(5) the Information Practices Act, which regulates the collection and disclosure of personal information by state agencies and departments; (6) employment-privacy exemptions in the Public Records Act; and (7) other legislatively created privacy protections.

While employers in the private sector have more latitude in their employment practices than do government employers, they are still subject to a variety of restrictions that protects employee privacy: (1) common law privacy provisions; (2) article 1, §1 of the state Constitution which prohibits unreasonable privacy invasions by private businesses; (3) state legislation prohibiting certain types of employment discrimination; (4) state legislation prohibiting the collection of certain forms of information about employees or applicants; (5) sexual harassment legislation and administrative regulations; and (6) state legislation protecting employees from other forms of privacy infringements.

The Eleventh Annual Institute on Equal Employment Opportunity Compliance, held earlier this year, included a presentation on "Privacy in the Employment Relationship: Recent Developments." The course handbook that was distributed at this Institute contains a section bearing the same name.[510] The article focuses exclusively on informational privacy rights of employees. According to the author:[511]

> The legal issue of privacy in the employment relationship has five relatively independent aspects:
>
> — Collection of information and where it is maintained.
> — Disclosure of information outside the corporation.
> — Access to the information by persons within the corporation other than the employee
> — Access by the employee.
> — Medical records.

According to the California Labor Code, "[e]very employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine the employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. . . . [¶] This section shall not apply to the records of an employee relating to investigation for a possible criminal offense. It shall not apply to letters of reference."[512] Generally, the law favors access by employees to their own personnel files.

Therefore, the burden of proof is on the employer to demonstrate any claim of confidentiality that would prevent such access.[513] Furthermore, if an employee or an applicant signs any instrument relating to the obtaining or holding of employment, the employee must be provided with a copy of that instrument.[514]

Use and disclosure of medical information by employers are governed by the recently enacted Confidentiality of Medical Information Act.[515] This legislation requires that:[516]

> (a) Each employer who receives medical information shall establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information. These procedures may include, but are not limited to, instruction regarding confidentiality of employees and agents handling files containing medical information, and security systems restricting access to files containing medical information.
>
> (b) No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.
>
> (c) No employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information which the employer possesses pertaining to its employees without the [employee] having first signed an authorization under section 56.11 or 56.21 permitting such use or disclosure, except as follows:
>
> (1) The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.
>
> (2) That part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the [employee] has placed in issue his or her medical history, mental or physical condition, or treatment may be used or

disclosed in connection with that proceeding.

(3) The information may be used only for the purpose of administering and maintaining employee benefit plans . . . and for determining eligibility for paid and unpaid leave from work for medical reasons.

(4) The information may be disclosed to a provider of health care or other health care professional or facility to aid the diagnosis or treatment of the [employee] where the patient or other person specified in subdivision (c) of section 56.21 is unable to authorize the disclosure.

Disclosures made by an employer regarding an employee's job performance are conditionally privileged if made to others within the company for legitimate business reasons. For example, an interoffice memorandum stating the reasons that an employee was terminated is not a violation of the employee's right of privacy per se, but under appropriate circumstances might be actionable.[517] Similarly, disclosures made in good faith to an employee's co-workers regarding the employee's breach of responsibilities may not be actionable if the content of the disclosures is true.[518]

Former employers may respond to inquiries from potential employers concerning an employee's past performance and qualifications. If such communications are truthful and made without malice, they will not subject a former employer to any liability.[519] However, criminal penalties attach when an employer, by misrepresentation, prevents or attempts to prevent a former employee from obtaining new employment.[520]

With respect to employee or applicant arrest record information, the California Labor Code provides:[521]

> No employer whether a public agency or private individual or corporation shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention which did not result in a conviction, or information concerning a referral to and participation in any pretrial or post-trial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor for determining any condition of employment . . . any record of arrest or detention which did not result in a conviction. . . .
>
> In any case in which a person violates any provision of

> this section . . . the applicant may bring an action to recover from such person actual damages or two hundred dollars ($200), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section shall entitle the applicant to treble actual damages, or five hundred dollars ($500), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500). [Emphasis added.]

In 1982, legislation was introduced (AB 2965) which would have extended the protections of Labor Code §432.7 regarding arrest records to protect employees as well as applicants for employment. The Commission on Personal Privacy supports such an extension of this law.

On a similar note, no public agency, whether state or local, shall, on an initial application form for any license, certificate, or registration, ask for or require the applicant to reveal a record of arrest that did not result in a conviction or a plea of no contest.[522] This provision, of course, protects employees who must seek business or professional licenses as a condition of employment.

During the course of the Public Hearings conducted by this Commission, several witnesses testified on matters involving invasions of privacy in employment settings. Discrimination on the basis of sexual orientation and marital status in hiring, promotion, level of compensation, and fringe benefits, was the main thrust of much of this testimony. Since these issues will be discussed in detail in the portion of this Report entitled "Sexual Orientation Discrimination in California," they will not be dealt with here. Sexual harassment in the workplace was another subject of testimony. The Commission conducted a survey of state and local government employers regarding their policies and practices in handling sexual harassment problems. The results of this survey are included in a Supplement to the Commission's Report.

One major problem that surfaced several times during the Public Hearings pertains to the use of polygraph testing of employees or applicants for employment. On this subject, Labor Code §432.2 states:

> (a) No employer shall demand or require any applicant for employment or prospective employment or any employee to submit to or take a polygraph, lie detector or similar test

or examination as a condition of employment or continued employment. The prohibition of this section does not apply to the federal government or any agency thereof or the state government or any agency or local subdivision thereof, including, but not limited to, counties, cities and counties, cities, districts, authorities, and agencies.

(b) No employer shall request any person to take such a test, or administer such a test, without first advising the person in writing at the time the test is to be administered of the rights guaranteed by this section.

Government Code §3307 states that police officers may not be required to submit to polygraph examinations in departmental investigations or otherwise. This statute does not prohibit the use of polygraph tests for applicants for employment with law enforcement agencies.

A number of states prohibits the use of polygraph tests in employment settings under any circumstances.[523] A few others require polygraph operators to be licensed and provide for revocation of licenses if operators question or test a person on matters pertaining to religious, labor, or political affiliations, or sexual activities.[524]

The Commission on Personal Privacy is most concerned about the use of polygraphs in screening applicants for employment. Attorney Susan McGrievy testified regarding the use of polygraph tests by police departments:[525]

> I think the problem is that almost all police departments require polygraphs in order for a person to be hired as a member of the police department. Most of those police departments have limited the questions which you can ask in a sexual area, but they have not totally done away with them.
>
> . . . Now, I have received a minimum of six to seven complaints. (I can't give you the names of those individuals, because I respect their rights to privacy.) One young man, who I will tell you about, indicated to me that he had been living in New York, graduated from school there, and had been notified by the Los Angeles Police Department that he was going to get a job here. He gave up his apartment, flew out here, and took the polygraph, where he was asked this question about having ever had "outrageous sexual activity," went blip, and then followed these questions, according to

him: "Have you ever slept with a man?" "When did you sleep with a man?" "Did you commit oral copulation?" "Did you commit sodomy?" Sort of a voyeuristic approach. Then he was told that they re-examined his application for the police department, and he had used marijuana within the last year period, and, although it was waiverable, they weren't going to waive it in this instance. I now perceive a pattern of practice in rejecting homosexuals from the Los Angeles police department by using other means.

The problem is that the use of those kinds of questions at all in determining qualifications -- that is what worried me, and it seems to me that would be responsive to legislation.

Mr. William Petrocelli, author of Low Profile, also addressed the problem of the polygraph as a major invasion of employee privacy in his testimony before the Commission:[527]

I think the polygraph in employment should be flat-out outlawed! Instead of a law that says that it can be used only with the employee's consent, I think the law should say that you can't even ask employees to give their consent -- because, you talk to any polygraph operator, and they'll say that the employer is sending people down to their agency to be given a lie detector test and they get in there, and they always persuade them to do it. The veiled threat is that if you don't give your consent, you're going to lose your job. . . .

I think that if a person wants to use it in connection with a crime to try and clear themselves voluntarily, maybe there's a use for it, but I think that an agency that's using the polygraph as a basis for determining whether to hire someone, let it be the police or whatever, I think they're making a big mistake. It's just unreliable, for one thing -- plus being an invasion of privacy on top of everything else. . . .

. . . [I]t's an invasion of privacy on a lot of levels. First of all, its intruding upon your body mechanisms in measuring -- what a polygraph really does is measure perspiration and

> blood rate and that sort of thing. The questions that are asked are usually very intrusive. A polygraph operator, once they get you strapped to the box, is really free to go in any direction he wants, and that's what they say they do. They wait and see what kind of reaction they get, and if they get an "interesting" reaction, they will continue questions in that area. And they may very well get into the most private and intimate matters. It's an invasion of privacy in that the information they glean from the test -- be it true or false -- I think one of your witnesses said this earlier, even true responses on a polygraph can be used against you. Sometimes people get on the machine, and they get so panicked that they'll tell you anything just to show they are telling the truth and they reveal all kinds of private information. I just think that it's inherently unfair, that it really ought to be confined to the narrowest possible area. . . . That would be voluntarily, with criminal work.

Based upon information presented at its Public Hearings, as well as from other independent sources, the Commission on Personal Privacy finds that current law fails to adequately protect employees from serious privacy invasions caused by the use of polygraph tests. Polygraph testing is one of the most intrusive procedures that has come to the attention of the Commission.

THE COMMISSION RECOMMENDS that Government Code section 3307, which prohibits law enforcement agencies from requiring peace officers to submit to polygraph tests, be amended to protect applicants for peace officer positions from being required to take such tests. Furthermore, if peace officer applicants are requested to take such tests, the law should mandate that personnel officials inform applicants of their right to refuse to submit to polygraph testing. There should be no effect on applicant status for refusal to consent to polygraph testing.

THE COMMISSION RECOMMENDS that §432.2 of the California Labor Code be amended. Presently, this statute exempts state and local government employers from its provisions. Section 432.2 prohibits employers from requiring or demanding that applicants or employees submit to polygraph testing as a condition of employment or continued employment. The blanket exemption of governmental employers from this provision should

be eliminated. The only exempt positions should be those requiring top security clearances.

THE COMMISSION RECOMMENDS that if any applicant or employee voluntarily submits to polygraph testing, the law should prohibit questioning in certain highly intimate and private areas including: religious, labor, sexual, or political activities and associations. Violation of this prohibition should carry criminal penalties, civil recovery of actual damages or $1,000, whichever is greater, and reasonable attorney fees and costs to any employee who prevails in any litigation arising under this statute.

After being adopted into law and in effect for a few years, if these recommendations do not appear to have solved abusive polygraph practices, the Legislature should consider prohibiting the use of polygraph testing under any conditions in employment settings.

The Commission notes that privacy in employment settings is one of the least developed areas of privacy law. In its short life, this Commission was able to concentrate to only a very limited extent on invasions of privacy experienced by employees and applicants for employment. What our research in this area did show, however, was that invasions of employee privacy are varied and widespread. This is an area deserving of focused and long-range study not only because of the number of problems that exists but also because of the complexity of the competing interests of employers.

THE COMMISSION RECOMMENDS that the Labor Commissioner establish a 12-month Task Force on Private-Sector Employment Privacy. The purpose of this Task Force, composed of a cross-section of business and labor representatives, would be to identify recurring invasions of employee privacy, to present legal provisions which protect employee privacy, and to make recommendations for legislative or administrative actions that are necessary to further protect the privacy rights of private-sector employees. This Task Force should be created in early 1983 and should report its findings and recommendations to the state Labor Commissioner in early 1984. In turn, the Labor Commissioner should make recommendations to the Legislature based upon the report of this Task Force.

In addition, the following recommendation has been adopted by the Commission based upon its research and the materials located in the Supplements published herewith. (See the Report submitted by Donna J. Hitchens and Linda Barr.)

THE COMMISSION RECOMMENDS that the Legislature add a chapter to the California Labor Code that would prohibit an employer from:

(a) soliciting or requiring the divulgence of any information about an employee's (or prospective employee's) private life that has not been demonstrated by the employer to be necessary to the performance of the job;

(b) using any information acquired about an employee's (or prospective employee's) private life, that has not been demonstrated by the employer to be necessary to the performance of the job, to influence any decision regarding the hiring, placement, promotion, assignment, or termination of the employee;

(c) subjecting an employee to harassment or interrogation on the basis of information acquired about the employee's private life that has not been demonstrated to be necessary to the performance of the job.

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Financial Privacy

The California Legislature has enacted a number of statutes protecting personal privacy in various financial transactions. Consumer credit reporting services and consumer credit investigative agencies are two highly regulated industries in California.

The Consumer Credit Reporting Agencies Act governs one aspect of financial privacy.[528] Pursuant to the provisions of this Act, consumers have a right to inspect any files or records about them maintained by such an agency. If any information is inaccurate, the consumer has a right to have corrections made. Users of such credit reports have obligations to the consumer which are imposed by this legislation. One obligation involves notification of a consumer if an adverse decision pertaining to that consumer, in matters of credit or insurance, is based wholly or partly on information supplied by a credit reporting agency. Similar requirements attach if employment is denied because of information contained in such a credit report.

The Civil Code also imposes obligations on investigative consumer reporting agencies. The Code gives consumers who are the subjects of investigations conducted by these agencies a right to inspect all files and records maintained by the agency about them.

Mr. William Petrocelli testified at the Commission's Public Hearing in San Francisco on a number of privacy problems, including some inadequacies in the Consumer Credit Reporting Agencies Act. He specifically discussed the monumental privacy problems that can be caused by computerized credit reporting data banks.[529]

> We're stumbling into a 1984 society almost by accident as we allow more and more computerized data banks to grow without any thought as to the threat they pose to personal privacy. And here, I think, is the main message I want to get across: any laws that you recommend to the Legislature should pass one basic test — are they computer-proof? If they aren't, they may not be worth the trouble.
>
> There are four basic computer characteristics that we need to keep in mind: (1) there is the ability of a computer to scan a data bank and compile all of the information from different sources that pertains to a particular individual;

(2) there's the reverse capability that enables the computer operator to scan a data base and come up with a list of persons who match a pre-determined set of characteristics; (3) there is the capability of computers to inter-link by telephone, so that data banks in various parts of the world can function, in effect, as one giant computer; and (4) there is the extraordinary vulnerability of computers to electronic crime and unauthorized use. The combination of these four factors makes a computerized file of personal information a highly dangerous commodity that should be handled with as much care as a lump of nuclear waste.

Let me mention a few specifics. California's Consumer Credit Reporting Agencies Act allows credit bureaus to disclose personal information on computers to anyone with "legitimate business need." That kind of vague phrase is no protection at all. The big credit bureaus usually have 100 million or so computerized files with as many as 20,000 computer terminals in the offices of clients, giving them direct access to the data base. As a practical matter, anyone at an office of a bank, an insurance company, or other company with such a terminal, can get a credit report on anyone else by pushing a few buttons, and the request for information never passes through human hands. Similarly, a credit card issuer or any other company that wants to pre-screen a list of potential customers, can provide a credit bureau with the financial, social, or other characteristics it wants and get back a list of persons who meet those criteria based on information in the credit bureau's computer. In effect, the credit bureau "sells" its list to anyone who wants it. We need specific laws to stop this sort of thing, and I would propose the following:

- That it be illegal to make consumer credit information available by computer access to anyone not an employee of the credit bureau without prior written consent of the consumer;

- That the definition of "legitimate business need" be tightened so as to confine it to consumer-initiated transactions -- this would eliminate pre-screening;

- That credit bureaus be prohibited from using computerized credit files unless the system will make a foolproof record of the date, time, and identification of anyone gaining access to the data.

The Commission finds that existing legal provisions protecting consumers against loss of privacy are inadequate. Suggestions that the Commission received from privacy experts such as Mr. William Petrocelli are well taken.

THE COMMISSION RECOMMENDS that the Legislature amend the Consumer Credit Reporting Agencies Act to accomplish the following objectives: (1) the definition of "legitimate business need" be narrowed to include only "consumer-initiated transactions"; and (2) consumer credit bureaus that maintain computerized consumer credit files be required to obtain a special permit to do business in California, and that such permits be issued or renewed by the California Department of Consumer Affairs only to credit bureaus that conduct certified annual audits of data security systems, proving that their systems record the date, time, and identification of anyone gaining access to computerized credit files.

The Commission is troubled by the fact that tenant reporting services are not presently covered by the Consumer Credit Reporting Agencies Act. According to an article that appeared earlier this year in the Los Angeles Times, many prospective tenants have been treated unfairly by these renter reporting agencies:[530]

> In 1978, Lucky Kellener paid his brother's rent in Van Nuys with a check. Because of that, Kellener may have trouble renting an apartment in southern California until 1985.
>
> When his brother eventually was evicted from his apartment Kellener's name was inadvertently included on the "unlawful detainer" filed in court by the landlord as one of the first legal steps in an eviction.
>
> As a result, Kellener was put on a massive private computer list of undesirable tenants.
>
> Thus Kellener became what he and many tenant group representatives consider a victim of U.D. Registry Inc., a five-year-old Encino firm that collects and sells data on the estimated one million tenants who have been served with

unlawful detainers in seven Southland counties since 1971. . .

Tenant advocates are troubled by U.D. because of the size of its data base and its popularity — the bulk of Southland landlords are believed to make use of its service.

But what troubles tenant representatives most about U.D. Registry is the firm's apparent willingness to allow misleading, erroneous, or outdated information to remain in its files, and its basic assumption that the landlord's view of the dispute is true.

"They just pick up the filing of the unlawful detainer, not the verdict or the judgment in the case," said Mary Lee, a program specialist for the Fair Housing Council of the San Fernando Valley, who said her office handles hundreds of complaints against the company.

"Let's say a tenant has a dispute with his landlord and the landlord files [an unlawful detainer]. The registry picks up the name from the public record of the filing and puts it on the computer. Even if the landlord eventually drops the case or the tenant wins it hands down, the registry doesn't add that information. The name stays on the list to haunt him, and the person doesn't even know it until he goes to rent an apartment."

Legal commentators have analyzed the problems faced by tenants who have been hurt by tenant reporting services, the claims of landlords regarding the need for such services, and existing law on the subject.[531] Their study called for some amendments to existing law so that the more than ten million persons living in California rental property would have some protection from unreasonable information practices. Noting that remedial legislation had been introduced in 1978, the commentators concluded:[532]

> California tenants are presently exposed to unacceptable invasions of privacy by tenant reporting companies. Safeguards provided by federal law are ineffective to prevent unfair exploitation of unlawful detainer records. State law provides no safeguards at all. The proposed bill, SB 411, will bring tenant reports under the same safeguards now established by state law for consumer credit and investigative reports; in addition, the bill will significantly curb reports of unlawful detainer records.

A renewed attempt to amend state law was made in 1981. Assembly Bill No. 714, co-sponsored by a number of legislators in both the Assembly and Senate, would have amended the Consumer Credit Reporting Agencies Act so that renter reporting services were included within its provisions. Having passed the Assembly in 1981, this bill was defeated in the Senate this year by a vote of 8 to 27.

The Commission on Personal Privacy finds that present law does not adequately protect millions of California renters from the abusive information practices of some renter reporting services.

THE COMMISSION RECOMMENDS that the legislature enact legislation to subject renter reporting services to the protections contained in the California Consumer Credit Reporting Agencies Act. Accuracy of information, fair notice procedures, consumer access to records, and purging of adverse information after a reasonable period of time should all be included in any future legislative efforts on behalf of the privacy rights of tenants.

Several other statutes regulate the area of financial privacy. Customer lists of telephone answering services and employment agencies are protected as trade secrets.[533] The willful betrayal of a professional secret by a physician constitutes unprofessional conduct that may result in discipline being imposed by the Board of Medical Examiners.[534] Private trust companies may not disclose information concerning the administration of any private trust confided to them.[535] Credit may not be denied to anyone on the basis of marital status.[536] Bookkeeping services may not disclose the content of any records or information to anyone other than the person or entity who is the subject of the record.[537] The California Right to Financial Privacy Act sets forth the procedures and policies for government access to client records maintained by financial institutions.[538] This array of legislation evidences the Legislature's continuing concern for the financial privacy of Californians.

Another area of financial privacy that appears to be inadequately regulated was brought to the attention of the Commission during its Public Hearings. On the subject of Electronic Funds Transfer Systems, Mr. William Petrocelli testified:[539]

> We should be taking a hard look at computerized record trails which will be developed by the next generation of bank cards. I think this is an area that has been totally neglected. Banks are stumbling onto something called "Electronic Funds Transfer Systems" [EFTS] that will allow a bank to transfer

funds from the customer's account to the merchant's account electronically, as the card is inserted in a terminal at the store. But one central computer will have to link all the stores and the banks, and anyone who can gain access to that computer can follow a person electronically from store to store like a cat with a bell around its neck! Merchants can "piggy-back" onto the EFTS system and insert details of the transaction into the computer that can then be bifurcated into the store's computer for inventory control. But this compounds the privacy problem because the central computer will not only know where you are, but the details of what you're buying. So anyone running a surveillance on a computer, trying to find out what a particular individual is up to at that time, will not only know date-to-time, where the person is buying the thing and using their card, but they will also be able to get the details of what exactly they're buying, which is a tremendous invasion of privacy. Although I didn't put it into the prepared statement, you can reverse the process. You can trigger it so that anytime anyone buys a particular item at a particular store, that will ring a bell and you will get a name back. So you can start with the name and find out what the person is doing, or you can start with a set of characteristics and you'll get a list of names back.

I think we're stumbling into the world of EFTS without a thought being given to privacy. As a minimum we should do the following:

1. Strictly license EFTS data banks and require the tightest control on access;
2. Outlaw bifurcation and "piggy-backing" so as to minimize the data base — in other words, eliminate the details of the transaction from the data base; and
3. Require full disclosure to the customers of the privacy risk in an EFTS system.

The Commission on Personal Privacy finds that Electronic Funds Transfer Systems pose a serious risk to personal privacy of consumers.

THE COMMISSION RECOMMENDS that the California Legislature take immediate action to protect Californians against the threat to privacy that these systems pose. Furthermore, the Commission recommends that the minimum safeguards outlined above be incorporated into such protective legislation.

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Insurance Privacy

The Insurance Information and Privacy Protection Act, recently passed by the Legislature, became effective October 1, 1981. Unless extended by additional legislation, it is scheduled to expire in 1989. This Act regulates the information practices of insurance institutions that offer life, disability, property, and casualty insurance.[540]

In addition to insurance institutions, this Act also regulates insurance-support organizations and insurance agents. The Act defines the term "insurance institution" to mean any entity engaged in the business of insurance, including medical service plans and hospital service plans. Residents who are protected include (1) natural persons who are the subject of information collected, received, or maintained in connection with insurance transactions, and (2) applicants, individuals, or policyholders who engage in or seek to engage in insurance transactions.

Insurance consumers are protected by seven major provisions of the Insurance Information and Privacy Protection Act:

(1) Pretext Interviews Restricted;[541]
(2) Notice to Consumers of Information Practices;[542]
(3) Regulation of Investigative Consumer Reports;[543]
(4) Consumer Access to Insurance Records;[544]
(5) Correction of Inaccurate Records;[545]
(6) Explanation of Adverse Underwriting Decisions;[546]
(7) Restrictions on Information Disclosures.[547]

The purpose of the Insurance Information and Privacy Act is "to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents, or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision."[548]

Pretext interviews are prohibited as a means of obtaining information in connection with an insurance transaction, except for investigations regarding claims that are suspected to be fraudulent. "Pretext interview" means an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following acts: (1) pretends to be someone the person is not; (2) pretends to represent someone the person is not in fact representing; (3) misrepresents the true purpose of the interview; or (4) refuses to identify himself or herself upon request.[549]

Insurance institutions and agents covered by this Act must give notice to applicants or policyholders regarding company information practices, including (1) whether personal information may be collected from persons other than the individual proposed for coverage; (2) the types of personal information that may be collected and the types of sources and investigative techniques that may be used to collect the information; (3) the types of disclosures and the circumstances of such disclosures that may be made without prior consent of the applicant or policyholder; (4) a description of the consumers' rights to have access to their insurance records and to have inaccurate records corrected; and (5) the fact that information obtained from a report prepared by an insurance-support organization may be retained by the insurance-support organization and disclosed to others.[550]

Investigative consumer reports may not be prepared or used in connection with insurance transactions unless the insurance institution or agent informs the consumer of the following: (1) that the consumer may request to be interviewed in connection with the preparation of the investigative consumer report; and (2) that upon request, the consumer is entitled to receive a copy of the investigative consumer report. "Investigative consumer report" means a consumer report in which information about a natural person's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with the person's neighbors, friends, associates, acquaintances or others who may have knowledge concerning such items of information. "Consumer report" means any written, oral, or other communication of information bearing on a natural person's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or expected to be used in connection with an insurance transaction.[551]

Individuals who feel they are the subjects of personal information in the files or records of an insurance institution or insurance-support organization, or insurance agent, may demand access to any records containing such

information.[552] Within 30 days after receiving a request for access, the insurance entity must inform the requestor of the existence or nonexistence of such information, permit inspection and copying, disclose the identity of persons or entities to whom the information has been disclosed within the preceding two years, and provide the requestor with a summary of procedures for requesting correction, addition, or deletion of information.

Within 30 days after receiving a request to correct, amend, or delete information from insurance files, the insurance entity shall either (1) correct, amend, or delete the information; or (2) notify the individual of its refusal to comply with the request and the reasons for refusing and also notify the individual of his or her right to file a statement of explanation.[553] Any statement of explanation received by the insurance entity must be filed with the disputed information and brought to the attention of anyone gaining access to the disputed information. A statement of explanation is a statement setting forth what the individual thinks is correct, relevant, or fair information and why the individual disagrees with the information on file.

If an adverse underwriting decision is made regarding an individual, the insurance institution or agent shall either (1) advise the individual of the reason for the adverse decision; or (2) advise the individual of his or her right to obtain the reason supporting the adverse decision. The individual shall also be advised of his or her rights to gain access to records and to correct, amend, or delete inaccurate information.[554]

An insurance institution, agent, or insurance-support organization shall not disclose any personal or privileged information about an individual collected or received in connection with an insurance transaction, unless the disclosure is: (1) with the written authorization of the individual; or (2) reasonably necessary to enable a contractor to perform business services for the insurance entity and the contractor agrees not to make any further disclosures; or (3) made to another insurance entity and the disclosure is reasonably necessary to detect or prevent criminal activity or is necessary for the receiving entity to perform services for the individual to whom the information pertains; or (4) to a medical institution for the purpose of verifying coverage or benefits, informing an individual of a medical problem of which the individual may not be aware, or for auditing purposes; or (5) to an insurance regulatory authority; or (6) to a law enforcement or other governmental authority pursuant to law; or (7) otherwise permitted or required by law; or (8) in response to a facially valid administrative or court order; or (9) for the purpose of conducting research; or (10) to an actual or potential

purchaser of the insurance entity; or (11) to others who will use information for marketing purposes (with certain limitations) and the individual has had an opportunity to forbid a disclosure for this purpose; or (12) by a consumer reporting agency to someone other than an insurance entity; or (13) to a group policyholder for purposes of reporting claims experience or for audits; or (14) to a professional peer review committee for the purpose of reviewing the service of a medical facility or professional; or (15) to a governmental authority for the purpose of determining eligibility of the individual for health benefits for which the governmental authority may be liable; or (16) to a policyholder for the purpose of providing information regarding the status of an insurance transaction; or (17) to a person having a legal or beneficial interest in a policy of insurance but only to the extent necessary to permit that person to protect his or her interest in the policy.[555]

The state Insurance Commissioner has the power to examine and investigate into the affairs of every insurance institution or agent doing business in this state whether or not such insurance entity has violated any of the provisions of this Act. The Commissioner also has authority to investigate into the affairs of every insurance-support organization acting on behalf of an insurance institution or agent doing business in this state in order to determine if any provisions of this Act have been violated.[556]

After conducting a hearing into any charges that this Act has been violated, the Insurance Commissioner shall issue an order with findings and if the allegations are deemed true, a cease and disist order may be issued.[557] Any person subject to the order or whose rights were allegedly violated may obtain a review of the Commissioner's order by filing a civil action in court within 30 days from the date of service of the order.

The remedies provided by the Insurance Information and Privacy Protection Act are both exclusive and rather limited. They are exclusive because the Act specifically prohibits lawsuits based on such theories as defamation, invasion of privacy, or negligence for wrongful disclosures.[558] If an insurance entity fails to comply with those sections of the Act that provide for access to records, correction of records, or adverse underwriting decisions, a person whose rights are violated may apply to a court for appropriate equitable relief (injunctions).[559] If an insurance entity violates the section on unauthorized disclosures, an individual who is victimized by such a wrongful disclosure may recover only actual damages for the violation.[560] The prevailing party to any litigation arising under the provisions of this Act may be awarded reasonable

attorney fees and costs.[561]

Any action for violation of this Act must be filed in court within two years of the date the alleged violation is or should have been discovered.[562]

While the Insurance Information and Privacy Protection Act is a substantial improvement over previous privacy law on this subject, the Commission on Personal Privacy finds that the remedies of the Act are inadequate. Violations of the provisions which guarantee access to records, correction of records, and explanation of adverse underwriting decisions are not subject to any form of damages — even for blatantly intentional violations. The aggrieved consumer has only two non-monetary remedies: (1) complain to the Insurance Commissioner, or (2) seek a court order requiring the company to comply with the law.

THE COMMISSION RECOMMENDS that the California Legislature amend section 791.20 of the Insurance Code to provide for damages when insurance entities violate the rights of consumers to gain access to their records, to correct or amend inaccurate records, and to obtain an explanation for adverse underwriting decisions. Each violation of these particular rights should carry a minimum penalty of $1,000 or the amount of actual damages suffered, whichever is greater.

THE COMMISSION RECOMMENDS that the legislature amend section 791.20(b) of the Insurance Code to provide for a minimum penalty of $1,000 or actual damages, whichever is greater, for unauthorized disclosures of personal information.

Communications to the Insurance Commissioner or to any person in that office regarding any fact concerning the holder of, or applicant for, any certificate or license issued under the Insurance Code are deemed to be made in official confidence.[563] This statute affords a degree of privacy protection to persons cooperating with the Commissioner in investigations pertaining to businesses that must hold certificates or licenses under the Insurance Code.

Persons or financial institutions that lend money for real property transactions usually have a beneficial interest in any fire or casualty insurance policy on the property which the borrower has secured from an insurance agent or insurance institution. As a result, the lending institution possesses personal information about the borrower. Section 770.1 of the Insurance Code prohibits the lender from sharing such personal information with businesses that may desire to solicit the owner to purchase additional or substitute insurance coverage on the property if the borrower has filed a

statement with the lender prohibiting the sharing of such information. The Commission finds the intent of this provision to be laudable but finds the protection to be inadequate.

THE COMMISSION RECOMMENDS that §770.1 of the Insurance Code be amended to prohibit lenders from sharing with third parties any personal information about borrowers that lenders obtain from the borrowers' insurance policies, unless lenders have specifically sought and obtained authorization from the borrowers for such disclosure. Present law authorizes disclosure unless the borrower takes affirmative action to file a prohibitory statement. The proposed amendment would reverse this and prohibit such disclosure unless the lender takes affirmative steps to notify the borrower of the intended disclosure and gives the borrower a genuine opportunity to authorize or refuse to allow this type of a disclosure.

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Sex offender registration, which allows for special police surveillance, access to personal information, and other invasions of privacy affecting the right to travel and the right to limit government's use of the personal information gathered, may be appropriate when a sex crime is inherently dangerous to society and when the expectation of the dangerous crime being repeated is high.

However, there is a category of misdemeanor non-commercial disorderly conduct offenses [such as Penal Code sections 647, subdivisions (a) and (d)] which involves only consenting adults or consenting adults and vice-officers who are pretending to be consenting adults. In these cases, the Commission feels that the stigma created by sex registration, as well as the invasions of privacy, may constitute cruel or unusual punishment. At best, registration in these situations is a gratuitous humiliation which is out of all proportion to the crime committed. In addition, the sex registration law, as it bears on these misdemeanor offenses, has an exceptionally large impact on the male homosexual portion of the population, since arrests are almost always made by vice-officers in locations which are often used as meeting areas for gay males.

Under the specifications of California law, mere arrest for these misdemeanors has harsh ramifications on persons who are working in certain professions because of the connection between these misdemeanors and the sex registration statute.

THE COMMISSION RECOMMENDS to the Legislature that Penal Code section 290, which specifies the offenses subject to the sex offender registration requirement, be amended to delete subdivisions (a) and (d) of section 647 of the Penal Code from coverage.

Penal Code section 647, subdivisions (d) and (e) criminalize certain types of loitering. Subdivision (d) prohibits lingering in or near a public restroom for the purpose of engaging in or soliciting lewd conduct. Subdivision (e) prohibits lingering in a public place and then not producing identification to the satisfaction of the police when requested to do so.

What these subdivisions have in common is criminalization of less than overt criminal behavior. For example, engaging in lewd conduct is a crime. A more removed crime is having a conversation (solicitation) regarding engaging in lewd conduct. Penal Code §647(d) prohibits loitering with the

intention of engaging in or soliciting lewd conduct, that is, thinking about soliciting a lewd act. Absent an overt act which would amount to an actual solicitation or lewd act, such a crime is often prosecuted based solely on the subjective interpretation of a vice-officer or other law enforcement officer, of ambiguous conduct of the part of the defendant.

In addition, regarding subdivision (e), the Commission recognizes the chilling effect on many lawful activities which results from having to produce identification for police upon demand. For example, someone walking down a public street to a meeting of some politically or socially unpopular group may not want to carry identification. One's only purpose may be to anonymously explore a minority lifestyle or viewpoint without danger of implication to the mainstream of one's life. The right of personal privacy certainly should protect this venture. The virtuous goal of preventing crime is not a sufficient rationale for harassing people whose conduct may be subject to various interpretations.

The freedom to choose anonymity from time to time is a right of fundamental importance to members of society. The state has little interest in intruding upon this right unless some overt act toward criminal behavior has taken place. Subdivision (e) not only gives the state the authority to intrude based upon mere suspicion, but also seems to require in California the carrying of an identification satisfactory to the police. If the police stop and there is no probable cause for arrest, if that person is not carrying satisfactory identification, that is, identification containing sufficient information, then that person may be arrested under this statute. If a statewide identification card is to be required, such a requirement should be explicitly imposed by the Legislature or the voters of the state after sufficient discussion and debate.

THE COMMISSION recommends that subdivisions (d) and (e) of section 647 of the Penal Code (loitering) be repealed. Such legislative action will maintain the integrity of the criminal law and protect freedom of private thought and movement from unreasonable intrusions.

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California's Public Records Act was adopted by the Legislature in 1968.[564] Section 6250 of the Government Code sets forth the legislative intent behind this Act:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Like the federal Freedom of Information Act upon which it was modeled, the general policy of the California Public Records Act favors disclosure.[565] According to the Public Records Act, public records are open to inspection at all times during the office hours of the state or local agency, and every citizen has a right to inspect any public record, except for records that are specifically exempted from such inspection.[566]

To prevent secrecy in public affairs, the public policy established by this Act makes public records and documents available for public inspection by journalists and members of the general public alike.[567] Members of the press have no greater rights or privileges to access to public records than do members of the general public.[568]

If a record is a public record, all persons have access thereto as permitted by the Public Records Act, and a person who may be the subject of a particular record does not, because of being personally affected, have any greater right than any other person to examine such a record.[569] Conversely, the person who is the subject of the record has no right to prevent disclosure of a public record to any other person.[570]

Section 6254 of the Government Code exempts certain records from mandatory disclosure. This means that, unless otherwise prohibited by law, the custodian of the following types of records may, but need not, make the records available for public inspection:[571]

> (a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

(b) Records pertaining to pending litigation;

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

(d) Certain records relating to agencies which regulate financial institutions;

(e) Certain information obtained in confidence relating to geological or geophysical data, plant production data, and similar information relating to utility systems development;

(f) Records of complaints to or investigations conducted by or records of intelligence information of the office of the Attorney General and state and local police agencies for correctional, law enforcement or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident . . . unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation; provide however, that nothing herein shall require the disclosure of that portion of those investigative files which reflects the anlysis or conclusions of the investigating officer. . . .;

(g) Test questions, scoring keys, and other examination data used to administer an employment or licensing or academic examination;

(h) Real estate appraisals and similar evaluations made for state or local agencies relative to the acquisition of property;

(i) Information required from a taxpayer in connection with the collection of local taxes which is received in confidence and the disclosure of such information would result in unfair competitive disadvantage to the taxpayer;

(j) Library circulation records;

(k) Records, the disclosure of which is prohibited by federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege;

(l) Correspondence of and to the Governor in the custody of the Governor's legal affairs secretary;

(m) In the custody of the Legislative Counsel;

(n) Financial data required to be filed by a licensing agency by an applicant for a license;

(o) Certain other financial data.

Once the custodian of government records makes a voluntary disclosure to any member of the public of a record that is not subject to mandatory disclosure, the custodian cannot later claim that the record is exempt from disclosure. In other words, once an exempt record is voluntarily disclosed to one member of the public, all members of the public have a right to subsequent access.[572]

Each agency, upon request for a copy of records, shall determine within ten days after the receipt of the request whether to comply and shall immediately notify the person making the request of such determination and the reasons therefor.[573] In unusual circumstances, the time limit can be extended by the head of the agency for an additional ten working days.[574] The burden of proof for denying disclosure is on the agency, should it claim that the record is exempt from mandatory disclosure.[575]

Any person may institute proceedings for injunctive relief or declaratory relief to enforce a right to inspect or to receive a copy of any public record.[576] A plaintiff prevailing in litigation to enforce this right shall be awarded costs and reasonable attorney fees.[577] If the plaintiff's case is clearly frivolous, costs and reasonable attorney fees may be awarded to the public agency.[578]

The public's right to be informed about the operations of state agencies is set forth in the Bagley-Keene Open Meeting Act:[579]

> It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. . . . [T]he Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.
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> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating

> authority, do not give their public servants the right to decide what is good for people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The Open Meeting Act requires that all meetings of a state body be open and public and all persons be permitted to attend any meeting of a state body, with limited exceptions. Any public official who attends a meeting of a state body which the official knows is being conducted in violation of this statute, is guilty of a misdemeanor.[580]

Notwithstanding the vital concern for openness in government operations, the Legislature has demonstrated an interest in respecting and protecting the right of informational privacy of individual citizens. The Legislature referred the privacy amendment of the state Constitution to the voters for approval in 1972. This amendment was designed primarily to protect informational privacy interests. Then, after what one legal commentator called a "lengthy and turbulent process," the California Legislature enacted the Information Practices Act of 1977 (sometimes also referred to as the California Privacy Act).[581]

The Information Practices Act applies only to state agencies. It was designed to accomplish at least three goals:[582]

> (1) To place strict limitations on second use of information. "Second use" includes the dissemination of information to third parties (parties other than the record subject and the initial acquiring agency) and the use of the information by the original party for a new purpose.
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> (2) To render state agencies accountable for their information practices.
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> (3) To increase individuals' awareness of government's information practices and policies, particularly with regard to information concerning them.

The Information Practices Act provides for an individual's right of access to records of state agencies containing personal information about the individual, provides for a right to have inaccurate records corrected, and restricts agency disclosures of personal information to third parties or members of the public.

The basic ground rules established by the Act for agency collection of personal or confidential information include the following requirements:

- Each agency shall maintain in its records only personal or confidential information which is relevant and necessary to accomplish a purpose of the agency authorized by law.[583]

- Each agency shall collect such information to the greatest extent practicable from the individual who is the subject of the information rather than seeking it from another source.[584]

- When personal information is collected by an agency, the source of the information shall be maintained, with certain exceptions.[585]

- Each agency collecting personal information from an individual must give the individual notice of the agency's information-sharing policies and practices.[586]

Each state agency is required by the Information Practices Act to establish rules of conduct for persons involved in the design, development, operation, disclosure, or maintenance of records containing personal or confidential information. Such persons must be instructed with respect to the rules and requirements of this Act, any rules or procedures adopted pursuant to this Act, and the remedies and penalties for noncompliance.[587]

Each state agency is required by the Information Practices Act to establish appropriate and reasonable administrative, technical, and physical safeguards to ensure compliance with the Act, to ensure security and confidentiality of records, and to protect against anticipated threats or hazards to their security or integrity that could result in any injury.[588]

Each state agency must designate an agency employee to be responsible for ensuring that the agency complies with the provisions of the Act.[589]

As used in the Information Practices Act, the term "personal information" means any information in any record about an individual that is maintained by an agency, including, but not limited to, his or her education, financial transactions, or medical or employment history.[590]

As used in this Act, the term "confidential information" means any of the following:[591]

(1) Any information in any record maintained by an agency which principally performs criminal law enforcement functions, if the information is (a) compiled for the purpose of identifying criminal offenders and alleged offenders and consists of information about the status of a case in the justice system, or (b) is compiled for the purpose of a criminal investigation of suspected criminal activity, or (c) is contained in any record which could identify an individual and which is compiled at any stage of the process of enforcement of the criminal laws;

(2) Information, such as examination material, the disclosure of which would compromise the objectivity or fairness of the testing or examination process;

(3) Information containing medical, psychiatric, or psychological material, if the holder of the record determines that disclosure would be medically or psychologically detrimental to the individual. Such information, however, must be released, upon written authorization, to licensed medical or psychological personnel designated by the data subject.

(4) Information, other than for criminal law enforcement, consisting of investigative materials being used by an agency for purposes of investigating a specific violation of state law, but only so long as the investigation is in progress. Sources of information used for such investigations may be kept confidential as long as the agency determines that confidentiality is necessary to protect law enforcement activities;

(5) Records consisting of information used solely for purposes of verifying and paying state health care claims;

(6) Any information which is required by statute to be withheld from the individual to whom it pertains.

In disclosing information contained in a record to an individual, an agency shall not disclose any confidential information that may be contained in a record containing personal information. Any confidential information must be deleted before personal information is disclosed.[592]

Each individual has a right to inquire and be notified as to whether an agency maintains a record about that person.[593] Individuals shall be given

access to inspect records containing personal information, within 30 days of a request to inspect active information, and within 60 days of a request to inspect inactive records.[594] The requesting individual and one other person of the individual's choosing must be permitted access to inspect such records. If requested, copies must be made within 15 days of inspection; reasonable fees may be charged to cover costs of the agency.[595]

If the agency determines that some or all of the information contained in records requested is confidential, the agency shall notify the requesting individual of this determination and that the disclosure is not authorized by law. A special procedure is established in cases where the mere disclosure of the existence of confidential material would be life endangering or would seriously interfere with attempts to apprehend criminal suspects or attempts to prevent the commission of a crime.[596]

A civil action may be brought by an individual whenever an agency fails to comply with the Information Practices Act in such a way as to have an adverse impact on the individual.[597] If the lawsuit is based upon the agency's refusal to allow inspection, the aggrieved person may seek an injunction to require disclosure. The prevailing party in such a suit shall be awarded reasonable attorney fees and costs.[598] Damages may be recovered by persons who have been injured by an agency's failure to keep accurate records of personal information.[599] Intentional violations of this Act or rules thereunder by any employee shall constitute cause for discipline of that employee.[600]

Pursuant to the Information Practices Act of 1977, the California Legislature established the Office of Information Practices within the Executive Office of the State Personnel Board.[601] The Office of Information Practices is authorized to:

- Assist individuals in identifying records which may contain information about them as well as helping them secure access to such records.[602]

- Investigate, determine and report any violation of this Act or any regulation adopted pursuant to it.[603]

- Report any violations of this Act, of which it has knowledge, to the affected agency and, if the violation is not corrected within 60 days, to the Office of the Governor, the Legislature, and the appropriate law enforcement agency, such as the Attorney General or local district attorney.[604]

- Develop model guidelines to assist departments in the implementation of this Act and, upon request, to otherwise assist agencies in preparing regulations and meeting technical and administrative requirements.[605]

- Attempt to mediate any dispute between an agency and a complaining individual involving provisions of the Act.[606]

- Maintain up-to-date information about agency systems which contain personal or confidential information concerning individuals.[607]

Mr. Justin Keay, Manager of the Office of Information Practices, told the Commission at its Public Hearing in San Francisco:[608]

> The Information Practices Act at this time governs only state agency records and it excludes, by specific reference, the California Courts and the records of the Legislature, and the State Compensation Insurance Fund. It does not cover units of local government, and it does not cover private enterprise except in rare instances where private enterprise performs work under contract for the state. The law, in theory at least, places some limitations on state agencies in the collection and maintenance and disclosure of information. And I'll jump to the main strength of the law, in my opinion, and that is, with the exception of criminal law enforcement records, it has provided almost total access to the individual who is the subject of records. The big exception to that is the area of criminal law enforcement records.
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> Some of the requirements on state agencies are that when they collect information from individuals, they must tell them what it's for, whether it's mandatory or voluntary, what are the uses, what are the consequences of not providing it, where it's kept, how it can be accessed, and so on. The law contains general provisions about the maintaining of information with relevance and necessity to statutory or constitutional purposes of the agency. That leaves a lot open for question or debate, however. It provides civil remedies and some penalties for violations of the law.

In 1978, shortly after it became law, the immediate problem became evident, and that was in the area of conflicts between the Information Practices Act and the state's open records law, which is called the Public Records Act. In California, the Public Records Act is modeled after the federal Freedom of Information Act. All four of these laws [federal Freedom of Information Act, federal Privacy Act of 1974, California Public Records Act, and California Information Practices Act] get confused sometimes as to their meaning and application.

But the problem that developed was in the area of releasing information that had always been considered in the public domain. . . . the identities of offenders . . . and . . . Worker's Compensation Appeals records, which are judicial records. So the law was amended to make it clear that the Public Records Act supersedes the Information Practices Act as to disclosing information, making it available to the public. Some people felt that that "gutted" the Information Practices Act, that it was a destruction of the privacy protection provisions. I personally don't feel that way, but it is arguable that if a state agency decides to make a very sensitive record publicly accessible (let's say a medical file) . . . [a person] would have no redress under the Information Practices Act. It would not be a violation to release my medical file to the public under the Public Records Act. I probably would have, in the case of a medical record, redress under the constitutional right of privacy, and whatever other torts might exist on that.

The public's right to inspect public records maintained by the federal government is guaranteed by the Freedom of Information Act. Individuals who are the subject of personal records maintained by the federal government have a right to inspect, copy, and correct records under the Privacy Act of 1974.

The public has a right to inspect public records maintained by state agencies pursuant to the Public Records Act. Individuals who are the subject of records of state agencies containing personal information have rights of access to those records to copy them, and to have inaccurate records corrected under the provisions of the Information Practices Act.

The public also has a right to inspect public records maintained by local government agencies pursuant to the Public Records Act. However, as the law now stands, individuals do not have rights to inspect, copy, and correct records containing personal information about them that are maintained by local agencies because the Information Practices Act does not apply to local government. The Commission on Personal Privacy believes this gap should be closed. An extension of at least some of the provisions of the Information Practices Act to local governments is necessary and overdue. Recognizing that many city and county governments are presently facing financial crises, the Legislature could properly subject these governments to the least costly aspects of the Information Practices Act.

THE COMMISSION RECOMMENDS that the Legislature extend the provisions of the Information Practices Act that gives individuals a right to inspect and copy records containing personal information about them to such records maintained by local government agencies. Since the agencies may charge reasonable fees for such services, there should be no significant cost to local government agencies if this aspect of the Information Practices Act were so extended. The other aspect of this law that should be extended to local governmental entities is the requirement to correct or amend any records containing inaccurate personal information. Individuals may be severely harmed by the maintenance of inaccurate or incomplete personal information in the records of agencies within local government as well as at the state and federal levels. The nominal cost involved in correcting inaccurate information is a small price to pay for protecting important personal privacy rights.

Because of the cost factor, the Commission on Personal Privacy is not recommending, at the present time, a blanket extension of the entire Information Practices Act to cities, counties, and other local government entities. However, the Legislature should consider awarding a grant to a "model city" that would voluntarily adopt the entire act for three years on a trial basis.

During the Public Hearing, the Commission on Personal Privacy learned that the Office of Information Practices consists of only two people. These two people have the responsibility to perform the various duties outlined above including overseeing the information practices of all state agencies, departments, boards, and commissions. In the recent past, the Office of Information Practices had a staff of five persons, but because of budget

restraints, the staff was cut by more than fifty percent.[609]

The Commission also learned that since 1979, the Office of Information Practices has not engaged in any major educational efforts to inform the public of its existence and functions or to inform individuals that they have informational privacy rights pursuant to the Information Practices Act.[610]

The Commission on Personal Privacy finds that the Office of Information Practices is severely understaffed. Even within its present scope of responsibility, it is not realistic to expect that two people alone can enforce the mandates of the Information Practices Act.

THE COMMISSION RECOMMENDS that the Legislature provide funding to accomplish the following objectives:

> FIRST: An Informational Privacy Advisory Council should be created to advise the Office of Information Practices. The Advisory Council would function in a manner similar to the Advisory Board to the Office of Family Planning. Its members would be appointed by the Executive Officer of the State Personnel Board and would consist of experts on legal and practical aspects of informational privacy. Members of the Advisory Council would not receive compensation but would receive reimbursement for expenses. The Advisory Council should meet quarterly and should issue a yearly report on state government information practices. The Advisory Council should hold public hearings at least once a year to receive testimony regarding the effectiveness of the Public Records Act, Information Practices Act, and other policies and practices of state and local government that have an impact on informational privacy rights. The Advisory Council could make recommendations for legislative or administrative changes it deems appropriate. A position should be created so that the Advisory Council has an Executive Secretary to assist the Council and to manage its day-to-day affairs.
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> SECOND: A section on Systems and Public Information should be established within the Office of Information Practices. This section would perform the following duties: (1) gather and maintain the annual statements which must be filed by each agency regarding its information system and

personal information practices; (2) assist each agency in developing regulations for complying with the Act as well as any training programs necessary to keep agency employees who handle personal information advised of their duties under the Act; (3) assist individuals in locating personal information within an agency and gaining access to such information; and (4) conduct such educational programs as may be necessary to keep the public informed of the existence of the Office and rights created by the Act. Present personnel within the Office of Information Practices are already performing these functions.

THIRD: An Informational Privacy Research Center should be created as an adjunct to the Office of Information Practices. The purpose of this Research Center would be to keep abreast of legislative and judicial developments that affect personal privacy rights. Court decisions and legislative enactments affecting personal privacy rights would be analyzed and summarized in plain English. The Research Center would be available to testify regarding pending legislation affecting personal privacy and to file amicus curiae briefs in pending appellate litigation on that subject. The Research Center would regularly brief the Office of Information Practices, its Advisory Council, and other state government officials on any significant changes or prospective changes in privacy law.

In addition, the following recommendation has been adopted by the Commission based upon its research and study.

THE COMMISSION RECOMMENDS that the Legislature repeal existing sections of the Public Records Act allowing public access to arrest records prior to the time that an accusation is filed with a court by a prosecutor. Up to the time a formal accusation is filed, arrest records should be deemed confidential. It is further recommended that the practice of printing arrest information in "police blotters" in newspapers be curtailed in the interests of justice, fairness, and because the information is of extremely limited use to the public and is more inflammatory than reliable as to guilt. The Commission suggests that the self-restraint thus exercised by the press is in the best tradition of responsible journalism.

In addition to the two general laws governing access to government records by the public and by individuals who are the subject of such records, there are many specific statutes that regulate particular records in the areas of adoption,[609] arrest,[610] automobile accidents,[611] juvenile court,[612] officially privileged information,[613] payroll,[614] students,[615] tax assessment,[616] venereal disease,[617] and welfare eligibility.[618] When a specific statute conflicts with the provisions of general statutes, such as the Public Records Act or the Information Practices Act, the provisions of the specific statute control.[619]

Persons who have been arrested and who are determined to be factually innocent are the beneficiaries of new legislation that authorizes the sealing or destruction of police and court records that were generated as a result of such arrests.[620] For arrests occurring on or after January 1, 1981, petitions for such relief may be filed up to two years from the date of the arrest or filing of an accusatory pleading, whichever is later. Until January 1, 1983, petitioners can file for relief under this statute for arrests which occurred or accusatory pleadings which were filed up to five years prior to the effective date of this statute (September 29, 1980). Therefore, persons who are the subject of such arrest and court records generated between 1975 and 1980 will lose their right to have these records sealed or destroyed unless they file for relief by the end of this year.

The Commission on Personal Privacy feels that this privacy legislation is a valuable tool for those who have found themselves caught up in the criminal justice system but who were innocent of any wrongdoing. Under such circumstances, these individuals should not have to live the rest of their lives with their record marred. Penal Code §851.8 is a reasonable way to afford persons so arrested some relief. The Commission has found that there has been little publicity or education of the public regarding the terms and benefits of this remedial statute.

THE COMMISSION RECOMMENDS that the Legislature amend §851.8 of the Penal Code to eliminate the deadline of January 1, 1983, so that all persons who were innocently arrested in the past may seek relief under the statute whenever they learn that such relief is available.

At its Public Hearing in San Francisco, the Commission received testimony regarding court policies and practices that afford a degree of privacy and anonymity to some litigants and witnesses. Mr. Robert Formichi, Reporter of Decisions for the California Supreme Court, testified regarding

the practices of California appellate courts relative to the disclosure and the nondisclosure of the names of individuals who are parties or witnesses in appellate litigation:[621]

> Decisions are reported in the official reports and are there in perpetuity, so there is, as a result, a danger that individuals whose names appear in the reports will be harassed throughout their lifetimes because of that particular entry in the reports.
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> For example, in the early days of the reports, it was quite common to name a rape victim, or someone who had been assaulted, or some minor, or an individual who was innocently embarrassed by some facts beyond his or her control. That was done, I think, accidentally in the sense that the Courts were intent upon disposing of the issues before them, and these concepts about privacy and the dangers that can result from the reports being in the public domain weren't considered. In 1969, I believe, the Court took cognizance of the fact that the Juvenile Court laws were designed primarily to permit the rehabilitation of youths who had gone awry, and it was felt that to name the individuals in the reports would be counter-productive to the objective of those statutes that had been designed to foster rehabilitation. So the Court developed a policy of not naming the minor individuals. And what it does, is name individuals indirectly by giving their first names and then an initial. The reason for that is the reports really don't have a purpose of punishment, they are designed to assist and benefit the practicing bar, the courts, and the public to identify litigation issues in the courts and the disposition of those issues. And for that reason, the names are not disclosed in Juvenile Court matters.
>
> Then it became clear, as the Court became involved in that concept, that others ought not to be named when the remarks in the opinion could be damaging or the disclosure could be damaging. And the Court now uses non-disclosure identifications with regard to victims of crimes. They use such non-disclosure internal identifications with regard to adoption proceedings, proceedings concerning the family,

where there's a dispute between parents with regard to the placement of a child. Issues along that line are, as a matter of Court policy, concealed as to any identity only. And the California Style Manual, of which I am the author, which has a collection of policies relative to the identification of individuals, has a number of sections which have these protective types of identification.

I suppose there are areas where protection has not been extended. For example, if a minor has been bound over to the Criminal Courts, there the identification is made. . . .

In civil matters, to this point, the courts generally have not concealed the name of the individual. There have been rare instances where the court has, and I can just mention one of those instances. A schoolteacher was accused of a crime involving sexuality and the school teacher had the crime dismissed, and the Board of Education brought an action against the individual seeking to have him dismissed because of the incident. The issue that developed was whether he was or was not "fit" to hold the job which he held teaching children. And the Court, on appeal, affirming the court below, said the individual's fitness had been established and accordingly, he should not be dismissed from his job and should be restored to the pay which he had lost by virtue of these proceedings. The Court, in that instance, which was a civil case, used a non-disclosure title. The courts do not generally conceal names in similar situations in civil matters. In criminal matters, it's a rare instance in which a court will use a concealed name with regard to the title or the body of the opinion. There have been rare cases when the court has done that. . . .

[Speaking of the non-disclosure policy established in the Style Manual] the policy was proclaimed by the Supreme Court and is applicable to the Courts of Appeal and the Appellate Departments of the Superior Court. It is a policy — not a Rule of Court — and is selective with the judges, although most of them are pleased to comply with it. . . .

[Answering a question about the receptivity of the Court

to a possible recommendation to make the guidelines for non-disclosure a Court Rule rather than a voluntary policy] Relative to the Court, I can't speak directly -- all I can indicate is that the courts are protectively inclined. They do not wish to damage people by virtue of reporting the decisions. They wish to get the law before the public and the Bar and the judges, and that's their primary purpose. If they can do that while protecting individuals, or protecting their rehabilitation posture or protecting them into the future, I'm sure the Court would be receptive to anything that would accomplish that while still identifying the cases for the Bar and the public.

The Commission's staff has reviewed the California Style Manual, of which Mr. Robert Formichi is the author. It is a handbook of legal style for California courts and lawyers. Unlike the California Rules of Court, which requires compliance, adherence to the guidelines established in the Style Manual is voluntary.

Several sections of the Style Manual discuss non-disclosure of parties or other persons associated with a case:

> Recognizing that the publication of the names of innocent victims of sex crimes and the names of minors who, without blame, are caught up in the type of case where damaging disclosures are made serves no useful legal or social purpose, the Supreme Court has issued the following policy memorandum to all appellate courts: "To prevent the publication of damaging disclosures concerning sex-crime victims and minors innocently involved in appellate court proceedings it is requested that the names of these persons be omitted from all appellate court opinions whenever their best interests would be served by anonymity." Customarily expressions such as "the complaining witness," "the mother," "a 10-year-old girl," "the prosecutrix," "C.D. testified," . . . are substituted.
>
> Clerk's and reporter's transcripts as well as briefs reflect the true names of parties and the foregoing non-disclosure policy does not extend to them.[622]

> The prevailing appellate court practice is not to disclose the identity of minors in either the title or the body of opinions reviewing proceedings under the Juvenile Court law. . . . This practice has been adopted in collateral proceedings as well. . . .
>
> It is noted that in order to carry out this non-disclosure policy it is usually necessary to suppress the names of parents and others bearing the minor's last name.[623]
>
> Where an appeal is taken to review an order or judgment following a petition for adoption . . . [w]here the opinion contains disclosures that are detrimental to the child or the contesting parties the appellate court policy of protecting against the injurious effects of such disclosures would recommend the use of an anonymous style title. . . .
>
> Party references in the body of the opinion would normally be consistent with the anonymous style title.[624]

The Commission on Personal Privacy is aware of three cases in which California appellate courts recently have exercised their discretion to use anonymous titles in cases involving adult parties. All three cases involved alleged homosexual behavior with undercover vice officers as the complaining witnesses. In one case, the charges were dismissed and future appellate litigation arose involving a collateral disability associated with the arrest, namely, whether the person could be fired from his job.[625] The second case involved a pretrial appeal by the prosecutor after a trial court declared the statute involved to be unconstitutional.[626] The third case involved a habeas corpus action in which the petitioner was seeking to overturn his previous conviction because subsequent case law indicated that it might have been an invalid conviction.[627] In each of these cases, the Commission feels that the courts properly applied a discretionary non-disclosure policy. However, the Commission notes that the Style Manual and the California Rules of Court are both silent as to the inherent discretion of appellate courts to use anonymous titles in published opinions involving adult litigants.

This Commission has found existing rules and policies on the subject of non-disclosure of parties and witnesses in appellate cases inadequate to effectively protect the privacy of persons who are actually or presumptively innocent of any wrongdoing. Additional rules should be adopted for non-disclosure in pretrial appellate litigation in criminal cases. Defendants in

criminal cases are presumed to be innocent until proven guilty. If a defendant ultimately obtains a favorable disposition based upon his or her factual innocence, sealing and destruction of arrest and court records may be available under recently enacted legislation.[628] This relief may be moot if the defendant was involved in pretrial appellate litigation that resulted in a published court opinion bearing the defendant's name, which opinion was circulated to thousands of lawyers and judges and which will be a public document in perpetuity. One way of protecting presumptively innocent appellate litigants is to require anonymous identifiers in all pretrial appellate opinions in criminal cases. Another area ripe for consideration involves cases filed in appellate courts, whether by extraordinary writ or appeal, in which the litigant is seeking to vindicate a privacy right. Presently, persons are deterred from engaging in civil or criminal appellate litigation to redress a violation of personal privacy because any relief granted in a published opinion may cause more harm because of the publication than originally suffered from the substantive violation. A policy might also be established for criminal appeals in which the trial court is ordered to enter a judgment of acquittal or a dismissal based upon insufficiency of the evidence, or to seal records.

THE COMMISSION RECOMMENDS to the California Judicial Council the adopting of a rule which would provide for the use of initials in the title and body of appellate opinions while defendants in criminal cases remain presumptively innocent or are acquitted, and in civil cases when a litigant's rights have been vindicated when the information contained in the opinion of the court could cause an invasion of privacy or further harm or ridicule to an innocent person. This type of rule should especially apply to sensitive cases, such as those involving child custody.

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In addition, the following recommendations concerning juror privacy have been adopted by the Commission based upon its research and materials located in the Supplements published herewith. (See both the report and the article which were submitted by Commissioner Godfrey Lehman.)

THE COMMISSION RECOMMENDS that the Judicial Council conduct a study regarding the privacy rights of jurors and prospective jurors. The Commission suggests that during 1983, the Chairperson of the Judicial Council convene a Select Committee on Juror Privacy. It is further recommended that members of this committee be chosen from the bench, the bar, and the community-at-large. At least one representative from each of the following groups should serve on the committee: municipal court judges, superior court judges, appellate court justices, jury commissioners, public defenders, city attorneys, district attorneys, county counsels, law enforcement, private practitioners, law school professors, the media, and persons who have served on juries.

The Commission suggests that a preliminary report of the committee be widely disseminated in order to obtain comments and suggestions from interested groups and individuals. A final report should be filed with the Judicial Council, appropriate committees of the Legislature, and presiding judges of the municipal and superior courts throughout the state.

This recommendation is based upon the following findings:

(1) Routine practices, such as background investigations by private investigators, jury questionnaires used by jury commissioners, and extensive voir dire in the courtroom regarding personal matters, are conducted with court approval or knowledge and constitute serious invasions of privacy.

(2) Present practices utilized in selecting jurors often are employed in an attempt to obtain a partial rather than an impartial jury.

(3) Most jurors are not aware that they might refuse to answer personal questions on a variety of constitutional grounds. Information regarding the possibility of objecting to questions is not imparted to prospective jurors by court personnel.

(4) Overbroad collection and wholesale dissemination of personal information through public records and public trials constitute a serious threat to the jury system.

(5) Invasions of the privacy rights of jurors and prospective jurors has been allowed to continue over the years mainly because the legal system has focused almost exclusively on the rights of defendants and witnesses.

THE COMMISSION RECOMMENDS that the names of jurors shall not be released before trial to any person except as necessary to summon jurors, and that release of any name be considered a misdemeanor; and that when names

of jurors are drawn at the commencement of trial, only the communities of residence, without home address, be announced for the purpose of establishing that the juror candidates are bona fide residents of the designated county, municipality, or judicial district.

THE COMMISSION RECOMMENDS that the Judicial Council create a standard questionnaire to be sent to prospective juror candidates throughout the state, limited to qualifications to serve or reasons for being excused and any other matters which the Judicial Council deems essential. It is further recommended that the Judicial Council promulgate rules governing the confidentiality of the information received in such questionnaires.

THE COMMISSION RECOMMENDS that the Legislature repeal §227 of the California Code of Civil Procedure. This statute authorizes seizure in public areas of citizens for jury service. The Legislature should create a new section substituting a system of telephoning juror candidates who have been previously advised of being placed on a stand-by for emergency calls, and allowing a reasonable number of hours to appear at court, and a specified period of days for such stand-by status.

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PERSONAL PRIVACY AND CALIFORNIA'S EXECUTIVE BRANCH

The United States Supreme Court sets privacy standards under the federal Constitution. California voters and the California Supreme Court determine the parameters of privacy protection under the state Constitution. California's Legislature adopts specific policies and comprehensive regulatory schemes to protect privacy on a wide range of subjects. But it is generally the Executive Branch of state and local governments that actually administers these constitutional and statutory principles on a day-to-day basis.

The Governor of California is authorized to issue verbal or written directives to subordinate executive officers concerning the enforcement of the law. Such authority emanates from a constitutional charge as the "supreme executive power" to "see that the laws are faithfully executed."[629] Furthermore, the Governor has been directed by the Legislature to "supervise the official conduct of all executive and ministerial officers."[630] The Governor may employ an executive order to effectuate a right, duty, or obligation that emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and statutes.[631]

In furtherance of this authority, Governor Edmund G. Brown Jr. has issued two executive orders to implement constitutional privacy rights. On September 29, 1976, Governor Brown issued an order to all agencies under his jurisdiction requiring them to adhere to certain informational privacy policies.[632] This executive order contained several informational privacy precepts and acted as a forerunner to the Information Practices Act of 1977:[633]

> • the right to privacy and the right to petition one's government for the redress of grievances are fundamental rights granted and secured to all individuals by the Constitution of the State of California;
>
> • individuals should have a right to gain access to information pertaining to them that is maintained by government unless there is a clear and overriding public interest in withholding such information;
>
> • individuals should have a right to correct any misinformation that is being maintained on them by their government;

- the government has an obligation to collect only that information for which there exists a compelling state interest and to insure the accuracy and reliability of such information;
- every individual should be informed of the uses that will be made of information he or she is asked to supply to the government;
- state agencies under the supervision of the Governor can provide a model for all other agencies of the Executive Branch as well as for local governments in administering programs designed to implement the rights and principles outlined above.

Executive Order B-22-76 became effective on January 1, 1977. It contained many guidelines that were later enacted into law within the Information Practices Act. The Governor informally designated the Executive Officer of the State Personnel Board to oversee implementation of the provisions of this order. The order officially designated the Office of Administrative Hearings as the agency to mediate any disputes that might arise between agencies and aggrieved individuals.

The other executive order issued by the Governor on the subject of privacy is Executive Order B-74-80, which established the Commission on Personal Privacy. Pursuant to the provisions of this order, the Commission was charged with the responsibility to study invasions of personal privacy and discrimination on the basis of sexual orientation in both the public and private sectors and to issue a report to the Governor and Legislature on these subjects. This Report has been prepared in response to that mandate.

The Governor's veto power is another method by which the right of personal privacy can be protected. Although it has rarely been used for this purpose, the Governor has vetoed at least one bill on privacy grounds. In a statement issued by the Governor when he vetoed a bill in October, 1981, which would have made all police reports available for public inspection, the Governor stated:[634]

> I recognize the need for legislation to clarify what records law enforcement agencies should make public. However, this bill is overly broad and may force the disclosure of confidential information, deter citizens from fully cooperating with law enforcement officials and cause needless emotional trauma for victims.

The bill was opposed by 125 police departments and groups, which vigorously lobbied for the Governor's rejection of the bill. The police groups felt that the bill was too broad and would allow for the release of too much information.

The Attorney General of the State of California is the chief law enforcement officer of the state. The Attorney General oversees the operations of the Department of Justice and has the responsibility for maintaining the integrity of the criminal justice information systems which that department operates. The Attorney General represents state agencies and the People of the State of California in litigation pending in the appellate courts of this state. In this capacity the Attorney General may sometimes invoke the privacy protections of article 1, §1 or article 1, §13 or defend statutes or practices which are challenged as violative of those provisions. Another major function of the office of the Attorney General is the preparation of legal opinions for government officials. These opinions may be verbal or written, formal or informal. Sometimes formal written opinions are designated for publication in the Opinions of the California Attorney General.

The Attorney General's Office was contacted by the Commission's staff in an effort to determine the number and kinds of cases that are presently pending in the California appellate courts involving privacy issues. The staff was advised that the Attorney General does not maintain a central indexing system for appellate issues and therefore could not give a complete response. The Commission's staff contacted each of the major sections in the Attorney General's Office and requested the above-described information.

One significant privacy opinion recently published by the Attorney General involved the authority of a city or county to restrict single-family zoning areas to occupants who are related by blood, marriage or adoption. The exact question asked was, "May a city or county restrict the inhabitants of relocatable, rental housing units placed in the backyards of single-family residences to the parents or grandparents of the owner or occupier of the single-family residence?" The Attorney General answered:[636]

> A plan has been presented with the objective of providing housing for the elderly and at the same time providing family togetherness and privacy for all members of the family. According to this plan, grandparents or parents of the owners of single-family residences would be housed in separate,

relocatable, self-contained, rental housing units placed temporarily in the backyards of the single family residence. . . .

We . . . conclude that under the federal Constitution, as interpreted by the United States Supreme Court, a clearly enunciated policy of a city or county to provide low cost housing for the elderly and to promote family togetherness would permit the city or county to restrict occupation of such housing units to the parents or grandparents of the owner or occupier of the single-family residence. A recent California Supreme Court case, however, leads us to conclude that such a restriction would probably violate the guarantee of the right to privacy contained in the California Constitution and would thus be invalid. . . .

The [California Supreme Court] held that a restriction that prevented unrelated persons from living together (described by the court as an "alternate family" (City of Santa Barbara v. Adamson (1980) 27 C.3d 123) was an invasion of those persons' constitutional right of privacy, and that such invasion can only be upheld where there is a compelling public need. The majority of the court did not find that compelling need in zoning matters, and reversed the preliminary injunction granted by the trial court against the living arrangements in the Adamson household. . . .

Zoning ordinances restricting single-family residence occupancy to legal families are frequently defended on the basis of promoting quiet and stability in the neighborhood. In the proposed plan under consideration here, the objective would be to promote family, not neighborhood, stability. This may well be a proper governmental objective, but in light of the Court's strong requirements as enunciated in Adamson of a compelling public need to allow an invasion of the privacy of non-related "families," we have doubt as to whether this objection is a compelling public need. We must conclude, therefore, that the proposed restriction to limit occupancy of relocatable housing units to parents and grandparents of the owner or occupier of the adjoining single-family residence probably would be held invalid in California.

The state Controller recently commissioned a consultant to study the area of inheritance taxation and alternate families. Mr. James Foster testified at the Commission on Personal Privacy Public Hearing in San Francisco regarding the results of his report to the Controller.[637] His report recommended that the "Controller's office take a leadership role in investigating how these changes [the changing make-up of families and households] affect the whole area of taxes and taxation."[638] The specific recommendation was for a "special commission to investigate the matter of taxes and social change with the objective of achieving an equitable tax structure that meets the needs of our changing times."[639]

THE COMMISSION RECOMMENDS that the state Controller propose legislation to rectify the inequities identified in the report entitled "California Tax Laws and Alternate Families." This report may be found in the Supplement to the Commission's Report.[640]

Based upon the same supplemental report, the Commission has adopted the following recommendation.

THE COMMISSION RECOMMENDS that the Legislature amend §17044 of the Revenue and Taxation Code so as to delete subdivision (a). The result of such an amendment would be that a taxpayer with a recognized dependent could file a state income tax return as "head of household" whether or not the taxpayer and the dependent are related by blood, marriage, or adoption.

Various departments within the Executive Branch of state government have issued guidelines, rules, regulations, or policy statements with respect to personal privacy protection. For example, the Advisory Board to the Office of Family Planning adopted a resolution at its meeting in San Diego on March 5, 1981, supporting the sexual privacy rights of teenagers. The Advisory Board expressed opposition to the proposed regulation of the Secretary of the United States Department of Health and Human Services that would require any state, local, or private agency operating with federal funds to notify the parents of teenagers before providing information or services for family planning. The Commission on Personal Privacy subsequently received a letter from the Director of California's Department of Health Services asking this Commission to oppose the regulation.[641]

Family planning information and decisions, especially pertaining to contraception and abortion, are protected by the right of privacy in both the state and federal Constitutions. Teenagers do not forfeit their constitutional rights merely because of their minority status. The imposition of a blanket

requirement that parents of all teenagers must be notified prior to offering information or services to them will have a chilling effect on the privacy rights of many adolescents. Some parents are already involved in ongoing dialogues with their teenagers on the subject of family planning. For these teens the notice requirement imposed by federal regulations will not have an adverse impact. But many adolescents live under conditions where their sexuality is a subject neither for discussion nor for expression. The Commission on Personal Privacy notes that there is a large class of teenagers whose freedom of choice in family planning, for all practical purposes, will be denied by the federal notice requirement. While the Commission on Personal Privacy encourages open discussion on sexuality between teens and their parents, the fact remains that many parents have created virtually insurmountable barriers to such a dialogue. Present law in California provides for confidentiality for these teenagers in matters of family planning, contraception, and abortion, should they find such privacy necessary. State and local family planning agencies should not be coerced by a federal regulation and its concomitant "power of the federal pursestring" to withdraw privacy rights that have already been extended to teenagers.

The Commission finds that the Health and Human Services Agency regulation requiring parental notification before any family planning services are provided to teenagers (42 C.F.R., Part 59, sub. a) is incompatible with the broad privacy protections that teenagers enjoy under California's constitutional right of privacy.

The Commission finds that the regulation is also inconsistent with the President's platform of states' rights and federalism in that states that have recognized privacy rights for teenagers under state law which are broader than privacy rights under the federal Constitution, should not be compelled to reduce privacy for teenagers to the minimal federal standards. Federal regulations should be revised to allow for the right of a state to give teenagers more privacy protection than the federal government deems wise.

THE COMMISSION RECOMMENDS that this regulation be eliminated because it interferes with the right of states, such as California, to be more protective of the privacy of teenagers than would the federal government.

The following additional recommendations regarding education have been adopted by the Commission based upon its research and the materials located in the Supplements published herewith. (See Report entitled "Recognizing Sexual Orientation within the Curriculum.")

THE COMMISSION RECOMMENDS that the Legislature repeal §51550 of the California Education Code. This statute has provisions which treat sex education differently than any other aspect of the curriculum in public schools. The provision of this statute that prohibits a student from attending sex education classes if his or her parent requests non-attendance, is particularly offensive to the student's right to learn and constitutes an overly broad infringement on the student's freedom of academic choice.

THE COMMISSION RECOMMENDS that the state Department of Education mandate age-appropriate "Family Life / Parenting / Sex Education / Human Relations" as a required course for all public primary and secondary students. The Department of Education should establish a permanent Division of Family Life and Sex Education, with adequate staff and budget, that would have responsibility for creating educational materials for use in such courses throughout the state.

THE COMMISSION RECOMMENDS that the departments of Mental Health, Corrections, Youth Authority, Social Services, and Developmental Services require adequate and appropriate training in human sexuality and sexual orientation for all staff and ancillary personnel who counsel or oversee children and adolescents in state operated institutions.

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The California Department of Social Services provided the Commission with a statement regarding the "protections established to safeguard the privacy of the approximately 500,000 children and adults who receive care from one of the nearly 50,000 community care facilities licensed by the State of California."[642] The Department's policy on privacy states:[643]

> Licensed community care facilities provide care and supervision to persons who require some degree of assistance with the activities of daily living and in the assumption of responsibility for their health, safety, and well being. The determination of the need for care in a community care facility involves a medical assessment and the gathering of other personal and confidential information regarding the individual resident/client. Regulations require that all such information and records obtained by the licensee in the

course of providing services shall be confidential. Each licensee is responsible for storing confidential records and for ensuring that confidential information is released only upon the written consent of the person, or his/her guardian or conservator. Regulations also establish personal rights for persons who receive services from community care facilities. For example, residents of a facility must have access to telephones to make and receive confidential calls and to letter writing materials and stamps, and must receive unopened correspondence. These and other personal rights which protect the privacy of residents are the responsibility of each facility and compliance is monitored by the licensing program.

Community care licensing does not regulate the permissive sexual activity between consenting adults or the cohabitation of unmarried adults in licensed facilities. We do require that an adult resident of a community care facility be free to leave such facility (unless precluded from doing so by his/her guardian or conservator) so that the resident would conceivably also elect to have a consenting adult sexual partner outside the facility. Community care facilities may elect to establish a program of sexuality for consenting adults. A placement agency's assessment for an individual resident may then include a program of sexuality for adults as a part of a "normalization" process. The licensed facility is free to permit such activity. Licensing regulations require that the licensee cooperate with the placement agency or with any treatment program participated in by the client and that the licensee provide reinforcement within the facility to those services provided to residents from community resources. However, under no circumstances are activities in the facility allowed to impinge on the rights of other residents/clients being served.

The licensing program is primarily concerned with ensuring that the health and safety of residents is protected and that residents are not abused (sexually or physically) in facilities. The largest number of enforcement actions (sus-

pension or revocation of a license) that we take against facilities are the result of an incident of such abuse.

The Fair Employment and Housing Commission of the State of California recently issued a ruling concerning rights of cohabiting partners of the opposite sex.[644] The individual in this controversy testified at the Public Hearing of the Commission on Personal Privacy in Los Angeles.[645] The Boy Scouts of America, Inc., refused to employ an otherwise qualified applicant on the ground that he and his fiancee were living together without the benefit of matrimony. The organization considered unmarried cohabitation by a Scouting professional to be improper and inconsistent with Boy Scout values and with the image and lifestyle expected of professional Scouters.[646] In its memorandum decision dated August 6, 1981, the Fair Employment and Housing Commission held that such employment discrimination is illegal:[647]

> An initial issue is whether the ban against employment discrimination on the basis of marital status extends to employer actions based upon an applicant's unmarried cohabitation. . . .
>
> Respondent argues that denying employment because of applicant's unmarried cohabitation is not an action based on marital status, maintaining that the term "marital status" in the employment discrimination provisions of the Act cannot be construed to include unmarried cohabitation. Neither the facts nor the law supports respondent's contention.
>
> Respondent learned of Henderson's unmarried cohabitation only because it made a prohibited inquiry into his marital status. [Calif. Admin. Code, tit. 2, sect. 7287.3 subd. (b).] Henderson was eliminated from further consideration for employment solely because he was living with a woman to whom he was not married. Had Henderson and Meusborn been married, Henderson would not have been eliminated. . . . Any further consideration of his application was conditioned upon his getting married or living as a single, unmarried individual apart from Meusborn. It could hardly be more clear that respondent's actions were based upon Henderson's marital status. . . .
>
> On the basis of the foregoing, we hold that a complaint

of employment discrimination based on marital status may be grounded in an individual's unmarried cohabitation with a member of the opposite sex.

The staff of the Commission on Personal Privacy has reviewed the programs, policies, and practices of a number of departments within the Executive Branch of state government with respect to the privacy rights of clients of those departments. Topical reports that contain some of the results of this research are published in the Supplements to the Commission's Report.[648]

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SEXUAL ORIENTATION DISCRIMINATION IN CALIFORNIA

Introduction

In addition to the directive to study invasions of the right of personal privacy, the Executive Order creating this Commission contained a mandate to "study the problems of discrimination based upon sexual orientation . . . in both the public and private sectors, documenting the extent of such problems, exploring in what forms the problems are manifested, noting existing remedies, and making recommendations for legislative, administrative, and other action where appropriate."[651] Several reasons are stated in the Executive Order for the specific inclusion of sexual orientation discrimination in the overall study of privacy:[652]

- California must recognize the full human potential of all its citizens as its most valuable resource;
- In order to safeguard this human potential, it is necessary to protect the fundamental right to personal privacy against the threat of discrimination for reasons of an individual's sexual orientation;
- Sexual orientation discrimination contravenes the policy of this state;
- There exist certain stereotypes relating to sexual minorities which are held in common by many people and which result in an individual's being judged without regard for that person's qualities and merits; and
- A study of the problems of sexual minorities and the adequacy of existing law to protect the personal privacy of all individuals is necessary so that legislative and administrative action and public attitudes may be based upon accurate information, thus encouraging protection of the civil rights of all Californians against unjust discrimination.

The Commission agrees with the underlying suggestion, implicit in the Governor's Executive Order, that protection of the right of privacy for all requires vigorous enforcement for even those minorities that may be unpopular to many. The principle that freedoms can remain safeguarded for the majority only by ensuring their protection for the minority can also be seen at work in many other areas of the law.

For example, the chain of protection of personal religious freedom is only as strong — even for the majority — as the protection offered the most heretical minority. It is to the credit of many religious leaders that, while they espouse their faith as singularly true, they strongly defend as a principle the right of all to freedom in religious belief.

It is ironic, yet often true, that the constitutional rights we take for granted may obtain their real thrust and power in unpopular cases. Yet, these cases are sometimes the only testing-ground for the protection of those rights and, objectively speaking, are a crucial element in constitutional evolution. The dangers inherent in a suspension of constitutional principles because of popular sentiment against a person or group are so enormous that the temptation must be assuaged by public education.

This, then, is one of the primary objectives of this Report. Aside from the merit naturally inherent in ending sexual orientation discrimination, the larger right of personal privacy is viable only if the right and all its aspects — locational, decisional/associational, and informational — are afforded <u>all</u> participants in the life of the state.

While this is not the first government study on issues related to sexual orientation discrimination, it is the first time, to our knowledge, these issues have been examined comprehensively in the primary context of the right of personal privacy. The Commission on Personal Privacy is fortunate to be able to build upon the studies conducted by the National Institute for Mental Health, the Pennsylvania Council on Sexual Minorities, and the Oregon Task Force on Sexual Preference.[653]

The Commission's approach to studying sexual orientation discrimination in the context of the right of personal privacy was designed to respond to the concerns expressed in the Executive Order. The pages which follow address what this Commission believes to be central questions relating to sexual orientation discrimination, namely:

(1) What is the connection between sexual orientation discrimination and the right of personal privacy?

(2) What legal bases other than privacy exist for protection against sexual orientation discrimination, both under federal and state law?

(3) What are the underlying causes of sexual orientation discrimination?

(4) In what ways has sexual orientation discrimination manifested itself in California?

(5) What solutions presently exist or can be created to prevent or remedy sexual orientation discrimination?

The first approach to this study utilized a variety of resources to identify the major problem areas involved in sexual orientation discrimination. The Commission created several subject-matter committees.[654] Each committee reviewed academic and professional literature involving sexual orientation discrimination within its substantive domain. The committees also sought advice from professional consultants - - both academics and practitioners. The Commission's staff assisted the committees in identifying the major problems and in locating research materials. The Commission conducted two public hearings in order to elicit information from noted experts, community leaders, and the general public.[655] Twenty-five witnesses testified concerning various forms of sexual orientation discrimination.

The second approach to this study involved staff research into actual and potential legal protections. The California and United States Constitutions were examined as well as court cases applying constitutional provisions to situations involving sexual orientation discrimination. Furthermore, both legislative and administrative approaches to sexual orientation discrimination were studied.

The final approach to the study consisted of extensive deliberations over the numerous recommendations which were ultimately adopted by the Commission.

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"What does sexual orientation discrimination have to do with the right of personal privacy?" This question surfaced frequently throughout the Commission's study. Generally, when the topic of privacy is raised in conversation, many people discuss "informational privacy" issues, such as computers, credit reports, and the like, but few immediately think of the issue of sexual orientation discrimination. The Commission's research and analyses demonstrate, however, that sexual orientation discrimination is a major threat to the right of personal privacy in that it has an adverse effect on an individual's right to form and express his or her personality. Sexual orientation discrimination invades decisional privacy rights, territorial privacy rights, and informational privacy rights.

A number of public officials in this country have recently discussed the connection between the right of privacy and sexual orientation discrimination. A most erudite explanation of this connection is found in a 1980 opinion written by Federal District Court Judge Terence T. Evans in a decision ordering the Secretary of the Army to reinstate a woman into the Army Reserves after she had been discharged for "being a homosexual."[656]

> Ms. benShalom engaged in no known homosexual activity. She did not advocate homosexuality to anyone while on duty. Her homosexuality caused no disturbances except in the minds of those who chose to prosecute her. In fact, the record is clear that her sexual preferences made no difference to her immediate supervisors or her students. The court is satisfied from the record that her sexual preferences had as much relevance to her military skills as did her gender or the color of her skin. The broad sweep of this regulation substantially impinges the First Amendment rights of <u>every</u> soldier to free association, expression, and speech. . . .
>
> Closely intertwined with the First Amendment concepts is the petitioner's claimed right to personal privacy. The court is convinced that the discharge also directly infringed upon this constitutionally-protected interest, and was therefore improper.
>
> The right to privacy is rooted in the First, Fourth, Fifth, and Ninth Amendments, along with the penumbras of the express provisions in all first eight amendments. . . .

As the government has steadfastly contended, the petitioner lost her job simply because of what she is -- a homosexual. The difficulty with the government's position is that it fails to make a critical distinction which is made manifest by the facts of this case; the petitioner was treated in the same way as one who openly engages in homosexual activity, even though she is "guilty" of nothing more than having a homosexually-oriented personality.

Just as some heterosexuals have, throughout human history, chosen to forego sexual activity for a variety of reasons, it cannot be assumed that all who have personalities oriented toward homosexuality necessarily engage in homosexual conduct.

The privacy of the integral components of one's personality -- the essense of one's identity -- this court believes, is an interest so fundamental or "implicit in the concept of ordered liberty" as to merit constitutional protection. [Citations.] As Justice Brandeis stated, in his now famous dissent:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." [Citations.]

The right of privacy includes the privacy in independently making certain kinds of important decisions. Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977).

If what the United States Supreme Court itself has termed the right of "personal privacy" [citations] means anything at all, it should safely encompass an individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as one's personality, self-image, and indeed, one's very identity.

The " . . . autonomous control over the development and expression of one's intellect, interests, tastes, and personality" (emphasis added) are among the most precious of rights protected by the First Amendment. [Citation.]

As stated above, [the Army Regulation on homosexuality] effectively "chills" the free association of any soldier with known or suspected homosexuals. The right of association is found in the penumbral zone of privacy created by the First Amendment. [Citation.] Incursion on this right of association, therefore, invades the right to privacy in one's religious, political, economic, or cultural associations. . . .

On a broader scale, the Army's policy of discharging people simply for having homosexual personalities also offends privacy interests in the First Amendment.

One's personality develops and is made manifest by speech, personal expression and association of one's self with certain persons to the exclusion of others. The Ninth Amendment protects the privacy of one's personality, while the First Amendment protects manifestations of that personality. It is only when one's personality, no matter how bizarre or potentially dangerous, actually manifests itself in the form of unlawful conduct, that the government may intercede in an effort to control the personality or restrict its manifestation. A homosexual personality -- formed genetically or by human experience; the product of deliberate choice or predetermination -- may be displeasing, disgusting and immoral to many. These, however, are social judgments, not ingredients for gauging constitutional permissibility.

" . . . Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." While the law remains unsettled as to whether private sexual conduct between consenting adults is protected by the right of privacy [citations], the court believes that constitutional privacy principles clearly protect one's sexual preferences in and of themselves from government regulation.

New York Attorney General Robert Abrams recently addressed the connection between privacy and sexual orientation with an unusual degree of

sensitivity and insight. The following comments are excerpts from his keynote address to the Second Annual Conference on Law and the Fight for Lesbian and Gay Rights:[657]

> I am very pleased to be able to open this national conference on law and the fight for gay rights. Nothing pleases me more as the chief legal officer of New York than to address you on a subject that is important to the very fabric of the concepts held in the Constitution. I wish today to address specifically the role of the law and the lawyer in achieving the goal of full civil rights for lesbians and gay men, and I wish to offer my thoughts about some of the underlying considerations in reaching that goal. . . .
>
> While discussing special issues in litigation workshops, it could be useful to consider a conceptual framework within which this litigation might best proceed. To my thinking, one main concept unifies the issues of gay rights, and that is the right of privacy. This right conceptually encompasses control over one's body and control over one's decisions about personal lifestyle. It is a right already recognized as a fundamental right by the United States Supreme Court in such cases as Eisenstadt v. Baird . . . and Doe v. Bolton. . . And as indicated in a footnote in Carey v. Population Services . . . the Court has not yet determined whether the right to privacy protects private sexual activity between consenting adults. The footnote indicated that the Court did not view its summary affirmance in Doe v. Commonwealth's Attorney . . . as deciding that precise issue.
>
> Before the police power of the state can be invoked to justify an intrusion into an individual's personal decisions, compelling reasons to do so must be shown. The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm. The state must certainly be involved in protecting children from violence and from situations in which their inability to make mature judgments is manipulated and used against them. But justifications for discrimination against lesbians and gay men, which are based on prejudices, religious dogma, and un-

substantiated, unfounded and false presumptions are not compelling. It is just not justifiable to continue criminal sanctions against private sexual activity between consenting adults because the majority of people are outraged at the thought. Nor is it justifiable to deny employment, or housing, or other basic rights to lesbians and gay men because of these prejudices. Nor can such rights be denied because of a presumption that homosexuals molest children when the facts indicate overwhelmingly that it is young girls who are sexually molested, and that they are molested by adult men who are heterosexual and all too often members of the girl's immediate family.

The right of privacy protects not only activities which are private acts between consenting adults, but also private and personal decisions, even if publicly acknowledged. The issue of privacy as broadly-defined should encompass the right to live one's life unhindered, no matter how controversial or unconventional that lifestyle is. Defined this way, the right of privacy is the central issue for the gay community as well as for racial, ethnic and religious communities and for women. Intense opposition to all of these groups often focuses on the right of individual members to make personal lifestyle decisions which are unacceptable to the majority. The right of women to control their own bodies, for example, has been a source of vehement and often violent opposition. The underlying argument against passage of the ERA and against equal opportunity principles is that the social fabric of this country would be destroyed by legitimizing unstereotypical behavior or lifestyles. The opposition to lesbians and gay men is also based on a prejudice toward a particular lifestyle decision. Thus, this broadly-defined privacy right is a concern to each of these groups. It is a common interest in which all are linked, and around which all could join forces to achieve the basic rights that each are seeking. . . .

Earlier this year, after the Wisconsin Legislature gained the distinction of being the first state legislature in this country to pass comprehensive legislation protecting the civil rights of lesbians and gay men, Republican

Governor Lee Sherman Dreyfus was confronted with the decision to sign the measure into law or to veto it. In an official statement released by him when he signed the bill, he underscored the connection between the right of personal privacy and protection against sexual orientation discrimination. The following remarks are excerpts from this official message:[658]

> AB 70 prohibits discrimination in employment, housing and public accommodations based on sexual orientation. This bill has a controversial history and my office has been under heavy pressure to veto it. It also, however, has the support of a wide ranging group of religious leadership, including leadership of the Roman Catholic Church, several Lutheran synods and the Jewish community.
>
> I have decided to sign this bill for one basic reason, to protect one's right to privacy. As one who believes in the fundamental Republican principle that government should have a very restricted involvement in people's private and personal lives, I feel strongly about governmentally sanctioned inquiry into an individual's thoughts, beliefs and feelings.
>
> Discrimination on sexual preference, if allowed, clearly must allow inquiries into one's private life that go beyond reasonable inquiry and in fact invade one's privacy.
>
> No one ought to have the right [to inquire into] and no one ought to be placed in a position of having to reveal such personal information when it is not directly related to an overriding public purpose. . . .

There is a danger that members of the general public, as well as sexual minorities, might equate privacy to secrecy. One of the witnesses who testified at the Public Hearings conducted by the Commission on Personal Privacy cautioned the Commission about this problem:[659]

> My name is Carol Migden. I'm the Executive Director of Operation Concern of Pacific Medical Center -- that's an outpatient psychiatric clinic for lesbians and gay men here in San Francisco, and also for their families.
>
> From a psychological perspective, the issue is not that, as lesbians and gay men, our privacy has been invaded, rather that privacy has been used against us to suppress or inhibit

healthy psychological development. Often, emotional stability for gay people hinges upon our willingness to be private. From early age, progressing through adulthood, people are inculturated with a similar set of social values. The messages are clear. We learn that homosexuality is taboo, we know that it is perceived as evil, as decadent and immoral, and yet, it is also mysterious, it is strangely intriguing, and it is cloaked in a veil of secrecy. If lesbians and gay men agree to anonymity in order to hide, then they are protected. But if we choose to live as free and open lesbians and gay men, then we are penalized as the Family Protection Act and the McDonald Amendment reveal. We've been targeted for legal discrimination, so in other words, we are penalized for not being private, which is an interesting use of the "private." "Coming-Out," a process which promotes disclosure and not secrecy, has always been psychologically traumatic for gay people, because of internalized feelings of self-hatred, of guilt, of shame, which result from a steady barrage of social intolerance. Those who remain "in the closet" or remain "private" suffer extreme lifelong adverse psychological effects. They suffer impairment in terms of ego development; they're plagued throughout their lives by problems related to self-esteem, ego development and negative image-building.

At Operation Concern in recent years, we've seen a steady increase in the numbers of acute disturbances and suicide ideation, which, we believe, is resultant from an escalating sense of social intolerance. In closing, what I want to suggest is not that issues of privacy are not important to us, but just that we have to consider the complexities of the situation and not to be imprisoned by our efforts to free ourselves, because the message for gay people is to live privately, and that is contrary often to our effort to live healthy adjusted lives.

Another witness at the Public Hearings touched upon the development of our concepts about the right of privacy, — noting its departure from connotations of secrecy and movement toward notions of personal autonomy

and freedom of choice. Mr. Steve Block, lecturer on the subject of personal privacy at the Law School at the University of California at Berkeley, testified:[660]

> One aspect of privacy which has emerged in recent years, as perhaps the predominant focal point of attention, is that interest sometimes characterized as "the right to intimate association." While the contours of that right remain somewhat ill-defined, it is focused for the most part upon individual autonomy in the matters of sexual freedom, child bearing and the like, and seems to have something to do with protecting a zone of liberty that is at the core of the individual's sense of identity.
>
> Legitimizing those interests as matters of privacy has not been easy. In the first place, they are not predicated like more traditional concerns, upon a desire to shield some activity or information from public view. It is, for example, as offensive to the freedom to make child-bearing decisions, to prohibit the public sale of contraceptives, as it is to prohibit their use in the bedroom. Similarly, many of us would suggest that discrimination based upon sexual orientation is an invasion of our privacy, even if predicated upon the individual's public declaration of his or her sexual preference. In short, the spectrum of privacy which we are discussing, is really an aspect of individual liberty — somewhat far afield of privacy as traditionally conceived.

This same concept has been articulated by some members of the federal judiciary:[661]

> The "right of privacy," apt in some cases, is a misleading misnomer in others . . . This freedom may be termed more accurately "the right to be let alone," or personal autonomy, or simply "personhood." One thing for sure — it is not limited to the conduct of persons in private. [S]ecrecy is not a necessary element of the right and . . . the right exists, whether or not exercised in secret.

We have all heard the cliche, "What two consenting adults do in the privacy of their own bedroom is none of the law's business." This notion has its foundation in territorial privacy concerns. At one stage of the development of the sexual civil liberties movement, this was both the beginning and the end of the privacy argument. Notwithstanding the emergence of more sophisticated privacy arguments concerning the fundamental right of consenting adults to express themselves sexually, much can still be said about the soundness of the privacy-in-the-bedroom argument.

Some of the earliest developments in privacy law arose out of a sense of territoriality. The adage, "a man's home is his castle," is only one example of this perspective on privacy. The Griswold case could be said to be the first major bridge between territorial privacy and decisional privacy in the context of a right to sexual expression.[662] In Griswold, the Court asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" Answering in the negative, the Court referred to "the sanctity of a man's home and the privacies of life."[663] Homes are not stripped of their inherent privacy protections merely because they may be occupied by lesbians or gay men.

Territorial privacy rights also have been invoked to protect gay social clubs from warrantless searches. Speaking of a police entry into a gay men's social club without the owner's permission, the Appellate Department of the Los Angeles Superior Court declared such an entry illegal in violation of privacy rights protected by the Fourth Amendment:[664]

> Whether the Corral Club should be classified as a private club or a commercial enterprise is of little moment where the ultimate question is whether the officer had the right to make a warrantless entry of the facility in which the club conducted its activities. If the area involved "was one in which there was a reasonable expectation of freedom from government intrusion," it was constitutionally protected from a warrantless search. . . . "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

In a decision declaring the New Jersey fornication statute unconstitutional in violation of the right of privacy, the Supreme Court of that state discussed decisional privacy rights of consenting adults:[665]

> We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.
>
> . . . [Supreme Court decisions have] underscored the inherently private nature of a person's decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited. Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. We therefore join with other courts which have held that such sexual activities between consenting adults are protected by the right of privacy.

A unanimous panel of judges in a New York appellate court recently made some pertinent remarks on this subject in a case challenging the constitutionality of New York's sodomy law:[666]

> Thus it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. The right is broad enough to include sexual acts between non-married persons and intimate consensual homosexual conduct.

When the New York sodomy law was subsequently reviewed by the highest court of that State, the New York Court of Appeals took pains to emphasize the aspect of privacy involved in the constitutional challenge:[667]

> Because the statutes are broad enough to reach non commercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution.
>
> As to the right of privacy. At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accord with those decisions, undeterred by governmental restraint. . . .
>
> The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its protection, the People contending that it extends to only two aspects of sexual behavior--marital intimacy . . . and procreative choice . . . . Such a stance fails however adequately to take into account the decision in Stanley v. Georgia . . . and the explication of the right of privacy contained in the court's opinion in Eisenstadt. . . .
>
> In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions - - such as those made by defendants before us - - to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as those decisions are voluntarily made by adults in a noncommercial, private setting. . . .

In addition to territorial and decisional privacy rights, informational privacy rights are also often violated in the context of sexual orientation discrimination. Persons who are suspected of homosexual activity or tendencies may be the subjects of interrogation or surveillance, the object of which is to ferret out homosexuals in order to punish them or deny them jobs, housing, or other benefits.

Teachers have been an especially vulnerable target for such invasions of privacy. Three examples should suffice to demonstrate the "Catch-22" that teachers may face. Joe Acanfora lost his teaching job because he was homosexual and subsequently lost his court battle for reinstatement:[668]

> While Acanfora was a junior at Penn State University he joined an organization known as the Homophiles of Penn State, which had as its purpose the development of public understanding about homosexuality. Acanfora not only attended Homophile meetings, but he served as the group's treasurer and joined other members in bringing a lawsuit that established it as an official university organization. His public acknowledgment of his homosexuality ultimately led to his suspension from a student teaching assignment, but a state court promptly ordered that he be reinstated. When Acanfora applied for teacher certification, however, Penn State officials differed as to his qualifications and forwarded his application to the Pennsylvania Secretary of Education without recommendation.
>
> In the meantime, Montgomery County [Maryland] school officials, unaware that Acanfora was a homosexual, employed him as a junior high school science teacher. They didn't learn of his homosexuality until several weeks after school opened in the fall, and only then as a result of a widely publicized press conference at which the Pennsylvania Secretary of Education announced favorable action on Acanfora's application for teacher certification in that state. Shortly after that disclosure, the Montgomery County deputy superintendent of schools transferred Acanfora, without reduction in pay, from teaching to administrative work in which he had no

contact with pupils. When the school officials did not accede to Acanfora's demands that he be returned to his classroom assignment, he commenced this action.

Following his transfer to an administrative position, Acanfora granted several press and television interviews. . . . The transcripts of the television programs, which the district court found to be typical of all the interviews, disclose that he spoke about the difficulties homosexuals encounter, and, while he did not advocate homosexuality, he sought community acceptance. He also stressed that he had not, and would not, discuss his sexuality with his students. . . . There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the First Amendment and that they do not justify either the action taken by the school system or the dismissal of his suit. . . . On his application for a teaching position in the Montgomery County Schools, Acanfora responded to a request for information about his professional, service, and fraternal organizations by mentioning only his student membership in the Pennsylvania State Education Association. In response to a request for information about his extracurricular activities, he listed swimming, bowling, student council, magazine and newspaper staffs, honor society, and Naval Reserve Officers Training Corps. He made no mention of his membership and official position in the organization known as the Homophiles of Penn State. Nevertheless, he verified that the information he submitted was accurate to the best of his knowledge. His omission of the Homophiles was not inadvertent. To the contrary, he realized that this information would be significant, but he believed disclosure would foreclose his opportunity to be considered for employment on an equal basis with other applicants. . . .

The school officials admit that if Acanfora had revealed his affiliation with the Homophiles, they would not have employed him. . . .

> Not every omission of information in an employment application will preclude an employee from attacking the constitutionality of action taken by the governing body that employs him. But here Acanfora wrongfully certified that his application was accurate to the best of his knowledge when he knew that it contained a significant omission. His intentional withholding of facts about his affiliation with the Homophiles is inextricably linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers. Acanfora purposefully misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. "When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction."

The second teacher case chosen as an example shows what can happen to an instructor who privately and honestly answers a supervisor's question regarding the instructor's sexual orientation.[669]

> Defendant school district discharged Gaylord — who held a teacher's certificate — from his teaching position at the Wilson High School in Tacoma on the ground of "immorality" because he was a known homosexual. Gaylord appealed this decision . . . . The relevant findings of the trial court may be summarized as follows.
>
> Gaylord knew of his homosexuality for twenty years prior to his trial, actively sought homosexual company for the past several years, and participated in homosexual acts. He knew his status as a homosexual, if known, would jeopardize his employment, damage his reputation, and hurt his parents.
>
> Gaylord's school superior first became aware of his sexual status on October 24, 1972, when a former Wilson High student told the school's vice-principal he thought Gaylord was a homosexual. The vice-principal confronted Gaylord at his home the same day with a written copy of the student's

statement. Gaylord admitted he was a homosexual and attempted unsuccessfully to have the vice-principal drop the matter.

On November 21, 1972, Gaylord was notified the board of directors of the Tacoma School Board had found probable cause for his discharge due to his status as a publicly known homosexual. This status was contrary to school district policy . . . which provides for discharge of school employees for "immorality." After hearing, the defendant board of directors discharged Gaylord effective December 21, 1972.

. . . The [trial] court concluded "appellant was properly discharged by respondent upon a charge of immorality upon his admission and disclosure that he was a homosexual" and that the relief sought should be denied.

There was uncontroverted evidence plaintiff was a competent and intelligent teacher so the court could reasonably assume Gaylord knew what homosexuality could mean. It was not a word to be thoughtlessly or lightly used. Gaylord's precaution for 20 years to keep his status of being a homosexual secret from his parents is eloquent evidence of his knowledge of the serious consequences attendant upon an undefined admission of homosexuality.

Our next inquiry is whether homosexuality as commonly understood is considered immoral. Homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times. . . .

And with that opinion the Supreme Court of the State of Washington declined to order the teacher's reinstatement, relying on the ground that homosexuals are guilty of immorality as a matter of law. It seems somewhat incongruous that such a decision was rendered within the past few years - - and in a state which had just decriminalized private sexual acts between consenting adults, whether homosexual or heterosexual in nature.

The case of John Gish has a slightly different twist to it. In 1972, Gish had assumed the presidency of the New Jersey Gay Activists Alliance. In that capacity, he subsequently participated in a number of communications through various public media in which he promoted the goals of the Alliance. He also attended a convention of the National Educational Association and helped organize a gay caucus within the NEA.

In July, 1972, the Board of Education adopted a resolution directing Gish to submit to a psychiatric examination since his "overt and public behavior" indicated a strong possibility of potential harm to students, according to the Board's reasoning. Gish appealed to the Commissioner of Education and the State Board of Education, both of which affirmed the resolution of the local board.

On appeal to the Appellate Division of the Superior Court of the State of New Jersey, Gish argued that the Board's directive to submit to a psychiatric examination violated his First and Fourteenth Amendment rights to free speech and association, as well as his right not to be deprived of liberty without due process of law. The judicial panel which heard his appeal held that "submission by Gish to a psychiatric examination takes nothing from him except his time, . . . from the standpoint of being deprived of a right or privilege it is minimal, except as may loom in his mind."[670]

John Gish, James Gaylord, and Joseph Acanfora all experienced graphically and painfully how sexual orientation discrimination may infringe on one or more informational privacy rights. Although each of them pursued his case to the United States Supreme Court, that Court maintained a steadfast posture of declining to take gay-related cases.[671]

Invasions of information privacy also occur in jobs requiring security clearances, those involving law enforcement, and in military settings. Informational privacy infringements also are found in child custody disputes, immigration and naturalization cases, and government surveillance operations.

Persons who choose to remain "private" about their sexual orientation sometimes have that fact used against them on grounds that they are concealing relevant information or are possible targets for blackmailers. Those persons who choose to be socially involved in gay groups may find themselves in a double bind: damned if they are truthful when questioned about their homosexuality (as Gaylord did) or damned if they conceal it when questioned (as happened to Acanfora). Those who choose to be openly political about the treatment afforded homosexuals by society face the risk of being viewed as a danger to students and required to submit to psychiatric examinations (as in the Gish case). Fortunately, in California the present picture is not so bleak, as will be discussed within.

Sexual Orientation Terms and Definitions

The Commission has been directed to study the problems associated with sexual orientation discrimination. Just what does "sexual orientation discrimination" mean? Within this Report, "sexual orientation discrimination" is defined as "prejudice-in-action, namely, the segregation, separation, exclusion or treatment of any person or class of persons unequally because of actual or perceived sexual orientation".[672] Of course, this definition is not complete without defining "sexual orientation."

In the broad sense, "sexual orientation" refers to the direction of sexual attraction and/or physical attraction, and its expression.[673] In its narrower sense, the way it is most often used in civil rights legislation, sexual orientation means "having a preference for heterosexuality, homosexuality, or bi-sexuality, having a history of such a preference, or being identified with such a preference."[675] It is in this narrower sense that the term is used throughout this Report.

Very often the terms "sexual orientation" and "sexual preference" are used interchangeably in popular literature and in the media, although there is a subtle but important distinction between these terms. In the Glossary of Terms Commonly Associated with Sexual Orientation, published in 1980 by the California State Personnel Board, the distinction between these two terms is highlighted:[676]

> The term, sexual preference, is often used to express the meaning of sexual orientation. However, sexual preference is often misinterpreted to mean that sexual attraction, including same-sex attraction, is generally a matter of conscious choice. Although such a choice might be possible, current research indicates that sexual orientation may not be a matter of choice. Therefore, sexual orientation is the acceptable terminology and the more accurate term.

After a recent study on the development of human sexuality, researchers Bell, Weinberg, and Hammersmith chose the title for their resulting book to be Sexual Preference: Its Development in Men and Women.[677] Notwithstanding the title, the authors seem to use the terms "sexual preference" and "sexual orientation" interchangably throughout the book. However, in its epilogue, the researchers briefly speak to connotations associated with the term "preference:"[678]

> Although we have entitled our present work Sexual Preference, we do not mean to imply that a given sexual orientation is the result of a conscious decision or is as changeable as the many moment-to-moment decisions we make in our lives. Neither homosexuals nor heterosexuals are what they are by [their own] design. Homosexuals, in particular, cannot be dismissed as persons who simply refuse to conform. There is no reason to think it would be any easier for homosexual men and women to reverse their sexual orientation than it would be for heterosexual readers to become predominantly or exclusively homosexual.

Throughout this Report, the term "sexual orientation" is used rather than the term "sexual preference" because it seems to more accurately reflect the origins of one's sexual identity and expression. Many of the authorities reviewed by the Commission suggest that the direction of one's erotic or sexual attraction is determined in the first few years of life. Although there is no scientific consensus as to whether sexual orienation is determined biologically, environmentally, or by a combination of these factors, it is clear at least that sexual orientation is not always a matter of deliberate choice.

Since this Report focuses on sexual orientation in the narrower sense of the term, that is, heterosexuality, homosexuality, and bi-sexuality, these terms must also be defined. The State Personnel Board's Glossary of Terms, referred to above, defines these words as follows:[679]

> Heterosexuality: sexual attraction, emotional, and/or physical attraction and behavior, which is primarily directed to persons of the other gender.
>
> Homosexuality: sexual attraction, emotional, and/or physical attraction and behavior, which is primarily directed to persons of the same gender.
>
> Bisexuality: sexual attraction, emotional, and/or physical attraction, and behavior, which is directed to persons of both genders.

With respect to the usage of these terms, the Glossary cautions:[680]

Except for strictly scientific or scholarly uses, it is inappropriate to apply the terms heterosexual, homosexual, and bisexual to people. Incorrectly used, it can be taken to indicate that sexual orientation is the sole basis of personal or group identity.

For example, a homosexual person may have ethnic, gender, geographical, political, professional, and religious identities, in addition to his/her sexual identity. The term, homosexual, has also been popularly misinterpreted as applying only to men, and is also inappropriate because of its formal, clinical tone. Therefore, it is generally advisable, as will be explained below, to use, where possible, the terms gay and/or lesbian, instead, in referring to people of homosexual orientation.

Whether one uses the clinically oriented term "homosexual" or the more socially oriented terms "gay" and "lesbian," one must still confront the problem of defining what is meant when people speak of "a homosexual." In an extensive study entitled The Church and Homosexuality, conducted by the United Presbyterian Church in the United States of America in the late Seventies, this definitional problem was addressed as follows:[681]

One approach to the definition of "homosexual" focuses on overt behavior: anyone who repeatedly engages in sexual relations with a person or persons of the same sex is homosexual. Such a definition excludes the adolescent who occasionally experiments with homosexual behavior. It also excludes the person who has strong emotional attraction to persons of the same sex but does not express this attraction genitally.

Another approach to the definition of "homosexual" focuses on psychological response: anyone who experiences repeated, intense attraction to a person or persons of the same sex is a homosexual. Such a definition excludes a casual experimenter. It also excludes people whose repeated homosexual behavior is motivated by circumstance rather than by affectional attraction and preference. Thus, the normally heterosexual prisoner who engages in homosexual behavior because he or she has no sexual access to the

opposite sex is not called "homosexual" (or at most is called "circumstantially homosexual"). Included as "homosexual" in the psychological response approach to the definition are people with repeated, intense attraction to those of the same sex who nevertheless refrain from genital behavior or who nevertheless choose to express their sexuality in heterosexual patterns of relationship (including marriage).

In current social scientific literature, the psychological response approach to definition is the more common and accepted one. Homosexuality is viewed as an affectional orientation rather than as a specific pattern of overt behavior.

Kinsey himself ranked people on a 7-point continuum from 0, exclusively heterosexual in psychological reactions and overt experiences, to 6, exclusively homosexual in psychological reactions and overt experiences, with 3 being "equally heterosexual and homosexual."

The Kinsey studies of male sexual behavior in 1948 and female sexual behavior in 1953 concluded that relatively few people are exclusively homosexual in orientation and behavior throughout life (Kinsey himself estimated 4 percent of males and 1-3 percent of females). However, the studies showed that others are primarily homosexual (commonly estimated to be an additional 3-6 percent among both males and females), and many "heterosexual" persons experience more than incidental homosexual impulses or behavior after age 16 (Kinsey estimated 25 percent among males and about half as many among females; many researchers believe these figures to be too high). The evidence thus shows that "homosexual" and "heterosexual" are not necessarily exclusive categories. In a statistically significant minority of the population, homosexual and heterosexual impulses and behavior combine -- albeit in many different proportions.

Noted sex researchers Masters and Johnson, in their recent book entitled Homosexuality in Perspective, explained the Kinsey scale:[683]

> The Kinsey classification was used as a frame of reference in rating study-subjects' sexual preference. In brief review, and using a liberal rather than literal interpretation, Kinsey 0 orientation means that the man or woman has never had overt homosexual experience.

A Kinsey 1 identification describes an individual whose minimal amount of homosexual experience has been far overshadowed by the degree of his or her heterosexual experience. The classification of Kinsey 2 suggests a person with a significantly higher level of homosexual experience than a Kinsey 1, but still with a predominant background of heterosexual reaction.

A rating of Kinsey 3 represents an individual with a history of approximately equal homosexual and heterosexual experience. Despite obvious ambivalence as to partner gender, there usually is a history of periods of partner identification. An individual rated as Kinsey 4 is one who has had a significant amount of heterosexual experience but whose sexual outlets have been predominantly homosexual. A man or woman with a Kinsey 5 preference rating is an individual whose homosexual experience fully dominates his or her history and whose heterosexual activity is minimal. Finally, a Kinsey 6 describes a man or woman whose sexual preference is the exact opposite of a Kinsey 0 -- that is, an individual who has no history of overt heterosexual experience.

Psychologists C. David Tollison and Henry E. Adams had this to say about the definition of homosexuality in a book they recently authored:[684]

The word homosexuality is derived from the Greek root "homo," meaning sameness. Homosexuality thus means that two individuals of the same sex are involved in sexual activity. The term therefore applies to women as well as men although female homosexuality is more often called lesbianism, because the classic Greek poet Sappho described sexual relations between women on the island of Lesbos. More specifically, homosexuality is defined as an erotic preference for same-sex persons when a choice of sexual partners is available. Note the phrase a preference for sexual partners; this definition says nothing about the type of sexual activity. Homosexuality may occur for any number of reasons: as a result of restricted choice of sexual partners; as a means of satisfying curiosity; as a religious ritual in

some cultures; and as foreplay for arousal purposes in group sex; as well as in other similar episodic ways. Infrequent homosexual experience is common in both sexes. This does not mean that everyone who has engaged in a homosexual act is, in fact, homosexual or has a homosexual orientation; as we have said above, homosexuality is based on a preference for the same-sexed partner who consistently arouses in fantasy and in sexual situations. This definition is meaningful since it includes cognitive and physiological indices as well as overt behavior. It is highly probable that individuals are able to engage in non-preferred sexual activity through the use of preferred sexual fantasies. Consequently a definition of homosexuality which is based upon sexual preference, overt behaviors, and physiological indices is both accurate and useful.

Dr. Evelyn Hooker, Chairperson of the National Institute of Mental Health Task Force on Homosexuality, wrote about the definition of homosexuality in the Final Report issued at the conclusion of that national study:[685]

> Homosexuality (homo- derives from the Greek root meaning "same") includes an extraordinary diversity of dyadic relations and of individual mental states and action patterns. The patterns of social organization that develop when homosexuals seek each other out also vary greatly. Because of this diversity, "homosexuality" is an ambiguous term with many meanings. Some investigators, such as Ford and Beach, limit the term to overt sexual relations between individuals of the same sex. For others, notably Kinsey and his associates, the degree of psychic arousal and the frequency of overt sexual response to individuals of the same or opposite sex determine ratings on a heterosexual/homosexual continuum that ranges from exclusively heterosexual to exclusively homosexual, with several intermediate ratings. Investigators with a clinical perspective frequently stress motivational and subjective aspects of erotic preference as criteria for defining persons as homosexual; overt behavior is considered as of secondary importance.

> In the social perspective of homosexual subcultures, the defining criteria may be shared understanding of sexual preferences of one's own sex and participation in social activity centered on the search for, and interaction with, these individuals. Thus, it is clear that "Who is homosexual?" and "What is homosexuality?" are very complex questions, clarification of which would be a lasting contribution to social science.

The Report published by the State of Oregon Task Force on Sexual Preference defined the term "homosexual" and took pains to clarify the distinction between homosexuals, transsexuals, and transvestites, terms which are not infrequently confused with each other:[686]

> Homosexuals
>
> . . . people whose emotional and sexual preference is for people of their own sex. Most homosexuals are not transsexuals or transvestites.
>
> Transsexuals
>
> . . . individuals who are biologically of one sex, but who psychologically feel that they are of the other sex and "trapped in the wrong kind of body." Transsexuals who are preparing for sex-change surgery may be conspicuous as they try to become accustomed to wearing the clothing of the opposite sex and to develop the appropriate mannerisms. Transsexuality is not a sexual preference, i.e., it is not a matter of sexual attraction to another person. Instead transsexuality is a matter of self-identity ("gender identity").
>
> Transvestites
>
> . . . people who obtain emotional or sexual satisfaction from dressing in the clothes of the opposite sex, although they wear the clothes which are considered socially appropriate for their own gender most of the time, including at work. Most transvestites are heterosexual. Transvestites generally are not interested in sex-change surgery.

The Commission on Personal Privacy finds it unnecessary to define the term "homosexual" for purposes of this study. This study is not about "homosexuals." Rather, its intention is to expose and understand discrimi-

nation which occurs in California on the basis of actual or perceived sexual orientation. The Commission's research indicates that perpetrators of such discrimination generally do not stop to ask or consider whether the victim is a "Kinsey 6" or a "Kinsey 1." Our research also indicates that people who are not "homosexuals" can be the victims of sexual orientation discrimination because the perpetrator perceives that they are homosexuals. Obviously the effects of sexual orientation discrimination can be just as severe for a "Kinsey 1" as for a "Kinsey 6."

Because there is a sizeable portion of the population which is predominantly or exclusively homosexual in orientation, as will be discussed later in this Report, and because the visibility of self-identified members of this class is increasing, there is a need to use socially acceptable terminology when referring to them. The term "gay" is generally considered synonymous with "homosexual."[687] According to the Glossary of Terms Commonly Associated with Sexual Orientation, published in 1980 by the California State Personnel Board, a booklet the Commission has found most insightful and helpful, both in defining words and in advising as to usage, the terms "gay" and "lesbian" are considered socially acceptable and are defined as:[688]

> GAY: The term refers to a person whose homosexual orientation is self-defined, affirmed, or acknowledged as such. Gay can also refer to homosexually-oriented ideas, communities, or varieties of cultural expression (e.g., styles, lifestyles, literature, or values). The term can also include bisexuals, and can refer to both men and women.
>
> LESBIAN: The term refers to a woman whose homosexual orientation is self-defined, affirmed, or acknowledged as such. Lesbian also refers to female homosexually-oriented and can refer to women-oriented ideas, communities, or varieties of cultural expression (e.g., styles, lifestyles, literature, or values).

• • •

Underlying Causes of Sexual Orientation Discrimination

At the root of sexual orientation discrimination, lies fear — and that fear has come to be known as "homophobia." Dr. George Weinberg of the famous Kinsey Institute defined homophobia in his book entitled Society and the Healthy Homosexual, as follows:[689]

> . . . the dread of being in close quarters with homo sexuals -- and in the case of homosexuals themselves, self-loathing.

"Homophobia" is a term which was coined only recently and which represents a shift in focus from the causes of homosexuality to the causes of discrimination against actual or perceived homosexuals.

Dr. Vern L. Bullough, founder of the Center for Sex Research at California State University at Northridge, commented about the development of homophobia:[690]

> Undoubtedly the first thing many people with homosexual inclinations do when they become aware of them is to deny them. So do the people most involved in their lives: their parents, their brothers and sisters, their teachers, their peers. Statements such as, "It's just a passing phase," or "This is normal for all children that age," lead to a denial of reality. In talking with parents of children who later became gay, and who have finally accepted their children's sexual orientation, one is struck by how much denial they employed while their children were growing up. They refused to accept what should have been obvious, if only because the consequences of accepting it seemed so horrible to them. The more reality is denied, however, the more the individual becomes isolated, feeling that he is a freak, alone in the world, with nobody else like him, a belief encouraged by societal repression of any real discussion of homosexuality. It is this denial which sometimes leads to extremes of machismo or femininity, a person truly afraid to reveal himself.
>
> Many people never progress beyond the denial stage, and these people often become the most homophobic individuals denouncing homosexuality as an evil, and fearing their own repressed desires. They are good candidates to be the

authoritarian personality described by Adorno and others. Though Adorno was concerned primarily with racist attitudes, his description of the authoritarian personality offers great insight into individuals who remain in the first stage of denial. Such a person is described as one motivated by deep feelings of insecurity, holding rigidly to conventional ideas with moralistic fervor, tending to see people as good or bad, grasping at pseudoscientific theories, appearing unrealistic in his or her goals and expectations, having a preoccupation with power and status, and unable or unwilling to tolerate weakness and ambiguity. Any weakness or ambiguity might weaken the denial of homosexual leanings and undermine the individual's defenses. This is not to say that all authoritarian personalities are secret homosexuals, or that all homophobic individuals are [secret homosexuals], but only to indicate that some probably are, particularly those who deny their own inclinations with such fervor that they are unable to relax or be tolerant of others.

Dr. Betty Berzon, a therapist in private practice in Los Angeles, specializing in working with lesbians, gay men, and their families, recently wrote about the need for gay people themselves to de-program their own homophobia:[691]

> Deprogramming ourselves is a long and arduous process. In our formative years we were all exposed to the same anti-gay jokes from our non-gay counterparts, the same stereotypes of lesbians and gay men, the same misinformation from our peers. For we gay people who have swallowed all this toxic material, it works against us from the inside while society's homophobes (persons who fear homosexuality and have an antagonistic and punitive attitude toward gay people) work against us from the outside. In the long run, I am convinced, we will be able to do something collectively about societal oppression. In the short run we each owe it to ourselves to do something now about our self-oppression. We must work to rid our thinking of destructive stereotypes and depersonalizing myths: "Gay people are superficial/immature/disloyal/flighty/narcissistic." "Gay men think only of

sex." "Lesbians are angry and over-aggressive." "Gay men can't form lasting relationships."

How often have you heard a gay person stereotype another gay person? Every time we unthinkingly use one of those cliches we tarnish our image. We pay tribute to bigotry and ignorance. Just as we must stop reinforcing the straight world's homophobia by laughing at their fag and dyke jokes, we must stop reinforcing our own homophobia by perpetuating these harmful generalizations about ourselves.

In addition to deprogramming our homophobia, we must also begin to reprogram our thinking about ourselves as gay people. One of the most effective ways we can do that is to substitute accurate for inaccurate information regarding homosexuality and the lives of lesbians and gay men.

Joshua Dressler, associate professor of law at Hamline University School of Law in St. Paul, Minnesota, recently addressed the issue of judicial homophobia. Some excerpts from his commentary underscore how homophobia affects the administration of justice and retards the growth of civil liberties:[692]

"Any 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 were to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected." . . .

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.

. . . 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 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. . . .

Public opinion poll or the English language [proliferation of negative terms for "homosexuals"], 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 same 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. . . . 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 1970's.

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. . . . [I]t is consistent with our legal and ethical systems to presume both the moral worth of <u>all</u> people, and their right to be treated equally. It seems only proper, therefore, that those who con-

demn 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. . . .

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 particularly 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 of most gay males, nor is it uncommon in heterosexuals. Finally, psychologists say that heterosexuals are more likely to suffer from transvestitism than gays. The stereotypes, then, are myths, and the resultant fears and prejudices are irrational.

. . . The existence of homophobia, its manifestations through stereotypes, and its impact on case law is apparent. But <u>why</u> 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 <u>believes</u> 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 anti-homosexual 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. . . . Finally, religion's impact is evident when one observes the recent campaigns against gay rights. Anita Bryant's "crusade" was religious. The leaders of the 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." . . .
>
> But, given the many possible causes of homophobia, the question still remains: How do we move away from the status quo? [Former United States Supreme Court Justice] 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.

The United Presbyterian Church in the United States of America, after conducting an extensive study and debate on the subject of homosexuality, published The Church and Homosexuality.[693] In addressing the issue of homophobia, the Report states:[694]

> How then shall the church respond in ministry to homosexual persons - - young and old, within and without? What shall the church undertake on behalf of persons uncertain about their sexual orientation and frightened by developmental processes they cannot control and do not understand? Obviously, United Presbyterians identified with the different models of biblical authority and interpretation will construct different models of ministry; for the objectives and forms of ministry will be decisively shaped by one's answer to the question, "Is homosexual behavior per se sin?"
>
> Before any model of ministry can be constructed and implemented, however, the heterosexual majority within the church must acknowledge and minister to the particular condition of sin that has caused our denomination to mimic society's posture of contempt toward homosexual persons

rather than to extend toward them God's grace, love, compassion, and justice. That condition is seen in the exaggerated, irrational, dishonest, and virulent dimensions of our fear of homosexuality and homosexual persons. It is often called "homophobia." [fn. "Homophobia" was first used in this sense by Weinberg, Society and the Healthy Homosexual. Although the term is etymologically incorrect (such a word should mean "fear of the same"), it is now widely used with the above meaning and is certainly less clumsy than the term that is etymologically correct — "homoerotophobia."]

Many Christians are gripped by a dread of homosexual behavior out of all proportion to its magnitude as "sin" within the Bible. Such dread inhibits friendships and working relationships between heterosexual and homosexual persons. Thus, heterosexual Christians' stereotypes of homosexual persons go largely unchecked by personal knowledge and experience.

In January 1977, Presbyterian Panel distributed a questionnaire on homosexuality and related issues to its representative sample of United Presbyterians. . . .

The Panelists' [largely negative] responses suggest that United Presbyterians' concepts about homosexual persons are based largely on Scripture, community standards, and church teachings and very little on either positive or negative personal experiences with homosexual persons. One may conclude that some United Presbyterians do not allow personal experience, whether positive or negative, to shape their views about homosexuality, that many have had no conscious contact with homosexual persons, and that some do not understand or admit to the sources of their attitudes and opinions. In any case it is clear that the majority of United Presbyterians operate with concepts (whether true or false) that are uninformed by personal experiences with homosexual persons.

A situation in which strongly held attitudes toward persons are based largely on abstract principle rather than on concrete experience is fraught with danger. Principle can become the captive servant of unconscious (or even con-

scious) social and psychological fears, in which case prejudice, discrimination, and oppression come to be practiced against persons in the name of principle. All too often, we believe, this circumstance occurs in Christians' relationships with homosexual persons.

What are some of the fears to which our principles may become sinfully enslaved? What are some of the dynamics of homophobia?

First, many heterosexual persons see in homosexual persons a mirrored image of impulses they feel -- and fear -- within themselves. Kinsey's famous studies call attention to the surprisingly large number of heterosexual people who experience either incidental or more than incidental moments of homosexual attraction, arousal, or behavior. Such persons' fear of and guilt about their own seductibility may lead only too readily to their projecting basic responsibility for their feelings onto predominantly homosexual persons, labeling them "seducers."

Second, many heterosexual persons experience homosexual persons as a threat to their gender identity. Homosexual persons may not act the way "real" males or females "should." For some heterosexual males, tenderness, lessened competitiveness, and emotional intimacy with other men do not belong to an acceptable male gender scheme. Insofar as homosexual persons model such unacceptable behaviors, they become "perverters."

Third, many heterosexual persons experience discomfort and pain in their marriage relationships. Divorce is rampant. The temptation to divorce is epidemic. A number of marriages are held together not by love but by the residual fear that divorce is morally wrong. For those who genuinely value the family and believe it to be a guarantor of social stability but who also experience joylessness and pain in their own particular marriage, it is all too easy to experience guilt-ridden jealousy of those who seem to be "free" -- such as the single, the "swinger," and the homosexual. And from within such guilt-ridden jealousy it is all too possible to project basic responsibility for the family's inner dis-ease [sic] onto

those, like the homosexual person, who stand outside, labeling them "subverters."

Fourth, some people's desire for children arises in part from a fear of death and a desire to achieve some measure of immortality through offspring. Anyone such as a homosexual person who has no apparent need for children may pose a psychic threat to these people. In defense, they may imagine that the homosexual person really does desire children -- secretly; and they may project onto him or her a need, in lieu of natural offspring, to abduct, seduce, or molest other people's offspring.

These four cases by no means account for all of the possible dynamics of homophobia. However, they do illustrate some of the irrational and dishonest dimensions of fear and guilt that all too often captivate our principles. The church must confess its homophobia and be healed of it so that homosexual persons may be approached with grace rather than guilt, with love rather than hate, with compassion rather than fear, with justice rather than oppression.

. . . United Presbyterians, whether or not we believe all homosexual behavior to be sin, hold common commitments to the separation of church and state; to the preservation of a realm of private morality subject to religious or ethical conscience rather than to criminal law; to the right of a privacy free from surveillance by the state; to the right to freedom from invidiously discriminatory applications of law; to the protection of the legitimate rights of minorities; to the worth and dignity of each person as a child of God; and of Christ's commandments to show love, compassion, and justice toward neighbors, including those we may not like or of whom we may not "approve." These common commitments summon us to work actively both for the decriminalization of all private sexual acts between consenting adults and for legislation guaranteeing the rights of all persons -- regardless of sexual orientation -- to employment, housing, and public accommodations.

In 1973, the National Opinion Research Center of the University of Chicago conducted its annual survey of social attitudes. This survey had over 1,500 respondents. Previous surveys of this organization had asked respondents if they would allow admitted communists, socialists, or atheists to speak in their home towns, if they would support the removal of books by such people from their local libraries, and if they would allow these dissenters to teach in colleges and universities. The 1973 survey included homosexuals in the list of dissenters; it also included questions to test respondents for racism and sexual puritanism. A paper delivered at the 1974 Annual Meeting of the Amercian Political Science Association analyzed the data. The paper was later published under the title "Homophobia: Illness or Disease?"[695] The data indicated a strong correlation between racism and homophobia:[696]

- 56.6% of those who would strongly object to a black person coming to dinner oppose all gay rights, while 84.7% of those favoring all three rights for gays do not object to a black person at dinner.

- 78% of those opposing open housing laws oppose all gay rights, while 51.8% of those favoring all gay rights favor open housing laws.

This aspect of the study caused the author to remark, "These data, combined with the absence of racial differences in support for gay rights, should give pause to the black politician who argues that his 'community' does not support gay rights. Not only do blacks support gay rights as much as whites, but the whites who are most likely to support the rights of blacks are those who support gay rights. These politicians ought to be able to recognize a civil-rights issue when they see one and to know where to cultivate a civil-rights coalition."[697]

In addition to the findings that race, sex, and marital status are unrelated to homophobia, and that racism and sexual puritanism are strongly connected to homophobia, the study demonstrated that the two demographic variables which were the most strongly related to homophobia were age and education:[698]

- 62.7% of those under 30 support all gay rights, while 52.6% of those over 60 support no gay rights.

- 71.9% of those with graduate education support all gay rights, while 46.3% of those with less than a high school education oppose all gay rights.

The author concluded his article with the following comments:

> This paper is by its own definition a study of homophobia. It has found that there is little meaning in separating gay rights from other civil rights. It also found that support for civil rights and liberties is surprisingly related to the trend toward the youth culture and the new morality. Many aspects of opposition to gay rights and civil rights in general take the guise of 'protecting youth' from 'corrupting' influences. These corrupting influences range from college teachers who are atheists or homosexuals to blacks who are in the neighborhood or (worse) at the dinner table, to the legalization of abortion or the use of marijuana. More recent data currently being analyzed (1974, 1976) indicates that by 1976 a clear majority supported all gay rights, and that there was a slight decrease in the disapproval of homosexuality.[699]

The Commission on Personal Privacy is convinced that homophobia (an irrational fear of homosexuality) is a primary cause of sexual orientation discrimination. This fear is nurtured by myths and stereotypes about lesbians and gay men and is perpetuated by ineffectual communication.

Homophobia is a serious social problem which poses a threat not only to the right of personal privacy but also to the very essence of our constitutional democracy which is premised on equality of opportunity.

• • •

MYTHS AND STEREOTYPES

"I have my mind made up -- so don't confuse me with the facts." Many people have their minds made up on the subject of homosexuality. Their concepts about homosexuality were formed rather early in life in subtle and not so subtle ways. The fact that homosexuality was not to be the subject of conversation within the family told them something. The fact that their peers told "queer" jokes or otherwise spoke in a derogatory way about homosexuals told them something. The fact that virtually no one admitted to being a homosexual, much less having homosexual feelings, also told them something. What many, if not most people, learned very early in life was that homosexuality was a taboo subject and that homosexuals were to be avoided, distrusted, feared, or hated. The natural inference that any young persons of average intelligence would draw from such silence or negativism would be that, at all costs, they should not be homosexuals themselves, or, if they were, they had better not admit to it.

It is in this context -- fear, denial, avoidance, and silence -- that misinformation about homosexuality has been handed down through the generations. Few people have dared to stand up and challenge the derogatory information which has been disseminated. Those who have questioned the so-called absolute truths about homosexuality have often been the targets of ridicule, discrimination, and even violence.

The following section of the Report explores some of the major myths and stereotypes which are the generic threads of much of the misinformation that are woven to form the fabric of homophobia out of which the garments of discrimination are sewn.

THE COMMISSION RECOMMENDS that the California Department of Education prepare and distribute a booklet entitled "Myths and Stereotypes about Homosexuality." A booklet of this nature was prepared by the Pennsylvania Department of Education and has been very well received as an educational tool in that state. The Commission finds that such a booklet is needed in California for use both in the public and private sectors.

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MYTH: Gays are an Insignificant Minority

Those who perpetrate and those who seek to perpetuate sexual orientation discrimination often claim that lesbians and gay men comprise an insignificant percentage of the population. So why all the fuss, they ask, when only a few people are being treated in a manner which has been historically accepted?

Even if only a small number of people were being affected by unjust discrimination, this would not change the fact that invidious discrimination is unjust -- regardless of whether ten people or ten million people are victims. Nonetheless, since this myth is often used as a rationale for not ending discrimination, it merits discussion here.

Ever since Alfred Kinsey did his famous studies on the incidence of male and female homosexuality, this first myth has been demonstrated to be false.[700] Kinsey's original research, based on a sample of over 12,000 persons, indicates that:[701]

- 37% of the total male population had at least some overt homosexual experience to the point of orgasm between adolescence and old age;
- 50% of the males who remained single until age thirty-five had had overt homosexual experience;
- 13% of the male population had more homosexual than heterosexual experience between the ages 16 and 65;
- 18% of the male population had at least as much homosexual as heterosexual activity;
- 4% of the male population were exclusively homosexual throughout their lives;
- 28% of the female population reported homosexual arousal or orgasm by age forty-five;
- Less than 3% of the female population were exclusively homosexual throughout their lives.

More recent statistics provided by the Kinsey Institute in 1977, as well as the findings of other researchers, indicate that lesbians and gay men constitute approximately 10 percent of the American population,[702] and that, taking into account the population of the state there may be over two million lesbians and gay men residing in California,[703] -- not an insignificant number.

MYTH: Gays are not Victims of Discrimination

Often, when lesbians and gay men have sought legislative protection against sexual orientation discrimination, opponents have argued that valuable legislative time should not be wasted on something that is not really a problem. Opponents demand proof that sexual orientation discrimination exists.

The Commission's research and the experience of individual Commissioners have demonstrated that lesbians and gay men, and persons believed to be homosexual in orientation, have historically been and continue to be the victims of unjust discrimination. Discrimination has taken the form of intimidation and sometimes fatal violence; employment discrimination, including active "witchhunts" for gays in civil service positions; exclusion and deportation of immigrants; exclusion and discharge from the military; surveillance by police and investigative agenices; arrest and incarceration for private sexual conduct with consenting adults or for public displays of affection; denial of government benefits; loss of custody and visitation of natural children; higher taxation; judicial intolerance; discriminatory enforcement of the law; police harassment; unfair treatment by public accommodations and private businesses, such as health care facilities, nursing homes, insurance companies, financial institutions, and entertainment facilities.

Accusations of "gay genocide" have been documented by research and historical evidence. Professor Louis Crompton of the University of Nebraska recently published an article entitled "Gay Genocide: From Leviticus to Hitler."[704] Professor Crompton introduces his evidence with the following remarks:[705]

> The word genocide can as properly be applied historically to society's treatment of gay people as to any of these other groups [Jews in Nazi Germany, American Indians, Armenians exterminated by Turks, certain Protestant sects]. For an astonishing length of time -- no less than 1400 years -- homosexual men and women in western society stood under a formal sentence of death, and were, in consequence, systematically killed or mutilated. But there has been no public account of this crime against humanity, all but unparalleled in its relentless use of sanctified legal traditions, and in its continuance century after century.

> This is because there has been no "gay history" as there has been a history of the Jews, of the Blacks, of the Indians, and of Christian sects. "Straight" historians have been inhibited from writing on the subject by the taboo which made it "unspeakable," "unmentionable," and "not fit to be named among Christian men." Gay historians, who might have had a greater incentive to record the martyrdom of their brothers and sisters have been restrained by this convention, and something more: the fear of ceasing to be invisible. Suppose western civilization had killed off its Jews, declared Jewish people to be unmentionables, and discouraged any record from being kept of anti-Jewish pogroms. Suppose the reign of terror had been so complete that Jewish communities and culture had vanished and no one dared publicly identify himself as Jewish or dared speak, without the most elaborate precautions, to someone he thought might belong to this minority. Suppose in addition that Christian scriptures contained an unequivocal law to the effect that all Jews must be killed as practitioners of "abominations." The histories of oppression that today contain chapters on the persecution of Protestants, Catholics, witches, and heretics, would no doubt be silent about the Jews, just as they are now silent about homosexuals.
>
> Can this chapter of gay history be written at all, given the centuries' old conspiracy of silence? I would like to suggest that it can, and to make a first tentative effort towards filling in the blank pages in our history books.

Professor Crompton documents genocidal laws of this nature which existed in Europe as late as 1885. These laws established a tradition of torturing persons who committed homosexual acts by castrating or dismembering them, or killing them by stoning, burning, hanging, or burying them alive. Professor Crompton explains:[706]

> [T]he authors of the "Holiness Code" in the Book of Leviticus inscribed what was to prove the most fateful statement ever written, anywhere, on the subject of homosexuals. In a bare twenty words they wrote an edict that was to have immense influence on western law-making in Chris-

tian times: "If a man also lie with mankind as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death." The punishment for such an act in the Old Testament times was stoning to death. . . .

This was an unequivocal policy of gay genocide, and following the adoption of Christianity as the official state religion of Rome it became the legal policy of Christian Europe until the French Revolution, and of North and South America as long as they were under European control.

. . . The first imperial edict condemning gay men to "exquisite punishment" was issued in 342 A.D., five years after Constantine's baptism and death, in the name of his sons Constantius and Constans. This law reflected the vehement anti-gay policy of Paul and the Church Fathers, who, when the question of civil punishment arose, took positions that were genocidal. Then fifty years later, in 390, Theodosius, the first Christian emperor to decree the death penalty for heretics, passed a law condemning homosexuals to be burnt at the stake. In the same year Theodosius' governor at Thessalonika in Greece arrested a popular charioteer for a minor homosexual offense and jailed him. The Thessalonikans rioted and killed the governor. Theodosius, disguising his wrath, invited the citizens to games at the stadium, hid soldiers in the stands and massacred more than 7,000 of the spectators. . . .

The so-called Etablissements of St. Louis, issued about 1270, prescribed that "If anyone be suspected of bougrerie, he shall be taken to the Bishop, and if he is proved guilty, he shall be burned." "Bougrerie" or "buggery," at first meant heresy, then usury, and finally homosexuality. This law was in force in France until the end of the eighteenth century. Justinian's famous edict of 538, which, on the analogy of the Sodom story, blamed homosexuals for the plagues, famines, and earthquakes that had recently beset the Byzantine empire, seems, according to the accounts of Procopius and Theophanes, to have been part of a systematic campaign of terrorism unleashed against homosexuals by the Emperor. Because of the prestige of Justinian's famous code, it also

had great influence on later legislation. The earliest legal treatise that touches on the subject (a work called "Fleta," written about 1300) prescribes an unorthodox penalty: "Those who have connection with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground." A marginal note in another English treatise of about the same date indicates the role the clergy were to play in identifying gay people for punishment - "The Inquirers of Holy Church shall make their inquest of sorcerers, sodomites, renegades and misbelievers" and if they find any such, they shall deliver him to the king's court to be put to death — in this case, by fire. The religious nature of these ordinances is clear enough. But even after Parliament passed a civil statute in 1533 making gay love a felony with hanging as its penalty, commentators like Coke and Blackstone always stressed the religious origin of the law. Coke's Institutes tell us the traditional English endictment was "grounded upon the word of God," and Blackstone, in his Commentaries of 1765-69 says this crime is one which "The voice of nature and of reason, and the express law of God, determine to be capital, of which we have a signal instance . . . by the destruction of two cities by fire from heaven."

On the continent, Spanish law had originally condemned homosexuals to castration and stoning to death. Ferdinand and Isabella, orthodox in all things, changed the penalty to burning. A generation later, Ferdinand's grandson, Charles V, then Holy Roman Emperor, set forth in his Constitution of 1532 an order that also explicitly condemned not only male homosexuals but also lesbians to the flames: "If a man commit unchastity with a beast or man, or a woman with a woman, they have forfeited their lives and shall be condemned to death by fire in the usual fashion." According to an eighteenth century French legal encyclopedia, "The Swiss exercise extraordinary rigors against men guilty of this crime. They cut off one limb after another in the course of several days -- first an arm, then a thigh; when the body is a lifeless trunk it is thrown on the fire." These genocidal laws remained in the criminal codes in France until 1791,

in England until 1861, and in Scotland as late as 1885.

Professor Crompton also addressed the official treatment of gay people in the United States:[707]

> What of the United States? To what extent were gay people subject to the death penalty in the American colonies? Copies of early American colonial codes are obscure and hard to come by. To date, I have seen nothing about this subject in any book on homosexuality. In 1641, however, Massachusetts Bay Colony promulgated its famous "Body of Laws and Liberties," the prototype for much later Puritan legislation. Among the twelve capital crimes — which include idolatry, witchcraft, and blasphemy — is lovemaking between men. The language, however, is not that of English law, that is, of Henry VIII's statute of 1533. Instead, the Puritans go "back to the Bible" with a vengeance, and actually legislate Leviticus verbatim: "If any man lyeth with mankinde, as he lyeth with a woeman, both of them have committed abhomination, they both shall surely be put to death." So, with language 2200 years old, America's first settlers condemned their gay sons to death, and in the case of a 1656 New Haven statute, their Lesbian daughters. This Old Testament formula was adopted by the colonies of Massachusetts, Connecticut, New Hampshire, New York and Pennsylvania. Only the Quakers revolted and showed a momentary flash of Christianity. In 1682, William Penn's reform code reduced the penalty for same-sex relations to six months' imprisonment. But in 1700, Pennsylvania re-introduced capital punishment for sodomy in the case of Blacks, and eighteen years later, under English pressure, for all men. After the Revolution, Pennsylvania led the way in abolishing the death penalty in 1786 and other states began to follow suit in the next decade.
>
> This should be ample to suggest the Reign of Terror gay people faced in Europe and America for almost a millennium and a half. The consequent demoralization, the isolation, the lack of community and common culture can be imagined: we are only beginning to overcome these effects now. Officially, all Christian states were genocidal. In theory at least, the

status of the homosexual was even worse than that of a Jew or heretic. Not all Christian countries condemned Jews to death, or exile, and a convicted heretic could escape the flames by recanting.

Professor Crompton also documented the fact that death penalty laws for homosexual activity were not merely theoretical but were actually enforced. He produced evidence of executions in Spain, France, Holland, England, and even in the United States. With respect to England, he stated, "[S]ystematic executions of gay men actually continued into the nineteenth century, and are recorded in government statistical tables."[708] The article is concluded with an account of gay genocide in the twentieth century:[709]

> I have now to justify my title by bringing my account of the history of gay genocide down to the twentieth century and Hitler. The Nazi treatment of homosexuals has gone all but unrecorded in standard histories. A number of books in German touch on the subject but almost nothing has appeared in English. . . .
>
> On June 28, 1935 . . . the Nazis began a legal campaign against homosexuals by adding to Paragraph 175 another law, 175a, which created ten new criminal offenses, including kisses between men, embraces, and even homosexual fantasies! Arrests jumped from about 800 to 8,000 a year. More important, the Gestapo entered the picture. In 1936, its leader, Heinrich Himmler, who was violently anti-homosexual . . . declared: "Just as we today have gone back to the ancient German view on the question of marriage mixing different races, so too in our judgment of homosexuality — a symptom of degeneracy which could destroy our race — we must return to the guiding Nordic principle -- extermination of degenerates."
>
> Himmler soon found means to put his extermination campaign into action. Following release from prison, homosexuals were now declared "enemies of the state" and placed in "protective custody." The latter expression was a euphemism for relegation to a concentration camp.
>
> Himmler gave orders that homosexuals be sent to level 3 camps -- death mills to which Jews were also consigned.

In 1937, the SS newspaper, Das Schwarze Korps estimated that there were two million homosexuals in Germany and called for their extermination.

How many perished? We know that more than 50,000 homosexuals were arrested under paragraphs 175 and 175a during the Nazi terror. In addition, the Gestapo sent many more men to camps without a trial. Homosexuals who had come to the attention of the police prior to the Nazi era were also apprehended and police lists of suspected homosexuals were used. (The Berlin police had an index of 20,000 names.) Homosexuals were also seized in occupied countries such as Holland and Poland and sent to Germany. Estimates of the number of deaths have varied from 100,000 to 400,000. Since many Nazi records were destroyed, it will probably never be possible to reach a final determination in the matter.

After the war, survivors of Hitler's concentration camps were in the main treated extremely generously by the post-war German government in the matter of reparations. Homosexuals, however, were told they were ineligible for compensation since they were technically "criminals." (The Nazi laws were not repealed until the Social Democratic Party came to power in 1968.) Most of those who survived kept their experiences secret for fear of further discrimination.

Professor Crompton concluded his article with the following comments:[710]

The irony of this situation hardly needs pointing up. It is over-whelming. For 14 centuries, western civilization, acting in the name of religion and morality, perpetrated a monstrous crime against its homosexual minority. It was in effect the "perfect crime." Death warrants were, so to speak, issued with God's signature attached to them, torture (as Beccaria, Lea and others tell us) was freely employed to obtain confessions, the victims were labelled "unspeakables" and "unmentionables" and their sufferings were a subject about which silence was rigorously prescribed. Friends, relatives,

and lovers who had some insight into these situations were intimidated by what may be called, without exaggeration, an unrelenting reign of terror.

Religion and morality are institutions that have commanded the respect of the world in a way that Hitler has not. Yet Hitler only put into practice what Christianity had preached for thousands of years. That survivors of the campaign of torture and extermination should, by and large, be as silent about their ordeals as the men of the sixth or sixteenth centuries, dramatizes more poignantly the dilemma of the homosexual than any other fact that I can think of.

Those who argue that this pattern of gay genocide has ended need only refer to the present theocratic regime in Iran, which as recently as last year put gay people to death on account of their sexual orientation.[711]

A recent statement made by a spokesperson for the Moral Majority in Santa Clara County emphasizes the dangers of a theocratic approach even in California:[712]

> I agree with capital punishment, and I believe that homosexuality is one of those that could be coupled with murder and other sins.

In addition to historical silence regarding systematic oppression of lesbians and gay men, a second dynamic helps to perpetuate the myth that sexual orientation discrimination does not exist: short memories.

Professor Martin Duberman, who teaches "The History of Radical Protest Movements" and "The History of Sex Roles and Sexuality" at City University in New York, discussed this problem in an article entitled "Hunting Sex Perverts."[714]

> In the two seminars I teach at City University . . . we've recently been discussing the feminist and gay movements. At one point I made allusion to the Family Protection Bill. Blank stares. The what bill? Two of the students (out of 45) vaguely recalled hearing something about it, but were at a loss to say just what.
>
> Ignorance of the bill is not confined to students at CUNY (whose average age, incidentally, is 25). The national media have done almost nothing to publicize the bill's provisions

— or, for that matter, to call attention to a number of other ominous recent governmental initiatives and interventions, such as the MacDonald amendment, the denial of immigration rights and legal aid services to gays, the hardened line against allowing gay people to join the armed forces. The media has given considerable attention to that fount of homophobia, the Moral Majority, but has not sufficiently detailed and emphasized its bottom-line goals: to put the patriarchs firmly back in power, women back in the kitchen, children back in Bible class, blacks back in line — the unemployment line — gays back into the closets (air-tight ones, to encourage asphyxiation).

The gay press has done an infinitely better job than the national media in keeping us informed of the Far Right's agenda. Unfortunately, only a fragment of the gay population reads the gay press. Of those who do, I've heard any number shrug off the Moral Majority's goals as too "farfetched" to warrant alarm: "Mainstream America would never buy so far-out a program. Besides, we gays are now too well established, have too much money, political clout — and allies — to be easy prey for oppression."

Perhaps. But I keep hearing those Jewish voices in Germany in the thirties: "We're too well-integrated into the society, too powerful in our influence, to worry unduly about the frothings of the lunatic fringe." Knowing the fate of the Jews, we're denied the comfort they took, the faith they placed in conventional safeguards -- or in human "reason" and "compassion." Still, the ostriches among us have a fallback position: all <u>that</u> took place in Germany. This, after all, is the United States. It couldn't happen here. Wrong. It already has -- not merely repression, but genocide. Ask Native Americans. Ask blacks.

True, there never has been in this country a systematic, explicit, state-sponsored program for the mass repression/extermination of gay people. Yet the necessary preludes for such a policy -- official denunciation and harassment — have long (some would say always) been present; homophobia, along with baseball and apple pie, are among the few constants in

our history. Harassment has had its ebbs and tides. In the twentieth century the highest tide came in 1950-55, when Senator Joe McCarthy spearheaded a drive to eliminate "perverts" and Communists from positions in Government, to break their "stranglehold" on the State Department and other federal agencies.

Try mentioning the McCarthyite witch hunt and purge to your gay friends. If your spot poll is anything like mine, the most common response you'll get is a vague flicker of recognition — along with a campy rebuke for always being so heavy. I doubt that such a remarkable and unwarranted equanimity could be maintained if gay people would read the actual words spoken in Congress (and elsewhere) thirty years ago, the startling sweeping, unqualified denunciations of our "degeneracy." Proceeding on the tired and admittedly pedagogical cliche that "knowledge is liberating" can convert somnambulance to wakefulness. I'd like to introduce you to some small portion of the vitriol against us which poured forth in the early fifties.

On the following pages are reprinted portions of Senate Document No. 241, published in the 2nd Session of the 81st Congress, which may serve to rebut the myth under discussion: