University of Dayton Law Review

Volume 11 | Number 2 Article 4

1-1-1986

Queer Law: Sexual Orientation Law in the Mid-Eighties (Part II)

Rhonda R. Rivera
Ohio State University

Queer Law: Sexual Orientation Law in the Mid-Eighties (Part II)

Cover Page Footnote

I wish to thank the following persons: research, Daren Draves; footnote specialist, Winnifred Weeks; editor, Carol Fey, J.D. (OSU 1984); typist, Carol Peirano.

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

PART II

*Rhonda R. Rivera***

TABLE OF CONTENTS

PART II

II. EMPLOYMENT AND RELATED OCCUPATIONAL DISCRIMINATION

F. Security Clearances

In 1986, the rights of a gay person who seeks a security clearance remain unclear. Security clearances are generally sought by three types of employees: (1) military personnel; (2) employees of government agencies, such as the Central Intelligence Agency (CIA), the National Security Agency (NSA), the Federal Bureau of Investigation (FBI), or the Department of State (State); and (3) employees of private employers engaged in defense contract work. This subsection of the article[1]

---

*"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).

** Associate Dean and Professor of Law, The Ohio State University College of Law. B.A., Douglass College (1959); M.P.A., Syracuse University (1960); J.D. Wayne State University (1967). Member, Ohio and Michigan Bars. I wish to thank the following persons: research, Daren Draves; footnote specialist, Winnifred Weeks; editor, Carol Fey, J.D. (OSU 1984); typist, Carol Peirano.

1. This article is the third in a series. The previous two articles are 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

will focus on civilian security clearances which involve the latter two types of employees.

The Nation's current security program grew out of a security program instituted in the late 1940's by all three branches of the armed forces in reaction to the "cold war." The security program existed for a long time before being subjected to external scrutiny. In 1958, the program was reviewed by the United States Supreme Court in the now famous case of *Greene v. McElroy*.[2] In *Greene*, the Supreme Court held that procedural due process requirements applied to the revocation of a security clearance.[3] The response of the President to these limitations was the issuance of Executive Order No. 10,865.[4] This Executive Order created a program in the Department of Defense to safeguard classified material used by private industry in executing defense contracts. The Department of Defense implemented this program through Department of Defense Directive No. 5220.6[5] which included a set of procedural safeguards. The directive listed twenty-one criteria specifying conduct which could lead to a refusal to grant a security clearance. Men and women classified as homosexuals were generally denied clearances.[6] The four criteria most often used to refuse clearances to gay people were:

> N. Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.
> P. Any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.
> Q. Acts of reckless, irresponsible, or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons.
> S. Any facts or circumstances which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest.[7]

---

article; the author also suggests keeping those articles on hand for reference as one reads this article.

This is the second part of a three-part article. The first part was Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties—Part I*, 10 U. DAYTON L. REV. 459 (1985) [hereinafter cited as Rivera, Part I]. Part I covered private employment, federal employment, state and local government employment, teaching, and professional and occupational licensing. Part III will appear in Volume 12 of the *University of Dayton Law Review*.

2. 360 U.S. 474 (1959). For further discussion on *Greene*, see Rivera I, *supra* note 1, at 831.

3. *Greene*, 360 U.S. at 506–08.

4. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960).

5. Dept. Def. Directive No. 5220.6 (1966).

6. Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403, 409 (1973).

7. Dept. Def. Directive No. 5220.6 (N), (P), (Q), (S) (1966). *See also* Note, *supra* note 6,

Between 1969 and 1973, a number of challenges to security clearance decisions were brought by gay persons adversely affected by denials of security clearances.[8] In dealing with these challenges, the courts established two broad principles. First, a rational nexus must be shown to exist between a person's homosexuality and the reasons for denial of a security clearance.[9] Second, an employee may not be questioned about his or her sex life in a way which severely invades one's personal privacy.[10] The application of these principles, however, did little to prevent discrimination against gay persons seeking security clearances. The rational nexus test as applied to security clearance decisions is substantially weaker than the rational nexus test which is applied to government employees in general.[11] In addition, the cases which attempted to delineate between permissible and impermissible questions about one's sex life drew no clear lines. In fact, in two cases, the courts, operating under these two broad principles, upheld the denial of security clearances to gay persons.[12]

Since 1974, no security clearance case involving a gay person has reached a federal court of appeals. Apparently, only one case filed in a federal district court has been decided on the merits.[13] Consequently, almost all information on how gay persons are faring in their applications for security clearances must be gleaned from accounts in newspapers.

In December, 1980, a nongay newspaper reported that the NSA had allowed a gay employee to keep his job and his clearance after the agency learned of his homosexuality.[14] The Agency conditioned their

---

at 409.

8. *See* Rivera I, *supra* note 1, at 829–37.

9. *See, e.g.*, Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Although the majority did not broach the subject, the dissent strongly demanded that the government show a "rational connection" between one's homosexuality and one's ability to protect classified information. *Id.* at 242 (Wright, J., dissenting). *See also* McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973) (upholding a denial of a top secret security clearance on the grounds that plaintiff was a potential blackmail target, thus establishing a sufficient rational nexus between the plaintiff's gayness and government denial of a security clearance); Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973) (applying a diluted version of the rational nexus test in examining the degree to which the government could inquire into the applicant's private sex life).

10. *Gayer*, 490 F.2d at 752.

11. The rational nexus test applied to government employees in general was enunciated in Norton v. Macey, 417 F.2d 1161 (D.C. Cir. 1969). The court in *Norton* stated: "A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service." *Id.* at 1167.

12. *See McKeand*, 490 F.2d at 1264; Marks v. Schlesinger, 384 F. Supp. 1373, 1379 (C.D. Cal. 1974). *See also* Rivera I, *supra* note 1, at 835–36 for a discussion of these cases.

13. Doe v. Casey, 601 F. Supp. 581 (D.D.C. 1985). For a discussion of *Doe*, see *infra* notes 24–35 and accompanying text.

14. *Homosexual Employee to Keep Security Job*, The Columbus Dispatch, Dec. 30, 1980,

acquiescence to the employee's homosexuality on the employee's "coming out" to his family. The imposition of the condition was apparently made to prevent the employee from being subjected to possible blackmail. The employee had been with the Agency for six years, performing classified work. When his homosexuality was discovered, he was asked by the Agency to resign. Instead, he fought back and achieved a victory.

Also reported in December, 1980, was the case of Warren Preston.[15] Preston had been employed by the General Telephone and Electric Co. for twelve years prior to the denial of his application for a security clearance to work on a U.S. Army contract. Rather than acquiesce, Preston filed suit in federal district court. However, the Army settled the suit before trial, paying Preston ten thousand dollars and promising to notify his employer that the clearance denial had been in error. According to Preston's lawyer, the Army also agreed to rewrite its regulations so that homosexuality per se would not be sufficient to cause the denial of a security clearance.[16]

In mid-1982, three gay newspapers reported the case of Betty Anderson.[17] Anderson was a GS-7 secretary in the Pentagon. She applied for a security clearance so she could compete for higher-paying jobs. At first, she was denied a clearance because she refused to undergo a psychiatric examination, supposedly necessary because of her homosexuality. The examination was ordered to see if she suffered from "ego-dystonic homosexuality."[18] According to the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, a manual used to describe psychological disorders, one has "ego-dystonic homosexuality" when one is unhappy about being gay. At the time, Anderson was in the nineteenth year of a gay relationship and showed no apparent signs of dissatisfaction with her homosexuality. After a two-year battle, Anderson received her security clearance.

One common thread in all three of these cases is that the gay parties involved had the advice and support of Franklin Kameney, a longtime gay activist. In the 1960's, Kameney was instrumental in winning changes in the federal civil service favorable to gay employees.[19]

---

15. Gay Community News, Nov. 29, 1980, at 1.

16. *Id.*

17. News of the Columbus Gay and Lesbian Community, Nov. 1982, at 3; The Washington Blade, Sept. 30, 1982, at A-1; The Advocate, July 8, 1982, at 6.

18. *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) (1980). This is the current compendium of diagnostic classifications approved by the American Psychiatric Association. Following the elimination of homosexuality per se as a diagnostic category, ego-dystonic homosexuality was created to take its place.

19. J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL

In late 1982, gay newspapers reported that two gay men had their top secret security clearances suspended. Both men were cartographers with the Defense Mapping Agency (DMA). The suspensions occurred when the DMA officially learned that the men were gay. Both men indicated that they were "out" to their families and co-workers. Nevertheless, the DMA informed the men that they were being investigated for possible susceptibility to blackmail by hostile intelligence organizations. A spokesperson for the Agency indicated that although there was no policy prohibiting the award of security clearances to gay persons, homosexuality could be a factor in determining whether a security clearance should be awarded. The DMA spokesperson indicated that decisions whether to award a security clearance to a homosexual employee were made on a case-by-case basis.[20] The end result of that particular case is not known. Of importance in that case and others is the issue of potential blackmail of the homosexual based on his or her sexual orientation and protests from governmental agencies that no blanket policy exists against security clearances for gay persons. In a sense, this attitude represents grudging progress. Not many years ago, most agencies would have proudly announced a blanket proscription against issuing security clearances to homosexuals.

The common thread of "no categorical denials of security clearances to homosexuals" is supported by a National Gay Task Force (NGTF) report.[21] *It's Time*, the NGTF's newsletter, stated in late 1982 that "the U.S. Departments of Energy, Transportation, Agriculture, Defense, Commerce, and Housing and Urban Development have all affirmed that 'homosexuality *per se* is not grounds for denial of a security clearance.' "[22] The policy of all these departments seems to be to encourage gay workers to "come out" in order to remove their susceptibility to blackmail.

The last case which appeared in the print media on a national scale was that involving John Green.[23] Green sued the CIA in Novem-

---

COMMUNITY IN THE UNITED STATES, 1940-1970, at 150–57 (1983). Franklin Kameney was barred from federal employment by the U.S. Civil Service Commission in 1958 following the discovery by investigators that he had been once arrested for "lewd conduct." Eager to put his anger to work, he, along with several others, founded Washington, D.C.'s Mattachine Society. With Kameney's leadership, the Washington D.C. Mattachine Society "aimed its fire at the government, specifically the discriminatory policies of the U.S. Civil Service Commission, the armed forces' exclusion of homosexuals and the blanket denial of security clearances to all homosexuals by the Pentagon." *Id.* at 154.

20. The Advocate, Jan. 20, 1983, at 11.

21. *It's Time*, National Gay Task Force Newsletter, Nov.–Dec. 1982.

22. *Id.*

23. *See A Gay Aerospace Worker Sues the CIA*, NEWSWEEK, Nov. 28, 1983, at 53, col. 1; *CIA Is Sued by Homosexual*, N.Y. Times, Feb. 21, 1984, at 6; *Homosexuals Press Fight on Right to be Agents*, N.Y. Times, Feb. 1, 1984, at B6, col. 3; The Advocate, Jan. 24, 1984, at 12.

ber, 1983, because, after ten years of working on sensitive intelligence projects, his security clearance was suspended. Green was an engineer with Thompson, Ramo, Woolridge, Inc. (TRW). By November, 1984, the CIA had settled Green's suit against that Agency. The exact details of the settlement are unknown because the federal district judge handling the case ordered the settlement sealed. We do know that Green was reinstated to his job at TRW and did receive back pay. Green maintained that his "gayness" had never been "closeted" information on the job. Only a few months before the suspension of the clearance, he had indicated at work that he belonged to the largest gay ski club in California.

Security clearances for gay men and women have been a *sub rosa* issue for over ten years. Homosexuality per se seems to have been laid to rest as a non-rebuttable presumption of unfitness in security clearance cases. Whether the average gay person employed in a defense industry has been able to obtain a security clearance routinely is simply unknown to anyone except the investigators who reveal nothing on this subject. Two trends seem evident. First, gay men and women who "dig in their heels" and fight the revocation or denial of security clearances based on homosexuality seem to win after long battles. Second, openly gay persons can successfully rebut their susceptibility to blackmail.

After a period of no reported cases, January, 1985, brought a decision in favor of a gay employee of the CIA.[24] The nonprobationary career employee was terminated for reasons of national security after he had voluntarily disclosed his sexual orientation. The employee had worked for the CIA as a clerk typist for four years and had been promoted to the position of electronics technician. In 1978, he had been selected to participate in a special CIA upward mobility program. However, in 1982, after nine years of exemplary service, Doe was placed on administrative leave and was subsequently terminated three months later.[25] As an employee, he had never made advances to fellow employees nor was there any indication of his disclosing classified information.[26] The court, in finding for Doe, said there was no evidence that "his homosexuality disrupted or affected his duties and responsibilities in any manner."[27] While the *Doe* case is not per se a security clearance case, the issue is of a security clearance nature because of the type of the governmental agency involved.

Why was Doe dismissed? The Deputy General Counsel of the CIA

24. *See Doe*, 601 F. Supp. 581 (D.D.C. 1985).
25. *See* The Advocate, Feb. 19, 1985, at 4.
26. *Doe*, 601 F. Supp. at 583.
27. *Id.*

said that no policy existed suggesting that homosexuality per se was a ground for dismissal.[28] Rather, the Deputy General Counsel reiterated the by now familiar assertion that the CIA made such decisions on a case-by-case basis. When Doe was terminated he received no hearing and no justification for his dismissal. The CIA maintained that the Director could terminate anyone at his discretion for national security reasons.[29]

The court found in favor of the gay plaintiff and reinstated his administrative leave status, upholding Doe's right to procedural due process. The court's decision did not turn on the substantive issue of homosexuality. Rather, the court focused on the procedural rights of nonprobationary employees. The court held that actions of the Director of the CIA could be subject to judicial review pursuant to the Administrative Procedures Act and imposed the requirements of procedural due process on the Agency in handling personnel terminations.[30] The court relied[31] on *Norton v. Macy*,[32] *Ashton v. Civiletti*,[33] and *Matlovich v. Secretary of the Air Force*[34] as foundation for the due process standards imposed. Thus, even gay employees are entitled to fair treatment and procedural safeguards.

Doe v. Casey is significant because of (1) the statement by the CIA that gay persons are not per se excludable, and (2) the judicial imposition of due process requirements on personnel actions of the highly security-conscious CIA. The use of the *Norton* case as the basis for applying procedural due process requirements to government security agency personnel actions is important because the *Norton* case established the requirement of the proof of a rational nexus between a person's sexual orientation and the effect that orientation will have on the agency's efficiency.[35] *Doe v. Casey* may be the first step toward establishing a similar requirement for the CIA.

Newspaper accounts, coupled with the *Doe* case, seem to indicate that gay persons, if they are tenacious and persistent, can get security clearances. All accounts indicate that the investigations are not carried out quickly and that the gay employee must wait out the government. The long delays accompanying gay security cases are the subject of current litigation in California. Richard Gayer, who was himself a liti-

28. *Id.*
29. *Id.* at 588.
30. *Id.* at 590.
31. *See id.* at 588.
32. 417 F.2d 1161 (D.C. Cir. 1969).
33. 613 F.2d 923 (D.C. Cir. 1979).
34. 591 F.2d 852 (D.C. Cir. 1978).
35. *Norton*, 417 F.2d at 1167.

gant on security clearance issues in 1971 and 1973,[36] represents the plaintiffs in a rather unusual suit, *High Tech Gays v. Defense Industrial Security Clearance Office*.[37] On October 31, 1984, Gayer filed suit on behalf of an organization called "High-Tech Gays." High-Tech Gays describe themselves as "an unincorporated association of over one hundred gay engineers, computer scientists, and others who work in the high-technology electronics industry in the 'Silicon Valley' of Northern California."[38] This organization, and named individuals, brought suit against the Defense Industrial Security Clearance Office (DISCO), and against the Defense Investigation Service (DIS), both agencies of the Department of Defense. The DIS is the arm of the Department of Defense which investigates individuals who apply for security clearances. The results of the investigation go to DISCO, which can either grant the clearance or refer the request with its recommendation to the Directorate for Industrial Security Clearance Review (DISCR), a third arm of the Department of Defense. The plaintiffs do not maintain that DISCO and DIS will never issue security clearances, but rather they allege that gay persons are subject to longer, more detailed investigations than are nongay persons and that the delay is purposeful and injurious. The High-Tech Gays allege that the delays cause gay persons in the defense industries to lose jobs, promotions, and opportunities, because defense contractors cannot just "sit around" and wait for long delayed results. Moreover, according to the complaint, the lengthy delays unjustly stigmatize workers. The complaint alleges that DISCO and DIS have discriminatory policies, but that when the clearance is reviewed by DISCR, the clearance is often granted because DISCR does not seem to have the same policy.[39]

The most interesting part of the suit is the claim that DISCO and DIS are acting in bad faith because the agencies have known since 1957 that gay persons are no more of a security risk than are nongay persons. The plaintiffs make this allegation based on *The Crittenden Report*,[40] completed by the Navy in 1957 and recently obtained under the Freedom of Information Act. The report explicitly states that "no

---

36. *See Gayer*, 490 F.2d 740 (D.C. Cir. 1973); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971).

37. No. C-84-6078 TEH (N.D. Cal. 1984).

38. First Amended Complaint for Declaratory and Injunctive Relief at 2, High Tech Gays v. Defense Indus. Sec. Clearance Office, No. C-84-6078 TEH (N.D. Cal. Oct. 31, 1984).

39. *Id.* at 6.

40. S. CRITTENDEN, JR., UNITED STATES NAVY, REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS (Dec. 21, 1956–Mar. 15, 1957) [hereinafter cited as CRITTENDEN REPORT]. *See infra* notes 326–31 and accompanying text.

intelligence agency . . . adduced any factual data"[41] to support the opinion that homosexual persons were security risks. The report concludes that "in view of the lack of statistical data to prove or disprove [the] thesis [that gay people are greater security risks than nongay people] the Board believes a factual study should be conducted."[42] This part of *The Crittenden Report* begins with the following words: "A third concept which persists without sound basis in fact is the idea that homosexuals necessarily pose a security risk."[43] The High-Tech Gays' complaint specifically charges that various government agencies, having knowledge of the report, deceived the courts about gay people as security risks.

The case is unique both in the underlying theory and in the remedy requested. The plaintiffs do not seek relief based on their right to privacy, nor do they seek relief based on their right to equal protection under the law. Rather, the suit asks for declaratory and injunctive relief to bring about fair play. In essence, the plaintiffs ask that DISCO and DIS investigate gay people with the same alacrity with which nongays are investigated. Moreover, plaintiffs say, "if the Government is truly concerned about sexual activities, it should ask every applicant about the frequency and variety thereof, and determine if he desires to conceal any aspect of his sexuality from anyone."[44] The government has sought dismissal of the suit on a range of grounds, from lack of standing to sovereign immunity. The complaint has now survived two motions to dismiss.

High Tech Gays have submitted to the government a set of interrogatories which have remained unanswered while the battle over the motions to dismiss continues. If answered, the interrogatories will clearly raise "rational nexus" issues. For example, plaintiffs ask: "What is the security significance of whether the employee takes 'the active or passive role' in sexual relationships, and what is the security significance of the fact that the employee meets other persons in bars with whom he later has consensual sex in private?"[45] The interrogatories also raise issue with the popular belief that gay people are "spies" more often than nongay people by asking for statistics on how many gay persons have been approached by blackmailers and how many have

41. CRITTENDEN REPORT, *supra* note 40.

42. *Id.*

43. *Id.*

44. Brief Opposing Dismissal at 2, High Tech Gays v. Defense Indus. Sec. Clearance Office, No. C-84-6078 TEH (N.D. Cal. Jan. 15, 1985).

45. Plaintiff's Interrogatories Nos. 8–9, High Tech Gays v. Defense Indus. Sec. Clearance Office, No. C-84-6078 TEH (N.D. Cal. Nov. 23, 1984).

actually complied with the demands.[46] If the *High Tech* suit survives the motions to dismiss, accurate answers to the interrogatories may prove highly embarrassing to security personnel. The case has great potential for defining the rights of gay persons.[47] The suit goes beyond defending one person and attacks the system by seeking to destroy the false premises used by security agencies to hold up or deny security clearances to gay people.

As indicated earlier, ascertaining the actual policy that security personnel apply to gay employees seeking security clearances is often difficult. The current public relations stance is that no general policy exists which discriminates against gay people and that cases are decided on a case-by-case basis. This official policy is enunciated by DISCO in their pleadings in the *High Tech* case. However, general discrimination against gays remains extant.

On May 16, 1979, the House Permanent Select Committee on Intelligence held hearings on "pre-employment security procedures of intelligence agencies."[48] Karl Ackerman, Deputy Assistant Secretary for Security in the State Department,[49] was asked directly by Representative McClory, "What do we do in order to try to avoid getting homosexuals?"[50] Ackerman's reply did not directly answer McClory's question. Subsequently, Representative Aspin asked, "Would [homosexuality] be enough to disqualify a person from getting a security clearance nowadays?"[51] Ackerman answered, "In a given case, yes sir."[52] Ackerman pointed to evolving standards but reiterated: "On the matter of homosexuality, insofar as it is adjudged to be a matter of a security risk, that has not changed."[53] Representative Aspin asked

---

46. *Id.* As I write, the John Walker spy case came to public light, with the subsequent arrests, investigation, trial, and convictions of family members. It thus appears that a heterosexual and his or her family is also not immune from the influence of others!

47. On July 3, 1985, Judge Henderson issued an order granting plaintiffs' motion to certify a class of "[a]ll gay persons who, since January, 1982, have applied for, are now applying for, or may in the future apply for Secret or Top Secret industrial clearances from DISO . . . and all gay persons who, since January, 1982, have held, now hold, or may in the future hold such clearances." High Tech Gays v. Defense Indus. Sec. Clearance Office, No. C-84-6078 TEH (N.D. Cal. July 3, 1985) (order granting class certification). In addition, plaintiffs' motion to file a third amended complaint was granted and defendant's countermotion for partial judgment on the pleadings was denied. *Id.*

48. *See Pre-Employment Security Procedures of the Intelligence Agencies: Hearings before the Subcommittee on Oversight of the House Permanent Select Committee on Intelligence*, 96th Cong. 1st Sess. 1 (1979) [hereinafter cited as *Security Procedures Hearings*].

49. *See id.* at 1–30 (testimony of Karl Ackerman, Deputy Assistant Secretary for Security, Department of State).

50. *Id.* at 7.

51. *Id.* at 16.

52. *Id.*

53. *Id.* at 17.

whether, if in light of changing public attitude, the rules have changed.[54] Ackerman answered that a "closet homosexual is likely to be judged a security risk" but that his Agency had been studying carefully the question of the so-called open homosexual.[55] Moments later, however, Ackerman discounted the openness issue by saying that even if the employee were open, two other issues weighed against "open homosexuals."[56] First, he indicated that homosexual persons would not be cleared because the Department of State has a "worldwide service," and, in many countries, homosexuality is a "flat violation of the law."[57] Second, he stated that there is a "very definite area where the psychiatric profession is not at all in accord as to whether homosexuality, be it open or closed, open or closet, is still not perhaps a manifestation of a deeper psychological problem."[58] Representative Aspin summarized Ackerman's testimony on this point: "[T]he matter is under review but so far the policy has not been changed."[59] Ackerman replied, "That is correct. But very much on a case by case basis."[60]

Evidently, while the last words say "case by case," "closeted" gay persons are all still considered security risks and open gay persons are at risk because of alleged foreign and psychiatric disapproval. Later in the same hearings, Mr. Robert Gambino, Director of Security for the CIA, also testified.[61] In a question related to the extension of security clearances to openly gay persons, Gambino opined that openness may not be enough to overcome the denial of security clearances.[62] He stated, "Even in the so-called open homosexual case, [the gay individual] associates with a number of people that have the same lifestyle who are not as open and who, as a matter of fact, may be lovers or close friends who would go to any extent to prevent themselves from being exposed."[63] Thus, the open homosexual can be "vulnerable through his friends."[64] Gambino said that this vulnerability, coupled with the fact that "the medical and psychiatric community is in disar-

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* This remark is very similar to reasons offered by the military for the discharge of gay service members. *See infra* note 133 and accompanying text.

58. *Security Procedures Hearings*, *supra* note 48, at 17 (testimony of Karl Ackerman).

59. *Id.*

60. *Id.*

61. *See id.* at 30–54 (testimony of Robert Gambino, Director, Office of Security, Central Intelligence Agency). For an interesting juxtaposition to Mr. Gambino's testimony, see Gayer v. CIA, No. 84-2229, D.C. No. 84-0330 SW, (D. Cal. Jan. 25, 1984), *aff'd*, 760 F.2d 275 (9th Cir. 1985).

62. *Security Procedures Hearings*, *supra* note 48, at 47 (testimony of Robert Gambino).

63. *Id.*

64. *Id.*

ray as to whether or not homosexuality is an outward manifestation of a deeper psychological problem," creates a risk to be resolved in favor of the agency and presumably against the gay employee.[65] Also testifying was Thomas O'Brien, Director of Security Plans and Programs, Office of the Deputy Undersecretary of Defense.[66] O'Brien was asked by Representative Young, "Would your policy [against hiring homosexuals] be the same [as that of the CIA and the State Department]?"[67] This question was answered in the affirmative.[68] "What about a civilian employee?"[69] O'Brien said the issue there was not as clear because there were "court decisions that tell us we cannot use homosexuality per se as a basis for denial of [a security] clearance."[70] O'Brien added that they look "at the whole person" to determine if he or she meets their stringent criteria.[71]

In March, 1980, the House of Representative's Subcommittee on Investigations held hearings on federal personnel security background investigations.[72] In these hearings, the government employees who testified made a distinction between whether a gay person was "suitable" for federal service as opposed to whether he or she was a potential security risk.[73] Mr. Arch S. Ramsay, Associate Director of the Staffing Services of the Office of Personnel Management, testified. He pointed out that in determining suitability for hiring in the civil service, a nexus must be established between conduct and job performance.[74] A concern about blackmail, he indicated, was not considered in "suitability" decisions but was still relevant in security situations.[75] Representative Albosta asked Ramsay if the change in public attitude with regard to homosexuality and the suitability for federal employment caused undesirable people to be in the federal service.[76] Ramsey replied that "the quality and the efficiency of the Government service have not

---

65. *Id.*

66. *See id.* at 56–97 (testimony of Thomas O'Brien, Director for Security Plans and Programs, Office of the Deputy Undersecretary of Defense for Policy Review).

67. *Id.* at 76.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Federal Personnel Security Background Investigations: Hearing before the Subcommittee on Investigations of the House Committee on Post Office and Civil Service*, 96th Cong., 1st Sess. 1 (1980) [hereinafter cited as *Personnel Security Hearings*].

73. *See, e.g., id.* at 29 (testimony of Arch S. Ramsay, Associate Director, Staffing Services Group, Office of Personnel Management).

74. *Id.*

75. *Id.*

76. *Id.* at 32.

suffered."[77]

Thus, if *Doe v. Casey*[78] really results in the imposition of the rational nexus test to the same degree in security clearance matters as the test is used in other government agency personnel actions,[79] discrimination against at least "open" gay persons may be coming to a slow but steady end. One should note the similarity between the "open" standard being developed in security clearance matters and the protection given by the California Labor Code to "open" (or manifest) gay persons under the rule of *Gay Law Students Association v. Pacific Telephone & Telegraph Company*.[80] In both situations, a gay person may have more protection under the law when the gay person is "out of the closet."

G. *Military*

In no other arena of American life has discrimination against gays been so systematic and systemic as in the armed forces.[81] Elimination of gay persons in the military has been an official policy since 1943[82] and continues as the policy to this day. The content of this policy has gone through various stages with varying results. In the period prior to 1973, the court cases which arose from this policy were of two kinds. One set of cases reviewed court martial proceedings of persons accused of sodomy pursuant to article 125 of the Uniform Code of Military Justice (UCMJ)[83] or of conduct unbecoming an officer and a gentleman pursuant to article 133 of the UCMJ.[84] These cases did not deal with persons who had a "gay"[85] identity but rather with individu-

---

77. *Id.*

78. 601 F. Supp. 581 (D.D.C. 1985).

79. *See supra* note 11 and accompanying text.

80. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (for the first time in American legal history gay people were extended strong protection in employment). *See* Rivera II, *supra* note 1, at 315; Rivera I, *supra* note 1, at 809.

81. *See* Rivera II, *supra* note 1, at 319–24; Rivera I, *supra* note 1, at 837–55. *See also* Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191 (1980–81); Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 ARIZ. L. REV. 79; Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351 (1981–82).

82. *See* Berube, *Coming Out Under Fire*, MOTHER JONES, Feb.–Mar. 1983, at 24.

83. 10 U.S.C. § 925 (1982). Article 125 provides that:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Id.

84. *Id.* § 933.

85. The fifth definition given the word "gay" as a noun in *The American Heritage Dictionary of the English Language* is homosexual, with a derivation described as "Middle English *gay*,

als allegedly caught while engaged in same-sex conduct or in a situation which indicated same-sex conduct. The central issue in such cases was not the constitutionality of the military's regulations but the guilt or innocence of the defendant accused of a "crime" under military law.[86] The second type of case seen before 1973 reviewed administrative discharges of personnel thought to be homosexual persons. These cases usually focused on procedural questions and generally did not challenge the consitutional basis for the discharges.[87]

Starting in 1973, however, challenges were brought by persons who self-identified as "gay" and who attacked the constitutionality of the military regulations which were used to either refuse them induction or to separate them from the service.[88] The substantive basis for these civil rights suits included the right of privacy, the right of association, the impermissibility of the use of a person's status as a basis for punishment, and the due process requirement of a rational nexus between conduct and punishment.[89] The suits challenged the regulations used by all the armed services to discharge gay men and women. The trend of the cases seemed to be leading, albeit slowly, to a less repressive posture by the armed services. In *Doe v. Chafee*,[90] decided in 1973, a federal district court applied the rational nexus test of *Norton v.*

---

gai, from Old French *gai*, from Old Provencal, probably from Gothic *gaheis* (unattested), akin to Old High German *gahi*, sudden, hurried, impetuous." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ____ (W. Morris ed. 1980).

86. *See* United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958); United States v. Lovejoy, 41 C.M.R. 777 (N.C.M.R. 1969); United States v. Yeast, 36 C.M.R. 890 (A.C.M.R.), *petition for review denied*, 36 C.M.R. 541 (C.M.A. 1966); United States v. Vaughn, 20 C.M.R. 905 (A.C.M.R. 1955), *petition for review denied*, 21 C.M.R. 340 (C.M.A. 1956); United States v. Jones, 13 C.M.R. 420 (A.C.M.R. 1953); United States v. Knudson, 7 C.M.R. 438 (N.C.M.R. 1951). For an analysis of the above cases, see Rivera I, *supra* note 1, at 838 n.228.

87. *See* Nelson v. Miller, 373 F.2d 474 (3d Cir.), *cert. denied*, 387 U.S. 924 (1967); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965), *modifying and aff'g*, 230 F. Supp. 249 (N.D. Cal. 1964); Benson v. Holloway, 312 F. Supp. 49 (D. Neb. 1970); Courtney v. Secretary of the Air Force, 267 F. Supp. 305 (C.D. Cal. 1967); Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa.), *cert. denied*, 383 U.S. 921 (1966); Unglesly v. Zimny, 250 F. Supp. 714 (N.D. Cal. 1965); Beard v. Stahr, 200 F. Supp. 766 (D.D.C. 1961), *vacated per curiam*, 370 U.S. 41 (1962); Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975); Clackum v. United States, 296 F.2d 226 (Ct. Cl. 1961).

88. *See* Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974); benShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980); Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977), *vacated*, 591 F.2d 849 (D.C. Cir. 1978); Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Matlovich v. Secretary of the Air Force, 414 F. Supp. 690 (D.D.C. 1976), *vacated*, 591 F.2d 852 (D.C. Cir. 1978); Doe v. Chaffee, 355 F. Supp. 112 (N.D. Cal. 1973).

89. *See Champagne*, 506 F.2d 979 (7th Cir. 1974) (right of privacy); *benShalom*, 489 F. Supp. 964 (E.D. Wis. 1980) (right of association and impermissible use of a person's status as a basis for punishment); *Matlovich*, 414 F. Supp. 690 (D.D.C. 1976) (right of privacy); *Doe*, 355 F. Supp. 112 (N.D. Cal. 1973) (rational nexus).

90. 355 F. Supp. 112 (N.D. Cal. 1973).

Macy[91] to a military discharge proceeding. If this trend had continued, the military would have been required to show a rational nexus between a serviceperson's homosexuality and the quality of their military service. When this same standard was imposed on the federal civil service, the government was unable to show that gay persons were not good employees.[92] In 1974, in *Champagne v. Schlesinger*,[93] the Navy articulated a new "gloss" on their regulations. The Department claimed that not all gay men and women had to be discharged—exceptions were allowed. This claim came back to "haunt" the Navy as well as the Air Force, which claimed a similar regulation in 1976 and 1977, when Leonard Matlovich[94] and Vernon Berg[95] brought suit. These suits proved to be the strongest challenge the Navy and Air Force had faced, up to that time, to their policy of eliminating gay persons from the military.

Matlovich was a decorated Vietnam veteran and a noncommissioned Air Force officer with an exemplary record. Vernon Berg was an Annapolis graduate, an ensign, who also held an unblemished military record. Both men had "come out" to their superiors, and both men were subsequently discharged. Each man lost his constitutional challenge in the Federal District Court for the District of Columbia.[96] Although Judge Gesell castigated the Navy and Air Force in the strongest terms for what he termed their "knee jerk" reaction, he held that the policies were constitutional.[97] Matlovich and Berg appealed and their cases were combined. The court of appeals vacated and remanded both cases.[98] Since both services had insisted at trial that the policies were not mandatory and that exceptional gay servicemen and women could be retained, the court of appeals demanded a reasoned explanation as to why Matlovich and Berg were not within the exception.[99] The

---

91. 417 F.2d 1161 (D.C. Cir. 1969). The rational nexus test requires that there be some rational basis for the connection between homosexuality and discharge from civil service employment based on quality of work. *See id.* at 1164.

92. *See* Rivera II, *supra* note 1, at 317, 319; Rivera I, *supra* note 1, at 822. *See also* 5 C.F.R. § 731.202(b) (1984) (providing for specific factors to be considered in making suitability disqualifications).

93. 506 F.2d 979 (7th Cir. 1974) (two women challenged their general discharges on the ground that Navy policy regarding private consensual homosexual conduct between adults was void because it was unconstitutional).

94. *Matlovich*, 414 F. Supp. 690 (D.D.C. 1977).

95. *Berg*, 436 F. Supp. 76 (D.D.C. 1977).

96. *Matlovich*, 414 F. Supp. at 693; *Berg*, 436 F. Supp. at 83.

97. Matlovich v. Secretary of the Air Force, Civ. No. 75-1750 (D.D.C. July 16, 1976) (oral opinion of Judge Gesell).

98. *Matlovich*, 591 F.2d 852, 861 (D.C. Cir. 1978); *Berg*, 591 F.2d 849, 851 (D.C. Cir. 1978).

99. *Matlovich*, 591 F.2d at 859; *Berg*, 591 F.2d at 851.

court did not dispute the Navy's or Air Force's right to rid themselves of gay persons but rather held that due process required a rational basis for determining whom should be retained. The case was remanded to Judge Gesell so that the armed services could explain their processes.[100] The answers were not swiftly forthcoming.

Meanwhile, two other cases were decided which indicated that the armed services would have to allow gay men and women the opportunity to serve. In California, Roseann Saal won her case against the Navy. The judge in *Saal v. Middendorf*[101] held that the Navy's regulations were unconstitutional because gay men and women were presumed unfit per se. The judge did not find a constitutional right to engage in homosexual conduct, nor did he say that the Navy could not discharge gay service persons. The court did hold, however, that individual service men and women had a due process right to be judged on their individual merits and to be free of a policy of mandatory dismissal.[102] When the Navy articulated its position, originally stated in *Champagne*,[103] that no mandatory exclusion existed, the court was not convinced and found the dismissal system to be mandatory. *Saal* was appealed by the Navy and on appeal it was combined with *Beller v. Middendorf*[104] and *Miller v. Rumsfeld*[105] under the name of *Beller v. Middendorf*.[106] While *Beller* was before the Court of Appeals for the Ninth Circuit and while the Navy and Air Force were trying desperately to meet the demands of the Federal District Court for the District of Columbia in *Matlovich* and *Berg*,[107] Miriam benShalom won her case in May, 1980, against the Army.[108] *benShalom* was a status case;[109] the record contained no proof that homosexual acts existed.[110]

---

100. *Matlovich*, 591 F.2d at 861; *Berg*, 591 F.2d at 851.

101. 427 F. Supp. 192 (N.D. Cal. 1977) (Schwarzer, J.), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

102. *Id.* at 203.

103. *See Champagne*, 506 F.2d at 984. "The defendants take the position throughout their brief and argument that the regulation does not require mandatory discharge of homosexuals." *Id.*

104. 4 MIL. L. REP. (PUB. L. EDUC. INST.) 2218 (N.D. Cal. 1976), *aff'd*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). A "Top Secret" security clearance showed that Beller had contacts with homosexual groups. *Beller*, 632 F.2d at 794. Beller later acknowledged in a sworn statement that he had frequented gay bars and had been the president of a gay motorcycle club. *Id.* For these reasons, the Navy ordered Beller honorably discharged on December 18, 1975. *Id.* at 795. *See also* Gay Community News, Jan. 10, 1981, at 1.

105. 6 MIL. L. REP. (PUB. L. EDUC. INST.) 3001 (N.D. Cal. 1977), *aff'd*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981).

106. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905; 454 U.S. 855, *reh'g denied*, 454 U.S. 1069 (1981).

107. *See supra* notes 94–100 and accompanying text.

108. *benShalom*, 489 F. Supp. 964 (E.D. Wis. 1980). *See* Rivera II, *supra* note 1, at 322–23.

109. *See e.g.* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340

The Army discharged her based on her statements that she was a lesbian. The district court found that the actions of the Army violated her first amendment rights of free speech and association, her right to privacy, and her right to substantive due process.[111] The court further held that if proof of homosexual conduct had existed, a rational nexus would have to have been shown between such conduct and her alleged unsuitability for military service. The court ordered her reinstated into the Army Reserves.[112] At that particular moment in history, gay rights in the military seemed within reach.

Within the next six months, however, three events occurred that reversed the trend. First, on October 23, 1980, the Ninth Circuit affirmed the district court's decision in *Beller* and, at the same time, reversed the lower court's holding in *Saal*.[113] Second, Berg and Matlovich reached a settlement with the Navy and Air Force, respectively, in which each relinquished his alleged right of re-enlistment.[114] Last, the Department of Defense promulgated new and more strict regulations regarding homosexuality in the armed forces.[115] Simultaneously, a "nonevent" occurred. The Army disregarded the direct order of the district court in *benShalom* by not re-enlisting Miriam benShalom.[116]

The decision in *Beller*[117] by the Court of Appeals for the Ninth Circuit struck at the heart of attempts by gay litigators to impose a rational nexus test on the military similar to the test imposed by the *Norton*[118] court on the federal civil service. The end result of the *Beller* case was particularly disheartening because at least twice in the opin-

---

(upholding the firing of a teacher due to his status as a gay person), *cert. denied*, 434 U.S. 879 (1977).

110. *See benShalom*, 489 F. Supp. at 969, 973.

111. *Id.* at 971–77.

112. *Id.* at 977.

113. *Beller*, 632 F.2d at 818.

114. *See* Gay Community News, Feb. 14, 1981, at 3; *id.*, Dec. 6, 1980, at 1. Although most reports in the gay press were neutral on this point, some headlines gave a distinct impression that Berg and Matlovich had "sold out." *See, e.g., Matlovich Accepts $160,000 Payoff*, High Gear, Feb. 1981, at 2. *See also* The Advocate, Jan. 8, 1981, at 7.

115. *See infra* notes 150–55 and accompanying text.

116. On May 20, 1980, the district court granted benShalom's request for a writ of mandamus, ordering the Army to reinstate her. *See benShalom*, 489 F. Supp. at 977. The Army appealed and was granted a stay of the court's judgment. Subsequently, the Army voluntarily dismissed its appeal, and the judgment and order became final on November 24, 1980. Gay Community News, Nov. 29, 1980, at 2. The Army, however, never reinstated benShalom. *See* Order, benShalom v. Secretary of the Army, CA No. 78-C-431 (7th. Cir. Sept. 9, 1985).

117. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905; 454 U.S. 855, *reh'g denied*, 454 U.S. 1069 (1981).

118. 417 F.2d 1161 (D.C. Cir. 1969). For a discussion on the rational nexus test, see *supra* note 91.

ion the court took positions which gave some minimal recognition to gay rights. For example, in the introduction to his decision, Judge Kennedy, speaking of the Navy policy against the retention of gay servicemembers, stated: "[W]e recognize that to many persons the regulations may seem unwise . . . ."[119] He indicated that the only remedy for such persons was to prevail on elected officials to change the policy.[120] Moreover, in his discussion of the place of homosexual conduct in the spectrum of constitutional privacy rights, Judge Kennedy found that "some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge."[121] Additionally, in his balancing test, Judge Kennedy balanced governmental interests against "whatever heightened solicitude is appropriate for consensual private homosexual conduct."[122] However, in the final analysis, Judge Kennedy showed almost complete deference to alleged military concerns and found the weight of those concerns determinative. The focus of the *Beller* decision was on the "nature of the employer," i.e., the military, as the crucial element. The military is, by " 'necessity, a specialized society separate from civilian society.' "[123] The court stated: "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessity."[124] What was the military necessity cited in *Beller*? The court accepted as the basis for the military regulation an affidavit of the Assistant Chief of Naval Personnel which listed six categorical statements of why gay people could not be allowed to remain in the Navy.[125] The *Beller* court relied on this affidavit while admitting that evidence existed indicating "that attitudes towards homosexual conduct have changed among some groups in society . . . ."[126] The court also admitted that the Navy's blanket rule requiring the discharge of all homosexual servicepersons was "perhaps broader than necessary to accomplish some of its goals" and that "[u]pholding the challenged regulations as constitutional is distinct from a statement that they are wise."[127] Even though the court found the discharge of the three individuals "harsh," the final decision was that Mary Roseann Saal, James Lee Miller, and Dennis R. Beller were discharged from the Navy.

The harshest criticism of the *Beller* decision came not from gay

119. *Beller*, 632 F.2d at 792.
120. *Id.*
121. *Id.* at 810.
122. *Id.*
123. *Id.* (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).
124. *Id.* at 811.
125. *Id.* at 811 n.22.
126. *Id.* at 811.
127. *Id.* at 812.

rights advocates but from Judge Kennedy's peer, Judge William A. Norris. When the plaintiffs asked that the case be reheard en banc, the motion was denied.[128] Judge Norris dissented from the denial of the en banc rehearing in an eleven-page opinion. Norris reviewed the history of the right of privacy as a substantive due process right and concluded that a fundamental right was involved in *Beller* which, in his estimation, required the use of strict scrutiny.[129] This view was echoed by Justice Boochever who stated that the Navy regulation could not survive either a strict scrutiny standard or the "heightened solicitude" standard enunciated by Kennedy.[130] Justice Norris reserved his strongest criticism, however, for Kennedy's uncritical acceptance of the Navy's reasons for the regulation: "The *Beller* panel was easily seduced. It accepted without critical scrutiny the Navy's statement of its interests and the importance of those interests. The panel made no attempt to respond to the devastating observations of Judge Schwarzer regarding those professed interests . . . ."[131] Following the lead of Judge Schwarzer in *Saal*, Judge Norris reviewed in-depth, one by one, the Navy's offered statement of interests. His reaction to the panel's decision in *Beller* is terse: "Considered with proper detachment rather than knee-jerk acquiescence, the military necessity argument is revealed not to be supported by the record in *Beller*."[132] The Navy's stated interests were:

> (1) protection of the "fabric of military life," . . .
> (2) preservation of the "integrity of the recruiting process," . . .
> (3) maintenance of the "discipline of personnel in active services," . . . and
> (4) assurance of the "acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own," . . . .[133]

The Navy stated that these interests are served by a regulation barring gay people from the service because:

> (1) tension will arise between homosexuals and heterosexuals, because the "great majority of naval personnel . . . despise/detest homosexuality," . . . ;
> (2) undue influence caused by emotional relationships among homosexuals will "subvert" the proper performance of duties or chain of

128. Miller v. Rumsfeld, 647 F.2d 80, 80 (9th Cir.), *cert. denied*, 454 U.S. 855, *reh'g denied*, 454 U.S. 1069 (1981).

129. *See id.* at 83–86 (Norris, J., dissenting).

130. *See id.* at 80 (Boochever, J., dissenting).

131. *Id.* at 87 (Norris, J., dissenting) (citations omitted).

132. *Id.*

133. *Id.* at 87–88 (quoting *Beller*, 632 F.2d at 810–12) (citations omitted).

> command, . . . ;
>
> (3) the ability of homosexuals to perform supervisory or command duties will be "degraded" by their inability to "maintain the necessary respect and trust," . . . ; and
>
> (4) recruiting effort will be adversely affected by parents' concerns about their children "associating with individuals who are incapable of maintaining high moral standards,". . . .[134]

Norris stated that the first problem with these interests was that "[t]he Navy is not in the business of promoting its own moral views or shielding the moral sensibilities of Navy personnel and citizens of host nations."[135] The dissent saw the Navy's job as fighting wars and agreed that discipline is necessary to this task. Judge Norris stated, however, that:

> Never . . . has the Navy offered anything to indicate that maintenance of such discipline war-readiness requires that the private lives of Navy members meet the approval of other members, citizens of host nations, or the Navy itself. Intolerance is not a constitutional basis for an infringement of fundamental personal rights. Yet intolerance or a presumption of intolerance is at the very root of each of the dangers which the Navy asserts is posed to its interests by homosexuals.[136]

Norris pointed out that none of the problems supposedly created and listed by the Navy is confined to homosexual servicemembers. Many of the same problems arise with women or minority service personnel.[137] For example, tensions arise between black and white sailors because some persons in the Navy despise and detest other races.[138] Emotional relationships develop between nongay men and women in the Navy which can affect the chain of command.[139] Blacks and women may fail to gain the respect of their subordinates, and a command problem could arise.[140] Norris pointed out that the Navy could not constitutionally bar blacks or women for these reasons.[141] Moreover, Norris observed that the Navy already has a well-developed system for judging each serviceperson on their own individual fitness which the Navy uses efficiently to handle other "problems."[142] With regard to parental worries, Norris stated that parents of naval recruits can only shield their

---

134. *Id.* at 88 (Norris, J., dissenting) (quoting *Beller*, 632 F.2d at 811 n.22) (citations omitted).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 89.
140. *Id.*
141. *Id.*
142. *Id.* at 88.

children from incidental association with gay persons by "shielding them from the world."[143] Lastly, Norris observed that persons in host nations are much more likely to be offended by public behavior of our servicepersons such as drunkenness and drug use and by outward characteristics such as race and gender than by private sexual behavior.[144] Not only did Norris critique the reasons advanced by the Navy, but he pointed out that a less restrictive alternative existed. The Navy already makes wide use of individual fitness hearings. Why not in these situations, asks Norris? While many might find Norris' arguments more cogent then the majority opinion in *Beller*, the majority opinion was ultimately successful. *Beller* was appealed to the Supreme Court which denied certiorari.[145]

The *Beller* decision "cut the rug out" from under the remand of *Matlovich* and *Berg* because the *Beller* decision was based on the same or similar regulations that were at issue in *Matlovich* and *Berg*.[146] The armed services, however, were in a quandry. When the Air Force failed within a reasonable time to provide an explanation as to why Matlovich was not an "exception," Judge Gesell ordered the Air Force to reinstate him.[147] The parties were at a standstill. Under the new regulations, which did not contain an "exception" rule, Matlovich would be discharged upon reinstatement. Moreover, the *Beller* decision created a conflict between the Ninth and D.C. Circuits. On the other hand, the Air Force failed to provide the explanation demanded by the court and was faced with a court order to reenlist Matlovich. This failure, and the likelihood of a similar eventuality in the Navy's situation with Berg, may explain the settlements reached. Matlovich and Berg accepted monetary settlements from the two services and agreed not to enforce whatever reinstatement rights they had. Matlovich settled in early December, 1980, and Berg settled on January 19, 1981.[148] The *Beller* decision, reinforced by the settlements in *Berg* and *Matlovich*, may have been the reason that the Army felt secure enough to ignore

143. *Id.* at 89.

144. *Id.*

145. Beller v. Lehman, 452 U.S. 905 (1981).

146. In both *Beller* and *Berg*, the Navy regulation at issue was SECNAVIST 1900.9A which states in part: "Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. . . . Their prompt separation is essential." *See Beller*, 632 F.2d at 803; *Berg*, 436 F. Supp. at 79. The Air Force regulation in *Matlovich* was AFM 39-12 (change 4), para. 2-103 (Oct. 21, 1970), which provided for the discharge of Air Force personnel found to have engaged in homosexual acts. *See Matlovich*, 591 F.2d at 853, 853 n.1. For a general discussion of the use of these regulations in the aforementioned cases, see The Advocate, Oct. 16, 1980, at 9. *See also* The Washington Blade, Sept. 11, 1980, at 1.

147. The Advocate, Oct. 16, 1980, at 9. *See also* The Washington Blade, Sept. 11, 1980, at 1.

148. *See supra* note 114 and accompanying text.

the district court's order to reinstate benShalom.[149]

With gay litigants in disarray,[150] the Department of Defense issued new regulations designed to close all loopholes and provide for the separation of gay servicemembers. The changes were initially set out in a revision of Department of Defense (DoD) Directive 1332.14 in January, 1981. The changes were also incorporated in the most recent version published January 28, 1982.[151] Directive 1332.14 applies to enlisted personnel in all three services: Army, Air Force, and Navy, both regular and reserve. DoD Directive 1332.20[152] applies to officers and incorporates the same basic provisions with regard to separation for homosexuality. The main difference between the provisions applicable to the enlisted servicepersons and to the officers is that officers have more procedural safeguards. However, officers have less assurance of an honorable discharge absent mitigating circumstances. In addition to the DoD Directive, each service has its own regulations to implement the Directive, and these service regulations often differ in substantive ways.[153] Directive 1332.14 covers enlisted personnel separations. Section H, title "Reasons for Separation," is devoted solely to homosexuality. The section begins with a statement attempting to justify the policy that "homosexuality is incompatible with military service":[154]

> The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity

---

149. *See supra* notes 108–16 and accompanying text. For a period of time, benShalom appeared to have dropped her fight for reinstatement. *See* OSU Lantern, Oct. 18, 1982, at 1. benShalom, however, petitioned the district court to hold the Army in contempt for its failure to reinstate her. On June 6, 1984, the district court denied the contempt petition and instead, ordered the Army to pay benShalom $991.16 in backpay. *See* Order, benShalom v. Secretary of the Army, CA No. 78-C-431 (E.D. Wis. June 6, 1984). The judge seemed, *sua sponte*, to substitute damages for reinstatement. benShalom appealed the order. The Seventh Circuit upheld the denial of the contempt petition, but remanded on the damages issue. The court held that the district court erred in awarding damages in lieu of reinstatement. The Seventh Circuit held that the reinstatement order was valid and that benShalom was entitled to an enforcement of that order by the district court. Order, benShalom v. Secretary of the Army, CA No. 78-C-431 (7th Cir. Sept. 9, 1985). Upon remand, the district court apparently ordered reinstatement by March 1, 1986. However, on February 28, 1986, that order was stayed, pending appeal, by order of the United States Court of Appeals for the District of Columbia. *See* The Washington Blade, Mar. 7, 1986, at 1. benShalom commented on the appeal: "I'm qualified for the work . . . . But they think all of Western civilization will fall if I'm readmitted." *Id.*

150. *See* K. BOURDONNAY, R. JOHNSON, J. SCHUMANN & B. WILSON, FIGHTING BACK 13 (1985) [hereinafter cited as FIGHTING BACK]. *Fighting Back* is available from The Midwest Committee for Military Counseling, 421 South Wabash Ave., Second Floor, Chicago, Ill. 60605-1208. This manual was written to assist counselors and attorneys working with clients who are gay and lesbian servicemembers, veterans, or persons who are draft-susceptable.

151. Dept. Def. Directive No. 1332.14 (1982) (Enlisted Administrative Separations).

152. *Id.* No. 1332.20.

153. *See id.* No. 1332.14, at 30–44.

154. *Id.* No. 1332.14, encl. 1, § H.1.a.

> to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.[155]

Many of the stated reasons for separation of gay servicemembers are similar to the list of reasons given in *Saal* and *Beller* and critiqued by Judges Schwarzer and Norris.[156] The question is whether these justifications have any basis in fact. One difficulty in examining the statement is that the military jargon which pervades it may be hard to comprehend by a non-military person. For example, how does one insure the "integrity of the system of rank and command"?

The new directive defines a homosexual as a person, "regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts."[157] A homosexual act is defined as "bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires."[158] In their determination to close all loopholes, the drafters may have been overzealous. According to the "Kinsey Scale," only persons who are "0" on the scale, i.e., who have fantasized about or acted *only* with the opposite sex all their lives, would *not* fall into the Department of Defense's definition.[159] Probably eighty-five percent of the American public would be covered under this new definition. The directive's definition of a homosexual act is similarly broad. Close reading indicates that no genital contact is necessary nor, for that matter, sufficient. The regulation has more con-

---

155. *Id.*

156. *See, e.g., Saal*, 427 F. Supp. at 198, 201. Judge Norris finds the Navy's "reasons" to be "so weak that they cannot possibly survive any form of heightened scrutiny, much less the strict scrutiny which is appropriate." *Miller*, 647 F.2d at 88 (Norris, J., dissenting).

157. Dept. Def. Directive No. 1332.14, encl. 3, § H.1.b.1. (1982).

158. *Id.* § H.1.b.3.

159. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 623, 639 (1948) [hereinafter cited as A. KINSEY]. After discussing the continuum approach, better known as the "Kinsey Scale," the authors comment that "[not] all things are black nor all things white . . . . Only the human mind invents categories and tries to force facts into separate pigeonholes." *Id.* at 639. In remarking upon the military estimates of homosexuality in the service (less than 1% officially identified as homosexual): "The most obvious explanation of these very low figures lies in the fact that both the Army and Navy had precluded the possibility of getting accurate data on these matters by announcing at the beginning of the war that they intended to exclude all persons with homosexual histories." *Id.* at 621. Pigeon-holes, once again!

troversial and problematic provisions. To separate a person from military service, any of three possible findings will be sufficient: an act, a statement, or an attempted marriage. One act is all that is required under the regulation. The act could have been pre-service, many years in the past.[160] Since Kinsey found that thirty-seven percent of all American men have had a same-sex experience at one time in their life,[161] strict enforcement could pose an interesting problem. The directive does provide an affirmative defense to the accusation of an act; namely, the person must prove the conduct was a "fluke."[162] To take advantage of this defense, one must prove that all five of the following conditions are true:

> (a) the conduct is a departure from the member's usual and customary behavior; and
>
> (b) such conduct under all the circumstances is unlikely to recur; and
>
> (c) such conduct was not accomplished by use of force, coercion, or intimidation; and
>
> (d) under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and
>
> (e) the member does not desire to engage in or intend to engage in homosexual acts.[163]

Clearly, this enumeration of specifics is designed to close the loophole created by the circuit court's decision in *Matlovich* and *Berg*.[164] These conditions are the specific circumstances under which a service person can be retained.

The older directive spoke of "homosexual tendencies." The new directive requires the separation of persons who state they are homosexual or bisexual.[165] The addition of bisexuality is new and obviously brings a large group under the regulation. However, of more interest from the standpoint of legal analysis is the deletion of the homosexual tendencies section, and its replacement with statements of sexual orientation as the second criteria justifying a separation from service. This section seems to be in direct response to the *benShalom* case. Miriam benShalom was separated because she proclaimed her lesbian identity. She was separated under the "tendencies" section.[166] The district court

160. Dept. Def. Directive No. 1332.14, encl. 3, § H.1.c. (1982).
161. A. KINSEY, *supra* note 159, at 623.
162. *See* FIGHTING BACK, *supra* note 150, at 19.
163. Dept. Def. Directive No. 1332.14, encl. 3, § H.1.c.(1)(a)–(e) (1982).
164. *See supra* notes 94–100 and accompanying text.
165. Dept. Def. Directive No. 1332.14, encl. 3, § H.1.c.(2) (1982).
166. *See benShalom*, 489 F. Supp. at 969.

ordered her reinstated because her first amendment speech rights were violated. The new regulation does not require that a person be separated for "being" a gay person thus avoiding the status issue covered in *Robinson v. California*.[167]

The third basis of separation is an attempted marriage or marriage to a person known to be of the same sex.[168] The regulation does not indicate whether the situation sought to be covered is the attempt by two gay persons to be "legally" married or is the participation in a "gay union" ceremony.[169] If the latter is intended, surely first amendment religious rights are implicated.

The new regulation provides for the separation of enlisted personnel on the grounds outlined above. One crucial issue for many persons is the type of discharge to be given to the separated gay service person. One change, which occurred in the 1970's, brought the possibility of separation with an honorable discharge. Also in the 1970's, veterans applied for upgrades of their discharge papers and were successful.[170] The stigma of a less than honorable discharge affected many people's ability to obtain civilian employment for many years.[171] Section H.2 of the new regulation governs how the discharge will be characterized. The regulation provides that a general or honorable discharge will be given unless certain aggravating circumstances exist. In that case, an "Other Than Honorable (OTH)" discharge will be given. Specific aggravating circumstances include the following conduct: (1) the homosexual act in question was by force, coercion, or intimidation; (2) the act was with a person under sixteen years of age; (3) the act was with a subordinate in circumstances that violate customary military superior-subordinate relationships; (4) the act was in public view; (5) the act was for compensation; (6) the act was aboard a military vessel or aircraft; and the last catch-all, (7) the act was in another location subject to military control under aggravating circumstances which have an adverse impact on discipline, good order, or morale comparable to the

---

167. 370 U.S. 660 (1962) (held that it was unconstitutional to penalize someone based solely upon their status).

168. Dept. Def. Directive No. 1332.14, encl. 3, § H.1.c.(3) (1982).

169. Because marriage, as recognized by all states, is not available to gay couples, many choose to create their own ritual or religious ceremony, which marks or celebrates the commitment each partner has to the other. *See* Rivera I, *supra* note 1, at 874. *See also infra* notes 375–78 and accompanying text.

170. *See* LEGAL SERVICES CORP. NEWS, Nov.–Dec. 1980, at 3. *See also* Rivera II, *supra* note 1, at 323–24.

171. *See Judicial Limitations on Military Characterizations of Discharges: Roelofs v. Secretary of the Air Force*, 10 MIL. L. REP. (PUB. L. EDUC. INST.) 6003 (Mar.–Apr. 1982). *See also* 1 D'EMILIO, *supra* note 19, at 45; FIGHTING BACK, *supra* note 150, at 100.

impact of such activity aboard a vessel or aircraft.[172] Thus, "specific aggravating circumstances" clearly covers a number of situations which lend themselves to broad and/or homophobic[173] interpretations. For example, since a homosexual act does not require genital contact, a kiss given and passively received which (1) gave sexual satisfaction at some level to either participant, and (2) which was done in public view or in a vessel or on an airplane or in some other location under military control such as a barracks, would constitute an aggravating circumstance allowing the discharge to be OTH.

Gay servicemembers given OTH discharges under these rules do have recourse to challenge such discharges. Under the case of *Roelofs v. Secretary of the Air Force,*[174] an OTH discharge is permitted only when the conduct involved would have an adverse impact on the military mission. Thus, an OTH discharge would be permitted only when the conduct in question actually impaired the person's performance of duty. Basically, *Roelofs* extended the rule of *O'Callahan v. Parker*[175] to administrative discharges. *O'Callahan* held that court martials are proper only when the conduct is service related. As will be evident in the cases that follow, all the definitions and conditions can be interpreted very broadly. Whether a person receives a general discharge or an honorable discharge depends on his or her service record. Generally, these regulations would seem to indicate that most gay persons who are separated will receive either general or honorable discharges. However, one should remember that the directive also provides that a "trial by court martial is not precluded in appropriate circumstances,"[176] as in *United States v. Newak.*[177]

One cannot leave this discussion of separation regulations without examination of fraudulent enlistment as a ground for separation. Directive 1332.14 provides that fraudulent enlistment is a basis for separation and can result in an OTH discharge.[178] Technically, a fraudulent enlistment requires a "deliberate material misrepresentation, omission, or concealment which, if known at the time of enlistment, induction, or

172. Dept. Def. Directive No. 1332.14, encl. 3, § H.2 (1982).

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

174. 628 F.2d 594 (D.C. Cir. 1980) (court for the first time found that a serviceperson's conduct must have a real impact on his or her service in order for it to be the grounds for a less than honorable discharge).

175. 395 U.S. 258 (1969).

176. *See* FIGHTING BACK, *supra* note 150, at 28.

177. 15 M.J. 541 (A.F.C.M.R. 1982). For a discussion of the *Newak* decision, see *infra* notes 218–29 and accompanying text.

178. Dept. Def. Directive No. 1332.14, encl. 2, § E.4.a. (982).

entry into a period of military service, might have resulted in rejection."[179] The directive clearly contemplates that an unconfessed same-sex act can be the basis of a fraudulent enlistment. A material misrepresentation can include statements regarding such pre-service homosexual conduct. As shall be seen in the discussion of *Rich v. Secretary of the Army*,[180] a fraudulent enlistment theory can be used successfully to separate gay servicemembers. If one combines the rather broad definition of a "homosexual" in the directive with the broad definition of "homosexual acts," many persons could be "guilty" of an omission or misrepresentation of facts. The issue is particularly difficult because a person's consciousness of being gay often develops long after homosexual thoughts and actions have occurred. Moreover, many persons who honestly consider themselves heterosexual in orientation have engaged in acts or had thoughts which the Department of Defense would characterize as "homosexual" in nature.[181] Under the regulation, a misrepresentation or omission must not only be material but deliberate as well. However, given the fluidity of sexual orientation as described by Kinsey, many people could honestly consider themselves heterosexual at one point in time and yet subsequently develop an awareness of themselves as possessing a bisexual or homosexual orientation. In theory, such persons would not be subject to a fraudulent enlistment discharge because the misrepresentation was not deliberate.[182] However, given the homophobia of the armed forces, such a change in consciousness might be given little credence.

The regulation for the separation of officers is very similar to that governing enlisted personnel and, therefore, will not be detailed here. Each service has its own regulations implementing the Department of Defense Directive, and such regulations at times differ substantively. Examples of such service regulations in action will be seen in the cases discussed below.

Many military cases dealing with gay servicepersons have a number of common components. First, civilians who rely on the confidentiality of their statements to doctors, psychiatrists, and other counselors, including clergy, are often unaware that confidentiality does not exist in the armed services. Many persons have revealed gay feelings to doctors, counselors, and even clergy "in confidence" only to find that their

179. *See* FIGHTING BACK, *supra* note 150, at 15.

180. 735 F.2d 1220 (10th Cir. 1984). *See infra* notes 256–66 and accompanying text.

181. *See* A. KINSEY, *supra* note 159, at 656; J. MARMOR, THE MULTIPLE ROOTS OF HOMOSEXUAL BEHAVIOR 4 (1980).

182. This was precisely the issue in *Rich* but the serviceperson's testimony was not accepted. *See Rich*, 735 F.2d at 1225.

admissions are immediately passed up the chain of command.[183] In *Lauritzen v. Secretary of the Navy*,[184] Carol Lauritzen told her psychiatrist she thought she had homosexual tendencies; this confidence put her through an incredible ordeal. However, she won retention and sued to collect her attorney's fees from the Navy, which she received as a prevailing party under the Civil Rights Attorney's Fees Awards Act.[185]

The second common component in these military cases is the method of investigation used to discover gay servicemembers. Investigators will often offer immunity to a person who will reveal the names of other persons whom they know or suspect to be gay. This method has led to purges, pogroms, or wholesale "witchhunts" in various service installations.

Probably the most famous recent purge was the allegation of wholesale lesbianism brought against the female sailors on the *Norton Sound*. Many commentators suspect that charges of lesbianism are a "second-hand" way of ridding the Navy of unwanted women, regardless of their sexual orientation.[186] In the *Norton* incident, twenty-four women were originally charged with lesbianism. This number represented more than one-third of the women aboard the *Norton Sound*, a missile test ship stationed in Long Beach, California. The charges resulted from the initial allegations of one woman and from a list of names which was passed around the ship. Sailors were to note those women who they believed were gay. Charges against sixteen of the women were dropped early in the investigation. Only four of the women were actually tried. Of these, two were acquitted and retention recommended; two were found "guilty" of homosexual behavior at discharge hearings. Subsequent to the four trials, charges were dropped against the remaining four servicewomen. At the actual hearings, the woman who had made the original allegations admitted under oath that

---

183. *See, e.g.*, Lauritzen v. Secretary of the Navy, 546 F. Supp. 1221 (C.D. Cal. 1982) (Lauritzen told a Navy psychiatrist that she "might have homosexual tendencies"), *rev'd sub nom.* Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984); *Air Force Officer Bucks Military Policy On Gays*, The Advocate, Sept. 30, 1982, at ___ (an 18-year veteran of the Air Force, while under treatment for hepatitis, told his physician that he was gay and doctor disclosed this information to the sergeant's supervisors even though the physician promised to protect his patient's identity); *AIDS Test May End Navy Career*, The News of Columbus Gay and Lesbian Community, June 1982, at 186 (reporting that a petty officer requested testing for AIDS and was subsequently "accused" by the Navy of making an admission of homosexuality to psychiatrists who examined him).

184. 546 F. Supp. 1221 (C.D. Cal. 1982), *rev'd sub nom.* Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984).

185. *Id.* at 1229. *See* 28 U.S.C. § 2412 (1982).

186. *See Navy's Most Recent Sex, Drug Scandal Whipping Up Stormy Seas in California*, CIV. LIBERTIES, June 1981, at 6; Podeska, *Norton Sound Trials End*, NOW Times, Sept. 19, 1980, at 1; Columbus Citizen-Journal, Aug. 1, 1980, at ___.

she had lied. She said that the Navy investigators told her she would be labeled a homosexual unless she accused her friends.[187] The *Norton Sound* case became a *cause celebre* when the ACLU and NOW intervened to represent the women. Some evidence exists that the frequency of such accusations are more common under the Reagan administration.[188]

James Woodward's case was decided shortly after the settlements in *Berg* and *Matlovich* and shortly after the promulgation of the new directive. Woodward was a Navy pilot who in 1974 was released from active service because of alleged homosexual tendencies.[189] This release was upheld by the United States District Court for the District of Columbia in 1978, which granted defendant's motion for summary judgment.[190] Woodward, however, returned to court three years later and asked for reinstatement and damages because, at the time of his separation, the Navy had not provided a rationale for his release from active service.[191] Basing his argument on the decisions in *Berg* and *Matlovich*, Woodward persuaded the court that the Navy had violated due process in not providing a rationale.[192] The case was remanded to the Secretary of the Navy who was ordered to provide reasons for the decision.[193]

Obviously, in light of other decisions and the regulation changes, Woodward's method of attack is no longer of much interest. However, two facts from the case are noteworthy. First, Woodward was thought to be gay because he was seen in an officer's club with an enlisted man who, at the time, was being separated from the service because of homosexuality.[194] Second, when questioned by his commanding officer, Woodward admitted "homosexual tendencies."[195] The military policy against fraternization served to call Woodward to someone's attention. His admission of "tendencies" to his commander was sufficient to cause his release from active service.[196]

The "last gasp" of the "exception" doctrine used in *Berg*,

---

187. *See* Podeska, *supra* note 186, at 1.

188. *Navy Officer's Case Signals Renewed Purge*, Gay Community News, Dec. 7, 1983, at 1.

189. Woodward v. Moore (Woodward I), 451 F. Supp. 346 (D.D.C. 1978), *vacated*, 25 Fair Empl. Prac. Cas. (BNA) 695 (D.D.C. 1981). Note that this case comes under the old regulation which used the "tendencies" standard or issue. *See supra* note 165 and accompanying text.

190. *Woodward I*, 451 F. Supp. at 349.

191. Woodward v. Moore (Woodward II), 25 Fair Empl. Prac. Cas. (BNA) 695 (D.D.C. 1981). *See supra* notes 94–100 and accompanying text.

192. *Woodward II*, 25 Fair Empl. Prac. Cas. (BNA) at 696.

193. *Id.* at 697.

194. *Woodward I*, 451 F. Supp. at 347.

195. *Id.*

196. *Woodward II*, 25 Fair Empl. Prac. Cas. (BNA) at 696.

Matlovich, and *Woodward* is represented by a case involving an Air Force major. The plaintiff in *Doe v. Secretary of the Air Force*,[197] whose case began in 1979, was administratively discharged with an OTH discharge. Doe was found to have had sexual relations with the fifteen-year-old son of another Air Force officer. Because of his outstanding military record, Doe claimed that under the doctrine enunciated in *Matlovich* and *Berg*, he was procedurally entitled to an explanation as to why he was not retained as an "exception." The court held that the explanation which he had received was procedurally sufficient, i.e., "misbehavior aggravated by the commission of homosexual acts with a child."[198] However, the court did find his OTH discharge improper because the Air Force had not introduced evidence to show how Doe's misbehavior was service connected. Under *Roelofs*, in order to give an OTH discharge, the behavior must be service connected.[199] Nevertheless, since the Air Force regulation governing separation for homosexuality[200] presumes that the homosexuality of a member of the Air Force reduces the overall effectiveness of the service, a general discharge, rather than an honorable discharge, can be given. The court ordered that Doe be given a general discharge.[201]

The issue of fraternization, noted in *Woodward*, occurred again in the case of *United States v. Coronado*.[202] However, in *Coronado* the accused officer received a court-martial for "conduct unbecoming an officer." Coronado engaged in consensual sodomy in his off-base apartment with an Army-enlisted man. Coronado challenged the jurisdiction of the military because the acts in question took place off base. Moreover, he stressed that the prosecutor in the civilian jurisdiction chose not to prosecute. The opinion of the Air Force Court of Military Review, which reviewed the court-martial proceedings, illustrates clearly the military's belief in the sacrosanct and separate nature of military life. Coronado did not receive a court-martial for sodomy, which is an offense pursuant to article 125 of the UMCJ, but was punished for sodomy which crossed rank lines. As the court stated, he "is charged with disgracing his position as an officer . . . [an] offense [which] is not cognizable in civilian courts."[203] The court held that his behavior constituted "a direct flouting of military authority."[204] Coronado ar-

197. 10 MIL. L. REP. (PUB. L. EDUC. INST.) 2302 (D.D.C. 1982).
198. *Id.* at 2304.
199. *See supra* notes 174–75 and accompanying text.
200. A.F. Reg. 36-w, § 8 (_____).
201. *Doe*, 10 MIL. L. REP. (PUB. L. EDUC. INST.) at 2304.
202. 11 M.J. 522 (A.F.C.M.R. 1981).
203. *Id.* at 525.
204. *Id.*

gued that the off-base location of the act brought into play the *O'Callahan* rule[205] which requires that a "service connection" be established before the military can court-martial a serviceperson. Coronado's behavior was held to be service-connected because the court found that "he took his rank, prestige, and authority with him when he departed the installation."[206] The last finding of the Air Force Court of Military Review is startling. The court found that Coronado's offense "pose[d] a threat to both Pope Air Force Base and Fort Bragg."[207] This finding was based on the court's conclusion that the ability of both men to perform their duties was impaired. For instance, the Army-enlisted man had been late for duty once as a consequence of his liaison with Coronado. Also, Coronado's "fellow members of the military" showed him less respect when his misconduct became known. The decision reveals, however, no evidence that Coronado's abilities were impaired before he was charged and before that charge became known. Actually, when one examines other cases, Captain Coronado was fortunate; his sole punishment was dismissal from the service rather than a jail sentence.[208] Dismissal from the service for an officer, however, is comparable to an undesirable discharge for an enlisted person.[209]

After deciding *Beller*,[210] the Ninth Circuit exhibited even further deference to the military in *Hatheway v. Secretary of the Army*.[211] Joseph Hatheway appealed his court martial conviction under article 125 (sodomy) to the federal courts. Lieutenant Hatheway, who had been second in command of a Green Beret detachment for four years, was arrested by the Army ten days before he was to receive an honorable discharge. The evidence against Hatheway was given by an enlisted man who was given immunity from prosecution and who claimed to have had sex with Hatheway. At his court martial, Hatheway proffered evidence that only homosexual sodomy was ever actually prosecuted even though article 125 prohibited heterosexual sodomy as well. The military judge ruled that even if those facts were shown to be true, the prosecution still had a valid case against him. Hatheway was convicted and dismissed from the service.[212] The Ninth Circuit refers to Hathe-

205. *See supra* notes 175–76 and accompanying text.

206. *Coronado*, 11 M.J. at 524.

207. *Id.* at 525.

208. *Id.* at 523.

209. *See* FIGHTING BACK, *supra* note 150, at 27.

210. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905; 454 U.S. 855, *reh'g denied*, 454 U.S. 1069 (1981). *See supra* notes 117–45 and accompanying text for discussion of *Beller*.

211. 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981).

212. *Id.* at 1379. By way of contrast, in United States v. Johanns, 20 M.J. 155 (C.M.A. 1985), the court of military appeals held that an Air Force officer's engagement in mutually voluntary, private, non-deviate sexual intercourse with three enlisted women was not conduct un-

way in the opinion as a "convicted felon."[213] Lest one not understand, Hatheway was and still is presumably "a convicted felon" because a military court found him guilty of sodomy. The Ninth Circuit framed the main issue as "whether the commission of homosexual acts is an 'impermissible' ground for selective prosecution under Article 125."[214] The court held that such acts were not! The court, citing *Beller*, said that the *Beller* holding "was the judgment that those who engage in homosexual acts severely compromise the government's ability to maintain . . . a [strong military] force."[215] Therefore, the court held that the military could select those cases for court-martial which involve violations "most likely to undermine discipline and order in the military."[216] Thus, the military's selective prosecution of homosexual sodomy is permissible because such a selection furthers an important governmental interest.[217]

Coronado and Hatheway were each officers who committed sodomy with an enlisted person, and their penalty after court-martial was dismissal from the service. Doe was a major who committed sodomy with a minor. His penalty was an administrative OTH discharge, upgraded by the court to a general discharge. Second Lieutenant Newak was an officer found guilty of sodomy with an enlisted person and sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for seven years![218] Lieutenant Newak differs from Coronado, Hatheway, and Doe in one significant way: Joann Newak is a woman.

Joann Newak came from Vandling, Pennsylvania. Her father is dead, her mother is a nurse, and her sister, a school teacher. Joann Newak went to Maywood College, a Roman Catholic liberal arts college, graduating in 1979. After graduation, at the age of twenty-one, she joined the Air Force. For two and one-half years she rendered excellent service and was certain of promotion to First Lieutenant. She was stationed at Hancock Field in Syracuse, New York at the time of her court martial.[219] The charges against Second Lieutenant Newak were that in her off-base apartment she smoked marijuana with an en-

---

becoming an officer, nor was it prejudicial to good order and discipline. *Id.* at 159. Although the disciplinary articles involved were different than those used in *Hatheway*, the facts are such that the different standard required of heterosexual officers as opposed to homosexual officers becomes apparent.

213. *Hatheway*, 641 F.2d at 1380.
214. *Id.* at 1381 (footnote omitted).
215. *Id.* at 1382.
216. *Id.*
217. *Id.*
218. United States v. Newak, 15 M.J. 541, 542 (A.F.C.M.R. 1982).
219. Village Voice, Apr. 12, 1983, at 8.

listed person, allegedly gave pills thought to be amphetamines, that were in fact diet pills, to others, and last, but not least, engaged in sodomy with an enlisted person. She was charged not only with sodomy under article 125 but under articles 80,[220] 133,[221] and 134[222] as well. In particular, under article 133, the charge specified that Lt. Newak did "engage in conduct unbecoming an officer and gentleman." Specifically, she was charged with wrongfully suggesting to an enlisted female person of the Air Force that such person was bisexual, and for proceeding without authority to kiss the enlisted person on her neck, saying, "I love you."[223]

Originally, Newak was offered a dismissal, equivalent to an enlisted persons' OTH discharge. She felt that because of her excellent service record she deserved an honorable discharge. Naively, she went

---

220. 10 U.S.C. § 880 (1983). Article 80 includes charges for attempting any act defined as an offense under the UCMJ. *Id.*

221. *Id.* § 933. Article 133 provides for punishment for conduct "unbecoming an officer and a gentleman." *Id.*

222. *Id.* § 934. Article 134 is a general article and provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id. The elements of offenses involving indecent language and indecent acts with another are spelled out in the *United States Manual for Court-Martials* as follows:

> [Indecent Language:]
> (1) That the accused orally or in writing communicated to another person certain language;
> (2) That such language was indecent; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. . . .
> *Explanation.* "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards.

UNITED STATES MANUAL FOR COURT-MARTIALS, 1984, ¶ 89, at IV-131 (1984). One might add that the explanation alone is enough to "incite lustful thought"!

> [Indecent Acts with Another:]
> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. . . .
> *Explanation.* "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

Id. ¶ 90, at IV-131.

223. Hemhoff, *The Court Martial of Lieutenant Joann Newak*, Village Voice, Apr. 12, 1983, at 8.

to trial. The Air Force assigned her counsel. At one point, not only was the Air Force lawyer representing Newak, but he was also representing two enlisted personnel, one with granted immunity, who were going to testify against her. At the court martial, Newak's civilian counsel pointed out that the sexual acts in question were consensual, adult, and private, and that the acts occurred off-base, when Lt. Newak was not on duty. Additionally, Newak argued that the acts in question were not criminal under New York law where they took place.[224] Newak was found guilty and sentenced to seven years at hard labor which the Secretary of the Navy reduced to six years. In her appellate brief, speaking on the issue of penalty, Faith Seidenberg, Newak's ACLU lawyer, pointed out that Newak had an exceptional military record, that several military personnel of high rank had so testified, that she had no prior criminal record, and that no court anywhere would send such a person to jail. The United States Air Force Court of Military Review was unmoved. In a short opinion, the court brushed aside the arguments of improper representation.[225] Nor did the court find her sentence "excessive."[226] The concurring senior judge asserted that the arguments based on the facts that the conduct was off-base, off-duty, and non-criminal in the civilian world, failed to recognize " 'that the military is, by necessity, a specialized society separate from civilian society.' . . . That responsibility [of commissioned officers] cannot be checked at the gate on the way home at the end of the duty day."[227] In still another concurrence, Judge Miller wrote a nineteen-page defense of the court-martial and military justice system. He was, he wrote, counteracting "two innuendos" contained in Newak's appellate brief. In summary, Miller wrote: "[S]he, as a commissioned officer, not only destroyed her subordinate's instinctive respect and obedience for her, herself, but, in all probability, destroyed their instinctive respect and obedience for other officers and *for the entire military system as well.*"[228]

News of the heavy sentence leaked out and became an issue in

---

224. This raised the distinction between civilian jurisdiction and what Justice Miller, in his lengthy concurrence, called "status jurisdiction." *Newak*, 15 M.J. at 558 (Miller, J., concurring).

If "status jurisdiction" (i.e., a military justice system) prevails, then the law in the civilian jurisdiction is irrelevant. *Newak* thus differs from cases like *Coronado*, where sodomy was a crime in North Carolina, the state in which the acts took place, *Doe*, whose acts were with a minor, and *Hatheway*, who claimed that he was selectively punished because heterosexual sodomy was not prosecuted even though prohibited under the UCMJ.

225. *Newak*, 15 M.J. at 543–44.

226. *Id.* at 544–45.

227. *Id.* at 545 (Hemingway, S.J., concurring) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

228. *Id.* at 564 (Miller, J., concurring) (emphasis added).

civilian papers. Imprisoned at Fort Leavenworth, she was at first denied the right to write to the media. The case generated considerable publicity and public outcry from the gay community. The court martial went to the Air Force Judge Advocate for review. The sentence was reduced to three years. Newak has appealed to the United States Court of Military Appeals.[229]

The *Newak* case not only illustrates the military's "hard-nosed" position against gay people but, to many, the case also illustrates discrimination against women. This case, coupled with the *Norton Sound* investigation[230] and other similar actions, raises the question of whether the military is using the pseudo-issue of lesbianism to rid itself of women.[231]

Like the *Newak* case, the case of Sergeant Perry Watkins attracted considerable national attention.[232] And like the *Newak* case, the *Watkins* case has an unhappy ending. On August 27, 1967, Perry Watkins reported for induction into the United States Army. On the medical form next to the box labelled "homosexuality," Perry Watkins checked yes. Watkins was inducted and became a company clerk and chaplain's assistant. During November, 1968, Watkins told Army investigators that he was gay and had been since he was thirteen. He was honorably discharged in 1970. In 1971, he reenlisted for three years. In January 1972, Watkins was denied a security clearance based on his 1968 statements. He was again honorably discharged in 1974. He again reenlisted, this time for six years. In 1975, proceedings were instituted against him because of his homosexuality. Watkins freely admitted he was gay. His commander called him " 'the best clerk I have known.' "[233] His sergeant testified that everyone in the company knew Watkins was gay. A four-member review board unanimously found Watkins suitable for retention, and this finding was approved by the Secretary of the Army.[234] In 1977, Watkins was granted a security clearance and began work on the Nuclear Surety Personnel Reliability Program.[235] On October 26, 1979, Watkins was again permitted to reenlist for a three year period. On December 18, 1979, he was notified

---

229. *See* Lambda Update, Feb. 1985, at 7, col. 2; Gay Community News, Oct. 29, 1983, at ____.

230. *See supra* notes 186–88 and accompanying text.

231. *See* NOW Times, May 1983, at 3; Village Voice, Apr. 26, 1983, at 6, col. 2.

232. Watkins v. United States Army, 551 F. Supp. 212 (W.D. Wash. 1982), *rev'd*, 721 F.2d 687 (9th Cir. 1983). *See* The Advocate, June 12, 1984, at 11; Gay Community News, June 2, 1984, at 2; The Advocate, Dec. 23, 1982, at 2; Columbus Dispatch, Nov. 14, 1982, at A9; N.Y. Times, Oct. 21, 1982, at 2, col. 6.

233. *Watkins*, 551 F. Supp. at 220.

234. *Id.* at 216.

235. *Id.* at 220.

that his security clearance was going to be revoked.[236] When he appealed the revocation of the security clearance in February, 1981, he was told that separation proceedings were being commenced against him. He was ordered dismissed on the ground that he admitted to being a homosexual and he was given an honorable discharge. Note that Watkins had now been in the Army for fourteen years, had been enlisted and reenlisted four times, and had steadily, throughout the fourteen years, stated he was gay. His service record was excellent.[237]

Watkins took his case to the federal district court in the State of Washington. In October, 1982, Judge Rothstein found for Watkins in a summary judgment proceeding under the theory of equitable estoppel.[238] The Army claimed that they did not know of Watkin's homosexuality. The judge called that claim "patently absurd" and said such a claim suggested "bad faith."[239] The Army's acts, the court found, amounted almost to a policy of ignoring this servicemember's homosexuality for more than fourteen years.[240] Finally, the court found that Watkins had relied to his detriment on the Army's behavior.[241] The court ordered Watkins to be reenlisted and estopped the Army from relying on the Army regulation which would bar him.[242] After the order of reinstatement, the Army attempted to circumvent the order by directing Watkins to appear at a reenlistment hearing. At the hearing, the Army attempted to get Watkins to answer questions about past homosexual acts, current intentions, and other such matters.[243] Their claim was that such acts would bar his reenlistment. The court called this attempt "transparent," and the "consequence unjust," and ordered the reenlistment of Watkins.[244]

The Army appealed to the United States Court of Appeals for the Ninth Circuit of *Beller* infamy.[245] The court pointed out that new regulations had been promulgated since *Beller*.[246] The court characterized

---

236. *Id.* at 216.

237. *Id. See* CIV. LIBERTIES, Nov. 1981, at 3.

238. *Watkins*, 551 F. Supp. at 220–23. Equitable estoppel precludes someone (i.e., the Army) from changing its position or policy when another person (i.e., Watkins) relied on that position or policy to his or her detriment. *Id.* at 219–20. Because Watkins had told the service that he was gay when he originally entered the service and because the service continually reenlisted him, the Army was estopped from asserting that Watkins was unfit for the military because he was homosexual. *See id.* at 220–23.

239. *Id.* at 220.

240. *Id.*

241. *Id.* at 223.

242. *Id. See also* Army Reg. 601-280, ¶ 2.14(c) (1982).

243. *Watkins*, 551 F. Supp. at 223.

244. *Id.* at 224.

245. Watkins v. United States Army, 721 F.2d 687 (9th Cir. 1983).

246. *Id.* at 689.

the language of these regulations as "stark."[247] Retention of an admitted homosexual serviceperson, the court noted, is not permitted absent an express finding that the soldier in question is in fact *not* gay.[248] The new regulation "made clear," the court said, "that the Army's new policy immediately disqualifies any homosexual person from continued military service irrespective of the character of the soldier's past service."[249] Looking at the district court opinion, the Ninth Circuit said that the district court was, in effect, ordering Army officers to disobey Army regulations.[250] Such a course would be a serious threat to Army discipline. Only if the district court had found those regulations repugnant to the Constitution could the court have made that order.[251] Since the district court did not find the regulations unconstitutional, its opinion was reversed and remanded.

Judge Norris, who dissented when the Ninth Circuit refused to hear *Beller en banc*, concurred because he was bound by *Beller*.[252] Norris, however, had some strong words about the Army and the Court.[253] In regard to the Army, Norris asserted:

> The Army rewarded Sgt. Watkins' years of outstanding service by destroying his chosen career. When he needed only five more years to qualify for retirement benefits, he was discharged solely because the Army decided to purge all homosexuals . . . .[T]his regressive policy demonstrates a callous disregard for the progress American law and society have made toward acknowledging that an individual's life style is not the concern of government, but a fundamental aspect of personal liberty.[254]

In regard to the Ninth Circuit, Judge Norris had this to say:

> [O]ur court abdicated one of its primary duties: to safeguard individual rights against intrusions engendered by governmental insensitivity or bigotry. To me, the Army's current bias against homosexuals is no less repugnant to fundamental constitutional principles than was its long-standing prejudice against minority servicemen.[255]

The case of *Rich v. Secretary of the Army*[256] illustrates the use of the fraudulent enlistment theory to separate gay persons from the

---

247. *Id.*
248. *Id.* (citing Army Reg. 635-200, ¶ 15-3(b) (1982)).
249. *Id.* at 690.
250. *Id.*
251. *Id.*
252. *Id.* at 691 (Norris, J., concurring).
253. *Id.*
254. *Id.*
255. *Id.*
256. 516 F. Supp. 621 (D. Colo. 1981), *aff'd*, 735 F.2d 1220 (10th Cir. 1984).

Armed Services. Roger Rich served in the Army from 1968 to 1974 and was honorably discharged. During his tour of service, he met and married a woman from Turkey, and they had a son. His wife and son, however, did not accompany him when he returned to the United States in 1971. In March, 1976, his wife and child were killed in an auto accident. In August, 1976, Rich applied for reenlistment in the Army. During the reenlistment process, he answered in the negative when responding to questions about homosexuality. He went on active duty on August 24, 1976. In October, 1976, he was solicited by another male; he did not participate in any sexual acts but did discuss homosexuality with the person. As a consequence, he thought and read about homosexuality. Rich was hospitalized in March, 1977. During his illness he called his first sergeant and told her that he was gay and would have to be discharged. Sergeant Nichols had a "counseling" session with Rich during which he told her he had been a homosexual for a number of years. On May 24, 1977, the commanding officer recommended that Rich be discharged for unsuitability under chapter 13.[257] Then, three days later, the commanding officer changed the charge to a chapter 14[258] charge for fraudulent enlistment. The claim was that Rich had concealed his homosexuality at his reenlistment. In June, 1977, Rich was honorably discharged under chapter 14.[259]

Rich went to federal court to protest that he should have been separated under chapter 13 for unsuitability rather than chapter 14 for fraudulent enlistment.[260] Rich claimed that when he entered the service he had had some same-sex experiences but that he had also had many opposite sex experiences and considered himself a "heterosexual." He said, therefore, that he had not "deliberately" misrepresented himself. The court upheld the decision of the Army to separate Rich for fraudulent enlistment.[261] The judge stated that "the choice made in approaching a particular case is a command decision."[262] Judge Matsch pointed out that "the justifications for the exclusion for homosexuals are applicable regardless of the level of sexual activity involved."[263] The judge noted that "[t]he principle reason for the Army's rejection of homosexuals is the belief that societal intolerance will be reflected in peer behavior which will be inimical to the legitimate governmental interests

257. *Id.* at 623. *See* Army Reg. 635-200, ch. 13 (1973).
258. *Rich*, 516 F. Supp. at 624. *See* Army Reg. 635-200, ch. 14 (1973).
259. *Rich*, 516 F. Supp. at 625.
260. *Id.* at 624–25.
261. *Id.* at 629.
262. *Id.* at 627.
263. *Id.* at 628.

in discipline and morale."[264]

Rich illustrates a number of principals previously discussed. First, confidentiality does not exist in the Army; the Army's meaning of "counseling" differs significantly from common usage. Secondly, many persons who at enlistment view themselves as heterosexual can be caught by the broad definition of homosexuality used by the Armed Forces and may later find themselves, as Rich did, facing discharge for fraudulent enlistment. Finally, the Army's varying reasons for excluding gay people have at last been refined to only one reason—the problems allegedly created by the "social intolerance of peers." No longer are gays erroneously portrayed as incompetent or security risks. Now, the justification is clear and simple.

Rich appealed to the Tenth Circuit.[265] The court of appeals upheld the district court's opinion and added nothing new to legal precedent. The decision essentially relied on *Beller* and followed the same rationale. The only item of note was a specific finding that sexual orientation is not a suspect classification.[266]

Probably no case in recent years has caused as much consternation as *Dronenburg v. Zech*.[267] On its face, *Dronenburg* should have been just one more in the long line of cases where a gay serviceperson who sought to be reinstated was denied a remedy in federal court. At the district court level, *Dronenburg* was routine. The court denied a preliminary injunction to allow Dronenburg to stay in the Navy pending the outcome of the case. Subsequently, the district court granted summary judgment for the Navy.[268] The case was appealed to the Court of Appeals for the District of Columbia. Leonard Graff of the National Gay Rights Advocates, one of Dronenburg's lawyers, said shortly after the summary judgment, "if we can't win it in the District of Columbia Circuit, we can't win . . . at all."[269] Allegedly, the case was brought in the District of Columbia, rather than in California, to obtain a more liberal bench.[270] Probably, the litigators also wanted to get away from the Ninth Circuit of *Beller* fame.

Many thought *Dronenburg* was a particularly strong case for gay rights in the military because of Dronenburg's excellent record with the

---

264. *Id.*

265. *Rich*, 735 F.2d 1220 (10th Cir. 1984).

266. *Id.* at 1229. A "suspect" classification is one accorded special constitutional protection, namely "strict scrutiny," on the basis that one is discriminated against because of an immutable characteristic that has historically been discriminated against and that legislative action has failed to address adequately.

267. 741 F.2d 1388 (D.C. Cir.), *reh'g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984).

268. *Id.* at 1389.

269. The Washington Blade, Oct. 15, 1982, at 1.

270. News of the Columbus Gay and Lesbian Community, Apr. 1982, at 4.

Navy.[271] James Dronenburg enlisted in the Navy immediately after completing high school. When discharged, he was a petty officer and had served nine years. He was a naval linguist and cryptographer with a top secret clearance. Shortly before his discharge, he reenlisted, lured by the $12,000 reenlistment bonus offered by the Navy.[272] Even the appeals court described Dronenburg in a complimentary fashion: "During [his tenure, Dronenburg] maintained an unblemished service record and earned many citations praising his job performance."[273] While superficially, because of his service record, Dronenburg seemed to be the right person for a test case, the circumstances under which he was discovered weakened the case. Dronenburg, a noncommissioned officer, was named as a sexual partner by a nineteen-year old enlisted man. The enlisted man had decided that he wanted to get out of the Navy by admitting to homosexual behavior as his justification. As was typical, Navy investigators pressured him into naming his sexual partners, one of whom was Dronenburg.[274] The sexual behavior in question not only crossed ranks but occurred in the naval barracks. A stronger case may have been presented had the sexual behavior occurred, as it did in other cases, off base and between peers. However, given the vehemence of the opinion of the court of appeals, a more attractive fact pattern would not have changed the decision.

The decision of the court of appeals left gay litigators stunned.[275] The case was heard by a three-judge panel, which included Robert Bork and Anthony Scalia, both Reagan appointees to the bench and noted for their reactionary jurisprudence.[276] The Navy's action was upheld. This decision was hardly a surprise given other decisions in this area. What came as a surprise was Judge Bork's decision to deny, in a lengthy and strongly worded dictum, constitutional privacy rights to persons on the basis of their homosexuality. Bork's decision placed heavy reliance on the *Doe v. Commonwealth's Attorney*[277] decision and ignored significant privacy cases such as *Eisenstadt v. Baird*[278] and

271. Why this was emphasized, in view of this especially strong case, is odd; almost all the gay service members involved in major military litigation had excellent service records. *See, e.g., Matlovich*, 414 F. Supp. 690 (D.D.C. 1977), *vacated*, 591 F.2d 852 (D.C. Cir. 1978).

272. The Washington Blade, Oct. 15, 1982, at 1.

273. *Dronenburg*, 741 F.2d at 1389.

274. The Washington Blade, Oct. 15, 1982, at 1.

275. Lambda Update, Nov. 1984, at 1.

276. *Dronenburg v. Zech*, No. 81-0933 (D.D.C. Oct. 6, 1982) (available on LEXIS, Genfed library, Dist file).

277. 425 U.S. 901 (1976) (upholding a Virginia statute making it a criminal offense to engage in private consensual homosexual conduct on the basis that the right to privacy extended no further than to matters of marriage, procreation, or family life). *Doe* was most likely a decision based on standing, but Bork dismissed that point. *See Dronenburg*, 741 F.2d at 1392.

278. 405 U.S. 438 (1972) (extending the right to privacy to unmarried couples and individ-

Stanley v. Georgia.[279] In discussing the line of Supreme Court privacy cases Bork stated, "The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships and child rearing and education. *It need hardly be said that none of these covers a right to homosexual conduct.*"[280] This remark parallels a similar remark made in *Doe* almost ten years earlier.[281] Bork declared that legislation may implement morality and concluded, therefore, that the military regulation separating gay servicemembers had a rational relationship to a permissible end.[282] Even if a rational relationship is demanded not to morality but to some other legitimate purpose of the Navy, Bork concluded that such a relationship still existed: "The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. *The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate.*"[283]

Dronenburg requested that the case be reheard en banc. This request was denied.[284] However, four judges took the opportunity to take exception to Bork's decision in the case. In particular, the four dissenters stated that the emphasis placed on *Doe* was improper.[285] They maintained that the decision in *Doe* was not determinative of the issue of homosexual conduct under the rubric of a privacy right. Moreover, they submitted that the footnote in *Carey*[286] indicated that the question was still open. Using the same criticism advanced by Judge Norris in *Beller*, the four dissenters criticized the lack of analysis of the Navy's

---

uals by requiring access to contraceptives for both married and unmarried people).

279. 394 U.S. 557 (1969) (recognizing constitutional protection for privacy in the home).

280. *Dronenburg*, 741 F.2d at 1396–97 (emphasis added).

281. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 (1975) ("With no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life—the next question is whether there is any ground for barring Virginia from branding it as criminal."), *aff'd*, 425 U.S. 901 (1976). With a lead-in like that, is it any wonder that the answer to the question in *Doe* was no?!

282. *Dronenburg*, 741 F.2d at 1398.

283. *Id.* (emphasis added).

284. Dronenburg v. Zech, 746 F.2d 1579, 1579 (D.C. Cir. 1984).

285. *Id.* at 1580 (Robinson, III, C.J., dissenting, joined by Wald, J., Mikva, J. & Edwards, J.).

286. Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977). As Justice Brennan stated:

> Appellees argue that the State's policy to discourage sexual activity of minors is itself unconstitutional, for the reason that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regarding such behavior among adults.

Id. *See Dronenburg*, 746 F.2d at 1580.

justifications for the regulation:

> There may be a rational basis for the Navy's policy of discharging all homosexuals, but the panel opinion plainly does not describe it. The dangers hypothesized by the panel provide patently inadequate justification for a ban on homosexuality in the Navy that includes personnel of both sexes and places no parallel ban on all types of heterosexual conduct.[287]

Furthermore, the dissenters argued that the case called for serious equal protection analysis. The one judge who could have subjected the case to a rigorous equal protection analysis chose strangely to deny the en banc hearing on the basis of *Doe*. Ruth Bader Ginzberg, for years a leading feminist litigator and champion of equal rights, voted with Bork to deny an en banc hearing.[288] Dronenburg decided not to seek certiorari to the Supreme Court. The *Dronenburg* case has been the subject of much discussion and analysis both in and out of the legal world.[289] *Dronenburg* certainly is the capstone on a trend of cases blocking categorically the participation of known gay people in the military. Until new regulations are added or until an extreme change occurs in the judiciary, a change seems unlikely.

For a short time, the case of *Matthews v. Marsh*[290] seemed to portend a loophole in the new regulations issued by the armed services to implement Department of Defense Directive 1332.14. The case of Diane Matthews drew national attention.[291] After high school, Diane Matthews joined the Army. She earned a good conduct medal, a certificate of achievement, and a distinguished soldier's award before she switched to the Army Reserves while going to college. She was a sergeant in the ROTC at the University of Maine when she inadvertently became a "celebrity." When asked, Matthews told her superior she was lesbian. She had sought permission to miss a drill to attend a student government meeting where the funding for a gay student group was at issue. After losing her position both in the Army Reserves and ROTC, Matthews filed suit in federal court. The district court stated the issue was: "Does a person's statement that she is homosexual constitutionally justify exclusion from the Army's Reserve Officer's Training Corps

---

287. *Dronenburg*, 746 F.2d at 1581 (Robinson, III, C.J., dissenting).

288. *Id.* (Ginsburg, J.).

289. *See, e.g.*, Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech*, 10 U. DAYTON L. REV. 767 (1985). Richard Saphire's work appeared in the same volume as Part I of this article. *See generally Symposium, The Legal System and Homosexuality—Approbation, Accommodation, or Reprobation?*, 10 U. DAYTON L. REV. 445 (1985).

290. No. 82-0216P (D. Me. Apr. 3, 1984), *vacated*, 755 F.2d 182 (1st Cir. 1985).

291. Keerdoja & Zabarsky, *A Gay Soldier's Fight to Serve*, NEWSWEEK, Jan. 23, 1984, at 15.

program?"[292] Specifically, the court said that no actual homosexual behavior had been alleged or proven.[293] The case thus hinged on the constitutionality of the Army regulations which implemented the new Department of Defense Directive 1332.14.

The regulation required the separation of a person who "stated that he/she is a homosexual," with homosexual defined as a person "(1) who engages in, (2) desires to engage in, or (3) intends to engage in homosexual acts."[294] Matthews challenged the regulation as an infringement of her right to free speech.[295] The court was not persuaded by the Army's argument that no free speech issue was present. In particular, the court focused on the Army's justification for the regulations. Army witnesses admitted that "homosexuals can be effective soldiers." Homosexual soldiers, admitted the Army, are only a threat to the Army when they "come out."[296] According to the court, the Army made it clear that "what it seeks to prevent is the identification of homosexuality."[297] The court characterized Matthews' statement, "I am a lesbian," as a statement of self-identification of a certain element of her personality.[298] This statement was an "expression of what one stands for." The court saw as important that Matthews' statement was elicited while she was engaged in student political activity. The Army argued that Matthews' speech was irrelevant, that she was disenrolled because of what she was rather than for what she said. The statement for the Army only proved her status. The court said that if that were so, then Matthews was disenrolled for "unuttered intent or desire." Viewing her situation either way, the court found a first amendment interest.[299] The court, however, also concluded that the military interest was to be accorded special deference. The issue, therefore, was to be resolved through a balancing of military interests against first amendment interests. The military interest as reformulated by the court was "to eliminate the presence of persons who, by their statements, demonstrate a propensity to engage in homosexual conduct."[300] Thus, "with the goal of eliminating homosexual propensity, the Army has prohibited the expression (or existence, if the Army's argument is accepted that statements are irrelevant) of desire or intent to engage in homosexual acts,

---

292. *Matthews*, No. 82-0216P, slip op. at 1.
293. *Id.*
294. Army Reg. 135-175 (_____); *Id.* 635-100 (_____).
295. *Matthews*, No. 82-0216P, slip op. at 2.
296. *Id.*, slip op. at 14.
297. *Id.*
298. *Id.*, slip op. at 15.
299. *Id.*, slip op. at 30.
300. *Id.*, slip op. at __

regardless of whether the desire or intent is ever consumated."[301] Why is this expressed propensity forbidden? It is not a concern that homosexuals are poor soldiers. Indeed, the Army admitted that "homosexual persons make fine soldiers and leaders so long as they are not known to be homosexuals."[302] Rather, the Army's policy arises from its expressed concern for the reaction of other personnel and potential recruits to the presence of homosexuality. The Army, the court found, rejects gay soldiers because of the belief that societal intolerance will be reflected in peer behavior which will affect morale and discipline.[303]

As a result of the court's recognition that the case involved not only the interests of Matthews and the Army, but also the interests of the other soldiers, the issue involved was reformulated. The court asked, "If as a result of Matthews' self identification other soldiers react as the Army fears they will, must the Army suffer the presence of Matthews and deal directly with the reactions of others or may it exclude Matthews instead?"[304] The court concluded that the first amendment right of Matthews outweighed the Army's interest. The regulation was not narrowly drawn but was a prohibition at every time, in every place, and under every circumstance. The prohibition was clearly content-discrimination. If the Army's action was upheld, a particular subject of expression would be eliminated from the vocabulary of servicemembers. Moreover, the Army sought to exclude persons "for even harboring the thought or emotion, regardless of the expression."[305] In a striking analogy, the court suggested that the Army, through discipline and education, controls the reaction of others "[a]s it has done with racial integration."[306] The district court ordered Matthews reinstated.[307]

The Army appealed to the First Circuit.[308] The decision was most unusual. The court of appeals vacated the order of the lower court and remanded in light of new evidence as to actual homosexual conduct.[309] After the district court's order to reinstate her, Matthews had reapplied. In the course of her processing, she indicated on her application that she had engaged in homosexual conduct in the distant and recent past. This application apparently was appended to the Army's appellate brief. The court of appeals, in a very unusual decision, remanded be-

301. *Id.*, slip op. at ___.
302. *Id.*, slip op. at ___.
303. *Id.*, slip op. at 25.
304. *Id.*, slip op. at ___.
305. *Id.*, slip op. at ___.
306. *Id.*, slip op. at ___.
307. *Id.*, slip op. at 29.
308. Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985).
309. *Id.* at 184.

cause the proof of homosexual acts "might supply alternate grounds for disenrollment."[310] The appellate court also noted that the trial court had denied discovery regarding Matthews' sexual conduct. The appellate court questioned why such discovery had been denied, opining that "Matthews' actual conduct would be highly relevant to the disposition of this case."[311] The court of appeals admitted that taking notice of facts not in the record was ordinarily improper.[312] The court, however, preferred to resolve the case on the grounds of actual conduct, "rather than to undertake a review of the serious constitutional issues presented . . . ."[313] The reasons the court gave for this unusual action were that Matthews could not be reinstated and, therefore, any decision would be a merely impermissible advisory opinion.[314]

The situation is similar to that which confronted Perry Watkins.[315] When Watkins was ordered reinstated by the district court, the Army attempted to use the reenlistment process so that Watkins could be denied enlistment on a new set of facts.[316] The district court in *Watkins* labeled this maneuver as a ruse and ordered reinstatement, barring the issue of homosexuality as a ground for denial.[317] Apparently, the Army in *Matthews* used the same method. The application process for reenlistment was used to secure admissions of same-sex sexual conduct so that the Army could get around the fact that Matthews had originally been disenrolled for her statements or status. The court of appeals "bought into" the Army's methodology. What had been a perfect test case became problematical. The method used by the Army to get around the *Matthews* issue had been predicted in the *Military Law Reporter*.[318] In a section entitled *An Easy Way Around Matthews* the reporter stated:

> Even though *Matthews* is only an East Coast district court's opinion . . . its importance has been quickly dissipated. Service declarations of homosexuality, if contradicted by the enlistment application, are readily proceeded against under Chapter 14 [fraudulent enlistment] rather than Chapter 13. The absence of a right to a hearing requires only that the military find some preservice homosexual activity upon which it can base

---

310. *Id.* at 183.

311. *Id.*

312. *Id.* (citing Goldman v. Sears, Roebuck & Co., 607 F.2d 1014, 1017 n.6 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980)).

313. *Id.* at 184.

314. *Id.*

315. *See supra* notes 232–55 and accompanying text.

316. *See supra* notes 243–44 and accompanying text.

317. *Watkins*, 551 F. Supp. at 224.

318. *See* 12 MIL. L. REP. (PUB. L. EDUC. INST.) 1081 (July–Aug. 1984).

a reasonable finding of a fraudulent declaration.[319]

In his opinion, Judge Hornby of the federal district court was extremely precise in his delineation of the issue as involving a nonconduct situation. Moreover, his opinion was lengthy and carefully crafted. In one sense, the appellate court essentially said, "You wasted your time; go back and do it the easy way!"

For gay rights litigators, getting the proper issue before the proper court with the best plaintiff and the best facts remains an elusive goal. Perhaps *Pruitt v. Weinberger*[320] will be the case in which this goal is realized. The attorneys for Pruitt include the ACLU of southern California. In the last two or three years, the ACLU has become more active in gay rights litigation. Dusty Pruitt, the plaintiff, is also Captain Dusty Pruitt, United States Army Reserves and Reverend Dusty Pruitt, pastor, Metropolitan Community Church. As a captain in the Reserves, Pruitt was assigned for two weeks each year to the United States Army Reserve Component Personnel Administrative Center in St. Louis, Missouri. Captain Pruitt joined the Army in January, 1971, served five years on active duty and served seven years in the Reserves. In May, 1982, Captain Pruitt was promoted to major, effective February 6, 1983. However, a major she was not to be. On January 27, 1983, the *Los Angeles Times* reported on her activities as a pastor of the Metropolitan Community Church of Long Beach, California and on her status as a lesbian. Her promotion to major was withdrawn and she was told she had been investigated for possible separation on the basis of homosexuality.[321] Pruitt filed suit in federal district court.

The Army argued that the suit should be dismissed because Pruitt failed to exhaust her administrative remedies.[322] Pruitt by stipulation and by affidavit admitted she was a lesbian. She argues that using the administrative methods of the Army would be futile because the policy of the Army is clear and has no exceptions: gay people are required to be separated. The *Pruitt* court attempts, as did the court in *Matthews*, to bring a pure speech issue before the court. The Army disputes any

---

319. *Id.*

320. No. 83-2035 WPG (C.D. Cal. filed July 8, 1983).

321. Letter from Major Michael Brawley, Judge Advocate General's Corps, to Dusty Pruitt (May 18, 1983). Major Brawley had been approved to "conduct a preliminary inquiry and report . . . findings . . . on the question of whether [Pruitt was] a homosexual as defined by paragraph 2-38, AR 135-175 . . . ." *Id.*

322. The issue of failure to exhaust administrative remedies is often raised by the Armed Forces. A defense to this claim is that exhaustion would be futile. Mel Dahl's case against the Navy was dismissed by a district court in Chicago on the grounds that he failed to exhaust his administrative remedies. The dismissal was on November 2, 1984, and the issue still lays before the Board for Corrections of Naval Records as of May 8, 1985. Letter from Joseph Shuman, Dahl's attorney, to Rhonda Rivera (____).

first amendment issue by contending that speech and thought are conduct which permit separation of gay persons from the armed services. In some ways, the issues are a replay of *Matthews* in a different arena. The added twist is that the location is California. Pruitt, in her Response to Defendant's Motion to Dismiss,[323] argues that her remarks are protected speech in its purest form. "Coming out of the closet" has been held in California to be political speech.[324] Pruitt argues that this political speech will be chilled if the Army can continue to separate soldiers for homosexual tendencies, rather than for conduct. This argument seems particularly apropos given the Army's testimony in *Matthews* that self-identification is what it wishes to prevent.

In support of her position, Pruitt's brief quotes at length from the infamous *Crittenden Report*, using the Navy's report to undermine the Army's arguments. Pruitt also asks the court to consider that the regulation impinges on a fundamental right and thus requires the application of a compelling state interest standard. Pruitt asks the court to reexamine the *Beller* issues and opt for the dissenting argument of Judge Norris. Pruitt calls the policy of the Department of Defense "a policy without empirical foundation, rooted without shame, in historical bigotry." The brief delineates the varying and contradictory positions taken over time against gay people in the military and cites the military's own studies to refute the positions taken in various cases.[325] The argument is impressive but whether the district court will "buck" the current trend remains to be seen.

Two issues are raised by *Pruitt* that need to be examined before the subject is exhausted. First, some discussion of the *Crittenden Report* and other military studies is needed. Additionally, *Pruitt* raises the issue that gay talent in the military is being squandered. The extent of that "squandering" merits some attention.

Over the past ten years, as I have written in this area, I have heard reports of a military study which had conclusions contrary to the military's announced policy. Now, under the Freedom of Information Act, gay rights litigators have obtained at least part of the *Crittenden Report*, a Navy report dating back to 1957.[326] The report is also used by the plaintiffs in the case of *High Tech Gays v. Defense Industrial*

323. Response to Defendant's Motion to Dismiss at 35, Pruitt v. Weinberger, No. 83-2035 WPG (C.D. Cal. filed July 8, 1983).

324. *See* Gay Law Student Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

325. Response to Defendant's Motion to Dismiss at 47–49, Pruitt v. Weinberger, No. 83-2035 WPG (C.D. Cal. filed July 8, 1983).

326. CRITTENDEN REPORT, *supra* note 40.

Security Clearance Office[327] and also is used extensively in the *Pruitt* briefs. The report is fascinating and amazingly open-minded considering that the time of its origin was 1957.[328] One conclusion of the *Crittenden Report* was that "it is not considered to be in the best interest of the Military departments to liberalize standards ahead of the civilian climate."[329] Yet, when the report was written, not one state had decriminalized same-sex sexual conduct; at present, twenty-six states have. The *Crittenden Report*, written in the 1950's, the years of McCarthy and communist "witch-hunts," found *no* data to prove or disprove that gay people were more of a security risk than nongay persons. The report even cited to information about gay long-term monogamous relationships.[330]

Probably one of the most telling pieces of information in the report is the recognition of the frequency of homosexual behavior in the general population and the recognition that only a small percentage of the homosexual military personnel is ever recognized and discharged. The drafters of the report accepted the Kinsey figures. The report also listed "fallacies concerning homosexuality," including that gay people are recognizable from exterior appearance and mannerisms. The report candidly admits that one fallacy is that homosexual individuals cannot acceptably serve in the military. Another section to the report is entitled *Deficiencies of Knowledge*; the report again admits to the lack of information in 1957. Interested parties should read the report. One must ask how the Armed Forces in good faith have made and still make statements before the courts about gay persons which are contrary to the military's own *Crittenden Report*. One other military writing cannot be ignored. In 1960, over twenty-five years ago, in the JAG bulletin of the Air Force, a member of the bar working for the Air Force wrote: "[T]he service record of homosexuals disclose generally that homosexuality per se has no relationship to ability to perform good military service."[331]

When one looks at the cases on a case-by-case review, the harshness of the results on the individual is manifest. That case-by-case re-

---

327. *See* Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss, High Tech Gays v. Defense Indus. Sec. Clearance Office, No. C-84-6078 TEH (N.D. Cal. filed Feb. 16, 1985). *See also supra* notes 37–48 and accompanying text.

328. In the 1950's, "in the atmosphere of heightened concern about national security, the military . . . worked overtime to purge homosexuals." J. D'EMILIO, *supra* note 19, at 44. During the late-1940's discharges for homosexuality averaged slightly more than 1,000 per year. Separations averaged 2,000 per year in the early 1950's and rose by another 50% by the beginning of the 1960's. *See id.*

329. *See* CRITTENDEN REPORT, *supra* note 40.

330. *See id.*

331. II USAF JAG BULL., Nov. 1960, at 20.

view, while illustrative, can obscure the magnitude of the issue. Before October, 1984, the exact number of gays discharged was difficult to ascertain. D'Emilio estimated in his history that 40,000 to 50,000 persons were separated from the armed services for homosexuality between 1950 and 1970.[332] Another estimate was 2400 per year in the 1950's and 1960's.[333] In 1978–79, the Navy admitted releasing seventy-six women and 778 men.[334] Given the percentage of women in the service, the proportion of women released seems greater. The Navy, in fiscal year 1983, released 1067 persons, including twelve officers.[335]

These piecemeal statistics became outdated in October, 1984, when the Government Accounting Office (GAO) completed a study of the military release of gay service members.[336] The report revealed that between 1974 and 1983, 14,111 persons were discharged from the military for homosexuality. These figures may still be low and inaccurate because gays are often discharged for other reasons than are given. The ten-year record shows a steady increase over the period. The report indicated that over fifty percent of the discharges were from the Navy. Of the number reported discharged, 191 were officers. Of more interest to pragmatists are the figures on the cost to the military and, ultimately to the taxpayer, of the military's policy against gays. The GAO estimate is that twenty-three million dollars is wasted each year because of the policy. Each year the cost of recruiting and training the approximately 1800 persons who will ultimately be discharged is approximately twenty-two and a half million dollars. The cost of processing the discharges each year is approximately $370,000. The study showed that the average recruit stays in the service after training for over five years, while the gay servicemembers average only three years. Thus, for the money spent on training, the services get less productivity from gay soldiers and sailors because they are discharged. In addition, the twenty-three million dollar figure does not include other costs of the military policy such as all the attorney fees paid to fight legal challenges nor does it include the cost of the investigations into alleged homosexuality. Whatever one may think of the policy of separating gay servicemembers, one can only wonder at the waste that results. Consider the cost of discharging 14,311 persons whom the Army admits

---

332. *See* J. D'EMILIO, *supra* note 19, at 40–53.

333. Gay Community News, Dec. 7, 1983, at 1. Figures quoted were in a story about Commander Vanderwier, a decorated Vietnam veteran, who was convicted of sodomy in 1983, ordered dismissed from the Navy, and stripped of his retirement benefits.

334. Columbus Citizen-Journal, Aug. 1, 1980, at 9.

335. N.Y. Times, Dec. 2, 1983, at 13.

336. *See* National Gay Rights Association Newsletter, Spring 1985, at 1; *For The Record: A Review of Gay & Lesbian News for the Period Ending Nov. 2, 1984*, The Advocate, Nov. 27, 1984, at 3.

are quite capable of carrying out their military duties and who are no more likely to be security risks than are any other group.

III. FAMILY LAW ISSUES

A. *Marriage*

For a number of years, gay persons have attempted to "marry" or seek the legal sanction of their union from the state. In each and every case where this issue has been tested, marriages between persons of the same sex have been declared impermissible or invalid.[337] Most of the cases involving the marriage issue arose in the early 1970's. Since 1980, when the attorney general of Connecticut issued a formal opinion letter on the subject,[338] few published cases or official actions have come to light.[339] However, this area of the law is not totally devoid of judicial activity.

Irwin v. Lupardus[340] was decided by the Ohio Court of Appeals for the Eighth District in 1980. Two women filed a divorce action alleging a common law marriage. They listed a second cause of action: that the parties had contracted toward each other an obligation of mutual respect and support and mutual ownership of assets, and that this contract had been breached. The trial court dismissed the suit for failure to state a cause of action and the appeals court affirmed.[341] Not surprisingly, the court found that marriage is, by definition, a heterosexual relationship.[342] The court found that no violation of the equal protection clause followed because the purpose of marriage was the perpetuation of family groups and that capacity was lacking in same-sex relationships.[343] The court also dismissed the contract action saying that the parties could not do indirectly what they could not do directly.[344] The case illustrates a growing legal problem: The lack of a legally

337. *See* Rivera II, *supra* note 1, at 324–25; Rivera I, *supra* note 1, at 874–75.

338. *See* Letter from Carl J. Ajello, Connecticut Attorney General, to the commissioner of the Connecticut Department of Health Services (June 17, 1980). *See also Connecticut Defines "Marriage" to Exclude Same Sex Couples*, 6 FAM. L. REP. (BNA) 2737 (Sept. 12, 1980) (containing text of opinion letter).

339. A number of articles, however, have appeared or have been discovered on the subject since Rivera II, *supra* note 1. *See* Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984); Lentz, *Marriage Rights: Homosexuals and Transsexuals*, 8 AKRON L. REV. 369 (1975); Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 J. FAM. L. 607 (1972–73).

340. No. 78-D-97925 (Ohio Ct. App., 8th Dist. June 26, 1980) (on file with University of Dayton Law Review).

341. *Id.*, slip op. at 5.

342. *Id.*, slip op. at 3.

343. *Id.*, slip op. at 4.

344. *Id.*

sanctioned method for gay couples to divorce or otherwise terminate their relationship.

In *De Santo v. Barnsley*,[345] a male couple sought a divorce and alleged a common law marriage under Pennsylvania law. Their argument was not based on a statute as in *Irwin*.[346] The Pennsylvania Superior Court upheld the ruling of the lower court to dismiss for failure to state a cause of action.[347] However, unlike the Ohio court, the Pennsylvania court indicated that the parties may have had a remedy under Pennsylvania law.[348] The court specifically pointed out that the law did take into account changes in social relationships and directed the litigants to *Knauer v. Knauer*.[349] Under *Knauer*, agreements between nonmarried cohabitors were recognized in Pennsylvania. Therefore, Pennsylvania may provide a remedy in contract for divorcing gay couples.

For numerous gay couples, the issue no longer centers on obtaining a traditional marriage recognized by the state. Many gay couples now have a religious ceremony which they understand has no legal validity.[350] Most gay couples do not seek marriage but seek equal economic benefits for their relationship. Some seek equality through law reform,[351] others through private contracting.[352] For whatever reason, the legality of gay marriages has ceased to be as great an issue in the 1980's. Of greater concern is the legal issue regarding the creation and recognition of the gay family.[353]

B. Divorce

Gay persons have, for a variety of reasons, "married" persons of the opposite sex. In some cases, gay persons may not have reached a consciousness of their sexual orientation, or they may have been striving to accommodate themselves to the social norm. Such persons may enter the marriage with the belief that marriage will "cure" them.

---

345. 328 Pa. Super. 181, 476 A.2d 952 (1984).

346. In *Irwin*, the Ohio statute provided: "Male persons of the age of eighteen years, and female persons of the age of sixteen, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage." OHIO REV. CODE ANN. § 3101.01 (Page 1980). The *Irwin* court defined "marriage" in its traditional sense as only including heterosexual relationships. *Irwin*, No. 78-D-97925, slip op. at 2–3.

347. *De Santo*, 328 Pa. Super. at 181, 476 A.2d at 952.

348. *Id.* at ____, 476 A.2d at 955.

349. 323 Pa. Super. 206, 470 A.2d 553 (1983). In *Knauer*, the court held that "agreements between nonmarried cohabitors fail only to the extent that they involve payment for sexual service." *Id.* at ____, 470 A.2d at 564.

350. *See infra* notes 635–37 and accompanying text.

351. *See infra* note 631 and accompanying text for a discussion on domestic partnership laws.

352. *See* Schultz, *Contractual Ordering On Family Law*, 70 CAL. L. REV. 204 (1982).

353. *See infra* notes 629–815 and accompanying text.

Probably fewer gay people enter traditional marriage today than they did five or ten years ago, however, the number is still sizeable.

Whatever the reasons for such a marriage, many of these marriages end in divorce. In the past, courts and judges found application of the traditional fault-based grounds to the issue of sexual orientation and divorce a difficult task. In no jurisdiction was homosexuality itself grounds for divorce. Rather, the courts granted divorces by characterizing the gay partner's behavior as involving "cruelty." In some cases, however, the courts were unable to accommodate the situation and failed to grant the divorce.[354] Two cases illustrate a more modern approach to sexual orientation as an issue in divorce. In 1978, a Louisiana court of appeal treated mixed-sex and same-sex adultery on an equal basis. In *Adams v. Adams*,[355] where the wife had engaged in a lesbian affair while married, the court held that the same standards of proof applied to adultery regardless of the sex of the partner.[356] While that approach may be modern, the court was rather modest in the description of the adultery. The court indicated that a lesbian adulterous affair had gone on but stated that the "several incidents . . . need not be detailed."[357] The lesbian affair was found by the court to constitute cruel treatment sufficient to entitle the husband to a legal separation.[358]

M. V. R. v. T. M. R.,[359] a 1982 New York case, carried the issue to the next logical step by addressing the issue of marital fault. In *M. V. R.*, the court held that an extramarital same-sex affair, like a mixed-sex one, could be grounds for divorce based on adultery.[360] This holding can be compared to *Cohen v. Cohen*,[361] another New York case decided in 1951. In *Cohen* the wife sought a divorce based on adultery; she offered as proof her husband's conviction for sodomy. The court refused to grant her a divorce holding that sodomy did not constitute adultery.[362] The court in *M. V. R.*, however, showed a surprising sensitivity to gay issues. The central issue of the case was whether marital fault could be considered in determining an equitable distribution of property. The court held that fault could not be used because it would open "the door to evidence whose very purpose may be to prejudice judges in impermissible ways."[363] Justice Glen pointed out that such evidence

354. *See* Rivera II, *supra* note 1, at 325; Rivera I, *supra* note 1, at 879–83.
355. 357 S.2d 881 (La. Ct. App. 1978).
356. *Id.* at 882.
357. *Id.* at 883.
358. *Id.* at 882–83.
359. 115 Misc. 2d 674, 454 N.Y.S.2d 779 (Sup. Ct. 1982).
360. *Id.* at 681–83, 454 N.Y.S.2d at 784–85.
361. 200 Misc. 19, 103 N.Y.S.2d 426 (Sup. Ct. 1951).
362. *Id.* at 20, 103 N.Y.S.2d at 428.
363. *M. V. R.*, 115 Misc. 2d at 680, 454 N.Y.S.2d at 783 (footnote omitted).

would be particularly susceptible to bias in cases involving gay persons.[364] The justice admitted that "judges themselves are frequently not free from anti-homosexual preferences . . . ."[365] The court concluded that if evidence of fault were allowed the husband might be punished indirectly for his sexual orientation, an action which the highest court in New York stated could not be done directly.[366]

Divorce issues seldom reach appellate levels because of their fact-intensive nature. With divorce easily accomplished, and fault a declining problem, divorce law has few gay issues.[367] However, child custody problems, a by-product of divorce, remain a crucial gay litigation issue.[368]

C. *Custody*

Cases involving the custody of children of gay parents are among the most numerous of gay rights cases.[369] Such cases involve three different sets of protagonists: gay parent versus nongay parent, gay parent versus nongay third party, and gay parent versus the state. Gay parent versus nongay parent usually arises in the context of a divorce. Gay parent versus nongay third party embraces a variety of situations including cases involving grandparents, aunts and uncles, guardians, and others. Gay parent versus the state typically arises in instances where

---

364. *Id.* at 680–83, 454 N.Y.S.2d at 783–84.

365. *Id.* at 681, 454 N.Y.S.2d at 783.

366. *See* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (New York statute criminalizing sodomy was found unconstitutional), *cert. denied*, 451 U.S. 987 (1981). The use of *Onofre* in this context shows how removal of the criminal status carries over into other areas of the law.

367. In 1982, a California superior court ruled that a surgeon must continue paying alimony of $700 per month to his ex-wife even though she was living in a long-term lesbian relationship. The Advocate, June 10, 1982, at 3. Generally, alimony payments cease when a former spouse remarries. This situation is an instance where recognition of a gay marriage would benefit heterosexual marriage policy. *See* Comment, *Alimony, Cohabitation, and the Wages of Sin: A Statutory Analysis*, 33 ALA. L. REV. 577 (1982).

368. *See infra* notes 369–627 and accompanying text.

369. The generalizations found in the nine paragraphs that follow are supported by material found in the following authorities: Bagnell, Gallagher & Goldstein, *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); Brownstone, *The Homosexual Parent in Custody Disputes*, 5 QUEENS L.J. 199 (1980); Clemens, *In the "Best Interests of the Child" and the Lesbian Mother: A Proposal for Legislative Change in New York*, 48 ALB. L. REV. 1021 (1984); Goodman, *Homosexuality of a Parent: A New Issue in Custody Disputes*, 5 MONASH U.L. REV. 305 (1979); Gottsfield, *Custody Litigation: Private Lives, Public Issues*, 6 FAM. ADVOC., Spring 1984, at 36; Leitch, *Custody: Lesbian Mothers in the Courts*, 16 GONZ. L. REV. 147 (1980); Rivera II, *supra* note 1, at 327–36; Rivera I, *supra* note 1, at 883–904; Wilson, *Homosexuality and Child Custody: A Judicial Paradox*, 10 THURGOOD MARSHALL L. REV. 222 (1985); Recent Developments, *Lesbian Child Custody*, 6 HARV. WOMEN'S L.J. 183 (1983); Annot., 100 A.L.R. 3d 625 (1980); Annot. Bibliography, *Lesbian Mothers and Their Children*, LESBIAN RIGHTS PROJECT (1980) (available at 1370 Mission St., 4th Floor, San Francisco, Cal. 94103).

neglect has been charged. The gay parent is usually a lesbian mother, although gay father cases are now arising with greater frequency.[370]

Custody cases are most often tried in courts of domestic relations or in juvenile courts. Generally, they are bench trials; the most well-known exception is in Texas where jury trials are commonly used. The rules of law which guide a judge in selecting a custodian are very broad, and the judge is permitted an extreme amount of discretion. Probably in no other area is the presence of a homophobic judge so likely to result in a decision which is discriminatory to the gay litigant.

In cases involving an initial award of custody, the general rule is that the decision should be made "in the best interests of the child."[371] In a growing number of states, judges have been given precise issues which they must consider in identifying the child's "best interests."[372] A different standard is used in some custody cases after an original order has already been entered. Thus, when the issue is of first impression, the court must apply the "best interests" test. If custody has already been granted to one parent, and a change of custody is sought, a higher standard is mandated. In that case, the person seeking custody must first show that a change of circumstances has occurred which affects the child's custodial situation. Once that change has been proven, the court then considers the best interests of the child or children. In gay custody cases, the circumstance most often alleged to have changed is the sexual orientation of the custodial parent. Often, the sexual orientation of the parent has not really changed; the other parent has just discovered that the former spouse is gay. Quite often, when the nongay parent has known for some time about the sexual orientation of the co-parent, the gay parent has sought unsuccessfully to estop the nongay parent from raising the issue. Courts have rejected such estoppel arguments saying that since the sexual orientation was not initially made known to the court, then a sufficient change of circumstances exists, regardless of whether the other parent had previous knowledge. Custody orders are always open to challenge, and such orders are particularly open to challenge in cases where one parent is gay.

---

370. Fadiman, *The Double Closet*, LIFE, May 1983, at 76.

371. *See* Rivera I, *supra* note 1, at 886.

372. For example, the Ohio Revised Code provides that the following "relevant factors" shall be considered in determining the best interests of a child:

(1) The wishes of the child's parents regarding his custody;

(2) The wishes of the child regarding his custody if he is eleven years of age or older;

(3) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;

(4) The child's adjustment to his home, school, and community;

(5) The mental and physical health of all persons involved in the situation.

OHIO REV. CODE ANN. § 3109.04(C)(1)-(5).

Custody cases are fact intensive. As indicated earlier, the standards are vague, and great discretion resides in the trial judge to determine, in every particular set of facts, what are the best interests of the child or children. Because such cases are so fact intensive, appeal is difficult and success on appeal is unlikely. Few issues of law really exist, and appellate courts are loathe to overturn lower court decisions unless a "gross abuse of discretion" is shown. Convincing an appellate court that a "gross abuse of discretion" has occurred is difficult in the ordinary custody case and is particularly difficult in a gay custody case. Often litigators will have raised constitutional issues on behalf of their gay clients at the trial level where such issues are generally ignored or summarily dismissed. These issues do not fare any better at the appellate level. Often the gay parent will claim a first amendment infringement or a privacy claim, but in custody cases appellate courts generally brush such constitutional issues aside. Therefore, the original trial becomes the battleground where the war is won or lost.

Gay parents are often denied custody. The reasons given boil down to a few arguments: if gay parents have custody, they will molest the children; if gay parents have custody, they will turn the children into homosexuals; if gay parents have custody, they will perform sex acts in front of the children; if gay parents have custody, the children will be harmed because of the immoral environment. Often those parents who are allowed to retain custody of their children do so under severe court-imposed restrictions. The most common restriction is that the gay parent's life partner may not reside in the home with the parent and the child. The gay parent is thus forced to choose between his or her child and an adult relationship. When gay parents lose custody, their visitation rights are also often restricted. Commonly, gay parents are forbidden from keeping their children overnight, bringing the children into the gay parent's home unless the gay parent's life partner is excluded, and are not allowed to take the child to a gay religious service, gay political meeting, or any other location where the child may be around "known" homosexuals. In some highly restrictive cases, the gay parents may only visit their children in the presence of "certified heterosexuals."

The number of child custody cases that have turned on the sexual orientation of the parent is not known. Most child custody cases, regardless of the issue, never go beyond the trial level. Taking an appeal is difficult, expensive, and usually fruitless. A good number of the cases discussed in this section were decided on the trial level. In a sense, such cases may be more representative of trends than would be appellate cases. Gathering material on gay cases is made more difficult by the use of anonymous names for the parents involved and by the penchant

for sealing records that is often indulged in by the judiciary.

The state of the law in this area is difficult to summarize because the cases are often state-idiosyncratic and within a state, judge-idiosyncratic. Aside from the broad rule of the best interests of the child, few legal rules can be stated. In the gay area, the basic rule which has developed is that homosexuality per se is not a sufficient reason to bar a person from custody or visitation. However, even courts which claim to adhere to that rule are often, upon close examination, found to have made the parent's sexual orientation the deciding factor. The rule favored by gay rights litigators is a "nexus" test: the homosexuality of a parent should only be an issue insofar as the parent's sexual orientation can be proven to have harmed the child. The application of the "nexus" test is problematic in those states that do not statutorily require a showing of present harm but rather base the decision on the potentiality of future harm to the child. Where gay parents have shown, by a preponderance of the evidence, that no present harm exists, judges have shown a strong tendency for speculating as to potential harm.

In response to the multitude of adverse decisions against gay parents, a litigation strategy and methodology have developed. Also, supportive social scientists have undertaken numerous studies to ascertain if any of the accusations against gay persons as parents have a rational basis. Some of these litigation strategies and studies will be discussed at great length through the remainder of this article.

1. Pre-Eighties Cases

In this author's previous articles, approximately forty-five cases involving custody were reported between the years 1947 and 1980, with over forty of the discussed cases falling between 1970 and 1980.[373] This chapter will chronicle more than fifty additional cases in this area.[374]

---

373. Rivera, Book Review, 132 U. PA. L. REV. 391 (1984) (reviewing J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970 (1983)). In this book review, the author compares legal events with the socio-economic observations made by D'Emilio, and analyzes the type of cases appearing in a particular historical period.

Note that the use of the word "reported" in the instant article refers to cases discussed in this article and in Rivera I and Rivera II, many of which are unpublished cases. Discovering case information is an arduous process. Often, the first clue is provided by a small gay newspaper article which may indicate only a state name or possibly one or more of the parties' initials. The possibility that the case involves gay people is sometimes only an inference. Next, we write or call the known or logically deducible court, organization, or attorney. Some of the information gathered at this stage is helpful and correct; some is not. In some instances, we have to make several contacts before finding useful and accurate information. When possible, we obtain pleadings, briefs, and unpublished decisions. While this chapter represents the addition of over 50 cases to prior efforts, more than 25 cases are still in the throes of the investigation process described above.

374. A number of cases that mention homosexuality and have some relationship to child

Improved research techniques, combined with even greater diligence, have turned up a variety of cases, including thirteen which were decided prior to 1980. These older, but newly found cases, illustrate many of the general statements made above as well as in my previous articles. For example, in the very early cases and continuing in some instances into the present, judges, in their written opinions, either made no direct reference to the sexual orientation of the parent or cloaked their references in euphemisms.[375] In the case of *In re Mara*,[376] decided in 1956, the mother was permitted to keep custody of her children, because "[t]he questionable, if not unwholesome influence in the home [had] been removed at the court's request . . . ."[377] The unwholesome influence was a female friend of the mother's who boarded at the mother's home. Similarly, in *Thabet v. Thabet*,[378] the West Virginia Supreme Court of Appeals in 1970 awarded custody of the children to their father because the mother was "still interested in pursuing a course of activity that would not be conducive to having . . . custody

---

custody matters are not really gay custody cases. *See, e.g.*, Mathews v. Mathews, 428 So. 2d 51 (Ala. Civ. App. 1982) (wife accused of homosexual conduct); Greening v. Newman, 6 Ark. App. 261, 640 S.W.2d 463 (1982) (past homosexual acts mentioned); Newell v. Newell, 146 Cal. App. 2d 166, 303 P.2d 839 (1957) (trial court transcript quoted regarding a second husband's "marginal" homosexuality); Campi v. State, 392 So. 2d 962 (Fla. Dist. Ct. App. 1981) (allegation that children stayed overnight in a homosexual's home); Sweet v. White, 104 Ill. App. 3d 734, 432 N.E.2d 1098 (1982) (wife testified that husband had been given only daylight visitation hours in divorce decree because he had homosexual tendencies); Gray v. Gray, 57 Ill. App. 3d 734, 373 N.E.2d 317 (1978) (wife accused husband of being a gangster and a homosexual); Comisky v. Comisky, 48 Ill. App. 3d 17, 366 N.E.2d 87 (1977) (father accused daughter of being a lesbian); Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681 (1974) (mother lost custody because of unconventional lifestyle, including "that she possibly had friends who were homosexuals and may have been one herself"); Shanholt v. State, ___ Ind. App. ___, 448 N.E.2d 308 (1983) (admissibility of evidence pertaining to homosexual activity an issue); Salas v. Salas, ___ Ind. App. ___, 447 N.E.2d 1176 (1983) (wife accused of having had a lesbian relationship); Attorney Grievance Comm'n v. Kerpelman, 288 Md. 341, 420 A.2d 940 (1980) (allegation of premarital homosexual act by father seeking custody mentioned in midst of grievance suit against attorney), *cert. denied*, 450 U.S. 970 (1981); Cook v. Cobb, 271 S.C. 136, 245 S.E.2d 612 (1978) (one of the parents alleged to have homosexual friends in New York City).

375. Gay and lesbian invisibility has proved both a blessing and a curse: a fleeting blessing for those who must secret their gayness and a curse for the development of a gay movement and the achievement of civil rights. As one writer observed:

> A decision to participate in the movement implied that individuals had rejected, at least in part, the society's dominant attitude toward same-sex eroticism. But antihomosexualism pervaded American culture, and it infected the consciousness of gay men and women no less than heterosexuals . . . . Such a self-image would hardly propel men and women into a cause that required group solidarity and the affirmation of their sexuality, nor would it encourage them to entertain the idea that their efforts might create a brighter future.

J. D'EMILIO, *supra* note 19, at 124.

376. 3 Misc. 2d 174, 150 N.Y.S.2d 524 (Fam. Ct. 1956).

377. *Id.* at 175, 150 N.Y.S.2d at 525.

378. 154 W. Va. 477, 176 S.E.2d 687 (1970).

. . . ."[379] The court never stated that the mother was a lesbian but did discuss her " 'frequent and extended visits with her friends and acquaintances of the female sex.' "[380] While the *Thabet* court was reluctant to label the mother, the trial court in *Roberts v. Roberts*[381] stated clearly in its findings of fact that the mother was a lesbian.[382] This case involved a gay parent versus a third party. The custody of the child was sought by an aunt and maternal uncle of the mother. The court stated two conclusions about the mother: she was a lesbian, and she did not keep a fit and proper home.[383] This case falls in the irrebutable presumption category: because the parent is gay, he or she is conclusively unfit. The custody went to the aunt and uncle who had "a suitable home and were financially able" to care for the little girl.

In *Gay v. Gay*,[384] the Georgia Court of Appeals reversed a lower court opinion which had placed a child with a children's services agency rather than with the mother or father. The court of appeals noted that the father was clearly unfit but stated that the evidence about the mother's alleged homosexuality was all hearsay from the father and paternal grandmother, both of whom had a stake in the outcome. The case was hardly a gay rights victory as the mother denied that any lesbian relationship ever existed. The appellate court put aside evidence of past behavior and awarded the child to the mother, emphasizing that no "present" unfitness existed.[385] In *Buck v. Buck*,[386] decided by the Georgia Supreme Court in 1977, another mother was awarded custody. The supreme court held that the trial judge had not abused his discretion when he awarded custody to the mother who admitted to past homosexual relationships and still had homosexual friends.[387] Perhaps, gallantry is not dead in Georgia, as a lady's word was believed in both *Buck* and *Gay*.

Fleischer v. Fleischer[388] illustrates an extreme imposition of visitation restrictions against the gay parent. The lesbian mother in this case

---

379. *Id.* at 484, 176 S.E.2d at 691.

380. *Id.* at 479, 176 S.E.2d at 688.

381. 25 N.C. App. 198, 212 S.E.2d 410 (1975).

382. *Id.* at 201, 212 S.E.2d at 412.

383. *Id.*

384. 149 Ga. App. 173, 253 S.E.2d 846 (1979). Honest, that's the case name!

385. *Id.* at 175, 253 S.E.2d at 848. Note that although the case began as a divorce between a mother and father, the children's services agency seemed to have intervened. Therefore, the standard used was not the "best interests" standard but rather, it was the "fitness of the parent" standard. What the court may have really decided was that the mother was the lesser of two evils and that a natural parent, even a gay one, was a better option than an institution, the children's services agency.

386. 238 Ga. 540, 233 S.E.2d 792 (1977).

387. *Id.* at 541, 233 S.E.2d at 793.

388. 2 FAM. L. REP. (BNA) 2044 (N.Y. Sup. Ct., Kings County Nov. 25, 1975).

was forbidden to visit with her daughter for three years. Three psychiatrists, including the mother's, indicated that seeing her mother would be detrimental to the child's growth and development. The judge conducted extensive *in camera* discussions with the eight-year-old girl and concluded that the child knew of her mother's lifestyle and was adversely affected by that knowledge.[389] The judge drew his conclusion in part from the child's reluctance to discuss with him her dislike of her mother.[390]

Two Pennsylvania cases involving visitation rights in the late 1970's also reveal findings against the gay parent. In *Gerhart v. Gerhart*,[391] a nongay father was awarded custody rather than his former wife. The trial court refused to believe the mother's statement that her prior gay relationship had ended, citing as evidence, among other things, a tatoo of her lover's name on the mother's arm. The court found that the mother's irresponsibility was "compounded by her lesbianism."[392] The order did not mention any visitation for the mother. A year later, in *Scarlett v. Scarlett*,[393] a mother challenged that the lower court erred in too severely limiting her hours of visitation. While the appeals court increased the mother's visitation times, the court left standing a restriction that the mother "refrain 'from exposing Amy to any improper influences, particularly her lesbian lover.' "[394] As in *Gerhart*, the court did not place credence in the mother's statement that the same-sex relationship was over. The court said that visitation, under Pennsylvania case law, can only be restricted "where a parent has been shown to suffer from severe mental or moral deficiencies that constituted a grave threat to the child."[395] No evidence was cited to support the inference that the mother's "moral deficiences" constituted a grave threat to the child. The court simply assumed that homosexuality was a moral deficiency.

A similar moral judgment is found in *Teepe v. Teepe*.[396] This is one of the few cases where the father is the person associated with homosexuality. The appellate court upheld the award of the child to the mother by the trial court and concluded that the trial court had not decided the case solely on the issue of sexual orientation.[397] Sexual misconduct which "affects the child" may be considered, the court

389. *Id.*
390. *Id.*
391. No. 535 (Pa. C.P. Ct., Lehigh County Dec. 22, 1976).
392. *Id.*, slip op. at 4.
393. 257 Pa. Super. 468, 390 A.2d 1331 (1978).
394. *Id.* at ____, 390 A.2d at 1333.
395. *Id.*
396. 271 N.W.2d 740 (Iowa 1978).
397. *Id.* at 744.

stated;[398] however, "immoral acts alone do not necessarily make a person unfit for custody of his or her children."[399] The appellate court held that the trial court had properly considered the father's immoral acts as one of several factors. Thus, in *Teepe*, as in *Gerhart*, the court equated homosexuality with immorality and assumed an adverse effect on the child. In *Armanini v. Armanini*,[400] a somewhat similar rule produced a different result. In *Armanini*, the court held that the mother's sexual preference, by itself, did not make her unfit and awarded custody to the mother who was living with her life partner.[401] The New York court did not use the term immorality. No ostensible restrictions were placed on the mother. However, the court said it would review the situation in three months to see whether the mother's lesbianism was "interfering" with proper child rearing. In the mother's favor were recommendations by two social service agencies that she be named custodian.

In the next three cases, all resolved at the trial court level in different parts of the country, custody remained with the lesbian mother. In all three cases, the trier of fact found no harm to the children from the sexual orientation of their mothers. The mother retained custody in *Unglaub v. Unglaub*,[402] a Minnesota case decided in 1978. She was described as an excellent mother. The case did not put the judge to the ultimate test because, although the mother affirmed that she was indeed gay, she was not living with another gay person. In *Prezbindowski v. Prezbindowski*,[403] decided in Washington in 1976, the father charged that the sexual orientation of the mother created a greater harm than would a change of custody. The court disagreed, saying that the only advantage of a custody change would be to remove the children from daily contact with their gay mother. Since the court could not find any harm resulting from the mother's sexual orientation, custody was not changed. The mother was living with her life partner, whom the court characterized as a good influence on the home. The court also relied on psychiatric evidence that children will not become gay simply because they are raised by a gay parent.[404] The *Peterson v. Peterson*[405] case from Colorado, decided in 1978, probably comes as close to an ideal approach to the custody issue as this author has seen.

---

398. *Id.* at 743–44.
399. *Id.*
400. 5 FAM. L. REP. (BNA) 2501 (N.Y. Super. Ct., Nassau County Feb. 16, 1979).
401. *Id.*
402. No. 62380 (Minn. Dist. Ct., 4th Dist. May 31, 1982).
403. No. 19028 (Wash. Super. Ct., Franklin County Sept. 9, 1976).
404. *Id.*, slip op. at 3.
405. No. D-66634 (Colo. Dist. Ct., Denver County May 3, 1978).

The court acknowledged that the children would either live with one couple, the father and his new wife, or the other couple, the mother and her life partner. Both parents were found to be fit and both partners loved and were loved by the children. The rule in Colorado, the court stated, is not to consider conduct of a party that does not affect his or her relationship to the child. Other than the designation of the couples, which clearly points out that one couple is a same-sex couple, and the one line reference to parental conduct, the judge made no reference to the sexual orientation of the mother. Basically, this court treated the issue as irrelevant.

2. The Eighties Cases

We shall now turn to an examination of the cases of the 1980's. Instead of looking at the cases chronologically, we will examine them geographically. My thesis is that the courts are currently more homophobic in the central and southern regions of the United States than they are nearer the east and west coasts. Why should this be so? Gay consciousness has been elevated on the coasts since the 1970's; that consciousness is only today penetrating the center of America. Gay parents have been challenging and educating the courts and the bar on the east and west coasts for over a decade. Those courts have domesticated the issue of gay parents much further than their central and southern counterparts. The losses of the 1970's on the coasts are the groundwork for the victories of the eighties. The losses of the 1980's in the central and southern states are the forerunners for the cases of the 1990's.

The first three cases to be examined are from Missouri. No other grouping of cases so clearly reveals a hostile attitude on the part of the bench. *N. K. M. v. L. E. M.*[406] was decided by the Missouri Court of Appeals in August, 1980. In the original hearing, the lesbian mother received custody of the daughter with harsh restrictions, namely that the mother discontinue her relationship with "Betty" and that the daughter not be allowed any contact with the mother's "friend." Later, the father sought and was granted a change of custody to him because the mother allegedly had not abided by the restrictions. On appeal, the mother contended unsuccessfully that the restrictions were unreasonable and invalid. The appellate court upheld the trial court's decision, leaving custody with the father.[407] The analysis used by the court is instructive.

First, the appellate court analogized the restrictions on the

406. 606 S.W.2d 179 (Mo. Ct. App. 1980).

407. *Id.* at 182.

mother's friend to restrictions on a "habitual criminal, . . . sexual pervert, or a known drug pusher."[408] Second, the appellate court spent a large portion of the opinion discussing the mother's relationship and the character of the "friend." In a very stereotypic manner the appellate court decided that the mother was "quite passive and subservient in her relation to Betty, while Betty occupies a dominant role."[409] Third, the court described the mother's evidence this way: "Kathy's evidence, since it tends not to support the judgment of the court, may be summarized."[410] Is not the judgment of the court supposed to reflect the evidence? The evidence, which the court chose to summarize succinctly, was the evidence of a psychiatrist who described the child as "well-adjusted" and who recommended that the child remain with the mother.[411] Fourth, the court seemed to believe that the child would be influenced toward homosexuality if she remained with her mother. The appellate court admitted that, at the then-present time, the child was well-adjusted and normal,[412] but it justified the change of custody on its own prediction of the future. "The court does not need to wait, though, till the damage is done. If the child's situation is such that damage is likely to occur as her sexual awareness develops . . ." then custody may be changed.[413] No evidence was cited to show that any expert predicted future harm. The opinion does not use the word "les-

---

408. *Id.* at 183. The court's full statement was, "Suppose the *persona non grata* were an habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher? To cut off association with such a person as a condition to the child custody would be entirely reasonable." *Id.*

409. *Id.* at 184. The judge's "dominant-passive" remark reflects the stereotypic view that relationships between gay couples mirror stereotypic relationships of traditional heterosexual couples with one partner being male and dominant, the other female and passive. In fact, the view that maleness equals dominance and femaleness equals passivity is itself a stereotypic notion that numerous heterosexuals have had to overcome. While gay couples in the 1940–1950's did struggle to create relationships based on their only model, that of heterosexuals, gay couples in the 1970–1980's have largely abandoned such rigid roles. Clearly the judge's attitude lags behind both the heterosexual and homosexual times! As described by one commentator:

> [T]o the ancient world of Greece and Rome, men—and it was above all a masculine society—were regarded as naturally bisexual. No distinction was made between the love of boys and the love of women. This was simply a question of taste, about as significant as preferring coffee or tea for breakfast. The crucial distinction in law and morality was between those who took the active roles and those who took the passive roles—the penetrators as opposed to the penetrated. This concept effectively degraded submissive boys, women, and slaves of both sexes, and elevated active men, regardless of their gender preference. To us, gender preference is all-important, and the distinction between the active and passive roles of only minor significance.

Stone, *The Strange History of Human Sexuality: Sex in the West*, THE NEW REPUBLIC, July 8, 1985, at 25–27.

410. *N. K. M.*, 606 S.W.2d at 185.

411. *Id.*

412. *Id.* at 186.

413. *Id.*

bian" at all and uses the word "homosexuality" sparingly. In sum, the case is a classic: treatment of gay people as analogous to criminals, use of archaic stereotypes, judicial voyeurism, disregard of expert testimony, and findings based not on the record but on the judge's personal beliefs.

L. v. D.,[414] decided two years later in the Missouri Court of Appeals, is not much different in its approach. The lesbian mother sought a change of custody from the father to herself. This case is one of those instances, quite common in gay custody cases, where the gay parent not only loses but ends up worse off than before the suit was brought. Here, the trial court not only denied the motion for change of custody but added new restrictions to the mother's visitation.[415] The restrictions were to prevent any contact between the children and the mother's life partner. The appellate court upheld the trial court. Again, the decision was not unexpected, and the methodology was instructive.

The world caught up to Missouri in the two years between the cases. The second sentence of *L. v. D.* refers to the mother as a lesbian. The mother had made certain allegations about the father. The truth of those allegations of course is unknown. The appellate court, however, labels them "illusory."[416] The mother claimed that the father interfered with her custodial rights when he moved without notifying her or giving her the new phone number. The appellate court said the father's conduct was not so substantial as to be worth considering.[417] Although, the children expressed a desire to stay with the mother, the court ruled that because of their tender years their preferences were not really important.[418] The mother also alleged that the father was purposely alienating the children by telling them about her relationship; the father claimed he was "educating" the children. The court ruled that the mother had no alienation claim because the alienation had its "foundation in the conduct of the complaining parent."[419] The court dismissed oral evidence presented by two expert witnesses and dismissed the submission of various written studies and articles, all in support of the mother's position. The appellate court said the trial court had the power to find the witnesses not credible. To bolster this argument, the appellate court *sua sponte*, took judicial notice of anti-gay evidence given in another Missouri trial four years earlier which dealt with rec-

414. 630 S.W.2d 240 (Mo. Ct. App. 1982).
415. *Id.* at 241.
416. *Id.*
417. *Id.*
418. *Id.* at 242.
419. *Id.* at 243.

ognition of gay student groups, not with a custody matter.[420] The court also cited to and quoted from *N. K. M. v. L. E. M.*[421] for the proposition that current harm need not be shown. Finally, the court cited *Bezio v. Patenaude*,[422] and admitted that a situation might exist where the court could allow children in the custody of a "practicing lesbian."[423] This case, however, was obviously not the one!

The last of the Missouri cases deals with a gay father. *J.L.P. (H) v. D.L.P.*[424] was decided twenty-seven months after *N. K. M. v. L. E. M.* The gay parent in this case was labeled an "avowed homosexual." The trial court had given the gay father visitation with restrictions, namely, no overnight visits, no gay church meetings, and no gay social meetings.[425] Lambda Legal Defense attempted to file an amicus brief in this case, but the court denied permission.[426] The father's principal argument was that the uncontradicted expert evidence was totally ignored. The evidence was that the child had not been harmed at the then-present time. The appellate court brushed this contention aside, stating that the trier of fact is not bound by expert testimony.[427] The court commented on the testimony at length. One expert's opinion on the etiology of homosexuality was derided by the court which said that the fact the father had had a heterosexual relationship with the mother proved the expert wrong. The testimony about child molestation was also labeled "suspect" because "[e]very trial judge . . . knows that the molestation of minor boys by adult males is not as uncommon as the psychological expert's testimony indicated."[428] The appellate court affirmed, relying on the "potential" for harm. The father in this case took an unusual position. Usually gay parents testify that they do not want their kids to grow up to be gay. The father in this case said he wanted his son to be gay. The author suspects that this enraged the

---

420. *Id.* (citing Gay Lib v. University of Mo., 416 F. Supp. 1350 (D. Mo. 1976), *rev'd*, 558 F.2d 848 (8th Cir. 1977)). The judge does not mention that the anti-gay testimony was not considered credible by the Eighth Circuit.

421. 606 S.W.2d 179 (Mo. Ct. App. 1980). *See supra* notes 406–14 and accompanying text.

422. 381 Mass. 563, 410 N.E.2d 1207 (1980). *See infra* notes 571–79 and accompanying text.

423. L. v. D., 630 S.W.2d at 244.

424. 643 S.W.2d 865 (Mo. Ct. App. 1982).

425. *Id.* at 866.

426. Lambda Legal Defense and Education Fund is a national gay legal defense fund. The Lambda brief probably would have been an educational brief, as it contained a discussion of stereotypical beliefs about gay persons and gay parents with information regarding research and testimony dispelling those myths. The appellate court, however, apparently chose not to be confused by additional facts. *See id.* at 867.

427. *Id.* at 868.

428. *Id.* at 869.

judges. At the end of the appellate decision, the court warned the father that if he "persist[ed]" in this position and harm resulted to the child, even greater restrictions were in store for him.[429]

In all three of these cases, an examination of the opinions and other documents indicates that all of the gay parents, like the nongay parents, were imperfect humans in their parenting abilities. However, for the most part, those issues were never discussed and balanced. Because the courts focused on the sexual orientation of the parents, the parent-child relations were never fully explored, and the best interests of the children, whatever they may have been, were never the central issue.

Missouri authority has held that expert opinions are not binding on the trier of fact;[430] one assumes that the Missouri lawyers were aware of this rule. My observation is that lawyers who are not experts in gay custody litigation are basically unprepared for the hostility or ignorance which will be met from the bench. In some cases, better advice would have counseled the litigant not to have appealed, as many cases show instances of appeal leaving the gay parent in an even worse position.

Two Iowa cases illustrate situations where the parent had to make a hard choice in legal strategy. In *Eaganhouse v. Eaganhouse*,[431] the lesbian mother returned from another state and brought the child with her for the sole purpose of contesting a custody modification motion made by her former husband. The court awarded the child to the ex-husband, citing the mother's instability of residence, including the move from out-of-state, as a reason for the change of custody.[432] The case illustrates two common phenomena in gay custody cases. First, the nongay father brought the case shortly after he remarried. Interestingly, remarriage of the nongay parent seems to trigger custody suits. Second, the court in this case disclaimed any prejudice stating "there was much testimony concerning the parenting of respondent [mother] in particular and of lesbians in general. The court in this case was of the opinion that this phase of the matter was greatly overemphasized by both parties. The court accepts that a person's ability to parent is not necessarily affected by their sexual preference."[433] Yet, even with the disclaimer, one comes away from the opinion with the intimation that a nongay mother would not have lost custody in the same

429. *Id.* at 872.

430. *See* Note, *Visitation*, 22 J. FAM. L. 185, 187 n.14 (1983–1984).

431. CD 78-1176 (Iowa Dist. Ct., Jones County Aug. 29, 1980).

432. The court also denied custody based on the mother's admission of marijuana usage, even though she agreed to stop smoking marijuana if it would impact on the court's decision.

433. *Id.*, slip op. at 4.

situation.

In *King v. King*,[434] another Iowa lesbian mother appealed the lower court's decision against her to the Iowa Supreme Court and ended up withdrawing the appeal as a matter of strategy.[435] When the Kings were divorced, the father received custody because of the mother's lesbianism. Four years later, the lesbian mother moved for a change of custody on the grounds that the father had given over physical custody of the children to her. Subsequent testimony revealed that the father was often drunk and was clearly not a fit custodian. The mother had expert testimony from a psychiatrist indicating that no harm existed to the children because of their mother's sexual orientation and that no future harm was foreseen. The mother had favorable testimony from the children's teacher and from a babysitter who stated clearly that she was a heterosexual. The mother even gave the obligatory testimony stating that it was "her duty" to bring the children up as heterosexuals.[436] After much testimony, the trial court flatly denied the mother custody,[437] stating that, "were it not for the lesbian lifestyle chosen by [the mother] she would be awarded custody."[438] One reading of the judge's decision would be that he used a conclusive presumption that Sheila King's sexual orientation was against the best interests of her children. Sheila King, represented by the Iowa Civil Liberties Union (ICLU), appealed the decision to the Iowa Supreme Court. The ICLU filed an extensive brief arguing both Iowa custody law and constitutional issues.[439] The favorable language of *Teepe*,[440] decided in 1978 by the same court, was cited even though the allegedly gay father in that case lost custody. The supreme court responded by issuing a short order temporarily remanding the case back to the trial court. The trial court was directed to appoint an attorney to represent the children. The attorney was directed to conduct an investigation to determine "who, other than the father, should have custody of the children in their best interests, under all the facts including the mother's homo-

434. No. 3-66091, Mills No. 342 (Iowa Sup. Ct. Sept. 22, 1981).

435. Telephone interview with Naomi Mercer, of Mercer & Mercer, Des Moines, Iowa, Sheila King's attorney (June 24, 1985).

436. Brief for Appellant at 20, King v. King, No. 3-66091, Mills No. 342 (Iowa Sup. Ct. Mar. 9, 1981).

437. *Id.* at 24.

438. *Id.* at 24–25.

439. *Id.* at ___.

440. 271 N.W.2d 740 (Iowa 1978). "Such misconduct which affects the child may be given consideration in determining child custody . . . although immoral acts alone do not necessarily make a person unfit for custody of his or her children." *Id.* at 743–44. *See supra* notes 22–24 and accompanying text.

sexuality."[441] During all of the trial and the subsequent legal events, the children had remained in the physical custody of the mother. The father had left them in her custody and made no attempt to retake them although technically he was the legal custodian. When the case was remanded to the trial court, the judge appointed an attorney. The attorney submitted a psychiatrist's report which the court refused to accept. The apparent reason was that the report was favorable to the mother. The court appointed another psychiatrist who was regarded by the mother and her local attorney as extremely prejudiced against gay people. At this point, the mother and her attorney made a strategic decision—they asked leave of the Iowa Supreme Court to withdraw the appeal. Although the attorney appointed by the lower court opposed their motion, the motion was granted. Thus, the mother remained the physical custodian of the children while the absent father remained the legal custodian. According to her attorney, Sheila King feared that the local judge would order the children placed in foster care rather than let her have physical custody. The *King* case ended with mother and children united but without the protection of a proper custodial order.[442]

Lest Iowa be considered to have the only judicial system exhibiting signs of homophobia, an analysis of the Oklahoma system produces a similar finding. The following words are representative of the current judicial attitudes:

> It is now time to draw the line in Oklahoma so that it can take its place in the columns (sic) where it stands on homosexual marriages and homosexual custody, so at this time I would reverse the custody of the child and award custody to the [nongay] father, order the child to be given to the father by six o'clock this evening.[443]

In Oklahoma, the right way and the wrong way to proceed are

---

441. Order Appointing Attorney to Represent Children at 1, King v. King, No. 3-66091, Mills No. 342 (Iowa Sup. Ct. ——— ——, 1981).

442. *See* Dismissal of Appeal, King v. King, No. 3-66091, Mills No. 342 (Iowa Sup. Ct. Sept. 22, 1982); Motion for Leave to Dismiss, King v. King, No. 3-66091, Mills No. 342 (Iowa Sup. Ct. Aug. 26, 1982); Letters from G. Elizabeth Otte to Naomi Mercer, of Mercer & Mercer, Des Moines, Iowa, Sheila King's attorney (Apr. 15, 1982, Jan. 19, 1982 & Jan. 4, 1982); Letter from Naomi Mercer, of Mercer & Mercer, Des Moines, Iowa, to Rhonda Rivera (July 20, 1982).

443. Record at 302–05, M.J.P. v. J.G.P., 640 P.2d 966 (Okla. 1982). The trial judge's statement is contained in Note, *Parent and Child: M.J.P. v. J.G.P.: An Analysis of the Relevance of Parental Homosexuality in Child Custody Determinations*, 35 OKLA. L. REV. 633, 657 (1982). I would like to thank the note author, Marie Westin Evans, for the very helpful investigation she performed to uncover facts not revealed in the supreme court's opinion. Not only is the article a boon to this discussion as it highlights much of the record, but the article is well worth reading to master the whole subject of gay child custody.

clear. Linda Duck kept her children;[444] Martha Potter lost hers.[445] When the Potters were divorced, the court awarded their two-and-a-half-year old son to his mother. Within a year, the father moved to change custody based solely on his wife's lesbian relationship. The wife stipulated as to her sexual orientation. The testimony was uncontradicted that the child was healthy, well-adjusted, alert, happy, and normal. The testimony of both the father and the paternal grandparents admitted these facts. The expert witness, a psychiatrist, not only supported this view of the child but testified that separation for the child from his mother would be a traumatic event.[446] Thus, the evidence in this case indicated no present harm and no nexus with the mother's sexual orientation. Nevertheless, the trial court awarded custody to the father and restricted the visitation of the mother. The mother could not have the child overnight if her life partner were in their home. On appeal, the mother argued that the decision was based on the judge's personal moral beliefs and that he had, in fact, created a conclusive presumption against a gay parent. She also argued that the judge was patently biased and should have excused himself.[447] As evidence of the judge's bias, the mother cited his voyeurism during the trial.[448] One third of the hearing was devoted to questioning the mother's sexual partner, many of the questions coming from the bench. The mother also alleged that the judge had made his decision before hearing her testimony; she pointed out that he read his decision in part from a book which he brought to the bench before her testimony.[449]

The Supreme Court of Oklahoma, in a truly amazing opinion, upheld the decision of the trial court[450] after superficially analyzing two gay custody cases, inferring that only those two existed. First, the court cited *Bezio v. Patenaude*[451] which required a nexus between the parent's homosexuality and present harm. Having alluded to the *Bezio* rule, a Massachusetts Supreme Court decision which was certainly relevant case law for a case of first impression in Oklahoma, the court then ignored the rule. Second, the court also cited favorably to the dissenting opinion in *Schuster v. Schuster*[452] which quoted at length from a law review article that supported the criminalization of homosexual-

444. *See infra* notes 458–60 and accompanying text.
445. *M.J.P.*, 640 P.2d at 970.
446. Note, *supra* note 443, at 655.
447. *M.J.P.*, 640 P.2d at 969.
448. *Id.*
449. Note, *supra* note 630, at 443.
450. *M.J.P.*, 640 P.2d at 970.
451. 381 Mass. 563, 410 N.E.2d 1207 (1980). *See M.J.P.*, 640 P.2d at 967.
452. 90 Wash. 2d 626, 635–36, 585 P.2d 130, 135–36 (1980) (Rosellini, J., dissenting). *See M.J.P.*, 640 P.2d at 968. *See also* Rivera, *supra* note 1, at 899.

ity because, without such sanction, young people might choose homosexuality and undermine the traditional family.[453] Not only did the theory in this article contradict all objective scientific evidence on the etiology of homosexuality but it also contradicted the expert testimony in *M.J.P.* Nevertheless, the *M.J.P.* court passed over the testimony of the expert that the child showed no evidence of present harm. Instead, the court pointed to the expert's answers to a series of cross-examination questions in which the expert was asked speculative questions about the child's future.[454] The court stated that sufficient evidence existed to support the trial court's decision. The court explained the trial judge's patent voyeurism by saying that the judge's questions to the mother's partner "evidenced a desire to learn more about the home and family of a homosexual couple . . . ."[455] To the mother's other arguments of bias, the Oklahoma Supreme Court's total answer was, "we are not impressed."[456]

Seldom do legal scholars who write about cases have information about the facts that surround an opinion. However, in *M.J.P.*, a newspaper story described the case. According to *The Advocate*, Judge David Winslow, the trial judge in *M.J.P.*, first awarded the child to the mother and then reversed himself after receiving letters from local members of the fundamentalist church to which the father belonged. The judge himself was a part-time fundamentalist minister as well as an elected official. Phil Frazier, lawyer for the mother, is quoted as saying that even though his client lost he was glad that the state's highest court had "at last" established a guideline to be used by Oklahoma courts in dealing with gay custody cases. If those remarks are correct, one questions how zealous Frazier was in his representation of Martha Potter. Frazier said further that he did not think the decision was unfair because lesbian mothers chose their life-style. According to Lana Hartig, Potter's life partner with whom Potter had gone through a gay commitment ceremony, Potter could not handle the decision. Shortly after the decision, Potter denounced lesbianism, married a man, and

---

453. *See Schuster*, 90 Wash. 2d at 635–36, 585 P.2d at 135–36 (Rosellini, J., dissenting) (quoting Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 691–96 (1977)).

454. *See M.J.P.*, 640 P.2d at 968–69. For example, the opinion states: "On cross-examination, Dr. W. acknowledged that it is in a child's best interests to be taught the prevailing morals of society, and that it is generally considered immoral for two women to engage in a homosexual lifestyle." *Id.* at 969. "Dr. W. concluded: 'Probably the greatest problem with it will be in early adolescence when he is very much aware of society's feelings. If he has been taught in some way that it is very sinful and he becomes aware of it, that could be as traumatic as growing up with it being somewhat normal and then finding out that society considers it wrong . . . .'" *Id.*

455. *Id.* at 969.

456. *Id.* at 970.

moved out of state without leaving a forwarding address. The child over whom the father battled so hard lived primarily with his paternal grandparents. Hartig, who lived with the child for three years, is not allowed to see him, although her twelve-year-old son is permitted to visit.[457]

Rather than admit her lesbianism, Linda Duck, with her attorney, pursued another strategy in a similar situation. Duck was awarded custody of her children by another Tulsa, Oklahoma judge just one week after the decision in *M.J.P.* Duck fought a three-year battle for her children and maintained throughout the struggle that she was not a lesbian. She lived with another woman named Marilyn. Duck told her husband and the court that she and Marilyn had had a brief affair and nothing more. She admitted to a reporter from *The Advocate* that she had lied but said she "had to play the game."[458] She said, "But what do you want? Do you want to be honest and have your whole life but lose your children, or be dishonest for a few years and keep your children?"[459] Duck's position seems to have been a matter of chosen trial strategy. According to C.B. Savage, Duck's attorney, "[I]n my initial conversation with Ms. Duck, I advised her she had a choice to make. Did she want her children, or did she want to focus the attention of the case on the question of lesbians' rights? She wanted her children."[460]

The decision by the North Dakota Supreme Court in *Jacobson v. Jacobson*[461] corresponds with the Oklahoma and Missouri decisions. However, in *Jacobson*, the trial court had awarded custody of the children to their lesbian mother only to be overruled by the supreme court. The trial court judge said that he had extensively researched the available case law. His conclusion was that the cases are divided into two categories: " '[T]hose in which courts, without explaining the reasons for their conclusions, determine that homosexuality is a factor to be considered in awarding custody; those in which, based upon expert tes-

---

457. The Advocate, Mar. 18, 1982, at 1.

458. *Id.*

459. *Id.*

460. Letter from C.B. Savage, of Savage, O'Donnell, Scott, McNulty & Cleverdon, Tulsa, Okla., to Rhonda Rivera (July 19, 1982). Savage also wrote:

> What we were able to do with the testimony of several expert witnesses and the parties involved was to convince the court that the best interests of the children would be served by placing their custody with Ms. Duck, their mother . . . not Ms. Duck, a lesbian. To my way of thinking, it is a question of trial strategy.
>
> Perhaps the reason some lesbian mothers have not been so fortunate in retaining custody of their children is that they have been more concern [sic] with being militant about their lesbianism when they should have presented themselves to the trier of fact as being militant about their motherhood.

Id.

461. 314 N.W.2d 78 (N.D. 1981).

timony, the courts conclude that the subject is irrelevant.' "[462] The trial judge found sexual orientation to only be one of many factors to be used in determining the best interests of the children and then, only if some legitimate method of weighing those factors was found. Approaching the problem in this fashion, the trial judge determined that both parents were fit. He decided that less disruption would occur in the children's lives if they remained with their mother. This decision was, according to the North Dakota Supreme Court, a clear mistake. For the highest court, "the homosexuality of Sandra [the mother] is the overriding factor."[463] The court stressed that when the mother lived with her lover the relationship would not be a legal one. Additionally, the court hypothesized, without evidence, that the relationship might not be stable either. The court stated that "Sandra's homosexuality may, indeed, be something which is beyond her control."[464] The court said, however, she could control with whom she lived, and she should make that sacrifice to keep her children. The North Dakota Supreme Court would seem to fall into that small group which makes a parent's homosexuality conclusively "not in the best interests" of the child. The court's emphasis on the lack of a legal relationship and the comparison to heterosexual cohabitation[465] puts gay persons in a "Catch 22" position. Since same-sex marriage is forbidden, gay persons can never legalize the relationship—heterosexual cohabitors have a choice.

While the hostility of the courts in the central states seems fairly evident, the attitudes of midwestern courts are less capable of categorization. In *D.H. v. J.H.*,[466] decided by an Indiana appellate court in 1981, the original order giving custody to the father was upheld. The appellate opinion stated that "homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child."[467] However, even with that fine statement, the court decided that sufficient evidence existed to support the award to the non-gay father. The evidence mentioned in the appellate opinion as dispositive included the mother's poor housekeeping and a father who

462. *Id.* at 79 (citation omitted in original).

463. *Id.* at 80.

464. *Id.* at 81.

465. *See id.* (citing Jarrett v. Jarrett, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (residence of mother's "paramour" found to have possible adverse affect on the moral and emotional health of three daughters), *cert. denied*, 449 U.S. 927 (1980)). The *Jacobson* court wrote: "Here, although Sandra was not residing with Sue at the time of the hearing on custody, her intentions to do so in the future were plainly announced to the trial court . . . . It is this particular fact which we believe to be material in this instance." *Jacobson*, 314 N.W.2d at 81.

466. 418 N.E.2d 286 (Ind. Ct. App. 1981).

467. *Id.* at 293.

prepared meals and helped the kids with their lessons while his wife "was out running around . . . ."[468] The Indiana court placed great emphasis on the trial judge's perspective, as the judge was in a position to see the parties and observe their conduct. No manifest abuse of discretion was found.

The cases from Michigan in the 1980's are a curious group. Michigan, unlike Indiana and the other central states, had a number of gay custody cases in the years before 1980. *People v. Brown*,[469] decided by the Michigan Court of Appeals in 1973, has been often cited as the landmark neglect case in the custody area. *Brown* pitted a lesbian mother against the state; therefore, the standard applied by the court was not the "best interests" test but the stricter parental "unfitness test." The *Brown* court stated that there was little evidence to support the conclusion that the lesbian relationship would render the home an unfit place for children.[470] The opinion also seemed to require a nexus between parental homosexual conduct and harm to the children.

Two Michigan circuit courts rendered decisions rather favorable to lesbian mothers in 1975 and 1976. These decisions were based on the Michigan Child Custody Act which sets out ten specific criteria to be used to determine the best interests of the child. One of those criteria is the moral fitness of the parent. In *Stamper v. Stamper*,[471] the judge treated the partner of the lesbian mother on an equal plane with the woman cohabiting with the father. In *S. v. S.*,[472] the court also allowed children to remain with a lesbian mother with a live-in life partner.

In 1979, *Miller v. Miller*,[473] a lesbian mother case, reached the Michigan Supreme Court. Both the trial and appellate courts had rendered decisions unfavorable to the lesbian mother. The Michigan Supreme Court remanded, saying that clear and convincing evidence had not been shown in support of a change of custody from the mother. This case presents an interesting precedential problem. Both appellate opinions are extremely short, and neither describes any of the evidence

---

468. *Id.* at 296.

469. 49 Mich. App. 358, 212 N.W.2d 55 (1973). For an extensive analysis of this case, see Rivera I, *supra* note 1, at 888.

470. *Brown*, 49 Mich. App. at ____, 212 N.W.2d at 59.

471. No. 75-054-550-DM (Mich. Cir. Ct., Wayne County June 15, 1977). For an extensive analysis of this case, see Rivera I, *supra* note 1, at 900.

472. No. 75-16125DM (Mich. Cir. Ct., Washtenaw County Dec. 6, 1976). The court applied the Michigan Child Custody Act of 1970. *See* MICH. COMP. LAWS ANN. §§ 722.21–.29 (West Supp. 1985). The case is unpublished and records are suppressed. The opinion and order are in the author's files by permission of the court. It is unfortunate that this opinion was not published because of the careful, systematic method in which the court evaluated the custodial alternatives against the criteria embodied in the statute.

473. No. 77-2631 (Mich. Sup. Ct. Dec. 16, 1979).

involved in the case. Nevertheless, gay rights litigators regarded the *Brown* and *Miller* decisions as putting Michigan among the states requiring a clear nexus between the parent's sexual orientation and current harm to the child. However, two cases decided in 1980 disabused them of such a conclusion.

In *Irish v. Irish*,[474] the Michigan Court of Appeals ordered a restricted visitation schedule for a lesbian mother. The visitation could only take place "provided that while the children were visiting plaintiff no intimate sexual contact was to take place between plaintiff and her lover in the children's presence and that the children could not remain overnight if plaintiff's lover were present overnight."[475] On appeal, plaintiff argued that the trial court had utilized an erroneous standard of proof. The mother claimed that the trial court had not, by clear and convincing evidence, found the modification of visitation to be in the best interests of the children. The appellate court found that the clear and convincing standard was unnecessary; a mere preponderance of the evidence was sufficient. The court stated that since a modification of visitation rights was not a change in the children's custodial arrangements, a lesser standard of evidence was applicable.[476] Because the issue was not custody, the trial court did not have to make a finding as to each criterion enumerated in the Michigan Child Custody Act. The appellate court noted that the only real change resulting from the trial court's order was not the amount of visitation which the mother was allowed but the amount of time the children would have in the presence of their mother's "lover." The court then said, "Based on the mores of our society, we do not consider the continued presence of the lover of the children's mother as an element of the children's custodial environment which must be preserved and protected by the high standard of proof required by [section] 7(c) [of the Child Custody Act]."[477]

Hall v. Hall,[478] decided in the same year, was also a clear defeat for the lesbian mother. After losing custody of her children at the trial level, Sharon Hall argued on appeal that the trial court had adopted a conclusive presumption that she was unfit because of her sexual orientation. The appellate court said that the trial court had correctly regarded her sexual orientation "as only one factor in its determination of moral fitness."[479] However, the other evidence, said the appellate

474. 102 Mich. App. 75, 300 N.W.2d 739 (1980).

475. *Id.* at 78, 300 N.W.2d at 741.

476. *Id.* at 79, 300 N.W.2d at 741.

477. *Id.* at 79–80, 300 N.W.2d at 741.

478. 95 Mich. App. 614, 291 N.W.2d 143 (1980).

479. *Id.* at 615, 291 N.W.2d at 144. Note also that moral fitness is one of the criteria for determining the best interests of the child under the Michigan Child Custody Act of 1970. *See*

court, was a finding by the trial court "that, given a conflict, the plaintiff would unquestionably choose the relationship over the children."[480] Thus, the appellate court held that "the interests of the children could well be subverted by the plaintiff's relationship . . . ."[481] The opinion does not reveal the mother's exact words nor the context of her statement. However, one must ask whether heterosexual mothers should be asked to give up their lovers or new husbands for their children? In this author's seventeen years as a domestic relations litigator, I have never heard such a question asked. The human need for adult companionship is viewed as a separate and distinct need from that of a parent-child relationship, and the two are not seen in conflict except in the instances of gay families. This emphasis on removal of the same-sex adult from the children's world is clearly misplaced. Studies now show that children thrive best in a home with two caring adults regardless of their gender.[482]

The acceptance of gay custody is not much better in Ohio. Ohio has probably the earliest gay custody case resolved by the imposition of restrictions. In *Holland v. Holland*,[483] decided in 1947, a woman who was presumably gay was allowed to retain custody of her children if her female friend left the home. Later, in 1974, Ohio was the location of what may be the first gay parent case to use expert testimony to educate the court—*Hall v. Hall*.[484] As a result, the mother retained custody. *Towend v. Towend*,[485] decided by an Ohio appeals court in 1976, was as blatant a case of judicial homophobia as one is likely to find; the mother lost custody to the paternal grandmother. And in 1980, *Haton v. Haton*[486] was decided by an Ohio court of appeals. The trial court had ordered change of custody to a nongay father from a lesbian mother. On appeal, the mother argued that the court had not properly found that the child's present environment endangered the child. Ohio statutorily requires a showing of present harm[487] before a

---

MICH. COMP. LAWS ANN. § 722.23(f) (West Supp. 1985).

480. *Hall*, 95 Mich. App. at 615, 291 N.W.2d at 144.

481. *Id.*

482. *See* Kirkpatrick, *Lesbian Mother Families*, PSYCHIATRIC ANNALS 12(9) (Sept. 1982); Kirkpatrick, Smith & Roy, *Lesbian Mothers and Their Children: A Comparative Study*, 5 AM. J. ORTHOPSYCHIATRY 51:3 (1981); Presentation by M. Hotvedt, R. Green & J. Mandel, The Lesbian Parent: Comparison of Heterosexual and Homosexual Mothers and Their Children, American Psychological Association Annual Meeting (Sept. 4, 1979).

483. 49 Ohio L. Abs. 237, 75 N.E.2d 489 (Ohio Ct. App. 1947). *See* Rivera II, *supra* note 1, at 328 n.146.

484. No. 55900 (Ohio C.P. Ct., Dom. Rel. Div., Licking County Oct. 31, 1974).

485. No. 639 (Ohio Ct. App., 11th Dist. Sept. 30, 1976). For an extensive discussion of this case, see Rivera I, *supra* note 1, at 902.

486. No. W.D.-80-30 (Ohio Ct. App., 6th Dist. Nov. 21, 1980).

487. *See* OHIO REV. CODE ANN. § 2109.04(B)(1)(c) (Page Supp. 1984). The statute pro-

prior custody decree is modified. The *Haton* court identified ten of the thirty-four findings of fact as evidence that the plaintiff's homosexuality had a present adverse impact. A number of the findings are merely statements of facts which prove nothing in and of themselves about adverse impact.[488] However, a majority of these findings focus on the "open sexuality" of the mother and her lover. A psychiatrist found the openness to be harmful. The mother's statement to the court that, having realized the alleged harm, she would comport herself differently, was to no avail. One hard question would be whether similar incidents between a heterosexual couple would have been seen as "open sexuality." Certainly, the court's emphasis focused on the open nature of the behavior in the presence of the child.[489]

Hercenberg v. Hercenberg,[490] tried in Columbus, Ohio, in late 1982, clearly illustrates how positive results for the gay parent can be obtained when the lawyer is familiar with gay custody law and trial strategy. After a record hearing, the trial court left the children in the custody of their lesbian mother. The father had sought to change custody to himself because of the mother's sexual orientation. The court found that although a change of circumstances had occurred, no present endangerment was proven. Even the father admitted that his concerns were prospective. An expert testified that the children exhibited

---

vides in pertinent part:

> [T]he court shall retain the custodian or both of the joint custodians designated by the prior decree, unless one of the following applies:
>
> . . . .
>
> (c) The child's present environment endangers significantly his physical health or his mental, moral, or emotional development and the harm likely to be caused by a change in environment is outweighed by the advantages of the change of environment to the child.

Id.

The court in Whaley v. Whaley, 61 Ohio App. 2d 111, 399 N.E.2d 1270 (1978), in construing the statute, notes "one other difficulty with the Ohio standard which requires that a direct adverse impact be shown. This means that a court may not act to change custody until the harm has, or probably has been done." *Id.* at 118, 399 N.E.2d at 1275. The court went on to state that the modification of a prior custody order is likely to harm a child in light of the needs of a child for a stable environment. The modification of a prior custody order under the statute can only be made where the harm caused by the change is outweighed by the advantage of such change. A court's inquiry into the moral conduct or standards of a custodial parent is limited to a determination of the effect of such conduct on the child. *Id.* at 119, 399 N.E.2d at 1275 (quoting Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 681 (1977)).

488. *E.g.*, "No. 13. That the defendant is a homosexual and has had homosexual relationships with others since a time preceding [sic] their dissolution of marriage." *Haton*, No. W.D.-80-30, slip op. at 2; "No. 14. That the Defendant has had homosexual relationships with individuals who were, at one time or another, students of the Defendant at Lakota High School." *Id.*

489. Examples of openness included walking naked in the house, lying on the bed with another woman and allowing the child to jump in bed between them, and displays of physical affection for others. *Id.*, slip op. at ____.

490. No. 76DC-02-427 (Ohio C.P. Ct., Dom. Rel. Div., Franklin County Mar. 10, 1983).

no present harm. The father appealed but subsequently withdrew the appeal after an out-of-court settlement which provided that custody of the teenage son would go to the father with custody of the daughter remaining in the mother.

Turning to the southern United States, prior to 1980, very few cases were reported: three cases were reported for Georgia,[491] three cases for North Carolina,[492] one for West Virginia,[493] two for Texas,[494] and one for Kentucky.[495] Moreover, the 1980's have not brought a rash of new cases. The sole Texas case since 1980, *In re T.L.H.*,[496] seems to be in the "gallantry is not dead" mode.[497] The case was tried to a jury, as is usual for Texas custody cases.[498] On appeal, a nongay father who was denied custody, alleged that the trial court had committed error by refusing to admit evidence of the mother's lesbianism. The appellate court stated that the trial court had not prohibited introduction of evidence about the mother's alleged homosexual acts but rather, it had prohibited only evidence which labeled the mother and her friends as lesbians.[499] The mother not only retained custody but was awarded her attorney's fees. The court's decision may have been influenced by the fact that the father's allegations of sexual abuse of the child were totally unsupported by the evidence.[500]

A Kentucky lesbian mother won custody of her children in *Gerde v. Butler*,[501] but she paid the price imposed in homophobic courts: her custody was restricted. The mother had to maintain a home without a life partner present, was to refrain from allowing her children contact with gay persons, and was to use only a heterosexual babysitter when such services were required.

On the other hand, *Peyton v. Peyton*,[502] a 1984 Louisiana case, placed no restrictions on the lesbian mother. Like Michigan,[503] Louisi-

---

491. Buck v. Buck, 238 Ga. 540, 233 S.E.2d 792 (1977); Bennett v. Clemens, 230 Ga. 317, 196 S.E.2d 842 (1973); Gay v. Gay, 149 Ga. App. 173, 253 S.E.2d 846 (1979).

492. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), *cert. denied*, 415 U.S. 918 (1974); Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979); Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979).

493. Thabet v. Thabet, 154 W. Va. 477, 176 S.E.2d 687 (1970).

494. *In re* Risher, 2 FAM. L. REP. (BNA) 2715 (Tex. Ct. Dom. Rel., Dallas County Apr. 16, 1976); *In re* Nelson, No. 951, 546 (Tex. Ct. Dom. Rel., Harris County May 24, 1973).

495. S. v. S., No. 79-CA-1588-MR (Ky. Ct. App., Jefferson County July 11, 1980).

496. 630 S.W.2d 441 (Tex. Ct. App. 1982).

497. At least two other cases exist where the "lady's word was believed." *See Buck*, 238 Ga. 540, 233 S.E.2d 792 (1977); *Gay*, 149 Ga. App. 173, 253 S.E.2d 846 (1979).

498. *See T.L.H.*, 630 S.W.2d at 443.

499. *Id.* at 445–46.

500. *Id.* at 446–49.

501. No. 80-CI-2230 (Ky. Cir. Ct., Kenton County Sept. 30, 1981).

502. 457 So. 2d 321 (La. Ct. App. 1984).

503. *See* MICH. COMP. LAWS ANN. §§ 722.21–.29 (West Supp. 1985).

ana requires that specific criteria be considered in child custody cases with one of those criteria being moral fitness.[504] In the *Peyton* case, the appellate court said in essence, "a plague on both your houses." The appellate judges noted that where the father was cohabitating openly with a female and the mother was engaged in discreet lesbian affairs, "the trial judge did not see fit to favor one form of adultery over another . . . ."[505] The trial judge decreed a joint custody arrangement, and the appellate court affirmed. The evidence included testimony of a social worker that the child showed no signs of disturbance and had a good relationship with both parents.[506] Actually, the appellate court seemed more disturbed by the open nature of the father's cohabitation than by the mother's lesbianism.[507]

A 1982 southern case, more in the tradition of the Oklahoma-Missouri mold, is the Tennessee case of *Dailey v. Dailey*.[508] As in the *Jacobson* case in North Dakota,[509] the appellate court in *Dailey* decided to render its own decision, disregarding the facts found (or in this case, not found) by the trial court and deciding issues not raised by either party at trial or on appeal. Lesbianism was very much at issue in the custody hearing despite the trial court's finding that the "admitted lesbianism of the respondent (mother) is not *per se* a sufficient change in circumstances as to warrant a change in custody . . . ."[510] The trial court changed custody from mother to father but granted the mother liberal visitation, including weekends. Nevertheless, a close look at the facts leads one to conclude that the trial court harbored strong negative feelings against a lesbian home. The little boy in question had cerebral palsy. His mother had moved from a small rural town to Nashville where the child could attend, without charge, a school for children with similar problems and in that same school receive, on a daily basis, special speech and physical therapy which the record showed he desparately needed. The judge chose to have the child remain in the small town where he attended a small Christian school with no other handicapped children, which could not provide any speech or physical therapy required by the child. This therapy was available only by going

504. LA. CIV. CODE ANN. art. 146 (West Supp. 1984).

505. *Peyton*, 457 So. 2d at 324.

506. *Id.* at 322.

507. As the appellate court observed, "Furthermore, although the mother and Ms. Greenwood are still roommates, the presumptions society makes when an unmarried man and woman share living quarters do not apply in situations where members of the same sex are roommates." *Id.* at 325.

508. 635 S.W.2d 391 (Tenn. Ct. App. 1981).

509. *See supra* notes 461–66 and accompanying text.

510. Dailey v. Dailey, No. 7885, slip op. at ___ (Tenn. Cir. Ct., Bradley County Apr. 7, 1981).

to two other schools, twice a week, at a cost of over $160 per week. If the mother was a fit parent, which on the record seems a safe inference, the best interests of the child probably would have best been served by residence in Nashville with his mother. One could assume the court, and even her ex-husband and his relatives, regarded her as fit because she was permitted to retain custody while awaiting all the many hearings pending the decision and was subsequently granted liberal visitation by the trial judge. The mother's appeal of the trial court decision was, in hindsight, dreadful strategy.

The appellate court not only upheld the trial court's custody decision but *sua sponte* remanded with directions to incorporate highly restrictive visitation rules on the mother. She was prohibited from having her son in the home where she lived with her life partner. She was also prohibited from having the child in the "presence" of her life partner or with "any other homosexual with whom the [mother] *may* have a lesbian relationship."[511] The appellate court's reasoning was that "[t]o permit this small child to be subjected to the type of sexually related behavior that has been carried on in his presence in the past . . . could provide nothing but harmful effects on his life in the future."[512] The appellate court characterized the mother as "flagrantly flaunting" her sexuality in front of her child. Yet, the trial judge never found that such sexual behavior had occurred; the psychologist witness, a former roommate witness, and the mother herself testified to her extremely discreet behavior. Not even the father, his parents, nor her parents, had testified of any open sexual behavior. Only a brother of the mother, whose credibility was highly suspect, made any accusations. The trial judge obviously discounted his testimony. Yet, the appellate court seemingly structured its decision around the brother's charges. Three psychologists testified. The appellate court ignored two of them and focused on the father's expert who not only admitted prejudice against gay persons, but had never seen the child in the company of either of the two parents.[513] The behavior of the appellate court becomes legally stranger and less explicable in rational terms when one remembers that, in child custody cases, appellate courts generally defer to the trier of the fact on issues of credibility. The trial judge had found no open sexuality nor any possible problems with letting the child visit his mother in Nashville. Yet the appellate court mandated restrictions. The Tennessee Supreme Court denied permission to appeal in February, 1982. By August, 1982, the father had left for Peru to search for

511. *Dailey*, 635 S.W.2d at 396 (emphasis added).
512. *Id.*
513. *See id.* at 393-94.

gold. The maternal grandparents were then considering filing for custody.[514] The *Dailey* case also illustrates the approach of homophobic courts towards constitutional arguments: the court dismissed the constitutional issue in one sentence as "without merit."[515]

The last of the southern cases come from Virginia and seem facially contradictory. In the 1981 case of *Doe v. Doe*,[516] the Virginia Supreme Court refused to grant an adoption petition which would have stripped the lesbian mother of all parental rights. The case was treated by many as a victory for gay parents and as portending a reasoned approach to other gay custody issues in Virginia. Those optimists were disabused of such a notion by the same court's decision in *Roe v. Roe*,[517] four years later. In *Roe*, the Virginia Supreme Court overruled a trial court award of joint custody and removed a child from the home of her father and his life partner where she had previously lived for over five years. The decision was based solely on the father's sexual orientation. The *Roe* court held, "*as a matter of law*,"[518] that the gay father was an unfit and improper custodian because he continuously exposed his nine-year-old daughter to his "immoral and illicit" homosexual relationship.[519] The Virginia Supreme Court admitted that the trial court had found "no evidence that the father's conduct had an adverse effect on the child . . . ."[520] However, the court pointed out that sodomy was a felony in Virginia. Additionally, the court called the conditions under which the child must live an intolerable burden because of the condemnation of society. The court characterized the father, who had more than adequately cared for his daughter for over a five-year period, as "impos[ing] this burden upon her *in exchange for his own gratification.*"[521] The trial court had found the little girl to be a " 'very lovely, outgoing, bright and intelligent child . . . a very happy child [who] seemed to be well adjusted and outgoing.' "[522] Although the father had relied on *Doe v. Doe*, the 1981 adoption case, the *Roe* court said such reliance was misplaced. The court said that although under *Doe*, parental rights would not be terminated because of homosexuality of the parent per se, the *Doe* court had not dealt with custo-

514. Letter from Abby R. Rubenfeld to Dana Goldstein, research assistant to Rhonda R. Rivera (Aug. 26, 1982).

515. *Dailey*, 635 S.W.2d at 396.

516. 222 Va. 736, 284 S.E.2d 799 (1981).

517. 228 Va. 722, 324 S.E.2d 691 (1985).

518. *Id.* at ____, 324 S.E.2d at 694 (emphasis added).

519. *Id.*

520. *Id.* at ____, 324 S.E.2d at 692.

521. *Id.* at ____, 324 S.E.2d at 694 (emphasis added).

522. *Id.* at ____, 324 S.E.2d at 692 (citation omitted in original).

dial rights or visitation because those issues were not raised.[523] Having removed the child from the father's physical custody, the Virginia Supreme Court imposed severe restrictions both on the father and his life partner. The child was not to visit in the home shared by the father and his life partner if the life partner was there (where was he supposed to go?) and was not to have any visitation at all with the life partner present.[524] We must bear in mind that the life partner had co-parented the child with the gay father over the previous five years.

Think of the many child custody cases, in a nongay context, where continuity and stability are stressed. Think of the decisions which turn on which custodian is the psychological parent. Think of the decisions which automatically defer to the trial court as the best observer of the best interests of the child. Think of *Stanley v. Illinois*[525] wherein the Supreme Court emphasized the importance of the family[526] and held that all parents are entitled to due process in this area.[527] *Stanley* forbade the use of conclusive presumptions against parents.[528] None of these basic issues of child custody appear in the *Roe* opinion. How can it be in the best interests of this lively, intelligent, outgoing nine-year-old child to remove her from her home of five years, forbid her to see one of her primary caretakers, and severely restrict visitation with her other primary caretaker, her natural father?

The 1980's cases from the courts of the southern and central United States generally approach gay parent cases from a position of overt homophobia. The rules have, time and again, been bent to enforce the morals and fears of the bench as they relate to parents and children. On one hand, if the trial court has found against the gay parent, then the appellate court decides it cannot interfere because of the strong policy of setting aside the judgment of the court theoretically best able to judge the participants. On the other hand, if the trial court has allowed a gay person to keep or visit his or her child, then the appellate court finds a clear abuse of discretion. Uncontroverted evidence of no harm is ignored. Experts are relied upon, not based on the level of their knowledge, but based on how closely their prejudices conform to those held by the court. Often judges consider, *sua sponte*, issues raised by neither party. No judge seems to consider the trauma to the child of his or her removal from a custodial parent who happens to be gay. Does this happen because judges actually believe gay people

523. *Id.* at ____, 324 S.E.2d at 693–94.
524. *Id.* at ____, 324 S.E.2d at 694.
525. 405 U.S. 645 (1972).
526. *Id.* at 651.
527. *Id.* at 658.
528. *Id.* at 657–58.

are more likely to molest their children? In trial after trial, experts have attempted to destroy this myth with hard evidence to the contrary. Does this happen because judges really believe that the child will become gay through association? Again, in trial after trial, expert testimony has disproved this myth. Does this happen because judges really believe that peer-inflicted teasing will emotionally destroy the child? Are children removed from interracial homes, Amish homes, or Moonie homes for such reasons? One New Jersey judge stated that the only effect he could predict would be that children of gay parents would grow up to be more tolerant people.[529] One cannot forget the trial court judge in *Jacobson* who said he had reviewed all the cases and found them to fall into two categories: courts which held against gay parents without a reasoned explanation and courts which decided through the use of expert witnesses that the issue was irrelevant.[530]

The 1980's cases from the northeastern section of the country differ significantly from the cases previously described.[531] In 1980, a Delaware family court awarded custody to a lesbian mother and imposed no restrictions on her living arrangement with another woman. The case, *DeBoise v. Robinson*,[532] did not involve a contest between two natural parents but rather a contest between a lesbian mother and her parents.[533] The grandparents sought custody of their grandchild alleging that the mother was irresponsible. The court characterized the allegation as being based "largely on the differing life styles of the parties: namely, the grandparents are devout and fundamental Christians and the mother is not and, in addition, her sexual preference is female."[534] The hearing involved substantial expert testimony and substantial testimony by social service agencies which investigated the situation. The court followed the recommendations of the experts and made little reference to the mother's sexual orientation.

---

529. *See* M.P. v. S.P., 169 N.J. Super. 425, 438, 404 A.2d 1256, 1263 (1979) (Antell, J.).

530. *See Jacobson*, 314 N.W.2d at 79 (N.D. 1981). *See also supra* text accompanying note 462.

531. Two cases dealing with alleged parental neglect in which lesbianism was an issue occurred in Pennsylvania in 1981. One case was *In re* Jones, 286 Pa. Super. 574, 429 A.2d 671 (1981), where the mother's lesbian relationship with a "male impersonator" was at issue. No discussion of the relationship is found in the opinion; the case essentially focuses on an evidentiary question. The second case is somewhat more relevant. *In re* Breisch, 290 Pa. Super. 404, 434 A.2d 815 (1981), dealt with the parental neglect by a mother who was described as affecting a masculine appearance, wearing men's clothing, and having a masculine-oriented marital status. *Id.* at ____, 434 A.2d at 817. This author questions whether the mother was a lesbian. More likely, she was a female to male transsexual. The case has so many issues other than the sexual relationship of the mother that the author does not categorize this case as a gay custody case.

532. No. C-9104 (Del. Fam. Ct., New Castle County Nov. 17, 1980).

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

534. *Id.*

A similar result occured in *Medeiros v. Medeiros*,[535] decided in Vermont in 1982. The lesbian mother in *Medeiros* was awarded custody of the children, and no restrictions were placed on her relationship. The court found specifically that no evidence existed that the mother's relationship had any negative effect on the children. The court relied upon expert testimony that all the research on the subject indicated that children living with a parent having a homosexual relationship have no greater risk of suffering adjustment or psychological disorders than do children living with a parent in a heterosexual relationship.[536] One interesting facet of this case was the appointment of a separate attorney to represent the children's interests. When the children's attorney filed his report supporting custody in the mother, the father sought to have the attorney dismissed as prejudiced. The court denied the father's motion and placed great weight on the conclusions of the children's attorney. The court did make one finding directly as a result of the sexual orientation issue. The court gave the father permission to reopen the custody issue without showing a change of circumstances. The court said because the research cited by the expert was scant, a method was needed to provide for a later review of the situation.[537]

Approximately two years later, the father did attempt a custodial change. One of the father's charges was that the mother had lied. She claimed to have informed the children of the nature of her relationship with her lover. The father stated that he told the children of their mother's sexual orientation and that the relationship was the cause for the divorce. He maintained he did this because "it was unwise to keep family secrets" from the children. The father's second main allegation was that since he had married the woman with whom he had been cohabitating, they could now provide a better home. The mother moved to dismiss the father's motion for change of custody. The dismissal motion was granted in a thirteen-minute hearing.[538] One can assume that the court did not find present harm to the children.

In the neighboring state of Maine, a gay father won a significant visitation battle. In *Stone v. Stone*,[539] the trial court had denied the father overnight visitation rights with his two daughters unless "his boyfriends" were not present. The appellate court reversed, finding that

---

535. No. 5196-80BC (Vt. Super. Ct., Bennington County Mar. 31, 1982).

536. *Id.*, slip op. at 8.

537. *Id.*, slip op. at 15.

538. *See* Judge's Activity Log, Medeiros v. Medeiros, No. 5196-80BC (Vt. Super. Ct., Bennington County Nov. 26, 1984).

539. No. 79-141 (Me. Super. Ct., Knox County July 15, 1980), *rev'g*, No. 71-2-D111 (Me. Dist. Ct., Knox County July 26, 1979).

the trial judge's restriction constituted an abuse of discretion.[540] The Maine court arrived at that conclusion in the following fashion. First, visitation was defined as an aspect of custody. The court then noted that the right of a parent to the care and companionship of his children is a "fundamental right."[541] This parental right is an element of the best interests of the child because the right of the parent produces a concomitant benefit to the child. The court saw that because a custody contest only forces a choice as to a *better* parent, custody issues do not confront the constitutional issues as often as visitation issues do. A restriction in visitation cuts a parent off from the care and companionship of the child. According to the Maine court, denial of visitation should occur only in extreme circumstances, namely, clear physical danger. Even parents who have been incarcerated for violent crimes are often permitted to see their children. The Maine court's review of the law concluded with the observation that "courts generally hold that the sexual behavior or preferences of the parents do not *per se* make them unfit as parents nor require deprivation or limitation of visitation."[542] However, the sexual behavior of the parent is one element of a child's environment that should be considered. The Maine court indicated that "courts may not simply impose their own moral judgments on the lifestyle of the parents."[543] The Maine rule is as follows: "Before parental rights are restricted, there must be a finding in each case, based upon evidence presented, that the particular conduct of the parent is having or will have a deleterious impact upon the particular child or children."[544] The court specifically ruled out decisions based on speculation, stating, "The issue is not the possible effect of homosexuality, generally, but of appellant's specific homosexual behavior in so far as it affects the character of the environment to which the girls were, or would be exposed."[545] Looking at the record, the appellate court found that the trial court had made its decision "based on its personal dislike of the father's sexual behavior."[546] That being the case, coupled with no showing or finding of adverse effect on the children, the appellate court reversed and remanded.

The *Stone* case, unlike the southern or central states' decisions, took note of the constitutional arguments implicit in custodial decisions. Further, the court applied a strict nexus test—harm must be

---

540. *Id.*, slip op. at 4.
541. *Id.*
542. *Id.*
543. *Id.*
544. *Id.*
545. *Id.*, slip op. at 5.
546. *Id.*

shown before a restriction can be imposed. Finally, the court recognized that visitation arrangements are custodial decisions and should be judged by custodial standards.

In 1980, New Jersey was the scene of two custody cases involving mothers who were living with each other. The cases are somewhat reminiscent of the *Schuster-Isaacson* cases[547] from Washington but even more reminiscent of the Oregon *Koop-Driber* cases.[548] In *Belmont v. Belmont*,[549] the father sought a change of custody from the mother on two grounds: First, that the children would live a better life in his suburban home than in his former wife's city home and, second, that the mother was living in a gay relationship with Margaret Wales. Wales also had two children. The judge said he refused to argue the merits of one locale over another. The mother had expert testimony from Dr. Richard Green, a well-known authority in gay custody and sexual development in children. The judge relied extensively on Dr. Green's testimony. The judge concluded that the mother's sexual orientation was only one of many factors to be considered,[550] taking his approach from the 1979 New Jersey case of *M.P. v. S.P.*[551] which held that deciding a case on the basis of the parent's sexual orientation was impermissible.[552] In *Belmont*, the judge characterized the situation as follows: "The children are doing well in every respect and are being raised in a loving, though unconventional home."[553] The court did say that "everything being equal," a heterosexual home was preferred. However, everything was not equal. The judge found the father's case so woefully weak that his good faith in even bringing the action was at issue. Consequently, the court ordered him to pay a portion of the mother's attorney fees.

While Rosemary Dempsey Belmont was fighting off her ex-husband's attempt to change custody, her lover Marjorie Wales was fighting a similar battle in another county. *Silverweig v. Wales*[554] never resulted in a written opinion, as the parties settled. However, the

---

547. The *Schuster-Issacson* cases were heard on consolidation. *See* Schuster v. Schuster, Nos. D-36867, D-36868 (Wash. Super. Ct., King County Dec. 22, 1974), *aff'd in part*, 90 Wash. 2d 626, 585 P.2d 130 (1978).

548. *See* Koop v. Koop, No. 221097 (Wash. Super. Ct., Pierce County Sept. 17, 1973), *aff'd mem.*, 16 Wash. App. 1006 (1976); Driber v. Driber, No. 220748 (Wash. Super. Ct., Pierce County Sept. 17, 1973). For an in-depth discussion of the *Schuster-Isaacson* and *Koop-Driber* cases, see Rivera I, *supra* note 1, at 894, 898–900.

549. 6 FAM. L. REP. (BNA) 2785 (N.J. Super. Ct., Hunterdon County July 22, 1980).

550. *See id.*

551. No. M-16937-74 (N.J. Super. Ct., App. Div. July 23, 1979).

552. *Id.*, slip op. at 4.

553. *Belmont*, 6 FAM. L. REP. (BNA) at 2785–86.

554. Silverweig v. Wales, although not officially reported, was made public in newspaper accounts. *See* The Advocate, Aug. 20, 1981, at 5; Gay Community News, July 11, 1981, at 1.

settlement was, according to Wales and her lawyers, forced on her by the court. The final arrangement was a joint custody agreement with the two children living with their father during the week but visiting their mother three out of four weekends. Newspaper accounts indicate that the trial focused almost exclusively on Marjorie Wales' sexual orientation. Moreover, the newspaper accounts attribute the forced settlement to the pressure placed on the lesbian mother by the trial judge. The startling facts are that the *Belmont* decision and the *Wales* result occurred in the same state in counties that are separated by a few mere miles.

Two cases put New York at the forefront of providing equal treatment of gay parents and nongay parents. In this article and in previous ones, the author has reported seven New York cases. The *Mara* and *Fleischer* cases,[555] coupled with *In re Jane B.*,[556] decided in 1976, put New York among those state courts which view the homosexuality of the parent as pathological. Recent New York cases have, however, taken a more progressive viewpoint. In *Smith v. Smith*,[557] decided in 1977, the court stressed that "a causal connection between lesbianism and its adverse effect upon the child should be shown."[558] In *DiStefano v. DiStefano*,[559] the New York appellate court noted the trial court's holding that a parent's sexual orientation does not render him unfit per se.[560] In *Werneburg v. Werneburg*,[561] a New York family court paid lip service to the rule that sexual orientation does not render a parent unfit per se, but the decision nonetheless went contrary to the gay parent. In 1979, a New York family court held that being gay does not render a parent unfit per se and that a causal connection (nexus) should be shown between sexual orientation of the parent and an adverse effect on the child.[562]

In *Guinan v. Guinan*,[563] a New York appellate court left primary physical custody with a mother accused of homosexuality. While in one sense the case is not a gay custody case because the mother denied being a lesbian, the language of the court will prove extremely helpful

555. For a discussion of these cases, see *supra* text accompanying notes 376–77 & 388–90 and accompanying text.

556. 85 Misc. 2d 515, 380 N.Y.S.2d 848 (Sup. Ct. 1976). For a discussion of *In re Jane B.*, see Rivera I, *supra* note 1, at 896–97.

557. 3 FAM. L. REP. (BNA) 2692 (N.Y. Fam. Ct., Richmond County Sept. 13, 1977).

558. *Id.* at 2693.

559. 60 A.D.2d 976, 401 N.Y.S.2d 636 (1978).

560. *Id.*, 401 N.Y.S.2d at 637.

561. 6 FAM. L. REP. (BNA) 2280 (N.Y. Fam. Ct., Rensselaer County Jan. 29, 1980).

562. Armanini v. Armanini, 5 FAM. L. REP. (BNA) 2501 (N.Y. Super. Ct., Nassau County Feb. 16, 1979).

563. 102 A.D.2d 963, 477 N.Y.S.2d 830 (1984).

to gay parents in the future. The court stated:

> [W]hether defendant had sexual relationships with other women is not determinative . . . . A parent's sexual indiscretions should be a consideration . . . only if they are shown to adversely affect the child's welfare. Specifically, the mere fact that a parent is a homosexual does not alone render him or her unfit as a parent.[564]

Gottlieb v. Gottlieb,[565] decided in 1985 by the New York Supreme Court, Appellate Division, represents a break-through case in gay custody cases. At the trial level, the gay father not only lost custody of his minor daughter but had severe restrictions imposed upon visitation with his daughter. The restrictions were:

> "[1] that the defendant's visitation privileges at his home are conditioned upon the total exclusion of his lover or any other homosexuals during such visitation periods . . . [2] that the defendant's visitation privileges not limited to his home are conditioned upon the total exclusion of his lover and any other homosexuals from any contact with defendant and child . . . [3] that during defendant's periods of visitation the child will not be taken to any place where known homosexuals are present nor will defendant involve the child in any homosexual activities or publicity."[566]

In theory, Richard Gottlieb could visit with his daughter in his home on alternate weekends from late-Friday afternoon until early evening on Sunday and could have visitation during the month of July, not limited to his home. However, since he and his life partner shared a home, the restrictions meant that the other man would have to leave his home every other weekend. The life partner was quite well-known to the daughter because during the appeal, she visited in their home regularly.

The court left custody with the mother, but both the dissenting and the majority opinions called the decision "close." On appeal, the five appellate judges all agreed on the deletion of restrictions 1 and 2, quoted above, as well as all of 3, except for the portion providing, "nor will the defendant involve the child in any homosexual activities or publicity."[567] Judge Kupferman said that such restrictions served "no real purpose other than as a punitive measure against the father."[568]

---

564. *Id.* at 964, 477 N.Y.S.2d at 831 (citations omitted).

565. 108 A.D.2d 120, 488 N.Y.S.2d 180 (1985).

566. *Id.* at ____, 488 N.Y.S.2d at 181–82 (citation omitted in original).

567. *See id.* at ____, 488 N.Y.S.2d at 181 (Fein, J.); *id.* at ____, 488 N.Y.S.2d at 182 (Kupferman, J., concurring); *id.* (Kassal, J., concurring); *id.* at ____, 488 N.Y.S.2d at 183 (Sandler, J., dissenting).

568. *Id.* at ____, 488 N.Y.S.2d at 182 (Kupferman, J., concurring). Judge Kupferman was puzzled as to why the National Organization for Women should file an amicus brief:

> Understandably, the father's position is supported by an amicus curiae brief from

Judge Kasal, one of the three judges who left standing the partial restriction in 3, quoted above, said in his concurring opinion that the restriction applied equally to heterosexual activity.[569] Judge Sandler, who along with Judge Carro, would strike all the restrictions, said no evidence was introduced that indicated the defendant father would involve his daughter in inappropriate activities, and therefore the restriction was unnecessary. Judge Sandler characterized the situation as follows:

> Nonetheless, given the central reality that we are considering an issue between two worthwhile, responsible, moral people, one of them a homosexual and the other a heterosexual, the unpleasant connotation inherent in the special restriction on one and not the other seems to us sufficient to justify deleting this particular restriction precisely as we have all agreed to strike the other restrictions.[570]

The *Gottlieb* case represents a logical trend in New York case law. *Bezio v. Patenaude*,[571] a landmark case decided by the Massachusetts Supreme Judicial Court, does not, however, have such historical antecedents.[572] *Bezio* is a case in which the natural parent was opposed by a third party, the children's guardian. The natural parent seeking custody in this case was a lesbian whose household included her life partner. The probate judge awarded custody to the guardian even though uncontradicted evidence established that a parent's sexual orientation per se is irrelevant to the "parent's ability to provide necessary love, care, and attention to a child."[573] The trial judge, relying on his own beliefs rather than the evidence, concluded that a lesbian household " 'creates an element of instability that would adversely [a]ffect the welfare of the children.' "[574] The supreme judicial court reversed and

---

LAMBDA Legal Defense & Education Fund. Strangely, it is also supported by the NOW . . . Legal Defense and Education Fund. While the similarity to the problem for lesbians detailed in *DiStefano v. DiStefano* may certainly arouse their interest, I doubt if the majority of NOW members would object to the provision in [3] above, which the dissent mistakenly would excise from the decree, that the father will not "involve the child in any homosexual activities or publicity."

Id. (citation omitted). Although the judge was puzzled, this author is not. NOW recognizes the linkage between sexual stereotyping and oppression, as was made clear in a resolution passed at the 1981 NOW Conference, which stated in part: "WHEREAS, there is a continuing need for consciousness-raising among our members about the undeniable relationship between lesbian rights and feminism, THEREFORE BE IT RESOLVED that NOW increase action and public education at all levels of the organization on lesbian rights." 14 NOW, Oct. 1981, at ____.

569. *Gottlieb*, 108 A.D.2d at ____, 488 N.Y.S.2d at 182 (Kassal, J., concurring).

570. *Id.* at ____, 488 N.Y.S.2d at 183 (Sandler, J., dissenting).

571. 381 Mass. 563, 410 N.E.2d 1207 (1980). *See* Note, *Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1981).

572. This author has not reported in the past on any Massachusetts gay custody cases and is unaware that any other cases exist prior to 1980.

573. *Bezio*, 381 Mass. at 569, 410 N.E.2d at 1211.

574. *Id.* (citation omitted in original).

remanded the case, stating that the trial judge's finding was without basis in the record.[575]

The expert evidence in *Bezio* was particularly strong. The main witness, a clinical psychologist and professor of psychology, testified: " 'There is no evidence at all that sexual preference of adults in the home has any detrimental impact on children . . . .' "[576] The expert witness further testified that " '[t]here is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, maladjusted than children raised with a loving couple of mixed sex.' "[577] According to both the plaintiff's expert witness and the defendant's expert witness, sexual orientation of the parent is an *irrelevant* factor with regard to parenting skills and the mental health of the children.[578]

Not only did the Massachusetts court find that the trial judge had abused his discretion by substituting his own beliefs for uncontradicted evidence, even more importantly, the highest Massachusetts court warned jurists not to impose their personal viewpoints on unconventional households. The court asserted that "[t]he State may not deprive parents of custody of their children 'simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average.' "[579]

While *Bezio* is indeed a landmark case, it is not a custody case arising between two natural parents as a result of a divorce. The case involved a natural parent versus a guardian. Therefore, the standard used was not the best interests of the child but rather the stricter "fitness of the parent" standard. The court placed great emphasis on the natural bond between child and parent. The question which resulted for gay custody litigators[580] was whether the *Bezio* rule would apply in divorce cases. The case of *Doe v. Doe*[581] answered that question in the affirmative. In *Doe*, the Massachusetts Appeals Court upheld a trial court's joint custody decision where the mother was a lesbian and involved in a relationship. The appellate court, specifically relying on *Bezio*, stated that the principle of *Bezio* does apply to a divorce situa-

575. *Id.* at 580, 410 N.E.2d at 1216.

576. *Id.* at 578, 410 N.E.2d at 1215.

577. *Id.*, 410 N.E.2d at 1215–16.

578. *Id.* at 578–79, 410 N.E.2d at 1216.

579. *Id.* at 579, 410 N.E.2d at 1216 (quoting Custody of a Minor (No. 2), 378 Mass. 712, 719, 393 N.E.2d 379, 383 (1979)).

580. The Gay and Lesbian Advocates and Defenders (GLAD) and the American Civil Liberities Union (ACLU) were amici curiae on *Bezio*.

581. 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983).

tion.[582] The court stated that "a parent's life-style must be evaluated 'in terms of the interpersonal relationships of the persons involved as they affect the well being of the children . . . .' "[583] The court relied on the expert testimony of four psychiatrists. The court, discounting the psychiatrist who testified adversely with regard to the effect of sexual orientation on the child, found that he was not credible because " 'he had no supporting studies and his exposure to single parent lesbians was limited.' "[584] The three other psychiatrists all testified that the mother's life-style would not adversely affect the child. One psychiatrist introduced into evidence a study he had conducted showing that no differences exist in children raised by gay parents as opposed to children raised by nongay parents.

Thus, the *Doe* court, relying on *Bezio*, left standing a joint custody arrangement for a lesbian mother. Taken together, *Doe* and *Bezio* portend the end of judicial discrimination against gay parents in Massachusetts.

The east coast states are not the only states that have judicially adopted a more progressive attitude toward gay parents. In several of the western and west coast states, gay parents have achieved success in custody battles. Both Colorado cases previously reviewed by this author resulted in favorable decisions for the gay parent.[585] *Mueller v. Mueller*,[586] however, did not continue that trend. The trial judge in *Mueller* awarded the two children to their nongay father.[587] The trial judge specifically ignored the recommendations of experts, stating that "[t]he court is not bound by the testimony of experts . . . ."[588] The judge formed his own opinion, "I think the homosexuality of the mother is severe now, with the oldest child being age ten and can't help become more severe as the children go into puberty . . . ."[589] The judge found the mother to be a fit custodian, and no finding was made of any adverse effect on the children. The case was appealed, with both Lambda Legal Defense and ACLU filing amicus briefs. In an unpublished decision, the appellate court upheld the trial court's award.[590] In essence, the court focused on the deference which should be paid to the trier of

582. *Id.* at ____, 452 N.E.2d at 296.
583. *Id.* (quoting Fort v. Fort, 12 Mass. App. Ct. 411, 415, 425 N.E.2d 754, 759 (1981)).
584. *Doe*, 16 Mass. App. Ct. at ____ n.2, 452 N.E.2d at 296 n.2.
585. *See* Peterson v. Peterson, No. D-66634 (Colo. Dist. Ct., Denver County May 3, 1978); *In re* Hatzantopolis, 4 FAM. L. REP. (BNA) 2076 (Colo. Juv. Ct., Denver County Dec. 6, 1977).
586. No. 79-DR-1246 (Colo. Dist. Ct., Jefferson County Mar. 27, 1980), *aff'd*, No. 80-0392 (Colo. Ct. App. Nov. 19, 1981).
587. *Id.*, slip op. at 5.
588. *Id.*
589. *Id.*
590. Mueller v. Mueller, No. 80-0392 (Colo. Ct. App. Nov. 19, 1981).

fact. However, the appellate court also concluded that the trial court had found a nexus between the mother's conduct and the best interests of the children.[591] A review of the trial court record, however, reveals no such nexus. The mother unsuccessfully sought review from the Colorado Supreme Court. Interestingly, neither the trial court nor the appellate court imposed restrictions of any kind on the mother's visitation.

Probably the most notorious case in recent years, *Batey v. Batey*,[592] was partially heard in a Colorado court, although it was finally decided in California.[593] The *Batey* case began in California where Frank and Betty Batey were divorced. In the original decree, Betty was given custody, and Frank was granted liberal visitation. In September, 1982, the California court changed custody from Betty to Frank because Betty had repeatedly denied Frank his visitation rights. The court also ordered the parties to go into therapy with their son, Brian. Two weeks into the new custody arrangement, Betty took Brian for a weekend visitation and never returned. For the next nineteen months, Frank did not see his son.[594] Eventually Betty was found in Denver, Colorado. She was ordered to produce the child for the court; she refused, was found in contempt, and was jailed. The young son then turned himself in so that his mother might go free. What caused such a battle over a child? Betty was an extremely zealous member of the Pentecostal church; Frank was gay.[595]

When Brian turned himself into the authorities in Denver, he was placed in a neutral setting and evaluated. The Colorado court then honored the valid California decree and returned Brian to the Child Stealing Unit of San Diego, California. In California, Brian was again placed in a neutral milieu, and his case brought before the superior court.[596] The decision rendered on November 21, 1984 by Judge Judith McConnell of the superior court illustrates neutrality and fairness towards the gay parent. The issue before the court was a motion for change of custody from Frank to Betty. The court looked to see if a change of circumstances had occurred. The judge noted that Frank had not changed in his situation: he had the same house, the same "companion," and the same love for his son. Betty, too, was the same, said the judge, including her harsh attitudes toward Brian visiting his fa-

---

591. *Id.*, slip op. at ___.

592. No. 84-DR001745 (Colo. Dist. Ct., Denver County May 7, 1984).

593. Batey v. Batey, No. D162395 (Cal. Super. Ct., San Diego County Sept. 22, 1982).

594. Verified Petition for Enforcement of California Custody Decree at 1, Batey v. Batey, No. 84-DR001745 (Colo. Dist. Ct., Denver County Apr. 13, 1984).

595. *Id.* at 2.

596. Letter from Larry A. Sinnett, Denver Child Protection Agency caseworker, to Judge Reed, Denver, Colo. (May 3, 1984) (reporting Brian's new location in California).

ther. The real change, said the judge, was in Brian. The court found that although he had aged physically, Brian had regressed intellectually, academically, and emotionally. Moreover, his views against his father had become entrenched. The judge found that many of the changes in Brian were a direct result of his mother's actions. The judge acknowledged that reopening the custody issue because of the mother's wrongful actions would be inequitable to the father; however, she felt bound to do so in order to protect the child's best interests.[597]

Where was Brian to be placed? He could not be placed with his father, said the court, because his ideas against his father were now so deeply entrenched that he probably would run away. The court said Mrs. Batey could not have custody "because despite all of the overwhelming evidence . . . of Brian's need for his father, she has willfully deprived the child of contact with him. She has not taught him to hate the sin, love the sinner, but . . . has consistently communicated her wish to Brian that he have no relationship with his father."[598] Moreover, the court noted that not only was Mrs. Batey unwilling to provide Brian with therapy, but she also failed to provide Brian with an education during the nineteen months he was missing. In addition, the court indicated that Mrs. Batey had treated Brian inappropriately, turning him into her male protector. The judge decided that Brian would be in "grave danger" of even greater emotional harm if returned to his mother. The judge ordered custody to a neutral foster home. Each parent was to have equal visitation. The father's visitation would be unsupervised, and the mother's visitation would be unsupervised so long as she encouraged Brian's visitation with his father. The judge ordered Brian back into therapy and into a special school to restore his educational skills. Mrs. Batey was ordered not to disparage her ex-husband or his lifestyle, and Mr. Batey was ordered not to disparage his ex-wife or her religion. The judge told Mr. Batey he had to learn to acknowledge Brian's religious beliefs. Finally, speaking of Frank's life partner, the judge said he presented no "danger to the child and he, of course, may be present at . . . visits."[599] The *Batey* case made no new case law[600] but generated national media attention on the issue of the sexual

---

597. Batey v. Batey, No. D162395, slip op. at 4 (Cal. Super. Ct., San Diego County Sept. 22, 1982).

598. *Id.*, slip op. at ___.

599. *Id.*, slip op. at 11.

600. California case law previously discussed by the author includes: Chaffin v. Frye, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); *In re* Tammy F., No. 32648 (Cal. Ct. App., Sonoma County Aug. 21, 1973), *reported in* 2 WOMEN'S RIGHTS L. REP., Dec. 1974, at 21; Jullion v. Ceccarelli, No. 49874-4 (Cal. App. Dep't Super. Ct., Alameda County June 8, 1977); *In re* Deana P., No. 10747-J (Cal. App. Dep't Super Ct., Sonoma County July 12, 1973), *reported in* 2 WOMEN'S RIGHTS L. REP., Dec. 1974, at 21; Mitchell v. Mitchell, No. 240665 (Cal. App. Dep't

orientation of a parent.[601]

The state of Washington was the scene of the famous *Schuster-Isaacson* cases which for a long period were the most famous of the lesbian mother cases. The cases became immortalized in a film and a book on lesbian parenting.[602] However, *Schuster-Isaacson* never squarely faced the issue of sexual orientation in custody decisions. In *Cabalquinto v. Cabalquinto*,[603] the Washington Supreme Court, sitting en banc, almost faced the issue. Although the court established guidelines, it remanded the case to the trial court rather than reversing the case outright.[604] The Cabalquintos were divorced in Colorado with custody of the minor child going to the mother and liberal visitation to the father. Shortly after the decree was issued, the mother moved to Washington, and the father moved to California. Approximately four years after the divorce decree, the father decided he wanted his son to visit him in California, but the mother refused to permit the visit. The father filed a motion in a Washington state court to enforce the liberal visitation rights granted him under the Colorado decree. The trial judge refused to grant visitation in California, and the father appealed.[605]

The Washington Supreme Court said that, normally, decisions of trial judges are not disturbed unless the judge has abused his discretion. The supreme court pointed out, however, that the fact Ernest Cabalquinto was gay raised the issue of an abuse of discretion in this case. No evidence indicated that visitation in California would be harmful, nor was there a finding that the child was endangered. The court admitted that the trial judge had made some "unfortunate and unnecessary references . . . to homosexuality . . . ."[606] The supreme court stated that, as a matter of law, "homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation."[607] The court emphasized that "[v]isitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the par-

---

Super. Ct., Santa Clara County June 8, 1972); Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); Zimmerman v. Zimmerman, 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (1959). *See* Rivera I, *supra* note 1, at 883-904.

601. *See, e.g.*, Columbus Dispatch, Nov. 22, 1984, at B1; Gay Community News, Nov. 10, 1984, at 2; The Advocate, May 29, 1984, at 11; Columbus Citizen-Journal, May 2, 1984, at 1; N.Y. Times, Apr. 25, 1984, at 11; N.Y. Times, Apr. 18, 1984, at 11.

602. *See* Rivera I, *supra* note 1, at 898 n.604.

603. 100 Wash. 2d 325, 669 P.2d 886 (1983).

604. *Id.* at 329, 669 P.2d at 888.

605. *Id.* at 327, 669 P.2d at 887.

606. *Id.* at 328, 669 P.2d at 888.

607. *Id.* at 329, 669 P.2d at 888.

ent."[608] Moreover, the court warned that visitation privileges are not to be used to penalize parents for their conduct. Having established the guidelines, the court remanded to the trial court. The majority chose to remand because they were unable to determine whether clear abuse of discretion occurred.[609]

One of the concurring judges castigated his colleagues for not having reversed. Justice Stafford observed that "[a]n examination of the record below leaves no doubt that the trial judge allowed his declared views on homosexuality to color his evaluation of the evidence."[610] Stafford accused the majority of sweeping the problem under the rug. Stafford asserted that nothing could be gained by remanding the case to a judge "who clearly relied on his own personal views to arrive at incorrect reasons for the ultimate ruling."[611] Stafford would have reversed outright.[612] Regardless of the method used, the *Cabalquinto* court has placed Washington squarely in the group of states which prohibits the use of a parent's sexual orientation as a determinative factor against him or her.

Two Oregon cases should be noted: [613] *Rudhe v. Rudhe*[614] and *Finke v. Finke*[615] are both trial court decisions that resulted in clear victories for the lesbian mothers involved. In both cases, the lesbian mothers were represented by one of the nationally recognized experts of gay custody cases, Katherine English. *Rudhe* was initiated as a motion to change custody of three children from the mother to the father. The father focused on the mother's lesbianism and on the virtues of his new remarriage. The mother countered with expert testimony. She relied on Oregon law which mandates: "In determining custody . . . the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child."[616] The outcome was that custody remained with the mother,

608. *Id.*

609. *Id.*

610. *Id.* at 332, 669 P.2d at 889 (Stafford, J., concurring & dissenting).

611. *Id.* at 334, 669 P.2d at 891.

612. *Id.*

613. Two other Oregon cases have been previously discussed by this author: Ashling v. Ashling, 42 Or. App. 47, 599 P.2d 475 (1979) (appellate court removed harsh restrictions on lesbian mother's visitation rights); O'Harra v. O'Harra, No. 73-384E (Or. Cir. Ct., 13th Jud. Dist. June 18, 1974) (custody taken from lesbian mother), *aff'd. sub. nom.*, O. v. O., 20 Or. App. 201, 530 P.2d 877 (1975). *See* Rivera II, *supra* note 1, at 333–34 (discussing *Ashling*); Rivera I, *supra* note 1, at 884–85 (discussing *O'Harra*). *See also* A. v. A., 15 Or. App. 353, 514 P.2d 358 (1973) (gay father retained custody).

614. No. D8104-62623 (Or. Dist. Ct., Multnomah County May 4, 1982).

615. No. 81-7-158 (Or. Dist. Ct., Clackamas County Jan. 25, 1983).

616. OR. REV. STAT. § 107.137(4) (1985).

and the court ordered the father's child support payments to be increased.

Finke was tried on a motion by the lesbian mother to modify a joint custody arrangement to custody in herself. The court awarded custody to the mother. The father was ordered to pay child support and the mother's legal fees. In the author's mind, both these cases represent the genre of cases where the nongay parent's lawyer believes all that is needed to achieve a victory is to cry "lesbian" in the courtroom. Certainly, this tactic has won in some instances, but when the gay parent is represented by a lawyer familiar with gay custody cases and strategy, the result is often the unexpected. Defending a gay parent is an expensive proposition because of the absolute need for expert witnesses. In *Rudhe*, the lesbian mother asked that the ex-husband be ordered to pay for these extra costs incurred to combat homophobia. She was awarded attorney fees.[617]

May, 1985, brought a case of first impression before the Alaska Supreme Court. In *S.N.E. v. R.L.B.*,[618] a nongay father sought to change the custody of his child from the mother, a lesbian in an ongoing relationship, to himself. The trial court awarded custody to the father. However, the supreme court dictated a nexus requirement for use in child custody cases, ruling that the scope of judicial inquiry was limited to facts directly affecting the child's well being.[619] Thus, a nexus must exist between the parent's conduct and the parent-child relationship. The father maintained on appeal that the mother's sexual orientation had not been the issue. The court held otherwise, stating a taint existed throughout the record. The court commented, "[I]n marked contrast to the wealth of testimony that Mother is a lesbian, there is no suggestion that this has or is likely to affect the child adversely."[620]

The Alaska Supreme Court also held that "it is impermissible to rely on any real or imagined social stigma attaching to the mother's status as a lesbian."[621] For this proposition, the court cited the recent United States Supreme Court case of *Palmore v. Sidoti*.[622] *Palmore*, which reversed a lower court decision that had removed a child from an interracial home, provided statements by the Court which not only fit the interracial situation but the gay custody situation as well.[623] The

617. *Rudhe*, No. D8104-62623, slip op. at 3.
618. No. S426 (Alaska Sup. Ct. May 10, 1985).
619. *Id.*, slip op. at ___
620. *Id.*, slip op. at ___
621. *Id.*, slip op. at ___.
622. 466 U.S. 429 (1984).
623. *See infra* text accompanying note 625.

Alaska Supreme Court determined that the trial court, in changing custody to the father, had conjectured that the mother's gay relationship might be unstable and cause possible adverse effects. The court rejected this conclusion, stating that the trial court had relied on its own unsupported opinion about homosexual relationships, and consequently, the case was remanded.[624]

The Alaska case brings together two themes which occur throughout many gay custody cases and resolves the issues in a method which treats in a neutral fashion the sexual orientation of the parent. First, litigators have fought long and hard to prevent the use of conclusive presumptions about gay parents. Although the obvious goal is to have sexual orientation be irrelevant, the short term resolution is to require the opposing party to show a nexus between the parent's sexual orientation and a proven adverse effect. The Alaska case does exactly that. The second theme is the charge that the stigma of their parent's sexual orientation will cause children to be harassed and will thus result in emotional damage to the child. Gay parents have, by expert testimony, proven time and time again that gay parents are not child molesters, that children do not become gay because their parents are gay, and that being gay does not adversely affect parenting skills. Lastly, in answer to the many cases in which the restrictions have been placed on the households of gay parents by mandating exclusion of their life partners, studies now show that a loving couple of the same gender does no harm to the children. In fact, having two parental figures, regardless of their gender, is beneficial. Yet one issue remains: the children will be teased.

Litigators on behalf of gay parents have tried various approaches to counteract this last charge. For example, gay parents point out that their children will still have a gay parent no matter who has custody. That may be true, said one court, but if the nongay parent has custody the issue will not be an everyday affair. Other litigators have attempted to introduce evidence that no teasing has occurred. That method did not remove the possibility of teasing in the future. Experts have testified that the potential harm of teasing really depends upon how the custodial parents handle the issue and support the children. All of these arguments fail to reach the real issue: why should the actions of intolerant people toward innocent children cause otherwise fit parents to lose custody of their children? *Palmore* answers that question and the Alaska court adopted that answer. As Chief Justice Burger stated:

---

624. *S.N.E.*, No. S426, slip op. at ___. A secondary issue in *S.N.E.* revolved around a "gag" order issued by the trial court judge. The Alaska Supreme Court found the order an overbroad restriction of free speech. *Id.*, slip op. at ___.

> There is a risk that a child living with a step parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[625]

The question is, of course, how long before the words "sexual orientation" can be substituted for race? At least in Alaska, the words have already been substituted and the analogy completed.

In summary, looking at the cases geographically, patterns of change exist. The cases argued in the ten years between 1970 and 1980 laid the groundwork for the successes of the 1980's. In those areas of the country where gay consciousness was sufficient to encourage parents to fight for their children in the 1970's, the results were often very harsh on the gay parent. Unfortunately those very personal losses were necessary to make today's victories possible. The main task of litigators on behalf of their gay clients in custody cases has been to educate the court. The myths and stereotypes surrounding gay persons have pervaded the bench as well as the public. Until judges could see gay mothers and fathers as distinct human beings, rather than as erotic monsters, few reasoned decisions were possible. Simultaneously, social and behavioral scientists have sought to answer the questions surrounding gay parenting. These studies, coupled with a better understanding of gay people in general, have led the courts to begin to see gay parents in a more balanced perspective. The author does not subscribe to a position that all gay men and women should be awarded their children in custody battles. Rather, the author's position is that in the determination of the fitness of a parent, same-sex or mixed-sex behavior is only relevant if a direct adverse effect on the child can be shown. When the author has spoken of gay victories, the victory is for the principle that sexual orientation should be a neutral factor in such decisions.

Aside from the education of the bench, the most significant factor contributing to changes in the law has been the development of a gay custody bar and through these litigators, the development of a litigation strategy for custody cases involving a gay father or a lesbian mother. This strategy has been discussed in a number of law review articles and most completely, in the *Lesbian Mother Litigation Manual* published

---

625. *Palmore*, 466 U.S. at 433 (footnote omitted).

by the Lesbian Rights Project.[626] Another source is Chapter 1:03 in *Sexual Orientation and the Law*.[627] One of the main purposes of such information is to convince attorneys who have never litigated a gay custody case that such a case is not a run-of-the-mill case. Too often, well-meaning family law attorneys attempt to litigate gay custody cases only to discover too late the complexities involved in such litigation.

While changes in the law are happening, the changes are taking place at a discriminatory cost to gay litigants. To educate the court, numerous experts are required and expert witnesses' fees mount up quickly. Usually, guardians ad litem are appointed, psychological examinations of all parties are ordered, and hearings are unusually long. Gay litigants must bear enormous costs merely to win an objective and neutral hearing. Obviously, the emotional costs are even higher. The time will come when the attorney for a nongay parent cannot simply walk into the courtroom and shout "homosexuality" and expect to win. When standards are neutral, divorcing parents, gay and nongay alike, can really achieve the best interests of their children.[628]

---

626. *See* D. HITCHENS, LESBIAN MOTHER LITIGATION MANUAL (1982).

627. *See* NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW (1982). *See also* C. ARTHUR & K. ENGLISH, AN EXPERT TESTIFIES IN A LESBIAN PARENTING CHILD CUSTODY CASE (1980); HARAMLAMBIE, HANDLING CHILD CUSTODY CASES (19__); WELLMAN, A THEORY OF RIGHTS (1985); ANTI-SEXISM COMMITTEE OF THE SAN FRANCISO-BAY AREA NATIONAL LAWYERS GUILD, A GAY PARENT'S LEGAL GUIDE TO CHILD CUSTODY (1978); Davies, *Representing the Lesbian Mother*, 1 FAM. ADVOC., Winter 1979, at 21; Hitchens & Price, *Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1978–79); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Lambe, *Handling Contested Custody Cases*, CASE & COM., July–Aug. 1983, at 2; Litwack, Gerber & Ferester, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269 (1979–80); Nacheman, *The Gay Parent: A Special Custody Case*, 1 OR. ST. B.F. 1 (1979); Annot., 36 A.L.R. 4th 997 (1985); Graham, Rand & Rawlings, Psychological Adjustment and Factors the Court Seeks to Control in Lesbian Mother Custody Trials (Sept. 4, 1979) (unpublished manuscript presented before the 87th Annual Convention of the American Psychological Association).

628. As stated by one commentator in summarizing the situation:

> The unknown quantity in this analysis, the effect of cohabitation on the child, is perhaps the most important. Society is changing so rapidly in the area of acceptable and normal family patterns that the results of any particular arrangement are unclear. However, one may safely conclude that a child is influenced by many forces besides his home. Heredity, peers, the media and society all influence the growing child. Therefore, the court should not place too much emphasis upon any one facet of the child's life. Rather than establishing a presumption that cohabitation of a custodial parent will wreak moral havoc, the court must look at the advantages and disadvantages offered by each party seeking custody. This required analysis will certainly make custody adjudications more difficult, but custody is an important decision deserving in-depth consideration. The result the court reaches, whether to leave the child with the cohabiting parent or to remove him, is not as important as fully analyzing the situation. The question in these kinds of cases is not one of abstract morality, but of the effect a custodial parent's health and character have on the child. If the child is happy, well-adjusted, and in a stable home and the cohabitation is having no obvious ill effect on him, it is in the child's best interest to remain with his

D. Gay Family

Unrecognized Families was the title given to comparable sections in previous articles.[629] The use of the title *Gay Family* emphasizes two significant changes in recent years. First, gay people, when forming family units,[630] are taking a more aggressive posture toward society and the legal system. They are actively seeking recognition for those family units. For example, in some cities gay persons have successfully lobbied for domestic partnership acts.[631] Second, lawyers representing such family units are seeking more sophisticated methods of protecting these units.[632] These lawyers also recognize that gay cohabitants do have aims and problems that differ from those of mixed-sex cohabitants. Nongay cohabitants can always marry to protect their units, should they so choose. Moreover, cohabitation by nongays, while some-

---

cohabiting parent.

Mendel, *Custody and the Cohabiting Parent*, 20 J. FAM. L. 697, 718–19 (1981–82) (citations omitted).

629. *See, e.g.*, Rivera I, *supra* note 1, at 904.

630. One of the myths about gay people is that they lead lonely, isolated lives, condemned to promiscuity. In a recent book, however, two commentators concluded that gay relationships and nongay relationships, and their variety, are more similar than diverse. *See generally* A. BELL & M. WEINBERG, HOMOSEXUALITIES (1978). They identify three major "classifications": close-coupled, open-coupled, and functionals. Close-coupled describes partners who are "closely bound together" and who "tend to look to each other rather than to outsiders" for sexual and interpersonal satisfactions. These couples, when compared to other classifications in the study, were the least likely to seek partners outside their special relationships, had the smallest amount of sexual problems, and were unlikely to regret being homosexual. Open-coupled are described as living with a special sexual partner but tending to seek satisfactions with people outside the partnership. In most aspects of their social and psychological adjustment, the open-couples could not be distinguished from the homosexual respondents as a whole. Functionals are described as closest to "swinging singles." They were least likely to regret being homosexual and were very involved in the gay world.

Even the *Crittenden Report*, a study done by the Navy in 1957, recognized that gay people often lived in long-term relationships. *See supra* note 330 and accompanying text. *See generally* L. FADERMAN, SURPASSING THE LOVE OF MEN (1981) (describing "Boston marriages," essentially unions, not necessarily sexual, between women).

631. In November, 1982, the San Francisco Board of Supervisors passed a "domestic partnership" ordinance, introduced by Supervisor Harry Britt. It was vetoed by Mayor Diane Feinstein in December, 1982. The measure would have required that officially declared domestic partners of gay city employees be given the same treatment in areas such as health insurance and bereavement leave that is accorded spouses of nongay employees. Gay Community News, Dec. 25, 1982, at 1. Berkeley, California became the first city to give unmarried employees' "domestic partnership" benefit coverage. The policy, fully effective in March, 1985, requires city workers seeking "domestic partnership" coverage to file an affidavit attesting that the partners are not married, that both share the common necessities of life, and that both are responsible for their common welfare. *See* 11 FAM. L. REP. (BNA) 1151, 1151–52 (Jan. 29, 1985).

632. *See* R. ACHTENBERG, SEXUAL ORIENTATION AND THE LAW (1985) (chapters 1–4 deal with family and property); H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES (1980) (contains information regarding the buying and selling of property, dealing with child custody and visitation, estate planning, and contractual "living together" arrangements).

what disapproved in society, can be assimilated as a trial run before the nuptials. Choosing to live together, for gay persons, often can lead to "talk" and thus blow their cover, i.e., their closet.

Many gay couples want to be legally married. They desire the symbolism and recognition of the marital relationship, and the financial and legal benefits enjoyed by married couples.[633] However, marriages between persons of the same sex are not legally recognized anywhere in the United States.[634] While many gay couples have been "married" in religious ceremonies, the religious validity of such ceremonies is not recognized by most denominations; the ceremonies are at the discretion of individual clergypersons who do not have the approval of the whole denomination.[635] The Unitarian-Universalists have officially approved such ceremonies.[636] The Metropolitan Community Church also officially approves of these ceremonies which are called Holy Unions.[637] Regardless of any religious significance, these ceremonies do not affect the couple's legal status.

Just as the law does not recognize the formation of these family units, the law also does not provide a mechanism for the dissolution of these units.[638] Hence, uncoupling can cause serious legal problems for which no specific remedy exists. For example, suppose a couple buys a home and takes title in both names. Years later, the couple breaks up. If the couple had no contract providing for this eventuality, how is the real estate divided? In a marriage, the divorce court can order a sale of

---

633. Desirable legal benefits include tax advantages when joint filing would be advantageous, recovery of damages for actions such as wrongful death, receipt of social security, military and veterans' benefits, and insurance coverage. *See* Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 389 n.379 (1984). *See also* Van Gelder, *Marriage as a Restricted Club*, MS., Feb. 1984, at 59.

634. *See* Rivera II, *supra* note 1, at 324; Rivera I, *supra* note 1, at 904; Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982). Some countries, however, are considering recognition of such unions. *See The Bells are Ringing in Sweden*, Gay Community News, June 13, 1981, at 2. *See also supra* notes 340–53 and accompanying text.

635. *See Homosexual Weddings Stir Dispute*, N.Y. Times, Sept. 5, 1984, at B4, col. 1 (describing the controversy sparked in Syracuse, N.Y., by the Grace Episcopal Church rector's approval of the Ray of Hope Metropolitan Community Church's use of the Episcopal church for worship and gay marriages).

636. *See Gay and Lesbian Weddings Affirmed By Church*, Gay Community News, July 14, 1984, at 2; *Unitarian Assembly OKs Gay Marriages*, Columbus Citizen-Journal, June 29, 1984, at 11.

637. The Metropolitian Community Church is a church whose ministry is aimed predominantly at the gay community. Holy Unions are religious commitment or joining ceremonies. Holy Unions are also performed by clergy involved with groups such as DIGNITY (Catholic gay community organization), Integrity (Episcopal), and Lutherans Concerned. *See* Columbus Citizen-Journal, June 14, 1984, at 11 (discussing gay unions).

638. *See supra* notes 340–45 and accompanying text. *But see supra* notes 345–50 and accompanying text.

the home or order transfer of title to one of the parties based on the court's equity powers. The gay couple, if they cannot agree on a method of separation, is forced into an action for partition. Not only is such a suit time-consuming and expensive, neither party may have kept records which could be used to prove his or her contribution to the purchase and maintenance of the property. The intermingling of funds expected in a traditional marriage poses acute problems of proof in a gay union.

How have gay couples handled divorce? Using a variety of causes of action, they have sued each other. One of the earliest cases, of those discoverable, is the California case of *Richardson v. Conley*.[639] Denease Conley and Sherry Richardson not only had a Holy Union at the Metropolitan Community Church, but also signed a written agreement wherein Conley agreed to support Richardson. When the couple broke up, Richardson took Conley to court on a contract theory, similar to that used in *Marvin v. Marvin*.[640] The California Superior Court awarded Richardson support of one hundred dollars per month from Conley.[641]

Not all couples live in California. In the case of *Cox v. Elwing*,[642] the parties, Don Cox and David Elwing lived in Chicago, Illinois, where they met and married in a Holy Union at the Metropolitan Community Church. Elwing moved to Washington, D.C. because of a job opportunity, and Cox followed. Cox gave up his job and devoted his time to maintenance of their joint home. Upon their breakup, Cox claimed that Elwing had made express promises to support him until he became employed again. Cox sued in the District of Columbia Superior Court on a quantum meruit theory, alleging an oral promise to support him in return for maintaining a common domicile and renovating certain property. The superior court granted Elwing's motion for judgment on the pleadings, and Cox appealed.[643] The appellate court vacated the judgment and remanded, stating that material and factual issues existed which needed to be resolved. Thus, Cox was awarded his day in

---

639. 4 FAM. L. REP. (BNA) 2532 (Cal. Super. Ct. June 27, 1978). *See* The Advocate, July 12, 1978, at 12; *Bliss, Then Divorce—All Very Ladylike*, Columbus Citizen-Journal, June 3, 1978, at 5.

640. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In *Marvin*, the California Supreme Court held that either party to a nonmarital relationship could enforce an express or implied agreement dividing accumulated property, and that express contracts between unmarried cohabitants could be enforced "except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services." *Id.* at 661, 557 P.2d at 106, 134 Cal. Rptr. at 815.

641. *Richardson*, 4 FAM. L. REP. (BNA) at 2572.

642. 432 A.2d 736 (D.C. 1981).

643. *Id.* at 737.

court.[644]

Of seeming importance in the *Cox* decision was the fact that the plaintiff did not mention sexual services as part of the bargain. In *Jones v. Daly*,[645] however, the admission of sexual relations resulted in dismissal of the action. Randal Jones brought suit against the estate of James Daly claiming that Daly promised to support him. Jones claimed that in return for this promise, he was to quit his job and "devote a substantial portion of his time to Daly's benefit as his lover, companion, homemaker, traveling companion, housekeeper and cook."[646] Jones claimed that he met all these obligations until Daly's death. As in *Conley* the basis of Jones' suit was the *Marvin* decision. In *Jones*, the trial court sustained a demurrer to the complaint, and the appellate court affirmed.[647] The court noted that the *Marvin* decision required that a cohabitant's suit "not rest on illicit meretricious consideration."[648] The *Jones* court found that the facts clearly indicated that the "rendition of sexual services to Daly was an inseparable part of the consideration."[649] Hence, the agreement was not enforceable.[650]

More recently, two very famous persons found themselves in the midst of same-sex cohabitant suits, both in California. Billie Jean King was sued by Marilyn Barnett on a *Marvin*-like cause of action.[651] In her pleadings, Barnett described the sexual and emotional intimacies of the two women and alleged that King had made an express oral contract to support Barnett for the rest of Barnett's life. King answered Barnett's complaint, admitting the intimacies but denying any contractual undertaking. In addition, King counterclaimed for unlawful detainer. Barnett's suit was dismissed for failure to state a cause of action and King won the unlawful detainer suit.[652] To illustrate just how vicious such suits can get, King has reportedly brought suit against Bar-

644. Unfortunately, the final outcome is unknown to the author. None of the attorneys listed as counsel could be located.

645. 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981).

646. *Id.* at 505, 176 Cal. Rptr. at 131.

647. *Id.*

648. *Id.* at 507, 176 Cal. Rptr. at 133 (quoting Marvin v. Marvin, 18 Cal. 3d 660, 674, 557 P.2d 106, 116, 134 Cal. Rptr. 815, 822 (1976)). *See supra* note 640.

649. *Jones*, 122 Cal. App. 3d at 508, 176 Cal. Rptr. at 133. The only permissible sale of sexual services is in marriage.

650. On appeal, the attorneys for Jones felt that the suit could have been won if no admission of sexual services had been made at the trial level. Jones' appellate attorneys very carefully pointed out that they did not represent Jones at the trial level. Interview with Sheldon W. Andelson, of Andelson & Andelson, Los Angeles, Cal., attorney for Jones at appellate court level (July 17, 1985).

651. Barnett v. King, No. C365232 (Cal. Super. Ct., Los Angeles County Dec. 22, 1982).

652. King v. Barnett, No. C274391 (Cal. Super. Ct., Los Angeles County June 4, 1981).

nett and her lawyer for malicious prosecution.[653]

In 1982, Liberace found himself in a similar position when he was sued by Scott Thorson.[654] Thorson alleged both a *Marvin*-like cause of action and a more traditional action in contract. The trial judge dismissed the former action because the contract was for sexual services.[655] The cause of action in contract remains before the court and has not yet been tried or settled.

A final case of interest is *Ruth v. Smith*,[656] an Ohio action. In this case the parties, James Ruth and Tommy Smith, separated after cohabitating for over twenty years. During that period of time, their monetary affairs became inextricably entwined. For a variety of reasons, many pieces of property were in Smith's name. When Smith left, he allegedly conveyed away their joint home to a third party without Ruth's permission and sold his interest in their joint business without notice to his former mate. Ruth brought suit, in part alleging a partnership and asking for an accounting and dissolution. Since Smith had owed him money, making Ruth a creditor, Ruth alleged that the sale of the residence was a fraudulent conveyence. In addition, Ruth also argued a traditional contract theory. Finally, he asked that a constructive trust be imposed on the proceeds of the sale. Smith's answer to most of the claims alleged by Ruth was that everything he received was a gift "for his companionship, affection and service." Ruth never makes any reference to their intimacy, but Smith refers to Ruth as his cohabitor. The Ohio court will probably find the contract tainted with sexual services and dismiss the case. If that is the result, the manifest injustice is apparent. In Ohio, sex between two persons of the same sex is not criminal; the participants, however, are punished nonetheless. If Ruth's allegations are true, then Smith has taken financial advantage of him; Smith can benefit merely by naming their relationship for what it really was. Thus, Ruth would have no remedy under Ohio's current legal system.

Presenting all the legal theories raised by James Ruth concerning the now-defunct relationship required creative lawyering. Until society either grants some legal recognition to gay couples or until all couples enter into written agreements providing for dissolution, creative lawyer-

---

653. Telephone interview with Dennis M. Wasser, of Wasser, Rosenson & Carter, Los Angeles, Cal., attorney for King (July 15, 1985). *See* Granelli, *Palimony Courts Get New Players*, Nat'l L.J., May 18, 1981, at 1, col. 4.

654. Thorson v. Liberace, No. C428492 (Cal. Super. Ct., Los Angeles County Oct. 14, 1985).

655. *Id.*, slip op. at ___. *See Liberace Trial Ordered*, Columbus Citizen-Journal, Mar. 21, 1985. at 3.

656. No. 83CV-12-69 (Ohio C.P. Ct., Franklin County filed Dec. 7, 1983).

ing will be needed.

One option which has been utilized by gay couples to give their relationship legal status has been adult adoption,[657] in which one member of the life partnership adopts the other. Two immediate benefits accrue: first, the adopted "child" will inherit from his or her new "parent" without benefit of a will and vice-versa; second, the parties to the adoption can legally be defined as a family.[658] Two detriments, however, are also immediately evident. Adoption is forever; you cannot divorce your child or your parent. In addition, the adult who is adopted and who is technically the child of the relationship may lose inheritance rights from his or her biological family. Aside from the practical benefits and detriments, a larger policy issue still looms. Should adults who are in a sexual relationship be allowed to adopt one another? Does this relationship constitute incest? Should the state allow a "pseudo marriage"?

Only three reported cases involving adult adoption among gay persons exist, and all three arose in New York. In 1981, the Family Court of Kings County, New York, granted the adoption of one gay man by another.[659] The purpose of the adoption, according to the court, was that the parties "wished to establish a more permanent legal bond."[660] In this case, the younger of the two men adopted the older because the younger did not wish to cut off his inheritance expectations from his biological family. The two men said they wished to establish legal and economic responsibility for one another. They indicated that "even if there were a failing in intimacy, there would still be a bond, a responsibility."[661] The court ruled out a public policy-public morals argument, noting that homosexual acts were no longer criminal in New York after *People v. Onofre*.[662] Because the court viewed the couple's purpose as seeking valid legal and economic benefits, the adoption was upheld.

Only ten months later, the Family Court of New York County, New York, came to the opposite conclusion.[663] The couple in that instance consisted of two gay men with the younger seeking to adopt the older. The court held that "such an adoption would violate the intent of

---

657. *See* Comment, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE U.L. REV. 667 (1984).

658. The second benefit is of particular interest where, for example, a rental lease restricts occupancy to family members.

659. *In re* Anonymous, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (Fam. Ct. 1981).

660. *Id.* at 793, 435 N.Y.S.2d at 528.

661. *Id.*

662. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

663. *In re* Adult Anonymous II, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (Fam. Ct. 1981), *rev'd*, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982).

the Domestic Relations Law and do violence to the public policy that generates this state's laws on adoption."[664] The court expressed sympathy with "the yearning of two decent people living exemplary, productive lives who are seeking to obtain some legal recognition of the bond that exists between them."[665] However, the adoption was disapproved. The parties appealed, and the decision was reversed.[666] The appellate court said adult adoption "is permissible as long as the parties' purpose is neither insincere nor fraudulent."[667] The court, while noting that homosexual relationships were not criminal in New York, also stated that the couple did not seek adoption to cultivate their sexual relationship but rather to formalize themselves as a family for both symbolic and highly practical reasons.[668] Justice Asch took exception to the opinion of the lower court and took judicial notice that the " 'nuclear' family arrangement is no longer the only model of family life in America."[669] He stated that a court could not deny an adoption petition simply on the basis of the court's view of what a family should be. He described the family as "a continuing relationship of love and care, and an assumption of responsibility for some other person,"[670] adding that such a relationship "[c]ertainly [was] present in the instant case."[671] Justice Sullivan registered a strong dissent, calling the situation a "subversion" and a "cynical distortion" of the adoption process.[672]

The third New York adoption case eventually reached the highest New York court; the adoption petition was denied.[673] In the case of *In re Robert Paul P.*,[674] the adoption had initially been denied at both the family court level and at the appellate division level.[675] The New York

---

664. *Id.* at 320, 443 N.Y.S.2d at 1009.

665. *Id.* at 322, 443 N.Y.S.2d at 1010. The court also stated, "The relationship is no longer what it was for Oscar Wilde and Lord Alfred Douglas—the love that dares not speak its name." *Id.*

666. *In re* Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982), *rev'g*, 111 Misc. 2d 320, 443 N.Y.S.2d 1008 (Fam. Ct. 1981).

667. *Id.* at 31, 452 N.Y.S.2d at 199.

668. *Id.* at 34–35, 452 N.Y.S.2d at 201. One of the practical reasons was the giving of consent in medical situations when one of the two might be hospitalized. *See infra* notes 763–64 and accompanying text.

669. *Anonymous II*, 88 A.D.2d at 35, 452 N.Y.S.2d at 201.

670. *Id.*

671. *Id.*

672. *Id.* at 38, 452 N.Y.S.2d at 203 (Sullivan, J., dissenting).

673. *In re* Robert P., 117 Misc. 2d 279, 458 N.Y.S.2d 178 (Fam. Ct.), *aff'd sub nom. In re* Pavlik, 97 A.D.2d 991, 469 N.Y.S.2d 833 (1983), *aff'd sub nom. In re* Robert Paul P., 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984).

674. 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984).

675. *See In re* Robert P., 117 Misc. 2d 279, 458 N.Y.S.2d 178 (Fam. Ct.), *aff'd sub nom. In re* Pavlik, 97 A.D.2d 991, 469 N.Y.S.2d 833 (1983).

Court of Appeals affirmed.[676] The two gay men in this adoption were fifty-seven and fifty-years-old and had lived together for twenty-five years. In their petition of adoption, the two listed a variety of economic, legal, and practical reasons for the adoption. However, their bottom line was, "[s]imply stated we are a family and seek to formalize such."[677] Quoting Justice Sullivan's dissent in the New York Supreme Court, Appellate Division case *In re Adult Anonymous II*, the court of appeals described the use of adoption in this context as "a cynical distortion of the adoption function."[678] The purpose of the adoption statute was to create a filial relationship, and "sexual intimacy is utterly repugnant" to such a relationship.[679] The issue, the court said, had nothing to do with a concept of private morality nor with the morality of the parties' conduct; rather, the issue addressed was whether the New York Domestic Relations Law was an appropriate means to formalize an indisputedly non-filial relationship between sexual partners. The court's answer was in the negative. The court maintained, however, that the ruling applied equally to nongay persons as well as to gay persons.[680]

The dissent, in its opinion, concluded that nothing in the statute provided for an inquiry into the sexual habits of the parties.[681] What the parties desired in this case was the legal status of parent and child with its concomitant rights and responsibilities. According to the dissenting judge's reasoning, these motives were proper and were within the purview of the statute.[682] However, the majority denied the adoption, thus rendering unavailable that method of formalizing a relationship between New York citizens.[683] At trial, in the adoption case of *In re Robert Paul P.*, the family court said that the parties were utilizing adoption for purposes which were properly served by marriage, wills, and business contracts. Ohio has a unique statute that provides against all the criticisms leveled at the use of adoption by gay couples. By Ohio statute an adult cannot adopt another adult except under very limited circumstances.[684] However, under another statute, an adult can desig-

676. *Robert Paul P., in re* 63 N.Y.2d at 235, 471 N.E.2d at 425, 481 N.Y.S.2d at 653.

677. *Id.* at 235 n.1, 471 N.E.2d at 425 n.1, 481 N.Y.S.2d at 653 n.1.

678. *Id.* at 238, 471 N.E.2d at 427, 481 N.Y.S.2d at 655 (quoting *Anonymous II*, 88 A.D.2d at 38, 452 N.Y.S.2d at 203 (Sullivan J., dissenting)).

679. *Robert Paul P.*, 63 N.Y.2d at 236, 471 N.E.2d at 425, 481 N.Y.S.2d at 653.

680. *Id.* at 236–39, 471 N.E.2d at 425–27, 481 N.Y.S.2d at 653–55.

681. *See id.* at 239–42, 471 N.E.2d at 427–29, 481 N.Y.S.2d at 655–57 (Meyer, J., dissenting).

682. *Id.* at 242, 471 N.E.2d at 429, 481 N.Y.S.2d at 657.

683. *Id.* at 239, 471 N.E.2d at 427, 481 N.Y.S.2d at 655.

684. In Ohio, an adult may only be adopted:

(1) If he is totally and permanently disabled;

nate an heir.[685] A person so designated will inherit from the party who so designates as if the designee were the designator's child. The statute is not an adoption statute so it cannot be argued that its use is a "cynical distortion of filial relationships." Moreover, the designation need not last forever. After one year, the designator can withdraw the designation.[686] The use of adoption to formalize a gay relationship always faces a problem of what happens should the relationship fail. The designation of an heir is relatively simple in Ohio. The parties merely appear before a probate judge with two disinterested witnesses and state their intentions.[687] A couple can each designate one another as heir.[688] Revocation of the designation of an heir is by a similar process.[689] The major difference is that the relationship becomes legally viable only on the death of one of the parties,[690] unlike adoption where the persons' positions change while they are alive.

For gay couples, marriage, even "pseudo-marriage," is not available. Contracts may be helpful, but only if the taint of sexuality is carefully avoided. What of wills? One of the main worries surrounding the wills of a gay couple is that the biological families will contest the wills with charges of undue influence. This problem has been explored extensively by Jeffrey Sherman in his article *Undue Influence and the Homosexual Testator.*[691] Sherman looked at the few cases that reveal the sexual orientation of the testator and his legatee. Four such published cases exist, although two cases shed little light on the subject.[692] Of

---

(2) If he is determined to be a mentally retarded person as defined in section 5123.01 of the Revised Code;

(3) If he had established a child-foster parent or child-stepparent relationship with the petitioners as a minor, and he consents to the adoption.

OHIO REV. CODE ANN. § 3107.02(B) (Page Supp. 1984).

685. *Id.* § 2105.15 (Page 1976).

686. *Id.*

687. *Id.*

688. *Id.*

689. *Id.*

690. *Id.*

691. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

692. The first case is *In re* Anonymous, 75 Misc. 2d 133, 347 N.Y.S.2d 263 (Surrogate's Ct. 1973). This case involved a will contest where undue influence was charged based on a same-sex relationship between the testator and the legatee. However, the undue influence issue was never reached because the legatee refused to answer discovery questions about sexual relations, on the basis of his fifth amendment privilege against self-incrimination. The court granted him transactional immunity to answer the questions. According to Sherman, the case was settled before trial, so the undue influence issue was never resolved. Sherman, *supra* note 691, at 234. The second case is *In re* Larendon's Estate, 216 Cal. App. 2d 14, 30 Cal. Rptr. 697 (1963). In *Larendon*, the testator was murdered by his legatee. At that time in California, no statute prevented a murderer from benefiting from the decedent's estate; the charge of undue influence was therefore brought. To read about the murder, which is particularly gruesome, see People v. Dal-

interest is *In re Spaulding's Estate*,[693] where the will of the homosexual testator was upheld against a charge of undue influence. Although the court noted that "an unnatural sexual relation" existed between the decedent and his beneficiary,[694] it held that the mere existence of this relationship was insufficient to create undue influence.[695] Another noteworthy case is *In re Kaufmann's Will*,[696] characterized by Sherman as a "clear example of judicial homophobia."[697] What one notices in these decisions is that the courts expect, in traditional mixed-sex marriages, that the partners will have a strong influence on one another. However, the influence of a gay person on his or her partner is treated as unnatural and "undue." In *Kaufmann*, the decedent wrote a letter to his family to prevent the suit that was subsequently brought. In the letter, he said:

> "Walter [his lover and beneficiary] gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life . . . . All of this adds up to Peace of Mind—what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult!"[698]

The court asserted that this letter was "not based on reality"[699] and its "emotional base" was "gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."[700] Another description might have simply said this was a letter written by a man in love. Needless to say, the legatee lost and the money went to Kaufmann's nieces and nephews, "[a] natural plan of testamentary dispostion."[701] After his review and analysis, Sherman concluded: "[A] homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a

---

ton, 201 Cal. App. 2d 396, 20 Cal. Rptr. 51 (1962).

693. 83 Cal. App. 2d 15, 187 P.2d 889 (1947).

694. *Id.* at 16, 187 P.2d at 890.

695. *Id.* at 22, 187 P.2d at 893 ("Only by entering upon the field of conjecture could a jury have decided that in making this will decedent was moved not by his own unnatural inclination but by undue pressure of proponent.").

696. 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), *aff'd*, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965). For a thorough discussion of this case, see Sherman, *supra* note 691, at 239–46. *See also infra* notes 698–702 and accompanying text.

697. Sherman, *supra* note 691, at 239.

698. *Kaufmann*, 20 A.D.2d at 470, 247 N.Y.S.2d at 671.

699. *Id.* at 471, 247 N.Y.S.2d at 672.

700. *Id.* at 474, 247 N.Y.S.2d at 674.

701. *Id.* at 486, 247 N.Y.S.2d at 685.

heterosexual testator who bequeaths the bulk of his estate to a spouse or lover."[702]

Lawyers representing gay clients who wish to have wills drawn expend a great deal of effort tailoring the wills in order to prevent or defeat contests brought by the biological families. Some attorneys suggest a video tape of the signing with a statement by the testator. Others use *in terrorem* or no contest clauses.[703] Testators are advised to leave some items to the natural objects of their testamentary affections, i.e., their biological family. In wills made by traditional spouses, each spouse is often nominated the other's executor. In gay wills, cautious attorneys urge a neutral executor if the gay spouse is the primary beneficiary. The devices are numerous but the results remain to be seen.[704]

The will contest over the estate of John D. McBride illustrates an attempt by a biological family to overturn a gay testator's will.[705] John McBride died in 1983, leaving an estate valued at over $150,000 to a named trustee:

> "[T]o be devoted to furthering the civil rights of American homosexuals, one half . . . to be devoted to aid and assist those homosexuals who have been victims of legal duress, with the other one-half used in helping to further in the courts and the U.S. Congress abolition of restriction of any kind or nature against the civil rights of homosexuals."[706]

The will had been drawn by a Pennsylvania attorney, the executor named was a Pennsylvania bank, and the estate's assets were in Pennsylvania. McBride had lived in Pennsylvania until his retirement two years before his death. He spent his last two years in Mexico. McBride's will was challenged by two nieces who were not mentioned in the contested will nor in McBride's previous will. In fact, whether McBride knew the two women at all is unclear. The nieces made two claims. One was that McBride's will was invalid under Mexican law where they claimed he was domiciled and, hence, he actually died intestate. Secondly, if the will was technically valid, McBride lacked testamentary capacity due to senility and alcoholism. If either of their arguments succeeded, the nieces would inherit under the law of intes-

---

702. Sherman, *supra* note 691, at 267.

703. For a model will incorporating such provisions, see R. ACHTENBERG, *supra* note 632, at 4-41 app. 4B.

704. *See supra* note 632 and accompanying text. *See also* R. RIVERA, OUR RIGHT TO LOVE (1978) (chapter entitled Legal Planning for Loving Relationships).

705. *In re* Estate of McBride, No. 251 (Pa. C.P. Ct., Orphan's Ct. Div., Erie County Sept. 20, 1984).

706. Amended Petition for Appeal to Probate, *In re* Estate of McBride, No. 251 (Pa. C.P. Ct., Orphan's Ct. Div., Erie County May 4, 1984) (section IIB of attached McBride will).

tacy.[707] At first, the named trustee refused to fight the nieces, thus prompting five different gay rights groups to attempt to intervene. However, the trustee did eventually agree to contest the nieces' allegations.[708] On January 4, 1985, the court declared the will valid. Although the further allegation that McBride lacked testamentary capacity was withdrawn,[709] the nieces indicated that they would appeal the probate court's decision with regard to the validity of the will. However, in May, 1985, the nieces agreed to settle for six thousand dollars. In upholding the will's validity, Judge Dwyer said: "No doubt there may be many people who would disagree with the propriety of such a distribution, but since a testator has a right to dispose of his property in any manner not illegal or against public policy, such disposition must be allowed . . . ."[710]

The laws of intestacy not only favor biological family members but also protect the rights of spouses. A gay person must, therefore, use a will if the goal is to guarantee that his or her spousal equivalent will be a beneficiary upon his or her death.

Other important benefits hinge on the marital relationship. Fringe benefits which accrue to spouses are among the most important employment perquisites. The ability to enroll one's spouse in medical, dental, and vision care plans is an expected fringe benefit in today's society. Similarly, the right of survivorship in an employee's retirement plan is a benefit which also accrues automatically to traditional spouses. Death benefits in various entitlement programs are also frequently tied to the marital relationship. Life-partners of gay employees, however, are generally not entitled to any of the aforementioned benefits. As a result, the gay employee in a committed relationship receives substantially less compensation than the married nongay employee.

The battle to equalize job benefits is, without a doubt, the new issue facing gay rights litigators. The front lines of the battle are probably in California and Wisconsin, the two states which protect gay employees both in private and public employment.[711] Another battleground is within large private corporations which have already

---

707. *Id.*

708. The trustee retained as his counsel the local lawyer retained by *The Advocate*, National Gay Alliance, Lambda, and the National Gay Task Force. Lambda Reports, Apr. 2, 1985, at ___.

709. *Id.*

710. *McBride*, No. 251, slip op. at ___. *See* Gay Community News, Feb. 2, 1985, at 1.

711. Wisconsin has the first statewide gay rights statute. *See* WIS. STAT. ANN. § 111.31 (West Supp. 1985). California has an executive order which covers public employees. Cal. Exec. Order B-54-79 (Apr. 4, 1979). Case law in California also brings open gay employees under the California Labor Code. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

discovered that "prohibitions against hiring homosexuals make neither economic nor social sense."[712] A third battleground is in labor negotiations by those unions which have taken an official stand opposing discrimination against gay union members.[713] Finally, the battle is being waged by state employees in at least two of the states which have executive orders: Ohio and New York.[714]

Aside from intense lobbying and pressure, the issue of benefits equality is the subject of a number of suits, many of them far from final disposition. The case of *Donovan v. Workers' Compensation Appeals Board*,[715] however, has been resolved. On November 26, 1976, Thomas Finnerty died, following a short hospitalization caused by a suicide attempt. Prior to his death, Finnerty was found to be one-hundred percent disabled as a result of an injury to his nervous system. On January 4, 1977, plaintiff Earl Donovan applied to the California Worker's Compensation Board for death benefits as a dependent of Finnerty. He alleged that Finnerty's disability had left the decedent with a suicidal tendency, and thus Finnerty's death was job related. On July 18, 1978, the application was denied because the board held that Donovan's relationship with Finnerty was "illicit," and therefore, he could not be a "good faith member of Finnerty's household."[716] Donovan petitioned for reconsideration, and the same judge denied his petition, saying, "[T]he legislature could not have conceived, in imposing the good faith requirement for dependency, that is (sic) could be diluted to include the relationship of homosexual lovers. The requirement of good faith does in fact import 'moral content . . . .'"[717] Donovan appealed to the California Workers' Compensation Appeals Board. The appeals board took additional testimony on the issue of the cause of Finnerty's death and on Donovan's economic dependency on Finnerty. The appeals board subsequently found that Donovan had not proven

712. Muskowitz, *Job Rights for Gays: The Price Tag Gets Higher*, BUS. WK., Nov. 26, 1984, at 133.

713. *See* Rivera, Part I, *supra* note 1, at 476–78.

714. For a listing of these executive orders, see *infra* note 749. Pennsylvania also has an executive order, but at the present time the author knows of no action being taken with regard to this particular issue. *See* Pa. Exec. Order No. 1975-5 (Sept. 19, 1975) (commitment toward equal rights). New Mexico's Governor has also issued an executive order, thus becoming the fifth state governor to do so. *See* N.M. Exec. Order No. 85-15 (Apr. 1, 1985). The order forbids discrimination in hiring, promotion, and administration of state services and requires all businesses contracting with the state to include in their contracts a provision stating that they will not discriminate against gays in employment. *See id. See also* The Washington Blade, Apr. 12, 1985, at 1.

715. 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).

716. Workers' Compensation Judge's Opinion at 2, No. 73 LA 385-107 (Cal. Workers' Comp. Bd., Los Angeles County July 18, 1978).

717. Recommendation of Workers' Compensation Judge on Petition for Reconsideration at 4, No. 73 LA 385-107 (Cal. Workers' Comp. Bd., Los Angeles County Aug. 23, 1978).

that Finnerty's death was a result of his disability.[718] However, the appeals board did award Donovan some medical costs.[719] This decision was appealed to the California Court of Appeals. The court of appeals found that in making the decision as to the cause of Finnerty's death, an incorrect burden of proof had been imposed.[720] The court also noted that the dependency issue was "purposefully avoided" because the board was "confronted" by the problem of a homosexual relationship.[721] The court remanded to the appeals board to correct the burden of proof and also to decide the dependency issue.[722] On remand, the California Workers' Compensation Appeals Board found not only that the death was caused by the decedent's disability, but also found that Donovan was a good faith member of the decedent's household and his total dependent.[723] In finding Donovan a "good faith" member of decedent's household, the appeals board rested its decision on the *Marvin* case which the board said was equally applicable to gay relationships as to nongay relationships. On December 3, 1983, the appeals board awarded Donovan a $25,000 death benefit.[724] This order was challenged one more time by a petition to reconsider, which was denied. The board held that "the inability to enter a recognized marriage should not control the issue of good faith member of a household."[725] In December, 1984, almost eight years after he applied for the benefits, Earl Donovan received his check from the California Compensation Insurance Fund.[726] The decision stands for the principle that, in California, a gay person can be a "good faith member of another's household" and can be recognized as a "dependent." The benefit involved is statutory, and under *Donovan*, a gay person can meet the statutory definitions in order to receive benefits.[727]

---

718. Opinion and Decision After Reconsideration at 8, No. 73 LA 385-107 (Cal. Workers' Comp. App. Bd. May 28, 1981).

719. *Id.* Donovan also moved to have this decision reconsidered. His petition was denied on June 17, 1981.

720. *Donovan*, 138 Cal. App. 3d at 327, 187 Cal. Rptr. at 872.

721. *Id.* at 329, 187 Cal. Rptr. at 873.

722. *Id.*, 187 Cal. Rptr. at 874. A petition to the court of appeals for a rehearing was denied on January 11, 1983; petition for rehearing before the supreme court was denied on February 16, 1983.

723. Opinion and Notice of Intention at 9, No. 73 LA 385-107 (Cal. Workers' Comp. App. Bd. Nov. 3, 1983).

724. Opinion and Decision After Remittitur at 2, No. 73 LA 385-107 (Cal. Workers' Comp. App. Bd. Dec. 3, 1983) ($3000 in attorney fees was to be subtracted and interest added).

725. *Id.* at 3.

726. The Advocate, Dec. 11, 1984, at 10. Glassman, Donovan's attorney, is quoted as saying that the case took eight years because "the original judge on the California Workers' Compensation Appeals Board at the trial level belonged to the dinosaur age." *Id.*

727. This case has been cited by many as the first of its kind. That distinction may, however, belong to Scott Smith, the life partner of Harvey Milk, the San Francisco supervisor who

A similar case is *Hinman v. Department of Personnel Administration*,[728] currently before the California Supreme Court on a petition for review.[729] Boyce Hinman, an employee of the State of California for over ten years, lived with his life partner, Larry Beatty. At the time of the suit, they had lived together more than twelve years. When Hinman attempted to enroll his partner in a health care plan, which provided dental care for state employees,[730] the application was denied.[731] Hinman appealed to the California Court of Appeals and argued that the denial of benefits violated both the equal protection clause of the California Constitution and the executive order of the governor.[732] The court of appeals upheld the decision,[733] holding that the denial of Hinman's application did not violate the equal protection clause. Although Hinman had argued that a classification by sexual orientation should be reviewed with "strict scrutiny,"[734] the court found that no classification based on sexual orientation had been made.[735] Rather, the classification used to award or deny benefits was on the basis of marital status.[736] According to the court, Hinman and his fellow state employees who are gay and have life partners are similarly situated, *not* to married heterosexual employees, but to unmarried heterosexual employees.[737] Bona fide medical plans, the court said, are specifically exempt from issues of marital status by state statute.[738] The appeals court also rejected the application of the executive order,[739] stating that the executive order bans discrimination solely on the basis of sexual orientation.[740] Hinman, the court found, was not discriminated against solely because of his sexual orientation; *he had not been denied promotion or*

---

was murdered by Dan White in 1978. The *New York Times* reported that Smith was awarded a survivor's benefit by the San Francisco Retirement Board as he was Milk's partial dependent. N.Y. Times, Nov. 11, 1982, at A26. This benefit was expected to be routinely approved by the California Workers' Compensation Appeals Board.

728. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).

729. Petition for Review, Hinman v. Department of Personnel Admin., No. C23749 (Cal. Sup. Ct. filed June 6, 1985).

730. *Hinman*, 167 Cal. App. 3d at ____, 213 Cal. Rptr. at 413. *See also* Lesbian Rights Project Newsletter, Summer 1985, at 1. It is interesting to note that Hinman was the Lesbian Rights Project's first male client. *See also* The Advocate, Mar. 31, 1983, at 9.

731. *Hinman*, 167 Cal. App. 3d at ____, 213 Cal. Rptr. at 413.

732. *Id.* at ____, 213 Cal. Rptr. at 412. *See* CAL. CONST. art. 1, § 7; Cal. Exec. Order B-54-79 (Apr. 4, 1979).

733. *Hinman*, 167 Cal. App. 3d at ____, 213 Cal. Rptr. at 420.

734. *Id.* at ____, 213 Cal. Rptr. at 412.

735. *Id.* at ____, 213 Cal. Rptr. at 416.

736. *Id.*

737. *Id.*

738. *Id.* at ____, 213 Cal. Rptr. at 419.

739. *Id.*

740. *Id.*

harassed.[741] The court found no differences between the dental benefits given Hinman and other unmarried state employees.[742]

The *Hinman* case is currently before the California State Supreme Court on a petition for review.[743] The outcome of that review, if undertaken, is crucial to the development of gay legal protection far beyond the outcome of the case itself. An important argument, made to the court in the petition for review, is that sexual orientation is a suspect class under California law.[744] The brief filed on behalf of Hinman notes that a classification based on sexual orientation meets all the requirements under California law for a suspect class, and since *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*[745] was decided in 1979, lower courts in the California appellate system have considered sexual orientation to be a suspect class.[746] A declaration that sexual orientation is a suspect class would require that strict scrutiny be used to examine the classification under the equal protection analysis under the California Constitution. Hinman argues in the petition that such a classification cannot withstand strict scrutiny.[747]

In addition to his equal protection argument, Hinman argues that an executive order should be treated in the same manner as a statute which bans discrimination. Discrimination based on sexual orientation, Hinman argues, is a well-recognized form of employment discrimination.[748]

The outcome of Hinman's arguments is important. In particular, if a decision is rendered that defines and determines the strength of an executive order, the effect will be felt in the four other states with executive orders.[749] A decision, on the issue of a classification based on abil-

---

741. *Id.*

742. *Id.*

743. Petition for Review, Hinman v. Department of Personnel Admin., No. C23749 (Cal. Sup. Ct. filed June 6, 1985).

744. Gender is a "suspect" class under California law. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). It is not, however, a suspect class under the United States Constitution. *See* Craig v. Boren, 429 U.S. 190 (1976).

745. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

746. *See, e.g.*, Halford v. Alexis, 126 Cal. App. 3d 1022, 179 Cal. Rptr. 486 (1981); Kubik v. Scripps College, 118 Cal. App. 3d 544, 173 Cal. Rptr. 539 (1981).

747. Petition for Review at 4–5, Hinman v. Department of Personnel Admin., No. C23749 (Cal. Sup. Ct. filed June 6, 1985).

748. *Id.* at 5–6.

749. *See* N.M. Exec. Order No. 85-15 (Apr. 1, 1985); N.Y. Exec. Order No. 28 (Nov. 18, 1983); Ohio Exec. Order No. 64-83 (Dec. 30, 1983); Pa. Exec. Order No. 1975-5 (Sept. 19, 1975). In Ohio, for example, the Advisory Committee on Executive Order 64-83, which banned state government employment discrimination on the basis of sexual orientation, had worked out a method by which spousal equivalents of gay employees could be covered under the state insurance plan. The committee's plan was overridden by a committee controlled by the legislature. An advisory opinion by the Office of the Counsel to the Governor indicated that because the executive

ity to have a spouse, if rendered, will be equally important. Marriage laws seem intractable. If a comparable status for gay partners can be recognized, the legality of marriage will become, for most, a moot issue.[750] If *Hinman* is reviewed by the California Supreme Court, the decision is bound to make legal waves.

A similar case involving employee benefits is *Brinkin v. Southern Pacific Transportation.*[751] Plaintiff Lawrence Brinkin was a clerk for the defendant railroad. His life partner of eleven years died. The railroad denied him the funeral benefit leave that was given automatically to married employees.[752] Subsequently, his grievance appeal to his labor union was denied.[753] Brinkin sued both Southern Pacific and his union in the San Francisco County Superior Court, alleging three causes of action: the first based on the California Constitution privacy provision; the second based on the California Fair Employment and Housing Act; and the third based on the San Francisco Police Code.[754] The union sought to have the case tried in federal court. The federal district court found no federal jurisdiction and remanded the case to the original court[755] where the case is still pending.[756]

Another pending California case is *Chamberlin v. Frontier Airlines*[757] which also involves an employee benefit. In this case, the benefit extended to employees of Frontier Airlines is reduced air fare for spouses and dependents. The plaintiff, Allen Chamberlin, requested that these benefits be extended to his life partner of ten years. Chamberlin applied for the benefits under both categories, i.e., spouse and household dependent. The airline denied both requests. Chamberlin also claimed that after he filed a complaint with the California De-

---

order did not have the force of an antidiscrimination statute, the advisory committee had no recourse. A decision to the contrary by the California Supreme Court would be extremely significant. The author is privy to this information as Co-Chair of the Ohio Governor's Advisory Committee.

750. The author believes that marriage is a heterosexual tradition and rite. Moreover, the author would like to see the state out of the marriage business altogether. In this scheme, marriage as a sacrament should be administered by churches if they so choose. The state can decide in a neutral manner what patterns of residency or economic dependency shall be benefited under tax schemes. Employers can provide whatever benefits they wish, not conditioned on religiously conferred status.

751. 572 F. Supp. 236 (N.D. Cal. 1983).

752. *Id.* at 237.

753. *Id.* Brinkin was covered by a collective bargaining agreement between the railroad and his union, the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO. *Id.*

754. *Id.*

755. *Id.* at 239.

756. Telephone interview with Matthew Coles, San Francisco, Cal., attorney for Brinkin (July 15, 1985).

757. No. 310989 (Cal. Super. Ct., Sacramento County filed Dec. 22, 1983).

partment of Fair Employment and Housing, he was harassed and suspended on pretextual grounds. Chamberlin brings his suit alleging a violation of the California Labor Code[758] and a violation of the privacy provision of the California Constitution.[759] He also claims that the suspension was retaliatiory and, hence, violates two California statutes.[760] The case is still in its discovery stages. The outcome will test the cause created for "out" gay employees by the *Gay Law Students* case.

In addition, other important and interesting issues are raised for gay people because no legal relationship can be created between life partners. For example, what happens if one of the life partners is seriously injured and is in a hospital intensive care unit? Does the other life partner have a right to see his or her partner or paticipate in medical decisions? Without some mechanism, the answer is no. If parents or other biologically-related relatives are available, the hospital and often the doctors will rely on these persons and consult with them to the exclusion of the life partner. The only way a life partner can participate is to be recognized and consulted by the biological family. Quite often, the biological family is unrelenting in its exclusion. A dramatic example of such a situation is that of Karen Thompson and her life partner, Sharon Kowalski.[761] Thompson and Kowalski had lived together for five years, owned a home together, and had exchanged rings in a ceremony of commitment. Kowalski was subsequently injured in a near fatal accident which left her a quadraplegic. Thompson spent hours each day at the hospital with Kowalski. At the suggestion of a psychiatrist, Thompson explained the nature of her relationship with Kowalski to Kowalski's parents. The parents denied her explanation and accused her of "sexually abusing" their daughter. The parents petitioned the court to be named Kowalski's guardian; Thompson also filed. The court granted the guardianship to the parents with the condition that Thompson be allowed "equal access." The parents then filed a petition and had their daughter moved 150 miles from Thompson's home so as to make visits nearly impossible. In April, 1985, the father filed a motion with the court to terminate completely the life partner's visits with his daughter.[762] While this behavior may seem inexplicable to the outside observer, the family's reaction is, unfortunately, rather

758. *See* CAL. LAB. CODE §§ 1101–1105 (West 1971 & Supp. 1986). *See also Gay Law Students Ass'n*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1978) (cause of action was created under the Code for "manifest homosexuals").

759. CAL. CONST. art. I, § 1.

760. *See* CAL. GOV'T CODE §§ 12900–12995 (West 1980 & Supp. 1986); CAL. LAB. CODE §§ 1101–1105 (West 1971 & Supp. 1986).

761. *See* The Advocate, June 25, 1985, at 13.

762. The Washington Blade, Apr. 26, 1985, at 10.

common.

In order to prevent this situation, gay couples have begun to protect their relationship through "medical" powers of attorney.[763] In those states where legally valid, the medical powers may be durable powers.[764] A durable medical power might have allowed Karen Thompson to remain an important person in Sharon Kowalski's life regardless of the wishes of Kowalski's parents.

Another issue which arises due to a lack of a legal relationship is the question of confidential communications. In most states, a spouse cannot be compelled to testify against his or her spouse, and a spouse can claim that his or her communications with the other spouse are privileged.[765] Since marriage is not possible for gay couples, the privilege does not apply to them.[766]

Numerous instances exist in the daily lives of nongay people where benefits accrue because of the ability to marry. Seldom are these situations noticed unless one is unable to take full advantage of them. For example, the American Automobile Association (AAA) gives married couples a discount on their insurance and offers a special rate for associate members (spouses and children). Some gay couples at various locations in the United States are applying for these discounts. At least one AAA chapter has agreed to extend its programs and discounts to gay couples.[767]

Another common problem arises when a gay couple rents an apartment together. Insurance companies have refused to grant gay couples joint policies and they insist that each person take out a separate renter's policy. The home office of Allstate Insurance Company

---

763. *See* R. ACHTENBERG, *supra* note 632. *See also* Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985 (1984).

764. A "durable" power of attorney allows the power of attorney to remain in effect notwithstanding the later incapacity of the principal. *See, e.g.*, OHIO REV. CODE ANN. § 1337.09 (Page Supp. 1984). Also, the author's former relentless research assistant located an Ohio statute which permits a person to nominate an eventual guardian should one need to be appointed. *See id.* § 2111.121. The use of instruments drafted pursuant to such statutes might have eased the Thompson-Kowalski guardianship problems.

765. *See* E. CLEARY, MCCORMICK ON EVIDENCE §§ 78–86 (3d ed. 1984).

766. *See* Annot., 4 A.L.R. 4th 422 (1980); The Advocate, June 11, 1985, at 25, col. 1 (Describing a trial situation where the issue was whether "two gay defendants have to testify against each other where theirs is a relationship analogous to a marital relationship?").

767. The Washington Blade, May 31, 1985, at 9, col. 2 (reporting on the decision by the AAA of Southern California to offer gay couples the same auto insurance discount offered to heterosexual couples). In Ohio, a representative of the Ohio Automobile Club stated "specifically to the definition of spouse, we leave that to the master member. In enrolling a master member, we request only that the prospective member identify the associates as his or her spouse, and if dependents, whether or not they are under the age of 23. No further proof of a relationship is required." Letter from Anthony Priore, Vice President of Marketing, Ohio Automobile Club, to Craig Covey, Stonewall Union (Feb. 8, 1985).

recently decided to issue a joint policy to a gay couple after a complaint was made to the Michigan State Insurance Bureau. The claim was that the insurance company was discriminating on the basis of marital status. State Farm Fire and Casualty Group has settled a lawsuit brought on a related issue by the Lesbian Rights Project by consenting to treat equally, married and unmarried couples who seek homeowners policies.[768]

Another insurance problem is the inability of gay couples to obtain medical insurance to cover both parties. Progress, however, has been made toward eradicating this problem. For example, on August 1, 1984, the Berkeley School Board voted to include domestic partners of school district employees in benefit programs.[769]

Numerous other issues confront gay families and the lawyers that serve them. Many lawyers representing gay clients who reside together advise them to enter into a contract which defines their economic arrangements. Such contracts also should provide for a fair and sane method of disengagement in order to lessen the situations delineated in the various gay divorce cases.[770] How to draft such contracts to make them both enforceable and practical is beyond the scope of this article but is certainly a legal issue facing gay families.[771] Finally, the gay client's lawyer must consider the tax consequences of such economic arrangements.

Many gay families have children in the home. The children are generally the issue of one of the partner's previous heterosexual relationship, usually a marriage. Aside from these children who were conceived by traditional methods, gay couples are increasingly seeking other parenthood opportunities. Three potential situations are possible: adoption, foster parenting, and biological parenting through artificial insemination. When known gay persons have attempted any of these processes, controversy has arisen.

Persons allowed to adopt have generally been in traditional marriages; only recently have single persons even been considered. No estimate is possible as to how many adoptive parents who are officially labeled as single parents are, in reality, gay. Such parents have probably exercised great discretion about their sexual orientation, fearing

---

768. *See* Lesbian Rights Project Newsletter, Summer 1985.

769. Gay Community News, Dec. 12, 1984, at 1. The American Psychiatric Association offers such insurance to its members. Correspondence from the American Psychiatric Association to Rhonda Rivera (July 17, 1985). The National Organization of Women also offers such insurance.

770. *See supra* notes 638–57 and accompanying text.

771. C. Blackburn, Legal Structures for Intimate Relationships 8 (1982) (unpublished manuscript) (available in author's files). *See generally* R. ACHTENBERG, *supra* note 632.

that if they were revealed to be gay, they would not be allowed to adopt.[772] However, in a number of instances, openly gay persons have sought to adopt. In 1982, New York's Department of Social Services adopted new regulations which prohibited discrimination on the basis of sexual orientation against candidates for adoptive parents. One of the regulations provides: "Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it related to the best interests of adoptive children."[773] The Department indicated in July, 1985, that no figures exist as to the number of approved gay applicants or approved placements with gay persons which have occurred since implementation of the regulation.[774]

David Frater, a Californian, made the *New York Times* when he, an openly gay man, was allowed to adopt his foster son, Kevin.[775] Kevin was described in one newspaper as a "professed heterosexual."[776] The county adoption agency granted permission only after Frater sued them. Kevin had lived in Frater's home for three years under emergency protective custody. Prior to being placed with Frater, Kevin had been placed unsuccessfully in fifteen other homes.[777]

While Kevin is not gay, young persons who are gay often need foster care or adoptive parents either because their natural parents have disowned them,[778] or adoptive[779] or foster parents have refused

---

772. Schultz, *Expanding the Parent Pool: Adoption and Gay Men Who Wish To Father*, The Advocate, July 21, 1983, at 25. *See also* Letters from M.J.W. to Rhonda Rivera (July 9, 1985; May 8, 1983) (detailing M.J.W.'s experience in attempting to become an adoptive father as an openly gay man in Ohio).

773. N.Y. Dept. Social Servs. Reg., pt. 421(h) (1982). The guidelines which accompany the regulation add: "There is *no* basis for any belief that sexual contact with children or exploitation of children under their care occurs with any more frequency among homosexually oriented persons than is the case with heterosexuals." *Id. See also* Lambda Notes, Winter 1983, at 4.

774. Letter from Joseph Semidei, Deputy Commissioner, Division of Family and Children Services, New York State Department of Social Services, to Rhonda Rivera (July 15, 1985).

775. N.Y. Times, Jan. 10, 1983, at A8, col. 2.

776. Columbus Citizen-Journal, Dec. 10, 1982, at 2.

777. Gay Community News, Jan. 29, 1983, at 1.

778. For example, consider "a father who continually taunted his fourteen-year-old son with accusations about the boy's sexuality . . . . The father sought to justify his behavior as a legitimate form of discipline designed to cure the child of certain unspecified 'girlie' behavior." *In re* Shane T., N.Y.L.J., Aug. 20, 1982, at 14, col. 5–6 (N.Y. Fam. Ct., Richmond County Aug. 19, 1982). The boy was repeatedly called a "fag," "faggot," and "queer" by his father. His father told him many times he should have been a girl and humilitated him in public by calling him a "fag" while they were shopping. *Id.* The judge found the father guilty of abuse under the New York Family Court Act. *Id.*

779. *See, e.g., In re* Russell, 170 Pa. Super. 358, 85 A.2d 878 (1952). In this case, the person adopted was a homosexual young man. The executor of the adoptive mother's estate sought to set aside the adoption. One reason given was the young man's sexual orientation. The judge

them shelter.[780] In at least one case in Missouri, the Department of Social Services actively sought to place a gay youth with a gay adoptive parent.[781]

Foster care is another option for gay persons who wish to be parents. A consensus is growing that gay adults can be good placements for gay youth. Programs have been initiated in New Jersey,[782] Pennsylvania,[783] and in Los Angeles, California.[784] Thus, foster parenting seems possible for gay adults if the children are of an age to have identified themselves as gay. However, foster parenting in general by gay adults has recently come under attack in Boston, Massachusetts. "Last Spring, a Boston couple in their thirties, responsibly employed, churchgoing people without children, applied to the State Department of Social Services to become foster parents."[785] This description from the *New York Times* introduced the story of Donald Babets and David Jean of Boston, Massachusetts, who received two foster children only to have them removed following a media uproar. The two little boys, who had been battered children, were placed with Babets and Jean after a year-long investigation. This placement was done with the knowledge and consent of the children's mother. When a newspaper story sensationalized the placement, the children were immediately removed.[786] However, the story did not end there. In response to the newspaper furor, the Massachusetts House of Representatives added an amendment to a budget bill instructing the Massachusetts Department of Social Services not to place children in gay households for foster care, adoption, or day care.[787] The amendment also stated: "A homosexual preference shall be considered a threat to the psychological and physical well being of the child."[788] Responding to the political furor, the Department of Social Services announced a new guideline along simi-

---

declined to set aside the adoption, saying: "The appellants also take the position that if Thomas Russell-Freeman was a homosexual the adoption decree had to be vacated. We are at a loss to understand this reasoning. While homosexuality is abhorrent, we know of no rule of law that a homosexual has no civil rights." *Id.* at 363, 85 A.2d at 880.

780. *See* T. Bergara, Meeting the Needs of Sexual Minority Youths (19__) (unpublished manuscript) (available in author's files).

781. Letters from Susan C. Guerra, J.D., Missouri Department of Social Services, to Rhonda Rivera (July 17, 1985; Jan. 17, 1985).

782. *See* 6 FAM. L. REP. (BNA) 2118 (Dec. 18, 1979); N.Y. Times, Dec. 2, 1979, at E6, col. 1; Columbus Citizen-Journal, Nov. 27, 1979, at 5.

783. The Advocate, July 9, 1985, at 9; New York Native, June 3–16, 1985, at 9.

784. The Advocate, July 9, 1985, at 19.

785. N.Y. Times, May 19, 1985, at L12, col. 1.

786. Gay Community News (Boston, Mass.), June 1, 1985, at 1; The Washington Blade, May 17, 1985, at 10.

787. *See* The Washington Blade, May 31, 1985, at 1.

788. *See id.*

lar, but less harsh lines. The Department announced that "children are best served when they are placed in traditional family settings."[789] Thus, Massachusetts surprisingly became the first state to actively discriminate against gay foster or adoptive parents. One needs to be reminded that Massachusetts is the setting of *Bezio v. Patenaude*[790] and *Doe v. Doe*,[791] two of the most progressive gay parenting cases. If adoption and foster parenting seem controversial, consider the issue of artificial insemination of gay parents.[792] Lest California appear to be the only avant-garde state, the first case to be examined, *Karin T. v. Michael T.*,[793] will be from New York. While not technically a gay rights case, the legal issues raised are exactly the same. In *Karin T.*, suit was brought by the New York Department of Social Services as the assignee of the mother of two children in order to collect support from the other parent. The "other parent," Michael T., turns out to have been a somatic female at birth and was born with the name Marlene A.T.[794] When sued, Michael T.'s answer denied that she was the

---

789. N.Y. Times, May 25, 1985, at 9.

790. 381 Mass. 563, 410 N.E.2d 1207 (1980). *See* Note, *Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1980–1981). *See also supra* notes 571–80 and accompanying text for a discussion of *Bezio*.

791. 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983). *See supra* notes 580–84 and accompanying text for a discussion of *Doe*.

792. Ellen Goodman, a relatively liberal syndicated columnist, wrote: "I have never understood the need of gay couples to define their relationships as 'family.' I am uncomfortable with those gay women who deliberately go out to get children of their own through artificial insemination." Columbus Citizen-Journal, June 6, 1985, at 4.

793. 127 Misc. 2d 14, 484 N.Y.S.2d 780 (Fam. Ct. 1985).

794. As indicated, this case is not a gay case because investigation beyond the published case revealed that Marlene/Michael is a transsexual who at the time of the case had begun but not completed the transsexual protocol. Telephone interview with James Phillipone, Michael T.'s attorney (July 15, 1985). Michael has had a breast reduction and has taken male hormones. The remaining procedures for Michael T. would normally be a hysterectomy and the construction of a penis using vaginal tissue.

A person who has a same-sex sexual orientation is not a transsexual. In fact, 85% of all transsexuals are heterosexual in their sexual orientation. A transsexual is a person whose psychosexual identification differs from their somatic identification. For example, in this case, Marlene's psychosexual identity was male (Michael) but her body structure was female. In her mind, her sexual orientation was toward a person of the opposite sex; she thought herself male so her erotic choice was female. An outside observer would believe her to be a lesbian, a woman (bodily) who is attracted to women. When her body type was conformed to her psychosexual identity, "his" mind and "his" body were congruent, and he was Michael. Michael, in his own mind, is a heterosexual who was attracted to Karin. A gay person's psychosexual identity conforms to his or her body type. A gay man is physically male and believes himself to be male and has no desire to change his mind or his body. His sexual orientation, however, is toward another male. *See* Rivera I, *supra* note 1, at 803, 803 nn.19–21. *See also* 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); Richardson, *The Challenge of Transsexuality: Legal Responses to an Assertion of Rights*, 4 N. ILL. L. REV. 119 (1983).

father of the children because she was female.[795] According to the evidence, Michael T. dressed in traditional male clothing and worked at jobs which Michael considered men's work. Michael and Karin were married in New York state, and subsequently, the couple had two children by artificial insemination. As part of the artificial insemination process, Michael signed an agreement with Karin T. and with the doctor who administered the process. The agreement provided that any child or children born of the process were Michael's "own legitimate child or children and are heirs of his body . . . ."[796] Concurrent with the support suit, an action was brought to declare the marriage of Karin and Michael void.

The judge in *Karin T.* began his opinion by stating that "[n]either counsel for the parties nor the Court has found any authority similar to the fact situation in this case."[797] The judge turned from an examination of parental support laws to a decision based on contract and estoppel. First, he held Michael T. liable for support based on the contract made between Karin T., Michael T., and the doctor who performed the artificial insemination.[798] The court found the children to be third party beneficiaries of the contract.[799] When the defendant argued that she was not a "parent" under New York domestic relations law, the judge estopped her from making the argument on equitable grounds.[800] The court would not allow Michael T./Marlene A.T. "to completely abrogate her responsibilities for the support of the children involved . . . [nor] benefit from her own frauduent acts which induced their birth . . . ."[801] After the court's decision, the parties reached a private settlement as to support, and, in return, Michael received the visitation rights which he desired.[802]

A similar case with a similar outcome is the California case of *Loftin v. Flournoy*,[803] noted by the *New York Times* as raising "novel" legal issues.[804] Ms. Loftin and Ms. Flournoy joined their households in April, 1977. Flournoy brought two children from a previous marriage

795. *Karin T.*, 127 Misc. 2d at 14, 484 N.Y.S.2d at 781.

796. *Id.* at 16, 484 N.Y.S.2d at 782.

797. *Id.* at 15, 484 N.Y.S.2d at 782.

798. *Id.* at 16, 484 N.Y.S.2d at 783–84.

799. *Id.* at 18, 484 N.Y.S.2d at 784.

800. *Id.* at 19, 484 N.Y.S.2d at 784.

801. *Id.* at 18, 484 N.Y.S.2d at 784.

802. Michael's lawyer believed that Michael would have won on appeal by claiming that the family court did not have jurisdiction in the matter because the decision was essentially reached on a contract basis. However, Michael did not appeal because he wanted visitation. Telephone interview with James Phillipone, Michael T.'s attorney (July 15, 1985).

803. No. 569630-7 (Cal. Super. Ct., Alameda County Jan. 2, 1985).

804. N.Y. Times, Sept. 9, 1984, at 11.

with her. In June, 1977, the couple exchanged vows at the local Metropolitan Community Church. In November, 1977, using a turkey baster armed with sperm from her brother, Loftin artificially inseminated Flournoy. On August 28, 1978, a female baby was born to Flournoy and named Sparkle C. Loftin; the name L. Loftin was used as the father's name on the birth certificate. Subsequent to the birth of the child, the parties entered into a written legal agreement which provided primarily for property arrangements. One section of the agreement, however, dealt with the children. The provision obligated the person who vacated their joint residence to turn guardianship of all three children over to the person remaining in the home. The same provision provided that the parties would agree to mediation prior to any suit.[805]

The parties separated in July, 1980, and were granted a dissolution by their church in September, 1980. The question of the rights of the non-biological parent arose in a manner similar to *Karin T.* The biological mother applied for support from Aid to Families with Dependent Children. The District Attorney of Alameda County brought a "Complaint for Reimbursement of Public Assistance and Child Support" against Loftin on October 6, 1981. Thirteen days later, a stipulation and order were entered whereby Ms. Loftin agreed to pay one hundred dollars per month in child support for Sparkle Loftin's support. On March 4, 1983, Loftin filed a complaint, seeking visitation rights. The court referred the matter to family court services on August 31, 1983, for investigation. Flournoy answered and denied that the court had jurisdiction to hear the matter. On August 17, 1984, a hearing was conducted for the sole purpose of determining whether the court had jurisdiction.[806] The court came to the conclusion that Ms. Loftin was not a parent within the California Family Law Act, thus, the statute did not confer jurisdiction.[807] Similarly, neither the Uniform Child Custody Jurisdiction Act nor the Uniform Parentage Act was found to grant jurisdiction.[808] Flournoy's attorney conceded that Loftin could, if she wished, apply as a non-biological parent for guardianship. The court pointed out that California had precedents where non-biologically related persons were found to be pyschological parents of children and were given custody. The court concluded that Loftin may not be prevented from asserting a right to custody simply because there is

805. Plaintiff's Trial Brief at 1–4, Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct., Alameda County Jan. 2, 1985).

806. *Id. See also* Defendant's Trial Brief, Loftin v. Flournoy, No. 569630-7 (Cal. Super. Ct., Alameda County Jan. 2, 1985).

807. *Loftin*, No. 569630-7, slip op. at 7.

808. *Id.*, slip op. at 8–9.

no specific statute or case that covers the particular situation.[809] The court then found jurisdiction "to be the general custody law of this [state] that is embedded in statutes and cases . . . ."[810] After the determination of jurisdiction, the court asked for an update of the family service investigation and set a date for a hearing on the merits. However, prior to the hearing the parties reached an agreement which provided supervised visitation rights to Loftin who was ordered not to remove the child from California.[811]

In both *Karin T.* and *Loftin*, serious questions remain as to the jurisdiction of the courts which rendered judgment. However, as neither decision was appealed, the issue remains unresolved. Logically and equitably, the family courts seem best suited to settle such disputes. The lack of a forum results, however, because no legal recognition exists for the parties and their relationship to the child. Moreover, the law does not provide legal parameters for artificial insemination, except those laws which cover doctors providing such a service to married couples.[812] Practical techniques, of a self help variety, are not covered by statutes and, given the ease of administration, seem impossible to prevent or regulate. The state could criminalize artificial insemination of non-approved persons. Such a prohibition, however, would probably be no more successful than the prohibition of alcohol or abortion. Jailing a mother of a small child and creating a new ward of the state would be counterproductive. Moreover, gathering proof of how artificial insemination took place would raise serious invasion of privacy issues. The situation is best controlled by providing a legal relationship for the child and co-parents so that continuity of emotional relationships can be maintained, and the child can be adequately supported by those who brought him or her into the world. The issue is extremely complex;[813] however, anecdotal evidence leads the author to believe that the number of children already conceived in a fashion similar to Sparkle Loftin may be significant.[814]

---

809. *Id.*, slip op. at 20.

810. *Id.*, slip op. at 21.

811. *Id.*, slip op. at 2–3 (Stipulation & Order).

812. *See* Kritchesky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 32–37 (1981).

813. *See* Hitchens, *Lesbians Choosing Motherhood: Legal Issues in Donor Insemination*, LESBIAN RIGHTS PROJECT (1981).

814. *See* The Washington Blade, May 31, 1985, at 6 (reporting that the Gay Activist Alliance was lobbying the Washington City Council to protect nontraditional arrangements between consenting parties to artificial insemination by donor); Lambda Update, Feb. 1985, at ___ (reporting that in January, 1985, over 350 persons attended a conference in New York on the subject of "Lesbians Choosing Motherhood"); *Mother by Choice*, Gay Community News, Nov. 3, 1984, at 8; Gay Community News, July ___, 1984, at 2 (reporting that a California judge ruled that a lesbian must grant visitation rights to a gay man who donated sperm); The Advocate, Sept. 30,

The many facets of the legal issues involved with the creation of gay families is indicative of the legal system's failure to accommodate reality.[815] In the past, nonmarital relationships between nongay persons were in a similar situation. When a dispute arose, the courts left the parties as they found them, as a method of showing societal disapproval of their meretricious relationship. However, neither this approach nor "justice" ended nonmarital relationships between mixed-sex couples. Sometimes, when left as they were found, the parties resorted to violence to settle their disagreements. More often, the more physically and/or financially powerful person took advantage of the weaker person. Children of such arrangements were often the innocent victims. The *Marvin* decision, and similar decisions in other states, recognized the resulting inequities and attempted to create some remedies within the legal system for nonmarried mixed-sex cohabitants. Some of these same cases can, no doubt, be used in same-sex cohabitation litigation. However, the law has not found an equitable way to deal with gay relationships or the children they produce. Contractual arrangements can perhaps resolve property disputes. Such contracts, however, cannot make enforceable decisions about issues in which the state has a strong public interest, such as the welfare of children. Even valiant efforts, made by lawyers who represent gay family members, to adapt current legal remedies simply do not bridge the gap.

1982, at ___ (reporting that a doctor at Georgetown University in Washington, D.C., lost his staff appointment because he artificially inseminated a lesbian); The Advocate, Oct. ___, 1981, at ___ (reporting that in Melbourne, Australia, the Queen Victoria Hospital had provided artificial insemination for lesbians); *Lesbians Having Babies by AID (Artificial Insemination by Donor)*, The Advocate, Feb. 22, 1978, at 7.

815. *See* Sutton, *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GOLDEN GATE U.L. REV. 1007 (1980).