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Joel J. Finer

Cleveland State University, j.finer@csuohio.edu

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GAY AND LESBIAN APPLICANTS TO THE BAR: EVEN LORD DEVLIN COULD NOT DEFEND EXCLUSION, CIRCA 2000

JOEL JAY FINER*

Some months ago, the Editors of this Journal solicited an historic "Brief," to be published anonymously (at the author's request)—Brief Against Homophobia at the Bar: To Law School Dean: Mid 1960s, 10 Colum. J. Gender & Law 63 (2000). The present article: a) explores the numerous legal, social, and attitudinal developments since that Brief was written (in the mid-1960s); b) develops tests and criteria for evaluating the "good moral character" requirements for admission to the practice of law (particularly as impacting on sexual practices, propensities, and gender orientation, lawful or unlawful in different jurisdictions at different times); and c) relates developments in attitudes and practices of Bar examiners.¹

In 1957, the publication of a report to Parliament, the Wolfenden Report, which recommended the repeal of laws criminalizing private homosexual conduct between consenting adults,² sparked an intensely debated controversy in political philosophy and jurisprudence. The issue: is society justified in criminalizing behavior which, although causing no secular harm, transgresses widely held moral values? The principal proponent of morals legislation was Lord Patrick Devlin, who responded to the Wolfenden recommendation with a paper disputing the report's premises—that criminal law had no proper business punishing private immorality.³ Devlin argued that the maintenance of a shared public sense of morality is essential to maintaining the cohesion of society:

* Professor of Law, Cleveland-Marshall College of Law; B.B.A., City College of New York; M.A., LL.B., Yale University.

¹ This last aspect of Professor Finer's contribution herein, relies significantly, but by no means exclusively, on Professor Deborah Rhode's seminal article on the subject of the "good moral character" requirement (e.g., the instant article suggests additional analogies, and otherwise expands on and updates that premiere study: Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 516 (1985)).

² See Committee on Homosexual Offences and Prostitution, The Wolfenden Report cmt. 247 (1957).

³ Patrick Devlin, The Enforcement of Morals, 45 Proceedings of the British Academy 1 (1959).

If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail . . . the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought.⁴

Lord Devlin contended that the maintenance of the common moral bonds of society necessitated the expression of these morals through laws pertaining to a widely-shared abhorrence of certain behavior, including homosexual conduct:

I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. *No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law.*⁵

For Devlin, where such virtually universal moral outrage was present, not even the values of liberty or privacy could trump the case for translating that outrage into criminal prohibitions.

Oxford Professor of Jurisprudence H.L.A. Hart, a philosophical successor to the libertarianism of John Stuart Mill, vigorously opposed Devlin's views. In this country, the most distinguished proponent of the Mill-Hart philosophical position is Professor Ronald Dworkin.⁶ Hart, Dworkin, and those of a similar persuasion, and Lord Devlin and those of his persuasion, produced a prodigious body of legal, moral, and political philosophy.⁷

While I am of the Mill-Hart-Dworkin persuasion, the Devlin-Hart disagreement will not be pursued herein,⁸ for one thesis of this Article is

⁴ *Id.* at 10.

⁵ *Id.* at 17 (emphasis added).

⁶ See Ronald Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986 (1966).

⁷ For scholarship in support of Hart's views, see, for example, Graham Hughes, Morals and the Criminal Law, 71 Yale L.J. 662 (1961) (book review) and Robert S. Summers, Book Review, 38 N.Y.U. L. Rev. 1201 (1963). For scholarship favoring Devlin's position, see, for example, Eugene Rostow, The Enforcement of Morals, 1960 Cambridge L.J. 174.

⁸ Nor do I address the question whether the Constitution prohibits restrictions on liberty that are justified by neither the Mill-Hart prerequisites nor the Devlin prerequisites, other than to note that where there is neither a secular harm nor a broad consensus

that in the present moral climate, even supporters of Lord Devlin's philosophy could not justify criminalizing private sexual conduct between consenting adults. I look at this specifically in the context of admission to the Bar.

At the outset, let me state my reasons for the subtitle of this article—*i.e.*, “Even Lord Devlin Could Not Defend Exclusion,” in the moral climate of the year 2000. Devlin, in his major work on this subject,⁹ conceded that his thesis was subject to certain important exceptions or qualifications.¹⁰ The most significant of these, for present purposes, is that when, over time, “[t]he limits of tolerance shift”¹¹ as to particular behavior, society would not be required or even justified in continuing to criminalize that conduct.¹²

Critical to Devlin's thesis defending the enforcement of morality was the presence of a strong and pervasive public demand for enforcement, a demand generated by almost universal disgust and abhorrence, such that the very idea of legal tolerance was itself intolerable.

As I examine, in Part I, the developments since the mid-1960s with respect to the legal, constitutional, social, and reputational status of homosexuals, it becomes abundantly clear that the conditions for even the debatable Devlinian justification for prohibiting consensual same-sex intimacies are simply not present. Rather, there have been major “shifts” in the “limits of tolerance” away from condemnation and outrage, and toward toleration and acceptance.

The Hart-Devlin debate focused on the legitimacy of criminalization. In 1986, the Supreme Court in Bowers v. Hardwick¹³ upheld the criminalization of adult consensual private homosexual sodomy. Ten years later, the Romer¹⁴ decision found that discrimination against homosexuals as a class violated the Equal Protection Clause because such

condemning the behavior as outrageous, courts would need to strain mightily indeed to discern the necessary rational basis for restricting liberty. (And as Romer teaches, animus is the antithesis of a rational basis.)

⁹ Devlin, *supra* note 3.

¹⁰ *See id.* at 18.

¹¹ *Id.*

¹² *See id.*

¹³ 478 U.S. 186 (1986).

¹⁴ Romer v. Evans, 517 U.S. 620 (1996).

discrimination lacked a rational basis and was motivated by an animus against the disadvantaged group. The discussion which follows contends that the necessary social attitudinal basis for Devlin's views has dissipated, that there is no rational basis for adverse treatment of gay or lesbian applicants to the Bar,¹⁵ and that any feelings of "disgust," "indignation" or "intolerance" by Bar examiners toward homosexual applicants is the very animus condemned by Romer as an untenable—indeed constitutionally reproachable—basis for discrimination.

In recent decades, there have been many significant developments in the constitutional, legal, and social status of homosexual men and women. The first part of this commentary will document these developments. Thereafter, the "good moral character" requirement for admission to the practice of law in virtually all jurisdictions will be examined in order to gain further insight into the actual or potential risks of inquiry, investigation, and/or exclusion based on criminal convictions, unprosecuted homosexual practices (both where criminalized and where not criminalized), and gay or lesbian status itself.¹⁶

I

There have been developments at the constitutional, federal, and state levels, as well as in the judicial and legislative spheres. In flux have been laws and judicial interpretations concerning marriage and domestic partnership, employment, housing, education, military status, insurance, hate crimes, sodomy statutes, public health regulations, adoption, child custody, visitation, etc. Outside the law itself, organized religion has passionately debated questions such as the ordination of gays and lesbians as clergy and the solemnization of committed partnerships between gays and lesbians. As this piece is nearing completion, the Miami Herald reports that the Central Conference of American Rabbis, which represents Reform rabbis in the United States and Canada, decided that its members—1800 rabbis—may perform religious rituals to solemnize gay and lesbian

¹⁵ That is, the absence of a nexus to attributes indicative or predictive of future unethical practice of law.

¹⁶ Of course the constitutional considerations relevant to assessing the validity of criminalization sound in due process, while those bearing on employment opportunities or public certification directly implicate the Equal Protection Clause. There are interesting and significant relationships between the Bowers decision, focusing on the former, and the later decision in Romer, focusing more on status discrimination or targeting.

unions.¹⁷

The phenomena that seem to have had significant impact on the interests of gay and lesbian Americans, and on public perceptions and attitudes toward them, have been: “gay liberation”—particularly in San Francisco in the 1960s and 70s; the blight of AIDS since the early 1980s; the Bowers decision upholding the criminalization of homosexual sodomy;¹⁸ the rise of the political and religious right; developments regarding same-sex marriage; the Romer case striking down a state constitutional amendment which restricted political rights of homosexuals;¹⁹ President Clinton’s general, albeit uneven, support and implementation of fairer treatment for gays and lesbians in the military; the increased openness and assertiveness of homosexuals; and changes in the manner in which gay men and lesbians and their lifestyles are depicted in popular media.

A. Constitutional Status/Federal and State

In 1986, the Supreme Court in Bowers v. Hardwick struck a heavy blow to gay and lesbian aspirations by upholding the constitutionality of a state criminal sodomy statute (at least in its application to consensual *homosexual* relations). Ten years later, in Romer, a decision not mentioning Bowers, a majority of the Court invalidated a Colorado constitutional amendment barring homosexuals from obtaining legislative protection against acts of discrimination as a specified class. **In Romer, the Court found an absence of rational basis for this discriminatory classification, which it viewed as impermissibly motivated by anti-homosexual animus.**²⁰

Some scholars interpret the holding in Romer to mean that discrimination against gay people almost always lacks a rational basis (and, by implication, as necessarily overruling Bowers),²¹ other scholars view it as prohibiting discrimination against gays only when the law in question

¹⁷ Reform Rabbis Back Blessings of Gay Unions, Miami Herald, Mar. 30, 2000, at A1.

¹⁸ Bowers v. Hardwick, 478 U.S. at 196.

¹⁹ Romer v. Evans, 517 U.S. 620 (1996).

²⁰ *See id.* at 632.

²¹ *See, e.g.*, Thomas C. Grey, Bowers v. Hardwick Diminished, 68 U. Colo. L. Rev. 373 (1997) (claiming that Hardwick cannot be reconciled with Romer; the latter strongly suggesting that discrimination against homosexuals cannot survive even a rational basis test.)

cannot be linked to some public-regarding justification,²² and still others view Romer as opening the door to the potential constitutional treatment of homosexuals as a suspect or quasi-suspect class (thus requiring that discriminatory laws be subject to greater scrutiny than they are under the rational basis test.)

In post-Romer litigation, courts have tended to find that the Equal Protection Clause does not require courts to invalidate laws discriminating against gays where such laws can be said to be rationally related to a legitimate public objective.²³

The consensus among scholars, although not universal, is that at the least, Romer prohibits discrimination based on nothing more than an *animus* toward the status of homosexuality. Courts are seeing at least that much in Romer as well.

For example, a recent decision of a federal district court in Ohio declared that a school board's non-renewal of a homosexual teacher's contract, if shown to be "motivated solely by animus towards that group . . . [would] necessarily . . . [violate] the Equal Protection Clause, because a 'desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose.'"²⁴

Although the Equal Protection Clause has not been judicially read as affording for lesbians and gay men the same constitutional protection afforded to men and women, based on their gender as such, most of such cases were decided before Romer²⁵ and read Bowers as precluding

²² See, e.g., Cass R. Sunstein, The Supreme Court, 1995 Term-Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 6, 101 (1996) (stating that Hardwick is not implicitly overruled by Romer; and discrimination against gays is prohibited where, and only where, it cannot be linked to some public-regarding justification (*i.e.*, where based only on animus)).

²³ See, e.g., Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997) (upholding amendment of Cincinnati City Charter that removed homosexuals from present or future protections by municipal anti-discrimination ordinances as rationally related to city's interest in avoiding costs of investigating complaints); Richenberg v. Perry, 97 F.3d 256, 260-61 (8th Cir. 1996) (upholding military discharge of homosexual as rationally based on presumption that self-declared homosexuals have propensity to commit homosexual acts).

²⁴ Glover v. Williamsburg Local Sch. Dist. Bd. of Educ., 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998), (citing Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) (citing Romer v. Evans, 116 S. Ct. at 1629)) (emphasis added). The court also noted that "[i]t is inconceivable that Bowers stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation." *Id.* at 1169. *But cf.* Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997)

²⁵ See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990);

constitutional treatment of homosexuals as a suspect category, which would require at least quasi-strict scrutiny of discriminatory laws or practices. Romer retains considerable potential significance in the future of equal protection and even due process analysis.²⁶

B. State Constitutional Developments

The Supreme Court of Hawaii interpreted that state's constitution as requiring that marriage licenses be issued to same-sex couples absent a compelling justification, which the State failed to demonstrate in subsequent litigation on remand.²⁷ Although the Hawaii electorate subsequently empowered its legislature to amend its constitution so as to preclude recognition of same-sex marriages,²⁸ legislation was enacted providing same-sex couples with many of the benefits afforded to married couples.

The Vermont Supreme Court has construed that state's constitution as requiring that same-sex couples receive the "common benefits and protections that flow from marriage under [Vermont law]" (requiring and permitting the Vermont legislature to elect either to grant marriage licenses to same-sex couples or bring about substantial equality of rights and privileges).²⁹

Woodward v. United States, 871 F.2d 1068, 1074-76 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 102-03 (D.C. Cir. 1987).

²⁶ For an insightful and provocative disquisition of the doctrinal and societal impact of Romer on the Bowers holding, see Andrew M. Jacobs, Romer Wasn't Built In A Day: The Subtle Transformation In Judicial Argument Over Gay Rights, 5 Wis. L. Rev. 893 (1996).

²⁷ Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *on remand sub nom. Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

²⁸ See Hawaii, Alaska Don't Want Same-Sex Marriage, Orlando Sentinel, Nov. 5, 1998, at A17. The Hawaii Constitution now states that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const., art. I, § 23. After the voters acted, the Hawaii Supreme Court dismissed as moot the constitutional challenge to the prohibition against same-sex marriage. See Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999).

²⁹ Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

As of this writing the Vermont House of Representatives has approved a bill creating “civil unions,” “setting the stage for the state to adopt the most sweeping set of rights for same-sex couples in the country.”³⁰

C. The Crime of Sodomy/State Laws and Constitutions

Since 1980 courts in seven states have struck down sodomy laws under state constitutions,³¹ and since the drafting of the Model Penal Code in 1961 (declining to criminalize consensual sodomy), at least twenty-six states have repealed such criminal laws.³² Currently eighteen states forbid sodomy.³³

³⁰ Carey Goldberg, Vermont’s House Backs Wide Rights for Gay Couples, N.Y. Times, Mar. 17, 2000, at A1.

³¹ See State v. Smith, 729 So. 2d 648 (La. App. 1999); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996); Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986).

According to Powell v. State, 510 S.E.2d 18 (Ga. 1998) (striking down law forbidding consensual sodomy as violating the Georgia Constitution):

Adults who “withdraw from the public gaze” . . . to engage in private unforced sexual behavior are exercising a right “embraced within the right of personal liberty.” . . . We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.

Id.

Cf. State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992) (declaring sodomy statute invalid), *rev’d*, 869 S.W.2d 941 (Tex. 1994) (reversing on grounds that lower court lacked necessary jurisdiction).

On the other hand, appellate courts in North Carolina and Rhode Island have rejected state constitutional challenges to sodomy laws. See State v. Chiaradio, 660 A.2d 276 (R.I. 1995); State v. Poe, 252 S.E.2d 843 (N.C. Ct. App. 1979).

³² Evan Wolfson & Robert S. Mower, When the Police Are in our Bedrooms, Shouldn’t the Courts Go in After Them?: An Update on the Fight Against “Sodomy” Laws, 21 Fordham Urb. L.J. 997, 1042 (1994).

³³ See National Gay and Lesbian Task Force, The Right to Privacy in the U.S.—January 2001, at <http://www.nglftf.org/downloads/sodomymap0101.pdf>. Prohibitions in thirteen of those states apply on their face to heterosexual and homosexual sodomy. *Id.*

D. Laws Addressing Discrimination Against Lesbians and Gays

Laws prohibiting discrimination against homosexuals are now on the books of the District of Columbia and ten states—California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, Wisconsin,³⁴ and in municipalities or counties in at least twenty-six other states,³⁵ including the cities of Phoenix, Atlanta, Denver, Chicago, New Orleans, Boston, Detroit, Minneapolis, St. Louis, New York, Cleveland, Philadelphia, Pittsburgh, Austin, Charlottesville, and Seattle.³⁶

E. Private Employment by Major Employers

While over 300 major employers offer domestic partner benefits to unmarried partners (extended health insurance and/or bereavement and other benefits),³⁷ the great majority of gay and lesbian workers in

³⁴ See Cal. Lab. Code § 1102.1 (1997); Conn. Gen. Stat. §§ 46a-81c (1997); D.C. Code Ann. § 1-2512 (1997); Haw. Rev. Stat. §§ 368-1, 378-2 (1996); Mass. Ann. Laws ch. 272, § 98 (Law. Co-op. 1996); Minn. Stat. §§ 363.03, 363.12 (1996); N.H. Rev. Stat. Ann. §§ 354-A:7, :8 (1998); N.J. Rev. Stat. §§ 10:2-1, :5-4, :5-12 (1996); R.I. Gen. Laws §§ 28-5-2, 28-5-7 (1996); Vt. Stat. Ann. tit. 3, § 495 (1996); Wis. Stat. § 111.36 (1996).

³⁵ See Thomas H. Barnard & Timothy J. Downing, Emerging Law on Sexual Orientation and Employment 29 U. Mem. L. Rev. 555, 557-58 & n.7 (1999); American Civil Liberties Union (ACLU), State and Local Laws Protecting Lesbians and Gay Men Against Workplace Discrimination, at <http://www.aclu.org/issues/gay/gaylaws.html> (last updated Oct. 1998). For examples of local ordinances protecting gays and lesbians from discrimination, see, for example., Los Angeles, Cal., Municipal Code ch. IV, art. 12, §§ 49.70-49.80 (1979); Administrative Code of the City of New York §8-107.

³⁶ ACLU, *supra* note 35. For an analysis of most of the statutes and ordinances referred to in notes 34 and 35, *supra*, see Developments in the Law: Employment Discrimination (Statutory Protection for Gays and Lesbians in Private Employment), 109 Harv. L. Rev. 1625, 1625-47 (1996).

³⁷ James P. Baker, Equal Benefits For Equal Work? The Law of Domestic Partner Benefits, 14 Lab. Law. 23 (1998).

[A] trend is emerging among private employers to offer domestic partner benefits to their employees. The trend is being led by some of the nation's most respected corporations, including Microsoft, Levi Strauss, Xerox, IBM, Walt Disney, Auto Desk, Bank of America and Chevron, all of whom offer, or plan to offer, health benefits to the domestic partners of their employees. Additionally, nationwide more than 40 governments (from the City of San Francisco to the State of Vermont),

committed relationships do not receive such benefits.

F. Family Law

In areas of family law other than marriage as such, gays and lesbians have slowly but steadily been overcoming negative stereotypes and moral obloquy. In matters of child custody and visitation rights, gay and lesbian divorced spouses, whose contact with their children was once (and in some cases still is) treated as presumptively detrimental to the child's best interests, are increasingly likely to find courts open-minded regarding the impact of gay/lesbian parenting or visitation on the welfare of children. Courts are more likely today to require, in showing of a harmful impact on a child from custody or contact with a gay parent, a nexus between the parent's sexual orientation and an actual detriment to the child.³⁸ Absent such a nexus, courts apply a variety of factors to decide custody/visitation issues, such as the level of care provided to the child, the degree of attachment of the child to each parent, the stability of each spouse, which parent has functioned as the primary caregiver, etc.

While progress has been made, there are still far too many courts that will weigh homosexuality negatively, explicitly, *or often implicitly*,³⁹ concluding that the gay or lesbian spouse is less suitable to fulfill the parental role or less stable, or more likely to subject the child to an immoral upbringing or to expose the child to social stigma and ridicule.⁴⁰

Judges across the country have been increasingly willing to approve adoptions with two "mothers" or "fathers," giving full parental rights to the non-biological parent, as they have long done for heterosexual stepparents. Such adoptions are no longer rare for gay couples in the District of

and 130 colleges and universities (from Stanford University to the University of Iowa), offer domestic partner benefit programs.

Id.

³⁸ See, e.g., S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985).

³⁹ See generally Susan J. Becker, Child Sexual Abuse Allegations Against a Lesbian or Gay Parent In a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of Experts and Judges, 74 Denv. U. L. Rev. 75 (1996).

⁴⁰ See, e.g., S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987). For other cases discriminating against homosexual parents in custody disputes see, for example, S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980); G.A. v. D.A., 745 S.W.2d 726 (Mo. Ct. App. 1987); Roe v. Roe, 324 S.E.2d 691 (Va. 1985).

Columbia and about twenty states.⁴¹

G. Hate Crimes

In eighteen states, hate crime laws specifically include crimes based on sexual orientation, in four states and the District of Columbia the laws include crimes based on sexual orientation and gender identity, and sixteen states with hate crime laws do not specify sexual orientation.⁴² Federal hate crime legislation, now under consideration by Congress and the subject of legislative hearings, would include crimes motivated by the sexual orientation of the victim.

H. Setbacks for Gay and Lesbian Rights

In response to the Hawaii decisions finding that its state constitution, as then written, compelled issuance of marriage licenses to same-sex couples, Congress enacted the Defense of Marriage Act.⁴³ This statute provides, in essence, that: 1) no federal benefits or entitlements based on marriage would be afforded to partners in a same-sex marriage; and 2) states had no obligation to afford full faith and credit to same-sex marriages contracted lawfully in other states.

As noted, the Hawaiian electorate effectively overruled the state judicial opinions interpreting the Hawaii Constitution as requiring issuance of marriage licenses to same-sex couples.⁴⁴

In the same vein, over twenty states have enacted legislation declaring that only marriages between partners of the opposite sex will be recognized as valid.

At least one anti-gay rights ordinance has survived scrutiny notwithstanding *Romer*. The Sixth Circuit, reviewing an amendment of the Cincinnati City Charter denying municipal benefits to homosexual partners of city employees, found that the provision had a rational basis—to save the city the administrative expenses necessary to investigate and defend against

⁴¹ Joan Biskupic, For Gays, Tolerance Translates To Rights; Legal Gains Reflect Shift in Attitudes, Wash. Post, Nov. 5, 1999, at A1.

⁴² See National Gay and Lesbian Task Force, Hate Crimes in the U.S. - January 2001, at <http://www.nglhf.org/downloads/hatemap0101.pdf>.

⁴³ 28 U.S.C.A. § 1738C (West Supp. 1998) (foreclosing interpretation of any federal statutory provision referring to marriage or spousehood as applying to same-sex couples.)

⁴⁴ See *supra* note 28 and accompanying text.

a charge of discrimination.⁴⁵

1. Military Status

Under a policy known as “Don’t Ask, Don’t Tell,” gay and lesbian members of the armed forces have been discharged or denied re-enlistment in cases where they have either engaged in homosexual activity, or revealed themselves to be gay or lesbian. Courts upholding such adverse actions have found justification (a rational basis) in 1) a presumed propensity of homosexuals to commit homosexual acts; and 2) the need to promote unit cohesion, reduce sexual tension, and foster instinctive obedience, unity, commitment, and esprit de corps.⁴⁶

While the “Don’t Ask, Don’t Tell” policy was instituted in 1994 partly in order to make it easier for homosexuals to serve in the military, in practice gay and lesbian troops have been discharged from the military “at a far higher rate than before the policy went into effect.”⁴⁷ Moreover, harassment, assaults, and even murders of homosexuals in the military have, until very recently, been met with tepid responses and even willful blindness on the part of supervisory or command level officers.

Recently President Clinton expressed disappointment with the implementation of the “Don’t Ask, Don’t Tell” policy, calling it “out of whack.”⁴⁸ Soon thereafter, the Pentagon announced that it was instituting

⁴⁵ Equal. Found. of Greater Cincinnati, Inc., 128 F.3d at 292-93. See, however, also from the Sixth Circuit, Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

⁴⁶ Able v. United States, 155 F.3d 628 (2d Cir. 1998). See also Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (adding the rationale that it was legitimate for Congress to proscribe homosexual acts based on its conclusions that a military force should be as free as possible of sexual attachments and pressures).

⁴⁷ Philip Shenon, Pentagon Moving to End Abuses Of ‘Don’t Ask, Don’t Tell’ Policy, N.Y. Times, Aug. 13, 1999, at A1.

⁴⁸ President Admits ‘Don’t Ask’ Policy Has Been Failure, N.Y. Times, Dec. 12, 1999 at A1. According to the article:

President Clinton reminded his audience that the original intent was that people would not be rooted out, that they would not be questioned out, that this would be focused on people’s conduct. If they didn’t violate the code of conduct and they didn’t tell, their comings and goings, the mail they got, the associates they had—those things would not be sufficient to keep them out of the military, or subject them to harassment.

Id.

training sessions for every member of the military in order to raise the sensitivity of personnel, starting in boot camp and continuing throughout each person's military career.⁴⁹ The purpose is to substantially reduce or eliminate anti-gay violence and harassment, as well as to increase overall tolerance and respect. In pursuit of that objective, penalties have been increased for hate crimes in the military, including those targeting homosexuals.⁵⁰

I. Public Attitudes

What all of this shows is that while homosexuals and homosexuality have not achieved full, pervasive, and nationwide equality of legal treatment, their legal status has substantially improved in many respects. This is the case, notwithstanding the existence of continuing political and legislative opposition (sometimes successful), to extending various rights to gay people.

Changes in the law both reflect and influence public opinions and attitudes. Today there is nothing approaching Lord Devlin's justification for the "enforcement of morals"—*i.e.*, a national consensus of "moral outrage" and "indignation"; a pervasive revulsion of homosexuality as something "intolerable and disgusting."

Instead there has been increasing public acceptance of gays and lesbians.⁵¹ About half of the population now finds homosexuality or a homosexual lifestyle acceptable:

When asked by Gallup whether "homosexuality should be considered an acceptable alternative lifestyle or not," the proportion of Americans who chose "acceptable" rose from one-third (34% in 1982) to one-half (50% in 1999). Similarly, Yankelovich Partners found that the percentage of Americans who feel "lifestyles . . . such as homosexual relationships" are "not acceptable at all" dropped from a clear majority in 1978 (59%) to a clear minority in 1988 (33%).⁵²

⁴⁹ Shenon, *supra* note 47.

⁵⁰ Clinton Adds Stiffer Penalties to Military Code for Bias Crimes, N.Y. Times, Oct. 7, 1999, at A17.

⁵¹ *See generally* Kenneth Sherrill & Alan Yang, From Outlaws to In-Laws; Anti-gay Attitudes Thaw, 11 The Public Perspective, Jan. 20, 2000, at 20.

⁵² *Id.* at 20 (footnote omitted); *see also* Frank Newport, Some Change over Time in American Attitudes towards Homosexuality, but Negativity Remains, Gallup News Service, Mar. 1, 1999, at <http://www.gallup.com/poll/releases/pr990301b.asp>. The

While in some areas of the country and sectors of the population homophobia still clearly exists,⁵³ the extent of disapproval has dropped substantially in recent years.

With respect to attitudes toward employment opportunities, “the evidence is clear: overwhelming majorities are supportive, particularly over the past decade.”⁵⁴

Gallup reports 83% of Americans favored equal [employment] rights in 1999 (three separate surveys done between 1993 and 1996 showed support between 81 and 84%), a substantial increase from a baseline of 56%, reported by Gallup in 1977. Gallup’s numbers are confirmed in a Princeton Survey Research Associates (PSRA) trend that asks whether there “should or should not be . . . equal rights for gays in terms of job opportunities” (83 to 84% supported equal rights in three separate surveys between 1996 and 1998).⁵⁵

While the Bowers Court in 1986 ignored the arguments for the Mill-Hart position, today, however, with respect to same-sex intimate relationships, there is a demonstrable absence of empirical evidence supporting Lord Devlin’s debatable justification for legislating against deontological “immorality.”

percentage holding the view that sexual relations between consenting adults of the same sex is always wrong has dropped substantially as well, after over a decade at a high level (between seventy and seventy-five percent chose “always wrong” in nine separate surveys spanning from 1980 to 1991). By 1996, that figure had dropped to fifty-six percent. Sherrill & Yang, *supra* note 51, at 20.

A poll conducted by the National Gay and Lesbian Task Force “found that though disapproval of homosexuality had dropped by nearly 20 percentage points since its peak of 75 percent in the late 1980’s, it was still 56 percent in 1996, the most recent year examined on that question.” Carey Goldberg, Acceptance of Gay Men and Lesbians Is Growing, Study Says, N.Y. Times, May 31, 1998, at A21.

Fifty-seven percent of the people surveyed in a Washington Post/Kaiser Family Foundation/Harvard University poll in 1998 said homosexuality was unacceptable. Biskupic, *supra* note 41.

⁵³ See, e.g., GOP Prayer Breakfast Attendees Denounce Gay Marriage: Speakers Liken Same-Sex Unions To Nazism, Demand End to Tolerance, Ventura County Star (Ventura County, Ca.), Feb. 8, 2000, at A04; see generally Biskupic, *supra* note 41.

⁵⁴ Sherrill & Yang, *supra* note 51, at 20.

⁵⁵ *Id.*

II

A. Homosexuality and the Requirement of “Good Moral Character” for Admission to the Bar

Pre-admission screening of potential lawyers for “good moral character” is required by every jurisdiction.⁵⁶ Several major questions about the screening process exist;⁵⁷ those to be discussed herein include: What perceived moral failings or “vices” *are* appropriate for character committees to take into account? What have courts, character committees, and Bar examiners, charged with screening out those lacking “good moral character,” actually said or done with respect to indications of homosexuality, homosexual intimacies, and non-marital heterosexual conduct?⁵⁸

⁵⁶ See generally Rhode, *supra* note 1.

⁵⁷ These include, for example, procedural due process issues, issues regarding the reliability of sources of information examiners receive, the capacity of character committees to make probability judgments about the likelihood of repetition of misconduct or sufficiently sound judgments about whether a miscreant has been rehabilitated.

⁵⁸ The very practice of pre-admission moral screening has been called into question. See, e.g., Patrick L. Baude, An Essay on the Regulation of the Legal Profession and the Future of Lawyers’ Characters, 68 Ind. L.J. 647 (1993):

[I]t seems hard to see that the requirements serve *any* straightforward purpose. The proportion of applicants denied admission to the bar is minute—best estimated at one in five hundred. Yet the requirement persists in every state and commands a fairly large amount of time and money.

The obvious explanations for the continuation of character and fitness inquiries are inadequate to explain the present state of affairs. . . . [T]he regulation of the bar is made of two almost incompatible components. On the one hand is the project of convincing potential customers that their lawyers will not cheat or otherwise harm them. This is an essential part of marketing for any business.

....

The other project is the Weberian enterprise of justifying the privileges of lawyers in the political and economic sphere. These privileges are finally justified by appeal to the idea that lawyers are committed, in the words of the Preamble to the American Bar Association’s Model Rules of Professional Conduct, to “cultivate knowledge of the law beyond its use for clients, . . . to improve the law . . . and to exemplify the legal

What are the risks that gay or lesbian Bar candidates will suffer some adverse action, such as intrusive personal inquisitions, significant delays in gaining admission, and even exclusion from the profession?⁵⁹

A typical statement of the determination to be made by screening authorities is whether:

[a] reasonable man could fairly find that there were substantial doubts about [the applicant's] "honesty, fairness and respect for the rights of others and for the laws of the state and nation."⁶⁰

Having closely perused scholarly works⁶¹ and numerous judicial opinions, I suggest there are four factors which could create risks of adverse action for gay or lesbian candidates:

- 1) the very vagueness, elasticity, and abuse-inviting nature of the term "good moral character";
- 2) references, in expressions of "standards," to furthering or maintaining the "repute of the Bar" or the good "image" of the profession;
- 3) the criminality in the jurisdiction of the particular conduct, even absent any conviction in the candidate's history; and
- 4) the per se,⁶² or at least presumptive,⁶³ exclusion of

profession's ideals of public service." This second project is by and large a failure or, at best, an illusion.

Id. at 649-50 (footnotes omitted).

⁵⁹ When relating actions by Bar committees and courts, adverse actions against practicing lawyers, such as reprimand, suspension, and disbarment will also be noted.

⁶⁰ Konigsberg v. State Bar of Cal., 353 U.S. 252, 264 (1957) (setting forth the definition advanced by counsel representing the California Bar).

⁶¹ See, e.g. Patrick L. Baude, An Essay on the Regulation of the Legal Profession and the Future of Lawyers' Characters, 68 Ind. L.J. 647 (1993); Rhode, *supra* note 1. Students' works making significant contributions include Richard R. Arnold, Jr., Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants, 1997 Utah L. Rev. 63 (1997); Maureen M. Carr, The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards, 8 Geo. J. Legal Ethics 367 (1995); The Professional Image Standard: An Untold Standard Of Admission To The Bar, 66 Tul. L. Rev. 1015 (1992); Michael D. White, Good Moral Character and Admission to the Bar: A Constitutionally Invalid Standard?, 48 U. Cin. L. Rev. 876 (1979).

⁶² See Arnold, Jr., *supra* note 61, at 64.

⁶³ *Id.*

applicants who have actually been convicted of crime.

1. Moral character/moral turpitude

Undertaking and analyzing the results of the most comprehensive investigation into the past and present practices of screening committees and Bar examiners, Professor Deborah Rhode observed in the Yale Law Journal that:

Throughout its history, the moral fitness requirement has functioned primarily as a cultural showpiece. In that role, it has excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts. Although the number of applicants formally denied admission has always been quite small, the number deterred, delayed, or harassed has been more substantial. In the absence of meaningful standards or professional consensus, the filtering process has proved inconsistent, idiosyncratic, and needlessly intrusive.⁶⁴

The vague terms “moral character” and “moral turpitude”⁶⁵ fail to give guidance to those who need to interpret such language (*e.g.*, applicants, lawyers, bar examiners, courts), confer excessive discretion on those who authoritatively construe and apply them, and, of course, confer the power to gravely abuse such discretion.

As Justice Black, writing for the Court, observed:

The term “good moral character” has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. *Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and*

⁶⁴ Rhode, *supra* note 1, at 493-94.

⁶⁵ Discussing the meaning of “moral turpitude,” Justice Jackson declared: “If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral.” *Jordan v. De George*, 341 U.S. 223, 234 (1951) (Jackson, J., dissenting).

*discriminatory denial of the right to practice law.*⁶⁶

a. Appropriate Considerations in Screening Bar Candidates

Bar examiners are concerned with misconduct that basically falls into three categories. First, the Bar is concerned with misconduct that will impact the welfare of clients, other participants in the lawyers' world (judges, juries, witnesses, other attorneys), and the institution of justice itself.

Given the special fiduciary obligations of attorneys, traits that bear on the lawyer-client relationship understandably receive considerable attention. The qualities of honesty, trustworthiness, and fair-dealing capture much of this concern. Where the candidate has engaged in acts such as fraud,⁶⁷ larceny,⁶⁸ embezzlement,⁶⁹ academic dishonesty,⁷⁰ or misrepresentation,⁷¹ the candidate's admission to the Bar might pose a threat to clients who entrust their legal affairs to such an attorney. Financial misfeasance is of particular concern to character committees since lawyers are frequently entrusted with business and monetary affairs within a wide range of concerns of potential clients. The character flaws within this subset of misconduct have a fairly direct bearing on an attorney's worthiness of the trust and confidence of clients, and on her capacity to satisfy the legitimate expectations of others within the legal profession.

Bar examiners also consider moral character important for the protection of the fairness and integrity of the justice system itself. Prior acts of corruption, bribery, perjury, or obstruction of justice⁷² are obviously of legitimate concern.

⁶⁶ Konigsberg v. State Bar of Cal., 353 U.S. at 262 (emphasis added).

⁶⁷ See, e.g., Lark v. West, 289 F.2d 898 (D.C. Cir. 1961).

⁶⁸ See, e.g., Fla. Bd. of Bar Exam'rs Re R.D.I., 581 So. 2d 27 (Fla. 1991).

⁶⁹ See, e.g., People ex rel. Deneen v. Gilmore, 73 N.E. 737 (Ill. 1905).

⁷⁰ See, e.g., In re the Application of Harold Kearl Widdison, 539 N.W.2d 671 (S.D. 1995).

⁷¹ Cf. State ex rel. Bd. of Law Exam'rs v. Podell, 207 N.W. 709 (Wis. 1926).

⁷² See, e.g., In re Rappaport, 558 F.2d 87 (2d Cir. 1977) (obstructing justice, giving false testimony); cf. Lubetzky v. State Bar of Cal., 815 P.2d 341 (Cal. 1991) (en banc) (instituting harassing litigation).

These necessary virtues are summed up by the term “integrity.” Evidence of lack of integrity, depending on its nature and strength, warrants concerns about unethical lawyering. In short, the strongest case for investigation and/or negative action is misconduct pertinent to the special obligations of lawyers as lawyers.

A second sphere of arguably⁷³ legitimate professional concern may be misconduct that manifests propensities which threaten the personal security of those who would interact with attorneys. Past acts and/or convictions⁷⁴ of homicide,⁷⁵ rape, assault,⁷⁶ or robbery,⁷⁷ or instances of exploitation of children⁷⁸ or other vulnerable persons⁷⁹ are matters within the legitimate focus of Bar examiners,⁸⁰ even though the risks they create

⁷³ There is room here for a thoughtful analysis of whether or when the gatekeepers of the legal profession may justifiably inquire into convictions or unprosecuted instances of this sort of conduct, for example, not directly bearing on the virtues necessary to the functioning of a lawyer as a lawyer. *See infra* note 80.

⁷⁴ The approach to actual convictions differs among the states. Some jurisdictions automatically and permanently disqualify those convicted of certain offenses. Others presumptively disqualify those convicted of all or certain specified felonies. Some set a minimum time period between the date of conviction and eligibility for the Bar. In states with presumptive disqualification, various factors are taken into account; several states use the guidelines of the ABA. *See generally* Arnold, Jr., *supra* note 61.

⁷⁵ *See, e.g., In re Dortch*, 486 S.E.2d 311 (W. Va. 1997); *In re Moore*, 303 S.E.2d 810 (N.C. 1983).

⁷⁶ *See, e.g., In re Vandenbossche*, 724 N.E.2d 405 (Ohio 2000), *In re Farmer*, 131 S.E. 661 (N.C. 1926).

⁷⁷ *See, e.g., In re Jeb F.*, 558 A.2d 378 (Md. 1989).

⁷⁸ *See, e.g., In re Christie*, 574 A.2d 845 (Del. 1990) (suspending an attorney who had engaged in sexually inappropriate and criminal activities with two teenage minors in supplying them with alcohol and engaging in exhibitionism—showing them “X-rated” video tapes and masturbating in their presence. He had been convicted of various related crimes.).

⁷⁹ *See, e.g., In re T.J.S.*, 692 A.2d 498 (N.H. 1997) (conviction of felonious sexual assault of two students when employed as teacher); *In re Hicks*, 20 P.2d 896 (Okla. 1933) (lawyer disbarred for having a sexual relationship, resulting in pregnancy, with a retarded woman—a dwarf weighing about 60 pounds); *In re Okin*, 272 A.D. 607 (N.Y. App. Div. 1947) (disbarment of attorney who operated a brothel).

⁸⁰ Inquiry into this sort of misconduct—criminality of a violent or abusive nature—seems justified by the fact that some attorneys will practice independently, or are not vetted by the firms that hire them.

The lawyer-client relationship naturally involves closeness, in a proximate physical sense, and in a psychological sense; and in any event involves reliance and

are not directly or uniquely an aspect of the practice of law.⁸¹

b. Dubious Bases For Exclusion

More troublesome is a third category of behaviors: misconduct that has little or nothing to do with endangering clients or their legitimate expectations, endangering other actors in the legal system, or jeopardizing the effective functioning of the justice system itself.

Certain conducts that have at times produced adverse Bar actions are far from evidencing a danger to denizens of the lawyer's world. For example, just how relevant is it that the applicant or practicing attorney committed adultery⁸² or was convicted of seduction⁸³—behaviors which have generated adverse actions and harsh condemnations?⁸⁴

dependency by one person upon another. The importance of "public confidence" in the lawyer encompasses those who, as part of the lawyer's world, become vulnerable; they have a legitimate expectation that they can feel comfortable and safe physically, as well as in their financial and other legal interests.

⁸¹ The issues here have to do with the substantive guidelines, procedural processes, the extent of expertise, and the commitment of resources necessary to make determinations (or use rebuttable or irrebutable presumptions) relating to probability of future crimes.

⁸² Grievance Comm. of Hartford County Bar v. Broder, 152 A. 292 (Conn. 1930).

⁸³ In re Wallace, 19 S.W.2d 625 (Mo. 1929) ("The relation created by an engagement to marry is one of confidence and trust. An abuse of that relation for the satisfaction of sexual desires is not only contrary to good morals, but is an act of baseness and depravity. We have no doubt that seduction under promise of marriage involves moral turpitude."). Compare State v. Byrnett, 3 Ohio N.P. 28 (1895) (seduction held not grounds for disbarment).

⁸⁴ See State v. McClaugherty, 10 S.E. 407 (W. Va. 1889); In re Rothrock, 106 P.2d 907 (Cal. 1940).

What is the threat represented by acts or convictions of adultery (which few states criminalize and some courts have found cannot constitutionally be criminalized) or seduction (which the vast majority of states no longer treat as criminal)? In terms of professional morality, can faithlessness in one sphere (marital) be readily translated into significant faithlessness to a client? Marital infidelity may signify a breakdown of the relationship and/or a history of mutual provocative behaviors. The marriage relationship, being so different from professional relationships, may have nothing significant to say about loyalty to clients.

The repeal of seduction laws may not conclusively indicate the total irrelevance of such behavior. But there are seductions and there are seductions. Determinations by unschooled Bar examiners of subtle, exploitative, manipulative character traits would be inherently unreliable. In any event the issue of sexual relations between attorney and client, in certain circumstances undoubtedly unethical, in others, on the line, and in a few situations perhaps of little ethical significance, is by these complexities an additional demonstration of

Several judicial decisions and opinions have emphasized the need for a demonstrable nexus between ostensibly “immoral” behavior and qualifications for public employment or professional licensing in order for such behavior to legally justify exclusion, dismissal, or other negative action.

Chief Judge Bazelon, writing for the District of Columbia Circuit in Norton v. Macy, held that an off-duty homosexual advance by a federal employee was not a ground for dismissal; he rejected, at the outset, the contention that such “immorality” warranted the adverse job action:

A pronouncement of “immorality” tends to discourage careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude.

....

So construed, “immorality” covers a multitude of sins. Indeed, it may be doubted whether there are in the entire Civil Service many persons so saintly as never to have done any act which is disapproved by the “prevailing mores of our society.”⁸⁵

Regarding prospective or practicing attorneys, similar points have been emphasized by state and federal courts:

[A] lawyer should so conduct himself that the work of the Courts and the administration of justice will not suffer by reason of his continuing to hold a license to practice. *This does not mean that the Court has the function or right to regulate the morals, habits or private lives of lawyers, who like other citizens are free to act and to be responsible for their acts*, but when the morals, habits or conduct of a lawyer demonstrate unfitness to practice law or adversely affect the proper administration of justice, then the Court may have the duty to suspend or revoke the privilege to

the untenability of expecting or permitting Bar Examiners to predict ethical conduct from ambiguous behaviors.

⁸⁵ Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

A 1969 opinion for the California Supreme Court by Justice Tobriner concludes in no uncertain terms that private behavior not bearing on the fitness to carry out one’s professional or vocational obligations may not be a basis for exclusion, dismissal, or disbarment. Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969) (holding that a teacher’s homosexual actions “cannot constitute immoral or unprofessional conduct or conduct involving moral turpitude . . . unless those actions indicate his unfitness to teach”). *Id.* at 220.

practice law in order to protect the public.⁸⁶

We take it to be a sound principle that *the court has no regulatory power over the private life of members of the Bar*, and that it cannot exclude them from practice for acts in that capacity unless they be such as to clearly demonstrate their unfitness to longer enjoy the privileges of the profession.⁸⁷

It would be carrying the doctrine [requiring good moral character] too far to hold that an attorney must be free from every vice, and to strike him from the roll of attorneys because he may indulge in irregularities affecting to some extent his moral character, when such delinquencies do not affect his personal or professional integrity. *To warrant a removal, his character must be bad in such respects as show him to be unsafe and unfit to be entrusted with the powers and duties of his profession.*⁸⁸

Acts alleged to involve “moral turpitude” do not warrant disbarment unless it “may fairly be inferred [from those acts] that . . . [the attorney’s] moral character is . . . such as will probably lead him into an abuse of the privileges of his profession, or a disregard of his duties either to the court or to his clients.”⁸⁹

Indeed, the Supreme Court, in overturning a state’s exclusion of a Bar candidate because of his past membership in the Communist Party and his arrest record, declared that:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but *any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.*⁹⁰

⁸⁶ In re Gorsuch, 75 N.W.2d 644, 648 (1956) (emphasis added).

⁸⁷ Bartos v. United States District Court, 19 F.2d 722, 724 (8th Cir. 1927) (emphasis added).

⁸⁸ McClagherty, 10 S.E. at 410 (emphasis added).

⁸⁹ In re Rothrock 106 P.2d at 910.

⁹⁰ Schwartz v. Bd. of Bar Exam’rs, 353 U.S. 232, 238-39 (1957) (footnotes and citations omitted) (emphasis added)

These categories result in problematic differences in determinations about the sorts of misconduct, past and predicted, that have such “rational connections.”

It would seem then that sound principles mandate a real *nexus* between the conduct in question, and a) the safety and security of clients and their interests or b) the safety, security, and legitimate interests of other people and institutions in the lawyers’ world. When acts committed under reasonable expectations of liberty or privacy become the basis of denying an otherwise competent applicant, demonstration of a real linkage between misconduct and legitimate concerns of the Bar should be required.

2. *Furthering the Repute and Good Image of the Bar*

Beyond the protection of clients and the public and the proper functioning of the institutions of justice, courts and leaders of the Bar have often asserted another role or function that screening and disciplinary processes serve: the protection of the image and reputation of the profession itself.⁹¹

Professor Rhode, analyzing the results of her research, surveys, and interviews of Bar examiners in several jurisdictions, observes that these objectives—the protection of the reputation of the profession and the attainment of a favorable public image—*serve substantially to further the economic well-being and perceived social status of the lawyers’ guild.*⁹²

⁹¹ See, e.g., *In re Cason*, 294 S.E.2d 520, 523 n.5 (Ga. 1982) (“Fitness Board serves the members of the bar in upholding public confidence.”); *In re Childress*, 561 N.E.2d 614, 622 (Ill. 1990) (holding that certification would “tend to undermine the integrity of the profession.”).

In denying reinstatement to a disbarred attorney who blamed his financial misconduct on cocaine use, the Court observed, “his use of cocaine increases the danger he presents to the public, the courts, and the reputation of the legal profession.” *In re Demergian*, 768 P.2d 1069, 1074 (Cal. 1989) (emphasis added).

See also M.A. Cunningham, Comment, *The Professional Image Standard: An Untold Standard of Admission to the Bar*, 66 Tul. L. Rev. 1015 (1992).

⁹² Rhode, *supra* note 1, at 510-11.

Professor Rhode finds that from one perspective, the certification process “[is] an integral part of the [profession’s] general effort to legitimate the profession’s regulatory autonomy and economic monopoly.” *Id.* at 511.

Weeding out the unworthy . . . helps to legitimate a status in which practitioners have strong psychological as well as economic stakes . . . to enhance its members’ social standing. . . . In [the view of Bar examiners], a single unethical lawyer brings “disrepute to the whole

When image and reputation enhancement seek precedence over human values such as privacy, even Justice Scalia (a vigorous dissenter in Romer and supporter of the Bowers decision) has expressed strong disapproval. Dissenting from a decision upholding a requirement that employees of the U.S. Customs Service be subject to random drug-testing, including urinalysis, Justice Scalia declared that given the absence of any history of agents' drug abuse or resulting harms to the public, the *image* of the agency could not justify the invasion of employees' privacy:

What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, *but it will show to the world that the Service is "clean,"* and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! *I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.*⁹³

profession," penalizing the thousand who slave "mightily and righteously." . . . To the extent that character review can "screen[] out . . . moral risks before they are admitted to practice . . . , the profession's priceless reputation" is well-served.

Id. at 510-11 (citations omitted).

Indeed, this emphasis on "repute" and "image" of the bar, was used earlier in the twentieth century to exclude a range of persons deemed "undesirable," including women, Jews, those from the "lower classes," the foreign-born, and "non-conformists of various hues: radicals, religious fanatics, divorcees, fornicators, and any individual who challenged the profession's anti-competitive ethical canons."

Id. at 500-02.

⁹³ Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (emphasis added).

While the majority in Van Raab did find that the danger to the service and the public from weapon-carrying employees who might be using illicit drugs was a weighty enough concern to justify limited invasion of modesty concerns with regard to excretory functions, and some invasion of medical privacies, there are no comparable public dangers presented by homosexual applicants. The privacy interests invaded are considerable,

The Bars' emphasis of the image and reputation of the legal profession as a service industry (with its history of self-serving, profit-oriented, prejudiced, and class-based exclusions), does not itself justify the imposition of exclusionary or disciplinary sanctions, particularly when based on private sexual intimacies without secular impact.⁹⁴

It is no wonder that the invitation to abuse through the use of the term "morality" to maintain or advance the repute and image of the Bar⁹⁵ (or "public confidence") has led, particularly in the first half of the twentieth century, to questionable if not completely untenable exclusions and sanctions.⁹⁶

involving as they do private, intimate sexual conduct, expressing affections and needs close to the core of personal identity.

⁹⁴ In *Norton v. Macy*, an agency failed to discharge a civil service employee who had made a homosexual pass at a man outside of the workplace. Chief Judge Bazelon remarked that:

[His] continued employment . . . might "turn out to be embarrassing to the agency" in that "if an incident like this occurred again, it could become a public scandal on the agency." The assertion of such a nebulous "cause" [as the possibility of embarrassment to the Agency] poses perplexing problems for a review proceeding which must accord broad discretion to the Commission. We do not doubt that NASA blushes whenever one of its own is caught in flagrante delictu; but if the possibility of such transitory institutional discomfiture must be uncritically accepted as a cause for discharge which will "promote the efficiency of the service," we might as well abandon all pretense that the statute provides any substantive security for its supposed beneficiaries. A claim of possible embarrassment might, of course, be a vague way of referring to some specific potential interference with an agency's performance; but it might also be a smokescreen hiding personal antipathies or moral judgments which are excluded by statute as grounds for dismissal. 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. . . . We think the unparticularized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency's performance is an arbitrary ground for dismissal.

417 F.2d at 1167 (footnotes omitted) (emphasis added).

⁹⁵ As well as pursuing the ambiguous goal of maintaining "public confidence in the bar."

⁹⁶ Professor Rhode has this to report about early twentieth century cases:

In recent years, however, there have been few reported instances of exclusion or imposition of disciplinary sanctions for purely deontological "immorality." Indeed, absent criminalization of the conduct in the jurisdiction, the cases, particularly in the past quarter century, tend to treat such conduct as of little or no relevance.

So, for example, in 1979 the Virginia Supreme Court, reviewing a case in which a female Bar applicant was cohabiting with a man outside the institution of marriage, concluded that though such "living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law. It cannot, therefore, serve to deny her the certificate."⁹⁷

But there perhaps remains some potential for such abuse. Professor Rhode's empirical research generated these observations:

Attitudes toward sexual conduct such as cohabitation or homosexuality reflect . . . diversity. Some bar examiners do not regard that activity as "within their purview," unless it becomes a "public nuisance" or results in criminal charges. . . . In [some] . . . jurisdictions, . . . cohabitation and homosexuality can trigger extensive inquiry and delay, and some slight possibility of denial. In the remaining states, examiners reported few applications

[They] centered on prostitution and fornication, and generated a set of somewhat murky moral mandates. Commercial relationships with fallen women were permissible to a point; those who paid money for sexual favors were often forgiven, while those who accepted money for abetting such activities were purged from the profession. Singled out for particular condemnation was a black attorney who managed a house of ill repute where "white girls . . . consorted with negroes" and smoked opium. To a 1929 Missouri court, seduction by an unfulfilled promise to marry constituted "baseness and depravity" mandating disbarment. By contrast, in the preceding year, New Jersey justices found fornication with a fifteen-year-old to warrant only a six-month suspension, in light of the victim's previously dissolute life and the attorney's reputation as an "upright and moral man." Seducing one's secretary was discreditable but not disabling; seducing the wife of a war hero was unforgivable. While sexual advances toward the secretary were dismissed as part of the "weaknesses, passions and frailties possessed in some degree by all mankind," the adulterous liaison with a prominent society matron (notwithstanding its subsequent legitimation through marriage) constituted an act of "inherent baseness without alleviation or excuse."

Rhode, *supra* note 1, at 553 (footnotes omitted).

⁹⁷ *Cord v. Gibb*, 254 S.E.2d 71, 73 (Va. 1979).

presenting evidence of “living in sin” or homosexuality. According to one Board of Bar Examiners president, “Thank God we don’t have much of that in Missouri.” How these individuals would view such conduct if brought to their attention remains unclear.⁹⁸

3. *Commission of Criminal Acts and Convictions for Crimes*

While there is minimal risk today of Bar examiners taking adverse action based on non-criminal, victimless intimate conduct, or being upheld if they did, in the few jurisdictions that still criminalize homosexual sodomy, a gay or lesbian applicant is at a higher level of jeopardy. While only six states automatically exclude applicants with felony convictions, in the other forty-four states, such applicants must overcome an explicit or operational presumption of unfitness.⁹⁹ As one commentator has observed, “this logic licenses inquiry into any illegal activity, no matter how remote or minor.”¹⁰⁰

There are considerable (and unpredictable) disparities in the treatment of prior criminal acts.¹⁰¹ Some states have adopted ABA guidelines setting out factors relevant to “assigning weight and significance to prior conduct,” while other states rely on their own guidelines (critical language in most of the guidelines, ABA and non-ABA, is so vague as to be of little use).

Perhaps the principal animating idea underlying the adverse treatment of criminal conduct, whatever its nature, is the notion that

⁹⁸ Rhode, *supra* note 1, at 539 (footnotes omitted). See also *id.* at 578-80.

⁹⁹ Carr, *supra* note 61, at 383-90; see also Arnold, Jr., *supra* note 61.

¹⁰⁰ Carr, *supra* note 61, at 384.

¹⁰¹ Rhode, *supra* note 1, at 539.

She also notes:

Exclusion necessarily yields highly idiosyncratic determinations of what acts are sufficiently damning to warrant non-certification. Violation of a fishing license statute ten years earlier was sufficient to cause one local Michigan committee to decline certification. But, in the same state, at about the same time, other examiners on the central board admitted individuals convicted of child molesting and conspiring to bomb a public building.

Id. at 538.

commission of any crime, whether or not prosecuted,¹⁰² demonstrates a “disrespect for law,” thus “self-evidently” manifesting unfitness to practice law.¹⁰³ So, a person who has been convicted of a crime, any crime (e.g., consensual sodomy), bears the burden of demonstrating that he has rehabilitated himself.¹⁰⁴

Some courts, however, reject the argument that absent proof of rehabilitation criminality requires exclusion, emphasizing even here, the necessity of a *connection*, a *nexus*, between the crime (or non-prosecuted criminal act) and fitness for the practice of law.

Of particular significance to this issue are cases in New York and Florida involving prior acts of sodomy. In 1973, the New York Court of Appeals reversed a lower appellate court that had given undue weight to applicant’s prior conviction (and disbarment) in Florida, for *public sodomy*.¹⁰⁵

And more recently, the Supreme Court of Florida has held that “private non-commercial sex acts between consenting adults are not

¹⁰² See, e.g., In re K.S.L., 495 S.E.2d 276 (Ga. 1998) (unprosecuted entry of automobiles with intent to steal).

¹⁰³ See Konigsberg v. State Bar of Cal., 353 U.S. 252, where the Court focused on whether a “reasonable man could fairly find that there were substantial doubts about [the applicant’s] ‘honesty, fairness and respect for the rights of others and for the laws of the state and nation.’” *Id.* at 264. To this effect see, for example, In re Christie, 574 A.2d 845 (Del. 1990): “As officers of the Court, members of the Bar are expected to respect and uphold the law. ‘[L]awyers who act illegally diminish the stature of the legal professional and reduce public confidence in the rule of law.’” *Id.* at 851 (citation omitted).

See also, In re Gahan, 279 N.W.2d 826, 829 (Minn. 1979); Florida Bd. of Bar Exam’r ex rel N.R.S., 403 So. 2d 1315 (1981), in which Justice Alderman dissented from the holding that private consensual sodomy between adults was not a basis for exclusion:

Lawyers are officers of the court, and, in the eyes of the public, they are a part of the machinery of the law. Even minor violations of law by lawyers tend to lessen public confidence in the legal profession, which in turn lessens public confidence in our judicial system and ultimately the law itself. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

Id. at 1318 (Alderman, J., dissenting).

¹⁰⁴ See, e.g., In re Jaffee, 806 P.2d 685 (Or. 1991); In re Davis, 313 N.E.2d 363 (Ohio 1974). See generally Carr, *supra* note 61.

¹⁰⁵ In re Kimball, 301 N.E.2d 436 (N.Y. 1973), *reversing In re Kimball*, 40 A.D.2d 252 (N.Y. App. Div. 1973).

relevant to prove fitness to practice law,”¹⁰⁶ even though those acts are criminalized in Florida.

While these two highest state courts sent a message that gay or lesbian intimacies had little or no bearing on fitness to practice, the opinions in each case were short and direct. However, the dissenting opinion in the lower appellate court in New York (co-authored by two members of the court), made the reasons quite clear in language and constitutional insight not in evidence thirteen years later in the opinion by the Bowers majority. Justices Martuscello and Shapiro wrote for the Appellate Division in 1973:

While the majority avoids the issue of homosexuality and homosexual acts as a purported badge of unfitness to practice law, we prefer to meet that issue squarely. To us it seems clear that the social and moral climate in New York (and probably throughout the Western World) has in recent years changed dramatically with respect to homosexuality and consensual homosexual acts. *Today they are generally viewed as no more indicative of bad character than heterosexuality and consensual*

¹⁰⁶ Florida Bd. of Bar Exam’r ex rel N.R.S., 403 So. 2d at 1317.

The board may ask the petitioner to respond to further questioning if, in good faith, it finds a need to assure itself that the petitioner’s sexual conduct is other than non-commercial, private, and between consenting adults. Otherwise, the board shall certify his admission.

Id.

The dissenting opinions made the quite logical argument (once the premises are accepted) that the Bar has both the authority and the obligation to pursue the question, where there has been prior criminality, whether the applicant will continue to violate the criminal laws of the state. *See id.* at 1317 (Boyd, J., dissenting); *id.* at 1318 (Alderman, J., dissenting).

Justice Boyd declared:

I am opposed to the admission of any person whose admitted “orientation” indicates a lifestyle likely to involve routine violation of a criminal statute . . . [This principle should be applied] to any applicant with an admitted orientation that indicates a lifestyle involving routine violation of any of those laws which constitute legislative standards of morality in personal conduct.

Id. at 1318.

Subsequently the Florida Supreme Court ordered on the condition of passage of the Florida Bar exam, the reinstatement of Harris L. Kimball, the former Florida attorney, whose Florida disbarment for public sodomy was held by the New York Court of Appeals in 1973 to be insufficient grounds for exclusion from the New York Bar. Fla. Bar ex rel Petition of Harris L. Kimball for Reinstatement, 425 So. 2d 531 (1982), *rehearing den.* Feb. 7, 1983.

heterosexual acts. In our opinion, an applicant for admission to the Bar in New York in 1972 cannot be considered unfit or lacking the requisite character to practice law, merely because he is an avowed homosexual.”¹⁰⁷

The footnote in that dissent observed that by that year, there was a “‘changed climate’ regarding the morality of homosexual behavior, [indicated by] the spate of stage shows, movies, TV shows, articles and books according . . . sympathetic treatment to homosexuals and their problems as a ‘minority’ group.”¹⁰⁸

That gay and lesbian aspirants to the practice of law *presently* have little to fear from Bar examiners and character committees,¹⁰⁹ is a conclusion demonstrated by developments perhaps even more persuasive than the profoundly significant legal and attitudinal changes described in Part I of this article. It is a conclusion powerfully fortified by the existence of organizations among the judiciary,¹¹⁰ among attorneys in numerous jurisdictions,¹¹¹ and among law students¹¹² throughout the country, dedicated to advancing the legal rights of men and women whose fulfillment may best be attained by intimate association with those of the same sex.

¹⁰⁷ *In re Kimball*, 40 A.D.2d at 258 (Martuscello, J., and Shapiro, J., dissenting) (citations omitted) (emphasis added).

¹⁰⁸ *Id.* at 309.

¹⁰⁹ Professor Rhode’s conclusions that “some slight possibility of denial” exists (Rhode, *supra* note 1, at 539), should be understood as reflecting the year her study was published—1985. This is not to say that there is no possibility whatsoever of temporary exclusion of a person convicted of sodomy in a state prohibiting it.

¹¹⁰ *E.g.*, IALGC (The International Association of Lesbian and Gay Judges: <http://home.att.net/~ialgi/>).

¹¹¹ *E.g.*, BALIF (Bay Area Lawyers for Individual Freedom); GALLOP (Gay and Lesbian Lawyers of Philadelphia: <http://www.libertynet.org/gallop/>); GAYLAW (Gay and Lesbian Attorneys of Washington: <http://www.gaylaw.org/main.html>); LEGAL (Lesbian and Gay Law Association of Greater New York: <http://www.le-gal.org/>); MLGBA (Massachusetts Lesbian and Gay Bar Association: <http://www.mlgba.org/intro.html>); NC-GALA (North Carolina Gay and Lesbian Attorneys: <http://www.ncgala.org>).

¹¹² *E.g.*, LEGALS (Lesbian and Gay Law Students at SMU Law School); the University of Southern California Gay and Lesbian Law Union which notes: “[s]everal of the Law School’s deans, faculty members, and administrators are openly gay and lesbian.”; HLS Lambda (Harvard Law School); Outlaws (The Out Law Student Alliance of the University of Michigan Law School).

Indeed the American Bar Association itself has adopted several resolutions making clear its position in favor of laws forbidding discrimination on the basis of sexual orientation in employment, housing, and public accommodations,¹¹³ and prohibiting the disadvantaging of homosexuals with regard to adoption,¹¹⁴ child custody, and visitation rights.¹¹⁵

The Bowers decision, whether or not itself rooted in animus, legitimated majoritarian animus—*i.e.*, the legislative treatment of homosexual behavior as morally reprehensible and deserving of criminal retribution. In Romer, however, animus became an unacceptable basis for negative treatment of a group.¹¹⁶ The animus rejected by Romer is what generates the mistreatment the gay male and the lesbian have suffered in society—victimization, condemnation, and persecution. The future may be not too distant, when, rather than serving to *justify* criminalization and discrimination against members of a group (whose beliefs and practices are different or queer), “moral condemnation,” *standing alone*, will be deemed a constitutionally untenable ground for legal disadvantaging of secularly harmless behavior.¹¹⁷

If Bowers is not quite the evil of Dred Scott and Romer is not quite the courageous effort of Brown to undo such an evil, Bowers will nevertheless stand as one of the last century’s least defensible decisions, and Romer as an inspiring and visionary reaffirmation of the best of twentieth-century jurisprudence.

¹¹³ The resolution urged “the federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations,” Paul Marcotte, House Affirms Gay Rights: Resolution Provokes Floor Fight, 75 A.B.A. J. 125 (1989).

¹¹⁴ Jeffrey G. Gibson, Lesbian and Gay Prospective Adoptive Parents: The Legal Battle, 26 Hum. Rts. 7 (1999).

¹¹⁵ *Id.*

¹¹⁶ And arguably, by strong implication, an unacceptable basis for criminalization of the practices that virtually determine membership in that group.

¹¹⁷ For an extended and impressive scholarly treatment of the relationship between Bowers and Romer along similar lines, see Jacobs, *supra* note 26.

