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# Military Policy Toward Homosexuals: Scientific, Historic, and Legal Perspectives

A Thesis
Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

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# Military Policy Toward Homosexuals: Scientific, Historic, and Legal Perspectives

by Major Jeffrey S. Davis, JA

ABSTRACT: This thesis examines military policy toward homosexuals. Scientific, historic, and legal perspectives are reviewed as they relate to current policy and the distinction between homosexual acts and homosexual status. This thesis concludes that the current policy is legal, but can be improved upon by making homosexuality a waivable disqualification for accessions and by giving commanders discretion to retain homosexuals in certain situations.

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# I. INTRODUCTION

Homosexuality is incompatible with military service.[1] So states DOD Dir. 1332.14. Yet there are certainly homosexuals within the military. Current policy is to not let them in.[2] If they somehow get in, they are to be put out.[3] To facilitate this process, current policy allows separation based on homosexual tendencies alone, without proof of any homosexual acts.[4] But many military homosexuals have resisted their separation actions and have proven themselves to be a litigious lot.

The cases often involve a soldier, sailor, or airman who, but for being a homosexual, is outstanding in every respect.[5] Using the testimony of supervisors and co-workers, these servicemembers tend to show the inapplicability of each of the policy reasons used by the military to justify their exclusion.[6] But the current policy contains no exceptions.[7] Commanders have no discretion to retain homosexuals and are themselves derelict if they do not initiate separation action.[8] Should commanders have this discretion? Can the retention policy be altered without altering the accession policy?

Separating people from the military based on sexual orientation, or status, as opposed to acts, may yet lead to a successful challenge under the fundamental rights prong of equal protection.[9] Recently the Supreme Court declined to hear Ben-Shalom v. Marsh, a case raising a challenge under the suspect/quasi-suspect class prong of equal protection, but the Court

has never squarely addressed either prong of equal protection in a homosexuality case.[10]

The policy may also lead to problems if the selective service system is ever put to use. The draft could be avoided by anyone claiming to be a homosexual. Should the military modify this sexual orientation based policy?

Sodomy, whether heterosexual or homosexual, is against the law for members of the armed services.[11] The Supreme Court has held sodomy statutes to be constitutional.[12] But is sodomy the real problem, or is it sexual activity in general? Should the prohibition of sodomy remain in the UCMJ?

Some people don't realize they have homosexual tendencies until after they have enlisted or been commissioned.[13] Should they be treated differently than those people who lie about their sexual orientation in order to enter military service?

This article contends that current policy on accession of homosexuals should be altered to the extent that homosexuality becomes a waivable disqualification. As to separation, Service Secretaries and commanders should have the discretion to retain homosexuals who meet certain criteria. Finally, the military should not separate personnel based on statements of sexual orientation alone, but should also require evidence of prejudice to good order and discipline.

A multidisciplinary approach is used to reach these conclusions. Part II relies on science to explain why

homosexuals exist, in what numbers, and the relationship of homosexuality to concerns other than sexual orientation. Part III is a history of the treatment of homosexuals in the armed forces, with emphasis on treatment in the U.S. Army. National and international trends are also addressed. Part IV is an analysis of the legal arguments that have been made for and against homosexual efforts to serve in the armed forces. Emphasis is placed on equal protection analysis, as the fundamental rights prong of that analysis seems to be the best remaining argument in the homosexual arsenal. Part V is a critical appraisal of current policy, with suggestions for improvement.

## II. SCIENTIFIC PERSPECTIVES

### A. Homosexuality Defined and Theories on Causation

The military has its own definitions for homosexual, bisexual, and homosexual act. A homosexual is defined as a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts. A bisexual is defined as a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts. A homosexual act is defined as bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.[14]

Homosexuality is an area that often leads to heated discussion of divergent views. Science lends objectivity to the discussion. There has been a great

deal of scientific research on the possible causes and effects of homosexuality.

1. The Kinsey Model

In 1948, Dr. Alfred C. Kinsey and two research associates at Indiana University published a nine year case history study on human sexual behavior.[15] Their sample, intended to represent a cross section of the population of the United States, consisted of about 5300 white males from across the country.[16]

Kinsey did not adopt the common practice of labeling people as heterosexual, homosexual, or bisexual. He developed a seven point continuum based on psychologic reactions (specific arousal by same or opposite sex stimuli) and overt heterosexual and homosexual experience. The scale ranges from exclusively heterosexual (rate 0) to exclusively homosexual (rate 6). The middle (rate 3) is equally heterosexual and homosexual. Individuals can be assigned a different position on the scale for each age period of their lives.[17]

Kinsey used the term homosexual in connection with human behavior to mean sexual relations, either overt or psychic, between persons of the same sex.[18] He did not attempt to demonstrate what caused homosexuality. He believed that questions generated from data such as he had gathered should be addressed by those scientists attempting to discover biologic bases, psychologic or social bases, or hereditary bases of homosexuality.[19]

2. Causation

Causation is of interest because it relates to the notion of fault, which relates to conscious choices. "Many homosexuals claim that their sexual orientation is the result of biological forces over which they have no control or choice."[20]

Sexual orientation refers to a consistent preference or ambivalence in regard to the gender of a sexual partner. Heterosexuals consistently prefer the opposite sex, homosexuals consistently prefer the same sex, and bisexuals have varying degrees of ambivalence.[21] The question is: what factor or combination of factors causes or leads to sexual preference?

Throughout the 20th century, scientists have attempted to discover what causes sexual orientation. Most have taken heterosexuality as the norm and tried to explain why a minority of people deviate from it.[22] Some scientists have focused on personal experience and environment, while others have explored genetic and physiological explanations.[23]

Researchers have more recently proposed a theory of how the entire spectrum of human sexual orientation is determined.[24] The theory is that hormonal and neurological variables operating during gestation are the main determinants of sexual orientation. Activation of the sexual orientation does not occur until puberty, and may not stabilize until early adulthood. Personal experience and environment may be

involved in sexual orientation, but it would be very unusual for such variables to overcome a strong predisposition to either heterosexuality or homosexuality.

a. Normal development

From conception, females have two of the same sex chromosomes (XX), while males have two different sex chromosomes (XY). A fetus will naturally develop into a female unless certain events occur. Soon after conception of a male, genes in the Y chromosome trigger the production of biochemicals such as testosterone that cause male sex organs to appear. Other cells (called sertoli cells) also form and prevent the formation of structures that would otherwise become the uterus and fallopian tubes of a female.[25]

For fetuses being masculinized, testosterone creates hormone receptor sites within cells. During puberty, testosterone is produced in large quantities and bonds to the receptor sites formed during gestation.[26]

Separate areas of the brain control masculine and feminine behavior, and the masculine areas normally develop at the expense of the feminine areas. For example, the preoptic anterior nucleus of the hypothalamus is generally over twice as large in men as in women. This area appears to regulate the masculine sexual orientation tendency to mount in response to various feminine cues. Neurological organization for

this area occurs during the 3d and 4th months of gestation.[27]

The norm is for males and females to develop a heterosexual orientation after a complex series of biochemical reactions that occur during gestation. A bisexual or homosexual orientation may result if these reactions are modified due to genetic variations, biochemicals produced in response to stressful situations, drugs taken by the pregnant mother, or other variables.[28]

b. Deviations from the norm

Scientists have modified the above described variables in laboratory experiments. Male rats with testes removed and female rats that have received testosterone injections, both prior to completion of neuro-organization, have been induced to display homosexual behavior. Similar work has been done with rhesus monkeys.[29]

Drugs called antiandrogens block the effects of testosterone and other sex hormones. Administration of antiandrogens to a pregnant rat will often result in homosexual behavior among the offspring after they reach puberty. Barbiturates, marijuana, and other drugs can also partially divert or block masculinization of the nervous system during neuro-organization.[30] Alcohol has been found to have both demasculinizing and defeminizing effects on the brains of both sexes of rats.[31]

Severe stress to a mother during neuro-organization

of a fetus can lead to bisexual and homosexual male offspring. Stress causes depressed testosterone production in many species of mammals. The stress hormones such as adrenalin appear to inhibit production of testosterone. The hormones from the mother then pass through the placenta and affect the fetus.[32]

The only behavioral variable found to induce homosexual activity is total sexual segregation. Rhesus monkeys in this situation have displayed homosexual behavior. But when later given continued opportunities to "monkey around" with the opposite sex, most monkeys have displayed heterosexual behavior.[33]

Though scientists can't conduct sexual orientation experiments on humans, there is evidence that many of the methods used to induce homosexual behavior in lab animals have similar effects on humans.[34]

Four types of genetic mutations have been identified as probably causing homosexual or bisexual traits in humans. They all seem to involve chromosomes other than the sex chromosomes. Only one of the four types affects genetic females (XX).[35] These are not situations where a person simply has a different sexual orientation. Depending on the type of mutation, a genetic male may have the physical appearance of a female, or a genetic female may have male genitalia.

A drug used to lessen the risk of miscarriage, the synthetic estrogen diethylstilbesterol (DES), has been linked to lesbian daughters of mothers who took the drug during pregnancy. One study found lesbianism to be more common among women whose mothers had taken DES than among women whose mothers had not.[36]

Stress has also been linked to homosexuals and bisexuals. A study of males born in Germany between 1934 and 1953 indicated an unusually high proportion of homosexuals were born during and immediately after World War II (from 1941 to 1946).[37] Another study involved asking mothers to recall any stressful episodes they experienced during pregnancy, such as deaths of close relatives, divorces, separations, traumatic financial or sexual experiences, or feelings of severe anxiety. The mothers who could recall such episodes included nearly two-thirds of the mothers of male homosexuals, one-third of the mothers of bisexuals, and less than 10% of the mothers of heterosexuals.[38]

Several hypotheses follow from the prenatal neurohormone theory, and many have been tested. For example, homosexuality should be primarily a male phenomenon.[39] This is because mammals are fundamentally female and become male only when all the genetic and biochemical reactions associated with the addition of the Y chromosome work in the normal manner. Natural selection would also tend to favor fewer deviations in females, because only females can gestate offspring. Evidence from humans worldwide and from all other mammals studied supports the idea that homosexuality is more common among males than among females.[40]

Another hypothesis is that homosexuality should often be an inherited trait, because there are likely to be many genetic factors that increase the chance of a deviation from the biochemical norm.[41] "Support for

this deduction can be found in studies reporting considerably higher concordance rates for homosexuality among identical twins than among fraternal twins . . . [S]everal studies have found that close relatives of homosexuals have higher incidences of homosexuality than the general population." One study, for example, found "that nearly one-quarter of all brothers of male homosexuals also were homosexuals, a much higher rate than the 3-7% typically reported among human males generally."[42]

The prenatal hormone theory also "implies that efforts to change sexual orientation should be essentially confined to modifying where, when, and how sexual orientation is expressed; the orientation itself should not change."[43] This is because

> sexual orientation appears to be largely determined by hypothalamic-limbic system brain functioning, and most conditioning procedures, and certainly all counseling methods, gear their corrective efforts at neocortical functioning ("rational thought"). Although the neocortex's ability to learn ways to override and circumvent lower brain functioning should never be underestimated, basically a homosexual's neocortex would have to learn how to prevent hypothalamic-limbic areas of the brain from functioning as they were organized to function.[44]

The vast majority of homosexuals never seek treatment.[45] Of those who have, there have been some

reports of successfully changing homosexuals into heterosexuals, but the criteria for success have often been "either vague or considerably less than exclusive heterosexual behavior."[46] The best predictor of whether a homosexual will respond to treatment is the amount of heterosexual experience prior to treatment.[47] Those who seek treatment are thus more likely to be bisexuals than homosexuals. At any rate, the reports on treatment of homosexuality seem consistent with the hypothesis that efforts to change sexual orientation should be minimally effective.[48]

The prenatal neurohormone theory, if correct, would indicate that those homosexuals who attribute their sexual orientation to biological forces beyond their control are right. But there are many social scientists who do not share this view. For example, many behavioral scientists favor experiential explanations for sexual orientation,[49] and some psychoanalysts maintain that homosexuality is a neurosis that can be cured.[50] Still, the prevailing view among psychologists is that "the diversity among sexual orientations is likely to be understood from a combination of sociological, cultural, and biological factors."[51] The prenatal hormone theory combines such factors and makes sense.

B. The Incidence of Homosexuality

1. Homosexuals in society

The sexual histories of the 5300 subjects in the Kinsey study revealed a surprising incidence of homosexual experience in the general population.[52] For the purpose of reporting incidence, Kinsey defined a homosexual experience as physical contact to the point of orgasm with another male.[53] Kinsey's data indicated that:

> [A]t least 37% of the male population has some homosexual experience between the beginning of adolescence and old age . . . Some of these persons have but a single experience, and some of them have much more or even a lifetime of experience; but all of them have at least some experience to the point of orgasm.[54]

Kinsey made generalizations from his data with his seven point heterosexual-homosexual scale.[55] The generalizations all pertained to white males after the onset of adolescence up to age 55, and included: 63% never have overt homosexual experience to the point of orgasm, approximately 13% react erotically to other males without having overt homosexual contacts, 25% have more than incidental homosexual experience or reactions (rates 2-6) for at least three years, 18% have at least as much homosexual as heterosexual in their histories (rates 3-6) for at least three years, 13% have more of the homosexual than the heterosexual

(rates 4-6) for at least three years, 10% are more or less exclusively homosexual (rates 5 or 6) for at least three years, 8% are exclusively homosexual (rate 6) for at least three years, and 4% are exclusively homosexual throughout their lives.[56]

> Since only 50 per cent of the population is exclusively heterosexual throughout its adult life, and since only 4 per cent of the population is exclusively homosexual throughout its life, it appears that nearly half (46%) of the population engages in both heterosexual and homosexual activities, or reacts to persons of both sexes, in the course of their adult lives.[57]

Kinsey was looking at American white males in the 1940s. Worldwide, as of the 1980s, the incidence of exclusively homosexual males was estimated at 3-5%, regardless of varying degrees of social tolerance, intolerance, or repression.[58]

The incidence of "feminized males" or "queens," who are often caricatured, is estimated at about 10% of the male homosexual population.[59] There is also evidence that homosexuality is more common among males than among females, both in humans worldwide and in all other mammals that have been studied.[60] Kinsey found that only 2 or 3% of women were mostly or exclusively homosexual on a lifelong basis.[61]

## 2. Homosexuals in the military

If the incidence of homosexuals in the military is the same as the incidence in the general population, about 3-5% of the military is exclusively homosexual. Data that impact upon incidence include separations for homosexuality and studies of known homosexuals who report military service in their histories.

There were few discharges for homosexuality during World War II.[62] Data for separations due to homosexuality in the post-war 1940s through the 1950s can only be estimated due to the nature of military record keeping during those periods.[63] The Army, for example, did not record the number of enlisted personnel separated for homosexuality until mid-1960.[64] Nevertheless, data reviewed by Williams and Weinberg (1971) suggest that about 2000 persons per year, or one out of every 1500 servicemen (.066%), were separated from the armed forces for homosexuality between the late forties and mid-fifties.[65]

Even in the 1960s, the services did not have uniform data collection on homosexual separations. The Army separated 6,139 enlisted soldiers for homosexuality during a seven and one-half year period from 1960-1967 (averaging 818 per year).[66] From 1957 to 1965, the Army allowed an average of 30 officers per year to resign in lieu of administrative elimination action for homosexuality.[67] From 1950 to 1965, the Navy separated a total of 17,392 enlisted men for homosexuality for an average of 1087 per year.[68] No

statistics are available for naval officers during this period.[69]

When similar data for the Marine Corps and Air Force are considered, the average estimate of personnel separated from all armed forces for homosexuality from the mid-fifties through the sixties is between 2000 and 3000 per year.[70] The Navy accounted for the highest percentage of separations, and indeed, in 1961 stated that homosexuality and other sexual perversions accounted for approximately 40% of all its Undesirable Discharges.[71]

More recent and complete data of administrative separations for homosexuality for all services are available for fiscal years 1985 to 1987.[72] The reported categories include enlisted and officer personnel by gender.

The Army had 1197 separations, which included 829 enlisted males (.05%, or 5 in 10,000), 354 enlisted women (.17%), 11 male officers (.004%), and 3 female officers (.007%). The Navy had 2241, which included 1825 enlisted males (.13%), 382 enlisted females (.27%), 30 male officers (.02%), and 4 female officers (.02%). Two of the Navy personnel were separated judicially rather than administratively. The Marine Corps had 309 separations, which included 213 enlisted males (.04%), 90 enlisted females (.33%), 6 male officers (.01%), and no female officers. The Air Force had 912, which included 644 enlisted males (.043%), 220 enlisted females (.1%), 41 male officers (.01%), and 7 female officers (.02%).

The data from fiscal years 1985 to 1987 show that all of the services except the Navy are separating about 4 or 5 enlisted men per 10,000 for homosexuality, while the Navy is separating 13 enlisted men per 10,000. Naval officers of both sexes also have higher separation rates than other services. The Marine Corps has the highest rate of separations for enlisted women at 33 per 10,000, followed by the Navy at 27 per 10,000.

The important finding is the relatively small number of separations for homosexuality in all services (from 1:10,000 to 33:10,000) in relation to the incidence of exclusive homosexual orientation in the general population (from 300:10,000 to 500:10,000).[73] This raises the question of how many homosexuals serve in the military without ever getting caught.

One study from the World War II era addresses this question.[74] It traced 183 men known to be homosexual prior to entering the military. Of these, 51 were rejected at induction and 14 were admitted but later discharged. The remaining 118 served from one to five years, and 68 of them served as officers.

Two studies with results similar to the World War II study were reported in 1967.[75] In one, 550 white homosexual males who had served in the military indicated that 80% experienced no difficulties. The other study included 214 male homosexuals who had served, with 77% receiving honorable discharges. In 1971, Williams and Weinberg reported that 76% of the 136 homosexuals in their study received honorable discharges.[76]

Dr. Joseph Harry, in a study of 1,456 men and women interviewed in 1969 and 1970, found that homosexual and heterosexual men seemed equally likely to have served in the military, while lesbians were more likely than heterosexual women to have served.[77] Sexual orientation was determined using the Kinsey heterosexual-homosexual rating scale, with homosexuals being defined at those scoring four or higher.[78] There were no findings that explained why higher numbers of lesbians entered the service.[79]

Harry reported that one-third of the homosexual males who did not serve in the military avoided service by declaring their homosexuality. This figure represented 14% of all homosexuals (those who did not serve and those who did serve), and raised the question of why more homosexuals did not declare their homosexuality.[80] One explanation was that many did not know they were homosexuals at the time they volunteered or were drafted.

Harry found the median age of fully realizing one's homosexuality and becoming socially and sexually active to be approximately 19 or 20, and that most men come to a realization of their homosexuality by their mid-twenties.[81] Kinsey had earlier found homosexual behavior patterns in males to be "largely established" by age 16, with only a small portion of men materially modifying their sexual behavior patterns upon entering military service.[82] Harry found:

> Those who defined themselves as homosexual at later ages were more likely to have had military service. Similarly, those who

> became socially active homosexuals after the age of 22 were a good deal more likely to have served in the military. Those who came to an early realization of their homosexuality, and those who came out earlier, are more likely to have declared their homosexuality to the military.[83]

Some support for Harry's findings comes from a study of homosexuals living in the Chicago area by the Institute for Sex Research in 1967. Of those with prior military service, 27 of 80, or 34%, reported that they did not consider themselves homosexual before induction.[84]

From this data it appears that the incidence of homosexual men in the general population may approximate the incidence of homosexual men in the military, and the incidence of homosexual women may be greater in the military than in the general population. It appears that 75% or more of the homosexuals who serve in the military are never detected, and a significant percentage may not realize they have a homosexual orientation until after entering the military.

Homosexuals are detected by the military in three main ways: discovery through another person (sometimes related to jealousy, a lovers' tiff, or blackmail), voluntary admissions (usually for the purpose of getting out of the military), and the homosexual's own indiscretion.[85] Variables related to detection include frequency of homosexual behavior prior to entering the

military, sexual behavior in the military, and status of partner (military or non-military).[86]

The following conclusions result from the Williams and Weinberg study: Those engaging in more frequent homosexual activity prior to entry are more likely to get caught, just as those who do the same while in the military are more likely to get caught. Those homosexuals who have a military as opposed to a non-military sex partner are also more likely to get caught. Common sense says as much. The interesting data comes from correlating the different variables with manner of discovery. Those who engage in more frequent sex prior to entering the military and use non-military partners are the least likely to get caught. Those who engage in sex more frequently upon entering the military are more likely to come to the attention of the military voluntarily, whereas those who engage in sex less frequently upon entry are more likely to be caught through their own indiscretion.[87]

Still, it appears that the great majority of homosexuals who serve in the military are never detected at all.

## C. Nonsexual Differences Between Homosexuals and Heterosexuals

"The vast majority of homosexual men and women never consult with a mental health professional of any sort."[88] In 1973, the American Psychiatric Association voted to stop classifying homosexuality as a mental disorder.[89] But some homosexuals still seek the

assistance of psychiatrists because they do not want to be homosexual.[90] Homosexuality unwanted by a patient is called ego dystonic homosexuality.[91] These patients range from those wishing to increase their heterosexual responsiveness to those with low self-esteem who want to adjust to a homosexual orientation.[92] Either way, the psychological baggage carried by ego dystonic homosexuals sets them apart from heterosexuals and most homosexuals.

The more important question is whether the majority of homosexuals have more emotional and psychological problems than heterosexuals. The bottom line is that they do not.

> For the last fifteen years, many research studies have evaluated the performance of homosexuals and heterosexuals on a variety of psychological tests. A recent review of data from dozens of these studies concluded that there are no psychological tests that can distinguish between homosexuals and heterosexuals and there is no evidence of higher rates of emotional instability or psychiatric illness among homosexuals than among heterosexuals.[93]

The two problem areas where homosexuals are over represented are alcohol abuse[94] and the acquired immune deficiency syndrome (AIDS).[95] In a 1980 report of problems surfaced by homosexuals during contacts with family physicians, alcoholism was found to be slightly more prevalent in the homosexual population.[96] A study of the lifetime drinking histories of homosexual and

heterosexual women interviewed in the late 1960s suggested significantly more problem drinking in the lesbian sample.[97]

A 1978 study of four urban areas in the Midwest reported that about one-third of male homosexuals surveyed were alcoholic.[98] More recently, in a study comparing the preservice adjustment of homosexual and heterosexual military accessions tested in 1983, homosexuals who had been discovered and discharged did as well or better than heterosexuals in most tested areas, but did less well in preservice drug and alcohol use.[99]

The acquired immune deficiency syndrome (AIDS) is a fatal disease with no known cure. The virus that causes the disease, the human immunodeficiency virus (HIV), is transmitted by body fluids such as blood and semen. By February 1990, 60% of the 119,590 known cases of AIDS in the United States were homosexual or bisexual men, 21% were female and heterosexual male intravenous drug users, 7% were homosexual/bisexual men who were also intravenous drug users, and 5% were attributed to heterosexual contacts.[100]

Anyone can get AIDS. Homosexual and bisexual men are particularly susceptible because they often have multiple sex partners, thereby increasing the risk of contact with an infected person, and because anal sodomy lends itself to transmission of the disease. The military has an active program to screen personnel and potential accessions for HIV.[101] This probably keeps some homosexuals out of the military.

Ironically, it also makes the military one of the safest places to engage in sodomy.

## III. HISTORIC PERSPECTIVES

> Don't talk to me about naval tradition. It's nothing but rum, sodomy, and the lash.
> Winston Churchill

### A. Historical Antecedents

Homosexuality and bisexuality are nothing new. Forms of each were widely accepted in ancient Greece.[102] The poet Sappho lived circa 600 B.C. on the Isle of Lesbos, from which the term lesbian is derived.[103]

Plato lived from about 427-347 B.C.[104] His Symposium praised the virtues of male homosexuality and suggested that pairs of homosexual lovers would make the best soldiers.[105] One Greek bisexual known to have done well was Alexander the Great, who lived from 356-323 B.C. and conquered an empire that stretched from present-day Yugoslavia to the Himalayas.[106]

Jewish homosexuals presumably weren't doing so well. The Old Testament has some of the earliest writings on the subject, such as Leviticus 20:13: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[107] Most historians have written that Christianity persecuted and condemned homosexuals from

its beginnings as well, but there is also evidence that Catholic Europe more or less tolerated homosexuality until the Middle Ages.[108]

> The primary ammunition for the Church's position against homosexuality came from the writings of Saints Augustine and Thomas Aquinas, who both suggested that any sexual acts that could not lead to conception were unnatural and therefor sinful. Using this line of reasoning, the Church became a potent force in the regulation (and punishment) of sexual behavior. While some homosexuals were mildly rebuked and given prayer as penitence, others were tortured or burned at the stake.[109]

In England, the ecclesiastical law against buggery (anal intercourse) became firmly established as the criminal law of the state in 1563.[110] What had been one of the sins against nature became one of the "crimes against nature." This terminology is still used to describe sodomy in many jurisdictions.[111]

Ecclesiastical law served as the basis for punishing homosexual behavior in Europe until the 19th century, when the Napoleonic Code led to a liberalization of attitudes.[112] The 19th century also saw homosexuality take on the status of a sickness to be treated by the medical community.[113]

The history of anti-sodomy laws in America was succinctly stated in Bowers v. Hardwick, the Supreme Court case holding that anti-sodomy statutes are constitutional:

> Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.[114]

B. Military Law

Military law, as applied to homosexuals and homosexual acts, can be divided into statutes used to prosecute and regulations used to keep homosexuals out of the service. Both have evolved over the years.

1. Sodomy Statutes

The Articles of War of 1916 became effective March 1, 1917, and were the first complete revision of military law since the Articles of War of 1806.[115] The 93d Article of this revision, which addressed "miscellaneous crimes and offenses," proscribed assault with intent to commit any felony, including assault with intent to commit sodomy.[116] This was the first mention of sodomy in military law. It did not proscribe sodomy; only assault with intent to commit

sodomy. The Manual for Courts-Martial, 1917, provided the following guidance:

> Sodomy consists in sexual connection with any brute animal, or in sexual connection, per anum, by a man with any man or woman. (Wharton, vol.2, p. 538.)
>
> Penetration of the mouth of the person does not constitute this offense.
>
> Both parties are liable as principals if each is adult and consents; but if either be a boy of tender age the adult alone is liable, and although the boy consent the act is still by force.
>
> Penetration alone is sufficient.
>
> An assault with intent to commit this offense consists of an assault on a human being with intent to penetrate his or her person per anum.[117]

This rather narrowly drafted statute, proscribing only assault with the intent to commit anal sodomy, did not last long. Following World War I, Congress enacted new Articles of War in 1920.[118] For the first time, sodomy was included as a separate offense among the "miscellaneous crimes and offenses."[119] The definition was expanded to include oral sodomy: "Penetration of the mouth of the person also constitutes this offense."[120] Curiously, though, assault with intent to commit sodomy was still limited to assault "with intent to penetrate his or her person per anum."[121] This remained the law through World War II. The sodomy statute did not change again until 1951, with the

adoption of article 125 of the Uniform Code of Military Justice.[122] Article 125 states: "Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense."[123] The Manual for Courts-Martial, 1951, provided the following discussion:

> It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal.[124]

Assault with intent to commit sodomy became part of article 134, UCMJ, and was not limited to any particular variety of sodomy.[125] These laws have remained substantially unchanged except for altering the maximum punishments for certain forms of the offenses.[126]

The court-martial cases tend to have aggravating factors such as assaultive conduct, coercion, involvement of a minor, or abuse of rank. Though a court-martial offense since 1920, consensual sodomy without aggravating factors, when detected, has historically led to administrative separation.[127]

## 2. Regulations

Regulations pertaining to homosexuality or homosexual acts are generally of three interrelated varieties: accession, reenlistment, and separation. The rules for officers are the same as the rules for enlisted personnel, though they are found in different regulations. The different services have substantially similar regulations, as they are all derived from the same Department of Defense directives.[128]

Both the Army and the Navy announced at the beginning of World War II that they intended to exclude all persons with homosexual histories.[129] But, the social climate being as it was, "few men with any common sense would admit their homosexual experience to draft boards or to psychiatrists at induction centers or in the services."[130]

From 1922 to 1945, Army enlisted personnel suspected or charged with homosexual attempts or acts faced the prospect of a "Section VIII" discharge.[131] The general heading for Section VIII was "inaptness or undesirable habits or traits of character." Specific traits, such as homosexual behavior, were not listed. Most soldiers discharged under Section VIII received an honorable discharge. In cases of psychopathic behavior, chronic alcoholism, or sexual perversion including homosexuality, the discharge was without honor.[132]

In 1945, War Department policy concerning homosexuals was to either court-martial them, or hospitalize those deemed to be "reclaimable."

Hospitalization was to be followed by return to duty, separation, or court-martial. Mere confession of homosexual tendencies to a psychiatrist was not sufficient cause for discharge. Hospitalization was required, to be followed by return to duty or separation.[133]

The postwar homosexual policy reached its most liberal point on March 23, 1946, with the publication of War Department Circular No. 85.

> This order made it clear that enlisted personnel who were to be discharged because of homosexual tendencies, yet had not committed any sexual offense while in the service, could be discharged honorably. For officers in this category, it was further provided that they be permitted to resign under honorable conditions.[134]

The pendulum began to swing the other way in 1948. The provision for honorable discharge was deleted. Homosexuals were to be tried by court-martial or separated as unfit with an undesirable discharge. The category of those "unfit" at this time included criminals, pathological liars, homosexuals, drug addicts, misconduct (sic), and sexual perverts. But, in those cases where there had been a long period of good service, a homosexual could be separated as "unsuitable" (with a general discharge) rather than as unfit.[135]

In 1949, the newly created Department of Defense issued a directive outlining a harsher policy on homosexuality for all branches of the service.[136] The

1950 Army Regulation implementing this policy divided homosexuals into three classes.

Class I homosexuals were those whose homosexual offenses involved assault or coercion as characterized by force, fraud, intimidation, or the seduction of a minor (regardless of the minor's cooperation). A general court-martial was mandatory for this category. Class II homosexuals were those who either engaged in or attempted to engage in homosexual acts. Preferral of court-martial charges was mandatory, but a resignation in lieu of court-martial could be accepted from officers, or a statement accepting a dishonorable discharge could be accepted from enlisted soldiers. Class III homosexuals were personnel who exhibited, professed, or admitted homosexual tendencies but had not committed any provable acts or offenses. Class III also included personnel who committed homosexual acts outside military jurisdiction. Class III homosexuals could receive either an honorable or a general discharge.[137]

In 1955, a Class III homosexual could get an honorable discharge if he or she had admitted to homosexual tendencies at induction but was inducted anyway, or if there was "heroic service" indicated in the soldier's record, and provisions were made to retain personnel who became involved in homosexual acts but were not "true, confirmed, or habitual" homosexuals.[138] By 1958, an honorable discharge was mandatory for class III homosexuals. Convening authorities could also approve an honorable or general discharge for class II homosexuals if the individual

concerned disclosed his homosexual tendencies upon entering the service, or had performed outstanding or heroic service, or had performed service over an extended period and it would be in the best interests of the service.[139]

In 1966, the Army required a psychiatric examination prior to separation for homosexuality.[140] In 1970, the homosexuality regulation was superseded and became parts of regulations that covered all types of unfitness and unsuitability discharges.[141] Unsuitability could be demonstrated by evidence of homosexual "tendencies, desires, or interests" (language later found to be unconstitutional).[142] In 1972, the unfitness and unsuitability provisions for enlisted personnel became chapters 14 and 13 of Army Regulation 635-200, the regulation pertaining to all types of enlisted personnel separations.[143]

This was significant because separation boards convened pursuant to AR 635-200 generally had the authority to recommend retention of soldiers being processed for elimination, and commanders could disapprove a board's recommendation to separate. This provided two loopholes for some homosexuals, even though the Army policy was simply that homosexuality is incompatible with military service. A similar problem developed with officer separations, because the officer elimination regulation implied that separation was discretionary.[144] Indeed, prior to February 1977, the Army's litigation posture was that there was discretion to retain homosexuals.[145]

Meanwhile, the Air Force and the Navy were suffering some setbacks with their homosexuality regulations. The Navy regulation on homosexuality, dated July 31, 1972, did not provide any terms of exception to the general policy of separating homosexuals.[146] But in litigation in 1974, the Navy argued that the regulation did not require mandatory discharge of homosexuals.[147]

The application of the Navy regulation became an issue in Berg v. Claytor, a case involving a homosexual officer.[148] The separation board deciding Ensign Berg's case was instructed that it had discretion to recommend retention. The court reviewing the case on appeal could not find in the record any indication of "the actual considerations which went into the Navy's ultimate decision not to retain Berg."[149] The court remanded the case to the Secretary of the Navy for a fuller articulation of the Navy policy on retention of homosexuals. Subsequent case history does not indicate whether such matters were ever presented.

In Matlovich v. Secretary of the Air Force,[150] a companion case to Berg v. Claytor, application of the Air Force regulation on discharge of homosexuals was at issue.[151] Technical Sergeant Matlovich, after 12 years of service, applied in 1975 for an exception to the policy of discharging homosexuals. The Air Force regulation expressly provided for exceptions where "the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised," and added "an exception is not

warranted simply because the airman has extensive service."[152]

Matlovich's request was denied, and discharge proceedings were initiated. During judicial review following his discharge, the Air Force stipulated that other homosexuals had been retained in the past.[153] Despite his outstanding record, the Air Force said his case lacked the "unusual circumstances" that existed in some other cases. The Air Force did not articulate what constituted "unusual circumstances." The court remanded the case for the Air Force to clarify its policy on retention of homosexuals.[154] Subsequent case history does not indicate whether such matters were ever presented.

In Ben-Shalom v. Secretary of Army, the Army in 1980 was told that the language it had been using since 1970 to define unsuitability due to homosexual "tendencies, desires, and interests" was unconstitutional.[155] The language violated the First Amendment and the constitutional right to privacy.[156] The Army had been using this language in several different regulations concerning active duty and reserve officer and enlisted accessions, reenlistments, and separations.[157] The definition was changed after Ben-Shalom I so that discharge for homosexual tendencies included those "admitted homosexuals, but as to whom there is no evidence that they engaged in homosexual acts either before or during military service. A homosexual is an individual, regardless of sex, who desires bodily contact . . ."[158]

In 1981, the Army revised the enlisted separations regulation, AR 635-200, to create a separate chapter for separations due to homosexuality.[159] The policy made it clear that all personnel fitting the definition of a homosexual were to be separated, with no exceptions. In the area of homosexual acts, an exception could be made if a soldier met five criteria which essentially meant the soldier wasn't really a homosexual.[160] The Department of Defense issued a directive in 1982 that made this total exclusion policy uniform throughout all the Services.[161] There have been no major changes to regulations that address homosexuality since 1982.

C. National and International Trends

During the 1950s, the American Law Institute recommended that states adopt a Model Penal Code that decriminalized all non-violent consensual sexual activity between adults in private, but retained a prohibition on public solicitation to engage in deviate sexual activity.[162] As of 1987, twenty-four states had either adopted the Model Penal Code or had otherwise removed criminal penalties for consensual sodomy.[163] Attempts to get other states to repeal sodomy statutes have not been successful since the June 1986 Bowers v. Hardwick decision.[164]

Internationally, the status of laws concerning homosexual behavior as of 1988 was:

> In 5 countries (and in some parts of the USA, Canada, and Australia) the law protects gays

> and lesbians against discrimination. In 64 countries homosexual behaviour is not illegal (although different ages of consent for homo- and heterosexual behaviour may exist), but there is no protection against discrimination on the basis of sexual orientation. In 55 countries homosexual behaviour is illegal (in most cases between men, but that doesn't mean that the situation of lesbians is any better), and in 58 countries no information is yet available. Legally speaking, the situation is . . . worst in Africa and rather better in Europe.[165]

A number of countries have tackled the issue of whether homosexuals should be allowed in the military. Many countries do not allow homosexuals to serve, even where homosexual acts between consenting adults are legal. Such countries include Canada, Peru, Venezuela, New Zealand, Italy, Great Britain and Northern Ireland.[166]

Some countries proscribe homosexual acts without addressing homosexual status. Brazil does not outlaw homosexual acts outside the military, but criminalizes "indecent acts, homosexual or not" between soldiers.[167] In Spain, homosexual acts have not been illegal since 1978, but sexual acts between soldiers on duty inside barracks are illegal.[168]

At least five countries in addition to Brazil and Spain allow homosexuals in the military. In Israel, homosexuality has not been a reason for dismissal from

the armed forces since 1988, but homosexuals are not allowed to have security jobs.[169] It has been legal for homosexuals to serve in the armed forces of Denmark since 1979.[170] Homosexuals may serve in the armed forces of the Federal Republic of Germany, but they are not considered to be suitable for senior positions.[171] In the Netherlands, the Dutch have allowed homosexuals to serve since 1974.[172] And Sweden has allowed homosexuals in the armed forces since 1979.[173]

## IV. LEGAL PERSPECTIVES

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. O.W. Holmes[174]

For a number of years, most of the litigation in this area involved former military personnel who had been discharged for homosexuality suing to get their records amended because they weren't really homosexuals, or so went the argument.[175] These attacks proceeded mostly on procedural grounds, such as the military not following its own regulations.[176] In the 1970s the focus changed, and more of the litigation was from homosexuals who admitted their homosexuality, but were attacking military policy and regulations on constitutional grounds.[177] Some of the cases were

decided on the constitutional issues. Others never got that far. This section reviews some of the legal theories advocated for and against these efforts.

A. Sodomy Statutes

The statutory proscription of sodomy provides the moral bedrock on which the military builds its policy against homosexuals. The military statute, article 125, UCMJ, proscribes both homosexual and heterosexual sodomy. It was attacked in Hatheway v. Secretary of the Army.[178] Lieutenant Hatheway claimed that selective prosecution of homosexual sodomy under article 125 violated equal protection, and that article 125 was unconstitutional as to private heterosexual acts. He also claimed that article 125 violated the First Amendment prohibition respecting establishment of religion, and that article 125 unconstitutionally violated his right to personal autonomy.

Hatheway lost. The 9th Circuit Court of Appeals held that the convening authority could selectively prosecute those cases most likely to undermine military order and discipline, that Hatheway lacked standing as to private heterosexual acts, that article 125 has a legitimate secular purpose and effect, and that Hatheway's personal autonomy argument carried less weight than the government interests, especially as Hatheway's acts with a subordinate enlisted soldier had been viewed in a barracks by other enlisted soldiers.

The Supreme Court squarely addressed the constitutionality of a state's sodomy statute in Bowers

v. Hardwick in 1986. Framing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time," the Court held that it did not.[179] Hardwick had challenged the Georgia sodomy statute, which prohibited all sodomy, both homosexual and heterosexual,[180] and which had been the law in Georgia since 1816.[181]

The 11th Circuit had held "that the Georgia statute violated Hardwick's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[182]

Had the Court agreed to recognize a fundamental right to engage in sodomy, any law affecting the exercise of that right would have to be supported by a compelling government interest.[183] In deciding against Hardwick, the Court stated that there should be great resistance to expanding the substantive reach of the Due Process Clause, particularly if it required redefining the category of fundamental rights.[184]

Of perhaps future significance, Hardwick did not defend at the Supreme Court on the basis of the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment. A four-justice dissent wrote that such theories should have been considered anyway.[185]

## B. Litigation Issues Concerning Homosexuality Regulations

### 1. Judicial review of military discharge determinations

Some litigation has involved homosexuals trying to get back into the military, and some has involved those trying to legally prevent their separation. In the latter category, personnel have sought declaratory and injunctive relief to preclude their discharge. Two such cases were Berg v. Claytor and Matlovich v. Secretary of the Air Force.[186] Berg and Matlovich each raised the issue of whether private consensual homosexual activity between adults is constitutionally protected, but that issue was never reached.

Judicial review of discretionary military administrative determinations is generally limited to whether the action complained of is supported by substantial evidence and is not arbitrary, capricious, or unlawful.[187] The military also enjoys a long history of judicial deference to military affairs.[188] But one area where the military is closely scrutinized is the application of its own regulations. The government lost both Berg and Matlovich because neither the Navy nor the Air Force could explain what criteria were used to determine whether to retain homosexual personnel. The court took the position that it could not provide review of either case until the Services provided standards on which to base the review.[189]

Matlovich and Berg are the exceptions. The government has ultimately prevailed in most requests by homosexuals to preclude discharge.[190] Rich v. Secretary of the Army illustrates the dilemma homosexuals sometimes face.[191] In Rich, an Army medical specialist challenged his involuntary discharge for fraudulent enlistment. The Army had determined that Rich falsely represented that he was not a homosexual on his reenlistment documents.

After noting that "the composition and qualifications of the armed forces is a matter for Congress and the military," the court held that "concealing or failing to disclose homosexuality in the enlistment process is material, and one doing so may be discharged for fraudulent enlistment."[192] Even though Rich claimed that he was not sure of his homosexuality until after he reenlisted, the court found enough evidence from a number of Rich's admissions to conclude that the Army's conclusions were not arbitrary or capricious or unsupported by substantial evidence.

2. Fighting a war of attrition: exhaustion of administrative remedies as a government defense

Sometimes the constitutional issues are never reached because the homosexual plaintiff fails to exhaust administrative remedies, which usually means review by one of the various boards for correction of military or naval records.[193] That process can take from months to years.[194] But it is favored because it gives the administrative agency an opportunity to

correct the problem, possibly eliminating the need for judicial action, and because it develops a factual record upon which a court can later rely. An incidental benefit to the government is that during this process plaintiffs sometimes fail to pursue their claims and are never heard from again.

Courts will not require exhaustion of administrative remedies if the plaintiff can demonstrate that exhaustion would be a futile exercise. Elimination of the exhaustion requirement is sometimes seen in the homosexual cases, such as where a known homosexual faces an absolute prohibition against reenlisting.[195]

3. Constitutional issues

a. Due Process

Homosexual litigants have raised a number of issues in their attempts to remain in the military. Two issues of historical interest are 5th Amendment procedural and substantive due process. Both of these issues were raised in Beller v. Middendorf, a consolidation of three Navy cases.[196]

The procedural due process issue requires inquiry into whether military discharge procedures deprive homosexuals of property or liberty interests without due process.[197] The property interest is the expectation of continued employment. In Beller, all three plaintiffs had committed homosexual acts, which provided cause for dismissal under the Navy

regulations. Once there was cause for dismissal, there could be no expectation of continued employment. "Therefore, unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality in its decision . . . we see no basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest."[198]

Deprivation of a liberty interest could occur if military charges of homosexuality were false, made public, and followed by discharge. Such actions might damage standing and associations within the community. They might also impose a stigma or disability affecting employment opportunities.[199] The Beller court found that liberty interests were protected by the military practice of conducting predischarge hearings at which respondents could present evidence to support their arguments that they should be retained.[200]

Substantive due process requires that laws be at least rationally related to some legitimate government interest. If the law in question impacts on what the Supreme Court has described as fundamental rights, such as in the areas of procreation, choice of a marriage partner, or family planning, the law is given heightened scrutiny.[201] In such a case, the law must further a compelling state interest and provide the least restrictive way to meet that interest. Prior to Bowers v. Hardwick, homosexuals often argued that private, consensual, adult homosexual activity should be protected as an aspect of the fundamental right of privacy.

The Beller court avoided the issue of whether consensual private homosexual conduct was a fundamental right, and instead focused on whether the military regulation violated due process. In doing so, the court abandoned the rational basis and compelling state interest tests used in equal protection analysis. It chose instead 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."[202]

In this balance, the court was more impressed with the weight of the Navy arguments. The Navy provided several reasons for its policy.

> The Navy "perceive[s] that homosexuality adversely impacts on the effective and efficient performance of the mission . . . in several particulars." The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on

occasion be in confined situations for long periods.[203]

The court concluded that the regulation was a reasonable effort to accommodate the needs of the Government with the interests of the individual.[204] The court also noted that "[t]he due process clause does not require the Government to show with particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted," and that discharge of the plaintiffs "would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational."[205]

b. The First Amendment

The government has not won all of the homosexuality cases. In Ben-Shalom v. Secretary of the Army, a case involving a homosexual Army reservist, Army regulations promulgated in the 1970s were held to be unconstitutional insofar as they allowed discharge for homosexual tendencies, desire, or interest.[206] The issue had been framed as "whether petitioner can be discharged from the Army (even if the discharge is "honorable") simply because she is a homosexual, although there is no showing that her sexual preferences interfered with her abilities as a soldier or adversely affected other members of the Service."[207]

All prior military homosexual litigation had involved homosexual acts. Miriam Ben-Shalom admitted she was a homosexual, but the Army had no proof that she had engaged in homosexual acts or made homosexual advances. After being discharged as unsuitable because of her homosexuality, Ben-Shalom brought a mandamus action to compel her reinstatement.

The problematic word in the regulation was "interest." The court found the regulation to be overbroad because it substantially impinged upon the First Amendment rights of every soldier to free association, expression, and speech.[208]

> The Army's interests in protecting the national defense, maintaining discipline and upholding the law of obedience under the "peculiar" conditions of military life, are time-honored and given great respect by all courts, including this one. They are, however, substantially outweighed by the "chill" imposed on the First Amendment liberties of its soldiers by this regulation. The court can see no detrimental effect on any legitimate military interest caused by a soldier who merely "evidences" a "tendency, desire, or interest" in most anything, including homosexuality.[209]

The court found violations of the constitutionally protected right of personal privacy at two different levels. On one level, the regulation chilled the right of free association of any soldier with known or suspected homosexuals (the court having found the right

of association in the penumbral zone of privacy created by the First Amendment).[210] On a different level, the regulation was defective insofar as personnel could be discharged for having a homosexual personality.

> Certainly, the "peculiar" nature of military life and the need for discipline gives the Army substantial leeway in exercising control over the sexual conduct of its soldiers, at least while on duty and at the barracks. This court, however, will not defer to the Army's attempt to control a soldier's sexual preferences, absent a showing of actual deviant conduct and absent proof of a nexus between the sexual preference and the soldier's military capabilities.[211]

The writ of mandamus was issued, the Army did not appeal, and the Army changed its regulations.[212] Soon after, the Department of Defense directed all the services to implement new regulations.[213] The issue of the homosexual personality, though, like the Tar-Baby, is a rather sticky one that keeps coming back.[214]

Consider Reverend (former Captain) Dusty Pruitt.[215] The Army had no evidence that she had committed any homosexual acts, but learned of her homosexual status after the Los Angeles Times article Pastor Resolves Gay, God Conflict described her as a lesbian.[216] Captain Pruitt admitted to her commander that she was a homosexual, and she was discharged. She claimed that the regulation under which she was discharged from the Army Reserve violated the First Amendment because it

called for punishment solely on the basis of her assertion of her status.[217]

The court did not question the constitutionality of the Army policy. Nor did it find the regulation to be overly broad. It noted that the Army "understandably would be apprehensive of the prospect that desire would ripen into attempt or actual performance."[218]

Miriam Ben-Shalom raised the issue again in 1988 after the Army refused to reenlist her into the Army Reserve under its new policy.[219] She argued "that the new regulation had the effect of chilling her freedom of expression as she would no longer be able to make statements regarding her sexual orientation, statements that she would otherwise be free to make."[220] The district court agreed, but the Seventh Circuit Court of Appeals did not.

> Ben-Shalom is free under the regulation to say anything she pleases <u>about</u> homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What Ben-Shalom cannot do, and remain in the Army, is to declare herself to <u>be</u> a homosexual.[221]

Exclusion based on being a homosexual, as opposed to talking about homosexuality or committing homosexual acts, raises the issue of equal protection.

c. Equal Protection

The Equal Protection Clause requires that all persons similarly situated be treated alike.[222] The Supreme Court has found an implied equal protection component in the Fifth Amendment due process clause,[223] and has treated federal equal protection claims under the Fifth Amendment the same as state equal protection claims under the Fourteenth Amendment.[224]

1. Levels of scrutiny under equal protection analysis

The highest level of equal protection scrutiny is strict scrutiny. At this level, legislation (and by extension, regulations) burdening a class unequally will be sustained only if tailored to serve a compelling state interest. Two categories of legislation are subject to strict scrutiny: statutes that classify by race, alienage, or national origin (often called suspect classes); and statutes which impinge on personal rights protected by the Constitution.[225]

The Supreme Court has also recognized a middle area of somewhat heightened scrutiny where legislation burdening a class unequally fails unless it is substantially related to a sufficiently important governmental interest. Classifications based on gender and illegitimacy (often called quasi-suspect classes) are given such review.[226] The Court has not extended suspect or quasi-suspect class status beyond the categories mentioned.[227]

If legislation does not qualify for strict or heightened scrutiny, it must pass the rational basis test.

> The general rule is that legislation is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[228]

Under this deferential standard of scrutiny, it does not matter if an individual member of the burdened class is an exception.[229] So, if regulations pertaining to homosexual servicemembers need only meet the rational basis test, the fact that a homosexual servicemember might be outstanding in every respect is irrelevant. The inquiry is directed at the regulation, not the servicemember.

2. The two prongs of equal protection

As Justice Brennan once wrote, "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis."[230] The prongs, which require different analysis, are whether the regulation burdening a class unequally does so by (1) impinging on

a fundamental right protected by the Constitution, or (2) affecting a class entitled to heightened scrutiny or suspect class status.[231]

a. Fundamental rights

The "fundamental rights" prong of equal protection is easily confused with substantive due process fundamental rights analysis, but it involves a different inquiry. Bowers v. Hardwick illustrates this.[232] The Supreme Court held that there is no fundamental right to engage in sodomy. Applying substantive due process analysis, the Court refused to invalidate a long standing law that presumably reflected the will of the Georgia electorate. It is tempting to leap to the conclusion that since homosexuals have been traditionally defined by their acts (engaging in sodomy), and since those acts are not protected, then there cannot be a fundamental right to be a homosexual.

But the equal protection focus should not be on whether a homosexual has the fundamental right to engage in sodomy; it should be on whether a homosexual has the fundamental right to be a homosexual. To be sure, since Bowers v. Hardwick, there is no constitutional right to engage in homosexual sodomy. Still, a person can have a homosexual orientation without engaging in proscribed homosexual acts, just as a person can have a heterosexual orientation without engaging in proscribed heterosexual acts.

The question of whether a person has a fundamental right to have the sexual orientation that he or she develops through forces beyond personal control is far different from the question of whether there is a right to commit sodomy. Laws and regulations can and do change. But while anyone can refrain from doing an act proscribed by law or regulation, no one can refrain from being who he or she is.

Bowers v. Hardwick did not foreclose either branch of the equal protection analysis as to homosexual orientation.[233] It was a due process case, and the Court explicitly did not decide it on the basis of the Equal Protection Clause.[234] The only reference to equal protection analysis was in a footnote of the dissent. Justice Blackmun, after referring to the possible equal protection issue of discriminatory enforcement of gender-neutral sodomy statutes, said "a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class."[235]

Under the fundamental rights prong of equal protection, regulations which burden a particular class by impinging on a fundamental right must meet strict scrutiny. To the extent that homosexuality regulations impinge upon the right to be homosexual, as opposed to the commission of an illegal act, such regulations should be required to meet a compelling state interest. Future litigation should focus on this prong.[236]

But, given the Court's disinclination to take a more expansive view of its authority to discover new fundamental rights imbedded in the Due Process Clause,

it seems unlikely that the Court will be inclined to discover new fundamental rights based on equal protection.[237] That is unfortunate for homosexuals because, regardless of the Constitution, their homosexual orientation is a fundamental aspect of their lives. The remaining inquiry, raised by Watkins v. United States Army, is whether the other prong of equal protection analysis applies.[238]

b. Suspect/Quasi-suspect class

The Supreme Court has identified a number of factors for deciding whether a statute burdens a suspect or quasi-suspect class. These include: whether the class in question has suffered a history of purposeful discrimination,[239] whether it is defined by a trait that frequently bears no relation to ability to perform or contribute to society,[240] whether the class has been saddled with unique disabilities because of prejudice or inaccurate stereotypes,[241] whether the trait defining the class is immutable,[242] and whether the class has the political power necessary to obtain redress from the political branches of government.[243]

Judge Norris, concurring in Watkins, found all of these factors applicable to homosexuals. But there is room for disagreement with some of his conclusions.[244] There is no doubt that homosexuals have suffered a history of purposeful discrimination. In Watkins, the Army conceded this point.[245] Likewise, the trait of homosexual orientation does not correlate with ability to perform or contribute to society. Not only is

history replete with homosexuals who have contributed much to society,[246] but aside from sexual orientation, researchers cannot distinguish between homosexuals and heterosexuals.[247]

The question of whether homosexuals have been saddled with unique disabilities because of prejudice or inaccurate stereotypes is more difficult. Asking the question begs the issue. The criminalization of some of the behavior that identifies a homosexual as such is a unique disability, but it is also constitutional. In the military context, the unique disability is not being allowed to serve, which has also been upheld as constitutional. But the law is often based on notions of morality, which may well be prejudicial and based on inaccurate stereotypes. Judge Norris suggests that the "irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes."[248]

Homosexual orientation is immutable. While it is not a visible manifestation like skin color or gender, as Justice Blackmun wrote in Bowers v. Hardwick, "neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality."[249] If homosexual orientation is mutable, it is only so with great difficulty, and the likelihood of it being truly changed is very low.[250]

The final factor is whether the class has the political power necessary to obtain redress from the

political branches of government. About half the states have repealed their sodomy laws, and as of 1990 there are two openly homosexual members of Congress.[251] California and Wisconsin have passed statutes prohibiting discrimination against homosexuals.[252] The Civil Service Reform Act of 1978 has been interpreted to make homosexuality by itself not a disqualification for federal employment.[253] The most significant display of political power has been in the cities:

> In many major cities with significant gay populations, political organization of the gay community has advanced far enough to secure the enactment of local ordinances prohibiting such [anti-gay] discrimination. Since the early 1970s, more than fifty cities or other political subdivisions (counties or districts) have passed such ordinances, including most of the major centres of gay life in America, such as Boston, New York, Los Angeles, San Francisco, Atlanta, the District of Columbia (Washington, D.C.) and Philadelphia.[254]

Judge Norris notes that the relevant political level for seeking protection from military discrimination is the national level, "where homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination."[255] He states that "homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches."[256] But there is much evidence to the

contrary, and it is unlikely that the Supreme Court would find homosexuals to be such a politically powerless group.

Homosexuals should not get suspect class status under this prong of equal protection analysis because they are not politically powerless. But because they have suffered purposeful discrimination and are defined by an immutable trait unrelated to their contributions to society, they may yet achieve quasi-suspect status. Without this status, regulations impinging upon homosexuals need only be rationally related to a legitimate government interest.

### 3. Equal Protection applied to homosexuality regulations

The Fifth Amendment equal protection issue, as framed in Ben-Shalom III, is "whether homosexuals, defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class."[257] The same issue was raised in Watkins.[258]

The appellate courts in both Watkins and Ben-Shalom III declined to extend suspect or quasi-suspect class status to homosexuals. These cases were not argued on the basis of the fundamental rights prong of equal protection. In Watkins, a panel of the Ninth Circuit found that homosexuals were a suspect class, and that the Army failed to provide a compelling reason for its homosexuality regulations.[259] The Ninth Circuit, en banc, then decided the case in favor of Watkins on an

estoppel theory, and withdrew the earlier Watkins opinion.[260] The equal protection issues were addressed only in the en banc concurring opinion of Judge Norris, joined by Judge Canby.

The Ben-Shalom III court reasoned that 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."[261] The court applied rational basis scrutiny and found that the Army met that standard without difficulty.[262]

The Supreme Court declined to hear Ben-Shalom III without comment. A denial of certiorari does not carry the weight of an affirmance. Indeed, it does not even mean that the Supreme Court agrees with the decision of the Court of Appeals.[263] But it does signal that the Court is not likely to hear similar cases any time soon unless a split develops among the circuits.

Judge Norris, concurring in Watkins, evaluated the equal protection claim with a three-stage inquiry.[264] First, do the regulations in fact discriminate based on sexual orientation? Second, which level of judicial scrutiny applies? And third, do the regulations survive the applicable level of scrutiny?

a. Do regulations discriminate based on homosexual orientation?

Equal protection requires that people be treated equally. If a regulation affects everyone equally,

there should be no equal protection problem. Everyone in the military is capable of committing homosexual acts, and there is little disagreement that the military can lawfully proscribe such acts by its personnel. But everyone in the military does not have a homosexual orientation, and there is much disagreement over regulating what a person is, as opposed to what a person does. To the extent that a regulation affects or burdens only one class of the population, those with the homosexual orientation, the threshold inquiry is met.

Military homosexuality regulations since 1982 have uniformly emphasized the unsuitability for military purposes of people with a homosexual orientation.[265] In contrast, the military has exceptions allowing accession and retention of people who have committed homosexual acts, but they only apply to people who do not have a homosexual orientation. There are no exceptions for people with homosexual orientations.

Judge Wood, writing for the Ben-Shalom III court, resolved the issue by finding that homosexuals are likely to commit prohibited homosexual acts. He found that the regulation classifies upon reasonable inferences of probable conduct in the past and in the future. "The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here."[266]

Judge Wood wrote martial music for military ears. But, whether or not the military decides to go sleuthing after the class most likely to commit the proscribed acts, the inquiry is still whether the regulations affect or burden everyone equally. The answer is that they do not. At least as far as this threshold question is concerned, Judge Norris provided the correct analysis in his concurring opinion in Watkins.[267]

> On their face, these regulations discriminate against homosexuals on the basis of their sexual orientation. Under the regulations any homosexual act or statement of homosexuality gives rise to a presumption of homosexual orientation, and anyone who fails to rebut that presumption is conclusively barred from Army service. In other words, the regulations target homosexual orientation itself. The homosexual acts and statements are merely relevant, and rebuttable, indicators of that orientation.[268]

b. Which level of judicial scrutiny applies?

The question of whether a regulation affecting homosexuals as a class should be given strict scrutiny, heightened scrutiny, or rational basis scrutiny depends on whether the regulation is more like one affecting race, alienage, or national origin, or more like one affecting gender or legitimacy, or more like one affecting a legitimate government interest.

Almost all courts that have considered this issue have applied rational basis scrutiny. Those not applying rational basis scrutiny have been overruled.[269] Judge Norris, concurring in Watkins, supports strict scrutiny.[270] But he believes homosexuals are a politically powerless group. Homosexual regulations may one day be judged with heightened scrutiny because homosexuals have several, but not all, of the characteristics of a suspect class.[271]

c. Do the regulations survive the applicable level of scrutiny?

If the strict scrutiny standard applied, the homosexuality regulations would have to be tailored to meet a compelling government interest. Even under a standard of review deferential to the military, it is unlikely that the current regulations could withstand the scrutiny. The government has won only one compelling state interest case, the World War II era national origin case of Korematsu v. United States.[272] Such review of homosexuality regulations is not likely to succeed under the equal protection suspect class theory, but it could with a fundamental rights theory.

If heightened scrutiny applied, the regulation would have to be substantially related to a sufficiently important government interest. The government interest is articulated in Department of Defense Directive 1332.14:

> 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 servicemembers 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.[273]

The military mission is an important government interest. The question is whether the military policy of excluding all homosexuals is substantially related to accomplishment of the mission. This first requires examining whether the presence of homosexuals prevents or hinders the military from accomplishing the mission. And, the military gets deferential treatment. In military affairs, a court should not substitute its views for the "considered professional judgment" of the military.[274]

Since there always have been and always will be homosexuals in the military, it cannot be tenably

argued that homosexuals prevent the military from accomplishing its mission. But any disruption to military affairs arguably hinders the military mission. Given the deference normally accorded the military, an assault on the regulations under heightened scrutiny would probably be resolved in the military's favor.

The remaining question is similar to that raised by Justice Brennan in Rowland:

> Finally, even if adverse state action based on homosexual conduct were held valid under application of traditional equal protection principles, such approval would not answer the question, posed here, whether the mere nondisruptive expression of homosexual preference can pass muster even under a minimum rationality standard as the basis for discharge from public employment.[275]

Is there such thing as "nondisruptive expression of homosexual preference" in the military setting?

The minimum rationality standard requires only that the classification drawn by the government regulation rationally further some legitimate, articulated state purpose.[276]

The first question is whether the purpose of military homosexuality policy constitutes a legitimate state purpose. The stated purpose is preventing the impairment of the military mission. It would be difficult to attack such a broad statement of purpose. The state clearly has an interest in military mission accomplishment.

The second question is whether the regulation rationally furthers the stated purpose. To the extent that homosexual activity is regulated, it does. In the military environment, any sexual activity tends to be disruptive. To the extent that homosexual orientation is regulated, it does not. A person's sexual orientation has nothing to do with the military mission. With the issues co-mingled, the regulation has so far passed minimum scrutiny.[277]

The fact that military homosexuality regulations have survived legal attacks does not mean that they cannot or should not be improved. It means only that the courts are not going to make it happen. It is up to the military to come up with the best policy without court intervention.

## V. POLICY PERSPECTIVES

> In December 1934 the Ministry of Justice issued new guidelines stating that homosexual offenses did not have actually to be committed to be punishable; intent was what mattered.
> R. Plant, The Pink Triangle: The Nazi War Against Homosexuals 112-13 (1986).

In January 1982 the Department of Defense issued new guidelines stating that homosexual offenses did not have actually to be committed to separate military personnel from the service; intent was what mattered.[278]

Of course, there is a world of difference between sending a homosexual to a concentration camp and simply firing him from his or her job.

A. Basis for Current Policy

"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."[279] These opening sentences of the policy refer to both conduct and speech that seriously impair the mission.

A person engaging in sexual conduct in a military environment, whether homosexual or heterosexual, may well distract or detract from the mission. There are also situations where the statements of a person with homosexual tendencies could create a problem for the mission, such as if a homosexual soldier were to solicit another soldier to engage in homosexual acts. Presumably, this is what the drafters of the policy had in mind. What is not clear is how missions are impaired by statements not involving solicitation, but which still demonstrate a propensity to engage in homosexual conduct.

"The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale . . . "[280] There is little argument as to personnel who commit homosexual acts in barracks, aircraft, on board ship, or on duty.

Similar problems would be expected with personnel who commit heterosexual acts in such places or situations.

Even with homosexual acts, though, it becomes difficult to see how these discipline problems occur where the acts are off government property with non-military personnel. Such cases often involve an act of sodomy which, if discovered, can be prosecuted or dealt with administratively. But the real effect on discipline is negligible. Outside those with an official need to know, few military personnel will even be aware of such acts until the military initiates adverse action.

It is also difficult to see how the presence of personnel who admit to a homosexual orientation adversely affects the maintenance of good order. About 75% of the homosexual personnel are never discovered at all, so they are not causing these problems.[281] Of course, by definition neither are they talking about the fact of their homosexual orientation. If they had the freedom to discuss it openly, it is doubtful that they would choose to do so in a hostile environment. If such a person does cause a problem with order, morale, or discipline, and it can be articulated and proven, then he or she should be separated. Conversely, if a real problem cannot be articulated or proven, there should be no separation.

"The presence of such members adversely affects the ability of the Military Services to . . . foster mutual trust and confidence among servicemembers . . ."[282] Here the military position is that the great majority of servicemembers "despise/detest homosexuality."[283]

Even if that is so, it does not necessarily follow that the great majority despise homosexuals. Personnel who work hard and make an effort to get along foster mutual trust and confidence. Those who do not tend to be despised and detested and are bid good riddance if they can be separated for any reason.

There have also been times when the "great majority" wasn't too keen on the idea of allowing minorities and women in the military. "The peculiar nature of Army life has always required the melding together of disparate personalities. For much of our history, the military's fear of racial tension kept black soldiers segregated from whites. Fear of sexual tensions, until very recently, kept the participation of female soldiers to a minimum."[284]

The military should not allow the fear of prejudice to drive its personnel policy. Even if the basic homosexuality policy doesn't change, the supporting rationale should be purged of arguments based on prejudice.

"The presence of such members adversely affects the ability of the Military Services to . . . ensure the integrity of the system of rank and command . . ."[285] The fear is that openly homosexual supervisors could not command respect.[286] But this is best solved by leadership training and by rating supervisors on their leadership abilities. Cases such as those of Technical Sergeant Leonard Matlovich and Staff Sergeant Perry Watkins, homosexual personnel who received outstanding ratings in all aspects of performance, demonstrate that even openly homosexual supervisors can do well in the

military.[287] Perhaps the ability to command respect is more a function of leadership than sexual orientation.

"The presence of such members adversely affects the ability of the Military Services to . . . facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy . . ."[288] Even in a sexually integrated military, men and women do not share showers and close living quarters due to basic privacy considerations. These privacy considerations are just as applicable to heterosexuals and homosexuals of the same gender. But that appears to be a unit level management problem, not an "assignment and worldwide deployment problem."

"The presence of such members adversely affects the ability of the Military Services to . . . recruit and retain members of the Military Services . . . "[289] As the American military has historically excluded homosexuals, it is difficult to understand what leads to this conclusion other than conjecture. It is just as easy to surmise that a policy to exclude or punish personnel who commit homosexual acts in barracks or on ship would be sufficient to meet these concerns.

"The presence of such members adversely affects the ability of the Military Services to . . . maintain the public acceptability of military service . . ."[290] Again, we've never really tried it, so how do we know? There will always be some people for whom military service will not be acceptable under any policies or circumstances. Assuming the fears are legitimate, they

could arguably be assuaged with a focus on acts rather than orientation.

"The presence of such members adversely affects the ability of the Military Services to . . . prevent breaches of security."[291] A breach of security could occur if a homosexual or bisexual with access to classified information was blackmailed with the threat of disclosure to his family or superiors. Judge Norris addressed this issue in Watkins.

> It is evident, however, that homosexuality poses a special risk of blackmail only if a homosexual is secretive about his or her sexual orientation. The Army's regulations do nothing to lessen this problem. Quite the opposite, the regulations ban homosexuals only after they have declared their homosexuality or have engaged in known homosexual acts. The Army's concern about security risks among gays could be addressed in a more sensible and less restrictive manner by adopting a regulation banning only those gays who had lied about or failed to admit their sexual orientation. In that way the Army would encourage, rather than discourage, declarations of homosexuality, thereby reducing the number of closet homosexuals who might indeed pose a security risk.[292]

Or, as stated by Representative Gerry Studds in 1989: "The question is not whether gay men and women will

serve. The only question is will they be compelled by Defense Department policy to hide."[293]

B. Problems with current policy

If it's not broken, don't fix it. Is the current policy in need of adjustment? Yes. The military views a person who admits to a homosexual orientation as a crime waiting to happen who should be immediately expelled.

A policy that deprives people of opportunity because of what they are, as opposed to what they do, is contrary to American ideals. The letter of the law may not be violated, but the spirit is. In equating admissions of homosexual orientation with illegal homosexual conduct, military policy turns the presumption of innocence on its head.

Does the policy work? It is taken as a given that people with a homosexual orientation are simply incompatible with military service. But the incidence of homosexual men is about the same in the military as in the general population, and the incidence of homosexual women is greater in the military than in the general population.[294] While 75% are never detected, a portion of the 25% who are detected simply turn themselves in when they decide they want to get out.[295] The system isn't broken. It never worked to begin with.

People 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.

The policy excludes those who are truthful while admitting those who choose to lie from day one. Personnel who don't discover their orientation until after they are on active duty face a similar dilemma. If they are troubled by their discovery, they cannot seek help without being separated. So the people needing help the most are discouraged from seeking it, but they will still be operating our multi-million dollar weapons systems while they try to sort out their sexuality.

None of this is to say that personnel who are disruptive should be admitted or retained on active duty. Some homosexual personnel are and will be disruptive, just as some heterosexual personnel are and will be disruptive. Policy should be crafted to allow the exclusion of disruptive personnel, but it should be crafted in such a way that it does not create as many problems as it solves.

C. Proposals for Modification

1. Statutory

The military sodomy statute, Article 125, UCMJ, is overbroad.[296] The real problem for the military is not the servicemember who engages in sexual activity on his or her own time, away from the military installation or vessel. The problem is the servicemember who disrupts the military mission through choice of the place or partner for the sexual activity. Sexual intercourse, whether of the homosexual or heterosexual variety,

should be prohibited on duty, in the barracks, on board ships or aircraft, or in situations that would create the appearance or prospect of favoritism within a chain of command.[297]

2. Regulatory

a. Accessions

Homosexuality is currently a non-waivable disqualification for service in the military.[298] It should be a waivable disqualification. To qualify for a waiver, an applicant should be required to sign a statement that explains the sodomy statute and the fact that violations may lead to either an adverse administrative separation or a court-martial. Personnel with a homosexual orientation would know the rules, and those who gain entry after disclosing their orientation would be less likely to become security risks. A waiver provision would also help in the event that the selective service system has to be used for national mobilization.

b. Separations

The current separation policy includes a list of questionable conclusions about how the presence of homosexuals adversely affects the military.[299] The policy is not all bad, it just says too much. The military has a legitimate interest in keeping disruptive activity to a minimum. The basis for

separation should be homosexual activity, not homosexual orientation. Sexual activity on duty, in barracks, on ship or aircraft, or between members of the same chain of command can be disruptive, whether it is homosexual or heterosexual.

The administrative proscription of homosexual acts is also justified to the extent that such acts are illegal when they involve sodomy.[300] Even if Congress repeals the military sodomy statute, which does not appear likely anytime soon, sodomy will still be illegal for military personnel in about half of the fifty states via the Assimilated Crimes Act.[301] The basis for the policy should say as much, and refrain from using a laundry list that is easily assailed as reminiscent of old arguments used to exclude minorities from the military.[302]

The bases for separation of homosexuals may include preservice, prior service, or current service conduct or statements.[303] This goes too far only in the situation of personnel who acknowledge a homosexual orientation, but for whom there is no evidence of any proscribed homosexual activity. Personnel who lie by failing to disclose prior homosexual acts or a known homosexual orientation should face separation for fraudulent entry. Personnel who commit homosexual acts that are prejudicial to good order and discipline should face separation for such conduct. But personnel who admit their homosexual orientation and for whom there is no evidence of homosexual activity should not be separated without proof of real prejudice to good order and discipline.

Commanders and Service Secretaries should have the discretion to retain homosexuals. Commanders are in the best position to judge whether a person has value to the military. This discretion existed once before, but it was taken away when the current policy was promulgated in 1982.[304] For example, Staff Sergeant Perry Watkins was retained in 1975 (as a Specialist 5) after a board of officers unanimously recommended "that SP5 Perry J. Watkins be retained in the military service because there is no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance."[305]

If the discretion to retain homosexuals is returned to commanders and Service Secretaries, homosexual personnel should only be retained if they meet standards consistent with military interests. Retention should be authorized for anyone with a homosexual orientation who has not engaged in homosexual acts where there is no evidence of prejudice to good order and discipline. Retention should be authorized for personnel who commit homosexual acts that do not 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.[306]

# VI. CONCLUSION

A policy must be legally sound, but it should also reflect an understanding of historical and scientific facts. There are going to be personnel with homosexual orientations in the military regardless of the policy. Some will come in knowing that they are homosexual, and some will not discover their sexual orientation until after they are on active duty. The policy should reflect that reality and make the most of it.

People who identify themselves as heterosexuals, bisexuals, and homosexuals exist on all points of the continuum of human sexual behavior. While the majority is exclusively heterosexual, a significant segment is exclusively homosexual and even more could be considered bisexual during different periods of adult life.

There seem to be a number of causes for the continuum of sexual orientation, almost all of which occur prior to birth. People do not choose to be where they are on the continuum of sexual preference, but they can choose whether, when, and how they are going to act. It is logical to assume that most are going to act in accordance with their preference.

One of the acts associated with the homosexual and bisexual preference is sodomy, which is illegal in the military. Other homosexual acts, while not illegal, provide a basis for administrative separation from the military.

Other than sexual preference, there are no discernible differences between those who are

exclusively heterosexual and everyone else. In terms of behavior, a small percentage of homosexual men will exhibit effeminate characteristics. There is some evidence that homosexuals as a class may be more prone to alcoholism than the general population, but that could be because more of them have reason to drink. People who engage in anal sodomy are also at greater risk of acquiring AIDS than any other group.

As homosexuals have become politically organized, many states and countries have become more tolerant and have repealed many anti-sodomy laws. Some countries, such as Great Britain and Canada, have legalized homosexual acts between consenting adults but still prohibit homosexuals from serving in the military. A number of countries, such as Israel, West Germany, and Spain, now allow homosexuals to serve in the military.

American homosexual military personnel have advanced a number of legal arguments to stay in the military. They have won a few battles, but for the most part they have lost the war. Since Bowers v. Hardwick was decided in 1986, establishing conclusively that there is no fundamental right to engage in sodomy, homosexuals have had an uphill battle on all fronts.

The equal protection theory is the best remaining theory for homosexuals attempting to remain in the military. Though the suspect class prong of equal protection appears to be a lost cause since the Supreme Court declined to issue a writ of certiorari in Ben-Shalom v. Marsh, the fundamental rights prong may yet prove successful. To prevail, a homosexual litigant will have to make an issue of whether there is a

fundamental right to be a homosexual. Even the Supreme Court would have a difficult time trying to decree homosexuals out of existence.

If the right case gets before the Court under the fundamental rights prong of equal protection, homosexuality legislation and regulations could be subject to strict scrutiny even without a fundamental right to engage in sodomy. If that happens with the current regulations, the military will almost certainly lose the challenge. In the meantime, the rational basis test is the appropriate level of scrutiny and the current regulations pass such scrutiny. But the fact that the current policy is constitutional does not mean that it works, that it is wise, or that the military cannot improve upon it.

The policy should advance and protect true military interests. It should not be crafted so that entry is denied those who are truthful while allowed for those who are untruthful. It should not discourage those in need of help from seeking it. The current policy is easy to administer, but it is ineffective at keeping homosexuals out of the military. It creates a number of problems that could be avoided by a few modifications. If homosexuals are going to be in the military regardless of all efforts to keep them out, a point reinforced by history, the military should adjust to that reality.

In conclusion, current policy on accession of homosexuals should be altered to the extent that homosexuality should become a waivable disqualification. Service Secretaries and commanders

should have the discretion to retain homosexuals who meet certain criteria. Finally, the military should not separate personnel based on statements of sexual orientation alone, but should require evidence of prejudice to good order and discipline.

1. Dep't of Defense Directive 1332.14, Enlisted Administrative Separations (Jan. 28, 1982) [hereinafter DOD Dir. 1332.14].

2. See, e.g., Army Reg. 601-210, Regular Army and Army Reserve Enlistment Program, para. 4-4 (1 Dec. 1988).

3. DOD Dir. 1332.14, supra note 1.

4. Id.

5. See, e.g., Watkins v. United States Army, 875 F.2d 699, 702-04 (9th Cir. 1989) (en banc); Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854 n. 4, 856 (D.C. Cir. 1978).

6. Id.

7. DOD Dir. 1332.14. There is a limited exception. Enclosure 3, Standards and Procedures, para. H.3.g.(2) authorizes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned.

8. Uniform Code of Military Justice art. 92, 10 U.S.C. sec. 892 (1982).

9. See infra pp. 49-51.

10. See Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, ___ U.S. ___ (1990).

11. Uniform Code of Military Justice art. 125, 10 U.S.C. sec. 925 (1982) [hereinafter UCMJ].

12. Bowers v. Hardwick, 478 U.S. 186 (1986), reh'g denied, 478 U.S. 1039 (1986).

13. Harry, Homosexual Men and Women Who Have Served Their Country, 10 J. Homosexuality 117, 121 (1984).

14. DOD Dir. 1332.14, supra note 1.

15. A. Kinsey, W. Pomeroy, and C. Martin, Sexual Behavior in the Human Male (1948) [hereinafter A. Kinsey].

16. Id. at 3-9.

17. Id. at 636-47. The other rates are: (1) predominantly heterosexual, only incidentally homosexual, (2) predominantly heterosexual, but more than incidentally homosexual, (4) predominantly homosexual, but more than incidentally heterosexual, and (5) predominantly homosexual, but incidentally heterosexual.

18. Id. at 612.

19. Id. at 660-66.

20. W. Masters, V. Johnson, and R. Kolodny, Masters and Johnson on Sex and Human Loving 349 (1986).

21. Ellis & Ames, Neurohormonal Functioning and Sexual Orientation: A Theory of Homosexuality-Heterosexuality, 101 Psychological Bull. 233 (1987).

22. Id.

23. Id.

24. Id.

25. Id. at 236-37.

26. Id. at 237-38.

27. Id. at 239.

28. Id. at 243-48.

29. Id. at 240-41.

30. Id. at 241. Other drugs include chlorimipramine, diazepam, diethylstilbesterol (DES), pargyline, and reserpine.

31. Id. at 242.

32. Id. at 242.

33. Id. at 243.

34. Id.

35. Id. at 244-47. The four types are 5 alphareductase deficiency, androgen insensitivity syndrome, faulty testosterone synthesis, and congenital adrenal hyperplasia syndrome (which affects females).

36. Id. at 247.

37. Id.

38. Id.

39. Id. at 249.

40. Id.

41. Id. at 250.

42. Id.

43. Id. at 251.

44. Id.

45. F. Sultan, D. Elsner, and J. Smith, Ego-Dystonic Homosexuality and Treatment Alternatives, in Male and Female Homosexuality: Psychological Approaches 192 (L. Diamant, ed. 1987).

46. L. Ellis and M. Ames, supra note 21 at 251.

47. Id.

48. Id.

49. Id.

50. R. Fine, Psychoanalytic Theory, in Male and Female Homosexuality: Psychological Approaches 86-87 (L. Diamant, ed. 1987).

51. B. Gladue, Psychobiological Contributions, in Male and Female Homosexuality: Psychological Approaches 130 (L. Diamant, ed. 1987).

52. A. Kinsey, supra note 15, at 625.

53. Id. at 623.

54. Id.

55. See supra p. 4.

56. A. Kinsey, supra note 15, at 650-51.

57. Id. at 656.

58. T. Sarbin and K. Karols, Nonconforming Sexual Orientations and Military Suitability, at 8-9 (1988) (draft study of the Defense Personnel Security Research and Education Center) [hereinafter Sarbin and Karols].

59. Id. at 26.

60. L. Ellis and M. Ames, supra note 21, at 249.

61. W. Masters, V. Johnson, and R. Kolodny, supra note 20 at 345.

62. W. Menninger, Psychiatry in a Troubled World: Yesterday's War and Today's Challenge 225 (1948) (of 20,620 soldiers diagnosed as constitutional psychopaths by the Army in 1943, 1625 were of the homosexual type).

63. C. Williams and M. Weinberg, Homosexuals and the Military 45-46 (1971) [hereinafter Williams and Weinberg].

64. Id. at 47.

65. Id. at 46-47.

66. Id. at 47-48.

67. Id. at 48.

68. Id. at 49.

69. Id.

70. Id. at 53.

71. Military Justice: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 1006 (1966), quoted in Williams and Weinberg, supra note 63, at 50.

72. Sarbin and Karols, supra note 58, at 21 and Appendix B.

73. Id. at 22.

74. W. Menninger, supra note 62, at 227, quoted in Williams and Weinberg, supra note 63, at 60 (interim report by C. Fry and E. Rostow reported by W. Menninger).

75. Williams and Weinberg, supra note 63, at 60.

76. Id.

77. Harry, supra note 13, at 119.

78. Id. See supra note 17 and accompanying text.

79. Harry, supra note 13, at 119.

80. Id. at 121.

81. Id. at 121 and 124.

82. A. Kinsey, supra note 15, at 416.

83. Harry, supra note 13, at 122.

84. Williams and Weinberg, supra note 63, at 92.

85. Id. at 88-91.

86. Id. at 91-99.

87. Id.

88. F. Sultan, D. Elsner, and J. Smith, supra note 45, at 192.

89. L. Diamant, Male and Female Homosexuality: Psychological Approaches 13 (1987).

90. Id.

91. Id.

92. F. Sultan, D. Elsner, and J. Smith, supra note 45, at 195.

93. W. Masters, V. Johnson, and R. Kolodny, supra note 20, at 354.

94. L. Diamant and R. Simono, The Relationship of Homosexuality to Mental Disorders, in Male and Female Homosexuality: Psychological Approaches 174-78 (L. Diamant, ed. 1987).

95. W. Masters, V. Johnson, and R. Kolodny, supra note 20, at 543.

96. L. Diamant and R. Simono, supra note 94, at 175.

97. Id. at 176.

98. Id. at 177.

99. M. McDaniel, Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability (1989) (draft study PERS-TR-89-004 of the Defense Personnel Security Research and Education Center).

100. Centers for Disease Control. HIV/AIDS Surveillance Report, February 1990 at 8.

101. See, e.g., Army Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 1-14 (11 Mar. 1988).

102. W. Masters, V. Johnson, and R. Kolodny, supra note 20, at 346.

103. L. Diamant, supra note 89, at 4.

104. T. Cowan, Gay Men & Women Who Enriched the World 17 (1988).

105. W. Masters, V. Johnson, and R. Kolodny, supra note 20, at 346.

106. T. Cowan, supra note 104, at 11-16.

107. L. Diamant, supra note 89, at 5. Other Biblical references to homosexual conduct include Genesis 9, Genesis 19, and Romans 1:26,27.

108. W. Masters, V. Johnson, and R. Kolodny, supra note 20, at 346.

109. Id. at 347.

110. Sarbin and Karols, supra note 58, at 14.

111. Id.

112. L. Diamant, supra note 89, at 6.

113. Id. at 15.

114. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).

115. W. Aycock and S. Wurfel, Military Law Under the Uniform Code of Military Justice 14 (1955).

116. Manual for Courts-Martial, United States Army, 1917, para. 443.

117. Id.

118. Act of June 4, 1920, ch. II, 41 Stat. 787.

119. Manual for Courts-Martial, United States Army, 1921, para. 443.

120. Id.

121. Id.

122. Uniform Code of Military Justice art. 125, 10 U.S.C. sec. 925 (1951) (current version 10 U.S.C. sec. 925 (1984)) [hereinafter UCMJ art. 125].

123. Id.

124. Manual for Courts-Martial, United States, 1951, para. 204.

125. Uniform Code of Military Justice art. 134, 10 U.S.C. sec. 934 (1982).

126. For example, the Manual for Courts-Martial, 1984, increased the maximum punishment for forcible sodomy to dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

127. See generally Williams and Weinberg, supra note 63, at 33, 38-53 (explaining that few homosexuals receive punitive discharges from courts-martial; most are separated administratively).

128. DOD Dir. 1332.14, supra note 1; Dep't of Defense Directive 1332.30, Separation of Regular Commissioned Officers for Cause (Feb. 12, 1986).

129. A. Kinsey, supra note 15, at 621.

130. Id. at 622.

131. Army Reg. 615-360, Enlisted Men, Discharge; Release From Active Duty, para. 51-56 (26 Nov. 1942); para. 51-56 (4 Apr. 1935); para. 49-54 (14 Sep. 1927); para. 49-54 (6 Dec. 1922).

132. Honorable discharges were characterized as "white" and discharges without honor were characterized as "blue." L. West and A. Glass, Sexual Behavior and the Military Law 252 (R. Slovenko, ed. 1965). See also Note, Homosexuals in the Military, 37 Fordham L. Rev. 465 (1969).

133. Army Reg. 615-368, Enlisted Men, Discharge, Undesirable Habits or Traits of Character, para. 2.b. (7 Mar. 1945) (C1, 10 Apr. 1945) [hereinafter AR 615-368].

134. Williams and Weinberg, supra note 63, at 27. This policy was later published in AR 615-368, para. 3 (14 May 1947).

135. AR 615-368, para. 2 (27 Oct. 1948).

136. Williams and Weinberg, supra note 63, at 27.

137. Army Regulation 600-443, Personnel, Separation of Homosexuals, para. 3 (12 Jan. 1950) [hereinafter AR 600-443].

138. Army Regulation 635-89, Personnel Separations, Homosexuals, para. 3 (21 Jan. 1955) [hereinafter AR 635-89].

139. AR 635-89, para. 3 (8 Sep. 1955).

140. AR 635-89, para. 5 (15 Jul. 1966).

141. Army Reg. 635-212, Personnel Separations, Discharge, Unfitness and Unsuitability, para. 6 (15 Jul. 1966) (C8, 21 Jan. 1970), and Army Reg. 635-100,

Personnel Separations, Officer Personnel, para. 5-5 (19 Feb. 1969)(C4, 21 Jan. 1970) [hereinafter AR 635-100].

142. Ben-Shalom v. Secretary of Army, 489 F.Supp. 964 (E.D. Wis. 1980) (homosexuality regulation violated First Amendment).

143. Army Reg. 635-200, Personnel Separations, Enlisted Personnel, para. 13 and 14 (15 Jul. 1966) (C39, 23 Nov. 1972) [hereinafter AR 635-200].

144. AR 635-100, supra note 141, at para. 5.

145. DAJA-AL 1978/4168, 2 Jan. 1979.

146. SECNAV INSTR. 1900.9A (31 Jul. 1972).

147. Champagne v. Schlesinger, 506 F.2d 979, 983-84, (7th Cir. 1974).

148. Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978).

149. Id. at 851.

150. Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

151. Id. at 855. The regulation was Air Force Manual 39-12, para. 2-103, (C4, 21 Oct. 1970).

152. Id.

153. Id. at 854.

154. Id.

155. Ben-Shalom v. Secretary of Army, 489 F.Supp. 964 (E.D. Wis. 1980) [hereinafter Ben-Shalom I].

156. Id. at 972-77.

157. DAJA-AL 1980-2213 (7 Jul. 1980) (enclosing proposed
changes to AR 135-178, AR 635-100, AR 635-200, AR 140-111, and AR 601-210).

158. AR 635-200, para. 13 (21 Nov. 1977) (IO2, 28 Nov. 1980).

159. AR 635-200, para. 15 (21 Nov. 1977) (C4, 10 Mar. 1981).

160. A soldier will be separated . . . unless there are approved further findings that (1) Such conduct is a departure from the soldier's usual and customary behavior; and (2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and (3) Such conduct was not accomplished by use of force, coercion, or intimidation by the soldier during a period of military service; and (4) Under the particular circumstances of the case, the soldier's continued presence in the Army is consistent with the interest of the Army in proper discipline, good order, and morale; and (5) The soldier does not desire to engage in or intend to engage inhomosexual acts.

161. DOD Dir. 1332.14, supra note 1.

162. See American Law Institute, Model Penal Code sec. 213.2 (Proposed Official Draft 1962), noted in A. Leonard, The legal position of lesbians and gay men in the United States, in Second ILGA Pink Book 104 (1988).

163. A. Leonard, supra note 162, at 104.

164. Id. at 105.

165. R. Tielman and T. de Jonge, Country-by-Country Survey, in Second ILGA Pink Book 186 (1988).

166. Id. at 188-242.

167. Id. at 199.

168. Id. at 240.

169. Id. at 213.

170. Id. at 228.

171. Id. at 230.

172. Id. at 237.

173. Id. at 240.

174. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), quoted in Bowers v. Hardwick, 478 U.S. 186, 199 (1986), reh'g denied, 478 U.S. 1039 (1986).

175. See Rivera, Our Straight-Laced Judges: The Legal Position of Homosexuals in the United States, 30 Hastings L.J. 799, 841 (1979).

176. Id.

177. Id.

178. Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981).

179. Bowers v. Hardwick, 478 U.S. at 190, 196.

180. Id. at 188 n.1.

181. Id. at 197.

182. Id. at 189. The 11th Circuit had relied on decisions in Roe v. Wade, 410 U.S. 113 (1973) (abortion case); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception case); Stanley v. Georgia, 394 U.S. 557 (1969) (obscene material in privacy of home); and Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception case).

183. See cases cited infra note 200 and accompanying text.

184. Bowers v. Hardwick, 478 U.S. at 195.

185. Id. at 197 n.8, and 201-03.

186. Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978); Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978). See supra pp. 31-32.

187. See, e.g., Miller v. Lehman, 801 F.2d 492, 496 (D.C. Cir. 1986) (decision of Board of Correction of Naval Records to deny relief); Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986) (decision of Army Board for Correction of Military Records to deny relief).

188. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986); Brown v. Glines, 444 U.S. 348 (1980); Orloff v. Willoughby, 345 U.S. 83 (1953).

189. Berg v. Claytor, 591 F.2d at 851, 857. See also Martinez v. Brown, 449 F.Supp. 207, 211 (N.D.Cal. 1978) (district court seeking articulation of factors used by Navy to retain homosexuals).

190. See, E.g., Beller v. Middendorf, 632 F.2d 788, 792, 798-99 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1980) (plaintiff Beller), 454 U.S. 855 (1981) (plaintiff Miller)(3 cases consolidated).

191. Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).

192. Id. at 1224 n.1 and 1225.

193. E.g., Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984) (district court ordered plaintiff to seek review of discharge order from Board of Correction of Naval records, which granted plaintiff's request for relief); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980) (female enlistee discharged after marrying a transsexual); Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974) (two Navy enlisted women appealing discharge for homosexuality); and Krugler v. U.S. Army, 594 F. Supp. 565 (N.D. Ill. 1984) (dismissed for failure to exhaust).

194. e.g., Von Hoffburg v. Alexander, 615 F.2d at 642 n. 17 (expressing concern that plaintiff's case had been pending before the ABCMR for two years).

195. E.g., Beller v. Middendorf, 632 F.2d at 801.

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

197. Id. at 805, citing Board of Regents v. Roth, 408 U.S. 564 (1972).

198. Id. at 805.

199. Id. at 806, citing Roth, 408 U.S. at 573.

200. Id. at 806.

201. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptive statute infringed on fundamental right of privacy); Loving v. Virginia, 388 U.S. 1 (1967) (miscegenation statute infringed on fundamental right to marry); Roe v. Wade, 410 U.S. 113 (1973) (concerning abortion statute); and Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to unmarried persons infringed on fundamental right of privacy).

202. Beller v. Middendorf, 632 F.2d at 807.

203. Id. at 811.

204. Id. at 812.

205. Id. at 808 n.20.

206. Ben-Shalom v. Secretary of Army, 489 F.Supp. 964 (E.D. Wis. 1980) [hereinafter Ben-Shalom I]. See supra p. 32.

207. Id. at 969.

208. Id. at 973-74.

209. Id. at 974.

210. Id. at 975-76 (citing Griswold v. Connecticut, 381 U.S. at 484-85).

211. Id. at 976.

212. See supra p. 32.

213. Id.

214. J. Harris, The Tar Baby (1904).

215. Pruitt v. Weinberger, 659 F.Supp. 625 (C.D. Cal. 1987), appeal filed, No. 83-2035 (9th Cir. 1989).

216. Id. at 627.

217. Id.

218. Id.

219. Ben-Shalom v. Marsh, 881 F.2d 454, 457 (7th Cir. 1989), cert. denied ___ U.S. ___ (1990) [hereinafter Ben-Shalom III]. Ben Shalom II involved procedural issues not relevant to this article. Ben-Shalom v. Secretary of the Army, 826 F.2d 722 (7th Cir. 1987).

220. Id.

221. Id. at 462.

222. Plyler v. Doe, 457 U.S. 202, 216 (1982).

223. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

224. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

225. Id.

226. Id. at 440-41.

227. The suspect class cases include: Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage); Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); and Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin). The quasi-suspect class cases include: Mississippi University for Women v. Hogan,

458 U.S. 718, 723-24 (1982) (gender), and Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy).

228. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1984).

229. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976).

230. Rowland v. Mad River Local School District, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.).

231. See, e.g. Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

232. Bowers v. Hardwick, 478 U.S. 186 (1986).

233. Contra Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (holding that homosexuality could not be a suspect classification because conduct that defines the class is not constitutionally protected).

234. 478 U.S. at 196, n. 8.

235. Id. at 202, n. 2.

236. But see Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) (homosexuality classification not suspect, but valid even under heightened scrutiny in light of Army's demonstration of a compelling government interest).

237. See 478 U.S. at 194.

238. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc).

239. See, e.g., Cleburne, 473 U.S. at 441; Murgia, 427 U.S. at 307; San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973).

240. Mathews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender).

241. See Cleburne, 473 U.S. at 440-41.

242. See Plyler, 457 U.S. at 216 n. 14, 219 n. 19, 220, 223; Frontiero, 411 U.S. at 685-87. But see Cleburne, 473 U.S. at 440-41 (defining characteristics of suspect classes without mentioning immutability); Murgia, 427 U.S. at 313 (same); Rodriguez, 411 U.S. at 28 (same).

243. See, e.g., Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 216 n. 14; and Rodriguez, 411 U.S. at 28.

244. Watkins, 875 F.2d at 724-28.

245. Id. at 724.

246. See, e.g., T. Cowan, supra note 104.

247. See supra p. 20.

248. 875 F.2d at 725.

249. Bowers v. Hardwick, 478 U.S. at 202 n. 2. Contra Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (homosexuality not immutable because primarily behavioral in nature).

250. See supra pp. 10-11.

251. A. Leonard, supra note 162, at 103-04.

252. Watkins, 875 F.2d at 727 n. 30.

253. A. Leonard, supra note 162, at 102.

254. Id. at 106.

255. 875 F.2d at 727, n. 30.

256. Id. at 727.

257. Ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989), cert. denied ___ U.S. ___ (1990).

258. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc).

259. Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988).

260. Watkins, 875 F.2d at 711.

261. Ben-Shalom III, 881 F.2d at 464.

262. Id.

263. 36 C.J.S. Federal Courts sec. 204 (1960).

264. 875 F.2d at 712.

265. See sources cited supra notes 14, 158-61.

266. Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, ___U.S. ___ (1990).

267. Watkins, 875 F.2d at 712-16.

268. 875 F.2d at 714.

269. See, e.g. Ben-Shalom III and Watkins.

270. 875 F.2d at 724-28.

271. See supra pp. 51-53.

272. Korematsu v. United States, 323 U.S. 214 (1944).

273. DOD Dir. 1332.14, supra note 1.

274. Goldman v. Weinberger, 475 U.S. 503, 508 (1986); Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981); Orloff v. Willoughby, 345 U.S. 83, 93;94 (1953).

275. Rowland v. Mad River Local School District, 470 U.S. 1009, 1016 (1985) (Brennan, J., dissenting from denial of cert.).

276. McGinnis v. Royster, 410 U.S. 268, 270 (1973).

277. E.g., Ben-Shalom III, 881 F.2d at 464; Woodward, 871 F.2d at 1076; Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

278. DOD Dir. 1332.14, supra note 1.

279. Id.

280. Id.

281. See supra pp. 16-18.

282. DOD Dir. 1332.14, supra note 1.

283. See, e.g. Watkins v. United States, 875 F.2d 699, 728 (9th Cir. 1989); Beller v. Middendorf, 632 F.2d 788, 811 n.22 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1980) (plaintiff Beller), 454 U.S. 855 (1981) (plaintiff Miller).

284. Ben-Shalom v. Secretary of the Army, 489 F.Supp. 964, 976 (E.D. Wis. 1980).

285. DOD Dir. 1332.14, supra note 1.

286. See, e.g. Watkins, 875 F.2d at 729; Beller v. Middendorf, 632 F.2d at 811 n.22.

287. Matlovich v. Secretary of the Air Force, 591 F.2d 852, 854 (D.C. Cir. 1978); Watkins v. U.S. Army, 875 F.2d 699, 704 (9th Cir. 1989).

288. DOD Dir. 1332.14, supra note 1.

289. Id.

290. Id.

291. Id.

292. Watkins, 875 F.2d at 731.

293. Rethinking DOD Policy on Gays, The Washington Post, Nov. 6, 1989, at A 11, col. 1.

294. See supra pp. 16-18.

295. See supra pp. 18-19.

296. Uniform Code of Military Justice art. 125, 10 U.S.C. sec. 925 (1982).

297. See proposed statute at Appendix A.

298. See, e.g., Army Reg. 601-210, Regular Army and Army Reserve Enlistment Program, para. 4-4 (1 Dec. 1988).

299. DOD Dir. 1332.14, supra note 1.

300. UCMJ art. 125.

301. 18 U.S.C. sec. 13, and see supra p. 33.

302. E.g., Watkins v. U.S. Army, 875 F.2d 699, 729 (9th Cir. 1989) (en banc).

303. DOD Dir. 1332.14, supra note 1.

304. See supra p. 30.

305. Watkins, 875 F.2d at 702.

306. See proposed Directive at Appendix B.

## APPENDIX A

## PROPOSED SEXUAL ACTIVITY STATUTE

Any person subject to this chapter who willfully engages in sexual intercourse or sodomy in public view, or with an animal in any location, or with any other person subject to this chapter --

(1) while on duty, or

(2) in a barracks or other assigned billeting area, or

(3) on a vessel, aircraft, or other government conveyance, or

(4) when either person is in the chain of command of the other person,

shall be punished as a court-martial may direct. An accused's lack of knowledge of the duties assigned shall be an affirmative defense to this offense. Barracks or other assigned billeting areas include any area assigned to personnel for billeting purposes by competent superior authority, but does not include areas assigned as family housing.

APPENDIX B

PROPOSED MODIFICATION TO DIRECTIVE FOR SEPARATION DUE TO HOMOSEXUAL ACTS (ENCLOSURE 3 TO DOD DIR. 1332.14)

H. Homosexuality

1. Basis

a. Homosexual activity in the military environment is disruptive and seriously impairs the accomplishment of the military mission. It is also illegal when such activity includes sodomy.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

(3) A homosexual act means bodily contact, actively undertaken or passively permitted, between persons of the same sex for sexual satisfaction.

(4) Military environment means on duty, or; any place or property subject to military control, or; any situation that would create the appearance or prospect of favoritism within a military organizational unit or chain of command.

c. The bases for separation may include preservice, prior service, or current service conduct or statements. Military personnel will be processed

for separation per this chapter if the servicemember has engaged in, attempted to engage in, or solicited another to engage in a homosexual act in a military environment unless there are approved further findings that:

(1) Such conduct is a departure from the servicemember's usual and customary behavior; and

(2) Such conduct is unlikely to recur because it is shown, for example, that the act occurred because of immaturity, intoxication, coercion, or a desire to avoid military service; and

(3) Such conduct was not accomplished by use of force, coercion, or intimidation by the servicemember during a period of military service; and

(4) Under the particular circumstances of the case, the servicemember's continued presence in the military is consistent with the interests of the military in proper discipline, good order, and morale; and

(5) The servicemember does not intend to engage in homosexual acts in a military environment.

d. Personnel who identify themselves as homosexual or bisexual, but for whom there is no evidence of homosexual acts in a military environment, will not be processed for separation for homosexual acts. Such personnel may be separated in appropriate circumstances for other reasons set forth in this Directive.

2. Characterization of Description. Characterization of service or description of separation shall be in accordance with the guidance in section C of part 2.

When the sole basis for separation is homosexual acts, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C of part 2 and there is a finding that during the current term of service the servicemember attempted, solicited, or committed a homosexual act in the following circumstances:

a. By using force, coercion, or intimidation.

b. With a person under 16 years of age.

c. With a subordinate in circumstances that violate customary military superior-subordinate relationships.

d. Openly in public view.

e. For compensation.

f. In a military environment, as defined by this directive, when there are findings of an adverse impact on morale, good order, or discipline.

3. Procedures. The Administrative Board Procedure (section C of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.c., above.

b. The Administrative Board shall follow the procedures set forth in subsection C.5 of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.c., above, is supported by the evidence, the Board

shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's authority (section O. of this Part).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of

the following considerations:

1. There is insufficient evidence to support the finding; or

2. Retention is warranted under the limited circumstances described in paragraph H.1.c., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.c., the Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

e. The burden of proving that retention is warranted under the limited circumstances described in paragraph H.1.c. rests with the member, except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

f. Findings regarding the existence of the limited circumstances permitting a member's retention under paragraph H.1.c. are required only if:

(1) The member clearly and specifically raises such limited circumstances; or

(2) The Board or Separation Authority relies upon such circumstances to justify the member's retention.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with the provisions of this Directive;

(2) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(3) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(4) Precludes separation in appropriate circumstances for another reason set forth in this Directive; or

(5) Precludes trial by court-martial in appropriate cases.