AMERICAN BAR ASSOCIATION

LAW STUDENT DIVISION

ANNUAL MEETING

AUGUST, 1973

RESOLUTION: GOOD MORAL CHARACTER AND ADMISSION TO THE BAR

PROPONENT: NINTH CIRCUIT, A.B.A.--L.S.D.

618½ East Lomita Avenue
Glendale, California
June 29, 1973

A.B.A.--L.S.D.
Resolution Committee
1155 E. 60th Street
Chicago, Illinois

Re: Good Moral Character and Admission to the Bar

Dear Committee Members,

In recent months I have been informed of the rather confused state of affairs regarding the use of the requirement of "good moral character" by various State Bar Associations in admitting applicants to the bar.

A survey was conducted by a law student in Spokane, Washington in which he asked several State Bar Associations if they would refuse admission to an "admitted homosexual" who had no criminal arrests or conviction and who was otherwise qualified. The responses were varied. The State Bar of California responded that "homosexuality" in and of itself would be irrelevant. Other responses were noncommittal or negative.

In the case of In Re Kimball 339 N.Y.Supp.2d 302 (App.Div. 1973) a divided court said in dictum to the actual holding that homosexuality of an applicant could be used to bar him from the practice of law.

In a recent case in Ohio, after almost 2 years of hearings and debate, a divided Board of Character and Fitness of the State Bar of Ohio recommended that the Ohio Supreme Court admit a known "bisexual". The applicant had graduated cum laude and had passed the Ohio Bar Exam but was delay for this unreasonable length of time simply because of his "status" and his private sexual orientation.

Since there are over 5,000 gay law students in the United States, probably over 15,000 gay lawyers, and an untold number of gay undergraduate students who will seek entrance into law school in the coming years, this problem must be resolved soon.

Not only does this problem affect homosexuals or bisexuals. Any person who has been divorced is subject to an investigation into such private sexual matters. Any person who is cohabiting with another "not his spouse" would be subject to investigation and possible denial of admission to the bar because of lack of "good moral character".

This resolution was submitted to the Ninth Circuit of the L.S.D. at its annual meeting and was adopted. The Ninth Circuit now submits it to the entire L.S.D. and asks that it be adopted. It is being submitted so that in the near future the A.B.A. itself can set down guidelines to the various State Bar Associations on this delicate matter.

In the fall this resolution will be submitted to both the Young Lawyer's Section and the Section on Individual Rights. In December, the Association of American Law Schools will be voting on it. We hope to see it submitted to the Section on Legal Education and Admission to the Bar sometime in 1974. Eventually, a vote of the House of Delegates of the A.B.A. will be in order.

Since this is a problem that affects students more than lawyers (it is harder to get into practice than it is to stay in practice) it seems fitting that the first body to adopt the resolution should be the largest law student organization in the country. We sincerely hope that it will be so indorsed at the annual meeting.

Sincerely,

Thomas F. Coleman/ for the 9th Circuit

cc: Robert Drake
Raymond Tyra
Patrick Hays

I N D E X

SUBJECT: GOOD MORAL CHARACTER AS A REQUIREMENT FOR ADMISSION TO THE BAR

WHEREAS: The practice of law is a personal privilege which has been limited to persons of good moral character. Although a state may require high standards of qualification such as good moral character before it admits an applicant to the Bar, any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

The test of "GOOD MORAL CHARACTER" is a vague qualification which can become a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

While a Bar composed of lawyers of good character is a worthy objective, it should not be necessary to sacrifice vital freedoms in order to obtain that goal. Sexual orientation and private sexual behavior between consenting adults are matters having no rational connection with an applicant's fitness or capacity to practice law. Furthermore, official inquiry into a person's private sexual habits does violence to his constitutionally protected area of privacy.

RESOLVED: That the sexual orientation or sexual conduct of an applicant for admission to the Bar or of a member of the Bar should not be a proper subject for investigation, denial of

admission, or any disciplinary action by the Bars of the several states or of any state or federal court, provided that such sexual conduct occurs in private with other consenting persons of the age of legal consent. Sexual orientation, as used in this resolution, includes heterosexuality, homosexuality, and anbisexuality.

PROPONENT: NINTH CIRCUIT ABA/LSD

I

INTRODUCTION

Should homosexuals be allowed to practice law? Or, to phrase the question more accurately, "Should lawyers be permitted to be open and honest about their sexual orientation?" The latter phrasing more precisely poses the issue and the topic of this report since it cannot be seriously doubted that many lawyers and law students have had homosexual experiences or are exclusively homosexual. Based on the Kinsey research, estimates that "at least 37 percent of the American male population has at least one homosexual experience defined in terms of physical contact to the point of orgasm, between the beginning of adolescence and old age,"[1] and on the assumption that the members of the legal profession share the characteristics of the society as a whole, it is simply inconceivable that there are no homosexuals in law. A problem arises, however, because homosexuality is thought by many to be sick, sinful and wrong; in short, a character flaw. Applicants to the bar must face the fact that "statutes or court rules quite uniformly prescribe as a prerequisite for admission to practice law . . .the applicant be 'of good moral character.'"[2] Moreover, attorneys may be disciplined for conduct involving moral turpitude, unprofessional conduct, lack of good moral character, or for conduct evidencing an unfitness to practice law.[3] This report will explore the question of whether homosexuality per se, that is, without the involvement of minors, force, or public lewdness, is sufficient to justify denying admission to the bar or disciplining an attorney.

At the outset it should be noted that the requirement of good moral character is not being challenged. The Supreme Court has approved the standard, but has also noted the danger of abuse in application:

> 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 unusually 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 adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. . . .
>
> We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated--free to think, speak, and act as members of an Independent Bar.[4]

In a companion case to the one from which the above quotation was taken, the Court demanded that any prerequisite to admission to the bar meet a rational nexus test: "A State can require high standards

of qualification, such as good moral character or proficiency in its law, before it admits a.. applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[5]

Before embarking on a discussion of the issue of homosexuality and the good character requirement, it would be helpful to have some idea of how the standard has been employed. It is also necessary to make explicit this writer's belief that the good moral character requirement and the question of moral turpitude are simply two ways of raising the same issue--whether the conduct in question implies an unfitness to be a member of the legal profession. Although the burden shifts from the applicant for admission to the bar (to show that he is of good moral character) to the bar itself (to show that the attorney is unfit to be a member of the profession),[6] there are common questions concerning the relevance of certain acts to one's ability to practice law. Hence the following discussion of conduct which has been the basis for disciplinary proceedings against attorneys will help determine the limits of acceptable behavior of one seeking admission to the profession.

It should come as a surprise to no one that professional misconduct such as deceit or fraud upon the court, or attempting to bribe a judge or another official of the court is the kind of wrongdoing that the bar will not tolerate.[7] Similarly, a breach of a client's trust such as conversion or commingling of the funds of a client is the kind of misconduct warranting severe discipline.[8] Far more difficult are questions relating to the significance of non-professional conduct that reflects on the attorney's integrity. The Code of Professional Responsibility is, by itself, of little help in deliniating the bounds of acceptable conduct: "A lawyer shall not . . . (e)ngage in illegal conduct involving moral turpitude or engage in any other conduct that adversely reflects on his fitness to practice law."[9] The problem of whether conduct involves moral turpitude often arises in the wake of an attorney's criminal conviction. The difficulty in applying the standard can be perceived by examining the definition that has been formulated: "Moral turpitude is an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything 'done contrary to justice, honesty, modesty, and good morals.'"[10] The importance of a fair determination of whether an act involves moral turpitude is emphasized by the following observation:

> The common law rule, codified in a number of states, differentiates between felonies and misdemeanors to the extent of disbarring any attorney convicted of a felony but disbarring those convicted of misdemeanors only if "moral turpitude" is involved. While the distinction is salutary, it probably does not go far enough. By failing to differentiate between the various felonies, the attorney guilty of involuntary manslaughter, and the one who unwittingly commits statutory rape as well as the larcenist, burgler and embezzler are subject to disbarment.[11]

If this suggestion is followed and the states do apply the moral turpitude standard to felonies as well as to misdemeanors, the attorney

has at least a chance of retaining his license, but he must show that his conduct was not turpitudinous.

While a cataloging of the offenses involving moral turpitude is beyond the scope of this paper, Professor Pirsig has collected a sampling of cases illustrative of the kinds of acts that have been found to be turpitudinous: willful violation of the national bank laws; soliciting a bribe; participating in a conspiracy to bring uninspected milk into the city in violation of sanitation laws; obtaining money by giving worthless checks; and misrepresenting that cemetery lots were under perpetual care, when no provision had been made for such care.[12] Another offense which the state bars have had to classify concerns the failure to file, or the filing of false income tax returns. There are cases going both ways on the question of whether such acts involve moral turpitude.[13] The California Supreme Court has taken the interesting position that income tax problems do not necessarily involve fraud of intentional dishonesty for personal gain, hence a hearing must be held to determine whether the circumstances establish moral turpitude.[14]

A "circumstances test" similar to that employed by California courts in income tax cases seems to be carried over into the area of sexual misconduct by attorneys. A recent collection of cases[15] dealing with disciplining attorneys for sexual offenses can be examined from the premise that there are fundamentally two classes of problems. The first class has as its common element the involvement of minors, force, deceit, or public lewdness. The second class, while always involving allegedly immoral conduct, is limited to private adult consensual activity. While cases in the first group are treated quite summarily and quite harshly, usually resulting in indefinite or permanent disbarment, those in the second are examined carefully and rather sympathetically, and usually end with the imposition of a mild sanction, such as suspension for a short period of time, if a sanction is imposed at all. In the first class are cases of bigamy (in which the attorney knew of the legal disability to marry, but nevertheless entered a second marriage);[16] seduction under the promise of marriage;[17] intercourse with a minor stepdaughter;[18] operating a house of prostitution;[19] indecent assault upon a fifteen-year-old boy;[20] and having intercourse with a mentally deficient dwarf, resulting in her pregnancy,[21] In the second class of cases are adultery;[22] fornication;[23] and visiting a house of prostitution.[24]

Further evidence of the reluctance of the bar to deal with sex offenses except when aggravating circumstances are present is found in a study of one hundred fifteen reported cases of alleged lawyer misconduct in the state of Ohio from 1957 to 1966.[25] In one case an attorney was indicted for sodomy, but pleaded guilty to felonious assault.[26] A statistical table indicating which statutes were violated establishes that the charge did involve a minor.[27] The only other case that could conceivably involve a sex offense concerned a charge of felonious assault on a fifteen-year-old girl.[28] Although it is true that a number of charges of nonprofessional conduct were resolved informally, for example, by an attorney's choosing to turn in his license rather than face the embarrassment of facing disciplinary proceedings, it is significant that only two cases involving sexual misconduct were reported in

Ohio during the period of the study. As the authors of one text put it: "The bar sometimes seems less concerned with keeping its house clean that with the pretense that it is clean."[29]

The above cases, with the exception of the ones involving minors, did not concern homosexual behavior. Two recent decisions, however, have dealth with the issue. In The Florida Bar v. Kay,[30] an attorney was disbarred (although not permanently) for being a "party to a homosexual act with a consenting adult male in the public lavatory of Stranahan Park . . . ."[31] The Court's opinion is quite brief, and merely adopts the judgment of the Board of Governors of The Florida Bar. The concurring opinion of Chief Justice Ervin is quite thoughtful and deserves being quoted:

> While Respondent's act definitely affronts public conventions, I am concerned as to the extent of the authority of the Board of Governors of The Florida Bar under controlling concepts of due process to continue the discipline of Respondent since there is no showing in the record of a substantial nexus between his antisocial act, or its notoriety, or place of commission, and a manifest permanent inability on Respondent's part to live up to the professional responsibility and conduct required of an attorney. . . .
>
> The present record contains no evidence--scientific, medical, pathological or otherwise--suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar. Consequently, the present case leaves this issue unresolved by appropriate findings based on competent evidence. . . . Governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing there is a substantial connection between the private acts regulated and public interests and welfare.[32]

Another case was recently reported in a newspaper article[33] involving an attorney who was arrested on a sodomy charge and convicted of public lewdness in Florida in 1955. The attorney was expelled from the Florida Bar in the year of his conviction, but was seeking admission to the Bar of New York. Although he had passed the bar examination in 1971, had made a full disclosure of his past, and had obtained a favorable report from the Committee on Character and Fitness, he was denied admission by a 3-to-2 decision of a New York appellate court. The majority opinion reasoned that since consensual sodomy, the offense which caused the applicant's Florida disbarment, was a felony in New York in 1955, and would have resulted in his immediate disbarment in New York, "the applicant should be required to be readmitted in the first state before he may be admitted by us to the bar in our state."[34] Furthermore, the Court ventured the following opinion in dicta:

> Our Legislature still considers consensual sodomy an act of "deviate sexual intercourse" and, as such, a Class B misdemeanor. Accordingly, so long as this statute is in effect, homosexuality, which, in its fulfill-

ment, usually entails commission of such a statutorily proscribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar who proposes to pursue this way of life in disregard of the statute.[35]

Taking sharp issue with that position, the minority opinion responded:

> To us it seems clear that the social and moral climate of New York (and probably throughout the Western World) has in recent years changed dramatically with respect to homosexuality and consensual homosexual acts. Today they are viewed as no more indicative of bad character than heterosexuality and consensual heterosexual acts. In our opinion, an applicant for admission to the Bar of New York in 1972 cannot be considered unfit of lacking the requisite character to practice law.[36]

Recently the Ohio Board of Character and Fitness was called upon to decide the specific issue of whether homosexuality per se was sufficient to deny admission to the bar. The Ohio Board concluded that homosexuality was not sufficient to justify automatic denial of admission to the bar, but that each case was to be judged on its own merits.[37] Although a precedent has now been established in Ohio, several arguments were raised in the proceedings which merit exploration. The following discussion will focus on admission to the bar, but it should be noted that many of the problems will be common to other professions and occupations. Therefore the material dealing with the issues peculiar to the legal profession will follow a general examination of the treatment of homosexuality by recent court opinions.

II

Case Law on Homosexuality

A number of cases have come before the federal courts concerning homosexuals in government employment. As might be expected in such a controversial area, there appears to be a split in the circuits. The case that has attracted the most publicity is McConnell v. Anderson.[38] The plaintiff in the dispute was an open homosexual who had received a good deal of publicity from his attempt to obtain a license to marry another man. While that attempt to change the law was unsuccessful--the marriage license was denied--McConnell found himself in yet another imbroglio, this time to obtain his reinstatement as a librarian at the University of Minnesota. Although the district court accepted his argument that he was fired only because he was a homosexual, and without proof that his job performance was thereby impaired,[39] the Eight Circuit reversed on the ground that his university-employer had a right not have the views of its employees foisted upon it.[40]

The FifthCircuit has also responded unfavorably to the assertion that homosexuality is an insufficient basis to justify employment termination. In Anonymous v. Macy,[41] the Court summarily dismissed the contention that private homosexual acts do not effect the efficiency of government service.

The District of Columbia Circuit, on the other hand, has been quite receptive to claims that homosexuality per se is not adequate justification for the termination of one's employment.[42]

Because of the excellent discussion of the issues by Judge Bazelon in the case of Norton v. Macy,[43] that opinion will be quoted at lentgh.

> The Fifth Circuit of Appeals recently refused to consider a substantive attack on a dismissal for private homosexual conduct, apparently believing that it had no authority to review on the merits a Civil Service determination of unfitness. The courts have, it is true, consistently recognized that the Commission enjoys a wide discretion in determining what reasons may justify removal of a federal employee; but it is also clear that this discretion is not unlimited. The Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees; it forbids all dismissals which are arbitrary and capricious. These constitutional limits may be greater where, as here, the dismissal imposes a "badge of infamy," disqualifying the victim from any further Federal employment, damaging his prospects for private employment, and fixing upon him the stigma of an official defamation of character. . . .
>
> We are not prepared to say that the Commission could not reasonably find appellant's homosexual advance to be "immoral," "indecent," or "notoriously disgraceful" under dominant conventional norms. But the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. And whatever we may think of the Government's qualifications to act in loco parentis in this way, the statute precludes it from discharging protected employees except for a reason related to the efficiency of the service.[44]

The above quotation is significant not only because of its due process approach and its requirement of a nexus between the alleged wrongdoing and the nature of the employment, but also because of the recognized distinction between personal and official disapproval of unconventional behavior. A strikingly similar approach was employed in a case involving not employment, but naturalization. The opinion in In Re Labady[45] is directly relevant to the topic of this report since the question in the case was whether an open homosexual possessed the requisite good moral character specified in the naturalization statute.[46] Judge Mansfield was quite candid in making known his own feelings: "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."[47] However, the Court recognized that good moral character could not be determined by "popular vote," and instead concentrated on factors such as petitioner's reputation as a quiet, law-abiding person who was highly regarded by his employer and associates, and whose homosexual acts were with consenting adults in purely private situations. In granting the petition for naturalization, the Court concluded: "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."[48]

Another case which is particularly germane to the inquiry of this report is Morrison v. State Board of Education,[49] a case in which a public school teacher's life diploma was revoked because of immoral and unprofessional conduct and acts involving moral turpitude. The teacher successfully challenged the revocation on the ground that the school board had failed to produce evidence to establish a nexus between the admitted acts of the petitioner and his fitness to teach. In the course of the opinion, the California Supreme Court referred to one of its earlier decisions:

> In Hallinan v. Committee of Bar Examiners (1966) 65 Cal.2d 447, 55 Cal.Rptr. 228, 421 P.2d 76, for example, we considered the meaning of "acts of moral turpitude" as applied to an applicant for admission to practice law. . . . In that case the applicant had been arrested and convicted of a number of minor offenses in connection with peaceful demonstrations and civil rights "sit ins"; he had likewise been involved in a number of fistfights. We held that the applicant could not be denied admission to the bar. The nature of these acts, we ruled, "does not bear a direct relationship to petitioner's fitness to practice law. Virtually all of the admission and disciplinary cases in which we have upheld decisions of the State Bar to refuse to admit applicants or to disbar, suspend, or otherwise censure members of the bar have involved acts which bear upon the individual's manifest dishonesty and thereby provide a reasonable basis for the conclusion that the applicant or attorney cannot be relied upon to fulfill the moral obligations incumbent upon members of the legal profession. . . . Although petitioner's past behavior may not be praiseworthy it does not reflect upon his honesty and meracity nor does it show him unfit for the proper discharge of the duties of an attorney.[50]

The Morrison court found no evidence that the appellant had ever considered any physical or otherwise improper relationship with a student, had failed to impress upon his pupils the principles of morality set forth in the state education code, or had had problems in his relationship with his co-workers,[51] hence he was entitled to have his teaching diploma restored.

The California high court's specific enumeration of the concerns which could legitimately arise with regard to a homosexual teacher is indicative of the kind of approach that ought to be undertaken by the legal profession. This paper will now turn to an examination of the objections raised to allowing homosexuals to practice law.

III

The Homosexual Lawyer

It should be recalled that the scope of this report excludes certain kinds of conduct; namely, that involving minors, force, and public lewdness. Sexual activity, both homosexual and heterosexual, which impinges upon legitimate societal interests exposes the offender to the specified sanctions. Attorneys certainly ought to be subject to the same criminal penalties, and ought also be

subject to disciplinary proceedings if the act can properly be classified as one involving moral turpitude. Similarly, applicants for admission to the bar who have been guilty of child molestation, rape (homosexual or heterosexual), or some form of overt sexual behavior occuring in a public place which causes actual harm to another individual, must bear the burden of showing that such a history does not indicate something less than good moral character.

As for homosexuality per se and the practice of law, the objections seem to be threefold: (1) homosexuality usually entails the violation of the state statutes prohibiting deviate sexual intercourse, and thus indicates a flouting of the law; (2) homosexual lawyers are subject to blackmail and thus threaten the integrity of the administration of justice; and (3) homosexuality indicates a mental illness making the person emotionally unfit to be an attorney. Each of these contentions will be considered in the following discussion.

A. Flouting the Law

Although a number of objections are encompassed under the generic heading of "flouting the law," it should be noted that the threshhold question concerns a determination of what the applicable state law purports to forbid. Under the theory of Robinson v. California[53] homosexuality itself cannot be considered a crime, but the states have attempted to outlaw various homosexual acts. The modern trend, of course, is to decriminalize consenting adult sexual activity, homosexual as well as heterosexual. As early as 1955 the drafters of the Model Penal Code recommended such a revision of the law,[54] and as of this writing Illinois, Connecticut, Oregon, Colorado, Hawaii, Ohio, and Delaware have followed the suggestion of the American Law Institute, and New York, Kansas, Minnesota, and Utah have reduced private adult consensual homosexual acts from felonies to misdemeanors.[55] Moreover, in those states which still attach some criminal sanction to homosexual acts, not all activities would be within the prohibition of the law. For example, autoeroticism and mutual masturbation would probably not be violative of any state law.[56] Hence it would be erroneous to assume that a profession of homosexuality necessarily involves a violation of the law.

Furthermore, existing statutes may be narrowly interpreted to exclude applicability to non-public acts. For example, the Court in the Labady decision mentioned earlier in this paper examined the relevant New York law:

> We reject the Immigration and Naturalization Service's contention that petitioner's conduct has violated New York Penal Law 130.33 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. . . . We have found no prosecution of private homosexual acts under 130.33. One New York court has stated in dictum that the private conduct of an admitted homosexual was not violative of any criminal statute. . . . Many state statutes prohibiting homosexual conduct

> explicitly require "openness" or publicity. . . . 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.[57]

Finally, statutes purporting to regulate private adult consensual sexual behavior is subject to attack on constitutional grounds. For example, Griswold v. Connecticut[58] can be read to establish a zone of sexual privacy free from governmental regulation, absent some compelling state interest. A recent decision from a court in the District of Columbia invalidated that jurisdiction's statute against solicitation for prostitution, citing the right to privacy, freedom of speech and equal protection as its basis for doing so.[59] Further, although this writer has not obtained the citations to the cases mentioned, a recent issue of the Criminal Law Bulletin noted:

> Although the United States Supreme Court vacated the decision of a three-judge federal panel which found the Texas sodomy law unconstitutional (1971), it did not resolve the issue. More recently (December 17, 1971) the Florida Supreme Court has found that state's sodomy law unconstitutional. And in Washington, D. C. (May 24, 1972), a constitutional challenge was dismissed after plaintiffs and defendants agreed to a consent decree stating that the District's sodomy law "does not apply, and cannot be applied to private consensual sex acts involving adults. . . .[60]

B. Blackmail

The argument that homosexuals are subject to blackmail is not peculiar to members of the legal profession, but is it contended that the potential for extortion is more serious since a corrupt attorney is likely to impinge on the integrity of the administration of justice. It is true, of course, that judges, prosecutors, and attorneys generally are in strategic and sensitive positions in the legal system and in society as a whole. The fear of corruption is not caused by homosexuality, however, but by those who must keep their sexual activities secret. Ironically, the bar itself, if it insists upon treating homosexuality as unacceptable in the profession, must bear much of the blame for not allowing its homosexual members to make their sexual orientation known. If homosexual applicants to the bar and members of the bar could make their sexual inclination known without fear of reprisal or publicity, then the incentive to blackmailers would cease to exist, at least with respect to membership in the bar.

The homosexual attorney ought to have the option to disclose his orientation to potential employers, clients, and friends; hence it is essential that the information disclosed to the organized bar be kept confidential. Should an attorney choose not to make his homosexuality a matter of common knowledge, and should he be the victim of attempted extortion, he would be under an ethical obligation to disentangle himself from the situation.[61]

C. Psychiatric Unfitness

The final argument that can be raised against the admission of homosexuals to the practice of law is that a professed sexual

deviation evidences a mental illness affecting the capacity of the person to practice law. Mr. Justice Douglas quoted Sigmund Freud to make the following point:

> "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degredation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respected persons of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo da Vinci, etc.). It is a great injustice to prosecute homosexuality as a crime and cruelty too. If you do not believe me, read the books of Havelock Ellis."[62]

Today, however, psychiatrists and psychologists still seem divided over the causes and consequences of homosexuality. A recent bibliographical essay[63] notes that Dr. Lawrence J. Hatterer, author of Changing Homosexuality in the Male, is an exponent of the "sickness school" (meaning that he considers homosexuality to be a form of mental illness), but recommends psychoanalytic treatment only of those who are "troubled by" their homosexuality.[64] Psychiatrist Thomas Szasz, author of The Manufacture of Madness: A Comparative Study of the Inquisition and the Mental Health Movement, is of the view that the homosexual is a

> sexual heretic who is being persecuted and punished because of his non-conformity and because he is feared. Doctors, the author Szasz says, label him sick although homosexuality is not an illness, and join with lawmakers in assuming that it is their patriotic duty to rid society of such internal enemies by cure, expulsion, or involuntary hospitalization.[65]

Finally, it is noted that George Weinberg, a clinical psychologist and psychotherapist, and author of Society and the Healthy Homosexual,

> (1) charges his professional colleagues with refusing to examine critically the biases, traditions, and misinformation on which their views are based; (2) attacks as unnecessary, harmful, and cruel such treatment techniques as electric shock, emitic drugs, brain surgery, and desensitization; and (3) criticizes the studies many "experts" have published as too often technically and statistically incompetent, inconsistent, and devious. It is Weinberg's thesis that homosexuals can be, and often are, just as happy, healthy, and well-adjusted as heterosexuals. He gives special attention to "homophobia"--a harmful fear and irrational prejudice of homosexual persons and attitudes. "I would never consider a patient healthy," he writes, "unless he had overcome his prejudice against homosexuality."[66]

No claim is made that the foregoing excerpts are representative of modern thought in the mental health field, but there does appear to be sufficient controversy in the area to make it exceedingly risky to generalize about homosexuality. Certainly it would be improper for the bar to simply indulge in a "homophobic prejudice" by endorsing a policy of prohibiting the admission of homosexuals to the profession.

IV

Conclusion

Perhaps the importance of the bar's taking a strong position on the issue of homosexuality can be emphasized by a brief episode in the life of a would be lawyer, related by the authors of a monograph prepared in opposition to a sexual solicitation provision in the new Federal Criminal Code:

> A very close friend of one of the writers of this memorandum--a young man, homosexual, who had graduated from Yale with high honours and had then subsequently graduated from the Harvard Law School--but had not yet been admitted to the bar--was arrested several years ago while sitting on a park bench in a Washington, D.C. park. He had been engaged in private conversation for almost half an hour with a vice-squad officer of whose identity he had been unaware. The conversation finally came around to matters sexual, and victim invited the officer to go to his hotel room for homosexual purposes. He was immediately seized and placed under arrest, a second officer emerging out of the nearby bushes to assist in this purpose. The defendant was charged with "making an indecent proposal," the District of Columbia's form of solicitation statute. Though he engaged a lawyer, he was persuaded to plead guilty and, although sentence was suspended because he had no previous record, the defendant was never able to gain admission to his state bar because of this "morals" conviction.[67]

The point of this story is simply to point out the tremendous danger that an arbitrary classification can present in terms of talent lost to the legal profession. There is no suggestion that all homosexuals who would seek admission to the bar would be brilliant attorneys, just as there is no suggestion that all homosexual artists have the capacity to be a Michelangelo or a Leonardo da Vinci. Rather, the bar should look to the examples of historical stupidity of allowing social prejudices to be frozen into legal forms; classes of people discriminated against for centuries on the basis of race and religion come immediately to mind. Once again the bar has the opportunity to exercise moral leadership by knocking down the barriers to minority group members, homosexuals, in the legal profession.

PROPONENT: NINTH CIRCUIT ABA/LSD

REPORT: Researched and written by
Thomas F. Coleman (Loyola University of Los Angeles, School of Law).

V

Footnotes

1. A. Kinsey, W. Pomeroy & C. Martin; Sexual Behavior in the Human Male 623 (1948).
2. V. Countryman & T. Finman; The Lawyer in Modern Society 740 (1966) hereinafter cited as Countryman & Finman.
3. See generally, Note, Disbarment: Non-Professional Conduct Demonstration Unfitness to Practice; 43 Cornell L.Q. 489 (1958).
4. Konigsberg v. State Bar of California, 353 U.S. 252, 262-73 (1957).
5. Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, 239 (1957).
6. In Re Hallinan, 65 Cal.2d 447, 451-53, 421 P.2d 76, 80-81 (1966).
7. ABA Code of Professional Responsibility DR 1-102(A)(5): "A lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice." See also Countryman & Finman, supra, note 2, at 804-05.
8. O. Schroeder, Jr.; Lawyer Discipline: The Ohio Story (1967) hereinafter cited as Schroeder reports that more disciplinary proceedings were based on the mishandling of clients' funds than any other offense.
9. ABA Code of Professional Responsibility DR 1-102(A)(3) and (6).
10. In Re Wallace, 323 Mo. 203, 19 S.W.2d 625 (1929).
11. Countryman & Finman, supra note 2, at 808-09.
12. M. Pirsig; Cases and Materials on the Standards of the Legal Profession 167 (1957).
13. Compare Rheb v. Bar Ass'n of Baltimore City, 186 Md. 200, 46 A.2d 289 (1946) with Committee on Legal Ethics of the West Virginia State Bar v. Sherr, 149 W.Va 721, 143 S.E.2d 141 (1965).
14. In Re Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954).
15. Annot. 36 A.L.R.3d 735 (1971).
16. People ex rel. Healy v. Propper, 220 Ill. 455, 77 N.E. 208 (1906); In Re Kelley, 237 App. Div. 673, 266 NYS 677 (1933); The Florida Bar v. Smith, 195 So. 2d 852. (fla. 1967).
17. In Re Wallace, 323 Mo. 203, 19 S.W.2d 625 (1929).
18. The Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968).
19. In Re March, 42 Utah 186, 129 P. 411 (1913); In Re Okin, 272 App. Div. 607, 73 NYS2d 861 (1947); In Re Kosher, 61 Wash.2d 206, 377 P.2d 988 (1963).
20. In Re Van Wyck, 207 Minn. 145, 290 N.W. 227 (1940).
21. In Re Hicks, 163 Okla. 29, 20 P.2d 896 (1933).
22. Grievance Committee of Hartford County Bar v. Broder, 112, Conn. 263, 152 A. 292 (1930); In Re Faubion, 101 S.W.2d 103 (mo. App. 1937).
23. In Re H T , 2 Pennyp. 84, 39 Phila. Leg. Int. 356, 14 Lanc. Bar 127 (1882); In Re Isserman, 6 N.J. Misc. 146, 140 A. 253 (1928).
24. People ex rel. Black v. Smith, 290 Ill. 241, 124 N.E. 807 (1919).
25. Schroeder, supra, note 8.
26. Id at 32.
27. Id. at 122.
28. Id. at 48, 122.
29. Countryman & Finman, supra note 2, at 809.
30. 232 So. 2d 378 (Fla. 1970).

31. Id. at 379.
32. Id. at 379-81.
33. N.Y. Times, Jan. 10, 1973, at , col. ( ).
34. Id.
35. Id.
36. Id.
37. The opinion of the Board of Commissioners on Character and Fitness was not available to this writer during the drafting of this paper.
38. 316 F. Supp. 809 (D. Minn. 1970), rev'd 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).
39 316 F. Supp. 809 (D. Minn. 1970).
40. 451 F.2d 193 (8th Cir. 1971).
41. 398 F.2d 317 (5th Cir. 1968), cert. denied, 393 U.S. 1041 1969).
42. See Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965); Scott v. Macy, 402 F.2d 644 (D.C. Cir. 1969); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971). See also Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L.Rev. 1738 (1969).
43. 417 F.2d 1161 (D.C. Cir. 1969).
44. Id. at 1163-68 (footnotes omitted).
45. 326 F. Supp. 924 (S.D.N.Y. 1971).
46. 8 U.S.C. 1427 (1970).
47. In Re Labady, 326 F. Supp. 924, 927 (S.D.N.Y. 1971).
48. Id. at 930. It should be noted that the Court decided that the case of Boutilier v. Immigration and Naturalization Service, 387 U.S. 118 (1967) did not control in the principal case since the Court in Boutilier merely decided that Congress had intended the phrase "psychopathic personality" to include homosexuals. Id. at 926 n.2.
49. 1 Cal.3d 214, 82 Cal.Rptr. 175, 461 P.2d 375 (1969).
50. Id. at 379-80 (emphasis in the original).
51. Id. at 392.
52. See 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 (1966).
53. 370 U.S. 660 (1962).
54. Model Penal Code, 207.5, Comment (Tent. Draft No. 4, 1955).
55. Parker; The Homosexual in American Society Today: The Homophile-Gay Liberation Movement, 8 Crim. L. Bull. 692, 694 (1972) hereinafter cited as Liberation Movement.
56. See Special Student Contribution; Homosexuality and the Law--An Overview, 17 N.Y.U. L. Forum 273, 280-87 (1971) hereinafter cited as Special Student Contribution.
57. In Re Labady, 326 F. Supp. 924, 928 (1971) (emphasis in the original).
60. Liberation Movement, supra, note 55, at 694-95. For a greater development of the constitutional arguments see Special Student Contribution, supra note 56 at 295-99.
58. 381 U.D. 479 (1965).
59. United States v. Moses, Crim. Case No 17778-72 (D.C. Sup. Ct., Nov. 3, 1972).
61. See supra note 7.
62. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 130 n.3 (1967) (Douglas, J., dissenting).

63. W. Parker; Homosexuality--A Bibliographical Essay, 8 Crim. L. Bull. 716 (1972).
64. Id. at 716-17.
65. Id. at 718.
66. Id.
67. M. Wulf, S. Coxe & A. Warner; Monograph, at 8-9 (unpublished).