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FAIR EMPLOYMENT FOR THE HOMOSEXUAL

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*Psychological and Medical Views and Employment*

Homosexuals living in Judaic-Christian territory have always fared badly, being consistently treated with considerable hostility. While no longer stoned to death, as required in the ancient rabbinical codes, or burned at the stake or castrated, as ordered by the ecclesiastical courts, homosexuals remain ostracized.<sup>1</sup> That religious, social and economic punishment can be as severe as that meted out by a judge in a criminal proceeding needs little amplification. Recently, Illinois<sup>2</sup> and Connecticut<sup>3</sup> changed their criminal codes to legalize homosexual acts between consenting adults. This may indicate that the homosexual is today more acceptable in social and economic situations.

Past and current psychological and medical doctrine is helpful in deciding whether homosexuals should be protected by a fair employment law, the subject of this article. Unfortunately, while many "scientific" explanations are available, none are universally accepted. There is wide acceptance of the view that homosexual experiences start before or during adolescence with other youngsters or adults.<sup>4</sup> Some feel that a homosexual or heterosexual climate is established unknowingly by conditions

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1. LEVITICUS 20:3; M. BUCKLEY, MORALITY AND THE HOMOSEXUAL 128 (1959); I F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 26 (2d ed. 1898).

2. ILL. ANN. STAT. ch. 38, §§ 11-3, 11-4, 11-5, & 11-9 (Smith-Hurd, 1961).

3. PUB. L. No. 828, § 214 *repealing*, GEN. STAT. OF CONN. ch. 944, § 53-216 (1969). [*Editor's note*: Oregon has recently followed the lead of Illinois and Connecticut; see 1971 ORE. LAWS ch. 743, §§ 112-16, *repealing*, ORE. REV. STAT. § 167.040 (1953) (effective Jan. 1, 1972).]

4. I. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY 8 (1962).

in the home.<sup>5</sup> In some instances, sexual choice occurs after maturity.<sup>6</sup> It is possible that a child is born without a sexual preference and the preference is later developed by environmental factors. For example, convicts with heterosexual leanings often engage in homosexual practices while in prison.<sup>7</sup>

Kraft-Ebing felt that homosexuality was a physical trait acquired at birth, a theory in disrepute for some time.<sup>8</sup> It was recently suggested that there was an endocrine imbalance in the male homosexual.<sup>9</sup> This theory supports the view that homosexual behavior is due to physical characteristics rather than environment. In a study recently published, the researchers found a significant variance in the sperm count between the exclusive (or almost exclusive) homosexual and the heterosexual male.<sup>10</sup>

It is perhaps noteworthy that some psychologists and psychiatrists adhering to the environmental, bisexual or physical trait theory do not consider the homosexual mentally disturbed or incapable.<sup>11</sup> This becomes important when rationally discussing employment opportunities for the homosexual.

The probability of homosexual play is something different from the innate capacity or potential. While there may be some innate predisposition toward homosexuality in everyone, outward signs are principally exhibited by males under 20 years of age.<sup>12</sup> The leaning or innate tendency toward homosexual expression can be explained on a physiological basis—boys reach a state of optimum sexual intensity during adolescence, a period during which heterosexual contact is discouraged. Sometimes the dominant role of the mother and the mouse-type father signals

5. *Id.* at 44-117.

6. *Id.* at 14-15.

7. Compare the bisexual preference of the ancient Greek. See H. LICHT, *SEXUAL LIFE IN ANCIENT GREECE* 413-17 (1932); W. STEKEL, *BI-SEXUAL LOVE* 56 (1944).

8. Margolose, *Homosexuality: A New Endocrine Correlate*, 1 *HORMONES AND BEHAVIOR* 151 (Feb., 1970).

9. *Id.*

10. Kolodny, Masters, Hendryz and Toro, *Plasma Testosterone and Semen Analysis in Male Homosexuals*, 285 *NEW ENGLAND J. OF MEDICINE* 1170 (Nov. 18, 1971). It was also reported in this study that "[s]ixty per cent described sexual encounter with an adult male before the age of 16, whereas 97 per cent had sexual experience with a peer-group male before 16. For all subjects current patterns of sexual behavior included fellatio, and 63 per cent also acknowledged anal intercourse." And the physical and mental health of this group was reported good. "Two subjects were currently in psychotherapy, and one other subject had previously consulted a psychiatrist. No paranoia or paranoid-like symptomatology was apparent in the group." *Id.* at 1171-72.

A similar result was published by Loraine, Ismail, Adamopolous, and Dore, *Endocrine Functions in Male and Female Homosexuals*, 4 *BRITISH MEDICAL J.* 406 (1970). See also Dorner, *Hormonal Induction and Prevention of Female Homosexuality*, 42 *J. OF ENDOCRINOLOGY* 163 (1968) and Dorner and Hinz, *Induction and Prevention of Male Homosexuality by Androgen*, 40 *J. OF ENDOCRINOLOGY* 387 (1968).

11. M. HOFFMAN, *THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION OF EVIL* 121-22 (Bantam ed. 1968).

12. S. KLING, *SEXUAL BEHAVIOR AND THE LAW* 102-03 (1965).

inverse sexual preference.<sup>13</sup> While this explanation is speculative, the incidence rate of homosexual behavior shows that it most frequently occurs between boys ranging in age from 4 to 13 and drops somewhat in the 14 to 20 range. Homosexual experiences drop considerably after 20 years of age, due to the increased availability of heterosexual contact and public disapproval.

Dr. Kinsey concluded that 4 percent of the adult male population in the United States will remain exclusively homosexual throughout life, with 37 percent having some overt homosexual experience.<sup>14</sup> Furthermore, 10 percent of the male population between 16 and 65 years of age will remain exclusively homosexual for at least 3 years.<sup>15</sup> In England, it is estimated that 5 percent of the male population is predominantly homosexual, a figure that corresponds with the sampling taken by Dr. Kinsey.

Dr. Kinsey estimates that there are at least two and one-quarter million confirmed homosexuals in the United States over the age 18.<sup>16</sup> A government task force in 1969 estimated "that there are currently three or four million adults in the United States who are predominantly homosexual and many more individuals in whose lives homosexual tendencies or behavior play a significant role."<sup>17</sup> The estimate for England is a minimum of 500,000 hard core homosexuals.<sup>18</sup> It is also estimated that 1 percent of those serving in the United States military forces are confirmed homosexuals.

In a detailed study undertaken in England of criminal charges preferred against homosexuals, 19 percent involved males 50 years of age or older.<sup>19</sup> Significantly, 23 percent of the cases involved married, widowed, or divorced males. Of this statistical category, 25.7 percent were childless while the balance fathered children or had a pregnant wife. This figure corresponds to statistics later presented.

The statistics bear further consideration in light of available employment opportunities, both private and public, for the homosexual. With 4 percent of the male population exclusively homosexual<sup>20</sup> and a considerably larger number admitting to bisexual activity, employment opportunity is important to the national economy as well as to the individual. Even if all criminal laws regulating homosexual expression between con-

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13. B. MAGEE, *ONE IN TWENTY: A STUDY OF HOMOSEXUALITY IN MEN AND WOMEN* 30-32 (1966).

14. A. KINSEY, C. MARTIN & W. POMEROY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

15. SCOTTISH HOME DEPT., *REPORT OF THE COMMISSION ON HOMOSEXUAL OFFENCES AND PROSTITUTION* 17 (1957) (The Wolfenden Report).

16. KINSEY, *supra* note 14, at 648.

17. *FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY* 4 (English Report, 1969).

18. A. GIGEROFF, *SEXUAL DEVIATIONS IN THE CRIMINAL LAW* 89 (1968).

19. L. RADZINOWICZ, *SEXUAL OFFENCES* 113-19 (1957).

20. KINSEY, *supra* note 14, at 648.

senting adults were repealed, it is unlikely that, given the state of public opinion, employment opportunity would increase substantially. Many homosexuals are forced to find employment where antagonism is less evident or live in fear of being discovered, which can affect efficiency. An assumption herein made is that the sexual and the bisexual will face similar employment experiences. 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.

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.<sup>21</sup> 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 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.<sup>22</sup> 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.

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21. ECONOMIC REPORT OF THE PRESIDENT 76 (Feb., 1971).

22. *Homosexual Fights Rule in Security Clearance*, N.Y. Times, Nov. 26, 1967, at 70, col. 3;

With some exceptions—hair-dressing, theatre, design, etc.—the known homosexual can count on losing his job. Professionals who are found out have been booted out of their chosen vocation, and a license to practice denied or taken away for moral reasons.<sup>23</sup> Detected civil servants and servicemen have been discharged.<sup>24</sup> In fact, an alien with homosexual leanings prior to entry into the United States can be deported.<sup>25</sup> The increased militancy and visibility of the homosexual probably makes it more difficult for him to earn a living at the present time.

### *The Military*

Intelligence reports prepared by the Army, Navy and Air Force and additional data supplied by the Federal Bureau of Investigation and Central Intelligence Agency classify the homosexual as a poor military risk. A Senate report, based on intelligence provided by the military and other federal agencies, states:

The lack of emotional stability . . . found in most sex perverts and the weakness of their moral fiber, makes them susceptible to the blandishments of the foreign espionage agent. It is the experience of the intelligence experts that perverts are vulnerable to interrogation by a skilled questioner and they seldom refuse to talk about themselves. Furthermore, most perverts tend to congregate at the same . . . clubs . . . which places can be identified . . . making it possible for a recruiting agent to develop clandestine relationships which can be used for espionage purposes.<sup>26</sup>

Those responsible for this Senate report show distaste for the homosexual by citing non-existent facts and consistently referring to him as a "pervert." While there has been some softening in official military attitude since 1950, the date of this Senate report, a vast majority of those in the military support the Senate position.<sup>27</sup>

23. See, e.g., *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957).

24. *Vigil v. Post Office Dept.*, 406 F.2d 921 (10th Cir. 1969); *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968); Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465 (1969).

25. *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118 (1967). The plaintiff had been arrested in Canada for homosexual behavior, but the case was dismissed. But he admitted homosexual acts since 14 years of age. The plaintiff, 32 years of age and living in the United States for 8 years, was deported under the 1952 Immigration Act as a "psychopathic personality." While no one knows what a "psychopathic personality" is—Congress did not even define it—and the plaintiff was not tested, the Supreme Court ruled that deportation was proper.

26. *EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT*, S. MISC. DOC. NO. 241, 81st Cong., 2d Sess. at 4-5 (1950).

27. *Williams and Weinberg, The Military. Its Processing of Accused Homosexuals*, 14 *AM. BEHAVIORAL SCIENTIST* 203 (1970); *MEDICAL FITNESS STANDARDS FOR APPOINTMENT, ENLISTMENT AND INDUCTION*, AR 40-51, 2-34 a (b).

The report refers to "the experience of intelligence experts that perverts are vulnerable to interrogation by a skilled questioner . . . ."<sup>28</sup> Where this information came from and how this information was gathered remains a secret. Were a large enough number of homosexuals exposed to the kind of grilling implied to support this assertion? It seems doubtful. But even if the homosexual is "vulnerable to interrogation by a skilled questioner," isn't the heterosexual in the military equally susceptible? It is doubtful whether "gay" people are more inclined to crack up under experienced grilling than "straight" people.

Another questionable conclusion is the alleged tendency of homosexuals to talk about themselves. All kinds of people have a need, some less frequently than others, to discuss events in their life with friends. The homosexual knows that society views him as a leper, and it is not often that he will talk about himself to outsiders. There has been, in recent years, a greater willingness on the part of the homosexual to be identified and to speak freely,<sup>29</sup> but most still prefer to remain anonymous.

Another doubtful conclusion reached by the Senate committee is the tendency of "perverts . . . to congregate at the same . . . clubs . . . ." For those pursuing anonymity—homosexuals try to avoid notoriety—congregating at "clubs" is risky. In England, Holland, Illinois, Connecticut and other areas where the homosexual cannot be criminally accused, there is less need to operate secretly. But even if criminal prosecution is not feared, the homosexual fears loss of job or blackmail and tries to avoid the "gay" watering hole.

Military policy as it affects the homosexual is of interest in light of the recent homophylic effort to change military policy.<sup>30</sup> While the military has found the homosexual above average in intelligence, education, and performance, there remains an unwillingness to induct or retain him.<sup>31</sup> The "straight" or "gay" reluctantly join the military today and necessity may force a reexamination of policy in the military. Homosexual organizations claim that they wish to serve in the military for patriotic reasons,<sup>32</sup> but this is suspect because of the general unpopularity of the Vietnam War. There is a strong possibility that the type of mili-

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28. S. Misc. Doc. No. 241, *supra* note 26, at 4-5.

29. Alverson, *U.S. Homosexuals Gain In Trying to Persuade Society to Accept Them*, Wall Street Journal, July 17, 1968, at 1, col. 1; 78 NEWSWEEK, August 23, 1971, at 45; N.Y. Times, June 28, 1971, at 23, col. 3.

30. *War Role Sought for Homosexuals*, N.Y. Times, April 17, 1966, at 12, col. 1.

31. J. GERASSI, *THE BOYS OF BOISE*, 100-01 (1966).

32. N.Y. Times, *supra* note 30.

tary discharge and stigma of not having served, which could affect the ability of a homosexual to earn a living, motivates the patriotic stance. But if the homosexual was a good or superior soldier in the Greek city-state,<sup>33</sup> it is possible that he can serve with distinction today.

During World War II, homosexuals were dishonorably discharged from the military. In 1943, the Army processed 20,620 constitutional psychopaths, of which 1,625 were classified as homosexuals.<sup>34</sup> Later, the official policy of the military was somewhat liberalized; those "caught in the act" or admitting homosexual acts were still given a dishonorable discharge, but others were granted an honorable discharge.<sup>35</sup> After World War II, enlisted men who could not adapt because of homosexual tendencies were given an honorable discharge if no sexual offense was committed while in service.<sup>36</sup> The Army still felt that homosexuals were not good soldiers because they were unreliable, sought special favors, negatively influenced the "normal" soldier, and were susceptible to blackmail.

Most homosexuals, active or inactive, waltz through life undetected, and it seems reasonable to presume that they also serve in the military undetected. Thus, the change in policy was probably unimportant for the bulk of homosexuals in the military. But to those detected or admitting homosexuality, leaving the military without an honorable discharge signals harassment when seeking employment. After World War II and the undeclared wars in Korea and Vietnam, veterans received job preferences, bonuses, and free education, and a veteran with a dishonorable or undesirable discharge suffered.

The typical soldier accused of homosexual behavior or tendencies leaves the military without a fight, accepting a "dishonorable" or "other than honorable" discharge.<sup>37</sup> Rarely would the accused seek a reversal of the military decision and an "honorable" discharge. But in *Clackum v. United States*,<sup>38</sup> a female soldier was ushered out of the military with an other than honorable discharge, which falls between an honorable and a dishonorable discharge. Air Force regulations in effect

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33. D. WEST, *THE OTHER MAN: A STUDY OF THE SOCIAL, LEGAL AND CLINICAL ASPECTS OF HOMOSEXUALITY* 25-29 (1955).

34. Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 466 (1969).

35. *Id.* at 467.

36. *Id.*

37. Williams and Weinberg, *The Military, Its Processing of Accused Homosexuals*, 14 *AM. BEHAVIORAL SCIENTIST* 203 (1970).

38. *Clackum v. United States*, 296 F.2d 226 (Cl. Ct. 1960).

provided that a summary discharge<sup>39</sup> was proper without establishing, by acceptable evidence, homosexuality. The female soldier was given a psychiatric examination, lasting for half an hour, and a diagnosis of "sexual deviate manifested by homosexual" *tendencies* was made.<sup>40</sup> The court ordered that the other than honorable discharge be replaced by an honorable discharge because the "Air Force has the undoubted right to discharge her . . . for any reason or for no reason . . . [to] preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties."<sup>41</sup>

The court criticized the summary discharge, a military procedure designed to expedite justice, because of the lack of due process. It is unthinkable, even unprofessional, that a psychiatrist can decide in half an hour that a person is a latent homosexual, without substantiation, and the military drum the victim out of service without a hearing. The court was aware of the fact that the less than honorable discharge would handicap the plaintiff in the future. The court managed to achieve an equitable solution by finding the procedure unfair.

Most homosexuals are given an administrative or summary discharge, waiving their right to a full hearing. These boards are not required to follow court procedure, and many released with less than an honorable discharge would "win" if their cases were brought before a military tribunal.<sup>42</sup> Rather than face the publicity of a full hearing, many simply accept a dishonorable or other than honorable discharge.

### *Government Employment*

Minorities facing hostility in the United States have seen some change, and the homosexual hopes to eventually benefit as another minority group. Black organizations promote the "Black is Beautiful" slogan to instill pride and a sense of community. To a lesser extent, Mexicans, Jews, and Italians have undertaken similar promotions. Homophobic organizations are now conducting similar drives to instill

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39. Without a hearing. *Id.*

40. 296 F.2d at 226.

41. *Id.* at 228. For what appears to be a contrary decision, see *Grant v. United States*, 162 Ct. Cl. 600 (1963).

42. Williams and Weinberg, *The Military, Its Processing of Accused Homosexuals*, 14 AM. BEHAVIORAL SCIENTIST 212-15 (1970).

self-respect in the homosexual and gain public acceptance.<sup>43</sup> Homosexuals often seek confrontation and fair play, no longer content to wage defensive actions like providing bail bond, legal aid, etc. Instead, they sponsor offensive legal programs, political involvement, open and well-publicized discussions, picketing, etc.<sup>44</sup>

A recent editorial appearing in *The Washington Post* stated:

Persecution of homosexuals is as senseless as it is unjust. They may have valuable gifts and insights to bring to public service. If they are qualified for a job in terms of intelligence, experience and skill, if they conduct themselves, like other employees, with reasonable circumspection and decorum, their private sexual behavior is their own business; it is none of the government's business so long as it does not affect their independence and reliability. Like anyone else, they have a right to privacy, a right to opportunity and a right to serve their country.<sup>45</sup>

*The New York Times* reports change in public employment policy in New York City during 1966.<sup>46</sup> Based on these changes, known homosexuals are eligible for employment. It was reported:

In the past, an investigator could reject an applicant if "by his appearance, actions, or attitudes he appeared to be a homosexual," a spokesman said.

"Now, if he gives us the impression that he can do the job, and has all the other qualifications, we say he should be hired," the spokesman continued.

These changes in hiring procedures were made quietly and without public notice. . . .<sup>47</sup>

However, the homosexual was not to be hired in a job requiring contact with young people or with people easily "swayed." This policy did not, evidently, extend to the acknowledged or convicted homosexual. It was a limited change, important because it was a beginning. The 1966 employment policy was changed in 1969, when the Civil Service Commis-

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43. *Homosexuals Proud of Deviancy*, *Medical Academy Study Finds*, N.Y. Times, May 19, 1964, at 1, col. 2.

44. *U.S. Homosexuals Gain in Trying to Persuade Society to Accept Them*, Wall Street Journal, July 17, 1968, at 1, col. 1; *Homosexuals Ask Candidates' Ideas*, N.Y. Times, August 19, 1968, at 21, col. 1; *Criticism by Two Officials at Columbia Anger Leaders of Student Homophile League*, N.Y. Times, May 11, 1967, at 58, col. 2.

45. *Editorial*, *The Washington Post*, Feb. 2, 1971, editorial page.

46. *City Hires Parolees in Change of Policy*, N.Y. Times, Jan. 7, 1967, at 1, col. 4.

47. *Id.*

sion in New York City decided that suspected homosexuals could not be barred from any job.<sup>48</sup> The policy shift was made after two men, suspected homosexuals, were denied jobs as caseworkers in the Department of Welfare. Contending that they were not homosexuals, the two sued in a federal district court, claiming an abridgement of due process of law. In a settlement approved by the court—the case was not decided on the merits—the Commission issued the following statement:

The City of New York does not have a policy of absolute disqualification for homosexuality. The only exclusion it utilizes are those provisions which authorize disqualification for either mental or physical disability or for guilt of a crime or infamous or notoriously disgraceful conduct. Each case of homosexuality is carefully examined to determine whether or not it falls into any of these categories.

Policy dictates that with reference to a homosexual applicant, the commission would be required to determine the personal qualities reasonably considered indispensable to the duties of the position, and then to reasonably determine whether the applicant's condition is inconsistent with the possession of these qualities to the extent of rendering him unfit to assume the duties of the position.

. . . [a]n admitted homosexual, when the acts are frequent and recent would not be qualified for the position of Correction Officer, whose duty it would be to guard prisoners in one of the city penitentiaries.

Nor would such a person be probably qualified as a children's counselor or playground attendant. . . .<sup>49</sup>

Since 1969, suspicion without proof should not bar employment in sensitive city positions. However, the admitted or proven homosexual could be, or even has a right to be, employed in city jobs not considered sensitive.

Minorities, the Catholic, Jew, and Black, tend to be drawn to the city. The homosexual also gravitates to the city, where employment opportunity is greater, to be with others with similar interests, and to "get lost" in the huge and impersonal mass. As homosexuals surface and become more militant, it is in the large city, in the main, that open action is taken (as did the Catholic, Jew, and Black). New York, San Francisco and Chicago today show more tolerance for the homosexual, a toleration slowly spreading to the government employer. Ultimately, the same

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48. *City Lifts Job Curb for Homosexuals*, N.Y. Times, May 9, 1969, at 1, col. 2.

49. *Id.* at 23, col. 1.

pressures will reach the private employer. New York, a minority battleground, has always been the bellwether for *avant garde* legislation and policy, subsequently followed elsewhere.<sup>50</sup>

Federal employment is particularly important, not only because of the mammoth bureaucracy, but because of the extensive publicity and its snowballing influence. Following public opinion and religious influence, the federal government has, to put it mildly, discouraged the employment of homosexuals, advancing the following reasons:

1. The practising homosexual violates local and state laws.
2. Homosexual love is immoral, condemned by religion and society.
3. Homosexuals are prone to blackmail.
4. Homosexuals are not emotionally stable.
5. Homosexuals exert a corrosive and undesirable influence upon fellow employees, contaminating the government office.
6. Homosexuals are immoral.
7. Employing one homosexual means that others will be drawn. Thus, the government must avoid becoming a "beehive" of homosexual activity.
8. Homosexuals are effeminate, always looking for playmates among boys and young men.<sup>51</sup>

This standardized rationale merits comment. While the practicing homosexual violates the criminal laws in most states, the accused is presumed innocent until proven guilty. Even if guilt is established, people who have served their sentence need employment. Furthermore, the heterosexual playboy violates state law without experiencing employer rancor. Blackmailing would end if homosexuals were permitted to operate openly. While some homosexuals are emotionally unstable, others are well adjusted or no more emotionally disturbed than the heterosexual employee.<sup>52</sup> The homosexual cannot exercise a substantially corrosive influence if society continues to find sexual inversion distasteful. Few homosexuals are effeminate and an unwritten code of ethics may prevent them from pursuing the young.<sup>53</sup> In a nutshell, the reasons advanced by

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<sup>50</sup> For example, New York, in 1945, passed the first fair employment law. See 8 BNA FAIR EMPLOYMENT PRACTICE MANUAL 451:875 (1971).

<sup>51</sup> S. MISC. DOC. NO. 241, *supra* note 26, at 3-5.

<sup>52</sup> Kinsey did not consider homosexuality as pathologic. See I. BIBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 304 (1962); see also Hooker, *Male Homosexuality in the Rorschach*, 22 J. OF PROJECTIVE TECHNIQUES 33 (1958).

<sup>53</sup> Discussions with members of the Mattachine Society, Los Angeles, April, 1971.

government agencies to avoid hiring the homosexual are not, for the most part, supported by fact or logic.

The United States Civil Service regulations provide that criminal, immoral and disgraceful conduct are grounds for denying employment or discharge.<sup>54</sup> While those holding or applying for "insensitive" positions are not investigated in depth, they are discharged or not hired if proof or even a whisper of homosexual behavior is uncovered.<sup>55</sup> As stated in 1966 by Mr. Macy, chairman of the Civil Service Commission, "[i]f an individual applicant were to proclaim publicly that he engages in homosexual conduct, that he prefers such relationships, that he is not sick or emotionally disturbed . . . the Commission would be required to find such an individual unsuitable for federal employment."<sup>56</sup> Mr. Macy further stated that "evidence showing . . . a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct."<sup>57</sup> This latter contention is difficult to square with actual practice.

Applicants for "sensitive" positions at the Atomic Energy Commission, Department of State, and Federal Bureau of Investigation, to mention some, are thoroughly investigated, and homosexuals, actual or suspected, are routinely excluded from employment.<sup>58</sup> Emphasizing the federal policy on hiring, the Subcommittee on Investigations for the Committee on Expenditures concluded that "it should be borne in mind that the public interest cannot be adequately protected unless responsible officials adopt and maintain a realistic and vigilant attitude toward the problem of sex perverts in the Government. To pussyfoot . . . will allow some known perverts to remain in Government. . . ."<sup>59</sup> In Appendix III, the Subcommittee listed cases of reported sex perversion and few, if any, involved posts or agencies vital to national security.<sup>60</sup>

Substantial sums of money are spent each year by federal agencies to investigate employees or prospects. After years of accumulation, the Civil Service Commission, Federal Bureau of Investigation, and other

54. Exec. Order No. 10450, 5 C.F.R. § 731.201 (April 27, 1953).

55. *U.S. Homosexuals Gain in Trying to Persuade Society to Accept Them*, Wall Street Journal, July 17, 1968, at 1, col. 1.

56. Maddocks, *The Homosexual and the Law*, 34 SOCIAL ACTION 5, 11-12 (1967).

57. *Id.*

58. Parker, *Homosexuals and Employment*, at 8, in *ESSAYS ON HOMOSEXUALITY*, ESSAY NO. 4 (1970).

59. S. Misc. Doc. No. 241, *supra* note 26, at 21.

60. *Id.* at 25.

agencies are repositories for millions of dossiers, fountains of personal information. Much of this information is unverified, based on allegations of friends, acquaintances, enemies, experts, generalists, the knowledgeable and unknowledgeable, etc. It is claimed that this hit-and-miss type of information is vital to national security, and homosexuals and companions are properly excluded from "sensitive" positions based on this data.<sup>61</sup> The local personnel officer and agency director are in a position to bar "undesirables" without challenge.

Defections by homosexuals to foreign countries with vital data have received considerable publicity. While some defectors were English citizens, the incidents were widely publicized in this country, not only because of the sensationalism, but because of the need to press home the point that the maintenance of vigilance is essential. William J. Vassall, an acknowledged homosexual, was employed for many years by the British Admiralty.<sup>62</sup> After being photographed in Russia by Russian agents while participating in a sexual orgy, Vassall was forced to supply secret information. The press pointed out that Vassall was sent to Russia in spite of his "gay" reputation.

Even more publicity was given to the defections to Russia by Guy F. De M. Burgess and Donald D. Maclean, homosexuals employed in the British Foreign Office.<sup>63</sup> While Vassall's fear of exposure led to the disclosure of confidential information, Burgess and Maclean were communist sympathizers in college and willingly cooperated with the Russian government; their homosexuality was not responsible for the defections.

William H. Martin and Bernon F. Mitchell, alleged homosexuals employed by the top-secret National Security Agency in the United States, disappeared behind the Iron Curtain.<sup>64</sup>

While caution is necessary when filling the "sensitive" post—homosexuals and *others* can be persuaded to spy or defect—there is less or no reason for denying employment to the professed but discreet homosexual. What seems to determine government policy is not national security but the general distaste for the homosexual. For example, the Office of Economic Opportunity has refused, without legislative en-

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61. Worsuop, *Homosexuality: Morals and Security*, in II EDITORIAL RESEARCH REPORTS 505, 510-12 (1963).

62. *Id.*

63. *Id.* at 513-15.

64. *Id.* at 510-12.

dorsement, to employ homosexuals in the poverty program.<sup>65</sup> To support the ban, the Office of Economic Opportunity cited its need to secure public support for the Job Corps.

The President and executive branch of government are authorized by Congress to establish civil service regulations implementing legislation calling for "efficiency."<sup>66</sup> The cornerstone of the federal legislation, "efficiency," is a much abused and ill-defined term. To assure efficient operation, the Civil Service Commission has taken an interest in the suitability of the homosexual for federal employment, a specific unmentioned by Congress in the enabling legislation. Congress also specified that civil service employees cannot be terminated unless necessary to promote "efficiency."<sup>67</sup>

There is little doubt that Congress, being interested in men of "character," intended to bar the homosexual from federal employment. The legislative call for federal "efficiency" and "character" is implemented by the Civil Service regulation discouraging the employment of the "[c]riminal, infamous, dishonest, immoral or notoriously disgraceful."<sup>68</sup> Disqualifying the homosexual from employment because of "inefficiency" is dubious unless broadly defined. Many homosexuals are well-qualified for government employment and their ability to perform satisfactorily on the job is unquestioned. Consequently, the Civil Service interpretation expands the traditional concept of "efficiency." If the homosexual affects the morale of other employees, their "efficiency" can be impaired. Practicing homosexuals do not violate laws in some states, but even there they are considered to engage in "immoral or notoriously disgraceful conduct," which prevents federal employment.<sup>69</sup> While some homosexuals are criminals, many lead a respectable life, except for sex, according to prevailing heterosexual standards. In the public eye, the homosexual is without "character," a position as old as the Hebrew and Christian religions and followed by government agencies. While "criminal" behavior and "character" are not cut from the same legal cloth, the two concepts are intentionally interrelated when considering hiring a homosexual.

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65. *Federal Job Corps to Exclude Youths Having Police Records*, N.Y. Times, Nov. 21, 1964, at 30, col. 2.

66. 5 U.S.C. § 3301 (Supp. III, 1968).

67. 5 U.S.C. §§ 7501(a) and 7512(a) (1967).

68. 5 C.F.R. § 731.201(b) (1971).

69. *Id.*

The private life of a government employee, or any employee for that matter, is entitled to protective shelter, whether for constitutional or other reasons, unless his work suffers. If the homosexual does not "carry on" in a federal facility (or, perhaps, publicly), the public interest in monitoring his private life is not discernible (with the possible exception of national security). The right to privacy has to be considered an essential goal, pierced only where a real, and not an imaginary, need exists. On federal premises during working hours, the Civil Service Commission rightfully maintains vigilance, barring all play, heterosexual and homosexual, and disruption. But this position is logical and fair only if "straight" and "gay" employees are treated evenly when digressions occur. Homosexuals cavorting in federal showers or bathrooms are unfairly punished for sexual play when the heterosexual offender is ignored.

A homosexual in ill-health is not entitled to federal employment—Congress authorized the Executive branch of government to set "health" standards which can affect "efficiency."<sup>70</sup> The physical well-being of all employees is of concern to the federal employer. However, the "efficiency" of a homosexual is frequently challenged on the ground of mental "health."<sup>71</sup> All homosexuals are believed to be mentally and emotionally unbalanced and in need of psychiatric care, and some analysts support this view.<sup>72</sup> The mental "health" of the homosexual is supposedly evaluated under the same standards as the "straight" employee, but in actual practice a dual standard operates. While the seriously disturbed cannot effectively handle a job, the homosexual is often under no greater emotional strain than the qualified "straight" employee; yet, the mental disequilibrium of the "gay" employee is presumably greater than others.

High morale in the government office, essential to "efficiency," is an elusive and much sought-after goal. Personnel directors, plying their trade, seek to eliminate unnecessary disturbance, sponsor bowling leagues, baseball and basketball teams, publish company magazines, and reward the outstanding and long-time employee, all in the name of capturing employee loyalty and improving morale. While the value of these programs is difficult to measure—they disappear and reappear in

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70 See note 66 *supra*.

71 *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl.), *cert. denied*, 397 U.S. 1039 (1969); *Morrison v. Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

72. I. BIBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 305-15 (1962).

new forms—it is claimed without a shred of evidence<sup>73</sup> that the homosexual in the plant injures employee morale. Whether the homosexual negatively affects the “efficiency” of other employees is a thesis that has not been proven. If not effeminate and if unknown, the homosexual employee cannot dampen morale and efficiency. Effeminate employees are not always homosexuals, a fact of life well-known to office employees in particular. Whether “straight” or “gay,” the effeminate employee has been known to promote morale, the butt of good-natured (?) humor.

Where the “gay” habits of the employee are known—it is more likely that they are suspect rather than known—there is some possibility that morale will suffer and efficiency be impaired. But this possibility is based on prejudice and ignorance rather than on hard information. Disapproval of the sex life of an employee does not always lead to a loss of “efficiency.” In fact, disapproval of an employee can lead to cohesiveness and pulling together of other employees that is otherwise absent. With the increased sexual liberty characteristic in today’s society, it seems less likely that a homosexual today can disrupt morale to the extent that he would have 50 or 100 years ago. Many government employees are college educated and less likely to be disturbed than those with less education.

Inefficiency is tolerated in many government offices (and private firms) and considerable effort is made to keep this “in the family.” In the large organization and particularly in white-collar employment, inefficiency is not easily pinpointed and proving disruption because of a known homosexual would be difficult. Congress, when it undertakes budgetary allocation and appropriation, is far more damaging to employee morale than an entire squad of homosexuals working in a government office. Anyone employed in a federal agency can testify to the damage caused by newspaper reports speculating that budgets will be cut, salary increases denied, etc. Yet, the Civil Service Commission seems to view the negative impact upon public employees of budgetary considerations as an unavoidable occupational hazard.

It is likely that easing the homosexual into public employment, free of notoriety, will not threaten morale and efficiency; a more serious threat is the public attitude. In fact, the hostility of the Civil Service Commission to employment of the homosexual may be due to what it perceives

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73. Parker, *Homosexuals and Employment*, at 15, in *ESSAYS ON HOMOSEXUALITY*, ESSAY NO. 4 (1970).

as the public attitude rather than other reasons advanced. If society is reluctant to accept the homosexual as a federal employee, the Civil Service Commission would be severely criticized in Congress and elsewhere. It was recently stated that:

Some homosexual employees, in certain situations, are less likely to undermine public confidence than are others. Public disapproval would probably be less if the Commission failed to dismiss a homosexual employee with many years of meritorious service than if it accepted an applicant. Homosexuals who restrict themselves to private acts are less offensive than those indulging in open solicitation. Clandestine homosexuals are less likely to arouse public hostility than those who openly profess their homosexuality. . . . The presence of homosexual employees in high level positions, in jobs requiring extensive public contact, in new programs apt to draw fire, or in rural areas with strong traditional values would be more detrimental to public confidence than employment elsewhere.<sup>74</sup>

Homosexuals or suspected homosexuals discharged from government employment are, generally, unwilling to risk exposure by turning to the courts for help. As a result, few homosexuals complain publicly. This may be changing.<sup>75</sup> The few cases which have come before a court will now be reviewed. After a refusal of employment or removal from an agency job, an appeal can be made to the Civil Service Commission and the federal district court (or Court of Claims). However, there is no right to petition the federal district court until the Civil Service Commission makes a decision.<sup>76</sup>

Few complaints are aired by the Civil Service Commission or the courts. The "gay" employee, like his counterpart in the military, seeks to avoid the publicity attending a grievance or court case and fails to seek redress. The old legal fable that government employment is a privilege and not a right, which means that the homosexual is not likely to win by fighting his removal, also prevents a legal contest. Furthermore, the doctrine of separation of powers among the executive, legislative, and judicial branches of government spells reluctance on the part of judges to question the hiring and retention policies of agencies.<sup>77</sup> While the legal

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74. Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1745 (1969).

75. Schumach, *On the Third Sex*, N.Y. Times, May 7, 1967, § 4, at 5, col. 1.

76. 27 FED. REG. § 550 (1960).

77. *Burnap v. United States*, 252 U.S. 512, 515 (1920); *Keim v. United States*, 177 U.S. 290, 296 (1900).

and constitutional rationale operating against the homosexual is currently in a state of transition and therefore the future course of events difficult to forecast, legal changes are taking place. Treading softly but, nevertheless, wielding a "big stick," courts have been hacking away at the fairness of the procedure used by federal agencies and the Civil Service Commission—the concept of procedural due process—rather than questioning the substantive right of homosexuals to employment.<sup>78</sup> From a public relations point of view, it is easier to convince society that procedures must be fair than to protect the substantive right of the homosexual to employment. What seems certain is that the tempo of court involvement will increase in the future because of the Mattachine Societies, Gay Liberation Party, and, less frequently, the American Civil Liberties Union.

A comment is in order to clarify and or muddle the distinction made between procedural and substantive due process of law. While these concepts are tossed about as though clearly defined, as a practical matter the distinction between procedural and substantive due process is somewhat fuzzy. For example, the Norris-La Guardia Act limiting the employer's use of the labor injunction is classified as a procedural law, regulating the issuance of an injunction in a federal district court.<sup>79</sup> As a practical matter, the substantive rights of the union and the employer are affected when an injunction is issued or refused. Should the federal injunctive procedure apply in a state court hearing where the federal substantive law controls? The homosexual who complains that his procedural rights have been damaged by a federal agency, clutches at the substantive right to hold a job and is often unconcerned with procedural due process. Since the acceptance of Keynesian economics and the federal commitment to full employment, is there a substantive right—the right of all homosexuals—to hold a government job? In essence, while the court decisions are based upon procedural due process, the substantive right of a homosexual to hold a government job is being determined. Because the decisions are restricted to discussions of procedural due process, it is difficult to evaluate the substantive changes that seem to be taking place. Furthermore, until the Supreme Court fixes authoritatively the responsibility of government to employees, conflicting opinions will emanate from state and federal courts. Attorneys representing

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78. *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), *cert. denied sub. nom.*, *Murray v. Macy*, 393 U.S. 1041 (1969).

79. 29 U.S.C. §§ 101 *et. seq.* (1964).

homosexuals jockey for advantage and sue in jurisdictions favoring their clients. Less favorable jurisdictions are bypassed when possible, and the Supreme Court, in the not-too-distant future, is going to be involved (it did agree to hear the *Dew* case, discussed *infra*, but an out-of-court settlement was reached, rendering the issue moot<sup>80</sup>).

Courts initially were unwilling to protect civil servants claiming a constitutional denial of procedural due process.<sup>81</sup> Even though the Civil Service Act and the supplemental regulations contained procedural safeguards and an employee could only be discharged "for cause," the courts refused to get involved, citing standardized generalities sometimes irrelevant to the particular case to support their lack of interest.<sup>82</sup> With obvious reluctance, the federal courts began to look at claims made by plaintiffs that the discharge was not "for cause," developing in the process a philosophy that the government employer must act in good faith, free of arbitrary or capricious decision-making.<sup>83</sup> While the early plaintiffs were not homosexuals, the door opened to permit the extension of the same safeguards. This limited protection was not too meaningful in the early stages because the courts would not question the judgment of the agency finding "cause."<sup>84</sup>

The legal change was gradual, a rather typical course of development. More and more government jobs opened, and local, state and federal employers hired a sizeable portion of the total work force. While government is small, its decisions cannot significantly affect prospective jobholders and court scrutiny, under these circumstances, may be undesirable. When government agencies hire large numbers of employees, a

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80. *Cert. granted*, 375 U.S. 904, *cert. dismissed*, 379 U.S. 951 (1964).

81. *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961); *Taylor and Marshall v. Beckham*, 178 U.S. 548 (1900); *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951); *Lynch v. Chase*, 55 Kan. 367, 40 P. 666 (1895); *McAuliffe v. Mayor of New Bradford*, 155 Mass. 216, 29 N.E. 517 (1892).

82. 5 U.S.C. § 7501 (1967); *Levy v. Woods*, 171 F.2d 145 (D.C. Cir. 1948); *Culligan v. United States*, 107 Ct. Cl. 222 (1946), *cert. denied*, 330 U.S. 848 (1947); *Golding v. United States*, 78 Ct. Cl. 682, *cert. denied*, 292 U.S. 643 (1934); *Levine v. Farley*, 107 F.2d 186, 191 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 622 (1940).

83. *Vigil v. Post Office Dept.*, 406 F.2d 921 (10th Cir. 1969); *Taylor v. Civil Service Comm.*, 374 F.2d 466 (9th Cir. 1967); *Brown v. Zuckert*, 349 F.2d 461 (7th Cir. 1965), *cert. denied*, 382 U.S. 998 (1966); *McTiernan v. Gronouski*, 337 F.2d 31 (2d Cir. 1964); *Pelicone v. Hodges*, 320 F.2d 754 (D.C. Cir. 1963).

84. *Bishop v. McKee*, 400 F.2d 87, 88 (10th Cir. 1968); *Studemeyer v. Macy*, 321 F.2d 386 (D.C. Cir. 1963), *cert. denied*, 382 U.S. 834 (1965); *Eustace v. Day*, 314 F.2d 247 (D.C. Cir. 1962); *Bailey v. Richardson*, 182 F.2d 46, 62 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

*laissez faire* approach by the courts toward the executive branch of government is less satisfactory.

In *Dew v. Halaby*,<sup>85</sup> the plaintiff, after 20 months of satisfactory service, was dismissed from the Federal Aviation Agency for past homosexual acts. The plaintiff, when suit was brought, was 26 years of age, married and a father, and the homosexual conduct had taken place when he was 18 years of age. Because the Civil Service Commission reconsidered and rehired the plaintiff, the Supreme Court dropped the case after agreeing to hear it.

*Dew*, in terms of the broad issue, is not the best type of case to test the public employment rights of a homosexual. As previously mentioned, homosexuality is more likely to occur in the young who tend to outgrow this phase than in the mature person. The plaintiff was being punished for conduct occurring in the past, without a claim that wrongdoing occurred while an employee. There was, in addition, evidence of a psychiatric examination indicating that the plaintiff was a well-adjusted family man with no sign of reverting to past practices. All this took place at a time when the Civil Service Commission claimed it did not expel homosexuals with many years of service or fire employees held guilty of minor crimes in the past.<sup>86</sup>

Since the plaintiff's efficiency rating was satisfactory, the government could not claim inefficiency. Why was he discharged? Evidence was not presented that the plaintiff's presence damaged morale; in fact, it is unlikely that his fellow employees knew of his past. The plaintiff did not fill a "sensitive" post and could not have been considered a security risk. Even if classified as a security risk, an even-handed solution would be to transfer the plaintiff to a less sensitive position. Was the agency concerned with the need to maintain public confidence? If so, no evidence to support such a possibility was presented. Yet the court of appeals followed the decision of the Federal Aviation Agency and the Civil Service Commission because evidence of a denial of due process was not presented. A dismissal based on a charge totally unsupported by evidence is a denial of procedural due process, allowing the court to avoid consideration, if it sees fit, of the substantive employment rights of the plaintiff. Since the law is in a transitional stage and *stare decisis* sup-

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85. 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 375 U.S. 904, *cert. dismissed*, 379 U.S. 951 (1964).

86. Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1744-46 (1969).

ports the thesis that there is no right to a government job, tactically the safest legal course is to find a denial of procedural due process (and not substantive due process). But the court in *Dew* could not find any government wrongdoing in 1963.<sup>87</sup>

Why was the plaintiff reinstated by the Civil Service Commission after the Supreme Court granted *certiorari* in 1964? It does not seem likely that the federal government had shifted to a policy more favorable to the plaintiff. What appears likely is that the Commission felt that its decision could not be supported by any evidence and did not wish to risk an upheaval of its policy which could protect other employees.

On the petition for review to the Supreme Court, the attorneys for the plaintiff pointed to the Veterans' Preference Act which provides that veterans can be discharged from federal employment to "promote . . . efficiency. . . ." and for no other reason.<sup>88</sup> Thus, the claim was made that the issue was not the scope of judicial review but the meaning of the Veterans' Preference Act. The rebuttal submitted by the respondent was partially based on the notion that a court should not question the judgment of an agency which decides that an employee is inefficient.<sup>89</sup> But nowhere does the respondent submit evidence establishing the inefficiency of the plaintiff.

The same court of appeals decided *Norton v. Macy*,<sup>90</sup> where the plaintiff was discharged from his federal job for homosexual behavior. Picking up a hitchhiker in his automobile, the plaintiff invited him to his apartment for a drink—to the stranger a sign of a homosexual advance. The plaintiff was stopped by a police officer for exceeding the speed limit, handed a traffic citation and released. Notified of the incident, the National Aeronautics and Space Administration discharged the plaintiff. The plaintiff denied making a play for the stranger, but admitted to homosexual tendencies in the past when under the influence of alcohol. The Civil Service Commission upheld the discharge of the plaintiff as an efficiency measure.<sup>91</sup> In court, the plaintiff claimed that there was insufficient evidence to deduce that he had made a play for the stranger and doubts were expressed that government "efficiency" would be promoted by his discharge. Upsetting the legal "apple cart" and

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87. *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963).

88. Petitioner's Brief for Certiorari, No. 36, *Dew v. Halaby*, 376 U.S. 904 (1964).

89. Respondent's Brief in Opposition to Certiorari at 9-10, *Dew v. Halaby*, 376 U.S. 904 (1964).

90. 417 F.2d 1161 (D.C. Cir. 1969).

91. *Id.* at 1163.

departing from the traditional position, the appellate court in *Norton* ruled that it could review the government decision to determine whether the plaintiff was discharged for good reason, substantiated by evidence.<sup>92</sup> Prior to *Norton*, courts were reluctant to challenge a discharge.<sup>93</sup> The court carefully pointed out that the plaintiff did not hold a sensitive position.<sup>94</sup>

While the plaintiff admitted to homosexual tendencies when intoxicated, the evidence was insufficient to conclude that a sexual advance was made on the night of the plaintiff's arrest. The court, evidently, did not consider past acts of homosexual behavior as evidence of a current intent. *Norton* states that a homosexual cannot be thrown out of a civil service job for past immoral behavior, even if admitted. While the evidence to justify a discharge was inconclusive, the Civil Service Commission had not been criticized in the past for discharging admitted homosexuals. The court of appeals seems to have taken the position that a homosexual, at least in the absence of current indiscretion established by acceptable evidence, has a right to federal employment.<sup>95</sup> However, since the Civil Service Commission has indicated a reluctance to discharge long-time employees and past indiscretions are ignored, the court simply forced the government to follow established policy. Did the court in *Norton* decide a procedural or substantive due process question?

The facts in *Scott v. May*<sup>96</sup> are closer to *Dew* than *Norton*. In *Norton*, the plaintiff admitted to a homosexual past and a future probability of such acts when under the influence of alcohol. While there had been indiscretion in the past, all evidence in *Dew* pointed to a total commitment to heterosexual play in the near past and foreseeable future. The *Scott* case went before the courts on two separate occasions.<sup>97</sup> In *Scott I*, the court of appeals, in a 2 to 1 decision, ruled in favor of the plaintiff who had been disqualified from federal employment because an investigation showed that he was a homosexual. However, no specific evidence of homosexual activity was cited. The appellate court was concerned with the ability of the plaintiff to secure public or private employment

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92. *Id.* at 1165-67.

93. Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEORGETOWN L.J. 632, 633-34 (1969-70).

94. 417 F.2d at 1166.

95. *Id.* at 1165-66.

96. 349 F.2d 182 (D.C. Cir. 1965).

97. *Id.* and 402 F.2d 644 (D.C. Cir. 1968).

in the future. Thus, an applicant cannot be denied federal employment or be discharged from his position without evidence of specific acts of past homosexual behavior.<sup>98</sup> To some extent, *Scott I* and *Norton* are contradictory. Judge Bazelon, presenting the majority viewpoint in *Scott*, also felt that the Commission must show that homosexuality impairs efficiency. This is dictum because there was no evidence of specific sexual acts.<sup>99</sup> But in a concurring opinion Judge McGowan differed, holding that the government was not required to establish inefficiency.<sup>100</sup> There is an important difference between the viewpoints of Judge Bazelon and Judge McGowan—homosexuals are entitled to a federal job according to Judge Bazelon because it is unlikely that efficiency would be impaired. Judge McGowan, on the other hand, holds that an established homosexual is not entitled to federal employment even if he is efficient.

*Norton* and *May* suggested increased court investigation in the future of the right of an employer, public or private, to monitor the private life of an employee. Judge Bazelon in both cases showed greater interest, express or implied, in the right to privacy than in the government's concern with sex. Dissenting Judge Burger in *Scott I* presented the traditional view that the judiciary should not meddle in executive affairs, that efficiency is undermined because a homosexual can be blackmailed, and the federal service should not be turned into a haven for the deviate.<sup>101</sup>

Based on *Scott I*, the plaintiff was rehired and later discharged when he failed to complete a questionnaire inquiring whether he was a homosexual. Returning to the judicial battleground, the plaintiff sought reinstatement. The government tried to avoid a consideration of the broad issue, whether homosexuals could be refused public employment, by claiming that the plaintiff was discharged for refusing to answer a proper question. Supporting the plaintiff, the court felt that the plaintiff's failure to answer was used as a pretext to justify discharge for unproven homosexual acts.<sup>102</sup> It would have been helpful if the court had decided whether a job applicant could refuse to answer sexual questions. This may be of particular significance in Oregon, Illinois and Connecticut where homosexual acts are no longer a crime and the position can be

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98. 349 F.2d at 184-85.

99. *Id.*

100. *Id.* at 185-86.

101. *Id.* at 187-89.

102. 402 F.2d at 647-48.

taken that questions relating to sex are unjustifiable invasions of the right to privacy.

In *Vigil v. Post Office*,<sup>103</sup> the plaintiff, working for the Post Office as a janitor, was arrested and admitted engaging in a homosexual act in the back seat of a car. He was convicted in Denver, Colorado, for violating a local ordinance and was discharged from his job. While claiming that he was drunk, the arresting officers said the plaintiff was sober. The court mentioned *Scott*, but not *Norton*, distinguishing the two cases on the basis of a vague versus a specific charge of homosexual behavior and held that the Post Office rightly decided to discharge the plaintiff.<sup>104</sup> A concurring opinion said that the plaintiff was dismissed because of a criminal conviction and not because of homosexuality.<sup>105</sup>

Balancing, a judicial art much practiced, is necessary when weighing a claim of denial of due process. Walking the tightrope requires considerable skill and knowledge, and not only is the plaintiff in need of protection, but there can be a vital public interest as well. It is difficult in *Dew*, *Norton*, and *Scott* to show an overriding public interest. In none of the cases did the plaintiff's homosexuality (or heterosexuality) affect performance on the job. There was no evidence that the plaintiffs could be blackmailed or that vital government information could be supplied if blackmailed. Furthermore, husbands on the "prowl" and gamblers are as subject to blackmail as the homosexual, and there is some question as to whether federal agencies routinely rule out the employment of all employees prone to blackmail.

Another practical approach has been officially unwrapped to protect homosexuals in public employment. In *Dew*, *Scott*, and *Norton*, there was no specific evidence of homosexual action of current vintage. But in a case involving a University of Minnesota employee, the plaintiff admitted that he was a practicing homosexual.<sup>106</sup> The plaintiff, a librarian, was informally hired, and prior to formal acceptance by the Board of Regents, applied for a license to marry a male student at the law school. After a hearing and personal appearance before the Board of Regents, the plaintiff was not hired. While admitting that he was a homosexual, the plaintiff denied practicing sodomy, a crime in Minnesota. The Board conceded that the plaintiff was a competent librarian,

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103. 406 F.2d 921 (10th Cir. 1969).

104. *Id.* at 924.

105. *Id.* at 925.

106. *McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971).

but that his admission to being a homosexual was tantamount to confessing an act of sodomy, making him unfit for public employment. The court carefully noted that the employment application used by the University of Minnesota did not ask prospective employees questions pertaining to sex—*i.e.*, the plaintiff did not lie—and a librarian cannot injure national security.<sup>107</sup>

Turning to *Scott* as precedent, the district court in *McConnell* took the position that “an admission that one is a homosexual, standing alone and without any evidence of any practice thereof will not justify the Civil Service Commission (and the Board of Regents) in refusing to certify him as eligible for employment based on a determination of ‘immoral conduct.’”<sup>108</sup> But in *Scott* the plaintiff declared he was not a confirmed homosexual, while in *McConnell* the plaintiff admitted being “gay” and sought to marry another male. Thus, there is evidence clearly showing that the plaintiff was and would continue as a practicing homosexual. *McConnell* has to be interpreted as a decision that the established homosexual is entitled to public employment. Unlike *Vigil*, the plaintiff in *McConnell* had not been convicted of a crime.

The court in *McConnell* further noted that judges in the past had let the government decide whether a job applicant was a homosexual, but the challenge was proper on the question of procedural due process.<sup>109</sup>

Expressly pointing to the shift in recent decision, the district court in *McConnell* concluded that:

[T]he courts have abandoned the concept that public employment . . . is a mere privilege and not a constitutionally protected right . . . . Though by current standards many persons characterize an homosexual as engaging in “immoral conduct” . . . it seems clear that to justify dismissal from public employment . . . it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality . . . . The Regents are of necessity speculating and presuming. Plaintiff’s position will not expose him to children of tender years . . . . What he does in his private life . . . should not be his employer’s concern unless it can be shown to affect in some degree his efficiency in the performance of his duties . . . .<sup>110</sup>

The court was obviously referring to job performance as an efficiency

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107. *Id.* at 812.

108. *Id.*

109. *Id.*

110. *Id.*

factor and not the possible impact of hiring a homosexual on employees and the public. If the plaintiff was hired to work as a librarian in a grammar or high school, the public authorities could rightfully refuse employment. This rationale seems to be based on the unproven but often claimed notion that the homosexual exercises an evil influence over young boys and/or takes advantage of them sexually. In fact, there is considerable feeling that the young take advantage of the mature homosexual.<sup>111</sup>

It is difficult to evaluate the impact of *McConnell*, involving a public librarian in contact with young and old. What if the plaintiff had been hired to work in a university operated high school? Does the Minnesota court imply that there would be a right to discharge under these circumstances? The court seemed satisfied that young people at a university were less susceptible to influences than those of high school age. The court took the same viewpoint as the New York City Civil Service Commission.<sup>112</sup> This type of thinking, presently in the *avant garde*, still reflects society's hostility to the homosexual who does not seek to spread his lifestyle to the young. But this commonly held notion, formalized into the decision-making process, handicaps the homosexual seeking public or private employment.

The Minnesota court did not take the position that a homosexual was entitled to public employment, but it supported constitutional procedural protection; the plaintiff had "a right not to be discriminated against under the Fourteenth Amendment due process clause."<sup>113</sup> The plaintiff was unquestionably seeking publicity by applying for a marriage license as an exercise of the right of free speech—a point not discussed by the court. The court issued an injunction under the Civil Rights Act of 1871, forcing the Board of Regents to hire the plaintiff. Because the plaintiff had moved to Minnesota, quitting his previous job, there was no other adequate remedy, according to the court. It remains possible that in another case, absent the publicity and unavailability of another job, the court might award damages. Yet, the lower court in *McConnell* seemed to go beyond this point.

The Eighth Circuit Court of Appeals reversed the *McConnell* decision on October 18, 1971, taking a more traditional position.<sup>114</sup> Starting with

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111. Based on interviews with members of the Mattachine Society, Los Angeles, April, 1971.

112. *City Lifts Job Curb for Homosexuals*, N.Y. Times, May 9, 1969, at 1, col. 2.

113. 316 F. Supp. at 814.

114. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

the premise that the Board of Regents for the University of Minnesota has a right to control university affairs unless its actions are arbitrary or capricious, the appellate court felt that the right of judicial review is limited.<sup>115</sup> The court noted:

. . . [I]t is at once apparent that this is not a case involving mere homosexual propensities . . . . Neither is this a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is instead . . . a case in which the prospective employee demands . . . the right to pursue an active role in implementing his unconventional ideas . . . . We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands. . . .<sup>116</sup>

The court of appeals was concerned with the "activist role" and "unconventional ideas", which certainly raise some important constitutional issues. Does a public employer have a right to exclude employees on these grounds?

*Morrison v. State Board of Education*<sup>117</sup> falls factually between *Dew* and *McConnell*. The plaintiff in *Morrison*, certified to teach in California high schools, was employed for some time without incident either in or out of school. The plaintiff had no criminal record, although he admitted to a homosexual problem at the age of 13. While counseling a fellow teacher experiencing marital difficulty, the plaintiff and colleague engaged in homosexual play upon four occasions. Six years passed since the incidents occurred and the plaintiff asserted that he had not engaged in homosexual play since then. The California law makes sodomy, fellatio, solicitation, loitering near public toilets, and exhibitionism illegal, but other forms of homosexual play are not outlawed.<sup>118</sup>

Citing immoral conduct as the reason,<sup>119</sup> the Board of Education in *Morrison* revoked the plaintiff's permit to teach in California. California law provides for the revocation of a teaching license without a hearing if one is convicted of a designated sexual crime,<sup>120</sup> but a hearing must be held if there is no conviction. The California Supreme Court, with

115. *Id.* at 195.

116. *Id.* at 196.

117. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

118. CAL. PENAL CODE §§ 286, 288a, 314, 647 (1971).

119. The court in *Morrison* decided that there is no clear cut distinction between "immoral" and "unprofessional" conduct, reasons for revoking a teaching certificate.

120. The constitutionality of such a proviso is doubtful.

Justice Tobriner writing the majority opinion, reversed the lower courts in favor of the plaintiff, holding that what is tabbed "immoral" must be judged on a case-to-case basis.<sup>121</sup> Following *Norton*, Justice Tobriner felt that acts labeled "immoral" in the past are not necessarily "immoral" today. Not only was the conduct of the accused homosexual to be considered, but Justice Tobriner felt, *a la Norton*, that a court can review the decision of a state agency. Furthermore, the court in *Morrison*, again following *Norton*, ruled that "[t]he private conduct of a . . . teacher, is a proper concern of those who employ him only to the extent" that his teaching is impaired, emphasizing the right to privacy.<sup>122</sup>

Based on *Norton* and *Morrison*, a local and federal employee accused of homosexuality is protected to the following extent:

1. Homosexuality alone is not sufficient reason to justify, with or without a hearing, exclusion from a government job.
2. Decisions made by state and federal agencies are reviewable to assure fair play, part of procedural due process.
3. The conduct in private of a public employee does not bar employment unless his performance on the job is affected.

Not only do concepts of immorality change but different groups hold different views. For this reason, courts review decisions made by administrative agencies which are prone to political pressure. However, Justice Tobriner may not have been on solid ground when he went on to say "[w]e cannot believe that the Legislature intended to compel disciplinary measures against teachers who committed such peccadillos if such conduct did not affect students or fellow teachers . . . ." <sup>123</sup> Given the typical legislative attitudes, it is doubtful whether job protection was intended for the homosexual.

Taking a position more extreme than the lower court in *McConnell*, the majority in *Morrison* said that the following factors should be considered when weighing morality:

1. Effect of conduct on students and teachers.
2. Whether the misconduct is of recent vintage.
3. Type of teaching certificate held by the accused.
4. Presence or absence of extenuating circumstances.
5. Likelihood of reoccurrence.

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121. 1 Cal. 3d at 220, 461 P.2d at 379, 82 Cal. Rptr. at 179.

122. *Id.* at 224, 461 P.2d at 382, 82 Cal. Rptr. at 182.

123. *Id.* at 225, 461 P.2d at 383, 82 Cal. Rptr. at 183.

6. The possible chilling effect of punishment on the constitutional rights of teachers.<sup>124</sup>

Judge Tobriner enunciated criteria concerning teachers but the same criteria could apply to other kinds of government employment.

An interesting point in California and other states is the so-called "expunge" statute designed to protect the ex-convict. Under the California statute, a defendant sentenced to probation may, after completion of his probation period, secure from the court the dismissal of the charges against him, "and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted . . . ." <sup>125</sup> In *Taylor v. U.S. Civil Service Commission*,<sup>126</sup> the plaintiff, employed by the Air Force, was discharged as an "efficiency" measure when two past convictions of the vagrancy-lewd law in California were uncovered. The plaintiff claimed that his prior convictions had been expunged under the California law, and he was, currently, "not guilty." The Civil Service Commission ruled that the two prior convictions were evidence of immoral conduct and justified the plaintiff's discharge. According to the Federal Court of Appeals, expunging the prior conviction did not establish innocence and the discharge was not capricious; the character of an employee can be determined by past convictions as they bear on current "efficiency."<sup>127</sup>

Federal jobs and administrative procedures are not controlled by state law, so it may not be necessary to follow a state law. However, the appellate court in *Morrison* did not consider this possibility, and the decision seems to stand for the proposition that an ex-convict, at least one held guilty of a sex crime, is not protected when denied a federal job in the name of "efficiency." The decision smacks of double jeopardy, imprisonment and subsequent economic punishment. In *Norton*, the court held that homosexuality is not the equivalent of "inefficiency" and *Dew* states that the past is irrelevant. Should the same result be reached if an ex-convict and an expunging statute are involved?

Courts differ and cases are distinguished on the basis of fact, but the prevailing opinion today is that past acts of homosexuality, standing alone, and general charges of wrongdoing, unsubstantiated by specific evidence, do not justify the discharge of a public employee.<sup>128</sup> Because

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124. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.

125. CAL. PENAL CODE § 1203.4 (1961).

126. 374 F.2d 466 (9th Cir. 1967).

127. *Id.* at 469-70.

128. *Vigil v. Post Office Dept.*, 406 F.2d 92 (10th Cir. 1969); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969); *Scott v. Macy*, 402 F.2d 644 (D.C. Cir. 1968); *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965).

the public considers the homosexual immoral, it can be anticipated that some courts will search for reasons to justify discharge.

One means of keeping the homosexual from a public job is to ask, on the employment questionnaire, whether he is "gay." Homosexuals have, in the past, refused to supply this information or lied. If the applicant refuses to respond, the courts would probably uphold the right of a government agency to this information even though irrelevant to efficiency and an invasion of privacy. In *Scott II*, the information was sought after the plaintiff was discharged, indicating an intent to exclude the homosexual.<sup>129</sup> But if sex information is requested prior to employment, the homosexual cannot refuse to answer unless there is a constitutional violation of the right to privacy.

Should the homosexual lie and deny his "gay" qualities, he is susceptible to discharge. Yet society forces the homosexual to lie—to admit that he is "gay" means economic suicide and the possibility of criminal prosecution.

Homosexuals are arrested and/or convicted for "gay" crimes. If they truthfully admit conviction, they will not be hired. If they lie, they can be discharged for supplying false information. It seems that fair employment legislation will be necessary, preferably at a federal level, to protect the homosexual from employment discrimination.

### *National Security*

In 1953, President Eisenhower issued Executive Order 10450 to protect the national security.<sup>130</sup> As could be anticipated, the security-risk category was broadly defined to include homosexuals, immoral people, felons, etc., all of whom were declared to be unsuitable employees. As a result of the decision in *Greene v. McElroy*,<sup>131</sup> the 1953 rules were declared invalid by the Supreme Court because the person seeking security clearance was inadequately protected.

The current rules, issued in 1960 by President Eisenhower as Executive Order 10865, reiterated the need for screening in positions affecting the national security and established broad safeguards for the person seeking job clearance.<sup>132</sup> Implementing Executive Order 10865, the Department of Defense issued Directive 522.06 in 1960, protecting the jobholder

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129. 402 F.2d at 645-46.

130. 18 FED. REG. § 2489 (1953).

131. 360 U.S. 474 (1959).

132. 25 FED. REG. § 1583 (1960).

handling classified information unless inconsistent "with the national interest."<sup>133</sup> While the national interest was not sublimated for the protection of the jobholder, the executive branch of government did establish the policy that the individual was entitled to some consideration. Of course, what is not "clearly consistent with the national interest" was not spelled out. Homosexuals were denied security clearance before and after 1960, by what is tantamount to a per se rule, because they participated in criminal or immoral conduct and were easy prey for the black-mailer.

An incident reported in the *New York Times* typifies the treatment accorded the homosexual under the 1960 regulations.<sup>134</sup> A young soldier, an admitted homosexual, carried an address book with the name of Benning Wentworth, a federal employee. Queried about his association with the soldier, Wentworth said that the former, while a civilian, made a pass at him which was rejected. Wentworth was discharged after his security clearance was taken away, a discharge which appears contrary to the holding in *Norton*. However, Wentworth admitted to being a homosexual, perhaps a fact distinguishing this case and *Norton*.

*Schlegel v. U.S.*<sup>135</sup> involved the plaintiff's loss of his civilian job with the Army, a job that did not entail the handling of classified information, after his security clearance was refused for an occasional fill-in job as a duty officer handling top secret messages. An investigation for clearance uncovered that the plaintiff had on a number of specific occasions participated in homosexual acts. One reason cited by the plaintiff to support his quest for job reinstatement, but not security clearance, was that the federal guidelines were violated. The guidelines provide:

- (2) Misconduct while off duty does not, in itself, serve as a basis for removal. There must be a showing that the misconduct affected the employee's performance . . . or the specific manner in which the misconduct reflected discredit upon the . . . Army . . . or the manner in which the misconduct was otherwise detrimental to the efficiency of the service.<sup>136</sup>

Key terminology protecting the jobholder is "[t]here must be a showing," whatever that means, of factors affecting the efficiency of or discrediting the military service. Since misconduct alone is not grounds for release from employment and the plaintiff was a veteran honorably

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133. 25 FED. REG. 14392 (1960).

134. *N.Y. Times*, Nov. 26, 1967, at 70, col. 3.

135. 416 F.2d 1372 (Ct. Cl. 1969).

136. C.P.R. S. 1.3-3c (2).

discharged from the military service, there had to be a "showing" that removal would promote efficiency.

While the various levels of hearing boards concluded that the plaintiff's efficiency had been impaired, the court refused to determine whether the evidence supported such a conclusion.<sup>137</sup> Since Department of Defense Directive 522.06 requires that the showing be made "clearly," it seems that tangible evidence must be produced to support the conclusion that efficiency was impaired. *Schlegel* can be viewed, because of the court's reluctance or inability to point to specific evidence of an impairment of efficiency, as support for the proposition that clear evidence is unnecessary. Instead, the court doted upon the three who testified that efficiency and morale would have been negatively affected, a future possibility, unless the plaintiff was discharged.<sup>138</sup> The testimony relied upon were conclusions unsupported by fact, hardly squaring with the Defense Department directive calling for clear evidence. The court then proceeded to cite the legal position that the decision of an administrative agency, absent a showing of a lack of good faith, could not be reviewed.<sup>139</sup>

*Schlegel* and *Norton* can be distinguished on the basis of jobs requiring security clearance and those that are not "sensitive." Yet this distinction is unrealistic, not only because the plaintiff in *Schlegel* was denied job clearance, but because he lost his non-sensitive post. In addition, the court in *Schlegel* claimed a distinction—in *Norton* there was only one unsubstantiated act of homosexuality, while a series of "gay" acts were established in *Schlegel*.<sup>140</sup> As a point of departure, in *Norton* the court ruled that it could evaluate administrative conclusions, to determine whether they were supported by evidence,<sup>141</sup> while in *Schlegel* the court decided that it was not authorized to go beyond the conclusion. Evidently, if there is some evidence to support the finding of homosexuality, the court was unwilling to question whether efficiency was impaired.

The concurring judges in *Schlegel* emphasized the need for security

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137. 416 F.2d at 1378.

138. *Id.* at 1374.

139. *Id.* at 1375.

140. *Id.* at 1378.

141. 417 F.2d 1161, 1164-65 (D.C. Cir. 1969).

precautions and the possibility that the Army would face public ridicule if the plaintiff was not fired. One of the concurring judges stated:

An agency is not necessarily wrong if it deems that good public relations favor efficiency, and that bad ones detract from it . . . . Nor is it absurd to fear that a public which loses respect for the employees of an agency will lose respect for the agency itself.<sup>142</sup>

Since the majority opinion did not establish injury to efficiency, the concurring judge tied efficiency to public respect, a concept difficult to support in light of standard definition.

The public and private employee can affect the national security. In *Adams v. Laird*,<sup>143</sup> the plaintiff, employed by a private employer as an electronics technician, enjoyed security clearance for seven years. Because of a subsequent denial of "Top Secret" clearance on the ground of homosexuality, the plaintiff also lost his lower level security clearance. There was evidence in *Adams* that the plaintiff had been a practicing homosexual all of his adult life, a distinguishing factor from *Norton*. While the plaintiff did not deny his homosexuality, contrary to *Norton*, he argued that clearance cannot be denied unless there is a clear and present danger to the government, which was not established. The court refused to adopt the plaintiff's position because the President can set standards for jobs affecting national security in the absence of a constitutional infringement.<sup>144</sup>

Since the plaintiff held a security clearance for seven years without incident, the likelihood that the plaintiff was a security risk was small. Since the risk may be greater in the "Top Secret" category, there may be greater need to respect the administrative decision. There may be less reason to support the administrative decision at the lower level of clearance. The dissenting judge favored remand "for a determination of the relationship between the . . . homosexual conduct and the ability of appellant to protect classified information" and "[g]eneralized assumptions that all homosexuals are security risks certainly cannot outweigh almost eight years of faithful service," a denial of due process and a bill of attainder.<sup>145</sup>

It should be borne in mind that the heterosexual has been far more frequently involved in espionage than the homosexual, and it is doubtful

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142. 416 F.2d at 1383.

143. 420 F.2d 230 (D.C. Cir. 1969).

144. *Id.* at 235-36.

145. *Id.* at 240-41.

that this is due to screening. Irvin Scarbeck turned secret documents over to his Polish mistress; Judith Coplon gave secret data to her Russian lover; Elizabeth Bentley, a confessed spy, admitted her love for a Communist agent, etc.<sup>146</sup> The preoccupation with the homosexual as a security risk seems unjustified, especially since he seldom holds a job in which he has access to vital information.

### *The Taft-Hartley Act*

Neither the Civil Rights Act of 1964 nor the Taft-Hartley Act mentions the homosexual. Although the former does not protect an employee from employment discrimination based on his homosexuality, the latter may offer some measure of protection. The Taft-Hartley Act does not cover public employees, and no cases have been found pertaining to the homosexual as a private employee; nevertheless, it could prove useful as a fair employment tool. Drawing an analogy, nothing in the Act or in the legislative hearings suggested that Blacks were entitled to protection from racial discrimination by an employer or union, but the influence of the Supreme Court and the shift in public opinion led the NLRB into the battle. Looking at the requirement of fair representation by a union<sup>147</sup> and the definitions of unfair labor practices,<sup>148</sup> the NLRB and courts were able to extend some protection to the black employee. It is 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. Such a move may be timely, based on the recent cases in federal courts involving public employees.

According to the Taft-Hartley Act, a job applicant can be turned away or an employee discharged by an employer for *any* reason other than to hit at a union.<sup>149</sup> Based on this position, an employer can lawfully discharge or refuse to hire a homosexual. However, the discharge of a "gay" employee presents a situation in which the NLRB could be by-

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146. Parker, *Homosexuals and Employment*, in *ESSAYS ON HOMOSEXUALITY*, ESSAY No. 4 (1970). Other cases of heterosexual espionage are reported therein at 18-19.

147. *Syres v. Oil Workers Union*, 350 U.S. 892 (1955).

148. *Hughes Tool Co.*, 147 NLRB 1573 (1964); *Local 1367, Longshoremens Union*, 148 NLRB 897 (1964); *Local 12, Rubber Workers Union*, 150 NLRB 312 (1964).

149. *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953); *Farmers Co-Operative Co.*, 102 NLRB 144, *rev'd*, 208 F.2d 296 (8th Cir. 1953); *American Bottling Co.*, 99 NLRB 345 (1952), *aff'd*, 205 F.2d 421 (5th Cir. 1953), *cert. denied*, 346 U.S. 921 (1954); *Magnolia Petroleum Co. v. NLRB*, 200 F.2d 148 (5th Cir. 1952); *NLRB v. W.C. Nabors Co.*, 89 NLRB 538 (1950), *aff'd*, 196 F.2d (5th Cir. 1952), *cert. denied*, 344 U.S. 865 (1952); *South Jersey Coach Lines*, 89 NLRB 1260 (1950).

passed in favor of arbitration. A large majority of collective bargaining agreements provide that an employee cannot be discharged except for "just cause," culminating in arbitration under an "all disputes" provision. The "just" discharge of a "gay" employee could be brought before an impartial arbitrator, providing the union requests arbitration.<sup>150</sup> Is an employee justly discharged because he is gay?

Whether arbitration constitutes a viable alternative to fair employment legislation is speculative. Union members and leaders hold little sympathy for the homosexual, as does society in general, and if an employer decides to discharge him, it is unlikely that the union will request arbitration. Unless the union acts in bad faith or engages in unfair representation, the homosexual cannot put the question of a "just" discharge before an arbitrator.<sup>151</sup> It is doubtful whether a court would intervene and order arbitration when a union fails to protect a homosexual. Yet, the failure to request arbitration could be viewed as discrimination, an unfair labor practice, or unfair representation.

The importance of bringing this issue before an arbitrator cannot be minimized. Arbitrators have shown greater interest in protecting the employee from discharge than the employer in deciding what is "just cause," and the homosexual, even with a criminal record, may be entitled to his job. Discharge is the capital punishment of the industrial world, and arbitrators are reluctant to impose this penalty, especially for the long-term employee. More and more arbitrators take the position that the employer has no right to look into the private life of an employee.<sup>152</sup> Few employers bother to punish the heterosexual offender, except for rape, and the arbitrator must take this dual standard into account when rendering an opinion involving the homosexual. Once again, an important consideration is getting the union to request that the discharge be submitted to arbitration.

Suppose an employer wishes to hire or retain a homosexual and the union demands his discharge. While the arbitration process generally accommodates the employee and union, the employer can also request arbitration. Admittedly, few employers "buck" a union by resorting to arbitration.

The employer is not obligated to succumb to the wishes of the union

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150. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

151. *Vaca v. Sipes*, 386 U.S. 171 (1967).

152. Kovarsky, *Discharges for Events Occurring Away from Work*, 13 LABOR L.J. 374 (1962).

and turn away the homosexual employee. Where an employee is not required to join a union as a condition for employment, the union, technically speaking, has no control over the work force under the Taft-Hartley Act. In the absence of a legitimate union-security proviso in a collective bargaining agreement, the union is without legal interest in the employer's work force. Where a union-security clause is contracted, a union cannot pressure the employer to discharge an employee except for the non-payment of initiation fees and dues.<sup>153</sup> Consequently, management is in a position to hire the homosexual employee irrespective of the desires of a union.

Yet, it seems unlikely that the employer will react any differently to a homosexual than a union member or leader. By subtle and not so subtle union and employee pressures, the employer willing to hire the "gay" employee could be forced to change hiring practices. Interested in maximizing profits and efficiency in the plant and concerned with his public image, the typical employer will not retain the homosexual employee. It is at this point that the homosexual is without any social or legal support.

An analogy is in order. Employers, before the passage of the Federal Fair Employment Bill, claimed that they were willing to hire and promote blacks, but union pressure prevented fair employment. Thus, a fair employment bill was necessary to attack unions practicing discrimination.<sup>154</sup> By the same token, employers willing to hire the homosexual will need legal aid to counteract union pressure.

An examination of the decisions involving other types of discharge reveals what the homosexual can anticipate. The plaintiff, constantly quarreling with other employees and negatively affecting morale, was discharged by his employer.<sup>155</sup> The plaintiff was a bush pilot flying over wilderness, and the court, upholding an arbitrator's decision supporting the discharge, noted that employee morale was an important factor in safety. Since the collective bargaining agreement provided for arbitration, the employer requested the arbitrator to decide whether the discharge was proper. To justify discharging a homosexual, an employer could claim, as in the public employment cases, that morale is negatively affected, a justification that may be acceptable to an arbitrator. Yet, it is doubtful whether a homosexual seriously affects morale, and most

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153. 29 U.S.C. § 158(b)(2) (1971).

154. Kovarsky, *The Negro and Fair Employment*, 56 Ky. L.J. 757, 775-95 (1968).

155. *Farris v. Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash. 1953).

jobs held by homosexuals (and others) cannot affect the safety of others.

An employee was discharged for gambling and booking bets on his employer's premises.<sup>156</sup> The employee was charged with committing a felony, later reduced to a misdemeanor, and fined by the criminal court. Submitting the discharge to arbitration under the "just cause" provision of the collective bargaining agreement, the union claimed that the penalty was too severe. The collective bargaining agreement gave the employer the right to discharge any employee violating "any penal law," and the employer claimed that he was exercising his contractual right. But the agreement also provided that an employee who gambled would be subjected to "relatively mild punishment." Finding that the penalty imposed was too harsh and that conflicting contractual clauses were applicable to the offense, the arbitrator ordered the employer to reinstate the employee.<sup>157</sup>

Disagreeing with the decision, the employer refused to reinstate the employee, claiming that the arbitrator exceeded his authority and the punishment was necessary to protect his public image.<sup>158</sup> The court supported the arbitrator, citing the Supreme Court decision in *Enterprise Wheel & Car Co.*,<sup>159</sup> and noted the employee's long service, efficiency, the greater public tolerance for gambling than in the past, and that the contract authorized "relatively mild punishment." The court also considered that "employment plays an important role in implementing the public policy of rehabilitating those convicted of [a] crime which overrides any [employer's] policy of precluding reinstatement . . . ."<sup>160</sup>

Whether the rationale expressed by the court applied to a homosexual accused or convicted of a misdemeanor or felony is speculative. If he is efficient, and the public is more tolerant today of the homosexual, the same rationale can be applied in the absence of a contractual clause granting the employer the right of discharge for homosexuality. While the public is more tolerant of gambling than homosexuality, would the employer's public image be tarnished by extending employment? Would morale and efficiency in the plant be hindered by employing a known homosexual? At least in some industries, like theatre, music, and hair-dressing, it would not be advantageous for the employer to establish a negative impact upon plant efficiency and good will.

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156. *Machinists Union, Dist. #8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969).

157. *Id.* at 1226.

158. *Id.*

159. 363 U.S. 593 (1960).

160. 406 F.2d at 1227.

In *Photoswitch, Inc.*,<sup>161</sup> an employee of ten years standing concealed a conviction for larceny from his employer. The employer, discovering the criminal record, discharged the employee during a period of union organization. The NLRB ordered reinstatement because the employee was not discharged for concealing a criminal record but for favoring union organization, a violation of section 8(a)(3). The Board noted that:

1. The conviction occurred more than ten years ago and since then the employee was "clean."
2. The employee worked at a naval depot during wartime, cleared by the F.B.I.
3. The employer did not always follow his enunciated policy of discharging employees with a criminal record.

Could the same rationale be used to support the employment rights of a homosexual with a criminal record?<sup>162</sup> Would this approach be particularly valid in states like California with an expungement statute or in Connecticut, Illinois and Oregon (that a federal and not a state law is involved is acknowledged)?

Collective bargaining agreements are negotiated authorizing unions to operate as exclusive job placement agents for employers. Called a "hiring hall," such agreements are valid under the Taft-Hartley Act if union and non-union job applicants are referred without discrimination.<sup>163</sup> The question raised is whether a union operating a "hiring hall" can legitimately refuse to refer a homosexual. In construction and printing, considerable use is made of the "hiring hall," and referrals can be important to the homosexual. No cases are reported where referral was refused to a homosexual, so that the answer is speculative. But unions have refused to make referrals for other reasons and these decisions may be applicable.

Several members of the National Maritime Union were refused referral after being convicted of narcotic charges.<sup>164</sup> It should be pointed out

161. 99 NLRB 1366 (1952).

162. For other cases involving the discharge of an employee with a criminal record, see *Elder-Beermer Stores, Inc.*, 173 NLRB 566 (1968); *Alterman Transport Lines*, 173 NLRB 434 (1968); *Sanitary Laundry and Dry Cleaning Co.*, 171 NLRB No. 123 (1968); *Atlantic Co.*, 79 NLRB 820 (1948).

163. *Local 357, Teamsters Union v. NLRB*, 365 U.S. 667 (1961).

164. *Figueroa v. Nat. Maritime Union*, 55 L.R.R.M. 2743 (S.D.N.Y. 1964).

that in the *Dew* case previously reviewed, the plaintiff, when younger, had smoked marijuana. The district court in *Dew* said:

There is no doubt . . . that a person who smokes marijuana cigarettes . . . shows a dangerous weakness of character. Likewise, a person who has engaged in sexual deviation in the form of homosexuality shows certain weakness of character, so to speak. Both [of] these weaknesses of character affect a person's reliability.<sup>165</sup>

After the General Counsel, in the case involving the Maritime union, failed to uncover evidence supporting an unfair labor practice charge under sections 8(b)(1) (A) and (2), the plaintiffs petitioned the federal district court for relief under sections 101(a)(5) and 102 of the Landrum-Griffin Act.<sup>166</sup> The court of appeals, reversing the district court, favored the union, ruling that it was not obligated to refer those convicted of violating the narcotics laws.<sup>167</sup> Homosexuality and the use of narcotics pose some difficulty in the maritime industry, where the "hiring hall" is widespread, and judicial sympathy for the right of a union to refuse placement can be anticipated. However, if the conviction was in the past, should persecution continue? Should the "gay" person not convicted of a crime be refused referral?

The questions raised in this section may be academic. The musicians union operates a "hiring hall" in many cities, and it has shown little interest in the sex life of its members. Based upon an examination of confidential data provided by the Mattachine Society of Los Angeles, few homosexuals seek blue collar employment or the type of job where a "hiring hall" is used.<sup>168</sup> Consequently, while the homosexual needs employment protection, neither the Taft-Hartley Act nor the Landrum-Griffin Act appear to lend much support.

### *The Homosexual and Private Employment*

The availability of confidential data highlighting the employment difficulties of the homosexual in private industry is limited. Sampling is not helpful because many homosexuals wish to remain anonymous and random contact is not useful. Information is not available through reliable

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165. Respondent's Brief in Opposition to Certiorari at 6, *Dew v. Halaby*, 376 U.S. 904 (1964), quoting the unreported opinion of the District Court.

166. 29 U.S.C. §§ 401 *et. seq.* (1971).

167. *Figuroa v. Nat. Maritime Union*, 342 F.2d 400 (2d Cir. 1965). For a similar decision, see *Paige v. Nat. Maritime Union*, 63 L.R.R.M. 2505 (S.D.N.Y. 1966).

168. See Table I *infra*.

academic channels. Unpublished information, admittedly of limited value, was made available by the Mattachine Society, Los Angeles, and the Gay Activist Alliance (G.A.A.), New York City. The available information will now be reviewed.

The Los Angeles study was initiated in 1960 and only 388 homosexual's responses were accepted by the Mattachine Society. While the information supplied is dated, it is doubtful that significant changes have taken place. The difficulty of evaluating these responses cannot be underestimated. Some were lengthy, others short; some were related to the question, other answers were irrelevant; some were well-written while others show low-level verbal skills; some disclosed considerable sensitivity while others indicated a lack of insight, etc. Pertinent information, such as the reception accorded the known homosexual by the employer, degree of acceptance if any, and the responsibility of the homosexual for some of his employment problems, was unavailable.

Based on information supplied by the G.A.A., the homosexual faces considerable discrimination in both public and private employment. Because "gay" employees hide their sex preferences and many are not noticeable, little employment discrimination is reported in relation to the general condemnation of the homosexual. Where homosexuals are readily spotted or known, it seems fair to assume that they will face considerable employment discrimination.

Gathering data of value presents considerably greater difficulty than coaxing a response. Even the definition of a homosexual poses a challenge. For example, when is an adult a confirmed and practicing homosexual? In the questionnaires examined in Los Angeles, 76 reported a heterosexual marriage and 47 of these unions resulted in children. Because some marriages are contracted to further careers and to assure anonymity, the homosexual is difficult to identify. While the Kinsey report states that four percent of our total population are hard core homosexuals,<sup>169</sup> a considerably larger percentage of the male population are bi-sexual and difficult to identify. Furthermore, when is one a confirmed homosexual—when male sex is preferred 30, 50, 70, 80, or 100 percent of the time?

Studies made of the homosexual are often unfair not only because of the inability to resort to sampling technique, but because society judges him by the parading "queen," those criminally charged with molesting

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169. See note 14 *supra*.

or influencing children, and psychiatrists who classify all homosexuals as mentally disturbed people. The studies published by psychiatrists, clinical psychologists and criminal investigators are not based on random sampling; yet, they are viewed as representative of the homophile community.

The data tabulated in Table I reflects the employability of the homosexual and not the attitude of the employer. It is apparent that the educational level of the 388 reported homosexuals was considerably above the national average. The median years of schooling was 15.1 compared to 10.6 for the general population in 1960.<sup>170</sup> Two hundred and six reported holding college degrees, including 51 Masters of Arts degrees and 30 Doctorates, a considerably larger percentage than the national average. A more complete survey of the educational level of the homosexual would probably be less favorable; the average years of schooling is probably less than herein indicated because of the number of responses that were not tabulated. Also, the more educated person is more likely to respond than the person with less education.

The level of education neither speaks for nor against the native intelligence or ability of the homosexual. Rather, the massive dose of education may be attributed to ostracism, thus forcing him to live an inward life. In addition, the homosexual probably finds greater acceptance on the college campus than elsewhere, drawing him to the "sheltered" life.

Another factor is the inability of some heterosexual males to support a family while pursuing a college education. Since the committed homosexual does not raise a family, he is financially able to continue his schooling. But this explanation may be of limited value because of the availability of scholarships, the G.I. Bill, day-care centers for children, and the "pill".

The educational level of the homosexual points to his concentration in better than average jobs at a salary exceeding that of the average wage earner. In short, there seems to be a positive correlation between education, occupation, and income. Columns 2 and 3 of Table I point to the economic success of the reporting homosexual and suggest that he does not face employment discrimination. This, of course, is untrue. The "gay" employee may be concentrated in occupations where he faces less discrimination or, more likely, his sex preferences are unknown.

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170. U S. BUR. OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1962, at 117, table 148 (83rd ed.).

Table I  
 RELEVANT INCOME FACTORS AS REPORTED BY 388 HOMOSEXUALS IN 1960

<u>Education</u>	<u>Number</u>	<u>Careers</u>	<u>Number</u>	<u>Yearly Income</u>	<u>Number</u>
Less than 12 years	24	Professional, technical, managerial, fine arts, self-employed	208	Over \$9,600	48
High School Degree	158	Clerical and sales	128	\$4,800 to \$9,599	185
College Graduate	206	Skilled craft, trades, operatives, service	28	\$1,200 to \$4,799	112
Bachelors (125) Masters (51) Doctorates (30)		Unskilled labor	24*	No income	36
<u>Current Health**</u>	<u>Number</u>	<u>History of Psychiatric Care</u>	<u>Number</u>		
Excellent	131	3 months treatment or more	69		
Good	229	Less than 3 months treatment	30		
Fair	25	No treatment	289		
Poor	3				

\*This category is somewhat uncertain.

\*\*The correspondent was asked to judge his health, so that this category is subjectively determined.

The percentage of homosexuals in the professional, technical, managerial, and fine arts categories is high. Yet, as previously mentioned, this does not indicate an absence of employment discrimination. In an unpublished report prepared by the G.A.A., entitled "Employment Discrimination Against Homosexuals," Supplement #1, issued on February 3, 1971, and presented to the New York City Commission on Human Rights, the employment problems of the homosexual, even in occupations presumed to be relatively free of discrimination, were reported. For example, the report indicated that the Columbia Broadcasting System, which denied discrimination, in fact discharged an employee whose draft record showed a tendency toward homosexuality.<sup>171</sup> While the entertainment world is more tolerant of deviant behavior than other vocations, there is some discrimination, at least, in the technical and administrative end.

Other incidents of employment discrimination are reported by the G.A.A. Seeking employment as a cab driver, *A* was asked to explain his 4F military classification. Discovering that his classification was due to homosexuality, the employer refused to hire *A*, although *A* had submitted statements from two psychiatrists that his sexuality would not interfere with the performance of his job.<sup>172</sup> The Hadle Agency in New York City, serving primarily the publishing industry, reports prospective employees suspected of being homosexuals to employers.<sup>173</sup> The International Business Machine Corp. ferrets-out sexual information from prospective jobholders, asking such questions as, "Do you have a girl friend?," "Exactly where do you socialize?," "Are you a homosexual?"<sup>174</sup> It was further contended that "gay" employees of the firm were dismissed upon discovery. The Household Finance Co. not only refuses to hire homosexuals but considers them to be poor credit risks.<sup>175</sup> Banks, the All State Insurance Co., and the American Automobile Association were also mentioned as discriminators.<sup>176</sup>

The data supplied by the G.A.A., while unverified, is not surprising; it has a ring of truth because of the generally prevailing attitude.

Based on the data tabulated in Table I, in the subheading "Careers,"

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171. G.A.A., *Employment Discrimination Against Homosexuals*, Supp. #1, at 12 (unpublished report issued Feb. 3, 1971).

172. *Id.* at 4.

173. *Id.*

174. *Id.* at 5.

175. *Id.* at 4.

176. *Id.* at 6.

only 24 homosexuals held jobs classified as unskilled. Furthermore, only 28 reported holding jobs in the blue-collar skilled craftsmen category (and not all of the 28 can be considered as blue-collar workers). The bulk of the reported homosexuals fell into the professionals, technical, managerial, fine arts and self-employed category (208), while 128 were employed in clerical and sales work. This may signify that the typical homosexual is not interested in physical labor, whether skilled or unskilled. However, other factors could account for the white-collar interest of the homosexual. As education increases, all job seekers tend to be less interested in blue-collar work. The "big money" and prestige opportunities are in sales and management and in the professional and technical categories. While downgrading the blue-collar worker economically and socially is unwarranted, mankind seeks *entre* to the most prestigious jobs. To that extent, the homosexual is no different from the ambitious heterosexual. But popular feeling persists, unverified, that the homosexual looks for a job that does not require the flexing of muscles and where fingernails can be kept clean.

Another possible explanation for the preferences of the homosexual is that he seeks employment where there is greater acceptability. Because professional, technical, managerial, and similar types of occupations require considerably more education than blue-collar work, the homosexual may find greater, although imperfect, tolerance for his way of life. Still another explanation is the industrial growth and demand for employees since the end of World War II. While the number of skilled blue-collar jobs has increased since 1945, they have not increased as rapidly as white-collar jobs.<sup>177</sup> Job openings in the service, professional, technical, and managerial occupations have increased more rapidly than in the blue-collar level and technology tends to wipe out unskilled jobs.

Another interesting facet of the data contained in "Careers" is that few homosexuals hold jobs where union representation is widespread. It is no secret that unions experience difficulty in organizing the white-collar employee, where the homosexual is concentrated, although unions have been more successful in recent years.<sup>178</sup> This suggests that while unions are no more receptive to the homosexual than other segments in our society, the employer is responsible for most of the discrimination.

A recent phenomenon is the emergence of collective bargaining in the

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177. 63 L.R.R. 81 (Sept. 26, 1966); 1963 CIVIL RIGHTS HEARINGS 1130.

178. *Prospects for Organizing White-Collar Employees*, LABOR RELATIONS YEARBOOK, 417-18 (1969).

public employment sphere. While the Taft-Hartley Act exempts the public employee from coverage, many state agencies engage in collective bargaining and, by executive order, federal employees can be represented by a union.<sup>179</sup> Most public employees are white-collar workers and there is considerable feeling that more public employees will join unions in the future. Many are teachers employed by a local or state government. Today, there is some tendency on the part of teacher and other professionals unions to protect the homosexual employee. For example, the United Federation of Teachers (U.F.T.) has notified the Board of Education in New York City that it will not tolerate the dismissal of licensed and tenured homosexual teachers. And, according to the G.A.A., "an unwritten agreement" has been negotiated "with the Board of Education" that homosexuals will not lose their jobs.<sup>180</sup>

If public white collar unionism should continue to spread, espousing a U.F.T. *avant garde* philosophy, homosexuals can be protected by contract and the *Norton* type of decision.<sup>181</sup>

The sub-headings "Current Health" and "History of Psychiatric Care" were included because some employers claim that the homosexual is beset by physical and emotional problems. While the data presented is not conclusive, it appears that he represents no greater health problem than the heterosexual employee.

The employer unwilling to hire the homosexual has little difficulty in gathering damaging information in this golden age of record keeping and computers. His sources of information include contacts with previous employers, private investigators, employment agencies, civil service records, F.B.I. dossiers, insurance records, and, more significantly, draft, military, and police records (with or without conviction). The G.A.A. claims that "69% of the major private employers in . . . [the] City of New York require draft status information [and] 71% of the major private employers ask for military records. Application for employment with the City of New York requires release of both draft and military records."<sup>182</sup> The G.A.A. also reports that in addition to New York City, "88% of the 100 civil service departments for which we have application forms request information regarding civil service . . . or

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179. EXEC. ORDER No. 10988, 3 C.F.R. 521 (comp. 1959-63); Exec. Order No. 11491, 3 C.F.R. § 100.735-451 (Supp. 1970).

180. G.A.A., *supra* note 171, at 10.

181. 417 F.2d 1161 (D.C. Cir. 1969). *See also* notes 90-95 *supra* and accompanying text.

182. G.A.A., *supra* note 171, at 7.

previous employment information." The G.A.A. reports that more than 100 job application forms used by private concerns in New York City require military and insurance policy information.<sup>183</sup> It should be noted that the investigation conducted by the G.A.A. was not exhaustive.

The F.B.I., which engages in surveillance and investigation for many reasons, has made dossiers available to government agencies, state and federal. Thus, the homosexual seeking public or private employment may find that the F.B.I. has supplied information, sometimes unverified. Large firms routinely contact past employers and/or request references before hiring an employee. War has become a routine part of life since 1941, subjecting most young males to the military draft. As a result, much data of a confidential nature is available to the "right" party. The G.A.A. claims that some insurance companies refuse to write life, theft, fire, automobile, and other kinds of policies for the known homosexual, who supposedly has a short life span and presents a greater risk. A few private and many public employers request job applicants to explain why insurance coverage was refused, which may put the spotlight on the "gay" person. Homosexuals are arrested at "gay" bars and in other public gathering places even though no crime is committed or charge preferred, creating a permanent police record.

Through these and other sources, information can be acquired that suggests increased difficulty for the homosexual seeking employment. For this and other reasons, legislation may be necessary to protect homosexuals and others.

### *A Fair Employment Law for Homosexuals*

Since World War II, state and federal laws have been passed to protect minority races and religions, senior citizens, and women (who are not, technically, a minority). Today, some effort is being expended to pass legislation protecting the homosexual. While there is little chance that such a law will be passed locally or nationally at the present time, it can be anticipated that momentum will continue to gather to pass a fair employment bill. Consequently, the type of legislation proposed will be reviewed.

On January 6, 1971, a comprehensive bill was submitted by members Clingan and Burden to the New York City Council.<sup>184</sup> Although the bill

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183. *Id.* at 8-9.

184. Letter from the Gay Activists Alliance to the New York City Commission on Human Rights, Feb. 1, 1971.

was killed in committee, it was the first bill given public sponsorship. The G.A.A. supported the Clingan-Burden bill as did some influential citizens.<sup>185</sup>

A similar bill was brought before the New York Assembly in February, 1971, sponsored by representatives Olivieri, Koppell, Solarz, Leichter, Hochberg, Stein, Gottfried, Berle, Strelzin, Blumenthal and Simon.<sup>186</sup> Another bill was proposed in the New York Senate on February 10, 1971, by Senator Ohrenstein.<sup>187</sup> The assembly bill was defeated, surprisingly, by a margin of 84 to 60; there was more support for the bill than this writer anticipated.

There is a greater likelihood that such legislation can be passed (even though the probability is not great at the present time) in New York City than in other cities or states or on a national level. Because of a more progressive and liberal type of representation, and voters who favor the liberal candidate, New York City is probably the ideal testing ground for this type of legislation. Because of upstate representation in the State of New York, there is little likelihood of passage at the state level (however, the vote of 84-60 shows future possibility). There appears to be no chance of passing a federal law in the near future.

New York City is the cultural and entertainment center of the United States, possibly the world, where increasing publicity is being given, via the mass media of communication and on Broadway, to the unfair treatment of the homosexual. The councilman in New York City has to look at this influential support.

A parallel can be drawn. In 1945, New York became the first state to pass fair employment legislation to protect minorities.<sup>188</sup> Gradually, other states passed similar bills, and a federal law was enacted in 1964 prohibiting racial discrimination by public and private employers, unions, and employment agencies.<sup>189</sup> New York State has been a leader in *avant garde* legislation, exercising considerable influence elsewhere. Should New York City pass a fair employment bill to protect the homosexual, it will influence the passage of similar legislation elsewhere. In 1961, Illinois passed legislation repealing criminal sanctions against consenting adults who engage privately in homosexual activities; Connecticut and Oregon passed similar legislation in 1971.<sup>190</sup>

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185. G.A.A., *supra* note 171, at 14. The City Council Committee on General Welfare voted 7 to 5 to keep the bill in committee. N.Y. Times, Jan. 28, 1972, at 1, col. 4.

186. #4186, N.Y., 1971-72 Regular Sessions.

187. #3646, N.Y., 1971-72 Regular Sessions.

188. M. BERGER, *EQUALITY BY STATUTE* (1952).

189. 42 U.S.C. §§ 2000(e) *et. seq.* (1964).

190. *See* notes 2-3 *supra*.

The Clingan-Burden bill is aimed at the elimination of prejudice based on "sexual orientation," permitting a city administrative agency to undertake educational programming, initiate investigations, and receive and adjudicate complaints. The bill provides in part:

1. It shall be an unlawful discriminatory practice:
  - a. For an employer, because of the age, race, creed, color, national origin (or), *sex, or sexual orientation* of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
  - b. For an employment agency to discriminate against any individual because of his age, race, creed, color (or), national origin, *sex, or sexual orientation*, in receiving, classifying, disposing or otherwise acting upon applicants for its services or in referring an applicant or applicants to an employer or employers.
  - c. For a labor organization, because of the age, race, creed, color, national origin, (or) *sex, or sexual orientation* of any individual, to exclude or to expel from its membership such individuals or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.
  - d. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, (or) *sex, or sexual orientation*, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.
  - e. For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this title or because he had filed a complaint, testified or assisted in any proceeding under this title.
- 1-a. It shall be an unlawful discriminatory practice for any employer, labor organization, employment agency or any joint labor-manage-

ment committee controlling apprentice training programs:

- a. To select persons for an apprentice training program registered with the State of New York on any basis other than their qualifications, as determined by objective criteria which permit review;
- b. To deny to or withhold from any person because of his race, creed, color, national origin, (or) sex, *or sexual orientation* the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, or other occupational training or retraining program;
- c. To discriminate against any person in his pursuit of such programs or to discriminate against such a person in the terms, conditions, or privileges of such programs because of race, creed, color, national origin, (or) sex, *or sexual orientation*;
- d. To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, (or) sex, *or sexual orientation*, or any intent to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.<sup>191</sup>

The bill is a replica of the fair employment legislation currently in effect in New York,<sup>192</sup> with the additional prohibition against discrimination based on "sexual orientation." The bill, generally speaking, prohibits employer, union, and employment agency discrimination against the homosexual and ferreting-out and circulating information pertaining to "sexual orientation."

The effectiveness of the Clingan-Burden bill is questionable. The bill does not prohibit the employer from refusing to hire an applicant convicted of a homosexual crime or dishonorably discharged from the military for homosexual activities. If an employer abides by a general policy not to hire ex-convicts and those with less than an honorable discharge, the homosexual could be refused employment without penalty. However, the employer hiring ex-convicts and those without an honorable discharge would violate the Clingan-Burden bill if the homosexual was refused equal employment opportunity.

Consensual homosexual activity is a crime in all states except Illinois,

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191. To the Council, City of New York, Int. No. 475, at 2-4.

192. 8 BNA, FAIR EMPLOYMENT PRACTICE MANUAL 451:875 (1971).

Connecticut and Oregon. Any legislative attempt to assure fair employment for the homosexual criminally convicted bristles with technical, social, and legal problems. Not only would there be difficulty in passing fair employment legislation, but repealing the state criminal laws will prove difficult and of long duration. A more effective manner of hitting at homosexual discrimination would be the passage of a federal fair employment bill to protect the convicted homosexual. Congress has the power to pass such legislation under the interstate commerce clause, pre-empting state legislation having a negative effect upon the homosexual community. While there is some question of limiting state criminal legislation by passing a civil fair employment bill, the interstate commerce clause is probably broad enough to assure constitutionality.

Most state laws and the federal fair employment law provide for "bona fide" exemptions, permitting the employer to discriminate after securing government approval. Based on the University of Minnesota case previously reviewed,<sup>193</sup> where the homosexual, surrounded in his work by young children, was denied employment, a Board of Education could secure a "bona fide" exemption for public schools. While there is little evidence to suggest that the homosexual teacher is after the young student, many believe this is a fact, and a commission charged with enforcing and interpreting a fair employment bill could make a "bona fide" exception.

Based on the data supplied by the Mattachine Society of Los Angeles, few homosexuals hold blue collar jobs where unions control hiring halls, apprentice training programs, etc. Thus the Clingan-Burden bill would have little impact upon unions representing blue collar workers. However, homosexuals gravitate toward the teaching profession, and the number of public school teachers joining unions has been increasing. While teachers' unions may be more hospitable to the homosexual than other unions, there is, nevertheless, at least some discrimination, and unions seeking employment opportunity for the homosexual teacher would be aided by the proposed legislation.

### *Some Additional Comments*

Novels, plays, and newspaper articles with homosexual themes appear with increasing frequency, showing greater understanding and requesting

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193. *McCConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971).

or demanding greater toleration.<sup>194</sup> However, the bulk of our society probably views the homosexual as a sexual deviate, a psychotic who indulges in child-molestation, unsuitable for integration into the work force.<sup>195</sup>

Organized religions supplied the fuel, initially, for the public distaste for the homosexual. In fact, criminal laws prohibiting homosexual conduct can be traced to biblical literature.<sup>196</sup> Following the law of England, the Puritans successfully urged the suppression of homosexuality in the colonies. The Victorian era brought little if any change in the public attitude toward the homosexual. Currently, church leaders express views seeking greater tolerance for the homosexual than in the past.<sup>197</sup> This change in attitude could help change society's image of the "gay" people. Yet, basic Christian and Judaic doctrine continues to place homosexual behavior in a sinful category.<sup>198</sup>

In many ways, time has brought about a situation at odds with past events and common thought. Hebraic-Christian societies have, in the past, looked to religion for moral leadership and guidance, and legal institutions followed traditional goals established by influential religious leaders. With rapid political, economic, and technical changes taking place since World War II and the diminishing influence of the *religioso*, the judicial branch of government, particularly the United States Supreme Court may have become a more influential moral pacesetter than organized religion.

This pronouncement at first blush may seem strange and heretical to the traditionalist and the uninitiated, but the "facts of life" may support this conclusion. Leadership in most religious organizations is in the hands of older clerics who seek to preserve past traditions or fear condemnation from parishioners when favoring change. A "don't-rock-the-

194. R. ANDERSON, *TEA AND SYMPATHY* (1953); M. CROWLEY, *BOYS IN THE BAND* (1969); J. ACKERLY, *MY FATHER AND MYSELF* (1969); J. GERASSI, *THE BOYS OF BOISE* (1966); *Fairness for Homosexuals*, Washington Post, Feb. 2, 1971, editorial page; *U.S. Homosexuals Gain in Trying to Persuade Society to Accept Them*, Wall Street Journal, July 17, 1968, at 1, col. 1; *City Lifts Job Curb for Homosexuals*, N.Y. Times, May 9, 1969, at 1, col.2.

195. In interviews with responsible leaders in the homosexual community, I was impressed with the code of ethics that is followed, similar to that in the "straight" community.

196. M. BUCKLEY, *MORALITY AND THE HOMOSEXUAL* 116 (1959); GENESIS 19:5; JUDGES 19:24; I CORINTHIANS 6:9; I TIMOTHY 1:9; W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 202-09 (1967).

197. *Homosexual Law Reform*, 114 AMERICA 278 (Feb. 26, 1966).

198. THE GENERAL ASSEMBLY OF THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA, *SEXUALITY AND THE HUMAN COMMUNITY* 17-20 (1970).

boat" philosophy describes much of the managerial decision-making in religion. Changes, consequently, are difficult to promote, except with persistent and strong pressures from sources within and without the church. The typical jurist, at least at a state and municipal level, suffers from similar controls and inertia; subject to re-election or re-appointment, he is often fair game for politicians. While the district judge in a federal court holds a life-time appointment, he generally comes from and resides within the district in which he sits, clinging to familiar ideology and influences. The United States Supreme Court Justices not only hold life-time appointments, but are subjected to a new, often a more sophisticated and "advanced" set of influences, with less need to fit in a more static social structure. It is for this reason that the *avante garde* moral leadership can come from the Supreme Court and other jurists, while the *religioso* in the field sticks to tradition to satisfy his flock and superiors.

Supreme Court Justices can "afford" to be moral opportunists. For example, the Supreme Court, far ahead of the masses and religious leaders, was able to condemn segregated schooling as the mark of a racist society.<sup>199</sup> The Supreme Court in essence assumed the role of the moral persuader. The lower federal courts have already begun to show greater understanding toward the homosexual.<sup>200</sup>

Another factor promising change is the make up of the voting population. The liberal legislator of the past, if that be the proper label, could not afford, politically speaking, to support a fair employment bill for homosexuals. With those eighteen years of age or older voting, a new group will wield considerable influence in state and federal elections.<sup>201</sup>

Younger voters, on the whole, seem more willing to tolerate change than older people. It seems plausible to assume that the liberal legislator will be more predisposed to support a bill aiding the homosexual, influenced by the younger voters. An attitudinal survey made in Australia showed that 22 per cent of those polled supported legislation legalizing homosexual play in private between consenting adults.<sup>202</sup> Percentage-wise, the younger people sampled were even more favorably disposed

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199. *Brown v. Board of Education*, 347 U.S. 483 (1954).

200. *McConnell v. Anderson*, 316 F. Supp. 809 (D.C. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Scott v. Macy*, 347 F.2d 182 (D.C. Cir. 1965); *Scott v. Macy*, 402 F.2d 644 (D.C. Cir. 1968).

201. U.S. CONST. amend. XXVI.

202. Chappell and Wilson, *Public Attitudes to the Reform of the Law Relating to Abortion and Homosexuality*, 42 AUSTRALIAN L.J. 120, 178 (1968).

toward the abolition of criminal sanctions than older people. This raises the possibility that younger voters will support a fair employment bill. Yet there is a difference between the lifting of criminal sanctions for homosexual play and fair employment. The Australian sampling only covered the criminal sanctions imposed upon the homosexual and not his employment status—it is possible that many favor the elimination of criminal penalties without favoring a fair employment policy.

The added dosage of education supplied to large numbers also increases the possibility that fair employment legislation for the homosexual is possible. In the Australian survey, 48 per cent of those polled with some college education favored repealing the criminal sanctions, while only 23 per cent with a high school diploma favored repeal, dropping to 9 per cent for those with a grammar school education.<sup>203</sup> Based upon occupation, which is related to education, 45 per cent of those classified as professionals favored a change in the Australian law, compared to 16 per cent for laborers. It seems reasonable to conclude that education increases toleration for the “undesirable.” With overall educational levels higher in the United States than in Australia, it is possible that the homosexual will find even greater acceptance in the United States.

*Religiosos* in the United States generally hold that true happiness is harvested through the family. To rear a family, marriage is considered an absolute essential. Given such a social and religious climate, the homosexual does not contribute to society's welfare. The concept of marriage and family as the good or even the best way of life is being challenged today. While divorce is a simple matter today, unhappily married couples remain together.<sup>204</sup> Given such a situation, the homosexual in the market place is no worse off than the family man. Employers reluctantly hire those with family difficulties. Psychiatrists claim that many homosexuals are unhappy, prone to mental difficulty.<sup>205</sup> But if the married person is also unhappy, which can lead to mental disequilibrium, the homosexual is no worse off, and the employer faces no greater risk by employing the homosexual. In fact, if society would fully accept the homosexual, there is the distinct possibility that his mental health, if troubled, would improve considerably, a boon to the employer seeking the happy employee.

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203. Wilson and Chappell, *Australian Attitudes Toward Abortion, Prostitution and Homosexuality*, 40 AUSTRALIAN Q. 1, 12-14 (1967).

204. H. LANTZ & E. SNYDER, MARRIAGE 415 (2d ed. 1969).

205. I. BIBER, HOMOSEXUALITY 18 (1962).

When organized religions, Judaism and Catholicism, asserted that God willed an increase in population, the death rate was much higher than today. Under such circumstances, married people had to be encouraged to procreate. If procreation were not encouraged, the religious group would not grow powerful, and the necessary muscle to provide the necessities of life would be unavailable. It seems fair to conclude that the biblical interpretations resorted to by the *religioso* were self serving to some extent, given the acknowledged need to multiply. Given the current state of medical knowledge and the population explosion, limiting the birth rate seems desirable, a fact acknowledged by many religious leaders.<sup>206</sup> The exclusive homosexual cannot swell the ranks of mankind, and the practicing bisexual may also limit population growth, a factor which could influence social acceptability for the sexual invert. In this limited context, the homosexual can be viewed as a contributor to society rather than the pariah of biblical origin.

The crucial role played by religion in 17th century England is difficult to imagine today. Everyone had to attend church and pay tithes; pulpits were used to make political announcements, books were censored by the *religioso*, teachers were licensed by a bishop; and the Bible provided guidance to all problems.<sup>207</sup>

The right to establish public morality, the group interest, has given way to greater concern for individual choice. For example, what was regulated as immoral behavior in colonial America is tolerated, even accepted, today. Within the family there are differences between parents and children concerning what is acceptable behavior. Parents hold to different standards from their parents. Yet, if three generations are to live side-by-side, each level must learn to tolerate the behavior of others. It can be reasoned that no one should be punished for a life or sex style that does not *seriously injure* or, perhaps, *seriously offend* others following another code of behavior. A society that eulogizes individuality but demands that everyone live up to an institutionally determined behavior pattern speaks with a forked tongue. It is even uncertain whether society has a right to demand conformity even if it is seriously affronted.

Many today, young and old, are not offended by homosexuality privately negotiated between consenting adults. Others who are offended

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206. Christianity Today, A Protestant Affirmation on the Control of Human Reproduction, Vol. XIII, No. 3, at 18 (Nov. 8, 1968). A consensus statement from a Protestant Symposium on the Control of Human Reproduction (held August 27-31, 1968).

207. C. HILL, THE CENTURY OF REVOLUTION, 1603-1714, at 75-86 (1961).

find it difficult to establish injury, let alone serious injury, to their or society's well-being; the legislation enacted in England and several states is testimony to this position. Public intercourse between husband and wife and members of the opposite sex would offend many people; yet intercourse in private, even among the unmarried, is no longer considered an evil. Kinsey estimated that 95 percent of all males engaged in some type of sexual play punishable as a crime.<sup>208</sup> Psychiatrists postulate that heterosexual play out of wedlock and an infinite variety of sexual practices are natural. Given the breadth of the psychiatric point of view, how far removed is homosexual activity from acceptable heterosexual activity?

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208. Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 U. CHI. L. REV. 162, 163 (1949).