The Private Lives of Public Employees

Robert M. O'Neil
Indiana University School of Law - Bloomington

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John Jerome Bruns III wanted very much to be a policeman. His qualifications seemed impeccable. When he took the civil service examination required by the City of Baltimore of applicants for municipal employment, he achieved the highest score among candidates for the police force. Detailed inquiries into his background revealed an exemplary record, a reputation for integrity, and the high esteem of neighbors and friends. Most law enforcement agencies would have been eager to have such an applicant for a patrolman’s position.

There was, however, one catch: during the initial interview with a senior member of the force, Bruns volunteered that he and his wife were members of Pine Tree Associates, Inc. The organization was a nudist club, maintaining a camp to which members repaired for sunshine and congenial company on weekends and holidays. After learning of this rather unusual affiliation, the Baltimore Police Department decided not to recommend Bruns’s appointment, even as a probationary patrolman. Though he had passed the character and background check as well as the written exam with flying colors, the idea of having a practicing nudist on the force was anathema to the administration.¹

Undaunted by the rejection, Bruns sought redress in federal district court. The case was clearly one of first impression, for there were no precedents defining the rights of nudists to seek public employment or other government benefits. The three-judge court at length held that Bruns had been denied employment on a constitutionally impermissible ground.² In the absence of any proof that association with nudists

¹ During the background check, the credentials of Pine Tree Associates had been found beyond reproach. The group was fully accepted, even by immediate neighbors of its rural camp, and had apparently caused no problems in the community. The membership was impressive, including an Army general, an Air Force colonel, teachers, federal employees, and, ironically, a respected, ranking member of the Baltimore Police Department, whose penchant for sun worship had been a well-kept secret. Perhaps most important, those activities of the association that took place without clothing were completely private, thereby avoiding any possible illegality.

would impair his effectiveness as a patrolman—a reluctance, for example, to wear clothing on the job or to enforce laws against indecent exposure—the city's interest in barring him from the force was tenuous at best. But the individual interests on the other side of the balance merited constitutional protection, principally freedom of association under the first amendment for which the Supreme Court had frequently upheld claims of public employees. To be sure, the district court acknowledged that a policeman's role was an unusually sensitive one which might warrant some restrictions not appropriate to other callings. But no claim advanced by the Baltimore Police Department justified either a blanket rule against employing nudists or rejecting an applicant solely because of his membership in a nudist club.

The case is unique, but the issues it raises have growing importance. During the past decade, the courts have steadily expanded the political rights of government employees to be free of burdensome loyalty oaths, to speak out against government policy without reprisal or penalty, to invoke the privilege against self-incrimination, and to participate in political organizations. Little attention has been given, however, to the private side of the government worker's life. Largely neglected by scholars as well as courts has been the whole matter of life style, not only how the government employee spends his hours off the job, but to some extent how he looks and how he behaves on the job. Neglect of these issues cannot continue much longer. Confrontation, and therefore litigation, is made inevitable by the progressive divergence between the tastes, mores, and appearances of younger public employees and the expectations of older supervisors and agency heads who set the standards. The resolution of these expanding spheres of conflict is the central concern of the present article.

THE CLASH OF VALUES: A SURVEY OF CURRENT PROBLEMS


ordered in 1970 to shave off the vandyke beard he had worn for five years, was startled to discover an 1842 general army order which required all officers to wear beards. Presumably the commandants of that time enforced that rule with a vigor to match the contemporary insistence on clean-shaven chins. Perhaps the difference is that no clean-shaven officer of 1842 would have thought he could seriously claim constitutional protection for not wearing a beard. Today, resort to the courts is within the realm of possibility, as the suit recently filed by the bearded Illinois reservist suggests.

Even contemporary comparisons reveal anomalies. About the time that a bachelor New York policeman was suspended for living with his girlfriend, a Detroit policewoman was fired for refusing an order to play the role of a prostitute as part of her duties. A social worker in California was fired several years ago for refusing to take part in unannounced predawn raids on the homes of clients, though countless public employees have been fired precisely because they violated the legal rights of those whom they were supposed to serve. Then there is the curious case of the 29-year old unmarried Air Force captain who was threatened with dismissal from the service for giving birth to a child at a time when being married virtually disqualified women for many of the choicest posts in the Foreign Service. The list of paradoxes could be lengthened substantially, but these few samples should suggest that government regulation of its workers' private lives is not always completely rational or consistent.

"Life style" of course encompasses many varied attributes of behavior and character. But there are several areas in which the problems have been recurrent and especially serious, at least to the extent that published reports and litigated cases are reliable indicators. At the outset, therefore, it may be helpful to review recent cases under these rather broad headings: symbolic and nonverbal expression of social and political ideas; hair style and length; homosexual involvements; heterosexual involvements; extracurricular writings; and criminal acts or prior records. The survey that follows is necessarily somewhat superficial and selective.

**SYMBOLIC AND NONVERBAL EXPRESSION.** The Supreme Court has firmly, if recently, established the constitutional right of a public employee to speak out publicly against governmental policy or practice.  

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10 See N.Y. Times, Aug. 16, 1971, at 17, col. 5-6.
11 Pickering v. Board of Educ., 391 U.S. 563 (1968). For later applications of
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Still far from clear, though, is the extent to which the Constitution affords comparable protection to the civil servant who uses subtler means to convey his views. A San Francisco postal worker was fired several years ago for wearing a peace button with the inverted "Y" symbol. Recently a municipal bus strike in Pittsburgh was touched off by the firing of a driver for wearing a "Free Angela Davis" button. A school teacher in Addison, New York, and a postal worker in Mt. Prospect, Illinois, were fired for wearing black armbands to work on the very same day, the occasion of the November 1969 anti-war moratorium. A black social worker in San Francisco was suspended for placing on his office wall a poster which championed the cause of Angela Davis, Eldridge Cleaver, and H. Rap Brown. Reprisals for such symbolic expression are not confined to the political left: transit policemen in New York City, for example, have faced discipline for wearing on their uniforms small pins containing the American flag. A few of these cases have reached the courts. Others have been settled within the agency, occasionally by changing the regulation. Many others have doubtless gone unreported.

HAIR LENGTH AND STYLE. As men's hair has become longer and whiskers more evident, government has increasingly assumed a role of surrogate barber. There are now countless cases of public employees in a wide variety of positions having been reprimanded, suspended, or fired for allowing their hair to exceed a certain length: policemen, for example, in New York City, Alabama, and California. School teachers


16 Had they simply failed to report to work on that day, the consequences probably would have been far less grave.
19 N.Y. Times, June 14, 1971, at 66, col. 4-6; id., Nov. 18, 1970, at 20, col. 1; San Francisco Chronicle, Nov. 13, 1970, at 8, col. 7-8. The problem is not exclusively a domestic one. Twelve streetcar conductors in Blackpool, England, were recently fired because their shoulder-length hair evoked complaints about their "untidy" appearance. San Francisco Examiner & Chronicle, Sept. 12, 1971, § B,
in California, Florida, and Massachusetts have been told they may not wear beards, no matter how neatly trimmed.\textsuperscript{20} Sometimes the canons of hair style have governed even the length of sideburns. An FBI agent in Alexandria, Virginia, a fireman in Coral Gables, Florida, and a city hall worker in South San Francisco, California, were transferred or threatened with dismissal for letting their hair grow below the earlobes.\textsuperscript{21}

Government concern about hair style has carried even beyond the public sector. Throughout the state of California, and perhaps elsewhere, unemployment-compensation offices have been declaring long-haired young persons ineligible for benefits despite sworn statements that each was available for work and had diligently sought a job.\textsuperscript{22} One recent case shows how the process works. Late in the spring of 1971, a long-haired young man walked into the California state unemployment-compensation office in Van Nuys, told an interviewer he was an over-the-counter stock trader who had sought but could not find work, and filled out the application forms for benefits. Though he had the requisite experience and declared himself available for work, the applicant's eligibility was challenged at once by the interviewer because of the length of his hair and the style of his dress. The assistant manager of the office came out to inspect and remarked, "To tell you the truth, he looked like a slob, by my way of thinking, and he didn't look like the kind of person who would create a favorable impression." But further inquiry revealed that the applicant's experience involved mostly handling telephone orders. Accordingly, the interviewer's judgment was reversed, and the young man was declared eligible for benefits.\textsuperscript{23} This case suggests that government benefit programs may extend canons of dress and hair style well into the private sector, substantially beyond any concern with how people look while performing government services.

\textbf{HOMOSEXUAL ASSOCIATIONS.} A single casual involvement with a person of the same sex may permanently disqualify a person for certain


\textsuperscript{21} Chicago Daily News, June 18, 1971, at 14, col. 1-2; Lindquist v. City of Coral Gables, 323 F. Supp. 1161 (S.D. Fla. 1971) ; San Francisco Chronicle, Aug. 19, 1971, at 4, col. 1-5. The California Unemployment Insurance Commission appeals board recently ruled that men with long hair are not eligible for benefits when most employers in the applicant's location will not hire men with long hair. N.Y. Times, Jan. 9, 1972, § 1, at 52, col. 3-4.

\textsuperscript{22} See Bernstein, State Unemployment Officials at Odds on Hair, Dress Rules, Los Angeles Times, June 1, 1971, § 1, at 3, col. 2-3.

\textsuperscript{23} Id.
types of public employment, not because of a particularized judgment about the vulnerability of homosexuals in certain sensitive positions, but often because of a general rule or administrative intuition. Matters have recently begun to improve. The New York City Civil Service Commission, for example, announced in 1969 that homosexuality will no longer disqualify applicants for most municipal jobs. But the disability remains a serious and substantial one elsewhere. Federal civil servants in a wide range of positions, a librarian at the University of Minnesota, a California public-school teacher, and a security-clearance holder in private employment, have been fired, sometimes on the basis of a single incident with another consenting adult. It is especially difficult to determine the extent and nature of this problem. Despite the recent emergence of the Gay Liberation Movement and the far greater willingness to acknowledge openly a homosexual experience or tendency, the general stigma and the practical consequences of such candor are probably still sufficient to keep most reprisals in the public sector from the press or the courts. It is only the extraordinary case that comes to light and reveals the continued existence of the problem.

HETEROSEXUAL ASSOCIATIONS. If relations with the same sex can disqualify a government worker, one might suppose pursuit of the opposite sex would be rewarded, at least so long as no laws were broken. This has not been so, however. A postal clerk in San Fran-


25 N.Y. Times, May 9, 1969, at 1, col. 2. Mayor Lindsay has issued a directive, overriding the city council, against bans on hiring homosexuals for New York City agencies. Cincinnati Post, Feb. 11, 1972, at 25, col. 2.


cisco, an FBI agent in Washington, a policeman in New York City—all bachelors—were recently fired merely for having shared quarters with women to whom they were not married. A junior-college teacher in California was dismissed for living with a former female student after helping her to obtain a Mexican divorce of dubious validity. A colleague at another junior college was fired after being caught in an automobile with a female student, flagrante delicto, shortly after their evening class. There are doubtless hundreds of such cases, most of them withheld from the press and the courts because of the obvious indelicacy of disclosure.

EXTRACURRICULAR WRITINGS. The public employee who writes a letter to the local newspaper attacking the policies of his superiors is now protected, at least short of false and malicious charges. Seemingly less subversive literary activities have, however, led to the discipline of government workers. Several years ago a school teacher in northeast Ohio wrote a series of letters to a former male student, the language of which was later described by a sympathetic judge as “gross, vulgar and offensive” to many adults. When the letters came to the attention of the superintendent of schools, the teacher was fired. About the same time, a school-bus driver in California was fired because he had lent his name to a bizarre, and nearly unintelligible, semi-religious tract written principally by his brother-in-law. There have been several such causes célèbres in higher education: the dismissal of Professor Leo Koch from the University of Illinois for writing to the student newspaper a letter which appeared to advocate premarital intercourse among undergraduates, and the firing of Professor Mulford Q. Sibley from the University of Minnesota for suggesting in a similar letter that

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35 Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971). The teacher had also assaulted the officer who discovered the couple, so it is uncertain whether his sexual activity alone triggered his dismissal.
36 Legend has it, for example, that the only transgression for which a tenured member of the Harvard faculty can be fired is being caught in bed with a Radcliffe girl. See Cottle, The Pains of Permanence, in Academic Tenure (B. Smith ed., to be publ. 1972). There is no reliable count of the number of dismissals, if any, resulting from such an infraction.
the campus should have a broad range of student organizations, includ-

ing "a Communist Club . . . a Society for the Promotion of Free Love, a
League for the Overthrow of Government by Jeffersonian Violence
and perhaps a nudist club."41

Most recently a Los Angeles policeman of impeccable record nearly
lost his job by writing a best-selling novel about law enforcemen
t.42 The manuscript was submitted to the Chief essentially as a courtesy,
not because of a departmental regulation requiring official "clearance"
of public statements by members of the Force. The author and the
publisher declined to make certain changes suggested by the Chief,
feeling the "clearance" rule had no possible application to fiction. The
author-officer was sternly reprimanded, but allowed to continue on his
beat.43

These and other recent cases suggest a paradox: the public employee
today may get himself into more serious trouble by expression of views
remote from his job than by attacking his superiors in the local paper.
The latter is constitutionally protected within broad limits; the legal
status of the former is doubtful. Yet the writing unrelated to the job
more likely expresses the employee's private feelings, however un-

 orthodox. In short, these writings much more probably reflect in some
way his style of life and personality.

CRIMES COMMITTED OFF THE JOB. A wide range of criminal acts,
both before and during the period of employment, may jeopardize a
government position.44 Where the offense is trivial, as is a parking fine
or minor traffic conviction, the agency may require it to be listed on
an application blank but is unlikely to consider it in assessing eligibility
for most jobs. The situation is properly different, of course, where the
infraction relates to job competence; a traffic offense that can be wholly
disregarded in the case of an accountant, teacher, or clerk may acquire
considerable importance when the offender seeks employment as a truck
or bus driver. Beyond those infractions that nearly every citizen com-
mits at some time, the situation is far less clear. The California State
Department of Education denied teacher's credentials to several Berke-
ley graduates convicted during the 1964 Sproul Hall sit-in.45 Despite
the reversal of these decisions by the Board, later reports indicated the

41 See Speech Ass'n of America, Comm. on Freedom of Speech, Freedom of
Speech Newsletter, No. 5, Apr. 1964, at 4.
43 Los Angeles Times, Jan. 8, 1971, § II, at 1, col. 2. Presumably his literary
triumph makes his modest patrolman's income less essential. It is worth specu-
lating how he might have fared if popular acclaim for his novel had not drawn
the attention of the press to the whole incident.
44 See Note, Employment of the Rehabilitated Offender in the Federal Service,
agency continued to deny credentials to applicants otherwise qualified, on the basis of a single conviction for a protest or demonstration. The California Education Department also revoked the lifetime credentials of a tenured teacher who was convicted of a single count of marijuana possession, and later refused to restore those documents when the teacher's conviction was expunged by the superior court.

The relationship between crime and public employment is as controversial as it is legally uncertain. When Mayor John Lindsay proposed during his reelection campaign that ex-convicts should be hired by New York City for youth guidance work, his principal opponent launched a bitter attack. When the Mayor of Detroit announced that felony convictions would no longer disqualify applicants for city jobs, even for the police force, the decision had to be justified by the urgent need to increase the proportion of racial minorities in municipal employment. Few other major cities have been so willing to relax a policy that typically still disqualifies an applicant at the threshold. Yet there are virtually no cases defining the rights of ex-convicts to public employment or other government benefits. The problem, one of profound importance for public administration and the civil service, has remained substantially beyond reach of the courts.

This random survey of public sector problems invites a series of generalizations. First, restrictions of the kind we have reviewed relate tenuously at best to the formal job qualifications. In many instances they are totally irrelevant: a postal clerk who lives with his girlfriend is not likely to be less efficient in sorting letters than one who lives with his wife. Nor is a fireman with long sideburns less able to put out fires than one with a crew cut. Where the relationship of the restriction to the job is arguably a bit closer—buttons and posters displayed during working hours, for example—the analysis becomes more difficult. We shall return to it later, of course.

Second, all the restrictions surveyed here reflect governmental attempts to use the power of employment to regulate the private lives—the basic expression of the personalities—of public workers. The political processes as well as the courts would check at once any serious attempt to intrude as deeply into the lives of ordinary private citizens. The view that such intrusions are permissible because of the employment relationship rests upon a notion that has long since been put to rest with regard to expression, political activities, and associations of government employees.

48 N.Y. Times, Oct. 22, 1969, at 1, col. 2; id. at 50, col. 2.
50 For general discussions of the doctrine of unconstitutional conditions, and the increasing circumscription of government's conditioning power, see R. O'Neil,
Third, these restrictions and intrusions have been largely unchallenged until very recently because they affect people at their most vulnerable points. It is one thing to admit publicly that one is a Communist, a concession, incidentally, which has never been a prerequisite to challenging in court a loyalty oath or disclaimer. But it is quite another matter to advertise that one has been fired because he is or is suspected of being a homosexual, an adulterer, or just an "oddball." Moreover, the primary concern of watchdog groups such as the American Civil Liberties Union, the American Association of University Professors, and the National Association for the Advancement of Colored People has been the political and civil rights and liberties of disadvantaged and harassed groups. Unorthodoxy unrelated to traditional forms of expression and association has understandably received a much lower priority. The ACLU, at least, has recently taken a stronger interest in the area of life styles, realizing that harassment of longhairs may reflect base motives and generate what look like vendettas against political radicals.51

Fourth, disqualification for appearance or life style seldom turns upon the sensitivity of the particular position held or sought, unlike political criteria which have generally differentiated between the potentially dangerous and the clearly innocuous civil servant. Indeed, the situations may even be reversed. There is evidence that a bureau chief may grow a beard, live with his girlfriend, or display provocative posters in his office with relative immunity, so long as the matter does not get out of hand or cause a scandal in the community. It is the applicant or the probationary worker, the one with no status or opportunity for redress, who suffers most from enforcement of constraints upon life style.

Fifth, the restrictions we have reviewed are typically uncodified. Disqualifications for unorthodox behavior or appearance usually invoke broad language such as "the good of the civil service" or "immoral conduct." Save perhaps for hair style and length, where some public agencies have been uncommonly precise, explicit rules against such departures from conventional norms are rare. Several factors may explain the reluctance to codify these standards. Regulations are of course


51 \textit{See} ACLU Activity Report, Dec. 1970-Feb. 1971, at 10-11. ("The trend in long-hair cases, a staple of affiliate legal dockets, is toward court rejection of governmental restraints on personal grooming, although a definitive Supreme Court ruling is not in the offing.")
made vulnerable, both in legislative bodies and in courts, by being made explicit; any agency head knows he can get away with much broader internal regulation by not defining his criteria and hoping that none of the victims of his unwritten rules complain. Moreover, to adopt a rule is to announce that a problem exists. The agency head who fears censure if superiors or legislators even suspect he is harboring homosexuals or longhairs may feel the wisest course is to withhold any official recognition of the matter, even to the point of not formally proscribing its existence or recurrence. Finally, these issues are of course relatively new. On the one hand, public workers are no longer as timid as they once were; with growing union membership and even threats of strikes to embolden them, civil servants now dare to be different in ways their fathers and grandfathers would not have contemplated. At the same time, the steady growth of the public sector, and the parallel shrinkage of the private sector in some areas such as education, have brought into government employment many persons who would formerly have retained their individuality and worked in the private sector.

Sixth, the transgressions that get public employees into trouble often involve fairly common conduct. A single act of possessing marijuana is still a crime, to be sure, but if every offender were rendered unemployable the jobless figures would swell. If every bachelor who lived with his girlfriend were fired for it, many lines of work would be decimated. Those who enforce such regulations should be aware that values change, so that a person may today be fired for wearing a beard in an agency where a clean-shaven worker would have invited ridicule a century ago. The rules enforced today in the public sector thus often reflect a norm that exists more in principle than in reality.

53 The growth of public employment has been steady and impressive. Whereas the nation's three million public workers comprise about 10 per cent of the non-agricultural work force in 1930, the number today exceeds ten million and the percentage approaches 20. The growth has been substantially greater in state and local than in federal employment, though significant expansion has taken place at all levels. See generally R. O'Neil, supra note 46, at 58-59.
54 A recent Gallup Poll indicates that fifty-one per cent of all college students have used marijuana at least once. N.Y. Times, Feb. 6, 1972, § 1, at 52, col. 4-5. Roughly 11 per cent of the adult population of San Francisco appear to have violated the narcotic laws on one or more occasions. The percentages are much higher for certain age and occupational groups, of course. For a collection of such data, see generally J. Kaplan, Marijuana—The New Prohibition (1970).
55 Professor Sanford Kadish observes of the various laws forbidding relations among unmarried consenting adults, “Whether or not Kinsey's judgment is accurate that 95 per cent of the population are made potential criminals by these laws, no one doubts that their standard of sexual conduct is not adhered to by vast numbers in the community, including the otherwise most respectable (and, most especially, the police themselves); nor is it disputed that there is no effort to enforce these laws.” Kadish, The Crisis of Overcriminalization, 374 Annals 157, 159-160 (1967).
Seventh, disqualification for unorthodox behavior or appearance often fails to distinguish between the casual and the persistent deviation from the norm. The man who has been apprehended for or has confessed to a single rendezvous with a male friend may be treated like the open and notorious homosexual. If a tenured school teacher is fired for a single count of marijuana possession, school authorities could not have dealt with him more harshly if he had sold heroin to his students. Yet if the touchstone were the degree of risk to the public service or some comparable governmental interest, a distinction would surely have to be drawn between the occasional trangression and the continuing or recurrent course of conduct. The simple fact is that government, largely unaccountable for the way it deals with appearance, character, and life style, has seldom been forced to differentiate between the occasional and the recurrent since it has not been called upon to justify its actions.

Eighth, the procedures available for testing and reviewing such reprisals have been shoddy. The fault lies at several points. Frequently there is a hearing within the agency, and it may comply with all the formal requisites of due process. But if the only issue to be decided is whether the employee did the act with which he is charged, then confrontation, counsel, and written record are of limited value. If one may not challenge the agency to show that it was harmed or the individual's job performance impaired by the attribute or transgression in question, the result is predetermined.\textsuperscript{56} The only recourse then lies through judicial review. In the courts, too, a formally adequate procedure is often illusory, because judges have been extraordinarily deferential to the rulings of civil service and other agencies.\textsuperscript{57} This is particularly so in the federal system, where the theoretically substantial safeguards enjoyed by civil servants have been drastically diluted by the willingness of the courts to accept uncritically a Commission determination that a dismissal will "promote the efficiency of the service."\textsuperscript{58}

Finally, we should note that governmental constraints on life style are not always more onerous than those of private industry. Indeed, in many lines of work the public sector is probably more tolerant: the man who repairs machines for the General Services Administration may have to keep his hair short, but he need not don the uniform blue suit


\textsuperscript{58} For a recent and particularly distressing example of such deference in a case involving the dismissal of a homosexual, see \textit{Schlegel v. United States}, 416 F.2d 1372, 1378 (Ct. Cl. 1969).
and white shirt of the customer representative for IBM. The college professor in a state-supported institution may very well be freer in his style of life (if not in his speech or politics) than his private college counterpart.

LIFE STYLE AND THE LAW: THE SEARCH FOR PRECEDENTS AND ANALOGIES

The practical importance of these life style issues is beyond question. It is surprising, therefore, how infrequently the issue has reached the courts. Some reasons have already been suggested for the paucity of litigation: the stigma invited by simply bringing such a suit, and the lack of support for plaintiffs asserting such seemingly ephemeral interests. Litigation may also have been deterred partly by the apparent lack of precedent or analogy by which to claim protection for deviant and dissonant life styles. Save perhaps for the state courts in California and the federal courts in the District of Columbia, pertinent decisions are still remarkably scarce.

The matter is not entirely one of first impression, however. The Supreme Court has frequently defined the political and associational rights of public employees. These cases are not directly apposite but surely merit consideration. Moreover, the Supreme Court has inadvertently come much closer to the life style issue in a series of cases dealing with defamatory statements about public officials; in that area a differentiation between the "official" and "private" sectors of the plaintiff's life has been essential to set the limits of an important constitutional privilege. Finally, there are analogies that may be worth examining; these are the cases dealing with comparable questions in different contexts.

Such a survey of potentially applicable law tends to confirm what we have already implied, that the life style cases really are different and must be decided according to an essentially intrinsic body of principle, with such assistance as more traditional areas of the law will afford.

THE PUBLIC AND POLITICAL RIGHTS OF PUBLIC EMPLOYEES. The public employee's legal status is vastly better today than at the time when Justice Holmes remarked that Officer McAuliffe might "have a constitutional right to talk politics, but ... no right to be a policeman." If it is true that the Supreme Court has never squarely relieved the government worker of Holmes's dilemma, one who enters the public service may still (save in California and Oregon) be compelled to

steer clear of partisan politics. But that is one of the few lacunae remaining from a time when public employment and other government benefits were classed as "privileges" which could be conditioned, denied, or terminated as agency heads or legislators saw fit.

All that has changed. The principal catalyst for reform has been the recent development of the doctrine of unconstitutional conditions, applied with particular force to government employment. Courts have consistently repudiated the notion that because government was under no legal obligation to offer employment to any person, it might therefore withhold such employment on arbitrary or discriminatory grounds or encumber public service with onerous and intrusive conditions. In a host of recent decisions, the Supreme Court has cautioned that "public employment . . . may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."

The doctrine has been applied in several instances of special relevance to the life style question. Over a decade ago, the Supreme Court struck down an Arkansas law which required all public-school teachers to list annually the organizations to which they belonged. The majority held the law to be an infringement of the teacher's freedom of association. The opinion of Mr. Justice Stewart stressed the tenuous governmental interest in prying so deeply into an employee's personal associations, noting, for example, that Arkansas might have sought a much narrower class of information if it were seriously interested only in professional or educational affiliations of its teachers. But this "comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the state's legitimate in-

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63 For the most recent expression of that view from the United States Supreme Court, see Adler v. Board of Educ., 342 U.S. 485, 492 (1951). While this notion has been permanently put to rest in the public-employment context, it may be stirring again in other sectors of government benefits, e.g., Wyman v. James, 400 U.S. 309 (1971).


It was in this case, incidentally, that the Supreme Court first applied to public employment the concept of the "less onerous alternative," insisting that even concededly valid governmental interests must be served by those means least intrusive to sensitive individual liberties. Granting, as the Court did, that a state may have reason to ask whether teachers overcommit their time to extracurricular pursuits, there were clearly more precise ways of making that inquiry.

The loyalty oath decisions may also be germane. These cases progressively narrowed government's constitutional power to restrict and control the associations of public employees. In a series of decisions the Supreme Court has declared that one may not, as a condition of entering the public service, be required to forswear most affiliations, but only those, in fact, that amount to knowing, active membership in illicit organizations accompanied by the specific intent to further the group's unlawful aims. As a practical matter, one may be compelled to swear little more than affirmative allegiance to the Constitution and laws, and to promise faithful execution of the duties of his office.

The relevance of these decisions to the life style issue should be apparent. While the Court has dealt only with political associations, the protections of the first amendment should extend equally to nonpolitical affiliations: John Bruns's membership, for example, in the nudist group that barred him from serving on the Baltimore police force. The Supreme Court has never held that the freedom to associate depends upon a commitment to pursue political objectives. Constitutional protection should be equally applicable to all lawful associations.

A third group of cases involving the public employee's duty of disclosure may also be relevant. The Supreme Court has cut a tortuous

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67 Id. at 490.
69 On this point Mr. Justice Frankfurter parted company from the majority, feeling that Arkansas's interest in overseeing the extracurricular commitments of its teachers justified the broad inquiry. Shelton v. Tucker, 364 U.S. 479, 494-495 (1960) (dissenting opinion).
71 That such an affirmative commitment may be demanded of a public employee or applicant has now been made clear by Connell v. Higginbotham, 403 U.S. 207 (1971). Before this decision, Professor Van Alstyne argued that as a practical matter, "the state may go no further than to require that one be willing to affirm a general commitment to uphold the Constitution and faithfully to perform the duties of the position he holds." Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841, 847. He is undoubtedly right, although state legislatures do not abandon hope that some sort of disclaimer may be fashioned to replace those that have fallen as victims of constitutional combat.
72 For a suggestion that freedom of association transcends political objectives, see Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964).
path through this thicket, making the abstraction of general precepts quite difficult. Some years ago the Court sustained dismissals of civil servants—a subway conductor in New York and a school teacher in Philadelphia—for refusing to answer questions posed by superiors about suspect political associations. Later the Court sustained the discharge of a California recreation worker for refusing to respond to a legislative committee in violation of explicit agency policy. After some years, the Court seemed to swing back again, holding that New Jersey could not compel a policeman to give incriminating testimony to his superiors under threat of dismissal. Most recently, the Court invalidated a New York City Charter provision which required the dismissal of a "public officer" for refusing to testify about his official conduct or refusing to waive immunity from any prosecution growing out of the inquiry.

The older cases are especially pertinent here since they represent virtually the last decisions upholding constraints upon public employment. Even there, the Court took care to stress the possible relevance of the inquiry to fitness for the job at a time when political associations and activities were still held germane to employability in the public sector. Had New York, Philadelphia, or Los Angeles inquired instead into the sex lives, personal friendships, or extracurricular writings of its civil servants, the equities might have been differently balanced.

Finally, there is the recent emergence of the government employee's right to criticize. In Pickering v. Board of Education, the Supreme Court first dealt with the recurrent problem of the public worker who criticizes his boss. Reprisals for stepping out of line in this fashion have often taken the form of instant dismissal. In a pair of cases involving school teachers in Alaska and Illinois who had publicly challenged board of education policies, the Court held that such statements, even if false, were constitutionally protected, and thus no longer cause for dismissal in the absence of clear proof of damage to the agency's operations. The decision contained many important caveats, however,
reserving for a later day many situations in which more substantial governmental invasions might be shown. What is important for us is the protection thereby afforded even to job-related and potentially embarrassing statements of personal opinion. The Court had no occasion to pass upon comments more remote from the immediate employment relationship—broad attacks, for example, on government policy in Vietnam—but the implications seem clear. Lower courts have extended the *Pickering* principle in that direction as well.

Several pertinent principles of general application emerge from these decisions. First, the Supreme Court has consistently approached such questions, not in rigid, doctrinaire fashion, but by balancing and weighing conflicting interests. Starting with the constitutional claims of the government employee or applicant, the Court has juxtaposed valid countervailing interests asserted by the state. Second, such governmental interests have always received substantial deference, whatever the outcome of the case. Even in the loyalty oath context, where governmental claims have probably fared least well, the Court has repeatedly acknowledged that government has a right to exclude from the public service those who actively plot its destruction. Third, however, the Court has insisted that even the most legitimate government interest must be served through the narrowest means available where constitutional liberties are affected. Fourth, the Court has implied that the government’s interest is strongest where the restriction relates most directly to the nature of the job, and becomes attenuated as government seeks to use the power of employment to regulate activities and associations more remote from the office. Finally, the failure of the Court to draw clear and sharp lines between the public and private sectors of a civil servant’s life may simply reflect the disposition of recent cases. Where the Court has struck down even conditions and inquiries pertaining directly to the job or working hours, such delineation between public and private life has been unnecessary. It has been at least ten years, in fact, since the Court upheld a constraint on public service in a way that would have invited such analysis. The absence of

*Pickering* case, the only one reviewed on the merits) and the efficiency or morale of the agency, see Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 Duke L.J. 841, 850-54. Cf. R. O’Neil, The Price of Dependency: Civil Liberties in the Welfare State 96-100 (1970).


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a standard for structuring the government employee's life is thus easily explained and does not suggest any judicial callousness toward his privacy.

PRIVATE LIVES AND THE PRIVILEGE OF FAIR COMMENT. The distinction between public and private activities that is absent from the political area is partially present in cases expanding the privilege of press comment on public officials and public figures. A brief review of these decisions may suggest their relevance to the question now before us.

The basis of the fair comment privilege is the 1964 decision in New York Times Co. v. Sullivan. There a unanimous Court held that even false statements about the official conduct of public office-holders were constitutionally privileged in the absence of proof of actual malice, that is, knowledge that the statements were false, or a reckless disregard for their veracity. Neither the New York Times case, nor any of its early progeny, however, compelled the Court to draw any line between "official" and "private" conduct, since the allegedly defamatory charges giving rise to litigation all related to on-the-job matters.

Recent cases have, however, begun to test the limits of the constitutional privilege. Despite early suggestions that the Court would confine the privilege to the working day, its bounds have been steadily expanded. Two cases decided during the spring of 1971 indicate how little is left, for these purposes at least, of the private life of a public official. One case involved a candidate for public office in New Hampshire who was implicated in some questionable partisan activities. A nationally syndicated column referred to the candidate as a "former small-time bootlegger," an allusion to events long antedating the man's entry into politics. He brought suit against the local paper which carried the column, seeking to avoid the New York Times privilege both because he was a candidate rather than an incumbent and because the charge went far beyond his "official" life. But the Supreme Court held against him on both counts. The process by which holders and seekers of public office were assimilated is of little concern to us. On the other point, the Court held as a matter of constitutional law that "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office" in the application of the first amendment standard. A companion case, involving newspaper charges that a Florida official had once been charged

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87 The present author must confess error on this point; see O'Neil, Television, Tort Law and Federalism, 53 Calif. L. Rev. 421, 453 (1965). Other commentators were more foresighted, e.g., Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L.Q. 581 (1964).
with perjury in a federal court, was decided in precisely the same way on the basis of the New Hampshire case.\footnote{89 Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). It may be that the whole issue has now become moot. Later in the same term the Court, by a bare and apparently hesitant majority, extended the privilege to cover all matters of "public interest," whether or not "public officials" or even "public figures" were involved. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Cases may still arise involving defamatory statements about public officials which are not "matters of public interest," though they are likely to be infrequent. In this context, therefore, the Court will seldom have occasion to invoke the "public official" distinctions reviewed here, assuming the Rosenbloom majority survives.}

A superficial analysis of these recent defamation cases might suggest the Court has laid bare the private lives of public office seekers and holders. Surely the New York Times concept could have been confined rather narrowly to charges about conduct in one's public position, thus avoiding application of the privilege to statements about candidates. Yet the very reasons why the Court rejected such a limitation reveal a substantial respect for that which is really private. The basic principle is one of equity and parity: a candidate for public office should be fair game for press criticism because he submits himself, his record, and his life to public scrutiny. He cannot, in other words, have it both ways. Mr. Justice Stewart explained for a unanimous Court, "A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase, 'official conduct.'\footnote{90 Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971). It is not clear if a candidate who keeps his family in the background could sue for invasion of their privacy.}

The converse presumably follows from this analysis: a public office holder who does \textit{not} open his personal life to public scrutiny—for example, an appointee to a volunteer advisory board, or even the typical career civil servant—should be able to limit the privilege of fair comment to what happens between 9 and 5 on weekdays.\footnote{91 While no case appears to have articulated this distinction, it seems fairly implied in the major precedents to date. See Notes, 52 Cornell L.Q. 419, 426-429 (1967) ; 75 Yale L.J. 642, 649-652 (1966).} If a remote charge of crime is \textit{never} irrelevant to voter appraisal of a candidate for a major statewide elective office, comparable charges should usually be irrelevant to judgments about the minor bureaucrat, the public-school teacher, the municipal bus driver; in short, the great mass of public employees who do not invite notoriety because they do not seek popular acclaim.
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The evolution of defamation cases involving public officials suggests a two-dimensional standard or grid: the zone of "official conduct" should broaden, and the zone of privacy shrink accordingly, as one goes up the hierarchy toward those prominent elective posts that afford their occupants little if any immunity from public view. But the determination should be both subjective and variable; the amount of heat one gets, to paraphrase the adage, should depend on how far he enters the kitchen. Accordingly, most government employees would retain, for this purpose at least, a very substantial measure of privacy.

The analogy is imperfect, of course. But the defamation cases may provide one possible guidepost in determining how far government may concern itself with an employee's personal life. There may, of course, be events or traits of concern to an employing agency though not of sufficient public interest to permit the press to recount them irresponsibly. Conversely, there may be matters that deserve to be publicized, even falsely, but do not warrant intrusion or reprisal by a public worker's superiors.

LIFE STYLE AND THE LAW IN OTHER CONTEXTS. Analogies, even those of limited utility, are worth pursuing where the precedents are uncertain. The fact is that life style issues have been squarely adjudicated in other contexts. There are countless naturalization cases, for example, turning on the relevance to an applicant's "good moral character" of an adulterous or meretricious relationship. The decisions, however, may not be terribly helpful. One difficulty, of course, is that the statutory standard is so extremely vague. This makes the critical judgment both eclectic and highly subjective. Some years ago Judge Learned Hand explained the inordinate difficulty of making this very judgment, with an alien's fate in the balance. Courts could not, he observed, profitably "conduct an inquiry as to what is the common conscience on the point." It would not do to poll the public at random;

a majority of the votes of those in prisons and brothels, for instance, ought scarcely to outweigh the votes of accredited churchgoers. Nor can we see any reason to suppose that the opinion of clergymen would be a more reliable estimate than our own. The situation is one in which to proceed by any available method would not be more likely to satisfy the im palpable standard, deliberately chosen, than...to resort to our conjecture, fallible as we recognize it to be.

The disposition of the particular case may be instructive: the Second

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93 See generally Posusta v. United States, 285 F.2d 533, 535 (2d Cir. 1961) (L. Hand, J., observing "Obviously it is a test incapable of exact definition; the best we can do is to improvise the response that the 'ordinary' man or woman would make, if the question were put whether the conduct was consistent with 'good moral character'.").
94 Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949).
Circuit had earlier held that a continuous though adulterous relationship would not necessarily preclude a finding of "good moral character."\(^9\) Now the issue was whether it made a critical difference that "the alien's lapses are casual, concupiscent and promiscuous, but not adulterous."\(^9\) These added features, Judge Hand concluded, do not make "a critical difference," at least "so far as we can divine anything so tenebrous and impalpable as the common conscience. . . ."\(^9\)

Over the years, the courts have decided quite a number of these cases, mostly involving the legal significance of illicit heterosexual liaisons, but a few involving homosexuality as well.\(^8\) A very recent case of the latter sort may suggest the potential utility of precedents in the naturalization context. The issue arose when the petitioner, an emigré from Cuba in 1960, admitted he had engaged in homosexual contacts about once a month. Despite this history, the district court held he had established the requisite "good moral character" and was entitled to citizenship.\(^9\) Several factors were persuasive: the contacts always occurred in the privacy of the home; only consenting adults were involved, all apparently bachelors, as was the petitioner; and none of the conceded activities violated state laws. Moreover, the petitioner's record was in all other respects exemplary, so that his disqualification would have to rest solely upon his deviant sex life. The court acknowledged the opprobrium in which homosexuals are still widely held, but concluded that "private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of . . . [the Naturalization law]."\(^1\) A contrary holding on this issue, seemingly one of first impression in the federal courts as late as the spring of 1971, would "encourage governmental inquisition into an applicant's purely personal private temperament and habits . . . even though such attitudes or conduct would not harm others."\(^1\)

The most enlightened naturalization cases suggest several principles potentially applicable to public employment. First, there has been a tendency to limit governmental concern and inquiry to public acts and associations, leaving the individual the broadest possible zone of privacy

\(^{95}\) E.g., United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).
\(^{96}\) Schmidt v. United States, 177 F.2d 450, 452 (2d Cir. 1949).
\(^{97}\) Id.

\(^{98}\) E.g., In re Mortyr, 320 F. Supp. 1222 (D. Or. 1970), one of the more thoughtful treatments of the heterosexual problem; and see In re Petition of Schmidt, 56 Misc. 2d 456, 289 N.Y.S.2d 89 (Sup. Ct. 1968), for a less sensitive treatment of the homosexual issue as it bears on "good moral character."


\(^{100}\) In re Labady, 326 F. Supp. 924, 927-928 (S.D.N.Y. 1971).
\(^{101}\) Id. at 928.
immune from official scrutiny. Second, the courts in these cases have increasingly stressed the issue of effect: whether or not the offending conduct harms other persons such as friends, family, neighbors, and colleagues. Third, even the violation of a criminal statute—one proscribing, for example, adultery, fornication, or sodomy—is no longer a disqualification per se, but merely a factor warranting deeper inquiry into the facts of the particular case. Fourth, popular abhorrence or public stigma should not be disabling; again, the court must recognize the independent context in which the issue arises and make a specific inquiry. Finally, courts in these naturalization cases have tended increasingly to balance various aspects of the petitioner's record so that other commendable qualities may redeem the "moral character" even of a fairly serious transgressor.

There are two obvious limits to the naturalization analogy, tantalizing though it is. On one hand, the governmental interest in denying citizenship to the unorthodox applicant is probably far less than its interest in refusing him employment. The lawfully resident alien can offend his neighbors or shock the community to as great a degree as the citizen. The "image" of the United States is unimpaired by the knowledge that a long-hair, a deviant, or even a pervert is no longer merely a visitor but is now a full-fledged citizen. Surely the morale and efficiency of the public service is unaffected by any unorthodox traits, unless, of course, the possessor happens also to hold a government job, but that is a quite independent issue. Most of the arguments the government can make in support of life style restrictions have little application to the naturalization process.

The other distinction is more difficult to develop. The constitutional rights of those who seek citizenship are not necessarily identical to those of citizens seeking other government benefits. It is now clear that aliens as a class may not be the subject of detrimental discrimination under state law; the Supreme Court most recently so held in striking down state laws setting a double standard for welfare applicants. Clearly, the equal protection clause applies with full force to protect the substantive interests of noncitizens. But when it comes to the naturalization process itself, it is less clear that government may not impose conditions and restrictions which would be unconstitutional as applied to citizens seeking other government benefits. At least—and this is

104 Cf. Johnson v. United States, 384 F.2d 713 (9th Cir. 1967).
109 Some years ago, the Court observed that "naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien
enough to qualify the analogy—many courts may still feel the difference between applicant and citizen justifies some dilution of the constitutional claims of the former. The value of precedents drawn from the naturalization field may therefore be impaired by the persistence of such an unarticulated double standard.

There are other, less apposite analogies. Yet none of them fully resolve the newer life style issues in public employment. None of them apply in the absence of a framework especially suited to the special character of these problems. It is now time to suggest a framework by which available precedents and analogies may be brought to bear upon a unique set of legal and constitutional issues. Only in this way can the courts deal effectively with cases of a type they are bound to see with greater frequency in the future.

Life Style and the Law: Criteria for a New Analysis

It is not easy to know where to begin the search for a new analytic framework. The United States Supreme Court has never provided a comprehensive theory of government employment, preferring instead to deal with the cases on a selective basis. The Supreme Court of California has come much the closest of any court to offering such a guide, through a pair of cases in 1966 and 1967. Justice Tobriner announced in Bagley v. Washington Township Hospital District\footnote{110} the court’s holding that “a governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.”\footnote{111} This test amply resolves the kinds of cases for which it was designed: oaths and disclaimers, restraints on partisan political activities, and public expression of political beliefs.\footnote{112}

The Bagley formulation is, however, limited by its own terms; it is not quite a general theory of public employment. It is addressed only
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to "waivers of constitutional rights" and "the resulting impairment of constitutional rights"; the application of this test to individual interests of lesser dignity remains uncertain. It is true the California supreme court has applied this test rather broadly by analogy; for example, to strike down a state compulsory financial disclosure law governing municipal employees. In the process the court has implied a need for a more comprehensive formulation. The questions posed in Bagley are surely the proper ones with which to start, but they do not go quite far enough to resolve the newer cases. The questions that follow may continue the analysis where Bagley left off.

TO WHAT EXTENT DOES INDIVIDUAL BEHAVIOR RESULTING IN DISQUALIFICATION ENJOY CONSTITUTIONAL PROTECTION? The source and extent of constitutional protection for attributes of life style vary widely. Some forms of expression are almost certainly protected by the first amendment; those, for example, that are closest to traditional "pure speech." On the other hand, spending a night with one's mistress presumably finds little justification in the Bill of Rights, though imposition of penalties for such a tryst may raise other constitutional questions. Between these extremes lie a host of difficult cases, across the zone of uncertain or limited constitutional protection. Four distinct types of claims may be considered: freedom of expression and association; equal protection; privacy; and substantive due process. Each set of interests merits discrete analysis.

Freedoms of Expression and Association. No doubt the clearest claim to first amendment protection is the use of symbolic speech, such as the wearing of arm bands and buttons and the display of posters expressing political and social views. The Supreme Court has not considered the scope of free expression in the public employment context, but there is one case so closely analogous it cannot be ignored. In Tinker v. Des Moines Independent Community School District, the Court held that students could not be expelled for the peaceful wearing of black arm bands in protest against the Vietnam War, absent proof of disruption of school activities. In the course of the opinion, Justice Fortas spoke of the constitutional rights of "teachers and students" as though both groups shared a common liberty. Yet the Court has never held that symbolic protest by public employees, academic or nonacademic, is equally protected.

The application of Tinker to the teacher's rights invites attention to

particular circumstances. There are obvious differences, going both ways, between students and teachers. On one hand, the school is understandably more concerned about the possibly coercive effects of a teacher displaying a political symbol than about a single student doing the same. On the other hand, the administration may act in loco parentis only with respect to student conduct on school premises. The result in such a case may therefore depend on the precise effects created by the particular symbol: the way it is worn, the age of the students, the size and type of class, the teacher’s explanation, if any, and so on. Comprehensive rules do not emerge readily. Perhaps the relevance of *Tinker* for other sectors is easier. Especially where the government employee is not in a position either to imply official endorsement of the position he espouses or to influence with apparent governmental sanction the conduct of those with whom he deals, the right to protest symbolically should enjoy constitutional protection. Where the circumstances are different, the scope of expression may well be more limited.

Freedom of association is also clearly available to the public employee under some circumstances. Where a disqualification results from membership in a formal group or organization, as with John Bruns’s nudist association, first amendment protection seems substantial. But what of the individual who claims comparable protection for purely personal “associations,” such as private liaisons with members of the opposite sex? These too are surely associations in the vernacular sense, yet to extend full first amendment protection to every nightly tryst would seem to distort the function of the Bill of Rights. The purview of the constitutional freedom of association probably does not extend beyond membership in groups, organizations, and associations that have some recognized existence and function beyond merely personal interaction. There is little law on the point, but common sense dictates some such limit to this rather recently created liberty.

To what extent are dress, appearance, and hair length and style also protected by the first amendment? No Supreme Court decision even approaches the question. The lower courts have dealt extensively of late with the claim that high-school students have a first amendment

117 Of course a homosexual cannot be denied employment because he is a member or even an officer of the Mattachine Society, but that is not the hard question.
118 There appear to be no holdings defining the outer limits of freedom of association. This may be partly the result of its recent emergence; though now firmly fixed in first amendment law, the doctrine really dates from NAACP v. Alabama, 357 U.S. 449 (1958). It is hardly surprising that all the major cases have dealt with essentially political organizations. See generally T. Emerson, *The System of Freedom of Expression* 425-433 (1970). Cf. Murray v. Jamison, 333 F. Supp. 1379 (W.D.N.C. 1971) (membership in Ku Klux Klan held not disqualifying.)
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right to wear their hair longer than regulations allow. Most judgments, even those in favor of the students, have stopped short of recognizing a clear first amendment right, though some have spoken of "communication" and "expression" in relation to hair length. The rejection of the first amendment plea does not disregard the claim that students may seek to convey a message in this way, but holds only that this particular medium may not claim constitutional protection as either "pure" or "symbolic" speech. One court of appeals has suggested a formula that may be appropriate for these novel problems: "As the non-verbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote."

Such a formula may be applicable to public employees' claims as well. Clearly there are cases in which the "expression" or "communication" component of hair length and style is minimal, as where a slovenly appearance is simply the result of indolence. In other cases, however, the claim to protection may be quite substantial. Thus one court, in sustaining the right of a black teacher to wear a neatly trimmed beard in violation of school policy, found the beard "an appropriate expression of [the teacher's] heritage, culture and racial pride as a black man" assuring its wearer "the protection of first amendment rights."

Flexibility in the assessment of such claims is essential, along with a recognition that the expression of personality through life style is but one component on the individual side of the balance.

Equal Protection. Even where the first amendment claim is doubtful or marginal, the Constitution may be brought to bear through the equal protection clause. Several courts have invalidated restrictions on public employees' appearance and activity because they were found to be arbitrary and discriminatory. There are two potentially vulnerable classifications: one between persons in the public sector subject to the regulation and private citizens beyond its reach; another between public workers penalized by the restriction and those unaffected by it. Courts have not been overly precise about which classification is suspect in the few cases raising the issue.

Where such a classification is challenged as discriminatory, there is some uncertainty about the appropriate standard of review. At the

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119 See generally an excellent student note reviewing the cases in this light, 84 Harv. L. Rev. 1702, 1707-1710 (1971).
120 Richards v. Thurston, 424 F.2d 1281, 1283 (1st Cir. 1970).
very least, an agency imposing any such classification would have to demonstrate a rational basis. There is an argument that more need not be shown; the Supreme Court found a rational basis sufficient to sustain the distinction between large and small families in respect to receipt of welfare benefits. Thus if one looks to the benefit encumbered by the restriction, a rational basis might suffice. If, however, one considers the collateral effects of the classification at least in all cases where first amendment interests are implicated, then courts should apply the substantially higher standard announced by the Supreme Court in *Shapiro v. Thompson*, the case involving residence tests for state welfare. There the Court held that because the constitutional right to travel was abridged by a waiting period for eligibility, a merely rational basis for the restriction would not suffice. Instead, such a classification would be valid only if shown to be necessary to promote a “compelling state interest.” Arguably, a restriction on eligibility for public employment which chills any form of symbolic expression or communication—in the form of hair length or style, dress or appearance, and surely group membership—could be supported only if such a “compelling state interest” were shown. The case would be a fortiori, of course, if the restriction in fact discriminated on racial or ethnic grounds; for example, a prohibition against Afro hair styles but not long straight hair.

The utility of the equal protection clause has yet to be tried in the life style area. If the *Shapiro* standard of review is applicable, many restrictions now in force would at once become vulnerable. Even the rational basis test would at least impose upon the agency some burden of justification which might prove difficult to meet. At the very least, a duty to explain and articulate the reason for differential treatment of applicants on largely aesthetic grounds would compel a rationality and candor not always found in the public service.

The Supreme Court has recently given added impetus to this analysis. During the spring of 1971, the Court struck down a Cincinnati ordinance loosely prohibiting unlawful assemblies. The law made it a crime for “three or more persons to assemble...on any of the sidewalks...and here conduct themselves in a manner annoying to persons passing

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125 Id. at 638.
126 As indicated above, several courts have struck down such regulations as “arbitrary” or “discriminatory” without explicit resort to *Shapiro*, apparently believing that the classification was vulnerable even under the traditional “rational basis test.” See cases cited note 122 supra.
127 Coates v. City of Cincinnati, 402 U.S. 611 (1971). Cf. Palmer v. City of Euclid, 402 U.S. 544 (1971), striking down another Ohio municipal ordinance, this one punishing as a “suspicious person” anyone found “abroad” late at night who fails to give a “satisfactory account of himself.” This provision was also deemed unconstitutionally vague.
Mr. Justice Stewart wrote for the majority: "Such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." Though the decision was not based solely on the prospect of discriminatory enforcement, this comment was hardly inadvertent. It does suggest, for the first time, the Supreme Court's concern with uneven and arbitrary application of seemingly neutral laws in ways that may restrict severely the range of expression through life style and appearance.

The Right of Privacy. Clearly, government employees do not waive all rights to privacy by entering the public service. A privacy claim may even be dispositive in a case where the agency learns about the employee's indiscretion or aberration through a clear invasion of personal freedom. One case will illustrate the point: several years ago, a civilian employee named Wentworth lost his security clearance when the Defense Department found out he was a homosexual. The discovery came about because a young man with whom Wentworth once had relations confessed his past involvement to a psychiatrist and a chaplain at the time he joined the Air Force. Later, Air Force investigators seized a notebook belonging to the youth and there found Wentworth's name. The young man received a discharge from the armed forces, and the Defense Department went after Wentworth's security clearance. The claims to privacy were rejected through internal appeals, and there appears to be no court decision on the point. There are, however, several court cases holding dismissals invalid because they resulted from seizure of personal effects from an employee's locker or trunk.

Here the claim to privacy rests directly upon the fourth amendment's injunction against unlawful searches and seizures; unless a public servant is held to have recourse to that clause of the Bill of Rights, such a reprisal should be set aside by the courts.

The potential application of the privacy concept is, however, far broader. Posed most starkly, the question is this: can the activities of a public employee on his own time and away from public view ever constitute grounds for dismissal or reprisal? There is a related issue: whether even on-the-job manifestations of personality, such as hair length and style, may invoke the protection of privacy. Two Supreme Court decisions are clearly in point. One is *Griswold v. Connecticut*, Mr. Justice Stewart had at one time been responsible for the enforcement of that statute as vice-mayor of Cincinnati.

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128 Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (emphasis added). Mr. Justice Stewart had at one time been responsible for the enforcement of that statute as vice-mayor of Cincinnati.


130 E.g., Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); Saylor v. United States, 374 F.2d 894 (Ct. Cl. 1967).

131 381 U.S. 479 (1965).
in which the Court held invalid Connecticut's ban against giving information about contraception or using birth control devices. Mr. Justice Douglas, writing for the majority, recognized a novel zone of privacy based not only on the fourth amendment but also on other portions of the Bill of Rights, including the seldom-used ninth amendment. The birth control law was invalid because it deeply invaded that zone of privacy. Though the Court stressed that the marriage relation was involved and claimed a special sanctity, the realm of privacy recognized by the Court presumably goes beyond the matrimonial bedroom.\textsuperscript{132}

The other apposite Supreme Court case is \textit{Stanley v. Georgia},\textsuperscript{133} holding that the private and personal use and viewing of obscene materials may not be made a crime. Mr. Justice Marshall wrote for a unanimous Court, ‘Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.’\textsuperscript{134} Although the Court subsequently held that the right to possess such material in private did not protect the disseminator or the importer, the qualification does not seriously dilute the privacy principle.

How far do \textit{Griswold} and \textit{Stanley} protect the private life of the public employee from official scrutiny and reprisal? At the very least, the holdings apply by analogy. No government agency could now discipline its staff for using contraceptives or for reading obscenity at home. Beyond that, the spirit of these decisions must immunize certain private acts and even nonfirst amendment associations from agency concern. Thus it is not surprising to find a district court recently holding that a bachelor postal clerk could not be discharged for sharing quarters with an unmarried female friend: ‘The government cannot condition employment on the waiver of a constitutional right . . . even in cases where it has a legitimate interest, it may not invade ‘the sanctity of a man’s home and the privacies of life’ . . . .’\textsuperscript{135} A few months earlier the California supreme court held that a school teacher could not be dismissed for a single homosexual act. The decision rested ostensibly on statutory construction. But in the course of saving the statute, the court observed that a broad constraint against “immoral acts” would raise serious constitutional problems. Specifically, ‘school officials concerned with enforcing such a broad prohibition might be inclined to probe into the


\textsuperscript{133} 394 U.S. 557 (1969).

\textsuperscript{134} \textit{Id.} at 566.

\textsuperscript{135} Mindel v. United States Civil Serv. Comm’n, 312 F. Supp. 485, 488 (N.D. Cal. 1970) (quoting \textit{Griswold}, 381 U.S. at 484, which in turn was quoting from \textit{Boyd v. United States}, 116 U.S. 616, 630 [1886]).
private life of each and every teacher, no matter how exemplary his classroom conduct. Such prying might all too readily lead school officials to search for 'telltale signs' of immorality in violation of the teacher's constitutional rights."\textsuperscript{138}

Along similar lines, the District of Columbia Circuit reversed the dismissal of an occasional homosexual: "The due process clause may cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections. . . . [T]he notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy and diversity."\textsuperscript{137}

The California supreme court has also struck down a compulsory financial disclosure law, noting that the personal and family financial affairs of a public employee fell within the zone of privacy marked out by \textit{Griswold} and thus could not be the subject of broad inquiry "absent a showing of compelling need and that the intrusion is not overly broad."\textsuperscript{138} The homosexual-naturalization case of which we spoke earlier declared a strong protection for the zone of privacy.\textsuperscript{139} The case of the Ohio school teacher discharged for writing apparently obscene letters to a former student also contains strong language vindicating the privacy of public employees.\textsuperscript{140} In these and other cases, still only a handful, but increasing, courts have begun to assimilate \textit{Griswold} and \textit{Stanley} to the public sector and thereby mark out a zone of privacy for the government worker.

The assimilation is still imperfect, however. About the time the California supreme court and the District of Columbia Circuit held that a single homosexual act could not disqualify a civil servant, the Court of Claims asserted the opposite and more traditional view. The handling of the privacy claim suggests that even the doctrine of unconstitutional conditions is not fully appreciated. The discharged civilian worker argued, \textit{inter alia}, that private homosexual acts among consenting adults were protected from official reprisal by \textit{Stanley v. Georgia}. The Court of Claims brushed the argument aside:

The instant case is clearly distinguishable from the \textit{Stanley} decision, which involved a criminal prosecution for violating a penal statute. The plaintiff in the

\begin{footnotesize}
\textsuperscript{138} Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 234, 461 P.2d 375, 390, 82 Cal. Rptr. 175, 190 (1969). \textit{Griswold} is again the main reference.
\textsuperscript{139} \textit{In re} Labady, 326 F. Supp. 924, 927-928 (S.D.N.Y. 1971).
\end{footnotesize}
present suit was not prosecuted but was merely removed from his position with the Army. The criminally accused stands in the reach of more constitutional protections than does the civil servant who is being removed for misconduct. Additionally, the government has not prevented [the plaintiff] from committing homosexual acts. Nor has it imposed a criminal penalty upon him for having done so.141

The distinction between criminal penalties and denial of government benefits dies hard. One would have thought, however, that by 1969 the Supreme Court had laid to rest the archaic view which apparently still governs the Court of Claims."142 Perhaps the Stanley argument was properly rejected; it is one thing to say that government must keep a reader of pornography on the staff, and another to hold that a practicing homosexual cannot be discharged. But the issue is not properly resolved by saying, as did the Court of Claims, that constitutional rights exist only when one is criminally prosecuted and not when collateral benefits of citizenship are jeopardized.

Even if the privacy claim applies to covert off-the-job acts, a more difficult question remains: to what extent may the Griswold concept protect expressions of personality that extend into working hours? The argument that it may extend this far is not frivolous. Take the matter of a beard or sideburns, for example. The government employee who is told he may not wear whiskers in a certain fashion on the job is also being told that he may not appear that way during the roughly four-fifths of his time he spends off the job. The matter of hair length is a bit different. As some New York City policemen have been finding, it is possible to pass muster with a "straight" wig that will conceal shaggy locks on the beat but can be removed when one returns to his own subculture after work. No such metamorphosis would be possible with beard, mustache, or sideburns, however. Thus the agency that imposes such a rule during working hours is unavoidably reaching far into the employee's private domain, quite apart from the extent to which the restriction also curtails expression of personality on the job.

There is only the most timid legal support for this view of privacy. Justice Douglas, dissenting from the denial of certiorari in a student long-hair case, argued that the guarantees of free expression and privacy should permit "idiosyncrasies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men."143 A recent and thoughtful student note argues along these lines for a plausible claim of privacy: "There are few things more personal than one's body and its appearance, and there

142 See materials cited supra note 126.
143 Ferrell v. Dallas Indep. School Dist., 393 U.S. 856, denying ccert. to 392 F.2d 697 (5th Cir. 1968).
could be few laws more destructive of the notion that there is a range of decision-making within which the individual is autonomous, than a rule regulating physical makeup.”144 Yet it will probably be quite some time before such a view becomes widely accepted by the courts, even by those that do recognize privacy claims in the more conventional sexual-relationship context.

Due Process. A constitutional guarantee of last resort in life style cases is the due process clause, at least in its substantive dimensions. Many courts which have been unwilling to hold that hair length and style deserve first amendment protection have nonetheless invalidated school regulations as applied to students on general due process grounds.145 There have been occasional extensions of the same concept to employment cases. A California appellate court, for example, concluded that a Pasadena school teacher’s wearing a beard was within the general “liberty” protected by the due process clause.146 The court recalled that in Kent v. Dulles, 147 the Supreme Court had analogized the right to travel abroad, an interest not expressly protected in the Bill of Rights, to the citizen’s other general liberties, including “the choice of what he eats, or wears, or reads.”148 The search for precedents could go much further back, of course, to the time when the substantive due process concept was riding high. There has never been a bolder enumeration of the range of personal liberties to which that clause might extend than the litany in Meyer v. Nebraska.149 Presumably Justice McReynolds would have had little difficulty holding that a school district which cannot forbid its teachers to instruct in foreign languages may not require them to cut their hair.

There is a risk in relying too heavily upon substantive due process, of course. Because of the absence of guidelines and precedents, the application of this concept varies according to the predilections and tolerances of the individual judge, rather like the naturalization cases where, as we have seen, subjective judgments play an inordinately large role.150 Yet there is an interest in “liberty” here that may not fit readily under any specific rubric of the Bill of Rights. As Justice Murphy suggested many years ago with regard to procedural guarantees, the

144 Note, 84 HARV. L. REV. 1702, 1711 (1971).
145 E.g., Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).
148 Id. at 126.
149 262 U.S. 390, 399 (1923).
150 E.g., Posusta v. United States, 285 F.2d 533, 535 (2d Cir. 1961); Schmidt v. United States, 177 F.2d 450, 451-452 (2d Cir. 1949).
due process clause may include safeguards and freedoms that find explication nowhere in the Constitution but are still essential to "liberty" in a free and democratic society.\textsuperscript{151} So it may be with life style; if it is not free expression, and not privacy, and not equality, perhaps it can still come within the very broad contours of the due process clause.

\textbf{TO WHAT EXTENT DOES THE APPLICATION OF THE RESTRICTION REFLECT SUBSTANTIAL GOVERNMENTAL INTERESTS?} Having dealt with constitutional protection of individual behavior, we come to the essential second question, the other side of the balance. For even if the employee's conduct merits constitutional protection, the claim to exemption may be overridden in particular cases by a powerful countervailing government interest. There are obvious examples: the public employee may argue that freedom of speech protects his wearing a long, flowing beard; but if he prepares food, operates a lathe, or cares for animals in the city zoo, some limit can be set to this kind of self-expression. Many kinds of posters and buttons are permissible when displayed or worn on the job, but there is doubtless government power to prohibit the use of certain highly inflammatory or demeaning racial epithets and the like. These and other readily imaginable cases suggest there is urgent need for a more detailed analytical framework to aid the solution of such conflicts.

Two general comments seem appropriate at the start. On one hand, any inquiry in this area should be directed to \textit{particular} cases. A general rule need not be either valid or invalid, unless incapable of any constitutional application. The question in each case should be whether the rule is valid as applied in the instant case, balancing the particular interests on both sides.

Moreover, any justification for a restriction must reflect its application to \textit{public employment}, and not its general rationale. It may well be that government can still constitutionally make sexual relations between consenting adults a crime, despite strong pressure to change such laws. But general validity of fornication and sodomy laws does not automatically justify their use as a basis for dismissal of government workers. It may be relevant that the proscription is valid in the abstract, but it is only one factor among many.

Other conditions pertinent to such a determination are suggested by the following illustrative questions:

\textit{What is the effect, if any, upon the individual's job performance?} Courts in recent public employment cases have increasingly insisted upon a showing of direct relationship to job competence or performance. The California supreme court, in reversing the discharge of the homo-

\textsuperscript{151} Adamson v. California, 332 U.S. 46, 124 (1947) (dissenting opinion).
sexual teacher, made clear that the "immoral conduct" statute could survive only as thus modified: "An individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.\footnote{Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 235, 461 P.2d 375, 391, 82 Cal. Rptr. 175, 191 (1969).} Other courts have taken the same view in cases involving hair style and length, private correspondence, and heterosexual relations.\footnote{E.g., Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485, 487-488 (N.D. Cal. 1970); Forstner v. City & County of San Francisco, 243 Cal. App. 2d 625, 633-634, 52 Cal. Rptr. 621, 627 (1966); Jarvela v. Willoughby-Eastlake City School Dist. Bd. of Educ., 12 Ohio Misc. 288, 290, 233 N.E.2d 143, 146 (C.P. Lake County 1967).} Every such decision, of course, leaves it open to the agency to demonstrate such harm by proof which, even if it existed, was presumably deemed irrelevant in advance of the announcement of such a standard by the court.

The hard question lies below the surface: if the agency may justify sanctions by showing such harm or threat, what kinds of proof will suffice? In such a case, the government typically claims that, absent actual disruption or dereliction, the proscribed act or trait would tend to impair the worker's effectiveness. In some cases, the simple answer is the one the courts have given: let the employee go back to his job, take appropriate precautions, and wait to see whether those fears are well founded. If they are, then he may be fired; if they are unfounded, then the first dismissal will be shown to have been unjust and unnecessary. Yet such cases do require a certain amount of intelligent guessing about probabilities. Speculation is not completely in the dark, of course. Many judges have come to the bench from administrative positions of responsibility and authority in which they may have encountered comparable problems. There is some writing on public administration, though remarkably little, that may provide hard data.\footnote{Cf., e.g., Frederickson, \textit{Understanding Attitudes Toward Public Employment}, 29 Pub. Ad. Rev. 411 (1967); Gibson & James, \textit{Student Attitudes Toward Government Employees and Employment}, 29 Pub. Ad. Rev. 429 (1967).} There are the judgments of other communities; if New York City now employs homosexuals for many city jobs\footnote{N.Y. Times, May 9, 1969, at 1, col. 2.} and Detroit will hire ex-felons as policemen,\footnote{N.Y. Times, May 28, 1968, at 20, col. 3-4. One court of appeals cited such experience as relevant to governmental claims concerning employment of homosexuals in the federal service, Norton v. Macy, 417 F.2d 1161, 1167 & n.28 (D.C. Cir. 1969). Mayor Lindsay has issued a directive against bans on hiring homosexuals in New York City agencies. See note 25 \textit{supra}.} then the claim of other cities to impose a higher standard at least requires justification. Finally, there is often the record of past performance. If experience with the employee up to the moment of
discharge has been untroubled, the agency's gloomy prognosis becomes harder to sustain.

These observations may aid solution of dismissal and discharge cases. More difficult are cases involving rejection of initial applications. Where an agency says categorically, "We have never had any practicing nudists in our police force, and we don't want to start now," past experience is not available.\(^{157}\) In such cases, however, the experience of other public agencies surely is relevant, at least to the extent of imposing a special burden of proof on the agency that wants to impose exception-ally high aesthetic or moral standards on its work force. Prediction based on probabilities may also be useful. Finally, the court that is willing to say, "Let the man keep his job and his beard or his girlfriend" may also tell the agency, "Hire him despite his beard or his girlfriend and see what happens. You may be proven wrong."

The foregoing discussion must be qualified in one important respect. It is certainly not meant to suggest here that any person has a constitutional right to public employment as an initial matter, for that has never been the law and should not be. All that is involved is rejection of applicants for specific grounds that may infringe legal rights. It is only these cases that are reviewable at all.\(^{158}\) An agency may, of course, turn away an applicant because his hair is too long by telling him that all positions are full or that he does not meet their current needs. It is not always easy to probe underneath the surface. But we have long since passed the point when a Black or a Jew could be denied civil rights by such dis-simulation. Comparable scrutiny can doubtless be exercised for the protection of subtler personal interests if it becomes necessary. For now, such scrutiny is seldom essential, since public agencies seem to be quite candid in expressing their reproval of deviant life styles and appearances.

What is the effect, if any, upon the efficiency of the agency? Government may be able to demonstrate that some restrictions are essential to the working of the agency even though the competence or performance of the person subject to them is not in issue. In the two leading cases involving occasional homosexuals, the California and District of Colum-bia courts noted that these were not the kinds of behavior that affected

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\(^{157}\) Of course the claim to purity may be exaggerated. Recall the case of Mr. Bruns; the Baltimore Police Department discovered while doing a background check that one of its senior officers was also an active member of Pine Tree As-\(^{158}\) For one rather startling suggestion to the contrary, see Davis v. Toledo Metropolitan Housing Auth., 311 F. Supp. 795, 797 (N.D. Ohio 1970): "Those seeking to be declared eligible for public benefits may not be declared ineligible without the opportunity to have an evidentiary hearing." And see generally, O'Neil, Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases, 1970 Sup. Ct. Rev. 161, 202-213.
fellow workers. Presumably an aggressive homosexual who pursued colleagues of the same sex, whether on or off the job, would be quite another matter. Buttons and posters that outraged fellowed workers and precipitated ethnic conflict would fall under the same exception. Perhaps even an aggressive heterosexual would be similarly disqualified, though it is hard to regard those innocent trysts that have drawn censure in recent cases as signs of a psychopathic personality. Probably, in fact, most of the traits of which we have spoken, except for hair style and length, could conceivably create conditions within the agency reparable only through the dismissal of the deviant employee.

What is the effect, if any, on the image of and public confidence in the agency? The trust of the public is surely a valid interest of government. Yet it is an interest readily inviting abuse. There was a time when refusal to hire Blacks or women as municipal bus drivers or law enforcement officers was widely justified on this ground. We have learned better by experience, though the inequities have been corrected and the fears allayed only through the direct force of anti-discrimination law. A similar trial may lie ahead in the life-style area. Agency heads may well believe that the public lack confidence in long-haired or bearded public servants. It is not so easy for a court simply to tell the agency head that the public are wrong, and therefore he is wrong to embody their biases and tastes in his employment policies. There are intermediate grounds, of course, such as suggesting that the agency try to find jobs behind the scenes for persons of unorthodox appearance, as government employers have doubtless done for decades for certain disabled veterans who had to be hired but might hurt the agency's image if they were prominently identified with it. We shall speak later of the obligation which government may have to adopt the alternative least subversive of individual rights.

What particular factors and circumstances are relevant in the case? We have suggested throughout this section that judgments about governmental interests cannot be made in the abstract. A close analysis of relevant data in each individual case might include some attention to the following factors, all of which have been deemed pertinent by courts passing upon recent public employment dismissals:

(a) How sensitive the position held or sought? In determining whether a particular form of unorthodox behavior or expression might impair either the employee's performance or the working of the agency, the position in question is surely relevant. In overruling several dismissals, courts have emphasized the relatively weaker governmental

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claim to regulate the life of the holder of a low-level, insensitive position.160

(b) Have other members of the agency or institution been involved? Particularly in sexual matters, this second question becomes vitally important. It is one thing for a teacher to carry on a homosexual relationship with a student; it is quite another for the same teacher to confine his contacts to other consenting adults remote from the school setting.161

(c) Was the behavior recent and is it recurrent? Public agencies have sometimes failed to distinguish the single transgressor from the persistent offender. A single casual involvement with a person of the same sex may elicit the designation "homosexual," when no medical or psychological expert would so characterize it. Courts have drawn this distinction in several cases.162 They have also taken note of the time of the allegedly disqualifying behavior, distinguishing between remote and recent occurrences.163 Particularly where the transgression occurred long before the case arose, extenuating circumstances surrounding it may also be relevant and are properly considered.

(d) What is the probability of repetition? Where the behavior clearly enjoys constitutional protection, this question need not be asked. Where a man has a constitutional right to wear a beard on the job, an assumption that he will continue to wear it in the future does not hurt the cause. But in the case of certain traits and behavior which might be disqualifying if recurrent, some assessment about the probability of repetition is vital. Medical or psychological testimony may afford useful insights, supplementing the declarations of the employee himself.164

(e) How does the transgression relate to the employee's entire record? In naturalization cases, courts have increasingly reviewed the entire record and made an overall assessment of the applicant's "moral


164 For an example of the use of such testimony as bearing upon an employee's probable future performance, see Alford v. Department of Educ., 13 Cal. App. 3d 884, 91 Cal. Rptr. 843 (1970).
character.'

Even a fairly serious offense may therefore be outweighed by exemplary conduct in other regards. Such a balancing may also permit the court to consider the probable effect of the disqualification, whether, for example, a denial of citizenship would jeopardize the family relationship, which the law presumably seeks to protect and preserve, and therefore be counter-productive. Comparative inquiries are being made in public employment cases; a single lapse need not destroy years of loyal and competent service. This precept, of course, is simply a further application of the view that each case must be decided on its own facts and not by doctrinaire rules. Agencies tend to act categorically; if there is to be justice and equity in this area, courts must act discretely.

What is the status of the behavior outside the public service? We have suggested earlier that some firings reflect the enforcement in the public service of unrealistically rigid standards of aesthetics or morality. These standards may well reflect what citizens and taxpayers believe, but not what they do. In the area of sexual relations, for example, the Kinsey data and others reveal that a high percentage, perhaps an overwhelming majority, of American men have spent at least one night in the company of a female to whom they were not married. Fornication laws, where they still exist—and even more so, the noncriminal constraint against mere cohabitation—reflect an idealized and abstract concept of morality. Even with respect to homosexual relations, compliance with the norm is lower than might be supposed; the Kinsey studies estimated that 37 per cent of American males have had at least one homosexual encounter at one time in their lives. While this figure may be exaggerated and is in any event well below half the male population, the extent of homosexuality appears sufficient to temper the stigma. Much the same could be said of the use of marijuana: recent examples of prosecutions for homosexual conduct and the sale of marijuana reflect an idealized and abstract concept of morality. For a general treatment of the problems of sex crimes among consenting adults, see Committee on Homosexual Offenses and Prostitution, Report, Cmd. No. 247 (1957) (Wolfenden Report); Fisher, The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?, 30 Md. L. Rev. 91 (1970); Kadish, The Crisis of Overcriminalization, 374 Annals 157 (1967).


A. Kinsey, W. Pomeroy, & C. Martin, supra note 158, at 623. Of this figure, one court comments, "If this is so, a policy of excluding all persons who have engaged in homosexual conduct from government employ would disqualify for public service over one-third of the male population. This result would be both inherently absurd and devastating to the public service." Norton v. Macy, 417 F.2d 1161, 1167 n.28 (D.C. Cir. 1969).
surveys suggest that perhaps forty per cent of American college students have in this way violated the narcotic laws at least once. The norm, of course, is not necessarily impeached by widespread evidence of occasional noncompliance. But some doubt is raised about the equity of allowing government agencies to enforce that norm collaterally with their accustomed rigor.

A second element is the popular attitude toward enforcement of the norm, revealed partly through the compliance data and by direct evidence where it exists. Several years ago, the California Committee of Bar Examiners refused to certify the admission of Terrence "Kayo" Hallinan because of a series of criminal infractions. Many of these resulted from sit-ins and other demonstrations designed to protest what he believed to be racial injustice. The California supreme court reviewed the whole record and declared Hallinan to be of "good moral character" despite the deference usually accorded the character and fitness determination. While the court disclaimed any intent to condone civil disobedience, it did "express strong doubt that the leaders of current civil rights movements are today or will in the future be looked upon as persons so lacking in moral qualification that they should for that reason alone be prevented from entering their chosen profession." In several naturalization cases, despite Judge Hand’s caveat about polling the public, courts have tried to determine whether "the moral feelings, now prevalent generally in this country [would] be outraged" by the allegedly disqualifying conduct.

This discussion suggests an obvious corollary: standards and expectations change more rapidly than positive laws in this area. Yet government agencies tend to invoke inherited bases for disqualification long after popular adherence and support has eroded. Courts should be sensitive to these changes, and they may play a vital role in keeping public agencies from getting too far out of touch with reality through the dictation of employment policies. The district court noted in Bruns that "there is indeed a changing attitude in this country toward policing morality where consenting adults are involved," citing changes in and attempts to change the laws regulating such conduct. A recent naturalization case stressed the need to recognize "the change that has taken place in national standards of morality during the postwar decades. . . ." What has been said of sexual relations may apply

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173 Id. at 461-462, 421 P.2d at 87, 55 Cal. Rptr. at 239.
174 United States v. Francioso, 164 F.2d 163 (2d Cir. 1947).
equally with regard to hair style, dress, and other aspects of life which may make an increasingly compelling claim to protection as popular attitudes and expectations change.

The converse does not, however, necessarily follow. That is, a particular trait or characteristic should not be proscribed simply because it is unpopular. Indeed, it is the least accepted qualities that most need the protection and solicitude of the courts precisely for this reason. Thus a federal district judge began his review of the recent application of a homosexual for naturalization by confessing he shared the popular "revulsion" and "moral conviction or instinctive feeling" against homosexuality, but went on to grant the application.\(^7\) Clearly if the issue had been put to a majority vote anywhere in the country, the applicant would not have had the slightest chance of success. Probably the same would be true if the citizens of Baltimore were asked to vote whether they wanted to allow nudists on the police force. Yet here as in many other areas of individual rights, it is quite clear that disqualification cannot be justified by public abhorrence or misunderstanding of idiosyncrasies and deviations from widely held norms.

*How clear and specific is the standard of conduct?* One of the most troublesome features of the life-style area is the vagueness and generality of the regulatory standards. Most of the dismissals coming before the courts have rested upon such imprecise grounds as "immoral conduct" or "efficiency of the service." The courts have understandably taken a rather harsh view of such criteria, occasionally finding them invalid but more often holding that they are valid but must be enforced in ways that mitigate the vagueness of the key terms.\(^7\)

Where first-amendment freedoms are affected, the vice inherent in such vague language is, of course, apparent. One who faces so uncertain a standard of performance must steer clear of a broad zone of activity, much of which may be constitutionally protected.\(^7\) Moreover, even where the first-amendment interest is less clear, an employee is entitled, under notions of due process, to some notice and warning of the particular kinds of infractions or deviations that may constitute "immoral conduct" or "unprofessional behavior." Then, too, a court can know what the agency has in mind only when the standards of conduct are set down with some particularity.

A most revealing case on the vagueness issue is that of Carter, the bachelor FBI clerk who was discharged for sharing an apartment with


a young lady.\textsuperscript{180} The FBI had received an anonymous letter charging that Carter was "sleeping with young girls and carrying on." Carter was called in for questioning, and admitted that on two occasions he had shared a bed with the girl but insisted there had been no sexual relations. He was thereupon dismissed for "conduct unbecoming an employee of the Bureau." He took the case to court, and was ultimately vindicated there. Without going so far as to hold the conduct itself beyond the Bureau's reach, the court of appeals sent the case back for a full trial. The key issue was the adequacy of notice that the "conduct unbecoming" standard might be applied in this manner:

The Government invokes the standard of the lady from Dubuque and argues that as the FBI relies on the cooperation of the citizenry it is reasonable to compel moral standards for all employees—clerks as well as agents—that would satisfy that most upright lady. Pretermitting the issue whether the standard of the lady from Dubuque would have been reasonable if announced, there is a threshold problem, whether the employees have adequate notice of such a standard. . . . [There must be a trial on the issue whether the FBI Handbook] clearly puts FBI employees on notice that they must meet not only the general standards of their own community, but also the special standards of the lady from Dubuque.\textsuperscript{181}

At the very least, then, it may be reasonable for courts to insist, as many have done, that the standards applicable to life-style matters be specified with some precision. Enumeration of the grounds of ineligibility or disqualification is not too much to ask of an agency that wishes to regulate the private lives of its workers. Whether or not the agency head may say of "immoral conduct," to paraphrase Mr. Justice Stewart's subjective view of obscenity, "I know it when I see it,"\textsuperscript{182} that is not enough for the employee or the applicant. It should not be enough for the courts.

What less onerous alternatives are available to the agency? The California supreme court has held that in all public employment cases affecting constitutional rights, an agency must demonstrate in support of restrictions that "no alternatives less subversive of constitutional rights are available."\textsuperscript{183} The United States Supreme Court has imposed the same obligation in a more limited class of cases, notably those involving clear first-amendment freedoms, for example, the Arkansas demand for lists of all organizations to which public-school teachers belonged.\textsuperscript{184}

The "less onerous alternative" concept has general relevance to

\begin{footnotes}
\item[180] Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968).
\item[181] Id. at 1246-1247.
\item[182] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion).
\end{footnotes}
public employment cases of all sorts. Before an agency discharges a person for a personal trait or characteristic, even where justification may be shown with regard to the particular position, alternatives should be canvassed. If the public would not tolerate a long-haired person in the kitchen and the agency cannot safely place him at the lathe, there may be countless other jobs at which he could work efficiently and happily. While wearing certain insignia might create chaos at some times and places, that result need not follow under all conditions. When an agency would be made dangerously vulnerable by keeping a homosexual in a sensitive position, his transfer may be justified, but not necessarily his discharge from the service. In these instances the application of the "less onerous alternative" principle may facilitate the search for satisfactory compromise within the public service. As with other criteria we have considered, its function may be to mitigate the rigid and arbitrary view that agencies often take of employee qualifications and transgressions.

What procedures are provided within the agency? The effective scope of substantive rights may depend upon the adequacy of procedural safeguards at the initial level. It is not enough that some form of hearing be provided before an employee can be fired for his expression, his appearance, or his off-the-job conduct. Civil service laws generally do afford a technically adequate hearing. The more important issue is the scope of the hearing, whether the kinds of questions we have canvassed here can be explored within the agency. If the only issue to be determined is whether the employee has in fact grown a beard, written a hostile letter, or slept with his girlfriend, the function of the hearing is little more than to make a record for a reviewing court. And if the reviewing court pays the kind of deference to the agency's judgment that has been traditional in federal civil service cases, there simply may be no forum in which to air the issues that are vital to the protection of constitutional rights.

The solution to the hearing problem is much more legislative and administrative than judicial, though the reviewing court should expand

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185 Federal law does not assure an adversary hearing to discharged civil servants, 5 U.S.C. § 7501 (1970). Compare the situation under California law, where no hearing is required before suspension of a civil servant, unless the offense giving rise to the suspension included "behavior or acts outside of duty hours." Cal. Govt. Code § 19576 (West Supp. 1971). For all penalties other than suspension, including dismissal or discharge, a hearing is required by Cal. Govt. Code § 19578 (West 1963).

the scope of its scrutiny to compensate for a restrictive view within the agency. Much greater attention needs to be given to the whole matter of internal hearing procedures, to safeguard the employee's opportunity to raise basic questions at the initial stage. A dismissal that does not, for example, reflect a balancing of the full range of individual against institutional interests should simply never get out of the agency at all. Proper statutory safeguards could ensure a hearing that is substantively as well as formally adequate.

CONCLUSION

The life-style problems will not go away. Hair is likely to get longer, beards more common, arm bands more prevalent, and deviant sex patterns more widespread whether or not one shares Charles Reich's prognosis. Meanwhile, "straight" public attitudes toward life style deviance may stiffen, placing government agencies under increasing pressure to use the power of employment as a guarantor of conformity that cannot be mandated directly through the criminal law. The confrontation may intensify. Only the courts have shown they can maintain a modicum of entente among the public service, the taxpaying public, and unorthodox subculture. Some workable legal and constitutional premises are essential to that accommodation. It is not too early to begin the systematic ordering of those premises.