

LOS ANGELES CITY TASK FORCE ON FAMILY DIVERSITY

RESEARCH TEAM ON

GAY AND LESBIAN COUPLES

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SUMMARY OF RECOMMENDATIONS

1. CLEARLY DEFINE WHAT CONSTITUTES A LEGITIMATE HOMOSEXUAL COUPLE. Incorporate that definition into an Affidavit of Domestic Partnership.
2. INCLUDE THAT DEFINITION IN SECTION 4.127 OF THE ADMINISTRATIVE CODE which provides for family sick leave and bereavement leave for city employees. Employees signing Affidavits of Domestic Partnership would then be able to use their family sick and bereavement leave benefits for their named domestic partner.
3. INCORPORATE THE AFFIDAVIT INTO ANY PLANS TO REVISE THE CITY'S BENEFIT SCHEME, PARTICULARLY FOR HEALTH AND DENTAL CARE BENEFITS, or any other benefits which the City might offer to married couples which would be equally appropriate for legitimate gay and lesbian couples.
4. RECOMMEND TO THE CITY'S PRIVATE EMPLOYERS THAT THEY INCORPORATE SIMILAR AFFIDAVITS INTO THEIR BENEFIT POLICIES.
5. CONSULT THE CITY ATTORNEY'S OFFICE FOR AN OPINION about the legality, in light of such a concise, and legally binding definition of homosexual relationships, of excluding them from benefits, either because of marital status discrimination or sexual orientation discrimination, or on any other basis, by any business, club or other organization, public or private.
6. RECOMMEND THAT THE LOS ANGELES UNIFIED SCHOOL BOARD'S POLICY FOR FAMILY LIFE EDUCATION INCLUDE RESPONSIBLE INFORMATION ABOUT HOMOSEXUALITY including information about legitimate gay and lesbian couples.
7. RECOMMEND THAT THE LOS ANGELES UNIFIED SCHOOL BOARD INCORPORATE, IN ITS GUIDELINES ABOUT THE PREVENTION OF YOUTH SUICIDE AND THE TEACHING OF GENOCIDE, THAT APPROPRIATE AND FACTUAL INFORMATION REGARDING HOMOSEXUALITY BE INCLUDED IN EACH.
8. RECOMMEND THAT THE SCHOOL BOARD APPOINT VIRGINIA URIBE AS COMMISSIONER FOR GAY AND LESBIAN AFFAIRS FOR THE LOS ANGELES UNIFIED SCHOOL DISTRICT, a position which would have the same standing as advisors for all other minority matters.
9. BEGIN IMMEDIATELY TO APPOINT GAYS AND LESBIANS TO RESOLVE THE DRAMATIC UNDERREPRESENTATION OF GAY AND LESBIAN CITY APPOINTEES TO CITY BOARDS AND COMMISSIONS, and encourage other cities within LA County to do the same, by way of a written recommendation signed by the City Council.
10. IMMEDIATELY AMEND SECTION 10.8.2 OF THE ADMINISTRATIVE CODE, SETTING OUT MANDATORY NONDISCRIMINATION CRITERIA FOR CITY CONTRACTORS, TO BRING IT INTO CONFORMANCE WITH RECENT CHANGES IN STATE AND LOCAL LAW PROHIBITING DISCRIMINATION BASED ON MARITAL STATUS, MEDICAL CONDITION OR SEXUAL ORIENTATION.

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INTRODUCTION

There is no question that the prejudice against homosexuality runs very deep in many people. It is equally true, however, that to increasing numbers of people, the irrationality and injustice of that prejudice is becoming evident. As homosexuals make their presence, and their common humanity known, more and more heterosexuals are finding cause to question their beliefs and superstitions in the face, not only of hard facts, but real people.

Because most arguments against homosexuality derive from some combination of conventional beliefs about Christian theology, theories of natural law, or legal moralism, it is important to understand those concepts, both in their original historical contexts, and in the current setting in order to comprehend the policy of tolerance this report will recommend. It is our finding that, while the City has adopted an ordinance nominally prohibiting discrimination against homosexuals, that ordinance does not constitute a coherent or comprehensive policy. It is the purpose of this report to recommend a new policy that incorporates the positive aspects of current policy, but corrects the serious and harmful deficiencies which an anti-discrimination ordinance standing on its own is incapable of addressing.

The divisions the City is currently experiencing over this issue, including lack of adequate representation, discriminatory adoption laws, promotion and compensation discrepancies, violence, accusations of police bias, and others, are direct results of a failure to consider, at the most profound level, what we really think and feel about the topic of sexuality in general, and homosexuality in particular, and how we deal with such sensitive subjects, so steeped in emotion and misunderstanding, in a way that will address the issues rationally, for the good of the entire City. It is the overall purpose of this report to do just that, to examine the particular sources of the prejudices against homosexuals, how they were invented and how they are being used and perpetuated today, and the ways in which a thoroughly considered public policy can ease the tensions which currently exist, while taking into account both the force and depth of the fears in those so prejudiced, and the needs and daily realities of the City's hundreds of thousands of homosexual men and women.

In Part One of this report we will look at the major objections to homosexuality per se which are most often presented as arguments that it is the obligation of public policy to limit or eradicate homosexuality, and examine some of the sources which gave rise to such arguments, and the serious conflicts between those arguments and the actual facts. The final section of Part One will lay out a basis for the construction of a more realistic and humane policy which is in keeping with a deeply understood moral code and the political realities of the present and future. Part Two will lay out specific recommendations for implementing that policy in Los Angeles, in a reasonable and responsible manner.

PART ONE

Answering the Arguments

In the sixth century A.D. the Emperor Justinian passed the first law in Western history explicitly proscribing homosexual acts. (1) Prior to that time homosexuality was of little or no interest to public policy. Up until about the third century debate about homosexuality did not concern its moral status, but whether it was a more perfect form of love than its heterosexual counterpart. (2) By the time of Justinian, however, a change had occurred, and with the conflation of state interests with those of an emerging church, homosexuality was classified as both immoral and illegal.

Two points need to be made: 1) This alleged immorality arises out of an increasingly narrow view of morality which is able to assign condemnation strictly in terms of expected sexual norms, and does not take into account any other values or qualities of the individual in question; and 2) that condemnation was neither universal, nor consistently enforced (or enforceable) from Justinian's time to the present. The inadequacies and injustice of this policy come out of the conflict between the perceived nature of homosexuality and the actual fact of homosexuality as it is manifested in real men and women. In order to understand how that conflict has affected our own society it is important to examine some of the reasons that surround the invention of the prejudice.

Marriage as a Heterosexual Institution

The first is the relation of homosexuality to marriage. Ancient Roman laws governing marriage (the first significant body of law on the subject) arise out of three articulated state interests: inheritance of property, the avoidance of accidental incest, and determination of a child's citizenship status. (3) The third was particularly important to Roman society since citizenship was derived directly from both parents, and determined an array of rights, privileges and obligations. It should be clear that these state interests are not in the nature of the relationship between the married partners, but in the effects that partnership will have on the state via the couple's children. In fact, in a world that did not know of modern birth control methods, laws existed covering nearly all regularized sexual relationships between members of opposite sexes, including concubinage. (4) It is equally true that the state's interest in homosexual relationships was negligible, if it existed at all for precisely this reason. Again, the state's interest was not in the relationships between people, but in the consequences of those relationships, in the form of children. The numerous, documented relationships between homosexuals in both Greece and Rome, and throughout the Western world is powerful evidence that those relationships not only existed, but were not in conflict with either marriage or the predominant moral code.

A change begins to occur in the first and second centuries

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A.D. While homosexual relationships and marriage continue to coexist, the production of children comes to be seen as a means of justifying sexual pleasure. (5) Such pleasure is looked on with suspicion. The Stoic school of philosophy helps to redefine sex in utilitarian terms, in which no pleasure is appropriate without some "good" product as its end. Long before this idea turns up in Christian ideology it has been given its ground. But it is important to note that the "good" product of sex is defined solely as the birth of a child (though even this was an arguable point at the time). The narrowness of this emerging definition will have significant repercussions.

With that justification in place, theology begins to merge with the state interests already in place to recreate marriage as a kind of fortress within which sex is permissible; that is, despite the innately suspicious nature of sex, it will be allowed within this limited realm in order to ensure the continuation of the species, which is determined to be the highest possible civil good. It should be noted that at this point, no arguments appear which use this reasoning to try to prohibit homosexual relationships; and, in fact, arguments for the validity of gay love carry a great deal of authority. But over the course of the two centuries, heterosexual marriage gains a foothold of legitimacy, not because the nature of the relationship is superior, but because it so comfortably fits the accepted Stoic reasoning.

But if the only, or preeminent good of marriage is the production of children, then what should be the fate of someone who is infertile? What should be done about the case of the widow who is past her child-bearing years, who meets a man she would like to marry? In either event no children could conceivably result from a marriage. Should such marriages be allowed, then, since the sexual pleasure which would result from such unions would have no justification in the moral order enunciated?

This question does not get significantly asked until about the thirteenth century, when Thomas Aquinas categorically anathematizes homosexuality per se as evil. The answer that develops, of course, is that such marriages would be allowed, not because they fit prescribed natural law theories, but because they imitate what are (by the thirteenth century) conventional relationship models. Homosexuals, who find themselves in exactly the same situation of wishing to regularize their relationships, are prohibited from marrying, or having any sort of recognized relationships. The justifications for this (discussed below) do not detract from the essential inconsistency of the argument.

Biblical Arguments

As John Boswell shows definitively in his study, Christianity, Social Tolerance and Homosexuality, (6) passages commonly quoted today as proof of some kind of biblical proscription of homosexual activity are evidence only of a deeply felt bias in those so using (or misusing) the arguments. The

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mistranslations and misunderstandings of the Hebrew words "kadash," "kadeshim," and "toevah" (in Genesis 19 and Leviticus 18:22), and two Greek words which Paul uses (in 1 Corinthians 6:9, and 1 Timothy 1:10) formed, by the time of the King James Translation in the sixteenth century, a justification for discrimination against homosexuals, which cannot be found, either in other passages by the original authors, or in commentary by their contemporaries. Jesus, himself, for example, when he refers to the destruction of Sodom, does not use it to condemn homosexuals but to warn against the graver sin of inhospitality, which was a far more serious offense in a nomadic culture of many wayfarers. Jesus, in fact, never mentions homosexuals; if homosexuality is the grave evil it is supposed, and if Sodom is its legendary capital, why would the man who came to represent the supreme moral authority refer to the story and not mention it at all?

The interpretation which reads the story of Sodom as a lesson about inhospitality has gained increasing scholarly acceptance since it was first proposed in 1955, (7) and accords far more accurately with the contemporary morality of the writers than the commonly accepted one. More important, although Sodom is mentioned in dozens of other passages in the Bible (8), none of those other writers refer to it as a warning against homosexuality. It is only within an emerging context of intolerance of homosexuals that the story comes to be associated with, and, ultimately, to stand for the supposed evil of homosexuality.

Arguments against Levitical proscriptions of homosexuality are quite different. Here there is no question that the activity being prohibited is homosexuality ("Thou shalt not lie with mankind as with womankind; it is abomination." 18:22). Even without taking into consideration the problematic translation of the Hebrew "toevah" as abomination (the word more accurately applies to those acts which are ritually unclean for Jews, such as eating pork, which is also prohibited in these same chapters, and "abomination" is clearly out of proportion), Jewish prohibitions were explicitly not enforced upon early Christians by the Council of Jerusalem ca. A.D. 49. Given contemporary levels of tolerance for homosexuality, such prohibitions would have seemed as arbitrary as the prohibitions against eating pork or cutting the beard.

New Testament objections to homosexuality can be found exclusively in the writings of Paul. The references in 1 Corinthians and 1 Timothy seem both to be simple mistranslations; the word used in 1 Corinthians ("malakoi"), and rendered as "effeminate" is translated in other NT and patristic writings as "cowardly," "refined," "sick," "gentle," or "weak-willed," and is overwhelmingly considered to mean "masturbation" in church tradition through the Reformation, and in Catholic theology until well into the twentieth century. (9) The reference in Timothy ("arsenokoitai"), translated into English as "abusers of themselves with men" has stronger homosexual connotations, but would more accurately have been translated "male prostitute,"

which would almost certainly have been Paul's contemporary understanding of the word.

The passage in Romans is not mistranslated, but its use against homosexuality in general is a very good example of how important context is.

"God gave them up unto vile affections: for even the women did change the natural use into that which is against nature: and likewise also the men, leaving the natural use of the woman, burned in their lust one toward another, men with men working that which is unseemly and receiving in themselves that recompence of their error which was meet." Romans 1:26-27

Paul's references to women and men who "did change the natural use" of their sexuality, and "burned in their lust one toward another," when taken out of context, looks damning to homosexuality in general. But the point of the passage is far broader than just sexuality. This is one example among many Paul cites of people who left a particular calling; construing the entire passage as a prohibition of homosexuality wrests it out of Paul's context. In order for it to make his point, it MUST refer to heterosexuals who engage in homosexual acts against their heterosexual orientation. As such, it would neither prohibit, nor even rebuke Christians who were homosexual by nature who wished to engage in mutual acts of love, Christians whom Paul was fully aware of in his society. As it is, the passage is evidence of a persistent misunderstanding of homosexuality, in that it assumes that there is a way for otherwise heterosexually inclined people to be so affected by homosexual lust that it would transform them. Given the extensive research that has been done on the subject throughout the nineteenth and twentieth centuries, and a simple look at the historical record, such a position would be untenable in the modern world. According to Alfred Kinsey's landmark study in 1948, which has not ever been seriously contradicted, 10 percent of all males are "more or less exclusively homosexual" in their orientation. (10). It is misunderstanding arising out of irrational fear that causes people to use passages like Paul's against homosexuals, when, in fact, they were not so intended, and to do so, in fact, does violence to the writer's major intention. The fears of such people should not be discounted, but it must be recognized that the justification for their fears cannot be found in these passages.

Celibacy

The capriciousness of these arguments becomes more pronounced when Christian theology is asked to address the issue of what homosexuals should do with their sexuality.

Once homosexuality becomes defined as immoral per se, the prevailing opinion is that homosexuals are just heterosexuals gone wrong. Some, like Ruth Tiffany Barnhouse, take the paternalistic stance:

"...human beings are simply incapable of always choosing wisely and require constant help, love and guidance to learn to do better. We have also seen that this is true even if the person's responsibility is mitigated by the process having taken place unconsciously. It is impossible for homosexuality not to be included in this category." (11)

The author continues in this paternalistic vein by lumping homosexuality in with "all failures of maturation," and pleads that homosexuality not be singled out for special punishment.

It is unlikely that many fulfilled, successful homosexuals would agree with this assessment of their maturity, or of their ability to accurately assess their own most intimate feelings. This passage illustrates how some heterosexuals are able to rationalize themselves into superiority by reinventing homosexuals as people who simply don't know what's best for them. If the reasoning sounds familiar, it should; it is precisely the tactic used against blacks in this country, from the 18th century until the Civil Rights Movement, and can still be found today.

More importantly, however, this kind of thinking denies the fact that there are homosexuals. It depends on the assumption that all people are, in fact, capable of, and (once they are mature enough) desirous of sexual intercourse with a member of the opposite sex for the purpose of having babies. It wholly ignores the fundamental factors of attraction which draw people to one another in the first place, and the most rudimentary facts about sexuality.

Those who are able to admit that some people actually are homosexual, and who just cannot bear the thought, prescribe celibacy for them. (12) But this perverts the entire concept of celibacy, particularly within the Roman Catholic framework. Celibacy was conceived as a special calling for the clergy, who were especially blessed by their ability to rise above sexual temptation through success in this extreme self-denial. For homosexuals, however, celibacy is inflicted as a kind of punishment. To enforce it on homosexuals is to enforce on them that same blessed state, to make them suffer for their deepest feelings so intensely that they must attain a state of grace whether they will or not, a far cry from the voluntary clerical vow, the mark of holiness. This either degrades the clergy or ennobles homosexuals, and in either case cannot be what the church has in mind.

The injustice of this is manifest. People have inherent sexual urges that can neither be suppressed nor denied. No one expects heterosexuals to ignore their sexuality. But in the case of homosexuals, it is not only expected, it is recommended.

Morality and Natural Law

The assumption of prima facie immorality on the basis of homosexuality arises most influentially from Thomas Aquinas, particularly his Summa Theologiae. (13) While it would be impossible to review all of his arguments in this report, his central theses are crucial to an understanding of how homosexuality came to acquire the moral stigma it has.

The Summa was begun in about 1265, after the period usually referred to as the High Middle Ages, in which European urbanization led to a renaissance of acceptance for varied lifestyles, including homosexuality. (14) The thirteenth century begins to see a dramatic increase in absolutist governments, and uniformity of thought, both religious (the Inquisition, for example), and secular. (15) Within that social context, intolerance of diversity became the new norm, and dogmatic opinion was most welcome.

Aquinas uses two primary rationales against homosexuality, both of which depend on his conception of natural law: that homosexuality is not practiced among animals, and that it impedes the propagation of the species, both of which attest to its "unnaturalness." The first argument is a standard one for his age, and needs little more than casual observation to refute. The second directly contradicts Aquinas himself in an earlier section of the Summa, (16) in which he defends voluntary virginity as a supreme Christian virtue by arguing that individuals are not obligated to procreate, it is only the race as a whole which is so obligated. As Boswell states:

"In the end Aquinas admits more or less frankly that his categorization of homosexual acts as "unnatural" is a concession to popular sentiment and parlance... Aquinas was not an innovator; the Summa's position, in this as in many matters, was a response to, not the origin of, popular attitudes."
(17)

Thus, what is (and has been) taken as the supreme rational argument for the immorality of homosexuality can be seen as both highly irrational and internally inconsistent. (Even more so than I have been able to document here; see Boswell pp. 318-334 for a more complete analysis) More than that it is an acquiescence to conventional biases at a time when society was actively seeking restrictive notions of convention.

That these biases and conventions have continued (more or less) through to the present is evidence of how much we wish to restrict convention. The arguments remain as irrational and inconsistent today as when they were first presented. If sexuality is to be strictly "according to nature," (i.e., like animals) how can formalized relationships be explained at all (not to mention the fact that, as above noted, homosexuality does occur in animals)? The need to formalize relationships is a distinctly human need, arising, not out of our sexual natures at all, but out of the love we feel, the need we have for security

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and stability, our fear of loneliness, and dozens of other factors, none of which are usually attributed to animals.

Further, to attribute immorality to homosexuals on the basis of sexual orientation alone belies an attitude that would deny every other value, characteristic and act that could comprise a whole person. Even if there were a good case to be made for the de facto immorality of homosexuality, why is it that that alone is sufficient to condemn the entire person, as if his humanity were completely overridden by his sexuality? Again, it is the bias which we allow to affect our reason, and not our reason which justifies the bias. Morality must consist of an aggregate of actions, attitudes and motivations, or it is nothing more than a convenient way to condemn any disfavored minority opinion. That has been exactly the situation homosexuals have been asked to accept.

An additional argument exists which can wholly override the Propagation of the Species argument. The reductio ad absurdum that is usually presented is that if homosexuality were to become the norm, the species would die out, which is certainly a dire outcome. But, of course, homosexuality could not possibly become the norm. Alfred Kinsey's data indicate that at any given time, and in any given population, approximately 10 percent have either an exclusively or overwhelmingly homosexual orientation (18). While it is true that no one has ever seriously recommended a public policy of encouraging homosexuality, it is only necessary to look at the culture which most nearly idealized homosexuality, that of Greece, in the Hellenic and Attic periods, to see that the society not only survived, but flourished, intellectually, culturally, philosophically, athletically, and even numerically. It is not hard to see that a modern policy of mere tolerance in this country could hardly be a step toward the species' extinction, when Greece, which had a total population which is exceeded today by many American cities managed to go much closer to the dreaded "encouragement," and did not suffer for it. Once again, the flaw in this kind of thinking is that homosexuality is so alluring that, if tolerated, it would prove irresistible. This accords neither with facts nor with reason.

Almost half a century after the Kinsey report there is still no reason to question the fact that 90 percent of the population are heartily attracted to members of the opposite sex. Those who are so attracted know the force and depth of the attraction. But when that vast majority takes advantage of their majority status to degrade or deny the feelings of the remaining 10 percent of the population, who alone know the legitimacy and honesty of their own sexuality, that majority does a grave injustice to morality and shared humanity, and does nothing but create misery and anxiety where none needs exist.

Children

The prevailing attitude of homosexual immorality is nowhere more evident than in social fears regarding the predatory nature of homosexuals toward children. It is often even taken for

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granted that the corruption runs so deep a homosexual would make an unfit parent for his or her own children, an opinion that more and more family law courts are rejecting daily. The misconceptions and prejudices of the arguments against homosexual parents are good indicators of this class of arguments against homosexuals in general. They are: 1) that the children, if exposed to homosexuals, will grow up to be homosexual; 2) that the adults will molest children they have contact with; 3) that the children will be stigmatized by other children for coming from such a home. Again, facts and reason do not support any of these fears. Studies published in publications like Child Psychiatry and Human Development, The American Journal of Psychiatry and The American Journal of Orthopsychiatry, as well as papers for the American Orthopsychiatric Society and the Bulletin of the American Academy of Psychiatry all show that there is virtually no correspondence between the orientation of one or both parents and the orientation of the child, (19) a fact that could easily enough have been determined by looking at the obvious reality that homosexual children seem not to be affected in their orientation by that of their parents, when the parents are heterosexual.

The irrational fear of that argument becomes intensified in the second objection, that homosexuals will molest their own (or, indeed, any) children. Studies conducted by the Criminal Justice Center of Sam Houston State University, the Children's Division of the American Humane Association, and the Human Development Service all show that the overwhelming and disproportionate number of molestations are by heterosexual males against young girls. One study found that 97 percent of offenders against children are male, and 90 percent of victims are female. (20) Actual studies which could provide any statistical indication in support of the notion that homosexuals are abnormally attracted to children are nonexistent.

The third objection, that children from gay or lesbian homes will be stigmatized by other children, and by biased adults, depends almost exclusively on the insistence that the prejudice against homosexuality is somehow ineradicable and irreversible. It is demonstrably neither. Of those children studied who had lived with an openly gay or lesbian parent, only about 5 percent reported harassment because of their parent's orientation. (21) It is only the abnormally curious and vindictive opinions of bigoted parents that could make an issue out of something so irrelevant. Children have no means of stigmatizing until they are taught how. This is only one more example of how the system of prejudice can be self-perpetuating, but that it is subject to change if we truly wish that.

Legal Moralism

This change is already occurring in England, where homosexuality was decriminalized more than a decade ago, despite the urging of Lord Patrick Devlin, particularly in his otherwise well-considered The Enforcement of Morals. (22) While Devlin's arguments against homosexuality did not hold, the more lasting

impact of his thought is central to much thinking about the criminal law in general, particularly in the U.S. Devlin holds that the law is based in the Judeo-Christian ethic, and, as such, is inextricably tied to the prevention and punishment of immoral, or sinful behavior.

This opinion has been seriously questioned by many scholars, most notably Professor H.L.A. Hart. But even if Devlin is right, that does not argue for laws criminalizing homosexual behavior. Norman Pittenger, in his essay, "The Morality of Homosexual Acts" addresses this issue. Pittenger first discusses the two requirements for an act to be sinful: the inner spirit of the actor, and the manifest intentionality of the action. Against these criteria he is unable to distinguish between the inherent sinfulness of homosexual and heterosexual acts. (24) If, as legal moralism holds, sinfulness is equated with immorality, and immorality justifies the criminal law, than laws against homosexual acts, per se, are as wrong as laws against heterosexual acts per se. Sexual acts cannot be classified as immoral until some other criteria come into play, such as lack of consent or voluntariness, or, (more difficult to determine) the actor's failure to consider his or her act within a morally defined context. That is the effect of marriage for heterosexuals, it provides a clear moral definition within which two people may know more certainly that their intentions and spirits are within some agreed-upon limits. Modern law has not developed such a framework for homosexual acts; lacking that, and given our inherent suspicions about sexual motivation in general, it is not strange that our assumptions about homosexual acts have developed as they have. Again, it is only the lack of formalized relationship guidelines that leave us to presume all homosexual acts are wrong. If such guidelines were set up it would be easier to focus on those homosexual acts which are clearly wrong, such as rape or those child molestations which actually do occur, and not taint every homosexual act with imagined immorality, and thus, lack of legal status.

This subcommittee has no overwhelming objection to legal moralism in general, and does not contest the idea that the law does, in fact, have a certain amount of moral content which can be beneficial to society as a whole. It is, in fact, our contention that laws which criminalize, or otherwise stigmatize homosexuals or their relationships are proof of a strong immorality in the law which arises, not out of the Judeo-Christian ethic of love, but out of fear, intolerance, ignorance and brutality.

A Feminist Perspective

Another argument against homosexuality can be classed as Sex as Metaphor. It does not depend on natural law theory, or legal moralism, or even religion, (though religion has taken it up quite seriously), but on a deep and powerful sexism. This reasoning contends that it is not the creation of children which is the highest good of sexual intimacy, it is the fulfillment of our whole selves; that is, there is an essential complementarity

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between male and female; neither is complete without the other. Therefore heterosexual union is the ultimate means of achieving that completion.

In her article, "From Machismo to Mutuality," Rosemary R. Ruether deconstructs the sexism of that argument. (25) It depends on the belief that human beings are incomplete, and incapable of self-fulfillment. While the truth of that belief is open to debate, and our human incompleteness might be a very valid view of the human condition, there is a second, crucial assumption that gets made that deflates the entire argument.

That assumption is that sexuality is more than just a metaphor for that incompleteness, it is the essence of it. In Ruether's words:

"Those traits traditionally called masculine and those called feminine are presumed to define the unchangeable natures of men and women. Men are actors, thinkers, doers who protect and act upon others. Women are passive, dependent, weak in their ability to take care of themselves, emotional, lacking full rationality, perhaps more "spiritual" and "intuitive." Sexuality to be whole must unite these two halves of the human psychophysical essence." (26)

This is to take genitalia and construe them as metaphors that are not just guides for proper living, but shackles. It requires a

"sodomasochistic concept of male and female relations. It covertly demands the continued dependency and underdevelopment of women in order to validate the thesis that two kinds of personalities exist by nature in males and females, and which are each partial expressions of some larger whole. Such a view can allow neither men nor women to be whole persons who can develop both their active and their affective sides." (27)

In this view, it can be seen as an attempt at a self-fulfilling prophecy which seeks to keep men and women in their (currently) assigned roles and, as Ruether states, it denies any possibility that males and females could develop in any other ways. This is to take the fact of biological sexuality, and extend it to a person's humanity. It insists that a person cannot and must not be anything other than what his or her genitals dictate. As such it is a device perfectly suited to maintaining a power structure which so admirably serves men at the expense of women.

An even more profound aspect of this argument's sexism can be seen in the way it is applied to homosexuality. The

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overwhelming majority of laws against homosexuality historically have applied exclusively to men, and say virtually nothing about women. (28) In fact, while objections to male homosexuality are still fairly common, lesbianism, although objectionable to some philosophically, is still interesting enough to men that it is a common, almost cliché part of modern pornographic films aimed at heterosexuals. While it is true that these female characters in pornographic films for the most part are not identified as lesbians, but as somehow bisexual, the lack of such scenes with two males indicates strongly that the problem is not with homosexuality in general, but something deeper.

That something may have to do with our expectations for males. Within any patriarchal-sexist society, men will be seen to be in control; women, and those men who do not have sufficient power (which includes racial minorities) are viewed as vulnerable, weak, and are treated paternalistically, as if they were some species of children. This is supposed to be all right for women, since they have a biological imperative to be so (their genitals dictate their weakness); but men who lack this power have shirked their duty. If sex is to be the metaphor for this power relationship, then male homosexuality involves a violation of one man's power that lesbianism lacks. This can be seen in early objections, not to homosexuality in general, but to passive homosexuality in men. The ancient Greek tradition of older men falling in love with boys arose not out of some inherent pedophilia, but out of the conventional sense that there was no shame for a boy to be passive in sexual relations, whereas there was shame in an older man's passivity. (29) The position of women as mere vessels for sexuality, rather than as sexual beings in their own right makes the issue of lesbianism moot, or of the most minor interest, and accounts in part for their exclusion from the laws, as well as (for example) their absence from literature and other arts from early Greece which are abundant in portrayals of male homosexuality. (30) The suppression of female sexuality has served as a metaphor for the suppression of women in general, particularly those traits in women which we value (nurturing, sensitivity) but have an investment in denying to men. By maintaining the fiction that genital features are some kind of de facto proof of character traits that have no other apparent biological basis, the troubling consequence is that we must continue to disallow far more important and valuable aspects of our characters, and the requirement remains that we treat ourselves as if we were crippled.

The human need to form relationships should not depend on such a requirement. This gross misuse of a mere metaphor has harmed women for centuries, and their objections apply equally in the case of homosexuals. The reasons people fall in love and form relationships are varied and complex, as every individual knows who has been in love. The social convention that the only real love can be between a man and a woman because they complement one another is ultimately only another way of saying men and women must remain fundamentally different. The perceived danger posed by homosexual relationships is that they present an

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opposing and threatening metaphor of equality, mutuality and respect that, if adopted as a model for heterosexual relationships, would seriously endanger male prerogatives of freedom, excess and authority which men have been taught to expect and hold dear.

Building A Coherent Policy

Given all of this, what would constitute a responsible public policy which can balance political realities against the legitimate needs of a significant and perhaps more-comfortably-ignored part of the population? While gays and lesbians have always existed in America (31), the Stonewall Riots of 1969 were the first signal that homosexuals would not accept their invisibility and second-class status any longer. The AIDS crisis has intensified that by making invisibility more difficult, and for many impossible. Homosexuality is now in the minds of Americans, as is the system that has for so long punished homosexuals for any measure of honesty regarding their orientation. Since the Gallup Poll first began surveying people on their feelings about homosexuality in 1977, there has never been a majority of people who favored criminalization of homosexual activity between consenting adults (compare this with the 25 states which still have such laws on the books), and in the most recent study in 1986 found that acceptance had continued to increase despite widening public knowledge about AIDS (32). Given this increasing, but still not universal tolerance and acceptance of homosexuals, what can be done to ease the discriminatory policies of the past, and address the issues that are only now arising?

That policy can no longer exclude the evidence, opinions, feelings and facts of homosexuals themselves. Any policy regarding homosexuality will, of necessity, affect the most fundamental aspects of the lives of millions of men and women who are gay and lesbian, and to formulate such a policy without their input would be unconscionable and inhumane, going against just about everything we as a society believe about the dignity and self-determination of the individual, and his or her position with regard to the state. For too long in this country laws have been passed against homosexuals, which depended on a mostly unstated understanding that homosexuals were de facto criminals who had no place in society, no moral or human worth, and no right to say anything to the contrary, particularly with respect to government. Needless to say, homosexuals did not contribute to the formulation of this policy.

Legalization

Criminality is the first subject the policy must address. While the Supreme Court has said that homosexual sodomy does not have Constitutional protection, the Court's decision in Bowers v. Hardwick in 1986 was passed by the narrowest of margins (5-4), and was widely criticized, by a broad-based constituency that included far more than just homosexuals. Justice Blackmun felt so strongly that he read his fiery and rational dissent from the bench, an extraordinary measure, and he has said publicly on several occasions that the decision "must be overturned." (33) Those states which have criminal laws on the books are now defying not only the opinions of an increasing majority of people, but the stated policies of a growing number of churches. As of 1980 the following church bodies had issued statements

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which support civil rights for homosexuals, and included homosexuals within their moral and spiritual ministry: the American Baptist Churches; the Disciples of Christ; the Friends; the Moravian Church; the Protestant Episcopal Church in the USA; Unitarian Universalist Churches in North America; United Church of Christ; and the Union of Hebrew Congregations. The Presbyterian Church and the United Methodists strongly supported civil rights for homosexuals, but reserved spiritual acceptance for further consideration (34). Since 1980 other churches have moved toward inclusion of homosexuals, most recently several Lutheran bodies.

It should be apparent that a policy which imposes any sort of penalties on homosexual activity between consenting adults does not rest on a rational, moral or humane foundation. But aside from criminal penalties, what other ways do homosexuals suffer because of legal structures?

Relationships and Marriage

The most profound of these is in relationships. In states which have long since decriminalized homosexuality, there remains in place a half-formed, ambiguous shadow-policy of discouraging long-term relationships between homosexuals. As noted on pp. 2-3, marriage does not need to be the primary interest here, since public recognition of marriage as a heterosexual stronghold is so fierce. But there are benefits and a status that marriage bestows on a couple that homosexuals must eventually achieve. Under the fiction that all people are heterosexual, the world can be divided into two classes: married and single. As it is now, we are accustomed to looking at homosexuals as exclusively single people; the conflict between the old fiction of exclusive heterosexuality and the reality of 10 percent homosexuality has, in this arena, never been addressed, and while we, as a society, are willing to grant the existence of homosexuality as an issue of sex, we do not account for it as an issue of love.

The history of marriage shows that it developed as a kind of protective barrier in which people could exercise their sexuality within a legitimated realm that the state agreed not to pry into once the couple had publicly expressed their commitment to one another. That is the realm that the Constitution has been held to protect. But given the reality of the depth and commitment of homosexual feelings (which do not differ, except in object from heterosexual feelings), and the fact that studies show that homosexuals form long-term relationships for exactly the same reasons heterosexuals do (35), how are homosexuals supposed to legitimate their commitment so that it, too, enjoys that protection which it must eventually have? If the rule is that the only accepted relationships shall be between properly married heterosexual couples, and everybody else is just single, then homosexuals are not just out of luck, they are being actively denied a Constitutional protection that is afforded to only a privileged class. This is a profound and troubling problem that, thus far, has never been satisfactorily resolved. As noted above, the "moral" reasoning conventionally offered as

justification is inadequate, and unworthy of the close reasoning usually associated with the consideration of Constitutional issues.

But the Constitutional issues are not the only ones. Marriage confers on the partners certain benefits which are most often justified because they promote marriage. This involves a linked pair of tacit messages: the first is that there is inherent value in people forming committed relationships with one another; the second is that, without encouragement, people would not tend to form such relationships. It is no longer possible to hold that the only legitimate state interest in marriage is with the children of the marriage. Unlike ancient Rome, the modern state does not care if the couple have children or not, and most statutory schemes are so complex regarding marriage that references to marital status can show up dozens of times in a single chapter or section, many of which deal only with the relationship between the husband and wife.

It must be emphasized that these laws were written in this country at a time when it was widely believed that all the people the laws applied to were heterosexual. That is no longer possible to believe. Health care benefits, sick and bereavement leave for family members, laws governing inheritance and pensions, insurance, property ownership, travel discounts, club memberships... all these and more exclude homosexual couples as long as there is no resolution to the problem of legitimating gay and lesbian relationships. If homosexuals are not criminals, then they are full citizens, and entitled to the benefits, privileges and responsibilities of citizenship. And a primary benefit of citizenship is participation in a process which legitimizes the commitment of those citizens in a mutually loving relationship. The state has made participation in that process vital, and, in fact, actively promotes its value, yet it denies it to homosexuals over and over again. If the problem of homosexual promiscuity is so troubling, this question should be posed: how would the sexual behavior of heterosexuals differ if the state so actively discouraged their relationships as it does those of homosexuals?

The Issue of Family

What this conflict ultimately comes down to is the issue of Family status. It is widely believed that this elaborate network of benefits, privileges, rights and assistance is for the purpose of preserving the American Family. In its archetypal form, that family consists of a working father, a mother who stays at home, and approximately two children. The near-mythic power of this archetype has so pervaded all of our thinking about the Family, that in more cases than not it has excluded, rather than included relationships that for all purposes are Families, regardless of sexual orientation. We have never really examined what, exactly, we wish to preserve and promote with this policy. It is that lack of examination, not some flaw in the idea itself, that has caused the divisiveness and acrimony we are presently experiencing.

What characteristics do homosexual couples share with this archetype that would include them as families? Looked at another way, what aspects of the archetype are, in fact, fundamental to a description of family relationships, and what aspects just reflect majority statistics?

The first place to look is not in the relationships themselves, but in what we value in the ideal of people forming committed relationships. For those who have children, that ideal is obvious. A stable home environment is unquestionably important for raising children with a sense of security, both spiritual and economic. It is even conceded that, given present economic realities and concepts of human self-worth, there are perfectly acceptable ways to arrange homes and families so that both parents can maintain employment outside the home as a means of strengthening both the home and the family; that is, in order to meet rising economic demands on families, and to ease financial pressures that are a highly significant factor in driving couples apart, a two-income family can provide a more stable environment for love, security, independence and nurturing to flourish.

For this purpose, homosexual couples with children are no less families than heterosexual couples with children, and but for the totem of a marriage license, are providing an identical environment. As noted on p. 8 above, the fears usually associated with homosexual parents are little more than excuses to prohibit homosexuals from raising their own children, and have, in the past, proved to be tremendous barriers for homosexuals to create such a loving, secure and nurturing environment. This is to wholly ignore the real world, and the actual effects of social policy; in a study only now being compiled by SCWU (Southern California Women for Understanding) of 990 lesbians in Los Angeles County, nearly 13 percent of them were mothers. Of those, more than 46 percent of the children lived with their mother, and 76.5 percent of the children knew their mother was lesbian. This sample is only an indication of the existence and extent of this kind of family right now, and right here. It cannot be in a society's interest to prevent the formation of the best possible environment for parents to raise their children, and that reasoning holds for homosexuals as well as heterosexuals. This has even been noted by the courts in the case of unmarried heterosexual couples (36)

Other Family Configurations

What about couples who do not have children? Children obviously have a central role in our desire to encourage long-term commitments, and have provided that rationale consistently throughout history, as earlier noted. But there are significant examples of couples who are not able, or do not wish to have children: older couples, couples who decide they are not suitable, or do not desire to be parents; gay and lesbian couples. An interesting way to look at the reasons we value relationships in general, as opposed to the relation of parents to their children, is to examine the satisfaction we get from the

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relationship two people maintain after their children are grown and have moved out. We do not suggest that, now that their job is done, that they go their separate ways. The relationship itself has value.

A good part of that value comes from the fact that the couple, as human beings, derive pleasure from their continuing relationship. Society as a whole benefits when its individual citizens are the happiest. This utilitarian approach applies to all of the other reasons people form relationships: the benefits of stability, the avoidance of loneliness, the support and nurturing another person can provide, and the fulfillment of intimacy. While intimacy is usually construed as an emotional bond, laws which deal with it for homosexuals almost always confine it to the sexual arena, or, at the very least, omit any consideration of the emotional aspect of such relationships.

Speaking to this last point, the U.S. Supreme Court has said that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." (37) Noting this in his dissent in Bowers, Justice Blackmun adds, "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests... that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." (38) It is the fact that relationships help to make us fuller in our humanity that provides the essential reason society should promote those relationships. By excluding any adult, voluntary relationship which is, by virtue of a commitment and love expressed publicly by both parties, based on mutuality and accordance with the virtues we as a society have agreed are essential, we are, in fact, creating a class of people which we consciously wish to prevent from attaining those virtues.

Theologians have entered the debate on just this point. James B. Nelson and Norman Pittenger have both noted the value of homosexual relationships within a specifically Christian context. Nelson, after examining the ways in which homosexuals have been oppressed by various church mythologies, states that acceptance of gays and lesbians "would actually bring constructive family consequences." (39) Among those are: a) a greater overall marital stability, since homosexuals would no longer labor under the fictional assumption that they must marry someone of the opposite sex, or forfeit any claim to morality and family life; b) a strengthening of the bonds between parents and children, with love not conditioned on a homosexual lying about his most intimate feelings to those people he or she is closest to on a spiritual basis; and c) the benefits to society as a whole from the eventual eradication of discrimination and injustice based on unfounded fears and myths.

We hold families sacred, then, not because they are a certain configuration of people, but because they are valuable to our ideas of what a good society consists of, and enable us, as fulfilled and satisfied individuals to move toward that society.

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Families provide support, love, nurturing and sharing, all things that strengthen individuals, and deepen their understanding of the patience, tolerance, persistence and hard work that go into enriching human life. Those values can be reinforced in a number of ways, and through a number of relationships, and we only limit our own ability to move forward as a society if we limit the number of people we encourage to achieve their highest human potential through those relationships. It is exactly that kind of limitation we practice against homosexuals by focusing only on the heterosexual aspects of Family. Relationships are as necessary for homosexuals as they are for heterosexuals, whether it is for the purpose of raising children in a wholesome environment, as a support system in times of need, as a means of expressing love, both sexually and spiritually in a responsible, committed and adult manner, for moral dialogue, or even just for company. Homosexuals have naturally responded to their own innate human needs, and have formed their families with no system of social support, nor of economic assistance, because they were given no alternative. But in overcoming the innumerable obstacles society has put in their way, gay and lesbian families have developed a fear of and alienation from this punishing society. This alienation is far too high a social cost to pay for the dubious satisfaction of maintaining an irrational prejudice. Gay and lesbian families, with and without children, exist here and now; this is a fact that no amount of pretending can change.

By this reasoning also, it is possible to approach the more troubling issue of single-parent families, where one person, usually (though not always) a woman, must raise her children, for whatever reason, without a network of support in place. What we offer, instead, is unfair blame, and useless, harmful alienation. In order to assure the kind of home environment that will encourage those children to develop in the ways we value as a society -- independent, respectful, caring, etc. -- it is our collective responsibility to see to it that the parent is not penalized for her situation, and that there are adequate institutions in place to guarantee such families a minimal level of security. Child care, affordable housing, employee benefits which are sensitive to this unique situation, are all means of "encouraging families" in ways that achieve the ultimate ends we desire without worsening a situation which for many may not be ideal to begin with, by using a narrow definition of Family to assign them something less than full family status.

And that is, perhaps, the worst way in which we currently use the archetypically defined Family, not as a means to enable all of us to grow and adapt to the world in healthy, fulfilling ways, but as a way to punish those who do not conform themselves to the imagined mold. Oliver Wendell Holmes said, in 1897 that it is "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." (40)

That is precisely the situation we find ourselves in today. Laws which penalize homosexuals, or prohibit them from attaining and enjoying the full rights and benefits of their citizenship, particularly those which we bestow on the relationships of heterosexuals, are not only discriminatory, they are destructive, to the extent that by needlessly punishing homosexuals for the intimate expression of their most personal feelings, this society has been depriving itself of the better energies of ten percent of its population, energies which are, instead, expended in trying to maintain the fabric of an extensive lie, which ultimately extends into every aspect of life. Homosexuals themselves have finally decided that those energies can be better utilized. Further, the energies heterosexuals expend in trying to fabricate rationales which condemn homosexuals as immoral, unproductive, or in any way less than fully human, can also be better spent in exercising tolerance, understanding and cooperation. The privacy that heterosexuality enjoys by virtue of marriage is exactly the privacy homosexuals wish for their own relationships; once love and commitment have been publicly acknowledged, the couple's sexual relations are no one else's business. There are a number of ways this can be addressed; what is most important is that it be addressed. It is no longer possible, and it has never been useful for social policy to pretend that homosexuals do not exist. Nor is it practical to ignore the essential fact of homosexuality, which is that, with the single exception of sexual orientation, homosexuals are identical to heterosexuals. Sexual orientation does not determine character, any more than does hair or skin color; it is not sexual orientation that makes people want or not want to commit to a relationship, nor is it sexual orientation which can determine when, or to what extent people fall in love -- those mysteries are all, right now, beyond our understanding. But they are the very mysteries which drive us all, homosexual or heterosexual, in the most powerful and important ways. No policy can affect those intimate and profound motivations. All public policy can do is state, as clearly and thoughtfully as it can, what is in the best interest of the society as a whole with regard to certain public aspects of those feelings.

As we hope is clear, at the public level, homosexuality is neither in conflict with heterosexuality, nor is it a threat to heterosexuality. The dominance of heterosexuality is inarguable. Our priorities are somewhat different than those in existence at the beginning of the world. Day-to-day survival, despite certain vagaries of random criminal assault, is for the most part assured. We value now, not merely getting by, but making something useful out of our lives, of leaving behind a legacy of goodness and decency, and perhaps actions and thoughts which had a beneficial effect on the way others lived. The long-term relationships we form with those we love can help us immeasurably in our quests to achieve those goals. It is in those intimate relationships that we can explore our greatest fears, our most profound questions, our worries, hopes, and joys. Again, public policy is interested not in the nature of what draws the people together, or what keeps them together, but that if they stay together they do so for reasons that will encourage happiness,

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growth, stability and responsibility, and that their children, if any, are brought up in the best possible environment. As such, there is no reason to exclude homosexual relationships from these considerations, since their contributions to the society are as valuable as those of anyone.

The lack of this kind of policy has, in the past, minimized and discouraged such contributions from homosexuals, and has worked against the good of the whole society. Those who would continue to hold to the anachronistic and discredited notions of homosexual immorality will be in an increasingly small and mean minority, unable to tolerate any but their own narrow and punitive notions of morality. Again, such notions make for a less moral society, and work against the good of society as a whole, by diffusing the focus from truly criminal behavior, wasting valuable police and judicial resources, and, in extreme cases, harming innocent people who have done nothing wrong, by denying them their full value as citizens. Homosexuals are citizens, with worth, dignity, potential and, increasingly, power. Gays and lesbians do not want their contributions, financial, political or social, to be taken for granted, as other minorities have, in the past, stated. We expect our rights as citizens, and will fight, with all our resources when those legitimate rights are threatened. As we have in recent years, we will support those who understand this simple declaration, and acknowledge our rights as citizens. To ignore this is to continue to divide our society, when there is already in existence a majority which recognizes the injustice that exists.

It is possible that these issues have not been considered up until now because gays and lesbians have never made their presence so public before. While the penalties for being honest and open about their orientation are still in effect -- and these include violence, threats and disenfranchisement, obstacles to job advancement and emotional fulfillment, financial punishment, unnecessary straining of parental and other family ties, exclusion from all benefits given to more conventional heterosexual relationships by clubs, businesses and other organizations, the intolerance and bigotry, of biased individuals, and the institutional bias of insurance companies, hospitals, police, and some government officials, degrading stereotypes in the media, the vicious zealotry of religious fanatics and their followers, unfounded accusations and suspicions, fear, bitterness and anger -- while these and many other daily penalties still exist, the injustices of the present system are so manifest, and the goals so close and so important, that there is no longer any good reason for gays and lesbians to accept their outright exclusion from the society. Gays and lesbians will no longer tolerate the bigotry that offends them, the nonsensical arguments by which they are persecuted, or the ignorance of those who just wish the issue would go away. It will not go away. The question now is who will provide the leadership to implement policies that are more just.

PART TWO

Recommendations

To date, the courts have, in general, been reluctant to grant benefits to unmarried couples of whatever stripe, not because of the relationships' lack of significance or stability, but because of the lack of authentication, Elden v. Sheldon (1985) 64 Cal.App.3d 745, Ledger v. Tippitt (1985) 164 Cal.App.3d 578, Hinman v. Dept. of Personnel Administration (1985) 167 Cal.App.3d 516, MacGregor v. Unemployment Ins. Appeals Board (1984) 37 Cal.3d 205 . While this problem of proof can be overcome in the case of heterosexual couples by getting married or, in some cases, having children, such as in MacGregor, no such formal option exists for homosexual couples, since marriage is prohibited to them in Civil Code section 4100 and the genetic bond of a child is not as clear-cut as it is in the case of a child's heterosexual birth parents.

Yet homosexuals have the same human drives which compel them to fall in love as do heterosexuals, and the same need to make commitments and form relationships. The formation of support groups for gay and lesbian couples, both on the local level and nationwide, is only one indication that such couples both exist, and desire to have their relationships recognized publicly for what they are: committed, loving, mutual and vastly important. In this, too, they do not differ from heterosexuals.

The obvious solution to this conflict would seem to be a relaxing of the marriage laws. While this has been proposed by many homosexual and civil-rights advocates, including the ACLU, it has also been suggested, in a more facetious manner, by homophobes, confident that the proposal would create such a public outcry that it would not stand a chance of passage. Given the increasing acceptance of gays and lesbians in general, but also given the depth and intensity of feeling of those people who are so severely afraid of homosexuality in any form, it is likely that the public debate would be, at the very least, heated and divisive.

The anger and divisiveness of such a debate are not necessary, and are certainly not desirable. But the present lack of policy regarding this increasingly important issue is equally untenable.

This committee recommends a middle course, which provides recognition of gay and lesbian relationships, documents and binds their commitment in a manner that can satisfy the courts, or any agencies which might have a genuine interest in the existence and legitimacy of such relationships, and yet does not encroach on the sensitive territory of heterosexual marriage. That middle course consists of the adoption of an Affidavit of Domestic Partnership.

Domestic Partnership

Domestic partnership affidavits are already in use in both the City and Unified School District of Berkeley, the Village Voice newspaper, the Worker's Trust Insurance Company, certain nursing organizations and the City of West Hollywood, among others, and are under consideration in some form by increasing numbers of employers and cities, including Madison, Wisconsin. While the specifics differ slightly, these affidavits are used for three main purposes:

- To recognize and validate the relationship.
- To use that recognition as a means to achieve equity in certain benefits; the affidavit assures that those relationships, and only those relationships which are legally binding and committed, and satisfy all other criteria for family status, have access to that status.
- To resolve the conflicts between local, state and federal antidiscrimination policies, particularly with regard to marital status and sexual orientation, and the inability of homosexuals to attain marital status.

In order to responsibly implement this affidavit, it is important to define what, exactly will constitute a legitimate homosexual couple. Given the lack of a statutory definition, it would be unwise to simply let couples declare themselves as such and leave it at that. After various public hearings and much research of domestic partnership affidavits already in use, this subcommittee recommends the following criteria for a model domestic partnership affidavit:

The partners swear, under penalty of perjury, that:

- 1) They are currently living together, and have been for a specified, significant length of time (6-12 months).
- 2) They share the common necessities of life.
- 3) They have a mutual obligation of support, and are each other's sole domestic partner.
- 4) They are both over 18, and are competent to contract.
- 5) Neither partner is married.
- 6) Neither partner is related by blood to the other.
- 7) They agree to notify the appropriate body within 30 days if any of the above facts changes.

These criteria define a relationship that meets the Butcher court's test of "stable and significant," and also obligates the

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parties to one another contractually as enunciated in Marvin v. Marvin. This answers the court's objections to the problems of proof, and it also answers the objections of those who would try to claim that, because these couples are not technically married, they are not legally committed to one another. Under Marvin this contract is legally enforceable, and imposes on the couple all of the obligations that come with such contracts, exactly like marriage licenses. Without challenging the state's statutory scheme regarding marriage the city can provide for its gay and lesbian citizens who have formed committed, responsible relationships. This addresses both the policy of nondiscrimination enunciated in section 49.70 of the Municipal Code, and the current realities of the AIDS crisis.

Uses for Domestic Partnership Affidavits

There are many possible uses for this affidavit, three of which we consider here. They are:

- 1) Incorporation into the City's Administrative Code for purposes of Family Sick Leave and Bereavement Leave.
- 2) Consolidation in any revised or restructured City benefit plan, particularly for health and dental benefits.
- 3) Recommendation by the City, through example, and through more formal means, to the City's private employers that they utilize the concept in their own benefit plans.

First, it should be immediately incorporated into the city's definition of family which is spelled out in Admin.Code section 4.127 for the purposes of Family Sick Leave and Bereavement Leave. Due to the exceedingly stressful situation surrounding an illness or death in an employee's household, if the city were to continue failing to extend this valid use of an employee's already accrued leave time to the long-term partner of a gay man or lesbian, while making this an explicit part of its policy for a more limited conception of family, it will, more and more, be seen as both inhumane and unfeeling. Further, since it is likely that most gay and lesbian employees already take time off for just this reason, but use other excuses to do it, there will be a minimal additional cost, if any to the city.

The second area the domestic partner affidavit can prove indispensable in is that of health care benefits. As the city considers revising its entire benefit scheme, for the purpose of providing more fully for the changes that are taking place in Los Angeles and the country as a whole, it would be both pointless and dangerous to ignore the changing demographics within the homosexual community. Both the City of Berkeley and the Berkeley Unified School District have extended health care benefits to domestic partners for over a year now. The city reports that approximately 6 percent of its workforce enjoys such coverage.

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The school district, which expected to have a higher rate of closeted homosexuals due to a fears about loss of job or advancement potential, still reports nearly 1.5 percent currently signed up. Fears that major insurers would not cover such relationships are groundless: Kaiser is one of the city's three insurers, and Blue Cross covers the school district, and officials of both the city and the school district reported no problems (beyond the ordinary ones) in extending coverage, once the criteria for the relationships had been clearly defined and understood. And since the city of Los Angeles has a far greater workforce than either Berkeley or its school district (and since the precedent has already been set), any resistance from insurers can be overcome.

While the city does not have jurisdiction to require private employers to incorporate this affidavit into their employee benefit plans (a federal law overrides such requirements), we recommend that the city, by its example, and through more formal channels, recommend its adoption by private employers. The city should also request that the City Attorney's office look into various state anti-discrimination laws, and the city's own ordinance prohibiting discrimination based on sexual orientation, to explore possible legal implications for employers who choose to ignore this means of verifying such relationships. Given the clear definition of the relationship in the affidavit (which in some respects is even more exacting than the rules governing marriage), the lack of a state-sanctioned ceremony is virtually the only legal difference. People who are in contractually obligated relationships such as those outlined in the domestic partnership affidavit are not, by any conceivable definition of the term, single, and to discriminate against them as if they were is to overleap reality and logic, and at the cost of perverting both language and human love. Given the specificity of the affidavit, and the obligations it imposes in binding the relationship, the differences between such relationships and marriages would seem to be more and more arbitrary, especially with regard to employee benefits. The City Attorney should seriously consider this.

Other Recommendations

City Contractors/Subcontractors

Division 10, Chapter 1, Article 1, Section 10.8 of the Administrative Code specifies guidelines for mandatory nondiscrimination by City Contractors, in keeping with current federal, state and local rules in effect. Since that section was last updated 12 years ago, in April of 1975, the California State legislature has added Marital Status and Medical Condition to its list of illegal discriminations (in Government Code 12940), and the State Attorney General's Office has delivered its opinion that discrimination based on sexual orientation is prohibited to private employers by Labor Code sections 1101 and 1102 (69 Ops. Atty. Gen 80). Since that time, too, the City itself has passed its own ordinance prohibiting discrimination based on sexual orientation in Section 49.70 of the Municipal Code.

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We most strongly urge that the City Council amend Section 10.8.2 to bring it into conformance with those changes, and add Marital Status, Medical Condition and Sexual Orientation to the already existing list of mandatory nondiscrimination criteria for City Contractors and Subcontractors.

Education

Domestic partnership, while crucial, is only one of the issues which affects lesbian and gay couples. The prejudices which run against the maintenance of homosexual relationships are deep, not because they must be, but because they are passed on out of fear and misunderstanding. Those issues can and must be addressed by our school system in a dispassionate, rational way. We recommend that the Council advise the LA Unified School Board of the following:

1) The Los Angeles Unified School District has a commendable unit in its Health Education class called "Family Life and Sex Education," which "recognizes and accepts the various aspects of one's sexuality," and as an official policy, does discuss alternate family lifestyles. It does not, however, at present, discuss the matter of same-sex couples. This, of course, presents the message to gay and lesbian students that their sexual orientation falls in an acceptable range of toleration, but provides no responsible model for a relational outlet, and, once again, reinforces the only other alternative, anonymous or promiscuous sex. That is not a model the school district ought to be promoting, and we urge the council to advise the LA Unified School Board that it must include information on gay and lesbian couples in this unit.

2) The LA Unified School District currently has 250,000 students in grades 7-12. Yet, with the exception of one campus, Fairfax High, there is no referral service or counseling program for gay or lesbian students. Again, using the most reliable figure of 10 percent who would be expected to be overwhelmingly homosexual in their orientation, there are 25,000 students who, at this particularly troubling and anxious period of their lives, have specific counseling needs that are not being met. Given that the district "recognizes and accepts" homosexuality, the council should advise the school board that Fairfax High's Project 10 be expanded until responsible counseling and referral service is available on all school campuses.

3) The council should recommend to the school board that it should appoint Virginia Uribe (Project 10, Fairfax High) to serve as its Commissioner on Gay and Lesbian Issues, with the same staff and standing of the district's other Commissioners for American Indians, Asian-Pacifics, Blacks, Mexican-Americans and Sex-Equity (appointed specifically to monitor Title IX violations). Her duties should include:

a) Counseling throughout the district until counseling facilities are established on all campuses.

b) Lead in-service training for school administrations.

c) Train, and be accessible to all Family Life and Sex Education class teachers.

d) Provide input to the State Board of Education on gay and lesbian issues, particularly with regard to the factual historical and social aspects as the History and Social Studies units are being revised.

In addition, this committee would like to go on record as supporting the continued existence and status of these commission positions.

This can all be accomplished with no cost to the City, in its advisory capacity, and with minimal cost to the school district.

We also wish to acknowledge the Los Angeles Unified School Board for their courageous and ongoing work in this area. Their policy of understanding helps to further the district's mission of educating all students to fulfill their highest potential, by removing the obstacles of prejudice and confusion which hinder gay and lesbian students during this naturally turbulent period.

Youth Suicide and Genocide

The state-recommended guidelines on the prevention of youth suicide should be implemented in the city's schools, and should be mandated to include accurate and rational information concerning the facts of homosexuality. In addition, those classes that deal with the Holocaust must deal with the horrible truth of the tens of thousands of homosexuals who were systematically slaughtered beside the Jews. The exclusion of this fact from standard history texts dealing with World War II, as well as the ongoing debate in Sacramento regarding the fact's inclusion in a state mandate on the teaching of genocide, says more powerfully than anything how deep our own irrational hatred of homosexuals goes. We are willing to rewrite history itself in order to preserve that hatred, consciously tailoring the truth, in exactly the way for which we criticize and despise our enemies. We are, in short, willing to miseducate our children in the sacred name of our prejudices.

Again, no one is recommending that homosexuality be encouraged, as if such an argument could make sense. Those who are homosexual have been so despite violent attacks, religious bigotry, ridicule, and, as mentioned, attempted genocide. Yet they have never comprised significantly more than 10 percent of any population, even in societies which idealized the practice. The constancy of the numbers from ancient Greece to the present seems to defy both extremes of persecution and enthusiasm. What we recommend is a humane, reasonable policy of tolerance, and that that policy be given a foundation in our young people. The existing policy of intolerance and vilification has neither eradicated homosexuality nor provided any perceivable benefits

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whatsoever; rather it has helped to waste the self-esteem and ambition of a large part of the homosexual population, and has encouraged those with irrational fears to exercise those fears (again, often violently), in the name of some ill-informed "morality."

If true morality is anything, it is a willingness to understand, a disavowal of self-interest for the benefit of others. Charity, unselfishness, generosity of spirit; these are more hallmarks of morality than hatred, intolerance or fear. The moral society we want, the good society, is one where we are able to understand one another, to recognize one another's humanity, to encourage only the best in each other and in ourselves. Our State School Board is supposed to be instrumental in working toward that end. But, as recent history has proved, there are times when our schools (or those who run them), for politically and emotionally charged reasons have an investment in perpetuating systems which promote just the opposite, a divided antagonistic society, capable of exploding into violence.

We walk a fine line now to avoid that violence as ignorance and fear about AIDS threatens to enflame passions before we can properly educate ourselves and our children about prevention. While AIDS is a distinct issue from homosexuality in other countries, most notably on the African continent, its initial appearance within the gay community in this country points up the isolation and stigma we attach to homosexuality; initial attempts to stigmatize the disease, itself, as somehow homosexual demonstrate dramatically how far from reasonable our thinking about sexual orientation can be. This alienates gays and lesbians and robs them of their humanity. AIDS does not draw this distinction Its lesson is that we are all vulnerable, that we are, in fact, all the same. If none of the better reasons will do, then this reason alone must be adequate. At the most fundamental level possible, at the level of life itself, the differences between heterosexuals and homosexuals are superficial and irrelevant. If the dangers of promiscuous sex are to be this perilous, then a better, more responsible model must be presented, and it must be presented as including the groups who are most at risk. Young gays and lesbians must know that monogamous relationships are not only possible, but the most effective means to protect themselves. It is long past the time when we can put our heads in the sand and pretend gays and lesbians do not exist, are not part of everyday life. They are a part of everyday life, whether closeted and afraid of rejection because of this fact, or open and trying to overcome the many obstacles placed daily in their way. It must be the responsibility of the schools to remove those obstacles that come from miseducation. Our schools must provide for an educated, humane and able citizenry; it is not their job to reinforce prejudice, to degrade, or to lie, whether by omission or by actively presenting false information. This message must be relayed immediately by the City to the following: 1) The Los Angeles Unified School District Board of Education; 2) The State Board of Education; 3) The State Superintendent of Public Instruction, Mr. Bill Honig, who has been valiant in his

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attempts to make reason and calm prevail in addressing the needs of the state's gay and lesbian students.

Political Appointments

That leads to this subcommittee's final recommendation: because of this matrix of intolerance and cruelty, many homosexuals have seen little advantage to leading their lives openly and honestly, and have viewed the normal channels of the political process as ineffective or futile. The male heterosexual dominated power structure has reinforced the invisibility of gays and lesbians by an act of conscious exclusion, both from the laws, and from the structure. Many lesbians and gays who have grown so frustrated that they have seen little alternative within the system itself, have been forced into other channels to make their political existence manifest.

While this is gradually changing, it can still be seen in the near invisibility of openly gay and lesbian citizens involved in the city's government. Of the 200 mayoral appointees to the city's boards, agencies and commissions, only three, (1.5 percent) are openly gay or lesbian. That is hardly reflective of the city's population of more than 321,500 gays and lesbians (41). To correct that vast inequity, we propose the following:

- 1) The City Council urge the Mayor to rectify the imbalance with immediate appointments.
- 2) Qualified gay and lesbian candidates be given active consideration for all available, appropriate posts.
- 3) The press be notified of all vacancies and new positions.
- 4) Gay and lesbian political organization be notified of all vacancies and new positions.
- 5) The gay and lesbian media be informed of all vacancies and new positions.
- 6) To inform surrounding and nearby cities (including Santa Monica, Beverly Hills, etc.), in writing, that they should seriously consider implementing these proposals within their own jurisdictions.

The range of city functions which directly affect gays and lesbians, however, should not be restricted by meager stereotypes. City planning, zoning, rent control, police, business licenses, public transportation, health care: the range of human issues directly coincides with the range of gay issues, and to view sexuality as somehow relevant is to deny homosexuals their humanity and autonomy, to say, in effect, You people can deal with your sexual orientation issues, and we'll take care of all the rest for you. While homosexuals desperately want to

contribute their growing expertise in (for example) AIDS issues, there is a growing feeling that as citizens of this city, we should be allowed to participate in all aspects of the government which affect us as citizens, and come to the issues which affect us as homosexuals in the normal course of the process.

Conclusion

What we, as a committee, ultimately wish to address with these recommendations is the conflict and confusion brought about by the current partial-policy of the City of Los Angeles regarding its gay and lesbian citizens. On the one hand the City has made it clear that it will not tolerate discrimination based solely on sexual orientation, whether it is in housing, employment, or certain other contexts. But at the same time, by failing to account for that discrimination which is institutionalized in many conventional modes of thinking about such matters as marriage, employment benefits or access to the political process, the City has closed its eyes to some significant varieties of discrimination that do more than just deny homosexuals a place to live or work. In endorsing, through its employee benefit system, only those couples who are legally married, the City helps to perpetuate a system that denies to homosexuals the most fundamental social validation of their relationships, a validation that is taken for granted in the case of heterosexuals. By ignoring these same needs in homosexuals the City discriminates as blatantly and unfairly as any landlord who refuses to rent an apartment to a gay man. But discrimination is only the beginning of the social harm; the simple failure to account for these legitimate and human urges in homosexuals, not just to have sex, but to create warm, loving and validated family relationships, enforces on homosexuals a penalty for attempting such relationships. In spite of the moral misbeliefs of some who are highly sensitive to the idea of homosexuality, the demographics of the AIDS crisis illuminate all too painfully the cost of this relational penalty, and argue definitively that steps must be taken to correct it.

It is in the City's power to set an example of responsible, progressive and well-considered policies, to implement those policies as an employer, and recommend them to other employers and agencies. It is further in the City's power, and its best interest, to advise the Los Angeles Unified School system that part of their public responsibility is to educate students that intolerance and narrow-mindedness are neither productive nor acceptable. In addition, it is in the City's power to closely examine the policies of various organizations which operate within the city that have implemented policies which favor married couples while (perhaps intentionally) excluding gay and lesbian couples. The Auto Club, various insurance agencies, businesses which offer spousal discounts, newspapers which will not list the surviving partner of a deceased homosexual in an obituary: all of these and hundreds more are examples of discrimination homosexuals suffer that is not protected by the City's ordinance. Each has a social cost because each incident has a human cost. Every gay man who is turned down for a spousal discount on his Auto Club membership because he is not married to his partner pays a small but significant economic price for his homosexuality. But as important, and far more expensive to society in the long run, is the cost to his own picture of himself and his relationship in the world, and his attitude toward the elected officials who make or allow these rules. This

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unquestioned rejection of the validity of his relationship is one of innumerable similar rejections he and his partner experience. No matter how strong the love between them may be, the cumulative effect of these constant batterings is to punish them over and over again, without ever once considering that the nature of this relationship may be healthy, productive, and worthy of support. Such assumptions are not justified or justifiable. Any state or institutional interference with such relationships, either actively (such as laws which punish homosexual relationships), or passively (by, for example, simply not dealing with the issue of businesses which offer preferences only to heterosexual couples), weaken the relationship, and send the message that the preferred option for homosexuals is anonymous sex. There is no third option in this arena.

Public policy must either encourage relationships, or it must encourage the alternative to relationships, which is random sexual encounters. Given the current health crisis, the second option is untenable. It is this which is our current public policy in this city, and it is no longer acceptable. Deliberation and the most profound thought must be given, not only to changing the policy, but to healing the wounds the policy has caused. The time for such deliberation has arrived. We present this report to counter the myths and fears that this debate is sure to provoke, in the knowledge that it is we, ourselves, who are most familiar with the objections and the answers to those objections. Those of us who are homosexuals can no longer afford to sit by while legislative and policy decisions are made which concern the most intimate and fundamental aspects of our lives, decided without our participation, and influenced by those whose hysteria preempts their reason or ability to listen. We know best what we feel, and what course of action will make best use of our abilities and varied potentials. Most important, we present the results of our efforts and research, and our recommendations, in the hope that those who are open-minded enough to consider them will see that they benefit not only the homosexual community, but the City as a whole. It is that which has been our intention.

SUMMARY OF RECOMMENDATIONS

1. CLEARLY DEFINE WHAT CONSTITUTES A LEGITIMATE HOMOSEXUAL COUPLE. Incorporate that definition into an Affidavit of Domestic Partnership.
2. INCLUDE THAT DEFINITION IN SECTION 4.127 OF THE ADMINISTRATIVE CODE which provides for family sick leave and bereavement leave for city employees. Employees signing Affidavits of Domestic Partnership would then be able to use their family sick and bereavement leave benefits for their named domestic partner.
3. INCORPORATE THE AFFIDAVIT INTO ANY PLANS TO REVISE THE CITY'S BENEFIT SCHEME, PARTICULARLY FOR HEALTH AND DENTAL CARE BENEFITS, or any other benefits which the City might offer to married couples which would be equally appropriate for legitimate gay and lesbian couples.
4. RECOMMEND TO THE CITY'S PRIVATE EMPLOYERS THAT THEY INCORPORATE SIMILAR AFFIDAVITS INTO THEIR BENEFIT POLICIES.
5. CONSULT THE CITY ATTORNEY'S OFFICE FOR AN OPINION about the legality, in light of such a concise, and legally binding definition of homosexual relationships, of excluding them from benefits, either because of marital status discrimination or sexual orientation discrimination, or on any other basis, by any business, club or other organization, public or private.
6. RECOMMEND THAT THE LOS ANGELES UNIFIED SCHOOL BOARD'S POLICY FOR FAMILY LIFE EDUCATION INCLUDE RESPONSIBLE INFORMATION ABOUT HOMOSEXUALITY including information about legitimate gay and lesbian couples.
7. RECOMMEND THAT THE LOS ANGELES UNIFIED SCHOOL BOARD INCORPORATE, IN ITS GUIDELINES ABOUT THE PREVENTION OF YOUTH SUICIDE AND THE TEACHING OF GENOCIDE, THAT APPROPRIATE AND FACTUAL INFORMATION REGARDING HOMOSEXUALITY BE INCLUDED IN EACH.
8. RECOMMEND THAT THE SCHOOL BOARD APPOINT VIRGINIA URIBE AS COMMISSIONER FOR GAY AND LESBIAN AFFAIRS FOR THE LOS ANGELES UNIFIED SCHOOL DISTRICT, a position which would have the same standing as advisors for all other minority matters.
9. BEGIN IMMEDIATELY TO APPOINT GAYS AND LESBIANS TO RESOLVE THE DRAMATIC UNDERREPRESENTATION OF GAY AND LESBIAN CITY APPOINTEES TO CITY BOARDS AND COMMISSIONS, and encourage other cities within LA County to do the same, by way of a written recommendation signed by the City Council.
10. IMMEDIATELY AMEND SECTION 10.8.2 OF THE ADMINISTRATIVE CODE, SETTING OUT MANDATORY NONDISCRIMINATION CRITERIA FOR CITY CONTRACTORS, TO BRING IT INTO CONFORMANCE WITH RECENT CHANGES IN STATE AND LOCAL LAW PROHIBITING DISCRIMINATION BASED ON MARITAL STATUS, MEDICAL CONDITION OR SEXUAL ORIENTATION.

Footnotes

1. Boswell, John, Christianity, Social Tolerance and Homosexuality (1985) pp. 63-72.
2. Boswell, pp. 381-389. See also Foucault, Michel, The Care of the Self (1986) pp. 193-227.
3. Stoquart, "Marriage in Roman Law," 16 Yale Law Journal 303-327.
4. *ibid.*
5. Foucault, pp. 39-68.
6. Boswell, pp. 91-117.
7. See Bailey, Derrick Sherwin, Homosexuality and the Western Christian Tradition (1955) pp. 2-3; McNeill, John J. The Church and the Homosexual, (1976) pp. 42ff.
8. Deut. 29:23, 32:32; Isa. 3:9, 13:19, Jer. 23:14, 49:18, 50:40, Lam. 4:6, Ezek. 16:46-48; Amos 4:11; Zeph. 2:9, Matt. 10:15; Luke 17:29, etc.
9. Boswell, p. 107.
10. Kinsey, Alfred, Sexual Behavior in the Human Male, (1948) p. 651.
11. Barnhouse, Ruth Tiffany, "Homosexuality: A Symbolic Confusion," in Homosexuality and Ethics Ed. Edward Batchelor, Jr. 1980. p. 83.
12. Batchelor, Edward, Homosexuality and Ethics: See p. 63-78
13. Batchelor, pp. 39-47.
14. Boswell, pp. 207-266.
15. *ibid.* pp. 270.
16. 2a.2ae.151 152
17. Boswell, p. 328.
18. Kinsey p. 651.
19. Achtenberg, Roberta, "Preserving and Protecting the Families of Lesbians and Gay Men," 1986 p. 4 (FN)
20. *ibid.* p. 2
21. *ibid.* p. 4, particularly FN 22 and 23.
22. Devlin, Patrick, The Enforcement of Morals (1965), p. v §-228

24. Pittenger, W. Norman, "The Morality of Homosexual Acts," in Homosexuality and Ethics pp. 139-145.
25. Ruether, Rosemary, in Homosexuality and Ethics, pp 28-32.
26. *ibid.* p. 29.
27. *ibid.*
28. See particularly Germany's Paragraph 175, under which homosexuals were imprisoned and executed during World War II.
29. But see Dover, K.J. Greek Homosexuality, pp. 19-39 on prostitution.
30. *ibid.* p. 111-124.
31. See Katz, Jonathan, Gay American History, (1976).
32. The Gallup Report Number 244-45, January/February 1986. In 1982, a 45 percent plurality favored legalization, while only 39 percent were opposed; the 1986 results showed that more than 50 percent of those under 50 favored legalization.
33. Most recently on Bill Moyers' In Search of the Constitution, aired on PBS on April 29, 1987.
34. Batchelor, pp. 235-242.
35. See Blumstein and Schwartz American Couples (1983), Peplau, "Intimate Relationships of Lesbians and Gay Men" in Changing Boundaries: Gender Roles and Sexual Behavior (1983) McWhirter and Mattison, The Male Couple (1984), Peplau, "Research on Homosexual Couples: An Overview," Journal of Homosexuality (Winter, 1982)).
36. MacGregor v. Unemployment Insurance Appeals Board 37 Cal.3d 205 (1984)
37. Paris Adult Theatre I v. Slayton, 413 U.S. 49, 63 (1973)
38. Bowers v. Hardwick 106 S.Ct. 2841, Blackmun, dissenting.
39. Nelson, James B., "Gayness and Homosexuality: Issues for the Church," in Homosexuality and Ethics. pp. 197-198.
40. Holmes, Oliver Wendell, "The Path of the Law," Harvard Law Review (1897) p. 469.
41. The LA City 1980 Census showed a city population in Los Angeles of 2,968,000. In the updated approximation done in July of 1986, that figure was approximately 3,215,000; based on Kinsey's 10 percent figure that would indicate a population of roughly 321,500 gays and lesbians within the city of Los Angeles alone.