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Gays in the Military: What About Morality, Ethics, Character and Honor?

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I. Introduction

America's armed forces have always condemned homosexual behavior. Between World War II and 1992, a regime of administrative exclusion and discharge became firmly entrenched.¹ However, for a few months during late 1992 and early 1993, this strict regime seemed vulnerable. William Clinton had promised during his presidential campaign that he would allow openly gay men and women to serve in the military.² Shortly after taking office, he reaffirmed his intention.³ Congressional leaders, the joint chiefs, and much of the American public objected to the President's plan. Mr. Clinton agreed to withhold action until July 1993, which gave Congress and the Pentagon time to study the problem and work out a solution.⁴

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1. For comprehensive histories of administrative and court-martial policies from 1916 until 1993, see RAND, *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 3-10 (1993); Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical and Legal Perspectives*, 131 MIL. L. REV. 55, 72-79 (1991). See also Kurt D. Hermansen, *Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151, 156 (1992) ("Since George Washington's Continental Army, the military branches have aggressively driven out lesbian and gay service members.").

2. Anna Quindlen, *How do we get out of this military mess?*, THE BALTIMORE SUN, Dec. 6, 1994, at 15A; Anna Quindlen, *President's Policy On Gays In Military Remains a Muddle*, CHI. TRIB., Dec. 5, 1994, at 19.

3. Melissa Healy, *Dismiss Open Gays, Pentagon Memo Says*, L.A. TIMES, June 23, 1993, at 10A.

4. A fair account of events between January and July 1993 can be gleaned from these articles: Michael Duffy, *Military Obstacle Course*, TIME, Feb. 8, 1993, at 27; Given Iffil, *Clinton Accepts Delay in Lifting Military Gay Ban*, N.Y. TIMES, Jan. 30, 1993, at 1; Pat Towell, *Months of Hope, Anger, Anguish Produce Policy Few Admire*, CONG. Q. (Weekly Report) July 24, 1993, at 1666.

A compromise was announced in a Secretary of Defense memorandum dated July 19, 1993;⁵ Congress' version of the compromise was expressed in 10 U.S.C. § 654⁶ which was enacted four months later.⁷ The compromise makes only minor concessions to gay and lesbian concerns. Individuals who apply for a commission or want to enlist are told about the policy of excluding and separating known homosexuals, but are not questioned about their sexual propensities and experience.⁸ In effect, they are cautioned not to volunteer the information if they should happen to be homosexual. Once in the service, they are expected to conform to standards that include refraining from consensual sodomy or related sexual crimes and obeying the rules incorporated in 10 U.S.C. § 654(b).⁹ Section 654(b) provides:

b. *Policy* — A member of the armed forces shall be separated . . . if one or more of the following findings is made and approved in accordance with . . . [established administrative procedures]:

5. Secretary of Defense, Memorandum for Secretaries Army, Navy, Air Force, Chairman Joint Chiefs of Staff, Subject: Policy on Homosexual Conduct in the Armed Forces, July 19, 1993.

6. 10 U.S.C. § 654 (1994). See also National Defense Authorization Act for F.Y. 1994, Pub. L. No. 103-160 § 571(d)(1). For a concise analysis of the allocation of power between Congress and the Executive to establish policy with respect to homosexuals, and Congress' paramount authority in that regard see William A. Woodruff, *Military Personnel Policy: Who's in Charge? The Courts, Congress or the Commander in Chief?*, ARK. LAW., Autumn 1993, at 47-51.

7. A detailed comparison of the Defense Department's July 19 memorandum and the statute is beyond the scope of this essay. When the Defense Department subsequently implemented the statute it carried forward some concepts and terminology from its July 19 memorandum that are noticeably absent from the statutory language. For example, the statute follows the general military personnel policy practice of managing by category rather than by making individualized judgments on each person who desires to serve. See 10 U.S.C. §§ 654(14), (15) (excluding the category of persons whose presence creates unacceptable risks to military interests and declaring that those who demonstrate a propensity or intent to engage in homosexual acts fall into the excluded category). Moreover, the statute defines "homosexual," "bisexual," and "homosexual act" and excludes those who fall within the definitions. 10 U.S.C. § 654(f). The implementing directives, on the other hand, seem to adopt more of an individualized approach to determining enlistment qualifications. See Dep't of Defense Dir. No. 1304.26, Qualification Standards for Enlistment, Appointment, and Induction, ¶ D.3 (Feb. 28, 1994) ("It is DOD policy to . . . [j]udge the suitability of persons to serve . . . on the basis of their adaptability, potential to perform, and conduct."). Furthermore, the statute does not define or even use the terms "sexual orientation" or "homosexual orientation," yet the implementing directives declare that sexual orientation is a nondisqualifying characteristic. Compare 10 U.S.C. § 654(f) (defining "homosexual," "bisexual," and "homosexual act") with Dep't of Defense Dir. No. 1332.14, ¶ H.1.a. O, Enclosure 2, (Feb. 28, 1994) (declaring that "sexual orientation is a personal and private matter" and defining, *inter alia*, "sexual orientation.").

Our main purpose in writing this paper is to present the moral justification for the policy of separating homosexuals. We can do this without resolving incongruities between the statutory language and the Department's implementing directives.

8. Quindlen, *supra* note 2.

9. See 10 U.S.C. § 654(d) (1994).

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(1) That the member has engaged in, attempted to engage in or solicited another to engage in a homosexual act or acts unless there are further findings, . . . that the member has demonstrated that —

(A) such conduct is . . . [not] . . . usual and customary . . . [for him or her] . . . and (B) . . . unlikely to recur; . . . and (E) [that he or she] . . . does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she . . . [does not engage in or have] . . . a propensity . . . [or intent] to engage in homosexual acts.

(3) That the member has married . . . a person known to be of the same biological sex.¹⁰

A “homosexual” is defined in section 654(f)(1) to include a person who has a “propensity” to engage in homosexual acts and a person to whom the term “gay” or “lesbian” applies.¹¹ The term “homosexual act” is defined in section 654(f)(3) to include not only any “bodily contact” to satisfy sexual desires (e.g. sodomy and mutual masturbation), but also any bodily contact which demonstrates a “propensity” to engage in bodily contact to satisfy sexual desires (e.g. homoerotic kissing and embracing).¹²

The meaning of section 654(b) is reasonably clear. Once one masters its vocabulary and allocation of burden of proof, the essence of the section is (i) to provide for separating gays and lesbians while not discharging straight people who commit isolated homosexual acts and (ii) to separate gays and lesbians when they have committed or have tried to commit a homosexual act or have done one of two other things that show their sexual propensities, i.e., they have stated that they are homosexual, or words to that effect, or have contracted or tried to contract a homosexual marriage.¹³ Section 654(b), in effect, tells gays and lesbians: “You can get into the armed forces without having to lie, but once you are in the only way to avoid any risk of being discharged is to stay celibate and in the closet.”

10. 10 U.S.C. § 654(b) (1994).

11. *Id.* § 654(f)(1).

12. *Id.* § 654(f)(3).

13. *Id.* § 654(b).

A. *Scope of this Essay*

The central concern of this paper is with morality and with the fact that Congress, the Pentagon, and the Justice Department have not used the rhetoric of morality, ethics, character, and honor when defending the military's policy on homosexuality. For example, one of the key findings that Congress has relied on to justify the policy of separating homosexuals is expressed in pragmatic terms. "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."¹⁴

The utilitarian tenor of this finding is consistent with the earlier testimony of General Colin Powell when he appeared before the Senate Armed Service Committee. The Chairman of the Joint Chiefs said that he and other military leaders should not "use . . . [their] official position to make moral or religious judgments on this issue."¹⁵

This article will identify and refine the neglected moral underpinnings of the separation policy. Our paper will demonstrate (i) how a morality argument can refute the contentions of opponents that the policy reflects the homophobia of the military brass and their underlings and (ii) how a morality justification strengthens the government's position when defending the policy against equal protection, First Amendment, or other constitutional attacks. The article will also touch on some related problems of statutory and regulatory construction and recommend how they be resolved.

II. A Moral Justification for the Policy

We maintain that, despite all the emphasis on pragmatic, utilitarian reasons, an important moral justification is implicit in the statutory and regulatory statements of the policy. Military morality is a major, unstated premise underlying the armed forces' practice of discharging homosexuals. Regardless of how divided or uncertain the rest of our nation may be about the morality, immorality, or moral inconsequence of homosexual behavior, there is no confusion in the military's credo. It is morally wrong for a serviceman or woman to engage in any kind of

14. 10 U.S.C. § 654(a)(15)(1994).

15. S. Rep. No. 112, 103d Cong., 1st Sess. at 279 (1994). *See also*, Defendants' Memorandum of Law in Support of Motion to Dismiss at 20, *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y., 1994) (No. CV94-0974) (citing additional items of legislative history showing that policy does not reflect a governmental position on religious, philosophical or moral beliefs).

homosexual conduct with anyone, any time, and any place. Service members who have a genuine propensity to indulge in homosexual acts have a serious handicap, which many would call a character defect, regardless of how soldierly, good, or noble they may be in other respects. In other words, we will show that the military believes that homosexual behavior is immoral and that this belief infuses 10 U.S.C. § 654 and its implementing regulations.

Before developing this moral justification, we should mention the political, public relations, and other prudential reasons why Congress and the Pentagon have tried to divorce their policy from morality. Some of their reasons are obvious, while others can be inferred. Many proponents of the policy were motivated by politics or a desire to be civil and avoid unnecessary acrimony. Gays, lesbians, and their supporters would be offended if homosexual behavior was labeled "immoral;" the moral pejorative would add further stigma to the insult and injury of expulsion. Those who might be offended include the President himself, some members of the Congress and administration, and other powerful individuals and organizations. The Pentagon apparently concluded that the best strategy for making its policy palatable was to stick to pragmatic arguments about the potential effects on the military's war-making capability of allowing homosexuals to serve. The congressional and military leadership may have hoped to minimize their own involvement in the great national debate about the acceptability of homosexual behavior.¹⁶

These reasons, however valid originally, should not deter the Pentagon and the Justice Department from now arguing morality as a reason for not allowing homosexuals to serve in the military. The argument can be couched diplomatically by emphasizing that the

16. One can intuit other reasons why the Pentagon pulled its punches on morality. For example, (i) a moral rationale, if identified too closely with religious beliefs, might attract arguments that the policy constitutes an establishment of religion, (ii) a convincing moral justification is hard to articulate in times like these when some churches ordain homosexuals and bless their couplings, (iii) the drafters of the policy may have been more comfortable with the concepts and terminology of modern, scientific psychology than with the older ideas and language of free will and moral accountability. It may have been easier for the drafters to write about the "propensities" of putative homosexuals than about the moral beliefs of other servicemen and women. Finally, the Defense and Justice Departments seem not to have relied expressly on morality to justify or defend the regulation-based policy which preceded the current policy. *Cf.* Opinion of Circuit Judge Wald in *Steffan v. Perry, Sec'y of Defense*, 1994 U.S. App. LEXIS 33045 (USCA, D.C. Cir. 1994). Judge Wald (i) quotes the regulation's stated justification at *96-*97 which does not mention "morality," and (ii) assumes that part of the stated justification — that the presence of homosexuals would have a bad effect on morale, discipline and recruitment — indulges the "dislikes," prejudices, "private biases" and bigotry of other people. *Id.* at *141-*145.

separation of homosexuals is based on the special needs of the military and the moral beliefs of its members and by stating that the armed forces take no position on the morality of homosexual behavior in the larger society. The Justice Department has even less reason than the Pentagon to avoid moral arguments. Arguments that homosexual conduct violates military moral norms will not worsen relations with critics who already condemn the policy as biased, bigoted and homophobic. In fact, proof of the moral justification directly refutes their criticism.

A. General Observations about Military Morality

Nowadays, it is no longer politic or accurate to speak of America as a Christian nation. We are living in a pluralistic society during a time of competing moralities and moral confusion — a time when the language of morality is frequently manipulated, deliberately or unconsciously, to conform to the desires or purposes of the speaker. For example, governmental distribution of condoms is characterized by many people as immoral, while others see it as a highly moral, public health measure.¹⁷

Fortunately, the question addressed in this article is relatively narrow: how is the constitutionality of the armed forces' homosexual policy affected by military views about the morality of homosexual conduct? One need not explore all of the philosophical, theological, and semantic possibilities of what people mean nowadays when they say that some particular act is immoral. Nevertheless, it is helpful to begin with a little blue collar moral philosophy and a few definitions. The authors conceive moral norms and values to exist on at least three levels: individual, abstract, and institutional. Individual and institutional moralities are the most significant for the purposes of this article. Individual and institutional moralities were also very important to the Military Working Group that advised the Secretary of Defense when the current policy was being formulated.¹⁸

1. Morality at the Individual Level.—The individual morality of service members refers to their personal, deeply-held beliefs about how they and their fellows in the armed forces ought to conduct themselves.

17. John Haas, *Thinking Ethically about Technology*, 28 INTERCOLLEGIATE REV. 5-6 (Fall 1992). There is a current movement, which is gaining grass roots and political support, to restore the ancient virtues and the concept of character to a central place in American life. See, e.g., Howard Fineman, *The Virtuecrats*, NEWSWEEK, June 13, 1994, at 31; Kenneth L. Woodward, *What is Virtue?* NEWSWEEK, June 13, 1994, at 38.

18. See *infra* notes 34 and 35 and accompanying text. *Caveat.* The Working Group seems to use the term "institutional morality" in a less precise way than we do in this essay.

Of course, not every deeply-held belief should be dignified by the title “moral” belief.¹⁹ Happily, we need not pin down the proper philosophical or theological criteria for determining whether a belief at the margins qualifies for the title of a “moral” belief. In this article, we accept as a moral belief an individual’s conviction that homosexual behavior by a service member is always morally wrong. We accept, *arguendo*, another individual’s conviction that homosexual conduct is no different than heterosexual conduct — when sufficiently removed from a member’s official duties, it is beyond the ambit of military moral condemnation.²⁰

2. *Morality at the Abstract Level.*—Moral theology and Aristotelian ethics are examples of what we inartfully refer to as abstract level morality.²¹ Their counterpart in the Armed Forces is traditional military morality — a congeries of norms and values regarding what is right and wrong conduct for an American serviceman or woman that is deeply ingrained in the organization and culture of our military. Some norms and values are embedded more deeply and immutably than others. This is certainly true of the martial virtues of duty, loyalty, courage, self sacrifice, patriotism, and honor.²² This is also true, now and for the foreseeable future, of the moral disapproval of homoerotic conduct. Three factors combine to perpetuate that disapproval: the traditional Judeo-Christian condemnation of same gender sodomy, the Armed Forces’ natural preference for “manly” character and qualities in male

19. See generally BERNARD GERT, *MORALITY: A NEW JUSTIFICATION OF THE MORAL RULES* 3-5, 18 (1988). A profound faith in the spiritual efficacy of spit-shining one’s shoes does not deserve to be described as a moral belief. At the other end of the spectrum, a soldier may have a belief about a truly important matter that is so patently evil, wrong-headed, or outlandish that it too does not deserve to be called a moral belief, e.g., maiming people who annoy him.

20. See *id.* at 134-35, 205.

21. See Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 1003 (1941).

22. The martial virtues and ideals are described in the gung-ho language of the U.S. Army Rangers’ Creed: “[N]ever shall I fail my comrades. I will always keep myself mentally alert, physically strong and morally straight, and I will shoulder more than my share of the task, whatever it may be . . . Energetically will I meet the enemies of my Country. I shall defeat them on the field of battle . . . Surrender is not a Ranger word. I will never leave a fallen comrade to fall into the hands of the enemy and under no circumstances will I ever embarrass my country . . .” C. James Novak, *One Hundred Percent and Then Some*, *RETIRED OFFICER MAG.*, June 1994, at 44, 46. They are described more eloquently in a 1962 speech by General of the Army Douglas MacArthur at the U.S. Military Academy. MacArthur spoke of the “great moral code — the code of conduct and chivalry” of all officers and enlisted persons that is embodied in West Point’s motto, Duty-Honor-Country. The speech is reprinted in THEODORE J. CRACKEL, *THE ILLUSTRATED HISTORY OF WEST POINT* 280 (1991).

personnel, and the innate conservatism of the typical military professional.²³

3. *Morality at the Institutional Level.*—The Model Rules of Professional Conduct of the American Bar Association is an example of an institutional morality, which is the established ethical or moral standards of the legal community.²⁴ If one conceives the armed forces to possess an institutional morality, as we do, what are its nature and sources? How and by whom are its norms and values laid down and altered? What are its contemporary norms and values and how can they be proven? Happily, we do not have to discuss every possible answer to these questions. Our discussion of individual and abstract (i.e., traditional) morality in the military presages the position we take.

For the purposes of this article, it is realistic to define the institutional morality of the armed forces as the shared moral beliefs of the experienced, active duty members of the officers' and noncommissioned officers' corps concerning matters in which they perceive the military to have a significant interest. The limitation to "experienced" active duty personnel means that most enlisted men and women of the lower grades and most newly commissioned officers are not part of the population whose ideas of military morality are *directly* pertinent. If there is no consensus about a particular matter, then the beliefs of majorities of both corps would still be weighty enough to provide moral guidance.

It makes sense — and is probably about as close as one can get to representative democracy in a hierarchal organization like the armed forces — to equate the collective understanding of right and wrong of experienced active duty officers and non-commissioned officers (hereinafter NCOs) to the corporate morality of the military. These are the people who run the military enterprise and who may spend five to thirty-five years of their lives under its regime. These people have been promoted based on assessments of their knowledge of the military and of their character. They occupy leadership and other responsible positions from top to bottom in the Army, Navy, Air Force, and Marine Corps. For better or for worse, they instruct those under and around them about morality, ethics, character, and honor, even if only by example. As a group, they have a central role in preserving, modifying, and transmitting the abstract morality described in the preceding section. Although there is likely to be a close correlation between institutional and abstract

23. See *infra* notes 39, 41 and 43 and accompanying text.

24. ABA MODEL RULES OF PROFESSIONAL CONDUCT (1992).

morality, we are deliberately treating them as different levels of morality. We conceive abstract morality as being more enduring and perhaps more elitist because its traditional norms do not change with every shift in majority views.

4. *The Sources Generally of Individual and Institutional Moral Beliefs in the Military.*—There are many sources from which individual officers, NCOs, and other enlisted persons derive the moral norms and values which they believe apply within the military. Of course they enter the service with character, moral outlook, and any religious faith, formed more or less by their civilian lives. After entry, they remain subject to the influences of America's civilian society and culture. All of these "civilian" factors may affect what they eventually come to believe is moral or immoral behavior for a member of the armed forces.

Any preconception about military morals that an individual may have when entering the service will very likely be modified over time. As Congress cogently put it when enacting the current policy on homosexuality, "[th]e primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise Military life is fundamentally different from civilian life."²⁵ After several years of being part of an organization with such a mission, being exposed to its moral traditions, and experiencing the differences between military and civilian life, an officer or NCO should have a pretty good sense of military morality. A moral belief that is shared by majorities of the experienced members of the officer and NCO corps is a reliable reflection of the institutional morality of the armed forces.

A distinguished military historian has expressed, with typical British elegance, an idea that is central to this essay:

Soldiers are not as other men . . . [War] . . . must be fought by men whose values and skills are not those of politicians and diplomats. They are those of a world apart, a very ancient world, which exists in parallel with the everyday world but does not belong to it. Both worlds change over time and the warrior world adapts in step to the civilian. It follows it, however, at a distance. The distance can never be closed for the culture of the warrior can never be that of civilization itself²⁶

5. *Relation of Law to Institutional Morality in the Military.*—Law, especially criminal law, and morality interact in the military just as in the

25. 10 U.S.C. §§ 654(a)(4), (8) (1994).

26. JOHN KEEGAN, *A HISTORY OF WARFARE*, Intro. xvi (1994).

civilian world. They both have rules and standards in common, but are not coextensive.²⁷ It is not always easy to identify those laws, regulations, and orders which reflect or shape contemporary military morality and those which do not. The Uniform Code of Military Justice provides a good example.²⁸ It comprehensively condemns involuntary sodomy, voluntary sodomy with a person of the same or opposite sex, and bestiality.²⁹ A male soldier who has consensual "deviate" intercourse 1,000 miles away from his base, for example, while on furlough and in mufti, with an adult civilian female in the privacy of her home would violate Article 125. *Quaere*: has he also violated a contemporary moral norm of the military? Should he feel that what he did was morally wrong — that he has let the Army down? Or is an act of fellatio or cunnilingus with a person of the opposite sex, under such remote circumstances, an act for which institutional morality furnishes no guide, either because a majority of officers and NCOs do not agree about whether the act is moral or immoral or believe that, for moral purposes, the act falls within a zone of privacy where the soldier is free to act in any way that his own conscience and respect for the legal command of Article 125 permit, or his desire impels.³⁰

27. In an organization and culture as authoritarian as the military — in which law and other types of formal and informal controls are more pervasive, respected and obeyed than is often the case in civilian life — there is a temptation to conflate law and the forces' corporate morality. However, the distinction is easily made in this essay because we have defined institutional morality in terms of the collective beliefs of the officers' and NCOs' corps. Under this conception, neither Congress nor the President or anyone else in the chain of command can create a moral precept by virtue of their position or "law making" powers. They and their edicts may persuade, but cannot direct, subordinates to change a conviction about moral right and wrong. In other words, not every law or command embodies a moral imperative beyond the duty of everyone in the armed forces to obey all laws and lawful orders. A soldier who drinks a can of beer in barracks in violation of a standing order commits a punishable offense; no one other than a blue-nosed martinet is likely to regard him as a moral delinquent. Even an officer or NCO whose religious faith forbids the use of alcohol will probably make a distinction between his personal faith and his understanding of what is immoral behavior for other soldiers.

28. See UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 801 *et seq.* (1983).

29. 10 U.S.C. § 925 (1956).

30. In September 1991, the Tailhook Association held its annual convention in Las Vegas. Many of the participants, including some females, were active duty officers of the Navy and Marine Corps' air arms. At times, the event became a drunken orgy in which a large number of unwilling women were manhandled or subjected to other indignities. The ensuing scandal dogged the Navy for the next 2½ years. See, e.g., Monica Morkowski, *Chronology of the Navy Tailhook Scandal*, N.Y. TIMES, Feb. 9, 1994, at B7; Eric Schmitt, *In Tailhook Deal, Naval Chief Says He'll Retire Early*, N.Y. TIMES, Feb. 16, 1994, at A1. The affair is such a tangled mess that the only reliable lesson about military sexual morality to be drawn from it seems to be that there is less agreement in the armed forces about the immorality and seriousness of consensual heterosexual acts than about homosexual acts.

B. The Immorality of Homosexual Conduct in the Military

The answer to our *quaere* would be easier, and probably different, if the soldier's partner in the "deviate" act were another male. Strong proof that homosexual conduct anytime, anywhere, and with anyone offends both institutional and individual morality in the military lies in the findings on which Congress and the Secretary relied to justify the current policy. We suggest that however much Congress and the executive branch may have wanted to bypass moral issues, they could not entirely avoid dealing with them and taking a position by implication. Their findings that the presence of individuals who demonstrate a propensity for homosexual conduct

- (i) would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability; and
- (ii) is incompatible with military service because it interferes with the factors critical to combat effectiveness, including unit morale, unit cohesion and individual privacy.³¹

imply that homosexual conduct by a member of the armed forces violates deeply-held individual and institutional beliefs that the conduct is morally wrong. Some, if not all, of the harmful effects recited in the findings have to be caused or exacerbated by widespread disapproval within the military of homosexual conduct. The disapproval of a great many members must inevitably stem from moral sentiments.³²

One does not have to rely on an implied legislative or executive branch finding to establish that homosexual conduct, or demonstrated propensity, offends the personal moral sense of a substantial number of people of every rank and grade. One does not need to poll or sample the current views of the officers' or non-commissioned officers' corps to determine contemporary institutional morality. One does not even have to employ expert witnesses to prove either point, although expert testimony may be helpful. There is more than enough commonly known or credible published information available for counsel to argue, and federal courts to decide, that the institutional morality of the armed forces and the individual moral beliefs of its members are important justifications for the homosexual personnel policy.

31. 10 U.S.C. § 654(a)(15) (1994).

32. How the moral sentiments of members can be proven is treated in the next section.

1. *Proof that Homosexual Conduct Offends Individual and Institutional Moral Beliefs.*—We shall sketch some of the reasons and arguments on which government attorneys and federal courts may rely (i) to show that many, probably most, officers and enlisted persons of every rank and grade, regardless of length of service, consider homosexual conduct in the military to be immoral and also consider a propensity for such behavior to be a serious handicap or character defect and (ii) to show that a large majority of experienced officers and NCOs (the people whose collective moral views this essay equates to institutional morality) hold the same beliefs. Keep in mind that in this essay morality and moral beliefs are conceived broadly. The individual moral beliefs of service members regarding homosexual behavior refers to their personal, deeply held beliefs about how they and their fellows in the armed forces ought to conduct themselves.³³ The following reasons and argument outlined are relevant when ascertaining moral beliefs; they are not mutually exclusive, exhaustive, or listed in order of importance:

- (a) A Military Working Group consisting of high ranking uniformed representatives of all military departments was convened by the Secretary of Defense in early 1993 to make recommendations for implementing President Clinton's goal of ending discrimination because of sexual orientation.³⁴ The Working Group treated moral considerations as highly relevant and relied on them heavily in arriving at its findings and recommendations.³⁵

33. See *supra* Part II.A.1. The religious or philosophical foundations (e.g., utilitarian, deontological/ethical, or natural law) of an individual's moral beliefs can be obvious or obscure, sophisticated or ingenuous, and widely shared or idiosyncratic. See Haas, *supra* note 17, at 6-10.

34. See generally, OFFICE OF THE SECRETARY OF DEFENSE, SUMMARY REPORT OF THE MILITARY WORKING GROUP (July 1, 1993) [hereinafter, REPORT OF MILITARY WORKING GROUP]. In Part I (Background) of its report, the Working Group pointed out that the "shared moral values of the institution — the collective sense of right and wrong — provide the foundation which . . . is the essential difference between a professional armed force and a mercenary force. It also provides to individual service members the moral basis for personal service, commitment and sacrifice." *Id.* at para. B2a. "As citizen soldiers, military members bring their values with them when they enter the Service. Whether based on moral, religious, cultural or ethical considerations, those values are often strongly held and not amenable to change . . . leadership and discipline . . . generally should not . . . attempt to counter the basic values which parents and society have taught. Indeed efforts to do so will likely prove counter-productive." *Id.* at para B2b. In Part III (Findings) the Working Group alluded to morality, expressly or by implication, when stating many of its findings regarding the adverse consequences of having known and unknown homosexuals in the service. For example, para A1 on unit cohesion includes the following: "f. *Core values.* The core values of the military profession would be seen by many to have changed fundamentally if homosexuals were allowed to serve. This would undermine institutional loyalty and the moral basis for service, sacrifice and commitment for those members." *Id.* at para. A1.

35. *Id.*

(b) President Clinton's January 1993 announcement of his intent to allow openly gay individuals to serve was greeted with a firestorm of protest.³⁶

(c) The majority of Americans disapprove of homosexuality.³⁷ An overwhelming proportion believe sexual relationships between two adults of the same sex are always wrong. The available evidence indicates that a substantial majority of males in the military are very much opposed to allowing homosexuals to serve in the military. Females in the military appear to be less opposed.³⁸

(d) The traditional Judeo-Christian condemnation of sodomy continues to shape individual moral beliefs in many ways; for example, directly through the person's religious faith or indirectly as the unacknowledged basis for an ethical belief or effective cultural taboo.³⁹

(e) The existence of criminal statutes proscribing voluntary homosexual sodomy and related offenses in many states and in the military's Uniform Code of Military Justice influence beliefs about the morality of homoerotic behavior. This is especially true in the military where such crimes are more likely to be prosecuted than in the civilian world.⁴⁰

(f) Most people believe that while men and women are a lot alike, their basic natures are different and complementary in certain respects. A corollary of this belief is likely to be a conviction that homosexual conduct is socially and morally undesirable. One need not pin down the ultimate source of such convictions (God? Nature? Nurture? Culture?) in order to credit their reality. Beliefs about what it means to be a man or a woman are especially deeply rooted in the military which depends on man's capacity for aggression, tempered by the martial and manly virtues for its effectiveness. These convictions deserve the title of moral beliefs, whatever political liberals, radical feminists and progressive moral theologians think of them.⁴¹

36. See, e.g., Joyce Price, *Opponents to Gays in Military Jam Lines*, WASH. TIMES, Jan. 27, 1993, at 4; Rowland Evans and Robert Novak, *The Brass Dissent*, WASH. POST, Jan. 27, 1993, at 19.

37. See RAND, *supra* note 1, at 207, 240.

38. *Id.*

39. Condemnation of homosexual practices is "firmly rooted in Judeo-Christian moral and ethical standards." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring). See also *Morality and Homosexuality*, WALL ST. J., Feb. 24, 1994 at 18 (explaining the statement of Ramsey Colloquium, a group of Christian and Jewish scholars).

40. Sodomy is punishable under Article 125, UCMJ. Consensual homosexual sodomy continues to be a crime in almost half the states. See Arthur A. Murphy, *Homosexuality and The Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 695-96 (1993).

41. See, e.g., EDWARD BACHELOR, JR., *HOMOSEXUALITY AND ETHICS* 3-167 (1980) (this

(g) Most members of the officers' and NCO's corps are resistant to social experiments and tampering with things that seem to work well.⁴² This conservatism comes, as it does to most people, with age and is reinforced by living in a subculture in which a professional military tradition contends with the American democratic tradition. The professional military tradition does not see human nature as highly malleable. It regards obedience and subordination of personal interests as paramount virtues for military men. Fusion of the official and private spheres of its members' lives is a basic feature of the tradition.⁴³

These reasons amply support the conclusion that homosexual behavior and proclivities offend individual and institutional moral norms and values in the armed forces.

III. How the Moral Justification Strengthens the Government's Defense of the Policy

With the help of the American Civil Liberties Union and the Lambda Legal Defense & Education Fund, the plaintiffs in *Able v. United States*, admitted gay and lesbian service members, have begun a sophisticated attack on the constitutionality of 10 U.S.C. § 654 and the

anthology includes positions of professional moralists ranging from traditional divine and natural law views that homosexual acts are intrinsically evil to revisionists' stance that homosexual acts are natural and good); JAMES Q. WILSON, *THE MORAL SENSE* 179-80 (1993) (explaining that men and women are innately different in temperament, for instance aggressiveness, and moral orientation; early childhood experiences, however, may create a disposition to emphasize one or the other of several moral sentiments); KEEGAN, *supra* note 26, at 79-94 (With regard to war and human nature — neurologists and geneticists have done little more than identify and categorize emotions and responses that have been eternally familiar. What science does not explain is why groups of individuals combine to fight others. For explanation of that phenomenon, in which lies the roots of war, we have to turn to psychology, ethology and anthropology, see *id.* at 84); see Murphy, *supra* note 40, at 697 n.16 ("Society's preference for heterosexuality is deeply embedded in the structures of our culture and law. It shapes the outlook, choices and lives of millions of Americans who are not homophobic It assumes that men and women are not in every way identical and interchangeable."). See also Richard A. Schwedes, *What do Men Want? A Reading List for the Male Identity Crisis*, N.Y. TIMES BOOK REV., Jan. 9, 1994, at 3, 24; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 96 (a feminist critique — homosexual relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other).

42. See Report of Military Working Group, *supra* note 34. Para. A1e of the Group's findings says, "Lifting the ban on homosexuals serving in the military would be perceived by many service members as the imposition of a political agenda by a small group — an agenda which is seen as having no military necessity and as being, in fact, destructive to the finest fighting force in the world." *Id.*

43. Arthur A. Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97, 100-101 (1964). See also SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 162-79 (1957) (explaining that the military ethic is realistic and conservative).

Defense Department regulations that implement it. Lieutenant Colonel Jane Able and her five co-plaintiffs are asking the U.S. District Court for the Eastern District of New York to declare the statute and regulations unconstitutional because they violate their Fifth and First Amendment rights.⁴⁴ The Government has filed a strong brief supporting the military's policy for separating homosexual personnel. The litigation involves issues of statutory and regulatory construction, as well as questions about the significance of a great deal of constitutional case law.⁴⁵ Many of the claims, defenses, and arguments being made in the *Able* case are the same as those made in litigation under the 1981 and earlier versions of the military's policy. Some claims and defenses differ because of changes in the wording of the current policy and its justifications.⁴⁶

Our essay goes into the constitutional and non-constitutional issues arising in *Able* no more deeply than is necessary (i) to enable readers who are conversant with the intricacies of the subject, to judge the merits of our proposed morality justification and (ii) to acquaint casual readers with some important aspects of the gays-in-the-military controversy.

A. Morality Refutes Equal Protection Claim

The *Able* complaint alleges an equal protection claim under the Fifth Amendment based on the fact that 10 U.S.C. § 654 and its implementing regulations make a distinction between the speech and behavior that is impermissible for homosexuals and that which is impermissible for heterosexuals.⁴⁷ The complaint alleges that the distinction serves no rational or legitimate governmental or military interest because the differences in the way in which the two classes are treated is based solely on the prejudices and presumed prejudices of heterosexual personnel and civilians.⁴⁸ In their memorandum, the plaintiffs assert that the statute and the regulations cannot survive constitutional scrutiny no matter which of the two standards of review is applied; that is, whether the standard be heightened scrutiny, which the plaintiffs advocate, or the minimal,

44. Appellant's Brief, *Able v. U.S.*, 847 F. Supp. 1038, (E.D.N.Y. 1994) (No. CV 94-0974).

45. *Id.* at 34.

46. At the time this paper went to the printer, the District Court had granted a preliminary injunction which enjoined the Government from discharging the plaintiffs pending the resolution of the lawsuit; the Government had appealed the injunction to the Second Circuit Court of Appeals. On September 4, 1994, the District Court had ruled on a motion to dismiss, denying the motion as to the claims discussed in this essay. See *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994).

47. Plaintiffs' Complaint, at ¶ 19, *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (No. CV 94-0974).

48. *Id.*

rational basis testing which courts ordinarily use when reviewing measures for managing the internal affairs of the armed forces.⁴⁹ The plaintiffs cite *City of Cleberne v. Cleberne Living Center, Inc.*⁵⁰ for the proposition that a government may not discriminate against one group in order to cater to the irrational biases and prejudices of other people and that such prejudices can never form a rational basis for a discriminatory policy.⁵¹

If the Government chooses to add the institutional moral beliefs of the armed forces and the individual moral views of its members⁵² to the pragmatic justifications for the military's policy, government attorneys can make arguments, like those which follow, when defending against equal protection claims.

The Government could begin by arguing that *Cleberne* does not require Congress and the military to risk a reduction in combat effectiveness. *Cleberne* merely holds that a government may not impose a policy solely for the purpose of disadvantaging a particular group or class.⁵³ The congressional findings in 10 U.S.C. § 654(a) establish that the purpose behind the current policy is not to disadvantage homosexuals; but rather, it is to promote an efficient and effective military capable of winning wars.⁵⁴ Congress' purpose is confirmed in the report of the Senate Armed Services Committee.⁵⁵

49. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 22-24, *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (No. CV 94-0974).

50. 473 U.S. 432 (1985).

51. Plaintiffs' Memorandum, *supra* note 49, at 25. See *Cleberne v. Cleberne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

52. No doubt there are homophobes in the military, just as there are in the larger society from which it recruits. We are confident, however, that the negative attitudes of many more members can be traced to moral convictions and sentiments than to pathological, irrational homophobia. Even some of the relatively few gay-bashing servicemen who physically and verbally assault homosexuals may be motivated by religious or moral convictions. Their fault does not lie with their beliefs about homosexuality. Their real fault, which is truly deplorable, is a disregard for law and a lack of modern secular tolerance or religious charity. They are throwbacks to the religious warriors and inquisitor-clergy of long ago. Learned Hand was on the mark as usual, when he said: We hate no one as much as "the heretic who lays impious hands upon our Ark." One should be aware of the regrettable practice of many gay activists who label as "homophobic" any person who condemns homosexual behavior regardless of that person's sincerity and credentials. For example, on April 19, 1994, members of Lambda interrupted a speech at Harvard Law School by a distinguished natural law scholar, Professor John Finnis of Oxford University, accusing him of homophobia. A Lambda member followed up with a scathing column in the student newspaper. See Scott Wiener, *Homophobia Cannot Be Tolerated*, HARV. L. REC., Apr. 29, 1994, at 11.

53. See *Cleberne*, 473 U.S. at 432.

54. See, e.g., 10 U.S.C. §§ 654(a)(4), (14) (1994); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382 (9th Cir. 1981) (stating that military personnel who engage in homosexual acts severely compromise the government's ability to maintain a strong military).

55. "The Committee's primary focus and concern has been the implications of any change in

There is no reason Congress could not have relied explicitly, rather than implicitly,⁵⁶ on the military's moral beliefs to support its findings that the presence of homosexuals poses a threat to the armed forces' morale, good order, and discipline and to unit cohesion. The Supreme Court in *Bowers v. Hardwick*⁵⁷ acknowledges that the law can be, and frequently is, based on notions of morality.⁵⁸ *Bowers* went on to allow Georgia to criminalize homosexual sodomy because the citizens of that state regard the conduct as immoral.⁵⁹

Even though Congress, the Pentagon, and the Justice Department have tried to avoid relying on moral arguments in the past, they have not waived them forever. Government attorneys and the courts, *sua sponte* if need be, should utilize this important underlying rationale for the military's policy.⁶⁰

Bowers suggests that the moral beliefs of the military at the *institutional* level can be used for more than merely explaining and supplementing the pragmatic justifications on which Congress has expressly relied. If homosexual behavior by a serviceman violates a moral norm shared by majorities of the experienced members of the officers' and non-commissioned officers' corps — which one can equate to an institutional moral belief⁶¹ — that fact alone should be sufficient to justify the policy. In *Bowers*, the plaintiffs argued that the consensual homosexual aspects of Georgia's sodomy statute violated substantive due

the current policy on the effectiveness of our armed forces" S. Rep. No. 112, 103d Cong. 1st Sess., at 268-69 (1994).

56. See *supra* text accompanying notes 31-32.

57. 478 U.S. 186, 196 (1986).

58. *Id.*

59. *Id.*

60. See *Steffan v. Perry*, Sec'y of Defense, 1994 U.S. App. LEXIS 3304, at *12-*13 (USCA, D.C. Dir.) (stating that under minimal rational basis review in equal protection analyses, the burden is on the party attacking the governmental arrangement to negate every conceivable basis which might support the arrangement, whether or not the basis has support in the record, and a classification is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.).

In *Dronenburg v. Zech*, *Dronenburg* had been discharged for engaging in homosexual acts with a 19 year old Navy recruit. He argued that the Navy's regulation was unconstitutional because it was based on majority morality. 741 F.2d 1388 (D.C. Cir. 1984). In rejecting this argument, Judge Bork, speaking for the Court, pointed out that *Dronenburg's* theory would destroy the basis for much of society's most valued legislation. In many areas, "legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality." *Id.* at 1397. The authors are not aware of any decision other than *Dronenburg* in which the court speaks to the morality issue. The issue was raised by the other party, not the Government.

61. See *supra* part II.A.3.

process when applied to sodomy committed in the privacy of one's home.⁶² The court used a rational basis standard when evaluating this contention and found a rational basis in the "presumed belief of a majority of the electorate in Georgia that homosexual acts are immoral and unacceptable."⁶³ By analogy, the existence of an *institutional* belief, even if it were only presumptive rather than proven, that homosexual conduct in the military is wrong is sufficient in itself to furnish a rational basis for the policy.

Regardless of whether the Federal courts subject the military's homosexual separation policy to a minimal, rational basis review or to a heightened scrutiny, rational basis review, the courts should find that the policy, reinforced with our proposed morality justification, does not violate the equal protection clause.⁶⁴

B. *Morality Refutes First Amendment Claim*

The plaintiffs in *Able* have alleged in their complaint that 10 U.S.C. § 654 and the Defense Department's regulations violate their First Amendment right of free speech because the statute and regulations restrict the content and viewpoint of their speech, based solely on the presumed prejudices of heterosexual service members and civilians.⁶⁵ The plaintiff's memorandum points out that under the statute⁶⁶ and regulations if gay or lesbian service members state to anyone in any manner, at any time, in any place, and for any reason that they are homosexuals, they are immediately subject to discharge.⁶⁷ Citing *Parker v. Levy*⁶⁸ and *Brown v. Glines*,⁶⁹ the *Able* plaintiffs have acknowledged that, to some extent, the speech of service members may be restricted to meet overriding demands of discipline and duty. The First Amendment, however, does apply, and the Government must show that regulations restricting members' speech protect both a substantial governmental

62. *Bowers*, 478 U.S. at 191.

63. *Id.* at 196.

64. Minimal rational basis review, tempered by the deference owed to military judgment, is the proper standard of review. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1985); *Chappel v. Wallace*, 462 U.S. 296 (1983); *Steffan v. Perry, Sec'y of Defense*, 1994 U.S. App. LEXIS 33045, at *12-*13 (USCA, D.C. Cir. 1994). See also Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557 (1994); MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE 7-88 (1993). But cf., Hermansen, *supra* note 1, at 167-209.

65. Plaintiffs' Complaint, *supra* note 47, at ¶¶ 1, 2, 20, 27.

66. 10 U.S.C. § 654(b)(2) (1994).

67. Plaintiffs' Memorandum, *supra* note 49, at ¶ 36.

68. 417 U.S. 733, 758-61 (1974).

69. 444 U.S. 348, 354, 357 n.14 (1980).

interest unrelated to the suppression of ideas and restrict speech no more than is reasonably necessary to protect the interest identified.

The preceding paragraph summarizes only part of the plaintiffs' complex and nuanced First Amendment argument.⁷⁰ The summary, however, should suffice for an understanding of how a morality justification helps the Government answer the free speech argument. The Government can make a compelling response along the following lines: A serviceman's statement that "I am gay," or words to that effect, contains both "speech" and "nonspeech" elements. While the verbalization is clearly speech, the statement is also an act of identification, which is a nonspeech element.⁷¹ The Supreme Court has held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."⁷²

When a serviceman states that he is gay, that act of self identification is an admission, which is strong proof that he is a homosexual and as such has a propensity to engage in homosexual acts.⁷³ The serviceman has the opportunity to rebut the probative effect of his statement, for instance, by demonstrating that he was lying, joking, or mistaken about his sexual propensities.⁷⁴

Logic and common sense tell us that a service member who is found to be a homosexual is very likely to have engaged in, and will continue to engage in, homosexual acts. It is fair and makes sense, as a prophylactic measure, to find that a member is a gay or lesbian and to discharge him or her on the basis of an un rebutted admission of homosexuality. The military should not have to remain exposed to the risks which come from the presence of homosexuals and wait until they

70. While trying to master the plaintiffs' First Amendment argument, one of this essay's writers (Murphy) recalled Thomas Wolfe's description of the awe felt by countryfolk while they watched circuit-riding lawyers try their cases:

[The lawyers had arrived] their saddle bags stuffed with all the cunning of their accursed and incessant papers. They had come in and then had spoke strange words — strange words of depth and learning no one else could understand. While all the helpless natives looked on and gaped their wonderment, the great men cleared their throats and uttered strange and mystic words.

Thomas Wolfe, *How Certain Joyners Went to Town*, from *THE HILLS BEYOND* 248 (1941).

71. *Able v. U.S.*, 847 F. Supp. 1038, 1041 (E.D.N.Y. 1994).

72. *Id.* at 1041, quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

73. 10 U.S.C. §§ 654(f)(1), (3). See *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

74. 10 U.S.C. § 654(b)(2).

are caught in the act.⁷⁵ A member's act of "coming out" can endanger service interests, sometimes as much as an act of sodomy. This is another reason why the statement "I am gay" can be the rebuttable basis for discharge. The comfort, esprit, and unity of organizations are threatened by the presence of individuals and cliques who are known to be gay. The pride and satisfaction that servicemen and women generally take in their profession and branch would be diminished if large numbers of homosexual personnel were free to express gay pride.⁷⁶

The morality rationale that we propose in this essay will strengthen the Government's position when it answers a free speech claim in the same way that it does when used to resist an equal protection claim. The institutional moral beliefs of the military and of its individual members, along with the utilitarian reasons recited by Congress in 10 U.S.C. § 654(a), add up to a substantial governmental interest. Discharges based on statements admitting homosexuality do not restrict free speech any more than is reasonably necessary.⁷⁷

C. *Some Problems of Construction*

While reading the Government's motion to dismiss the complaint in *Able* and the plaintiffs' memorandum opposing that motion, one quickly discovers that the parties differ about the meaning of many parts of Section 654 of the United States Code and its implementing regulations.⁷⁸ We are singling out two problems of construction for brief discussion because each of them is important and intertwined with the plaintiffs' free speech claim. We recommend that the Pentagon resolve the two problems by amending its regulations. These matters ought not to be left to the uncertainties of judicial resolution. The two issues of construction are created by the failure of the Defense Department to define the term "statement" which is used in Section

75. See 10 U.S.C. §§ 654(a)(14), (15). See also *Ben Shalom*, 881 F.2d at 461.

76. Cf. *Waters v. Churchill*, 511 U.S. 686 (1994). Speech by a government employee is protected by the First Amendment only when it relates to a matter of public concern and the employee's interest in expressing himself on the matter is not outweighed by the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 694.

77. *Ben Shalom*, 881 F.2d at 458-62. See also, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (holding that review of military regulations challenged on First Amendment grounds is far more deferential than review of laws or regulations designed for civilian society, and that the military need not encourage debate or tolerate protest to the same extent, rather the military must foster instinctive obedience, unity, commitment, and esprit de corps).

78. In their complaint, the plaintiffs in fact challenge the statute and regulations as being vague, unintelligible, inconsistent, and overbroad in violation of the First and Fifth Amendments. Plaintiffs' Complaint, *supra* note 47, at ¶¶ 33, 34.

654(b)(2) of Title 10 and by the dichotomy that the Department creates through the way it uses the words "sexual orientation" and "conduct."

Under section 654(b)(2), a member's "statement" that he is gay can be the basis for discharging him; however, the implementing regulations do not try to define "statement."⁷⁹ The plaintiffs in *Able* objected to the unbounded reach of the term, and they noted in their memorandum that a statement could include confiding in a military doctor, clergyman, friend, or relative.⁸⁰

We recommend that the Defense Department make some effort to narrow the term to conform to public policy and elementary fairness. For example, the statements that can be the bases for discharge probably should exclude those that deserve to be characterized as coerced, improperly induced, privileged,⁸¹ or *de minimis*. The Pentagon, when deciding the scope of a *de minimis* exception, ought to consider whether statements made in various situations would have any tendency to threaten or harm a significant military interest. While a soldier's acknowledgement to casual friends in his platoon that he is gay poses a threat to unit cohesion, it is hard to see how a servicewoman's discussing her lesbianism privately with a trusted civilian friend or relative creates much of a risk to the service's interests.

Narrowing the meaning of "statement" in the manner suggested may make it easier for the courts to find that 10 U.S.C. § 654 and its regulations restrict speech no more than is reasonably necessary.⁸² Even if the Constitution does not require that the meaning of "statement" be narrowed and even though there is no indication in the statute that Congress contemplated a restrictive definition of "statement," the Defense Department should, nevertheless, consider whether it may be wise to do so. After all, the entry of gays and lesbians is facilitated by not questioning applicants for commission or enlistment about their sexuality. Is it fair for the armed forces to be able to seize upon every single admission, regardless of the circumstances in which it is made, to hasten their departure from the service?⁸³

79. 10 U.S.C. § 654(b)(2) (1994).

80. Plaintiffs' Memorandum, *supra* note 49, at ¶¶ 36, 37.

81. Compare Lincoln Caplan, *Don't Ask, Don't Tell — Marine Style*, NEWSWEEK, June 13, 1994, at 28 (reporting that a marine corporal sought confidential counseling from Navy psychologist, and corporal's admission that he was homosexual led to discharge proceedings) with *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (holding that there is a serious question whether service member's admission of homosexuality in a challenge of the constitutionality of the regulations can be treated as the kind of statement that can be the basis for homosexual discharge).

82. Cf. *Brown v. Glines*, 444 U.S. 348, 354-55 (1980).

83. One of the authors (Woodruff) does not join in this portion of the essay. In his view, the statutory language, the legislative history, and the implementing directives sufficiently define the

The Defense Department in the Secretary's Memorandum of July 19, 1993, which announced the current policy, used the term "homosexual orientation" which did not subsequently appear in 10 U.S.C. § 654.⁸⁴ The memorandum emphasizes that "*homosexual orientation* is not a bar to service entry or continued service unless manifested by *homosexual conduct*."⁸⁵ Pentagon regulations adopted after the enactment of Section 654 sharpen the apparent dichotomy between orientation and conduct. In February 1994, the Defense Department defined "sexual orientation" as "an abstract preference for persons of a particular sex as distinct from a propensity or intent to engage in sexual acts."⁸⁶

The plaintiffs in *Able* have seized on this dichotomy and have exploited it. The gist of their arguments seems to be that when the military discharges soldiers solely on the basis of their statements that they are homosexuals, without other proof of homoerotic acts, intent, or propensities, the military is separating the soldiers for exercising their right of free speech. The military is also separating them for their orientation, rather than conduct, contrary to its own regulations and the Constitution.⁸⁷

The courts should reject arguments like those being made in *Able* which rest on the orientation-conduct dichotomy. Better yet, the Defense Department, itself, should eliminate the semantic bases for such

types of statements that warrant separation without the necessity of carving out exceptions or further refinements. The statute provides for separation of one who by his statements claims to be a person who engages in, intends to engage in, or has a propensity to engage in homosexual acts. 10 U.S.C. §§ 654b(2), f. The Senate Report accompanying the legislation clearly adopted the practice followed by the previous version of the policy and approved by the court in *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990). S.R. No. 103-112, 103d Cong., 1st Sess., at 294 (1994). The implementing directives adopt this view and define a statement that supports separation as "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts." Dep't of Defense Dir. No. 1332.14, Enlisted Administrative Separations, ¶ P., Encl. 2, (Feb. 28, 1994). In Woodruff's view, the changes recommended in this section of the text are inconsistent with the legislative findings that the presence in the Armed Forces of those who engage in, intend to engage in, or have a propensity to engage in homosexual acts "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capacity." 10 U.S.C. § 654a(15) (1994). He is also of the opinion that the recommended "exceptions" would create more rather than less litigation as individuals try to convince courts on a case-by-case basis that they fall within one of the exceptions.

84. Secretary of Defense Memorandum, *supra* note 5, at 1.

85. *Id.*

86. Dep't of Defense Dir. No. 1332.14, Enlisted Administrative Separations, Definitions Section (Feb. 1994) (definition of "sexual orientation").

87. Plaintiffs' Memorandum, *supra* note 49, at 41-42, *Able* (No. CV 94-0974). But see the additional definitions, in the regulation cited *supra* note 83, of "statement that a member is a homosexual," "homosexual conduct" and "propensity": The DOD directive, fairly read, does not support the plaintiffs' argument.

arguments by rewriting its regulations to remove any conceivable suggestions (i) that there is a complete, real-life cleavage between orientation and conduct and (ii) that when soldiers say they are homosexual, there is a significant possibility that they are talking about an abstract preference — an “unlikely to be indulged,” emotional or aesthetic attraction toward persons of the same sex — rather than a real propensity or intent to engage in homoerotic behavior.⁸⁸ In the unlikely event that a member who unequivocally said that he was gay was referring to an abstract preference or to an inchoate or thoroughly suppressed urge, the member can prove that fact to rebut the presumption that he is the genuine article as defined in the statute.⁸⁹

The causes of whatever ambiguity there is in the Defense Department regulations — such as that resulting from the orientation-

88. See *Meinhold v. United States*, 34 F. 3d 1469, 1994 U.S. App. LEXIS 23705 (USCA 9th Cir. 1994). The Navy sought to discharge Meinhold, a petty officer, on the basis of a statement which he made on a national television news show, “Yes, I am in fact gay.” The provisions of the Department of Defense regulation, then in effect, governing discharges for statements admitting homosexuality were quite similar to current policy. The Court of Appeals decided that DOD could not discharge Meinhold solely on the basis of his statement. The Court regarded an unadorned statement that one is a homosexual to be an admission of homosexual orientation, i.e., a status, which, according to the Court, indicates no more than an *inchoate* desire or propensity to engage in homosexual conduct. Discharging an individual on the basis of that status alone, said the court, would be constitutionally questionable. See *id.* at *26-*29. The Court avoided this issue and a perceived equal protection problem by construing the regulation to authorize discharge for a statement admitting homosexuality only when the statement itself manifests a concrete, expressed desire or intent to engage in homosexual acts. *Id.* at *3-*4, *30-*32.

In our opinion the Ninth Circuit decision is wrong. In any event, the construction which *Meinhold* places on the former regulatory policy should certainly not be applied to the current statute-based policy. See *supra* notes 73-77 and accompanying text. See also S.R. No. 103-112, 103d Cong., 1st Sess., at 294 (1994) (explaining provisions of current statute relating to verbal or non-verbal statement that “I am homosexual” or words to that effect); see *Steffan v. Perry*, Sec’y of Defense, 1994 U.S. App. LEXIS 33045 (USCA, D.C. Cir. 1994). For the great majority of individuals who identify themselves as “homosexuals,” the concepts of “status” and “conduct” are coterminous. Homosexuality, like all forms of sexual orientation, is tied closely to sexual conduct. *Id.* at *29-*30. When a service member declares that he is a homosexual, without any explanation, the *military may rationally take that statement* as highly likely to be an admission of homosexual conduct, intent or propensity and discharge him. *Id.* at 38, explained at *30-*38.

Finally, the interpretation that *Meinhold* places on the former regulatory policy would seriously interfere with the efficiency and effectiveness of the current, statute-based policy, if it were to be applied to that policy. Unless the military can discharge a member on the basis of his or her unexplained statement admitting homosexuality (i) the separation of acknowledged (probably practicing) homosexuals would often be unduly complicated and delayed, and (ii) militant gays and lesbians could announce their homosexuality with relative impunity. Both eventualities would threaten the morale, good order, discipline and unit cohesion that 10 U.S.C. § 654 is meant to promote.

Note: One of the authors, Prof. Woodruff, was counsel for an amicus curiae in the *Steffan* appeal which, like *Meinhold*, was decided under the former regulation-based policy.

89. 10 U.S.C. §§ 654(b)(2), (f)(1) (1994); Dep’t of Defense Dir., *supra* note 84, at Hb(2).

conduct dichotomy — probably lie as much in politics as in drafting difficulties. The Clinton Administration lost the battle to win gays and lesbians the chance to serve openly and to remain sexually active. The Administration seems to have used the semantic orientation-conduct distinction as a sop to appease President Clinton's gay⁹⁰ and liberal supporters. The President's spokespersons like to say that the policy does not discriminate on the basis of orientation, but only targets conduct.

This dichotomy and any other illusory or cosmetic provisions that might exist in military regulations or publications and obscure the true status of gays should be corrected.⁹¹ The obligation of candor, and the benefits to be derived from candor — not the least of which is avoiding unnecessary legal issues of regulatory construction — call for absolute clarity in describing the position of homosexuals in the military.

V. Conclusion

The Armed Forces and Congress gave up the high ground when they declined to rely on morality to justify the policy of separating gays and lesbians who meet the criteria of 10 U.S.C. § 654(b). Opponents of the policy have exploited the opening by contending that the policy is based on the irrational prejudice and homophobia of military personnel.⁹² The Justice Department and the Pentagon should retake the moral high ground by asserting and establishing that the dangers to good order, discipline, unit cohesion, privacy, and morale, which until now have been the explicit justifications for the policy, are largely caused or exacerbated by the moral repugnance that many or most personnel feel toward homoerotic behavior.

The moral disapproval of individual servicemen and women would still be important even if considerably less than half of all personnel disapproved. Among service members willing to accept homosexuals into the ranks, most are probably motivated by simple tolerance. Not very many are likely to be dedicated advocates of gay rights or ardent multi-

90. It has been reported that President Clinton received up to 90% of the gay vote and that gay-rights political action committees contributed almost \$3,000,000 to his campaign. John Barry & Daniel Glick, *Crossing the Gay Minefield*, NEWSWEEK, Nov. 23, 1992, at 26.

91. The Pentagon's description of its policy, including its use of "don't ask, don't tell, don't pursue" nomenclature, apparently has misled some gays and lesbians to believe that commanders are supposed to be lenient in enforcing the policy against homosexuals who are "discreet" and "keep a low profile." In truth, the limitations on when and how investigations will be conducted may make it less likely that offenders will be caught, but the policy does not call for laxity in enforcement. See, e.g., Debbie Howlett, *For homosexuals 98% of the old policy*, USA TODAY, July 28, 1994, at 11A; Lincoln Caplan "Don't Ask, Don't Tell" — *Marine Style*, NEWSWEEK, June 13, 1994, at 28; Eric Schmitt, *Gay Troops Say the Revised Policy is Often Misused*, N.Y. TIMES, May 9, 1994, at A1.

92. See *supra* note 48 and accompanying text.

culturalists. The Pentagon and Fort Hood, Texas, are not the Berkeley campus. In other words, not very many military people are likely to feel a deep sense of grievance or loss because of the absence of gays and lesbians in the ranks.

In this article, we have equated the concept of institutional morality to the collective moral beliefs of majorities of the experienced members of the officers' and noncommissioned officers' corps. It should not be hard to establish or presume that a service member who engages in homosexual conduct, regardless of circumstances, violates the military's institutional morality. Institutional morality provides an additional and straightforward defense that can be used when the armed forces' homosexual personnel policy is attacked as infringing constitutional rights. The reasoning of *Bowers v. Hardwick*⁹³ and *Dronenburg v. Zech*⁹⁴ suggest that the institutional moral condemnation of homosexual conduct by itself, without the added weight of utilitarian justifications, provides a rational basis for the military's policy. In the highly improbable event that the Supreme Court should ever hold that homosexuals are a suspect or quasi-suspect class, the military's institutional morality could have a central role in justifying substantial constraints on the service of homosexuals.

The opponents of the policy like to point to the military's success at integrating blacks. All that is necessary, they maintain, is to order the Armed Forces to integrate gays and lesbians, then the leadership will find the means and the will to overcome resistance in the ranks. Congress very wisely did not impose this burden on the military. The Armed Forces already have enough chronic social problems on their hands, in maintaining racial harmony, expanding the roles of women (including combat roles), coping with the domestic and financial problems of underpaid young married personnel, and dealing with sexual harassment, disruptive heterosexual romances, and creeping political correctness.⁹⁵

93. 478 U.S. 186 (1986). See *supra* notes 57-60 and accompanying text.

94. 741 F.2d 1388 (D.C. Cir. 1984). See *supra* note 60.

95. See, e.g., RAND, *supra* note 1, at 186-88 (race relations); Steve Komarow, *Door Opens for Women, but not all the Way*, USA TODAY, July 28, 1994, at 11A; Eric Schmitt, *As Military Pay Slips Behind, Poverty Invades the Ranks*, N.Y. TIMES, June 12, 1994, at 1; Eric Schmitt, *Navy Prepares a Manual About Sexual Harassment*, N.Y. TIMES, April 10, 1994, at 16; J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993); David J. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 MIL. L. REV. 37 (1992) (problems of pregnancy, single parents, and dual service couples and diminished respect for authority are largely the result of erosion of the ban on fraternization between the ranks); James Webb, *Political Correctness Infects the Pentagon*, N.Y. TIMES OP-ED, July 10, 1994, at E19 (former Secretary of Navy criticizes new Chief of Naval Operations for caving in to an unjustified charge of gender discrimination).

On the whole, the services cope with their social problems more successfully than civilian society, but that is no reason to compel them to accept gays and lesbians under conditions that would be morally offensive. There is no constitutional requirement or practical justification for imposing such an onerous distraction on the military.