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# HOMOPHOBIA, "MANIFEST HOMOSEXUALS" AND POLITICAL ACTIVITY: A NEW APPROACH TO GAY RIGHTS AND THE "ISSUE" OF HOMOSEXUALITY

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Douglas Warner\*

## INTRODUCTION

In *Gay Law Students Association v. Pacific Telephone & Telegraph, Inc. [GLSA]*,<sup>1</sup> the California Supreme Court held that homosexual employees of a privately-owned public utility could sue to challenge the company's policy of arbitrary employment discrimination against homosexual individuals.<sup>2</sup> The decision has broader implications and is of greater significance than may appear from its subject matter and its procedural setting.<sup>3</sup>

The court in *GLSA* explicitly recognized the legitimacy of the gay rights movement's challenges to the social and legal oppression of homosexuality. The conclusion that "manifest homosexuals" who "make an issue of their homosexuality" are engaged in political activity and are protected from arbitrary employment discrimination is a provocative reversal of the

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1. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

2. *Id.* at 466-67, 595 P.2d at 597, 156 Cal. Rptr. at 19.

3. The case was before the court on an appeal from a judgment of dismissal, sustaining defendant PT & T's demurrer and denying plaintiffs' request for mandate and declaratory relief against defendant Fair Employment Practices Commission (FEPC). *Id.* Thus the court was not presented with disputed factual issues or questions of proof. The decision was based solely on the allegations contained in the pleadings.

traditional judicial approach to the issues raised by the gay rights movement. The court not only agreed that gay people deserve the same treatment in the law and in society as other citizens, but forthrightly extended legal protection to gay people's efforts to achieve that result.

This Comment will survey the popular and largely unsupported beliefs about homosexuality, which result in the societal oppression of gay people. The law's reflection of this cultural homophobia has been instrumental in that oppression. In light of the homophobia in society and its consequences in the law, the *GLSA* court's approach was necessary, its results consistent with contemporary knowledge and with fundamental principles of a just society. The purpose of this Comment is to demonstrate why that is so and to speculate on the decision's implications for the gay rights movement, for gay people, and not least of all, for the society.

### *Definitions*

This Comment takes the position that "homosexual" is descriptive only of sexual orientation, preference, or behavior, and that it is inappropriate to categorize or define individuals or a class solely on the basis of sexuality. Consequently, "homosexual" is used as an adjective—homosexual teachers, homosexual persons, homosexual acts—to refer to the sexual component of those persons and their behavior.<sup>4</sup>

Furthermore, the word "homosexual" is laden with largely negative historical connotations. Thus "homosexual" is used chiefly where quoted sources use it, and in discussion of the historical and more abstract legal, moral, and social issues raised by homosexuality.

The term "manifest homosexual" appears in the *GLSA* opinion without a precise textual definition.<sup>5</sup> This Comment uses "manifest homosexual" as a term of art to refer to its con-

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4. See Katchadourin & Martin, *Analysis of Human Sexual Behavior*, in *HUMAN SEXUALITY* 38-39 (H. Katchadourin ed. 1979) [hereinafter cited as *HUMAN SEXUALITY*] (citing A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) [hereinafter cited as *KINSEY, MALE*]).

5. 24 Cal. 3d at 488, 595 P.2d at 610-11, 156 Cal. Rptr. at 32-33. See text accompanying note 26 *infra*.

text in the *GLSA* opinion. A pervasive theme in what follows will be to suggest a meaning for the term, and so to appreciate both the vagueness and the potential of its use in *GLSA*. Initially, the presumption is that "manifest homosexual" is properly interchangeable with "gay person."

"Gay" is used with the meanings and implications it has acquired in the context of the "gay rights movement" of recent years. Whatever its origins,<sup>6</sup> "gay" has come to represent a self-proclaimed and proudly-assumed identity as a "homosexual person." It connotes not only a self-identity, but a sense of community with others who have accepted and learned to value their homosexuality. In the context of "gay rights" and "gay liberation," the word further connotes some degree of challenge and opposition to the dominant "heterosexual" or "straight" culture and its oppression of homosexuality.

Homosexual individuals who recognize their homosexual desires, who to some degree accept and act on them, but who do not reveal their sexual orientation publicly are referred to as "passing"<sup>7</sup> (as heterosexual), and are said to live "in the closet". The process of fully accepting one's homosexuality and publicly acknowledging it is "coming out of the closet."<sup>8</sup> Life "outside the closet" has been described as "being known about."<sup>9</sup> In general, this Comment uses "gay" to describe individuals who have "come out of the closet," and "homosexual" to refer to those who either may not recognize or accept their sexual orientation, or who have consciously chosen, for a variety of reasons, to camouflage it.

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6. It is not altogether clear how the word "gay" came to be synonymous with the word "homosexual." See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 802 n.18 (1979) (quoting a passage from the writings of Gertrude Stein).

For a discussion of the connotations of the word "gay"—a "healthy homosexual person's" acceptance of homosexuality as natural and not requiring a defense—see G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* 82-88 (1973).

7. M. WEINBERG & C. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* 177 (1977).

8. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32; see also *OUT OF THE CLOSETS, INTO THE STREETS: VOICES OF GAY LIBERATION* 6-34 (K. Jay & A. Young eds. 1972) [hereinafter cited as *OUT OF THE CLOSETS*]. See text accompanying notes 214-55 *infra*.

9. WEINBERG & WILLIAMS, *supra* note 7, at 177.

“Heterosexual” and “straight” are used to connote, respectively, non-homosexual and non-gay. “Homophobia” refers to the characteristics of persons or cultures which reflect the complex inter-weavings of myths, stereotypes, history, fear, guilt, shame and ignorance, and which result in the heterosexual majority’s discomfort with and oppression of the homosexual minority.

“Lesbian” generally refers to a gay woman;<sup>10</sup> “lesbians and gay men” is a preferred expression for referring to the community of openly-identified gay people who, with all their diversity, have encountered the variety of inequities and prejudices of an anti-homosexual society, who have in various ways survived and surmounted those obstacles, and who now pose challenges to their oppression and alternatives for a future society.

#### I. THE GLSA DECISION AND THE LABOR CODE HOLDING

In June, 1975, four individuals and two gay rights organizations filed a class action suit against Pacific Telephone and Telegraph,<sup>11</sup> alleging illegal discriminatory employment practices against homosexual persons. Pacific Telephone had rejected one individual’s application for employment because of his homosexuality, and anti-homosexual harassment had caused another individual to leave his job at PT&T. Members of two organizations active in promoting equal rights for gay people—the Society for Individual Rights (S.I.R.) and the Gay Law Students Association [G.L.S.A.]—had sought and been denied employ-

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10. Rivera, *supra* note 6, at 802 n.16. See also D. WOLF, THE LESBIAN COMMUNITY 25 (1979).

11. Also named as defendants were the State Fair Employment Practice Commission (FEPC) and various of its officials. Plaintiffs sought to compel the FEPC, pursuant to its alleged statutory mandate, to receive and consider claims of employment discrimination against homosexual persons by PT & T and other employers. Gay Law Students Ass’n v. Pacific Tel. & Tel., Inc., 24 Cal. 3d at 464, 595 P.2d at 595, 156 Cal. Rptr. at 17-18. The court held that California’s Fair Employment Practice Act, in CAL. LAB. CODE § 1420(a) (West 1971) did not prohibit discrimination on the basis of sexual orientation. The protected categories included “race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex . . . .” The court held that the plaintiffs’ arguments that the FEPA bars discrimination against homosexual persons, either on the theory that the Act prohibits all forms of arbitrary discrimination or on the theory that discrimination against homosexual persons is “sex discrimination” within the meaning of the Act, were not viable. *Id.* at 489-90, 595 P.2d at 612-13, 156 Cal. Rptr. at 33-34. Thus the court sustained the trial court’s denial of plaintiffs’ request for a writ of mandate against the FEPC. *Id.*

ment with PT&T, or would seek employment in the future and would be adversely affected by PT&T's policy. The complaint alleged that PT&T's "articulated policy of excluding homosexuals from employment opportunities" was arbitrary and illegal, and specifically charged PT&T with a policy of discrimination against "manifest" homosexuals.<sup>12</sup>

Plaintiffs sought declaratory and injunctive relief to prohibit PT&T's discriminatory hiring practices and monetary damages to compensate victims of PT&T's discrimination. PT&T demurred, claiming that the complaint failed to state a cause of action. The trial court sustained the demurrer; the court of appeal affirmed.<sup>13</sup>

The California Supreme Court reversed the judgment sustaining the demurrer. Examining the sufficiency of the allegations of plaintiffs' complaint,<sup>14</sup> the court found that plaintiffs had stated three causes of action against PT&T: [1] the California Constitution's equal protection clause barred PT&T from engaging in arbitrary employment discrimination;<sup>15</sup> [2] Califor-

12. *Id.* at 464-66, 595 P.2d at 595-97, 156 Cal. Rptr. at 17-19.

13. *Id.*

14. *Id.*

15. The court's initial premise was that the state and federal equal protection clauses prohibited employment discrimination by the state or any governmental agency. Homosexual persons as a class were protected by this guarantee equally with other members of the society. *Id.* at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19.

In light of traditional attitudes toward homosexuality, this holding is significant; however, the court had not yet resolved the issue before it, *i.e.*, whether the constitutional equal protection guarantee prohibits PT & T, a privately owned public utility, from arbitrary discrimination. The court concluded that the arbitrary exclusion of a class of qualified individuals from equal employment opportunities by a state-protected and state-regulated public utility did violate equal protection. *Id.* at 469, 595 P.2d at 599, 156 Cal. Rptr. at 21.

California's regulatory scheme, as set out in the Public Utilities Code and in the CAL. CONST. art. XIII, §§ 1-9, makes a public utility "in many respects more akin to a governmental entity than a purely private employer." *Id.* The fundamental importance of an individual's freedom of opportunity to work and earn a living, considerations peculiar to the quasi-monopolistic nature of the utility, as well as the extensive regulation by the state, served to make the discrimination by a state-protected public utility like PT & T untenable. *Id.* at 469-70, 595 P.2d at 599-600, 156 Cal. Rptr. at 21-22. The court noted that diverse sections of the Public Utilities Code regulated prices, service standards, account and recordkeeping, issuance of stocks and bonds, and, moreover, had endowed public utilities like PT & T with government-like powers such as eminent domain.

The court thought that rejection from employment by a public utility like PT & T would leave an individual no option for employment in certain job areas. The quasi-monopolistic nature of the utility eliminated the "inherent, if limited, check which the

nia Public Utilities Code section 453 subdivision (a) was held to prohibit employment discrimination by a public utility;<sup>16</sup> and [3]

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free market system places on employment discrimination," and the general public is forced by its necessary patronage to support a utility's discriminatory policies. *Id.* at 471, 595 P.2d at 600, 156 Cal. Rptr. at 22. Because its quasi-monopolistic authority over employment opportunities is derived directly from a state-granted exclusive franchise, a public utility's discriminatory employment practices are particularly pernicious. *Id.*

One commentator has sharply criticized the court's reasoning. Note, *Gay Law Students Association v. Pacific Telephone & Telegraph Co.: Constitutional and Statutory Restraints on Employment Discrimination Against Homosexuals by Public Utilities*, 68 CALIF. L. REV. 680 (1980) [hereinafter cited as *GLSA Note*]. Specifically, the court's suggestion that PT & T's state-protected monopoly over the telecommunications industry equates with a monopoly over employment opportunities is attacked as simply wrong. Of PT & T's more than 90,000 employees, the vast majority perform jobs which are available in many other industries besides that which PT & T monopolizes. *Id.* at 696-97, especially at note 87. The reasoning that PT & T's monopoly leaves consumers no choice but to support its discriminatory employment policies seems sounder.

The court further relied on federal decisions which have found state action by private entities such as labor unions. A private entity may not use state-granted monopoly power over employment opportunities to violate constitutional rights any more than may the state. *Gay Law Students Ass'n v. Pacific Tel. & Tel., Inc.*, 24 Cal. 3d at 472-74, 595 P.2d at 600-602, 156 Cal. Rptr. at 22-24. The court reasoned that the equal protection guarantee against "second class citizenship" protects against employment discrimination "by the invidious practice of a state-protected employer no less than when it is implemented by a state-protected union." *Id.* at 474, 595 P.2d at 602, 156 Cal. Rptr. at 24.

Plaintiff's allegations of PT & T's policy of arbitrary discrimination against homosexual employees and applicants had therefore stated a cause of action, and the judgment sustaining P.T. & T.'s demurrer was reversed.

16. The court reasoned that a number of considerations—common law restrictions on monopoly power, the nature and scope of the state's regulation of public utilities, and the state's grant to the utility of a virtual monopoly in its realm—subjected PT & T to obligations not imposed on other private entities. The court recognized that "a public utility, such as PT & T, undoubtedly constitutes a paradigm example of an enterprise 'affected with the public interest.'" 24 Cal. 3d at 476, 595 P.2d at 603, 156 Cal. Rptr. at 25.

Among these obligations is Public Utilities Code section 453(a), drafted by the legislature to prohibit discrimination with respect to rates, charges, service, facilities or in any other respect. The statute has been interpreted to proscribe only unjust or unreasonable differential treatment. The court held, over strong arguments by PT & T and a dissent by Justice Richardson [*Id.* at 493, 496-500, 595 P.2d at 615-17, 156 Cal. Rptr. at 37-39], that this prohibition applied not merely to "consumer-directed aspects of public utility operations" but to discriminatory employment practices as well.

The court reasoned that the language of section 453(a) prohibiting discrimination "in any other respect" could fairly be interpreted to include employment practices. Examining the legislative history of the statute, the court found further support for its conclusion that section 453(a) was intended to forbid more than rate and service discrimination. The constitutional considerations of the court's earlier analysis also supported this construction of section 453(a)'s broad language.

Finally, the court found support for its holding in the common law doctrines restricting monopolistic power which underlie section 453(a)'s prohibition of discrimination. Relying principally on the California decision in *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944), and its progeny, the court saw no difficulty in interpreting

the complaint established a cause of action under California Labor Code sections 1101 and 1102,<sup>17</sup> which prohibit employment policies that interfere with employees' "political activity." While recognizing the existence of three causes of action for gay employees subjected to arbitrary employment discrimination by a public utility, the opinion's special significance lies in its Labor Code holding.

Labor Code sections 1101 and 1102 were enacted to guard against employers' use of their economic power to interfere with "the fundamental right of employees in general to engage in political activity."<sup>18</sup> Section 1101 proscribes employment policies

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section 453(a) to prohibit arbitrary employment discrimination. The court left open the question whether the pre-*Marinship* common law doctrines and their post-*Marinship* evolution would themselves prohibit a public utility from engaging in employment discrimination. The court read section 453(a) as codifying the common law doctrine prohibiting quasi-public entities, *i.e.*, those "affected with the public interest" from engaging in arbitrary discrimination. 24 Cal. 3d at 483-84, 595 P.2d at 607-08, 156 Cal. Rptr. at 29-30. Furthermore, the common law *Marinship* doctrine restricting discriminatory practices by monopolistic quasi-public entities was broad enough to reach employment discrimination against homosexual persons. *Id.*

As a public utility with a state-protected monopoly, PT & T was unable to claim the common law privilege of private employers to hire and fire at will unless restricted by statute. Under its interpretation of section 453(a), the court held that plaintiffs' complaint had stated a cause of action.

17. CAL. LAB. CODE § 1101 (West 1971) provides: "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics . . . (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." Similarly, section 1102 states: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32. The court stated:

Although sections 1101 and 1102 refer only to "employees," identical terminology in the federal Labor Management Relations Act has been held to protect *applicants* for employment as well as on the job employees.

We cannot view the statutes as permitting employers to hire only members of the Republican Party, but forbidding them from firing members of the Democratic Party. Such an anomalous interpretation of these statutes would allow employers to thwart the legislative purpose of protecting citizens by merely advancing their discriminatory practices to an earlier stage in the employee-employer relations. "Employers cannot be permitted to evade the statutory objectives of [a] statute by indirection."

*Id.* at n.16 (citations omitted) (emphasis in original).

18. *Id.* at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32.



which "control or direct the political activities or affiliations" of employees. Section 1102 bars employers from interfering with employees' rights to "follow or refrain from . . . following any particular course or line of political action or political activity." Little case law or critical commentary on these statutes exists.<sup>19</sup> The earliest and fullest interpretation of these provisions appeared in *Lockheed Aircraft Corp. v Superior Court*<sup>20</sup> where the court stated that the words "politics" and "political" implied "orderly conduct of government, not revolution."<sup>21</sup> In intervening years, the Supreme Court has recognized the political character of activities such as participation in litigation,<sup>22</sup> the wearing of symbolic armbands,<sup>23</sup> and the association with others for the advancement of beliefs and ideas.<sup>24</sup> In light of these precedents, the *GLSA* court thought that the statutes could not be "narrowly confined to partisan activity."<sup>25</sup> The court continued:

Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge

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19. Note, *California's Controls on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1020 (1970) [hereinafter cited as *California's Controls*].

20. 28 Cal. 2d 481, 171 P.2d 21 (1948).

21. *Id.* at 485, 171 P.2d at 25.

22. NAACP v. Button, 371 U.S. 415, 429 (1963).

23. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

24. NAACP v. Alabama, 357 U.S. 449 (1958).

25. 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32.

their sexual preferences, and to associate with others in working for equal rights.

In light of this factor in the movement for homosexual rights, the allegations of plaintiffs' complaint assume a special significance. Plaintiffs allege that PT&T discriminates against "manifest" homosexuals and against persons who make "an issue of their homosexuality." The complaint asserts also that PT&T will not hire anyone referred to them by plaintiff Society for Individual Rights, an organization active in promoting the rights of homosexuals to equal employment opportunities. These allegations can reasonably be construed as charging that PT&T discriminates in particular against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations. So construed, the allegations charge that PT&T has adopted a "policy . . . tending to control or direct the political activities or affiliations of employees" in violation of section 1101, and has "attempt[ed] to coerce or influence . . . employees . . . to . . . refrain from adopting [a] particular course or line of political . . . activity" in violation of section 1102.<sup>26</sup>

The Labor Code holding is provocative and potentially far-reaching for numerous reasons. Plaintiffs had not briefed or argued the Labor Code cause of action.<sup>27</sup> Whatever his motives, whatever his appreciation of its consequences, Justice Tobriner's analysis represents another example of judicial initiative in using the law to address controversial and evolving issues in contemporary society.<sup>28</sup>

As recognized by commentators and observers in the gay rights movement, the Labor Code holding has practical consequences beyond its prohibition of a public utility's discriminatory employment policies.<sup>29</sup> It is not difficult to perceive the importance of the statutory prohibition of arbitrary discrimina-

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26. *Id.* at 488, 595 P.2d at 610-11, 156 Cal. Rptr. at 32-33 (citations omitted).

27. *Id.* at 500-01, 595 P.2d at 618, 156 Cal. Rptr. at 40 (Richardson, J., dissenting).

28. For a discussion of Justice Tobriner's role in recognizing and shaping other areas of contemporary social change, see Willemsen, *Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change*, 29 HASTINGS L.J. 73 (1977).

29. *See, e.g.*, 5 SEX. L. REP. 41 (1979).

tion against manifest homosexuals in *private* employment.<sup>30</sup> After years of unsuccessful struggle for effective, large-scale statutory protection from majoritarian anti-gay prejudice and discrimination, the gay rights movement was justified in receiving the *GLSA* decision with a sense of appreciation and accomplishment.

Justice Tobriner's opinion represents one of the first signs of judicial awareness of the gay rights struggle.<sup>31</sup> It may be the first published opinion acknowledging the legitimacy, the history, and the social impact of the gay rights movement. By comparing the gay rights movement to the black civil rights and women's liberation movements, the court recognized that the struggles for equal protection in the law and for an end to oppression in the society are intimately and inseparably inter-related.<sup>32</sup> Implicit is the recognition that the social prejudices toward homosexuality and the legal oppression of gay people feed on and reinforce each other.

The traditional societal attitudes toward homosexuality have reflected beliefs based on myths, erroneous stereotypes, and ignorance:<sup>33</sup> that homosexuality is immoral; that it is evidence of psychological deviancy and emotional instability; and that homosexuality is somehow dangerous and abhorrent to a well-ordered society. In a society holding such views, the plight of gay people has been predictably precarious. All too often, the societal oppression of homosexuality has been legally sanctioned and the punishment legally inflicted. Too often, and with questionable legal, moral, and rational justification,<sup>34</sup> courts have re-

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30. Sections 1101 and 1102 of the Labor Code apply to all private employers in the state. Section 1100, enacted as part of the codification in 1937, was derived from the original enactment, 1915 Cal. Stats., ch. 38, § 1, and restricted application of these sections to entities who regularly employed 20 or more employees. Section 1100 was repealed by 1945 Cal. Stats. ch. 1141, § 1. See *California's Controls*, *supra* note 19, at 1028.

31. Earlier cases that at least implicitly recognize the social and political controversy surrounding gay rights include *Acanfora v. Montgomery County Bd. of Educ.*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) [discussed at notes 330-337 *infra*], *Gay Students Organization of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974), and *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977) [discussed at notes 338-344 *infra*].

32. See text accompanying note 26 *supra*.

33. See text accompanying notes 57-145 *infra*.

34. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 240 (1977); see also Richards, *Sexual*

flected the biases and prejudices of the society and viewed gay people as deserving their social and legal oppression.<sup>35</sup>

Many gay people have internalized the societal attitudes, resulting in guilt, self-loathing, and a tendency to conform to the expectations of the majority.<sup>36</sup> Most have hidden or denied their homosexuality, living their lives in the closet, assuming an external identity which allows them to pass in the straight world.<sup>37</sup> Those individuals who have openly acknowledged their homosexuality, or who have refused or been unable to hide it, have encountered the full fury and opprobrium of an outraged majority.<sup>38</sup>

The modern gay rights movement has developed in the context of this social oppression of gay people, and challenges the attitudes toward homosexuality underlying that oppression.<sup>39</sup> The gay rights movement seeks to achieve a more realistic understanding of homosexuality and a greater respect for individual diversity and freedom by working on many fronts:

- developing appreciation of the historical role and contributions of gay people and of modern “gay culture”;
- correcting erroneous majoritarian ideas about homosexuality in order to discredit any reliance on an individual’s sexual orientation for discrimination and oppression;
- working within the political system to achieve protection for

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*Autonomy and the Constitutional Right of Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); Comment, *An Analysis of Rationales in Homosexual Public Employment Cases*, 23 S.D.L. REV. 338 (1978) [hereinafter cited as *Analysis of Rationales*].

35. For example, *Boutilier v. Immigration and Naturalization Serv.*, 387 U.S. 118 (1967) (deportation of homosexual alien upheld because homosexuality was “psychopathic personality”); *see note 115 infra*; *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969) (dismissal from civilian position with the U.S. Army because of the immorality of employee’s homosexual acts); *Doe v. Commonwealth’s Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff’d mem.*, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976) (upholding Virginia’s criminal sodomy law as not violative of equal protection, due process, or the right of privacy; *see note 153 infra*); *see generally* Rivera, note 6 *supra*.

36. *See text accompanying notes 195-214 infra*.

37. WEINBERG & WILLIAMS, *supra* note 7, at 177.

38. *See text accompanying notes 258-345 infra*. For an account of the hysteria surrounding revelations of homosexual behavior and the complex ingredients of a “public scandal” in a small city in the 1950’s, *see* J. GERASSI, *THE BOYS OF BOISE* (1966); *see generally* discussion in C. TRIPP, *THE HOMOSEXUAL MATRIX*, 202-42 (1975); *see especially id.* at 202-07 for a brief account of the “Boise Affair.”

39. *See text accompanying notes 215-257 infra*.

“gay rights”; and,  
—challenging in the courts the bases for the prevailing legal status of gay people.

The California Supreme Court set the stage for its Labor Code holding by acknowledging the existence of the gay rights movement, and by recognizing the personal and social implications of gay people coming out of the closet and challenging the societal oppression of homosexuality.

The Labor Code holding recognized that the gay rights struggle has precipitated, and is the subject of, controversial political debate.<sup>40</sup> Gay rights activists, and other openly-identified gay people who encounter society’s homophobia, who challenge anti-homosexual discrimination, or who otherwise challenge the traditional societal prejudices toward homosexuality, are engaged in a form of political activity. The court was imprecise in its definition of the political aspects of homosexuality. There seems to be no pretense that homosexuality is inherently political.<sup>41</sup> Eschewing its own value judgments on homosexuality (in a decidedly non-traditional judicial fashion<sup>42</sup>), the court recognized that the subject of homosexuality—the behavior, the etiology, the definitions, the passions aroused, the controversy, the evidence—is exceedingly complex. In addition to everything else thought, believed, or feared about homosexuality, one component of its reality in the last third of the twentieth century is inescapably political. Manifest homosexuals who associate with others to work for equal rights and who make an issue of their homosexuality are engaged in political activity.<sup>43</sup>

This conclusion is consistent with one of the central tenets of the modern gay liberation movement. Coming out as a gay

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40. See text accompanying note 26 *supra*. See, e.g., Leo, *Homosexuality: Tolerance vs. Approval*, TIME, Jan. 8, 1979, at 43.

41. No one proposes that “sex,” abstractly and inherently, is “political”; however, social and cultural attitudes can give political meaning and consequences to sexuality. See text accompanying notes 116-145, 195-251 *infra*; TRIPP, *supra* note 38, at 202-42. “When highlighted as an issue of social danger or moral concern” and in several other ways, “homosexuality can come to be politically significant.” *Id.* at 202.

42. Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIB. REV. 19 (Jan.-Feb. 1979); see text accompanying notes 258-345 *infra*; see generally Rivera, note 6 *supra*.

43. Gay Law Students Ass’n v. Pacific Tel. & Tel., Inc., 24 Cal. 3d at 488, 595 P.2d at 610-11, 156 Cal. Rptr. at 32-33.

person in a hostile and oppressive straight society is necessary in order to address and to eliminate oppression. In addition to the significant personal consequences, coming out is inherently and inescapably a political act.<sup>44</sup>

Finally, and most important, the *GLSA* court's extension of legal protection from employment discrimination to out-of-the-closet gay people (manifest homosexuals who make an issue of their homosexuality) represents an abrupt and radical departure from the traditional judicial attitudes toward homosexuality. In effect, the Labor Code holding reverses one of the most common and most pernicious judicial approaches to the subject of homosexuality, and in particular to the claims for equal protection in the law for openly-identified gay people.

Courts have traditionally manifested intolerant attitudes toward homosexuality *per se*, reflecting the myths, prejudices, and fears of the society. In any legal context where homosexuality has become an issue, these attitudes have resulted in the denial of legal rights and legal protection to homosexual individuals.<sup>45</sup> Yet some courts have rejected unsupportable societal attitudes toward homosexuality as insufficient legal justification for oppression. Disclaiming any prejudice toward homosexuality *per se*, these relatively progressive courts have insisted that an individual's homosexuality may justify the denial of legal rights only if it is shown that, in the specific context, homosexuality has some rational connection to a harm or detriment claimed to result.<sup>46</sup>

With remarkable consistency, the courts adopting this approach in cases involving manifest or openly-identified gay people have concluded that an individual's open assertion of homosexuality, or making an issue of homosexuality, does constitute sufficient justification for imposing legal sanctions. This has occurred most noticeably in cases involving the dismissal from public employment of gay activists or publicly-known gay persons.<sup>47</sup> Homosexuality *per se*, homosexual status, and even spe-

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44. See text accompanying notes 215-257 *infra*.

45. See text accompanying notes 146-194 *infra*.

46. This so-called "rational nexus" standard was first articulated in *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); see text accompanying notes 172-180 *infra*.

47. See, e.g., cases discussed at notes 258-345 *infra*.

cific homosexual acts were not the bases for dismissal. Rather, media attention, "flaunting behavior," assertive challenges to homosexual stereotypes and societal oppression, or the mere open acknowledgment that one was gay justified dismissal. The typical rationales are [1] that such behavior is contrary to accepted standards of morality;<sup>48</sup> [2] that proximity to such individuals offends co-workers or the public;<sup>49</sup> [3] that an avowed gay person cannot be a proper role model;<sup>50</sup> or, more generally, [4] that while a closeted homosexual person may be tolerable, publicly leading a homosexual life-style will somehow impair an employee's ability to perform a job and adversely affect the employment relationship.<sup>51</sup>

In *GLSA*, the court made no mention of these concerns. Also absent is any reference to the immorality, the deviancy, the emotional and psychological instability traditionally associated with homosexuality. Any allusion to the social abhorrence of homosexuality neatly reversed the traditional significance of that factor. Under its holding, being a manifest homosexual, making an issue of homosexuality, associating with other gay people, no longer justifies legal oppression, but requires legal protection.

The propriety of the court's Labor Code holding has been questioned on the grounds of the "significant complications" it may create for future employment relations.<sup>52</sup> This criticism is superficially appealing, but is valid only if one discounts or ignores the context in which *GLSA* arose. Legal commentators have long recognized the impropriety and irrationality of the discrimination traditionally suffered by homosexual employees, and the insufficiency and injustice of the legal rationales upholding such discriminatory practices.<sup>53</sup> In recent years, gay rights

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48. For example, *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340 (1977), *cert. denied*, 434 U.S. 879 (1977). For a discussion of *Gaylord*, see text accompanying notes 319-329 *infra*.

49. For example, *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977). For a discussion of *Singer*, see text accompanying notes 286-297 *infra*.

50. For example, *Safransky v. State Personnel Bd.*, 62 Wis. 2d 464, 215 N.W.2d 379 (1979). For a discussion of *Safransky*, see text accompanying notes 311-318 *infra*.

51. For example, *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971). For a discussion of *McConnell*, see text accompanying notes 276-285 *infra*.

52. *GLSA Note*, *supra* note 15, at 712-13.

53. For example, *Rivera*, *supra* note 6, at 805-74. See also *Analysis of Rationales*, *supra* note 34; Comment, *Out of the Closet, Out of a Job: Due Process in Teacher Dis-*

activists have viewed the achievement of legal protection from employment discrimination as a cornerstone of their struggle against the oppression of gay people.<sup>54</sup> In acknowledging the political significance and the social implications of gay people's decisions to come out—to make an issue of their homosexuality—the court quite properly confronted the reality and the irrationality of the oppression of homosexuality. In extending the Labor Code's protection against employment discrimination to manifest homosexuals, the court was addressing the significant problems presently existing in employment relations.

The broad and imprecise language of the Labor Code holding has been criticized for creating uncertainty in subsequent application.<sup>55</sup> The novelty of the court's approach to homosexuality and to the claims of the gay rights movement and the procedural posture of the case demand flexibility for interpretation and application. Justice Tobriner's opinion should be viewed as a long overdue correction of past judicial insensitivity, intolerance, and unthinking prejudice against homosexuality.

This Comment accepts the propriety, the validity, and the necessity of the Labor Code holding. This Comment does not explore what new scope, if any, the Labor Code holding gives to political activity. The discussion proceeds from the assumption that the court's recognition of the gay rights movement has not distorted the generally accepted meaning of the word political. Nor does this Comment seek to specify which activities of manifest homosexuals are to be considered making an issue of their

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*qualification*, 6 HASTINGS CONST. L.Q. 663 (1979) [hereinafter cited as *Out of the Closet, Out of a Job*]; Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U.L.Q. 527; Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV. 495 (1976); Comment, *The Homosexual's Legal Dilemma*, 27 ARK. L. REV. 687 (1973); Note, *Government Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

54. See text accompanying note 26 *supra*. The National Gay Task Force (NGTF) is a national gay civil rights organization formed in 1973. In addition to lobbying for legislation protecting gay persons from employment discrimination, groups like the NGTF have negotiated with large private employers to obtain pledges of nondiscrimination. Employers such as AT&T, IBM, CBS, NBC, Gulf & Western, Mobil, Xerox, and many others have stated that they do not discriminate on the basis of sexual orientation. NGTF, *Gay Civil Rights Support Statements and Resolutions Packet Volume 1* (mimeographed insert) (unpublished document available from NGTF, Room 506, 80 Fifth Avenue, New York, New York, 10011).

55. GLSA Note, *supra* note 15 at 711-14.



homosexuality and therefore political and protected.<sup>56</sup>

The broad outline of the argument is as follows: Human sexuality is little understood, provokes great anxiety, and is simultaneously devalued and over-emphasized in this culture. The dread and oppression of homosexuality is part of this cultural concern with sexuality. The fears and myths and prejudice which constitute the society's homophobia are in fact unsupported and unjustifiable. Moreover, the oppression of homosexuality denies to a significant portion of the population the opportunities to express sexual love and emotional intimacy, to achieve self respect, and to participate fully and equally in the society. Thus homophobia is not only irrational, but is at odds with principles of autonomy, liberty, and individual worth which are fundamental to an enlightened and just society. In such a

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56. The Labor Code holding can fairly be read to say that coming out is a process and a phenomenon laden with political implications. See text accompanying notes 40-43 *supra*. The diversity of gay people and the myriad social contexts in which they live suggest practically limitless ways of coming out and of being out—i.e., being a manifest homosexual who makes an issue of homosexuality. See text accompanying notes 196-257 *infra*. The cultural, behavioral, and personality characteristics which signify the possibilities and degrees of coming out are also nearly limitless.

The most obviously and traditionally political activities include activism in mainstream politics and gay-oriented political associations (*viz.*, seventy-one openly gay delegates and alternates to the 1980 Democratic National Convention, or membership in groups such as San Francisco's Harvey Milk Gay Democratic Club, Alice B. Toklas Democratic Club, Concerned Republicans for Individual Rights, or the National Gay Task Force; see, e.g., Zemel, *Delegates Take to the Floor of Demo Convention*, *The Sentinel*, Aug. 6, 1980, at 7, col. 1 (The *Sentinel* is a locally distributed biweekly San Francisco paper covering news and concerns of the gay community; its address is 1042 Howard St., San Francisco, Ca. 94103)) as well as wearing a "Gay and Proud" or "Dyke" button (see, e.g., WOLF, *supra* note 10, at 86) or participating in a Gay Freedom Day Parade or a candlelight march in honor of an assassinated gay political leader such as San Francisco's Harvey Milk (see, e.g., Hinkle, *The Dan White Story*, *The Sentinel*, Nov. 30, 1979, at 17-21; Shilts, *Cleve Jones Rising*, *CHRISTOPHER STREET*, Oct./Nov. 1980, at 14-22). But coming out in a straight society need not take the form of traditional political activism to be seen as a political challenge to the irrationality and injustice of homosexual oppression. In the face of "dyke" jokes at the office, to tell one's co-workers, "I'm a lesbian and offended" is political activity; in the face of rigidly defined gender roles, for a man to wear a diamond earring or bring a male lover to an office party is political activity. Wearing a red kerchief in a hip pocket may be innocuously apolitical for an Iowa farmer, but may connote a distinct sexual preference for a man in a gay bar on Saturday night.

To examine the political implications of the myriad indicia of coming out, of being a manifest homosexual, is not the intent and is beyond the scope of this Comment. The proposition is rather that the Labor Code holding gives protection from employment discrimination to out-of-the-closet gay people in a society that irrationally condemns homosexuality and "makes an issue" for those gay people who, by coming out, seek to be judged on their individual merits and to foster a greater tolerance for human diversity and a greater respect for personal autonomy.

homophobic society, gay people—"manifest homosexuals" who accept, value, and respect their sexuality—necessarily if not explicitly, challenge the society's ignorance, prejudices, and injustice.

This Comment seeks to show that the California Supreme Court recognized that this is true. Appreciating the irrationality and injustice of homophobia, the significance of gay rights activism, and the impropriety of the traditional judicial approaches to the legal rights of gay people, the court quite properly saw that coming out of the closet makes an issue of homosexuality, or more accurately, that a homophobic society makes an issue of a proud and healthy sexuality. Against this background, the court stated, "manifest homosexuals" who "make an issue" of their homosexuality are engaged in political activity and deserve legal protection.

## II. CULTURAL MYTHS ABOUT HOMOSEXUALITY

The causes and effects of the societal oppression of homosexuality are complex and are not fully understood. This culture has commonly regarded homosexuality as immoral, aberrant, a sign of emotional and psychological sickness, inconsistent with fundamental cultural values, and as posing a danger to a well-ordered society. Such attitudes are expressed in many aspects of contemporary American culture.

Widely-shared and largely unexamined myths about the nature of homosexuality underlie the prevailing attitudes. These myths may reflect not only an ignorance of homosexuality, but a narrow understanding of human sexuality in general, and a more fundamental, generalized fear and anxiety regarding all forms of sexual behavior.<sup>57</sup>

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57. One observer has labelled this generalized cultural fear and anxiety about sex and sexual behavior "erotophobia." Anti-homosexual attitudes are but one expression of this cultural anxiety. W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES: A CROSS-CULTURAL AND CROSS-SPECIES INVESTIGATION* 71 (1967).

Homosexuality may be one of the more objectionable and anxiety-provoking forms of sexuality and sexual behavior in American culture. A. KINSEY, W. POMEROY, C. MARTIN, D. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 477 (1953) [hereinafter cited as KINSEY, *FEMALE*]; see generally, WEINBERG & WILLIAMS, *supra* note 7, at 17-21.

### A. HOMOSEXUALITY AS A RARE DEVIATION FROM THE CULTURAL NORM

Many people believe that homosexuality is rare and occurs exclusively on the fringes of society.<sup>58</sup> A consequence of this belief is that most people assume that they do not personally know any homosexual individuals, and that as a fringe aberration, homosexual persons are readily identified when encountered.<sup>59</sup> This view of the rarity of homosexuality can be explained by two phenomena. First, rampant homophobia convinces many homosexual persons that it is unwise, and frequently dangerous, to reveal their homosexuality to the society at large, regardless of any manifestation of a particular individual's feelings about homosexuality.<sup>60</sup> Second, the attempts to camouflage sexual orientation are often successful because most homosexual persons fail to exhibit the expected characteristics of the majority's stereotyped images.<sup>61</sup>

It has been argued that as many as a third of the adult population has participated in homosexual activities, and that as many as ten percent form their primary sexual and emotional attachments with same-sex partners.<sup>62</sup> Some evidence indicates that homosexuality may be proportionately more prevalent among men than women.<sup>63</sup> Yet the incidence of homosexuality in the population seems consistent at all social and economic levels, among all racial, ethnic, and religious groups, and among all ages.<sup>64</sup>

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58. State of Oregon Dep't of Human Resources, Final Report of Task Force on Sexual Preference 18-19 (Dec. 1, 1978) (Task Force on Sexual Preference, 607 Corbett Building, 430 S.W. Morrison St., Portland, Ore., 97204) [hereinafter cited as Oregon Task Force]. An inconsistency in society's anti-homosexual attitudes which will become apparent throughout the following discussion should be noted here. If society believes there to be so few homosexual individuals and that they are so readily identifiable, their existence or their public identification ought not be viewed as so dangerous a threat to the society. See text accompanying notes 116-145 *infra*.

59. Oregon Task Force, *supra* note 58, at 11-12, 18-19.

60. WEINBERG & WILLIAMS, *supra* note 7, at 54-55.

61. Oregon Task Force, *supra* note 58, at 15.

62. See generally, KINSEY, MALE, *supra* note 4 at 650-51; KINSEY, FEMALE, *supra* note 57, at 473-74; Rivera, *supra* note 6, at 800 n.4.

63. KINSEY, FEMALE, *supra* note 57, at 474-75; see also Oregon Task Force, *supra* note 58, at 18-19.

64. KINSEY, MALE, *supra* note 4, at 610-66; KINSEY, FEMALE, *supra* note 57, at 487-89.

Certain professions, such as hair-dressers and interior decorators, have become stereotyped as dominated by homosexual men. Similarly, there are thought to be a disproportionate number of lesbians among women athletes. Regardless of popular stereotypes of "swishy faggots" and "bull dykes," gay men and lesbians are in fact present in all professions and all occupations.<sup>65</sup>

The reasons for the myth that homosexuality is rare are readily understandable. Societal intolerance creates oppression. Oppression is internalized as repression that exacts a toll on the psychological health and emotional well-being of the homosexual individual.<sup>66</sup> This repression results in the attempt to pass in the straight world and encourages invisibility.<sup>67</sup>

Invisibility fosters stereotypes. Popular images of homosexual individuals as being inherently and recognizably different serve to rationalize intolerance.<sup>68</sup> So long as societal intolerance causes homosexual individuals to remain closeted, the majority will continue to believe that homosexuality is rare, that homosexual individuals are immediately identifiable, and that the average person never comes to know or contact homosexual people.<sup>69</sup>

#### B. HOMOSEXUALITY AS A FAILURE TO CONFORM TO CULTURAL GENDER ROLE MODELS

Critical to understanding the societal attitudes toward homosexuality is an appreciation of the nature of the culturally approved gender role models. The culture demands male conformence to its definition of men: strong, assertive, dominant, aggressive, rational, self-confident, active and competent in the external world. The cultural model for women differs: women are seen as weak, passive, compliant, emotional, self-effacing,

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65. Oregon Task Force, *supra* note 58 at 19, 46. See also, Dorfman, *A Gay Businessman: Out of the Closet and Onto Wall Street*, *ESQUIRE*, Mar. 13, 1979, at 53. See generally A. BELL & M. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978).

66. See text accompanying notes 195-214 *infra*. See generally WEINBERG & WILLIAMS, *supra* note 7, and authorities cited therein, especially at 1-13.

67. *Id.*

68. *Id.* See also Harrison, *The Dynamics of Sexual Anxiety*, 37 *CHRISTIANITY IN CRISIS* 136, 137 (1977).

69. Oregon Task Force, *supra* note 58, at 14-23.

and inherently suited for the security and order of domesticity.<sup>70</sup>

By popular definition, homosexual individuals seek to form sexual and affectional relationships with others of the same sex.<sup>71</sup> Consequently, they violate the traditional expectations for interpersonal sexual roles. The assumption that the sexual practices of homosexual individuals correspond to traditional heterosexual practices contributes to the notion that homosexual individuals do not and can not conform to the cultural roles assigned to their respective genders. One member of a homosexual couple is expected to perform in a masculine/dominant role and the other in a feminine/passive role.<sup>72</sup>

Whenever a homosexual man exhibits feminine characteristics, or a homosexual woman exhibits masculine traits, the assumption is reinforced. In fact, there is a glaring lack of scientific or statistical research into the question of the relative proportions of effeminate men and masculine women in the homosexual and heterosexual populations.<sup>73</sup>

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70. *Id.* at 15-16. For authority on these role models and their psychological determinants, see the excellent and definitive work by E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974), with special attention to chapter 10, at 349-60. For analysis of sex differences and differentiated anxiety levels with respect to failure to conform to gender models (parent/child, boy/girl, heterosexual/homosexual), see MACCOBY & JACKLIN at 339 et seq. For additional background, see HUMAN SEXUALITY, *supra* note 4, with particular attention to Luria, *Psychosocial Determinants of Gender Identity, Role and Orientation*, at 163-193; Maccoby, *Gender Identity and Sex Role Adaption*, at 194-203; Sears, *Sex-Typing, Object Choice, and Child Rearing*, at 204-22; and Gagnon, *The Interaction of Gender Roles and Sexual Conduct*, at 225-45.

71. This conceptualization of homosexuality ascribes a disproportionate significance to an individual's sexual identity. Not only does identity have many components besides the fundamental personality feature of sexual identity or gender identity, but sexual identity itself has been described as having three components: "(1) an individual's basic conviction of being male or female, (2) an individual's behavior which is culturally associated with males and females (masculinity and femininity), and (3) an individual's preference for male or female sex partners." Katchadourian, *Terminology of Sex and Gender* in HUMAN SEXUALITY, *supra* note 4, at 23 (quoting R. GREEN, *SEXUAL IDENTITY CONFLICT IN CHILDREN AND ADULTS* (1974)). See generally Katchadourian, *Terminology of Sex and Gender*, in HUMAN SEXUALITY, *supra* note 4, at 13-25. Cf. Denny, *Gay Manifesto for the 80's*, CHRISTOPHER STREET, Jan. 1981, at 16 (a political view that homosexuality and heterosexuality are fundamentally important *in themselves* as criteria for differentiating individuals).

72. Oregon Task Force, *supra* note 58, at 15-18.

73. Green, *One Hundred-Ten Feminine and Masculine Boys: Behavior Contrasts and Demographic Similarities*, 5 ARCHIVES SEXUAL BEHAVIOR 425 (1976) (one of the few studies of incidence and implications of effeminacy in boys).

The perceived violation of traditional gender role models may also underlie the fear that homosexuality somehow threatens the structure and value of the family as an institution.<sup>74</sup> Yet the prevailing sociological analyses do not support the conclusion that the importance of the family lies in encouraging heterosexuality or conformance to gender models.<sup>75</sup> In fact, homosexual individuals are necessarily influenced by the traditional family structure: homosexual children are typically reared in heterosexual families. There is some evidence that homosexual men and women felt themselves to be, or were identified by others as, respectively, childhood "sissies" and "tomboys."<sup>76</sup> Yet the truth is that most homosexual persons do conform to their respective gender roles, both in self-identity and external characteristics.<sup>77</sup>

The belief that homosexual individuals inevitably and necessarily violate gender models is simply not supported by any

74. See text accompanying notes 121-133 *infra*.

75. Cross-cultural differences in the definition of the family are abundant. Uniformly, however, it appears that the "nuclear family" includes at least one man and one woman. G. MURDOCK, *SOCIAL STRUCTURE* (1949). Despite disagreement about the functions of the family in different cultures, there is general agreement that the fundamental social value of the family lies more in the realm of providing economic security, education, and an environment for child rearing. See A. SKOLNICK, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 1-34 (1973). If this is true, it reveals nothing about the incompatibility or contradiction between perceived homosexual non-conformance to gender models and the social value of the family. Cf. Epstein, *Children of Gays*, *CHRISTOPHER STREET*, June 1979, at 43-50 (the "problem" of children of gay parents is the homophobia of the society and their peers; conversations with children of gay parents revealed maturity, tolerance, independence, and self-assurance not typical of their ages).

For a discussion of sex-role typing and parental/family influence on children, see generally MACCOBY & JACKLIN, *supra* note 70 at 277-302. See text accompanying notes 125-128 *infra*. For a recent examination of concerns, attitudes, and sociological trends with respect to the "American Family," see White House Conference on Families, *FINAL REPORT: LISTENING TO AMERICA'S FAMILIES* (1980).

76. See, e.g., M. SAGHIR & E. ROBINS, *MALE AND FEMALE HOMOSEXUALITY* 18-31, 192-203 (1973). While a majority of the homosexual subjects in this study reported a childhood syndrome of behavior culturally defined as more appropriate for the opposite gender, the researchers conceded that the significance of this was uncertain because the true prevalence of cross-gender behavior in preadolescents is not known. Moreover, retrospective distortion is a major problem with recall data of this kind, especially in an area as emotionally charged as reconciling one's present sexual self with one's sexual history. Luria, *supra* note 70.

77. SAGHIR & ROBINS, *supra* note 76, at 108, 269. There seems to be general agreement that homosexual individuals are psychologically indistinguishable from the general population. See, e.g., BELL & WEINBERG, *supra* note 65, at 36-59.

evidence.<sup>78</sup> With substantial evidence to the contrary, the popular adherence to such beliefs may reveal more about the society's concepts of men and women, of sexuality, and of the nature of interpersonal relations, than it purports to explain about homosexuality.<sup>79</sup>

### C. HOMOSEXUAL PEOPLE ARE SEXUALLY PROMISCUOUS AND AGGRESSIVE

Many people believe that homosexual individuals are uniquely aggressive in seeking sexual partners, that they are exclusively and continuously seeking sexual gratification and desire to convert or recruit others to homosexuality.<sup>80</sup> This belief simultaneously fosters and reflects the persistent objectification of individuals as "homosexuals," indicating a categorization based on sexual activity.<sup>81</sup> Thus, "homosexuals" are defined as *exclusively sexual beings*, rather than as people who express or desire same-sex sexual gratification, and who may otherwise and in most respects be indistinguishable from those who seek heterosexual gratification.<sup>82</sup>

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78. In fact, no correlation exists between gender identity and sexual orientation. See, e.g., Simon & Gagnon, *Femininity in the Lesbian Community* in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 256-67 (E. Goode & R. Troiden eds. 1974). For a discussion of the significance and varying manifestations of "effeminacy" in men, see TRIPP, *supra* note 38, at 173-202.

79. One researcher has suggested that male masculinity and female femininity do not in themselves epitomize psychological health. There is growing evidence that androgyny, defined as a combination of both high-rated masculine and high-rated feminine characteristics, may actually represent maximum social effectiveness and competence as well as optimal personal well-being. Because of cultural norms and gender expectations, men are usually better off being masculine, and women better off being feminine. But for optimal social adaptation and fulfillment of individual potential, it may be best to exhibit both "high masculine" and "high feminine" characteristics. See, Bems, *Measurement of Psychological Androgyny*, 42 *J. CONSULTING AND CLINICAL PSYCH.* 155-62 (1974); Bems, *Sex-Role Adaptability: One Consequence of Psychological Androgyny*, 31 *J. PERSONALITY AND SOC. PSYCH.* 634-43 (1975). See text accompanying notes 125-128 *infra*.

80. A United States Senate Document warned: "These perverts will frequently attempt to entice normal individuals to engage in their perverted practices . . ." COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENT'S SUBCOMMITTEE ON INVESTIGATIONS, INTERIM REPORT: EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 241, 81st Cong., 2d Sess. 4 (1950) [hereinafter cited as SENATE DOCUMENT]. See also Oregon Task Force, *supra* note 58, at 19-23.

81. See WEINBERG & WILLIAMS, *supra* note 7, at 207-10 (discussion of the "Kinsey Scale"); cf. HUMAN SEXUALITY, *supra* note 4, at 35-40 (discussion of the components of sexual behavior and Kinsey's decision to label acts rather than people).

82. WEINBERG & WILLIAMS, *supra* note 7, at 267-89. See also notes 76 & 77 *supra*.

Whenever a homosexual man makes a sexual advance to a heterosexual man, the myth of sexual aggressiveness is thought to be corroborated. The bias and inconsistency underlying this belief are readily apparent. A heterosexual man's sexual advance to an unknown woman in a public place or to an acquaintance in relative privacy is not condemned by society even though such advances are often offensive to the woman involved.<sup>83</sup> The traditional image of masculinity is consistent with heterosexual solicitation. Moreover, the assumption of a heterosexual man soliciting a woman is that she will be heterosexual and possibly receptive. The culture has never challenged that assumption and penalized heterosexual males for taking a risk and guessing wrong—that the women solicited may be lesbians and quite properly offended and disgusted. Yet the attitude toward homosexual solicitation is quite different.<sup>84</sup>

Explicit aggressiveness can pose real problems for homosexual persons. The price exacted of those who offend heterosexual society by their open and unwelcome homosexual advances would seem to ensure that caution and discretion are essential. Moreover, homosexual people themselves are continually bargained with heterosexual recruitment, ranging from well-meaning attempts at heterosexual seduction by friends or acquaintances,<sup>85</sup> to the more blatant attempts at "cure" or behavior modification.<sup>86</sup>

It has been argued that homosexual men in urban areas may be more promiscuous than the societal norm.<sup>87</sup> Sexual promiscu-

83. Oregon Task Force, *supra* note 58, at 20; see also Comment, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879, 879-82 (1980).

84. Oregon Task Force, *supra* note 58, at 20-22. See also text accompanying notes 94-99 *infra*.

85. Oregon Task Force, *supra* note 58, at 20-22. See also text accompanying notes 94-99 *infra*.

86. For an annotated listing of books and articles on the "treatment" of homosexuality dating from 1940 to 1968, see M. WEINBERG & A. BELL, *HOMOSEXUALITY: AN ANNOTATED BIBLIOGRAPHY* (1972). For a documentary history of a variety of "treatments" and their effects, see J. KATZ, *GAY AMERICAN HISTORY* 129-207 (1976).

87. See, e.g., M. HOFFMAN, *THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION OF EVIL* 44-45, 77-78, 166-79 (1968); TRIPP, *supra* note 38, at 128-34, 150-59; SAGHIR & ROBINS, *supra* note 76, at 68-71. For a brief discussion of promiscuity and venereal disease, see Richards, *supra* note 34, at 986 n.127. See also KINSEY, *MALE*, *supra* note 4, at 589, 630-36.



ity, like all sexual behavior, may be explained more reliably by socialized and biological sex differences than by a heterosexual/homosexual distinction.<sup>88</sup> Moreover, it is far from settled that the majority of those leading active homosexual lives deviates substantially from the heterosexual norm in terms of the number of sex partners, the frequency or variety of sexual activity, or the relative value of sexuality and sexual behavior in the ordering of an individual's life.<sup>89</sup> The view that homosexual persons are exclusively and unremittently sexual beings cannot be supported.<sup>90</sup>

Given the obstacles that society places in the way of expressions of homosexual love and commitment, it would not be surprising that stable relationships and healthy sexual adjustments were rare or non-existent among the homosexual population. In fact, the opposite is true. Despite cultural oppression, despite lack of legal recognition, despite the denial of the social and economic benefits accorded to heterosexual relationships, homosex-

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88. KINSEY, *MALE*, *supra* note 4, at 589; *see also*, CHURCHILL, *supra* note 57 at 57-58, 112-13; HOFFMAN, *supra* note 87, at 168-71. *Cf.* D. SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* (1979) (a controversial socio-biological explanation of sex differences in sex behavior). For a general discussion of sex differences and socialization, see MACCOBY & JACKLIN, *supra* note 70.

89. Two obstacles confront researchers examining "promiscuity." The first is conceptual:

It is difficult to know what might be meant by the assertion that "promiscuity" is greater in one group than another. It may be true, for example, that the average homosexual person is more or less promiscuous than the average heterosexual person. However, it may also be true that homosexual persons are more *variable* in their promiscuity (i.e., there are more homosexual persons than heterosexual persons who have *many* partners and *no* partners). This may or may not conform to the assertion commonly made regarding differences in promiscuity in the two groups.

Interview with John A. Martin, Research Psychologist, Departments of Psychology and Pediatrics, Instructor, Department of Pediatrics, Stanford University (Nov. 14, 1980).

The second is methodological: studies of sexual practices of homosexual persons have characteristically used volunteer subjects who are more likely to be "out," involved in the gay movement and gay culture, and (not surprisingly) more sexually active. WEINBERG & WILLIAMS, *supra* note 7, at 4, 96. *See also* TRIPP, *supra* note 38, at 101-26.

90. It has been observed that the condemnation of perceived homosexual male promiscuity by heterosexual males contains an element of hypocrisy, or even jealousy. Heterosexual males may not condemn promiscuity *per se*, and may in fact greatly desire it, but may simply lack the opportunities which are often available to gay men. TRIPP, *supra* note 38, at 150-59.

ual relationships abound and thrive.<sup>91</sup>

Promiscuity is but one aspect of sexual adjustment. That promiscuity may be the most visible manifestation of sexuality may help explain, but surely does not justify, the stereotype of "sexually promiscuous homosexuals."

The underlying question remains: why is promiscuity perceived as an issue at all? The answer seems to entail the society's ambivalence about matters of sex, sexual identity, and sexuality.<sup>92</sup> Condemnation of sexual promiscuity indicates much about the unresolved conflicts within the condemners, and about their readiness to express their own frustrations by imposing their values on others, without accounting for the actual significance of either promiscuity or homosexuality.<sup>93</sup>

Related to the belief in the sexual aggression and promiscuity inherent in homosexual individuals is the concern about homosexual recruitment. The sexual advances made by homosexual men are commonly labelled as recruiting.<sup>94</sup> The "perversion" seen in homosexuality may well reflect the fear of homosexual advances—enticement of "normal" people.<sup>95</sup> Anti-

91. *Id.* at 159-70. See also, SAGHIR & ROBINS, *supra* note 76, at 56-58, 72-77, 224-28, 236-39. Cf. HOFFMAN, *supra* note 87, at 45 (Sexual promiscuity must be distinguished from inability to develop close and lasting sexual interpersonal relationships.). For a discussion of some of the problems peculiar to gay relationships because of the lack of legal and social recognition, see Dlugos, *Gay Widows*, CHRISTOPHER STREET, Feb. 1980, at 19-24. For a respected sexologist's examination of the "psychopathological state of being in love" and a discussion of the intricate interrelationships among sexuality, love, and pair-bonding, see J. MONEY, *LOVE AND LOVESICKNESS* (1980).

92. "[S]exual behavior, whatever form it may assume, is always a focal point of social anxiety; this is particularly the case, though not exclusively, with societies like our own in which the religious code is inordinately erotophobic." CHURCHILL, *supra* note 57, at 71. For a discussion of general societal anxieties about sexuality, and cultural differences in encouraging, tolerating, regulating, and condemning various aspects of sexual behavior, see *id.* at 15-35, 70-88.

93. "There seems to be no question but that the human male would be promiscuous in his choice of sexual partners throughout the whole of his life if there were no social restrictions." KINSEY, *MALE*, *supra* note 4, at 589.

Desire and capacity for promiscuity is characteristic of males and not females. The incidence of homosexual promiscuity is descriptive of sociological and cultural factors, not of homosexuality.

The condemnation of homosexual promiscuity may be explained by recognizing that "[u]sually human beings only fear evils that they feel strongly attracted to." CHURCHILL, *supra* note 57, at 57.

94. Oregon Task Force, *supra* note 58, at 20.

95. See, e.g., SENATE DOCUMENT, *supra* note 80.

homosexual crusaders advocating the traditional values of morality, decency, and family have focused on homosexual recruitment as one of the gravest dangers to the social fabric posed by homosexuality.<sup>96</sup> Because "normal" people would otherwise not fall prey to "unnatural" homosexual desires and because homosexual persons cannot reproduce themselves,<sup>97</sup> the argument runs, they must recruit others to join their ranks. A principled inquiry reveals that homosexuality is neither abnormal nor unnatural.<sup>98</sup> Moreover, it is apparent that those not already inclined toward homosexual experimentation and gratification are not subject to conversion by the blandishments or example of those already initiated.<sup>99</sup>

#### D. HOMOSEXUAL PEOPLE ARE CHILD MOLESTERS

Related to the fear of homosexual recruitment is the widely-

96. See text accompanying notes 116-145 *infra*. For example, the controversy surrounding the Dade County, Florida referendum and repeal of a gay rights ordinance was fueled by Anita Bryant's Save Our Children Crusade, and fears that allowing homosexual teachers in schools would lead inevitably to child pornography. See *Enough! Enough! Enough!*, TIME, June 20, 1977, at 59-60; see also, *Gay Rights Defeat in Dade County Has National Implications*, 4 SEX. L. REP. 25 (1977).

For an example of one notorious anti-homosexual crusader's fears of homosexuality and concern over "recruitment," see generally, A. BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977).

97. Of course, a same sex couple is biologically incapable of conceiving their own child [as of this date]. But this fear discounts the reality of the countless parents who have discovered or always known of their homosexual desires, yet have reconciled homosexual behavior with reproduction and child-rearing. See, e.g., WOLF, *supra* note 10, at 136-65; Rivera, *supra* note 6, at 883-904. Cf. KINSEY, *MALE*, *supra* note 4, at 285-89 (the relatively low incidence of homosexual behavior among (especially older) married males is probably due to social factors, particularly the organization of the family).

Additionally, this view does not account for the increasing incidence of "alternative" insemination and child-rearing in the gay community. See Comment, *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GOLDEN GATE U.L. REV. 1007, 1007-09 (1980).

98. For a discussion of concerns with the "abnormality" of homosexuality, see text accompanying notes 121-132 *infra* and authorities cited. The view that homosexuality is unnatural, of course, reflects ignorance and misconceptions of nature. Homosexual behavior appears in all societies, in all ages, and in many non-human species—and thus is hardly contrary to or disapproved by "nature." See generally CHURCHILL, *supra* note 57, at 60-88; E. WILSON, *SOCIOBIOLOGY* (1978). Cf. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORD. L. REV. 1281 (1977) (moral condemnation and legal punishment of so-called "unnatural acts" is constitutionally impermissible) [hereinafter cited as *Unnatural Acts*].

99. Oregon Task Force, *supra* note 58, at 21. See generally TRIPP, *supra* note 38, at 67-100. For a discussion of what is known about the etiology of homosexuality, see notes 107-111 and 116 *infra* and accompanying text.

held belief that homosexual persons are child molesters, and thus criminal, immoral, and dangerous.<sup>100</sup> The factual assumptions underlying the myth are erroneous. While the concern about homosexual child molestation is deep and real, it is entirely out of proportion to the reality and scope of its existence. The overwhelming majority of reported criminal child molestations involve male molesters and female victims who are often related to or acquainted with the offender.<sup>101</sup>

The issue of child molestation is most frequently raised when homosexual teachers are discovered in public schools or in other positions of proximity to or influence over children.<sup>102</sup> Amid the passions and hysterical reaction typically manifested toward the propriety of homosexual teachers in the schools,<sup>103</sup> the reality is generally overlooked that nearly all cases of child molestation are heterosexual.<sup>104</sup>

To inquire into society's abhorrence of *all* child-adult sexual relations is a different question than that raised by the abhorrence of the molestation and sexual abuse of children.<sup>105</sup> Similarly, the societal reaction to adults who abuse their power and influence over children to gratify sexual desires would seem to

100. Oregon Task Force, *supra* note 58, at 36-41.

101. *Id.* See also HOFFMAN, *supra* note 87, at 92-95, and J. GAGNON & W. SIMON, *SEXUAL CONDUCT* 163 (1973), both of which discuss aspects of P. GEBHARD, J. GAGNON, W. POMEROY & C. CHRISTENSON, *SEX OFFENSES* (1965) (the use of violence in sexual molestation of children is almost exclusively heterosexual; men arrested for sex offenses with boys are the "least homosexual" of all arrested for illegal homosexual conduct; males with repressed homosexual desires who take up heterosexual marriages show the strongest propensity for sexual contact with children). No more than 5% of reported child molestations reported at the Regional Resource Center for Child Abuse in Boise, Idaho, involved same-sex activity. While the proportion of homosexual persons in the total population is not known, it almost surely exceeds 5%, which suggests that a randomly selected heterosexual male is more likely to be a child molester than a randomly selected homosexual male. See Oregon Task Force, *supra* note 58, at 38.

102. Oregon Task Force, *supra* note 58, at 36, 42. For a discussion of cases involving the dismissal of homosexual teachers from public schools, see text accompanying notes 298-345 *infra*. See also Rivera, *supra*, note 6, at 860-74.

103. The controversy over gay teachers is illustrated by the 1977 Dade County gay rights referendum where a majority of the voters were convinced that employment protection for gay teachers would, among other dangerous consequences, threaten harm to children under the teacher's supervision. See *Enough! Enough! Enough!*, *supra* note 96.

104. Oregon Task Force, *supra* note 58, at 20-21, 36-42.

105. See, e.g., Schultz, *The Age of Sexual Consent: Fault, Friction, Freedom*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 357-38 (L. Schultz, ed. 1980); see generally Oregon Task Force, *supra* note 58, at 37-43.

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be irrelevant to the issue of homosexuality. Quite simply, the condemnation of sexual molestation of children has little meaning and less propriety in a consideration of the reality of homosexuality.

## E. HOMOSEXUALITY AS A DISEASE

Another aspect of the fear of homosexual recruitment is a fear of contagion. This concern alludes to a metaphorical image of an infectious disease that is transmitted by the close proximity of the germ-bearers to the uninfected. The belief is frequently expressed that homosexual employees will pervert other employees or somehow infect the working environment.<sup>106</sup>

No more is known about the causes of homosexuality than about the causes of heterosexuality.<sup>107</sup> Whether an individual's sexual orientation is fixed or subject to continual flux and evolution,<sup>108</sup> it is determined by any number of variable, interrelating factors.<sup>109</sup> Proximity to practicing homosexual persons is *not* a significant factor, whether occurring during impressionable childhood years or during adulthood.<sup>110</sup> Homosexuality appears

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106. A 1950 United States Senate Document addressing concerns about federal employment of "homosexuals and other sex perverts" neatly summed up this concern:

Most of the authorities agree and our investigation has shown that the presence of a sex pervert in a government agency tends to have a corrosive influence upon his [*sic*] fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. It is particularly important that the thousands of young men and women who are brought into federal jobs not be subjected to that type of influence while in the service of the government. *One homosexual can pollute a government office.*

SENATE DOCUMENT *supra* note 80, at 4 (emphasis added).

107. A major problem of any inquiry into causation is definitional. Unless "sexual behavior," "homosexual," "heterosexual," and even "sex" are clearly defined, and unless aspects of behavior to be examined are described with considerable precision, cause cannot be studied accurately. *See generally* Katchadourian, *supra* note 71. *See also* TRIPP, *supra* note 38, at 36-100, and CHURCHILL, *supra* note 57, at 88-99.

108. *Cf.* Luria, *supra* note 70, at 181 (problems of characterizing sexual orientation), 182 (possibility of homosexual choice), and 189 (the way gender roles are now does not determine the way they must be in the future).

109. Hooker, *Homosexuality*, 14 INT'L ENCYCLOPEDIA SOC. SCI. 222 (1968), *reprinted in* NATIONAL INSTITUTE OF MENTAL HEALTH, TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS (1969).

110. Oregon Task Force, *supra* note 58, at 21.

to be but one of myriad possible human adaptations, and one's sexual orientation may be irreversibly settled at an early age, so that proximity to others can have no impact.<sup>111</sup>

The disease metaphor underlying the fear of homosexual contagion addresses issues other than the question of whether a homosexual person in a position of trust or authority can provide a proper role model or refrain from attempting to induce others to become homosexual. Although statistically not the norm, homosexuality may no more justifiably be labeled disease than may other variant characteristics such as sexual celibacy, right-handedness, or preferring to sleep in the daytime. The disease label and all the negative connotations associated with it<sup>112</sup> should be attached with even more care and circumspection by lay society than by the medical profession. In fact, since 1974, the American Psychiatric Association has officially regarded homosexuality as "not-disease."<sup>113</sup> The older view of homosexuality as sickness was based on research which is recognized as thoroughly discredited.<sup>114</sup> Recent appraisals conclude that there is neither a clinical entity to be labelled homosexuality, nor any single and certain explanation for homosexual behavior.<sup>114.1</sup> Yet the popular view of homosexuality as disease persists, despite the imprecise, ambiguous, and contested state of the knowledge

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111. The increasing weight of modern evidence points to the importance of early social experience in influencing sexual orientation. See HOFFMAN, *supra* note 87, at 112-127; J. MONEY & A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 153-201 (1972). Cf., CHURCHILL, *supra* note 57 at 382-91 and TRIPP, *supra* note 38, at 251 (substantial irreversibility of sexual preference).

112. "Disease" connotes treatment, attempts to cure, quarantine, social aversion and/or sympathy, all of which are inappropriate with respect to homosexuality. See authorities cited in note 86 *supra*.

113. By a unanimous vote (with two abstentions), the Board of Trustees voted to remove homosexuality from its list of "mental disorders." NGTF Support Packet, *supra* note 54, at 4; WEINBERG & WILLIAMS, *supra* note 7, at 6 n.11; N.Y. Times, Dec. 16, 1973, § 1 at 1, col. 1. In April 1974, the A.P.A. general membership approved the board's action. N.Y. Times, Apr. 19, 1974, § 1 at 12, col. 4. *But see Sick Again?*, TIME, Feb. 20, 1978, at 102 (psychiatric poll).

114. WEINBERG & WILLIAMS, *supra* note 7, at 4-5. See also Bell, *Research in Homosexuality: Back to the Drawing Boards*, 4 ARCHIVES OF SEXUAL BEHAVIOR 421 (1975).

114.1. See generally HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL (J. Marmor ed. 1980); W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE (1979). For a compelling critique of psychiatry's attitude toward homosexuality and the use of other "disease" concepts by the "science" of "mental health," see the works of T. SZAZ: SEX AND PRESCRIPTION (1980); THE MANUFACTURE OF MADNESS (1970); and LAW, LIBERTY AND PSYCHIATRY (1963). See also Mass, *A Talk with Thomas Szaz*, CHRISTOPHER STREET, March/April 1981, at 32-39.

of both homosexuality and mental health/illness. Moreover, the respect and authority accorded to the attitudes and the scientific theory and research underlying the use of such disease concepts reveals more about homophobia than about the medical, psychological, or sociological reality of homosexuality.<sup>115</sup>

#### F. HOMOSEXUALITY AS IMMORAL AND A THREAT TO SOCIETY

The popular prejudices against homosexuality are reflected in a more general fear that homosexuality represents a threat to the moral values and preservation of a well-ordered society. If one may choose to be homosexual,<sup>116</sup> to grant the validity of that

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115. For example, in *Boutilier v. Immigration and Nat. Serv.*, 387 U.S. 118 (1967), the Supreme Court held that the "psychopathic personality" section of the Immigration and Naturalization Act (8 U.S.C. § 1182(a)(4) (1976)) was neither vague nor violative of due process as applied to require the exclusion of homosexual aliens. The Court relied on the documented history of the Act and its revision of earlier statutory language to conclude that Congress did not use the term "psychopathic personality" in its clinical sense, but intended it to "specify such types of pathologic behavior as homosexuality or sexual perversion." 387 U.S. at 122 (quoting H.R. REP. No. 1365, 82nd Cong., 2nd Sess., reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1653, which accompanied H.R. 5678, 82nd Cong., 2d Sess. (1952) and resulted in the Immigration and Nationality Act of 1952, Pub. L. 414, 66 Stat. 163 (codified at 8 U.S.C. §§ 1101-1503 (1976))).

The errors of the *Boutilier* holding are not exclusively those of the Court. Indeed the case represents a pristine example of conscientious judicial examination of legislative intent and legislative use of psychiatric jargon. See, T. SZAZ, *THE MANUFACTURE OF MADNESS* 242-59 (1970).

Legislative and judicial memorialization of contemporary "expert knowledge" is commonplace and often justifiable. Unfortunately, erroneous expert knowledge can obtain independent life and disproportionate significance in judicial opinions by creating legal authority for attitudes and assumptions which are no longer supportable. The legal significance accorded to the 1950's "knowledge" of homosexuality continues to plague gay people.

See Richards, *supra* note 34, at 985 (crude and unjust stereotypes underlying discrimination and prejudice should be uprooted with respect to homosexuality as they are in other areas of modern life, e.g., status of women, and inferiority of blacks). For additional discussion of the homophobia revealed in immigration policies, see note 254 *infra*.

116. The belief that one may choose to be homosexual seems inconsistent with the labeling of homosexuality as a disease. See text accompanying notes 106-115 *supra*. For an example of the judicial resolution of this quandary in the context of upholding the dismissal of a homosexual teacher, see *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340, cert. denied, 434 U.S. 879 (1977), discussed in the text accompanying notes 319-329 *infra*.

The extent to which an individual exerts any choice over sexual development, desires, and attitudes may be de minimis. Sexuality is fundamental and integral to each person's biological, psychological and emotional identity. For a view of the importance of sexual love to individual autonomy, see Richards, *supra* note 34, at 999-1009. The determinants of sexual identity, sex-object choices, and sexual desires are exceedingly complex. See note 129 *infra*.

One element of choice is revealed by an inquiry into sexual behavior, individual ad-

choice (or to accord gay people full and equal rights of citizenship) is thought to be dangerous to society.<sup>117</sup>

Underlying the condemnation of choosing homosexuality is the fear of those who choose to express and fulfill their homosexual desires.<sup>118</sup> The society encourages and rewards those who choose heterosexual interaction in spite of the formidable and inherent obstacles presented.<sup>119</sup> Yet society reacts quite differently to those who choose homosexuality. Quite simply, homosexuality per se is perceived as threatening, pernicious and aberrant. In a word, homosexuality is thought immoral; those who openly profess homosexuality are thought to deserve hatred, abuse, and punishment.

### Moral condemnation is inextricably linked to the prevailing

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aptation, and expression of inner sexual desires in an external social context. Feeling homosexual desires, one may choose to express them, to seek same-sex partners, to indulge in same-sex erotic fantasies, or to engage in any of a variety of behaviors which may be called sexual. Katchadourian, *supra* note 71, at 10-13. Similarly, those who feel heterosexual desires have a choice of means, contexts, and degrees of seeking heterosexual gratification. Luria, *supra* note 71, at 180-82; see text accompanying notes 195-257 *infra*.

Instead of "why?," a more useful inquiry might be "how?"; not "why one desires same-sex or opposite-sex gratification" but "how an individual's expression of sexual desires and accommodation of sexuality are influenced and resolved." This would lead to an appreciation of the complex interactions among social forces, cultural views of sex, and individual differences. Such an appreciation, freed from the not-so-implicit moral judgments in the question "why homosexuality?" may further an understanding of all forms of sexuality, sexual expression, and sexual diversity. Simon & Gagnon, *Homosexuality: The Formulation of a Sociological Perspective*, 8 J. HEALTH AND SOC. BEHAVIOR 179 (1967); see also WEINBERG & WILLIAMS, *supra* note 7, at 7, and CHURCHILL, *supra* note 56, at 121-98.

117. See, e.g., Leo, *Homosexuality: Tolerance vs. Approval*, TIME, Jan. 8, 1979, at 48; DeBoer, *The Polls: Attitudes Toward Homosexuality*, 42 PUB. OP. Q. 265 (Summer 1978); Ireland, *Open Season on Gays*, NATION, Sept. 15, 1979, at 207; Bush, *Interview with Rev. Jerry Falwell*, The Sentinel, Sept. 5, 1980, at 7; *What the Pollsters Say . . .*, The Sentinel, Aug. 8, 1980, at 6.

118. Because most homosexual individuals are not readily identifiable as such, they are often able to avoid societal or individual disapproval directed at them personally. For a discussion of passing in a straight world, see text accompanying notes 195-214 *infra*. Consequently, the severest condemnation is directed toward those whose homosexuality is publicly "known about." See text accompanying notes 258-345 *infra*; WEINBERG & WILLIAMS, *supra* note 7, at 287-89; see also Denny, *supra* note 71, at 18 (abhorrence of homosexual teachers is directed only at openly-gay teachers, and not at the "spinster school marm" and dedicated "bachelors" without whom the school system could not exist). Cf. Epstein, *Homosexual/Heterosexual: The Struggle For a Sexual Identity*, HARPER'S, Sept. 1970, at 37-51 (rather a son be a dope addict, or dead, than homosexual).

119. For a discussion of some of the difficulties inherent in sexual and emotional intimacy between individuals of opposite genders, see TRIPP, *supra* note 38, at 36-49.



popular ignorance and misconceptions about the nature of homosexuality. The fears of recruitment, contagion, and child molestation, the culturally prescribed and rigidly defined gender roles, and the popularly perceived homosexual stereotypes<sup>120</sup> are routinely invoked in making moral distinctions of right vs. wrong, good vs. evil, safe vs. dangerous, health vs. decay, vigor vs. decline. Homosexuality is popularly associated with images of hedonism, moral corruption, and cultural decadence. Historical symbolism associated with homosexuality equates condemnation of homosexuality with cultural self-preservation and serves to buttress modern fears and to justify oppression.<sup>121</sup>

More than oversimplifying the complexity and overemphasizing the significance of human sexuality, such a reading of history confuses symptoms with causes.<sup>122</sup> Moral condemnation of

120. See text accompanying notes 58-115 *supra*.

121. The orgies and debauchery at the decline of the Roman Empire, "nonproductive" members of society like homosexual royalty, artists, and poets, and the decadence of the Berlin cafe society in the 1920's are examples of the popular perceptions of the incompatibility of homosexual behavior with a healthy society. For a discussion of some of the historical periods viewed as decadent, see R. GILMAN, *DECADENCE: THE STRANGE LIFE OF AN EPITHET* (1979). Cf. Karlinsky, *Decadence*, CHRISTOPHER STREET, April 1980, at 10-15 (decadence is a dangerously ambiguous idea in contemporary social history).

For a discussion of how changes in cultural attitudes toward sex (e.g., from a "sex-positive culture" to a "sex-negative culture") account for the changes in cultural attitudes toward homosexuality, see CHURCHILL, *supra* note 57, at 121-54. "It would appear that the human intellect can only very imperfectly and only very briefly make the distinction between ethical hedonism and amoral self-indulgence." *Id.* at 122. For a comprehensive, scholarly explication of homosexuality in ancient Greece which undermines the equation of homosexuality with immorality and decadence, see K. DOVER, *GREEK HOMOSEXUALITY* (1978). Dover's examination of Greek homosexuality and attitudes toward sex in general supports the assertion of CHURCHILL, *supra* note 57, at 121: "The Greeks bequeathed to us the fundamentals of rational thought and hence the fundamentals of ethical living. Nowhere did they apply their penchant for rational thought and ethical living more clearly than in the area of homosexual love. Nowhere are such values more to be sought today."

122. Rarely can cultural decay or the decline of civilizations be authoritatively ascribed to a single cause. The study of history reliably suggests only that certain events and periods of crisis in societies portend or coincide with changes in human consciousness, ethical values, or social structure. Hedonism and excessive indulgence, for example, are more appropriately regarded as symptoms of social upheaval and the evolution of cultural values than as causes. Moreover, because contemporary society reflects the Judeo-Christian devaluation and disapproval of sexuality, "sexual indulgence" and homosexuality in particular are popularly identified as aspects of cultural decline. See text accompanying notes 129-139 *infra*.

However much biologists, anthropologists, historians, or moralists may dispute the meaning and significance of human sexuality, there is probably general agreement with the proposition that expressions of sexual behavior and attitudes toward sexuality are essentially culture-bound; the variety of historical attitudes toward sex and love may

homosexuality, like homosexual behavior itself, must be viewed in its social context.<sup>123</sup> A society structured around the nuclear family<sup>124</sup> perceives a threat to its order and its values in a homosexuality *defined to exclude* children, responsibility, normality, individual dignity and autonomy, and any human experience or interests shared with the heterosexual majority.

Girls are implicitly encouraged in this culture to seek personal and social fulfillment as companions to men and as bearers/nurturers of children.<sup>125</sup> Lesbians (and other women) who reject dependence on men and seek control over their own destinies, who value their connections with women more than

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reveal more about the variety of historical cultures than about the nature of sexuality. See, e.g., DOVER, *supra* note 121; A. CAPPELANUS, *THE ART OF COURTLY LOVE* (J. Perry, trans., 1959); D. DE ROUGEMONT, *LOVE IN THE WESTERN WORLD* (M. Belgion, trans., 1956); T. HORNER, *JONATHAN LOVED DAVID: HOMOSEXUALITY IN BIBLICAL TIMES* (1978); M. HUNT, *THE NATURAL HISTORY OF LOVE* (1959); D. WEST, *HOMOSEXUALITY RE-EXAMINED* (1977).

For example, innumerable observers have pointed to ancient Greek culture's attitudes toward sexuality, love, and homosexuality as an enlightening contradistinction to contemporary conceptions of the nature of love and sex. See, e.g., DOVER, *supra* note 121; CHURCHILL, *supra* note 57, at 121-41; cf., S. FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* 15 n.1 (J. Strachey, trans. and ed. 1962):

The most striking distinction between the erotic life of antiquity and our own no doubt lies in the fact that the ancients laid the stress upon the instinct itself, whereas we emphasize its object. The ancients glorified the instinct and were prepared on its account to honor even an inferior object; while we despise the instinctual activity in itself, and find excuses for it only in the merits of the object.

123. KATZ, *supra* note 86, at 6-7; see also notes 115, 121 *supra*. For insight into the diversity of contemporary gay life in four foreign cultures, see Roca, *Eduardo: After the Revolution*, CHRISTOPHER STREET, Feb. 1980, at 44-46 (Cuba); Altman, *Down Rio Way*, CHRISTOPHER STREET, April 1980, at 23-27 (Brazil); "G", *The Secret Life of Moscow*, CHRISTOPHER STREET, June 1980, at 15-22 (Russia); Altman, *Paris*, CHRISTOPHER STREET, July/Aug. 1980, at 24-30.

124. The nuclear family is traditionally envisioned as a strong, aggressive, and competent husband/father, complemented by a compliant, supportive, and domestic wife/mother, and their dependent, subservient and gender-role-typed children. That this traditional model is evolving and no longer generally agreed upon seems obvious. Cf. White House Conference on Families, *supra* note 75, at 8-14, 113, 115, 118 (attempts to define the family as "being related by heterosexual marriage, blood, or adoption" were "Minority Recommendations" without enough support among the general population or the Conference Delegates to receive "Conference Recommendation" status). For a summary of recent sociological and cultural trends affecting marriage and the family, see generally A. SKOLNICK, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* (2d ed. 1978).

125. See generally MACCOBY & JACKLIN, *supra* note 70, at 303-48 for a discussion of the influence of socialization on sex differences.

men, and who are as likely to exhibit valued feminine characteristics (including motherhood) as they are to behave and succeed in traditionally masculine fashion, necessarily challenge cultural values and cause havoc in the roles of traditional womanhood.<sup>126</sup> Boys taught to emulate and value masculine traits—to be strong, unemotional, dominant, and career-oriented—experience fundamental conflicts when confronted with images of effeminate or sexually passive homosexual men.<sup>127</sup> The cultural stereotypes and expectations that homosexual men are effeminate and otherwise socially disesteemed are contradicted by evidence of masculine and successful gay men. Such contradictions must also be reconciled with individual uncertainty about one's own masculinity and social acceptance.<sup>128</sup>

The cultural definition of heterosexuality as normal and the popular myths about homosexuality make the moral aversion to homosexuality comprehensible. However, neither the cultural view of normal sexuality nor the condemnation of the abnormal-

126. See English, *The War Against Choice: Inside the Anti-Abortion Movement*, Mother Jones, Feb./Mar. 1981, at 16-32. See generally WOLF, *supra* note 10.

127. Some of the epithets for homosexual men are revealing: fairy, sissy, pansy, fruit, and queer. For a summary of the psycho-social adjustments individuals must make in resolving conflicts between learned cultural beliefs and co-existing contradictory internal beliefs, see note 196, *infra*. Cf. R. ROBERTIELLO, *A MAN IN THE MAKING: GRANDFATHERS, FATHERS, SONS* (1979) and L. KRIEGEL, *ON MEN AND MANHOOD* (1979) (discussions by two heterosexual men of aspects and implications of masculinity in the 1980's, regarded by one reviewer as superficial "books of fashion;" see Johnson, *Book Review: Puppy Dog Tails*, CHRISTOPHER STREET, April 1980, at 53-55.

128. The historical second-class status of women in this society lends support to the view that masculinity is over-valued, and that men who violate or reject masculine characteristics and prerogatives, as gay men are popularly thought to do, are somehow degraded to the status of women and are especially despicable. See, e.g., CHURCHILL, *supra* note 57 at 159-63; HOFFMAN, *supra* note 86, at 185-87.

By the same reasoning, however, the premium placed on masculinity in a culture where women have long been thought to be inferior and mere appendages to men makes lesbians equally threatening. Whether or not exhibiting masculine characteristics, lesbians' sexual indifference or aversion to men kicks a patriarchal society where it hurts. See generally D. MARTIN & P. LYON, *LESBIAN/WOMAN* (1972); WOLF, *supra* note 10; S. FIRESTONE, *THE DIALECTIC OF SEX* (1970).

For the observation that heterosexual adolescents and young men may resent gay men's exhibition of the external trappings of masculinity and success—cars, clothes, entertainment, sexual experimentation, a measure of freedom and social competence—see E. WHITE, *STATES OF DESIRE: TRAVELS IN GAY AMERICA* 40-41 (1980). For a recent critique of the myths about the consequences of parental nurture on the sexual attitudes of the young based on the view that homophobia is a pivotal motivation for sexism with practical and well-formulated suggestions for "alternative" child-rearing, see L. POGREBIN, *GROWING UP FREE: RAISING YOUR CHILD IN THE 80's* (1980).

ity of homosexuality is easily defensible.<sup>129</sup> If homosexuality is thought to threaten the family and ultimately the very structure of society, it must be remembered that homosexual behavior has existed in all societies, and that many highly developed cultures have attached a positive, useful, and even respected social role to homosexual behavior.<sup>130</sup> Moreover, a characteristic of modern civilization is the evolution of moral values, family and personal roles, and the structure of society.<sup>131</sup> The popular view that such changes are caused by homosexuality not only reflects an ignorance of the complexity of human sexuality, but ascribes to homosexuality a contemporary force and importance which neither historical nor scientific evidence supports.

If gay people are pariahs, divorced from normality and incapable of functioning in or contributing to the social order, it cannot be forgotten that they have been raised in heterosexual families and inculcated in all the cultural values which they are thought to threaten—except, of course, for heterosexuality. Homosexual individuals are more or less well-adjusted to life in a heterosexual society; gay people who accept and affirm their sexuality may well represent the best adjustment of all.<sup>132</sup> It is not homosexual behavior, but *society's concern with homosexual be-*

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129. It is "the notion that heterosexuality is the normal, natural outcome of sexual development against which other forms of sexual expression are to be compared" that underlies the traditional, now-discredited psychological and psychiatric approach to homosexuality as deviancy. WEINBERG & WILLIAMS, *supra* note 7, at 3. What is reliably known about human sexuality is its complexity, that it embraces distinct but intricately interrelated biological, social, psychological, and emotional components. Normality and abnormality are not only dangerously simplistic terms, but represent a conceptually inadequate framework for discussion and understanding. For a collection of excellent, scholarly papers on a variety of evolutionary, biological, psychological, sociological, and anthropological perspectives on sexuality, see HUMAN SEXUALITY, *supra* note 4.

For a discussion of sexual love, its relation to individual autonomy, and the impropriety of "moral" strictures on sexuality, see Richards, *supra* note 34 at 999-1009.

130. For general discussions of cross-cultural manifestations of homosexual behavior among males, see TRIPP, *supra* note 38, at 68-80; CHURCHILL, *supra* note 57, at 70-88. See generally DOVER, *supra* note 121; A. KARLEN, SEXUALITY AND HOMOSEXUALITY (1971); A. ROWSE, HOMOSEXUALS IN HISTORY: A STUDY OF AMBIVALENCE IN SOCIETY, LITERATURE, AND THE ARTS (1977). For a view that natural selection may place a positive value on homosexuality, see WILSON, *supra* note 98.

131. See notes 121, 122 *supra*. For a discussion of the historical moral principles and respect for "human rights" underlying the constitutional right to privacy and the theory of American constitutional democracy, see Richards, *supra* note 34; see also Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

132. See WEINBERG & WILLIAMS, *supra* note 7, at 267-75; BELL & WEINBERG, *supra* note 65. See generally, WEINBERG, *supra* note 6.

havior, that represents the real social threat.<sup>133</sup>

The moral code which homosexuality is thought to violate may be largely religious in origin, modernly articulated in terms of a narrow and selectively interpreted historical vision of religious values and teachings.<sup>134</sup> In fact, modern religious values are evolving. The religious bases of "moral values" as well as the appropriate religious and social responses to "immorality" are hotly debated.<sup>135</sup> Furthermore, quite apart from broad philosophical and constitutional considerations of the interaction between religion, morality, and law,<sup>136</sup> there rage debates over the practical implications of the legal enforcement of majoritarian moral values.<sup>137</sup>

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133. WEINBERG & WILLIAMS, *supra* note 7, at 8-10. See also, TRIPP, *supra* note 38, at 259-67; SAGHIR & ROBINS, *supra* note 76, at 316-23; HOFFMAN, *supra* note 87, at 180-202.

134. For a critique of what the Bible says about homosexuality, see J. McNEIL, S.J., *THE CHURCH AND THE HOMOSEXUAL* 37-66 (1976). See generally, D. BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* (1976).

For a provocative re-thinking of the historical role of the Christian Church vis-a-vis homosexuality, see J. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980). For a briefer survey of the church's attitudes toward homosexuality and impact on the law, see Barrett, *Legal Homophobia and the Christian Church*, 30 *HASTINGS L.J.* 1019 (1979).

For a judicial invocation of the supposed Biblical condemnation of homosexuality, see *Doe v. Commonwealth's Atty.*, 403 F. Supp. 1199, 1202 n.2 (E.D. Va. 1976), *aff'd mem.*, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976). For a discussion of *Doe*, see note 152 *infra*. See also, Richards, *supra* note 34, at 996-99.

135. See generally, *A Special Issue on Homosexuality*, 37 *CHRISTIANITY IN CRISIS* (May 30 & June 13, 1977). See also, Gittings, *The Homosexual and the Church*, in *THE SAME SEX* 151 (R. Weltge ed. 1969); C. CURRAN, *CATHOLIC MORAL THEOLOGY IN DIALOGUE* 184-219 (1975).

136. The dictionary definition of morality speaks in terms of the quality or concept of determining right from wrong, distinct from religious laws or tenets. In the abstract, every society wants to view itself as ultimately a moral society. The law's reflection of society's definitions of morality is understandable, perhaps commendable. Insofar as the society defines its moral terms clearly enough, the legal system is a natural and logically suited forum for translating abstract morality into social policy and flesh-and-blood results.

The problem, of course, is the difficulty of defining moral terms and locating a moral consensus. See generally, DWORKIN, *supra* note 34; Richards, *supra* note 34, at 975-1009; Henkin, *Morals and the Constitution*, 63 *COLUM. L. REV.* 391 (1963); P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H. HART, *LAW, LIBERTY, AND MORALITY* (1963); Caron, *The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy*, 15 *McGILL L.J.* 9 (1969); *Unnatural Acts*, *supra* note 98, at 1281-87.

137. See, e.g., Comment, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 63 *U.C.L.A. L. REV.* 644 (1966); CHURCHILL, *supra* note 57, at 199-239; HOFFMAN, *supra* note 87, at 79-99; Hefner, *The Legal Enforcement of Morality*, 40 *U. COLO. L. REV.* 40 (1968). See

In recent years, major Western religions have experienced a noteworthy resurgence of religious fervor and of political and nationalistic influence.<sup>138</sup> In this country, various Christian faiths (and more broadly, the whole Judeo-Christian value structure) have traditionally been influential in defining the parameters of the prevailing morality.<sup>139</sup> Recently, fundamental religious groups and leaders not only have gained new adherents and increased prominence, but have renewed the aggressive advocacy of their faith and their values in the secular realm.<sup>140</sup>

Nowhere is this more apparent than in the well-publicized positions on political issues taken by many religious groups. Indeed, the contemporary controversy over many issues is largely fueled by the injection of aggressively religious/moralistic values. Examples are numerous: the opposition to the Equal Rights Amendment; the opposition to legalized abortion, and the advocacy of the so-called "Human Life Amendment"; the renewed efforts to include religious activities in public schools; the defense of the traditional family structure as a necessary requisite to a moral society; and not least of all, the opposition to calls for equal rights for homosexual persons and for a normalization of the blighted societal prejudices toward homosexuality per se.<sup>141</sup>

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*especially* THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1957; American ed. 1963).

For a brief discussion of practical considerations in the enforcement of laws criminalizing homosexual behavior, see WEINBERG & WILLIAMS, *supra* note 7, at 21-29.

138. The resurgence of fundamentalist Christian faiths in the United States and the Islamic Revolution in Iran are examples. See, e.g., Dabney, *God's Own Network*, HARPERS, Aug. 1980, at 33-40; Harris, *Islamic Fundamentalism and Christian Responsibility*, CHRISTIAN CENTURY, Apr. 4, 1979, at 365-66; Brata & Duncan, *Interview with Reverend Jerry Falwell*, PENTHOUSE, Mar. 1981, at 58-66, 150-56.

139. See WEINBERG & WILLIAMS, *supra* note 7, at 6. See also Oakes, *Perceptions of Homosexuality by Justices of the Peace in Colonial Virginia*, 4 SEX. L. REP. 35-37 (1978). For a discussion of the impact of Puritan beliefs in American culture, see D. CORY, *HOMOSEXUALITY: A CROSS-CULTURAL APPROACH*, 428 (1956). See generally KATZ, *supra* note 86.

140. See note 138 *supra*. See also Davis, *Conservatism in America*, HARPERS, Oct. 1980, at 21-26; Gaillard, *Right Wing Religion*, PROGRESSIVE, Apr. 1980, at 12-13; Barrett, *Politicizing the Word: Jerry Falwell's Patriotic Rallies*, TIME, Oct. 1, 1979, at 62; Foley, *Evangelical Politics*, COMMONWEALTH, Feb. 29, 1980, at 104-07.

141. See English, *supra* note 126, at 18-20. See also Comment, *Denial of Medi-Cal Funds for Abortion: An Establishment of Religion*, 9 GOLDEN GATE U.L. REV. 421, 427-33 (1979); A. BRYANT & B. GREEN, *AT ANY COST* (1978); A. BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* (1977); 4 SEX. L. REP. 61 (discussing religious groups' efforts to repeal gay rights ordinances); see text accompanying notes 247-257 *infra*; Brata & Duncan, *supra*

Sexuality is an inherent and integral aspect—though not necessarily or even customarily a definitive aspect—of every person's emotional, psychological, cultural, and spiritual reality.<sup>142</sup> Sexual orientation is beyond the reach of individual choice and for the most part unresponsive to any desire to change.<sup>143</sup> The condemnation of homosexuality thus represents an alarming intolerance of the needs, values, and autonomy of others. It reveals an unfortunate ignorance of the importance of human sexuality, and thus a lack of self-knowledge as well.<sup>144</sup> Ultimately, the moral condemnation of homosexuality undermines the moral values sought to be protected and nurtured. In the modern world and in contemporary pluralistic American society, it may be impossible to agree on what constitutes morality. Yet if morality has any meaning and if the power of moral values are to have any force at all, unquestioning reliance on myth and ignorance must be morally suspect.<sup>145</sup> The pervasive ignorance, prejudice, fear, and hatred which characterize the condemnation of homosexuality may be termed immoral with more justification and logic than the behavior condemned.

### III. EXPRESSIONS OF HOMOPHOBIA IN THE LAW

The lack of evidence supporting either the myths about homosexuality or the concerns about its threat to the social fabric indicates that the myths address issues unrelated to the nature and practice of homosexuality. Thus culture has traditionally disapproved, and fostered an aversion to, any open discussion of human sexuality and the cultural and emotional baggage loaded onto it.<sup>146</sup> The distaste for homosexuality may disguise collective

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note 138. See also Bush, *The Visionary Agenda of Rev. Jerry Falwell*, *The Sentinel*, Feb. 6, 1981, at 1, 6.

142. SAGHIR & ROBINS, *supra* note 76, at 108-269; BELL & WEINBERG, *supra* note 65, at 195-231; CHURCHILL, *supra* note 57, at 36-59.

143. See notes 86 and 129 *supra*.

144. See, e.g., CHURCHILL, *supra* note 57, at 155-98 (homosexuality in a "sex-negative" environment); *Unnatural Acts*, *supra* note 98, at 1304-13, 1333-46 (sexual love is fundamental to concepts of individual liberty and self-respect).

145. For a persuasive argument that the moral condemnation of homosexuality and sexuality in general is immoral and contrary to the principles underlying constitutional government and individual rights, see generally, Richards, *supra* note 34; *Unnatural Acts*, *supra* note 98.

146. See note 57 *supra*; see also, KINSEY, *FEMALE*, *supra* note 57, at 476-87; J. Martin, *Issues and Problems in the Study of Human Sexual Development* (May 1977) (unpublished paper, Stanford University Department of Psychology, on file in the office of the Golden Gate University Law Review).

and individual anxieties concerning repressed sexual desires and frustrations.<sup>147</sup>

Sociologists recognize a generalized impulse to seek scapegoats. Blame for social problems and psycho-sexual maladjustments is often assigned to other groups or individuals without undertaking the difficult and complex inquiries into the problem itself or into the actual nature of the group perceived to be blameworthy.<sup>148</sup> Because much of the society lacks exposure to the reality of homosexuality or to the experience of homosexual individuals, there is a willingness to believe the worst and to imagine the rest.<sup>149</sup> Moreover, the social and moral values which are thought to be threatened or undermined by homosexuality are evolving independently of the "decay" associated with homosexuality.<sup>150</sup> Fundamental moral principles—*i.e.*, the respect for truth, fairness, and individual autonomy underlying the concept of "human rights"—and a healthy society are threatened not by homosexuality but by unsupportable myths and unreasoning homophobia.<sup>151</sup>

Whatever the explanation for their existence and psychological significance, these myths define the contours of a societal attitude and prejudice toward homosexual persons. Not surprisingly, this homophobia is reflected in many aspects of law.

The majoritarian influence on legislation and on legal concepts of public policy is obvious. The loathing of perceived homosexual recruitment and promiscuity, and the propensity to define homosexual individuals exclusively in sexual terms, are

147. TRIPP, *supra* note 38, at 11. Kinsey found that the highest incidences of homosexual behavior were in the group that most often expressed disapproval of such behavior, *i.e.*, males who most often condemned, ridiculed, sought to punish, and expressed disgust for homosexual activity. KINSEY, MALE, *supra* note 4, at 383-86.

148. "Scapegoatism" is a well-recognized sociological and psychological principle. The social attitudes toward homosexuality are in this respect closely analogous to, and indeed are but another aspect of, the sociological concern with prejudice, discrimination, and understanding inter-group relations. See generally G. ALLPORT, THE NATURE OF PREJUDICE (1954).

149. R. BROWN, SOCIAL PSYCHOLOGY 152-96 (1965); Sherif, *Subordinate Goals in the Reduction of Intergroup Conflict*, 63 AM. J. SOC. 349 (1958).

150. See text accompanying notes 116-145 *supra*. See generally Richards, *supra* note 34. See also Karlinsky, *supra* note 121, at 12.

151. For the view that public moral condemnation of homosexuality has no moral justification, and a discussion of the concept of human rights underlying the right to privacy, see Richards, *supra* note 34.



inextricably intertwined with the majoritarian morality which has demanded the criminalization of homosexual conduct.<sup>152</sup>

Stereotypes of effeminate, homosexual men and masculine women and the unsubstantiated fear of homosexual contagion nourish the willingness to dismiss homosexuality as a disease. This allows for the assumptions that homosexual persons are deviant, unstable, and maladjusted, and that these characteristics somehow describe and inhere to homosexuality itself.<sup>153</sup> From these attitudes flow the legal conclusions that homosexual persons are not entitled to a host of legal rights guaranteed to others.

The legal repercussions of homophobia can most easily be appreciated by considering a straightforward heterosexual-homosexual distinction. Most heterosexual citizens interact routinely with government institutions, agencies, or regulations in a variety of settings in which others experience significantly different treatment because they are homosexual.

—The private sexual behavior of an unmarried heterosexual federal employee, if discovered by superiors, has rarely

152. The Supreme Court's summary affirmation of the district court's opinion in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976), reveals the Court's reticence to undertake an in-depth and principled analysis of the constitutionality, propriety, morality, or practicality of criminalization of private consensual homosexual conduct.

The district court held in *Doe* that asserted state interests in protecting morality, the family, and "decency" outweighed the privacy, equal protection, and due process rights of gay citizens. The challenged statute (VA. CODE § 18.1-212 (1950) prohibiting "Crimes Against Nature") applied on its face equally to heterosexual and homosexual behavior, and the decision thus upheld the state's right to criminalize all "adult private consensual sex which did not fit in the traditional standard of penile-vaginal sexual intercourse between a man and a woman." See discussion in Rivera, *supra* note 6, at 944-46.

As for homosexual conduct, it was not protected by the right of privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), because such conduct was "obviously no portion of marriage, home, or family life." 403 F. Supp. at 1202. For a discussion of the misconceived moral principles underlying the constitutional right of privacy as applied by the *Doe* Court, see Richards, *supra* note 34, at 975-90; see also *Unnatural Acts*, *supra* note 98, at 1319-36.

153. Given society's propensity to view homosexuality as a disease, the attempts to "treat" and the claims of "cure" follow logically enough. But of course, such attempts to cure are usually doomed to failure. See TRIPP, *supra* note 38, at 251-59. The claims of cure are either overstated, or examples of a "cure" that is worse than the "disease," or the result of addressing "symptoms" in lieu of the fundamental psycho-social-sexual interactions in the lives of troubled individual "patients." CHURCHILL, *supra* note 57, at 283-89. See also KATZ, *supra* note 86, at 129-207.

resulted in the invocation of the Civil Service Commission's power to dismiss from federal employment those who are immoral. Dismissals of homosexual employees under similar circumstances have occurred routinely.<sup>154</sup>

—A male foreigner seeking to enter this country, who admits an arrest years before on charges of soliciting a female prostitute (if such an arrest were likely even to occur<sup>155</sup>), is unlikely on those grounds to be denied entrance because of "sexual deviancy" or "moral turpitude." Male foreigners arrested for sexual solicitation of another *man* have been deported on those grounds.<sup>156</sup>

—The tax-exempt non-profit incorporation of organizations such as a historical society, a charitable foundation, or an educational research center is typically a matter of routine bureaucratic paperwork. An organization dedicated to educating the society about homosexuality has been denied incorporation as contrary to public policy.<sup>157</sup>

—A loving and committed heterosexual couple desiring to publicly affirm their relationship may obtain a marriage license and the resulting social and economic benefits as a matter of course. Same-sex couples seeking the recognition and benefits accorded heterosexual married couples have been uniformly denied the right to marry.<sup>158</sup>

—Bars where heterosexual persons routinely congregate for relaxation, recreation, or the possibility of finding willing sexual partners rarely encounter the harassment of vice squad raids or difficulties with liquor licensing authorities. There was a time when such harassment was routinely vis-

154. *See, e.g.*, *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969); *Vigil v. Post Office Dep't of United States*, 406 F.2d 921 (10th Cir. 1969); *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968); *Taylor v. United States Civil Serv. Comm'n*, 374 F.2d 466 (9th Cir. 1967); *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963). *See generally* Rivera, *supra* note 6, at 813-25.

155. *See, e.g.*, WOLFENDEN REPORT, *supra* note 137, at 143, 147.

156. For a discussion of deportation cases, see Rivera, *supra* note 6, at 934-42. Deportations also are frequently based on the alien's non-disclosure of such a prior arrest. *See, e.g.*, *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956).

157. *State ex rel. Grant v. Brown*, 39 Ohio 2d 112, 313 N.E.2d 847 (1974) (discussed at notes 262-271 *infra*). Denial of incorporation may be profitably compared with those cases denying university recognition or funding to gay student organizations; see note 161 *infra*.

158. *Jones v. Hallahan*, 501 S.W.2d 588 (1978); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1978); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974). *See generally* Rivera, *supra* note 6, at 874-78.

ited on bars catering to homosexual persons because of the "contribution to public immorality" they were believed to represent.<sup>159</sup>

—Granting child custody to a divorced parent who remarries, or who remains single but maintains an active heterosexual sex life, is not typically regarded as contrary to the "best interest of the child." The standard practice is to deny custody to a homosexual parent on the grounds that the parent's homosexuality alone is so deleterious to the child as to outweigh any consideration of parenting ability.<sup>160</sup>

—Associations of heterosexual students, seeking official university recognition, funding, or access to university facilities for meetings or social events, encounter minimal obstacles in the nature of inquiries into the morality, propriety, or adverse consequences of the appearance of university support of their organizational purposes. Analogous associations of homosexual students have more than once been forced to resort to the courts to obtain similar benefits.<sup>161</sup>

The pervasiveness of the cultural bias against homosexuality becomes apparent. An examination of the cases involving homosexual persons<sup>162</sup> reveals that anti-homosexual prejudices are frequently shared by the judiciary. The societal oppression of homosexuality is affirmed and aggravated by the minimal legal protection afforded to homosexual persons. Expressing beliefs that homosexuality is immoral, that it is evidence of psychological illness or emotional instability, or simply that it is abhorrent and dangerous to society, courts have denied legal redress against societal oppression to homosexual persons.<sup>163</sup>

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159. See cases and discussion in Rivera, *supra* note 6, at 913-24.

160. See cases and discussion in Rivera, *supra* note 6, at 883-904; see generally Hitchens & Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1979); Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Note, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

161. *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1978); *Gay Students Organization of Univ. of New Hampshire v. Bonner*, 509 F.2d 652 (1st Cir. 1974); see cases and discussion in Rivera, *supra* note 6, at 924-30.

162. For a discussion of the methodological problems encountered in attempting to identify and locate published opinions involving homosexuality and the rights of gay people, see Rivera, *supra* note 6, at 804-05.

163. See *Analysis of Rationales*, *supra* note 34. See also text accompanying notes 258-345 *infra*.

In addition to affirming the constitutionality of the criminalization of homosexual acts,<sup>164</sup> the most egregious demonstrations of judicial deference to unsupportable cultural homophobia may appear in cases which uphold employment discrimination on the basis of sexual orientation. With good reasons, the lack of legal protection against employment discrimination may be the legal bias most commonly feared and encountered by gay people.<sup>165</sup>

The traditional, and still prevailing, common law view of employer-employee relations gives to private employers the power to refuse to hire or to discharge anyone for any reason, subject to contractual obligations or specific statutory restrictions.<sup>166</sup> Without exception, statutes aimed at curbing employers' freedom to discriminate on the basis of race, sex, religion, and national origin have been interpreted to deny protection from arbitrary discrimination on the basis of sexual orientation.<sup>167</sup>

A large body of legal commentary on the subject of employment discrimination against homosexual persons has consistently concluded that such discrimination is unjust and illogical.<sup>168</sup> The repeated defeats of gay rights legislation in many jurisdictions suggest, however, that societal and legislative attitudes are not yet in accord with those of legal commentators.<sup>169</sup>

Without statutory protection, gay people seeking to challenge discriminatory treatment in employment have met with infrequent success in the courts. Typically, the result in any given case turns on the facts and their presentation, and on the court's attitude toward homosexuality, rather than on any unequivocal, principled legal recognition of and respect for the rights of gay people.<sup>170</sup>

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164. See note 152 *supra*.

165. WEINBERG & WILLIAMS, *supra* note 7, at 282; see text accompanying notes 258-345 *infra*.

166. *California's Controls*, *supra* note 19, at 1015.

167. Rivera, *supra* note 6, at 805-13; see, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel., Inc.*, 24 Cal. 3d at 489-92, 595 P.2d at 611-13, 156 Cal. Rptr. at 33-35.

168. See note 53 *supra*; see generally, Rivera, *supra* note 6, at 805-74.

169. See 4 SEX. L. REP. 41, 52, 61, 70-73 (1978). See also notes 191, 256 *infra*.

170. A frequently cited and particularly egregious example of judicial homophobia was expressed by Skelton, J., in *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969),

In recent years, courts have extended some measure of protection to homosexual employees in public employment. These courts have not disclaimed belief in the prevailing attitudes toward homosexuality, or required adherents to those beliefs to offer factual support for their validity.<sup>171</sup> Nevertheless, these courts have, to an important extent, effectively "neutralized" the legal effect of cultural anti-homosexual prejudices. Regardless of the validity of these prejudices, courts seem to be saying that for the government as employer to justify denying the rights of homosexual employees, it must at least appear that the "danger" or "immorality" or "sickness" of homosexuality actually threatens harm in the immediate employment context. Looking at the reality of specific homosexual individuals in specific factual contexts, courts have concluded that before a homosexual person may be denied government employment, the government must show that an individual's homosexuality bears a rational relationship to the detriment claimed to result from retaining homosexual employees.

This "rational nexus" standard was first and most succinctly stated by the District of Columbia Court of Appeals in *Norton v Macy*,<sup>172</sup> a case involving a challenge to a federal employee's dismissal on the grounds of his homosexuality. Prior to *Norton*, courts had generally deferred to the administrative findings of the Civil Service Commission, and upheld the dismissals of homosexual employees from the federal government under Civil Service regulations prohibiting conduct which is "criminal, infamous, dishonest, immoral, or notoriously disgraceful" and so tends to impair "the efficiency of the service."<sup>173</sup>

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*cert. denied*, 397 U.S. 1039 (1970):

Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true. If activities of this kind [*i.e.*, off-duty, private, consensual homosexual acts] are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.

*Id.* at 1378. See Dressler, *supra* note 42, at 20; see generally *Analysis of Rationales*, *supra* note 34.

171. See text accompanying notes 172-188 *infra*.

172. 417 F.2d 1161 (D.C. Cir. 1969).

173. 5 C.F.R. § 731.201(b)(1980). See generally, Rivera, *supra* note 6, at 813-18; see also Note, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U.L. REV. 267 (1969); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

Clifford Norton was charged with immoral conduct which allegedly made him unsuitable for continued employment with the National Aeronautics and Space Administration. He had been arrested for a traffic violation after morals squad officers had witnessed him approach another man, who first climbed into Norton's car, and then returned to his own car and followed Norton. While in custody for a traffic violation, the police interrogated Norton and the second man for more than two hours concerning their sexual activities and history. Part of the interrogation was secretly witnessed by a NASA security officer, who subsequently continued the interrogation after the traffic citation had been issued. Norton denied making a sexual overture to the man as claimed, but admitted youthful sexual activities with other men. He also admitted that he may have occasionally engaged in homosexual activity while temporarily blacked out after drinking.

NASA concluded that Norton had made a homosexual advance to the second man, that this was "immoral, indecent, and disgraceful conduct," and that he was "unsuitable for further Government employment." The Civil Service Commission upheld these findings, and when Norton brought an action for reinstatement, the district court granted the government's motion for summary judgment.<sup>174</sup>

The circuit court of appeals held that the government's stated reasons for Norton's dismissal were arbitrary and capricious, and therefore violated due process limitations.<sup>175</sup> Chief Judge Bazelon's opinion specifically recognized both the stigmatization of a homosexual employee's future employment prospects, and the infringement of the employee's right to privacy, resulting from the government's customary practice of uniformly excluding homosexual individuals from federal employment.<sup>176</sup>

The court did not deny that an individual's homosexual conduct might be immoral, indecent, or notoriously disgraceful under the conventional norms of the society. Yet the court found the federal bureaucracy's attempt to enforce the majority's attitudes in the private lives of its employees to be "at war

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174. 417 F.2d at 1162-63.

175. *Id.* at 1163-65.

176. *Id.* at 1165-67.

with elementary concepts of liberty, privacy, and diversity."<sup>177</sup> A policy of labeling certain behavior as immoral, and a blanket conclusion that such behavior will impair government efficiency, do not comply with the statutory authorization to dismiss employees in order to promote the efficiency of the service.<sup>178</sup> While an individual's homosexual conduct might bear on the efficiency of the service in a number of ways,<sup>179</sup> the government has the burden of showing that the individual employee's conduct, alleged to be immoral, does in fact have "some reasonably foreseeable, specific connection . . . with the efficiency of the service."<sup>180</sup> This connection must be sufficiently established that a reviewing court can discern it.

The same year that *Norton's* "rational nexus" test was formulated, the California Supreme Court announced a similar standard for the revocation of teacher credentials based on the alleged immorality of a teacher's homosexual activity. In *Morrison v. State Board of Education*,<sup>181</sup> the court set aside a Board of Education ruling that a teacher's isolated, limited, and private homosexual activity with another teacher some years before constituted "moral turpitude" sufficient to justify revocation of his teaching credentials.

Marc Morrison was an experienced teacher with a record of uncriticized professional performance. During a one week period, Morrison had engaged in a limited, non-criminal homosexual relationship with another male teacher and friend who was involved in marital and financial difficulties and was undergoing severe emotional stress. One year later, the friend reported the incident to Morrison's school superintendent, and Morrison resigned. Nineteen months after that, the State Board of Education conducted a hearing concerning revocation of Morrison's

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177. *Id.* at 1165.

178. *Id.* at 1165-68.

179. The court noted that [1] the potential for blackmail may jeopardize national security, [2] homosexual conduct may signify an unstable personality unsuited for certain jobs, and [3] offensive on-the-job conduct, or "notorious conduct," may have repercussions with fellow employees or with members of the public who contact an employee in his or her official capacity. *Id.* at 1166. It should be asked why sexual orientation is relevant when notorious heterosexual conduct in the workplace may also be offensive or similarly impair efficiency.

180. *Id.* at 1167.

181. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

teaching credentials. With the exception of some "undefined homosexual problem at the age of thirteen" and the incident with the fellow teacher, Morrison denied experiencing "the slightest homosexual urge or inclination [in] more than a dozen years."<sup>182</sup> He was charged with no other homosexual act, nor with any misconduct while teaching. Three years after the isolated homosexual incident, the Board revoked Morrison's credentials on the ground that he had engaged in "immoral and unprofessional conduct, and an act involving moral turpitude" proscribed by section 13202 of the California Education Code.<sup>183</sup> The superior court denied Morrison's request for a writ of mandate to set aside the Board's decision and he appealed.

The California Supreme Court declined to invalidate section 13202 as unconstitutionally vague or over-broad, but instead looked for a rational legislative intent and construed the statute to meet constitutional requirements.<sup>184</sup> A dismissal or loss of credentials on the grounds of immorality can only occur where the alleged immoral conduct has been shown to make one unfit to teach. The court enumerated several factors to be considered in making that determination.<sup>185</sup> The goal and effect are to insure

182. *Id.* at 220, 461 P.2d at 378, 82 Cal. Rptr. at 178.

183. Former CAL. EDUC. CODE § 13202 (currently codified at CAL. EDUC. CODE §§ 44421, 87331 (West 1978)).

184. *Morrison v. State Bd. of Educ.*, 1 Cal.3d at 225-28, 461 P.2d at 382-86, 82 Cal. Rptr. at 182-86. *Cf. Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). (A lesbian teacher's challenge to her discharge on the grounds of "immorality" after she revealed her homosexuality resulted in the court finding the statute void for vagueness: "[I]mmorality means different things to different people and its definition depends on the idiosyncracies of the individual school board member." *Id.* at 255); for a discussion of *Burton*, see Comment, *Remedial Balancing Decisions and the Rights of Homosexual Teachers: A Pyrrhic Victory*, 61 IOWA L. REV. 1080 (1976).

185. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students and fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

*Morrison v. State Bd. of Educ.*, 1 Cal.3d at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186 (footnotes omitted). The court had already stated that "[s]urely the legislature did not intend that identical standards of probity should apply to more than half a million pro-



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that vague personal or cultural standards of morality cannot justify a conclusion that homosexuality is inherently or necessarily grounds for denial of a teacher's individual rights, without regard to more objective and more rational standards of competence.

The court plainly implied that this application of a form of the *Norton* rational nexus standard was to be extended to the many state regulated or licensed trades and professions whose practitioners, as teachers, were required to meet some "good moral character" standard.<sup>186</sup> Thus, while the court did not explicitly disagree with the claim that homosexuality is immoral, or preclude a judicial appraisal of the morality of homosexuality, it nevertheless restricted the manner and situations in which the "homosexuality is immoral" rationale may be used to deny the benefits of government employment or privileges to homosexual individuals.

The development of *Norton's* "rational nexus" and of *Morrison's* "occupational fitness" standards, though subject to inconsistent application,<sup>187</sup> has resulted in some measure of job security for homosexual government employees.<sup>188</sup> Nevertheless, homophobic attitudes remain a cause of concern for many homosexual government employees, and a subject of controversy in the society. Efforts like the unsuccessful Briggs Initiative in California in 1978 sought to deny employment opportunities in the public school system to those suspected of practicing, support-

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fessional and government employees in widely varying fields without regard to their differing duties, responsibilities, and degree of contact with the public." *Id.* at 228, 464 P.2d at 385-86, 86 Cal. Rptr. at 185-86 (footnotes omitted). See note 186 *infra*.

186. The court observed that

[a] particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilism and necrosadism might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, zoerastism in a veterinarian or trainer of guide dogs, prolagnia in a fireman, undinism in a sailor, or dendrophilia in an arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or shorthand reporter.

*Id.* at 228 n.21.

187. *Morrison's* standard was not applied in subsequent cases as the court may have envisioned. See *Rivera, supra* note 6, at 820-29, 864-69; see also *Out of the Closet, Out of a Job, supra* note 53, at 695-712. See text accompanying notes 258-345 *infra*.

188. *Rivera, supra* note 6, at 825-29.

ing, or advocating homosexuality.<sup>189</sup> In Oklahoma, the nearly identical Helms Bill has achieved the same result, although its fate is uncertain as a result of current challenges to its constitutionality.<sup>190</sup> In recent years, local efforts to assure protection from employment discrimination against gay people have been the subject of intense political debate, and in some cases have been repealed in popular referenda.<sup>191</sup>

In some jurisdictions, executive orders have prohibited anti-homosexual discrimination in public employment.<sup>192</sup> But no state has yet prohibited discrimination in private employment on the basis of sexual orientation.<sup>193</sup> Anxiety over job security is well-founded for homosexual people, and many choose to pass in order to avoid the serious social and economic consequences of losing their jobs.<sup>194</sup>

#### IV. THE EFFECTS OF HOMOPHOBIA

##### A. LIFE IN THE CLOSET—"PASSING"

The cultural attitudes toward homosexuality produce distinctive consequences for homosexual individuals.<sup>195</sup> These con-

189. The Briggs Initiative was defeated in the Nov. 7, 1978 election, after intense campaigning on both sides. The measure would have amended California's Constitution to prevent the employment in public schools of anyone guilty of "advocating, soliciting, imposing, encouraging, or promoting private or public sexual acts between persons of the same sex." Rivera, *supra* note 6, at 869 n.416.

190. The suit, in Federal District Court in Oklahoma, is NGTF v. Board of Educ., Docket No. 80-1174 D. See *It's Time*, Nov./Dec. 1980, at 1, 4 (newsletter of the National Gay Task Force) (NGTF, Room 506, 80 Fifth Ave., New York, New York 10011).

191. Gay rights ordinances have been repealed in Dade County, Florida, Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon; a repeal attempt failed in Seattle, Washington. 4 SEX. L. REP. 61 (1978). In all these referenda, local fundamentalist religious groups played a large role, asserting the traditional moral condemnation of homosexuality in their efforts to impose their moral values on the population in general. See text accompanying notes 138-141 *supra*.

192. Rivera, *supra* note 6, at 826 n.153; Pennsylvania Governor Shapp was the first to issue an Executive Order forbidding discrimination in state services and employment on the basis of sexual orientation. 4 SEX. L. REP. 52, 55-57 (1978). On April 4, 1979, California Governor Jerry Brown issued Executive Order B-54-79 forbidding anti-homosexual discrimination in state employment. See, 63 OP. CAL. ATT'Y GEN. 583 (1980).

193. Rivera, *supra* note 6, at 812-13. See also *It's Time*, July/Aug. 1980, at 4.

194. WEINBERG & WILLIAMS, *supra* note 7, at 226-29, 281-82; see also text accompanying notes 195-214 *infra*.

195. These consequences may not be widely appreciated. Older sociological and psychological research has been thoroughly discredited. See notes 114, 115 *supra*. Frequently, the only information made available to the public has served to support prevailing cultural attitudes toward homosexuality. TRIPP, *supra* note 38, at 228-40.

sequences are analogous to those experienced by other victims of oppression, including women, blacks and other racial or ethnic minorities, and various classes of "social deviants."<sup>196</sup>

The nature of homosexual oppression and the nature of homosexuality itself, however, result in certain characteristics which distinguish homosexual individuals from members of other oppressed groups. Unlike blacks and women, the majority of homosexual individuals are not readily identifiable by others as members of the oppressed group.<sup>197</sup> This allows homosexual

Furthermore, to the extent that people believe they don't know homosexual individuals and that the prevailing wisdom about homosexuality is undisputed (and undisputable), there is little impetus to inquire further. Oregon Task Force, *supra* note 58, at 2-5.

Much that is known about the effects of anti-homosexual attitudes on those who are homosexual is drawn from testimony of those homosexual individuals themselves. While in many ways self-serving, such testimony should not be disregarded. It is verified by evidence obtained by objective observers. See WEINBERG & WILLIAMS, *supra* note 7, at 267-89. More important, their descriptions of the prejudice encountered and its effects on their lives should appeal to the common sense understanding of all who are willing to set aside preconceived and unsupportable generalizations about homosexuality and look at the reality of individuals who are homosexual.

Additionally, while little research has been done on the effects of homophobia on homosexual individuals, extensive social-psychological research on the impact of societal oppression on members of minority groups would appear to be applicable and revealing in this context. *Id.* at 7-13, especially notes 17, 19, and 21.

See also SAGHIR & ROBINS, *supra* note 76, at 179-88 (discussion of sociological implications of homophobia and effects on homosexual individuals); Richards, *supra* note 34, at 1006-09 (effects of anti-homosexual laws on homosexual individuals).

196. The process by which individuals adapt to and are influenced by cultural attitudes is one aspect of social-psychology's "dissonance theory." L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); R. BROWN, SOCIAL PSYCHOLOGY 584-604 (1965). Cultural attitudes (external beliefs) frequently conflict with individual beliefs and desires (internal beliefs). Each individual must resolve that conflict. Because both beliefs intrinsically co-exist, no resolution can be entirely satisfactory. Somehow the impact of one belief must be reduced. An individual's resolution of this conflict contributes not only to his or her acceptance by society (*i.e.*, if resolved by conforming to external beliefs and expectations, social acceptance will be greater) but also to individual self-image (*i.e.*, allegiance to individual beliefs may provide a greater sense of dignity and self-worth, and boost ego-strength).

Dissonance theory addresses the resolution within an individual of conflicts caused by any opposing beliefs, *i.e.* external-external (*e.g.*, "homosexuality is bad" vs. "X, a homosexual, is popular and respected") and internal-internal (*e.g.*, "I don't like homosexuals" vs. "I like X, a homosexual") as well as external-internal (*e.g.*, "homosexuality is bad" vs. "I am homosexual and I believe it is right and good").

197. This lack of external identification has led many to argue that homosexual people do not constitute a "class." Those who would condemn homosexuality as immoral or as a religious sin argue that homosexual individuals have chosen their sexual orientation and so ought not to be compared with racial or religious minorities, women, or the poor. See, *e.g.*, Rev. Jerry Falwell Interview, *supra* note 117, at 7, col. 4-5.

Others who regard homosexuality as a sickness, or as an inferior (unnatural, unfor-

people to choose to "pass," to keep their sexual orientation hidden from the rest of the world, to feign heterosexuality, and to avoid explicit hostility and other adverse social consequences.<sup>198</sup> In view of the negative judgments and serious repercussions which accompany public revelations of homosexuality, most homosexual people have understandably chosen invisibility.<sup>199</sup>

Attempts to "pass" in the heterosexual world, while often successful, are seldom achieved without a price. Foremost is the fear and anxiety felt about possible exposure of their hidden sexual orientation. The fear of exposure will often determine how one manages one's homosexuality, and affects psychological well-being.<sup>200</sup> Public recognition as a homosexual person is often feared because altered reputation may close off certain areas of life.<sup>201</sup> Others may relate to a publicly-identified homosexual person solely in terms of that status, without regard to other more salient attributes.<sup>202</sup> And public knowledge of homosexual status or conduct may result in a variety of adverse legal consequences—among them criminal prosecution, loss of employment,

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tunate, immature) deviation from the heterosexual norm, insist that homosexual individuals should be treated (medically, or in general by society) accordingly; for example, psychotherapy's attempts to "cure" (see, e.g., notes 86, 112, *supra*) and religious attempts to "save" (see generally, BRYANT, *supra* note 95). See also, Anonymous, *The Heterosexual Solution: A Dilemma For Gay Mormons*, *The Advocate*, Feb. 22, 1978, § 1, at 10-14, col. 1.

This approach still indicates a failure to appreciate both the diversity of homosexual adaptations and the nature of homosexuality. See WEINBERG & WILLIAMS, *supra* note 7, at 3-30. Moreover, it reflects the more general ignorance of the complexity of all sexuality. See note 128 *supra*; see generally, BELL & WEINBERG, *supra* note 65.

198. For a summary of the legal consequences, see text accompanying notes 152-194 *supra*. For a discussion of the personal risks involved in being "known about," see text accompanying notes 199-214 *infra*. See also, Kleinberg, *Passing: Gay Men Posing as Straight*, CHRISTOPHER STREET, Aug. 1979, at 28-40. Also, it should be noted that blacks do not have the option of passing for white and thus avoiding racial prejudice and discrimination.

199. See text accompanying notes 58-69 *supra* for a discussion of how the invisibility of homosexuality fosters the illusions that it is rare, and that the average person never knows or contacts homosexual individuals. Cf. Dressler, *supra* note 42, at 27 ("One of gay people's greatest enemies is their own invisibility.").

200. WEINBERG & WILLIAMS, *supra* note 7, at 9.

201. *Id.* (citing E. RUBINGTON & M. WEINBERG, *DEVIANCE: THE INTERACTIONIST PERSPECTIVE* (2d ed. 1973)).

202. WEINBERG & WILLIAMS, *supra* note 7, at 9. For a discussion of the tendency to define homosexual individuals exclusively in terms of sexual orientation, see text accompanying notes 80-82 *supra*. Cf. SAGHIR & ROBINS, *supra* note 75, at 179-89 (coming out implies an emphasis on sexual orientation, but society should focus on homosexual persons as individuals).

deportation, military discharge, loss of child custody, and loss of professional license.<sup>203</sup> It appears that many of the psychological and emotional problems experienced by covert homosexual persons<sup>204</sup> are not due to the effects and strain of passing per se, but rather are due to the worry about exposure and its anticipated consequences.<sup>205</sup> Even those who acknowledge and accept their own homosexuality are deprived of valuable opportunities for growth, self-fulfillment, and well-being when their need to camouflage their true sexual identity causes them to reject any appearance of connection or relationship with other homosexual individuals.<sup>206</sup>

The alternative to passing—"being known about"—is not always a matter of free choice. Frequently criminal entrapment, egregious invasions of personal privacy, revealing slips of the tongue, or simple and unavoidable happenstance result in the sabotage of an individual's efforts to conceal sexual orientation.<sup>207</sup> The consequences are often disastrous, although there is evidence that for many people being known about is not as catastrophic as expected.<sup>208</sup>

#### Aside from anxiety about the problems incident to public

203. See generally Rivera, *supra* note 6.

204. These problems include alcoholism, loneliness, and frustration, in addition to conflicts produced by being homosexual yet feeling obliged to attack homosexuality in order to maintain a heterosexual cover and social acceptance. See, e.g., Miller, *What It Means To Be a Homosexual*, N.Y. Times, Jan. 17, 1971, Magazine, at 48; H. BROWN, FAMILIAR FACES, HIDDEN LIVES (1976); Gay Academic Union, The Universities and The Gay Experience: Proceedings of the Conference Sponsored By The Women and Men of the Gay Academic Union 57-87 (1974) (essays in Part III Coming Out In The Universities: A Panel) [hereinafter cited as Coming Out Panel]. See also *Gay Murder Study: Closeted Gays More Prone To Knife Murders*, Bay Area Reporter, Dec. 31, 1980, at 8, col. 3 (Bay Area Reporter is a locally distributed biweekly San Francisco newspaper. Its address is B.A.R., 1527-15th St., San Francisco, Ca. 94103).

205. WEINBERG & WILLIAMS, *supra* note 7, at 178-79.

206. *Id.* at 154-61.

207. For examples of how closet doors may be yanked open from the outside, see *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974), discussed *infra* at notes 330-337; *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash. 2d 286, 559 P.2d 1340 (1977), discussed *infra* at notes 319-329. Cf. WEINBERG & WILLIAMS, *supra* note 7, at 24-26 (police methods of enforcing anti-homosexual laws) and L. HUMPHREYS, TEA ROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES (1970) (discussion of how guilt and need for anonymity influence sexual activities of closeted homosexual men).

For discussion of other ways homosexual individuals become publicly identified, or assume a gay identity, see generally Coming Out Panel, *supra* note 204; OUT OF THE CLOSETS, *supra* note 8; WEINBERG, *supra* note 6.

208. WEINBERG & WILLIAMS, *supra* note 7, at 186, 277.

revelation, the effort to repress, ignore, or explain away homosexual desires and conduct inevitably exacts its own toll, again distinguishing the oppression experienced by homosexual individuals from that of other disesteemed minorities.<sup>209</sup> Guilt and self-loathing induced in many homosexual individuals by religious and moral sanctions on homosexuality are also part of the psychological burden.<sup>210</sup>

The first and most critical issues confronting homosexual people may be the decision whether to recognize their own homosexuality, and to what extent to recognize it. Thus, for complex reasons, some people may never recognize within themselves those sexual desires strongly and universally condemned by society. Others may become aware of their homosexual desires late in life, after years of unquestioned and unquestioning heterosexual activity.<sup>211</sup> Still others are able to explain away same-sex desires or activity as "not homosexuality."<sup>212</sup>

Similarly, realization of one's homosexual identity can occur in a variety of contexts and can take many forms. Traditionally,

209. For example, racial minorities and women suffer from societal oppression, but typically suffer no anxiety about the public disclosure of their identities as members of culturally disesteemed minorities.

210. HOFFMAN, *supra* note 87, at 118-21, 180-82; *see also* WEINBERG, *supra* note 6, at 69-90; SAGHIR & ROBINS, *supra* note 75, at 61, 231. *See generally* Coming Out Panel, *supra* note 204.

211. "Self-acknowledgement" should be distinguished from "self-acceptance." One may recognize one's homosexuality, even act on homosexual desires, but not accept or approve the desires or the conduct. The resulting guilt and self-loathing are common experiences for many homosexual individuals. *See* BELL & WEINBERG, *supra* note 65, at 81-102; HUMPHREYS, *supra* note 207, at 1-153; *see generally* HOFFMAN, *supra* note 87.

For an account of the damaging effects of prejudice on the self-conception of the disesteemed group, *see* G. ALLPORT, *THE NATURE OF PREJUDICE* ch. 9 (1954); *see also* E. GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

212. One observer has identified four "systems of denial," whereby individuals are able to deny their self-knowledge and the repression of their homosexuality or rationalize their homosexual tendencies: (1) "compliance with gender role"—a man thinks he is not homosexual if he is masculine or active in same-sex relations; (2) "personal innocence"—the other person initiated sexual activity; (3) "only-for-now"—one's homosexual desires or activities are temporary, to be "out-grown"; and (4) "special friendship"—homosexual desires are sublimated in the context of what is viewed as a unique relationship with another of the same sex. TRIPP, *supra* note 38, at 134-40. These rationalizations serve to avoid the negative moral and social implications of homosexuality. They constitute an implicit claim that one is "really" heterosexual, and frequently result in eliminating any associations with homosexual social sets. *See* WEINBERG & WILLIAMS, *supra* note 7, at 10-11; *cf. id.* at 276-79, 287-89 (homosexual people have much to gain from accepting their sexuality and relating honestly with other homosexual people).

and for the great majority, self-acknowledgement of one's homosexuality occurs in an extremely limited context. Most reveal their homosexuality to few if any friends, acquaintances, or family members. Many express their sexuality in limited, often furtive, and sometimes anonymous settings. Others are involved in heterosexual marriages, or otherwise feign heterosexual interests in order to deflect suspicion and societal disapproval. Those who know and associate with other homosexual individuals often persist in segregating that part of their lives from the pretense of heterosexuality or the asexuality they strive to maintain generally.<sup>213</sup>

Those who choose to come out typically have decided that the psychological and emotional burdens of passing are too great. The personal price of remaining hidden, of living a lie, of denying an important part of one's identity and humanity is felt to be a sacrifice not justified by the potential repercussions of coming out.<sup>214</sup> In recent years, personal decisions of closeted homosexual individuals to publicly acknowledge their sexual orientation and to assume a gay identity have created a widespread challenge to the societal oppression of homosexuality. In light of the homophobia in society and in the law, the "personal" has become "political."

## B. THE GAY RIGHTS MOVEMENT—"COMING OUT"

Homosexuality has existed in all eras and all cultures.<sup>215</sup> The roll call of historical figures thought to have been homosexual<sup>216</sup> is the most obvious indication, if not the most descrip-

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213. WEINBERG & WILLIAMS, *supra* note 7, at 9-11; see also ROSS, *Modes of Adjustment of Married Homosexuals*, 18 SOC. PROB. 385 (Winter 1971); HOFFMAN, *supra* note 87, at 15-24. Cf. HUMPHREYS, *supra* note 207 (findings that over half of a sample of persons using public restrooms for sex were heterosexually married). See generally SEXUAL CONDUCT, *supra* note 101, at 137-64; SAGHIR & ROBINS, *supra* note 76, at 84-104, 242-65; Kleinberg, *supra* note 198; McDowell, *The New Gay Conservatism on Campus*, CHRISTOPHER STREET, Dec. 1980, at 26-33.

214. The fear of coming out is not paranoia; the stakes are high, as even "gay liberationists" have noted. See WEINBERG & WILLIAMS, *supra* note 7, at 288.

215. See text accompanying notes 116-145 *supra*.

216. See, e.g., Douglas, J., dissenting in *Boutilier v. Immigration and Nat. Serv.*, 387 U.S. at 130 (quoting Judge Moore below, 363 F.2d at 497-98: "To label a group [homosexual persons] so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, André Gide and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores.").

tive,<sup>217</sup> of the diversity of homosexual individuals. Unfortunately, historians and cultural arbiters have overwhelmingly reflected a heterosexual bias. Consequently, the existence of homosexual peoples has been denied and the significance of homosexuality in historical cultures and in the lives of historical figures has been disparaged or "interpreted" away.<sup>218</sup> The effect of this anti-homosexual bias has been to deny to modern homosexual people an historical context,<sup>219</sup> to denigrate their sense of self-worth, and to foster majoritarian myths about the rarity, deviancy, and cultural threat of homosexuality.<sup>220</sup>

Homosexual organizations and a homosexual subculture have long existed in this country and elsewhere.<sup>221</sup> The current public awareness of homosexuality, the increasing number of those who define themselves as gay, and the growth of gay rights organizations, a gay rights movement, and a "gay culture" are all relatively recent. The large numbers of homosexual individuals who publicly reveal their sexual orientation have not gone unnoticed. The social implications and repercussions of this modern phenomenon have been the subject of considerable public controversy and discussion.<sup>222</sup>

The appearance of a gay rights movement seems an entirely appropriate and inevitable response to the social forces behind the oppression of homosexuality. The modern gay rights movement challenges both the causes and effects of this oppression.

The movement is popularly traced to the 1969 Stonewall incident, where Greenwich Village gay bar patrons reacted to a po-

217. The most readily identifiable homosexual individuals have, naturally enough, been the most prominent for other reason. To point to Walt Whitman, Michelangelo, and Frederick the Great as examples of people who have been homosexual is to ignore the vast majority of those never mentioned in the history books. See KATZ, *supra* note 86, at 2-3, and TRIPP, *supra* note 38, at 274-76.

218. Denny, *supra* note 71, at 16; see also DOVER, *supra* note 121, at vii (Preface). For a provocative reinterpretation of the role of homosexuality vis-a-vis church and society in the early Christian era, see generally BOSWELL, *supra* note 134. See also Martin, *Reclaiming Our Lives*, CHRISTOPHER STREET, June 1980, at 32-38.

219. KATZ, *supra* note 86, at 1; Denny, *supra* note 71, at 15-17.

220. See text accompanying notes 57-145 *supra*.

221. J. LAURITSEN & D. THORSTAD, *THE EARLY HOMOSEXUAL RIGHTS MOVEMENT (1864-1935)* (1974). See generally KATZ, *supra* note 86.

222. See, e.g., *The Homosexual In America*, TIME, Oct. 31, 1969, at 56-67; *How Gay Is Gay*, TIME, April 23, 1979, at 72-76; see also WEINBERG & WILLIAMS, *supra* note 7, at 17-21, 279-89.



lice raid, and to a pattern of police harassment, with shouting, missile throwing, and demonstrations.<sup>223</sup> Obviously a police raid and demonstrations in the street do not create a social movement. But Stonewall's symbolic importance should not be underestimated.

As a rallying cry for gay people in the early 1970's, Stonewall served to coalesce diffuse and isolated anger, resentment, and frustration. Self-education, self-acceptance, and a developing "gay pride" were the immediate goals of post-Stonewall gay liberation. Inspired and nourished by the social activism and cultural transformations of the 1960's, the gay rights movement in the 1970's has sought, through political and social activism, to make the presence and plight of gay people in society known and comprehensible to the majority.<sup>224</sup>

In seeking social change, the movement has analogized the issues of homosexual oppression to majoritarian prejudices and oppression encountered by other minority groups.<sup>225</sup> Some of the more activist proponents of gay rights view their struggle in revolutionary terms, identifying homosexual oppression as a class struggle<sup>226</sup> and the oppressor as white, middle-class, male-dominated heterosexual society.<sup>227</sup> Others, less strident but no less historically aware or politically motivated, speak less of revolutionary ends while attempting to identify common issues of oppression and common interests in social change with other minorities such as blacks, Jews, and women.<sup>228</sup>

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223. N.Y. Times, June 29, 1969, § 1, at 33, col. 1; N.Y. Times, June 30, 1969, § 1, at 22, col. 1; see also, WEINBERG & WILLIAMS, *supra* note 7, at 36-37; Young, *Out of the Closets, Into The Streets*, in *OUT OF THE CLOSETS*, *supra* note 8, at 6-34; WOLF, *supra* note 10, at 65-66.

224. See generally *OUT OF THE CLOSETS*, *supra* note 8; D. TEAL, *THE GAY MILITANTS* (1971).

225. See generally *OUT OF THE CLOSETS*, *supra* note 8; TEAL, *supra* note 224; see also Denny, *supra* note 71, at 14, 16, 18; notes 231, 251 *infra*.

226. KATZ, *supra* note 86, at 5, identifies an "anti-capitalist, pro-socialist (or at least radical) tradition among a small but significant group of homosexual emancipation pioneers, American as well as English and German."

227. For a radical analysis of homosexual oppression from the early years of the modern gay rights movement, see Leaflet of the Red Butterfly Brigade and Statement of the Male Homosexual Workshop in TEAL, *supra* note 224, at 102, 174-75. For a more recent appraisal of homophobia, oppression and liberation, see Denny, *supra* note 71.

228. The GLSA court recognized the similarities of the gay rights movement to the struggles for black civil rights and women's liberation. *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32. See also TEAL, *supra*

The movement encourages gay people to associate with others, and to organize and work together to achieve protection for gay rights.<sup>229</sup> An increasing awareness of a gay culture has resulted in burgeoning interest—on the part of gays and straights alike—in an analysis and understanding of the contributions of gay people, of their presence throughout society, and of the irrationality of homophobia and of homosexual oppression.<sup>230</sup> Efforts to form alliances with other oppressed minorities and activist social change movements, though widely recognized, are neither universally supported by gay people, nor received with consistent enthusiasm by other minorities.<sup>231</sup>

The gay rights movement thus takes many forms and proceeds in many directions. Indeed, viewing the accumulation of groups, efforts, and purposes as a movement is in some respects misleading. The phenomenon is anything but monolithic. For any number of reasons, not all homosexual persons identify themselves as gay, let alone identify with or support the goals and methods of gay liberation.<sup>232</sup>

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note 224, at 169-71.

229. *Gay Law Students Ass'n v. Pacific Tel. & Tel., Inc.*, 24 Cal. 3d at 488, 595 P.2d at 610-11, 156 Cal. Rptr. at 32-33. See also WEINBERG & WILLIAMS, *supra* note 7, at 26-29, 34-39, 51-56.

230. See note 222 *supra*; see also KATZ, *supra* note 86 at 6-9. See generally, THE GAY ACADEMIC (L. Crew, ed. 1978); H. BROWN, FAMILIAR FACES, HIDDEN LIVES (1976); R. MARTIN, THE HOMOSEXUAL TRADITION IN AMERICAN POETRY (1979); L. HUMPHREYS, OUT OF THE CLOSET: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION (1972).

231. As a political strategy, the alliance and shared struggle of minority groups seeking to overcome majoritarian prejudices and discrimination is traditionally respected and useful, although not always effective. Particularly in the case of the gay rights and black civil rights struggles, several considerations point to what may prove to be the limited efficacy of such a political alliance. The diversity of gay people is foremost: they exist in all social, economic, racial, ethnic, and religious groups. The shared oppression of homosexuality may not be sufficient to create political bonds crossing over economic class, religious group, or racial identity distinctions. Unlike the attitude of the heterosexual majority toward them, most homosexual persons probably do not identify themselves primarily in terms of sexual orientation or preference, but rather in terms of family, occupation, social status, economic level. See WEINBERG & WILLIAMS, *supra* note 7, at 270-75.

Socialist and labor activists have also allied with the gay rights movement in some instances. But the theory of coalition behind such alliances may not realistically address the economic and political diversity of gay people, and it may prove to be true that wealthy white gay men have more in common with wealthy white straight men than with either other minority groups' struggles, or with other gay people in other economic and social levels. See, e.g., TEAL, *supra* note 234, at 177-79. See generally WHITE, *supra* note 128.

232. Older, "quieter" gay activists may resent what are perceived as strident de-

The inevitable confrontation with majoritarian values encountered by most openly gay people would seem to point toward the development of a unifying, progressive political ideology. In spite of this radical challenge to historically venerated, pervasively manifested beliefs posed by the proud assumption of a gay identity,<sup>233</sup> gay people adhere to no consistent or even predictable ideology. Closeted homosexual individuals, almost by definition, fail to perceive their homosexuality as a problem of cultural attitudes and societal oppression.<sup>234</sup> Even those gay people who recognize and value the importance of their sexuality may identify more with others of similar class, race, age, or religion than with other gay people.<sup>235</sup>

With all this in mind, it is nevertheless fair and useful to acknowledge the significance of one message of the gay rights movement which unifies many of its diverse elements and is recognized as fundamental by observers as well. That message is the need for all homosexual persons to "come out of the closet."<sup>236</sup> Regardless of the diversity of gay people, regardless of individual decisions to actively promote social change or to make gay identity a political issue, coming out of the closet necessarily constitutes a challenge to the traditional cultural attitudes toward homosexuality and to the oppression experienced by gay people.

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mands and disruptive tactics of a new generation of gay liberationists who are "rocking the boat." WEINBERG & WILLIAMS, *supra* note 7, at 28-29. See also WOLF, *supra* note 10, at 48-58.

233. See Denny, *supra* note 71, at 14-21.

234. While life in the closet can often be a result of conscientious consideration of the pros and cons of coming out, the denial or de-emphasis of a gay identity would seem necessarily to defer to the force if not the propriety of cultural homophobia. To that extent, a closeted homosexual person may have internalized and accepted the cultural beliefs that homosexuality is "wrong" and somehow a product of individual fault. See TRIPP, *supra* note 38, at 134-49; SAGHIR & ROBINS, *supra* note 76, at 61; HOFFMAN, *supra* note 87, at 180-98; WOLF, *supra* note 10, at 33-43.

235. WEINBERG & WILLIAMS, *supra* note 7, at 274; see note 231 *supra*. Cf. Denny, *supra* note 71 (who advances (not uniquely) the proposition that a gay identity and, more generally, gay peoples' attitudes toward and acceptance of sexuality unite individuals across lines of class, race, etc.). For an examination of the diverse aspects of a community of women united by lesbianism, feminism, and alternative cultural institutions, see WOLF, *supra* note 10.

236. See text accompanying note 26 *supra*. See also *How Gay is Gay*, TIME, Apr. 23, 1979, at 75; *Out of the Closet, Out of a Job*, *supra* note 53, at 663; WEINBERG & WILLIAMS, *supra* note 7, at 28; Dressler, *supra* note 42, at 27; WEINBERG, *supra* note 6, at 69-90.

The movement's message is intended for closeted and guilt-ridden homosexual persons as much as for the straight and ignorant or indifferent majority. "It's okay to be gay"—neither sinful, nor sick, nor immoral, nor so very unusual. By coming out, gay people tell society that they are not sick but healthy, not immoral but loving, not aberrant but representative of one of the myriad forms of human development and expression. The message is that they are not a threat but responsible, caring, and concerned—not cardboard stereotypes but full, complex, and feeling human beings. Their collective voice reveals that they are not "alone" but are "many."

Encouraged and supported by the strength in numbers represented by the gay rights movement, gay people are unlearning the cultural devaluation of homosexuality.<sup>237</sup> Through exploration of their sexuality, gay people learn that sexuality is a valuable and an integral component of their individual identity. In the face of society's denial of the validity of their experience and history, and the disapproval of their existence, gay people discover a foundation for a needed sense of community in their affirmation of a gay identity.<sup>238</sup> The recognition of a gay community with shared interests, and the development and appreciation of a gay culture, contribute to increased understanding of the nature of a sexual identity and of sexual oppression.<sup>239</sup>

An individual's exposure to openly gay people can change personal perceptions of homosexuality.<sup>240</sup> Like changes in any personal beliefs or attitudes, such changes do not occur casually or spontaneously. If the struggle to confront fears and to unlearn prejudices is often difficult, the rewards can be correspondingly great.

#### Familiarity with one gay person can result in a re-evaluation

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237. WEINBERG & WILLIAMS, *supra* note 7, at 270-71. See also WEINBERG, *supra* note 6, at 69-90.

238. See, e.g., *How Gay Is Gay*, TIME, Apr. 23, 1979, at 72-76. See also *Gay Ghettos: A Search For Male Communities*, HUMAN BEHAVIOR, Sept. 1978, at 41; *A Walk On San Francisco's Gay Side: One out of Three Voters Estimated to be Homosexual*, N.Y. Times, Nov. 6, 1977, Magazine, at 67; Hooker, *The Homosexual Community*, in SEXUAL DEVIANCE 167-84 (J. Gagnon & W. Simons eds. 1967); N. ADAIR & C. ADAIR, WORD IS OUT: STORIES OF SOME OF OUR LIVES (1978).

239. See text accompanying notes 115-44 *supra*.

240. Denny, *supra* note 71, at 20.

of implicitly accepted cultural attitudes on the part of well-meaning straight people who have never bothered to question the validity of what they thought they knew about homosexuality. A gay person's testimony about his or her oppression may strengthen relationships with friends.<sup>241</sup> Knowledge of the impact homophobia has had on one gay person's life can lead to an appreciation of the effects other beliefs and attitudes may have on others. An individual's re-evaluation of attitudes toward homosexuality necessarily involves a re-examination of more fundamental attitudes toward sex and sexuality.<sup>242</sup>

Homosexual and heterosexual individuals obviously differ in terms of cultural acceptance and external encouragement of their respective sexual identities. By coming out of the closet, a gay person allows straight people to appreciate how internal experience, an individual's awareness and acceptance of sexuality and a sexual identity, also differ according to the cultural approval bestowed or withheld.<sup>243</sup> While choice of sex objects and expressions of sexual desires distinguish heterosexual from homosexual, the varieties of human sexual response and behavior are not confined to simple polar alternatives, but fill a broad and complex spectrum of possibilities. While sexual orientation may describe and explain certain aspects of one's life, individual differences are not defined or reliably predicted by reference to the gender of one's sex partners.<sup>244</sup>

Many parents are troubled and guilt-ridden upon learning of their children's homosexuality. Parents may eventually learn that their gay children remain the offspring whom they have always nurtured and loved. Parents and children may come to know each other more fully, more honestly.<sup>245</sup> The improved family relations which result belie traditional fears that homo-

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241. WEINBERG & WILLIAMS, *supra* note 7, at 54-59, 186. See also SAGHIR & ROBINS, *supra* note 76, at 179-83; WEINBERG, *supra* note 6, at 69-90; Coming Out Panel, *supra* note 204; see generally WOLF, *supra* note 10.

242. See text accompanying notes 57-145 *supra*.

243. See WEINBERG & WILLIAMS, *supra* note 7, at 150-51; see also, WEINBERG, *supra* note 6, at 69-90.

244. WEINBERG & WILLIAMS, *supra* note 7, at 274. See text accompanying notes 57-145 *supra*.

245. WEINBERG, *supra* note 6, at 91-118. See also B. FAIRCHILD & N. HAYWARD, NOW THAT YOU KNOW: WHAT EVERY PARENT SHOULD KNOW ABOUT HOMOSEXUALITY (1979); Hasbany, *Mom and Dad Come Out: The Sentinel Visits With Parents of Gays*, *The Sentinel*, Jan. 23, 1981, at 6.

sexuality somehow threatens the family. Families can appreciate first-hand the effect of such cultural attitudes on their lives, and see that the "problem" of homosexuality is actually the problem of society's fear and oppression of homosexuality.<sup>246</sup>

Such increased awareness has readily perceived effects on individuals, and more intangible repercussions in society. The extent to which contemporary sexual liberation and the appearance of increased tolerance bespeak a growth in understanding of homosexuality remains uncertain.<sup>247</sup> As cultural attitudes toward sex "loosen up," and as the demystification of homosexuality and the acceptance of gay people increase, resistance to such changes stiffens. Increased tolerance of homosexuality is frequently identified with a broader and more generalized sexual permissiveness. Yet the acceptance of permissiveness, the notion of sexual license, implies the continued existence and force of some strictures and prohibitions.<sup>248</sup>

The traditional moral and religious attitudes toward sex and sexuality are being re-evaluated.<sup>249</sup> Their continued functional significance as guiding principles in the formation of a cultural consensus and the structuring of modern society are widely questioned. Yet their impact should not be lightly discounted.<sup>250</sup>

While tolerance of homosexuality and understanding of human sexuality may be increasing among individuals, the goals of the gay rights movement, however defined, still seem far off. Whether united with other oppressed minorities and civil rights groups in ultimate goals or on specific issues, or whether addressing concerns peculiar to themselves, gay rights activists still face a difficult struggle.<sup>251</sup> While homosexuality and gay rights

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246. See text accompanying notes 120-133 *supra*. Cf. WEINBERG, *supra* note 6, at 139 (the "homosexual problem" is the problem of condemning variety in human existence) and SAGHIR & ROBINS, *supra* note 76, at 317 (the "homosexual condition" cannot be made into a disease by simple intuition, moral indignation, and proclamation).

247. See WEINBERG & WILLIAMS, *supra* note 7, at 19 for a discussion of public opinion polls taken in the 1960's which revealed considerable public intolerance of homosexuality; see also TRIPP, *supra* note 38, at 1-9.

248. TRIPP, *supra* note 38, at 2-3.

249. See notes 134-137 *supra*.

250. See discussion at notes 139-145 *supra*.

251. Homosexual oppression is most obviously a critical concern for gay people. Ultimately, however, that oppression is not peculiar to gay people, but is indicative of more general cultural attitudes with repercussions in the lives of all. Homosexuality is not

have increasingly become topics of public attention and debate, gay activist organizations and gay rights supporters seeking political and legal gains are met with increasing resistance from homophobes.

Thus, many jurisdictions cling to traditional moralistic, anti-sexual policies and refuse to decriminalize private sexual behavior between consenting adults.<sup>252</sup> Physical expression of homosexual love can lead to imprisonment, disgrace, and ruin.<sup>253</sup> Lobbying for legislative and administrative action to protect gay rights has met with limited success.<sup>254</sup> The attitude that homo-

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political in itself, though for gay rights activists in a homophobic society, homosexuality necessarily becomes political. The gay rights movement has sought and found considerable support among non-gay groups and individuals: civil libertarians, civil rights activists, social and sexual reformers, and other oppressed minorities allied in the struggle for civil rights protection.

In challenging denial of civil rights to gay people, the gay rights movement necessarily challenges the sexual oppression experienced by all. Thus, rather than seeking legislative protection for gay civil rights, an alternative strategy is to seek recognition and protection of a broad-based right to privacy for all persons. Sexual orientation or private consensual sexual conduct or political activism around socio-sexual reform issues should be excluded from inquiry and consideration by the legal system in general, by employers, by providers of services, by the courts deciding cases in any area of law. *Cf.* Richards, *supra* note 34 (moral principles underlying constitutional right to privacy require respect for sexual autonomy) and *Unnatural Acts*, *supra* note 97 (sexual love is properly seen as fundamental civil liberty).

252. See Rivera, *supra* note 6, Appendices A and B at 949-55. Recently, homosexual acts between consenting adults have been decriminalized in two more jurisdictions. See *People v. Onofre*, 424 N.Y.S.2d 566, 72 N.E.2d 286 (1980). New Jersey repealed its proscription on homosexual acts, 1978 N.J. LAWS, ch. 95, § 2C:98-2, effective Sept. 1, 1979.

253. WEINBERG & WILLIAMS, *supra* note 7, at 280-81. See also, HOFFMAN, *supra* note 87, at 79-99; CHURCHILL, *supra* note 57, at 199-238.

254. To date, neither Congress nor any state legislature has enacted any prohibition of anti-homosexual discrimination. Several municipalities and local governments have provided protection against discrimination in public or in private employment, housing, or other areas. *It's Time*, July/Aug. 1980, at 4, col. 3. See Rivera, *supra* note 6, at 810 nn.61, 62.

Repeated efforts to amend California's Fair Employment Practices Act to prohibit discrimination on the basis of sexual orientation have been unsuccessful; see note 11 *supra*; see also *Federal Gay Rights Bill Reaches Congress Next Week*, *The Sentinel*, Jan. 23, 1981 at 1, col. 3; *Bay Area Reporter*, Feb. 12, 1981, at 9, col. 1.

Federal immigration policies have recently been the focus of intensive and concerted litigation, lobbying, and negotiation. In September 1980, the Justice Department announced revisions in its policy of enforcing the statutory exclusion of homosexual aliens. The new policy prohibits I.N.S. officials from inquiring into or acting on "suspicions" of an alien's sexual orientation, while authorizing the continued exclusion of individuals who openly identify themselves as homosexual. See *It's Time*, July/Aug. 1980, at 1, col. 2, and *It's Time*, Sept. 1980, at 1, col. 2. But see *Repeal of Immigration Laws Faces Uncertain Future*, *The Sentinel*, Mar. 6, 1981, at 1, col. 2.

The new policy is an advance over the blanket exclusion of all homosexual aliens

sexuality is somehow inherently detrimental to individuals and society persists.<sup>255</sup> Even small gains have been controversial: local gay rights ordinances have been subjected to popular referenda in many jurisdictions, and frequently defeated.<sup>256</sup>

Many gay rights activists have sought protection in the courts. On balance, their efforts have met with limited success.<sup>257</sup> Even those courts which have transcended, to some extent, personal prejudices and societal aversion to homosexuality per se have frequently reached results which, in fact, uphold and perpetuate discriminatory treatment of gay people. Many of these cases involve claims for legal protection by those who have been characterized as gay rights activists or as openly-identified, "notorious" gay individuals. Consistently, courts have viewed activism, "notoriety," or public-identification of gay people as justification for the denial of their legal rights, particularly in cases upholding dismissals from public employment of openly-identified gay people.

## V. LEGAL CONSEQUENCES OF "MANIFEST HOMOSEXUALITY"

Increasingly, homosexual persons are responding to the call of the gay rights movement by coming out of the closet and identifying themselves as gay. The decision to come out is only the first step. The process, the emotional turmoil, the reception by family and friends, the character of life outside the closet

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and the carte blanche inquiry into private lives which the old policy authorized. (see note 115 *supra*). Nevertheless, it represents at best a grudging tolerance of homosexuality, and a minimal change in the legal consequences of homophobia. While respecting the private lives of homosexual persons, the policy says to gay people, "keep it private." It thus represents a more subtle, but equally insupportable, intolerance.

255. To a great, if undetermined, extent, anti-homosexual attitudes may persist because of the law's reflection of moral values, scientific knowledge, and social theories which, whatever their significance in the past, no longer have moral, factual, or social validity. See note 115 *supra*.

256. Rivera, *supra* note 6, at 810 n.6. Gay Rights ordinances were also defeated in referenda in San Jose and Santa Clara County, Calif. in 1980. S.F. Chronicle, June 4, 1980, at 8, col. 1., S.F. Chronicle, June 5, 1980, at 5, col. 5.

257. A comprehensive survey of the results of litigation affecting the rights of gay people is in Rivera, *supra* note 6. Cf. Coleman, *The Executive Branch of Government: An Untapped Source of Power For Gay Rights*, 4 SEX. L. REP. 41, 52 (1978) (reform through judicial process likely to be much slower than through other branches of government); but see, Abrams Address: *New York Attorney General Speaks Out On Gay Rights Issues*, 5 SEX. L. REP. 21, 26 (1979) (judiciary has power and obligation to prevent tyranny and to counter anti-gay prejudice).



vary widely, unique to the circumstances of each individual. Life is not necessarily made easier; an individual's problems and the challenges posed by a heterosexual orthodoxy to the homosexual minority may simply take another form. Objective evidence and personal testimony both suggest that the principal rewards of an individual's open assumption of a gay identity may be in the improved character and expanded potential of inter-personal relationships with others of whatever sexual orientation.<sup>258</sup>

The larger consequences of coming out ultimately contribute to a more open and tolerant society.<sup>259</sup> Unfortunately, some of the short-term consequences for many out-of-the-closet gay people have been less rewarding. Personal abuse and harassment from threatened and frightened homophobes are common.<sup>260</sup> Friends and family members frequently fail to understand or even to tolerate a loved one's revelation of homosexuality, though in all other respects the individuals and the relationships may be essentially unchanged.<sup>261</sup> Not the least of the adverse consequences experienced by openly-identified gay people are those imposed by the law.

Before the *GLSA* opinion, few courts have upheld the rights of out-of-the-closet gay people. Those which have extended legal protection to the advocacy of homosexuality as a valid lifestyle or of other gay rights goals are even more exceptional. Even when private homosexual conduct or status is protected, courts have found a public policy rationale for denying legal rights to those who publicly profess what the society disapproves. In

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258. WEINBERG & WILLIAMS, *supra* note 7, at 276-79, 287-89; see also *Coming Out Panel*, *supra* note 204, at 57-87.

259. See text accompanying notes 236-248 *supra*.

260. Resentment, insecurity, or belligerent ill will may motivate adolescent harassment and assault of openly gay people. The frequency and viciousness of such attacks has generally gone unrecognized, but has been documented by local observers and organizations in the gay community. A San Francisco, California group, Community United Against Violence (CUAV), has recorded reports of assaults and played a watch-dog role over police response and policies regarding anti-gay harassment and attacks. CUAV also seeks to organize the gay community, increase vigilance, and teach self-defense. CUAV can be reached at P.O. Box 14406, San Francisco, Calif. 94114, Phone (415) 864-8347. See also Ellis, *Anti-Gay Violence Reaches New Heights in New York*, *Bay Area Reporter*, Jan. 29, 1981, at 17, col. 1, and Ireland, *Rendezvous in the Ramble*, *New York*, July 24, 1978, at 39-42.

261. See text accompanying notes 237-248 *supra*.

*State of Ohio ex rel. Grant v Brown*,<sup>262</sup> the Ohio Supreme Court declared that "promotion of homosexuality as a valid life style is contrary to the public policy of this state."<sup>263</sup> So finding, the court denied petitioners' request for mandate compelling the Secretary of State to approve articles of incorporation for a non-profit organization intended in part "[t]o promote acceptance of homosexuality as a valid life style."<sup>264</sup>

In a cursory opinion, the majority accepted the discretionary determination by the Secretary of State that such a gay rights organization violated public policy, despite the recent decriminalization of homosexual conduct between consenting adults in the state. The court acknowledged that "[t]he subject [of homosexuality and gay rights], as a whole, invites more extensive discussion" but explicitly refrained: "we forbear."<sup>265</sup>

An incisive dissent castigated the court for its timidity and inaccuracy. Objecting that the Secretary of State's role in determining the statutory acceptability of proposed articles of incorporation was merely ministerial, without authority to make such public policy judgments, the dissent further took issue with the majority's interpretation of Ohio's public policy.<sup>266</sup> The majority, furthermore, inaccurately perceived the appropriate role of public policy in limiting the purposes for which lawful associations of citizens may incorporate.<sup>267</sup>

The majority seemed to latch on to the public policy determination by the Secretary of State as a desperate attempt to avoid a "more extensive discussion" of homosexuality.<sup>268</sup> Unfortunately, neither the judicial reluctance to address the issue of homosexuality,<sup>269</sup> or the social abhorrence of open advocacy of homosexuality as a valid and healthy alternative, is unusual.

262. 39 Ohio 2d 112, 313 N.E.2d 847, *cert. dismissed*, 420 U.S. 916 (1974).

263. *Id.* at 113, 313 N.E.2d at 848.

264. *Id.* at 114 n.1, 313 N.E.2d at 849 n.1 (Stern, J., dissenting).

265. *Id.* at 113, 313 N.E.2d at 848.

266. *Id.* at 114-16, 313 N.E.2d at 849-51 (Stern, J., dissenting).

267. *Id.*

268. The dissent claimed that Lexis research revealed *no* recorded decisions of the Ohio Supreme Court where the terms "homosexual" or "homosexuality" were even used, let alone where the issues were discussed. *Id.* at 16 n.3, 313 N.E.2d at 851 n.3.

269. See Coleman, *To Publish or Not to Publish, That Is the Question*, 26 SEX L. REP. 18-20 (1976) for evidence that many appellate courts habitually refuse publication of opinions favorable to gay rights.

Moreover, the responses of the courts to the claims of the gay rights movement have continued to reflect homophobic prejudices. This has been seen most frequently in cases which have upheld government dismissals of openly gay employees. Courts purporting to apply *Norton's* rational nexus test<sup>270</sup> have by and large agreed with government claims that retaining such "notorious" gay employees would impair efficiency, cause the government embarrassment, or be inconsistent with the proper role model required for the position.<sup>271</sup>

The classic illustrations of the judicial approach to open, proud gay identity and purposeful gay rights activism are *Singer v United States Civil Service Commission*<sup>272</sup> and *McConnell v. Anderson*.<sup>273</sup> Although the factual settings differ, the issues and the judicial responses to the claims of gay rights activists are strikingly similar. In *McConnell*, the Eighth Circuit upheld a state university's rejection of an applicant for a library job on the ground that his open gay activism would "foist tacit approval of this socially repugnant concept upon his employer," contrary to "the best interests of the university."<sup>274</sup> In *Singer*, the Ninth Circuit upheld the dismissal of a federal employee on the ground that activities which "openly and publicly flaunt[ed] his homosexual way of life" would impede "the efficiency of the service by lessening general public confidence in the fitness of the government."<sup>275</sup>

Thus, both courts explicitly denied job protection because of the notoriety of plaintiffs' gay activism, and because the public opprobrium attached to their activities might impair their employers' reputation or efficiency.

James McConnell was an approved applicant for a librarian position at the University of Minnesota. After he and a male lover sought to obtain a marriage license,<sup>276</sup> the Board of Re-

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270. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), discussed in the text accompanying notes 172-180 *supra*.

271. See text accompanying notes 272-345 *infra*.

272. 530 F.2d 247 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977).

273. 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

274. *Id.* at 196.

275. 530 F.2d at 251.

276. The decision denying their right to obtain a marriage license is *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *cert. denied*, 409 U.S. 810 (1972); see discus-

gents rejected his application on the ground that his "personal conduct, as represented in the . . . news media, [was] not consistent with the best interests of the University."<sup>277</sup> McConnell sought to enjoin the University from denying his application on the grounds either of his homosexuality or of his desire "to publicly profess his 'earnest' belief that homosexuals are entitled to privileges equal to those afforded to heterosexuals."<sup>278</sup>

The district court found no evidence that plaintiff's homosexual tendencies would interfere with the performance of his job, and enjoined the Board of Regents from refusing to hire him on the asserted ground that the media attention given to his personal conduct was not in the best interests of the University.<sup>279</sup> The court of appeals disagreed. The court found that McConnell's homosexual tendencies or even clandestine conduct were not in issue. Rather, the court held, plaintiff had no "right to pursue an activist role in implementing his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept on his employer . . . ."<sup>280</sup>

Recognizing the distaste with which much of the society has viewed homosexuality, the court plainly indicated its agreement. Not only are same-sex lovers denied the right to marry,<sup>281</sup> but an attempt to do so and to focus media attention—a blaze of publicity—on the issues of the denial of gay rights are doubly condemned. The publicity, far from interfering with a gay employee's ability to perform the job<sup>282</sup> will "foist tacit approval" of the employee's "socially repugnant" behavior on the employer. The presumably deleterious consequences for the employer, its reputation, and the society were not precisely articulated.

#### An employee's off-the-job activity, whether public or pri-

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sion in *Rivera*, *supra* note 6, at 874-75.

277. 451 F.2d at 194. The extent of the media coverage had been four news articles appearing in local papers. *Id.* at 195 n.4.

278. *Id.* at 194.

279. *Id.* The lower court opinion is at 315 F. Supp. 809 (D. Minn. 1970).

280. *Id.* at 196.

281. *See* text accompanying note 158 *supra*.

282. The district court had found no connection between McConnell's openly gay identity and his ability to perform the job he was seeking. 316 F. Supp. at 814-15.

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vate, explicitly sexual or essentially political advocacy, may or may not result in a public impression of the employer's approval. The court failed to adequately address this issue. Neither did the court seem concerned with, or even aware of, the broader and more complex question of the deterrent effect of its decision on those who would seek to challenge societal attitudes and encourage peaceful social change.<sup>283</sup> The court displayed no appreciation of the implications for protected speech and association rights in its decision upholding job discrimination on the basis of an employee's not-job-related speech and political activity.<sup>284</sup> The court *was* solicitous of the University's unwillingness to "accede to such extravagant demands" as those posed by McConnell's challenge to the prevailing social attitudes toward homosexuality.<sup>285</sup>

Gay activist John Singer was a probationary employee of the Equal Employment Opportunity Commission (EEOC) for nearly a year. An investigation to determine his continued "suitability for employment in the competitive Federal service" revealed numerous details of his open advocacy of gay rights and the widespread publicity he had received.<sup>286</sup>

Like James McConnell, Singer had sought to obtain a marriage license with another man.<sup>287</sup> He also had received extensive media attention, and had been publicly identified as an EEOC employee. He was active in organized gay rights groups. He "had 'flaunted' his homosexuality by [publicly] kissing and embracing a male" and he "indicated by his dress and demeanor that he

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283. The court dismissed McConnell's claim that his efforts to obtain a marriage license were protected symbolic speech. 451 F.2d at 196 n.7. The denial of McConnell's rights to publicly address the issues of homosexual oppression is especially unfortunate. In deferring to the University's fears about alleged public concern over its employment of a gay activist, the court not only denied McConnell's rights, but also assured that the University as employer need not address and confront such "public concern," and that neither the University, the public, nor gay people will be able to examine and discuss the issues. See text accompanying notes 344-57 *infra*.

284. See *Out of the Closet, Out of a Job*, *supra* note 53, at 681-82; see also text accompanying notes 327-340 *infra*.

285. 451 F.2d at 196.

286. 530 F.2d at 248-49. For a discussion of this case, see Comment, *Singer v. United States Civil Service Commission—Dismissal of a Government Employee For Advocacy of Homosexuality*, 1976 UTAH L. REV. 172; Note, 7 GOLDEN GATE U.L. REV. 99 (1976).

287. The decision denying Singer's right to marry is at *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974); see also text accompanying notes 158, 276 *supra*.

intended to continue homosexual activity as a 'way of life.'"<sup>288</sup>

Characterizing his activities as "those of an advocate for a socially repugnant concept"<sup>289</sup> which constituted "immoral and notoriously disgraceful conduct" within the meaning of the Civil Service Regulations,<sup>290</sup> the Commission Investigator disqualified Singer from continued federal employment. Despite Singer's "superior" job rating in his supervisor's evaluation report, and despite comments in a letter from his co-workers that he was a competent worker and that they found their experience with him "educational and positive,"<sup>291</sup> the Commission concluded that Singer's continued employment would impair the "efficiency of the service."

Following unsuccessful administrative appeals, Singer sued for injunctive and declaratory relief, damages, and reinstatement, contending that the Commission had failed to establish the rational nexus required to justify his dismissal because of his homosexual status. The district court granted summary judgment of dismissal with prejudice.

The court of appeal affirmed, upholding the Commission's disqualification of Singer in order to promote the efficiency of the service. Concluding that Singer had not been terminated because of his homosexual status or because of any private homosexual acts, the court distinguished *Norton*. It found that Singer's "notorious conduct and open flaunting and careless display of unorthodox sexual conduct in public" had the required rational connection to the claimed impairment of service efficiency.<sup>292</sup>

The court also rejected Singer's argument that the Commission's dismissal violated his first amendment rights of speech

288. 530 F.2d at 249.

289. *Id.* at 250 n.3.

290. *Id.* 5 C.F.R. § 731.202(b) (1980) was the basis for the Commission's action. See discussion in Rivera, *supra* note 6, at 833-35, outlining the revisions of the regulations, and discussing John Singer's persistent efforts to have the decision reversed, *id.* at 823 n.137.

291. 530 F.2d at 250 n.4. The court dismissed this information in a footnote, finding that regardless of his job performance and his reception by co-workers, Singer's activities would nevertheless "impair service efficiency." *Id.*

292. *Id.* at 255.

and association. Once again revealing little appreciation for the expressive rights of those individuals or groups "abhorred" by society, and every indication of its own distaste for the "open and public flaunting" of homosexuality, the court brusquely concluded that the Government's interests in promoting the efficiency of the service outweighed the employee's interest in "broadcasting his homosexual activities."<sup>293</sup>

The court's repeated characterization of openly gay identity as homosexual "flaunting" reveals its distinctly anti-homosexual bias. The imprecise references to his activities as "public homosexual conduct" betray the court's confusion regarding the nature of homosexuality and homosexual conduct, and its ignorance of or indifference to the realities of homosexual oppression.<sup>294</sup>

The homosexual advertisements displayed on Singer's car windows were no more public homosexual conduct than the display of, for example, the Playboy "Bunny" symbol is public heterosexual conduct. Denying employment because two men kissing in public is deemed unorthodox sexual conduct which impairs efficiency is no more defensible than a dismissal because of an employee's open flaunting and careless display of orthodox sexual conduct. The "flaunting" of heterosexual activity is pervasive throughout the society,<sup>295</sup> yet the federal employee dismissed for such flaunting may be non-existent.

The court acknowledged in a footnote the tributes to Singer's actual job performance from supervisor and co-workers.<sup>296</sup> Yet the court upheld the Commission's action, justifying with a time-worn litany of myths and unsupported fears the conclusion of "impaired efficiency."<sup>297</sup>

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293. *Id.* at 255-56.

294. See text accompanying notes 195-257 *supra*.

295. See Oregon Task Force, *supra* note 58, at 20, 22.

296. See text accompanying note 291 *supra*.

297. The reasons for the Commission's conclusion were set forth in the letter as follows:

"The information developed by the investigation, taken with your reply, indicate that you have flaunted and broadcast your homosexual activities and have sought and obtained publicity in various media in pursuit of this goal. . . . Your activities in these matters are those of an advocate for a socially repugnant concept.

Notoriety attending gay rights activism or public profession of one's homosexuality have proved to be serious considerations for gay teachers in public schools as well.<sup>298</sup> In *Gish v. Board of Education of the Borough of Paramus*,<sup>299</sup> a teacher's gay rights activism was raised in the context of concerns with the deviation from normal mental health such activity was thought to represent. John Gish had taught in a public high school for seven years when he became president of the New Jersey Gay Activists Alliance. His activities, directed toward media promotion of the Alliance and of gay rights goals, included issuing statements to the press and encouraging a "Holding Hands" demonstration on the George Washington Bridge.<sup>300</sup> Pursuant to a statute which authorized the local board of education to require medical examinations "whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health,"<sup>301</sup> Gish was ordered to undergo a psychiatric examination. He appealed the State Board of Education's affirmance of the order on the ground that it violated his constitutional rights of speech, press, and due process.

The court affirmed the Board's interpretation of the statute and the exercise of its authority. Gish's "deviation from . . . normal mental health" was indicated by his uncontroverted gay rights activism. Two psychiatrists supported the Board's determination that Gish's behavior justified concern with his "fitness to be a teacher in intimate contact with numbers of impressiona-

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'. . . In determining that your employment will not promote the efficiency of the service, the Commission has considered such pertinent factors as the potential disruption of service efficiency because of the possible revulsion of other employees to homosexual conduct and/or their apprehension of homosexual advances and solicitations; the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among youth; the possible use of Government funds and authority in furtherance of conduct offensive to the mores and law of our society; and the possible embarrassment to, and loss of public confidence in, your agency and the Federal civil service.'

530 F.2d at 250 n.3. See text accompanying notes 57-145 *supra*.

298. See *Out of the Closet, Out of a Job*, *supra* note 53.

299. 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied*, 434 U.S. 879 (1977).

300. *Id.* at 100, 103, 366 A.2d at 1339, 1341.

301. *Id.* at 99, 366 A.2d at 1339 (quoting the statute, N.J.S.A. 18A 16-2). Gish's earlier constitutional challenge to the statutes is reported as *Kochman v. Keansburg Bd. of Educ.*, 124 N.Y. Super. 203 (1973).



ble adolescent pupils."<sup>302</sup> The court deemed this determination to be "fair and reasonable."<sup>303</sup> Yet the court noted the lack of "a single instance of any undue conduct or actions in the classroom or out of the classroom with respect to a particular student."<sup>304</sup>

The opinion does not indicate whether the court or the Board of Education would have been concerned with the teacher's mental health in the absence of his gay activism and the resulting media attention. The court was probably not prepared to hold that homosexual status, or even private, consensual homosexual acts, would require submission to a psychiatric examination. Yet the court's distaste for homosexuality and specifically for gay rights activism is manifest in two assumptions: [1] the "deviation from normal . . . mental health" represented by advocacy of gay rights is sufficient to require the teacher to establish his psychological health, and [2] such advocacy is also likely to pose a threat to school children.<sup>305</sup>

The *Gish* court assumed that some restrictions of teachers' rights of speech and out-of-school association are justified. It found that the Board of Education's order did not deny Gish's right to speak or engage in political activity.<sup>306</sup> The Board was concerned with assuring that a teacher not pose a threat of harm to students.

A teacher's fitness is to be judged not merely in light of teaching abilities and classroom performance. Also to be considered is the speculative harm which may result from factors unrelated to academic proficiency or to job requirements.<sup>307</sup>

The difficulty, as always, when viewing homosexuality as a disease, is in determining what is *normal health* and what is a deviation sufficient to pose a reasonable threat of harm to stu-

302. *Gish v. Board of Educ. of the Borough of Paramus*, 145 N.J. at 105, 366 A.2d at 1342.

303. *Id.*

304. *Id.* at 104, 366 A.2d at 1341.

305. *Id.* at 103-05, 366 A.2d at 1341-43.

306. *Id.* at 105, 366 A.2d at 1143.

307. *Id.* at 104-05, 366 A.2d at 1342. *Cf.* text accompanying notes 181-86 *supra* (California Supreme Court's enumeration of factors to be considered in lieu of a blanket conclusion that homosexual behavior constitutes unfitness to teach. *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 374, 82 Cal. Rptr. 175 (1969)).

dents or to job performance. Moreover, the legal significance of that determination is questionable when the authorities relied upon reflect, more or less uncritically, the ignorance and biases of the society at large.<sup>308</sup>

A similar difficulty arises when the legal rights of openly gay people are approached from the "homosexuality is immoral" perspective. The problems of determining an appropriate moral code, and of the extent to which the law ought to enforce it, often receive scant and superficial consideration.<sup>309</sup> Traditional moral strictures against homosexuality especially condemn those gay people who not only accept and take pride in their sexuality, but wear it openly and demand acceptance from others.<sup>310</sup>

In *Safransky v. State Personnel Board*<sup>311</sup> the Wisconsin Supreme Court upheld the dismissal of an openly gay resident houseparent at a state institution for retarded teen-age boys on the ground that his on-the-job discussion of his homosexual lifestyle had an adverse influence on his job performance and thus constituted "just cause" for dismissal.<sup>312</sup>

Paul Safransky had frequently and candidly discussed aspects of his personal life with co-workers, occasionally in the presence of the patients in his charge. He had described the cross-dressing escapades of his roommate, had teased a presumably heterosexual male aide about having a "date," and had occasionally worn face make-up on the job.<sup>313</sup> At a disciplinary hearing he admitted that he was an "avowed homosexual." The Personnel Board found that "homosexual activity is contrary to the generally recognized and accepted standards of morality," that Safransky's job "required intimate personal contact with those retarded children assigned to his care," and that "his admitted homosexual tendencies and attitudes" were inconsistent with the exercise of "proper parental care, custody, control and

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308. Cf. note 115 *supra* (Judicial affirmation of the use of "psychopathic personality" to describe homosexual persons is inappropriate memorialization of jargon and erroneous "expert knowledge.").

309. See authority cited in notes 135, 136 *supra*.

310. See text accompanying notes 116-144 *supra*.

311. 62 Wis. 2d 464, 215 N.W.2d 379 (1974).

312. *Id.* at 474-75, 215 N.W.2d at 386.

313. *Id.* at 467-69, 215 N.W.2d at 380-82.

moral training" required by his job.<sup>314</sup>

In affirming, the court held that there was substantial evidence to support all the Board's findings except for the "finding that homosexuality is contrary to the accepted standards of morality . . ., [stating] that whether homosexuality is immoral or not is irrelevant to the determination of 'just cause.'"<sup>315</sup> Nevertheless, just cause for dismissal was present. Safransky's frank discussions and flamboyant activities represented a failure to display "an appropriate male image consistent with that experienced by the remainder of society" and to "project the unorthodoxy of male homosexuality to the patients under his care."<sup>316</sup>

The court's concern that the patients be exposed only to orthodox heterosexuality is especially unfortunate for the patient with "homosexual problems" before whom Safransky had once discussed his homosexual activities.<sup>317</sup> Exposure only to the normality of orthodox heterosexuality and the denial of viable homosexual alternatives and role models are of course what create the "problems" associated with homosexuality, for both heterosexuals and homosexuals.<sup>318</sup> The recurring concern that homosexual individuals not be allowed positions of authority over children results in the absence of role models for homosexual youths, and the perpetuation of the myths of the rarity and inherent abnormality of homosexuality.

Another gay teacher's dismissal was upheld in *Gaylord v. Tacoma School Dist. No. 10*.<sup>319</sup> Taking the familiar approach that homosexuality is immoral, the Washington Supreme Court held that an otherwise eminently qualified high school teacher could be fired when his homosexuality had been publicly revealed.

James Gaylord had taught for twelve years in Tacoma public schools, receiving consistently excellent job performance eval-

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314. *Id.* at 469-71, 215 N.W.2d at 382-83.

315. *Id.* at 473-74, 215 N.W.2d at 383.

316. *Id.* at 475, 215 N.W.2d at 383.

317. *Id.* at 469, 215 N.W.2d at 381.

318. See WEINBERG & WILLIAMS, *supra* note 7, at 8-10, and other authorities cited at note 133 *supra*.

319. 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

uations. He had not revealed his homosexuality to family, colleagues, students, or superiors, but had begun to participate in the activities of a gay organization. When a former student reported to the vice-principal a suspicion that Gaylord was gay, the principal questioned the teacher, and Gaylord acknowledged his homosexuality. His honesty backfired: the Board of Education fired Gaylord for immorality due to "his status as a publicly known homosexual."<sup>320</sup>

In affirming, the court invoked a litany of authorities condemning homosexuality as immoral.<sup>321</sup> While homosexuality had been re-defined as not a psychiatric disorder in itself, the court emphasized that it was a disorder for those who wish to change their homosexuality.<sup>322</sup> Because Gaylord desired no change, but knew of and acted on his homosexual desires for over twenty years, Gaylord's homosexuality represented "a voluntary choice for which he must be held morally responsible."<sup>323</sup> The court held that his reticence in revealing his homosexuality to his family and associates reflected his self-condemnation, and compounded his guilt.<sup>324</sup> Disregarding Gaylord's outstanding employment record,<sup>325</sup> the court relied on statements by one student and three teachers that Gaylord's continued employment would create problems.<sup>326</sup> Although no evidence of any overt sexual conduct or indiscretion had been offered, the court held that the School Board need not wait for conduct. Gaylord's admission of his homosexuality was sufficient to impair his job performance and the effectiveness of the school.<sup>327</sup>

*Gaylord* has been widely criticized.<sup>328</sup> Gay rights advocates

320. *Id.* at 289, 559 P.2d at 1342.

321. Among selected psychiatric and medical authorities, the court relied on 7 *NEW CATHOLIC ENCYCLOPEDIA* 116 (1967). *Id.* at 291-92, 559 P.2d at 1343.

322. *Id.* at 296, 559 P.2d at 1345-46.

323. *Id.*

324. *Id.* See text accompanying notes 195-214 *supra*, concerning the causes and effects of passing.

325. "The most recent evaluation of [his] teaching performance stated that 'Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and student in his field.'" *Id.* at 300, 559 P.2d at 1347 (Dolliver, J., dissenting).

326. *Id.* at 298-99, 559 P.2d at 1346-47.

327. *Id.*

328. See, e.g., Rivera, *supra* note 6, at 871-73; Note, *Homosexual Teacher Dismissal: A Deviant Decision*, 53 *WASH. L. REV.* 499 (1978); Note, *Homosexuality Held Immoral for Purposes of Teacher Discharge*, 14 *WILLAMETTE L.J.* 101 (1977).

may understandably have viewed James Gaylord as the perfect plaintiff: discreet, respected, excellent credentials and reputation, dragged into the legal limelight and his employment jeopardized by the aggressive prejudice of others.<sup>329</sup> Thus the opinion is especially discouraging, as it reveals the scope of the adverse consequences the law continues to impose on "manifest homosexuals," and the Catch-22 effect of opening the closet door. One may be popular, accepted, and respected if presumed to be heterosexual; if one's homosexuality is revealed—even innocently, through chance and speculation of others—one suddenly is "immoral." An individual's character and entire past may be subject to a reappraisal solely in terms of a previously unknown but now paramount sexual orientation.

For courts to address the rights of gay people in terms of the immorality of homosexuality is especially unfortunate. Such a judicial approach reinforces myths and ignorance and memorializes an insupportable public morality. Moreover, judicial espousal of such moral precepts lends an aura of respectability and inviolability which artificially obstructs the inevitable changes occurring in society and in moral values. Gay people struggling to affirm their own identities as whole and healthy individuals have little problem with homosexuality. The "problem" of homosexuality continues to be the popular prejudices and intolerance throughout society and the law.

Some courts have questioned the majoritarian oppression of homosexuality. The constitutional rights of speech and association of gay teachers, if given limited protection, have at least been recognized. In *Acanfora v. Board of Education of Montgomery County*,<sup>330</sup> the Fourth Circuit ruled that a high school teacher's public statements on the subject of homosexuality were protected by the first amendment.

Joseph Acanfora had been openly active in a gay student organization while at college in Pennsylvania. While awaiting approval of his Pennsylvania teacher certificate, he was hired to teach in Maryland. After the school year had begun, it was an-

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329. In this respect, Gaylord's "gay rights advocacy" is quite different than that of, for example, the plaintiffs in *Singer* and *McConnell*, discussed in text accompanying notes 272-297 *supra*.

330. 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

nounced at a widely publicized Pennsylvania press conference that he would receive a Pennsylvania certificate. This public disclosure of his homosexuality resulted in the Maryland school district transferring him to a non-teaching position. He sued seeking reinstatement.<sup>331</sup>

Subsequent to bringing suit, Acanfora received considerable media attention, including an appearance on television with his parents, and several news interviews.<sup>332</sup> The district court held that his transfer was improper, but denied relief because of the subsequent publicity.<sup>333</sup>

The court of appeal disagreed. The media attention received by Acanfora on the subject of his homosexuality indicated that it was "a matter of public interest about which reasonable people could differ."<sup>334</sup> Acanfora's response to the publicity was reasonable, and resulted in no disruption of the school or impairment of his fitness to teach. His public statements justified neither his transfer to a non-teaching position, nor the district court's dismissal of his suit.<sup>335</sup>

The court upheld his transfer on other grounds, however. Acanfora had not listed his affiliation with the gay student organization on his teaching application, and the school system admitted that if he had, he would not have been hired. This omission<sup>336</sup> resulted in another Catch-22. Although the school district transferred him because of the publicity surrounding his homosexuality, it was not liable to him on his constitutional claim—"an issue that he practiced deception to avoid."<sup>337</sup> An "honest" acknowledgment of his homosexuality would have pre-

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331. *Id.* at 500.

332. *Id.*

333. 359 F. Supp. 843 (D. Md. 1973). The district court had stated that the constitutional rights of speech and association belonging to gay teachers involved "a sense of discretion and self-restraint" to "avoid speech or activity likely to spark the added public controversy which detracts from the educational process." It concluded that Acanfora's "repeated, unnecessary appearance on local and especially national news media" indicated a lack of the "self-restraint" required of teachers, and justified his transfer. *Id.* at 856-57.

334. 491 F.2d at 500.

335. *Id.* at 500-01.

336. The omission was found to be intentional, and Acanfora had certified the application to be "accurate to the best of his knowledge." *Id.* at 501.

337. *Id.* at 504.

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vented Acanfora from being hired; not revealing it was "deceptive" and justified his transfer. Thus *Acanfora's* recognition of the free speech rights of gay teachers may fairly be characterized as empty rhetoric, resulting as it did in no substantive protection from adverse employment consequences.

More positive substantive results were reached in *Aumiller v. University of Delaware*.<sup>338</sup> A district court held that state university officials' refusal to renew a lecturer's contract because of his public statements on the subject of homosexuality violated his constitutional rights of free expression and association. In a long and thorough opinion, the court addressed some of the controversial issues surrounding homosexuality.

Richard Aumiller had been a graduate student and non-tenured "Lecturer" at the University of Delaware for three years. His homosexuality was known to two of his superiors, but not generally to the University administration. Gay students asked him, and he agreed, to serve as the faculty advisor of a campus gay organization. A local newspaper approached Aumiller to do an interview about the gay group. The resulting articles discussed some aspects of the gay rights movement, and the largely closeted lifestyles of some of the local gay people.<sup>339</sup> When the articles came to the attention of University officials, they refused to renew Aumiller's contract, and he sued for back pay, reinstatement, and damages.<sup>340</sup>

The court found that Aumiller had not sought the publicity or engaged in controversial public conduct.<sup>341</sup> His teaching performance had not been impaired, and there had been neither disruption of University routine nor deleterious influence on students. Aumiller had taken care not to imply any official University approval of his homosexuality, his lifestyle, or his statements.<sup>342</sup> The court thus awarded Aumiller reinstatement to a one-year contract, compensatory damages for emotional distress, and punitive damages for the "pernicious insensitivity" of the

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338. 434 F. Supp. 1273 (D. Del. 1977).

339. The articles appear in an Appendix to the decision. *Id.* at 1313-19.

340. *Id.* at 1277-79.

341. The court distinguished *Singer* and *McConnell* on these grounds. *Id.* at 1293. See text accompanying notes 272-297 *supra*.

342. 434 F. Supp. at 1293, 1297.

University President in violating Aumiller's constitutional rights.<sup>343</sup>

Although the results were undoubtedly gratifying to Richard Aumiller, the value of the case as a precedent for gay rights advocates may be limited. Not only did Aumiller come into court with "clean hands," but the actions of the University officials were explicitly based on his public statements. The court did not deny that the social abhorrence of homosexuality, or the possible loss of public respect for a government institution seen as condoning homosexuality, might in some situations justify denial of a gay person's constitutional rights.<sup>344</sup>

There is a message for gay people in these cases, implicit in *Aumiller*, less subtle in *Gish* and *Acanfora*, and plainly articulated in *Singer*, *McConnell*, *Safransky*, and *Gaylord*. Reflecting cultural prejudices, more or less uncritically, the results in these cases have reinforced the impact of society's homophobia on gay people and have validated their fears and apprehensions about coming out.<sup>345</sup> The law's perpetuation of the societal oppression of homosexuality assures that homosexuality remains an "issue," and thus legitimates the decisions of gay people to come out of the closet and confront the issue.

## VI. CONCLUSION: IMPLICATIONS OF *GLSA* AND THE LABOR CODE HOLDING

The employment discrimination encountered by gay people who come out of the closet, who make an issue of homosexuality, who affront society by challenging the wisdom and rationality of the prevailing prejudices against gay people, is but one of the manifestations of the strength and extent of homophobia. The effects of judicial reliance on the perceived social abhorrence of homosexuality have been to perpetuate the myths and ignorance

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343. The one-year contract was awarded in the form of back pay, since the academic year had already ended. *Id.* at 1309, 1311, 1313.

344. The court noted that it had no occasion to rule on the issue of whether or when a public university professor may constitutionally be dismissed solely on the ground that he is homosexual. *Id.* at 1292, n.56. Moreover, in distinguishing *Singer* and *McConnell*, the court took pains to point out that Aumiller never "engage[d] in certain activities for the express purpose of generating publicity or notoriety . . . such as applying for a marriage license, kissing a man in public, or participating in homosexual demonstrations." *Id.* at 1293.

345. See text accompanying notes 195-214 *supra*.



underlying homophobia, and to magnify and complicate the consequences of oppression in gay people's lives. Moreover, the law's enforcement of such factually insupportable and demonstrably unjust anti-homosexual attitudes is inconsistent with the principles underlying the rule of law in a just and humane society.

Against this social and legal background, the departure of the Labor Code holding in *GLSA*<sup>346</sup> is immediately apparent, although its importance may not be fully appreciated. Manifest homosexuals who make an issue of their homosexuality may no longer be subjected to arbitrary employment discrimination by private employers. The effect of the holding is to extend *Norton's*<sup>347</sup> rational nexus standard in two ways. First, gay employees in the private sphere now have a measure of employment protection, on statutory grounds, which *Norton* had sought to assure for gay government employees on constitutional grounds. Second, and more important, the Labor Code holding must be read as a limitation, more protective than the rational nexus standard, of the extent to which homosexuality may be considered as relevant in the employment context.

The court did more than recognize the political legitimacy of the gay rights movement, and it did more than create a legal remedy for the conceded injustice of arbitrary employment discrimination against out-of-the-closet gay people.<sup>348</sup> The recognition of the political legitimacy of the gay rights movement and of the significance of coming out in a straight society implies two propositions. First, the claims of gay liberation are consistent with the ideals of an enlightened, humane, and just society, and all the more so in a constitutional democracy predicated on the values of pluralism and respect for individual freedom. The court did not and need not hold that any disesteemed and oppressed minority group whose members make an issue of

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346. See text accompanying note 26 *supra*.

347. See text accompanying notes 171-180 *supra*.

348. By characterizing manifest homosexuals who make an issue of their homosexuality as engaged in political activity, the court arguably recognized as well what observers have described as the "politicization" of sexuality. See, e.g., S. FIRESTONE, *THE DIALECTIC OF SEX* (1970); K. MILLET, *SEXUAL POLITICS* (1970); D. ALTMAN, *HOMOSEXUAL: OPPRESSION AND LIBERATION* (1971); see also Coleman, *The Sex Law Explosion: A Survey of Judicial and Legislative Developments in Sexual Law During the Past Decade*, 4 *SEX. L. REP.* 21 (1978).

whatever characteristics or behavior society condemns will thereby become political and entitled to the Labor Code's protection from arbitrary employment discrimination.<sup>349</sup> Second, the cultural abhorrence of homosexuality is factually insupportable, and the oppression of gay people is logically, theoretically, and practically inconsistent with the asserted values of a free society. Therefore, such attitudes *ought not be enforced in the law*. Thus the court rejected the legal significance such cultural attitudes have been accorded and created a remedy in the law for those who seek and deserve an end to their oppression.<sup>350</sup>

Drawing these inferences from the language of the *GLSA* opinion is justified by considering the larger legal, social, and political context in which the case arose and to which the court responded.<sup>351</sup> Homophobia is irrational and insupportable; its effects are unjust. Those who challenge the oppression of homosexuality and the denial of gay rights draw on historic traditions of respect for personal dignity and autonomy.<sup>352</sup> The law has for too long reflected culture ignorance, fear, and prejudices, and

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349. Cf. *GLSA* Note, *supra* note 15, at 713 (criticism of the Labor Code holding on the ground that any woman, for example, might be able to state a cause of action for employment discrimination under sections 1101 and 1102 by identifying herself as a believer in "women's liberation"). See also note 350 *infra*.

350. An analogy, extreme but simple, may clarify both the profound implications and the necessary limitations of the court's application of the Labor Code's protection for employees' "political activity" to plaintiffs' claims in *GLSA*. The court would (and should) recognize the arguably "political" rights of those who challenge the law's reflection of cultural beliefs about certain behaviors and characteristics. (Whether such challenges to orthodoxy have a "political" history and a recognizably "political" articulation, as do the gay rights movement's challenges to homophobia and the oppression of gay people, might be a determinative factor in recognizing "political" rights; see text accompanying notes 215-259 *supra*). The court would also recognize and endorse, for example, the demonstrable personal, social, and spiritual value of rabbis or nuns, as well as the obviously and unquestionably anti-social behavior of rapists and thieves.

Moreover, because both the society's condemnation of rapists and its respect for religion and religious leaders are logically, theoretically, and practically consistent with fundamental and demonstrably important legal and moral values of a just society, the law should properly reflect those values. Thus, the court would affirm the legitimacy and propriety of the legal benefits accorded to rabbis (e.g., tax-deductible religious contributions which provide their salaries, or exemptions from the draft) and the legal punishment of rapists (e.g., prison sentences). The Labor Code holding does not prevent employment discrimination against members of minority groups whose political claims—whether for the freedom to rape at will, or for the internment in concentration camps of ministers, Jews, or those whose beliefs are abhorrent to a particular minority faith—are fundamentally anti-social and *properly* condemnable by the society.

351. See text accompanying note 26 *supra*.

352. See Richards, *supra* note 34.

has for too long failed to recognize and to correct its own role in the oppression of gay people.

The "self-correction" undertaken by the *GLSA* court is a bold and sure first step. The Labor Code holding is not to be viewed as a usurpation of legislative prerogatives,<sup>353</sup> nor as merely creating a legal remedy for employment discrimination against gay people which the majority of the society has apparently been unwilling to provide. Rather, the recognition of the legitimacy of gay liberation and of the irrationality of homophobia must be seen as affirming the principles inherent in the rule of law in this society: not one morality preferred over another, but rationality, fairness, and truth preferred over superstition, injustice, and ignorance. Finally, the popular myths and the unfounded fears of immorality, sickness, and danger shall no longer serve to justify the oppression of gay people.

The practical value of *GLSA* as a legal precedent for gay people challenging discrimination is speculative.<sup>354</sup> Unfortunately, its application will be in the hands of courts which, although bound by the language, may reject the rationale and theoretical underpinnings of the Labor Code holding. The symbolic value of the opinion is nevertheless undeniable. Reversing the traditional judicial reflection of cultural homophobia, the court rejected as well the validity of anti-homosexual prejudices and oppression. By protecting the rights of manifest homosexuals who make an issue of their homosexuality, the court has created a judicial, legal, social, and personal climate conducive to addressing the many issues raised by homosexuality and sexual oppression. It is to be hoped that the society and the law will take advantage of this climate, and that discussion and consideration of the issues will be free, open, robust, and unrestrained. Ultimately, it is hoped that coming out will not be necessary or significant, in society or in the law. The issues to be made of homosexuality will then assume a role in the lives of individuals and in the social fabric more in proportion to the significance they deserve.

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353. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

354. See text accompanying notes 187, 258-345 *supra* for examples of some courts' reluctance to adhere to the principles established in *Norton* and *Morrison*.