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Criminal Law--Laws Which Prohibit Consenting Adults from Participating in Homosexual Activities in Private, 23 S.C. L. Rev. 816 (1971)

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CRIMINAL LAW—LAWS WHICH PROHIBIT CONSENTING ADULTS FROM PARTICIPATING IN HOMOSEXUAL ACTIVITIES IN PRIVATE

I. INTRODUCTION

The twentieth century has witnessed something of a revolution in what is commonly referred to as *morality*. Morality may be generally defined as a set of customs and standards in a community which delineate anticipated or acceptable conduct[1] The greater the consensus within the community as to what these standards are, the greater will be compliance with them in actual practice. In many instances certain of these standards have been deemed essential in many societies, and as a result, have been codified and formalized. Once given the force of law, these select standards become rules of conduct which demand compliance. Behind these laws is the authority of the governing body and often the threat of punishment to those who fail to comply. When the community consensus as to what is or ought to be a particular community standard deteriorates, those whose views diverge from what was the original standard no longer tend to comply. Sometimes the change in community attitudes is so pervasive that it effectuates a change in the standard itself. When this type of situation develops, it is not unusual for a law which reflects the former standard to be repealed. Perhaps our society is in the midst of one of these periods of change. There are growing groups within our community which urge that certain laws reflecting standards which no longer represent or enjoy adequate support from the community consensus be repealed.[2] More important, there are some who argue that it is not the business of the law to enforce morality purely for morality's own sake in any instance.[3]

II. PUNISHMENT OF THE HOMOSEXUAL

A. Criminal Sanctions

One area of the legal enforcement of morality which has spawned

1. *See* H.L.A. HART, THE CONCEPT OF LAW 7-8, 43-47 (1st ed. 1961). *See also* L. FULLER, THE MORALITY OF LAW 5-9 (rev. ed. 1969).
2. L. FULLER, THE MORALITY OF LAW 132 (rev. ed. 1969).
3. H.L.A. HART, LAW, LIBERTY AND MORALITY 4 (1963).

great controversy is the area of victimless sex crimes: fornication, sodomy, homosexual acts, and other so-called unnatural sexual acts. In recent years the controversy over laws which make punishable homosexual acts between consenting adults in private has grown to such proportions that it now demands the public's attention.

The State of South Carolina has a crime known as "buggery"[4] which makes certain acts punishable as a felony without making allowance for private, consentual acts.[5] Black's Law Dictionary defines buggery as "a carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or man unnaturally with a woman."[6] How and when this law has been enforced in South Carolina is something of an enigma since there is apparently no case law interpreting or applying it.

B. Sanctions Outside the Criminal Law

Laws which make these consensual homosexual acts illegal, criminal, and punishable are not the only sanctions placed upon those who may participate in these acts. The homosexual who is employed by the government may be and has been subjected to a different threat. Since many government agencies either control or participate directly in the hiring and firing of their personnel, they constitute a considerable threat to the job security of the homosexual employee. Generally, Congress or the state legislative body will limit the authority of the agencies in this area in order to prevent arbitrary decisions, and to ensure that due process is afforded all employees and applicants.[7] One common limitation on the power of dismissal is the requirement that the agency or board show good cause before an employee may be dismissed.[8] Two recent cases are good examples of agency actions aimed at the dismissal of employees who had allegedly engaged in homosexual activities.[9]

In 1969 the United States Court of Appeals for the District of Columbia Circuit had the occasion to review the case of *Norton v.*

4. S.C. CODE ANN. § 16-412 (1962).
5. S.C. CODE ANN. § 16-11 (1962).
6. BLACK'S LAW DICTIONARY 243 (4th ed. rev. 1968).
7. Musser v. Utah, 333 U.S. 95 (1948).
8. Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951).
9. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

Macy.[10] The appellant, who had been a budget analyst for the National Aeronautics and Space Administration (N.A.S.A.), and another man, Procter, were arrested by morals squad officers of the District of Columbia police force for a traffic violation. At the morals office both men were questioned extensively as to any activities between them and as to their sexual histories. A N.A.S.A. security official, Chief Fugle, was contacted and fully appraised of the results of the interrogation at which the appellant consistently denied having made any sexual advances towards Procter. Appellant then went with Fugler to a N.A.S.A. office where Fugler and another security officer questioned the appellant further. During this interrogation, the appellant admitted that he had engaged in some homosexual acts while in high school and in college. He also allegedly admitted to having periods of blackout after drinking during which he suspected he had engaged in homosexual acts. Appellant further admitted that he had experienced a blackout when he met Procter. Upon this evidence, N.A.S.A. determined that the appellant had in fact made homosexual advances toward Procter, and added further that the act was "immoral, indecent, and disgraceful conduct."[11] N.A.S.A. also decided to dismiss the appellant on the grounds that he possessed "traits of character and personality which render [him] . . . unsuitable for further Government employment."[12] This determination was upheld by a Civil Service Appeals Examiner and the Board of Appeals and Review. After the federal district court turned down his request for reinstatement, the appellant proceeded to the Circuit Court for relief.

Chief Judge Bazelon, speaking for the court, noted that the appellant was a veteran and "could be dismissed only for 'such cause as will promote the efficiency of the service.' "[13] The court then held that the appellant was unlawfully discharged since there was nothing in the record to suggest "any reasonable connection between the evidence against him and the efficiency of the service . . . ."[14] Bazelon unhesitatingly attacked the Civil Service Commission for deeming itself the judge of the morality of an employee's off-duty conduct. He stressed

10. 417 F.2d 1161 (D.C. Cir. 1969).
11. *Id.* at 1163. *See* 5 C.F.R. § 731.201(b), (g) (1969).
12. *Id.*
13. *Id.* at 1162. *See* 5 U.S.C.A. § 7512(a) (Supp. 1968).
14. *Id.*

that when the Commission simply labels an employee's acts as immoral, it is discouraging "careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude."[15] Bazelon admitted that the Commission could possibly have found that the appellant's homosexual advances were immoral "under dominant conventional norms,"[16] but he stated that it is not within the authority of the federal bureaucracy to enforce community standards of morality in the private lives of its employees. Bazelon then turned to the question of the appellant's performance as an employee and whether there was evidence present indicating that his homosexual activities adversely affected his efficiency. Bazelon pointed out that there was substantial evidence that appellant was dismissed according to a "*custom* within the agency"[17] and in order to avoid any embarrassment to the agency in the future. He admitted that embarrassment to the agency could hinder the appellant's efficiency in the service, but alleged that such a claim could easily be employed by the agency as a "smokescreen hiding personal antipathies or moral judgments. . . ."[18] In the appellant's case, Bazelon indicated that the claim of possible embarrassment to the agency was an unreasonable grounds for dismissal.

In light of Chief Judge Bazelon's opinion, it is apparent that the action taken by N.A.S.A. and the Civil Service Commission in the *Norton* case was something other than administrative in nature. In reality, the agency and the Commission were exercising a power to punish under a guise of administrative authority to promote efficiency in the service, and this is what Judge Bazelon finds so objectionable.

A situation somewhat similar to the *Norton* case arose in *Morrison v. State Board of Education*[19] which was reviewed by the Supreme Court of California. In that case, the appellant, a former school teacher of exceptional children, was appealing a determination by the California State Board of Education that he was unfit to teach and no longer entitled to a teaching diploma. The board had based its decision on facts which indicated that the appellant and a fellow male

15. *Id.* at 1165.
16. *Id.*
17. *Id.* at 1167 (emphasis added by court).
18. *Id.*
19. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

teacher had engaged "in a limited, noncriminal physical relationship which petitioner described as being of a homosexual nature"[20] on four occasions within one week. Justice Tobriner, speaking for the court, pointed out that California law does authorize the dismissal of a teacher for any act involving moral turpitude.[21] But he stressed that the authorizing statute would be unconstitutional if interpreted to give the Board the power to dismiss teachers for no other reason than immoral conduct. Tobriner submitted that the terms " 'immoral or unprofessional conduct' or 'moral turpitude.' " are too broad for statutory language since "they embrace an unlimited area of conduct."[22] He assumed, however, that the legislature did not intend to give the board the power to dismiss an employee simply because it disapproves his private conduct. Therefore, Tobriner interpreted the legislature as meaning that dismissal is in order only where the employee's private conduct adversely affects his performance on the job. He concluded that there was no evidence presented to show that appellant's private conduct affected his performance.[23] The case was, therefore, reversed and remanded.

But what indeed was the intention of the legislature? In saving the statute from being deemed unconstitutional for vagueness and violation of due process, the court has failed to present any substantial evidence to indicate the real legislative intent. Justice Tobriner assumes the legislature intended a narrowing application since a literal and broad interpretation would be unreasonable in that it would "subject to discipline virtually every teacher in the state."[24] Perhaps Tobriner has been too clement toward the legislature. It is likely that the legislature indeed intended to subject to dismissal those teachers whose private conduct might be deemed immoral by the Board. As in *Norton v.*

20. *Id.* at 218-19, 461 P.2d at 377-78, 82 Cal. Rptr. at 177-78 (footnote omitted).

21. *Id.* at 217, 461 P.2d at 377, 82 Cal. Rptr. at 177. *See* Board of Educ. v. Swan, 41 Cal. 2d 546, 261 P.2d 261 (1953). For professionals, other than teachers, who are licensed by the state *see* Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Yakov v. Bd. of Medical Examiners, 68 Cal. 2d 67, 435 P.2d 533, 64 Cal. Rptr. 785 (1968); Lorenz v. Bd. of Medical Examiners, 46 Cal. 2d 684, 298 P.2d 537 (1965).

22. *Id.* at 224-25, 461 P.2d at 382, 82 Cal. Rptr. at 182. *See* Hale v. Bd. of Educ., 13 Ohio St. 2d 92, 234 N.E.2d 583 (1968); Jarvella v. Willoughby-Eastlake City School Dist., 12 Ohio Misc. 288, 233 N.E.2d 143 (1967).

23. *Id.* at 236, 461 P.2d 392, 82 Cal. Rptr. at 192.

24. *Id.* at 225, 461 P.2d at 382-83, 82 Cal. Rptr. at 182-83.

Macy,[25] what results is not an exercise of administrative authority. The revocation of the appellant's diploma to teach was more in the nature of a purely punitive act than one taken to promote the efficiency of teachers as a whole or to protect the public welfare. His diploma was revoked simply because the State Board of Education disapproved of his conduct.

Both of the above cases present the same general question. Where do we strike a balance between the right of the individual to pursue his private life without government interference and the government's interest in promoting the public welfare. Both cases were decided in favor of the individual's rights since there was no showing that the dismissals were aimed at promoting a valid public interest. The courts are hinting that the enforcement of morality for its own sake is not so precious a value as to outbalance the interest in preserving rights to privacy. This line of reasoning may very well be applied to laws which make criminal private homosexual acts between consenting adults. It follows then that we should not label conduct which does not conform with community standards of morality as criminal on that basis alone. There must be some important public interest which necessitates the government's proscription of such conduct before an invasion of this realm of individual privacy may be justified.[26]

III. THE DEBATE OVER LAWS WHICH ENFORCE MORALITY

A noted advocate of laws which make private homosexual activity illegal is Lord Justice Devlin. He submits that these crimes are not in truth victimless, nor are the acts consensual. He names society as the victim of these immoral acts and urges that society has not given its consent to the performance of these acts. He feels that society *has* an extremely important interest to protect in enforcing these morality crimes. This interest is the preservation of society itself.[27] Lord Devlin explains:

> There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first state of disintegration, so that society is justified in taking the

25. 417 F.2d 1161 (D.C. Cir. 1969).

26. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

27. P.A. DEVLIN, THE ENFORCEMENT OF MORALS 12-13 (1965).

> same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.[28]

Addressing the question of homosexuality, Lord Devlin says there is a "general abhorrence"[29] of it, that people consider it "so abominable that its mere presence is an offence."[30] Lord Devlin concludes that, given this public intolerance, society has the right to "eradicate it."[31]

H.L.A. Hart, Professor of Jurisprudence at the University of Oxford and a strong opponent of laws which make consensual, private homosexual acts criminal, answers Lord Devlin's argument in his book *Law, Liberty, and Morality*.[32] Professor Hart states that there is no proof that allowing consenting adults to privately participate in homosexual activities will lead to the disintegration of society.[33] Hart perceives what he calls "an undiscussed assumption"[34] in Lord Devlin's argument. He interprets Devlin to say that "those who deviate from any part [of morality] are likely or perhaps bound to deviate from the whole."[35] Hart argues that there is simply no evidence to justify this assumption.[36] Professor Hart is willing perhaps to agree that "some shared morality" is essential for society's existence, but he is unwilling to identify society with its morality as he alleges Lord Devlin does. If we were to adopt Devlin's thesis, says Hart, society would be destroyed everytime there is a change in morality.[37] Later in his book, Professor Hart concedes that the views of Devlin, and others more extreme than Devlin's, may have been applicable during the Victorian period in England since at that time there was an overwhelming consensus within society that immoral activities should be punished.[38] But he insists that modern public opinion is not so intolerant. Professor Hart then sug-

28. *Id.* at 13-14.
29. *Id.* at 17.
30. *Id.*
31. *Id.*
32. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).
33. *Id.* at 50.
34. *Id.*
35. *Id.* at 50-51.
36. *Id.* at 51.
37. *Id.* at 52. *But see* P.A. DEVLIN, THE ENFORCEMENT OF MORALS 13-14 n. (1965).
38. *Id.* at 62.

gests that "a number of mutually tolerant moralities"[39] may exist in today's society. He is further willing to concede that there is "much in social morality worth preserving even at the cost"[40] which wil result from enforcement. But Hart will not go as far as Devlin. Hart feels that "essential universal values"[41] should be preserved, however, there may be, and should be, "individual divergences in other fields"[42] from society's prevalent morality. He, therefore, submits that laws which make criminal private homosexual activities between consenting individuals are not longer essential or universal in their value, and should be repealed.

Professor Lon L. Fuller of Yale agrees with Hart that these laws should be repealed, but he finds it unnecessary to address himself to the question of whether or not homosexuality is immoral as such. Instead, he determines, according to what he calls the "inner morality of law,"[43] that crimes prohibiting consensual homosexual acts in private are not really functional as law.[44] Professor Fuller explains:

> The reason for this conclusion would be that any such law simply cannot be enforced and its existence on the books would constitute an open invitation to blackmail, so that there would be a gaping discrepancy between the law as written and its enforcement in practice.[45]

A close analysis of Professor Fuller's argument yields what is perhaps the most compelling reason for abandoning the legal enforcement of morality as applied to private, consensual acts. Is the enforcement worth the cost in resources and human suffering which will result from enforcement?

Assuming that uniform and consistent enforcement is desirable, an attempt to implement such enforcement would require either a diversion of law enforcement manpower from other areas of enforcement, or the expenditure of sizeable funds to employ more enforcement officials, and perhaps the creation of a special agency. Besides the difficul-

39. *Id.* at 62-63.
40. *Id.* at 70.
41. *Id.* at 71.
42. *Id.*
43. *See* L. FULLER, THE MORALITY OF LAW Ch. 2 (rev. ed. 1969).
44. *Id.* at 132-33.
45. *Id.* at 133.

ties posed by inadequate numbers of enforcement personnel and insufficient funds to finance so mammoth a task, there are other imposing problems in actually applying and administering these morality laws. The most obvious of these problems stems from the fact that these crimes are victimless. How do enforcement officials become informed of violations of these laws when in fact they have been breached? Given the private, consensual nature of the acts in question, it is unlikely that enforcement officials will easily obtain knowledge of them. Certainly there are instances where one of the consenting parties decides to reveal what took place. He may have a change of heart and feel guilty, or he may have a vindictive motive. Perhaps the act was not in fact private, having been witnessed by some third person. But these examples do not eliminate the multiple instances of acts which are never called to the attention of law enforcement officials, and the second example takes the acts out of the realm of privacy and presents the added consideration of offensiveness to a third person's concepts of decency. In such a case, the crime would no longer be "victimless."[46] The only possible solution would appear to be that hypothetical, extreme example of the police state in which the acts of every man are monitored by eavesdropping devices located in every nook and cranny. Such a suggestion is ludicrous since it conflicts so fundamentally with our modern concepts of liberty and privacy. We simply do not prefer the uniform and efficient enforcement of such laws to the preservation of individual freedom.[47]

IV. CONCLUSION

Recent cases reveal a trend toward striking a balance in favor of the individual doing as he pleases in private when no harm results to others. The trend is away from allowing the government to interfere with the individual's right to privacy in such cases. The trend relies on an old thesis: one is free to do as he wishes without interference, so long as he does no harm to others.[48] In our modern society, government has the authority to interfere with the individual's exercise of his rights. The question presented is when should government exercise its power under

46. *See* H.L.A. HART, LAW, LIBERTY AND MORALITY 44-45 (1963).

47. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

48. J.S. MILL, ON LIBERTY Ch. I (1859).

this authority to interfere? The obvious answer is only when necessary to prevent harm to other members of society. This simple line of reasoning is no less applicable today than it was in the day of John Stuart Mill. Professor Hart claims to have refined it, but has actually restated it within a modern context.[49] Since laws which make criminal private, consensual homosexual acts between adults are, at best, of questionable value to society's interest in self-preservation, they should be repealed in deference to the individual's rights to do as he pleases in private.

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49. *Supra* Note 46, at 5-6.