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THE POWER TO RAISE AND SUPPORT ARMIES: THE HOMOSEXUAL EXCLUSION POLICY IN PERSPECTIVE

by

Captain Melissa Wells-Petry

ABSTRACT: This thesis examines the regulatory rationales for the homosexual exclusion policy. It discusses issues resolved in legal challenges to the policy and arguments advanced by plaintiffs. It takes a comprehensive view of homosexuality and compares characteristic traits of homosexuality to traits necessary for successful soldiering.

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PART ONE. INTRODUCTION.

> Others will debate the controversial issues . . . which divide men's minds; but serene, calm, aloof, you stand as the nation's war-guardian . . . as its gladiator in the arena of battle. . . . Your guidepost stands: Duty--Honor--Country.
>
> General of the Army
> Douglas MacArthur,
> West Point, 1962 [1]

Serene, calm, aloof, the nation's war-guardian. General MacArthur's famous address to the cadets at West Point set forever the standard for military service, the touchstone for understanding the military institution. Yet, over the three decades since MacArthur spoke the principles of "duty--honor--country," controversies surrounding the United States Army were rarely phrased in such noble terms.

This thesis will examine the controversy occasioned by the military's homosexual exclusion policy.[2] Homosexuals are excluded from military service based on the secretarial determination that homosexuality is incompatible with military service.[3] The controversy over whether that secretarial determination is appropriate has been phrased in constitutional terms, equitable terms, even political

and sociological terms. It is useful, however, to put that controversy in context, that is, in military terms as applying to a military force whose mission is to be the nation's "gladiator in the arena of battle." It is only then that the whole dynamic of the homosexual exclusion policy can be precisely reviewed.

Far from standing aloof from national or social controversies, in this instance controversies regarding homosexual rights, challenges to the homosexual exclusion policy attempt to draw the Army directly into the fray. Homosexuals charge that the military discriminates. Ugly, almost evil, the word "discrimination" portends all manner of injustice and dismal failure of American ideals. To label a policy as "discrimination" seems automatically and absolutely to judge it as morally wrong and legally incorrect. Yet it is clear that all military personnel policies discriminate.

Indeed, the military discriminates on a variety of bases. The military excludes, for example, single parents,[4] felons,[5] handicapped individuals,[6] transsexuals,[7] conscientious objectors[8] and persons with any of a number of medical conditions.[9] The

military discriminates, for example, on the basis of height and weight,[10] physical and mental ability,[11] visual acuity,[12] political beliefs and religious affiliation,[13] language,[14] youth and age.[15] All military personnel policies discriminate. They discriminate between those individuals or groups that, in the judgment of the Congress or the Service Secretaries, have strong potential for successful soldiering and those that do not.

Implicit in military personnel policies is a principle well-recognized at law, that is, that no one has a right to military service.[16] When the Army is viewed as what it is, this nation's war-guardian, there is little room to doubt the wisdom of that principle.[17] Military service is at best an inestimable privilege, at worst a harsh and dangerous burden. But this peculiar military context must illuminate any discussion of providing homosexuals, or any other excluded group, the "right" to military service.

This thesis will provide an overview of the legal challenges to the military's homosexual exclusion policy. Then a more detailed examination of the regulatory rationale for and practical perspectives on

the homosexual exclusion policy will be set forth. Finally, several proposals to modify the exclusion policy will be reviewed.

PART TWO.

OVERVIEW OF THE LITIGATION, 1971 - 1991:

I. THE SOUND AND THE FURY:

The Temptation to Equate Controversy With Substance

The sound and the fury surrounding legal challenges to the military's homosexual exclusion policy has sometimes led to the impression that there is widespread discontent with the policy and a great groundswell of grassroots impetus to change the policy to make it more favorable for homosexuals. Whether this such sound and fury illuminates or obscures the practical issues surrounding homosexuality within the military will be discussed in a subsequent section on the rationale for the policy and the politics of social experimentation. From a litigation point of view, however, the din that sometimes accompanies challenges to the homosexual exclusion policy is out of proportion

to the facts.

It is estimated that well over ten million people have served in the armed forces since 1971. In the last twenty years, the United States Army has defended thousands of lawsuits on military personnel policies. Many of these cases are brought by individuals seeking to get into the Army or to get out of the Army, that is, individuals challenging, on every conceivable ground, their exclusion from or inclusion in military service.

Over the last twenty years, six cases brought by soldiers challenging the homosexual exclusion policy were decided.[18] Also over these twenty years, six cases challenging the homosexual exclusion policies of the other military branches were decided.[19] Of these twelve lawsuits, none were filed by individuals who were denied enlistment, commissioning, or admission to a commissioning program by reason of homosexuality. Rather, the cases generally were filed by individuals who entered the military knowing their homosexuality was a service-disqualifier, and who challenged the exclusion policy once their homosexuality was discovered.[20] Of these twelve cases, no court held the

homosexual exclusion policy legally infirm on any ground.[21] Thus, despite the impression urged by publicity or academic comment to the contrary, there is a substantial and virtually unanimous body of law affirming the constitutionality of the homosexual exclusion policy. This section will review this body of law, including issues based on privacy, First Amendment freedoms, due process and equal protection guarantees.

II. HOMOSEXUALITY AND THE RIGHT TO PRIVACY.

One common theme in legal challenges to the homosexual exclusion policy was infringement of the right to privacy.[22] Privacy, as a constitutional right, primarily "is rooted in the First, Fourth, Fifth and Ninth Amendments."[23] The Supreme Court has delineated the scope of the right to privacy by decision, rather than by definition.[24] The Court has held that a constitutional right to privacy is abridged by government regulation of matters regarding family relationships,[25] marriage,[26] and child-bearing.[27] The Court has repeatedly declined to expand the right to privacy beyond these areas.[28] Further, the Court has

frequently held that, even in these sensitive and intimate areas, some regulation is permissible.[29]

Plaintiffs challenging the homosexual exclusion policy on privacy grounds argued two theories. The first theory asserts a constitutional right to privacy in homosexual conduct.[30] The second theory asserts a constitutional right to privacy in simply being homosexual.[31] Both theories failed. Although courts deciding challenges to the homosexual exclusion policy vigorously debated the scope of the right to privacy,[32] no court extended constitutional protection to homosexual conduct.[33] This issue was finally settled in Bowers v. Hardwick. In Hardwick, the Supreme Court rejected claims that the right to engage in sodomy was a fundamental right protected by the Constitution.[34]

The second privacy theory focused, not on conduct, but on the state of being homosexual. This psycho-sociological state of being homosexual is variously defined as the sum of the "integral components of one's personality,"[35] an expression of "fundamental matters at the core of one's personality, self image, and sexual identity,"[36] "the essence of one's identity,"[37] "homosexual status,"[38] and one's "sexual preferences."[39]

Plaintiffs urged that the homosexual exclusion policy burdened this psycho-sociological state of being, and thus abridged the constitutional right to privacy.[40] Courts viewed the effect of the policy otherwise.[41] As held in similar challenges to other exclusion policies, courts found that the denial of the opportunity to be a soldier does not infringe any asserted right to be homosexual.[42] In sum, the constitutional right to privacy does not protect homosexual conduct, nor does it insulate homosexuals from the impact of otherwise permissible regulations. The homosexual exclusion policy, therefore, is not invalid on any theory of a constitutional right to privacy in homosexuality.

III. HOMOSEXUALITY AND AND FIRST AMENDMENT RIGHTS

In addition to privacy claims, plaintiffs argued that the homosexual exclusion policy abridged constitutional rights of free association and free speech. These issues had been heard before in cases challenging other military exclusion policies, and they were resolved similarly.

A. The Right to Free Association

The right of association, like the right to privacy, is not express, but rather emanates from the First Amendment.[43] The Supreme Court recently affirmed that the right to associate is constitutionally protected in two distinct situations, "intimate association" and "expressive association".[44] Regardless of the type of association at issue, the underlying activity must be protected by the First Amendment before constitutional guarantees apply.[45]

In challenges based on associational rights, plaintiffs raised issues of both intimate and expressive association. In Berg v. Claytor[46] and Dronenburg v. Zech,[47] for example, plaintiffs claimed, in essence, that the association incident to homosexual acts was "intimate association" for purposes of First Amendment guarantees.[48] Neither court addressed the question of whether there was a protected sphere of intimate association surrounding homosexual conduct. Courts simply found that exclusion from military service "based on homosexual activity 'places no restriction on [an individual's] right to associate with whomever he chooses, and clearly does not

contravene the First Amendment.'"[49]

Expressive association was at issue in cases where there were no homosexual acts of record.[50] Ben-Shalom v. Marsh was the only case explicitly to address expressive associational rights.[51] In Ben-Shalom, the district court read the Army's then-current regulation as infringing a soldier's right "to meet with homosexuals and discuss current problems or advocate change in the status quo . . . [or] to receive information and ideas about homosexuality."[52] The court's reading was based on regulatory language that mandated discharge of a soldier who "evidences homosexual tendencies, desire, or interest."[53] This regulatory language was subsequently clarified.[54]

On review, the Circuit Court of Appeals in Ben-Shalom found, as did the Dronenburg court, that association, expressive or otherwise, was not implicated, much less chilled, by the homosexual exclusion policy.[55] The homosexual exclusion policy, like other exclusion policies, simply denies individuals the opportunity to be soldiers. The policy does not deny or preclude homosexuals from the opportunity to engage in constitutionally protected

intimate or expressive association with others.

B. The Right to Free Speech

Although privacy and associational claims were advanced, freedom of speech was the principal focus of First Amendment challenges to the homosexual exclusion policy.[56] Analysis of First Amendment speech questions is well-settled. The first inquiry is whether the factual predicate of the claim constitutes speech at all.[57] If speech is at issue, then the court must inquire whether that speech is constitutionally protected.[58] If protected speech is at issue, the next inquiry is whether the regulation actually implicates or abridges that speech.[59] Finally, if there is such an effect on protected speech, the government's interests in the regulation are evaluated. The regulation must be within the constitutional power of the government, further an important or substantial governmental interest, and not restrict First Amendment rights more broadly than required to further the government's interests.[60]

1. The declaration of homosexuality as speech.

Most challenges to the homosexual exclusion policy based on the First Amendment right to freedom of speech involved the plaintiff's declaration, "I am a homosexual." Courts found the statement, "I am a homosexual," to be evidence of identity or admission of a fact about oneself, rather than speech per se.[61] Although the statement is, "in some sense speech, it is also an act of identification. And it is the identity that makes [one] ineligible for military service, not the speaking of it aloud."[62]

Statements of identity frequently disqualify individuals for military service, without constitutional moment.[63] The statement, "I am a Nazi," certainly is protected political speech, quite unlike a statement of one's sexual identity. Still, in Blameuser v. Andrews, the Court of Appeals readily upheld excluding an individual from the military who, by his statement, identified himself as a Nazi.[64] No different result is warranted for statements of sexual identity, marital status, religious affiliation, health or educational status, or for any other statement that may be "simply an admission that [the individual] comes

within a classification of people whose presence in the Army is deemed by the Army to be incompatible with its . . . goals."[65]

As the Court held in Ben-Shalom, it is plain that the operation of all military personnel exclusion policies is triggered by the identity that disqualifies the individual for military service. Under these policies, it simply is not material how the disqualifying identity is revealed. Thus, as one court frankly concluded, "the free speech issue raised in . . . [cases challenging the homosexual exclusion policy] appears to be specious."[66]

2. The declaration of homosexuality as protected speech.

Even if the statement, "I am a homosexual," constitutes speech, further inquiry is required to determine if that speech is protected by the First Amendment. The standard-bearer for protected speech is Connick v. Myers.[67] Connick held that, for speech to be within the ambit of the First Amendment, it must address a "matter of public concern."[68] An individual's declaration of homosexuality does not meet this standard.

Looking first to the content of the statement, courts held that declarations of one's homosexuality involve "facts private in nature."[69] Clearly, the mere fact of publication is not sufficient to bring a declaration of one's homosexuality within the First Amendment.[70] Moreover, such declarations are generally made "for personal reasons and not to inform the public of matters of general concern."[71] Thus, because they are not part of an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[72] declarations of one's homosexuality are not protected speech.

3. The homosexual exclusion policy as an abridgement of protected speech.

Even if the statement "I am a homosexual" is protected speech, there must be an actual abridgement of the First Amendment guarantee of free speech before the constitutionality of the regulation is jeopardized. To demonstrate this abridgement, the court must first determine precisely what the regulation regulates.[73] If speech is implicated, the individual's interest in making the speech must, in essence, be balanced against the governmental interests furthered by the regulation.

It is clear that "a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms."[74]

The question of precisely what the homosexual exclusion policy regulates is probably the most confounding of any raised throughout this litigation. The question may be stated as follows: Does the homosexual exclusion policy regulate speech (the declaration, "I am a homosexual") and therefore status (the psycho-sociological content, or import, of that speech)? Or does the policy regulate conduct (homosexual manifestations), and that conduct, either in the past, present or future, is reasonably inferred from the declaration, "I am a homosexual"? This question may be described as creating a status/conduct dichotomy.

No plaintiff challenging the homosexual exclusion policy claimed that the Uniform Code of Military Justice proscription of sodomy was unconstitutional.[75] Few plaintiffs disputed that the regulatory policy could be applied against them, and that discharge was permissible, if they were shown to have committed homosexual acts.[76] The controversy, then, centered on

the inference to be drawn from one's admission of homosexuality, without other evidence of homosexual acts.

Plaintiffs argued that an admission of homosexuality is wholly unrelated to conduct. Such an admission, according to plaintiffs, signifies one's homosexual status, but fails completely to indicate or even suggest the possibility of past, present or future homosexual conduct.[77] The Army, on the other hand, argued that common sense simply tells otherwise.[78] In this view, there is an obvious connection between an admission of homosexuality and the propensity to commit homosexual acts over time. Thus, the homosexual exclusion policy treats an admission of homosexuality as raising a rebuttable presumption of homosexual conduct, either in the past, present or future.[79] Courts often turned their decisions on whether they accepted or rejected the neat dichotomy between homosexual status and homosexual conduct urged by plaintiffs.

a. Homosexual status as the focus of the homosexual exclusion policy.

Plaintiffs challenging the homosexual exclusion

policy are not the first to allege a status/conduct dichotomy. The somewhat metaphysical distinction, however, between what a person is and what a person does remains difficult to articulate, much less to account for in the broad sweep of regulations such as military personnel policies. The Supreme Court, in Robinson v. California, confronted this dichotomy when California enforced a statute making it a crime to be a narcotics addict.[80] A close analysis of Robinson is instructive.

The Supreme Court first found that the statute at issue in Robinson could have been construed to reach conduct, rather than status. The Court, however, was bound by the fact that California had explicitly construed the statute as criminalizing the status of being addicted to narcotics.[81] The Court held that the statute was constitutionally infirm because it punished an individual for a status, being addicted to drugs, that could be acquired without engaging in any criminal behavior.[82] Thus, plaintiffs argue, the homosexual exclusion policy is likewise infirm because it punishes an individual for a status, homosexuality, that can be acquired without engaging in any criminal behavior.

This argument, whatever its merits, does not follow logically from Robinson.

The homosexual exclusion policy is distinguishable from the statute in Robinson in several important respects. First, operation of the homosexual exclusion policy is not similar to a criminal prosecution.[83] Second, exclusion from military service is not punishment, any more than exclusion from a welfare entitlements scheme is punishment.[84] Even if the homosexual exclusion policy implicates status and not conduct, the Court in Robinson explicitly recognized that administrative and penal sanctions based solely on status are sometimes permissible and appropriate.[85] Finally, the distinction between the statute in Robinson and the homosexual exclusion policy is seen most clearly by analogy. If a person presented himself for enlistment in the Army and declared, "I am a drug addict," the status at issue in Robinson, certainly it would be constitutionally permissible for the Army to exclude that individual from military service.[86] This is true even without independent evidence of the individual's past, present or possible future drug use. Thus, even if the homosexual exclusion policy does

somehow implicate status and not conduct, that would not necessarily render the policy unconstitutional.[87]

b. Homosexual conduct as the focus of the homosexual exclusion policy.

For the most part, the military refused the invitation to step into the abstract status/conduct quagmire. Instead, the Army asserted the common sense proposition that when a person says, "I am a homosexual," his declaration, as is usual throughout the law, should be given its ordinary meaning.[88] The Army Regulation defines a homosexual as a person who "engages in, desires to engage in, or intends to engage in homosexual acts."[89] Homosexuals have defined themselves as "one who has committed sodomy."[90] One judge, though dissenting based on a status argument, nevertheless allowed that he would "be the first to admit that homosexuals, in sexually expressing their affection for persons of their own sex, frequently engage in sodomy."[91] Finally, the dictionary defines homosexuality as "sexual desire for others of one's own sex [and] sexual activity with another of the same sex."[92] It is plain that the ordinary meaning of a declaration that one is homosexual must embrace at

least some aspect of sexual activity, desire or intent.

Plaintiffs challenging the homosexual exclusion policy based on First Amendment guarantees of freedom of speech had generally made forthright, unequivocal declarations that they were homosexual.[93] In Ben-Shalom, the court found that such a declaration, "if not an admission of [homosexual] practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct."[94] Thus, courts rejected arguments based on status. The homosexual exclusion policy is, as the law clearly recognizes, ultimately directed at controlling homosexual conduct, criminal and otherwise, within the military.[95]

In sum, there is "absolutely no First Amendment violation" when a declaration of homosexuality, without other evidence of homosexual acts, is used as a basis for discharge from military service.[96] The Ben-Shalom court stated the relative positions of the parties under the regulation as follows: "[p]laintiff can say what she wants to say about homosexuals, but if plaintiff admits she is one, then the Army has the right to say something in response."[97] The military

has concluded that a statement of homosexuality is reliable evidence of a propensity for homosexual conduct over time. Thus, the military has declined to "assume the risk that the presence of homosexuals within the service will not compromise the admittedly significant government interests asserted in the [homosexual exclusion policy]."[98]

4. The scope of and authority for the homosexual exclusion policy.

The last prong of the speech analysis is seen in United States v. O'Brien.[99] O'Brien set out a test that evaluates the authority for and importance of the government's underlying interest in a regulation, as well as the scope of the regulatory restriction, if any, on First Amendment rights.[100] As demonstrated above, the homosexual exclusion policy does not implicate First Amendment rights. Assuming that it did, however, the homosexual exclusion policy comports with O'Brien.

Subsequent sections will discuss the governmental interests underlying the homosexual exclusion policy in detail. Courts have readily accepted that the policy decision on homosexuality is within the inherent

authority of the executive and legislative branches to raise armies.[101] Courts also found without difficulty that the policy is supported by substantial and important governmental interests related to the combat readiness of the armed forces and the defense of our national objectives.[102] In fact, based on the types of regulatory restrictions on First Amendment rights of soldiers already upheld by the Supreme Court, it would have been surprising indeed if the homosexual exclusion policy had been found to sweep with too broad a brush.[103] The Court has often found that military interests may far outweigh the advantage to society of a strict and unresponsive view of First Amendment freedoms.[104] Indeed, the Supreme Court has repeatedly recognized that, in the military context, First Amendment freedoms must sometimes be compromised.[105]

In challenges to the homosexual exclusion policy, courts declined to create "a First Amendment 'exclusionary rule' to bar the use of [one's] statements as evidence of [one's] homosexuality."[106] Thus, whether the statement "I am a homosexual" is speech, even protected speech, it is, like other statements of identity, a permissible basis for

application of military personnel policies, including military exclusion.

5. Homosexuality and First Amendment Rights: Conclusion.

The homosexual exclusion policy operates like other military exclusion policies. It is not unique among policies setting standards for the accession and retention of soldiers.[107] The homosexual exclusion policy does not implicate, much less violate, First Amendment guarantees of rights of free association or free speech. If it did, most other military exclusion policies likewise would be infirm. Moreover, if a statement of one's homosexuality is protected by the First Amendment, this would give special significance to the homosexual identity as opposed to other identities that are service-disqualifying. In the absence of a principled way to distinguish homosexuality from other service disqualifiers, much less from other sexual preferences,[108] that result is unwarranted in law and logic.

IV. HOMOSEXUALITY AND DUE PROCESS: Substantive and Procedural Guarantees

In 1986, the Supreme Court held in Bowers v. Hardwick that there was no fundamental right to engage in sodomy.[109] Hardwick was decided on a substantive due process analysis.[110] Because substantive due process operates to recognize rights that are otherwise unenumerated, a claim under substantive due process must implicate a right that could be classified as fundamental.[111] The fundamental nature of a right is found in historical inquiry.[112] Although courts have attempted to refine the analysis for substantive due process claims,[113] the Supreme Court has always returned to the question of whether the subject right is "implicit in the concept of ordered liberty."[114] As already noted, this inquiry is essentially an historical one.[115]

In challenges to the homosexual exclusion policy, most courts recognized that the whole tenor of Supreme Court caselaw counseled the greatest caution in expanding or creating fundamental rights.[116] Even before Hardwick, courts addressing substantive due process challenges to the homosexual exclusion policy refused to find a constitutionally protected right to

engage in homosexual acts.[117] Since no fundamental right triggered heightened scrutiny, the policy was tested against the rational basis standard.[118] Courts routinely held that the policy meets that test without difficulty.[119]

Besides substantive due process claims, plaintiffs urged procedural due process claims. To raise an issue of procedural due process, a claim must implicate a property or liberty interest.[120] Only then is process constitutionally due.[121]

It is well-settled that a soldier has no property interest in continued military service, and that enlistment itself is a privilege, not a right.[122] Homosexual plaintiffs, like single parents or other excluded plaintiffs, may have an "abstract need or desire for" military service.[123] This, however, is not sufficient to provide them the "legitimate claim of entitlement" that is required for constitutional protection to obtain.[124] Thus, no property interests are implicated by the homosexual exclusion policy.[125]

Liberty interests, likewise, are not proved by subjective need or desire. The threshold requirements for finding a protected liberty interest in government

employment[126] are a discharge or termination of a government employee, based on false and stigmatizing reasons, and publication of those reasons by the employer.[127] In an attempt to demonstrate that the homosexual exclusion policy implicated a protected liberty interest, plaintiffs advanced two theories of stigma. The first theory asserts that the fact of homosexuality, or being labeled a homosexual, is stigmatizing.[128] Since most plaintiffs were self-identified and admitted homosexuals, courts readily rejected this theory.[129] The second theory asserts that discharge from the military is itself stigmatizing, because it brands a person as "unfit" to soldier.[130] This theory also was rejected.[131]

In sum, the homosexual exclusion policy implicates no protected property or liberty interest. Thus, the policy does not raise procedural due process claims on those grounds.[132] Further, the homosexual exclusion policy does not infringe any fundamental right. Thus, substantive due process likewise provides no basis upon which to invalidate the policy.

V. HOMOSEXUALITY AND EQUAL PROTECTION.

Equal protection challenges to the homosexual exclusion policy engendered lively debate and are still urged as the most viable route to judicial invalidation of the homosexual exclusion policy.[133] Equal protection analysis is well-settled. It entails three tiers: the rational basis test for regulations that do not burden a fundamental right or a suspect or quasi-suspect class, heightened scrutiny when a quasi-suspect class is burdened, and strict scrutiny when a suspect class is burdened.[134]

The equal protection analysis determines the appropriate standard of review to apply, not the ultimate constitutionality of the policy in question.[135] This section will discuss the applicability of the various standards of review in terms of homosexuals as a suspect class and homosexuality as a fundamental right.

A. Suspect Classification

In High Tech Gays v. Defense Industrial Security Clearance Office, the court reiterated the prerequisites to heightened scrutiny under equal protection guarantees. The court stated, "[t]o be a

'suspect' or 'quasi-suspect' class, homosexuals must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group, and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right."[136]

Most courts accepted that homosexuals had suffered a history of discrimination.[137] At the same time, courts recognized that not all discrimination was automatically impermissible or necessarily inappropriate. Indeed, several courts concluded that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."[138] Still, for purposes of suspect classification, homosexuals were held to meet the criteria of having a "history of discrimination."[139]

The other criteria for suspect classification--"immutability" and "political powerlessness"--occasioned more debate. The question of political power was disposed of easily by most courts, in favor of finding that homosexuals were in fact politically powerful.[140] Suspect classification, then, hinged on

homosexuals meeting the criteria for constitutional protection as a discrete group.

The criteria for constitutional protection as a discrete group, that is, for denomination as a suspect class, are often denoted by the shorthand term, "immutability." The standard in its entirety, however, requires "obvious, immutable, or distinguishing characteristics that define [the proposed class] as a discrete group."[141]

In challenges to the homosexual exclusion policy based on suspect classification, immutability was usually presented as a simple issue of whether or not homosexuals could change (either their behavior or their sexual orientation).[142] The ability or possibility of change in homosexuals was often presented as an issue of the etiology, or origin of homosexuality.[143] The theory was: if homosexuals did not choose to be homosexual, then they cannot change their homosexuality; if they cannot change their homosexuality, then it is immutable; finally, if homosexuality is immutable, then homosexuals are a suspect class.

This syllogism, whatever its merits, misperceives

the standard for suspect classification. Taken together with the requirement for "obvious and distinguishing characteristics that define a discrete group," and compared to the characteristics of established suspect classes, it is plain that the changeability of the condition that defines the class is only one factor in determining whether a classification is suspect.[144] Further, the standard for suspect classification considers the nature of a group in existence, not how it came to exist.[145]

Nevertheless, immutability, as a synonym for changeability, was very much in issue in claims based on homosexuality as a suspect classification. Plaintiffs argued that homosexuality was an immutable characteristic.[146] Courts saw it differently. Whether or not homosexuality was immutable, courts found that homosexuality was not immutable in the same way as race, national origin, alienage and gender.[147] Indeed, courts rejected the notion that homosexuality was immutable at all. Instead, courts held that homosexuality was "behavioral and hence [was] fundamentally different from traits . . . which define already existing suspect and quasi-suspect classes. . .

. The behavior or conduct of such already recognized classes is irrelevant to their identification."[148] In fact, one lower court opined that homosexuals were a suspect class so long as they did not, or were not alleged to, engage in homosexual behavior.[149]

Immutability, as seen above, is not the sum of the definition of a suspect class. Still, no challenge to the homosexual exclusion policy specifically addressed suspect classification in other terms.[150] In other contexts, however, courts have discussed whether homosexuals have obvious, distinguishing characteristics that define them as a discrete group. In Norton v. Macy, for example, the court commented that homosexuals were impossible to identify.[151] Similarly, in Cyr v. Walls, which involved a proposed class action, the court held that it could not "certify any class limited to gay persons because of lack of identifiability."[152]

This lack of identifiability is perhaps the clearest argument against finding that homosexuality is a suspect classification.[153] Regardless of the theory, however, the settled legal conclusion is that homosexuals do not constitute a suspect class.[154] Thus,

homosexuals join the ranks of other groups that must look first and primarily to the elected legislature, rather than the judiciary to secure their objectives. These ranks include single parents,[155] transsexuals,[156] undocumented aliens,[157] prisoners,[158] the mentally retarded,[159] youth,[160] and the aged.[161] Like these groups, homosexuals are not a suspect class. Like homosexuals, these groups are, or may be, excluded from military service.[162] In no instance, however, has military exclusion of these groups occasioned heightened, much less strict scrutiny of the relevant policy.[163]

B. Fundamental Rights

Plaintiffs, in addition to arguing suspect classification, advanced equal protection theories based on fundamental rights pertaining to homosexuality.[164] Challenges to the homosexual exclusion policy based on equal protection of a fundamental right to engage in homosexual conduct failed.[165] But equal protection claims are still urged as a basis for future litigation.[166]

This new assertion of equal protection claims is a

direct result of the Hardwick holding that there is no fundamental right to engage in homosexual acts. To advance an equal protection claim after Hardwick, plaintiffs must argue that some fundamental right distinct from conduct is implicated by the homosexual exclusion policy.[167] Some argue that this other right is a fundamental right to be homosexual.[168]

Those who argue this theory only generalize the contours of the fundamental right to be homosexual. Since, in some sense, every person is what he is regardless of law, policy, religious tenets or public or private opinion to the contrary, the right to "be" is a difficult concept indeed.[169] An attempt at definition must be made, however, in order to test this right against the constitutional standard of equal protection.

After Hardwick, any definition of the right to be homosexual must avoid the prohibited aspect of homosexual conduct, else be disqualified from constitutional protection. Thus, it is fair to say that the concept of the right to be homosexual relies on a strict status/conduct dichotomy.[170] As discussed previously, the result of the status/conduct dichotomy

is the notion of a homosexual as a psycho-sociological being. When the dichotomy is strictly applied, a homosexual becomes a personality disembodied from any suggestion of past, present or future homosexual conduct. Here the homosexual is only an identity. That identity has its own vitality, and is quite apart, even remote, from its owner's physical acts. It is this homosexual, or this aspect of a homosexual, that arguably has a fundamental right to <u>be</u>.

To test the viability of this alleged right, the first question that must be answered is how this fundamental right to be homosexual differs, theoretically or practically, from a right to other states of existence. For example, in the area of military personnel policies, any one who is excluded from service could make a similar claim that the exclusion impinged his right to <u>be</u> whatever characteristic the Army had determined was service-disqualifying.[171] It may be established that the particular trait or identity is at "the core of one's personality, self-image, [or even] sexual identity."[172] Even so, that fact simply does not demonstrate that that trait or identity should "enjoy special

constitutional protection"[173] or "be 'afforded shelter' as a fundamental right."[174] Indeed, the opposite conclusion is plainly unworkable, if not unthinkable.[175]

A second inquiry goes to how any right to be homosexual is impinged by the homosexual exclusion policy. The homosexual exclusion policy denies homosexuals the opportunity to be soldiers.[176] It does not preclude them in any way from being homosexuals.[177] All military personnel policies operate similarly. They offer or deny the opportunity to soldier. They neither contemplate, nor affect any aspect of a military applicant's right to be whatever he is.[178]

A final inquiry must be to test the logic and common sense of the status/conduct dichotomy itself, because the alleged fundamental right to be homosexual depends upon this dichotomy completely for its legal viability. Can a personality or identity be so easily and cleanly separated from the physical body that houses it?

Close analysis shows that, in practical terms, the status/conduct dichotomy is simply ephemeral. The dichotomy is difficult in theory and unrecognizable in reality. To be a workable policy premise, the

status/conduct dichotomy requires either factual celibacy or deliberate ignorance of the facts. The first is unrealistic, the second unacceptable.[179] Thus, the status/conduct dichotomy, and any fundamental rights alleged to arise from it, is not an appropriate conceptual basis for law or policy. Because of the nature of the interests at stake, this is particularly true in the unique dynamic of military personnel policies.

C. Homosexuality and Equal Protection Guarantees: Conclusion

In sum, plaintiffs were unable to establish a fundamental right to engage in homosexual acts. Thus, equal protection challenges to the homosexual exclusion policy based on fundamental rights failed. While some argue a fundamental right to be homosexual is protected by equal protection guarantees, the right to be is amorphous and there are no apparent principles by which to distinguish between states of being for purposes of constitutional protection. Thus, the law is unlikely to create a new category of equal protection claims based on the right to "be". Because the homosexual exclusion policy does not burden a fundamental right or

a suspect class, it was tested against the rational basis standard. As courts repeatedly held, the policy meets that standard without any difficulty.[180]

Summary:

Legal Challenges to the Homosexual Exclusion Policy, 1971 - 1991.

Twenty years of litigation on the homosexual exclusion policy has resulted in a substantial and virtually unanimous body of law affirming the policy's constitutionality. The homosexual exclusion policy does not implicate, much less abridge, constitutional guarantees of privacy, free association, free speech, due process or equal protection of the laws.[181] Moreover, the law has explicitly and repeatedly recognized that the homosexual exclusion policy has a rational basis. Thus, the first question in reviewing policy--is the homosexual exclusion policy <u>permissible</u>?--is soundly answered in the affirmative. The answer to the next question--is the policy <u>appropriate</u>?--takes some lessons from the law, but encompasses a broader and more detailed range of practical factors as well. The next section will

discuss practical perspectives on whether the homosexual exclusion policy is an appropriate striking of the balance between individual desires and the needs of the service.

PART THREE.

THE HOMOSEXUAL EXCLUSION POLICY AND THE RATIONAL BASIS TEST

I. INTRODUCTION

"The commander's major task is to fight a war, not a lawsuit."[182]

The homosexual exclusion policy, though unique in provoking litigation, is not different in any conspicuous degree from other military exclusion policies, or other military personnel policies in general. Military personnel policies are designed to effect decisions on how best to compose America's fighting force. They are designed to discriminate between those classes of individuals whose potential for successful soldiering, in the judgment of the Army's senior military and civilian leadership, is strong and those whose potential is weak. These policies are not anti-single parent, anti-overweight people, anti-high school dropout, anti-handicapped

people or anti-homosexual. Military personnel policies are not anti- any individual. They are simply pro-Army.[183]

Nevertheless, because of the attention the homosexual exclusion policy has garnered in some circles, it is important to be reminded of the consequential context in which the policy operates. Challenges to the homosexual exclusion policy, like most challenges to military personnel policies, focus on the desires and interest of the individual plaintiff. Despite the individual sympathies involved, however, this viewpoint is out of focus. "The essence of military service 'is the subordination of the desires and interest of the individual to the needs of the service.'"[184]

This backdrop is necessary to put the homosexual exclusion policy in practical perspective and to begin to see it as only a small part of the cumulative striking of the balance between individual desires and the needs of the Army. The homosexual exclusion policy has survived judicial scrutiny time and time again. Yet it remains in controversy. Much of this controversy results from a failure to apprehend the way

military personnel policies in general operate. More broadly, this controversy results from a fundamental misperception of what the Army in fact is, as a political, social and constitutional entity that has no analogue in the civilian sector.

To put the homosexual exclusion policy in perspective, this section will examine the legal standard of review applied to the policy, the rational basis test. The discussion will then focus on the Army's litigation stance in defending military personnel policies and plaintiffs' arguments on the appropriateness of the homosexual exclusion policy. The final section will examine the regulatory rationale for the homosexual exclusion policy in detail.

II. THE RATIONAL BASIS TEST.

One of the most important, and most hotly contested, issues raised in challenges to the homosexual exclusion policy was the determination of the appropriate standard of judicial review. As already shown, courts rejected claims that the homosexual exclusion policy burdens either a fundamental right or a suspect class.[185] Thus, the

policy is tested against the rational basis standard.[186]

The rational basis test has been stated in a variety of ways. In general, the test operates as a presumption that a government regulation is valid for equal protection purposes so long as the regulatory classification "rationally furthers some legitimate, articulated state purpose."[187] Stated conversely, a government regulation is not valid if the regulatory classification is based on "factors which are . . . seldom relevant to the achievement of any legitimate state interest."[188] Thus, the standard is widely recognized as "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause."[189]

In Dallas v. Stanglin, the Supreme Court reaffirmed that this relaxed and tolerant form of judicial scrutiny was a necessary reflection of the fact that "the problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific."[190] The Court went on to note that a less flexible approach to determining statutory validity would vitiate "the principle that the Fourteenth Amendment gives the federal courts no power to impose

upon the States their view of what constitutes wise . . . social policy."[191]

The homosexual exclusion policy readily survives rational basis scrutiny.[192] From a practical point of view, however, the validity of the rationale underlying the homosexual exclusion policy continues to generate debate. Opponents of the policy argue that the secretarial determination that homosexuality is incompatible with military service cannot be proved. Therefore, opponents argue, the secretarial determination is not an appropriate basis for excluding homosexuals from military service. This argument is, in essence, a revisiting of the rational basis issues raised in legal challenges to the homosexual exclusion policy. Thus, the following section will closely examine the litigation positions on the rational basis for the homosexual exclusion policy.

III. THE ARMY'S LITIGATION STANCE.

Practical as well as legal factors influence the Army's approach to litigation challenging military personnel policies, including challenges to the homosexual exclusion policy. As a practical matter, to

comprehend the potential scope of such challenges, it is imperative to understand the scope and breadth of the Army's personnel management operation. This understanding is central to a full appreciation of all that is at stake in such litigation.

Over the last two decades, the United States Army has been at an average strength of nearly one million soldiers on active duty. Each year, recruiters screen or process thousands of candidates for military service. Thousands of personnel actions--enlistments, reenlistments, promotions, discharges, reductions--take place world-wide every day. In addition, when the world changes, the Army changes.[193] Army leaders must quickly respond to new missions and emergencies with efficient and effective measures to manage personnel movement in a fighting force of active duty soldiers and reservists that numbers in the millions. Military personnel management is not a small, insignificant, or easy job.

The magnitude and complexity of managing military personnel proves the wisdom that, in the absence of a burden on fundamental rights or suspect classifications, the rational basis test is the

appropriate standard against which to review the "rough accommodations" of the practical problems of running an army.[194] The magnitude and complexity of running the Army, even solely from the viewpoint of personnel management, also explains why, in litigating military personnel policies, the Army holds fast to the rational basis standard of proof.

To prevail on a rational basis standard of review, the standard of proof is a sufficient showing that the questioned "policies and procedures . . . are rationally related to permissible ends."[195] Under City of Cleburne v. Cleburne Living Center, it is clear that the Army need not conclusively establish as fact that homosexuality is incompatible with military service.[196] To prevail on rational basis review, "[i]t is enough to show that a potential danger exists without the restrictions of the challenged . . . regulation."[197] As the court in Dronenburg v. Zech plainly stated in its review of the homosexual exclusion policy, the military "is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate."[198]

When the Army is hailed into court to defend a

personnel policy, it defends, not the merits of the policy, but rather the Secretary's prerogative to establish the policy and to exercise his professional judgment in the first instance. In essence, the Army defends the Secretary's common sense, a proposition not proven or disproved by social science studies or by what is familiar to trial courts as a "battle of the experts." A full array of civilian experts, on psychology, sociology, sexology, theology or any other number of fields, could provide ample expertise to the court.[199] Yet these experts would remain unable to answer what is quintessentially the military's judgment call on which individuals or groups, considering the administrative burden the Army is willing to bear, have strong potential for successful soldiering and which do not.[200]

Although over the years there was an inordinate amount of publicity attending challenges to the homosexual exclusion policy, it was imperative for the Army to defend those cases in the same way lawsuits on other personnel policies were defended. Certainly, the emotional and political dynamics surrounding challenges to the homosexual exclusion policy were quite different

than those surrounding, for example, litigation on the single parent exclusion policy. But the legal issues, the standard of review and standard of proof, were the same in both instances.

In some of the challenges to the homosexual exclusion policy, the Army presented evidence of the regulatory rationale as stated in the regulation itself.[201] In other cases, affidavits or testimony was presented.[202] Some judges rejected both approaches as offering "merely a series of platitudes."[203] In the end, however, courts had no difficulty finding that the military interests underlying the homosexual exclusion policy--good order, discipline and morale--were substantial.[204] Further, courts specifically found that the military's concerns about homosexuality were "not conjectural, but had a basis in fact."[205]

Once the Army presents evidence that there is a rational basis between excluding homosexuals and morale, good order and discipline within the armed forces, the burden shifts to plaintiffs to show that the proffered basis, and hence the secretarial determination that homosexuality is incompatible with military service, is irrational.[206] Few plaintiffs

presented affirmative evidence in an effort to negate the Army's showing.[207] No plaintiff attempted to show that homosexuality is compatible with military service.[208] The proposition that the homosexual exclusion policy was irrational, however, was often advanced by vigorous argument.[209]

IV. PLAINTIFFS' ARGUMENTS ON IRRATIONALITY OF THE HOMOSEXUAL EXCLUSION POLICY.

A. Introduction.

Before turning to the various arguments plaintiffs made in an attempt to show that the homosexual exclusion policy is irrational, it is important to set out the fundamentally different perspectives of the parties to such a lawsuit. Lawsuits, and controversies in general, center on individuals. Lawsuits, in the most basic sense, and however ultimately styled in terms of legal claims, begin with an individual who feels wronged.[210] Thus, lawsuits, and the larger social controversy they may reflect, have their origin in individual equities.

In stark contrast to a focus on individual equities, military personnel policies have their origin in the military's weighty obligation to maintain an

"efficient and easily administered system of raising armies"[211] whose "primary business . . . [is] to fight or be ready to fight wars should the occasion arise."[212] It is beyond cavil that,

> [m]ilitary regulations must be considered in the light of military exigencies, "must be geared to meet the imperative needs of mobilization and national vigilance . . . and great and wide discretion exists in the . . . interpretation in such matters as what constituted "for the good of the service."[213]

The overriding principle in military personnel policies is "the good of the service." This principle clearly cannot be relinquished, even though it may cause a hardship to particular individuals.

Plaintiffs have challenged the homosexual exclusion policy on a wide spectrum of legal claims and theories based on every type of individual right ever established under the United States Constitution. But these challenges, naturally, embraced a human element as well. This element--the adverse impact of the homosexual exclusion policy on <u>individual homosexuals</u>--rather than some aspect of the broad policy issues involved, was the gravamen of plaintiffs' arguments that the policy was so irrational that it violated equal protection guarantees.[214] Clearly, however, the

effect on individuals is not the determinant of a policy's rationality or even appropriateness. From the viewpoint of managing an army, a challenge to a military personnel policy is not a hermetically sealed question that effects only the individual plaintiff, and thus should be decided on individual equities. The Army must look at its policies ex ante. It must assess the cumulative cost to the Army of providing all homosexuals a right--in economic terms, an "incentive"--to seek military service.[215] By contrast, plaintiffs' ex post arguments based on the effect of the exclusion policy on individuals are simply nonresponsive.[216] Because these arguments were the subject of wide discussion, however, they will be briefly examined.

The arguments can be summed up and expressed in three general points. First, that the homosexual exclusion policy is irrational because it punishes homosexuals for something--their homosexuality--they did not choose and cannot change. Secondly, that the homosexual exclusion policy is irrational because it ignores individual equities. Finally, that the homosexual exclusion policy is irrational because it wrongly emphasizes or relies upon social and political

dynamics as they are, rather than as they should be. These points will be discussed in turn.

B. Punishment.

Plaintiffs argued that the homosexual exclusion policy is irrational because it punishes homosexuals for their homosexuality, which is a trait they did not choose and cannot change.[217] This idea is sympathetic at first blush. It does not, however, withstand close analysis.

One defect in this argument is that not every result that is unsatisfactory to the individual is cognizable as "punishment," either at law or in logic. Punishment, as contemplated by the law, is quintessentially the result of criminal sanctions.[218] Administrative results simply do not impose punishment.[219] This argument fails ultimately, however, because of the logical defect in maintaining that denial of the opportunity to soldier impacts at all on one's ability to be a homosexual.[220]

Even if the operation of the homosexual exclusion policy is punishment, the premise that that punishment

is based on something homosexuals did not choose and cannot change wholly misses the point. Although much judicial and academic time has been invested in exploring the etiology of homosexuality,[221] how or why individuals become homosexual is completely irrelevant to the secretarial determination that homosexuality is incompatible with military service. While some urge that etiology is relevant to fault,[222] fault, however that term is used, is not relevant to military personnel policies. The Army does not attempt to determine the etiology of single parenthood, drug or alcohol abuse, high school absenteeism, obesity, or of any other service-disqualifying characteristic. When a person is disqualified from military service by reason of physical or mental handicap, for example, whether he was handicapped by accident of nature or through his own fault is wholly irrelevant to the fact that he is does not meet accession or retention standards for soldiering.

The Army clearly must make personnel decisions and apply broad policy objectives based on an individual's situation at the time he presents himself for enlistment, not on some notion of whether the

individual was responsible or not for creating that situation. The Army plainly is not in the business of sorting out the genesis of social or sexual phenomena. Nor should the Army be expected to attempt that formidable task. Finally, even assuming the homosexual exclusion policy punishes homosexuals for something they did not choose and cannot change, that fact does not demonstrate that homosexuality is compatible with military service.[223]

The Army simply sets accession and retention standards for soldiers. These standards are based on the needs of the service, which vary and fluctuate over time. These standards are not designed, nor do they operate to punish anyone. This is true regardless of how a particular individual acquired the characteristic that may ultimately disqualify him from military service, and regardless whether the individual deplores the service-disqualifying characteristic or prefers it. As Chief Justice Burger observed in Bowers v. Hardwick, the regulation of homosexual conduct "is essentially not a question of personal 'preferences' but rather of the legislative authority of the State."[224] Similarly, the homosexual exclusion policy is not about personal

sexual preferences. Rather, the policy is one expression of the judgment of senior military and civilian leaders on how maintain an "efficient and easily administered system of raising armies"[225] whose "primary business . . . [is] to fight or be ready to fight wars should the occasion arise."[226]

C. Case-by-Case Analysis: The Individual Equities.

The second argument advanced by plaintiffs in an attempt to show that the homosexual exclusion policy is irrational asserts that the policy produces unfair, even foolish results as to particular homosexuals. Plaintiffs claim that the policy can be rational only if it operates on a case-by-case basis and allows for individual equities.[227] This argument again highlights the difference between ex post arguments, which are not responsive to broad policy concerns, and ex ante analysis, which is.

Plaintiffs' claims are based, essentially, on their individual military service record.[228] From the Army's perspective, however, the service record of the individual plaintiff is simply not material to whether homosexuality, as a set of discernible characteristics

of a class, is compatible with military service. Policy-makers know fully well that all military exclusion policies may sometimes exclude good soldiers. But that result, like the result of the exclusionary rule for evidence obtained in violation of the Fourth Amendment, is the considered price military society is willing to pay for good order, discipline and morale within the armed forces. Paraphrasing Justice Harlan's revered statement, by its personnel exclusion policies, the Army has forthrightly concluded that "it is far worse to enlist a poor soldier than to let a good soldier go free."[229] This perspective, unlike plaintiffs' view, recognizes the reality of how personnel policies must operate if they are to be in fact "policies."[230]

The reality of policy-making is that "[n]early any statute which classifies people may be irrational as applied in particular cases."[231] Further, as the Supreme Court has observed, "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. . . . Perfection in making the necessary classifications is neither possible nor necessary."[232]

These points are especially apt in the context of military personnel policies. The scope of responsibility in military personnel management is immense, extending even to combat readiness. Not only must military personnel policies deliver soldiers with the best potential for successful service, they must do so without imposing an undue administrative burden on the Army's warfighting mission.[233] No soldier who has ever served has not at some time wished his personal situation could receive more individualized attention from the Army. But, in the end, the Army determines, as it must, when individualized personnel decisions profit the Army as a whole.[234]

The law clearly does not require the Army to "show with particularity that the reasons for the general policy of discharging homosexuals . . . exist in a particular case before discharge is permitted."[235] The argument urged by plaintiffs, however, is that the Army <u>should</u> make such a showing. This particularized showing, plaintiffs contend, would result in a workable, perhaps better, balance of the homosexual's desire for military service and the needs of the Army.

Plaintiffs ask the Army to take on a huge

administrative burden in a futile attempt to predict the unpredictable.[236] No one, not even the individuals involved, can say with certainty how their homosexuality will, over time, affect their service as a soldier.[237] Nor can there be any meaningful assurances that, over time, an individual's homosexuality will not result in criminal or other disruptive behavior.[238]

In the event that such behavior does result, the Army must then bear the additional burden and considerable expense of administrative or judicial discharge of the individual.[239] A final point to consider is that when a policy allows for exception or individualized determinations, this serves only to provide another basis for litigation.[240] Unlike other grounds for discharge where the Army has decided to provide for exceptions or case-by-case determinations,[241] the Army could reasonably conclude that to provide exceptions as to homosexuality would then compel the Army "to engage in sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts."[242]

The Army need not choose between sleuthing and "[shutting] its eyes to the practical realities of" homosexuals in the military.[243] Clearly, a policy that avoids or minimizes this choice in the first instance is best for the Army and the individuals involved.[244]

The homosexual exclusion policy sets down a general rule, but, as the Supreme Court has stated in another context, "[g]eneral rules are essential if [an army] of this magnitude is to be administered with a modicum of efficiency."[245] This is true "even though such rules inevitably produce seemingly arbitrary consequences in some individual cases."[246] Thus, when plaintiffs argue that individual equities demonstrate that the homosexual exclusion policy is irrational, they simply misperceive the focus and operation of military personnel policies.

D. What Should Be, According to Plaintiffs.

The final major theme disputing the rational basis of the homosexual exclusion policy centers on the notion that the policy wrongly emphasizes or relies upon social and political dynamics as they are, rather than as they should be, according to plaintiffs. This

theme has three notable variations. These are that the homosexual exclusion policy is irrational because it is based on morality, which should have nothing to do with the law. That the policy is irrational because it is based on societal prejudice against homosexuality, which prejudice the Army should endeavor to change. Finally, that the homosexual exclusion policy is irrational because it reaches the off-duty conduct of soldiers, which conduct should not be the Army's proper concern. The next three sections will discuss these arguments in turn.

1. Morality.

Plaintiffs challenging the homosexual exclusion policy often disputed the moral dynamic of homosexuality. Some claimed the homosexual exclusion policy is based on morality, and therefore the policy abridges the Establishment Clause.[247] More boldly, some plaintiffs contended that "the existence of moral disapproval for certain types of behavior is the very fact that disables the government from regulating it."[248] Indeed, one judge opined that it is "of no significance that the [homosexual] conduct in question

may be condemned as immoral by a majority in our society."[249] The argument, then, is that the homosexual exclusion policy is irrational because it coincides with "majority morality and majority choice is always made presumptively invalid by the Constitution."[250]

Courts readily found that this theory of irrationality is not grounded in law or logic.[251] The Supreme Court has made clear, and expressly so as to homosexuality, that morality informs the law.[252] That there are a variety of views on the morality of homosexuality is a fact. But the fact that the homosexual exclusion policy may coincide with an historical, moral or majoritarian view of homosexuality does not mean it lacks a rational basis.[253] Indeed, one can only imagine the type of army that might be fielded if, to be rational under the rational basis test, military personnel policies were required to take an approach that was the opposite of historical, moral and majoritarian views. Moreover, moral precepts have been an important, explicit and integral part of soldiering from the time of the very formation of the United States Army.[254]

2. Prejudice.

A second theory of irrationality centers on prejudice. Plaintiffs claim that the homosexual exclusion policy lacks a rational basis because it accounts for, or is based on, existing societal conclusions or attitudes about homosexuality.[255] The argument asserts that the Army's justifications for excluding homosexuals amount to no more than a "series of platitudes."[256] The policy, plaintiffs contend, serves only to "illegitimately cater[] to private biases."[257] Moreover, in this view, the Army should, or should be forced to, take up the task of endeavoring to change societal attitudes or prejudice toward homosexuality. This task of social reformation extends even to changing the attitudes of foreign nations and of organizations such as the KGB.[258]

The argument that the homosexual exclusion policy had its genesis in social prejudice fails, first, to admit that the homosexual exclusion policy is premised on the risk of eventual homosexual conduct.[259] The argument asserts that attitudes about homosexuals exist in the abstract and are unrelated to attitudes about homosexual conduct. It was in this context that

plaintiffs often analogized the homosexual exclusion policy to the racial segregation. The analogy between homosexuality and race, however, compares two incomparable traits. Even some courts positing this analogy conceded that it was flawed by the fact that "constitutionally, race is a suspect classification; and race, unlike desire or intent, cannot be suppressed."[260] Nevertheless, the analogy between homosexuality and race is frequently held up as a reason to be skeptical of the homosexual exclusion policy.[261]

Such skepticism is yet another expression of the status/conduct dichotomy. Plaintiffs claimed that, apart from any prospect of conduct that all parties agreed was detrimental to the Army, homosexuals are excluded from military service "on the ground that they [in terms of their status, and apart from their conduct] are offensive to the majority or to the military's view of what is socially acceptable."[262] Joining the analogy to racial segregation, plaintiffs argued that if homosexuals could properly be excluded from military service, then "no rights are safe from encroachment and no minority is protected against

discrimination."[263] Thus, plaintiffs attempted to demonstrate that the homosexual exclusion policy was irrational because racial segregation was impermissible.

One court flatly declared that this argument linking homosexuals and racial minorities was "completely frivolous."[264] Conversely, one court rejected the Army's attempt "to avoid the race analogy by arguing that the homosexuality regulation is directed at conduct," whereas past policies on segregation were based upon attitudes among the races.[265] Even assuming the analogy between homosexuality and race is useful, the comparison does not address, much less negate, the bases for the homosexual exclusion policy.

Racial segregation was based on some "view of what [was] socially acceptable" at the time. The concerns underlying the homosexual exclusion policy, however, are infinitely broader than social sensibilities. The homosexual exclusion policy has a moral dimension, one that did not attend racial segregation. Homosexuality, unlike race, impacts on military security and privacy concerns, as well as on assignment and deployment

considerations.[266] Homosexual culture, to the extent it involves homosexual conduct, cannot be integrated into the military community in the same way as racial minority cultures are integrated.[267] Finally, because homosexuality, unlike racial membership, does not have constitutional status, a policy integrating homosexuals into the military would require creating, rather than implementing rights for homosexuals. Creating rights is a vastly different, and potentially more disruptive, social process than implementing the law of the land.

Racial segregation and homosexual exclusion clearly are not alike, either in legal status or in practical terms. Simply put, members of racial minorities never have and never will present the potential that homosexuals present for adversely affecting military interests on several fronts.[268] Thus, the analogy between homosexuality and race does not withstand inquiry. Certainly, it provides basis to find the homosexual exclusion policy irrational. As the court carefully explained in Dronenburg v. Zech,

> The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights

that are solidly based in constitutional text and history.[269]

Analogies, nevertheless, are helpful in revealing the assumptions in plaintiffs' claims that homosexuals are excluded from military service solely as a result of illegitimate social prejudice. But an apt, and hence more illuminating, analogy is one that compares homosexual preference with other sexual preferences, rather than with racial or ethnic identity.

It would be a fundamental analytical mistake to accept the assumption that there are only two sexual preferences extant among humans. This assumption, however, underlies the notion that if the law would only treat homosexuality and heterosexuality, and their respective manifestations, as "morally equivalent,"[270] then every person's "core . . . personality, self-image, and sexual identity" would be accommodated and prejudice, as defined by plaintiffs, would be eliminated.[271]

The facts are otherwise. Sexual preferences, whether defined by the partner or object of sexual desire, or by a preference for particular methods of sexual gratification, range over a spectrum that is limited only by one's imagination. Non-homosexual

preferences, such as pedophilia, exhibitionism, fetishism, bestiality, transsexualism and sado-masochism, are sexual orientations in the same sense that that term was used by plaintiffs in challenges to the homosexual exclusion policy.[272] Societal attitudes toward these non-homosexual orientations are based, not on a prejudgment of the individual, but rather on conclusions about the defining sexual conduct.[273]

Unlike the analogy posed between homosexuality and race, there is no constitutional, principled way to distinguish between sexual preferences.[274] Thus, even heterosexual expressions are not completely protected by the law.[275] The law confines legal protection in sexual matters to "family relationships, marriage and procreation and does not extend more broadly to all kinds of private sexual conduct between consenting adults."[276]

This body of constitutional law simply cannot be explained away as "illegitimately cater[ing] to private biases."[277] Nor is illegitimate bias a reasonable construction of the homosexual exclusion policy. As one court held, "the concerns set forth in the [homosexual exclusion policy] cannot be so easily

dismissed as mere prejudice."[278] It simply cannot be said that the exclusion of homosexuals from military service is "so seldom relevant to the achievement of [good order, discipline and morale in the armed forces] that laws grounded in such considerations can be deemed to reflect prejudice and antipathy," rather than a rational basis in fact.[279]

3. Off-duty: Soldiers or Civilians?

The final theory of irrationality strikes at the very nature of military service. This argument asserts that the homosexual exclusion policy was irrational because it is based on the off-duty conduct of soldiers, which, the argument goes, is not the Army's business.

This is not a theme that rings true with the professional soldier: few forget the patient explanation that they are soldiers twenty-four hours a day.[280] This unique military status and its import have been affirmed by courts and commentators alike for as long as the Army has existed.[281] In The Soldier and the Law, for example, written in 1941 by law professors at the United States Military Academy, the authors

explained this unique status in a chapter titled, "To The Soldier:"

> Private Doe: 'Raise your right hand. Now repeat after me--!' . . . You are now a soldier! Perhaps you are not yet a real soldier in the full meaning of the term -- there you stand in your civilian clothes, your civilian haircut, untrained in even the barest fundamentals of military service; you do not <u>feel</u> different except for a slight twinge in the pit of your stomach that has nothing to do with food or drink. But a soldier you are, nevertheless. You will quickly attain the outward symbols of military service. The physical development and technical training you will acquire in due time. But <u>immediately</u> . . . a change of great moment to you has taken place. You have not merely obtained a new job, a new employer. You are not merely working for the government. You have not merely entered into a contract which you may modify or break at will. . . . [Y]ou have acquired a new <u>status</u>. . . . In short, you have not only entered in a new and strange environment . . ., you have become subject <u>to a new system of law</u>.[282]

This new system of law quite definitely encompasses the creed that "[t]here is no distinction between duty time and off-duty time as the high moral standards of the service must be maintained at all times."[283] Inside the courtrooms where challenges to the homosexual exclusion policy were advanced, however, the impact of military status on the questions before the court was often ignored or slighted.[284] The idea that the military might be concerned about the off-

duty, off-post conduct of its soldiers was often advanced, and sometimes greeted, with alarm, if not with outright horror.[285] This response demonstrates only a lack of understanding of that transforming moment when a civilian becomes a soldier and takes on the unique rights, duties and obligations as a member of the profession of arms.[286]

There can be no doubt that the Army is, and absolutely must be, concerned with the conduct of its soldiers, whether off-duty or off-post.[287] This concern applies to all misconduct, including homosexual misconduct. More importantly, the Army must have soldiers who understand and accept their military status and its resulting responsibilities, even the need for sacrifice. Plainly, it is no defense, either to the criminal offense of homosexual conduct or to its deleterious impact on good order, discipline and morale, to say, "I'd always known [homosexual conduct] was against the rules . . . [but] it was my private time while I was off duty."[288] The homosexual exclusion policy clearly is not irrational on the ground that it encompasses, as does the criminal law, the off-duty, off-post conduct of soldiers.

E. Plaintiffs' Argument that the Homosexual Exclusion Policy is Irrational: Conclusion

In an attempt to establish that the homosexual exclusion policy lacked a rational basis, plaintiffs argued that the policy was irrational because it punished homosexuals for their homosexuality, because it did not account for the equities surrounding individual homosexuals, and because it failed to be pro-active on the issue of homosexual rights. This failure of pro-action was advanced by arguments that the homosexual exclusion policy was based realities the Army should endeavor to change--on morality, on societal conclusions about homosexuality, and on the Army's view that off-duty conduct of soldiers, whatever its nature, was the Army's proper concern.

These arguments were rejected. Moreover, regardless of merit, these arguments could not carry the burden of evidence negating the Army's showing of a rational basis for the homosexual exclusion policy. Plaintiffs made no showing that homosexuality, as a characteristic of a group, is compatible with military service. Thus, every court that reached the issue

found without difficulty that the homosexual exclusion policy met the rational basis standard.

V. THE REGULATORY BASIS FOR THE HOMOSEXUAL EXCLUSION POLICY.

A. Introduction.

> A critic should . . . not check a great commander's solution to a problem as if it were a sum in arithmetic. To judge . . . it is necessary for a critic to take a more comprehensive view.
>
> - Clausewitz, On War

The Secretary has determined that homosexuality is incompatible with military service. That determination is not based on the circumstances, conduct or qualities of individual homosexuals. Rather, it is the result of applying common sense and experience to discernible characteristics of the circumstances and conduct of homosexuals in general. This use of classwide presumptions is recognized as both necessary and appropriate in policy-making.[289]

Clearly, the determination that homosexuality is incompatible with military service is not, strictly

speaking, a determination of fact. Rather, it is an exercise of professional military judgment in making a broad policy choice.[290] Yet the argument is heard that the secretarial determination that homosexuality is incompatible with military service is a wrong basis for policy-making because it cannot be proven.[291]

The law clearly does not require proof of the factual merits of the Secretary's exercise of judgment in making policy choices. If the merits were reached, however, certain facts about homosexuality would pertain. These facts are readily discernible from a survey of medical and other literatures that document homosexual behaviors and homosexual culture. These facts will be discussed in the context of the rationales for the homosexual exclusion policy as set out in the Army's regulation.

B. The Regulatory Rationales.

"The military commander has traditionally been responsible for the health, welfare, support, morale, and discipline of the members of his command, expecting in return loyalty and dedication to mission."[292] This fundamental principle of military life is reflected in

the seven rationales the Army regulation sets out in support of the determination that homosexuality is incompatible with military service. These rationales are:

> The presence of homosexual individuals in the military adversely affects the ability of the armed forces:
>
> (1) to maintain discipline, good order, and morale;
>
> (2) to foster mutual trust and confidence among soldiers;
>
> (3) to ensure the integrity of the system of rank and command;
>
> (4) to facilitate assignment and worldwide deployment of soldiers who frequently must live and work under close conditions affording minimal privacy;
>
> (5) to recruit and retain soldiers;
>
> (6) to maintain public acceptability of military service, and
>
> (7) to prevent breaches of security.[293]

These rationales are inter-related. Each eventually points to a cumulative adverse impact on good order, discipline and morale of the armed forces--in short, an adverse impact on combat readiness.[294] Although not so neatly severable in reality, the regulatory rationales can be divided into four sets for purposes of discussion. Thus, the discussion will

focus on homosexuality as it relates to military concerns for good order, discipline and morale. The discussion will then turn to security concerns and privacy concerns. The final set of related rationales, "to recruit and retain soldiers" and "to maintain the public acceptability of military service," will be addressed in Part Four, which considers the politics of social experimentation.

1. Good order, discipline and morale.

Good order, discipline and morale in the armed forces is a dynamic, over-arching concept. As a rationale for the homosexual exclusion policy, good order, discipline and morale is an goal in itself.[295] For these purposes, good order, discipline and morale encompasses two other regulatory rationales: "to foster mutual trust and confidence among soldiers" and "to ensure the integrity of the system of rank and command."[296] Discussion of the potential impact of homosexuality on the good order, discipline and morale of the armed forces will address homosexual sexual practices, health issues related to homosexual sexual practices, substance abuse and related mental health

issues.

a. Homosexual Sexual Practices.

Throughout the litigation challenging the homosexual exclusion policy, there was little dispute that homosexual acts were detrimental to the good order, discipline and morale of the armed forces.[297] Facts about the scope, nature and result of homosexual sexual practices are, then, useful in evaluating the rational basis for the homosexual exclusion policy.

Research suggests that there are qualitative and quantitative differences between patterns of homosexual and heterosexual activity.[298] There is a ample evidence that homosexuals are likely to have significantly greater numbers of sexual partners than heterosexuals.[299] It is common in the literature to find homosexuals reporting median lifetime numbers of partners in excess of 1,000.[300] While public health concerns may have caused some downward trend in numbers of homosexual partners, this has not been conclusively established.[301] Recent evidence of a resurgence of sexually transmitted diseases,[302] findings reported at the Sixth International Conference on AIDS,[303] and

anecdotal reports from the homosexual community[304] suggest that there has not been a significant or long-term change in either numbers of partners or types of sexual acts practiced by homosexuals.[305] Further, reducing the number of partners may not reduce the chance of exposure to infections, such as with HIV, because of the increase over time in the size of the pool of infected individuals.[306]

There is evidence that homosexual acts are more likely than heterosexual acts to be committed furtively, that is, when the identity or face of the partner is hidden, and in public or semi-public, such as in rest rooms, highway rest stops and public parks.[307] Similar patterns of sexual liaisons have been self-reported by homosexuals while in the military.[308] Homosexual partners are frequently anonymous,[309] and "[m]any homosexuals deliberately seek anonymous sexual intercourse."[310]

The American Medical Association Council on Scientific Affairs has stated that a person who shows,

> a dominant pattern of frequent sexual activity with many partners who are and will remain strangers, presents 'evidence of shallow, narcissistic, impersonal, often compulsively driven, genital- rather than person-oriented sex and is almost always regarded as pathological.

> Whether such patterns of activity may yet allow appropriately satisfactory adjustments in other aspects of living is not the only issue.[311]

A further problem raised by the anonymity and number of the partners involved in homosexual acts is the adverse impact that has on the ability of the relative community to control sexually transmitted diseases.[312] Contact tracing, the primary public health response to sexually transmitted disease, is virtually impossible in these circumstances.[313]

Homosexual sexual practices include oral and anal sodomy (receptive and insertive),[314] oral-anal contact, or anilingus (called "rimming") (receptive and insertive),[315] anal-perineal contact (called "fisting"),[316] and anal-digital contact. Secondary homosexual sexual practices include rectal insertion of objects[317] and urination on or into the body cavities of the partner.[318] Research suggests that "sexual practices found to be frequent among homosexual men were rare among [heterosexuals]."[319]

b. Health Consequences of Homosexual Sexual Practices

Facts regarding the health consequences of homosexual sexual practices are also relevant to the

impact homosexuality could have within the military. Homosexual sexual practices, apart from frequency of the practice or number of partners, put homosexuals at unique risk to contract pathogens and develop disease or infection.[320] This risk results from the fact that "fecal-oral contamination is a common occurrence in homosexual activity and is not limited to direct oral-anal contact."[321] Enemas or rectal douching may be used to reduce the risk of fecal-oral contamination, but these precautions do not completely protect the participants in the sexual act.[322] Research suggests that "few heterosexual[s] . . . were exposed to feces during sex or had rectal trauma. None of the heterosexual men was exposed to semen."[323]

In addition to pathogenic infection resulting from exposure to feces and semen, there is evidence that homosexuals, particularly men, are at increased risk for a large number of sexually transmitted diseases.[324] The problem presented by the increased risk of disease is compounded by "[f]requent asymptomatic oral and anal infection" and exposure to a "wide variety of agents, often difficult to diagnose and sometimes unidentified."[325] Some researchers have concluded that:

> homosexual men are less preoccupied with health issues and that there is probably less guilt or venereoneurosis in homosexual clinic attenders. This finding does suggest that homosexual men are less concerned about [sexually transmitted diseases] and probably more likely to underplay the illness and its impact. . . . Defining oneself in sexual terms [as homosexuals tend to do] makes [sexually transmitted disease] acceptable as a risk of one's central status.[326]

Blood- and semen-borne infectious agents may be retroviruses, which means there can be a significant lapse between the time of infection and the time of seroconversion, that is, the point at which there are sufficient antibodies in the blood to mark the presence of the virus.[327] Blood-borne infectious agents may affect the safety of the military blood supply and increase the risk of infection through blood spatters and battlefield transfusions.[328] The presence of infectious agents or disease may adversely impact on the ability of the military to administer vaccinations or inoculations safely.[329] Missed vaccinations or inoculations can adversely impact on the individual soldier, as well as on the force as a whole.[330] Further, frequent use of antibiotics, which has been observed in the homosexual population, may compromise an individual's immunosuppression system and complicate medical efforts to control infection.[331]

Anal sodomy and anal-perineal contact ("fisting") may result in trauma and other complications, such as prolapsed hemorrhoids, penile edema, and anal fissures.[332] The practice of anal sodomy puts homosexuals at high risk for proctological and genital complications, including anal cancer.[333] Homosexuals are shown to have an increased prevalence of intestinal spirochetosis, which may result in rectal discharge, rectal bleeding, and diarrhea.[334] Enteric infections of, and trauma to, the rectum or anus may result in gay bowel syndrome.[335]

Medical reports show a significant occurrence of patients presenting in emergency rooms for removal of foreign objects inserted in the rectum, or for injuries incident to homosexual sexual acts.[336] In some instances, surgery and hospitalization is required.[337] Complications may include perforations of the intestine and death from internal fecal contamination.[338]

Finally, the medical community has repeatedly recognized that optimal medical care for homosexuals requires training, procedures and often resources beyond that required to meet the medical needs of heterosexuals.[339] The requirement for specialized

medical care is recognized as a cogent reason for exclusion from military service.[340]

c. Substance Abuse.

The adverse impact of substance abuse upon good order, discipline and morale within the armed forces is self-evident.[341] Thus, facts about the incidence of alcohol and drug abuse within the homosexual population are useful in suggesting the potential impact on good order, discipline and morale if homosexuality was not a disqualification for military service.

Some researchers have concluded that between 30 to 50 percent of the homosexual population suffers from alcoholism.[342] The estimated incidence of alcoholism among the heterosexual population is ten percent.[343] Homosexual women were found to have a significantly higher prevalence of alcoholism than heterosexual women,[344] and research suggests they frequently may be concerned about their use of chemical substances.[345] The homosexual bar, which functions as a place of social and sexual opportunity central to the homosexual community, may contribute to the incidence of alcoholism.[346] Alcohol or drug abuse may contribute to

high-risk behavior.[347]

Similar data are reported on the incidence of drug abuse. "Estimates of serious substance abuse among male homosexual adults range as high as 30%, and . . . data suggest even higher rates among [homosexual] adolescents."[348] Anecdotal evidence may support the reported incidence of alcohol and substance abuse within the homosexual population.[349]

d. Emotional or Psychological Stressors

Military life presents unique stressors that may tax vulnerable or poorly developed coping skills.[350] In populations or individuals with endemic stressors, the pressures of military life may exacerbate the potential for stress-related pathologies or inappropriate behaviors.[351] Thus, facts about stressors observed within the homosexual population are useful in evaluating the factual basis for the determination that homosexuality is incompatible with military service.[352]

Alcohol and other substance abuse, which has a significantly higher prevalence in the homosexual population, correlates with psychiatric dysfunction, although it has not been established whether substance

abuse is a cause or effect of psychiatric impairment.[353] Other stressors on mental or emotional adjustment are noted to result from turmoil or anxiety in regard to sexual identity.[354] It has been observed that in regard "to mental health, [homosexuals] appear to have some unique problems arising from the emotional toll of secrecy, disapproval, and, often, internalized shame."[355] Homosexuality itself may be diagnosed as a personality or character disorder in some cases.[356] Some data suggests that "it is generally true that more persons in the . . . homosexual groups [studied] . . . regardless of medical status, experienced depressive and anxiety disorders more than did heterosexual controls."[357]

Suicide ideation may be more prevalent among the homosexual population.[358] One study of 1,917 homosexual women found suicide ideation, frequently acted out in suicidal attempts, occurred in more than 50% of those in the study group.[359] The incidence of suicide ideation among homosexuals may be supported by anecdotal evidence.[360] Attempts to maintain social norms that impose profound lifestyle changes on homosexuals, such as norms imposed by the military

community, could be an additional stressor that might result in inappropriate coping behavior.[361] Anecdotal reports demonstrate the stressors that may be imposed on homosexuals within a military environment.[362] Further, physical health status, such as repeated incidents of infection or disease, can adversely impact on mental health status.[363] The requirement to divert time and energy to physical or mental health problems may be an additional stressor on the individual as well as on the relevant community, in this instance the military.[364]

e. Impact of Homosexuality on Good Order, Discipline and Morale: Conclusions.

Review of medical and other literature documenting homosexual sexual practices, health consequences of homosexual sexual practices, substance abuse and observed emotional or psychological stressors is useful in evaluating whether there is a factual basis from which the Secretary could rationally conclude that homosexuality is incompatible with military service. Despite the theory of a status/conduct dichotomy, homosexual activity is not a remote possibility within

the homosexual population. The health consequences of homosexual activity may adversely affect the homosexual soldier. Homosexual activity may spread disease within the military community, compromise the military blood supply, and burden military medical resources as well as other soldiers, who must perform the duties of those who are sick or absent because they are seeking medical care. The potential synergism of military stressors on emotional and psychological stressors observed within the homosexual population also poses serious problems for both the individual and the Army. Clearly, the observed scope, nature and result of homosexual sexual practices, as well as the observed stressors within the homosexual population, support the judgment that homosexuality could have an adverse impact on good order, discipline and morale within the armed forces.[365]

2. Military Security Concerns.

Some perceive the security concerns of the homosexual exclusion policy as a one-dimensional "objection that because of their alleged susceptibility to blackmail [homosexuals] present potential security risks."[366] Thus, the simply reply is that this

objection "could be forever eliminated if the military were to lift its ban on homosexuals--thereby immunizing [them] against blackmail."[367]

Security concerns are not so one-dimensional, however. Security threats are uniquely informed and impelled by the complexities of human nature and the human psyche. Thus, answers to broad-ranging threats to security are not so simple as merely changing military accession or retention standards in an attempt to "immunize" homosexuals from hostile intelligence activity. Moreover, the homosexual exclusion policy is not based on the individual homosexual as a security risk. The inquiry goes to whether homosexuality presents, or increases, security risks to the force overall.

Security concerns are much broader than the passing of secret documents or other sensational compromises of classified information. The military discipline of "operational security" recognizes that every soldier, regardless of duties or clearance, has information that may be useful to hostile agents.[368] Further, the Army can reasonably conclude that anything that increases hostile intelligence activity is

detrimental to the force, without regard to whether that activity results in actual breaches of security.[369]

Hostile intelligence activity presents multiple layers of threat to security. The potential for blackmail, or other forms of coercion, based on sexual information is well-recognized.[370] Indeed, blackmail based on homosexuality is not solely the province of hostile agents nor solely the concern of soldiers.[371] But blackmail is a worst case scenario, one that usually arises only if and when a relationship turns adversarial. Thus, while blackmail is an important security concern, it is only one factor in the complex of threats presented by hostile intelligence activity.

Compromising relationships between hostile intelligence agents and soldiers begin with identification of individuals who are perceived as vulnerable. These individuals are then targeted with positive appeals, including enticements "with money, sexual favors, [and, for example,] treatment for alcoholism."[372] Targeting involves the "exploitation of what [hostile] agencies consider to be human weaknesses, indiscretions and vices."[373] Targeting "might include surveillance of [vulnerable individuals]

and their associates."[374] As the court found in High Tech Gays v. Defense Industrial Security Clearance Office, the doctrine of hostile intelligence agencies, such as the Soviet Intelligence Service (the KGB), instructs agents to attempt to:

> identify those who are ideologically sympathetic, experiencing career difficulties, unsuccessful in social relationships, experiencing problems with narcotics, alcohol, homosexuality, or marital difficulties . . .. [N]o one trait may be sufficient, and . . . the KGB is encouraged when these traits are found in combination. . . . The KGB is not primarily interested in homosexuals because of their presumed susceptibility to blackmail. In its judgment, homosexuality often is accompanied by personality disorders that make the victim potentially unstable and vulnerable to adroit manipulation.[375]

Thus, some hostile intelligence agencies view homosexuality as a marker for other exploitable traits.[376] Further, the homosexual may feel disenfranchised or alienated, especially under the stressors of military life and the potential sanctions for homosexual conduct.[377] The concomitant resentment or bitterness the homosexual might experience may be projected back at the Army, or at society as a whole.[378]

Disclosure of one's homosexuality does not "immunize" a soldier from hostile intelligence targeting.[379] Indeed, general awareness of one's

homosexuality might facilitate targeting.[380] Even open homosexuals remain vulnerable to coercion based on loyalty to, or pressure by, partners who do not want their own homosexuality exposed.[381] Moreover, disclosure does not preclude the possibility that the presence of homosexuals in a military unit will cause increased hostile intelligence activity, which is a harm to be avoided in its own right.[382] It is not material whether homosexuals are more likely than heterosexuals to compromise security. The danger to security lies in the fact that the total effect of increased targeting logically might be increased adverse results.

The standard for granting a security clearance is not strictly applicable to this discussion, but it is illuminating.[383] In general, a security clearance "may be granted or retained only if '<u>clearly</u> <u>consistent</u> with the interests of the national security.'"[384] This high standard illustrates the gravity of the risks involved when the security of the Nation is open to compromise. The security concerns addressed by the homosexual exclusion policy also involve serious risks. These documented risks are clearly another factual matter in

the calculus behind the homosexual exclusion policy.

3. Privacy Concerns.

Another basis for the homosexual exclusion policy is that the exclusion of homosexuals "facilitate[s] assignment and worldwide deployment of soldiers who frequently must live and work under close conditions affording minimal privacy."[385] This rationale addresses the privacy concerns of other soldiers that would be implicated if homosexuals were allowed to serve in the military.

One manifestation of cultural privacy expectations, generally but in the Army as well, is gender segregation. The fact is that, in non-private settings, gender segregation is the norm in sleeping arrangements, shower facilities, and bathrooms, as well as is some in some occupations, such as clothing sales.

Gender segregation is based on two presumptions. The first presumption is that people have a sexual preference for persons of the opposite sex. The second presumption is that people should be allowed to choose to whom, by exposing their bodies or by engaging in intimate bodily functions, they expose an aspect of

their sexuality. Since sexuality is not in issue when heterosexuals are segregated by gender, the privacy implications of bodily exposure and intimate bodily functions are not in jeopardy.[386]

Courts have recognized these privacy considerations in several settings. In urinalysis cases, such as National Treasury Employees Union v. Von Raab,[387] courts note as a given in the urinalysis procedure that the observer is of the same sex as the person providing the urine sample.[388] In the instance of body searches, even visual only, one factor in the reasonableness of the search is whether it was performed by an officer of the same sex as the individual who was searched.[389] In prisons, the law recognizes that inmates of both genders have some privacy entitlements to same-sex guards in certain situations, such as when using the shower or bathroom facilities.[390] Clearly, society chooses to preserve and finds appropriate the privacy considerations historically protected by gender segregation.[391]

Similarly to society at large, the Army often depends on gender segregation to provide adequate protection of a person's privacy entitlements while at

the same time allowing for efficient, cost-effective processing and housing of large numbers of soldiers. Gender segregation, in many situations, also has clear utility for preserving good order, discipline and morale. The protection and restraint provided by gender segregation breaks down, however, when the underlying presumption that individuals sexually prefer the opposite sex is invalid, as in the case of homosexuals.[392]

For the homosexual man, for example, the Army's preinduction physical may be viewed as "pretty spectacular, I mean, 'cause you've got three hundred naked men in one room."[393] But the Army does not intend preinduction physicals, open bay barracks, group shower facilities or mass inoculations to be spectacular, only efficient. Nor do soldiers of either gender deserve to be stripped unwittingly of their right to choose to whom they reveal themselves in a sexual context.[394] Thus, the only way to maintain the protection and discipline--and, as will be seen, public acceptance of and respect for military service--that is otherwise achieved through gender segregation is either to exclude homosexuals or to accommodate them, if

possible.[395] The Army need not attempt accommodation.[396] But, for purposes of evaluating the rational basis for the homosexual exclusion policy, the fact that accommodation efforts would be required in order to meet the privacy and disciplinary needs of individuals and the Army supports the judgment that homosexuality is incompatible with military service.

VI. SUMMARY:

PRACTICAL PERSPECTIVES ON THE HOMOSEXUAL EXCLUSION POLICY AND THE RATIONAL BASIS TEST.

The homosexual exclusion policy, like any other solution reached by a military commander, cannot be "checked as if it were a sum in arithmetic." It is helpful, however, to take a comprehensive view of the factors that might go into the commander's policy equation. There is ample evidence from which the military could reasonably conclude that allowing homosexuality within the armed forces would present substantial risks to good order, discipline and morale, security, and to the privacy entitlements of other soldiers. One rationale may be stronger than others. The importance, or relative weight, of the separate

rationales may ebb and flow over time, or vary from station to station, or change from assignment to assignment. But, as the basis for a broad policy choice, the convergence of these several critical military concerns--good order, discipline and morale, security, and privacy concerns--certainly justifies the secretarial determination that homosexuality is incompatible with military service. The Army need not try to fine tune policies to minimize risk to combat readiness. Rather, it can elect a solution that avoids risk altogether.

PART FOUR.

THE POLITICS OF SOCIAL EXPERIMENTATION:

Practical and Constitutional Reasons for Policy-Making Restraint

I. INTRODUCTION.

"I don't know what effect they will have on the enemy, but, by God, they scare me."

- The duke, upon review of his troops

Throughout history the call to arms has resulted

in the assemblage of armies great and small, sharply skilled or hopelessly doomed. As it enters the last decade of the century, the American military is the most highly trained, highly disciplined, highly motivated and best equipped armed force ever fielded in the history of the nation. This very success, however, has invited the opinion that this Army, in addition to being a warfighting force, should be the engine of social change, the "leader[] in social experimentation and . . . adaptability to changing community standards,"[397] the revisionist of the "wisdom and the values of a society that has allowed [the military] to be so wrong [about homosexuals] for so long."[398]

This opinion that the Army has a social as well as a military mission came into commerce at the same time the military was becoming more and more civilianized in the public consciousness. Despite recruiting slogans proclaiming "it's not just a job," the absence of war and the advent of the all-volunteer force made it increasingly easy to lose sight of what the Army is. In some circles, the Army was viewed as a sort of benevolent welfare agency. In others, it was a college for professional or career development. Over time, it

was frankly presumed by some that the Army existed simply to provide a job to everyone who wanted one, regardless of the requirements of some abstract concept of "soldiering."

In point of fact, however, the Army exists for only one reason: to preserve the peace and security, and to provide for the defense, of the United States, in its unique position of leadership in the international community.[399] Thus, the end result of force composition decisions must be, not social utopia, but rather an army, and that army must be the best in the world.[400]

Advocates of an army of social change have advanced several proposals to modify the homosexual exclusion policy. These policy models attempt to address the problems of homosexuality within the military without excluding homosexuals. The proposals include a disclosure model, a decriminalization model, and an accommodation model. This section will explore the operation and soundness of each model.

II. THE DISCLOSURE MODEL.

The disclosure model relies on the notion that the

problems of homosexuality in the military can be addressed by allowing homosexuals to serve openly, while the Army relies on the criminal justice system to prevent homosexual conduct. In this model, the homosexual is required to declare his homosexuality openly.[401] Then he is required to acknowledge affirmatively that homosexual acts are criminal offenses under the Uniform Code of Military Justice.[402] Before discussing the efficacy of this model, a preliminary observation must be made.

The procedure described in the disclosure model has a serious disadvantage. It puts the homosexual soldier in an openly adversarial role with the Army from the moment he puts on his uniform.[403] It says to that soldier that the Army has allowed him into the service, but nevertheless the Army lacks confidence in his ability to serve successfully. This procedure would, in essence, officially stamp homosexual soldiers as probationers.[404] Whether the model nevertheless might be effective in addressing the problems of homosexuality in the military depends on two factors. These factors are the willingness of homosexuals to disclose their homosexuality and the practical effect

of criminal sanctions on homosexual conduct.

Disclosure of one's sexual identity is an intensely personal decision. It is not at all clear that lifting the "sanction" for homosexuality would result in one-hundred-percent disclosure, or even in disclosure by the majority of homosexuals who presented for enlistment.[405]

The practical effect of criminal sanctions on homosexual conduct is also problematical.[406] In the disclosure model, the homosexual soldier is required to sign a statement acknowledging that sodomy is an offense under the Uniform Code. The rationale is that then the Army is ensured that homosexual soldiers "know the rules."[407] Essentially, this statement is the equivalent of a pledge of celibacy on the part of the homosexual soldier. Celibacy, however, is widely regarded as an unrealistic standard of behavior. Further, it has not been observed as a statistically significant feature of either homosexual or heterosexual communities.[408] Indeed, the concept of monogamy, much less celibacy, has been rejected by some homosexuals as an expression of "pervasive heterosexism" and, thus, as a "marginalization" of

one's homosexual identity.[409]

In short, it is reasonable to conclude, as did the court in Baker v. Wade, that "[c]riminal sanctions do not deter homosexual sodomy--because 'sex, next to hunger and thirst, is the most powerful drive that human beings experience,' and it is unrealistic to think that laws [proscribing sodomy] will force total abstinence."[410]

Historically, this failure of deterrence has led some to advocate simply repealing the "failed" law.[411] The fact that laws are broken, however, does not demonstrate that law has no utility.[412] The potential that sodomy laws will be disobeyed, on the other hand, does demonstrate that requiring homosexual soldiers to pledge to celibacy may, as a matter of policy, be an exercise in futility.[413] The futility lies not in any allegation that homosexual soldiers might be insincere in such a pledge, but rather in the remarkable realities of the sexual dynamic.

If, as a general policy matter, a pledge to celibacy is futile, then the disclosure model fails to protect either the Army or the homosexual soldier from the risks and adverse consequences of homosexual

conduct in the military. The Army bears the considerable risk of a detrimental impact on good order, discipline and morale, hence on combat readiness.[414] This risk carries the burden of expensive administrative and judicial processes.[415] Moreover, the detriment to combat readiness, whatever the underlying misconduct, cannot be recompensed by the judicial system. The burden of repairing the effect of criminal offenses on good order, discipline and morale falls on commanders, who must then divert time and resources to that task. Finally, as noted in Beller, the Army bears the risk that, allowing homosexuals to serve, regardless of any pledge to celibacy, might be understood as tacit toleration, perhaps even tacit approval, of homosexual conduct.[416]

In the disclosure model, the homosexual soldier is in no more enviable position than the Army. Because his homosexuality is known to all, his probationary status is known to all. He may feel that one misstep could pack him off to prison, yet the strain of repressing the outward manifestation of his homosexuality may be great.[417] Even if the eventual result of this tension is not prohibited homosexual

conduct, the stressors inherent in this model may cause inappropriate coping behaviors or an exacerbated sense of disenfranchisement or alienation.[418] Further, the homosexual soldier's known vulnerability to prosecution if he fail, or is perceived as failing in his pledge, could become a divisive element or basis for manipulation or coercion among soldiers.[419]

In sum, the disclosure model fails to address the problems of homosexuality in the military. Rather, it raises serious problems for both the Army and the homosexual soldier. It is not a better solution for either the Army or the individual than the solution effected by the homosexual exclusion policy.

III. THE DECRIMINALIZATION MODEL: Amendment of the Law Proscribing Sodomy

The decriminalization model, similarly to the disclosure model, assumes that controlling criminal conduct is the sole rationale for the homosexual exclusion policy. Thus, the model solution is to decriminalize sodomy. The proposal is to repeal the law proscribing sodomy or to limits its scope to acts that occur "on duty, in the barracks, on board ship or aircraft, in a situation that would create the

appearance or prospect of favoritism within a chain of command, or in a situation that otherwise causes actual prejudice to good order and discipline."[420]

In military law, the proscription of sodomy is found in Article 125 of the Uniform Code of Military Justice.[421] The decriminalization model proposes amending Article 125 by adding two elements of proof, one as to the situs of the crime, the other as to the "actual" prejudicial impact of the crime.[422] These elements are reminiscent of the service-connected jurisdictional analysis that was overruled by the Supreme Court in Solorio v. United States.[423]

This model has two serious flaws. If, as has been shown, criminal sanctions have little deterrent effect on homosexual conduct, expanding the elements of proof may serve only to diminish further the impact of the sanction.[424] At the same time, expanding the elements of proof increases the burden of prosecution as to conduct that plaintiffs, courts, and legislative drafters have repeatedly recognized as plainly prejudicial to good order, discipline and morale. Neither result sensibly furthers the model's objective to ameliorate the problems of homosexuality in the

military.

The most serious deficiencies in the decriminalization model, however, are practical ones. The model creates anomalies and ignores the realities of homosexual conduct. Under the model, many instances of homosexual conduct would fall outside the scope of the proposed proscription, yet still be acutely detrimental to the Army or even to the soldier.[425] Thus, it is anomalous, as well as unworkable, to decree that homosexual acts are lawful in some instances but not in others. Moreover, it is not clear why homosexual sexual offenses should be proscribed only in limited situations, while other types of sexual offenses are not similarly limited to certain locations or participants or by "actual" results.[426]

Finally, the decriminalization model is deficient because it ignores the practical realities of homosexual conduct. The model's premise is that homosexuality <u>would be</u> compatible with military service <u>but for</u> the fact that homosexual acts are criminalized. This simplification of the rationale for the homosexual exclusion policy is not supported by the law or the evidence. Thus, this model fails to account for the

whole complex of factors that are addressed by the homosexual exclusion policy. This model, therefore, is not a better solution than that effected by the present policy.

IV. THE ACCOMMODATION MODEL.

In the accommodation model, the Army attempts to adapt to the unique needs and circumstances of homosexuals through education, training and changing the way the Army does business. This model is based on the fact that some homosexuals enter the military in spite of the exclusion policy.[427] The model's premise is that, since some covert homosexuals are presently in the military, "it cannot tenably be argued that homosexuals prevent the military from accomplishing its mission."[428] The proposal, therefore, is that "[i]f homosexuals are going to be in the military regardless of all efforts to keep them out . . . the military should adjust to that reality" and accommodate them fully.[429] This model will be reviewed for logical soundness and practicability in the military setting.

A. Logical Soundness of the Accomodation Model for Homosexuality in the Military

The logical soundness of the accommodation model depends on the strength of the model's premise and its factual predicates. The accommodation model relies on the premise that if a law is violated, it should be abandoned. Stated another way, the premise is, if the Army is unsuccessful in excluding some homosexuals, it should therefore allow all homosexuals to serve.[430] In a broader perspective, this premise raises the question of whether the function of the law is to reflect reality or rather to reflect the reality society is striving to achieve through the rule of law. Logically, law must be the latter. Thus, the fact that some homosexuals evade the exclusion policy does not demonstrate that homosexuality is compatible with military service. This analysis also holds true in regard to all other groups that are subject to exclusion policies.

A second logical weakness in the accommodation model is its factual predicate. The model equates an army where some homosexuals serve covertly by evading the exclusion policy with an army where all homosexuals are allowed to serve openly. This equation is

completely indefensible. It simply is not credible to extrapolate from an army where some break the rules to an army where the rules are removed.

Clearly, the differences between these two armies would be qualitative and quantitative. For example, increased numbers of homosexuals might be attracted to the military if they could enter the service without deception and then serve openly.[431] Increased numbers of homosexuals, in circumstances where they could openly display their homosexuality and openly enjoy the company of other homosexual soldiers, would have a different impact on the military environment than homosexuals, fewer in number, who serve covertly by evading the exclusion policy.[432] Because the accommodation model fails to account for the critical differences between an army where the homosexual exclusion policy has, at minimum, a restraining effect and an army without restraint, the model is not logically sound.

A final observation must be made on the logic of the accommodation model. The standard of inquiry for assessing the impact of homosexuality within the armed forces is not whether those homosexuals who evaded an

exclusion policy have "prevented the military from accomplishing its mission."[433] The Army need not sputter to a complete halt before it has a rational and practical basis for policy choices. As the law has recognized, the Army need not even "assume the risk that the presence of homosexuals within the service will not compromise the admittedly significant government interests asserted in [the homosexual exclusion policy]."[434]

B. Practicability of the Accomodation Model for Homosexuality in the Military

1. Introduction: The Dynamics of Accommodation in General

Accommodation is always an alternative to excluding certain groups from military service. The question is will accommodation succeed and how much will it cost.[435] The objectives of accommodation are met when the accommodating measures permit an identifiable group of individuals to be full participants in soldiering, as that norm is held within the military community. The corollary of this norm is that, after accommodation, the identifiable group enjoys status and respect as full-fledged soldiers

within the military community.

An example that illustrates the dynamics of accommodation in the military environment is handicapped individuals. The Army could accommodate handicapped individuals by building special facilities and transportation assets, procuring expanded medical resources, modifying military training requirements, creating tailored assignment and deployment policies, and by exempting handicapped individuals from certain routine duties, such as posting guard or serving as Charge of Quarters.[436] But these measures would not result in handicapped individuals being full participants in soldiering, as that norm is held within the military community. The opposite is true. Indeed, the more extensive the measures required to accommodate a group, the more likely that the group will be viewed by other soldiers as essentially civilians in essentially civilian jobs, who are not subjected to the rigors of military life, but who happen to wear military uniforms.[437] This perception becomes especially acute as the accommodation of the group extends closer to precluding their deployment to combat theaters.[438]

This illustrates how some groups, because of their general circumstances, simply are not able unable to achieve status and respect as full soldiers within the military community.[439] Thus, apart from issues of the administrative burden and cost-effectiveness, accommodation poses an intrinsic, although not always insurmountable, danger to good order, discipline and morale. Accommodation raises the grave prospect of an army ultimately divided between those who can be called upon to go into harm's way and those who are excused from that requirement. This danger of an army divided, and related systemic effects on unit cohesion, must be addressed forthrightly if accommodation, regardless of the group accommodated, is to profit the Army and the individuals involved.

2. The Proposed Accommodation Model: Focus

The accommodation model focuses primarily on two regulatory rationale for the homosexual exclusion policy, maintaining "the integrity of the system of rank and command" and facilitating the "assignment and worldwide deployment of service members who frequently must live and work under close conditions affording

minimal privacy."[440] The model does not further address the problem of homosexual conduct within the military. As is usual by definition in any model of accommodation, more emphasis is placed on changing the accommodating community than on changing the accommodated group. This section will discuss the impact of accommodation in the context of the regulatory rationales, as well as the systemic effects of accommodation.

a. Impact of Accommodating Homosexuality on the Integrity of the System of Rank and Command

The integrity of the system of rank and command is obviously a crucial component of combat readiness.[441] In the accommodation model, the military's concern is expressed as "[t]he fear that openly homosexual supervisors could not command respect."[442] The model solution is to provide homosexual soldiers with leadership training to facilitate their ability to command respect, and to rate supervisors on their leadership abilities.[443]

The closest analogue that is helpful in evaluating this proposal is the social dynamic within a prison. Prison populations are microcosmic societies. These

populations spontaneously institute power structures and develop systems of rank and command. It is well documented that inmates stratify themselves according to their crimes, as perceived by the inmates.[444] In this process, certain types of offenders frequently are stratified in such a way that they cannot command respect or hold positions of leadership in the system of rank and command within the prison. This exclusion from leadership is unrelated to the inmate's actual ability to lead. Further, the chance is small that this exclusion from leadership could be effected by enhancing the leadership skills of the excluded inmates.

Similarly, if the homosexual soldier is unable to command the respect of his subordinates, superiors or the military as a whole, enhancing or facilitating that soldier's leadership skills does not solve the problem. This is because, as in the above analogue, the failure of respect is unrelated to the actual ability of the homosexual soldier to lead.[445]

This apparent disconnect between respect and ability is not unique. Rather, it is an integral aspect of the view that respect is a fragile and

coveted commodity that must be earned. Respect and ability are often closely related, but they are not routinely coextensive. Thus, to the extent the model relies on increasing ability as a means by which to increase respect, the theory that leadership training could effectively address the problems of homosexuality in the military is infirm and the model is deficient on that ground.[446]

b. Impact of Accommodating Homosexuality on Privacy Entitlements and Related Military Concerns

The accommodation model also addresses the military's determination that homosexuality hinders or complicates the "assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy."[447] The model recognizes the positive effects of gender segregation in protecting individual privacy and promoting discipline, but concludes that the impact of homosexuals on the efficacy of gender segregation "appears to be a unit level management problem, not an 'assignment and worldwide deployment problem.'"[448]

Gender segregation, as already seen, serves several important goals of personal privacy,

discipline, and cost-effective administration of the force.[449] The accommodation model hypothesizes that what the Army achieves for heterosexuals through gender segregation, the commander can achieve through "management" in situations where the presumptions underlying gender segregation have broken down, namely where there exists sexual preference for the same gender.[450]

The strength of this hypothesis is quickly tested by applying it to heterosexual soldiers and asking whether, or how easily, the commander could manage privacy and disciplinary concerns if he did not have the tool of gender segregation. When the hypothesis is applied to heterosexuals who are not segregated by gender, in situations where gender segregation is traditionally appropriate, the operation of the hypothesis becomes clear. The commander, for example, would be faced with the puzzling task of teaching, training, leading, exhorting or somehow forcing his male and female soldiers not to manifest their sexual preferences while showering together.[451]

Plainly, this model expects the impossible, or at least the herculean. The commander is faced with

privacy problems and potential indiscipline if he integrates homosexuals with same-sex heterosexuals under conditions affording minimal privacy.[452] The commander is faced with different, but equally serious, privacy problems and potential indiscipline if he segregates homosexuals with other homosexuals in close living conditions.[453] Since the commander does not have a tool similar to gender segregation to meet the privacy and disciplinary implications of homosexuality, homosexuality, contrary to the premise of the model, does hinder or complicate "assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy."

There are two possible ways to work around the practical problems homosexuality presents for managing soldier assignments and deployments. These are to change the aspects of Army life that create "close conditions affording minimal privacy" or to implement assignment or deployment limitations for homosexuals. This section will explore these alternatives in turn.

(a) Changing the way the Army does business.

If homosexuality presents problems in situations where soldiers must live and work together in close conditions affording minimal privacy, one way to accommodate homosexuality within the military is to change the conditions of Army life that afford minimal privacy. This would minimize the need to depend on gender segregation for protection of privacy and discipline. To make this accommodation, the Army must change the way it does business. It must change its focus, for example, from the most efficient, most cost-effective methods to get the largest number of soldiers rested, showered, dressed and inspected in the shortest period of time with the least temptation to indiscipline to a more individualized lifestyle. The Army would provide soldiers with private rooms, private bathroom facilities, and so on.

The Army sometimes has taken a more individualized approach to military living. But this approach may not always be possible, cost-efficient, or conducive to the military's disciplinary goals. The Army may opt or be required by military or operational necessity to establish different living arrangements at any time.

Finally, how soldiers are billeted at post, camp or station is not dispositive of the problems homosexuality presents for assignment and deployments. The abiding fact of army life is that, in a moment, the soldier can be ordered into long-term, high-stress situations where privacy is at a premium and discipline is decisive.[454]

In sum, even if the Army decided it was profitable to change the way it does business in order to accommodate homosexuality, the Army can only change so much. The Army cannot change the fact that it is an army, and that therefore, by the very nature of fighting wars and training to fight, its soldiers will be required to "live and work in close conditions affording minimal privacy."

(b) Assignment and Deployment Limitations

The second way to address the problems homosexuality presents in "close conditions affording minimal privacy" is to imposing assignment and deployment limitations. Without assignment and deployment limitations, homosexual soldiers must be deployed into situations of minimal privacy, while the

commander is expected to do the best he can to maintain good order, discipline and morale. That is, at the same time he is taking his unit into a special high-stress, high-stakes environment, the commander must also fully shoulder "the risk that the presence of homosexuals within [his unit] will not compromise" his soldiers' combat readiness.[455] Since this result does nothing to ameliorate the problems presented by homosexuality in the military environment, assignment and deployment limitations must be imposed.

Assignment and deployment limitations, as discussed above, risk divisiveness by creating a group that is perceived as less than full-fledged soldiers because policies limit their service to "easy" stations and "clean" duties.[456]

There are always some soldiers who manage extended periods of service in garrison or at posts with the nicest facilities or best locations. But this is perceived by other soldiers essentially as a matter of good fortune. One soldier's good fortune, however, has a different social connotation than the situation where an identifiable group of soldiers consistently is assigned to what may be perceived as desirable duties

or stations as the result of official policy.

The effect of assignment and deployment limitations for homosexuals may be divisive in other ways. Unlike soldiers who are simply lucky in the duties or stations they draw, duty limitations for homosexuals are based on behavior that is disruptive of the military mission. The logic of behavioral-based assignment limitations might be difficult for other soldiers to accept. Clearly, for the most part of the army day, soldiers are being told to and trained how to change their behavior to match that required for successful soldiering.[457] Soldiers might conclude, therefore, that homosexual behavior is an inappropriate ground for what is perceived as special treatment in assignments or duties.[458] To the extent soldiers perceive that the accommodation of homosexuals is unfair, the model creates or exacerbates tensions between the accommodating community and the accommodated group.[459]

Neither changing the way the Army does business, nor imposing assignment and deployment limitations for homosexuals results in successful accommodation of homosexuality within the armed forces. Both courses of

action present risks to the Army and the individual that are better avoided by the homosexual exclusion policy.

3. Systemic Effects of Accommodating Homosexuality in the Military

The accommodation model, as seen, affects the system of rank and command, and the assignment and deployment of soldiers. Accommodation also has systemic effects on the military. Successful accommodation of homosexuality in the military would necessarily include successful integration of some important features of homosexual culture, as well as adaptation of the accommodating culture to the special needs and requirements of homosexuality. This section will discuss some of the potential stress points between homosexual culture and military culture.

(a) Cultural Integration.

A culture is defined by its language, dress, traditions and social norms. The military has an extremely well-defined culture, as does the homosexual community. One feature of military culture traditionally recognized as important to soldiering is

the availability of religious resources, such as chaplains. As recognized in Katcoff v. Marsh, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of national defense.[460]

Although homosexuality is accepted in some religions or denominations,[461] homosexuals increasingly have turned to specialized congregations for spiritual support.[462] To accommodate homosexuality in the military, homosexuals similarly may conclude that the military chaplaincy must accommodate homosexual parishes as well as homosexual clergy. Indeed, under an accommodation model, homosexual clergy would not be disqualified, by reason of homosexuality, from appointments as military chaplains at large. Thus, the divisiveness that attends the larger debate on homosexuals and religion could result within, or be projected onto the military community.[463]

Other important concerns presently at issue in homosexual culture regard homosexual marriage and adoption of children by homosexuals.[464] To accommodate homosexuality within its ranks, the military might be required to grapple with these issues as well. The military sometimes bases benefits on marital or

parental status. These benefit schemes might be challenged by homosexual soldiers on the same grounds homosexuals challenge local and state benefit schemes, and federal laws.[465] Further, Department of Defense policy is to facilitate the adoption of children. This policy is also subject to legal challenge if it excluded homosexual soldiers as eligible adoptive parents. Indeed, any policy differences between the treatment of heterosexual and homosexual soldiers would, regardless of legal merit, raise the specter of litigation.[466]

Other features of homosexual culture that might impact on whether homosexuality can be accommodated successfully in the military are homosexual bars, and organizations or publications oriented to homosexuals.[467] If homosexuals are accommodated within the military, it is incumbent on the Army to determine, for example, whether soldiers can buy homosexually-oriented magazines at the post exchange, organize homosexually-oriented social clubs, athletic teams or events on post, or establish other culturally-based adjustments within the larger military culture.[468]

Thus, even if the homosexuality of individual

soldiers was not a detractor from successful service, the Army might constantly be faced with military, political, social and moral issues regarding homosexuality. Clearly, acts that may be perceived as sponsoring homosexuality, or as condoning a sub-culture based around prohibited or disruptive conduct, might have negative repercussions within military culture.[469] Certainly, the "calm, serenity, and aloofness from controversy" that the Army requires in order to concentrate on its military mission would be jeopardized by the myriad issues presented by attempts to bring homosexual culture into the military culture.[470]

(b) Community Adaptation

Besides cultural integration, the accommodation of homosexuality within the military requires community adaptation. This adaptation may include special facilities or personnel, especially for provision of medical care, and special living arrangements. As previously discussed, homosexuals may require specialized medical resources to meet their sometimes unique physical and emotional needs.[471] Accommodation

poses other practical problems, such as whether homosexual soldiers should be allowed to room together in the barracks or share government quarters.[472] Special living arrangements for homosexuals, though they may be appropriate, require the Army to make policy choices that may cause contention or result in litigation, no matter what policy choice the Army makes.[473] Special living arrangements also risk reinforcing homosexuality as a sub-culture within the larger military community. Thus, special living arrangements may be necessary for accommodation, yet actually work against successful accommodation at the same time.[474]

(c) Conclusion

Social and political issues such as the legitimacy of homosexual clergy, the appropriateness of homosexual marriage, and the wisdom of homosexual adoption, as well as other issues of culturally-based adjustment, are some of the most controversial ever confronted by society as a whole. Controversy, however, is part and parcel of the larger society. Indeed, controversy benefits rather than detriments the democratic process.

Similar conclusions do not apply within the military, however. As the Supreme Court stated in Goldman v. Weinberger, "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state."[475] Nor, as a corollary, must, or even should, the Army be forced to grapple with and resolve issues that are confounding society at large.[476] This is especially true since this process of confrontation and resolution, particularly to the extent it involves litigation, would require the expenditure of scarce resources, financial and otherwise, better spent on accomplishment of the military mission.[477]

(4) Summary:

The Accommodation Model
for Homosexuality in the Military

The Supreme Court has discussed the accommodation of individual rights in other settings that have a stringent requirement for order and discipline. In Turner v. Safly, the Court reviewed regulations pertaining to prison inmates.[478] Applying Turner's analysis to the military, the Court's view could be stated as follows: "[w]hen accommodation of an asserted

right will have a significant 'ripple effect' on fellow [soldiers], courts should be particularly deferential to the informed discretion of [military] officials."[479]

Regardless of any disagreement over the nature, or even desirability, of the "ripple effect" of accommodating homosexuality within the military, it is clear that the effect of accommodation would not be neutral. It is equally clear that the potential effect of accommodating homosexuality within the military is significant. The potential effect of accommodating homosexuality reaches not only to fellow soldiers, but to the parameters of military culture itself. Accommodation is not more advantageous to the Army than the present homosexual exclusion policy. Rather, accommodation of homosexuality presents significant risks of a controversial and costly adverse impact on good order, discipline and morale. Just how serious and far-ranging these risks might be is seen in the regulatory rationales that homosexuality is incompatible with military service because of its impact on the Army's ability to "recruit and retain soldiers" and to "maintain the public acceptability of military service."[480]

These concerns--recruitment, retention, and the public acceptability of military service--are each a function of the relationship between the American people and their army. The following section will examine the homosexual exclusion policy, and proposed changes to the policy, in the context of this singularly important relationship.

III. THE RELATIONSHIP BETWEEN THE AMERICAN PEOPLE AND THE AMERICAN ARMY:

Practical Reasons for Policy-Making Restraint

> "When people ask me why I went to Vietnam, I say, 'I thought you knew. You sent me.'"
>
> - Lt. Col. Wallen Summers [481]
> West Point, 1971

The American soldier is inextricably related to the American people as a whole. At various times in history, the American soldier has been treated as a poor relation. At other times, he has been highly regarded as a prominent member of the family. Regardless, the soldier knows well that his destiny is tied to the will of the people who together comprise

the nation he has pledged to defend.

This relationship between the soldier and the public is not a conjectural one, but rather one founded on the fact that, "under the Constitution, the American people through their elected representatives not only raise, support, and regulate the Army but also determine the very battlefields upon which the Army must fight."[482] Thus, when the military evaluates the possible impact of a particular policy on the public, its analysis must focus on the "importance of maintaining the bond between the American people and their soldiers . . . [because that bond is] the source of [the Army's] moral strength."[483]

Stated simply, the consequence of an incautious policy determination that breaks the bond between soldier and public is disaster. Thus, even if recruitment, retention and public acceptability of the military had not been expressed as rationales for the homosexual exclusion policy, the American people are always at issue when the Army formulates military personnel policies. It is the American people, ultimately, who must be persuaded of the wisdom of, and have confidence in, force composition decisions.

In this sense, the dynamics of the volunteer force call for professional military as well as business judgments in formulating military personnel policies. When a policy is formulated and its expected result is reviewed, military and operational considerations are paramount. But the review process also must include a sophisticated, essentially business judgment as to whether the policy will--almost literally--"play in Peoria."

Indeed, amassing the all-volunteer force year after year from cities and towns across the nation is big business. Millions of dollars are spent annually on advertising. Thousands soldiers are dedicated to full-time recruiting duties. But these efforts and funds are wasted if military personnel policies create an environment within the force that is unacceptable--or even reputed or perceived to be unacceptable--to those otherwise most likely to desire military service. The cost in terms of national defense is even greater than the mere waste of recruiting efforts and funds.[484]

As seen in previous discussions, the law does not require the Army to produce social science data to prove its regulatory rationale that the presence of

homosexuals within the Army would adversely affect recruiting, retention and public acceptability of military service in general.[485] National opinion polls, however, do demonstrate the potential for such an adverse impact.[486] But opinion polls, national surveys and expert testimony are not the only vehicles of insight into how the American public might react to the accommodation of homosexuality within its military.[487]

Some insight is provided by the controversy surrounding homosexual clergy, homosexual marriage and other socialization issues.[488] Some insight is provided by the scope and depth of societal disapproval of homosexual sexual practices and lifestyle, which disapproval is reflected not only by the law, but also in countless instances of social tension throughout the nation.[489] Some insight is provided by state and national electorates which have, with few exceptions, rejected legislation that would have made homosexuals a protected minority.[490] Indeed, the Congress has repeatedly rejected attempts to amend Title VII, the federal employment discrimination statute, to include homosexuals.[491] A common theme in the debates surrounding all such legislative proposals was the

desire to avoid condoning homosexual conduct.[492]

Whether or not homosexual sexual practices are morally deserving of societal disapproval or should instead be condoned misses the point. These practices, and the surrounding lifestyle, are disapproved of by many.[493] If the wide controversy and disapproval surrounding homosexuality were projected onto the military because it accommodated homosexuals, the negative impact this would have on mission accomplishment, much more so on recruiting and retention, is obvious.

The broad view of the American people, this society, is important to the inquiry of whether the homosexual exclusion policy avoids an otherwise negative impact on recruiting and retention. But the individual recruit is at the heart of this debate. Considering evidence that suggests nearly 75% of Americans conclude that homosexuality is "always wrong,"[494] and the observed concomitant determination to avoid sponsoring homosexuality in any way,[495] it is naive to conclude that accommodation of homosexuality within the military would have no impact on public acceptability, recruiting or retention in the armed

forces. It is not mere conjecture that young people, as well as their families, who are already making a serious decision on whether military service is right for them, may be influenced to take an even more cautious view of soldiering if homosexuals were--or were perceived to be--a large, visible or militant segment of the military community.[496]

This resulting hesitation is not confined to the question of military service. There is evidence of the influence of homosexuality in other social institutions.[497] In 1987, the chairman of Notre Dame's theology department, for example, posed these questions in Commonweal, an influential theological periodical:

> What impact does the presence of a large number of gay seminarians have on the spiritual tone and moral atmosphere of our seminaries? . . . How many heterosexual seminarians have decided to leave the seminary and abandon their interest in a presbyterial vocation because of the presence of significant numbers of gays in seminaries and among the local clergy? . . . Do homosexual bishops give preference, consciously or not, to gay candidates for choice pastorates?[498]

In a subsequent interview this year, the above author stated,

> "I hear about it too often from the seminary people I know, . . . [h]ow heterosexual males are being forced out, discouraged by the excessive number of homosexuals in the seminary. It was always there . . . [b]ut today the balance is

> being tipped in their favor. Claiming celibacy is a wonderful cover for gays, and let's face it, the seminary presents a marvelous arena of opportunity for them.[499]

If the results, or perceived results, of accommodation of homosexuality in the Army followed a similar pattern, as they might, accommodation would have an adverse impact on recruiting, retention and public acceptability of military service. Further, in terms of privacy and disciplinary risks, the soldier's lifestyle is very different from the cleric's. This raises the possibility that problems observed, for example, in seminaries, would be magnified in the military setting.

Clearly, the effect of accommodation of homosexuality in the military is not likely to be neutral as to recruiting, retention and public acceptability. The homosexual exclusion policy may take a cautious approach, but great and unflagging caution is appropriate in dealing with the relationship between the American people and the American Army. In this regard, the principles of war are as relevant to military personnel policies as they are to battle plans, since in each case the end goal is precisely the

same. As Clausewitz, perhaps the most renowned and studied military strategist of all time, explained:

> The task of the military theorist . . . is to develop a theory that maintains a balance among . . . the trinity of war--the people, the government, and the Army. . . . A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless.[500]

The empowering balance between the people, the government, and the Army is necessarily a delicate balance. Accommodation of homosexuality within the military presently has the potential to disrupt that balance. Indeed, it is possible that efforts to accommodate homosexuality within the military "would conflict with [public] reality to such an extent that for this reason alone [accommodation] would be totally useless," if not calamitous. As the law recognizes and common sense counsels, military personnel policies, like battle plans, must be infused with realism if they are to have any utility at all. The reality of the dynamic bond between the American people and American Army, and the reality of the wide controversy surrounding homosexuality, raises serious and real concerns about using the Army as a laboratory for experimenting with homosexual rights.[501]

There is an forum, however, where this controversy might be properly resolved, and where the Army may be assured that far-ranging policy decisions comport with the desires of the American people. This forum, naturally, is the national legislature. The following section will discuss the relationship between the coordinate branches of government and the role and power of the legislature to "raise and support the land and naval forces."[502]

IV. THE RELATIONSHIP BETWEEN THE COORDINATE BRANCHES OF GOVERNMENT:

Constitutional Reasons for Policy-Making Restraint

"Judges are not given the task of running the Army."[503] This succinct explication of constitutional order was made by the Supreme Court in 1953. Before and since, the Court has consistently and forcefully emphasized that judicial deference to professional military judgments is an unwavering requirement for proper functioning of the three coordinate branches of government.[504]

The requirement that judges recognize, and defer to, military judgment and expertise is based,

partially, on the recognition that "it is difficult to conceive of an area of governmental activity in which the courts have less competence [than the] complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force."[505] This practical basis for judicial deference proves itself. More critical than the practical basis for judicial deference, however, is its constitutional basis, which is founded on separation of governmental powers among the coordinate branches.

Judicial deference toward military judgments is constitutionally required because "ultimate responsibility for [the military] is appropriately vested in branches of the government which are periodically subject to electoral accountability."[506] The potential result of departing from this standard is severe. As the Supreme Court has strongly counseled, it is this very "power of oversight and control of the military force by elected representatives and officials which underlies our entire constitutional system."[507]

Challenges to the homosexual exclusion policy challenged the judiciary to overstep this boundary. Plaintiffs urged judges to substitute their judgment

for the judgment of the Congress and the military's senior leadership.[508] The scope and complexity of the issues presented by accommodating homosexuality in the Army, rather than excluding homosexuals military service, demonstrates the wisdom of judicial restraint and judicial deference to the military. Conversely, these issues reinforce the constitutional and practical imperative that the democratic process be brought to bear in making risky policy decisions with far-ranging implications for force composition.

The value and utility of the democratic process to resolve issues raised by challenges to the homosexual exclusion policy is often overlooked. Plaintiffs challenged the courts to change the policy from the bench. Some commentators challenge the Service Secretaries to change the policy from the Pentagon. Some have even called for the President to rescind the policy by Executive Order. But to those who counsel judges or military officials or even the President to act with dispatch to rescind the homosexual exclusion policy, this fact should be recalled: "[t]he American Army really is a people's Army in the sense that it belongs to the American people, who take a jealous and

proprietary interest in its involvement."[509] The people exercise their control through the elected Congress, and it is there that the power of decision properly lies.[510]

The Congress has addressed the issue of homosexuals in federal employment.[511] It has, for example, repeatedly rejected proposals to amend Title VII, the federal employment discrimination statute, to extend coverage to homosexuals.[512] If subordinate, or even executive, policy-makers rescinded the homosexual exclusion policy on their own initiative, they would be providing legislative status to homosexuality within the military while the Congress has not seen fit to provide such status to homosexuality within the federal civilian service or elsewhere.[513]

Such policy initiatives would "protect from regulation a form of behavior never before protected, and indeed traditionally condemned."[514] That result would not sensibly account for the differences between soldiering and federal service, much less for the concerns expressed in the regulatory rationales for the homosexual exclusion policy. It would instead "fix an arbitrary relationship between [the people, the

government and the Army that] conflict[s] with reality," that is, the reality of the present legal and social status of homosexuality in America.[515] To make the military a proving ground for homosexual social and political issues when the larger society is nowhere near a consensus in favor of such issues would be an anomaly and that result should be avoided.[516]

Myriad, complex and emotional issues attend proposals to accommodate homosexuality, whether in the military or in any other setting. Only the democratic process provides the appropriate forum for controversy of this scope. Only the democratic process can gauge truly the pulse of the public and, thus, best judge the competing interests of the individual and a combat-ready Army. Indeed, as Justice Scalia has keenly observed, "[o]ur salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[517]

In sum, there is ample evidence, in both law and fact, as well as in common sense and experience, to support the secretarial determination that homosexuality is incompatible with military service.

To make a determination to the contrary is fraught with risk. Permitting homosexuals to serve, and accommodating homosexuality within the military, poses risks to good order, discipline and morale, risks to security and privacy concerns, and risks to the public acceptability and desirability of military service. In short, a determination contrary to the homosexual exclusion policy risks the combat readiness of the armed forces. Such weighty risk should be assumed only after the most thoughtful and thorough consultation with the American people. After all, it is their army. And it is their prerogative, through their elected representatives, to "not only raise, support, and regulate the Army but also [to] determine the very battlefields upon which their Army must fight."[518]

PART FIVE.

SUMMARY.

As General MacArthur observed in his famous address to the cadets at West Point, which has become an address to every soldier who has ever served,

> [T]hrough all this welter of [social] change and development, your mission remains fixed, determined, inviolable--<u>it is to win our wars</u>. Everything else in your professional career is but

> corollary to this vital dedication. All other public purposes, all other public projects, all other public needs, great or small, will find others for their accomplishment; but you are the ones who are trained to fight; yours is the profession of arms.[519]

The profession of arms is unlike any other. It is not a profession of individual aspiration, nor is it a profession of social pro-action. In evaluating military personnel policies or force composition decisions, the touchstone is not how the policy or decision furthers the interest of the individual or the enlightenment of society at large. From the Army's point of view, the proper first question in force composition decisions is not how the decision will affect single parents, handicapped persons, homosexuals, women, minorities, and so on. The proper first question the Army asks is quite simply this: will this policy decision make us a better army? Will it improve the Army's ability to move, shoot and communicate? Will it enhance combat-readiness? If the answer to the question of whether a certain policy will make for a better army is a resounding "yes," then the policy must be implemented as soon as possible. If the answer to that first question is "no" or no answer at all, whether that negative answer is resounding or

voiced only faintly, grave trepidation is in order.

A substantial and virtually unanimous body of law affirms the constitutionality of the military's homosexual exclusion policy. A substantial body of medical and other literature demonstrates a factual basis for the secretarial determination that, based on the convergence of several important rationales, homosexuality is incompatible with military service. There is no ground upon which to conclude, at all much less with any certainty, that allowing homosexuals to serve in the military would "make us a better army." Indeed, homosexuals themselves have repeatedly conceded the detrimental and disruptive effect of homosexual conduct within the military.[520]

Experimenting with personnel management and force composition costs. It costs money, personnel resources and time. It costs administrative burdens and the potential for expensive and protracted litigation. It costs, at least initially, some degree of diminishment in good order, discipline and morale, hence in combat readiness. In regard to experimenting with the homosexual exclusion policy, these costs to the Army are simply unwarranted and wasteful. Similarly to

other groups that are excluded from military service, there is no evidence that the positive contribution of individual homosexuals would outweigh the potential of homosexuals as a group and homosexuality as a sub-culture to detract from successful military service or from the good order, discipline and morale of the fighting force as a whole.

Resources, tangible and intangible, are too precious to gamble on personnel policies. And this nation's Army, which history shows to be at once strong and fragile, is plainly too precious to gamble on social initiatives that are far beyond those embraced by the nation this Army serves. For now, at least, the homosexual exclusion policy strikes an appropriate balance between the desires of individuals and the requirements of "this nation's war-guardian."

The United States will no doubt continue to grapple with issues of homosexual rights. But to the extent that homosexuals advance their cause as one of the nation's "public purposes, . . . public projects, [or] . . . public needs," it is appropriate for homosexuals to "find others [besides the military] for their accomplishment." There is no sensible or

sufficient reason for the military, as a social institution, much less as an armed force, to attempt to go first in forging rights for homosexuals. Social reformation is neither the province nor the mission of America's fighting force. Rather, the mission of America's fighting force is a constant, costly and consuming vigilance, both internal and external, that is unknown outside the profession of arms. Indeed, as General MacArthur poignantly observed, the military has a single "fixed, determined, inviolable [mission]--<u>it is to win our wars</u>."

1. Crocker, The Army Officer's Guide, Stackpole Books (Harrisonburg, Pa. 1981) at ix.

2. This thesis will address the Army regulation on homosexuality and will be written from the Army's point of view. The services, however, have similar homosexual exclusion policies. The analysis set out in this thesis may be equally applicable to the other military branches.

3. Department of Defense Directive 1332.14, Enlisted Administrative Separations (Jan. 28, 1982). Regulatory references are to Army Regulation [AR] 635-200 (Enlisted Ranks Personnel), chapter 15. The term "exclusion" will be used to refer to disqualification for military service in general, including at accession, at reenlistment and for purposes of separation from the military at any point in time.

4. See, e.g., Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981). Cf. Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985).

5. Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986). See United States v. Fisher, 477 F.2d 300 (4th Cir. 1973) (defendant could not voluntarily enlist

in the military because he was pending a felony charge).

6. Smith v. Christian, 763 F.2d 1322 (11th Cir. 1985) (applicant excluded from military service because he was missing a finger).

7. Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981).

8. Johnson v. Robison, 415 U.S. 361 (1974) (conscientious objectors were excluded from military service, then sued because they were denied veterans' benefits).

9. See, e.g., Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990) (upholding military exclusion for HIV [human immunodeficiency virus] seropositivity). 10 U.S.C. @ 505(a).

10. Williams v. United States, 541 F. Supp. 1187 (E.D.N.C. 1982) (Marine discharged for being fifty pounds over military weight standards); Vance v. United States, 434 F. Supp. 826 (N.D. Tex. 1977). Cf. Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979).

11. See Billings v. Truesdell, 321 U.S. 542 (1944)

(citing physical and mental aptitude requirements under Selective Draft Act of 1917, sec. 3).

12. See United States v. Lavin, 346 F. Supp. 76 (S.D.N.Y. 1972).

13. Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980) (Reserve Officer Training Corps [ROTC] cadet excluded from ROTC for adhering to Nazism). Khalsa v. Weinberger, 759 F.2d 1411 (9th Cir. 1985) (military excluded member of Sikh religion because religious precepts precluded applicant from complying with military appearance regulations). Cf. Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969) (civilian employee of the Air Force discharged for discussing personal political views on the war in Viet Nam).

14. See, e.g., Dicicco v. Immigration and Naturalization Service, 873 F.2d 910 (6th Cir. 1989) (plaintiff originally excluded from the military for not speaking English).

15. See, e.g, Spain v. Ball, 1991 U.S. App. LEXIS 4127 (2nd Cir. 1991) (military age requirements imposed by 10 U.S.C. @ 532 are permissible).

16. E.g., Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972); Lindenau v. Alexander, 663 F.2d

68, 72 (10th Cir. 1981); Alberico v. United States, 783 F.2d 1024 (Fed. Cir. 1986); Crawford v. Cushman, 531 F.2d 1114 (2nd Cir. 1976); Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981).

17. This is also the reason why the converse is true, that is, that no one has the right to avoid military service when called upon by the nation. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

18. The text refers to reported cases that reached substantive challenges to the homosexual exclusion policy. The cases were Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied 110 S. Ct. 1296 (1990); Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981); Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985); Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987); Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), vacated on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc). Cf. Krugler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984), Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) (dismissed for failure to exhaust administrative remedies).

19. The text refers to reported cases that reached substantive challenges to the homosexual exclusion policy. See note 18 and Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1989); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980); Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978); Johnson v. Orr, 617 F. Supp. 170 (E.D. Cal. 1985). Cf. Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C.Cir. 1978), Secora v. Fox, 747 F. Supp. 406 (S.D. Ohio 1989), Doe v. Secretary of the Air Force, 563 F. Supp. 4 (D.D.C. 1982) (decided on procedural due process).

20. Some homosexuals have described how they entered the military by evading accession questions or by deceit. See M. Humphrey, My Country, My Right to Serve, HarperCollins (New York 1990) at 94, 108, 122, 139, 157, 167-68, 170, 243-44. "I knew that being gay in the military was taboo. . . . I think every person in . . . the service has filled out the same form. They ask you . . . 'Are you now or have you ever been a homosexual?' I'd been to bed with [other] men . . . but when I saw that question, there was no hesitation-

-I lied. I nevertheless wanted to participate in sexual activity with men, wanted to meet other men that wanted the same thing, and thought I could keep my activities under wraps." Id. at 108 (interview with Hatheway). See Hatheway, 641 F.2d 1376; "I knew that the regulation against homosexuality could keep me out of the military. . . . I do remember very clearly how the military doctor stated the question about homosexuality, 'Do you have any problems with homosexuality . . .?' he asked. 'No,' I answered. . . . I remember . . . coming home to my partner and saying, 'I made it through. I didn't have to lie.' And as far as I was concerned, I did not lie. . . . I had a right to be there, and I felt that what I was doing was not aginst the regulations." M. Humphrey, supra, at xvii & xviii. "I certainly sidestepped that god-awful question about homosexuality. I said, 'no.' I lied. I knew I was telling an untruth, but who was to know?" Id. at 243-44. Cf. Dillard v. Brown, 652 F.2d 316 (3rd Cir. 1981) (plaintiff, challenging single parent exclusion policy, did not disclose that she had a minor child); Dubbs v. Central Intelligence Agency,

866 F.2d 1114 (9th Cir. 1989) (plaintiff did not disclose homosexuality in initial security review). But see Woodward, 871 F.2d 1068 (plaintiff enlisted in 1972; he acknowledged sexual attraction to other men, but denied ever engaging in homosexual conduct); Watkins, 875 F.2d 699 (plaintiff was drafted in 1967 after an Army psychiatrist discounted his statement that he was homosexual). Cf. M. Humphrey, supra, at 34 & 73. "[The military] had a big problem with the gay issue around this same time because of Vietnam. There were an awful lot of guys who'd march in and say, 'Hey, I'm gay--send me home.' So the military had a very bizarre policy for a while: that if you came in and said you were gay, you had to be able to prove it . . .because of people trying to use homosexuality to evade the service." Id. at 73 (interview with Berg). See Berg, 591 F.2d 849. Cf. United States v. Matthews, 38 C.M.R. 430 (C.M.A. 1968) (accused falsely swore that he and other Marines were homosexual in order to obtain a discharge from the Marine Corps).

21. But see Watkins, 847 F.2d 1329, vacated on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc).

22. Privacy issues have been raised and rejected in

challenges to other military exclusion policies. See, e.g., Lindenau, 663 F.2d at 73 (rejected claim that single parent exclusion policy infringed plaintiff's privacy in matters of marriage or child bearing). Cf. Bowen, 483 U.S. at 601-02 (rejected claim that exclusion from statutory entitlements scheme infringed plaintiff's privacy in family matters).

23. Ben-Shalom, 489 F. Supp. 964, 975 (E.D. Wis. 1980) [Ben-Shalom I].

24. "The 'penumbra' was no more than a perception that it is sometimes necessary to protect actions or associations not guaranteed by the Constitution in order to protect an activity that is." Dronenburg, 741 F.2d at 1392. See Bowers v. Hardwick, 478 U.S. 186, 190 (1986) (privacy cases have recognized rights that have little or no textual support in the language of the Constitution). See also Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984) (an additional element of uncertainty in privacy claims based on homosexuality is the scope of any right to privacy in a military environment).

25. Prince v. Massachusetts, 321 U.S. 158 (1944).

26. Loving v. Virginia, 388 U.S. 1 (1967).

27. Griswold, 381 U.S. 479 and Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Roe v. Wade, 410 U.S. 113 (1973) and Carey v. Population Services International, 431 U.S. 678 (1977) (abortion); Skinner v. Oklahoma ex re. Williamson, 316 U.S. 535 (1942) (procreation). Cf. Lindenau, 663 F.2d 68, West v. Brown, 558 F.2d 757 (5th Cir. 1977) (military policy of excluding single parents from service did not curtail freedoms to choose in matters of marriage, family life or child bearing). See also Dillard, 652 F.2d 316.

28. See, e.g., Hardwick, 478 U.S. at 194-195. "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Id. See Woodward, 871 F.2d 1068.

29. See, e.g., Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983). "[T]he right to marry is not unfettered. . . . In addition to regulating the procedures, duties, and rights stemming from marriage, state regulations have absolutely prohibited certain marriages, such as result by incest, bigamy, or homosexuality." Id. at 1540, citing Sosna v. Iowa, 419 U.S. 393, 404 (1975) and Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring). Cf. United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961) (upheld military regulations on marriage).

30. See, e.g, Rich, 735 F.2d 1220; Dronenburg, 741 F.2d 1388.

31. Cf. High Tech Gays v. Defense Indus. Security Clearance Off., 909 F.2d 375 (1989) (Canby, J., dissenting from rejection of suggestion of rehearing en banc) (suggesting the equal protection clause is to protect people from discrimination based on what they are).

32. Cf. Ben-Shalom I, 489 F. Supp. 964, Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984), and Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) with Rich, 735 F.2d 1220, Dronenburg, 741 F.2d 1388 and Baker v. Wade,

769 F.2d 289 (5th Cir. 1985). See Hardwick, 478 U.S. 186.

33. Indeed, one court held that "even if privacy interests were implicated [by the homosexual exclusion policy], they are outweighed by the Government's interest in preventing armed service members from engaging in homosexual conduct." Rich, 735 F.2d at 1228. See also Hatheway, 641 F.2d at 1383-84 (personal autonomy not violated when soldier was given a dishonorable discharge for homosexual acts). See, e.g., Dronenburg, 741 F.2d 1388, Matlovich, 591 F.2d 852. See also Matthews, 755 F.2d 182, Baker, 769 F.2d 289. But see New York v. Onofre, 415 N.E.2d 936 (1980) (criminal proscription of sodomy held unconstitutional). Possible health consequences of homosexual acts will be discussed in Part Three, but the law has recognized that public health concerns may outweigh privacy interests. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination).

34. Hardwick, 478 U.S. at 190.

35. Ben-Shalom I, 489 F. Supp. at 975.

36. Rich, 735 F.2d at 1228.

37. Ben-Shalom I, 489 F. Supp. at 975.

38. Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984) (court viewed homosexual status as distinct from homosexual propensity).

39. Ben-Shalom, 881 F.2d at 456.

40. Cf. United States v. Voorhees, 16 C.M.R. 83, 106 (C.M.A. 1954) (Latimer, J., concurring in part and dissenting in part) ("while freedom to think is absolute of its own nature, the right to express thoughts . . . at any time or place is not"). Arguments based on a protected right to be homosexual are also advanced under equal protection guarantees. See Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, 131 Mil. L. Rev. 55 (1991) at 91. Equal protection will be discussed below.

41. See, e.g., Ben-Shalom, 881 F.2d 454.

42. In similar challenges to the single parent exclusion policy, plaintiffs likewise failed to demonstrate how denial of the opportunity to be a soldier prevented them from being parents or from being single. Lindenau, 663 F.2d 68, West, 558 F.2d 757, Dillard, 652 F.2d 316. In Lindenau, the court found that the single parent exclusion policy did "'not

affirmatively curtail marriage or child bearing,' but instead insures that National Guard personnel can rapidly respond to national defense requirements and fulfill their duties within the military community." Id. at 73, quoting West, 558 F.2d at 760. Cf., Bowen, 483 U.S. 587, 601-02 (exclusion of certain families from welfare benefits did not intrude on choices concerning types of family units or living arrangements). See also Goldman v. Weinberger, 475 U.S. 503 (1986).

43. Dallas v. Stanglin, 490 U.S. 19, 23-24 (1989).

44. Id. at 24, quoting Roberts v. United States Jaycees, 468 U.S. 609, 617-618 (1984). Intimate association pertains to the association in human relationships that are fundamental to personal liberty. Id. Expressive association pertains to the exercise of rights expressly guaranteed by the First Amendment, such as speech, assembly and petition for redress of grievances. Id. In Dallas, the Court again recognized practical limits on associational rights, stating, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street, or meeting one's friends at a

shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." Id. at 25. Cf. Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) (association for the purpose of public debate and similar protected purposes).

45. Id. at 24, 25. Cf. Stanley v. Georgia, 394 U.S. 557 (1969) (right to privacy depends on First Amendment protection of the underlying activity).

46. Berg, 591 F.2d 849.

47. Dronenburg, 741 F.2d 1388.

48. Plaintiffs stated they were homosexual and numerous homosexual acts were established on the record. Berg, 591 F.2d at 850; Dronenburg, 741 F.2d at 1398. See also M. Humphrey, supra note 20, at 72-79 (interview with Berg) & 89-92 (interview with Dronenburg). While plaintiffs argued that rights emanating from the First Amendment, such as privacy and associational rights, operated to protect homosexual acts, the acts themselves are outside the express terms of First Amendment protection. In traditional analysis of speech issues, "[the] critical line for First Amendment purposes must be drawn between advocacy,

which is entitled to full protection, and action, which is not." Healy v. James, 408 U.S. 169, 192 (1972).

49. Berg, 436 F. Supp. at 79. See also High Tech Gays v. Defense Ind. Sec. Clearance Off., 895 F.2d 563, 580 (9th Cir. 1990) (permissible to consider membership in a homosexual organization as one factor in decision to grant or deny security clearances). Cf. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973) ("[s]tatutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision").

50. The failure of the record to establish homosexual acts may be relevant to resolution of the legal issues, but not necessarily or logically an indication that the plaintiff has not committed homosexual acts. As explained in Cyr v. Walls, "the Court can take notice of the logical distinction between gay individuals who simply prefer the companionship of members of their own sex and homosexual individuals who actively practice homosexual conduct. . . . This entirely theoretical distinction could, of course, be redetermined on the basis of later factual proof." Cyr v. Walls, 439 F.

Supp. 697, 702 (N.D. Tex. 1977). See Matthews, 755 F.2d at 183. Ben-Shalom, 881 F.2d at 464 (Army did not establish acts but plaintiff did not deny "that she has engaged or will engage in homosexual conduct"). Woodward, 871 F.2d at 1074, n.6 (no claim of celibacy, but court rejected counsel's attempts to characterize plaintiff as having only homosexual "tendencies"). Pruitt, 659 F. Supp. at 626 (court did not make findings on whether Army had established homosexual acts but the record showed that plaintiff was twice "married" to another woman). Steffan, 733 F. Supp. at 121 (Navy did not establish acts but plaintiff obtained restraining order to avoid answering questions about commission of homosexual acts; plaintiff did not challenge Navy's right to refuse reinstatement based on commission of homosexual acts). Cf. Aumiller v. University of Delaware, 434 F. Supp. 1273, 1303 & n.86 (D. Del. 1977) (University did not establish professor engaged in homosexual acts but professor obtained restraining order to prevent inquiry into his living arrangements with a homosexual student). Plaintiffs Steffan and Woodward have disclosed their homosexual

conduct in interviews. See, e.g., M. Humphrey, supra note 20, at 235-243 & 161-167.

51. Ben-Shalom I, 489 F. Supp. 964. Associational rights were raised in Matthews, No. 82-0216-P, slip. op. (D. Me. Apr. 3, 1984) and Woodward, 871 F.2d 1068. The claim was dropped in Matthews because plaintiff admitted to homosexual acts. In Woodward, the claim was not pursued on appeal.

52. Id. at 974.

53. Id. at 971. National Gay Task Force v. Oklahoma, 759 F.2d 1270 (10th Cir. 1984). See Cyr, 439 F. Supp. at 700 (homosexuals "have the fundamental right to meet, discuss current problems, and to advocate changes in the status quo, so long as there is no 'incitement to imminent lawless action'"). Cf. also Weston v. Lockheed Missiles and Space Co., 881 F.2d 814 (9th Cir. 1989) (plaintiff stated he was a member of an organization called Lesbian and Gay Associated Engineers and Scientists; Lockheed never submitted his security clearance application because it believed the application revealed "evidence of homosexuality").

54. It is inaccurate to state, as some commentators have, that the "current [homosexual exclusion] policy

allows separation [from the military] based on homosexual tendencies alone." Davis, supra note 40, at 55. As the court in Ben-Shalom clearly explained:

> [T]he new regulation we are now considering is a different regulation from that originally considered in Ben-Shalom I. The features then found objectionable have been substantially eliminated. Discharge of a soldier who 'evidences homosexual tendencies, desire, or interest' is no longer broadly mandated. . . . That 'tendency' and 'interest' language is now gone. . . . What remains in the new regulation is but a bar against persons who either admit a 'desire' to commit homosexual acts or who have in fact committed homosexual acts. . . . We are here concerned with plaintiff's forthright admission that she is a homosexual. That reasonably implies, at the very least, a 'desire' to commit homosexual acts.

Ben-Shalom, 881 F.2d at 460 [footnotes omitted]. See Watkins, 875 F.2d at 707.

55. Id. at 460. See Dronenburg, 746 F.2d 1579, 1582, n.1 (suggestion for rehearing en banc denied) (statement of Bork, Cir. J., and Scalia, Cir. J.) Indeed, in cases where the threat of prosecution, surely a more serious result than administrative sanctions, was alleged to chill free association, the Supreme Court has stated:

> [E]ven assuming such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional powers and is designed to safeguard a vital national interest.

United States v. Harriss, 347 U.S. 612, 626 (1954). See United States v. O'Brien, 391 U.S. 367 (1968). As will be shown, the homosexual exclusion policy is

"plainly within the area of congressional powers and is designed to safeguard a vital national interest." See, e.g., Ben-Shalom, 881 F.2d at 458-60 (the homosexual exclusion policy clearly promotes a legitimate government interest).

56. In addition to the privacy and association challenges discussed above, First Amendment challenges also included claims based on the right to free exercise of religion and the Establishment Clause. See, e.g., Hatheway, 641 F.2d at 1378 ("introduced affidavits to the effect that sodomy prohibitions have religious origins and that homosexual acts, standing alone, are not harmful"). These claims failed. Id.

57. See O'Brien, 391 U.S. at 375 ("[the law] prohibits knowing destruction of certificates issues by the Selective Service System, and there is nothing necessarily expressive about such conduct").

58. Connick v. Myers, 461 U.S. 138, 143 (1983).

59. See O'Brien, 391 U.S. at 375 ("[a] law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses").

60. Id. at 377. See Arcara v. Books, 478 U.S. 697 (1986).

61. See, e.g., Johnson, 617 F. Supp. at 173, Pruitt, 659 F. Supp. at 627, Ben-Shalom, 881 F.2d at 462. See also Woodward, 871 F.2d at 1074, n.6, Rich, 735 F.2d at 1224, 1225. This analysis is not unique to homosexuality: it applies equally to all such statements, whether they relate to parenthood, weight, educational status, or some other regulatory disqualification for military service.

62. Ben-Shalom, 881 F.2d at 462. Accord Johnson, 617 F. Supp. 170. In Johnson, the court viewed "plaintiff's self-assertion of her homosexuality as nothing more than an admission of a fact, and such fact may serve as a lawful basis for discharge." Id. at 172-73. Cf. O'Brien, 391 U.S. at 376 ("[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in that conduct intends thereby to express an idea").

63. Statements such as "I am a single parent," "I am overweight," and "I am not a high school graduate," for

example, also trigger the application of military personnel regulations and may result in exclusion.

64. Blameuser, 630 F.2d 538. Cf. O'Brien, 391 U.S. at 370 (conviction for burning draft card as an expression of political beliefs did not abridge the First Amendment); Goldwasser, 417 F.2d 1169 (D.C. Cir. 1969), cert. denied 397 U.S. 922 (1970) (upheld Air Force discharge of a civilian employee for discussing "religion, politics, [and] race" while teaching English to foreign military officers).

65. Pruitt, 659 F. Supp. at 627. Cf. Khalsa, 759 F.2d 1411 (upheld Army's refusal to process Sikh's enlistment application because applicant's religious beliefs made it impossible for him to comply with Army grooming and appearance regulations).

66. Johnson, 617 F. Supp. at 172. Cf. Rich, 735 F.2d at 1229 (plaintiff was discharged for fraudulent enlistment based on his declaration of homosexuality; the court held "[t]his is not a case where any First Amendment rights were directly curtailed").

67. Connick, 461 U.S. 138.

68. Id. at 145-47. Accord Pickering v. Board of

Education, 391 U.S. 563 (1968) and Roth v. United States, 354 U.S. 476 (1956).

69. E.g., Johnson, 617 F. Supp. at 178, Pruitt, 659 F. Supp. at 627, Ben-Shalom, 881 F.2d at 462. One district court and two dissenting justices concluded that a declaration of homosexuality does address a matter of public concern. Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984), remanded, 755 F.2d 182. Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984), cert. denied 470 U.S. 1009 (1985) (Brennan, J., and Marshall, J., dissenting).

70. Connick, 461 U.S. at 147-148.

71. E.g., Woodward, 871 F.2d at 1071, n.2. Cf. Matthews, No. 82-0216-P, slip op., (D.C. Me. Apr. 3, 1984). "Matthews' self-identification was undoubtedly a matter of significant 'personal interest' to her. Placing it in the latter category, however, ignores the reality that the issue of open employment for homosexuals (particularly in military service) is currently a matter of intense public debate." Id., remanded, 755 F.2d 182. See Rowland, 470 U.S. at 1012 (Brennan, J., and Marshall, J., dissenting). The Supreme Court did not accept the dissent's analysis

that an individual's declaration of homosexuality "necessarily and ineluctably" involves that individual in any "public debate . . . regarding the rights of homosexuals." Id. Operation Desert Storm, for example, engendered debate on deployment of single parents to combat zones. But a declaration that one is a single parent does not necessarily or ineluctably involve that individual in the debate on deployment policies.

72. Roth, 354 U.S. at 484.

73. See, e.g., Healy, 408 U.S. 169. "[The] critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." Id. at 192.

74. O'Brien, 391 U.S. at 376. Cf. Rich, 735 F.2d 1220. In Rich, the court held that "any incidental effect that the Army policy of excluding homosexuals has on First Amendment rights is justified by the special needs of the military. To insure that the armed services are always capable of performing their mission, the military 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" Id. at 1229, citing Brown v. Glines, 444 U.S.

348, 354 (1980) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

75. One plaintiff challenged the proscription as applied to him. Hatheway, 641 F.2d 1376. Hatheway's claim of selective prosecution was rejected, as the court found that "the commission of homosexual acts is [not] an 'impermissible' ground for selective prosecution under [military law]". Id. at 1381. See, e.g., United States v. Scoby, 5 M.J. 160 (C.M.A. 1978), United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970) (military law proscribing sodomy is constitutional).

76. See, e.g., Matthews, 755 F.2d at 183 (plaintiff did not challenge Army's right to disenroll her from ROTC for homosexual acts); Ben-Shalom , 881 F.2d at 461 ("[i]t is not disputed, the plaintiff and the district court agree, that the Army has the right to enforce its regulation prohibiting the actual performance of homosexual actions"). Challenges to the policies of commissioning programs, such as ROTC, present unique implications for doctrines of separation of power. Commissions as Army officers are granted by the President in his sole discretion as Commander-in-Chief. His discretion as Commander-in-Chief is unreviewable.

See Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981) (transsexual excluded from military service). In Doe, the court noted that "[e]ven assuming plaintiff had already achieved the rank of first lieutenant, such appointments are solely within the discretion of the President. Plaintiff has no contractual, express or implied, or constitutional right to an appointment as a captain." Id. at 904; Kreis v. Secretary of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989) (the court is not competent to allocate officer promotions). Cf. Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990) (Kozinski, J., concurring), citing United States Navy v. Egan, 484 U.S. 518, 527 (1988).

77. Steffan, 733 F. Supp. 121. "Your honor, . . . [t]hey're trying to turn a status case into a conduct case. . . . If [plaintiff] is asked at a deposition have you ever engaged in [homosexual] conduct I'm going to direct him not to answer. . . . [Plaintiff] refused to answer any questions related to whether he engaged in homosexual acts while attending the [Naval] Academy . . . on the grounds of relevance and fifth amendment privilege." Id. at 123. Indeed, the contention, accepted by at least one court, was that an admission

of homosexuality was irrelevant to homosexual conduct as a matter of law. Steffan, 420 F.2d 74 (D.C. Cir. 1990). In Steffan, the district court dismissed for failure to cooperate with discovery. See Matthews, 755 F.2d 182. The Navy argued that plaintiff's declaration of homosexuality put homosexual conduct in issue. On review, the Court of Appeals held that since, in its view, plaintiff had been excluded from the military "solely because of his 'status' as a homosexual," plaintiff's declaration of homosexuality was irrelevant to homosexual acts. Steffan resigned from the Navy before investigators inquired into his participation in homosexual acts. See M. Humphrey, supra note 20, at 235-43.

78. Ben-Shalom, 881 F.2d at 459-461. Common sense is an important commodity in the law and should not be underrated as a factor in decision-making. See, e.g., Rowland, 470 U.S. at, 730 F.2d 444, n.13 ("[a] jury is entitled to make rational inferences and apply its common-sense knowledge of the world"). At oral argument in Ben-Shalom, the Court of Appeals for the Seventh Circuit put several common-sense questions to counsel. These questions highlighted the analytical

difficulty in bifurcating status and conduct, as follows:

> Does the Army have any way of distinguishing a practicing homosexual from an admitted homosexual?
>
> Can you be a homosexual and have no propensity to commit homosexual acts?
>
> How does one know he or she is a homosexual?
>
> Isn't experience--acts--the most telling indication that you are a homosexual?

Author's notes from oral argument (May 18, 1989, Chicago).

79. See AR 635-200, para. 15-3a(note). The regulation permits the soldier the opportunity to rebut the presumption of homosexuality drawn from homosexual acts or declarations of homosexuality. Id. Ben-Shalom, 881 F.2d at 457. The court in Ben-Shalom noted that the notice of intent to discharge Ben-Shalom from the Army

"advised plaintiff that her admission of homosexuality gave rise to a presumption that she was a homosexual, and that therefore she had thirty days within which to submit a response rebutting that presumption. In her response to the Army's notice, plaintiff again admitted that she is a lesbian." Id. Cf. Steffan, 733 F. Supp. 121 (plaintiff did not challenge Navy's right to refuse reinstatement on grounds of commission of homosexual acts, but invoked Fifth Amendment to avoid answering discovery questions about homosexual conduct).

80. Robinson v. California, 370 U.S. 660, 664 (1962).

81. Robinson, 370 U.S. at 665. The evidence presented, and found sufficient, at Robinson's criminal trial for the offense of addiction was physical evidence of drug use (tracks) and the defendant's statement that he used drugs. The Court did not discount that the evidence was proper evidence of drug use (conduct). It rejected, however, the contention that the evidence circumstantially proved addiction (status). Id. at 666.

82. Id. at 667, n.9.

83. Conviction of a criminal offense requires proof beyond a reasonable doubt. That standard is the

highest standard of proof known to the law. It is vastly, and rightly, different from the government's burden in administrative proceedings or policy determinations, where myriad factors such as cost and administrative burden are proper considerations. Mathews v. Eldridge, 424 U.S. 319 (1976) (the amount of process that is "due" depends on the consequences of the deprivation). Indeed, "not only does the standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'" Cruzan v. Missouri, __ U.S. __, __, 110 S. Ct. 2841, quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982). Addington v. Texas, 441 U.S. 418, 423 (1979) (Harlan, J., concurring) (the function of the standard of proof is to instruct the factfinder on the degree of factual correctness society demands in light of the consequences of the determination).

84. See, e.g, Rich, 735 F.2d at 1224-25, n.1 ("[n]o punishment is involved in this case . . . the Secretary has the statutory authority to decide that [homosexuality] make[s] one ineligible for military service"); Pruitt, 659 F. Supp. at 627 (rejecting

plaintiff's contention that the homosexual exclusion policy is punishment based solely on homosexual status rather than homosexual conduct). See Bowen, 483 U.S. 587 (exclusion from welfare benefits scheme was not punitive). Certainly, exclusion from military service bears no similarity to imposition of criminal sanctions.

85. Robinson, 370 U.S. at 664, 666. "[A] State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. . . . A State might determine that the general health and welfare require . . . compulsory treatment, involving quarantine, confinement, or sequestration." Id.

86. This is true even though addiction may be at "the core of one's personality." See Rich, 735 F.2d at 1228. Indeed, in Robinson, the Court took note that "a person may even be a narcotics addict from the moment of his birth." Robinson, 370 U.S. at 667, n.9.

87. Cf. Rich, 735 F.2d at 1228 (even if privacy rights

were implicated by the homosexual exclusion policy, that did not render the policy unconstitutional).

88. E.g., Ben-Shalom, 881 F.2d at 464 ("it cannot be said to be without individual exceptions, but [a declaration that one is a homosexual] is compelling evidence that plaintiff has in the past and is likely to again engage in [homosexual] conduct").

89. AR 635-200, para. 15-2a.

90. M. Humphrey, supra at 20; Padula, 822 F.2d 97. In Padula, the plaintiff, a homosexual, rejected the status/conduct dichotomy, and argued instead that "homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status." Id. at 102. See Surawicz, Intestinal Spirochetosis in Homosexual Men, 82 American Journal of Medicine [Am. J. Med.] 587-592 (1987). "[H]omosexual men tend to define themselves in sexual terms (the very name, homosexual, defines them as having sex with persons of the same gender)." Id.

91. High Tech Gays, 909 F.2d 375, 380 (1990) (Canby, J., dissenting). See also Woodward, 871 F.2d at 1076, n.10. Indeed, one court has held that to call someone

a "queer" imputes the act of sodomy to him. Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), citing Head v. Newton, 596 S.W.2d 209 (Tex. Civ. App. 1980).

92. The American Heritage Dictionary of the English Language, (ed. Morris) American Heritage Publishing Co., Inc. and Houghton Mifflin Company, Boston 1975.

93. See, e.g., Ben-Shalom, 881 F.2d at 460; Matthews, 755 F.2d at 183; Woodward, 871 F.2d at 1069-70; Dronenburg, 741 F.2d at 1389; Johnson, 617 F. Supp. at 171; Pruitt, 659 F. Supp. at 626.

94. Ben-Shalom, 881 F.2d at 464. Cf. Harper v. Wallingford, 877 F.2d 728 (9th Cir. 1989). In Harper, an inmate was denied access to a NAMBLA [North American Man-Boy Love Association] newsletter. Prison officials testified, and the court accepted, that "although it was not clear the plaintiff is a pedophile, the fact that he is an anti-social personality and he has sodomized a child in the past make it more likely that he will commit such an act in the future." Id. at 730. A fortiorari if plaintiff declared himself to be a pedophile, the prison could properly withhold the NAMBLA materials.

95. Pruitt, 659 F. Supp. 625. The Pruitt court observed:

> [I]t makes little difference whether a person has committed homosexual acts, or would like to do so, or intends so to do. A person in one of the last two categories could reasonably be deemed to be just as incompatible with military service as one who engages in homosexual acts. Certainly, the morale factor could reasonably be considered to be the same, and the Army understandably would be apprehensive of the prospect that desire or intent would ripen into attempt or actual performance.

Id. at 627. Rich, 735 F.2d at 1224 (declamations of homosexuality have the same adverse implications for good order, discipline and morale as do homosexual acts).

96. Ben-Shalom, 881 F.2d at 462.

97. Id. Cf. Harriss, 347 U.S. at 626 (even if the

statute restrained speech, the restraint was the indirect result of self-censorship).

98. Id. at 460. "[T]he Army does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission." Id. at 460-61. Accord Pruitt, 659 F. Supp. 625. Cf. Harper, 877 F.2d 728, Espinoza v. Wilson, 814 F.2d 1093 (6th Cir. 1987) (prison officials did not have to assume the risk that homosexually-oriented literature would have an adverse impact on discipline and rehabilitative efforts within the prison). See also Dubbs, 866 F.2d at 1118 (CIA Director testified that homosexuality raises a risk which must be resolved in favor of the agency); Bowen, 483 U.S. at 603, n. 9 (Court recognized the statutory risk allocation between the State and the individual).

99. United States v. O'Brien, 391 U.S. 367 (1968).

100. Id. at 377.

101. E.g., Rich, 735 F.2d at 1224-25, n.1 (the Secretary has the authority to set military accession standards such as the homosexual exclusion policy).

102. See, e.g., Rich, 735 F.2d at 1227-28, n.7 (the Army's regulatory justifications are sufficient to

sustain the homosexual exclusion policy); Woodward, 871 F.2d at 1076 (the homosexual exclusion policy serves legitimate state interests in good order, discipline and morale within the armed forces); accord Beller, 632 F.2d 788. Cf. Metro Broadcasting, Inc. v. Federal Communications Commission, 110 S. Ct. 2997 (1990) (minority ownership policies, which may effectively exclude some non-minority owners, serve an important governmental interest in dissemination of diverse information to the public).

103. In Brown v. Glines, for example, the Court upheld a regulation prohibiting a soldier from circulating petitions addressed to the Congress, even though a soldier has the statutory right to communicate directly with members of Congress. Brown, 444 U.S. at 358. In Goldman v. Weinberger, the Court upheld a regulation that precluded an orthodox jew from wearing a yarmulke while in military uniform, even though the right to the free exercise of religion is explicitly established and protected by the First Amendment. Goldman, 475 U.S. 503. Finally, in O'Brien itself, the Court upheld a statute that imposed criminal sanctions for destruction of draft registration cards, even though there is an

established right to engage in symbolic, political speech. O'Brien, 391 U.S. at 377. Even if the subject speech was otherwise protected, exclusion from military service does not approach the severe result of criminal sanctions, although the Court found such sanctions valid in O'Brien.

104. Cf., e.g., United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972). In Priest, the Court of Military Appeals discussed the operation of the First Amendment within the military and noted, "[i]n military life . . . other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." Id. at 344. See Voorhees, 16 C.M.R. 83, 106 (C.M.A. 1954) (Latimer, J., concurring in part and dissenting in part) ("no officer or man in the armed forces has a right, be it constitutional, statutory, or otherwise, to publish any information which will imperil his unit or its cause").

105. See, e.g., Parker v. Levy, 417 U.S. 733 (1974). As one court notes, "[t]here is no constitutional right to be free from an appropriate degree of discipline, if one is affiliated with an organization where discipline is necessary, such as a team, a military unit, a police force, or a high school. Even enumerated rights, such as those guaranteed by the First Amendment, are limited by the need for discipline, commensurate with the nature of the organization to which one belongs." Petrey v. Flaugher, 505 F. Supp. 1087, 1091 (E.D. Ken. 1981) (student challenged expulsion from school for smoking marijuana).

106. Johnson, 617 F. Supp. at 175. At a criminal trial, where the standard of proof is vastly higher than that required in administrative proceedings, a statement of one's homosexuality could be admitted as evidence relevant to an element of proof for the charged offenses. See, e.g, United States v. Chadd, 82 C.M.R. 483 (C.M.A. 1963) (declaration of homosexuality relevant to nonconsent in a rape case); United States v. Vanderwier, 25 M.J. 263 (C.M.A. 1987) (admission of homosexuality corroborated commission of homosexual acts).

107. As the court stated in Ben-Shalom, "the essence of military service is the subordination of the desires and interests of the individual to the needs of the service." Ben-Shalom, 881 F.2d at 461, quoting Goldman, 475 U.S. at 507 [emphasis added].

108. Cf. Dronenburg, 741 F.2d at 1397, n.6.

109. Hardwick, 478 U.S. at 191.

110. Id. at 194. But see Cruzan, __ U.S. __, 110 S. Ct. 2841 (1990) (Scalia, J., concurring) (noted the "historically recurrent debate over whether 'due process' includes substantive restrictions"). The rationale for substantive due process has been stated as,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the constitution. This 'liberty' is not a series of isolated point picked out in terms of the taking of property; the freedom of speech . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary

> impositions and purposeless restraints . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting).

111. See, e.g., Cruzan, __ U.S. __, 110 S. Ct. 2841 (Scalia, J., concurring); Michael H. v. Gerald D., 491 U.S. __ (1989) (plurality opinion); Hardwick, 478 U.S. at 192; Moore v. East Cleveland, 431 U.S. 494, 502-503 (1977) (plurality opinion).

112. Hardwick, 478 U.S. 186. "Proscriptions against [sodomy] have ancient roots. . . . [T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching." Id. at 192, 197 (Burger, Chief Justice, concurring). See Cruzan, __ U.S. __, 110 S. Ct. 2841 (Scalia, J., concurring). "[When the applicable principles are not] set forth in

the Constitution [they are not] known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory . . . [but it] is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference." Id. at __. Cf. Lindenau, 663 F.2d at 72 (court found that the military's single parent exclusion policy was "facially neutral and had a strong historic and rational basis").

113. See, e.g., Beller, 632 F.2d 788. In Beller, the court opined that "[r]ecent decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals." Id. at 807. Applying this test, which the court defined as "heightened solicitude," Beller

nevertheless held that the homosexual exclusion policy did not violate substantive due process. Id. at 810. But see High Tech Gays, 895 F.2d at 572 (the heightened solicitude test was overruled by Hardwick). Cf. Norton v. Macy, 417 F.2d 1161, 1167 (D.C. Cir. 1969) (court applied an "inherently absurd" standard to a due process challenge to the federal government's homosexual exclusion policy).

114. Hardwick, 478 U.S. at 192. But cf. Miller v. Rumsfeld, 647 F.2d 80 (9th Cir. 1981) (Norris, J., dissenting from rejection of suggestion for rehearing en banc). In dissent to Miller, which upheld the military's homosexual exclusion policy against due process challenges, Judge Norris urged a substantive due process analysis that focused "on the significance and intimacy of a personal decision to the individual." Id. at 85 [emphasis added]. This focus, similarly to the heightened scrutiny applied by Beller, is inherently different from the historical inquiry pursued by the Supreme Court. Further, military personnel policies focus, as they must, on the needs of the service. See also Goldman, 475 U.S. at 507 ("[within] the military community there is simply not

the same [individual] autonomy as there is in the larger civilian community"), quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953) and Parker, 417 U.S. at 751 [other citations omitted]; Ben-Shalom, 881 F.2d at 465 ("plaintiff is a member of the armed forces and her conduct, at the very least, has an impact upon other soldiers" [emphasis added]).

115. See Baker, 769 F.2d at 292, quoting Berman v. Parker, 348 U.S. 26, 32 (1954) ("[i]n view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that [the proscription of sodomy] is 'totally unrelated to the pursuit of' . . . implementing morality, a permissible state goal"). Humphrey notes that sanctions for homosexual acts have been recorded as early as the year 1444. M. Humphrey, supra note 20, at xxii. Cf. Davis, supra note 40, at 72, 74 (the 1916 Articles of War proscribed sodomy and the military has had some form of official homosexual exclusion policy since at least the 1940's).

116. See Hardwick, 478 U.S. at 194-96. Cf. Miller, 647 F.2d at 83 (Norris, J., dissenting) (basing analysis on the view that "[s]ociety's attitudes toward

various aspects of sexuality and personal autonomy have changed enormously in recent years. As social issues have become legal issues, the Supreme Court has redefined the bounds of the government's power to prohibit certain activities or types of behavior") [emphasis added]. But see note 493 (opinion polls show over 74% of Americans conclude that homosexual sexual acts are "always wrong").

117. See, e.g., Dronenburg, 741 F.2d 1388, Rich, 735 F.2d 1220, Matlovich, 591 F.2d 852.

118. The homosexual exclusion policy also was subjected to an intermediate level of scrutiny styled as "heightened solicitude." Beller, 632 F.2d at 810. See Hatheway, 641 F.2d at 1382, n.6. Heightened solicitude was essentially a balancing test. Id. at 807. The Beller court, applying this stricter standard of review, upheld the homosexual exclusion policy. Id. at 810-11. But see High Tech Gays, 895 F.2d at 572 (Beller heightened solicitude test overruled).

119. See, e.g., Ben-Shalom, 881 F.2d at 464; Rich, 735 F.2d at 1227-28, n.7; Woodward, 871 F.2d at 1076; Pruitt, 659 F. Supp. at 627; Berg, 591 F.2d 849; Johnson, 617 F. Supp. 170.

120. See, e.g., United States Information Agency v. Krc, 905 F.2d 389 (D.C. Cir. 1990) (plaintiff, terminated from the Foreign Service because of his homosexuality, did not have a liberty interest implicated by the mere loss of some employment opportunities). Cf. Dorfmont, 913 F.2d 1399 (because there is no protected interest in obtaining a security clearance, there is no liberty interest in employment that requires such clearance).

121. Doe v. Casey, 796 F.2d 1508, 1524 (D.C. Cir. 1986) (plaintiff challenged his exclusion from the CIA based on his homosexuality; the court held "even if the CIA deprived Doe of his liberty interest in his reputation . . . our inquiry is not at an end. The due process clause requires that the CIA not deprive Doe of his liberty interest without due process of law").

122. See, e.g., Alberico, 783 F.2d at 1024 and cases cited at note 16. Ben-Shalom I, 489 F. Supp. at 971 (plaintiff "cannot establish any 'entitlement' to continued service sufficient to elevate her subjective expectancy to a status worthy of due process protection. . . . When she enlisted [she] was 'entitled' to be retained only for as long as she

complied with Army regulations"). If the law were otherwise, every person who had ever been denied enlistment, and every soldier who had ever been denied reenlistment, would have a potential due process claim. See Lindenau, 663 F.2d at 72 (a ruling that single parents had a property interest in enlistment "could result in a flood of litigation attacking all enlistment regulations and criteria"). See also Cortright v. Resor, 447 F.2d 245, 251 (2nd Cir. 1971), cert. denied, 405 U.S. 965 (1972) (court refused to fashion a rule that would give every soldier a "ticket to the courthouse to challenge any [decision] that was distasteful to him"). Cf. Neal v. Secretary of the Navy, 472 F. Supp. 763 (E.D. Pa. 1979) (plaintiff was discharged for convenience of the government after repeatedly being implicated in homosexual and other misconduct; court rejected plaintiff's argument that he has a "reasonable expectation" of a full career in the Marine Corps based on recruitment promises, being addressed as a "lifer," selection for duties requiring an extension of his enlistment, promotion to gunnery sergeant and his record as "one of the Corps' finest") with Watkins, 875 F.2d 699.

123. See Roth, 408 U.S. at 577.

124. Id. A further difficulty in the argument that plaintiffs had a "legitimate claim of entitlement to" military service is that many plaintiffs entered the military by evading the homosexual exclusion policy. See note 20. Thus, they were not entitled to enter military service in the first instance, much less to remain in service in violation of personnel regulations. Applying the Supreme Court's analysis from Bowen v. Gilliard, it is clear that:

> [s]ome perspective on the issue is helpful here. Had no [plaintiff ever served in the military], and had [the military] then instituted a [homosexual exclusion policy], it is hard to believe that we would seriously entertain an argument that the new [policy] constituted a taking. Yet, somehow, once [homosexuals are in the military] and [the military] sees a need to [discharge] them . . ., the 'takings' label seems to have a bit more plausibility. For legal purposes though, the two situations are identical.

Bowen, 483 U.S. at 604, citing Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

125. See, e.g., Rich, 735 F.2d 1220. Cf. Ybarra v. Bastian, 647 F.2d 891, 893 (9th Cir. 1981) (property interests are extinguished when employee has an automatic disqualification for future employment), citing Beller, 632 F.2d at 805.

126. Military service, it should be noted, is not employment. See, e.g., United States v. Gallagher, 22 C.M.R. 296 (C.M.A. 1957) (the President has promulgated for the military a formalized Code of Conduct "which reaffirmed the duty of every serviceman to resist this Nation's enemies, in mind and spirit, in combat and captivity, to the bitterest of bitter ends"). See text at note 280-88.

127. Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990) (plaintiff challenged his exclusion from military service based on his HIV infection). The existence of a protected liberty interest does not itself raise a substantive due process claim. Once a liberty interest is demonstrated, the inquiry is whether an appropriate

process was afforded to protect that interest. See, e.g., Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986); Endicott v. Huddleston, 644 F.2d 1208, 1216 (7th Cir. 1980).

128. Saal v. Middendorf, 427 F. Supp. 192, 198 (N.D. Cal. 1977) ("rightly or wrongly, a disclosure of homosexual activity will tend to stigmatize a person, particularly when coupled with an involuntary separation from military service"), reversed sub nom Beller, 632 F.2d 788.

129. E.g., Rich, 735 F.2d at 1227 ("plaintiff himself publicized his homosexuality and the circumstances of his discharge"). See generally M. Humphrey, supra note 20.

130. Beller, 632 F.2d at 806. See Neal, 472 F. Supp. 763 (service record indicated homosexual acts, but plaintiff was discharged for the convenience of the government; plaintiff unsuccessfully argued that he was "branded as being unfit to be a marine," and thus had a liberty interest implicated in his military discharge).

131. The "mere fact of discharge from a government position does not deprive a person of a liberty interest." Beller, 632 F.2d at 806. Further, under

the homosexual exclusion policy, the basis for discharge was homosexuality. There could be no stigma of unfitness "since the regulations do not make fitness of the particular individual a factor in the decision to discharge." Id.

132. But see Matlovich, 591 F.2d 852 (court found that Air Force had not adequately followed procedures for implementing its homosexual exclusion policy).

133. Davis, supra note 40, at 91.

134. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985).

135. While much of the debate has centered on what standard of review was required, the homosexual exclusion policy survived heightened as well as rational basis scrutiny. See, e.g., Beller, 632 F.2d at 807, 810 (applied a test styled as "heightened solicitude"); Hatheway, 641 F.2d at 1382, n.6.

136. Bowen, 483 U.S. at 602-03 (families who were excluded from program of Federal Aid to Families with Dependent Children were not a suspect classification), citing Lyng v. Castillo, 477 U.S. 635, 638 (1986) (classes of individuals excluded from the Federal Food Stamp Program were not suspect).

137. E.g., Ben-Shalom, 881 F.2d at 465. There is controversy in public literature, however, on the point of whether homosexuals as a group have suffered discrimination. See, e.g., Phillips, Gay Rights Bill Goes Before House Today, Boston Globe, Mar. 27, 1989, at 49. One lawmaker commented, "'I just don't think that civil rights spring from a private social activity.' [The lawmaker] . . . also said that he did not believe the gay community has demonstrated that a pattern of discrimination exists against homosexuals. 'Every other civil rights movement showed there was a pervasive pattern of discrimination. I don't think that pattern has ever been established by anyone at all in this debate.'" Id. In places where ordinances prohibiting certain types of discrimination against homosexuals have been enacted, generally at the municipal level, the ordinances are rarely invoked. See, e.g., Impact of City Sex-Bias Laws Tough to Gauge, Los Angeles Times, Oct. 30, 1989, at B1, col. 2.

138. Padula, 822 F.2d at 103. Accord Baker, 769 F.2d at 292; Rich, 735 F.2d at 1229; Ben-Shalom, 881 F.2d at 465-66.

139. Id. at 465.

140. Id. at 466. Clearly, homosexuals are not so helpless as to "command extraordinary protection from the majoritarian political process." Padula, 822 F.2d at 102, quoting San Antonio School Dist., 411 U.S. at 93. Cf. DeSantis v. Pacific Telephone and Telegraph Co., 608 F.2d 327, 333 (9th Cir. 1979) (homosexuals were not protected by 42 U.S.C. @ 1983(5) [Civil Rights Act] because homosexuals were not encompassed by the underlying "Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights").

141. Bowen, 483 U.S. at 602, citing Massachussetts Bd. of Retirement, 427 U.S. at 313-14. But see, e.g., High Tech Gays, 909 F.2d at 377 (Canby, J., dissenting) (Supreme Court has stated the standard for suspect classification variously).

142. See, e.g., Davis, supra note 40, at 93.

143. Id. at 57-63.

144. See Schweiker v. Wilson, 450 U.S. 221, 229 (1981) (rejecting lower court's finding that, although "the mentally ill as a group do not demonstrate all the characteristics . . . denoting inherently suspicious

classifications," heightened scrutiny nevertheless applied).

145. See note 215 (discussion of ex post and ex ante analyses) and text at notes 221-23 (the irrelevance of "fault" in military personnel policies).

146. See, e.g., High Tech Gays, 909 F.2d at 377 (Canby, J., dissenting).

147. See, e.g., Frontiero, 411 U.S. 677 (gender not a suspect classification). Cf. Trerice v. Pedersen, 769 F.2d 1398, 1402-03 (9th Cir. 1985) (rejecting claim that military prisoners were a protected class under 1985(3) because prisoners did not possess "discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex").

148. High Tech Gays, 895 F.2d at 573; Woodward, 871 F.2d at 1076; Padula, 822 F.2d at 103. But cf. High Tech Gays, 909 F.2d 375 (Canby, J., dissenting). Judge Canby disputed the majority's determination that homosexuality was behavioral and thus not immutable. In his view, "[i]t is not enough to say that the category is 'behavioral.' One can make 'behavioral' classes out of persons who go to church on Saturday,

persons who speak Spanish, or persons who walk with crutches." Id. at 377. Judge Canby's statement is true, but it is also true that the military might constitutionally exclude from service "persons who go to church on Saturday, [cf. Khalsa, 759 F.2d 1411 (Sikh excluded because religious precepts required wearing unshorn head and facial hair, iron bracelets and turbans); Goldman, 475 U.S. 503; see also O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (prison regulations that prevented attendance at religious service were reasonably related to legitimate penological interests and thus constitutional)], persons who speak Spanish [see Dicicco, 873 F.2d 910 (plaintiff initially excluded from military because he did not speak English)], or persons who walk with crutches [see, e.g, Smith v. Christian, 763 F.2d 1322 (11th Cir. 1985) (plaintiff excluded because he was missing a finger)]."

149. Ben-Shalom, 881 F.2d at 463. The district court accepted plaintiff's claim that "homosexuals, as defined merely by the status of having a particular sexual orientation and absent any allegations of sexual

misconduct, constitute a suspect class." Id. The appellate court reversed. Id. at 464.

150. In High Tech Gays, however, Judge Canby did note that "[t]he Supreme Court has more than once recited the characteristics of a suspect class without mentioning immutability. See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985); Massachussetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. [1,] 28. . . . See Graham v. Richardson, 403 U.S. 365, 371-2 (1971)." High Tech Gays, 909 F.2d at 377 (Canby, J., dissenting). See Ben-Shalom, 881 F.2d at 457 (plaintiff claimed homosexuals were a discrete and insular group for equal protection purposes; court focused on group as defined by homosexual behavior).

151. Norton, 417 F.2d at 1167, n.28.

152. Cyr, 439 F. Supp. at 703. The court noted that "[c]lass existence is complicated . . . by the fact that gay individuals are not readily identifiable, unlike individuals with certain racial or color characteristics, individuals with certain types of surnames, or individuals of a certain physical sex." Id. at 704. "Gays cannot, after all, be detected

simply by the color of their skin." M. Humphrey, supra note 20, at ix. Cf. Remafedi, Adolescent Homosexuality: Psychosocial and Medical Implications, 79 Pediatrics 331-337 (1987) (surveying the needs of gay minors is hindered by their lack of visiblity). But see Smith v. Liberty Mutual Insurance Company, 569 F.2d 325 (5th Cir. 1978) (plaintiff, a homosexual, claimed that he was "discriminated against [not] because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the description 'effeminate'"); Davis, supra note 40, at 64 ("[t]he incidence of "feminized males" or "queens" . . . is estimated at about ten percent of the male homosexual population").

153. This is especially true in light of the Supreme Court's willingness to accord women, who are infinitely more identifiable than homosexuals, only quasi-suspect class status. National Gay Task Force, 729 F.2d 1270, citing Frontiero, 411 U.S. 677 (if gender is not a suspect classification, neither is a classification based on choice of sexual partners).

154. E.g., Rich, 735 F.2d at 1229; Ben-Shalom, 881 F.2d at 464; Hatheway, 641 F.2d at 1382; Woodward, 871 F.2d at 1076; Padula, 822 F.2d at 103; National Gay Task Force, 729 F.2d at 1273; DeSantis, 608 F.2d at 333; High Tech Gays, 895 F.2d at 571.

155. See Lindenau, 663 F.2d 68. Cf. Bowen, 483 U.S. 587 (families are not a suspect class).

156. Holoway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977) (transsexuals are not a suspect class); Accord Doe v. Alexander, 510 F. Supp. 900.

157. Plyler v. Doe, 457 U.S. 202, 223-234 (1982) (undocumented aliens were not a suspect class, but statute did not meet rational basis test).

158. Trerice, 769 F.2d 1398.

159. Schweiker, 450 U.S. 221.

160. Dallas, 490 U.S. at 25.

161. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). Also see Papasan v. Allain, 478 U.S. 265 (1986) (the wealthy are not a suspect class).

162. E.g., Lindenau, 663 F.2d 68 (single parents excluded). While other groups were excluded, no groups besides homosexuals and prisoners have been defined by conduct that was criminal.

163. See, e.g., Lindenau, 663 F.2d 68, Doe v. Alexander, 510 F. Supp. 900. But see Beller, 632 F.2d 788 (found homosexual exclusion policy constitutional after subjecting it to intermediate scrutiny). Contra High Tech Gays, 895 F.2d at 572 (Beller heightened solicitude test no longer valid).

164. One might have predicted that the ruling in Hardwick would settle the equal protection issues as roundly as it settled due process challenges to the homosexual exclusion policy. Schweiker, 450 U.S. 221 (the Fifth Amendment and the Equal Protection Clause of the Fourteen Amendment impose identical standards); Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) ("Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourth Amendment"). See Beller, 632 F.2d at 810; Ben-Shalom, 881 F.2d at 463-64; Woodward, 871 F.2d at 1075, n.7. In Ben-Shalom, the court concluded that, "[a]lthough the [Hardwick] Court analyzed the constitutionality of the [sodomy] statute on a due process rather than an equal protection basis, Hardwick nevertheless impacts on the scrutiny aspects under an equal protection analysis." Ben-Shalom, 881 F.2d at

464. Accord Padula, 822 F.2d at 97, High Tech Gays, 895 F.2d at 570-71. But because Hardwick was decided on due process grounds, some judges left open the possibility that homosexuals might yet succeed on a fundamental rights theory under equal protection guarantees. E.g., High Tech Gays, 909 F.2d 375 (Canby, J., dissenting). A similar debate surrounded the meaning of the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976). Ten years before Hardwick, Doe upheld the constitutionality of a sodomy statute. Some argued that the Court's affirmance was on procedural grounds and, thus, was not relevant to challenges to the homosexual exclusion policy. See, e.g., Dronenburg, 741 F.2d at 1392; Miller, 647 F.2d 80 (Norris, J., dissenting).

165. See notes 164 & 167.

166. Davis, supra note 40, at 91.

167. See Ben-Shalom, 881 F.2d at 464. "If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis

scrutiny for equal protection purposes. The Constitution . . . cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result." Id. Accord Padula, 822 F.2d at 103; Woodward, 871 F.2d at 1076.

168. Davis, supra note 40, at 91.

169. The most renowned articulation of a right to "be" is no doubt Justice Brandeis' observation that the true balance between society's interests and the interests of the individual is found in "the right to be let alone--the most comprehensive of rights and the most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). It cannot be said that the homosexual exclusion policy abridges any right to be let alone. Indeed, it arguably advances a homosexual's interest in being let alone, since military service imposes a variety of standards of conduct, including those embodied by the Uniform Code of Military Justice. See 10 U.S.C. @ 801-934. See note 362.

170. Cf. Cruzan, __ U.S. __, __, 110 S. Ct. 2841 (Scalia, J., concurring) (an action/inaction dichotomy was nonsensible in context of rendering life-sustaining

care; the line is between "ordinary" action and "excessive" action).

171. For example, an overweight applicant could claim he has a right to be a person who enjoys food; an applicant who adheres to Nazism could claim he has a right to be extreme. Cf. Blameuser, 630 F.2d 538. As demonstrated by the lower court's analysis in Ben-Shalom, the right to "be" cannot be limited to the right to be homosexual. The court stated that, "[t]he privacy of the integral components of one's personality--the essence of one's identity--this court believes, is an interest so fundamental or 'implicit in a concept of ordered liberty' as to merit constitutional protection." Ben-Shalom, 489 F. Supp. at 975, reversed, 881 F.2d 454 (7th Cir. 1989), cert. denied 110 S. Ct. 1276 (1990). There is no principled, constitutional way to distinguish between personalities or identities for purposes of affording constitutional protection to some and not others. For example, it may be constitutionally permissible to infringe one's practice of religion, an explicit and established constitutional right. This is true even though one's relationship with one's god may be as or more critical

to one's identity than sexual preference Cf. O'Lone, 482 U.S. 342, Ogden v. United States, 758 F.2d 1168 (7th Cir. 1985).

172. Rich, 735 F.2d at 1228.

173. See Beller, 632 F.2d at 810.

174. See Miller, 647 F.2d at 83 (Norris, J., dissenting).

175. Homosexuality is only one in a whole spectrum of possible sexual identities. See text at notes 270-72.

176. Cf. Bowen, 483 U.S. at 604-05. In discussing a statutory amendment that excluded some families from welfare benefits, the Court observed, "it is imperative to recognize that the amendment at issue merely incorporates a definitional element [regarding who is eligible to enter] into an entitlements program." Id.

177. Cf. Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981) (exclusion from the military because of transsexualism); Lindenau, 663 F.2d 68 (exclusion from military because of single parenthood). See Ulane, 742 F.2d 1081 (exclusion from employment because of transsexualism). See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). In Rodriguez,

the Court found that even if some quantum of education was constitutionally protected, heightened scrutiny would apply only if the statue effected a "radical denial of educational opportunity." Id. at 44. Applied here, even if homosexuality was constitutionally protected, heightened scrutiny would apply to the homosexual exclusion policy only if it radically denied one the opportunity to be homosexual. This is hardly the case. Indeed, homosexuals can leader fuller lives outside the military, because homosexual conduct is subject to criminal sanctions under the Uniform Code of Military Justice. 10 U.S.C. @ 925. See generally M. Humphrey, supra note 20, and note 239.

178. Cf., e.g., Goldman, 475 U.S. 503. In Goldman, the Court found constitutionally permissible a regulation that directly infringed upon a military member's constitutional right to free exercise of religion. Id. at 507-08. Goldman, an Orthodox Jew, could continue to follow his religious precepts, but, to the extent they conflicted with military regulations, he had to choose between following his religious precepts and being in the Air Force. The

fact of that requirement to choose did not preclude Goldman from being an Orthodox Jew. Khalsa, 759 F.2d 1411 (Sikh excluded). See Manual for Courts-Martial, 1984, Part IV, para. 14c(2)(a)(iv) ("the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order"). All rules can create dilemmas for those who come within the ambit of the rule. Some conclude, however, that the fact that a rule creates unpleasant dilemmas calls the soundness of the rule into question. See Davis, supra note 40, at 103 ("[p]eople who know they have a homosexual orientation and who want to serve in the military are faced with a dilemma: disclose and be excluded, or lie and hide"). Cf. Dillard, 652 F.2d 316 (plaintiff would have been excluded from military service had she obeyed the rule to disclose that she was a single parent). But the fact that an individual must choose between obeying the rules of an organization and not joining the organization does not impact on one's opportunity to think or feel whatever and however one wishes, and

it does not call the soundness of the rule into question.

179. See text at notes 298-305.

180. Ben-Shalom, 881 F.2d at 464. See notes 204-05. Accord Woodward, 871 F.2d at 1075; Dronenburg, 741 F.2d at 1398. The rational basis test and the regulatory bases for the homosexual exclusion policy will be discussed in detail below.

181. Nor does it abridge the Establishment Clause or free exercise of religion. See note 56.

182. Voorhees, 16 C.M.R. at 107.

183. See Lindenau, 663 F.2d at 73 (the single parent exclusion policy simply "insures that [military] personnel can rapidly respond to national defense requirements and fulfill their duties within the military community").

184. Ben-Shalom, 881 F.2d at 461, quoting Goldman, 475 U.S. at 507. But cf. Miller, 647 F.2d 80 (Norris, J., dissenting) (suggesting a due process analysis that focused on the significance and intimacy of the personal decision to the individual).

185. See text at notes 154 & 165.

186. Ben-Shalom, 881 F.2d at 464-65; Woodward, 871 F.2d at 1076; Rich, 735 F.2d at 1229; Dronenburg, 741 F.2d at 1398; Accord Padula, 882 F.2d at 103; High Tech Gays, 895 F.2d at 574; Baker, 769 F.2d at 292.

187. McGinnis v. Royster, 410 U.S. 263, 270 (1973).

188. Cleburne, 473 U.S. at 440.

189. Dallas, 490 U.S. at 26. "This judicial deference is grounded in a constitutional presumption that 'improvident [classifications] will eventually be rectified by the democratic processes.'" Cleburne, 473 U.S. at 440.

190. Dallas, 490 U.S. at 27.

191. Id.

192. See notes 204-05.

193. See, e.g., Vuono, Training and the Army of the 1990s, 1 Military Review 2-9 (Jan. 1991). "As we marvel at the collapse of the Soviet empire, we also witness the birth of a new era of uncertainty and peril, an era in which the threats we [the Army and the nation] will confront are themselves ill-defined . . .. [W]e must also prepare for the implications of the instability and chaos that historically trail in the wake of collapsing empires. . . . If the wave of the

future is the 'come as you are' war, then we must be ready to go at all times." Id. at 4.

194. See Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913).

195. High Tech Gays, 895 F.2d at 576.

196. Id. at 575, citing Cleburne, 473 U.S. at 440. Indeed, the term "incompatible" can be a relative, rather than conclusive term. The Secretary need not determine whether homosexuality is absolutely incompatible with military service, somewhat incompatible or so on. The determination simply states the problem: homosexuality is incompatible with military service. The exclusion policy states the solution to that problem arrived at by the Army's senior military and civilian leadership.

197. Espinoza, 814 F.2d at 1097-98. In Espinoza, plaintiff challenged a prison regulation that permitted withholding of homosexually-oriented mail. "[P]rison officials had testified that there was a strong correlation between prison violence and inmate homosexuality. . . . The officials also testified that homosexuality played a major role in inmate assaults, rapes, intimidation, extortion and personal abuse.

Consequently, the prison officials believe that they could not sanction an activity that might further expose innocent inmates to increased dangers, increase the opportunities for identification of homosexual inmates, and increase the ability of dangerous inmates to target homosexual inmates." Id. at 1097 [emphasis added]. The court upheld the regulation based on the potential danger to discipline within the prison. Id. 198. Dronenburg, 741 FF.2d at 1398. Indeed, common sense and experience are integral factors in force composition decisions. See Bowen, 483 U.S. 587, 599-601, n.5 (common sense and experience utilized in formulating statutory entitlements scheme). Cf. High Tech Gays, 895 F.2d at 566 (the ultimate decision on security clearances "must be an overall common sense determination based upon all available facts"). The Dronenburg court observed that "[t]his very case illustrates the dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit." Id. at 1398.

199. See, e.g., Baker, 553 F. Supp. 1121; Aumiller, 434 F. Supp. 1273. In Baker, a psychiatrist and a

sociologist testified as experts in homosexuality. Baker, 553 F. Supp. at 1129-31. Further, a theologian and professor of the New Testament testified that, "in his expert opinion, the Bible does not condemn consensual homosexual conduct." Id. at 1129, n.2. In Aumiller, "both parties presented expert witness testimony relating to the etiology of homosexuality and its psychological implications." Aumiller, 434 F. Supp. at 1290.

200. Cf. Mathews v. Eldridge, 424 U.S. 319 (even where process is constitutionally due, fiscal and administrative burdens are factors in determining how much process is "enough"). In setting accession or retention standards, the Army need not come up with better, that is, more substantiated, answers than medical science. It is enough that a characteristic, circumstance or propensity for particular conduct raises a doubt about the potential for successful soldiering. See, e.g., Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985) (experts differed on whether plaintiff could be safely vaccinated for smallpox, but Air Force could rely on its determination that the risk of unsafe vaccination made plaintiff unfit for military service).

Cf. Dubbs, 866 F.2d 1114 (experts were in disarray on homosexuality, but risk must be resolved in favor of the agency). Cf. also United States v. Benedict, 27 M.J. 253 (C.M.A. 1988). In Benedict, experts testified variously on the issue of whether the insanity defense applied based on a diagnosis of pedophilia. Regardless that expert evidence might be in disarray on pedophilia, as a policy matter, the Army could resolve in its favor risks raised by that sexual orientation.

201. See, e.g., Rich, 735 F.2d at 1227-28, n.7.

202. See, e.g., Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984) (testimony of Major General H. Norman Schwarzkopf and declaration of Major General Kenneth L. Peek, in their capacities as former Director for Military Personnel Management and Assistant Deputy Chief of Staff for Personnel for the Army and Director of Personnel Plans, Office of the Deputy Chief of Staff, Manpower and Personnel, Department of the Air Force, respectively), remanded on other grounds, 755 F.2d 182 (1st Cir. 1985); Beller, 632 F.2d 788 (affidavit of Assistant Chief of Naval Personnel). Cf. Dallas, 490 U.S. 19 (rational basis demonstrated by

testimony of an urban planner and a city police officer).

203. Brown, 444 U.S. at 368-69 (Brennan, J., dissenting) (rejecting argument that military had a substantial interest in good order, discipline and morale).

204. E.g., Ben-Shalom, 881 F.2d at 465; Beller, 632 F.2d at 811. The court in Ben-Shalom readily recognized that "the military establishment is very different from civilian life. When necessary, the military must be able to protect and defend the United States. That is a most important government mission, a difficult, demanding and complex one. It requires a trained professional force of reliable, loyal, and responsive soldiers of high morale, with respect for duty and discipline, soldiers who can work together as a team to accomplish whatever missions they may be given by their commanders." Id. at 460.

205. Beller, 632 F.2d at 811. Accord Dronenburg, 741 F.2d at 1398; Ben-Shalom, 881 F.2d at 465; Woodward, 871 F.2d at 1076; Pruitt, 659 F. Supp. at 527; Rich, 735 F.2d at 1227-28, n.7; Hatheway, 641 F.2d at 1382 ("those who engage in homosexual acts severely

compromise the government's ability to maintain [a strong military] force").

206. Cf. High Tech Gays, 895 F.2d at 574, citing Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting); Harper, 877 F.2d 728. In Harper the court explained, "[t]he moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 . . . (1986). If the moving party satisfied this burden, the opponent must set forth specific facts showing that there remains a genuine issue for trial. FRCP 56(e). However, no defense to an insufficient showing is required. Neely v. St. Paul Fire & Marine Insurance Co., 584 F.2d 341, 344 (9th Cir. 1978). . . . [A]n issue of fact is only a genuine issue if it can reasonably be resolved in favor of either party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250-251 . . . (1986)." Id.

207. In general in these cases, the Army presented evidence of the effect of homosexuality within the military. See, e.g., Rich, 735 F.2d at 1227-28, n.7. Plaintiffs presented evidence of their individual record of military service. See, e.g., Matlovich, 591

F.2d 852. Cf. Beller, 632 F.2d at 81 (witnesses testified plaintiff's homosexuality had not presented problems, but that homosexuality could have an adverse impact within the Navy).

208. "A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment." Harper, 877 F.2d at 731, citing Celotex, 477 U.S. at 322. Accord High Tech Gays, 895 F.2d at 574. Further, the "burden to demonstrate a genuine issue of fact increases where the factual context makes the non-moving party's claim implausible." Harper, 877 F.2d at 731, citing Matshushita Electric Industrial Company, Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Plaintiffs generally did not attempt to prove that, or show a genuine dispute of fact as to whether, homosexuality is compatible with military service. Most plaintiffs had admitted to homosexual acts, and no plaintiff made a forthright claim of celibacy. See e.g., Woodward, 871 F.2d at 1074, n.6; Steffan, 733 F. Supp. at 123. Since the detrimental effect of

homosexual conduct on the military was generally conceded, see, e.g., Matthews, 755 F.2d at 183, even if a status/conduct dichotomy was sensible and accepted, it could be said that plaintiffs did not have standing to prove that homosexuality was compatible with military service. As noted, however, the rationality of the homosexual exclusion policy was the subject of vigorous argument.

209. Cf. High Tech Gays, 895 F.2d 563. In a challenge to a Department of Defense (DoD) policy on investigating homosexuals applying for security clearances, plaintiffs did submit affidavits and offer evidence. The court held, however, that summary judgment had been improperly granted plaintiffs because their "affidavits and evidence fail to make a sufficient showing that the DoD does not have a rational basis for its [policy] or that there is a genuine issue of material fact for trial. . . . Nor have plaintiffs offered 'any significant probative evidence tending to support [their] complaint.'" Id. at 575 [citations omitted].

210. See, e.g., Miller, 647 F.2d at 85 (Norris, J.,

dissenting) (focusing on the "significance and intimacy of a personal decision [about homosexuality] to the individual").

211. Ben-Shalom, 881 F.2d at 462, citing O'Brien, 391 U.S. 367. Cf. Mathews v. Eldridge, 424 U.S. 319. In Mathews, the Court found that one factor in due process analysis was "the Government's interest, including the function involved and the fiscal and administrative burdens" that a policy choice would entail. Id. at 332. The plaintiff in Mathews had a recognized property interest in the terminated benefit (Social Security payments). Because plaintiffs challenging the homosexual exclusion policy do not have a property interest in military service, arguably even greater weight should be accorded fiscal and administrative burdens that would be imposed on the Army by suggested changes to the policy.

212. Toth v. Quarles, 350 U.S. 11, 17 (1955).

213. Noyd v. McNamara, 378 F.2d 538, 540 (10th Cir. 1967).

214. See, e.g., Beller, 632 F.2d 788. "During the discharge hearings of the plaintiffs, various members who testified on their behalf indicated that while

plaintiffs' homosexuality did not impair the efficiency of the Navy, a member's homosexual conduct might in other circumstances cause difficulties, especially aboard a ship." Id. at 812.

215. Judge Easterbrook's keen articulation of ex post and ex ante analysis of legal questions applies here. He has illustrated these two analytical approaches with Clark v. Community for Creative Non-Violence (CCNV), 468 U.S. 288 (1984). Easterbrook, The Supreme Court, 1983 Term--Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4 (1984). Clark involved a National Park Service regulation that proscribed camping in parks in Washington, D.C. The Park Service, however, did allow the erection of "symbolic" tents in parks near the White House as part of a demonstration for the homeless. Once the tents were up, the demonstrators asked permission to then sleep in the tents. The Park Service refused. The court of appeals, citing the First Amendment, found for the demonstrators. Judge Easterbrook observed that:

> The points made by the court of appeals [in Clark] are typical of ex post arguments in litigation. They start from the assumption that the parties occupy fixed positions and ask whether the distribution of entitlements in that position is fair. Here the court . .
>
> . started from the existence of a village of tents occupied by the CCNV and asked: Why not allow a little sleep? The effect is small, the demonstrators few, the need great; less restrictive alternatives are available. Only knaves would say no.
>
> Yet the Supreme Court said no. It simply changed the perspective. Instead of asking, "What is the effect of allowing these few people to close their eyes?", it asked, in essence, "What is the effect of camping in the national parks near the White House?" . . . [T]he Court asked not what would happen if the CCNV's demonstrators took naps, but what would happen if a relaxation of the ban on

> camping made similar demonstrations more attractive. As the implicit cost of demonstrating fell, more people with less to say would seek initial permits; those who sought permits would stay longer; those whose desire to speak was weaker than the CCNV's
>
> who would come more frequently; some impostors who simply wanted to sleep and not speak would use the parks as living quarters . . .. The Court was barely interested in the CCNV's methods and message. It asked instead how complex patterns of behavior would change if sleeping were permitted.

Id. [emphasis added]. The Supreme Court's approach was ex ante, that is, forward-looking, considering systemic effects. Similarly to the lower court in Clark, plaintiffs in challenges to the homosexual exclusion policy asked, "What is the effect of allowing me--one individual homosexual--to be in the military?" The proper question, however, is, "What is the effect of allowing all homosexuals to be in the military?" What

would happen if a relaxation of the ban on homosexuality made military service more attractive to homosexuals? How would complex patterns of behavior change if homosexuality were permitted within the military? These questions are addressed in detail below.

216. Further, arguments are not evidence, and evidence is required to negate the Army's showing of a rational basis for the determination that homosexuality is incompatible with military service. See notes 206-08.

217. See, e.g., High Tech Gays, 909 F.2d 375 (Canby, J., dissenting). In Judge Canby's view, "[w]hen the government discriminates against homosexuals [or single parents, overweight persons, transsexuals, the young or the old, for example], it is discriminating against persons because of what they are, through no choice of their own, and what they are [or may be] unable to change. Preventing such unfair discrimination is what the equal protection clause is all about." But see, e.g., Health Care Needs of a Homosexual Population, 248 J.A.M.A. 736-739 (1982) (about one-third or more of those wishing to change their homosexual orientation

became exclusively heterosexual after psychoanalysis or psychotherapy).

218. See Rich, 735 F.2d 1220. "No punishment is involved in this case. . . . [T]he Secretary has the statutory authority to decide that certain attributes make one ineligible for military service." Id. at 1224-25, n.1.

219. See, e.g., Alberico, 783 F.2d at 1028 (the challenged regulation "does not impose additional punishment, but merely provides the Army with a means of removing from its ranks undesirable officers who have committed serious crimes"). Cf. Rich, 735 F.2d at 1228 (even if homosexual conduct had some measure of constitutional protection, "it does not follow that the Army could not exclude homosexuals")

220. For example, in Dronenburg v. Zech, plaintiff argued that "'the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body,' except by the least restrictive means available and in the presence of a compelling state interest." Dronenburg, 741 F.2d at 1391. The homosexual exclusion policy controls accession to the armed forces. It does not control an

individual's sexual activities or the individual's "intimate personal decisions regarding his or her own body." Cf. Bowen, 483 U.S. at 601 (excluding certain individuals from a welfare entitlement scheme did not "interfere with a family's fundamental right to live in the type of family unit it chooses").

221. See, e.g., Davis, supra note 40, at 57-63; Baker, 553 F. Supp. at 1121, reversed 769 F.2d 289. In Baker, the district court found, after expert testimony, that "[a]lthough there are different theories about the 'cause' of homosexuality, the overwhelming majority of experts agree that individuals become homosexuals because of biological or genetic factors, or environmental conditioning, or a combination of these and other causes." Id. at 1129. On close review, the court's finding encompasses all possible causes of sexual behavior, including learned behavior, which is an aspect of environmental conditioning. Thus, even if etiology were relevant, it is not clear that the cause of homosexuality has been conclusively established so as to be useful in legal or practical analysis. Cf. Aumiller, 434 F. Supp. at 1290 (the court heard expert witness testimony relating to the etiology of

homosexuality and its psychological implications, but questioned the relevance of such evidence to plaintiff's First Amendment speech and association claims). See Schweiker, 450 U.S. at 229, n.11 (the district court acknowledged that it was debatable "whether and to what extent the mental illness is an 'immutable characteristic determined solely by the accident of birth'").

222. Davis, supra note 40, at 58. See also High Tech Gays 909 F.2d at 377 (Canby, J., dissenting) ("[t]he question is, what causes the behavior? Does it arise from the kind of a characteristic that belongs peculiarly to a group that the equal protection clause should specially protect?"). Cf. Friedland, AIDS and Compassion, 259 J.A.M.A. 2898-2899 (1988). Friedland writes:

> Rather than blaming the victims, we should examine the societal conditions that promote unhealthy risk-taking behavior, particularly intravenous drug use, and ask who is responsible for them? . . . Illicit drug use

> is entwined with and the product of unemployment, poverty, racism, and hopelessness and is perpetuated by greed and corruption at many levels in our society. . . . Certainly the drug user is responsible for his or her own actions, but he or she is also the victim of powerful and shameful social forces and conditions.

Id. Similarly, the blame for many service-disqualifiers, for example, single parenthood or failure to graduate from high school, could be apportioned between the individual and society. But the fact that social forces may play a role in creating an individual's circumstances is not relevant to whether those circumstances are compatible with military service.

223. Cf. High Tech Gays, 895 F.2d at 575. See also Robinson, 370 U.S. at 667, n.9 ("a person may even be a narcotics addict from the moment of his birth"). An addictive personality may be unchosen and unchangeable, but that does not demonstrate that addiction is compatible with military service.

224. Hardwick, 478 U.S. at 197 (Burger, Chief Justice, concurring). The Chief Justice went on to find "nothing in the Constitution depriving a State of the power to enact the statute [proscribing sodomy]." Id.

225. Ben-Shalom, 881 F.2d at 462.

226. Toth, 350 U.S. at 17.

227. See Matlovich, 591 F.2d 852; Rich, 735 F.2d at 1228, n.7 (court rejected plaintiff's contention that his substantive due process claim must be considered with regard to the "distinguishing facts of plaintiff's case"). The Supreme Court has repeatedly recognized that individual preference is not the criteria for constitutional soundness. The Court has held that, "[a]s long as the classification scheme . . . rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of [operation] that we, as individuals, perhaps would have preferred." Schweiker, 450 U.S. at 235.

228. But see note 124.

229. A paraphrase of Justice Harlan's comments in In re Winship, 397 U.S. 358, 372 (concurring opinion) ("it

is far worse to convict an innocent man than to let a guilty man go free").

230. Cf. Bowen, 483 U.S. at 600 ("Congress is entitled to rely on a classwide presumption that custodial parents have used . . . support funds in a way that is beneficial to entire family units," even though there was evidence that some parents did not).

231. Beller, 632 F.2d at 808, n.20, citing Weinberger v. Salfi, 422 U.S. 749 (1975).

232. Schweiker, 450 U.S. at 234, quoting Massachusetts Bd. of Retirement, 427 U.S. at 314.

233. Cf. Mathews v. Eldridge, 424 U.S. 319 (fiscal and administrative burdens are a proper factor to consider in determining constitutionality of policies based on due process challenges).

234. Beller, 632 F.2d at 809, n.20 ("the Navy could rationally conclude that homosexuality presented problems sufficiently serious to justify a policy of mandatory discharge while other grounds for discharge did not").

235. Id. at 808, n.20. The Beller court further held that "[d]ischarge of the particular plaintiffs before us would be rational, under minimal scrutiny, not

because their particular cases present the dangers which justify [the homosexual exclusion] policy, but because the general policy of discharging all homosexuals is rational." Id.

236. Indeed, plaintiffs in these cases frankly refused to venture a prediction of their own future conduct. See, e.g., Ben-Shalom, 881 F.2d at 464; Steffan, 733 F. Supp. 121 (sought protective order and invoked Fifth Amendment privilege to avoid answering discovery questions concerning homosexual conduct). See note 20. Also, so long as sodomy remains a crime, and so long as considerations relevant to the situation of sexual partners exist, candor will be diminished. Cf., e.g., Goldsmith, HIV Prevalence Data Mount, Patterns Seen Emerging by End of This Year, 260 J.A.M.A. 1829-1830 (1988). "Studies have shown that some men who claim they caught AIDS from a prostitute, for example, eventually admit to having practiced such risky behavior as intravenous drug use or homosexual anal intercourse." Id. Cf. Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970). "[The] attempt to define not only the individual's future actions, but those of outside and unknown

influences renders the 'grant or denial of security clearances . . . an inexact science at best.'" Id. at 239.

237. See, e.g., M. Humphrey, supra note 20, at 111. "I had become very [homosexually] active with a number of soldiers on the post. I had been there almost five years and my tour was almost up, so I began throwing caution to the wind. I wasn't much into the psychological mating or lover relationship." Id.

238. E.g., M. Humphrey, supra note 20, at 11. "I entered the military knowing that I was a lesbian, but also knowing that I wanted to do what was right by military standards and stay there! But, by God, when I got into basic, I thought I had been transferred to hog heaven! No damn kidding! Lordy!" Id.

239. See generally M. Humphrey, supra note 20. Of the 42 homosexuals whose interviews appear in Humphrey's book, covering the period from 1940 to 1990, 31 individuals self-reported having been involved in at least one investigation or administrative or judicial proceeding based on homosexuality during their time in the military. Id. at xiii, 4, 9, 12, 31, 33, 37, 45,

48, 74, 85, 91, 98, 105, 111, 125, 129, 136, 141, 145, 153, 164, 169, 176, 181, 202, 225, 229, 239, 245, 251.

240. See, e.g., Berg, 591 F.2d 849; Matlovich, 591 F.2d 852. In Berg the court stated that, "[a]lthough the Navy regulation on homosexuality . . . does not in terms provide any exception to the general policy of separating homosexuals, the Navy has interpreted it as not mandating separation in all cases." Id. at 851. The court then found that the Navy had failed to "articulate adequately why it determined not to retain this appellant." Id. Cf. Doe v. Casey, 796 F.2d 1508. The Casey court observed, "[b]ecause Doe himself does not view homosexuality as stigmatizing . . . he would have no liberty interest claim if all homosexuals were banned from CIA employment. If, on the other hand, the CIA terminated Doe because his homosexuality presented a unique security risk not necessarily presented by all other homosexuals, we must conclude that the statement is sufficiently stigmatizing to give rise to a colorable liberty interest claim." Id. at 1523. Thus, if avoiding the drain of litigation is one policy goal, avoiding policies that provide exceptions or individualized determinations, except where

constitutionally required, may help accomplish that goal.

241. See Beller, 632 F.2d at 809, n.20. Beller addressed the fact that not all grounds for discharge set out in military personnel policies are automatic. The Beller court stated:

> [T]he district court . . . appeared to declare due process violated because some other groups subject to discharge were not required to be discharged. . . . Some personnel are given a second chance to 'overcome his/her deficiencies'.. . . Giving someone a second chance to overcome his or her deficiencies is not at all the same as requiring fitness of the individual to be considered. In any event, the fact that the [military's] choice of categorization is overinclusive and underinclusive does not mean that the regulations violate due process. . . . The [military] could rationally conclude that homosexuality presented problems sufficiently serious to

> justify a policy of mandatory discharge while other grounds for discharge did not.

Id. Homosexual acts, like other sexual misconduct, are difficult to prove and deter. See note 242 & 244. Drug use, for example, which may be waivable, can be detected and deterred by urinalysis. But see note 410.

242. Ben-Shalom, 881 F.2d at 464. See generally M. Humphrey, supra note 20. See note 239. Plaintiff Hatheway, for example, detailed his homosexual activities while in the Army. Id. at 108-118. At his trial by court-martial for sodomy, Hatheway "raised a defense of unconsciousness. One psychiatrist testified Hatheway suffered from 'pathological intoxication' and stated his opinion that Hatheway was not conscious of the sodomitic acts. Another psychiatrist testified this was a real possibility." Hatheway, 641 F.2d at 1378. Cf. also Neal, 472 F. Supp. 763. Every defendant has the right to put the government to its proof on a criminal charge. But, in making policy decisions, the Army properly can consider the administrative and judicial burden--the forced requirement to sleuth--presented by homosexual conduct.

It should also be noted that, in military criminal practice, defense experts are generally paid for by the military, not the defendant. AR 27-10, para. 6-5 (Military Justice).

243. Ben-Shalom, 881 F.2d at 464.

244. See M. Humphrey, supra at note 20. "I was ordered in front of the post commander. He said, 'We have an accusation that you're a homosexual. It's being investigated by [Criminal Investigation Division], and you are not to go to your work station at the vault [a classified area] until we find out what's going on.' I was quaking in my boots because it was true, it was quite true that I was gay, but I thought nobody knew . . .. However, nothing was found in the investigation, so he later called me in and apologized." Id. at 111 (interview with Hatheway, later convicted for committing sodomy with an enlisted man in the barracks). "I was called in by the [Naval Investigative Service] . . .. Apparently, they had been observing me for a while and had signed affidavits from different people that stated I had engaged in homosexual acts. At that time, I denied it, of course, but with what they had, the commanding officer

recommended a court-martial. . . . Then I got arrested in Milwaukee, by civilian police, for indecent exposure. It was like all these things were coming down at one time. . . . I was under quite a bit of pressure." Id. at 45. "We were stroking, caressing, and kissing in front of the other part guests . . . One of the other guys at the party was in my squadron [I was the Commanding Officer of the squadron] . . .. This [Air Force Office of Special Investigations] investigator, a woman, said, 'Would you like to make a statement?' . . . I wrote, 'I am not now nor have I ever been homosexual, nor have I committed any homosexual acts,' signed Paul Starr. That came back to haunt me later on in the court-martial for making a false official statement. That was one of my charges, but at that time I did not know that they were putting my case together from many sources." Id. at 229.

245. Salfi, 422 U.S. at 776.

246. Id.

247. See note 56.

248. Dronenburg, 741 F.2d at 1397.

249. Miller, 647 F.2d at 86 (Norris, J., dissenting).

But see Parker, 417 U.S. 733 (Blackmun, J., concurring). "The law should . . . be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right." Id. at 765.

250. Dronenburg, 741 F.2d at 1397. Cf. Hardwick, 478 U.S. 186. "[Respondent] insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalided on this basis." Id. at 195.

251. Id.

252. Doe v. Commonwealth's Attorney, 425 U.S. at 1202; Hardwick, 478 U.S. 186. In Hardwick, the Court stated, "[morality] is said to be an inadequate rationale to support the law [proscribing sodomy]. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Id. at 195. Though moral concerns are clearly sufficient to meet the rational basis test, the military interests furthered by the homosexual exclusion policy are much broader

than the suppression of moral delinquency. Dronenburg, 741 F.2d at 1392. See text at note 293.

253. E.g., Dronenburg, 741 F.2d at 1397.

254. See Parker, 417 U.S. 733. "In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." Id. at 765, (Blackmun, J., concurring), citing Fletcher v. United States, 26 Ct. Cl. 541, 562-63 (1891); United States v. Stockman, 17 M.J. 530, 532 (A.C.M.R. 1983) ("[c]onduct that deliberately violates an order issued to protect the status of Berlin by a soldier assigned to a unit specifically deployed to protect the status of Berlin is not merely 'bad', it is dishonorable. The appellant's approved sentence is fully warranted").

255. A corollary theory was that societal conclusions or attitudes about homosexuality, whatever their result, had no basis in fact.

256. Brown, 444 U.S. at 368-69 (Brennan, J., dissenting).

257. Watkins, 875 F.2d at 728 (en banc) (Norris, J., concurring). Contra Ben-Shalom, 881 F.2d at 465.

258. High Tech Gays, 895 F.2d at 578 (court rejected plaintiffs' suggestion that the KGB's doctrine should be ignored in favor of adopting the position of the American Psychological Association on homosexuality). Miller, 647 F.2d at 88 (Norris, J., dissenting) (judge suggested that combat readiness was unrelated to how citizens of host nations viewed the conduct of American military members). But see, e.g., Sullivan v. Immigration and Naturalization Service, 772 F.2d 609 (9th Cir. 1985) (a homosexual claimed that "deportation to Australia will cause him undue hardship because homosexuals are not accepted in that society and because the members of his own family who live in Australia have turned against him). Cf. Krc, 905 F.2d 389 (employee properly denied overseas assignments because of homosexuality); Beller, 632 F.2d at 81 (the Navy can reasonably deem the homosexual exclusion policy ensures "the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own"). Cf. Young 'Ignoring' AIDS Warning, Daily Telegraph, Aug. 26, 1990, at 4 (Americans had a reputation in Britain for carrying the AIDS virus). See also Padula, 822

F.2d at 104 (the FBI is a national law enforcement agency; to have agents who engage in homosexual conduct that is criminal in roughly half the states would undermine the agency's effectiveness).

259. See, e.g., Ben-Shalom, 881 F.2d 454. The homosexual exclusion policy "does not classify plaintiff based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." Id. at 464.

260. Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984).

261. See, e.g. Saal, 427 F. Supp. 192; Miller, 647 F.2d 80 (Norris, J., dissenting from rejection of suggestion for rehearing en banc). In Saal, the court stated that the military "has abandoned the stereotypes of the past that have stigmatized women and members of minority races . . .. [I]ts failure to accord the same treatment to plaintiff simply because she engaged in homosexual acts must be found to be irrational and capricious and thus in violation of the Fifth Amendment." Id. at 203, reversed sub nom Beller, 632 F.2d 788. The Saal court thus compared two

incomparable matters, the first stereotypes, which are attitudes, the second, conduct.

262. Dronenburg, 741 F.2d at 1397. Cf., e.g., Impact of City Sex-Bias Law Tough to Gauge, Los Angeles Times, Oct. 30, 1989, at B1, col. 2. "Critics of homosexuals project a city of immorality, filled with gay sex in public restrooms [conduct] . . . while the gay rights supporters speak in broad, impassioned terms about equality [for their homosexual status]." Id.

263. Dronenburg, 741 F.2d at 1397.

264. Id. This argument has also been rejected outside the courtroom. See, e.g., Sheldon, Acceptance of Homosexuals as "Minorities" is Common--but Wrong, Los Angeles Times, Aug. 20, 1989, at 14, col. 1. The author writes,

> By positioning themselves as a minority, homosexuals skillfully used the rhetoric of civil rights ("discrimination") and the widespread public legitimacy of the civil rights movement to advance their political agenda.

As a reverend who endeavored to advance the civil rights movement in conservative areas . . ., I have found it increasingly curious that many people uncritically, indeed reflexively, accept this comparison of homosexuals to minorities. To equate a status fixed by genetics (sex, race) or historical accident (national origin) with a behavior-based status (a group linked by a common preference, say, to commit sodomy) requires serious analysis.

* * *

The only answer is the mesmerizing impact of a misplaced analogy. The person who finds sexual expression in sodomy (or, for that matter, in incest, adultery, bestiality or sadomasochism) can define himself as a member of a particular 'minority' who shares that behavior. But it makes no sense for him to claim the same social protections of those who are born black, female or in a foreign country.

Id.; A Waltz With Truth or Trouble?, Los Angeles Times, Sep. 13, 1990, at E1, col. 4. "'Black people tell me, "Don't compare what you're doing [for homosexual rights] to what civil rights leaders of the '60s did," . . . [b]ut I don't see any difference.'" Id. Cf. Dr. Martin Luther King, Jr.'s statement, "I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

265. Matthews, No. 82-0216-P, slip op. (D.C. Me. Apr. 3, 1984). The Army's position that racial segregation was based on attitudes among the races, while the homosexual exclusion policy was directed at homosexual conduct, is borne out by the military's response to racial integration. The military, to the present, has an extensive equal opportunity program designed to shape and educate attitudes among the races. The equal opportunity program does not focus on behaviors because there are no behaviors that specifically characterize a particular race. If a similar program were implemented on behalf of homosexuals, however, it could not be successful unless it shaped or changed attitudes toward homosexual conduct. Such a program could change

attitudes toward homosexuals only if it taught people: (1) homosexuals do not, or rarely, commit homosexual acts, or (2) homosexual acts are morally and socially acceptable, even if legally proscribed. See, e.g., Commentary; Irvine's Human Rights Ordinance, Los Angeles Times, Oct. 22, 1989, at B12, col. 2. "Granting special protection for any behavior-based life style will eventually undermine the very core of the judicial system by removing its ability to evaluate a person's character based on his or her conduct." Id. [emphasis added]. The first approach is not demonstrably true, and the second approach is decidedly outside the realm of the Army's commission.

266. A black person is not subject to blackmail on pain of revealing that he is black. Homosexuality, however, is well-recognized as a basis for blackmail. See text at notes 363-84. Further, race does not implicate privacy entitlements because privacy entitlements are related to gender. Privacy entitlements are implicated by homosexuality, however, because, for homosexuals, gender segregation does not

achieve segregation by sexual preference. See text at notes 385-95.

267. Cultural expressions of racial and homosexual cultures do not present similar legal, social, political or moral issues. For example, no commander would hesitate to authorize the post exchange to sell "Ebony" or "Jet," magazines which are oriented to black culture. Radically different issues and problems would be presented by sale at the post exchange of "The Advocate," the nation's largest magazine oriented to homosexuals. See text at notes 467.

268. See text at note 293.

269. See Dronenburg, 741 F.2d at 1397. The potential impact of homosexuality within the military will be discussed below.

270. Dronenburg, 746 F.2d at 1583. The court stated, "[w]e cannot take seriously the dissent's suggestion that the Navy may be constitutionally required to treat heterosexual conduct and homosexual conduct as either morally equivalent or as posing equal dangers to the Navy's mission. Relativisism in these matters may or may not be an arguable moral stance . . . but moral relativism is hardly a constitutional command, nor is

it, we are certain, the moral stance of a large majority of naval personnel." Id.

271. See Rich, 735 F.2d at 1228.

272. See Dronenburg, 741 F.2d 1388. In Dronenburg, plaintiff argued that bestiality could be prohibited, but only "on the ground of cruelty to animals." Id. at 1397, n.6. Thus, plaintiff's view was that, but for the fact that bestiality was, or may be, cruel to animals, bestiality was a legitimate sexual preference and could not otherwise be a basis for regulation. Cf. High Tech Gays, 895 F.2d at 568.

273. This distinction can be seen in societal reaction to AIDS, which reaction has been generally stigmatizing. While some have argued that the stigma attached to AIDS arises from social prejudice against homosexuals, researchers have observed that social reaction to AIDS is influenced by conclusions about conduct. See, e.g, Minority Issues In AIDS, 103 Public Health Reports [Pub. Health Rep.] 91-94 (1988) (AIDS is a sensitive issue because it is usually contracted through behaviors that have negative societal connotations, such as drug abuse, homosexual behavior, and prostitution); McCarthy, The Role of the American

Hospital Association in Combating AIDS, 103 Pub. Health Rep. 273-277 (1988) (negative attitudes about the lifestyles of homosexuals and drug abusers are closely bound with attitudes about AIDS).

274. Apart from the absence of principled constitutional distinctions, the array of sexual preferences also frequently presents a semantic quagmire. See, e.g., Ulane, 742 F.2d at 1084 (the district court "distinguished transsexuals as person who, unlike homosexuals and transvestites, have sexual identity problems; the judge agreed that the term 'sex' does not comprehend 'sexual preference,' but held that it does comprehend 'sexual identity'"); Baker, 553 F. Supp. at 1127, n.8 (the court found that "a 'homosexual' is one who has an emotional, erotic attachment to one of the same sex--while a 'gay' is one 'who is proud of being a homosexual'"); Cyr, 439 F. Supp. at 699, n.2 ("the Court will attempt, for the sake of clarity . . ., to use the term 'homosexual' in describing specific sexual acts and those persons who engage in, promote, or encourage such acts. The Court will attempt to use the term 'gay' in referring to the more general aspects of the life-styles of those

individuals who prefer the companionship of members of their own sex and of the commercial institutions that serve those life-styles").

275. See, e.g., Johnson v. San Jacinto Jr. College, 498 F. Supp. 555, 575 (S.D. Tex. 1980) and Wilson v. Swing, 463 F. Supp. 555 (M.D.N.C. 1978) (extra-marital relationship not protected by constitutional right to privacy); J.B.K., Inc. v. Caron 600 F.2d 710 (8th Cir. 1979) (fundamental rights not violated by anti-prostitution statute).

276. Padula, 822 F.2d at 103. See Dronenburg, 741 F.2d at 1396 (it is "impossible to conclude that a right to homosexual conduct is 'fundamental' or 'implicit in the concept of ordered liberty' unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw").

277. See Watkins, 875 F.2d at 728 (en banc) (Norris, J., concurring).

278. Ben-Shalom, 881 F.2d at 465. In Ben-Shalom, the court stated, "[W]e believe that this particular classification [homosexuality] is supported by military considerations and should be left to the Army." Id. Accord Dronenburg, 741 F.2d 1388.

279. Cleburne, 473 U.S. at 440. See, e.g., Beller, 632 F.2d at 811 ("the concerns [underlying the homosexual exclusion policy] have a basis in fact and are not conjectural"). Cf. Turner v. Safly, 482 U.S. 78, 89-90 (1987) (in upholding a prison regulation, the Court found that the regulation and its goal were not nearly "so remote as to render the policy arbitrary or irrational" [emphasis added]).

280. See, e.g., United States v. Matthews, 2 M.J. 881, 885 (A.C.M.R. 1976) (Costello, J., concurring) ("military life is such that the degree of community control over even its law-abiding members is greater than that to which civilian probationers are subject").

281. See, e.g., In re Grimley, 137 U.S. 147 (1890). Cf. also Voorhees, 16 C.M.R. at 107 (Latimer, J., concurring in part and dissenting in part) ("No man willingly lays down his life for a national cause . . . yet implicit in military life is the concept that he who so serves must be prepared to do so").

282. J. McComsey & M. Edwards, The Soldier and the Law, Military Service Pub. Co. (Harrisonburg, Pennsylvania 1941) at 5 & 7.

283. Air Force Manual 39-12, section 2-103(a).

284. See, e.g., Matlovich, 591 F.2d 852 (court expressed dismay that plaintiff was discharged from the Air Force for only "minimal [homosexual] sexual involvement with Air Force personnel and none with those with whom he worked").

285. See, e.g., Ben-Shalom, 489 F. Supp. 964; Matthews, No. 82-0216-P, slip op. (D. Me. Apr. 3, 1984). But cf. off-post, off-duty homosexual conduct of a soldier is amenable to criminal prosecution under the Uniform Code of Military Justice. 10 U.S.C. @ 925.

286. But see Ben-Shalom, 881 F.2d 454. The court observed that, "[c]ivilian society is not subject to those sometimes harsh and specialized millitary demands, and fortunately need not be because our civilian society can depend on the military, which is." Id. at 460.

287. See, e.g., United States v. Crittenden, NMCM 84-2760, slip op., (N.M.C.M.R. Oct. 5, 1984) (May, J., concurring). In discussing drug offenses, Judge May explained:

> It is not solely the immediate period prior to commencement of an infantry assault, the

> lifting off of a helicopter flight, the general quarters alarm aboard ship, or the dispatch of attack aircraft, which is of critical importance when gauging the effect of illegal drugs on our military forces. We must also be aware of the impact created by . . . the decline in response to service ethics, and the effect upon the ability of the individual marine, sailor, soldier, airman, or coast guardsman, to incorporate within their conscious will, the ability to respond effectively and immediately to the orders and directives of military superiors.

Id. [emphasis added]. All misconduct, whether off-duty, off-post or not, effects an incremental decline in response to service ethics. This ethical decline jeopardizes obedience in all instances as well as the discipline of the force in general.

288. M. Humphrey, supra note 20, at 228 (interview with Starr, formerly a captain in the Air Force). See

United States v. Scoby, 5 M.J. 160 (C.M.A. 1978); United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970).

289. Cf. Bowen, 483 U.S. 587, 601, n.15 (Congress was entitled to use a classwide presumption of how custodial parents use support funds).

290. The analytical process in making policy choices such as that effected by the homosexual exclusion policy might be described as follows:

> (1) What characteristics can be discerned about the circumstances and conduct of homosexuals as a class?
>
> (2) Are those characteristics compatible with military service? That is, do those characteristics tend to make successful soldiering--for the individual and the force as a whole--more or less likely?
>
> (3) What administrative burden would the Army bear if it attempted to identify individuals who were, or might be, and would continue to be exceptions to the classwide presumptions?

(4) Would the benefits of attempting to identify individual homosexuals whose circumstances and conduct are compatible with military service outweigh the administrative and other costs to the Army?

(5) What types and magnitude of risk would the Army bear for inaccurate decisions on which homosexuals are eligible for enlistment?

Cf. Mathews v. Eldridge, 424 U.S. 319. Homosexuals, unlike the plaintiff in Mathews, do not have a property interest implicated by the homosexual exclusion policy. But applying Mathews generally, the policy question might be summed up as a simple cost-benefit analysis: what might the Army gain by allowing homosexuals to serve compared to what the Army might lose by allowing homosexuals to serve? See note 215.

291. Cf. Bowen, 483 U.S. 587. In Bowen, the Supreme Court noted that the Congress had relied on a series of

reasonable assumptions, presumptions and common sense propositions in formulating a statutory entitlements scheme. Id. at 599-601, nn.14 & 15. Based on the reasonableness of these assumptions, presumptions, and common sense propositions, which were not proof proper, the Court went on to find that "the justification for the statutory classification is obvious." Id. at 603, quoting Lyng, 477 U.S. at 642. See also Brown v. Heckler, 589 F. Supp. 985 (E.D. Pa. 1984), affirmed 760 F.2d 255 (3rd Cir. 1985) (congressional presumption that a stepparent will support his stepchildren was rational, although it was not a legal duty and even though not every stepparent did so); United States v. Henderson, 36 C.M.R. 741 (A.F.B.R. 1965) (military did not need specific proof that inoculations served a "clear public interest in the military community," but an order to be inoculated was legal based on common knowledge that such shots are necessary to health and welfare of the military community).

292. United States v. Williams, 8 M.J. 506, 509 (A.F.C.M.R. 1979) [footnotes omitted]. United States v. Martin, 5 C.M.R. 102 (C.M.A. 1952). United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).

293. Army Regulation [AR] 635-200, para. 15-1 (Personnel Separations, Enlisted Personnel). Also AR 635-100, para. 5 (Active Duty Officers), AR 135-175, para. 2 (Reserve Component Officers), and AR 135-178, para. 10 (Reserve Component Enlisted Personnel).

294. Voorhees, 16 C.M.R. 83 (Latimer, J., concurring in part and dissenting in part). "Embraced in [military] success is sacrifice of life and personal liberties, secrecy of plans and movement of personnel; security; discipline and morale; and the faith of the public in the officers and men and the cause they represent." Id. at 105-06.

295. See Chappell v. Wallace, 462 U.S. 296 (1983) ("no military organization can function without strict discipline and regulation").

296. See also text at notes 441-46.

297. See note 76.

298. Ildefonso, Oral Sex as a Risk Factor for Chlamydia-Negative Ureaplasma-Negative Nongonococcal Urethritis, 15 Sexually Transmitted Diseases [hereafter Sex. Trans. Dis.] 100-102 (1988).

299. Haverkos, The Epidemiology of [AIDS] Among Heterosexuals, 260 J.A.M.A. 1922-29 (1988).

"[H]omosexual men . . . reported a median of 1,160 lifetime sexual partners, compared with . . . 81 for Haitian men . . . and 40 for male heteroseuxal intravenous drug users." Id. Collier, Cytomegalovirus Infection in Homosexual Men; Relationship to Sexual Practices, Antibody to Human Immunodeficiency Virus, and Cell-Mediated Immunity, 82 Am. J. Med. 593-601 (1987). "The homosexual men had significantly more sexual partners in the preceding one month, six months,and lifetime (median 2, 9 and 200 partners, respectively), than the heterosexual subjects (median 1, 1, and 14 partners)." Id. Ross, Illness Behavior Among Patients Attending a Sexually Transmitted Disease Clinic, 14 Sex. Trans. Dis. 174-179 (1987). "The significant correlations reveal that homosexual patients are likely . . . to have more partners . . . than heterosexual patients." Id.

300. See, e.g., Ostrow, Sexually Transmitted Diseases and Homosexuality, 10 Sex. Trans. Dis. 208-215 (1983). "The median number of lifetime sexual partners of the [more than] 4,000 [homosexual] respondents was 49.5. Many reported ranges of 300-400, and 272 individuals reported 'over 1,000' different lifetime partners."

Id. Guinan, Heterosexual and Homosexual Patients with the Acquired Immunodeficiency Syndrome, 100 Annals of Internal Medicine [hereafter Ann. Intern. Med.] 213-218 (1984). "Heterosexual patients from all risk groups reported considerably fewer sexual partners than did homosexual men, both for the year before onset of illness and for lifetime. . . . Homosexuals had a median of 68 partners in the year before entering the study, compared to a median of 2 for heterosexuals. . . . Homosexuals in the study had a median of 1,160 lifetime partners, compared to a median of 41 for heterosexuals in the study." Id. Gold, Unexplained Persistent Lymphadenopathy in Homosexual Men and the Acquired Immune Deficiency Syndrome, 64 Medicine 203-213 (1985). In a study of 93 homosexuals, the "mean number of estimate lifetime sexual partners was 1,422 (median, 377; range, 15-7000)." Id. It has been noted that "[l]ifetime total partners [may be] more reliably reported than either numbers of partners in the last 6 months or numbers of partners during the high period." Saltzman, Reliability of Self-Reported Sexual Behavior

Risk Factors for HIV Infection In Homosexual Men, 102 Pub. Health Rep. 692-697 (1987).

301. Linn, Recent Sexual Behaviors Among Homosexual Men Seeking Primary Medical Care, 149 Archives of Internal Medicine [hereafter Arch. Intern. Med.] 2685-90 (1989). "Sexual practices were also strongly associated with the number of sexual partners . . . For example, those practicing safe sex averaged 1.8 partners over the past 6 months, compared with 14.5 partners for those in the unsafe group." Id. Research suggests that "people tend to bias responses toward the socially desirable answers [note omitted]. Under the pressure of the AIDS epidemic, subjects may under-report sexual activity." Saltzman, supra note 300.

302. Handsfield, Trends in Gonorrhea in Homosexually Active Men, 262 J.A.M.A. 2985-86 (1989). Cf. Fleming, Acquired Immunodeficiency Syndrome in Low-Incidence Areas; How Safe Is Unsafe Sex?, 258 J.A.M.A. 785-787 (1987). "Most HIV antibody-positive persons in this study were identified because they had other [sexually transmitted diseases], and thus had recently engaged in sexual activity that could have resulted in the transmission of their HIV infection." Id. Young

'Ignoring' AIDS Warning, Daily Telegraph, Aug. 26, 1990, at 4. "Evidence is growing that young homosexual men are ignoring safe sex warnings . . . [T]here had been a slight increase in the incidence of gonorrhoea and syphillis, which suggested condoms were not being used." Id.

303. See, e.g., Relapses Into Risky Sex Found in AIDS Studies, New York Times, June 22, 1990, at A18, col. 5. "[S]ome homosexuals are relapsing into high-risk behaviors, AIDS experts said here today. . . . [H]igh-risk behavior was also a problem among younger gay men who had not yet learned the horrors of the disease first hand. The sexual practice that worries the experts most is anal intercourse, especially without a condom. It is widely regarded as the practice most likely to transmit the virus that causes AIDS." Id. "Many young men appear to be ignoring advice on safer sexual practices. In another San Francisco study, Dr. George Lemp tested 816 gay and bisexual men and found that 41 percent of those aged 20 to 24 years old were infected, indicating that they engaged in high-risk sex during the mid-1980's when older gays were shunning such practices." Id.

304. It's 'The Pro-Sex '90's'; Gay Spirits Buoyant Again in San Francisco's Haunts, Washington Times, June 22, 1990, at A1. "[T]he panic of the 1980s is over. Men who once shied away from the bars and parties are returning for . . . 'the pro-sex Nineties.' . . . 'There's an active pro-sex backlash to an anti-sexual time' . . . They are again gathering for sex with strangers, the difference being that [at safe-sex clubs] they must use condoms. Among the 19 percent [surveyed] who sometimes take no precautions, men under 25 are twice as likely to lapse." Id. Young 'Ignoring' AIDS Warning, Daily Telegraph, Aug. 26, 1990, at 4. "'It is difficult to legislate for behavioural patterns.' . . . [L]ately there had been real concern that in the past eight years people had become tired of thinking about safe sex." Id. Relapses Into Risky Sex Found in AIDS Studies, New York Times, June 22, 1990, at A18, col. 5. "Dr. Ron Stall of the University of California at San Francisco reported that a survey of 389 gay men . . . who were trying to reduce high-risk sexual activities found that 19 percent reported sometimes reverting to risky

practices. A similar survey by the San Franscisco AIDS Foundation found a 16 percent relapse rate among 401 gay men who had vowed to practice safe sex." Id. Safe Sex Relapse Poses AIDS Threat, UPI, June 21, 1990. "A significant proportion of homosexual men appear to be reverting back to risky sexual behavior, threatening to undo gains made in halting the spread of AIDS, researchers warned Thursday." Id.

305. Goldsmith, As AIDS Epidemic Appraoches Second Decade, Report Examines What Has Been Learned, 264 J.A.M.A. 431, 433 (1990). "[A] study . . . showed that a disheartening amount of unsafe sex occurs among 18- to 25-year old homosexual men. (This is a matter of urgent concern, as is also 'relapse' to unprotected anal intercourse among homosexuals who had switched to other practices or used condoms earlier.)" Id. Linn, supra note 301. In a study of 823 homosexual or bisexual men, "[d]uring the previous 2 months, 64% had engaged in at least one sexual behavior considered unsafe. . . . This study has documented that the incidence of unsafe sexual behavior was high among gay and bisexual men in Los Angeles, even among men seeing

private physicians and among men who were HIV positive or diagnosed with AIDS." Id. Hull, Comparison of HIV-Antibody Prevalence in Patients Consenting to and Declining HIV-Antibody Testing in an STD Clinic, 260 J.A.M.A. 935-938 (1988). "Sixty percent of the total sample continued to practice receptive anal intercourse [after HIV testing]. Significant numbers of homosexual men in San Antonio, Texas, Boston, Cleveland, and Albuquerque have continued to practice unprotected receptive anal intercourse." Id. [citations omitted].

306. See Hellinger, Updated Forecasts of the Costs of Medical Care for Persons with AIDS, 105 Pub. Health Rep. 1-12 (1990) ("back calculating" size of HIV infection pool). Cf. Haverkos, supra note 299. "Presumably, the prevalence of HIV infection at the present time is also much greater in the homosexual male population than in the heterosexual female population. Therefore, for each random, anonymous sexual encounter in 1988, a homosexual man is more likely to contact an infected male partner than a heterosexual man is to encourten an infected female partner." Id. See, e.g., Relapses Into Risky Sex

Found in AIDS Studies, New York Times, June 22, 1990, at A18, col. 5. "AIDS experts [at the sixth International Conference on AIDS] say these factors make the danger of relapse [into unsafe homosexual sexual practices] particularly worrisome: . . . With a large pool of infected people, estimated at up to 1 million nationwide, slippage by even a small percentage could result in a significant number of new cases." Id.

307. Aral, Demographic Effects on Sexually Transmitted Diseases in the 1970s: The Problem Could Be Worse, 10 Sex. Trans. Dis. 100-101 (1983). "Gay men apparently have larger numbers of different sex partners, engage in furtive sexual activities more often, and have unprotected anal intercourse more frequently than do heterosexual men." Id. Remafedi, Adolescent Homosexuality: Psychosocial and Medical Implications, 79 Pediatrics 331-337 (1987). "Meeting in gay bars or public places (e.g., parks, beaches, on the streets) accounted for the majority of [homosexual] encounters." Id. Book Directs Homosexuals to Local College 'Cruising' Spots, Washington Times, Feb. 23, 1990, at A1. "Officials at [local] universities have been

forced to consider inncreasing security at campus buildings that became major homosexual 'cruising' spots after being listed in . . . a North American guidebook for homosexuals [that] lists buildings . . . where homosexual men can seek out semi-public illicit sex. . . . 'It is not conducive [to the functions] of the university to have people engaging in homosexual activities in the bathrooms.' . . . [There is concern with] the predisposition of off-campus men to frequent

the building." See Campus Life at note 489. But see M. Humphrey, supra note 20 (Defense Personnel Security Research and Education Center, "Nonconforming Sexual Orientations and Military Suitability," Appendix B (Monterey, California 1990)).

308. See M. Humphrey, supra note 20, at 7, 29, 52, 57, 65-66, 68, 88, 89-90, 119-20, 201 & 228. "In the Enlisted Men's Club, the john was very active and guys would meet in there to have sex. If not right there, out somewhere, out in the fields." Id. at 57. "I laid real low for a while and then started seeking out the 'tearoom' scene [sexual acts in public toilets]. The train stations were real good sources for that kind of

stuff." Id. at 228. "I hit some [homosexual] bars and a bath or two . . . [M]en can go out and just diddle and have a wonderful time . . . In the gay culture particularly, you do that. . . . We get physical, we get real promiscuous, and there are outlets and places where you can go and you don't even have to know your partner's name." Id. at 201. Plaintiff Dronenburg stated that, "there was a place in Seoul, it was on one of the bases . . . where people could meet, look each other over, start a conversation, or swing down the hall and then start into something more than conversation. . . . [The USO] had facilities and you could identify other gays there, and more often than not you'd drift into the shower, and somebody would drift with you." Id. at 90.

309. Biggar, Low T-Lymphocyte Ratios in Homosexual Men, 251 J.A.M.A. 1441-46 (1984). "[C]onventional case-contact approaches [are difficult in homosexual populations] because of the large number of sex partners . . . and the high frequency of 'anonymous sex,' such as in bathhouses and bars." Id. Partner Notification for Preventing [HIV] Infection--Colorado, Idaho, South Carolina, Virginia, 260 J.A.M.A. 613-15

(1988). "Partner notification for patients with hepatitis B . . . has proven difficult because of the . . . large number of anonymous sex partners among many homosexual men." Id. Remafedi, supra note 307. "In nearly one third of cases [in a study of homosexual adolescents] 24/79, 30%), subjects reported 'we didn't know each other' before initiating sex.'" Id. But see Health Care Needs of a Homosexual Population, 248 J.A.M.A. 736-39 (1982). "[L]esbians do not often engage in sex with anonymous partners." Id.

310. Gold, supra note 300. "[Patient 1] had an estimated lifetime total of 4,000 sexual partners . . . [Patient 2] visited bathhouses weekly, where he had sexual relations with an undetermined number of men . . . [Patient 3] estimated that he had had sexual relations with 100 men in bathhouses. . . . [Patient 6] estimated that he had more than 1,000 sexual partners at bathhouses and at home." Id. Francis, The Prevention of [AIDS] in the United States, 257 J.A.M.A. 1357-66 (1987). "Business establishments such as bathhouses, bars, and adult book stores, where multiple, usually anonymous sexual encounters take

place among a male homosexual clientele, have facilitated the spread of HIV infections." Id.

311. Health Care Needs of a Homosexual Population, 248 J.A.M.A. 736-39 (1982). Ross, supra note 299. "[T]hese data may also reflect the fact that the sample has a degree of psychological disturbance, most clearly associated with higher numbers of partners." Id. Cf. also High Tech Gays, 895 F.2d at 580 (plaintiff admitted to weekly participation in promiscuous homosexual acts and to receiving treatment for an "ongoing" schizophrenia disorder).

312. Ernst, Characteristics of Gay Persons with Sexually Transmitted Disease, 12 Sex. Trans. Dis. 59-63 (1985). "The association between [sexually transmitted disease] and urban residence among male homosexuals . . . is possibly a function of greater opportunity for anonymous sexual encounters in urban communities. This idea is supported by our finding that, among males, urban residents reported a larger number of sex partners per month than do those living in rural areas." Id.

313. Rutherford, Contact Tracing and the Control of Human Immunodeficiency Virus Infection, 259 J.A.M.A.

3609-3610 (1988). "Contact tracing [in a study on transmission of hepatitis B] failed, in part, because of large numbers of anonymous sexual partners among young homosexual men." Id. See Ramstedt, Contact Tracing for Human Immunodeficiency Virus (HIV) Infection, 17 Sex. Trans. Dis. 37-41 (1990).

314. Guinan, supra note 300. "Homosexuals and heterosexuals were compared for a variety of factors, including sexual practices. Homosexuals were much more likely to practice inserting penis into partner's rectum [98% of homosexuals compared with 13% of heterosexuals], inserting partner's penis in mouth [98% of homosexuals compared with 6% of heterosexuals], and inserting partner's penis into own rectum [94% of homosexuals compared with 3% of heterosexuals]." Id. Ildefonso, supra note 298. "[O]ral sex is also a more frequent practice among gays." Id. Walters, Sexual Transmission of Hepatitis A in Lesbians, 256 J.A.M.A. 594 (1986). "[O]ral-genital contact is a common sexual practice in [lesbians]." Id. St. Lawrence, Differences in Gay Men's AIDS Risk Knowledge and Behavior Patterns in High and Low AIDS Prevalence Cities, 104 Pub. Health Rep. 391-395 (1989). "The most

common sexual activity among gay men in the smaller cities was unprotected anal intercourse." Id.

315. Walters, supra note 314. "[Patient 2, a] lesbian with a history of oral-genital and oral-anal sex with patient 1 . . . was evaluated . . .. [Patient 3, a] 31-year-old lesbian had regular oral-genital and oral-anal sex with patient 1." Id. "Homosexual males are at high risk for acquiring hepatits A as a consequence of promiscuity and the practice of oral-anal sex." Id., citing Corey, Sexual Transmission of Hepatitis A in Homosexual Men: Incidence and Mechanism, 302 New England J. of Medicine 435-438 (1980). Goilav, Vaccination Against Hepatitis B in Homosexual Men, 87 Am. J. of Med. 3A-21S-3A-25S (1989). "Risk factors for HBV infection in homosexual men include . . . oral-anal sex." Id. Accord Kingsley, Sexual Transmission Efficiency of Hepatitis B Virus and Human Immunodeficiency Virus Among Homosexual Men, 264 J.A.M.A. 230-234 (1990). Stamm, The Association Between Genital Ulcer Disease and Acquisition of HIV Infection in Homosexual Men, 206 J.A.M.A. 1429-1433 (1988). "Ninety-two percent of these men [in the study] reported that they practiced

receptive anal intercourse, and 63% practiced analingus." Id. St. Lawrence, supra note 314. "The assessed [homosexual] behaviors included unprotected anal and oral intercourse using condoms, oral-anal contact."

316. Roffman, Continuing Unsafe Sex: Assessing the Need for AIDS Prevention Counseling, 105 Pub. Health Rep. 202-08 (1990). "[T]he help-seeking intention of gay men was cross-tabulated with several indices of their high-risk sexual behaviors (condom use, unprotected anal intercourse, unprotected oral sex, fisting, rimming, and shared sex toys). Id. Gottesman, The Use of Water-soluable Contrast Enemas in the Diagnosis of Acute Lower Left Quadrant Peritonitis, 27 Diseases of the Colon and Rectum [hereafter Dis. Colon Rect.] 84-88 (1984). "The accurate diagnosis of free perforation in rectal trauma is also important. In the homosexual community, fist fornication is becoming increasingly common." Id. Kingsley, Colorectal Foreign Bodies, Management Update, 28 Dis. Colon Rect. 941-944 (1985). But see Stamm, supra note 315 (fisting and vaginal intercourse with a female

partner were assessed but were reported very infrequently).

317. Barone, Management of Foreign Bodies and Trauma of the Rectum, 156 Surgery, Gynecology and Obstetrics [hereafter Surg. Gyn. Obst.] 453-457 (1983). "The incidence of trauma to the rectum, secondary to homosexual practices, is increasing. . . . 112 patients with trauma of the rectum or with retained foreign bodies, or both, resulting from homosexual or autoerotic practices, were seen." Id. Kingsley, supra note 316. "Anorectal injuries and retained colorectal foreign bodies secondary to homosexual activities, sexual assaults, and transanal autoeroticism are common occurrences in the present society." Id.

318. See Linn, supra note 301. "The incidence of 'fisting,' [and] exchange of urine . . . was low, but the incidence of other unsafe or psosibly unsafe sexual behaviors was considerably higher." Id.

319. Collier, supra note 299. "Sexual behavior, as reflected in the number of sexual partners and history of sexually transmitted disease, was different in [the homosexual and heterosexual] groups. None of the

heterosexual men participated in anal-receptive intercourse." Id.

320. Health Care Needs, supra note 311. "[The homosexual community] may be underserved because the homosexual is unaware of the diseases he or she is at special risk of acquiring, and therefore fails to consult a physician when seriously ill." Id. Newell, Volatile Nitrites; Use and Adverse Effects Related to the Current Epidemic of the Acquired Immune Deficiency Syndrome, 78 Am. J. Med. 811-816 (1985). "Possible etiologic factors [for disease in homosexuals] included multiple sexual partners, multiple sexually transmitted diseases, medication used to treat these diseases, known viruses such as cytomegalovirus and hepatitis B virus, sexual practices that involved anal contact, and use of recreational drugs." Id.

321. See, e.g., Walters, supra note 314. "[Patient 2 had] a history of oral-genital and oral-anal sex with patient 1 . . . [Patient 3] had regular oral-genital and oral-anal sex with patient 1 . . .. Patient 1 apparently transmitted hepatitis A to patients 2 and 3; . . . the chief mode of transmission in each instance was probably fecal-oral." Id.; Health Care Needs,

supra note 311. "Transmission of . . . enteric infections probably occurs either as a result of oral-anal and oral-perineal intercourse, or when fellatio follows anal sex." Id.

322. Cornelis, Factors Influencing the Risk of Infection with Human Immunodeficiency Virus in Homosexual Men, Denver 1982-1985, 16 Sex. Trans. Dis. 95-102 (1989); Barone, supra note 317. Dr. Barone observes,

> A controversial point in the management of [patients presenting with colorectal retained foreign bodies or other rectal trauma incident to homosexual sexual practices] is whether or not a loop colostomy is sufficient to avoid continuing [fecal] contamination. . . . We have found that most of these patients had given themselves enemas before the trauma occurred. Therefore, contamination has been less extensive than expected. . . . [E]xperienced judgment may dictate the need of a double-barrel colostomy or a Hartman procedure if fecal contamination is extensive and an excessive amoung of stool remains in the colon.

Id. Enemas or rectal douching, however, may increase the risk of viral transmission through the rectum. Goilav, supra note 315. "Risk factors for [hepatitis B virus] infection in homosexual men include . . . rectal douching." Id. Kingsley, supra note 315.

323. Guinan, supra note 300.

324. Gold, supra note 300. In a study of 93 homosexuals, histories of sexually transmitted disease "included gonorrhea, 65.5%; hepatitis, 52.5%; amebiasis, 49.5%; venereal warts, 40.8%; phthirus pubis, 39.7%; syphilis, 36.7%; nonspecific urethritis, 26.8%; genital herpes simplex, 22.9%; shigellosis, 16.1%; giardiasis, 10.7%; nonspecific proctitis, 10.7%; and scabies, 6.4%." Id. Ernst, supra note 312. "In addition to high rates of gonorrhea, syphilis, and hepatitis B, gay men have been shown to be at high risk for veneral transmission of anorectal veneral warts, hepatitis A, enteric pathogens, and cytomegalovirus infection. The recently described acquired immune deficiency syndrome (AIDS) involving opportunistic infections such as Pneumocystis carinii pneumonia and

Kaposi's sarcoma accentuate the public and personal health risk associated with sexually promiscuous gay males." Id. [citations omitted]. Collier, supra note 299. "A past history of sexually transmitted disease was given by 160 (89 percent) of 180 homosexual men compared with 12 (46%) of the 26 heterosexual clinic patients." Id. Alter, Hepatitis B Virus Transmission Between Heterosexuals, 256 J.A.M.A. 1307-10 (1986).

"[Hepatitis B] infection occurred at rates of] 40% to 60% among homosexual men, compared with 4% to 18% among heterosexual men." Id.

325. Ostrow, supra note 300.

326. Ross, supra note 299.

327. In the time between infection and seroconversion, the infected individual can infect others, even though there is no medical indication that he is a viral carrier.

328. See Hill, HIV Infection Following Motor Vehicle Trauma in Central Africa, 261 J.A.M.A. 3282-83 (1989). A man "acquired the HIV following a motor vehicle accident . . .. During the accident the patient received multiple lacerations and was covered with the

blood of similarly injured and bleeding passengers. This exposure through lacerated skin to the blood of persons with a high probability of being infected with HIV demonstrates an unusual mode of transmission and emphasizes the importance of HIV prevention during travel." Id.

329. Cf. Maier v. Orr, 754 F.2d 973 (Fed. Cir. 1985) (airman discharged because there was doubt that she could be vaccinated safely).

330. See Henderson, 36 C.M.R. 741 (order to be immunized is legal, and failure to be immunized represents a substantial threat to the health and welfare of the military community). See note 452.

331. Surawicz, Intestinal Spirochetosis in Homosexual Men, 82 Am. J. Med. 587-592 (1987). "[A]ntibiotic use is frequent [in homosexuals] and may also contribute to changes in the microflora of the intestine." Id.

332. Kingsley, supra note 316. "Impalement injuries from penile and fist anal fornication, resulting in mucosal hematoma, laceration, and perforation have been reported." Id. [citations omitted]. Barone, supra note 317. "One of these patients died. He was a 23 year old man who presented in a state of septic shock

12 hours after fist intercourse. In this patient, Fournier's gangrene developed which resulted in necrosis of the rectum and perineum, in spite of having fecal diversion performed. Multiple organ failure developed, and he did not respond to treatment." Id. Gingold, Simple In-Office Sphincterotomy with Partial Fissurectomy for Chronic Anal Fissure, 165 Surg. Gyn. Obst.46-48 (1987). "Anal fissure is seen in . . . male and female homosexuals engaging in anal sex." Id. Stiffman, Behavioral Risks for [HIV] Infection in Adolescent Medical Patients, 85 Pediatrics 303-310 (1990). "[F]emale to female transmission [of HIV] has only been reported in one case and suggested in another (both cases involved traumatic sex practices)." Id. 333. Holly, Anal Cancer Incidence: Genital Warts, Anal Fissure or Fistula, Hemorrhoids, and Smoking, 81 J. National Cancer Institute 1726-31 (1989). "Eighty-two percent of homosexual patients and 72% of homosexual control subjects reported [practicing anal intercourse.] . . . [A]nal cancer risk for men who expressed a homosexual preference [was] more than 12 times that for heterosexual men." Id. Taxy, Anal Cancer, 113 Archives of Pathology and Laboratory

Medicine 1127-1131 (1989); Cobb, Giant Malignant Tumors of the Anus, 33 Dis. Colon & Rect. 135-138 (association between receptive anal intercourse and squamous-cell carcinoma of the anus).

334. Surawicz, supra note 331. "Previous studies have demonstrated intestinal spirochetosis in rectal biopsy specimens from 2 to 7 percent of heterosexual and 36 percent of homosexual patients. . . . We observed intestinal spirochetosis in rectal biopsy specimens from 39 (30 percent) of 130 homosexual men but in none of the control . . . specimens." Id.

335. Ostrow, supra note 300. "Because so many . . . conditions are due to infection of, or trauma to, the rectum or anus, . . . the term 'gay bowel syndrome' [was coined]." Id. Margolis, Sexually Transmitted Anal and Rectal Infections, 161 Surg. Gyn. Obst. 42 (1985). "Symptomatic anorectal disease is more common among homosexual men than among heterosexuals. In approximately two-thirds of the patients, careful study will reveal an etiologic agent for proctitis. The remainder may be classifed as 'gay bowel syndrome.'" Id. Cf. Surawicz, supra note 331. Homosexual men are

"predisposed to acquiring organisms that are sexually transmitted during rectal intercourse." Id.

336. Barone, supra note 317. "A series of 101 patients with trauma of the rectum, secondary to homosexual practices, presenting at this hospital is reviewed. Two patients were injured twice. Thirty-six patients had retained foreign bodies in the rectum, 55 had lacerations of the mucosa, two had disruptions of the anal sphincter and ten had perforations of the rectosigmoid. . . .[There was one mortality]." Id. Kingsley, supra note 316. Crass, Colorectal Foreign Bodies and Perforation, 142 American Journal of Surgery [hereafter Am. J. Surg.] 85-88 (1981).

337. Id.

338. Barone, supra note 317. "Serious injuries, secondary to homosexual acts, can and do occur, as evidenced by the mortality reported in this series. Perforations of the rectosigmoid above the peritoneal reflection can be treated by laparotomy, repair of the perforation, removal of gross [fecal] contamination by irrigation, proximal loop colostomy and appropriate antibiotic therapy. Perforations below the peritoneal

reflection are challenging instances which require individualized management." Id.

339. See, e.g., Raymond, Addressing Homosexuals' Mental Health Problems, 259 J.A.M.A. 19 (1988). "[T]he Pride Institute . . . aims to affirm homosexuality as an alternative life-style, to help patients understand the role their homosexuality plays in chemcial dependency, and to help them learn how to deal better with the heterosexual community. . . . [T]he program is currently the only residential substance abuse program . . . specifically aimed at homosexuals." Id. Remafedi, supra note 307. "Although families and youths may directly consult health professionals about homosexuality, the issue more commonly surfaces as a result of other concerns such as sexually transmitted diseases, substance abuse, family conflict, academic underachievement, prostitution, and attempted suicide. Successful management [of homosexual youths] . . . underscores the importance of monitoring behavior and development and attending to frequently unmet medical needs such as hepatitis B immunization and sexually transmitted disease screening and education [for] this underserved and highly vulnerable population of

adolescents." Id. Goldsmith, supra note 305. "There is even a suggestion . . . that [blood donor] interviews might be carried out by a computer to enhance the privacy and boost the likelihood of truthful replies." Id. See Ostrow, supra note 300.

340. See, e.g., Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981) (rational to exclude transsexuals from military service as the Army would otherwise be required to acquire facilities and expertise to treat endocrinological and other complications of transsexualism).

341. Whipple v. Martinson, 256 U.S. 41, 45 (1921) (regulation of drugs is so manifest in the interest of public health and welfare that it needs no discussion). See, e.g., United States v. Wade, 15 M.J. 993 (N.M.C.M.R. 1983) ("even the most minor use or abuse of drugs is inimical to, and has a debilitating effect upon, the ability of the armed forces 'to perform [their] constitutional duty to fight--and to be fully prepared to fight--to protect this country's national interests'"); United States v. Miller, 16 M.J. 858 (N.M.C.M.R. 1983) (alcohol as deleterious to the

"morale, good order, discipline, effectiveness, efficiency, and health of our armed forces").

342. Bieber, Book Reviews: T. O. Ziebold & J. E. Mongeon, Alcoholism and Homosexuality, 171 J. of Nervous and Mental Disease [hereafter J. Nerv. Men. Dis.] 755-756. Ernst, supra note 312. "Eighteen per cent of the male and 23% of the female [homosexual] respondents received scores on the Brief Michigan Alcoholism Screening Test that . . . were indicative of high risk for alcohol-related problems." Id.

343. Id.

344. Lewis, Drinking Patterns in Homosexual and Heterosexual Women, 43 J. of Clinical Psychiatry 277-279 (1982).

345. Raymond, supra note 339. "One fourth [of the 1,917 lesbians in the study] reported drinking several times a week and 6% said they drink daily. Overall, the study found that 14% of lesbians worried about their chemical substance use." Id.

346. Ernst, supra note 312. Dr. Ernst found that,

> Alcoholism is an additional health problem for both gay men and lesbians. . . . [It has been]

> estimated that gay men and women have a risk of alcoholism that is two to three times that of the general population. One reason for this high incidence of alcoholism among gays may be the importance of 'gay bars' in the social life of the gay communities; gay bars are the most frequently used institution for introduction into the gay community. . . . Furthermore, especially for urban males, gay bars often serve as a source of contacts for sexual liaisons. As a result, alcoholism may be associated with [sexually transmitted disease] in [the homosexual] population.

Id. Bieber, supra note 342. "Among the special problems of gay alcoholics is the gay bar, which provides social and sexual opportunities. Remedial measures are suggested that include setting up a special section at bars for serving nonalcoholic drinks and teaching gays alternate ways of finding sexual partners and socializing." Id. See note 339.

347. See, e.g., Linn, supra note 301. "Table 1 shows

a linear relationship between the use of drugs and the kind of sexual behaviors practiced during the same time period. Clearly, men who had engaged in unsafe sex were significantly more likely to have used drugs more often than men who had engaged in safer sex." Id. Rolfs, Epidemiology of Primary and Secondary Syphilis, 264 J.A.M.A. 1432-37 (1990). "These reports suggest that drug use increases transmission of . . . sexually transmitted diseases through . . . high-risk sexual behaviors." Id. Accord Zylke, Interest Heightens in Defining, Preventing AIDS in High-Risk Adolescent Population, 262 J.A.M.A. 2197 (1989). Relapses Into Risky Sex Found in AIDS Studies, New York Times, June 22, 1990, at A18, col. 5. "Among the reasons given for relapse [into unsafe homosexual sexual practices in the study] . . . were being 'turned on,' partner pressure, the influence of drugs or alcohol, not having condoms and stress." Id.

348. Remafedi, supra note 307. See also Gold, supra note 300. In a study of 93 homosexuals, "[a]myl or butyl nitrite and marijuana were used by all patients but one. Other drugs used included cocaine, methaqualone, LSD, amphetamines, ethyl chloride,

barbiturates, phencyclidine and heroin. Most patients took drugs orally or by inhalation. Only three said that they had ever injected drugs either intravenously or subcutaneously." Id. Kingsley, supra note 315. In a study of 823 homosexual men, "[r]egarding drug use, the prevalence for most substances was high. During the prior 2 months, 6% had used intravenous drugs, 3% had shared needles, 50% had smoke marijuana, 18% had used crystal, 26% had used cocaine, and 32% had used poppers [nitrites]." Id. Levine, Retrovirus and Malignant Lymphoma in Homosexual Men, 254 J.A.M.A. 1921-25 (1985). "All patients were homosexual or bisexual, and all engaged in anonymous sexual contact. . . . All but one . . .admitted to the use of 'recreational' street drugs." Id. Friedland, Intravenous Drug Abusers and [AIDS], 145 Arch. Intern. Med. 1413-17 (1985). "Seventy-four percent of [40] patients, including all homosexual men, attended 'shooting galleries,' where anonymous multiple-partner needle sharing took place." Id. Newell, supra note 320. "Prevalence of [amyl or butyl] nitrite use among male homosexuals is very high . . . A guide to

homosexual love-making asserts that the use of amyl nitrite has 'passed into every corner of gay life.'" Id.

349. In Humphrey's book of interviews with homosexuals who had served in the military, several individuals mentioned a problem with or period of abuse of alcohol or drugs . M. Humphrey, supra note 20, at 41, 65, 85 & 88, 96-97, 103-06, 110, 137, 146, 159, 178 & 180. Baum described her time in the Marine Corps as a time when "my drinking was totally out of control. . . . I was usually hung over." Id. at p. 181. Fucci stated that, while in the Air Force, "I began having hallucinations, probably partially from the drinking, or maybe from not drinking as much." Id. at 97. Marden stated, "Just recently, I spent a year in the alcohol abuse program . . . because I was half dead from drinking." Id. at 146. Cf. High Tech Gays, 895 F.2d at 569 (plaintiff claimed his security clearance was denied by reason of his homosexuality, but his clearance was denied based on evidence of past drug abuse); Secora, 747 F. Supp. 406 (Secora, a Technical Sergeant, claimed that he had engaged in a single homosexual encounter brought on by alcoholism and depression); Hatheway, 641 F.2d 1376 (at

his trial by court-martial for sodomy, plaintiff, by way of the testimony of two psychologists, raised the defense of "pathological intoxication" in order to allege that he was unaware he committed the offense). But see M. Humphrey, supra note 20, at 111.

350. See, e.g., United States v. Rasmussen, 4 M.J. 513 (C.G.C.M.R. 1976) (there was evidence that accused required constant supervision and lacked adaptability for military life).

351. See, e.g., Raymond, supra note 339. "The stresses of being gay in a predominantly straight society may at least in part account for the alcoholism and other substance abuse estimated to occur in 35% to 40% of homosexual persons." Id. Cf. United States v. Parker, 10 M.J. 849 (N.C.M.R. 1981). At his trial by court-martial for unauthorized absence, Parker testified, "I was harassed by my homosexuality. . . . I could not adjust to military life. . . . I began to get a lot of mental pressures, and I started using drugs to escape some of this pressure." Id. at 850. "The ship's doctor related that [Parker] 'is afraid of being on ship because of homosexuality . . . Desires out of

Navy because of fear of retribution for sexual preference. I believe he is sincere.'" Id.

352. Cf. High Tech Gays, 895 F.2d 563. In High Tech Gays, plaintiffs attacked a Department of Defense (DoD) policy that subjected homosexuals to expanded background checks for purposes of security clearances. The DoD advanced several rationales for its policies, including that "a homosexual may be emotionally unstable." Id. at 578, n.13. The court did not address that rationale, however, because it upheld the policy on other grounds. Id. Cf. Linn, supra note 301. "[U]nder 'psychological measures,' men engaging in unsafe sex felt significantly less in control of their emotions." Id.

353. Ross, The Prevalence of Psychiatric Disorders in Patients with Alcohol and Other Drug Problems, 45 Archives of General Psychiatry [Arch. Gen. Psych.] 1023-31 (1988). Bieber, supra note 342. "[A]lcoholism is symptomatic of more basic psychopathology." Id. Lewis, Diagnostic Interactions; Alcoholism and Antisocial Personality, 171 J. Nerv. Men. Dis. 105-113 (1983). "The association of alcoholism with other psychiatric disorders is important . . . The

association between alcoholism and criminality has been reported consistently over the years." Id.

354. See Flavin, The Acquired Immune Deficiency Syndrome (AIDS) and Suicidal Behavior in Alcohol-Dependent Homosexual Men, 143 Am. J. of Psychiatry 1440-1442 (1986). "Three alcohol-dependent homosexual men with suicidal ideation and behavior consciously attempted to contract [AIDS] as a means of committing suicide. . . . In these three patients the combination of depressed mood, social isolation, chronic alcohol use, and a discriminatory, unsupportive social climate contributed to conflicts surrounding sexual orientation, pointing the way to a perceived altruistic self-destructive escape." Id. Raymond, supra note 339. "More than 75% of [the 1,917 lesbians in the study] had sought counseling at some time, a fifth of those because of their sexual orientation." Id. Remafedi, supra note 307. "The very experience of acquiring a homosexual or bisexual identity at an early age places the individual at risk for dysfunction. This conclusion is strongly supported by the data." Id. See, e.g., Baker, 553 F. Supp. 1121 (the court heard testimony on plaintiff's "disgust and self-

loathing upon recognition of [his homosexuality], his isolation and suffering, [and] his suicidal

tendencies"); Rich, 735 F.2d at 1223 ("an emotional crisis stemming from confusion regarding [plaintiff's] sexual identity produced health problems . . . plaintiff was hospitalized for a gastrointestinal illness").

355. Raymond, supra note 339.

356. See, e.g., Bender, Book Reviews: L. H. Silverman, Search for Oneness, 172 J. Nerv. Men. Dis. 442-443 (1984). Cf. Dubbs, 866 F.2d 1114. In Dubbs, the former Director of the CIA "testified that in his view the medical and psychiatric professions were in 'disarray as to whether or not homosexuality is an outward manifestation of a deeper psychological problem' . . . and that '[homosexuality] raises . . . a risk which has to be resolved in favor of the agency.'" Id. See Rich, 735 F.2d at 1225, n.4. In defense to a charge of fraudulent enlistment, plaintiff argued that "the Army was required to view homosexuality as a medical defect, and the concealment of a medical defect is not cause for discharge as a fraudulent entry." Id.

357. Atkinson, Prevalence of Psychiatric Disorders Among Men Infected with [HIV], 45 Arch. Gen. Psych. 859-64 (1988).

358. Raymond, supra note 339. Remafedi, supra note 307. "[Other researchers on homosexual youth] concluded that their subjects experienced extreme emotional turmoil as reflected in the prevalence of psychiatric consultations (60%) and suicide attempts (by one third of the sample). . . . We previously described the stressors . . . during the acquisition of a homosexual identity and we hypothesize that these factors may predispose [homosexual youth] . . . to impaired social, emotional, and physical health." Id. See also Parents Fear Schools Teach Homosexuality, Washington Times, Nov. 21, 1989, at A1 (the suicide rate among homosexual adolescents was two to six times higher than among heterosexual teenagers).

359. Raymond, supra note 339. Twenty percent of the 1,917 lesbians in the study had attempted suicide at least once. Id.

360. M. Humphrey, supra note 20. Several of the homosexuals interviewed in Humphrey's book self-reported either an episode of suicide ideation or a

suicide attempt, generally related to their homosexuality. Id. at 3, 30, 41, 50, 141, 146, 151-52, 159, 186. See Baker, 553 F. Supp. 1121 (plaintiff testified he had suffered suicidal tendencies as a result of recognizing his homosexuality); United States v. Varraso, 21 M.J. 129 (C.M.A. 1985). At her trial for murder, Varraso's statement was entered into evidence: "[The victim] and I discussed committing suicide together, due to my depressed state, because of constant conflicts with my lesbian lover and company personnel. . . . [She was under the influence of] qualudes, tylenol #3, and lots of beer. . . . All I drank that day was six beers, between 9:00 AM and 3:00 PM." Id. at 138.

361. Handsfield, supra note 302. Kegeles, Intentions to Communicate Positive HIV-Antibody Status to Sex Partners, 259 J.A.M.A. 216-217 (1988). "We found that a sizeable minority of people engaging in sexual activities that may transmit HIV did not intend to tell their partners if they are HIV positive. . . . [L]ack of intention to communicate positive test results to nonprimary partners may be attributable to not knowing these individuals' names." Id. Holland, The

Psychosocial and Neuropsychiatric Sequelae of the Acquired Immunodeficiency Syndrome and Related Disorders, 103 Ann. Intern. Med. 760-764 (1985). "Transmission of AIDS through sexual contact or body fluid often leads to self-imposed or physician-recommended limitation of social and intimate contacts. Guidelines for safe sex among homosexuals may require marked alteration of sexual behavior and the need to reveal medical status to partners. Pressure to accept a monogamous relationship or celibacy may be difficult." Id. Cf. United States v. Dumford, 30 M.J. 137 (1990), cert. denied, 111 S. Ct. 150 (199) (HIV positive service member convicted of violating "safe sex" order). But see Raymond, supra note 339.

"Despite the frequency with which lesbian women sought counseling, used alcohol, or reported suicidal thoughts, [the president of a health-consulting firm] says that . . . 'this is a very well-adjusted group . . . with a powerful capacity to cope' by calling on informal sources of support, such as friends and self-help groups." Id.

362. M. Humphrey, supra note 20. Many of the

individuals interviewed noted the unique stress their homosexuality caused while they were in the military. "I can't emphasize enough that we [homosexuals] lived in absolute terror of being found out. It would have been a terribly overwhelming experience. . . . It just isn't for everyone, the military. There is too much one must hide in order to stay in undiscovered. It's not worth it." Id. at 127. "In order to serve in the U.S. military, lesbians and gay men must live a lie and be in constant fear of exposure. That is destructive to the gay spirit." Id. at 142-443. "I say [to other homosexuals], 'No! Keep the hell away from the military. . . .' The risks are too great. If you're going to live and have a relaxed, happy, normal existence--[joining the military is] the worst thing to do." Id. at 58. Simply allowing homosexuals to openly identify themselves as homosexuals within the military would not reduce this type of stress. In fact, it might increase stress by fostering suspicion of homosexual acts. See note 403 (describing isolation, even from the homosexual community, after publicly disclosing homosexuality). So long as homosexual acts

and conduct prejudicial to good order and discipline are proscribed, the potential for stress and fear of discovery remains.

363. Ross, supra note 299. "[Patients] with higher numbers of previous infections [with sexually transmitted diseases] . . . tended to deny life stressors more, to attribute their problems to the illness, and to display significantly higher levels of disease conviction (including symptom preoccupation), of affective disturbance (anxiety and sadness), and of exaggeration of symptoms." Id.

364. Cf. Doe v. Alexander, 510 F. Supp. 900 (D. Minn. 1981). In discussing the exclusion of a transsexual from military service, the court stated, "[t]he regulation here at issue is . . . designed to assure the enlistment of personnel free of medical conditions which would cause excessive lost time from duty, medically adaptable to global geographic areas and capable of performing duties without aggravation of existing physical or medical conditions." Id. at 905.

365. Cf. Dallas, 490 U.S. at 27. In Dallas, the Supreme Court reviewed a statute that excluded adults from dance halls catering to teen-agers. The Court's

analysis in Dallas can be applied to the homosexual exclusion policy: "[the Army] could properly conclude that [excluding homosexuals from military service] would make less likely illicit or undesirable [soldier] involvement with alcohol, illegal drugs, and promiscuous sex." Id. citing Prince, 321 U.S. 158. The Court held that the statute rationally furthered important governmental interests. Id.

366. Saal, 427 F. Supp. at 201, n. 11.

367. M. Humphrey, supra note 20, at viii.

368. Operational security has long been recognized as a principle of military engagement, thus as a critical component of combat readiness. See H. Summers, On Strategy: A Critical Analysis of the Viet Nam War, Dell (New York 1984) at 205-206 ("security is essential to the preservation of combat power"). While there are myriad scenarios, one example of simple, yet perhaps pivotal information a soldier may possess is medical information. In regard to Operation Desert Storm, for example, Army reported that, "[b]ecause of operational security concerns, [the Department of Defense] did not confirm the specific diseases against which troops are to be inoculated . . . [because] once Iraq is aware of

the measures to be taken against certain diseases, [biological warfare] strains could be altered or added to counter prevention." News Call, Army, Feb. 1991, at 69.

369. See High Tech Gays, 895 F.2d at 577. In High Tech Gays, the court noted that the DoD established that homosexuals are targeted by counterintelligence agencies and, because homosexuals are targeted, the DoD subjects homosexuals to an expanded investigation. Id. at 576. Thus, the DoD policy is based on the fact of the targeting, not on any presumption about homosexuals' susceptibility to the goal of that targeting. Cf. Krc, 905 F.2d 389 (Director of Security testified that he did "not want to be responsible . . . for placing [a homosexual employee] in an environment where he could be subjected to a hostile intelligence approach").

370. E.g., High Tech Gays, 895 F.2d 563 (plaintiff, an open homosexual, admitted he had been the subject of blackmail attempts because of his homosexuality); United States v. Hughes, 389 F.2d 535 (2nd Cir. 1968) (homosexual conduct used by an extortion ring). See M. Humphrey, supra note 20. "[I]n my last duty assignment

[as a Military Intelligence officer], it wasn't an issue of my homosexuality so much that made me leave the Army but an issue of compromise. I was being blackmailed into doing things because of it. And that's when I refused to be blackmailed. I said, 'Fine, I quit' [active duty and joined the Army Reserve]." Id. at 217 [emphasis added]. Cf. Above Suspicion, The Times, Jan. 19, 1990, at Features ("[t]he law's disapproval of homosexuality is by and large supported by public opinion [in the United Kingdom]. . . . it is only realistic to accept that an active homosexual must run a certain risk of blackmail, all the more so if he occupies a sensitive position in society [such as a judge]"); France; Out of Line, Economist, Nov. 10, 1990, at p. 57 (Europe), p. 61 (U.K.) (a man "claimed that his superiors had asked him to recruit young prostitutes of both sexes in an attempt to discredit leading public figures with suspected homosexual or paedophiliac tendencies").

371. Cf. outing. "Outing," the public identification of homosexuals by other homosexuals against their will, has frequently been likened to blackmail. The World is

'Outing'; The New Gay Militants, Washington Times, Sep. 13, 1990, at E1. "Last year, openly gay Democratic Rep. Barney Frank of Massachusetts threatened to name homosexual Republicans in Congress in reprisal for what he said was an innuendo campaign to insinuate that Rep. Thomas S. Foley of Washington, then seeking the House speakership, was gay. The threat sounded like blackmail, but it was perfectly justifiable blackmail in Mr. Frank's eyes. He said that some anti-gay Republicans had 'forfeited their right to privacy.'" Id. "Outing has engendered a deep rift in the gay and lesbian community . . . The homosexual rights establishment . . . stands firmly by the principle that . . . '[i]nvoluntary disclosure [of one's sexual orientation] is a coercive action.'" Id. [emphasis added]. Dragging People Out of Their Closets, Is 'Outing' A Search for Truth or New Kind of Media Witch Hunt?, Toronto Star, Aug. 25, 1990, at F3. "Not surprisingly, [outing is] causing anger, anxiety and fear in Hollywood, where a sexy, heterosexual image seems crucial to many lucrative careers. 'If the public knows you're gay, it has a whole different

perception of you,' says one actor, who is gay and worried." Id.

372. High Tech Gays, 895 F.2d at 576.

373. Id.

374. Dubbs, 866 F.2d at 1116. "In addition, efforts would be made to place [individuals] in circumstances in which their conduct could lead to arrest or other sanctions or otherwise influence their actions through direct or indirect pressure on them or their partners." Id. Cf. Ashton v. Civiletti, 613 F.2d 923 (D.D.C. 1979) (a mail clerk with the Federal Bureau of Investigation was named by a casual homosexual partner who was under investigation by the Navy for homosexual acts); Urban Jacksonville, Inc. v. Chalbeck, 765 F.2d 1085 (11th Cir. 1985) (plaintiff stated, "I do not want to identify any persons with whom I have been involved in homosexual activity or further describe the type of homosexual activity"); Dronenburg, 741 F.2d at 1389 (plaintiff initially denied homosexuality; Navy produced sworn statements of plaintiff's partner).

375. High Tech Gays, 895 F.2d at 577 [original emphasis omitted and emphasis added].

376. See Dubbs, 866 F.2d at 1116 ("[c]ertain hostile intelligence services regard homosexual behavior as a vulnerability which can be used to their advantage"); Krc, 905 F.2d at 393 (Director of Security testified that "[plaintiff's] homosexuality would make him extremely vulnerable to hostile intelligence approaches").

377. High Tech Gays, 895 F.2d at 575 (homosexuals interest KGB handlers "since the homosexual frequently is shunted [sic] by society and made to feel like a social outcast. Such a personality may seek to retaliate against a society that has placed him in this unenviable position"). Baker, 553 F. Supp. 1121, (N.D. Tex. 1982), reversed on other grounds 769 F.2d 289 (5th Cir. 1985). The district court in Baker found, after expert testimony, that "the existence of these criminal laws [proscribing sodomy], even if they are not enforced . . ., does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals--fear of arrest, loss of jobs, discovery, etc.--can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement

officials". Baker, 553 F. Supp. at 1130. While the district court held that the law proscribing sodomy was unconstitutional, it does not follow that because a law causes anguish in a law-breaker that the law is unconstitutional or that it should be abandoned. Baker, 769 F.2d 289 (5th Cir. 1989). Moreover, it is the fact of the alienation, not its cause, which must concern the Army.

378. See M. Humphrey, supra note 20, at 116. Plaintiff Hatheway was a lieutenant in the Army's Special Forces. See note 20. He was court-martialed, among other charges, for committing homosexual sodomy with an enlisted man in the barracks. Hatheway described an incident after his trial as follows: "I got a little crazy at the end, after the trial itself. I slammed open the door of the adjutant's office and . . . I was screaming at him; then I turned, went into the colonel's office, and repeated my act. . . . I berated him . . . I think he was very taken aback by the bitterness with which I reacted to him. All he could say was, 'Whatever you do, don't be so angry as to tell the whole world of what you know Special Forces

does to protect the free world.' What he had done with that statement was to . . . put his burden of national defense on me, so I told him to f--- off. I just flipped him the bird and walked out." Id. at 116 [emphasis added].

379. The argument that disclosure addressed the military's security problems, whatever its merits, assumes that most homosexuals will or desire to disclose their sexual preference. But see, e.g., McKeand v. Laird, 490 F.2d 1262 (9th Cir. 1973) (there was evidence that plaintiff feared disclosure of his homosexuality, in that he stated he would rather terminate his employment with the Air Force than have his homosexuality exposed during a security clearance background check); Valdiviez v. United States, 884 F.2d 196 (5th Cir. 1989) (a soldier who donated HIV-infected blood "was aware that, as a practicing homosexual, he was in a high risk group for AIDS but gave blood anyway because he did not want anybody to think he was 'gay'"). Cf. Holland, supra note 361. Dr. Holland observes, "there are selected groups who are especially susceptible to . . . anxiety. These groups include

persons . . . who fear . . . the disclosure of belonging to a risk group." Id.

380. See High Tech Gays, 895 F.2d at 577. The court discussed the evidence presented by the Department of Defense (DoD):

> The DoD . . . presented . . . sworn statements of Sergeant Lonetree . . . relating one meeting with his Soviet control Sasha (later identified as . . . an officer of the KGB), where Sasha specifically inquired as to homosexuals. [Lonetree stated:] "During a meeting with Sasha, he asked me to tell him who were the homosexuals, drunks and people who were exploitable . . .. He also asked for other Marines . . . who might be queers, dopers or drunks . . . [on another occasion] Sasha also wanted to know which marines had problems with alcohol or drugs or those who were homosexual."

Id. [emphasis added]. Further, one plaintiff, who was employed by a defense contractor and who was openly homosexual, admitted that he had been targeted because of his homosexuality. Id.

381. Dubbs, 866 F.2d at 1116; Padula, 822 F.2d 97. In Padula, the court found it was "not irrational for the [Federal Bureau of Investigation] to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuals exposes many homosexuals, even "open" homosexuals, to the risk of possible blackmail to protect their partners, if not themselves." Id. at 104.

382. Cf. United States v. Benton, 7 M.J. 606 (N.C.M.R. 1977). "The commander of a military installation is responsible for the maintenance of good order and discipline aboard that installation. The proscription against solicitation is concerned not only with the prevention of the harm that would result should the inducements prove successful, but with protecting those aboard military installations from being exposed to inducements to commit or join in the commission of crimes." Id. at 608.

383. To be commissioned as an Army officer one must be eligible for security clearance to at least the "SECRET" level. Thus, if homosexuality is a factor in the security clearance determination, it is also a relevant factor in excluding homosexuals, at least from the officers' corps. Homosexuality is relevant to security clearance determinations. See, e.g., Webster v. Doe, 486 U.S. 592 (1988), Dubbs, 866 F.2d 1114, Dorfmont, 913 F.2d 1399, Krc, 905 F.2d 389, McKeand, 490 F.2d 1262, Padula, 822 F.2d 97, High Tech Gays, 895 F.2d 563, Doe v. Weinberger, 820 F.2d 1275 (D.C. Cir. 1987). Military commissions are granted by the President, who has "unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief." Dorfmont, 913 F.2d 1399 (Kozinski, Cir. Judge, concurring), citing United States Navy v. Egan, 484 U.S. at 527.

384. Dorfmont, 913 F.2d at 1402; Doe v. Weinberger, 820 F.2d at 1278 (homosexual's indiscriminate pattern of sexual activity led to decision that his access to classified information was "not clearly consistent with the national security"). See also Doe v. Casey, 796 F.2d at 1520 ("Congress . . . recognized the need for

the Director to have broad power to terminate CIA personnel for even the slightest security risk" [emphasis added]).

385. AR 635-200, para. 15-1.

386. Indeed, jeopardizing these privacy entitlements can be a crime. See United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978). In Johnson, the accused secreted himself in the women's latrine in order to watch women use the facilities. The court found that the accused's "act constitutes an invasion of privacy of those observed" and "evinces a wanton disregard for a normal standard generally and properly accepted by society, in addition to bringing discredit upon the Armed Forces in the eyes of the victim and her sister." Id. at 771.

387. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1988).

388. See, e.g., National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989); Schaill v. Tippecanoe County School Corporation, 864 F.2d 1309 (7th Cir. 1988); National Federal of Federal Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987); Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989).

389. See, e.g, Dufrin v. Spreen, 712 F.2d 1084, 1087 (6th Cir. 1983); Vaughan v. Ricketts, 859 F.2d 736, 747 (9th Cir. 1988); Torres v. Wisconsin Dept. of Health & Social Services, 838 F.2d 944, 969 (7th Cir. 1988); McDonell v. Hunter, 809 F.2d 1302, 1329 (8th Cir. 1987).

390. See, e.g., Rider v. Pennsylvania, 850 F.2d 982 (3rd Cir. 1988) (hiring female guards to monitor female prisoners did not constitute unlawful discrimination against male guards); Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990) (surveillance by opposite-sex guards was not unreasonable because intrusion on inmate privacy was minimal and guards had strong statutory rights to equal employment opportunities).

391. These recognized and protected privacy considerations would be even more at issue among people actually living together in close conditions, which is unlike the infrequent situation of undergoing urinalysis and unlike the distant relationship between guards and inmates.

392. See generally M. Humphrey, supra note 20. Hardman, for example, claims that while on board ship in the Navy, "one of the techniques, which I

outrageously developed, was merely crawling in with [other men] and engaging them in sex and leaving them as if nothing had ever happened. You don't say anything; you pretend it never happened. And so long as you never discussed it, it never happened." Id. at 22.

393. Id. at 61.

394. The violation of the privacy entitlement does not depend on any acting out of sexual attraction toward others. See United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978) (voyeurism).

395. Accommodation will be discussed extensively below.

396. See Timm, 917 F.2d at 1093, n.13 (prison officials could choose to accommodate equal employment rights of female guards or to accommodate privacy interests of the inmates and security interests of the institution).

397. Matlovich, 13 Fair Empl. Prac. Cas. (BNA) 269 (1976).

398. M. Humphrey, supra note 20 at x.

399. 10 U.S.C. @ 3062(a).

400. The military strength of the United States should not be taken for granted, nor should the complexity of the task of fielding a successful military force be underestimated. As the Chief of Staff of the Army has noted, the Army of 1990--

> is the finest fighting force this nation has ever fielded and the best in the world today . . . [But] [t]his Army did not come about by accident. It is the product of a comprehensive and visionary plan that has as its foundation the Army's six fundamental imperatives--principles that are the benchmark by which we measure every proposal and every program, and form the architecture by which we are building the Army of the future. These imperatives include an effective warfighting doctrine, a mix of armored, light, and special operations forces, continuous modernization; the development of competent, confident leaders; and an unbending commitment to a quality force.

Vuono, supra note 193, at 2-3.

401. Davis, supra note 40, at 104. Disclosure of homosexuality is already required in the military accession process. But see note 20. This disclosure requirement does not duplicate the situation proposed in the model, however, because presently homosexuality results in exclusion, whereas in the model homosexuality would not be a service-disqualifier.

402. Davis, supra note 40, at 104.

403. One homosexual who did disclose her homosexuality found it also put her in an adversarial role with the larger homosexual community which preferred anonyminity. Plaintiff Ben-Shalom stated, "[T]he lack of support from the gay community doesn't help the pain. There was no support whatsoever. I've taken more harassment and more hurtful things from the gay community than I ever have from heterosexuals. . . . People didn't want to be seen with me in public. I don't understand why. . . . But if you're seen with a queer, walking down the street, well, my God, you must be a queer too. . . . It's been very solitary." M. Humphrey, supra note 20, at 191-92.

404. Clearly, this is not the best foundation for the loyalty--which must be from the Army to the soldier as much as from the soldier to the Army--and esprit that is essential to good order, discipline and morale. Moreover, this result highlights the fact that disclosure of one's homosexuality serves no useful policy function apart from the homosexual exclusion policy. Disclosure has no impact on the validity of the regulatory rationales for the policy. Disclosure would not negate, and might exacerbate, military security and privacy concerns. Disclosure would not affect one's sexual conduct, use of drugs or alcohol, or coping skills. In fact, disclosure may have a negative impact on behavior or social adjustment.

405. Cf. Dubbs, 866 F.2d 1114 (plaintiff did not disclose homosexuality although it was not an automatic disqualification for employment with CIA). See also, e.g., Holland, supra note 361. "The diagnosis [of AIDS] may force the patient's identification as a likely member of a stigmatized minority . . .. Families may abruptly learn of a lifestyle they find difficult to accept. In the largest risk group, homosexual and bisexual men, the diagnosis may create a

crisis in which an otherwise private sexual preference is revealed." Id. [emphasis added].

406. The practicability of criminal sanctions depends on effective deterrence as well as cost-effectiveness. Cf. Harper, 877 F.2d 728. In Harper, prison officials restricted access to materials from the North American Man-Boy Love Association (NAMBLA). The court noted that there was testimony that "searches for NAMBLA materials which have been introduced to the prison are not as effective as forbidding their introduction in the first place. This factor thus favors upholding the regulation." Id. at 734. Obviously, avoiding a problem is more advantageous than attempting to solve a problem once it exists. The disclosure model is deficient to the extent the cost of taking a "wait and see" attitude toward the homosexual's potential to commit homosexual acts, in terms of combat readiness as well as financial and other resources, outweighs the benefit to the Army of permitting homosexuals to serve.

407. Davis, supra note 40, at 104.

408. See notes 298-305.

409. The Hands The Would Shape Our Souls, Atlantic Monthly, Dec. 1990, at 79. Cf., e.g, Holland, supra

note 361. "Guidelines for safe sex among homosexuals may require marked alteration of sexual behavior . . .. Pressure to accept a monogamous relationship or celibacy may be difficult." Id. See also Kramer vs. Kramer, Los Angeles Times, June 20, 1990, at E1, col. 2. Larry Kramer, a homosexual and a well-known homosexual rights activist, published a book in 1978 titled "Faggots." Id. The book is described as "a scathing critique of sexual promiscuity among homosexuals that sold more than 440,000 copies. It also made Kramer public enemy No. 1 in some gay circles. The author said his book had only suggested that homosexual men look for love, instead of random sex. But critics felt he was denigrating the gay liberation movement. When the AIDS crisis erupted in 1981, the same tension emerged. Kramer called for safe sex policies, while a multitude of homosexual leaders angrily resisted, saying such recommendations were premature and punitive." Id.

410. Baker, 553 F. Supp. at 1130, reversed 769 F.2d 289. If criminal sanctions are not a deterrent, administrative sanctions may be even less effective in deterring homosexual acts within the military. There

is evidence that sex, "the most powerful drive that human beings experience," may not be deterred even by the potential for life-threatening consequences.; Relapses Into Risky Sex Found in AIDS Studies, New York Times, June 22, 1990, at A18, col. 5. "[The director of the Gay Men Health's Crisis stated, 'No one can live with "don't" for a lifetime, especially when it comes to sex.'" Id. Cf. Young 'Ignoring' AIDS Warning, Daily Telegraph, Aug. 26, 1990, at 4. "'[T]he Government's campaigns have been very effective in raising people's awareness [about AIDS] but not in changing their behaviour . . . It is difficult to legislate for behavioural patterns.'" Id. Indeed, in one view, to leave a person with "no real choice but a life without any physical intimacy" may violate the Eighth Amendment. Hardwick, 478 U.S. at 203 (Blackmun, J., dissenting).

411. See. e.g., Now For a Drug Policy That Doesn't Do Harm, New York Times, Dec. 18, 1990, at A24, col. 6 (advocating legalization of most narcotics).

412. Philosophically, the mere existance of law has an important pedagogical function. Practically, the

mere existance of law has a restraining, even if not completely deterrent, effect.

413. See High Tech Gays, 909 F.2d at 382 (Canby, J., dissenting) (suggesting that the "frequent violation of a law that has fallen into disuse," i.e., the law proscribing sodomy, was not a rational basis for the military's security concerns regarding homosexuality).

414. See United States v. Van Slate, 14 M.J. 872 (N.M.C.M.R. 1982) (May, J., concurring in part and dissenting in part). "The effect and impact of criminal offenses can quickly pervade and sap the morale of any unit because of the necessary intermixture of professional mission and duties with the equally necessary social and interpersonal relationsips which are part and parcel with military life and tradition." Id. at 876.

415. These processes are expensive in military and financial terms. Judicial burdens may include not only trial by court-martial but also the defense of federal litigation. See note 239 (the majority of former service members interviewed in Humphrey's book were involved in at least one investigation or administrative or judicial proceeding). Cf. Voorhees,

16 C.M.R. at 107 ("[the commander's] major task is to fight a war, not a lawsuit. Criminal sanctions may be adequate in civilian circles, but preventive measures must be taken in the military") [emphasis added].

416. Beller, 632 F.2d at 811. Even more onerous is the potential for equitable estoppel claims. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989). Under Watkins, any evidence that a soldier's misconduct was known or could have been known by soldiers at some level may impute knowledge to the Army as a whole for purposes of equitable estoppel. Thus, Watkins provides soldiers the argument that they need meet only the standard of conduct they were actually meeting when they last reenlisted. If, for example, a soldier, in this model a known homosexual, was under investigation for homosexual acts at a station in Korea, and his company commander unwittingly reenlisted him at his present duty station in Washington, the soldier could argue that subsequent efforts to discharge him for homosexual acts are estopped because the "Army" knew of his homosexual acts and reenlisted him despite that knowledge. See id. at 707-08. See also Neal, 472 F. Supp. 763. The appearance of "tacit approval" of

homosexual conduct, resulting from allowing homosexuals to serve and common recognition of the sexual dynamic, could likewise be a basis for estoppel claims. But see Ben-Shalom, 881 F.2d at 465 (expressing serious doubts on the merits of the Watkins holding on estoppel). Cf. McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971) (plaintiff was not denied employment because of his homosexual tendencies or conduct, but because of his activism regarding the societal status to be accorded homosexuals, which had the effect of forcing tacit approval of homosexuality upon the employing University).

417. M. Humphrey, supra note 20, at xiii. "What I did have was a massive amount of unresolved anger toward the colleague who had made the accusation [the individual who informed the Army that Humphrey was homosexual]. I lost my trust in any individual with his kind of self-righteousness. In fact, I was beginning to distrust mankind in general. I sought psychiatric help to resolve these negative feelings." Id.

418. As noted previously, these kinds of feelings may

result in security or disciplinary problems. Some military members who were court-martialed for homosexual conduct saw themselves as victims who were punished, not for their criminal acts, but for "being homosexual." M. Humphrey, supra note 20, at, e.g. 186. Those who express bitterness about the military's discovery of their homosexuality had often entered the military through deceit and with full knowledge that their homosexuality disqualified them for military service. Coller, for example, stated she knew she was homosexual, but enlisted by saying "what [the military] wanted to hear." Id. at 11. When her homosexuality was discovered, she was discharged. Id. at 15. She describes her feelings as, "I pay my taxes because I don't want to go to jail, but I'd never do anything service-oriented for this country, and I'm not a patriot. You know, I figure that I gave them all I had so very long ago and they just f-----d me over. So f--- them now!" Id. at 18. Boler claimed that he "f---- d everything that moved," but he was embittered over his discharge because he felt that the Air Force "never proved anything." Id. at 86 & 87. Starr stated, "I

confessed to three charges of sodomy, two counts of fraternization, and one count of official false statments, which was that 'I'm not a homosexual' statement. There was plenty that they [the Office of Special Investigations] didn't know. . . . A lot of people attending the trial were my troops, people who wanted to see me get what they felt was my just deserts. . . . I was known as a kick-ass commander, and so the troops that I had given reprimands to were there to watch me suffer. . . . I spent nine months [in] confinement . . . For being gay!" Id. at 229-30 & 235 [original emphasis].

419. Accusations of homosexual conduct, sincere or false, could be prompted or threatened based on knowledge of another's homosexuality. The homosexual, as well as the accuser, might feel that such accusations, or threatened accusations, would have enhanced credibility based on the fact of homosexuality. See United States v. Clayton, 38 C.M.R. 46 (C.M.A. 1967) (the First Sergeant was known in the unit as the "First Skirt" and had been previously investigated for homosexuality; accused was charged with false swearing after he alleged the First Sergeant

had made homosexual advances toward him); United States v. Eason, 21 M.J. 79 (C.M.A. 1985) (accused claimed he participated in drug activity because his unit commander had pressured him into performing homosexual acts).

420. Davis, supra note 40, at 106.

421. 10 U.S.C. @ 925. The offense of sodomy has a single element of proof: "[t]hat the accused engaged in unnatural carnal copulation with a certain other person or with an animal." Elements in aggravation are "with a child under the age of 16" and "by force." Id.

422. Davis, supra note 40, at 106.

423. Solorio v. United States, 483 U.S. 435 (1987).

424. Every element of proof must be established beyond a reasonable doubt to the satisfaction of the trier of fact.

425. Acts, for example, that impact adversely on the soldier's health detract from that soldier's mission accomplishment. This may also burden fellow soldiers and military resources. See, e.g., United States v. Scott, 24 M.J. 578 (N.M.C.M.R. 1987) (court noted that sailor running a prostitution ring exposed the military community to disease); United States v. Ragan, 33

C.M.R. 331 (C.M.A. 1963) (whether conduct is prejudicial to good order and discipline does not depend upon the relationship between the actor and the military, but on the effect of the conduct upon the service).

426. Cf. Davis, supra note 40, at 104. "The real problem for the military is not the service member who engages in sexual activity on his or her own time, away from the military installation or vessel." Id. But see Hardwick, 478 U.S. 186. In Hardwick the Supreme Court explained, "if respondent's [challenge to the law proscribing sodomy] is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down the road." Id. at 195.

427. See note 20.

428. Davis, supra note 40, at 98. But see Bowen, 483 U.S. 587. Applied here, the Bowen analysis is, "[t]he evidence that a few [homosexuals] were willing to violate the law by not [abiding by the homosexual

exclusion policy] does not alter the fact that the entire program has resulted in saving huge sums of money [and the maintainance good order, discipline and morale]." Id. at 599. See note 239.

429. Davis, supra note 40, at 108. Davis and others rely on Kinsey's estimate of the incidence of homosexuality within the general population as a factual predicate to such proposals. Id. at 103. Kinsey's data, however, is increasingly questioned. See, e.g., J. Reisman & E.W. Eichel, Kinsey, Sex and Fraud: The Indoctrination of a People, Huntington House Publishers (Lafayette, La. 1991). See MacDonald, High-Risk STD/HIV Behavior Among College Students, 263 J.A.M.A. 3155-59 (1990) (one percent of students described their sexual orientation as homosexual). The Reisman study "charges that the Kinsey data is skewed toward aberrant sexual behavior because 25 percent of the male sample had a prison or sex-offender history. At least 200 of the subjects were male prostitutes. . . . Kinsey's research included 'several hundred' youths ages 2 months to 15 years old . . . [and] masturbation of infants by 'technically trained' experts." Kinsey, Sex and Fraud, Washington Times, Dec. 21, 1990, at B7.

"[C]urrent data show that the homosexual population is only 1 percent to 2 percent [of the general population, rather than at least 10% as asserted by Kinsey]." Id. Further, regardless of the actual statistical incidence of homosexuality in the general population, there is no scientific methodology by which to extrapolate that statistical incidence to the military population. See Baker, 553 F. Supp. at 1129, n.14 (the court found, based on Kinsey's data, that 5% of the general population was homosexual, therefore 5% of Texans were homosexual, therefore there were "at least 500,000 exclusive homosexual males in Texas"). Cf. Davis, supra note 40, at 103. There is no scientific or common sense basis upon which to conclude that any sub-group of the general population is proportionately represented within the military population. Moreover, the statistical incidence of homosexuality is simply not relevant to whether homosexuality is compatible with military service.

430. Davis, supra note 40, at 108.

431. Cf. Dillard, 652 F.2d 316. In Dillard, the court noted that "[f]or a period of time . . . prior to

Dillard's enlistment, single parents . . . had been allowed to enlist in the [National] Guard. . . . [T]here was a significant increase in the enlistment of single applicants with minor children. Also, during this period, sole parents presented many problems in other personnel management areas." Id. at 318 & n.1.

432. See, e.g., notes 468-70.

433. Davis, supra note 40, at 98 [emphasis added].

434. Ben-Shalom, 881 F.2d at 4607, citing Brown, 444 U.S. at 360. Cf. Pruitt, 659 F. Supp. at 627 ("the Army understandably would be apprehensive of the prospect that [homosexual] desire or intent would ripen into attempt or actual performance"); Dubbs, 866 F.2d 1114 (evidence that homosexuality raises a risk that must be resolved in favor of the agency).

435. Cost, in terms of money and combat-readiness, is a vitally important factor in accommodation. Not only is cost an important aspect of practicability, it is also a factor in the legal analysis of the reasonableness of efforts at accommodation. See Turner v. Safly, 482 U.S. 78 (1987). In Turner, the Supreme Court reviewed a prison regulation that impinged on inmates' constitutional rights. Although the law has

not established any constitutional rights arising from homosexuality, Turner is instructive. Discussing the availability of alternative policies, the Court stated, "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Id. at 90-91 [emphasis added]. Applying Turner generally to the question of accommodating homosexuals in the military, accommodation would be appropriate only if,

first, the accommodating alternatives are fully successful, and secondly, if accommodation can be accomplished at "de minimis cost to valid [military] interests."

436. These are the types of duties that all soldiers, regardless of their military occupational specialty, are required to perform unless excused from duty for a

military reason. For example, Army legal clerks may pull guard duties and Army lawyers serve stints as the Staff Duty Officer. See United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) for a description of duties and responsibilities of the Charge of Quarters.

437. The author was once asked by civilian co-counsel, "Why can't a person in a wheelchair be in the Army? Couldn't a person in a wheelchair be a cook or a clerk in the Army?" The answer is, yes, a person in wheelchair could be a cook or clerk in the Army. But that person could not be a soldier. Cooking or clerking may be a particular soldier's job, but it is not all there is to soldiering. Similar questions have been posed in reference to homosexuals. A representative of the American Bar Association once asked, "Why couldn't homosexuals be in the Army if they were in a non-sensitive positions?" The answer is, for one thing, that there are no truly non-sensitive positions in the Army. And there are no "lone" soldiers. As has been recognized, a soldier's conduct, homosexual or otherwise, "at the very least, has an impact upon other soldiers." Ben-Shalom, 881 F.2d at 465.

438. Indeed, General John W. Foss, Commander, U.S. Army Training and Doctrine Command, has stated that the "primary mission of projecting land combat power will place a premium on the deployability of our Army." Foss, Advent of the Nonlinear Battlefield: AirLand Battle-Future, Army, Feb. 1991, at 21. If deployability is key for the Army, an individual who cannot deploy cannot be a full-fledged soldier. This perception of a group as "second-class soldiers" could result, for example, from recent legislative initiatives to accomodate single parents or dual-soldier married couples by precluding deployment to combat theaters. Deployability to a combat theater should not be confused with combat exclusion. Women, for example, are presently excluded from certain combat-related occupations. But they are deployed to combat theaters in the same way as men who serve in the same military occupational specialities are deployed.

439. This is not an example of bias against handicapped people, but rather an example of the military social norms.

440. AR 635-200, para. 15-1. Davis, supra note 40, at 101.

441. See note 400.

442. Davis, supra note 40, at 101. In Woodward v. United States, the court noted that "Woodward informed the Chief of Naval Personnel in a [letter] that: 'I am well aware of the problems of social acceptance and special problems of leadership with which I will be confronted as my associates become aware of my homosexuality.'" Woodward, 871 F.2d at 1069-70. Cf. Miller, 647 F.2d 80 (Norris, J., dissenting). On the issue of whether "openly homosexual supervisors could . . . command respect," Judge Norris states that,

> [m]uch of the tension and hostility, absence of trust and respect [and] offended sensibilities, . . . flows not from the fact of a private sexual act, but rather from related public behavior. Yet much potentially offensive public behavior other than actual sexual activity is beyond the [military's] power to control. Public expressions and encouragements of homosexuality as personal philosophy, and public displays of behavioral tendencies or traits commonly perceived as

> homosexual, clearly are more likely than private conduct to arouse hostility, create tension, or offend sensibilities. Yet such disruptive public behavior may not constitutionally be prohibited by the [military].

Id. at 89. See also Smith, 569 F.2d 325 (homosexual claimed he was discriminated against for being too effeminate). Passing the inaccuracy that the military must tolerate any form of disruptive behavior, Judge Norris concluded, similarly to the conclusions underlying the models, that the homosexual exclusion policy was ineffectual and therefore should be removed. Miller, 647 F.2d at 89. A more reasoned conclusion, however, is that, if such disruptive conduct cannot be prohibited, then homosexuals must be excluded. Clearly, exclusion is then the only method by which the military can avoid the adverse impact on good order, morale and discipline that would result from the noted "tension and hostility, absence of trust and respect [and] offended sensibilities" caused by certain homosexual behavior.

443. Davis, supra note 40, at 101. Cf. Dallas,, 490 U.S. 19. In Dallas, the Supreme Court reviewed a statute regulating dance halls. Respondent, similarly to the model, proposed that, rather than excluding minors from dance halls, "the city [could] achieve its objective through increased supervision, education, and prosecution of those who corrupt minors." Id. at 26 [citation omitted]. The Court rejected the argument that, because the "city's stated purposes . . . [could] be achieved in ways that are less intrusive," the statute was irrational on that ground. Id. at 23.

444. See, e.g., Harper, 877 F.2d at 730 ("inmates who are identified as or suspected of being pedophiles or homosexuals are a favorite target for violence since many incarcerated felons were sexually abused as children"); Espinoza, 814 F.2d at 1094 (plaintiffs "received threats from other inmates due to their convictions for sex crimes involving a child and being labeled homosexual. Both men received threats of rape and assault and were labeled 'baby rapers' by their fellow inmates. Both men requested protective custody status").

445. See, e.g., Beller, 632 F.2d at 811-12 (court recognized that attitudes toward homosexuality would impact on ability of homosexuals to command the respect necessary to perform supervisory duties).

446. To the extent the model may contemplate "follower" training as well as leadership training, see note 265.

447. AR 635-200, para. 15-1.

448. Davis, supra note 40, at 101-02.

449. See text at notes 385-95.

450. Davis, supra note 40, at 102.

451. In addition, the commander would have to train his soldiers not to feel that their privacy was infringed by the presence of the opposite sex in situations such as this. Through the dedication of resources and personnel, the commander could control flagrant misconduct in these conditions, but he would have little control over the overall impact on the climate of his command.

452. See M. Humphrey, supra note 20, at xxiv.

453. Id. "The military fears that if the homosexual is allowed in its ranks, there will be . . . rampant sexual activity among the men and women (men with men,

women with women)." Id. It cannot be said that such concern is completely without a rational basis.

454. For the soldier, more than for anyone else, "[t]he facts of war are often in total opposition to the facts of peace." M. Watson, Chief of Staff: Pre-War Plans and Preparations (US Army in World War II) (Washington, D.C.: USGPO 1950), at 12.

455. See Ben-Shalom, 881 F.2d at 460. Cf. Chappell v. Wallace, 462 U.S. 296 ("the inescapable demands of military discipline and obedience to order cannot be taught on battlefields").

456. See notes 435-39.

457. See J. McComsey, supra note 282, at III. "The War Department realizes that the adjustments of the individual to differences between military and civil environments 'may be a slow, laborious process requiring infinite patience and consideration on the part of the leader.' . . . The Supreme Court has observed that the Army is not a deliberative body, but that its law is that of obedience. There must be no question as to the right to command or the duty to obey--without, however, losing sight of the fact that there is no enduring substitute for leadership." Id.

458. Cf. Acceptance of Homosexuals as 'Minorities' is Common--but Wrong, Los Angeles Times, Aug. 20, 1989, at 14, col. 1 ("the Board of Supervisors voted down an unnecessary . . . discrimination ordinance, which would have afforded special status to a behavior-based group, homosexuals").

459. Cf. Jones on Behalf of Michele v. Board of Educ., 632 F. Supp. 1319 (E.D. N.Y. 1986). In Jones, female students sued to prevent gender integration at their all-girl school. Their claim was based partially on the fact that the New York City Board of Education had "identifed homosexuals as needing special educational assistance," and that the Board had established a special school for homosexual students. The girls sued for a special school for girls. The court found, however, that "the mere fact the Board, in the exercise of its educational discretion, has identified homosexuals as requiring special treatment does not give rise to any obligation to do the same for girls." Id. at 1326. The court further found that girls could not be regarded as similarly situated with homosexuals, and thus be given a special school, because girls were nearly a majority of the student

population, while homosexuals were a much smaller percentage. Id. The court held therefore that, because girls were in the majority, the girls did not have "an equal right to be treated differently." Id.

460. Katcoff v. Marsh, 755 F.2d 223 (2nd Cir. 1972). Katcoff details the history of the military chaplaincy from before the American Revolution.

461. Only Reformed Judaism, Reconstructionist Judaism, and the Unitarian Universalist Association are reported to have national policies that permit ordination of active homosexuals. The Hands The Would Shape Our Souls, Atlantic Monthly, Dec. 1990, at 80.

462. See, e.g., Cyr, 439 F. Supp. 697 (the Metropolitan Community Church caters primarily to the spiritual and worldly problems of homosexuals).

463. See, e.g., Methodists Rethink Beliefs on Gay Sex, San Francisco Chronicle, Feb. 14, 1991, at A23. "[S]ome in the church believe that all homosexual activity is immoral . . . others find gay and lesbian sex acceptable 'when practiced in a context of human caring and covenantal faithfulness.' . . . The proposed [doctrinal] changes . . . are certain to touch off fierce debate in the often-polarized denomination."

Id.; The Gay Tide of Catholic-Bashing, U.S. News & World Report, Apr. 1, 1991, at 15. "In the past 18 months or so, many churches across the country (six in Los Angeles alone) have been vandalized and broken into, with gay activists claiming responsibility. . . . [This is] a straight-out hate campaign. A catalog to an AIDS art show . . . reflects the general tone: Cardinal O'Connor is a 'fat cannibal in skirts,' and his cathedral is 'a house of walking swastikas.'. . . Savage mockery of Christianity is now a conventional part of the public gay culture. . . . [O]ne newly ordained young priest and his elderly mother [were pelted] with condoms until police intervened and escorted them away." Id.

464. See note 465. Cf. Von Hoffburg, 615 F.2d 633 (plaintiff soldier was married to a female-to-male transsexual).

465. See Adams v. Howerton, 673 F.2d 1036, 1040-41 (9th Cir. 1982) (declining to consider whether homosexuals had a "fundamental right to marry" which was burdened by an immigration statute, and even if the marriage was valid for analytical purposes, it did not

confer spousal status under federal immigration laws), cert. denied, 458 U.S. 1111 (1982); Sullivan, 772 F.2d 609 (homosexual attempted to obtain visa as "an alleged spouse of an American citizen"). See Gay Is Denied Spousal Right To Share in His Lover's Estate, New York Law Journal, Dec. 28, 1990, at 1. "[The judge] rejected claims by the survivor of the relationship . . . that his constitutional rights had been violated because he and [decedent] were prevented from being legally married because of the state prohibition against same-sex marriages. . . . [The] court holds that persons of the same sex have no constitutional rights to enter into a marriage with each other." Id. One might logically conclude that a homosexual soldier could not argue he had a marital-type relationship with a person of the same sex without admitting to homosexual acts. But see Pruitt, 659 F. Supp. 625 (plaintiff admitted to twice being "married" to another woman; the court declined to reach issue of homosexual acts).

466. Cf. Williamson v. A. G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (plaintiff claimed he was

censured for wearing makeup and openly discussing his homosexual sexual life, while heterosexuals who discussed their sex lives were not censured). See United States v. Davis, 26 M.J. 445 (C.M.A. 1988) (male sailor court-martialed for wearing women's clothing and makeup). Litigation, regardless of result, is expensive and not a favored use of taxpayer funds appropriated for national defense. More importantly, as the Supreme Court has recognized, the mere pendency of lawsuits is disruptive to the military mission. United States v. Johnson, 481 U.S. 681 (1987). Clearly, the law recognizes that homosexuality is a relevant consideration in the grant of security clearances. Denials of security clearances based on homosexuality could engender repeated and protracted litigation, just as in the civilian sector. See note 374. Cf. Weston v. Lockheed Missiles & Space Co., 881 F.2d 814 (9th Cir. 1989). In Weston, after declining to process a security clearance application based on plaintiff's homosexuality, the Department of Defense was required to submit classified documents to the

court for in camera inspection for purposes of establishing the state secrets privilege. Classified information and trials present unique and substantial administrative burdens.

467. The homosexual bar is a feature of homosexual culture that reflects the desire of homosexuals to socialize together. See note 346. Homosexual bars are rarely integrated with heterosexuals. An establishment usually becomes a "gay bar" by establishing a homosexual-only patronage. The practical effect is the exclusion of heterosexuals. A similar social pattern could result in military establishments, such as recreation centers or officers' clubs. If the establishment was patronized primarily by homosexual soldiers, the practical effect would be the exclusion of heterosexual soldiers. See also note 403. A comparable phenomenon might occur if homosexual soldiers gravitated toward and were concentrated in certain military occupations.

468. Cf. Rutgers Panel Seeks Way to Assure Gay Rights, New York Times, Mar. 5, 1989, at 1, col. 2. "Discussion [on addressing the concerns of homosexuals in a university setting] has included the possibility

of creating a gay studies major, extending bereavement leave and health benefits to the partners of gay employees, expanding student housing to include gay couples, designating special dorms as 'safe residential space,' creating a center or lounge for gay students and offering more lectures and cultural events with gay themes. . . . [A] small but vocal group of students made it clear that they did not want a portion of their tuition spent on programs and activities for homosexuals. . . . '[Y]ou have to have both sides presented and then let students make their minds up about what they want to believe,' said Jack O'Kane, . . . who has organized the Rutgers University Heterosexual Alliance. . . . 'Right now you guys have a monopoly on this issue.' The university has also . . . directed the library to expand its acquisitions of books relating to homosexuality." Id.; The Hands The Would Shape Our Souls, Atlantic Monthly, Dec. 1990, at 59-88. "There is another element--an important one--in the debate over gay clergy . . . expressed from East Coast to West. Of those theological schools that have been most open to gays, many have found that gay

faculty and students have in turn attempted to influence curriculum, faculty appointments, and other matters. Given all the other difficulties that seminaries face, the possibility of a 'gay veto' is not an issue that most schools are eager to take on." Id. at 80; see also Jones, 632 F. Supp. 1319 (special schools for homosexual students). Jones is discussed at note 459.

469. Cf., e.g., Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), cert. denied 430 U.S. 982 (1977). In Mississippi Gay Alliance, the court refused to compel a campus newspaper to run a paid advertisement for a homosexual group. The court noted that homosexual conduct was a crime and that "newspapers have the right to avoid becoming even peripherally involved in criminally related activity." Cyr v. Walls, 439 F. Supp. 697 (N.D. Tex. 1977), citing Mississippi Gay Alliance, 536 F.2d at 1075-1076 & n.4. But see Gay Alliance v. Matthews, 544 F.2d 162 (4th Cir. 1976) (no claim or evidence that plaintiff group participated in criminal homosexual acts). See A Waltz With Truth or Trouble?, Los Angeles Times, Sep. 13, 1990, at E1, col. 4 (homosexual brought suit against

Disneyland for ban on same-sex dancing at its establishments). It is not unforeseeable that the cadre of homosexual rights groups and legal defense funds that supported plaintiffs challenging the homosexual exclusion policy would continue to seek to further their cause within the military if homosexuals were permitted to serve.

470. Cf., e.g., McConnell 451 F.2d 193 (publicity generated by plaintiff's application for license to enter into a homosexual marriage was a permissible factor in decision to deny employment). The more time and effort the Army, commanders and non-commissioned officers must direct toward resolution of practical problems and social and political issues, such as those related to attempting to accommodate homosexuality within the military, the more time and effort is needlessly subtracted from military training, training that is even more critical as the force builds down in the future. As the Army's Chief of Staff has observed,

> [W]e have begun to shape a smaller Army--one with fewer soldiers and fewer units. . . . So every soldier, every unit, and every leader

> within our smaller force structure must be fully trained to fight and win. . . . [W]e must train with our eyes firmly fixed on our sacred responsibilities to the sons and daughters of this nation who are entrusted to our care. . . . [W]henever a sergeant takes the extra time to plan his training in precise detail, whenever he spends those extra hours executing his training to exacting standards, whenever he devotes that extra effort to scrupulously assessing his training, he is investing in the lives of his soldiers.

Vuono, supra note 193, at 4-5 [emphasis added]. Plainly, the Army must not invite training detractors--whether social or political controversy or labor-intensive practical problems--into its ranks lightly.

471. See notes 339-40.

472. From the military point of view, just the fact of two homosexual soldiers living together might be deleterious to good order, discipline and morale. Certainly, no commander would authorize heterosexual

male and female soldiers to room together in the barracks, regardless of how sincerely they disavowed any sexual intent toward one another. This again raises the practical problems addressed by gender segregation, which cannot be solved in the same way in regard to homosexuals. Yet if homosexuals are treated differently, there is the danger that they will be viewed by others as receiving "special treatment" or that the matter will become a grounds for expensive litigation, or both. In any event, the issue and contention itself would be an unwarranted and unnecessary detraction from good order, discipline and morale.

473. Cf. Aumiller, 434 F. Supp. 1273. In Aumiller, a homosexual university professor was living with a homosexual student. The court found that, "[a]side from the mere fact of the shared residence, defendants did not offer a single piece of independent evidence indicating that Aumiller had exploited or taken advantage of his roommates." Id. at 1305. But Aumiller sought and received "a protective order restricting defendants' ability to inquire into [his] living arrangements." Id. at 1303, n.86.

474. One phenomenon observed in military culture is that soldiers who are grouped by behavior, or potential behavior, that is unrelated to soldiering frequently become a focal point for reinforcing the military identity of the larger group. See M. Humphrey, supra note 20, at 112. "The unit had gotten a nickname throughout Germany as the 'Gay Berets' as a consequence of my court-martial [for homosexual sodomy]." Id.

475. Goldman, 475 U.S. at 450. Cf. Voorhees, 16 C.M.R. at 106 ("what may be questionable behavior in civilian life, and yet not present any danger to our form of Government, may be fatal if carried on in the military community").

476. "[T]hose who . . . work to protect our nation should not be required to toil in contention and strife engendered from within. It is enough that they might be required to labor while being critically assailed from without." Voorhees, 16 C.M.R. at 108.

477. See Commentary; Irvine's Human Rights Ordinance, Los Angeles Times, Oct. 22, 1989, at B12, col. 2. "Recently the Irvine World News stated: 'Sadly the [human rights ordinance protecting sexual orientation]--regardless of whether the authors were well-intended

or simply pandering to a narrow political interest group--has indeed been divisive and expensive. It may yet . . . be litigious and destructive.'" Id. After a 10-year-old boy entered a public bathroom in a local park and found three homosexual men engaged in public sex, Irvine citizens repealed the human rights ordinance by referendum. Id. Cf. Voorhees, 16 C.M.R. at 105 (Latimer, J., concurring in part and dissenting in part) ("we should bear in mind that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully").

478. Turner, 482 U.S. 78. See also O'Lone, 482 U.S. 342.

479. Turner, 482 U.S. at 90. By contrast, no constitutional rights have been established arising from homosexuality. Turner was applied in Harper v. Wallingford, where an inmate challenged a prison regulation that restricted his access to literature from the North American Man-Boy Love Association (NAMBLA). By affidavit, a superintendent testified that NAMBLA materials could "lead to violence committed both by and against its readers." Harper, 877 F.2d at

733. A prison psychologist testified that exposure to NAMBLA materials could adversely affect the rehabilitation of 60-80% of the inmates. Id. at 79. The court found this was "a sizable ripple effect . . . by any measure." Id. Cf. Ben-Shalom, 881 F.2d at 465 ("[t]he present case involves entirely different circumstances [than those discussed by Justice Blackmun in his dissent to Hardwick]; plaintiff is a member of the armed forces and her conduct, at the very least, has an impact upon other soldiers").

480. AR 635-200, para. 15-1.

481. H. Summers, supra note 368, at 45.

482. Id. at 19 (Foreward by Major General Jack N. Merritt).

483. Id. at 47. See also Voorhees, 16 C.M.R. 83. "At the heart of every successful military force are morale, discipline, and public support of the cause. An army which lacks those cannot hope to succeed . . . and the nation must necessarily fail in battle." Id. at 106.

484. The defense needs of the nation exist apart from military recruiting success. If recruiting efforts fail to meet manpower needs because, for example,

military service is poorly regarded by the general public, it may become necessary to lower military accession or retention standards. Lower standards, however, may diminish the reputation of the force further, thus creating a vicious cycle for military personnel planners. Cf., e.g., "McNamara's Project 100,000" (cited in Dicicco, 873 F.2d 910).

485. Dronenburg, 741 F.2d at 1398.

486. See note 493.

487. Cf. note 496.

488. See, e.g., Zablocki, 434 U.S. at 399 (Powell, J., concurring in the judgment) (states have a strong interest in ensuring that its rules regarding marriage reflect the widely held values of its people, and thus states have legitimately established various prerequisites to marriage and banned incest, bigamy and homosexuality).

489. See, e.g., The World is 'Outing'; The New Gay Militants, Washington Times, Sep. 13, 1990, at E1. "'I hate straights,' declared the most talked-about manifesto at New York's Gay Pride Parade on June 24. Straights, procreators, 'breeders'--that's you, heteros. Get out of our faces." Id. Campus Life:

Michigan; Gay Rights Group Protests Remarks by Official, New York Times, at 41, col. 1. "[A] regent . . . questioned the university's financing of a Lesbian and Gay Male Programs Office . . . [H]e requested an investigation of whether the bathrooms of a university building were 'being used as a meeting place for members of the homosexual community to perform sexual acts.' . . . [He] said 'young people of this state, when they enroll at the university, ought not to be forced, for example, to have a professed homosexual as a roommate' . . . [The AIDS Coalition to Unleash Power saw the problem as] 'institutionalized heterosexism' [and demanded] adding the term 'sexual orientation' to the antidiscrimination clause of the school's bylaws, the establishment of a center for AIDS research and the creation of a lesbian-gay studies department." Id. Protesters Leave 'Artworks' at Church, Office, UPI, Jul. 8, 1990. "Artists Against Religious Oppression claimed . . . 'The message is that the church should stay out of politics and medicine, that it should stop its oppression of women, gays and lesbians, that it should stop preaching sin and lies and that it should

start preaching safe sex and the truth' . . . Witnesses said boards were bolted to the door of the Torrance church to form an approximately 10-foot-tall cross. Affixed to the cross were about 30 penis-shaped objects . . . covered with condoms." Id.

490. See, e.g., Impact of City Sex-Bias Laws Tough to Gauge, Los Angeles Times, at B1, col. 2. "[M]ore than 60 towns and cities across the country, from rural hamlets to metropolitan centers, . . . made it illegal to discriminate against gays and lesbians in such areas as employment, housing and public services. . . . Gay activists for the most part have been stymied in efforts to get anti-discrimination measures passed nationally and in states such as California. . . . [A]ctivists acknowledge that tracing [the] impact [of such ordinances] is difficult." Id. Some argue that the lack of national legislation on behalf of homosexuals proves that homosexuals are politically powerless. As it cannot be said that homosexuals have failed "to attract the attention of lawmakers," a more reasonable explanation for the lack of national legislation favoring homosexuals is the simple functioning of the democratic process.

491. See, e.g., Ulane, 742 F.2d 1081 (transsexuals not protected by Title VII). The Ulane court noted that several proposed amendments to Title VII to provide coverage to homosexuals had been rejected by Congress, including Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, House Comm. on Education and Labor, 97th Cong., 2d Sess. 102 (1982) (statements of Rep. Hawkins, chairman of the subcommittee, and Rep. Weiss, N.Y., author of bill); Civil Rights Amendments Act of 1979: Hearings on H.R. 2074 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 2d Sess. 6 (1980) (statements of Rep. Hawkins, chairman of the subcommittee, and Rep. Weiss, N.Y., coauthor of bill). Id. at n.11. In Ulane, the court found that Title VII does not prohibit discrimination based upon "affectational or sexual orientation." Id. at 1085. Accord DeSantis, 608 F.2d 327. As the court said in Kizas v. Webster, "[i]t suffices to point out that if [Title VII] permitted discrimination in government employment that the

Constitution prohibits, courts would be obliged to hold the statute invalid to the extent it conflicted with the superior norm." Kizas, 707 F.2d 524, 542 (D.C. Cir. 1983). Title VII has not been held invalid because it excludes homosexuals from its scope.

492. See note 137.

493. See, e.g., '60s Sexual Revolution Didn't Occur, Kinsey Study Says, Los Angeles Times, June 30, 1989, at 18, col. 1. "'The purported sexual revolution of the 1960s didn't occur' . . . 'In terms of public morality, the American population tends to be very conservative and has continued that way.' . . . Arguing that America did not undergo a sexual revolution, the researchers cited data showing 72% of those interviewed said it was always wrong to have extramarital sex, while 79% disapproved of homosexual relations. More than 75% of those interviewed in 1970 said homosexuals should not be allowed to work as judges, schoolteachers and ministers. Almost 68% said homosexuals should not be doctors. A majority of the respondents favored laws against prostitution, homosexuality and extramarital sex." Id.; A Requiem for Fashion, Crain's New York

Business, Apr. 9, 1990, at 1. "Garment makers don't want to offend or lose customers with a designer who flaunts his homosexuality. . . . '[L]et's face it, [a businessman said], the majority of the public does not approve of homosexuality.'. . . Last year [1989], 74.2% of those questioned in a national survey said that sex between two adults of the same gender 'is always wrong,' according to the National Opinion Research Center in Chicago." Id.

494. See note 491.

495. Id. See note 458.

496. See Rowland, 730 F.2d 444 (Edwards, J., dissenting) ("the wrath of parents" was brought upon the school when teacher declared she was a homosexual). Judge Clears Way for Gay Night at Amusement Park, Reuters North European Service (Los Angeles), Jul. 11, 1986 (parents of 75 employees at Magic Mountain complained about a scheduled homosexual event at the theme park).

497. See, e.g., notes 465, 489 & 493.

498. The Hands That Would Shape Our Souls, Atlantic Monthly, Dec. 1990, at 80.

499. Id. at 81.

500. H. Summers, supra note 368, at 26-27, quoting Carl von Clausewitz, On War, edited and translated by M. Howard & P. Paret (Princeton, New Jersey: Princeton University Press, 1976), I:1, at 89.

501. See, e.g., Beller, 632 F.2d at 811 (the Navy "could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate"); Dronenburg, 741 F.2d at 1396 (in challenging the homosexual exclusion policy, plaintiff asks the court "to protect from regulation a form of behavior never before protected, and indeed traditionally condemned").

502. United States Constitution, Article I, Section 8.

503. Orloff, 345 U.S. at 93.

504. See, e.g., Goldman, 475 U.S. 503.

505. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

506. Id.

507. Id. One military historian notes that, "[a]s The Federalist Papers clearly show, the Founding Fathers deliberately rejected the idea of an 18th century-type Army answerable only to the Executive.

They wrote into the Constitutional specific safeguards to ensure the people's control of the military. H. Summers, supra note 368, at 37, citing The Federalist, edited by J.E. Cooke (Middletown, Connecticut: Wesleyan University Press, 1961) and particularly the essays of Alexander Hamilton (Nos. 8, 24, and 29) and James Madison (Nos. 41 and 47).

508. See Ben-Shalom, 881 F.2d 454. The Ben-Shalom court recognized this challenge and rejected it, explaining:

> [T]he Army should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces. The Commander-in-Chief, the Secretary of Defense, the Secretary of the Army, and the generals have made the determination about homosexuality . . . and we, as judges, should not undertake to second-guess those with the direct responsibility for our armed forces.

Id. at 461.

509. H. Summers, supra note 368, at 33, quoting General Fred C. Weyand, Chief of Staff, U.S. Army, July 1976.

510. See, e.g, Ben-Shalom, 881 F.2d at 466 (homosexuals can seek a congressional determination on the military's homosexual exclusion policy, but the court will not substitute a mere judge-made rule for the Army's regulation).

511. Military service is not "federal employment." Rather, accession into the military effects a change in status from civilian to soldier. The soldier is not in an employee-employer relationship with the Army. See In re Grimley, 137 U.S. 147 (1890).

512. See note 491.

513. See DeSantis, 608 F.2d 327.

514. Dronenburg, 741 F.2d at 1396. See note 490.

515. Cf. Dronenburg, 741 F.2d 1388. "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected

representatives, not through . . . this court." Id. at 1397 [emphasis added].

516. See Matlovich, 13 Fair Emp. Prac. Cas. (BNA) 269 (1976) (the Army should be the "leader[] in social experimentation and . . . adaptability to changing community standards"). The Matlovich court, in 1978, assumed that community standards on homosexuality were "changing." But see, e.g., note 493. As an initial matter, the utility or pertinence of the court's observation is dependent upon which community the court found whose standards were relevant to the standards of the military community. Even if community standards--at some level of social organization--were changing in 1978, there is no evidence in 1991 that community standards have changed so radically that homosexuality is now an accepted standard of conduct in American society and institutions, including the law.

517. Cruzan, __ U.S. __, __, 110 S. Ct. 2841 (1990) (Scalia, J., concurring). Clearly, reliance on the democratic process is the virtue and strength of the rational basis test under the Equal Protection Clause. Applied to the homosexual exclusion policy, the democratic process would ensure that the nation is

willing to sign up for and support the type of army that policy-makers create by military personnel decisions with the potential for far-ranging implications for force composition.

518. H. Summers, supra note 368, at 19.

519. Crocker, supra note 1, at viii-ix.

520. Even when lower courts struck down the homosexual exclusion policy (which decisions were later reversed in every instance), there were careful remarks that "the Court does not hold that the [military] is constitutionally required to enlist or retain persons who engage in homosexual acts." Saal, 427 F. Supp. at 202, reversed sub nom Beller, 632 F.2d 788.