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The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation

*Diane H. Mazur**©

INTRODUCTION

The academic literature on the "gays in the military" debate usually groups the court challenges of gay servicemembers in terms of the legal claims they raise. There are "privacy" or "due process" cases, "equal protection" cases, "First Amendment" cases, and cases bringing some combination of these claims.[1] Often the

 Assistant Professor, University of Florida College of Law. J.D., University of Texas School of Law, 1988. Captain, U.S. Air Force, 1979-83. I thank Justin Witkin for his helpful research assistance.

[1] *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1595-1600, 1619-21 (1993) (comparing due process and equal protection cases); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994) (discussing First Amendment cases); David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393, 413-19 (1994) (comparing due process, equal protection, and First Amendment cases); Paul Siegel, *Second Hand Prejudice, Racial Analogies and Shared Showers: Why "Don't Ask, Don't Tell" Won't Sell*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 185, 188-200 (1995) (comparing equal protection and First Amendment cases); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 702-09 (1992) (comparing due process, equal protection, and First Amendment cases); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On*

cases are also categorized according to the legal distinctions which the plaintiffs urge on the court. For example, "conduct" cases are always carefully distinguished from mere "status" cases. Under this argument, if the military cannot prove a servicemember has ever engaged in any prohibited "conduct" or behavior, it may not rely solely on the servicemember's gay orientation or "status" as a ground for exclusion.[2]

These legal descriptions of the cases, however, often obscure the artificiality of their facts. Commentators and litigators make their points with plaintiffs who fit into narrowly-drawn complaints, but who fail to represent the everyday servicemember. A more pragmatic and authentic way to view the cases is to examine how the servicemembers' controversies with the military arose. If these legal controversies have little to do with the treatment of gay servicemembers generally, any legal resolution may have little to do with improving the conditions under which gay servicemembers serve.

Part I of this Article examines the leading cases brought by gay military plaintiffs in this different light, focusing on the representativeness of the servicemembers' controversies with the military. In most of the litigated cases, the military has not initiated conflicts by discovering, and then discharging, gay servicemembers. Instead, servicemembers have first revealed their sexual orientation and then challenged the military to justify discharging them. This factual setting is highly unrepresentative of how the military most often applies its exclusionary policy, and it deflects attention away from more serious concerns about how the military treats its gay servicemembers.

Parts II and III address the contradictory positions that both litigators and commentators have taken in advocating for gay servicemembers. Part II discusses the distinction between status

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Deference, Rationality, and the Constitution, 66 U. COLO. L. REV. 375, 390-429, 448-59 (1995) (comparing equal protection and First Amendment cases); Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919, 927-47 (1994) (comparing due process, equal protection, and First Amendment cases).

[2] *See, e.g.*, Cain, *supra* note 1, at 1621-27; William B. Rubenstein, *Challenging the Military's Antilesbian and Antigay Policy*, 1 LAW & SEXUALITY 239, 257-60 (1991) (book review); Schlueter, *supra* note 1, at 396-98, 421-22; Strasser, *supra* note 1, at 396-404; Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994); Williams, *supra* note 1, at 934-36.

and conduct, which has become the basis for the most common litigation posture adopted by gay servicemembers. Under this distinction, plaintiffs contend that their gay orientation or status alone should not be disqualifying. They concede, however, that the military would be justified in discharging those gay servicemembers with any intimacy in their lives. As a result, the status/conduct distinction leaves a very demeaning, unrepresentative, and counterproductive picture of gay men and women in the military, one which denies the importance of normal human intimacy. Inexplicably, though, commentators have combined the status/conduct distinction with a pronounced preoccupation with sexual activity in the military in general. Part III discusses the negative effect of these exaggerated and unrepresentative descriptions of sexual conduct in the military.

Part IV examines the larger issues of the importance of telling an authentic, representative story in litigation, and the importance of challenging the military to do the same. It reviews the literature of narrative scholarship, with an emphasis on the requirement that narratives be typical of the experience they represent. Gay servicemembers need not be "unknown soldiers"; their interests would be better served by representative, rather than artificial, pictures of their military experience.[3]

I. KNOWING THE REAL SOLDIER

The most common category of gay military plaintiffs can be called "six o'clock news" plaintiffs. These servicemembers go outside military channels to issue a public challenge, confronting the military with a stance of "I'm gay — what are you going to do about it?" Not surprisingly, the military initiates discharge proceedings, and the servicemember responds with a lawsuit to prevent or reverse the discharge.

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[3] My understanding of the representative servicemember should be taken in the context of my military experience. I served as an aircraft maintenance and munitions maintenance officer with the U.S. Air Force in the late 1970s and early 1980s. My duty assignments were both in the United States and overseas in the Republic of Turkey, which at the time was designated a "hardship tour" because of limited facilities for servicemembers' families. In the United States, my squadron's duties ranged from the more routine "Cold War" responsibility of preparing for conflict with the Soviet Union to the less routine deployment of aircraft to remote sites under field conditions.

Petty Officer Keith Meinhold,[4] a mid-level Navy enlisted man, was literally a "six o'clock news" plaintiff. His challenge to the military began on the national evening news. In a May 1992 interview on ABC World News Tonight, Meinhold declared that he was gay and that he intended to bring suit against the military to overturn its policy excluding gay servicemembers.[5]

Marine Sergeant Justin Elzie's[6] story is similar, but perhaps more difficult to understand. Unlike Meinhold, Elzie had no plans for a future in the military. An eleven-year veteran, he had already applied and been approved for early retirement under the post-Persian Gulf draw-down of military personnel. Before his final discharge was to take place, though, Elzie appeared on World News Tonight in January 1993 to declare that he was gay.[7]

Women have also been "six o'clock news" plaintiffs, although they have generally been so in the past, well before the Clinton administration raised the issue of gay men and women in the military.[8] These plaintiffs of the past had to content themselves with newspaper coverage rather than national television appearances. Their declarations, however, made waves commensurate with the times.[9]

Sergeant Miriam Ben-Shalom[10] was the earliest of these plaintiffs. She was a reservist — a "weekend warrior" — training to become an Army drill instructor. After graduating from the training course in 1975, she began duty as an instructor at one of

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[4] Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

[5] *Id.* at 1472-73.

[6] Elzie v. Aspin, 841 F. Supp. 439 (D.D.C. 1993).

[7] *Id.* at 440-41.

[8] Women were all but invisible in the recent debate, which focused almost exclusively on whether straight men should be forced to knowingly serve alongside gay men. A discussion of whether the military's justifications for excluding gay servicemembers would even apply to gay military women is beyond the scope of this Article.

[9] There are probably a number of reasons for the relative lack of attention to cases brought by gay military women in the late 1970s and early 1980s. First, homosexuality was not the subject of public discussion to the extent it is today. Second, the military was not the focus of much attention at the time; this period was a quiet one, before Panama, Grenada, and the Persian Gulf. *But see* TIME, Sept. 8, 1975 (featuring cover picture of Sergeant Leonard Matlovich in his Air Force uniform, accompanied by caption "I am a homosexual"). Third, the presence of women in the military at all did not draw much public attention until the deployment for the Persian Gulf War. JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 441 (rev. ed. 1992).

[10] Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

the Army's Drill Sergeant Academies. Within ten days of beginning her new assignment, the Army had decided to discharge her.[11] Sergeant Ben-Shalom had chosen her graduation as the occasion to begin her challenge to the military's exclusionary policy, resolving that "people should know they allowed open lesbians in the Army."[12] She "publicly acknowledged her homosexuality during conversations with fellow reservists, in an interview with a reporter for her division newspaper, and in class, while teaching drill sergeant candidates."[13]

Captain (and Reverend) Dusty Pruitt[14] was also a reservist, but she had served for four years of active duty before entering the ministry. In 1983, after seven years of reserve service and just before her next promotion was to take place, she gave an interview to the *Los Angeles Times*. In that interview she stated that she was a lesbian and that she had twice entered into a ceremonial "marriage" with another woman. "The article focused on Pruitt's struggle to resolve personal contradictions between her religion and military career, and her sexuality."[15]

Following the long political battle which culminated in the "Don't Ask, Don't Tell, Don't Pursue" compromise,[16] plaintiffs have become more sophisticated — or more efficient — in their challenges to the military. Rather than publicizing their sexual orientation to the media, waiting for the military to initiate a discharge proceeding, and then attempting to block the action with a lawsuit, the most recent "six o'clock news" plaintiffs began their challenge by filing a complaint contesting the validity of the ban. In early 1994, six gay military women and men, the lead plaintiff a Lieutenant Colonel with the pseudonym of Jane Able, brought suit against the United States and the Secretary of

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[11] Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964, 969 (E.D. Wis. 1980).

[12] RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF 228 (1993).

[13] Ben-Shalom v. Secretary of the Army, 489 F. Supp. at 969. Sergeant Ben-Shalom's declarations must have created quite a firestorm. For example, military-sponsored newspapers are the model of blandness. They usually contain nothing more controversial than the time and place for the next meeting of the Officers' Wives Club. I would not be surprised to find that even the soldiers responsible for writing and publishing the story had been punished.

[14] Pruitt v. Cheney, 963 F.2d 1160, 1161 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

[15] *Id.*

[16] Williams, *supra* note 1, at 925.

Defense. By declaring in their complaint that they were gay and seeking an injunction against enforcement of the ban, they became the first servicemembers to challenge the "Don't Ask, Don't Tell, Don't Pursue" compromise.[17]

Meinhold, Elzie, Ben-Shalom, Pruitt, and the *Able* plaintiffs all shaped their controversies with the military by issuing public challenges which could not be ignored. Most of the cases contesting the gay ban fall within this category, but they leave an unrepresentative impression in two ways. First, they suggest that the military would look the other way on issues of sexual orientation if its gay personnel would just refrain from publicizing themselves to the media. Second, they encourage a focus on the effect of *public declarations* of sexual orientation on military readiness, when the more pertinent question would be the relevance of sexual orientation itself to the success of the military mission.

Less common in the courts, but more common in real life, are cases that arise in ways other than by gay servicemembers' public declarations. One category of these cases are those that begin as a result of security clearance interviews. All servicemembers normally have a security clearance at some level, but those with more sensitive duties require higher levels of clearance. The higher the clearance, the more intrusive the investigation the military undertakes to find any information about the applicant that might compromise security. At a minimum, the investigative agent will ask the applicant a series of questions designed to elicit any relevant admissions on topics such as drug use, sexual indiscretion, and the like. At least before "Don't Ask, Don't Tell, Don't Pursue" — and perhaps still after — the applicant was always asked directly whether he or she was a homosexual.[18]

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[17] Able v. United States, 847 F. Supp. 1038 (E.D.N.Y. 1994).

[18] Under the "Don't Ask" part of the "Don't Ask, Don't Tell, Don't Pursue" compromise, it is unclear to what extent the "Are you a homosexual?" question can still be asked. Department of Defense guidelines state that "[q]uestions pertaining to an individual's sexual orientation are not asked on personnel security questionnaires." Defense Guidelines on Conduct (July 19, 1993), *reprinted in* 1993 CONG. Q. WKLY. REP. 1977 [hereinafter Defense Guidelines]. An individual's sexual conduct, however, "is a legitimate security concern only if it could make an individual susceptible to exploitation or coercion." *Id.* The exception appears to swallow the rule: any sexual conduct between people of the same sex could make an individual "susceptible to exploitation or coercion" if that conduct must be kept secret to avoid discharge from the military. Provided the investigator's question is phrased in terms of

The investigator would not actually expect an honest answer from gay servicemembers. The military knows that a certain percentage of its servicemembers are gay, and lying, and those same servicemembers know they have to give a dishonest answer to the question if they want to remain in the military. The question is routinely asked and answered, nonetheless. Although the investigator would be very surprised if an applicant ever said "Yes, as a matter of fact I *am* gay," it does happen on rare occasion.

The best-known example of this second type of case involves Colonel Margarethe Cammermeyer,[19] the highest-ranking individual the military has ever sought to discharge on the basis of sexual orientation. Cammermeyer underwent a security investigation for the top-secret clearance necessary to attend the Army War College, a "think tank" policy school for those senior officers destined for even higher places in the Army. In response to the routine "Are you a homosexual?" question during the routine interview, Cammermeyer gave the very non-routine answer that she was indeed a lesbian.[20]

Mel Dahl[21] was a sailor who also surprised a military investigator. Dahl needed a higher security clearance than the usual sailor because he was slated to be trained as a cryptographer, an encipherer and decipherer of codes.[22] Unlike Colonel Cammermeyer, though, he was a new recruit just out of basic training when he told an investigator, in response to the usual question, that he was gay.[23] When the Navy initiated his dis-

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conduct, it seems the question can still be asked.

The effect of the gay ban is counterproductive in that it theoretically makes blackmail more likely, not less likely. I use the word "theoretically" because, despite the ban's incentives for secrecy, the military concedes that gay servicemembers present no greater security risk than heterosexual servicemembers. U.S. GEN. ACCOUNTING OFFICE, PUB. NO. NSIAD 92-98, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 35-36 (1992).

[19] Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994).

[20] *Id.* at 912-13.

[21] Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993).

[22] SHILTS, *supra* note 12, at 386.

[23] *Dahl*, 830 F. Supp. at 1321. Dahl would have known this question would be asked when he enlisted just a few months before. Because it would make little sense to answer it truthfully if he was expecting to stay in the Navy for very long, it seems reasonable to infer that he enlisted with the intention of "making a point." If that is true, Dahl qualifies as one of the "six o'clock news" plaintiffs discussed earlier.

charge several days later, Dahl contacted civil-liberties groups and newspapers and soon became a "cause celebre."[24]

Because both the gay servicemember and the investigative agent understand the charade of the security clearance interview, very few gay servicemembers come to the attention of the military in this way. Sometimes, however, a servicemember may just have become weary of the secrecy, and the interview provides a convenient opportunity for it to end. In Cammermeyer's case, she may have been surprised by the question and failed to understand its significance because, as a nurse and a reservist for many years, she was fairly far removed from the trenches of day-to-day military business.[25] Overall, the cases arising out of answers to routine questions asked at security clearance interviews are not at all representative of the way the military generally deals with gay servicemembers.

The controversies that would be representative of the military's treatment of gay servicemembers are rarely pursued in court. This third category of cases involves those that begin when a commander receives information tending to show that a particular servicemember may be gay, or simply finds reason to speculate that the servicemember may be gay. The military searches out more evidence supporting the accusation and then either pressures the servicemember to resign or begins a discharge proceeding.

Only one of the recent "status" cases that have driven the debate over the exclusionary policy falls in this category. Joseph Steffan[26] was a midshipman at the U.S. Naval Academy when he disclosed in confidence to two of his classmates that he was gay. One of the classmates passed that disclosure on to his girlfriend, who told her parents, who in turn told one of the Academy's lawyers.[27] The Navy began an investigation to uncover further evidence of Steffan's homosexuality. The investigation was halted

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[24] SHILTS, *supra* note 12, at 386.

[25] Nurses do not usually need to apply for enhanced security clearances, and medical units generally have little interest in weeding out gay servicemembers. *Id.* at 389 ("Opposition [to the exclusionary policy] was particularly strong in the military's medical corps, where gays had always played a major role and where the generals tended to be better educated.").

[26] Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

[27] SHILTS, *supra* note 12, at 562. No newspapers, no television interviews, and no lawsuits were involved in calling Steffan's sexual orientation to the Navy's attention.

only when Steffan admitted the accusations were true, and he was then forced to resign.[28] The Navy obtained his resignation under the threat that his records would otherwise indicate both that he was involuntarily discharged and that the reason for the discharge was homosexuality.[29] His family had strongly urged him to go quietly; they were embarrassed enough already.[30]

Steffan's story has received an enormous amount of attention.[31] A comparison with another servicemember's story which has received very little attention illustrates the artificial nature of the cases that commentators and litigators are relying on to overturn the ban. Major Joyce Walmer[32] had served in the Army since 1979. During her career, she had been involved in a long-term relationship with another woman, but that relationship apparently had ended by 1992. Walmer's former partner told the Army of their prior relationship, and the Army initiated an investigation even though it had found no reason to question Walmer's service over the last thirteen years.[33] Based on the results of the investigation, which was likely not difficult to carry out, Walmer was finally discharged from the Army in April 1995, about four years before she would have been eligible to retire.[34]

Walmer's discharge falls in the same category as Steffan's forced resignation from the Naval Academy. In each case, the military initiated the confrontation, used its resources in an attempt to uncover evidence that would confirm its allegations, and discharged a servicemember who had not asked for a fight. Why then was so little attention paid to Walmer, when the loss of sixteen years of an officer's experience was at stake?[35]

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[28] Steffan v. Perry, 41 F.3d at 683.

[29] Steffan v. Cheney, 780 F. Supp. 1, 3 (D.D.C. 1991), *aff'd sub nom.* Steffan v. Perry, 41 F.3d 677, 683 (D.C. Cir. 1994) (en banc); Steffan v. Perry, 41 F.3d at 702 (Wald, J., dissenting).

[30] SHILTS, *supra* note 12, at 569.

[31] Midshipman Steffan's case has been discussed in 253 articles in major newspapers. Search of LEXIS, News Library, MAJPAP File (July 19, 1993).

[32] Walmer v. United States Dep't of Defense, 52 F.3d 851 (10th Cir. 1995).

[33] *Id.* at 852. One of the unfortunate consequences of the gay ban is that it gives angry people the ultimate weapon, a weapon not available in the civilian world. I have no doubt that if bitter heterosexuals could get their ex-partners fired from their jobs by reporting the nature of their relationships, they would sometimes do so.

[34] *Id.* at 856.

[35] In comparison to the attention paid to Midshipman Steffan, *see supra* note 31, Major Walmer's controversy with the Army has been mentioned in just four articles in major

The answer to this question must be that Walmer failed to meet the artificial litigation posture so favored by gay activists. With her ex-partner's report in the hands of the military, it was no longer possible to create the fiction that Walmer had never had a personal relationship with another woman and would never in the future want a personal relationship with another woman. With Steffan, whether he was believable or not, such a fiction was still possible.

II. THE DISTINCTION BETWEEN STATUS AND CONDUCT

> This whole issue really came to light when Secretary of Defense Cheney was asked to comment on a study which said that there were many thousands of men and women who were homosexuals in the military forces who served our country with great distinction and never did anything in their conduct that was destructive of the morale or the purpose of the military. And I think he referred to this rule as "an old chestnut" or something of that kind. What I want to do is come up with an appropriate response that will focus sharply on the fact that we do have people who are homosexuals who served our country with distinction . . . . [T]he issue ought to be conduct. Has anybody done anything which would disqualify them, whether it's Tailhook Scandal or something else.[36]

President-Elect Clinton made the above statement at the very opening of the debate about how the military should handle the gay servicemembers in its ranks. He had an intuitive understanding of what the focus of the policy should be: the conduct of servicemembers, both gay and straight. He also had an intuitive understanding of the nature of the conduct that should be proscribed: *mis*conduct. Clinton's use of the Tailhook incident as an example shows that, at least at the beginning, he believed that the only type of conduct that would disqualify gay servicemembers would be the same type of conduct that would — or should — disqualify straight servicemembers. Both groups of servicemembers should be eligible to serve, provided they refrain from "inappropriate"[37] or "destructive"[38] behavior.

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newspapers. Search of LEXIS, News Library, MAJPAP File (July 19, 1993).

[36] *The Transition; Excerpts From President-Elect's News Conference in Arkansas*, N.Y. TIMES, Nov. 13, 1992, at A18.

[37] Jeffrey Schmalz, *Difficult First Step*, N.Y. TIMES, Nov. 15, 1992, § 1, at 22.

Ultimately, what constitutes disqualifying "conduct" by gay servicemembers became something much different. This new definition of conduct is so all-encompassing that it excludes gay men and women from the military just as effectively as did the old policy.[39] Prohibited conduct goes beyond sexual harassment, lewd conduct, adultery, or any of the other usual forms of inappropriate sexual behavior. Under the legislatively codified version of the compromise policy agreed to by President Clinton and the military services, a prohibited "homosexual act" is defined as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)."[40]

Aside from the personal dignity stripped from servicemembers by such a detailed description of private, intimate behavior, the law prohibits all intimacy, at any time and at any place, no matter what the circumstances. The definition could not be more restrictive or intrusive. A servicemember would be discharged if it was discovered, for example, that she had held hands with or kissed another woman in her home in complete privacy.[41]

Furthermore, the military need not prove that a gay servicemember actually has an intimate side to his or her life. Gay servicemembers are equally ineligible for service, and will be

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[38] Thomas L. Friedman, *The President-Elect; Clinton to Open Military's Ranks to Homosexuals*, N.Y. TIMES, Nov. 12, 1992, at A1.

[39] An article in *California Lawyer* chronicled the behind-the-scenes activity during the national debate on gay men and women in the military. Chandler Burr, *Friendly Fire: How Politics Shaped Policy on Gays in the Military*, CAL. LAW., June 1994, at 54. Professor Chai Feldblum, a Georgetown University law professor, served as a legal advisor to the Campaign for Military Service, a coalition of groups seeking to overturn the gay ban. She saw from the very start that President Clinton's remarks about distinguishing status from conduct were being misinterpreted. Although to Clinton "conduct" meant *mis*conduct — sexual behavior that was harmful to others — members of Congress and the military services were interpreting "conduct" as any private intimacy whatsoever. Professor Feldblum warned the Administration that its statements, left unclarified, could result in a policy that failed to protect the private lives of gay servicemembers. *Id.* at 57. The separation of status from conduct "completely misapprehended the nature of being gay — or straight, for that matter" and was "as workable as accepting left-handed soldiers while forbidding them from shooting left-handed." *Id.*

[40] 10 U.S.C. § 654(f)(3) (1994).

[41] Defense Guidelines, *supra* note 18.

discharged, if they have any *propensity* for intimacy. "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[42]

Despite the comprehensiveness of the ban on gay conduct, lawyers bringing cases on behalf of gay military plaintiffs have conceded that the military can exclude people on that basis. They concede that anyone who engages in any conduct covered by the definition, or anyone with even a propensity to engage in that conduct, can be discharged.[43] How then do they expect to prevail? The predominant strategy today, championed by both litigators and commentators, is to argue that these gay military plaintiffs have been discharged solely because of their "status" as gay men or women, not because of any prohibited conduct or propensity for prohibited conduct.[44]

All the plaintiffs discussed in Part I of this Article found themselves in a controversy with the military because of statements they made, essentially various forms of "Yes, I'm gay." Whether they engineered the opportunity for a declaration or honestly answered when the military asked, their acknowledgment of sexual orientation made them subject to discharge. Under the Clinton compromise, a person who "has stated that he or she is a homosexual" is presumed to be "a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[45]

This is the narrow link that the plaintiffs contest: they contend that a statement of sexual orientation, or status, reflects nothing

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[42] 10 U.S.C. § 654(a)(15) (1994).

[43] Steffan v. Perry, 41 F.3d 677, 684, 685 (D.C. Cir. 1994) (en banc); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1477 (9th Cir. 1994); Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992); Cammermeyer v. Aspin, 850 F. Supp. 910, 918 (W.D. Wash. 1994); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1334 (E.D. Cal. 1993). Plaintiffs concede that the military may exclude on the basis of homosexual conduct, however defined, under Bowers v. Hardwick, 478 U.S. 186 (1986). *Hardwick* held that there is no fundamental privacy right to engage in homosexual sodomy. Part III of this Article discusses the significance of sodomy and of the *Hardwick* decision to the exclusion of gay men and women from the military.

[44] *But see* Philips v. Perry, 883 F. Supp. 539 (W.D. Wash. 1995) (rejecting challenge to exclusionary policy because gay servicemember explained that he had had physical intimacy in his life in past and would continue to do so in future).

[45] 10 U.S.C. § 654(b)(2) (1994).

about whether a servicemember has a propensity to engage in homosexual conduct, however broadly defined. If there is no link between orientation and conduct, even one based on a greater propensity to engage in the conduct, then the military loses its rational basis for distinguishing between gay and straight servicemembers. The policy would then fail on equal protection grounds. If the statement does reflect a propensity, however, the case is lost, as the rest of the proof has been conceded.

Whether a particular case is won or lost, though, is unimportant. Some plaintiffs have been successful in convincing the court that, despite the fact that they consider themselves to be gay, they have no propensity to engage in any conduct prohibited by the military.[46] However, in the process of separating status from conduct, commentators have made factual and legal arguments that are damaging to gay servicemembers. The status/conduct distinction is counterproductive for three reasons: it is demeaning, it is factually absurd, and it just encourages the search for conduct.

A. The Distinction Between Status and Conduct Is Demeaning to Servicemembers

Speaker of the House Newt Gingrich has said that gay people should be tolerated rather than condemned because homosexuality is "an orientation in the way that alcoholism is an orientation."[47] Surprisingly, commentators make an uncomfortably close argument in contending that the military should not presume that its gay servicemembers will engage in harmful conduct just because of their homosexual orientation. Professor Francisco Valdes has written the most extensive treatment of the separation of status from conduct in the military cases. His thesis rests on a bedrock of case law concerning "status crimes" which limits the government's ability to criminally punish persons suffering from conditions such as drug addiction and alcoholism.[48]

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[46] *Meinhold*, 34 F.3d 1469; Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995); *Cammermeyer*, 850 F. Supp. 910; *Dahl*, 830 F. Supp. 1319.

[47] *GOP Should Be Tolerant of Homosexuals, Gingrich Says*, L.A. TIMES, Nov. 24, 1994, at A27.

[48] Valdes, *supra* note 2, at 391-95. *See also* Strasser, *supra* note 1, at 401-03 (applying case law concerning "status crimes" to exclusion of gay men and women from military).

Robinson v. California[49] invalidated a statute that criminalized the *status* of being addicted to narcotics in addition to the *conduct* of a particular narcotics offense, such as the use of narcotics on a particular occasion. When arrested, the defendant carried signs of intravenous drug use on his arms: scabs, scar tissue, discoloration, and numerous needle marks. The defendant also admitted that he had used narcotics in the past.[50]

In reversing the defendant's conviction, the United States Supreme Court reasoned that the status of narcotics addiction is an illness much like mental affliction, leprosy, or venereal disease.[51] Furthermore, narcotics addiction is not even necessarily blameworthy, as one can become addicted through the medicinal use of narcotics or through his or her mother's use before birth.[52] Because the law punished the disease rather than specific behavior, it constituted cruel and unusual punishment.[53]

An equally sorry soul, addicted to alcohol, was the subject of prosecution in *Powell v. Texas*.[54] The defendant was convicted of the offense of being "found in a state of intoxication in a public place."[55] Despite the defendant's "afflict[ion] with the disease of chronic alcoholism,"[56] the United States Supreme Court distinguished *Robinson* and affirmed the conviction. The Court did not lack sympathy for "these unfortunate people."[57] This defendant, however, was convicted on the basis of more than his mere status as an alcoholic; he was convicted because he went out in public while drunk.[58] Provided the defendant "has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus,"[59] the state may criminally punish the conduct.

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[49] 370 U.S. 660 (1962).
[50] *Id.* at 661.
[51] *Id.* at 666-67.
[52] *Id.* at 667 n.9.
[53] *Id.* at 667.
[54] 392 U.S. 514 (1968).
[55] *Id.* at 517.
[56] *Id.*
[57] *Id.* at 530.
[58] *Id.* at 532.
[59] *Id.* at 533.

Professor Valdes analogizes these cases to the exclusion of gay servicemembers, arguing that *Robinson* and *Powell* stand for "an independent principle that forbids the state from penalizing status"[60] and "prohibits discrimination on the basis of sexual orientation *per se*."[61] In Professor Valdes's view, then, the military would be prohibited from making any distinctions based upon a servicemember's status as either gay or straight in the absence of any particular prohibited conduct. "Substantively, the status/conduct rule requires that punishment and discrimination must be based on conduct, not status."[62]

But the rule of *Robinson* and *Powell* says nothing about discrimination. It only prohibits the state from making it a crime to have some continuing status. *Robinson* itself contemplated that the status of narcotics addiction could result in discrimination, but not objectionable discrimination. For example, the state could civilly commit addicts for the purpose of treatment.[63]

A clearer way to distinguish the reach of *Robinson* and *Powell* from the exclusion of gay servicemembers is to imagine what would happen if the defendant in *Robinson* had presented himself for enlistment into the military. Professor Valdes does not suggest that the defendant, standing there with his arms covered with signs probative of drug addiction, could successfully demand that the military not discriminate against him on the basis of his status as an addict.[64] If status reflects a propensity to engage in harmful conduct, then the military can use that status to disqualify an individual.

Reliance on *Robinson* and *Powell* to invalidate the military's exclusion of gay servicemembers is more than just an inaccurate extension of the principle. More importantly, the analogy is

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[60] Valdes, *supra* note 2, at 419.

[61] *Id.* at 426.

[62] *Id. See also* Williams, *supra* note 1, at 934-36 (arguing that *Robinson* prohibits military from discriminating on basis of sexual orientation).

[63] *Robinson*, 370 U.S. at 665.

[64] The military excludes from service those with "medical conditions or physical defects that would require excessive time lost from duty or would likely result in separation from the Service for medical unfitness." *Qualification Standards for Enlistment, Appointment, and Induction*, DOD Directive 1304.26, enclosure 1, § (B)(5)(b)(2) (Mar. 4, 1994). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (holding that public transportation authority could rationally exclude from employment drug addicts enrolled in methadone treatment program).

demeaning to those who serve their country and counterproductive to the ultimate goal of inclusion. The basic theme behind this line of case law is the "love the sinner, hate the sin" sentiment, mixed with an extra dose of compassion for those not entirely to blame for their miserable condition.[65] It assumes that the conduct associated with the status is harmful, but it protects the prospective violator until that point when the harmful conduct actually occurs.

In the context of gay men and women in the military, this legal strategy reinforces the idea that any intimacy between people of the same sex is repugnant and that the only acceptable gay servicemember is the completely celibate gay servicemember. It concedes both the harmful nature of that private intimacy and the importance to the military of preventing its occurrence. As a result, the gay servicemember is joined together with the addict, the drunk, and other categories of unfortunates and menaces.[66] Worse yet, gay military plaintiffs have relied on rulings that the government should not presume that members of the Communist Party will compromise national security[67] or that those who desire to commit treason against the United States will actually commit treason.[68] Arguments that incorporate persons who may seek to harm the United States are particularly damaging to servicemembers.[69]

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[65] The recent research into biological determinants of sexual orientation caused one court to view gay people more sympathetically than drug addicts. "Robinson's status as a narcotics addict was self-acquired. How much worse it is to infer the commission of acts from one's homosexual status, which may well be acquired at birth or in early childhood." Able v. United States, 880 F. Supp. 968, 975 (E.D.N.Y. 1995). The first warning to gay military plaintiffs that their arguments are counterproductive ought to be when they begin to sound just like Representative Gingrich's news statements. *See supra* note 47 and accompanying text.

[66] *See, e.g.*, Steffan v. Perry, 41 F.3d 677, 709, 714 (D.C. Cir. 1994) (Wald, J., dissenting); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478-79 (9th Cir. 1994); Watkins v. United States Army, 875 F.2d 699, 716, 725 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990); Able v. United States, 880 F. Supp. 968, 974-75 (E.D.N.Y. 1995); Cammermeyer v. Aspin, 850 F. Supp. 910, 919 (W.D. Wash. 1994); Selland v. Aspin, 832 F. Supp. 12, 15 (D.D.C. 1993); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993).

[67] Aptheker v. Secretary of State, 378 U.S. 500 (1964), *cited in* Steffan v. Perry, 41 F.3d at 709, 714 (Wald, J., dissenting) *and Cammermeyer*, 850 F. Supp. at 919.

[68] Steffan v. Perry, 41 F.3d at 713-14 (Wald, J., dissenting).

[69] *See, e.g.*, Strasser, *supra* note 1, at 399-401 (arguing that case law protecting subversives should also protect gay servicemembers).

B. The Distinction Between Status and Conduct Is Factually Absurd

The main line of attack taken by plaintiffs in the military cases is to break the link between status and conduct. They attempt to establish that gay servicemembers do not necessarily have any propensity to engage in gay conduct, as broadly defined by the military. These plaintiffs present themselves as people who have never had an intimate relationship in the past, who will never have an intimate relationship in the future as long as they serve, and who will never even have a propensity to have an intimate relationship as long as they serve.

It is absurd to think that gay servicemembers will forego all human comfort for years, for a career, or for life.[70] It is important to understand the enormity of the deal that gay military plaintiffs are offering to strike with the military. Despite the "fundamental importance of love, affection, intimacy, commitment, expressions of concern, and all other forms of *conduct* that lesbians and gay men embrace as part of their lesbian and gay lifestyle,"[71] these servicemembers insist they will serve without it.

In their strained effort to separate status from conduct, plaintiffs have offered ludicrous expert testimony. One clinical professor of psychology testified that "[t]here is almost no relationship between an individual's orientation and his or her sexual conduct."[72] In the same case, a research psychologist testified that "a person's public identification of his or her sexual orientation does not necessarily imply sexual conduct, past or present, or a future desire for sexual behavior."[73] While it is true for both straight and gay individuals that "sexual identity (status) is something much broader than sexual conduct,"[74] they are not unrelated concepts.

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[70] A servicemember who retires from the military after a full career is subject to the Uniform Code of Military Justice for life. 10 U.S.C. § 802(a)(4) (1994).

[71] Cain, *supra* note 1, at 1635-36 (emphasis added).

[72] Cammermeyer v. Aspin, 850 F. Supp. 910, 919 & n.15 (W.D. Wash. 1994).

[73] *Id.* at 919 & n.14.

[74] Cain, *supra* note 1, at 1625. Professor Cain notes that "there is a certain degree of absurdity to making legal arguments in favor of gay and lesbian rights that ignore sex. The conduct/status distinction contributes to this absurdity by pretending that status can be successfully bifurcated from conduct." *Id.* at 1641.

Some of the plaintiffs' stories have also been difficult to understand. For example, Captain Pruitt argued that she was discharged solely for her homosexual orientation, as there was no evidence that she had engaged in homosexual acts.[75] Yet at the same time she explained that she had entered into two ceremonial marriages with other women.[76] Was she trying to create the impression that she had never so much as held hands with either of her partners in life, an act which would have disqualified her from military service?[77] Along these same lines, Midshipman Steffan argued that the military should not presume that servicemembers who say they are gay will ever engage in gay conduct,[78] but then stated in his deposition that he had taken three AIDS tests since his forced departure from the military.[79]

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[75] Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

[76] *Id.* at 1161.

[77] Similarly, Colonel Cammermeyer has been involved in a committed relationship with another woman, although that fact was apparently not of record in the litigation. *See generally* MARGARETHE CAMMERMEYER & CHRIS FISHER, SERVING IN SILENCE (1994).

[78] Steffan v. Perry, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc).

[79] Steffan v. Cheney, 733 F. Supp. 121, 123 (D.D.C. 1989) (dismissing case for discovery violation), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990). Professor Thomas Stoddard has written a chronicle of his experience as one of the lawyers representing Midshipman Steffan. Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.-C.L. L. REV. 555 (1992). In *Steffan v. Cheney*, Steffan refused to answer questions posed during discovery concerning his sexual conduct. Professor Stoddard's position was that the questions were irrelevant, as the Naval Academy had discharged Steffan only because he admitted that he was gay and not because of any particular conduct. *Id.* at 563-64 & n.48.

While the questions were not relevant to the grounds for Steffan's dismissal, they were relevant to the stance he took in the litigation: that there is "no 'rational connection' between orientation/status and conduct as a factual or experiential matter." Steffan v. Perry, 41 F.3d 677, 710 (D.C. Cir. 1994) (Wald, J., dissenting). For the sake of the honesty and integrity of his service, it would have been better to answer the questions and litigate on that basis. The taking of three AIDS tests is not suggestive of celibacy and, in any event, Steffan has explained in out-of-court interviews that he did have sexual "experiences" while at the Naval Academy. MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT 237-38 (1990).

The combination of practical reality and theoretical argument is jarring.[80]

There is a tone of indignation in the response of commentators and litigators to the military's assumption that those with a gay sexual orientation or status will have a propensity to engage in gay conduct.[81] They contend that only heterosexual prejudice or bias can explain the assumption that gay servicemembers will likely share intimate relationships with persons of the same sex.[82] There is no reason to presume, they argue, that gay servicemembers will be more likely to engage in prohibited conduct than straight servicemembers. "The government's contention in this case smacks of precisely the sort of stereotypical assessment forbidden . . . ; at bottom, the government . . . seem[s] to be saying that gay servicemembers — unlike heterosexuals — must be presumed incapable of controlling their sexual 'desires' in conformity with the law."[83]

Of course, in the abstract, gay servicemembers are just as likely as straight servicemembers to conform their conduct to the law. However, that abstract statement fails to take into account the context of the "law" each group is expected to obey and the scope of the conduct that is prohibited. Heterosexuals can conform their conduct to the law if they refrain from engaging in conduct such as adultery, indecent assault, wrongful cohabitation, fraternization, indecent acts, pandering and prostitution, sodomy,

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[80] Sergeant José Zuniga was another servicemember discharged after a "six o'clock news"-style disclosure that he was gay. In line with the prevailing expectations imposed upon gay military plaintiffs, Zuniga first insisted that he was a virgin. Later, unable to plausibly maintain the pretense, he admitted that he had lied about his intimate life. JOSÉ ZUNIGA, SOLDIER OF THE YEAR: THE STORY OF A GAY AMERICAN PATRIOT xi-xii (1994).

[81] William Rubenstein calls the military's reliance on this assumption "divorced from reality," a "bizarre vacuum of doublespeak," "irrational," ludicrous," and "absurd." Rubenstein, *supra* note 2, at 257. An argument relying on the separation of status from conduct results in gay activists meeting themselves coming around the other way. In Bowers v. Hardwick, 478 U.S. 186 (1986), activists filed an amicus brief arguing that the commission of sodomy was inseparable from life as a gay man. S. REP. NO. 112, 103d Cong., 1st Sess. 283 (1993) ("[Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment. . . . [S]tate regulation of same sex behavior constitutes the total prohibition of an entire way of life."); Steffan v. Perry, 41 F.3d at 690 n.11; Schlueter, *supra* note 1, at 397 n.27.

[82] Steffan v. Perry, 41 F.3d at 712 (Wald, J., dissenting); Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1380 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *and cert. denied*, 494 U.S. 1004 (1990); Valdes, *supra* note 2, at 387.

[83] Steffan v. Perry, 41 F.3d at 712 (Wald, J., dissenting).

and bigamy.[84] Gay servicemembers, in contrast, can conform their conduct to the law only if they forego all human contact. No one can rationally be expected to comply with military regulations under these circumstances, no matter how committed to their calling they otherwise might be. The idea that people can control a propensity to commit a crime does not apply to controlling a propensity to be human.[85]

Commentators have resisted these normal assumptions about human nature and have instead adopted what could be called a "defense lawyer's mentality" in addressing the issue of conduct. Their position is essentially that "if you can't prove it, it didn't (and won't) happen." Their writings reflect great frustration with a system that excludes on the basis of propensity for conduct rather than, as in the criminal justice system, the commission of conduct. "Once an announcement [that one is gay] is made, *even without a hint of evidence* that the service member has engaged in homosexual conduct, he or she is likely to be discharged from the military."[86] According to these commentators, absent any conduct

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[84] Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478 n.10 (9th Cir. 1994).

[85] In *Meinhold* and *Dahl*, a hypothetical policy was offered to illustrate why the military should not presume that gay servicemembers have a greater propensity to violate the law than straight servicemembers. Under this hypothetical policy, ethnic minorities are excluded from service because the military believes they have a greater propensity to steal; non-minority servicemembers, in contrast, are not discharged unless they actually steal. *Meinhold*, 34 F.3d at 1478 n.9; Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1335 n.17 (E.D. Cal. 1993). "Surely defendants would not attempt to defend the constitutionality of such a policy . . . ." *Dahl*, 830 F. Supp. at 1335 n.17. The hypothetical, however, is flawed. First, the two groups are held to identical standards of conduct; no one may steal. In the military, in contrast, gay servicemembers are held to a different standard of conduct, one that is almost humanly impossible to meet. Second, any reasonable person could control a propensity to commit a crime, such as theft. Reasonable people cannot control their propensity to be human.

A second analogy used in *Able* is even more flawed. The court lectured that "Hitler taught the world what could happen when the government began to target people not for what they had done but because of their status." Able v. United States, 880 F. Supp. 968, 974 (E.D.N.Y. 1995). The "status" of having a particular religion, however, carries with it the "conduct" of participating in the traditions of that religion, just like the "status" of having a particular sexual orientation carries with it the "conduct" of intimate life.

[86] Williams, *supra* note 1, at 928 (emphasis added). The dissenting opinion in *Steffan* also adopted the "defense lawyer's mentality" when it concluded that servicemembers who say they are gay do not necessarily have any propensity to have intimate relationships with people of the same sex. Steffan v. Perry, 41 F.3d 677, 712, 715 (D.C. Cir. 1994) (Wald, J., dissenting). Judge Wald believed that servicemembers would not reveal that they were gay unless "they were quite confident that no additional evidence of conduct or intent existed." *Id.* at 712.

"on the record,"[87] there should be no recognition that the conduct takes place.

This stance, however, is also counterproductive. The relationship between a servicemember and the military he or she serves is not the same as the relationship between a defendant and a prosecutor. Challenging the military to "catch me if you can" robs the servicemember of dignity. It puts the servicemember in the position of conceding that any private intimacy is harmful to the military mission, but then insisting that the military provide proof of conduct which any thinking person knows takes place.

One of the most unfortunate results of the current policy is that it forces servicemembers to lie about their lives, to participate in the "intentional cultivation of deception and dishonesty."[88] As one commentator noted:

> [The policy] impos[es] a duty of deception on members of sexual minorities within a culture that otherwise demands strict adherence to the ideals of honor and duty. Indeed, the popular name of the new policy — "Don't Ask, Don't Tell" — sets the tone for the conspiracy of silence and pretense contemplated by this compromise.[89]

But the artificial separation of status from conduct does not eliminate the lie; it just changes the lie. Servicemembers who could truthfully reveal their sexual orientation or status under a policy distinguishing status from conduct would still be required to lie about what that status means.

C. The Distinction Between Status and Conduct Just Encourages the Search for Conduct

Even if courts were to agree that gay men and women in the military did not necessarily have a propensity for intimacy with others of the same sex, the military would see an easy solution. If an admission of gay status is not enough to justify discharge because it fails to show a propensity for conduct, then the military will just rely on evidence of conduct itself.

Notice that Judge Wald does not say "unless they were quite confident that they had no interest in intimacy"; the emphasis is on whether any *evidence* of intimacy could be uncovered.

[87] Valdes, *supra* note 2, at 409.

[88] *Id.* at 472.

[89] *Id.*

It is difficult to convey how enthusiastically the military applies its resources to uncovering homosexuals in the ranks.[90] There is a joke told about the Naval Investigative Service (NIS) which could apply to the investigative units of the other services: "Call the NIS and tell them you've got a dead body and the agents may show up in the next week or so. Call and say you've got a dead body and you think the murderer was a homosexual and the agents will be there in thirty seconds."[91]

The military has already anticipated the possibility that it may be required to rely more on evidence of conduct in discharging gay servicemembers. After the Navy lost the *Meinhold* case[92] and was ordered to reinstate him to duty, an Army legal journal published advice on how to avoid that result in its own future cases:

> More importantly, what does *Meinhold* mean to staff judge advocates (SJAs) [military lawyers] in the field? *Meinhold* strongly supports the proposition that homosexual acts continue to be a valid basis for discharge from the Armed Forces. . . .
>
> . . . SJAs and commanders in the Ninth Circuit would be well advised not to rely on self-identification statements alone to support a separation from the military if any other evidence of homosexuality can be obtained through an appropriate investigation.[93]

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[90] *See, e.g.*, Michelle M. Benecke & Kirstin S. Dodge, Recent Developments, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 221 (1990) (describing investigation of military women at Parris Island Marine Corps Recruit Training Depot from 1986 to 1988, which resulted in imprisonment of three women and resignation or discharge of more than one-fourth of women stationed there).

[91] SHILTS, *supra* note 12, at 335. Throughout his book Shilts reports dozens of examples of investigations of gay servicemembers carried out with a zeal that must be surprising to civilians.

[92] Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

[93] Lieutenant Colonel Hayden, *Ninth Circuit Renders Partial Victory on Department of Defense Homosexual Policy*, 1994 ARMY LAW. 35, 36. The *Meinhold* court ruled that the plaintiff's declaration of his sexual orientation on the national evening news failed to show a "concrete, fixed, or expressed desire to commit homosexual acts," but rather indicated only the "inchoate 'desire' or 'propensity' that inheres in status." *Meinhold*, 34 F.3d at 1479. It is perfectly understandable why Lieutenant Colonel Hayden did not invite his colleagues to dance on the head of that pin and instead recommended that they rely on evidence of conduct.

In the regulations promulgated under "Don't Ask, Don't Tell, Don't Pursue," the Department of Defense attempted to explain the difference between "propensity" and "desire." "Propensity to engage in homosexual acts means more than an abstract preference

Only one commentator has foreseen the long-term problems created by legal protection for mere status without corresponding protection for associated conduct: "Indeed, if homosexual status is accorded constitutional protection by the courts, there is every reason to believe that government actors will become more intent on justifying their discriminatory actions in terms of conduct rather than status."[94]

The distinction between status and conduct is a very dangerous strategy to pursue. Rather than having "the potential to counteract discrimination,"[95] the strategy has a much greater potential to increase surveillance and harassment of gay servicemembers. It invites the military "to engage in the sleuthing of soldier's personal relationships."[96] For example, the Navy terminated its investigation of Midshipman Steffan, which had already lasted for months, only because he agreed to resign from the Academy.[97]

Department of Defense regulations issued under the "Don't Ask, Don't Tell, Don't Pursue" legislative compromise purport to limit the discretion of military investigators to "pursue" suspected gay servicemembers.[98] It should not be assumed, however, that the revised regulations result in any practical change in the way in which those investigations are conducted.[99] The new regulations on investigations can be manipulated to the military's advantage for the same reason, ironically, that the new policy fails to protect gay servicemembers in general: they rely on the same unworkable distinction between status and conduct.

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or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." *Enlisted Administrative Separations (Standards and Procedures)*, DOD Directive 1332.14, § (H)(b)(2) (Dec. 21, 1993) [hereinafter *Standards and Procedures*]. The question of when "abstract preference or desire" ripens into "likelihood" seems more the province of the romance novel than military regulation.

[94] Cain, *supra* note 1, at 1627.

[95] Valdes, *supra* note 2, at 450.

[96] Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

[97] Steffan v. Perry, 41 F.3d 677, 683 (D.C. Cir. 1994) (en banc).

[98] *Enlisted Administrative Separations (Guidelines for Fact-Finding Inquiries into Homosexual Conduct)*, DOD Directive 1332.14 (Dec. 21, 1993) [hereinafter *Guidelines for Fact-Finding Inquiries*].

[99] *See, e.g.*, William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN L. REV. 607, 617 (1994) (assuming that compromise policy "would end the 'witch hunts' of the past"); Williams, *supra* note 1, at 926 (assuming that "Don't Pursue" provision was "designed to prevent the military from seeking out gay service members").

Under the new regulations, the military professes no interest in determining anyone's status or sexual orientation. "A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct . . . ."[100] But there can still be a tremendous amount of interest in whether someone's sexual orientation *is* manifested by conduct, as broadly defined by the military.

A military commander can initiate an investigation of suspected gay servicemembers on the basis of "credible information." "Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge."[101] A gay servicemember is subject to discharge if he or she: (1) "has engaged in a homosexual act," (2) "has said that he or she is a homosexual," or (3) "has married or attempted to marry a person of the same sex."[102]

What would *not* constitute "credible information"? Information is not credible if based only on "rumor," "suspicion," "capricious claims," or the "opinions of others."[103] The key word in that sentence is "only." Any concrete, credible fact added to rumor and suspicion will justify an investigation which, given sufficient time and resources, will eventually uncover the reality that a gay servicemember has a private or home life just like anyone else. If a commander discovered that a civilian woman had moved with a female servicemember to her new duty assignment,[104] that fact would constitute "credible information" supporting a basis for discharge. If a commander discovered that a woman in his unit lived with another woman in a one-bedroom apartment off-base, the same would be true.[105]

Strangely enough, the new regulations go out of their way to protect servicemembers who engage in more stereotypically gay

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[100] *Standards and Procedures*, *supra* note 93, § (H)(a).

[101] *Guidelines for Fact-Finding Inquiries*, *supra* note 98, § (C)(1).

[102] *Id.* § (C)(2). These three bases for discharge correspond to the same three "findings" that would require separation under the "Don't Ask, Don't Tell, Don't Pursue" legislative compromise. 10 U.S.C. § 654(b) (1994).

[103] *Guidelines for Fact-Finding Inquiries*, *supra* note 98, § (C)(3).

[104] SHILTS, *supra* note 12, at 532.

[105] Melissa Healy, *New Policy Will Allow Military to Expel Gays*, L.A. TIMES, July 16, 1993, at A1.

"associational activities." Commanders are not permitted to initiate investigations based on reports of activity such as "going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct."[106] The military hopes to skirt First Amendment challenges by allowing activities that straight servicemembers could theoretically engage in to educate themselves about gay people.[107]

Again, the key phrase in the limitation is "in and of itself." If a report that a servicemember has gay friends is simply supplemented with some concrete, credible fact probative of gay conduct, such as information that a female servicemember is

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[106] *Guidelines for Fact-Finding Inquiries*, *supra* note 98, § (C)(3)(d). Gay activists, military officials, and judges have all placed an inordinate emphasis on the gay rights parade as a marker of progress in non-discrimination litigation. Commentators have generally viewed gay men and women in the military through the eyes of gay activists and not the eyes of gay servicemembers. *See, e.g.*, Williams, *supra* note 1, at 928 (presuming that gay servicemember might announce his or her sexual orientation at gay rights rally). They fail to understand that the values inherent in military service are not the values inherent in the typical gay rights parade. BRUCE BAWER, A PLACE AT THE TABLE 91 (1993). "If at best the event hints at the diversity of the gay population in America, altogether too much of it is silly, sleazy, and sex-centered, a reflection of the narrow, contorted definition of homosexuality that marks some sectors of the gay subculture." *Id.* at 154. Examples of how gay rights parades have resulted in degrading images of servicemembers in uniform are seen in 1993 CONG. Q. WKLY. REP. 1096, 1814. In two pictures, men purporting to be members of the military engage in improper public displays of affection while in uniform.

Unfortunately, courts have seized on the importance gay activists place on gay right parades, using them to demonstrate why constitutional protections for gay servicemembers are unnecessary. According to these courts, the participation of elected officials in these parades shows that gay citizens are not politically powerless for purposes of suspect class analysis. Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Steffan v. Cheney, 780 F. Supp. 1, 8-9 (D.D.C. 1991), *aff'd sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc). It is unfortunate that such trivial recognition has such far-reaching effects.

The gay rights parade continues to haunt non-discrimination litigation. The most significant United States Supreme Court case affecting the lives of gay citizens since *Hardwick* involved the right to march as part of a gay contingent in a St. Patrick's Day parade. Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 63 U.S.L.W. 4625 (U.S. June 19, 1995).

[107] *See, e.g.*, Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964, 974 (E.D. Wis. 1980) (invalidating an earlier version of military exclusion policy). "This regulation directly infringes on any soldier's right at any time to meet with homosexuals and discuss current problems or advocate changes in the status quo . . . ." *Id.* "This regulation further infringes on the fundamental right of any soldier to receive information and ideas about homosexuality." *Id.* *See also* Schlueter, *supra* note 1, at 414-16 (discussing First Amendment issues raised by "Don't Ask, Don't Tell, Don't Pursue").

always seen in the company of the same woman, the investigation can proceed. The protection for associational activities was only meant to apply to straight servicemembers, allowing them to freely seek out information or express their opinions on gay-related issues. It was never intended to increase the scope of permissible behavior for gay servicemembers:

> In assessing what is credible information to initiate an inquiry, a commander may consider whether such actions as frequenting gay bars, reading gay literature, or marching in a gay rights parade are non-verbal statements which show a propensity to engage in homosexual acts. What the policy recognizes is that heterosexuals, as well as homosexuals, might march in gay rights parades, frequent a gay bar, [and] read gay literature. . . . [C]ommanders should be sensitive to the legitimate interests of service members in what they read and who their friends are and what they believe in."[108]

In the end, the attempt to legally separate the concepts of status and conduct, which are inseparable in real life, will only make life more difficult for gay men and women in the military.[109] Professor Kathryn Abrams has written about the problems caused by creating the fictionalized "good soldier" who is palatable to straight members of the military, but who gay servicemembers can never realistically become.[110] She uses the phrase "good soldier" not in the sense that these gay servicemembers are

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[108] S. REP. NO. 112, 103d Cong., 1st Sess. 292 (1993). Repeated associational activities can also trigger an investigation. If a commander discovers that a servicemember has engaged in some associational activity, the commander can warn the servicemember that his or her behavior has raised eyebrows. If the servicemember continues to participate in similar activities, a "close and continual association with known homosexuals could certainly be a factor considered in deciding whether to initiate an investigation." Schlueter, *supra* note 1, at 416. *See also Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Armed Services Committee*, 103d Cong., 1st Sess. 713-14 (1993) (testimony of General Colin Powell, Chairman, Joint Chiefs of Staff) (explaining that "pattern" of associational activity can trigger investigation).

[109] Reports after the implementation of "Don't Ask, Don't Tell, Don't Pursue" already indicate that the military has abused the limitations purportedly placed on its discretion to ask and to pursue. Eric Schmitt, *The New Rules on Gay Soldiers: A Year Later, No Clear Results*, N.Y. TIMES, Mar. 13, 1995, at A1; Eric Schmitt, *Gay Troops Say Clinton's Policy is Often Misused*, N.Y. TIMES, May 9, 1994, at A1. The former Assistant Secretary of Defense under President Reagan, Lawrence Korb, has described the military's treatment of gay servicemembers under the new policy as "business as usual." Lawrence Korb & C. Dixon Osburn, *Gay Troops are Still Asked, Harassed*, N.Y. TIMES, Mar. 19, 1995, § 4, at 15.

[110] Kathryn Abrams, *Gender in the Military: Androcentrism and Institutional Reform*, 56 LAW & CONTEMP. PROBS. 217, 229-32 (1993).

competent soldiers — invariably they are — but in the sense of how the military would like them to be. For gay soldiers to be "good soldiers," they must be celibate, without any interest in ever having an intimate personal life. For that matter, they should not even talk about their lack of interest in ever having an intimate personal life. Professor Abrams notes:

> In some respects, this "good soldier" characterization seems to be a reasonable strategy. Many of those targeted by the policies discussed here *are* in fact good soldiers, whose difference in gender or sexual orientation has little, if any, impact on their performance. More importantly, the appeal to the dominant norms of the challenged institution — like civilian feminists' invocation of women's similarities to men — has seemed to be a strategically safe approach. By characterizing stigmatized groups according to the military's own criteria, advocates would seem to minimize the number of contested issues and maximize their chance of persuading military leaders.[111]

However, the fictionalized "good soldier" approach creates more problems than it solves. First, it concedes that the military is correct in its belief that gay servicemembers with normal intimate lives are harmful to the military's task of protecting the nation.[112] The continuing *mis*educational effect of that concession cannot be measured. Second, the "good soldier" approach leaves gay servicemembers "without recourse if and when it becomes obvious that [they] cannot completely conform to dominant standards framed without the new entrants in mind."[113] A standard that requires gay men and women in the military to forego intimacy and deny humanity cannot be met, no matter how cleverly it may be designed to fit a hair-splitting constitutional argument. The artificial separation of status from conduct creates a test designed for gay servicemembers to fail.

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[111] *Id.* at 229.

[112] *Id.* ("[The 'good soldier' approach] accepts the view of professional standards promulgated by the dominant group without challenging its premises, origins, or perspectivity.").

[113] *Id.* at 230-31 n.47.

III. THE PREOCCUPATION WITH SEXUAL ACTIVITY

In discussing the intimate, private lives of gay men and women, courts quickly become preoccupied with the details of sexual activity, to the exclusion of other, more complete descriptions of those relationships. In *Bowers v. Hardwick*,[114] for example, the United States Supreme Court framed the issue before it as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[115] The very first sentence of the opinion focused immediately on what the majority could not stop thinking about: that the respondent had violated a sodomy statute "by committing that act with another adult male in the bedroom of respondent's home."[116]

It is not surprising, given the description of the question at issue, that the Court concluded there was no such fundamental right and the rationality of the criminal penalty was supported by the presumed immorality of the conduct.[117] But consider how differently *Loving v. Virginia*[118] might have been viewed if the Court had been equally obsessed with the private, intimate behavior of the plaintiffs. Rather than framing the issue as whether the state could "prevent marriages between persons solely on the basis of racial classifications,"[119] the Court could have taken a *Hardwick*-like view of the facts and asked "whether the Federal Constitution confers a fundamental right on blacks to engage in sexual intercourse with whites."[120] Such a narrow focus

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[114] 478 U.S. 186 (1986).

[115] *Id.* at 190.

[116] *Id.* at 187-88. The dissent notes the Court's "almost obsessive focus on homosexual activity." *Id.* at 200 (Blackmun, J., dissenting). Intimate conduct between women can also be the subject of judicial preoccupation. *See* Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (discussing custody dispute in which child was "living daily under conditions stemming from active lesbianism practiced in the home").

[117] *Hardwick*, 478 U.S. at 196.

[118] 388 U.S. 1 (1967).

[119] *Id.* at 2.

[120] The dissent in *Hardwick* recognized the parallels between laws prohibiting intimate conduct between people of the same sex and laws prohibiting marriages between people of different races. In both cases, the prohibitions were long-standing and based on religious justifications. *Hardwick*, 478 U.S. at 210 n.5 (Blackmun, J., dissenting). Commentators have suggested that discrimination on the basis of sexual orientation preserves the dominance of men over women in the same way that miscegenation statutes preserved white supremacy. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1,

on the detail of disfavored conduct can blind a court to the reasons that the conduct should be protected in the first place.

A. Pictures of Military Life

One of the most inexplicable things about the legal commentary in favor of lifting the ban on gay servicemembers is that it combines the enforced celibacy of the status/conduct distinction with the same pronounced preoccupation with sexual activity seen in *Hardwick*. At the same time commentators expect gay military plaintiffs to serve without any intimacy in their lives, they describe what they imagine to be the hyper-sexualized environment of a sex-segregated military. There is a perception among several commentators that rampant sex takes place between ostensibly straight men in the military, or between gay men and straight men, and their writings reflect a great sense of unfairness in the exclusion of gay men for the same conduct that straight men supposedly enjoy.

Professor William Eskridge has used the story of Sergeant Perry Watkins to illustrate this perceived hyper-sexualized environment of the military.[121] Sergeant Watkins was, to say the least, one of the most unusual, unrepresentative gay military plaintiffs ever to challenge the military's exclusionary policy. When drafted during the Vietnam War, he told the recruiters that he was gay. While in the military, he was wildly promiscuous and not particularly discreet. He willingly provided sexual services to men in the unit and entertained them as a drag queen in military shows.

Several investigations during his career uncovered the unhidden fact that Sergeant Watkins was gay, and several times the military declined to discharge him. When, after fifteen years of service, the Army concluded that it really did want to discharge him, the

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16-23 (1994). Similarly, the same arguments raised more than 50 years ago to justify continued racial segregation in the military have been resurrected to justify the exclusion of gay men and women. *See generally* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

[121] Eskridge, *supra* note 99, at 611-12, 621-22. As did Professor Eskridge, in telling the story of Sergeant Watkins in this section, I draw from two sources: the sanitized version of the facts contained in the reported case and the more personal accounts that Sergeant Watkins has offered about his own career. *See id.*; Watkins v. United States Army, 875 F.2d 699, 701-05 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); HUMPHREY, *supra* note 79, at 248-57; SHILTS, *supra* note 12, at 60-64, 79, 161-62.

Ninth Circuit Court of Appeals would not allow the Army to do so. Under these facts, the Army was estopped from complaining about Watkins's homosexuality. The court did not consider any constitutional issues related to the gay ban in general.

Professor Eskridge concludes that Watkins's experience is a "prevalent phenomenon in the largely sex-segregated military."[122] He presumes that the military tolerates, and even "thrive[s] on,"[123] "boatloads of homosexual conduct,"[124] participated in by "plenty of ostensibly heterosexual men."[125] This side of the story has been shielded from the public debate on gay men and women in the military, he suggests, because conservative pragmatists are "skittish about stories that might alienate mainstream audiences."[126] I disagree. This side of the story was not part of the debate because, in addition to being inflammatory, it is so unrepresentative as to be useless.

Professor Eskridge's military is a military I do not recognize. First, only narrow pockets of our military forces continue to be sex-segregated, even in times of war.[127] Second, the article simply exaggerates the sexual component of military life,[128] to a counterproductive end. The more that commentators create a false picture of a military preoccupied with sex, the more likely it is that courts will retain a *Hardwick*-like obsession with detail that prevents reasoned judgment.

Other commentators have contributed to this false picture. In analyzing the *Steffan*[129] litigation, Carl Stychin explains that the military had to remove Steffan from the ranks because his gay identity made all the sexual conduct between straight military men seem "gay."[130] "The tenor of the [district court] judgment

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[122] Eskridge, *supra* note 99, at 627.

[123] *Id.*

[124] *Id.* at 628.

[125] *Id.* at 627. Professor Eskridge goes on to describe this conduct in vulgar language unnecessary to the legal argument he makes. *See id.* at 627, 629.

[126] *Id.* at 622.

[127] *See generally* HOLM, *supra* note 9, at 438-72 (describing role of women in Persian Gulf War).

[128] *See, e.g.*, Eskridge, *supra* note 99, at 627 (describing Navy rituals at sea), 628-29 (describing basic training as "hypermasculine" process that has "traditionally involved sexual humiliation").

[129] Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

[130] Carl F. Stychin, *Inside and Out of the Military*, 3 LAW & SEXUALITY 27, 37-38 (1993).

focuses on the awesome, seductive power of Steffan's sexuality which demands his expulsion from the military."[131] Both Professor Eskridge and Carl Stychin seem to believe that the military excludes gay men[132] from service only because straight men want to reserve all the same-sex conduct for themselves.

Professor Judith Hicks Stiehm proposes a different reason for the gay ban, one that focuses on gay men as potential victims. She reasons that the military excludes gay men in an effort to prevent sexual assaults, like those that take place in prisons:

> In a hyper-macho environment, some *non*-homosexuals believe that sodomizing other men is a means of demonstrating their masculinity. Literature abounds on this practice in United States prisons, and while the military is certainly not a prison, it is an extremely isolated and hierarchial environment in which coercion and compliance are frequently required. . . . Thus, the military makes an effort to exclude potential victims and to prohibit all homosexual acts.[133]

Why is there such a preoccupation with the idea that the military must be a highly sexualized environment? In part, this preoccupation may arise from two basic misunderstandings concerning what the exclusionary policy is designed to prevent.

First, commentators have incorrectly assumed that the ban against gay servicemembers is designed to achieve a very narrow goal: the prevention of the specific act of sodomy. Viewed from this very narrow perspective, the ban seems ill-suited to its task. It fails to exclude servicemembers who commit heterosexual sodomy, even though military law prohibits sodomy no matter what the gender of the partners.[134] Furthermore, it seems to reach more broadly than necessary against gay servicemembers, as the prevention of sodomy might be achieved by means less sweeping than exclusion of all gay men and women.[135] However, as

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[131] *Id.* at 40. I probably cannot imagine the embarrassment that this article caused Mr. Steffan.

[132] I assume this reasoning is not meant to apply to the exclusion of gay women from the military.

[133] Stiehm, *supra* note 1, at 701. This reasoning makes me wonder how female officers could be as successful as male officers in leading men, when sexual assault is one of the means used to obtain "compliance."

[134] 10 U.S.C. § 925 (1994).

[135] *See, e.g.*, Strasser, *supra* note 1, at 457 ("The best explanation for this policy is that the military's interest is not in punishing sodomy *per se*, but in punishing the orientation.");

discussed below, the exclusion of gay servicemembers has relatively little to do with the specific act of sodomy. This misinterpretation of the policy may invite commentators to take positions that over-emphasize and exaggerate descriptions of sexual conduct in the military.

Second, as also discussed below, commentators have misconstrued a provision of the exclusionary policy that gives the military the discretion to retain a servicemember who has engaged in prohibited acts, if the circumstances show that the servicemember has no propensity to repeat the behavior.[136] They misinterpret this provision as providing a "free pass" for straight servicemembers to engage in same-sex conduct, while barring gay servicemembers from doing exactly the same thing. Again, this misinterpretation of the policy may encourage commentators to over-emphasize and exaggerate the sexual behavior of straight servicemembers in order to establish an "equal opportunity" argument.

B. Understanding the Relationship of Sodomy to the Exclusionary Policy

Commentators have incorrectly assumed that the exclusionary policy was primarily intended to prevent the commission of sodomy.[137] That assumption leads to the complaint that the military is unfairly bootstrapping its proof by using words — a servicemember's declaration of sexual orientation — as proof of the commission of sodomy. Professors David Cole and William Eskridge, for example, contend that the military takes the words "I am gay" and uses them as "evidence of conduct — sodomy — that is illegal under the Code of Military Justice."[138] Professor Valdes similarly reasons that the military uses "strategic evidentiary bootstrapping," relying on "evidence of status" — the servicemember's declaration of sexual orientation — "to presume unproven criminal conduct" — sodomy.[139]

Valdes, *supra* note 2, at 467-68 (arguing that policy is overbroad if purpose is to prevent commission of sodomy).

[136] 10 U.S.C. § 654(b)(1)(A)-(E).

[137] *See* 10 U.S.C. § 925 (criminalizing commission of sodomy by military personnel).

[138] Cole & Eskridge, *supra* note 1, at 320.

[139] Valdes, *supra* note 2, at 406. *See also id.* at 426 (arguing that "evidence of status

But the military is not using status to presume the commission of sodomy, primarily because it does not have to prove the commission of conduct at all. It uses those words as evidence of a propensity for prohibited gay conduct in general, a larger category which includes all forms of private intimacy. The military may discharge a servicemember on that basis alone, unless the servicemember carries the burden of proving that he or she in fact has no propensity to ever have an intimate relationship.[140]

The proof of sodomy has never been that important to the military, as the military can discharge gay servicemembers for reasons far broader than the commission of a crime. In fact, many more heterosexual servicemembers are actually charged with sodomy than homosexual servicemembers,[141] although the focus of enforcement against heterosexuals may be sodomy committed by force rather than consensual sodomy.[142]

Sodomy itself is important to the debate about the exclusionary policy only because it provides an analytical link to *Hardwick*, the major stumbling block to claims by gay military plaintiffs. *Hardwick*'s ruling that there is no fundamental privacy protection for sodomy has caused most military plaintiffs to abandon any claims based on conduct. Instead, they urge artificial distinctions between status and conduct, under the assumption that *Hardwick* could not justify discrimination based on orientation alone.[143]

The most recent challenge to the exclusionary policy, however, has taken a different tack. Instead of completely distancing themselves from *Hardwick* by asserting that their status as gay men and women reflected no propensity to engage in any form of gay

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perform[s] double duty as evidence of conduct"); Strasser, *supra* note 1, at 453 (arguing that policy "presumes that these individuals will commit sodomy"); Williams, *supra* note 1, at 935 (arguing that "military will *presume* conduct from status").

[140] 10 U.S.C. § 654(b)(2).

[141] THEODORE R. SARBIN & KENNETH E. KAROLS, DEFENSE PERSONNEL SEC. RES. & EDUC. CTR., NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY 21 (1988), *reprinted in* GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS 27 (Kate Dyer ed., 1990).

[142] Rubenstein, *supra* note 2, at 242-43 n.11. The military has, although rarely, prosecuted and imprisoned gay servicemembers for intimacy within private, consensual relationships. *See, e.g.*, United States v. Baum, 30 M.J. 626 (U.S. Navy-Marine Corps C.M.R. 1990) (reversing female corporal's conviction after sentence already served); United States v. Newak, 24 M.J. 238 (C.M.A.) (reversing female lieutenant's conviction after sentence already served), *modified*, 25 M.J. 164 (C.M.A. 1987), *and cert. denied*, 493 U.S. 1070 (1990).

[143] Cain, *supra* note 1, at 1621-22.

conduct, the *Able* plaintiffs attempted to limit *Hardwick* strictly to its facts.[144] Their attempt to distinguish *Hardwick*, though, suffered from the same obsession with sexual detail found in legal commentary, robbing servicemembers of the dignity they deserve.

The *Able* servicemembers conceded, in recognition of *Hardwick*, that they could not engage in sodomy as prohibited by military law.[145] In a departure from all the prior cases, however, the plaintiffs alleged that each would "have non-sexual but 'bodily' contact with others" that might reveal that plaintiff's "sexual orientation," and would express his or her "sexual feelings" with a same-sex partner "in private, off-duty,[146] consensual sexual activity."[147] This type of claim could not be more counterproductive. It certainly invites the court, in *Hardwick* fashion, to speculate about exactly what the plaintiffs have in mind.

In dismissing that claim, the District Court for the Eastern District of New York afforded more respect and dignity to the servicemembers than their lawyers did. In the court's view, the plaintiffs would have no standing to bring their claims unless there was "a reasonable probability that [they] would have been able to engage in the proscribed behavior."[148] Given the "personal and intimate nature of the relationships that plaintiffs say they would establish," "they must at least allege that they can identify persons as expected participants."[149] The plaintiffs' allegations were dangerous, demeaning, and unrepresentative, as they gave the impression that the identity of one's partner is unimportant as long as the desired conduct takes place.

Professor Patricia Cain suggests that a strategy of limiting *Hardwick* to its facts can be useful in non-discrimination litigation in general. "When sexual conduct is at issue, gay rights litigators need to be explicit about what the conduct is."[150] However,

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[144] Able v. United States, No. 94-CV-0974, 1995 WL 116322 (E.D.N.Y. Mar. 14, 1995).

[145] *Id.* at *2.

[146] This allegation is so obvious as to be silly. How often do military people of either sexual orientation have sexual relations *on* duty? *See also* Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 41 n.16 ("[I]t also is 'arguably' egregious to treat differently the private, consensual, off-duty, sexual activity of gay military personnel.").

[147] *Able*, 1995 WL 116322, at *2 (footnote added).

[148] *Id.* at *4.

[149] *Id.*

[150] Cain, *supra* note 1, at 1633-34.

courts are unlikely to draw the lines between different forms of intimate behavior that the *Able* plaintiffs sought. The admonishments of the old-fashioned sorority house mother come to mind: "It's OK to have a boy visit in your room, but I want to see the door open and four feet on the floor at all times."

Courts will be reluctant to devise a detailed list of constitutionally protected intimacies, particularly given judicial deference to the military's judgment of what constitutes harmful conduct. Furthermore, plaintiffs ought to be reluctant to ask for a detailed list. Any distinctions courts could draw would be demeaning to gay servicemembers and just as intrusive, if not more, than a complete prohibition on gay conduct.

C. Understanding the Exception to Disqualifying Conduct

Under the terms of the military exclusion policy, there are circumstances under which servicemembers can be retained even though they have engaged in prohibited same-sex conduct. The servicemember must demonstrate the following:

> (A) such conduct is a departure from the member's usual and customary behavior;
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> (B) such conduct, under all the circumstances, is unlikely to recur;
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
>
> (E) the member does not have a propensity or intent to engage in homosexual acts.[151]

This exception is consistent with the way in which the military treats declarations of sexual orientation. Prohibited conduct and prohibited declarations of one's sexual orientation are both disqualifying, unless the servicemember can carry the burden of proving that he or she has no propensity to engage in gay conduct in the future.[152]

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[151] 10 U.S.C. § 654(b)(1)(A)-(E).

[152] 10 U.S.C. § 654(b)(1),(2).

The policy's exception for certain conduct that is otherwise disqualifying raises more ire in commentators than any other provision. The exception[153] is viewed as providing a "free pass" for straight servicemembers to have sex with other men,[154] while gay men are discharged for exactly the same conduct. Professor Valdes interprets the exception to "excuse[] homosexual acts committed by soldiers with a heterosexual orientation"; their conduct can be "affirmatively approve[ed]" by the military."[155]

Under this interpretation, the military is more interested in excluding gay servicemembers than in preventing gay conduct.[156] Professor Kenneth Williams predicts that a servicemember "who simply announces that he or she is gay, lesbian or bisexual is much more likely to be discharged than someone who has actually engaged in homosexual conduct."[157] Commentators assume that straight men who have engaged in same-sex conduct can easily qualify for the exception and remain in the military. Professor William Rubenstein explains that "individuals found engaging in homosexual conduct can elude separation by claiming, for instance, that the conduct was a mistake."[158]

Given this interpretation of the exception, it would be quite unfair — and irrational — for the military to excuse harmful behavior that actually takes place, but to discharge others in an effort to prevent the same behavior.[159] But this interpretation disregards the reality of the policy. Purportedly straight men will be retained after engaging in sexual conduct with other men about as often as gay men will be retained after declaring that

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[153] The exception has been termed "Queen for a Day" by some. *See* SHILTS, *supra* note 12, at 199.

[154] Once again, no one is thinking of women when they criticize this provision.

[155] Valdes, *supra* note 2, at 404.

[156] Rubenstein, *supra* note 2, at 257.

[157] Williams, *supra* note 1, at 927.

[158] Rubenstein, *supra* note 2, at 257.

[159] Some courts have been very receptive to this misinterpretation, finding the exception for some disqualifying conduct, but not all disqualifying conduct, irrational. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478 n.11 (9th Cir. 1994); Steffan v. Aspin, 8 F.3d 57, 64-65 (D.C. Cir. 1993), *vacated sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Watkins v. United States Army, 847 F.2d 1329, 1338-39 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) (en banc), *and cert. denied*, 498 U.S. 957 (1990); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993); Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1375 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *and cert. denied*, 494 U.S. 1004 (1990).

they are gay — which is to say almost never. Both are theoretical rather than realistic possibilities.[160]

The history of this exception from the usual consequences of disqualifying conduct shows that the exception was never intended to favor straight men over gay men. The exception was probably never intended to be applied very often at all. It was initially added to the exclusionary policy in 1982 as part of a more general amendment prompted by the military's defeat in *Matlovich v. Secretary of the Air Force.*[161] An earlier version of the policy in effect at that time provided that gay servicemembers could be retained in the military if "the most unusual circumstances exist and provided the airman's ability to perform military service had not been compromised."[162] In finding that Sergeant Matlovich failed to meet the exception, the Air Force offered no reasons why "the most unusual circumstances" did not exist in his case. The Air Force did offer some examples of reasons that might qualify — intoxication, youthfulness, or undue influence of a superior — but none were relevant to Matlovich's case.[163]

In reversing Matlovich's discharge, the Court of Appeals for the District of Columbia did not decide whether the discharge was proper or improper. It remanded the case to require the Air Force to articulate reasons why Matlovich failed to qualify for the exception that would have allowed him to remain in the military.[164] This requirement to factually justify discharges of gay

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[160] Not one instance of a servicemember avoiding discharge under the exception for disqualifying conduct appears in the legal commentary since the exception was added to the policy in 1982. 32 C.F.R. pt. 41, app. A, pt. 1, § H(1)(c)(1) (1994) (superceded). Compare the earlier version of the exclusionary policy at 32 C.F.R. § 41.7(g) (1976) (providing that servicemember will be discharged as "unsuitable for further military service" if he or she has "[h]omosexual or [o]ther [a]berrant [s]exual [t]endencies") with 32 C.F.R. § 41.7(i) (1976) (providing that servicemember will be discharged for "[m]isconduct" if he or she has engaged in "[s]exual perversion," which includes "homosexual acts" and sodomy).

Similarly, it was only recently that Lieutenant Zoe Dunning convinced the Navy that, although she maintains that she is gay, she has no propensity to have intimate relationships with other women. Her case was believed to be the first in which the military accepted that proof from a gay servicemember. Reynolds Holding, *Navy Quits Trying to Boot Lesbian Officer,* S.F. CHRON., June 16, 1995, at A16.

[161] 591 F.2d 852 (D.C. Cir. 1978). *See also* Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978) (companion case to *Matlovich*) (also requiring military to articulate reasons why it had not elected to retain gay servicemember).

[162] *Matlovich,* 591 F.2d at 854 n.1.

[163] *Id.* at 856.

[164] *Id.* at 857.

servicemembers is what led the military to revise its policy. Instead of an open-ended discretionary exception — which would rarely be applied in any event — the military shifted to a much more narrow and specific exception to a policy that would otherwise provide for no exceptions whatsoever.[165]

In drafting that narrow exception, the military had in mind the same sort of highly unusual circumstances suggested in *Matlovich*: youthful mistakes, impaired decisions, and undue influence. The important purpose of the new policy, however, was to generally relieve the military of the responsibility of having to factually justify its discharges of gay servicemembers.[166] The new policy was not intended to craft new loopholes in order to retain more servicemembers who have had sexual relations with others of the same sex.

Other commentators have suggested that the military adopted this exception to give itself more discretion in retaining gay servicemembers who, because of their value, the military could not afford to discharge.[167] But the military has never needed statutory discretion to retain gay servicemembers; there have always been commanders who have disagreed with the exclusionary policy and just looked the other way. Some even affirmatively support the gay servicemembers under their command.[168] For that reason, it is

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[165] S. REP. NO. 112, 103d Cong., 1st Sess. 266-67 (1993).

[166] KATHERINE BOURDONNAY ET AL., FIGHTING BACK, LESBIAN AND GAY DRAFT, MILITARY AND VETERANS ISSUES 19-20, 96-97 (Joseph Schuman & Kathleen Gilberd eds., 1985); Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 77-79 (1991); Stiehm, *supra* note 1, at 688 & n.20.

There is a general misperception that the 1982 policy change limiting discretion to retain gay servicemembers was an intentional attempt by President Reagan to make the lives of gay men and women more difficult. Karst, *supra* note 120, at 548 n.193, 551, 577-78; Stiehm, *supra* note 1, at 688; Valdes, *supra* note 2, at 396-97. While Reagan may be an easy target for that charge, there is no basis for it. The policy was changed to eliminate the need to justify discharges when the military rarely retained gay servicemembers anyway; the amendment had absolutely no practical effect on how gay servicemembers were treated on a day-to-day basis.

[167] 167. Karst, *supra* note 120, at 549-50; Williams, *supra* note 1, at 925-26.

[168] SHILTS, *supra* note 12, at 532-35. *See also id.* at 645 ("With each year, the military services found themselves increasingly at odds concerning the enforcement of gay regulations. Some officers demanded imprisonment of gays, and others believed in complete acceptance."); Karst, *supra* note 120, at 579 ("[C]ommanders tend to overlook gay and lesbian doctors; after all, service doctors are hard to retain.").

Sergeant Watkins's treatment by the Army also provides a good example of how differently commanders can implement the same "policy." Some commanders did not care

almost difficult to call the exclusionary policy a "policy." It might be more accurate to describe how the regulations work in practice as a "license" rather than a policy. Those who dislike gay men and women have been handed a license to use their rank to practice their prejudices. In contrast, those who believe the job is done better with gay servicemembers than without them ignore the regulations.

IV. AUTHENTICITY OF STORIES

Most of the recent challenges to the exclusionary policy have not arisen because an unlucky servicemember drew a commander who was intent on ridding the service of gay men and women. In fact, in at least three of the cases, commanders may have been well aware that the servicemember was gay and took no action.[169] The controversies were shaped only because the plaintiffs went outside the military and made declarations about their sexual orientation to the media. The plaintiffs drew the first sword and the military responded.

There are litigation advantages to bringing a challenge as a "six o'clock news" plaintiff. The servicemember, rather than the military, chooses the basis for discharge: the servicemember's statement about sexual orientation or status. Discharges initiated by the military, in contrast, will likely rely on some form of conduct, which would preclude the servicemember from contending that the discharge was based on status alone. The servicemember also can choose the timing of the lawsuit, hoping to benefit from a run of favorable public opinion.

But the entire character of the "six o'clock news" lawsuit is unrepresentative of those who serve. It necessarily focuses on public declarations because the declaration sets the military's legal machinery in motion. That focus on individual expressiveness, however, is an uncomfortable match with a profession that requires "the subordination of the desires and interests of the individual to the needs of the service."[170]

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at all that he was gay; all they saw was that Watkins was a superb clerk. Some cared quite a bit and sought to discharge him. Watkins v. United States Army, 875 F.2d 699, 701-05 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

[169] Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1475 (9th Cir. 1994); SHILTS, *supra* note 12, at 228 (Sergeant Ben-Shalom), 435 (Captain Pruitt).

[170] Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Orloff v. Willoughby, 345

The testimony of a senior military officer during congressional hearings on the exclusionary policy illustrates the negative effects of public declarations:

> Homosexuals constantly focus on themselves. Their so-called needs, what they want, their entitlements, their rights. They never talk about the good of the unit. It is this constant focus on themselves, the inability to subjugate or subordinate their own personal desire for the good of the unit, this is an instant indicator of trouble in combat, and frankly, even not in combat.[171]

A lawsuit that relies on a public declaration draws attention to the servicemember, not the servicemember's contribution to the country, and unfairly portrays these gay men and women as valuing their own political expressiveness above all else.

A. Public and Private Declarations

The same declaration — "I am gay" — that frames the status/conduct distinction for equal protection purposes has also raised First Amendment claims by military plaintiffs. The claim seems to be a natural one; after all, in some sense the plaintiffs are being discharged for their speech. Plaintiffs have argued that statements about their sexual orientation "constitute[] political speech, touching on a matter of public concern."[172] These speech claims, however, have been almost uniformly unsuccessful, and some of the more recent challenges have not even bothered to raise them.[173]

Courts have rejected First Amendment claims because the military is excluding gay servicemembers for their status, and the

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U.S. 83, 92 (1953)). The incompatibility of individual expressiveness and military service became an issue between Petty Officer Meinhold and his Navy colleagues. They complained about his "love of the limelight" as a public spokesman on the issue of gay men and women in the military. Jane Gross, *Gay Sailor's Colleagues Unsettled and Unheard*, N.Y. TIMES, Apr. 5, 1993, at A18.

[171] *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Armed Services Committee*, 103d Cong., 1st Sess. 89 (1993) (testimony of Colonel John Ripley). *See also* Siegel, *supra* note 1, at 192 ("Ban supporters claim that gays inappropriately emphasize the 'individual rights' aspects of the debate to the detriment of the common good . . . .").

[172] Pruitt v. Cheney, 963 F.2d 1160, 1163 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

[173] *See* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994).

propensity for conduct that the status represents, and not for their speech.[174] Speech is only the means by which the military discovers that a particular servicemember is ineligible for service. Presumably the military would not violate the First Amendment if it discharged those who declared other disqualifying facts, such as "I was more than thirty-five years old at the time of my enlistment" or "I am neither an American citizen nor a legal permanent resident."[175] A claim that the exclusionary policy inhibits speech is really an attack on the basis for the exclusion itself.

Moreover, most of the military cases have arisen from public declarations to the media. This has left a false impression that the controversy is one regarding limits on political expression. Commentators have followed this theme, seeing in military plaintiffs "individual expressions of homosexual identity that are crucial to the gay rights movement."[176]

For example, Professor Kenneth Karst believes that "the personal is political" for gay servicemembers.[177] He suggests that the most important question facing gay servicemembers is whether to publicly declare their sexual orientation.[178] In the context of a policy excluding them from the military, "coming out is not just an act of self-definition but an act of political expression."[179] Professor Williams agrees, concluding that "service members who 'come out' frequently do so for political reasons."[180]

Professors Cole and Eskridge take the theory even further, arguing that *all* behavior prohibited under the exclusionary policy is expressive, whether conduct- or speech-based.[181] "The only reasons the government offers for the military's regulation of

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[174] Pruitt v. Cheney, 963 F.2d at 1163-64; Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Cammermeyer v. Aspin, 850 F. Supp. 910, 928 (W.D. Wash. 1994); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1338 (E.D. Cal. 1993). *Contra* Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (finding policy's restrictions on speech unconstitutional under First Amendment because statement "I am gay" failed to show sufficient propensity to engage in prohibited conduct).

[175] *Qualification Standards for Enlistment, Appointment, and Induction*, DOD Directive 1304.26, enclosure 1, § (B)(1)(a), (2)(a) (Mar. 4, 1994).

[176] Karst, *supra* note 120, at 563.

[177] *Id.* at 562.

[178] *Id.*

[179] *Id.* at 561.

[180] Williams, *supra* note 1, at 933.

[181] Cole & Eskridge, *supra* note 1, at 321-22.

homosexual conduct are based on what that conduct communicates to other service members who may be offended by knowledge that some of their fellow soldiers are gay or lesbian."[182] Again, the basic assumption underlying their argument is that public declarations, however expressed, are at the center of the debate. "[T]he bulk of the 'conduct' regulated by the new policy consists of public expressions of homosexuality, e.g., hand-holding, kissing, marriage,[183] or saying that one is homosexual."[184]

There is no doubt that the personal *is* political for the "six o'clock news" plaintiffs. Their declarations are politically motivated; they issue public challenges to the military for the very purpose of forcing a change to the policy. But to assume that these plaintiffs are representative of gay servicemembers in general trivializes the real problems that the exclusionary policy creates.

The commentators miss the point that, on a day-to-day basis, the most difficult problem for gay servicemembers is military scrutiny of their non-declarative, non-expressive conduct. Professor Karst assumes, for example, that Captain Pruitt's career would not have been interrupted "so long as she kept quiet about her sense of her own sexual identity."[185] Professors Cole and Eskridge similarly assume that "hand-holding in private, or a private commitment to a lifelong homosexual relationship, does not trigger investigation or penalty."[186]

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[182] *Id.* at 322.

[183] In addition to discharges for prohibited statements and prohibited conduct, the policy also requires discharge for servicemembers who have "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(3). Looking at this provision through modern, gay-friendly eyes, commentators have wrongly assumed that the military is referring to "commitment ceremonies" between persons of the same sex that have become more common in recent years. Karst, *supra* note 120, at 560 n.234; Valdes, *supra* note 2, at 469-70. This provision, however, dates from 1982, well before commitment ceremonies would have been common knowledge in military circles. *See* 32 C.F.R. pt. 41, app. A, pt. 1, § H(1)(c)(3) (1994) (superceded). Compare the earlier version of the exclusionary policy at 32 C.F.R. § 41.7(g), (i) (1976). What the military has in mind is an attempt to enter into a legal marriage through some pretense about the gender of the partners. *See also* Able v. United States, No. 94-CV-0974, 1995 WL 116322, at *5 (E.D.N.Y. Mar. 14, 1995) (holding that provision applies only to legal marriages).

[184] Cole & Eskridge, *supra* note 1, at 332 (footnote added).

[185] Karst, *supra* note 120, at 561. *See also* Stiehm, *supra* note 1, at 700 (suggesting that purpose of exclusionary policy is not to actually exclude gay men and women, but to "keep them from asserting their identity and from making too much noise").

[186] Cole & Eskridge, *supra* note 1, at 333. *See also* Stiehm, supra note 1, at 700-01

The prohibitions under the exclusionary policy, however, are not limited to public speech and conduct, although it may seem that way from the legal challenges brought. The policy targets private, intimate behavior just as much as public, political declarations. The servicemember need not say "I'm gay" on national television; the same statement made to a close friend or family member, if discovered, will result in discharge. One need not hold hands with someone of the same sex at the Officer's Club on base; hand-holding in the privacy of one's home, if discovered, will result in discharge. It is simply not true that the military "selectively regulates public conduct."[187] Its investigation of private conduct is much more common, intrusive, and destructive.

B. Telling the Right Stories

Running through this Article is a theme of the importance of representativeness. When commentators or litigators choose a servicemember to illustrate a point or to bring a legal challenge, they also choose that particular servicemember's experience of gay military life. They can also craft that experience in a number of ways to fit, stretch, or upset existing legal doctrine, and the final result can be either representative or unrepresentative of the harm at issue. The question of whose story should be told, and how it should be told, is central to the field of narrative scholarship, or legal storytelling.

Narrative scholarship, in its simplest form, is a scholarship of perspective. It contends that the law often appears neutral and dispassionate only because competing perspectives have been systematically excluded.[188] When the traditional perspective goes unchallenged, it can appear to be objective reality rather than just one subjective viewpoint. Narratives, or stories, restore the balance by supplying the missing viewpoints of those less frequently

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(suggesting that exclusionary policy only requires that "any participation in homosexual acts must be private").

[187] *See* Cole & Eskridge, *supra* note 1, at 333.

[188] Eskridge, *supra* note 99, at 607 ("The stories told in traditional scholarship focus on issues important to legal elites and are told from their point of view, which is often presented as the consensus or neutral perspective."), 608 ("'Outsider' scholarship posits that law's traditional stories reflect neither neutrality nor consensus.").

represented in the law — those not "white, male, affluent, and ostensibly heterosexual."[189] "[S]tories are said to demonstrate something about how power works, especially how it can inhere invisibly in the most apparently 'neutral' of standards."[190]

A roundtable of articles recently debated the strengths and weaknesses of narrative scholarship. This series was initiated by a critique of the narrative movement by Professors Daniel Farber and Suzanna Sherry.[191] Responses were written by Professors William Eskridge,[192] Marc Fajer,[193] Jane Baron,[194] Richard Delgado,[195] and Alex Johnson.[196] Professors Farber and Sherry also added an essay in rebuttal.[197] While any general treatment of the role of narrative scholarship would be beyond the scope of this Article, this recent review of legal storytelling sheds light on the question of representativeness of story that is so important to a discussion of gay men and women in the military.

Narrative scholarship is much more controversial than it needs to be. Its foundation is little different than the common-law tradition of application of law to fact; narrative scholarship merely broadens the sources of fact available to test the more general rules.[198] In broadening those sources of fact, however, Professors Farber and Sherry believe that the story should be typical of the perspective it purports to represent.[199] "Even if a story is true, it may be atypical of real world experiences. . . . [I]f the story is being used as the basis for recommending policy changes, it

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[189] *Id.* at 607.

[190] Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 259 (1994).

[191] Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) [hereinafter Farber & Sherry I].

[192] Eskridge, *supra* note 99.

[193] Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994).

[194] Baron, *supra* note 190.

[195] Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

[196] Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994).

[197] Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN L. REV. 647 (1994) [hereinafter Farber & Sherry II].

[198] Farber & Sherry I, *supra* note 191, at 822-23.

[199] Farber & Sherry II, *supra* note 197, at 652 ("Our own view is that stories are significant only when they are shown to be typical.").

should be typical of the experiences of those affected by the policy."[200] Otherwise, the atypical story would "allow an unrepresentative individual to speak for a group, in effect silencing other members."[201]

Even though Professors Farber and Sherry speak of narratives generally, their concern for whether a story is typical can be applied to litigation brought by gay servicemembers. Many of the military plaintiffs' claims discussed in this Article were still at issue in the courts at the same time the very basis of the exclusionary policy was contested in Congress. The personal pictures of the debate painted by the servicemembers' stories could, and likely did, affect the outcome of "Don't Ask, Don't Tell, Don't Pursue."

Professor Fajer also addresses the issue of a narrative's representativeness when he responds to the question of whether the experiences of more-privileged members of "outsider" groups can be typical of the experiences of less-privileged members.[202] He concedes that the life experiences of more- and less-privileged persons will not be the same just because both are black or because both are gay. The treatment both receive from the majority, however, *because* they are black or *because* they are gay may have little to do with privilege.[203] For example, if two women walking together are harassed with homophobic threats, their experience is no less typical if it happens in an exclusive neighborhood.

Other authors disregard the importance of a typical story. Professor Johnson expressed concern about what happens to the story deemed atypical.[204] If the typical experience is privileged over the atypical, then how will the atypical experience be heard?

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[200] Farber & Sherry I, *supra* note 191, at 838. *Accord* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 253-54 (1992) ("Attention to particulars runs the risk of taking an atypical instance to represent a larger problem, thereby developing a response to the particular event that will produce havoc when it is applied to the more usual case.").

[201] Farber & Sherry I, *supra* note 191, at 839-40.

[202] Fajer, *supra* note 193, at 1852-53. Professor Fajer is responding to a concern raised by Professors Farber and Sherry: "[I]t would be helpful to have a more complete explanation of how black law school professors — whose occupation confers social and economic privilege, and who may come from privileged backgrounds similar to their white counterparts' — have a special claim to represent the views of poor blacks in urban ghettos." Farber & Sherry I, *supra* note 191, at 817.

[203] Fajer, *supra* note 193, at 1852.

[204] Johnson, *supra* note 196, at 817.

While the narrative may not be representative, it may still "tend to make the reader question whether *any* person should be subject to the treatment detailed in the story."[205]

Most of the objection to a requirement that a narrative be representative, however, comes from a suspicion about who will evaluate representativeness. Narratives of "outsider" experience will always seem unrepresentative if viewed from the narrow perspective of the "insider."[206] In discussing whether a story should be considered typical, Professor Delgado wonders "who is to decide that — surely not one situated outside that experience."[207] Professor Fajer agrees. "To the extent authenticity analysis makes any sense, surely it must be the right of members of the group to decide for themselves what makes them authentic."[208]

But who constitutes "members of the group"? Can commentators or litigators involved in gay activism make reasonable choices about the representativeness of gay military plaintiffs? Are the lives of gay men and women in the military outside the perspective of gay activists in the same way that narrative scholars argue that whites fail to understand blacks and men fail to understand women?

There is little doubt that narratives are helpful in understanding the lives of gay servicemembers, at two levels. First, the law is unlikely to have an informed perspective about the lives of gay men and women in general because of pressures to remain closeted.[209] At a second level, the law will be even less informed, if that is possible, about the lives of gay servicemembers because

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[205] *Id.*

[206] *See* Delgado, *supra* note 195, at 667 ("New stories are always interpreted and judged in terms of the old. One that differs too drastically from the standard account will strike the listener as extreme, false, or unworthy of belief.").

[207] *Id.* at 674.

[208] Fajer, *supra* note 193, at 1852 n.32.

[209] Farber & Sherry I, *supra* note 191, at 829 n.119 ("Because of the phenomenon of 'closeting,' information about the lives of gay men and lesbians may be unavailable to scholars. In this case, storytelling may be particularly useful as a way of filling in informational gaps."). Professor Fajer misunderstands this statement to suggest that stories about the lives of members of other outsider groups, such as racial minorities, are *not* important. Fajer, *supra* note 193, at 1849. That is not what Professors Farber and Sherry meant to say at all. They merely suggest, and I agree, that narratives can be even more helpful to gay men and women than they are to other outsider groups in providing missing perspectives. While the law may not be particularly receptive to the perspectives of blacks, for example, there is no pressure for secrecy corresponding to the effects of closeting.

the pressure for secrecy in the military goes far beyond the effects of closeting in the civilian world.

Narratives about gay servicemembers therefore help to change what Professor Fajer calls "pre-understanding" — "assumptions, both good and bad, about categories of people":[210]

> Pre-understanding about a particular group can interfere with discourse about that group because many people believe they "know" important things about members of the group, things which often are not true about many group members. The pre-understanding of judges and lawyers can infect the legal process and build incorrect or overbroad assumptions into the structure of law and legal decisions. . . .
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> . . . .
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> . . . Yet these messages often contradict our own lived experience of ourselves and of other members of our groups. This creates a dissonance in our lives: we are immersed in a culture that tells us what we must be like because we fit in certain categories, yet we live individual lives that stray, often wildly, from the expressed norms for the category.[211]

Ironically, in the debate over gay men and women in the military, the usual roles of insider and outsider seem to be reversed. The commentators and litigators advocating gay causes in essence become the insiders, carrying a very definite "pre-understanding" of what gay people are like. That pre-understanding or stereotype disregards the perspective of the new outsider — the gay servicemember — in the same way that traditional majority groups have disregarded minority perspectives. When activists for gay causes attempt to characterize the lives of gay servicemembers, they miss the mark. They characterize the harms differently, the priorities differently, and the remedies differently.

Most of the legal challenges to the exclusionary policy — the "six o'clock news" cases — create the kind of dissonance in military lives that Professor Fajer warns against. For example, the status/conduct distinction creates an artificial picture dissonant with anyone's life. "[I]n the effort to force grievances into existing legal categories, lawyers may strip away crucial aspects of the [plaintiff's] experience."[212]

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[210] Fajer, *supra* note 193, at 1847.

[211] *Id.* at 1847-48.

[212] Farber & Sherry I, *supra* note 191, at 829.

The picture is not only artificial, but also misleading. Professors Farber and Sherry note the importance in narrative scholarship of fairly confronting all the facts that comprise the narrative. "In particular, a failure to confront available contrary evidence, or at least to present that evidence to the reader, is dishonest. . . . A related form of intellectual dishonesty is to delete facts that undermine the scholar's thesis."[213]

The strained separation of status from conduct has forced advocates to ignore plain facts that undermine the fiction that gay military plaintiffs have no interest in an intimate life. Commentators fail to address the reality that Captain Pruitt had formally entered into a committed relationship with another woman,[214] that Colonel Cammermeyer was also part of a committed relationship,[215] and that Midshipman Steffan took repeated AIDS tests after his forced resignation from the Naval Academy.[216]

At the other end of the spectrum of artificiality are the narratives that exaggerate and over-emphasize sexual conduct by servicemembers. Professor Eskridge's emphasis on the story of Sergeant Watkins[217] reflects a detachment from the reality of military life that, ironically, narrative scholarship is intended to prevent.[218] "Outsider scholarship seeks to challenge the law's agenda, its assumptions, and its biases."[219] In this case, however, the agenda, the assumptions, and the biases may actually lie with those advocating for gay military plaintiffs.

Professor Eskridge suggests that the gay community would "respond intuitively to those parts of Watkins' story that reveal him as an irreverent drag queen who consistently violated the military's antisodomy laws."[220] But I doubt that gay

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[213] *Id.* at 852.

[214] Pruitt v. Cheney, 963 F.2d 1160, 1161 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992).

[215] *See generally* MARGARETHE CAMMERMEYER & CHRIS FISHER, SERVING IN SILENCE (1994).

[216] Steffan v. Cheney, 733 F. Supp. 121, 123 (D.D.C. 1989) (dismissing case for discovery violation), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990).

[217] Eskridge, *supra* note 99, at 611-12, 621-22.

[218] Professors Farber and Sherry rely on Professor Eskridge's judgment that Watkins's story is "prevalent" in evaluating its usefulness. "That is exactly why, from our perspective, Watkins'[s] story is relevant; were he the only one — or were we to doubt his typicality — we would find the story intriguing but rather irrelevant." Farber & Sherry II, *supra* note 197, at 652.

[219] Eskridge, *supra* note 99, at 608.

[220] *Id.* at 621. *See also* Abrams, *supra* note 110, at 237 (favoring "more complex self-

servicemembers, particularly women, would respond intuitively to that description. Rather than reflecting a "dramatic fantasy of gender plasticity,"[221] a drag queen's performance is simply degrading to women. It makes entertainment out of a display of women as sexually suggestive, frivolous, and empty-headed.

Why are gay servicemembers such "unknown soldiers," even to commentators, litigators, and activists who purport to be on their side? These servicemembers are certainly unfamiliar to the military in which they serve unseen. They are also unfamiliar, though, to the legal scholars who write about them with an ignorance, and perhaps an ambivalence, that comes from a basic distrust of military service. At times these scholars' hostility toward the military is open and obvious:

> The litigation can be critiqued on a number of levels. First, the goal itself was questionable from the beginning: why were we utilizing our scarce resources towards realizing such a limited and dubious end? After all, serving in the military, and all it stands for in this country, would require lesbians and gay men to conform to a narrow, militaristic, inhumane reality and become part of an institution whose primary purpose is to kill others. . . .
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> I have a great deal of sympathy for this point of view. I myself harbor no desire to serve in the military and often work to convince others not to do so.[222]

Sometimes the antipathy is more subtle, revealing itself through misconceptions about the military rooted in bias. For example, the nature and purpose of basic training — "boot camp" — for new servicemembers has been the subject of much misunderstanding and exaggeration. Professor Stiehm asserts that one of the purposes of basic training is to "secure subordination and compliance by terrorizing recruits."[223] As an example of a

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revelation" of Watkins over celibate image of Steffan).

[221] Eskridge, *supra* note 99, at 624.

[222] Rubenstein, *supra* note 2, at 251. Professor Rubenstein has represented, either as counsel or as amicus curiae, many of the gay military plaintiffs challenging the exclusionary policy. *See* Steffan v. Perry, 41 F.3d 677, 681 (D.C. Cir. 1994) (en banc); Ben-Shalom v. Marsh, 881 F.2d 454, 456 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); Able v. United States, 847 F. Supp. 1038, 1039 (E.D.N.Y. 1994), *modified*, 44 F.3d 128 (2d Cir. 1995).

[223] Stiehm, *supra* note 1, at 689 n.23. Commentators have also exaggerated the degree to which humiliation and personal insult are used as training tools in the modern military. *See* Eskridge, *supra* note 99, at 628-29 ("The cult begins to form in boot camp, which breaks green recruits and reduces them to the same miserable level. This process has traditionally

technique used to "generate fear and compliance," she explains the "impossible task" exercise.[224] In this type of exercise, a recruit is ordered, under time pressure, to accomplish a task that the instructor knows cannot be accomplished.

There is nothing sinister, however, about this training tool; it is not designed to terrorize recruits. To the contrary, it serves a useful training function. Under the controlled circumstances of basic training, it presents a real life situation: what should be done when the original plan is no longer possible? It teaches the recruit to deal with frustration calmly and effectively and to consider alternatives without panic. These constructive aspects of military training, however, will be disregarded when they conflict with the assumption that the military teaches by terror.

From the start, the debate over gay men and women in the military elicited mixed feelings in gay activists.[225] While they realized the importance of equal access to the performance of public service,[226] military service was not the kind of public service they were interested in performing.[227] There was a sense of great distance between the concerns of the gay political community and the concerns of the military. While it is not surprising that a group enthusiastically excluded from the military would feel little connection to it, that sense of distance extends beyond the civilian gay community to the civilian world in general.

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involved sexual humiliation and a denigration of whatever traits differentiate one recruit from another.").

[224] Stiehm, *supra* note 1, at 689 n.23.

[225] Williams, *supra* note 1, at 921 n.12 ("[T]he lifting of the ban was never a top priority in the gay community.").

[226] Professor Karst has discussed the relationship between military service and full citizenship. Karst, *supra* note 120, at 524-29.

[227] *See* Andrew Sullivan, *Gay Values, Truly Conservative*, N.Y. TIMES, Feb. 9, 1993, at A21. Sullivan asserts:

> Certainly, [gay] radicals always suspected homosexuals who wanted to join the military, regarding them as foolishly embracing a system that oppressed them. For many years after the 1969 Stonewall riots in Greenwich Village in New York, which gave birth to the gay rights movement, the military issue wasn't on the official gay rights agenda at all. For those who came from the antiwar movement, it was anathema. It was only in the late 80's that some argued that it should be placed at the forefront of the battle for gay civil equality.

Id. See also SHILTS, *supra* note 12, at 727-28 (describing opposition of national gay activist organizations to Persian Gulf War).

C. Understanding and Challenging the Military

Kirstin Dodge has written a very insightful article examining the relationship between the citizen and the servicemember in our society, focusing on problems that arise from the separation between civilian and military worlds.[228] According to Dodge, in the conscriptive military of the past, there was broad overlap between the experience of civilians and the experience of servicemembers:

> Citizen-soldiers who come together temporarily to train or fight in the nation's defense circulate in and out of the military, bringing their opinions from civilian life to their military service. Their military experience likewise shapes their contributions to debates about military needs, treatment of servicemembers, and the like. Everyone sees herself as potentially in need of protection by the military, as potentially called upon to guard the country, and as potentially subject to military regulations.[229]

In a standing military staffed by volunteers, however, the responsibility for military service is met by proportionately fewer citizens. The opportunity for give-and-take between citizens and servicemembers is reduced. Even the desire for give-and-take is reduced because military service no longer has the relevance in people's lives that it once did. The ramifications of this disconnection are important:

> Civilians . . . do not care to familiarize themselves with conditions in the military because they will never be directly affected by military law. These developments represent a serious breakdown of communicative politics. Predictably, under such conditions, the populace will rely on military decisionmakers' "expert" opinions: on what other information are people to rely?[230]

This deference to military judgment has had far-reaching effects in the debate over gay men and women in the military. Courts have been extremely reluctant to second-guess the "considered

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[228] Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1 (1992).

[229] *Id.* at 28.

[230] *Id.*

professional judgment" of the military that the presence of gay servicemembers is harmful to the military mission:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive branches.[231]

The appropriateness of this deference to military judgment has generally gone unchallenged, even among those who seek to change the underlying exclusionary policy. But this is one of the occasions in which the disconnection between civilian and military spheres, particularly the gulf between gay activists and the military, has prevented many scholars and litigators from seeing how inappropriately this deference has been granted. The problem is that there is nothing "considered," "complex," "subtle," or "professional" about the judgments the military has made regarding the service of gay men and women.

Before courts give the military the benefit of judicial deference, they should determine precisely the military expertise at issue. If the military has little expertise in an area, then deference would not be appropriate. In the case of gay servicemembers, there are three components to the necessary expertise: (1) understanding the military mission to be accomplished; (2) understanding the characteristics of gay servicemembers that differ from those of their straight colleagues; and (3) understanding the effect of those characteristics on the accomplishment of the mission.[232]

Identifying the expertise at issue reveals that the military has specialized knowledge in only one of these three components — the military mission to be accomplished. The military could not

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[231] Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1476 (9th Cir. 1994) *and* Cammermeyer v. Aspin, 850 F. Supp. 910, 915 (W.D. Wash. 1994) (quoting Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981)).

[232] Professor Karst identifies similar questions that judges have failed to ask the military: "Who are the relevant experts on military matters? What forms their professional knowledge and judgment on the capacities of women and the influence of homosexual servicemembers?" Karst, *supra* note 120, at 574. Karst continues: "For the moment let us assume that some generals and admirals actually deliberated on excluding gay and lesbian servicemembers and barring women from combat positions. How did these officers become experts on the 'manliness of war,' or on the effects of women or gay men on the military mission?" *Id.* at 575.

possibly be making professional judgments in the remaining two areas. It does not even know *who* in the military is gay, let alone the characteristics or the effects of these unknown people. When the military merely adopts a cultural bias from the larger society, it makes no professional judgment peculiar to its own expertise.[233] A general's conclusion that gay servicemembers are harmful to military discipline rests solely on "his unexamined sense that he has experienced discipline only in (what he believed to be) all-heterosexual units."[234]

Unfortunately, the increasing separation of military and civilian worlds makes it very easy for the military to dismiss those with whom it disagrees. "You haven't been there, so you wouldn't understand" is the position the military takes.[235] Lawyers opposing the exclusionary policy, both commentators and litigators, have been reluctant to directly confront the military on any matter remotely related to military life, no matter how ridiculous the military's position may be.

Opponents of the gay ban instead limit themselves to arguments of statutory interpretation. They attempt to identify circumstances in which the statutory policy is inconsistent with its stated goals or is over-inclusive, under-inclusive, or internally inconsistent. The result is a series of strained positions, more theoretical than real: the unworkable status/conduct distinction, the false link between sodomy and ineligibility for military service, and the misinterpretation that the policy protects straight but not gay offenders.

While the military has not been an informed participant in the debate over gay servicemembers, neither have its opponents. It is important that those seeking to change the policy identify when the military is irrational in its description of military life, and not

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[233] *Id.* at 574. Courts should be most suspicious of wholesale exclusions of certain groups from the military, because those exclusions are the most likely to be based on cultural bias. *Id.* at 572; Dodge, *supra* note 228, at 30.

[234] Abrams, *supra* note 110, at 234.

[235] *See* Dodge, *supra* note 228, at 25; Karst, *supra* note 120, at 576. President Clinton, in particular, has been dismissed in this manner. "If President Clinton had gone through basic training at Parris Island or any of the other four military basic training group headquarters, do you think we would be here today discussing this question?" *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Armed Services Committee*, 103d Cong., 1st Sess. 743 (1993) (question asked by Senator Lauch Faircloth, directed to General Carl Mundy, U.S. Marine Corps Commandant).

only when it is constitutionally irrational in its drafting of policy. Two examples can illustrate the difference: (1) the military's insistence that gay servicemembers must not be permitted to have private lives off-base, because "soldiers are soldiers twenty-four hours a day"; and (2) the military's fear and confusion related to privacy concerns — the "shower issues."

During the debate over the exclusionary policy, some suggested that a compromise might be reached if the military allowed gay servicemembers to conduct their private lives without interference, provided they did so off-base and away from view.[236] This suggestion, however, was quickly rejected. Gay servicemembers, in the military's view, were just asking for special exemptions from the rules that applied to everyone else. There was no such thing as an "off-base exception" for disobedience of military law.[237] The military's sanctimonious stance was memorialized in the final legislative compromise:

> (9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not

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[236] Schlueter, *supra* note 1, at 426-27. Prior to the recent debate, even an Army lawyer had suggested a similar amendment to the policy:

> 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.

Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 104 (1991).

[237] *See* Schlueter, *supra* note 1, at 426-27. Schlueter states:

> While it is true that what takes place off-post may not *appear* on its face to be of any concern to the military, nevertheless service in the armed forces is an around-the-clock proposition. What servicemembers do in their free time, off-post, is still subject to the legitimate needs and the interests of the military.

Id. See also Senator Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994) (summarizing justifications offered in support of exclusionary policy during congressional hearings). Senator Nunn argues: "Members of the armed forces are subject to disciplinary rules and military orders, twenty-four hours a day, regardless of whether they are actually performing a military duty." *Id.*

> ending until that person is discharged or otherwise separated from the armed forces.
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> (10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.[238]

The military's position on this issue is ridiculous, but no one challenging the policy has ever explained why. The military has always had different rules for conduct on- and off-base, or on- and off-duty. For example, an off-duty servicemember need not wear a uniform, salute, or wear his or her hair in regulation fashion. Conversely, an on-duty servicemember cannot become intoxicated, although the "twenty-four hour a day" rule has never prohibited military people from drinking while off-duty. To draw a closer analogy, the fact that a servicemember cannot have sexual relations with his or her spouse while on-duty does not mean it cannot happen at home.

Advocates for gay servicemembers have also failed to adequately challenge the military's concern for the privacy of straight servicemembers. "Shower issues" captured an enormous amount of attention during the debate over the exclusionary policy. The response of commentators and litigators to this very sensational concern, however, has too often been overly simplistic. Rather than meeting the issue head on, they have been more likely to allege prejudice as the only explanation for those who disagree with them. I do not intend to suggest that prejudice is not a problem; however, there are more basic reasons why the military's concerns are overrated.

The military believes that straight and gay servicemembers of the same sex should not shower together and share quarters for exactly the same reason it presumes military men and women are separated in their personal activities: to reduce sexual attrac-

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[238] 10 U.S.C. § 654(a)(9),(10) (1994). In the context of gay servicemembers, the "24 hours a day" rule is a red herring. The rule is relevant only to the jurisdictional reach of military courts. If a servicemember commits a crime under military law, the offense can be prosecuted in a military court even if the offense is committed in the community and not on base. Solorio v. United States, 483 U.S. 435 (1987). *See also* Schlueter, *supra* note 1, at 426 ("[C]ourt-martial jurisdiction depends entirely on the status of the defendant as a member of the armed forces."). This jurisdictional rule is unrelated to the issue of which conduct should be prohibited by the military in general.

tions.[239] Faced with the prospect of knowingly showering with gay military men, straight military men have imagined what would happen if men were permitted to shower with women. Given that comparison, the military has found the invasion of straight servicemembers' privacy to be unacceptable.[240]

In response, those opposing the exclusionary policy allege that simple prejudice is the cause of any uncomfortableness. Because only the prejudice of straight servicemembers causes them to assume their gay colleagues will look at them in a lustful manner, an exclusion of gay servicemembers on this basis would improperly lend the government's support to private prejudice.[241] Commentators tend to reduce the problem to one of preventing sexual assaults by gay servicemembers. They contend either that the probability of assaults is low or that disciplinary measures can control any problem that exists.[242]

But that argument fails to squarely meet the issue. No one would suggest that a low probability of assaults or the availability of disciplinary measures would be enough to justify complete integration of male and female living quarters. Still, the argument essentially concedes that the military has made a valid analogy between straight and gay servicemembers of the same sex, on the

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[239] Siegel, *supra* note 1, at 200-02; Schlueter, *supra* note 1, at 419.

[240] The privacy rationale was incorporated into the final legislative compromise. *See* 10 U.S.C. § 654(a)(12) (1994) ("The worldwide deployment of United States military forces . . . make[s] it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.").

[241] *See, e.g.*, Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993), *vacated sub nom.* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

[242] *See* Cole & Eskridge, *supra* note 1, at 341 ("It is hard to credit this sort of anxiety as a compelling *state* interest, unless it were accompanied by evidence of more tangible secondary effects, such as a greater risk of sexual assault."); Strasser, *supra* note 1, at 441 ("[G]ay and lesbian individuals (whether publicly self-identified or not) will have great incentive not to make advances towards those who would reject them. This may be especially true where men are concerned.") (contemplating a violent response to advances by gay male servicemembers). Professor Karst asserts:

> If the exclusion rule were dropped, so that [gay servicemembers] were no longer deterred from making their sexual orientation known, there would be no reason to expect a flood of unwelcome sexual advances. . . . The rules forbidding fraternization and harassment, along with the threat of criminal prosecution for 'lewd' or 'indecent' acts, are one set of disincentives to unwanted homosexual advances.

Karst, *supra* note 120, at 556.

one hand, and between male and female servicemembers, on the other. This concession leaves the policy's opponents in the difficult position of having to explain why the same concerns should not apply in each case.

The more fundamental problem is that the basic analogy relied on by the military is flawed. Our society segregates men and women in their personal activities based on gender, not sexual attraction.[243] We have never had separate facilities based on sexual orientation — not in locker rooms, boarding schools, sports camps, college dormitories, or in communal lodgings for civilian public service programs.[244]

Justice Scalia recently discussed the limited privacy expectations inherent in group showering activities in *Vernonia School District 47J v. Acton*,[245] a decision allowing drug testing of high school athletes. Noting that these football players undressed in front of one another, took group showers, and used toilet stalls without doors, the United States Supreme Court concluded that "[s]chool sports are not for the bashful."[246] Furthermore, these players volunteered to participate, knowing there would be substantial limitations on privacy.

While intrusions on the privacy of high school athletes only last for several hours each day, the personal activities involved in team sports are little different from the personal activities involved in group living in the military. Certainly the athletes are never segregated by sexual orientation; each player has to assume that gay as well as straight students will participate. Why should military men have a greater expectation of privacy than high school football players?

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[243] Siegel, *supra* note 1, at 203 & n.63. *See also* LOIS SHAWVER, AND THE FLAG WAS STILL THERE: STRAIGHT PEOPLE, GAY PEOPLE, AND SEXUALITY IN THE U.S. MILITARY (1995). Dr. Shawver is a clinical psychologist who advised the Canadian government during its 1992 debate over gay men and women in the military. *Id.* at v. She describes as "folklore" the idea that our society segregates the personal activities of men and women to reduce sexual attraction. The relationship is just the opposite: we segregate men and women to *enhance* the possibility of sexual attraction. The sharing of personal hygiene activities results in diminished eroticism. *Id.* at 15-26.

[244] Cole & Eskridge, *supra* note 1, at 341 n.98. *Accord* Siegel, *supra* note 1, at 205; Stiehm, *supra* note 1, at 693. During the debate, a proposal for segregation of gay and straight servicemembers was raised and rejected. Schlueter, *supra* note 1, at 418.

[245] 63 U.S.L.W. 4653 (U.S. June 26, 1995).

[246] *Id.* at 4656.

The military has fanned the flames of the privacy issue by appealing to the fears of men who watch too many war movies on television. The most extreme living conditions in the military have been presented as the norm. "The servicemember's home is often a small two-person tent, a cramped berth in a submarine, or an open-bay barracks where a large number of individuals share, not only a common sleeping area, but common shower and restroom facilities."[247]

The word "often" is an exaggeration; most single servicemembers, most of the time, live in dormitories much like college students do, and married servicemembers live in houses or apartments with their families just like civilians do. Although it is true that servicemembers live with little privacy when deployed under field conditions, the activities of dressing, showering, and sharing sleeping quarters with others of the same sex while in the field are still no different than the same activities engaged in by football players or college roommates.

Despite a general judicial deference to military judgment, courts have required the military to articulate rational reasons for the exclusion of gay men and women.[248] The military has not always been able to carry this burden, even when opponents have yielded to military expertise on almost every relevant factual issue. Perhaps the challenge to the exclusionary policy would be even stronger if opponents did not so quickly yield. The gay servicemembers that have been the subject of so much debate have so far been more theoretical than real. Neither side has pressed its case with concern for factual accuracy, and that disregard for truth will, in the long run, be more harmful than helpful to gay men and women in the military.

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[247] Schlueter, *supra* note 1, at 419. The Senate Armed Services Committee was especially enamored with the small sleeping berths on aircraft carriers and submarines, taking camera crews through living quarters as part of the congressional hearings on gay men and women in the military. 1993 CONG. Q. WKLY. REP. 1241.

[248] *See, e.g.*, Pruitt v. Cheney, 963 F.2d 1160, 1167 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992) ("The Army does not ask us to deny review; it asks us to uphold its regulation without a record to support its rational basis. This we decline to do.").

CONCLUSION

There is little doubt that narratives of gay servicemembers' lives have been beneficial throughout the debate over the exclusionary policy. Stories like Midshipman Steffan's have been useful in educating the public about the human consequences of the policy; they have also forced the military to discard some of its least defensible justifications for exclusion.[249] But Steffan's counsel overestimated the benefits of the story when he concluded that it had "greatly enhanced the chances that other lesbians and gay men will be able to serve in the future."[250] It would be more accurate to say that the litigation may have enhanced the chances for gay men and women to serve, but only under more oppressive and dishonest conditions.

While the "political theater" of the "six o'clock news" plaintiff has generated great heat for political activists,[251] it has shed very little light on the real issues affecting gay men and women in the military. Advocates for gay servicemembers have relied on fictitious plaintiffs, making "so strained a constitutional argument as to amount to a basic attack on the policy itself."[252] At the same time, these advocates have allowed the creation of an equally fictitious military by failing to challenge an institution they would rather not understand. It is almost as if both sides have informally agreed to debate the theory, but not the reality. Why not make the argument on the merits? Gay servicemembers would be better served by a loss on the true merits than a victory on illusory terms.

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[249] Rubenstein, *supra* note 2, at 254-61; Stoddard, *supra* note 79, at 570-71.

[250] Stoddard, *supra* note 79, at 568.

[251] *See* Abrams, *supra* note 110, at 236 ("As lawyers file their equal protection challenges in court, their clients take their cases on the road, appearing in public fora, coming out on the national news, and even debating prominent military officials on 'Nightline.'"). *See also* Stoddard, *supra* note 79, at 564 (describing work of Steffan's public relations consultant, resulting in numerous appearances on national television).

[252] Steffan v. Perry, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc).