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DRONENBURG V. ZECH: FUNDAMENTAL RIGHTS AND THE MILITARY

I. INTRODUCTION

In *Dronenburg v. Zech*,¹ the United States Court of Appeals, District of Columbia Circuit, upheld the discharge of a Navy Petty Officer on the grounds that he had engaged in homosexual relations while a member of the service.² The initial basis for the discharge was Instruction 1900.9C,³ promulgated by the Secretary of the Navy, which provided for the “separation” from the naval service of any member who “solicits, attempts, or engages in homosexual acts.”⁴

In reaching its decision, the court held that the Navy had not violated Dronenburg’s constitutional rights to privacy and equal protection of the laws.⁵ The court also concluded that the Navy’s policy of discharging homosexual members was rationally related to a permissible objective⁶ and, in a larger context, that

1. 741 F.2d 1388 (D.C. Cir. 1984).

2. *Id.* at 1398.

3. SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216, *quoted in Dronenburg*, 741 F.2d at 1389.

4. *Id.* at 1389.

5. *Id.* at 1391. The fourteenth amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Aside from the right to equal protection expressly guaranteed by the amendment, the right to privacy is also found in the due process clause contained within it. *See Roe v. Wade*, 410 U.S. 113 (1973).

6. *Dronenburg*, 741 F.2d at 1398. The Supreme Court uses the deferential “rational basis” test when reviewing legislation challenged under the due process or equal protection clauses of the Constitution. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). In that case, the Court upheld the state regulation of opticians based upon a finding that the legislature enacting the law in question *might have had* any number of rational reasons for adopting the challenged restrictions. *Id.* at 487-88.

The more stringent “strict scrutiny” test, which demands that the state have a *compelling* interest in the object of the legislation and that the legislation be drawn as narrowly as possible, is used when the legislation under review abridges or impairs constitutional rights or other fundamental guarantees. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). There the Court struck down a state abortion statute which prohibited abortions (except in certain cases) at all stages of pregnancy, based on considerations of maternal and fetal safety. *Id.* at 150. In *Roe*, the Court found those considerations not sufficiently

there is no constitutional right to engage in homosexual relations.⁷ The broad dicta in *Dronenburg* and the fact that the court disposed of the appeal on general constitutional grounds applicable in a civil context makes the opinion of the court of more than passing interest to civilians. This Note will discuss some of the implications for both servicepeople and civilians arising out of *Dronenburg* and its forebears.

II. HOMOSEXUALS IN THE UNITED STATES ARMED FORCES — A BRIEF OVERVIEW

Despite its acceptance in the armed forces of many other nations,⁸ homosexuality has never been accepted in the American military.⁹ The military attitudes regarding homosexual relations have traditionally mirrored the attitudes of society at large,¹⁰ with the penalties for such "crimes against nature" including expulsion from the service and even prison terms.¹¹ This approach is in sharp contrast to many other nations, whose armed forces have no specific prohibitions against

compelling during the first trimester of pregnancy to justify the infringement of the constitutional right to privacy. *Id.* at 155.

7. *Dronenburg*, 741 F.2d at 1397.

8. See McCrary & Gutierrez, *The Homosexual Person in the Military and in National Security Employment*, in *HOMOSEXUALITY AND THE LAW* 115-46 (D. Knutson ed. 1980). Among the nations which do not specifically ban homosexuals from the military are Japan, Spain, Italy, and the Philippines. *Id.* at 116.

9. *Id.* See also Bourdonnay, *Military and Veterans*, in *SEXUAL ORIENTATION AND THE LAW* 6-3 to -4 (R. Achtenberg ed. 1985). Katherine A. Bourdonnay is an attorney in private practice in Seattle, specializing in military law. She is chairperson of the Draft Committee of ACLU-Washington and former Director of Military Counseling at the San Diego Gay Center. Her Article contains much valuable information for gay people in the armed forces or other governmental employment regarding rights and remedies.

10. Bourdonnay, *supra* note 9, at 6-3 to -4. Bourdonnay relates that one of George Washington's officers, Lt. Frederick Gotthold Enslin, was court-martialed for attempted sodomy. Upon conviction, he was ordered drummed out of camp by "all the Drummers and Fifers in the Army never to return." *Id.* General Washington approved Enslin's "discharge" "with Abhorrence and Detestation of Such Infamous crimes . . ." *Id.*

11. McCrary & Gutierrez, *supra* note 8, at 116. "From time to time throughout United States military history, there have also been pogroms to rid the services of any homosexual person who had escaped initial detection." *Id.* See also Bourdonnay, *supra* note 9, at 6-4. Throughout the Forties and Fifties, servicemembers accused of being gay were frequently threatened with court-martial in order to gain their acquiescence to discharge. *Id.* Article 125 of the Uniform Code of Military Justice permits punishment "as a court-martial may direct" for a conviction of the crime of "unnatural carnal copulation with another person of the same or opposite sex." 10 U.S.C. § 925 (1975). The sentence for consensual sodomy where the participants are over 16 years of age cannot exceed five years at hard labor. *Id.* § 856.

homosexuals.¹²

Generally, the various branches of the United States armed forces have promulgated and enforced their own separate regulations regarding homosexuals, on a branch-wide basis.¹³ Staff in all branches have sought and continue to seek to exclude homosexuals.¹⁴ When a homosexual is discovered or “confesses,” the service involved usually encourages the resignation of that person.¹⁵ Sometimes the embattled servicemember can strike a deal whereby he or she “voluntarily” resigns from the service, and thus avoids administrative proceedings.¹⁶ When a homosexual servicemember refuses to cooperate with this general scheme, the military’s elaborate administrative machinery can be brought to bear upon him.¹⁷

Typically, the forced separation of a gay servicemember follows the same basic course in all branches of the service.¹⁸ Once a complaint has been received about a suspected homosexual, an investigative agency goes to work.¹⁹ The investigator(s) talks to the complainant,²⁰ to witnesses,²¹ and sometimes to the suspect himself.²² The agency composes and submits a final report to the suspect’s commanding officer. The commanding officer then decides if there is sufficient evidence to proceed.²³ If not, the process ends at that point. If the commanding officer elects to pro-

12. McCrary & Gutierrez, *supra* note 8, at 116.

13. See Bourdonnay, *supra* note 9, at 6-34 n.82 (citing various regulations by branch).

14. Bourdonnay, *supra* note 9, at 6-3 to -4. The regulations and branches of service represented are: Army, AR 635-200, Ch. 15; Air Force, AFR 39-10; Navy, NAVMILPERSMAN 3630400; and Marine Corps, MARCORSEPMAN 6207. *Id.* at 6-4.

15. Bourdonnay, *supra* note 9, at 6-5 to -6.

16. *Id.* at 6-6.

17. *Id.* The textual discussion of the administrative discharge procedure that follows is taken largely from Bourdonnay, *supra* note 9, at 6-10 to -21.

18. *Id.* at 6-10 to -11.

19. *Id.* at 6-10. In the case of the Navy, this agency is the Naval Investigative Service (NIS).

20. *Id.* at 6-9 to -10. The complainant could be almost anyone, from an aggrieved lover to the recipient of unwanted homosexual advances to an informant. *Id.* Even military chaplains and psychiatrists can be complainants, as they are not obligated to treat confessions of homosexuality with confidentiality. *Id.*

21. *Id.* at 6-10.

22. *Id.* at 6-10.

23. *Id.* at 6-11. The suspect’s commanding officer exercises a great deal of discretion in deciding how accusations of homosexuality against one of his subordinates will be handled. *Id.* at 6-11, 6-15 to -17.

ceed, the suspect is informed that he is being considered for administrative discharge for homosexuality.²⁴ The suspect is also advised of his rights to silence, counsel, and free services of a military lawyer.²⁵ In addition, the suspect may also hire a civilian attorney, if he or she can afford one.²⁶

Once the suspect's commanding officer has made the decision to go forward, he appoints a recorder to take charge of the "prosecution." The recorder presents the service's case against the accused.²⁷ The commander also appoints at least three officers to sit on the Administrative Discharge Board.²⁸ In Navy proceedings, the officer of the rank of lieutenant commander or above is senior member or president of the Board.²⁹ During the hearing itself, the president rules on objections, but a majority of the Board can overrule him.³⁰

At the hearing, defendant's counsel can interview the Board members and challenge them for cause,³¹ usually prejudice.³² Those Board members whom defense counsel does not challenge then make recommendations to the suspect's commanding officer about whether or not to keep the challenged members on the Board.³³ The commanding officer has the power to ignore the

24. *Id.* at 6-11.

25. *Id.* at 6-11 to -12.

26. *Id.* at 6-12. Bourdonnay suggests that retention of a civilian attorney may result in a more forceful defense, since military lawyers are frequently overworked and there is always a danger of conflict of interest when a military attorney openly opposes the aims of his superiors. *Id.*

27. *Id.* at 6-15.

28. *Id.* at 6-16.

29. *Id.* at 6-15. The suspect's commanding officer exercises a great deal of control and influence in the entire chain of events following accusations of homosexuality against members of his command. *Id.* at 6-11, 6-15 to -17. The commanding officer not only appoints the "prosecutor," but also the "judges" who sit on the Board itself. *Id.* It thus seems clear that a commanding officer who seeks to influence the outcome of a hearing has a very good chance of doing so, provided he knows his officers well. *Id.* See also *infra* text accompanying notes 33-34 for further discussion of the commanding officer's role.

30. Bourdonnay, *supra* note 9, at 6-18 n.47.

31. *Id.* at 6-16.

32. *Id.* at 6-16 to -17. Bourdonnay urges defense counsel to question Board members extensively to elicit their views on gay rights. *Id.* In addition, she also suggests using the opportunity to discuss the nature of the accusations and the standard of proof necessary to convince the Board members of guilt. In this way, Board members can perhaps be sensitized with regard to the relative ease with which accusations are made, and perhaps prejudices can be somewhat allayed. *Id.*

33. *Id.* at 6-17.

challenges and allow the members involved to sit on the Board.³⁴ Should he decide to replace them, the defendant's counsel may also challenge the new members, following the same procedures.³⁵

For some Administrative Discharge Board hearings, the commanding officer involved may appoint a nonvoting legal advisor³⁶ to aid Board members, but this is not mandatory.³⁷ The hearings are often very informal and often conducted according to very lax rules of evidence.³⁸ This is especially true at hearings prompted by accusations of homosexuality, where the chief source of evidence is hearsay or innuendo. In such situations, notes one writer, "the regulations are frequently, blatantly disregarded."³⁹

At the hearing, the defendant may remain silent⁴⁰ or may make an unsworn statement without being cross-examined.⁴¹ If he chooses to make a sworn statement, however, he is subject to cross-examination.⁴² In theory, no adverse inferences should be drawn from a defendant's refusal to submit to cross-examination,⁴³ but the fact remains that refusal to make a sworn statement, in a military or a civil court, frequently carries with it a stigma of guilt.⁴⁴

Following the presentation of evidence, the Board deliberates, returning findings of fact and recommending retention or discharge of the defendant.⁴⁵ The Separation Authority,⁴⁶ which has the power to approve, disapprove, or modify the decision,

34. *Id.*

35. *Id.* at 6-16 to -18.

36. *Id.* at 6-13 n.36.

37. *Id.*

38. *Id.* at 6-18. The informality of such proceedings should be clear from the fact that the defendant's commanding officer exercises almost supreme power in determining the outcome. *See supra* notes 23, 29 and accompanying text. This power is enhanced by the fact that strict rules of evidence are not used at the hearing itself. Bourdonnay, *supra* note 9, at 6-18.

39. Bourdonnay, *supra* note 9, at 6-18.

40. *Id.*

41. *Id.*

42. *Id.* at 6-18 to -19.

43. *Id.* at 6-19.

44. *Id.*

45. *Id.*

46. *Id.*

then reviews the Board's decision.⁴⁷ The Separation Authority has wide discretion to order a new administrative discharge hearing,⁴⁸ to upgrade the level of the discharge,⁴⁹ or even to recommend a discharge where the original hearing Board has recommended retention.⁵⁰ The final power to review the decision and/or upgrade the level of the discharge rests with the Secretary of the Navy.⁵¹ Should the Secretary decide not to amend the discharge recommendation, the defendant is informed that the discharge has been approved and outprocessing will begin, usually within a few days.⁵² At that point, the only feasible option for a servicemember who wishes to remain in the Navy is to seek an injunction from the relevant United States district court, pending judicial review.⁵³ District courts have frequently granted summary judgment in favor of the service seeking the discharge,⁵⁴ although there have been some exceptions over the years.⁵⁵ In *Matlovich v. Secretary of the Air Force*,⁵⁶ for example, the District of Columbia Circuit Court of Appeals stayed the discharge of a much-decorated sergeant who had admitted to being homosexual.⁵⁷ The court found that the Administrative Discharge Board's findings were "conclusory . . . without any real explanation"⁵⁸ of why the Air Force had not exercised its right

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 6-20 to -21. The Secretary almost never modifies a discharge order, though upgrading of discharges is not uncommon. *See, e.g., Dronenburg*, 741 F.2d at 1389.

52. Bourdonnay, *supra* note 9, at 6-21. "Outprocessing" is simply the administrative process through which an active duty military member is discharged.

53. *Id.* at 6-21. The jurisdiction of federal courts to review the legality of military discharges was established by the Supreme Court in *Harmon v. Brucker*, 355 U.S. 579 (1958). In that case, involving a soldier who sought an injunction to force the Army to upgrade his dishonorable discharge to honorable, the Court held that the district court had the power to determine its jurisdiction over the matter *and* to determine if the Secretary of the Army had exceeded his authority in granting Harmon the dishonorable discharge. *Id.* at 582.

54. *See, e.g., Dronenburg*, 741 F.2d at 1389. *See also* *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980). In that case, both of Saal's co-plaintiffs were appealing from summary judgments granted in favor of the Navy. *Id.* at 794, 795.

55. *See, e.g., Saal v. Middendorf*, 427 F. Supp. 192 (Ca. 1977), *rev'd sub nom.* *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1980). In *Saal*, the district court found that the Air Force's systematic expulsion of homosexual servicemembers was irrational, "at least as applied to her." *Saal*, 427 F. Supp. at 202. *See infra* text accompanying notes 65-67 for further discussion.

56. 591 F.2d 852 (D.C. Cir. 1978).

57. *Id.* at 861.

58. *Id.* at 855.

to retain Matlovich in the service.⁵⁹ The Air Force regulation under which Matlovich was ordered discharged permitted retention in unusual circumstances provided that the airman's ability to continue to serve had not been compromised.⁶⁰ Because neither the Board nor the Secretary of the Air Force had explained how this rule had been applied in Matlovich's case, the court ordered the case remanded,⁶¹ so that the Air Force could present a more complete explanation and the court, in turn, could determine if that exercise of discretion was "arbitrary, capricious, or unlawful."⁶² Following remand, Matlovich agreed not to return to active duty, in return for an out-of-court settlement.⁶³

When permitting a full hearing on the issues, most courts have ruled in favor of the military.⁶⁴ One exception was *Saal v. Middendorf*,⁶⁵ in which the district court found that the Navy's refusal to allow an otherwise exemplary servicemember to re-enlist solely because of her homosexuality was irrational and capricious, "at least as applied to her."⁶⁶ The district court ordered the Navy to consider Saal's request to re-enlist in the light of all relevant factors and "free of any policy of mandatory exclusion."⁶⁷ The United States Court of Appeals for the Ninth Circuit reversed.⁶⁸ It held that the Navy's actions had not violated the due process clause,⁶⁹ and that the right to privacy was not applicable to homosexual relations, at least not in a military context.⁷⁰ The Supreme Court refused to grant certiorari in the

59. *Id.*

60. *Id.*

61. *Id.* at 857, 861.

62. *Id.* at 857. If the regulation were found to be "arbitrary, capricious, or unlawful," then presumably the classification(s) contained within it would have been struck down by the due process clause and/or the equal protection clause. See U.S. CONST. amend. XIV, § 1.

63. Bourdonnay, *supra* note 9, at 6-5. Disappointing as the denouement of *Matlovich* was, it is difficult to imagine Sergeant Matlovich actually returning to active duty, considering the resentments and notoriety that would have followed him throughout the rest of his military career.

64. McCrary & Gutierrez, *supra* note 8, at 124.

65. 427 F. Supp. 192 (Ca. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1980).

66. *Saal*, 427 F. Supp. at 202.

67. *Id.* at 203.

68. Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980).

69. *Id.* at 812.

70. *Id.* at 810-11. The court accordingly applied the "rational basis" test, and found

case.⁷¹

The regulations governing the discharge of homosexuals from the military are nominally promulgated by the secretary of each service.⁷² They are regularly amended or reworded,⁷³ but there has been very little change in the last five years.⁷⁴ During litigation, the branch involved usually admits that not *all* gay servicemembers are automatically discharged.⁷⁵ Nevertheless, it is difficult, considering the excellent service records of some of those who have been discharged,⁷⁶ to find any hard and fast standards with regard to a decision to retain gay servicemembers.⁷⁷ The question may be meaningless after the reversal of *Saal*, which suggested that, for the time being at least, the armed forces enjoy wide discretion in discharging or retaining gay members.⁷⁸

that the Air Force's policy of discharging homosexuals was rationally related to several legitimate goals, including maintenance of security, discipline, and morale. *Id.*

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

72. *Bourdonnay*, *supra* note 9, at 6-3, 6-6. Though each secretary has some discretion in formulating the regulations for his or her branch, the regulations relating to homosexuals are very similar in all branches—and similarly sweeping in their effects. *Id.*

73. *Id.* at 6-5 to -6. After the reversal of *Saal*, a "new tightening of policy" became apparent in the Defense Department. *Id.*

74. *Id.*

75. *See Beller v. Middendorf*, 632 F.2d 788, 802 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980). In *Beller*, the court noted that the Navy did not discharge *all* homosexuals it discovered in the service. *Id.* at 805. At the same time, the court also found that the Navy's policy of discharging homosexuals, when it was applied, did not violate the constitutional right to privacy. *Id.* at 810.

76. As noted, Sergeant Matlovich had received numerous commendations and decorations during his military career. *Matlovich*, 591 F.2d at 854 n.4. In fact, Sergeant Matlovich was a recipient of the Purple Heart and the Bronze Star, and had volunteered for service in Vietnam. *Id.* "Airman" Saal also had a fine service record, having been lauded for her "fine military behavior" and "[h]ighly recommended for advancement and reenlistment." *Saal*, 427 F. Supp. at 203-04 (emphasis in original). *See also* *Nelson v. Miller*, 373 F.2d 474, 476 (3rd Cir. 1967) (a highly qualified electronics engineer was ordered discharged from the Navy for one incident of homosexuality, despite ten years of service, and despite the fact that the Administrative Discharge Board had unanimously recommended retention).

77. *See supra* note 76 and accompanying text.

78. The *Beller* court, while finding the Navy regulations on homosexuality "perhaps broader than necessary," nevertheless upheld them as "a reasonable effort to accommodate the needs of the government with the interests of the individual." *Beller v. Middendorf*, 632 F.2d 788, 812 (9th Cir. 1980).

III. THE *DRONENBURG* DECISION

A. FACTS OF *DRONENBURG*

James L. Dronenburg joined the Navy at the age of eighteen. He was trained as a Korean linguist and cryptographer. During his service with the Navy, he compiled an impressive record of commendations for job performance and earned a top security clearance.⁷⁹ Dronenburg had been promoted to Petty Officer after nine years in the Navy when he was enrolled as a student at the Defense Language Institute in Monterey, California.⁸⁰

After a nineteen-year-old seaman recruit, who was also a student at the Language Institute, made sworn statements accusing Dronenburg of repeated homosexual acts,⁸¹ the Navy began an investigation.⁸² After first denying the allegations,⁸³ Dronenburg admitted that he had engaged in homosexual relations in a barracks on the Navy base.⁸⁴ Shortly thereafter, the Navy informed Dronenburg that it would seek to administratively discharge him.⁸⁵

During a two-day hearing before an Administrative Discharge Board, Dronenburg testified at length with counsel present.⁸⁶ He again admitted having engaged in the homosexual acts of which he was accused.⁸⁷ The three-member Board recommended that Dronenburg be discharged;⁸⁸ two members suggested that the discharge be characterized as "general" and the third member voted for an "honorable" discharge.⁸⁹ The Secre-

79. *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* The general discharge is also known as a discharge "under honorable conditions." C. SHANOR & T. TERRELL, *MILITARY LAW IN A NUTSHELL* 239 (1980). Such a discharge is usually given for "unsuitability, which indicates some type of character problem over which the servicemember has no control." *Id.* Though a general discharge may carry some degree of stigma for the veteran seeking post-service employment, it is not a bar to the collection of military benefits. See 38 C.F.R. § 3.12(a) (1985).

tary of the Navy reviewed the case at Dronenburg's request, affirming the discharge order, but directing that the discharge be "honorable."⁹⁰ Following this decision, Dronenburg challenged the discharge order in federal district court.⁹¹ The district court granted summary judgment for the Navy, and Dronenburg appealed to the United States Court of Appeals, District of Columbia Circuit.⁹²

B. THE COURT'S ANALYSIS

The court in *Dronenburg* relied heavily on *Doe v. Commonwealth's Attorney*,⁹³ in which a Virginia district court upheld a state law which made it a felony for any person to "carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge"⁹⁴ The Supreme Court summarily affirmed *Doe*,⁹⁵ leading the court in *Dronenburg* to conclude that if a civil statute that prohibits sodomy (among other acts) is constitutional, then a military regulation which has the same effect is certainly permissible, given the need for even greater restrictions on personal freedom among the personnel of the armed forces.⁹⁶

Dronenburg contended that *Doe* was not an authoritative decision by the Supreme Court,⁹⁷ since the plaintiffs in that case were homosexuals who had not been charged under Virginia's sodomy statute, but who merely sought a declaratory judgment that the law as written was unconstitutional.⁹⁸ Viewed in this

90. *Dronenburg*, 741 F.2d at 1389.

91. *Id.*

92. *Id.*

93. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

94. VA. CODE § 18.2-361 (1982).

95. 425 U.S. 901 (1976).

96. *Dronenburg*, 741 F.2d at 1392. The court based this view on cases such as *Parker v. Levy*, 417 U.S. 733 (1974), where the Court upheld the court-martial and conviction of an Army officer accused of making statements disapproving of the war in Vietnam. The Court found that the Army's need for discipline and combat readiness necessitated a "different application" of first amendment protections to servicemembers. *Id.* at 758. See also *Brown v. Glines*, 444 U.S. 348 (1980), where the Court upheld an Air Force regulation which prohibited servicemembers from circulating petitions intended for Congress on military bases without the express permission of the base commander. *Id.* at 361. Needless to say, a first amendment decision is not necessarily dispositive of the issues in a case based on the right to privacy.

97. *Dronenburg*, 741 F.2d at 1392.

98. *Id.*

light, *Doe* would represent merely a concurrence in the *judgment* by the Supreme Court, but not necessarily an endorsement of the reasoning of the district court on the merits of the case.⁹⁹ The Supreme Court might have affirmed based on plaintiffs' lack of standing, rather than on the district court's constitutional analysis. Admitting for the sake of argument that *Doe* was "somewhat ambiguous precedent,"¹⁰⁰ the *Dronenburg* court proceeded to review the plaintiff's appeal and its constitutional bases.¹⁰¹

Dronenburg based his appeal on two grounds: the right to privacy included in the due process clause of the fourteenth amendment and the equal protection clause of the same amendment.¹⁰² The court's analysis and disposition of both claims was somewhat similar.¹⁰³

In his right to privacy argument, *Dronenburg* relied on *Griswold v. Connecticut*,¹⁰⁴ the first Supreme Court case to recognize a general constitutional right to privacy.¹⁰⁵ In *Griswold*, the Court invalidated a Connecticut law which prohibited the use of contraceptives,¹⁰⁶ holding that such a law was violative of a constitutionally-based right to privacy.¹⁰⁷ This right was not found in any specific section or amendment of the Constitution, but rather in various penumbras or emanations from several distinct amendments.¹⁰⁸ Portions of the "several fundamental constitu-

99. *Id.* See also *Fusari v. Steinberg*, 419 U.S. 379 (1975) (Burger, C.J., concurring).

When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was settled. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.

Id. at 391-92.

100. *Dronenburg*, 741 F.2d at 1392.

101. *Id.* at 1391-98.

102. U.S. CONST. amend. XIV, section 1 provides that no state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

103. *Dronenburg*, 741 F.2d at 1392-96, 1397-98.

104. 381 U.S. 479 (1965).

105. *Id.* at 485.

106. *Id.* (citing CONN. GEN. STAT. § 53-32 (1958)).

107. *Griswold*, 381 U.S. at 484-86.

108. *Id.*

tional guarantees"¹⁰⁹ found in the first, third, fourth, fifth, ninth, and fourteenth amendments, when taken collectively, were found to create a right of privacy inherent in marriage which the state could not violate.¹¹⁰ Connecticut's anti-contraceptive statute could not be enforced without violating that right, by virtue of "the sanctity of the marital bedroom."¹¹¹ Dronenburg also relied on the privacy cases which followed *Griswold*, particularly *Eisenstadt v. Baird*¹¹² and *Roe v. Wade*.¹¹³ *Eisenstadt* invalidated a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons.¹¹⁴ The basis for the *Eisenstadt* holding was the equal protection clause, and the Court emphasized that the right to privacy applied equally to *individuals*, whether married or single, in "matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹¹⁵

In *Roe v. Wade*, the Supreme Court held that no state could prevent a woman from terminating her pregnancy by abortion during the first trimester of pregnancy.¹¹⁶ The right to privacy discussed in *Roe* was founded squarely in the fourteenth amendment's concepts of "personal liberty and restrictions upon state action"¹¹⁷

Based on *Griswold* and its progeny, Dronenburg asserted that his right to privacy guaranteed personal autonomy and a right to control intimate personal decisions about one's own body, absent a compelling state interest in interfering with those rights.¹¹⁸ In *Roe v. Wade*, the Court employed the strict scrutiny test, the test normally used by the Supreme Court when reviewing enactments that implicate constitutional guarantees and "fundamental" rights.¹¹⁹ Nevertheless, the District of Columbia

109. *Id.* at 485.

110. *Id.* at 484-86.

111. *Id.* at 486.

112. 405 U.S. 438 (1972).

113. 410 U.S. 113 (1973).

114. *Eisenstadt*, 405 U.S. at 453.

115. *Id.* at 453.

116. *Roe*, 410 U.S. at 163.

117. *Id.* at 153.

118. *Dronenburg*, 741 F.2d at 1391.

119. *Roe*, 410 U.S. at 162-64. Applying the strict scrutiny test in the abortion context, the Court found compelling state interests in protecting both maternal and fetal health, but these interests were secondary to the individual's right of privacy until after

Circuit Court chose to interpret the right to privacy quite narrowly,¹²⁰ as encompassing only the right to make personal decisions about procreation and childbearing.¹²¹ Having found the right to privacy inapplicable to the issue of homosexual activities,¹²² the court asserted further that the cases cited by *Dronenburg* could not be extrapolated to cover the question of homosexuals in the military.¹²³ Accordingly, the *Dronenburg* court applied only the rational basis test to the Navy regulation in question.¹²⁴

The rational basis test is the test normally used in due process and equal protection analysis when fundamental rights or suspect classifications are not involved.¹²⁵ A court applying the test to a statute must ask if the enactment in question bears a rational relation to a permissible and legitimate state interest. If a rational basis for the law is present and it is not arbitrary or capricious, the court must allow it to stand.¹²⁶ The court in *Dronenburg* found numerous rational bases for Instruction 1900.9C,¹²⁷ including the Navy's need for discipline and morale,¹²⁸ the possibilities of unrest if openly gay sailors were al-

the first trimester of pregnancy. *Id.* at 163.

120. *Dronenburg*, 741 F.2d at 1395-96.

121. *Id.* "The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct." *Id.*

122. *Id.*

123. *Id.* at 1396. The court explained:

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court. It is true that the principle appellant advances would explain all of these cases, but so would many other, less sweeping principles.

Id.

124. *Id.* at 1397-98. In applying minimal scrutiny to the Navy's treatment of homosexuals, the court stated, "The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate." *Id.* The court concluded that the presence of homosexuals in a military unit is "almost certain to be harmful to morale and discipline." *Id.* at 1398.

125. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See also *supra* note 6 and accompanying text.

126. *Williamson*, 348 U.S. at 487-88.

127. SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216, quoted in *Dronenburg*, 741 F.2d at 1389. As noted, the Instruction provided for the discharge of any Navy personnel who "solicits, attempts, or engages in homosexual acts." *Id.*

128. *Dronenburg*, 741 F.2d at 1398.

lowed to remain in the Navy,¹²⁹ and the danger of "homosexual seduction" practiced by military superiors over lower ranking servicemembers.¹³⁰ Finding that the Navy's discharge of homosexuals was a rational means of effecting a legitimate interest,¹³¹ the court dismissed Dronenburg's right to privacy arguments.¹³²

The court analyzed Dronenburg's equal protection arguments in much the same way.¹³³ Dronenburg contended that permitting discrimination within the Navy against homosexuals would result in increased discrimination directed against other "unpopular" minority groups within the armed forces.¹³⁴ The court rejected this argument as "completely frivolous,"¹³⁵ noting that a failure to grant constitutional protections to homosexuals did not thereby destroy established protections of other racial and ethnic minorities.¹³⁶

The court further found that naval regulations based on morality were not *ipso facto* violative of the equal protection clause.¹³⁷ Finding moral values pervasive in most of society's legislation, the court emphasized that "majority morality" is "conclusively valid,"¹³⁸ so long as the enactments involved are not in themselves in conflict with the Constitution.¹³⁹ Since the court had already found that there was no constitutional right to en-

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1395-97. "[T]his regulation is plainly a rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces." *Id.* at 1398.

133. *Id.* at 1397-98.

134. *Id.* at 1397.

135. *Id.*

136. *Id.* "The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights that are solidly based in constitutional text and history." *Id.*

137. *Id.*

138. *Id.*

139. *Id.* "When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason." *Id.* While military authorities are accountable to the President of the United States, the difficulty of repealing or amending a military regulation through the political process is self-evident. This is especially true in light of the restrictions put on the first amendment rights of members of the armed forces, as alluded to earlier. See *supra* note 96 and accompanying text.

gage in homosexual conduct, either under the aegis of the right of privacy or as a fundamental right, and that the Navy regulations involved were rationally related to legitimate ends, the court rejected Dronenburg's equal protection arguments.¹⁴⁰ The court concluded by suggesting that the question of gay rights was a political one, not one for the courts.¹⁴¹

IV. IMPACT AND SIGNIFICANCE OF *DRONENBURG*

The decision in *Dronenburg v. Zech*¹⁴² is one more brick in the judicial wall which declares that there is no constitutional protection for homosexual activities.¹⁴³ The cornerstone of this wall is the oft-cited decision in *Doe v. Commonwealth's Attorney*.¹⁴⁴ But even without *Doe*, as the *Dronenburg* court made clear,¹⁴⁵ there is a general reluctance on the part of judges to strike down anti-homosexuality legislation because of the view that such decisions "create" new constitutional rights.¹⁴⁶ The plaintiff in *Dronenburg*, of course, maintained that it was not the creation of new constitutional rights that he was seeking, but simply the recognition of rights that he argued were inherent in the right to privacy.¹⁴⁷

Is the court of appeals' interpretation of *Griswold v. Connecticut*¹⁴⁸ and its progeny¹⁴⁹ consistent with the meaning and

140. *Dronenburg*, 741 F.2d at 1398.

141. *Id.* at 1397. "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." *Id.*

142. 741 F.2d 1388 (D.C. Cir. 1984).

143. *Id.* at 1397.

144. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

145. *Dronenburg*, 741 F.2d at 1392. "But even should we agree that *Doe v. Commonwealth's Attorney* is somewhat ambiguous precedent, we would not extend the right of privacy created by the Supreme Court to cover appellant's conduct here." *Id.*

146. *Id.* at 1396-97.

147. *Id.* at 1391, 1395-96. The record is sparse regarding details of Dronenburg's relationship with the seaman recruit who implicated him in homosexual conduct. In this regard, the court stated only that the young man "chose to break off the relationship." Certainly the question arises of whether or not a gay "marriage" or "family" situation might be more likely to find protections under the right of privacy than simply homosexual activity in general. The court in *Dronenburg* did not address this issue, but it is certainly significant in light of two more recent decisions. See *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); *Roberts v. U.S. Jaycees*, 103 S. Ct. 3244 (1984). See also *infra* note 201 and accompanying text for discussion.

148. 381 U.S. 479 (1965).

spirit of those cases? Since the Supreme Court recognized the constitutional right of privacy in 1965,¹⁵⁰ it has been expanded and rephrased in numerous ways. For example, in *Eisenstadt v. Baird*,¹⁵¹ this right was held to encompass “matters so fundamentally affecting a person as the decision whether to bear or beget a child,”¹⁵² thus suggesting that there were some areas *in addition to* procreation and contraception that were subject to the protection of the right to privacy.¹⁵³ The *Dronenburg* court refused to consider the question of whether or not one’s choice of sexual partner was a matter as fundamental as the decision to become a parent, claiming that *Eisenstadt* provided no criteria for determining what rights were included in that category.¹⁵⁴

Similarly, in discussing *Roe v. Wade*,¹⁵⁵ the *Dronenburg* court acknowledged the broad implications of the decision,¹⁵⁶ but emphasized the Supreme Court’s observation in *Roe* that the right to privacy did not guarantee an unlimited right to do as one pleased with one’s body.¹⁵⁷ But the limiting factors listed in *Roe* were the state’s interests in “safeguarding health, in

149. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

150. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

151. 405 U.S. 438 (1972).

152. *Id.* at 453.

153. *Id.* The open-endedness of the language used in *Eisenstadt* is undeniable, though time and events have demonstrated a general reluctance to extend the right of privacy beyond the areas of procreation and contraception. See, e.g., *Dronenburg*, 741 F.2d at 1395-96. See also *supra* notes 121 & 123 (language used in *Dronenburg*).

154. *Dronenburg*, 741 F.2d at 1393-94. Since choice of sexual partner is a vital prerequisite to making the decision to become a parent, it might well be argued that the right to choose one’s spouse or sexual partner *does* fit within *Eisenstadt*’s contemplation of fundamental rights (emphasis added). See *Eisenstadt*, 405 U.S. at 453. Certainly the Supreme Court has been staunch in its support for the right to marry, and for the right to choose a husband or wife, unhampered by irrational state regulations. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down a state law which made it a crime for any white person to intermarry with someone of another race. *Id.* at 11-12. See also *Zablocki v. Redhail*, 434 U.S. 374 (1978), in which the court invalidated a Wisconsin statute which prevented the issuance of a marriage license to any person who was delinquent in support payments to minor children not in his or her custody. *Id.* at 377. The basis for the decision in both cases was the equal protection clause of the fourteenth amendment. *Zablocki*, 434 U.S. at 377; *Loving*, 388 U.S. at 12. In addition, in *Loving*, the Court noted that the due process clause of the same amendment would also have acted to invalidate the statute. *Id.* at 12.

155. 410 U.S. 113 (1973).

156. *Dronenburg*, 741 F.2d at 1395.

157. *Id.* The court also remarked that *Roe* “provided no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy.” *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

maintaining medical standards, and in protecting potential life,"¹⁵⁸ all matters that arguably do not arise in the choice of a sexual partner. Even assuming that a statute barring homosexual activities might be based partly on a desire to stem the spread of Acquired Immune Deficiency Syndrome (AIDS),¹⁵⁹ there is still some question of whether or not such a purpose would bear a rational relationship to the means used to implement it. The severity of AIDS, which has no known cause or cure, and the fact that some seventy percent of its victims are homosexual or bisexual¹⁶⁰ might lend considerable support for *any* law regulating homosexual activities, at least in the search for any articulable rational basis.¹⁶¹ One writer has opined, "[T]he nature of the threat may be so compelling that most courts would find that closing [gay] bathhouses would withstand any degree of scrutiny."¹⁶² In any event, the Navy's regulations have nothing to do with the physical health of servicemembers, at least at present; discipline and morale are clearly the goals of Instruction 1900.9C.¹⁶³ The emphasis on health in *Roe* thus seems inapposite in a discussion of a homosexual's right to privacy. The *Dronenburg* court concluded the matter by noting that both *Roe* and *Eisenstadt* had left the right to privacy somewhat general and undefined.¹⁶⁴ It used this fact as a justification for removing the plaintiff's claim from the right to privacy arena.¹⁶⁵

The *Dronenburg* court's refusal to grant private, consensual homosexual conduct the protections of the equal protection

158. *Roe*, 410 U.S. at 152-53.

159. See Comment, *Preventing the Spread of AIDS By Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, 15 GOLDEN GATE U.L. REV. 301 (1985), for a general discussion of AIDS and its symptoms, as well as the constitutional ramifications of attempts to halt the spread of the disease.

160. *Id.* at 303.

161. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); see also *supra* note 6 (discussing *Williamson*). At its most deferential, the rational basis tests seeks only any conceivable rational basis for the legislation under consideration. *Williamson*, 348 U.S. at 487-88.

162. Comment, *supra* note 159, at 323.

163. *Dronenburg*, 741 F.2d at 1389 (quoting SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216). The Instruction itself states of homosexuals in the armed forces: "The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security, and morale." *Id.*

164. *Id.* at 1395.

165. *Id.*

clause was brief and conclusory.¹⁶⁶ The court simply asserted that a finding that there was a fundamental right to engage in homosexual conduct in private would necessarily grant protected status to "any and all private sexual behavior."¹⁶⁷ The court offered no support for this view,¹⁶⁸ but simply pressed on to the application of the rational basis test. Again, the regulation passed muster.¹⁶⁹

In his dissent in *Doe v. Commonwealth's Attorney*,¹⁷⁰ District Judge Merhige asserted his view that private consensual sex acts between adults were matters in which the state had no legitimate interest, absent any evidence of harm.¹⁷¹ This view has been adopted by a few courts, most recently by the United States Court of Appeals, Eleventh Circuit, in *Hardwick v. Bowers*.¹⁷²

In *Hardwick*, the court struck down a Georgia statute prohibiting sodomy,¹⁷³ finding that it violated the fundamental constitutional rights of the plaintiff, a young man who was arrested and charged with violating the statute.¹⁷⁴ The prosecutor refused to present the case to a grand jury and Hardwick was released.¹⁷⁵ Nevertheless, the court found that Hardwick had

166. *Id.* at 1396. Indeed, the *Dronenburg* court stated at the outset that resolution of the plaintiff's equal protection arguments was "to some extent dependent" upon the resolution of his right to privacy claims. *Id.* at 1391. This may explain the rather brief treatment of *Dronenburg's* equal protection claim.

167. *Id.* at 1396. "We 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.*

168. The conclusion that protecting consensual homosexual relations through the right to privacy amounts to constitutional protection for *all* sexual acts is without a logical basis. California has essentially decriminalized sodomy when performed by consenting adults under Penal Code section 286. CAL. PENAL CODE § 286 (West 1985 & Supp. 1986). That statute makes sodomy a crime only when it is accomplished by force, performed on a minor, or committed by jail or prison inmates. *Id.* Needless to say, the liberalizing of California's sex laws in this area has not resulted in the legalization of prostitution, child molestation, or sado-masochism.

169. *Dronenburg*, 741 F.2d at 1397-98.

170. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting).

171. *Id.* at 1203.

172. 760 F.2d 1202 (11th Cir.), *cert. granted*, 106 S. Ct. 342 (1985).

173. GA. CODE § 16-6-2 (1984) which makes it a felony to perform or submit to "any sexual act involving the sex organs of one person and the mouth or anus of another. *Id.*

174. *Hardwick*, 760 F.2d at 1211.

175. *Id.* at 1204.

standing to challenge the law, based on his reasonable subjective fear of future prosecution on the same charge.¹⁷⁶

The *Hardwick* court based its decision squarely on the right to privacy,¹⁷⁷ as enunciated in *Griswold*,¹⁷⁸ *Eisenstadt*,¹⁷⁹ and other cases in which the Supreme Court defended the right to marry.¹⁸⁰ Significantly, the court noted, "For some, the sexual activity in question here serves the same purpose as the intimacy of marriage."¹⁸¹ The *Hardwick* court also placed great weight on the fact that the plaintiff planned to carry on homosexual activities in private.¹⁸² Finding an absence of "public ramifications"¹⁸³ in *Hardwick's* case, the court applied the protections of the right to privacy to his case, and employed the strict scrutiny test.¹⁸⁴ Because *Hardwick's* homosexual activities were part of an intimate association analogous to marriage and would be carried on in private, the court found that the Georgia sodomy statute implicated fundamental rights.¹⁸⁵ The court therefore remanded the case, requiring the state of Georgia to prove a compelling state interest and that the statute in question was the most narrowly drawn means of serving that interest.¹⁸⁶

176. *Id.* at 1205-06.

177. *Id.* at 1212.

178. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

179. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

180. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). See *supra* note 154 for a discussion of both cases.

181. *Hardwick*, 760 F.2d at 1212.

182. *Id.* at 1211, 1212.

183. *Id.* at 1212. The court in *Hardwick*, analogized private consensual homosexual activity to the private possession of obscene materials for one's own use. *Id.* The latter activity was found to be protected by the right to privacy in *Stanley v. Georgia*, 394 U.S. 557 (1969), a case involving obscene films which the defendant possessed for his own private viewing. One might wonder, however, if the "public ramifications" of homosexuality might be more serious or costly in a military setting. The comparison may be more apt if we assume the existence of actual privacy for those homosexuals within the armed forces who wish to carry on relationships and remain in the military. In reality, such seclusion might be hard to obtain for the average servicemember during the day-to-day rigors of active duty.

184. *Hardwick*, 760 F.2d at 1211, 1213. After subjecting the statute in question to strict scrutiny, the court concluded that the plaintiff's fundamental rights were implicated. Accordingly, the court remanded the case, ordering that Georgia prove that the law served a compelling state interest through the most narrowly drawn means. *Id.* at 1211, 1213.

185. *Id.* at 1211.

186. *Id.* at 1211, 1213.

The Supreme Court has since granted certiorari in *Hardwick*.¹⁸⁷ The *Hardwick* court's heavy reliance on similarities between the plaintiff's homosexual relationships and a heterosexual marriage are especially interesting in light of some of the dicta in the recent Supreme Court case of *Roberts v. United States Jaycees*.¹⁸⁸ In *Jaycees*, the Supreme Court rejected a challenge by the Jaycees to a Minnesota law which prohibited discrimination based on gender in "public accommodations."¹⁸⁹ In holding that the statute did not violate the right to privacy of the members of the Jaycees,¹⁹⁰ Justice Brennan noted that the fourteenth amendment right to privacy protects personal choices to enter into certain types of intimate relationships,¹⁹¹ primarily those that "attend the creation and sustenance of a family."¹⁹² These family relationships, Justice Brennan suggested, are characterized by a relatively small number of members,¹⁹³ a high degree of selectivity in deciding to begin and maintain the relationship(s),¹⁹⁴ and "seclusion from others in critical aspects of the relationship."¹⁹⁵ The Jaycees' membership selection could not be characterized in this manner and hence could not find constitutional shelter by that argument. The factors enumerated in *Jaycees* are arguably applicable to a gay relationship, and they are very similar to the chief considerations of the *Hardwick* court: privacy of the association¹⁹⁶ and the similarity of the association to marriage.¹⁹⁷ It remains to be seen if the Supreme Court will forcefully apply the dicta in *Jaycees* when it decides *Hardwick*.

Many states have taken the question out of the hands of the

187. 106 S. Ct. 342 (1985).

188. 104 S. Ct. 3244 (1984).

189. *Id.* at 3251-52. The Jaycees permitted only men between the ages of 18 and 35 to be "regular" members, with the power to vote and hold office in the organization. *Id.* at 3247. When the Minneapolis and St. Paul chapters began admitting women as regular members in 1974 and 1975 respectively, the national organization imposed sanctions, including not counting those chapters' votes at national conventions and not permitting their members to hold national Jaycees offices. *Id.* at 3247-48.

190. *Id.* at 3251-52.

191. *Id.* at 3250.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Hardwick*, 760 F.2d at 1212.

197. *Id.*

courts by liberalizing their laws to allow most kinds of sexual activity between consenting adults.¹⁹⁸ However, twenty-five states still have statutes that criminalize homosexual relations;¹⁹⁹ nineteen states also outlaw certain sex acts between men and women.²⁰⁰ Even if the Supreme Court upholds the Eleventh Circuit in *Hardwick*, this would not necessarily invalidate all state restrictions on private consensual sexual activity; much may depend upon how close the questionable activity is to a marriage or family relationship.²⁰¹

Changes in the laws regarding consensual sexual relations between adults may have little effect on the situation in the military.²⁰² The military's status as a society unto itself, with severely limited constitutional protections for its members, is well-established.²⁰³ The willingness of the Supreme Court to allow members of the armed forces "a different application of those protections"²⁰⁴ guaranteed by the Constitution has combined with the inherent conservatism of the military to make reform grindingly slow.²⁰⁵ The need for discipline and obedience among the soldiers and sailors defending the United States is, as always, the justification preventing any rapid or widespread re-

198. See, e.g., CAL. PENAL CODE § 286 (West 1985 & Supp. 1986). See also *supra* note 168 for brief discussion of section 286).

199. *High Court to Study Homosexual's Case*, N.Y. Times, Nov. 5, 1985, at Y11, col. 1.

200. *Id.* at col. 3.

201. Certainly from a strategic viewpoint, it would be easier (and arguably more consistent with *Griswold* and its progeny) to argue that the right of privacy extends at least to gay "marriages" or relationships that approximate the stability of the family. This limited approach would probably find more favor than a general "all or nothing" approach which would seek legitimacy for *all* homosexual activities, no matter how casual or how promiscuous the participants. See *supra* note 147 and accompanying text.

202. See *supra* note 96 and accompanying text for discussion of constitutional rights in a military context.

203. See, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Brown v. Glines*, 444 U.S. 348 (1980). Both of these cases upheld limitations on the first amendment rights enjoyed by members of the United States armed forces. See also *supra* note 96 and accompanying text.

204. *Parker*, 417 U.S. at 758.

205. *McCrary & Gutierrez*, *supra* note 8, at 116-17. The innate conservatism of the American military is perhaps best illustrated by the fact that the decisions to integrate the armed forces along racial and gender lines were preceded by years of heated, often rancorous debates. In both cases, those arguing for the maintenance of the status quo emphasized the effects on morale and efficiency among the troops that would result from the free interaction between white male troops and black and women troops respectively. *Id.*

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form.²⁰⁶ There is no question that discipline and obedience are compelling interests in a military context. The real question is, how far may constitutional rights be denied or abridged by the authorities in serving those interests?

One writer has estimated that the United States military discharges some two thousand men and women each year for suspected homosexuality.²⁰⁷ Many of these people, like Petty Officer Dronenburg, have excellent service records.²⁰⁸ As noted, discharge is not always mandatory.²⁰⁹ The Discharge Board exercises some discretion in making recommendations,²¹⁰ and the Secretary of the Navy has the power, seldom exercised,²¹¹ of appellate review.²¹² The potential for inequity, for arbitrary discharges, is very great, as even a perfunctory study of some of the better-known cases has shown.²¹³

In formulating its regulations, the Department of the Navy has freely generalized about both homosexual and heterosexual members of the service.²¹⁴ The presumption behind the Navy's

206. *Id.*

207. Fitcher, *Military Homophobia: Ex-Officer Fights Back*, PLEXUS, Sept. 1985, at 1.

208. Petty Officer Dronenburg, as noted, had received many commendations during his career and had received top security clearance. *Dronenburg*, 741 F.2d at 1389. Sergeant Matlovich, as noted, was a recipient of the Purple Heart who had volunteered for service in Vietnam. *Matlovich*, 591 F.2d at 854 n.4. Certainly both men's careers suggest that the military brass' preoccupation with homosexuals as security risks were unwarranted.

209. *See, e.g., Beller v. Middendorf*, 632 F.2d 788 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980). *See also McCrary & Gutierrez, supra* note 8, at 117.

210. Bourdonnay, *supra* note 9, at 6-19.

211. *Id.* at 6-21.

212. *Id.* at 6-20 to -21.

213. Consider, once again, the achievements of "Airman" Saal and of Sergeant Matlovich, both of whom had excellent service records up until (and even beyond) the discovery of their homosexuality. *See supra* note 76 and accompanying text for relevant discussion.

214. *See, e.g., Beller v. Middendorf*, 632 F.2d 788 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980). In *Beller*, the court included in its opinion excerpts from an affidavit submitted to it from the Assistant Chief of Naval Personnel. The affidavit stated, in part, that "the great majority of naval personnel [who] despise/detest homosexuality, especially in the unique close living conditions aboard ships." *Id.* at 811 n.22. The affidavit emphasized the debilitating effects that having homosexuals in the Navy would produce, including undue influence arising from "emotional relationships with other homosexuals" and the inability of officers or others in authority "to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality" *Id.* The concern was also raised that recruitment might be hindered "should par-

policies on discharges of homosexuals is that homosexuals are threats to combat readiness, security, and morale.²¹⁵ The Navy vehemently asserts that heterosexual sailors despise and detest homosexuality, especially in close quarters aboard ships.²¹⁶ As long as the civil courts responsible for reviewing decisions of military law accept such facile justifications, instructions such as 1900.9C²¹⁷ will serve as a tool for the blanket discharge of homosexuals and suspected homosexuals from the various branches of the armed forces.

V. CONCLUSION

By presupposing that the majority of sailors despise and detest homosexuality and in setting up regulations to formally express these sentiments, the Department of the Navy fulfills its own prophecy. The high command maintains the "purity" of the service and increases the likelihood that the Navy will indeed be composed largely of homophobic men and women by systematically discharging homosexuals and suspected homosexuals from the Navy. Some of the most lasting lessons of life are taught by example. Thus the average enlisted person learns vividly from his superiors that homophobia is an admirable and acceptable attitude in the United States Navy.

The question of the role of gay people in the military cannot be resolved with one order. At the same time, the military's dogged refusal to evaluate gay servicemembers in terms of merit and value to the unit clashes violently with the egalitarian traditions and ideals that our armed forces popularly are supposed to represent. The homosexual's battle for acceptance has seen many victories in civilian society; by contrast, in the armed forces, his fate is usually sealed unless he can prove himself absolutely vital to his unit, and even that is no guarantee.

ents become concerned with their children associating with individuals who are incapable of maintaining high moral standards," since "[a] homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive." *Id.*

215. SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216, *quoted in Dronenburg*, 741 F.2d at 1389.

216. *Beller*, 632 F.2d at 811 n.22. See *supra* note 214 for relevant discussion.

217. SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216. See *supra* text accompanying note 4 for relevant language.

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Apart from the considerations of the *utility* of homosexual servicemembers (which can obviously only be done on an individual basis), there is the larger question of the right to privacy. Simply put, is the armed forces' blanket power to discharge men and women because of their sexual preferences reconcilable with the constitutional right to privacy? In cases of incompatibility, of course, it is patently obvious which enactment must change or give way.

The military is not immune to the problems and controversies of the real world. The continuing separation and persecution of a large and important group in our military can only breed more intolerance and make the armed forces less representative of the society it defends. Diversity (and yes, *quality*) must of necessity suffer when otherwise exemplary men and women are purged from the ranks of the military simply because of their sexual orientation. As long as this "knee-jerk" reaction to homosexuals in the military persists, the sad and degrading spectacle of discharges under protest will continue to haunt us. Like General MacArthur's "old soldiers," gay soldiers never die; and neither will they fade away.

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