

## DON'T ASK, DON'T TELL: A DYING POLICY ON THE PRECIPICE

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*“When I Was in the Military, They Gave Me a Medal for Killing  
Two Men and a Discharge For Loving One.”<sup>1</sup>*

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1. Epitaph on the tombstone of Sergeant Leonard Matlovitch, a highly decorated sergeant in the United States Air Force, who spent nearly twelve years in the service. MARY ANN HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE* xxvii (1990). This article is dedicated to the fine men and women who comprise the membership of the Alexander Hamilton Post 448 of the American Legion. Dr. Paul D. Hardman founded Post 448 in 1984 to provide an avenue for public service, military pride, and long-overdue recognition for the sacrifice and valor of the thousands of gay and lesbian members and veterans of the United States military. *See* Alexander Hamilton Post 448, Historical Highlights, <http://www.post448.org/historical.html> (last visited Mar. 30, 2008). The membership of Post 448 includes veterans and the families of veterans of every war in the twentieth and twenty-first centuries. *Id.* At great personal sacrifice, the members of Post 448 have been active advocates and representatives of the gay military community throughout the United States. *Id.* In 1987, Post 448 became the first openly gay Veterans organization to place a wreath in a ceremony of the Tomb of the Unknowns in Arlington National Cemetery to honor gay and lesbian people in uniform who have made the ultimate sacrifice in service of this country. *Id.* Post 448 is an inclusive organization, recognized nationally for its activism pertaining to the welfare of all military veterans, and especially for its tireless efforts to end the discrimination based on sexual orientation in the United States military represented by “Don’t Ask, Don’t Tell.” *See id.*

## I. INTRODUCTION

Despite causing heavy personnel losses and tactical damage during crucial times, the forced separation of gay service members from the U.S. military since the passage of “Don’t Ask, Don’t Tell”<sup>2</sup> has consistently been upheld by federal appellate courts.<sup>3</sup> Appellate courts have routinely denied challenges based on equal protection, substantive due process, and first amendment rights.<sup>4</sup> In the vast majority of those cases, despite much evidence to the contrary, courts have simply deferred to military judgment that the presence of known homosexuals is detrimental to the military’s ability to provide for national defense.<sup>5</sup> Courts have agreed with military advocates that statements about sexual orientation constitute powerful indicators of intent or propensity to engage in sexual conduct with people of the same gender, easily turning sexual orientation identification into sexual conduct.<sup>6</sup> Importantly, the military has abandoned arguments based on threats to public health, psychological instability, or vulnerability to blackmail.<sup>7</sup>

The most successful argument in favor of the policy continues to be deference to the judgment of a shrinking number of military leaders regarding the protection of the sensibilities of a small group of heterosexuals who would feel threatened by the presence of known gays and lesbians.<sup>8</sup> That argument was also central to cases under the former ban, confirming that, despite its apparent openness to gays and lesbians, “Don’t Ask, Don’t Tell” is no more than a *de facto* ban.<sup>9</sup>

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2. “Don’t Ask, Don’t Tell” can be found at 10 U.S.C. § 654 (2006). Some of the implementing regulations can be found at DEP’T OF DEFENSE DIRECTIVE 1332.14 (1993) [hereinafter DIRECTIVE 1332.14] and DEP’T OF DEFENSE DIRECTIVE 1332.30 (1997) [hereinafter DIRECTIVE 1332.30]. In addition, each military branch maintains separate administrative discharge procedures.

3. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996) (holding that 10 U.S.C. § 654 is constitutional).

4. *See, e.g., id.*

5. *See, e.g., id.*

6. *See, e.g., id.*

7. *See* Able v. United States, 880 F. Supp. 969, 973-74 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), *rev’d*, 155 F.3d 628 (2d Cir. 1998).

8. *See id.* at 976-77.

9. *See generally* MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE 7-10 (1993) (discussing the litigation that took place under the

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“Don’t Ask, Don’t Tell” essentially reduces gay military service members to their sexual identity. It then creates a fiction whereby their sexual identity can be sequestered and confined in a box every minute of every hour of every day for the entire duration of their military service. If any hint of their sexual orientation manages to escape, even as they confide with counselors, clergymen or medical professionals, gay service members may be targeted for expulsion and even criminally prosecuted. For many gay service members, the price of serving in the military imposed by the policy is a life of deception, where the only way to survive is by passing as heterosexual twenty-four hours a day, seven days a week, whether on or off military bases.<sup>10</sup> Individuals and smaller groups, however, have found ways to co-exist with their heterosexual comrades under the protection of understanding superiors, or by developing informal support systems.<sup>11</sup>

This article examines the labyrinth of statutes, regulations and directives that compose “Don’t Ask, Don’t Tell,” a policy which those suspected of being gay or lesbian find difficult, if not impossible, to escape. It also analyzes the real-world and military consequences of the *de facto* ban and the effects of the moral condemnation of gays and lesbians by the U.S. Supreme Court upon deliberations of the policy in Congress and upon lower courts that have presided over challenges to the policy. Relying heavily on the legislative history of

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former ban during 1971-1991).

10. See C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military’s Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199, 229-34 (1995) (documenting aggressive “witch hunts” of gays, lesbians and bisexuals by commanding officers even after the passage of “Don’t Ask, Don’t Tell”).

11. See *Thomasson v. Perry*, 80 F.3d 915, 952 (4th Cir. 1996) where dissenting Circuit Judge Hall discusses the experience of people under the command of Lt. Paul Thomasson. Lt. Thomasson served for more than fifteen months after declaring that he was gay. Though people in his unit disapproved of homosexuality, “[n]ot a single sailor testified that he had suffered even mildly diminished morale.” *Id.* Yeoman Third Class John J. Broughton explained:

At first [after Thomasson’s disclosure], I was shocked and did not know whether or not to back out [of a volunteer assignment to work with Thomasson] and work in my old office. I did not know whether I could work with a homosexual. I decided to stick with the decision I made prior to knowing of LT Thomasson’s disclosure. I am glad I did . . . LT Thomasson[,] in my opinion, is the best “LT” in the Navy. . . . His sexual orientation had no adverse effect on myself or to the Navy.

*Id.* at 952 n.7.

“Don’t Ask, Don’t Tell,” and the social and political context under which the policy was enacted, the article makes the case for a more careful evaluation of the policy under a searching rational basis analysis than has previously been attempted. The article argues that, given all the evidence that has been ignored by Congress and the courts since before the passage of “Don’t Ask, Don’t Tell,” the true last-remaining reason for the policy is a level of legislative and administrative animus toward homosexuals as a group, which most other groups in the history of this country have rarely experienced. The article thus argues that “Don’t Ask, Don’t Tell” may be the prototypical case of invidious discrimination against a politically unpopular group. Recognizing the reality that courts are likely to continue ignoring a mountain of evidence and legal doctrine in favor of overturning the law, nevertheless, the article concludes that Congress should reconsider its earlier stance and, this time, get it right by dismantling “Don’t Ask, Don’t Tell” in favor of a policy of non-discrimination, as has been done in the majority of the civilized world.<sup>12</sup>

## II. ADOPTION OF THE POLICY

The “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (“Don’t Ask, Don’t Tell”) policy replaced an outright ban on service by homosexuals in the United States military.<sup>13</sup> Motivated partially by the

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12. Representative Martin T. Meehan introduced the Military Readiness Enhancement Act of 2007, a bill designed to overturn “Don’t Ask, Don’t Tell,” to the House of Representatives on February 28, 2007. Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (2007).

13. DEP’T OF DEFENSE DIRECTIVE 1332.14 (1982), *available at* <http://dont.stanford.edu/regulations/regulation41.pdf> (“Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers, to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain public acceptability of military service; and to prevent breaches of security.”).

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death of Alan Shindler, a U.S. Navy sailor who was brutally murdered because of his sexual orientation, then presidential candidate Bill Clinton promised to eliminate discrimination based on sexual orientation in the military. President Clinton's proposal to eliminate the ban was vigorously opposed.<sup>14</sup> The opposition galvanized around the idea that a person who had never served in the military (Clinton) should not dictate to military leaders how to manage personnel matters. It managed to pit a so-called "draft dodger," against honorable military veterans whose first-hand experience carried much more weight. In 1993, after much acrimonious testimony from representatives of every branch of the military and a large number of members of Congress who supported the existing ban, and testimony from a smaller number who opposed the ban, Congress passed "Don't Ask, Don't Tell," changing essentially nothing.

The President hailed the 1993 law as a reasonable compromise between full integration and complete exclusion. Significantly, many military and congressional supporters of the exclusionary policy finally admitted that gay men and women have performed honorably and courageously in service of the United States of America for generations.<sup>15</sup> Indeed, despite the large numbers of forced separations

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14. See BILL CLINTON, MY LIFE: THE PRESIDENTIAL YEARS 20-24 (2004) (explaining that overwhelming opposition from the Joint Chiefs of Staff, a veto-proof resolution in the House opposing the lifting of the ban, and similar opposition in the Senate, forced him to fall well short of the plan to eliminate the ban). Among the most vocal opponents of changing the former policy were Generals Norman Schwarzkopf and Colin Powell. Stressing the importance of an amorphous sense of "morale," "esprit de corps," "cohesiveness," and "discipline," members of Congress repeatedly cited the two generals' views that changes in the former policy would not only undermine good order or discipline but also that they would indeed "destroy the military." 139 CONG. REC. S1262-02 (statement of Sen. Coats). Members of Congress also took advantage of Clinton's lack of a military resume to undermine the president's standing to bring about the change. *Id.* (statement of Sen. Smith) ("I find it extremely troubling that someone with no military experience and a controversial record of opposition to past military campaigns can so casually dismiss the input of our Nation's most trusted and experienced military commanders.").

15. Unfortunately, even those statements managed to deny gays and lesbians full recognition for their military sacrifices. To military leaders, gays had managed to contribute only while being silent about their sexual orientation. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Services*, 103rd Cong. (1993) (statement of General McPeak) ("[H]omosexuals have served in the past . . . . Those who had successful tours, even

before and after “Don’t Ask, Don’t Tell,” the evidence indicates that gay men and women have served, and continue to serve with distinction in the U.S. military.<sup>16</sup> Thousands have been wounded or died in the service of this Country, earning, but never completely enjoying, the respect and adulation they deserve for their sacrifices.

In a study of data from the 2000 Census, the Urban Institute found that 36,000 gay men and women currently serve in the U.S. military.<sup>17</sup> That figure increases dramatically when the estimates of gay men and women trained for guard or reserve duty are added.<sup>18</sup> According to conservative estimates, there are over 65,000 gay and lesbian military personnel currently—including active duty, guard, and reservists.<sup>19</sup> Those numbers pale in comparison to the numbers of living gay and lesbian veterans, whose total is estimated to be nearly one million.<sup>20</sup> Importantly, though most of these service members are currently serving, or have served, in silence,<sup>21</sup> many have managed to serve openly without consequence.<sup>22</sup>

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full careers, kept their homosexuality a secret.”); *see generally* ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF MEN AND WOMEN IN WORLD WAR TWO (1990); RANDY SHILTS, CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY (1993).

16. Staff Sergeant Eric Alva, the first American Marine wounded in Iraq, was gay. Larry Shaughnessy, *Gay Veteran Calls for End of “Don’t Ask, Don’t Tell,”* CNN, Mar. 1, 2007, <http://www.cnn.com/2007/POLITICS/02/28/gays.military/index.html> (last visited Jan. 10, 2008). Mr. Alva’s heroism was recognized in a meeting with President Bush. *Id.* In a speech on Capitol Hill to announce he was leaving the military rather than continue a life of silence, Mr. Alva stated, “I’m an American who fought for his country and for the protection and the rights and freedoms of all American citizens—not just some of them, but all of them.” *Id.*; *see generally* Kurt D. Hermansen, Comment, *Analyzing the Military’s Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992) (chronicling the stories of several outstanding gay military members who were discharged prior to “Don’t Ask, Don’t Tell”).

17. GARY J. GATES, THE URBAN INST., GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000, at 1, 4 (2000), *available at* [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf).

18. *Id.*

19. *Id.*

20. *Id.* at 7.

21. *See generally* MARGARETHE CAMMERMEYER WITH CHRIS FISHER, SERVING IN SILENCE (1994). Cammermeyer admitted to being a lesbian and was then dishonorably discharged. The Living Room, Biographies: Margarethe (Greta)

### A. What "Compromise"?

In passing "Don't Ask, Don't Tell," Congress declared that sexual orientation would no longer be a basis for exclusion from military service. However, the new statute and the implementing regulations did little to change the status quo.<sup>23</sup> And, in fact, may have made matters worse. While purporting to open the door to military service for gay men and women, Congress nonetheless declared that "[m]ilitary life is fundamentally different from civilian life,"<sup>24</sup> and that "[t]he prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service."<sup>25</sup> In finding that "[s]uccess in

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Cammermeyer, <http://andrejkoymasky.com/liv/fam/bioc1/camm1.html> (last visited Mar. 30, 2008). After winning her civil suit against the military, she was rehired and served openly for three more years. *Id.*

22. It is not uncommon for gay service members to serve openly in the military. Navy Lieutenant Jenny Kopfstein's case is typical of cases where the military has chosen to retain gay men or women who were filling critical needs at the time of their outing. Kopfstein served openly for two years before her discharge. *Gay Veterans of War on Terror Sue Pentagon for Re-Instatement*, SLDN, Dec. 6, 2004, <http://www.sldn.org/templates/press/record.html?record=1718>. Colonel Margarethe Cammermeyer served openly for three years. The Living Room, *supra* note 21. Captain Rich Richenberg also served openly. Eric Schmitt, *The New Rules on Gay Soldiers: A Year Later, No Clear Results*, N.Y. TIMES, Mar. 13, 1995, at 1. *See generally* Woodward v. United States, 871 F.2d 1068, 1069 n.1 (Fed. Cir. 1989) (stating the Navy conceded that despite its policy to remove gays and lesbians, which provided for no exceptions, "the Navy did retain some officers with 'homosexual tendencies'"); HUMPHREY, *supra* note 1 (chronicling the stories of dozens of gay men and women who served openly in the military).

23. Although Congressman Studds voted for the policy, he showed his frustration with "Don't Ask, Don't Tell" when he stated:

Whatever action we take on the bill before us, the ban on lesbians and gay men in the military will remain. The DOD Directive issued in July at the President's behest was far from the result for which I had hoped and worked for so many years. Under the directive, lesbians and gay men will continue to be subject to investigation and separation from the military merely for speaking privately about their sexual orientation or engaging in private consensual relationships. This perpetuates a situation in which gay men and lesbians are denied the security, dignity, and openness in their private lives which their comrades in arms take for granted.

139 CONG. REC. H7065-03 (1993) (statement of Rep. Studds).

24. 10 U.S.C. § 654 (a)(8) (1993).

25. *Id.* § 654(a)(13).

combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion,”<sup>26</sup> Congress essentially deferred to military leaders’ judgment that homosexual conduct, broadly defined to include declarations of homosexual identity, constitutes a hindrance to military preparedness and morale,<sup>27</sup> while ignoring comprehensive studies that had found the opposite to be true. Congress’ deference, combined with a continued willingness by courts to infer conduct from status, would later serve to defeat challenges to the policy when other justifications fell apart under judicial scrutiny, or were simply ignored or abandoned by military advocates.<sup>28</sup>

Despite the existence of comprehensive studies by the RAND Corporation and by the Government Accounting Office (GAO),<sup>29</sup> all of which had found that openly gay men and women could serve without much of an effect on military preparedness or morale, Congress relied heavily on the work of a Military Working Group (MWG) convened by the Department of Defense (DOD) for the purpose of analyzing the proposed changes.<sup>30</sup> General John Otjen, a

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26. *Id.* § 654(a)(6).

27. *See id.* § 654(a)(15). I use the term “defer” because military leaders did not present data to support their assertions. *See HUMPHREY, supra* note 1, at viii. Rather, they presented anecdotal accounts of the effect of a known homosexual on the morale of their charges. *See id.* at viii-ix, where Congressman Gerry E. Studds (D-Mass), the first openly gay member of Congress, discusses the existence of a study done by the Pentagon that concluded that gays and lesbians could serve openly in the military without negative consequences. *See also* NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT (1993) [hereinafter RAND STUDY].

28. *See Able v. United States*, 968 F. Supp 850, 854 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998) (detailing the systematic abandonment of those justifications to support a ban on gay military service). President Clinton’s executive order ended discrimination based on sexual orientation in the issuance of security clearances, thereby ending concerns that people holding security clearance could use sexual orientation for blackmail. Exec. Order No. 12,698, 60 Fed. Reg. 40,245 (Aug. 2, 1995). Clinton’s Executive Order applies to civilian workers in the Federal Government and to people in uniform. *Id.*

29. U.S. GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DOD’S POLICY ON HOMOSEXUALITY (1992).

30. OFFICE OF THE SEC’Y OF DEF., DOD, SUMMARY REPORT OF THE MILITARY WORKING GROUP 1 (1993), *available at* <http://dont.stanford.edu/regulations/milworkgroup.pdf> [hereinafter MWG].

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strong supporter of the former ban, chaired the MWG.<sup>31</sup> The MWG was unified in its advocacy for an absolute ban, and aggressively opposed change. In its report on the status of gays in the military, the MWG insisted that: “All homosexuality”—“known” and “unknown,” belonging to “practicing” and “non-practicing homosexuals”—“is incompatible with military service.” Citing a study of military discharges covering fiscal years 1989-1992, the MWG asserted that “[o]f all discharges for homosexuality, at least 79 percent clearly involved homosexual conduct.”<sup>32</sup>

The MWG’s “study” of military discharges under the gay ban stands in stark contrast to a similar study done recently by the GAO. Contrary to the findings of the MWG, the GAO found that most discharges under “Don’t Ask, Don’t Tell” are the result of statements about the person’s sexual orientation, not as a result of prohibited sexual conduct.<sup>33</sup> At first glance, the difference between the two studies is puzzling. Closer inspection reveals that the drastically different conclusions between the two studies are explained by variations in the criteria utilized to define conduct, and likely by the goals that were being pursued by the two different groups. In contrast to the GAO’s mandate, which is simply to study a problem and report its analysis, the MWG advocated aggressively for the continuation of the gay ban, despite its charge to analyze and evaluate the issue. Its conclusion that most discharges prior to the policy were the result of homosexual sexual conduct, is consistent with a broad definition of “homosexual conduct” to include statements demonstrating a

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31. *Thomasson v. Perry*, 80 F.3d 915, 951 (4th Cir. 1996) (Hall, J., dissenting). General Otjen stated, “there’s is a collective sense in the military . . . that homosexuality is wrong.” *Id.* He “believed that all the members of the Military Working Group shared this ‘collective sense.’” *Id.* However, “he conceded that, but for fear and prejudice against homosexuals, the policy would be unnecessary.” *Id.*

32. MWG, *supra* note 30, at 11.

33. U.S. GOV’T ACCOUNTABILITY OFFICE, *MILITARY PERSONNEL: FINANCIAL COST AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED* 11 (2005) [hereinafter GAO: *MILITARY PERSONNEL*]. Numerous commentators have deconstructed the military’s reliance on statements as indicators of conduct. In her analysis of “Don’t Ask, Don’t Tell,” Judith Butler concluded that a sort of fear of contagion permeates the military’s attitudes toward gays and lesbians, as if an “infection through the ear” were possible through statements such as “I am a homosexual.” See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 116 (1997).

“propensity” to engage in such conduct, and is consistent with its position that all manifestations of homosexuality are incompatible with military service.

Not surprisingly, the MWG’s conclusions were also consistent with the moral condemnation of gays by many military and political leaders during Congressional debates over the passage of “Don’t Ask, Don’t Tell.” Ignoring the comprehensive study by the RAND Corporation, which had been commissioned by the Pentagon, and relying instead on anecdotal stories, personal opinions of military leaders, the MWG’s “findings”—which were little more than personal opinions,<sup>34</sup>—and the powerful legacy of *Bowers v. Hardwick*, political and military leaders framed President Clinton’s initiative as an attack on national security. They also reduced gays in the military to the role of aggressive criminal sexual predators, while portraying heterosexuals as inexperienced and vulnerable young people, whose parents relied on the military to protect them from what the Supreme Court had deemed to be criminal conduct of the worst kind.<sup>35</sup> Callously, they even invoked the image of unfortunate disabled military veterans who would have to compete with carriers of AIDS for scant medical resources after their service commitment had ended.<sup>36</sup>

The threat posed by openly gay service members was so great that even those who held the slightest hint of same sex attraction or affection toward their fellow service members could undermine the military’s ability to promote unit cohesion and morale. According to military leaders, the mere presence of a known homosexual could cause entire units to abandon their responsibilities to defend the country.<sup>37</sup> Therefore, as a “compromise,” Congress purported to eliminate sexual orientation as a bar to service while continuing to

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34. See MWG, *supra* note 30, at 5-11.

35. In the debate about “Don’t Ask, Don’t Tell” Senator Mosley-Braun quoted the Commandant of the Marine Corps: “[h]ow would you react if your son called and informed you that his roommates for the next 2 years were two homosexuals.” 139 CONG. REC. S1262-02 (1993) (statement of Sen. Mosley-Braun).

36. See *id.* (statement of Sen. Murkowski) (“A decision to admit gays to the military will not be a free one. That decision will be paid for in increased funding for VA, or by the veterans VA must turn away in order to care for the new AIDS cases the decision will bring.”).

37. See generally *id.*

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prohibit broadly-defined sexual conduct between people of the same gender.<sup>38</sup>

Not surprisingly, the promise of that “compromise” has been illusory.<sup>39</sup> Though the DOD directive implementing the new law appears to focus on conduct and not identity,<sup>40</sup> gay service members have been separated from the military based on their sexual orientation in even greater numbers since the passage of the policy,<sup>41</sup> unless, of course, they are needed, pursuant to what has become a policy of convenience.<sup>42</sup> To that end, the military has maintained a system of flexible regulations designed to respond to staffing needs during times of crisis. For example, during the Vietnam War the military suspended many removal proceedings of gay service members when it could not be sure that it would have enough people in uniform to carry out the war.<sup>43</sup> The same occurred during the

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38. See 10 U.S.C. § 654(b) (2006).

39. See, e.g., Aaron A. Seamon, Comment, *The Failed Compromise of 10 U.S.C. § 654: An Assessment of the Military's “Don't Ask, Don't Tell” Policy*, 24 U. DAYTON L. REV. 319 (1999).

40. DIRECTIVE 1332.14, *supra* note 2.

41. MICHELLE BENECKE & DIXON OSBURN, SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE 3RD ANNUAL REPORT ON “DON'T ASK, DON'T TELL, DON'T PURSUE” 2 (1996-1997), available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/166.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/166.pdf). Janet Halley has argued persuasively that “Don't Ask, Don't Tell” is far worse than its predecessor. JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 1-2 (1999). Halley points out that while the outright ban was as bad as it looked, the new policy, in contrast, is “designed to *look like* conduct regulation in order to *hide* the fact that it turns decisively on status.” *Id.* at 2.

42. Wisconsin Rep. Scott Gunderson explained in the debates over “Don't Ask, Don't Tell” that “when in need of manpower during the Vietnam war, the military consistently accepted recruits and draftees despite their acknowledgment during questioning of their homosexuality.” 139 CONG. REC. H7065-03 (1993) (statement of Rep. Gunderson).

43. Randy Shilts documented the reduction of discharges based on sexual orientation during the Vietnam War by reviewing the military's own statistics. SHILTS, *supra* note 15, at 70. “Between 1963 and 1966, for example, the Navy discharged between 1,600 and 1,700 enlisted members a year for homosexuality.” *Id.* However, from 1966 to 1967, the number of gays discharged fell to 1094. *Id.* The trend continued downward in 1968 when the Navy ejected 798 enlisted men for homosexuality, and remained steadily downward as the Navy discharges based on homosexuality dropped to 643 at the height of the war in 1969 and 461 the following year. *Id.*

Persian Gulf War under President George H. Bush,<sup>44</sup> and again during the wars in Iraq and Afghanistan under President George W. Bush.<sup>45</sup>

The retention of gay personnel during crucial times undermines the most common argument against their presence in the military—that their service undermines unit discipline and cohesion in wartime. It also reveals a side of military life that has been hidden from view by opponents of gays in uniform.<sup>46</sup> The stories are too numerous to count of openly gay military personnel co-existing with heterosexuals in the day-to-day life of the military.<sup>47</sup> Indeed, openly gay individuals have

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44. Wade Lambert & Stephanie Simon, *U.S. Military Moves to Discharge Some Gay Veterans of Gulf War*, WALL ST. J., July 30, 1991, at B6 (detailing how the Army put ongoing personnel discharge actions “on hold” while gay soldiers were sent to the Gulf War, only to discharge them upon their return). Similarly concerned about military staffing during the Gulf War, President George H. Bush issued Executive Order 12728 on August 22, 1990, invoking the “stop loss” order under 10 U.S.C. 673 (c). Exec. Order No. 12,728, 55 Fed. Reg. 35,029 (1990). The stop-loss orders during wartime have not escaped the attention of Congress. During the debates on “Don’t Ask, Don’t Tell,” Senator Mosley-Braun observed:

We would expect, then, that in wartime—when unit cohesion can literally mean the difference between life and death—the military would be especially vigilant in ferreting out and discharging gay soldiers. But in fact, Mr. President, the record clearly demonstrates that precisely the opposite is true. From World War II through Operation Desert Storm, whenever American Forces have gone into battle the Pentagon has always found a way to keep suspected or acknowledged homosexuals in uniform. 139 CONG. REC. S1262-02 (1993) (statement of Sen. Mosley-Braun).

45. See SHARON E. DEBBAGE ALEXANDER ET AL., SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” (2004), available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/1411.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1411.pdf). SLDN has noticed a reduction in the numbers of gay discharges from the military during the Afghanistan and Iraqi Wars. *Id.* at 1. In fiscal year 2003 discharges of gays and lesbians plummeted 17%. *Id.*

46. TASK FORCE ON MILITARY PERS., REPUBLICAN RESEARCH COMM., PROPOSAL TO END THE BAN ON GAYS IN THE MILITARY 14 (1993), available at <http://dont.stanford.edu/regulations/RRCTFOMP.pdf> (“Those who have served successfully in the military, and there have been large numbers of successful homosexuals who have performed on tours of duty or even completed careers and retired from the services, but they have either been celibate or they have been so secretive that the homosexual practices were not identified, not called to the [sic] attention, and their behavior did not have to be dealt with.”).

47. See generally STEVEN ZEELAND, BARRACK BUDDIES AND SOLDIER LOVERS: DIALOGUES WITH GAY YOUNG MEN IN THE U.S. MILITARY (1993); Press

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been able to co-exist with heterosexuals in uniform for a long time, forming all of the complex relationships that exist in the rest of American society,<sup>48</sup> suggesting that even if the policy were to be overturned, little would change in the military. The public debate as to whether openly gay service members should be allowed to serve has so far managed to ignore the existence of all of these complex social relationships.

### B. *Don't Ask*

The so-called “compromise” hardly opened the door for gays in the military. President Clinton’s claim that the “Don’t Ask” portion of the policy represented his most important success in this area rings hollow when one considers the policy in operation. Although the new federal statute prohibited recruiters and commanders from asking direct questions about a person’s sexual orientation, the implementing rules do not prohibit indirect intrusive questions about a person’s sexual orientation,<sup>49</sup> nor do they prohibit reliance on information about a person’s sexuality gathered from fellow servicemembers.<sup>50</sup> Moreover, nowhere does the policy provide a remedy to service members discharged in violation of the law;<sup>51</sup> nor does the statute or its implementing rules provide a sanction to the military for noncompliance.<sup>52</sup> Further, in a savings provision to the statute, Congress reserved for the Secretary of Defense the authority to reinstate questioning of recruits if the Secretary determines that such

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Release, Servicemembers Legal Def. Network, Army Drops Discharge of Gay Reservist (Jan. 16, 2001), *available at* [www.sldn.org/templates/press/record.html?section=2&record=220](http://www.sldn.org/templates/press/record.html?section=2&record=220) (discussing the story of Lt. Steve May, a Republican member of the Arizona House, who was allowed to serve out his term of service after fighting the military’s attempt to expel him for two years).

48. *See, e.g.,* ZEELAND, *supra* note 47.

49. *See* HALLEY, *supra* note 41, at 49-50. Halley discusses the case of Sergeant Steven Spencer, who was discharged under “Don’t Ask, Don’t Tell” from the Army Reserve. *Id.* at 50-51. Though the Army never directly asked Spencer whether he was gay, it did ask questions such as whether he ever stated he was a homosexual, whether he ever stated he was bisexual, or intended to engage in future homosexual acts. *Id.* at 51.

50. *Steffan v. Perry*, 41 F.3d 677, 683 (D.C. Cir. 1994).

51. *See* 10 U.S.C. § 654.

52. *See id.*

questioning is necessary to effectuate the policy.<sup>53</sup> The end result is a scenario where lone military personnel are pitted against a military free from civilian control, that has not only refused to support the stated goals of the policy, but instead has resisted them at every turn. The absence of remedies or sanctions for noncompliance renders this section of the policy essentially meaningless.

### C. *Don't Tell*

To eliminate the perceived threat of homosexual conduct, the law provides that service members can be removed for: 1) engaging or attempting to engage in homosexual acts,<sup>54</sup> 2) for marrying or attempting to marry a person of the same sex,<sup>55</sup> or 3) for stating that he or she is a homosexual<sup>56</sup> in what has come to be known as the "Don't Tell" principle.<sup>57</sup> Under that principle, the revelation of a person's sexual orientation, either through the person's own words or through the testimony of another person, raises a presumption that the person is a homosexual.<sup>58</sup> If not rebutted, the presumption leads to discharge from the military.<sup>59</sup> Though a small number of people have successfully rebutted that presumption, the hurdle raised by the presumption is virtually impossible to overcome.<sup>60</sup>

The law's conflation of identity and conduct, and appellate courts' deference to military judgment, have resulted in an amalgam of confusing opinions, leaving unanswered the question of exactly how gay men and women can serve in the military now that the prohibition against their presence has been lifted. The statute's definition of the term "homosexual" contributes much to this confusion. The statute

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53. *See id.* § 654(e).

54. *Id.* § 654(b)(1).

55. *Id.* § 654(b)(3).

56. *Id.* § 654(b)(2).

57. *Id.*

58. *Thomasson v. Perry*, 80 F.3d 915, 937 (4th Cir. 1996) (Luttig, J., concurring).

59. *See* 10 U.S.C. § 654(b).

60. *See Able v. United States*, 880 F. Supp. 968, 976 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), *rev'd*, 155 F.3d 628 (2d Cir. 1998) (noting that members in the process of discharge "[have] only at best a hypothetical chance to escape separation.").

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defines “homosexual” as “a person, regardless of sex, who engages in, has a propensity to engage in, or intends to engage in homosexual acts,”<sup>61</sup> directly incorporating broadly-defined same gender sexual conduct or propensity for such conduct into the identity of the individual. Nowhere in the statute, regulations, or Directives does the government provide a definition of a qualified gay service member.

In perhaps the most revealing statement about the hopeless situation faced by gay men and women in the military who are targeted for removal under the policy, the Eighth Circuit Court of Appeals declared that a service member shall be separated

if there is a finding “[t]hat the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”<sup>62</sup>

The court continued, “to avoid discharge, a service member who has declared, ‘I am a homosexual,’ must prove that he or she is not a homosexual *as that term is defined in the statute*.”<sup>63</sup> A close analysis of the policy in operation, however, reveals that the court should have emphasized the words: “*to avoid discharge, a service member who has declared, ‘I am a homosexual’ must prove that he or she is not a homosexual,*” rather than the last clause of its statement. Indeed, to overcome the presumption, the individual must essentially demonstrate that he or she is a heterosexual who may have accidentally and temporarily strayed from his or her true sexual orientation.<sup>64</sup>

Noting that the statute defines a homosexual as “a person of either gender ‘who engages in, attempts to engage in, . . . or intends to

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61. 10 U.S.C. § 654(f)(1).

62. *See* Richenberg v. Perry, 97 F.3d 256, 259 (8th Cir. 1996) (quoting 10 U.S.C. § 654(b)(2)).

63. *Id.*

64. *See* *Able*, 880 F. Supp. at 976 (observing that examples of successful challenges by service members discharged for stating they were homosexual or bisexual were “aberrations” limited to “atypical” cases in which “the member stated at the discharge hearing that he or she was gay, but was apparently able to escape discharge by stating that he or she did not intend to engage in ‘homosexual acts’”).

engage in homosexual acts,”<sup>65</sup> the court mentioned the cases of seven people who were able to overcome the presumption, to support its assessment that “[t]he DOD Directive explicitly states that the military will not exclude service members for their homosexual thoughts, opinions, fantasies, or orientation.”<sup>66</sup> Closer examination of the cases cited reveals that service members who have been able to overcome the presumption are limited to those whom identified themselves as heterosexuals, or who had not yet fully identified themselves as gay before they were threatened with discharge.<sup>67</sup>

#### *D. Don't Pursue*

Despite the appearance of investigatory limitations, the threshold to justify an investigation into a person's intent or propensity to engage in homosexual conduct is very low. Thus, the military may begin an investigation based on a joke about a service member's sexual orientation, or even an obscure reference.<sup>68</sup> Moreover, “homosexual conduct” is construed broadly. Therefore, virtually any touching of another person of the same gender, such as holding hands, can provide grounds for investigation and eventual discharge.

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65. *Richenberg*, 97 F.3d at 259 (quoting 10 U.S.C. § 654(b)(2)).

66. *Id.* at 261.

67. In a concurring opinion, Judge Luttig revealed that 10 U.S.C. § 654 provides that “a service member who states that he is homosexual (or otherwise evidences his homosexuality) shall be separated from service unless he demonstrates that he is not, as *statutorily defined*, a ‘homosexual.’” *Thomasson v. Perry*, 80 F.3d 915, 937 (4th Cir. 1996). In support of this interpretation, Judge Luttig noted that Secretary Aspin had also “affirmed that the policy disqualifies from service all known homosexuals, agreeing in response to questions from Senator Gramm that, under the policy, military personnel ‘would at least be assured that no one would be a self-professed homosexual and be allowed to continue to serve.’” *Id.* at 938.

68. The case of Timothy R. McVeigh, an accomplished seventeen-year veteran of the U.S. Navy, is an example of the military's pursuit of individuals despite the directives not to pursue. Seamon, *supra* note 39, at 319. Senior Chief McVeigh was “outed” to the military by a non-commissioned officer on board McVeigh's submarine, who reported to the Navy that his spouse had learned of McVeigh's sexual orientation when she came across his profile on America On-Line (AOL). *Id.* at 319-21. Importantly, McVeigh's commander chose not to begin an investigation when he learned that McVeigh might be gay. *Id.* at 321 n.9. However, the Navy pursued the matter and arranged for AOL's assistance to identify McVeigh. *Id.* at 320-21.

*E. Don't Harass*

The "Don't Harass" component of the policy is the result of Directives passed by various military agencies in reaction to continued harassment of gays and lesbians even after the lifting of the gay ban.<sup>69</sup> As originally designed, "Don't Ask, Don't Tell" did not contain an anti-harassment component. The military passed the rules governing harassment on the basis of sexual orientation largely as a result of the death of Army Private First Class Barry Winchell, who was beaten to death by a fellow soldier because of his sexual orientation.<sup>70</sup> Unfortunately, despite attempts by DOD and the military to curb harassment against gays in uniform, harassment based on sexual orientation has remained constant since the passage of "Don't Ask, Don't Tell."<sup>71</sup>

In a comprehensive study of sexual harassment of homosexuals in the military published March 16, 2000, the Inspector General's office of the DOD found that 37% of all respondents had witnessed or experienced harassment on the basis of perceived homosexuality.<sup>72</sup> Those respondents who did report witnessing harassment were also asked whether the harassment was witnessed by someone senior to either the victim of the harassment or the perpetrator.<sup>73</sup> "Seventy-three percent stated that the senior person did not do anything to immediately stop the harassment."<sup>74</sup> Seventy-one percent of the respondents attributed the harassment to enlisted service members.<sup>75</sup> Of those who asserted that they would not feel free to report harassment, approximately 71% feared retaliation towards themselves and well over 70% feared retaliation to the person being harassed.<sup>76</sup>

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69. See *Department of Defense Issues Review of Efforts to Curb Anti-Gay Harassment*, SLDN, June 29, 2004, <http://www.sldn.org/templates/press/record.html?record=1548> (last visited Mar. 10, 2008).

70. *Id.*

71. See OFFICE OF INSPECTOR GEN., DOD, EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY 8-13 (2000), available at <http://www.dodig.mil/Audit/reports/fy00/00-101.pdf>.

72. *Id.* at 8.

73. *Id.* at 11.

74. *Id.*

75. *Id.* at 12.

76. *Id.* at 16.

Outside of potential discipline of the harasser, the Directives do not provide a remedy to the victim. Not surprisingly, the military may begin an investigation into the sexual orientation of victims of harassment if it deems the information reliable, whatever its source. This puts victims of harassment into a potential catch-22. Before deciding whether to report the harassment, they must also consider the possibility of an investigation and potential discharge. Therefore, rather than protecting victims of harassment, the directives serve to further disempower the most vulnerable class.

### III. THE MORE THINGS CHANGE . . . THE WORSE THEY GET

In reality, little has changed since the passage of the policy. Indeed, things may be even worse for gay people in uniform under the new policy.<sup>77</sup> Despite the new openness to military service by gay men and women expressed by some supporters of “Don’t Ask, Don’t Tell,” homosexual identity has continued to be used to instigate military discharges. Several studies have revealed that the military’s aggressive enforcement of the *de facto* gay ban represented by “Don’t Ask, Don’t Tell” resulted in a significant increase in discharges based on sexual orientation in the first seven years under the policy, as compared to the previous ten years under the complete ban.<sup>78</sup> However, a study compiled by the Michael D. Palm Center shows that, as has been the case with virtually every war, personnel shortages during the wars in Iraq and Afghanistan have resulted in a sharp reduction of gay discharges.<sup>79</sup> Indeed, as a result of the severe personnel shortages, many openly gay military members have been allowed, or have even been required, to finish their terms, undermining the military’s most aggressive argument in opposition to their service.<sup>80</sup>

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77. See HALLEY, *supra* note 41, at 1-2.

78. See, e.g., GAO: MILITARY PERSONNEL, *supra* note 33, at 6.

79. See Press Release, Michael D. Palm Ctr., Researchers Locate Army Document Ordering Commanders Not to Fire Gays (Sept. 13, 2005), available at [http://www.palmcenter.org/press/dadt/releases/researchers\\_locate\\_army\\_document\\_ordering\\_commanders\\_not\\_to\\_fire\\_gays](http://www.palmcenter.org/press/dadt/releases/researchers_locate_army_document_ordering_commanders_not_to_fire_gays).

80. See, e.g., Press Release, Servicemembers Legal Def. Network, *supra* note 47.

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The forced separation of gay and lesbian service members from the United States military since the passage of “Don’t Ask, Don’t Tell” has resulted in a tremendous loss of human potential. It has also resulted in large financial losses in every branch.<sup>81</sup> In a 2005 study of the financial costs and costs of critical skills of the policy, the GAO found that although the total cannot be accurately estimated, the first ten-year period of the policy was extremely costly to the DOD.<sup>82</sup>

According to the GAO, the average annual cost from 1994-2003 to recruit military service members was \$10,500 per person.<sup>83</sup> During that time, 9352 gay service members were discharged, resulting in an estimated total cost of approximately \$95 million to recruit replacements.<sup>84</sup> The estimated cost to train replacements for the service members separated under the policy totaled roughly \$95 million.<sup>85</sup> The Navy spent an estimated \$48.8 million, the Air Force spent an estimated \$16.6 million, and the Army spent an estimated \$29.7 million.<sup>86</sup> Those figures do not include the cost to train replacements in the Marine Corps.<sup>87</sup> Importantly, because of a lack of data, the figures do not include the cost of investigation, counseling/pastoral service for discharged members, separation procedures, the cost of review board operations and the cost of defending legal challenges to the policy.<sup>88</sup> A more comprehensive study of the cost of the policy, conducted by a blue ribbon commission organized by the University of California at Santa Barbara, concluded that the actual cost of implementing the policy was almost twice as much as the GAO estimated, or approximately \$363 million dollars.<sup>89</sup>

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81. See GAO: MILITARY PERSONNEL, *supra* note 33, at 3-4.

82. *Id.*

83. *Id.* at 12.

84. *Id.* at 13.

85. *Id.* at 14.

86. *Id.* at 14-15.

87. *Id.* at 14.

88. *Id.* at 15-16. Similarly, the cost of the ban before “Don’t Ask, Don’t Tell” was a concern for members of Congress during the debates on “Don’t Ask, Don’t Tell.” Senator Boxer noted that the military spent \$27 million per year under the old ban to root out gays and lesbians, money that could be better spent elsewhere or saved. 139 CONG. REC. S1262-02 (1993) (statement of Sen. Boxer).

89. FRANK J. BARRETT ET AL., FINANCIAL ANALYSIS OF “DON’T ASK, DON’T

The cost of forced separation to the military and service members is much more than economic. It has also been strategically damaging to the military, and personally and professionally devastating to many of the discharged service members. Recent headlines have confirmed that hundreds of separated service members were crucial to the military's goals of successfully carrying out wars in distant lands that have brought the U.S. military across unfamiliar languages and cultures.<sup>90</sup> Those service members, and many more like them, have not only been denied the opportunity to serve during these crucial times, but have also been forced to endure the emotional and psychological trauma of an involuntary transition to civilian life in a stigmatized status.<sup>91</sup>

Besides the personal costs, the forced transition to civilian life is sometimes accompanied by economic or professional hardship. To its credit, for many generations the military has provided educational and employment opportunities where none existed, by means of the Montgomery G.I. Bill.<sup>92</sup> However, although ostensibly allowed to serve under the new policy, gay service members run a constant risk of losing jobs and benefits. Gay service members with distinguished military histories have been discharged just short of retirement, losing valuable military pensions.<sup>93</sup> Others have been forced to repay the cost

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TELL": HOW MUCH DOES THE GAY BAN COST? 1 (2006), *available at* <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>.

90. *See, e.g.,* Anne Hull, *How 'Don't Tell' Translates*, WASH. POST, June 18, 2004, at A1. Approximately 8% of service members discharged under "Don't Ask, Don't Tell" held critical occupations. BARRETT ET AL., *supra* note 89, at 16. Approximately 3% of them had skills in important foreign languages, like Arabic and Korean. *Id.* at 3-4.

91. For many gay people in uniform, forced separation from the military amounts to a humiliating public disclosure of what should have been a very private matter. Discharge documents for people expelled pursuant to "Don't Ask, Don't Tell" contain a narrative reason for the discharge, such as "homosexual conduct" or "engaged in homosexual acts." ROBERTA ACHTENBERG & KAREN MOULDING, *SEXUAL ORIENTATION AND THE LAW* § 7.9 (2008). The discharge documents also contain reenlistment codes showing that the member is barred from reenlistment. *Id.*

92. *See generally* DEP'T OF VETERANS AFFAIRS, *THE MONTGOMERY GI BILL-ACTIVE DUTY 2* (2004), *available at* [http://www.gibill.va.gov/pamphlets/CH30/CH30\\_Pamphlet.pdf](http://www.gibill.va.gov/pamphlets/CH30/CH30_Pamphlet.pdf).

93. For example, the Army discharged Lt. Col. Steve Loomis for being gay, just eight days from his twenty-year retirement date, resulting in the forfeiture of his retirement pension. Complaint at 1, *Loomis v. United States*, 68 Fed. Cl. 503 (2005)

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of their education though they were willing to fully complete their military commitments.<sup>94</sup> Though dishonorable discharges have been utilized less often under the new policy than under the former ban, a general discharge, unlike an honorable discharge, has many negative consequences. For example, those who receive a general discharge lose educational benefits under the Montgomery G.I. Bill.<sup>95</sup> Veterans Affairs benefits, retirement benefits and federal loan benefits may also be jeopardized with a less than honorable discharge.<sup>96</sup>

Fatefully, wars in Afghanistan and Iraq, and catastrophic disaster at home, have drained the military's human resources. The drain in human resources has been worsened by the military's lack of success in recruiting and by the military's policies that govern the mobilization of reserve military personnel. The wars in Iraq and Afghanistan, and the Army's lack of success in recruiting, have caused serious damage to the Army's ability to sustain the pace of troop deployments long enough to counter insurgencies in those countries.<sup>97</sup> To make up for the shortage of personnel, the military has lowered its qualification standards.<sup>98</sup> However, it continues to defend aggressively its virtual gay ban.

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(No. 03-1653C).

94. See, e.g., *Hensala v. Dept. of the Air Force*, 343 F.3d 951, 953-55 (9th Cir. 2003) (detailing the case of John D. Hensala, a gay medical doctor who declared his sexual orientation but nonetheless desired to remain in the military was discharged under "Don't Ask, Don't Tell" and made to repay the cost of his medical education—\$71,429.53).

95. DEP'T OF VETERANS AFFAIRS, *supra* note 92, at 2.

96. To receive benefits under the Montgomery G.I. Bill, members of the military must serve for two or three years and receive an Honorable discharge. *Id.* at 2, 6. Service members who "come out" or who are "outed" may receive a less than honorable discharge, putting their V.A. benefits at risk. 38 C.F.R. § 3.12(d)(5) (1997).

97. See Julian E. Barnes, *Marines Who Served Will Be Ordered Back*, L.A. TIMES, Aug. 23, 2006 (reporting that the Marines Corps "would begin calling Marines back to active-duty service on an involuntary basis to serve in Iraq and Afghanistan" because of the shortage of personnel).

98. Press Release, Michael D. Palm Ctr., Military Enlistment of Felons Has Doubled (Feb. 13, 2007) available at [http://www.palmcenter.org/press/dadt/releases/military\\_enlistment\\_of\\_felons\\_has\\_doubled](http://www.palmcenter.org/press/dadt/releases/military_enlistment_of_felons_has_doubled).

## IV. STATUS EQUALS CONDUCT

Much of the legal framework that collapsed homosexual status into conduct in many areas of U.S. society, including the military, is founded upon the Supreme Court's opinion in *Bowers v. Hardwick*.<sup>99</sup> In *Bowers*, the Supreme Court considered an appeal by the state of Georgia regarding a facial challenge to a state statute that criminalized sodomy.<sup>100</sup> The challenge was brought by Michael Hardwick, a gay man, and John and Mary Doe, a heterosexual couple.<sup>101</sup> Ignoring the fact that the challenged statute defined sodomy in physical, gender neutral terms,<sup>102</sup> and that heterosexual couples could also be prosecuted under the challenged state law,<sup>103</sup> Justice White callously mischaracterized the issue before the court as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."<sup>104</sup>

By focusing sharply on homosexual sodomy, Justice White managed to sidestep the issue of decisional privacy raised by Hardwick, while reluctantly accepting the constitutional defensibility

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99. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The purpose of this section is not to critique in depth the shortcomings of *Bowers*. There are many excellent articles on that topic. See, e.g., Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L. J. 1073 (1988). The aim of this article is, instead, to trace the ever-widening effects that *Bowers* had on the rights of gays in the military. In fact, the moral condemnation of sexual conduct between individuals of the same gender in the military has much older roots. See, for example, *Dronenburg v. Zech*, 741 F.2d 1388, 1396 (D.C. Cir. 1984), where Judge Robert Bork rejected privacy and equal protection arguments in the case of a highly decorated gay officer who had been discharged from the Navy. As the Supreme Court would later find in *Bowers*, Bork drew a parallel between sexual conduct between consenting adults and all other types of sexual conduct, presumably even rape and pedophilia, to support the court's decision, by stating, "[w]e would find it impossible to conclude that a right to homosexual conduct is 'fundamental' or 'implicit in the concept of ordered liberty' unless *any and all* private sexual behavior falls within those categories, a conclusion we are unwilling to draw." *Id.* (emphasis added).

100. *Bowers*, 478 U.S. at 189.

101. *Id.* at 188, 188 n.2.

102. See *id.* at 190.

103. See *id.*

104. *Id.*

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of a long line of precedent that supported Hardwick's position.<sup>105</sup> Perhaps the most damaging feature of the opinion was Justice White's aggressive stance regarding the immorality of homosexuality and gay relationships. Instead of grouping gays, as the dissent did, with consenting heterosexual adults defending a right to engage in intimate relationships,<sup>106</sup> Justice White aligned gay people with those who commit adultery, incest and other sexual crimes.<sup>107</sup>

Justice White's brutal debasement and condemnation of gay relationships was exceeded by Justice Burger, who, in a terse concurring opinion, relied on vague historical references and a gratuitous citation to Blackstone's description of sodomy<sup>108</sup> to continue to frame the issue before the Court as one involving criminal conduct of the worst kind.<sup>109</sup> The majority thus utilized the status of the Court as the Nation's moral compass to stigmatize gay people as the moral equivalents of adulterers who betray the sacred institution of marriage, as the moral equivalents of incestuous relatives who violate children's trust, and as criminals of the most reprehensible kind, with devastating results.

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105. *See id.* at 190-91.

106. *Id.* at 199 (Blackmun, J., dissenting). Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens stated, "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be left alone.'" *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Blackmun added:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of those intensely personal bonds.

*Id.* at 205.

107. *Id.* at 195-96 (majority opinion) ("And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed at home.").

108. *Id.* at 197 (Burger, J., concurring) ("Blackstone described 'the infamous *crime against nature*' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'").

109. *See id.* at 196-97.

The majority's negative characterization of the issue before the Court and its aggressive moral condemnation of gay relationships created an ever-widening shadow from which it became nearly impossible to escape. The Court's condemnation of gay people and their relationships, and its conflation of status and criminal conduct, provided much of the fuel for legal opinions and legislative initiatives that simply acquiesced to heterosexual prejudices.<sup>110</sup> The Court's condemnation of gay relationships took added significance after other arguments such as the protection of public health from the spread of disease such as AIDS,<sup>111</sup> and the protection of society from psychologically pathological homosexuals,<sup>112</sup> or the claim that gay men and women were especially susceptible to blackmail,<sup>113</sup> were systematically defeated by gay rights advocates, or abandoned by anti-gay forces.<sup>114</sup>

Significantly, and somewhat ironically, despite the fact that many of those arguments were defeated by gay-rights advocates or abandoned by the military, *Bower's* powerful moralistic disapproval

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110. See, e.g., *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). In this case, the appeals court noted that *Bowers* permitted the criminalization of "the most common sexual practices of homosexuals." *Id.* at 1076, n.10. See also Francisco Valdez, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994).

111. See, for example, *Steffan v. Cheney*, 780 F. Supp. 13-16 (D.D.C. 1991), where Judge Gasch ruled that the regulations regarding forced separation of homosexuals were rationally related to the military interest in protecting soldiers and sailors from AIDS, a position that had not been advanced by the military in that case.

112. See generally GARY L. LEHRING, OFFICIALLY GAY 84-98 (2003) (tracing the military's reliance on psychologists and psychiatrists who sought an institutional role in the military by claiming that they could best detect homosexuals for separation).

113. In *Able*, the government affirmatively rejected the old myths of homosexuality as a mental illness, or personality disorder that had been used from the 1920's through the 1960's to exclude homosexuals from serving in the military. *Able v. United States*, 880 F. Supp. 968, 973 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), *rev'd*, 155 F.3d 628, (2d Cir. 1998). The government also rejected prior policy statements that called for the dismissal of homosexuals because they presented the potential for "breaches of security," that may arise if closet homosexuals were blackmailed. *Id.* at 974. It also rejected earlier statements calling for the dismissal of homosexuals based on public health. *Id.*

114. *Id.* at 973-74.

of gay relationships left little choice but to argue, in some cases, that service members who wished to remain in the military after being identified had no propensity or intent to engage in intimate sexual conduct with people of the same gender during their military service.<sup>115</sup> That tactic, though sometimes successful,<sup>116</sup> helped to legitimize the military's discriminatory practices against gays and conceded (at least in the eyes of defenders of the policy and many courts) the moral high ground to the military's decision to defer to the biases of a minority of heterosexuals. Interestingly, those tactics were also inconsistent with arguments made with great force by gay rights advocates in *Bowers* regarding the importance of sexual expression.<sup>117</sup>

Since the day it was handed down, *Bowers* has influenced virtually every decision involving gays in the military, whether under the old ban or the new policy.<sup>118</sup> In *Schowengerdt v. United States*, a

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115. See, for example, *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (en banc), where a gay Midshipman brought suit against the Military Academy. Steffan conceded that the military may discharge service members who engage in homosexual conduct, *id.* at 685, but argued, unsuccessfully, that the mere act of identifying himself as gay did not mean that he would engage in sexual conduct with men, *id.* at 687. See also *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 859 (D.C. Cir. 1978) (holding that the plaintiff was entitled to an explanation regarding why an exception to service by homosexuals under "unusual circumstances" did not apply to him).

116. See, for example, *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1479-80 (9th Cir. 1994), where the Ninth Circuit ruled that a mere statement of sexual identification, without a "concrete, expressed desire to commit homosexual acts," did not indicate an intent to engage in homosexual conduct.

117. See *Richenberg v. Perry*, 97 F.3d 256, 262 (8th Cir. 1996) (referencing an amicus brief filed by the Lambda Legal Defense and Education Fund in *Bowers*, where Lambda had argued "'for gay people, sexuality and their sexual orientation play an especially central role in the definition of self. . . . [Sodomy laws] impose an added burden on gay people, blocking their sense of self as well as their sexual fulfillment'").

118. The influence of *Bowers* was palpable during the Congressional hearings on "Don't Ask, Don't Tell." During an exchange with Senator John Kerry, who supported lifting the ban, Senator Strom Thurmond stated: "[h]omosexuals practice sodomy. The Code of Military Justice and many states have provisions against sodomy. How would you reconcile the situation with homosexuals in the military?" *Policy Concerning Homosexuality In the Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 103 Cong. 493 (1993) (statement of Sen. Strom Thurmond, Member, S. Comm. on Armed Serv.). Senator Kerry responded: "[m]ake it consistent for heterosexuals and homosexuals. Whatever the standard is going to be

case that arose under the former gay ban, the Ninth Circuit declared that a substantive due process challenge to the gay ban that existed prior to “Don’t Ask, Don’t Tell” was foreclosed by *Bowers*.<sup>119</sup> Similarly, *Woodward v. United States*,<sup>120</sup> *Steffan v. Perry*,<sup>121</sup> *Ben-Shalom v. Marsh*,<sup>122</sup> and *Pruitt v. Cheney*,<sup>123</sup> all relied heavily on *Bowers* to reject challenges to the gay ban that existed prior to “Don’t Ask, Don’t Tell.” The Ninth Circuit reiterated this position in 1997 under the new policy in *Holmes v. California Army National Guard*.<sup>124</sup> The Ninth Circuit again reached the same conclusion in *Phillips v. Perry*.<sup>125</sup> *Able v. United States* and other cases continued to preserve and expand the legacy of *Bowers* by collapsing a person’s identity into homosexual sexual conduct.<sup>126</sup>

The most common thread in those cases has been the ease with which courts have turned statements of sexual orientation identification into powerful indicators of the person’s propensity to

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and apply it appropriately.” *Id.* (statement of Sen. John Kerry, Member, S. Comm. on Armed Serv.). Thurmond replied: “[h]eterosexuals do not practice sodomy. . . . Homosexuals do. *Id.*

119. *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991).

120. *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989). Relying on *Bowers* to deny claims of due process and equal protection in a military discharge involving a gay naval officer, the court in *Woodward* stated, “[a]fter *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula v. Webster* that ‘there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.’” *Id.* at 1076 (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)).

121. In this case, the court collapsed a statement about sexual identity with the propensity or desire to engage in homosexual conduct. *Steffan v. Perry*, 41 F.3d 677, 689-90 (D.C. Cir. 1994) (en banc).

122. *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989). Relying on *Bowers*, the Seventh Circuit rejected an equal protection challenge to the ban, declaring that the class of homosexual persons could not be entitled to heightened scrutiny when the conduct *defining* the class could, constitutionally, be criminalized. *Id.* at 464.

123. *Pruitt v. Cheney*, 963 F.2d 1160, 1166 n.5 (9th Cir. 1991).

124. *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997).

125. *Phillips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997).

126. *See Able v. United States*, 880 F. Supp. 969, 974-76 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), *rev’d*, 155 F.3d 628 (2nd Cir. 1998) (describing “Don’t Ask, Don’t Tell” as a prohibition on homosexual conduct, but defining conduct as “statements” of sexual orientation).

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engage in homosexual conduct, easily fending off arguments based on a person's willingness to forgo sex during military service. Not surprisingly, while it is possible that a small number of service members can remain celibate during their military service, courts have relied on common experience to find that celibacy is virtually impossible to sustain.<sup>127</sup> Therefore, attempts to disprove a relationship between statements of sexual orientation and the propensity to engage in sexual conduct with persons of the same gender have been largely futile.<sup>128</sup>

Further, it takes much more than a promise of celibacy to avoid discharge under the policy. The military's ability to expel gay personnel is enhanced by a definition of homosexual conduct that is so broad that virtually any touch of another person of the same gender, or even words of sexual identification can provide grounds to investigate and eventually discharge a member from military service. The statute sets an extremely low threshold of proof for intent or propensity to engage in homosexual sexual conduct. While "homosexual acts" appear to be narrowly defined as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires,"<sup>129</sup> the argument that the person did not intend to satisfy "sexual desires" by merely showing affection for another is foreclosed by a broad definition in a subsequent subparagraph, which adds, "any bodily contact which a

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127. In *Steffan*, a case challenging the ban that existed before "Don't Ask, Don't Tell," the court reasoned that:

[i]t is sufficient to recognize that the government's presumption, as embodied in the Academy regulations, is certainly rational given that the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indication as to the direction of one's drive.

*Steffan v. Perry*, 41 F.3d 677, 690 (D.C. Cir. 1994); see also *Ben-Shalom*, 881 F.2d at 464.

128. See generally Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996) (criticizing the approach to litigation that relies on the fiction that the service member does not intend to engage in homosexual conduct during his or her military service). Indeed, attempts to argue that the service person, having declared a gay sexual orientation, would then be able to remain celibate throughout his or her service in the military have generally failed. See, e.g., *Ben-Shalom*, 881 F.2d at 464.

129. 10 U.S.C. § 654(f)(3)(A) (2006).

reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).”<sup>130</sup> Subparagraph (B), thus provides a blanket prohibition of any contact, not just those undertaken for the purpose of satisfying sexual desires. As a result, touching the shoulder of a person of the same gender, or holding hands however slightly in a show of affection may lead to investigation and eventual discharge.<sup>131</sup>

The second most common thread is the courts’ willingness to defer to military judgment that the presence of known homosexuals in the military will undermine unit preparedness, cohesion and morale. In support of this conclusion, courts have relied heavily on anecdotes and personal opinions contained within the legislative history of “Don’t Ask, Don’t Tell” from military and congressional leaders, while ignoring mountains of evidence to the contrary.<sup>132</sup>

Significantly, as it deferred to the personal beliefs, anecdotal stories and personal fears of military leaders, Congress ignored comprehensive and careful analysis performed by the RAND Corporation that had been conducted at great cost to the government.<sup>133</sup> The RAND study proved that responsibility for unit cohesion and morale is properly placed on military leadership, not on individual interpersonal dynamics.<sup>134</sup> Indeed, RAND identified numerous studies that demonstrated that the most important determinant of unit morale is the successful accomplishment of a mission, not whether the individual members of the unit have formed interpersonal bonds, or even whether they personally like each other.<sup>135</sup> Those findings are supported by numerous studies on group cohesion performed in military and civilian settings.<sup>136</sup>

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130. *Id.* § 654(f)(3)(B).

131. “But statements are not the only means for discharge. Those that don’t speak about their sexual orientation may still be discharged if it is discovered that they engage in or have a propensity to engage in prohibited conduct.” *Thomasson v. Perry*, 895 F. Supp. 820, 825 (E.D. Va. 1995).

132. *Thomasson v. Perry*, 80 F.3d 915, 929 (4th Cir. 1996).

133. 139 CONG. REC. S11157-04 (1993) (statement of Sen. Kennedy).

134. RAND STUDY, *supra* note 27, at 29-30.

135. *See id.* at 303.

136. Elizabeth Kier has found that “[p]olitical, strategic, operational, and tactical factors such as the quality of training, intelligence, and supply capabilities, as well as the military’s objectives and strategy, contribute to battlefield

## V. A SEARCHING RATIONAL BASIS TEST

Equal protection challenges to “Don’t Ask, Don’t Tell” based on intermediate or strict scrutiny have routinely been rejected.<sup>137</sup> After determining that the appropriate level of scrutiny is the rational basis test, courts have had no trouble turning back challenges by simply deferring to the judgment of a shrinking number of military leaders as “rational.” In *Dallas v. Stanglin*,<sup>138</sup> Justice Rehnquist described a formidable obstacle to a successful challenge of legislation under the traditional rational basis test. Justice Rehnquist noted that “rational basis scrutiny . . . is the most relaxed and tolerant form of judicial scrutiny.”<sup>139</sup> Quoting *New Orleans v. Dukes*,<sup>140</sup> Rehnquist stated that “[i]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.”<sup>141</sup> An even narrower version of rational basis analysis was described by Justice Clarence Thomas in *Federal Communications Commission v. Beach Communications, Inc.*,<sup>142</sup> where he stated, “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>143</sup>

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effectiveness.” Elizabeth Kier, *Homosexuals in the U.S. Military: Open Intergration and Combat Effectiveness*, 23 INT’L SECURITY 5, 8 (1995). In addition to those factors, leadership seemed to be the most critical. *Id.* Kier’s sophisticated analysis has revealed that more support exists for the hypothesis that the causal connection runs from success to unit cohesion, rather than from unit cohesion to success. *Id.* at 13.

137. See, e.g., *Selland v. Perry*, 905 F. Supp. 260 (D. Md. 1995).

138. *Dallas v. Stanglin*, 490 U.S. 19 (1989).

139. *Id.* at 26. (“[A] state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some ‘reasonable basis’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.’” (quoting *Dandridge v. Williams*, 397 U.S. 471 (1970)).

140. *New Orleans v. Dukes*, 427 U.S. 297 (1976).

141. *Dallas*, 490 U.S. at 27 (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

142. *FCC v. Beach Commc’n, Inc.*, 508 U.S. 305 (1993).

143. *Id.* at 313.

According to Justice Thomas, “because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.”<sup>144</sup> Completing a grim picture, Thomas added, “[i]n other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”<sup>145</sup> However, an emerging body of law that calls for searching inquiry into the legitimacy of discriminatory classifications that do not involve a traditional suspect class or a traditional fundamental interest has taken a firm hold in the modern legal landscape.

*A. Exceptions to Traditional Rational Basis Review*

In a line of landmark cases, the Supreme Court has concluded that the challenged classification could not possibly have served a legitimate public purpose; *United States Department of Agriculture v. Moreno*,<sup>146</sup> *City of Cleburne v. Cleburne Living Center*,<sup>147</sup> *Romer v. Evans*<sup>148</sup> and most recently *Lawrence v. Texas*<sup>149</sup> form the core of that doctrine.

*Moreno* involved an act of Congress to amend the Food Stamp Act of 1964.<sup>150</sup> To accomplish the goals of stimulating the agricultural economy and alleviating hunger and malnutrition,<sup>151</sup> Congress chose to exclude from the food stamp program any household containing unrelated individuals.<sup>152</sup> Applying a “searching” rational basis test, the Court determined that whether a person is related to other members of a household was clearly irrelevant,<sup>153</sup> and, indeed, ran contrary to the policies behind the statute. Relying on a Conference Report and a statement on the floor of the Senate, the Court concluded that the

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144. *Id.* at 315.

145. *Id.*

146. U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528 (1973).

147. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

148. *Romer v. Evans*, 517 U.S. 620 (1996).

149. *Lawrence v. Texas*, 539 U.S. 558 (2003).

150. *Moreno*, 413 U.S. at 529.

151. *Id.* at 533.

152. *Id.* at 530.

153. *Id.* at 534.

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purpose of the 1971 amendment to the Food Stamp Act was to exclude “hippies” and “hippie communes” from the food stamp program.<sup>154</sup> The Court then declared that “a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.”<sup>155</sup>

In *Cleburne*, the Court set aside a zoning ordinance that specifically required group homes for people with mental illnesses to get a special use permit while freely permitting the operation of other care and multiple-dwelling facilities.<sup>156</sup> While refusing to categorize people with mental illness as a quasi-suspect class,<sup>157</sup> the Court nonetheless ruled that they were protected from this type of invidious discrimination.<sup>158</sup> Invoking *Zobel v. Williams*<sup>159</sup> and *United States Dept. of Agriculture v. Moreno*,<sup>160</sup> the Court held that “[t]he state may not rely on a classification whose relationship to its asserted goal is so attenuated as to render the distinction arbitrary or irrational.”<sup>161</sup>

Importantly, while ratifying the doctrine from *Zobel* and *Moreno* that “some objectives—such as ‘a bare . . . desire to harm a politically unpopular group’—are not legitimate state interests,”<sup>162</sup> the court added another layer of analysis where those motives could not be outwardly identified. The Court’s search of the record did not appear to reveal a “bare desire” to harm people with mental retardation. However, the Court found that the justifications offered by the City Council for requiring a special use permit for a group home for mentally retarded people and not for other similar uses were based on stereotypes of people with mental retardation and paternalism toward that group.<sup>163</sup> The Court also dismissed concerns over population concentration, street congestion, fire hazards, and danger to other

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154. *Id.*

155. *Id.*

156. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

157. *Id.* at 442.

158. *Id.* at 446.

159. *Zobel v. Williams*, 457 U.S. 55 (1982).

160. *Moreno*, 413 U.S. 528.

161. *Cleburne*, 473 U.S. at 446.

162. *Id.* at 447 (quoting *Moreno*, 413 U.S. at 534).

163. *See id.* at 448-50.

residents,<sup>164</sup> concluding that the permit requirement was based on nothing more than irrational prejudice against people with mental illness.<sup>165</sup> Finding that such negative attitudes and fears do not provide legitimate reasons for discrimination, the Court concluded that the ordinance violated equal protection, even under the rational basis test.<sup>166</sup>

Significantly, concurring in the judgment and dissenting in part, Justice Marshall reminded the Court that its rational basis analysis was “most assuredly not the rational basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*”<sup>167</sup> Instead, it was a much more searching inquiry into the legitimacy of the justifications given by the state for its classifications.<sup>168</sup>

In *Romer*, the Court declared unconstitutional an amendment to the Colorado Constitution that prohibited all state and local governments from enacting laws designed to protect people from discrimination on the basis of sexual orientation.<sup>169</sup> Amendment 2 was the result of a statewide referendum that had taken place in response to a number of recently enacted city ordinances banning discrimination on the basis of sexual orientation in housing, employment, education, public accommodations, and health and welfare services.<sup>170</sup> Amendment 2 repealed the ordinances and also prohibited all legislative, executive and judicial action at any state level designed to protect the class.<sup>171</sup> Relying primarily on voting

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164. *Id.* at 450.

165. *Id.*

166. *Id.* at 448.

167. *Id.* at 458 (Marshall, J., concurring in part, dissenting in part).

168. *See id.* at 460.

169. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

170. *Id.* at 623-24.

171. Amendment 2 read as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST. art. 2, § 30b, *held unconstitutional by Romer v. Evans*, 517 U.S. 620 (1996).

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rights cases, the Colorado Supreme Court held that Amendment 2 was subject to strict scrutiny, finding that the law violated equal protection by depriving gays and lesbians the opportunity to participate in the political process.<sup>172</sup> On remand, the state failed to convince the trial court that the statute was narrowly tailored to serve compelling state interests.<sup>173</sup> The trial court enjoined Amendment 2, and the state supreme court affirmed the ruling.<sup>174</sup>

Relying on a searching rational basis analysis, the Court agreed that Amendment 2 violated the equal protection clause. The state held that Amendment 2 was merely designed to place gays and lesbians in the same position as all other persons, by denying homosexuals special rights.<sup>175</sup> Finding such a reading implausible, the Court pointed out the sweeping nature of Amendment 2.<sup>176</sup> The Amendment was not only intended to nullify specific legal protections,<sup>177</sup> but was also designed to forbid reinstatement of those laws and policies, putting gays and lesbians in a solitary class.<sup>178</sup>

Importantly, the Court recognized the modern trend in anti-discrimination laws that were designed to remedy Congress' inability to protect individuals against some types of discrimination.<sup>179</sup> Noting that Colorado's state and local governments had passed many public accommodations laws prohibiting discrimination against non-suspect groups,<sup>180</sup> the Court stressed that Amendment 2 not only barred homosexuals from securing protection under the public accommodation laws, but also "nullified specific legal protections for this targeted class in all transactions in housing, sale of real estate,

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172. *Romer*, 517 U.S. at 625.

173. *Id.* at 625-26.

174. *Id.* at 626.

175. *Id.*

176. *Id.* at 626-27.

177. *Id.* at 626.

178. *Id.* at 627.

179. *See id.* at 627-28.

180. *Id.* at 628-29 (listing non-suspect categories that had been the subject of non-discrimination measures, such as "age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability . . . and, in recent times, sexual orientation").

insurance, health and welfare services, private education, and employment.”<sup>181</sup>

The Court also noted that Amendment 2 could be read to deprive gays and lesbians of the protection of more general laws.<sup>182</sup> As the Court explained, “in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and, thus, forbidden basis for decision.”<sup>183</sup> Such a decision would itself constitute a policy prohibiting discrimination based on homosexuality under the amendment,<sup>184</sup> denying homosexuals safe harbor even in laws of general application.<sup>185</sup> Rejecting the state’s position that the law did nothing more than deny homosexuals “special rights,”<sup>186</sup> the Court found nothing “special” in the rights denied by the Amendment.<sup>187</sup> Instead, the Court pointed out that Amendment 2 denied homosexuals basic protections taken for granted by most people.<sup>188</sup> The Amendment thus created a class of outsiders, with few basic protections.

The Court concluded that Amendment 2 did not satisfy rational basis analysis because the Amendment imposed a “broad and undifferentiated disability on a single named group.”<sup>189</sup> The Court also noted that the breadth of the Amendment 2 was “so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affects.”<sup>190</sup> With regard to the first point, the Court stressed that “even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”<sup>191</sup> Citing a number of cases examining classifications that were ultimately upheld under the

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181. *Id.* at 629.

182. *Id.* at 630.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 631.

187. *Id.*

188. *Id.*

189. *Id.* at 632.

190. *Id.*

191. *Id.*

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rationality test because they were narrowly drawn and grounded in sufficient facts to enable the Court to ascertain a relationship between the classifications and the purpose they served, the Court stated that such an inquiry ensures that “classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”<sup>192</sup>

The Court’s analysis provided some insight into a number of factors that might provoke a more searching inquiry under that test. The Court noted that Amendment 2 was both “too narrow and too broad” in its identification of people by a single trait and its blanket denial of protection to that group.<sup>193</sup> Characterizing the Amendment as unprecedented, the Court stated that the absence of precedent was itself instructive: “[d]iscrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>194</sup> Stressing that laws that purport to achieve equal protection through indiscriminate imposition of inequalities run contrary to our constitutional tradition of equal protection,<sup>195</sup> the Court concluded that a law making it “more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection.”<sup>196</sup>

On the second point, the Court concluded that Amendment 2, and laws like it, “raise the inevitable inference that the disadvantage imposed is borne of animosity toward the class of persons affected.”<sup>197</sup> In support of Amendment 2 the state had offered two justifications. The first was “respect for others citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>198</sup> And, the second was the state’s “interest in conserving resources to fight discrimination against other groups.”<sup>199</sup> Focusing on the severity of the harm inflicted upon

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192. *Id.* at 632-33.

193. *Id.* at 633.

194. *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

195. *See id.*

196. *Id.*

197. *Id.* at 634.

198. *Id.* at 635.

199. *Id.*

homosexuals,<sup>200</sup> and stressing that the extreme breadth of the measure was so far removed from those justifications,<sup>201</sup> the Court rejected the state's argument.<sup>202</sup>

*Lawrence* involved a challenge to a state statute banning same-sex sodomy.<sup>203</sup> Finding for the petitioners and against the state, the Court ruled that the statute violated the petitioners' liberty interests under the Fourteenth Amendment to the U.S. Constitution,<sup>204</sup> and overruled *Bowers*.<sup>205</sup> Concurring in the judgment but declining to join the Court in overruling *Bowers*, Justice O'Connor argued that the case was more properly decided under the equal protection doctrine.<sup>206</sup> Relying on *Moreno*, *Cleburne*, and *Romer*, O'Connor reminded the Court that "some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests."<sup>207</sup> Noting that the state's justification was the promotion of morality, O'Connor argued that moral disapproval by itself does not constitute the legitimate state interest required to justify a ban on homosexual sodomy but not heterosexual sodomy.<sup>208</sup> Scrutinizing the justifications offered by the state, O'Connor reasoned that because the law was so seldom enforced with respect to "private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. . . . [R]ais[ing] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."<sup>209</sup> O'Connor therefore would have reached the same result, but with a completely different analysis, confirming the viability of the exceptions to deferential rational basis review reflected in *Moreno*, *Cleburne* and *Romer*.

*Moreno*, *Cleburne*, and *Romer* illustrate attempts to legislate against a perceived moral or character flaw that does not generally

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

204. *Id.* at 579.

205. *Id.* at 578.

206. *Id.* at 579 (O'Connor, J., concurring).

207. *Id.*

208. *Id.* at 583.

209. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

exist in the realm of “traditional” (but sadly uninformed) societal values. The key in those cases is the Court’s rejection of unsupported explanations for the discriminatory state action. A mere religious objection to homosexuals in *Romer* did not justify state action that denied basic legal protections and allowed invidious discrimination against that group.<sup>210</sup> The fear of people with mental illness did not support state discrimination in *Cleburne*.<sup>211</sup> And the image of the moral superiority of a nuclear family versus a household composed partly of unrelated people did not support denying a most basic public benefit in the form of food stamps in *Moreno*.

In each of those cases, the invidiousness of the discrimination and the magnitude of the harm on a politically unpopular group moved the Court to reject the unsupported justifications offered by the state. In those cases, if the statute is “a status-based enactment divorced from any factual context from which [courts] could discern a relationship to legitimate state interest,”<sup>212</sup> the statute must be found to violate the rationality test under equal protection. Significantly, those cases have generated a growing array of lower court decisions consistent with those principles.<sup>213</sup>

Challenges to the military’s exclusionary policies based on suspect class status or a fundamental right to privacy have failed to persuade courts to apply a heightened level of scrutiny. Absent a

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210. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

211. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

212. *Romer*, 517 U.S. at 635.

213. The following cases relied on the combination of *Moreno*, *Cleburne*, and *Romer* to justify a searching rational basis analysis: *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (holding that selective prosecution on the basis of sexual orientation violates the Equal Protection Clause); *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279 (D. Utah 2003) (holding that retaliation against teacher-coach’s public expression of her sexual orientation violates Equal Protection Clause); *Esperanza Peace and Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Texas 2001) (invalidating decision by City of San Antonio to remove funding to plaintiff because of its support of gay and lesbian issues). A key cite search of the three cases separately revealed that *Moreno* has been cited negatively ten times, and has been referenced positively 426 times; *Cleburne* has been referenced negatively thirty-one times and positively 1983 times; and that *Romer* has been cited negatively fourteen times, and positively 278 times. Though a careful analysis of those trends is beyond the scope of this article, they tend to suggest strongly that, contrary to some scholars’ pessimism, searching rational basis review is alive and growing in the lower courts.

suspect class or a fundamental right, courts have stressed that the proper constitutional test is traditional rational basis analysis. Ironically, to make that point, several courts have relied on cases that stand for exceptions to traditional rational basis review such as *Cleburne* and *Romer*.<sup>214</sup> While appearing to rely on those cases, some courts have concluded that heightened judicial scrutiny does not apply to constitutional challenges to the policy. However, rather than apply a searching analysis, courts have relied on a run-of-the-mill rational basis test, simply deferring to military judgment as “rational” without conducting an analysis of the policy or its supporting rationale. Those courts have acted as if a searching rational basis test does not exist.

### B. *Lawrence in the Military Context*

A growing number of cases in the lower courts reveal that the viability of “searching rational basis analysis” to invalidate legislation or decisions designed specifically to target politically unpopular groups is here to stay. Importantly, military courts themselves have recognized that *Lawrence* calls for the application of a “searching rational basis test” to “Don’t Ask, Don’t Tell,” contradicting assertions made by civilian courts that *Lawrence* does not apply in the military context.<sup>215</sup> Indeed, military courts have ruled that some of the military’s policies must be analyzed against the more demanding searching rational basis standard. In 2003, Eric P. Marcum, a Technical Sergeant for the U.S. Air Force, was convicted of a violation of Article 125 of the Uniform Code of Military Justice for engaging in consensual sexual relations with a man under his command.<sup>216</sup> Marcum appealed his conviction, arguing that his conviction should be set aside based on *Lawrence*.<sup>217</sup> While upholding

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214. See, e.g., *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (citing *Cleburne* for the proposition that “[t]he Navy’s challenged practice regarding homosexuals need only be rationally related to a permissible governmental end to pass constitutional muster”).

215. See, for example, *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 395, 400 (D. Mass. 2006), where District Judge George O’Toole ruled that *Lawrence v. Texas* does not require that challenges to “Don’t Ask, Don’t Tell” be reviewed under a heightened standard, and that the policy is Constitutional under a run-of-the-mill rational basis standard.

216. *United States v. Marcum*, 60 M.J. 198, 201 (C.A.A.F. 2004).

217. *Id.* at 202.

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Marcum's conviction of sex with a subordinate who was in a military position where "consent might not easily be refused,"<sup>218</sup> the court made clear that the holding in *Lawrence* applies in the military context.<sup>219</sup>

In opposition to Marcum's argument that *Lawrence* had invalidated Article 125 as a violation of due process, the government argued that *Lawrence* is not applicable to the military context because of the distinct and separate character of military life as recognized by the Supreme Court in *Parker v. Levy*.<sup>220</sup> In what may be construed as an attempt to preserve the most damaging part of *Bowers*, the government insisted that because the Supreme Court in *Lawrence* did not expressly create a fundamental right to engage in homosexual sodomy, the issue was most properly analyzed under the rational basis standard.<sup>221</sup> According to the government, under that standard, Article 125 passed constitutional muster because it was designed to criminalize conduct that "create[s] an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion," as recognized by Congress in 10 U.S.C. § 654 (a)(15).<sup>222</sup>

In addition to arguing for the lowest standard of scrutiny, the government asked the court to ignore *Lawrence* because that case did not involve people in uniform,<sup>223</sup> overlooking the fact that the military's anti-gay policies are rooted firmly in another civilian case that did not involve people in uniform—*Bowers*.<sup>224</sup> Though it conceded that the Constitution applies to members of the Armed Forces, the government argued that *Lawrence* only applies to civilian conduct.<sup>225</sup>

An alternative argument was designed to confine *Lawrence* within the limits established by the *Hardwick* decision and to continue to collapse sexual orientation into the act of sodomy. To limit *Lawrence*, the government urged the court to defer to military judgment on the

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218. *Id.* at 203 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

219. *Id.* at 207.

220. *Id.* at 205-206 (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

221. *See id.* at 206.

222. *Id.* (quoting 10 U.S.C. § 654(a)(15) (2006)).

223. *Id.*

224. *See id.*

225. *Id.*

matter of the criminalization of sodomy by contending that Congress definitely addressed homosexual sodomy when it enacted 10 U.S.C. 654.<sup>226</sup> The government misconstrued Finding 15 of “Don’t Ask, Don’t Tell” by arguing that Congress “not only prohibited sodomy through article 125 . . . but . . . determined in 1993 through 10 U.S.C. § 654 that *homosexuality, and, therefore, sodomy* was incompatible with military service.”<sup>227</sup> That argument, combined with the government’s assertion that *Lawrence* had reaffirmed that the right to engage in homosexual sodomy was not a fundamental right, invited the court to reintroduce the overruled and discredited *Bowers* doctrine.<sup>228</sup>

Importantly, the government’s argument also revealed its view of the true meaning of “Don’t Ask, Don’t Tell.” As it stands, “Don’t Ask, Don’t Tell” has been taken to mean that statements revealing sexual orientation status equal homosexual conduct. However, “Don’t Ask, Don’t Tell” does not call for the conclusion that homosexual status equals sodomy. Nonetheless, the government continued to advance the argument that homosexual orientation is the equivalent of criminal sexual conduct.

In contrast, the appellant and several amici, argued for strict scrutiny of the military’s regulation on sodomy.<sup>229</sup> In their view, Article 125 suffered from the same constitutional deficiencies as the statute in *Lawrence*.<sup>230</sup> According to appellant and the amici, the Supreme Court placed the interests at issue in *Lawrence*, within the realm of its privacy jurisprudence.<sup>231</sup> By overruling *Hardwick*, they argued, the Supreme Court effectively decided that private, consensual, sexual conduct is a constitutionally protected liberty interest, warranting strict scrutiny.<sup>232</sup>

The court’s independent analysis of *Lawrence* was consistent with the arguments raised by the appellant, and revealed the wisdom of *Lawrence* even as applied in the military context. Significantly, the

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226. *Id.*

227. *Id.* (emphasis added).

228. *See id.*

229. *Id.* at 204.

230. *See id.*

231. *Id.*

232. *See id.*

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court refused the government's invitation to reintroduce *Bowers* into the equation by rejecting its characterization of *Lawrence*. Instead, the court agreed with the appellant's argument that the Supreme Court had placed *Lawrence* squarely within its substantive due process jurisprudence, and declared that the holding in *Lawrence* was not about whether *Lawrence* had created a fundamental right to engage in homosexual sodomy, but rather whether "the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."<sup>233</sup>

With respect to the criminalization of sodomy among consenting adults, the court quoted approvingly language from *Lawrence* that stated:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of an individual.<sup>234</sup>

Reflecting the lack of specificity in *Lawrence* regarding the proper standard of Constitutional review applied in that case, the court noted that good arguments could be advanced that *Lawrence* applied rational basis analysis, and that the right at stake in that case was deemed fundamental by the Supreme Court.<sup>235</sup> The court also observed that, in response to *Lawrence*, some courts have applied rational basis analysis while others have applied strict scrutiny.<sup>236</sup> While the court in *Lawrence* placed the liberty interest at stake

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233. *Id.* at 203 (quoting *Lawrence v. Texas*, 539 U.S. 558, 564 (2003)).

234. *Id.* (quoting *Lawrence*, 539 U.S. at 578 (2003)).

235. *See id.* at 204.

236. *Id.*

“within the *Griswold* line of cases,”<sup>237</sup> it did not expressly identify the liberty interest at stake as a fundamental right.<sup>238</sup> The military court therefore chose not to presume the existence of such a fundamental right, especially in the military context.<sup>239</sup>

However, while the court chose not to apply strict scrutiny, it also declined to apply run-of-the mill rational basis analysis.<sup>240</sup> Instead, the court concluded that *Lawrence* requires the application of *searching* rational basis analysis to Section 125.<sup>241</sup> Since *Marcum*, at least two other cases in the U.S. Army Court of Criminal Appeals have resulted in the recognition that *Lawrence* identifies a liberty interest and the right to engage in private, consensual, sexual conduct without government intervention. Pursuant to *Lawrence*, the U.S. Army Court of Criminal Appeals in those cases overturned convictions for consensual sodomy among heterosexuals.<sup>242</sup>

*C. Analysis of “Don’t Ask, Don’t Tell” under a  
Searching Rational Basis Test*

One of the most scholarly expositions of the one-sided game of semantics manifested in “Don’t Ask, Don’t Tell” was conducted by Judge Eugene H. Nickerson of the U.S. District Court for the Eastern District of New York in *Able v. United States*.<sup>243</sup> Judge Nickerson’s powerful opinion demonstrated the way in which a discriminatory policy such as “Don’t Ask, Don’t Tell” can be dismantled under a searching analysis. Although the opinion was vacated, Judge Nickerson’s reasoning is still illustrative to show how the policy could not withstand searching rational basis.

In *Able*, six members of the military, whose only violation was to state that they were homosexual, argued that the policy violated their

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237. *Id.* at 205.

238. *Id.*

239. *Id.*

240. *See id.*

241. *Id.*

242. *See, e.g.,* United States v. Bullock, No. ARMY 20030534, 2006 WL 3490404 (A. Ct. Crim. App. 2004).

243. *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995), *vacated*, 88 F.3d 1280 (2d Cir. 1996), *rev’d*, 155 F. 3d. 628 (2d Cir. 1998).

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First Amendment and equal protection rights.<sup>244</sup> Though Nickerson did not identify a constitutional standard, his opinion clearly shows that the policy would not survive scrutiny under a searching rational basis analysis. To lay the foundation for his critique of the policy, Nickerson first noted that the DOD directives, which the policy operates from, assume that sexual orientation is no longer a bar to military service.<sup>245</sup> Secondly, Nickerson pointed out that the law was designed to distinguish sexual orientation from sexual conduct with a person of the same sex.<sup>246</sup> Nickerson also noted that, according to the DOD, that conduct is not limited to homosexual acts.<sup>247</sup> Such “conduct” also includes statements by a person that demonstrate a propensity to engage in homosexual acts.<sup>248</sup> Nickerson recognized the government’s position that statements of identification such as “I am a homosexual,” “I am gay,” “I am a lesbian,” and “I have a homosexual orientation” give rise to a presumption that the person has a propensity to engage in homosexual acts, requiring discharge unless rebutted.<sup>249</sup>

Operating under the assumption that the directives distinguish between homosexual orientation and “propensity” to engage in homosexual acts, Nickerson found little guidance in the directives regarding the manner in which a statement regarding sexual orientation can signal a “propensity” to engage in homosexual acts. Judge Nickerson focused on the tortured reasoning found in the directives.<sup>250</sup> Nickerson wondered how an “orientation” can mean an “abstract preference” to engage in homosexual acts if not revealed, but if admitted becomes evidence of “likelihood” to commit acts requiring discharge.<sup>251</sup>

Judge Nickerson next demonstrated the manner in which the military sought to continue its exclusionary practices while masking those practices in apparently principled procedural technicalities that

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244. *Id.* at 970, 972. The policy was also challenged based on vagueness, overbreadth and intimate association—however, this article will restrict its analysis to the First Amendment and equal protection challenges.

245. *Id.* at 971.

246. *Id.* at 975.

247. *Id.*

248. *Id.* at 971.

249. *Id.* at 972.

250. *Id.*

251. *Id.*

provide little more than an illusion of protection. Nickerson found that the legislative history of the Act revealed that Congress sought to reach homosexual conduct simply because “prohibition of homosexual conduct in the military is deemed necessary” by the military.<sup>252</sup> Nickerson noted that, according to Finding 15 of the Act “the prohibition against such conduct is so necessary that even those who have a mere ‘propensity’ to engage in that conduct must be discharged.”<sup>253</sup> Recognizing that the plaintiffs had done nothing more than “acknowledge who they are,” the judge stressed that the First Amendment places a value on speech not only as an instrument by which ideas may be exchanged but as “an expression of personal dignity and integrity.”<sup>254</sup>

With respect to deference to the military in the area of military policy, Nickerson was careful to distinguish between policy decisions in the military context and the constitutionality of military decisions when those decisions clash with individual liberties protected by the Bill of Rights. Accordingly, Nickerson stressed that “[e]ven in the military context, regulation of speech based on content survives constitutional scrutiny only if it is ‘no more than [what is] reasonably necessary to protect [a] substantial government interest.’”<sup>255</sup>

According to Nickerson, the legislative history of the Act shows that the military had finally admitted to the ability of gays and lesbians to serve their country honorably and admirably.<sup>256</sup> Further, Congress had manifested confidence that homosexuals did not pose a danger to unit cohesion by allowing them to join the military.<sup>257</sup> Despite those facts, Judge Nickerson noted with some dismay, homosexuals were still required to conceal their sexual identity or risk discharge.<sup>258</sup> Characterizing the military’s practice as punishment based on status, Nickerson drew a parallel to *Robinson v. California*.<sup>259</sup> In that case,

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252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 973 (quoting *Brown v. Glines*, 444 U.S. 348, 355 (1980)) (alteration in original).

256. *See id.* at 974.

257. *Id.*

258. *Id.*

259. *Id.* at 974.

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the Court rejected the argument that prosecution of an admitted narcotics addict was justified on the theory that he had possessed or would possess drugs.<sup>260</sup> The court reasoned that the defendant's status as an addict did not justify "an inference that he had possessed or in the future would possess illegal drugs."<sup>261</sup>

Judge Nickerson probed deeper into the Act's legislative history, concluding that in order to avoid challenges based on status, the drafters had devised a game of semantic gymnastics designed in such a way that gay service members could never win.<sup>262</sup> The policy, according to the judge, was cleverly designed to avoid First Amendment problems by defining conduct to include statements about sexual orientation, thus transmogrifying statements about status into admissions of misconduct, which the speaker would have a practically insurmountable burden of disproving.<sup>263</sup>

Judge Nickerson next demonstrated that a principled distinction between the meaning of "orientation" and "propensity," the most crucial terms of the exclusionary policy, simply did not exist in either the Act or the directives.<sup>264</sup> Though the Act stated that "orientation" would no longer be a bar to military service, the judge noted that those who formulated the policy saw only a hypothetical distinction, and that the directives equate a statement of "orientation" with an admission or at least a "propensity."<sup>265</sup> Relying on testimony from the Senate hearings, Nickerson stressed that those who simply admit to being gay have, at best, "only a 'hypothetical' chance to escape discharge."<sup>266</sup> The judge then wondered how a simple admission of gay identity, an orientation that Congress has determined to be innocuous, can be made to constitute proof of the case of an offense so threatening to the military mission as to warrant removal, characterizing such a consequence as "draconian."<sup>267</sup>

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260. *Id.*

261. *Id.* at 974.

262. *Id.* at 975.

263. *Id.* at 975-76.

264. *Id.* at 975.

265. *See id.*

266. *Id.* The Court characterized as anomalous three cases presented by the government to demonstrate that the "propensity" presumption could be overcome. *Id.* at 976.

267. *Id.* at 976.

Judge Nickerson rejected as “aberrations stemming from a dysfunctional application of the policy” three cases offered by the government to prove that the presumptions could be overcome.<sup>268</sup>

In one case the member had said “she thought she may be gay.” In another, the member had stated “I’m kind of confused about my sexual preference.” And, in the third the member had said he was a homosexual only in what he thought was a confidential session with a Navy counselor who tried to make him “comfortable” and “as free as possible.”<sup>269</sup>

The most significant part of judge Nickerson’s analysis, for purposes of searching rational basis analysis under equal protection, focused on the government’s argument that the majority of heterosexuals would prefer not to know that there were homosexuals living among them, thus justifying the imposition of silence upon gays.<sup>270</sup> Reasoning that the policy and its implementing directives were designed in deference to an unspoken and unsupported prejudice against homosexuals, Nickerson concluded that the Act was designed to condemn homosexual status as an evil because of the reaction it would generate among heterosexuals, who would react so as to damage unit cohesion.<sup>271</sup> Noting that the bulk of the anecdotal testimony by military leaders who opposed the lifting of the ban focused on the potential reactions of heterosexuals whose traditional moral or religious values would put them at odds with gays and lesbians, the judge also concluded that such animosity toward homosexuals could only be based on irrational prejudices.<sup>272</sup> The judge nevertheless engaged two arguments advanced by the government. First, the argument that the policy “seeks to accommodate the privacy interests of service members.”<sup>273</sup> And, second, that the policy somehow addresses the concern about “sexual tension” in the unit.<sup>274</sup>

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268. *Id.*

269. *Id.*

270. *Id.*

271. *See id.* at 976-77.

272. *See id.* at 977-78.

273. *Id.* at 978.

274. *Id.*

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Regarding the question of privacy, the judge noted that the showers, latrines and barracks became no more private after the passage of the Act than they were before it was passed.<sup>275</sup> If, Nickerson stressed, protection of the privacy of heterosexuals involves protecting them from the stares of homosexuals when they are in the shower, a policy requiring silence about sexual orientation would hardly serve that purpose.<sup>276</sup> That is, if indeed there are homosexuals who wish to peek at naked bodies in the showers, they may do so when their orientation is a secret as when it is open.<sup>277</sup> Thus, not knowing the sexual identity of their service mates will give heterosexuals reason to suspect everyone, hardly a circumstance likely to increase “cohesion.”<sup>278</sup> The judge concluded that such a guarantee of privacy would tend to mislead heterosexual service members, who can hardly be unaware that because of the passage of the Act, gays and lesbians are serving amongst them.<sup>279</sup>

The government’s claim that the policy serves to reduce or eliminate “sexual tension” in the barracks was also quickly dismantled by Judge Nickerson. The existence of “sexual tension” was thus attributed by the government to a belief that gays and lesbians will naturally follow their “tendencies” and behave in improper ways that will give rise to such tension.<sup>280</sup> Noting that the comment had already been offered in support of the total ban, Nickerson pointed out that the argument can hardly have force now that gays are allowed to serve.<sup>281</sup> Such conduct, according to the judge, is not more likely to occur because homosexuals have acknowledged their orientation.<sup>282</sup> Moreover, Nickerson stressed, inappropriate behavior by a gay service member, whether in the closet or not, is already controlled by the military’s regulations.<sup>283</sup>

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275. *Id.*

276. *Id.*

277. *Id.*

278. *See id.*

279. *See id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

After referencing comprehensive studies by the RAND Corporation and by the GAO which had concluded that the impact of open homosexuals on military readiness would be minimal—the same studies that had been ignored by Congress—Judge Nickerson wondered about the absence of a discussion in the legislative history of the Act about the impact on unit cohesion of forcing homosexuals to assist in perpetuating a hoax on heterosexuals. As Nickerson saw it, the policy adopted by Congress did not serve its stated purposes of promoting unit morale and cohesion.<sup>284</sup> At best, Nickerson stressed, the policy represented a concession by Congress to the sensibilities of some heterosexuals.<sup>285</sup> And, even if the First Amendment were to tolerate the suppression of a truthful self-identification by homosexuals, according to the judge, it would require a legislative finding that the consequences of disclosure would be infinitely more serious than anything revealed in the record before Congress.<sup>286</sup>

*D. Evidence of Congressional and Military Animus in the Legislative History of “Don’t Ask, Don’t Tell”*

The legislative history of “Don’t Ask, Don’t Tell” reveals a level of animus toward gays and lesbians that far surpasses the degree of animus cited by the Supreme Court in *Cleburne*, *Moreno*, and perhaps even *Romer* to justify the application of a searching rational basis test.<sup>287</sup> Significantly, the incandescent level of animus present in the deliberation of “Don’t Ask, Don’t Tell” has not been the subject of much discussion in the many legal challenges to the policy. A careful look at the legislative history provides ample support for Judge Nickerson’s conclusion that the policy was designed to do little more than defer to the unfounded prejudices of military and political opponents. The next discussion of the policy in Congress and further legal challenges to the policy cannot ignore the enormous amount of evidence of animus in the legislative history of “Don’t Ask, Don’t Tell.”

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284. *Id.* at 979.

285. *Id.*

286. *Id.* at 979-80.

287. *See* 139 CONG. REC. H7065-03 (1993).

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Despite the revisionist recollection of some courts,<sup>288</sup> Congressional debates over the Clinton proposal were anything but balanced. Discussion of Clinton's proposal took place amidst a political firestorm, in which Clinton was aggressively demeaned as a captive of a special interest group who did not have the credentials to lead the military.<sup>289</sup> The political tension generated by opponents of the President's proposal threatened to undermine the Clinton administration's ability to govern, not just in military affairs, but in other areas. Not only did President Clinton face a veto-proof majority in Congress in support of the former ban, Clinton was essentially held hostage to a potential public relations disaster in the form of a threat by the Joint Chiefs of Staff to resign *en masse* if he persisted in going forward with his proposal to eliminate the gay ban.<sup>290</sup> Not surprisingly, the "compromise" to which Clinton eventually agreed essentially left the status quo unchanged.

Clinton's proposal to focus on conduct and not identity received an overwhelmingly negative response in the Senate. Not surprisingly, anti-gay animus that focused almost exclusively on the threat to military masculinity posed by homosexual men stoked the political storm in both houses.<sup>291</sup> Among other things, gay military members

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288. See, e.g., *Richenberg v. Perry*, 73 F.3d 172, 173 (8th Cir. 1996). The court cited the "lengthy public debate" that took place involving Congress and the President during the passage of "Don't Ask, Don't Tell" to reject a motion for an injunction to bar the Air Force from discharging Richenberg. *Id.* See also *Thomasson v. Perry*, 80 F.3d 915, 923 (4th Cir. 1996) (describing the policy as a "statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation"). However, careful analysis of the legislative history of the act reveals a one-sided game of careful retrenchment by congressional opponents of an open policy and by military leaders that leads to little if any change.

289. "The President, in a tough campaign, made commitments to special interest groups that, if elected, he would lift the ban on gay service in the military. The President then took office, set up a commission, looked at the hard facts, and came out with a policy that did not make sense to anybody." 139 CONG. REC. S11157-04, S11193 (1993) (statement of Sen. Gramm).

290. HALLEY, *supra* note 41, at 20.

291. See, e.g., Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499, 501, 545-47 (1991) (identifying "the pursuit of manhood" or masculinity as one of the principal forces driving the former gay ban in the U.S. military).

were reduced to the role of promiscuous threats to public health.<sup>292</sup> According to Senator Murkowski (R. Alaska), opening the door to gays would endanger the health of military veterans by redirecting precious resources designated for their care to carriers of AIDS.<sup>293</sup> Moreover, the proposal to lift the ban took place amidst the realities of the end of the Cold War, which had resulted in a sharp reduction of the numbers of military personnel,<sup>294</sup> enabling political opponents to characterize the debate as one involving a new openness to gays while simultaneously closing the door to patriotic heterosexual military veterans.

On September 28, 1993, the House of Representatives met to consider three versions of the new policy on gays in the military. One version, presented by Representative Mehan, proposed to leave all decisions regarding gays in the military in the hands of the President.<sup>295</sup> A second proposal, presented by Representative Hunter, advocated for a continuation of the complete ban and a codification of questions regarding sexual orientation prior to induction into the military.<sup>296</sup> The third version contained most of the components of today's policy and was proposed by Representative Skelton.<sup>297</sup>

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292. See 139 CONG. REC. S1262-02 (1993) (statement of Sen. Smith) ("One thing is for certain, by legitimizing homosexuality in the Armed Forces, the President is ensuring that homosexual behavior will, inevitably, become more brazen and prevalent. Promiscuity, already a major health problem in the homosexual community, will likely increase in on-base clubs, local nightclubs, and throughout forces deployed worldwide. While some may dismiss this threat as exaggerated, the reality is that such promiscuity could have a very direct impact on the incidence of sexually transmitted diseases within the Armed Forces.").

293. *Id.* (statement of Sen. Murkowski) ("A decision to admit gays to the military will not be a free one. That decision will be paid for in increased funding for VA, or by the veterans [that the] VA must turn away in order to care for the new AIDS cases the decision will bring.").

294. Discussions of Clinton's proposal in the Senate coincided with the President's plans to eliminate 200,000 military personnel because of the end of the Cold War. *Id.* (statement of Sen. Smith). The proposal to lift the ban, while eliminating large numbers of personnel, was depicted as the reckless work of a traditional anti-military liberal whose anti-war activities and lack of military service rendered him incapable of serving as Commander-in-Chief. *Id.*

295. 139 CONG. REC. H7065-03 (1993).

296. *Id.*

297. *Id.*

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Hunter's amendment received the most vocal support from proponents of an absolute ban. Framing their objections to integration of gays and lesbians in religious and moral terms, defenders of the ban had no difficulty stressing that a person's homosexual orientation was the equivalent of immoral, reprehensible, or even criminal conduct.<sup>298</sup> Hunter depicted gays and lesbians as uncontrollable sexual predators who must be barred from service. To rally support for the codification of the military's practice of inquiring about the sexual orientation of new service members, Hunter warned that "in 1981 homosexual activities . . . were bad for the young men and women serving in the military, 84 percent of whom were unconsenting victims."<sup>299</sup> Thus, according to Hunter, the real reason for his amendment was not "moral concern, unit cohesion, and all the other things that [came out during the hearing], but it [was] because of the duty of trust we owe to our constituents to protect their children in uniform."<sup>300</sup>

The vilification of gays and lesbians in the House was not confined to people in uniform. Speaking after Congressman Frank, an openly gay member of Congress voiced strong support of a policy based on conduct and not identity. Congressman Dornan refused to allow the House to be "lectured about well-behaved homosexuals by some Members with, shall we say, behavioral problems of their own . . . ."<sup>301</sup> Though he was chastised by the Chairman for inappropriate remarks concerning a sitting Member, Dornan continued his assault by denying President Clinton's assertion that Clinton "was deeply impressed by the devotion to duty and country exhibited by homosexuals who have served with distinction."<sup>302</sup> Dornan completed

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298. *Id.* (statement of Rep. Spence) ("My own personal, moral and religious belief[] [is] that the homosexual lifestyle is unnatural and immoral, as well as being illegal in some States, and should not be legitimized by a cloak of acceptability in our society.").

299. *Id.* (statement of Rep. Hunter).

300. *Id.* This sentiment was shared by Representative Sam Johnson of Texas, who stated, "[W]e have got a lot of innocent kids in the service nowadays, guys that do not understand the world. . . . I think that it is important that we protect those kids in our service. I think it is something that we owe the parents of this Nation." *Id.* (statement of Rep. Johnson).

301. *Id.* (statement of Rep. Dornan).

302. *Id.* (referring to Clinton's remarks). Dornan stated that "[w]e keep hearing that, but there [sic] is the evidence of all this distinction?" *Id.*

his attack by denying the existence of “witch hunts” against gays and lesbians, maintaining that in his military experience, having served on active duty at ten bases around the country, there had been instances of homosexual conduct on eight of those bases, each involving dishonorable conduct and dishonorable discharges.<sup>303</sup> Thus, without more than his word to support his claim, Dornan asserted that every discharge of a gay or lesbian soldier he had ever known about had involved dishonorable conduct. Skelton’s amendment was ultimately passed after members of the House were assured that little or nothing would change under this new version.

Congressional debates over the new policy were surprisingly candid. Perhaps sensing their advantage, opponents of the policy showed little to no restraint in their condemnation of gays and their Congressional supporters. Military and Congressional leaders portrayed gay men and women in the military as promiscuous predators that had no control over their sexual desires<sup>304</sup> and as sexual deviants who could not be trusted with young lives.<sup>305</sup> Despite President Clinton’s assurance that his proposal focused on conduct, those who opposed the new policy saw no need to distinguish between identity and conduct.<sup>306</sup> Gay identity continued to be a proxy for criminal predatory sexual conduct, notwithstanding the fact that gays were no more likely than heterosexuals to engage in such conduct.

Congressional animosity toward gays in the military was exceeded by military leaders, who came out in full force to oppose to President Clinton’s initiative.<sup>307</sup> To military leaders, the presence of known gays and lesbians represented an affront to the middle-American values that drove the military to success.<sup>308</sup> Openly gay

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303. *Id.*

304. *See supra* note 292 and accompanying text.

305. *See* 139 CONG. REC. S1262-02 (statement of Sen. Smith).

306. *See* 139 CONG. REC. S1262-02 (statement of Sen. Wallop) (“It is not the individual qualities of the homosexual, but rather homosexuality itself, which is incompatible with military service.”).

307. Lifting the ban would “destroy the military.” *Id.* (statement of Sen. Smith (quoting General Norman Schwartzkopf)).

308. *See* TASK FORCE ON MILITARY PERS., *supra* note 46, at 3 (“[T]hese hearings, I think, are of great importance to the American people because there are literally thousands of families sitting at their kitchen tables and in their front rooms watching television, having heard the President’s pronouncements, waiting to see

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military personnel were thus criticized as a threat to national security.<sup>309</sup> Admiral Moorer, an aggressive critic of the Clinton initiative, argued that openly gay military personnel represented a moral downgrade of the military<sup>310</sup> because their uncontrollable sexual urges<sup>311</sup> and their unmistakable effeminate characteristics would render them ineffective as soldiers or military leaders.<sup>312</sup> To Admiral Moorer, keeping gays out of the military was necessary not only to protect the military from moral corruption, but to protect the sensibilities and morale of military wives.<sup>313</sup> Moorer essentially echoed *Bowers* when he condemned gays as carriers of the most

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how Capitol Hill deals with this issue. And sitting with those families are their 17-, 18- and 19-year-old children who are encouraged and have been encouraged to join the American military. And I think that it could be accurately stated that middle America is a wellspring for this great voluntary military force . . . . And the question is going to be are we going to lose this perception by middle America of the military as a wholesome environment for their young people; and, should we lose that, what effect will it have on our ability to accomplish that mission?" (statement of Rep. Duncan Hunter).

309. Statement of Rep. John T. Doolittle (R-CA): "I think homosexuality is a severe problem in this society . . . . I think we're playing with very, very serious matters in this country that go right to the heart of our preparedness and right to the issues of national security." *Id.* at 6. Statement by Rep. Bentley: "This issue is so very, very vital, I think, and can make such a difference to the future of national security." *Id.*

310. "I must say that this issue, to me, is the most important, the most disturbing, that I've ever encountered in war or peace because what is going on here is an effort in effect to downgrade and demean and break down the whole structure of our military forces . . ." *Id.* at 7-8.

311. "So those that come into the armed services must be qualified, and the homosexuals, as I will go into later, are not qualified for that kind of duty because of the impact they have on the organization overall—because they do not practice discipline and self-control . . ." *Id.* at 8.

312. "You might ask the question will the troops respect a platoon if it's well-known in their unit that he's a homosexual? And I can guarantee you that these young people who are young . . . will spot a homosexual a mile away . . ." *Id.*

313.

What will the ladies living on the base think about these people that are exposed to their children? They're not going to like it at all. And the morale of the ladies, the wives on the base, are dictated in effect by the morale of the fighting men that are present.

*Id.* at 9.

reprehensible kind of natural punishment for an immoral lifestyle.<sup>314</sup>

The intimidating one-sided nature and the lack of objectivity of the legislative discussion over “Don’t Ask, Don’t Tell” did not escape Senator Edward Kennedy. Kennedy challenged the validity of the legislative “findings” intended to provide justification for the policy, and submitted a statement for the legislative record to expose the controversial hearings that had been conducted by the Senate Armed Services Committee.<sup>315</sup> Kennedy wrote separately to preserve the hearings in some detail.<sup>316</sup> Noting that the first hearing had been described as “an objective presentation of the history of the ban and the legal issues surrounding a potential lifting of the ban,”<sup>317</sup> Kennedy pointed out that the committee had called on a non-expert who relied on secondary sources while ignoring experts who had done primary research in the area.<sup>318</sup> With respect to constitutional issues that would arise after the lifting of the ban, Kennedy also pointed out that the committee had relied on two witnesses, who, although experts on military law, were not experts on constitutional law.<sup>319</sup> In fact, Kennedy noted, [a]lthough [the committee’s expert] discussed constitutional issues at length, he never mentioned the key Supreme Court cases of *Palmore v. Sidotti* or *Cleburne v. Cleburne Living Center*,<sup>320</sup> perhaps the two most important cases in this area. In light of the extensive testimony presented by those witnesses, Kennedy found it “unfortunate that the Committee did not hear from preeminent constitutional scholars—such as Guido Calabresi” of whom the

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314.

Everyone knows—no one can dispute that the homosexuals as a group are responsible for introducing into this country and spreading—because of their very filthy and immoral practice, we have a disease spread all over this country now . . . And when the homosexuals in the military catch AIDS, don’t forget when you get enlisted or appointed or commissioned, you are, in effect, given a lifetime medical insurance. And so there’s Uncle Sam, the taxpayer, paying for this for I don’t know how long, just at a time when the military budgets are really strapped.

*Id.*

315. 139 CONG. REC. S11157-04 (1993) (statement of Sen. Kennedy).

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* (citations omitted).

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committee could have asked questions.<sup>321</sup> Nonetheless, Kennedy stated, many “legal scholars (including Dean Calabresi) prepared written testimony discussing the unconstitutionality of the ban.”<sup>322</sup>

Regarding unit cohesion, Kennedy noted that the committee had called three witnesses whose testimony had been crucial to Findings 13 and 15 of the amendment.<sup>323</sup> Those witnesses, whose testimony was anything but unanimous on whether gay people could serve openly, provided the main source of expert testimony for the committee.<sup>324</sup> However, as Kennedy pointed out, just as significant to the committee’s ability to issue findings were the witnesses who were never called. Kennedy cited two studies that had been conducted by the DOD itself,<sup>325</sup> and two other studies performed by the GAO. According to Kennedy, the first GAO study was a comprehensive look at the cost of the policy, other nations’ military policies on homosexual service, and non-discrimination policies in other U.S. paramilitary organizations; the second dealt with policies regarding homosexual service in twenty-five foreign countries.<sup>326</sup> Despite the fact that all of these studies supported service by openly gay people, Kennedy noted with some dismay that “the authors of these studies never testified before the Committee.”<sup>327</sup>

According to Kennedy, “the most striking gap in the information provided to the Committee was the absence of the study conducted by the Rand Corporation,” which the DOD had commissioned to inform the debate.<sup>328</sup> Other than an assurance by the Secretary of Defense that

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321. *Id.*

322. *Id.*

323. *Id.*

324. Kennedy noted that “Dr. Henderson was adamant that allowing openly gay people to serve in the military would have a severe and disastrous effect on unit cohesion,” while not being able to cite any studies on the subject. *Id.* Kennedy also noted that a second witness, Dr. Marlowe, was of the opinion that “simply stating one is gay could be considered injecting one’s homosexuality into the group.” *Id.* In addition, Kennedy pointed out that “Dr. Korb testified that his personal experience led him to believe that gay people could serve openly and effectively in the military and that any cohesion problems could be addressed through good leadership.” *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

he had been briefed on the RAND report and had considered the data in making his determination, the committee was never briefed on that report. Therefore, the committee made its findings on unit cohesion devoid of data and witnesses which “would have been essential for a fair-minded and objective assessment of the issue.”<sup>329</sup>

Kennedy was also disturbed by other gaps in the testimony before the committee. Regarding gay service in foreign countries, Kennedy lamented that no witness was produced that had detailed knowledge of the situation in Canada and Australia.<sup>330</sup> Both Canada and Australia, two countries with similar cultures to the U.S., recently lifted their bans and had previously expressed concerns over unit cohesion.<sup>331</sup>

Kennedy also revealed that he had received over 100 testimonials from heterosexual and homosexual individuals who were in some way connected with Norfolk Naval Base.<sup>332</sup> All 100 opposed the ban.<sup>333</sup> However, homosexual servicemembers feared that public testimony would reveal their sexual identity, either through the actual testimony or through a post-testimony investigation.<sup>334</sup> Heterosexual servicemembers also did not want to testify against the ban because they feared that their own sexual identity would be called into question.<sup>335</sup> “Many of [those] individuals recounted in detail the atmosphere of fear and coercion that existed in military bases during the time when lifting of the ban was under consideration which precluded these individuals from feeling safe in speaking up against the ban.”<sup>336</sup>

In conclusion, Kennedy stated that if the debate on the policy showed anything, it showed that exclusion of gays from the military has nothing to do with conduct; rather, it has to do with the fears and concerns of heterosexual service members who believe that they do not know any homosexual service members and who cannot bear to

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329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

serve with homosexuals.<sup>337</sup> Indeed, as this article has demonstrated, the most powerful driving force of “Don’t Ask, Don’t Tell” continues to be a concession to the unfounded fears of a minority of heterosexual service members. Accommodating such prejudices is not a legitimate governmental interest.

#### VI. WHAT WILL HAPPEN IF “DON’T ASK, DON’T TELL” IS OVERTURNED

The experiences of other countries will prove instructive regarding the likely consequences of overturning the gay ban. Those experiences reveal that little will change if the policy is overturned. Comparisons with other countries were prominent during the debates on “Don’t Ask, Don’t Tell.”<sup>338</sup> Though other countries, most notably NATO countries, were more open to gays and lesbians,<sup>339</sup> Congressional critics went to great lengths to demonstrate that, even in those countries, concerns over the integration of gays and lesbians into military service were still severe.<sup>340</sup>

Although Congress had commissioned a multi-million dollar study of the issue by the RAND Corporation, Senator Warner introduced an article from the *Army Times* entitled, “*NATO Acceptance of Gays Runs Full Spectrum*” as empirical evidence.<sup>341</sup> The article stated that despite more liberal policies than the current U.S. ban, “nations that allow homosexuals to serve openly had not resolved the problem of fully integrating them into their armies.”<sup>342</sup> For example, the article noted that “[g]ay German officers [found] paths to promotion blocked, and in some cases [had] been blocked from access to classified material . . . .”<sup>343</sup> The article also stressed that gay life in the German military could be unpleasant.<sup>344</sup> Though problems feared by U.S. commanders had yet to materialize in the

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337. *See id.*

338. 139 CONG. REC. S1262-02 (1993) (statement of Sen. Warner).

339. *See id.*

340. *See id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

German military, Germany nevertheless withheld promotions from gay officers under the belief that they could not command adequate respect from fellow soldiers.<sup>345</sup> Even so, German officials reported that anti-gay violence, lowered readiness, and discipline problems had not materialized.<sup>346</sup>

On the other hand, the article stated that “Britain’s policy on gays in the military [was] quite simple.” According to Chris Pengelly, a spokesman at the British Embassy, “[w]hen you come out of the closet, you also come out of the army.”<sup>347</sup> “And although policies on homosexuals in the military [were] being challenged and changed in other countries, Britons interviewed in Washington and London said there [was] little if any sentiment for change in Great Britain.”<sup>348</sup> The fact that countries such as Canada and Australia had recently lifted their gay bans made no difference in Britain.<sup>349</sup> “Britain’s military leadership contend[ed], much like its U.S. counterpart, that allowing homosexuals to serve would hurt the military.”<sup>350</sup> “John Keegan, military editor of The Daily Telegraph in London, recently wrote that in the wake of Australia’s decision to lift its gay ban, ‘The moment for experimentation with homosexual military rights is not yet with us, and probably never will be.’”<sup>351</sup>

The article also included information on Norway, where gays and lesbians have been allowed to serve openly in the armed forces for the past 14 years.<sup>352</sup>

“Basically, the difference between the United States and Norway is that in Norway, it’s not an issue,” said Air Force Lt. Col. Ragnar Haugholt, the assistant Army, Navy and Air Force attaché for the Norwegian Embassy here. “A lot of what is going on in the United States is based on believing not knowing.”<sup>353</sup>

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345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

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Norway ended its gay ban in 1979 with very few consequences.<sup>354</sup>

Similarly, according to the article, France did not discriminate against gays and lesbians as long as they obeyed the rules of the French armed forces.<sup>355</sup> Capt. Phillipe Hunter, a spokesperson for the minister of defense said, "For example, it is not possible to punish somebody because of his sexual life. But if this person makes some sexual harassment upon other members of his unit, he will be in trouble."<sup>356</sup>

Senator Warner introduced another *Army Times* article, "*In Israel: The Hard Reality*," to dramatize the harsh reality of gay life in the Israeli Military.<sup>357</sup> The article told the story of Yaron, a 30-year-old reserve lieutenant in the Israeli navy.<sup>358</sup> The article questioned how a homosexual like Yaron handled his duties aboard an attack boat surrounded by other men.<sup>359</sup> The author found that question especially relevant given the fact that critics of the U.S. ban had pointed to Israel, France and Germany as models of integration.<sup>360</sup> In contrast to a story in the *New York Times* that had lauded the Israeli military for successful integration, the *Army Times* noted that known gays in the Israeli military are forced to "undergo psychological testing to remain in the service. . . . [B]arred from positions requiring top security clearances. . . . [And] rarely are assigned to combat units do not serve without stigma"<sup>361</sup> because they are considered "abnormal both in the military and Israeli society."<sup>362</sup>

In the *Army Times* story Yaron revealed that, though his performance reviews were excellent, he was concerned about sexual tension.<sup>363</sup> Consequently, Yaron felt compelled to hide his sexual orientation.<sup>364</sup> Fearing that his subordinates would not take orders

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354. *See id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

from him if they knew that he was gay, Yaron chose to keep his sexual orientation private.<sup>365</sup> Still, Yaron said emphatically that he would never have sexual relations with a subordinate.<sup>366</sup>

According to the article, the success of the Israeli military with gays and lesbians is attributed to the Israeli concept of universal military service, which is a “springboard to successful civilian career;” to the military’s ability to determine assignments and promotions based on quality; and to psychological testing administered to every individual who claims to be a homosexual.<sup>367</sup> Though most homosexuals were permitted to remain in the service after psychological testing, they could be restricted from serving on particular units.<sup>368</sup> Nonetheless, Israel reported that there is “no evidence that homosexuals are less effective in combat than heterosexuals.”<sup>369</sup> The vision of the harsh reality of life in the military for gays in Israel was also advanced by Senator Gramm: “I would just like for the record to show that the Israeli military is one of the most restrictive militaries on the planet in terms of the promotion and participation of avowed homosexuals.”<sup>370</sup>

Gramm’s opinion of the harsh reality of life for gays and lesbians in the Israeli military did not comport with a study done by the RAND Corporation, which was available to Congress in 1993, but was conveniently ignored by opponents of the new policy.<sup>371</sup> The RAND study found that gays and lesbians have been allowed to serve in the Israeli military since Israel was founded in 1948.<sup>372</sup> It also found that Israel poses no restriction on the promotion of gays and lesbians.<sup>373</sup> Importantly, RAND also found that Israeli law was more supportive of homosexual rights than U.S. law.<sup>374</sup> Noting that the former official

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365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* (statement of Sen. Gramm).

371. RAND STUDY, *supra* note 27, at xvii.

372. *See id.* at 85-87 (stating that military service is compelled for everyone in Israel and that all restrictions, specifically those prohibiting homosexuals from top security intelligence positions, have been lifted).

373. *See id.* at 87.

374. *Id.* at 86-87 (noting that homosexual acts between consenting partners

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military policy potentially restricted homosexuals from serving in intelligence positions, the RAND Corporation observed that the policy was abandoned in 1993.<sup>375</sup>

The Israeli military is an important comparator to the United States armed forces, because both countries have experienced constant military activity in the last half of the twentieth century. As the Israeli experience has shown, a history of effective military service has helped legitimize the right of gays and lesbians to serve in uniform. In the end, the Israeli experience has repeatedly shown that military success depends heavily on preparation, strategy, logistics, and resources, and much less on individual interpersonal relationships.

The most significant modern parallel to the experience of the United States military can be found in England, where the government terminated an absolute ban on gays and lesbians in January of 2000.<sup>376</sup> As was the case in the U.S., British authorities advocated for a complete ban on gays and lesbians to protect their youthful members from the perceived danger of homosexual sexual predators and to promote recruitment.<sup>377</sup>

After a serious challenge to the ban in the British High Court, the British Ministry of Defense assembled the Homosexual Policy Assessment Team to assess the situation and determine whether changes were needed.<sup>378</sup> The Team analyzed policies from the U.S., Australia, Canada, Israel and the Netherlands.<sup>379</sup> After a leak of a possible compromise, the Team recommended the continuation of the ban, which was justified along the same lines as the exclusionary American policy.<sup>380</sup> The ban was strongly supported by people in uniform. Comments such as “[m]en don’t like taking showers with men who like taking showers with men,” and “homosexuals will be

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over the age of 17 was no longer a crime; and that since 1992, discrimination in employment on the basis of sexual orientation has been illegal).

375. *Id.* at 87-88.

376. AARON BELKIN & R.L. EVANS, CTR. FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, THE EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES: APPRAISING THE EVIDENCE 2 (2000), available at <http://www.palmcenter.org/files/active/0/Britain1.pdf>.

377. *Id.*

378. *Id.* at 19.

379. *Id.*

380. *Id.* at 19-20.

beaten up” were common.<sup>381</sup> As had been the case in the U.S. with the MWG, the Team recommended continuation of the ban even though committee members who had visited other countries had learned that the integration of gays had made little difference.<sup>382</sup> That stance was shared by the British armed forces minister and the three chiefs of staff.<sup>383</sup>

On September 27, 1999, the European Court of Human Rights ruled unanimously that the ban on homosexual military service violated the privacy rights of the plaintiffs.<sup>384</sup> In deciding which regulations to adopt to implement the court’s ruling, the British military rejected the American “Don’t Ask, Don’t Tell” model as a complete disaster.<sup>385</sup> Instead, it opted for a set of regulations based on conduct governing “sex not sexuality,”<sup>386</sup> based on the Australian model.

The British regulations implementing the new policy are based on the fundamental principle that a person’s sexual orientation is a private matter.<sup>387</sup> Not surprisingly, little happened after the lifting of the ban. Except for a few resignations of proponents of the ban, there was no mass exodus of disgruntled service members following the lifting of the ban.<sup>388</sup>

Here, it is important to note that the passage of an anti-discrimination law will not necessarily lead to rapid integration of the military. Studies of militaries in countries without gay bans have shown that the passage of anti-discrimination legislation will not result in a massive wave of revelations of soldiers’ sexual orientation or “coming out.”<sup>389</sup> Whether a person comes out as gay or lesbian involves a profoundly personal and private decision, which is best

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381. *Id.* at 21.

382. *Id.*

383. *Id.* at 22.

384. *Id.* at 23.

385. *Id.* at 24.

386. *Id.*

387. *Id.* at 27.

388. *Id.* at 45.

389. In fact, Congress was well aware of this during the debates about the passage of “Don’t Ask, Don’t Tell.” As early as 1993, the RAND Corporation had found that a massive “coming out” of gay men and women had not occurred in any country that had lifted its ban on gays. *See* RAND STUDY, *supra* note 27, at 14.

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made when the person feels safe and supported. Thus, many individuals are likely to maintain their sexual identity secret until they no longer feel threatened by the revelation.

While the military is different from police and fire departments, the integration of homosexual police and firemen into those areas can help inform the likely outcome of a non-discrimination policy in the military.<sup>390</sup> More helpful yet is an examination of the experiences of the Federal Bureau of Investigation and of the Central Intelligence Agency, two agencies that run training programs that most resemble the experience of military personnel. Both the FBI and the CIA have training regiments much like the military.<sup>391</sup> Just like in the military, the organizations' training programs also require the relinquishment of a certain amount of privacy.<sup>392</sup> In fact, for many FBI and CIA operatives, the physical environment of their work is one and the same as the physical environment where people in uniform perform their responsibilities, as they work side-by-side with the military in times of war.<sup>393</sup> Similar to the military experiences of other countries, a massive "coming out" has not taken place because of the liberalization of policies regarding who can participate. Indeed, little has changed in those occupations or organizations since discriminatory policies have been eliminated.

## VII. CONCLUSION

Despite a mountain of evidence to the contrary, federal courts have continued to defer to the irrational fears and prejudices of a shrinking group of heterosexuals regarding the presence of openly gay service members in the military. The courts' continued reluctance to address the issue from a searching rational basis perspective is not shared by military courts. Importantly, a growing number of military leaders have come to recognize the unnecessary waste in human

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390. See RAND STUDY, *supra* note 27, at 15-20.

391. Press Release, Michael D. Palm Ctr., As More Intelligence Agents Work with Military Personnel, Scholars Question Rationale for Pentagon's Gay Ban (July 15, 2002), available at [http://www.palmcenter.org/press/dadt/releases/as\\_more\\_intelligence\\_agents\\_work\\_with\\_military\\_personnel\\_scholars\\_question\\_rationale\\_for\\_pentagon\\_s\\_gay\\_ban](http://www.palmcenter.org/press/dadt/releases/as_more_intelligence_agents_work_with_military_personnel_scholars_question_rationale_for_pentagon_s_gay_ban).

392. See *id.*

393. See *id.*

resources represented by the policy and have called for its immediate abolition. Many members of the military share this sentiment, expressing no apprehension or fear of serving alongside gay people in uniform. The time has come for Congress to revisit the policy. However, this time, Congressional and military leaders must conduct an informed discussion of the real consequences of discrimination. Congress cannot once again be guided by uninformed preconceptions and irrational fears as it decides whether to continue a discriminatory practice that has been abandoned by the majority of civilized countries world-wide.