



2000

Brief Against Homophobia at the Bar: To Law School Dean-Mid 1960s

Joel J. Finer
Cleveland State University, j.finer@csuohio.edu

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_articles

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Society Commons](#), and the [Legal Education Commons](#)

[How does access to this work benefit you? Let us know!](#)

Original Citation

Joel J. Finer, Brief Against Homophobia at the Bar: To Law School Dean-Mid 1960s, 10 *Columbia Journal of Gender & Law* 63 (2000)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

HEINONLINE

Citation: 10 Colum. J. Gender & L. 63 2000-2001

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Fri Oct 5 11:17:49 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1062-6220](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1062-6220)

BRIEF AGAINST HOMOPHOBIA AT THE BAR: TO LAW SCHOOL DEAN: MID 1960s

ANONYMOUS

In the mid-1960s, the author addressed the following “brief” to the Dean of a major law school on behalf of a law student, successfully urging that the Dean not report the student’s homosexual activities to the state Bar committee which screened applicants for “good moral character.” The brief, years ahead of its time, retains its power, eloquence and relevance. The Journal is publishing it as a piece that highlights the historical struggle of gays and lesbians to escape injustice and cruelty, and to be treated with dignity and respect.

To protect the privacy of the persons and institution involved, the author has made minor modifications to the text¹ and has chosen to publish this work anonymously.²

I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn, by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man.

—Clarence Darrow (*Closing argument in the trial of Leopold and Loeb, 1924, A. Weinberg, Attorney for the Damned 86-87 (1957)*).

¹ Such modifications in no way alter the substance, tone, style or forcefulness of the original. Other revisions are limited to corrections of typographical errors, punctuation and the style of the original footnotes.

The student is herein referred to by the fictitious name “Mr. Lawson.” The pertinent committee of the state Bar is simply designated as “the Committee.”

² The Brief, while radical in certain respects for the time and place it was written, also took such context into account when addressing certain presumed values and beliefs of even liberals of the time. Today, for example, the author would not characterize homosexuality as “a condition,” nor discuss whether or not a gay or lesbian is “to blame” for that “condition.” Nor would the author treat as a “given” that repetition of homosexual conduct is “undesirable” or deem it necessary to contend against the probability of such repetition.

The author dedicates this publication to the humane, decent and nurturing human being who, even before reading the brief, was very probably inclined to make the decision he did—a decision made in a climate then inhospitable to the idea that homosexuals deserved to be treated with as much dignity and respect as afforded those of heterosexual orientation.

[H]istory, and our own conscience will judge us more harshly if we do not now make every effort to test our hopes by action and this is the place to begin.

—John F. Kennedy, July 26, 1963.

Should you inform the Character Committee of the state Bar that, in your opinion, Mr. Lawson, a high-ranking graduating senior, is morally fit to practice law, notwithstanding indications that he committed a homosexual-sexual act with another consenting adult in private?

Representatives of the police department and the local prosecutor's office have related to you the following story: A nineteen year old, on probation for burglary, was picked up by the police for questioning when his uncle reported his suspicion that the boy was wearing stolen clothes. Actually, he was wearing the clothes of Mr. Lawson, a law student, which the latter had reported to the police as stolen. The probationer told the police that some time earlier Mr. Lawson had engaged him in conversation at the Greyhound Bus Terminal and subsequently invited him to the student's apartment for a few drinks. At the apartment Mr. Lawson eventually performed fellatio (oral-genital relations) on the probationer, with consent, and paid him a sum of money. [You were] informed that upon being confronted by the police with this story, Mr. Lawson said, "I have a problem, I can control it as long as I don't drink." Of course, both the probationer's allegations and the implied admission of Mr. Lawson were presented to you in the form of double or triple hearsay; *whatever doubts may subsequently be raised about the relevance of the allegations or the propriety of disclosure are thus significantly aggravated by the dubious quality of the evidence.*

Arguments which might be advanced to support either making a disclosure, or an adverse evaluation, to the . . . [Committee]:

1) Homosexuals are basically evil; they are potential if not actual pederasts who will seduce young boys if necessary to satisfy their needs.

2) Homosexuals are a threat to the efficient and successful functioning of any organization because they are likely to antagonize and accost co-workers and clients.

3) A homosexual is highly neurotic, unstable, and likely to get into trouble with the law; thus a law firm or client could not confidently rely on his dedicated and productive service.

4) Since a homosexual must commit acts that are either illegal, or regarded as immoral, to satisfy his needs, he will be subject to leverage or blackmail and may thus compromise the vital interests of his clients or his firm.

5) Since it is quite clear that society in general, and the Character Committee, in particular, would consider the applicant's homosexual nature and conduct relevant to his moral fitness to practice law, you are duty bound at least to disclose the incident, rather than attest to the boy's moral fitness for the practice of law.

1) Is a homosexual "evil?"³

Although authorities vary on whether homosexuality is hereditary⁴ or results from early childhood environmental factors⁵ they are agreed that it is not a condition voluntarily sought or acquired. Freud said of homosexuals that they are "often, although not always, men and women who otherwise have reached an irreproachably high standard of mental growth and development, intellectually and ethically, and are afflicted only with this one fateful peculiarity."⁶ In a letter to a woman who had expressed concern about her son, Freud said:

Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an

³ I will not venture to discuss the philosophical or religious question whether homosexual acts between consenting adults in private violates a Kantian "internal morality," a natural law morality, or a religious morality; I do suggest that society is only justified in condemning, through the imposition of sanctions and the labeling as "evil," conduct which causes a secular harm and is essentially voluntary. See H.L.A. Hart (Oxford Professor of Jurisprudence), *Law, Liberty and Morality* (1963); Report of the Committee on Homosexual Offenses and Prostitution Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, Sept., 1957 (hereinafter referred to as the Wolfenden Report); A.L.I. Model Penal Code (limiting punishment to those "deviate sexual relations involving force, imposition or corruption of the young."); cf. *Perkins v. North Carolina*, 234 F. Supp. 333, 340 (1964).

Goethe suggested that since homosexuality is as old as humanity itself it can be considered natural. But cf. Devlin, *The Enforcement of Morals*, (1959).

Ford and Beach, in *Patterns of Sexual Behavior* (1952) indicate that the majority of human societies have permitted, or even condoned, homosexuality. See generally, Donnelly, Goldstein and Schwartz, *Criminal Law* 137-200 (1962).

⁴ See, e.g., deSavitsch, *Homosexuality, Transvestitism, and Change of Sex* (1958).

⁵ See, e.g., Bergler, *Homosexuality: Disease or Way of Life?* (1957).

⁶ Freud, 20th Lecture, *The Sexual Life of Man, A General Introduction to Psychoanalysis*, 313-314 (1953).

illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development. Many highly respectable individuals of ancient and modern times have been homosexuals, several of the greatest men among them (Plato, Michelangelo, Leonardo de Vinci, etc.)⁷

Dr. E. Chesser, the eminent British psychiatrist, asserts without reservation that the homosexual “is in no way to blame for his sexual disposition. Whether it has been inherited or acquired it is something given, something he must come to terms with.”⁸

One of the prevailing fallacies among uninformed laymen is that homosexuals are likely to commit pederasty. In fact, pederasty is wholly distinct from homosexuality; homosexuals are no more likely than heterosexuals to seek gratification from young children. Virtually all medical authorities have rejected the notion that adults who commit homosexual acts have any particular propensity to seduce children.⁹

2) Will homosexuals jeopardize the efficient functioning of an organization (e.g., a law firm) by “flirting with” or accosting co-workers or clients?

The Wolfenden Report,¹⁰ prepared by a distinguished group of legal, social, ethical and academic leaders of British society, after extensive hearings and studies concluded:

There are no *prima facie* grounds for supposing that because a particular person’s sexual propensity happens to lie in the direction of persons of his or her own sex it is any less controllable than that of those whose propensity is for persons of the opposite sex.

[T]here seems to be no good reason to suppose that at least in the majority of cases homosexual acts are any more or any less resistible than heterosexual acts and *other evidence would be required to sustain such a view in any particular case.*¹¹

⁷ 3 Jones, Life of Freud 195 (1957).

⁸ Chesser, Live and Let Live (1958).

⁹ See, e.g., Wolfenden Report, *supra* note 3, at ¶ 57; Berg, Fear, Punishment, Anxiety and the Wolfenden Report 33 (1959); deSavitsh, *supra* note 4 at 13-14; and Chesser, *supra* note 8 at 34-35.

¹⁰ Full title *supra* note 3.

¹¹ *Id.*, at ¶¶ 32-33 (emphasis added).

Homosexual instincts are no less controllable than heterosexual instincts;¹² there is no reason to believe that Mr. Lawson will manifest his sexual inclinations in any situation related even remotely to his professional activities. (Indeed, I would surmise that the heterosexual is substantially more likely to flirt with, or make a pass at, his female business associates, for he rarely stands as much to lose as a homosexual, by an erroneous estimate of his chances of success.) Mr. Lawson has been a law student for three years and a member of the Law Review for about two years; he has held a position of responsibility and trust on the Law Review. Highly discreet inquiries yielded the following opinion: Although Mr. Lawson has a “funny personality” and is rather “egotistical” and “not as easy to get along with as some others,” Mr. Lawson has done valuable work and has elicited valuable performance from subordinates under his charge. Evidently, if Mr. Lawson’s colleagues do not particularly seek him out for social companionship, they nevertheless have little or no difficulty working with him in an efficient and productive relationship.

An Associate Dean has indicated that so far as he knows, no student suspects that Mr. Lawson is a homosexual; in any event, no incident involving Mr. Lawson other than the one under consideration has ever been brought to that Dean’s attention. There is, in short, not a scintilla (let alone a preponderance) of evidence to suggest that Mr. Lawson would ever jeopardize his professional status and development by annoying or accosting his male colleagues or clients.

3) Are homosexuals unfit to practice law because they are neurotic, unstable, and likely to get into difficulties with the law?

There is some indication that, generally speaking, homosexuals are more likely to be tense, nervous or neurotic than non-homosexuals. While there is considerable uncertainty over the question whether homosexuality is itself symptomatic of internal conflicts that an individual has been unable to deal with through other forms of sublimation or other defense mechanisms,¹³ there is general agreement that the widespread condemnation

¹² R. T. Oerton, The Problem of Homosexuality, 61 Law Society's Gazette 609 (1964).

¹³ Compare Dr. Clara Thompson, Changing Concepts of Homosexuality in Psychoanalysis, 10 Psychiatry: Journal of the Biology and Pathology of Interpersonal Relations, with the Wolfenden Report (“On the criterion of symptoms... homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health.”) and with Oerton, *supra* note 12.

and stigmatization of the homosexual does tend to make him secretive, tense, or mildly neurotic.¹⁴

The fact that homosexuals as a class are more likely to be mildly neurotic than others is certainly no basis for inferring that Mr. Lawson is morally unfit to practice law. In the first place, we have little evidence that Mr. Lawson is in fact neurotic; second, and in all seriousness, my own observations (amateur, to be sure) have convinced me that a significant percentage of law students compiling outstanding records in course and law review work are driven by abnormal internal conflicts that warrant the label "neurosis"; and third, and what perhaps should be decisive, the little evidence we do have on Mr. Lawson's ability to perform ethically and competently, the scholarly, the institutional, and the personal functions of law practice speaks only in his favor. (It should also be mentioned here, that if it is unthinking societal mistreatment that is primarily responsible for homosexuals' neuroses, you may well have an overriding duty, as a protector of your charge and a force for societal enlightenment, to at least avoid the infliction of further deprivations in the case before you. (See discussion below.)

It may be argued that although we do have reason to believe that Mr. Lawson can sufficiently control his impulses in his career-related activities, we also have evidence that Mr. Lawson does not have sufficient control over his impulses to avoid embarrassing entanglements bound to have public radiations. Mr. Lawson did show a lack of judgment in this instance, with regard to the possibility of public disclosure, both in his method of selection of a sex partner and in reporting the theft of his clothes to the police. (While some might think it shockingly amoral not to mention the sexual behavior itself as evincing lack of good judgment, I submit that it would be hypocritical and inhumane to expect a true homosexual to forever deny himself his needs. "[H]ow many heterosexuals would be able to deny themselves sexual satisfaction for the whole of their lives if called upon to do it?"¹⁵) Assuming that the likelihood of indiscreet behavior is pertinent to our determination, the extent of Mr. Lawson's control generally would be a relevant consideration. Dr. Chesser observes that many homosexuals who do make a bona fide attempt to stay within the law experience

the greatest difficulty in sublimating their instinctive impulses One man may find continence comparatively easy, whereas another can only maintain it by a perpetual tormenting struggle.

¹⁴ See Group of Anglican Clergy and Doctors, Interim Report, The Problem of Homosexuality, reprinted in Bailey, Sexual Offenders and Social Punishment (1956); Oerton, *supra* note 12; Note, 70 Yale L.J. 623, 629 (1961).

¹⁵ Oerton, *supra* note 12.

Some (homosexuals) are highly sexed and have the greatest difficulty in sublimating their instinctive impulses, others are able to solve the problem satisfactorily. It depends on the strength of their desires and the extent to which they have integrated their personality.¹⁶

Dr. Glueck, writing in the *Minnesota Law Review*, makes the following observations:

A pattern of homosexual behavior may be extremely variable An individual may commit a single homosexual act and never repeat this [H]e may have periods of time when he is active homosexually, alternating with periods when he is heterosexually active or . . . he may be persistently homosexually oriented in his psychosexual adjustment.

A person with strong latent homosexual forces, but with some general ability to control himself, may initially enter a relationship strictly for interpersonal satisfaction, but *if his control and judgment faculties are weakened by alcohol, sexual excitement and arousal may develop as an additional pattern frequently viewed by the individual as an unwanted complication with the result that some type of prohibited sexual act occurs.*¹⁷

There are few facts regarding the nature of Mr. Lawson's condition. Assuming the truth of all the hearsay, he recently committed a homosexual act while under the influence of alcohol, and, if his admission is true, has apparently committed at least one other such act in the past, also while under the influence of alcohol. Without a psychiatric examination of Mr. Lawson¹⁸ we can have no understanding of the frequency and intensity of his desires, the strength of his control mechanism under ordinary circumstances, the duration of his capacity for self-control, the possibility of his sublimating his needs into more socially acceptable outlets (e.g., could he achieve psychological and physical satisfaction from marriage sufficient to alleviate a significant part of his problem?), the quantity of alcohol sufficient to impair his behavioral controls, his capacity to abstain from drinking, or the nature and "treatability" of a possible underlying neurosis

¹⁶ Chesser, *supra* note 8 at 36.

¹⁷ Glueck, *An Evaluation of the Homosexual Offender*, 41 *Minn. L. Rev.* 187, 195 (1957).

¹⁸ The fact that Mr. Lawson revealed the theft to the police under circumstances where he must at least have subconsciously suspected that the crime was committed by his homosexual partner, might well suggest to the psychoanalytically sensitive, the insight that Mr. Lawson subconsciously sought the revelation of his activity; perhaps because he had deep guilt feelings and desired punishment; perhaps because he desperately wanted help.

(homosexual conditions rooted in neuroses presumably may, in many cases, be alleviated by prolonged psychotherapy).¹⁹

In view of these observations one solution which might be advanced is to request Mr. Lawson to submit to a psychiatric examination and base your recommendation decision on the psychiatric findings (assuming we could obtain meaningful results in the short time remaining before you must decide). My own view, to be presently elaborated, is that to deprive a law student of the well-earned fruits of his labor on the basis of psychiatric findings that he *might*, at some future time commit a homosexual act that *might* become public and *might* merely embarrass a client, employer or associate, would manifest gross infidelity to a faculty's obligations to its students, implicitly adopt and perpetuate a form of bigotry at least as insidious, irrational and pernicious as racial discrimination, and inflict a grave, and perhaps permanently crippling injustice on Mr. Lawson. I submit that in the absence of probative, reliable and substantial evidence of a significant possibility that Mr. Lawson will fail to defend, protect and enhance the interests of his clients and employer in accord with the high ethical tradition of the state Bar, it is wholly unjustified to cause his exclusion. This brings me to the next point.

4) Since a homosexual must commit "immoral" or illegal acts to satisfy his needs and thus create the possibility of attempted blackmail, is there a significant possibility that Mr. Lawson, at some future time, will be blackmailed into compromising the interests of his clients or his firm?

A homosexual who is substantially unable to suppress his needs may find it necessary to rely on the discretion of rather casually selected partners. There can be no assurance that he may not, at some future time, inadvertently choose either a professional blackmailer²⁰ or a man who conceives of blackmail after an active sexual relationship with Mr. Lawson. But it is not irrelevant to note that applying the most conservative estimates of the prevalence of sexual behavior, to any graduating class, at least ten to fifteen percent of the students have committed adultery in the last five years

¹⁹ If the homosexuality is not neurotically inspired, the analyst's role is to assist the patient in alleviating the guilt feelings and learning to accept his condition. The patient is not told that he is evil or that what he does is wrong; he's made to see that this is the way he is and that his condition is not blameworthy. No self-respecting school of psychoanalysis would do otherwise. Thus, the successful treatment of a true homosexual does not produce a man who has suppressed his desires and no longer seeks sexual gratification in relationships with males.

²⁰ Apparently known in police and underworld circles by the colorful but revolting title, "fruit-pickers." See Gann, *Of Good and Evil* (1963). See also Sen. Doc. No. 241, 81st Cong. 2d Sess. 1-20 (1958).

(and at least five percent have engaged in one or more homosexual acts during that period). Certainly one who committed adultery would stand as much to lose or more by disclosure. Yet I doubt very seriously that you would report a student's adulterous relationship or transaction to the Bar (even though his moral responsibility is at least equally, if not more deserving of condemnation than the homosexual's) unless you had reason to believe that he was submitting or would submit to blackmail.²¹

And there is absolutely no basis here for concluding that Mr. Lawson would jeopardize the interests of his client or firm, or violate the high ethical standards of the legal profession, merely because he was threatened with disclosure. Had he committed embezzlement or extortion there would be a valid basis for questioning his capacity to practice in accordance with either the letter or the spirit of the high ethical responsibilities this profession has toward society. But Mr. Lawson's ethical principles, his honesty, his sense of fairness, his sense of duty to those who entrust him with their interests, and his moral capacity to comply with every obligation a lawyer qua lawyer owes to society has never been subject to question. His sexual behavior has nothing to do with his ethical values and is wholly consistent with his willingness and ability to tell a potential blackmailer, in plain language, to "go to hell."

Indeed, the very basis for believing that Mr. Lawson has previously engaged in homosexual behavior is his own candidness, *i.e.*, his alleged admission to a police officer immediately upon being confronted, that "I have a problem," even though he might well have succeeded in convincing the police that the probationer's story was a total fabrication. Surely nothing could be further from warranting even speculation that Mr. Lawson is so obsessed with shame or fear that he would give the slightest consideration to compromising his principles of honesty and fairness in order to avoid disclosure.

5) Can you in good faith certify this young man as morally fit to practice law and withhold the hearsay reports of his homosexual transaction if you have no doubt that the Character Committee would consider his homosexuality as highly relevant to their determination whether to recommend his admission to the Bar?

Conversations with the Associate Dean (who spoke discreetly with a high official of the Bar) and others, leave virtually no doubt that disclosure of Mr. Lawson's "problem" would result in *automatic* denial of a license to practice law in . . . [this state].

²¹ Consider the priceless remark of the London Observer: "At least the Profumo affair has given due warning of one thing - the necessity of purging all heterosexuals holding high government posts, as potential security risks."

As Dean, you have several relevant obligations: you have a duty to the Bar, to the public, and to the students: to train competent and principled attorneys, to assist the Bar in screening out candidates who lack either the necessary competence or ethical standards, to protect and defend law students against injustice if and when their problems fall within your institutional capacity, and to set an example of enlightened moral leadership to all those leaders of thought and action within this state who look to you for guidance.

It should now be clear that Mr. Lawson's homosexual act, in and of itself, is an insufficient basis for concluding that he lacks moral fitness to practice law. The Supreme Court has held that "a State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with an applicant's fitness or capacity to practice law."²² Professor Vern Countryman's remarks are quite pertinent:

It seems unnecessary to discipline an attorney for misconduct, which, although a crime, does not reflect on his professional integrity or ability.

Many crimes, including felonies, . . . do not reflect so unfavorably [as larceny, burglary, embezzlement and crimes involving fraud or deceit] on an attorney's fitness as to warrant the loss of livelihood ensuing from disbarment. Thus an attorney guilty of involuntary manslaughter, which is a crime of negligence and not of intention, is not necessarily unfit to practice law. Nor is one who, during the "noble experiment" kept bottles of beer in his cellar not for resale but for use by himself and his friends. Nor is an attorney who is guilty of statutory rape though he reasonably believed his companion to be over the statutory age. While these crimes evidence some disrespect for law, it is questionable whether the taint involved is sufficiently great as to justify disbarment. If the test is whether these crimes reflect on either an attorney's fitness, trustworthiness or competence, disbarment does not seem justified.²³

²² *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, (1957); compare *In re Anastaplo*, 366 U.S. 82 (1961).

²³ Countryman, *The Lawyer in Modern Society*, pt. IV, ch. 7, p. 239 (1962). The Supreme Court granted *certiorari* in a case involving the right of a government agency to fire a man upon discovering that he had committed homosexual acts several years prior to his commencement of employment. *Dew v. Halaby*, 376 U.S. 904 (1964). See the divided opinion of the D.C. Cir., 317 F.2d 582 (1963) upholding the agency. Before the Supreme Court could hear argument, the F.A.A. administrator, Najeeb Halaby, with the consent of the Solicitor General, capitulated. He ordered Dew's reinstatement and gave him \$12,000 in back pay so that in Halaby's words, "justice can be done." [For a similar situation] see Ridgeway, *Snooping in the Park*, *The New Republic*, Jan. 16, 1965.

Mr. Lawson did violate a state law —§ —; this provision also forbids sodomy and oral-genital relations between man and woman whether or not married! Upon being told that a student violated this statute (or the statutes forbidding fornication [citation omitted] and adultery [citation omitted]) in its heterosexual respects, would you give the slightest thought to either conveying the information to the Committee or investigating further? To quote Mr. Justice White (No. 1) (in a different context, to be sure) “to ask the question is to answer it.” These prohibitions are so remote from the moral realities of our day that they are simply not enforced in the absence of coercion, exploitation, involvement of children, or highly offensive public display.²⁴ Were violation of these provisions a basis for exclusion from the legal profession, at least half of the graduating class would be disqualified. Should you single out one homosexual student from this large group of “sexual offenders?”

Given the present stage of our constitutional development, I do not suggest that Mr. Lawson would have a significant prospect of persuading the Supreme Court to invalidate Committee action rejecting him from law practice solely on the basis of his homosexual acts. I rest on whatever force may be found in my arguments addressed to the rationality, propriety and morality of such Board action.

²⁴ The local prosecutor's office has evidently informed you that in the absence of such aggravating circumstances, sex crime prosecutions are not brought against homosexuals. The 1957 Report of the Group for the Advancement of Psychiatry noted a recent statistical study which revealed that six million homosexual acts take place for every twenty convictions.

For the reaction of one of the most sensitive and sophisticated legal academicians to an instance of the extremely rare prosecution of private consensual adult homosexual conduct, see Alexander M. Bickel, A Case of Homosexuality, *The New Republic*, p. 5 (Dec. 12, 1964).

See also Professor Bickel's thought-provoking exploration of the doctrine of desuetude:

The question is whether a statute that has never been enforced and that has not been obeyed for three quarters of a century may suddenly be resurrected and applied “Wherefore very rightly this also is held,” John Chipman Gray quotes from Julianus, “that statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.”

The Least Dangerous Branch 148 (1962).

The mere fact that Mr. Lawson technically committed a felony, engaged in by many and enforced by virtually none, should not preclude his admission notwithstanding the fact that one plausible construction of the disbarment provisions would require compulsory disbarment on proof of conviction of any felony. (Canons of Ethics, art. XIII (B), § 9, *but cf.* § 8, whose language and legislative history, might permit a contrary construction.) In any event, the requirement of a conviction defers to the wise exercise of prosecutorial discretion which in this case reflects that readiness to overhaul outworn mores and that toleration of non-conformity which is the essence of civil liberties.

The issue before you is not the abstract question whether to inform the Committee of facts about a graduating student **you** knew it thought relevant but you thought irrelevant. The issue before you is whether to cause the rejection of a high-ranking, hard-working graduating senior solely because of his homosexual condition and conduct.²⁵

We know that the homosexual is no more responsible for his inclinations than the heterosexual. We know from scientific, social, and medical studies that homosexual relations between adults in private cause no demonstrable harm. We know that although the homosexual is no more depraved than the Negro, the Jew, the feeble-minded or the left-handed, he has for centuries been the victim of unspeakable persecutions and cruelties, from ostracism to murder. We know also that to deprive a man of the well-earned fruits of three years' labor is to inflict almost as severe a deprivation as a prison sentence.²⁶ Whatever the complexities of defining the term "justice," surely it is unjust to impose such a hardship on one who merely is what he is and hurts no one by it.

The unthinking masses have forever been intolerant and cruel to what they refused to understand, and have tormented and tortured what they most feared in themselves. It is not a lawyer's gift to know why this is so. But being lawyers, and not the insensitive academicians of Lord Snow's Cambridge,²⁷ we do have a keen and lively sense of justice, and of injustice.

²⁵ Some would suggest that your responsibility terminates with the conveyance of "the facts." But as you well recognize, we have too recently seen what can happen to the moral quality of a people when they simply "turn over the information" to an agency known to be perpetuating moral outrages. Surely none would suggest that if the Board were known to discriminate against Jews, that one could inform the Board that an applicant was a Jew yet avoid responsibility as an immoral accessory before the fact.

²⁶ Donald Webster Cory (Pseud) explains:

If homosexuals are arrested under rather sordid circumstances, seeking sexual partners in places forbidden by public law, shall society not stop to ask whether the cause of this action is the banishment of their pursuits from so many of the accepted pathways of life?

...

Banned from many avenues of private employment and from government employment, banned from many educational opportunities, banned from serving one's country in the Army and Navy, banned from the ordinary channels of expression of public opinion through newspapers and magazines—this is the extent of civil liberties for the homosexual.

(Homosexual): The Homosexual in America (1951).

²⁷ See, e.g., C. P. Snow, The Affair (2d ed. 1960). See also Cory, *supra* note 26 ("Only an enlightened public opinion can serve as a weapon in the struggle to maintain civil liberties and human rights, but society immunizes itself against such enlightenment, not only

So we must know that to take adverse action against a man because of his homosexual condition is wrong; it is a wrong perpetrated on him and it is a wrong perpetuated indefinitely.

Time and time again you have championed the forces of enlightenment and fair play, even when your adversaries—malicious ignorance and blind prejudice—have had powerful and influential supporters. Far from playing the role of mirroring, and thus reinforcing, the twisted values of the morally bankrupt, you have raised an enlightened standard which men of social conscience throughout this region could turn to for moral guidance.

(We lawyers are both blessed and blighted with an awful talent—the myopic capacity to keep quietly within the assumed bounds of our jurisdiction and ignore the chaos that rages beyond. We cry “institutional incompetence,” “primary jurisdiction,” “not within our mandate” and “not for us to decide.” So within our legal scheme it is often the case that a decision-maker must refuse to decide what is ultimately right, even if in so doing he fails to prevent what is ultimately wrong. Yet even where the law demands the utmost deference by one institution toward another, the former, having the power to avoid or negate the act of the latter, may and must do so where the latter has abused its discretion or been grossly unfair. So here, while you may ordinarily be expected to defer to the Committee’s notions of relevance and fairness, you must avoid and prevent this wrong, knowing just how terribly wrong it is.)

I suggest that your function vis-à-vis the Committee is wholly consistent with your responsibilities as a moral leader. It is the opinion of the Dean of — Law School that is sought, not the contents of a police report. For your opinions of a man’s moral capacity to practice law provides the perspective of an enlightened educator and the insights of a high public servant, and thus adds an essential dimension to the final shape of the Committee’s decisions. If you agree that the Committee’s automatic exclusion policy is not only based on a substantially irrelevant criterion, but is probably immoral, and if you can truthfully assert that nothing has come to your attention which, *in your opinion* would cast a reasonable doubt on Mr. Lawson’s moral fitness to practice law, then I submit, you have both the legitimate discretion and the ultimate duty to so attest.²⁸

by imposing public disgrace on all those who would speak boldly on the subject, but by a conspiracy of silence.”).

²⁸ In order to afford Mr. Lawson effective protection . . . [the form letter would have to be revised]. It now reads: [language omitted]

Nothing in the rules governing admissions to the [state Bar] compels such a form. Something along the lines of the statement in the text would seem quite acceptable; of course, any modification designed to protect Mr. Lawson must be made uniformly for all members of the [law school]

(In the final analysis one simply cannot be indifferent to the torment, the ridicule, the perpetual anguish and the desperate sadness that curses the life of the contemporary homosexual.²⁹ Even our Lady, The Law, in her noblest moments, recognizes her own profound and majestic uncertainty and relies finally and finely on sympathy and humanity. At stake is a career, a life, a lifetime; all the wisdom and understanding of we who have been “the prey, and the sport, and the plaything, of the infinite forces that move men,”³⁰ who have tried, and perhaps failed only little less than most; all our reason and logic and piety cannot decree that justice compels disclosure, and perhaps, in the end, if all else fails to lift the darkness, the strongest light to guide our judgment can only be compassion. For we who have known not the anguish of shame and disgrace, but ever agonize at the “intolerable labor of thought” and we who now must trifle with the vital interests of a human being and society, surely we must understand that the spirit of liberty, and of mercy, is that spirit which “is not too sure that it is right”³¹ and which can rarely hope to see, but “through a glass darkly.”³²)

Respectfully
submitted,

ANONYMOUS

class to avoid a “tip-off” that would defeat . . . [the purposes of such modification.].

²⁹ For a deeply moving portrayal of the homosexual's suffering, see James Baldwin, Giovanni's Room (1956).

³⁰ Clarence Darrow, Closing argument in the trial of Leopold and Loeb, 1924, Arthur Weinberg, Attorney for the Damned (1957).

³¹ Learned Hand, The Spirit of Liberty: Papers and Addresses of Learned Hand at 190 (Irving Dillard, Ed., 3d ed. 1960).

³² 1 Corinthians 13:12.