University of Dayton Law Review

Volume 10
Number 3 *Symposum: The Legal System and Homosexuality: Approbation, Accommodation, or Reprobation?*

Article 3

5-1-1985

Queer Law: Sexual Orientation Law in the Mid-Eighties

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Cover Page Footnote

I wish to thank the following persons: research, Judith Fisher and William Evans; footnote specialist, Charles Munnell, J.D. (OSU 1978); editor, Carol Fey, J.D. (OSU 1984); typist, Carol Peirano.

QUEER* LAW: SEXUAL ORIENTATION LAW IN THE MID-EIGHTIES PART I

*Rhonda R. Rivera***

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PART I

I. INTRODUCTION

A. *Scope*

The purpose of this article[1] is to survey, review, synthesize, and

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* "1. Deviating from the expected or normal; strange. 2. Odd or unconventional in behavior; eccentric. 3. Arousing suspicion. 4. *Slang.* Homosexual." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1070 (W. Morris ed. 1976).

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1. This article is the third in a series. The previous two articles include Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) [hereinafter cited as Rivera I], and Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980–81) [hereinafter cited as Rivera II]. This article builds on those articles and continues the reporting begun there. The author strongly suggests that the reader of this article review the introductions and conclusions of those articles before reading this article; the author also suggests keeping those articles on hand for reference as one reads this article.

Part II of this article will appear in Volume 11 of the *University of Dayton Law Review*, and

connect all the civil law matters, both cases and other legal materials,[2] which affect the lives of citizens whose sexual orientation[3] is homosexual.[4] Because over 22,000,000[5] Americans are gay,[6] because these gay

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will cover military employment, security clearances, family issues, and other civil issues.

2. The material used is not limited to published appellate cases. Since 1975 I have been engaged in research in this area. I attempt to locate and file any material relating to a legal dispute which involves the issue of a person's homosexuality. I subscribe to numerous gay newspapers and journals. Lawyers around the country send me materials. Because these materials are of limited circulation, I take full responsibility for accuracy when I use them. All of these materials will soon be made more accessible because the material will be stored in a computer. I wish to thank The Ohio State University Seed Grant program for the funds to develop the program and to input the data.

3. Our initial concern was whether or not sexual orientation was conceptually defined in the research literature. It was defined in only a minority of the studies and with wide variation in meaning as illustrated by these examples: "sex object choice;" "[p]ederasty means anal intercourse with a boy;" "[s]exual orientation refers to the individual's physical and affectional preference for individuals of the opposite or same sex;" and; "[t]rue homosexuality, like heterosexuality, is a lifelong process involving the initial development of physiologic responses and the later expression of overt sexual behavior. The physiologic component is an established pattern to visual, auditory, and tactile stimulation. The response is an emotional and sexual arousal culminating in fantasies, dreams, or sexual outlet through masturbation or sexual involvement." As a research concept, sexual orientation clearly has a perplexing array of meanings.

Although the studies in which sexual orientation was operationally defined were much more numerous, a wide range of methods were used. In most instances, however, the methods of measurement were apparently operational only for the study at hand. Studies that had conceptual definitions usually had operational definitions.

The conceptual jumble apparent in the research on sexual orientation cannot, we believe, be resolved with greater methodological rigor. It is symptomatic of an underlying confusion. Sexual orientation was treated as if it were a palpable, unitary phenomenon although it was conceived in divergent and sometimes contradictory ways.

The fact that respondents were selected on the basis of their putative sexual orientation implies that the researchers were in fact concerned with sexual identity. The idea of sexual identity, however, provides no more stable focus of investigation than the amorphous notion of sexual orientation. The single, constant attribute of the concepts of sexual orientation and sexual identity is the biological sex of partners in sexual relationships. Both concepts, therefore, imply relationships. The array of conceptual and operational definitions and the diverse methodologies suggest that the investigators may have had correspondingly varied notions about what constituted a sexual relationship. These variations in approach suggest that some conceived relationships as "physical" and "erotic," while others saw them as "romantic," "affectional," and "affiliative."

Shively, Jones & DeCocco, *Research on Sexual Orientation: Definition and Methods*, 9 J. HOMOSEXUALITY 127, 134 (1983–84).

4. For the specific issues covered, see *supra* Table of Contents. Other topics, including family issues and other civil issues will be discussed in Part II of the article.

5. The Kinsey Institute estimates that 9.13% of the total population have had either extensive or more than incidental homosexual experience. Letter from Paul H. Gebhard of the Institute for Sex Research to Rhonda R. Rivera (March 18, 1977). *See* A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650–51 (1948); A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 473–74 (1953). The population of the United States in 1980 was 226, 545, 805. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1984 (104th ed. 1983). Therefore, nearly 23 million Americans are exclusively or predominately homosexual in their sexual orientation.

people come from every socio-economic strata, because they are parents, children, spouses, widows, widowers, siblings, and because they are soldiers, lawyers, construction workers, nurses, and candlestick makers,[7] the instances where the lives of gay persons can intersect with the legal system are incredibly numerous. The common denominator in these cases is that the sexual orientation of the individual involved has become dispositive of the outcome of the legal dispute. A small section on criminal matters pertaining to gay and lesbian[8] persons has been included because criminalization of the sexual behavior of gay people has influenced the outcome of many of the civil law cases.

B. Purpose

This article is written, as were the two previous articles, for a special audience. The persons I most wish to reach are lawyers who represent gay citizens. Very few resources exist to furnish such lawyers with the information they need to do a competent job for their clients. Second, this article is written for gay law students who are invisible in many instances (out of sound reasons demonstrated by all my writings) and who need to know their law. These articles represent what sex-based discrimination law classes are for women, and what race discrimination law classes are for black students. Third, this article is written for gay and lesbian laypersons; any lawyer worth his or her salt should be able to explain the law to those who are affected by it. Lastly, this article is intended for legal scholars and those who are interested in an area of law that is rapidly changing.

C. Methodology

The scope and purpose of this article dictate an atypical methodology; thus, the facts underlying the cases discussed will be described in detail. When the legal system deals a blow to a gay person, the ineq-

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6. *See* Rivera I, *supra* note 1, at 802 n.18; *see also* J. BOSWELL, CHRISTIANITY, SOCIAL INTOLERANCE, AND HOMOSEXUALITY 43 (1980), where Boswell urges scholars to use the term "gay." For Boswell, "gay" describes persons who are conscious of erotic preference for their own gender.

7. "Social diversity has been extremely well documented in the recent studies conducted for the Kinsey Institute with research funds from the National Institute of Mental Health. Even these researchers encountered problems in trying to assemble the most representative group." Paul & Weinrich, *Whom and What We Study: Definition and Scope of Sexual Orientation, reprinted in* W. PAUL, J. WEINRICH, V. GONSIOREK & V. HOTVEDT, HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL AND BIOLOGICAL ISSUES 27–29 (1982).

8. "A female homosexual." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 749 (W. Morris ed. 1976). "Lesbian: A woman who has sexual relationships with other women, and who may or may not participate in her Gay culture. From the islands of Lesbos in Greece, home of the poet Sappho who wrote love poems to women, among other subjects." J. GRAHN, ANOTHER MOTHER TONGUE 307 (1984).

uity and injustice are often hidden unless we understand the characteristics of the individual and his or her situation.[9] Second, quotations of judges are used at some length in order to accomplish two objectives. In the case of homophobic[10] quotations, the oppression of the legal institution as an institution is illustrated. In the case of supportive quotations, material is supplied for the lawyer to use in supporting the position of his or her gay client.[11]

Another stylistic anomaly is that the basic resource material for the article is not limited to published appellate cases. A great deal of gay law never reaches appellate courts. Appellate review is expensive and public; gay clients are often resource-poor and publicity-averse. Second, gay law is just on the edge of recognition as a legitimate scholarly endeavor; only very recently have legal indexes and periodicals referenced material in a discoverable manner. Difficulties along this line are still evident. Third, some of the most significant cases are in lower courts, administrative tribunals, and lawyers' files. Because gay persons know that the likelihood of a fair shake in the court system is remote, many disputes are handled at the lowest possible levels. As a consequence of these factors, much information is discovered in gay newspapers and magazines,[12] through the auspices of gay legal defense funds,[13] through lawyer networks,[14] and from civil rights organiza-

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9. For example, does it not matter that Admiral Hooper, who was convicted of homosexual activity, was a decorated World War II veteran who had been retired for 10 years at the time of his military conviction? *See* United States v. Hooper, 26 C.M.R. 417 (1958). Is it not relevant that Leonard Matlovich, who was discharged from the Air Force because of his homosexuality, was described by Judge Gesell as follows: "He has had a most commendable, highly useful service in the military over a long period of time, starting with the Air Force in 1963 . . . . Here is a man who volunteered for assignment to Viet Nam, who served in Viet Nam with distinction, who was awarded the Bronze Star while only an Airman First Class, engaged in hazardous duty on a volunteer basis on more than one occasion, wounded in a mine explosion, re-volunteered, has excelled in the Service . . . and has at all times been rated at the highest possible rating by his superiors in all aspects of his performance, receiving in addition to the Bronze Star, and the Purple Heart, two Air Force Commendation Medals and a Meritorious Service Medal." Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854 n.4 (D.C. Cir. 1978). James Gaylord, who lost his teaching job, was a teacher who for 12 years had received excellent evaluations. Gaylord v. Tacoma School District No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

10. Homophobia is the irrational fear of homosexual persons or homosexuality. Hudson & Ricketts, *A Strategy for the Measurement of Homophobia*, 5 J. HOMOSEXUALITY 357 (1980).

11. One excellent source for lawyers is D. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (Lesbian Rights Project) (1982).

12. *See, e.g.*, The Advocate, 1730 South Amphlett, Suite 225, P.O. Box 5847, San Mateo, California 94402; Gay Community News, 22 Bromfield St., Boston, Massachusetts 02108.

13. Lambda Legal Defense and Education Fund [hereinafter cited as Lambda LDEF], 132 West 43rd Street, New York, New York 10036 (special thanks to Abby R. Rubenfeld, Esq., for her help in locating case materials); Lesbian Rights Project, 1370 Mission St., 4th Fl., San Francisco, California 94103 (special thanks to Roberta Achtenberg, Esq. and Donna Hitchens, Esq.); Gay Rights Advocates, 540 Castro Street, San Francisco, California 94114; Gay and Lesbian

tions.[15] Wherever possible, the footnotes give as much information as is available, in as precise a manner as possible, along with suggestions as to possible leads for exploration. Some footnotes also contain material of a rather broad nature. Legal attitudes and rules governing gay behavior are neither set in a vacuum nor created solely by legal reasoning. Therefore, when possible, relevant nonlegal sources are cited. Lastly, this article does not analyze *in depth* the issues or the cases discussed. Rigorous, deep, substantive analysis of all the issues is not the goal of this article. However, other scholars have written excellent analytical pieces about some of the areas surveyed here.

D. Language

Choice of language to describe a subject can and does affect the substantive message. I would ask the reader to refer to my first article for precise clinical definitions of homosexuality, heterosexuality, transsexuality, transvestism, sexual identity, gender identity, and others.[16] Along a broader line, please note that my own use of language has changed. I no longer discuss "homosexual persons" because I have become convinced that this pseudo-medical term is clinically incorrect and socially harmful. By focusing on the *sexual*, one treats gay citizens as one-dimensional, erotic persons[17] and also invests the term with pathological undertones. I no longer use the phrase "sexual preference" because I have become convinced that the term is also misleading (sexual orientation should not be equated with one's preference for margarine over butter). Moreover, the use of preference allows a justification to bigots in which I will no longer participate.[18] I shall, in most cases, use the term "gay" to describe both men and women whose sexual orientation is toward persons of the same sex. Gay is the preferred word.

Advocates and Defenders, 100 Boylston Street, Suite 900, Boston, Massachusetts 02116.

14. These networks include: The Bar Association for Human Rights of Greater New York, P.O. Box 1899, Grand Central Station, New York, New York 10163; The American Association of Law Schools Section on Gay and Lesbian Legal Issues; and The National Lesbian and Gay Attorneys Referral Directory, (GLAD). Thanks also to Lyle, Pam, Robert, Katherine, Doug, Mary D., and Betsy.

15. Particularly helpful is the American Civil Liberties Union-National Gay Rights Project, 633 S. Shatto St., Suite 207, Los Angeles, CA 90048. *See also* E. BOGGAN, M. HAFT, C. LISTER, J. RUPP & T. STODDARD, AN ACLU HANDBOOK: THE RIGHTS OF GAY PEOPLE (rev. ed 1983); The National Lawyers Guild-National Gay Rights Task Force, 853 Broadway, Room 1705, New York, New York 10003; National Organization of Women's Lesbian Rights Project, 1400 New York Ave., N.W., Washington, D.C. 20005-2102.

16. *See* Rivera I, *supra* note 1.

17. *See* A. MOSES & R. HAWKINS, COUNSELING LESBIAN WOMEN AND GAY MEN: A LIFE ISSUES APPROACH xi (1982).

18. *But see* an excellent study of the origins of a person's homosexuality in A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE (1981).

Certainly, if respect for differences demands that persons of the Negro race be called blacks and that female persons be called women, gay people deserve no less. The last issue is one few writers can avoid, that is, gender specific language. This issue takes on a particular sensitivity in the gay community because there is a technical, nonpejorative label which exists solely for gay women, i.e., lesbians; however, the word "gay" covers both men and women. No comparable, nonpejorative term exists solely to describe gay men. The politically correct method is to use "gay men and lesbians," a cumbersome approach for an author. I shall use the term "gay" as a generic term and hope for the best.

E. Values

One of the pitfalls of doing research in this area is that the scholar is presumed to be gay, otherwise he or she would not write in this area. Holders of such a view (especially if the scholar is discovered indeed to be gay) tend to discount the information presented and the conclusions drawn. On the other hand, an honest scholar must inform the readers of his or her value system so that judgments are seen as objective and not as propaganda. The first level of inquiry should not be the sexual orientation of the writer, but rather should be his or her demonstrated track record for objective reporting and sound, unbiased judgments. Second, the author must be honest about underlying values. I believe passionately in the equality of all persons before the law, including, and especially, gay persons. Most of the information about how gay people have been treated by legal institutions I find repugnant, unjust, and antithetical to my moral system.[19] Third, I regard myself as an honest and competent legal scholar who believes in academic freedom and the duty of the scholar to be academically honest in his or her research.

II. EMPLOYMENT AND RELATED OCCUPATIONAL DISCRIMINATION

A. Private Employment

The basic premise at common law with regard to hiring and firing was that a private employer could hire and fire "at will."[20] This axiom of employment relationships permitted arbitrary and capricious decisions unrelated to merit or competency, but was regarded as a fundamental premise of a free enterprise society. An exception to this principle was enacted at the federal level with the passage of Title VII of the

19. *See* Rivera, *They All Know*, II PLUMBLINE, Nov. 1983, at 10 (published by the Episcopal Society of Ministry in Higher Education).

20. An early characterization of the employment at will doctrine recognized the employer's traditional right to discharge employees "for good cause, for no cause or even for cause morally wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519–20 (1884), *rev'd on other grounds sub nom.* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

1964 Civil Rights Act.[21] That legislation prohibited employment discrimination by private employers and the federal government on the basis of race, color, religion, sex, and national origin.[22] Subsequently, discrimination has also been forbidden by federal statute on the basis of age[23] and handicap.[24] However, sexual orientation was not one of the enumerated employee characteristics protected under either Title VII or other legislation.

Gay employees have sought unsuccessfully to bring sexual orientation under the ambit of Title VII. The courts have denied this protection on many occasions.[25] The reasons cited have included: (1) that only the enumerated classes were legislatively intended to be protected, and hence, any broader protection encompassing additional classes must be added by legislative action;[26] and (2) that the term "sex" does not encompass sexual orientation, i.e., discrimination based on the gender of the employee's loved one is not prohibited by a prohibition based on "sex."[27] Gay advocates have unsuccessfully argued that when a man may not choose another man for a life partner, but a woman may, such a distinction does discriminate on the basis of the gender of the employee.[28] Similarly, gay advocates have contended that allowing discrimination on the basis of the gender of the employee's life partner is, in effect, sex discrimination because the basis of the discrimination lies in outdated and irrational stereotypes about the proper behavior of the sexes. The eradication of such stereotypes was one of the underlying purposes of Title VII.[29] However, none of these arguments has prevailed and Title VII protection is unavailable for employees discriminated against on the basis of their sexual orientation. The Equal Employment Opportunity Commission (EEOC), charged with the enforcement of Title VII, has followed a similar path and has refused to take jurisdiction over sexual orientation discrimination charges.[30]

One case presents a slight twist on the usual factual situation. In

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21. 42 U.S.C. § 2000e–2000e-17 (1982).

22. To be regulated by Title VII, an employer must have at least 15 regular employees. *Id.* § 2000e.

23. Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (1982).

24. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–960 (1982).

25. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Parfitt v. D.L. Auld Co., No. 74-437 (S.D. Ohio July 20, 1975) (dismissed for failure to state a claim).

26. *See DeSantis*, 608 F.2d at 333; *Holloway*, 566 F.2d at 663.

27. *See DeSantis*, 608 F.2d at 331; *Liberty Mut.*, 569 F.2d at 326–27; *Parfitt*, No. 74-437.

28. *See DeSantis*, 608 F.2d at 330.

29. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

30. [1976] 2 Empl. Prac. Guide (CCH) ¶ 6493, 6495.

Valdes v. Lumbermen's Mutual Casualty Co.,[31] a Florida district court held that a female employee would be entitled to Title VII relief if she could show that an employer's policy against employing gay persons was not applied uniformly. The employee claimed that her employer, erroneously believing her to be a lesbian, fired her, but that the same employer did not fire gay men. Thus, the court held that if the female employee could successfully show that gay men were not fired, the court could conclude that firing the plaintiff for being a lesbian was only a pretext for firing her because she was a women.[32] Presumably, the employer could remedy this situation by proceeding to fire all males thought to be gay, an illustration of equal nonprotection.[33] The futility of this disparate treatment argument, with its difficult burden of proof, is clearly revealed in an EEOC decision from 1977. The commission held that when no evidence existed that the employer would not have discharged the lesbian employee if she had been a male homosexual, Title VII was not violated.[34]

While both the courts and the EEOC have categorically refused to take jurisdiction over sexual orientation discrimination complaints against private employers, both institutions have found that claims of sexual harassment of a same-sex nature are covered by Title VII.[35] For example, in *Wright v. Methodist Youth Services, Inc.*,[36] the court held that the discharge of a male employee for rejecting advances allegedly made by his male supervisor constituted a violation of Title VII. Sexual harassment of a female employee by a male supervisor has been characterized in Title VII language as a "demand made of a female employee that would not be made of a male employee" and, hence, actionable sex discrimination.[37] In *Wright*, the court characterized the male employee's complaint as "the obverse of that coin": a demand of a male employee that would not be directed to a female employee.[38] For the court, in each case, the problem is identical: "the exaction of a condition which, but for his or her sex, the employee would not have

31. 507 F. Supp. 10 (S.D. Fla. 1980).

32. *Id.* at 13.

33. The dysfunctional nature of attempting a disparate impact argument in gay employment cases—that is, that discrimination against gays adversely impacts males, who make up a greater percentage of the homosexual population—was cited in Rivera I, *supra* note 1, at 809. Such a litigation strategy is advocated in Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 498, 506–11 (1976), and in Rivera & Galvan, *Homosexuals and Title VII*, 3 TEX. S.U.L. REV. 126, 136–38 (1975). The argument was attempted in *DeSantis*, but was rejected by the court. *DeSantis*, 608 F.2d at 330.

34. [1977] 21 Fair Empl. Prac. Cas. (BNA) 1789.

35. *See, e.g.*, [1981] 27 Fair Empl. Prac. Cas. (BNA) 1789.

36. 511 F. Supp. 307 (N.D. Ill. 1981).

37. *Id.* at 310.

38. *Id.*

faced."[39]

This recognition of same sex harassment as covered by Title VII has been supported by other courts[40] and by the EEOC.[41] One is tempted to comment that being fired for loving someone of the same sex could also be characterized as "the exaction of a condition which, but for his or her sex, the employee would not have faced."[42]

One recent Title VII case, *Ulane v. Eastern Airlines, Inc.*,[43] came close to creating a broader, judicially recognized concept of sex and gender. *Ulane* involved a transsexual airline pilot who had been fired after sexual reassignment surgery, which left Ulane somatically a woman, congruent with her psychosexual identity. In at least one prior Title VII case, a court erroneously lumped homosexual persons and transsexual persons together[44] and concluded that the total group had no recourse. In *Ulane*, the trial court recognized that precedent precluded Title VII protection of homosexual persons but sought to use modern psychological and medical information to distinguish transsexual persons. The court took judicial notice of the difference between psychosexual identity and sexual orientation.[45] The court held that, by firing Ulane, Eastern violated Title VII prohibitions against sex discrimination. The trial judge, Judge Grady, reasoned that the firing was "in effect, a statement that a condition of plaintiff's continued employment was that she remain a male."[46] Grady concluded that if such were the case, "clearly the allegations of the complaint show that the discharge was because of sex."[47] Grady admittedly took a broad view of sexual discrimination, stating that the discharge "need only have some causal connection to a sexual consideration in order to be prohibited by the statute."[48]

The Seventh Circuit reversed the district court decision, taking a traditional view of Title VII application.[49] Since the court could not find "sexual identity disorder" among the enumerated protected clas-

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39. *Id.*

40. *See* Zalewski v. M.A.R.S. Enters., Ltd., 561 F. Supp. 601 (D. Del. 1982); *Wright*, 511 F. Supp. 307; Hodges v. John Morrel Co., No. 78–2258 (W.D. Tenn. 1978).

41. [1981] 27 Fair Empl. Prac. Cas. (BNA) 1789.

42. *Wright*, 511 F. Supp. at 310.

43. 581 F. Supp. 821 (N.D. Ill. 1982), *rev'd*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2033 (1985).

44. Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978).

45. *Ulane*, 581 F. Supp. at 821.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Ulane (II)*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2033 (1985).

ses, the judges concluded that Title VII did not apply.[50] Ironically, the court sententiously began by stating that "we do not condone discrimination in any form."[51] Again, in the traditional mode, the court of appeals looked at the legislative history of Title VII and found no support for protecting transsexual employees from employment discrimination. Another make-weight in the court's mind was Congress' continued rejection of amendments to add new enumerated classes to Title VII.[52] Such a position once again indicates a judicial failure to differentiate between transsexual persons and gay persons. The legislation consistently rejected in Congress deals only with sexual orientation and not sexual identity discrimination.[53] *Ulane* thus joins a long line of cases signifying for litigators the futility of attempting to include sexual orientation under sex in Title VII. Consequently, other approaches currently underlie the more significant cases in the private employment sphere.

In 1981, Sam Dorr[54] was the manager of the Bardstown Branch of the First National Bank of Louisville, Kentucky. He had worked for the bank for nineteen years, and had compiled an outstanding work record. In November, 1981, Dorr became president of Integrity/Louisville, Inc. and Dignity/Louisville, Inc.[55] The bank, through Dorr's supervisors, issued an ultimatum: resign from the organization, move to a lesser job at lesser pay, and avoid any public connection with the gay religious group. Plaintiff, an active member of the Episcopal church for 39 years, was intensely committed to his lay ministry in the group. He felt forced to "involuntarily resign" from the bank.

Dorr subsequently filed a civil suit with claims that illustrate a creative approach in both the use of Title VII and other remedies. Dorr did claim a Title VII violation, but not sex discrimination; rather, Dorr claimed discrimination on the basis of religion. The claim was processed first through the EEOC, which refused jurisdiction on the grounds that no religious discrimination occurred. Dorr also sought to

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50. *Id.* at 1086.

51. *Id.* at 1084.

52. *Id.* at 1085.

53. *See, e.g.*, S. 2081, 96th Cong., 1st Sess., 125 CONG. REC. 17,854 (1979). For a good general discussion of transsexuality and the law, see Haag & Sullinger, *Is He or Isn't She? Transsexualism: Legal Impediments to Integrating a Product of Medical Definition and Technology*, 21 WASHBURN L.J. 342 (1982).

54. Dorr v. First Ky. Nat'l Corp., No. 83-0118-L(G) (W.D. Ky. Feb. 1, 1983), *appeal docketed*, No. 84-5607 (6th Cir. Apr. 1984).

55. Integrity is a lay organization of the Episcopal Church of America which ministers to, among others, the church's gay members. Integrity, Inc. is a tax-exempt § 501(c)(3) corporation, its stated corporate purposes being religious, educational, charitable, and literary. Dignity is a similar group in the Roman Catholic Church. Often the two groups meet together to share resources.

use a section 1983 action,[56] claiming that the bank and its employees sought to deprive him of his first and fourteenth amendment rights. To support this claim, Dorr had to show "state action" and used an interesting argument. Namely, he contended that because the bank was highly regulated under Kentucky law, the bank was a quasi-public institution and hence subject to the fourteenth amendment. Using a similar argument, Dorr also claimed that the bank officers were also acting "under the color of law." These arguments parallel the successful arguments made in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,[57] in which the California Supreme Court found the telephone company to be a quasi-public institution because of the highly regulated nature of its monopoly position. In that case, discrimination on the basis of sexual orientation was prohibited for the telephone company because of state constitutional limitations on state action.[58] Lastly, Dorr also raised a section 1985(3)[59] claim.

The strategy chosen by the attorneys in the *Dorr* case was to cast the discrimination in religious terms. Dorr saw his work in Integrity and in Dignity as part of the lay ministry enjoined by Episcopal teachings. At trial, considerable supportive testimony was elicited from Episcopal clergy in support of Dorr's position. The trial court found against Dorr despite the judge's conclusion that Samuel Dorr was a "deeply religious man who was well-informed about the doctrines of the Episcopal church."[60] At trial, the bank conceded the sincerity of Dorr's religious beliefs, but defended its actions on the basis that Dorr had insufficiently communicated the religious basis of his intended activities with Integrity to the bank. The trial court was much harsher, holding that Dorr's beliefs were not truly religious. This conclusion arose from a statement in Dorr's pretrial deposition that the doctrines of the Episcopal church did not "require" him to be a member or an officer of Integrity nor did they require him to be a homosexual person.[61] Thus,

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56. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

57. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

58. The Supreme Court of California held that the California constitutional equal protection guarantee is violated when a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly, utilizes its authority arbitrarily to exclude gay people from employment opportunities. *Id.* at 474–75, 595 P.2d at 602, 156 Cal. Rptr. at 24.

59. 42 U.S.C. § 1985 (1982) (conspiracy to interfere with civil rights).

60. It is particularly interesting to note that the trial judge himself was an Episcopalian.

61. Plaintiff's deposition, *Dorr*, No. 83-0118-L(G).

in the judge's eyes, since no dogma required Dorr's actions, Dorr's beliefs were not "sincerely held."[62]

The trial court also held that the bank's dismissal of Dorr was not based on religious animus since the bank did not consider Dorr's activities to be religious. Dorr had presented his supervisor with written material describing in detail the religious nature of Integrity. However, the supervisor himself admitted at trial that he saw "homosexualism" (sic) and religion as "mutually exclusive."[63] The court constantly referred *sua sponte* to Dorr's work as "gay rights advocacy" rather than participation in a lay ministry in a gay group.[64] The case is now on appeal in the Sixth Circuit.[65] Interestingly, a joint amicus curiae brief was filed on Dorr's behalf by the Presbyterian Church and the Episcopal Bishop of New York.

A somewhat similar case arose in California; however, sexual orientation protective law is more developed there and the result may be dissimilar.[66] Leland Larsen,[67] a fifty-four year old senior bank vice president, was fired after working for Fidelity Savings and Loan Association for over thirty years. Larsen alleged his termination was because the bank discovered he was gay.[68] Originally, Larsen sued under three causes of action: breach of an implied covenant of good faith and fair dealing leading to wrongful termination, fraudulent concealment,

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62. *Dorr*, No. 83-0118-L(G).

63. Record, *Dorr*, No. 83-0118-L(G).

64. In Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979), *cert. denied*, 452 U.S. 939 (1981), the U.S. District Court for the District of Columbia discussed an employer's obligation to make reasonable accommodation to the religious beliefs of their employees under Title VII. The court stated "The Constitution is designed to shield robust and seemingly eccentric expression and conduct no less than those which are more mildly conventional . . . and the Civil Rights Act's religious discrimination provisions incorporate that constitutional standard." *Id.* at 1183–84.

65. *Dorr*, No. 83-0118-L(G). Lambda Legal Defense also submitted an amicus brief.

66. *Gay Law Students*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14, is certainly the most favorable case. In my *Drake Law Review* article, I did not make clear the full import of the decision. *See* Rivera II, *supra* note 1, at 315–16. (Thank you Richard Gayer, esq., for pointing this out.) *Gay Law Students* not only treated a public utility as a quasi-public employer and hence subject to the state's equal protection clause, but the case went much further. *Gay Law Students*, 24 Cal. 3d at 472, 595 P.2d at 600, 156 Cal. Rptr. at 22. The court also found that discrimination against openly gay persons or their supporters violated the California Labor Code by interfering with employees' political freedoms. *Id.* at 489, 595 P.2d at 611, 156 Cal. Rptr. at 33 (citing CAL. LAB. CODE §§ 1101, 1102 (1980)). This holding meant that all private employers covered by the Labor Code are prohibited from discriminating against openly gay employees. For a discussion of what constitutes "openly gay" see R. Gayer, Employment Discrimination—Only the "Identified" Lesbian or Gay Man Is Protected (Feb. 1982) (unpublished manuscript).

67. Larsen v. Fidelity Sav. & Loan Ass'n, No. 0377981 (Sup. Ct. Cal. Aug. 11, 1981).

68. About the same time, the governor of California vetoed a civil rights bill which would have protected gay persons from discrimination in employment. Governor Deukmejian stated that the bill was simply unnecessary, because there is no such discrimination. N.Y. Times, Sept. 2, 1984, § 1, at 26, col. 1.

and breach of contract. After a summary judgment for defendants on breach of contract and breach of an implied covenant, only fraudulent concealment remains. The trial date is set for mid-1985.[69]

Another case similar to *Dorr* is *Blum v. Gulf Oil Corp.*,[70] which attempted to use religious discrimination to protect a gay employee. Blum alleged he was fired not only because he was gay, but also because he was Jewish; he brought his suit on traditional Title VII grounds and under section 1981.[71] The court dismissed the sexual orientation claim in one sentence: "Discharge for homosexuality is not prohibited by Title VII or Section 1981."[72] In addition, the religious grounds were rejected because the employer had articulated a legitimate reason for the dismissal, which the employee admitted to, namely, use of the employer's telephone for personal business reasons.[73] Blum claimed the given reason was a pretext, and, had he been granted adequate discovery, he could have shown that other employees behaved in a similar fashion without retribution. He failed to convince the court in any respect.[74] Where some fault can be found with an employee, a showing that the reason articulated for termination is pretextual is difficult. However, as the human rights commissioner of New York City said, speaking of equal opportunity for women: "[W]e won't have equal rights when a female Einstein is made an assistant professor of mathematics; rather we will have equal rights when a female shlemiel can go as far as a male shlemiel."[75] Equal employment protection for gay people requires a similar rubric.

Three recent cases still before the courts indicate an attempt to go beyond the generally unsuccessful Title VII, section 1981, and section 1983 dead end routes in private employment discrimination cases. Two

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69. The bank was able to have the two other claims dismissed by invoking the Federal Reserve Act. Since California has a well-developed exception to employment at will, Larsen's case has been significantly weakened by the applicability of the Federal Reserve Act. Although the original complaint had other plaintiffs, Larsen is currently the only plaintiff. The bank has deposed Larsen's doctors and his roommate, and has involved his ex-wife in the litigation. Telephone interview with Marlene Thomason, attorney for Larsen (Nov. 29, 1984).

70. 597 F.2d 936 (5th Cir. 1979) (per curiam).

71. *Id.* at 937. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

72. *Blum*, 597 F.2d at 938.

73. *Id.* at 937.

74. *Id.* at 938.

75. This quote appeared in *The New York Times* many years ago; the author regrets the absence of an exact cite.

of the cases involve suits against the *Christian Science Monitor*, a Boston, Massachusetts-based newspaper which, although operated by the Christian Science Church, is a well-known national newspaper with high quality, secular news reporting. In the first case, Jim Ogan, a nine-year employee, was fired in March of 1982.[76] At the time of his dismissal he was a business and cost analyst in the building and grounds division. Ogan did not bring an action under federal law, but rather sued for breach of contract and for violation of a Massachusetts statute which gives Massachusetts citizens a remedy against "unreasonable, substantial or serious interference with . . . privacy."[77] Originally Ogan also claimed emotional stress and wrongful termination as causes of action, but these claims were also dismissed. However, the other claims withstood a motion to dismiss[78] and the case now awaits trial.

Meanwhile, an almost parallel action developed. In December of 1982, the *Monitor* dismissed Christine Madsen after seven years of highly successful reporting.[79] After discovering that Madsen was a lesbian, the paper fired her because she refused to "heal" herself as ordered by the church. As was Ogan, Madsen was a church member at the time of her termination.[80] The Madsen case also did not rely on federal laws to protect employment rights; rather, Madsen charged bad faith termination of employment, breach of contract, defamation, infliction of emotional distress, failure of the employer to follow its own internal procedures and bylaws, violation of the Massachusetts constitution, violation of the Massachusetts statute prohibiting invasion of privacy, the public policy of the state, and, last but not least, sexual preference discrimination.[81] In August of 1983, Madsen's suit withstood the defendant's motion to dismiss and motion for a summary judgment.[82] On April 20, 1984, Massachusetts' highest court, the Supreme Judicial Court, agreed to take the case on direct review.[83]

The most interesting and potentially the most useful ground claimed in Madisen's suit lies in the argument that a termination on the basis of sexual orientation violated both the public policy and the

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76. Gay Community News, Apr. 3, 1982, at 1, 3; *see also id.*, Nov. 27, 1982, at 1, 3. The author has been unable to obtain original materials on this case.

77. MASS. GEN. LAWS ANN. ch. 214, § 1B (West Supp. 1984).

78. Gay Community News, Apr. 3, 1982, at 1, 3.

79. In fact, shortly after her dismissal, Madsen won first place honors in the Best Sportswriter's category of the New England Women's Press Association awards.

80. Gay Community News, Nov. 27, 1982, at 1, 3.

81. Madsen v. Trustees, Christian Science Publishing Co., No. 58-574 (Super. Ct. Mass. Dec. 1, 1982).

82. Gay Community News, May 19, 1984, at 2.

83. The oral argument took place on October 4, 1984.

common law of the State of Massachusetts. Although violations of the United States Constitution were claimed, the emphasis was on Massachusetts' statute prohibiting an invasion of privacy and on the state's public policy. Such a tactic seems a wise litigation strategy because the United States Supreme Court and federal courts either avoid gay employment issues[84] or are, in many cases, hostile. Especially in the coming years under the Reagan administration, a resort to progressive state courts may prove much more fruitful for gay advocates.[85]

The right of privacy claim which underlies both the Madsen and Ogan cases is somewhat unique because they are based on state statute. As the right is statutory, new, and extremely broad, these gay cases may create very significant results.[86]

The second significant claim arising from the *Christian Science Monitor* cases that may create new law is the claim that employment discrimination on the basis of sexual orientation is against the public policy of the state of Massachusetts. One authority cited in Madsen's complaint is the June 19, 1982, executive order on nondiscrimination of the city of Boston.[87] Madsen also asserts that the Commonwealth of Massachusetts has a public policy that employees who perform their duties in a satisfactory manner shall be entitled to job security and not summarily discharged for unfair or bad faith reasons.[88] The latter claim is consistent with an increasing trend to attack the common-law doctrine of employment at will. The doctrine has already been abolished in a number of states, which provides a new method of attack for gay employees. The Madsen case challenges the doctrine in a state where the employment at will doctrine has already been undermined. Massachusetts courts recognize an implied covenant of good faith and fair dealing in employment contracts, and have held that a termination

84. *See In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984); Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980), *aff'd en banc*, 654 F.2d 304 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); Burton v. Cascade Dist., 512 F.2d 850 (9th Cir.), *cert. denied*, 432 U.S. 839 (1975); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), *cert. denied*, 393 U.S. 1041 (1969); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

85. However, a really adverse Supreme Court decision could chill state advances as well.

86. *See generally* Note, *The Massachusetts Right of Privacy Statute: Decoy or Ugly Duckling?*, 9 SUFFOLK U.L. REV. 1248 (1975).

87. Complaint, *Madsen*, No. 58-574.

88. Madsen relies on Massachusetts statutes which provide both public and private causes of action for impairment of civil rights. MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11I (West Supp. 1984).

not made in good faith can constitute a breach of contract.[89]

Even if the court will recognize such a cause of action, the real issue is whether the court will recognize the cause against the particular employer, the *Christian Science Monitor*. Does a religious denomination have a different standard of behavior? Madsen's lawyer, Katherine Triantafillou, has argued that even if a lower standard applies to religious bodies, the lower standard does not apply to the *Monitor*. Madsen's argument is that the *Monitor*, which is published not by the church but by an independent publishing company, is in essence a secular employer.[90] The public image of the *Monitor*, as reflected in its advertisements, certainly plays up the newspaper's secular nature. This case, like *Dorr*, uses religious interests to advance the cause of one of the litigants. However, Dorr, the gay litigant, was refused the shield of his faith. In contrast, in *Gay Rights Coalition v. Georgetown University*,[91] the university relied on the Roman Catholic religion as a shield against prohibitions imposed by the Washington, D.C. Human Rights Ordinance. The clash of religious rights with other rights will be seen again when we examine the battle pitting a New York City mayor's executive order against the Archdiocese of New York and the Salvation Army.[92]

A similar doctrinal approach in which a gay invoked an accepted category of discrimination is seen in *Trueman v. Advanced Underwriters Insurance Agency, Inc.*[93] The employer in that case, upon learning that Trueman had *Kaposi's sarcoma*, a part of the AIDS syndrome, terminated his employment in advance of the contract's two-year termination date and without the thirty-day required notice. Plaintiff Trueman sued, alleging discrimination not on the basis of sexual orientation, but on the basis of handicap under Michigan law.[94] He also claimed that his employer's conduct constituted sexual harassment under the Michigan civil rights statute. Under Michigan law, an employee has the right to be free from sexual harassment, which is defined to include "verbal or physical conduct or communication of a sexual nature" when "such conduct has the purpose or effect of substantially

89. *See* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); *see also* Annot., 12 A.L.R. 4th 544 (1982); R. Bienstock, Exceptions to At Will Employment: Applications to Gay Related Employment Discrimination (July 7, 1983) (unpublished paper for the Lambda LDEF).

90. Telephone interview with Katherine Triantafillou, Madsen's attorney (Jan. 5, 1985).

91. Gay Rights Coalition v. Georgetown Univ., CA-5863-80 (Super. Ct. D.C. Apr. 30, 1980).

92. *See infra* text accompanying notes 137–51.

93. No. 84-415382 NO (Cir. Ct. Mich. May 31, 1984). *See also* the discussion of this case in Part II's section on discrimination against AIDS victims.

94. MICH. COMP. LAWS ANN. §§ 37.1101–.1209 (West Supp. 1984).

interfering with the employee's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment."[95] According to Trueman's complaint, the employer inquired at length about the employee's sexual life and made disparaging remarks based on the discovery of *Kaposi's sarcoma* and, ultimately, fired the employee based on the presence of a supposedly sexually transmitted disease. This use of the sexual harassment claim by gays has grown out of the loophole created when courts recognized same-sex sexual harassment as a Title VII claim while rejecting sexual orientation discrimination itself as prohibited.[96]

Like Madsen and Ogan, Trueman also alleged a common-law breach of contract, intentional infliction of emotional distress, and tortious interference with a potentially advantageous economic relationship. In addition, a statutory allegation of a special nature rounded out his attack: Trueman charged a violation of the Detroit Human Rights Ordinance.[97] Detroit is one of the few cities in the nation to have a civil rights ordinance that forbids sexual orientation discrimination in private employment.[98]

As indicated above, the employment at will doctrine is being assailed throughout the nation. In *Satori v. Society of American Military Engineers*,[99] the doctrine is directly challenged on behalf of a gay employee. Joseph Satori had worked for the Society of American Military Engineers for over eight years when he was fired. His abrupt termination came about after he discussed, with a group of other gay persons, gay culture and politics with a newspaper reporter. The subsequent article disclosed Satori's employer's name; Satori was told he had "breached a sacred trust" by revealing for whom he worked and was consequently fired.[100] Satori applied for unemployment benefits, which the Virginia Employment Commission awarded him over the society's objection.[101]

The circumstances under which Satori spoke to the newspaper reporter dramatically illustrated his belief that the society had impliedly agreed to terminate employees only for cause and not for sexual orientation. The 1979 bylaws of the society specifically stated that sexual orientation was a prohibited reason for firing an employee.[102] Relying

95. *Id.* § 37.2103(h)(iii).

96. *See, e.g., Wright*, 511 F. Supp. 307.

97. Detroit City Charter § 7-1004.

98. For a list of such cities, which is updated quarterly, contact the National Gay Task Force, 80 Fifth Avenue, New York, New York, 10011.

99. No. 9008 (Cir. Ct. Alexandria, Va. June 6, 1984).

100. The Advocate, Dec. 8, 1983, at 14.

101. *Id.*

102. The bylaws stated in relevant part:

on this statement, Satori for the first time publicly discussed his orientation. After his termination, Satori brought suit against the society on the following grounds: wrongful discharge in tort, wrongful discharge in contract, estoppel, intentional infliction of emotional distress, and defamation.[103] The society in its answer denied the existence of the bylaw statement.[104] In Satori's motion for judgment, he alleged that the society had changed the bylaw immediately after firing him.[105] The society moved for a summary judgment alleging that Virginia did not recognize an exception to the employment at will doctrine nor a claim based on wrongful discharge in tort. Interestingly, in its motion the society admitted the existence of its policy against discrimination on the basis of sexual orientation but said "the representation does not not rise to a high enough level, as a matter of law, to rebut the presumption that the employment . . . was terminable at will."[106] Satori's motion in opposition pointed out that there were issues of fact that were only resolvable by a jury and, hence, a summary judgment was improvident. The plaintiff also made a strong argument that the trend in Virginia law was to recognize exceptions to the employment at will doctrine.[107] Notwithstanding these claims and others, Judge Grenadier of the Circuit Court for the City of Alexandria found for the society on all points and granted a motion for dismissal.[108] The judge's order is bereft of legal discussion of the issues and is wholly conclusory. The dismissal will be appealed to the Virginia Supreme Court.[109]

The cases cited in this review of private employment discrimination litigation reveal the creative energies utilized to find a method to remedy sexual orientation employment discrimination when all the standard statutory and constitutional remedies have failed. As in the area of gay domestic law, attorneys are utilizing traditional concepts in a nontraditional area.

Another approach to protecting the employment rights of gay employees is through the use of labor laws and labor unions.[110] Under the

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> Nondiscrimination Policy: The Society fully supports the policy of equal opportunity and will not discriminate or knowingly participate in any activity that discriminates on the basis or [sic] race, color, religion, sex, *sexual orientation*, or national origin. Likewise, The Society will take no official action which is or appears to be detrimental or discriminatory to any class or group of persons.

Plaintiff's Motion for Judgment, *Satori*, No. 9008 (emphasis added).

103. *Id.*

104. Answer and Grounds for Defense, At Law, *Satori*, No. 9008.

105. Motion for Judgment, *Satori*, No. 9008.

106. *Id.*

107. *Id.*

108. Order, *Satori*, No. 9008.

109. Letter from Calvin Steinmetz, Satori's attorney, to Rhonda R. Rivera (Nov. 13, 1984).

110. *See* Note, *Challenging Sexual Preference Discrimination in Private Employment*, 41

National Labor Relations Act, unions owe a duty of fair representation to their members.[111] Certainly, such a duty would encompass the representation of a gay employee should he or she be fired or discriminated against in some other manner. Little material is available to indicate whether unions are undertaking such representation or whether gay union members are aware of such a potential remedy.

The case of Michael Frorillo[112] indicates that some activity exists and demonstrates the protection a collective bargaining agreement may give gays. Frorillo was an employee of the Human Resources Institute, a private psychiatric hospital in Brookline, Massachusetts. An openly gay therapist, Frorillo also was the union steward for Local 285 of the Service Employees International Union. Frorillo was accused of molesting several psychiatric patients and was disciplined despite the hospital's admission that they were "unable to make a definitive determination as to the truth of the allegations."[113] The issue, as stated before the state labor arbitration board, was whether the hospital had violated the collective bargaining agreement between the union and itself. The hospital subsequently characterized its actions as "not discipline," but just "managerial judgment."[114] The arbitrator found against the hospital and ordered the hospital to make Frorillo whole for the economic losses sustained by him through its unwarranted action. The union seems to have thoroughly met its responsibilities to its gay member. Frorillo's sexual orientation was not mentioned once in the arbitrator's decision. Moreover, the testimony of Frorillo's peers indicated that they at least were sensitive to the possibility that he was made a "scapegoat" or was "set up" by the patients because he was gay.[115]

That unions are becoming increasingly aware and supportive of the employment rights of gay people is illustrated by the increasing number of unions which are issuing statements in support of gay employment and civil rights. In 1983, the AFL-CIO formally endorsed civil rights legislation prohibiting discrimination on the basis of sexual orientation as "consistent with trade unionism." The AFL-CIO also by

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OHIO ST. L.J. 501 (1980).

111. Under § 9(a) of the National Labor Relations Act, the representative selected by the majority of the employees in an appropriate bargaining unit is the exclusive representative of all unit employees. National Labor Relations (Taft-Hartley) Act § 9(a), 29 U.S.C. § 159(a) (1982). The union's right of exclusivity has been judicially determined to carry with it a correlative duty to fairly represent all unit employees. For more information on the duty of fair representation, see L. MODJESKA, HANDLING EMPLOYMENT DISCRIMINATION CASES § 7.5 (1980).

112. Service Employees Int'l Union Local 285 v. Human Resources Inst., Am. Arb. Ass'n No. 1130-1028-82 (1983) (Golick, arb.).

113. *Id.*, slip op. at 9.

114. *Id.*

115. *Id.* at 20.

resolution protested personnel actions taken against workers merely on the basis of sexual orientation.[116] Other unions taking similar stands include the International Ladies Garment Workers Union (ILGWU), The American Federation of State, County, and Municipal Employees (AFSCME), Service Employees International Union (SEIU), Communication Workers of America (CWA), and the Newspaper Guild.[117]

Whether such resolutions will be translated into tangible employment protections for gay union-members remains to be seen. An attempt by the CWA to include sexual orientation protection in its contract with the state of New Jersey was refused by the state government.[118] The Associated Press refused a similar clause in its contract with the Wire Services Guild while the United Press International accepted the clause.[119] SEIU has nondiscrimination clauses in some of its contracts, and a recent strike against a Massachusetts telephone company involved an alleged discriminatory firing of a gay person.[120] On still another front, Local 2 of the Hotel and Restaurant Employees and Bartenders Union of San Francisco negotiated a new paid holiday: Lesbian/Gay Freedom Day.[121] In Los Angeles, Hospital and Service Workers Local 299 (SEIU) accepted its first all gay and lesbian bargaining unit, the staff of the Gay and Lesbian Services Center of Los Angeles.[122] These various union activities, ranging from resolutions of support to strikes in support of gay employees, indicate a new awareness on the part of American trade unionism and provide another line of attack for the lawyer seeking to protect gay employees.[123]

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116. *See* The AFL-CIO and Civil Rights: Report of the AFL-CIO Executive Council and Resolutions Adopted by the Fifteenth Constitutional Convention of the AFL-CIO (Oct. 6, 1983) (unpublished manuscript).

117. The ILGWU adopted its resolution without controversy at its 38th convention held May 30, 1983. The Advocate, Aug. 4, 1983, at 12. The AFSCME resolution was adopted at its convention on June 23, 1982. Gay Community News, Apr. 30, 1983, at 2. The SEIU accepted a unit of employees of the Gay and Lesbian Community Services Center on January 31, 1984. *Id.*, Feb. 11, 1984, at 1. The CWA attempted to negotiate a sexual preference nondiscrimination clause in its contract with the state of New Jersey, but was unsuccessful. *Id.*, June 25, 1983, at 2. The Newspaper Guild, the nation's largest union of editorial employees, passed a resolution in support of nondiscrimination on the basis of sexual orientation at its convention in Cleveland, Ohio, on June 27, 1983. *Id.*, July 23, 1983, at 1.

118. Gay Community News, June 25, 1983, at 2.

119. The Wire Services Guild, representing 1,245 editorial employees at Associated Press, demanded a sexual preference nondiscrimination clause in contract negotiations that began November 3, 1982, but the Associated Press's final offer did not include the clause. *Id.*, Mar. 12, 1983, at 1.

120. *Id.*, June 12, 1982, at 1.

121. The Advocate, Jan. 24, 1984, at 16. The employer is a gay-owned restaurant serving one of the districts in San Francisco that has a large gay populace.

122. *Service Employees Int'l Union*, No. 1130-1028-82.

123. Other unions who support gay rights include the American Postal Workers Union, the International Longshoreman's and Warehousemen's Union, the Screen Actors Guild, the United

Another development is contributing to the ultimate demise of the employment at will doctrine and may also be useful in gay cases. The National Gay Task Force (NGTF),[124] between 1976 and 1981, surveyed over 850 major firms in the United States: the "Fortune 500" and 350 leading nonindustrial firms. The purpose was to ascertain the corporations' current policies with regard to gay employees and to encourage the adoption of nondiscriminatory policies. To date, 238 companies have responded. All of the top ten "Fortune 500" responded favorably with policy statements that sexual orientation was not a factor in hiring or firing, while over fifty-one percent of the top 100 "Fortune 500" companies also responded favorably.[125]

Some of the statements of companies were contained only in the letters to the NGTF while others were found in official company handbooks and statements. The latter type of statements raise the question whether an employee could rely on such statements to the extent that the company would be estopped from taking any negative action based on the employee's sexual orientation. The *Satori* case[126] raised the estoppel issue, but the court did not deal with it seriously. The published statements also raise the possibility that such statements form an express or implied contract with the gay employee and abrogate the employment at will doctrine. For example, the Western Electric Company publishes a pamphlet, distributed to new employees, entitled "Equal Opportunity Policy and Affirmative Action Policies." In the pamphlet, in a section entitled "Sexual Preference," the company publishes the following statement:

> Western Electric's policy is that an individual's sexual preferences are not criteria either for becoming an employee or remaining an employee. Job retention and promotability are based on demonstrated job performance and general conduct. An individual's sexual tendencies or preferences are strictly personal, and information about these matters should

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Auto and Aerospace Workers Union of California (AFL-CIO), the Department Store Employees Union of California, Local 715 of the SEIU, the Chicago Teachers Union, the Union of Boston Public School Teachers, the Massachusetts Restaurant and Hotel Workers Union, the Joint Council of Teamsters No. 28 of Washington, the Black Coalition of Building Trades of Rhode Island, the Central Labor Council of Santa Clara County, California, the Massachusetts Amalgamated Meatcutters Union, and the AFSCME Locals 22, 1164, 1902 & 2083. The Advocate, June 26, 1984, at 42.

124. The National Gay Task Force is a gay civil rights and public education organization whose purposes are to educate the public about same-sex relationships; to work for civil rights for gays in the areas of employment, housing, and public accommodations; and to combat all forms of discrimination on the basis of sexual orientation. The National Gay Task Force has a nationwide membership and serves as an information clearinghouse for more than 3,000 lesbian and gay organizations around the United States.

125. The National Gay Task Force Corporate Survey.

126. Motion for Judgment at Law, *Satori*, No. 9008.

not be sought out by Company personnel.[127]

The *Satori* case also raises this issue. However, at least at the trial level, the published statement did not protect the fired gay employee.[128]

In the private employment sector, one further method of protection for the gay employee lies in legislation. As already indicated, federal legislation providing such protection does not exist. However, state and local protective legislation does exist in some locales. The most comprehensive legislation is in Wisconsin, the first state to pass a comprehensive "gay rights bill."[129] The bill, passed in 1982, adds the words "sexual orientation" to an existing law prohibiting racial, sexual, and other forms of discrimination. The statute outlaws discrimination in many areas, most importantly for our consideration, in private employment.

Unlike some other legislation protecting gays that sat on the books unused,[130] the Wisconsin law is being litigated. As of April, 1984, twenty-three cases based on sexual orientation had been filed with the Wisconsin Equal Rights Division.[131] Moreover, on March 20, 1984, Jim Taylor became the first gay employee in Wisconsin to successfully pursue a discrimination charge under the law.[132] Taylor was fired as a chef at a country club after appearing on a television show dealing with gay issues. Taylor was awarded $1,000 in backpay, but chose not to seek reinstatement because he found a better job elsewhere.[133]

While the Wisconsin law provides the most comprehensive protection in the country, as of this writing forty-four cities and twelve counties have some type of gay rights ordinance. However, most of these ordinances do not cover private sector employment.[134] Rather, much of that legislation protects municipal employees or deals with public ac-

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127. Western Electric, Equal Opportunity Policy and Affirmative Action Programs (Nov. 1981).

128. Another possible legal approach generated by such statements may be a third-party beneficiary argument. However, this author has not found cases using that approach and the argument has many inherent weaknesses.

129. WIS. STAT. ANN. § 111.31 (West Supp. 1984).

130. In the first six months after the Anchorage, Alaska antidiscrimination ordinance passed, the municipal clerk's office had received no complaints. In Ann Arbor, Michigan, only four complaints of discrimination against gays were made during the first year of its antidiscrimination ordinance. In Seattle, Washington, the city clerk could recall only two cases involving gays since the ordinance's inception, both of which were won by the complainant. S. Berlin, Private Employment Discrimination Based upon Sexual Preference (Sept. 26, 1976) (unpublished manuscript).

131. Gay Community News, Apr. 21, 1984, at 2.

132. *Id.*

133. *Id.*

134. *See* NATIONAL GAS TASK FORCE, GAY RIGHTS PROTECTIONS IN THE UNITED STATES AND CANADA (1985).

commodations or housing. Philadelphia and Detroit are notable exceptions where the legislation includes private employment within its scope.[135]

Four states have executive orders prohibiting sexual orientation discrimination that have been issued by governors, but such orders cover state employment, not private employment.[136] None of these executive orders extend the coverage to private employers who contract with the state. A number of mayors have issued executive orders protecting the rights of gay municipal employees. But again, such orders do not usually apply to persons contracting with the city. New York City's Executive Order No. 50 was an exception—the city attempted to require all contracting agencies to agree not to discriminate on the basis of sexual orientation.[137] The city first met resistance from the Salvation Army and then from the Roman Catholic Archdiocese of New York. Both groups were told they would lose their contracts with the city, mostly social service contracts, unless they would agree in writing to abide by the executive order. The Salvation Army lost four million dollars in contracts by refusing to sign. The archdiocese brought pressure to bear on Mayor Koch, who exempted religious organizations from the order until its legality could be tested in the courts.

Subsequently, however, the archdiocese, joined by the Salvation Army and some Orthodox Jewish groups, brought suit challenging the executive order. On September 5, 1984, a Manhattan State Supreme Court Judge held the executive order unconstitutional.[138] Judge Klein ruled that the mayor had "usurped the power of City Council and . . . impermissably invaded the legislative domain."[139] Klein's rationale was that since neither the New York City Administrative Code nor state or federal law contained sexual orientation as a protected class, the executive order went beyond implementing existing employment discrimination laws. Thus, according to the judge, the mayor was creating new social policy without legislative basis.[140] The case has been appealed. However, the rationale has serious implications for all executive orders at both the city and state levels that prohibit discrimination on the basis of sexual orientation. Under the reasoning of Judge Klein, all such orders would become null because neither federal nor state legislation

135. *Id.*

136. The four states are California, New York, Ohio, and Pennsylvania. N.Y. Times, Sept. 2, 1984, § 1, col. 1.

137. *Id.*, Nov. 27, 1984, at B3, col. 1.

138. Under 21 v. The City of New York, Index No. 15046/84 (N.Y. Sup. Ct. Oct. 5, 1984).

139. *Id.*, slip op. at 4–5.

140. *Id.* at 3–4.

lists gay people as a protected, enumerated class.

While the executive order wended its way through the New York court system, the Board of Estimate of the City of New York took the matter into its own hands. The board, a legislative body, adopted a resolution refusing to approve city contracts unless the contractor for city services agreed to sign a gay antidiscrimination clause.[141] The Archdiocese of New York and others challenged the board's action, but State Supreme Court Judge Saxe upheld the board of estimate on two grounds.[142] First, the judge ruled that the resolution in question was a proper exercise of the board's power. The judge found that "limiting the award of service contracts to agencies who will refrain from discriminatory practice serves the City's best financial interests." The resolution ensures that "contract costs are not artificially and unnecessarily inflated as a result of a construction of a labor pool that is produced by discrimination."[143] The second reason given by Judge Saxe was broader and more controversial. He found that discrimination on the basis of sexual orientation violated the equal protection clause of the United States Constitution through the fourteenth amendment and violated article 1, section 11 of the New York State Constitution as well.[144] The judge reviewed almost all the favorable gay cases,[145] most of which require a "rational nexus,"[146] and concluded that "the right of individuals to be free of arbitrary and disparate treatment in their employment solely on the basis of sex preference is one of constitutional magnitude both under the Fourteenth Amendment and under the New York State Constitution."[147] Judge Saxe went further: "I hold that homosexuality is a protected category under both the State and Federal constitutions."[148] This conclusion is one which gay rights advocates would like to see adopted at higher judicial levels.

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141. N.Y. Times, Oct. 26, 1984, at B4, col. 6.

142. Under 21 v. The City of New York, Index No. 24895/1984. (N.Y. Sup. Ct. Nov. 15, 1984). *See also* N.Y. Times, Nov. 16, 1984, at B3, col. 1.

143. *Under 21*, Index No. 24895/1984, slip op. at 9.

144. *Id.* at 10.

145. *Van Ooteghem*, 628 F.2d 488; Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975); *Gay Law Students*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14; Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256 (Super. Ct., App. Div. 1979); *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947, *cert. denied*, 451 U.S. 987; *In re* Kimball, 40 A.D.2d 252, 339 N.Y.S.2d 302, *rev'd per curiam*, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973); Doe v. Doe, 222 Va. 736, 284 S.E.2d 799 (1981).

146. *Norton*, 417 F.2d 1161.

147. *Under 21*, Index No. 24895/1984.

148. *Id.*, slip op. at 16.

In addition, Judge Saxe specifically found that his decision upholding the board of estimate's resolution was not barred by principles of res judicata, holding that the board's resolution was different from the executive order and the implementing resolution examined in Judge Klein's case.[149] The result of this ruling was that the archdiocese and the Salvation Army were required to sign the nondiscrimination clause if those organizations wanted to furnish city services.[150] Until a higher court decides the issue, the New York City situation remains murky and the rights of gay employees tenuous.

In the most recent development, the archdiocese on cross-appeal has expanded its attack and claimed that Executive Order No. 50 is also void as to the enumerated classes, e.g., women and blacks.[151] This new move has done something no other event has. Lamda, a gay legal defense and education fund (LDEF), has now been joined in its amicus brief by NAACP LDEF, Puerto Rican LDEF, the Asian American LDEF, New York Civil Liberties Union, and the Center for Constitutional Rights—the old line traditional civil rights organizations.[152] As of this writing, only the Klein opinion is under appeal. The final New York decision on executive orders will no doubt effect other such orders.

B. Federal Employment

Since the late 1970's, no published cases nor other developments have occurred in the area of federal government employment.[153] However, the reader should be warned that the area of employment covered in this section speaks solely to federal civil service employment. Federal employment that requires a security clearance is covered subsequently, as is employment in the military.[154]

Based on *Norton v. Macy*,[155] a federal employee cannot be dis-

149. *Under 21*, Index No. 15046/84, slip op. at 2–5.

150. N.Y. Times, Nov. 27, 1984, at B3, col. 1.

151. *Id.*

152. Gay Community News, Jan. 5, 1984, at 2.

153. *See* Rivera I, *supra* note 1, at 813–25; Rivera II, *supra* note 1, at 317–19. *See also* Baker v. Hampton, 6 Empl. Prac. Dec. (CCH) ¶ 9043 (D. D.C. 1973) (holding that questions asked of a federal employee about his homosexual conduct which he refused to answer would not, even if answered, establish a relationship between homosexuality and the ability to perform the job in question (clerk-typist) and were, therefore, improper); Williams v. Hampton, 7 Empl. Prac. Dec. (CCH) ¶ 9266 (D. Ill. 1974) (holding that "administrative was not improperly vague" and "gave adequate notice that homosexuality was prohibited conduct falling within the regulation's coverage."). In *Williams* the employee involved was a housekeeping aide at a Veteran's Hospital. *Id. See generally* Levine, *Legal Rights of Homosexuals in Public Employment*, in 1978 SURVEY OF AMERICAN LAW 455 (1978).

154. *See* Part II of this article.

155. 417 F.2d 1161, 1164 (D.C. Cir. 1969). For a full discussion of *Norton*, see Rivera I,

charged solely because the employee is gay. Promoting the "efficiency of the service" is still, as it was at the time of *Norton*, the basic standard against which a civil service employee is judged.[156] *Norton* established that to discharge a federal civil service employee a "rational nexus" had to exist between the proscribed conduct of the employee, such as gay conduct, and the "efficiency of the service."[157] The *Norton* case coupled with the case of *Society for Individual Rights, Inc. v. Hampton*,[158] forced the civil service to change various guidelines and regulations that were clearly antigay. The *Federal Personnel Manual* now reads:

> Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such an exclusion be based on a conclusion that a homosexual person might bring the public service into contempt. You are however, permitted to dismiss a person or find him unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal Service.[159]

Among the "specific factors" enumerated in federal regulations which might hurt the efficiency of the service is "[c]riminal, dishonest, infamous or notoriously disgraceful conduct."[160] Although the word "immoral" was removed from this list in 1975,[161] it had been the most popular designation used to remove gay people from the federal government.[162] However, "immoral" as an effective category against gay people was undermined by *Scott v. Macy*[163] in 1965. The guideline, as written, still poses potential problems for gay persons in federal government. First, gay sexual acts between consenting adults in private are still criminal in a minority of states.[164] Moreover, "infamous or notori-

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supra note 1, at 818–20. *See also* Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970).

156. 5 C.F.R. § 731.201 (1984).

157. *Norton*, 417 F.2d at 1164.

158. 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975). For a full discussion of *Hampton*, see Rivera I, *supra* note 1, at 821–22.

159. S3-2a.(3)(c), Subchapter 53. Guidelines for Applying Specific Factors, United States Civil Service Commission, Federal Personnel Manual Systems, FPM Supplement 731–1, Inst. 2, July 31, 1979, at 8 [hereinafter cited as Guidelines]. *See* Singer v. United States Civil Serv. Comm'n, 530 F.2d 247, 254 n.14 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977).

160. 5 C.F.R. § 731.202(b)(2) (1980).

161. A. LARSEN & L. LARSEN, EMPLOYMENT DISCRIMINATION § 109.12 (1984).

162. *Id.*

163. 349 F.2d 182, 184–85 (D.C. Cir. 1965). *See also* Rivera I, *supra* note 1, at 816.

164. The minority states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kan-

ously disgraceful conduct" is hardly a precise term and is obviously open to judgmental and subjective interpretation. However, the guidelines for these terms currently reads:

> [b]ased upon court decision and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness.[165]

Arguably, such a guideline left open the possibility that a homosexual employee who "flaunted"[166] his sexual orientation could be fired. *Singer v. United States Civil Service Commission*[167] focused precisely on this issue. Singer's case began under the old regulations. The case was, at the request of the solicitor general, remanded back to the Ninth Circuit Court of Appeals for consideration under the changed regulations.[168] The Ninth Circuit, in turn, remanded the case back to the administrative labyrinth of the civil service. The ultimate result was that Singer's alleged behavior, which some might arguably describe as "flaunting," was found not to have diminished the "efficiency" of the service.[169] The problem with *Singer* as a precedent is that the conclusion was reached administratively by a part of the civil service administration rather than by a court.

The Civil Service Reform Act of 1978 prohibits discrimination "for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[170] This section provided the foundation for an interpretative memorandum issued by the Office of Personnel Management on May 12, 1980,[171] which specifically mentioned for the first time the phrase "sexual orientation" as opposed to "homosexuality" and which used the phrase in a protective manner. The memorandum, still in effect at this writing, provides that

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sas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, and Virginia. 1985 Survey prepared by the National Gay Task Force, 80 Fifth Avenue, New York, New York 10011.

165. *See* Guidelines, *supra* note 159; *Singer*, 530 F.2d at 255 n.15.

166. *See infra* note 272.

167. *Singer*, 530 F.2d at 255. For a full discussion of the conclusion of *Singer*, see Rivera II, *supra* note 1, at 317–19.

168. *Singer*, 429 U.S. 1034.

169. *See* Rivera I, *supra* note 1, at 823–24 n.139.

170. 5 U.S.C. § 2302(b)(10) (1982).

171. Memorandum, Policy Statement on Discrimination on the Basis of Conduct Which Does Not Adversely Affect the Performance of Employees or Applicants for Employment (OPM May 12, 1980) (emphasis added).

"the privacy rights and constitutional rights of applicants and employees are to be protected against inquiries into, or actions based upon non-job related conduct, such as religious, community or social affiliations, or *sexual orientation.*"[172] While seemingly definitive, the memorandum is only issued by a department of the government and could be revoked. Moreover, as the U.S. Court of Appeals for the D.C. Circuit recently pointed out, albeit in dicta, the privacy rights and constitutional rights of American citizens might not include actions based on "sexual orientation."[173]

The quiescence in the litigation in the federal employment area may indicate an acceptance of the new regulations and at least a tolerance for gay employees. This seeming lack of discrimination could end should a court decision override the Federal Employee Appeals Authority in *Singer* or the Office of Personnel Management.[174] Nevertheless, the federal civil service may be, on the whole, the safest place for a gay person to be employed in 1985.[175]

C. *State and Local Government Employment*

Unlike the federal employment area, the state and local areas have seen a great deal of litigation in the last five years. Before turning to a discussion of these cases, the growth of state executive orders must be considered. Four states now have executive orders which prohibit discrimination on the basis of sexual orientation in state employment. The oldest of these orders is the Pennsylvania executive order issued by Governor Milton Shapp in 1975.[176] Shortly after the governor issued this order, a court challenge was brought to enjoin its enforcement. In *Robinson v. Shapp*,[177] the court found the issue nonjusticiable. Interestingly, at the time of the executive order, homosexual conduct was still criminal in Pennsylvania.[178] The criminality of the conduct was the

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172. *Id.*

173. *See* Dronenberg v. Zech, 741 F.2d 1388, 1396 (D.C. Cir. 1984). *See generally, Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1738–80 (1984).

174. If federal regulations, as interpreted by the courts, fail to protect the gay employee, he or she may well wish to consider another potential remedy. *See* Clark, *Homosexual Public Employees: Utilizing Section 1983 to Remedy Discrimination*, 8 HASTINGS CONST. L.Q. 255 (1981).

175. For practice guides, see E. BUSSEY, FEDERAL CIVIL SERVICE LAW AND PROCEDURES: A BASIC GUIDE (1984); Broida, *Representing Federal Civilian Employees in Discrimination Cases*, PRAC. LAW., Jan. 15, 1983, at 57.

176. Pa. Exec. Order No. 1975–5 (Sept. 19, 1978) (Commitment toward Equal Rights).

177. 23 Pa. Commw. 153, 350 A.2d 464 (1976), *aff'd*, 473 Pa. 315, 374 A.2d 533 (1977).

178. 18 PA. CONS. STAT. ANN. § 3124 (Purdon 1973). This statute is still on the books. *Id.* § 3124 (Purdon 1983). *See also* United States v. Brewer, 363 F. Supp. 606 (M.D. Pa.), *aff'd mem.*, 491 F.2d 751 (3d Cir. 1973) (holding the statute constitutional as applied to prisoners), *cert. denied*, 416 U.S. 990 (1974). *But see* Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (holding the statute unconstitutional).

basis of the challenge to the executive order. The court avoided the issue by declaring that "it is not illegal to have an 'affectional or sexual preference' "[179] and, thus, the executive order in effect applied only to prohibiting discrimination on the basis of status.

The next state to issue an executive order was California, when Governor Jerry Brown issued a nondiscrimination order in 1979.[180] In 1980, a California state senator requested an attorney general opinion on the legitimacy of the order. The then attorney general, George Deukmejian,[181] issued an opinion upholding the order.[182] The attorney general's opinion indicated that the governor had a right under the California Constitution to supervise the official conduct of the members of the executive branch. Therefore, the opinion stated, the executive order prohibiting discrimination on the basis of sexual orientation was proper as long as the order did not amend existing legislation.[183] The opinion examined California's Civil Service Act to determine if the order conflicted with the statute. The attorney general's opinion concluded that, because the thrust of the civil service legislation was to base civil service appointment and retention on merit and fitness, the executive order was "wholly consistent" with the civil service legislation.[184] The opinion declared, additionally, that the executive order effectuated protections that emanated from both the federal and state constitutions,[185] citing the duty found in the California Constitution to ensure merit in the civil service,[186] and, the right of equal protection guaranteed by both the United States and the California Constitutions.[187]

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179. *Robinson*, 23 Pa. Commw. at 156, 350 A.2d at 466.

180. Cal. Exec. Order No. B-54-79 (Apr. 4, 1979).

181. Governor George Deukmejian vetoed on March 13, 1984, legislation that would have prohibited discrimination against gays in employment. He stated that he was not persuaded that such discrimination existed and cited a lack of "compelling evidence" to justify the creation of an additional "special protected class." The governor did sign on September 26, 1984, an amendment to the Unruh Civil Rights Act that authorized gay victims of violent attacks to sue their attackers. Presumably the documentation of antigay violence ("queer bashing") was sufficient. NATIONAL NOW TIMES, Mar.–Apr. 1984, at 2; Gay Community News, Sept. 22, 1984, at 1; *id.*, Oct. 20, 1984, at 1.

182. 63 Op. Cal. Att'y Gen. 583 (1980).

183. *Id.* at 584–85.

184. *Id.* at 586.

185. *Id.*

186. CAL. CONST. art. VII, § 1(b).

187. U.S. CONST. amend. XIV; CAL. CONST. art. 1, § 7. Deukmejian's successor as attorney general, John Van De Kamp, issued a ruling on discriminatory employment practices by local public agencies. After reviewing state and federal equal protection holdings, the opinion discussed the constitutional dimensions of the right to privacy. While noting that a vaguely defined right of privacy existed in the United States Constitution, the opinion relied principally on the inalienable right to privacy found in article I, section one of the California Constitution. According to the opinion, "it is not lawful for a local public agency to discriminate in its employment practices on the basis of sexual orientation." 66 Op. Cal. Att'y Gen. 486 (1983). This opinion is being chal-

The California State Personnel Board, on February 9, 1984, issued an official memo to all state agencies and employee organizations "reiterating the continuing responsibilities of departments to provide a work environment free of sexual orientation discrimination."[188] The memo spelled out the legal bases for the policy and cited not only the governor's executive order and California Constitution, but also the California Labor Code. The memo pointed out the now famous *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*[189] case in which the California Supreme Court held that the "struggle of the homosexual community for equal rights" must be recognized as "political activities" protected under California law.[190] Therefore, the State Personnel Board warned that "state agencies are . . . prohibited from pressuring employees to remain" in the closet or from discriminating against those gay persons who participate in gay rights activities.[191]

The two most recent executive orders were issued in late 1983 by the then newly-elected governors of Ohio and New York. On December 30, 1983, Governor Richard Celeste of Ohio issued Executive Order No. 64–83, which bans discrimination in state employment on the basis of "sexual orientation."[192] Governor Mario Cuomo of New York issued New York Executive Order No. 28 on November 18, 1983, which prohibits discrimination on the basis of sexual orientation in state employment and in the rendering of state services.[193] Neither executive order

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lenged by the San Bernardino United School District, which was sued by a former school administrator who claimed that her demotion was based on her sexual orientation. Gay Community News, Sept. 22, 1984, at 2.

188. Memorandum from the California State Personnel Board to state agencies and employee organizations (Feb. 9, 1984).

189. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

190. *Id.* at 485, 595 P.2d at 610, 156 Cal. Rptr. at 32.

191. On October 9, 1980, Governor Brown issued a second executive order which established a Commission on Personal Privacy with members appointed in part by the governor and in part by certain legislative leaders. The commission was to study the problems of discrimination based upon sexual orientation, note existing remedies, and make recommendations for legislative, administrative, and other actions. In December, 1982, the commission issued a report to the outgoing Brown administration that addressed the areas of information practices and reports, criminal justice, public and private sector employment, housing, consumer issues, family law, medical and mental health, and immigration.

On February 9, 1984, the California State Personnel Board issued further guidance on the subject of state employment discrimination based on sexual orientation. In addition to a discussion of the current legal environment, the memorandum outlined the scope of departmental affirmative action requirements and listed services made available to administrators responsible for implementing the law.

192. Ohio Exec. Order No. 64–83 (Dec. 30, 1983).

193. N.Y. Exec. Order No. 28 (Nov. 18, 1983). The New York executive order had antecedents in the Carey administration. On February 17, 1982, Meyer S. Frucher, director of the State Office of Employment Relations, wrote a memorandum to all state agency heads asking them to adopt "equal employment policies banning discrimination on the basis of sexual prefer-

extended the ban on employment discrimination to contractors with the state, a provision sought by gay rights activists in both states. The Ohio order set up a seven-member Governor's Advisory Committee in the Department of Administrative Services; however, the committee had no clear cut powers and the method of implementation of the order was left uncertain.[194] The New York order created a large task force and seemingly provided for implementation through the Office of Employee Relations.[195] Effective mechanisms for implementing the orders are not in place at this time in either state, and as a result, implementation has proceeded slowly.[196]

In some instances, municipal or county employees are protected by either executive orders or by municipal or county ordinances that specifically ban discrimination on the basis of sexual orientation. As of January 1, 1985, sixty-seven cities and counties and eight states have some form of protection,[197] although the scope of that protection varies widely. When gay state and local employees do not have an executive order or statute upon which to rely, discrimination is fought in the courts rather than in administrative hearings and tribunals. Constitutional rights to freedom of expression and association, and to privacy are all potentially available to state employees through the due process and equal protection clauses of the fourteenth amendment. Past state and local cases have relied on the "rational nexus" test enunciated in *Norton v. Macy*,[198] which is applied to federal employees. Moreover, some evidence exists that reliance on the *Norton* "rational nexus" test

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ence." Although the memorandum was without force of law, Frucher said it represented a "moral commitment" to end "professionally intolerable" discrimination. The memorandum was in response to a commitment made to the Civil Service Employees Association during contract negotiations. The Advocate, Apr. 1, 1982.

194. The Department of Administrative Services works in collaboration with the Governor's Advisory Committee and is undertaking a series of briefings for personnel officers in state agencies in which the practical consequences of this policy will be explored. The author is a member and cochairperson of the Governor's Advisory Committee.

195. The Office of Employee Relations was charged with the promulgation of clear and consistent guidelines, the maintenance of an environment where only job-related criteria were used to assess employees or prospective employees, and the implementation of procedures for the investigation of complaints. N.Y. Exec. Order No. 28 (Nov. 18, 1983), Statement of Policy, ¶ 3.

196. As a member of the Ohio Governor's Advisory Committee, the author is in constant contact with Abby Rubenfield of Lambda, who is on the New York task force for the implementation of the New York executive order. Both groups have found the implementation slow and confused.

In Ohio, the Equal Employment Opportunity (EEO) department officers were first designated to take grievances. This designation was discovered to be improper because the EEO was limited to "enumerated groups." Another grievance system is being developed.

197. *See* NATIONAL GAY TASK FORCE, *supra* note 134.

198. 417 F.2d 1161 (D.C. Cir. 1969). The court held that a reviewing court must be able to discern some reasonably foreseeable, specific connection between an employee's conduct and the efficiency of the service. *Id.* at 1167.

is perceived by state governments as the appropriate limit on their powers.

In 1982, the attorney general of Ohio issued an opinion in response to the question: "May sexual preference be a determining factor, or be considered at all, in the hiring or discharge of employees on the Ohio Youth Commission?"[199] Opinion 78 concluded that sexual preference could be considered, but stated that in considering homosexuality as a factor the employer must show a "rational relation to the employee's ability" to perform his or her job before the sexual orientation could be used in a determinative way.[200] The unfortunate part of the opinion is that the question was asked in the context of whether the Department of Youth Services could consider the sexual preference of a staff counselor because "a youth's knowledge" of the employee's sexual orientation might cause "homosexual panic"[201] in the youth. The opinion leaves the impression that "homosexual panic" could provide a "rational nexus."

Interestingly, after the issuance of the executive order in Ohio, the Ohio Advisory Committee requested the attorney general for an opin-

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199. 82 Ohio Op. Att'y Gen. 78 (1982).

200. *Id.* The opinion applied to departmental employees and applicants for employment as well as to private contractors performing services for the agency. *Id.*

201. The term "homosexual panic" refers to

> an adjustment disorder of adult life characterized by delusions and hallucinations that accuse the patient, in derisive and contemptuous terms, of a variety of homosexual practices. The panic typically occurs in patients with schizoid personality disorders who have successfully protected themselves in the past from physical intimacy. Breakdown occurs in a setting of enforced intimacy, such as a college dormitory or a military barracks.

H. KAPLAN & B. SADOCK, MODERN SYNOPSIS OF PSYCHIATRY III 714 (3d ed. 1980).

> In Freudian theory it is widely assumed that the syndrome of homosexual panic . . . is due to life situations that have unduly stimulated the "latent homosexuality" of a person to the point at which his ego has become overwhelmed by fear that these homosexual impulses may emerge. It is true that in occasional instances this kind of mechanism may be operative, but it would be more correct to consider this a manifestation of *repressed* homosexuality rather than *latent* homosexuality . . . .
>
> In most cases of homosexual panic, however, the issue is not one of homosexual anxiety but rather of what Ovesey (1955) has called "pseudohomosexual anxiety." In cultures such as ours, where homosexuality is identified with weakness and effeminacy in men, many men who are insecure about their masculinity express this insecurity in the form of fears that they are really homosexual or will be so regarded by others. Most often it will be found that such anxieties are not related to repressed homoerotic tendencies but rather to profound feelings of masculine inadequacy. Psychotherapeutic interpretations along these lines will prove to be more fruitful and effective.

Marmor, *Overview: The Multiple Roots of Homosexual Behavior*, in HOMOSEXUAL BEHAVIOR 15 (J. Marmor ed. 1980) [hereinafter cited as J. MARMOR]. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)* does not list homosexual panic as a mental disorder. *See also* Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984) (discussing the use of homosexual panic as a legal defense to murder).

ion on whether Opinion 78 was moot. While no official attorney general opinion was issued, the attorney general's office did reply by letter, stating that there was no conflict between the prior opinion and the new executive order; they could both stand. The letter stated that since the executive order did not define "discriminate," the office presumed that the meaning was that sexual orientation could not be used against an employee in an "arbitrary, capricious or otherwise constitutionally impermissible way."[202] Thus, the executive order was interpreted not to prohibit the use of sexual orientation as an employment consideration, but rather to limit the use of sexual orientation as a permissible standard when a rational nexus existed. This is comparable to sex as a bona fide occupational qualification, but much broader in scope. Presumably, even a discredited concept such as "homosexual panic" could, under the executive order, be a permissible reason to fire or to not hire in Ohio.

The most popular method used recently by gay employees to litigate discrimination claims is to utilize section 1983 of the Civil Rights Act of 1871.[203] Since state and local government discrimination is "under color of law" as required by the statute, section 1983 has proved a remarkably vital litigation mechanism. The statute provides a remedy to any persons who, as a result of state action, suffer "deprivation of any rights, privileges or immunities secured by the Constitution and laws."[204] Moreover, the injured party may pursue both legal and equitable remedies. Most importantly, interpretations have not limited the application of the section to members of a suspect class,[205] which makes the statute available to gays who, like women, have not been held to be members of a suspect class.[206]

One interesting application of section 1983 was *Doe v. University of Utah Hospital.*[207] The plaintiff had worked for about a year and a half as a children's play coordinator for hospitalized, terminally ill chil-

202. Letter from Attorney General Anthony Celebreeze to Mr. William Denihan, assistant director, Ohio Department of Administrative Services (Sept. 27, 1984).

203. 42 U.S.C. § 1983 (1982). For an excellent comprehensive discussion of this area, see Clark, *supra* note 174.

204. 42 U.S.C. § 1983 (1982).

205. Parratt v. Taylor, 451 U.S. 527 (1981); Maine v. Thiboutot, 448 U.S. 1 (1980); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

206. Lower California courts have come to conflicting interpretations of *Gay Law Students*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14. In *In re* Kreps, N-14221 (Civil Serv. Comm'n, Contra Costa County, Cal. Mar. 3, 1980), the administrative law judge stated that *Gay Law Students* held that gay people were a suspect class. Report and Recommendations at 15, *Kreps*, N-14221. The superior court reversed on this point in Rainez v. Contra Costa Civil Serv. Comm'n, No. 212332, slip op. at 2 (Cal. Super. Ct. Aug. 13, 1980). *See also* Chaitin & Lefcourt, *Is Gay Suspect?*, 8 LINCOLN L. REV. 24 (1973).

207. No. C-81-0394J (D. Utah May 28, 1981).

dren. He had received numerous complimentary letters from patients and parents of patients. Moreover, the plaintiff was the subject of a complimentary newspaper article and of three complimentary articles in the hospital's own newsletter. In short, he was a good employee and the hospital never maintained otherwise. The plaintiff was asked by a local television station to appear in a documentary about gay persons and the Mormon church; he consented. He informed his supervisor in advance. The hospital administration immediately decided that the plaintiff could not continue as children's play coordinator.

Doe filed suit under section 1983, alleging that "acting under color of law" the hospital had violated his right of free speech, deprived him of a property interest without due process, denied him equal protection of the law, and denied his right of privacy. The allegations made for a classic section 1983 suit. However, neither the factual nor the legal issues were ever resolved because the hospital settled out of court. The settlement included $15,000 in compensation and the promise of a permanent, full-time position at the hospital at a salary comparable to his prior salary as children's play coordinator. However, the plaintiff consented to a job that was in a "nonsensitive" area outside the pediatrics unit. In return, the hospital agreed that plaintiff could discuss homosexuality and express his opinions about homosexuality in private or in public. But the plaintiff's freedom was limited in that he was not supposed to disclose or discuss his employment in such speech. Moreover, the settlement agreement also limited his speech to "expressions [which] do not adversely affect plaintiff's ability to perform his duties." The settlement is a mixed bag. By preventing the plaintiff from working in the pediatrics unit, the settlement caters to the myth of gay persons as child molesters.[208] Moreover, it seems highly unlikely that the speech limitation could ever be constitutionally applied to the speech of

208. While 56% of a population sample agreed that homosexuals should have equal rights in terms of job opportunities, 65% of the sample felt homosexuals should not be hired as elementary school teachers. N.Y. Times, July 17, 1977, at 34, col. 1. *See also* LaMorte, *Legal Rights and Responsibilities in Public Education*, 4 J.L. & EDUC. 449 (1975). Much of the objection to homosexuals as teachers is based on a popular, though mistaken, belief that homosexual individuals are child molesters. Child molestation is not a homosexual phenomenon.

Pedophilia, a sexual preference for children, is distinct from homosexuality. *See* D. WEST, HOMOSEXUALITY REEXAMINED 212–17 (1977); D. WEST, HOMOSEXUALITY 118–19 (1967); Comment, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 629 (1961). Homosexual men primarily prefer men of their own age rather than children. INSTITUTE FOR SEX RESEARCH, SEX OFFENDERS 639 (1965); M. SCHOLFIELD, SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY 147–55 (1965), *cited in* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 129 n.51 (1973). In fact, child molesters tend to be heterosexual in orientation. INSTITUTE FOR SEX RESEARCH, *supra* at 277–79, 303–04, 332–343. Moreover, child molesters are almost never female, either heterosexual or homosexual. *Id.* at 9; D. WEST, HOMOSEXUALITY, *supra*, at 115.

nongay persons. The fact of settlement itself, however, does lend credence to the efficacy of section 1983 as a vehicle for redress. Moreover, when individual job rights, and hence, survival needs are part of individual gay rights cases, criticism of settlements from the broader view of gay legal rights is particularly unwarranted.[209]

In another case involving a hospital, Bruce La Flamme was fired from his job with Boston City Hospital. La Flamme, however, never had to resort to formal suit. First, he was supported by his union, Service Employees International Union Local 285, which filed a formal grievance on his behalf. The union's contract with the hospital included a nondiscrimination clause with regard to sexual orientation. Moreover, the hospital was covered by the executive order issued by the mayor of Boston prohibiting sexual orientation discrimination in municipal employment.[210] The arbitrator determined that La Flamme had been wrongfully terminated and the hospital settled by awarding La Flamme backpay for the period of his termination.[211] During his termination, La Flamme successfully sought unemployment compensation, thus convincing the unemployment compensation officials that his termination was not just.[212]

A classic use of section 1983 occurred in *Van Ooteghem v. Gray*.[213] Van Ooteghem was an assistant county treasurer for a county in Texas. It was undisputed that he was a good employee. Consequently, he was treated as a professional and allowed to regulate his working hours. Van Ooteghem informed his employer, the treasurer of the county, Hartsell Gray, that he intended to testify before the county

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209. Two cases involving homosexuals in the military—Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir. 1978) and Matlovich v. Secretary of the Air Force, 414 F. Supp. 690 (D.D.C. 1976), *vacated*, 591 F.2d 852 (D.C. Cir. 1978)—resulted in cash settlements after extensive litigation. Sergeant Matlovich received $160,000 from the Air Force. Ensign Berg agreed not to make public the amount he received from the Navy. For a discussion of these cases, *see* Rivera I, *supra* note 1, at 849–52; Rivera II, *supra* note 1, at 319–21.

210. Boston Exec. Order No. 2 (Jan. 9, 1984). The executive order of the new Flynn administration is similar to previous executive orders of Mayor White and prohibits discrimination in the delivery of municipal services as well as in municipal employment. On July 11, 1984, shortly after the La Flamme settlement, the mayor signed into law a revised human rights ordinance that had been introduced by City Councilman David Scondras and had passed the city council by a vote of 12 to one. The ordinance, which applies to both the public and private sectors, protects citizens from discrimination on the basis of sexual orientation in, *inter alia*, the areas of employment, labor organization, credit transactions, bonding and insurance, education, and public accommodations and services. In addition, the ordinance established a City Human Rights Commission, with an executive director and staff.

211. Gay Community News, June 16, 1984, at 1.

212. *Id.*

213. 628 F.2d 488 (5th Cir. 1980), *cert. dismissed*, 451 U.S. 935, *reh'g granted*, 640 F.2d 12 (5th Cir.), *aff'd in part and remanded per curiam*, 654 F.2d 304 (5th Cir.), *cert. denied*, 455 U.S. 909 (1982); *on remand*, 584 F. Supp. 897 (S.D. Tex. 1984).

commissioners on the subject of the civil rights of gay persons. Three days later, Gray by letter informed Van Ooteghem that he was restricted to the office from 8 a.m. to 12 noon and from 1 p.m. to 5 p.m., Monday through Friday, which coincidently coincided with hours when citizens were permitted to address the county commissioners. Van Ooteghem was instructed to sign the letter to indicate his acquiescence to these new rules. He refused and was fired, allegedly for insubordination.[214] Van Ooteghem filed suit based on section 1983 and alleging a violation of his right to free speech. The district court agreed with the plaintiff, ordered him reinstated, and awarded backpay and attorney's fees.[215]

On appeal, the Fifth Circuit affirmed.[216] Admittedly, Van Ooteghem was an at-will employee and could have been fired for any reason. However, under *Mount Healthy City School District v. Doyle*,[217] even an untenured employee cannot be fired for a constitutionally infirm reason. Treasurer Gray maintained that he fired his assistant for insubordination. However, the Fifth Circuit accepted the district court's finding that Van Ooteghem's proposed speech to the county commissioners was a substantial or motivating factor in his dismissal. The Fifth Circuit then applied the balancing test mandated by *Pickering*,[218] that is, that the state cannot prevent the speech of its citizens absent a compelling need. The trial court had found that the speech by Van Ooteghem did "not significantly interfere with the operation of the treasury nor impede his performance of his duties."[219] Thus, no compelling state interest was found. Judge Goldberg summed up:

> It may be true that some treasury workers, or Gray himself, found the prospect of an employee addressing the Commissioners Court on homosexual rights to be distressing. However, the ability of a member of a *disfavored class* to express his views on civil rights publicly and without hesitation—no matter how personally offensive to his employer or majority of his co-employees—lies at the core of the Free Speech Clause of the First Amendment.[220]

Three state university teacher cases must be compared. The ultimate result in the first, *Korf v. Ball State University*,[221] seems one

214. *Van Ooteghem*, 628 F.2d at 490.
215. *Id.* at 493, 496.
216. *Id.* at 488.
217. 429 U.S. 274 (1977).
218. Pickering v. Board of Educ., 391 U.S. 563 (1968).
219. *Van Ooteghem*, 628 F.2d at 492.
220. *Id.* at 492–93 (emphasis added).
221. 726 F.2d 1222 (7th Cir. 1984).

upon which most persons, regardless of their beliefs about homosexuality, could agree. However, procedurally the case does raise a nagging suspicion that a double standard exists when dealing with a gay university teacher as opposed to a nongay university teacher. In *Korf*, the university fired a male teacher for making sexual advances to male students. The sexual advances were coupled with promises of good grades if the sexual conduct that was solicited occurred. Dr. Korf admitted a sexual involvement with a seventeen-year old student, but denied the other allegations. Eight witnesses testified against him. The university committee found Korf guilty of unethical conduct under the American Association of University Professors (AAUP) regulations on professional ethics.[222]

Korf attacked his discharge on a number of grounds. He claimed that he had not received adequate notice of the standard of conduct to which he was being held. The Seventh Circuit found that the university's interpretation of the AAUP standards was entirely reasonable and rationally related to the duty of the university to provide a proper academic atmosphere.[223] Korf also argued that he was being denied the equal protection of the law because nongay professors were not being held to the same standard. The Seventh Circuit held against him on this issue as well. The court held that Korf was not fired because of his sexual orientation, but because of unethical conduct which exploited students; sexual orientation was irrelevant and thus equal protection issues were not raised.[224]

The third issue raised by Korf casts some doubt on the court's resolution of the other issues. Korf claimed that the district court abused its discretion in denying his motion for further discovery. The district court denied this motion before ruling by summary judgment on his equal protection claim. The information Korf sought was the university's practices with respect to the university's inquiry into private sexual relationships of the faculty and treatment of faculty members having heterosexual relationships with students.[225] The Seventh Circuit said such information, even if discovered, would be irrelevant because the university did not fire Korf because of his private sexual conduct or because of his sexual relationship with the student. Rather, according to the court, he was fired for his unethical and exploitative conduct with students. Hence, according to the appellate court, Korf's

222. *Id.* at 1224.

223. *Id.* at 1229. Compare this with the court's treatment of this issue in Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983), *aff'd*, 737 F.2d 1403 (5th Cir. 1984), where the university claimed the existence of an unwritten rule. *See infra* note 230 and accompanying text.

224. *Korf*, 726 F.2d at 1229.

225. *Id.* at 1230.

request for discovery was a mere "fishing expedition."[226] While Korf's behavior as described in the court's opinion seems beyond the pale regardless of his sexual orientation, one cannot but wonder if the university engaged in selective enforcement.[227]

Naragon v. Wharton[228] involves university teaching, allegations of unethical sexual conduct, and the use of section 1983 as the basis of litigation, without the disturbing elements found in *Korf*. In her complaint, Kristine Naragon alleged that the change in the terms of her employment by Louisiana State University was based on her sexual orientation. She claimed that the conduct of the university violated her right to freedom of belief, association, and speech, and denied her due process, equal protection and all rights cognizable under section 1983. Naragon had been a graduate teaching assistant in the university's school of music for five semesters when the problem began. In late 1982, the parents of an undergraduate student complained to the provost about Naragon's sexual relationship with their daughter. They said Naragon was an agent of the devil and was exercising unnatural influence over their daughter. Naragon admitted her involvement with the student, who at the time of the relationship was an adult. The student was not, and had not been, in any of Naragon's classes.

The provost informed the music department that Naragon should not be given a graduate assistantship which involved contact with students. At that time, no other type of assistantship existed. The issue was presented three times to the music faculty, which three times voted overwhelmingly to renew Naragon's teaching assistantship. In a meeting with the dean, Naragon was told that no questions existed about her academic performance (she had a 4.0 average), teaching ability, or ethical conduct. According to Naragon's complaint, the dean said the sole issue was "whether a gay person should be allowed to hold a teaching position which involved contact with undergraduates."[229] As a consequence of Naragon's situation, the dean fashioned a special research assistantship in music which involved no student contact. But the provost refused to meet with Naragon and her major professor of mu-

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226. *Id.*

227. In accordance with established university procedures in these matters, an ad hoc university senate committee was given the responsibility of investigating the charges and making recommendations. The committee found Korf guilty of unethical conduct, but found the evidence insufficient to support the allegation that he encouraged dishonest academic conduct and accordingly recommended a three-year probation. The trustees of the university refused to accept the recommendations and returned them to the committee for reconsideration. The committee then reversed itself and recommended discharge. Based on this recommendation, the trustees voted to terminate Dr. Korf's employment. *Id.* at 1224–25.

228. 572 F. Supp. 1117, *aff'd*, 737 F.2d 1403.

229. Complaint at 4, *Naragon*, 572 F. Supp. 1117.

sic, and denied the internal grievance Naragon had filed with the university.

Naragon sought a preliminary injunction from the U.S. District Court of Louisiana claiming irreparable harm in that the teaching assistantship would be given to someone else and that removal from a teaching assistantship would have a direct impact on her future ability to secure teaching employment. The district court issued a temporary restraining order on August 23, 1983, ordering Naragon's reinstatement. The court simultaneously set a trial date for August 29, 1983. But on September 30, 1983, the court lifted the order and ruled that the university was justified in terminating her teaching assignment because she was not a "positive role model" as the university regulations required.[230] At trial, the university contended that Naragon had violated an *unwritten* rule banning any "close personal relationship" between a faculty member and a student. However, music faculty members with twenty to thirty years experience testified that they had never heard of the policy. Judge West held that Naragon was not discriminated against because of her sexual orientation, although acknowledging that the university had not taken action against several heterosexual faculty members who had had sexual relationships with their students. The difference, he maintained, was that in Naragon's case the parents had complained and Naragon had twice been involved in public confrontations with the parents.[231] Seemingly contradicting his position that Naragon was not a victim of sexual orientation discrimination, the judge addressed the question whether Naragon would have been removed notwithstanding her sexual orientation, and concluded: "It is obvious that had the plaintiff been heterosexual, and not homosexual, a relationship between her and Miss Doe as described during the trial would be most unlikely."[232]

Thus, according to the lower court decision, Naragon's sexual orientation was not a substantial and motivating factor[233] of the university's action, and moreover, the university had a compelling state interest. The trial court held that the university had successfully carried the burden of showing that the plaintiff's conduct constituted a material and substantial interference with the mission of the university. As de-

230. *Naragon*, 572 F. Supp. at 1121.

231. *Id.* at 1123.

232. *Id.* at 1124.

233. *Id.* The court applied the test created by the United States Supreme Court in *Mount Healthy*, 429 U.S. 274, to determine whether an employment action involving a gay teacher was a constitutional violation. The *Mount Healthy* test requires that the plaintiff show that his or her exercise of a protected activity was a "substantial" or "motivating" factor in the adverse action taken. *Id.* at 287.

lineated by the court, the "University has a right, and indeed a duty, to take all reasonable and lawful measures to prevent activities which adversely intrude into the teaching process or which might adversely intrude into the teaching process or which might adversely affect the University's image and reputation."[234]

On appeal, the Fifth Circuit held that it was Naragon's intimate relationship with Doe and not her "homosexual tendencies" that was the motivating factor for the decision to change her assignment. Thus, since the decision was unrelated to Naragon's sexual orientation, there was no need to discuss her constitutional arguments.[235] The appellate decision should be read carefully to note how the choice of words indicates the underlying homophobia of the writer. For example, the Fifth Circuit referred to the "undue influence" that Naragon exercised over the student.[236] The phrase is not found in the lower court opinion nor was any evidence presented that Naragon had any undue influence over the student in question. The inference could be that mere homosexuality was "undue influence." Do male teachers who live with and sleep with their female students exercise undue influence? Another interesting word used in the appellate opinion was that Naragon "controlled Doe's participation" in an interview with the dean of students.[237] Apparently, Naragon irritated the court, which commented "Naragon persists" at the beginning of the paragraph which ends with the words: "none of the arguments about Naragon's constitutional rights need be discussed."[238] Later the Fifth Circuit concluded, "it appeared that Doe was confused and not thinking independently, and the breach with her parents was a serious problem."[239] Doe was living with Naragon during the whole trial and continued to do so afterwards. The use of the anonymous title Doe was not at the student's request, but at the request of her parents.

Judge Goldberg dissented from the two to one decision, finding that the "trial judge below was clearly erroneous in his finding that Ms. Naragon's sexual preference was not a motivating factor in her reassignment."[240] Moreover, Judge Goldberg accused his colleagues of not facing up to the "unavoidable equal protection concern in this case."[241] The judge stated:

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234. *Naragon*, 572 F. Supp. at 1121.
235. *Naragon*, 737 F.2d at 1405.
236. *Id.* at 1404.
237. *Id.*
238. *Id.* at 1404–05.
239. *Id.* at 1405.
240. *Id.* at 1408 (Goldberg, J., dissenting).
241. *Id.*

> The extent to which the Equal Protection Clause of the Fourteenth Amendment prohibits or circumscribes discrimination based upon an individual's sexual preference is a largely unresolved, yet immensely important legal issue of our day. But the obvious role of private biases in the University's action does not ring loudly enough in the majority's ears to attract their attention. I will not put a maxim silencer on the validated cries of discrimination and the calls to this Court for constitutional justice."[242]

In *Korf*, the university utilized nationally recognized AAUP standards, albeit with new interpretations, while in *Naragon* the alleged unwritten regulations seemed to exist only in the innermost recesses of the administrators' minds. In *Korf*, the teacher had direct control over the students allegedly solicited; in *Naragon*, no academic contact existed. In *Korf*, all but one of the alleged solicitations were supposedly unwelcome and coupled with promises of grades. In *Naragon*, the relationship was consensual, private, adult, and involved no possible favors. The results for the gay teachers, however, were similar.

Merle Woo, a gay university teacher in California, achieved a different result. Woo, who was "nonrenewed" as of June, 1982, attacked the actions of the University of California on two levels. Woo first challenged the university's claim that Woo could be nonrenewed under a system-wide rule that allowed administrators to terminate lecturers after four years of employment. An action was filed with the State Public Employees Relations Board on behalf of Woo by the American Federation of Teachers. An administrative judge ruled that the university had expressly misapplied the rule in Woo's case. Moreover, the judge found the university guilty of an unfair labor practice and ordered the university to reinstate the former four-year rule and rehire all the lecturers who were affected by the university's action.[243] The university appealed this decision.

In addition to this favorable administrative decision, Woo also filed suit[244] alleging sexual orientation discrimination and other forms of discrimination, interference with her first amendment, equal protection, and due process rights, and loss of property and liberty interests. The basis of her suit was the ever-popular section 1983.[245] The university moved to dismiss, but the motion was denied by the federal district

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242. *Id.*

243. Gay Community News, Mar. 3, 1984, at 6.

244. Woo v. University of Cal., No. C-83-1505 S.C. (N.D. Cal.).

245. Woo alleged violations of her rights to freedom of speech, freedom of association, equal protection, and due process based upon § 1983. Her right to privacy and other California law-based claims were brought into federal court by virtue of pendent jurisdiction. Finally, Woo also claimed race and sex discrimination based on Title VII.

court on June 3, 1983. The university also tried to have the case stayed on the grounds that the administrative appeal was still pending before the Public Relations Board. The court denied the stay as well. Shortly after this double loss, the university settled. On February 16, 1984, the Board of Regents of the University of California approved a settlement reinstating Woo with a two-year contract as a visiting lecturer, a cash award of $48,584, and attorney fees of $25,000.[246]

The *Woo* case must be viewed with two caveats. First, Woo was more than an open lesbian; she was a highly political, student-oriented teacher fighting not only for her status as a lesbian, but also for her rights as an Asian-American woman and as a teacher who believed in a special kind of education. The fact that Woo's sexual orientation claim was accompanied by a traditional Title VII claim on race discrimination made settlement more likely. Second, the *Woo* case took place in California, a state which is certainly more receptive to sexual orientation claims than other states.

When one looks at the teacher cases, one is struck by the idiosyncratic effect of geography on outcomes. The same rules applied by judges in different states produce different results. The results also seem to hinge on how judges structure the facts. For both gay students[247] and teachers,[248] universities have been safer places than other institutions. However, the safety has often been found in the protection of first amendment freedom of speech rights; gay persons speaking have more protection that gay persons acting. The transition from protecting speech to protecting private sexual acts will come about only when the equal protection issue is faced squarely. Either gay teachers will be accorded the same protection as nongay teachers on campus, or nongay teachers who engage in sexual relationships with students will have to be equally sanctioned. The whole issue of sexual harassment by teachers (predominantly male) of students (predominantly female) in the university setting has barely been faced. Until that issue is resolved, gay teachers will probably continue to be scapegoats and be treated differently. The real issue in the teaching world is not one of homosexuality or heterosexuality, but one of power and professionalism. What are the proper limits when one person is in a position of authority over another? Can sexual relations ever be consensual in that context?

The state and local arena has seen a significant number of cases arising from charges of discrimination by police forces. As gay persons

246. In theory, the settlement is confidential. This information was obtained from a newspaper and not from the plaintiff or her attorney. Gay Community News, Mar. 3, 1984, at 6.

247. For numerous cases in this area, see Rivera I, *supra* note 1, at 924–30; *see also* Rivera II, *supra* note 1, at 336.

248. Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977).

have obtained equal civil rights in some cities, either gay police officers have "come out" or gays have tried to join the police as openly gay persons. New York City now actually has an organization of gay police officers called Gay Officers Action League (GOAL). The Police Group's Brotherhood in Action, a coalition of police groups, has refused to allow the organization of gay officers to join.[249] For many years no one would admit that anyone on any police force was gay. Sergeant Charles Ochrane, Jr., broke tradition when, as an openly gay police officer in New York City, he testified in favor of the gay rights bill before the New York City Council.[250] San Francisco now actively recruits gay officers.[251] Since police organizations are typically regarded and treated as paramilitary organizations, one might expect a response to gay members similar to the response of the American military. Few persons expecting this response have been disappointed.

Childers v. Dallas Police Department[252] provides an appropriate prototype. Childers was first employed by the city of Dallas in May of 1969. Subsequently, after examination, he became part of the classified service as Storekeeper #5. In May 1973, he took the examination for Storekeeper #7 and achieved the highest score of anyone taking the examination. His personal records indicate that in 1972, 1973, and 1974, Childers was a satisfactory and, in some respects, "a superior employee."[253] Based on the examination results, Childers became eligible for a position with the property division of the Dallas Police Department. Childers applied for the position.

During the interview for the position, the police sergeant who conducted the interview became aware that Childers was gay. The exact content of the conversation is in dispute. Both agree that Childers did discuss his membership in the gay-oriented Metropolitan Community Church.[254] The sergeant testified that upon ascertaining to his satisfac-

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249. The Advocate, Sept. 17, 1984, at 19.

250. *Id. See also Officer Almsteld—On the Force and Openly Gay, id.*, June 23, 1983, at 30 (regarding a Washington, D.C., police officer).

251. *Id.*, June 12, 1984, at 15.

252. 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982).

253. *Id.* at 137.

254. *Id.* The Universal Fellowship of Metropolitan Community Churches (MCC) was founded in 1968 by Reverand Troy Perry, a former Baptist and Pentecostal. MCC now has approximately 26,000 members and 170 congregations. The doctrine of the church is described as "somewhat conservative Protestant." The denomination was supposedly founded as a haven for homosexual Christians. However, the church's constitution does not mention homosexuality. The church's matrimonial rite is described as "a spiritual joining of two persons in a manner fitting and proper by a duly authorized minister of the church." N.Y. Times, July 26, 1981, § 1, at 34, col. 1. The request of MCC to join the National Council of Churches was "postponed indefinitely" on November 9, 1983. *Id.*, Nov. 10, 1983, at A14, col. 1. *See also id.*, May 24, 1984, at A11, col. 1; Gay Community News, Nov. 26, 1983, at 1, 14.

tion that Childers was gay, he disqualified him. The grounds for disqualification, in the mind of the police official, were that since Childers was gay he was therefore a habitual lawbreaker and a potential security risk. The potential security risk existed, the officer assumed, because Childers would have sexual paraphernalia as contraband in the property room and because he would warn homosexuals of impending raids. The sergeant admitted that he disqualified Childers without checking his work or arrest records.[255]

On April 4, 1974, Childers again took the Storekeeper #7 examination and passed with an ever higher score. He was again interviewed by the same police officer and they again allegedly discussed Childers' membership and activities in the Metropolitan Community Church. Childers maintained they also discussed his participation in a Gay Pride Parade. Childers claimed that the police officer told him he would not be hired because of the emotional strain "it" would cause.[256] The police officer testified that he told Childers that he would not be hired because he would be a security risk and his sexual activities were in violation of state law.[257]

Childers sued the police department under sections 1983, 1985, and 1986, under the first, ninth, and fourteenth amendments of the United States Constitution, and under a section of the Texas Revised Code.[258] The gist of his complaint was that he was discriminated against because of his religion and related first amendment activities, and because of his sexual orientation. The religion claim was dismissed as "frivolous."[259] The court reasoned that Childers' membership and activities in the Metropolitan Community Church did not raise a first amendment claim because the church did not "require" Childers to be a homosexual and because some members of the church were not gay.[260]

The court did admit that the freedom of expression and association

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255. *Childers*, 513 F. Supp. at 138.

256. *Id.*

257. *Id.* In 1982 the same court that ruled in *Childers* held that the Texas sodomy statute was unconstitutional. *See* Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g granted* 743 F.2d 236 (Jan. 25, 1985).

258. *Childers*, 513 F. Supp. at 136. The Texas statute the plaintiff invoked prohibits discrimination in state employment. *See* TEX. REV. CIV. STAT. ANN. art. 6252–16 (Vernon Supp. 1980).

259. *Childers*, 513 F. Supp. at 138.

260. *Id.* at 139. The court's position is similar to that taken by the court in Dorr v. First Ky. Nat'l Bank Corp., No. 0118-L-(G) (W.D. Ky. Feb. 1, 1983), *appeal docketed*, (6th Cir. Apr., 1984). In *Dorr*, the court held that the gay plaintiff's religious beliefs were not "seriously held" because the Episcopal Church did not require Dorr to join Integrity or to be gay. *See supra* text accompanying note 62. The religious views of nongay persons seem to be sacrosanct while gays' religious views are frivolous or insincere.

claims in *Childers* were "more troublesome."[261] It found that "Steven Childers' efforts to organize the homosexual minority, to educate the public as to its plight and to obtain for that minority better treatment or a change in the laws respecting homosexuality represented a clear example of the associational activity singled out for protection under the First Amendment."[262] However, the court said, the real issue was not the protected nature of Childers' speech and association, but to what extent a police department might burden such activity. The court then purported to use the *Pickering* balancing test[263] and found the action of the police department justified. The denial of a job to Childers was necessary to "prevent the material and substantial interference with Childers' performance of his duties and the efficient operation of government."[264] How would hiring Childers hurt his own performance and the efficiency of the government? The court first stated that a police department must be "beyond reproach" and "reflect the values of a majority of society."[265] Apparently, employment of Childers would not allow the department to be "beyond reproach" because he "was in no way inclined to be discreet about his homosexuality or his homosexual activities."[266] His lack of "discretion" was illustrated by the court's reference to his public advocacy of homosexuality and his admission of cohabitation with his life partner.[267] Only a few short paragraphs before, Childers' speech had been characterized as protected. Subsequently, the same speech was used by the court as an illustration of his lack of discretion. Childers' admission of cohabitation with his life partner was simply telling the truth; other gay public employees have been fired for fraud for omitting salient facts from employment forms and interviews.[268] Also, Childers had no choice but to cohabit since he and his lover could not marry.

To support the lack of discretion argument, the court cited the federal case of *Singer v. United States Civil Service Commission*,[269] which, by the court's analysis, turned on "flaunting" as unacceptable gay behavior.[270] The *Childers* court, however, used incomplete information about the outcome of *Singer*, failing to discuss the remand and

261. *Childers*, 513 F. Supp. at 139.
262. *Id.*
263. *Pickering*, 391 U.S. 563.
264. *Childers*, 513 F. Supp. at 140.
265. *Id.* at 141.
266. *Id.*
267. *Id.*
268. *See, e.g.*, Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.) *cert. denied.*, 419 U.S. 836 (1974).
269. 530 F.2d 247 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 1034 (1977).
270. *Childers*, 513 F. Supp. at 141.

its rather different outcome.[271] The often implicit rule that gay people can have jobs as long as they are properly quiet about "it" has long been a theme in gay rights cases. The concept of what is "flaunting" in a gay relationship and what is "flaunting" elsewhere has always been a double standard.[272] Whatever one may feel about proper public behavior becomes irrelevant, however, because the *Childers* court clearly included "participating in homosexual demonstrations" as "flaunting."[273] Certainly, civil rights demonstrations have traditionally been specially protected free speech. Are women in an Equal Rights Amendment march or blacks in a civil rights march "flaunting"?

The court's second line of reasoning was that Childers' activities were "inconsistent with and substantially deleterious to the efficient operation of government."[274] Why? Well, first of all homosexuality is an issue "charged with emotion and anxiety."[275] Moreover, the court opines it is "controversial" and plaintiff's view is quite likely a "minor-

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271. *See* Rivera II, *supra* note 1, at 317–18.

272. One of the charges against Singer was that he "flaunted" his homosexuality. Consider the following discussions on flaunting: "Even a mundane expression of Gay social identity is perceived as a form of provocative sexual display or 'flaunting.' Gagnon and Simon (1967, p. 137) were indeed right when they wrote:

> We have allowed the homosexual's sexual object choice to dominate and control our imagery of him. We have let this single aspect of his total life experience appear to determine all his products, concerns and activities. The mere presence of unconventional sexuality seems to give the sexual content of his life overwhelming significance. [Yet] homosexuals . . . vary profoundly in the degree to which their homosexual commitment and its facilitation becomes the organizing principle of their lives.

Paul, *A Taxonomy of Categories and Themes in Anti-Gay Argument*, in HOMOSEXUALITY 40 (W. Paul, J. Weinrich, V. Gonsiorek & V. Hotvedt eds. 1982).

With respect to gay teachers, it has been observed: "Anyone raised in American culture 'knows' that heterosexuals never flaunt their lifestyle in class—only homosexuals do. The word 'flaunt' is a code work or euphemism, with hidden meanings. Consider the comparable anti-Semitic usage of the word 'pushy' as a euphemism for 'Jewish.'" *Id.* at 51–52. The same author comments that:

> Openly Gay people are often described in a media with the adjective "admitted" or "self-confessed." For example, when an Eagle Scout was dismissed from Scouting for Gay civil rights activities, the press described him as "an admitted homosexual" . . . . But he had not "admitted" anything, nor had he described himself as "homosexual"; rather, he had affirmed his identity, which he defined as Gay. Linking "admitted" or "confessed" with "Gay" implies guilt or shame. It is insinuated in a way that makes this guilt or shame appear self-evident.

Id. at 52.

> Today, assertions that Gay people only bring it on themselves by "flaunting" or disclosing their sexual orientation are contradicted by studies which demonstrate official efforts to detect and punish homosexuality . . . . Intrusions on privacy and threats of public exposure are a constant fact of life for the millions of conventional homosexuals who are forced to develop covert protective strategies in the closet . . . .

Paul, *Minority Status for Gay People*, in HOMOSEXUALITY, *supra*, at 359.

273. *Childers*, 513 F. Supp. 141 n.10 (citing *Aumiller*, 434 F. Supp. at 1293).

274. *Id.* at 141.

275. *Id.*

ity view."[276] The court then indicated that, while it "appreciated that the primary purpose of the first amendment is to protect minority views," nevertheless, the "activity *of the sort* in which Childers was involved" is public and thus, "undermines the legitimate needs for obedience and discipline within the police department."[277] According to the court, Childers' activities were deleterious because they would foment controversy and conflict in the department. The police department, the court maintained, had the right to protect its public image and avoid ridicule and embarrassment.[278] These goals alone, the court held, were sufficient to overcome Childers' first amendment rights.[279] Surely anyone reading these justications must remember that the same reasons were historically used to deny blacks and women positions with the police and military. The court went on to say that Childers' views would subject him to harassment, and his gay activities would promote unrest and disharmony among fellow workers.[280] Surely black workers are sometimes harassed by their racist fellow workers, which creates unrest and disharmony; the same may be said for women with sexist coworkers.

The court, in a footnote, could not resist engaging in a rather old-fashioned sterotyping of gay people, which has long been discredited: The court said that the "stress" of the situation might interfere with Childers' ability to perform his job.[281] A psychologist testified that many gays feel left out of society, feel inferior because of societal attitudes, and even feel persecuted. Can one deduce why? The psychologist testified that, therefore, a homosexual worker might feel stress and anxiety especially in relationship to his or her fellow officers.[282] In conclusion, according to the court, the "peculiar conditions inherent in the police department" overcame first amendment considerations.[283] The court also dismissed all of Childers' other claims.[284] The case was appealed to the Fifth Circuit, which affirmed without a published opinion.[285]

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276. *Id.* The court never explained its remark about a police force reflecting majoritarian views. If that remark was based on a legitimate rule, the court would be hard pressed to explain the presence of blacks on the police force in Dallas, Texas.

277. *Id.* at 142.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 142 n.12.

282. *Id. But see* A. BELL & M. WEINBERG, HOMOSEXUALITIES 197 (1982): "Numerous investigations have failed to show any consistent or clear-cut differences between homosexuals and heterosexuals in terms of their psychological adjustment."

283. *Childers*, 513 F. Supp. at 142.

284. *Id.* at 143–48.

285. *Childers*, 669 F.2d 732.

Steven Horn had been a police officer in Mesa, Arizona for four years before being fired for being gay.[286] Prior to his police service, Officer Horn had been Sergeant Horn, a member of the First Division of the U.S. Marines, and had received the bronze star for his heroism in Vietnam. When Steve Horn told his superiors at the police department that he was gay, he was fired.[287] The *Horn* case is not, strictly speaking, a state and local government employment discrimination case. Horn chose to challenge the Arizona statute that criminalized homosexual conduct, rather than fight his dismissal directly. The case becomes interesting in the state and local area because the trial court judge made errors of law in his opinion and went beyond the scope of the argument about the constitutionality of the Arizona statute. The judge announced that despite the pleadings, the constitutionality of the Arizona law was not the issue before the court. In a rather unique approach, the judge announced that the Mesa Police Department "may treat them [the laws] as constitutional."[288] The judge then granted summary judgment on the basis that the police department had not acted arbitrarily or unjustly in firing Steve Horn. The judge found that the police department has "unique needs." The police department, he said, had to have officers who would enforce the law and not selectively enforce the law based on their conscientious objections.[289] Nowhere in the pleadings were any allegations that Horn had not in the past enforced the law. Moreover, among the unique needs of the department was its need to "maintain a law abiding image." Not content with these determinations, the judge went on to find that Horn was not discharged because of his status, i.e., "being a homosexual," but rather because he announced that he would continue to do acts proscribed by the Arizona statute. The judge drove the final nail in the coffin by relying on the department's contention, alleged in the pleadings but never proven at trial, that Horn had been untruthful. This finding, according to the court, would "rationally" support the department's discharge of Horn.[290] Interestingly, the department's finding of untruthfulness was made at a hearing that was unrecorded and was not before the

286. Horn v. City of Mesa, No. C427557 (Super. Ct. Ariz. Sept. 18, 1981), *aff'd mem.*, 1-CA-CIV 6514 (Ariz. Ct. App. July 19, 1984), No. 176697-PR (Ariz. Sup. Ct. Oct. 1, 1984).

287. Just prior to Horn's dismissal, the police chief ordered Horn to take a polygraph test. Horn was asked if he had ever used his position to gain homosexual favors. Horn answered that he had not. The chief then asked Horn if other Mesa police officers were homosexuals. Again, Horn replied in the negative. Only after Horn's cooperation with the chief's questioning was he fired. The Advocate, Oct. 30, 1980, at 12.

288. Judgment Dismissing Action at 1, *Horn*, No. C427557.

289. *Id.* at 3.

290. *Id.*

judge.[291]

In Horn's appeal,[292] the Arizona Court of Appeals seemingly recognized that the lower court's homophobic zeal had resulted in an egregious legal error. Nonetheless, the court of appeals affirmed the lower court in an unpublished memorandum decision.[293] The court stated that the Arizona Supreme Court had recently found the statutes criminalizing homosexual conduct constitutional and noted that an appeals court could not "reject" this holding. The court admitted that a material issue of fact existed when the lower court granted the motion for summary judgment,[294] but held that the lower court's decision was not arbitrary or an abuse of discretion. Moreover, the court stated "it is virtually certain that were the department required to review the matter again the result would be the same."[295] Horn's appeal to the Arizona Supreme Court was denied.[296]

Two other cases involving police officers occurred in California, with results significantly different from the Texas and Arizona cases. In fact, one case never made it to the courtroom. Tom Cady graduated at the top of his class at the Kentucky Policy Academy. Subsequently, he became a police chief in a small town in Kentucky. When Cady learned that the city of San Francisco would hire openly gay officers, he moved to San Francisco and applied for a position with the police department.[297] Admitted into the Police Academy in May of 1981, Cady successfully completed the course of study. He then entered "field training," but only made it through twelve weeks of the fourteen-week program. Allegedly, Cady was told that if he did not resign, he would be terminated and that if he were terminated he could never work for the city. The police department cited poor performance as the reason for Cady's termination.[298]

Cady appealed to the Civil Service Commission of the city and county of San Francisco. At a hearing before the Civil Service Hearing Panel, Cady alleged that during both his academy stay and his field

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291. Motion of Petitioner for Rehearing, *Horn*, No. C427557.

292. Gay Rights Advocates was denied permission to file an amicus curiae brief in this case. Letter from Craig Mehrens, attorney for Steven Horn, to Rhonda R. Rivera (Nov. 4, 1983).

293. *Horn*, 1-CA-CIV 6514.

294. "We acknowledge appellant's argument that a material issue of fact existed as to whether or not he lied to Chief . . . . In our minds, this is a makeweight consideration . . . ." *Id.*, slip op. at 6.

295. *Id.*

296. *Horn*, No. 17697-PR. Horn may now take his case to federal court. Letter from Craig Mehrens, attorney for Steven Horn, to Rhonda R. Rivera (Oct. 23, 1984).

297. The Advocate, July 7, 1983, at 6.

298. Cady v. San Francisco Police Dep't, slip op. at 1–2 (San Francisco Civil Serv. Hearing Panel, Feb. 11, 1983).

training placement he was constantly verbally harassed by being called "girl," "fag," and "faggot," and that his sexual orientation was mocked by officers, including senior officers. Moreover, he maintained that his field training placement was marked by discriminatory actions, including failing to be instructed in certain areas and by certain officers, being given evaluations inconsistent with department practice, and being subjected to additional tests and evaluations that other recruits were not given. At the hearing, the police department refused to furnish comparative data on other recruits. The department also refused to allow the Civil Service Commission staff to review the daily observation reports of other recruits to compare those evaluations with Cady's.[299]

The hearing panel made two findings. Initially, a discriminatory work environment was found. Evidence of homophobia was found at both the police academy and at the field training station.[300] However, the panel held that there was insufficient evidence to support Cady's claim that the police department had conspired to eliminate him on the basis of his sexual orientation.[301] Cady appealed to the full commission. The commission found that the facts were in dispute, but "resolved the doubts in favor of Mr. Cady." Under its "power to fashion a remedy in cases which allege prohibited discrimination contained in the Charter of the City," the commission reinstated Cady in the police department.[302] This case represents the first instance that the San Francisco Civil Service Commission ordered a city employee reinstated because of sexual orientation discrimination.[303]

A second California case involved a lesbian who wanted to become a deputy sheriff in Contra Costa County, California.[304] Denise Kreps applied for the position of deputy sheriff in February, 1979. After written and oral examinations and an agility test, Kreps ranked eighteenth

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299. While the opinion of the Hearing Panel is fully written, the decision of the Civil Service Commission is not. Rather, the commission issued only a Minute Order reinstating Cady. The facts are drawn from three sources: the panel's opinion, Cady's sworn statements, and a letter from Matthew Cole, Mr. Cady's attorney, to Rhonda R. Rivera (Dec. 18, 1984) [hereinafter cited as Cole letter].

300. *Cady*, No. 2018-81, slip op. at 4. The discriminatory work environment was in violation of San Francisco Administrative Code § 16.9-25 (prohibiting sexual harassment), Civil Service Rule 1.03 (prohibiting discrimination on the basis of sexual orientation), as well as state law.

301. *Cady*, No. 2018-81, slip op. at 4.

302. Notice of Action Taken by the Civil Service Commission (July 12, 1983). It is unclear whether the commission accepted the proposed findings of fact submitted by either party.

303. Cole letter, *supra* note 299. Mr. Cole believes the case to also be important on the issue of comparative data. Cady did not contest the police department's charges that he was deficient in some areas; rather, he pointed out that he was treated differently than other employees. Since the police refused to supply comparative data, the issue was resolved in Cady's favor. *Id.*

304. The *Kreps* case was reported extensively in the gay press. *See* High Gear, July, 1981, at 3; National NOW Times, Oct.–Nov. 1980, at 6; The Advocate, June 25, 1981, at 11; *id.*, Feb. 19, 1981, at 10.

out of 800 applicants. For two and one-half years prior to her application, she had been a dispatcher with the sheriff's department. Moreover, for a good part of that time she had been a reserve deputy. In January of 1979, Kreps had been made a class I reserve, which indicated that she was permitted to work without supervision. As a reserve deputy, she had done both patrol and detention duty. While she had received no evaluations as a reserve deputy, Kreps's dispatcher evaluations were favorable.[305]

With her high test scores and superior background in police work, Denise Kreps would have appeared to be an excellent candidate for the position of deputy sheriff. But during a routine polygraph examination given all recruits, Kreps answered truthfully that she had had same-sex sexual relations, and in fact had had such relations the night before the examination. Ten days later Kreps was informed by Sheriff Rainey that he was disqualifying her because of her homosexuality.

Kreps appealed to the Civil Service Commission of Contra Costa County. At a hearing before an administrative judge, Kreps testified that all her sexual acts were in private and with consenting adults. She also testified that she had never witnessed homosexual acts between prisoners nor engaged in any such acts with prisoners. The sheriff testified that he had decided to disqualify Kreps without reviewing her personnel file. Moreover, he also admitted that he had made the decision without knowledge of anything in her background that would indicate that she would violate department rules. The sheriff's reasons for disqualification were that, if hired, Kreps might not report incidents of homosexual behavior between prisoners, she might commit homosexual acts with prisoners, and in a detention facility she would be in a "module" with female prisoners for whom she had a sexual preference. The sheriff further justified his position by stating that he believed that prisoners had a right not to be guarded by a homosexual. However, the sheriff admitted that potential problems existed when male police officers transported female prisoners, and that in the detention facilities police officers who were not gay had gotten involved with prisoners.[306]

Three of Kreps's former coworkers—a female deputy sheriff, a male deputy sheriff, and a female detective—all testified that Kreps's work was excellent and that they had never seen Kreps engage in any "inappropriate behavior."[307] Testimony relating to how deputies were assigned in the detention facilities with regard to both male and female

305. *In re* Kreps, N-144221, slip op. at 2–3 (Civil Serv. Comm'n, Contra Coast County, Cal. Mar. 3, 1982).

306. *Id.*, slip op. at 3–4.

307. *Id.* at 5.

prisoners indicated that guards were seldom alone with prisoners.[308]

The sheriff's department brought in a psychiatrist, Dr. Cooley, who had had a long association with police departments and with various jails. His testimony is fascinating because, although he is a psychiatrist practicing in the year 1984, Dr. Cooley reflects almost every classical and disproven stereotype about gays. Dr. Cooley testified that, in his opinion, the use of homosexual guards was not advisable for a number of reasons. First, Dr. Cooley maintained that a lesbian who chose to be a prison guard would tend to be aggressive. This "aggressive" person, he stated, would then be placed in contact with "passive" prisoners. Second, the prison guards have many visual, vocal, and tactile contacts with prisoners. Third, Dr. Cooley stated, being a prison guard is a unique experience of being in a dictatorial, punitive role over "disturbed people." Dr. Cooley had found that by the end of thirty months, a sizeable portion of guards "act out" this role. Gay guards, Dr. Cooley contended, would be more likely to act out "sexually" with a prisoner than heterosexual guards, because no mature person would have sexual relations with a prisoner. Homosexuals, he testified, are "less mature than heterosexuals."[309]

Dr. Cooley was also worried about possible psychological harm to the prisoners, in that prisoners might experience "homosexual panic."[310] Cooley indicated that prisoners could usually identify gay guards almost immediately. Moreover, Cooley stated that Kreps exhibited a number of "masculine" tendencies, such as body stance, short haircut, casual manner of dress, and minimal use of makeup. Even Kreps's truthful testimony was attacked by Dr. Cooley, who viewed her admission of her sexual orientation as indicative of a self-defeating attitude. Most persons, he testified, would have lied about their sexual orientation and "hoped to get by with it." Moreover, the fact that Kreps had had sex the night before the polygraph test indicated that she had chosen to deal with the stress of the examination by having a homosexual experience. However, Dr. Cooley conceded that a heterosexual person's having sex the night before an examination would not be abnormal.[311]

Among the most interesting features of Dr. Cooley's testimony is

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308. *Id.* at 6–7.

309. However, it has been observed that "[i]n actual fact many homosexuals, both male and female, function responsibly and honorably in positions of the highest trust and live emotionally stable, mature, and well-adjusted lives that are indistinguishable from those of well-adjusted heterosexuals, except for their different sexual preferences." Marmor, *Homosexuality and the Issue of Mental Illness*, in HOMOSEXUAL BEHAVIOR 400 (J. Marmor ed. 1980).

310. See *supra* note 201 on homosexual panic.

311. *Kreps*, N-14221, slip op. at 7–9.

the suggestion that the correct and normal conduct for Kreps would have been to lie in the polygraph examination. There have been a number of cases where gay persons have lost their jobs for concealing their sexual orientation on job applications and in interviews. When their sexual orientation was discovered, they were fired, not for being gay, but for fraud.[312] Dr. Cooley's theory that being open about one's sexual orientation reveals self-defeating behavior flies in the face of nearly every major study which indicate that acceptance of one's homosexuality is the healthiest approach.[313]

An openly lesbian sergeant of the San Francisco Sheriff's Department testified on Kreps's behalf. She had been on the force for five years and had spent four years working in a detention facility. Her testimony, based on her experience, rebutted almost every one of the sheriff's speculations.[314] Kreps also introduced a psychologist who was engaged in research on the mental health of lesbians. The psychologist, Dr. Thomas, testified that research has shown no differences between the mental health of heterosexual and homosexual women. Dr. Thomas refuted Dr. Cooley's testimony, stating that lesbians are not easily identifiable, are no more likely to act out than are heterosexuals, and are no more likely to use their positions to coerce other persons into sexual acts than are heterosexuals.[315]

After all this testimony, the administrative law judge held in Kreps's favor. The judge found that the sheriff's concerns were speculative and were not based on substantiated evidence, and thus the sheriff's actions violated Kreps's equal protection rights under the California Constitution.[316] In a moment of extraordinary zeal, the judge had found that gay persons were a "suspect class" under the California Constitution,[317] and that the sheriff had shown no "compelling interest" to justify his actions. The judge also made a *Norton*-like[318] rational nexus finding, and held that the sheriff had not shown that Krep's sexual orientation rendered her unfit to be a deputy sheriff.

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312. *Acanfora*, 359 F. Supp. 843, *aff'd on other grounds*, 491 F.2d 498, *cert. denied*, 419 U.S. 836.

313. *See* Freedman, *Homosexuals May be Healthier Than Straights*, PSYCHOLOGY TODAY, Mar. 1975, at 31.

314. *Kreps*, N-14221, slip op. at 10–11. The witness, Connie O'Connor, was recently promoted to the rank of lieutenant in San Francisco's Sheriff's Department. In her new job she will supervise 75 courtroom deputies. The Advocate, Nov. 24, 1983, at 13.

315. *Kreps*, N-14221, slip op. at 11.

316. *Id.* at 15.

317. *Id.* He cited to Morrison v. Board of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1968), and *Gay Law Students*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14. However, these cases do not stand for this point.

318. *Kreps*, N-14221, slip op. at 15. *See supra* note 198 (discussion of the *Norton* test).

Sheriff Rainey appealed to the Contra Costa Superior Court.[319] The court said the proper test was not to look for "a compelling reason," but rather to see if the sheriff's actions were "unreasonable."[320] Thus, the court rejected the suspect class finding and instead applied a "rational basis" test. Even under that standard, the court found that the sheriff had denied Kreps the equal protection of the law by his "unreasonable" actions. In fact, the court found the sheriff's concerns "sufficiently improbable."[321]

The real life results bore out the court's decision in Kreps. Denise Kreps graduated first in her class of thirty-nine from the state police academy and won the award of "Outstanding Student." Ironically, the man who had to hand her the award was none other than Sheriff Rainey.[322]

Not all California cases have had a happy result for the gay employee. Andrew Exler, who worked for the Orange County Human Services Agency as a clerk-typist, was dismissed for alleged "insubordination and poor work performance."[323] Exler was fired shortly after he had lost one round in a highly publicized gay rights case against Disneyland, which had prohibited Exler from dancing with another man.[324] He was also fired on the same day on which he wore a gay rights button to work.[325] The Orange County Employees Association represented Exler and sought to have his discrimination complaint arbitrated under their collective bargaining agreement. The arbitrator held that the issue was not subject to arbitration because the contract did not cover discrimination based on sexual orientation.[326] However, the Human Services Agency did have a supplemental personnel procedure which forbade discrimination not based on "merit." The county conceded that sexual orientation discrimination would fall within the am-

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319. *Rainey*, No. 212332.

320. *Id.*, slip op. at 2.

321. *Id.* While a judge in Contra Costa County, California, found the sheriff's fears "sufficiently improbable," a jury in San Diego, California, was taking an opposite stand. The San Diego County Grand Jury found that County Sheriff John Duffy's policy of not hiring gay deputies is "rational" and should be continued. The Advocate, June 26, 1984, at 28.

322. High Gear, July, 1981, at 3.

323. The Advocate, June 25, 1981, at 11.

324. Exler v. Disneyland, No. 25235 (Cal. Ct. App. Oct. 16, 1981). The court of appeals remanded the case for a jury trial, which Exler won late in 1984. *See* MICHIGAN ORGANIZATION FOR HUMAN RIGHTS NEWSLETTER, Sept.–Oct. 1984, at 4. This case will be reviewed in Part II of this article in the section on public accommodations.

325. The button said "You are being patronized by a Gay American." Exler refused to take the button off while meeting the public. Summary of Evidence at Hearing and Findings and Recommendation, County of Orange v. Orange County Employees Ass'n, no. 72-30-0201-81 (Am. Arb. Ass'n July 27, 1981).

326. *County of Orange*, No. 72-30-0201-81, slip op. at 11–13.

bit of that prohibition.[327]

Exler appeared before a hearing officer of the Judicial Arbitration Service. The hearing officer found against Exler, holding that sexual orientation was not the basis of Exler's termination. Allegedly his work was poor, he played his radio too loud, he returned from lunch and breaks late, and he smoked in a nonsmoking office. However, the hearing officer also listed as one of his misdeeds his refusal to take off his gay rights button while meeting the public.[328] Certainly, such a reason raises first amendment issues. The case was hardly a victory for Exler himself. However, the admission by the county that a personnel action based on sexual orientation was not permissible if personnel actions could only be based on "merit," was an important legal victory for other employees.[329]

The case of *Parsons v. Time, Inc.*[330] involved an employee of a state university who was terminated, at least in part, because she was rumored to be a lesbian. However, the litigation that ensued does not fit neatly into our previous categories. Pam Parsons was the head coach of the women's basketball team at the University of South Carolina. She was a highly successful, winning coach who was simultaneously known for her tough discipline of her players. Questions had arisen concerning her recruiting practices in the past, including charges of giving players money and violating other recruiting rules.[331] However, her coaching position was not questioned until a player accused her of being a lesbian. One of Parsons' players lied to her parents about spending the night at a friends home when, in fact, she had spent the night at Parson's home. Caught in the lie by her mother, the player then proceeded to describe hugging and kissing which allegedly went on between Parsons and her housemate, another player. The mother reported these allegations to a university official who forced Parsons to resign. However, Parsons did get a financial settlement from the university[332] and the situation seemed at a close.

Shortly afterwards, however, a local newspaper printed an article alleging that Parsons was fired for having a lesbian affair with a player. But this article was inconsequential compared to the next event. *Sports Illustrated* printed an expose about Parsons in its annual swim suit is-

327. Letter from Kathleen Sage, attorney for Orange County Employees Association, Inc., to Rhonda R. Rivera (Oct. 23, 1984) [hereinafter cited as Sage letter].

328. *County of Orange*, No. 72-30-0201-81, slip op. at 1–2.

329. *Id.*, slip op. at 1. According to Sage, Exler's attorney, the county has consistently refused to add "sexual orientation" to the nondiscrimination clause in its contracts, even though the union has sought such an addition in its bargaining. Sage letter, *supra* note 327.

330. No. 83 CP401315 (Ct. C.P. Columbia, S.C. Mar. 31, 1983).

331. The Advocate, June 26, 1984, at 16–18.

332. *Id.*

sue, an issue of especially high circulation.[333] The article spoke of alleged recruiting violations, drug use, and the rumored lesbianism. Even the most dispassionate observer could conclude that Parson's coaching career was over. Throughout all these events, Parsons maintained that she was not a lesbian and that her relationship with the live-in player, Tina Buck, was merely a friendship.[334] Parsons had accepted the South Carolina firing until the *Sports Illustrated* article appeared. She sued the magazine, owned by Time, Inc., for libel, invasion of privacy, and intentional infliction of emotional harm.[335]

The case was heard in federal court before a jury. Lewis Cromer, Parsons' lawyer, felt he was winning[336] until a surprise witness turned the case into a lesbian soap opera. Volunteering herself to Time, Inc., a lesbian bartender, Ms. DeLay, from Salt Lake City, Utah, testified that she had seen Parsons and Buck many times after the suit was filed in the bar where she worked. She further testified that the two women danced together, hugged, and kissed. DeLay said she was motivated to testify by what she saw as Parsons' dishonesty and hypocrisy. DeLay did testify that Buck had refused to dance with her.[337]

Whatever the real facts, the jury chose to find for Time, Inc.[338] One could conclude the story was over. However, the judge who heard the case called in the FBI *sua sponte* to check Parsons' testimony to see if she had lied when she said she had never been to the bar in Salt Lake City. The FBI investigation apparently came to the conclusion that Parsons had lied and perjury charges were filed against her.[339] She has recently pled guilty to those charges and currently faces a possible jail term and fine.[340] Parsons still steadfastly denies being a lesbian. Questions fairly leap out. Would *Sports Illustrated* have published such a sensational article about a heterosexual coach-player affair? Did the magazine deliberately choose the article to sell the issue? Why after filing suit would the plaintiff risk going to gay bars? Lastly, what would motivate one lesbian to turn on another so harshly?

D. Teaching

Employment of gay persons as teachers in elementary schools and high schools is still a very controversial issue. No other area of employ-

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333. *See* Lieber & Kirschenbaum, *Stormy Weather at South Carolina*, SPORTS ILLUSTRATED, Feb. 8, 1982, at 30–34, 37.

334. The Advocate, June 26, 1984, at 16–18.

335. Complaint at 1–2, *Parsons*, No. 83 CP401315.

336. Telephone interview with Lewis Cromer, Parsons' attorney (Dec. 6, 1984).

337. The Advocate, June 26, 1984, at 18–19.

338. *Parsons*, No. 83 CP4101315.

339. Letter from Lewis Cromer, Parson's attorney, to Rhonda R. Rivera (Dec. 10, 1984).

340. *Id.*; *see also* Gay Community News, Jan. 5, 1985, at 2.

ment for gay people attracts such condemnation by the general public. The reasons for such unease stem from common sterotypes and misconceptions. The stereotype of the lesbian or the gay man as a child molester has historically been used to ban gays from the teaching profession. However, statistics indicate that child molestation is not linked with homosexuality and that heterosexual men are much more likely to molest children than are gay men and lesbians combined.[341] Another reason often given for keeping gay persons out of the classroom is the belief that a gay teacher could convert an otherwise heterosexual student into a gay student. But medical research has clearly demonstrated that sexual orientation is well-established in an individual before he or she reaches school age;[342] thus, gay teachers simply cannot change the sexual orientation of their students.

The final reason often given for the exclusion of gay persons from teaching is that a gay person is an immoral role model. Such an approach labels all gays as immoral per se. Once so labeled, a gay person becomes ineligible for teaching because teachers are supposed to be positive role models for students. This final argument is based not on conduct but on status: the gay person is excluded not for what he or she does, but for who he or she is.

By definition, the exclusion of gay persons on the basis of "being gay" depends upon the acquisition of knowledge that the teacher is gay. Thus, the issue arises only when a teacher is discovered to be gay or in some way reveals his or her homosexuality. When the teacher's sexual orientation is not known, a presumption of heterosexuality ex-

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341. " '[S]cholarly data reveal that about eleven out of twelve pedophilic arrests involve men with *female* minors—that is, are heterosexual crimes.' In all likelihood 'the adult heterosexual male constitutes a greater risk to the underage child than does the adult homosexual male.' " Voeller, *Society and the Gay Movement*, in J. MARMOR, *supra* note 201, at 238 (citations omitted).

342. [P]arents in our culture have fears with regard to their children becoming homosexual. These fears are easily stimulated by ignorant or malicious assertions that children exposed to homosexual teachers (particularly if these teachers are popular and likeable) are in danger of modeling themselves after such teachers and thus becoming homosexual themselves. Yet there is not an iota of evidence for such assertions! As we have seen, the etiology of homosexuality is affected by many factors, some possibly genetic or constitutional, others dependent on early familial relationships, still others deriving from sociocultural elements. People do not 'choose' to be homosexual any more than they 'choose' to be heterosexual. In almost all instances, the basic factors that lead to a homosexual propensity are established before the age of six, well before the school years even begin. That modeling is not a relevant factor, in any event, is indicated by the fact that all homosexuals come from heterosexual families, and that the overwhelming majority of the 'models' they are exposed to in our culture are heterosexual.

Overview: The Multiple Roots of Homosexual Behavior, in J. MARMOR, *supra* note 201, at 19–20 (citations omitted).

ists. Being a "closet case," then, is acceptable.[343] A gay teacher who keeps quiet and behaves clandestinely does not upset the presumption of heterosexuality and is generally allowed to continue his or her career. But a gay teacher whose sexual orientation is either open or discovered is regarded as an immoral role model and is discharged.[344]

One could argue that such a system is inherently dysfunctional for at least two reasons. First, persons who are forced to hide, and hence live in fear of discovery, are not likely to be as healthy or productive as persons who can be open about themselves.[345] Second, the forced closeting of gay teachers ignores the fact that ten percent of students are gay;[346] their sexual orientation was set long before school age and no amount of heterosexual role modeling is going to change their basic predisposition.[347] Those students would benefit from positive gay role

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343. One gay pattern common to all modern or 'emerging' nations is the closeting of Gays into an underground society. Apparently this shift from visibility to invisibility happens in the often centuries-long changeover from tribe to village to modern industrial state. The compulsory hiddenness of Gay life is evident to Western Gay people. 'Being in the closet,' that is, hidden, and 'coming out of the closet,' that is, being revealed, are expressions that have recently escaped from Gay slang into American pop culture as a result of the impact that Gay writing, Gay mass demonstrations, and other Gay organizing endeavors have had on mass consciousness during the 1970's. At present the term 'closet' implies a scandalous secret, or skeleton, in the family closet. In the case of a Gay person, it refers more precisely to *being* the skeleton in the family's closet. That skeleton is the reality of Gayness itself. The sometimes violent and always frightening suppression of Gay culture often forces Gay people to live in the closet, in a secret world. And this suppression prevails throughout the modern industrial world.

Living in the closet does not eliminate Gay sex or lifelong gay relationships, but it does hide Gay culture from view, channeling it into a closely guarded and psychologically dangerous, though vital and lively, underground. Social suppression of Gay culture is reflected in such statements as 'no one cares what you do in private, just don't flaunt it,' that is, don't express it, make it public. But without flaunting there is no culture; there is only the initiation of heterosexual culture and the illusion that only one culture exists. Closets exist to maintain this illusion.

J. GRAHN, *supra* note 8, at 23.

344. *See, e.g.*, Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1373 (1985).

345. *See* B. BERZON & R. LEIGHTON, POSITIVELY GAY, 1–14, 88–100 (1979); Freedman, *supra* note 313, at 31–32.

346. *See supra* note 5.

347. Thus the 'model' of a popular homosexual teacher can never 'cause' homosexuality to develop in any child of either sex whose programming, both biologically and developmentally, is proceeding along heterosexual lines. The only effect that exposure to homosexual teachers can have on heterosexual children (assuming the teachers' sexual orientations become known) is to create more tolerance and understanding toward homosexuals as people, and to dispel the wide-spread prejudicial myths about them, thus reducing potential homophobia. As for that small percentage of children who for prior developmental reasons are already struggling with homosexual feelings, with all the guilt and self-hatred attendant upon such feelings in our culture, a role-model with whom they can identify in a positive way can only help them to feel better about themselves and thus contribute to their mental health. In both instances, the basic effect is a positive one rather than a negative

models so that they can become healthy, productive citizens. However, the idea of a healthy gay role model is anathema to persons who believe gay persons are per se immoral and conclude that no gay person can ever be healthy. As long as this viewpoint controls the local school systems, excellent teachers will be barred or ousted from the teaching profession.[348] The legal landscape is already cluttered with the names of excellent teachers so discarded; Gaylord,[349] Burton,[350] and Acanfora[351] are among the most famous.

In the early eighties, not many cases emerged involving gay teachers. Most teachers eschewed the gay limelight and remained firmly closeted. However, the few cases that did arise presented important and interesting issues. For example, the United States Supreme Court recently refused to hear the important case of *Rowland v. Mad River School District*.[352] The plaintiff, Marge Rowland, was a guidance counselor in a southern Ohio school system.[353] Two gay students consulted Rowland in her capacity as counselor.[354] Rowland informed a secretary at the school of the nature of the students' concern.[355] In a separate and unrelated private conversation, Rowland also told the secretary that she had fallen in love with a woman and characterized herself as a "bisexual."[356] These confidences turned out to be misplaced, as Rowland's supervisors soon learned of both statements.[357] When her

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one.

J. MARMOR, *supra* note 201, at 20. *See also* A. FRICKE, REFLECTIONS OF A ROCK LOBSTER, (1981), describing one young man's story about "growing up gay." Fricke sued to be allowed to take a boyfriend to the prom. Fricke's case will be discussed in Part II of this article in a section on Public Forums.

348. R. RUBINSTEIN & P. FRY, OF A HOMOSEXUAL TEACHER, 88–92 (1981).

349. *See* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977); Gaylord v. Tacoma School Dist. No. 10, 85 Wash. 2d 348, 535 P.2d 804 (1975). For a discussion of the *Gaylord* case, see Rivera I, *supra* note 1, at 871–73.

350. *See* Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). For a discussion of the *Burton* case, see Rivera I, *supra* note 1, at 870–71.

351. *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

352. *Rowland*, 730 F.2d 444, *cert. denied*, 105 S. Ct. 1373.

353. *Rowland*, 730 F.2d at 446.

354. *Id.*

355. *Id.*

356. Ms. Rowland used the term "bisexual" meaning for her that she could "as easily fall in love with a woman as a man." Record at 319, *cited in* Brief of Plaintiff-Appellee at 7, *Rowland*, 730 F.2d 444. Although Ms. Rowland characterized her sexual orientation as "bisexual," in effect the issue was homosexuality. The U.S. District Court dismissed Rowland's suit *sua sponte* because "[i]t is now clear . . . that there is no constitutional right to engage in homosexual activity." Rowland v. Mad River School Dist., No. 77-3516, slip op. at 2 (S.D. Ohio 1977), *vacated and remanded*, 615 F.2d 1362 (6th Cir. 1980).

357. *Rowland*, 730 F.2d at 446.

supervisors called Rowland in and urged her to resign, she refused.[358] Subsequently, Rowland talked to fellow teachers, told them that she was being forced to leave because she was bisexual, and asked them for their support.[359] Shortly thereafter, Rowland was suspended.[360] Testimony at the trial revealed that the school board had been told that the suspension came about because Rowland had told some staff members of her sexual orientation.[361] At the time of the suspension, no school official had any evidence that Rowland's revelations had any effect on the functioning of the school.[362] Moreover, no student or parent knew of her sexual predilictions. Lastly, no conduct on Rowland's part was of concern or at issue.[363]

Immediately after her suspension, Marge Rowland brought suit in federal court against the school board and the school administrators, alleging that her suspension violated the United States Constitution and Ohio law.[364] The district court issued a preliminary injunction against the school and ordered Rowland reinstated.[365] Rowland was reassigned to a newly created position without student contact and was ordered to create a special curriculum.[366] After her return to work, Rowland was formally evaluated by the principal and subsequently was not recommended for renewal.[367] The school board unanimously adopted the recommendation, and, without an independent recommendation, did not renew Rowland's contract for the following year.[368] Rowland responded by filing a second suit, claiming that her transfer to a nonguidance position and her nonrenewal on the basis of her sexual orientation[369] violated the United States Constitution. The basis of her suit, as was her earlier suit, was section 1983.[370]

In June of 1976, the district court granted partial summary judgment in the first lawsuit to the defendants, dismissing all of Rowland's causes of action except one.[371] The one remaining issue was Rowland's claim that she had been suspended solely because of her sexual orienta-

358. *Id.*
359. *Id.*
360. *Id.*
361. Record at 630, *cited in* Brief of Plaintiff-Appellee at 12, *Rowland*, 730 F.2d 444.
362. *Id.*
363. *Id.* at 13.
364. *Rowland*, 730 F.2d at 446.
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*

tion, in violation of her constitutional rights.[372] This claim was consolidated with the claims of the second suit.[373] Then, in August of 1977, the district court *sua sponte* dismissed all of Rowland's remaining claims.[374] The district court stated that sexual orientation was not constitutionally protected.[375]

The dismissal was appealed to the Sixth Circuit Court of Appeals, which vacated the district court's order.[376] The Sixth Circuit's action is important because its reasoning indicates the state of the law in 1980, at least from the Sixth Circuit's viewpoint. In an unpublished decision, the court stated:

> In view of the fact that neither the Supreme Court of the United States nor this court has ruled on the precise issues raised in this case, related to the reason for non-hiring, the court concluded that dismissal of this action without development of any of the circumstances surrounding the decision of the defendants was improper.[377]

Thus, according to the Sixth Circuit, the issue of whether sexual orientation discrimination is unconstitutional is still open.

The case continued on a different route than most. Upon remand to the district court, the case went to a federal magistrate who conducted a jury trial on the issues.[378] Moreover, the magistrate submitted to the jury a series of special verdict questions.[379] The answers to these questions were not what one might expect from a jury in southern Ohio.[380] The jury found that Rowland's statements with regard to her

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372. *Id.*

373. *Id.*

374. Rowland v. Mad River Local School Dist., No. 77-3516, slip op. at 2 (S.D. Ohio 1977).

375. *Id.*

376. Rowland v. Mad River Local School Dist., 615 F.2d 1362, slip op. at 1–2 (6th Cir. 1980).

377. *Id.* at 2.

378. *Rowland*, 730 F.2d at 447.

379. *See id.* at 456–60.

380. Joan Black, one of Rowland's attorneys, described the jury strategy as follows:

> This case is significant because it was won before a Dayton, Ohio jury drawn from conservative counties, in an era of increasing repression, especially in the area of gay and reproductive rights. Our trial strategy became a crucial factor in determining the outcome. To begin with, we had a community attitude survey conducted by members of the Midwest Office of the National Jury Project. This was funded by the National Education Association, which has been supporting Rowland's case from the beginning. This provided insight into what to include in voir dire and what evidence to stress at trial. The assistance of another Jury Project staffer, during voir dire and the first two days of trial, proved invaluable.
>
> Perhaps the most important factor was the voir dire. We are fortunate to live in a district where most judges allow attorney conducted voir dire, and Magistrate Steinberg followed this procedure. He also granted our motion for expanded small-group voir dire, due to the sensitive nature of the subject matter involved.

bisexuality did not "in any way interfere with the proper performance of . . . [her] duties or with the regular operation of the school generally."[381] The jury further found that her suspension, transfer, and nonrenewal were caused by her speech[382] and that none of these actions would have occurred "if Ms. Rowland had not been bisexual and if she had not told . . . [others] of her sexual preference."[383] However, the jury also found that Rowland had acted improperly in telling the secretary of the sexual orientation of the two students.[384]

Based on the jury's findings, the magistrate entered a judgment with damages in favor of Rowland.[385] In holding that Rowland should not have been treated differently than heterosexual employees solely because she was homosexual or bisexual, the magistrate recognized that there is a right to equal protection based on sexual orientation.[386] Moreover, the magistrate found that the school system had abridged Rowland's first amendment right to freedom of speech without showing a compelling state interest to justify its actions.[387] According to the magistrate's opinion, Rowland was suspended, transferred, and nonrenewed solely because of her speech, and the school system failed to demonstrate how that speech interfered with school operations.[388] At the end of his opinion, the magistrate waxed poetic, stating that "Apparently the jury felt, as does the Court, that in our public educational system . . . there is room for the 'free spirit,' the unconventional person who marches to the beat of 'a different drummer.' "[389] The magistrate concluded that a person "has a constitutional right to be different."[390]

The Sixth Circuit apparently disagreed, and in a two-to-one decision reversed the lower court's holding.[391] The court held that Row-

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In addition, our client was very straight-forward. The insinuations and innuendos of the defendants were met by Rowland's honest, candid replies. The defense provided no students or co-workers to refute witnesses' testimony that Rowland had been a good counselor whom students trusted.

Black, *Trial Strategy*, 11 GUILD NOTES 19 (Jan./Feb. 1982).

381. *Rowland*, 730 F.2d at 456.

382. *Id.* at 457–58.

383. *Id.* at 460.

384. *Id. See also id.* at 450.

385. Rowland v. Mad River Local School Dist., No. c-3-75-125 (S.D. Ohio judgment entry Oct. 19, 1981).

386. Rowland v. Mad River Local School Dist., No. c-3-75-125, slip. op. at 4–5 (S.D. Ohio filed Oct. 22, 1981).

387. *Id.* at 5–7.

388. *Id.*

389. *Id.* at 12–13.

390. *Id.* at 13.

391. *Rowland*, 730 F.2d 444.

land's statements were not protected speech.[392] The statements, the court concluded were not "matters of public concern;" instead, Rowland was speaking only "as an employee upon matters of personal interest."[393] The court also easily disposed of the equal protection claim, holding that the jury verdict and the magistrate's decision left an ambiguous area.[394] According to the court, the school board had a "permissible" reason to discharge Rowland, namely her improper revelation of the students' sexual orientation.[395] The school board, the court continued, could have violated the constitution only if Rowland's nonrenewal was motivated by a constitutionally impermissible reason.[396] The Sixth Circuit found that that jury's special verdict did not really answer the question of the reason for Rowland's nonrenewal clearly, but rather than remand the case, the court settled the issue itself.[397] The court concluded that the equal protection issue was not properly submitted to the jury[398] because Rowland had presented no evidence of how similarly situated heterosexual persons had been treated.[399]

Judge Edwards issued a strongly worded dissent: "I find no language in the Constitution of the United States which excludes citizens who are bisexual or homosexual from its protection, and particularly of the protection of the first and fourteenth amendments thereto."[400] Judge Edwards found that Rowland's speech was protected speech in that what she said became a matter of "public concern" and part of the national "debate on homosexuality and the rights or lack thereof of homosexuals."[401] He further determined that Rowland had presented a genuine equal protection claim, offering the following analogy:

> [A]ssume . . . the disclosure had been by a teacher whose appearance was consistent with the majority race status, but who revealed she had a black parent. If community protest in this rural southwestern Ohio county had convinced the principal and school board to non-renew that teacher, would there be any doubt about whether or not this was . . . a case for federal constitutional remedy."[402]

Judge Edwards dismissed the majority's lack of evidence argument by pointing out that the jury had found that *but for* her bisexuality Row-

392. *Id.* at 449.
393. *Id.*
394. *Id.* at 449–50.
395. *Id.* at 450.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.* at 452.
401. *Id.* at 453.
402. *Id.*

land would not have been suspended, transferred, or nonrenewed.[403] The jury, according to Judge Edwards, had ample evidence for its finding.[404]

In Judge Edwards' estimation, the majority opinion treated the case "*sub silentio*, as if it involved only a single person and a sick one at that—in short, that plaintiff's admission of homosexual status was sufficient in itself to justify her termination."[405] The judge then urged the court to take judicial notice of two facts. The first is that "homosexuality is not a mental disease . . . [and] the second is the extent of homosexuality in the United States."[406] While Judge Edwards' words may warm the hearts of gay legal experts, it must be remembered that they are only the words of a dissenting judge.

The *Rowland* case is important for a number of reasons. First, community disapproval of gay teachers is a widespread assumption, one which may underlie the actions of school boards. Yet in *Rowland*, a jury in a rather rural section of Ohio found in favor of a bisexual teacher. Perhaps communities are more tolerant than their officials know. Second, the Sixth Circuit's decision in *Rowland* carefully avoided addressing the issue of whether discrimination on the basis of sexual orientation is constitutionally permissible. By some fast and fancy legal footwork, the court found other reasons to deny Margy Rowland relief.[407] This approach was particularly unwarranted in light of the magistrate's decision, which squarely faced the sexual orientation issue.[408] Perhaps judges in the 1980's cannot rationally endorse discrimination against gay persons, but are nonetheless unable to put aside their personal feelings and tolerate a gay person's victory. Third, *Rowland* is interesting because, when the Sixth Circuit sent the case back to the district court, the court of appeals stated that the issue of the constitutionality of sexual orientation discrimination had not been decided.[409] After seven years in the court system and a plethora of decisions, the issue remains undecided.[410]

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403. *Id.* at 454.

404. *Id.*

405. *Id.*

406. *Id.* at 454–56.

407. *See id.* at 449–52.

408. *Id.* at 448.

409. *See* Rowland v. Mad River Local School Dist., 105 S. Ct. 1373 (1985). Justice Brennan, joined by Justice Marshall dissented to the denial of certiorari noting that the case "raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences." *Id.* at 1373 (Brennan, J., dissenting). He concluded that, "[b]ecause determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts," certiorari should be granted. *Id.*

410. The saga of Marge Rowland since she was nonrenewed is an interesting one. During the time period when she was awaiting a final decision, Marge Rowland went to law school, grad-

The *Rowland* case is significant in yet another respect. The great bulk of Rowland's counsel fees were paid by the National Educational Association,[411] which has taken a very strong position supporting the right of gay persons to teach.[412] This support was demonstrated in the following two cases, in which the local teaching association provided legal counsel to the gay teacher.[413]

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uated and became a member of the Ohio Bar in February, 1981. The day after she received her damage award from Magistrate Steinberg she was indicted for welfare fraud. She is defending on the basis of selective enforcement. Black, *supra* note 380, at 19.

411. *See Rowland*, 730 F.2d at 445.

412. Resolutions of the National Education Association are as follows:

H-14 Civil Rights

The National Education Association is committed to the achievement of a totally integrated society and calls upon Americans to eliminate by statute and practice barriers of race, color, national origin, religion, sex, sexual orientation, age, handicap, marital status, and economic status that prevent some individuals, adult or juvenile, from exercising rights enjoyed by others, including liberties decreed in common law, the Constitution, and statutes of the United States. Civil order and obedience to the law must be ensured without abridgement of human and civil rights. Individuals, adult or juvenile, must be assured a speedy and fair judicial process with free legal counsel for those in need. To be effective citizens, individuals must be trained and aided in developing strategies and expertise that will enable them to operate effectively in a democratic society.

E-23 Nondiscriminatory Personnel Policies/Affirmative Action

The National Education Association believes that personnel policies and practices must guarantee that no person be employed, retained, paid, dismissed, suspended, removed, transferred, or retired because of race, color, national origin, religious beliefs, residence, physical disability, political activities, professional association activity, age, marital status, family relationship, sex, or sexual orientation.

The Association urges the development and implementation of affirmative action plans and procedures that will encourage employment of women in administrative positions, minorities at all levels, and men in the classroom at the elementary and preschool levels.

It may be necessary to give preference in recruitment, hiring, retention, and promotion policies to certain racial groups or women or men to overcome past discrimination. (citations omitted).

Letter from Michael D. Simpson, staff counsel, National Education Association, to Rhonda R. Rivera (Jan. 7, 1985) (discussing NEA policy).

413. *See also* Ferndale Educ. Ass'n v. School Dist., 67 Mich. App. 645, 242 N.W.2d 481 (1976), a case in which a local education association represented a teacher who might have been gay. The teacher, who was hired for the first time by the school board, was required to submit to a "pre-employment" physical before beginning work. In the doctor's report were the following words: "'4F Army for (?) & homosexuality details not known . . . . History nervousness and psychiatric Rx due to homosexuality.'" *Id.* at 647, 242 N.W.2d at 483. As a consequence of this report, the teacher was terminated. *Id.* The teacher and the Ferndale Education Association (FEA) filed a grievance; the school board maintained that the teacher had never become an employee because successfully passing the exam was a prerequisite to employment. *Id.* The arbitrator found that the teacher was an employee and was entitled to a hearing on the matter of his dismissal. *Id.* The school board ignored the arbitrator's decision, and the teacher and the FEA sought mandamus from the court. *Id.* The lower court denied the writ and an appeal was taken to the court of appeals. *Id.* at 648, 242 N.W.2d at 483. The Court of Appeals remanded to the trial court because the trial court had made its decision without any record. However, the court of appeals said that the teacher deserved a hearing whether he was an employee or not because "allegations of homosexuality and resultant dismissal" could seriously jeopardize the teacher's

In re C.[414] involved a teacher who was represented by the Washington Education Association. The case is set in an interesting context because Washington's state supreme court had earlier upheld the dismissal of a gay teacher, James Gaylord.[415] As a result of the *Gaylord* case, many teachers' unions in Washington have bargained for a "privacy clause" in their contracts. The Evergreen School District had adopted a clause which read: "The private and personal life of any employee is not within the appropriate concern or attention of the Board."[416] In a hearing to determine whether the firing of a gay teacher had violated the contract, the hearing officer held that, by agreeing to the privacy clause, the school board had contracted away any right to fire employees merely because of their gay status.[417]

If the school board had so restricted itself, how did the issue even arise? The teacher in question, a female physical education teacher, had been rumored to be a lesbian long before her dismissal. These rumors were exacerbated by a new policy requiring that female students strip before taking their mandatory shower.[418] The showering policy was highly unpopular. A number of students claimed that having to be undressed before the teacher in question made them uncomfortable because she was rumored to be gay.

Because of these rumors, the school administrators met with the teacher and strongly suggested that her female roommate not visit the campus in the future. The roommate had previously attended games and dropped in at the teacher's office. The issue came to a head when another teacher claimed to have seen the teacher and her roommate in an affectionate embrace of twenty to thirty seconds duration at 7:30 a.m. in a parked car in the school parking lot. Shortly thereafter, several parents wrote letters that referred to the teacher in the context of homosexuality between the students. The Evergreen School Board dismissed C.[419]

C., represented by her union, protested and the matter was heard

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employment prospects. *Id.* at 652, 242 N.W.2d at 485.

414. (Jan. 31, 1984) (Bratt, arb.). The name of the teacher was revealed in a newspaper article in *The Advocate*, April 17, 1984, at 73, and is used in the opinions which are on file with the author. However, the teacher's attorney asked that privacy be maintained because of the students and teacher involved. Lambda LDEF, which is providing consultation services to the Washington Education Association, titles the case as it appears in this text.

415. *See Gaylord*, 85 Wash. 2d 248, 535 P.2d 804; Rivera I, *supra* note 1, at 871–73; Rivera II, *supra* note 1, at 319 n.63.

416. *In re* C., slip. op. at 22 (Findings of Fact and Conclusions of law by Hearing Officer entered Jan. 31, 1984).

417. *Id.* at 23.

418. *Id.* at 7–9.

419. *Id.* at 8–9, 14–16.

by an administrative law judge. Although the judge held against the teacher, he made a number of interesting findings. With regard to the showering situation, which the school board made central to its case, the judge found that "the allegations of the impropriety of a locker room being supervised by an alleged homosexual do not meet a level which support a discharge of a teacher . . . ."[420] The judge indicated that this finding was based in part on the testimony about homosexuality presented by expert witnesses on behalf of the teacher.[421]

At the hearing, evidence was introduced which showed that three students of the teacher had been engaged in homosexual affairs with other students. However, evidence also showed that the teacher neither knew about nor was involved with the affairs in any way. The judge found that the role of C. in the lives of these students was not such that her absence "would have 'tipped the balance' and prevented either . . . from engaging in homosexual acts."[422]

Nonetheless, the judge did find the presence of C. had "some influence on the creation of a climate that might have made the homosexual relationship of the students . . . more acceptable."[423] In addition, the judge held that the school district had a "significant interest in and responsibility for the atmosphere created by the acts and statements of its teaching staff."[424] How did this justify the dismissal of the teacher? According to the evidence, C. had told one student that she was a lesbian, mentioned to another student how difficult it was to get out of bed while her roommate was still in bed, and lastly, told at least two students that she did not believe that anyone could get fired because of their sexual preference. The teacher flatly denied making these statements, yet the judge held that not only had she made the statements, but also that such statements were unacceptable and unprofessional. The judge found that the statements affected her ability to teach because they created "a climate of acceptability or condonation of sexual practices by students who might look to staff members for confirmation of their own sexual identities and/or orientation, and for approval of their sexual behavior."[425] The judge found that two of the three students had had significant homosexual experiences before the incidents described in the hearing, that they continued to have such experiences after the hearing, and that they were "prone towards a significant ho-

420. *Id.* at 10.
421. *Id.* at 10.
422. *Id.* at 18.
423. *Id.* at 19.
424. *Id.* at 18.
425. *Id.* at 19.

mosexual orientation."[426] Yet, somehow, C. was held responsible for the sexual behavior of these students. Her alleged statements, coupled with the alleged embrace, were sufficient cause in the judge's mind to justify the discharge.[427] The privacy clause in the contract did not protect the teacher because it did not protect acts on campus.[428]

During the hearing, C. labeled herself as bisexual. The judge found that the school district had failed to demonstrate that the teacher's sexual orientation "in and of itself constitutes sufficient cause [for] discharge."[429] This favorable statement was heavily influenced by the expert testimony given on behalf of C.[430] However, the judge also noted that all the experts came from Seattle and a university setting, and commented that perhaps homosexuality was more accepted in that area than it was in Evergreen, which was a more rural area.[431] The judge agreed that a local school board had a right to set its own standards for its employees, and opined that one of the drawbacks of working for Evergreen was its conservative standards.[432] The teacher appealed the administrative decision to a trial court and also instituted a separate suit against the school district for violation of her civil rights.[433]

The Evergreen case raised the role model issue rather clearly, but failed to consider that a homosexual person might be a positive role model. Also clearly ignored is the question of whether heterosexual teachers may create an "atmosphere" that encourages students' sexuality.[434]

Another case involving representation by the teachers' association raised much more delicate issues. Gay rights litigators are always looking for the perfect case with the perfect client, one whose behavior is so exemplary that bigots cannot successfully raise a pretext to justify discriminatory action.[435] Unfortunately, *Ross v. Springfield School Dis-*

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426. *Id.* at 18.

427. *Id.* at 16.

428. *Id.* at 16.

429. *Id.* at 11.

430. *In re* C., slip op. at 3–4 (Memorandum Opinion of Hearing Officer entered Jan. 31, 1984).

431. *Id.*

432. *Id.*

433. Telephone interview with Ms. C's attorney, Faith Hanna, of the Washington Education Association (Jan. 24, 1985).

434. For example, would teachers who were "avowed" heterosexuals be responsible for an atmosphere in which teenage pregnancies occurred?

435. *Compare* Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854 n.4 (D.C. Cir. 1978) (where the plaintiff was a perfect client), *with* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (where a less than perfect client committed sexual acts in the barracks).

trict[436] is far from the perfect case because of the behavior involved. Frank Ross was a librarian in two elementary schools in the Springfield School District.[437] He went to Eugene, Oregon, the closest large city.[438] While there, he went to an adult bookstore, entered a cubicle with another man, locked the door, and engaged in sexual conduct with his companion.[439] The bookstore, which was being set up for a raid, was under surveillance by police officers.[440] One officer stood on the shoulders of another police officer, peered over the seven-foot walls of the cubicle and observed Ross.[441] In the abatement and nuisance suit brought against the bookstore, Ross was subpoenaed,[442] although, as it turned out, he never had to testify, nor was he ever prosecuted.[443] The district attorney determined that Ross had committed no crime because, under the statute, the bookstore was not a "public" place.[444] Ross's mistake came about when he honestly told his principal why he needed the morning off to answer the subpoena.[445] Word of Ross's involvement in the nuisance suit spread quickly among school officials and eventually reached parents, although Ross's name was not published in newspaper accounts of the incident. Parents phoned the school, expressing their objections to Ross's life-style, that is, his homosexuality.[446]

On March 27, 1979, the Springfield school district superintendent filed a complaint with the Teachers Standards and Practices Commission, seeking to have Ross's teaching license revoked on the grounds of "gross unfitness."[447] The commission refused to revoke Ross's license, finding a lack of probable cause.[448] Then, on January 14, 1980, the school board dismissed Ross for "inefficiency, immorality, and gross unfitness."[449] Ross appealed to the Fair Dismissal Appeals Board, as was required under the Oregon statute.[450] The board dismissed the

436. Ross v. Springfield School Dist. No. 19, 56 Or. App. 197, 641 P.2d 600 (1982), *rev'd*, 294 Or. 357, 657 P.2d 188 (1982), *on remand*, 71 Or. App. 111, 691 P.2d 509 (1984).
437. *Ross*, 56 Or. App. at ___, 641 P.2d at 502.
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*
442. *Id.* at ___, 641 P.2d at 603.
443. *Id.*
444. *Ross*, 71 Or. App. ___, 691 P.2d at 513.
445. *Ross*, 56 Or. App. at 200, 641 P.2d at 603.
446. *Ross*, 71 Or. App. at ___, 691 P.2d at 512.
447. *Ross*, 56 Or. App. at 200, 641 P.2d at 603.
448. *Id.*
449. *Id.*
450. *Id.* at 202, 641 P.2d at 604.

charge of inefficiency for lack of evidence,[451] but upheld Ross's dismissal for gross unfitness and immorality.[452]

Ross appealed the board's decision to the Oregon Court of Appeals, which upheld the board's decision.[453] On appeal to the Oregon Supreme Court, however, the appeal's court's ruling was reversed.[454] The Oregon Supreme Court held that the Fair Dismissal Appeals Board was bound by the holding of the Teacher Standards and Practices Commission that Ross was not "grossly unfit."[455] On the issue of "immorality," the court remanded the issue back to the Fair Dismissal Appeals Board, because the board had not articulated a standard against which to judge Ross's behavior.[456]

On remand, the Fair Dismissal Appeals Board had little trouble finding a standard that justified Ross's termination.[457] In the rehearing, the board found that Ross was indeed "immoral," enunciating a new standard for immorality: "to constitute immorality . . . [the sexual conduct] must violate either the moral standards of the school community or the moral standards of the people of the State of Oregon."[458] The board also said that a teacher must have actual or constructive notice that the behavior is immoral, and that constructive notice can be inferred when the conduct is universally condemned.[459] The board found that Ross's behavior—"engaging in sexual intercourse *publicly*"—was universally condemned.[460]

Ross appealed the board's decision to the Oregon Court of Appeals.[461] The main issue on appeal was whether the conduct in question was in "public." The court of appeals upheld the board, employing a dictionary definition of "public": " 'in public; in a manner observable by or a place accessible to the public.' "[462] The court reasoned that "a person *in an adjoining booth* could readily look under the walls and, with some assistance, could look over them."[463] Moreover, the person in the next booth, the court stated, could see through the "glory hole."[464] Ross, according to the majority, involuntarily took the risk of being

451. *Id.*
452. *Id.*
453. *Ross*, 56 Or. App. 197, 641 P.2d 600 (1982).
454. *Ross*, 294 Or. 357, 657 P.2d 188 (1982).
455. *Id.* at 362, 657 P.2d at 193.
456. *Id.* at 363, 657 P.2d at 194.
457. *Ross*, 71 Or. App. at ___, 691 P.2d at 511.
458. *Id.*
459. Gay Community News, Feb. 2, 1983, at 12.
460. *Ross*, 71 Or. App. at ___, 691 P.2d at 511 (emphasis added).
461. *Ross*, 71 Or. App. at ___, 691 P.2d 509 (1984).
462. *Id.* at ___, 691 P.2d at 512.
463. *Id.* (emphasis added).
464. *Id.*

observed "in a place where he either knew or should have known that he could not expect complete privacy."[465] In a footnote, the court stated categorically that the fact that the sexual activity in question was homosexual rather than heterosexual "plays no role in our analysis."[466]

Judy Gillette dissented, calling the case "the stuff of which personal tragedies are made."[467] Judge Gillette found that Ross's activities were not public, for the reality was that the bookstore was totally adapted for sexual use; it was "a place for private viewing of sexually explicit films and for *private* sexual activity."[468] Gillette noted that the Oregon Supreme Court had found an expectation of privacy in a toilet stall and reasoned that one should have a far greater expectation of privacy in the book store cubicle.[469] Gillette concluded that Ross was "being punished not for having engaged in sexual activity publicly, but for having engaged in homosexual activity that eventually became public."[470] The judge stated that, in his personal opinion, neither the Fair Dismissal Appeals Board nor the court were willing to say that homosexuality per se is immoral. However, they were willing to "strain" the language of the statute to justify the dismissal of a teacher whose homosexuality became public.[471] This behavior resembles the majority opinion in *Rowland*; Judge Gillette, like Judge Edwards, tried to deal directly with the issue.[472]

The Oregon Teachers Association represented Ross through its general counsel. The latest opinion of the Oregon Court of Appeals will be appealed to the Oregon Supreme Court with the hope that the highest court will find Judge Gillette's dissent persuasive.[473]

Gay rights cases have not, however, fared well before courts of last resort. One of the most striking examples of the reluctance of the judiciary to determine substantive gay rights issues is the recent decision of the United States Supreme Court in *National Gay Task Force v. Board of Education*.[474] This case was the first case involving gay rights

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465. *Id.*

466. *Id.* at ___, n.6, 691 P.2d at 513 n.6.

467. *Id.* at ___, 691 P.2d at 513 (Gillette, J., dissenting).

468. *Id.* at ___, 691 P.2d at 513 (Gillette, J., dissenting) (emphasis added).

469. *Id.*

470. *Id.*

471. *Id.* at ___, 691 P.2d at 514.

472. *See Rowland*, 730 F.2d at 452 (Edwards, J., dissenting); *supra* notes 351–55 and accompanying text.

473. Letter from Robert D. Durham, Ross's attorney, to Rhonda R. Rivera (Dec. 4, 1984).

474. National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

to reach the Supreme Court on its merits[475] since *Boutilier*[476] in 1967. The case arose as a consequence of a law enacted by the Oklahoma legislature in 1978.[477] The law was modeled after the Briggs initiative (Proposition 6), which was on the California ballot in 1978.[478] The Briggs initiative was defeated by the voters of California after an intensive campaign.[479] The general purpose of both the California initiative and the Oklahoma legislation was to exclude gay persons and supporters of gay rights from the teaching profession.[480]

The Oklahoma statute used two key definitions. The first, "public homosexual *activity*," was defined as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: a) committed with a person of the same sex, and b) indiscreet and not practiced in private."[481] Section 886 set out Oklahoma's version of "the detestable and abominable crime against nature."[482]

The second key definition, "Public homosexual *conduct*, (as distinguished from activity) was defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees . . . ."[483] The stat-

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475. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976); People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. dismissed as improvidently granted*, 104 S. Ct 2332 (1984).

476. Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967) (holding that by using the term "psychopathic personality" the Congress intended to exclude homosexual persons from entry into the United States).

477. *See* OKLA. STAT. tit. 70, § 6-103.15 (Supp. 1978); *see also National Gay Task Force*, 729 F.2d at 1272.

478. L. CANNON, REAGAN 132–33 (1982) (*noted in* The Advocate, Oct. 14, 1982, at 10.)

479. *Id.* Larry Berner won a $10,000 settlement from Senator Briggs, the author of the initiative (Proposition 6) in a suit charging libel, slander, and invasion of privacy. Berner, a second grade teacher, infiltrated the Briggs campaign and wrote an expose for a gay newspaper. Subsequently, Senator Briggs in his campaign speeches referred to Berner as the kind of person who should not be allowed to teach and insinuated that Berner had sex with his students. *See* The Advocate, October 28, 1982, at 7.

480. *See The After Hours Question*, NEWSWEEK, Jan. 21, 1985, at 68.

481. OKLA. STAT. tit. 70, § 6-103.15(A)(1)(a), (b). *See National Gay Task Force*, 729 F.2d at 1272.

482. The Oklahoma statute states that: "every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." OKLA. STAT. tit. 21, § 886 (1971). *See National Gay Task Force*, 729 F.2d at 1273. It should be noted that this statute makes private homosexual or heterosexual sodomy criminal. Sodomy in Oklahoma includes copulation between two females, see Warner v. State, 489 P.2d 526 (Okla. Crim. App. 1971), heterosexual acts, see LeFavour v. State, 77 Okla.Crim. 383, 142 P.2d 132 (1943), and oral sex, see *Ex parte* De Ford, 14 Okla. Crim. 133, 168 P. 58 (1917). In Oklahoma, the consenting partner is an accomplice. *See* Hopper v. State, 302 P.2d 162 (Okla. Crim. App. 1956).

483. OKLA. STAT. tit 70, § 6-103.15(A)(2) (Supp. 1978). *See National Gay Task Force*, 729 F.2d at 1272.

ute provided that a teacher could be refused employment or discharged if "the teacher . . . has engaged in public homosexual conduct or activity; *and* [h]as been rendered unfit, because of such conduct or activity, to hold a position as a teacher . . . ."[484] Unfitness was determined by considering the following factors: "[t]he likelihood that the activity or conduct may adversely affect students or school employees; [t]he proximity in time or place of the activity or conduct to the teacher's . . . official duties; [a]ny extenuating or aggravating circumstances; and [w]hether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."[485]

The statute was challenged in federal district court by the National Gay Task Force (NGTF). The effect of the statute was so initially "chilling" that no gay teachers in Oklahoma were willing to be the plaintiff.[486] Hence, NGTF challenged the statute, representing its members in Oklahoma who were teachers.[487] At the trial court level, the court found that although the statute did reach protected speech, it was nevertheless constitutional.[488] The court read into the statute a "material and substantial disruption test."[489]

At the appellate level, the Tenth Circuit found the section of the law which dealt with public homosexual *activity* to be constitutional; however, the section of the law which allowed teachers to be dismissed for public homosexual *conduct* was found unconstitutional.[490] The court found that no "constitutional problem" existed in firing a teacher who engaged in "public homosexual activity,"[491] however, the dismissal of a teacher on the grounds of public homosexual *conduct* did present a constitutional problem.[492] The court held that mere advocacy, even of

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484. OKLA. STAT. tit. 70, § 6-103.15(B)(1), (2) (Supp. 1978) (emphasis added). *See National Gay Task Force*, 729 F.2d at 1272.

485. OKLA. STAT. tit. 70, § 6-103.15(C)(1),(2),(3),(4) (Supp. 1978). *See National Gay Task Force*, 729 F.2d at 1272.

486. The Advocate, March 30, 1981, at 9. *The Advocate* reported that the NGTF was seeking an employee of the Oklahoma City School District to test the law. *Id.* At the trial court level, a teacher was for a short time a coplaintiff. *Id.*

487. *Id.*

488. *National Gay Task Force*, 729 F.2d at 1272.

489. *Id.*

490. *Id.* at 1273–75.

491. *Id.* at 1273. The court rejected the plaintiff's privacy arguments as irrelevant since the statute did not punish private acts. *Id.* The court also rejected the equal protection argument made by the plaintiff on the basis that sexual orientation was not a suspect class. *Id.* Therefore, using something less than a strict scrutiny test, the court stated that "[s]urely a school may fire a teacher for engaging in an indiscreet public act of oral or anal intercourse." *Id.* (citations omitted).

492. *Id.* at 1273–75.

illegal conduct, was protected by the first amendment.[493] The court also found that the words "encouraging and promoting" were similar to "advocating," and thus, were also protected speech.[494] The court recognized that the state may limit the speech of teachers to a greater extent than the speech of average citizens, but held that according to the test set out in *Tinker*,[495] the state had not shown that the restriction was necessary to prevent the disruption of official functions or to insure effective performance by the employee.[496]

The court found further that the statute was not saved by the list of factors to be considered in finding a teacher unfit and pointed out that an "adverse effect" (one of the factors) might not result in a "substantial and material" disruption.[497] The conduct part of the statute was, in the court's eyes, simply too broad and incapable of a narrow construction.[498]

The board of education appealed that portion of the Tenth Circuit's opinion which struck down part of the statute; the United States Supreme Court granted certiorari.[499] The case commanded great attention not only because of the subject matter, but because Professor Lawrence Tribe, a noted constitutional scholar, argued the case for the gay rights organization.[500] The statute presented a difficult issue to the Court because the drafters very carefully pulled language from the *Morrison*[501] case to describe the factors relevant to unfitness, and because the school board's brief to the Supreme Court used the magic word "nexus," from *Norton*,[502] to describe how the factors should be used to create a "nexus" between the proscribed speech and the occupational performance.[503] Many observers believed that the Supreme Court would again avoid deciding a gay case on the merits by employ-

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493. *Id.* at 1274 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

494. *National Gay Task Force*, 729 F.2d at 1274.

495. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (holding that a state's interest outweighs a teacher's right to free speech only when the expression results in a material or substantial disruption in the normal activities of the school).

496. *National Gay Task Force*, 729 F.2d at 1274.

497. *Id.* at 1274–75.

498. *Id.* The court was apparently miffed at the legislature, chiding that "[t]he Oklahoma legislature chose the word 'advocacy' despite the Supreme Court's interpretation of that word in *Brandenburg*." *Id.* at 1274.

499. *National Gay Task Force*, 105 S. Ct. 76 (1985).

500. *See* Gay Community News, Oct. 13, 1984, at 1; *Arguments before the Court*, 53 U.S.L.W. 3521 (1985).

501. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). *See* Rivera I, *supra* note 1, at 862–67.

502. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). *See* Rivera I, *supra* note 1, 818–19.

503. Petitioner's Brief at 4, National Gas Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

ing the *Pullman*[504] doctrine of abstention; sending the case off to the Oklahoma Supreme Court for a try at a restrictive interpretation that would pass constitutional muster.

When the Supreme Court decided the *NGTF* case on March 26, 1985, the Court did not resort to the *Pullman* device to avoid the issue. Nevertheless, the actual result was disconcerting to both sides. In a four-to-four *per curiam* decision,[505] the Court affirmed the Tenth Circuit's decision that struck down part of Oklahoma's antigay statute. Because of the nature of the decision, how the various justices voted is technically unknown. One vote is clear: Justice Powell took no part in the decision as he was hospitalized during the argument.[506] Legal scuttlebutt has Stevens, Blackmun, Marshall, and Brennan affirming the decision and Burger, O'Connor, White, and Rehnquist dissenting. Because of the tie vote no national precedent was set. The decision only technically affects the states included in the Tenth Circuit. Both gay advocates and the Oklahoma City Board of Education publically claimed victory.[507] However, most gay rights litigators breathed a sigh of relief that another decision survived the Supreme Court.

One lesson of the teacher cases is that teaching is a dangerous employment arena for gay persons. Prior to the *Gaylord*[508] decision, one could say that homosexuality *per se* was not a reason for dismissal, that "immorality" alone was too vague a concept to cause the dismissal of gay teachers, and that the real key was a nexus between the teachers' sexual orientation and his or her job performance. This latter criterion would be judged by the standards enunciated in *Morrison*,[509] a case cited nationwide. However, *Gaylord*, in which the Supreme Court denied certiorari, allowed a dismissal based on the teacher's status as a gay person on a finding that such a status was immoral *per se*.[510] Thus, after *Gaylord*, the law as applied to both "avowed" gay persons and persons who had merely engaged in same-sex acts was idiosyncratic to the state where the case originated. However, even after *Gaylord*, no case law suggested that teachers could lose their jobs merely because

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504. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). For an explanation of the doctrine of abstention, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 99–109 (2d ed. 1983).

505. *National Gay Task Force*, 105 S. Ct. 1858 (mem.).

506. The same week the Supreme Court ordered reargument in three other cases that Powell had also missed. It is unclear why the Supreme Court did not take the same avenue in *NGTF*. The *N.Y. Times* speculated that Justice Powell did not want to participate in the case. N.Y. Times, Mar. 27, 1985, § 1, at 10.

507. Wash. Blade, Mar. 29, 1985, at 1.

508. *Gaylord*, 85 Wash. 2d 348, 535 P.2d 804. *See* Rivera I, *supra* note 1, at 871–73.

509. *Morrison*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175.

510. *Gaylord*, 85 Wash. 2d at 296, 559 P.2d at 1346.

someone believed them to be gay. However, an opinion of the West Virginia Attorney General has espoused just that position.[511] The opinion was written in response to a request from the superintendent of the Hampshire County Schools located in Romney, West Virginia. The superintendent wanted to fire one of his teachers.[512] The teacher was a woman who apparently often wore trousers to school, worked part-time at a service station to supplement her teaching income, and had a female roommate.[513] Apparently, the teacher also had some facial hair.[514] What was often not mentioned in news reports was that the teacher suffered from a form of cancer, and as a consequence, took steroids which caused both weight and hair problems.[515] She was a kindergarten teacher.[516]

The opinion, issued February 24, 1983, was seemingly motivated in part by the then upcoming political campaign for attorney general; however, the man who wrote the opinion lost in the primary and is no longer in office.[517] Nonetheless, the opinion is on the books. Moreover, the school board in Romney has acted in reliance upon the opinion, and has fired the teacher, Linda Conway.[518] The teacher, who has steadfastly maintained that she is not gay, has commented on the situation: "It was like waking up in the twilight zone. People treated me as if I had some kind of disease that they would catch or something. I'm really beginning to sympathize with gays."[519] The opinion states three main conclusions: "teachers may be dismissed for immorality if it affects their fitness to teach; lesbianism and homosexuality are forms of immorality in most West Virginia communities; and, reputation may be adduced to show homosexuality, lesbianism, and other forms of morality."[520] The most problematic statement in the opinion is: "if a person under consideration has not been observed in an overt homosexual or lesbian act, but by his other behavior has acquired a community reputation as a homosexual or lesbian, there is precedent under West Vir-

511. *See* Opinion of the Attorney General of the State of West Virginia, slip op. at 2 (Feb. 24, 1983); Gay Community News, March 19, 1984, at 1.

512. The Advocate, May 12, 1983, at 8. *See also* Charleston Gazette, Dec. 9, 1984; Telephone interview with William McGinley, West Virginia Education Association attorney who represents Linda Conway (Jan. 8, 1985) [hereinafter cited as McGinley interview].

513. McGinley interview, *supra* note 512.

514. *Id.*

515. *Id.*

516. *Id.*

517. The new attorney general has pledged to somehow remove or change the opinion. Telephone interviews with various West Virginia politicians (Jan. 8, 1985).

518. Gay Community News, Jan. 12, 1985, at 2.

519. *Id.*

520. Opinion of the Attorney General of the State of West Virginia, slip op. at 4 (Feb. 24, 1984).

ginia and federal laws for admitting such reputation as evidence in any proceeding involving such persons's future employment as a teacher."[521] The opinion is fraught with tortured readings of well-known cases. The writer of the opinion admits that in West Virginia homosexual acts are not illegal, yet he then states that, *as a matter of law*, homosexuality is immoral in most West Virginia counties.[522] Citing to *Wigmore on Evidence*, he concludes that proof of reputation as a gay person may be used as evidence in a fitness hearing.[523] He admits no West Virginia case on point exists.[524] His analysis of cases from other jurisdictions is superficial and incomplete.[525] In fact, when the opinion was first issued, an attorney for the West Virginia Education Association called the opinion "pretty funny" and "legally absurd."[526] The opinion is not very funny now, because the school board, using the opinion as a lever, forced Linda Conway to resign.[527] The school board claims the resignation was voluntary.[528] The West Virginia Education Association (WVEA) filed suit on her behalf.[529] Before getting to the substantive issue raised by the attorney general's opinion, namely the ability of a school board to fire a teacher on the basis of rumored homosexuality, the WVEA and Conway had to convince the court that she had been coerced into resignation, rather than having made a voluntary resignation.[530] This issue, coercion, was tried to a local jury and Conway lost.[531] The coercion issue is on direct appeal to the West Virginia Supreme Court.[532] Time will tell whether the substantive issue will be reached. Meanwhile, West Virginia teachers who may be gay or who may dress like gay persons are keeping a low profile.

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521. *Id.* at 4.

522. *Id.* at 3.

523. *Id.* at 2.

524. *Id.* at 1.

525. For example, Singer v. United States Civil Service Comm'n, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977), is cited, but the opinion does not deal with the final conclusions of the case; see Rivera I, *supra* note 1, at 824–25; Rivera II, *supra* note 1, at 317–18; a second example is an incorrect reading of Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (requiring a rational nexus between *conduct* and teaching fitness). *See* Opinion of The Attorney General of the State of West Virginia, slip. op. at 3, 8 (Feb. 24, 1983).

526. Gay Community News, Mar. 19, 1984, at 1.

527. *Id.*

528. Motion to Dismiss, Conway v. Hampshire County Bd. of Educ., No. CA-83-C-143 (Cir. Ct. of Hampshire County, W. Va. Dec. 6, 1983).

529. McGinley interview, *supra* note 512.

530. *Id.*

531. *Id.*

532. Conway v. Hampshire County Bd. of Educ., No. 83-2030 (W. Va. Sup. Ct. of Appeals Mar. 26, 1985).

E. *Professional and Occupational Licensing*

Almost all states license a wide variety of occupations and professions. Many of the statutes setting the criteria for licensure require that the applicant have "good moral character." Since homosexuality is oftimes condemned as "immoral," the "morals" requirement can be used against gay persons who seek licensure. Most licensure decisions are made by administrative bodies which either do not formally publish their decisions or whose decisions are so obscure that they seldom come to the attention of the legal researcher. An administrative decision can, of course, in most situations, be appealed to a court and thereby come to the attention of the researcher.

The two professions most directly affected by such a requirement are law[533] and medicine.[534] Almost all of the few cases which involve gay persons are in those two areas. One possible conclusion is that there are no gay lawyers or doctors. The vast number of gay legal and medical organizations belie this.[535] The second possible reason for the paucity of cases is that the professions seldom really inquire into the private lives of their members unless forced to do so. A third possibility is that many gay lawyers and doctors are refused licensure, but do not appeal. Probably, such a course of action was likely 20 years ago, but not now. Assumption two seems most likely.

The one published case concerning licensure comes from Florida. It is the fourth in a series of Florida decisions, each decision more sup-

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533. Annot., 21 A.L.R. 4th 1109 (1983); Annot., 36 A.L.R. 3d 735 (1971): The American Bar Association House Delegates rejected by a 158–134 vote a resolution that would encourage federal, state, and local governments to adopt legislation prohibiting discrimination on the basis of sexual orientation in employment, housing, and public accommodations. 52 U.S.L.W. 2079 (1983).

534. McLaughlin v. Board of Medical Examiners, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353 (1973); Lorenz v. Board of Medical Examiners, 290 P.2d 79 (Cal. Ct. App. 1955), *rev'd*, 46 Cal. 2d 684, 298 P.2d 537 (1956). Teachers are also licensed. See R. RUBINSTEIN & P. FRY, OF A HOMOSEXUAL TEACHER 6 n.29 (1981), for a list of each state's licensing statutes.

535. Gay and Lesbian Advocates and Defenders, Inc., (GLAD), 2 Park Square, Boston, Massachusetts 02116; Lawyers for Human Rights, Box 480318, Los Angeles, California 90048; Gay Law Students Association, P.O. Box 872, Chicago, Illinois 60690; American Association of Physicians for Human Rights, Box 14366, San Francisco, California 94114; American Medical Student Association, Lesbian and Gay People in Medicine Task Force, 300 Riverside Drive, 311-E, New York, New York 10025; Association of Lesbian and Gay Psychologists, 210 Fifth Ave., New York, New York 10010; Caucus of Gay, Lesbian and Bisexual Members of the American Psychiatric Association, 245 East 17th St., New York, New York 10003; National Coalition of Black Gays, Black Health Professionals of NCBG, 1131 West Pratt Blvd., Chicago, Illinois 60626; Lambda Legal Defense and Education Fund, Inc., 132 West 43rd St., New York, New York 10036; Committee on the Rights of Gay People, American Bar Association, c/o Independent Rights and Responsibilities Section, 1200 Elm St., Washington, D.C. 20036; Lesbian and Gay Legal Workers Group, 1535 Grant St., Suite 180, Denver, Colorado 80203; National Lawyers Guild Gay Caucus, 23 Day St., San Francisco, CA 94131; New York Law Group, Box 1899 Grand Central Station, New York, New York 10163.

portive of gay lawyers than the previous one. In 1957, the Supreme Court of Florida upheld the disbarment of a gay lawyer.[536] In 1970, the Florida Supreme Court upheld a second disbarment;[537] however, the chief justice expressed reservations that a "nexus" had not been shown between the lawyer's conduct and his ability to practice law.[538] Then, in 1978, the Florida Supreme Court was asked by the Florida Board of Bar Examiners for "guidance" with regard to the admission of Robert Eimers.[539] Eimers, unlike the previous persons, had no convictions for homosexual conduct and admitted only to his "status" as a gay person.[540] The supreme court ordered Eimers admitted and specifically used a rational nexus test in its considerations. Foreshadowing its most recent decision, the court in *Eimers* said that "governmental regulation in the area of private morality is generally considered anachronistic without a showing or a rational nexus between private behavior and public welfare."[541] In 1981, the issue again faced the Florida Supreme Court in *Florida Board of Bar Examiners v. N.R.S.*[542] However, in this case, the lawyer who was denied admission to the bar by the board petitioned for admission.[543] N.R.S. had been previously admitted in New York[544] and had passed all parts of the Florida bar examination. His selective service classification as 4–F[545] caused the bar examiners to inquire into his sexual conduct at an informal hearing. N.R.S. admitted a continuing sexual preference for men. He refused to answer questions about past sexual conduct and said he had "no present intention regarding future homosexual acts."[546] He did state he would obey all the laws of Florida.[547] The court decision is extremely short and

536. State *ex rel.* Florida Bar v. Kimball, 96 So. 825 (Fla. 1957). The lawyer in question had been convicted of sodomy, a felony under Florida law. However, he was subsequently (16 years later) admitted in New York. *In re* Kimball, 40 A.D.2d 252, 339 N.Y.S.2d 302, *rev'd per curiam*, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

537. Florida Bar Ass'n v. Kay, 232 So. 2d 378 (Fla.), *cert. denied*, 400 U.S. 956 (1970).

538. *Id.* at 380.

539. *In re* Florida Bd. of Bar Examiners (Eimers), 358 So. 2d 7 (Fla. 1978).

540. Remember, status was sufficient for dismissal in the case of the teacher in Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P. 2d 1340, *cert. denied*, 434 U.S. 879 (1977).

541. *Eimers*, 358 So. 2d at 10. *See* Rivera I. *supra* note 1, at 857–58.

542. 403 So. 2d 1315 (Fla. 1981). *See also* Note, *Private Homosexual Activity and Fitness to Practice Law*, 6 NOVA L.J. 519 (1982).

543. *Id.* 1316. Note that the lawyer who represented N.R.S. was Robert E. Eimers.

544. This case is the reverse geographical situation of that in *Kimball*, when the plaintiff went to New York after Florida.

545. Through its discharge system, the military service often stigmatizes gay men, sometimes for life. "The armed forced are well aware of the stigma attached to any discharge other than honorable." Rivera I, *supra* note 1, at 839.

546. *N.R.S.*, 403 So. 2d at 1316.

547. *Id.* The sodomy statute of Florida was repealed. However, the dissenting judge alleged that the Florida statute, which forbids unnatural and lascivious acts, also prohibits homosexual

does not include much reasoning. The court held that the bar examiners could only ask questions that were rationally relevant to fitness to practice law. Therefore, "private noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law."[548] Two of the justices dissented at length. One judge argued that homosexual acts are illegal under the Florida lewd and lascivious statute;[549] both judges felt homosexuality was inconsistent with good moral character.[550] One commentator has speculated that the basis of the decision really rests on the new constitutional amendment to the Florida constitution which gives citizens of Florida a right to privacy.[551] Whatever the reason, gay lawyers in Florida seem protected by the latest decision.

The second case to be considered in this section presents a more difficult issue. Most persons who support gay rights find themselves in a moral quandary when a gay person is prosecuted or punished for certain sexual acts. For the supporter, the issue is not that one approves or condones a certain behavior, but rather whether one suspects that the punishment is not equal because the accused is gay. Essentially, cases like *In re Winton*[552] hinge on the equal protection of the law and questions of selective prosecution. Crane Winton was the judge of the District Court of Hennepin County, Minnesota. In February 1982, a series of investigative reports on the sexual abuse of children was televised. Included were allegations that Judge Winton had engaged in prostitution with young men. A grand jury subsequently indicated the judge for both felony and misdemeanor prostitution. The Board of Judicial Standards instituted its own investigation, but withheld its decision pending the resolution of the criminal charges. The felony charges were dropped and the judge pled guilty to two counts of misdemeanor prostitution. The board, after completion of its investigation (including a hearing which produced a transcript 1,247 pages in length), recommended removal, the strongest possible sanction. Winton appealed to the Supreme Court of Minnesota, essentially arguing that the sanction was inappropriate.[553] Lambda LDEF, in its supporting brief, pointed out cases of heterosexual judges who committed misdemeanor prostitution with females and who had received public censure, rather than

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acts. Id. at 1317 (Boyd, J., dissenting). The petitioner's claim that the application of that statute to private homosexual acts was unconstitutional was summarily denied by the court in a footnote. *Id.* at 1316 n.*.

548. *Id.* at 1317.

549. *Id.* at 1319 (Alderman, J., dissenting).

550. *Id.* at 1317–18.

551. Note, *supra* note 542, at 525–26.

552. 350 N.W.2d 337 (Minn. 1984).

553. *Id.* at 343.

removal, as their penalty.[554] However, the supreme court upheld Winton's removal and assessed the ex-judge $43,000 in costs.[555]

The hearing revealed that over the period of seven or eight years, Judge Winton had had sexual relationships for money with five to twenty young males. Originally, the charges seemed to involve sexual relations with minors, but, as the facts developed, that was not at issue. The facts did show that the judge had revealed his identity and his status as a judge to a number of these young men. Moreover, his relationships often involved sodomy, conduct which is still criminalized in Minnesota.[556] Lastly, the judge apparently did not, at first, admit the monetary nature of these relationships. However, in his last deposition, he admitted that he paid for these services and promised that he would never indulge in prostitution again. The court commented unfavorably on the truthfulness issue; however, the court held that his prostitution acts were sufficient in and of themselves to justify removal. The court stressed the public nature of his acts (he solicited in a public park) and his indiscretion in revealing to his sexual partners his status as a judge. The court found however, that "the most crucial aspect of this sordid affair is that respondent sought out and exploited young persons."[557] In its opinion, the court did not once use the word homosexual nor did it discuss Winton's actions as homosexuality. The court did distinguish Winton's case from that of a heterosexual judge who admitted using a female prostitute. The court emphasized the private nature of the heterosexual judge's actions as opposed to Winton's.[558] Whether the court would have decided the case differently if it had involved heterosexual prostitution is an obviously unanswerable question, however, the homophobia of the judicial board was evident. In its brief, the board said:

> We do not contend that a judge's homosexual preference alone is a basis for discipline. A homosexual may be a judge if he or she is a celibate. A judge who practices homosexuality, and thereby violates the sodomy law should be disciplined as should a heterosexual judge who engages in fornication or adultery.[559]

The quotation reveals the equal protection argument. The board's position essentially maintains that marriage is the status to be protected, thus relations outside of marriage (fornication or adultery) are punish-

554. Brief of amicus curiae Lambda LDEF at 24–27, *Winton*, 350 N.W.2d 337.
555. *Winton*, 350 N.W.2d at 344.
556. *Id.* at 343.
557. *Id.*
558. *Id.*
559. Brief of amicus curiae Lambda LDEF at 6, *Winton*, 350 N.W.2d 337.

able for heterosexual persons. Gay persons, however, are denied marital status, so the commensurate position advocated by the board for the homosexual person is celibacy. By making private, consensual, homosexual acts criminal and forbidding any kind of legal recognition of even monogamous unions of gay persons, the law takes from gay people one of life's strongest needs: intimate companionship.[560] We will never know whether Crane Winton would have sought prostitutes if he could have had a legally recognized relationship. Both these cases arose in states where homosexual acts between consenting adults in private are still criminally penalized. In twenty-six other states, private, consensual, adult homosexual acts are not criminalized. The presence of the criminal penalty in a state casts a shadow over other areas, (e.g., custody, immigration, and licensure) and contributes to the patchwork of results. Those who become impatient with the state-by-state approach should remember that one of the purposes attributed to states was to be experimental outposts for subsequent national action. If the results of decriminalization of homosexuality are not dysfunctional in those states where decriminalization has occurred, then perhaps, eventually gay persons can enjoy equal protection of the law all over the nation.

560. *See generally* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).