HOMOSEXUALS IN GOVERNMENT EMPLOYMENT: *THE BOYS IN THE BUREAU*

> Forasmuch as there is not yet sufficient and condign Punishment appointed and limited by the due Course of the Laws of this Realm, for the detestable and abominable Vice of Buggery Committed with Mankind or Beast . . . That the same Offence be from henceforth adjudged Felony, and such Order and Form of Process therein to be used against the Offenders as in Cases of Felony at the Common Law; and that the Offenders being hereof convict by Verdict, Confession, or Outlawry, shall suffer such Pains of Death, and Losses and Penalties of their Goods, Chattels, Debts, Lands, Tenements and Hereditaments, as Felons be accustomed to do, according to the Order of the Common Laws of this Realm . . . .[1]

In the past two decades, enormous progress has been made by state and federal courts in the areas of civil rights and due process. Banners have been waved, parades staged, monies collected, equal time given, demonstrations held, brassieres burned, and cities turned to bloodbaths; all in the cause of bringing to light some area of discrimination which the courts have subsequently redressed. Individual preferences as to mode of dress,[2] length of hair,[3] religion[4] or non-religion,[5] views on war,[6] use of contraceptives,[7] reading material,[8] motion pictures,[9] and choice of life style have been upheld by various courts throughout the land. Markedly absent from the individual's new found freedoms is his freedom to choose the gender of his sex partner.

Homosexuality has been a part of society since earliest recorded history. Our Stone Age ancestors left records of such sexual activity in their cave drawings[10] and it has been reported by anthropologists that some forty-nine of the seventy-six primitive societies accepted

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1 25 Hen. VIII, c. 6 (1533). With the exception of the substitution of life imprisonment for the death penalty and forfeiture of property, the Act remained intact until 1967.

2 *See, e.g.*, Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).

3 *See, e.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

4 *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

5 *See* Abington School Dist. v. Shempp, 374 U.S. 203 (1963).

6 *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

7 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

8 *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966); United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

9 *See, e.g.*, Lordi v. UA New Jersey Theaters Inc., 108 N.J. Super. 19, 259 A.2d 734 (Ch. 1969).

10 86 CHRISTIAN CENTURY 354-56 (1969).

homosexuality as part of their existing culture.[11] In some of those societies there existed a warlike fraternity of men, among whom sexual relations took place without taboos.[12] In Australia, before the advent of the white settlers, marriages between men and boys were quite common.[13] The Japanese and Chinese histories also reveal unscorned homosexuality, prior to the Christian influence.[14]

The most well-known acceptance is found in the annals of the Greek and Roman Empires. The Greek male existed in a bisexual world. The highest form of love considered to exist was that of love between fellow men and this inspired them on the battlefield, on the athletic courts and in their cultural endeavors. Their heterosexual relationships were generally considered secondary. The Romans also displayed a bisexual nature with particular emphasis on the adoration of male youths.[15]

The condemnation of homosexual practices dates back to the incipiency of the Judeo-Christian culture. The Old Testament describes the dramatic destruction of Sodom and Gommorah following the citizens' professed lust for the young angel that called upon Lot.[16] In the New Testament, St. Paul considered homosexuality a major contributing factor to the degradation of the pagan world.[17] The Christian world continued such censure and various kings sought to eradicate the "evildoers" by burning them at the stake or by simple castration.[18] Such purges only forced the practice underground, however, and it later reappeared during the more liberal historical periods.[19] In the twentieth century such corporal punishment has been abolished, but the moral indignation, inherent abhorrence, social stigma and continuous harassment have not.

The homosexual in America has summarily been denied his right to exist as he is, free from scorn and persecution. He has been plagued by police departments, considered an outcast by most social groups and

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11 *Id.*

12 D. CORY, THE HOMOSEXUAL IN AMERICA 16 (1951).

13 *Id.*

14 *Id.*

15 *Id.* at 17.

16 *Genesis* 19:1-25.

17 *Romans* 1:26-27.

18 86 CHRISTIAN CENTURY, *supra* note 10, at 356.

19 *See* D. CORY, *supra* note 12, at 18. For example, a revitalization of the Greek spirit and its concomitant homosexual aspects occurred during the Renaissance. It has been maintained that Michaelangelo and Leonardo Da Vinci engaged in homosexual practices. The Napoleonic Code of post-revolutionary France excluded homosexuality from its list of crimes. *Id.*

often been denied the right to work, particularly in government related jobs. It is the intent of this comment to concentrate on the denial of the right to work by various government agencies. Particular emphasis will be placed upon the fact that the alleviation of this problem has, in view of the inaction of the agencies themselves, become the task of the judiciary.

RECENT CASES

The Civil Service Act sets standards to be adhered to by government personnel[20] and provides procedural steps for the removal of employees whose conduct is deemed violative of these standards.[21] The employee is afforded certain measures of appeal[22] within the Civil Service structure but is was not until the landmark decision of *Gadsden v. United States*[23] that the litigant enjoyed complete review through judicial scrutiny.

Until *Gadsden*, courts were loath to disturb the factual findings of governmental agencies and restricted themselves to procedural inquiries.[24] In this case, the Court of Claims considered evidence upon which the dismissal had been predicated to be within its purview, maintaining that the aim of the judicial inquiry should be a determination of whether the dismissal was actually "for cause."[25] The court stated that such cause must be free from the arbitrary and capricious whims of superiors in order to neutralize any implication of bad faith.[26]

Although the door is clearly open, courts have still been reluctant to overturn agency decisions and the aversion increases where dismissals are based on homosexuality. In the now famous case of *Dew v. Halaby*,[27] an Air Force veteran was dismissed from his position as an

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20 5 U.S.C. § 3301 (1970) empowers the President to prescribe rules and regulations for admission into the civil service and to ascertain the fitness of the applicant as to age, health, character, knowledge and ability for employment.

The authority to determine specific qualifications has been delegated to the Civil Service Commission. *See, e.g.*, Exec. Order No. 11,228, 3 C.F.R. 317 (1964-65 comp.); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-58 comp.).

21 5 U.S.C. § 7501 (1970).

22 5 C.F.R. § 731.401 (1970).

23 78 F. Supp. 126 (Ct. Cl. 1948), *cert. denied*, 342 U.S. 856 (1951). *See* Note, *Dismissal of Homosexuals From Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632, 635-36 (1970).

24 *See, e.g.*, Eberlein v. United States, 257 U.S. 82 (1921); Keim v. United States, 177 U.S. 290 (1900).

25 78 F. Supp. at 127.

26 *Id.* at 128.

27 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed per stipulation*, 379 U.S. 951 (1964).

air traffic controller by the Federal Aviation Agency. Because of his veteran status, Dew could only be dismissed for "such cause as will promote the efficiency of the service."[28] After creditable service in the FAA for two years, it was learned that his previous employer, the CIA, had requested his resignation because of admitted homosexual conduct when he was eighteen years old. Dew was quickly terminated and the dismissal was upheld through the various appellate stages within the administration.[29]

The crucial issue on appeal, after the government had been granted a summary judgment in district court, was whether Dew's pre-employment conduct was a sufficient basis for a discharge which would "promote the efficiency of the service."[30] The court concurred with the government that such acts "may have, and can be determined to have, an adverse impact upon the efficiency of the service."[31] More importantly, the court demonstrated its verdancy in the area by asserting that Dew's past conduct was indicative of a personality which did not meet the requirements of character, stability and responsibility of the particular position.[32] A dissenting judge accused the court of

> [u]sing some unfortunate adolescent acts as its springboard . . . [to drive] a gaping hole in the wall of protection which has surrounded civil service workers for almost a hundred years.[33]

The Supreme Court granted certiorari, but before the case was heard, stipulation of agreement was entered and Dew was reinstated with appropriate back pay. Commenting on this turn of events in the later case of *Norton v. Macy*,[34] Judge Bazelon stated:

> If these official actions may not be deemed a confession of error, the history of the case at least casts considerable doubt on the authority of what was, in any event, a narrow holding.[35]

The true import of *Dew*, however, was that it employed the *Gadsden* rationale in the particular area of dismissal of homosexuals, entertaining for the first time the question of the effect of homosexuality on "the efficiency of the service."[36]

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28 317 F.2d at 585 (quoting from 5 U.S.C. § 863 (1964), recodified in 5 U.S.C. § 7512(a) (Supp. 1968)).

29 *Id.* at 583-84.

30 *Id.* at 585.

31 *Id.* at 587 (quoting from defendant's brief).

32 *Id.* at 587-88.

33 *Id.* at 589 (Wright, J., dissenting) (footnote omitted).

34 417 F.2d 1161 (D.C. Cir. 1969). *See also* Comment, *Government Employment and the Homosexual*, 45 ST. JOHN'S L. REV. 303 (1970); Note, *supra* note 23.

35 417 F.2d at 1166.

36 317 F.2d at 586-89.

Two years after *Dew*, the same court displayed a significant change in attitude when it overturned the Commission's disqualification of a government employee because of alleged homosexual activities some eleven years prior to his employment. In *Scott v. Macy*,[37] the court held that a disqualification for "immoral conduct" was a serious stigma which would jeopardize the appellant's chances of ever obtaining suitable employment.[38] It was therefore incumbent upon the agency to specify what conduct it found to be immoral and how it related to "occupational competence or fitness."[39] The court further noted that the terms "homosexual" and "homosexual conduct" have different meanings to different people and that the Commission was therefore precluded from drawing the conclusion of "immoral conduct" based on such vagueness.[40]

A case illustrating conclusions based on such ambiguity is *Doe v. Department of Transportation*,[41] where a private citizen was denied a medical certificate necessary to obtain a private pilot's license. The reason for the denial was a previous conviction of sodomy and alleged past homosexual experiences.[42] The certificate could not be granted if there existed an established medical history or medical diagnosis of a character or behavior disorder severe enough to have repeatedly manifested itself overtly.[43] Doe argued that, according to the regulations, such a

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37 349 F.2d 182 (D.C. Cir. 1965). Although the *Scott* court remanded the case with instructions to enter summary judgment for the plaintiff, it was careful to state, ". . . this does not preclude the Commission from excluding appellant from eligibility for employment for some ground other than the vague finding of 'immoral conduct' here." *Id.* at 185.

Granting this discretion to the agency resulted in Scott's reappearance before the same court as an appellant some three years later. In Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968), the government's contention was that the plaintiff had been terminated merely for refusing to give testimony as to his homosexual activities. The court, however, had difficulty distinguishing the fact pattern of *Scott I* and *Scott II*:

> We are unable to conclude, however, that the Commission's decision did not in fact rest upon a finding of "immoral conduct." Therefore, the current disqualification cannot stand. Where individual rights of substance turn upon whether the Commission acted for one reason rather than another, we think it not too much to expect that the Commission will not leave its motivations clouded by inexactitude of expression. Civil service investigators are doubtless not unlike the rest of us in being slow to relinquish a conviction of the correctness of an action once taken for the reason it was taken. If a wholly new and different reason is to become the mainspring of the action, that should be made clearly to appear—and the resources of language are fully up to this task. Thus, this appeal must terminate as did the former one . . . .

Id. at 648 (footnote omitted).

38 349 F.2d at 184.

39 *Id.* at 185 (quoting from Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

40 *Id.* at 184-85.

41 412 F.2d 674 (8th Cir. 1969).

42 *Id.* at 675.

43 14 C.F.R. § 67.17 (1971) provides in pertinent part:

disorder must be in existence at the time of the application. A clinical psychologist who examined Doe and testified for the *government*, was not able to positively diagnose an existing character or behavior disorder.[44] The applicant maintained quite logically that

> overt acts, no matter how seemingly immoral, distasteful or otherwise socially unacceptable, are irrelevant in the absence of a firm clinical diagnosis showing an existing abnormality of the mind; the regulations . . . deal with physical or mental impairments and not with moral behavior.[45]

Commenting on Doe's contention, the court found the argument to be "somewhat ingenious," but further stated, "it does not convince us."[46]

The question of the effect of homosexuality on efficiency was finally assessed succinctly by Judge Bazelon in his decision of *Norton v. Macy*.[47] The case, though possibly distinguishable in future cases because of its factual pattern,[48] not only established the court's right of review as unquestionable but also legitimized the ability to set guidelines.

Norton, an accountant for the National Aeronautics and Space Administration, was arrested for a traffic violation after being observed picking up a male passenger. The passenger admitted that Norton "felt his leg" during the ride. Norton was interrogated by the police for two

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(a) To be eligible for a third-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

. . . .

(d) Nervous system:

(1) No established medical history or clinical diagnosis of any of the following—

(i) A character or behavior disorder that is severe enough to have repeatedly manifested itself by overt acts.

44 412 F.2d at 677.

45 *Id.*

46 *Id.*

47 417 F.2d 1161 (D.C. Cir. 1969). *Compare* Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970) where the plaintiff had been dismissed from an Army Civil Service position for homosexual activity with three young servicemen on four occasions, one of which involved the use of slight force. *See also* Note, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U.L. REV. 267 (1969); Note, *Is the Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912 (1970).

48 There was a severe due process violation in that Norton was interrogated for two and a half hours by the police and another two hours by NASA officials without the benefit of counsel or warnings. The statements which were the basis of the administrative charges were the result of these sessions. 417 F.2d at 1162-63.

An attempt to determine exactly how much the court was affected by these violations would be mere speculation. A statement that it was not affected, however, would be unrealistic.

hours during which time the security chief of NASA was summoned and allowed to read the confidential arrest record and secretly monitor another twenty minutes of interrogation held for his benefit. Norton allegedly admitted to engaging in homosexual activities while in high school and college and to experiencing homosexual desires while under the influence of alcohol.[49]

NASA officials found that the homosexual advance made on the night in question amounted to "immoral, indecent, and disgraceful conduct" sufficient to classify Norton as a person who possessed traits of character and personality which rendered him unsuitable for further government employment.[50] The Court of Appeals for the District of Columbia reversed the agency's final decision, reminding it of the injustice in imposing "an official defamation of character" upon an employee.[51] The court was also cognizant of the agency's interference with private conduct and the possibility of a resultant due process violation.[52]

Moreover, the court clearly admonished the Civil Service Commission holding that the Commission had neither the expertise nor the power to enforce moral judgments but were "confined to the things which are Caesar's."[53] There must be a rational nexus, said the court, between the conduct deemed immoral and the efficiency of the service:

> [I]f the statute is to have any force, an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying "shame."[54]

Following *Norton*, the issue of homosexuality and employment was dealt with on a state level and, although discussion of this decision is not strictly germane, it is nevertheless indicative of changing judicial attitudes. In *Morrison v. Board of Education*,[55] the Supreme Court of

[49] 417 F.2d at 1162-63.

[50] *Id.* at 1163.

[51] *Id.* at 1164.

[52] *Id.*

[53] *Id.* at 1165.

[54] *Id.* at 1168.

[55] 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). Another recent state case which merits attention is Florida Bar v. Kay, 232 So. 2d 378 (Fla. Sup. Ct. 1970), where an attorney was disbarred for homosexual activity with a consenting adult in a partially partitioned public toilet stall—the evidence and arrest being obtained by a concealed police officer. The majority, in a per curiam opinion, merely recited the judgment of the Board of Governors of the Florida Bar and affirmed. Chief Justice Ervin, however, was disturbed as to the connection between the conduct and the employment. He concurred that the attorney should be disciplined but disagreed as to permanent disbarment:

> While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar

California overturned a ruling of the State Board of Education, which had revoked the life diploma[56] of a school teacher for alleged homosexual activity.

Morrison, a teacher with an exemplary record for a number of years, had engaged in a limited non-criminal physical relationship with a man which was described as being homosexual in nature.[57] The other man later reported the incident to the superintendent of schools and Morrison subsequently resigned. Thereafter, the State Board conducted a hearing to decide whether a revocation of Morrison's life diploma was warranted.[58] The teacher testified that he had undergone some undefined homosexual problems in early adolescence, but, with the exception of the incident in question, had participated in no homosexual conduct. A year and a half later, the Board concluded that the incident constituted immoral and unprofessional conduct and that the act involved moral turpitude, all of which necessitated revocation under the Education Code.[59]

Morrison's subsequent petition for a writ of mandamus was denied by the superior court.[60] Upon appeal, the Supreme Court of California reversed, stating that the charges of "immoral," "unprofessional" and "moral turpitude" were mere abstractions "until applied to a specific occupation and given content by reference to fitness for the performance of that vocation."[61]

> under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney.

Id. at 379 (Ervin, C.J., specially concurring).

56 *See*, CAL. EDUC. CODE § 12905 (West 1969) which defines a life diploma as a document issued on the basis of specific requirements. The document empowers one to teach in a specific area.

57 1 Cal. 3d at 218-19, 461 P.2d at 377-78, 82 Cal. Rptr. at 177-78.

58 *Id.* at 219-20, 461 P.2d at 378, 82 Cal. Rptr. at 178. The statute which enables the Board to conduct such hearings is CAL. EDUC. CODE § 13202 (West 1969), *as amended*, CAL. EDUC. CODE § 13202 (West Supp. 1971):

> The State Board of Education shall revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the Public School System, or for any cause which would have warranted the denial of an application for a certification document or the renewal thereof, or for evident unfitness for service, life diplomas, documents, or credentials issued pursuant to this code.

Among the causes which would have warranted the denial of an application or renewal was "any act involving moral turpitude." CAL. EDUC. CODE § 13129(e) (West 1969) (repealed 1970).

59 1 Cal. 3d at 220, 461 P.2d at 378-79, 82 Cal. Rptr. at 178-79.

60 *Id.* at 218, 461 P.2d at 377, 82 Cal. Rptr. at 177.

61 *Id.* at 239, 461 P.2d at 394, 82 Cal. Rptr. at 194.

THE AGENCY ARGUMENTS: SUPPOSITION V. "RATIONAL NEXUS"

> [S]ex perverts, like all other persons who by their overt acts violate moral codes and laws and the accepted standards of conduct, must be treated as transgressors and dealt with accordingly.
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> . . . .
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> . . . [T]here is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.
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> . . . .
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> . . . [I]f a homosexual attains a position in Government where he can influence the hiring of personnel, it is almost inevitable that he will attempt to place other homosexuals in Government jobs.
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> . . . .
>
> The lack of emotional stability which is found in most sex perverts and the weakness of their moral fiber, makes them susceptible to the blandishments of the foreign espionage agent.[62]

The above are excerpts from a scathing report entitled *Employment of Homosexuals and Other Sex Perverts in Government.*[63] In addition to the inflammatory title, the document is fraught with unsubstantiated conclusions, inaccuracies, and a general abandonment of fair play. The terms "homosexual" and "pervert" were treated synonymously and labels of "unstable," "weak" and "unsuitable" were attached automatically thereto.[64]

Although there have been a number of appeals lodged by parties who have been dismissed, mainly by the Department of Defense and the Civil Service Commission, evidence is scant as to the total number of terminations and denied applications due to homosexuality.[65] The evidence which does exist, however, suggests the conclusion that the general governmental policy has remained substantially intact.[66] In-

62 SENATE COMM. ON EXPENDITURES IN EXECUTIVE DEPARTMENTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 241, 81st Cong., 2d Sess. 3, 4, 5 (1950) [hereinafter cited as SENATE DOCUMENT NO. 241].

63 SENATE DOCUMENT NO. 241, *supra* note 62.

64 *Id.* at 2.

65 From existent calculations, however, it is obvious that the number of terminations and application denials for reason of homosexuality rises and falls with the whim of administrators. In a four month period during 1950 there were 382 terminations for sexual deviation compared with 200 terminations for the same reason in the preceding three year period. In the three year period following the publication of SENATE DOCUMENT NO. 241, 1700 applicants were denied employment for homosexuality and other deviant sexual behavior. S. MITCHELL, THE HOMOSEXUAL AND THE LAW 55 (1969).

66 The tendency would be to believe that since SENATE DOCUMENT NO. 241, the agencies' policies probably have been liberalized. As late as 1966, however, John W. Macy, Jr., former chairman of the Civil Service Commission stated:

creased judicial awareness of the problem, nevertheless, will compel the government to set forth supportable arguments substantiating the "rational nexus" between homosexuality and job inefficiency.[67] The possible arguments may be summarized as follows:[68]

1. The condition of homosexuality is indicative of unstableness and other psychological disorders which would render the employee or applicant unfit;
2. Employment of homosexuals would greatly hamper the productivity of their co-workers;
3. Homosexuals present an easy mark for extortionists and are therefore a serious security risk;
4. Mass employment of homosexuals would destroy public confidence in the civil service.

The first argument depicts the homosexual as psychologically unfit to perform his job requirements. No supporting clinical evidence exists and, at present, these allegations amount to pure conjecture. Psychologists have found the homosexual to be of average intelligence with leanings toward the pursuit of cultural activities.[69] There are those among the homosexual population who display serious mental disorders which manifest themselves overtly but there is no evidence that the percentage of these individuals compares unfavorably to the percentage of disturbed members of the heterosexual population.[70] If such a manifestation were to occur, the agency could deal with the

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> Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

Letter from John W. Macy, Jr. to the Mattachine Society of Washington, Feb. 25, 1966.

67 *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

68 One possible argument has been omitted from this list: an admission by an individual that he is a homosexual is a confession of a criminal act (sodomy). The individual is thereupon dismissed or his application is denied because of this confession. The argument, due to already established constitutional propositions of due process of law, however, seems to be completely untenable and for that reason has not been included.

69 B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 155 (1954).

70 *See* Pomeroy, *Homosexuality*, in THE SAME SEX 3, 11 (R. Weltge ed. 1969).

One serious difficulty encountered by researchers is that of attempting to define who is a homosexual and who is heterosexual. Such a simplistic taxonomy is very indefinite and sexuality is more clearly expressed in degrees of masculinity and femininity. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 637-51 (1948).

problem and the homosexual as it would with the heterosexual and his problems.

Contentions that the mere proximity of homosexuals to heterosexual co-workers will hamper the latter's productivity are vacuous and unsubstantiated. First, it is wrong to assume that an individual's sexual proclivity will not only be obnoxious, but obvious to his fellow employees. Second, even if a person were a professed homosexual, there is no concrete evidence that the mere knowledge of this fact would adversely affect the efficiency of his co-workers.[71] If, however, the homosexual employee made unwelcome solicitations during work hours, he could be held to the same standard as a promiscuous heterosexual who annoyed the secretaries.

With regard to extortion, it should be noted that one of the homosexual's greatest fears, and that which would make him most susceptible to blackmail, is that of being discovered by his superiors. It would then appear that the agencies' policies may be the greatest source of their own problem.[72] There is no evidence of a relationship between homosexuality and a specific tendency to release information, but the imputation of the label to an undisclosed homosexual would have a substantial coercive effect. Professional thieves have made a business of blackmailing homosexuals.[73] The issue would perhaps be an insurmountable obstacle, then, for a homosexual who had kept his status a private matter. The agencies' difficulty however lies in the fact that, aware of this proposition, most homosexual plaintiffs in cases to come will probably profess their homosexuality in order to neutralize the government's extortion allegation.[74]

The final argument, that of adverse public opinion, is perhaps the most meritorious in that it is at least factually sound. It can be generally stated that society's view of homosexuals is unfavorable.[75] There will be a continuing reluctance to accept the fact that man is innately sexually neutral and responds equally to various sexual stimuli,

71 It has been found that an employee's satisfaction or dissatisfaction with his co-workers has no effect on his efficiency. W. WHYTE, MEN AT WORK 554 (1961).

72 *See* Comment, *Government—Created Employment Disabilities of the Homosexual,* 82 HARV. L. REV. 1738, 1749-50 (1969).

73 Maddocks, *The Law & the Church vs. the Homosexual,* in THE SAME SEX 95, 103 (R. Weltge ed. 1969).

74 *See, e.g.,* Grimm v. Laird, — F. Supp. —, Civil No. 173-71 (D.D.C., Sept. 27, 1971); Gayer v. Laird, — F. Supp. —, Civil No. 174-71 (D.D.C., Sept. 28, 1971), *appeal docketed,* No. 71-1934, D.C. Cir., Nov. 20, 1971; Ulrich v. Laird, — F. Supp. —, Civil No. 203-71 (D.D.C., Sept. 28, 1971), *appeal docketed,* No. 71-1935, D.C. Cir., Nov. 20, 1971. For a discussion of these cases see text *infra.*

75 In a recent Harris Poll, it was found that 63% of the people polled felt that homosexuality was harmful to the American way of life. Time, Oct. 31, 1969, at 61.

and that a preference for heterosexuality, therefore, becomes a mere sociological conditioning dictated by the prevailing culture.[76]

The clinical findings certainly contradict the opinion of the populace. Merely because an opinion is one of a majority, however, creates a problem of no small degree. "What they believe may be quite wrong: but it is quite contemporary and quite real."[77] But the protection of the rights of a minority is at the very basis of the judicial function. The exercise of this function assumes greater importance when legislators refuse to act for fear of their political lives and administrators refuse to act for fear of no one.

It is apparent from the foregoing discussion that the weight of the evidence is in favor of the homosexual. His greatest difficulty, however, may result from an agency tactic rather than an agency argument. When certiorari was granted in *Dew* the government reinstated the plaintiff and mooted the case causing a dismissal of certiorari.[78] Although there was more persistence in *Scott* by the agency, a similar course of action was followed.[79] Would-be martyrs could thus be frustrated by simple agency capitulation. A class action might be the sole solution to this problem.[80] Significant individual efforts have, nevertheless, been undertaken.

Grimm, Gayer AND *Ulrich*: A FRONTAL ASSAULT

The subject of the most recent cases has been the denial of security clearances. The principles to be extracted, therefore, will be somewhat particularized. The adaptability of these principles to other areas such as termination and application denial, however, should be apparent and not long in forthcoming.

One of these recent cases is *Adams v. Laird*.[81] Adams was an electronic technician who had received his "Secret" clearance while working for Melpar, Inc. in 1957. He subsequently changed jobs, and in 1962 his employer, National Scientific Laboratories, urged him to apply for a "Top Secret" classification. Adams made the application, and was requested to appear before the Potomac River Naval Command for further investigation. At this interview he was informed of his rights and then interrogated, at one point for seven consecutive hours. Thereafter,

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76 *See* B. KARPMAN, *supra* note 69, at 318.

77 P. DEVLIN, THE ENFORCEMENT OF MORALS 126 (1965).

78 Norton v. Macy, 417 F.2d 1161, 1166 (discussing the tactic employed in *Dew*).

79 The agency attempted to dismiss Scott twice on different grounds but finally capitulated. *See* note 37, *supra*.

80 *See* FED. R. CIV. P. 23(a)-(e).

81 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

Adams' "Secret" clearance was suspended and his application for "Top Secret" clearance was denied.[82] The charges against Adams were as follows:

> a. On July 30, 1964, you acknowledged to several persons that you had engaged in numerous acts of sexual perversion, beginning when you were 14 years of age and continuing up to that date.
>
> b. In 1962, while you and [Mr. "X"] were working jointly on a local science fair project, you solicited the said ["X"] to engage in unlawful and immoral acts of sexual perversion.[83]

Adams appealed the decision through the Department of Defense, the federal district court, and finally to the court of appeals. He argued that there was an "asserted absence of any adequately enunciated standard for evaluation of conduct disqualifying one for a security clearance." The court answered flatly that:

> [The regulation] sets forth many "Criteria," which include ample indications that a practicing homosexual may pose serious problems for the Defense Department in making the requisite finding for security clearance. They refer expressly to the factors of emotional instability and possible subjection to sinister pressures and influences which have traditionally been the lot of homosexuals living in what is, for better or worse, a society still strongly oriented towards heterosexuality.[84]

Although the court alluded to the blackmail possibility and also to the fact that Adams was guilty of seducing a fellow employee[85] as establishing the "rational nexus," the opinion was more concerned with a procedural inquiry.[86] Judge Skelly Wright, dissenting, rebuked the majority for this misplaced attention:

> In cases where national security is at stake, wide discretion must of course be accorded the determinations of the Board. However, there must in all cases be some rational relationship between the facts found and the actions of the Board. Without such relationship, it would be pointless to accord appellant any procedural rights. The burden on appellant to prove his entitlement to *Top Secret* clearance, or even to continuing *Secret* clearance is great indeed. The least he should be able to expect from the Board before it effectively takes away his right to earn his living in his chosen profession is a decision in which there is a rational nexus between the facts and the conclusions drawn therefrom.[87]

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82 420 F.2d at 233.

83 *Id.* at 233 n.1.

84 *Id.* at 239.

85 *Id.* at 240.

86 *Id.* at 235-38.

87 *Id.* at 242 (Wright, J., dissenting) (footnote omitted).

Based on the majority rationale in *Adams*, future test cases should involve plaintiffs who have neither seduced co-workers nor denied their homosexuality. Furthermore, the complaint should be aimed directly at the "rational nexus" contention rather than diverting the court with procedural arguments. Just such an approach seems to have been taken very successfully in a three case "package" recently decided by the Federal District Court for the District of Columbia.

Grimm v. Laird[88] was based on the revocation of the security clearance of George W. Grimm for homosexual conduct. The case was initiated, ironically, when Grimm successfully resisted an extortion attempt.[89] The would-be blackmailer, however, carried out his threat to report the plaintiff's homosexual activity to the Federal Bureau of Investigation.

Two and one-half years later, in July, 1963, the plaintiff was interviewed by agents of the Office of Naval Intelligence concerning the blackmail incident and his homosexual activity in general.[90] Grimm voluntarily discussed these matters and furnished the government with a written statement admitting his conduct. In April of 1964, he was informed by letter that the Screening Board had revoked his security clearance; accompanying the letter was a "Statement of Reasons" for that determination.[91] The statement set forth the criteria upon which the action was based but did not attempt to pinpoint the relationship between the homosexual activity alleged and the risk of divulging classified information.[92] The decision of the Screening Board was upheld twice on appeals at the administrative stage.

The court, in a brief opinion, disposed of the case, essentially, in one paragraph:

> The Central Board's findings and determination violated due process in that no sufficient rational nexus was shown between plaintiff's homosexual conduct and the determination that granting him access to classified defense information is not clearly consistent with the national interest.[93]

88 — F. Supp. —, Civil No. 173-71 (D.D.C., Sept. 27, 1971). Another case now pending before the same court should also be noted here. Wentworth v. Laird, Civil No. 149-71 (D.D.C., filed Jan. 19, 1971), involves a New Jersey resident who had his security clearance suspended for alleged homosexual activity. Wentworth, like Gayer, Grimm and Ulrich, has publicly admitted his homosexuality in an attempt to undermine the government's blackmail contention. The case has been before the court longer than the other three cases basically due to procedural infighting. Interview with Dr. Frank Kameny, Lay Counsel to the Mattachine Society, in Washington, D.C., Oct. 13, 1971.

89 — F. Supp. —, Civil No. 173-71.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

The case was heard upon cross motions for summary judgment.[94] The court denied the defendant's motion, granted the plaintiff's and remanded to the Central Board for a determination of the degree of relationship, if any, between the conduct and the employment.[95]

The very next day, the same court decided *Gayer v. Laird*[96] and *Ulrich v. Laird*[97] in favor of the homosexual plaintiffs and basically on the same grounds. *Gayer* was precipitated when the plaintiff, in completing a questionnaire to update his security clearance, admitted his membership in two homophile organizations. In July of 1969 he was interviewed by a special agent of United States Army Intelligence. Gayer admitted his membership in the organizations but refused to answer questions concerning his homosexual conduct on the ground of irrelevancy. The Screening Board determined that its purposes could be accomplished if the plaintiff answered certain written interrogatories.[98] In response, Gayer admitted that he was a homosexual and intended to continue to engage in homosexual activity, but refused to answer more specific questions contending that his privacy would be violated.

In March of 1970, the plaintiff was informed that his security clearance had been suspended for "willful failure or refusal to provide . . . information" which the defendants deemed "essential to a well-informed determination" of whether a continuance of his security clearance was consonant with the national interest.[99]

The district court based its decision on a lack of a rational nexus and the first amendment's guarantee of privacy:

> In normal circumstances, there is a right under the First

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94 *Id.*

95 *Id.*

96 — F. Supp. —, Civil No. 174-71 (D.D.C., Sept. 28, 1971).

97 — F. Supp. —, Civil No. 203-71 (D.D.C., Sept. 28, 1971).

98 — F. Supp. —, Civil No. 174-71. Some of the questions asked were as follows:

"II.

"Have you ever engaged in any homosexual act(s) or any act(s) of sexual perversion with (an)other male person(s)?

"III.

"(If the answer to Question II. is 'Yes,' answer the following):
"1. Name or describe the sexual acts engaged in with other male(s):
"2. Approximately how many such acts have occurred?
"3. Dates (approximate) or the period within which such acts have been engaged in:
"4. Where were such acts performed?

* * *

"6. What were the circumstances leading to the last such act? (Be specific as to where, when . . . the act was performed)."

Id.

99 *Id.*

> Amendment for an individual to keep private the details of his sex life, and this applies to homosexuals, professed or otherwise. . . .
> In connection with professed homosexuals, a category into which plaintiff falls, where a man has admitted that he is a homosexual and will continue to be one, there must be proof of a nexus between that condition and his ability effectively to protect classified information.[100]

Unlike *Grimm*, the court in *Gayer* restored the security clearance on its own motion while recognizing the right of the defendants to "review plaintiff's eligibility for continuation of his security clearance . . . so long as they proceed on the basis of information which excludes the type of detail" which they had previously required.[101]

Ulrich v. Laird,[102] like *Grimm*, was before the court on cross motions for summary judgment. The government, at the administrative stage, followed the same procedure as it had in *Gayer*—termination of the security clearance based on the plaintiff's refusal to answer interrogatories concerning his homosexual activities.[103] Ulrich admitted that he was a homosexual and that he intended to continue as such but refused to reply to the more specific questions.[104] The district court granted the plaintiff's motion and denied the defendants' again based on the right of privacy and lack of a rational relationship.

If the three decisions are employed as precedent by future courts in future cases, which will, of course, be dependent on the appellate action taken on the cases, several predictions can be made. First, courts will not condone the circuitous agency tactic of suspending a security clearance ostensibly for the homosexual's refusal to answer interrogatories when the actual basis is the condition of homosexuality itself. Secondly, the homosexual's privilege not to answer questions concerning his private sex life is protected by the first amendment. Finally, future agency suspensions must be status rather than activity oriented. In other words, given the homosexual's right not to answer questions

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100 *Id.*

101 *Id.*

102 — F. Supp. —, Civil No. 203-71.

103 *Id.*

104 *See* Clifford v. Shoultz, 413 F.2d 868 (9th Cir. 1969) where the court held that the plaintiff's security clearance was validly revoked for his refusal to answer interrogatories aimed at his relations with the Cuban Communist Party. The court cautiously noted, however:

> We do not now face such a case, but if some future proceeding might contain *irrelevant questions or questions of doubtful relevancy infringing upon the protectible interests of one under inquiry*, and if that person failed to obtain relief through administrative appeals within the Department of Defense, nothing in this opinion would preclude him from seeking judicial review and relief.

Id. at 878 n.7 (emphasis added).

pertaining to his private sex life, the agency will be forced to suspend or terminate his employment solely because of the individual's status as a homosexual. In order to have the suspension or dismissal upheld, however, the agency will be required to substantiate the relationship between the *condition* of homosexuality and job inefficiency.

McConnell: A GIANT STEP BACKWARD

A few short weeks after the *Grimm, Ulrich* and *Gayer* decisions, the Court of Appeals for the Eighth Circuit, in *McConnell v. Anderson*,[105] reversed the lower court's decision to enjoin the University of Minnesota from denying plaintiff's appointment as a head librarian, on the grounds that his publicized homosexuality was not consistent with the best interest of the University. McConnell and another male had applied for a marriage license in Minneapolis. Although the license was denied, the University contended that the application amounted to a public confession of criminal acts. The lower court found no evidence of criminality and viewed the University's allegations as merely speculative.[106] They commented that to deny McConnell his right to employment based upon such speculation was clearly violative of his fourteenth amendment privileges, and further stated:

> An [*sic*] homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional manner.[107]

On appeal, the University maintained that the trial judge had exceeded his authority by substituting his own judgment for that of the University in a legitimate action taken by the Board of Regents. The court recognized that the Board was "vested with plenary and exclusive authority to govern, control and oversee the administration of the University," but stated that it had the power to determine whether the Board had exceeded its constitutional bounds. The discretion of the Board was subject to "such judicial review as normally is available to litigants allegedly aggrieved by administrative action generally."[108]

The court repudiated the University's contentions on appeal but proceeded to reverse, imposing its own rationale. After distinguishing the factual pattern of the case from other situations which presumably would have been more palatable to the court, it encapsulated its rationale in an *ad hominem* attack on the defendant:

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105 — F.2d — (8th Cir., Oct. 18, 1971).
106 McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970).
107 *Id.* at 814.
108 — F.2d at —.

It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the 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 upon his employer, who is, in this instance, an institution of higher learning. We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands. We are therefore unable fairly to categorize the Board's action here as arbitrary, unreasonable or capricious.[109]

The logical extension of the Court's reasoning in this case results in a new definition of private conduct. Not only must the homosexual engage in his sexual activities in private, he must keep the fact that he engages in such conduct a private matter. The court was clearly offended by McConnell's attempt to "foist" his situation on the University (and the court) and decided the case on the basis of his audacity rather than the issues at hand. Hence, the one encouraging aspect of the decision for homosexuals, especially if it is appealed further, is its content.

CONCLUSION

As has been stated, the new principles which have been established in the *Grimm*, *Gayer*, and *Ulrich* decisions will be adaptable to other factual situations. This trilogy challenged an area in which the agencies' position is strongest—the security clearance. If homosexuals are allowed to hold jobs which involve national security they should, notwithstanding *McConnell*, certainly be allowed to hold ones which do not.

Although there is some slight evidence to the contrary, the policy of the agencies remains static. The dilatory tactics of reinstating homosexuals rather than adjudicating test cases and suspension for failure to provide specific information only serve to accentuate the agencies' desire to keep their policy intact. Previous commentators have exhibited dubiety that change could be effected by anyone other than the agencies themselves.[110] The molding of test cases by homophile groups

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109 *Id.* at — (footnotes omitted).

110 *See* Comment, *supra* note 72, at 1751:

As indicated by the preceding analysis, it may be that courts would find sufficient legal justification for the exclusion of homosexual workers from the Civil Service and from private employment requiring industrial security clearance. Moreover, it is unlikely that the courts will be afforded opportunity to review basic government policies, apart from an action by a professed homosexual for security clearance or a class action challenging the basic policy decisions of the Civil Service Commission. The inability of the courts to intervene

coupled with continued inaction by the agencies, however, sets the stage for judicial rectification of the problem.

Courts do not lack precedent to be employed in the remedy of the problem stated herein. The right to earn a living in a chosen profession has been recognized,[111] as has that to pursue private sexual preferences.[112] The judiciary, therefore, possesses both the implements and the forum to compel the reformation of a governmental policy which remains, to the detriment of a significant portion of the male population, both irrational and intractable.

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in the case of homosexual employment, coupled with the lack of nonhomosexual spokesmen for the interests of homosexual workers, creates a situation where the governmental process does not offer adequate protection to a minority group which lacks the political resources to protect itself.

Thus, the responsibility for establishing rational and equitable employment policies rests squarely on the Department of Defense and the Civil Service Commission. If these agencies choose not to act, it seems unlikely that the government-created employment disabilities of the homosexual worker will be alleviated in the near future.

111 Greene v. McElroy, 360 U.S. 474 (1959).

112 Griswold v. Connecticut, 381 U.S. 479 (1965). The rationale of Justice Goldberg's concurring opinion in *Griswold* is being increasingly employed in cases involving governmental constraints on private sexual conduct. *See In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971) (denial of naturalization based on the fact that the petitioner was a homosexual held to be violative of ninth amendment right to privacy); Mindel v. Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970) (dismissal of postal clerk for living with a woman to whom he was not married held to be a denial of ninth amendment guarantee).