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## Homosexuals in the Teaching Profession

Neal G. Horenstein\*

**W**HAT IS THE STATUS of the homosexual<sup>1</sup> in the teaching profession?<sup>2</sup> What are the problems in obtaining authorization to teach, or applying for a teaching position, and the effects of exposure as a homosexual on job security?

Throughout history man has reflected on the question of what ethical conduct society may condone or justifiably punish. In the teaching profession a resolution of this problem is attempted by the legislation of statutes proscribing immorality, moral turpitude, and unprofessionalism. In each of the fifty states the substantive and procedural power to revoke a teacher's certificate or authority, where these spacious terms are at issue, is a matter of express statute.<sup>3</sup>

Society endeavors, by various means, to uphold what it considers to be accepted norms of behavior. It is especially dutiful in regard to the qualifications and regulations for membership in the professions, due to the amount of influence professionals possess in the community. But the legislatures and the courts have taken particular interest in the teaching profession, for it has the enormous responsibility of pre-

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<sup>1</sup> Mitchell, *The Homosexual and the Law*, 6 (1969). The law classifies anyone as a homosexual if he is apprehended while participating in a sexual act with a member of his own sex.

*Author's note:* Although that is not the clinical definition of homosexuality, it is the definition used by the law and by school administrators, and will be the definition for the purpose of this comment.

<sup>2</sup> *Author's note:* This comment will deal only with the teacher in the public school system, on the elementary and secondary levels.

<sup>3</sup> Alaska Stat., ed. § 14.20.030 (1966); Code of Ala., Schools, tit. 52 § 337; Ariz. Rev. Stat., ed. § 15-209; Ark. Stat., ed. § 80-1214 (1947); Colo. Rev. Stat., Schools § 123-17-21 (1963); Conn. Gen. Stat. An., ed. § 10-151 (1965); Del. Code An., ed. § 14-1204 (1955); Fla. Stat. An., ed. § 231.28 (1969); Ga. Code An., ed. § 32-1010 (1947); Hawaii Rev. Stat., ed. § 297-11 (1968); Idaho Stat., ed., § 33-1208; Ill. An. Stat., Schools § 21-23; Burns Ind. Stat. An., ed. § 28-4308 (1933); Supp. to Gen. Stat. of Kans. Schools § 72-5406 (1969); Baldwin's Ky. Rev. Stat., ed. § 161.790 (1944); La.S.A. Rev. Stat., ed. § R.S. 17:441, Note 17 (1956); Me. Rev. Stat. An., ed. § 20 1751 (1967); An. Code of Md., Pub. Ed., Art. 77.114 (1965); An. L. of Mass., Public Schools § 71-42 (1966); Mich. Comp. Law, § 38.101 (1966); Miss. Code An., Schools § 6262-6263 (1930); Rev. Code of Mont., Schools § 75-2411 (1921); Rev. Stat. Neb., Schools § 79-1234 (1967); N. H. Rev. Stat. An., ed. § 189:13 (1935); N.J.S.A., Ed. § 18A:6-10 (1946); New Mex. Stat., Schools § 77-8-14 (1967); McKinney's Consol. L. of N.Y. An., ed. § 3020 (1947); Gen. Stat. No. Car., ed. § 115-145 (1965); No. Dak. Century Code An., ed. § 15-25-08 (1957); Okla. Stat. An., Schools 6-2 (1949); Ore. Rev. Stat., ed. § 342.175 (1965); R. I. Stat. Ed. § 16-12-6 (1969); Penna., ed. § 12-1211 (1949); Tex. Stat. ed. § 13.16 a.2 (1969); Tenn. Stat. ed. § 49-1412 (1966); So. Dak. Stat., ed. § 13-43-15 (1967); Wyo. Stat., ed. § 21.1-160 (1959); Wis. Stat. § 40.42 (1948); W. Va. Stat., ed. § 18A-3-6 (1970); Wash. Stat., Schools § 28.70.160 (1963); Va. Stat., ed. § 22-217.5 (1968); Vt. Stat., ed. § 1752b (1968); Utah Stat., Public Schools § 53-2-24 (1953); West's An. Calif. Codes, ed. § 13202 (1959).

paring society's children for a good and useful life.<sup>4</sup> The question that then arises is, "To what degree may society justifiably enforce its morality?" Should the teacher be restrained only to the extent of preventing conduct harmful to the community, or is deviation from the norm *per se* damaging to society?<sup>5</sup> Because of the responsibilities conferred upon the teacher, he has been closely scrutinized in his private life as well as when acting within the scope of his profession.<sup>6</sup> Generally where the courts have been presented with the problem of whether or not specific behavior constitutes moral turpitude, which would warrant dismissal, they have usually required that the conduct in question be such as will adversely affect the school situation, before dismissal will be approved. Dismissal has been held valid where the teacher cheated on an examination (held to afford an opportunity for reclassification<sup>7</sup>); was convicted of a sex crime<sup>8</sup>; used undignified language with reference to school administrators<sup>9</sup>; and, used intoxicants and talked profanely to his students.<sup>10</sup>

### The Homosexual and the Teaching Profession

Historically the homosexual has held a wide range of positions in the social structure. For the early Greeks homosexuality was accepted and often encouraged. Some of the most revered Greek leaders, as well as later Roman emperors, were homosexuals.<sup>10a</sup> Probably the condemnation of homosexuality by the early Christian church was to a great extent a reaction against the unbridled license of the Romans. But, even within the church, homosexuality was widely practiced, and we find the figure of the homosexual priest often present in Renaissance drama. With the decline of the church, secular authority adopted the prohibitions against homosexual activity.<sup>11</sup> These laws became most stringent with the advent of the Victorian Age, and both the United States and England firmly established homosexuality as an infamous crime against nature.<sup>12</sup>

<sup>4</sup> Goldsmith v. Board of Education, 66 Cal. App. 157, 225 P. 783 (1924); Board of Education v. Swan, 41 Cal. 2d 546, 261 P. 2d 261 (1953); Morrison v. State Board of Education, 82 Cal. Rptr. 175, 461 P. 2d 375 (1969).

<sup>5</sup> Harris, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 UCLA L. Rev. 581 (1967); Restow, The Enforcement of Morals, Camb. L. J. 174 (1960).

<sup>6</sup> Goldsmith v. Board of Education, *supra* n. 4; Board of Education v. Swan, *supra* n. 4; Morrison v. State Board of Education, *supra* n. 4.

<sup>7</sup> Shirer v. Anderson, 88 F. Supp. 858 (D.C.N.C. 1950).

<sup>8</sup> Peabody v. Board of County School Examiners, Ohio N.P. 151, 2 Ohio Dec. 25 (1894); Tracy v. School Dist. No. 22 Sheridan County, 70 Wyo. 1, 243 P. 2d 932 (1952).

<sup>9</sup> Sarac v. State Board of Education, 57 Cal. Rptr. 69, 249 Cal. App. 2d 58 (1967).

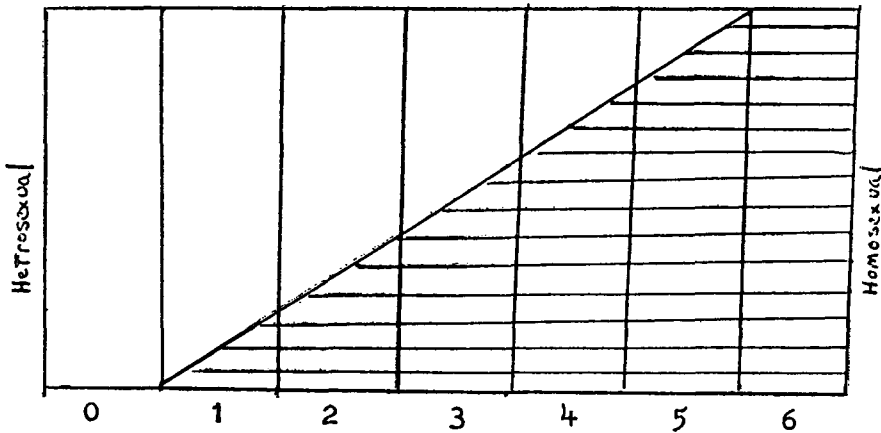
<sup>10</sup> Board of Education v. Swan, *supra* n. 4.

<sup>10a</sup> Mitchell, *op. cit. supra* n. 1.

<sup>11</sup> *Id.*

<sup>12</sup> Ga. Code An., § 4352 (1882); Penna. Code, § 373 (1910).

Today homosexuality is more openly practiced and discussed than at any other time in modern history, but the real range of homosexual activity is not commonly known. Dr. Kinsey rates man's sexual behavior on a six point scale, from the exclusively heterosexual to the exclusively homosexual; and finds the distribution shown on this chart:



- 0 Exclusively heterosexual with no homosexual behavior
- 1 Predominantly heterosexual, only incidentally homosexual
- 2 Predominantly heterosexual, but more than incidentally homosexual
- 3 Equally heterosexual and homosexual
- 4 Predominantly homosexual, but more than incidentally heterosexual
- 5 Predominantly homosexual, but incidentally heterosexual
- 6 Exclusively homosexual<sup>13</sup>

An individual's homosexual predilection may be overt or covert; he may be promiscuous or selective; he may function adequately in other areas of life; or he may be greatly disturbed emotionally.<sup>14</sup>

According to Dr. Kinsey, 37 per cent of the male population has had at least some overt homosexual experience to the point of orgasm between adolescence and old age. This accounts for nearly 2 males out of every 5 that one may meet. 32.9 per cent of college level males, at some time in their lives, have had homosexual experiences to the point of orgasm.<sup>15</sup>

All of the fifty states have enacted laws forbidding the act of sodomy, or what is sometimes referred to as "the crime against na-

<sup>13</sup> Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male*, 638 (1948).

<sup>14</sup> Mitchell, *op. cit. supra* n. 1 at 5.

<sup>15</sup> Kinsey, Pomeroy & Martin, *op. cit. supra* n. 13 at 651.

ture.”<sup>16</sup> With the evidence provided by Doctor Kinsey<sup>17</sup> on the incidence of homosexual activity, and in consideration of the laws prohibiting it, a good number of the college educated male population would be institutionalized if these laws were enforced. There is, of course, a percentage of this group now holding teaching positions; but what of the few who have been denied such positions? How many applicants have been refused, or teachers dismissed for the revelation of a single homosexual act?

The California Penal Code § 291 provides that:

Every sheriff or Chief of Police, upon the arrest for any of the offenses enumerated in Section 290 of any person who is employed as a teacher in any of the public schools of this state shall immediately give written notice of the arrest to the State Department of Education and to the Superintendent of Schools in the County wherein such person is employed. Upon receipt of such notice, the County Superintendent of Schools shall immediately notify the governing board of the school district employing such person.<sup>18</sup>

The enforcement of this statute is often a prerequisite for the revocation and suspension of a teaching certificate, for immoral or unprofessional conduct enumerated in California Code § 13202.<sup>19</sup>

### The Homosexual's Application

In the application for a teaching position the homosexual is confronted with the first of many obstacles to exclude him from his profession. Most school systems require that the applicant submit a form application, recommendations, school transcripts, and references, and also that he appear for a personal interview.<sup>20</sup>

In an interview with Mr. Darian Smith, Assistant Director of Personnel for the Cleveland Board of Education, Mr. Smith described to me the selection and entry process and Board policies in regard to the homosexual applicant.<sup>21</sup>

Interviewer: Who is responsible for the hiring and firing of teachers?

Mr. Smith: The Personnel Department.

Interviewer: What is the policy of the Cleveland Board of Education in the employing of homosexuals as teachers?

<sup>16</sup> *Honselman v. People*, 168 Ill. 172, 48 N.E. 304 (1897).

<sup>17</sup> Kinsey, Pomeroy & Martin, *op. cit. supra* n. 13.

<sup>18</sup> West's An. Calif. Codes, Penal Code § 291 (1967).

<sup>19</sup> West's An. Calif. Codes, ed. § 13202 (1959).

<sup>20</sup> Interview with Mr. Bob Milne, Vice-President of the Mattachine Society, N.Y. City (the Homosexual organization involved in the homosexual civil rights movement and in counseling for individual homosexuals in regard to legal, psychological, social and medical problems; located at 243 West End Ave., N. Y. C., N. Y. 10023).

<sup>21</sup> Interview with Mr. Darian Smith, Assistant Superintendent of Personnel, Cleveland, Ohio, Board of Education.

Mr. Smith: The Board has no written policy on the employing of homosexuals. The decision on any application is based on recommendations, school transcripts, and references. An important concern of the Board is the effect the activities of the prospective teacher will have on the children, teachers, and parents.

Interviewer: Outside of school transcripts, references, and recommendations, is there a background study made of the applicant?

Mr. Smith: Generally there is no background study except if there is information that comes to our attention that must be verified.

Interviewer: If an applicant is refused a position in the school system, is it necessary to inform him as to why he was not hired?

Mr. Smith: The Board of Education is not obligated to give a reason for the non-hiring of an applicant. The reason usually given is the availability of better qualified applicants.

Interviewer: If an applicant appeared, from his interview and records, to be a homosexual or had other psychological problems, could the Board refuse employment without showing cause?

Mr. Smith: If the applicant demanded cause the Board could very well give the reason of better qualified applicants, and even this would not be necessary.

Apparently a school board can refuse employment to a homosexual applicant, and thus enforce prejudice, by basing its refusal on less controversial grounds.

Mr. Bob Milne, Vice-President of the Mattachine Society of New York, commented on the problems confronting the homosexual applicant:

In the last few years school boards have become careful in statements made concerning the employment of homosexuals, due to the ever increasing number of homosexuals standing up for their civil rights. A few years ago school administrators wouldn't hesitate to state that they would not hire homosexuals under any circumstances. In most cases the prospective teacher is identified as a homosexual through rumor or allegation. What often occurs is that the homosexual is identified by his draft record, which, according to the Selective Service laws is confidential as between the draft board and the applicant. Actually, what happens is that an applicant seeking employment is asked what his draft status is, and if his answer is 4F or 1Y, which are the categories in which homosexuals are now classified, he is then asked to explain the reason for his classification. He can usually give a reason that would be passable, such as a heart murmur, flat feet, etc.; but the board might then request a signed waiver allowing them to obtain his selective service file. If the applicant refuses to sign the waiver he will not get the job. If he does sign the waiver, he will not get the job.<sup>22</sup>

Even in a situation where an applicant for a teaching certificate is refused certification and is given a cause other than, "there are better

<sup>22</sup> Interview with Mr. Bob Milne, *supra* n. 20.

qualified applicants,"<sup>23</sup> the principle has been well established that the state or school authority has the power to establish requirements or rules concerning the quality of moral character in applicants.<sup>24</sup> The court in *Marrs v. Matthews*, observed that although a citizen may have an inherent right to teach in a private school, that right does not exist as to free public schools financed by the state. The state may justly claim the right to prescribe the qualifications of those who teach, and name the conditions under which the privilege of teaching may be exercised.<sup>25</sup>

Mr. A. was an applicant for a teaching certificate in New York City. He was refused certification, although placing in the upper 5 per cent of applicants taking the teaching qualification examination, due to a single arrest in 1955 for immoral solicitation, which he claims to have been unjustified. He was not convicted.<sup>26</sup>

The statutes pertaining to moral character requirements for the purpose of obtaining a teaching certificate have been upheld as constitutional.<sup>27</sup> It would seem that the definition of morality and professional conduct is an ever changing one, affected by time and location. In *Schuer's Appeal*, a 1939 Pennsylvania case, the court upheld an unmarried teacher's dismissal when it was found that she was often seen in the company of a married man.<sup>28</sup> In a 1902 Kentucky case dismissal was upheld where the appellant teacher had become intoxicated on two occasions at a private party.<sup>29</sup> More recently, in 1965, a probationary teacher was dismissed from a Maryland high school for assigning the book titled *Brave New World*, by Aldous Huxley, to his class.<sup>30</sup> Would these decisions be followed at a different time in history or in another jurisdiction?

Homosexuality in this country has never been so widely discussed or tolerated as it is at the present time. It is doubtful that many courts today would find the grounds for dismissal of teachers cited in the previous paragraph to be adequate. The question still remains, however, as to the status of the homosexual.

<sup>23</sup> Interview with Mr. Darian Smith, *supra* n. 21.

<sup>24</sup> *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380 (1952); *Vogulkin v. State Board of Education*, 194 Cal. App. 2d 424, 15 Cal. Rptr. 335 (1961); *Epstein v. Board of Examiners of Board of Education*, 162 Misc. 718, 295 N.Y.S. 796 (1936).

<sup>25</sup> *Marrs v. Matthews*, 270 S.W. 586 (Tex. Civ. App. 1925).

<sup>26</sup> Interview with an applicant for a teacher's certification in New York City, who had a masters degree in education; who preferred to be unnamed as he was in the process of a civil action to appeal the denial of certification.

<sup>27</sup> *Vogulkin v. State Board of Education*, *supra* n. 24. See also, *People ex rel. Odell v. Flaningam*, 347 Ill. 328, 179 N.E. 823 (1932).

<sup>28</sup> *In Schuer's Appeal*, 36 Pa. D.C. 531 (1939).

<sup>29</sup> *Bowman v. Ray*, 178 Ky. 110, 80 S.W. 516 (1904).

<sup>30</sup> *Parker v. Board of Education of Prince George County, Maryland*, 237 F. Supp. 222 (D.C. Md. 1965).

### Dismissal of Teacher Accused of Homosexuality or Convicted of a Criminal Act Related to Homosexuality

Once employed, the teacher, if asked to resign for reason of homosexuality, theoretically has the right to demand a hearing before an administrative board.<sup>31</sup> But this is not always so, in the case of one convicted of a crime,<sup>32</sup> or as to a new teacher classified as probationary.<sup>33</sup>

The instances of the accused demanding his right to a hearing are almost nil. Bob Milne, Vice-President of the Mattachine Society:

Teachers accused of homosexuality when asked to resign, do resign out of fear; the fear and humiliation of testifying at a hearing and possibly court proceedings, which would be a traumatic experience in itself, outside of the damaging publicity generated. In my experience in the Mattachine Society I have been consulted by nearly a hundred teachers, in the last five years, facing dismissal, who I have urged to contest the school boards' action. Few have requested a hearing, and none that I can recall have taken their cases to the courts.<sup>34</sup>

Mr. Darian Smith, Assistant Supervisor of Personnel for the Cleveland Board of Education:

There have been no legal problems in this area. In the Board's history, teachers that have been accused of homosexuality which influenced their job have always resigned. If the teacher commits a criminal act he can be dismissed; but in my experience there have only been resignations by mutual agreement.<sup>35</sup>

It has been held that the requirement of a hearing must be satisfied, if demanded,<sup>36</sup> and notification that a hearing if requested would be of no help does not satisfy the requirement.<sup>37</sup> In *Neal v. Bryant*, a Florida case involving a dismissal for moral turpitude in the practicing of homosexuality, the court reversed the Board of Education's dismissal. The Board had failed to comply with the requirements of a hearing by not appointing an investigating committee to make a preliminary determination of probable cause for the dismissal.<sup>38</sup>

<sup>31</sup> Statutes, *supra* n. 3. All of the statutes pertaining to the dismissal of a teacher for immorality, moral turpitude, or unprofessional conduct, provide for a hearing on demand by the teacher.

<sup>32</sup> West's An. Calif. Codes, ed. § 13207.

<sup>33</sup> *Parker v. Board of Education of Prince George's County, Maryland*, *supra* n. 30.

<sup>34</sup> Interview with Mr. Bob Milne, *supra* n. 20. See, Roberts, *Homosexuals in Revolt*, New York Times (Aug. 24, 1970).

<sup>35</sup> Interview with Mr. Darian Smith, *supra* n. 21.

<sup>36</sup> *Lee v. Huff*, 61 Ark. 494, 33 S.W. 846 (1896). The power to revoke a teacher's license for lack of good moral character was held to have been violated when the teacher's license was revoked without an opportunity to defend at a hearing.

<sup>37</sup> *Zeller v. Prior Lake Public Schools*, 259 Minn. 487, 108 N.W. 2d 602 (1961).

<sup>38</sup> *Neal v. Bryant*, 149 S. 2d 529 (Fla. 1962).



## The Requirement of Good Cause for Dismissal

The requirement of "Good Cause," is satisfied in the case of a teacher convicted of a sex related crime.<sup>39</sup> Sodomy or sexual perversion are two such offenses which homosexuals are most often charged with, and are in fact the offenses which mark a man as a homosexual in the eyes of the law and school authorities.<sup>40</sup>

In a situation where a teacher was identified as a homosexual, but was neither arrested nor convicted of committing a criminal act, the Supreme Court of California was asked to make a decision as to whether homosexuality *per se* was proper cause for dismissal.

The appellant, after a hearing by the school board, was dismissed upon the finding that he had a homosexual relationship with another teacher, although not committing an offense under the California Statutes. In its decision the Supreme Court stated that it would not hold that homosexuals must be permitted to teach in the public schools of California. But the court did overrule the board's dismissal on the grounds that the board failed to show an adverse effect on the appellant's service, caused by his homosexuality.<sup>41</sup> The court cited *Norton v. Macy*, which held that a federal employee could be dismissed only if he had committed or was likely to commit some act with an ascertainable deleterious effect on the efficiency of his service.<sup>42</sup>

## Conclusion

Homosexuals in the United States consider themselves to be an oppressed minority,<sup>43</sup> psychologically disturbed only to the extent that the heterosexual society harasses them. While it would seem that the prevailing view among the populus and its authorities is that the homosexual is a psychologically disturbed person,<sup>44</sup> he often functions quite well in other respects.<sup>45</sup>

In recent years there have been attempts to modify the laws against homosexuality,<sup>46</sup> supporting the view that society should not attempt to enforce any particular pattern of moral and sexual behavior as long as there is no interference with the safety and the rights of others.

<sup>39</sup> *Fountain v. State Board of Education*, 157 Cal. App. 2d 463, 320 P. 2d 899 (1958); *Sarac v. State Board of Education*, *supra* n. 9.

<sup>40</sup> Interview with Mr. Bob Milne, *supra* n. 20; Mitchell, *op. cit. supra* n. 1.

<sup>41</sup> *Morrison v. State Board of Education*, *supra* n. 4.

<sup>42</sup> *Norton v. Macy*, 417 F. 2d 1161 (3 Cir. 1969).

<sup>43</sup> Roberts, *op. cit. supra* n. 34.

<sup>44</sup> Socarides, *Theoretical and Clinical Aspects of Overt Male Homosexuality*, J. Amer. Psychoanal. Ass., 552-556 (1960); Bychowski, *Homosexuality: a Psychosis*, in Lorand and Balint, *Perversions: Psychodynamics and Therapy*, 97-130 (1956).

<sup>45</sup> Cory, *The Homosexual in America*, Time (Mag.), Vol. 87, 40-41 (Jan. 21, 1966).

<sup>46</sup> Model Penal Code § 207.5, comment at 277 (Tent. Draft No. 4, 1955) Reporters of the American Law Institute; Wolfenden Report, Committee on Homosexual Offenses and Prostitution, Report (MD. No. 247, 1957).

Although in *Morrison v. State Board of Education*, the Court would not commit itself to the extent of requiring the school system of California to employ homosexuals, it did move towards clarifying the intent of statutes pertaining to the dismissal of teachers for homosexuality.<sup>47</sup> By requiring the system to prove that an individual's sexual inclinations produced an adverse effect on his teaching service, the Court thus refused to condemn the individual by reason of such inclinations. It would seem that this was a step towards judging the homosexual for his potential as an effective teacher, and towards not punishing him for his inability to conform to the sexual mores of society.

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<sup>47</sup> *Morrison v. State Board of Education*, *supra* n. 4.