THE SUPREME COURT AND GAY RIGHTS
An Historical Survey

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I. Introduction

The Supreme Court is quite aware that in recent years homosexuality and gay rights have become issues of public concern. Although its future decisions in this area may prove critical, the Court up to now has played a rather minor role in the on-going debate. As a consequence, it has been in the arena of state courts and federal district and circuit courts that the ever-increasing number of cases dealing with homosexuality and gay rights have been processed.

This paper will be limited to a discussion of those cases in which the Supreme Court has chosen to become involved, whether directly by agreeing to accept a case for review or indirectly by refusing to do so--a process known as granting or denying certiorari. When a case is denied certiorari, it usually means the Court is permitting the decision of a lower court to stand. Of the 58 cases coming to the Court's official attention, certiorari has been granted 18 times and denied 40 times. In eleven of the seventeen cases the Court has issued written opinions, sometimes quite brief.

These cases will be discussed according to their subject matter and the issues raised. For convenience, most cases are simply identified by the name of the original plaintiff, with the number following each name referring to the full legal citation given in the attached Table of Cases. For the few other Supreme Court cases mentioned, the full legal citation is indicated alongside the case name. Although homosexuals and the media use the terms "gay" and "gay rights," the law and court decisions, with but rare exceptions, do not.

Following the discussion of the cases, the major constitutional issues pertinent to the debate over current laws and policies dealing with homosexuality

will be summarized, and a few observations and suggestions will be made about the present situation and the outlook for the future.

II. State Sodomy and Related Statutes

"Sodomy" is the generic legal term used to refer not only to anal intercourse but also to such offenses as crime against nature, unnatural sexual acts, deviate sexual conduct, and the like. State sodomy laws have had a long and harsh history. Serious legal challenges to these laws is a quite recent development. Most such challenges began to appear after a number of states in the early '70s repealed or liberalized their laws dealing with private, consensual, adult sexual conduct as was recommended by the American Law Institute in its Model Penal Code issued in 1965. Some of the decisions of the "Warren" Court which placed increasing emphasis on individual rights may also have encouraged these challenges. However, these court challenges have not been very successful .

In the '70s the Supreme Court upheld the constitutionality of state sodomy statutes seven time. In 1970 in Buchanan (#1) the Court vacated the decision of a federal district court in Texas which had found the Texas felony statute unconstitutional. Two years later, in reversing the decision of the 5th Circuit Court, the Supreme Court found Florida's statute constitutional at the time it was applied in Stone (#2). In the same year, in a related matter, the Court in Riley (#3) let stand the decision of the District of Columbia court which had upheld Riley's conviction for soliciting a police decoy to commit sodomy.

In 1976 the Supreme Court let stand the sodomy laws of Arizona, Mississippi, and North Carolina--see Bateman, Mays, and Enslin, # 4, 5, and 6. In the same year it affirmed the decision of a Virginia district court in Doe (#7) which specifically held that the state's sodomy law does not violate the 1st, 5th, 8th, or 14th Amendments to the Constitution. This Virginia case proved to be of great precedential importance.

In 1980 the New York Court of Appeals in Onofre (#8) found the state's consensual sodomy law unconstitutional as a violation of personal privacy and the Constitution's equal protection clause. By refusing to accept the case on appeal, the Supreme Court decided not to overturn that decision. Similarly, three years later, after first granting and then withdrawing certiorari, the Court also let stand the decision of the same court in Uplinger (#9) which had found the state's law prohibiting loitering in a public place to solicit a homosexual act unconstitutional. But this seeming indifference was soon to end.

For the constitutionality of sodomy statutes 1986 proved a decisive year. In June the Court delivered its landmark decision in Hardwick (#10). In an opinion written by Justice White the Court majority (5-4) held that under the due process clause of the 5th Amendment homosexuals have no "fundamental" constitutional right to engage in acts of homosexual sodomy, not even in the privacy of their homes. This decision has had devastating consequences for the gay rights movement and for any issue involving homosexuality which comes before the courts. It has since been cited hundreds and hundreds of times in other cases as binding precedent. Although widely criticized as wrongly decided, unnecessarily harsh, and highly prejudicial, there seems to be little likelihood that this decision will soon be reversed or modified. Some critics see the Hardwick decision as misguided as the Supreme Court's decisions in the Dred Scott and Plessy cases of 1857 and 1896.

June's Hardwick decision was quickly followed in July and October by the Court's rejection of challenges to the sodomy laws of Oklahoma and Texas--see Post and Baker, #11 and 12. The holdings in these two cases are especially interesting because the reasoning of the lower court so closely approached the imminent decision in Hardwick. The decision in Post had found the Oklahoma statute unconstitutional insofar as it prohibited abnormal sexual acts between

consenting adult heterosexuals in private but had refrained from extending comparable privacy rights to homosexuals. And in Baker the new Texas misdemeanor "homosexual acts" statute had been found constitutional because homosexuals do not have privacy rights and because the Texas law was directed at certain conduct and not at a class of people.

III. Employment

A. Federal Employment

The Supreme Court has never issued a formal decision in a case involving the employment of homosexuals by the federal government. Between 1961 and 1970 it had several opportunities to do so. Instead, it refused to accept appeals in the five following cases: Shields (#13), an unreported case involving dismissal for pre-employment abnormal sexual acts and post-employment association with known homosexuals; Caplan, Anonymous, and Schlegel (#14, 15, and 16), cases which involved dismissal for alleged homosexual acts; and Dew (#17), a case which involved the dismissal of an air traffic controller for homosexual acts and for smoking marijuana. In each of these cases, lower courts had upheld the dismissals and had absolved the Civil Service Commission of acting in an arbitrary and capricious manner. By not intervening the Supreme Court chose to leave these decisions and the Civil Service policy in place.

For years the Civil Service Commission's policy was that homosexuals would not be hired to fill federal positions and that employees found to be homosexual would be dismissed. The two major assumptions underlying this policy were (a) that homosexual acts, whether alleged or admitted and whether committed before or after employment, constitute illegal and unacceptable acts of immorality and indecency and (b) that because most Americans strongly disapprove of homosexuality, the employment of such persons brings government service into "public contempt" and adversely affects the morale and efficiency of the office or department in which they work.

However, in the early '70s the Civil Service Commission significantly relaxed its prohibition against employing homosexuals. This change came about after the Circuit Court for the District of Columbia ruled against the inflexibility of the Commission's policy in Norton v. Macy (417 F. 2d 1161, 1969) and after the Carter administration made it known that it found the court's decision acceptable. Later, in 1977, in Singer (#18), in an unwritten decision, the Supreme Court directed the Commission to reconsider its dismissal of a homosexual employee who worked in the Seattle office of the Equal Employment Opportunity Commission for openly and publicly "flaunting" his homosexuality. The Court indicated that it was motivated to set aside the decision of the 9th Circuit Court upholding the dismissal by a written statement the Solicitor General had filed with the Court. From this time on, except for jobs in federal agencies concerned with national security, homosexuality per se has not been a bar to federal employment.

B. Security Clearances

Many cases involving homosexuals and national security have come before the federal courts. The courts have consistently agreed that denying security clearances to homosexuals is justified because they can properly be seen as security risks. Only two such cases have reached the Supreme Court. In Adams (#19) the Court in 1970 let stand the revocation of the security clearance of an electronics technician--a "practicing" homosexual--working in private industry. And in Doe (#20) the Court in 1988, in an opinion written by Justice White, held that because an administrative hearing is not required before dismissal, Doe's loss of his job as a cryptographic technician in the National Security Agency stands. In actual practice, however, the federal government for some years has issued security clearances to homosexuals on a case by case basis.

Very recently, by the end of 1993, even such security agencies as the Central Intelligence Agency and the Federal Bureau of Investigation have indicated that they do not now have an absolute ban prohibiting the employment of homosexuals. With regard to the CIA, this was the conclusion that emerged at the end of Doe's (#21) eight year odyssey through the courts. In this case the Circuit Court of the District of Columbia finally concluded that the CIA does not have a "blanket" policy against hiring homosexuals and that its dismissal of Doe, an admitted homosexual, was for reasons of national security. By refusing to accept Doe's appeal (#22), the Supreme Court let the Circuit Court's decision stand. With regard to the FBI, in an out-of-court settlement in December 1993 to the Buttino class action suit (not yet reported), it agreed to draw up guidelines for the employment of homosexuals. Thus far, the Supreme Court has had no involvement in the Buttino case.

In determining and changing the federal government's policies on the employment of homosexuals and the related security clearance issue, the Supreme Court has played a very minor role.

C. Local Government Employment

VanOotenghem (#23) is the only case found in this category. In refusing to hear an appeal, the Supreme Court let stand the decision of the 5th Circuit Court ordering the reinstatement of VanOotenghem, the assistant treasurer of a county in Texas, who had been dismissed after he announced to his employer both his homosexuality and his intention "to speak publicly" on homosexual issues. His was a Pyrrhic victory. By the time the decision was announced a new County Treasurer had been elected and the new Treasurer was free to choose his own assistant. But, for the future, a clear precedent had been set.

D. Professionals and Employment

Two cases, dating back to 1970 and 1972 fall into this category--Kay and

McConnell (#24 and 25). By denying certiorari to these cases the Supreme Court let stand the decisions of the Supreme Courts of Florida and Minnesota. In Kay the Florida court upheld the Florida Bar's dismissal of a lawyer who had been convicted of committing a homosexual offense. In McConnell the Minnesota court, reversing the decision of a lower court, upheld the University of Minnesota's refusal to hire McConnell as a librarian because he sought a license to marry another man and to "thereby foist his unconventional views on his employer." Not many cases are likely to be filed in this area inasmuch as many professional organizations and groups, including bar associations, have gone on record as opposed to the exclusion or removal professionals who are homosexual.

E. Public School Teachers

By refusing to review the cases of the six teachers mentioned in this paragraph, the Supreme Court has not only upheld their dismissal but has also, at least indirectly, approved the dismissal of homosexual teachers in the public schools anywhere in this country. Calderon (#26), a teacher in California was dismissed even though he was acquitted of the charge of oral copulation. Burton (#27), an Oregon teacher, was dismissed after it was learned that she was a lesbian. Acanfora (#28), a Maryland teacher, was dismissed in part because he took his case to the public when he talked to reporters and appeared on television programs. The Maryland court held that his public statements on homosexuality were not protected by the 1st Amendment. Gish (#29) was denied reinstatement as a teacher in New Jersey because he refused to undergo psychiatric examination and because his open support of gay rights "displayed evidence of deviation from normal mental health which might affect his ability to teach, discipline and associate with students." Gaylord (#30) was dismissed from his teaching position in the state of Washington for immoral conduct and because society's negative reaction to homosexuality "impairs" his ability to teach.

Rowland (#31), an untenured teacher in southern Ohio, was dismissed after admitting to her colleagues that she was a bisexual. In her suit against the school district a jury decided in her favor. On appeal, however, the District Court and the 6th Circuit Court ruled against her, and the Supreme Court let her dismissal stand.

These six cases, which date between 1973 and 1985, have set a clear precedent for the dismissal of homosexual teachers in the public schools should their employers desire to do so. These decisions also make it clear that the Supreme Court's important ruling in Pickering v. Board of Education (391 U.S. 563) does not necessarily apply to homosexual teachers like Acanfora and Gish. The "Pickering Doctrine," enunciated by the Court in 1963, holds that public school teachers--and by extension other public employees--may not be dismissed for speaking out on issues of public importance.

Without a written opinion, the Supreme Court by a 4-4 vote, in 1985, affirmed the decision of the 10th Circuit Court in the National Gay Task Force case (#32). The Oklahoma law at issue calls for the dismissal of public school teachers (1) for "public homosexual activity"--meaning a violation of the state's crime against nature statute if committed with a person of the same sex, if indiscreet, and if not done in private--and (2) for "public homosexual conduct"--meaning advocating, encouraging, promoting, etc., "public or private homosexual activity," The Circuit Court upheld the district court's finding that the section of the law referring to "public homosexual activity" is not an invasion of privacy and is not impermissibly vague. But the Circuit Court, reversing the district court's ruling on the section of the law referring to "public homosexual conduct," declared that portion of the law unconstitutional as overbroad and a violation of 1st Amendment rights. The Supreme Court affirmed both parts of the Circuit Court's decision.

The practical local significance of this case is unclear. For example, the courts did not resolve the conflict between the law insofar as it calls for the dismissal of public school teachers who engage in indiscreet and public homosexual acts and the Oklahoma Criminal Code which calls for incarceration of "any person" convicted of acts constituting the crime against nature without regard to the sex of the persons involved and without regard to whether the acts were committed in public or private. Despite the Circuit Court's adherence to the Pickering Doctrine, it remains to be seen just how free the state's public school teachers, especially homosexual teachers, are to speak out on homosexual issues.

IV. Gay Student University Groups

A dozen or so cases concerned with the rights of gay student groups at American colleges and universities have made their way through the federal court system. Overwhelmingly, but not without exception, the courts have supported the 1st Amendment rights of gay students to organize and to express their views and have ordered campus officials to grant the groups the recognition requested. Of these cases the Supreme Court has become involved in three.

By denying certiorari the Court let stand the decision of the 5th Circuit Court which upheld the right of the editor of a student newspaper at the University of Mississippi to refuse to print an advertisement submitted by the Mississippi Gay Alliance (#33) on the grounds that the Alliance was an "off-campus cell of homosexuals" and that the University Administration had had nothing to do with the rejection of the ad.

Over the strong dissent of Justice Rehnquist, the Court refused to hear the University of Missouri's Gay Lib case (#34) with the result that the 8th Circuit Court's order that the University recognize the gay student group prevailed. Rehnquist remarked in his dissent that although courts are reluctant to become

"embroiled" in "a controversial area of social policy," once a case comes into court judges must make a decision. The Supreme Court, he argued, should hear the case because the attitudes of the student group could "lead directly to violations of a concededly valid state criminal law"--i.e., Missouri's crime against nature statute.

Twice the case involving Gay Student Services (#35 and 36) and Texas Agricultural and Mechanical University has sought the Supreme Court's attention. Initially the Court let stand the decision of the 5th Circuit Court that the University should recognize the student group as an official campus organization. Five years later, in 1985, the Court simply dismissed the University's latest appeal.

V. Military Discharge of Homosexuals

Since World War II the military has had a general policy that homosexuals are not eligible for military service and that such persons are to be discharged. Over the years this policy has been enforced with varying degrees of strictness. By 1980 a number of military discharge cases were proceeding through federal district and circuit courts potentially en route to the Supreme Court. In such cases as Berg, Matlovich, and BenShalom (#37, 38, and 39) judges were beginning to closely question the military on its policy, especially asking what are the "exceptional" conditions under which a homosexual service person may be retained. Rather than having to answer this question in court, the Pentagon changed to a "no exceptions" policy which went into effect in 1981. In recent years, seven discharge cases have appealed for a hearing by the Supreme Court. All of them have been denied, and the Court has given no reason for refusing to hear arguments on an issue of some importance.

Three of these cases received little public attention and need but brief mention here. Hatheway (#40) was discharged after being convicted of sodomy

by a court-martial. Woodward (#41) was discharged for admitting homosexual tendencies and for associating with enlisted men awaiting discharge for homosexuality. Schowengerdt (#42), an engineer officer in the Naval Reserve, was discharged as a bisexual. The Supreme Court's refusal to hear these cases was announced in 1981, 1989 and 1992 respectively.

The other four cases have received considerable public attention. In Beller (#43), a consolidation of three separate cases, the Supreme Court in 1981 let stand a 9th Circuit Court decision that found the military's absolute ban on homosexuals constitutional. However, the Circuit Court remarked: "Upholding the challenged regulations as constitutional is distinct from a statement that they are wise." This decision was written by Judge, now Justice, Kennedy.

The Watkins case (#44) is unique in that the Army knew of Watkins' homosexuality at his first enlistment in 1976 and at his subsequent reenlistments--and so apparently did the officers and enlisted personnel with whom he served. This case spent seven years proceeding through the federal courts. Along the way, the military's ban was found both constitutional and unconstitutional, and homosexuals were declared both a suspect and not a suspect class for equal protection purposes. Finally, in 1990, the 9th Circuit Court en banc ordered the earlier decisions withdrawn and simply concluded: "This is a case where equity cries out and demands that the Army be estopped from refusing to reenlist Watkins." The Supreme Court let the estoppel order stand. The impact of this decision was muted when a year later in an out-of-court settlement Watkins agreed not to seek reenlistment.

The BenShalom case (#45) took ten years to proceed through the federal courts. Initially a district court found her dismissal for admitting she is a lesbian violated her 1st Amendment rights and her right to privacy, and the 7th Circuit Court ordered her reinstated. However, in 1990, after a rehearing of

the case, the same Circuit Court en banc reversed the earlier decision and concluded that BenShalom cannot remain in the Army "if she declares herself to be a lesbian." The Supreme Court let the Circuit Court's en banc ruling stand.

Pruitt (#46), a Captain in the Army Reserves and a minister, was discharged after the Army learned via a newspaper article that she was a lesbian. Thereafter, in 1983, she filed suit for reinstatement. After initially being dismissed, her suit was reinstated. The 9th Circuit Court, in 1992, amending its decision of the preceding year and noting that the Army discharges homosexuals for their status and not just for homosexual conduct, ordered the case to go to trial. This means the Army must now prove that its policy is rationally related to a legitimate government goal and is not based on prejudice. By not accepting the case for review, the Supreme Court is permitting this case to proceed to trial.

By letting the decisions of the lower courts stand in these cases and by failing to state its own views, the Supreme Court for the moment appears to be indirectly endorsing the following propositions: (a) the military's absolute ban against homosexuals is constitutional as a rational means of achieving a legitimate government goal, (b) homosexuals cannot qualify as a suspect or quasi-suspect class meriting heightened scrutiny under the equal protection clause of the 14th Amendment, (c) a homosexual in the military cannot claim a right under the 1st Amendment to state publicly his or her sexual orientation, (d) homosexuals cannot claim protection under the due process clauses of the 5th and 14th Amendments, and (e) excellence of service and behavior or the prejudice of others are not factors courts need to consider in dealing with military policies and homosexual discharges. Only two cases do not fit this pattern--Watkins and Pruitt. The Watkins case involved a situation not likely to occur again, and the Pruitt case may suggest that the Supreme Court feels the time to

resolve the issue of homosexuals in the military is approaching.

Slowly, but more and more openly, dissatisfaction within the judicial community is surfacing. For some years articles in law journals have been critical of present policies, and some lower court judges have expressed their frustration with the precedents by which they are bound. Far more important, in 1992 and 1993, several recent lower court decisions have gone beyond questioning the wisdom of the military policy to declaring it unconstitutional and based on illegitimate prejudice. Three such cases deserve brief mention.

A federal district court in California in Meinhold (#47) found the Navy's regulations requiring the discharge of homosexuals a bill of attainder and a violation of the 5th Amendment's due process clause. In reacting to open resistance by the military, the same court expanded its ruling (#48) to apply throughout the United States and not just to its own area of jurisdiction. In Steffan (#49) the District of Columbia ~~District~~ Circuit Court found the policy under which Steffan had been discharged unconstitutional, based on prejudice, and serving no legitimate purpose. Similarly in Dahl (#50) a federal district court in California found the military exclusion policy a violation of the equal protection clause and without a rational basis. Other cases--Richtenberg, Elzie, Selland, Phillips, and Paniccia to name a few--are now in their early stages.

The reaction of the executive and legislative branches to these three decisions has been immediate and hostile. In the Meinhold case the Supreme Court, at the request of the Solicitor General, in October 1993, stayed the judge's decision (#51) insofar as it pertains to anyone but Meinhold until the 9th Circuit Court, before which the case is now on appeal, has rendered its decision. The stay has the effect of permitting the Defense Department to implement its new "Don't Ask, Don't Tell" policy. The Steffan decision has been withdrawn by vote of the full District of Columbia Circuit Court (#52) and will now be reheard

by the same court en banc. No significant action has yet been taken regarding the Dahl case. Very likely, depending upon the decisions of the two circuit courts involved, the Supreme Court may for the first time hear and decide a case involving the military's exclusionary and discharge policy.

If the Supreme Court accepts one or more of these cases for review, it very likely will uphold the constitutionality of both the principle of the policy and its method of enforcement for the following reasons:

1st--The Supreme Court has a long tradition of deferring to the military in military matters. In Goldman v. Weinberger (475 U.S. 503, 1986) the Court said "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." In Orloff v. Willoughby (345 U.S. 93, 1953) the Court observed that orderly government requires the judiciary to be "scrupulous" in not interfering in legitimate military matters. These are but two such cases.

2d--If the Supreme Court had not approved of the many statements of deference made by the lower courts in the cases discussed in this paper, it could have expressed its reservations or disapproval in a variety of ways. It did not do so.

3d--The Supreme Court also has a long tradition of deferring to Congress when it legislates on military matters. In Parker v. Levy (417 U.S. 733, 1974) the Court observed that Congress is permitted to legislate "in greater breadth and flexibility" when prescribing rules for the military than when legislating for civilian society. In Rostker v. Goldberg (453 U.S. 57, 1981) the Court said judicial deference to Congress is "at its apogee" when Congress passes laws concerned with raising and supporting armies and "makes rules and regulations for their governance." In the same case, the Court also said deference is customary when in passing legislation Congress has specifically considered the constitu-

tionality of the proposed act. The legislation passed by Congress in 1993 which dictates the precise policy and actions the military must henceforth follow and which states the specific constitutional grounds on which the act is based would seem to fulfill the requirements set down by the Supreme Court.

In short, well established precedent and new Congressional legislation seem to assure the constitutionality of the military's exclusionary policy and the continued discharge of homosexuals from the armed forces.

VI. Immigration and Naturalization

In 1952 Congress passed the McCarran Act which contained a provision prohibiting the entry into the United States of persons "afflicted with psychopathic personality"--a term intended to include "homosexuals and other sex perverts." Fleuti (#53), a homosexual alien from Switzerland, was detained by immigration authorities upon his return from an afternoon visit to Mexico. Subsequently he was ordered deported and appealed. The 9th Circuit Court found the term "psychopathic personality" void for vagueness and held the order of deportation deprived Fleuti of due process. After hearing arguments, the Supreme Court in 1963, in an opinion written by Justice Goldberg, vacated the decision and remanded the case. It was not necessary, he wrote, to consider the constitutional issue. It was only necessary to determine whether Fleuti's visit of a few hours constituted an "intent to depart" on his part--an apparently dubious proposition.

In 1966 the Supreme Court had another opportunity to consider the McCarran Act. In Boutilier (#54), in an opinion written by Justice Clark, the Court upheld the deportation of Boutilier, a homosexual immigrant from Canada, as a person "afflicted with psychopathic personality" at the time of his entry into the United States. The term "psychopathic personality," Clark wrote, is not void for vagueness and is not repugnant to 5th Amendment due process.

Between 1970 and 1982, three more cases on this subject came to the Supreme Court's attention--Lavoie, Garcia-Jaramillo, and Adams (#55, 56, and 57). By denying certiorari, the Court left standing the 9th Circuit Court's decisions upholding the deportation of these men as homosexual aliens.

In the fall of 1990, however, Congress revised the immigration and naturalization law. As a result, homosexuals are no longer listed as persons to be excluded and deported on the basis of their sexual orientation.

VII. Miscellaneous Cases

Eleven additional cases pertaining to homosexuals and gay rights have sought review by the Supreme Court. Four of them were accepted, and written opinions were issued. In two cases involving pictorial erotica--Manual Enterprises and Mishkin (#58 and 59)--the decisions differed. In the former, Justice Harlan, writing for the Court in 1962, found certain magazines containing photographs of male nudes not obscene; and in the latter, Justice Brennan, writing for the Court in 1966, found certain magazines containing photographs appealing to both homosexuals and heterosexuals obscene. In a brief written opinion by Justice Powell in 1987 in the San Francisco Arts and Athletics case (#60), the Court upheld a lower court ruling that the United States Olympic Committee had the right to prevent a gay sports group from using the term "Olympic" in referring to their Gay Games festival. The decision, wrote Powell, did not violate anyone's 1st and 5th Amendment rights. In Jacobson (#61) the Supreme Court in 1992 reversed the conviction of a Nebraska man in his sixties who had ordered and received through the United States mail magazines containing photographs of naked young boys. Writing for the Court, Justice White found that Jacobson did not have the required predisposition to receive child pornography in view of the two and a half year effort of postal inspectors to get him to commit the offense.

In 1962 in Beard (#62) the Supreme Court, in an unwritten per curiam de-

cision dismissing the complaint as premature, vacated a District of Columbia district court's grant of summary judgment in favor of the Army which intended to remove from its active list and discharge an officer who had been arrested for soliciting a police decoy to commit an illegal sexual act.

In six additional cases, dating between 1958 and 1992, and each dealing with a different subject, the Supreme Court refused formal hearings. In Grant (#63), the Court left in place the refusal of the Ohio Secretary of State to accept Articles of Incorporation for an organization promoting the acceptance of homosexuality. In Francisco Enterprises, Inc. (#64), the 9th Circuit Court's decision upholding the revocation of the liquor license of an establishment frequented by male homosexuals was sustained. In Curran (#65), the Court dismissed an appeal in the case decided by a California appeals court which had found that the dismissal of Curran, an admitted homosexual, from the Boy Scouts violated the state's Unruh Civil Rights Act. In Olivieri (#66), the Supreme Court let stand the decision of the 2d Circuit Court which had affirmed the right of Dignity, a gay Catholic religious group, to demonstrate on the street in front of St. Patrick's Cathedral in New York City during a Gay Pride Parade. In McGann (#67), the Court let stand the decision of the 5th Circuit Court which upheld the right of an employer to change the coverage of the company's health plan, especially the amount of monetary coverage for an employee with AIDS. And last, in One, Inc. (#68), the first homosexual or gay rights case which it accepted, the Supreme Court without a hearing and without comment reversed the 9th Circuit Court's decision which had upheld the refusal of the Postmaster in Los Angeles to permit the delivery of the October 1957 issue of One, a gay monthly, because it contained allegedly obscene material.

VIII. The Constitutional Provisions at Issue

In determining the constitutionality or unconstitutionality of laws and policies concerned with homosexuals and gay rights, the courts must decide (a) how to interpret the provisions of the Constitution listed below which lawyers argue so heatedly about and (b) how to apply them in individual cases. In making these decisions, except for the Hardwick case, the Supreme Court has provided little direct guidance.

1st--Homosexuals and 1st Amendment rights. This Amendment provides for freedom of religion, speech, press, assembly, and petition. As seen in the cases discussed in this paper, various courts have held that under the 1st Amendment the employment of known homosexuals is and is not protected; that public employees--including or excluding public school teachers--may or may not speak out publicly on homosexual issues; that homosexuals may and may not assemble in places of their choosing; and that the licenses of establishments where they gather--such as bars--may and may not be revoked. But at present it seems safe to say that in civilian life homosexuals are free to identify themselves publicly; to speak out on homosexual and other issues; to publish and purchase books, magazines, newspapers, films, and the like, of interest to their community; to gather together in bars and other such places as they choose provided no illegal activity occurs; to protest in an orderly manner the policies and actions of government bodies, organizations, and churches with which they disagree; and to petition governments at all levels for redress of grievances. In the military, however, courts still hold that homosexuals are not free to openly reveal their sexual orientation; and that if they do, they are to be discharged. In addition, courts have found that laws incorporating the moral teachings of certain religious groups do not violate the 1st Amendment's prohibition against the establishment of religion.

2d--Homosexuals and the due process clauses of the 5th and 14th Amendments. These two Amendments provide that neither the federal government nor the states may deprive a person of life, liberty, or property without due process of law. Procedural due process means simply that parties whose rights and interests are at issue must be notified and heard. Substantive due process means that an individual may not be deprived of life, liberty, or property by an arbitrary or unreasonable action of some person or government official or body. Lower courts have repeatedly found that the dismissal of homosexual employees, the denial of security clearances, state sodomy laws, and the exclusion and obligatory discharge of homosexuals from the military do not violate substantive due process provided procedural due process has been followed. These findings were strongly confirmed by the Supreme Court in the Hardwick case where, using a substantive due process analysis, it found state sodomy laws neither arbitrary nor unreasonable because there are no terms in the Constitution, express or implied, which grant homosexuals a "fundamental" right to engage in homosexual sodomy.

3d--Homosexuals and the equal protection clause of the 14th Amendment. This clause says that no person shall be denied the equal protection of the laws. Over the years the Supreme Court has worked out a three-tiered test to apply in cases involving equal protection--rational, heightened or intermediate, and strict scrutiny. Though a few federal judges have found homosexuals to be a suspect or quasi-suspect class meriting heightened scrutiny, their decisions have been overruled. The predominant view is that the rational test is the applicable level of scrutiny. Accordingly, as shown in the cases discussed here, the proof required for constitutionality is that the policy or action must be a rational means of achieving a legitimate government goal. Under this test, the refusal to hire homosexuals, the denial of security clearances, and the military's exclusion and discharge policies have been found constitutional.

4th--Homosexuals and the constitutional right to privacy. This right is an evolving concept dependent on no single or precise statement or term in the Constitution. Under the decisions of the Supreme Court, the privacy right has thus far been limited to married couples, family situations, and heterosexuals. As seen in the cases discussed here, courts have specifically extended the right to privacy to the consensual sexual acts of married couples and to unmarried heterosexuals but have denied a comparable privacy right to homosexuals. By its Hardwick decision the Supreme Court has made a definitive statement supporting this position.

5th--Homosexuals and the 8th Amendment. This Amendment prohibits the infliction of cruel and unusual punishment. The sodomy laws in a number of states still authorize sentences ranging from one to twenty years in prison. The courts have never yet found a sentence of many years under these laws unconstitutional. Justice Powell in the Hardwick case suggested that a sentence of long duration for a single, private, consensual act of homosexual sodomy "would create a serious 8th Amendment issue." It is difficult to know how seriously to take his remark.

6th--Homosexuals and the reserved powers of the 10th Amendment. This Amendment reserves to the states and the people the powers not delegated to the federal government nor prohibited by it to the states. In other words, the states have the power to conduct the essential activities traditionally associated with government. This includes the power to pass laws and to take other actions necessary to promote and maintain public order, safety, health, morals and the general welfare. In the cases discussed here both the lower courts and the Supreme Court have consistently upheld state sodomy laws as "deeply rooted" in history and tradition, as a proper exercise of the police power, and as a legitimate means of promoting and enforcing morality which necessarily reflects religious teachings.

How these constitutional provisions are to be applied in future cases involving homosexual issues and gay rights is still unclear. Courts will have to continue to wrestle with the problem for some years to come. Along the way the Supreme Court may well have to become more actively involved.

IX. Some Observations and Suggestions

In their quest for justice and equal rights, homosexuals have not found in the courts the support they had hoped for. This is not surprising. Courts are basically conservative institutions concerned with interpreting existing laws, deciding cases as narrowly as possible, adhering to the precedents and traditions of the past, and staying "in the mainstream" of American thought and politics. Judges say it is the task of the executive and legislative branches of government--and not the courts--to make public policy. Only if laws and policies are felt to be in clear violation of some provision of the Constitution or are found to be truly invidious are courts likely to declare them unconstitutional. To homosexuals seeking change the federal courts, especially the circuit courts and the Supreme Court, have repeatedly said: take your complaints to your elected officials or challenge state laws in state courts.

In general, court decisions reflect both the personal views of individual judges and society's attitudes on a given subject. This is especially apparent in sexual matters. Some of the cases discussed here cannot mask the visceral, emotional, and moral biases of individual judges which have dictated their decisions. Like Alice's mad Queen, they arrive at their decision first, and only thereafter find reasons in support of it. In doing so, the labels "abnormal," "unnatural," "perverted," and "immoral" prove useful. In many ways judges are also political creatures. At times, many of them have been actively, or at least tangentially, involved in politics. This experience makes them very aware of public attitudes on matters coming before them. Again, in the sexual area,

they know full well that, despite the laws on the books, the general public does not want any government interference in the private, consensual, sexual activities of adult heterosexuals. Accordingly, it is not surprising to find the courts holding that laws prohibiting such activities are unconstitutional insofar as they pertain to heterosexuals but constitutional insofar as they pertain to homosexuals. This view has been ratified by a number of Supreme Court decisions which culminated in Hardwick. When the courts conclude that public opinion favors extending the same immunity to homosexuals, they will do so despite the personal biases of individual judges.

But there are now, and have been for some time, a number of judges who are quite dissatisfied with the way courts handle cases involving homosexuality and who are not willing to wait for social attitudes to change. This dissatisfaction can be seen in the three following areas. First--public employment. By the late 1960s certain federal courts were questioning the premises and the inflexibility of federal employment policies. Now, over twenty years later, because of their efforts and because of a more tolerant public attitude, homosexuality is no longer per se a bar to federal employment. Second--state sodomy laws. In the '70s and early '80s lower court judges declared such laws in Texas, Missouri, and Georgia unconstitutional. But their decisions were quickly overturned by an appellate court and by the Supreme Court in the Texas cases, by the state's Supreme Court in the Missouri case, and by the Supreme Court's Hardwick decision in the Georgia case. Third--military exclusion and discharge policies. Again, when a lower court in 1980 in the BenShalom case ruled against the military policy, it was overruled by an appellate court whose decision was left in place by the Supreme Court. Now, in 1993, two federal district courts in the Meinhold and Dahl cases and the District of Columbia Circuit Court in the Steffan case have ruled against the military. Already the Steffan decision has

been withdrawn. All three of these cases are likely to be reversed. Hence, to date, the "liberal" judges have prevailed only in the employment area--and even there, only slowly step by step and with strong resistance all along the way. In time they may win in the other two areas also--but only after many battles over many years.

Despite the refusal of federal courts to find certain laws and policies directed against homosexuals unconstitutional under the 1st, 5th, and 14th Amendments and under the right to privacy, there still remain constitutional arguments to pursue. There are a number of possible lines of approach. (1) Perhaps the most fertile would be to argue that the Constitution guarantees homosexuals, as well as heterosexuals, a "fundamental" right to their sexual orientation. "Liberty" is a fundamental right stated in the Constitution--both the 5th and 14th Amendments declare that "no person" shall be deprived of liberty "without due process of law." If the courts were to agree that homosexuals have a fundamental right to their sexual orientation, homosexuals could become a suspect or quasi-suspect class under the 14th Amendment's equal protection clause. As such, they would be entitled to heightened, if not strict, scrutiny, and a given law, rule, or practice operating to their disadvantage could be declared unconstitutional. Also, such a decision would to some degree mitigate the impact of the Hardwick decision. (2) First Amendment rights and the right to privacy should be pursued further. Why, for example, should not the statement of a person in the military that his or her sexual orientation is homosexual be protected in the same way it is in civilian life? Why should not the military adhere to the standard legal distinction between status and acts? (3) The "rational" scrutiny test applicable to equal protection claims needs to be pursued vigorously. Already in Meinhold and Dahl federal district courts have found the Navy's rationale for its exclusionary policy based not on reason but on myths, stereptypes,

and prejudice. The same question of rationale will arise in Pruitt's upcoming trial. Convincing arguments need to be prepared for presentation to the appeals courts and to the Supreme Court. (4) Perhaps a new case similar to Hardwick could be brought before the Supreme Court so that the Court by reexamining its substantive due process analysis could revise or reverse its Hardwick decision or could by applying an equal protection analysis come to a new decision which would supersede or diminish Hardwick. (5) Efforts to invalidate state sodomy laws must continue. Lobbying proved successful in Nevade when in June 1993 the governor signed legislation repealing the state's sodomy statute, and a court challenge proved successful in Kentucky when the state's Supreme Court declared the state's sodomy statute unconstitutional (Wasson v. Kentucky, 842 S.W. 487, 1992) under the Kentucky Constitution.

There has always been strong resistance to homosexual claims of discrimination and to calls for gay rights. The new major threat at the moment is the campaign of the Christian Right to pass initiatives in a number of states. Their most important success to date has been the passage of Amendment 2 to the Colorado Constitution in 1992. A state court issued a preliminary injunction preventing the Amendment from going into effect until its constitutionality has been determined. The Colorado Supreme Court in Evans v. Romer (854 P. 2d 1270, 1993) upheld the lower court's action. Since then the state court, in an opinion not yet published, has found the Amendment unconstitutional as a violation of the equal protection clause of the 14th Amendment. The case is now on appeal to the Colorado Supreme Court. After that court has made its decision, the case is sure to be appealed to the United States Supreme Court.

By these initiatives, the Christian Right seeks (a) to prohibit a state and all its subdivisions from granting any form of "protected status" to homosexuals, (b) to prohibit homosexuals from being designated a minority and from

making any claims of discrimination, and (c) to declare null and void any existing laws or ordinances which seek to restrain or eliminate prejudice and discrimination against homosexuals. Personal liberty, participation in the political process, petitioning for redress of grievances, and government imposition of religious doctrine are among the issues at stake. The activities of the Christian Right may well be before the courts--including the Supreme Court--for some years to come.

X. Conclusion

With but few exceptions, the Supreme Court has played a minor and sometimes inconsistent role in cases involving homosexuals and gay rights. Its general attitude seems to be (a) that the laws and policies of the legislative and executive branches of government will be upheld unless they are egregiously unconstitutional, and (b) that if those two branches of government choose to change their laws and policies, they are free to do so. Indicative of this attitude are its decisions with regard to the following matters: state sodomy laws, federal employment or nonemployment of homosexuals, granting or denying security clearances to homosexual employees in governmental or industrial jobs, dismissal of homosexual teachers in the public schools, employment of homosexuals by local units of government, exclusion and discharge of homosexuals from the armed services, and exclusion and deportation of homosexual aliens.

Of the opinions issued by the Supreme Court, only one has been truly significant--Hardwick. In Hardwick the Court said two very important things: first, it will not grant to homosexuals the sexual and privacy rights it has by a series of cases granted to heterosexuals, and second, the fate of the sodomy statutes rests exclusively with the states. When and if the Supreme Court decides a case involving the military policy of exclusion and discharge of homosexuals, that decision will stand alongside Hardwick as one of utmost importance. Of the cases

discussed in this paper, the most favorable decisions for homosexuals have come in those involving free speech rights under the 1st Amendment provided those rights are exercised in civilian, as distinguished from military, life. Thus far, the Supreme Court has not found that the 5th, 8th, or 9th Amendments offer homosexuals any protection against present laws and policies.

On issues of importance to homosexuals and gay rights, the Supreme Court, along with the lower courts, has played more a negative than a positive role. With today's federal courts being more conservative than they were fifteen or twenty years ago, and with the sometimes ominous decisions of recent years, the future role of the courts, and especially of the Supreme Court, is anything but clear or hopeful. For now and for some years to come, gay activists considering appealing cases to the Supreme Court will be well advised to observe the familiar road sign which warns "Proceed with Caution."

Yet, progress has been made on issues important to homosexuals as individuals and to the gay rights movement. Just as there have been and will be steps forward, there have been and will be steps backward. But the overall direction is forward.

TABLE OF CASES

47. Meinhold v. Department of Defense 808 F. Supp. 1453, 1992.
48. Meinhold v. Department of Defense 808 F. Supp. 1455, 1992.
49. Steffan v. Cheney ___ F. 2d ___, D.C. Cir. 1993.
50. Dahl v. Secretary of the Navy 830 F. Supp. 1319, Dist. Ct., Cal., 1993.
51. U.S. Department of Defense v. Meinhold #A-373, Oct. 29, 1993.
52. The Steffan decision (see #49) has been withdrawn by vote of the full D.C. Cir. Ct.
53. Fleuti v. Rosenberg 374 U.S. 449, 1963.
54. Boutilier v. Immigration and Naturalization Service 387 U.S. 118, 1966.
55. Lavoie v. Immigration and Naturalization Service 400 U.S. 854, 1970.
56. Garcia-Jaramillo v. Immigration and Naturalization Service 449 U.S. 828, 1980.
57. Adams v. Howerton 458 U.S. 1111, 1982.
58. Manual Enterprises, Inc. v. Day 370 U.S. 478, 1962.
59. Mishkin v. New York 383 U.S. 502, 1966.
60. San Francisco Arts and Athletics v. U.S. Olympic Committee 483 U.S. 522, 1987.
61. Jacobson v. U.S. 112 S.Ct. 1535, 1992.
62. Beard v. Stahr 370 U.S. 41, 1962.
63. Duggan v. Brown (formerly Grant v. Brown) 420 U.S. 916, 1975.
64. Francisco Enterprises, Inc. v. Kirby 415 U.S. 916, 1974.
65. Curran v. Mt Diablo County Boy Scouts of America 468 U.S. 1205, 1984.
66. Olivieri v. Ward 480 U.S. 917, 1987.
67. Greenberg v. H and H Music Co. (formerly McGann v. H and H Music Co.) 113 S.Ct. 482, 1992.
68. One, Inc. v. Olesen 355 U.S. 371, 1958.

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