MILITARY POLICY TOWARD HOMOSEXUALS: SCIENTIFIC, HISTORICAL, AND LEGAL PERSPECTIVES
by Major Jeffrey S. Davis

I. INTRODUCTION

Department of Defense Directive 1332.14 states that homosexuality is incompatible with military service. Accordingly, current policy prohibits homosexuals from entering military service. If a homosexual manages to enter the service in spite of this prohibition, the service will separate that individual as soon as possible. To facilitate this process, current policy allows separation based on homosexual tendencies alone, without requiring proof of any homosexual acts. Many military homosexuals, however, have resisted their separations from the military by strenuously defending their positions at administrative elimination hearings and by vigorously litigating their causes.

These cases often involve a soldier, sailor, or airman who, but for being a homosexual, is outstanding in every respect. Using the testimony of supervisors and co-workers, these service members try to demonstrate the inapplicability of each of the policy reasons the military uses to justify their exclusion. The current policy, however, contains no exceptions. Commanders have no discretion to retain homosexuals and are themselves derelict if they do not initiate separation action. Should commanders have this discretion? Can the retention policy be altered without altering the accession policy?

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3DOD Dir. 1332.14.
4Id.
5See, 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, 589 F.2d 852, 854 n.4, 856 (D.C. Cir. 1978).
6See, e.g., cases cited supra note 5.
7DOD 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.
Separating people from the military solely because of their sexual orientation or status may lead to a successful legal challenge under the fundamental rights prong of equal protection. Although the Supreme Court recently declined to hear Ben-Shalom v. Marsh, a case raising a challenge under the suspect/quasi-suspect class prong of equal protection, the Court never has squarely addressed either prong of equal protection in a homosexuality case.

The policy also may lead to problems if the Selective Service System is ever reactivated. The draft could be avoided by anyone claiming to be a homosexual. Should the military modify this policy, which is based on sexual orientation?

Sodomy, whether heterosexual or homosexual, is against the law for members of the armed services. The Supreme Court has determined that sodomy statutes are constitutional. Nevertheless, is sodomy the real problem, or is the problem sexual activity in general? Should the Uniform Code of Military Justice continue to prohibit sodomy?

Some people do not realize they have homosexual tendencies until after they have enlisted or have been commissioned. Should they be treated differently than people who lie about their sexual orientation to enter military service?

This article contends that current policy on accession of homosexuals should be altered so 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 solely on statements of sexual orientation, but should require evidence of prejudice to good order and discipline.

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9See infra text accompanying notes 232-38.
10See Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (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) [hereinafter Ben-Shalom II]. Ben-Shalom I was a 1980 case in which the Eastern District of Wisconsin determined that the homosexual regulation violated the first amendment. Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980) [hereinafter Ben-Shalom I].
11UCMJ art. 125.
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 United States Army. National and international trends also are addressed. Part IV is an analysis of the legal arguments that have been made for and against allowing homosexuals 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 homosexuals' best remaining argument. 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 a topic that often leads to heated discussion of divergent views. Science lends objectivity to the discussion. A great deal of scientific research has been conducted 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.\(^{16}\)

\(^{14}\)DOD Dir. 1332.14.
\(^{16}\)/d. at 3-9.
Kinsey did not adopt the common practice of labeling people as heterosexuals, homosexuals, or bisexuals. 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 that he had gathered should be addressed by those scientists attempting to discover biologic, psychologic, social, 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 twentieth 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 ex-

\(^{17}\)Id. at 636-47. The other rates are: 1) predominantly heterosexual, only incidentally homosexual; 2) predominantly heterosexual, but more than incidentally homosexual; 3) predominantly homosexual, but more than incidentally heterosexual; and 4) 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 Lovong 349 (1986).


\(^{22}\)Id.
perience and environment, while others have considered genetic and physiological explanations.23

Researchers recently have 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 naturally will 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 generally is over twice as large in men as it is 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 third and fourth 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 dur-

23Id.
24Id.
25Id. at 236-37.
26Id. at 237-38.
27Id. at 239.
ing gestation. A bisexual or homosexual orientation may result if these reactions are modified because of genetic variations, biochemicals produced in response to stressful situations, drugs taken by the pregnant mother, or other variables.  

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.  

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

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.  

The only behavioral variable found to induce homosexual activity is total sexual segregation. Rhesus monkeys in this situation have displayed homosexual behavior. When later integrated with members of the opposite sex, however, most monkeys have displayed heterosexual behavior.  

Though scientists cannot conduct sexual orientation experiments on humans, evidence exists that many of the methods used to in-
duce homosexual behavior in lab animals would 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 in which 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 diethylstilbestrol (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 on the mother also has 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 ten percent of the mothers of heterosexuals.38

Several hypotheses follow from the prenatal neurohormone theory, and many have been tested. For example, homosexuality primarily should be 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 also would tend to favor fewer deviations in females, because only females can gestate

34Id.
35Id. at 244-47. The four types are alphareductase deficiency, androgen insensitivity syndrome, faulty testosterone synthesis, and congenital adrenal hyperplasia syndrome (which affects females).
36Id. at 247.
37Id.
38Id.
39Id. at 249.
offspring. Evidence from humans worldwide and from all other mammals studied supports the idea that homosexuality is more common among males than among females.\textsuperscript{40}

Another hypothesis is that homosexuality should be an inherited trait, because there are likely to be many genetic factors that increase the chance of a deviation from the biochemical norm. "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."\textsuperscript{41} 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.'"\textsuperscript{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."\textsuperscript{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.\textsuperscript{44}

The vast majority of homosexuals never seek treatment.\textsuperscript{45} Of those who have, there have been some reports of successfully changing homosexuals into heterosexuals, but the criteria for success often have been "'either vague or considerably less than exclusive heterosexual behavior.'"\textsuperscript{46} The best predictor of whether a homosexu-

\begin{footnotesize}
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\item \textsuperscript{40}Id.
\item \textsuperscript{41}Id. at 250.
\item \textsuperscript{42}Id.
\item \textsuperscript{43}Id. at 251.
\item \textsuperscript{44}Id.
\item \textsuperscript{45}Sultan, Elsner & Smith, \textit{Ego-Dystonic Homosexuality and Treatment Alternatives}, in Male and Female Homosexuality: Psychological Approaches 192 (L. Diamant, ed. 1987).
\item \textsuperscript{46}Ellis and Ames, \textit{supra} note 21, at 251.
\end{itemize}
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al will respond to treatment is the amount of heterosexual experience the individual had prior to treatment. 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.

The prenatal neurohormone theory, if correct, would indicate that those homosexuals who attribute their sexual orientation to biological forces beyond their control are right. Many social scientists, however, do not share this view. For example, many behavioral scientists favor experiential explanations for sexual orientation, and some psychoanalysts maintain that homosexuality is a neurosis that can be cured. 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.” The prenatal hormone theory combines these 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. For the purpose of reporting incidence, Kinsey defined a homosexual experience as physical contact to the point of orgasm with another male. 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.
Kinsey made generalizations from his data with his seven-point heterosexual/homosexual scale. The generalizations all pertained to white males after the onset of adolescence up to age fifty-five, and included the following: sixty-three percent never have an overt homosexual experience to the point of orgasm; approximately thirteen percent react erotically to other males without having overt homosexual contacts; twenty-five percent have more than incidental homosexual experience or reactions (rates 2-6) for at least three years; eighteen percent have at least as much homosexual as heterosexual in their histories (rates 3-6) for at least three years; thirteen percent have more of the homosexual than the heterosexual (rates 4-6) for at least three years, ten percent are more or less exclusively homosexual (rates 5 or 6) for at least three years, eight percent are exclusively homosexual (rate 6) for at least three years, and four percent are exclusively homosexual throughout their lives.

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.

Kinsey was looking at American white males in the 1940’s. Worldwide, as of the 1980’s, the incidence of exclusively homosexual males was estimated at three to five percent, regardless of varying degrees of social tolerance, intolerance, or repression.

The incidence of "feminized males" or "queens," who are often caricatured, is estimated at about ten percent of the male homosexual population. Evidence also exists that homosexuality is more common among males than among females, both in humans worldwide and in all other mammals that have been studied. Kinsey found that only two or three percent of women were mostly or exclusively homosexual on a lifelong basis.
2. Homosexuals in the Military

If the incidence of homosexuals in the military is the same as the incidence in the general population, about three to five percent 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. Data for separations because of homosexuality in the post-war 1940's through the 1950's can only be estimated because of the nature of military recordkeeping during those periods. The Army, for example, did not record the number of enlisted personnel separated for homosexuality until mid-1960. 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.

Even in the 1960's, the services did not have uniform data collection on homosexual separations. The Army separated 6139 enlisted soldiers for homosexuality during a seven and one-half year period from 1960-1967 (averaging 818 per year). From 1957 to 1965, the Army allowed an average of thirty officers per year to resign in lieu of administrative elimination action for homosexuality. From 1950 to 1965, the Navy separated a total of 17,392 enlisted men for homosexuality for an average of 1087 per year. No statistics are available for naval officers during this period.

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. The Navy accounted for the highest percentage of separations, and in 1961 the Navy stated that

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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).
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.
homosexuality and other sexual abnormalities accounted for approximately forty percent of all its Undesirable Discharges.\footnote{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, \textit{supra} note 63, at 50.}

More recent and complete data of administrative separations for homosexuality for all services are available for fiscal years 1985 to 1987.\footnote{T. Sarbin & K. Karols, \textit{supra} note 58, at 21, app. B.} 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 were separating about 4 or 5 enlisted men per 10,000 for homosexuality, while the Navy was separating 13 enlisted men per 10,000. Naval officers of both sexes also have higher separation rates than are found in the 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).\footnote{W. Menninger, \textit{supra} note 62, at 227, quoted in C. Williams & M. Weinberg, \textit{supra} note 63, at 60 (interim report by C. Fry and E. Rostow reported by W. Menninger).} This raises the question of how many homosexuals serve in the military without ever being identified.

One study from the World War II era addresses this question.\footnote{Id. at 22.} It traced 183 men known to be homosexual prior to entering the military. Of these, 51 were rejected at induction, and 14 were ad-
mitted but later discharged. The remaining 118 served from 1 to 5 years, and 68 of them served as officers. Two studies with results similar to the World War II study were reported in 1967.\textsuperscript{76} 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.\textsuperscript{76}

Dr. Joseph Harry, in a study of 1456 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.\textsuperscript{77} Sexual orientation was determined using the Kinsey heterosexual-homosexual rating scale, with homosexuals being defined at those scoring four or higher.\textsuperscript{78} No findings explained why higher numbers of lesbians entered the service.\textsuperscript{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 fourteen percent 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.\textsuperscript{80} One explanation was that many did not know they were homosexuals at the time they volunteered or were drafted.

Harry found that the median age of fully realizing one's homosexuality and becoming socially and sexually active was approximately nineteen or twenty, and that most men realize their homosexuality by their mid-twenties.\textsuperscript{81} Kinsey earlier had found homosexual behavior patterns in males to be "largely established" by age sixteen, with only a small portion of men materially modifying their sexual behavior patterns upon entering military service.\textsuperscript{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

\textsuperscript{76}C. Williams & M. Weinberg, \textit{supra} note 63, at 60.
\textsuperscript{77}Id.
\textsuperscript{78}Harry, \textit{supra} note 13, at 119.
\textsuperscript{79}Id.; see \textit{supra} note 17 and accompanying text.
\textsuperscript{80}Harry, \textit{supra} note 13, at 119.
\textsuperscript{81}Id. at 121.
\textsuperscript{82}A. Kinsey, \textit{supra} note 15, at 416.
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.\(^3\)

Some support for Harry’s findings comes from a study of homosexuals living in the Chicago area conducted by the Institute for Sex Research in 1967. Of those with prior military service, twenty-seven of eighty, or thirty-four percent, reported that they did not consider themselves homosexual before induction.\(^4\)

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 seventy-five percent or more of the homosexuals who serve in the military are never identified, and a significant percentage may not realize they have a homosexual orientation until after entering the military.

Homosexuals are identified by the military in three main ways: discovery through another person (sometimes related to jealousy, a lovers’ argument, or blackmail); voluntary admissions (usually for the purpose of getting out of the military); and the homosexual’s own indiscretion.\(^5\) 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 nonmilitary).\(^6\)

The following conclusions result from the Williams and Weinberg study: Those engaging in more frequent homosexual activity prior to entering the military are more likely to be identified, as are those who do the same while in the military. Homosexuals who have a military as opposed to a nonmilitary sex partner also are more likely to be detected. Even more interesting, however, is that those who engage in more frequent sex prior to entering the military and use nonmilitary partners are the least likely to be identified. 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 discovered through their own indiscretion.\(^7\)
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." In 1973 the American Psychiatric Association voted to stop classifying homosexuality as a mental disorder. Nevertheless, some homosexuals still seek the assistance of psychiatrists because they do not want to be homosexual. Homosexuality unwanted by a patient is called ego dystonic homosexuality. 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. Either way, the psychological baggage carried by ego dystonic homosexuals sets them apart from heterosexuals and most homosexuals.

The 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.

The two problem areas in which homosexuals are over-represented are alcohol abuse and the acquired immune deficiency syndrome (AIDS). In a 1980 report of problems surfaced by homosexuals during contacts with family physicians, alcoholism was found to be slight-
ly more prevalent in the homosexual population. A study of the lifetime drinking histories of homosexual and heterosexual women interviewed in the late 1960's suggested significantly more problem drinking in the lesbian sample.

A 1978 study of four urban areas in the Midwest reported that about one-third of male homosexuals surveyed were alcoholics. 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, except in preservice drug and alcohol use.

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, sixty percent of the 119,590 known cases of AIDS in the United States were homosexual or bisexual men, twenty-one percent were female and heterosexual male intravenous drug users, seven percent were homosexual or bisexual men who were also intravenous drug users, and five percent were attributed to heterosexual contacts.

Anyone can get AIDS. Homosexual and bisexual men are particularly susceptible because often they 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. This screening program probably keeps some homosexuals out of the military. Ironically, it also makes the military one of the safest places to engage in sodomy—at least medically speaking.

III. HISTORICAL PERSPECTIVES

Don’t talk to me about naval tradition. It’s nothing but rum, sodomy, and the lash.

—Winston Churchill

*Diamant & Simono, supra note 94, at 175.
*Id. at 176.
*Id. at 177.
A. HISTORICAL ANTECEDENTS

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

Plato lived from about 427-347 B.C. His Symposium praised the virtues of male homosexuality and suggested that pairs of homosexual lovers would make the best soldiers. 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.

Jewish homosexuals presumably were not 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.” Most historians have written that Christianity embraced the persecution and condemnation of homosexuals from its beginnings as well, but there is also evidence that Catholic Europe more or less tolerated homosexuality until the Middle Ages.

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 therefore 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.

In England, the ecclesiastical law against buggery (anal intercourse) became established as the criminal law of the state in 1563. What had been one of the sins against nature became one of the "crimes

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102W. Masters, V. Johnson & R. Kolodny, supra note 20, at 346.
103L. Diamant, supra note 89, at 4.
105W. Masters, V. Johnson & R. Kolodny, supra note 20, at 346.
106T. Cowan, supra note 104, at 11-16.
107L. Diamant, supra note 89, at 5. Other Biblical references to homosexual conduct include Genesis 9, Genesis 19, and Romans 1:26, 27.
109Id. at 347.
110Sarbin & Karols, supra note 58, at 14.
against nature." This terminology still is used to describe sodomy in many jurisdictions.111

Ecclesiastical law served as the basis for punishing homosexual behavior in Europe until the nineteenth century, when the Napoleonic Code led to a liberalization of attitudes.112 The nineteenth 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 stated succinctly in Bowers v. Hardwick, the Supreme Court case holding anti-sodomy statutes 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 exclude or remove homosexuals from 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 ninety-third 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.

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111 Id.
112 L. Diamant, supra note 89, at 6.
113 Id. at 15.
114 Bowers, 478 U.S. at 192-94.
sodomy. The Manual for Courts-Martiai, 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; it read, “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-Martiai, 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

117 Id.
119 Manual for Courts-Martiai, United States, 1921, para. 443 [hereinafter MCM, 1921].
120 Id.
121 Id.
122 Id.
123 UCMJ art. 125 (1951).
124 Id.
125 MCM, 1951, para. 204.
Assault with intent to commit sodomy became part of article 134, UCMJ, and was not limited to any particular variety of sodomy. These laws have remained substantially unchanged except for altering the maximum punishments for certain forms of the offenses.

The courts-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, historically has led to administrative separation.

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, although they are found in different regulations. The different services have substantially similar regulations, because they are all derived from the same Department of Defense directives.

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

From 1922 to 1945, Army enlisted personnel suspected or charged with homosexual attempts or acts faced the prospect of a "Section VIII" discharge. 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

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125UCMJ art. 134.
126For 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.
127See generally C. Williams & M. Weinberg, supra note 63, at 33, 38-53 (explaining that few homosexuals receive punitive discharges from courts-martial; most are separated administratively).
130Id., at 622.
131Army 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).
under Section VIII received an honorable discharge. In cases of psychopathic behavior, chronic alcoholism, or sexual perversion including homosexuality, the discharge was without honor.\textsuperscript{132}

In 1945 War Department policy concerning homosexuals was either to court-martial them or to 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.\textsuperscript{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.\textsuperscript{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, individuals committing misconduct, and sexual perverts. In those cases in which there had been a long period of good service, however, a homosexual could be separated as "unsuitable" (with a general discharge) rather than as unfit.\textsuperscript{135}

In 1949 the newly created Department of Defense issued a directive outlining a harsher policy on homosexuality for all branches of the service.\textsuperscript{136} The 1950 Army Regulation implementing this policy divided homosexuals into three classes.

\textsuperscript{132}Honorable discharges were characterized as "white" and discharges without honor were characterized as "blue." L. West & A. Glass, Sexual Behavior and the Military Law 252 (R. Slovenco, ed. 1965); see also Note, Homosexuals in the Military, 37 Fordham L. Rev. 465 (1969).

\textsuperscript{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].

\textsuperscript{134}C. Williams & M. Weinberg, supra note 63, at 27. This policy later was published in AR 615-368, para. 3 (14 May 1947).

\textsuperscript{135}AR 615-368, para. 2 (27 Oct. 1948).

\textsuperscript{136}C. Williams & M. Weinberg, supra note 63, at 27.
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 who 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. 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 also could approve an honorable or general discharge for Class II homosexuals if it would be in the best interests of the service and if the individual concerned disclosed his or her homosexual tendencies upon entering the service, had performed outstanding or heroic service, or had performed service over an extended period.139

In 1966 the Army required a psychiatric examination prior to separation for homosexuality.140 In 1970 the homosexuality regulation was superseded and was integrated into 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

137Army Regulation 600-443, Personnel Separation of Homosexuals, para. 3 (12 Jan. 1950) [hereinafter AR 600-443].
138Army Regulation 635-89, Personnel Separations, Homosexuals, para. 3 (21 Jan. 1955) [hereinafter AR 635-89].
139AR 635-89, para. 3 (8 Sep. 1955).
142Ben-Shalom, 489 F. Supp. 964.
In 1972 the unfitness and unsuitability provisions for enlisted personnel became chapters 14 and 13 of Army Regulation 635-200 (AR 635-200), the regulation pertaining to all types of enlisted personnel separations.\textsuperscript{143}

This regulatory scheme 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 that homosexuality is incompatible with military service. A similar situation developed with officer separations, because the officer elimination regulation implied that separation was discretionary.\textsuperscript{144} Indeed, prior to February 1977, the Army's litigation posture was that there was discretion to retain homosexuals.\textsuperscript{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.\textsuperscript{146} In litigation in 1974, however, the Navy argued that the regulation did not require mandatory discharge of homosexuals.\textsuperscript{147}

The application of the Navy regulation became an issue in \textit{Berg v. Claytor}, a case involving a homosexual officer.\textsuperscript{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."\textsuperscript{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 ever were presented.

In \textit{Matlovich v. Secretary of the Air Force},\textsuperscript{150} a companion case to \textit{Berg v. Claytor}, application of the Air Force regulation on discharge

\textsuperscript{144} AR 635-100, para. 5.
\textsuperscript{145} DAD-AL 1972/4168, 2 Jan. 1979.
\textsuperscript{146} SECNAV INSTR. 1900.8A (31 Jul. 1972).
\textsuperscript{147} Champagne v. Schlesinger, 506 F.2d 979, 983-84 (7th Cir. 1974).
\textsuperscript{148} Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978).
\textsuperscript{149} Id. at 851.
\textsuperscript{150} Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).
of homosexuals was at issue. Technical Sergeant Matlovich, after
twelve years of service, applied in 1975 for an exception to the policy
discharging homosexuals. The Air Force regulation expressly pro-
vided for exceptions when "the most unusual circumstances exist
and provided the airman's ability to perform military service has not
been compromised," and added that "an exception is not warranted
simply because the airman has extensive service."  

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. Despite
Matlovich's 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 cir-
cumstances." The court remanded the case for the Air Force to clarify
its policy on retention of homosexuals. Subsequent case history
does not indicate whether such matters ever were presented.

In Ben-Shalom v. Secretary of Army (Ben-Shalom I), the Army
in 1980 was told that the language it had been using since 1970 to
define unsuitability because of homosexual "tendencies, desires, and
interests" was unconstitutional. The court held that the language
violated the first amendment and the constitutional right to
privacy. The Army had been using this language in several different
regulations concerning active duty and reserve officer and enlisted
acquisitions, reenlistments, and separations. The definition was
changed after Ben-Shalom I so that discharge for homosexual ten-
cencies 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 . . . ." 

In 1981 the Army revised the enlisted separations regulation, AR
635-200, to create a separate chapter for separations due to homosex-
uality. The policy made it clear that all personnel fitting the defini-

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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, 489 F. Supp. 964.
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) (C02, 28 Nov. 1980).
tion 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 that essentially meant the soldier was not really a homosexual.\textsuperscript{160} The Department of Defense issued a directive in 1982 that made this total exclusion policy uniform throughout all the services.\textsuperscript{161} There have been no major changes to regulations that address homosexuality since 1982.

\textbf{C. NATIONAL AND INTERNATIONAL TRENDS}

During the 1950's, 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.\textsuperscript{162} As of 1987, twenty-four states either had adopted the Model Penal Code or had otherwise removed criminal penalties for consensual sodomy.\textsuperscript{163} Attempts to get other states to repeal sodomy statutes have not been successful since the June 1986 \textit{Bowers v. Hardwick} decision.\textsuperscript{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 behavior is not illegal (although different ages of consent for homo- and heterosexual behavior may exist), but there is no protection against discrimination on the basis of sexual orientation. In 55 countries homosexual behavior is illegal (in most cases between men,

\textsuperscript{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 in homosexual acts. DOD Dir. 1332.14.


\textsuperscript{162}Leonard, supra note 162, at 104.

\textsuperscript{163}Id. at 106.
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.\textsuperscript{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, in spite of the fact that they consider homosexual acts between consenting adults to be legal. These countries include Canada, Peru, Venezuela, New Zealand, Italy, Great Britain, and Northern Ireland.\textsuperscript{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.\textsuperscript{167} In Spain, homosexual acts have not been illegal since 1978, but sexual acts between soldiers on duty inside barracks are illegal.\textsuperscript{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-related jobs.\textsuperscript{169} It has been legal for homosexuals to serve in the Armed Forces of Denmark since 1979.\textsuperscript{170} Homosexuals were permitted to serve in the Armed Forces of the Federal Republic of Germany, but they were not considered to be suitable for senior positions.\textsuperscript{171} In the Netherlands, the Dutch have allowed homosexuals to serve since 1974.\textsuperscript{172} Sweden has allowed homosexuals in the Armed Forces since 1979.\textsuperscript{173}

\textsuperscript{166}\textit{Id.} at 188-242.
\textsuperscript{167}\textit{Id.} at 199.
\textsuperscript{168}\textit{Id.} at 240.
\textsuperscript{169}\textit{Id.} at 213.
\textsuperscript{170}\textit{Id.} at 228.
\textsuperscript{171}\textit{Id.} at 230.
\textsuperscript{172}\textit{Id.} at 237.
\textsuperscript{173}\textit{Id.} at 240.
IV. LEGAL PERSPECTIVES

It is revolting to have no better reason for a rule of law than that 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.174

—O.W. Holmes

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 were not really homosexuals.175 These attacks proceeded mostly on procedural grounds, and many involved claims that the military did not follow its own regulations.176 In the 1970’s 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. In Hatheway v. Secretary of the Army178 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.

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174Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), quoted in Bowers, 478 U.S. at 199.
176Id.
177Id.
Hatheway lost. The Ninth Circuit Court of Appeals held that the convening authority selectively could 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 because 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 1986 in Bowers v. Hardwick. 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.\textsuperscript{179} Hardwick had challenged the Georgia sodomy statute, which prohibited all sodomy—both homosexual and heterosexual—\textsuperscript{180} and which had been the law in Georgia since 1816.\textsuperscript{181}

The Eleventh 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."\textsuperscript{182}

Had the Supreme 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.\textsuperscript{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.\textsuperscript{184} Although 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 observed that those theories should have been considered anyway.\textsuperscript{185}

\textsuperscript{179}Bowers, 478 U.S. at 190, 196.
\textsuperscript{180}Id. at 188 n.1.
\textsuperscript{181}Id. at 197.
\textsuperscript{183}See cases cited infra note 200 and accompanying text.
\textsuperscript{184}Bowers, 478 U.S. at 195.
\textsuperscript{185}Id. at 197 n.8, 201-03.
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 legally to 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\textsuperscript{186} and Mattovich v. Secretary of the Air Force.\textsuperscript{187} Berg and Mattovich each raised the issue of whether private consensual homosexual activity between adults is protected constitutionally, but that issue was never resolved.

Judicial review of discretionary military administrative determinations generally is limited to ensuring that the action complained of is supported by substantial evidence and that it is not arbitrary, capricious, or unlawful.\textsuperscript{188} The military enjoys a long history of judicial deference to military affairs.\textsuperscript{189} One area in which the military is scrutinized closely is the application of its own regulations. The government lost both Berg and Mattovich 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.\textsuperscript{190}

Mattovich and Berg are the exceptions. The government ultimately has prevailed in most requests by homosexuals to preclude discharge.\textsuperscript{191} Rich v. Secretary of the Army\textsuperscript{192} illustrates the dilemma homosexuals sometimes face. 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.

\textsuperscript{186}591 F.2d 849 (D.C. Cir. 1978).
\textsuperscript{187}Mattovich, 591 F.2d 852; see supra text accompanying notes 150-58.
\textsuperscript{188}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 Board for Correction of Military Records to deny relief).
\textsuperscript{190}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).
\textsuperscript{192}Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984).
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." 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, capricious, or unsupported by substantial evidence.

2. Fighting a War of Attrition: Exhaustion of Administrative Remedies as a Government Defense

Sometimes the constitutional issues never are 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. Although that process can take from months to years, 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 later can rely. An incidental benefit to the government is that during this process plaintiffs sometimes fail to pursue their claims and never are 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 sometimes is seen in the homosexual cases, such as when a known homosexual faces an absolute prohibition against reenlisting.

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

183Id. at 1224 n.1, 1225.
184E.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); Krugler v. United States Army, 594 F. Supp. 565 (N.D. Ill. 1984) (dismissed for failure to exhaust).
185E.g., Von Hoffburg, 615 F.2d at 642 n.17 (expressing concern that plaintiff's case had been pending before the ABCMR for two years).
186E.g., Beller, 632 F.2d at 801.
fifth amendment procedural and substantive due process. Both of these issues were raised in *Beller v. Middendorf*, a consolidation of three Navy cases.

The procedural due process issue requires inquiry into whether military discharge procedures deprive homosexuals of property or liberty interests without due process. 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 cause for dismissal existed, 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." Deprivation of a liberty interest could occur if military charges of homosexuality were false, made public, and followed by discharge. These actions might damage standing and associations within the community. They also might impose a stigma or disability affecting employment opportunities. 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.

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 procreation, choice of a marriage partner, or family planning—the law is given heightened scrutiny. In these cases, 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.

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187 Id.
188 Id. at 805 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).
189 Id.
200 Id. at 806 (citing Roth, 408 U.S. at 573).
201 Id.
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.”

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.

The court concluded that the regulation was a reasonable effort to accommodate the needs of the government with the interests of the individual. 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.”

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202Beller, 632 F.2d at 807.
203Id. at 811.
204Id. at 812.
205Id. at 808 n.20.
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 1970's were held to be unconstitutional insofar as they allowed discharge for homosexual tendencies, desire, or interest.207 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."208

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 had 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.209

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.210

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 soldiers to associate freely with known or

207 *Ben-Shalom*, 489 F. Supp. 964; see *supra* text accompanying notes 155-58.
208 *Ben-Shalom*, 489 F. Supp. at 969.
209 *Id.* at 973-74.
210 *Id.* at 974.
suspected homosexuals (the court having found the right of association in the penumbral zone of privacy created by the first amendment). 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.

The writ of mandamus was issued, the Army did not appeal, and the Army changed its regulations. Soon after, the Department of Defense directed all the services to implement new regulations. The issue of the homosexual personality, however, keeps coming back.

Consider Reverend (former Captain) Dusty Pruitt. 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. 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 homosexual status.

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."

111Id. at 975-76 (citing Griswold, 381 U.S. at 484-85).
112Id. at 976.
113See supra text accompanying notes 155-58.
114Id.
116Id. at 627.
117Id.
118Id.
Miriam Ben-Shalom raised the issue again in 1988 after the Army refused to reenlist her into the Army reserve under its new policy. 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." 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 about 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 be a homosexual.

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. The Supreme Court has found an implied equal protection component in the fifth amendment due process clause, and the Court has treated federal equal protection claims under the fifth amendment the same as state equal protection claims under the fourteenth amendment.

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 governmental 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 that impinge on personal rights protected by the Constitution.

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[118] Ben-Shalom, 881 F.2d 454.
[219] Id. at 457.
[220] Id. at 462.
[224] Id.
The Supreme Court also has recognized a middle area of somewhat heightened scrutiny when 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.\footnote{Id. at 440-41.} The Court has not extended suspect or quasi-suspect class status beyond the categories mentioned.\footnote{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); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy).}

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.\footnote{City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1984).}

Under this deferential standard of scrutiny, it does not matter if an individual member of the burdened class is an exception.\footnote{Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976).} Therefore, if regulations pertaining to homosexual service members need only meet the rational basis test, the fact that a homosexual service member might be outstanding in every respect is irrelevant. The inquiry is directed at the regulation, not the service member.

2. \textit{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."\footnote{Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.).} 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.\footnote{See, e.g., Plyler v. Doe, 457 U.S. 202, 216-17 (1982).}
a. Fundamental Rights

The "fundamental rights" prong of equal protection easily is confused with substantive due process fundamental rights analysis, but it involves a different inquiry. *Bowers v. Hardwick* illustrates this. 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 longstanding law that presumably reflected the will of the Georgia citizenry. It is tempting to leap to the conclusion that because homosexuals traditionally have been defined by their acts (engaging in sodomy), and because those acts are not protected, then there cannot be a fundamental right to be a homosexual.

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. Clearly, 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. While anyone can refrain from doing an act proscribed by law or regulation, however, 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. It was a due process case, and the Court explicitly did not decide it on the basis of the equal protection clause. 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."

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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.
Under the fundamental rights prong of equal protection, regulations that 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, these 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 the following: 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

236But 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).

237See 478 U.S. at 194.

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


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

242But 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).

243See, e.g., Cleburne, 473 U.S. at 441; Plyler, 457 U.S. at 216 n.14; Rodriguez, 411 U.S. at 28.
Judge Norris, concurring in Watkins, found all of these factors applicable to homosexuals. Nevertheless, there is room for disagreement with some of his conclusions. There is no doubt that homosexuals have suffered a history of purposeful discrimination. In Watkins, the Army conceded this point. Likewise, the trait of homosexual orientation does not correlate with ability to perform or contribute to society. Not only is history replete with accounts of homosexuals who have contributed a great deal to society, but aside from sexual orientation, researchers cannot distinguish between homosexuals and heterosexuals.

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 also has been upheld as constitutional. The law often is based on notions of morality that may 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."

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." If homosexual orientation is mutable, it is only so with great difficulty, and the likelihood of it truly being changed is very low.

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 were two openly homosexual members of Con-

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244 Watkins, 875 F.2d at 724-28.
245 Id. at 724.
246 See, e.g., T. Cowan, supra note 104.
247 See supra text accompanying note 93.
248 875 F.2d at 725.
250 See supra text accompanying notes 43-44.
gress. California and Wisconsin have passed statutes prohibiting discrimination against homosexuals. The Civil Service Reform Act of 1978 has been interpreted to mean that homosexuality by itself is not a disqualification for federal employment. The most significant display of homosexual 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 centers of gay life in America, such as Boston, New York, Los Angeles, San Francisco, Atlanta, the District of Columbia (Washington, D.C.) and Philadelphia.

Judge Norris noted 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." He stated that "homosexuals as a group cannot protect their right to be free from invidious discrimination by appealing to the political branches." There is much evidence to the contrary, however, and it is unlikely that the Supreme Court would hold that homosexuals are 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. Because they have suffered purposeful discrimination and are defined by an immutable trait unrelated to their contributions to society, homosexuals 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 *Brennan v. Shalala III*, is "whether homosexuals, defined by the status of hav-

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251A. Leonard, supra note 162, at 103-04.
252Watkins, 875 F.2d at 727 n.30.
253A. Leonard, supra note 162, at 102.
254Id. at 106.
255Watkins, 875 F.2d at 727 n.30.
256Id. at 727.
ing a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class." The same issue was raised in Watkins. 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. The Ninth Circuit, en banc, then decided the case in favor of Watkins on an estoppel theory, and withdrew the earlier Watkins opinion. 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." The court applied rational basis scrutiny and found that the Army met that standard without difficulty.

The Supreme Court declined to hear Ben-Shalom III without comment. A denial of certiorari does not carry the weight of an affirmance, nor does it mean that the Supreme Court agreed with the decision of the Court of Appeals. Nevertheless, 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. First, do the regulations actually discriminate based on sexual orientation? Second, which level of judicial scrutiny applies? 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

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261 Ben-Shalom, 881 F.2d at 463.
258 Watkins, 875 F.2d at 699.
259 Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988).
256 Watkins, 875 F.2d at 711.
261 Ben-Shalom, 881 F.2d at 464.
262 Id.
264 Watkins, 875 F.2d at 712.
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 lawfully can proscribe these acts by its personnel. Everyone in the military does not have a homosexual orientation, however, 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 uniformly have emphasized the unsuitability for military purposes of people with homosexual orientations. 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 classified 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

Whether the military decides to go sleuthing after the class most likely to commit the proscribed acts, the inquiry still is 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 homosex-

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266See sources cited supra notes 14, 158-61.
267Ben-Shalom, 881 F.2d at 464.
267Watkins, 875 F.2d at 712-16.
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 the following: 1) race, alienage, or national origin; 2) gender or legitimacy; or 3) 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. Judge Norris, concurring in Watkins, supported strict scrutiny, but he believed homosexuals are a politically powerless group. Homosexual regulations may one day be judged with heightened scrutiny because homosexuals have several of the characteristics of a suspect class.

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 this scrutiny. The government has won only one compelling state interest case—the World War II era national origin case of Korematsu v. United States. A 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, demon-

\footnotesize{
\begin{itemize}
  \item \textsuperscript{264}Id. at 714.
  \item \textsuperscript{265}See, e.g., Ben-Shalom, 881 F.2d at 454; Watkins, 875 F.2d at 699.
  \item \textsuperscript{270}Watkins, 875 F.2d at 724-28.
  \item \textsuperscript{271}See supra text accompanying notes 240-57.
  \item \textsuperscript{272}Korematsu v. United States, 323 U.S. 214 (1944).
\end{itemize}
}
strate 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 service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.\textsuperscript{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 inquiry first requires an examination of whether the presence of homosexuals prevents or hinders the military from accomplishing the mission. During this examination, the military gets deferential treatment. In military affairs, a court should not substitute its views for the "considered professional judgment" of the military.\textsuperscript{274}

Because there always have been and probably always will be homosexuals in the military, it cannot tenably be argued that homosexuals prevent the military from accomplishing its mission. Nevertheless, 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 probably would be resolved in the military's favor.

The remaining question is similar to the one raised by Justice Brennan in \textit{Rowland}:\textsuperscript{275}

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.\textsuperscript{275}

\textsuperscript{273}DOD Dir. 1332.14.
\textsuperscript{275}Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1016 (1985) (Brennan, J., dissenting from denial of cert.).

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MILITARY POLICY TOWARD HOMOSEXUALS

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 governmental purpose.276

The first question is whether the purpose of military homosexuality policy constitutes a legitimate governmental 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 government clearly has an interest in the accomplishment of the military mission.

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

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

277E.g., Ben-Shalom, 881 F.2d at 464; Woodward, 871 F.2d at 1076; Drabenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984).
278DOD Dir. 1332.14.
of the military mission." These opening sentences of the policy refer to both conduct and speech that seriously impair the mission.

A person, whether homosexual or heterosexual, engaging in sexual conduct in a military environment, may well distract or detract from the mission. There are also situations in which 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 . . . ." 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 when the acts are off government property with non-military personnel. These cases often involve an act of sodomy, which, if discovered, can be prosecuted or dealt with administratively. The real effect on discipline is negligible. Outside those with an official need to know, few military personnel even will be aware of these acts until the military initiates adverse action.

It also is difficult to see how the presence of personnel who admit to a homosexual orientation adversely affects the maintenance of good order. About seventy-five percent of the homosexual personnel never are discovered at all, so they are not causing these problems. Of course, 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 service members "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 also have been times when the "great majority" was not 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 does not 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 This problem, however, is solved best 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 service members 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

282DOD Dir. 1332.14.
283See, e.g., Watkins, 875 F.2d at 728; Beller, 632 F.2d at 811 n.22.
284Ben-Shalom, 489 F. Supp. at 976.
286See, e.g., Watkins, 875 F.2d at 729; Beller, 632 F.2d at 811 n.22.
287Matlovich, 581 F.2d at 854; Watkins, 875 F.2d at 704.
288DOD Dir. 1332.14.
quarters because of basic privacy considerations. These privacy considerations are just as applicable to heterosexuals and homosexuals of the same gender. Nevertheless, 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...." As the American military historically has excluded homosexuals, it is difficult to understand what leads to this conclusion other than conjecture. It is just as easy to surmise that a more limited 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...." There always will be some people for whom military service will not be acceptable under any policies or circumstances. Assuming the fears are legitimate, they arguably could 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." 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

288 Id.
289 Id.
290 Id.
291 Watkins, 875 F.2d at 731.
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

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 expelled immediately.

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 simply are incompatible with military service. Yet, the incidence of homosexual men is about the same in the military as it is in the general population, and the incidence of homosexual women is greater in the military than in the general population. 294 While seventy-five percent never are detected, a portion of the twenty-five percent who are detected simply turn themselves in when they decide they want to get out. 296 The system is not 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 accepting those who choose to lie. Personnel who do not 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. The people needing help the most, therefore, are discouraged from seeking it, but they still will be operating our multi-million dollar weapon systems while they try to sort out their sexuality.

None of this 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

294 See supra text accompanying notes 73-74.
296 See supra text accompanying notes 88-96.
will be disruptive. Policy should be crafted to allow the exclusion of disruptive personnel, but it should be crafted so 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.\textsuperscript{296} The real problem for the military is not the service member who engages in sexual activity on his or her own time, away from the military installation or vessel. The problem is the service member who disrupts the military mission through an inappropriate 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.

2. Regulatory

a. Accessions

Homosexuality currently is a nonwaivable disqualification for service in the military.\textsuperscript{297} 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 also would 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.\textsuperscript{298} The policy is not all bad, it just say too much. The military has a legitimate interest in keeping disruptive activity to

\textsuperscript{296}UCMJ art. 125.
\textsuperscript{297}See, e.g., Army Reg. 601-210, Regula-.
\textsuperscript{298}DOD Dir. 1332.14.
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 also is justified to the extent that these acts are illegal when they involve sodomy.\textsuperscript{299} Even if Congress repeals the military sodomy statute—which does not appear likely anytime soon—sodomy still will be illegal for military personnel in about half of the fifty states via the Assimilated Crimes Act.\textsuperscript{300} The basis for the policy should say this, and should refrain from using a laundry list that easily is assailed as reminiscent of old arguments used to exclude minorities from the military.\textsuperscript{301}

The bases for separation of homosexuals may include preservice, prior service, or current service conduct or statements.\textsuperscript{302} 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 that conduct. Nevertheless, 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.\textsuperscript{303} For example, Staff Sergeant Perry Watkins was retained in 1975 (as a Specialist Five) 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.”\textsuperscript{304}

\textsuperscript{299}UCMJ art. 125.
\textsuperscript{301}E.g., Watkins, 875 F.2d at 729.
\textsuperscript{302}DOD Dir. 1332.14.
\textsuperscript{303}See supra text accompanying notes 139-45.
\textsuperscript{304}Watkins, 875 F.2d at 702.
If the discretion to retain homosexuals is returned to commanders and Service Secretaries, homosexual personnel should be retained only 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 that are prejudicial to good order and discipline. Retention should be authorized for personnel who commit homosexual acts, as long as they 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.

VI. CONCLUSION

A policy must be legally sound, but it also should 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.

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 their place 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 may have reason
to drink. People who engage in anal sodomy also are 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 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 argument for homosexuals attempting to remain in the military. Though the suspect class prong of equal protection appears to be a lost cause because the Supreme Court declined to issue a writ of certiorari in Ben-Shalom v. Marsh, the fundamental rights prong still may prove to be successful. To succeed, a homosexual litigant will have to prevail on the issue of whether there is a fundamental right to be 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 almost certainly will lose the challenge. In the meantime, the rational basis test is the appropriate level of scrutiny, and the current regulations pass such scrutiny. The fact that the current policy is constitutional, however, 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 granted 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.

Current policy on accession of homosexuals should be altered so that homosexuality becomes 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.