"A ny school boy knows that a homosexual act is immoral, indecent, lewd, and obscene." At least Judge Byron Skelton of the United States Court of Claims, in a 1969 case involving the right of a homosexual to retain his civilian job in the Department of Army, believed as much. He went on to say that "if activities of this kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected."

Richard L. Schlegel, the homosexual in question, would have been able to go quietly about living his life according to his sexual preferences if his job had not required a "top secret" security clearance. A preliminary security check in 1961 revealed various homosexual acts which he performed with other military personnel. Schlegel was subsequently fired and, when he sued for back pay and other financial compensation in 1969, his claim was denied because Judge Skelton agreed with the Army and the Civil Service Commission that his "immoral and indecent conduct" would impair the efficiency of his service.

Judge Skelton's views on homosexuality are not unique in our society or, alas, within the judiciary. In fact, this spreading, irrational fear of homosexuality even has a name: homophobia. This malady has been raging recently in communities in Florida, Minnesota, Kansas, and Oregon, where gay people had their civil rights stripped from them by overwhelming public vote.

Such public insensitivity to the civil rights of an entire class of people is not unique, of course, although the practice of putting such rights up for a public referendum is relatively new. It would appear, however, that the intensity of feelings about gay people today is greater than those expressed about any other minority group. Many of those who are "liberal" in their attitudes toward racial, religious, and ethnic minorities still seem unable to extend those values to gay people.
Even more disturbing to those who are involved in the struggle for gay rights is that much of the American judiciary seems to be just as homophobic as the society at large. It is the goal of the American judiciary to be, as Felix Frankfurter put it, "as free, impartial, and independent as the lot of humanity will admit." Such a goal is especially important when civil liberties or rights are at stake. Because the purpose of the Bill of Rights is to protect the rights of the numerically few and the socially unpopular, it is the obligation of the members of the judiciary to put aside personal views and enforce those civil rights. The judiciary must be in the forefront of the battle against the expression of public whims and prejudices. Although individual exceptions clearly exist, the judiciary as a whole has failed in this mission by displaying the subjective, emotional, and often irrational sort of judgments endemic to homophobia in cases involving gay rights.

To understand fully judicial homophobia, one must first examine the sentiments of the society from which the judges are drawn. Although a generally negative public opinion toward homosexuals is evident today, the extent and depth of these feelings can not be easily gauged. However, there are various scientific tools by which one can measure societal emotions, one of which is the public opinion poll. In 1969, CBS-TV reported that about two-thirds of the public was disgusted by homosexuals or fearful of them; ten percent admitted that they hated gay people. A majority felt that homosexuality was more dangerous to society than abortion, adultery, and prostitution. In fact, a 1969 Harris Survey concluded that

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more than 60 percent of the public believed that homosexuality was harmful to American life. Four years later, half of the society felt that homosexuality could cause the downfall of civilization.

Such views may now be on the decline, but only slightly. Two national opinion polls in 1977 indicated that only about 55 percent of the public favored equal legal rights for gay people. Such results are belied, however, by the recent successful movements in various parts of the nation to deny such equality to homosexuals.

A less precise tool by which to measure societal feelings is a careful analysis of the national debate on the gay rights issue. Such study aptly demonstrates the depth of public insensitivity to its own discriminatory attitudes. Opponents of civil rights for gay people frequently equate gays to other socially hated and ostracized classes of people, rather than to blacks, Jews, and other historically oppressed minority groups. For example, a few months ago a Baptist minister stated that homosexuality was a "murderous, horridous, twisted, ugly thing, a powerful addictive lust." A Tulsa citizen said that gay people have no more minority rights "than do those addicted to drugs." A psychiatrist suggested that a gay person is "no more likely . . . to change his pattern of living . . . than the successful criminal." A Harper's magazine contributor equated gays to lepers; he confided that he would prefer his child to grow up to be a murderer or dope addict than a homosexual. Taking that one step further, a Baptist church deacon suggested that gays are "the lowest form of people" and his children would be better off dead than gay. A Gonzaga Law student, in response to a national questionnaire on gay
rights, wrote back to its author: "You must be a homosexual. I would never take a class from [you], because [homosexuals] make me sick."

The English language itself manifests society's penchant for considering gay people somehow different from other minority groups. This can be documented by merely skimming through the 1977 edition of Webster's New Collegiate Dictionary, replete with derogatory terms for homosexuals—"fag," "faggot," "fairy," "homo," "sissy," "queen," and "queer," just to name a few—all designated simply as synonyms for "homosexual." On the other hand, equivalent racial and ethnic slurs—"nigger" and "kike," for example—are identified as "offensive" or "disparaging." This is not to suggest that the editors of Webster's are prejudiced but, rather, that they are merely an accurate mirror of contemporary standards. Likewise, in a telephone conversation with a student bar officer at the University of Miami Law School last year, the student unashamedly commented: "We have a lot of fruits here." Miami might have a lot of "niggers," too, but it is doubtful he would have used such a term on the telephone with a complete stranger.

Public opinion poll or the English language, statistical or subjective analysis, the conclusion is the same: The American people as a whole hate and fear homosexuals. Unfortunately, members of the judiciary by and large share the discriminatory attitudes of their fellow citizens. One need not do a substantive analysis of various court decisions to grasp the depth of the judiciary's homophobia. Although judges usually pride themselves on writing scholarly, objective opinions, the form of many gay rights opinions is largely emotional. Judges have gratuitously described homosexual behavior as bizarre, repugnant, outrageous, sordid, and revolting. Courts have at times failed to describe the specific homosexual events in question because, as one court put it, "the records of the courts [should not] . . . be defiled with the details . . ." or, as another put it, description of such events should not "stain the pages of our reports." Such emotionalism apparently caused one judge to remind his readers that a "homosexual is after all a human being." One can think of few, if any, minority groups which require this type of defense in the 1970s.

While these various examples of homophobia may prove that the public and many members of the judiciary do indeed hate and perhaps fear homosexuality, it has been argued that gay rights advocates have not been able to prove that such feelings are irrational or wholly undeserved. However, few have ever demanded that blacks, women, Jews, or other minority groups prove that prejudice toward them was irrational. Rather, it is consistent with our legal and ethical systems to presume both the moral worth of all people, and their right to be treated equally. It seems only proper, therefore, that those who condemn or discriminate against gay people accept the burden of proving that gays are immoral and unworthy of equal treatment under the law.

To make such an argument against gay rights, one would probably have to resort to an assertion of the common stereotypes of gay people and homosexuality. Gays are mentally ill. By their nature, they seduce children (opponents of gay rights in St. Paul, Minnesota argued, for example, that "homosexuals can't reproduce, so they must seduce"). Gays proselytize heterosexuals or, as one psychiatrist put it, "Homosexuals divide the world into two classes: the openly homosexual and the potential candidates." Most gay men are effeminate and gay women mannish. Gays enjoy dressing in the clothes of the opposite sex. Homosexuality is sinful.

This last theological claim is subject to great debate. Recent biblical scholars have amassed substantial credible evidence pointing to a serious mistranslation of the Bible, especially from the Hebrew. There is also evidence that portions of the Bible have either been taken out of
Members of the judiciary by and large share the discriminatory attitudes of society in general.

context or misunderstood from a historical point of view. Furthermore, at least to the extent that views about homosexuality are institutionalized within the legal system, the First Amendment-mandated separation of church and state would seem to require some valid secular rationale for legal discrimination.

Quite simply, there is no such secular base. All of the stereotypes about gay people and homosexuality can be disproved. Homosexuality is not now considered a mental illness, and gay people as a whole do not seem to be peculiarly susceptible to mental disease. There is not one iota of evidence, scientific or statistical, to support the seduction or proselytization theories. People who are sexually stimulated by children are pedophiles, and are believed by psychologists to be neither heterosexual nor homosexual. Effeminate behavior is not typical in most gay males, nor is it uncommon in heterosexuals. Finally, psychologists say that homosexuals are more likely to suffer from transvestism than gays. The stereotypes, then, are myths, and the resultant fears and prejudices are irrational.

Unfortunately, homophobia has affected legal decisions more seriously than in the mere emotionalism of some legal opinions. The prime example of this is the litigation of gay teachers' rights to practice their profession. When a gay person chooses to be a teacher, he or she has struck at the public's emotional jugular vein. Parents and the nation guard their children jealously as the most vital national resource. They expect teachers to indoctrinate their children in all those values—including, of course, heterosexuality—which the nation holds sacred and also to serve as a role-model for the youths. Because of the accepted stereotypes of a homosexual, parents fear that the gay teacher will exhibit improper sex roles and may even seduce their youth. Besides, who wants a mentally ill sinner in the classroom? These emotions are so deeply and broadly felt that, according to 1977 Harris and Gallup polls, only about one-third of the nation believed that homosexuals should be permitted to teach children. Recent campaigns against gay rights have also focused on the issue of gay teachers' rights.

Much of the case law demonstrates that judicial feelings are similar to those of the society. When a public school teacher is entitled to a hearing, the law appears to say that a homosexual may not be fired solely because of his or her sexual preference. Unfitness to teach must also be demonstrated. The courts, however, have found this hurdle a simple one to bypass. If the teacher is convicted of a homosexual act—and there is no appellate case to date in which it is alleged a gay teacher acted improperly with a child—regardless of the existence or absence of consent, the teacher may be considered unfit because he or she, as a lawbreaker, is not now a proper role-model and can not teach law and order or morality.

If the homosexual commits no crime, indeed no proven sexual act, he or she may still be subject to discharge. In a 1977 case, Gish v. Paramus Board of Education, John Gish, a high school teacher with seven years of apparently faultless teaching experience, was ordered by the school board to submit to a psychiatric examination or else be discharged. The order was issued because Gish's conduct displayed evidence of "deviation from normal mental health" which might impair his ability to "associate" with students. This display of "deviation" consisted neither of immoral nor of illegal behavior; he simply assumed the presidency of

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the New Jersey Gay Activist Alliance, a legal political action group. The New Jersey court upheld the order, noting Gish’s “intimate contact” with “impressionable adolescent pupils.” Gish was not tried on the basis of the tangible evidence of his seven years of effective teaching, but apparently on the court’s acceptance of homophobic stereotypes—that gays are sick seducers, effeminate proselytizers, and inappropriate role-models.

The matter was taken a step further in another 1977 case, Gaylord v. Tacoma School District. James Gaylord, a teacher for 12 years, had kept his homosexuality a secret from everyone, even his parents. Nobody suspected. However, after hearing a rumor, the school principal asked Gaylord if he was gay. Gaylord was honest and, in spite of an excellent teaching record, his reward was a discharge. The Supreme Court of Washington upheld the discharge although there was no criminal conduct or classroom misconduct alleged. Instead, the court noted that one student and three teachers expressed opposition to his retention without giving any reason for their position. Three administrators, based on no evidence other than these four witnesses, then predicted classroom disruption if he were allowed to teach. The court reasoned that he could not maintain discipline and was unfit to teach. In permitting four people to veto Gaylord’s right to a livelihood on the basis of their personal prejudices toward his (hidden) sexual preferences, the court was giving judicial credence to their homophobia. Rarely has prejudice or ignorance received such legal condonation.

The existence of homophobia, its manifestation through stereotypes, and its impact on case law is apparent. But why is our society so riddled with prejudice toward approximately ten percent of the American population, and what can be done to change it?

The most important factor in the origin of homophobia is the Bible or, more accurately, the traditional interpretation of the Old and New Testaments. Whether or not the Bible does, in fact, condemn homosexuality is irrelevant. What matters is that the religious person believe the Bible says as much. In one Midwestern state, 47 percent of the population believed that homosexuality was a sin, and 46 percent believed that the Bible interprets it as such.

The correlation between the religious view and resultant antihomosexual laws is also evidenced in other ways. For example, in England only 14 percent of the population believes that a homosexual cannot be a good Christian or Jew, whereas 33 percent in the United States believes so. This correlates directly with national views regarding legislation of adult consensual homosexual conduct. In the United States, the nation is evenly divided, 43 percent for and 43 against; in England, with its less severely anti-gay biblical views, they overwhelmingly support legalization, 58 percent to 22 percent. Finally, religion’s impact is evident when one observes the recent campaigns against gay rights. Anita Bryant’s “crusade” was religious. The leaders of anti-gay repeal movements in St. Paul and Wichita were Baptist ministers; in Wichita a common slogan was “A Yes [anti-gay] vote is a vote for the Bible.”

While religion helps explain the origins of homophobia, other factors, such as the generally anti-sexual nature of our society, may explain its lingering popularity. Constitutional law demonstrates how low a priority sex is given in our value system, even with the United States Supreme Court. Politically dangerous speech, false and reputation-damaging speech, and even commercial speech fall within the broad protection of the First Amendment; but obscenity—speech regarding sex—falls completely outside the First Amendment. It follows that sexual conduct is also in very low esteem, particularly if it does not fall within traditional (i.e., religious) standards. Sex, simply, is a subject which neither the courts nor society care to discuss.

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A classic example of the emotionalism with which some judges treat the subject of sex is the recent opinion of Utah Supreme Court Chief Justice A. H. Ellett in an obscenity case involving a movie which depicted simulated acts of heterosexual sodomy. The justice intoned:

A more sickening, disgusting, depraved showing cannot be imagined. However, certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene it must [wholly lack serious literary, artistic, political, or scientific value]. Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mindwarped queer. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste. If those judges have not the good sense and decency to resign from their positions as judges, they should be removed either by impeachment or by vote of the decent people of the constituency.

In light of Justice Ellett's almost hysterical tirade on the subject of heterosexual sodomy, one can only imagine his views on the homosexual variety.

There may also be a psychological basis for twentieth-century homophobia. There are a number of psychosexual theorists who contend that humans are born naturally bisexual, and that the homosexual feelings are largely repressed in most people because they are considered sick or sinful. As a result, "reaction formation" occurs—a psychological mechanism by which one defends against a felt impulse by opposing its expression in others. It may be, therefore, that gays are nothing more than the scapegoats for the non-gay's sexual anxieties.

Finally, it would seem that there is a modern-day correlation between homophobia and the feminists' enemy—"machismo." Traditional sex-role stereotypes are antithetical to homosexuality. Tradition states that men should be sexual aggressors and women should be passive. Gay liaisons destroy this symmetry, and put into question the "macho" man's values. And the fact that some women can obtain sexual satisfaction without a man is no doubt insulting to the "macho" male.

But, given the many possible causes of homophobia, the question still remains: How do we move away from the status quo? Felix
Frankfurter again has the answer: "Experience attests that . . . habits and feelings will yield, gradually though this be, to law and education." However, the law today is as much the cause of the problem as it is the possible cure. Education, therefore, not only without but also within the legal profession—and within the courtroom—must be attempted.

There is good reason to believe that reeducation, through the confrontation of increasing gay rights litigation, will be easier in the future due to the emerging corps of gay and non-gay lawyers who are specialists in this field. Not only are there more visible homosexual lawyers who are willing to devote their efforts to gay rights cases, but there are also public interest groups like the Lambda Legal Defense and Education Fund. And there is the possibility that in the future some of these lawyers will eventually become judges and legislators and be in a better position to resolve the conflicts and misunderstandings involved in gay rights litigation.

But for the present, the gay rights attorney must be contented with confronting the real possibility that the judge is guilty of homophobic, stereotypical thinking. The attorney must therefore conduct a form of "sensitivity training." Just as men learned about their sexist thinking process from feminists, heterosexuals must come to realize the extent of their stereotypical thinking about gays. The process need not and, of course, should not be put in the form of an attack on the judge; but, whether we like it or not, the attorney must attack the past thinking of many judges. The lawyer should argue that precedent in the gay rights area be discarded where it can be shown that prior decisions were based on false, often unstated, premises with which the parties came into court. By showing that prior decisions were so based, it will force the current judge to look into his or her own psyche. The lawyer is then in a position to tactfully, but firmly, demand that the court's legal conclusions be based on information ascertained in the courtroom, and not from that judge's subconscious.

This demand serves to reinforce the attorney's second in-court strategy, namely, to make the courtroom the forum for science, not superstition or preconception. Legal philosopher Ronald Dworkin has written in Taking Rights Seriously: "The principles of democracy . . . do not call for the enforcement of the consensus . . . [when it is based upon] prejudices, personal aversion, and rationalizations." Otherwise, he says, we as a nation are no different than Nazi Germany. In short, the fact that a majority of Americans may dislike homosexuality, or not wish it upon their children, does not merit the court's respect unless such views are based on rational factors. Racial prejudice never has a valid basis for delaying integration. Likewise, the attorney must demand that a James Gaylord not be fired because others do not like him, unless and until such people can support their feelings with rational reasons. If experts—scientists, psychiatrists, educators—are called to testify to the harm of homosexuality, they too should be asked to back up their assertions with hard evidence. Even experts' views can often be proved to be personal rather than scientific. Without solid evidence, opponents of gay rights will have failed to meet their legal and moral burden.

Another strategy involves constitutional arguments. Although it can be persuasively demonstrated that consensual adult homosexuality should fall within the parameter of the constitutional right of privacy, the main argument is that "affective or sexual preference" is, like race and religion, a suspect classification, thus the case for gays is objectively very strong. Prior Supreme Court cases have considered four factors in designating a class as suspect: the group has historically been subjected to unequal legal treatment; the class is generally politically powerless; the group has been the victim of legislative prejudice, not ra-
tionality; and the classification is based on traits which the class is powerless to control. This article has already shown that the first three criteria are true, and all theories of the etiology of homosexuality seem to support the fourth criteria (sexual preference, however it originates, tends to occur early, before true choice is involved).

Although this equal protection argument is not likely to win immediate acceptance, it could be raised in those courtrooms where the judges seem open-minded. A victory on this basis would enhance the dignity of the gay rights battle.

Just as the courtroom must be a forum for education, the strategy outside the courtroom will have to be the same. In recent electoral campaigns gay-rights advocates often tended to run narrow campaigns in which they suggested, in essence, “You don’t have to like us; just give us our basic human rights.” Although this is an important and valid argument, most people rejected it, which suggests that the issue of homosexuality should be confronted directly. One of gay people’s greatest enemies is their own invisibility. The public must be forced to learn that politicians, lawyers, doctors, teachers, laborers, and police officers are gay. They must learn that people whom they respect, and who don’t live up to their negative stereotypes, are homosexual.

Perhaps most importantly, members of the non-gay community must come out of their closets and express their public support for gay rights by marching with gay people, literally and figuratively, as they did for blacks and other oppressed groups in past years. It may be as simple as talking to one’s neighbors about gay rights, or as difficult as going to one’s employer, when necessary, to convince him or her to hire gays. It may be through local PTAs to be sure that the school curriculum does not discuss homosexuality as a sickness or aberration. It may be by enlisting influential friends or respected organizations to take a stand on the issue. (For example, three major religious associations, the National Council of Churches, the National Federation of Priests’ Councils, and the Central Conference of American Rabbis, have come out in support of the rights of gay teachers.)

Another important issue which gay activists and civil libertarians must address themselves to is the dangerous precedent of putting gay rights up for public referendum. It started in Dade County, Florida, and spread to St. Paul, Minnesota; Eugene, Oregon; Wichita, Kansas; and Seattle, Washington. Even more ominously, California’s Proposition 6 (initiated by State Senator John Briggs) was an effort to deny teaching jobs to homosexuals and their supporters throughout the nation’s most populous state. The most recent anti-gay referendums in Washington and California failed, but the other ballot measures succeeded.

It can be hoped that this recent trend toward legislating homosexual invisibility is now on the wane, with the recent electoral victories of gay people. This is far from clear, however. Even homophobic conservatives such as Ronald Reagan opposed the Briggs initiative, so the lesson of the victory in California is less than clear. The Seattle election, on the other hand, is a clear-cut success.

The one clear lesson from all of the public referendums, whether successful or not, however, is that such elections have not seriously affected the openness of gay people. Although more setbacks for gay men and lesbians may be in the offing, there is increased hope for the long-range benefits of a gradual reeducation of judges and the American people by gay rights lawyers and lay people.

The process of change will be slow, but the struggle—one in which lawyers and lay people, heterosexuals and homosexuals, can and should participate—must proceed in and out of the courtroom.

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