COMMENT: OUT OF THE CLOSET, OUT OF A JOB: DUE PROCESS IN TEACHER DISQUALIFICATION

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Introduction

"Out of the closet" has been a rallying cry for gays in recent years. Unfortunately, for many who act upon this exhortation, coming out of the closet leads into limbo. The individual who takes that step risks not only public censure, but also the loss of employment or license to practice a profession. The threat exists not only for gays who openly acknowledge their sexual orientation and work for political reform and public acceptance of homosexuality, but also for those whose closet doors have been unsealed by zealous protectors of the public morality.[1]

In general, the government may neither deprive an individual of a valid property interest in employment,[2] nor impose a stigma which forecloses employment opportunities,[3] for reasons which are arbitrary and discriminatory.[4] Due process entitles an individual to notice and a hearing when these constitutionally protected interests are threatened.[5] Furthermore, public employment may not be conditioned on the surrender of constitutional rights, although the government does possess an interest in regulating the conduct of its employees to further its efficiency.[6]

Where homosexuality is the basis for dismissal or license revoca-

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1. *Compare, e.g.*, Gish v. Board of Educ., 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied*, 434 U.S. 879 (1977) (teacher's gay activism evidenced deviation from mental health justifying psychiatric examination and possible dismissal) *with* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (teacher for over twelve years whose friends on the faculty did not know he was gay dismissed for immorality after a former student reported to the administration his impression that the teacher was a homosexual).

2. Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

3. *Id.* at 573-74.

4. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 192 (1952). *See also* Board of Regents v. Roth, 408 U.S. at 589 (Marshall, J., dissenting).

5. Bell v. Burson, 402 U.S. 535, 542 (1971).

6. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

tion and the individual possesses a valid property interest or has been stigmatized by the government's action, the reasons for the disqualification may appear arbitrary to some yet quite reasonable to others.[7] A review of the case law concerning disqualification of gay employees reveals the operation of subjective moral attitudes in the decisions of school boards and reviewing courts.[8] Where such personal prejudice dictates the standard by which an individual is to be judged, this comment suggests that procedural due process has failed to achieve its objective of guarding against arbitrary and discriminatory governmental action. Moreover, First Amendment rights of activist gay employees may be unreasonably "chilled" if embarrassment to the employer[9] or notoriety[10] is held to justify disqualification in the interest of governmental efficiency. Because of the fear that young minds will be adversely influenced, teachers are particularly vulnerable to disqualification for unorthodox sexual conduct or attitudes;[11] yet a teacher's affectional preference may have no bearing on his or her competence in the classroom.[12]

The Supreme Court has denied certiorari in numerous cases contesting the employment disqualification of gays.[13] At the same time, its

7. *Compare, e.g.*, Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) *with* Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). In *Gaylord*, a teacher's status as a known homosexual justified dismissal for "immorality" in the eyes of the majority; to the dissenters, however, the dismissal's basic unfairness violated due process, 88 Wash. 2d at 306, 559 P.2d at 1351 (Dolliver & Utter, JJ., dissenting). The majority in *Morrison* held that homosexual conduct could not justify dismissal unless it demonstrated unfitness to teach, but two separate dissents saw a rational connection between the acts committed and unfitness, 1 Cal. 3d 214, 247, 251, 461 P.2d 375, 400-01, 403-04, 82 Cal. Rptr. 175, 200, 203 (Sullivan, J., joined by McComb, J., dissenting) (Burke, J., joined by McComb, J., dissenting).

8. In the words of one court: "Immorality means different things to different people, and its definition depends on the idiosyncracies of the individual school board members." Burton v. Cascade School Dist., 353 F. Supp. 254, 255 (D. Ore. 1973), *aff'd* 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

9. *See, e.g.*, Singer v. United States Civil Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976), *vacated and remanded*, 429 U.S. 1034 (1977).

10. *See* Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 237, 461 P.2d 375, 392, 82 Cal. Rptr. 175, 192 (1969).

11. For a discussion of the argument that teachers should be held to a higher standard of conduct than other professionals, see Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CAL. L. REV. 1442, 1457-61 (1973).

12. In one case, for example, the teacher had received "consistently favorable" evaluations of his teaching performance over the twelve years he taught high school before his sexual orientation became known. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 300, 559 P.2d 1340, 1347 (Dolliver, J., dissenting), *cert. denied*, 434 U.S. 879 (1977).

13. *E.g.*, Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

refusal to include private, consensual homosexual acts[14] within the ambit of the "right to privacy" covering marital[15] and some non-marital[16] heterosexual conduct weakens the argument that those who engage in such conduct should be afforded employment protection. On the other hand, some states, notably California, have adopted an approach which attempts to establish whether the unconventional conduct renders an individual unfit to practice his or her profession.[17] The Civil Service has progressed even further by issuing regulations safeguarding gay employees from disqualification solely because of their sexual preference or because employment of a homosexual might embarrass the Service.[18] It will be contended that this approach is preferable, as it leaves less room for the operation of subjective values in assessing an employee's fitness.

California established the requirement of a nexus between homosexuality and occupational fitness for teacher disqualification in the seminal case of *Morrison v. State Board of Education*.[19] The spirit of *Morrison* has been frequently violated,[20] however, and the protection it appears to furnish may evaporate under the heat of majoritarian prejudices.[21] Private, consensual sexual conduct and conduct otherwise protected under the First Amendment should be accorded legislative protection; yet this is unlikely to occur because legislatures are more apt to respond to pressure based on popular sentiment than to the need for protecting the constitutional rights of an unpopular minority.

14. *See* Doe v. Commonwealth's Att'y, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (constitutionality of Virginia's criminal statutes prohibiting sodomy and oral copulation upheld as applied to private consensual conduct).

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

16. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972).

17. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

18. 5 C.F.R. pt. 731, § 731.202(b) (1978).

19. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

20. *See, e.g.*, Newland v. Board of Governors, 19 Cal. 3d 705, 714 n.11, 566 P.2d 254, 259 n.11, 139 Cal. Rptr. 620, 625 n.11 (1977) (Supreme Court rejected defendant Board's argument that teacher convicted ten years earlier of an act of masturbation in a closed toilet stall in a bus station was unfit to teach as a matter of law); Board of Educ. v. Millette, 133 Cal. Rptr. 275 (1976), *vacated sub nom.* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977) (teacher's alleged solicitation of homosexual act in a public restroom viewed by court of appeal as demonstrating unfitness to teach as a matter of law); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (extramarital sexual acts at a "swinger's" party evidenced teacher's unfitness to teach principles of morality to retarded children).

21. The strength and nature of these prejudices is evidenced by California Proposition 6, General Election, November 7, 1978, which provided for filing charges against school employees for "advocating, soliciting, imposing, encouraging or promoting private or public" homosexual acts "in a manner likely to come to the attention of other employees or students." Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1978), p. 29. This initiative was, however, defeated.

This comment contends that state supreme courts, if afforded the opportunity to consider the issue, should recognize the constitutional dimensions of disqualification of homosexual teachers and other employees and delineate areas of protection under their state constitutions. Part I outlines the contours of due process in employment disqualification cases established by the United States Supreme Court. In Part II, substantive standards applicable to the disqualification of homosexual employees, as developed in federal and state courts and by the Civil Service, will be explored. Part III will discuss how these standards are applied, the problems inherent in their application and what results have been obtained. Finally, in Part IV, considerations leading toward more objective standards of due process applicable to gay teachers will be discussed. It will be concluded that the state constitution is a proper, and perhaps necessary, basis for protecting teachers and other employees from dismissal or license revocation due to sexual orientation.

I. Constitutional Protection for Public Employees

A. Procedural Due Process

Under the Fifth and Fourteenth Amendments, an individual's interest in public employment has emerged as constitutionally protected.[22] Because procedural fairness must be observed whenever disqualification of a public employee threatens a liberty or property interest,[23] due process entitles the individual to notice of the reasons for denial of government employment and an opportunity for a hearing on disputed issues of fact.[24] The aim of these procedures is to insure that government action is not arbitrary or capricious,[25] but because a liberty or property interest is required before any process becomes due, such governmental action may be allowed to stand if the existence of a protectable interest is not established. Since the Supreme Court has narrowed the concept of both liberty and property interests, procedural due process has been held to be unnecessary in many instances. Moreover, even when some form of hearing is mandated, a full-scale pretermination hearing is not always constitutionally required. For

22. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

23. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972).

24. Perry v. Sindermann, 408 U.S. 593, 601-03 (1972).

25. Board of Regents v. Roth, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting): "[I]t is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."

some employees, procedural due process is thus but a hollow guarantee.

1. Liberty

A liberty interest may be infringed when the state imposes a stigma or other disability that forecloses one's freedom to take advantage of other employment opportunities.[26] In *Board of Regents v. Roth*,[27] the conditions that would impose a stigma were expressed as "a charge . . . that [the employee] had been guilty of dishonesty, or immorality."[28] Roth, hired to reach for one year, was informed that he would not be rehired but was given no explanation. He alleged that the true reason for his non-retention was his criticism of the university administration and contended that the university must provide some justification for its actions. The Court held that no liberty interest was implicated in *Roth* because no such charges had been made and no regulations had been invoked to bar Roth from public employment at other state universities; therefore he need not be afforded a hearing.[29] Similarly, in *Cafeteria Workers Local 473 v. McElroy*,[30] the denial of a hearing was upheld when a cook at a naval gun factory was discharged for her failure to gain a security clearance. The Court stated that her removal had imposed no "badge of disloyalty or infamy"[31] and that she was free to obtain employment elsewhere.

In addition to the imposition of a stigma, public disclosure of the reasons for an employee's discharge is a prerequisite to finding a deprivation of liberty. Thus, in *Bishop v. Wood*,[32] a policeman who had been dismissed based upon charges which he claimed were false could not claim infringement of a liberty interest because the reasons for his dismissal were communicated in private.[33] Absent public disclosure, no injury to the employee's reputation was inflicted by the government. The boundaries of the liberty interest were also tightened in *Paul v. Davis*.[34] The Court there held that damage to reputation alone does

26. *Id.* at 573 (majority opinion).

27. 408 U.S. 564 (1972).

28. *Id.* at 573.

29. *Id.* The thrust of the Court's holding is that no reason for dismissal or nonretention need be given if an employee does not possess a protected property interest. *See* note 42 and accompanying text *infra*.

30. 367 U.S. 886 (1961).

31. *Id.* at 898.

32. 426 U.S. 341 (1976).

33. *Id.* at 348-49. *See also* Codd v. Velger, 429 U.S. 624, 628 (1977) (*per curiam*) (employer must create and disseminate a false and defamatory impression in order for employee to merit a hearing).

34. 424 U.S. 693 (1976). The petitioner in *Paul* contended that police officers had imposed a stigma upon his reputation by circulating a flyer to local merchants that falsely designated him as an "active shoplifter."

not deprive an individual of protected liberty; rather, it must be coupled with deprivation of some other tangible interest, such as a loss of public employment, in order to invoke procedural protection.[35] If an employee's reputation is thereby imperiled, he would be entitled to notice of the charges and a hearing for the purpose of proving them untrue and clearing his name, although the prospective employer would remain free to deny employment for other legitimate reasons.[36]

The requirement that these three factors—imposition of a stigma, public disclosure of the reasons for the discharge and deprivation of a tangible interest above and beyond damage to reputation—be present has thus reduced the number of instances when an employee can claim a right to procedural due process. In a manner similar to the Court's approach to liberty interests, the concept of what constitutes a property interest has also been limited.

2. Property

To trigger due process protections, a property interest must be more than "an abstract need or desire"[37] or a "unilateral expectation"[38] of a benefit. Whether a sufficient claim of entitlement to continued state employment exists is controlled by state law.[39] Thus, where a teacher has been granted tenure under state law, he or she may not be summarily dismissed without notice and a hearing.[40] In *Slochower v. Board of Higher Education*,[41] the Court held that a tenured teacher who had exercised his privilege against self-incrimination during a Senate hearing could not be discharged without a hearing, even though a state statute provided for automatic termination of tenure in such cases, because such summary action unconstitutionally deprived the teacher of a property interest. In contrast, no protected property interest was found in *Board of Regents v. Roth*[42] because his one-year contract made no provision for renewal.

The Court in *Roth* reiterated, however, that individuals who had been dismissed during the terms of their contracts or who could show a clearly implied promise of continued employment are entitled to due process.[43] This dicta is consistent with the decision in *Perry v.*

35. *Id.* at 701.
36. Board of Regents v. Roth, 408 U.S. 564, 573 n.12 (1972).
37. *Id.* at 577.
38. *Id.*
39. Bishop v. Wood, 426 U.S. 341, 344-47 (1976). *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (statute defining welfare eligibility held to create a property interest); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (contract created entitlement).
40. Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972).
41. 350 U.S. 551 (1956).
42. 408 U.S. 564, 578 (1972).
43. *Id.* at 577 (quoting Connell v. Higginbotham, 403 U.S. 207, 208 (1971)).

Sindermann,[44] wherein the Court ruled that a teacher who had held his faculty position for four years in reliance upon a de facto tenure provision could establish a legitimate claim of entitlement. The Court cautioned, though, that "[i]f it is the law [of the state] that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated."[45] Therefore, if a state's employees hold their positions at the will and pleasure of their employer, they may be dismissed without a hearing. In those cases, the only restriction on the public employer's action is that it not be "motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights . . . ."[46]

3. The Right to Notice and a Hearing

Once an employee has established the existence of a sufficient liberty or property interest, he or she is entitled to notice and a hearing to determine the adequacy of cause for dismissal.[47] While notice must include the reasons for the termination and the procedure to be followed for protesting it,[48] due process does not require a full evidentiary hearing in every case.[49] The extent of the process which is due instead depends on a balancing of the government's interest in expeditious removal of an employee whose conduct hinders the efficiency of public service against the weight of the property interest possessed by the employee, taking into account the seriousness and permanence of the threatened loss.[50]

A pretermination, adversary-type hearing was not required in *Arnett v. Kennedy*[51] because an act of Congress authorized dismissal solely for "cause" and mandated an evidentiary hearing only upon appeal, with the proviso that a wrongfully discharged employee would

44. 408 U.S. 593 (1972).

45. *Id.* at 602 n.7.

46. Bishop v. Wood, 426 U.S. 341, 350 (1976). *But see* Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) (even where plaintiff establishes that constitutionally protected conduct was a motivating factor in a decision not to rehire, reinstatement will be denied if the board can establish by a preponderance of evidence that it would have reached the same decision in absence of violation of a constitutional right). For criticism of Supreme Court decisions limiting due process protection of property and liberty interests, see Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

47. Arnett v. Kennedy, 416 U.S. 134, 166 (1974) (Powell, J., joined by Blackmun, J., concurring in part and concurring with the result in part). *But see* note 36 and accompanying text *supra*.

48. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-15 (1978).

49. Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 894 (1961).

50. Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., joined by Blackmun, J., concurring in part and concurring with the result in part).

51. 416 U.S. 134 (1974).

receive full back pay if reinstated.[52] The balance in *Arnett* was tipped in favor of the government's "substantial" interest in prompt removal of an unsatisfactory employee, which was found to outweigh the temporary deprivation of income Arnett would suffer if he prevailed on the merits on appeal.[53] In addition, pretermination procedures, although not full-scale hearings, were found to minimize the risk of error in removal decisions.[54] Although a majority of the Court agreed that governmental discretion to determine whether an employee's conduct interferes with its operation must be exercised fairly and reasonably to comport with constitutional due process requirements, the Court split as to the weight to be accorded competing interests in determining what procedures were necessary. In his concurring opinion, Justice Powell emphasized the government's interest in maintaining discipline and efficiency;[55] the dissenters, on the other hand, emphasized the importance of the employee's interest in retaining his or her job, and viewed a temporary suspension of income as a significant loss, meriting more procedural protection than was afforded.[56]

52. Lloyd–LaFollette Act, 5 U.S.C. §§ 5596, 7501 (a) (1976); 5 C.F.R. § 771.208 (1978). Arnett, a nonprobationary employee of the Office of Economic Opportunity, had his employment terminated after he publicly accused superiors of offering bribes of federal funds to a community organization if the organization would sign a statement against Arnett. The accusations were allegedly false and resulted in his removal "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501 (a) (1976). The dissenters in *Arnett* argued that the efficiency of the service standard would permit dismissal for even truthful criticism of an agency. 416 U.S. 134, 229 (1974) (Marshall, J., joined by Douglas & Brennan, J.J., dissenting).

53. Three members of the Court, Justice Rehnquist, the author of the plurality opinion, Chief Justice Burger and Justice Stewart, believed that a state statute or act of Congress which confers a property interest in employment and also specifies procedural limitations on the type of hearing required should be viewed as procedurally adequate. The plurality opinion stated: "[A] litigant in [Arnett's position] must take the bitter with the sweet." 416 U.S. at 154. Justices Powell and Blackmun, however, noted that procedural due process is a constitutional guarantee, not a matter of legislative grace as suggested by the plurality, but agreed that Arnett had received appropriate procedural protection. 416 U.S. at 166-67, 169-70 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result).

54. 416 U.S. at 154-55. The act required that an employee be given 30 days advance written notice with an opportunity to respond to the charges and appear before the official who was authorized to make the removal decision. 5 U.S.C. § 5596 (1976); 5 C.F.R. §§ 771.208, 772.305 (1978). Compliance with the act created an irony in Arnett's situation because the official authorized to remove Arnett was the director he had allegedly slandered. 416 U.S. at 155 n.21. A majority of the Court, however, did not perceive a need for an impartial decision–maker. 416 U.S. at 155-56 n.12, 170 n.5 (Powell, J., joined by Blackmun, J., concurring in the result).

55. 416 U.S. at 168 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the result in part).

56. *Id.* at 218-27 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting). Justice Marshall also pointed out that almost one–fourth of all appeals from agency dismissals result in a finding that the termination was illegal. *Id.* at 218-19. Justice White generally agreed with Justice Powell's analysis, but believed that an impartial decision–maker was

By tightening the boundaries of what constitutes a liberty or property interest and eliminating any obligation to provide a full-scale, pretermination hearing, the decisions in *Roth, Bishop, Davis* and *Arnett* offer little assurance to the employee who does not satisfy the prerequisites set forth therein. Even if he or she does meet these judicial requirements, procedural due process merely guarantees a hearing; it does not insure that the individual will be reinstated absent compelling or even important reasons for his or her removal.[57] An employee's right to substantive due process, on the other hand, guarantees that his or her dismissal will not be based on arbitrary or capricious grounds. This substantive component of due process will be discussed in the next section.

B. Substantive Due Process

The idea of what constitutes "fair" cause for disqualification consistent with substantive due process has not been adequately developed by the Supreme Court. While it may be assumed that removal on racial, ethnic or religious grounds would be unconstitutionally arbitrary,[58] the propriety of removal based on a teacher's homosexuality is less clear due to societal myths which equate homosexuality with incompetency to be a schoolteacher. Moreover, courts are often reluctant to substitute their judgment for that of legislative and administrative tribunals, thus leaving to them the question of when the dismissal of a gay teacher is constitutionally "fair."[59]

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required. *Id.* at 196-99 (White, J., concurring in part and dissenting in part). *But see* note 54 *supra*.

57. Some interests which merit procedural due process are considered "fundamental," and statutes impinging on those interests thus require a greater showing of justification than the ordinary "rational basis" test. *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (statute permitting garnishment of wages without notice and hearing violated due process property rights); Loving v. Virginia, 388 U.S. 1, 12 (1967) (antimiscegenation statute violated due process liberty interest in right to marry). Most statutes touching on liberty or property rights, however, must demonstrate only a rational connection between the regulation and a legitimate state interest. *See, e.g.*, Kelley v. Johnson, 425 U.S. 238 (1976) (regulation of length and style of policemen's hair bore rational relation to organization of police force and promotion of safety); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning regulation restricting land use to one-family dwellings housing not more than two unrelated individuals bore a rational relation to community interest in encouraging family values). *But see* Moore v. East Cleveland, 431 U.S. 494 (1977) (ordinance which effectively prevented two cousins from residing with their grandmother arbitrarily infringed on the institution of the family, a basic traditional value deserving of greater constitutional protection).

58. In analyzing the dismissal of a teacher when his homosexual status became known, a dissenting justice queried: "What if Mr. Gaylord's status was as a black, a Roman Catholic, or a young heterosexual single person, instead of a male homosexual? Would his dismissal be handled in such a manner?" Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 305, 559 P.2d 1340, 1350, *cert. denied*, 434 U.S. 879 (1977) (Dolliver, J., dissenting).

59. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963). *Ferguson* articulated the Court's

Homosexual conduct or status may result in employment disqualification through an administrative determination that the employee has exhibited "immorality" or "moral turpitude."[60] Few courts have been willing to assess the substantive fairness of such determinations, yet disqualification predicated on these reasons alone seems patently arbitrary. A teacher who has served competently for years may suddenly be deemed "unfit" when his or her sexual preference becomes public knowledge, simply by equating majoritarian moral values with standards of employment fitness.[61] It follows that even if an employee is entitled to procedural due process, the hearing given may be nothing more than a formality when such notions of morality underly the application of legislative criteria in judging an employee's fitness.[62] Thus, where procedural protections have been observed, many courts avoid the issue of whether it is fair to use such subjective, value-laden criteria.[63] This avoidance, as indicated above,[64] may stem from judicial distaste for infringing on legislative or executive prerogatives. Nevertheless, some courts have confronted this issue and have overturned morally-based disqualifications in areas other than homosexuality. For example, courts have found an insufficient connection between

distaste for the "superlegislature" judicial role established in Lochner v. New York, 198 U.S. 45 (1905) and other cases in which state economic regulations were invalidated as infringements on personal liberty rights. 372 U.S. at 731 (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)). Although reluctance to scrutinize legislative line-drawing is most obvious in cases where economic decisions are at issue, it may also be observed in the deferential stance of some courts and justices in other contexts. Justice Rehnquist, for example, has frequently criticized the "irrebuttable presumption doctrine" as an attack on legislative line-drawing. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441, 469 (1973) (Rehnquist, J., joined by Burger, C.J. & Douglas, J., dissenting) (permanent irrebuttable presumption of nonresidency for tuition purposes struck down). The dissent stated: "The [majority's decision] is quite inconsistent with doctrines of substantive due process that have obtained in this Court for at least a decade, and to which I would continue to adhere." *See also* Cleveland Board of Educ. v. LaFleur, 414 U.S. 632, 660 (1974) (Rehnquist, J., joined by Burger, C.J., dissenting) (irrebuttable presumption of pregnant teachers' incapacity at a specified stage of pregnancy violated due process clause). Justice Rehnquist asserted: "The Court's disenchantment with 'irrebuttable presumptions,' and its preference for 'individualized determination,' is in the last analysis nothing less than an attack upon the very notion of lawmaking itself." *Id. See also* Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

60. *See* notes 187-90 and accompanying text *infra*.

61. *See, e.g.*, Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

62. For a discussion of the relationship between substantive due process and cases involving conventional morality, see Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417 (1976).

63. *See, e.g.*, McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970); McLaughlin v. Board of Medical Examiners, 35 Cal. App. 3d 1010, 111 Cal. Rptr. 353 (1973).

64. *See* note 59 and accompanying text *supra*.

conduct and employment fitness where conviction of a crime barred an individual from practicing law,[65] an unwed mother from being an elementary school teacher[66] and persons convicted of marijuana possession from holding certain jobs.[67] Yet reviewing courts rarely fail to find such a nexus when homosexual conduct or status is at issue, perhaps because of the strength of public opprobrium attached thereto.

In theory, the independence of the judiciary should ensure the protection of the rights of unpopular minorities—including those of homosexuals. Since one function of the judiciary is to assure that legislative and administrative procedures comport with due process, there should be no barrier to judicial assessment of the fairness of any criteria against which an employee has been measured. As indicated earlier, procedural due process does not always guarantee a hearing. Nor, as just demonstrated, has the judiciary adequately defined the role of substantive due process in such hearings. A third constitutional alternative, the doctrine of unconstitutional conditions, offers a different, and perhaps more promising, approach to the problem.

C. Doctrine of Unconstitutional Conditions

Although the government generally has broad discretion to determine what conduct interferes with the efficiency of public service, the doctrine of unconstitutional conditions prohibits it from conditioning employment or receipt of a benefit on the surrender of constitutional rights. This is particularly relevant with respect to First Amendment rights, as stated in *Perry v. Sindermann*:[68]

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[69]

While a valid entitlement to continued employment is necessary in order to trigger procedural due process, it is immaterial where disqualification is predicated on an unconstitutional condition.[70] Thus, even though an employee cannot demonstrate state infringement of a protected liberty or property interest, if he or she has been disqualified because of the exercise of constitutional rights, a remedy may be af-

65. Hallinan v. Comm. of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

66. Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975).

67. *E.g.*, Vielehr v. State Personnel Bd., 32 Cal. App. 3d 187, 107 Cal. Rptr. 852 (1973).

68. 408 U.S. 593 (1972).

69. *Id.* at 597.

70. *Id.* at 597-98.

forded.[71] The doctrine of unconstitutional conditions may be particularly applicable when gay employees are dismissed for off-duty activities aimed at educating the public and working for political and social reforms. The limits on permissible governmental regulation of its employees' conduct imposed by this doctrine are explored below.

1. Parameters of the Doctrine

Although public employment may not be conditioned on the surrender of First Amendment rights,[72] public employees may be treated differently as a class in their exercise of these rights. This stems from the premise that the state "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[73] The Hatch Act,[74] for example, which prohibits federal employees from taking an active part in political campaigns, was upheld in *United States Civil Service Commission v. National Association of Let-*

71. In analyzing a condition on employment, a court may scrutinize a statute for vagueness or overbreadth, attempting to determine whether the government's action serves an important purpose which cannot be achieved through less drastic means. A statute is vague on its face if its terms are so ambiguous that a person of common intelligence cannot determine what conduct is prohibited. *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972). Courts will generally construe, rather than invalidate, vague civil statutes. *See, e.g.*, Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). If a statute restricts speech, however, it will be susceptible to a vagueness challenge because of the value placed on free expression and the danger of chilling protected speech. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611 (1971); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961). A statute authorizing dismissal of public school teachers for "treasonable or seditious" utterances was held unconstitutionally vague in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

Regulations may be held overbroad if the governmental interest is not substantial, if the means employed bear little relation to the interest sought to be protected or if the purpose could be achieved by less drastic means. *See* Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193, 217-19. *See generally* Note, *Less Drastic Means and The First Amendment*, 78 YALE L.J. 464 (1969). The Court in *Keyishian* also held statutes which barred employment to members of listed organizations to be impermissibly overbroad because "membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion." 385 U.S. at 606. An Arkansas statute which required teachers to disclose annually all organizational affiliations was held overbroad in Shelton v. Tucker, 364 U.S. 479 (1960). The Court reasoned that the state's purpose of ascertaining the fitness of teachers could be achieved through narrower means, minimizing the danger that public pressure might cause school boards to "discharge teachers who belong to unpopular or minority organizations." 364 U.S. at 486-87. *But cf.* Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (teacher's omission of his membership in a gay rights organization named "Homophiles of Penn. State" was held to constitute misrepresentation sufficient to bar him from standing to challenge the constitutionality of his disqualification). *See* notes 235 & 236 and accompanying text *infra*.

72. *See* notes 68 & 69 and accompanying text *supra*.

73. Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

74. 5 U.S.C. §§ 7321-7327 (1976).

ter Carriers.[75] The Court maintained that the Act served important governmental interests in limiting corruption, improper influence and coercion of employees, and in avoiding erosion of public confidence in the system of representative government.[76] The majority deferred to congressional and executive judgment that narrower prohibitions would not achieve the desired result.[77]

Letter Carriers permitted an extremely broad Congressional condition on public employment to stand, but the more recent decision in *Elrod v. Burns*[78] indicates that the government must justify any restraint of an individual's First Amendment rights by establishing a compelling interest which cannot be furthered by less drastic means. *Elrod* held that patronage dismissals—conditioning employment on political partisan support—from non-policymaking jobs were unconstitutional. The Court stated that such conditions must survive "exacting scrutiny";[79] the government must demonstrate the existence of a paramount interest which outweighs the restriction of an individual's constitutionally protected rights and that the means chosen are the least restrictive of the individual's protected interests.[80] Since political loyalty did not, in the Court's view, ensure more efficient service to the employer, there was not a sufficient connection between the government's interest and infringement of individual rights.[81] Furthermore, any legitimate interest in employing individuals who would wholeheartedly implement policies could be satisfied by employing the less drastic means of limiting dismissals to policymaking personnel.[82]

The trend toward requiring more than a rational basis to justify a teacher's dismissal for exercising First Amendment rights was initiated in *Pickering v. Board of Education*.[83] Pickering was dismissed from his teaching position for criticizing school board financial policies in a letter containing erroneous statements of fact published in the local paper.[84] His dismissal was upheld by the lower courts, but the Supreme Court reversed. The Court balanced the interests of the teacher in commenting upon matters of public concern against those of the state in promoting the efficiency of the public service.[85] The interest of the

75. 413 U.S. 548 (1973).
76. *Id.* at 565.
77. *Id.* at 566-67. The dissenters, however, noted the "chilling effect of [the Act's] vague and generalized prohibitions" and the irrelevancy of political creed to an employee's job performance. *Id.* at 596-97 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting).
78. 427 U.S. 347 (1976).
79. *Id.* at 362.
80. *Id.* at 363.
81. *Id.* at 364-66.
82. *Id.* at 367.
83. 391 U.S. 563, 567-68 (1968).
84. *Id.* at 564, 566-67.
85. *Id.* at 568.

school administration did not outweigh the teacher's interest in free expression because the statements were "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[86] The requirement of a nexus between a teacher's conduct and job or school efficiency might be met, the Court suggested, if the statements violated an express need for confidentiality, disrupted a necessary close working relationship or evidenced a teacher's general lack of competence.[87] But nonretention of a public employee in reprisal for the exercise of First Amendment rights, such as public criticism of an employee's superiors on a matter of public concern, is impermissible, as reiterated four years later in *Perry*.[88]

These cases demonstrate that the level of scrutiny employed by the reviewing court is extremely important in determining whether a teacher's dismissal effectively operates as an unconstitutional condition, especially when a teacher has been dismissed for advocating an unorthodox cause such as gay rights. "Exacting scrutiny," as employed in *Elrod*, would demand that: (1) the state's interest in protecting children and, arguably, in regulating the content of information flowing into young minds outweigh the teacher's interest in speaking out on matters of public concern; (2) the conduct of the teacher be in conflict with the employment interests asserted by the government;[89] and (3) the dismissal be the least drastic means available to achieve the state's purposes.[90] Some courts, however, have avoided applying such a rigorous analysis in cases where an employee has been dismissed for advocating gay rights.[91] Instead, they have required only a rational

86. *Id.* at 572-73.

87. *Id.* at 570-73.

88. Perry v. Sindermann, 408 U.S. 593, 599 (1972). *See* notes 68 & 69 and accompanying text *supra*. The latest decision in this line of cases, Givhan v. Western Line Cons. School Dist., 99 S. Ct. 693 (1979), applied the *Pickering* analysis to a teacher's *privately* communicated criticism of allegedly racially discriminatory policies of her school. The Court found that the teacher's dismissal would be unjustified if based solely on her constitutionally-protected speech.

89. *See* notes 80 & 81 and accompanying text *supra*. It might also be argued that any claimed relationship between a teacher's off-duty activities in support of gay rights and the state's interest in protecting children arises out of personal prejudices held by members of the school board and is therefore an impermissible justification for dismissal.

90. *See* note 82 and accompanying text *supra*. In this context, it could be contended that regulations prohibiting political activities during school hours or on school grounds, or even barring teachers from identifying themselves as school employees while engaging in political conduct, are permissible and less drastic means than disqualification to achieve a separation between the classroom and teachers' activities protected by the First Amendment of which a school board disapproves.

91. *See, e.g.*, McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). *See* notes 219-23 and accompanying text *infra*.

relationship between the teacher's conduct and the promotion of school efficiency through his or her disqualification. By applying this lower level of scrutiny, a teacher's dismissal will more easily be found to comport with constitutional parameters.

The foregoing discussion illustrates that the Constitution provides a framework for examining the legitimacy of a gay teacher's dismissal through the doctrines of procedural due process, substantive due process and unconstitutional conditions. These theories, however, have failed to provide adequate assurance that a gay teacher will not be dismissed solely on the basis of his or her sexual preference. As will be seen in the next sections, the Supreme Court has not squarely addressed the issue, and the lower court decisions are in conflict.

II. Standards of Due Process for Gay Employees

A. Guidance from the Supreme Court

The Supreme Court has had numerous opportunities to apply the principles outlined in Section I to cases involving homosexual employees. Gays have not only challenged the rationality and fairness of standards which led to their disqualification,[92] but have also raised the issue of an unconstitutional condition on employment when a gay employee's exercise of protected speech and associational rights has led to dismissal.[93] Yet the Court has thus far declined to consider these issues.

The only case involving sexual orientation to which the Court has given more than summary consideration is *Boutilier v. Immigration and Naturalization Service.*[94] In this 1967 decision, the Court upheld the exclusion of a homosexual alien from the United States, relying on a perceived Congressional intent to include homosexuals in the category of "psychopathic personalities" to be barred from entry into the country.[95] The precedential value of *Boutilier* today, however, is questionable. Research into the nature and etiology of homosexuality has burgeoned in recent years;[96] by 1974, greater knowledge and under-

92. *See, e.g., id.*; Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

93. *See, e.g.*, Gish v. Board of Educ., 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied*, 434 U.S. 879 (1977).

94. 387 U.S. 118 (1967).

95. Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(4) (1976). *But cf. In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971), in which an alien who had entered the United States lawfully, acknowledged his homosexuality to public health authorities but was not certified as a sex deviate but was instead found to be of good moral character, satisfying the requirements for naturalization. Immigration and Nationality Act, 8 U.S.C. § 1427 (a)(3) (1976).

96. *See, e.g.*, National Institute of Mental Health Task Force on Homosexuality: *Final Report and Background Papers* (1972); A. BELL & M. WEINBERG, HOMOSEXUALITIES: A

standing of diversity in sexual orientation resulted in the removal of homosexuality from the list of mental diseases by the American Psychiatric Association.[97] Were the Court to reconsider the issues presented in *Boutilier*, its implicit endorsement of the traditional belief that homosexuality is a mental disease might well be withdrawn.

Yet even rejecting the mental disease notion, the Court might nevertheless uphold a blanket exclusion of gays on other grounds,[98] for there are recent indications that the Court will not disturb morally-based limitations on individual rights relating to sexual preference. One of the more discouraging rulings for proponents of gay rights is that in *Doe v. Commonwealth's Att'y.*[99] The Supreme Court in *Doe* summarily affirmed a district court denial of an injunction sought against enforcement of Virginia's criminal sodomy statute where private consensual homosexual acts were involved.[100] The district court

STUDY OF DIVERSITY AMONG MEN & WOMEN (1978); J. MONEY, MAN & WOMAN, BOY & GIRL (1972); and research projects of the Center for Homosexual Education, Evaluation & Research (CHEER), San Francisco State University, California.

97. 9 PSYCHIATRIC NEWS 1 (1974). *See* N. Y. Times, Apr. 9, 1974, at 12, col. 4.

98. For example, conviction of a crime involving "moral turpitude" within five years after entry into the United States will permit deportation if an individual is sentenced to confinement as a result. 8 U.S.C. § 1251 (a)(4) (1976). Private consensual homosexual conduct is criminal in some states, a categorization with which the Supreme Court apparently agrees. These acts, as well as loitering or solicitation in a public place to commit a homosexual act, have been held to constitute crimes involving moral turpitude. *See* Velez–Lozano v. Immigration & Naturalization Serv., 463 F.2d 1305 (D.C. Cir. 1972); Hudson v. Esperdy, 290 F.2d 879 (2d Cir. 1961).

99. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

100. Many states have decriminalized such consensual private acts. *See*, CAL. PENAL CODE §§ 286, 288a (West Supp. 1979); COLO. REV. STAT. §§ 18-3-401, -402, -403 (1978); CONN. GEN. STAT. ANN. §§ 53a-65, -70, -71, -72a, -72b, -73a (West Supp. 1978); DEL. CODE tit. 11, §§ 765, 766, 772, 773 (Supp. 1978); HAW REV. STAT. § 768-71 (1968), *repealed by* 1972 Haw. Sess. Laws, act 9; ILL. ANN. STAT. ch. 38, § 11-2, -3, -4, -5, -9 (Smith-Hurd Supp. 1978); IND. CODE §§ 35-41-1-2, -42-4-2 (1976); IOWA CODE ANN §§ 705.1, -.2 (West 1950), *repealed by* 1976 Iowa Acts, ch. 1245, ch.4 § 526; ME. REV. STAT. tit. 17-A, §§ 251-255 (1978 Pamph.); MINN. STAT. § 617.14 (1964), *repealed by* Minn. Laws, ch. 507, § 12; NEB. REV. STAT. §§ 28-407, -408 (1943), *repealed by* 1975 Neb. Laws, L.B. 23 § 9, N.H. REV. STAT. ANN. § 579.9; N.M. STAT. ANN. § 30-9-11 (1978); N.D. CENT. CODE §§ 12.1-20-01 to -07 (1976); OHIO REV. CODE ANN. §§ 2907.01, .02, .03, .04, .05, .06, .07, .09 (Anderson 1975 and Supp. 1979); OR. REV. STAT. §§ 163.305, .325, .345, .385, .395, .405, .415, .425, .435, .445, .455, .465 (1975-76); S.D. COMPILED LAWS ANN. § 22-22-21, *repealed by* 1976 S.D. Sess. Laws, ch. 158, § 22-8; WASH. REV. CODE §§ 9.79.140, .170, .180, .190, .200, .210, .220 (1977); W. VA. CODE §§ 61-8B-1 to -13 (1977); WYO. STAT. § 6-98 (1957), *repealed by* 1977 Wyo. Sess. Laws, ch. 70, § 3. Decriminalization of private, consensual sodomy and oral copulation may be due primarily to a recognition of the practices of married heterosexuals. *See* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds sub nom.* Wade v. Buchanan, 401 U.S. 989 (1971). *See generally* Note, *Consent, Not Morality, As the Proper Limitation on Sexual Privacy*, 4 HASTINGS CONST. L.Q. 637 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974). In states where homosexual conduct is still criminal, statutes are rarely enforced against consenting adults who act in private. *See Ploscowe, Sex Offenses in the New Penal Law*, 32

had required only a rational basis to justify the statute, readily found in the state's interest in promoting morality and decency and in suppressing crime.[101] Since the court found no bar to the proscription of homosexuality, the statute was ruled enforceable against private as well as public conduct.[102]

Focusing on the right to choose one's sexual partner as fundamental in character, Judge Merhige in his dissent stated:

> [I]ntimate personal decisions on private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.[103]

The dissent would, in effect, extend the zone of privacy covering abortion and contraception decisions[104] to encompass consensual, private homosexual acts. The Supreme Court's summary affirmance indicates that while mental disease is no longer a sufficient justification, immorality is a proper rationale. As it now stands, *Doe* serves as powerful precedent to thwart the efforts of gay rights activists.

In *Carey v. Population Services International*[105] the Supreme Court indicated a willingness to reexamine traditional rationales for the regulation of sexual conduct in general from a pragmatic standpoint. At issue there was the constitutionality of a New York statute restricting minors' access to contraceptives. Relying on the "significant state interest" test used in *Planned Parenthood v. Danforth*,[106] where the Court found the state's interest insufficient to justify restricting privacy rights of minors through blanket prohibitions on abortion without parental consent, the Court in *Carey* struck down the statute.

The application of a more rigorous standard than the easily satisfied rational basis test to justify state infringement of minors' privacy rights would at first blush indicate that the Court might employ a heightened level of scrutiny in the area of gay rights. But the recent

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BROOKLYN L. REV. 274, 284 (1966); Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 688-89 (1966).

101. 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 985 (1976).

102. *Id.*

103. *Id.* at 1204 (Merhige, J., dissenting).

104. *See* notes 15 & 16 and accompanying text *supra*.

105. 431 U.S. 678 (1977).

106. 428 U.S. 52, 75 (1976). In *Danforth*, the court found that the state's interest in encouraging the strength of the family unit was not served by permitting parental veto of a minor's abortion; the parental interests were viewed as "no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.*

denial of certiorari in *Enslin v. Bean*[107] indicates that this is unlikely. Enslin, convicted of committing a "detestable crime against nature"[108] and sentenced to a year in prison, challenged the constitutionality of North Carolina's sodomy statute as applied to his consensual, private conduct.[109] The Court's refusal to review the conviction implies that protection for private, homosexual conduct will be left to the discretion of state legislatures, foreclosing any hope engendered by *Carey* that such statutes would be strictly construed.[110]

Although the summary affirmance of *Doe*, underscored by the denial of certiorari in *Enslin*, does not directly concern employment rights of gays, its likely effect will be to curb judicial and legislative efforts to recognize such rights. Together, the decisions undermine the idea that unorthodox sexual preference is to be accorded constitutional protection.[111] But while the Supreme Court has thus far been unwilling to consider employment protection for gays, lower federal courts, both at the district and appellate level, have attempted to formulate standards to ensure fair and rational review. These decisions, while lacking in uniformity, nonetheless shed more judicial light on the problem than has been provided by the Supreme Court.

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107. 436 U.S. 912 (1978) (Brennan & Marshall, J.J., dissenting in denial), *denying cert. to* 565 F.2d 156 (4th Cir. 1977), *aff'g without opinion sub nom.* Enslin v. Wallford, No. 77-1309 (E.D.N.C. Nov. 1978). *See* S.F. Examiner, May 15, 1978, at 1, col. 3.

108. N.C. GEN. STAT. § 14-177 (1969). The Supreme Court has also upheld a similarly worded Florida statute against a vagueness challenge because Florida cases had defined the nature of the "detestable crime". Wainwright v. Stone, 414 U.S. 21 (1973).

109. Enslin owned a massage parlor/adult bookstore. A local detective recruited a young Marine to ask Enslin for some "extra excitement," then hid in the bushes nearby hoping to witness the act through binoculars so he could "run Enslin out of town." The act of oral copulation was consummated in a back room which had no windows. The Marine's testimony apparently formed the basis for the conviction. *See* S.F. Examiner, May 15, 1978, at 1, col. 3.

110. In *Carey*, the majority stated that " 'the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults'." 431 U.S. at 688 n.5 (quoting 431 U.S. at 694 n.17). This statement was disputed by Justice Rehnquist, who viewed the question as settled by *Doe*. *Id.* at 718 n.2 (Rehnquist, J., dissenting). Although two members of the Court—Justices Brennan and Marshall—would have granted certiorari in *Enslin*, it seems evident that a majority of the Justices has foreclosed consideration of the issue regardless of circumstances surrounding the "criminal" conduct.

111. Freedom of choice in sexual matters, absent actual harm to the community, is a recurrent theme in lower court cases which evinces a willingness to extend employment protection to gays. *See, e.g.*, Acanfora v. Board of Educ., 359 F. Supp. 843, 851 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974), which adopted the view expressed in two important studies that homosexuality should not be a criminal offense. *See* MODEL PENAL CODE § 207.5(1) COMMENT (Tent Draft No. 4, 1955); COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT (Great Britain) 48-49 (Amer. ed. 1963). The Supreme Court's nonrecognition of this freedom may give added impetus to efforts, such as California's initiative campaign to oust gay teachers, *discussed at* note 21 *supra*, to withhold protection.

B. Federal Court Standards

An analysis of lower federal court cases indicates that while some differences exist, the recent trend is toward greater understanding and acceptance of homosexuality, with a concomitant extension of constitutional protection. In one of the earlier cases concerning gay employment rights, *McConnell v. Anderson*,[112] the Eighth Circuit adopted a conservative approach indicating its disapproval of overt homosexual behavior, despite lower court findings that private homosexual behavior would not affect employment fitness.

The district court had enjoined the Board of Regents of the University of Minnesota from rejecting McConnell, a gay activist, from employment as a librarian.[113] Under the *Roth* entitlement standard,[114] the applicant possessed no property interest. Relying on numerous authorities,[115] the district court ruled, however, that although the applicant did not have "an inalienable right to be employed by the university [he had] a right not to be discriminated against under the Fourteenth Amendment due process clause."[116] Stating that a homosexual was "entitled to the protection and benefits of the laws,"[117] the court held that a prospective employee's private life should not be his employer's concern unless it can be shown to affect his efficiency in performing his duties.[118]

On appeal, the Eighth Circuit set aside the injunction, stressing the "plenary and exclusive authority to govern, control and oversee the administration of the University"[119] vested in the board. In ruling that

112. 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

113. 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). McConnell had been offered employment at the university. No employment contract had been signed pending approval by the Regents, but McConnell had moved to Minneapolis expecting routine approval of his appointment. He applied for a marriage license to wed a male law student, predictably drawing substantial publicity to himself, though no reference was made to his potential association with the university. The Regents permitted McConnell a hearing, after they held an initial closed meeting and recommended that his appointment not be approved. After the hearing the board unanimously adopted a resolution that McConnell be rejected from employment on the grounds that his personal conduct, as represented in the public and university news media, was not consistent with the best interest of the university. *Id.* at 810-11.

114. *See* notes 39-45 and accompanying text *supra*.

115. McConnell v. Anderson, 316 F. Supp. at 814-15 (citing Keyishian v. Board of Regents, 385 U.S. 589 (1967); Schware v. Board of Bar Examiners, 353 U.S. 232, 234, 239 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Weiman v. Updegraff, 344 U.S. 183 (1952)).

116. 316 F. Supp. at 814.

117. *Id.*

118. *Id.* at 815. Since the holding was based on due process fairness grounds, the court did not reach McConnell's contention that employment rejection was a result of his exercise of free expression.

119. 451 F.2d 193, 195 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

the board's action was not arbitrary and capricious, the court concluded that ample factual information supported the board's judgment that McConnell's appointment would not be in the best interest of the university because his activist role would "foist tacit approval of this socially repugnant concept upon his employer," including condonation of "sodomous criminal activities."[120] The court, however, distinguished cases involving "mere homosexual propensities" as well as those in which an applicant is excluded from employment "because of a desire clandestinely to pursue homosexual conduct."[121] The inference can thus be drawn that homosexual employees might be tolerated in the Eighth Circuit if their sexual preference remains covert.

The Fourth Circuit took a more liberal view of gay employment rights, and also addressed the First Amendment issue not reached by the *McConnell* court,[122] in *Acanfora v. Board of Education*,[123] where it extended a district court decision which itself had afforded considerable protection to gay teachers. Acanfora had been transferred to a non-teaching position after the school board learned that he was a homosexual. It was conceded that he had not, and would not, discuss his sexual preference with students. During the litigation, however, Acanfora garnered considerable publicity due to media awareness of his case.[124] The district court heard extensive expert testimony on the causes and effects of homosexuality from recognized authorities.[125] Tracing the Supreme Court's development of the right to personal privacy,[126] the court declared: "The time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests. Intolerance of the unconventional halt the growth of liberty."[127]

In applying a procedural due process analysis, the Court found that because the transfer implicated Acanfora's protected property and liberty interests,[128] the board had wrongfully failed to provide an ad-

120. *Id.* at 196.

121. *Id.*

122. *See* note 118 *supra*.

123. 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 838 (1974).

124. Acanfora had appeared on a Public Broadcasting System program and had given interviews to other media in which he discussed the difficulties homosexuals ordinarily encounter. He sought community acceptance for gays but did not advocate homosexuality. *Id.* at 500.

125. 359 F. Supp. 843, 847-49 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (testimony of Dr. Reginald Spencer Lourie, Dr. Felix P. Heald, Dr. Stanford B. Friedman, Dr. William R. Stayton, Dr. John Money, NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS (1972)).

126. *Id.* at 850-51.

127. *Id.* at 851.

128. Ordinarily, a liberty interest in one's reputation is implicated when an employer

ministrative hearing. Yet recognition by the court of his procedural due process rights did not end the inquiry. The primary issue, in the court's opinion, was the degree of constitutionally permissible board regulation of Acanfora's speech and associational rights.[129] The court stated:

> If private, consenting adult homosexuality is "protectable," it follows from the First Amendment that public speech, organization and assembly in support of that goal by ordinary citizens is also protectable. This syllogism does not, however, encompass the definition of the boundaries of protectable speech and association of teachers, who hold a special position of trust and responsibility in the educational process.[130]

Given the sensitive nature of the subject of homosexuality, the district court felt that a gay teacher should exercise discretion and self-restraint in speech or activities to avoid sensationalism and controversy which might be deleterious to the educational process. It concluded that Acanfora's public appearances exceeded the boundaries of protected speech, and that the board's action therefore could not be characterized as arbitrary and capricious.[131]

The Fourth Circuit affirmed the result on appeal, but disagreed with the lower court's First Amendment analysis. It focused on the lack of evidence that the public interviews disrupted the school, impaired Acanfora's teaching performance or were reasonably likely to result in future impairment.[132] Absent such evidence, the appellate court ruled that Acanfora's comments on a matter of public interest were protected by the First Amendment and therefore did not justify the school system's action.[133] *Acanfora* is significant because both the district and appellate courts attempted to delineate specific guidelines for applying a due process rationale to the issue of the rights of gay

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makes a false and defamatory allegation which might preclude an employee from obtaining other jobs. *See* notes 26-36 and accompanying text *supra*. In *Acanfora*, no such allegation was involved, the facts surrounding the teacher's transfer and sexual preference not being in dispute; yet the court felt that implications arising from the board's action posed a threat to his reputation. This suggests that a protected liberty interest would be implicated not only by a false charge concerning one's sexual preference, but also by an unproven allegation that unorthodox sexual orientation adversely affected teaching ability. *Id.* at 853.

The court noted that homosexuality *per se* does not preclude successful job performance, but declined to remand the case for an administrative hearing because the board had already prejudged Acanfora's fitness, thus casting doubt on the fairness of the procedure. *Id.* at 851, 853.

129. *Id.* at 854-57.

130. *Id.* at 854.

131. *Id.* at 856-57.

132. 491 F.2d 498, 500-01 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

133. *Id.* at 501. The circuit court of appeals denied Acanfora a remedy, however, because he was held to lack standing to raise the constitutional issues. *See* notes 235 & 236 and accompanying text *infra*.

teachers. The principles which emerged would safeguard both private activity as well as public speech and conduct which does not impair performance of duties or interfere with the operation of schools. But since *Acanfora* is a pre-*Doe* decision, its holding that homosexuality is constitutionally protected is, perhaps, of questionable vitality.

McConnell and *Acanfora* illustrate the strikingly different attitudes that exist among appellate courts with respect to unorthodox sexual preference. At the district court level, one also finds a variety of rationales employed to analyze the problem. For example, an Oregon district court managed to avoid the issue of gay employment rights by striking down the applicable statute on vagueness and overbreadth grounds. In *Burton v. Cascade School District*,[134] a non-tenured high school teacher was dismissed during her second contract year because the principal of the school learned of her homosexuality from a student's mother. There were no charges of improper involvement with students or dereliction of teaching duties.[135] After a hearing at which Burton acknowledged that she was a practicing homosexual, she was dismissed for "immorality" under an Oregon statute.[136] The district court held the statute void for vagueness and overbreadth,[137] noting that the statute also posed serious constitutional problems because it did not require a nexus between conduct and teaching performance.[138] The court did not attempt to formulate a more appropriate due process standard, commenting instead: "No amount of statutory construction can overcome the deficiencies of this statute."[139]

In contrast to *Burton*, a Delaware district court confronted the problem of the constitutionality of employer limitations on freedom of expression in *Aumiller v. University of Delaware*.[140] Aumiller's contract as a lecturer was not renewed because university officials disapproved of his statements on homosexuality in three newspaper articles.[141] The

134. 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975).

135. *Id.*

136. OR. REV. STAT. § 342.530(1)(b)(1973-74): "Dismissal of teachers (1) During the period of the contract . . . the district school board shall dismiss teachers only for: . . . (b) immorality . . . ." (repealed by 1973 Or. Laws ch. 298 § 9).

137. 353 F. Supp. at 255.

138. *Id.* at 255 n.1.

139. *Id.* at 255.

140. 434 F. Supp. 1273 (D. Del. 1977).

141. Aumiller was a faculty advisor to a campus organization called the Gay Community, which was formed for political, social and educational purposes. He was quoted extensively in three newspaper articles written about the Community. This led to the decision not to renew his contract. In a letter to the Chairman of the Board of Trustees, the President of the University expressed his concerns that Aumiller's "evangelistic endeavor" would attract homosexuals to the campus and the statements would cause harm and embarrassment to the university, as well as his belief that Aumiller's statements were "shocking" and an "effront" [sic] to him and the university. *Id.* at 1278-85 & n.7.

court applied the *Pickering* analysis[142] to determine whether the university's interest was so significant as to outweigh Aumiller's right to speak out on issues of public interest without jeopardizing his continued employment. It concluded that Aumiller had not, either willfully or recklessly, sought to create the impression that he was speaking on behalf of the university or that the university endorsed his views,[143] nor did he exploit the university's facilities to advance his personal goals.[144] These factors, together with a lack of evidence as to any impairment of Aumiller's performance as a lecturer or disruption of the university, resulted in the court ruling that the university had violated Aumiller's First Amendment rights by refusing to renew his contract solely because of his protected public statements.[145]

The court in *Aumiller* enumerated several factors which, had they been present, would have supported the university's position: (1) an express purpose of generating publicity or notoriety on the part of the employee; (2) an attempt to convey the impression of university endorsement; and (3) utilization of university facilities for advocacy of homosexuality or for unauthorized activities.[146] Absent these factors, the university's justification was deemed insufficient. The *Aumiller* opinion is a thoughtful and realistic effort to relate expression on the controversial and emotionally-charged topic of homosexuality to employment rights within the framework of the *Pickering* analysis.

These federal decisions indicate that while a few courts still defer entirely to administrative determinations concerning gay teachers, others are willing to scrutinize the asserted state interests carefully, with a view toward protecting individual rights. Where a teacher's conduct is based on the exercise of First Amendment rights and is undertaken as a good faith effort to educate the public or speak out on an issue of public concern, the state may be precluded from basing disqualification on that conduct. These decisions, however, by no means provide a complete constitutional analysis. One group of cases which have focused more heavily on the substantive aspect of due process are those involving civil service employees. Many of the prejudices which formerly operated to bar gays from federal employment under civil service regulations are similar to those relied upon today to curtail the employment of gay teachers. As a result, the recently enlightened standards developed by the civil service, which will be described in the next section, should provide guidelines for determining the rights of gay teachers.

142. *Discussed at* notes 83-87 and accompanying text *supra*.
143. 434 F. Supp. at 1288-89.
144. *Id.* at 1298-99.
145. *Id.* at 1302.
146. *Id.* at 1301.

C. Civil Service Standards

A review of the development of due process standards applicable to gay civil service employees indicates a gradual rejection of the notion that homosexuals are *per se* unfit for governmental employment. The nadir of federal employment protection for gays undoubtedly occurred in the mid-twentieth century, when homosexuality was invariably equated with subversion of the government.[147] Diligent efforts were made during the 1950's to purge homosexuals, along with other "un-American" individuals, from government employment.[148] These efforts were rewarded not only by an increase in the number of "perverts"—as they were termed in government reports—uncovered by investigations and fired from their jobs, but also by the resignation of many employees who were threatened with investigation.[149] The broad sweep of these inquiries shattered the careers of many individuals who had had very limited homosexual experiences or who were merely suspected of homosexuality, as well as those who were exclusively gay, without regard to whether the conduct under investigation related in any way to job performance.[150]

From this starting point, governmental attitudes toward gay employees have undergone considerable change, especially with regard to what constitutes a sufficient nexus between homosexual activity and occupational fitness. This evolution is illustrated by three cases from the District of Columbia Circuit Court of Appeals. In *Dew v. Halaby*,[151] a substantive due process challenge was brought against civil service regulations which permitted reliance upon pre-employment conduct in order to justify removal for "such cause as will promote the efficiency of the service."[152] Dew, a married Air Force veteran and father of two

147. For a collection of news reports chronicling the efforts to weed out homosexuals and Communists from government employment, see J. KATZ, GAY AMERICAN HISTORY 91-104 (1976).

148. A committee charged with investigating homosexuals in the government viewed them as dangerous security risks, lacking in emotional stability, having a corrosive effect on other employees and likely to seduce "normal" individuals. SENATE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT; INTERIM REPORT BY SUBCOMMITTEE ON INVESTIGATIONS PURSUANT TO S. RES. 280, S. DOC. 241, 81st Cong., 2d Sess. (1950).

149. Between Jan. 1, 1947 and Apr. 1, 1950, 192 cases of homosexuals and other "sex perverts" were handled by the government departments. Due to increased vigilance, 382 cases were handled between Apr. 1 and Nov. 1, 1950. *Id.*

150. *See* J. KATZ, GAY AMERICAN HISTORY 99-104 (1976). *See, e.g.*, N.Y. Times, June 26, 1952, at 4, col. 4, reporting the resignations of 117 State Department employees who had been confronted with charges of homosexuality. *See also* Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1742-43 (1969).

151. 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed by agreement of the parties*, 379 U.S. 951 (1964).

152. 5 C.F.R. § 9.101 (Rev. 1961); *see* 5 C.F.R. §§ 9.102(a)(1), 22.201 (Rev. 1961).

children, was discharged from his position as an air traffic controller when the Civil Aeronautics Authority learned, from his previous employers, of several instances of homosexual conduct and marijuana smoking in which Dew had engaged about nine years earlier.[153] Relying heavily on agency discretion to determine what acts might have an adverse impact on the service, the majority found that Dew's removal was not arbitrary or capricious.[154] The opinion cited earlier findings by the Appeals Examiner that "[t]o require employees to work with persons who have committed acts that are repugnant to the established and accepted standards of decency and morality can only have a disrupting effect upon the morals and efficiency of any organization."[155]

In dissent, Circuit Judge Skelly Wright noted the impropriety of discharging a permanent employee on the basis of his pre-employment conduct, since that conduct might have no connection with his job performance.[156] He warned against the danger that any civil service employee's "unfortunate adolescent acts"[157] might be unearthed through research into his background "in an effort to turn up something 'disqualifying,' "[158] and suggested that the efficiency of the service would be better served by assurance to civil service workers that they will not be subjected to such intrusive investigations.[159]

Two years later, a new trend emerged when the same circuit court required the government to establish a nexus between allegedly immoral conduct and occupational fitness. In *Scott v. Macy*,[160] the employee had passed civil service examinations in 1962, but a background investigation revealed a 1947 arrest for "loitering" and a 1951 arrest for "investigation." He refused to answer questions about homosexuality and was subsequently disqualified for "immorality."[161] The court, in holding this action to be arbitrary, reasoned that the terms "immoral conduct" and "homosexual" had different meanings for different people;[162] the lack of notice as to what conduct would disqualify an applicant for government employment therefore rendered the

153. Dew had served as an air traffic controller for twenty months, receiving a performance rating of "satisfactory," before the Authority learned of the incidents. 317 F.2d at 583.

154. *Id.* at 587-88. 5 C.F.R. § 2.106 (Rev. 1961) provided for disqualification for "[c]riminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." The Court took note of the responsibilities of Dew's job and upheld the agency's judgment that its efficiency would be promoted through the removal of one who, through past conduct, had not demonstrated qualities of character, stability and responsibility. 317 F.2d at 587-88.

155. *Id.* at 587 n.10.

156. *Id.* at 590 (Wright, J., dissenting).

157. *Id.* at 589.

158. *Id.* at 590.

159. *Id.*

160. 349 F.2d 182 (D.C. Cir. 1965).

161. *Id.* at 182-83.

162. *Id.* at 184.

disqualification procedurally inadequate.[163] The majority emphasized that the grave consequences of governmental imposition of a stigma required that a commission at least "specify the conduct it finds 'immoral' and state why that conduct relate[s] to 'occupational competence or fitness.' "[164]

The nexus requirement was further refined in *Norton v. Macy*,[165] wherein the same circuit held that while homosexual conduct could be a factor in determining fitness for federal employment, it alone was not sufficient cause for dismissal. Norton was a budget analyst for NASA with a good employment record. He had been dismissed after a traffic arrest incident during which it was alleged that he had made a homosexual advance to his male passenger. Norton claimed that he had experienced a blackout during the incident and admitted suspecting that he might have engaged in homosexual activity during two previous blackouts induced by drinking.[166]

Writing for the majority, Judge Bazelon observed that due process establishes at least the minimal requirement that dismissal from government employment not be arbitrary and capricious. Beyond this, where the dismissal imposed a stigma or involved intrusion upon privacy, the "Due Process Clause may . . . cut deeper into the Government's discretion"[167] by requiring that the agency demonstrate a rational basis for its conclusion that an employee's discharge would promote the efficiency of the service.[168] Mere recitation of the immorality of an employee's conduct would not suffice; there must be "some ascertainable deleterious effect on the efficiency of the service."[169] The court described several ways in which homosexual conduct might bear on the efficiency of the service, but suggested that the effects of the conduct were "broadly relevant" rather than controlling.[170] The possibility of embarrassment to the agency as a result of an employee's homosexual conduct would not, in itself, suffice; a nexus must also be established between an employee's potentially embarrassing conduct and the efficiency of the service.[171]

163. *Id.* at 185-86 (McGowan, C.J., concurring).

164. *Id.* at 185. Then Circuit Judge Burger, in a vigorous dissent, took the position that homosexual conduct is not an arbitrary ground for exclusion from employment. *Id.* at 190 (Burger, C.J., dissenting).

165. 417 F.2d 1161 (D.C. Cir. 1969).

166. *Id.* at 1162-63.

167. *Id.* at 1164.

168. *Id.* at 1167.

169. *Id.* at 1165.

170. Noted were: 1) the potential for blackmail, which might jeopardize security; 2) any evidence of an unstable personality; and 3) offensive overtures on the job or notorious conduct causing reactions in other employees or in the public with whom an employee came into contact in the performance of his duties. *Id.* at 1166.

171. *Id.* at 1167.

Norton has been distinguished on the basis of its narrow set of facts, indicating, perhaps, that some jurisdictions are reluctant to adopt the idea that homosexuality is not, *per se*, evidence of unfitness. In *Schlegel v. United States*,[172] rendered shortly after *Norton*, the Court of Claims upheld the firing of an Army Office of Transportation employee for homosexual activities. The court distinguished *Norton* on the ground that Norton had merely made a homosexual advance, whereas Schlegel had consummated four homosexual acts with three different men. It was, the court found, inevitable that retention of a practicing homosexual employee would adversely affect the efficiency of government service, primarily by affecting the morale and efficiency of coworkers.[173] The concurring opinion of Judge Nichols, in which he criticized *Norton*, viewed embarrassment to a government agency through employment of a homosexual as a sufficient nexus with efficiency of the service to justify disqualification.[174]

The strongest nexus between sexual preference and efficiency of the service would seem to exist in security clearance cases. In an era when severe prejudice forced gays to conceal their sexual orientation, their susceptibility to coercion and blackmail was, perhaps, a valid concern. If, however, an individual were to openly acknowledge his or her sexual preference, the opportunity for blackmail would no longer exist. This reality appears to be increasingly recognized in the case law. Denial of a security clearance must be supported by showing a nexus between homosexuality and an inability to effectively protect classified information.[175] In addition, the means used to establish such a nexus are limited; any governmental inquiry into an individual's private life must be confined to one reasonably designed to establish the relationship between conduct and fitness, and may not unreasonably invade

172. 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970).

173. Three of Schlegel's superiors testified that morale and efficiency would be adversely affected by his continued employment. The Court stated: "Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. . . . If activities of this kind 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.

174. *Id.* at 1382. (Nichols, J., concurring). *Schlegel* and the dissenting opinions in *Norton* and *Scott* also reflect a concern with judicial usurpation of executive and legislative functions. *See* Norton v. Macy, 417 F.2d 1161, 1168-69 (D.C. Cir. 1969) (Tamm, C.J., dissenting); Scott v. Macy, 349 F.2d 182, 187-90 (D.C. Cir. 1965) (Burger, C.J., dissenting). The thrust of their reasoning is that public policy formulated by administrative or legislative bodies, even though unwise or unsound, must not be disturbed by courts unless it intrudes into areas forbidden under the Constitution. *See* notes 57-59 and accompanying text *supra*. *See also* Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968) (per curiam), upholding an agency determination disqualifying a homosexual employee. This failure to perceive a constitutional dimension to employment disqualification of gays, or to require the establishment of a rational nexus between homosexual conduct and employment fitness, reflects a stock assumption that homosexuality is *per se* unfitness.

175. Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973).

the individual's privacy.[176]

Against the background of *Scott* and *Norton*, the *coup de grâce* was finally administered to the mandatory exclusion policies of the civil service by an injunction against their enforcement issued by a federal district court. In *Society for Individual Rights, Inc. v. Hampton*,[177] the commission was enjoined from excluding or discharging an individual solely because he or she is a homosexual or because employment of a homosexual might bring the service into public contempt.[178] The court recognized that homosexuality is deemed immoral by a majority of society, but stated that "this alone does not justify denying . . . government employment."[179]

Civil service guidelines and regulations were subsequently revised to conform to the requirements of the injunction.[180] The effect of the revision is not yet clear, however. Disqualification may not be based solely on "unsubstantiated" conclusions concerning possible embarrassment to the federal service, but actual embarrassment might sustain disqualification. Precisely what constitutes "embarrassment"—and how much of this embarrassment a federal agency should be required to tolerate before a court will recognize it as an impediment to agency efficiency—remain undefined in this line of cases.[181]

176. *Id.* at 752. *See generally* C. TRIPP, THE HOMOSEXUAL MATRIX 213-22 (1975) (discussion of intelligence operations designed to use homosexuals and the unfeasibility of blackmailing government employees); Note, *Security Clearances for Homosexuals*, 25 STAN. L. REV. 403 (1973).

177. 63 F.R.D. 399 (N.D. Cal. 1973).

178. *Id.* at 402. The ruling effectively invalidated the policy stated in FEDERAL PERSONNEL MANUAL SUPPLEMENT (Int.) 731-71: "Homosexuality and Sexual Perversion—Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment."

179. 63 F.R.D. at 400. The court left open the possibility that homosexual conduct might justify dismissal where interference with governmental efficiency could be substantiated with specificity, noting that the government was free to consider what particular circumstances might suffice. *Id.* at 401.

180. The regulations were amended to delete "immorality" as cause for disqualification. 5 C.F.R. § 731.202(b) (1978). In addition, amended guidelines provided, in part: "Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is homosexual or has engaged in homosexual acts. Based upon these court decisions and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness." *Suitability Guidelines for Federal Employment*, FEDERAL PERSONNEL MANUAL 731-3 at 8 (1975).

181. It should be noted that military service regulations still mandate disqualification of gays, but these blanket exclusionary policies are being attacked, with some success, for their failure to provide for consideration of how homosexuality relates to individual fitness. *See,*

D. State Standards

While the federal courts have attempted to articulate substantive due process standards which recognize the rights of gay employees, in the state court systems this process generally takes place within a well-defined framework of procedural rules. California and a minority of other states have a two-tier statutory system of procedural due process requirements for teacher disqualification. The first tier is addressed to specific situations and is absolute in its terms. At this level, mentally disordered sex offenders and persons convicted of certain enumerated sex or narcotics offenses are barred from obtaining credentials and subject to automatic dismissal or license revocation without a hearing.[182] Since the offender has had notice and an opportunity to defend in the criminal proceeding, procedural due process requirements are considered satisfied for purposes of disqualification.[183]

The second tier of California's system, which applies to all cases which do not fall within the specific categories of the first level, requires

e.g., Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977). Due to the long-standing and explicit nature of such regulations, however, it is more difficult for courts to override administrative determinations that a gay individual must be excluded from the service. Perhaps the expressed discomfort of some courts with the current regulations will eventually result in more individualized consideration of fitness for military service. *See, e.g.*, Matlovich v. Secretary of the Air Force, No. 75-1750 (D.D.C. July 16, 1976), in which a reluctant court upheld an Air Force policy excluding homosexuals as applied to Sgt. Matlovich, who had earned an excellent service record. The court found that the regulation was not so irrational that it could be branded arbitrary, but closed with the hope that the military would "reexamine the homosexual problem, to approach it in perhaps a more sensitive and precise way." *See also* Duberman, *The Case of the Gay Sergeant*, N.Y. Times, Nov. 9, 1975, § 6 (Magazine), at 67, col.2.

182. CAL. EDUC. CODE §§ 44346, 44424-44426, 44435-44437, 87334-87336 (West Supp. 1977).

183. In Purifoy v. State Bd. of Educ., 30 Cal. App. 3d 187, 106 Cal. Rptr. 201 (1973), the court upheld automatic suspension of a teacher's certificate, against due process and equal protection challenges, after he had been convicted of violating CAL. PENAL CODE § 647 subds. (a), (d) (West 1972) (soliciting and loitering in a public tiolet). Statutes of other states which permit automatic disqualification for certain crimes without a fitness hearing include: IDAHO CODE §§ 33-1208, -1210; MINN. STAT. ANN. §§ 125.09, 125.12 subd. 8 (West); N.D. CENT. CODE §§ 15-36-15, 15-47-38; OR. REV. STAT. §§ 342.175, .865; PA. CONS. STAT. ANN. §§ 12-1211, -1226 (PURDON); S.C. CODE §§ 59-25-150, -160, -430; S.D. COMPILED LAWS ANN. §§ 13-42-9, -10; VA. CODE §§ 22-217.5, .8:1. Nevada, rather precisely tailoring the punishment to fit the crime, revokes certificates of teachers convicted of certain sex offenses where a student enrolled in a Nevada public school is the victim. NEV. REV. STAT. § 391.330. California's Education Code has been amended to permit fitness hearings to individuals convicted of any sex or narcotics offenses provided: 1) they have obtained or applied for a certificate of rehabilitation under CAL. PENAL CODE § 4852.01, -.07 (West 1972); 2) their probation has been terminated; and 3) the information or accusation has been dismissed under CAL. PENAL CODE § 1203.4 (West 1972). CAL. EDUC. CODE § 44346 (West 1977). Since misdemeanants are ineligible to apply for certificates of rehabilitation, satisfaction of the latter two requirements will qualify them for fitness hearings. Newland v. Board of Governors, 19 Cal. 3d 705, 566 P.2d 254, 139 Cal. Rptr. 620 (1977). *See* note 20 *supra*.

notice and a hearing before a teacher may be disqualified.[184] While this may appear to afford adequate due process rights to gay teachers, the statutes provide a loophole upon which to predicate dismissal: where homosexual conduct is at issue, a school board may base dismissal or credential revocation on "immoral or unprofessional conduct" or conviction of a non-enumerated crime involving moral turpitude.[185] In such cases, the board's inquiry is limited to determining whether the employee engaged in the conduct alleged, and whether such conduct could be termed immoral, unprofessional or indicative of moral turpitude. Once an affirmative determination has been rendered and administrative remedies have been exhausted, the employee or licensee may seek judicial review of both the evidence and the board's decision.

Other states with two-tier procedural system requirements correspond generally to the California framework.[186] The majority of states permit fitness hearings in all cases of teacher disqualification, regardless of whether the employee has been convicted of sex or narcotics offenses. Although statutes governing disqualification vary in specificity from state to state,[187] most include language prohibiting "immorality." No state code, however, specifically bars homosexuals from the teaching profession.[188] The terms "immoral or unprofessional conduct" and "moral turpitude" embodied in these typical discretionary disqualification statutes have been criticized for vagueness and overbreadth.[189] However, given the strong state interest in protecting school children and the virtual impossibility of drafting statutes that would cover all possible ways in which injury might result from retention of a particular employee, reviewing courts have generally refrained from declaring such discretionary statutes facially void.[190]

The California Supreme Court, in *Morrison v. State Board of Edu-*

184. CAL. EDUC. CODE §§ 44422, 44430-44432, 87332, 87340-87342 (West Supp. 1977).

185. CAL. EDUC. CODE §§ 44421, 44427, 44434, 444345, 87331, 87340, 87344 (West Supp. 1977).

186. *See* note 183 *supra*.

187. Such statutes range from very general language permitting disqualification for "cause", *e.g.*, ARK. STAT. ANN. § 80-1214 (1960), to fairly specific grounds for disqualification, *e.g.*, MISS. CODE ANN. § 37-9-59 (brutal treatment of a pupil); OKLA. STAT. ANN. tit. 79, § 6-103 (West) (teaching disloyalty to the American government).

188. *But see* California Initiative Statute, Proposition 6, General election Nov. 7, 1978 [defeated]. *See* note 21 *supra*.

189. *E.g.*, Burton v. Cascade School Dist., 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975) (statute voided for vagueness and overbreadth); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (statute construed to mean conduct which renders a teacher unfit to practice his profession).

190. The only exception thus far is the action of an Oregon federal district court in Burton v. Cascade School Dist., 353 F. Supp. 254 (D. Ore. 1973), *aff'd* 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). *See* notes 134-39 and accompanying text *supra*. The Oregon legislature subsequently revised revocation statutes to authorize disqualification for

cation,[191] declined to void a statute providing for license revocation for "immoral or unprofessional conduct or moral turpitude."[192] It added substantial judicial gloss to the phrase, however, by construing it to mean conduct which indicates unfitness to teach.[193] This more restricted interpretation was directed toward curing: (1) the breadth of the terms' application,[194] (2) variance in interpretation according to time, location, context and popular mood,[195] (3) lack of fair warning as to what conduct is prohibited,[196] and (4) the danger that officials might probe into the private lives of teachers in searching for signs of immorality.[197] The court focused on the purpose of fitness hearings and concluded that the distinction between automatic and discretionary disqualification statutes would be obliterated by a ruling that non-criminal homosexual conduct was *per se* immoral.[198]

The facts in *Morrison* were quite simple. The teacher had engaged in limited homosexual conduct on four occasions over a one-week period with a fellow teacher. Approximately a year after these incidents the other participant reported the affair to the school administration and proceedings to revoke Morrison's credential were instituted. At the State Board of Education hearing, Morrison testified to having some undefined homosexual problem at the age of thirteen, but he denied having any homosexual inclination for more than twelve years. There was no evidence that he had committed any acts of misconduct while teaching.[199]

Writing for the majority, Justice Tobriner set forth several factors which a school board might consider in determining whether a teacher's homosexual conduct affected his or her fitness to teach:

> (1) the likelihood that the conduct may have adversely affected students or fellow teachers;

"gross unfitness." ORE. REV. STAT. § 342.175(c). It could be contended that the new statute is no less vague than its predecessor.

191. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

192. CAL. EDUC. CODE § 13202 (West Supp. 1972) (current version at CAL. EDUC. CODE § 44421 (West Supp. 1977)).

193. 1 Cal. 3d 214, 238-40, 461 P.2d 375, 393-95, 82 Cal. Rptr. 175, 193-95 (1969), disapproving dicta in Sarac v. State Bd. of Educ., 249 Cal. App.2d 58, 63-64, 57 Cal. Rptr. 69, 72-73 (1967), which suggested that all homosexual conduct, even though not shown to relate to fitness to teach, warrants disciplinary action.

194. 1 Cal. 3d 214, 227-28, 461 P.2d 375, 384-85, 82 Cal. Rptr. 175, 184-85 (1969) (citing a wide variety of state licensed professions and relevant codes under which license holders may be disciplined for immoral or unprofessional conduct or moral turpitude).

195. *Id.* at 226-27, 461 P.2d at 383-84, 82 Cal. Rptr. at 183-84.

196. *Id.* at 231, 461 P.2d at 387, 82 Cal. Rptr. at 187.

197. *Id.* at 233-34, 461 P.2d at 390, 82 Cal. Rptr. at 190.

198. *Id.* at 218-19 n.4, 461 P.2d at 377-78, 82 Cal. Rptr. at 177-78.

199. *Id.* at 218-20, 461 P.2d at 377-78, 82 Cal. Rptr. at 177-78. The conduct involved was apparently mutual masturbation and occurred while the other participant was undergoing severe emotional stress due to financial and marital problems.

> (2) the degree of such adversity anticipated;
> (3) the proximity or remoteness in time of the conduct;
> (4) the type of teaching certificate held by the party involved;
> (5) the extenuating or aggravating circumstances, if any, surrounding the conduct;
> (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct;
> (7) the likelihood of the recurrence of the questioned conduct; and
> (8) 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.[200]

In applying these factors to Morrison's conduct, the California Supreme Court found that there was no evidence in the record to indicate that his retention would pose a "significant danger of harm to students or fellow teachers."[201] Nor was there evidence that the events had become so notorious as to impede his teaching performance.[202] The court noted that the board could reopen its inquiry into Morrison's fitness, and any further findings of unfitness, confirmed by a trial court after independent review of the evidence, would be upheld.[203]

The *Morrison* analysis is especially significant because it is the only attempt by a state supreme court to give content to "immorality" disqualification statutes as applied to homosexual conduct. Its approach has been applied to a wide range of conduct and professions in other states, as well as in California.[204] California legislative amendments to the Education Code provide for considering the fitness of felons and misdemeanants who meet statutory requirements;[205] such amendments are likely to increase the number of mandatory fitness hearings, bringing an even broader range of conduct within *Morrison*'s scope. A California ballot initiative which would have eroded existing

200. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186 (footnotes omitted).

201. *Id.* at 237, 461 P.2d at 392, 82 Cal. Rptr. at 192-93.

202. *Id.* at 239-40, 461 P.2d at 394-95, 82 Cal. Rptr. at 194-95.

203. *Id.* at 239-40, 461 P.2d at 394-95, 82 Cal. Rptr. at 194-95.

204. *E.g.*, Board of Trustees v. Judge, 50 Cal. App. 3d 920, 123 Cal. Rptr. 830 (1975) (teacher convicted of growing marijuana plant); Weissbuch v. Board of Medical Examiners, 41 Cal. App. 3d 924, 116 Cal. Rptr. 479 (1974) (physician convicted of marijuana possession); Vielehr v. State Personnel Bd., 32 Cal. App. 3d 187, 107 Cal. Rptr. 852 (1973) (tax representative trainee convicted of marijuana possession); Oakland Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972) (teacher distributed her pupils' vulgar compositions to the class); Blodgett v. Board of Trustees, 20 Cal. App. 3d 183, 97 Cal. Rptr. 406 (1971) (overweight physical education teacher); Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974) (teacher's adultery with another teacher); *In re* Grossman, 127 N.J. Super. 13, 316 A.2d 39 (1974) (teacher's sex change); Denton v. South Kitsap School Dist., 10 Wash. App. 69, 516 P.2d 1080 (1973) (teacher engaged in sexual relations with minor student).

205. *See* note 183 *supra*.

standards of fairness in employment disqualification of gay teachers was recently defeated at the polls.[206] The strength of the prejudices which led to the initiative's qualification for the ballot, however, may indicate that efforts to eliminate gay teachers from California schools will continue.

This section has attempted to lay the basic foundation from which certain standards pertaining to gay teacher disqualification are emerging. The next section will review the manner in which these standards are actually applied, both in California and elsewhere, with a view toward exposing logical gaps which still permit unfair disqualification of gay employees.

III. Inconsistent Application of Due Process Standards to Disqualification of Gay Employees

A. Disagreement Among Federal Courts

1. Rational Nexus Requirement

Most federal courts agree that the disqualification of an employee solely on the grounds of sexual preference would lack a rational basis since some connection between such conduct and job performance must be established in order to satisfy due process requirements. In *Norton v. Macy*,[207] the court stated that homosexual conduct could be relevant to the efficiency of the service in security clearance cases because of the potential for blackmail and because it might "be evidence of an unstable personality unsuited for certain kinds of work."[208] Thus, if an employee made offensive overtures on the job or engaged in notorious conduct, the adverse reactions of his or her co-workers or the public with whom he or she came into contact through the job might be taken into account in evaluating occupational fitness.[209] In Norton's case these factors were not present, and the court ordered him reinstated because of (1) the lack of public contact in his job; (2) the fact that fellow employees were unaware of the incident; and (3) the "questionable legality" of police investigative tactics which brought the conduct to light.[210] The reasoning in *Norton* has been followed in a number of decisions which have extended substantive due process safeguards to gay employees, most notably *Society for Individual Rights, Inc. v. Hampton*,[211] where the injunctive relief which was granted led to the revision of civil service standards. The remedies in both cases

206. *See* note 21 *supra*.
207. 417 F.2d 1161 (D.C. Cir. 1969). *See* notes 165-71 and accompanying text *supra*.
208. 417 F.2d at 1166.
209. *Id.*
210. *Id.* at 1166-68 & nn.27 & 34.
211. 63 F.R.D. 399 (N.D. Cal. 1973). *See* notes 177-79 and accompanying text *supra*.

were aimed at deterring improper federal bureaucracy enforcement of "the majority's conventional moral code of conduct in the private lives of its employees."[212]

Some federal courts, on the other hand, have been unwilling to preclude an agency from relying on majoritarian values. This attitude has been manifested by complete deference to administrative determinations, by finding that an employee's conduct rationally supported the agency's action or by concluding that the requirements of a particular job justified additional restrictions on employees' conduct. The last-mentioned rationale was utilized in *Adams v. Laird*[213] by the same circuit which rendered the *Norton* opinion. The particular job in *Adams*, in contrast to that in *Norton*, involved a security clearance, as the employee was an electronics technician who worked with private companies on defense-related projects. The District of Columbia Circuit Court of Appeals upheld the denial of a "top secret" clearance based on Adams' admitted homosexual contacts and the board's belief that the granting of such a clearance was not "clearly consistent with the national interest."[214]

Circuit Judge Wright based his dissent on several factors: the employee's eight years of faithful service under a "secret" clearance; the improbability of his susceptibility to blackmail in light of the publicity surrounding the litigation; and the unsupported assumption that he was unstable, untrustworthy and unreliable.[215] He criticized the board's reliance on stereotypical assumptions about homosexuals rather than hard facts in finding that Adams' homosexuality had the required nexus with unfitness for a security clearance.[216] By merely determining that the employee was gay, the board presumed that due process had been complied with. But its reliance on stereotypical notions that such individuals are unfit for security clearance, somewhat reminiscent of 1950's rhetoric,[217] effected a *per se* disqualification because there was no evidence that Adams fit the stereotype. In Justice Wright's view, the board's ruling amounted to a "bill of attainder against all homosexuals."[218]

Although most federal courts have discarded the notion that homosexuals are *per se* unfit for certain jobs, the ease with which homosexual conduct is found to have a rational nexus with employment fitness suggests that preconceptions about gays may operate to deny

212. 63 F.R.D. at 400-01 (quoting Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969)).

213. 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

214. *Id.* at 240.

215. *Id.* at 242 (Wright, J., dissenting).

216. *Id.*

217. *See* notes 147-50 and accompanying text *supra*.

218. 420 F.2d at 242 (Wright, J., dissenting).

them substantive due process even though procedural requirements are met. In *McConnell v. Anderson*,[219] the plaintiff alleged that his application for library employment was rejected because of his homosexuality and his desire, as exemplified by his application for a license to marry his male lover, "to publicly profess his 'earnest' belief that homosexuals are entitled to privileges equal to those afforded heterosexuals."[220]

Although such conduct is unorthodox, it touches on associational, speech and political expression rights. It should therefore fall within the boundaries defined by *Keyishian*,[221] *Pickering*[222] and *Perry*,[223] which require that public employees not be forced to relinquish First Amendment rights enjoyed by private citizens, and further, that they not be disqualified for activities barred by the First Amendment from being criminally punishable. The *McConnell* circuit court's reversal, however, may imply approval of one of the school board's original contentions, which was rejected by the district court,[224] that applying for a marriage license automatically connoted the practice of sodomy, then criminal under Minnesota law.

Singer v. United States Civil Service Commission[225] presented a similar concern with the effects of an employee's lifestyle on the public image of the government. Singer had been dismissed from the Seattle office of the Equal Employment Opportunity Commission[226] for "immoral and notoriously disgraceful conduct" based upon his "public . . . flaunting [of] his homosexual way of life" while identifying himself as an employee of a federal agency.[227] This "flaunting" consisted of: 1) his acts of kissing and embracing a male in the building where he was formerly employed in another state, 2) his dress and demeanor, 3) his application for a marriage license with another male, 4) the publicity surrounding the license application, 5) his active involvement in the Seattle Gay Alliance and promotion of an Alliance symposium and 6)

219. 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). *See* notes 112-21 and accompanying text *supra*.

220. 451 F.2d at 194. The Circuit Court of Appeals termed McConnell's desire to engage in these activities without jeopardizing his employment opportunity as imposing "extravagant demands" upon the university. *Id.* at 196.

221. *See* note 71 *supra*.

222. *See* notes 83-87 and accompanying text *supra*.

223. *See* note 88 and accompanying text *supra*.

224. 316 F. Supp. 809, 811 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

225. 530 F.2d 247 (9th Cir. 1976), *vacated and remanded* for reconsideration in light of the position now asserted by the Solicitor General in his memorandum filed on behalf of the U.S. Civil Service Commission, 429 U.S. 1034 (1977) (Burger, C.J., White & Rehnquist, JJ., dissenting).

226. Singer was dismissed under the regulations in force in 1972, prior to revisions precluding disqualification for homosexuality or agency embarrassment. *See* notes 180 & 181 and accompanying text *supra*.

227. 530 F.2d at 251.

his open acknowledgement of being gay.[228] Singer sought First Amendment protection for his conduct but the court found that the government interest in promoting efficiency of the service outweighed the employee's interest in exercising his First Amendment rights through "broadcasting" his homosexual activities. The nexus requirement was satisfied insofar as such publicity would "reflect discredit upon the Federal Government as his employer;"[229] Singer was thus unsuitable for civil service employment. As in *McConnell*, the prospect of adverse public opinion was influential in *Singer* but evidence of his competence was barely considered.[230] The peremptory nature of the *Singer* analysis apparently did not satisfy the new civil service requirements, since, after further proceedings, the Federal Employee Appeals Commission ultimately ordered Singer's reinstatement with back pay.[231]

The problem illuminated by *McConnell* and *Singer* is the extent to which a gay public employee, particularly a teacher, must remain "closeted" in order not to jeopardize his continued employment. If all avenues of public expression concerning one's own sexual preference must be avoided, gay public employees are effectively precluded from taking part in efforts to achieve equality and acceptance. Where public expression is conducted during off-duty hours and does not involve harm to others or specifically involve an employer, the doctrine of unconstitutional conditions, as outlined in *Pickering*,[232] might preclude employment disqualification based on such activities. Thus, judicial

228. *Id.* at 249.

229. *Id.* at 255.

230. *Id.* at 250 n.4. In fact, Singer had been rated by his supervisor as superior or very good in various categories of job performance. A letter from his coworkers expressed the opinion that he was competent and that their experience with him had been "educational and positive."

231. It is likely that *Singer* was remanded for reconsideration under the amended regulations which became effective before the circuit court judgment was rendered but after the district court decision was handed down. The remand might have seemed an empty gesture in view of the circuit court's statement: "We do not imply that the amended regulations and guidelines would require a different result under the facts of this case." *Id.* at 255 n.16. In fact, Singer's employer, the Equal Employment Opportunities Commission, again moved for his disqualification on remand for the same reasons. This time, however, the Federal Employee Appeals Commission ordered Singer's reinstatement. Federal Employees Appeals Authority, United States Civil Service Commission, No. SE 071380002) (July 21, 1978).

232. *See* notes 83-87 and accompanying text *supra*. Some courts' apparent willingness to tolerate discreet homosexual conduct, combined with their unwillingness to recognize any First Amendment protection for speech and associational rights connected with sexual preference, reflects an anomaly in reasoning which may be grounded in majoritarian values. A parallel might be drawn to the argument advanced by the plaintiff in *Plessy v. Ferguson*, 163 U.S. 537 (1896), who, being seven-eighths Causcasian and only one-eighth African, contended that his indistinguishability from whites should entitle him to all rights enjoyed by whites. The issue should not be how well an individual can blend in with the majority of

scrutiny of a claimed nexus between homosexuality and job fitness should be more rigorous when First Amendment rights are involved than the rational basis inquiry employed in cases such as *Scott* and *Norton*.

The trend reflected in *Norton* and *Hampton*, where an employer was required to establish a nexus between homosexual conduct and unfitness for employment, appears to be more widely accepted than that in *Adams* or *McConnell*. Yet the mere requirement that a nexus be shown does not always guarantee concrete relief. The effectiveness—or ineffectiveness—of available remedies will be discussed below.

2. Remedies

Where a court finds that a public employee's disqualification was based on unconstitutional grounds, it may remand the case for reconsideration of the employee's fitness in light of the court's ruling, or it may make its own final determination. In either event, a wrongly disqualified employee may emerge with a less than satisfactory remedy, or no remedy at all, as reflected in the teacher dismissal cases. In *Acanfora v. Board of Education*,[233] for example, the district court would have safeguarded the teacher from disqualification based on his sexual orientation but nevertheless held his related speech unprotected.[234] While the circuit court went further, acknowledging First Amendment protection for Acanfora's public statements, it also denied reinstatement on the technical ground that Acanfora lacked standing to challenge the constitutionality of the county's policy of not hiring homosexuals.[235] Lack of standing was based on his intentional omission of his affiliation with a homophile organization on his employment application due to his fear that he would not even be considered for employment if that information were included.[236]

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society, but rather whether the uniqueness of the individual is worthy of constitutional protection in a society which places a positive value on diversity and tolerance.

233. 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

234. *See* notes 123-33 and accompanying text *supra*.

235. Acanfora v. Board of Educ., 491 F.2d 498, 504 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

236. There is some likelihood that if Acanfora had included his affiliation on the employment application, no legal question as to the propriety of his disqualification would have arisen, for the board could simply have rejected him for more unassailable reasons. *See* Aumiller v. University of Delaware, 434 F. Supp. 1273, 1285 (D. Del. 1977), where university officials discussed the merits of giving a budgetary reason for not renewing Aumiller's contract, rather than admitting the real reason. *See* notes 140-46 and accompanying text *supra*. The Acanfora district court did not consider the standing argument to be worthy of discussion, Acanfora v. Board of Educ., 359 F. Supp. 843, 845 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); *cf.* Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd* 507 F.2d 611 (5th

The court in *Burton v. Cascade School District*[237] evinced a similar reluctance to enforce its decision in a meaningful way. Despite its invalidation of Oregon's statute on vagueness grounds, the court permitted the school district to deny reinstatement to Burton, limiting her relief to damages.[238] The rationale for this result was expressed as a balancing of Burton's interest in completing her one-year employment contract against the possible disruption of the school if she were allowed to remain.[239] The balance struck in *Burton* can be questioned because the decision in effect permits a school district to "buy out" an unwanted employee, although outright dismissal would be constitutionally impermissible. Such relief would seem to be wholly inadequate when measured against the value of an opportunity to prove one's capabilities and perhaps earn permanent employment in one's chosen field. This approach is particularly unfair where there has been no evidence of actual, as opposed to merely speculative, detriment to the school. Furthermore, the propriety of balancing community reaction against an individual's constitutional rights is doubtful. As dissenting Judge Lumbard pointed out: "If community resentment was a legitimate factor to consider, few Southern school districts would have been integrated."[240]

Reinstatement has been viewed as the proper remedy in a number of decisions where a public employee has been improperly terminated

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Cir. 1975), wherein an unwritten rule which precluded unwed mothers from school employment was challenged on due process and equal protection grounds. One of the two plaintiffs had lied on her employment application, stating that she had no children. The misrepresentation did not preclude her from having standing to challenge the constitutionality of the policy, which was subsequently found to have no rational relation to the school's stated objective of creating a proper moral atmosphere. The court found that the policy created an irrebuttable presumption that an unwed parent was an improper role model and that employment of an unwed parent would encourage school-girl pregnancies.

The difference between the court's emphasis on standing in *Ancanfora* and *Andrews* may reflect only a policy of different circuits. On the other hand, it may reflect dissonance between a court's recognition of constitutional rights for gays and a lingering reluctance to enforce such rights. Perhaps tolerance for unwed parenthood has reached a level as yet unattained by homosexuality.

237. 353 F. Supp. 254 (D. Ore. 1973). The Ninth Circuit upheld the district court's refusal to order Burton's reinstatement as a teacher. *See* 512 F.2d 850, 851-52, 854 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). *See* notes 134-39 and accompanying text *supra*.

238. 512 F.2d at 851-53. Burton was under a year-to-year contract with the school district. She had completed her second month when whe was dismissed, having served out the previous year's contract without incident. The district court awarded her a full salary for the remainder of the year one-half of her salary for the following year and attorney's fees and costs. It also ordered that the board expunge from its records and files all references to her dismissal. *Id.*

239. *Id.* at 852-53. The court noted that the long-standing legal controversy could be a factor in causing disruption to the school if Burton were reinstated for the few months remaining in her contract.

240. *Id.* at 855 (Lumbard, J., dissenting).

from employment based on the exercise of rights protected by the First Amendment.[241] In *Aumiller v. University of Delaware*,[242] for example, the court stated: "The violation in this case appears to present the classic situation in which reinstatement accompanied by an award of back salary constitutes an appropriate method of vindicating Aumiller's rights."[243] The court technically granted Aumiller's reinstatement for the term for which his contract had not been renewed on constitutionally impermissible grounds. This term had expired, however, by the time the decision was rendered. The court declined to reinstate Aumiller for a *future* term of a year because he had no property interest in future employment. Instead, the court awarded Aumiller the salary he would have earned had he not been wrongfully dismissed.[244] Since the award of back salary was predicated on Aumiller's right to reinstatement for the expired term, actual reinstatement would appear to turn on the vicissitudes of the court's calendar. Nevertheless, *Aumiller* is one of the few federal court decisions in the area of wrongful disqualification of a gay school employees which intimates that reinstatement would be a proper remedy.

In contrast to situations involving teachers, Civil Service cases which have overturned prior determinations of "immorality" have generally ruled that the evidence did not support the disqualification. In *Norton v. Macy*,[245] for example, the court simply held that Norton's conduct did not justify dismissal.[246] Similarly, in *Scott v. Macy*,[247] after the court had remanded the case, restoring Scott to the status of an eligible applicant,[248] a further Commission disqualification for reasons relating to Scott's homosexual conduct was overturned by the same court.[249]

The disparity between civil service and teacher dismissal cases in federal courts may be due to the courts' greater deference to community sentiment in the latter cases. In general, teachers probably have greater contact with members of the community than do most civil service employees, and it may be that the confidence of the community

241. *E.g.*, Sterzing v. Fort Bend Independent School Dist. 496 F.2d 92 (5th Cir. 1974); Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973); Woodward v. Hereford Independent School Dist., 421 F. Supp. 93 (N.D. Tex. 1976).

242. 434 F. Supp. 1273 (D. Del. 1977). *See* notes 140-46 and accompanying text *supra*.

243. 434 F. Supp. at 1308.

244. *Id.* at 1308-10. In addition to back wages, Aumiller was awarded $10,000 in compensatory damages for emotional distress and $5,000 in punitive damages against the president of the university for his "malicious or wanton disregard for Aumiller's constitutional rights." *Id.* at 1312-13.

245. 417 F.2d 1161 (D.C. Cir. 1969).

246. *Id.* at 1168. *See* notes 165-71 and accompanying text *supra*.

247. 349 F.2d 182 (D.C. Cir. 1965).

248. *Id.* at 185. *See* notes 160-64 and accompanying text *supra*.

249. Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1968).

is an important ingredient in the successful operation of a school system. On the other hand, it would seem to be no more rational or fair to base disqualification on adverse community sentiment concerning a gay teacher than it would be to permit disqualification of a teacher for his or her unpopular religious or political affiliations. These are factors which are extraneous to the teaching process. Nevertheless, the unavailability of adequate remedies to gay teachers in the federal courts continues.

B. Inconsistent Application in State Courts

1. Rational Nexus Requirement

State court decisions embody many of the same inconsistencies which appear in the federal court rulings. Here, however, traditional prejudices against gay teachers appear to be even more firmly entrenched. A Washington Supreme Court case, *Gaylord v. Tacoma School District*,[250] demonstrates the vitality of the view that gays are *per se* unfit to teach. Gaylord, a highly-rated high school teacher, was dismissed after twelve years for "immorality"[251] because he admitted to being gay in response to a school official's questioning, initiated after the official had been informed by a former student of his "impression" that Gaylord was a homosexual.[252] The court upheld the school board's policy and ruled it constitutional as applied to Gaylord.

The court found that Gaylord's status was covered by the school board policy because homosexuality is "widely condemned as immoral."[253] Since choice is an essential element of morality, and since the Court viewed homosexuality as an acquired orientation for most individuals, it reasoned that one who chooses this orientation must be held morally responsible.[254] Yet the record showed no evidence of homosexual conduct—only Gaylord's acknowledgement of his homosexuality. The majority, however, concluded that his admission implied homosexual conduct.[255] Having determined that homosexuality was

250. 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

251. These grounds for dismissal were contained in Tacoma School Dist. No. 10, Policy No. 4119 (5), *quoted in* Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d at 290, 559 P.2d at 1342.

252. 88 Wash. 2d at 298, 559 P.2d at 1346.

253. *Id.* at 295, 559 P.2d at 1345.

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

255. *Id.* at 297-98, 559 P.2d at 1344. Both dissenters criticized the majority's facile inference that Gaylord had engaged in illegal or immoral conduct. *Id.* at 300-02, 306-07, 559 P.2d at 1348-49, 1351 (Dolliver and Utter, JJ., dissenting). The majority, however, had indicated that proof of homosexual status alone would sustain the dismissal. It stated that school directors are not required to take an unacceptable risk in discharging their fiduciary duties by waiting for a specific instance of overt homosexual conduct before acting to prevent the perceived harm. *Id.* at 299, 559 P.2d at 1347. The likelihood of harm in Gaylord's

immoral *per se*, the court did not find it necessary to determine whether a nexus existed between Gaylord's sexual orientation and his fitness to teach. While an arguable link was implied in the court's finding that "confusion, suspicion, fear, expressed parental concern and pressure upon the administration" might impair Gaylord's efficiency as a teacher,[256] the evidence indicated that such an impairment was largely conjectural.[257]

Several collateral issues arise from the *Gaylord* opinion. First, had Gaylord responded dishonestly to the inquiry about his sexual orientation, an investigation into his private life might possibly have ensued. Thus, a mere suggestion of homosexuality could trigger whatever sort of inquiry a school board might wish to conduct. Second, the court relied on parental objections as a possible nexus between homosexuality and unfitness to teach. The few objections which were actually made, however, did not surface until after Gaylord's homosexual status became a matter of public knowledge. This information was made public by the school board, not by Gaylord. The court's decision could have the effect of arming school boards with a bootstrapping mechanism which it may unleash on even the most "closeted" gay teacher. Any diligent school board could discover a teacher's homosexuality, make it public knowledge, wait for adverse reactions which it could then use as the nexus by which to justify dismissal.[258] *Gaylord* thus demonstrates the continuing operation of traditional prejudices in disqualifying gay teachers for "immorality," along with the danger of unjustified invasions of personal privacy.

While the finding of "immorality" is a major avenue for disqualification of gay teachers, it is not the only method. For example, the constitutionality of a New Jersey statute which authorized requiring a psychiatric or physical examination of any school employee "whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health"[259] was upheld in *Gish v. Board of Education*.[260] The board had ordered Gish, who had been a high school teacher for seven years, to submit to a psychiatric

case was rather remote, however, in view of the fact that he had been a respected teacher for twelve years. Even his best friends on the faculty did not know he was gay. *Id.* at 303, 559 P.2d at 1349 (Dolliver, J., dissenting).

256. *Id.* at 297-98, 559 P.2d at 1346-47. The court pointed out that one student and three teachers had expressly objected to Gaylord's remaining on the faculty. In addition, the vice principal, principal and a retired superintendent testified that Gaylord's retention would create problems.

257. *See* note 255 *supra*.

258. To paraphrase Justice Douglas' query in Griswold v. Connecticut, 381 U.S. 479 (1965): Would we allow school boards to invade teachers' private lives searching for signs of homosexuality? *Id.* at 485.

259. N.J. STAT. ANN. §§ 18A:16-2,-3 (West 1968).

260. 145 N.J. Super. 96, 366 A.2d 1337 (1976), *cert. denied*, 434 U.S. 879 (1977).

examination because it believed his gay rights activism displayed such deviation as would affect his ability to teach, discipline and associate with his students,[261] despite the absence of instances of improper conduct in or out of the classroom with respect to students.[262]

Two psychiatrists were selected by the school board to examine Gish but each expressed negative opinions of his mental health prior to any examination, thus casting doubt on the impartiality of the inquiry.[263] The court rejected Gish's contention that due process demanded an impartial decision-maker, since the requirement that he undergo a psychiatric examination could not be classified as a penalty or sanction. It found that the board's duty to protect children outweighed the "minimal" deprivation of rights Gish would suffer by submitting to the examination.[264] This finding ignores a critical factor: presumably, the purpose of such an examination is to furnish the board with expert opinion of a teacher's fitness to be considered in subsequent disqualification proceedings. If the "experts" have begun to form their opinions *before* examining a teacher, their lack of neutrality would inject an element of unfairness into the ultimate board determination. Such a predetermined board hearing would be no more than a mere formality for the employee.

Gish also sought to avoid psychiatric examination on First Amendment grounds.[265] Although the court acknowledged his right to engage in the conduct and speech mentioned in the board's list of reasons for the examination, it again found that the board's interest in assuring the fitness of teachers was of paramount importance. Without even discussing the possible chilling effect on teachers' speech and associational rights resulting from the threat of psychiatric examination and subsequent disqualification, the court deemed the board's determination "fair and reasonable."[266]

Throughout the opinion, the court emphasized that Gish's examination was sought because of his gay activism, never avowing that homosexuality *per se* would be cause for examination and disqualification. Yet this appears to be the underlying rationale for the board's

261. *Id.* at 100-01, 103-04, 366 A.2d at 1339-40, 1341-42. Gish was president of the New Jersey Gay Activists Alliance, promoted the Alliance in the public media, attended a convention of the National Education Association and helped to organize a gay caucus there. *Cf.* Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973), where a college English teacher, under a contract, was ordered to undergo a psychiatric examination after he participated in anti–Vietnam war and anti–college administration demonstrations. No reason for the examination order was provided. The Ninth Circuit Court of Appeals held that this order violated due process requirements of notice and a proper hearing.

262. 145 N.J. Super. at 103, 366 A.2d at 1341.

263. *Id.* at 100-02, 366 A.2d at 1339-40.

264. *Id.* at 106-07, 366 A.2d at 1342-43.

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

266. *Id.* at 105, 366 A.2d at 1342.

action, since it also indicated concern over the strong possibility of psychological harm resulting from the students' continued association with Gish, independent of his activism.[267] Although the court avoided any discussion of how such harm might result, it implied that associating with Gish might somehow transmit sexual unorthodoxy to "impressionable, adolescent pupils."[268]

Similar reasoning led to the disqualification of a teacher for "incapacity" in *In re Grossman*.[269] Grossman, who had been a male, tenured music teacher for fourteen years, was dismissed after lengthy procedural processes because he had undergone a sex change. The state Commissioner found that there was no evidence that Grossman had engaged in deviant, abnormal or unbecoming conduct, and that the limited public protest against Grossman's continued employment would not disrupt the school if she were retained. Her dismissal was sustained, however, on the Commissioner's finding that Grossman's "incapacity" provided just cause.[270] No adverse findings existed as to her competence in conveying the subject matter to students. Instead, the finding of incapacity was based on the possibility suggested by expert psychiatric testimony for the board that some students might suffer emotional harm through the knowledge that their teacher had undergone a sex change. The court emphasized that the conclusion of incapacity related only to Grossman's fitness to teach in the school system where she had taught prior to the sex change.[271] In theory, then, the board's dismissal should not preclude Grossman from obtaining other school employment. The court's approval of the Commissioner's recommendation that the board submit a disability retirement application on Grossman's behalf,[272] however, suggests its recognition of the stigmatizing effect of dismissal for incapacity.

As applied to gay teachers, the reasoning utilized in *Grossman* could result in disqualification for "incapacity" if the fact of a teacher's sexual orientation became known. *Grossman* did not require evidence of actual disruption of the school; the mere possibility that some students might become disillusioned upon discovering the lifestyle of their teacher was sufficient. Furthermore, the court's heavy reliance on expert testimony as to Grossman's suitability as a role model for students

267. *Id.* at 100-01, 366 A.2d at 1339-40.

268. *Id.* at 105, 366 A.2d at 1342.

269. 127 N.J. Super. 13, 316 A.2d 39 (1974).

270. *Id.* at 22, 316 A.2d at 43.

271. *Id.* at 29-33, 316 A.2d at 47-49.

272. *Id.* at 33, 316 A.2d at 49. The *Grossman* approach might encourage recourse to compensating teachers dismissed for homosexual status by granting them disability pensions. Such a remedy would probably be financially impractical, however, because the number of gay teachers is undoubtedly far greater than the number who have undergone sex reassignment.

suggests that a similar result could be obtained in gay employment dismissal cases, provided that the board consults an expert who adheres to traditional concepts.[273]

These state court cases demonstrate the tendency to equate homosexuality, either explicitly or implicitly, with immorality, deviation from normal mental functioning or incapacity. While hearings may be afforded, adoption of a *per se* approach effectively eliminates the possibility that a gay teacher can establish the lack of a nexus between sexual orientation and occupational fitness. In Calfornia, the *per se* approach has been rejected by the supreme court, but, as will be seen, its alternative approach has not guaranteed substantive fairness in all cases.

2. Application of California's Nexus Requirement

The California decision in *Morrison v. State Board of Education*[274] seemingly protects teachers from arbitrary disqualification for unconventional sexual behavior by requiring that a school board demonstrate the manner in which his or her conduct relates to employment fitness. It will be recalled, however, that the conduct involved in *Morrison* was circumspect and non-criminal even before the revision of penal codes removed sanctions for consensual private acts. Moreover, it had occurred at least a year before it was reported to school officials.[275] The narrow facts of the case, though presenting an ideal opportunity for the court to delineate the nexus requirement, also make *Morrison* easily distinguishable from most other cases involving sexual unorthodoxy. In addition, the court cautioned that the law does not require that homosexuals be permitted to teach in California schools.[276] This reservation and the limited facts of *Morrison* may tend to curtail the application of its due process safeguards to openly gay teachers.

Even where it would be appropriate, the *Morrison* analysis is frequently applied superficially—if at all—to cases involving non-conventional sexual conduct. Despite *Morrison*'s express purpose of retaining the statutory distinction between automatic disqualification (for specified crimes) and discretionary disqualification (when other conduct is at issue),[277] some courts are quick to disregard it when the conduct is less innocuous than that of Morrison. This problem often arises where a gay educator has been acquitted of charges of public sexual miscon-

273. *See* Note, *Dimissal of a Transsexual from a Tenured Teaching Position in a Public School*, 76 WIS. L. REV. 670 (1976).

274. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969). *See* notes 191-204 and accompanying text *supra*.

275. *See* note 199 and accompanying text *supra*.

276. 1 Cal. 3d at 240, 461 P.2d at 394, 82 Cal. Rptr. at 194.

277. *Id.* at 218-19 n.4, 461 P.2d at 377-78 n.4, 82 Cal. Rptr. at 177-78 n.4. *See* note 198 and accompanying text *supra*.

duct,[278] has pleaded guilty to a lesser charge[279] or has been arrested and never charged.[280] At least one appellate court, in *Moser v. State Board of Education*,[281] has sustained credential revocation upon a finding of homosexual behavior in a public place without any further nexus requirement.[282] Another appellate court, in *Governing Board v. Metcalf*,[283] ignored the *Morrison* formulation,[284] relying instead on a *per se* determination of unfitness buttressed by the school principal's opinion that if Metcalf's conduct became known to the public, his exemplar image would be destroyed and he would be unable to function effectively as a teacher.[285]

Faced with this trend in the lower courts, the California Supreme Court specifically rejected the limitation of *Morrison* to non-criminal private conduct in *Board of Education v. Jack M.*[286] There, the teacher had been arrested for soliciting a homosexual act in a public restroom but no charges were pressed. The board filed a complaint but, based on substantial testimony regarding his fitness as a teacher, the trial court found in his favor.[287] The appellate court reversed, however, holding

278. *E.g.*, Board of Educ. v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (1973), *cert. denied*, 419 U.S. 807 (1974) (teacher was dismissed after acquittal of charge of oral copulation with another male. Held: the reasonable doubt standard of proof in criminal trials does not apply to civil proceedings where the purpose is to protect children).

279. *E.g.*, Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973). Pettit was arrested for committing three separate acts of oral copulation at a "swinger's" party and charged with violating CAL. PENAL CODE § 288a (West Supp. 1972), a crime enumerated in California's automatic disqualification statutes. The criminal charge was dropped and Pettit pleaded guilty to CAL. PENAL CODE § 650½ (outraging public decency), a misdemeanor. *See also* Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972). Moser was convicted of offensive conduct, CAL. PENAL CODE § 415, but the board found his acts constituted indecent exposure, loitering in a public toilet and solicitation to engage in lewd conduct, *id.* at 990-91.

280. *E.g.*, Board of Educ. v. Jack M., 19 Cal.3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977). Jack M. was arrested for lewd conduct in a public place, CAL. PENAL CODE § 647(a), but no charges were filed.

281. 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972).

282. *But see* Amundson v. State Bd. of Educ., 2 Civ. No. 37942 (December 17, 1971), in which the court found that a male teacher's act of soliciting two men, who later proved to be police officers, for acts of oral copulation in a public park was not shown to affect his fitness to teach. The *Amundson* court stressed that the teacher's conduct did not involve any students or fellow teachers and did not take place anywhere near school grounds. For a discussion of the relevancy of public versus private conduct, see Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CAL. L. REV. 1442, 1452-55 (1973).

283. 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974). In *Metcalf*, illegally obtained evidence concerning a teacher's act of oral copulation in a public restroom was held admissible in the civil proceedings which led to his disqualification.

284. *See* text accompanying note 200 *supra*.

285. 36 Cal. App. 3d at 550, 111 Cal. Rptr. at 727.

286. 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

287. *Id.* at 696, 566 P.2d at 604, 139 Cal. Rptr. at 702.

that the teacher's alleged criminal conduct evidenced unfitness as a matter of law.[288] Unanimously reversing the appellate court's ruling, the supreme court held that "neither statute nor decisional authority has applied a rule of *per se* unfitness to persons who were not convicted of specified sex offenses."[289] It noted that there was no evidence that the teacher had failed to instruct his students in morals, or that he was incapable of teaching. Moreover, extenuating circumstances might have influenced him to behave atypically on the occasion in question.[290]

The *Jack M.* decision should curb the predilection of some school boards and lower courts to characterize homosexual conduct as evidencing *per se* unfitness to teach. It should be noted, however, that the "substantial evidence" test relied upon by Justice Tobriner in *Jack M.*[291] is not difficult to meet. Where a trial court, in contrast to that in *Jack M.*, finds sufficient evidence of unfitness, its determination will probably be upheld.[292] The reluctance of some courts to apply the *Morrison* formulation may very well foreshadow its less than diligent application in the future.

Jack M. was an attempt by the California Supreme Court to indicate what grounds must satisfy *Morrison*'s nexus requirement to warrant employment disqualification. But the problems inherent in determining whether a teacher's dismissal comports with the requirements of due process are not solved merely by recognizing that the *Morrison* analysis applies, since *Morrison* simply listed the numerous factors to be considered in such a determination.[293] The scope of these problems will be explored below.

3. *Problems in the Application of* Morrison

One recurring problem in cases which do apply the *Morrison* criteria is that courts are free to weigh some factors heavily while omitting consideration of others entirely. How these factors are weighed may, in fact, turn upon the personal prejudices of a particular court, defeating the goal of *Morrison*. Thus, in *Pettit v. State Board of Education*,[294] a

288. Board of Educ. v. Millette, 133 Cal. Rptr. 275 (1976), *vacated sub nom.* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

289. 19 Cal. 3d at 699, 566 P.2d at 606, 139 Cal. Rptr. at 704. The court reaffirmed the principle that trial court findings, if supported by substantial evidence, will be upheld on appeal.

290. *Id.* at 700, 566 P.2d at 607, 139 Cal. Rptr. at 705. The homosexual solicitation was characterized as an isolated act of aggressive behavior by one of an otherwise passive sexual disposition, precipitated by an unusual amount of stress due to his mother's illness.

291. *Id.* at 696-700, 566 P.2d at 604-07, 139 Cal. Rptr. at 702-05.

292. *See* note 289 *supra.*

293. *See* text accompanying note 200 *supra.*

294. 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973). *See* note 279 *supra.*

teacher's credential revocation was upheld on the basis of her sexual misconduct. The court found that the "expert testimony" of three school administrators was sufficient to establish unfitness, even though their opinions might have been based in part on personal moral views.[295] As *Pettit* illustrates, a hostile school board or trial court may virtually disregard expert testimony regarding the non-probability of recurrence, the lack of effect on students and any remoteness in time or absence of actual public knowledge of a teacher's conduct.[296] Correspondingly, a board's perception of the "blameworthiness of the motives surrounding the conduct"[297] or "aggravating circumstances"[298] may be disproportionately emphasized.

Another problem stems from the fact that the factors enunciated in *Morrison* are subject to varying interpretation. What might appear to one adjudicative body as an "extenuating circumstance" might appear an "aggravating circumstance" to another.[299] If homosexuality is per-

295. 10 Cal. 3d at 35, 513 P.2d at 893, 109 Cal. Rptr. at 669. The court stated: "Even without expert testimony, the board was entitled to conclude that plaintiff's flagrant display indicated a serious defect of moral character, normal prudence and good common sense." *Id.*

For a discussion of school administrators as "experts" in teacher disqualification hearings, see Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAW. 839 (1974); Note, *Pettit v. State Board of Educ.—Out-of-Classroom Sexual Misconduct as Grounds for Revocation of Teaching Credentials*, 1973 UTAH L. REV. 797.

Justice Tobriner, dissenting in *Pettit*, stated that the "important issue of plaintiff's right to teach should not turn on the personal distaste of judges." 10 Cal. 3d at 41, 513 P.2d at 898, 109 Cal. Rptr. at 674 (Tobriner, J., dissenting). Furthermore, he noted that Pettit's duties did not include teaching sexual morality to her retarded pupils. *Id.* at 41-42, 513 P.2d at 898, 109 Cal. Rptr. at 674.

296. *Id.* at 42-43, 513 P.2d at 898-99, 109 Cal. Rptr. at 674-75 (Tobriner, J., dissenting).

297. *See, e.g.*, Governing Bd. v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (1971). Brennan, a teacher for thirty years, submitted an affidavit attesting to her almost daily private use of marijuana in support of a friend's motion in arrest of judgment. The affidavit was publicized, but no evidence was offered as to its effect on students. The court emphasized the "blameworthiness" aspect of her conduct, the intentional violation of the law to which Brennan attested in a public statement, but it omitted any consideration of Brennan's teaching record. Justification for dismissal was based on the *likely* effect her conduct would have on the students, rather than any actual effect. *Contra*, Comings v. State Bd. of Educ., 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972), where the court found that the record showed no evidence of whether Comings' conviction for marijuana possession had affected his students, therefore he could not be found unfit to teach.

298. *See, e.g.*, Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 35, 513 P.2d 889, 893, 109 Cal. Rptr. 665, 669 (1973). Although the majority in *Pettit* did not employ the term "aggravating circumstances" in this case, its repeated emphasis on Pettit's semi-public display of sexual conduct involving three different men suggested that the court's outrage precluded impartial consideration of other factors.

299. *See, e.g.*, Board of Educ. v. Jack M., 19 Cal. 3d 691, 695, 566 P.2d 602, 603, 139 Cal. Rptr. 700, 701 (1977). At the time of his alleged homosexual solicitation in a restroom, the teacher was experiencing stress over the illness of his mother. The school principal testified that Jack M.'s alleged conduct demonstrated improper reaction to stress and pressure, and

sonally abhorrent to members of the reviewing court, it is likely that they will anticipate a high degree of adverse impact upon students due to a teacher's homosexual conduct, even though that conduct may never become known to the students.[300] Since there is such a "wide divergence of views on sexual morality"[301] the fairness of permitting a school board or court to assess the "praiseworthiness or blameworthiness of the motives resulting in the conduct"[302] is questionable. And if a teacher is distressed by the knowledge that a colleague has engaged in homosexual conduct, an "adverse effect on fellow teachers" could readily be found, as was the case in *Gaylord*.[303]

A third problem is that both *Morrison* and *Jack M.* stressed the

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that she was not willing to take the risk of recurrence. It would appear that Jack M.'s stress was, if anything, an aggravating factor in the decision to disqualify him. The trial court, however, viewed M.'s accumulated stress as an *extenuating* factor.

300. *See e.g.*, McLaughlin v. Board of Medical Examiners, 35 Cal. App. 3d 1010, 1018-19, 111 Cal. Rptr. 353 359-60 (1973) (Kaus, P.J., dissenting). Although this case involved the disciplining of a physician accused of homosexual solicitation in a restroom, the dissenting opinion's analysis illuminates the effect of inveterate prejudice on the evidence-weighing process and is, perhaps, applicable to cases involving gay teachers: "What this court is really doing is to substitute a visceral feeling that the medical achievement of a homosexual doctor must be affected by his sex drive—at least with respect to male patients—for evidence that this is so in this particular case. Thus there is nothing whatever in the record to support the court's statement that 'appellant's problem apparently stays with him most, if not all of the time. . . .' The fact is, however, that there is no evidence that appellant has ever faltered in connection with his profession." *Id.*

See also L. HUMPHREYS, THE TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES (1975). This doctoral dissertation describes the clientele of public restroom encounters—many of whom are basically heterosexual—and the etiquette surrounding such experiences. According to Humphreys' research, most of such encounters take place at carefully chosen, out-of-the-way facilities which are unlikely to be frequented by passersby, but which are known meeting places where casual sex is available. Many of the men he observed were extremely cautious in finding partners and had elaborate warning systems to avoid being surprised by the public.

301. Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 43, 513 P.2d 889, 899, 109 Cal. Rptr. 665, 675 (1973) (Tobriner, J., dissenting).

302. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 229, 461 P.2d 375, 386, 82 Cal. Rptr. 175, 186 (1969) (footnote omitted). The court discussed the emotional, financial and marital difficulties of Morrison's partner, which might suggest that the court discerned an altruistic motive to Morrison's actions. *Id.* at 218-19, 461 P.2d at 377-78, 82 Cal. Rptr. at 177-78.

303. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340, 1346, *cert. denied*, 434 U.S. 879 (1977). *See* notes 250-57 and accompanying text *supra*. Three teachers objected to Gaylord's continued employment, which apparently had a degree of influence on the court. *See* note 256 and accompanying text *supra*. The largest teacher's union in California has adopted a policy which states in part: "The professional staff shall be employed and retained without discrimination because of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, social or economic belief, or *sexual orientation*." [Emphasis added]. CALIFORNIA TEACHERS ASSOC., POLICY STATEMENT ON ACADEMIC FREEDOM (adopted by the State Council of Educ., Jan., 1977). This suggests that in California, the majority of teachers favor employment protection for their gay peers.

isolated nature of the conduct at issue.[304] The conclusion which might be drawn is that an asexual, or very repressed, individual who "slips" under the pressure of exigent circumstances is more deserving of employment protection than a teacher who is open about his or her gay orientation, perhaps living in a stable, long-term relationship. The validity of this rationale is questionable in light of research which indicates that gays who openly acknowledge their orientation tend to be better adjusted than those who conceal or deny their homosexuality.[305] Moreover, this same rationale, if applied to heterosexual conduct, would be reminiscent of the days when married women were not permitted to teach, an atavism which would contravene notions of contemporary justice and mores.

According to the *Morrison* decision, notoriety which might impair classroom efficiency could furnish cause for dismissal.[306] This loophole would permit teacher disqualification in California under the facts presented in *Gaylord*,[307] *Acanfora*,[308] *Gish*,[309] *Aumiller*[310] and *Burton*,[311] since each of these teachers had arguably attained some degree of notoriety. In *Burton* and *Gaylord*, public awareness of the teacher's sexual preference had not even been engendered by any conduct of the teacher, but had instead been promulgated by the school board. Yet in none of these cases was there even a suggestion of criminal conduct, improper behavior with students or dereliction in teaching duties. One commentator has noted that school administrators seeking to justify disqualification of a teacher for notoriety may be simply voicing their own disapproval of the teacher's conduct.[312] Yet this is the precise due process problem that *Morrison* sought to avoid.[313]

The publicity aspects noted in *Morrison* and *Jack M.* raise another issue not yet dealt with by the California Supreme Court: where publicity arises from a gay teacher's political and educational efforts, as in

304. *See* notes 199 & 290 and accompanying text *supra*.

305. *See* NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY: FINAL REPORT AND BACKGROUND PAPERS (1972). The latest Kinsey Institute study indicates that on the whole, gay lifestyles vary much as do heterosexual lifestyles. The study suggests that gays are not, in general, anxiety-ridden as is usually believed, and that those who are involved in monogamous relationships might be even better adjusted and happier than their heterosexual counterparts. *Charting the Gay Life*, NEWSWEEK, Mar. 27, 1978, at 98-100, reporting on A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN & WOMEN (1978).

306. *See* note 202 and accompanying text *supra*.

307. *See* notes 250-58 and accompanying text *supra*.

308. *See* notes 223 & 224 and accompanying text *supra*.

309. *See* notes 260-62 and accompanying text *supra*.

310. *See* notes 140-44 and accompanying text *supra*.

311. *See* notes 134-35 and accompanying text *supra*.

312. Comment: *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CAL. L. REV. 1442, 1454 (1973).

313. *See* notes 195-97 and accompanying text *supra*.

Acanfora, *Gish* and *Aumiller*, the doctrine of unconstitutional conditions should weigh heavily against dismissal for notoriety.[314] In fact, no California case has squarely addressed the question of balancing a gay teacher's right to free expression against the state's interest in regulating speech that might interfere with the efficiency of the school district. This problem merits closer analysis to determine how the mandates of *Pickering*,[315] protecting teachers' speech and associational rights, might apply to the off-duty activities of teachers. Since notoriety, or even public awareness, concerning a teacher's sexual conduct is thought to interfere with his or her ability to function as a teacher, this justification could be offered to excuse any "chilling" of First Amendment rights.

While many issues remain unresolved in California after *Morrison*, the decision at least reflects a more careful and objective analysis of the constitutional rights of gay teachers than has been found in either federal or other state courts. But as indicated, much is left to be clarified. In the final section, an attempt will be made to delineate exactly what criteria should, and should not, play a role in determining whether a homosexual teacher is fit for his or her profession.

IV. Toward More Effective Standards of Substantive Fairness

Procedural safeguards in the context of employment disqualification are important, but if the substantive standards against which teachers are measured are subjective, procedural protection is illusory. Moral judgments are by their nature subjective. Conduct or status of which a segment of the population disapproves may have no demonstrable effect on employment performance, other than that arising from community censure. In such cases, the nexus between conduct and unfitness for employment would be at best fashioned from subjective criteria and virtually non-existent. In order to avoid the operation of subjective criteria, the primary concerns of administrative boards in assessing the fitness of teachers should be the educational competence of the teacher and the possibility of actual harm to students resulting from the teacher's conduct. Ultimately, state legislatures and courts should promulgate and ensure the application of objective criteria to teacher disqualification.

A. Educational Competence

A teacher's ability to function effectively in the classroom is a proper focus of inquiry in judging fitness. One component of a teacher's effectiveness is the capacity to maintain adequate discipline, a

314. *See* notes 68-91 and accompanying text *supra*.

315. *See* notes 83-88 and accompanying text *supra*.

task which is usually best achieved when students respect and want to please their teacher.[316] If a teacher's sexual conduct seriously undermines the respect he or she gains from the students, a finding of unfitness could be justified. This might occur if students observe a teacher's public sexual behavior or if publicity calls attention to a teacher's arrest for such conduct. Even in these cases, however, the effect of notoriety should be examined realistically to determine whether its long-range consequences warrant ousting an otherwise capable teacher. The event might engender only a brief flurry of comment from students or parents, but many courts assume that public knowledge of a teacher's unconventional sexual conduct will obliterate whatever goodwill and respect he or she has earned through years of competent teaching.[317] The teacher may be able to restore classroom order promptly so that the educational process is not impaired, and it would seem reasonable for adminsitrative boards to allow a brief period of time for this to take place.

In addition to a teacher's ability to maintain order in the classroom, a school board should also assign considerable weight to his or her skill in facilitating the learning process. Yet only rarely is the quality of a teacher's work even considered when he or she is under scrutiny for unconventional sexual behavior. In some instances, the revelation of a teacher's homosexuality is so damaging that even a demonstrated record of excellence in the profession may pale, as it did in *Gaylord*.[318] The ultimate losers, in such a case, may very well be the pupils, since they are deprived of a well-qualified instructor for reasons unconnected with his or her teaching ability.

School boards frequently cite a teacher's inability to act as "moral exemplar" for pupils to furnish evidence of unfitness.[319] A teacher's ability to instruct students, even by example, on sexual morality should not be examined. Rather, inquiries should focus on whether a teacher advocates or imposes on students his or her own view of sexual morality. It is inconceivable that a conventionally heterosexual teacher would be investigated for his or her ability to instruct students on how to "grow up straight," since this is not the job of a modern school teacher. As Justice Tobriner noted in his dissent in *Pettit*: "[The] view that teachers in their private lives should exemplify Victorian principles of sexual morality, and in the classroom should subliminally indoctrinate the pupils in such principles, is hopelessly unrealistic and atavistic."[320] To dismiss a gay teacher for his inability to accomplish the

316. *See* S. WEBSTER, DISCIPLINE IN THE CLASSROOM, 36, 60-61 (1968).

317. *See* notes 251 & 256 and accompanying text *supra*.

318. *See* notes 250-58 and accompanying text *supra*.

319. *See, e.g.*, Pettit v. State Bd. of Educ., 10 Cal.3d 29, 36, 513 P.2d 889, 894, 109 Cal. Rptr. 665, 670 (1973).

320. *Id.* at 44, 513 P.2d at 899, 109 Cal. Rptr. at 675 (Tobriner, J., dissenting).

"unrealistic and atavistic"[321] would therefore be patently unfair.

B. Actual Harm

In addition to focusing on realistic educational goals, an administrative board's scrutiny should be directed toward the possibility of actual harm resulting from a teacher's behavior. Where a teacher's conduct is directed at children, it should undoubtedly be cause for disqualification.[322] There is, however, little basis for assuming that because a teacher has engaged in unorthodox sexual conduct with adults, a similar likelihood exists for misconduct with students.[323] Yet this assumption may underly the reasoning of some boards and courts.[324]

Another possibility of "harm" which is often relied upon as a justification for a teacher's disqualification is the relationship between a teacher's sexual orientation and the sexual development of his or her students. Researchers have not yet established any such cause and effect relationship or lack thereof. Indeed, it may not be possible to determine whether a teacher's sexual preference significantly affects the sexual development of his or her students, but contemporary research indicates that sexual orientation is fixed before most children enter

321. *Id.*

322. *E.g.*, Hankla v. Governing Bd., 46 Cal. App. 3d 644, 120 Cal. Rptr. 827 (1975) (school principal who fondled a male student was criminally charged and placed on immediate compulsory leave of absence pursuant to dismissal proceedings); Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 940 Cal. Rptr. 318 (1971) (junior college teacher was found partially nude in a parked car with a female student and attempted to flee from deputy sheriff); Weissman v. Board of Educ., 547 P.2d 1267 (Colo. 1976) (teacher supervising field trip engaged in suggestive horseplay with female students); Denton v. South Kitsap School Dist. No. 402, 10 Wash. App. 69, 516 P.2d 1080 (1973) (teacher discharged because of sexual relations with a minor student who became pregnant). An instructor's sexual activity with a mature student, while it may not inflict actual harm upon the student, may raise the additional problem of a teacher's requiring sexual favors in exchange for good grades. *See, e.g.*, N.Y. Times, Aug. 22, 1977, at 30, col. 1, reporting on suit filed by women students charging Yale University faculty with engaging in sexually offensive conversations and behavior. Apart from the infliction of actual harm, a strong possibility of future harm to schoolchildren may be sufficient evidence upon which to predicate a teacher's disqualification. *See, e.g.*, Alford v. Department of Educ., 13 Cal. App. 3d 884, 91 Cal. Rptr. 843 (1970) (psychiatric testimony furnished substantial evidence that teacher suffering from mental illness was unfit to teach).

323. One researcher found that the prototypical child molester is a previously heterosexually–oriented man, aged 35-50, who is no longer experiencing heterosexual relations. The exclusively homosexual individual whose attention is focused on adults is hardly ever a danger to children. M. SCHOFIELD, SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY 149, 155 (1965). *Accord*, GREAT BRITAIN, COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 45-46 (Amer. ed. 1963); E. SCHUR, CRIMES WITHOUT VICTIMS 74 (1965).

324. The allusions to "harm" in opinions such as *Gaylord* suggest a concern with something more than the emotional impact of a teacher's sexual unorthodoxy noted in *Grossman*. *See* note 255 *supra*.

school.[325] Such generalized and unsubstantiated hypotheses of harm, therefore, do not provide fair criteria for a teacher's disqualification.

C. Ensuring Objective Criteria

Without guidance from the Supreme Court as to what employment standards are constitutional, most state legislatures have adopted statutory schemes governing employment disqualification which leave excessive room for judgments based on subjective notions of morality. Ideally, any loopholes should be closed by additional legislation. This could be done by amending education codes to indicate that: (1) private, consensual sexual conduct may not be considered as evidence of "immorality" or unfitness to teach, (2) public knowledge of a teacher's private conduct may not, by itself, furnish cause for disqualification, and (3) teachers may not be disqualified for engaging in out-of-classroom conduct otherwise protected under the First Amendment.[326] It is unlikely that legislatures will undertake this task on their own initiative, risking public disapproval; however, as shown by the history leading to revision of the civil service regulations, a push from the judiciary may result in administrative or legislative reevaluation of the underlying policies.[327] If, as is contended here, existing policies result in the arbitrary disqualification of gay teachers and other gay public employees, there should be no bar to judicial review of the constitutionality of such policies.[328]

Aside from judicial interpretation of federal guarantees or legislative revision of education codes, a third—and perhaps more effective—source for protecting the rights of gay teachers lies in state constitutions. The California Constitution, for example, contains an explicit right to privacy.[329] Moreover, the California judiciary has recognized that the "right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection,"[330] and, through the

325. J. MONEY & A. EHRHARDT, MAN AND WOMAN, BOY AND GIRL 23 (1972).

326. This approach would track, to some extent, the revised civil service regulations. *See* notes 180 & 181 and accompanying text *supra*.

327. It will be recalled that the civil service regulations were revised only after a federal district court issued an injunction against enforcement of the old regulations. Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973). *See* notes 177-79 and accompanying text *supra*.

328. As the district court pointed out in *Acanfora*: "While a court must necessarily bear a sense of proportion with respect to precedent and social mores, a rigidly restrictive theory of [constitutional] interpretation, avoiding the dangers of judicial activism, is open to criticism for abdication of the duty to expound the Constitution." Acanfora v. Board of Educ., 359 F. Supp. 843, 850 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

329. CAL. CONST. art. I, § 1.

330. Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 75, 435 P.2d 553, 559, 64 Cal. Rptr. 785, 791 (1968).

Morrison and *Jack M.* decisions, it has attempted to ensure that teachers accused of immorality are not dismissed without a "careful and reasoned" inquiry into their fitness.[331] These factors, coupled with the fact that California, as many other states, no longer regards private consensual homosexual acts as criminal,[332] suggest a state objective of maintaining the separation between purely private concerns and those which truly affect the welfare of the public.

If presented the opportunity, the California Supreme Court should consider the possibility that the state constitution precludes employment disqualification for private homosexual activities or conduct directed toward attaining equality of rights for homosexuals. It may be argued that the United States Supreme Court has affirmatively refused to recognize constitutional protection for affectional preference.[333] Ample precedent exists, however, for the protection of individual rights under the California Constitution to an extent even greater than that required by the Federal Constitution.[334] To this end, judicial clarification is needed on the question of whether the application of subjective moral criteria to decisions concerning employment disqualification offends the state constitution. Only with such guidance will the gaps left open by *Morrison*, permitting arbitrary evaluations of teacher fitness,[335] be filled.

331. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 238-39, 461 P.2d 375, 394, 82 Cal. Rptr. 175, 194 (1969).

332. *See* note 100 and accompanying text *supra*.

333. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). Affectional preference concerns those rights which have been found implicit in the Constitution in other contexts, such as the right to privacy and the right to exercise control over one's own body. As previously noted, the Supreme Court has declined to apply these developing rights to issues concerning homosexual conduct. *See* notes 99-111 and accompanying text *supra*. Even less helpful is the Court's silence on questions involving First Amendment rights and the "unconstitutional conditions" on employment problems. Gay employees, particularly teachers, are left without notice as to what conduct may preclude them from jobs; writing a letter to the local newspaper concerning gay rights, marching in a gay rights parade, attending meetings of activist organizations or signing a petition in support of gay rights could all conceivably subject a teacher to disqualification. Yet most people would defend a teacher's right to engage in any of those activities.

334. *Compare* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) *with* Harris v. New York, 401 U.S. 222 (1971); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) *with* Fronteiro v. Richardson, 411 U.S. 677 (1973); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) *with* San Antonio School Dist. v. Rodrigues, 411 U.S. 1 (1973). *See also* Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974). Another state where this argument could be made is Alaska, where a state constitutional right to privacy has already been interpreted to protect adult individuals' possession of marijuana at home for personal use. Ravin v. State, 537 P.2d 494 (Alas. 1975).

335. *See* notes 274-315 and accompanying text *supra*.

Conclusion

A review of the history of employment of gay individuals illustrates the effect public prejudice has had upon the due process safeguards to which they, as citizens, are entitled. Modern research and practical experience suggest that such opprobrium is unwarranted and even detrimental to society, but discriminatory treatment of gays' employment rights is still evident in the case law. Although the Supreme Court has failed to address this issue directly, the imprimatur of the *Doe* decision[336] implies that gay employment rights will not be accorded any protection under the Federal Constitution.

California has taken a step toward curtailing arbitrary enforcement of state dismissal and licensing codes against gay teachers, and other public employees and licensees, through the *Morrison* and *Jack M.* decisions.[337] The opportunity remains, however, for school boards and trial courts to apply their own subjective standards of morality to evaluations of teacher fitness.[338] The recent California campaign to mandate disqualification of gay teachers, which raised for many the spectre of anti-gay "witch-hunts,"[339] illuminates the need for employment safeguards based on fair standards.

This comment has attempted to show that any morally-based disqualification of teachers for conduct which is private and consensual, or which is otherwise protectible under the First Amendment, offends due process because it is patently arbitrary. The United States Supreme Court's avoidance of cases posing due process problems in disqualification of gay employees does not preclude state supreme court recognition of employment protection under the state constitution. If the legislature has failed to ensure that disqualification procedures adequately protect individuals' constitutional rights, the state supreme court should act. As expressed by Judge Lumbard, dissenting in *Burton v. Cascade School District*:

> One of the major purposes of the Constitution is to protect individuals from the tyranny of the majority. That purpose would be completely subverted if we allowed the feelings of the majority to determine the remedies available to a member of a minority group who has been the victim of unconstitutional actions.[340]

336. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976). *See* notes 99-104 and accompanying text *supra.*

337. *See* notes 191-200 and 286-90 and accompanying text *supra.*

338. *See* notes 294-313 and accompanying text *supra.*

339. For another illustration of the witchhunt analogy, see J. GERASSI, THE BOYS OF BOISE: FUROR, VICE AND FOLLY IN AN AMERICAN CITY (1968), a chronicle of a modern-day (1955) witchhunt which sent many gay residents of Boise to prison.

340. 512 F.2d 850, 855-56 (9th Cir. 1975) (Lumbard, J., dissenting) (footnote omitted).