MEMORANDUM

IN SUPPORT OF APPLICATION FOR

ADMISSION TO THE OHIO BAR

INTRODUCTION

In Rule XVII, the Supreme Court of Ohio has established that before one can be admitted to practice law in this state, he shall undergo a character investigation conducted by a Committee on Applicants for Admission to the Practice of Law, hereinafter, the Committee on Applicants. The Committee on Applicants is charged with investigating "character, reputation and moral qualifications". Rule XVII, Section 3(A). There is no effort to quantify these concepts within Rule XVII.

The Board of Commissioners on Character and Fitness, hereinafter the Board on Fitness, created by Section 9 of Rule XVII has, inter alia, the following power:

> "(2) Promulgate, subject to the approval of the Court, standards of conduct for applicants for admission to bar."

The applicant has been advised by the Clerk of the Supreme Court that the Board on Character has not exercised their authority.

It is submitted that some indication, if not every permissible indication, of the meaning is found in Rule XVIII,

the Disciplinary Rule. Applicant believes that the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States forbids the application of a more discriminating test of "character, reputation and moral qualifications" to applicants for admission than is applied to those whose admission is retained.

Nevertheless, if a more stringent rule could constitutionally be applied, there can be no doubt that the use of a character trait or lack of moral qualification to exclude one from practice will not pass constitutional muster, unless there is a nexus between that character trait or lack of moral qualification and the ability to serve society as an Attorney at Law. (See infra pp. 3 thru 4.) Since it is the very purpose of Rule XVIII to identify matters which support the assertion of that nexus, borrowing Rule XVIII definitions for Rule XVII is both sound and logical.

Essentially, Rule XVIII permits disciplinary action against those who are found professionally wanting due to "misconduct", "mental illness", and contumacious "conduct affecting any proceeding under this rule". It is submitted that the "character, reputation and moral qualifications" investigation is a pre-admission investigation of "misconduct" or traits that evidence potential "misconduct".

"Misconduct" is defined in paragraph 5(a) of Rule XVIII. The definition reads as follows:

> "(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon admission to the practice of law in this State, or any violation of the Canons of Professional Ethics or the Code of Professional Responsibility as adopted by the Court from time to time, disobedience of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude."

Thus the issue is---Is there evidence that the Applicant has or will engage in misconduct.

The contents of the Oath of Office and of the Code of Professional Responsibility are sufficiently well known that to quote them herein would do nothing except unnecessarily lengthen the memorandum. They equate, however, to the definition promoted by the State of California discussed in Konigsburg v. State Bar of California, 353 U.S. 252 (1957). In that case, the Supreme Court, while stating that California decisions probably did not support such a "broad" definition of "good moral character", accepted for that case a definition that "stresses elements of honesty, fairness and respect for the rights of others and for the laws of the state and nation". The Court held that the Fourteenth Amendment denied a state the power to withold the opportunity to practice law unless "on the whole record a reasonable man

could fairly find that there were substantial doubts about" the applicant's " 'honesty, fairness and respect for the rights of others and for the laws of the state and nation.' "

(at page 264) The Court cautioned:

> "The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is usually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences and prejudices of the definer. Such a vague qualification, which is easily adopted to fit personal views and predilections, can be a dangerous instrument for the arbitrary and discriminatory denial of the right to practice law."
>
> (at page 262)

The due process limitation was stated in Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957) a companion case with Konigsburg, as follows:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."
>
> (at page 239)

I have omitted a short factual statement containing names & have no authority to divulge.

Cmp

Bisexuality

Through the questionaire and through specific questions addressed to him, Applicant has said that he is a bisexual. Whether that admission was wise or required is no longer an open question. The matter is of record. The dimensions of the matter are not. Attached to this memorandum is an affidavit made by the Applicant. In that affidavit he denies that he has ever knowingly committed, or has ever been convicted of, a crime. Additionally he avers that his sex life is a purely private life. That is, he engages in no public sexual activity. Specifically he does not comit public solicitation; he is not an exhibitionist; he does not loiter in the vicinity of public or quasi-public toilets; and he has not engaged in lewd acts.

Further, he has not engaged in sex acts with minors and he has never engaged in a sex act with anyone who was not an adult consenter. Whatever his sexual activities have been, he is publicly discreet, courteous and fully cognizant and appreciative of the rights of others.

Applicant has not been required to say what his private sexual experiences have been. Applicant appreciates the recognition of his right to privacy.

That homosexuality is not the antithesis of "good moral character" was decided in In Re Labady, 326 F. Supp. 924 (1971). Because of the able and thorough discussion of the matter by Judge Mansfield, the entire decision is set forth as Appendix B. The essence of the discussion is contained in the following:

> "We believe that the most important factor to be considered is whether the challenged conduct is public or private in nature. If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the liklihood of harm to others is minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights.
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> * * *
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> In short, private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of §1427. To hold otherwise would be to encourage governmental inquisition into the

applicant's purely personal private temperment and habits (e.g., whether he harbors hate, malice or impure thoughts; whether he has engaged in masturbation, autoeroticism, fornication, or the like, etc.) even though such attitudes or conduct would not harm others.

* * *

Upon the record before us we conclude that petitioner has sustained his burden of compliance with Title 8 U.S.C. § 1427. He has led a quiet, peaceful, law-abiding life as an immigrant in the United States. Although he has engaged on occasion in purely private homosexual relations with consenting adults, he has not corrupted the morals of others such as minors, or engaged in any publicly offensive activities, such as solicitation or public display. He is gainfully employed, highly regarded by his employer and associates, and he has submitted to therapy which was unsuccessful. Under all the circumstances, setting aside our personal moral views, we cannot say that his conduct has violated public morality or indicated that he would be anything other than a law-abiding and useful citizen."

Similar holdings are to be found in Norton v. Macy, 417 F.2d 1161 (1969) where Judge Boyelon writing for the United States Court of Appeals for the District of Columbia, held that the Civil Service Commission could not deny on the record an employee of NASA his employment because he was a confessed bisexual. The Court said:

"Thus, Appellee is now obliged to rely solely on this possibility of embarrassment to the agency to justify Appellant's dismissal. The assertion of such a nebulous 'cause' poses perplexing problems for a review proceeding which must accord broad discretion to the Commission. We do not doubt that NASA blushes whenever one of its own is caught in flagrante delictu; but if the possibility of such transitory discomfiture must be uncritically

> accepted as a cause for discharge which will 'promote the effeciency of the service,' we might as well abandon all pretense that the statute provides any substantive security for its supposed beneficiaries. A claim of possible embarrassment might, of course, be a vague way of referring to some specific potential interference with an agency's performance; but it might also be a smokescreen hiding personal antipathies or moral judgments which are excluded by statute as grounds for dismissal. A reviewing court must at least be able to discern some reasonably forseeable, specific connection between an employee's potentially embarrassing conduct and the effeciency of the service ..."

Judge Boyelon points out that the "most widely accepted study" estimates that thirty-seven percent of the American male population have at least one homosexual experience during their lifetime. He says that to exclude all such persons from public service would "be both inherently absurd and devastating to the public service." (at page 1167, f.n. 28.) For other cases holding that homosexual behavior, without proof that there was a nexus between than behavior and a specific moral qualification required for the position, was not a basis for dismissal see, Morrison v. State Board of Education, 461 P2d 375 (1969), Supreme Court of California, (a school teacher); McConnell v. Anderson, 316 F.Supp. 809 (1970), United States District Court for Minnesota, (a college librarian); and Gayer v. Laird and Ulrich v. Laird, both unreported as of yet, and both decided September 13, 1971 by Judge Pratt of the Federal District Court of the District of Columbia,

(Department of Defense employees).

CONCLUSION

There can be no doubt that a Bar Association must investigate the character, reputation and moral qualifications of those who make application for membership. Neither can there be any doubt that the Bar Association is bound to deny membership to those who do not qualify. When the basis for failure to qualify is a moral or character deficiency, that deficiency must directly evidence the lack of some personal attribute requisite to professional service of the public. It is respectfully submitted that the Applicant in the instant case has demonstrated his ability, capability, desire and moral qualifications to be a member of the Bar of this State. He earnestly seeks the opportunity to prove that he has a surplus of these qualities.

Respectfully submitted by:

Craig William Patton

Craig William Patton
Applicant for Admission to the
Ohio Bar

AFFIDAVIT

State of Ohio)
County of Franklin) ss.

Craig William Patton, being first duly cautioned and sworn, deposes and says:

That he has never knowingly committed nor has ever been convicted of a crime.

That his sex life is a purely private life and that whatever his sexual experiences might have been, they have occurred only in privacy and that he has never engaged in any public or quasi-public sexual activity with any person.

That he has never engaged in a sex act with a minor or with anyone who was not an adult consenter and that he has never made any effort to persuade any person as to what his sexual mores should be.

That he does not commit solicitation; he is not an exhibitionist; he does not loiter in the vicinity of public or quasi-public toilets; and he does not engage in lewd acts.

Further, Affiant says that he tries at all times to be publicly discreet, courteous and fully cognizant and appreciative of the rights of others.

Craig William Patton

Craig William Patton

Subscribed and sworn to before me
this 30th day of November, 1971.

Roger F. Day

Roger F. Day
Notary Public, State of Ohio
My commission has no expiration
Date: O. R. C. 147.03

Exhibit B

In re Petition for Naturalization of
Manuel LABADY.
Court No. 2270.
Petition No. 790587.

United States District Court,
S. D. New York.
March 23, 1971.

Petition for naturalization. The District Court, Mansfield, J., held that a homosexual man was person of "good moral character" and was entitled to naturalization, where man led quiet, peaceful, law-abiding life as immigrant in United States, his homosexual relations were purely private with consent-

ing adults, he did not corrupt morals of others, such as minors, or engage in any publicly offensive activities, such as solicitation or public display, he was gainfully employed, highly regarded by his employer and associates, and he had submitted to therapy that was unsuccessful.

Petition granted.

1. Constitutional Law ⇐82

Official inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy.

2. Aliens ⇐62(5)

Private conduct which is not harmful to others, even though it may violate personal moral code of most of us, does not violate public morality which is the only proper concern of statute providing for naturalization of persons of good moral character. Immigration and Nationality Act, § 316(a), 8 U.S.C.A. § 1427 (a).

3. Aliens ⇐62(5)

A homosexual man was person of "good moral character" and was entitled to naturalization, where man led quiet, peaceful, law-abiding life as immigrant in United States, his homosexual relations were purely private with consenting adults, he did not corrupt morals of others such as minors, or engage in any publicly offensive activities, such as solicitation or public display, he was gainfully employed, highly regarded by his employer and associates, and he had submitted to therapy that was unsuccessful. Immigration and Nationality Act, § 316 (a), 8 U.S.C.A. § 1427(a).

See publication Words and Phrases for other judicial constructions and definitions.

Charles Spar, New York City, for petitioner.

Anargyros Camarinos, Gen. Atty. (Nationality), Immigration & Naturalization Service, New York City, for Government.

MANSFIELD, District Judge.

Petitioner, a 24-year old native and citizen of Cuba, was lawfully admitted into the United States as a permanent resident on December 3, 1960. On May 6, 1969, he filed his Petition for Naturalization pursuant to 8 U.S.C. § 1427. The Immigration and Naturalization Service ("the Service") opposes his petition on the ground that since he has been a homosexual he has not sustained his burden of establishing that within the five years immediately preceding the date of filing his petition he "has been and still is a person of good moral character * * *" within the meaning of 8 U.S.C. § 1427(a).[1]

Petitioner was a homosexual in Cuba and made this fact known to the Service authorities when he entered this country at the age of 14. The Medical Director and Chief of the Psychiatry Department of the United States Public Health Service Hospital in Staten Island, however, did not certify him as a "sexual deviate"

1. "§ 1427. Requirements of naturalization —Residence

"(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a *person of good moral character*, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." (Emphasis added)

Petitioner has the burden of establishing his good moral character. 8 U.S.C. § 1427(e).

or "psychopathic personality" under 8 U.S.C. § 1182(a) (4).[2] Since petitioner validly entered the country without deceit, the Service concedes that he is not now deportable.

After entering the United States in 1960 petitioner engaged in homosexual activities with several consenting adults. On the average he has been the active or passive partner in such activities about once a month, but the last occasion was about six months before his preliminary examinations by the Service upon his Petition for Naturalization. He has never engaged in homosexual activities with minors; all of his sexual acts have taken place in privacy, behind locked doors in hotel rooms. He has never engaged in such activity in any park, theatre, subway station, or any other public or semi-public place. He is unmarried and lives with his mother. There is no suggestion that his homosexual activities could harm a marriage relationship.

Petitioner has never been arrested. Though he has not applied for psychiatric treatment in the United States, he did unsuccessfully undergo therapy in Cuba. He does not drink; he does not frequent bars; he does not use narcotics. The Service stipulates that he has never been in trouble and, as his employer testified, he is highly regarded at his place of employment.

"Good moral character" is partially defined in 8 U.S.C. § 1101(f), which lists eight classes of conduct that preclude a finding of good moral character if engaged in during the five-year period immediately preceding the Naturalization Petition. These categories—e. g., habitual drunkard; adulterer; perjurer; convicted murderer (even if the conviction occurred before the five-year period); a person who within the five-year period was confined in a penal institution for 180 days or more; etc.—do not include petitioner's admitted conduct, but § 1101 (f) is not definitive and so provides by its own terms:

> "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not [within the five-year statutory period] of good moral character."

In determining good moral character,

> "the test is not the personal moral principles of the individual judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time. United States ex rel. Iorio v. Day, 2 Cir., 34 F.2d 920, 921; Repouille v. United States, 2 Cir., 165 F.2d 152, 153; United States v. Francioso, 2 Cir., 164 F.2d 163; Schmidt v. United States, 2 Cir., 177 F.2d 450, 451, 452; Johnson v. United States, 2 Cir., 186 F.2d 588, 590, 22 A.L.R.2d 240." (Posusta v. United States, 285 F.2d 533 at 535 (2d Cir. 1961) (per L. Hand, C. J.))

2. 8 U.S.C. § 1182(a) (4):

> "(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
> * * * * *
> "(4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect; * * *."

In Boutilier v. Immigration Service, 387 U.S. 118, 120, 87 S.Ct. 1563, 1565, 18 L.Ed.2d 661 (1967), the Court held that "Congress intended the phrase 'psychopathic personality' to include homosexuals such as petitioner [Boutilier]." *Boutilier* does not control the present case, however, because petitioner in this case was lawfully admitted and is proceeding under § 1427(a). "Congress did not * * * concomitantly or at any other time amend § 101(f) [of the Immigration and Nationality Act, codified in 8 U.S.C. 1101 (f), which defines 'good moral character' as used in section 1427(a)] so as to certify an intent to include in the residual 'good moral character' generalization a [homosexual] deviancy as constituting a bar to naturalization." Petition for Naturalization of Mario Belle (E.D.N.Y. Feb. 19, 1969) (#681121). *Boutilier*, moreover, was a case involving public homosexuality; at least one episode occurred in a public park. 387 U.S. at 119, 87 S.Ct. 1563.

If the criterion were our own personal moral principles, we would deny the petition, subscribing as we personally do to the general "revulsion" or "moral conviction or instinctive feeling" against homosexuality. E. g., Report of the Committee on Homosexual Offenses and Prostitution Presented to Parliament by the Secretary of State for the Home Department and the Secretary of State for Scotland by Command of her Majesty (Sept. 1957 Cmmd. 247) (The Wolfenden Report) § B(54); see also Dew v. Halaby, 115 U.S.App.D.C. 171, 317 F.2d 582, 587 & n. 10 (1963), *cert. granted*, 376 U.S. 904, 84 S.Ct. 671, 11 L.Ed.2d 605, *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 550 (1964); H v. H, 59 N.J.Super. 227, 237, 157 A.2d 721, 727 (1959) ("Few behavioral deviations are more offensive to American *mores* than is homosexuality."); In re Petition for Naturalization of Olga Schmidt, 56 Misc.2d 456, 289 N.Y.S.2d 89, 92 (Sup. Ct.1968) (petitioner's admitted homosexual activity is not "in the court's opinion, consistent with good moral character as the 'ordinary man or woman' sees it."); cf. Note, Private Consensual Homosexual Behavior: The Crime and Its Enforcement, 70 Yale L.J. 623, 627 & n. 34 (1951). But see, Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv.L. Rev. 1738, 1744 n. 25 (1969) (statistical knowledge of public attitudes towards homosexuality is extremely meager).

The test of "good moral character" prescribed by Judge Hand in *Posusta* was recognized by him as one that is "incapable of exact definition," p. 535, and in an earlier opinion he had confirmed that "good moral character" does not necessarily turn upon a popular vote.

> "Even though we could take a poll, it would not be enough merely to count heads, without any appraisal of the voters. A majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than that we adopted in the foregoing cases: that is, to resort to our own conjecture, fallible as we recognize it to be." Schmidt v. United States, 177 F.2d 450 at 451 (2d Cir. 1949).

[1] We believe that the most important factor to be considered is whether the challenged conduct is public or private in nature. If it is public or if it involves a large number of other persons, it may pose a threat to the community. If, on the other hand, it is entirely private, the likelihood of harm to others is minimal and any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights. For instance, it is now established that official inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy. Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Just as the state may not search "the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," *Griswold, supra* at 485, 85 S.Ct. at 1682, the state may not prohibit a person from possessing obscene matter in his home, because of the "right to be free * * from unwarranted governmental intrusion into one's privacy." Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247–1248, 22 L.Ed.2d 542 (1969). See also, Powell v. Texas, 392 U.S. 514, 532, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968) (state may use criminal laws to punish for *public* intoxication, since it had not attempted "to regulate appellant's behavior in the privacy of his own home.") (Marshall, J., concurring); United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970).

[2] In short, private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public moral-

ity which is the only proper concern of § 1427. To hold otherwise would be to encourage governmental inquisition into an applicant's purely personal private temperament and habits (e. g., whether he harbors hate, malice or impure thoughts; whether he has ever engaged in masturbation, autoeroticism, fornication, or the like, etc.) even though such attitudes or conduct would not harm others.

Without condoning the purely private conduct here involved, we accept the principle that the naturalization laws are concerned with public, not private, morality. As Judge Hand stated in *Posusta, supra*, § 1427 "is not penal; it does not mean to punish for past conduct, but to admit as citizens those who are likely to prove law-abiding and useful." See in accord In re Naturalization of Denessy, 200 F.Supp. 354, 359 (D.Del.1961). The distinction between public and private morality is further recognized in the American Law Institute's Model Penal Code pp. 277–78, Tent. Draft No. 4 (1955), which provides:

> "No harm to the secular community is involved in atypical sex practice in private between consenting adult partners. This area in private morals is the distinctive concern of spiritual authorities. It has been so recognized in a recent report by a group of Anglican clergy, with medical and legal advisers, calling upon the British Government to reexamine its harsh sodomy laws." [Footnote omitted]

There is nothing to indicate that private conduct of the type here involved would affect petitioner's ability to be "law-abiding and useful" to society.

We reject the Service's contention that petitioner's conduct has violated New York Penal Law § 130.38 which provides that

> "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person."

The statute does not specifically extend to consensual sodomy performed *in private*. At common law a lewd, obscene, or indecent act included only open or public behavior. Rittenour v. District of Columbia, 163 A.2d 558, 559 (Mun.Ct. of Appeals for Wash., D.C.1960); Grisham v. State, 10 Tenn. (2 Yerger) 589, 594–597 (1831). We have found no prosecution of private homosexual acts under § 130.38. One New York court has stated in dictum that the private conduct of an admitted homosexual was not violative of any criminal statute. In re Petition of Olga Schmidt, 56 Misc.2d 456, 289 N.Y.S.2d 89, 92 (Sup.Ct.1968); cf. Petition for Naturalization of Mario Belle (E.D.N.Y. Feb. 19, 1969) (#681121), at 7, n. 1 (admitted homosexual acts of petitioner fell short of N.Y. Penal Law § 130.38 which requires for its commission "deviate sexual intercourse"). Many state statutes prohibiting homosexual conduct explicitly require "openness" or publicity. Note, Private Consensual Homosexual Behavior: The Crime and its Enforcement, 70 Yale L.J. 623, 635 (1961) (see appendix of this Note which lists the relevant statutes).[3] Under these circumstances, and bearing in mind that criminal laws should be strictly construed, it is highly unlikely that petitioner's private conduct has violated any state law.

3. Foreign penal laws also generally do not apply to private sexual conduct. Such countries as France, Italy, Mexico, Uruguay, Denmark, Sweden and Switzerland do not attempt to punish such private activities, which are considered to be the concern of private, not public, morality. See A.L.I. Model Penal Code p. 278 (Tent. Draft No. 4, 1955). Germany is contrary, *Id.* Canon law demands that the sexual crime be public before the penalty, which is self-enforcing and automatic, exists. Adultery, for instance, does not become a crime unless it is public. Can. 2357, § 2, discussed in letter from Rev. Connery, Prof. of Moral Theology, to J. Goldstein, Sept. 25, 1958, printed in R. Donnelly, J. Goldstein, & R. Schwartz, Criminal Law 139–40 (1962).

In any event a violation of § 130.38, which is a Class B misdemeanor carrying a maximum punishment of three months imprisonment, would not necessarily preclude a finding of good moral character within the meaning of § 1427 (a). In re Van Dessel, 243 F.Supp. 328 (E.D.Pa.1965), the court approved citizenship for a woman who had engaged in sexual relations with an unmarried man over a period of years. They had not married because of religious differences. The court concluded that although petitioner's acts of fornication were illegal in the state in which she was residing, crimes involving fornication were common in the law, and that the crime by itself—with consent of the other adult, also unmarried, and with the act done in private, not done for money, and with no begetting of an illegitimate child—was far less serious than the crimes listed in 8 U.S.C. § 1101(f) (e. g., adultery, murder, perjury, trafficking in narcotic drugs, aiding in the illegal entry into the United States, or conviction for any offense resulting in confinement in a penal institution for a period of 180 days or more). Petitioner's conduct similarly does not reach the seriousness of such crimes. See also In re Naturalization of Denessy, 200 F. Supp. 354 (D.Del.1961) (fornicator admitted to citizenship); Posusta v. United States, 285 F.2d 533 (2d Cir. 1961) (fornicator admitted to citizenship). *Van Dessel, Denessy* and *Posusta* do not condone fornication; they simply hold that private fornication between consenting unmarried adults is not a violation of the public morality which is the concern of § 1427.

The relative complacency with which the public has viewed private homosexual conduct is further evidenced by the sparing enforcement of homosexual laws already on the books.[4] It is generally agreed that except in the cases of corruption of minors, violence, and public solicitation—and petitioner is not included in any of these categories—the existing laws are substantially unenforced. E. g., A.L.I. Model Penal Code, pp. 278 (Tent. Draft No. 4, 1955); see Ploscowe, Sex Offenses in the New Penal Law, 32 Brooklyn L.Rev. 274, 284 (1966). A study of Los Angeles County showed that even when the police knew that homosexuals were privately cohabiting, no arrests would be made. Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A.L.Rev. 643, 688–89 (1966).

The extent to which homosexuals are offered employment is also relevant in determining public attitudes toward private homosexual conduct, since one purpose of the "good moral character" clause is to insure that prospective citizens will be useful to society and law-abiding. Turning to local government, we find that the New York City Civil Service Commission has adopted a policy of accepting homosexuals as workers, except in some positions such as penitentiary guards and playground attendants. N. Y. Times, May 9, 1969, at 1, col. 2, cited in Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv.L.Rev. 1738, 1745 n. 30 (1969), and in Norton v. Macy, 135 U.S.App.D.C. 214, 417 F.2d 1161, 1167 n. 28 (1969). On the federal level, the Civil Service Commission no longer excludes all homosexuals from government service. The Commission as a matter of practice now "avoids expelling [homosexual] employees with many years service. It does not consider minor criminal conduct occurring two or more years before application for employment. It excludes only those whose homosexuality is a matter

4. To the extent that these laws seek to prohibit and punish private homosexual behavior between consenting adults, they are probably unconstitutional in light of Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); cf. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Powell v. Texas, 392 U.S. 514, 532, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) (Marshall, J., concurring).

of public knowledge or record. Results have apparently been satisfactory." Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L.Rev. 1738, 1745–46 (1969) (footnotes omitted). The Civil Service's power to fire homosexual employees has also been narrowed by the courts. Compare Norton v. Macy, 135 U.S.App.D.C. 214, 417 F.2d 1161, 1166–1167 (1969), with Dew v. Halaby, 115 U.S.App.D.C. 171, 317 F.2d 582 (1963), *cert. granted*, 376 U.S. 904, 84 S.Ct. 671, 11 L.Ed.2d 605, cert. dismissed by agreement of the parties when appellant reinstated with pay, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 550 (1964).

Lastly the Service points to certain passages in the Holy Bible as indicating that homosexual practices must be equated with lack of good moral character (see, e. g., Genesis 19:5; Leviticus 18:22; and Romans 1:26–27). Without conceding that § 1427 was intended to adopt Biblical standards, it appears that the portions of the Bible relied upon by the Service, like many other parts of the Holy Book, require interpretation and that even eminent theologians have not construed them as condemning all homosexuality. On the contrary it has been said that when read in context

> "[t]heir [the Scriptures'] aim is not to pillory the fact that some people experience this perversion inculpably. They denounce a homosexuality which had become the prevalent fashion and had spread to many who were really quite capable of normal sexual sentiments.
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>
> "Lack of frank discussion has allowed a number of opinions to be formed about them [homosexuals] which are unjust when applied generally, because those who have such inclinations in fact are often *hard-working* and *honourable* people." (Emphasis added) De Nieuwe Katechismus (Commissioned by the Catholic Hierarchy of the Netherlands and produced by the Higher Catechetical Institute at Nijmegen), trans. by K. Smith, A New Catechism 384–85 (Herder & Herder ed. 1967).

[3] Upon the record before us we conclude that petitioner has sustained his burden of compliance with Title 8 U.S.C. § 1427. He has led a quiet, peaceful, law-abiding life as an immigrant in the United States. Although he has engaged on occasion in purely private homosexual relations with consenting adults, he has not corrupted the morals of others, such as minors, or engaged in any publicly offensive activities, such as solicitation or public display. He is gainfully employed, highly regarded by his employer and associates, and he has submitted to therapy that was unsuccessful. Under all of the circumstances, setting aside our personal moral views, we cannot say that his conduct has violated public morality or indicated that he will be anything other than a law-abiding and useful citizen.[5]

The petition is granted.

It is so ordered.

5. Our position is in accord with Judge Rosling's thoughtful opinion in Petition for Naturalization of Mario Belle (E.D. N.Y. Feb. 19, 1969) (#631121), and contrary to In re Petition for Naturalization of Olga Schmidt, 56 Misc.2d 456, 289 N.Y.S.2d 89 (Sup.Ct.1968). The court in the latter case, however, frankly admitted that it had no evidence before it "concerning what the 'ordinary man or woman' would say about private homosexuality between consenting adults." *Id.* at 92.

FOR REASONS OF EXPEDIENCY AND EXPENSE ONLY PERTINENT PORTIONS
OF THIS REPORT HAVE BEEN PHOTOGRAPHED

III. STATEMENT OF THE CASE

The applicant entered the College of Law, Ohio State University, in September, 1968, and graduated from the College of Law in June, 1971, cum laude. While in law school he was awarded the Lett Civil Liberties Award, given to the third year law school student who demonstrated the most sincere interest in the field of civil liberties and was also awarded the American Jurisprudence Award for federal practice (R. 17-18).

The applicant graduated from Ohio State University with a Bachelor of Arts degree in March, 1968, summa cum laude and second in his class (R. 46). He was elected to Phi Beta Kappa while in undergraduate school (R. 17) and was given the President's Award For Academic Achievement and Scholarship (R. 18).

The applicant classifies himself as "bisexual" (R. 30), and while he is capable of having sexual relationships with members of the opposite sex, he is not emotionally capable of forming the type of a love relationship which is necessary for a successful marriage (R. 47; 93). In the sense that "homosexual" implies both an emotional and physical relationship with members of one's own sex, the

The definitions of "homosexual" as given by the applicant and the expert witnesses were essentially the same. The applicant defined a homosexual as "a person who has an orientation such that his preference in terms of erotic relationships with other people, by this meaning a relationship based upon love, dedication, concern for other people, would be directed at one's own sex" (R. 49). According to Dr. Harding, it is a term "used very broadly to classify a person who tends to enjoy the company of his own sex, rather than that of the opposite sex" (R. 200). Dr. Todd described homosexuality as "where, psychologically, emotionally and erotically a person prefers a love relationship with his own sex" (R. 178). The etiology or causation of such a preference appears uncertain. While in some cases the relationships with the parents seem very important, in other cases this does not seem to be a factor (R. 168). According to Dr. Harding, there are many theories as to the etiology of homosexualty and such theories are still in the developmental stage (R. 206). In the applicant's case, it was Dr. Harding's impression that the homosexual tendency developed as a result of a childhood relationship with his parents in which his mother tended to be a stronger figure than his father; a feeling of weakness and sense of not belonging with athletes and others in his school classes; and homosexual reactions to overcome feelings of weakness and inadequacy (R. 205-206).

Whatever the causes of homosexuality in general or in the specific case of the applicant, the existence of

such a condition does, in the opinion of the Board, have a bearing on the applicant's fitness to practice law. The applicant himself stated that "I definitely believe that sex has a bearing on good moral character" (R. 325). In at least three areas, an applicant's homosexual conduct could be relevant to the ultimate issue of his fitness to practice law, i.e., (1) the activities could be in violation of a statute of this state and show a deliberate disregard for the law; (2) the activities could be indicative or symptomatic of an underlying psychiatric condition which would directly affect the ability to practice law; and (3) the activities, because of the social stigma attached thereto, could subject the practicing attorney to unusually great pressures by threats of exposure and ridicule.

1. The Possibility of a Statutory Violation

Section 2905.44 of the Ohio Revised Code, the so-called sodomy statute, provides that:

> "No person shall have carnal copulation with a beast, or in any opening of the body, except sexual parts, with another human being.
>
> "Whoever violates this section is guilty of sodomy and shall be imprisioned not less than one nor more than twenty years."

There is no evidence that the specific acts prohibited by this statute have been performed by the applicant. He has, in fact, repeatedly denied any violation of that statute (R. 30, 31; 68; 74; 331) and has testified that the acts proscribed by the statute are repugnant to him (R. 68; 84).

The applicant, while recognizing certain historical events in which violation of existing laws would have appeared to have been morally proper, e.g., the Fugitive Slave Act and the laws of the Nazi regime in Germany, was convincing in his belief that "our democratic processes have enough built-in safeguards through the courts that people can go through legal channels to get meaningful change in society" (R. 327). In short, there is no indication that the applicant has violated Section 2905.44 of the Ohio Revised Code or that he has any attitude which would indicate, in general, a disrespect for the law.

2. The Possibility of an Underlying Psychiatric Disability

Homosexuality is often considered as a symptom of some underlying problem (R. 200; 219; 223-224), and may be the mechanism, for example, of dealing with some deep-seated anxiety state (R. 225-226). While this manifestation may be "outgrown" when it appears in children or adolescents or may disappear when circumstances change (R. 210), it also may become part of that person's character over a period of time (R. 225). In the opinion of Dr. Harding, a person (such as the applicant) who has practiced homosexuality for a period of five years is not likely to change (R. 210; 219). This, however, does not necessarily indicate that such persons are "unstable or sick" (R. 157). According to Dr. Todd, a homosexual orientation is not pathognomonic (diagnostic by itself) of any severe pathology. As with heterosexuals, a homosexual may possess varying degrees of immaturity, neuroses, borderline pychosis, etc. (R. 168). The real question, therefore, is the present degree of underlying emotional stability of the applicant.

It is undisputed that the applicant did have a degree of emotional instability in his early years. Dr. Harding's initial diagnosis when he examined the applicant in 1964 was a schizophrenic reaction which, in more current terminology, is defined as "an acute or chronic disorganization of a person's ego or himself; a psychotic type episode, where judgment is poor and the person can have feelings of unreality and act impulsively" (R. 199). The condition, as it relates to the applicant, would be classified today as "an adolescent adjustment reaction" (R. 204), occurring in a period of adolescent turmoil or rebellion (R. 209; 224). In the opinion of Dr. Harding, it was a transitory condition as contrasted with a chronic or permanent state (R. 215), and even during this period of time the applicant did not have a high degree of emotional instability (R. 209).

Dr. Todd, who evaluated the applicant for the purpose of the hearing, found that the applicant, after a period of turmoil and self-searching, had become a very mature and stable person, exhibiting characteristics of openness, genuineness and sincerity and possessing an ability to cope with conflict and stress (R. 155-156; 158-159). The applicant has a superior intellect (R. 161), with a genuine interest in and dedication to the legal profession (R. 56; 156) and a sense of altruism and sympathy in the field of civil rights (R. 56). He has good ego strength, is ambitious, and wants to be successful (R. 169-170). With regard to the applicant's admitted homosexual inclination, the doctor felt that the applicant's character, attitudes and values were more important than the details of his private sex life (R. 179). Dr. Todd would have no hesitation in seeking legal

help himself from the applicant if the applicant were admitted to the practice of law (R. 188).

The cumulative medical evidence clearly discloses the applicant's earlier emotional instability, but there is no substantial evidence that would indicate any immaturity or underlying instability at the present time.

3. The Possibility of Pressures Due to Social Stigma

It is recognized that there are widely varying degrees of what could be called homosexual conduct, ranging from aggressive behavior in terms of pursuit, dress, etc., to no physical contact but simply a preference for the company of one's own sex (R. 207; 211). There does not appear to be any uniformity in sexual activities between homosexuals, and stereotypes have no more validity in this group than in the heterosexuals. Nevertheless, it is recognized that there is a certain degree of "handicap and stigma and difficulty" associated with a homosexual in our society today (R. 187) and, therefore, it is believed that each case must be separately evaluated in terms of the possible effect on the applicant's ability to practice his profession and to properly fulfill his responsibilities to his clients.

According to the applicant, his sex activities form an insignificant and unimportant part of his life (R. 84). Such activities are conducted privately with consenting adults, and he has never engaged in solicitation with other males in public places (R. 58). Dr. Todd was of the opinion that the

applicant "did not participate in the public type of acts" (R. 181) and there is no evidence to the contrary. The applicant agreed that public solicitation would show a lack of good moral character (R. 326), the distinction being drawn as to whether one's sexual activity is offensive or injurious to other people (R. 326-327). He insists that there has been nothing destructive or harmful or in any way immoral about any sexual relations he has ever had (R. 325).

Similarly, Dean Kirby testified that, in his opinion, the mere fact of homosexuality alone would make no difference in the certification given by the Dean as to the applicant's good moral character, so long as that conduct did not manifest itself in some way that offended the law school community or created doubts that the applicant would be able to function as an attorney (R. 239). Practicing homosexuality privately with consenting adults would not affect the certification given by the Dean, inasmuch as no injury is done to another person or to society by such conduct (R. 245-246). Furthermore, the Dean does not believe that the applicant would be under any undue pressure or would be the potential subject of extortion attempts, in view of the fact that the applicant has already disclosed this personal characteristic in these proceedings and would have nothing to fear from any future threatened disclosure (R. 240). The applicant himself did not appear concerned over the possibility of being subjected to any such pressures, stating that, "I am proud of who I am and what I am and I am very discreet with what I am, but I have absolutely no fear of revealing this with anyone, if there is a purpose or reason behind it" (R. 90).

The applicant's present employer, while concerned that the applicant's personal life not become notorious, is of the belief that this is not likely to happen. The employer, aware of the applicant's sexual inclinations, has continued to employ him and will continue to employ him if the applicant is admitted to the practice of law (R. 249).

There is no real evidence that the applicant has engaged or is likely to engage in sexual activities of a non-private nature, and there is no proof that the applicant's private sex life has been or is likely to be offensive or injurious to other people. The risk of threatened exposure (which if not eliminated, has been certainly reduced by these proceedings) is not such a risk with this particular applicant as would impair his ability to properly perform the duties and responsibilities of a practicing attorney.

OTHER FACTORS CONSIDERED BY THE BOARD

In arriving at its conclusion and recommendation, the Board has also given weight to the following factors:

A. The Recommendations of the Columbus Bar Association Committees

The investigation of the applicant by the Columbus Bar Association's Committee on Admissions to the Bar was relatively thorough and conscientious, and a comprehensive report (Ex. A) was prepared. While there is some question as to whether the Committee did attempt to evaluate the applicant's mental and emotional stability in connection with his admitted

homosexual behavior (Cf., R. 115; 125), the local committee is to be commended for its investigation which disclosed this aspect of the case and for its handling of the case thereafter. Although one of the investigators did not recommend the applicant and chose to abstain in the voting (R. 145), both the subcommittee and the full committee voted, with no dissents, to recommend that the applications be approved (R. 109; 122).

B. The Recommendations of Others

A number of witnesses appeared in support of the applicant, and without minimizing the importance of the others, it is felt that the strong recommendations of Dean Kirby (R. 241), the applicant's present employer, Attorney Roger Day (R. 249), the applicant's former employer, Attorney Joan Zuber of the Ohio Department of Taxation (R. 278), and Attorney Earle Bridgwater, former President of the Ohio State Bar Association (R. 316-319) should be given weight.

C. The Intangible Factor

The ascertainment of one's character and fitness to practice law is not an exact process. Absent any accurate predictive test, there is always present a certain element of subjective judgment which enters into the ultimate conclusion. In the present case, the Board was favorably impressed with the applicant's obvious intelligence, his candor, and his strong desire to become an attorney. While such impressions would not, standing alone, justify the approval of the applications in question, it is only fair to state that

they were in part responsible for the final conclusion and recommendation of this Report.

CONCLUSION AND RECOMMENDATION

A majority of the Board present and voting at the meeting held on August 7, 1972, conclude that the applicant is a person of good moral character and is fit to practice law and they recommend that his applications be approved by the Supreme Court of Ohio.

Respectfully submitted,

BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS

By John D. Holschuh
John D. Holschuh, Chairman

ADDENDUM

At the meeting of the Board held on August 7, 1972, Commissioners Holschuh, Lynn, Fultz, Barrett and Nathanson voted in favor of the above recommendation and Commissioners Jacobs, Chalfant and Cardinal voted in opposition to the recommendation.

At the meeting of the Board held on September 21, 1972, Commissioners Corley and Chesney indicated that they did not concur in the above recommendation and Commissioner Dobnicker indicated that, without the benefit of the Board's discussion, held on August 7, 1972, he did not wish to either concur in or disapprove the above recommendation.

John D. Holschuh

John D. Holschuh, Chairman