E.2d 143 (C.P. Lake Cty. 1967)).
380. Id. at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186. The court also pointed out that different professions will have different standards of professional conduct: "A particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilia and necrosadism might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, zozerastism in a veterinarian or trainer of guide dogs, prolagnia in a fireman, undinism in a sailor, or dendrophilia in arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or shorthand reporter." Id. at 227 n.1, 461 P.2d at 385, 82 Cal. Rptr. at 185.
381. Id. at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186 (footnotes omitted).
382. Id. at 218-19 n.4, 461 P.2d at 378, 82 Cal. Rptr. at 178.
The Morrison court was sensitive to the severe consequences of the revocation of a professional license and apparently wished to protect the licensee from the vicissitudes of popular notions of morality and immorality.\footnote{383} The standard for revocation of teaching credentials developed by Justice Tobriner in Morrison closely resembles the due process standard of Norton v. Macy,\footnote{384} requiring a demonstrated connection between a person’s homosexuality and the purported inability to properly perform his or her job. The California courts, however, have not consistently applied that standard. In Moser v. State Board of Education,\footnote{385} the court upheld the revocation of Moser’s teaching credentials under section 13202 on the grounds of immorality.\footnote{386} The court distinguished Morrison, observing that in Morrison the petitioner’s behavior was private and noncriminal while in Moser it was public and criminal. As a result the court left undisturbed the essential holding of Sarac, namely, “that evidence of homosexual behavior in a public place constitutes sufficient proof of unfitness for service in the public school system.”\footnote{387} The Moser court ignored the specific standards enumerated in Morrison as well as the admonition that the criminality of the act was not to be the deciding factor in determining unfitness to teach.\footnote{388}

\footnote{383}{Id. at 239, 461 P.2d at 394, 82 Cal. Rptr. at 194.}

\footnote{384}{417 F.2d 1161 (D.C. Cir. 1969). This case held that a reasonably foreseeable connection must exist between a federal government employee’s homosexual conduct and the efficiency of the service before he or she can be dismissed. See notes 106-18 & accompanying text supra.}

\footnote{385}{22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972). Moser was not the first case to reach the courts after the articulation of the Morrison standard. In Amundsen v. State Bd. of Educ., Civ. No. 37942 (Cal. Ct. App. 2d Dist. Dec. 17, 1971), an unpublished case, the court held “that the Board could not revoke the credentials of a teacher convicted of a crime based on a homosexual encounter without evidence relating that act to fitness to teach.” Willemesen, Sex and the School Teacher, 14 SANTA CLARA L. 839, 849 (1974). For a discussion of the problem of unpublished cases, see text accompanying note 28 supra; notes 516-28 & accompanying text infra. See also To Publish or Not To Publish—That is the Question, 2 SEX. L. REP. 18 (1976).}

\footnote{386}{Moser was convicted of a homosexually related offense not covered by § 13207 and hence his credentials were challenged under § 13202 for “immorality.”}

\footnote{387}{22 Cal. App. 3d at 992, 101 Cal. Rptr. at 88.}

\footnote{388}{Another California case, contemporaneous with Moser, dealt with the revocation of teaching credentials but did not involve a homosexual teacher. Consistent with the Morrison decision, this case held that mere conviction of a crime without more, was not proof of unfitness to teach. Comings v. State Bd. of Educ., 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972). The Supreme Court of California refused to review either Moser or Comings. This refusal may be a result of the fact that the complexion of the court had changed. Two months after Morrison, Chief Justice Traynor, part of the Morrison majority, retired. Thus the four-person Morrison majority became a three-person minority who voted...}
The *Morrison* standard was once again circumvented by the court in *Purifoy v. State Board of Education*.\(^{389}\) Purifoy argued that section 13207 violated his due process rights because the provision for mandatory revocation upon conviction of certain crimes conclusively presumed that a person was unfit to teach, without evidence, notice or a right to be heard.

In what appears to be a blatant misconstruction of Purifoy's constitutional argument, the court concluded that Purifoy had his day in court when he was convicted of the crime in question and, therefore, was not deprived of his due process rights upon the subsequent revocation of his credential. According to the court, proof of unfitness required in *Morrison* was unnecessary in *Purifoy* because section 13207 required only a conviction of a specified crime. The court further noted that persons convicted of such crimes "constitute a class which the Legislature identified as constituting a dangerous element in the school community and which in its discretion it put under appropriate controls."\(^{390}\)

In 1973 the California Supreme Court decided *Pettit v. State Board of Education*,\(^{391}\) apparently in an attempt to clarify the proper standards to be applied with respect to revocation of teacher credentials. The Board of Education sought to revoke Ms. Pettit's teaching license under section 13202 on the grounds of "immorality"\(^{392}\) and was consequently required, under the *Morrison* standard, to prove that her conduct rendered her unfit to teach. The court upheld the revocation of Pettit's professional license, distinguishing *Morrison* in three ways. First, it pointed out that Morrison's behavior was not criminal while Pettit's was. Second, while Morrison's behavior was private, the court considered Pettit's behavior public.\(^{393}\) Finally, the court found that the testimony of three school administrators, suggesting that Pettit might attempt to inject her unorthodox views of sexual morality into the

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390. Id. at 197, 106 Cal. Rptr. at 208.
392. *Pettit* did not involve homosexual conduct but rather heterosexual fellatio. Moreover, Pettit was not convicted of the crime of oral copulation, which would have brought her automatically under the mandatory revocation provision of § 13207, but was convicted of conduct outrageous to public decency. For a review of all types of sexual behavior that have been held to affect teachers, see Annot., 78 A.L.R.3d 19 (1977).
393. The court's characterization of Pettit's conduct as "public" is arguable since the conduct in question took place in a private home among consenting adults. The behavior became known only as a result of police surveillance.
classroom and would be unable to act as a moral example for the children she taught constituted sufficient evidence of her unfitness to teach.

Justice Tobriner, author of the majority opinion in Morrison, wrote a vigorous dissent. Not only did he criticize the apparent disregard of the Morrison direction that a criminal conviction is not ipso facto the basis for revocation, but he disagreed strongly with the majority's characterization of Pettit's behavior as public. Moreover, Justice Tobriner questioned the sufficiency of the evidence of Pettit's unfitness particularly since the three alleged experts only expressed their opinions, without presenting any reasons for their conclusions.

Justice Tobriner pointed out that none of the experts knew Pettit, "none considered her thirteen year record of competent teaching; none could point to a single instance of past misconduct with a student, nor articulate the nature of any possible future misconduct." The experts, according to Justice Tobriner, were working under an unproven premise that plaintiff's behavior at the "swingers" party in and of itself demonstrated she could not set a good example to her students and that she was, therefore, unfit. Such assumptions, he felt, were unsupported and invariably led to the conclusion that proof of immoral conduct, whatever it may be, would always justify revocation. The Morrison standard, which the court in Pettit evidently chose to ignore, was designed precisely to avoid such arbitrary and discriminatory decision making.

In conclusion, Justice Tobriner suggested that "the majority opinion is blind to the reality of sexual behavior. Its view that teachers in their private lives should exemplify Victorian principles of sexual morality and in the classroom should subliminally indoctrinate the pupils in such principles is hopelessly unrealistic and atavistic." The Pettit decision, which has been severely criticized, seems to have removed some of the legal obstacles to the revocation of a Califor-
nia teacher's license by seriously undermining the *Morrison* standards. In fact, subsequent cases have upheld dismissals on the grounds that the teachers in question had been accused of sex-related crimes even though the charges had been dropped or, in one case, the accused had been acquitted.

In *Board of Education v. Calderon*, Mr. Calderon, a male homosexual teacher, challenged his dismissal by the school board, contending that his acquittal of a sex-related offense precluded the Board from using that charge as a grounds for dismissal. The court disagreed and asserted that under the Education Code the legislature intended to permit school boards to shield children of tender years from possible detrimental influence of teachers who commit the sex offenses described in the Education Code “even though they are not found guilty beyond a reasonable doubt.” The court cited *Pettit* for the proposition that the risk of having Calderon in a classroom was not that he might engage in the act again, but that he could not act as an example for his pupils or teach them moral principles.

Moreover, the court reasoned that neither the Board’s dismissal of Calderon nor the resolution of the instant civil action was barred by Calderon’s prior acquittal in the criminal case. The different degree of proof required in criminal and civil or administrative actions effectively precluded application of res judicata principles with respect to Calderon’s dismissal.

In *Governing Board of Mountain View School District v. Metcalf* the court similarly upheld the dismissal of a homosexual teacher, despite court dismissal of the underlying criminal charge. The school board dismissed Metcalf, concluding that the act of oral copulation of which he had been accused was evidence of “immoral conduct.”

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403. Calderon was accused of and acquitted of oral copulation with another man. Calderon was put on a compulsory leave of absence from his school while the criminal issue was resolved and subsequent to his acquittal, was notified that he was being dismissed. The trial court upheld his dismissal and found that the defendant had engaged in oral copulation as charged by the school board and that such behavior was depraved, dissolute, corrupt, indecent, shameless, and hence constituted “immoral conduct.” *Id.* at 493, 110 Cal. Rptr. at 918.
404. *Id.* at 496, 110 Cal. Rptr. at 921 (emphasis added).
405. *Id.*
406. *Id.*
408. Metcalf was charged with engaging in homosexual prostitution and, specifically, in an act of oral copulation. However, evidence supporting that charge had been improperly obtained and was excluded from the criminal proceeding, which was subsequently dismissed.
calf argued that the improperly obtained evidence should have been excluded from the dismissal hearing. The court observed that whether the exclusionary rule could be invoked in an administrative hearing depended on the purpose of the statute authorizing the hearing and determined that where the purpose of the statute was to protect children the rule did not preclude admission of such evidence. Citing *Pettit*, the court concluded that Metcalf's conduct indicated "a serious defect of moral character, normal prudence and good common sense" and therefore evidenced an unfitness to teach. Thus, the conduct itself, once labeled immoral, established the unfitness to teach.

Such a facile application of the *Morrison* standard was unequivocally rejected by the California Supreme Court in *Board of Education v. Jack M.* In that case, the school board sued a teacher, who had been arrested for homosexual solicitation but never charged with that offense in order to establish its right to discharge him from a tenured position on the grounds of "immoral conduct" and "evident unfitness for service." The court concurred in the finding of the lower court that this conduct did not demonstrate unfitness to teach. Justice Tobriner, writing for the majority, pointed out with approval that the trial court had framed its findings in terms of fitness to teach and had examined the conduct against the standards suggested in *Morrison*. The trial court found that the defendant's conduct had not come to public attention, that he was not likely to repeat such behavior, and that he did not present a threat to fellow teachers or students. Moreover, the trial court considered defendant's sixteen year record of competent teaching.

Having determined that the trial court's findings were supported by credible evidence, the court considered the board's alternative argument, namely that proof that the defendant committed a public sexual offense demonstrates unfitness to teach *per se*. Justice Tobriner pointed out that automatic dismissal by statute only applies to persons convicted of a specified crime. He observed that *Morrison* established

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409. 36 Cal. App. 3d at 551, 111 Cal. Rptr. at 727.
410. Id.
412. Id. at 694, 566 P.2d at 603, 139 Cal. Rptr. at 701.
413. Id. at 694-96, 566 P.2d at 603-04, 139 Cal. Rptr. at 701-02.
414. Although the Board of Education argued that defendant might be unable to fulfill his duty to set an example and instruct students in good morals and that his act evidenced a lack of judgment and discretion, Justice Tobriner disposed of these arguments by saying that they were "really no more than disputable inferences which the trial court rejected in favor of other inferences more favorable to defendant." Id. at 669, 566 P.2d at 606, 139 Cal. Rptr. at 704.
the right of a person not so convicted to a fitness hearing and that
"proof of the commission of a criminal act does not alone demonstrate
the unfitness of a teacher, but is simply one of the factors to be be
considered."

In *Jack M.*, the Supreme Court of California reaffirmed the
*Morrison* standard and emphasized that a California teacher should
not be dismissed nor lose his or her license under section 13202, even
where the person has engaged in unorthodox sexual conduct, unless his
or her unfitness to teach can be demonstrated. Consequently, the re-
quirement of a nexus between conduct and teaching fitness seems well-
established in California. Moreover, mandatory revocations of creden-
tials of homosexual teachers under section 13207 will probably become
less common now that California has decriminalized private consen-
sual adult sex.

Decisions in other states, however, do not reveal equally optimistic
prospects for the homosexual teacher. *Acanfora v. Board of
Education*, one of the first cases involving an admitted homosexual
that gained national attention, produced some impressive rhetoric but
in effect did little to advance the position of homosexual teachers. Jo-
seph Acanfora sought reinstatement to his position as a junior high
school teacher, after being transferred to an administrative position
with no student contact upon public disclosure of his sexual prefer-
ence. While the district court observed that "private, consenting
adult homosexuality should enter the sphere of constitutionally protec-

415. *Id.* at 702 n.6, 566 P.2d at 608, 139 Cal. Rptr. at 706.
of homosexual teachers in California was assured by the defeat of the Briggs Initiative in the
November 7, 1978 election. That measure would have amended the State constitution to
allow school boards to dismiss or refuse to hire school teachers, teacher’s aides, school ad-
ministrators or counselors for “advocating, soliciting, imposing, encouraging or promoting
private or public sexual acts between persons of the same sex.”
417. *See also* Neal v. Bryant, 149 So. 2d 529 (Fla. 1963). In this case, the Supreme
Court of Florida reviewed the revocation of the teaching certificates of three Florida teach-
ers, two women and a man, who admitted to participation in homosexual activities. The
court set aside the revocations on procedural grounds because the board of education failed
to follow its own regulations with regard to revocation.
418. 491 F.2d 498 (4th Cir. 1974).
419. Joseph Acanfora, while in college, had joined a gay student organization and had
been an active participant. His “openness” caused his college, Penn State, to forward his
application for a teaching certificate to the Pennsylvania Secretary of Education without a
favorable recommendation. While his Pennsylvania certification was pending, Acanfora
was hired as a junior high school science teacher in Maryland by the Board of Education of
Montgomery County. After the Maryland school year had begun, the Pennsylvania Secre-
tary of Education called a widely publicized press conference and announced that Acanfora
would indeed be given his Pennsylvania certificate.
able interests," and concluded that discrimination among teachers on the basis of homosexuality was not permissible, the court nevertheless found against Acanfora.

The court reasoned that the instruction of children carries with it special responsibilities whether a teacher be heterosexual or homosexual and that every teacher has to scrupulously keep private his or her personal life. The court observed that since homosexuality is a sensitive, emotion-laden subject, that tends to "breed misunderstanding, alarm and anxiety, a sense of discretion and self-restraint" must guide the homosexual teacher to "avoid speech or activity likely to spark the added public controversy which detracts from the educational process." The court concluded that Acanfora had failed to exercise such discretion by making "repeated, unnecessary appearances on local and especially national news media."

On appeal, the Fourth Circuit overruled portions of the lower court's opinion, holding that Acanfora's public statements were protected by the first amendment, but found against Acanfora on the question of his reinstatement. The court concluded that Acanfora could not prevail on appeal because he had deliberately omitted his membership in the gay student group from his Maryland job application. Because the Maryland school officials would not have hired Acanfora had they known about his membership, the court concluded that he had obtained his position through fraud and could not "now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid."

A year later, a lesbian school teacher won what one commentator terms a "Pyrrhic victory." In Burton v. Cascade School District Union High School No. 5, Peggy Burton won her battle when the court found the statute under which she was fired unconstitutionally vague, but she lost the war when the court refused to reinstate her. Ms.

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421. Id. at 856.
422. Id.
423. Id. Subsequent to the initiation of the suit, Acanfora became an object of media interest and appeared on several local and national radio and television shows to discuss his case.
424. 491 F.2d at 501.
425. Id. at 504. The court felt Acanfora had "bootstrapped" himself into the issue and thus lost standing to raise the constitutional issue. See 48 Temple L.J. 384 (1975).
Burton's contract was terminated on the grounds of "immorality" after she acknowledged that she was a practicing homosexual. The district court found the relevant statute void for vagueness, noting that "immorality means different things to different people and its definition depends on the idiosyncracies of the individual school board member." However, the court only awarded monetary damages and refused to reinstate Burton to her teaching position.

The issue of reinstatement was appealed to the Ninth Circuit. Although the court ultimately upheld the lower court's remedy, it nevertheless recognized the difficulty of balancing Burton's interest in completing her wrongfully terminated contract against the competing interest in avoiding the disruption which her reinstatement would inevitably cause. Burton argued that a similar antagonism would arise if she were fired because of race or religion and subsequently reinstated. The court refused to equate being fired for homosexuality with a dismissal in violation of other constitutional rights and concluded that "the nature of the constitutional right sought to be vindicated is not such as to compel reinstatement frequently ordered in response to racially motivated dismissals, or to those aimed at punishing the exercise of free speech." The dissenting judge considered reinstatement proper, noting that "if community resentment was a legitimate factor to consider, few Southern school districts would have been integrated.

Many such constitutional issues remain unresolved as a result of the Supreme Court's failure to grant certiorari in Gaylord v. Tacoma School District No. 10. James Gaylord had been a high school teacher for twelve years and had received excellent evaluations on all occasions. When a student reported to a vice-principal that he thought Gaylord was a homosexual person, Gaylord admitted his homosexuality. The Tacoma School Board discharged Gaylord for "immorality," an enumerated ground for dismissal under Washington law and Gaylord sued.

On appeal from the second of two lower court decisions, the Washington Supreme court first reviewed the trial court's findings that

428. Id. at 255.
430. 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975).
431. Id. at 853.
432. Id.
433. Id. at 855 (Lumbard, J., dissenting).
435. The trial court's first decision was remanded by the Washington Supreme Court in Gaylord v. Tacoma School District No. 10, 85 Wash. 2d 348, 535 P.2d 804 (1975) because
Gaylord "admitted his status as a homosexual" and therefore "from appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt act having been committed." Applying general principles of evidence and construction, the supreme court held that in interpreting Gaylord's admission that he was a homosexual person, "the construction must be adopted which is least favorable to him." The least favorable construction in the court's estimation was to consider him an overt, practicing homosexual person. The court noted that Gaylord had the opportunity "to explain that he was not an overt homosexual and did not engage in the conduct the court ascribed to him."

Next, the court concluded that "homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times." The court assumed that Gaylord knew homosexuality had "serious consequences" because he had kept his own sexual preference secret from his parents and that Gaylord felt comfortable with his homosexuality because he apparently desired no change. Consequently, the court concluded that Gaylord "made a voluntary choice for which he must be held morally responsible."

Having decided that Gaylord was an overtly homosexual person, that homosexuality was immoral, and that Gaylord had chosen this immoral conduct voluntarily, the court turned to the issue of whether Gaylord's performance as a teacher was impaired. The lower court found that while Gaylord's status as a homosexual person was unknown, his efficiency was not affected; but that when this fact was publicly disclosed, his efficiency was impaired. Although the school board had been responsible for making that disclosure, the supreme court said Gaylord had taken the risk of public disclosure by seeking out homosexual company. As evidence that Gaylord's ability to teach would be impaired, the court relied on the testimony of three fellow teachers and one student who objected to Gaylord remaining on the staff. In addition, the principal, vice-principal, and retired superintendent all testified that Gaylord's continued presence would create problems. Last, but hardly least, the court concluded that if Gaylord

the trial court had improperly applied the statutory burden of proof by giving special emphasis to the testimony of school officials.

436. 88 Wash. 2d at 294, 559 P.2d at 1344.
437. Id.
438. Id.
439. Id. at 295, 559 P.2d at 1345. The court referred to Jewish and Catholic encyclopedias among others as authority for this conclusion.
440. Id. at 296, 559 P.2d at 1346.
were retained it would indicate adult approval of homosexuality. Moreover, the court felt that if Gaylord were retained, his ability to teach principles of morality to his students would be impaired.

The dissent took issue with the majority on all points, contending that Gaylord was discharged because of his status not his conduct and that the Board had failed to prove that Gaylord's performance as a teacher was impaired. Noting that much of the testimony was purely speculative, the dissent argued that "[m]ere speculation coupled with status alone is not enough to establish a detrimental effect upon Gaylord's teaching ability."

The Supreme Court's denial of certiorari in Gaylord leaves standing the decision of the Washington Supreme Court, a decision which arguably gives school boards carte blanche to fire homosexual teachers on the basis of status alone. Certiorari also was denied on the same day in Gish v. Board of Education. Gish was a New Jersey high school teacher of seven years when he assumed the presidency of the New Jersey Gay Alliance (N.J.G.A.). Shortly thereafter the board of education adopted a resolution directing Gish to undergo a psychiatric examination pursuant to a New Jersey statute which allows such a direction whenever "an employee shows evidence of deviation from normal physical or mental health." While the board purported not to question Gish's right to participate in the N.J.G.A., it nevertheless determined that Gish's activities displayed evidence of deviation from normal mental health that might affect his ability to teach and, therefore, directed him to be examined. The New Jersey Superior Court upheld the board's right to order such an examination, saying the board's determination was fair and reasonable and was the logical decision of reasonable and fair-minded men who had evaluated Gish's behavior and who were concerned with his fitness as a teacher. On the other hand, the court felt that the examination required nothing of Gish but his time.

The refusal of the Supreme Court to review these two decisions

441. Id. at 298, 559 P.2d at 1347.
442. Id. at 305, 559 P.2d at 1350.
446. Id. at 99, 366 A.2d at 1339.
447. Id. at 105, 366 A.2d at 1342.
448. At last report the school board had transferred Gish to an administrative position with a $4,000 annual raise. The Advocate, Feb. 8, 1978, at 11.
has given state school administrators unfettered power to over gay teachers.

Family Issues

VIII. Marriage

At the present time, the ability to marry is regulated by the state. Once validated, the marriage relationship confers upon its participants preferential tax treatment, a right of action with regard to a fatal accident of the spouse, social security benefits, and the protection of the law of intestate succession. Moreover, the married couple benefits from innumerable nongovernmental benefits such as employee family health care, group insurance, lower automobile insurance, family memberships in various organizations, and the ability to hold real estate by the entirety. Beyond these legal and economic benefits, marriage is generally viewed as psychologically beneficial to the participants by strengthening the stability, emotional health, and societal respectability of the relationship.

Given the legal, economic, and psychological benefits of marriage, it is not surprising that homosexual couples who live in committed relationships would also wish to procure these benefits. A number of homosexual couples have tried to effectuate a legal marriage but to date no court has recognized such a union.

In *Baker v. Nelson* the Minnesota Supreme Court refused to allow the marriage of Richard Baker and James McConnell, concluding that the Minnesota statute governing marriage did not authorize

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452. 291 Minn. 310, 191 N.W.2d 185 (1971).

453. McConnell sued the University of Minnesota in McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970), rev'd, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972), for refusing to hire him as a librarian. It was this attempted marriage with Baker which prompted the University of Minnesota's refusal to hire McConnell. See text accompanying notes supra for a discussion of McConnell.
same-sex marriages. Although the Minnesota statute did not specify the sex of the parties, the court decided that the term marriage was to be construed according to common usage.454

The two men argued that such an interpretation was unconstitutional as a denial of equal protection because restricting marriage to opposite sex couples was an irrational and invidious discrimination that infringed upon their fundamental right to marry. While the court did not deny that marriage was a fundamental right, it rejected the contention that the state’s classification of persons authorized to marry was irrational. The court characterized the institution of marriage “as a union of man and woman, uniquely involving the procreation and rearing of children.”455 When the gay men pointed out that some heterosexual couples often do not want or cannot have children but are nevertheless permitted to marry, the court observed that the classification by the state of who may or may not marry is “no more than theoretically imperfect” and that “abstract symmetry is not demanded by the Fourteenth Amendment.”456

The court also rejected the analogy to Loving v. Virginia,457 in which the Supreme Court overturned an antimiscegenation statute. The court in Baker found there to be a clear commonsense, as well as constitutional, distinction between a restriction based on race and one based on sex.458

While their appeal to the Minnesota Supreme Court was pending, Jack Baker and Jim McConnell received a marriage license from a Minnesota court clerk and were married by a minister. Baker then applied, by virtue of his veteran’s status, for an increase in benefits for his dependent spouse. When the Veterans’ Administration denied the claim on the grounds that McConnell was not his spouse, Baker and

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454. The court referred to Webster’s Dictionary and Black’s Law Dictionary to determine the meaning of the term “marriage.” 291 Minn. at 311 n.1, 191 N.W.2d at 186. Webster’s defines marriage as “the state of being united to a person of the opposite sex as husband or wife.” Webster’s Third New International Dictionary 1384 (1966). Black’s provides the following definition: “Marriage . . . is the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.” Black’s Law Dictionary 1123 (4th ed. 1951).

455. 291 Minn. at 312, 191 N.W.2d at 186. This procreational model of sexual love has been challenged. See Richards, supra note 25, at 978-81, wherein the author argues that rejection of the procreational model was the basis for the Supreme Court’s decision in Griswold v. Connecticut, 381 U.S. 479 (1965).

456. Id. at 314, 191 N.W.2d at 187.


458. 291 Minn. at 314, 191 N.W.2d at 187.
McConnell sued. In *McConnell v. Nooner*, the court of appeals upheld the decision of the Veterans' Administration on the grounds that, pursuant to regulations of the Veterans' Administration, the validity of a veteran's marriage is determined in accordance with the law of the state where the veteran resides.

In *Jones v. Hallahan*, two lesbians sued the county clerk to compel the issuance of a marriage license. The women claimed that they were deprived of their constitutional right to marry, to associate, and to freely exercise their religion.

Like Minnesota's statute, the Kentucky statute neither specified the sex of those eligible for marriage nor defined marriage. The Kentucky court, like the Minnesota court in *Baker*, resorted to the popular definition of marriage and took judicial notice of the fact that "marriage was a custom long before the state commenced to issue licenses." The court decided that the women were not prevented from marrying by the statute of Kentucky, but "rather by their own incapability of entering into a marriage as that term is defined." Citing with approval *Baker v. Nelson*, the court concluded that the prohibition on same-sex marriage did not impinge upon any constitutionally-protected interests, including the guarantee of religious freedom under the first amendment. The court cited *Reynolds v. United States*, which sanctioned the prohibition of polygamy, for the proposition that the interest in the free exercise of religious beliefs can be outweighed by the greater interest in an orderly society.

A more comprehensive discussion of the constitutional implication of prohibitions against homosexual marriage is found in *Singer v. Hara*, in which two homosexual men sued to compel issuance of a marriage license. The petitioners claimed that the statutes of the

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459. 547 F.2d 54 (8th Cir. 1976).
462. A similar action was dismissed by the court in *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wisc. 1972), because plaintiffs had failed to submit an answering brief in response to defendant's supporting brief. The court said that the absence of plaintiffs' memorandum would require the court "to speculate on the plaintiffs' arguments in this relatively novel area of the law." *Id.* at 626.
464. *Id.*
465. *Id.* (emphasis added).
468. John Singer, one of the two plaintiffs in this case, was the plaintiff in Singer v.
State of Washington did not prohibit same-sex marriages; but that if such a prohibition did exist, it violated the Washington State Equal Rights Amendment (ERA) as well as the equal protection clause of the fourteenth amendment. The court summarily dismissed the petitioners' first argument, concluding that "it is apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages." The impact of the newly enacted state ERA was not clear. The petitioners argued that a law that permits a man to marry a woman but will not permit him to marry a man creates a classification based on sex and, therefore, is impermissible under the ERA. The petitioners further claimed that the fact that marriage licenses are denied equally to both male and female couples does not cure the discrimination. They observed that a similar argument was rejected by the Supreme Court in *Loving v. Virginia*, namely, that antimiscegenation statutes did not violate constitutional prohibitions against racial classification because the statutes affected both racial groups equally. The court concluded that the two cases were not analogous. Unlike the parties in *Loving*, who were barred from marrying because of an impermissible racial classification, the petitioners in *Singer* were not being denied entry into the marriage relationship because of their sex but because, by definition, that relationship can only be entered into by persons of opposing sex.

The court noted a generally recognized exception to an "absolute" interpretation of the ERA where differentiation between sexes is based on unique physical characteristics of a particular sex rather than upon a person's membership in a particular sex. Thus, since the fundamental reason that the state refuses to recognize same-sex marriages is founded upon "unique physical characteristics of the sexes," namely, the "im-

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469. United States Civil Service Comm'n, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977). Singer's attempted marriage helped spark the controversy which resulted in his being fired by the EEOC. See notes 134-48 & accompanying text *supra* for a discussion of *Singer*.  
470. *Id.* at 248, 522 P.2d at 1188-89.  
471. 388 U.S. 1 (1967).  
472. *Id.* at 252-53, 522 P.2d at 1191.  
473. *Id.* at 254-55, 522 P.2d at 1191-92.
possibility of reproduction,"\textsuperscript{474} that classification falls within the exception to the strict interpretation of the ERA and is not unconstitutional.\textsuperscript{475}  

The court similarly rejected the petitioners' argument that prohibition of same-sex marriages constituted a denial of equal protection. First, the court concluded that it was not compelled to apply strict scrutiny to this classification because neither a suspect classification nor a fundamental right was involved. While the court admitted that a classification based on sex may be inherently suspect, the court nevertheless reiterated its conclusion that the prohibition against same-sex marriages does not discriminate on the basis of sex but is a logical consequence of the commonly understood nature of the marriage relationship.\textsuperscript{476} In addition, the court summarily rejected the petitioners' alternative argument that homosexuals constituted a suspect class.\textsuperscript{477}  

The court's reasoning with respect to the second ground for applying strict scrutiny is less clear. While recognizing that marriage is a fundamental right, the court evidently defined that right narrowly to exclude same-sex marriages.\textsuperscript{478}  

After determining that strict scrutiny was not required, the court used the less exacting "rational basis" standard. The court concluded that the public interest in affording a favorable environment for the growth of children constituted "a rational basis for the state to limit the definition of marriage to exclude same-sex relationships."\textsuperscript{479}  

Until legislatures change the statutory definition of marriage or until the courts recognize that prohibition against same-sex marriages violates constitutionally protected interests, two homosexual individuals cannot marry one another. However, as long as financial and legal benefits accrue to heterosexual marital units, it seems likely that many homosexual family units will continue to seek legal recognition through marriage\textsuperscript{480} or will pressure legislatures to create another new status with the same legal and financial benefits.

\textsuperscript{474} \textit{Id.} at 260, 522 P.2d at 1194-95.  
\textsuperscript{475} \textit{Id.} For a different conclusion, see Note, \textit{The Legality of Homosexual Marriage}, 82 \textit{Yale L.J.} 573 (1973).  
\textsuperscript{476} 11 Wash. App. at 862, 522 P.2d at 1196.  
\textsuperscript{477} \textit{Id.} For petitioner's argument that homosexuals constitute a suspect class, see \textit{id.} at 262 n.12, 522 P.2d at 1196. \textit{See also} Chaitin & Lefcourt, \textit{Is Gay Suspect?}, 8 \textit{Lincoln L. Rev.} 24 (1973).  
\textsuperscript{478} 11 Wash. App. at 260, 522 P.2d at 1195.  
\textsuperscript{479} \textit{Id.} at 247, 522 P.2d at 1197. The court admitted that married persons are not required to have children and conceded that it was within the power of the legislature to change the definition of marriage without harm to the Constitution.  
\textsuperscript{480} One lesbian couple was jailed for staging a sit-in demonstration at the office of the
IX. Divorce

A large number of homosexual persons enter into traditional heterosexual marriages despite their sexual preference. Some of these marriages survive until the death of one of the spouses; others end in divorce. Whether or not the homosexuality of one of the partners is the actual reason for the divorce, it is highly likely that the issue of homosexuality will not be mentioned in the pleadings. Because few divorces involve homosexuality and few divorce cases are appealed, there are few published cases dealing with homosexuality as grounds for divorce. In states that have limited grounds for divorce the element of homosexuality has caused problems of characterizations.

The earliest reported divorce proceeding in which homosexuality clearly was the issue is Poler v. Poler. Although the court of appeals conceded that sodomy was not among the enumerated grounds

481. Here, as elsewhere, the definition of homosexuality becomes confusing. Many persons who have had a single or limited homosexual experience undoubtedly enter into heterosexual marriages. For example, according to Kinsey 37% of all males after puberty have had a homosexual contact to orgasm. A. Karlen, Sexuality and Homosexuality 444 (1971). Probably the heterosexual drive of these persons is stronger than their homosexual drive. However, given societal pressures, it is fair to assume that many persons who are predominantly homosexual marry. It may be a marriage of convenience where the other party willingly provides a “cover.” More likely the predominantly homosexual individual marries because he or she really has not faced up to his or her sexual preference or, perhaps, because he or she thinks marriage will effect a “cure.” The actual number of such persons is impossible to estimate. In Tearoom Trade, a sociological study of male homosexual sex in public restrooms, Humphreys found that 54% of his subjects were married men currently living with their wives. L. Humphreys, Tearoom Trade: Impersonal Sex in Public Places 105 (1970).

482. There are a variety of reasons why homosexuality will not be mentioned in the pleadings. The homosexual spouse may have hidden his or her preference completely. On the other hand the nonhomosexual spouse may not wish to stigmatize his or her ex-spouse or may not wish the homosexuality of his or her spouse to become a matter of public record. Given the existence of such broad grounds for divorce as “mental cruelty,” the subject often can be avoided.

483. In 1960, there were 393,000 divorces and annulments in the United States. In 1970, there were 708,000 and in 1975, there were 1,026,000. Information Please Almanac, Atlas and Yearbook 707, 712 (31st ed. 1977). Divorces are generally heard in lower courts with the judge acting as the finder of fact. In divorce and custody cases, “the facts” rather than “the law” often decide the case. Appellate courts pay great deference to the judge’s findings of fact. As most domestic relations lawyers know, trial judges are seldom reversed.

484. There are other divorce cases, earlier in time, which deal with sodomy with animals and other acts characterized as “unnatural.” This section only deals with divorce proceedings in which sexual acts between persons of the same sex are at issue. See generally Annot., 78 A.L.R.2d 807 (1961).

485. 32 Wash. 400, 73 P. 372 (1908).
for divorce, and despite the fact that it was not clear whether sodomy should be considered adultery or cruelty, or even an independent ground,\(^\text{486}\) the court nevertheless upheld the decree awarded on that ground. The court noted that the divorce statute allowed a court to grant a divorce for any other cause deemed sufficient and that sodomy had been regarded, at common law and in the ecclesiastical courts, as a ground for divorce.

In *Crutcher v. Crutcher*,\(^\text{487}\) the Mississippi Supreme Court decided that pederasty,\(^\text{488}\) like sodomy, should be classified as "cruel and inhuman" treatment and consequently within the statutory grounds for divorce. The court observed that "unnatural practices of the kind charged here are an infamous indignity to the wife, and . . . would make the marriage relation . . . revolting."\(^\text{489}\)

A Florida court in *Currie v. Currie*\(^\text{490}\) also found that the homosexual conduct of the husband was one of several factors that together constituted extreme cruelty to the wife and thus provided grounds for divorce. In this case, the husband not only had refused to have sexual relations with his wife for over five years but also took a young man into their home with whom he "gave expression to unnatural love . . . even before his wife’s eyes."\(^\text{491}\)

While some courts were willing to consider homosexuality as "extreme cruelty," others adhered to a more literal approach. In *Cohen v. Cohen*,\(^\text{492}\) the wife sued for divorce based on sodomy even though, at that time, the only ground for divorce under the applicable New York statute was adultery. As a part of her proof the wife provided the court with the record of her husband’s conviction for that crime. While the court’s sympathies were clearly with the wife, the court refused to grant the divorce because sodomy did not constitute adultery as defined by the court.\(^\text{493}\)

Another court avoided a similar problem of statutory construction in *Santos v. Santos*.\(^\text{494}\) The court rejected "gross misbehavior and

\(^{486}\) *Id.* at 402, 73 P. at 373.

\(^{487}\) 86 Miss. 231, 38 So. 337 (1905).

\(^{488}\) "Pederasty: *Homosexual* anal intercourse between men and boys as the passive partners. The term is used less precisely to denote male homosexual anal intercourse." *American Psychiatric Association, A Psychiatric Glossary* 115 (4th ed. 1975).

\(^{489}\) 86 Miss. at 235, 38 So. at 337.

\(^{490}\) 120 Fla. 28, 162 So. 152 (1935).

\(^{491}\) *Id.* at 34, 162 So. at 154.

\(^{492}\) 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951).

\(^{493}\) The court defined adultery as "sexual intercourse of two persons, either of whom is married to a third person." *Id.* at 19-20, 103 N.Y.S.2d at 427-28.

\(^{494}\) 80 R.I. 5, 90 A.2d 771 (1952).
wickedness" as grounds for divorce but nevertheless declared the marriage void from its inception. On the day of their marriage, the wife refused to have "normal sexual intercourse" with her husband and instead wanted only "unnatural intercourse." Three days later, the wife left to live with a girl friend of "questionable reputation." According to the court, this behavior clearly indicated that the wife had fraudulently concealed her tastes and intentions. Although the trial court considered this behavior analogous to adultery, it did not give a divorce on those grounds because the husband had failed to meet the requisite burden of proof.

More recently courts have considered the homosexuality of one spouse as part of a pattern of conduct, sufficient to constitute grounds for divorce. In A.B. v. C.D. the court awarded a divorce to the husband on the ground of indignities. Evidence showed that the husband returned home one day and found his wife and her woman friend engaged in an act of sodomy. In granting the divorce, the court observed that one act of sodomy alone was insufficient to establish grounds for divorce, a continuous course of conduct was required. The court found the requisite course of conduct in the fact that the wife had left home to live with her woman friend.

In H. v. H. a husband was similarly granted a divorce on the ground of "extreme cruelty." The wife had maintained an active homosexual relationship and eventually began living with her female

495. Id. at 7, 90 A.2d at 772.
496. Id.
497. The opinion in Gilmore v. Gilmore, 45 Cal. 2d 142, 287 P.2d 769 (1955), suggests that the alleged homosexual conduct of the wife was not the determining factor. While the exact nature of the sexual conduct is not really clear, it appears that the wife and another woman engaged in sexual conduct in the presence of the husband, apparently with his approval. Because the husband also was sexually active outside the marriage, the trial court concluded that the parties were in pari delicto with respect to sexual matters. Id. at 149, 287 P.2d at 773. The fact that the husband was nevertheless granted a divorce on the grounds of "extreme cruelty" suggests that the court must have considered factors other than the wife’s homosexuality.
499. In most jurisdictions sodomy laws apply to homosexual acts by persons of either sex. But see Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (1939) (crime of sodomy as defined by Georgia statute cannot be accomplished by two women); Comment, Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look At Sodomy Statutes, 62 Iowa L. Rev. 568, 568 n.6 (1976).
501. The husband also received custody of the two children. Id. at 232, 157 A.2d at 727. For a discussion of custody cases in which one parent is a homosexual person, see section on custody at text accompanying notes 513-631 infra.
lover. In granting the divorce, the court spoke harshly about lesbianism.

It is difficult to conceive of a more grievous indignity to which a person of normal psychological and sexual constitution could be exposed than the entry by his spouse upon an active and continuous course of homosexual love with another. Added to the insult of sexual disloyalty per se (which is present in ordinary adultery) is the natural revulsion arising from knowledge of the fact that the spouse’s betrayal takes the form of a perversion.

... Few behavioral deviations are more offensive to American mores than is homosexuality. Common sense and modern psychiatric knowledge concur as to the incompatibility of homosexuality and the subsistence of marriage between one so afflicted and a normal person.502

In Richardson v. Richardson,503 a wife sought divorce on the grounds of “constructive desertion” claiming that she had to leave home because of her husband’s alleged homosexuality. While the court indicated that “a pattern of homosexual activity on the part of one spouse could be so demeaning to the self-respect of the other that the latter would be justified in leaving the household,”504 the court refused to grant the divorce because there was not sufficient evidence of such activity.505

The issue of divorce on the grounds of homosexuality was similarly disposed of on a point of evidence in Luley v. Luley,506 in which the wife sought divorce on the ground of cruel and inhuman treatment because her husband was a “sexual pervert.”507 As corroboration of his propensities, the trial court allowed the wife to introduce evidence of an attempted homosexual act that allegedly took place five years prior to their marriage. The court of appeals concluded that the admission of such evidence was prejudicial error508 and vacated the decree awarded by the trial court.

Admission of evidence in support of the homosexual spouse was upheld in Feuti v. Feuti.509 When the wife filed for divorce on the

502. Id. at 236-37, 157 A.2d at 726-27.
504. Id. at 670, 304 A.2d at 5.
505. Id. at 671, 304 A.2d at 5.
506. 234 Minn. 324, 48 N.W.2d 328 (1951).
507. She claimed that during their marriage he had made “improper” requests for masturbation and fellatio. Id. at 325, 48 N.W.2d at 329.
508. The court observed, “It is not proper to raise a presumption of guilt on the ground that, having committed one wrongful act, the depravity it exhibits makes it likely he would commit another.” Id. at 326, 48 N.W.2d at 329.
grounds of extreme cruelty and neglect, the husband cross-petitioned for divorce on the grounds of extreme cruelty and gross misbehavior. The wife's alleged gross misbehavior was an "illicit sexual relation" with "Miss R." The trial court granted Mrs. Feuti the divorce and denied Mr. Feuti's cross-petition. On appeal, the supreme court affirmed, concluding that the trial court's admission of the testimony of certain witnesses that they had "observed nothing immoral" in Mrs. Feuti's relationship with Miss R. was not an abuse of discretion.

While neither homosexuality, lesbianism, nor sodomy seems to be grounds for divorce in and of itself, most courts are willing to consider homosexual behavior as part of a pattern of cruelty or misconduct and thus as adequate grounds for divorce. This approach often leads to arbitrary results as courts attempt to conceptualize homosexuality in terms of the traditional statutory grounds for divorce. If the courts instead objectively examined the alleged misconduct and its effect upon the marriage relationship, wholly apart from whether the misconduct involved homosexual or heterosexual activity, the results would presumably reflect more rational adjudicating.

X. Custody

The exact number of children who have homosexual parents is unknown. However, an approximation of that figure is possible. Various experts estimate that there are between eight million and sixteen million lesbian women in the United States and that among these women, 1.5 million to 5 million may be mothers. Assuming each mother has an average of two children and assuming, according to the most conservative estimate, that 1.5 million lesbian women are

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510. Id. at 221, 167 A.2d at 758.
511. Id. at 222, 167 A.2d at 759.
512. In Towend v. Towend, No. 639 (Ohio Ct. C.P., Portage County 1975), which is discussed with the custody cases at notes 621-28 & accompanying text infra, the court granted the husband a divorce from his lesbian wife on the grounds of extreme cruelty. Of course, in the new no-fault divorce states such issues are largely irrelevant. Traditional "faults" may nevertheless play an important part in property, alimony, and custody decisions. See Kretzschmar v. Kretzschmar, 48 Mich. App. 279, 210 N.W.2d 352 (1973). See section on Custody at text accompanying notes 513-631 infra.
mothers, approximately three million children may have lesbian mothers. There are fewer estimates on the number of gay fathers. Since gay men are presumed to outnumber gay women significantly, there may well be a comparable number of children of gay men.\footnote{Gay men make up approximately 13.95\% of the male population. Letter from Paul H. Gebhard, Institute of Sex Research, Inc. (Mar. 18, 1977).}

Obviously, not all of these children are the subjects of custody battles. First, some homosexual parents stay married until their children are no longer minors. Second, some parents split amicably and work out custody arrangements without any discussion of the homosexuality of one or both of the spouses. Some of these parents may hide their sexual preference from their former spouse so that homosexuality never becomes an issue. Finally, there are other homosexual parents whose former spouse has disappeared, died, or in the case of an illegitimate birth, never participated in the childrearing process. Therefore, millions of homosexual parents are raising their children without any state intervention. Other parents have not been so fortunate.

Gathering material on how homosexual parents fare before the courts in custody battles is extremely difficult. All the methodological problems previously discussed with respect to gay issues in general are present to an even greater extent with respect to child custody cases. A commentator notes that "few cases are reported where the mother's lesbianism is an issue, and even where reported, the factual bases of the decisions are often omitted or truncated."\footnote{Harris, \textit{Lesbian Mother Child Custody: Legal and Psychiatric Aspects}, V Bull. Am. Acad. Psych. and L. 75 (1977).} For example in \textit{Spence v. Durham},\footnote{283 N.C. 671, 198 S.E.2d 537 (1973).} the majority opinion never mentions the parent's homosexuality, but indicates that it will not discuss a situation that "was beyond the pale of the most permissive society." Only the dissent discloses the fact that the mother allegedly engaged in homosexual activity.\footnote{\textit{Id.} at 678, 198 S.E.2d at 541.}

Another commentator suggests, "The statement of facts found in the cases may be misleading in that they are conservatively drawn in deference to the privacy of the parties and the sensibilities of the public."\footnote{\textit{Id.} at 698, 198 S.E.2d at 552.} For example, the only published decision in \textit{O'Harra v. O'Harra}\footnote{\textit{Lauerman, Non-Marital Sexual Conduct and Child Custody}, 46 U. Cin. L. Rev. 647, 649 (1977).} is the brief opinion of the Court of Appeals of Oregon.\footnote{No. 73-384E (Or. Cir. Ct. 13th Jud. Dist. June 18, 1974), \textit{aff'd}, 530 P.2d 877 (Or. App. 1975), \textit{reported in} 2 Women's Rights L. Rep. at 24 (1974).}
affirming the lower court's decision: "We have examined the record in this case and are satisfied that the trial court made the correct decision. Because there is a potential for harm to persons involved, we conclude that no useful purpose would be served in publishing a detailed opinion."524

Many cases are not published at all.525 As one author observed: "[T]he issue is rarely mentioned above the level of a whisper, and the few cases that reach the appellate level are almost always ordered excluded from official and unofficial reports."526

Not only are appellate cases often unpublished, but trial court records are often sealed. In fact a Michigan circuit judge, in a recent article, recommended this procedure.527 These judicial practices create a dearth of precedent in the area, obscuring judicial discrimination against gay parents and depriving attorneys and scholars of valuable and needed materials.528

Suits in which gay parents fight to keep their children have been

524. Id. at 202, 530 P.2d at 877. Similarly, in Spence v Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), in which a mother successfully obtained custody of her children, the majority opinion does not refer to the mother's alleged homosexuality. The court apparently felt that the mother had "reformed" and that "[it]o perpetuate this evidence . . . would perhaps put a stumbling block in the way of [the] mother's continued restoration." Id. at 678, 198 S.E.2d at 541. Only the dissent alludes to the fact that the mother had perhaps engaged in homosexual behavior. The dissent felt that the children should be left with their grandparents to guard them "against the then clear and present danger of corrupt moral teaching, by example, by the mother and her chosen associates." Id. at 693, 198 S.E.2d at 549. In this case, it is extremely unclear whether the mother in fact was a homosexual person in any sense of the word. However, it is apparent that at the time of the case she had established a lifestyle that seemed to include no erotic or emotional attachments with either sex and thus won the court's approval.

525. The nonpublication issue is so real and so controversial that noted scholar Herma Hill Kay, in her extremely well-regarded text, K. DAVISON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION (1975), discusses unreported lesbian mother cases. Professor Kay applies the California standards with respect to certification for nonpublication to determine whether many of the child custody cases were properly denied publication. Id. at 275.


528. For example, in O'Harra v. O'Harra, No. 73-384E (Or. Cir. Ct. 13th Jud. Dist. June 18, 1974), aff'd, 530 P.2d 877 (Or. App. 1975), an Oregon court awarded the custody of three boys to their father and the Oregon Court of Appeals affirmed. Although the court did not spell out the basis of its decision, the mother's lesbianism was apparently at issue. Even though the trial was long and the appellate argument extensive, the court refused to publish a detailed opinion which might have provided guidance to subsequent litigants and their attorneys. Hunter & Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 BUFFALO L. REV. 691, 696 n.21 (1976).
few in number until quite recently. The great majority of cases have occurred in the last five years. The reason for the increase in cases can be attributed to a number of factors. First, a gay parent often refrained from contesting custody for fear that his or her spouse might reveal his or her sexual preference to parents, employer, and friends. Second, when gay parents sued for custody, they generally lost. Losing the fight over custody often meant losing their jobs as well and, consequently, the financial wherewithal to continue the legal battle. The recent upsurge in the number of cases is probably caused by a growing pride on the part of most gay parents and a growing support system to help them fight for the custody of their children.  

Disputes concerning the custody of children of homosexual parents usually arise in two contexts, in divorce proceedings between the spouses and in "neglect" proceedings between one spouse and the state. In divorce proceedings, the grandparents often intervene and seek custody of the children while in neglect suits, state social workers usually seek to deprive the homosexual parent of the custody of his or her child. This latter type of dispute usually only arises when the parent is receiving welfare or has a criminal record, and a zealous social worker becomes interested in the parent’s life-style.

In theory, when a court decides, in the context of a divorce proceeding, which parent should be given custody of a child, it considers only the "best interests of the child." This theory was originally advanced by Justice Cardozo, who observed that "[The judge] is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or as between one parent and another. . . . Equity does not concern itself with such disputes . . . . Its concern is for the child."  

However, the gap between theory and practice is great and the "morality" of the par-

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529. A number of organizations have been formed to give legal and emotional aid to lesbian mothers in custody battles. Lesbian Mother's Defense Fund, located at 2446 Lorentz Place North, Seattle, Washington 98109, is the best known.


531. Quoting Cardozo, one court observed: "'The law will not hold the crowd to the morality of saints and seers.'" S. v. J., 81 Misc. 2d 828, 831, 367 N.Y.S.2d 405, 408, (Sup. Ct. 1975). This court than ruled: "'The criterion to be applied to determinations of custody is not whether the court condones the mother's mode of living or considers it to be contrary to good morals, but whether the child is best located with the mother and there well behaved and cared for.'" Id. at 833, 367 N.Y.S.2d at 410.
ents is often at issue. Consider, for example, the court’s statement in *Bunim v. Bunim.*

Defendant here, in open court, has stated her considered belief in the propriety of indulgence . . . in extramarital sex experimentation. It cannot be that ‘the best interests and welfare’ of those impressionable [children] will be ‘best served’ by awarding their custody to one who proclaims, and lives by, such extraordinary ideas of right conduct.

In a neglect proceeding the standard is not the “best interests of the child.” Instead, a child can be removed from a parent if and only if that parent is found to be unfit. Accordingly, in 1973 a California juvenile court in *In re Tammy F.*, removed four children from the custody of their mother when she was convicted of possession of marijuana. Two of the children were subsequently returned to the mother and two were placed in foster homes. When the court discovered that the mother was a lesbian, the two children living at home were again removed from the mother. “The court of appeals sustained the juvenile court’s order in an unpublished opinion, concluding in part that ‘[t]he continuous existence of a homosexual relationship in the home where the minor is exposed to it involves the necessary likelihood of serious adjustment problems.’”

Approximately a year later the same lesbian mother sought to regain the two children originally placed and still living in foster homes. The lower court concluded that it was in the best interest of the children to leave them in a foster home because “the mother freely concedes that she has been, is, and intends to continue living in a lesbian relationship with another woman.” The case was appealed and subsequently remanded for further proceedings. On remand, the juvenile court again found that it would be detrimental to the children to return them to their mother and reaffirmed the order placing them in

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533. Id. at 394, 83 N.E.2d at 849, 86 N.Y.S.2d at 394. The author is indebted to N. Lauerman, author of *Non-Marital Sexual Conduct and Child Custody*, 46 U. Cin. L. Rev. 647 (1977), for calling attention to this quotation as well as to the quotation cited at note 531 supra.
535. Id. at 21.
536. Id.
an out-of-state foster home.\textsuperscript{539}

In deciding these two related cases, the lower court used the "best interest of the child" test and the appellate court sustained the application of this standard.\textsuperscript{540} As previously indicated, this is an improper standard in a neglect hearing. In a neglect hearing, the state or moving party must generally show harm to the child in order to justify removal of a child from its parent. With respect to Tammy and her siblings, the homosexuality of their mother, without evidence of harm, was considered sufficient cause to remove them from the custody of their natural mother and place them in foster homes.

In \textit{People v. Brown},\textsuperscript{541} a Michigan court reached an entirely opposite conclusion from that reached by the California court in the two previously discussed proceedings. A neglect proceeding was initiated in a Michigan probate court by a petition alleging that the home in which the Brown and Smith children were living was "unfit because the mothers were living together in a state of lesbianism which created an immoral atmosphere."\textsuperscript{542}

After a series of hearings and a variety of placements, the probate court ordered that the children be placed in foster homes. The appellate court reversed and remanded, saying: "There was sufficient evidence to support the conclusion that the women were engaged in a lesbian relationship. However, there is very little to support the conclusion that this relationship rendered the home an unfit place for the children to reside."\textsuperscript{543} On remand, the probate court granted the prosecution's motion to dismiss and allowed the children to return to their mothers.\textsuperscript{544} The \textit{Brown} decision is generally recognized for the proposition that a lesbian relationship is not a sufficient finding to render a home an unfit place for children to reside. Thus, a nexus between parental homosexual conduct and harm to the children must be shown, at least in Michigan neglect cases.

The most recent neglect case may also be the most unusual. At

\begin{footnotes}
\item[539] 2 WOMEN'S RIGHTS L. REP. at 22 (1974).
\item[540] \textit{Id.}
\item[542] \textit{Id.} at 360, 212 N.W.2d at 57.
\item[543] \textit{Id.} at 365, 212 N.W.2d at 59.
\item[544] The probate court was clearly reluctant to return the children to their mother. The court believed that the appellate court had ignored the fact that "this type of relationship between the parties [is] illegal, and thus creates an immoral atmosphere in the home." \textit{In re Brown} 2 (Mich. P. Ct., Lapeer County Oct. 12, 1973).
\end{footnotes}
issue in *In re Hatzopoulos*\(^5\)\(^4\)\(^5\) was the custody of Candace Hatzopoulos, whose mother, Jeannette, had committed suicide. Jeannette Hatzopoulos had lived in a committed relationship with Donna Levy, another lesbian woman, for thirteen years. During that relationship, Candace was born. Her biological father never had any relationship or contact with her. In 1974 Donna and Jeannette broke up because of Jeannette’s serious mental problems. However, Donna continued to have constant and continuous contact with Candace. When Jeannette committed suicide, Jeannette’s sister and brother-in-law took Candace but refused to let her see Donna Levy. The court examined the two custodial alternatives and chose to give Donna Levy custody of the child.

Donna’s sexual preference has not affected the child in the past and is not related to her ability to parent the child. Her strengths as a parent to the child are her sensitivity, her ability to empathize with the child, her warmth and her dependability. When sexual preference would become significant to the child, Donna has the ability to deal with it intelligently, openly and honestly.\(^5\)\(^4\)\(^6\)

The fitness standard, properly applied in neglect cases, is often incorrectly applied in divorce proceedings. Thus, some courts have denied custody to a homosexual parent not only because the child’s best interest presumably was served thereby, but also because the parent’s homosexuality was considered proof of parental unfitness.

One of the earliest published cases dealing with child custody and a homosexual parent is *Commonwealth v. Bradley*.\(^5\)\(^4\)\(^7\) At the time of the divorce between the mother and the homosexual father, the court gave general custody to the mother and temporary custody to the father, which included alternate weekends and two weeks in the summer. In what turned out to be a tactical error, the father appealed these limitations. The appeals court not only took away his temporary custody but gave the mother exclusive custody with the right to grant the father such limited visitation as she deemed best for the children.

The court’s decision was apparently precipitated by the fact that Mr. Bachman, the father, was a homosexual individual. After reviewing the evidence, the court said that Bachman’s lifestyle revealed an “erotic engrossment.”\(^5\)\(^4\)\(^8\) Although there was no evidence that Bachman allowed his propensities to be known by his children, the court

\(^5\)\(^4\)\(^6\).  *Id.*
\(^5\)\(^4\)\(^8\).  *Id.* at 591, 91 A.2d at 381.
warned that “the absence of harmful influences in the past does not eliminate the probabilities of the future.” The court said that the applicable standard was “the best interest and welfare of the child;” but nevertheless considered the fitness of the parent, noting that “[i]n the custody of [the father], [the children] may be exposed to improper conditions and undesirable influences.”

The homosexuality of the mother similarly influenced the court in *Immerman v. Immerman*. Although the lower court ruled that evidence of the mother’s sexual proclivities was inadmissible and awarded custody to the mother, the appeals court reversed. The court concluded that the exclusion of that evidence was erroneous and prejudicial because “[t]he moral character, acts, conduct and disposition of one who seeks the custody of a child are relevant matters.” Thus, in effect, the court held that the sexual orientation of the parent was relevant in and of itself whether or not it affected the child adversely.

The court in *Nadler v. Superior Court*, reached a similar result, but was nevertheless more sympathetic to the lesbian mother seeking custody of her child. The California Court of Appeal rejected the lower court, holding that homosexuality per se is conclusive of parental unfitness and instructed the lower court to consider all the evidence in making its decision.

On remand, the lower court once again granted custody to the father. The lesbian mother was given Sunday visitation rights, on the condition that another adult—“a relative who has no problems” and who was presumably not a homosexual person—be present at the time. As to Mrs. Nadler’s future visitation rights the court said: “I

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549. *Id.* at 593, 91 A.2d at 381.
550. *Id.* at 593, 91 A.2d at 381-82. Another early Pennsylvania case, *Leonard v. Leonard*, 173 Pa. Super. Ct. 424, 98 A.2d 638 (1953), was resolved in favor of a homosexual father. However, the court upheld the father’s visitation rights on the ground that his ex-wife’s allegations as to his “sexual perversion” and its alleged effect on their children was not supported by the evidence. *Id.* at 426, 98 A.2d at 638-39.
552. The father wished to testify to the fact that he had discovered his wife in a compromising position with another woman. *Id.* at 126, 1 Cal. Rptr. at 301.
553. *Id.* at 127, 1 Cal. Rptr. at 301.
554. A Pennsylvania court in *Commonwealth v. Cortes*, 210 Pa. Super. Ct. 515, 234 A.2d 47 (1967), in which a grandmother sought custody of her daughter’s five children, similarly excluded testimony with regard to the mother’s homosexuality. Also, as in *Immerman*, the court of appeals reversed and remanded, noting that the excluded testimony may well have answered questions vital to the welfare of the children.
want this child protected, and if the lady takes therapeutics (sic) and
the psychiatrist can assure me, then I will look for unrestrained visita-
tion." Nadler illustrates two common results. First, the homosexual
parent is allowed to see his or her own child only in the company of
another adult, usually a hostile relative. Second, future visitation or
custody rights are predicated on either a "cure" or "giving up" of the
parent's homosexuality. Such restrictions undoubtedly impair the
parent's ability to build or maintain a truly meaningful relationship
with a child. Moreover, conditioning the parent's right to see his or her
child upon a fundamental change in the parent's very nature, leaves the
parent with no real alternative.

Several years later, courts were still imposing restrictions upon the
visitation rights of homosexual parents. In 1974, a New Jersey court in
In re J.S. & C. restricted the visitation rights of a homosexual fa-
thor, after determining that the father was an avowed and publicly
known homosexual, that he associated with other homosexuals and was

557. Id. at 68.
558. Another common restriction upon the visitation rights of the homosexual parent
was imposed in Nelson v. Nelson, No. 951,546 (Tex. Ct. Dom. Rel. No. 2, Harris County,
May 24, 1973). The court awarded custody to the father without stating the basis for its
determination. However, earlier, the court alluded to the mother's lesbianism, observing
that "[t]his gay liberation business, not bad of itself, does raise questions for us." The court
allowed the mother visitation but on the condition that "all visitations are to take place
outside of the presence of Claudia [Mrs. Nelson's life-partner] or any other lesbian-type
person."

Nelson v. Nelson is unreported and is not cited in any other articles. Lesbian Mothers
Defense Fund provided a copy of the proceedings to the author.
559. There is deep conflict among medical and psychiatric authorities over the issue of
"curing" homosexual individuals. Some authorities insist that "cure" is impossible; others
claim a "cure" rate of one-third among their homosexual patients. Belief in such a "cure" is
a direct function of whether homosexuality is considered an illness or merely a variation of
sexual behavior. Some authorities question the ethics of trying to inculcate a homosexual
person with an alien sexual pattern, particularly when such treatment is administered for the
sake of conformity to social convention. See A. Karlen, Sexuality and Homosexuality
572-606 (1977); D.J. West, Homosexuality Re-examined 241-75 (1977); J.D. Frank,
Treatment of Homosexuals, in National Institute of Mental Health Task Force on
Homosexuality Final Report and Background Papers 63-68 (1972).
561. The court analogized the father to a bank robber who is allowed visitation rights
only on the assumption that he will not expose his child to his "unacceptable line of en-
deavor." Id. at 497-98, 324 A.2d at 97. A homosexual parent who advocates breaking New
Jersey's sodomy laws can, the court reasoned, be similarly restricted. Accordingly, the court
imposed the following restrictions on the father's visitation rights: (1) during visitation the
father may not cohabit or sleep with any individual other than a lawful spouse; (2) during
visitation the father may not involve the children in any homosexual related activities or
publicity; (3) during visitation the father may "not be in the presence of his lover." Id. at 498,
324 A.2d at 97 (emphasis added).
currently living with a homosexual "lover", and that the children associated with his "lover" and other acquaintances during their visits.562

The court nevertheless expressed some idealistic sentiments, observing that:

The parental rights of a homosexual, like those of a heterosexual, are constitutionally protected. Fundamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, per se. The right of a parent, including a homosexual parent, to the companionship and care of his or her child, insofar as it is for the best interest of the child is a fundamental right protected by the First, Ninth and Fourteenth Amendments to the United States Constitution. That right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child.563

After reviewing all the very favorable testimony about the father the court concluded that granting the father visitation rights would be in the best interests of the children. However, the court also concluded that unrestricted visitation would not be in their best interests and observed: "The lack of understanding and controversy which surrounds homosexuality, together with the immutable effects which are engendered by the parent-child relationship, demands that the court be most hesitant in allowing any unnecessary exposure of a child to an environment which may be deleterious."564

Equally stringent restrictions were imposed upon a lesbian mother in Mitchell v. Mitchell565 despite the fact that she was awarded custody of her children. Mrs. Mitchell had three children and planned to live with another lesbian mother who had already won custody of her three children.566 Mr. Mitchell, however, chose to fight custody and sought to make lesbianism the central issue. In what was at that time a new strategy, Mrs. Mitchell stipulated to her lesbianism in order to focus the court's attention on parental fitness and the child's best interests rather than on the sexual preference of the mother.

At trial, the probation officer, a court conciliation counselor, and a psychologist testified that Mrs. Mitchell should be appointed as the children's custodian. Moreover, the children, ages fourteen, nine, and

562. Id. at 489, 324 A.2d at 92.
563. Id. (emphasis added).
564. Id. at 497, 324 A.2d at 97.
566. This case was uncontested and that mother's lesbianism was never an issue. San Francisco Chronicle, July 12, 1972, at 34, 37, col. 1.
twelve, all wanted to stay with their mother. The only testimony to the contrary was that of the father who claimed that Mrs. Mitchell's immoral conduct rendered her unfit and that he could provide a good Christian home.\textsuperscript{567}

While the court, faced with such overwhelming evidence of Mrs. Mitchell's fitness, gave Mrs. Mitchell custody, it also imposed restrictions which destroyed the possibility of establishing a new family unit. The court prohibited Mrs. Mitchell from living with her "lover"\textsuperscript{568} and from associating with her unless the children were in school or visiting their father. Thus, the price Mrs. Mitchell was required to pay to keep her children was the destruction of a loving home with another adult with whom she could share the burdens of child rearing.\textsuperscript{569}

Similarly, in \textit{A. v. A.}, a gay father was allowed to keep his two sons but his life was considerably restricted. First, the court ordered the Clackamas County Juvenile Department\textsuperscript{571} to supervise the father. Second, to protect the boys from "possible pernicious influences"\textsuperscript{572} the trial court prohibited the defendant father from living with any man in the family home. The appellate court specifically approved that restriction.

The court was influenced by \textit{Nadler}\textsuperscript{573} and by the fact that there was no evidence that the boys were exposed to deviant sex acts or that their welfare was being adversely affected in any substantial way.\textsuperscript{574}


\textsuperscript{568.} The author abhors the use of the word "lover." Lover connotes that the relationship between the parties is short term and solely erotic. "Friend" is cute but hardly encompasses a loving relationship with a lifelong commitment. "Partner" sounds like a business arrangement. "Spouse" is technically incorrect and "husband" and "wife" are traditional roles inappropriate in a homosexual relationship. In order to avoid the use of the word "lover," which the author sees as pejorative in this context, the term "life-partner" will be used.

\textsuperscript{569.} Recent studies have shown that the greatest problems faced by the children of homosexual parents stem not from the parents' sexual orientation but rather from the difficulties inherent in all single parent households. Dr. Richard Green, who is in the process of completing a study of matched pairs of children of homosexual and heterosexual parents, says that "one is not seeing so far anything remarkable about these children [of lesbian mother families]." \textit{In Re Ransom}, unpublished op. at 41, No. 477051-8 (Cal. Super. Ct., Alameda County Nov. 9, 1977).

\textsuperscript{570.} 15 Or. App. 353, 514 P.2d 358 (1973).

\textsuperscript{571.} \textit{Id.} at 359, 514 P.2d at 361.

\textsuperscript{572.} \textit{Id.} at 356, 514 P.2d at 359.

\textsuperscript{573.} Nadler v. Nadler, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967). \textit{Nadler} held that homosexuality on the part of one parent does not make that parent unfit as a matter of law to have custody of children.

\textsuperscript{574.} 15 Or. App. at 358-59, 514 P.2d at 360.
While this suggests that the court adopted a more favorable attitude towards the homosexual father, the facts suggest the court may not have had any choice but to give the father custody. The mother had not had any contact with the boys for over ten years. She only decided to initiate the custody suit after her third marriage.

The irrationality of judicial decision-making in child custody cases is clearly illustrated in the cases of two lesbian mothers, Nancy Driber and Marilyn Koop, who decided to live together. In *Driber v. Driber*, the court apparently focused on the stability of the relationship between the two women and awarded Ms. Driber custody of all three of her children.

Nancy Driber's life-partner was not so fortunate. Another judge in the same county heard Ms. Koop's case, and in *Koop v. Koop* removed custody of two of her three children. Subsequently, the two children ran away from their father and refused to return to live with him. Marilyn Koop filed a petition seeking to have the children returned to her. When brought before the court, the children, ages eleven and thirteen, told the judge that they would not continue to live with their father. Consequently, the judge directed the sheriff to place the children in a juvenile detention home and ordered that the children be made wards of the juvenile court. After three months in a juvenile home the children were temporarily placed with their older half-sister.

After a lengthy hearing, in which a psychiatrist and a court social worker testified in favor of the mother, the judge talked to the children, both of whom expressed a desire to be with their mother. In addition, the temporary custodian, the half-sister, thought the children would be better off with their mother. Nevertheless, the court ordered placement with the half-sister. The court was evidently impressed by the father's testimony that the mother's relationship with Nancy Driber was "immoral." The mother's "immorality" rather than the "best interests of the children" was apparently the deciding factor.

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576. During that trial, Ms. Driber introduced into evidence a documentary film on lesbian parenting. The film, *Sandy and Madeleine's Family*, was a result of the *Schuster-Issacson* cases, see text accompanying notes 605–08 infra. The fathers in those cases argued that the making of the film was one reason why Sandy and Madeleine should lose their children.
Equally ambiguous notions of “immorality” prompted a Georgia court in *Bennett v. Clemens* to award to the paternal grandparents custody of their nine-year-old granddaughter. The mother wanted to retain custody and the father testified that he was in favor of such an arrangement. While there was no evidence of any sexually atypical behavior by the mother, on at least one occasion the mother allegedly left the child with four female friends who “smoked ‘pot’ on occasions, engaged in sexual acts with men and with each other in the presence of the child and otherwise taught the child about ‘the gay life.’” In upholding the award of custody to the grandparents the court of appeals found that the trial court had exercised sound discretion to protect the welfare of the child.

The dissent, on the other hand, pointed out that there was no evidence in the record that the child’s physical needs were not being cared for or that the child was neglected, abused, or mistreated in any way. Moreover, a psychiatrist testified that the child had been living in a “healthy environment.” According to the dissent, the grandparents’ only complaint was that the child was being brought up in an “immoral, hippy-type environment.” The dissent felt the trial court clearly abused its discretion by imposing its own moral judgment instead of considering the best interests of the child.

Where neglect, abuse, or mistreatment in some manner is absent, the state has no right to inquire into what a parent teaches his child, or with whom a parent allows his child to associate, or the type of environment a parent permits his child to inhabit. Within this relationship the family or parent adopts a moral standard for the members’ conduct and associations, and the state cannot intrude upon or disrupt this relationship by asserting a different moral standard, conceived by judges, that must be adhered to.

Occasionally, the homosexuality of a parent is unnecessarily made an issue. In *Chaffin v. Frye*, in which a lesbian mother lost custody of her two daughters to her own parents, many factors other than the mother’s lesbianism could have led to the same result. Ms. Chaffin had a record of five arrests and two convictions. She was characterized as

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580. Quite often, when courts allude to acts “in the presence of the child,” it is unclear in most contexts whether the courts mean in the same residence or actually in the presence of the child.
581. 230 Ga. at 319, 196 S.E.2d at 843.
582. *Id.*
583. *Id.* at 320, 196 S.E.2d at 844.
584. *Id.* at 321, 196 S.E.2d at 844.
585. *Id.* at 321-22, 196 S.E.2d at 844.
unstable socially and financially by a probation officer. She had in addition, some serious physical disabilities. Moreover, the children at issue had lived with their grandparents most of their lives and were then fifteen and thirteen.

Aside from these matters, which could have been determinative in and of themselves, the court made Ms. Chaffin's homosexuality a major issue. The appellate court concluded that the trial court was correct in denying the mother custody of her children, observing that "homosexuality is a factor which the trial court could consider." 587

[T]his factor is not merely fortuitous or casual, but rather it dominates and forms the basis for the household into which the children would be brought if custody were awarded to appellant. Appellant does not merely say she is homosexual. She also lives with the woman with whom she has engaged in homosexual conduct, and she intends to bring up her daughters in that environment. The trial court was not required to believe appellant's self-serving statements about the present nature of her homosexual relationship... 588

After noting that certain homosexual acts were then criminal in California and that children should not be exposed to homosexuality in their most formative and impressionable years, the court concluded that "[i]n exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests." 589 The court consequently upheld the trial court's decision 590 and awarded custody to the grandparents who ironically had already raised two homosexual children. 591

In In re Jane B., 592 a lesbian mother was similarly unsuccessful in obtaining custody of her child, even though at the time of divorce, cus-
tody of the child was given to the mother. The child, who was ten at the time of the decision, had been continuously with the mother from the age of three. The mother began a homosexual relationship with another woman when the child was nine and the two women and the child lived together. The father, upon learning of the homosexual arrangement, sought a change of custody.

The court rejected the mother's constitutional arguments, observing that while an adult's lifestyle is constitutionally protected that protection does not extend to situations where "innocent bystanders or children . . . may be affected physically and emotionally by close contact with homosexual conduct of adults." 593

The court examined a report that indicated that both parents were physically and financially able to care for the child and heard the testimony of two psychiatrists, introduced by the mother and father, respectively. Although the court said it was not finding the homosexual mother unfit per se, it nevertheless concluded that a "home environment with [a] homosexual partner in residence is not a proper atmosphere in which to bring up this child or in the best interest of this child." 594 The court also specifically found that the child was "emotionally disturbed by virtue of this environment and that the total circumstances warrant a change in custody." 595 The only testimony which supported this conclusion was that of a school psychologist who admitted under cross-examination that the divorce itself could be causing the child stress. 596

After taking the child from the mother's custody, the court circumscribed the mother's visitation rights. The child would not be allowed to remain overnight with the mother or to visit the mother when the mother's life-partner or any other homosexual persons were at home. The mother also was ordered not to take the child to any place where known homosexual individuals were present or to involve the child in any homosexual activities. 597 The last two admonitions seem gratuitous because the mother in this case led a very private life and apparently had no connection with gay activist politics. 598

Some of the more recent cases indicate a growing trend among

593. Id. at 524, 380 N.Y.S.2d at 857.
594. Id. at 525, 380 N.Y.S.2d at 858.
595. Id. at 527, 380 N.Y.S.2d at 860.
596. Id. at 518, 380 N.Y.S.2d at 852.
597. Id. at 528, 380 N.Y.S.2d at 860-61.
598. After citing with favor to In re J.S. & C., 129 N.J. Super. 486, 324 A.2d 90 (1974), see notes 560-64 & accompanying text supra, where similar restrictions had been used to control a gay activist father, the court presumably copied the order in that case.
homosexual parent-litigants to aggressively assail the courts' conventional attitudes about "morality" and homosexuality. *Hall v. Hall*,\(^5\) in which a lesbian mother was allowed to retain custody of her daughter,\(^6\) marks the beginning of the use of experts on homosexuality\(^6\) and the beginning of an aggressive position by many homosexual parents in defending their parental rights.

The case is also interesting because the issue of lesbianism and the impact of a lesbian home were fully discussed. Dr. Richard Green, probably the best known authority on homosexuality, was an expert witness for the mother.\(^6\) The transcript of Dr. Green's testimony illustrates a common occurrence in lesbian mother cases. After being examined by counsel for both sides, Dr. Green was examined by the judge who asked how "the sex act between lesbians [was] accomplished?"\(^6\)

A close examination of trial transcripts in cases involving lesbian mothers reveals either an incredible ignorance on the part of judges or, more likely, extremely distasteful voyeurism. If a woman has admitted her lesbianism and if sexual acts in front of the child or children are not at issue, the discussion of the explicit acts of the lesbian mother seems highly irrelevant.

In what is probably the most famous lesbian mother case,\(^6\) the.

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6. In *Hall*, all of the testimony was extremely favorable to Sarah Hall, the mother, and her life-partner. "All David Hall, [the father,] did was to come into court and short 'Lesbian'." Plaintiff's Post Trial Memorandum of Law & Fact, at 2. In this case that approach did not work.

7. For example, extensive expert testimony was used in *Ranson v. Ranson*, No. 477051-8 (Cal. Super. Ct., Alameda County Nov. 9, 1977), in which the court ultimately awarded the lesbian mother custody of her two children. The Advocate, Jan. 1, 1977, at 12.

During the trial, the mother introduced the testimony of Wardell Pomeroy, co-author of the Kinsey report, and Dr. Richard Green, an expert on homosexuality who also testified at the trial of *Hall v. Hall*, see text accompanying note 602 infra. Dr. Green testified that he had found the children "remarkable," that is, not significantly different from children of heterosexual mothers. *Court Hearing Reporter's Partial Transcript of Proceeding Examination of Dr. Richard Green* at 21, *Ranson v. Ranson*, No. 477051-8 (Cal. Super. Ct., Alameda County Nov. 9, 1977).


Perhaps *In re Risher* (Tex. Dom. Rel. Ct., Dallas County April 16, 1976) is the most infamous lesbian mother case. That child custody case involving a homosexual parent went before a Texas jury which removed a nine-year-old boy from his mother and gave custody to the father. The boy had lived with his mother, the mother's life-partner and the life-partner's minor daughter, since the divorce five years earlier. Because the decision was
consolidated case of *Schuster v. Schuster* and *Isaacson v. Isaacson*, two lesbian women won at the trial court level the right to live and raise their children together. At the time of their original contested divorces the lesbianism of Sandy Schuster and Madeliene Isaacson was thoroughly discussed. While the court awarded custody to the mothers, it ordered that the family of two women and eight children split up. Subsequently, the fathers petitioned for a change of custody based on a change of circumstances. Both fathers argued that since they had remarried they could provide adequate homes, that the mothers were in fact living together against court orders, and that the two women had publicized their relationship.

After a lengthy trial in which twenty-one witnesses were introduced, including eleven psychiatrists and psychologists, the court found that the change in circumstances was not sufficient to require a change in custody from the mothers to the fathers. The court noted that “almost all of the testimony of all of the people who actually saw, examined, or talked to the children was that the children are healthy, happy, normal, loving children.”

With regard to the homosexual orientation of the women, the court was persuaded that the only predictable effect would be “that these children will grow up knowing more about homosexuality and human sexuality than most children [but] . . . that this knowledge need not predispose them to become homosexuals.” However, the court did warn the mothers not to put the children on exhibition for the cause of homosexuality. On the other hand, the court found that two living units were a hardship on the children and not in their best interest. Although reversed on appeal, the court removed the restriction that the families live in two separate households. At the conclusion of its opinion the court stated:

I don’t think this case should be regarded as any landmark decision or as any stamp of approval by the Court on homosexuality. I think

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605. Nos. D-36867, D-36868 (Wash. Super. Ct., King County Dec. 22, 1974), *aff'd in part*, 585 P.2d 130 (Wash. 1978). On appeal, the Washington Supreme Court affirmed that part of the opinion that allowed the mothers to retain custody but ruled that the lower court had erred in modifying the custody order to allow the mothers to live together.

606. *Id.* at 5.

607. *Id.* at 6.
it is a case just like cases that we decide every day where we look to the individuals to try and determine what is the best interests of the children, and that is what I have attempted to do.\textsuperscript{608}

In \textit{Whitehead v. Black},\textsuperscript{609} a lesbian mother again won custody without any of the usual restrictions. However, that case really represents a personal victory for the mother rather than for lesbian mothers in general. One commentator attributed Carol Whitehead’s victory to the fact that she did not “flaunt” her lesbianism and was not too far “out of the closet.”\textsuperscript{610} Moreover, while the court admitted that the most unique and unusual feature of the case was the lesbianism of the mother,\textsuperscript{611} the court clearly indicated at the outset that it was not concerned with “any so-called rights of the mother.”\textsuperscript{612}

The court observed that although the State of Maine had decriminalized all private consensual sexual activity between adults, the court was not precluded from considering the sexual activities of parents. The sexual activity of the parent, according to the court, “becomes a relevant consideration, not for the purpose of censuring or criticizing the manner in which the parent lives, but for the purpose of determining the impact of the parent’s lifestyle upon the minor child.”\textsuperscript{613}

Despite its examination into the mother’s sexual activity, the judge awarded custody to the mother, observing that courts could not always attain the “ideal” home and often had to settle for a “custodial arrangement which adequately meets the . . . needs of these children.”\textsuperscript{614} The court’s decision was apparently influenced by a highly favorable report by a child psychiatrist, the fact that the child had lived continuously with the mother for over five years, and the mother’s attitude toward her lesbianism. The court noted that “[s]he was aware that her homosexual lifestyle could have an impact on her children and was intelligently seeking to minimize, if not totally eliminate, that impact.”\textsuperscript{615}

Another recent case, \textit{Stamper v. Stamper},\textsuperscript{616} resulted in an unusual order of joint custody. The court used the criteria in the Michigan

\begin{thebibliography}{99}
\bibitem{608} Id., at 11.
\bibitem{609} Nos. CV-76-422, CV-76-426 (Me. Super. Ct., Cumberland County June 14, 1976).
\bibitem{610} 2 \textit{FAMILY L. REP.} at 1138 (1976).
\bibitem{611} Unpublished opinion at 7, CV-76-422 & CV-76-426 (Me. Super. Ct., Cumberland County June 14, 1976).
\bibitem{612} Id.
\bibitem{613} Id., at 8.
\bibitem{614} Id., at 11.
\bibitem{615} Id., at 10.
\bibitem{616} No. 75-054-550-DM (Mich. Cir. Ct., Wayne County June 15, 1977).
\end{thebibliography}
Child Custody Act\footnote{617. Child Custody Act of 1970, Mich. Comp. Laws Ann. §§ 722.21-722.29 (West Supp. 1978-79).} to evaluate the custodial possibilities. On the question of the moral fitnesses of the parents, the judge noted there "is very little to choose between the parents."\footnote{618. Unpublished opinion at 6.} In discussing the home lives of the parties, the court used the neutral phrase "live-in associate" to refer to both the father's and mother's current life-partners, evidencing little concern regarding the gender of the mother's sexual partner. The court gave physical custody to the mother who was permitted to continue living with her life-partner. The father was awarded extensive visitation rights and joint responsibility for making decisions concerning the child.\footnote{619. Another Michigan court, applying the same Custody Act in S. v. S., No. 75-16125DM (Mich. Cir. Ct., Washtenaw County 1975), reached a similar result. After a careful review of the factors incorporated in the Act, the court found for the mother and allowed the children to reside in a home with both the mother and her life-partner. Commenting on the relationship of the two women, the court observed that "[s]tripped of natural revulsion against their private homosexual interaction, Mrs. S. and Mrs. K. do appear mutually to compliment each other and to have love, trust, understanding and respect for each other as human beings." This case is unpublished and the records suppressed. However, the opinion and order in this case are in the files of the author by permission of the court. It is unfortunate that this opinion was not published because of the careful, systematic method in which the court evaluated the respective custodial alternatives against the criteria embodied in the statute. The judge in this case was so impressed by this and another case he tried, that he wrote an article to help other judges. See Campbell, Child Custody: When One Parent Is Homosexual, 17 Judges' J., No. 2, at 52 (1978).} In \textit{Jullion v. Ceccarelli},\footnote{620. No. 490874-4 (Cal. Super. Ct., Alameda County June 8, 1977).} the court demonstrated an equally indifferent attitude towards the sexual preference of the mother. The lesbian mother had custody of her younger son for two years during a separation from her husband, while the older son resided with the father. At the full custody hearing the court would not allow the introduction of any evidence on the issue of sexual preference, concluding that the only relevant issue was the fitness of the parents. Since the court found both parents fit, the court concluded that the younger son's need for nurturing from his mother was dispositive and permitted the mother to retain custody of the younger son.

Although the foregoing cases suggest the development of a trend in favor of awarding custody to the gay parent, two recent cases indicate that many of the conventional attitudes and misconceptions regarding homosexuality still pervade the reasoning of some courts.
In *Towend v. Towend*, an Ohio court of appeal upheld an order removing three young children from the custody of their lesbian mother and placing them in the custody of their sixty-five-year-old paternal grandmother. The lower court decided the issue of the parties' divorce as well as the issue of child custody. The court awarded the husband a divorce on the ground of extreme cruelty observing that the lesbianism of the wife was not technically a ground for divorce in Ohio. In discussing Lorraine Towend's lesbianism in the divorce context the court made the following observations:

There is no question in the court's mind, of course, that society as a whole disapproves of sexual aberration of any kind, particularly homosexuality, and that is a very ancient disapproval. You read in the Old Testament of Sodom and Gomorrah . . . . An overwhelming majority of the people in this country strongly disapprove of homosexuality, regard it as a very wide aberration from what they do approve as indicated by various cant appellations they give to it, such as "Queer," "Fagot," and so forth, so there can be no question in the court's mind that the conduct revealed here is against the mores of our present day society, even this society that grows more permissive.

In addition the court awarded custody of the three children to the paternal grandmother after having found both the mother and the father unfit. As to the mother, the court concluded:

Ordinarily, children of these years would be given to the mother. The question arises 'should the court do that,' notwithstanding the lesbianism of the defendant. I don't say that a mother cannot be fit to rear her children even if she is a lesbian, but I wonder if she is fit when she boldly and brazenly sets up in the home where the children are to be reared, the lesbian practices which have been current there, clearly to the neglect of supervision of the children.

The lower court seemed to suggest that if the mother changed her nature, she might regain custody of her children. In upholding the lower court decision, the court of appeals noted that "the trial court recognizes the general community disapproval of homosexual activity,

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624. Id. at 5 (emphasis added). In its opinion, the court of appeals explained the trial court's conclusion: "There was testimony that considerable time was spent in sexual acts between appellant and Mrs. Dickinson and that they made love as many as five or six times in one day." The trial court found that the lesbian practices were "clearly to the neglect of supervision of the children." *Towend v. Towend*, No. 639, unpublished op. at 3 (Ohio Ct. App., Portage County Sept. 30, 1976).
625. The appeals court observed: "I would think that a lesbian, for the sake of the children, would have abandoned the practice . . . ." No. 639, unpublished op. at 13 (Ohio Ct. App., Portage County Sept. 30, 1976).
but . . . was not concerned with it beyond the direct adverse effect it had on the children. We are of the opinion the trial court’s decision was not tainted by bias.\(^{626}\)

This case involves two elements common to other child custody cases. First, part of Mrs. Towend’s conduct which the court condemned involved a newspaper and TV/radio interview given at a gay students organization of which she was a member. Despite the clear first amendment implications of the court’s holding, the court of appeals dismissed Mrs. Towend’s constitutional objections on the grounds that the only issue before the court was whether Mrs. Towend was a suitable person to raise her children.\(^{627}\) Second, the case is one of the most blatant examples of judicial voyeurism. Over objection of counsel, the trial judge forced Mrs. Towend to respond to questions regarding details of how Mrs. Towend engaged in love-making. Mrs. Towend had, at that point, already admitted her lesbianism and admitted the identity of her life-partner. The judge referred to these intimate details on at least three occasions in his opinion.\(^{628}\)

In *Smith v. Smith*,\(^{629}\) the court held that the mother’s lesbianism was not per se dispositive of her continued fitness as the custodian of her two sons, but nevertheless examined “whether and to what extent the emotional and mental health of the child [had] been affected by the mother’s deviant behavior.”\(^{630}\) Consulting clinical reports, the court found that the social stigma of having a lesbian mother had a traumatic emotional impact on one of the sons.

However, this case does not represent a clear example of judicial homophobia. Three younger children were ultimately permitted to remain with the mother, and the two older boys who went to their father had expressed a strong desire to live with him. In fact, this case represents positive precedent. The court stressed that “a causal connection between lesbianism and its diverse effect upon the child should be shown.”\(^{631}\)

From the preceding discussion it is evident that some courts are beginning to evaluate homosexual parents on the basis of their parent-
ing abilities rather than on the basis of their sexual preference. However, in each case where a homosexual parent has succeeded in getting a court to examine the situation with reasonable objectivity, the costs have been excessive. Because the homosexual parent must first overcome homophobia and misinformation before getting to the proper issue of the child’s best interest, he or she inevitably incurs tremendous legal expenses without guarantee of success. If the case is lost at the first level, the cost of appeal is staggering and often prohibitive. Justice for the homosexual parent does not come cheaply or often.

XI. Unrecognized Families

Homosexual couples who are not allowed to enter into marriage legally sanctioned by the state may nevertheless be able to achieve some of the legal and financial benefits normally accruing to that relationship. One commentator\textsuperscript{632} suggests that homosexual persons may soon have the option of a “quasi-marital” status.

Although private consensual homosexual activity might be legalized in this country without creating many problems as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it. If such proves to be the case, particular legal benefits available only to married couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits—without compelling states to grant marriage licenses—it might eventually create in effect a ‘quasi-marital’ status. State legislatures might explicitly grant such a status, and specify the attendant rights.\textsuperscript{633}

The Supreme Court’s acceptance of such a quasi-marital status does not appear to be imminent. At present, the most promising method of obtaining many of the legal advantages of the marriage relationship without obtaining a legally sanctioned marriage is the use of the private contract.\textsuperscript{634} One of the major impediments to the enforcement of contracts between nonmarried cohabiters has been the finding

\textsuperscript{633} Id. at 588-89.
\textsuperscript{634} In a comprehensive article, Leonore J. Weitzman suggests the use of contracts by nonmarried cohabiting couples and specifically deals with contracts between homosexual life-partners. Weitzman, Legal Regulation of Marriage: Tradition and Change—A Proposal
by the courts that their meretricious relationship taints and, hence, nullifies any agreement. In particular, public policy does not recognize sexual acts as consideration for a contractual promise.

This interpretation of public policy prevented the enforcement of contracts between nonmarried heterosexual cohabitors for many years. However, the recent case of *Marvin v. Marvin* is generally considered to have redefined the rights of nonmarried cohabitors with regard to financial interests and property rights. The California Supreme Court held that either party to a nonmarital relationship may enforce an express or implied agreement dividing accumulated property. Basing its decision on the policy that "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights," the court declared that express contracts between nonmarried cohabitors could be enforced "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual service." In the absence of an express contract, the court will look to the conduct of the parties to see if such an agreement can be implied.

While *Marvin* deals with two heterosexual persons, nothing in its language limits its application to homosexuals. Immediately after the decision was rendered, there was much speculation as to whether it would be applicable to homosexual persons. Shortly thereafter, the *Marvin* reasoning was applied to a lesbian couple, when a San Diego superior court judge ordered Denease Conley to pay monthly support to Sherry D. Richardson. The two women had participated in a religious ceremony and had signed a written agreement dealing with financial matters. When the relationship ended, Richardson brought suit for support and division of accumulated property.

Whether other states will even follow *Marvin* with respect to heterosexual nonmarried cohabitors is still doubtful. It is even more

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635. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).
636. Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.
637. Id. at 665, 447 P.2d at 110, 134 Cal. Rptr. at 819.
638. Id.
641. See Beal v. Beal, 4 FAM. L. REP. (BNA) 2464 (Ore. 1978); Carlson v. Olson, 3 FAM. L. REP. (BNA) 2467 (Minn. 1977). In these cases, the courts adopted a position similar to *Marvin*. But see Rehak v. Mathis, FAM. L. REP. (BNA) 1185 (Ga 1977) (rejecting *Marvin* approach).
doubtful whether *Marvin* will be applied to homosexual couples, especially in the majority of states where homosexual conduct is still a crime. Homosexual couples in the states rejecting the liberal reading of *Marvin* will have to fall back on traditional common-law methods of arranging their financial affairs such as wills and powers of attorneys.642

However, as the concept of family is redefined in American society643 there are small but interesting changes which bring the homosexual family closer to the mainstream. For example, under the New York Human Rights Law644 any two people living at the same address are considered "family" members even if they are not married or blood relations. The New York law forbids discrimination on the basis of marital status in public accommodations, employment, housing, and credit. On May 24, 1978, the Detroit (Michigan) City Council similarly amended its definition of "family" as applied to residential housing for single family occupancy. The new definition removes the requirement of consanguinity or marriage. This change was effectuated to bring housing ordinances in line with the new city charter which forbids discrimination on the basis of sexual orientation or marital status.645

Insurance companies also have discriminated against gay couples. However, under a relatively new California regulation, California insurance carriers may not discriminate on the basis of sexual orientation.646 Such discrimination is similarly prohibited by a Wisconsin regulation.647 In late 1976, the Illinois Department of Insurance Regulations ruled that Illinois insurance companies could no longer discriminate against gays and single women.648

Another aspect of family life includes having and raising children. While lesbian women have had children by artificial insemination,649 the legal problems created by artificial insemination for both homosex-

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643. The "typical American family"—a married man supporting a wife and children—is a mere six percent of the total of American families. Bell, *Let's Get Rid of Families!*, NEWSWEEK, May 9, 1977, at 19.
645. See The Advocate, July 12, 1978, at 10. However, a Department of Housing and Urban Development policy under which unmarried couples, including homosexuals, were eligible for public housing was recently nullified. Lesbian Connection, Sept. 1977, at 12.
646. See 2 SEX L. REP. at 17 (1976).
647. See 2 SEX. REP. at 30 (1976).
ual and heterosexual couples are far from resolved. For those homosexual individuals who do not wish to have children of their own, foster parenting is an altruistic way of experiencing parenthood. In New York City, a controversial new program has placed thirty youngsters between the ages of twelve and seventeen with gay couples. These young boys have all been rejected by their parents and shunned by welfare agencies and heterosexual foster parents because of their homosexuality.

In 1974 the State of Washington revised its statutes dealing with foster family homes to provide that a foster parent or parents must be stable, loving, and ready to meet the emotional needs of the children. These laws have been construed to include homosexual foster parents who possess the interest and qualifications to be licensed. Such licensing of homosexual foster parents was approved in In re Meyer, in which a homosexual foster father was awarded custody of his homosexual foster child. However, in a later case, In re Davis, the court refused to place a sixteen-year-old boy who had been declared incorrigible with a male homosexual couple who agreed to act as his foster parents. The boy's previous foster and group home placements had been unsuccessful because of his homosexual tendencies. Two state social workers, two juvenile parole officers, a psychiatrist, a psychologist, and a sociologist all agreed that the boy should be placed in a gay foster home. His father, however, was opposed to the placement on the grounds that it would effectively eliminate the boy's chances of turning out "straight." The court agreed, observing that "substituting two male homosexuals for parents does violence not only to the literal definition of who are parents but offends the traditional concept of what a family is." While explicitly recognizing that the two men could not legitimize their relationship under Washington law, the court nevertheless criticized them for living in a meretricious relationship. The court concluded that the boy "should be encouraged to behave


651. Franks, Homosexual Foster Parents: An Advance or a Peril, N.Y. Times, May 7, 1974, at 47.


654. Id. at 2846. The fallacy of this contention is discussed in Richards, supra note 25, at 729 & 756 n.235.

655. Id.
normally regardless of his sexual orientation" and thus should not be placed in a gay foster home.

Gay persons obviously have families and form family units with concomitant legal and financial needs. However, the legal institutions and policies of this country have only begun to recognize those needs. The provisions against discrimination in housing and insurance have been adopted by only a relatively few states. Moreover, alternatives to marriage and to traditional means of raising a family are evidently still at the experimental stage. Consequently, until courts and lawmakers are willing to either abandon the conventional lay and legal definitions of marriage or create new legal forms creating equal protections for nonmarried cohabitators, homosexual couples must continue to develop alternative ways to achieve the financial, legal, and emotional benefits conferred upon the legally-recognized family unit.

Other Civil Issues

XII. Incorporation and Tax Exempt Status

Like many other citizens, homosexual Americans have organized in groups to advance their cause, and like many other organized groups they have seen the advantage of incorporation at some stage in their organizational development. The two main benefits of incorporation are the limited financial liability and more favorable tax status it affords the individuals involved. In addition, numerous gay organizations have sought to incorporate in order to challenge more effectively discriminatory laws against homosexual individuals.

A frequent choice of corporate form for these groups is the nonprofit corporation. Indeed, approximately one-third of all corporations in the United States are nonprofit. The primary advantage of selecting the not-for-profit form is the tax-exempt status which the organiza-

656. *Id.* at 2847.
657. When Gertrude Stein died in 1946, Alice B. Toklas, her life-partner of 40 years, found herself at the mercy of the Stein family. Through various legal mechanisms, the Stein family left her virtually penniless. *See* S. Steward, *Dear Sammy: Letters From Gertrude Stein and Alice B. Toklas* 107 (1977); L. Sinon, *The Biography of Alice B. Toklas* 247-50 (1977). Recently, the Portland, Oregon Town Council, concerned about how gay couples who are splitting up deal with their property division, offered the gay community an arbitration service. The Advocate, Aug. 9, 1978, at 10.
tion may obtain under the federal Internal Revenue Code.\footnote{A. Conard & R. Krauss, Enterprise Organization 606 (1977).} Under certain circumstances a nonprofit corporation can receive its own income tax free,\footnote{I.R.C. \S\S 501.} and under other circumstances the corporation can be eligible to receive tax-deductible gifts from individuals.\footnote{I.R.C. \S\S 170, 507.}

Gay organizations have sometimes had difficulty in obtaining corporate status. In \textit{Gay Activists Alliance v. Lomenzo},\footnote{66 Misc. 2d 456, 320 N.Y.S.2d 994 (Sup. Ct. 1971).} the Gay Activists Alliance (GAA) attempted to become incorporated under the New York Not-For-Profit Corporation Law. The Secretary of State of New York refused to accept their certificate of incorporation, stating that it was not in an acceptable form because of the use of the word "gay," and further that its purposes were contrary to both the public policy and to the Penal Law of New York.\footnote{The purposes set forth in the proposed Certificate of Incorporation were: "(a) To safeguard the rights guaranteed homosexual individuals by the constitutions and civil rights laws of the United States and the several States, through peaceful petition and assembly and non-violent protest when necessary; (b) To speak out on public issues as a homosexual civil rights organization, working within the framework of the laws of the United States and the several States but vigilant and vigorous in fighting any discrimination based on sexual orientation of the individual; (c) To work for the repeal of all laws regulating sexual conduct and practices between consenting adults; (d) To work for the passage of laws ensuring equal treatment under the law of all persons regardless of sexual orientation; (e) To instill in homosexuals a sense of pride and selfworth; (f) To promote a better understanding of homosexuality among homosexuals and heterosexuals alike, in order to achieve mutual respect, understanding and friendship; (g) To hold meetings and social events for the better realization of the aforesaid purposes enunciated in (a) through (f) inclusive, above, and to achieve, ultimately the complete liberation of homosexuals from all injustices visited upon them as such, that they may receive ultimate recognition as free and equal members of the human community." \textit{Id.} at 456-57, 320 N.Y.S.2d at 995-96.} The GAA asked the court to order the Secretary to accept the certificate. The trial court upheld the Secretary's decision, ruling that such a decision, in the absence of abuse, was within the Secretary's discretion. The court further indicated that, by holding itself out as a homosexual civil rights organization, the GAA must be professing a present or future intent to break New York law.\footnote{Id. at 458, 320 N.Y.S.2d at 996-97. The court did not seem to understand the difference between status and conduct: "[I]t would seem that in order to be a homosexual, the prohibited act must have at some time been committed or at least presently contemplated." \textit{Id.} at 458, 320 N.Y.S.2d at 996-97.}

In a short, curt decision, the New York Supreme Court reversed.\footnote{Owles v. Lomenzo, 38 App. Div. 2d 981, 329 N.Y.S.2d 181 (1972).} The court said that nowhere in the statute is the use of the word "gay" proscribed, nor is the word obscene or vulgar. Moreover,
the purposes of the group were not unlawful because “[i]t is well estab-
lished that it is not unlawful for any individual or group of individuals
to peaceably agitate for the repeal of any law.”666 In a per curiam deci-
sion, the New York Court of Appeals affirmed.667 The highest court
succinctly held that the Secretary of State did not have the power to
reject an incorporation certificate if the formal requisites were com-
plied with and the purpose was lawful, nor did he have the power to
decide that certain names were “inappropriate.” Thus, GAA was al-
lowed to incorporate.

An attempted incorporation in Ohio in 1974 was not as successful.
The Greater Cincinnati Gay Society (GCGS) presented its articles of
incorporation as a nonprofit corporation to the Secretary of State, who
refused to accept the articles. In Grant v. Brown,668 GCGS brought suit
to enforce its rights. The Secretary claimed that he could not accept the
articles because homosexuality was a crime in Ohio. While the suit was
pending, the Ohio legislature enacted a new criminal code which
decriminalized private adult consensual sexual behavior for heterosex-
ual and homosexual persons alike. The Ohio Supreme Court held that
the Secretary acted correctly, notwithstanding the change in the law:
“We agree with the Secretary of State that the promotion of homosexu-
ality as a valid life style is contrary to the public policy of the state.”669

In a stinging dissent, Justice Stern pointed out that not only was
there no statute against homosexual conduct in Ohio, but there was no
judicially stated policy against homosexuality. He said that “nowhere
in the recorded decisions of the Ohio Supreme Court has any justice
ever used the term ‘homosexual’ or ‘homosexuality’, let alone dis-
cuss[ed] the policy implications of such a life style.”670 Justice Stern
also raised a constitutional issue by noting that both the Ohio and
United States constitutions permit people to speak and promote their
causes peaceably.671 In Justice Stern’s view, the Secretary’s job was es-
essentially ministerial, and a decision such as this one was an abuse of
power.672

Interestingly, the attorneys for the state thought the articles should
be accepted, but the Secretary of State initially refused to retreat from

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666. Id. at 982, 329 N.Y.S.2d at 183.
669. Id. at 113-14, 313 N.E.2d at 848.
670. Id. at 118, 313 N.E.2d at 851 (footnote omitted).
672. 39 Ohio St. 2d at 114-18, 313 N.E.2d at 849-51 (1974).
his position. After the decision, however, the articles were resubmitted and then accepted.

*In re Thom Lambda Legal Defense and Education Fund, Inc.* raises an issue similar to the one in *Brown*. The Lambda Legal Defense and Education Fund sought the status of a legal assistance corporation in New York. Section 495 of the Judiciary Law of New York prohibits the practice of law by corporations, but exempts corporations that are organized for "benevolent" or "charitable" purposes and corporations designed to assist persons without the financial ability to assert their civil rights. The stated purposes of the Lambda Fund were to provide legal services without charge in situations where the legal rights of homosexuals were substantially affected, to promote the availability of legal services to homosexuals by encouraging and attracting homosexual persons to the legal profession, and to educate homosexuals about their legal rights.

The lower court, in a one-paragraph per curiam decision, said that the described purposes of the Lambda Fund were "neither benevolent nor charitable." Moreover, the court said that there was no demonstrated need for such a corporation because it had not been shown that legal services would not be provided to homosexual persons by existing lawyers. In response to Lambda's affidavit stating that many attorneys will not accept cases involving homosexuality, the court replied that this was "no more than a matter of taste" and did not indicate a lack of available legal services.

In a per curiam opinion, the New York Court of Appeals reversed and remanded, holding that the lower court's decision was "unsupportable." Judge Burke's concurring opinion more explicitly pointed out that the Lambda application was substantially identical to that of the Puerto Rican Defense Fund, which had been approved: "We can perceive no rational distinction in the need for group legal services as between Puerto Ricans and homosexuals. Both groups are minorities

673. *Id.* at 115 n.2, 313 N.E.2d at 849.
678. 40 App. Div. 2d at 788, 337 N.Y.S.2d at 589.
679. *Id.*
680. *Id.*
subject to varied discriminations and in need of legal services." 682

On remand, the lower court granted the Lambda Fund’s application for incorporation 683 but struck one purpose from the proposed articles which read: “to promote legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing assistance to such students after admission to law school.” 684 Without further elaboration the court said that such a purpose did not fall within the type of legal services the Judiciary Act permitted. 685

Once a group is incorporated, the next logical step is to obtain the maximum tax benefits possible under the Internal Revenue Code. 686

*It’s Time*, the newsletter of the National Gay Task Force, reported in October 1977 on a significant policy change by the Internal Revenue Service that affected gay non-profit corporations. It said:

The Internal Revenue Service has reversed its policy of denying charitable tax-exempt status, under section 501(c)(3) of the tax code, to otherwise eligible organizations that take the position that homosexuality is an acceptable, alternative lifestyle, rather than a ‘sickness disturbance, or diseased pathology’. While any nonprofit corporation is exempt from taxes on its income, the old IRS policy prevented donors to gay charities from taking a tax deduction for their contributions . . . . 687

Since the reported change a number of gay organizations have been granted the right to receive tax-free gifts. 688 However, this alleged policy change of the Internal Revenue Service has not been officially promulgated and its exact dimensions are unknown. 689 At the present time, each request of a gay organization to be given section 501(c)(3)

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682. *Id.* at 615-616, 301 N.E.2d at 546, 347 N.Y.S.2d at 576.


684. *Id.* at 354, 350 N.Y.S.2d at 2.

685. If the court meant to inhibit the growth of the number of homosexual lawyers, it was not very successful. *See Gay Lawyers In and Out of the Closet*, 8 JURIS DOCTOR 33 (1978).


689. In a conversation on August 7, 1978 between the author and IRS Section Chief for tax-exempt organizations, Jean Gessay, Ms. Gessay said that she was “not aware” of any policy changes by the IRS. She said that if any gay organization had recently received a new status it was because the new status was “appropriate.” Moreover, she said she was unaware of any written IRS policy about the tax-exempt status of gay organizations.
status is being handled in the national IRS office on a case-by-case basis.690

The proliferation of gay organizations and their current corporate status indicates that few, if any, states are reading their incorporation statutes strictly so as to exclude gay organizations. This fact, coupled with the new IRS stance, should enhance the ability of gay organizations to further their causes.

XIII. Liquor Licensing Cases

The twenty-first amendment to the United States Constitution, repealing prohibition, contained a broad grant of authority to the states to regulate the use, distribution, and consumption of liquor. The expansion of regulation of the liquor industry to include the regulation of premises licensed for the sale of liquor is justified by pointing to the harmful potentialities arising from the sale of liquor. Under this "harmful potentiality" theory, not only must the sale be regulated, but the premises within which liquor is sold and consumed also must be controlled in order to avoid the alleged potential harm.691

Courts generally have subscribed to three theories when they uphold state regulation of liquor supply and consumption. The first theory is that the state enjoys a "super" police power over liquor sale and distribution and this power justifies the use of broad, general regulations which would otherwise run afoul of the charge of unconstitutional vagueness. Under the second theory, a license to sell liquor is a privilege, revocable by the state at its discretion without ordinary due process protections.692 The last theory allows a state to constitutionally restrict forms of expression normally protected by the first amendment because the twenty-first amendment confers more than normal state authority over public health, welfare, and morals.693

In the 1950's and 1960's the broad power of the liquor control

690. In a conversation between the author and Mr. Jim Herbst of the IRS Cincinnati office on August 7, 1978, Mr. Herbst said that he believes that a new policy is in effect with regard to gay organizations but that he had received no written directives on the subject. His understanding was that the national office now handles such requests on a case-by-case basis. He said that according to his understanding of past policy, gay organizations that advocated homosexuality have been denied § 501(c)(3) status because to grant such status would be against public policy. Now, he said, if the organization is purely educational, it will receive § 501(c)(3) status.


692. Id. at 695.

693. See California v. LaRue, 409 U.S. 109, 114 (1972).
agencies was used to eliminate, harass, and discourage gay bars. The myths about the use of bars as meeting places and recreational sites for homosexual persons largely have been disproved. For example, such bars are not places where all homosexuals "hangout"; studies show that only one homosexual in eight has ever visited a "gay" bar. Lesbians have few bars and seldom go to them. Homosexuals do not drink more than heterosexuals, and gay bars do not cause homosexuality. Although contacts for sexual activity are often made there, the bars are probably more important as social centers for persons denied other social outlets.

By far the greatest abundance of liquor licensing cases, spanning the years 1952 through 1967, has been produced by the State of New York. In 1952, *Lynch's Builders Restaurant, Inc. v. O'Connell* was decided per curiam by the New York Court of Appeals. Lynch had lost his liquor license because he allegedly "suffered or permitted the premises to become disorderly" by knowingly allowing homosexual activities on the premises. What the "activities" were, the opinion does not specify; however, the court indicated there was "ample proof" and that it was not "less probative" because a criminal charge based on that activity was dismissed. Thus, according to the highest court in New York, homosexual activity in a bar about which the licensee knew or should have known rendered the bar disorderly and subject to a liquor license revocation.

The next two cases, *Stanwood United, Inc. v. O'Connell* and *People v. Arenella*, provided some guidance as to the kind of "activity" which could result in license revocation. In *Stanwood*, the court said that "suffering premises to become disorderly means something more

695. See generally A. Karlen, Sexuality and Homosexuality 524 (1971).
697. "Although such establishments are sometimes condemned as breeding grounds of homosexuality, the charge is not convincing. Most of the people who go there (apart from tourists and some straight friends) already are involved in the homosexual life." E. Schur, Crimes Without Victims 87 (1965).
698. "They also serve the vital function of enhancing group cohesion and morale in the face of persistent moral condemnation by the society as a whole. For the individual homosexual, such places provide a much-needed opportunity to drop the mask he is often obliged to wear in the 'straight' (non-homosexual) world." Id. at 86.
701. 303 N.Y. at 410, 103 N.E.2d at 531.
than a mere happening on one occasion." The charge resulting in license revocation was based on a one-time observation by a policeman of fifteen males acting "in a female way." The police officer also arrested one person who allegedly solicited him. The court was unconvinced that the bar was a "gathering place for degenerates" because no other complaints were registered either before or after the one police visit.

In *Arenella*, the court held that one ten-minute visit by a policeman who then testified that the premises appeared to be a meeting place for homosexual individuals was insufficient evidence to justify revocation of a liquor license. However, the court explicitly stated that "[i]f the premises in question were frequented by homosexuals or sex deviates in an open and notorious manner, for the purpose of soliciting others to commit lewd and indecent acts . . . then the premises would be 'disorderly.'" The court gave some protection to the owners of gay bars when it said that "[u]nless some prohibited acts took place in the premises, the mere fact that homosexuals patronized the place, would not make the premises 'disorderly' within the meaning of the statute."

In *Fulton Bar and Grill, Inc. v. State Liquor Authority*, however, no prohibited acts were detailed. The finding of the state liquor authority, that the licensee had "knowingly permitted the licensed premises to be used as a gathering place for homosexuals and degenerates who conducted themselves in an offensive and indecent manner," was upheld by the court as sufficient to label the premises disorderly and to justify revoking the license. In *Gilmer v. Hostetter*, the court, upholding a license revocation, defined even more liberally the kind of behavior that would constitute disorderly conduct when homosexual individuals were involved. It held that "regular resort" by homosexual persons to the bar in question made the bar "disorderly" even without proof of homosexual solicitation. According to the court, this "disorder" could be inferred from observation on a number of occasions of

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704. 283 App. Div. at 82, 126 N.Y.S.2d at 347.
705. Id. at 80, 126 N.Y.S.2d at 346.
706. Id. at 81, 126 N.Y.S.2d at 347.
708. Id.
710. Id. at 771, 205 N.Y.S.2d at 38.
712. Id. at 587, 245 N.Y.S.2d at 253.
certain acts which indicated "overt homosexual tendencies."\textsuperscript{713}

In \textit{Kerma Restaurant Corp. v. State Liquor Authority},\textsuperscript{714} the lower court made what might be viewed as a liberal statement when it said, "[M]ere congregation of homosexuals, where there is no breach of the peace, does not make the licensed premises disorderly . . . ."\textsuperscript{715} This statement seems to indicate that a court would look for a criminal offense before judging a bar to be "disorderly." However, the court in \textit{Kerma} upheld the license revocation on the testimony of a policeman who stated that "several of the patrons exhibited characteristics and mannerisms which evidenced homosexual propensities; that he heard several male patrons address each other in endearing terms and saw several of them sit on the laps of others; that he was solicited by a male patron for a lewd and indecent act; [and] that only male patrons were present."\textsuperscript{716} While "mere congregation" did not prove disorderly premises, these further acts, the court held, were sufficient to uphold the license revocation.

\textit{Kerma} was appealed and reversed.\textsuperscript{717} The New York Court of Appeals found no proof in the record of any breach of the peace, and cited with approval the lower court's statement that a mere congregation without a breach of the peace was insufficient. Beyond that, the court was critical of the basis of the lower court's decision. "Indulgence in the inference that . . . 'several' . . . [of the] men in a grill . . . were, from their dress and makeup, homosexuals does not support the additional inference that they would create disorder."\textsuperscript{718} The court opined, "It is reasonable to think that even though he dresses strangely a homosexual may be orderly . . . ."\textsuperscript{719} The court did warn that if the licensee had known of the alleged homosexual solicitation that would be proof of suffering or permitting a disorderly premise.\textsuperscript{720}

During the appeal of \textit{Kerma}, the decision in \textit{Kifisia Foods, Inc. v. New York State Liquor Authority},\textsuperscript{721} was handed down. There the court summarily upheld a license revocation because the licensee allegedly permitted homosexual individuals to remain in his restaurant.

\begin{itemize}
\item \textsuperscript{713} Id.
\item \textsuperscript{714} 27 App. Div. 2d 918, 278 N.Y.S.2d 951 (1967) (mem.).
\item \textsuperscript{715} Id. at 918, 278 N.Y.S.2d at 952.
\item \textsuperscript{716} Id.
\item \textsuperscript{717} Kerma Restaurant Corp. v. State Liquor Auth., 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 822 (1967).
\item \textsuperscript{718} Id. at 115, 233 N.E.2d at 835, 286 N.Y.S.2d at 824-25.
\item \textsuperscript{719} Id. at 115, 233 N.E.2d at 835, 286 N.Y.S.2d at 825.
\item \textsuperscript{720} Id. at 116, 233 N.E.2d at 835, 286 N.Y.S.2d at 825.
\item \textsuperscript{721} 28 App. Div. 2d 841, 281 N.Y.S.2d 611 (1967) (mem.).
\end{itemize}
while acting in a lewd and indecent manner. Three policemen testified that they had been solicited, but the opinion does not indicate whether or not the licensee knew or had reason to know of the solicitations.

In Becker v. New York State Liquor Authority, the appeals court upheld suspension of a liquor license on the grounds that the licensee had permitted homosexual individuals to patronize his restaurant and to conduct themselves in an indecent manner. As pointed out by the dissent, no conviction of solicitation was involved. Upholding the suspension on appeal, the New York Court of Appeals narrowed the standard for suspending licenses by holding that fondling of primary sexual organs in a licensed premise on a public dance floor constituted "disorder" under the New York statute. The court made a further important point: such behavior, it said, constitutes "disorder" whether between heterosexuals or homosexuals.

If Kerma and Becker are to be taken at their face value, a licensee in New York can allow homosexual persons to frequent his bar without fear that his license will be revoked or suspended as long as the licensee does not knowingly permit solicitation on the premises nor allow fondling of primary sexual organs among his patrons.

In spite of its limiting effect in license revocation cases, the Becker decision was used to broaden coverage under a penal statute to include owners of homosexual establishments. In People v. deCurtis, the defendant was convicted of keeping a disorderly house in violation of a New York penal law under which persons cannot "maintain or keep a house of ill-fame . . . for the encouragement or practice by persons of lewdness, fornication, unlawful sexual intercourse, or for any other indecent or disorderly act . . . ." The statute was originally intended to apply to heterosexual prostitution. In order to apply it to a restaurant that allegedly allowed homosexual activities on its premises, the court used the definition from Becker that public fondling of primary

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722. Id. at 842, 281 N.Y.S.2d at 612.
725. Id. at 292, 234 N.E.2d at 444, 287 N.Y.S.2d at 402.
727. Former N.Y. PENAL LAW § 1146, cited in id. at 247, 311 N.Y.S.2d at 216.
728. In Harris v. United States, 315 A.2d 569 (D.C. 1974), the District of Columbia court analogized a homosexual health club to a heterosexual house of prostitution. On this basis, the court found that the club was a "bawdy or disorderly" house, and could thus be a nuisance per se.
sexual organs constitutes "disorder" whether between heterosexual or homosexual persons. Given this definition of disorder, the conviction under the statute was upheld.

California, like New York, has a large group of liquor license cases spanning the years 1951 through 1960. When Stoumen v. Reilly was decided by the Supreme Court of California in 1951, it appeared to be a clear victory for liquor licensees who catered to homosexual patrons. The liquor license of the plaintiff had been revoked because he was found to have conducted a disorderly house in violation of section 58 of the Alcoholic Beverage Control Act. The conviction was supported by the licensing board's finding that "persons of known homosexual tendencies patronized said premises and used said premises as a meeting place." The California Supreme Court reversed, saying that no evidence of any illegal or immoral conduct on the premises had been shown: "[S]omething more must be shown than that many of his patrons were homosexuals and that they used his restaurant and bar as a meeting place."

Subsequent to Stoumen, the legislature added subdivision (e) of section 24200 to the Business and Professions Code, which provided for suspension of a license "where a portion of the premises of the licensee upon which the activities permitted by the license are conducted are a resort for . . . sexual perverts." Moreover, a general community reputation that a particular bar was a resort for sexual perverts was allowed as proof of a violation of this section.

Initially, California appellate courts reconciled subdivision (e) with Stoumen by construing the "something more" than mere patronage requirement to mean any homosexual activity, even if the activity did not constitute a violation of the penal code. In Vallerga v.
However, the California Supreme Court struck down subdivision (e), holding that it was unconstitutional to revoke a liquor license solely on the basis that a bar or restaurant is a resort for a certain class of persons: "something more" must be shown.

While the Vallerga court struck down section 24200(e), it specifically called attention to another statute which could provide a basis for license revocation in such cases. The court pointed out that article XX, section 22 of the California Constitution vested in the Department of Alcoholic Beverage Control the authority to revoke a license for good cause when the continuance of the license would be "contrary to public welfare or morals." Under this authority, the Department of Alcoholic Beverage Control revoked liquor licenses for violation of California Business and Professions Code section 2561, which prohibits keeping a disorderly house. The revocations were upheld in Benedetti v. Department of Alcoholic Beverage Control, Morell v. Department of Alcoholic Beverage Control, and Stoumen v. Munro. As in the New York cases, the catch-all notion of "disorderly house" was held to embrace establishments visited by homosexual persons. In all cases, the courts ruled that the licensee was not required to have actual knowledge of the acts which made the premises a "disorderly house."

acts of sex perversion and demonstrated that he is a sex pervert." 162 Cal. App. 2d at 457, 328 P.2d at 276.

Warning that homosexuals may not be held to a higher degree of moral conduct than heterosexuals, the court nevertheless said that "any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature" may be regulated. Id. at 319, 347 P.2d at 912, 1 Cal. Rptr. at 497.

CAL. BUS. & PROF. CODE § 25601 (West 1964) permits revocation of a license for violation of § 25601.


In almost all of these cases, there are lengthy descriptions of the homosexual activity found to constitute disorder. Usually the activity includes same sex dancing, same sex kissing, same sex hugging, and allegedly same sex fondling of private parts. There is usually testimony that the men speak in high-pitched voices, giggle and mince and the women are mannishly attired. Because of the repetitiveness of the testimony it has not been detailed here. Usually there is no direct evidence of any sexual crime although the police agents almost always allege that they were solicited for deviant sex acts. Sometimes there are convictions of patrons for these alleged solicitations. The whole issue of police harassment and
The number of reported California cases falls off after 1961, perhaps indicating that gay bars were gaining tolerance and that police had begun to use their efforts in another direction. This conclusion is somewhat undermined by *Francisco Enterprises v. Kirby*,\(^744\) in which a holder of an alcoholic beverage license in California attempted to enjoin the Department of Alcoholic Beverage Control from revoking his license. The plaintiff’s allegations are novel with respect to liquor licensing cases. He claimed that the revocation proceedings were the result of a conspiracy among state officers to do away with his business solely because it was frequented by homosexuals; that the proceedings deprived him of due process and equal protection, and chilled his patrons’ rights of freedom of speech; and that the state statute under which his license would be revoked as contrary to “public welfare or morals” and “public morals, health, convenience and safety” was unconstitutionally vague.\(^745\) The merits of these allegations were not reached by the Ninth Circuit, which upheld a dismissal on jurisdictional grounds.\(^746\)

Pennsylvania courts have uniformly supported the state liquor board in its license revocations. One of the grounds on which a suspension was upheld in the 1966 case of *Anthony Wayne Bar and Restaurant, Inc.*,\(^747\) was that the employees of the licensee permitted “disorderly or improper conduct”\(^748\) on the licensed premises. The evidence supporting such a finding consisted primarily of observations by a police officer of conversations, dancing, and suggestive actions by the male clientele. The ground for suspension in another 1966 case, *In re Revocation of License of Clock Bar, Inc.*,\(^749\) was permitting solicitation of patrons for entrapment of male homosexuals in California is detailed in Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 647 (1966).

See also *Sultan Turkish Bath v. Board of Police Comm’rs*, 169 Cal. App. 2d 188, 337 P.2d 203 (1959). In *Sultan*, the city board of police commissioners revoked a Turkish bath owner’s license on the ground that the business was carried on in an unlawful and improper manner. The complaint against Sultan alleged that his establishment was a “hangout for male degenerates of all types who have committed on the premises indecent, lewd, lascivious acts prohibited by law.” Id. at 191-92, 337 P.2d at 205. The judge categorized the acts performed there not only as illegal and immoral but also as “disgusting,” id. at 196, 337 P.2d at 208, and upheld the license revocation.

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\(^{744}\) 482 F.2d 481 (9th Cir. 1973).

\(^{745}\) Id. at 484.

\(^{746}\) Id.


\(^{748}\) Id. at 713.

immoral purposes. Despite the fact that "[t]here was no evidence of any solicitations of patrons except those encouraged by the agents" of the Liquor Control Board, the court nevertheless upheld the suspension.

The last Pennsylvania case to deal with gay bars was Freedman Liquor License Case. There, an appeals court overturned a finding of no public disturbance, and hence no disorder, to uphold the suspension of a restaurant liquor license. In its cursory discussion of the issues, the court refused even to set out the "revolting" testimony leading to the license revocation, except to say that it supported the liquor board's findings. The court cited Anthony Wayne Bar for the proposition that activities by homosexuals constitute disorderly and improper conduct. Again, as in other states, no reported cases appear in Pennsylvania after the late 1960's.

A Louisiana case in 1957, Kotteman v. Greemberg, upheld the revocation of a permit to sell beer on the grounds that the general conduct of the establishment and the type of patrons who frequented it, were "not conducive to an orderly, law abiding establishment." The charges included evidence that over 250 arrests had been made on the premises over a two and one-half year period and testimony of police that the bar was "notorious as a place in which perverts and sex deviates congregated." The court upheld the revocation saying, "On the merits of the appeal we find little to discuss."

The Rhode Island Supreme Court, in the 1964 case of Cesaroni v. Smith, took much the same position as courts in sister states with regard to revocation of licenses of bars patronized by homosexuals. In Cesaroni, the court found the evidence sufficient to hold the licensee's establishment was disorderly under the Rhode Island statute even

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750. A second ground for the suspension, keeping of a disorderly house, was not sustained. Id. at 130-31.
751. Id. at 132.
753. Id. at 134, 235 A.2d at 625.
754. See text accompanying notes 747-48 supra.
756. 233 La. 327, 96 So. 2d 601 (1957).
757. Id. at 330-31, 96 So. 2d at 602.
758. Id. at 335, 96 So. 2d at 603.
759. Id. at 334, 96 So. 2d at 603.
761. The statute provided: "If any licensed person shall permit the house or place where he is licensed to sell beverages under the provisions of this title to become disorderly so as to annoy and disturb the persons inhabiting or residing in the neighborhood thereof, . . . and if it shall be made to appear to the satisfaction of the board, body or official hearing such
though no evidence in the record indicated that the conduct within the bar disturbed those living in the neighborhood. The court held that the legislature intended "to condition the continued operation of establishments" on the licensee's ability to prevent conditions which directly or "by indirection offend the sensibilities of the neighbors." The bias of the court is evident in its statement that the licensee permitted his bar "to become attractive as a gathering place for deviates of both sexes, a virtual house of assignation for perverts."

The single published case in Florida on the subject of gay bars, Inman v. City of Miami, deals with the constitutionality of a Miami ordinance prohibiting a liquor licensee from knowingly employing a homosexual person, knowingly selling or serving a homosexual person alcoholic beverages, or knowingly allowing two or more homosexual persons to congregate or remain in his place of business. The court upheld the law on the grounds that it had a rational relationship to public health, morals, safety, and the general welfare. The court concluded that "[t]he object of the ordinance as a whole is to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal by the Legislature . . . ." No basis for the conclusion that mere congregation by homosexual persons would lead to law-breaking is revealed by the opinion.

In Paddock Bar, Inc. v. Division of Alcoholic Beverage Control, a New Jersey appeals court upheld the suspension of a liquor license where the licensee was charged with permitting persons "who appeared to be homosexuals" to congregate upon his premises. Where it was clearly proven that the patrons had the appearance of homosexual persons, actual proof of homosexual status was not required. "It is often in the plumage," said the court, "that we identify the bird." The court charge that he has . . . permitted to be done any of the things hereinbefore in this section mentioned, then said board, body or official may suspend or revoke his license or enter other order thereon." Id. at 380, 202 A.2d at 294.

762. Id. at 384, 202 A.2d at 296.
763. Id. The court continued: "This obviously induced these unfortunate people to flock to a place where they would be assured that their conduct would be tolerated and where any residual reluctance at participation in acts of perversion would be overcome by the availability of alcoholic beverages . . . ." Id.

765. Id. at 52.
767. The business was held to be offensive to common decency and public morals. Id. at 407, 134 A.2d at 779.
768. Id. at 408-09, 134 A.2d at 780. The characteristics involved included, among
held that "it is inimical to the preservation of our social and moral welfare to permit public taverns to be converted into recreational fraternity houses for homosexuals and prostitutes."769

Four years later, another New Jersey appeals court in Murphy's Tavern v. Davis770 found in a fashion similar to Paddock that the patrons looked and acted like homosexual individuals. Such appearance and conduct was held to be a sufficient basis upon which to punish a licensee who allowed such persons to assemble on his premises.771 The court concluded that it was not "callous to the problem of the homosexual medically or socially"772 but that tight control over the liquor business mandated maintenance of accepted standards of public decency.773

In 1967 the New Jersey Supreme Court dealt with the issues raised in Paddock and Murphy in the case of One Eleven Wines & Liquors Inc. v. Division of Alcoholic Beverage Control.774 The court held that the Division of Alcoholic Beverage Control was unjustified in disciplining licensees because persons with homosexual mannerisms were permitted to congregate in their establishments. The court, citing to Robinson v. California775 for support, pointed out that "though in our culture homosexuals are indeed unfortunates, their status does not make them criminals or outlaws."776 Therefore, the court said, as long as homosexual persons break no laws, they have a right to congregate in public, and that includes patronizing taverns. The court said that the Department of Alcoholic Beverage Control produced no evidence to show what actual harm gay persons did in bars. The court warned that any further proceedings by the Department should be based on "specific charges of improper conduct" rather than on "general charges of mere congregation."777

Thus the New Jersey court joins those of New York and California

others, "effeminate pitch of voice," "manipulation of cigarettes," giggling, and rocking and swaying of posteriors in a "maidenly fashion." Id. at 409, 134 A.2d at 781.

769. Id. at 408, 134 A.2d at 780.
771. Id. at 95, 175 A.2d at 5.
772. Id. at 96, 175 A.2d at 6.
773. Id.
775. 370 U.S. 660 (1962). Robinson dealt with a California statute that made narcotics addiction a misdemeanor. The Supreme Court held that the statute inflicted cruel and unusual punishment in violation of the eighth and fourteenth amendments because it made the "status" of drug addiction a criminal offense regardless of the offender's actual behavior.
776. 50 N.J. at 342, 235 A.2d at 18.
777. Id. at 342, 235 A.2d at 19.
in agreeing that, in order to revoke a license under liquor regulation statutes, something more must be shown than mere status of the bar owner's patrons as homosexual. This posture is much to be preferred over that of many states where the standards under which licensees are prosecuted remain broad and for the most part ill-defined, thereby allowing virtually rubber-stamp confirmation of prosecutions under state liquor licensing statutes. Nevertheless, even under the stricter standard, the hands of the licensing boards are not tied. As the New Jersey case, *One Eleven Wines*, points out along with the *Vallerga* case\textsuperscript{778} which it cites with approval, the courts have left plenty of space for the beverage control departments to revoke licenses if they can show specific lewd and immoral conduct of patrons, with or without knowledge of the licensee in some cases. Even if bar owners seemingly need have little fear of prosecution from their licensing boards at present (to be inferred from the fact that few cases are finding their way into the courts), the lack of prosecution is more likely due to political disinterest than lack of a strong statute or court approval of prosecutions by the licensing departments.

XIV. Universities and Other Public Forums

The following cases, which relate to the first amendment rights of homosexual individuals and their organizations, reveal that courts almost without exception have upheld the right of homosexual persons to speak and organize. The bulk of these cases arise from confrontations between universities and gay student organizations.

*Associated Students of Sacramento State College v. Butz*,\textsuperscript{779} a California superior court decision, presaged the decision of the United States Supreme Court in the landmark student organization case of *Healy v. James*.\textsuperscript{780} In *Associated Students*, the college denied recognition to a homosexual group, Society for Homosexual Freedom, despite the fact that the group had complied with all the proper procedures for recognition.\textsuperscript{781} The court, in a straight-forward first amendment analy-

\textsuperscript{778} Vallerga v. Department of Alcoholic Beverage Control, 53 Cal. 2d 313, 347 P.2d 909, 1 Cal. Rptr. 494 (1959). See notes 735-36 and accompanying text *supra*.


\textsuperscript{780} 408 U.S. 169 (1972). In *Healy*, the Supreme Court held that denial of university recognition to a politically active student group, Students for a Democratic Society, affected the group's first amendment rights and that recognition could only be denied under extremely narrow and strict circumstances. For an examination of the right of association doctrine as applied to gay organizations see Wilson & Shannon, *Homosexual Organization and the Right of Association*, 30 HASTINGS L.J. 1029 (1979).

\textsuperscript{781} The college indicated that the denial was based on a number of factors: (1) Recogni-
sis pointed out that once public facilities are opened as a forum, the state cannot censor ideas by denying access to the forum based on the content of the ideas to be presented. Moreover, absent a clear and present danger or reasonable grounds to believe that a serious evil will result, free speech cannot be limited. Finding no evidence of imminent illegal acts in the case at bar, the court ordered the college to reconsider recognition of the group.

In Wood v. Davison, the first reported federal case to deal with the right of a university to regulate the activities of a gay student organization, the state-supported University of Georgia allowed a homosexual student organization to register but denied use of university facilities to the group for a conference and dance. The basis for the denial was that these activities were not within the purposes of the university and "introduce[d] an element which is believed to be not in the best interest of the University."

The court brought this case under the umbrella of the Supreme court's opinion in Healy v. James. Healy held that denial of recognition to a student group, rather than denial of facilities, abridged first amendment rights. The court noted, however, that Healy also dealt with the second issue when it observed that denial of facilities was the primary means of infringing on freedom of expression. The Wood
court enumerated three possible circumstances under which denial of facilities might be countenanced: (1) if the campus organization refused to abide by reasonable regulations; (2) if there was a demonstrable danger of violence or disruption; (3) if the meeting in question violated state or federal law. None of these circumstances being present, the court found that the university had not met its burden of justifying denial of access to the facilities.

Wood v. Davison was not appealed. Two years passed before the next gay student organization case reached a federal court. In early 1974, a district court decided Gay Students Organization of the University of New Hampshire v. Bonner. Like Wood the case involved denial of access to facilities rather than denial of recognition to the homosexual student group.

After a complaint to the university by the Governor of New Hampshire with respect to a dance sponsored by the Gay Student Organization (GSO), the university banned all social functions of that organization. Shortly thereafter, the organization sponsored a play at which allegedly obscene materials were distributed by persons who were not GSO members. The Governor of New Hampshire responded with an open letter to the trustees of the university:

[I]ndecency and moral filthy will no longer be allowed on our campuses.

I am not interested in legalistic hairsplitting . . . . Either you take firm, fair and positive action to rid your campuses of socially abhorrent activities or I, as [G]overnor, will stand solidly against the expenditure of one more cent of taxpayers’ money for your institutions.

Not surprisingly, the university then ordered an even more rigid ban on GSO social functions. A lawsuit ensued.

In holding the university’s action to be a clear violation of the first amendment, the court used tests similar to those of Wood v. Davison. Finding no evidence of either refusal to obey university regulations, violence, or violation of law, the court held that GSO was entitled to

788. Id. at 547-48.
790. Id. at 1090-92.
791. Id. at 1092.
792. As one of its defenses, the university pointed to the Governor’s position. The district court replied that “a State university may not be blackmailed into depriving its students of their constitutional rights.” Id. at 1100.
793. See text accompanying note 788 supra.
794. The university argued that GSO functions were “tantamount to criminal solicitation of deviate sexual relations,” 367 F. Supp. at 1100, contrary to New Hampshire law. The court, however, found neither evidence of illegal behavior or solicitation at GSO functions
use facilities in the same manner as other university student organizations.

On appeal, the First Circuit affirmed. 795 Responding to the university’s argument that “social events” are not among the class of protected associational activities, 796 the court noted that GSO was a cause-oriented political group. As such, while its social functions do not constitute “pure speech,” its “conduct may have a communicative content sufficient to bring it within the ambit of the First Amendment.” 797 The court found that “expression, assembly and petition constitute significant aspects of the GSO’s conduct in holding social events.” 798 Because the regulation of GSO’s social events was based on the content of its expression, the organization’s freedom of expression was curtailed. 799

*Mississippi Gay Alliance v. Goudelock,* 800 decided in 1976, involved a clash between a nonhomosexual student organization and an off-campus homosexual group. The newspaper of the University of Mississippi, a state-supported school, was run and edited by students. Its editor, Mr. Goudelock, refused to accept a paid advertisement tendered by the Mississippi Gay Alliance (MGA), an off-campus homosexual group, announcing its Gay Center which offered counseling, legal aid, and a library of homosexual literature. The Fifth Circuit affirmed a district court decision in favor of the university. Both courts agreed that the case did not involve the state action necessary to trigger a first amendment review, because, although the paper was supported in part by activity fees of students, university officials did not supervise or control the paper’s content. 801

nor that GSO advocated public homosexual acts, stating that the university could reasonably regulate if such situations actually arose.

795. 509 F.2d 652 (1st Cir. 1974).

796. *Id.* at 659.

797. *Id.* at 660.

798. *Id.* at 660-61.

799. Like the district court, the First Circuit found no evidence of imminent lawless action. The court ruled also that the university could regulate overt sexual behavior (heterosexual or otherwise), *id.* at 663, but that it could not ban GSO’s social functions consistent with the first amendment.

In University of New Hampshire v. April, 115 N.H. 576, 347 A.2d 446 (1975), the Supreme Court of New Hampshire turned aside the university’s attempt to accomplish the same results by an action in state court. The university sought a determination of whether it could permissibly regulate GSO activities if homosexuality were found to be an illness or mental disorder. The state supreme court refused to hear the case on the basis of res judicata; the university, the court said, was attempting to relitigate the issues already decided in the federal court.

800. 536 F.2d 1073 (5th Cir. 1976), cert. denied, 430 U.S. 982 (1977).

801. *Id.* at 1075.
In dictum, the court supported the position of student editor Goudelock. The court found that a Mississippi statute condemning "any intercourse which is unnatural, detestable and abominable" was constitutional, and, therefore, the editor had the right not to be involved with such activity.

In a strong dissent, Justice Goldberg declared that the advertisement in question was protected speech, and that it did not involve criminal or illegal activity. The status of being "homosexual," he noted, is not illegal in Mississippi. Justice Goldberg took the position that the case should be remanded on the issue of whether the student newspaper constituted state action, implying that such state action was involved. If the paper's activities constituted state action, and it accepted paid advertisements, then there must be equal access to that service, without discrimination based on content. Thus, Justice Goldberg would treat the state-supported student newspaper under the public-forum doctrine, at least with respect to paid advertisements.

The Fourth Circuit case of Gay Alliance of Students v. Matthews is squarely in line with Wood and Bonner and has a strong factual similarity to Healy. Virginia Commonwealth University (VCU) refused to recognize the Gay Alliance of Students (GAS) as a registered student organization. The district court found that there was "no cognizable constitutional deprivation" because of nonrecognition but nevertheless ordered VCU to give GAS access to many university facilities and services. The Fourth Circuit found a clear deprivation of first amendment rights and ordered VCU to register the gay student or-

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802. The judge's attitude toward the homosexual group became rather blatant when he referred to them as "this off-campus cell." Id. at 1075 (emphasis added).
803. Id.
804. Id. at 1075-76. In a footnote, Justice Coleman, the writer of the majority opinion, made it clear that he believed that no newspaper in Mississippi could be required to take "solicitations for homosexual contacts." Id. at 1076 n.4. In so stating, the justice apparently equated the Gay Center advertisement with solicitation.
805. Id. at 1076.
806. "I have little doubt that this court would review a decision by the students to exclude blacks from participation on the newspaper staff as a decision imbued with state action." Id. at 1085.
807. 544 F.2d 162 (4th Cir. 1976).
808. See id. at 164.
809. Because the university gave no reasons why it withheld registration, the parties stipulated to the university's probable reasons in the trial court: "1 As a matter of logic, the existence of GAS as a recognized campus organization would increase the opportunity for homosexual contacts. 2 Recognition of GAS would tend to encourage some students to join the organization who otherwise might not join. 3 Some students may benefit from membership in GAS and some may not, and to some it would confer neither benefit nor
organization. In so holding, the court reiterated the *Healy* warning: a university cannot restrict speech or association solely because it finds the group's views abhorrent.\textsuperscript{810} The concurring opinion echoed this thesis: "The stifling of advocacy is even more abhorrent, even more sickening. It rings the death knell of a free society."\textsuperscript{811}

The 1977 case of *Gay Lib v. University of Missouri*\textsuperscript{812} originated with the university's refusal to recognize a homosexual student organization based on "a concern for the impact of recognition on the general relationship of the University to the public at large."\textsuperscript{813} In the course of an administrative hearing on the issue, which included expert and lay testimony, the hearing officer made a finding that recognition of Gay Lib as a student organization would cause increased violations of Missouri sodomy laws.\textsuperscript{814} This finding was the basis for the district court's decision in favor of the university.\textsuperscript{815} Recognizing that denial of recognition was an infringement of the first amendment, the district court nevertheless reasoned that the university had overcome the heavy detriment. 4 The existence of GAS would tend to attract other homosexuals to VCU." *Id.* at 163-64.

The court found these reasons constitutionally insufficient to support an abridgment of first amendment rights. In response to the university's argument that recognition of GAS would increase the opportunity for homosexual contacts, the court said, "[E]ven if affording GAS registration does increase the opportunity for homosexual contacts, that fact is insufficient to overcome the associational rights of members of GAS." *Id.* at 166.

\textsuperscript{810} *Id.*

\textsuperscript{811} *Id.* at 168.


\textsuperscript{813} 558 F.2d at 851.

\textsuperscript{814} The other findings of the hearing officer were that recognition of Gay Lib by the university will: "(1) give a formal status to and tend to reinforce the personal identities of the homosexual members of those organizations and will perpetuate and expand an abnormal way of life, unless contrary to their intention as stated in their written purposes, the homosexual members make a concerted effort to seek treatment, recognize homosexuality as abnormal and attempt to cease their homosexual practices;

(2) tend to cause latent or potential homosexuals who become members to become overt homosexuals;

(3) tend to expand homosexual behavior which will cause increased violations of section 563.230 of the Revised Statutes of Missouri;

(4) be undesirable insofar as homosexuals will counsel other homosexuals, i.e., the sick and abnormal counseling others who are similarly ill and abnormal; and

(5) constitute an implied approval by the University of the abnormal homosexual lifestyle as a normal way of live and would be so understood by many students and other members of the public, even though, and despite the fact that, the University's regulations for student organizations provide that recognition of an organization by the University does not constitute approval or endorsement of the organization's aims or activities." *Id.* at 851 n.7.

\textsuperscript{815} 416 F. Supp. 1350 (W.D. Mo. 1976).
burden imposed on it by *Healy* and was thus constitutionally justified in its decision.\textsuperscript{816}

The United States Court of Appeals for the Eighth Circuit reversed. The court pointed out that *Healy*, combined with the decisions in *Bonner* and *Matthews*, militated for recognition.\textsuperscript{817} The expert testimony below, on the basis of which the district court found that violation of sodomy laws would result from recognition, was found insufficient to justify prior restraint by the government for the group of students in question.\textsuperscript{818} Gay Lib did not advocate breaking university rules. The court stated, "It is difficult to singularly ascribe evil connotations to the group simply because they are homosexuals."\textsuperscript{819} To do so, the court said, would impermissibly penalize persons because of their status.\textsuperscript{820}

Rehearing was denied *en banc* by the Eighth Circuit with a four-four split in voting. The Supreme Court of the United States denied certiorari.\textsuperscript{821} Dissenting from the denial of certiorari, Justice Rehnquist\textsuperscript{822} made it clear that he wanted to hear the case so that he might overrule the Eighth Circuit: "Writ large, the issue posed in this case is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws."\textsuperscript{823}

Rehnquist analogized the nonrecognition of the gay group to a measles quarantine. "[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that the measles sufferers be quarantined."\textsuperscript{824} Justice Rehnquist's view of the constitutional rights of homosexual persons seems not to be in doubt.

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\textsuperscript{816} *Id.* at 1370. The court found that recognition of Gay Lib would be "likely to incite, promote, and result in acts contrary to and in violation of the sodomy statute" of Missouri. *Id.*

\textsuperscript{817} 558 F.2d at 853.

\textsuperscript{818} *Id.* at 854. The court was critical of the expert testimony, saying that the opinions were without basis in scientific fact and were neither historically nor empirically verified. *Id.*

\textsuperscript{819} *Id.* at 856.

\textsuperscript{820} *Id.*

\textsuperscript{821} 434 U.S. 1080 (1978). Justices Rehnquist, Blackmun, and Burger voted to hear the case.

\textsuperscript{822} Justice Blackmun joined in this dissent.

\textsuperscript{823} 434 U.S. at 1082.

\textsuperscript{824} *Id.* at 1084. Presumably Justice Rehnquist believes homosexuality is contagious.
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The issues confronted by courts when organizations of homosexual persons clash with the administrators of academia are also present in cases involving nonuniversity forums. Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation,\textsuperscript{825} for example, involved the use of a state building as a forum for a homosexual organization. "Toward a Gayer Bicentennial Committee," composed of representatives from a number of gay organizations in Rhode Island, was formed to provide information to the public at large about the legal, political, and social aspirations of homosexuals through the medium of the bicentennial celebration. The group requested that the Rhode Island Bicentennial Commission include in its official calendar several events that the Committee proposed to conduct, and also requested use of the Old State House as a site for one of the events.

The Commission denied the requests,\textsuperscript{826} claiming that they failed to satisfy the formal requirements for such proposals. The court found no evidence that the stated reason controlled the Commission's action; rather, it seemed clear that the homosexual nature of the Committee provided the true motivation for refusing the requests. The court ruled that the Bicentennial Commission had made the Old State House a public forum, limited reasonably to the expression of bicentennial themes. Having created a limited public forum, the Commission could not restrict access arbitrarily. Therefore, the court ordered the Commission either to accept the Committee's proposals or to formulate "in writing, in clear and precise terms capable of even-handed application, the standards to be used in evaluating the plaintiffs' request for endorsement."\textsuperscript{827}

Sixteen days later, the same parties were again before the same court.\textsuperscript{828} The Commission had chosen to promulgate new standards rather than accept the Committee's proposals. After the Committee

\textsuperscript{826} Id. at 633.
\textsuperscript{827} Id. at 641-42. The court also ruled that if the Commission decided to issue new standards, the Committee must be afforded a fair opportunity to present a new proposal. Id. at 642.

The court obviously could not resist the opportunity to comment: "I cannot help but note the irony of the Bicentennial Commission expressing reluctance to provide a forum for the plaintiffs' exercise of their First Amendment rights because they might advocate conduct which is illegal. Does the Bicentennial Commission need reminding that, from the perspective of British loyalists, the Bicentennial celebrates one of history's greatest illegal events?" Id.

submitted a new proposal, the Commission again voted to deny bicentennial endorsement.

The Committee's proposal included several events. The first was a request for the use of the Old State House for an address on the subject of treatment of homosexual persons during Colonial and Revolutionary times. The Commission refused the proposal\textsuperscript{829} on the ground that access was tantamount to endorsement, and endorsement meant approval. The court reiterated its ruling that such reasoning was no excuse for curtailing first amendment rights\textsuperscript{830} and ordered the Commission to grant the use of the forum.\textsuperscript{831}

Like the preceding case, \textit{Aumiller v. University of Delaware}\textsuperscript{832} involves no denial of recognition to a gay student organization. Strictly speaking, \textit{Aumiller} is an employment case but is discussed in this section because the first amendment provides the basis for its holding. Speaking in his capacity as the faculty advisor to a recognized gay student organization, Richard Aumiller, a professor at the University of Delaware,\textsuperscript{833} made statements regarding homosexuality that were reported in newspaper articles.\textsuperscript{834} The fact that Aumiller was himself gay was known by his immediate superiors when he was hired, and by all

\textsuperscript{829} The Commission had first denied the request on the ground that the time slot was already promised to another group. The Committee then agreed to reschedule.

\textsuperscript{830} 417 F. Supp. at 645.

\textsuperscript{831} Commission endorsement of the other proposed events, a parade, a Gay Pride Day and a Gay Pride Week, was also at issue. The court said although these other events did not involve access to a public forum, they did involve a constitutionally protected interest, freedom of speech. Therefore, the Commission, a state body, could not withhold its endorsement arbitrarily. After an examination of the proposed events, the court ordered the Commission to endorse the Congress of People with Gay Concerns and only withheld an order on the parade because it would be too late to be effective. \textit{Id.} at 647.

\textsuperscript{832} 434 F. Supp. 1273 (D. Del. 1977).

\textsuperscript{833} While there are few cases on the subject, it would appear that university and college teachers who are homosexuals are not discriminated against nearly as much as are elementary and secondary school teachers. According to The Advocate, June 28, 1978, at 15, the president of Pennsylvania State University recently reinstated a gay professor fired because of his homosexuality. His firing was protested by the Pennsylvania chapter of the American Association of University Professors. However, in Hawaii, Maui Community College is presently being sued by Arnold A. Sciullo because his contract as a lecturer was not renewed. According to Mr. Sciullo's allegations, Provost Moikeha, a member of the Church of Latter Day Saints, refused to allow Sciullo to be rehired because of the provost's own religious beliefs condemning homosexuality. The Advocate, May 17, 1978, at 10.


\textsuperscript{834} The details of Aumiller's statements to the newspapers and the various responses by President Trabant are numerous. The court's opinion with the appended newspaper articles is 46 pages long. In describing the case, the factual details have been omitted.
the university administrators involved when his contract was renewed for the first time. When his contract came up for renewal after the appearance of the newspaper articles, however, the president of the university refused to sign it.835

The court said that the nonrenewal of Aumiller’s contract was clearly a direct consequence of his newspaper statements; therefore the proper issue was whether the university had violated his first amendment rights. The court relied on *Pickering v. Board of Education*836 to develop the criteria for judging Aumiller’s statements: The teacher’s right to free speech must be balanced with the state’s rights as an employer, but such balancing is to occur only when the statements can be shown, or are presumed, to impede the teacher’s classroom performance, to have substantially disrupted regular school operations, or to have violated some type of confidentiality.837 The court said that none of these factors applied in Aumiller’s case, and thus concluded that by failing to renew Aumiller’s contract, the University violated his first amendment rights.838

A third “public forum” case, *Alaska Gay Coalition v. Sullivan*,839 involved the 1976-77 Anchorage Bluebook, a paperback guide to services and organizations in the metropolitan area published by the City of Anchorage. The mayor of Anchorage had ordered that an entry listing and describing the Alaska Gay Coalition840 be deleted from the guide. The court made a factual finding that the Gay Coalition’s name was omitted solely because of the personal beliefs of its members.841

The Gay Coalition argued that the *Blue Book* was in essence a public forum, and therefore, the government could not deny access to that forum because of the content of its message. The court agreed, holding that the city could not deny access to the pages of the *Blue

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835. 434 F. Supp. at 1285-86. The court said that whether the university could fire Aumiller because he was a homosexual was not in issue. *Id.* at 1292 n.56.


837. 434 F. Supp. at 1292.

838. “The Court fully recognizes that homosexuality is an extremely emotional and controversial topic and that Aumiller’s opinions on the subject quite likely represent a minority view. But this unpopularity cannot justify the limitation of Aumiller’s First Amendment rights by the University of Delaware.” *Id.* at 1301.


840. The Coalition submitted a description of its purpose and activities which included its ability to furnish speakers to educate on the subject of homosexuality. *Id.* at 953.

841. *Id.* at 955.
whether involving universities or other public forums, cases in
this section are unlike any others described in this Article. Nowhere
else is there such a consistent respect for the constitutional rights of the
homosexual individual. If people are indeed educated through the
means of expression of ideas, gay rights advocates have a real chance to
speak out because their speech and association seem securely protected
at least from government intervention. The “Catch-22” of this situa-
tion, however, is that the same free speech which is constitutionally
protected may cause the speaker to lose his or her job in the private
sector or to be accused of “flaunting,” thus endangering even public
sector jobs.

XV. Immigration and Naturalization

The homosexuality of an alien can crucially affect his or her ad-
mission to the United States, ability to remain in the country and to
become a naturalized citizen of the United States.

An alien who is a homosexual can be denied entry into the United
States under two sections of the Immigration and Nationality Act. Section 212(a)(4) provides that aliens “afflicted with psychopathic per-
sonality, or sexual deviation” shall be excluded from admission into the
United States. Section 212(a)(9) provides that “aliens who have
been convicted of a crime involving moral turpitude . . . , or aliens
who admit having committed such a crime, or aliens who admit com-
mmitting acts which constitute the essential elements of such a crime”
shall also be excluded from admission.

The two exclusionary criteria can be applied to aliens at a variety

842. The city argued that the Gay Coalition had not been actually harmed by the dele-
tion of its material from the Blue Book. The court did not agree. “[T]he suppression of speech in itself . . . is the evil to be avoided . . . . Any further showing of adverse conse-
quences . . . is unnecessary.” Id. at 960.

843. There are other similar cases currently in the courts. A gay student organization
sued the College of the Redwoods in Eureka, California asserting that the college’s refusal to
recognize their organization officially violated its first amendment rights. Hi Gear, June
1977, at 4. At last report the college had changed its policy. Lesbian Connection, Dec. 1977,
at 10. According to a leading gay newspaper, in 1975 gay students filed an action against
Texas A & M in federal district court, which was subsequently dismissed. Plaintiffs are
currently challenging the dismissal in the Fifth Circuit, citing to the Bonner, Matthews and

844. See generally sections on Employment and Related Occupational Discrimination at
text accompanying notes 31-449 supra.


When an alien applies for an entry visa, he or she can be denied the right to enter. Such a denial has a ring of finality: refusal of an entry visa to an alien is not reviewable by a United States court. Second, once granted, a visa can be reevaluated at a border or port of entry under the same admission criteria. Third, under the "last entry" doctrine, an alien who leaves the United States for any period of time or for any reason (a vacation, a business trip, or a visit to a dying mother) may be reevaluated upon return to the United States as if he or she were entering for the first time. Thus, an alien clearly admissible at the time of his or her original entry may be excluded on the basis of conduct, such as homosexual acts, that occurred while he or she was residing in the United States.

Fourth, under section 241(a)(1) of the Act, an alien can be deported at any time if it can be shown that he or she was excludable at the time of entry. Under this section, aliens who have lived in the United States for years are potentially subject to deportation for acts they may have committed long before their first entry into the United States.

Finally, an alien who desires to change his or her status from non-immigrant to permanent resident may again be evaluated as if he or she were seeking original entry. The alien's conduct since the original entry becomes relevant to the change of status.

The application of these exclusionary criteria can be a continuing process that constantly hangs over the alien's head. This is particularly true of the homosexual alien who is directly affected by the triple effect of the above described criteria: if an alien admits he has been con-

849. The application for an immigrant visa asks whether the applicant suffers from psychopathic personality or sexual deviation, and the medical examination form requires the examining physician to examine for and report any indications of psychopathic personality or sexual deviation. See Dept. of State Form FS-150: Application for Immigrant Visa & Alien Registration; Dept. of State Form FS-398: Medical Exam of Visa Applicants.
850. Montgomery v. French, 299 F.2d 730 (8th Cir. 1962); United States v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929).
852. Id. at 2-23.
853. See Barber v. Rietmann, 248 F.2d 118 (9th Cir. 1957).
855. An alien can enter the United States as a nonimmigrant with the intention of only a temporary visit. Students, businessmen, and various consular officials, for example, have nonimmigrant visas. An alien can also enter as an immigrant seeking permanent residence and eventually citizenship. Amarante v. Rosenberg, 326 F.2d 58 (9th Cir. 1964).
victed of a crime involving moral turpitude, he may be excluded under section 212(a)(9); even if he escapes the snare of that section, he may be denied entry as being "mentally defective" under section 212(a)(4); if he denies either, he may be excluded for committing perjury.

The question of whether the homosexual is a psychopathic personality has been considered on a number of occasions.\textsuperscript{856} Under the 1917 Immigration and Nationality Act, aliens were excluded who were "persons of constitutional psychopathic inferiority" or who were found to be and certified by the examining surgeon as being "mentally defective."\textsuperscript{857} In \textit{United States v. Flores-Rodriguez},\textsuperscript{858} an alien was deported for perjury when he failed to state on his visa application that he had been convicted of soliciting, a crime involving moral turpitude.\textsuperscript{859} In the course of determining that Flores-Rodriguez's perjury was material, the court indicated that if the alien had not covered up his soliciting conviction, he would probably have been excluded as a person of constitutional psychopathic inferiority or as a mental defective. The court defined "constitutional psychopathic inferiority" as characterizing "individuals who show a life-long and constitutional tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with the authorities."\textsuperscript{860} The court also stated that "the term 'mentally defective,' as used in the statute, is a concept embracing more than intellectual capacity or lack thereof. . . . We think this language was designed to exclude homosexuals with exhibitionistic tendencies and other groups with lewd proclivities similarly repugnant to the mores of our society."\textsuperscript{861}

The 1952 Immigration and Nationality Act removed the phrase "persons of constitutional psychopathic personality" and substituted the phrase "afflicted with psychopathic personality."\textsuperscript{862} Under the new

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\textsuperscript{857} Ch. 29, § 3, 39 Stat. 875 (repealed 1952). See Richards, \textit{supra} note 25, at 727 n.117.

\textsuperscript{858} 237 F.2d 405 (2d Cir. 1956).

\textsuperscript{859} The offense was a violation of N.Y. \textsc{Penal Law} § 722(8) (McKinney 1967) which prohibits loitering in a "public place soliciting men for the purpose of committing a crime against nature."

\textsuperscript{860} 237 F.2d at 411.

\textsuperscript{861} \textit{Id.} Concurring with the majority opinion, Judge Frank was highly critical of the statutory interpretation of his colleagues, and went so far as to draw attention to the purported homosexuality of Plato. \textit{Id.} at 414 n.6.

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language, the Fifth Circuit held in *Quiroz v. Neely* that the lesbian in question was a psychopathic personality and hence excludable. The court disregarded the testimony of two doctors that homosexuals are not necessarily psychopathic personalities as that term is understood and used in the medical profession. Rather, the judge looked to legislative history of the Act and concluded, “[w]hatever the phrase ‘psychopathic personality’ may mean to the psychiatrist, to the Congress it was intended to include homosexuals and sex perverts.”

A year later, however, the Ninth Circuit in *Fleuti v. Rosenberg* voided a deportation order against alien Fleuti on the ground that the term “psychopathic personality” failed to give definite warning that homosexuality or sex perversion are included in the term, and thereby violated due process.

The Ninth Circuit maintained this position in 1966 in *Lavoie v. Immigration and Naturalization Service*. In that same year the Second Circuit in *Boutilier v. Immigration and Naturalization Service* again reached an opposite conclusion and the Supreme Court granted certiorari. The Court affirmed the Second Circuit’s holding that by its use of the term “psychopathic personality” in the Immigration and Nationality Act, Congress intended to exclude homosexuals from admission. The Court concluded that even if an applicant could get no fair warning from this phrase the statute was not void, because at the time when the standards of admission were applied one was either “afflicted with a psychopathic personality” or one was not. Adequate warning was irrelevant because there was no conduct to avoid.

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863. 291 F.2d 906 (5th Cir. 1961).
864. *Id.* at 907.
865. 302 F.2d 652 (9th Cir. 1962), *vacated and remanded*, 374 U.S. 449 (1963). Fleuti was a victim of the “last entry” doctrine. Fleuti, a Swiss, was admitted as a permanent resident in 1952. In 1956 he spent a few hours in Ensenada, Mexico. In 1959 the Immigration and Naturalization Service filed deportation charges against Fleuti claiming that in 1956, his last reentry, he was excludable because he was a homosexual person.

On appeal, the Supreme Court refused to deal with the constitutionality of the phrase “psychopathic personality,” focusing, instead, on whether a brief excursion was included within the purview of the Act. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

866. 360 F.2d 27 (9th Cir. 1966), *vacated and remanded*, 387 U.S. 572 (1967). The Supreme Court vacated the order of the court of appeals and remanded in light of its opinion in *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118 (1967). See text accompanying notes 867-72 *infra*. On remand, the Ninth Circuit found Lavoie to have been a “psychopathic personality” at time of entry and affirmed the deportation order. *Lavoie v. Immigration and Naturalization Serv.*, 418 F.2d 732 (9th Cir. 1969), *cert. denied*, 400 U.S. 854 (1970).

Registering a strong dissent, Justice Douglas called psychopathic personality "much too treacherously vague a term to allow the high penalty of deportation to turn on it." He pointed out facts that few have chosen to deal with regarding the policy of total exclusion of homosexuals:

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society. Douglas quoted with favor Judge Moore's dissent below: "To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michaelangelo, Andre Gide and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores." During the debate between the Second and Ninth Circuits and before the decision by the Supreme Court in Boutilier, Congress in 1965 amended section 212(a)(4) of the Act by adding the words "sexual deviation." The additional words were intended to make clear any doubts about Congressional intentions. In light of the Boutilier decision the addition was unnecessary, but it did provide double protection that no homosexual would enter the United States.

The second exclusionary criterion that often affects homosexual aliens is the exclusion of persons who have committed crimes of moral turpitude. The statute does not merely apply to those who have been convicted, but also to those who admit the crime or admit the acts that

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871. 387 U.S. at 127.
872. Id. at 129.
873. Id. at 130 (quoting 363 F.2d at 497-98 (Moore, J., dissenting)).
876. The amendment also affected aliens who applied for a change of status. In Campos v. Immigration and Naturalization Serv., 402 F.2d 758 (9th Cir. 1968), a young man who had lived in the United States for 11 years sought a change of status from non-immigrant student to permanent resident. Although he had been deemed admissible at the time of his entry, Campos was re-evaluated when he applied for change of status and was ordered to be deported for allegedly being a “Class A—Sexual Deviate.” The Ninth Circuit upheld the deportation order.
877. See note 847 & accompanying text supra.
constitute the crime. Because there is no judicial review when a visa is denied, the question of whether admission of homosexual acts that are not crimes in one’s home country would affect the admissibility of an alien remains unanswered.878

Courts have easily found various crimes involving homosexuality to be crimes involving “moral turpitude.” In Ganduxe y Marino v. Murff,879 the court found that the offense of disorderly conduct by loitering for purpose of inducing men to commit acts against nature, for which the penalty was a twenty-five dollar fine or ten days in jail, was clearly “a crime involving moral turpitude.” The case hinged on the fact that the defendant had failed to report this arrest. Such a misrepresentation was material, said the court, because if the Immigration and Naturalization Service had known of it, he could have been excluded as “a psychopathic personality.” This resulted in a no-win situation for Sr. Ganduxe y Marino for if he told the truth, he was excludable under one section and if he lied, he could be deported for perjury. In Babouris v. Esperdy,880 a deportation for a conviction under the same disorderly conduct statute used in Ganduxe was upheld. The court refused to accept petitioner’s argument that under New York law the particular action was considered an “offense” not a crime, ruling that an alien’s status did not depend on the classifications of misconduct adopted by states.881

Given the fact that in twenty-nine of the fifty states homosexual acts are still illegal,882 and that often homosexuals are singled out for harassment by law enforcement officials, it is more likely that homosexually active aliens will run afoul of the law than heterosexually active

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880. 269 F.2d 621 (2d Cir. 1959), cert. denied, 362 U.S. 913 (1960). Barbouris was ordered deported after living in the United States 39 years.
881. Id. at 623. In another case involving the New York disorderly conduct statute, the United States Court of Appeals for the District of Columbia Circuit held that a violation of that statute was a “crime involving moral turpitude.” Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir.), cert. denied, 368 U.S. 926 (1961). The court summarily avoided the issue of whether the statute was unconstitutionally vague, ruling that the issue was settled by the Supreme Court in Jordan v. DeGeorge, 341 U.S. 223 (1951). In Jordan, the Court held that the phrase “crime involving moral turpitude” did not lack sufficiently definite standards.
882. See Appendix A infra.
aliens. The homosexual alien who is caught runs the risk of deportation and the inability to change his immigrant status.

For the homosexual alien who seeks naturalization the standards differ from those of admission. To become a citizen, the petitioner must prove that during the statutory waiting period he or she was a "person of good moral character." Good moral character is not defined in the statute, and homosexuals are not specifically mentioned as persons who do not have good moral character.

In In re Schmidt, the court ruled that a lesbian did not possess the requisite "good moral character" to be naturalized despite the following findings: all of the alien's homosexual behavior had been in the privacy of her home with adult partners; she had been regularly and successfully employed for fourteen years; she had never been convicted of a crime; and her reputation, except for her sexual preference, was beyond reproach. In support of its conclusion that the woman's admitted practices of sexual deviation were not "consistent with good moral character as the 'ordinary man or woman' sees it," the court quoted a New Jersey divorce opinion: "Few behavioral deviations are more offensive to American mores than is homosexuality."

Three more recent cases have taken a broader view of "good moral character." In re Labady, decided in 1971 by a United States District Court in New York, found a homosexual man to be "a person of good moral character" and entitled to naturalization. The court made clear its own position by saying, "If the criterion were our own personal moral principles, we would deny the petition, subscribing as we personally do to the general 'revulsion' or 'moral conviction or instinctive feeling' against homosexuality." Laying aside its revulsion, however, the court focused on whether the challenged conduct was private or public in nature: "[P]rivate conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of

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883. In this section it is to be presumed that the alien was not excludable at the time of admission; that is, the alien was not a homosexual person at the time of admission, although he or she may be a homosexual person at the time of the petition for naturalization.
886. 56 Misc. 2d 456, 289 N.Y.S.2d 89 (Sup. Ct., Dutchess County 1968).
887. Id. at 460, 289 N.Y.S.2d at 92.
890. Id. at 927.
§ 1427.891

In 1973, in *Kovacs v. United States*,892 the Second Circuit upheld the denial of a petition for naturalization of a homosexual immigrant. However, the lack of good moral character found in this case resulted not from the petitioner's homosexuality but from his false testimony. The court said, "This is not a case like *Labady* . . . where the applicant testified truthfully about prior homosexual acts, yet still was granted naturalization because of the private character of his sexual life. Had Kovacs testified truthfully about his past, the petition might well have been granted."893

The trend begun with *Labady* was continued in *In re Brodie*,894 wherein the court granted naturalization despite the applicant's homosexuality. The court focused on the private nature of the alien's sexual life, his lack of contact with minors, and his otherwise good behavior. The court also noted that homosexual acts were no longer criminal between consenting adults under state law and that a local city council had passed an ordinance prohibiting discrimination in employment against homosexuals. The court concluded: "Noting these indications, I am convinced that the community regards homosexual behavior between consenting adults with tolerance, if not indifference. Brodie is a person of good moral character and his petition should be granted."895

*Brodie, Kovacs,* and *Labady* apparently moved the Immigration and Naturalization Service to reformulate its policy. In August, 1976, the Service announced a new policy regarding the naturalization of homosexuals: "The fact that a petitioner for naturalization is or has been a practicing sexual deviate, during the relevant statutory period is not, in itself, a sufficient basis for finding that he lacks the necessary good moral character."896 The interpretation continues: "However,
where there has been a conviction of a homosexual act or the admission or the commission of such an act in a jurisdiction in which it is a criminal offense . . . the Service view is that a showing of good moral character is precluded." 897 Thus, homosexuality per se does not presently prevent naturalization. However, the commission of a homosexual act or admission of such an act can be cause for the finding of lack of good moral character. This policy results in an interesting anomaly because in twenty-one states homosexual conduct is irrelevant while in the other twenty-nine states it is grounds for denial of a naturalization petition. 898

The position and policies of the Immigration and Naturalization Service have come under increasing criticism from gay rights and civil rights leaders. Under the Carter administration, Immigration and Naturalization Service administrators have met with National Gay Task Force 899 members to discuss changes in policy. As a consequence of a meeting held on April 4, 1978, between the National Gay Task Force, the Surgeon General of the United States, and the top representatives of the Immigration and Naturalization Service, the United States Public Health Service will no longer define homosexual persons as either "sex deviants" or "psychopathic personalities." 900 This change of policy should mean that homosexual aliens will no longer automatically be denied entry into the United States because of their homosexual status. If the applicant has been convicted of a crime of moral turpitude, however, that conviction would still constitute a bar to entry.

Criminal Issues

XVI. Criminalization of Homosexual Behavior

This Article does not attempt a descriptive survey of cases dealing with criminal charges of sodomy or other sexual acts of homosexual

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897. Id. (emphasis added).
898. See Appendix A infra.
899. The National Gay Task Force is an organization devoted to gay civil rights. See note 70 supra.
900. This change reflects the position of the American Psychiatric Association. The Public Health Service has announced that it will inform its officers at border crossings of the new policy; similar information will be given to Immigration officials, and State Department Visa officers. It's Time, May 1978, at 1-2.

After trying for 25 years, a Danish-born lesbian was granted United States citizenship in March 1978. She said that she had spent the last 17 years haggling with immigration officials over the connection between her sexual preference and "her suitability to become an official American." The woman reported that she did not know why her petition was suddenly granted. Lesbian Connection, June 1978, at 8.
persons, they are simply too numerous. Moreover, no aspect of homosexual behavior has been more thoroughly examined by legal scholars than the criminal area. The criminalization of homosexual behavior has been analyzed from a constitutional viewpoint, a moral viewpoint, a psychiatric viewpoint, a sociological viewpoint and last, but hardly least, from the viewpoint of a right to privacy. With the proposal of the Model Penal Code, many articles were written discussing a particular state's law in the area of homosexual criminal conduct. These articles provide a wealth of information with regard

901. All the sexual acts penalized when committed between persons of the same sex also can be performed by persons of the opposite sex. Laws forbidding certain sexual acts often do not differentiate as to heterosexuals or homosexuals, married or unmarried persons. Kinsey estimated that if all the laws then currently on the books forbidding various sex acts were enforced, 95% of all white American males would be subject to prosecution. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR OF THE HUMAN MALE 390-93 (1948).

902. See, e.g., 81 C.J.S. Sodomy §§ 1-16 (1977); 70 AM. JUR. 2d Sodomy §§ 1-26 (1973). Many cases appear in West's Decennial Digests and General Digest under the topic Sodomy.


907. See Richards, supra note 25; Bazelon, Probing Privacy, 12 GON. L. REV. 587 (1977); Silver, The Future of Constitutional Privacy, 21 ST. LOUIS U.L.J. 211 (1977); Taber, Consent, Not Morality, as the Proper Limitation on Sexual Privacy, 4 HASTINGS CONST. L.Q. 637 (1977). The preceding articles are not limited to or focused solely on homosexual conduct.


to the history of such laws and their jurisprudential development.

Given the wealth of material in this area coupled with the focus of this Article on the civil problems of homosexual persons, a detailed description of the cases in this area seems unnecessary. However, since the criminality of homosexual behavior affects the homosexual person's ability to be employed, to be naturalized, to hold a professional license and to obtain a security clearance,\(^9^{10}\) to mention only a few instances, the reader should know the current state of the law in this area. Therefore, Appendix A\(^9^{11}\) details, by state, the various statutes either prohibiting or decriminalizing homosexual behavior.

Many state statutes, that have criminalized homosexual behavior, have also been subject to numerous constitutional challenges. Appendix B lists by state the most recent cases challenging constitutionality of the respective statute.

One such case, however, warrants special consideration. In Doe v. Commonwealth's Attorney for Richmond,\(^9^{12}\) two adult, sexually active, homosexual men sought in a federal district court a declaratory judgment that the Virginia statute which criminalized sodomy was unconstitutional. The statute under attack proscribed: "Crimes Against

\(^9^{10}\) "Once convicted or once their condition becomes known to the relevant authorities, male sex deviants (like the leprous or the insane) must expect some legal and social restrictions. If they work in certain fields, such as teaching, or governmental posts involving security risk, they will lose their jobs. If they belong to a profession with strict disciplinary rules, like solicitors and medical men, they may have their license to practice taken away. They will not be accepted for admission to the armed forces or the merchant navy, they will be found unsuitable for a wide range of employment such as police, prison service, youth workers and so forth. They will never be considered for important posts in politics or public life. They may even encounter difficulties if they want to enter as students at a university. They will be rejected if they apply to emigrate to another country." D.J. West, Homosexuality 91 (1967).

\(^9^{11}\) The reader should be warned that this area of the law is subject to rapid changes and should be aware that this chart may soon be outdated.


Nature—If any person shall carnally know in any manner any brute animal or carnally know any male or female person by anus or by or with the mouth or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony.\textsuperscript{913}

The statute applies to heterosexuals as well as homosexuals and, at least on its face, to married persons as well as unmarried persons. The district court upheld that statute and apparently approved state criminal intervention in adult private consensual sex which did not fit the traditional standard of penile-vaginal sexual intercourse between a man and a woman. When the Supreme Court affirmed the district court's decision, the press decried the decision as a setback for gay rights.\textsuperscript{914} A close examination of the opinion, however, shows that it represents a much broader setback for all nonmarital sexual conduct.

The majority opinion concluded that there was no constitutional bar to punishing homosexual behavior.\textsuperscript{915} The court relied almost exclusively on \textit{Griswold v. Connecticut}\textsuperscript{916} which it restricted completely to its facts, interpreting the rule of that case to apply only to marital privacy. In finding that extra-marital sex, especially homosexual conduct, is not constitutionally protected, the court relied upon Justice Harlan's dissent in \textit{Poe v. Ullman},\textsuperscript{917} which was cited with approval by Justice Goldberg in \textit{Griswold}.

Because the right of privacy enunciated in \textit{Griswold} applied only in the marital context, homosexual conduct, which "is obviously no portion of marriage, home or family life,"\textsuperscript{918} was outside the pale of constitutional protection. The court concluded that "[i]f a State determines that punishment therefor, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so."\textsuperscript{919} The court did not clearly indicate whether the state was constitu-
tionally required to establish a legitimate interest in criminalizing such conduct. However, the court observed that if such proof were necessary, the state of Virginia had satisfied the requisite burden because the statute was directed to the suppression of crime.\textsuperscript{920} The circularity of that reasoning is clear: a state may declare conduct criminal in order to suppress crime. Moreover, the court noted that the state did not have to show that moral delinquency actually resulted from homosexuality, but only that the proscribed conduct was likely to contribute to moral delinquency.\textsuperscript{921} In support of this conclusion, the court pointed to the longevity of the Virginia statute, the fact that other states had similar provisions and, lastly, to the Judaic and Christian origins of such proscriptions.\textsuperscript{922}

In a forceful dissent, Judge Merhige pointed out that the court had ignored the Supreme Court's decisions in \textit{Eisenstadt v. Baird},\textsuperscript{923} which extended the \textit{Griswold} protections to single unmarried persons, and in \textit{Stanley v. Georgia},\textsuperscript{924} which protected private actions in the home. He concluded that the right of privacy is not limited to marital relationships but that all intimate personal decisions or private matters are constitutionally protected,\textsuperscript{925} observing that "[t]he right to select consenting adult sexual partners must be considered within this category."\textsuperscript{926}

Not only did Judge Merhige conclude that private adult consensual homosexual conduct was constitutionally protected, but he felt that Virginia had failed to show any compelling interest for its regulation.\textsuperscript{927} He noted that the state had made no offer of evidence that homosexual conduct caused society any significant harm and summarily rejected, as "unworthy of judicial response," the suggestion that the prohibition of homosexual conduct would encourage new heterosexual marriages and prevent divorce.\textsuperscript{928} Judge Merhige observed that the majority decision was based solely on the promotion of morality and decency,\textsuperscript{929} which was beyond the state's power, and concluded that "the issue centers not around morality or decency, but the constitu-

\textsuperscript{920} Id.
\textsuperscript{921} Id.
\textsuperscript{922} Id. at 1202-03.
\textsuperscript{923} 405 U.S. 430 (1972).
\textsuperscript{924} 394 U.S. 557 (1969).
\textsuperscript{925} 403 F. Supp. at 1205.
\textsuperscript{926} Id. at 1204.
\textsuperscript{927} Id. at 1205.
\textsuperscript{928} Id.
\textsuperscript{929} Id.
tional right of privacy." 930

The district court's decision was appealed directly to the United States Supreme Court and was summarily affirmed. 931 The judicial obligation of the Supreme Court to explain its decision is particularly compelling in light of the district court's failure to consider the two recent Supreme Court decisions in Stanley and Eisenstadt. The Supreme Court's failure to address the constitutional issues raised by Doe has been severely criticized by legal scholars and popularly interpreted as a continuing license for harassment and discrimination against homosexual individuals.

Conclusion

The purpose of this Article is to bring together all the legal sources necessary to give the reader a comprehensive picture of the legal status of homosexual individuals in our country today and is intended to be useful not only to the legal scholar but to the practitioner and layperson as well.

Because this area of the law is so young and so fragmented it has not been possible to find broad rules which cut across all the areas involved. However, a thorough reading of the Article does reveal systematic and pervasive discrimination against homosexual individuals in our courts and dispels the popular idea that, because homosexual individuals occupy every walk of life, there is no real discrimination against them. 932 On the contrary, homosexual individuals are penalized in all aspects of their lives because of their sexual preference. They lose their jobs, their children, and numerous other precious rights as a result of many current judicial policies.

In the short time since this Article was completed, there have been a few judicial and legislative victories for the proponents of homosexual rights. Leonard Matlovich's case against the U.S. Air Force was remanded to the district court by the District of Columbia Circuit Court on the grounds that the Air Force had failed to rationally explain why Sgt. Matlovich should not qualify as one of the "exceptional" ho-
mosexual servicement who is retained.\textsuperscript{933} John Singer was ordered re-
instated by the Federal Employee Appeals Authority of the United States Civil Service Commission\textsuperscript{934} and the Internal Revenue Service finally issued a Revenue Ruling making gay organizations eligible for tax-exempt status.\textsuperscript{935} The beginning months of 1978 saw numerous gay-rights ordinances overthrown by popular referendum,\textsuperscript{936} but in November of 1978 the attempt to repeal the Seattle, Washington ordinance protecting gay persons failed and in California, the infamous Briggs Amendment, which would have discriminated against gay teachers, failed to win popular approval.\textsuperscript{937} There are some signs of progress, but they are hard won and, as this Article reveals, such suc-
cesses only scratch the surface.

The resolution of the problem is beyond the scope of this Article. However, at a minimum, judges, in particular, as well as attorneys, need to examine their homophobic attitudes and the many popularly held myths and stereotypes. Only after such a reevaluation of judicial and societal attitudes can our legal system begin to achieve a fair and equal application of the laws to all persons.

Oh who is that young sinner with the handcuffs on his wrists?
And what has he been after that they groan and shake their fists?
And wherefore is he wearing such a conscience-stricken air?
Oh they're taking him to prison for the colour of his hair.

'Tis a shame to human nature, such a head of hair as his;
In the good old time 'twas hanging for the colour that it is;
Though hanging isn't bad enough and flaying would be fair
For the nameless and abominable colour of his hair.

Oh a deal of pains he's taken and a pretty price he's paid
To hide his poll or dye it of a mentionable shade;
But they've pulled the beggar's hat off for the world to see and stare,
And they're haling him to justice for the colour of his hair.

Now 'tis oakum for his fingers and the treadmill for his feet,
And the quarry-gang on Portland in the cold and in the heat,
And between his spells of labour in the time he has to spare
He can curse the God that made him for the colour of his hair.

A.E. Housman\textsuperscript{938}

\begin{thebibliography}{999}
\bibitem{934} See text accompanying notes 303-16 \textit{supra}.
\bibitem{935} Appeal of John F. Singer, Dec. No. SE07138002 (Federal Employee Appeals Auth.,
\bibitem{937} See \textit{It's Time}, June-July 1978, at 1.
\end{thebibliography}

\textsuperscript{933} THE \textbf{COLLECTED POEMS OF A.E. HOUSEMAN} 233 (1965). This poem was written
near the time of the trial of Oscar Wilde.
## Appendix A

*Part One—State Statutes Prohibiting Private, Consensual, Adult Homosexual Sexual Acts*

<table>
<thead>
<tr>
<th>State and Code</th>
<th>Type of Statute</th>
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</thead>
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<tr>
<td>ALA. CODE § 13A-6-65(a)(3) (Michie 1978)</td>
<td>modern definition(^b) (married couples excluded)</td>
</tr>
<tr>
<td>ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (West Supp. 1977)(^c)</td>
<td>common law definition(^d); “lewd and lascivious acts”</td>
</tr>
<tr>
<td>ARK. STAT. ANN. § 41-1813 (1977)</td>
<td>modern definition (homosexual acts only)</td>
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<tr>
<td>D.C. CODE ENCYCL. § 22-3502 (West 1973)</td>
<td>modern definition</td>
</tr>
<tr>
<td>FLA. STAT. ANN. § 800.02 (West 1976)</td>
<td>“unnatural and lascivious act”</td>
</tr>
<tr>
<td>GA. CODE ANN. § 26-2002 (1977)</td>
<td>modern definition</td>
</tr>
<tr>
<td>IDAHO CODE § 18-6605 (Supp. 1978)</td>
<td>common law definition</td>
</tr>
<tr>
<td>KAN. STAT. § 21-3505 (1974)</td>
<td>modern definition (homosexual acts only)</td>
</tr>
<tr>
<td>KY. REV. STAT. § 510.100 (1975)</td>
<td>modern definition (married couples excluded)</td>
</tr>
<tr>
<td>LA. REV. STAT. ANN. §§ 14:89, 14:89.1 (West Supp. 1978)</td>
<td>modern definition</td>
</tr>
<tr>
<td>MD. ANN. CODE §§ 27-553, 27-554 (Michie Supp. 1977)</td>
<td>“sodomy” (undefined); “unnatural and perverted sex practices”(^e)</td>
</tr>
<tr>
<td>MASS. ANN. LAWS, ch. 272, § 34 and § 35 (Michie 1968)</td>
<td>common law definition; “unnatural and lascivious act”</td>
</tr>
<tr>
<td>MICH. COMP. LAWS §§ 750.158, 750.338, 750.338a (1968)</td>
<td>common law definition; “gross indecency” between males; “gross indecency” between females</td>
</tr>
<tr>
<td>MINN. STAT. ANN. § 609.293 (West Supp. 1978)</td>
<td>modern definition</td>
</tr>
<tr>
<td>MISS. CODE ANN. § 97-29-59 (1972)</td>
<td>common law definition</td>
</tr>
<tr>
<td>MO. ANN. STAT. § 566.090 (Vernon Supp. 1978)</td>
<td>modern definition</td>
</tr>
<tr>
<td>MONT. REV. CODES ANN. § 94-5-505 (1975)</td>
<td>modern definition (homosexual acts only)</td>
</tr>
<tr>
<td>NEV. REV. STAT. § 201.190 (1977)</td>
<td>modern definition (homosexual acts only)</td>
</tr>
</tbody>
</table>
Part Two—States Which Have Decriminalized Private, Consensual, Adult Homosexual Sexual Acts

<table>
<thead>
<tr>
<th>State</th>
<th>Law and Effective Date</th>
</tr>
</thead>
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a. Twenty-nine states and the District of Columbia have laws forbidding “deviant” sexual behavior. Even though these laws include nearly every type of sexual act except penile-vaginal intercourse, the crime is usually called “sodomy”. Those statutes prohibiting sexual relations only between people of the same sex have been indicated as proscribing “homosexual acts only”.

b. States using modern definitions of the prohibited acts specifically describe what is prohibited rather than using general terms such as “sodomy” or the vague common-law definition. See note 4 infra.


d. States using the common law definition of “sodomy” use language similar to “the abominable and detestable crime against nature with mankind or beast.”

e. Defined in the statute as oral sexual acts.
### Appendix B

**Most Recent Court Decisions on the Constitutionality of State Statutes Prohibiting Private Consensual Adult Homosexual Sexual Acts**

<table>
<thead>
<tr>
<th>State</th>
<th>Case Name</th>
<th>Summary of the Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td><em>Horn v. State</em>, 41 Ala. App. 489, 273 So. 2d 249 (1973)</td>
<td>not vague&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>Arizona</td>
<td><em>State v. Bateman</em>, 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864 (1976)</td>
<td>not vague or overbroad; did not violate right of privacy or freedom of expression</td>
</tr>
<tr>
<td>Arkansas</td>
<td><em>Carter v. State</em>, 255 Ark. 225, 500 S.W.2d 368 (1973)</td>
<td>not vague or cruel and unusual punishment; did not violate equal protection or establish religion; no standing to raise privacy issue</td>
</tr>
<tr>
<td>District of Columbia</td>
<td><em>Stewart v. United States</em>, 364 A.2d 1205 (D.C. Ct. App. 1976)</td>
<td>did not violate equal protection or establish religion; no standing to raise privacy issue</td>
</tr>
<tr>
<td>Florida</td>
<td><em>Bell v. State</em>, 289 So. 2d 388 (Fla. 1973)</td>
<td>not vague</td>
</tr>
<tr>
<td></td>
<td><em>State v. Sandstrom</em>, 344 So. 2d 554 (Fla. 1976)</td>
<td><em>Bell</em> upheld</td>
</tr>
<tr>
<td>Kansas</td>
<td><em>State v. Thompson</em>, 221 Kan. 165, 558 P.2d 1079 (1976)</td>
<td>no standing to raise privacy or equal protection</td>
</tr>
<tr>
<td>Kentucky</td>
<td><em>Cooper v. Commonwealth</em>, 550 S.W.2d 478 (Ky. 1977)</td>
<td>did not violate equal protection</td>
</tr>
<tr>
<td>State</td>
<td>Case Name</td>
<td>Year/Decision Details</td>
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<tr>
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<tr>
<td>Louisiana</td>
<td>State v. Lindsey, 310 So. 2d 89</td>
<td>(La. 1975)</td>
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<td></td>
<td>State v. McCoy, 337 So. 2d 192</td>
<td>(La. 1976)</td>
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<td>Maryland</td>
<td>Hughes v. State, 14 Md. App. 497, 287 A.2d 299</td>
<td>(1972), cert. denied, 409 U.S. 1025</td>
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<td></td>
<td>Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478</td>
<td>(1974)</td>
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<td>Commonwealth v. Gallant, 369 N.E.2d 707</td>
<td>(1977)</td>
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<td></td>
<td>People v. Howell, 395 Mich. 16, 238 N.W.2d 148</td>
<td>(1976)</td>
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<td></td>
<td>People v. Penn, 70 Mich. App. 638, 247 N.W.2d 575</td>
<td>(1976)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>State v. Witt, 308 Minn. 214, 245 N.W.2d 612</td>
<td>(1976)</td>
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<td>Mississippi</td>
<td>State v. Mays, 329 So. 2d 65</td>
<td>(Miss. 1976)</td>
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<td>Missouri</td>
<td>State v. Crawford, 478 S.W.2d 314</td>
<td>(Mo. 1972)</td>
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<tr>
<td>Montana</td>
<td>State v. Ballew, 166 Mont. 270, 532 P.2d 407</td>
<td>(1975)</td>
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<td>Nevada</td>
<td>Hogan v. State</td>
<td>84 Nev. 372, 441 P.2d 620 (1968)</td>
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<td>Allan v. State</td>
<td>91 Nev. 650, 541 P.2d 656 (1975)</td>
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<td>New Jersey</td>
<td>State v. Lair</td>
<td>62 N.J. 388, 301 A.2d 748 (1973)</td>
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<td>State v. Jarrell</td>
<td>24 N.C. App. 610, 211 S.E.2d 837 (1975)</td>
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<td>Pennsylvania</td>
<td>United States v. Brewer</td>
<td>363 F. Supp. 606 (M.D. Penn.), aff'd, 491 F.2d 751 (1973)</td>
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<tr>
<td>Rhode Island</td>
<td>State v. Levitt</td>
<td>371 A.2d 596 (1977)</td>
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<tr>
<td>South Carolina</td>
<td>no cases</td>
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<tr>
<td>Tennessee</td>
<td>Rose v. Locke</td>
<td>423 U.S. 48 (1975)</td>
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<td>Young v. State</td>
<td>531 S.W.2d 560 (1975)</td>
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<tr>
<td>Utah</td>
<td>no cases</td>
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</table>
Virginia


see text accompanying notes 911-30 supra

Wisconsin

Jones v. State, 55 Wis. 2d 742, 200 N.W.2d 587 (1972)

not vague or overbroad or unconstitutionally applied

Gossett v. State, 73 Wis. 2d 135, 242 N.W.2d 899 (1976)

decided to determine constitutionality of statute as applied to consensual acts

a. The most recent decisions on the constitutionality of state "sodomy" statutes have been listed by state although some of the cases may not refer to the most recent version of a particular state's law. In some states, the statutes have merely been reenacted and renumbered, but in other states substantial changes in wording have been made since these decisions were handed down.

b. The statute does not violate due process because of vagueness.

c. The court was split 3-3 on this issue.