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HOMOSEXUALS IN THE MILITARY: THEY WOULD RATHER FIGHT THAN SWITCH

In the past ten years, nearly 15,000 people were discharged from the military for being homosexual.¹ The number of homosexual discharges is rising yearly.² The figures, however, do not accurately reflect the number of homosexuals in the armed forces because most are not detected by military authorities.³ Various studies have shown that seventy-five to eighty percent of all homosexual soldiers, including a number of officers, successfully complete their terms of service.⁴ Yet, despite their apparent ability and patriotism, homosexual soldiers continue to be discharged from military service in contravention of their constitutional right to privacy.

The Supreme Court has consistently recognized a constitutional right to privacy in matters concerning personal autonomy.⁵ The right to privacy is a fundamental right that is peripherally related to other rights explicitly mentioned in the Bill of Rights.⁶ Although the Court has been reticent to recognize explicitly the right to participate in consensual sexual relations,⁷ the language in earlier privacy decisions implicitly leads to such a conclusion.⁸

1. Kulieke, *Military Spends Millions to Exclude Gays*, The Advoc., Nov. 27, 1984, at 8, col. 1 (overview of recent military policy towards gays); see also T. STODDARD, E. BOGGAN, M. HAFT, C. LISTER & J. RUPP, THE RIGHTS OF GAY PEOPLE 36 (1983) (an American Civil Liberties Union Handbook) [hereinafter cited as RIGHTS OF GAY PEOPLE]. For a general discussion of the earlier treatment of homosexuals in the military, see C. WILLIAMS & M. WEINBERG, HOMOSEXUALS AND THE MILITARY 28, 53 (1971).

2. Kulieke, *Military Spends Millions to Exclude Gays*, The Advoc., Nov. 27, 1984, at 8, col. 1. Since 1974, 14,311 armed services members have been dismissed for being gay or lesbian; the numbers have been steadily increasing. *Id.* at 8, col. 2.

3. C. WILLIAMS & M. WEINBERG, *supra* note 1, at 60; RIGHTS OF GAY PEOPLE, *supra* note 1, at 36; see also J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 24-28 (1983) (history of gays in the military); *Homosexuals: One Soldier in 25?*, 57 NEWSWEEK, May 15, 1961, at 92, 94.

4. See C. WILLIAMS & M. WEINBERG, *supra* note 1, at 60.

5. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (the Constitution rebels at the thought of going into men's minds); *Loving v. Virginia*, 388 U.S. 1 (1966) (privacy in fundamental choices is a basic civil right); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy).

6. *Griswold*, 381 U.S. at 482-83. See also *infra* notes 92-110 and accompanying text.

7. See *infra* notes 148-55 and accompanying text.

8. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (right to choose a marital partner free of state racial restrictions).

Military regulations excluding homosexuals impinge upon constitutional rights in three major areas: freedom of association or the right to be homosexual,⁹ personal autonomy or the right to participate in private consensual sex,¹⁰ and the right to be let alone.¹¹ In promulgating overly restrictive regulations, the military has erroneously concluded that its goals are anathema to participation by homosexuals.¹² The military points to the mere potential for problems relating to morale,¹³ recruitment,¹⁴ suggestions of impartiality,¹⁵ and threats to national security as the rationale for drafting its overly restrictive regulations.¹⁶ These concerns, however, are misplaced and do not consider the outstanding contributions that undiscovered homosexuals have been making to the military over many years.¹⁷

The means currently employed in discovering and discharging homosexuals from the military is over-inclusive¹⁸ and invades constitutional privacy rights.¹⁹ The military should narrow the scope of its regulations, and discharge only those people whose sexuality

9. In *NAACP v. Alabama*, 357 U.S. 449, 462 (1960), the Supreme Court noted that freedom of association was a peripheral first amendment right. As a peripheral right, the freedom of association is intrinsic to the appreciation of other explicitly mentioned first amendment rights. *Griswold*, 381 U.S. at 482-83 (citing *NAACP v. Alabama*, 357 U.S. 449 (1960)). The Court has noted that "[w]ithout . . . peripheral rights the specific rights would be less secure." *Id.* See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1958) (the peripheral rights made it impermissible to bar a lawyer from practice simply because he had once been a member of the Communist party). In the military context, this peripheral right should be invoked in cases where the military discharges homosexuals for status alone, absent a showing of any homosexual acts. See *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980). For a discussion of this case see *infra* notes 123-29 and accompanying text.

10. Although the Supreme Court has not formally acknowledged the right, the language of early privacy decisions suggest that such a right exists. See *infra* notes 141-70 and accompanying text.

11. See Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (the right to be let alone lies at the very base of all privacy rights); see also *infra* notes 171-87 and accompanying text.

12. See *infra* note 25.

13. Cf. *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (court found homosexuality in the military detrimental to morale and discipline).

14. See *infra* note 67 and accompanying text.

15. See *infra* text accompanying note 71.

16. See *infra* notes 80-82 and accompanying text.

17. See, e.g., *Matthews v. Marsh*, 755 F.2d 182, 182 (1st Cir. 1985) (before Sergeant Matthews was honorably discharged after four years as a field communications equipment mechanic, she received high performance ratings and numerous awards).

18. See generally *Miller v. Rumsfeld*, 632 F.2d 788, *reh'g denied*, 647 F.2d 80, 86-89 (9th Cir. 1981) (Boochever, C.J., dissenting from denial of rehearing en banc).

19. *Miller*, 647 F.2d at 85-86 (Boochever, C.J., dissenting from denial of rehearing en banc) (even socially condemned activities are protected from infringement when carried out in private).

prevents them from completing their duties in a responsible manner.²⁰ Absent any nexus between work performance and sexuality, the constitutional rights of homosexuals are being consistently violated by systematic discharges from military service.²¹ With the adoption of a more rational, less exclusionary policy toward homosexuals, the military will strengthen itself and conform to the constitutional concern for privacy.²²

UNITED STATES MILITARY POLICY TOWARD HOMOSEXUALS

The History

Homosexuals have been systematically discriminated against in the United States Armed Forces more than in any other area of employment in the last three decades.²³ Such discrimination occurs because the military system fosters strict discipline and conformity;²⁴ homosexuals do not seem to fit in.²⁵ As one spokesperson for

20. *Id.* at 89 (Boochever, C.J., dissenting from denial of rehearing en banc) (less restrictive policies should be considered by the military).

21. *See, e.g.,* *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 977 (E.D. Wis. 1980) (discharge should not be allowed absent a "nexus" between sexuality and military performance).

22. For a discussion of some less restrictive alternatives to current military policy see *Miller*, 647 F.2d at 89-90 (Boochever, C.J., dissenting from denial of rehearing en banc).

23. *See* Rivera, *Our Straight Laced Judges: The Legal Position of Homosexual Persons In the United States*, 30 HASTINGS L.J. 799, 837 (1979).

24. It has been said that "[w]hen a person enters the Armed Forces of the United States, he leaves one society for another." Finn, *The Two Societies*, in CONSCIENCE AND COMMAND 3 (J. Finn. ed. 1971). Moreover,

[t]he primary objective of the system of military justice must always be to maintain discipline within the organization and to ensure prompt compliance with its dictates. With other systems it must be focused more on producing organizational effectiveness than on punishing or protecting individual action. Unlike the legal systems of the larger society, it must cope with individuals who are subject to great stress, pressure and responsibility and enforce rules and regulations that have no counterpart in civil life. Any punishment meted out must be viewed more from its effect on the organization as a whole than in its effect on the individual. Hence military justice must act as a deterrent to undesirable behavior and an instrument to reinforce organizational standards and command control.

Id. at 5.

Despite well produced misleading commercials assuring recruits that you can "be all that you can be" in the Army, severe limitations hinder that goal. In a recent, confidential Army survey, half of the officers who were questioned agreed that "the bold, original, creative officer cannot survive in today's Army." Halloran, *Army Survey Finds Officers Critical*, N.Y. Times, Apr. 21, 1985, at 1, col. 3.

25. The Department of Defense recently adopted regulations which uncatagorically state that

[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.

the Defense Department stated, a homosexual's "presence in a military unit would seriously impair discipline, good order, morale and security."²⁶ Homosexuals, therefore, have been consistently excluded from the United States Armed Forces.²⁷

The Selective Training and Service Act of 1940²⁸ led to the immediate registration of more than 16,400,000 males between the ages of twenty-one and thirty-five.²⁹ Because the military preferred young, single men with few dependents, a population group likely to include a disproportionate number of gay men, it employed psychiatrists to interrogate potential inductees about their sexual inclinations.³⁰ The psychiatric screening proved to be relatively ineffective in excluding homosexuals from the military because few homosexuals were willing to declare themselves as such to avoid service.³¹ Later, during the Vietnam War, many young men attempted to portray homosexual characteristics to evade the draft.³² Once the military became aware of such practices, they began to require medical proof of a draftee's homosexuality.³³ In today's volunteer military, medical proof of homosexuality is no longer required because the military relies primarily on self-disclosure.

The investigation and dismissal of homosexuals exacerbated in the early 1950's as the result of a Senate committee investigation into the employment of "homosexuals and other sex perverts"³⁴ in government. This investigation led to a Defense Department direc-

The presence of such members adversely affects the ability of the military services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to insure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military service; and to prevent breaches of security.

32 C.F.R. § 41.13 (1984). These new regulations repeat nearly verbatim the Defense Department policy enunciated in January, 1981. 32 C.F.R. § 41.13 (1981).

26. L.A. Times, Sept. 25, 1980, at 22, col. 1.

27. Army regulations and Department of Defense directives provide that a finding of homosexuality in any service member requires immediate separation from military service. *Matthews v. Marsh*, 755 F.2d 182, 183 (1st Cir. 1985) (citing relevant regulations).

28. 50 U.S.C. §§ 451-71 (App. 1982).

29. J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 24 (1983).

30. *Id.* See also W. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD* 221-31 (1948) (tracing the history of homosexuality and psychiatric screening in the military).

31. See J. D'EMILIO, *supra* note 29, at 24. The screening may have failed due to the patriotic fervor sweeping the country combined with the stigma attached to a rejection for neuropsychiatric reasons. *Id.*

32. See R. JOHNSON, *DON'T SIT IN THE DRAFT* 160-61 (1980) (a draft counseling guide describing the extreme lengths sought in evading military service).

33. *Id.* (requiring past psychiatric or medical records).

34. J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* (1983). For a further discussion of the homosexual "witch hunts" of the 1950's see *id.* at 40-44.

tive to all branches of the armed services which declared that "known homosexual individuals were military liabilities and security risks who must be eliminated."³⁵ The directive resulted in the overly restrictive regulations that have been enforced strictly ever since.³⁶

Current Regulations

Two methods, court-martial proceedings and administrative discharges, are used consistently to "eliminate" homosexuals from the military. Court-martials are regulated and governed by the Uniform Code of Military Justice.³⁷ Three applicable articles in the Code may be used to classify homosexual behavior as criminal: article 125 which prohibits sodomy,³⁸ article 80 which concerns attempted violations of the Code,³⁹ and article 34 which broadly prohibits any conduct which may discredit the armed forces.⁴⁰ Homosexual behavior will violate any of these articles and subject the offender to a maximum sentence of five years of hard labor coupled with either a dishonorable or bad-conduct discharge, as well as forfeiture of all pay and veteran's benefits.⁴¹

There are five types of discharges from the armed services: honorable, general, undesirable, bad-conduct, and dishonorable.⁴²

See also Note, Homosexuals in the Military, 37 FORDHAM L. REV. 465 (1968) (history of U.S. military attitudes toward homosexuals).

35. SENATE COMM. OF EXPENDITURES IN EXECUTIVE DEPARTMENT, S. Doc. No. 241, 81st Cong., 2D SESS., REPORT ON EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT 3 (1950). The report also stated that sex perversion weakens the moral fiber of an individual, has a corrosive influence on other employees, and may spread to the young and impressionable who fall under the influence of a pervert. *Id.* at 4. Furthermore, even one "sex pervert in a government agency" can pollute the office. *Id.* at 5. For a more complete discussion of this report see J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 42-44 (1983); *see also* GOVERNMENT VERSUS HOMOSEXUALS (L. Parr ed. 1975) (copy of the report in its entirety).

36. *See Note, Homosexuals in the Military, 37 FORDHAM L. REV. 465, 468 (1969) (author presents an overview of military attitudes).*

37. 10 U.S.C. §§ 801-940 (1982).

38. *Id.* § 925 (unnatural carnal copulation with either the same sex, opposite sex, or animal is deemed sodomy).

39. *Id.* § 880 (requires a specific intent to commit any act forbidden by the Code).

40. *Id.* § 934 (catch-all section).

41. *Id.* §§ 856-858A (punishments given in connection with a court-martial).

42. *See* 32 C.F.R. § 41, App. A (1984) (detailed description of administrative separations from the military); *see also* C. WILLIAMS & M. WEINBERG, *supra* note 1, at 52.

Bad conduct and dishonorable discharges can only be given as a result of court-martial. 10 U.S.C. § 59 (1982). The other types of discharge may be given as a result of a purely administrative process. An honorable discharge is a "separation from the service with honor," 32 C.F.R. § 41, App. A (1984), and can be awarded to an enlisted person on the grounds of convenience to the government or unsuitability. *Id.* A general discharge is a separation "under honorable con-

The type of discharge granted can have serious ramifications on the individual's subsequent civilian life. Because over ninety percent of all service personnel are granted honorable discharges,⁴³ an issuance of anything less than an honorable discharge is highly suspect.⁴⁴

Homosexuality or "sexual perversion" is specifically included as grounds for discharge for unsuitability,⁴⁵ unfitness,⁴⁶ misconduct,⁴⁷ and can be construed as grounds for a separation for the convenience of the government.⁴⁸ These current regulations were the result of special policy statements issued by each service mandating the removal of homosexual military personnel.⁴⁹ These directives classified homosexual personnel into four separate classes with each class treated differently. A Class I homosexual is a person who, while under military jurisdiction, has engaged in a homosexual act involving force, fraud, or coercion of a minor.⁵⁰ A member of this class of homosexual is usually discharged by means of a court-martial.⁵¹ The remaining classes are usually granted administrative discharges.⁵² A Class II homosexual is a person who, while under military jurisdiction, has become involved in, or attempted to become involved in, or solicited under aggravated conditions, a ho-

ditions issued to an individual . . . whose military record is not sufficiently meritorious to warrant an honorable discharge," and can be issued on the grounds of convenience to the government, unsuitability, unfitness, or misconduct. *Id.*

43. See C. WILLIAMS & M. WEINBERG, *supra* note 1, at 38.

44. See generally R. RIVKIN & B. STICHMAN, *THE RIGHTS OF MILITARY PERSONNEL* 112-18 (1977) (overview of various military discharges).

45. 32 C.F.R. § 41, App. A (1984).

46. *Id.*

47. *Id.*

48. *Id.*

49. Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 468 (1969) (early historical development of the current regulations). Note that the new regulations also allow one rarely utilized exception to the general rules of exclusion of homosexuals. According to this exception:

A person may stay in the military, even though he or she has committed, or attempted to commit, a homosexual act, as long as the following conditions are met: if the act was a 'departure from the member's usual and customary behavior,' or was done without 'force, coercion, or intimidation,' and is 'unlikely to recur,' if the member 'does not desire to engage in [further] homosexuals acts,' and if 'the member's continued presence in the Service is deemed consistent with the interest of the Service in proper discipline, good order and morale.'

32 C.F.R. § 41, App. A (eff. 1984).

50. Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 468 (1969). For the regulations promulgated by the various service branches implementing the new Defense Department regulations excluding homosexuals, see Army Regulations AR635-100, 635-212; Air Force Manual, AF Man. 39-12; Secretary of the Navy Instruction, SECNAV Instruction 199.9c; and Marine Corps Separation and Retirement Manual §§ 6016-6018.

51. 32 C.F.R. § 41, App. A (1984).

52. *Id.*

homosexual act.⁵³ A Class III homosexual is a person who displays, claims or admits homosexual tendencies, or who solicits a homosexual act in the absence of aggravated circumstances.⁵⁴ Lastly, a Class IV homosexual is a person who participated in homosexual behavior before entering the military or one who failed to admit his or her homosexuality at the time of entry and thus joined the armed services fraudulently.⁵⁵

While apparently based on discernible degrees of aggravation, these regulatory distinctions are seriously flawed. For example, the term "aggravated conditions" under Class II is vague and may duplicate the "force, fraud and coercion" condition mentioned in Class I. Because the lines are not clearly drawn, it is hard to be sure what circumstances would be deemed "aggravated" only for Class II purposes and yet not quite sufficient for Class I designation.⁵⁶ Although the differences between Classes I and II are vaguely distinguishable, Class III can clearly encompass Class IV because "aggravated circumstances" must be absent from each.⁵⁷ By categorizing homosexuals into these four classes, the military rules imply that homosexuality is criminal, recognizing different degrees of criminality based upon the extent of the homosexual's sexual activity.⁵⁸ This approach is problematic because homosexuality, like heterosexuality, is not a state of being that exists in different degrees.⁵⁹ Furthermore, the homosexual behavior required for Class I, and possibly Class II, need not be classified because it is already

53. *Id.*

54. *Id.*

55. 32 C.F.R. § 41, App. A (1984) (fraudulent entry into military service).

Administrative dismissal is most often used to discharge Classes II through IV. *Id.* Most of those discharged under these classes receive general discharges; however, some will receive undesirable or honorable discharges as well. *Id.* Officers, who must be court-martialed in order to be discharged, are generally given the opportunity "to resign 'for the good of the service'" in order to avoid trial. C. WILLIAM & M. WEINBERG, *HOMOSEXUALS AND THE MILITARY* 28 (1971).

56. Specifically, it would appear that force, fraud, and coercion would all be aggravated circumstances.

57. Because presumably all of the Class III and Class IV homosexual acts occur in private, it should be immaterial to distinguish whether these acts occur prior to, or during military service.

58. There is nothing criminal about homosexuality *per se*. See, e.g., *People v. Giani*, 154 Cal. App. 2d 539, 302 P.2d 813 (1956) (court held that there is no basis for the assumption that homosexuals are predisposed to commit prohibited acts). Criminality based upon status alone has been held unconstitutional. See, e.g., *Robinson v. California*, 370 U.S. 661 (1962) (narcotic addiction as a criminal act would constitute cruel and unusual punishment). For a more complete discussion of the *Robinson* case, see *infra* text accompanying notes 117-21.

59. It has been well documented that sexual orientation is not a matter of "choice." See, e.g., *Baker v. Wade*, 553 F. Supp. 1121, 1129-32 (N.D. Tex. 1982), appeal dismissed, 743 F.2d 236 (5th Cir. 1984); see also Comment, *Burdens On Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R. - C.L. L. REV. 497, 527 n.118 (1984) (authorities cited for the proposition that sexual orientation is not a matter of

encompassed within the definition of rape.⁶⁰ Therefore, the separate military rules relating to Class I and Class II homosexuals are unnecessary and redundant. Further, the other classes are similarly unfounded because the regulations do not adequately serve the military's purposes.⁶¹

Purposes for the Military Regulations

Many of the arguments for anti-homosexual legislation in civilian life have been applied even more strenuously to military life.⁶² Proponents of anti-homosexual legislation contend that homosexual behavior is a menace to the health of society, has a detrimental effect on the family, and that if not punished, will eventually turn consensual offenders into child molesters.⁶³

The Defense Department recently adopted regulations pronouncing the purposes for the military's exclusion of homosexuals.⁶⁴ Among the interests homosexuals purportedly impinge are: the maintenance of discipline, good order, and morale; the establishment of mutual trust and confidence among service members; the integrity of the system of rank and command; the recruitment of members; the public image of the military; and the prevention of breaches of security.⁶⁵ Federal courts have taken these interests into account in construing the validity of the armed services' exclusionary rules pertaining to homosexuals. The federal courts are divided on the issue depending upon the particular court's view of the constitutional right to private consensual sex.⁶⁶ Courts that have

choice); see generally W. MASTERS & W. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* (1979) (authors discuss fully the psychological aspects of homosexuality).

60. Regardless of the sex of the victim, the Class I description of acts "involving force, fraud or coercion of a minor" would be considered statutory rape. See, e.g., ILL. REV. STAT. ch. 38, § 11-1 (1983). Similarly, Class II involves aggravated conduct which may be considered assault, battery, or attempted rape regardless of the victim's gender. *Id.*; see also *id.* § 8-4 (rules governing attempt offenses).

61. See *infra* notes 74-79 and accompanying text.

62. Compare Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1629-32 (1974) (summarizes civilian arguments for anti-homosexual legislation) with RIGHTS OF GAY PEOPLE, *supra* note 1 (military arguments for excluding homosexuals).

63. Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1631 (1974).

64. See 32 C.F.R. § 41.13 (1984).

65. *Id.* See *supra* note 25.

66. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388, 1398, *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) (upheld military regulations since the Supreme Court has not recognized a constitutional right to participate in private consensual sex with a member of the same sex); *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army regulations found unconstitutional as relating to freedom to associate with homosexuals and freedom to be homosexual). See generally Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 ARIZ. ST. L.J. 79 (overview of inconsistencies existing in legal treatment of military policies). The term 'faggot,' meaning a bundle of

upheld the military regulations have identified such interests as protecting the fabric of military life, preserving the integrity of the recruiting process, and reconciling parental concerns about their children associating with homosexuals.⁶⁷

One recent case illustrated possible dangers that the military must consider. In *Dronenburg v. Zech*,⁶⁸ a 27-year old petty officer had repeated sexual relations with a 19-year old seaman recruit before the latter chose to end the relationship.⁶⁹ The *Dronenburg* court expressed concern that a situation like Petty Officer Dronenburg's would be detrimental to morale and discipline.⁷⁰ Moreover, the *Dronenburg* court stated that the situation would call into question the even-handedness of officers' dealings with lower ranks, spur dislike and disapproval among those who find homosexuality morally offensive, and, given the authority of military superiors, raise the possibility of homosexual seduction.⁷¹ While many of these concerns may be legitimate, none were supported with any substantiated facts in this instance.⁷² The *Dronenburg* court, in fact, concluded that the alleged problems were so obvious that no sociological tests were needed to substantiate the purposes behind the military rules.⁷³

The military's contentions, however, have been criticized for several reasons.⁷⁴ First, the hostility toward homosexuals does not justify excluding them because similar hostilities toward blacks or

sticks, acquired its pejorative connotation when homosexuals were burned at the stake in the Middle Ages. *Id.* at 79.

67. See *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980). But see *Miller v. Rumsfeld*, 647 F.2d 80 (9th Cir. 1981) (Boochever, C.J., dissenting from denial of rehearing en banc) (dissenting opinion provides a complete discussion and criticism of the *Beller* opinion).

68. 741 F.2d 1388, *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984).

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

70. *Id.*

71. *Id.*

72. The *Dronenburg* court addressed a number of possible problems without substantiating any of them. *Id.* at 1398.

73. In *Dronenburg*, the court stated that "the Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrates." *Id.* Significantly, the court equivocates before the prior statement in noting that the "effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline." *Id.* (emphasis added).

The *Dronenburg* court based its decision on a rational basis test. *Id.* Because the court invoked only minimal scrutiny, it considered the military rules rational and therefore failed to recognize a constitutional right to be homosexual. *Id.*

74. See *Miller*, 647 F.2d at 88-89. The first criticism of the *Beller* justifications is that the Navy should not be and is not in the business of promoting morality. *Id.* The Supreme Court has noted that "the primary business of . . . navies [is] to fight or be ready to fight wars should the occasion arise." *Id.* (citing *Toth v. Quarles*, 350 U.S. 11, 17 (1955)). Although the Navy may insist on discipline in the service, the maintenance of such discipline does not justify reg-

women would not justify their exclusion.⁷⁵ Second, the military itself is promulgating a lack of respect for homosexuals by treating them as second-class citizens.⁷⁶ Third, the emotional relationship is not a valid concern as there is no correlating rule relating to emotional heterosexual relationships.⁷⁷ Finally, parents' concerns are not a legitimate consideration because almost all recruits have reached the age of majority.⁷⁸ Even if parents' concerns are to be considered, parents cannot shelter their children from homosexuality because homosexuals participate in all walks of life.⁷⁹

Besides social considerations, an additional military concern acknowledged in a number of cases is the threat to national security arising out of homosexuals who hold high security clearances.⁸⁰

ulation of the private lives of Navy members. *Id.* "Intolerance is not a constitutional basis for an infringement of fundamental personal rights." *Id.*

Moreover, many of the Navy's concerns are not indigenous to homosexuals. *Id.* Regarding any other conduct or personal traits, the Navy has an elaborate system for case-by-case determination of fitness, however, the Navy refuses to tailor such an approach to homosexuality. *Id.*

75. See *Miller*, 647 F.2d at 88-89.

The Navy could assert identical fears as a basis for the blanket discharge or rejection of groups other than homosexuals, and the unconstitutionality would be unquestioned. The Navy recently has witnessed 'tensions and hostility' between members of various racial groups, many of whom may 'detest' and 'despise' other races. Yet, obviously the Navy could not constitutionally bar all blacks from service, regardless of whether the majority of Navy personnel despise them. Similarly, emotional relationships may—surely do—occur between male and female Navy personnel. Yet the Navy obviously may not bar all women from service simply because some emotional relationships might negatively affect proper command relationships. The same can be observed of the Navy's fear of the inability of some personnel to gain the respect and trust of those they command. This problem could—and no doubt does, in some instances—arise because the commander is black or a woman. Yet the Navy obviously could not constitutionally bar all blacks or all women even if they were not respected by the majority of Navy personnel.

Id.

76. *Id.* at 87-88.

77. *Id.* at 88-89.

78. The military requires that recruits be over 18 years of age. 10 U.S.C. § 505(A) (1982). In rare instances, a seventeen year old can be admitted with parental consent. *Id.*

79. The *Miller* dissent was adamant in rejecting parental concerns. Chief Judge Boochever wrote:

[H]omosexuals participate in all walks of life. They are in Boy and Girl Scouts, on high school facilities and athletic teams, and in church groups; they work in factories, stores, restaurants and offices. In short, parents can shield their children from incidental association with homosexuals only by shielding them from the world.

Miller, 647 F.2d at 89 (Boochever, C.J., dissenting from denial of rehearing *en banc*).

80. See *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973) (homosexual activity may be considered in determining the issuance of a security clearance); *Marks v. Schlesinger*, 384 F. Supp. 1373, 1377 (C.D. Cal. 1974) (homosexuality was a legitimate concern in granting a security clearance). *But see* *Wentworth*

The fear is that homosexuals, as opposed to heterosexuals, are easily subject to coercion, influence, or pressure due to the threat of blackmail.⁸¹ Ironically, the military regulations themselves create an atmosphere that increases the threat of blackmail because if the regulations did not proscribe homosexuality, the threat of blackmail would not exist.⁸²

Despite the military's concerns regarding homosexuals,⁸³ the problem appears to be somewhat self-inflicted.⁸⁴ Even during the height of the military screening process, Doctor William Menninger⁸⁵ alleged that "for every homosexual who was [excluded from the military service] . . . , there were five or ten who never were detected."⁸⁶ Because most of those healthy, young, all-american homosexuals admirably served their country without destroying the fiber of military life, the current concerns over admitting homosexuals to the military are absurd.⁸⁷ The exclusion of homosexuals based on the mere possibility of problems is especially untenable when the loss of time, effort, money, and good military personnel are taken into account.⁸⁸

Aside from the fact that the military regulations are absurd, they should also be ruled unconstitutional because homosexual soldiers should have the right to be homosexual without fear of military discharge.⁸⁹ Moreover, the homosexual soldier's constitu-

v. Laird, 348 F. Supp. 1153, 1155 (D.C. 1972) (admitted homosexuality was insufficient reason to justify withdrawal of security clearance absent other evidence of unreliability). See generally Rivera, *supra* note 23, at 829-37 (overview of homosexual relations and security clearances).

81. See *Gayer v. Schlesinger*, 490 F.2d at 746, 748.

82. By excluding homosexuals from the military and compelling the discharge of known homosexuals, the military has promulgated the possibility of blackmail.

83. See *supra* text accompanying notes 70-72.

84. Because many of the personnel being discharged under the military regulations have exemplary prior records, these soldiers would have undoubtedly continued to serve admirably absent the unbending military rules. C. WILLIAMS & M. WEINBERG, *supra* note 1, at 60.

85. Doctor William Menninger is a noted psychiatrist and the author of *PSYCHIATRY IN A TROUBLED WORLD* (1948).

86. J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 25 (1983). See also *id.* at n.4 (other sources for military estimates of homosexuals serving in the military).

87. See *supra* note 3.

88. "The four branches of the armed services—Army, Navy, Air Force, and Marines—spent \$22.5 million recruiting and training the nearly 1,800 gay and lesbian service members who were ousted during fiscal year 1983 because of their sexual orientation. Another \$370,000 was spent to process their military discharges." Kulieke, *Military Spends Millions to Exclude Gays*, *The Advoc.*, Nov. 27, 1984, at 8, col. 1.

89. See *infra* notes 111-40 and accompanying text; see also *supra* note 9. See generally Soloman, *The Emergence of Associational Rights for Homosexual Persons*, in *HOMOSEXUALITY AND THE LAW* 147-55 (D. Knutson ed. 1980) (general discussion of homosexuals' right to free association).

tional right to privacy is being infringed because homosexuals have an implicit right to participate in private consensual sexual activities⁹⁰ and to keep their sexuality private.⁹¹

THE RIGHT TO PRIVACY AND THE HOMOSEXUAL SOLIDER

The Origins of Privacy Law

The right to privacy is a freedom fundamental to the American way of life.⁹² The notion of a right to privacy is implicit in the fourteenth amendment's consideration of due process.⁹³ This right to privacy can also be found in the due process clause of the fifth amendment.⁹⁴ Moreover, implicit in the first amendment are the

90. See *supra* note 10. See also Note, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067-84 (1979). See generally Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957-1018 (1979).

91. See *supra* note 11.

92. See *Stanley v. Georgia*, 394 U.S. 557 (1969) (the constitution rebels at the thought of governmental intrusion into men's minds); *Loving v. Virginia*, 388 U.S. 1 (1966) (privacy in fundamental choices is a basic civil right of man); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) (liberty so rooted in the traditions and conscience of our people so as to be fundamental); Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See generally Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 253-71 (1966) (overview of the history of privacy); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41-49 (1974) (history of the first amendment as it relates to privacy); Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272-306 (1966) (the philosophy of the right to privacy); Nizer, *The Right to Privacy*, 39 MICH. L. REV. 526-60 (1941) (right to be let alone as a "natural right"); Comment, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499-528 (1952) (privacy as a staple of democracy).

93. The fourteenth amendment states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

Privacy is implicit here because it is encompassed by the concepts of life and liberty, and the privileges and immunities of citizenship which include the right to be left alone. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

94. The Due Process Clause of the Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The Bill of Rights, and in particular, the due process clause, was established to protect those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1935). The determination of which rights are fundamental demands an inquiry as to whether the right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

freedoms of association and expression which also relate to privacy rights.⁹⁵

In 1965, the Supreme Court expressly acknowledged an independent constitutional right to privacy.⁹⁶ In *Griswold v. Connecticut*,⁹⁷ the Court noted that "peripheral" rights existed, which although not explicitly found in the Constitution, were nevertheless paramount to the appreciation of those rights which were specifically mentioned.⁹⁸ Since then, the constitutional right to privacy

95. See *supra* note 9. Substantive due process was propounded by the dissenters in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The majority, however, felt that due process should be limited in its scope. *Id.* at 39. Gradually, the Slaughter-House dissenters' view became the majority view, leading to a broader interpretation of the due process clause. Although the use of substantive due process to protect economic rights has been discredited, substantive due process has flourished once again as a haven for fundamental values relating to the protection of privacy and autonomy. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964) (freedom of the entire university community to be devoid of governmental intervention); *NAACP v. Alabama*, 357 U.S. 449, 462 (1960) (freedom to associate and keep membership lists private); *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (freedom to teach); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right to educate one's child as one chooses); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (the right to reach a foreign language).

96. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Prickett, *The Right of Privacy: A Black View of Griswold v. Connecticut*, 7 HASTINGS CONST. L.Q. 777 (1980).

97. 381 U.S. 479 (1965).

98. *Id.* at 482-83. The Court noted that "[w]ithout those peripheral rights the specific rights would be less secure," and would lose their force. *Id.* For example, the Court recognized that the right to freedom of speech includes not only the right to print or utter, but the right to read, distribute, and receive as well. *Id.* at 482 (citing *Martin v. Struthers*, 319 U.S. 141, 143 (1943)). Finally, the Court concluded that the first amendment contains a penumbra where privacy is protected from government intervention. *Id.* at 483.

The narrow issue in *Griswold* concerned the constitutionality of a state statute which forbade the use of contraceptives. *Id.* at 480-81. The Court found that the statute violated the right to marital privacy contained within the penumbras of the Bill of Rights. *Id.* at 485. The Court reaffirmed the principle that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* (citing *NAACP v. Alabama*, 377 U.S. 288, 307 (1960)). The *Griswold* Court considered the State's entry into the sacred precincts of marital bedrooms "repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 486. Thus, the right of marital privacy was the first privacy right expressly found to be within the penumbras of the specific guarantees of the Bill of Rights. Justice Douglas wrote:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior discussion.

Id.

has been expanded and developed in a number of cases.⁹⁹ Yet, despite a wealth of privacy cases, the outer limits of the right to privacy have not been marked.¹⁰⁰

The right to privacy has received great attention in recent years in the area of abortion rights.¹⁰¹ In *Roe v. Wade*,¹⁰² the Court found that the fourteenth amendment's concept of personal liberty is broad enough to encompass a woman's decision to terminate her pregnancy.¹⁰³ The Court held, however, that a woman's right to an abortion is not absolute¹⁰⁴ and must be considered against important state interests.¹⁰⁵ The state interests, however, must be compelling in order to warrant regulations limiting privacy rights.¹⁰⁶ Furthermore, any legislative enactments limiting privacy rights must be narrowly drawn to express only the legitimate state interests at stake.¹⁰⁷ Foremost among the major privacy rights are:

99. See, e.g., *Carey v. Populations Servs. Int'l*, 431 U.S. 678 (1977) (minor's right to contraceptives recognized); *Roe v. Wade*, 410 U.S. 113 (1973) (woman's right to obtain an abortion upheld); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognized the fundamental right to decide whether to beget a child); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry outside of one's race acknowledged).

100. *Carey*, 431 U.S. at 684 (Brennan, J., concurring). In *Carey*, the Court held unconstitutional a statute forbidding the display or sale to minors of non-prescription contraceptives. 431 U.S. at 700. This was an important decision because it recognized a legitimate privacy interest outside the environs of the marital relationship. See Adamany, *The Supreme Court At the Frontier of Politics: The Issue of Gay Rights*, 1980 HAMLINE L. REV. 185, 204-05 (privacy rights of homosexuals and individual autonomy). This decision actually extends the notion of personal autonomy introduced by Justice Douglas in his opinion in *Doe v. Bolton*, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring). Moreover, the Court found that the state interest in limiting the sexual activity of minors was not legitimately served by restricting minors' access to contraceptives. *Carey*, 431 U.S. at 690-91, 695-96. The *Carey* Court acknowledged that limiting access to contraceptives will probably not substantially discourage early sexual behavior. *Id.* at 695. Furthermore, the "moral" concerns of the state were not sufficiently shown to meet the compelling state interest test. *Id.* at 690.

101. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (minors' right to abortion without parental consent); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidated restrictions on the distribution and advertising of nonprescription contraceptives); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) (abortions allowed with parents' or husband's consent); *Doe v. Bolton*, 410 U.S. 179 (1973) (abortions could not be restricted to state residents); *Roe v. Wade*, 410 U.S. 113 (1973) (established a woman's right to obtain an abortion).

102. 410 U.S. 113 (1973).

103. *Id.* at 153.

104. *Id.* at 154.

105. *Id.* The legitimate state interests the Court noted included safeguarding health, the maintenance of medical standards, and the protection of potential life. *Id.*

106. *Id.* The Court noted that "[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* While refusing to determine at what point life begins, the Court set the "compelling" point at the end of the first trimester. *Id.* at 163.

107. *Id.* at 155 (citing *Griswold*, 381 U.S. at 485). The interests at stake were outlined by Justice Douglas in *Doe v. Bolton*, 410 U.S. 179, 211-13 (1973) (Doug-

(1) freedom of association;¹⁰⁸ (2) personal autonomy;¹⁰⁹ and (3) freedom from intrusion or the "right to be let alone."¹¹⁰ Moreover, each of these areas lend added support for the homosexual soldier's right to privacy.

Freedom of Association—The Right to Be Homosexual

In *Griswold*, the Court acknowledged the right of marital privacy along with the broader peripheral first amendment rights of freedom to associate and privacy in that association.¹¹¹ The Court reaffirmed the right to marry and freedom of choice in the marital scheme in *Loving v. Virginia*.¹¹² In *Loving*, the Court struck Virginia's antiscegenation statute as unconstitutional.¹¹³ The Court noted that the freedom to marry the partner of one's own choosing is a vital personal right essential to the pursuit of happiness.¹¹⁴ Although *Loving* dealt strictly with racial barriers to marriage, some of the Court's language suggests that the choice of an adult marital partner would be beyond state intervention on any grounds.¹¹⁵ Logically, this would include the right to choose a ho-

las, J., concurring), the companion case to *Roe*. The interests included are: (1) the autonomous control over the cultivation and expression of one's intellect, interests, tastes, and personality, (2) freedom of choice in the fundamental decisions of one's life, and (3) freedom from bodily restraint or compulsion. *Id.* See Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1620-25 (1974) (in-depth discussion of privacy interests and homosexuality). A majority of the Court has never formally adopted these interests; however, many of the concerns Justice Douglas expressed have been referred to in lower court decisions concerning privacy. See, e.g., *Ben-Shalom v. Secretary of the Army*, 489 F. Supp. at 975. See generally Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) (overview of the right to sexual autonomy).

108. For a discussion of the related homosexual interests involved, see *supra* notes 9 & 89. See also *infra* notes 111-40 and accompanying text.

109. For a discussion of the related homosexual concerns regarding private consensual sexual activity, see *supra* note 92. See also *infra* notes 141-70 and accompanying text.

110. For a more complete discussion of this privacy interest, see *supra* note 11.

111. See *supra* note 98 and accompanying text.

112. 388 U.S. 1 (1966).

113. *Id.* at 12. See also VA. CODE § 20-59 (1960).

114. 388 U.S. at 12. Further, the Court noted that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

115. See *supra* note 114. Because marriage is a fundamental right, one should have as much right to choose a partner of the same sex as one of a different race. However, no court in the United States has ever acknowledged a constitutional right to marry a partner of the same sex. See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (no constitutional sanction or protection of the right to marry a person of same sex); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (prohibition of same sex marriage does not violate first, eighth, ninth or fourteenth amendments);

mosexual marriage partner.¹¹⁶

Further support for declaring the military regulations pertaining to homosexual status unconstitutional can be found in *Robinson v. California*.¹¹⁷ In *Robinson*, the Supreme Court declared unconstitutional a state statute making it a crime to be a narcotic addict.¹¹⁸ The Court held that it would be "cruel and unusual punishment" to imprison a person for being an addict by status alone without the presence of a correlating criminal act.¹¹⁹ Moreover, the dissent in *Robinson* suggested that the majority opinion stood for the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."¹²⁰ Although the homosexual in the military is not being imprisoned, discharge for status alone amounts to the same sort of punishment which the Court found prohibited in *Robinson*.¹²¹

Anonymous v. Anonymous, 67 Misc. 2d 982, 352 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (morning after discovery that "she" was a "he" nullified the marriage); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (prohibition of same sex marriage did not violate the equal protection clause). See generally Annot., 63 A.L.R.3d 1199 (1975) (history of same sex marriages in the United States). Only one state, however, explicitly requires that marriage applicants be members of the opposite sex. TEX. FAM. CODE ANN. § 1.01 (Vernon 1974); RIGHTS OF GAY PEOPLE, *supra* note 1, at 81.

Although some reformed religious groups have performed gay marriages, these marriages have no legal significance. They are usually referred to as ceremonies of "holy union" rather than "marriage ceremonies." RIGHTS OF GAY PEOPLE, *supra* note 1, at 82-83.

The quest for legal recognition of the homosexual family has led some homosexuals to attempt to adopt their companions. See, e.g., *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984) (57-year-old male petitioned to adopt his 50-year-old lover). This tactic for attaining a legally recognized relationship has been more successful than marriage. Such adoptions, however, have recently come under increased judicial scrutiny. *Id.* (court denied petition for adoption because the relationship between adult parties was incompatible with parent-child relationship). Cf. Moskowitz, *Job Rights for Gays: The Price Tag Gets Higher*, BUS. WK., Nov. 26, 1984, at 136 (law suits being filed against companies for homosexual spouse benefits).

116. If one has the fundamental right to choose a marriage partner of one's choice regardless of race and free from governmental intrusion, then surely one can also choose a marriage partner regardless of that person's sexual preference.

117. 370 U.S. 661 (1962).

118. *Id.* at 666-68.

119. *Id.* at 667. The court noted that narcotic addiction is an illness that can be acquired innocently or voluntarily. *Id.* Indeed, a person may be born addicted to narcotics. *Id.* at 667 n.9.

120. *Id.* at 682.

121. Homosexuality is not considered to be something that one chooses. See *supra* note 59. Therefore, the comparison to narcotic addiction is appropriate.

Moreover, in *Stanley v. Georgia*, the Court determined that a state has no right to control the moral content of a person's thoughts. 394 U.S. 557, 566 (1969). Thus, "a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565. Furthermore, the Court noted that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*

Lower courts have applied this freedom to associate in justifying the right to homosexual status.¹²² In *benShalom v. Secretary of the Army*,¹²³ the United States District Court for the Eastern District of Wisconsin declared unconstitutional an Army regulation which compelled the discharge of homosexuals for status alone¹²⁴ with no evidence of homosexual acts.¹²⁵ The *benShalom* court held that the Army regulation violated both the first amendment¹²⁶ and the constitutional right to privacy.¹²⁷ Moreover, the *benShalom* court noted that the broad sweep of the Army regulation substan-

While *Stanley* is restricted to the home, the constitutional right to privacy of family and marriage is not limited to a particular place but rather to a protected intimate relationship. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973). For discussion of the privacy rights of homosexuals, see Adamany, *supra* note 100, at 189-220.

122. See, e.g., *Gay Lib. v. University of Miss.*, 558 F.2d 848 (8th Cir. 1977) (right to form a homosexual group on a student campus recognized); *Martinez v. Brown*, 449 F. Supp. 207 (N.D. Cal. 1978) (freedom to associate with homosexuals upheld). See generally *Wilson & Shannon, Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979) (court recognition of right to homosexual status); Comment, *Free Speech Rights of Homosexual Teachers*, 80 COLUM. L. REV. 1513 (1980) (association rights of homosexual teachers explored); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974) (discussion of sexual autonomy rights); Annot., 50 A.L.R. FED. 516 (1980) (list of cases recognizing homosexual organizations on college campuses). But see *Berg v. Clayton*, 436 F. Supp. 76 (1977) (freedom of association not impinged by military discharge); *Gay Activists Alliance v. Lomenzo*, 66 Misc. 2d 456, 320 N.Y.S.2d 994 (N.Y. Sup. Ct. 1971), *rev'd sub nom. Owles v. Lomenzo*, 38 A.D.2d 981, 329 N.Y.S.2d 181 (1972), *aff'd sub nom. Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973) (certificate of incorporation for homosexual group denied as against state's penal code). For an exhaustive survey of the rights of homosexuals in the United States, see Rivera, *supra* note 23, at 799-955.

123. 489 F. Supp. 964 (E.D. Wis. 1980). For a comprehensive discussion of *benShalom* see Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191, 196-98 (1980) (constitutional claims and the military regulations excluding homosexuals); Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination In The Military*, 27 VILL. L. REV. 351, 357-58 (1981) (military regulations and first amendment infringements).

124. *benShalom*, 489 F. Supp. at 974. See also Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191, 196-200 (1980-81) (in-depth analysis of homosexual status in the military).

125. *benShalom*, 489 F. Supp. at 973. The Court noted that *benShalom* did not engage in any known homosexual activity, nor did she advocate homosexuality to anyone while on duty. *Id.*

126. *Id.* at 972-75. The court noted that while the government alleged that retention of homosexuals will be "detrimental to the 'unique mission' of the Army," they offered no proof to support that claim. *Id.* at 973. The court noted that "[i]n the area of First Amendment rights, the government must adopt regulations that are the least intrusive on the individual's liberties." *Id.* at 974 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973)). In balancing the rights, the court found the first amendment rights to free association were more important in this case. *Id.* at 975.

127. *Id.* at 975-77. The court noted that the military regulations effectively chilled the free association rights of soldiers. *Id.* at 975.

tially impinged the first amendment rights of every soldier to free association, expression, and speech.¹²⁸ Furthermore, the *ben-Shalom* court considered the "autonomous control over the development and expression of one's intellect, interests, tastes, and personality"¹²⁹ basic to the first amendment.

In schools, a situation somewhat analogous to the military because of the concern over impressionable minds, the federal courts have consistently held unconstitutional regulations that discriminate against homosexuals and intrude on the freedom of association.¹³⁰ In *Gay Student Services v. Texas A&M University*,¹³¹ the Fifth Circuit held that Texas A&M University could not bar the existence of a homosexual student group on campus.¹³² The court noted that schools have legitimate interests in prohibiting student activities that are likely to incite violence and disrupt discipline,¹³³ however, the court found that the school's fears of promulgating homosexuality did not amount to a compelling purpose sufficient enough to allow such a gross intrusion upon first amendment rights.¹³⁴

128. *Id.* at 976.

129. *Id.* at 975 (emphasis in original) (citing *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring)).

130. *See, e.g.*, *Healy v. James*, 408 U.S. 169 (1972) (homosexual school group's first amendment rights were impinged by the University's denial of official recognition). *Cf.* *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972) (gay school group was recognized but denied use of university facilities for a dance). *See generally* Rivera, *supra* note 23, at 924-34 (overview of homosexuality in university situations).

One recent case arose that presented an interesting clash between a university and military recruits. Two law students at Temple University in Philadelphia charged that the school had violated the city's fair practices ordinance which bans discrimination on the basis of sexual orientation by allowing military recruiters on campus and by helping them arrange interviews. *N.Y. Times*, Feb. 3, 1985, at 12, col. 6. After careful consideration, Philadelphia's Human Relations Commission ordered Temple University to stop assisting military recruiters. Kaplan, *Temple Recruiting Practice Ruled in Violation of Anti-Gay Bias Law*, *Nat'l L.J.*, Mar. 4, 1985, at 4, col. 4. Under this ruling, the military may still recruit in the city but cannot be assisted by any entity covered by the ordinance. *Id.* This case has been reversed but will be appealed. *See* Margolick, *Army Wins Case on Recruitment*, *N.Y. Times*, Sept. 12, 1985, at 13, col. 1 (district court disregarded first amendment concerns and deferred to the military).

131. 737 F.2d 1317 (5th Cir. 1984).

132. *Id.* at 1332-33.

133. *Id.* at 1327. For these interests to be legitimate, however, they cannot be based on apprehension alone. *Id.*

134. *Id.* at 1330. The university argued that the denial of recognition was justified as an appropriate means of protecting public health. *Id.* This argument was purely speculative, and as such the court found that it was not determinative. *Id.* Moreover, the fact that the homosexual student group's "fraternal" and "social" goals and purposes were not consistent with the philosophy and goals of the school was not in and of itself a valid reason for denying the group official recognition. *Id.*

In another highly publicized case, *Fricke v. Lynch*,¹³⁵ a homosexual student's right to attend the school prom with his date of the same sex was upheld.¹³⁶ Adopting the court's holding in *Gay Student Services*, the *Fricke* court found that the "mere desire of avoiding the discomfort and unpleasantness that always accompany an unpopular viewpoint"¹³⁷ did not justify prohibiting the particular expression of opinion at issue in the case. Furthermore, the court felt that even a legitimate interest in school discipline did not outweigh a student's right to freely express his homosexuality.¹³⁸ Because of the strong similarity of military and school concerns relating to discipline, morale, and preparation for the real world, the two settings are analogous.¹³⁹ Therefore, if the clear expression of homosexuality is upheld in the school setting, the denial of free association with homosexuality in the military setting escapes justification.¹⁴⁰

*Personal Autonomy—The Right to Participate In Private
Consensual Sex*

Although the Supreme Court has declared private sexual relationships between consenting adults to be within the capacity of state legislatures, any such legislation must have a compelling purpose.¹⁴¹ In *Eisenstadt v. Baird*,¹⁴² the Court declared unconstitutional a Massachusetts statute aimed at protecting morals by

135. 491 F. Supp. 381, 388-89. Cassill, *A Rhode Island town survives its night to remember as Aaron takes Paul to the Prom*, PEOPLE, June 16, 1980, at 98. See also A. FRICKE, CONFESSIONS OF A ROCK LOBSTER (1981) (book authored by defendant provided reflections on growing up "gay").

136. *Fricke*, 491 F. Supp. at 388-89.

137. *Id.* at 386 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)). In *Tinker*, the Court noted that high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506.

138. *Fricke*, 491 F. Supp. at 387. The free expression of homosexuality, however, should be done peacefully, in an appropriate time, place, and manner. *Id.*

139. Both the military and the school situations involve preparatory education for life situations.

140. The strict scrutiny applied to students' rights should also be applied to military personnel. *Cf.* N.Y. Times, Feb. 3, 1985, at 12, col. 6 (military discrimination against homosexual students prohibited by Philadelphia Human Relations Commission).

141. See *Roe v. Wade*, 410 U.S. 113, 155 (1973). Justice Blackmun stated that "[w]here certain 'fundamental rights' are involved, . . . regulations limiting these rights may be justified only by a 'compelling state interest.'" *Id.* at 155. See also Adamany, *supra* note 100, at 268-85.

142. 405 U.S. 438 (1971).

"regulating the private sexual lives of single persons."¹⁴³ The Court held that regulations concerning private matters invoke strict scrutiny¹⁴⁴ and therefore require a compelling state purpose.¹⁴⁵ The *Eisenstadt* Court asserted that the individual has the right to be free from unnecessary governmental intrusions into matters so vitally affecting a person as the choice of whether to beget children.¹⁴⁶ The Court's language suggests that individuals have the right to be left alone regarding matters that are basic to human sexuality.¹⁴⁷

Despite the Court's earlier suggestion in *Loving* that the choice of a sexual partner was a fundamental privacy right that could not be infringed by the state absent a compelling purpose, later Court decisions are ambiguous on this point. In *Doe v. Commonwealth's Attorney for Richmond*,¹⁴⁸ the Court summarily affirmed a lower court decision upholding the constitutionality of a Virginia criminal statute prohibiting sodomy.¹⁴⁹ Five years later, however, the Court denied *certiorari* in another case which held that the right of privacy did extend to private sexual conduct between consenting

143. *Id.* at 442. The state suggested that the purpose of the statute was to promote marital fidelity, as well as to discourage premarital sex. *Id.* at n.3. See MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1971).

Note, however, that under § 21A, contraceptives can be made available to married persons without regard to whether they are living with their spouses or to what uses the contraceptives will be put. Thus, the legislation would have no deterrent effect on extra-marital sexual relations. *Eisenstadt*, 405 U.S. at 442 n.3.

144. *Id.* at 452-53.

145. *Id.*

146. *Id.* at 453.

147. For a discussion of the right of privacy in the autonomy of one's body see Adamany, *supra* note 100, at 202-11.

148. 425 U.S. 901 (1976). Justices Brennan, Marshall, and Stevens would have noted probable jurisdiction and set the case for oral argument. Moreover, the summary affirmance did not resolve the issues presented in the case. It has been noted that a summary affirmance is "not of the same precedential value as would be an opinion of the Court treating the same question on the merits." *Edelman v. Jordon*, 415 U.S. 651, 671 (1974). Furthermore, the Court has noted that the judgment may be affirmed but not necessarily the reasoning by which it was reached. *Fusari v. Steinberg*, 419 U.S. 379 (1975). "An unexplicated summary affirmance settles the issues *for the parties* and is not to be read as a renunciation by this Court of doctrine previously announced in our opinion after full argument." *Id.* at 391-92 (emphasis in original). Finally, a summary affirmance does not prevent lower courts from coming to an opposite conclusion except on "the precise issues presented and necessarily determined by those actions." *Illinois State Bd. v. Socialist Workers Party*, 440 U.S. 173 (1979).

149. *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981). The court relied on the penumbras of the right to privacy outlined by the Supreme Court in *Griswold* and the cases that followed it. *Id.* at 481, 415 N.E.2d at 939, 434 N.Y.S.2d at 952. See Katz, *Sexual Morality and the Constitution: People v. Onofre*, 46 ALB. L. REV. 311 (1982); Recent Cases, *Expanding the Right of Sexual Privacy*, 27 LOY. L. REV. 1279 (1981); Note, *Right of Privacy—Consensual Sodomy and the Choice of a Moral Doctrine: New York's Permissive Position*, 5 W. NEW ENG. L. REV. 75 (1982).

adults.¹⁵⁰ Significantly, the Court's affirmation of *Doe* did not settle the question of the constitutionality of private sexual conduct since the decision can be distinguished in many ways.¹⁵¹ Indeed, prior decisions of the Court strongly suggest that the right to privacy lies firmly in the home and in the autonomy of the individual, whether single or married, to make certain intimate decisions about how to use one's own body.¹⁵² *Doe* is inconsistent with these values.¹⁵³ Thus, it has been suggested that since none of the *Doe* plaintiffs were threatened with arrest, the Court's disposition can ultimately be explained on the narrow issues of ripeness and standing.¹⁵⁴ Although these cases touch the periphery of the issue, the Court has never directly answered the question of whether one has the right to participate in private consensual sex.¹⁵⁵

150. See *State v. Saunders*, 75 N.J. 200, 210-11, 381 A.2d 333, 340-41 (1971) (narrow reading of *Doe* as it does not necessarily represent the reasoning of the Court). See also *Onofre*, 51 N.Y.2d at 486, 415 N.E.2d at 943, 434 N.Y.S.2d at 957 (*Doe* included no declaration of constitutionality). Accord *Baker v. Wade*, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982), appeal dismissed, 743 F.2d 236 (5th Cir. 1984) (six justices have agreed that *Doe* did not definitively answer the difficult question of whether the right of privacy extends to private sexual conduct between consenting adults). But see *Dronenburg v. Zech*, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984) (*Doe* constituted a vote on the merits and as such is binding on lower federal courts). See generally Annot., 20 A.L.R. 4TH 1009 (1983) (cases supporting the validity of statutes making sodomy a criminal offense).

151. For a discussion of the right of privacy in the autonomy of the body see Adamany, *supra* note 100, at 202-11.

152. See Adamany, *supra* note 100, at 218-20 (depreciation of the *Doe* decision).

153. See *Dronenburg v. Zech*, 746 F.2d 1579, 1580-81 (D.C. Cir. 1984) (Robinson, C.J., dissenting from denial of rehearing en banc).

154. Moreover, in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), decided only a year after *Doe*, Justice Brennan spoke for four Justices when he announced in a footnote that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Id.* at 694 n.17 (Brennan, J., concurring, joined by Stewart, Marshall, and Blackmun, J.J.). See also *Carey*, 431 U.S. at 688 n.5 (Brennan, J., concurring joined by Stewart, Marshall, Blackmun, Stevens, and White, J.J.).

155. See *supra* notes 148-53 and accompanying text. Recently, the Supreme Court has once again refused to hear a case concerning the issue of homosexual rights. The Court refused to hear an appeal by a public high school guidance counselor who lost her job as a result of disclosing to her co-workers that she was bisexual. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984), cert. denied, 105 S. Ct. 1373 (1985). See also Greenhouse, *Case Is Refused for Bisexual Who Lost Job As Counselor*, N.Y. Times, Feb. 26, 1985, at 10, col. 1. In an eleven page dissent, Justices Brennan and Marshall stated that "homosexuals constitute a significant and insular minority of this country's population. . . . [B]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local School Dist.*, 105 S. Ct. 1373, 1377 (1985) (Brennan and Marshall, J.J., dissenting from denial of certiorari). Furthermore, the Justices noted that the question of gay rights "raise serious and unsettled constitutional questions [that] . . . cannot any longer be ignored." *Id.* at 1379.

Since *Doe*, the Court's consistent refusal to hear any cases concerning the right to engage in private sexual activities¹⁵⁶ has resulted in conflicting interpretations of the *Doe* affirmance in the federal courts.¹⁵⁷ A number of federal courts have found state sodomy statutes unconstitutional,¹⁵⁸ either on equal protection or privacy grounds.¹⁵⁹ Another group of federal cases have upheld the constitutionality of state sodomy statutes,¹⁶⁰ largely relying on the ambiguous *Doe*. Meanwhile, private consensual sexual activity has been decriminalized in twenty-six states.¹⁶¹ The other states rarely prosecute against private consensual sexual activity even though many laws against sodomy remain in effect.¹⁶² Overall, the trend is towards the decriminalization of private consensual sex.¹⁶³

156. See Adamany, *supra* note 100, at 202-11.

157. See, e.g., *Baker v. Wade*, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984) (Texas statute discriminated against homosexuals by prohibiting same-sex sodomy only); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981) (sodomy posed no threat to the public per se); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977) (right to personal autonomy is fundamental to a free society). See generally, Annot., 20 A.L.R. 4TH 1009 (1983) (sodomy as a crime considered).

158. See, e.g., *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985) (constitutional infringement of fundamental privacy rights).

159. See, e.g., *Saunders*, 75 N.J. at 212, 381 A.2d at 342-43 (personal autonomy is fundamental, thereby compelling invalidation of state sodomy statute).

160. See, e.g., *State v. Santos*, 122 R.I. 799, 413 A.2d 58 (1980) (private unnatural copulation between unmarried adults not found to be encompassed in the constitutional right to privacy).

161. In twenty-two states, the decriminalization has been accomplished by either repealing or amending the pertinent criminal statute. RIGHTS OF GAY PEOPLE, *supra* note 1, at 109. Those states are: "Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, and Wyoming." *Id.*

In the other four states, the pertinent criminal statutes have been held unconstitutional when challenged. GA. CODE ANN. § 16-6-2 (1984) (statute pertaining to consensual sodomy held unconstitutional in *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); N.Y. PENAL LAW § 130.38 (Consol. 1965) (statute pertaining to consensual sodomy held unconstitutional in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)); 18 PA. CONS. STAT. ANN. §§ 3101, 3124 (Purdon 1973) (statute which prohibited voluntary deviate sexual intercourse held unconstitutional in *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); TEXAS PENAL CODE ANN. § 21.06 (Vernon 1974) (statute pertaining to any homosexual conduct declared unconstitutional in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984)).

162. Largely, sodomy is not prosecuted because private sexual activities are rarely, if ever, discovered. More significant, however, is the fact that enforcement of these laws are not a top priority of police forces. See generally RIGHTS OF GAY PEOPLE, *supra* note 1, at 108-17 (chapter concerns gays and criminal law).

163. See generally RIGHTS OF GAY PEOPLE, *supra* note 1, at 108-16 (general overview of current criminal legislation pertaining to homosexuals).

In *Baker v. Wade*,¹⁶⁴ a decision of the United States District Court for the Northern District of Texas, the court traced the Supreme Court's privacy decisions and concluded that the rights of privacy and personal autonomy do extend to private sexual conduct between consenting adults, whether heterosexual or homosexual.¹⁶⁵ Because the state had provided no evidence of any state interests compelling enough to justify the impingement of the right to privacy,¹⁶⁶ the state sodomy statute was held unconstitutional.¹⁶⁷ The court noted, however, that despite the homosexual controversy it would be irrational and unjust to create criminals by statute.¹⁶⁸ The court relied on *Robinson* in holding that Texas' sodomy statute was unconstitutional not only because it infringed constitutional privacy rights, but also because it created criminality based on status alone.¹⁶⁹

The Supreme Court has gradually developed and expanded the constitutional right to privacy, stopping short, however, of extending that right to all people regardless of their sexual identity. The prior decisions of the Court in *Loving* and *Eisenstadt* should lead to the extension of a right to private consensual sex which would settle the homosexual soldier's dilemma. The Court, however, has declined to hear this issue, choosing to avoid making a difficult, probably unpopular decision concerning this sensitive moral issue.¹⁷⁰

164. 553 F. Supp. 1121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984).

165. *Id.* at 1140. The court found that the implied constitutional protection of personal autonomy demands that a person be given free choice in their sexual partners. *Id.*

166. *Id.* at 1142. The court noted that the state did not produce a single witness, or any other evidence, to support the alleged state interests of "morality and decency, welfare and safety, and procreation." *Id.* The one witness who did testify was not an expert in the field of sexual psychology and his opinions were not based on sound research. *Id.* Furthermore, the witness' opinions were contrary to the weight of the evidence regarding current psychiatric views toward homosexuality. *Id.*

167. *Id.* at 1143. In its conclusion, the court addressed the controversiality of the homosexuality issue in our society. *Id.* at 1147. The court noted the emotional and controversial nature of this issue in our society, concluding that the court cannot allow public opinion to impede the granting of constitutional rights. *Id.*

168. *Id.* The court stated that the statute "makes criminals out of more than 700,000 individuals in Texas who are homosexuals, although they did not choose to be, and who engage in private sexual conduct with other consenting adults." *Id.* Furthermore, the court exclaimed that if this statute was not prohibited by the constitutional right to privacy, then "the state would have the same power to intrude into the private lives and bedrooms of heterosexuals, and regulate the intimate sexual relationships of married couples and single males and females." *Id.*

169. *Id.* at 1143.

170. The Court has avoided this issue, perhaps, because of fears of a duplication of the troubles that plagued Justice Blackmun after the controversial *Roe*

Freedom Against Intrusion—The Right to Be Left Alone

For nearly a century, judges and legal scholars have noted the importance of the right to be left alone.¹⁷¹ Justice Brandeis considered the right to have certain private matters kept private integral to man's pursuit of happiness.¹⁷² State courts have adopted this view primarily in cases involving privacy torts,¹⁷³ and the Supreme Court has also adopted the Brandeis view in a number of constitutional privacy decisions.¹⁷⁴

In *Watkins v. United States*,¹⁷⁵ the Supreme Court held that Congress has no power to expose, for the sake of exposure, private matters when the result can only be an invasion of an individual's privacy rights. Furthermore, although every "reasonable indulgence of legality"¹⁷⁶ must be afforded to actions of a branch of gov-

v. Wade decision. In a recent New York Times article, it was reported that Justice Blackmun has received numerous death threats, piles of hate mail and has needed virtually perpetual security protection since then. *A Candid talk with Justice Blackmun*, N.Y. TIMES MAGAZINE, Feb. 20, 1983, at 20. This reality may have kept the Court from opting to decide other controversial morality issues such as homosexuality. See the discussion of the *Rowland* case, *supra* note 155. See also *Board of Education v. National Gay Task Force*, 53 U.S.L.W. 4408 (Mar. 26, 1985) (dead-locked Court ruling without written opinion upheld lower court decision that Oklahoma could not constitutionally dismiss public school teachers for speaking out in favor of homosexual rights). The vote was 4 to 4, with Justice Powell not participating and with the positions of the eight voting Justices not identified. *Greenhouse, Vote Upholds Teachers on Homosexual Rights*, N.Y. Times, Mar. 27, 1985, at 9, col. 1. The press noted that this case represented the second time in a year that the court failed to issue a definitive opinion in a case concerning homosexual rights even after arguments were heard. *Id.* at col. 2. The other case was *New York v. Uplinger*, 104 S. Ct. 2332 (1984). The *Uplinger* case concerned a New York law which made it a crime to loiter in a public place for the purpose of a homosexual solicitation. *Id.* The court initially heard arguments in the *Uplinger* case but later decided that the review was improvidently granted in a 5-to-4 vote. *Greenhouse, Vote Upholds Teachers on Homosexual Rights*, N.Y. Times, Mar. 27, 1985, at 9, col. 2.

171. See, e.g., *Katz v. United States*, 389 U.S. 347, 350 (1967) (right to be left alone acknowledged by the Court); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (right to be let alone noted as fundamental to the pursuit of happiness). See also Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). For a full discussion of the right to privacy, see Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 233-46 (1977).

172. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 193 (1890). In his dissent in *Olmstead v. United States*, 277 U.S. 438, 471-85 (1927) (Brandeis, J., dissenting), Justice Brandeis noted the "significance of man's spiritual nature," concluding that the right to be let alone is "the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478 (Brandeis, J., dissenting).

173. For a general discussion of the privacy torts see W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS (5th ed. 1984).

174. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (right to be free from governmental intrusion); *Watkins v. United States*, 354 U.S. 178 (1957) (government committee inquiry held overbroad and unduly intrusive on individual privacy interests).

175. 354 U.S. 178, 205-06 (1957).

176. *Id.* at 187.

ernment, such deference cannot yield to an "unnecessary and unreasonable dissipation of precious constitutional freedoms."¹⁷⁷ Thus, there are limits to governmental intrusion into personal matters. Courts must strictly scrutinize private matters that will undermine an individual's right to be let alone.¹⁷⁸

The Supreme Court, in *Whalen v. Roe*,¹⁷⁹ acknowledged a state's right to keep a copy of every individual's prescription for certain drugs, so long as the data was securely kept and only put to limited use.¹⁸⁰ In his concurring opinion, Justice Brennan concluded that the limited use of the prescription drug information was not an invasion of privacy, but broad dissemination of such information would intrude on constitutionally protected privacy rights and would be justified only by compelling state interests.¹⁸¹ Accordingly, compelling interests should also be required when the government extensively inquires into private matters at the expense of the individual's right to be let alone. Although minor inquiries into an employee's homosexuality have been upheld in the area of government security, there is no justification for extensive investigation.¹⁸²

In *Gayer v. Schlesinger*,¹⁸³ the United States Court of Appeals for the District of Columbia determined that homosexuality may be considered when granting security clearances.¹⁸⁴ The Court emphasized, however, that a homosexual could not be required to respond to questions concerning intimate details of his sex life.¹⁸⁵ Allowing the government to ask only limited questions effectively balances the government's interests with the right to privacy. Unfortunately, the courts have not been consistent in this matter,¹⁸⁶ and some courts have even tolerated extensive interrogation into a

177. *Id.* at 204.

178. *Id.* at 197-200. See generally Griswold, *The Right to be Let Alone*, 55 Nw. U.L. REV. 216-26 (1960) (overview of government intrusion as it effects the right to be let alone).

179. 429 U.S. 589 (1977).

180. *Id.* at 602 (Brennan, J., concurring). The Court noted that "some individual's concern for their own privacy may lead them to avoid or to postpone needed medical attention;" however, "[r]equiring such disclosures to representatives of the state having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." *Id.*

181. *Id.* at 606. See also *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

182. See generally RIGHTS OF GAY PEOPLE, *supra* note 1, at 49-57 (chapter dealing with homosexuals and security clearances).

183. 490 F.2d 740 (D.C. Cir. 1973).

184. *Id.* at 748.

185. *Id.* at 752. The court noted that while the government may question prospective holders of security clearances as to their sexuality, "the identity of sex partners is not to be insisted upon, unless in a particular case some special reason can be held to justify it." *Id.*

186. Only one year later, in *Marks v. Schlesinger*, 384 F. Supp. 1373 (C.D. Cal. 1974) questions seeking descriptions of homosexual acts, and a list of places

homosexual's private life.¹⁸⁷ Homosexuals, therefore, are being singled out for an in-depth investigation into their private lives that would rarely be tolerated if done to any other group. The interest in national security can and should be achieved without unduly infringing the constitutional privacy rights of any man or woman, regardless of their sexuality. The right to be let alone commands nothing less.

UNITED STATES MILITARY POLICY TOWARD HOMOSEXUALS AS AN INFRINGEMENT OF CONSTITUTIONAL PRIVACY RIGHTS

In the past, the justifications for excluding homosexuals from the military may have been more justifiable because homosexuality was considered a psychological disorder.¹⁸⁸ The attitude toward homosexuals, however, has progressed immensely during the past twenty years.¹⁸⁹ In fact, the Board of Trustees of the American Psychiatric Association removed homosexuality from its official list of mental diseases in 1973.¹⁹⁰ In maintaining its inflexible treatment toward homosexuals, the military has failed to recognize contemporary social and medical attitudes in its regulations.

An increasing number of legal cases challenging military discharges for homosexuality have arisen during recent years because more homosexuals are questioning the legality of excluding homosexuals from the military rather than passively allowing their rights to be violated.¹⁹¹ As previously indicated, the military regu-

where the acts occurred, were held not to be a unconstitutional intrusion of the right of privacy. *Id.* at 1377-78.

187. *Id.* A recent article reported an incident illuminating the military's egregious disregard for a homosexual's privacy. Boffey, *Of AIDS and the Lack of Confidentiality*, N.Y. Times, Aug. 10, 1985, at 8, col. 3. The article reported that Navy doctors betrayed a homosexual AIDS patient by reporting him for discharge despite assurances that all inquiries into his sex life would remain confidential. *Id.*

188. See R. BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY* 3 (1981).

189. See Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 ARIZ. ST. L.J. 79, 111-12 (military out of synch with changing societal views toward homosexuality). See generally J. KATZ, *GAY AMERICAN HISTORY* (1976) (a documentary of lesbians and gay men in America); J. KATZ, *GAY/LESBIAN ALMANAC* (1983) (supplement to *Gay American History*). Cf. Rohter, *New York Officials Back School Serving Homosexual Youths*, N.Y. Times, June 4, 1985, at 1, col. 3 (New York City established school for homosexuals).

190. See *supra* note 188.

191. See Kulieke, *supra* note 1, at col. 3. See also Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97-124 (1964). Generally, one does not surrender his or her constitutional rights upon entering the military. *Beller v. Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980). See generally R. RIVKIN & B. STICHMAN, *THE RIGHTS OF MILITARY PERSONNEL* (1977) (An American Civil Liberties Union Handbook). Those constitutional rights, however, must be viewed in light of the special circumstances and needs which might infringe constitutional rights in other contexts but might survive scrutiny due to mili-

lations requiring discharges of persons who are homosexuals in status alone, without any evidence of participation in homosexual acts while in the service, have been declared overbroad and violative of first amendment freedoms.¹⁹² Courts have recognized that homosexual status has no more relevance to military skills than do gender or skin color;¹⁹³ in fact, homosexual status has absolutely no relevance to military job performance.¹⁹⁴ Finally, courts have noted the arbitrary, capricious, and unreasonable nature of the Army's conclusion that homosexual status alone makes an individual "unsuitable" for military service.¹⁹⁵ Many homosexual soldiers' service records are exemplary; absolutely no nexus exists between status as a homosexual and suitability for service.¹⁹⁶ Unfortunately, because the Supreme Court has yet to recognize that there is a right to be homosexual,¹⁹⁷ there is no consistency in the lower courts.¹⁹⁸ Thus, various degrees of scrutiny have been applied to

tary necessities. *Id.* See also *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (military service requires special discipline without counterpart in civilian life); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (military, by necessity, is a separate society).

192. *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 977 (E.D. Wis. 1980). See also *supra* notes 123-29 and accompanying text.

193. *benShalom*, 489 F. Supp. at 974.

194. See, e.g., *benShalom*, 489 F. Supp. at 977. The court noted that

[i]n this instance, not only was the petitioner discharged in violation of her first amendment and privacy rights, she was also discharged as 'unsuitable' for service simply due to her status as a homosexual. The record is very clear that, despite her homosexuality, she was a 'suitable' soldier in every respect. It is reasonable to conclude from the extensive record that her performance as a soldier was not only 'suitable' it was indeed exemplary. There is absolutely no 'nexus' between her status as a homosexual and her suitability for service.

Id. The court found that *benShalom* neither engaged in any known homosexual activity nor did she advocate homosexuality to anyone while on duty. *Id.* at 973. Moreover, "[h]er homosexuality caused no disturbances except in the minds of those who chose to prosecute her." *Id.* See also E. GIBSON, *GET OFF MY SHIP* (1978) (the story of a lesbian's separation from the Navy).

195. *Id.* at 976-77.

196. *Id.* at 977. See also *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (due process compels the court to forbid arbitrary and capricious dismissals). *Accord* *Martinez v. Brown*, 449 F. Supp. 207, 212 (N.D. Cal. 1978) (arbitrary and capricious dismissals are inconsistent with due process).

197. See *Adamany*, *supra* note 100, at 202-11.

198. *Id.*

Only a year after the Army's discharge of *benShalom* for homosexual status was held unconstitutional, another homosexual status discharge was upheld in *Rich v. Secretary of the Army*, 516 F. Supp. 621 (Colo. 1981), *aff'd*, 735 F.2d 1220 (10th Cir. 1984). *Rich* was discharged for fraudulent enlistment based on his "false" representation during the enlistment process that he was not homosexual. *Id.* at 1223. It was directed that *Rich* should be honorably discharged under Chapter 14, which permits discharge for fraudulent entry into the Army. *Id.* Fraudulent entry "is defined as the procurement of entry through any deliberate material misrepresentation, omission, or concealment which if known,

the military regulations.¹⁹⁹

For example, in *Beller v. Middendorf*,²⁰⁰ the Ninth Circuit apparently applied intermediate scrutiny in upholding military regulations excluding homosexuals.²⁰¹ The court, however, in applying intermediate scrutiny, failed to establish any nexus between the regulations and the job performance of the soldiers.²⁰² Thus, even with an intermediate scrutiny test, the broad sweep of the military regulations exceed the legitimate concerns of the military regarding homosexuals absent a specific showing of job impairment.²⁰³ Instead, strict scrutiny should be applied because fundamental constitutionally protected privacy rights are being infringed.²⁰⁴

Outside of the military context, federal courts have held that there must be a valid connection between a person's sexual activities and the quality of his or her work performance to justify firing the employee.²⁰⁵ Generally, the only cases which have upheld the dismissal of homosexual government employees concerned employ-

might have resulted in rejection." *Id.* (citing Army Reg. 635-200, ch. 14, § 14-5 (1973)).

Rich maintained that his sexual identity was not determined until after his enlistment, however, some of his earlier admissions were inconsistent with that contention. *Id.* The court was irrational in holding that Rich's first amendment rights were not violated since he was not discharged for advocating homosexuality or associating with homosexuals but rather for "being one." *Id.* at 1229. The fact that Rich was a homosexual was only discovered because of language or speech to that effect. Rich told his first sergeant that he was "gay" during a counseling session. *Id.* at 1223. A homosexual's status, absent any homosexual acts, should have been treated, as in the *benShalom* case, as an "arbitrary" discharge.

199. See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied sub nom. *Beller v. Lehman*, 452 U.S. 905 (1981) (military regulations considered under an intermediate scrutiny test). *Contra benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (strict scrutiny applied to the military regulations).

200. 632 F.2d 788 (9th Cir. 1980).

201. *Beller*, 632 F.2d at 810.

202. *Id.* This is the so-called "heightened solicitude" test. *Id.* This is a form of intermediate scrutiny, a middle ground between mere rationality and strict scrutiny. Using this test of intermediate scrutiny, the court established no "nexus" between the regulations and the job performance of the soldiers. In fact, the court was actually satisfied with unsubstantiated military concerns in upholding the regulations. See *supra* notes 74-79 for Judge Boochever's scathing attacks of the *Beller* decision.

203. Moreover, "heightened solicitude" does not sufficiently protect the constitutional rights of military personnel because the test does not call for compelling purposes to be required in impinging constitutional rights. This test merely requires an important government interest to be invoked. Strict scrutiny should always be applied when constitutional rights are being impinged. See *supra* notes 106-07 and accompanying text.

204. See *supra* note 79.

205. See, e.g., *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (landmark case demanded a "rational nexus" between sexuality and work performance to justify firing of employee). See generally, *Rivera*, *supra* note 23, at 805-29 (overview of federal, state and local, and private employment of homosexuals).

ees who openly flaunted their lifestyles to the detriment of the government's image.²⁰⁶ In those cases, the employees' job performance was negatively affected by their sexuality; no similar correlation exists in the military.²⁰⁷ As with race and sex, the military is perpetuating a negative stereotype of homosexuals by deeming them to be *per se* unsuitable for military service.²⁰⁸

The Supreme Court has continuously refused to accept public hostility to a particular group of people as justification for governmental discrimination against that group.²⁰⁹ In a recent decision concerning a racially mixed family setting, the Court held that a state judge could not consider the "real world" existence of racial prejudice in deciding whether a child should be taken from its natural mother who was living with a black man.²¹⁰ The Court held that "private biases and the possible injury they might inflict"²¹¹ are not legitimate considerations for the courts. Moreover, Chief Justice Burger, speaking for a unanimous court, stated that although the Constitution cannot control private biases, it will not tolerate them.²¹² Further, the Chief Justice stated that "private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect."²¹³ Many of the military's justifications for the exclusion of homosexuals are nothing more than a concession to the biases of the "real world."²¹⁴ Courts must not accept such reasoning as well, lest they give biases legal effect.

CONCLUSION

The military remains at cross-purposes with society's changing

206. *See, e.g.*, *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (dismissal of employee who openly flaunted a gay life style was proper and justified); *Acanfora v. Board of Educ. of Montgomery County*, 359 F. Supp. 843 (Md. 1973) (homosexual teacher who was arbitrarily transferred sought excessive publicity beyond the needs of his defense and sparked controversy which justified termination of his contract).

207. *See, e.g.*, *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980). *See also supra* text accompanying notes 193-94. No open flaunting of sexuality could occur in the military context since homosexuals in the military would strive to be discreet in order to avoid being detected and discharged.

208. *See supra* text accompanying notes 193-97.

209. *See, e.g.*, *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984) (racial prejudice cannot be considered in deciding an inter-racial child custody case); *Califano v. Westcott*, 443 U.S. 76, 89 (1978) (legislation that rests on presumption of "real world" biases cannot survive scrutiny under the due process clause); *Orr v. Orr*, 440 U.S. 268, 283 (1978) (state cannot be permitted to classify on presumed notions of stereotypical sexual roles).

210. *Palmore*, 104 S. Ct. at 1882.

211. *Id.*

212. *Id.*

213. *Id.*

214. *See supra* notes 74-79 and accompanying text.

attitudes toward sexuality;²¹⁵ the regulations are shackled in archaic classifications established by Defense Department directives of the McCarthy era.²¹⁶ Courts confronting the question of homosexual conduct in a military context must defer somewhat to the uniqueness of the military situation.²¹⁷ Such deference, however, does not justify the military's overbroad rejection of homosexuals.²¹⁸ Absent a nexus between sexuality and military performance, the military's sweeping, unqualified dismissal of homosexuals should not be supported or tolerated by our courts.

It is imperative for the military in the United States to remain strong and prepared for any crises that should arise. However, the military must not lose sight of the constitutional protections which are at the core of the American way of life. Every American should have the opportunity to serve and defend our country without fear of arbitrary discrimination. The military regulations conflict with the constitutional right to privacy by excluding homosexuals without question or pause. Although there may be circumstances when one's sexuality can impede one's ability to serve in the military, this situation does not often arise.

The military regulations should seek to bar from military service only those homosexuals who have allowed their sexuality to interfere with their job performance. Such a policy can be achieved through an open interview process in which some basic questions of sexuality can be presented to potential recruits. Once a potential recruit can be assured that homosexuality will not be an absolute bar to military service, the recruit can freely discuss his or her sexuality. Moreover, should problems arise after recruitment, they should be handled on a case-by-case basis. The military's concerns regarding homosexuals are only evident in a few, exceptional cases. The cases which involve no legitimate military concerns should not be prejudiced by those rare instances that do illuminate the military's valid concerns. Furthermore, many of the military's concerns will dissipate with the adoption of a less exclusionary policy toward homosexuals because the current military policy fosters unnecessary prejudice.

215. See Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 ARIZ. ST. L.J. 79, 111-112 (military out of synch with changing views toward homosexuality).

216. See *supra* notes 34-36 and accompanying text.

217. *Id.* See also *Middendorf v. Henry*, 425 U.S. 25 (1976) (court expressly noted "the difference[s] between the diverse civilian community and the much more tightly regimented military community"). Cf. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181-203 (1962) (history of constitutional rights relating to military service).

218. See *Kulieke, supra* note 1, at col. 3. See also *Murphy, The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97-124 (1964).

Courts should strictly scrutinize military regulations in order to afford maximum protection to the individual's right to privacy. As in the private sector, courts must carefully balance the military personnel's constitutional privacy rights against legitimate military concerns. Perhaps the Supreme Court will endeavor to settle the question of the constitutionality of consensual sexual relations once and for all. However, until that time comes, courts should use the previous privacy decisions of the Supreme Court as a basis for supporting the right to be homosexual, both as a soldier and as a civilian.

ADDENDUM

In the last few weeks prior to publication of this article, the United States Court of Appeals for the Fifth Circuit, in a nine to seven vote on *rehearing en banc*, reversed *Baker v. Wade*,²¹⁹ thereby reinstating Texas' sodomy statute. The majority's decision disregarded the many conflicting interpretations of the Supreme Court's summary affirmance of *Doe v. Commonwealth's Attorney for Richmond*²²⁰ and stated that "[t]here can be no question but that the decision of the Supreme Court in *Doe* was on the merits of the case."²²¹ Furthermore, the Fifth Circuit insisted that *Doe* should be "controlling authority until the Supreme Court itself has issued an unequivocal statement that *Doe* no longer controls."²²² However, it is precisely because the Supreme Court has not issued an unequivocal statement in this area that inconsistencies persist in the lower federal courts.²²³ The court concluded that the statute is valid because implementing morality is "a permissible state goal."²²⁴ The court disregarded, however, the strong arguments of the district court relating to the irrationality of creating criminals by statute.²²⁵

219. No. 82-1590 (5th Cir. Aug. 26, 1985) (9-7 decision *en banc*) (available Sept. 3, 1985, on LEXIS, Genfed library).

220. 425 U.S. 901 (1976). For a discussion of *Doe* and its progeny, see *supra* notes 148-63 and accompanying text.

221. No. 82-1590 (5th Cir. Aug. 26, 1985) (available Sept. 3, 1985, on LEXIS, Genfed library). For a discussion of the numerous interpretations of the Court's summary affirmance of *Doe*, see *supra* notes 154-55 and accompanying text.

222. No. 82-1590 (5th Cir. Aug. 26, 1985) (available Sept. 3, 1985, on LEXIS, Genfed library).

223. Compare *id. with Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985) (sodomy statute held violative of fundamental constitutional rights; *Doe* affirmance should not be considered an endorsement of the lower court reasoning).

224. No. 82-1590 (5th Cir. Aug. 26, 1985) (available Sept. 3, 1985, on LEXIS, Genfed library).

225. For a discussion of the district court opinion, see *supra* notes 164-69 and accompanying text; see also *supra* notes 117-21 and accompanying text (discussion of *Robinson* and the unconscionability of status criminality).

The court's decision is troubling not only as to the merits of the case, but also because the majority "tramp[ed] every procedural rule it consider[ed]."²²⁶ The Fifth Circuit's decision is just another addition to the myriad of confusion surrounding the constitutionality of state sodomy statutes. In order to remedy the incorrect result of this decision, one course of action would be to seek repeal of the sodomy statute through the Texas legislature. If, however, the case is brought to the Supreme Court, the Court will undoubtedly side-step deciding the merits of the sodomy law and reverse on the issue of standing.²²⁷ A reversal, even on standing, could only bode well for homosexual's privacy rights in the military and in society at large.

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226. No. 82-1590 (5th Cir. Aug. 26, 1985) (Goldberg, J., dissenting) (available Sept. 3, 1985, on LEXIS, Genfed library).

227. The bulk of the dissenting opinion questioned the standing of the district attorney of Potter County who intervened when the State's Attorney General dismissed the appeal. Specifically, the dissent maintained that the district attorney had not borne his burden of proving that his official interests were inadequately served by the Texas Attorney General. *Id.*