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The Concept of Attorney-Fitness in New York: New Perspectives

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THE CONCEPT OF ATTORNEY-FITNESS IN NEW YORK: NEW PERSPECTIVES

Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. . . . Whenever the condition is broken, the privilege is lost.[1]

INTRODUCTION

The certification of attorneys to practice law by admission to state bars is generally held to depend on their academic credentials, legal training and moral character.[2] In New York, this was made explicit by the court of appeals in its statement that "the practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study . . . ."[3] Of the three areas of qualification, obviously, the requisite moral character is the most difficult to judge, much less define, with uniform certainty. Yet, it is this facet which has the greatest potential effect on the conduct of attorneys and applicants to the bar.

A good moral character is both a condition precedent to the initial admission of attorneys[4] and a continuing requirement for the retention of that status.[5] To enforce this requirement, most states have given broad discretion to their courts to admit and retain only those deemed "fit" for the legal profession. State statutes commonly prescribe the minimal standards for admission and the continuation of membership in the bar. However, it is always within the courts' prerogative to develop and enforce additional criteria for the determination of "fitness."[6]

New York's statutory provisions regarding admission to the bar leave undefined the "character and general fitness requisite for an at-

1. *In re* Rouss, 221 N.Y. 81, 84-85, 116 N.E. 782, 783, *cert. denied,* 246 U.S. 661 (1917).

2. *In re* Brennan, 230 App. Div. 218, 219, 243 N.Y.S. 705, 706 (2d Dep't 1930).

3. *In re* Cooperative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910).

4. Schware v. Board of Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957).

5. *In re* Rouss, 221 N.Y. 81, 116 N.E. 782, *cert. denied,* 246 U.S. 661 (1917); *In re* Cohen, 7 N.Y.2d 488, 166 N.E.2d 672, 199 N.Y.S.2d 658, *aff'd* 366 U.S. 117 (1960).

6. *In re* Anastaplo, 366 U.S. 82 (1960).

torney and counsellor-at-law,"[7] thereby authorizing broad judicial discretion. Under New York law, however, determinations of post-admission fitness are less subject to judicial discretion. For example, disbarment is automatic on an attorney's conviction for a felony offense.[8] In fact, the felony disbarment rule in this state is far more rigid than that of many other states; generally disbarment depends on whether the crime involved moral turpitude.[9] In contrast, the New York rule mandates disbarment for any felony regardless of its moral character.

As opposed to the mandatory treatment of felony offenders, courts in this state are authorized to censure, suspend or disbar attorneys who are "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice."[10] For the determination of post-admission fitness, therefore, the courts have discretion to define unfitness only for lesser offenses; the disbarment for felony offenses requires no judicial action.[11]

In terms of the definition of fitness, therefore, the application and scope of judicial discretion in non-felony contexts is far more important than felony cases since each determination refines to some extent the moral character required of an attorney in this state. Clearly, judicial determinations of fitness affect all attorneys presently practicing in New York since their conduct must conform to that standard in order to avoid discipline or disbarment. Furthermore, since the implicit rule is that only those considered fit under these standards will be considered for initial admission to practice, the concept of fitness also has a potential affect on each prospective attorney as well.

The recent court of appeals decision discussed in this Comment, *In re Kimball*,[12] dealt with the judicially defined concept of fitness as it relates to one's sexual misconduct, criminal record and prior disbarment. Through an analysis of that case and others preceding it in

7. N.Y. JUDICIARY LAW § 90(1)(a) (McKinney 1968).

8. *Id.* § 90(4), which reads: "Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such."

9. *E.g.*, MD. ANN. CODE art. 10, § 16 (1957); WASH. REV. CODE § 2.48.220 (1951).

10. N.Y. JUDICIARY LAW § 90(2) (McKinney 1968).

11. Barash v. Association of Bar, 20 N.Y.2d 154, 157, 228 N.E.2d 896, 898, 281 N.Y.S.2d 997, 1000 (1967) (citations omitted).

12. 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453, *rev'g per curiam* 40 App. Div. 2d 252, 339 N.Y.S.2d 302 (2d Dep't 1973).

this jurisdiction, a fuller explication of the meaning of "fitness" will be developed. In particular, this Comment will address the issue of whether past or present conduct should be the focal point of the determination of fitness in admission and post-admission contexts.

IN RE KIMBALL: THE FACTS AND DECISION

In 1953, Harris Kimball gained admission to the Florida bar. For four years, he engaged in the active practice of law until his disbarment for "an act contrary to good morals and the law."[13] The circumstances of that act took place in 1955. In Orlando, Florida, on a summer evening, Kimball was arrested and charged with violating a city ordinance prohibiting "indecent and lewd acts in a public place."[14] The evidence was inconclusive as to exactly what occurred; it was undisputed that Kimball and a male companion had been swimming in the nude, but Kimball denied that any other act took place. Nevertheless, a court-appointed referee in the disbarment proceeding, which was eventually brought, found the evidence sufficient to establish that the two men were engaged in an act of sodomy when apprehended on the public beach.

Following the advice of counsel, Kimball posted and forfeited bail to the lewdness charge which, he was led to believe, would result in its reduction to "misconduct."[15] The charges were not reduced, however, and the records show only that Kimball forfeited bail, the equivalent of a plea of nolo contendere,[16] to the original charge.

On the basis of that incident, a member of the Florida bar charged Kimball with demonstrating a disregard for the laws and morals of the state and unfitness to continue to practice in that jurisdiction. After testimonial hearings, the referee recommended disbarment on the ground that Kimball had committed at act of sodomy.[17]

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13. Florida Bar v. Kimball, 96 So. 2d 825 (Fla. 1957).

14. ORLANDO, FLA., ORDINANCES § 62.40 (since repealed). Note that the appellate division originally cited the applicable statute as "FLA. STAT. ANN. § 800.01" in its recording of the facts; it corrected the error in *In re* Kimball, 41 App. Div. 2d 780, 342 N.Y.S.2d 373 (2d Dep't 1973).

15. Brief for Appellant at 7, *In re* Kimball, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

16. Laws of 1939, ch. 19554, § 69, *as amended* FLA. STAT. ANN. § 903.26(6) (1973), reads, in pertinent part: "The payment . . . of a forfeiture under the provisions of this law shall have the same effect on the bond as payment of a judgment."

17. Note that the proof applicable in disciplinary proceedings of attorneys need not meet the criminal standards as long as the adjudicatory body is convinced that the act

The board of governors of the Florida bar concurred with the findings and recommendation of the referee. After the required lapse of time for appeal, the Supreme Court of Florida formally ordered his disbarment.[18]

On November 30, 1971, 14 years after his disbarment in Florida, Harris Kimball was certified as having passed the New York State bar examination. Because of his prior disbarment, however, a subcommittee of the committee on character and fitness was assigned the task of determining his fitness. As a result of this inquiry, in which all of the evidence of the Florida disbarment proceeding was introduced, the subcommittee unanimously held that Kimball possessed the requisite character and fitness to practice law in New York "notwithstanding the admission of the applicant to being homosexual and having engaged in homosexual acts."[19] They did not, however, recommend admission. Similarly, the full committee on character and fitness unanimously concurred that Kimball possessed all the necessary qualifications for admission, but concluded that New York statutes and prior case law precluded his admission. In particular, the committee determined that the case of *In re Peters*[20] and section 90(5) of the New York Judiciary Law combined to create a policy that one disbarred in another state could not be admitted to the bar of New York State unless first readmitted in the bar of the foreign jurisdiction.

Peters dealt with a similar, yet distinguishable, application for admission to the New York bar. In *Peters,* as in *Kimball,* the application followed a disbarment in a foreign state. In both cases, the applicant passed the New York State bar examination and was found to be fit by the committee on character and fitness. In *Peters,* however, the court refused the applicant's admission stating that a prior disbarment was a "badge of unfitness,"[21] the validity of which is assumed. Though it stated that the rationale for denying admission was to avoid establishing the precedent of admitting attorneys previously disbarred, the court implied that its decision and the forcefulness of its dictum was due, at least in part, to that particular applicant's unre-

occurred and that it demonstrates the offending attorney's unfitness. *In re* Kass, 39 App. Div. 2d 352, 334 N.Y.S.2d 54 (2d Dep't 1972).

18. Florida Bar v. Kimball, 96 So. 2d 825 (Fla. 1957).

19. *In re* Kimball, 40 App. Div. 2d at 253, 339 N.Y.S.2d at 303.

20. 250 N.Y. 595, 166 N.E. 337 (1929), *aff'g* 221 App. Div. 607, 225 N.Y.S. 144 (1927).

21. 221 App. Div. at 608, 225 N.Y.S. at 145.

lenting criticism of the Alabama courts and judges for their disbarment proceeding. This, the court believed, further demonstrated his unfitness.[22]

The appellate division, upon receiving the committee's report concerning Kimball, held that *Peters* did not preclude his admission to the New York bar. *Peters,* it stated, held only that admission to the New York bar is not a right, but a privilege, and cannot be acquired by one's claim that a prior disbarment was void. In other words, the strong dictim of the *Peters* decision could not properly be applied to all applicants previously disbarred.

Similarly, section 90(5) of the New York Judiciary Law was held not to preclude the admission of Kimball because it was correctly interpreted by the court as being limited in effect to those applicants who were pardoned after being disbarred in foreign jurisdictions for the commission of crimes. In that event, the statute[23] requires that the applicant be readmitted to the foreign state bar before the pardon can operate to justify admission to the bar of this state. Clearly, as the court observed, this limitation on its scope made the section inapplicable to Kimball who was never pardoned for his alleged offense. It is interesting to note that the statutory section seems to require a higher standard for the admission of disbarred attorneys who were pardoned than for disbarred attorneys, like Kimball, who were never pardoned.

The appellate division's finding that Kimball's admission to practice was not prevented by established state law did not, however, decide the issue. Indeed, the court developed the rule that "[w]here we find that we would have disbarred the attorney on the same facts, the applicant should be required to be readmitted in the first State before he may be admitted by us to the Bar of our State."[24] Accordingly, the appellate division denied Kimball's application for admission to the New York bar because, from its reading of the facts, his act constituted sodomy which was a felony in New York at the time it was committed.[25] If he were a New York attorney when the act occurred,

22. *Id.*

23. N.Y. JUDICIARY LAW § 90(5) (McKinney Supp. 1974) reads, in pertinent part: "[I]f such attorney or counsellor-at-law has been removed from practice in another jurisdiction, a pardon in said jurisdiction shall not be the basis for application for re-admission in this jurisdiction unless he shall have been re-admitted in the jurisdiction where pardoned."

24. 40 App. Div. 2d at 254, 339 N.Y.S.2d at 305.

25. *See* Law of March 12, 1909, ch. 88, § 690 [1909] Laws of New York, *as amended* N.Y. PENAL LAW § 130.38 (McKinney 1967).

he would, presumably,. have been automatically disbarred and could not have been readmitted unless he was pardoned or his conviction was reversed.[26] Therefore, the court reasoned, his initial admission to the New York bar could not be justified until or unless he was first readmitted to the Florida bar.

The court of appeals,[27] in reversing the appellate division decision in this case, based its determination on two grounds largely ignored in the court below. First, it held that Kimball's past conduct was relevant, but not controlling, in the determination of fitness for admission. The court reasoned that, though "violative of accepted norms,"[28] his avowed sexual preference did not, in and of itself, justify a finding of unfitness for the practice of law. The court followed the traditional approach in bar admission cases by relying heavily on the determination of fitness made by the committee on character and fitness.[29]

Secondly, the court stated that it concurred with the dissenting opinion in the appellate division in its treatment of the Florida disbarment. In that dissent, it was asserted that, regardless of a prior disbarment, the New York courts are free to exercise their independent judgment of the applicant's fitness at the time he applies. The dissent argued that it was inconsistent for the majority to hold that it was free to exercise an independent judgment of fitness while, at the same time, denying admission to an applicant who was found to be fit at the present time.

The basic tenet endorsed by the court of appeals was that an applicant for admission to the New York bar must be judged by current standards, on the basis of his or her *present* fitness. Though the court's minimization of Kimball's alleged offense might have been prompted by a greater tolerance towards homosexuality, it implied that prior felonious conduct, unrelated to homosexuality, would be merely relevant and not controlling in its determination.

The dissenting opinion in the court of appeals argued that where

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26. N.Y. JUDICIARY LAW § 90(5) (McKinney Supp. 1974), which reads, in pertinent part: "Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or the governor of this or another state of the United States, the appellate division shall have the power to vacate or modify such order or debarment."

27. Note that the decision in the court of appeals was per curiam.

28. 33 N.Y.2d 584, 301 N.E.2d 435, 347 N.Y.S.2d 453 (1973).

29. *See, e.g.*, Spears v. State Bar, 211 Cal. 183, 294 P. 697 (1930).

there was a finding that the applicant committed sodomy in the past, the denial of the application was warranted, regardless of the applicant's present fitness. The dissent also asserted that the persistent violation of any criminal statute gives the courts the authority to deny the offender admission to the bar. The applicant's admission to being homosexual, the dissent argued, established that he regularly committed the misdemeanor of "consensual sodomy."[30]

Whether or not this conclusion is fair, the theory on which it was based can co-exist with the majority's holding in which the applicant's sexual conduct was considered relevant, albeit minimally, to the determination of present fitness. The major points of conflict between the majority and dissenting opinions in the courts of appeals, therefore, revolved around the issues of whether past or present conduct should be the focal point of the fitness inquiry and whether past or present legal and ethical standards should be used to judge it.

NEW YORK'S COMMON LAW TREATMENT OF DETERMINATIONS OF ATTORNEY-FITNESS

To appreciate the significance of the *Kimball* decision, some discussion of the prior decisions on attorney-fitness in New York is required. Before doing so, however, it is helpful to note that there are four basic grounds for the inference of unfitness needed to justify discipline of attorneys. They are: (1) felony convictions; (2) misdemeanor or minor offense convictions; (3) violations of the Canons of Professional Ethics; and (4) other conduct which, though not punishable by law, evidences a disregard for the responsibilities of the profession. Under certain fact situations, each type of impropriety can result in an order of disbarment. Generally, the severity of the disciplinary action parallels the courts' judgment of the seriousness of the conduct in terms of fitness.

As noted above, attorneys are automatically disbarred upon conviction of a felony offense.[31] In addition, the court of appeals has held

30. N.Y. PENAL LAW § 130.38 (McKinney 1967).

31. *E.g.*, Barash v. Association of Bar, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S. 2d 997 (1967); Devine v. Association of Bar, 19 N.Y.2d 592, 224 N.E.2d 740, 278 N.Y.S.2d 238 (1966); *In re* Liddy, 41 App. Div. 2d 422, 343 N.Y.S.2d 710 (1st Dep't 1973); *In re* Piazza, 39 App. Div. 2d 541, 331 N.Y.S.2d 737 (2d Dep't 1972); *In re* Thaler, 40 App. Div. 2d 7, 337 N.Y.S.2d 264 (1st Dep't 1972).

that a reversal of a felony conviction does not entail automatic reinstatement.[32] In these cases, the court will use its discretion to assess all of the circumstances, including the reason for the reversal, to determine whether the attorney would present a danger to his clients or the public if reinstated.[33] Furthermore, an out-of-state or foreign conviction for a crime *cognizable* as a felony under New York law (even if considered less serious in the foreign jurisdiction) has been held to be sufficient justification for the application of the automatic disbarment rule.[34] This result is due to the fact that New York's statute[35] does not specify which state law is to be used to determine the felony status of a crime committed out of state.[36]

The statutory provision punishing lesser offenses,[37] including misdemeanor convictions, grants discretion to the courts to authorize censure, suspension or disbarment. The court of appeals has held, however, that a conviction for a misdemeanor is prima facie proof of unfitness to practice law.[38] However, attorneys may litigate the issue of fitness in this situation, since "fairness and justice suggest that there be a wide range of inquiry as to facts which have a bearing on the ultimate issue of appellant's fitness to continue as a member of the Bar."[39]

The third area of conduct for which disciplinary action is justified under New York common law involves violations of the Canons of Professional Ethics. In one case, the prohibition against the advertisement of law firms in the canons[40] was interpreted broadly to include an

32. *In re* Cassidy, 296 N.Y. 926, 73 N.E.2d 41 (1947).

33. Barash v. Association of Bar, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967).

34. *In re* Yore, 37 App. Div. 2d 290, 324 N.Y.S.2d 599 (1st Dep't 1971).

35. N.Y. JUDICIARY LAW § 90(4) (McKinney 1968).

36. *Id.* For the text of this statute, see note 8 *supra.*

37. *Id.* § 90(2), which reads, in pertinent part: "[T]he appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . . ."

38. Keogh v. Richardson, 17 N.Y.2d 479, 214 N.E.2d 163, 266 N.Y.S.2d 984 (1965).

39. *Id.* at 481, 214 N.E.2d at 164, 266 N.Y.S.2d at 985.

40. ABA CANONS OF PROFESSIONAL ETHICS, No. 27, which reads, in pertinent part: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments . . . offend the traditions and lower the tone of our profession and are reprehensible . . . ."

article written in a popular magazine about a law firm in which complimentary references were made about particular firm members.[41] Although the article was independently written and was meant to depict the rigors of a corporate law practice, the court found that the law firm partners had violated the canon by their cooperation and acquiescence in the author's research. It held that "any substantial breach . . . thereof is considered as professional misconduct"[42] which, as noted previously, may be disciplined by censure, suspension or disbarment.[43]

Another closely related, yet separate ground for discipline of attorneys is conduct which, though not subject to criminal or civil sanctions, demonstrates an irresponsibility deemed contrary to the standards of the profession and the concept of fitness. Particularly when the conduct involves moral turpitude, the appellate division has held that the focus of the disciplinary proceedings should not be whether the attorney has been proven guilty under the rules of evidence applicable in civil or criminal courts but whether the conduct demonstrates his or her professional unfitness.[44]

The same criterion is applied in the discipline of attorneys for sexual misconduct, which can be the factual basis for any of the four disciplinary grounds. In one case, an attorney used his position to lure women into his law office, presumably for the purpose of conducting interviews for secretarial positions. Instead, the attorney asked highly personal questions and eventually attempted to molest the job applicants.[45] In disbarring the attorney, the court stated that this conduct, even if not criminally punishable, justified disbarment because it tended to bring reproach upon the legal profession in addition to demonstrating the attorney's unfitness to conform to the responsibilities of the practice of law.

One of the earliest cases of this kind involved an attorney who wrongfully retained money held by him for several clients and also committed adultery on a regular basis with one client's wife.[46] Though the attorney was disbarred, it is unclear whether he would have been

41. *In re* Connelly, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1st Dep't 1963).
42. *Id.* at 469, 240 N.Y.S.2d at 129.
43. *See* N.Y. JUDICIARY LAW § 90(2) (McKinney 1968).
44. *In re* Kass, 39 App. Div. 2d 352, 334 N.Y.S.2d 54 (2d Dep't 1972).
45. *In re* Gould, 4 App. Div. 2d 174, 164 N.Y.S.2d 48, *motion for leave to appeal denied*, 4 App. Div. 2d 833, 166 N.Y.S.2d 301 (1st Dep't 1957).
46. *In re* Titus, 66 Hun. 632, 21 N.Y.S. 724 (2d Dep't 1892).

so severely disciplined solely for his adultery. A prior case, cited by the court, had indicated that disbarment would not necessarily follow from mere sexual misconduct. It stated that "to warrant a removal, the character must be bad in such respects as shows the party unsafe and unfit to be intrusted with the powers of the profession. There are many vices that render the character more or less bad, that have no such tendency."[47]

Thus, the willingness of the courts of this state to disbar attorneys for sexual misconduct cannot be characterized in a definitive rule. The view that sexual conduct may be among those vices which do not justify disbarment or a determination of unfitness is implied by the *Kimball* result. A contrary result was reached in a prior case, however, in which it was held that a ten-year-old conviction on a charge of "lewdness or indecency" did justify disbarment.[48] Though the factual basis for the charge in that case is unrecorded, it is significant that, prior to *Kimball,* the type of conduct criminalized by a "lewdness" statute[49] resulted in the disbarment of a New York attorney.

It is important to note that, in prior cases, the inquiry in determinations of attorney-fitness was focused primarily (if not exclusively) on the offending *act* rather than the *person* and his continued ability to function as a legal professional. *Kimball,* therefore, represents a significant development in two respects. First, the fitness inquiry has changed its focus; it is no longer based solely on past conduct or behavior patterns. The primary point of reference is now the applicant's or attorney's *present* fitness, as judged by current legal and ethical standards, which takes into account primarily present fitness and abilities, and, to a much lesser degree, his or her past behavior. Secondly, the *Kimball* decision refines the concept of fitness: past criminal conduct, prior disbarments and the active practice of homosexuality cannot be considered obstacles to admission to practice if the applicant is otherwise considered fit.

Interpreted in this way, the *Kimball* result parallels a recent development in the law with regard to the relevance of homosexuality

47. *In re* Percy, 36 N.Y. 651, 654 (1867).

48. *In re* Fleckenstein, 27 App. Div. 2d 184, 277 N.Y.S.2d 830 (1st Dep't 1967).

49. N.J. STAT. ANN. § 2A:115-1 (1969), which provides: "Any person who commits open lewdness or a notorious act of public indecency, grossly scandalous and tending to debauch the morals and manners of the people, or in private commits an act of lewdness or carnal indecency with another, grossly scandalous and tending to debauch the morals and manners of the people, is guilty of a misdemeanor."

and other unpopular private behavior in determinations of fitness made in other contexts. Though not explicitly directed to the issue of homosexuality, this development—the "nexus requirement"—has also been applied in bar admission cases.

THE NEXUS REQUIREMENT

Until quite recently, government employees and teachers, among others, were regularly dismissed from employment on the basis of a finding that they were presently engaging in homosexual activity, or had done so in the past. The inference, either implicity or explicitly drawn, in each case was that homosexuality demonstrated a psychological problem, a potential security risk or moral unfitness for the position at issue.[50] Recently, however, numerous cases have begun to reflect a change in judicial reasoning on this issue paralleling a growing public and scientific awareness that such inferences are fallacious.[51] Though the approach is not yet universal,[52] the following cases exemplify this trend.

In *Norton v. Macy*,[53] a government employee was dismissed under the statutory justification, which reads: "[F]or such cause as will promote the efficiency of the service."[54] The underlying reason for his dismissal as a NASA employee was contradicted evidence that he was homosexual and had solicited homosexual activity. In dealing with

50. For an interesting discussion of the traditional justifications for the discrimination against homosexuals, see W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 108-12 (1973).

51. Note that the American Psychiatric Association has removed homosexuality from its list of mental disorders. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1970). Note also the finding of the National Institute of Mental Health, Task Force on Homosexuality, that "[a]lthough many people continue to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation by statute. Many homosexuals are good citizens, holding regular jobs and leading productive lives." *Cited in* W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 128 (1973).

52. *E.g.*, Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969); Schlegel v. United States, 416 F.2d 1372 (Ct. Cl. 1969). These cases held that, where employees have access to classified information, the fact of their homosexuality is sufficient in itself to establish the necessary causal connection with their employment-effectiveness to justify their dismissal.

53. 417 F.2d 1161 (D.C. Cir. 1969).

54. 5 U.S.C. § 7512 (Supp. IV, 1969).

this issue, however, the court imposed a "nexus requirement:" the government-employer must demonstrate a reasonable causal connection between the offending conduct and the "efficiency of the service" before dismissing employees on this basis.[55] In the absence of any such nexus, it was held to be a denial of due process to dismiss an individual solely on the basis of his sexual preference.

The view that homosexuality per se cannot be considered indicative of unfitness was part of the basis for *Morrison v. State Board of Education*,[56] in which the nexus requirement was imposed on a school board in determining fitness to teach. The court held that:

> [T]he Board of Education cannot abstractly characterize the conduct in this case as "immoral," "unprofessional," or "involving moral turpitude" . . . unless that conduct indicates that the petitioner is unfit to teach. In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected the students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, and the extent to which disciplinary action may inflict an adverse or chilling effect upon the constitutional rights of the teacher involved or other teachers.[57]

The holding of *In re Labady*[58] evidences the same sort of scrutiny of determinations of fitness based solely on sexual preference. In this case, which dealt with the naturalization of an avowed homosexual, the court upheld the alien's right to be admitted on the ground that homosexuality is not indicative of a lack of the "good moral character" required for American citizenship. Addressing the relevance of the alien's sexual preference, the court commented 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 [our] only concern . . . ."[59] Citing *Griswold v. Connecticut*,[60]

55. 417 F.2d at 1165.
56. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).
57. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186 (footnotes omitted).
58. 326 F. Supp. 924 (S.D.N.Y. 1971).
59. *Id.* at 927-28.
60. 381 U.S. 479, 485 (1965).

the court argued that "it is now established that official inquiry into a person's private sexual habits does violence to his constitutionally protected zone of privacy."[61] Therefore, in the absence of any nexus or causal connection between the applicant's private conduct and his "ability to be 'law-abiding and useful' to society,"[62] the alien must satisfy the moral character test if otherwise considered fit. The court also referred to a decision in which Justice Learned Hand asserted "the test [in determining good moral character] is not the personal moral principles of the individual judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time."[63]

Similar objections to a subjective test for fitness have led to the use of a form of the nexus requirement by the Supreme Court in two bar admission cases. In *Konigsberg v. State Bar of California,*[64] in which the applicant's refusal to answer certain questions of the character committee was held by the lower courts to impugn his fitness, the Supreme Court held that it could not be so interpreted. It stated that the concept of fitness is "a vague qualification, which is easily adapted to fit personal views and predilections, [and which] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."[65] In the companion case, *Schware v. Board of Examiners,*[66] the Court articulated the nexus requirement in stating that "[a] state can require high standards of qualifications, such as good moral character or proficiency in its laws, before it admits an applicant to the Bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law."[67] In both cases, the Court endorsed the view that the inquiry into an applicant's fitness in bar admission cases should be focused on present fitness as it affects the capacity to practice law. Evidence of past conduct or unpopular present behavior, therefore, is only relevant insofar as it is causally related to the applicant's potential to fulfill the demands and responsibilities of the legal profession.

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61. 326 F. Supp. at 927.
62. *Id.* at 928.
63. Posusta v. United States, 285 F.2d 533, 534-35 (2d Cir. 1961).
64. 353 U.S. 252 (1957).
65. *Id.* at 263.
66. 353 U.S. 232 (1957).
67. *Id.* at 239.

CONCLUSION

Though not explicit in the *Kimball* decision, the "nexus" reasoning must have led, at least in part, to its result. The minimal relevance afforded to Kimball's sexual preference and behavior, which are unrelated to his abilities as a lawyer, demonstrates an implicit exercise of the nexus principle. Of course, the effect of *Kimball* could be limited to the particular fact situation it represents. It is unlikely that it was meant by the court to enunciate a broad policy, and it is possible that it will not be treated as such. However, the argument of this Comment is that the *Kimball* decision is far more desirable as a policy for this state in bar admission cases than many of the cases preceding it, in which the determinations of fitness were based primarily on past conduct with little or no reference to the particular individual and his or her ability to practice law in the future. Evidence of past and present criminal behavior is certainly relevant to the determination of fitness, inasmuch as it demonstrates an attitude towards the law. But, as with homosexuality in other employment situations, it is the applicant's present fitness as judged by current, enlightened standards which should predominate in deciding fitness. And, as indicated by the Supreme Court in *Schware* and *Konigsberg*,[68] only present conduct rationally related to the capacity to practice law should even be considered in bar admission determinations of fitness.

The purpose of bar admissions and the requirement of fitness is, after all, to insure that only capable applicants are chosen for and retained in the bar. Since an applicant's capability as a lawyer is not affected in any way by his or her past conduct or private sexual activity, and since the profession and the public are represented only by each attorney's legal skills and integrity, the determination of fitness in bar admissions and post-admission contexts should not involve those aspects of an applicant's character which are not causally related to his or her potential to practice law in a capable fashion. While the holding of *Kimball* may be limited to its particular facts, its result, and the *Schware*[69] decision, clearly stand for this principle.

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68. *See* text accompanying notes 64-67 *supra*.

69. 353 U.S. 232 (1957).