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Managing the Military's Homosexual Exclusion Policy: Text and Subtext

JUDITH HICKS STIEHM*

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I. INTRODUCTION

For almost two decades there has been no draft in the United States. All who have entered the military have volunteered to do so.¹ Even when there has been a draft, many—indeed, most—citizens are exempt or deferred from service.² Whether or not these exemptions and deferments are equitable is a matter of continuing debate. What is clear, however, is that in many instances, those who are exempt or deferred at least have the right, if they choose, to volunteer for service.

This Article focuses on one group of individuals—homosexuals—who are denied that choice. These citizens were, and continue to be, excluded from military service, no matter how much they wish to enlist, how attractive they find the benefits, or how much they desire the responsibilities and affirmation of citizenship that military service confers. The Article begins by describing the military's policy of excluding homosexuals from service and how it has evolved, especially over the course of the past ten years. Current policy is not merely a relic of an outmoded past; it has been actively shaped by recent developments in politics and the law.³ The Article then goes

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1. See JUDITH H. STIEHM, *ARMS AND THE ENLISTED WOMAN* 32 (1989) (table 2.1).

2. See NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE?* 3, 37 (1967). Conscientious objectors, students, agricultural workers or others working in special occupations (for example, inner-city teachers), those who possessed an "extreme hardship," "sufficient" prior service, or a child, or those who were "sole surviving sons," elected officials, or ministers or divinity students were among those exempted or deferred from military service during the Vietnam War. *Id.* at 18 (chart 4). In addition, men under 19 or over 25, and all women, were exempt. *Id.* at 17, 19.

3. See THEODORE R. SARBIN & KENNETH E. KAROLS, *DEFENSE PERSONNEL*

on to consider the justifications offered for the policy, concluding that while there may be several unstated purposes for the implementation of the policy of excluding homosexuals from military service, actual practice significantly impedes military functioning without accomplishing its stated purpose. Finally, the Article reviews court decisions in an attempt to show that the judiciary is unlikely to save the Department of Defense ("DOD") from itself by requiring a change in policy. Thus, civilian DOD officials will have to decide whether or not it would be in their and the nation's best interest to retreat by altering the policy before the escalation of the guerrilla warfare that gay and lesbian advocacy groups are now conducting.

II. THE EXCLUSION POLICY AND ITS EVOLUTION

Most disqualifications from military service involve either a physical or educational deficiency.⁴ Standards in these categories fluctuate according to circumstance. If more recruits are needed, standards are lowered; if fewer are needed, standards are raised.⁵ The law does not require general announcement of such changes. Even during hostilities, as many as one in four young men may be considered educationally or physically unqualified.⁶

Citizens may also be disqualified for moral and administrative reasons. A young person who has had a brush with the law, for instance, may be barred from enlisting in the military.⁷ In addition, those who have radical political convictions can be disqualified if their views are deemed "not clearly consistent with interests of national security."⁸ Homosexuality is also considered grounds for "moral and administrative" disqualification.⁹

In the past, questions about homosexuality and military service have focused on the involuntary discharge of service personnel. Now questions are also being raised about denial of enlistment.¹⁰ The regu-

SECURITY RESEARCH AND EDUCATION CENTER, NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY at A-9 (1988).

4. See NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 2, at 203 (table 9.2).

5. See MARTIN BINKIN ET AL., BLACKS AND THE MILITARY 135-37 (1982); NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 2, at 201.

6. See BINKIN ET AL., *supra* note 5, at 98; NATIONAL ADVISORY COMM'N ON SELECTIVE SERVICE, *supra* note 2, at 203.

7. Army Reg. 601-210 Update, Sept. 30, 1985, at 23.

8. *Id.*; see also Julian Bond, *How the Draft Dodged Me*, N.Y. TIMES, Feb. 15, 1992 at 15.

9. Army Reg. 601-210 Update, *supra* note 7, at 23.

10. The number of homosexuals dismissed annually between 1985 and 1987 averaged over 1,500; this represented .1 to .2% of personnel. No statistics are available on denial of enlistment to persons *identified* as homosexuals, but apparently an individual's declaration is usually taken at face value. There is no certain way of knowing how to interpret these facts.

lations that bar homosexuals from the military differentiate the profession of arms from that of the physician, the professional athlete, the violinist, the lawyer, or the elected official. They also distinguish students and church members from military personnel. In short, they separate the military both from highly selective and from highly inclusive groups. One might even say they make the military deviant.

The military's argument for barring homosexuals is that it is a "special" institution.¹¹ DOD Directive 1332.14 states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers, to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.¹²

A similar directive applies to officers.¹³ In addition, each of the armed services has established regulations for its own forces based on these directives.¹⁴ Moreover, Uniform Code of Military Justice Articles 80, 125, and 134 in the *Manual for Courts Martial* provide for criminal prosecution for actions related to sodomy, attempts at militarily prohibited sexual activity, assault with intent to commit sodomy (which includes heterosexual sodomy), indecent assault, and indecent acts with another.¹⁵

Under each of the DOD Directives, a homosexual is defined as a

Does the minimal challenge to enlistment standards mean that there is no real attempt to screen out homosexuals who wish to serve? Or, does the rate of dismissal mean homosexuals are efficiently screened out, or that they do not seek to enlist, or that they are well closeted, or known and tolerated? Or, does it only mean that they cannot easily be denied enlistment or discharged against their will?

11. *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905, 454 U.S. 855 (1981).

12. See SARBIN & KAROLS, *supra* note 3, at A-9.

13. *Id.* at A-11.

14. *Id.* at A-13.

15. *Id.* at 19-20, A-2 to A-7. Other tactics used to discharge homosexuals have been to charge soldiers with fraudulent enlistment or conduct unbecoming an officer, and gentleman (including women). Telephone Interview with Mary Newcombe, Attorney for Dusty Pruitt (Feb. 10, 1992). See *infra* notes 152-59 and accompanying text.

person who "desires to engage in, or intends to engage in," as well as one who *does* engage in, homosexual acts.¹⁶ Homosexual acts are defined as "bodily contact . . . between members of the same sex for the purpose of satisfying sexual desires."¹⁷ The directives apply not only to in-service violations, but to "preservice" behavior as well.¹⁸ The policy is intended to leave no room for discretion or for exceptions. It prohibits conduct, excludes those whose status is that of "homosexual," and even excludes individuals whose statements demonstrate a propensity to engage in homosexual conduct. Thus, even to "desire" or "intend" makes someone ineligible to enlist or subject to discharge.¹⁹

Surprisingly, this highly inclusive, highly restrictive, mandatory policy only dates back to 1981, when Reagan administration officials apparently decided that having no discretion to retain a homosexual would be preferable to having to make and defend individual decisions related to enlistment and retention.²⁰ Thus, the DOD's response to the first serious, legal challenge to its discretionary power over the service of gays and lesbians was to increase its inflexibility by extending its definition of homosexuality and precluding any exceptions to its policy.²¹

This is not to suggest that homosexuality has ever been officially condoned by the United States military. Before World War II, the military treated acts of sodomy as criminal offenses, punishable by imprisonment. Still, although the services made no serious inquiries into questions of homosexual identity, two unofficial policies permitted the military to manage homosexuality without having to establish an official policy on the subject.²² First, vulnerable, effeminate men

16. SARBIN & KAROLS, *supra* note 3, at A-9.

17. *Id.*

18. *Id.*

19. Separation does *not* have to occur if the conduct is a departure from "usual and customary behavior," "is unlikely to recur," "was not accomplished by use of force, coercion or intimidation," and "the member's continued presence . . . is consistent with the interest of the Service in proper discipline, good order, and morale." *Id.* at A-9, A-10. Separation *must* occur, on the other hand, if the "member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual." *Id.* at A-10.

20. The Reagan administration's pursuit of an airtight rule was a reaction to cases like *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 859-60 (D.C. Cir. 1978), which held that since the Air Force's regulation on homosexuality contained an exception to the overall policy of separating homosexuals, there must be a reasoned explanation of an administrative decision to involuntarily discharge an airman.

21. Ironically, at the same time the DOD adopted its strict rule, homosexual civilians were experiencing some success in easing legal restrictions, and advocacy groups were increasingly engaged in public education and political action.

22. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 546 (1991).

were either not inducted or forced to fail basic training.²³ This presumably eliminated homosexuals who fit the stereotype of being weak and passive.²⁴ It also eliminated those who were *not* homosexuals but who might have been victimized by men who regarded abusing vulnerable individuals as proof of their own masculinity.²⁵ Second, the criminalization of sodomy worked to curb super- or hyper-masculinity. By having the right to punish all homosexual acts, as well as homosexual and non-homosexual rape, the military sidestepped the need to consider "purpose" or "consent," or an individual's "nature." The policies of eliminating potential victims and of criminalizing exploitive behavior appear to have served the military's purpose up to that time.

With World War II came the draft, the need to enlist large numbers of men, and arguments from the psychiatric community that homosexuality should be treated as an illness rather than as a crime.²⁶ Military officials argued that psychiatric screening for homosexuality at the time of induction would create substantial cost savings, and that discharge was usually better than jail, both for the military and the homosexual service member.²⁷ This decision to medicalize homosexuality combined with the draft to bring thousands of men under scrutiny. Draftees were certified as either heterosexual or homosexual, and processed accordingly. At the same time that this "more humanitarian" approach was being taken toward homosexuality, efforts to prevent "malingering" caused discovered homosexuals to be treated with revulsion.²⁸ Thus, while physicians had hoped to ameliorate the military's policy on gays by using a psychiatric framework, other social forces, in particular the need to enlist large numbers of men, combined with the psychiatric effort to produce an opposite effect. The military labeled every potential inductee, and it imposed severe informal sanctions on discovered homosexuals, who were later discharged.²⁹ During the course of the war, 18 million Americans

23. Part of basic training is to secure subordination and compliance by terrorizing recruits. See Ralph Schoenstein, *Fort Dix Ph.D.*, N.Y. TIMES, July 2, 1991, at A17. Drill instructors, though, are supposed to train recruits, not eliminate them. Therefore, almost all recruits complete basic training. One technique used to generate fear and compliance is by giving what all know to be impossible commands. Another is to have one weak recruit who is, in fact, run out, and whose ordeal serves as an implicit threat to other inductees. *SOLDIER GIRLS* (Churchill Films, 1981).

24. ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 19 (1990).

25. *Id.* at 19-20.

26. *Id.* at 9, 10-22, 33.

27. *Id.*

28. *Id.* at 20.

29. In the case of women, homosexuality was considered more of an "environmental"

were inducted; only 4 or 5,000 were rejected for homosexuality.³⁰ Clearly, little effort was made to open every closet door.

Again, the military's decision to define homosexuality as a medical problem both failed to rid the service of homosexuals and led to the stigmatization of homosexuality. On the one hand, the military tried to conceive of homosexuality as a form of mental illness to increase efficiency.³¹ On the other hand, it did not want declarations of homosexuality to become a way of avoiding service. The military put research teams to work to uncover a screening device for weeding out homosexuals while also figuring out a way to determine if and how some homosexuals might be "salvaged."³² These research efforts did not meet with notable success. Indeed, researchers had difficulty even creating a useful classification system for homosexuality.³³ Thus, while military policy continued to evolve, most homosexuals managed to remain in service the conventional way—by remaining in the closet.

One explanation for the military's apparently laissez-faire policy toward homosexuality was the need for able-bodied men. Such pressure makes any military less selective. Thus, by 1942 the Army agreed to accept men previously rejected for venereal disease. By 1943 it inducted fathers. It also took Japanese Americans out of relocation camps and enlisted African Americans in proportion to their share of the population.³⁴ By 1942 it also stopped "section eighting"³⁵ homosexuals who were doing their job well; a year later it discharged them only if "rehabilitation" was "impossible." By the time the war ended in 1945, discharged homosexuals were actually being re-inducted as long as they had committed no "in-service" acts.³⁶

In his book *Coming Out Under Fire*, Alan Berube describes the period during the early part of World War II as simultaneously repressive and liberating for homosexual servicemen.³⁷ By "liberating" he means that large numbers of young men were able to get together away from home in a situation where traditional constraints were

problem. BERUBE, *supra* note 24, at 46, 142. In the Women's Army Corps ("WAC"), discussion of homosexuality was more open, and members acknowledged the importance of friendship and the value of hero worship, which could lead to high achievement. *Id.* at 47-50.

30. *Id.* at 33. About 10,000 more were discharged after induction. *Id.* at 201.

31. *Id.* at 15.

32. *Id.* at 137, 152.

33. *Id.* at 15.

34. *Id.* at 179.

35. Section Eight of Army Regulation 615-360 permitted the discharge of men with "undesirable habits or traits of character." *Id.* at 139.

36. *Id.* at 180.

37. *Id.* at 99.

absent and borderline social behavior was expected.³⁸ In the service many gay men discovered themselves and each other. A homosexual social life among troops developed in which cliques formed and "camping" evolved as a survival technique.³⁹ "Swishes" and "butches" amused and emotionally inspired both straight and gay sailors. Still, the military's disapproval of homosexuality was well known, and acting out could jeopardize a service member.⁴⁰

In the postwar period tolerance ebbed.⁴¹ President Dwight Eisenhower made "sexual perversion" grounds for disqualification of civilians for federal employment and even for companies receiving federal contracts.⁴² Within the military, administrative discharges for homosexuality became more frequent. The only protests registered were appeals by non-admitters on due process grounds.⁴³

Organized resistance to discrimination against homosexuals began not in the military, but among civilians. The 1969 Stonewall Bar "riot" in Greenwich Village is often used to mark the beginning of active resistance to discrimination.⁴⁴ Shortly after Stonewall, however, certain homosexuals who were in the military began to come out and to challenge the exclusion policy. Leonard Matlovitch achieved one of the first (partial) successes, and the decision in his case played an important part in the genesis of the current policy.⁴⁵

III. MILITARY JUSTIFICATIONS FOR BANNING HOMOSEXUALS

While there has been a considerable amount of public debate even among uniformed personnel about the role of women in the military, there has been little attention to the question of homosexuals. With women, the discussion concerns "how many" and "doing what." With homosexuals, however, there are none, doing nothing—at least on the surface. Because someone cannot be a member of the military and acknowledge being a homosexual, examples of homosexuals who have had distinguished military careers are limited to persons fighting discharge. Also, to argue on behalf of homosexuals is not only to dispute established policy, but also to invite suspicion

38. *Id.* at 98.

39. *Id.* at 86.

40. *Id.* at 91-92. Some gay soldiers who put on drag routines lost their cover and "were exposed as queer." *Id.* at 91.

41. *See id.* ch. 10.

42. *Id.* at 269.

43. *Id.* at 274-75.

44. *Id.* at 271.

45. *See supra* notes 20-21; *see also infra* notes 97-101 and accompanying text.

about oneself.⁴⁶

The most common argument used by the military to justify its exclusionary policy is that the presence of homosexuals poses a threat to national security. Specifically, the military maintains that because most gay men lead secret lives, they are vulnerable to blackmail. The argument fails as soon as gay men can make their status public with impunity. Moreover, the military has been unable to provide any evidence to show that any homosexual soldier has been a security risk with the exception of one Austrian "closet" case in World War I.⁴⁷ The military's own reports—Crittenden in 1957 and Defense Personnel Security Research and Education Center in 1990—suggest that security is a not an issue except for the fact that, as one scholar notes, "Sanctions make rule-utilitarian justifications self-fulfilling prophecies."⁴⁸

The public acceptance and recruiting arguments both disappear in the presence of a draft. If one is told to go, one goes; indeed, one would probably want most others to have to go, too. In the all-volunteer situation, one might look to college campuses, which are similar to the military in that they enroll numerous young adults, but which are dissimilar in that they do so without inquiring about private sexual practices. Homosexuals are almost certainly present in all institutions of higher learning, and many of them are public about their orientation, performance, and status.⁴⁹ Still, I know of no instance where public acceptance of or enrollment at a college or university has been affected by the presence of homosexuals. The military may have a particular concern about having "effeminate" males dressed in uniform, but that is a separate issue, since effeminacy is not an accurate indicator of homosexuality.⁵⁰

Another argument—the lack of worldwide deployability due to privacy requirements—also fails to withstand scrutiny. The military

46. Interview with Martin Binkin, author of *Blacks and the Military* (March 14, 1990). Even informal inquiries about the justification for the ban on homosexuals generally elicit only vague responses, or formal responses drawn from Directive 1332.143. See *supra* note 12 and accompanying text.

47. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAWS* 198 (1988).

48. *Id.* Alluding to a recent grievous breach of security, Mohr notes: "After all, if the Marines guarding the U.S. Embassy in Moscow had been sleeping with each other wouldn't our national security have been ever so much better off?" *Id.* at 199. Secretary of Defense Dick Cheney has referred to this concern as "an old chestnut." Eric Schmitt, *Citing AIDS, Judge Backs Ban on Gays Serving in Military*, N.Y. TIMES, Dec. 10, 1991, at A15.

49. Elizabeth Mehren, *Northampton's Lesbians, Free to Be; in Mass. College Town, Women Prosper Out of the Closet*, WASH. POST, Dec. 26, 1991, at F1.

50. As Karst argues, public relations concerns about the ideology of masculinity are the "central purpose of the exclusion of gay men." Karst, *supra* note 22, at 557.

does not imply that any public sexual activity would necessarily take place if homosexuals were allowed to enlist, but it does worry about "stares in the shower." Apparently, men don't like being thought of as sex objects, especially by other men.⁵¹ Whether or not stares cause such discomfort, society has generally chosen to leave the problem of scrutiny or mental undressing by members of the same sex to social and peer control in YMCA's, sports clubs, or high school locker rooms. The military has never explained why such controls would not work in its situation, too. If sufficient privacy exists to allow women and men to be deployed together, it would seem the same would be true for heterosexuals and homosexuals. The problem may be, simply, that men do not want to be seen as sex objects and not *know* it. But if they do not know they are seen by other men as sex objects, does it really matter?

The military also maintains that the presence of homosexuals in the armed forces would threaten the integrity of rank and command. This problem, however, can be managed by existing fraternization policies, irrespective of gender. The increased presence of women has provided the military with experience in the implementation of fraternization policies.

This is not to suggest that the military's concern with morale is frivolous. Trust and confidence are certainly necessary between individuals who serve together, for only where trust exists is it possible to predictably rely on one another. But trust and confidence develop not from homogeneity, but shared experience. When individuals come to military service who are different from each other in geographic origin, ethnicity, sex, and race, the military assumes the job of training them to behave as a team. It has many powerful tools to develop desired responses. Admittedly, the task of building trust among the ranks is not easy, and the military has always been reluctant to accommodate more difference than required. Nevertheless, the military has successfully integrated both African Americans and women in the armed services in the last fifty years.⁵² It has also developed an elaborate individual evaluation system which makes it possible to assess who does and does not deserve trust and confidence.⁵³ Barring entire classes of people when the military has the ability to evaluate trust and confidence on an individual basis is thus both wasteful and unnecessary.

51. Panel discussion at the international Inter-University Seminar, in Baltimore, Maryland (Oct. 11-13, 1991).

52. See Karst, *supra* note 22; Binkin, *supra* note 5.

53. See, e.g., STIEHM, *supra* note 1, at 168 (detailing criteria for the Weighted Airman Program System).

Finally, the need to maintain discipline, order, and morale needs to be understood as a problem with more than one solution. One approach is to exclude individuals who are scorned by other members of the military. The problem with this approach is twofold: first, it gives preference and power to the intolerant; and second, it undermines discipline and morale among those who decide they must lead secret lives to survive. Moreover, the very process of investigating and enforcing the discharge of homosexuals itself causes disorder that threatens discipline and lowers morale.⁵⁴ If, as the military suggests, its concern about morale is basically an argument about efficiency, then it should count *all* the costs. Further, it must also avoid exposing itself to *either* side's deciding that it can "win" by raising the cost. As in the case of fraternization, existing regulations governing harassment can be used to control inappropriate behavior without any necessary reference to gender.

During World War II, most people believed that homosexuals simply were not fit for service.⁵⁵ This was especially true of men who fit a stereotype of being delicate, sensitive and slight.⁵⁶ Interestingly enough, poor performance is not one of the current justifications for exclusion.⁵⁷ Indeed, in a directive dated July 24, 1990, Vice Admiral Joseph Donnell, commander of the Navy's Surface Atlantic Fleet, suggested that although lesbians may be among the Navy's "top" performers—they nevertheless must be "vigorously rooted out."⁵⁸

A situation where the great majority of personnel "despise/detest homosexuality"⁵⁹ poses cohesion problems for the military and homosexuals serving in it. Homosexuals run the risk of being isolated and having others refuse to share living quarters and other facilities with them.⁶⁰ They also face the possibility of violence being directed

54. See MARY A. HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE* 45-46 (1988) (detailing discharge of Naval officer).

55. BERUBE, *supra* note 24, at 19.

56. *Id.* Possible signs for identifying male homosexuals included "feminine bodily characteristics," "effeminacy in dress and manner," and a "patulous [expanded] rectum." *Id.*

57. Unclassified administrative memo from Comnavsurlant to Alnavsurlant, July 24, 1990 [hereinafter Memo]; see also Jane Gross, *Navy Is Urged to Root Out Lesbians Despite Abilities*, N.Y. TIMES, Sept. 2, 1990, at A9.

58. Gross, *supra* note 57, at A9.

59. *Beller v. Mittendorf*, 632 F.2d 788, 811 n.22 (9th Cir. 1980) (testimony of Assistant Chief of Naval Personnel), *cert. denied sub nom. Miller v. Weinberger*, 454 U.S. 855 (1981).

60. In a recent hearing before the House Committee on the Budget, General Colin Powell elaborated on the military's concern with the privacy needs of heterosexuals. "[I]t is difficult in a military setting where there is no privacy, where you don't get choice of association . . . to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual life style, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive . . . [to] ask them to share the most private facilities together, the bedroom, the barracks, latrines, the showers." *House Comm.*

towards them.⁶¹ While this violence might "only" involve fistcuffs or bashing, it could also involve sexual assault.⁶² Both arguments, however, seem to fail under careful consideration. After all, if military leadership, discipline, and training can lead men and women to risk and sometimes even sacrifice their lives, as well as to take the lives of others, that same leadership, discipline, and training should certainly be able to train individuals to overcome their prejudice and to refrain from violence against their peers.

Homosexual seduction of young recruits is another form of victimization that concerns the military. Admiral Donnell specifically referred to a "predator" type environment⁶³ and to "subtle coercion"⁶⁴ by lesbians. Coercion and seduction can be initiated by hetero or homosexuals. However, such behavior is forbidden and appropriately called either "harassment" or "fraternization." It should be remembered that the age of young enlisted personnel is often a time of experimentation, discovery, and revelation. Whatever the facts, it would be easier for the folks back home to believe that a declaration of homosexuality has occurred because of pressure or seduction than it would be for them to believe that it has been either chosen or determined early in life by biological or environmental factors.

Apart from the arguments already discussed, the military has offered little explanation for its supposedly "special" environment, either in court or in policy statements.⁶⁵ This leads one to wonder if something more is involved in the exclusion of gays from the military, some subtext which is not a part of the public debate.

IV. MILITARY PRACTICE RELATED TO HOMOSEXUALITY

Mary Ann Humphrey's *My Country, My Right to Serve* offers a series of brief, highly personal accounts by homosexual veterans of what it was like for them to serve in the military.⁶⁶ She reports a general belief that entire categories of military jobs were dominated

Hearing on the Budget, DOD Spending, 1993 Defense Budget, 102 Cong., 2d Sess. 112-13 (1992).

61. Karst, *supra* note 22, at 556; see also Lynne Duke, *Homosexuals: Military's Last Social Taboo*, WASH. POST, Aug. 19, 1991, at A6.

62. See *supra* note 19 and accompanying text. The concern about sexual assault applies to rape committed by homosexuals as well as heterosexuals, many of whom do not consider the active partner a participant in a homosexual act. MOHR, *supra* note 47, at 26.

63. See *supra* note 57 and accompanying text.

64. *Id.*

65. According to one author, no official is allowed to defend the rules on the record. Jacob Weisberg, *Gays in Arms*, NEW REPUBLIC, Feb. 16, 1990, at 2.

66. See HUMPHREY, *supra* note 54. The vignettes cover World War II through the late 1980s.

by homosexuals,⁶⁷ even though there has never been any formal acknowledgment of this as fact. Humphrey also describes regular “purges” and “drumming out” ceremonies which led people to further conceal their homosexuality, and, if accused, not to contest the discharge.⁶⁸ In Humphrey’s volume, women’s accounts tend to emphasize the pain of leading a double life, while those of men concentrate more on disguises, games, meeting places, and impersonal but readily available sex—reportedly with numerous “straight” men, too.⁶⁹ One woman who earned a purple heart and was an aide to General Eisenhower said that she was directed by him to draw up a list of homosexuals in the unit. The woman told the General her name would be the first on the list, but was then corrected by his secretary who said no, *hers* would be the first, since she would be doing the typing. Both were then told by the General to “forget about it.”⁷⁰

Several men in Humphrey’s book describe homosexual acts in which an individual who does *not* consider himself homosexual dominates another, considering this behavior to be “super macho.”⁷¹ Experienced officers acknowledge that this is a real, though hardly prevalent phenomenon, giving rise to the phrase in the Marines, “fuck me, suck me, but don’t kiss me, I’m straight.”⁷² Homosexual experiences seemed to be less of a concern at overseas posts,⁷³ although enforcement of the ban did—and does—go on.⁷⁴

Critics of the military policy barring gay men and lesbians need to remember that unlike civilians, military personnel enjoy no confidentiality with a chaplain, counselor, or physician. At the same time, though, officials in all bureaucracies have a high capacity for “not knowing” what is well known. For instance, in the first year women were admitted to the Air Force Academy, a cadet carried a fetus to term without anyone “knowing” until she actually went into labor at the Academy hospital.⁷⁵ When investigations of alleged homosexual

67. *Id.* at 4.

68. *Id.* at 8-9.

69. *Id.* at 22, 95-96. One soldier who fought in Vietnam claimed without exaggeration to have had sex with “99 percent of the guys in [his] barracks.” *Id.* at 96.

70. *Id.* at 38-40.

71. *Id.* at 68.

72. *Id.*

73. *Id.* at 90 (discussing enforcement in Korea).

74. One female Marine pointed out the absurdity of enforcement, saying that “nobody cared that you were gay.” *Id.* at 186. Also, one marine wondered, “If they can’t tell who we are, how can we be a problem?” *Id.*

75. The cadet’s plan, to have the child during spring break, missed by only a few days. JUDITH H. STIEHM, *BRING ME MEN AND WOMEN* 209 (1981).

service personnel do occur, they are often initiated not by a commanding officer, but by rejected lovers or other vengeful individuals.

Estimates of the number of persons discharged for homosexuality between 1950 and 1970 run somewhere between 40,000 and 50,000.⁷⁶ A General Accounting Office report showed 14,000 homosexual servicemen and women released between 1974 and 1983.⁷⁷ Data from 1985-1987 show nearly 5,000 released.⁷⁸ Significant differences become evident when this data is examined as a percentage within different personnel categories. The highest percentage of discharges for officers is .02% per year for Navy men and women and Air Force women.⁷⁹ For enlisted men the rate is .04 or .05%, except for the Navy, which weighs in at .13%. In every case, enlisted women account for the highest number of discharges: Air Force, .1%; Army, .17%; Navy, .27%; and Marines .33%.⁸⁰

The numerous accounts of "witch hunts"—investigations that treat large numbers of women as suspect and that frequently result in purges of whole groups of women after prolonged periods of surveillance and interrogation—appear to contrast sharply with the usual practice of investigating and dismissing males as separate individuals, and only when their behavior is so flagrant that it cannot be ignored. The most well-known witch hunts are the Navy's investigations of the U.S.S. Norton Sound in 1980 and the U.S.S. Yellowstone in 1988, and the Marine's Parris Island investigation between 1986 and 1988.⁸¹ In the latter case, almost half of the 246 women in a unit were questioned. Sixty-five of them subsequently left the Marines.⁸²

Michelle Benecke and Kirstin Dodge argue that these investigations are directly linked to new opportunities and experiences for women. They maintain that women's entry into nontraditional occupations leads men to defend their turf by trying to drive women out, defining them as "not women" (i.e., lesbians), or trying to achieve sexual access to demonstrate their continued male dominance.⁸³ The psychological dynamics Benecke and Dodge lay out are complex; still, there is little doubt that women who undertake nontraditional jobs in

76. Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV. 275, 323 (1986).

77. *Id.*

78. *Id.*

79. SARBIN & KAROLS, *supra* note 3, at B-2 to B-4.

80. *Id.*

81. See Michelle Benecke & Kirsten Dodge, *Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 220-21 (1990).

82. *Id.* at 221.

83. *Id.* at 233-41.

the military do experience special harassment.⁸⁴

Admittedly, the military is a large organization with different services, occupations, assignments, and commanders with a good deal of discretion. Individuals can have widely varying experiences and perceptions of both the "reality" and the "practice" of homosexuals' service to their country. What is self-evident, though, is that policy and practice diverge, suggesting, perhaps, an unspoken purpose realized by the current policy.

By DOD directive,⁸⁵ the U.S. military proscribes service by homosexuals. It also proscribes the commission of homosexual acts by homosexuals and non-homosexuals.⁸⁶ It even proscribes service by individuals who have, or who claim to have, "homosexual tendencies."⁸⁷ Exceptions are not permitted, although provision is made for a one-time, youthful, non-coerced experiment (probably done while intoxicated) and for individuals who say they are homosexuals but are not.⁸⁸ If this policy were actually enforced, it would deprive the military of large numbers of effective personnel. Moreover, because it is not systematically enforced, but could be enforced at any time against

84. Some believe that the sexuality and homosexuality of military women has become more of a "problem" since men have fully taken over the command of women, and also since women have begun to work in jobs once reserved to men. To command well, men will have to develop an appreciation of women's culture, and also of what it is like to be a woman submerged in a culture in which "male" is not well distinguished from "military." It is still not clear why investigations of lesbians so often involve large numbers of women. Are investigators out to "get them all?" Are the investigated more naive? Are women more connected to each other? And, how appropriate are the charges and the findings? In the one case I know well, that of the *Norton Sound*, 24 women, or one-third of all women assigned to the unit, were originally accused. All African-American women were accused. Eventually only eight were charged. Charges against four of these were dismissed. Two were cleared. Only two were convicted—one of these, many believed, incorrectly. It must be noted, though, that even those who "win" do not necessarily have an unblighted career or even the opportunity to re-enlist.

The problem of lesbian-baiting also needs to be addressed. When women are in short supply most men will have no access to them. To explain this without losing face, it is easy for men to claim if a woman does date, that she is a whore, or if she doesn't, that she is a lesbian. The person herself is irrelevant; the explanation is about the man's lack of success disguised as lack of interest.

The problem is that being a lesbian is grounds for discharge. While perhaps not quite the same as calling her a drug addict or thief, such casual assertions can have real consequences. Women who stay in service are more likely to be childless and single than are men. In nontraditional fields they may be especially confident and independent. If they have good female "buddies" (a relationship which involves supposedly desirable bonding and cohesion), they are especially vulnerable to such baiting. A good commander needs to police such destructive language.

85. Hence the policy is civilian, not military, and administrative, not legislative, in origin.

86. See Memo, *supra* note 57; SARBIN & KAROLS, *supra* note 3, at A-9 to A-10.

87. *Id.*

88. *Id.*

a particular individual, it creates an atmosphere of hypocrisy, secrecy, fear, divisiveness, and homophobia among military personnel.

The policy also has a profound effect on the way in which the civilian population views homosexuals. Because the military is such an important national institution, it plays a major de facto role in educating the public and shaping public attitudes about homosexuality.⁸⁹ When the military determines that homosexuality is salient to and "incompatible" with service, it is in effect saying that there is something wrong with being homosexual.

It is hard to assess the military's "special nature" argument because the public statements concerning the argument simply repeat the language of the 1981 directive. To many, including a number of federal judges, the policy justifications for excluding gays from service are just common sense. To others, they reduce to exclusion justified by prejudice. The justification is that it is easier and more efficient to accommodate prejudice than it is to eliminate or control it. Unfortunately, an argument based on efficiency puts the military at the mercy of troublemakers by encouraging both sides of the debate to be disruptive. Thus, those who support a change in policy would have to conclude that the better strategy for overturning the current policy is to make it more difficult for the military to exclude homosexuals than to facilitate including them. Indeed, on a number of university campuses, advocacy groups have brought the issue to the public's attention by staging demonstrations against campus ROTC and military recruitment.⁹⁰ The exclusion also provides potential for enormous inefficiency if the draft is reinstated and resisters use the exclusion policy as a way to avoid service.

Thin justifications for the military's policy of excluding gays, coupled with contradictions in practice, have led scholars like Ken Karst to conclude that there is more to the policy than the military is willing to acknowledge. Karst argues that the military is bound to an ideology of masculinity that puts power and weapons in the hands of "real men," and that in order to uphold this ideology, women and homosexual men cannot be permitted to participate as equals.⁹¹ Limiting and excluding these marginal groups enables the military to

89. The military's policy is educational in the sense that it provides the civilian community with "authoritative" definitions of homosexuality and homosexual acts. At one time concern focused on acts; these were defined as criminal. Later, a shift occurred toward thinking of homosexuality as a mental illness. BERUBE, *supra* note 24, at 15. Since being dropped from the American Psychiatric Association's *Diagnostic and Statistical Manual*, homosexuality has been regarded as a preference or orientation.

90. Larry Tye, *Campus ROTC: Target Revived*, BOSTON GLOBE, Oct. 3, 1991, at A1.

91. See Karst, *supra* note 22, at 557.

maintain and exploit the gender line, but more importantly, makes it possible for most men to accept the extraordinary subjection required of them by the military without protest. That is, just by being in and eligible for combat, enlisted men are made to feel superior to the majority of the population they are fighting to defend.⁹²

Let us assume that many homosexuals have served, are serving, and will continue to serve in uniform.⁹³ Some will be well-closeted. Others will be known but not "out." Still others will be discharged or denied reenlistment. Some of these will endure great pain and humiliation. All, however, will be at constant risk of being accused or found out.⁹⁴

What, then, if anything, does the policy accomplish? The real goals of the policy seem to be twofold. First, since the military clearly does not want to eliminate all homosexuals from service (they are too numerous and valuable to be actually excluded), the policy seeks to make them invisible, to keep them from asserting their identity and from making too much noise. Servicemen and women should not appear too butch, or too effeminate, and any participation in homo-

92. *Id.* at 579. That the actual purpose of the policy is something other than what the military claims is demonstrated by the military's failure to achieve its stated goals of keeping women out of harm's way and of keeping homosexuals out of the military. *Id.*

I have concluded that the exclusion policy has been developed primarily with the stereotypical gay identity in mind, and that it has simply been extended to lesbians. Thus, early doubts about the "fitness" of male homosexuals have never been directed toward female homosexuals. Nor has it been suggested that lesbians will become victims, or isolates. Indeed, if anything, the contrary has been suggested in each instance.

93. It is estimated that male homosexuals serve in the military in about the same proportion they subsume of the population as a whole, and that women homosexuals serve in a somewhat higher proportion. See SARBIN & KAROLS, *supra* note 3, at C-5. However, one might expect differences in a volunteer, as opposed to a drafted military. One author claims that 37% of men and 13% of women have had "some" homosexual experience—that is, enough to disqualify them from military service. DAVID A. WARD & GENE KASSEBAUM, *WOMEN'S PRISON* 95 (1965). Even if one adopts a narrow construction of homosexuality and a conservative estimate of their participation in the military, one would have to estimate that 3 to 10% (60,000 to 200,000) of those now serving would not be if the exclusionary policy could be and was fully enforced. For further statistics on homosexuality in the military, see SARBIN & KAROLS, *supra* note 3, at C-1 to C-5.

94. The extent to which enlisted personnel are at risk of being exposed and discharged for being homosexual depends on a variety of factors. Different branches of the service have adopted different attitudes about the importance of enforcing the policy. See *supra* notes 80-105 and accompanying text. Moreover, enforcement appears to be more strict for enlisted than non-enlisted personnel, perhaps because they are younger and less experienced with concealment, or perhaps because they have less privacy. In addition, enforcement for women more often includes extensive witch hunts with accusations, interrogations, and divisive practices. Benecke & Dodge, *supra* note 81, at 222. Finally, the degree of risk depends on the strictness of the policy in force. Presently, the policy on homosexuality is very rigid. During World War II, however, known homosexuals were retained and even reinducted if they could be "rehabilitated." Berube, *supra* note 24, at 33.

sexual acts must be private. Thus, the total exclusion policy is actually a potent tool for requiring invisibility. If someone serves at the discretion of others, the threat of discharge, be it honorable, general, or dishonorable, is a powerful weapon for controlling his or her behavior. But it seems the military wants something more than simply to root out homosexuals. It also wants to eliminate effeminate males from the ranks, even if they are *not* homosexuals. This is based partly on image, but it also appears to be based on a concern about sodomy. In a hyper-macho environment, some *non*-homosexuals believe that sodomizing other men is a means of demonstrating their masculinity. Literature abounds on this practice in United States prisons,⁹⁵ and while the military is certainly not a prison, it is an extremely isolated and hierarchial environment in which coercion and compliance are frequently required. The United States public may continue to tolerate, albeit reluctantly, what are essentially male rapes in prisons, but it is unlikely to do so in a citizen army. Thus, the military makes an effort to exclude potential victims and to prohibit all homosexual acts.⁹⁶

The following chart summarizes apparent practice as it relates to the exclusion policy. It indicates that the military seeks exclusion for heterosexuals who are so hyper-macho as to commit homosexual acts, and for those who appear effeminate. The military also seeks exclusion for all homosexuals who have "come out." Those who are closeted are excluded only if their appearance is stereotypical.

95. One study estimates that 9% of heterosexual men are assaulted in prison. WAYNE WOODEN & JAY PARKER, *MEN BEHIND BARS* 239 (1982). Another author believes that race is a factor in prison rapes. DANIEL LOCKWOOD, *PRISON SEXUAL VIOLENCE* 37 (1980).

96. The military's policy also eliminates any need to consider whether there was consent to a particular act, and prevents homoerotic actions which might be stimulated by desired male bonding.

PRACTICE v. POLICY: MILITARY EXCLUSIONS ACTUALLY DESIRED

PERSONNEL	RELATIONSHIP TO "CLOSET"	HOMOSEXUAL			
		ACTS	WORDS	IDENTITY	APPEARANCE
HOMOSEXUALS	IN	INCLUDE	INCLUDE	INCLUDE	EXCLUDE
	OUT	EXCLUDE	EXCLUDE	EXCLUDE	EXCLUDE
HETEROSEXUALS		EXCLUDE (HYPER- MACHO)	INCLUDE (SERVICE AVOIDERS)		EXCLUDE (POTENTIAL VICTIMS)

A military organization strives for uniformity and compliance—that is why military personnel wear uniforms. It is not tolerant of any form of individualism or separateness—an understandable impulse given its mission. However, inclusion, rather than exclusion, is an essential element of a citizen army which enjoys broad, strong support. A democracy expects shared risks. Thus, it is to the nation's advantage if its military can successfully, as a matter of course, integrate homosexuals. To do so will require setting aside military claims that homosexuals are a "special case." It will also require setting aside the assertion that the military can train citizens to kill and die, but cannot teach them to be respectful of one another. Conversely, homosexuals may have to submit to a certain degree of social control if they are to participate effectively in military service.

V. LEGAL CHALLENGES TO THE EXCLUSION OF HOMOSEXUALS FROM THE MILITARY

Since the mid-1970s, a number of homosexuals have challenged their military discharges in civilian courts. Plaintiffs in two of the cases have won partial victories, but others have been unsuccessful in securing relief. A brief description of the cases and issues developed in them and an estimate of the usefulness of further litigation follows. Note that the concern here is not "the law," but rather, mechanisms or tactics that can assist in altering existing policy. Thus, instead of organizing the text around legal concepts as they have developed through cases, the discussion treats the cases separately as though each were an initiative for change. Note also the advantage gained by challenging exclusion that results from dismissal, rather than exclu-

sion that results from the refusal to permit enlistment. Already being in service makes it possible to argue good performance. This also weakens DOD arguments that the mere presence of homosexuals contributes to a lack of discipline and morale.

In *Matlovich v. Secretary of the Air Force*,⁹⁷ a decorated Vietnam veteran and non-commissioned officer named Matlovich "came out" to his superiors and was discharged.⁹⁸ Matlovich appealed on grounds of privacy. The court held that the service's policy of excluding gays was constitutional, but since the policy did provide for exceptions in certain cases, Matlovich was entitled to an explanation of why the exception did not apply to him.⁹⁹ When the Air Force failed to act, the court ordered Matlovich to be reinstated.¹⁰⁰ In December 1980, Matlovich settled for money (a partial victory), but the Department of Defense subsequently rewrote its regulation to remove the exceptions and the possibility of a defense based on quality of performance.¹⁰¹ The overall result of this challenge, paradoxically, was to increase restrictiveness.

In *Beller v. Middendorf*,¹⁰² three enlisted members of the Navy admitted to homosexual acts but sought to stay in the service.¹⁰³ One of the defendants had been in the Navy twenty years; another had been in service for fifteen years.¹⁰⁴ The United States Court of Appeals for the Ninth Circuit, however, refused to invalidate the Navy's regulation prohibiting homosexual conduct. Rejecting the plaintiff's claim that private consensual acts are constitutionally protected under the Due Process clause, the court held that "[t]he nature of the employer—the Navy—is crucial to our decision [to uphold the regulation]."¹⁰⁵ The court's opinion, written by Anthony M. Kennedy, now a Supreme Court justice, also reached the conclusion that there was no requirement to judge particular applications of the military regulation, and that, in fact, any "less broad prohibition . . .

97. 591 F.2d 852 (D.C. Cir. 1978).

98. *Id.* at 854.

99. *Id.* at 859.

100. *Matlovich*, 591 F.2d at 854.

101. Note that regardless of homosexual conduct or statements, provision is made for retaining individuals if it is found that the member is not in fact homosexual or bisexual. Memo, *supra* note 57, at A-12.

102. 632 F.2d 788 (9th Cir. 1980), *cert. denied sub nom.* *Miller v. Weinberger*, 454 U.S. 855 (1981).

103. *Id.* at 793.

104. *Id.* at 793-94. In one case, the plaintiff's superior officers up to the level of the Chief of Naval Personnel had recommended retaining him. *Id.* at 794.

105. *Id.* at 810. Interestingly, the court singled out the Navy, in its opinion, rather than referring to the military as a whole.

might be understood as tacit approval" of homosexuality.¹⁰⁶ Further, the court held that the Navy could rationally conclude that the presence of homosexuals "would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties."¹⁰⁷

In a blistering dissent attacking the court's refusal to rehear the case en banc, Judge William Norris argued that the Beller panel "was easily seduced," and that "[i]t accepted without critical scrutiny the Navy's statement of its interests and the importance of those interests."¹⁰⁸ He claimed that the Navy had done nothing to indicate that "war-readiness requires that the private lives of Navy members meet the approval of other members, citizens of host nations, or the Navy itself," and that "intolerance is not a constitutional basis for an infringement of fundamental personal rights."¹⁰⁹ Yet intolerance, or a presumption of intolerance, "is at the very root of each of the dangers which the Navy asserts is posed to its interests by homosexuals."¹¹⁰ The Supreme Court denied certiorari.¹¹¹ Norris remained the lone dissenter, but an eloquent proponent of the position that irrational fear does not justify discrimination.¹¹²

Another case, *Dronenburg v. Zech*,¹¹³ involved an enlisted man who was dismissed after admitting to numerous and repeated homosexual acts in military barracks with younger enlisted men.¹¹⁴ The court held that *Doe v. Commonwealth's Attorney for Richmond*,¹¹⁵ which upheld a Virginia statute criminalizing private consensual homosexual acts, was controlling with regard to any right to privacy the defendant might have.¹¹⁶ As to the question of equal protection and whether or not the Navy regulation was rationally related to an end the Navy was entitled to pursue, a three judge panel found:

To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce

106. *Id.* at 811.

107. *Id.* at 811-12. The court also concluded that allowing gays in the Navy might hamper recruiting efforts. *Id.* at 811.

108. *Miller v. Rumsfeld*, 647 F.2d 80, 87 (9th Cir. 1988), *cert. denied*, 452 U.S. 905 (1981).

109. *Id.* at 88.

110. *Id.*

111. *Beller v. Lehman*, 452 U.S. 905 (1981).

112. For further discussion of the Navy's policy on homosexuality, see MOHR, *supra* note 47, at 193. Mohr labels the principle that current discrimination is not a reason to establish good faith discrimination the "oscar wilde [sic]" principle. *Id.* at 193.

113. 741 F.2d 1388 (D.C. Cir. 1984).

114. *Id.* at 1389.

115. 525 U.S. 901 (1976).

116. *Dronenburg*, 741 F.2d at 1391-92.

social science data or the results of controlled experiments to prove what common sense and common experience demonstrate.¹¹⁷

The United States Court of Appeals for the District of Columbia Circuit denied the defendant's motion for rehearing en banc, but not without arousing a scathingly critical dissent, which accused the majority of throwing down a "gauntlet" to the Supreme Court on the privacy issue.¹¹⁸ The dissent also noted that with so many women now in the military, the issue of sexual conduct among members of a unit is not restricted to the issue of homosexuality, and that mandatory dismissal is not a proper remedy for every heterosexual act of fraternization or harassment.¹¹⁹ The case was not appealed to the Supreme Court, leaving intact the judiciary's policy about homosexuals in the military.¹²⁰

Watkins v. United States Army,¹²¹ probably the best known case on homosexuality in the military, was the other partial victory. At the time he first enlisted in 1967, Watkins had marked "yes" on the form asking if he had homosexual tendencies.¹²² While in the service he was openly gay and performed in drag shows.¹²³ He was initially investigated in 1968 for homosexuality, honorably discharged at the expiration of his enlistment in 1970, readmitted in 1971, investigated in 1972, readmitted in 1974, investigated in 1975, investigated in 1979, readmitted in 1979, and, finally, after the new 1981 regulations were put in place, discharged.¹²⁴ The decision to discharge him in 1981 was based on his 1967 admission that he was a homosexual.¹²⁵ A civilian court enjoined the discharge, finding that the proceedings, which were a repeat of the 1975 proceedings, constituted double jeopardy.¹²⁶ Watkins reenlisted again in 1982 while the case was appealed to the United States Court of Appeals for the Ninth Circuit.¹²⁷

A number of factors argued in Watkins' favor. First, Watkins had consistently received high ratings and the support of individuals

117. *Id.* at 1398. The court also noted the special dangers inherent in a situation where military superiors hold coercive power over their inferiors, "enhanc[ing] the possibility of homosexual seduction." *Id.*

118. 746 F.2d 1579, 1580 (D.C. Cir. 1984).

119. *Id.* at 1581. The dissent noted that the Navy currently handles problems arising from heterosexual relations on a case-by-case basis. *Id.*

120. Rivera, *supra* note 76, at 316.

121. 837 F.2d 1428 (1988), *reh'g en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990).

122. *Id.* at 1429.

123. *Id.* at 1430.

124. *Id.*

125. *Id.* at 1431.

126. *Id.*

127. *Id.* at 1432.

with whom he worked.¹²⁸ Second, unlike prior plaintiffs, who argued that military restrictions on homosexuality violated their right to privacy, Watkins based his claim on an alleged violation of his Fifth Amendment right to equal protection—that is, that the new regulation forbade not just homosexual acts but even homosexual status or “orientation.”¹²⁹ To support Watkins’ claim, the court had to find that: (1) individuals with a homosexual orientation were discriminated against as a class; (2) homosexuals constituted a “suspect” class and, therefore, discrimination on the basis of sexual orientation merits “strict” scrutiny; and (3) the government’s action was not “necessary to serve a compelling governmental interest” and thus did not meet the criteria for strict scrutiny.¹³⁰

The court also had to distinguish *Watkins* from *Bowers v. Hardwick*,¹³¹ the landmark Supreme Court decision which held that homosexuals have no constitutional right to engage in consensual sodomy.¹³² The Ninth Circuit found *Hardwick*, a substantive due process case, to be distinguishable from *Watkins*, which was based on equal protection.¹³³ However, rehearing the case en banc, the Ninth Circuit found for Watkins only on grounds of estoppel. The Supreme Court denied certiorari,¹³⁴ and Watkins received retroactive pay, retirement benefits, and an honorable discharge.¹³⁵ The result was that while Watkins scored a personal victory, the case had no real effect on broader military policy.

Plaintiffs have also challenged the military’s exclusionary policy

128. While the Army’s appeal of the district court injunction was pending, Watkins received 85 out of 85 possible points on an evaluation of his performance and professionalism. *Id.*

129. *Id.* at 1434.

130. *Id.*

131. 478 U.S. 186 (1986).

132. *Id.* at 190. The *Hardwick* case, decided by a 5-4 majority, upheld a Georgia state law criminalizing sodomy. *Id.* at 196. After leaving the court, Justice Lewis F. Powell, Jr., who had voted with the majority, indicated that he thought he “probably made a mistake” in not voting to apply the Constitutional right of privacy to consensual homosexual relations. Linda Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. TIMES, Nov. 5, 1990, at A14.

133. *Watkins v. U.S. Army*, 837 F.2d 1428, 1448 (1988), *reh’g en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990); *see also* Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981). The issue in *Watkins* concerned not acts and privacy, but sexual orientation and class discrimination. *Watkins*, 837 F.2d at 1448. Even after considering the deference owed military regulations, the court found that the Army’s justifications “illegitimately” catered to private biases. *Id.*

134. *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990).

135. *See* Linda Greenhouse, *Gay Soldier Wins Battle to Re-enlist*, N.Y. TIMES, Nov. 5, 1990, at A16.

on First Amendment grounds. In *BenShalom v. Marsh*,¹³⁶ Miriam BenShalom, an Army Reserve sergeant, won reenlistment at the district court level, under the First Amendment right to free speech as well as an equal protection claim as a member of a suspect class.¹³⁷ The military notably made no allegation that BenShalom had engaged in actual homosexual conduct either before or during her military service.¹³⁸ Instead, it argued that its 1981 regulations disqualified her from service.¹³⁹ The Army eventually reinstated her at the direction of the court.¹⁴⁰ However, seven months after her reinstatement, BenShalom's enlistment expired, and she was denied reenlistment on the basis of the new regulations and the statements which had been used against her in her 1976 unlawful discharge case.¹⁴¹ BenShalom appealed, requesting reenlistment, and the court again upheld BenShalom's challenge, declaring Army Reserve Regulation AR 140-111, Table 4-2, "constitutionally void on its face."¹⁴² Victory was brief, however; BenShalom ultimately lost at the appellate court level.¹⁴³

Another resounding rejection of both the privacy and equal protection arguments, and a potent reaffirmation of the special deference argument, occurred in *Woodward v. United States*.¹⁴⁴ Woodward was an officer who had acknowledged homosexual tendencies at the time of his enlistment.¹⁴⁵ Later he was recommended for discharge after he was seen socializing with an enlisted man who was being discharged for homosexuality.¹⁴⁶ The United States Claims Court denied Woodward's for back pay and reinstatement.¹⁴⁷

The Federal Circuit affirmed. Relying on the Supreme Court's opinion in *Bowers v. Hardwick*,¹⁴⁸ the court refused the argument that Woodward's homosexuality was protected under the constitutional

136. 703 F. Supp. 1372 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.* BenShalom v. Stone, 494 U.S. 1004 (1990).

137. *Id.*

138. *Id.* at 1373. This was actually BenShalom's second case. The first had been a test of her 1976 dismissal from the Army because of her (homosexual) status. BenShalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980), *aff'd*, 826 F.2d 722 (7th Cir. 1987). The courts had ordered her reinstated in 1980, but the military took no action until 1987—eleven years after her dismissal. BenShalom v. Marsh, 703 F. Supp. at 1373.

139. BenShalom v. Marsh, 703 F. Supp. at 1374.

140. *Id.*

141. *Id.*

142. *Id.* at 1373.

143. BenShalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied sub nom.* BenShalom v. Stone, 494 U.S. 1004 (1990).

144. 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

145. *Id.* at 1069.

146. *Id.*

147. *Id.* at 1070-71.

148. 478 U.S. 186 (1986).

right to privacy.¹⁴⁹ The court also relied on *Hardwick* to deny that homosexuals constitute a class subject to heightened scrutiny under the constitutional right to equal protection.¹⁵⁰ Finally, the court noted that "[s]pecial deference must be given by a court to the military when adjudicating matters involving their decisions on discipline, morale, composition and the like."¹⁵¹

The most recent case concerning homosexuality and the military, *Pruitt v. Cheney*,¹⁵² was designed to test the prohibition against a person's admission of homosexual orientation. The case was presented as a free speech issue. No acts were involved, and Pruitt was not on active duty.¹⁵³ Pruitt lost at trial level. The court noted in its opinion that

[i]t makes little difference whether a person has committed homosexual acts, or would like to do so, or intends so to do [T]he Army understandably would be apprehensive of the prospect that desire or intent would ripen into attempt or actual performance. . . . It is not for this Court to assess the wisdom of the Army's policy¹⁵⁴

On appeal, the Ninth Circuit took three years after hearing oral arguments before handing down its decision. When it did, it again confirmed that First Amendment free speech rights were not abridged by the military's homosexual exclusion policy. The court did hold, however, that the Army had not demonstrated the rational basis for its regulation, and that Pruitt had the right to argue that the Army had violated the Equal Protection Clause.¹⁵⁵ The new element in this decision is the application of *Palmore v. Sidoti*,¹⁵⁶ which struck down a denial of child custody to a divorced mother based on social disapproval of her second marriage to a man of a different race,¹⁵⁷ and *City of Cleburne v. Cleburne Living Center*,¹⁵⁸ which held that there was no

149. *Woodward*, 871 F.2d at 1074-75.

150. *Id.* at 1075-76. The court noted that *Hardwick* permitted the criminalization of the "the most common sexual practices of homosexuals." *Id.* at 1076 n.10 (citing *Hardwick*, 478 U.S. at 188 n.1, 196). Because "'there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal,'" the court reasoned that, under *Hardwick*, the military's discrimination against homosexuals is constitutional. *Id.* at 1076 (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)).

151. *Id.* at 1077.

152. 943 F.2d 989 (9th Cir. 1991).

153. *Pruitt v. Weinberger*, 659 F. Supp. 625, 627 (C.D. Cal. 1987), *aff'd in part, rev'd in part sub nom. Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991).

154. *Id.*

155. *Pruitt v. Cheney*, 943 F.2d 989, 996 (9th Cir. 1991).

156. 466 U.S. 429 (1984).

157. *Id.* at 434.

158. 473 U.S. 432 (1985).

rational basis for requiring a home for mentally retarded persons to obtain a special permit when other care facilities required no such permit.¹⁵⁹ Thus, the issue of discriminating against individuals because others are prejudiced against them was decided quite differently than in *Beller*, and is sure to play an important part in the next set of arguments.

Another recent applicable decision, *Steffan v. Cheney*,¹⁶⁰ involved the forced resignation of a Naval Academy midshipman who admitted his homosexual orientation just weeks before graduation.¹⁶¹ Steffan challenged the constitutionality of the Pentagon's ban on homosexuals, arguing that the regulation violated his rights of free speech and association, due process, and equal protection.¹⁶² The District Court dismissed the case after Steffan refused to respond to deposition questions during discovery about whether or not he had engaged in homosexual acts.¹⁶³ The Court of Appeals for the D.C. Circuit reversed, holding that because Steffan had not been charged with homosexual conduct by the Navy, the Navy was not entitled to discovery on that issue.¹⁶⁴ The case was remanded back to the District Court, which held that the regulations were rationally related to the state's interest in protecting soldiers and sailors from AIDS.¹⁶⁵

VI. CONCLUSION

This brief synopsis of caselaw spanning the last decade and a half offers little hope that the federal courts will provide relief to those disqualified or rejected from military service on the basis of their homosexuality or participation in homosexual acts.¹⁶⁶ Arguments about quality of performance, privacy, equal protection, and free speech have all been heard and rejected by the judiciary. Often the military's arguments have been accepted without question. Meanwhile, legal scholars continue to mount intellectually elegant challenges to the military's exclusionary policy,¹⁶⁷ although Chief Justice William Rehnquist's doctrine of military deference makes these

159. *Id.* at 455.

160. 733 F. Supp. 121 (D. D.C. 1984), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990).

161. *Id.*

162. *Id.* at 122.

163. *Id.*

164. *Steffan v. Cheney*, 920 F.2d 74, 76 (D.C. Cir. 1990).

165. *Federal Judge Upholds Military Ban on Gays*, MIAMI HERALD, Dec. 10, 1991, at 14A.

166. The only possible opening would appear to be a decision based on *Palmore* and *Pruitt*, prohibiting discrimination because of others' prejudice. See *supra* notes 152-57 and accompanying text.

167. See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 918 (1989) (arguing that "sexual

efforts seem somewhat futile.¹⁶⁸

If the Department of Defense is willing to admit that homosexuals are used when they are needed, as they were recently during the Persian Gulf conflict, then it seems both fair and possible to give them the opportunity to serve in peacetime. Indeed, if, as the military suggests, there must be experimentation in order to manage a newly visible minority before routinely integrating its members into the ranks of service personnel, it seems better to conduct that experimentation now, rather than during wartime.

There are already policies for maintaining discipline and morale in the face of special relationships. They include policies on sexual harassment, fraternization, rape, and public displays of affection. In recent years the military has gained extensive experience in managing special relationships between heterosexuals. There is no reason why it cannot do so with relationships between homosexuals, and do so without gender-specific policies. The military is superb at solving problems by modifying behavior. It is unworthy of an institution of such high caliber to seek to solve a "difference problem" by catering to the prejudices of some citizens by excluding others.

identity is produced by social interaction, and that activity of production is so fundamental . . . that, under the mandate of the equal protection clause, courts are obliged to protect it.").

168. Karst notes that "[i]n the last two decades the idea that judges have virtually nothing to say about any issue involving the military has grown like a weed." Karst, *supra* note 22, at 564. He distinguishes deference based on judicial incompetence or the military as a "separate community" from deference based on emergency needs, noting that the former was developed largely by Chief Justice Rehnquist. *Id.* at 568.