HOMOSEXUALITY:
AN INTRODUCTION TO THE DEBATE

JON STEINBERG

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PREFACE

The purpose of the following paper is to provide unbiased background information for Minnesota legislators on the subject of homosexuality. The paper provides a chronicle of statutory and case law, administrative actions and a variety of opinions (some from polls and some from individual authors). There was no attempt to suggest public policy directions for Minnesota on the subject. Those policy decisions will be made in the legislative process. Hopefully the information presented will aid in an understanding of legal and administrative decisions as well as public opinion on issues related to homosexuals and this understanding will aid Minnesota legislators in their decision-making responsibilities.

The bulk of the research for the paper was done by Susan Woodwick, Research Assistant in House Research under the supervision of Jon Steinberg, Legislative Analyst. Ms. Woodwick not only contributed her research skills but also organized and wrote the initial drafts of the document. Mr. Steinberg carefully completed the paper. Descriptions of the law were reviewed for accuracy and edited to assure an unbiased product. Comments and questions regarding the subject or this paper should be directed to Jon Steinberg, 296-5058.

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I. INTRODUCTION

Homosexuality has existed since ancient times. A majority of societies that have been studied condoned or even encouraged homosexual behavior, at least for some segments of the population. Examples are ancient Greece, Japan before the Meiji era, the Tanalans of Madagascar, the Siwamis of Africa, the Aranda of Australia, and the Keraki of New Guinea.[1] Among the Carthagians and Greeks, homosexual behavior was cultivated, considered a military virtue and identified with intellectual, aesthetic and ethical qualities.[2]

In contrast, complex modern societies have treated homosexuality as morally debased and legally a crime.[3] In England, during the Middle Ages, homosexual acts were defined as "sodomy," deserving of severe secular and ecclesiastical penalties meted out through torture, death or castration. By 1553, English courts assumed jurisdiction over the vice of "buggery" and upon conviction, the accused was put to death. Anal intercourse remained punishable by death until 1861, when the maximum penalty was changed to life imprisonment. The English statutes served as a foundation for later American statutes proscribing homosexual conduct.[4]

Today, laws penalizing homosexual conduct are changing. In 1965, all United States jurisdictions, except Illinois, proscribed private homosexual acts between adults.[5] In 1978, only 28 states provide criminal sanctions for private adult homosexual behavior. The following countries do not punish private homosexual activity between consenting adults: Belgium, Canada, Denmark, England, France, Germany, Greece, Italy, Mexico, Netherlands, Spain, Sweden, Switzerland, Uruguay.[6]

Civil rights for homosexuals has become a major political issue. Traditionally, performers of homosexual acts have been condemned as criminals who should be discriminated against. Presently there is no federal or state antidiscrimination statute specifically pertaining to homosexuals but efforts have been made to add "affectional preference" to the list of qualities cited in federal civil rights legislation which cannot be the basis of discrimination, and similar state legislation has been proposed. Approximately 40 local governmental units prohibit discrimination on the basis of affectional preference, although the areas covered by, and the rate of enforcement of those ordinances vary.

An introduction to the debate concerning homosexuality as reflected in federal and state statutes, case law and policies can be found in Chapters II and III. Chapter IV contains information about the prevalence and causes of, and public attitudes toward homosexuality.

II. FEDERAL LAWS AND POLICIES

A. Legislation

At least four bills have been introduced into the United States House of Representatives which prohibit discrimination on the basis of affectional or sexual preference with regard to education, housing, and public accommodations.[7]

Congress expressly mentioned homosexuality in the context of two funding bills this past year. When the Legal Services Corporation was extended for two years, a member of the House offered an amendment which prohibits use of Legal Service Corporation funds for cases concerning homosexuality.[8] A related bill passed the Senate October 12, 1977 and went to a conference committee. Similarly, a House-passed bill funding the Housing and Urban Development Department barred the use of public housing funds by homosexual and unmarried couples. However, the final version of P.L. 95-119 contains no such constraints.[9] If the law had closed public housing to homosexuals, it would have reversed a HUD policy begun under new regulations released in early May which opened public housing funds to unmarried couples living together, heterosexual and homosexual, if they could demonstrate a "stable, family relationship."[10]

B. Administration Policies

Areas in which the administrative branch of federal government has established explicit policies with respect to homosexuals are immigration and naturalization, and employment.

1. Immigration and Naturalization

A change in the United States Immigration and Naturalization Service policy with respect to naturalization of homosexuals was announced August 20, 1976. The change was apparently due to and reflected a court decision (In re Petition of Paul Edward Brodie, 394 F.Supp. 1208 (D. Oregon 1975)) which held that the petitioner's sexual orientation was not a bar to the "good moral character" requirement of 8 USCA 1427(a)." The Immigration and Naturalization Service General Counsel announced:

> The fact that a petitioner for naturalization is or has been a practicing homosexual during the relevant statutory period is not, in itself a sufficient basis for a finding that he lacks the necessary good moral character. However, where there has been a conviction of a homosexual act or the admission of the commission of such an act in a jurisdiction in which it is a criminal offense or when the homosexual act involves minors, or the use of threats or fraud, or the act of solicitation thereof in a public place, the Service view is that a showing of good moral character is precluded.[11]

Besides preventing naturalization, admission of a homosexual act may result in the recision of permanent resident status ('green card') and the initiation of deportation proceedings if the alien was a homosexual at the time of admission into the United States. This is possible because the Immigration and Nationality Act excludes aliens afflicted with "psychopathic personality" from the United States, as well as making them ineligible to receive visas. The fact that Congress saw homosexuals as psychopathic personalities was established in Boutilier v. INS, 87 S.Ct. 1563 (1967).

2. Employment

a. E. E. O. C.

The Equal Employment Opportunity Commission is an agency within the executive branch of the federal government. Created by Title VII of the Civil Rights Act of 1964, its purpose is to end discrimination based on race, color, religion, sex, or national origin in conditions of employment and to promote voluntary action to put equal employment opportunity into operation. The EEOC receives written charges of discrimination against public and private employers, excluding the federal government. Before 1970 the EEOC began receiving complaints involving discrimination against homosexuals. It was not until 1975 that the Commission considered such a case finding, though, that it lacked jurisdiction to deal with such complaints. The Commission expressed the opinion that when Congress used the word "sex" in Title VII it was referring to gender, not sexual proclivities or practices.[12]

b. Civilian

Much of the case law related to discriminatory treatment of homosexuals by employers concerns federal government jobs. Federal Civil Service regulations barring homosexuals from government positions were a product of the McCarthy era when the government determined that a known homosexual in the Civil Service "would be repugnant to the populace and might destroy confidence."[13] Until 1969, the courts consistently supported the government's exclusion of homosexuals as necessary to promote agency efficiency. Then, the Court of Appeals for the District of Columbia imposed severe limits on this policy, holding that it was overly broad and a denial of due process. In Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969), the

court declared that there must be "some reasonably foreseeable, specific connection between employee's potentially embarassing conduct and the efficiency of the service. Once the connection is established, then it is for the agency and the [Civil Service] Commission to decide whether it outweighs the loss to the service of a particular competent employee."

The stated need to "connect" employee behavior and agency efficiency was addressed in another 1969 decision in the Court of Claims, United States v. Schlegel, 416 F.2d 1372 (1969). The court suggested that homosexuality always has sufficiently foreseeable connection with efficiency to justify termination. The court stated:

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

Until 1973, the Federal Personnel Manual Supplement stated flatly that a homosexual was not suitable for employment because this condition automatically impaired his or her efficiency, and inhibited those who were forced to work with them.[14] However, in 1973, a federal district court in California extended the rationale of Norton v. Macy in judging the Manual Supplement. The district court concluded that the rule was overbroad and could not be enforced, and that the Commission must determine the particular circumstances which might justify dismissing an employee for homosexual conduct. Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. 1973), aff'd, 5 28 F.2d 905 (9th Cir. 1975). Consequently, the Civil Service Commission decided that homosexuals would be found unsuitable for federal service only when the evidence established that such a person's conduct adversely affects "job fitness," and deleted "immoral conduct" from

the list of specific factors for disqualification for employment.[15]

The "connection test" was used in early 1976 to uphold the dismissal of a homosexual clerk-typist whose place of employment's name (Equal Employment Opportunity Commission) was used in connection with a symposium sponsored by the Seattle Gay Community. The Ninth Circuit Court of Appeals distinguished this case, Singer v. United States Civil Service Commission, 530 F.2d 247 ((th Cir. 1976) from Norton v. Macy in which the dismissed employee had not sought to publicize his status. The court found a "rational connection" between the employee's behavior and agency efficiency, and the court distinguished his case from others where discrimination against homosexuals was seen as a denial of freedom of expression.

A change similar to the one made in the United States Civil Service Commission Federal Personnel Manual Supplement has been made in the United States Job Corps Manual. However, the change took place more recently. The new Job Corps Manual states that "[a] man or woman may not be excluded from participating in the Job Corps solely on the basis of his/her choice of a sexual partner of the same gender."[16]

c. Military

As a general rule, homosexuals are precluded from military service. If a military person is suspected of homosexuality, an extensive investigation is likely to ensue, with the individual often leaving service. The Navy terminates not only those who engage in homosexual conduct, but also those who have "homosexual tendencies." This policy is based on the belief that homosexual officers would be less effective on shipboard because they would be ridiculed by the enlisted personnel. Thus homosexuals may remain

in the Navy if the reactions of third persons do not inhibit their effectiveness.[17]

Recently, the Navy has been under fire from homosexuals who have been forced or locked out of military service or have received other-than-honorable discharges. In April, 1977, the Navy retroactively upgraded the discharge of former Ensign Vernon E. Berg, III. Although the Secretary's action did not change the Navy's basic policy of exclusion of gay people from the service, the action might aid gay service men and women who have been given less-than-honorable discharges to obtain upgrading of their discharges to honorable if they apply to the Navy's Board for Correction of Naval Records.[18] A change of discharge status is important because individuals who receive a less-than-honorable discharge from the military sometimes find it hard to get employment. Also, by law they may be unable to obtain welfare, food stamps, unemployment or other benefits.[19]

Berg's honorable discharge was part of the relief he sought when he sued the Navy for reinstatement and backpay. Berg v. Clayton, 436 F.Supp. 76 (D.D.C. 1977). The district court dismissed Berg's complaint and granted a summary judgment in favor of the Navy. The decision in Berg differs from that in Saal v. Middindorf, ___ F.Supp. ___ (N.D. Cal. 1977), which found Navy policy to be one of blanket exclusion of gays, and, as such, a violation of due process. Saal won injunctive relief after she was denied permission to re-enlist for the sole reason that she had engaged in homosexual conduct during the period of her Navy service. The district court held that the Navy must consider each case on its own merits and not assume that homosexuality automatically renders one unfit for service. When the Navy argued that chain-of-command problems would arise since

enlisted persons would not respect an officer who exhibited homosexual tendencies, a claim successfully made in Berg, the court observed that those arguments could justify dismissing members of minorities or other persons who also may be despised by some. Therefore, the court concluded that the Navy's blanket discharge rule for homosexuals was constitutionally invalid, at least as applied to the plaintiff.[20]

3. Requested Changes

Representatives of the National Gay Task Force met with President Carter's assistant for public liaison in late March and requested the following changes in federal policy:[21]

1. an upgrading of less-than-honorable discharges from the military on homosexual grounds
2. an end to discrimination by immigration authorities against gays who wish to enter the country
3. stronger measures to ensure the safety of gay prisoners
4. tax deductible status for gay organizations
5. federal grants for research and social services on gay issues.

C. Court Decisions

When discrimination is challenged, a plaintiff generally relies on section 1983 of the Civil Rights Act of 1871,[22] the first amendment and/or the fourteenth amendment. In this paper, federal court decisions are discussed in sections describing the federal or state laws and policies affected.

III. STATE LAWS AND POLICIES

A. In General

1. Civil Rights Laws

a. In General

The closest thing to a state policy which protects homosexuals is an executive order in Pennsylvania which prohibits discrimination against homosexuals in state employment. No state has a statute which protects homosexuals from discrimination although several state legislatures have considered such a law. As of May, 1977 the legislatures of Connecticut, Hawaii, Illinois, and Maine had defeated legislation which would have guaranteed some civil rights of homosexuals. At the same time, civil rights legislation was still pending in California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Oregon, Washington, and Wisconsin. See Appendix, Table 1.

More than 40 units of local government prohibit discrimination on the basis of sexual preference. See Appendix, Table 2. Most cities with gay rights legislation require individuals who have been discriminated against to appeal to the local human rights commission. In general, human rights commissions are cited for their slow handling of complaints. The Washington, D.C. Office of Human Rights has a backlog of 467 cases, some of them dating back to 1974.[23] In addition, the potential influence of civil rights legislation may be limited if a commission interprets an ordinance narrowly. For example, early in 1977 the Bloomington, Indiana, Civil Rights Commission ruled that the city's ordinance banning discrimina-

tion on the basis of sexual orientation did not apply to discotheques which prohibited same-sex dancing. Since same-sex dancing does not necessarily indicate sexual orientation, same-sex dancing is not considered a protected category under the ordinance.[24]

Recently, New York City and Tucson implemented policy changes which may increase protection afforded the civil rights of homosexuals. New York City's Commission on Human Rights made the news when a gay rights activist was appointed to the panel. Tucson passed a gay rights ordinance which is one of the most comprehensive in the country. The ordinance empowers the city attorney to prosecute violators of a person's civil rights.

b. Employment

The issue of employment discrimination against homosexuals has received the greatest attention when those employees are teachers. Employment policies are formulated by local school boards and university trustees, who must anticipate court review because of past court challenges. To date, none of the major cases originated in a city with gay rights legislation in effect at the time of the discrimination.

There has not been a United States Supreme Court case which explicitly states the rights of homosexual teachers. However, there have been a number of state and lower federal court decisions regarding homosexual employees of educational institutions. In a 1975 Journal of Law - Education article, a review of cases involving hiring practices noted a variety of court policies. "The only clear doctrine which emerges . . . is that in the absence of a criminal homosexual violation, dismissal or revocation of a teaching certificate must be related to unfitness to teach."[25]

In 1977, the confusion about allowable hiring and firing practices remains. In October, 1977 the United States Supreme Court refused to hear the case of a homosexual teacher who had been fired because his stated sexual preference was "immoral." In Gaylord v. Tacoma School District, 88 Wash 2d 286 (1975), the Washington Supreme Court upheld the decision of the trial court that the teacher was guilty of immorality and that, as a known homosexual, his fitness as a teacher was impaired to the injury of the high school in which he taught. This Washington court decision conflicts with Burton v. Cascade School District, 512 F.2d 850 (9th Cir.), cert.denied 423 U.S. 839 (1975), which found the morality statute used to dismiss a lesbian teacher unconstitutionally vague. The Gaylord court discounted the vagueness argument by stating, "Immorality as a ground of teacher discharge would be unconstitutionally vague if not coupled with resulting actual or prospective adverse performance as a teacher."

When the Eighth Circuit Court of Appeals upheld a decision by the University of Minnesota Regents not to hire a homosexual, the court's decision was based primarily on the applicant's activist role in the gay rights movement. McConnell 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). The court found that the plaintiff sought the right to pursue an activist role in implementing his unconventional ideas. Because it felt that he might foist tacit approval of this "socially repugnant" concept on his employer, the court held that the University's withdrawal of the job offer was constitutionally unobjectionable. The question actually at issue -- whether homosexuality alone is an adequate ground under the Constitution for the withdrawal of a promotion -- was never really resolved. In

contrast, the Fourth Circuit Court of Appeals has extended first amendment protection to a homosexual's public statements dealing with his views on the subject. 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 the factual situation in Acanfora was slightly different than that in McConnell, the respective decisions place the two courts in apparent conflict on the question of first amendment rights for homosexuals.

Safransky v. State Personnel Board, 62 Wis. 2d 464, 215 N.W.2d 379 (1974), can be compared to cases involving teachers because it involved the discharge of an employee who worked as a house-parent in a residential center for retarded boys. Because of his position, the court felt he should portray an acceptable lifestyle rather than make his atypical preferences well known.

Summary

Authors who discuss homosexuality and case law concur: there is generally judicial reluctance to define and examine the legal issues created by public antipathy for homosexuality.[26]

In general, the courts seem willing to support efforts to deny employment to individuals active in the gay rights movement. If an individual has not been politically active, dismissal seems to rely on demonstration of ineffectiveness in the position. Several courts have concluded that a homosexual, by definition, cannot teach effectively. Those courts have not relied on the experience of the Washington D.C. school system which in 1972 banned discrimination against homosexuals in hiring. According to

a Washington Post article dated 22 May 1977, this policy has not caused an increase in juvenile homosexuality or other problems.

c. Housing

The only recent state or local action regarding housing discrimination against homosexuals which received much public attention was in Bloomington, Indiana. There the Human Rights Commission refused to deal with the issue by declaring that it had no jurisdiction over situations in which people of the same sex are barred from sharing an apartment. This ruling was based on the belief that such a bar does not necessarily indicate anti-gay discrimination.

d. Public Accommodations

In contrast to the Bloomington Human Rights Commission, the California Attorney General seems willing to deal with the issue of homosexual civil rights. That office responded to a request for an interpretation of the state's Civil Rights Act, which includes as protected classifications race, color, religion, ancestry, national origin, and sex, by stating that "the specified forms of discrimination prohibited are illustrative rather than restrictive." To support his opinion, the Attorney General cited several cases where related code sections had been broadly applied. One of those cases prevented the proprietor of a bar and restaurant from excluding homosexuals. The citing of this case implies that sexual orientation will be counted among the protected classifications.[27]

e. Organizations

Recently there has been only one case of a homosexual group being refused articles of incorporation. It is more common for college campus

organizations to be denied recognition by their university. Even so, homosexual college students are relatively free to form organizations and receive recognition of those organizations. In 1974, an article in the Journal of College Student Personnel stated "A gay group on a state-supported campus must be accorded the same rights and privileges as all other recognized campus organizations."[28] The Eighth Circuit has joined the First and Fourth Circuits in holding that a state-run university may not constitutionally withhold recognition of a student organization comprised largely of homosexuals, whose basic purpose is to provide a forum for a discussion of homosexuality. Gay Lib v. University of Missouri, ___ f.2d ___ (8th Cir. 1977).[29]

All around the United States, organizations to promote the rights of homosexuals have incorporated, apparently without any trouble. Only in Ohio has incorporation been an issue. There the Secretary of State refused to accept articles of incorporation proffered by the Greater Cincinnati Gay Society for a nonprofit corporation on the ground "that the promotion of homosexuality as a valid lifestyle is contrary to the public policy of this state." The Ohio Supreme Court upheld this refusal, even though private consensual adult homosexual acts were no longer illegal in Ohio. State ex rel. Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974).

College students may organize, but it has been held that they cannot force student newspaper editors to advertise their organization's services. In Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), the advertising policy was decided by elected student editors. The record did not establish state action sufficient to invoke the first and fourteenth amendments.

f. Marriage

The assumption of a heterosexual marriage is so basic that it is rare to find legislation which explicitly excludes homosexual marriage.[30] When statutes describing marriage partners contained definite pronouns, there was no real question about gender. However, marriage statutes amended to contain neuter words display lack of gender qualification. This past summer California and Florida clarifed their statutes by passing bills which specifically state that a marriage license can only be issued to a man and a woman.[31]

The issue of homosexual marriages was first raised in the courts in Baker v. Nelson, 291 Minn.310, 191 N.W.2d 185 (1971). A Kentucky court has followed Baker by sustaining the denial of a marriage license to two women.[32] When homosexuals are denied a marriage license, they lose more than formal legitimacy for their relationship:

> Persons who are legally married receive concrete economic advantages in filing income tax returns; in obtaining social security, disability, unemployment, and pension benefits; in securing mortgages, homes, apartments, and insurance; in receiving loans and credit as a family; in adopting or obtaining custody of their children; and in gaining the property and tax benefits of inheritance laws.[33]

In spite of these disadvantages, it is not very likely that homosexuals who want to legitimize their relationships will find a court to recognize their wishes.

g. Custody of Children

Since there are an estimated 1.5 million lesbian mothers in this country, and custody is most likely contested if the mother's "morality" is questioned, courts must frequently decide whether children should remain with a homosexual parent.[34] A parent's custody may be challenged by a former spouse, the state,

or a third party.[35] In general, the standard used in a court's custody decision varies with the plaintiff. In all cases, the standards are vague and trial judges exercise great discretion.

In disputes between the father and mother, the "best interests of the child" standard is almost universally applied. Most courts have adopted the view that under "best-interests-of-the-child" standard, virtually any evidence concerning the child's environment is relevant.[36] Similarly, when the contest is with the state or a third party, a whole range of parental behaviors may be examined.

In Immerman v. Immerman, 176 Cal.App. 2d 122, 1 Cal. Rptr. 298 (1959), a state appellate court held that a parent's homosexuality is a relevant characteristic which must be considered in a custody decision because it demonstrates the parent's morality. The effect of this decision was modified by Nadler v. Superior Court, 255 Cal. App. 2d 523 (1967), in which another California appellate court reversed a trial court's determination that the mother's homosexuality rendered her unfit as a matter of law.

Courts have implied that a distinction exists between lesbianism as a mere sexual preference and lesbianism as a practice. Custody has been awarded to lesbian mothers on the condition that they maintain a household separate from that of their lovers. In 1972 and 1974, two appellate courts overturned orders that lesbian mothers must live separate and apart, holding that a homosexual relationship does not render a home unfit for children.[37]

h. Adoption

Given the difficulty American homosexuals have maintaining custody of their own children, restrictive adoption policies are not surprising.

In May, 1977 the Florida legislature passed a bill, which the governor signed, that bans homosexuals from adopting children. This means that homosexuals in Florida cannot adopt any children, even their own children who were born out of wedlock.[38] A similar policy is found in Nevada, where there is no case law on the subject, but the attorney general interprets "fit and proper persons" to mean that the adoptive parents may not be of the same sex.[39] These United States policies contrast with those of Denmark, where homosexuals may legally adopt children.[40]

2. Criminal Laws

a. Statutes

Twenty-eight states and the District of Columbia provide criminal sanctions for consenting adults who engage in private homosexual conduct. The sanctions are provided by means of general sodomy statutes which prohibit "unnatural" acts between heterosexuals and homosexuals alike. See Appendix, Table 3. Three states expressly forbid only homosexual sodomy. See Appendix, Table 4. Nineteen states no longer maintain any criminal penalties for private consensual sodomy. See Appendix, Table 5. The results of a survey of opinions concerning the consequences of decriminalization can be found in the Appendix, Table 6. Appendix, Table 7, lists bills which had been introduced, as of May, 1977, to change state sexual offense statutes.

b. Court Decisions

(i) The Right to Privacy -- Doe

While many state legislatures have modified their sodomy laws, others are hesitant to approach this controversial issue. Consequently, the

battle has often been fought in the courts, where opponents of the sodomy laws -- either defendants charged with the crime of sodomy or plaintiffs seeking civil rights relief -- have utilized a number of arguments in attacking the constitutionality of the statutes.

One of those cases recently reached the United States Supreme Court, but the policy implications of the Court's decision remain to be seen. The plaintiff in Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D.Va. 1975) aff'd 425 U.S. 901 (1976), advanced many constitutional arguments, but only one received the direct attention of the district court. Because of its incomplete treatment of the issues, the precendential value of the case remains unclear.

> The federal district court in the instant case focused its attention on probably the strongest arguments against the constitutionality of sodomy laws--the argument that the general right of privacy bars prosecution for private consensual sodomy. ... answers to plaintiff's equal protection and due process arguments may be found, perhaps, in the court's failure to find that sexual gratification or absolute privacy in the home is a fundamental right. This failure may have been a result of conscious deliberation, but the court's opinion does not evidence much consideration of the matter... Had the court answered all the issues raised, its opinion would have been virtually comprehensive of litigation involving sodomy statutes and with the Supreme Court's affirmance, would have become possibly the final word on the subject.[41]

The United States Supreme Court chose to summarily affirm, rather than fully examine the district court opinion, and by doing so created a number of uncertainties, both as to the precendential value of Doe for future cases dealing with the right of privacy and the effect of Doe on past decisions delineating this right.

Even though the precendential value of Doe is questionable, the district court opinion is worth considering in some depth because it demonstrates the legal reasoning used in many cases of discrimination against homosexuals. The plaintiffs claimed that enforcement of the law

was unconstitutional in light of the fifth and fourteenth amendments' due process clauses, the first amendment's guarantee of freedom of expression, the eighth amendment's prohibition against cruel and unusual punishment, and the first and ninth amendments' privacy guarantees. Emphasis was placed on the right of privacy, protected against state action by the fourteenth amendment's due process clause. Before a court is likely to find that a state action violates due process, the right actually at issue must be shown to be fundamental, and the state's interest in the statute not compelling. The right of privacy has been held fundamental, and within the concept of due process. However, in Doe, the district court was never convinced that the previously enunciated right of privacy extended to the private sexual conduct of homosexuals.[42] Thus, in Doe the district court found that the plaintiffs did not prove infringement of a fundamental right. In addition, the district court indicated that the state demonstrated a legitimate interest since the statute was directed toward the suppression of crime. The court reasoned that the longevity of the Virginia statute and its Judeo-Christian ancestry buttressed the state's claim of legitimate governmental interest.

(ii) Other Constitutional Arguments

As the preceding discussion indicates, the legal issues surrounding sodomy statutes are very complex. Sodomy statutes may be challenged for reasons other than interference with the right to privacy. Two of these bases of court action and the outcomes of some cases will be briefly discussed.

The United States Supreme Court has enunciated the doctrine that state regulation may be declared void for overbreadth if it sweeps too broadly

and infringes upon a protected freedom. Citing the Supreme Court's decision in Griswold v. Connecticut, 1381 U.S. 479 (1965), which declared a right to marital sexual privacy, defendants have theorized that a statute that on its face prohibits sodomy between all persons might be unconstitutionally applied to a married couple and, for that reason, is void as being too broad in its proscription.[43] Two challenges to a Texas statute which used this argument failed to get favorable court rulings.[44]

Plaintiffs may claim that a statute denies them equal protection of the law. The Court of Appeals of New Mexico found unjustified discrimination and declared the New Mexico sodomy statute to be unconstitutional. State v. Elliot, 88 N.M. 187, 539 P.2d 207 (Ct.App. 1975). Although a few lower state courts in other jurisdictions have reached similar decisions, overall the equal protection argument has not fared well.[45]

(iii) State Court Decisions Since Doe

The majority of state courts have reached results similar to Doe.[46] However, three state courts have found that sodomy statutes interfere with individual privacy. Courts of last resort in New Mexico and Arizona have invalidated sodomy statutes as an invasion of privacy.[47] In two New York cases, the court of appeals issued decisions questioning the validity of New York's consensual sodomy law.[48] These cases are significant because they indicate that courts do not feel precluded by the United States Supreme Court's decision in Doe from an examination of the merits of the constitutional issues.

B. Minnesota

1. Civil Rights Laws

a. Statutes and Ordinances

(i) Proposed Amendments to the Human Rights Act

During the first half of the 1977-78 legislative session, two bills were introduced to amend the Minnesota Human Rights Act. Senate File 497 revises the Human Rights Law by adding "affectional preference" to race, color, creed, national origin, sex, marital status, status with regard to public assistance and disability as one of the conditions protected against discrimination. "Affectional preference" means "having or manifesting preference for an emotional or physical attachment to consenting persons of a particular gender." Discrimination is prohibited in employment, housing, access to educational institutions, and granting of credit. Senate File 497 is less comprehensive than either the Minneapolis or St. Paul city ordinances and not as far-reaching as bills introduced in previous sessions. For example, it does not govern public accommodations. A similar bill, House File 1176, additionally provides for the dismissal of teachers who advocate in a learning environment a preference for sexual relations with persons of a particular gender.

Senate File 497 was eventually sent back to the Judiciary Committee, in spite of the fact that a number of legislative leaders endorsed its passage.[49] Organizations supporting the bill included the Mental Health Association, the League of Women Voters, the National Education Association, and the National Council of Churches.[50] The Greater Minneapolis Association of Evangelicals and the Catholic Bulletin were among the religious organiza-

tions opposing the bill.[51] For a description of legislative action concerning Senate File 497 and House File 1176, see Appendix.

(ii) City Ordinances

In Effect

Three Minnesota cities currently have civil rights laws which prohibit discrimination based on affectional preference. The Marshall civil rights policy is in the form of a regulation, and applies only to city employees. In contrast, the civil rights ordinances in the Twin Cities are broad, protecting a number of activities. Chapter 74 of the St. Paul Legislative Code forbids discrimination in employment, education, housing, public accommodations, and public services. In addition, Chapter 139 of the Minneapolis Code protects individuals from discrimination in the areas of labor union membership and property rights.

There have been efforts to change the Minneapolis ordinances to exempt nonprofit organizations performing charitable functions. These efforts are the result of a Minneapolis man being questioned about his sexual preference when he applied to be a Big Brother. In 1975 Gary Johnson filed a suit asking that the Civil Rights Department get involved because, he argued, voluntary nonprofit organizations were covered by the ordinance.[52] In 1976, the Hennepin County District Court, contrary to Civil Rights Department policy, ruled that Big Brothers is a public accommodation covered by the ordinance.[53] In March, 1977 a hearing officer ruled that it was discriminatory for Big Brothers to pass information to mothers about the sexual preference of prospective Big Brothers only when the men were gay, but because of other facts, Big Brothers did not discriminate against Johnson.[54]

In late July, the health and social services committee of the Minneapolis City Council voted 3 to 2 to kill a proposed ordinance that would have exempted nonprofit organizations in the performance of a charitable function from the discrimination ban.[55] Big Brothers has appealed the ruling of the Civil Rights Department to the Hennepin County District Court.[56]

Additional pressure on the Minneapolis ordinance was created when the leadership council of a labor union representing 4,000 city and county employees passed a resolution asking the Council to repeal the gay rights ordinance.[57]

Proposed

A proposal to amend the Mankato human rights ordinance to include homosexuals, which was deferred in September, 1976, will be reconsidered in the near future. The council decided to delay action because the legislature planned to consider a statewide gay rights bill.[58]

b. Court Cases and Complaints

When homosexuals have initiated court cases and complaints about discrimination in Minnesota, the disputed action has usually been a government policy. Complaints have been filed due to actions of Minneapolis police officers, the Minneapolis city attorney, the IRS, and the clerk of the Hennepin County District Court. The one nongovernmental decision-maker which received much publicity was a local newspaper. A column appearing December 22, 1975 which discussed NBC's fair-treatment policy toward homosexuals used language such as "lavender laddies." The Minnesota Committee for Gay Rights registered a complaint with the Minnesota Press Council

alleging that the column was defamatory to gay persons and inaccurately reported that NBC officials had capitulated to unreasonable demands by gay rights activists. The Press Council rejected the complaint, stating that the column was an editorial, and as such the Council could not pass judgment on its "reasonableness, validity or tastefulness."[59]

The internal affairs unit of the Minneapolis Police Department is currently investigating two complaints about possible discriminatory practices. One complaint is the result of an attack on two homosexuals at the Gay Nineties Bar, where police officers allegedly "did nothing,"[60] and the other is due to an antigay article in the department's monthly newsletter, "Pigtales."[61] Complaints about the police department have also been made to the Minneapolis city attorney's office. In late March a group of homosexual rights activists complained that homosexuals do not get equal protection from police and that in many cases they are harassed. The activists also stated that when homosexuals try to defend their rights by filing complaints with the Civil Rights Department, the city attorney's office, which reviews the complaints, never finds enough evidence to prosecute. The city attorney denied any prejudice by his staff.[62]

Recent court cases in Minnesota concerning discrimination against homosexuals have challenged an IRS ruling and a refusal to grant a marriage license. Since 1975, the IRS has refused to grant tax-exempt status to Gay House of Minneapolis, a telephone counseling center for homosexuals, claiming that Gay House has not shown that the subjects upon which it seeks to enlighten the public are beneficial to the community. Gay House filed a suit in federal district court in February, 1977 seeking recovery of $35 paid in taxes.[63]

Baker v. Nelson, 191 N.W.2d 185 (1971), arose from Gerald Nelson's denial of a marriage license to Richard John Baker and James McConnell. Nelson declined to issue the license on the sole ground that petitioners were of the same sex. When the two men ultimately petitioned the United States Supreme Court to compel the state to grant them a marriage license, their petition was denied, and their appeal was subsequently dismissed for lack of a federal question.

The "core" of Baker and McConnell's court challenge was that the state denied them equal protection of the law in violation of the fourteenth amendment. The trial court found no violation of equal protection since the refusal to grant a marriage license was reasonably related to the legitimate state purpose of regulating marriage, an object of which is to procreate and raise children.

A second major civil rights case arose from Baker and McConnell's situation. See page 12.

2. Criminal Laws

a. In Effect

Minnesota Statutes, 1977 Supplement, Section 609.293 makes sodomy between consenting adults a crime. A person convicted of sodomy may be sentenced to a year in prison and/or fined $1,000. However, prosecutions for such acts are rare.[64]

b. Proposed: Decriminalization

Criminal sanctions against consensual adult homosexual acts would have been removed by House File 302, introduced in the first half of the 1977-1978 session. After a hearing in the General Legislation and Veterans Affairs Committee, the bill was tabled.

IV. UNDERSTANDING HOMOSEXUALITY

A. Prevalence

Estimates of the size of the gay population depend on the source of the estimate, the definition of homosexuality, and the population base. There are 20 million lesbians and gay men in America, according to Jane O'Leary and Bruce Voeller, co-executive directors of the National Gay Task Force.[65] That is slightly less than 10% of the United States population. By most conservative estimates, 4 - 6% of the adult population (male and female) in the United States is predominately or exclusively homosexually-oriented in choice of sexual outlet.[66] Kinsey concluded that 4% of adult white males in America are exclusively homosexual throughout their lives after the onset of adolescence. He also estimated that 10% of United States males are more or less exclusively homosexual for at least three years between the ages of 16 and 55, and that 37% of the total male population has had some overt homosexual experience between puberty and old age.[67] It is generally estimated that the percentage of female homosexuals is approximately half that of males.[68] This estimate "may be due to the relative unimportance attached to female behavior in our culture--rather than a true assessment of the incidence of lesbianism."[69]

About 186,000 homosexuals live in the Twin Cities area, according to Bunyan and Co., a firm which manages gay baths.[70] One hundred eighty-six thousand individuals constitute approximately 10% of the total Twin Cities population. In other urban centers, gay communities claim from 10 to 15% of the adult population.[71]

B. Causes

From the limited evidence currently available, it is clear that the diverse forms of adult homosexuality are produced by many combinations of variables, including biological, cultural, psychodynamic, structural, and situational. No single class of determinants accounts for all or even one of these diverse forms. The relative importance of each kind of determinant appears to vary greatly from one individual to another.[72]

1. Biological Variables

Controversial evidence suggests that specific biological predispositions, interacting with psychological and cultural variables, may be critical. Hormones injected prenatally into animals affect adult sexual behavior. However, homosexual object choice in adults is not affected by hormone therapy and there has been no reliable demonstration of endocrine system differences between homosexuals and heterosexuals.[73]

2. Psychodynamic Variables

Evidence from many studies does not support the assumption that pathological parent-child relations are either necessary or sufficient antecedents or determinants of adult homosexuality. The evidence does indicate, however, that some forms of familial pathology appear to be associated with increased vulnerability of some individuals to homosexual development, and it suggests that psychopathology is more frequently associated with homosexuality in these individuals.[74]

3. Cultural Variables

Group norms and peer relationships in adolescence may determine the relative frequencies of heterosexual and homosexual patterns in adults by

affecting their self concepts, sex role expectations and performances and notions of what constitutes permissible behavior.[75]

4. Situational, Structural Variables

At critical choice points in the development process or continuously from early childhood, situational and social-structural variables may produce effects influencing adult patterns -- for instance, the feminizing effects of older sisters on younger brothers, situationally determined isolation from peers of the same sex in childhood and adolescence, or isolation from peers of the opposite sex in adolescence.[76]

C. A Mental Illness?

The American Psychiatric Association has removed homosexuality from its list of mental disorders. Research support for the view that homosexuality need not always be considered psychopathological is available. In one experiment, a sample of 30 homosexuals -- drawn from the general community, rather than from institutions or private therapy -- and a matched sample of heterosexuals were subjected to a battery of projective techniques, attitude scales, and intensive life history interviews. When two expert judges examined the test results (knowing nothing about the individual subjects), they experienced great difficulty in distinguishing between matched pairs of homosexual and heterosexual records. The researcher concluded that "some homosexuals may be very ordinary individuals, indistinguishable, except in sexual pattern, from ordinary individuals who are heterosexual," and that homosexuality "may be a deviation in sexual pattern which is within the normal range, psychologically."[84]

Most studies suggest that when group differences between homosexuals and heterosexuals exist they tend to be within normal range. A clear and

meaningful pattern of differences has not emerged, except perhaps to state generally that some homosexual groups show more intrapsychic stress. This difference may be explained by the strong and negative reaction by some segments of society to homosexuality.[77]

D. Public Sentiment

1. Churches

The influence of organized religion on public policy is demonstrated in the following incident, described in the book Lesbian/Woman. When two California assemblymen were approached with a request for changes in the state sex laws, they offered "the stock answer of the politician: 'To introduce such a bill at this time would be political suicide. It would be like being for sin. But if you can get the church to support changing the law you might have a chance.'"[78]

Churches generally support homosexuals' claim for civil rights, but view their acts as sinful. The following organized groups of Christians have passed resolutions favorable to gay rights in the past year and a half:[79]

The National Council of Churches

National Federation of Priests' Councils

The Lutheran Church in America

The United Church of Christ

The National Council of Catholic Bishops

The Episcopal Church General Convention

At the same time, no major church has reversed its basic opposition to homosexual acts as immoral.[80] Ordination of homosexuals is not a frequent nor popular practice.

2. The Public

NIMH Survey (1970)

Tables 8 - 13 in the Appendix display the findings of a 1970 national survey, sponsored by the National Institute of Mental Health, in which 30,000 American adults were interviewed. The sample represented with reasonable accuracy the noninstitutionalized adult population of the United States according to the full range of variables usually considered to be fundamental in describing a population.[81] Because of its sophisticated sampling techniques, this study is useful. However, public attitudes may have changed since 1970.

Recent National Surveys

The results of a Harris poll of 1900 adults indicated that Americans see homosexuals as victims of discrimination and believe they should be considered for jobs for which they are qualified. However, they apparently perceive homosexuals as unqualified for many positions because of their sexual preference.[82]

Harris Poll

	% Agree	% Disagree
- Homosexuals suffer the greatest amount of discrimination, followed in order by blacks, Mexican-Americans, women and Jews	55	
- Would favor a law banning discrimination against homosexuals in any job for which they are qualified	54	28
Approve of homosexuals working as:		
- counselors in a camp for young people	27	63
- teachers	34	55

Approve of homosexuals working as: (Continued)	% Agree	% Disagree
- school principals	33	58
- ministers, priests, or rabbis	40	50
- psychiatrists or social workers	40	48
- artists, factory workers, store clerks	80	
- television news commentators	72	
- company president	67	
- congressmen	53	
- doctors or police	48	

A Gallup Poll found similar attitudes. Fifty-six percent of the public believed gays should have equal rights in employment. At the same time, though, most people would exclude gays from such influential positions as elementary school teaching and the clergy.[83]

Recent Minnesota Surveys

In late August, the Minneapolis Tribune published the results of a poll of statewide attitudes toward homosexuals.[84]

Minneapolis Tribune Poll

	Yes	No	No Opinion
Should there be a law to make discrimination against homosexuals in housing illegal?	49	42	9
Should there be a law to make discrimination against homosexuals in employment illegal?	45	46	9
Do you think homosexuals are a threat of any kind to children?	47	42	11
Should there be a law calling for the treatment of homosexuals and imprisonment for any who have not been rehabilitated?	16	76	8

A "scientifically prepared" survey by the St. Paul Dispatch also found a majority of people disagreeing with the proposal of prison terms for homosexual acts between consenting adults. Sixty percent of those questioned thought that such sex acts between consenting adults should not be cause for imprisonment. Twenty-two percent of those queried disagreed and eighteen percent were undecided.[85]

FOOTNOTES

[1] Ogg, E. Homosexuality in Our Society. Public Affairs Committee, Inc. 1972, p.2.

[2] Stodola, M.A. "The Homosexual's Legal Dilemma." Arkansas Law Review 687-721 (1973).

[3] Ogg, supra note 1, p.2.

[4] Stodala, supra note 2, p.689.

[5] Schur, E.M. Crimes Without Victims: Deviant Behavior and Public Policy. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965, p.77.

[6] Stodola, supra note 2, p.693.

[7] The principal author of three bills, H.R. 8268, H.R. 8269 and H.R. 451, New York's Representative Koch, was recently elected mayor of New York City. H.R. 7775 is identical to H.R. 2998, except it includes a clarifying phrase specifically prohibiting affirmative action or quotas. (Congressional Record, June 14, 1977)

[8] Pioneer Press, 28 June 1977

[9] U.S. Code, Congressional and Administrative News, November 1977, pp. 1073-1089.

[10] Minneapolis Star, 28 May 1977.

[11] 2 Sex.L.Reptr. 71 (1976).

[12] Siniscalco, G.R. "Homosexual Discrimination in Employment." 16 Santa Clara Law Review. 495-512, 504 (1976).

[13] Reese, S.E. "The Forgotten Sex: Lesbians, Liberation, and the Law," Williamette Law Journal. 354-377, 371 (1975).

[14] "Policy on Gay Issues," National Association of Social Workers News, July, 1977, p.31.

[15] Siniscalco, supra note 12, p. 497.

[16] 3 Sex.L.Rptr. 21 (1977)

[17] Id.

[18] Id.

[19] Minneapolis Star, 20 July 1977.

[20] 3 Sex.L.Rptr. 26 (1977)

[21] Minneapolis Tribune, 27 March 1977.

[22] 42 USC §1983 [Civil action for deprivation of rights] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[23] Washington Post, 22 May 1977.

[24] 3 Sex.L.Rptr. 21 (1977)

[25] LaMorte, M.W. "Legal Rights and Responsibilities of Homosexuals in Public Education," Journal of Law--Education, V.4, No. 3, July, 1975, p. 460.

[26] "Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look At Sodomy Statutes," 6 Iowa Law Review, 1080-1098, 1097 (1976).

[27] 2 Sex.L.Rptr. 68 (1976)

[28] Gibbs, A. and McFarland, A.C. "Reorganization of Gay Liberation on the State-Supported Campus," Journal of College Student Personnel, Jan. 1974, pp. 5-7.

[29] 3 Sex.L.Rptr. 37 (1977)

[30] Weitzman, L.F. "To Love, Honor, and Obey? Traditional Legal Marriage and Alternative Family Forms," The Family Coordinator, V. 24, No. 4, October 1975, pp. 531-548, 540.

[31] Minneapolis Tribune, 1 June 1977, 19 August 1977.

[32] Weitzman, supra note 30, p.540.

[33] Weitzman, supra note 30, p.541.

[34] Hunter, N.D. and Polikoff, N.D. "Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy." 25 Buffalo Law Review 691-733, 691 (1976

Armanno, B.F. "The Lesbian Mother: Her Right to Child Custody," Golden Gate Law Review, Fall 1973, pp. 1-18.

[35] Riley, M. "The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied," San Diego Law Review 799-864 (June, 1975).

[36] Hunter and Polikoff, supra note 34, p.693,4.

[37] Mitchell v. Mitchell, No. 240665, Cal. Super. Ct., Santa Clara County, June 8, 1972.

Schuster v. Schuster, No. D-36868, Wash.Super.Ct., Sept. 3, 1974.

People v. Brown, 49 Mich. App. 358 (1975)

[38] Minneapolis Tribune, 1 June 1977.

[39] 2 Sex.L.Rptr. 61 (1976)

[40] Stodola, supra note 2, p.693.

[41] "Constitutional Law--Right of Privacy--State Statute Prohibiting Consensual Sodomy is Constitutional." Brigham Young University Law Review, 169-188, 182 (1977).

[42] The Doe court chose to limit its reading of Griswold v. Connecticut, 381 U.S. 479 (1965) to its factual situation (a married couple) when a broad reading of Griswold would grant the individual a right to make certain decisions involving intimate and personal matters. With its narrow interpretation of Griswold the court ignored several post-Griswold privacy decisions of the Supreme Court which many sodomy law opponents have read as clearing the way for a judicial overturning of the laws. Those post-Griswold decisions, Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1970) and Stanley v. Georgia, 394 U.S. 557 (1969) represent an expansion of the hither to defined bounds of the right to privacy. Brigham Young University Law Review, 183 (1977).

[43] Brigham Young University Law Review 176 (1977)

[44] The U.S. Supreme Court dismissed an appeal in Pruitt v. State, 402 U.S. 902 (1971) and the plaintiff's petition for certiorari was denied in Buchanan v. Batchelor, 471 S.W.2d 401 (Tex. Crim App. 1971), cert.den. 405 U.S. 930 (1972). See Brigham Young University Law Review 176,7 (1977).

[45] Brigham Young University Law Review 178 (1977)

[46] Cooney, L.L. "Recent Decisions--Constitutional Law--Right of Privacy--Sodomy Statutes--Supreme Court Summary Affirmance." Duquesne Law Review 123-132, 129 (Fall 1976).

[47] In State v. Callaway, 25 Ariz.App. 267, 542 P.2d 1147 (1975), the court reasoned that the U.S. Supreme Court established the right of sexual privacy to all people, whether married or not. In State v. Elliot, 539 P.2d 207 (N.M. 1975) the court relied on Griswold and Roe and extended their rationale beyond the right of marital privacy to protect all unmarried individuals. Cooney, supra note 46, p. 130).

48 People v. Rice, ___ N.E.2d ___ (1977), and People v. Mehr, ___ N.E. 2d ___ (1977). The court of appeals declined to rule on the merits of the defendant's constitutional challenge, but returned the cases to a lower court for a full trial where the facts surrounding the incidents could be established. The trial court originally held that the statute was unconstitutional as a denial of equal protection of the law to single persons, since the statute made consensual sodomy a crime only when committed by persons not married to each other. 3 Sex.L.Rptr. 17 (1977)

49 Catholic Bulletin, 6 May 1977;

Minneapolis Star, 23 April 1977.

50 Minneapolis Star, 23 April 1977.

51 Metropolis, 17 May 1972.

52 Minnesota Daily, 22 July 1977.

53 Minneapolis Tribune, 18 June 1977.

54 Minnesota Daily, 22 July 1977.

55 Minneapolis Star, 28 July 1977.

56 Minneapolis Tribune, 29 July 1977.

57 Minneapolis Tribune, 21 August 1977.

58 Mankato Free Press, 9 June 1977.

59 Minneapolis Tribune, 26 March 1977;

St. Paul Pioneer Press, 26 March 1977.

The Minnesota Press Council is a voluntary independent organization made up of members from the press and public that hears complaints against the news media in the state.

60 Minneapolis Tribune, 5 June 1977.

61 Minneapolis Tribune, 9 June 1977.

62 Minneapolis Star, 26 March 1977.

63 Minneapolis Tribune, 17 February 1977.

64 Minneapolis Tribune, 9 June 1977.

65 New York Times, 7 June 1977.

66 See NASW News, supra note 14.

67 Schur, supra note 5; NASW News, supra note 14.

68 Siniscalco, supra note 12, p.495.

69 NASW News, supra note 14.

70 St. Paul Dispatch, 8 August 1977.

71 NASW News, supra note 14.

72 Hooker, E. Homosexuality. National Institute of Mental Health Task Force on Homosexuality: Final Report and Background Papers. Editor J. Livingood. USDHEW, PHS, ADAMHA, 1976, p.14.

73 Id., p.12

74 Id., p.13

75 Id., p.13

76 Id., p.14

Hooker, supra note 72.

Schur, supra note 5, p.74.

77 Gonsiorek, J. "Psychological Adjustment and Homosexuality." JSAS Catalog of Selected Documents in Psychology, p.38.

78 Martin D. and Lyon, P. Lesbian/Woman. San Francisco, CA.: Glide Publications, 1972, p.237.

79 Minneapolis Tribune, 11 May 1977.

80 New York Times, 3 May 1977.

81 Levitt, E.E. and Klassen, A.D. "Public Attitudes Toward Homosexuality: Part of the 1970 National Survey by the Institute for Sex Research." Journal of Homosexuality, V. 1(1), 1974 p.29.

82 Minneapolis Star, 18 July 1977.

83 Minneapolis Tribune, 18 July, 1977.

84 Minneapolis Tribune, 28 August 1977.

85 St. Paul Dispatch, 17 June 1977.

A P P E N D I X

TABLE 1*

State Bills to prohibit discrimination based on sexual orientation.

California

AB 1130 amends the Fair Employment Practices Act to include "sexual orientation" in the categories of persons against whom it would be unlawful to discriminate in employment.

AB 1302 amends the Fair Employment Practices Act to re-define the word "sex" as it appears in the Act to include "sexual orientation" among other things.

AB ____ prohibits any contractors or suppliers dealing with the State of California from discriminating in employment on the basis of sexual orientation, sex, age, marital status and the usual others.

SB 1253 would allow school boards to dismiss any teacher who is believed to be a homosexual.

Connecticut

HB 5908 bans discrimination against homosexuals in employment, credit, and housing. Defeated 94-43.

SB 969 is a "Bill of Intent." It would, upon passage, make it the state's public policy to oppose discrimination against homosexuals.

Hawaii

HB41 bans discrimination on basis of sexual orientation in employment and real estate transactions. Defeated in House Committee 5-3.

SB 427 bans discrimination against homosexuals in employment and real estate transactions.

Illinois

HB 574 bans employment discrimination in institutions of higher learning based on sexual preference.

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* 3 Sex.L.Rptr. 32 (1977)

Illinois (Continued)

HB 575 bans employment discrimination against homosexuals in state agencies.

HB 576 prohibits private housing discrimination against homosexuals.

HB 577 forbids discrimination against homosexuals in public housing.

Maine

LD 1419 bans discrimination against homosexuals in areas of housing, employment and public accommocations. Defeated in Senate.

Maryland

HB 921 forbids discrimination against homosexuals in employment.

Massachusetts

H 3676 provides anti-discrimination protection for homosexual civil servants. Passed Senate.

H 3677 adds the term "sexual preference" to the charter of the Massachusetts Commission Against Discrimination thereby prohibiting discrimination on basis of sexual orientation in housing, public accommodations, employment and credit.

H 3751 provides that all sex acts between consenting adults in private would be legal.

Minnesota

SB 497 bans discrimination against homosexuals in areas of employment, housing, credit and education.

New Hampshire

SB 87 prohibts homosexuals from consorting in a public place; forbids adult persons of the same sex from "consorting in a lewd and licentious manner." Lewd is defined as "indecent and against social mores." Licentious is defined as "disregarding accepted rules and standards and marally unrestrained." Endorsed by Governor Thomsen.

Oregon

SB 603 amends the Civil Rights Bill to add sexual orientation and marital status; provides protection in areas of housing, employment and public accommodations.

HB 3310 prohibits discrimination based on sexual orientation in state employment.

Pennsylvania

SB 83 forbids the hiring of homosexuals or persons convicted of a sex offense for the jobs of state police officer, state correctional guards and staff, state probation officer, correction counselors, or any nursing or staff position in a state institution dealing with mental illness, retardation or physical rehabilitation. Penalizes the hiring officer with dismissal, a fine up to $300 and up to 90 days imprisonment. Passed Senate.

Texas

_____ would ban all gay organizations from state-supported campuses.

Washington

HB 689 bans discrimination against homosexuals in employment, housing, insurance, and licensing.

Wisconsin

AB 15 prohibits discrimination in employment on basis of sexual preference, marital status, economic status, age or educational status.

AB 323 decriminalizes all sexual acts between consenting adults in private; provides that persons may no longer have their driver's licenses revoked for conviction of the crime of sexual perversion.

SB 14 reduces the penalties for conviction of sexual perversion from a felony punishable by a $10,000 fine and 2 years imprisonment to a misdemeanor with a penalty of up to 30 days in jail and/or a $500 fine. Passed Senate; before House.

Effects of Decriminalization of Private Homosexual Behavior Between Consenting Adults as Perceived by Police Officers, Prosecuting Attorneys, and Homosexuals

	% of Respondents Agreeing		
Effects	Police	Prosecutors	Homosexuals
No increase in use of force by homosexuals	88%	90%	73%
No increase in involvement of homosexuals in non sex-related crimes	96%	65%	--
No increase in homosexual involvement with minors	69%	80%	96%
Increase in public display of homosexual behavior	65%	33%	58%
Increase in public solicitation by homosexuals	59%	26%	12%
Homosexual subculture had become more united	81%	60%	42%
Decrease in social condemnation of homosexuals	52%	45%	44%
Decrease in blackmail of homosexuals	17%	11%	31%
As many homosexual arrested today as before, but charged under different statutes	12%	11%	75%
Agreed with decriminalization when it occurred	44%	84%	88%
Agree with decriminalization now	57%	77%	100%

Seven states were surveyed -- Colorado, Connecticut, Delaware, Hawaii, Illinois, Ohio, and Oregon.

TABLE 2*

Local Government Units
With Civil Rights Laws Protecting Homosexuals

Date Enacted	Municipality	Conditions
1972	Atlanta, Georgia	Municipal employment/executive order
2/72	San Francisco, California	Administrative code/municipal employment
2/72	New York, New York	Municipal employment/executive order
3/72	East Lansing, Michigan	
7/72	Ann Arbor, Michigan	
11/73	Washington, D.C.	
11/73	Seattle, Washington	
11/73	Berkeley, California	
11/73	Detroit, Michigan	Included in new city charter
1/74	Columbus, Ohio	Housing and public accommodations
3/74	Minneapolis, Minnesota	
5/74	Alfred, New York	
7/74	St. Paul, Minnesota	
8/74	Palo Alto, California	
9/74	Ithaca, New York	Municipal employment
10/74	Sunnyvale, California	Municipal employment
11/74	San Jose, California	
12/74	Portland, Oregon	
2/75	Mountain View, California	Municipal employment
2/75	Cupertino, California	Municipal employment
3/75	Madison, Wisconsin	
4/75	Marshall, Minnesota	
7/75	Yellow Springs, Ohio	
7/75	Austin, Texas	
8/75	Santa Barbara, California	Municipal employment
9.75	Chapel Hill, North Carolina	Municipal employment
11/75	Bloomington, Indiana	
11/75	Urbana, Illinois	Employment, credit & public accommodations
1/76	Cleveland Heights, Ohio	
4/76	Ottawa, Ontario	Municipal employment
4/76	Boston, Massachusetts	Municipal employment/executive order
4/76	Pullman, Washington	Municipal employment
5/76	Amherst, Massachusetts	
5/76	Los Angeles, California	Municipal employment
1/77	Tucson, Arizona	
5/77	Iowa City, Iowa	Employment and public accommodations
7/77	Champaign, Illinois	Housing, employment & public accommodations
9/77	Wichita, Kansas	Housing, employment & public accommodations
	County	
7/75	Santa Cruz County, California	
11/75	Howard County, Maryland	
11/75	Hennepin County, Minnesota	

* Information compiled by National Gay Task Force

TABLE 3*

States Providing Criminal Sanctions
For Private Consensual Sodomy

Alabama
Alaska
Florida
Georgia
Idaho

Iowa
Kentucky
Louisiana
Maryland
Massachusetts **

Michigan
Minnesota
Mississippi
Missouri
Montana

Nevada
New Jersey
New York
North Carolina
Oklahoma

Pennsylvania
Rhode Island
South Carolina
Tennessee
Utah

Vermont
Virginia
Wisconsin

Total Number = 28

District of Columbia

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* Compiled from Brigham Young University Law Review, 166-188 (1977) and Information Release of National Gay Task Force.

** The Massachusetts statute has been construed as inapplicable to the private, consensual conduct of adults.

TABLE 4

States Which Expressly
Forbid Homosexual Sodomy

Arizona
Kansas
Texas

Total Number = 3

TABLE 5*

States Which Have
Decriminalized Private Consensual Sodomy

Arkansas
California
Colorado
Connecticut
Delaware

Hawaii
Illinois
Indiana
Maine
Nebraska (Effective 1978)

New Hampshire
New Mexico
North Dakota
Ohio
Oregon

South Dakota
Washington
West Virginia
Wyoming

Total Number = 19

---

* From Brigham Young University Law Review, 172 (1977 and Information Release of National Gay Task Force.

TABLE 6*

In 1976, the Journal of Homosexuality reported the results of a survey of police officers, prosecuting attorneys, and homosexuals in seven states which had decriminalized private homosexual activities of consenting adults. The results of that survey, which follow, must be viewed with caution because the response rate was very low (13-33%).

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* Geis, G. et al. "Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven American States," Journal of Homosexuality, V. 1, No. 4, Summer 1976, pp. 419-426.

TABLE 7*

Proposed Changes in State Sexual Offense Statutes

Arizona	SB 1035 - provides for punishment of life imprisonment upon the third conviction for rape, sodomy, arson and other specified crimes. HB 2055 bans all sexual acts between persons of the same sex, while all noncommercial sexual acts between consenting heterosexual adults would be lawful. HB 2055 amended Penal Code to provide for misdemeanor penalites for both homosexual and heterosexual sodomy. Enacted. HB 2184 increases penalties for rape, crime against nature, lewd and lascivious acts, and molestration of a child.
Delaware	HB 190 changes age limit of victim from 12 to 16 in which sodomy becomes a class B felony.
Indiana	HB 1173 would institute felony penalties for all acts of oral or anal sex, except when performed by a married couple. Rejected by Committee 6-4.
Kansas	SB 310 would drop the ban on consensual sexual acts by members of the same sex. Died in Committee.
Maryland	SB 506 creates a provision for a consecutive sentence upon conviction of a prison inmate for a sexual offense on another inmate. Passed Both Houses.
New York	A-1201 repeals the sodomy laws which are presently applicable only when performed by persons of the same sex. S-34 is the same as A1201.
Oklahoma	HB ____ would repeal the sodomy laws. Defeated in the House 54-46.

* 3 Sex.L.Rptr. 27,28 (1977).

Legislative Action on S.F. 497

AUT205 TP2075 PAGE 003
SF0497% Spear Coleman Osdahl
Milton Keefe, S.
HF1176 Berglin Bers Clawson
Wynia
HUMAN RIGHTS Discrimination based on a
ffectional or sexual preference prohibited.

MOST RECENT ACTIONS:
Report: pass as amended
04-21-77 SJPAGE:1279
Senate second reading
04-21-77 SJPAGE:1313
Referred to Rules Subcommittee on Bill Scheduling
04-21-77 SJPAGE:1313
Placed on General Orders Calendar
04-26-77 SJPAGE:1608
Sen. Gen. Ord.: Pass as amended
05-02-77 SJPAGE:1792
Re-referred to
05-05-77
Judiciary
05-05-77 SJPAGE:1903

Legislative Action on H.F. 1176

HF1176 PAGE 001
HF1176* Berglin Bers Clawson
Wynia
SF0497 Spear Coleman Osdahl
Milton Keefe, S.
HUMAN RIGHTS Discrimination based on s
exual preference prohibited.

MOST RECENT ACTIONS:

First reading, referred to
03-31-77
Commerce and Economic Development
03-31-77 HJPAGE:0781
Report: Pass as amended
05-04-77 HJPAGE:1861
Second Reading
05-04-77 HJPAGE:1902
Author removed
05-09-77 HJPAGE:2426
HF1176 PAGE 002
First reading, referred to
03-31-77
Commerce and Economic Development
03-31-77 HJPAGE:0781
Report: Pass as amended
05-04-77 HJPAGE:1861
Second Reading
05-04-77 HJPAGE:1902
Author removed
05-09-77 HJPAGE:2426

TABLE 8

Moral Attitudes

(Presented in Percentages)

	What is your opinion of sex acts between two persons of the same sex when they:		What is your opinion if a married person has sexual intercourse with someone other than the marriage partner?	If a teenager (boy/girl) 16–19 has sexual intercourse with a (girl/boy) without love?	If an unmarried adult (man/woman) has sexual intercourse with a (woman/man) when they love each other?
	have no special affection for each other?	love each other?			
Always wrong	77.7	70.2	72.2	51.7	31.5
Almost always wrong	8.4	8.4	14.3	19.4	14.0
Wrong only sometimes	6.3	7.2	10.7	19.6	22.2
Not wrong at all	5.6	11.4	2.1	5.0	28.7
Don't know	1.6	2.2	0.4	4.0	3.5
No answer	0.1	0.3	0.1	0.1	—
Total percent	99.7	99.7	99.8	99.8	99.9
Total sample	3018	3018	3018	3018	3018

TABLE 9

Occupational Attitudes

(Presented in Percentages)

Homosexual men should or should not be allowed to work in the following professions:

	Court judge (7)*	Schoolteacher (8)	Minister (9)	Medical doctor (3)	Government official (5)	Beautician (2)	Artist (1)	Musician (6)	Florist (4)
Allowed	22.8	23.1	23.1	32.3	32.6	71.7	84.5	85.2	86.8
Not allowed	77.2	76.9	76.6	67.7	67.4	28.3	15.5	14.8	13.2
Total responding	2957	2974	2970	2961	2954	2969	2960	2974	2972
No answer	61	44	48	57	64	49	58	44	46
Total sample	3018	3018	3018	3018	3018	3018	3018	3018	3018

*Parenthetic numbers in each column heading indicate the order in which inquiry was made in the interview.

TABLE 10

Opinions of Homosexuals as Dangerous

Homosexuality as Threatening, Offensive

(Presented in Percentages)

	Homosexuals are dangerous as teachers or youth leaders because they try to get sexually involved with children	Homosexuals try to play sexually with children if they cannot get an adult partner	Homosexuals are a high security risk for government jobs*	Homosexuals tend to corrupt their fellow workers sexually*	If homosexual men can't find men for partners, they try to force their attentions on women*	Homosexuality is a social corruption that can cause the downfall of a civilization	Homosexuality in itself is no problem, but what people make of it can be a serious problem	To what extent do you think homosexuality is obscene and vulgar?**
Strongly agree	44.7	35.1	43.1	22.8	6.9	25.0	27.3	65.2
Somewhat agree	28.8	36.0	15.8	15.6	10.9	23.8	27.8	18.6
Somewhat disagree	11.9	9.9	12.0	19.0	22.2	18.8	16.9	7.4
Strongly disagree	9.5	8.5	20.8	35.0	45.4	24.6	23.0	7.5
Don't know	3.9	9.8	7.2	7.0	13.7	7.2	3.8	—
No answer	0.8	0.6	0.8	0.6	0.6	0.7	0.8	1.0
Total percent	99.6	99.9	99.7	100.0	99.7	100.1	99.6	99.7
Total sample	3018	3018	3018	3018	3018	3018	3018	3018

*These three items provided responses concerning how many homosexuals are like this: "All or almost all?" "More than half?" "Less than half?" "Hardly any or none?" "Don't know," and a "No answer" category.

**This item provided five response categories: "Very much?" "Somewhat?" "Very little?" "Not at all?" and "No answer."

TABLE 11

Opinions Setting Homosexuals Apart from Heterosexuals

(Presented in Percentages)

	Homosexuals act like the opposite sex	Homosexuals have unusually strong sex drives	Homosexuals are afraid of the opposite sex	It is easy to tell homosexuals by how they look	There is an element of homosexuality in everyone
Strongly agree	22.1	22.4	15.9	11.8	9.5
Somewhat agree	46.7	36.1	39.8	25.0	29.9
Somewhat disagree	15.7	14.7	22.2	24.7	16.2
Strongly disagree	6.7	6.5	10.9	30.0	34.0
Don't know	7.6	19.4	10.7	7.8	9.7
No answer	0.9	0.6	0.5	0.7	0.7
Total percent	99.7	99.7	100.0	100.0	100.0
Total sample	3018	3018	3018	3018	3018

TABLE 12

Opinions on Rights of Homosexuals

(Presented in Percentages)

	Homosexuals should be allowed to dance with each other in public places	Homosexuals should be allowed to organize groups for social and recreational purposes	Bars serving homosexuals should be permitted	Homosexuals should be allowed to organize groups to deal with their social problems	Homosexuals should *not* be allowed to be members of churches or synagogues	What consenting adult homosexuals do in private is no one else's business
Strongly agree	7.3	17.5	19.4	11.0	8.9	38.1
Somewhat agree	15.1	29.3	31.0	33.2	7.9	29.9
Somewhat disagree	18.0	15.7	15.8	8.3	20.2	14.0
Strongly disagree	54.9	30.6	27.8	12.2	58.2	14.1
Don't know	3.7	5.8	5.8	4.1	3.6	3.4
No answer	0.7	0.8	0.5	0.8	0.9	0.5
Total percent	99.7	99.7	99.8	99.6	99.7	100.0
Total sample	3018	3018	3018	3018	3018	3018

TABLE 13

Homosexuality:

Opinions Concerning Causation and Cure

(Presented in Percentages)

FOR HOW MANY HOMOSEXUALS IS EACH STATEMENT TRUE?	"Cures"				"Causes"			
	Homosexuality is a sickness that can be cured	Homosexuals can stop being homosexuals if they want to	Homosexual men can be turned into heterosexuals by women who have enough sexual skills	Homosexual women can be turned into heterosexuals by men who have enough sexual skills	Young homosexuals become that way because of older homosexuals	Homosexuals are born that way	People become homosexuals because they are not attractive to the opposite sex	People become homosexuals because of how their parents raised them
All or almost all	37.9	23.0	8.8	13.7	18.7	16.7	11.5	13.6
More than half	24.0	17.4	16.4	20.4	23.8	13.6	17.8	24.9
Less than half	16.5	20.8	26.1	22.4	21.6	18.0	22.8	24.1
Hardly any or none	12.9	29.2	31.2	26.2	26.4	43.9	30.6	31.2
Don't know	7.8	8.6	16.5	16.3	8.7	7.4	7.2	5.1
No answer	0.9	0.7	0.9	0.7	0.5	0.5	0.6	0.8
Total percent	100.0	99.7	99.9	99.7	99.7	100.1	99.5	100.0
Total sample	3018	3018	3018	3018	3018	3018	3018	3018

Minnesota House of Representatives

Research Department

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