



6-1-1970

# Administrative Law -- Constitutional Law -- Is Governmental Policy Affecting the Employment of Homosexuals Rational?

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## Recommended Citation

William B. Crumpler, *Administrative Law -- Constitutional Law -- Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C. L. REV. 912 (1970).

Available at: <http://scholarship.law.unc.edu/nclr/vol48/iss4/13>

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## NOTES

### Administrative Law—Constitutional Law—Is Governmental Policy Affecting the Employment of Homosexuals Rational?

"I accept the moral responsibility to account to my God for my own conduct. I accept the moral responsibility to account to my fellow men for any conduct which causes them 'demonstrable harm.' I ask only that a spirit of tolerance prevail in the exchange."<sup>1</sup>

Thus spoke the plaintiff in *Schlegel v. United States*<sup>2</sup> in contesting his removal from an Army Civil Service position for immoral and indecent conduct. Schlegel was specifically charged with having engaged in four homosexual acts with three different men over a period of a year. These alleged acts became known to intelligence officials during a routine background investigation by the Army for upgrading his *Secret* security clearance to *Top Secret*. To sustain his removal, the Court of Claims had to find that Schlegel's conduct affected his job, reflected discredit upon the employing installation, or detrimentally affected the efficiency of the service.<sup>3</sup> Furthermore, since the plaintiff was a veteran, he fell within the ambit of protection afforded by the Veterans' Preference Act<sup>4</sup> so that his removal had to promote the efficiency of the service.

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<sup>1</sup> *Schlegel v. United States*, No. 369-63 at 30-31 (Ct. Cl., Oct. 17, 1969). The quotation is from the findings of fact.

<sup>2</sup> 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 38 U.S.L.W. 3403 (U.S. April 21, 1970).

<sup>3</sup> *Id.* at 1373-77. The court followed the guidelines of DEP'T OF THE ARMY CIVILIAN PERSONNEL REGULATIONS S1.3-3c(2) (1961) in setting out the tests for justifying removal. *Id.* at 1377.

Judicial review of administrative actions is an uncertain area of the law. It seems clear that an abuse of discretion or arbitrary actions are subject to correction by the courts, especially when they may have a stigmatizing affect. See *Slochow v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952). *But see Murray v. Macy*, Civil No. 67-382 (N.D. Ala., Nov. 27, 1967), *aff'd sub nom. Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1041 (1969).

Additional procedural problems, such as the rights of the accused to subpoena and to cross-examine witnesses, are generated by administrative actions. Such difficulties existed in *Schlegel* and in the other principal cases discussed in this note, but consideration of them is beyond its scope. See generally Note, *Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C.L. Rev. 608 (1970).

<sup>4</sup> 5 U.S.C. §7512(a) (Supp. IV, 1965-68). The Act provides that a veteran can be discharged from the Civil Service only for such cause as will promote the efficiency of the service.

The court found that the burden of establishing compliance with the Act was satisfied by the testimony of the plaintiff's superiors that the morale and efficiency of the office would have been affected by his continued presence. Moreover, the court reasoned that since homosexual acts are immoral and indecent, efficiency would inevitably be adversely affected by allowing one who had engaged in such acts to remain in Civil Service.<sup>5</sup>

The Court of Claims distinguished on the facts *Norton v. Macy*,<sup>6</sup> an earlier decision by the Court of Appeals for the District of Columbia. In *Norton* two of the three judges rejected the government's contention that, once the label "immoral" is plausibly attached to an employee's off-duty conduct, further inquiry into an adequate rational cause for his removal is unnecessary.<sup>7</sup> The plaintiff, a veteran, committed what the court believed to be a homosexual advance by feeling the leg of a stranger who had accepted a ride from him and by inviting the man to his apartment for a drink. Following the incident with the stranger, the plaintiff admitted to government investigators that he had engaged in mutual masturbation with other males in high school and college; had homosexual desires while drinking; and occasionally had undergone a temporary blackout after drinking, during two of which occasions he suspected that he might have engaged in homosexual activity.<sup>8</sup> The Civil Service Commission considered this evidence sufficient to warrant dismissal from the service, but the court, disagreeing, stated that a reasonable connection between the alleged conduct and the efficiency of the service had to

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<sup>5</sup> 416 F.2d at 1378.

<sup>6</sup> 417 F.2d 1161 (D.C. Cir. 1969).

<sup>7</sup> *Id.* at 1165. The court also refused to adhere to the decision of the Court of Appeals for the Fifth Circuit in *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), that courts have no authority to review on the merits a determination by the Civil Service Commission of fitness of an employee. *Id.* at 1163-65.

The plaintiff in *Anonymous* had nearly nineteen years of federal service and was a postal-window clerk in a small Alabama town whose citizens held him in high regard. A sailor, while in the brig of a Naval base in Florida, had admitted having participated with him in homosexual acts; and the plaintiff, questioned by authorities shortly thereafter, confessed to other private consensual acts that were in no way connected with his job. A psychiatrist testified that a wound received in World War II had rendered the employee impotent and had ultimately led to his participation in homosexual activities, which were not sufficient to classify him a pervert or sexual deviant. The psychiatrist further testified that the employee was of gentle disposition and low sexual drive and was far less likely to act violently than the average adult male; too, the acts would in no way affect his ability to perform his job. Nevertheless, the plaintiff's confession led to his discharge and a losing struggle in the federal courts. Petitioner's Brief for Certiorari at 3-12, *Murray v. Macy*, 393 U.S. 1041 (1969) (petition denied).

<sup>8</sup> 417 F.2d at 1162-63.

be demonstrated to justify discharge.<sup>9</sup> However, the court limited its decision to the particular circumstances involved and stated flatly that it was not holding that homosexual conduct may *never* be cause for dismissal of a federal employee protected by the Veterans' Preference Act.<sup>10</sup> Nor did the court conclude that potential embarrassment from an employee's private conduct could not affect the efficiency of the service.<sup>11</sup>

Indeed, the court manifested this circumscription in *Norton* a scant five months later in *Adams v. Laird*.<sup>12</sup> The majority in *Adams* upheld the denial to the plaintiff, employed by private industry in defense-related work, of a *Top Secret* security clearance and the suspension of his *Secret* clearance based on findings of homosexual conduct. His conduct had come to light during the background investigation to examine the appropriateness of upgrading his security clearance.<sup>13</sup> One judge, objecting to the assumption that all homosexuals are security risks, dissented vigorously on the ground that no relationship between the alleged homosexual conduct and Adam's ability to protect classified information had been demonstrated.<sup>14</sup>

Notwithstanding *Adams* and *Schlegel*, *Norton* represents a new dawn in the plight of homosexual federal employees, for it threatens a heretofore unquestioned federal policy of regarding homosexual acts as an ipso facto basis for dismissal from the Civil Service.<sup>15</sup> This policy stems

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<sup>9</sup> *Id.* at 1162. *But see* *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963). Note, however, the court's treatment of this case in *Norton*, 417 F.2d at 1166.

<sup>10</sup> See note 4 *supra*.

<sup>11</sup> 417 F.2d at 1168. "What we do say is that . . . an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame.'" *Id.* The court pointedly distinguished the type of embarrassment or discredit that financial irresponsibility of a governmental employee would create. The effect in such an instance is more ascertainable and concrete than a general tarnishing of an agency's antiseptic public image. *Id.* For an incisive analysis of homosexuality and the efficiency of the Civil Service, which presaged *Norton* by one month, see Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969).

<sup>12</sup> 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 38 U.S.L.W. 3404 (U.S. April 21, 1970). Two of the judges who decided *Norton* sat on the court in *Adams*. The dissenting judge in *Norton* voted in the majority in *Adams*, and the other judge, who was with the majority in *Norton*, dissented strongly. It is interesting to speculate what would have happened had the third judge in *Adams* been the second judge who voted with the majority in *Norton*.

<sup>13</sup> *Id.* at 232-34. Without the proper security clearance, Adams was effectively precluded from technical occupations for which he was highly qualified. *Id.* at 241; Affidavit No. 1 of Robert Larry Adams, filed in the United States District Court for the District of Columbia, March 8, 1968.

<sup>14</sup> 420 F.2d at 240-42.

<sup>15</sup> In *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965), the court overruled a dis-

primarily from public repugnance to homosexual behavior<sup>16</sup> and represents a fear by the government of the loss of public confidence and of the discomfiting effect on other employees if known homosexuals are allowed to remain in employment.<sup>17</sup> As indicated by *Adams*, a fear of compromise of classified information is also often involved.

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missal by the Civil Service Commission of an employee on a general charge of homosexual conduct. The Commission did not specify the exact acts with which the employee was charged, and the court held that the basis for dismissal was impermissibly vague. Dictum indicated that the court would demand for the Commission to show how the individual's conduct related to his occupational fitness. *Id.* at 184-85. A similar result obtained in a subsequent action brought by the Commission against Scott based on the same alleged conduct. The court did not feel that the earlier problem of ambiguity had been resolved and reversed again. *Scott v. Macy*, 402 F.2d 644, 647-48 (D.C. Cir. 1968).

Dissenting in both cases, the current Chief Justice of the United States, who then sat on the court of appeals, indicated that it was unnecessary for the Commission to relate the alleged homosexual conduct with suitability for federal employment; disqualification based solely on homosexual conduct, he contended, was not arbitrary. 349 F.2d at 189-90, 402 F.2d at 652. *Cf. Wyngaard v. Kennedy*, 295 F.2d 184 (D.C. Cir. 1961) (per curiam). *But see Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 125-35 (1967) (dissenting opinion).

<sup>16</sup> A recent Louis Harris poll reported that sixty-three per cent of the people of the nation regard homosexuals as harmful to American life. *The Homosexual: Newly Visible, Newly Understood*, TIME, Oct. 31, 1969, at 61 [hereinafter cited as TIME, Oct. 31, 1969]. This poll was in accord with one taken a short while earlier. Slovenko, *Sexual Deviation: Response to an Adaptational Crisis*, 40 U. COLO. L. REV. 222, 233 (1968) [hereinafter cited as Slovenko].

<sup>17</sup> See *Scott v. Macy*, 402 F.2d 644, 648-49 (D.C. Cir. 1968); Note, *Government-Created Employment Disabilities of the Homosexual*, *supra* note 11, at 1741-46. The Civil Service Commission has indicated that it would admit homosexuals in service as soon as the general public comes to view them with less repulsion. The Commission claims that it avoids expelling homosexuals with many years of service and excludes only those whose homosexuality is a matter of public knowledge or record. *Id.* at 1742, 1745-46. In the principal cases discussed in this note, however, the homosexual acts of the plaintiffs became a part of the public record only after the government took action against them. See also note 7 *supra*.

Illuminating federal policy is a letter from the Civil Service Commission to the plaintiff's attorney during the litigation in *Murray v. Macy*, Civil No. 67-382 (N.D. Ala., Nov. 27, 1967), *aff'd sub nom. Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 1041 (1969). The letter quoted in part another letter, addressed to the Mattachine Society, from Commission Chairman John W. Macy, Jr., dated February 25, 1966:

Suitability determinations also comprehend the total impact of the applicant upon his job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees by homosexual advances, solicitations or assaults, the unavoidable [*sic*] subjection of the sexual deviate to erotic [*sic*] stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a

The federal policy contributes significantly to the stigmatization suffered by those whose homosexual conduct is uncovered. Such stigmatization usually not only results in the loss of job and reputation but also severely hinders the search for a new job. One caught engaging in homosexual conduct suffers the alienation of friends and family and may be forced into the "gay" world by social ostracism even though the conduct may have been an isolated incident caused by curiosity, seduction, or other reasons. Engaging in homosexual acts may render one particularly vulnerable to extortionists; to criminal assaults; to harassment by police and private citizens; and, perhaps most disconcertingly of all, to official and community indifference to his trammled rights.<sup>18</sup>

In this light, the pragmatic mind must seek a rationale for the penalizing intolerance of homosexual behavior because constitutional repercussions may result if no rational basis can be found: while the Constitution imposes no direct restraint on private irrationality, through the due process clause it does forbid irrational governmental deprivation of liberty and property.<sup>19</sup> Other constitutional mandates<sup>20</sup> may also be affected by a determination that the general federal<sup>21</sup> policy works irra-

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Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

Appendix D to Petitioner's Brief for Certiorari, *Murray v. Macy*, 393 U.S. 1041 (1969) (petition denied).

<sup>18</sup> See W. CHURCHILL, *HOMOSEXUAL BEHAVIOR AMONG MALES* 226 (1967) [hereinafter cited as CHURCHILL]; A. ELLIS, *HOMOSEXUALITY: ITS CAUSES AND CURE* 87-90 (1965) [hereinafter cited as ELLIS]; P. GEBHARD, J. GAGNON, W. POMEROY, & C. CHRISTENSON, *SEX OFFENDERS: AN ANALYSIS OF TYPES* 623 (1965) [hereinafter cited as GEBHARD]; A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 663 (1948) [hereinafter cited as KINSEY/MALE]; E. SCHUR, *CRIMES WITHOUT VICTIMS* 83 (1965) [hereinafter cited as SCHUR]; Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441, 449-51 (1964) [hereinafter cited as Cantor]; Slovenko at 236 n.41.

<sup>19</sup> There is controversy over the application of substantive due process to protect individuals within the public sector against arbitrary governmental action. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

<sup>20</sup> The right to privacy, as illuminated by such decisions as *Griswold v. Connecticut*, 381 U.S. 479 (1965), may be invaded by governmental efforts to ferret out homosexuals. But note the dictum contained in Justice Goldberg's concurring opinion to that case. *Id.* at 498-99. Also, the constitutional sanction against cruel and unusual punishment may be violated by criminally punishing private, adult, consensual homosexual practices. See *Perkins v. North Carolina*, 234 F. Supp. 333, 337 (W.D.N.C. 1964).

<sup>21</sup> Of course, state and local governmental policies and laws would be similarly affected by the fourteenth amendment.

tionally to severely penalize homosexual behavior ipso facto without regard to individual circumstances.

To determine rationality, one must seek knowledge of the causes and ramifications of homosexual behavior. At the start, one should understand that not all those who manifest homosexual behavior are truly homosexual. A substantial number of persons, who are basically heterosexual, engage in homosexual acts for a variety of reasons, including curiosity, seduction, or peculiar situational demands such as those confronting prisoners whose sexual outlet is limited. Still others may participate in homosexual conduct simply because they seek any convenient relief for their sexual drive and are not particular about the means. The terms "homosexual" and "homosexuality" properly describe only persons who are *dominantly* or *exclusively* homosexually oriented.<sup>22</sup>

Some authorities believe that man is born with a neutral sexual disposition that is subjected to environmental conditioning leading to a particular preference. They would agree with Kinsey that "[t]here is nothing known in the anatomy or physiology of sexual response and orgasm which distinguishes masturbatory, heterosexual, or homosexual reactions."<sup>23</sup> According to this theory, humans are born with a potential

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<sup>22</sup> GROUP FOR THE ADVANCEMENT OF PSYCHIATRY REPORT No. 30 at 2-3 (Jan. 1955) [hereinafter cited as GROUP]; KINSEY/MALE at 615-66; Bowman and Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMP. L.Q. 273, 313 (1956) [hereinafter cited as Bowman and Engle]; Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 194 (1957) [hereinafter cited as Glueck].

Kinsey's research revealed that, as a minimum, thirty-seven per cent of American males have had at least one overt homosexual experience to the point of orgasm between adolescence and old age. Ten per cent are more or less exclusively homosexual for at least three years between the ages of sixteen and fifty-five, and four per cent are exclusively homosexual throughout their lives after the onset of adolescence. These figures are probably understatements. KINSEY/MALE at 623-25, 650-51.

Kinsey reasoned that the incidence and frequency of homosexual behavior, similar throughout all strata of American society, militated against the view that erotic sexual reactions between individuals of the same sex are abnormal or unnatural. KINSEY/MALE at 659. He is reported to have remarked that "[t]he only kind of abnormal sex acts are those that are impossible to perform." CHURCHILL at 69. For a criticism of Kinsey's reasoning, see Kubie, *Psychiatric Implications of the Kinsey Report*, 10 PSYCHOSOMATIC MEDICINE, Mar. 1948, at 95.

There is no evidence that homosexuality involves more males, or fewer males, today than it did among earlier generations. Furthermore, if all persons with any trace of homosexual history were eliminated from today's population, there is no reason for believing that the incidence of homosexuality in the next generation would be materially reduced. KINSEY/MALE at 631, 666.

<sup>23</sup> A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 446-47 (1953) [hereinafter cited as KINSEY/FEMALE].

to respond erotically to sexual stimulus without regard to the gender of the source; man has come to prefer a heterosexual outlet only because of the conditioning effect of his culture.<sup>24</sup> Therefore, sexual gratification with a member of one's own sex may be considered just as "natural" a response as with a member of the opposite sex, but the latter inclination may predominate in a given society by virtue of historically developed norms that are taught and adhered to by custom from generation to generation.<sup>25</sup>

Other authorities would not be content with this view of homosexual behavior as far as the dominant or exclusive homosexual is concerned. They would agree that homosexuality is *not* a product of any known hormonal or chromosomal factors<sup>26</sup> but would contend that there must be something amiss in the basic constitution of the homosexual since he undertakes great personal risk in pursuing his sexual inclination to the exclusion of the less portentous offerings of heterosexual relief. Perhaps man may learn through conditioning to enjoy one erotic stimulus more than others, but he also learns the mores of his society and the personal risks of flouting them. American society is extremely hostile to the homosexual,<sup>27</sup> and hence it is enigmatic that some Americans persist in and prefer a homosexual outlet for the basic sexual drive.<sup>28</sup> To explain this enigma, these authorities assert that homosexuality appears to be a product of personality development of such a subtle nature as to avoid a conscious recognition and to preclude a conscious choice.<sup>29</sup> Beyond this basic premise, there is considerable divergence of opinion on causative factors, but at least two general schools of thought emerge.

Present-day adherents of basic Freudian theory<sup>30</sup> insist that adult

<sup>24</sup> See CHURCHILL at 101-05; ELLIS at 78; KINSEY/FEMALE at 446-47, 481; Marmor, *Introduction* in *SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY* 9-16 (J. Marmor ed. 1965) [hereinafter cited as Marmor].

<sup>25</sup> For general discussions of the historical, religious, and anthropological aspects of homosexuality, see CHURCHILL at 199-210; GROUP at 1-2; KINSEY/FEMALE at 481-83; Taylor, *Historical and Mythological Aspects of Homosexuality* in *SEXUAL INVERSION*, *supra* note 24, at 140; Bowman and Engle at 276-78. See also Note, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312 (1954).

<sup>26</sup> CHURCHILL at 105; GROUP at 3, 6; Pare, *Etiology of Homosexuality: Genetic and Chromosomal Aspects* in *SEXUAL INVERSION*, *supra* note 24, at 70; Perloff, *Hormones and Homosexuality* in *SEXUAL INVERSION*, *supra* note 24, at 44.

<sup>27</sup> KINSEY/FEMALE at 477, 483. Cf. CHURCHILL at 199-210; Szasz, *Legal and Moral Aspects of Homosexuality* in *SEXUAL INVERSION*, *supra* note 24, at 128.

<sup>28</sup> See ELLIS at 78-84; GROUP at 2; Marmor at 11.

<sup>29</sup> GROUP at 3; Marmor at 11-15; Cantor at 442.

<sup>30</sup> Freudian theory has been described as "the departure point for all subsequent explorations." C. SOCARIDES, *THE OVERT HOMOSEXUAL* 22 (1968). Dr. Socarides

homosexuality represents an arrest of, or a pressured regression to, a universal childhood phase of personality development that is homoerotically oriented—a phase of maturation wherein the child's instinctive disposition for social intercourse and sexual exploration leans toward those of his own sex.<sup>31</sup> On the other hand, proponents of modern psychoanalytic theory challenge the idea that adult homosexual preference manifests a carry-over of a childhood phase. Rather, they assert that adult homosexuality represents an unconscious, incapacitating anxiety toward heterosexual relations. Homosexual release of the basic sex drive is easier than confronting this deep, unfathomable anxiety.<sup>32</sup>

Briefly stated, an important difference between these theories is that the latter interprets heterosexuality as a basic tendency of man and homosexuality as a manifestation of some psychological obstacle to heterosexual adaptation.<sup>33</sup> Those who adhere to the former theory admit of no basic heterosexual tendency while regarding homosexual adaptation, though at odds with cultural expectations, as the probable resultant of the interplay of environmental influences and the process of maturation.<sup>34</sup>

Whatever theory, or amalgamation of theories, is followed, there is significant support for the belief that the underlying impediment to heterosexual orientation is rooted in personality development. Early environmental circumstances, especially within the immediate family,<sup>35</sup> and other socio-economic and cultural forces amass to shape personality; and some subtle interplay among numerous, multifarious factors affects the course of development. One may broadly conclude, then, that an enigmatic quirk in personality development, quite beyond the control of the individual, ultimately leads to a homosexual predisposition.<sup>36</sup>

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is critical of Freud's view that homosexuality cannot be considered an illness. For a capsule form of Dr. Socarides' concepts, see *TIME*, Oct. 31, 1969, at 66-67. Freud's view is concisely set out in *A Letter from Freud*, 107 *AM. J. PSYCHIATRY* 786 (1951).

<sup>31</sup> See, e.g., Marmor at 2, 9-10; L. OVESEY, *HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY* 15-18 (1969). See also SCHUR at 72-73.

<sup>32</sup> See, e.g., Bieber, *Clinical Aspects of Male Homosexuality* in *SEXUAL INVERSION*, *supra* note 24, at 248; GROUP at 3; Marmor at 10-12; SCHUR at 72-73. But see CHURCHILL at 260-322; Marmor at 16.

<sup>33</sup> See sources cited note 32 *supra*.

<sup>34</sup> See sources cited note 31 *supra*.

<sup>35</sup> Frequently found in the personal history of a homosexual is a passive or hostile father and a domineering mother. Parental influences, particularly during the early years, appear to be a very important factor in the development of a homosexual bent. See GROUP at 3; SCHUR at 74; Glueck at 196-201.

<sup>36</sup> The presentation in the text was an over-simplification of a very complex problem. There are many unknown quantities and many variations of theories involved

The prognosis for reversing the homosexual penchant is dismal. All men carry a latent homoerotic potential, but most successfully repress it in their subconscious.<sup>37</sup> Homosexuals, on the other hand, cannot repress it because of the deep, underlying forces, instilled during youth, that work against heterosexual adaptation. Psychotherapy may overcome these forces if the patient both consciously and unconsciously really desires, but it is seldom that his subconscious can abandon the role dictated during the development of his personality. Hence, psychotherapy, a long and difficult process, may be curative for only a few homosexuals and beneficial to others only in the sense of enhancing social adjustment.<sup>38</sup> Moreover, there is universal agreement that criminal and civil penalties for, and societal hostility toward, homosexuality greatly hinder social adjustment.<sup>39</sup>

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in the development of homosexuality in an individual. For general discussions on causation, see ELLIS; KINSEY/FEMALE at 447-48; L. OVESEY, *HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY* (1969); *SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY* (J. Marmor ed. 1965); Glueck; Slovenko; *TIME*, Oct. 31, 1969, at 66-67.

Homosexuals have become weary from having their sexual penchant analyzed. As put by the founder and president of the Washington Mattachine Society: [H]omosexuality has been *defined* into a sickness or disorder through subjective personal, social, moral, cultural, and religious value judgments cloaked and camouflaged in scientific language. . . . [H]omosexuality cannot properly be considered to be a sickness, disorder, or pathology, nor a symptom of any of these, but must be considered a preference, orientation, or propensity that is different from heterosexuality.

Kameny, *The Federal Government vs. The Homosexual*, *THE HUMANIST*, May/June 1969, at 20. Kameny's views are also set forth in *TIME*, Oct. 31, 1969, at 66-67.

<sup>37</sup> *GROUP* at 2; Glueck at 194. Many psychiatrists believe that those who denounce homosexuals the loudest are plagued by fears of their own latent homosexuality. GEBHARD at 638 n.4; SCHUR at 113.

<sup>38</sup> See E. BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE* 10, 302 (1956); *GROUP* at 3-4; SCHUR at 72; R. SLOVENKO, *SEXUAL BEHAVIOR AND THE LAW* 91 (1965); Bowman and Engle at 280.

<sup>39</sup> See, e.g., ELLIS, at 87-88; GEBHARD at 623; Marmor at 20; Cantor at 448-51; Glueck at 203; *TIME*, Oct. 31, 1969, at 64.

Many eminent commentators have long recognized the need for relaxing criminal penalties for homosexual acts. Commonly, they reject the idea that such sanctions effectively serve any worthwhile societal goals; rather, they believe that much social harm may be caused by treating private, consensual homosexual conduct as criminal. The moral foundation of the sanctions is regarded as an inadequate basis for the laws although reform is neither considered an approval nor condonation of homosexuality nor a likely inducement for homosexual practices. However, violations of public decency or other notorious acts, such as offensive solicitation or the seduction of youth, *are* considered a proper concern of the law. See generally F. CAPRIO & D. BRENNER, *SEXUAL BEHAVIOR: PSYCHO-LEGAL ASPECTS* 162 (1961); CHURCHILL at 215-34; GREAT BRITAIN, COMMITTEE ON

The spectrum of personality of the homosexual is as wide and diverse as that of the heterosexual,<sup>40</sup> and his homoerotic bent alone reveals absolutely nothing of his character and social adjustment. This penchant is at most an indication of a unique constellation of factors influencing his personality development that has led to his particular sexual propensities. To say that the homosexual state demonstrates abnormality or perversity is to beg the question. The pertinent inquiry is: what is his character, and how well adjusted socially is he? *Authorities are in agreement that this query is answerable only by considering the homosexual individually in his own setting, just as a heterosexual must be personally considered in evaluating character and social adjustment.*<sup>41</sup>

At present the federal government does not adequately consider individual circumstances before harshly penalizing an employee for homosexual conduct. Failing to do so, in light of modern knowledge about homosexual behavior, may therefore be deemed unreasonable and the policy adjudged as irrational.<sup>42</sup> That the policy is founded on public opinion makes it no less irrational. Admittedly, the government must be concerned with public confidence, but it must also recognize that it

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HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 42-48 (Amer. ed. 1963); H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963); MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1955); MODEL PENAL CODE §§ 213.2-6, 251.1-3 (Proposed Official Draft, 1962); Note, *Deviate Sexual Behavior Under the New Illinois Criminal Code*, 1965 WASH. U.L.Q. 220; Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623 (1961).

<sup>40</sup> Hooker, *Male Homosexuals and Their Worlds* in SEXUAL INVERSION, *supra* note 24, at 86-87; Marmor at 19. See also GEBHARD at 623, 642. There are probably more neurotics among homosexuals than among heterosexuals, but this fact is inevitable in a hostile society. Marmor at 19; Cantor at 450.

<sup>41</sup> See, e.g., GEBHARD at 623; GROUP at 6; Hooker, *Male Homosexuals and Their Worlds* in SEXUAL INVERSION, *supra* note 24, at 86-87; Marmor at 5, 16-19.

<sup>42</sup> See GROUP at 6; Marmor at 21; Szasz, *Legal and Moral Aspects of Homosexuality* in SEXUAL INVERSION, *supra* note 24, at 128, 138; Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 407-11 (1963).

A recent report prepared under the auspices of the National Institute of Mental Health not only urges reform of penal sanctions against private, consensual homosexual practices but also urges tolerance of homosexuals by both private and public employers. The distinguished task force that prepared the report included this poignant remark:

The extreme opprobrium that our society has attached to homosexual behavior has done more social harm than good, and goes beyond what is necessary for the maintenance of public order and human decency. Homosexuality presents a major problem for our society largely because of the amount of injustice and suffering entailed in it, not only for the homosexual but also for those concerned about him.

TIME, Oct. 24, 1969, at 82.

often sets the trend in public attitudes and that its present policy toward homosexuals tends to perpetuate hostility rather than to promote tolerance.<sup>43</sup> Similar reasoning pertains to the problem of morale of employees.

Susceptibility to blackmail seems to be the primary reason for denying homosexuals a security clearance, but that rationale breaks down in the case of a professed homosexual who is not apprehensive of public disclosure of his sexual inclination. Furthermore, susceptibility to blackmail largely stems from the homosexual's fear of losing his job, a fear created in great part by present government policy. Heterosexuals may become vulnerable to extortion too, but there is no reason to believe that they could resist coercion any more successfully than homosexuals.<sup>44</sup>

Adverse public attitudes toward homosexual conduct are not likely to mollify within a short period of time, but the federal government must weigh individual rights against popular prejudices. Through prudent personnel management, the Civil Service could beneficially employ homosexuals while minimizing the anxiety of the public and of fellow employees.<sup>45</sup> For instance, counseling by a superior official might have had a desirable restraining influence on the plaintiff in *Norton v. Macy*<sup>46</sup> and possibly could have prompted him to seek professional help. He was not employed in a position requiring him to meet the public, and whatever homosexual potential he may have had was not a part of the public record.

The plaintiff in *Schlegel v. United States*<sup>47</sup> presents a more difficult problem due to his security clearance and the findings as to his particular acts. He had been found to have used slight force once in an unsuccessful attempt to accomplish sodomy on an unwilling partner, and the objects

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<sup>43</sup> SCHUR at 110. See also Hyams, *The Spurious Problem*, NEW STATESMAN, June 25, 1960, at 945-46; Wolfenden, *The Homosexual and the Law, Ahead of Public Opinion?*, NEW STATESMAN, June 25, 1960, at 941.

<sup>44</sup> See Marmor at 21-22; Wicker, *The Undeclared Witch-Hunt*, HARPER'S, Nov. 1969, at 108; Note, *Government-Created Employment Disabilities of the Homosexual*, *supra* note 11, at 1749-51.

<sup>45</sup> For a reasoned plan by which the federal government could smoothly alter its present policy toward homosexuals, see Note, *Government-Created Employment Disabilities of the Homosexual*, *supra* note 11, at 1742-46. See also Bowman and Engle at 316; TIME, Oct. 24, 1969, at 82.

The New York City Civil Service Commission has recently adopted a policy of accepting homosexual workers except for some positions such as penitentiary guards and playground attendants. Note, *Government-Created Disabilities of the Homosexual*, *supra* note 11, at 1745 n.30.

<sup>46</sup> 417 F.2d 1161 (D.C. Cir. 1969).

<sup>47</sup> 416 F.2d 1372 (Ct. Cl. 1969).

of all his ascribed homosexual advances were young servicemen.<sup>48</sup> These disturbing circumstances must be balanced, however, with his excellent record of over eleven years of governmental service that was free of trouble with the law.<sup>49</sup> Again, perhaps counseling or a transfer would have had an ameliorative effect.<sup>50</sup>

In *Adams v. Laird*<sup>51</sup> the court's decision was partly based on findings that the plaintiff had engaged in homosexual acts with two fellow employees.<sup>52</sup> Admittedly, sexual affairs among employees, whether homosexual or heterosexual, may create problems at the place of work. In Adams' case, however, there was no complaint against him, and his homosexual propensities were not a matter of public knowledge. In order not to lose his considerable technical skills but at the same time not to endanger security requirements, the government might reasonably have required him to present positive proof of his reliability in safeguarding classified information, including perhaps a psychiatric evaluation.

As recognized in *Norton*, a homosexual may be a source of embarrassment to the Civil Service, as when he engages in notorious conduct. His personal behavioral traits may present other problems with which the Civil Service should not have to cope. But *Norton* projects the idea that job performance and compatibility with others turn on the whole of a person's personality and integrity rather than solely on his private, discreet sexual conduct. An individual's character and social adjustment, his past work performance, the notoriety of and reasons for his conduct, the nature of the job, and the alternative corrective measures available should as a minimum be considered by the government before imposing severe penalties on one merely for homosexual behavior. In short, individual conduct must be individually treated; to do less may produce the

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<sup>48</sup> *Id.* at 1373-74, 1383.

<sup>49</sup> *Schlegel v. United States*, No. 369-63 at 19-20 (Ct. Cl., Oct. 17, 1969) (findings of fact).

<sup>50</sup> DEP'T OF THE ARMY CIVILIAN PERSONNEL REGULATIONS S1.3-1b(3) (1961), as quoted by the court in the findings of fact, *Schlegel v. United States*, No. 369-63 at 28-29, states:

Before proceeding with an action affecting an employee's employment or pay status, consideration should be given to the possibility of correcting the situation by counseling or training the employee, or through utilization of a reassignment or an oral or written reprimand. In many instances, such action will remedy the situation and, at the same time, will save the cost of replacement or work disruption which attends the actions of removal or suspension.

<sup>51</sup> 420 F.2d 230 (D.C. Cir. 1969).

<sup>52</sup> *Id.* at 234.

ill-effects of stigmatization and the needless loss of valuable skills to the country.

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### Admiralty—Dockside Injuries under the Longshoremen's and Harbor Workers' Compensation Act

In *Nacirema Operating Co. v. Johnson*<sup>1</sup> three longshoremen had been attaching cargo from railroad cars located on piers to ships' cranes for loading onto the vessels. One longshoreman had been killed when cargo hoisted by a crane knocked him to the pier or crushed him against the side of the railroad car. The other two had been injured in the same accident.

Deputy Commissioners of the United States Department of Labor denied claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act<sup>2</sup> in each case on the ground that the injuries had not occurred "upon the navigable waters of the United States," as required by the statute. The federal trial courts upheld the commissioners' decisions.<sup>3</sup> The Court of Appeals for the Fourth Circuit in *Marine Stevedoring Corp. v. Oosting*<sup>4</sup> reversed. The Supreme Court on certiorari reversed the Fourth Circuit and held that the Longshoremen's and Harbor Workers' Compensation Act did not cover longshoremen injured on docks, piers, or bridges. The basic reasons for the Court's denial of coverage to the longshoremen in *Nacirema* is best explained by the historical development of state and federal jurisdiction over maritime workers.

Although inadequate common-law remedies for injured workers led to the adoption of state workmen's compensation statutes following the industrial revolution,<sup>5</sup> there was no corresponding federal development

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<sup>1</sup> 396 U.S. 212 (1969).

<sup>2</sup> 33 U.S.C. §§ 901-50 (1964).

<sup>3</sup> *Nacirema Operating Co. v. Johnson*, 243 F. Supp. 184 (D. Md. 1965); *Traynor v. Johnson*, 245 F. Supp. 51 (E.D. Va. 1965).

<sup>4</sup> 398 F.2d 900 (4th Cir. 1968).

<sup>5</sup> The statutes of Washington, Iowa, and New York were constitutionally sustained in aspects not concerning the extent of their coverage. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 337 (1957).