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ARTICLE

Defending or Amending "Don't Ask, Don't Tell"

Arthur A. Murphy*

I. Introduction

Three years ago Professors MacRae, Woodruff, and I published an article in this law review entitled *Gays in the Military: What About Morality, Ethics, Character and Honor?*[1] In that article we developed moral arguments that justify the "don't ask, don't tell" policy of the armed forces. We recommended that the Justice and Defense Departments use those arguments when defending the policy in court and in the press.[2]

The "don't ask, don't tell" policy was enacted by Congress in late 1993 and implemented by Defense Department and service regulations that took effect in February 1994.[3] Under "don't ask,

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1. See Arthur A. Murphy, Leslie M. MacRae, William A. Woodruff, *Gays in the Military: What About Morality, Ethics, Character and Honor*? 99 DICK. L. REV. 331 (1995) [hereinafter *What About Morality*?].

2. *See id.* at 354.

3. The statutory policy was codified in 10 U.S.C. § 654 (1994) and implemented by a series of directives, instructions, and memoranda issued by the Department of Defense, and regulations issued by the individual services that generally became effective on February 28, 1994. *See, e.g.*, Department of Defense Directives 1304.26 (Qualification Standards for Enlistment); 1332.14 (Enlisted Administrative Separations); 1332.30 (Separation of Regular

don't tell," gays, lesbians, and bisexuals can enlist or accept a commission without being questioned about their sexual proclivities. They can remain in the armed forces as long as they do not disclose their homosexuality by engaging in homoerotic conduct, making a statement that admits homosexual behavior or propensity, or marrying a person of the same sex. If they violate the policy and are caught they are subject to administrative discharge proceedings.[4]

There have been significant developments concerning this policy since I wrote the *What About Morality?* article with Professors Woodruff and MacRae three years ago. The policy has been challenged on constitutional grounds, and some of the cases have reached and been decided by the federal appellate courts.[5] There has been a great deal of commentary, much of it disputing the wisdom and constitutionality of "don't ask, don't tell," in the media[6] and in law reviews.[7] Gay activists and their supporters are constantly attacking the fairness of the policy and the way it is administered.[8] They charge that commanders frequently interrogate individuals about their sexuality and start investigations

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Commissioned Officers). Regarding the statute and implementing regulations and troublesome discrepancies between the two, see William A. Woodruff, *Homosexuality and Military Services: Legislation, Implementation and Litigation*, 64 U. MO. KAN. CITY L. REV. 121, 150-55, 168-73 (1995).

4. For a more complete summary of the statutory policy, see Murphy et al.,, *supra* note 1, at 332-33. *See also infra* Appendix A.

5. *See, e.g.*, Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) (upholding the policy); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (upholding the policy), *cert. denied*, 117 S. Ct. 258 (1996); Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997) (declaring the policy invalid as violating the constitutional guarantees of free speech and equal protection).

6. *See, e.g.*, Jennifer Egan, *Uniforms in the Closet*, N.Y. TIMES MAGAZINE, June 28, 1998, at 26-31, 40, 48, 56 ("'Don't ask, don't tell' has created a world of fear and deceit for gay servicemen, alienating them from both fellow servicemen and the civilian gay world."); Frank Rich, *The 2 Tim McVeighs*, N.Y. TIMES, Jan. 17, 1998, at A27 (characterizing the "Don't ask, don't tell" policy as absurd, bigoted, and shortening exemplary careers); Editorial, The Trouble With "*Don't Ask, Don't Tell*," N.Y. TIMES, Apr. 8, 1998, at A24 (arguing that the policy is being badly administered and is inherently unjust, Clinton erred in letting himself be bullied into approving it).

7. *See, e.g.*, Chai R. Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996); Walter John Krygowski, Comment, *Homosexuality and the Military Mission: The Failure of the "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875 (1995).

8. *See, e.g.*, Andrew Sullivan, Undone by 'Don't Ask, Don't Tell,", N.Y. TIMES, Apr. 9, 1998, at A27; Gregory L. Vistica & Evan Thomas, *Backlash in the Ranks*, TIME, Apr. 20, 1998, at 27; Tim Wiener, *Military Discharges of Homosexuals Soar*, N.Y. TIMES, Apr. 7, 1998, at 27.

without the credible evidence of a violation that the regulations demand.[9] They claim that harassment of gays and lesbians by fellow servicemen has increased.[10] The Defense Department has answers for some but not all the complaints.[11] Perhaps the most significant event has been the 1996 decision of *Romer v. Evans*,[12] the Supreme Court's major pronouncement on homosexual rights since the 1986 benchmark case, *Bowers v. Hardwick*.[13]

This essay will bring the research up to date on the morality arguments that were proposed in our 1995 *What About Morality?* article. Initially, those arguments will be presented without referring to *Romer v. Evans*. The question of whether *Romer* requires any change in tactics will then be explored. Can the morality arguments still be used, with or without modification, to defend "don't ask, don't tell"? Can that policy be amended in some way that will make it easier to defend? Finally, even if *Romer* does not require that "don't ask, don't tell" be amended, should Congress, the President, and the armed forces consider adopting a less stringent, compromise homosexual personal policy?

II. The Neglected Moral Bases for the Policy

The greatest weakness in the government's defense of "don't ask, don't tell" has been its failure to assert in a strong, affirmative fashion the ultimate justification for treating homosexuals differently than heterosexuals. Homosexual behavior is offensive to the *institutional* morality of the armed forces and to the *individual* moral values of most service members. Moral and ethical principle are at the heart of the military's reluctance to associate itself with self-acknowledged, sexually active gays and lesbians.[14]

The opponents of "don't ask, don't tell" have been exploiting the administration's failure to develop and stress the moral justification. The opponents contend that the policy is unconstitutional because it caters to the prejudice, bias, bigotry, homophobia, and animosity of the straight members and leaders of the armed forces. They have convinced a number of federal judges and much of the liberal media that they are right. Four judges who

9. *See* Andrew Sullivan, *supra* note 8, at A27.
10. *See id.*
11. *See id.*; Vistica & Thomas, *supra* note 8, at 27.
12. 517 U.S. 620 (1996).
13. 478 U.S. 186 (1986).
14. *See* Murphy et al., *supra* note 1, at 334-35, 354-55.

dissented from the Fourth Circuit's 1996 decision in *Thomasson v. Perry*[15] to uphold the policy were persuaded that the policy reflects irrational prejudice.[16] In July 1997, United States District Judge Eugene Nickerson in *Able v. United States*[17] ruled that "don't ask, don't tell" violates the equal protection and free speech provisions of the United States Constitution.[18] Judge Nickerson spoke dismissively of moral considerations:

> Other than the arguments as to privacy and sexual tension . . ., the only explanation the government offers for the perceived "disruptive effect that the presence of members who engage in homosexual acts would have on the other members of the unit" is that their presence would raise "concerns" of heterosexual members "based on moral precepts and ethical values." . . .
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> . . . .
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> This is an outright confession that "unit cohesion" is a euphemism for catering to the prejudices of heterosexuals.[19]

The New York Times has lionized Judge Nickerson, praising all his rulings in the *Able* case.[20]

The failure of the government to occupy and defend the moral high ground is the result of a decision presumably made during the 1993 negotiations and legislative process that led to "don't ask, don't tell." That decision was to justify the policy by strictly utilitarian reasoning. There would be no explicit reference in the statute and in Pentagon regulations to moral and ethical considerations.[21] The policy would be devoid of rhetoric like that used by the generals and admirals of The Military Working Group who were directed in 1993 to study and make recommendations about the military's homosexual policy.[22] The Group reported, "the shared moral values of the institution—the collective sense of right and wrong—provide the foundation . . . . It also provides to

15. 80 F.3d 915 (4th Cir. 1996).

16. *See id.* at 949 (Hall, C.J. dissenting).

17. 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd* 199 U.S. App. LEXIS (2d Cir. Sept. 23, 1998).

18. *See id.* at 865.

19. *Id.* at 858.

20. *See, e.g.*, Editorial, *Banning Gay Soldiers by Trickery*, N.Y. TIMES, April 1, 1995, at 18.

21. *See* Murphy et al., *supra* note 1, at 334.

22. *See id.* at 342 n.34.

individual service members the moral basis for personal service, commitment and sacrifice."[23]

I won't try to pin down the thinking and motives of the people who participated in the decision to eschew moral arguments. One can assume that politics and President Clinton's sympathy for the cause of homosexual rights were major factors.[24] General Colin Powell, Chairman of the Joint Chiefs, offered another explanation when testifying before the Senate Armed Services Committee. The General testified that he and other military leaders should not "use . . . [their] official position to make moral or religious judgments on this issue."[25] Apparently General Powell, Senator Sam Nunn, and other decision makers did not foresee the extent to which future challengers of the policy could capitalize on their failure to spell out the moral bases for the policy. They probably counted too much on the federal courts continuing to defer to the judgment of Congress and the Commander-in-Chief on this essentially military matter.

The statute enacting "don't ask, don't tell" includes separate findings that describe the unique nature and needs of America's armed forces.[26] The last finding states a conclusion drawn from the previous fourteen and illustrates the utilitarian/pragmatic tenor of all fifteen:

> 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 armed forces high standards of morale, good order and discipline and unit cohesion that are the essence of military capability.[27]

When defending "don't ask, don't tell" in court, the administration has been elaborating on this and the other findings recited in the statute and implementing regulations. One of the other findings is that living and working conditions in the service sometimes entail "forced intimacy with little or no privacy."[28] Justice Department

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23. *See id.*

24. *See id.* at 335; *see also* DAVID MIXNER, STRANGER AMONG FRIENDS 2-5, 210, 271-310 (1996) (Account by long-time homosexual friend of President Clinton of homosexual support for the first Clinton campaign and of disappointment when he failed to deliver on his promise to secure equal treatment for gays in the military).

25. Murphy et al., *supra* note 1, at 334.

26. *See* 10 U.S.C. § 654(a)(1)-(15) (1994).

27. *Id.* § 654(a)(15).

28. *Id.* § 654(a)(12).

briefs dwell on the "sexual tension" that is likely to result if non-homosexuals and known homosexuals share close quarters. Some heterosexuals may be squeamish about being ogled and about the possibility of overt advances.[29]

III. Articulating the Moral Argument

The administration needs to make a greater effort to articulate the policy's moral basis when defending "don't ask, don't tell." *Bowers v. Hardwick*,[30] the 1986 benchmark case, supplies the key to a powerful morality-based defense. In *Bowers*, the Supreme Court declared that the state of Georgia could apply its sodomy statute to punish consensual intercourse between two homosexuals in the privacy of the home.[31] The majority, speaking through Justice White, refused to read into the Constitution a fundamental right to commit homosexual sodomy; that behavior had been condemned in America for too long and was still condemned too widely to be a constitutional right.[32] Consequently, the Georgia statute had only to meet a rational basis test to satisfy Fourteenth Amendment due process.[33] Justice White found a rational basis in "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[34] Although *Bowers* addresses a due process claim, its holding is readily extended to meet the equal protection attacks being made on "don't ask, don't tell." *Bowers* implies that homosexuals are not a suspect class and that as long as there is a rational basis for doing so they can be treated differently than heterosexuals.[35]

Bowers accepts the traditional morality of the majority as adequate justification for making homosexual sodomy a crime. An administrative separation from the service under "don't ask, don't

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29. Testimony that I encountered during an administrative discharge hearing while the deputy staff judge advocate of a U.S. Army division in 1956 is illustrative. In that proceeding, a soldier testified: "I woke up. There was a hand on my penis. It was not my own. It was the respondent's." Because storytelling is now fashionable in academic writing, I'll illustrate this piece with an occasional timeless anecdote.

30. 478 U.S. 186 (1986).

31. *See id.* at 189.

32. *See id.* at 192-94.

33. *See id.* at 189-90.

34. *Id.* at 196.

35. *See, e.g.*, Mark A. Papadopoulos, *Inkblot Jurisprudence:* Romer v. Evans *as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y. 165, 173-75 (1997); Feldblum, *supra* note 7, at 282-85; Arthur A. Murphy, *Homosexuality and the Law: Tolerance and Containment II*, 97 DICK. L. REV. 693, 699 n.24 (1993).

tell" is not as drastic a sanction as criminal conviction and imprisonment.[36] Thus, traditional majority morality, by itself, may suffice to justify discharges for homosexuality. If we add to this morality all the related utilitarian factors identified in the statute and regulations—unit cohesion, morale, and individual privacy—there is certainly more than a rational basis for the policy.[37]

What does it mean to speak of the military's "majority morality" with regard to homosexuality? The term can be understood in at least two ways. First, it can relate to the individual moral beliefs and sentiments of all the men and women of the armed forces, from new recruits to the chairman of the joint chiefs. Do most of them have a strong conviction that homosexual conduct is *wrong*—that it is conduct in which they and their fellow service members *ought* not to engage? Second, the term "majority morality" can relate to the individual moral beliefs and sentiments of a smaller, more select group—the experienced, active duty members of the officers' and non-commissioned officers' corps.[38] Are most of these people convinced that homosexual conduct is *wrong*—conduct from which everyone in the military *ought* to abstain? This second type of "majority morality" may fairly be labeled "institutional morality."[39]

To equate the collective understanding of right and wrong of experienced active duty officers and NCOs to the institutional morality of the military makes sense; it is probably as close as one can get to representative democracy in a hierarchal organization like the armed forces. These are the people who run the military enterprise and who may spend five to thirty-five years of their lives

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36. *See* Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 389 (1997) ("[A]rguments that a 'greater' governmental power includes a lesser one have been part of American jurisprudence at least since the time of Justice Holmes."); *cf.* S.I. Strong, *Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in Romer v. Evans*, 71 S. CAL. L. REV. 1, 43-44 (1997) (disagreeing with the course the law has been taking, but acknowledging the modern trend to blur the differences between civil and criminal law and to use civil and administrative remedies to address criminal problems).

37. *See* Murphy et al., *supra* note 1, at 344-48, 350. For an argument that morality helps refute the claim that "don't ask, don't tell" violates the free speech of homosexuals, see *id.* at 348-50.

38. Non-commissioned officers will hereinafter, be referred to as "NCO's." "Experienced" officers include both recent and older graduates of the service academies.

39. *See* Murphy et al., *supra* note 1, at 336-38. One can argue that institutional morality should be defined in a more abstract, less majoritarian fashion, that is, as traditional morality or as a military version of natural law. *See id.* at 337-38.

under its regime. These people have been promoted based on assessments of their character and knowledge of the military. 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 "traditional" military ideals and moral values.[40]

When applying *Bowers* in the military context, "institutional morality," the traditional majority morality of experienced officers and NCOs, is probably more significant than the majority morality of the entire military population. In any event, one is probably correct in assuming that both majorities regard homosexual conduct as immoral and a homosexual propensity as an undesirable character trait or an unfortunate compulsion.

Note that my interpretation of the *Bowers* concept of "majority morality" is democratic in two senses. First, "majority" refers to a large population. Second, "morality," or moral beliefs, is defined inclusively to refer to each individual's convictions about what constitutes right and wrong behavior. The religious or the philosophical foundations of an individual's moral beliefs can be metaphysical or pragmatic, obvious or obscure, sophisticated or blue collar, widely shared or idiosyncratic. Of course, there is a point beyond which a particular belief is so patently evil or silly that it would not deserve the label "moral" in the constitutional law semantics of the *Bowers* decision. A perverse tenet of a neo-nazi or satanic cult is an example. However, the beliefs of particular individuals that it is immoral, moral, or of no moral consequence for two adults to engage in consensual, homoerotic activity are not beyond the pale. All qualify as "moral" beliefs in an inclusive, democratic sense.[41]

There are many sources from which individual officers, NCOs, and other enlisted persons derive the moral principles and values that they believe apply within the service. Of course, they enter the service with character, moral outlook, and religious faith, if they have one, more or less formed by their civilian lives. After entry, they remain subject to the currents and cross-currents of American

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40. *See id.*
41. *See id.* at 336-37.

civilian society and culture. But after several years of being part of the unique organization and society of the armed forces, and being exposed to its traditional values, most officers and NCOs will share those values.[42]

Although increasing numbers of Americans approve or complacently accept homosexual behavior, the majority still disapprove or have serious reservations about that sort of conduct.[43] The overwhelming grass roots and political opposition to homosexual marriage that led Congress to pass the "Defense of Marriage Act"[44] shows that most Americans still do not agree with Andrew Sullivan's book that gays and lesbians are "virtually normal."[45] The traditional Judeo-Christian condemnation of sodomy continues to shape individual moral thinking and attitudes either directly through a person's religious faith or indirectly as the unacknowledged source of ethical belief or cultural taboo. Most people believe that while men and women are a lot alike their basic natures are different and complementary in important 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 genesis of such convictions in order to credit their reality.[46]

Experienced officers and NCOs are likely to be more conservative on social issues than the public at large. They live and work in a subculture in which the professional military tradition of "Duty, Honor, Country"[47] contends with the American democratic and libertarian traditions. The professional military tradition regards obedience and subordination of personal interests as paramount virtues for servicemen and women. Fusing of the official and private spheres of its members' lives is a basic feature of that tradition. Beliefs about what it means to be a man or woman are especially deeply rooted in the military that depends for

42. *See id.* at 339.

43. *See, e.g.*, Carey Goldberg, *Acceptance of Gay Men and Lesbians Is Growing, Study Says*, N.Y. TIMES, May 31, 1998, at A21; Alan Wolf, *The Homosexual Exception*, N.Y. TIMES MAGAZINE, Feb. 8, 1998, at 46 (discussing a study that shows that suburban Americans are surprisingly tolerant of everyone but gay men and lesbians); Murphy et al., *supra* note 1, at 343.

44. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

45. ANDREW SULLIVAN, VIRTUALLY NORMAL (1995).

46. *See* Murphy et al. *supra* note 1, at 344 n.41.

47. This phrase has been the motto of West Point for one-hundred years.

much of its strength on the martial and "manly" character of its predominantly male personnel.[48]

Being conservative, most seasoned officers and NCOs are resistant to social experiments and tampering with things that seem to work well.[49] They know the weak and irrational side of human nature. They are aware that there is no unbreachable protective mechanism that keeps immature, confused, lonely, frightened, or licentious straight people from yielding to impulse or seduction.[50] Most seasoned officers and NCOs fear, with good reason, that if the military "endorses" homosexual behavior by imposing no more constraints on homosexuals than on heterosexuals, the number of gays and lesbians will increase to some unpredictable extent, while the frequency of same gender sexual activity and the number of self-styled "bisexuals" is likely to multiply. Most seasoned officers and NCOs may feel that the increased numbers will not be limited to previously repressed, unhappy homosexuals. They suspect that a homosexual orientation is not, as the current scientific orthodoxy suggests, always fixed solely by nature or very early nurture. They think it possible that a permissive, sex-saturated moral environment may play a part in shaping the homosexual or bisexual orientation of an individual, or in other words that culture may directly or indirectly condition children and impressionable young adults to self-identify as homosexual or bisexual.[51]

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48. *See* Murphy et al., *supra* note 1, at 344 n.43.

49. *See id.* at 344 n.42.

50. I recall one soldier testifying at a court-martial trial at which I was the military judge that it was alcohol, curiosity, and the defendant's blandishments that induced him to bugger the defendant.

51. The January-February 1998 issue of HARVARD MAGAZINE included an article about the life of gay men at Harvard University. The next issue published a critical letter to the editor from Nathaniel S. Lehrman, M.D. Doctor Lehrman, the retired clinical director of a psychiatric center in Brooklyn, N.Y., made these points:

> Sexual feelings toward forbidden individuals pervade our American culture. . . . Ads showing near-naked men in provocative poses now similarly stimulate increasingly accepted homosexual feelings any of us can have. . . .
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> If we recognize the insignificance of sexual feelings, including the homosexual, we can dismiss them easily. . . . People preoccupied with homosexual feelings easily come to believe they are indeed "homosexual," especially if a clergyman or therapist confirms that "orientation," It is particularly important for teenage boys, and those who counsel them to recognize the fluidity of adolescent sexual feelings . . . .
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> . . . Gay communities, of which Harvard has many are then more than willing to confirm such "orientations" by enlisting these men in their homosexual culture and activities.

Conservative officers and NCOs, like many civilians, are unhappy with the more feckless changes in our national mores that began in the late 1960's. They see full-time and part-time homosexuals, and their apologists, subverting what little remains of the old moral consensus, the institutions of marriage and family, and the kind of society they want for their children.[52] Conservative officers and NCOs may agree with General Colin Powell that they should not preach morality to civilians, but they won't mind if the military's homosexual personnel policy furnishes an example of moral constancy to the larger society.

Experienced officers and NCO's are aware of practical problems that may occur less frequently and be easier to deal with as long as the number of homosexuals and the amount of same gender sexual activity are kept in check. They are familiar with the high rates of HIV/AIDS and other sexually transmitted diseases among homosexual males.[53] They may know that promiscuity, concealment of HIV-positive status from sex partners, and other unsafe sex practices are resurgent in the homosexual men's community.[54] Some officers and NCOs have seen or heard about situations like one I observed fifty years ago while serving in an Army engineer battalion. There were rumors that the captain commanding one company was "queer." The battalion commander ignored the rumors until the captain was accused of fraternizing with young enlisted men and favoring some of them with promotions and good assignments. After an investigation proved the accusation true and that the captain had also gotten drunk with at

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HARVARD MAGAZINE, Mar.-Apr. 1998, at 11-12. *Cf.* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY - VOLUME I: AN INTRODUCTION 3-13, 57-59, 70-73 (Vintage Books ed. 1990) (1978 transl.) (arguing culture is a determinant of sexual thinking and practices). *But see* Feldblum, *supra* note 7, at 323-27 (discussing harm that results when "real gays" repress their natural desires or conceal their sexual identity because of legal and social distinctions between homosexuals and non-homosexuals).

52. *See* Murphy, *supra* note 35, at 694-95; Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, the Culture Wars and* Romer v. Evans, 72 NOTRE DAME L. REV. 345, 369-71. Duncan concludes that the sexual revolution has wreaked havoc on the quality of life in our society and has infected our corporate health polluted the popular culture, and damaged the lives of countless children and families. *See id.* Duncan further concludes that individual liberty and religious freedom of moral traditionalists are becoming casualties.

53. *See* Murphy, *supra* note 35, at 704 n.33.

54. *See* Sheryl G. Stolberg, *Gay Culture Weighs Sense and Sexuality*, N.Y. TIMES, Nov. 23, 1997, at WK1; Alan J. Mayer, *The Irresponsibility That Spreads AIDS*, N.Y. TIMES, Nov. 15, 1997, at A17.

least one young soldier and sodomized him, the captain was discharged. Knowledgeable officers and NCOs sense that the military has enough problems with sex—witness the Tailhook and Aberdeen scandals[55]—without abandoning moral tradition and endorsing homosexual behavior by opening the ranks to professing, practicing gays, lesbians, and bisexuals.

The moral justification for "don't ask, don't tell" is especially important when it comes to applying the policy to women. The pragmatic arguments for excluding lesbians are not very strong. Compared to gay men, lesbians are much less likely to be sexually aggressive, promiscuous, and subject to HIV/AIDS and other sexually transmitted diseases. Compared to ultra-feminine women,[56] lesbian women are typically more military in appearance, conduct and attitude, and more physically fit. Women tend to be more tolerant of homosexuality than men. The presence of known lesbians is likely to be less disruptive than the presence of ultra-feminine women or men known to be gay.[57]

Finally, my proposal that the government should emphasize morality when defending "don't ask, don't tell" calls only for the

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55. In September 1991 the Tailhook Association, which included many Navy and Marine aviators, held a convention in Las Vegas. There was a great deal of drunkenness and sexual misconduct. *See* Murphy et al., *supra* note 1, at 340 n.30; Philip Shenon, *5 Years Later, Navy Is Still Reeling From Tarnish of Tailhook Incident*, N.Y. TIMES, May 20, 1996, at B6. During 1997 a spate of sex-related offenses by male drill instructors at the Army's Aberdeen, Maryland training facility involving female recruits were investigated and prosecuted. *See* Elaine Sciolino, *Army Trial Raises Questions Of Sex, Power and Discipline*, N.Y. TIMES, Apr. 12, 1997, at 1,8. The Armed Forces must deal with a host of social problems besides sexual misconduct. Some of these problems are fairly recent developments, others have always existed. They include maintaining racial harmony, integrating women, coping with the domestic and financial problems of personnel, and "de-glamorizing" heavy drinking. *See, e.g.*, Murphy et al., *supra* note 1, at 355; Charles C. Moskos, Jr., *From Citizens' Army to Social Laboratory*, THE WILSON QUARTERLY, Winter 1993, at 83 (discussing problems of race, gender and sexual orientation); Steven L. Majers, *Defense Chief Rejects Advice to Separate Sexes in Training*, N.Y. TIMES, March 17, 1998, at A1, A23; *Report: Money Woes Harm Navy Personnel*, THE SENTINEL (Carlisle, PA), Feb. 6, 1998 at A1; Eric Schmitt, *Pentagon Fights Wider Sale of Beer and Wine*, N.Y. TIMES, May 31, 1998, at 2. *See generally* Arthur A. Murphy, *The Soldier's Right to a Private Life*, 24 MILITARY L. REV. 97 (1964) (providing a historical perspective).

56. By "ultra-feminine women," I mean women whose appearance and behavior are sensuous.

57. Professor Diane H. Mazur contends that the arguments on which the government has been relying to show a rational basis do not constitutionally justify applying "don't ask, don't tell" to women. She makes a strong case for this position in *Remaking Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not*, 58 OHIO ST. L.J. 953 (1997). Of course, the government's arguments to date have underplayed morality.

voicing of something already implicit in the language of the statute and regulations. However much General Powell, Senator Sam Nunn, Congress, and the Executive Branch in 1993 may have wanted to bypass moral issues, they could not avoid dealing with them and taking a position by implication. The legislative findings recited in section 654(a) of the statute imply that homosexual conduct violates deeply held individual and institutional beliefs that the conduct is morally wrong.[58] These are findings that the presence of individuals who demonstrate a propensity for homosexual conduct would adversely affect good order and discipline, morale, individual privacy, and unit cohesion. Some, if not all, of the adverse effects have to be caused or exacerbated by widespread disapproval within the armed forces of homosexual conduct. Much of that disapproval must inevitably stem from moral sentiments; a number of officers and military clergymen who have written to me in the last three years confirm this conclusion.[59]

IV. Is *Romer v. Evans* a Threat to the Policy?

What effect does *Romer v. Evans*,[60] have on *Bowers*[61] and everything I have discussed? In *Romer* the Supreme Court considered the constitutionality of the celebrated/notorious "Amendment 2" to the Colorado state constitution.[62] Amendment 2 was adopted in 1992 by statewide referendum following a contentious campaign.[63] The Colorado amendment prohibited every branch of state and local government from adopting or

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58. *See* 10 U.S.C. § 654(a)(1)-(15) (1994).

59. *See* Murphy et al., *supra* note 1, at 341. An active duty major general wrote this about the 1995 article:

> Your analysis of the moral justification underlying the Government's policy on homosexuality highlights an important dimension of this often contentious issue, and adds a meaningful insight to the public debate. Translating the institutional morality of the armed forces into a substantive legal position sufficient to withstand constitutional scrutiny reflects a refreshingly straightforward and intellectually honest perspective. The fact that you and one of your co-authors are former career Army officers certainly enhances your credibility as spokesmen for the corporate morality of the military.

Archbishop Joseph Dimino commended the 1995 article to the bishops and priests of the Catholic archdiocese for the military services. Copies of correspondence alluded to in this essay are on file in the office of the DICKINSON LAW REVIEW.

60. 517 U.S. 620 (1996).

61. 478 U.S. 186 (1986).

62. *See Romer*, 517 U.S. at 623.

63. *See id.*

enforcing any law or policy that granted a protected status or claim of discrimination based on gay, lesbian, or bisexual orientation or conduct.[64] One consequence was to void Denver, Boulder, and Aspen city ordinances that forbade discrimination against homosexuals in employment, housing, and public accommodations.[65] The Supreme Court held that "Amendment 2" violated the Equal Protection Clause of the United States Constitution.[66]

One remarkable aspect of the majority opinion is that it does not mention *Bowers*. I'll quote enough of Justice Kennedy's words to enable the reader to get a sense of whether *Romer* might affect *Bowers* and the military's "don't ask, don't tell" policy:

> In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous . . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law . . . .
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> . . . .
>
> Amendment 2 confounds this normal process of judicial review . . . . It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence . . . .
>
> . . . .
>
> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense . . . .
>
> . . . .
>
> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." . . .

64. *See id.* at 624.
65. *See id.*
66. *See id.* at 635.

> . . . .
>
> The primary rationale the state offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality . . . . The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them . . . [Amendment 2] is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests . . . .
>
> . . . .
>
> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else [and] . . . a stranger to [Colorado's] laws. Amendment 2 violates the Equal Protection Clause . . . .[67]

Federal judges, legal scholars, and the lawyers who deal frequently with legal issues concerning homosexuals differ about the meaning of *Romer*.[68] Has the Supreme Court weakened, or even overturned, *Bowers* without actually saying so? Is "don't ask, don't tell" threatened? Some law professors and practicing lawyers see *Romer* as signaling the doom of *Bowers* and the military's homosexual policy.[69] I am among those who read *Romer* more

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67. *Romer*, 517 U.S. at 632-35.

68. *See, e.g.*, Timothy M. Tymkovich et al., *A Tale of Three Theories: Reason and Prejudice in the Battle Over Amendment 2*, 68 U. COLO. L. REV. 287 (1997) (placing *Romer* in its political, social, and litigation contexts, concluding that the *Romer* majority opinion is an example of ad hoc activist jurisprudence without constitutional mooring); Mark E. Papadopoulos, *Inkblot Jurisprudence:* Romer v. Evans *as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL'Y., 165, 201 (1997) (concluding that *Romer* is ambiguous like a Rohrshach inkblot, and that three separate readings "have emerged: (1) *Romer* overruled *Bowers v. Hardwick*; (2) *Romer* distinguished *Bowers*; (3) *Romer* and *Bowers* will work side-by-side to defeat different constitutional challenges by homosexuals") Papadopoulos believes that the third reading is the strongest and most logical at this point. *See id. But see* Philips v. Perry, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J. dissenting). Judge Fletcher stated that *Romer* implicitly rejects the contention that moral disapproval of homosexuality creates a legitimate state interest justifying discrimination. *See id.* Otherwise discrimination could always be justified by the moral disapproval of the majority. *See id.*

69. *See, e.g.*, Thomas G. Grey, Bowers v. Hardwick *Diminished,*, 68 U. COLO. L. REV. 373 (1997); Samuel A. Marcossan, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 232-34 (1998) (arguing that *Romer* contradicts the broad anti-gay reading of *Bowers* and will eventually lead to overruling its holding on sodomy.); Duncan, *supra* note 52, at 348 n.13; Richard C. Reuben, *Gay Rights Watershed [Romer v. Evans]*, A.B.A. J., July 1996, at 30.

narrowly to focus on *procedural* discrimination against homosexuals—on singling them out and denying them access to the ordinary processes for changing the law.[70] Read in this way, *Romer* does not inevitably undermine *Bowers* or threaten the armed forces policy on homosexuality.

Note that I said *Romer* does not *inevitably* pose those dangers. Unfortunately there are ideas and language in Justice Kennedy's opinion that may foreshadow the demise of *Bowers* and show that some justices may be willing to substitute their own judgment for that of Congress and the Executive Branch regarding the wisdom of "don't ask, don't tell." When "don't ask, don't tell" eventually reaches the Supreme Court, is a majority likely to find that the moral and utilitarian justifications, which are the foundation for the policy, amount to nothing more than "animosity"—a catering to the irrational prejudices of servicemen and women and their leaders?[71] In other words, will the Justices agree or disagree with Judge Nickerson's decision in *Able*[72] and with the four dissenters in *Thomasson*?[73] Or, might they proceed on another tack and conclude that, while there are legitimate justifications for treating homosexuals differently than non-homosexuals, the policy is not sufficiently tailored to those reasons?

V. Responding to *Romer*: Defending "Don't Ask, Don't Tell"

What should the Justice and Defense Departments, the President, and Congress do now to guard against defeat in the Supreme Court? Unless the government reinforces its position and changes tactics when defending "don't ask, don't tell," there is a danger that a majority of the Supreme Court will take sides in the culture wars and find that all or much of "don't ask, don't tell" violates the Constitutional guaranty of equal protection. Justice Scalia, dissenting in *Romer*, accuses the majority of mistaking a "Kulturkampf for a fit of spite."[74] Justice Scalia is not inclined to

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70. *See* Duncan, *supra* note 52, at 346-49; Jonathan S. Bauer, Note, *Applications to Gay Rights and Beyond,* Romer v. Evans, 116 S. Ct. 1620 (1996), 76 NEB. L. REV. 352, 368-69 (1997). *See also* Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387, 407-408 (1997) (arguing that *Romer* and *Bowers* can be reconciled and that the problem with Amendment 2 was its sheer breadth).

71. *See Romer*, 517 U.S. at 634.

72. *See supra* notes 18 and 19 and accompanying text.

73. *See supra* note 16 and accompanying text.

74. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

read the majority's decision narrowly; he asserts that the court in *Romer* is contradicting *Bowers* and placing the prestige of the Supreme Court "behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[75] Since the United States Constitution is silent on the subject, he maintains, and I agree, that such a basic conflict should "be resolved by normal democratic means . . . ."[76] The courts have "no business imposing upon all Americans the resolution favored by the elite class" of lawyers and law professors from whom federal judges are chosen.[77]

The government must do whatever it can within the parameters of *Able* and all other pending and future litigation, by either introducing evidence or supplementing the arguments in its briefs, to establish that the underlying purpose of the policy is to acknowledge and foster a unifying moral belief that homosexual behavior is wrong. The government should stress institutional morality as the more relevant of the two moralities described in this essay: the institutional morality of the armed forces and the moral values of its individual members.

The casual way in which the *Romer* majority inferred that people who voted for Colorado's Amendment 2 were motivated by animosity toward and a bare desire to harm homosexuals is a warning that the government cannot be content with unsupported, general assertions of moral motives and denials of animosity.[78] The government must strongly counter arguments made by opposing counsel that equate righteous disapproval to undeserved prejudice. That idea is already embedded in the thinking of federal judges like Judge Nickerson.[79]

The most ardently liberal federal judges can fairly be included in what Peter Steinfels, religion editor of the New York Times, has named the "lifestyle left."[80] He identifies the lifestyle left, which consists of both religious and non-religious people, as the opposite of the "religious right." The lifestyle left consists of groups and individuals, such as the ACLU and gay rights organizations, ideologically dedicated to pushing the envelope of socially

75. *Id.*
76. *Id.*
77. *Id.*; *see also* Murphy, *supra* note 35, at 695 n.26.
78. *See Romer,* 517 U.S. at 634-35.
79. *See supra* note 19 and accompanying text.
80. *See* Peter Steinfels, *Beliefs*, N.Y. TIMES, Aug. 10, 1996, at A29.

acceptable lifestyles.[81] They are not content with the separation of church and state; they seem hell-bent on increasing the estrangement between law and traditional morality.

The government position would be greatly strengthened if the Defense Department or Congress were to conduct hearings, specifically find that homosexual behavior offends the institutional morality of the military, and add that finding to the regulations or statute. Such a finding would make it extremely difficult for the courts to gloss over questions of (i) the extent to which moral considerations can justify "don't ask, don't tell" and (ii) just how much deference the judiciary owes to the political branches of government on this military and moral issue.

One commentator sees *Romer* as marking a watershed:

> American jurists stand in the unique position of being able to choose the direction in which the law will proceed. At this point, there is an arguably sufficient level of precedent to justify the continued enactment of morality legislation, but there is an equally well-established body of law to support the decreased use of morality as a justification for law.[82]

However close the question may be with regard to civilian law,[83] there are persuasive reasons for accepting the institutional

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81. *See id.*; *cf.* Lino A. Graglia, Romer v. Evans: *The People Foiled Again By the Constitution*, 68 U. COLO. L. REV. 427 (1997) (arguing that gaining full approval of homosexuality is today's *cause celebre* in legal academia).

82. S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1312-13 (1997); *see also* Steven A. Delchin, Comment, *Scalia 18:22: Thou Shall Not Lie With the Academic and Law School Elite; It is an Abomination*—Romer v. Evans *and America's Culture War*, 47 CASE W. RES. L. REV. 207 (1996). A key battle is being fought over the question of whether traditional religious moral beliefs may properly enter into formulation of public policy. *See id.* at 242. Historically and philosophically, religion has an important role in making law. *See id.* at 242-52.

83. For citation and discussion of modern cases that explicitly refer to the relation of morality and law, see Woodruff, *supra* note 3, at 166. *But see* Strong, *supra* note 36, at 44-46 (discussing caselaw and arguing that moral disapproval of disfavored groups is not a proper basis for law under constitutional and jurisprudential principles). The *Woodruff* article is an excellent, comprehensive treatment of the military's homosexual personnel policy. Professor Woodruff, a retired colonel and former chief of the Army's litigation office, argues that 10 U.S.C § 654, the "don't ask, don't tell" statute, is constitutional but that the implementing departmental regulations are inconsistent with the statute in important ways. *See* Woodruff *supra* note 3, at 178. Six of the judges in Thomasson v. Perry were persuaded by this argument and voted to uphold "don't ask, don't tell," solely on statutory grounds, holding that a service member could be separated simply for declaring he is gay. *See* Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996). They in effect accused the administration of pulling its punches when implementing and defending the policy. *See id.* at 934-35. (Luttig, J., concurring).

morality of the armed forces as a proper basis for military law and policy. For one thing the arguments made by Lord Patrick Devlin in his celebrated exchange with Professor H. L. A. Hart are even more cogent when applied to the military. Lord Devlin, discussing the repeal of Britain's sodomy law, maintained:

> What makes a society of any sort is a community of ideas . . . [including ideas about morality] . . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if . . . the agreement goes the society will disintegrate . . . .
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> . . . .
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> Common lawyers used to say that Christianity was part of the law of the land. That was never more than a piece of rhetoric . . . . What lay behind it was the notion that morals . . . were necessary to the temporal order.[84]

Lord Devlin believed that society may use legislation to protect its core moral values. The use of law is even easier to justify in the armed forces where discipline, order, and unit cohesion trump individual autonomy and self-expression. Congress and the President can impose restraints to preserve values that are deemed important by most experienced officers and NCOs.

When defending "don't ask, don't tell," the Justice and Defense Departments should draw heavily on what Justice Scalia says in *Romer* about the relation of law to morality. Justice Scalia maintains that a popular majority is entitled to preserve its traditional moral values through legislation.[85] This was the rationale of *Bowers*. He distinguishes between traditional moral disapproval and pointless or unworthy "animus."[86] Moral disapproval may supply a reasonable basis for legislation disfavoring homosexuals—unworthy animus cannot.[87] This distinction is reflected in the differences between *Bowers* and the earlier case of *City of Cleberne v. Cleberne Living Center*.[88] The discrimination

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84. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 9-10 (1965). For a more complete exposition of Lord Devlin's ideas see Feldblum, *supra* note 7 at 312-20. Professor Feldblum proposes that advocates of homosexual rights educate the public on the moral good of homosexual love and couplings so that the advocates eventually can support their positions with morality-based arguments. *See id.* at 331-35.

85. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting).

86. *See id.*

87. *See id.* at 644-45.

88. 473 U.S. 432 (1985).

found unconstitutional in *Cleberne* was discrimination against mentally retarded people.[89] This was discrimination inspired by unworthy animus, not by moral disapproval.

Sometimes the federal judges who find that "don't ask, don't tell" caters to the animus, animosity, or irrational prejudice of service members treat moral disapproval of homosexuality as *per se* animus.[90] These judges are not drawing the distinction between moral disapproval and unworthy animus that Scalia and his fellow dissenters, Chief Justice Rehnquist and Justice Thomas, did. The challenge for the government is to convince a majority of the court to draw that distinction. Even if a majority is reluctant to endorse the moral disapproval/unworthy animus dichotomy as a general principle, they ought to endorse it in a military context. Justice Blackmun, a dissenter in *Bowers v. Hardwick* who rejected the majority's morality rationale,[91] acknowledged in another case that the military has its own code of honor and that military law can embody the judgment of the military community about what is honorable, decent, and right.[92]

Sometimes the judges who find that "don't ask, don't tell" caters to animus seem to go along with Scalia's dichotomy. However, they comb through the legislative history and conclude that "don't ask, don't tell" in fact caters to the animus of all ranks and grades. These judges draw their conclusions from items like testimony in the Senate hearings by a plain-spoken retired admiral that homosexuals engage in a "filthy, disease-ridden practice" and are "inherently promiscuous."[93] The government can deal with this judicial fact finding approach by urging the morality-based arguments suggested in this essay and the earlier *What About Morality?* essay.[94] The Justice and Defense Departments should also search the legislative history for additional evidence to counter any claim that "don't ask, don't tell" caters to a pointless hate of

89. *See id.* at 448.

90. *See* Able v. United States, 968 F. Supp. 850, 858 (E.D.N.Y. 1997) (stating that the government's claim that the presence of known homosexuals would raise concerns of heterosexual service members which were based on moral precepts and ethical values is a confession that the policy caters to prejudices of heterosexuals).

91. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Blackmun, J., dissenting).

92. *See* Parker v. Levy, 417 U.S. 733, 764-65 (1974) (Blackmun, J., concurring) (defendant officer had been convicted by court martial of publicly urging negro enlisted men to refuse to serve in Vietnam).

93. *See* Thomasson v Perry, 80 F.3d 915, 951 (4th Cir. 1996) (Hall, C.J., dissenting).

94. *See generally* Murphy et al., *supra* note 1.

homosexuals or other unworthy animus. But once again, the ideal response to the argument that "don't ask, don't tell" caters to hate and homophobia would be for Congress and the Defense Department to determine whether there is a moral as well as utilitarian basis for the policy. Legislative and administrative fact finding is a more suitable and reliable process than judicial fact finding for determining this issue of morality/animus.

VI. Responding to *Romer*: Amending "Don't Ask, Don't Tell"

In *Romer*, Justice Kennedy criticized Amendment 2 on another ground—the deprivation it imposed on homosexuals seemed to be needlessly broad.[95] The amendment was not even roughly tailored to the justifications claimed by the state; for instance, the claim that the amendment was meant to ensure "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[96] What Justice Kennedy says in *Romer* suggests that the Defense Department and Congress ought to consider whether "don't ask, don't tell" is suitably tailored to the purposes that it is meant to serve. Are its sweeping constraints unnecessarily broad? Should Congress modify the policy immediately to reduce the risk that it will be overturned by the Supreme Court or should Congress wait to seee what the Court does?

There is little risk that the Supreme Court will find "don't ask, don't tell" to be inadequately tailored if the government does add institutional morality to the utilitarian justifications for the policy. The policy would easily meet the minimal requirements of the rational basis test. Of course, the correlation between the policy and its purposes would become much more critical if the Supreme Court backs away from the equal protection implications of *Bowers* and decides that homosexuals are a suspect or a quasi-suspect class.[97] Although the moral and utilitarian purposes of the policy would amount to a compelling national interest, the government might have a hard time convincing the Court that the equal protection and free speech provisions of the Constitution permit

95. *See* Romer v. Evans, 517 U.S. 620, 626-27 (1996).

96. *Id.* at 635.

97. *See Feldblum*, *supra* note 7 at 242, 246-98 (discussing equal protection jurisprudence, distinguishing *Bowers*, and maintaining that sexual orientation should be regarded as a suspect class).

the discharge, regardless of circumstances, of every gay and lesbian who indulges in romantic or erotic behavior or talking about his or her sex life.

During the 1993 congressional hearings I proposed a compromise policy of "tolerance and containment" to the Pentagon, the House and Senate armed services committees, and the White House.[98] My compromise would have placed constraints on homosexual behavior and speech that, while substantial, were less total and more realistic than "don't ask, don't tell." My proposal would have allowed homosexuals to have a discreet sex life, and to speak about their sexuality, in circumstances that were so far removed from a military environment and their military status and duties that there would be very little risk of prejudice to good order and discipline or of harm to the self-image and reputation of the armed forces. "Bisexuals," however, would not be allowed even a discreet *dual* sex life. They do have greater freedom of choice and would be expected to settle for either a heterosexual or homosexual identity. Two active duty officers, a brigadier general and a colonel, with whom I discussed the proposal agreed that a policy of tolerance and containment would neither give the impression of condoning homosexual behavior, nor significantly endanger military capability and combat effectiveness. However, the responses I received to the proposal indicated that key decision makers, except for Chairman Ron Dellums of the House Armed Services Committee,[99] were not ready to consider any alternative more lenient to homosexuals than "don't ask, don't tell." My suggested policy reprinted in Appendix B may be worth considering in light of the *Romer* decision.

My suggested policy also may deserve another look because of the constant criticism of "don't ask, don't tell" by gay rights advocates and the media[100] and the increasing political, social, and cultural acceptance of the homosexual lifestyle.[101] Five or ten years from now—even if "don't ask, don't tell" has been upheld by the Supreme Court—there may be irresistible political pressure to scrap the policy for being too harsh.

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98. For the complete text of this proposal, *see infra* Appendix B.

99. In his letter of May 28, 1993, Chairman Dellums wrote, "I commend you for your hard work on a proposal that I found thoughtful and well articulated. You can be sure that the committee will consider your views . . . ."

100. *See supra* notes 6 and 8 and accompanying text.

101. *See generally, e. g.*, Goldberg, *supra* note 43.

A compromise policy could probably be devised that would be satisfactory now and for the foreseeable future to homosexual servicemen and women who are more interested in being good soldiers, sailors, airmen, and marines than in promoting the homosexual cause. A well-designed compromise policy would surely detract less from military capability and be easier to administer than "don't ask, don't tell" if the armed forces one day find themselves needing to draw heavily on the homosexual population to meet requirements for manpower or particular skills. This could happen during a national emergency if the forces were greatly expanded and the draft restored.

Let me suggest possible changes other than those proposed in Appendix B:

a. A very lenient homosexual personnel policy might be modeled on the rules and practices for dealing with members accused of adultery. The adultery policy in essence calls for commanders to intervene only in egregious cases that involve a particularized military interest.[102]

b. A feature of any new policy (or of an amended "don't ask, don't tell" policy) might be to give homosexuals the opportunity to obtain advice, on a confidential basis, from a service lawyer, chaplain, or doctor.[103] All advice concerning the requirements of the policy would be candid, reliable, and not calculated to help the individual circumvent the restrictions of the policy. The chaplain's counseling presumably would be pastoral in nature and consonant with the religious faith of the chaplain and the individual. All other counseling would be non-coercive and would encourage responsible, healthy, and preferably abstinent behavior, with any bias leaning towards heterosexuality. It is a mistake to leave counseling of homosexual person-

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102. Regarding service member adultery, *see, e.g.*, William T. Barton, *the Scarlet letter and the Military Justice System*, THE ARMY LAWYER (Aug. 1997) (DA. PAM 27-50-297) 3, 8 (conviction for adultery requires proof that under the circumstances the conduct was prejudicial to good order and discipline, or had a tendency to bring discredit upon the armed forces, or in the case of an officer charged under Article 133 of the Uniform Code of Military Justice (UCMJ), was unbecoming conduct); Philip Shenon, *Military Rules on Morality Are Defended*, N.Y. TIMES, June 4, 1997, at A14; Mark Thompson, *Sex, The Army and a Double Standard*, TIME, May 4, 1998, at 30; *see also* Steven L. Myers, *Military Weighing Changes in Policy Toward Adultery*, N.Y. TIMES, July 19, 1998 at 1 (discussing changes being considered that would make the policy more lenient).

103. *See* Murphy et al., *supra* note 1 at 351 n.80-81.

nel, and the sexually confused and uncertain, entirely to surreptitious meetings with liberal promoters of gay rights.

c. A new policy, consistent with a philosophy of tolerance and containment, might be identical to "don't ask, don't tell" with one major exception—the policy would establish a defense of immunity if the putative violation occurred in certain clearly defined circumstances. The defense would not be meant to recognize a moral right to engage in homosexual behavior. Rather, it would be a realistic concession to human weakness and the relative immutability of true homosexuality. If a homosexual (defined to exclude a practicing bisexual) engaged in homoerotic conduct or disclosed his homosexuality under the defined circumstances he or she would not, by reason of that behavior, be subject to punishment or administrative discharge regardless of who happened to learn of the behavior.

The draftsmen of the immunity defense might consider incorporating the following ideas:

(1) There should never be immunity for violations of "don't ask, don't tell" occurring on a military installation, ship, aircraft, vehicle or in any place within 25 miles of the actor's duty station.
(2) There should never be immunity, regardless of where it occurs, for engaging in homoerotic conduct with, or confiding homosexual identity to, a member of the same unit or headquarters to which the actor is assigned.
(3) There should never be immunity if the homosexual behavior is a violation of currently enforced, local civilian law.
(4) Except as provided in (1), (2) and (3), there will be immunity for homoerotic conduct, including sexual intercourse, that occurs in a residence, hotel or comparably private place.
(5) Except as provided in (1), (2) and (3) there will be immunity for public behavior or speech that reveals homosexual affection or identity if:

(i) the actor is not in uniform or otherwise advertising his military status; and
(ii) the actor reasonably believes that no member of the unit or headquarters to which he or

she is assigned is present or likely to learn of the behavior or speech.

A number of compromises can be imagined that would improve the situation of homosexual men and women without posing a significant threat to the military's interests in distancing itself from open, active homosexuality.[104] Although such a compromise would be acceptable to many homosexual servicemen and women, no compromise is likely to satisfy gay activists and the "lifestyle left."[105] Complete integration of the military is a priority item on their agenda, although few of them would ever choose a military career for themselves. They want the armed forces to treat homosexuals and heterosexuals the same and to teach all servicemen and women to regard the behavior of gays, lesbians, and bisexuals as perfectly normal.[106]

VII. Conclusions

In the courts, media, and scholarly journals, a recurring argument by the opponents of "don't ask, don't tell" has been that the policy caters to the animus/irrational prejudice of heterosexual servicemen. The Justice and Defense Departments have not made a concerted effort to counter this argument by insisting that the policy is grounded in a moral belief that homosexual behavior is wrong and that, in the world of the military, homosexuality is looked on as a character defect or an unfortunate compulsion. The policy's defenders have been largely content to plug away with pragmatic arguments derived from congressional findings about the disruptive effect that the presence of known homosexuals would

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104. The compromises proposed in subsection c and Appendix B can be defended as compatible with natural law. These compromises can be reached by reasoning from premises about human nature and basic goods that are derived from common knowledge and intuition. The moral conclusions drawn from the reasoning are tempered with prudential considerations, such as practical and political expediency, when converting them into law. *See* Murphy, *supra* note 35, at 701. For an enlightening discussion about the methodology and merits of natural law and the relation between moral philosophy and civil liberties, *see generally* ROBERT P. GEORGE, MAKING MEN MORAL (1993).

105. *See supra* note 79 and accompanying text.

106. *See* SULLIVAN, *supra* note 45, at 173-78. *See generally* Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996) (arguing that homosexual service members are unknown soldiers to commentators, litigators, and activists who purport to be on their side, and that arguments on their behalf are often artificial and counterproductive because they focus on "political" matters like status and "coming out" rather than on freedom to experience intimacy in their lives).

have on things like morale, good order, discipline, unit cohesion, and privacy. This strategy has been working in the sense that the policy has thus far survived equal protection and free speech attacks in the federal appeal courts.[107] However, this strategy has not been persuasive enough to forestall vigorous dissents in the appellate courts and decisions by district court judges that the policy, or some aspect of it, is unconstitutional.[108] After *Romer*, one cannot be certain that a government strategy of relying solely on utilitarian arguments will prevail in the Supreme Court.

The armed forces deserve a homosexual personnel policy of undoubted constitutionally. The rationale of "don't ask, don't tell" will be stronger if the government relies on *Bowers* and adds institutional morality to its pragmatic arguments. While doing so, the government must help the courts avoid doctrinal error and semantic confusion about the meaning and relevance of "animus."[109] Justice Scalia is correct in his *Romer* dissent when he distinguishes between traditional moral disapproval of homosexuality and "pointless, hate-filled, gay-bashing" animus.[110] Moral disapproval can justify or help justify "don't ask, don't tell," unworthy animus cannot.

In assessing whether there is moral disapproval of homosexuality in the armed forces the terms "moral" and "disapproval" must both be broadly construed. This essay suggests that the institutional morality of the military be conceived as the belief of a majority of the experienced members of the officer and non-commissioned officer corps about what is right and wrong behavior for a service person. The "disapproval" of individual members may be passionate or dispassionate. Ideally, Congress and the Defense Department should add institutional morality to the explicit purposes of the policy set out in the "don't ask, don't tell" statute and in the implementing regulations.[111]

Sooner or later, the military's policy towards homosexuals will have to become more lenient.[112] The armed forces regularly

107. *See e.g.*, Philips v. Perry 106 F.3d 1420 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).

108. *See, e.g., Phillips*, 106 F.3d 1420; *Thomasson*, 80 F.3d 915, Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997).

109. *See supra* footnote 90 and accompanying text.

110. *See* Romer v. Evans, 517 U.S. 620, 636 (1996).

111. *See supra* note 3 and accompanying text.

112. *See supra* notes 55, 57-58, 60, 75-76, 78-79 and accompanying text. Of course, the military could try to maintain its present strict "don't ask, don't tell" policy—a homosexual

engage in secret contingency war planning. If the military is not already doing so, it should begin to identify and evaluate alternative plans for its next engagement on the homosexuality front. The goal of any potential replacement for "don't ask, don't tell" should be to maintain the institutional morality and the effectiveness of the military while being realistic and fair in the treatment of homosexuals. At least one potential replacement policy ought to be designed around the principle of tolerance and containment.[113]

This planning task should be assigned to one or more of the academies or advanced service schools, rather than to a Pentagon committee or a civilian think-tank. The faculty members of the military, naval and air force academies, the war colleges, and the judge advocate generals' schools are objective, practical scholars removed from Washington political pressures. They are educated in many disciplines and are experts on military culture and character and the functions of the armed forces. They are qualified to sketch or draft statutes and regulations to implement possible replacement policies and to present the alternative policies in their legal, social, moral, political, and practical contexts.

Let me end this essay about military morality and homosexual personnel policy with the words of a British military historian:

> 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 every day 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 itself.[114]

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who wants to serve in the armed forces can comply only by remaining 100% celibate and in the closet. Whether the military could do this indefinitely depends upon whether it could retain the support of Congress, the President, and the courts as well as upon the progress of the cultural struggle on the homosexuality front.

113. For a discussion of the principle of tolerance and containment as it would apply in civilian law, see Murphy, *supra* note 35. The putative legal principle and popular conservative slogan "no special rights for gays" is meaningless when dealing with the issue of gays in the military. "No special rights for gays" masks two frequently irreconcilable goals—treating homosexuals the same as heterosexuals and preserving the status quo.

114. JOHN KEEGAN, A HISTORY OF WARFARE, Intro. xvi (1994); *see also* David Stout, *An Army as Good as Its People and Vice Versa*, N.Y.TIMES, July 26, 1998, at WK1 (discussing the inevitability and need for cultural differences between the military and civilian society in America).

APPENDIX A

EXCERPTS FROM 10 U.S.C. § 654 (1994)

§ 654 Policy concerning homosexuality in the armed forces

(a) Findings - Congress makes the following findings:

* * * *

(b) Policy. - A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(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, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

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

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
(3) The member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents - (1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

* * * *

(f) Definitions - In this section:

> (1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian."
>
> * * * *
>
> (3) The term "homosexual act" means -
>
> > (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
> > (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

APPENDIX B

The author sent this letter to Senator Sam Nunn and other interested parties while the issue of gays in the military was being studied and negotiated by congressional committees, the defense department and the president. The letter sketches a policy of tolerance and containment that would allow known, non-celibate homosexuals to serve in the military under substantial constraints.

May 17, 1993

Honorable Sam Nunn
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510-6050

Re: DOD Policy Regarding Homosexuality

Dear Senator Nunn:

On January 27, 1993, I sent you a copy of an essay that I had written with John Ellington entitled *Homosexuality and the Law: Tolerance and Containment*. In your reply of March 5th you invited me to submit my views about Defense Department policy regarding homosexuality.

. . . . .

About my credentials - I have split the last fifty years about evenly between the military and law school teaching.

. . . . .

I will skip over my experience with homosexuality in the Army - my anecdotes go back a long way and could add little to the information you have already gathered. The two law review articles that I am enclosing should be more useful than anecdotes. Even though neither directly addresses the problem facing your Committee, I believe that both are very relevant. The articles supplement the observations and suggestions that I sketch in this letter. The first enclosure, *Homosexuality and the Law: Tolerance and Containment II*, is an expanded, documented version of the essay I sent you last January; it will be published in the Summer

issue of the Dickinson Law Review. I wrote the second enclosed article, *The Soldier's Right to a Private Life* [24 Mil. L. Rev. 97] for the Military Law Review in 1964 while still in the Army. Some of the particulars are out-of-date, but I think that the fundamental concepts are timeless and important (see e.g., pp. 97-102, 122-24).

Getting down to business, these are my views:

1. For a great many reasons, a homosexual orientation is a handicap in America's relatively small, all-volunteer, armed forces. Furthermore, it is undesirable for any service member to engage in sexual activity with someone of the same sex, regardless of whether the member's orientation is entirely homosexual, entirely heterosexual or something in between (e.g., bisexual, undiscriminatingly hedonistic, ambivalent or confused). However, it is possible for homosexuals to manage their lifestyle and behavior (without remaining celibate for thirty years) so that they do not adversely affect their value to the service. Similarly, my generalization that same-sex sexual activity is undesirable needs to be qualified. The circumstances under which the activity occurs may so negate or attenuate its connection or threat to service interests that the activity should be regarded as private, excusable or de minimis.

2. Allow me to suggest a compromise approach that I believe (i) would make it possible for known gays and lesbians to serve, (ii) would not appreciably degrade the quality and effectiveness of the armed forces and might even have a net beneficial effect from the fact that the services and homosexuals would be dealing candidly with each other, and (iii) would not be unduly difficult to put into place and to administer. The approach I am proposing can be characterized as a policy of tolerance and containment. It would require some changes in the current policy of "don't ask - don't tell."

3. As I understand the current policy, one object is to make it easier for homosexuals to enter and remain undetected in the armed forces. The services, and their agents, do not aggressively seek out homosexuals but if certain unequivocal indications of an individual's homosexual orientation come to official notice, he or she is subject to administrative separation. The current policy involves a gamble for both the armed forces and homosexual members: the policy is fair in the sense that voluntary choice and mutual risk make gambling fair. But the policy may be unfair in

other ways and have undesirable costs and consequences, to both the forces and the homosexual member. For example, in the accession process the armed forces lose some of their ability to screen out homosexuals who are unlikely to fit into service life. Also, prospective officers and enlistees, even when told about the current policy, are likely not to foresee or fully appreciate the risks, dilemmas, dissembling and stress that twenty years, or three years, of living in the closet may entail. They may misjudge their own capacity to endure, much less thrive in, such a precarious existence. The ultimate hard case, under current and former policy, is one in which an otherwise exemplary soldier, who has served many years but is not eligible to retire, is summarily discharged because his homosexuality comes to light.

4. Under the policy of tolerance and containment that I propose the services (i) would ask prospective officers and enlisted persons about their sexual orientation - they would be expected to give honest answers, (ii) would screen out individuals who seem clearly incapable of complying with service requirements for managing their lifestyle and conduct, (iii) would screen out individuals who are clearly pathological homophobes, (iv) would allow admitted and known homosexuals to enter and remain in the service, (v) after an individual enters the service, would treat the member's homosexuality as a matter of very limited official concern and something the member should keep to himself or herself and (vi) would regulate same-sex sexual conduct, and the kind of behavior that is associated with a homosexual lifestyle, to the very substantial extent necessary for a first-rate American armed forces.

5. Although "known" homosexuals would be allowed to serve, their homosexuality should be kept as private as possible. Official information about an individual's homosexuality should be disclosed only on a very strict "need-to-know" basis: for example, when relevant to a military or civilian criminal investigation or if the individual is a candidate for one of a few particularly sensitive assignments, or when an individual who has had trouble managing his homosexuality is being considered for promotion. Homosexual members would be made to understand that they must manage their homosexuality so that it does not adversely affect their own performance of duty, the discipline, cohesion, esprit and effectiveness of their units, and the morale and tranquility of other service members. If they compromise their value to the forces by engaging in forbidden or imprudent behavior their careers will suffer or may

be cut short. Homosexuals should be told to be circumspect in choosing the people to whom they admit their homosexuality. Gay pride has to be muted: reticence is the norm.

6. On the other hand, a gay or lesbian should not be held accountable for a problem which he or she played no culpable role in creating. A homosexual member should not have to sacrifice self-respect to avoid conflict provoked by someone else. For example, a gay sailor should not have to lie about his sexual orientation, unless he prefers to do so, to placate a bullying shipmate. The effect of the approach that I advocate would probably be to keep most gays and lesbians pretty much in the closet - the outcome that gay advocates predict would follow if each individual were free to decide for himself how "open" to be about his gayness. My policy would officially, and more surely, inhibit gays and lesbians from "coming out" in a destructive way. It would nevertheless allow them to serve honestly, honorably, and without anxiety, under substantial constraints that are imposed for the good of the armed forces.

7. Some new legislation and executive orders, and quite a few new service regulations and directives, would be needed to implement the policy of tolerance and containment that I am describing. A manual for leaders and a handbook for homosexual service members could be very helpful. *These laws, directives and manuals:*

a. When read together, should constitute a candidly stated, comprehensive implementation of the policy of tolerance and containment. (Avoid ambiguity, don't leave troublesome issues unresolved and to be worked out later.)

b. Should treat homosexual conduct separately from heterosexual whenever appropriate. (Recognize that the problems can be different, e.g., the "house rules" for on-post family quarters, bachelor apartments, and guest houses probably should forbid same-sex sexual intercourse but be silent regarding unmarried, male-female intercourse.)

c. Should make a clear distinction *between* rules of conduct that subject violators to punitive, administrative or other formal sanctions *and* ethical norms and rules of etiquette for which there are no sanctions or only informal sanctions. (This, of course, is a drafting problem when writing any official pronouncement intended to influence behavior. It is likely to be extra troublesome when dealing with matters that involve morality.)

d. Should define the acts of voluntary sodomy and other lewd conduct by a member with another person of the same sex that are criminal because committed under circumstances likely to prejudice good order and discipline or to bring discredit upon the armed forces, e.g., chain of command, barracks or shipboard sex.
e. Should define and authorize punitive or administrative sanctions for sexual harassment by, or of, a homosexual service member. (Be careful of this one!)
f. Should forbid or discourage homosexuals from engaging in any lewd, romantic, militant or freakish conduct or speech (i.e., behavior that is a manifestation of a gay or lesbian lifestyle and likely to offend straight service men and women) if the conduct occurs under circumstances likely to have an appreciable, adverse effect on the interests of the armed forces. Particularly egregious kinds of conduct that are likely to prejudice good order and discipline or discredit the armed forces should be made criminal and subject to punishment.

8. With particular reference to sodomy and the UCMJ - All the acts of voluntary sodomy that are referred to in 7d. above are already punishable, or could be made punishable, by armed forces regulations under the existing Articles 92, 133 or 134. Article 125, the current sodomy statute, would need to be amended. I suggest that Congress consider the following factors when revising 125, regardless of how the gays-in-the-military issue is resolved.
a. Involuntary sodomy, voluntary sodomy with a person of the same sex, voluntary sodomy with a person of opposite sex, and bestiality ought to be dealt with separately.
b. The proscription of voluntary, *opposite sex* sodomy under Article 125 should probably be eliminated. Such conduct would then be punished only in certain specified circumstances under Articles 92, 133 or 134 (compare para. 7d, above).
c. The two best ways in which Article 125 could treat voluntary *same-sex* sodomy are *either* to
(1) Eliminate it as a crime, thus permitting same-sex sodomy to be punished only under Articles 92, 133 or 134.

or

(2) Retain it as a universal proscription (i.e., applicable everywhere, at all times) by adding a section to Article 125 comparable to the voluntary, same-sex sodomy statute that I describe in my enclosed Dickinson Law Review piece. In essence, the amendment

to Article 125 would generally make it a crime for a person subject to military law to engage in voluntary same-sex sodomy. It would be a defense, however, if an accused member proved that he or she was a true homosexual and that the other person was either a true homosexual, or reasonably believed by the accused to be one. The rationale for this kind of sodomy article would be that it is consistent with the traditional and current moral values of military personnel, and furthers the pragmatic interests of the forces (e.g., promoting discipline, the service's image and AIDS control) while being fair to those members whose homosexual conduct may be regarded, depending upon one's viewpoint, to be natural and right for them or to be an unfortunate but tolerable shortcoming.

9. With the exceptions described above, homosexuals should be governed by the same rules and entitled to the same protection, benefits and treatment as their straight counterparts — no more and no less. They should be treated like, and made to feel like, part of one team. Disobedience and disrespect to gay or lesbian superiors as well as violence, harassment or gross incivility towards any service member because he or she is homosexual should be punished or corrected as appropriate. The services should not provide separate clubs or other separate facilities for gays and lesbians; nor should the services provide on-post housing and other benefits to the partner of a gay or lesbian service member. In my curbstone opinion, the fear that the armed forces will have to provide quarters, PX privileges and other on-post benefits to a gay member's mate if the marriage is valid under state law, is unfounded. Congress could constitutionally exempt the armed forces from providing those benefits that would be harmful to good order and discipline. In short, the armed forces should not go beyond tolerance and should do nothing special that might encourage, or be construed to endorse, homosexuality as an alternative way of life for military personnel.

10. I believe that the kind of tolerance and containment policy sketched above is really no more complex and has no more inherent difficulties than the current policy of "don't ask - don't tell." Actually the two have a lot in common: current policy could be labeled a policy of "*tacit* tolerance and containment," while my policy could be described as "don't ask *much - don't flaunt*." Much of the action required for implementing my policy would have to be taken to implement the cryptic "don't ask - don't tell" approach (e.g., drafting comprehensive laws, regulations and guidance like

those described in paras. 7 and 8 above). The special advantages of my suggested policy - both for the armed forces and for the gay or lesbian individual who wants to serve our country - are advantages that come from the policy's emphasis on candor and fairness.

11. I can envisage variants of my particular policy of tolerance and containment: my policy could be blended in some fashion with the current compromise. For example, a policy of "don't ask - don't tell" could apply to the accession process and the first three years of a homosexual's service. After that period (during which the member could, in effect, demonstrate the ability to manage conduct and lifestyle), a policy of tolerance and containment would apply. The member would not be subject to a discharge merely because he or she disclosed homosexuality to officials or it came to official attention.

Although I could say a lot more, my letter is already too long . . . .

Best wishes for the success of your Committee in dealing with this critical issue.

Sincerely yours,
Arthur A. Murphy
Professor Emeritus
LTC U.S. Army (retired)

Encls.

cc: President of the United States
Chairman, House Armed Services Committee
Secretary of Defense
Chairman, Joint Chiefs of Staff
TJAG, U.S. Army