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Introduction

A body of case law is developing as homosexuals in public education increasingly employ the judiciary in an attempt to secure what they consider to be their constitutional rights. The holdings in the reported cases dealing with homosexuals in public education to date do not reveal a clear direction. They do indicate, however, that arbitrary policies or practices which withhold employment from homosexuals, which result in a nonrenewal of contract or dismissal when their "deviance" is discovered, or which result in revocation of a teaching certificate may be subject to successful court attack.

This paper examines reported decisions which deal with questions of hiring, contract nonrenewal or dismissal, and revocation of teaching certificates of homosexuals in public education. Additionally, emerging issues and legal principles dealing with the homosexual-educator are discussed.

Hiring

The question of the constitutionality of practices or policies which deny employment to homosexuals at publicly-supported schools has not received extensive discussion in the courts. In the most significant case to date, the Eighth Circuit Court of Appeals, in reversing a federal district court decision, upheld the action of the University of Minnesota Board of Regents in not hiring a homosexual.[1] In that case, James McConnell had accepted an offered position, subject to approval by the Board of Regents, as a librarian at the University of Minnesota's St. Paul campus library. However, the University of Minnesota Board of Regents rejected his application for employment on the ground that his "personal conduct, as

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[1] McConnel v. Anderson, 316 F. Supp. 809 (D. C. Minn. 1970), *rev'd,* 451 F. 2d 193 (8th Cir. 1971), *cert. denied,* 405 U.S. 1046 (1972).

represented in the public and University news media, [was] not consistent with the best interest of the University." [2]

The appellate court asserted that the case did not simply involve the question of refusing to employ a homosexual nor excluding an applicant because of his clandestine desire to pursue homosexual conduct. Rather, it contended the case also, and perhaps more importantly, dealt with the issue of whether or not employment could be denied on the combined basis of McConnell's unconventional conduct and his playing an extremely activist role in the gay movement. In supporting this contention, the court cited the substantial nation-wide publicity resulting from McConnell's application for a marriage license to wed a male University of Minnesota law student and his membership in FREE (Fight Repression of Erotic Expression). Consequently, the appellate court held that the issue involved fell within the considerable discretion entrusted to the Board of Regents and that group

> ... possessed ample specific factual information on the basis of which it reasonably could conclude that the appointment would not be consistent with the best interests of the University.[3]

Inextricably linked with his homosexuality, in the court's opinion, was McConnell's considerable media-reported homosexual-related public activities. Given this particular factual situation, the federal appellate court affirmed the Regents' position. Unfortunately, *McConnell* does not address itself to the more fundamental question of a refusal to hire a homosexual who does not bring undue attention to his sexual persuasion by assuming a nonactivist position. This is an issue which will undoubtedly receive definitive treatment by the judiciary in time.[4]

Although the Fourth Circuit Court of Appeals had an opportunity to rule on the issue of denial of employment to a homosexual in *Acanfora v. Board of Education of Montgomery County,* it did not do so.[5] In that case a beginning teacher had withheld information on his application form regarding his homosexuality. Upon learning of his sexual persuasion, school officials transferred him to a nonteaching position, which action Acanfora promptly contested. Testimony by school officials revealed that Acanfora would not have been employed if he had listed his homosexual affiliation. In upholding the school system's actions, the appellate court held that Acanfora's intentional omission of his homosexual affiliation

[2] *Id.* at 194.

[3] *Id.* at 196.

[4] As a practical matter, however, it may be most difficult to demonstrate conclusively that homosexuality per se was the sole, or even a significant reason, for not being hired as a public school employee.

[5] 359 F. Supp. 843 (D. Md. 1973), aff'd 491 F. 2d 498 (4th Cir. 1974), *cert. denied,* 419 U.S. 836 (1974).

barred his attack on the constitutionality of the school system's employment policy. By taking this tack, the appellate court obviated the necessity of deciding on the merits a public school system's policy of not hiring homosexuals.[6]

Although to date the judiciary has not ruled conclusively on the constitutionality of practices or policies which deny employment in public education to homosexuals, the issue of denying employment in public service to an alleged homosexual has been discussed.[7] In the earlier *Scott v. Macy* decision the court overturned the disqualification of a homosexual civil service applicant who had qualified for a position. The court contended that merely labeling conduct "homosexual" and not specifying charges nor demonstrating a reasonable relationship between his alleged homosexuality and the efficiency of the agency were insufficient grounds for denying employment.

Dismissal or Nonrenewal of Contract

Dismissal or nonrenewal of contract due to a teacher's homosexuality has also been an issue in recent cases.[8] In one case a teacher was dismissed from her teaching position because she acknowledged being a practicing homosexual.[9] No allegation had been made concerning dereliction in her teaching duties or that any homosexual advances were made toward students. She was dismissed under an Oregon statute which allowed dismissal for "immorality." Although not ruling on homosexuality per se as a valid reason for dismissal, the federal district court held the statute to be unconstitutionally vague. The court reasoned that since there is not common agreement within or among communities regarding the definition of the term "immorality," the livelihood of teachers could be subjected to the idiosyncracies of individual school board members as they attempted, each in his own way, to define it. Consequently, lack of a clear definition of "immorality" denies teachers of fair warning regarding behavior that is pro-

[6] The district court whose decision was affirmed, but on different grounds, had addressed itself directly to this issue. It held: "...if Acanfora had admitted confidentially on his application that he is a homosexual, but that he had no intention of publicizing the fact, denial of employment for that reason would be unconstitutional." Acanfora v. Board of Educ. of Montgomery Cty, 359 F. Supp. at 853 (D. Md. 1973).

[7] Scott v. Macy, 121 U.S. App. D.C. 205, 349 F. 2d 182 (D.C. Cir. 1965). *See also* Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969); Scott v. Macy, 131 U.S. App. D.C. 93, 402 F. 2d 644 (D.C. Cir. 1968); Shields v. Sharp, No. 15666 decided by order of Nov. 1, 1960 (Unreported, *cert. denied,* 366 U.S. 917 (1961); Anonymous v. Macy, 398 F. 2d 317 (5th Cir. 1968); Vigil v. Post Office Department, 406 F. 2d 921 (10th Cir. 1969).

[8] A distinction is often made between the terms dismissal and nonrenewal of contract. Dismissal deals with the abrogation of a contract, on the part of the employer, which has a fixed term or under so-called tenure. Nonrenewal of contract refers to not offering an employee a new contract once the old one has expired.

[9] Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254 (D. Ore. 1973).

hibited or condoned. Requiring a teacher to guess at the meaning of the type of conduct which constitutes immorality, the court asserted, is a denial of due process and it permits erratic and prejudiced exercises of authority. The court also declared that the statute allowing dismissal for immorality presented a serious constitutional problem because it did not require a nexus between conduct and teaching performance.

Acanfora, discussed earlier, also shed light on the issue of non-renewal of contract involving a homosexual.[10] In that case the Fourth Circuit Court of Appeals overruled the federal district court's contention that Acanfora's transfer and nonrenewal of contract was not arbitrary or capricious because he went beyond reasonable bounds in defending himself. The lower court had held that Acanfora brought undue attention upon himself in his cause, before and after instituting his law suit, by engaging in the following activities: (1) a 15-minute interview on the Metropolitan Washington television program "Panorama"; (2) a 45-minute interview on the Metropolitan Washington WWDC radio program "Empathy"; (3) an interview on the educational television show "How Do Your Children Grow" on the Public Broadcasting System: (4) participating in a 20-minute segment on the Columbia Broadcasting System national news review "60 Minutes"; and (5) telephone interviews with The Montgomery County *Sentinel* and the Montgomery County *Tribune.* His remarks on "60 Minutes," the lower court had contended, had an element of sensationalism, and the design and function of the other programs in which he participated were such that they tended to spark controversy. These actions were not seen as reasonably necessary for self-defense; rather, these media appearances, it was held, were likely to produce imminent effects deleterious to the educational process.[11]

In overruling the lower court's rationale, but affirming its decision, the appellate court held that Acanfora's statements were protected by the first amendment. The court stated that the interviews did not disrupt the school or substantially impair his capacity as a teacher. Neither did they give school officials reasonable grounds to forecast that such disruption or impairment would take place. Since Acanfora's public statements had the protection of the first amendment, the Fourth Circuit Court of Appeals held that "they [his statements] do not justify either the action taken by the school system or the dismissal of his suit." [12]

Although Acanfora may have had the appellate court's blessing regard-

[10] Acanfora v. Board of Educ. of Montgomery Cty, 359 F. Supp. 843, (D. Md. 1973); 491 F. 2d 498 (4th Cir. 1974), *cert. denied* 419 U.S. 836 (1974). Although Acanfora's suit was based on an alleged arbitrary transfer to a nonteaching position his teaching contract was not renewed.

[11] Acanfora, 359 F. Supp. at 857 (D. Md. 1973).

[12] Acanfora, 491 F. 2d at 501.

ing his first amendment rights pertaining to freedom of expression, he was not allowed to return to his teaching position. Acanfora had been a member and treasurer of the Homophiles of Penn State while a student at that university, information he did not reveal on his application when seeking employment with the Montgomery County School system. His deliberate withholding of this information on his application, the appellate court held, precluded his maintaining a suit. The court asserted

> He [Acanfora] cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid.[13]

Since the court held that Acanfora had no standing before it, the decision does not provide us with a clear holding regarding a homosexual's legal status in public education.

Although language in the appellate decision implies Acanfora's suit may have been successful if he had not jeopardized his standing by withholding information on his application, other aspects of the decision tend to deny such an assertion. No comment was made by the appellate court, for instance, concerning the testimony by school officials that Acanfora would not have been hired if he had revealed his homosexual affiliation.

Two California appellate cases address themselves to the issue of dismissal based on criminal charges being brought for homosexual offenses. In one of these cases, Calderon, a teacher, was dismissed for engaging in an act of oral copulation, although he had been acquitted of the criminal charge.[14] Calderon contended that his acquittal of the criminal charge should be sufficient to permit him to continue as a teacher. The appellate court, in reviewing applicable provisions of the education code, did not agree. It maintained that since a conviction can be based only on a determination of guilt beyond a reasonable doubt, an acquittal does not establish that the acts in question were not committed. Consequently, the court held

> ... that our legislature properly intended by the enactment of the pertinent sections of the Education code to permit school boards to shield children of tender years from the possible detrimental influence of teachers who commit acts described therein ... even though they are not found guilty beyond a reasonable doubt.[15]

Additionally, the court posited that the issue between Calderon and the state was penal in nature while the case between him and the board was remedial, primarily for the protection of young children. The court was concerned that a teacher be able to teach moral principles, act as an ex-

[13] *Id.* at 504.

[14] Board of Educ., El Monte Sch. Dist. of Los Angeles Cty v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (2nd Dist. 1974), *Cert. denied,* 419 U.S. 807 1974).

[15] *Id.* at 496 and 920–921.

ample to students, and offer them moral guidance. Being charged with the crime of oral copulation, although subsequently being acquitted, in the view of the court, was apparently sufficient grounds to cast doubt on the teacher's ability to discharge these duties.

In another case, Metcalf, a sixth grade probationary teacher, was dismissed as a result of his conviction for engaging in an act of oral copulation in a doorless toilet stall in a public restroom of a department store.[16] He objected on constitutional grounds to the testimony of one of the arresting officers, who detailed the incident in question at the trial of the dismissal proceedings. Metcalf contended that the exclusionary rule, applicable in criminal trials, should apply in proceedings to dismiss a professional. The California appellate court did not agree and held that evidence of Metcalf's sexual misconduct that was inadmissible in his criminal prosecution was properly admitted in his dismissal proceeding. Additionally, the court contended that

> ... Metcalf's performance ... in a public restroom ... indicated a serious defect of moral character, normal prudence and good common sense ... and therefore evinced an unfitness to teach.[17]

The Supreme Court of Wisconsin upheld the dismissal of Safransky, an avowed homosexual who was a permanent status houseparent at a state institution for retarded teen-age boys.[18] Testimony revealed that he had openly discussed his homosexual activities with co-workers in the presence of residents while on duty. He often wore face makeup, including eye shadow, mascara, and pancake face powder. One witness stated that on several occasions he had called her a lesbian, and on one occasion this was done in the presence of residents.

The court asserted that since Safransky had duties of care, training and supervision of mildly and moderately retarded teen-age boys, this required him to emulate parentship and a code of conduct which residents could copy. One specific responsibility of a houseparent, the court averred, was to direct the patients to a proper understanding of human sexuality. This, the court reasoned, required a projection of the normalcy of heterosexuality and the unorthodoxy of male homosexuality. Consequently, the court held that since the patients were especially vulnerable they would tend to accept Safransky's actions and conduct as orthodox, and this would have a substantial adverse effect in his performance of duties.

Although not dealing with the question of the dismissal of a homosexual, it may be helpful to consider briefly the following two cases. A New Jersey

[16] Governing Bd. of the Mountain View Sch. Dist. of Los Angeles Cty v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (2nd Dist. 1974).

[17] *Id.* at 550–51 and 727.

[18] Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N. W. 2d 379 (1974).

case dealt with the issue of the dismissal of a male tenured teacher who underwent sex-reassignment surgery to change his external anatomy to that of a female.[19] In upholding the dismissal, the Appellate Division of the Superior Court of New Jersey contended that Ms. Grossman's presence in the school, where formerly she had been a male, would create a potential for psychological harm to the students. The court expressed no opinion, however, regarding her fitness to teach in another school system, where presumably students had not known her as a male.

An Ohio case discussed a teacher's dismissal for "immorality" because he had written a letter to a former student which "many adults would find gross, vulgar, and offensive." [20] The fact that the teacher in this case had previously displayed exceptional merit, was dedicated and enthusiastic, and had a sensitive concern for students' personal problems were overriding considerations in overturning his dismissal, since there was no evidence that the writing of these letters adversely affected the welfare of that particular school community. Further, the *Jarvella* court held that "the private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher, who is also a man." [21]

Revocation of Teaching Certificate

Several cases have addressed themselves to the question of revocation of a teaching certificate because of homosexual activity. Such cases have particular significance. Unlike actions such as refusal to hire, or dismissal by particular school systems, revocation of a teaching certificate brings the full weight of a state's plenary power over public education to bear on the individual teacher by refusal to permit the teacher the right to pursue his or her profession in the state. This action on the part of the state has as its purpose the protection of the community by eliminating certificated teachers who are considered not fit to teach. Naturally, such an extreme remedy as revocation of a teaching certificate under our constitutional system requires that the rights of due process, equal protection, and privacy be observed, and that the state not act in an arbitrary, capricious, or unreasonable manner.

Morrison v. State Board of Education is a landmark decision dealing with this issue.[22] Here the California Supreme Court, in a four-to-three decision, reversed a lower court's denial of a writ of mandate reviewing the California State Board of Education's revocation of Morrison's teaching

[19] In re Grossman, 127 N. J. Super. 13, 316 A. 2d 39 (1974).
[20] Jarvella v. Willoughby-Eastlake City Sch. Dist., 12 Ohio Misc. 288, 233 N. E. 2d 143 (1967).
[21] *Id.* at 291 and 146.
[22] 1 Cal. 3d 214, 461 P. 2d 375, 82 Cal. Rptr. 175 (1969).

certificate. Additionally, the court established the doctrine that revocation of a teaching certificate must be related to unfitness to teach. In that case Morrison admitted engaging in a noncriminal physical relationship which he described as being of a homosexual nature.[23] His testimony before the State Board of Education revealed that although he had had an undefined homosexual problem at the age of 13, he had never engaged in a homosexual act other than the incident in question. After a hearing before the California State Board of Education, that body concluded that the incident constituted "immoral and unprofessional conduct, and an act involving moral turpitude." Under California's education code, these offenses warranted revocation of a teaching certificate.

In its opinion the California Supreme Court expressed concern that definitions of such terms as "immoral or unprofessional conduct or moral turpitude" stretched over so wide a range that they could conceivably embrace an unlimited area of conduct. Consequently, the court insisted that there must be a relationship between these terms and unfitness to teach. Since this is a difficult relationship to establish, the court cited a number of cases where these general terms were the basis of disciplinary action against not only teachers but also holders of certificates, licenses, and government jobs other than teaching.

One case, considered worthy of consideration by the court, dealt with an applicant, Hallinan, who was denied admission to the bar because he had been arrested and convicted of a number of minor offenses in connection with peace demonstrations and civil rights "sit-ins," in addition to having been involved in a number of fistfights.[24] The California Supreme Court emphasized that these acts had to bear a direct relationship to Hallinan's fitness to practice law for them to be considered "acts of moral turpitude." Although commenting that Hallinan's past behavior may not have been praiseworthy, it did not reflect upon his honesty and veracity, important attributes for an attorney, nor did these acts show him unfit for the proper discharge of his duties as an attorney. Since these acts did not bear a direct relationship to Hallinan's fitness to practice law, he could not be denied admission to the bar.

Another decision cited by the California Supreme Court in which they attempted to define "moral turpitude" dealt with a doctor whose medical certificate had been revoked because he had been convicted of furnishing

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[23] Conviction of such specifically enumerated offenses as sodomy, oral copulation, public solicitation of lewd acts, loitering near public toilets, or exhibitionism under California law would have resulted in mandatory revocation of all diplomas and life certificates issued by the State Board of Education. Although not stated in the decision, Morrison apparently engaged in an act of mutual masturbation.

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

dangerous drugs without a prescription.[25] The court in that case held that since the purpose for revoking a certificate is not to punish a doctor but rather to protect the public, the Board of Medical Examiners can only legitimately punish a doctor through criminal prosecution. When dealing with a question such as this, the court insisted, the Board must limit its inquiry to the effect the doctor's actions has on the quality of his services to his patients.

Since the terms immoral or unprofessional conduct or moral turpitude resist definitive definition, their definition must include an indication of unfitness to teach. Without such a reasonable interpretation, the California court asserted that such terms as laziness, gluttony, vanity, selfishness, avarice, and cowardice might conceivably constitute immoral conduct in the eyes of some. The particular occupation must also be taken into consideration when applying these terms, for it is unlikely that identical standards of probity would be required of all those holding certificates or licenses from the state.[26]

Furthermore, the court, citing Kinsey data, contended that since at least 37 per cent of the American male population had at least one homosexual experience during their lifetime, an overbroad interpretation of these terms could compel disciplinary measures against a large number of male teachers who fell into that category, although their previous conduct did not affect students or fellow teachers. In pursuing this vein further, the court alleged that extramarital heterosexual conduct coupled with satisfactory teaching, absent an adverse effect on fitness to teach, would not constitute immoral conduct sufficient to justify revocation of a teaching certificate.[27]

Concern was also expressed by the California Supreme Court that no evidence was presented which indicated Morrison's unfitness to teach. No medical, psychological, or psychiatric experts testified whether or not Morrison would repeat such conduct in the future. No evidence was presented which indicated that Morrison was more likely than the average adult to

[25] Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 64 Cal. Rptr. 785, 435 P. 2d 553 (1968).

[26] This point is whimsically buttressed by the following quotation from *Morrison*. "A particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilism and necrosadism might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, zooerastism in a veterinarian or trainer of guide dogs, prolagnia in a fireman, undinism in a sailor, or dendrophilia in an arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or shorthand reporter." 1 Cal. 3d at 228; 461 P. 2d at 385; 82 Cal. Rptr. at 185 (1969).

[27] This notion has apparently been affirmed by the Iowa Supreme Court which held that a teacher's adultery was not grounds for revocation of his teaching certificate in the absence of evidence that such conduct balanced against an otherwise unblemished past would have an adverse effect on fitness to teach. *See* Erb v. Iowa State Bd. of Public Instruction, 216 N.W. 2d 339 (1974).

engage in untoward conduct with a student or that he might publicly advocate improper conduct. No suggestion was made that Morrison had ever considered or attempted any form of physical or otherwise improper relationship with any student. Yet, the California State Board of Education had abstractly characterized Morrison's conduct as immoral, unprofessional or involving moral turpitude. Uninformed speculation or conjecture regarding these matters, the court stated, would not be tolerated.

Although the California court supported Morrison's position, they clearly stated that they were not holding that homosexuals must be permitted to teach in the public schools of California. Rather, before a teaching certificate may be revoked, it must be shown that there is a relationship between homosexuality and unfitness to teach.

Since unfitness to teach is difficult to quantify, the California Supreme Court offered a number of considerations which may be helpful when determining whether or not a teacher's conduct indicated unfitness to teach. These included the following: (1) the likelihood that the conduct may have adversely affected students or fellow teachers; (2) the anticipated degree of such adversity; (3) the proximity or remoteness in time of conduct; (4) the type of teaching certificate held by the party involved;[28] (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. Employing criteria such as these should assist boards in determining whether or not a teacher's future classroom performance and overall impact on students are likely to meet board standards.

Homosexual activity which is criminal, or committed in a public place, has been found to be sufficient grounds for revocation of a teaching certificate. *Sarac v. State Board of Education* dealt with the revocation of a teaching certificate resulting from a teacher being convicted of a charge of disorderly conduct.[29] This conviction arose from Sarac's homosexual advances toward a police officer on a public beach. In upholding the revocation, the court asserted that "Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of Califor-

[28] At the time of the *Morrison* decision California issued the following credentials: standard elementary, standard secondary, standard junior college, standard designated subject, pupil personnel services, health services, teacher supervision, administration, librarian, foreign language, and exceptional children.

[29] Sarac v. State Bd. of Educ., 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (2nd Dist. 1957). Although agreeing with the holding in Sarac, *Morrison* later held that unnecessarily broad language which suggested that all homosexual conduct, even when not related to fitness to teach, was used in that case.

nia as it has been since antiquity. . . ." [30] Therefore, the court concluded, it is clearly immoral conduct and within the meaning of the educational code, and it clearly constitutes evident unfitness for service in the public schools.

Moser v. State Board of Education represents another case dealing with the revocation of a teaching certificate for engaging in a criminal activity.[31] Moser had masturbated while in public view in a public restroom and touched the private parts of another male. He was subsequently convicted of a violation of the California Penal Code. The court held that Moser's conduct was sufficient, by itself, to establish unfitness to teach. Both *Morrison* and *Hallinan*, were distinguished by the court. *Morrison* was distinguished on the ground that a noncriminal act was involved; and, *Hallinan* was distinguished on the grounds that a profession other than teaching was involved and terms such as "immoral conduct," "unprofessional conduct," and "acts involving moral turpitude" are given their precise meaning by referring to the particular profession.

Conclusions

A search of cases dealing with homosexuals in public education reveals relatively few reported ones, and a reading of the available decisions suggests that the case law is not well-established and at times inconsistent. To date, there has been no definitive United States Supreme Court decision dealing with this question.

Courts have not squarely addressed themselves to the issue of hiring practices in public education involving homosexuals. The Eighth Circuit Court of Appeals has upheld the University of Minnesota Regents in not hiring a homosexual, but that decision turned primarily on the applicant's activist role in the gay movement. Although the court's attitude toward homosexuality may be revealed by its use of such language as "socially repugnant concept" in describing it, the *McConnell* decision does not speculate on the legality of the Regents' hiring practice, absent an activist role. The Fourth Circuit Court of Appeals in *Acanfora*, on the other hand, has held that a homosexual's public statements dealing with his views on the subject had first amendment protection. Although there was a slightly different factual situation in *Acanfora* from *McConnell*, the respective decisions place the two circuits in apparent conflict on the question of first amendment rights for homosexuals.

Acanfora makes it abundantly clear, however, that a homosexual should disclose fully any previous homosexual associations he may have had when applying for a teaching position. Failure to do so may leave him without standing before the courts when he subsequently claims discrimination.

[30] *Id.* at 63 and 72.

[31] 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (2nd Dist. 1972).

Dismissal for admitting being a "practicing homosexual," absent criminal activity or the establishment of a nexus between conduct and unsatisfactory teaching performance, appears to be unconstitutional.[32] However, being charged with engaging in a criminal homosexual activity, even if one is not convicted, may be a basis for dismissal.[33] Also, evidence which may not be employed in a criminal trial may apparently be used in a dismissal proceeding.[34] The decisions in *Calderon* and *Metcalf* clearly demonstrate that courts, in an effort to protect children against homosexual teachers, may apply unique standards when homosexuals are involved.

Noncriminal homosexual activity, in the absence of establishing unfitness to teach, according to *Morrison*, is not sufficient grounds for revocation of a teaching certificate. Both *Sarac* and *Moser*, however, clearly hold that a criminal conviction based on homosexual activity is sufficient grounds for revocation of a teaching certificate.

Perhaps the only clear doctrine which emerges from a review of cases to date is that in the absence of a criminal homosexual violation, dismissal or revocation of a teaching certificate must be related to unfitness to teach. In addition to the suggested test mentioned earlier, unfitness to teach may be evidenced by posing "a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher." [35] Such a danger of harm could be evidenced by such factors as illegal conduct, potential misconduct with students, effect on the community of a teacher's notorious conduct, and the effect of the conduct on students.

Discussion

Several other factors emerge from a review of the reported cases. Decisions often appear to reflect stereotypes and the public's conventional wisdom toward homosexuality. Little empirical evidence is presented in the decisions; consequently, one may reasonably conclude that there is a paucity of empirical data dealing with the deleterious effect, or lack thereof, of the homosexual in public education. Since this area of the law appears to be at an early stage of development, it will undoubtedly undergo substantial modification as it is subjected to the battering of modern societal forces.

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[32] Burton v. Cascade Dist. Union High Sch. No. 5, 353 F. Supp. 255 (D. Ore. 1973).

[33] Board of El Monte Sch. Dist. of Los Angeles Cty v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (2nd Dist. 1974), *cert. denied*, 419 U.S. 807 (1974).

[34] Governing Bd. of the Mountain View Sch. Dist. of Los Angeles Cty v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (2nd Dist. 1974).

[35] Morrison, 1 Cal. 3d at 235, 461 P. 2d at 391, 82 Cal. Rptr. at 191.

Reflection of Majoritorian Beliefs

Certain language interspersed in many of the decisions reveals an anti-homosexual attitude among some judges. Phrases such as "Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards . . . as it has been since antiquity";[36] ". . . prevention of homosexuality is a worthwhile goal";[37] and ". . . implementing his (McConnell's) unconventional ideas concerning the societal status to be accorded homosexuals, and thereby to foist tacit approval of this socially repugnant concept upon his employer";[38] all reflect a bias. Such predilections would seem to make it difficult for judges to balance the rights of an individual (homosexual) against those of a sometimes ill-informed and intolerant majority. It is not difficult to understand such bias on the part of some judges, as a study reported in *Psychology Today* found that 84 per cent of the public viewed homosexuality as "obscene and vulgar." [39]

Much of the present-day bias against homosexuals undoubtedly has its roots in the prohibition against homosexuality enunciated in the Bible.[40] This Biblical prohibition has been given legal status in forty-two states and the District of Columbia, where homosexual behavior between consenting adults is a crime.[41] However, these statutes may, for the most part, be vitiated because of the lack of enforcement of these laws against private homosexuality.

Perhaps another element involving bias which must be recognized is the fear on the part of many, judges included, of the deleterious effect of homosexuals in the public school. Undoubtedly images of limp-wristed, effeminate, garishly-dressed men in makeup teaching school, or evil and sinister-looking men perpetrating evil deeds on unsuspecting and innocent children, lurk in the minds of many when the question of allowing a homosexual to teach in a public school is raised. Others fear the possible disapproval of the school system by the public and parents, and the subsequent possibility of a rejection of bond and funding measures at election time.

Lack of Empirical Data

None of the reported decisions to date was based on incontrovertible scientific evidence pertaining to a homosexual's effect on students, col-

[36] Sarac v. State Bd. of Educ., 249 Cal. App. 2d at 63, 57 Cal. Rptr. at 72 (2nd Dist. 1957).

[37] Acanfora v. Board of Educ. of Montgomery Cty., 359 F. Supp. at 847 (D. Md. 1973).

[38] McConnell v. Anderson, 451 F. 2d at 196 (8th Cir. 1971).

[39] *Sexuality,* PSYCHOLOGY TODAY, Sept. 1973, at 17–18.

[40] *See Leviticus* 18:22, 20:13; *Deuteronomy* 23:18; *Judges* 19:22; I *Kings* 14:24, 15:12; II *Kings* 23:7; *Romans* 1:27; I *Corinthians* 6:9; and I *Timothy* 1:10.

[41] C. Hite, *APA Rules Homosexuality not Necessarily a Disorder,* PSYCHIATRIC NEWS, January 2, 1974, at 16.

leagues, the school, or the community.[42] This is not surprising, as given the lack of sufficiently sophisticated research methodologies in the social sciences, it would be virtually impossible to suggest any type of causal relationship.[43] There are simply too many variables with which to deal. An example may be helpful in establishing this point. Consider the infinite number of forces of various magnitudes acting upon a child (a unique product of nature/nurture) as he grows older. Attempting to assess the effect of an interaction with one such force, say a homosexual, would be extremely difficult, if not impossible. In a "future shock" world of rapidly-changing mores and life styles, it would be ludicrous to attempt a measurement of the effect of one such variable (say interaction with a homosexual) on a child, colleagues, school or community.

Given the unavailability of sound empirical data by which to assess the impact of a homosexual, or any other "deviant," for that matter, on the school environment or those operating within it, folk wisdom steeped in antiquity often prevails. Such a process, of course, does not insure justice under law.

Liberalizing Forces

A number of societal forces appear to be operating which may influence the direction of the case law dealing with homosexuals in public education. These include: changing attitudes toward homosexuals by certain institutions; rapid changes in life-styles and mores, coupled with a greater willingness of homosexuals to surface; increased media attention toward the homosexual position which appears to be more sympathetic than hostile; related educational court cases where private but offensive actions of teachers, which historically have been grounds for dismissal and possible revocation of teaching certificates, have been upheld; and lastly, the increasing use of the judicial test of establishing a nexus between conduct and teaching performance.

Several institutions have changed their attitudes toward homosexuals in recent years. One such change, which undoubtedly will have far-reaching legal and societal ramifications, is the action of the American Psychiatric Association Board of Trustees' ruling, approved by a vote of the membership, that "homosexuality... by itself does not necessarily constitute a

[42] Several "expert" witnesses were employed in the *Acanfora* case at the district court level, but their testimony was largely based on their opinion, a theory, or their experiences. These "experts" did not necessarily agree, and none was able to make definitive statements regarding the effect of interaction on the part of young students with homosexuals.

[43] See G. Grant, *Essay Review*, HARVARD EDUCATIONAL REVIEW, Feb. 1972, at 109–125 for an excellent treatment of the shortcomings of social science research.

psychiatric disorder." [44] Consequently, homosexuality will no longer be listed under personality and other non-psychotic mental disorders as a subcategory of sexual deviations, along with fetishism, pedophilia, transvestism, and others. Additionally, the Trustees passed a resolution deploring discrimination against homosexuals in employment, housing, public accommodation, and licensing.

Although homosexuality has normally been a basis for exemption from military service, a recent action by an Army administrative board in West Germany may modify the Army's position toward homosexuals.[45] In its action, the Army board permitted a homosexual soldier to remain in the service until his discharge date which was over six months away.

Court action was responsible for another institution—a university—changing its policies toward homosexuals.[46] In this instance, the University of Georgia would not allow its facilities to be used by a homosexual organization for a dance. A subsequent ruling by a federal district court stated such action by the university infringed on the first amendment rights of students. As a result, the homosexuals conducted their dance.

Several communities have passed ordinances which prohibit discrimination in employment, housing, or public accommodation because of "sexual orientation." These communities include San Francisco; Minneapolis; Seattle; Toronto; Washington, D.C.; Ann Arbor, East Lansing and Detroit, Michigan; Berkeley, California; and Columbus, Ohio. However, voters in Boulder, Colorado and New York City have rejected such measures.

Significant changes are also taking place in the private sector. An article in *The Wall Street Journal* discussed a recent trend in private industry which suggests a "cautious but noticeable shift in hiring and firing policies by companies toward employees it knows or believes to be homosexuals." [47] The tenor of the article suggests that although changes are taking place, many firms are resisting this trend.

Life styles and mores have undergone more rapid change in the last two decades than at any other time in our history.[48] Traditional modes of living are being re-examined by contemporary yardsticks, and when found to be wanting they are often discarded. This may be evidenced by the apparent

[44] C. Hite, *supra* note 41, at 1.

[45] *See* WALL STREET JOURNAL, Dec. 28, 1973, at 1.

[46] Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972). *See also* Gay Students Organization of the Univ. of New Hampshire v. Bonner, 367 F. Supp. 1088 (D. N.H. 1974).

[47] M. Tharp, *Last Minority? With Little Fanfare, More Firms Accept Homosexual Employees,* WALL STREET JOURNAL, July 1, 1974, at 1, 15.

[48] *See* ALVIN TOFFLER, FUTURE SHOCK (1971), for a fascinating description of this change. In the school environment the change may also be seen by the spectacle of a practicing public school administrator now wearing his hair a length for which he would have suspended students in his school just a few years ago.

lack of sanctity of marriage and corresponding high divorce rate (and constant pressures that divorce be made easier to obtain), the tendency to have less children or none at all, the existence of a drug culture, etc. Such constant questioning and modification on the part of some provides a sympathetic environment for the consideration of life styles which our society has placed in a "taboo" status. This may be the case for homosexuality.

A synergistic force is introduced when the acceptance of constant reexamination of life styles is coupled with the tendency of those having minority viewpoints to openly espouse them. This tendency has been most dramatically seen as blacks and women have and are continuing to demand their civil rights. In the public schools it may be seen by the proliferation of suits challenging school rules dealing with grooming and dress, religion, married and pregnant students, females participating in interscholastic athletics, and pregnant teachers.[49] Evidence suggests that homosexuals, as the most recent vocal minority, are increasingly willing to surface and demand their civil rights.

Continuing nonhostile treatment of homosexual concerns by the media is undoubtedly another liberalizing force. In addition to the *Wall Street Journal* article discussed, *supra,* television discussion and treatment in the popular news magazines abound.[50] *Newsweek* quoted a spokesman for the New York Board of Education as saying, "I would say there are a number of homosexuals in the school system, and I don't see any danger coming from it." [51]

Particularly significant in bringing about a change in attitude toward homosexuals may be articles by such nationally-syndicated columnists as William Safire, a former Nixon speech writer. In one such article, "The Right to be Gay," Safire asserts that gays should not only be treated as people who are different but also as people who have a right to be different.[52] In discussing the role of homosexuals in the schools, he states

> Does this high-sounding concern for civil liberty mean that we should pass laws allowing Gays to teach small children in public schools? I'm afraid so. As long as a teacher does not teach homosexuality, he's entitled to be Gay....
>
> That is a painful stretch, but there is a practical side: Better a forthright homosexual teacher than a secret one.[53]

There is little doubt that such statements, especially by a reporter who is

[49] *See* M. La Morte, The Fourteenth Amendment: Its Significance for Public School Educators, EDUCATIONAL ADMINISTRATION QUARTERLY, Autumn 1974, at 1–19 for a discussion of school rules which have been challenged by court action.

[50] Acanfora, for instance, was interviewed on the CBS television program *60 Minutes.*

[51] *Homosexual Rights,* NEWSWEEK, May 20, 1974, at 76–77.

[52] W. Safire, *The Right to be Gay,* ATLANTIC CONSTITUTION, April 22, 1974, at 5A.

[53] *Id.*

considered to be conservative on the political spectrum, have a tendency to modify attitudes.

Historically, educators have generally been held to a higher standard of private conduct than others in the community. This notion appears to be waning, however, as some courts no longer require public school teachers to be "exemplars." Although many courts continue to hold to such a standard, the holdings in several reported decisions suggest otherwise. The following examples, although not dealing specifically with the question of homosexuality, point to this trend. There is little doubt that not too many years ago, successful defense in a court of law would have been unlikely in these cases. In one instance, Comings, a public school teacher who had been convicted for the possession of marijuana, had his teaching certificate revoked.[54] In reversing the decision to revoke his certificate, the court contended that no evidence was presented which showed that his conduct adversely affected students or fellow teachers, whether or not there were extenuating or aggravating circumstances surrounding his conduct, the likelihood of its recurrence, or Comings' motives.

As discussed briefly, earlier, Richard Erb, who had engaged in adulterous conduct with a fellow teacher, successfully overturned the revocation of his teaching certificate.[55] The Iowa Supreme Court, in its holding, stated that committing adultery does not automatically render a person unfit to teach. Evidence revealed Erb to be a dedicated, hardworking, effective teacher. Since there was no evidence to show that the affair had an adverse effect in his relationship with school administrators, fellow teachers, students, or the community, and since it was an isolated occurrence, unlikely to recur, the court held that Erb was not morally unfit to teach in Iowa. A holding such as this certainly represents a significant break with the past, when merely a hint of "scandal" was often sufficient for the request of a letter of resignation.

Another example of a liberalizing influence on the "exemplar" notion may be seen in a dissenting opinion in *Pettit v. Board of Education*.[56] Justice Tobriner, who wrote the majority opinion in *Morrison*, offered an interesting rationale for his dissent in *Pettit*. In that case, Elizabeth Pettit's dismissal and revocation of her teaching certificate was upheld by the California Supreme Court. Her offenses included: (1) participation (although disguised) with her husband in a television discussion, where she espoused group-sex and wife-swapping, and (2) publicly engaging in three acts of oral copulation with three different men, none of them her husband, at a

[54] Comings v. State Bd. of Educ., 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1st Dist. 1972).

[55] Erb v. Iowa State Bd. of Public Instruction, 216 N.W. 2d 339 (1974). *See also* Fisher v. Snyder, 346 F. Supp. 396 (D. Nebr. 1972), *aff'd.* 476 F. 2d 375 (8th Cir. 1974), which held that a teacher who permitted men to stay overnight in her apartment was not unfit to teach.

[56] 10 Cal. 3d 29, 513 P. 2d 889, 109 Cal. Rptr. 665 (1973).

"Swingers" party. Among the several questions Justice Tobriner raised was whether or not Ms. Pettit's private actions rendered her "unfit to teach." He cited her excellence for thirteen years as a teacher of the severely handicapped, and argued that if an undercover policeman had not been at the "Swingers" party, Ms. Pettit would still be teaching. He concluded his dissent by stating

> ... the majority opinion is blind to the reality of sexual behavior. Its view that teachers in their private lives should exemplify Victorian principles of sexual morality, and in the classroom should subliminally indoctrinate the pupils in such principles, is hopelessly unrealistic and atavistic.[57]

A decision upholding the public acts of a probationary public school teacher also suggests the existence of liberalizing forces.[58] Eileen Olicker, an Oakland, California teacher, reproduced and distributed to her special reading class of 13 and 14 year-old students the written results of an "anything goes" assignment to them. The material contained explicit vernacular references to sexual organs and the sex act. Her dismissal for this conduct, although upheld by a superior court, was overturned by an appellate court. The court agreed that Ms. Olicker's conduct was based in a good faith attempt to reach her students and motivate them to participate in class work. Additionally, the court stated that no evidence was presented which demonstrated that this exercise had an adverse effect on class discipline or that it interfered with the teaching process.[59]

Finally, a most significant liberalizing force is the increasing use by the judiciary of the test which requires the establishment of a nexus between conduct and teaching performance. Courts are demonstrating a reluctance to enforce or bar conduct solely on the basis of conventional wisdom, historical precedent, or "expert" opinion. Rather, they are requiring that there be a connection between the conduct in question and actual teaching performance.

As this test continues to be employed by the judiciary, it will undoubt-

[57] 10 Cal. 3d at 45, 513 P. 2d at 899, 109 Cal. Rptr. at 675.

[58] Oakland Unified Sch. Dist. v. Olicker, 24 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1st Dist. 1972).

[59] The foregoing examples should not be construed as suggesting that public school educators need no longer be "exemplars" or that they may engage in behavior which historically has been considered "deviant." There are a sufficient number of cases which suggest otherwise. For instance, *see* Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (2nd Dist. 1971) where a junior college teacher was considered unfit for service and discharged for assaulting a policeman and attempting a high speed escape after being found parked with a female student who was partially undressed and Governing Bd. of Nicasio Sch. Dist. v. Brennan, 18 Cal. App. 3d 124, 95 Cal. Rptr. 712 (1st Dist. 1971) where the court upheld a board's action not to reemploy a teacher who had executed an affidavit telling of her long and beneficial use of marijuana.

edly continue to affect many aspects of the case law in public education, including that dealing with homosexuals. Consequently, it will become necessary to demonstrate that a person's homosexuality affects his teaching performance. An inability to establish this relationship may make it impossible to remove him from the classroom. The use of such a test will insure that a capable, effective teacher will not be dismissed merely because he stands accused of unorthodox sexual behavior. It will not, on the other hand, protect an incompetent homosexual teacher.