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GOVERNMENT EMPLOYMENT AND THE HOMOSEXUAL

There exists today an ever-increasing concern regarding governmental intrusion into the private lives of American citizens. This has recently been evidenced in a number of judicial determinations wherein the courts have taken a restrictive view of governmental interference vis-à-vis such moral issues as contraception, pornography and abortion.¹ These decisions have manifested a discernible trend away from regulation of those areas of an individual’s life falling within the category of “morality.” The most recent developments along these lines appear to extend the scope of this protection to homosexuals.

Until recently, in addition to the criminal sanctions prescribed for private, consensual homosexual acts,² there has been a governmentally imposed civil censure of those whose conduct, while short of that criminally proscribed, transcends the boundaries of commonly accepted sexual mores. One result of this has been the traditional exclusion of homosexuals from government employment.³ Now, as modern concepts of due process expand, such exclusionary policies are being attacked as unduly harsh, unreasonably based, and, therefore, violative of the fifth and fourteenth amendment due process clauses.

In Norton v. Macy,⁴ the District of Columbia Circuit delimited the grounds upon which the Civil Service Commission may dismiss a homosexual employee by narrowly interpreting the congressional provision that no civil servant may be discharged except for “such cause as will promote the efficiency of the service.”⁵ Subsequently, in Morrison v. State Board of Education,⁶ the California Supreme Court refused to uphold the dismissal of a homosexual teacher under a statute providing for removal on the basis of “immoral conduct.” The Morrison court, relying extensively on Norton, held that the requirements of due process

⁴ 417 F.2d 1161 (D.C. Cir. 1969).
of law could not be satisfied unless the school board related its determination of immorality to the plaintiff's unfitness to teach. More recently, in McConnell v. Anderson, the United States District Court for Minnesota reached a similar determination regarding a state university's failure to hire an otherwise qualified librarian who publicly proclaimed his sexual preference for males. Abandoning the concept that public employment is a privilege rather than a constitutionally protected right, the federal district court found that the employing university's ruling of ineligibility was violative of the due process clause since it was predicated upon the plaintiff's unrelated private behavior rather than on any inability to successfully perform the duties of a librarian. These recent decisions indicate an apparent reversal in government policy towards homosexuals; and it is the scope of that reversal with which this comment will deal.

Prior to Norton, the American judiciary evidenced little concern for the substantive bases underlying the exclusion of homosexuals from governmental employ. Unquestioned government policy presumed the validity of such dismissals as being necessary for the promotion of general agency efficiency. The assumption that the presence of homosexuals impaired efficiency per se was so firmly embedded in the opinion of the District of Columbia Circuit in Dew v. Halaby that the majority disposed of a contrary argument by means of a footnote. Similarly, the dissent chose to ignore the efficiency issue and based its disagreement on the finding that although Dew might have had sexual relationships with other men previously, he was not, at the time of discharge, a homosexual. The circuit court thus deemed "the crucial question" to be whether removal could be properly based on the plaintiff's pre-employment conduct, despite the fact that the appellant introduced evidence allegedly proving that his admitted homosexual acts were unrelated to his competence. The issue was reduced to one of procedure, and the Civil Service Commission was not called upon to defend the broader policy under which the plaintiff had been dismissed. The Commission's determination of unfitness was thereby upheld despite its insistence that Dew's capability at the time of dismissal was "irrelevant," and its unvarnished admission that it had no evidence "whatsoever" that he was incompetent. However, the agency's awareness of the difficulties that might be encountered in defending its policy toward homosexuals

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8 317 F.2d 582 (D.C. Cir. 1963).
9 Id. at 587 n.10.
10 Id. at 591 (dissenting opinion).
11 Id. at 585.
12 Id. at 591 n.11 (dissenting opinion).
was made manifest upon the granting of certiorari by the Supreme Court. At this juncture the Commission chose to reinstate Dew with back pay in lieu of responding on the merits of the issue.

In *Anonymous v. Macy,* the Fifth Circuit was presented with an opportunity to unequivocally review the merits of the Civil Service Commission’s exclusionary policy towards homosexuals. The plaintiff, a postal worker discharged for homosexual activities, did not deny the allegations, but, instead, argued that such acts were committed in private during nonworking hours, that they had no effect on the efficiency of the service, and that they could not therefore be proper grounds for his dismissal. In a brief per curiam opinion, the court, relying on *Hargett v. Summerfield,* refused to consider the above contentions, concluding that a review of a Civil Service determination of unfitness on the merits was beyond the scope of its authority. As in *Dew,* the issue was thus reduced to one of procedure. The court found that the procedural defect, i.e., the Government’s failure to inform the appellant of an affidavit used against him at the initial hearing, had been waived. While the Fifth Circuit was admittedly concerned with protecting the discharged employee’s procedural rights, it found it unnecessary to determine whether there was a rational relationship between the facts as found by the Commission and the action allegedly taken on the basis of those facts.

Chief Judge Bazelon of the District of Columbia Circuit first recognized the possible need for an examination of the Civil Service Commission’s exclusionary policies in the 1965 decision of *Scott v. Macy.* In that case, a 2-1 decision, the court reversed the appellant’s dismissal from federal employment for homosexual activities because the Commission had failed to specify the particular acts found immoral. Relying on this procedural defect, Judge McGowan, concurring, was able to avoid the Chief Judge’s dictum that the appellant’s conduct must be shown to have a detrimental effect upon efficiency. He did, however, concede that this issue might have arisen if Scott had been given proper notice of the acts relied upon.

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13 398 F.2d 317 (5th Cir.), cert. denied, 393 U.S. 1041 (1968).
14 “So long as there is substantial compliance with applicable procedures and statutes, . . . administrative determination[s are] not reviewable as to the wisdom or good judgment of the department head in exercising his discretion.” *Id.* at 318 n.1, quoting 243 F.2d 29 (1957).
15 349 F.2d 182 (D.C. Cir. 1965).
16 Chief Judge Bazelon would require not only the specifics of the acts alleged, but also a statement as to how the conduct alleged was related to the appellants “occupational competence or fitness.” *Id.* at 186.
17 *Id.* at 186. In a strong dissent, Judge Burger, now Chief Justice of the United States Supreme Court, objected not only to the reversal, but also to the Chief Judge’s dictum concerning the showing of a relationship between conduct and efficiency. Relying
The same two parties again appeared before the District of Columbia Circuit after the Civil Service Commission had purportedly corrected the procedural defects upon which the earlier decision had been disposed.\textsuperscript{18} Subsequent to the first adjudication, the Commission had confronted Scott with specific allegations of homosexual activity, and then challenged him to deny that he had ever engaged in homosexual acts. The appellant denied all specific charges and asserted that the Commission had no right to ask the latter question because it had no bearing upon his fitness to perform work and, therefore, constituted an invasion of his right to privacy. The agency deemed the question pertinent to a determination of fitness, and rated him ineligible for employment due to his "refusal to furnish testimony" as provided by the Code of Federal Regulations.\textsuperscript{19} Despite Scott’s urgings that the gravamen of his disqualification was his reputedly immoral conduct, and contrary to its own prior ratiocination, the Commission abdicated its position and alleged instead that its determination was exclusively based upon the appellant’s failure to testify. The court, recognizing the fallacy of this argument, reversed the disqualification based on the Government’s failure to inform Scott of an unambiguous predicate for such agency action. Perhaps of greatest significance in this case was the Commission’s perseverance in its efforts to keep the broader issue, i.e., its policy toward homosexuals, beyond the reach of the judiciary. This intent on the part of the Commission was again made clear by its subsequent action when, as in Dew, the agency found the appellant suitable for employment rather than face the merits of the issue in further litigation.\textsuperscript{20}

The significant inquiries raised in Scott, i.e., whether governmental scrutiny of private conduct is violative of the constitutional right to privacy, and whether the exclusion of homosexuals from government service promotes efficiency, were not adjudicated until the decision of Norton v. Macy.\textsuperscript{21}

The controversy in Norton arose when the appellant, a budget analyst in the National Aeronautics and Space Administration (NASA), on Dew, Judge Burger felt the Commission was acting within the discretionary powers delegated by Congress. Moreover, he contended, “precedent, contemporary standards, and common sense require rejection of [Scott’s] substantive argument.” \textit{Id.} at 190 (dissenting opinion).

\textsuperscript{18} 402 F.2d 644 (D.C. Cir. 1968).
\textsuperscript{19} “[T]he Commission may deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee for any of the following reasons . . . (d) Refusal to furnish testimony as required by § 5.3 of this chapter. . . .” 5 C.F.R. § 731.201(d) (1968).
\textsuperscript{20} Note, \textit{supra} note 3, at 1748.
\textsuperscript{21} 417 F.2d 1161 (D.C. Cir. 1969).
was arrested, ostensibly for a traffic violation, by two officers of the Washington Morals Squad. A passenger in Norton's car told the authorities that the appellant had "felt his leg" and that "it would take an idiot not to be able to figure that he [appellant] wanted to have sex . . . on me." Immediately subsequent to police investigations, which lasted almost twenty-four hours, and which his supervising employer had witnessed incognito, Norton allegedly conceded that he had engaged in mutual masturbation with other males and that he sometimes experienced homosexual desires while drinking. As a result, he was discharged from his position for "immoral, indecent, and disgraceful conduct" and for having "traits of character and personality which render him . . . unsuitable for further Government employment." In a reversal of previous policy, the District of Columbia Circuit chose to assume *arguendo* that the Commission's factual findings were true and that the questionable procedural tactics utilized were satisfactory. The court thus concerned itself with the merits, i.e., whether Norton's dismissal would promote service efficiency as required by Congress.

Chief Judge Bazelon promptly rejected the Fifth Circuit's assertion that an administrative agency's estimation of an employee's qualifications is beyond judicial scrutiny. The Chief Judge, writing for the majority, was of the opinion that "[t]he Government's obligation to accord due process sets at least minimal substantive limits on . . . [the Civil Service Commission's] prerogative to dismiss its employees . . ." The administrative agency's admittedly wide discretion in this area, he said, did not obviate the need to show an "adequate rational cause" for its action. Moreover, these limitations were deemed greater where the individual's prospects for private employ would be severely curtailed as a result of the stigma attached to government dismissal; the court likened a federal rating of unsuitability to "an official defamation of character."

The court then turned to the Commission's hypothesis that the need to establish an adequate rational cause for dismissal could be neutralized by merely labeling an employee's conduct as immoral. In refuting this tenet, the District of Columbia Circuit stated that "[a] pronouncement of 'immorality' tends to discourage careful analysis because it unavoidably connotes . . . universal standards of rectitude."

The court felt that it was not within the province of the Commission

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22 *Id.* at 1162-63.
23 *Id.* at 1163.
24 *Id.* at 1164.
25 *Id.*
26 *Id.* at 1165.
"to make or enforce absolute moral judgments." Moreover, even assuming that such a determination could be accurately made, predicated on conventional societal standards, the imposition of such standards on the private lives of federal employees, the Circuit Court maintained, "is at war with elementary concepts of liberty, privacy and diversity." Thus, it was resolved that Norton could not be dismissed on the basis of "immoral conduct" unless there could be shown an ascertainable relationship between what he had done or might be disposed to do and the efficiency of the service.

The court next distinguished Norton from its earlier holding in Dew v. Halaby on the somewhat tenuous grounds that the latter case "rested on the special demands of a position entailing continuing responsibility for many lives." Since no proof was offered in Dew concerning service efficiency, and since the Commission had in fact admitted that its dismissal therein was not in any way related to Dew's capability, a distinction predicated on Dew's position or responsibility seems inconsistent with the efficiency standard promulgated in Norton. The Chief Judge did note, however, that Dew had not been finally adjudicated because Dew was reinstated shortly after the Supreme Court granted certiorari. In any event, the court emphasized that Norton was not in contact with the public and that his fellow employees were unaware of his reputedly immoral behavior. Moreover, the NASA official who fired him testified that Norton was a competent employee and expressed a desire to help him "if there was anyway around this kind of problem." The official admitted that the dismissal was based on the Commission's policy of excluding homosexual workers and did not reflect the agency's concern with the appellant's job performance or his affect on service efficiency.

The Commission's admitted reason for discharging Norton was based on the "nebulous" theory that although the appellant's continued employ would not directly lead to a decrease in efficiency, this result would occur indirectly because his presence would eventually embarrass the agency and lead to bad relations with the public. Refusing to accede to this reasoning, the court required the showing of "some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service." Finding the possibility of embarrassment unsubstantiated,
and the appellant's private behavior discreet, the District of Columbia Circuit held that his dismissal was an arbitrary governmental action, repugnant to the requirements of due process, and that he was therefore unlawfully discharged.

The Norton court specifically noted that its holding did not preclude the possible discharge of homosexuals from government employ, but rather, required that such action rest on some "ascertainable deleterious effect" upon service efficiency. Thus, the potential vulnerability of a homosexual privy to classified information to blackmail, or the notorious and flagrant displays of unorthodox sexual behavior, might, in a given situation, be valid grounds for a homosexual's dismissal. Moreover, if agency embarrassment were substantiated, it was conceded that this might also be cause for removal; but such cause must relate to "some more concrete injury to the service than a general tarnishing of an agency's antiseptic public image."32

Before a meaningful analysis of the Norton decision can be attempted, it is necessary to dispense with the dissent's concern that the court had violated agency discretion in reaching its determination. Placing heavy reliance on Hargett v. Summerfield, which the majority allegedly distinguished in its discussion of the Fifth Circuit's opinion in Anonymous v. Macy, the dissent, per Judge Tamm, concluded that the theory that homosexual conduct does not relate to efficiency is unrealistic, and that the reversal of the agency's dismissal of a homosexual was an abrogation of agency discretion.

Preliminarily, it must be reiterated that the Norton court found that the Commission's action was not improper per se, but rather it was improper because it was unsubstantiated. It is not only the privilege, but the duty of the courts to see that administrative action, whether or not the court agrees with the final determination, has a substantial basis in fact.33 Since the Civil Service Commission's own spokesman based his dismissal of Norton on mere custom, admitting that he was not himself adverse to the appellant's continued employment, the Commission's determination that the removal would promote efficiency seems not only to be devoid of any substantial basis in fact, but also in contradiction of its own findings. The "embarrassment theory" was likewise unrelated to any evidence suggestive of a deleterious effect upon efficacy. Indeed, the Chief Judge specifically noted

32 Id. at 1168.
that although the theory might be logically supportable in the abstract, neither the public nor Norton's fellow employees were aware of his alleged homosexual behavior. The appellant's dismissal was not reversed because the court disagreed with the Commission's theory, or because the majority chose to replace the agency's hypothesis with one of its own, but because "the record before . . . [the court did] not suggest any reasonable connection between the evidence against [the appellant] and the efficiency of the service." 34

The rationale underlying the court's strict interpretation of the efficiency standard in Norton was based largely on its awareness of the untoward difficulties thrust upon homosexual workers as a result of dismissal by the Government. The majority reasoned that the interests of the Civil Service in excluding these people must be weighed against the burdens created by such action. Notwithstanding the dissent's belief that the Commission had a valid interest in protecting governmental agencies from the possibilities of "public reproach and private extortion," 35 Judge Bazelon correctly reasoned that the agency's interests must be evaluated not in the abstract, but in cognizance of the rights of the individual.

The United States Supreme Court has consistently interpreted the due process clause of the fifth and fourteenth amendments as requiring such a balancing of interests. In Lawton v. Steele, 36 the Court stated that the means employed to effectuate an existent governmental purpose must be "reasonably necessary for [its] accomplishment . . . and not unduly oppressive upon individuals." 37 That the interests of the states are delimited by resultant burdens imposed on, and respect for the individual, is further manifested by Supreme Court standards for substantive due process such as "hardship so acute and shocking that our policy will not endure it" 38 and "protection of ultimate decency in a civilized society." 39 Similarly, the guarantees of due process were expressed by Justice Frankfurter in 1960, as follows:

[Government action] must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet . . . as against the hazards or hardships to the individual. . . . 40

34 417 F.2d at 1162.
35 Id. at 1169 (dissenting opinion).
36 152 U.S. 133 (1894).
37 Id. at 137.
In addition to the hardships imposed upon a discharged homosexual worker, the Norton court noted that the Commission's rationale would necessitate government regulation of the private behavior of its employees—thus traversing "that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections." The opinion of Mr. Justice Jackson in West Virginia State Board of Education v. Barnette presaged the more stringent standard now being imposed where government action infringes on personal liberties:

The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

More recently, in Griswold v. Connecticut, the Court, per Justice Douglas, reasserted this doctrine on the basis of the first amendment, stating that "[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion. . . ." Regarding Connecticut's proscription of the use of contraceptives, the Court ruled that

[s]uch a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom."

In the same decision, Justice Goldberg's concurrence expressed the view that the fourteenth amendment "embraces the right of . . . privacy though that right is not mentioned explicitly in the Constitution." He stated further:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged . . . simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State

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41 417 F.2d at 1164.
42 319 U.S. 624 (1943).
43 Id. at 639.
44 381 U.S. 479 (1965).
45 Id. at 483.
47 Id. at 486 (Goldberg, J., concurring).
may prevail only upon showing a subordinating interest which is compelling." The law must be shown "necessary, and not merely rationally related, to the accomplishment of a significant state policy."48

Since Griswold concerned the right to marital privacy, it must be made clear that the Norton decision, while relying on a theory similarly based on fundamental personal liberties, did not analogize any supposed right to participate in homosexual activities to the sanctity inherent in marriage. While such an analogy might be drawn,49 the Norton analogy is rather: that as the Government's right to regulate sexual behavior pales at the connubial bed, its prerogatives in setting employment standards wane where the enforcement of such standards necessitates the regulation of unrelated private behavior. Thus, the plaintiff's right to privacy, when viewed in conjunction with the damage to his future prospects for private employ, was said to magnify "[t]he Government's obligation to accord due process."50

That the protections afforded by the fourteenth amendment should be carefully considered where the individual's reputation and ability to effectively pursue his vocation are threatened is not without precedent. In Birnbaum v. Trussel,51 the Second Circuit employed this reasoning in reversing the expulsion of a physician from a municipal hospital for alleged bigotry towards Negroes. There, the court took specific cognizance of the trend to consider the dismissal as bearing upon the individual's opportunity for employment thereafter, and declared that

[w]henever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist.52

The court concluded that the dismissal threatened the vital inter-

48 Id. at 497 (Goldberg, J., concurring) (citations omitted).
49 In 1969, the United States Supreme Court established new guidelines for the censorship of obscene matter which bear significantly upon the Government's right to regulate private consensual behavior in general. See Stanley v. Georgia, 394 U.S. 557 (1969).
50 In Stanley the Court found that the mere categorization of matter as obscene was "insufficient justification for [an] invasion of personal liberties guaranteed by the First and Fourteenth Amendments." Id. at 565. These guarantees, said the Court, are "not confined to the expression of ideas that are conventional or shared by the majority." Id. at 566, citing Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959). The absence of any danger to society as a result of private possession of obscene matter was carefully weighed by the Court in reaching its determination. Id. at 560-68.
51 417 F.2d at 1164.
52 371 F.2d 672 (2d Cir. 1966).
53 Id. at 678.
ests of the appellant, i.e., his ability to pursue his career, and that his discharge was in contravention of the protections established to prevent injury by arbitrary governmental action.\textsuperscript{53}

Since Norton, the position of the homosexual vis-à-vis government employment has gained additional support from the California decision of Morrison v. State Board of Education.\textsuperscript{54}

Immediately subsequent to the discovery of Marc Morrison’s admitted participation in a private, noncriminal homosexual relationship, he resigned from his position as a teacher for the Lowell Joint School District of Los Angeles County. He had been previously granted a general secondary life diploma, had earned certification granting him the right to teach exceptional children, and had subsequently performed satisfactorily as a teacher. Thereafter, the board of education revoked his tenure pursuant to section 13202 of the California Education Code,\textsuperscript{55} which authorizes revocation for immoral conduct, unprofessional conduct, and acts involving moral turpitude.\textsuperscript{56} Morrison’s homosexual conduct was found to be a valid cause for revocation within the purview of this statute. Upon affirmation of the board’s decision by the Superior Court of Los Angeles County, the plaintiff appealed to the California Supreme Court.

In reversing the decision of the court of appeal, the supreme court, per Justice Tobriner, concluded that section 13202 authorizes revocation only for conduct indicating “unfitness to teach,” and that no evidence produced by the board of education indicated such unfitness on the part of Morrison.\textsuperscript{57} Absent evidence establishing a relationship between the plaintiff’s questioned private conduct and his ability to perform as a teacher, the revocation of his life diplomas could not be upheld. Thus, although section 13202 of the education code does not specify that the immoral conduct must bear a relationship to the employee’s performance on the job, such an interpretation was deemed necessary to uphold the constitutionality of the statute. The court maintained that without this interpretation the statute would be so

\textsuperscript{53} Id. at 678 n.13.
\textsuperscript{54} 1 Cal. 3d 214, 461 P.2d 575, 82 Cal. Rptr. 175 (1969).
\textsuperscript{55} CAL. EDUC. CODE § 13202 (West 1960) provides that “[t]he State Board of Education shall revoke or suspend for immoral or unprofessional conduct, ... or for any cause which would have warranted the denial of an application for a certification document, ... life diplomas, documents, or credentials issued pursuant to this code.” Id. § 13129(e) warrants denial of an application for such documents if the applicant has engaged in conduct involving moral turpitude.
\textsuperscript{56} It should be noted that these sections do not deal with criminal homosexual activity. Such would result in automatic dismissal upon conviction under CAL. EDUC. CODE §§ 12912, 13206, 13207.
\textsuperscript{57} 1 Cal. 3d at 236, 461 P. 2d at 392, 82 Cal. Rptr. at 192.
broad in scope that it would fall for arbitrariness under the due process clause of the fourteenth amendment.

Justice Tobriner noted that the uncertainty of phrases such as "unprofessional" or "immoral" conduct and "moral turpitude" have been condemned by courts and commentators, and that these expressions are used in such a wide variety of contexts that they become meaningless unless related to specific circumstances. While recognizing existing case law in support of the state's right to regulate conditions of government service pursuant to statutes utilizing such terms, the court distinguished those cases on the ground that they dealt with conduct having a discernibly negative effect on the employee's competence. Therefore, upon the court's findings that the board of education "failed to show that [Morrison's] conduct in any manner affected his performance as a teacher," and in reliance on Norton, the decision was reversed.

The majority's liberality is counterpoised by the provincialism of Justice Sullivan's dissent, which typifies much of the reasoning underlying the traditionally disdainful attitude towards homosexuals on the part of the government and the general public alike. Justice Sullivan disagreed with the majority view that the terms immoral and unprofessional would become arbitrary unless the questioned conduct was specifically related to the plaintiff's unfitness to teach. In support of his position, cases were cited defining immorality as "shameless conduct showing moral indifference to the opinions of respectable members of the community" and as acts of "baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man." So reprehensible were Morrison's acts, in the opinion of Justice Sullivan, that no authority or argument was considered necessary to substantiate the inference that they were encompassed by these definitions. Thus, he specifically opposed the Norton view that incompetence cannot be ipso facto imputed from immorality. Beyond this, Justice Sullivan contended that, even assuming the majority's position arguendo, the decision of the court of appeals should nevertheless have been upheld. This determination was based upon the assumption that Morrison stood in loco parentis vis-à-vis his pupils, and on the statutory provision requiring all teachers to impress the principles of morality upon their students.58 He maintained that the plaintiff was especially dangerous to the impressionable minds of his pupils because of his failure to admit the immorality of his conduct.

58 CAL. EDUC. CODE § 13556.5 (West 1960) requires all teachers to "endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, [and] patriotism."
In a similar fashion, the learned Justice refused to adhere to that part of the court's opinion distinguishing the instant case from that of Sarac v. State Board of Education. Although recognizing that Sarac, unlike the instant situation, involved homosexual behavior committed on a beach in full view of the public, followed by a criminal arrest, he stated that the fact that Morrison's acts were of a "clandestine [nature] . . . did not render them any the less homosexual acts.... It would be fatuous to assume," he said, "that such acts became reprehensible only if committed in public." Thus, Justice Sullivan concluded that the plaintiff's conduct was immoral within the meaning of section 13202 of the education code, and that by reason of the intrinsic immorality of his behavior, Morrison had demonstrated his unfitness to teach.

By resisting the temptation to assume total cognizance of society's moral fiber, the Morrison court properly refused to rule on whether or not homosexuality is immoral per se. The state's obligation to accord due process to all individuals regardless of "the opinions of respectable members of the community," was thereby correctly upheld. As noted in Norton, such opinions are of Lilliputian authority when weighed against the constitutional protections of privacy and due process of law. In a time during which attitudes towards sexual behavior are in a state of considerable flux, and in recognition of the fact that Morrison's behavior was, in the worst view, merely a violation of "moral" law, his dismissal was an arbitrary denial of his rights as an individual and therefore repugnant to the very essence of due process.

Justice Sullivan's contention that homosexuality can be accurately categorized within the prevailing societal view of immoral conduct does not mitigate the capriciousness of a dismissal which lacks adequate rational cause. His allegation that a homosexual is incapable of impressing the principles of morality "upon the minds of his pupils" is palpably unjustifiable. Morrison had successfully performed his duties as a teacher both before and after the discovery of his homosexual activities. No evidence was presented indicating his failure, or the possibility of his future failure, to impress moral principles upon his students. Moreover, his public conduct apparently evinced no reason to even suspect the unconventional nature of his private sexual behavior,

50 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).
60 1 Cal. 3d 214, 244, 461 P.2d 375, 398, 32 Cal. Rptr. 175, 198 (1969).
61 See notes 39-56 and accompanying text supra.
62 The essential aspect of due process of law has been held to be "the protection of the individual against arbitrary [state] action." Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 302 (1937) (Cardozo, J.).
and, if not for the fortuitous discovery of the latter, and the subsequent action taken by the board of education, his private life would not have been subjected to public scrutiny. Similarly, the inference that homosexuals are basically of low moral character is an empirically unsupportable assumption. Sigmund Freud considered them to be "men and women who otherwise have reached an irreproachably high standard of mental growth and development, intellectually and ethically." 

While the judicial direction as established in Norton and Morrison tends towards the expansion of due process protections for homosexuals, it has not been unqualifiedly accepted. Recently, the United States Court of Claims rendered a decision incorporating much of the reasoning found objectionable in Norton and Morrison.

In Schlegel v. United States, the Court of Claims held that the plaintiff was properly discharged from his position because of his participation in private homosexual activities. Despite Norton's objections to the making or enforcing of absolute moral judgments, the Schlegel court, after having allegedly distinguished its own case from the former on the facts, issued the following declaration:

Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true. If activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.

This pronouncement is of no more legal significance than the similar previously quoted statements of the Morrison dissent. Nevertheless, the Court of Claims distinguished Norton on the ground that the former decision involved only a minor infraction, whereas Schlegel was concerned with more reprehensible activities.

In the concurring opinions of Judges Davis and Nichols, it was correctly noted that the Schlegel majority misconstrued the main thrust of the District of Columbia Circuit's argument in Norton. Judge Nichols recognized that the Norton court might well have reached an identical determination had Norton's conduct been as acrimonious as Schlegel's. In justifying the court's holding, both concurring opinions relied on testimony indicating that Schlegel's retention would adversely

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63 "Approximately one year after the [homosexual] ... incident, Schneringer [Morrison's partner therein] reported it to the Superintendent of the Lowell Joint School District." 1 Cal. 3d at 219, 461 P.2d at 378, 82 Cal. Rptr. at 178.
64 S. Freud, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 267 (1943).
65 416 F.2d 1372 (Ct. Cl. 1969).
66 416 F.2d at 1378.
affect efficiency, and upon the fact that his position required a "top secret" security clearance. While Norton recognized that the potential vulnerability of a homosexual to blackmail might result in a determination of unfitness for a security clearance, it also maintained that an agency cannot support a dismissal merely on the basis that the individual's retention might cause "a general tarnishing of . . . [its] antiseptic public image." This view is specifically at variance with that entertained by Judge Nichols. "An agency," he said, "is not necessarily wrong if it deems that good public relations favor efficiency, and that bad ones detract from it." Hence, whereas Judge Nichols abstained from the imposition of an absolute moral standard, in contrast to the dogmatic approach of the Schlegel majority, he strongly disagreed with Norton in terms of the criteria to be used in determining whether or not an employee's discharge would promote efficiency.

Had the Court of Claims limited its holding to the security problem in Schlegel, as specifically recognized in Norton, the latter decision could have been readily distinguished. As to the majority's allegation that homosexual activities between consenting adults inevitably lead to a decrease in efficiency, it need only be stated that a dismissal resting solely upon an assumption having no empirical support must fall for arbitrariness under the fourteenth amendment. Similarly, the "embarrassment," or in deference to Judge Nichols, "good public relations" doctrine, is not significantly different from an unsupported determination of immoral conduct. Stated succinctly, this theory presumes that if a homosexual is discharged, the public image of the agency will be improved, thereby promoting efficiency. Perhaps the most obvious fallacy in this reasoning is that, in the instance of a discreet individual, the public would not become aware of his deviant sexual behavior if not for the attempt to dismiss him. As noted in both Morrison and Norton, however, if the individual's conduct is flagrantly displayed,

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67 The fact that such vulnerability is caused by legislative and governmental attitudes towards homosexuals is often conveniently forgotten. If not for the fear that he might be criminally punished or dismissed from his job as a result of exposure, the homosexual's susceptibility to blackmail would be negligible.
68 417 F.2d at 1168.
69 416 F.2d at 1383.
70 The difference however, might be more correctly interpreted as a matter of degree. Although Judge Nichols refrained from applying labels such as "indecent, lewd, and obscene" to the plaintiff, he nevertheless referred to "the numberless other cases involving homosexuals that stain the pages of our reports." Id. at 1982 (emphasis added). He also felt quite convinced that the public would regard Schlegel's behavior "as scandalous and disgraceful," Id. at 1983. Whatever the public's attitude towards the plaintiff's private conduct, that of Judge Nichols is abundantly clear—irrespective of any resultant decrease in the adequacy of service.
71 Id. at 1982.
i.e., if homosexual advances are committed during the course of employment, his conduct might well hinder performance. The same reasoning properly applies to a heterosexual employee who appears unable to control his sexual desires during the working day. However, the beliefs that homosexuals are less able to control their sexual drives than are heterosexuals, and that male homosexuals are immediately recognizable to their fellow employees and the general public as a result of their allegedly effeminate mannerisms, are equally invalid assumptions.72

Although it is conceded that the presence of a known homosexual may have an adverse effect upon efficiency, specific evidence must be presented to show that this condition exists. A dismissal based on public disapproval of an individual’s status as a homosexual,73 absent acts evidencing a negative consequence on agency efficiency is violative of the government’s obligation to accord due process of law. Testimony such as that upon which the Schlegel court so extensively relied does not fulfill this obligation. The witnesses therein no more than endorsed the Government’s allegation that the plaintiff’s presence decreased efficiency by reason of the public’s disdain of homosexuals. Their attestations were totally devoid of any evidentiary basis and consequently were nothing more than unsubstantiated opinion. The employee’s right to be confronted with an adequate rational cause for his removal cannot be satisfied by mere conjecture simply because the source of speculation is a bona fide witness.

In December of 1969, the District of Columbia Circuit was again faced with many of the previously discussed considerations in Adams v. Laird.74 The appellant therein had been employed for eight years by a private company engaged in defense work. Thereafter, he was denied security clearance because of his alleged involvement in homosexual activities, and sought injunctive relief requiring the Secretary of Defense to accord him security authorizations which were a prerequisite to his continued employment.

After finding that the appellant was a practicing homosexual, the court, per Judge McGowan, determined that “[t]he potential for instability and vulnerability to external pressure implicit in this du-

73 Crimes of status were invalidated in Robinson v. California, 370 U.S. 660 (1962), wherein the Court held that a statute prescribing a criminal penalty for the condition of being addicted to a drug was repugnant to the eighth amendment.
ality" was sufficient basis for denying clearance to Adams as inconsistent with the national interest. While Norton did suggest the possibility of problems regarding security clearances for homosexuals employed in secret projects, implicit in that opinion was the requirement that some concrete evidence be adduced indicating the unfitness for such clearance. Recognizing this, Judge Wright, dissenting, made the following observations; hopefully, future adjudications will take note.

Generalized assumptions that all homosexuals are security risks certainly cannot outweigh almost eight years of faithful service. . . . The due process clause of the Fifth Amendment encompasses the "right to hold specific private employment and to follow a chosen profession free from unreasonable government interference." As a result of the Board's actions, appellant's ability to obtain employment in his profession is at least seriously impaired . . . . Assumptions predicated on appellant's unfortunate affliction unrelated to the facts of this case cannot provide a legal basis for effectively denying him access to his livelihood . . . . The Board denied the clearance partially because appellant's homosexual acts indicated that he was not "reliable or trustworthy." But no rational connection between isolated homosexual activity and reliability is demonstrated by facts as distinguished from unsupported assumptions. If the Board has any evidence . . . that this appellant specifically, or that homosexuals taken as a group, are not trustworthy or reliable, it ought to include that evidence in this record. Judge Wright further stated that, whereas the Department of Defense had concerned itself with the possibility that Adams would pose a security risk, the Department was unable to point to a single breach in appellant's eight years of handling classified information. The least the appellant should be able to expect, he concluded, "is a decision in which there is a rational nexus between the facts and the conclusions drawn therefrom." As recently as September 9, 1970, the United States District Court for Minnesota rendered a decision embracing much of the reasoning espoused by Judge Wright. In McConnell v. Anderson, the court overturned a state university's refusal to hire an otherwise qualified librarian on the basis of his admitted homosexuality. The university argued that although the plaintiff might be competent professionally, his self-proclaimed sexual preference for other males connotes to the

75 Id. at 239 n.7.
76 Id. at 241 (dissenting opinion).
78 Id. at 242.
public that he practices sodomous and criminal activities, and that
criminal behavior by university employees cannot be condoned. In
answer, the district court stated that since no evidence was produced
tending to establish the plaintiff's participation in criminal activities,
the university's position was based on mere speculation. A distinction
was then drawn between a person's status as a homosexual, and the
commission of homosexual criminal acts. "[I]n the absence of proof
and not mere surmise that he has committed or will commit criminal
acts or that his employment efficiency is impaired by his homosexuality
. . . ," reasoned the court, the refusal to hire the plaintiff would consti-
tute "a deprivation of liberty and property under the Fourteenth
Amendment."80

While the immediate consequences of Norton, Morrison and
McConnell—i.e., vastly increased, if not unqualified, employment op-
portunities for homosexuals—are notable, the ramifications presaged
by these developments may be of more radical import. Although none
of these cases went so far as to abolish the criminal sanctions now
imposed on private, consensual homosexual activity, the due process
questions raised regarding the arbitrariness of the civil penalties are at
least arguably applicable to penal provisions as well. Just as the impair-
ment of agency efficiency must be evidenced in order to exclude homo-
sexuals from government employment, some demonstrably inimical
effect on society must be evidenced in order to outlaw nonconforming
moral codes.

This standard was recently implemented in Stanley v. Georgia,81
where the United States Supreme Court indicated that the absence of
empirical evidence of such an inimical effect rendered unconstitutional
the proscription against private possession of "immoral," obscene
materials. And, the Second Circuit, in interpreting Stanley, has further
verbalized the sacred nature of the individual's right to private moral
development by stating that

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[it]he most fundamental premise in our constitutional scheme may be that every adult bears the freedom to nurture or neglect his
own moral...growth. In a democracy one is free to work out one's
own salvation in one's own way... If the only reason for a prose-
cution is to protect an adult against his own moral standards which
do harm to no one else, it cannot be tolerated.82

Since, as Norton indicated, the majority's disdain for homosexu-

80 Id. at —.
82 United States v. Dellapia, — F.2d —, — (2d Cir. 1970).
ality is of little consequence when weighed against the due process rights of the individual, criminal sanctions must, in the future, rest solely upon sufficient empirical evidence of an inimical effect on society. Given the lack of such negative evidence, proscriptions against consensual adult homosexual activity are unjustified; and, in fact, proponents of such legislation must overcome much empirical evidence to the contrary.\(^8\)

In contrast to the assertion that homosexuality has been contrary to the social mores of most people "since antiquity,"\(^8\) sociological research indicates that individuals attracted to members of their own sex have been in evidence throughout history.\(^8\) It has also been found that some form of homosexual conduct is acceptable to the majority of human societies, and that in the United States, although "[t]he basic mammalian capacity for sexual inversion tends to be obscured . . . homosexual behavior is more common than the cultural ideals and rules seem to indicate."\(^8\) Professor Alfred C. Kinsey reported that "at least 37 per cent of the male population has some homosexual experience [to the point of orgasm] between the beginning of adolescence and old age."\(^8\)

Psychoanalytically, the presence of homosexuals can be explained by Freud's theory of bisexuality. He maintained that unconscious homosexuality is an important ingredient in basic personality structure, which may become dominant if there occurs an interference of normal sexual development.\(^8\) "Latent homosexuality apparently exists in everyone, although perhaps the amount varies from one person to

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\(^8\) Many modern legal thinkers feel such laws actually prevent many individuals from leading otherwise normal, socially productive lives. See, e.g., H.L.A. \textsc{Hart}, \textit{Law, Liberty and Morality} 45-52 (1963); \textsc{E. Schur}, \textit{Our Criminal Society} 192-94, 205-07 (1969); \textsc{Cantor}, \textit{The Need for Homosexual Law Reform}, in \textit{The Same Sex} 83 (R. Weltge ed. 1969).

\(^8\) \textsc{1 Cal. 3d} at 243, 461 P.2d at 397, 82 Cal. Rptr. at 197 (dissenting opinion).

\(^8\) \textsc{C. Ford & F. Beach, Patterns of Sexual Behavior} 125 (1952).

\(^8\) \textsc{Id.} at 143.

\(^8\) \textsc{A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male} 665 (1948). The prevalence of homosexuals in the United States despite the intolerance of society is further evidence of the unreasonableness of the present governmental attitude towards these individuals. No evidence has been found supporting the contention that a liberalization of the present policy would lead to an increase in overt homosexual behavior. The argument that a known homosexual teacher might cause his young students to emulate his behavior is also without support. Moreover, this view must be carefully weighed against the effect on the student who has engaged in homosexual activities, or who has experienced homosexual desires. The psychological welfare of such a pupil who hears himself described as a subhuman degenerate must be carefully considered before societal bigotry is propagated by government.

\(^8\) \textsc{Thompson, Changing Concepts of Homosexuality in Psychoanalysis}, 10 \textit{Psychiatry} 183 (1947).
In Freud's view, the persecution of homosexuals is a great injustice. In accord with the recommendations of the British Wolfenden Committee on Homosexual Offences and Prostitution, which determined that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business," Parliament no longer proscribes private, consensual homosexual behavior. While the Committee recognized that the laws of any society should be acceptable to the general moral sense of the community, it felt no obligation to "enter into matters of private moral conduct except insofar as they directly affect the public good."

In a similar vein, the American Law Institute made the following observation: "No harm to the secular interest of the community is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities." Unless American legislators have contrary evidence, which has heretofore been withheld from public scrutiny, it would seem incumbent upon them to follow the example of their British counterparts.

**CONCLUSION**

Perhaps the absence of a legitimate public purpose in punishing private homosexual behavior between consenting adults is the paramount reason underlying the need to liberalize present policy. It has long been recognized that the means employed to effectuate an existent purpose must be "reasonably necessary for [its] . . . accomplishment . . . and not unduly oppressive upon individuals." Ostensibly, legislation enacted to further the efficacy of state-controlled educational institutions or governmental agencies is not unwarranted. But the need to enforce moral standards to accomplish this end must be substantiated in order to meet the test of reasonableness. Statutes authorizing state action on the basis of private immorality cannot fulfill this requirement unless their application can be shown to further proper legislative intent. Under any other circumstances the enforcement of such

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80 Id.
82 Id. at 12.
provisions would be blatantly violative of the constitutionally protected right of privacy.95

Moreover, the societal propensity to condemn unconventional behavior cannot serve as the basis for governmental interference with private conduct, especially when weighed against the harsh results thereby imposed upon the individual. The acceptance of the argument that harm can properly be found existent on the basis of public "distress occasioned by the bare thought that others are offending in private against [sexual] morality ... is too slight to outweigh the great misery caused by [the enforcement of remedial legislation]."96 Even if action in the public behalf can be reasonably based on a proper legislative intent, the means to this end cannot be "unduly oppressive."97

The revocation of an individual's right to practice the profession of his choice is an extreme hardship. Although, to date, private homosexual acts are proscribed by law, this conduct can almost always be well integrated with an otherwise conforming way of life. The factual situations in Morrison, Norton and, indeed, Schlegel, support this conclusion. The result of legal action revoking a homosexual's right to pursue his chosen career must inevitably be a diminished desire to conform to an otherwise socially acceptable life style. State and federal policies authorizing such action help to establish the pernicious attitude of private employers and private citizens generally. Government dismissal of homosexual employees because of public intolerance cannot help but support the fallacious supposition that these individuals are incapable of leading socially productive lives.98

96 HART, supra note 83, at 46.
97 152 U.S. at 137.
98 See SCHUR, supra note 83, at 205-07 (1969); see also HART and CANTOR, supra note 83.