AND THE BAN PLAYED ON
Politics and Prejudice in the Cammermeyer Case

Military Justice is to Justice, what Military Music is to Music.
—Georges Clemenceau (in Lehring 1996, 269)

Prologue

On July 14, 1991, exactly thirty years to the day after her initiation into the United States military, Colonel Margarethe (Grethe) Cammermeyer went before a military board on charges of being a homosexual.1 In the hearing that followed, Cammermeyer’s military and civilian counsel presented a case that highlighted her great value to the military. They cited her nearly twenty-seven years of service,2 her tour of duty in Vietnam, and her numerous honors and awards. These included the Bronze Star for service in Vietnam, recognition as an outstanding Vietnam veteran, and the Veterans Administration (VA) Nurse of the Year Award. They also included membership in a national nursing honor society, Who’s Who of American Women, Who’s Who in the West, and Who’s Who in Science and Engineering. Cammermeyer’s attorneys praised her thirty-three published articles and book chapters, her completion of a doctorate, and her subsequent faculty appointments at the University of California–San Francisco and the University of Washington. They spoke of her current position as chief nurse of the Washington State National Guard and her candidacy for chief nurse of the entire National Guard.

Cammermeyer’s legal counsel presented testimony from her supervisor, who requested a special exception to policy so that Cammermeyer might
be retained by the military for her superior service despite the charges brought against her. They provided evidence from two psychological experts, who testified that homosexuality does not interfere with mental health, hinder the performance of military duties, or increase the likelihood that a soldier will engage in prohibited sexual behavior. They put on the stand Cammermeyer’s superiors, subordinates, and peers, who praised her nursing skills and leadership abilities and asserted unanimously that her presence had never disrupted the cohesion of her military unit, either before or after she disclosed her sexual orientation.3

The lawyers even put on the stand Cammermeyer’s oldest son, Matthew Hawken, and his wife, Lynette, both devout Mormons. Matthew and Lynette assured the board that every member of Cammermeyer’s family, including her aging father, knew of her sexual orientation. They explained that not only did her entire family support her but her three unmarried sons, as well as her father, had all chosen to live with her after her disclosure. Because her sexual orientation was already known to her entire family, Cammermeyer’s lawyers argued that she could never be subject to blackmail based on the threat of disclosure of her sexual orientation (a common argument supporting the military policy). Matthew and Lynette, along with the other witnesses called in the case, spoke of their pride in Cammermeyer and their belief that she should retain her position in military service.

During Cammermeyer’s military board hearing, the government offered only a single piece of evidence, calling to the stand no witnesses. In lieu of testimony or argument, it presented a statement made and signed by Colonel Cammermeyer. The statement was made to an officer of the Defense Investigative Service (DIS) in the course of a security clearance interview, set up at Cammermeyer’s request, for the purpose of upgrading her clearance to “top secret.” This status was a prerequisite to enrollment in the War College, and such enrollment was necessary to qualify Cammermeyer for her next career goal: the position of chief nurse of the National Guard. The DIS officer who conducted the interview, Agent Brent Troutman, had forwarded Cammermeyer’s answer to one of his routine questions to the Defense Department, which subsequently initiated military discharge or “separation” proceedings against her. As Cammermeyer later confessed, despite her many years of military service, at the time of her meeting with Agent Troutman she was woefully naive about the military’s policy on gays and lesbians. She was therefore unaware of the consequences of answering truthfully what she later referred to as “the question [that] would change my life” (1994, 3).
In the decision of the military board hearing of Colonel Margarethe Cammermeyer, rendered July 15, 1991, Colonel Patsy Thompson, who headed the hearing, addressed Cammermeyer with this pronouncement: “I truly believe that you are one of the great Americans” (Department of the Army 1991, 131). Nevertheless, she read the following decision of the board:

Col. Cammermeyer has proven to be a great asset to both the active and reserve component, the medical profession as a whole. She has consistently provided superb leadership and has many outstanding accomplishments to her credit, both military and civilian. Notwithstanding, the board finds that Col. Cammermeyer is a homosexual as defined in AR 135-175 and as evidenced by her statement to DIS Agent Brent B. Troutman on 28 April '89, her admission under oath to this board that she is a lesbian, and statements made under oath to this board by five character witnesses. We recommend that Col. Cammermeyer’s federal recognition be withdrawn. (Department of the Army 1991, 132–33)

In the absence of other evidence, witnesses, or testimony, the board’s decision rested on a single piece of evidence: a four-word statement affirmed by Cammermeyer to be her words and to be true. After nearly twenty-seven years of unblemished service to the United States military, the highly decorated Colonel Cammermeyer was summarily dismissed, with an honorable discharge, from her military office and from further military service. She was consequently denied her rank and a portion of her retirement benefits. At the same time, she lost the opportunity to become chief nurse of the National Guard, to achieve her goal of attaining the rank of general, and to retire with full military honors. These ambitions were thwarted as a result of her own brief statement—a statement she steadfastly refused to retract, despite a number of opportunities to do so. She refused to deny her statement, although to have done so would likely have allowed her to remain on the path to fulfilling her lifelong dream.

Grethe Cammermeyer’s four-word statement read: “I am a lesbian.”

Introduction

The events that led to Grethe Cammermeyer’s honorable discharge, like the events that led to Roberta Achtenberg’s political appointment, were part of a larger political context that marked a shift in status for gays and lesbians. That the Senate hearings on lesbians and gays in the military and the Senate debate over Achtenberg’s confirmation took place almost simultaneously
is neither coincidental nor insignificant. The events of 1993 followed on the heels of a year that was characterized by a “dramatic shift in visibility and credibility” of the gay and lesbian movement (Vaid 1995, 151). The events surrounding both Cammermeyer and Achtenberg were precipitated, although in different ways and with differing results, by the nomination and election of the first Democratic president who made lesbian and gay rights a plank in his official campaign platform. Bill Clinton’s presidency, with its promise of broader opportunities and acceptance for gays and lesbians, both reflected and reinforced the heightened visibility and newly amplified political voice belonging to gays and lesbians.

Candidate Clinton drew strong support from gay and lesbian communities, both in the form of political endorsements—Achtenberg, for example, was the first elected official in California to endorse him—and through generous campaign contributions from lesbians and gay men. In return, Clinton vowed not to forget his gay and lesbian constituents if he won the election. More specifically, Clinton promised gays and lesbians greater recognition and increased political access. He pledged to appoint gays and lesbians to important posts in his administration, and he promised, in what seemed no uncertain terms, to lift the ban on gays and lesbians in the military. When Clinton was elected and announced his intention to fulfill these commitments, in particular the lifting of the ban, the intense debate that ensued with Congress gave rise to equally intensive media coverage, sparking the interest of national constituencies on both sides of the military issue. It was in this context that both Achtenberg and Cammermeyer rose to the status of national figures, as the attainment of their personal goals became linked to the raging national debate over lesbian and gay rights, whose flames were fed by Clinton’s bold promise.

Whereas Achtenberg was an active player in the political game and a longtime lesbian activist who chose to stake her fortunes on Bill Clinton’s political acumen, Cammermeyer’s role was much less deliberate. She was pulled almost unknowingly, at least initially, into the political fray. A nurse by training and profession, a soldier by lifelong commitment, Cammermeyer had dedicated much of her life to serving her country and caring for its ailing soldiers, both on the battlefield and in the VA hospitals where she later worked. Like many other gay and lesbian service personnel, Cammermeyer had no intention of committing a rebellious act or of taking a political stand when she stated that she was a lesbian. She simply responded with the honesty she believed the situation, and the army, demanded. Her case illustrates former New Republic editor Andrew Sullivan’s claim that the military debate
“took place not because radicals besieged the Pentagon, but because of the ordinary and once-anonymous Americans within the military who simply refused to acquiesce in their own humiliation any longer. Their courage was illustrated not in taking to the streets in rage but in facing their families and colleagues with integrity” (1993, 33). It was precisely this integrity that would implicate Cammermeyer, almost by chance, as a central figure in a complex debate. Before it was over, this debate would encompass the nature of military service, heterosexual masculinity, and sexual expression and identity. It would examine the nature of language itself and the links between self-expression, personal conduct, and human freedom.

Despite the clear differences between the Achtenberg and Cammermeyer cases, the similarities between the rhetorical strategies they employ are striking. In both debates, supporters focus attention on the qualities of the individual, downplaying each woman’s connection with a larger constituency and attempting to isolate her from membership in the group “lesbians” or “homosexuals.” Opponents in both cases take the opposite approach, strengthening the identification between each woman and the larger group by emphasizing her representative status. No one in either case is willing to defend gays and lesbians as a group or to challenge negative stereotypes of them. Thus the defense of both women rests in their differences from the despised group, especially in their ability to prevent the stigmatized quality of homosexuality from interfering with their work.

In both cases, this argument is made through the legal concept of the “right to privacy,” through which each woman’s identity or “status” as a lesbian is distinguished from the presumed behavioral manifestations of that status. Through the careful separation of public behavior from private identity, the women are defended on the basis of their ability to be “mainstream.” In other words, there is no protection here for difference unless it can be successfully recuperated as sameness: a difference that makes no difference. What is never questioned in either of these discussions is the presumption that homosexual conduct, the military’s equivalent of the popular but ambiguous term lifestyle, is abnormal, undesirable, and immoral.

Whereas Achtenberg’s opponents denied that sexual orientation was at issue, ostensibly objecting not to her lesbianism but to her activism, Cammermeyer’s opponents emphatically argue that sexual orientation is the only issue. This distinction parallels the difference between the “new” and “old” military policies. It reflects the changes in acceptable government anti-gay arguments between 1991, when Cammermeyer’s hearing was convened, and 1993, when Achtenberg was confirmed. Under the guidelines of the new
policy, status and conduct are considered at least conceptually distinct, while under the old policy challenged by Cammermeyer, they were indistinguishable. In 1991, simply being a lesbian or gay man in the military, even without engaging in speech or conduct that communicated that status to others, provided necessary and sufficient grounds for discharge.

In Cammermeyer’s military board hearing, the debate officially pitted the government’s stated regulation against an individual’s petition for an exception to that policy. In seeking an exception, Cammermeyer’s lawyers presented extensive evidence of her individual contributions and consequent value to the military, keeping the focus on Cammermeyer herself. Yet the government’s disinterest in refuting or even questioning such evidence reveals that this case was not about a person but a policy. As a result, Cammermeyer’s subsequent civil court suit against the military was designed not only to enable her to continue her own military career but to challenge the rationale under which she and others were excluded from service.

From most vantage points, it appears that the military had everything to lose and nothing to gain by discharging one of its most qualified nurses and a highly decorated colonel in whom it had invested countless hours and innumerable dollars for education and training. In all ways but one, her discharge marked a severe loss for the military: a loss of irreplaceable talent and skill, given the professional standing she had attained. Yet the military board, with stated regret but without hesitation, took the action that would uphold policy even in the face of such loss. It discharged Colonel Cammermeyer with the same surety of purpose it would have shown in dismissing an unsuitable new recruit. Despite the loss represented by Cammermeyer’s separation, the military emerged from this battle “victorious” because it reaffirmed that, even at the highest levels, it could and would apply its ban absolutely.5

Because of the priority of the policy over the individual in legal challenges to the military, making sense of the Cammermeyer case requires examining the broad context of the military debate. Cammermeyer’s story is but one piece of a much larger puzzle of interlocking legal, moral, and cultural concerns. What makes her case especially noteworthy is that she was the highest ranking officer ever to be discharged because of homosexual status (Cammermeyer v. Aspin 1994, 7n. 6). In addition, hers is one of the few dismissals, especially of lesbians, that attracted national attention. Her case generated widespread media coverage and her autobiography, Serving in Silence, became a network television movie produced by Barbra Streisand and starring Glenn Close.
Cammermeyer’s case is also of particular interest because her discharge preceded the adoption of the “Don’t Ask, Don’t Tell” policy. The revelation of her sexual orientation occurred because she was asked a direct question, a question she refused to answer dishonestly. Under the new policy, Cammermeyer would presumably not have been asked such a question and so would not have been classified as a homosexual by the military. Consequently, her military career would never have been placed in jeopardy. This shift in military policy illustrates that homosexuality, and the definition of who is homosexual, is not an unchanging universal but instead a social construction, in this case a creation of the military. Through the Cammermeyer case and the larger debate over gays and lesbians in the military, the social construction of homosexuality is carried out at a level of visibility rarely available, affording an unusual glimpse of this work in process.

More specifically, Cammermeyer would not be identified as a lesbian under the new policy, presuming that she continued to act as she always had, keeping her sexual orientation a secret. Therefore she would, for all practical purposes, not be a lesbian under military policy. Thus she could have remained in the service and likely received the security clearance and the promotion she sought. Perhaps equally revealing is the fact that if Cammermeyer had been willing to retract her statement, as she was requested to do several times during the course of the proceedings against her, she would probably have been allowed to remain in the military until her retirement, despite the “knowledge” the military had already obtained about her sexuality.

Technically, the civil case Cammermeyer brought against the Department of Defense challenged only the old policy under which she was separated from military service. However, by the time Cammermeyer’s case reached the Ninth Circuit Court, where it was to be heard, this policy was no longer in effect. “Don’t Ask, Don’t Tell” was announced by Clinton in July 1993 and went into effect on February 28, 1994. The ruling on Cammermeyer’s case was issued on June 1, 1994. Yet, as her case and the broader debate about gays and lesbians in the military reveal, the differences between the old and new policies are negligible, and the two policies ultimately stand or fall as one (Bull 1994).

In the first section of this chapter, I examine the background and significance of the military’s policies on homosexuality, exploring the nature of the ban itself. By investigating the relationship between homophobia, racism, and sexism in military ideology, I show how the exclusion of gays and lesbians from the military arises from the gendered nature of the organization and its preoccupation with upholding an image of heterosexual
masculinity. Through a reading of Defense Department arguments presented at the 1993 hearings on the Policy Concerning Homosexuality in the Armed Forces (hereafter referred to in references as Policy Hearings), as well as the Defense Department’s arguments in the Cammermeyer case, I analyze the controversial way in which the new military policy equates speech with sex through the linking term of conduct.

In the second part of the chapter, I turn to the legal arguments that support both sides of the debate. As in the case of Achtenberg, I examine how the discourse of supporters as well as opponents broadens and narrows gay and lesbian freedoms, expanding and constraining the range of possibilities for envisioning gay and lesbian lives. I focus in particular on arguments about the immutability of sexual orientation, the right-to-privacy principle, and the distinction between status and conduct. I highlight the ways in which arguments for lifting the ban may inadvertently undermine broader goals of gay and lesbian self-determination and liberation. In this way, advances in one area of rights may exact a significant cost in other areas from individual gay and lesbian service members, as well as civilians. I also explore how the discourse of the military debate, like the discourse of other lesbian and gay rights initiatives, consistently misinterprets the meaning of sodomy statutes through its insistent but illegitimate equation of sodomy with homosexuality. Finally, I examine the impossibility of complying with the “Don’t Tell” directive, given the connotations of secrecy in American culture.

I conclude this chapter with an assessment of the role that heterosexual prejudice has played and continues to play in the formulation and maintenance of military policy on lesbians and gays. Such prejudice is an unconstitutional basis for exclusion, as the judge’s finding in Cammermeyer’s civil court case affirms. For this reason, elucidating the role of such prejudice and redirecting attention from the “gay problem” to the “homophobia problem” in the military and elsewhere offer a promising direction for future gay and lesbian rights initiatives.

A Battle of Necessity

The military is a somewhat surprising and unlikely site to become a focus of lesbian and gay rights efforts, and it was not an issue many activists would have chosen. For those with liberationist politics, arguing for the right to participate openly in what is often perceived as the most fundamentally repressive institution of our time is hardly an inspiring prospect (Robb 1993; Smith 1993). Some writers express misgivings about allocating movement
resources toward this goal, cautioning that this effort, “while solving one egregious case of heterosexist oppression . . . may very well contribute to the reinforcement of a wider regime of repression against gay and nongay people around the world” (Adam 1994, 116). The concerns of many lesbian and gay rights activists run more to such causes as environmentalism or the peace movement, which are largely at odds with the activities of the U.S. military.6 “For most gay people, the military ban was not the issue of choice. . . . But it was the issue of opportunity. For as far as gays have come, they cannot yet determine the order of their own social agenda” (Kopkind 1993, 9). Not yet in a position to choose their battles, movement leaders knew that when the discussion of gay and lesbian rights came to national attention by way of the military debate, their strong presence and vocal participation were essential.7

The military battle is a symbolic as well as a practical issue, and its consequences are ultimately much more far-reaching than gaining the right to serve one’s country.8 As the largest employer in the nation and one of the most influential institutions in the socialization of young adults, the military’s acceptance or exclusion of a group becomes a prototype for a group’s status in civilian life. “Participation in the military stakes claim to political and civil equality generally” (Rolison and Nakayama 1994, 128–29). Consequently, “if lesbians and gay men are judged unfit to serve their country, their second-class status is reemphasized. If, on the other hand, they are deemed acceptable, the rationale for stigmatizing them is greatly weakened” (Cruikshank 1994, 11). The ban creates a climate of hostility that has psychological as well as material consequences for the quality of life of millions of gay men and lesbians, both in and out of the armed forces:

The military’s policies have had a sinister effect on the entire nation: Such policies make it known to everyone serving in the military that lesbians and gay men are dangerous to the well-being of other Americans; that they are undeserving of even the most basic civil rights. Such policies also create an ambiance in which discrimination, harassment, and even violence against lesbians and gays is tolerated and to some degree encouraged. (Shilts 1993, 4)

In the past, the military at times has led the way for social change. The integration of African Americans into the armed forces preceded their widespread integration into society, and evidence that integration was successful in the military set a precedent that encouraged integration in other institutions. Equality in the military thus supports and promotes broader equality, whereas military discrimination legitimizes widespread prejudice. In this way, while military policy may have no direct influence on the practices of
civilian life, as an institution that commands great national respect, along with a substantial share of national resources, the policies the military adopts have effects that circulate far beyond the uniformed rank and file. This influence becomes even more pronounced at a historical moment in which the military debate is receiving such rapt attention from all forms of national media. To understand the nature of the messages the military conveys to the larger community, we must look more closely at the content of the military ban, its theoretical grounding, and its practical consequences.

**Military Policy and the Incompatibility of Homosexuals**

The ban on gays in the military has not always existed, nor has such a ban been universal among nations past or present (Korb 1994). Classical scholars are fond of pointing out that, historically, same-sex eroticism has a “long and hallowed relationship to democracy and military valor” (Boswell 1993, 15). In ancient Rome, for example, the love of warriors for one another was considered advantageous in building an effective fighting force, and erotic bonds between soldiers were regarded as increasing both morale and military readiness (Boswell 1993; D. Cohen 1993). More recently, although the exclusion of gays and lesbians from military service began during World War II, it was also during this war that thousands of gay men and lesbians served their country and created an active gay and lesbian subculture within military life (Bérubé 1990).

The military ban was implemented in the 1940s “on the advice of military psychiatrists” and was based on the belief, widely held by the psychiatric establishment at the time, that homosexuality was a mental illness and therefore incompatible with military service (Scott and Stanley 1994, xi). The American Psychiatric Association removed homosexuality from its list of mental disorders in the 1974 edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, but the ban on military service continued. On January 16, 1981, just five days before his administration was due to leave office, President Jimmy Carter issued a revised and more restrictive version of the policy. The most cited paragraph of this policy, called the “Directive on Enlisted Administrative Separations,” announced the military’s infamous view that “homosexuality is incompatible with military service.” The statement continues:

The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to en-
gage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security. (in Burrelli 1994, 19)

It was this version of the ban, now referred to as the “blanket ban” or simply the “old” policy, that remained in effect until its suspension pending the Senate Armed Services Committee’s hearings during the summer of 1993.

The old policy’s assertion that “homosexuality is incompatible with military service” exploited concerns about national security to justify the military’s use of any and all means to prevent gays and lesbians from enlisting and to discharge them from military service if they were discovered to be already in uniform. New enlistees were routinely asked Question 27 on the standard military processing forms: “Are you a homosexual or a bisexual?” While this inquiry was designed to screen out homosexuals initially, thus obviating the need for military concern over gays and lesbians in its ranks, the approach failed for several reasons. Some individuals familiar with the policy may simply have lied when responding to the question. But more often, young people enlisting in the military, many only eighteen or nineteen years old and away from home for the first time, might never before have considered the question and might not yet have come out even to themselves. Alternatively, some young men and women who felt unsure or unhappy about being gay or lesbian might have hoped that responding in the negative would make that answer true.

The most infamous rationale supporting the old policy was that because homosexuality was often kept a secret, gays and lesbians were particularly vulnerable to blackmail and thus were poor security risks. The fact that “there is not one documented case of a homosexual person disclosing national secrets based on blackmail about their homosexuality” (Department of the Army 1991, 62) did not deter those who supported the ban; nor did the reasonable argument that if homosexuality were not banned in the first place, there would be less need for secrecy and less of a basis for blackmail. Another expressed rationale for both the old and new policies was a belief that the presence of lesbians or gay men disrupts unit cohesiveness, an ele-
ment essential to military readiness and effectiveness. This reasoning suggests that homosexuals would make heterosexual service members uncomfortable in the already intimate confines of bunks and showers, because heterosexuals would not want to be looked at by or share sleeping quarters with individuals presumed to be physically attracted to them, and who would presumably be unable to control the sexual desires and impulses generated by this attraction. Military commanders also expressed concern about fraternalization among gay or lesbian service members, that is, the possibility of two members of the same unit, or a commander and a subordinate, becoming involved in a sexual relationship.

What is notable about these justifications is that they are all problems that can be and have been caused by heterosexuals, and each potentially troublesome behavior is already addressed and proscribed by the military’s governing code of laws, called the Uniform Code of Military Justice (UCMJ). There is nothing specific to gays or lesbians that suggests they are any more likely to commit these crimes than are heterosexuals. No evidence indicates that identifying oneself as gay or lesbian is inherently incompatible with honorably serving in the military. In other words, while these concerns have been used to justify the necessity of excluding gays and lesbians solely on the basis of sexual orientation, there is a difficulty in constructing the necessary links that would prove these criteria sufficient for the blanket exclusion of gays and lesbians.

This difficulty provides the basis for numerous challenges to military policy that have made their way through the U.S. court system. Under the guidelines of the Constitution, and based on the precedents established by legal challenges to exclusionary policies in civilian life, an institution that excludes a particular group or “class” of people must provide a reasonable basis for doing so. That reasonable basis must be related to the accomplishment of the institution’s mission and must not be based on prejudice. The legal procedure for judging exclusionary processes is as follows: “Initially, the court must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose” (Cammermeyer v. Aspin 1994, 12). This is known as the “rational basis review” requirement, and it calls for a lesser degree of scrutiny than is demanded by the criterion of suspect class status (Halley 1993).

It is in response to this rational basis requirement that the issue of unit cohesion has become so prominent in anti-gay military discourse. The mil-
itary defines unit cohesion as “the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members” (Cammrenmeyer v. Aspin 1994, 36n. 19). Military leaders claim that the presence of gays and lesbians decreases effectiveness by disrupting these bonds. However, this claim is difficult to substantiate. Because the military has been loath to admit the presence of gays and lesbians in the armed forces, it has conducted no studies and compiled no statistical evidence on whether their presence detracts from military effectiveness (Department of the Army 1991; Policy Hearings 1993). At the same time, the recent disclosures of many gay and lesbian service members who have served, and served with distinction, before and after making their sexual orientation known to others provides abundant anecdotal evidence to the contrary.

One of the most dramatic contradictions in the claim that gays and lesbians impair the military mission is the military’s policy of “stop-loss,” which was put into force most recently during the Persian Gulf War (Department of the Army 1991, 89). The stop-loss policy prevents any individual from leaving military service in the event of an emergency that requires military mobilization. Under this policy, during the Gulf War and other national crises, military personnel who had been identified as gay or lesbian but had not yet been discharged were retained in military service and sent to the Persian Gulf, even if they were expected to be discharged when they returned home. Nor did such service exempt them from discharge upon their return. What is most telling about this policy is that despite the claim that gay and lesbian soldiers are disruptive and unfit for military service, the military will send these soldiers into a situation where military cohesion and readiness are of the utmost importance. The circumstances of war provide precisely the conditions that are called on to justify the ban: facilities are at their least private and living quarters at their most crowded, unit cohesion is a matter of life and death, and the effectiveness of the military is put to the ultimate test. Yet this is also the situation in which military leaders choose to suspend their exclusion of gays and lesbians from the armed forces.

When newly elected President Clinton announced his intention to lift the ban, those who opposed this move were urgently pressed to offer a rationale for excluding homosexuals that was strong enough to justify the ban’s continuation. By this time, as even Secretary of Defense Dick Cheney had conceded, the argument that gays and lesbians posed a security risk was “a bit of an old chestnut” (Lehring 1996, 273), and this theme was quietly dropped. Moreover, as many who supported lifting the ban argued, exist-
ing UCMJ laws could be enforced to prevent or punish inappropriate sexual conduct among gay and lesbian service members. The codes regulating sexual impropriety could and should be applied to everyone equally, supporters asserted, to address and assuage the fears of heterosexual service members.

During the summer of 1993, after Clinton’s announcement, the Senate Armed Services Committee, chaired by Senator Sam Nunn, held hearings to determine what, if any, changes should be made to the military ban. Despite Clinton’s commitment to lift the ban, Congress promised to override the president if he issued an executive order to do so and threatened to pass into law an even harsher discriminatory policy (Cammermeyer 1994, 297). As Lawrence Korb, former assistant secretary of defense under Ronald Reagan and current supporter of lifting the ban, asserted, “In many ways, Clinton was the worst person to try to end the ban,” because of his lack of military experience and the controversy over his evasion of the Vietnam draft (1994, 227). Faced with the possibility of a standoff with Congress, Clinton agreed instead to a six-month moratorium on discharges while the Armed Services Committee held hearings on the policy and the military established a working group to study the issue.

For nine days during the spring and summer of 1993, Nunn’s committee heard testimony from military experts, legal counsel, a number of heterosexual service members, and a significantly smaller number of lesbian and gay current and former service members. Although there was some pretense of providing a balanced representation of views, the presentation of witnesses and testimony was noticeably skewed. Cammermeyer relates the tone and substance of the hearings:

They were designed only to justify the military’s policy of discrimination. I watched in amazement the testimony of so-called experts who had no personal experience regarding gay people in the military. I listened to the top brass repeat fears and biases without being challenged. Prejudice was justified on the basis of “that’s how we’ve always done it.” . . . A parade of witnesses went before the committee, handpicked to support the existing ban and justify the prejudice. (Cammermeyer 1994, 298–99)

Later she recalls, “I wasn’t surprised to hear that some of the soldiers who had been interviewed by the committee revealed that though they wanted the ban overturned, their superiors had told them not to disagree with the existing policy.”

The testimony of other military personnel supports this claim. In a de-
position submitted on Cammermeyer’s behalf, General Vance Coleman asserts that anti-gay sentiments constitute what he refers to as the military “company line,” which “discourages any vocal disagreement with current policy.” He charges that “the leadership of the military is responsible for the vocal opposition to lifting the ban,” and that the military personnel who are chosen to state their views are “hand-picked by leadership to voice their [negative] opinions” (Plaintiff’s Reply Memo 1994, 27–28). Similarly, during the Senate hearings, Sergeant Justin Elzie, a gay marine, explains:

If you stick a microphone or a camera in a Marine or young sailor’s face and ask them, how do you feel about this subject, chances are that no matter what their personal beliefs they will stick to the party line and support the ban. That is what the chain of command promotes, and they are afraid of being labeled as gay themselves. (Policy Hearings 1993, 667; see also 880–81)

Unsurprisingly, then, the heterosexual military personnel who spoke at the hearings unanimously agreed that they would be uncomfortable serving with gays and lesbians, that the presence of open gays and lesbians would undermine unit cohesion, and that having to serve with openly gay or lesbian service members would cause them to rethink a decision to reenlist. On the other side of the issue, Cammermeyer was the only lesbian to testify at the hearings. When two gay ex-service members were brought in, their testimony was sandwiched between that of two larger panels of heterosexual service personnel who opposed lifting the ban. Tellingly, the Senate heard no testimony from heterosexual service members who opposed lifting the ban (Policy Hearings 1993, 572). General John Otjen, a member of the Military Working Group who supplied the Senate with military representatives, acknowledged that no effort was made to solicit the participation of heterosexual service members who supported lifting the ban (Otjen 1994, 257–60).

When the hearings concluded, President Clinton and the Senate Armed Services Committee announced that they had reached a “compromise” between ban supporters and opponents. Dubbed “Don’t Ask, Don’t Tell, Don’t Pursue” by Secretary of Defense Les Aspin (Policy Hearings 1993, 727), the compromise replaced the former blanket ban on gays and lesbians with a policy that was grounded in the separation of homosexual “status” from homosexual “conduct.” In drawing this distinction, the new policy ostensibly accommodated Clinton’s view, shared by a number of senators on the committee, that “the issue ought to be conduct” (in Miller 1994, 88). The policy claimed to limit “the issue” to conduct by allowing gays and lesbians to serve
as long as their homosexual status was not manifested by homosexual behavior, which remained “conduct unbecoming.”

A key problem with this ostensible compromise lay in the ambiguity of the terms status and conduct and the fluidity of the boundaries between them. Even as this distinction was drawn, it was undermined by the wide expanse of territory covered by the category “conduct” and the extreme narrowing of the meaning of “status.” The new policy retains the grounds for discharge outlined under the old policy: the commission of homosexual “acts, statements, or marriages” (Policy Hearings 1993, 770). More specifically, under the new policy as under the old, an officer will be separated from military service under any of the following conditions, barring subsequent findings to the contrary:

1. The officer has engaged in, has attempted to engage in, or has solicited another to engage in a homosexual act or acts
2. The officer has stated that he or she is a homosexual or bisexual
3. The officer has married or attempted to marry a person known to be of the same sex

Most notable and contested in this definition is the interpretation of condition (2), the prohibition on speech. The manipulation of speech in the changeover from old to new military policy is revealing. In the old policy, the statement “I am a homosexual” or variants thereof would be cause for separation from the military because of their reference to status. In Pruitt v. Cheney, Dusty Pruitt, an officer in the U.S. Army Reserve, was discharged from the army after stating in an interview with the Los Angeles Times that she was a lesbian. While Pruitt’s lawyers argued that her statement comprised protected speech under the First Amendment, the army won its case by arguing that the First Amendment was not at issue (Policy Hearings 1993, 83). The army claimed that her speech itself was not the reason for her discharge. Instead, it was the status to which the statement referred that justified her dismissal, for this status was not protected. The army further contended that its knowledge of her status, however obtained, necessitated her separation.

Under the new policy, in which only conduct provides grounds for dismissal, speech itself is reclassified. No longer associated with status, statements such as “I am a homosexual” now constitute prohibited conduct. Under the old policy, “the admission of being a homosexual is not treated, ipso facto, as a propensity to engage in homosexual behavior. Rather it is considered a reasonable cause for conducting an investigation” that could
then lead to a discharge (Burrelli 1994, 19). In contrast, the new policy considers the admission itself to be conduct punishable by dismissal. It declares that “a person’s sexual orientation is considered a personal and private matter and is not a bar to service unless manifested by homosexual conduct.” However, the category of conduct encompasses all acts of self-identification as a homosexual; it therefore includes “acts” that are simply speech. “Current regulations are based on conduct, including statements” (Burrelli 1994, 28).

In the new policy, then, speech and conduct are indistinguishable. The statement that one is a homosexual is taken not only as an indicator of status but also, and more important, as an instance of conduct. Nunn explains the chain of associations that equate self-identification with conduct: “When someone stands up and announces they are gay or lesbian, does that not indicate something about their sexual conduct? . . . Is that not also stating that there is a basic tendency, at least, for the sodomy statute to be breached? . . . How do you then distinguish that from conduct?” (Policy Hearings 1993, 482). The effect of this line of reasoning is to sabotage the very division the new policy is intended to uphold: the possibility that “you can have the orientation without the propensity,” that is, the status without the conduct (Policy Hearings 1993, 800). The new regulation extends “the domain of ‘homosexual conduct’ to circumscribe even further the public construction of a homosexual identity. The identity/conduct distinction that advocates for gay, lesbian and bisexual rights have been so eager to assert is collapsed, in this instance through the mediating category of speech.” As a result, “speech, conduct and identity remain inextricably bound together” (Currah 1995, 66).

Whereas voice is generally associated with the mind and the body linked to behavior, then, these connections are ruptured within the framework of a policy that equates speech with conduct. Voice and body are equated through the characterization of verbal statements as certain, even infallible predictors of the body’s sexual behaviors.11 “Conduct unbecoming” includes all manner of “statements unbecoming,” so that any behavior or statement that is interpreted as expressing a same-sex orientation is equally prohibited and actionable. Both acts and statements are read as improper, public sexual acts. Jamie Gorelick, general counsel for the Defense Department, clarifies the policy change: “We used to say, in the old policy, ‘If you say you are a homosexual, we will presumptively conclude that you are.’ . . . We say now, ‘If you say you are a homosexual, we presumptively conclude that you engage in acts or have a propensity or intent to do so” (Policy Hearings 1993, 805). Navy lieutenant Tracy Thorne, who was discharged after an-
announcing on ABC’s Nightline that he is gay, notes wryly the practical consequence of this policy “change”: “The policy used to be that if the military found out that you were gay, they would kick you out. And now, if they find out that you’re gay, they’re going to kick you out” (Koppel 1994).

Ultimately, “the Clinton administration’s ‘Don’t Ask, Don’t Tell’ policy worsened the status-conduct distinction by treating speech itself as conduct” (Vaid 1995, 135).12 One danger of treating speech as conduct is that this equation provides a strategic opening for those hostile to gays and lesbians. Opponents connect the regulation of speech—a questionable proposition at best, given the broad protections of the First Amendment—with the regulation of a prohibited form of conduct: the act of sodomy. Sodomy has a long history of censorship and its condemnation has much broader appeal in the popular mind than does speech. By subtly yet strategically linking speech with sodomy, the “new” policy decisively reasserts its condemnation of gays and lesbians, renewing its insistence on their silence and invisibility.

The issue of sodomy provides a stronghold for opponents of lifting the ban. In the wake of Bowers v. Hardwick, an already widespread association of homosexuality with the sexual practice of sodomy was solidified in the minds of American lawmakers and the public. The military’s UCMJ contains a law specifically prohibiting sodomy. Article 125, section a, of the UCMJ reads: “Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.” Because the UCMJ functions as a legal code for the military, sodomy is not only prohibited but illegal behavior for military personnel; that is, it constitutes a criminal act that is punishable by court-martial and jail time, and it may result in a general or a dishonorable discharge. In contrast, homosexual status without evidence of conduct is against military policy but not against the law, resulting most often in an honorable discharge and no criminal charges.13

The regulation itself, like the majority of state sodomy laws, does not single out homosexuals.14 Its language prohibits “unnatural carnal copulation”—a highly ambiguous reference that has been interpreted to mean anal or oral sex—without regard to the gender or sexual orientation of the participants.15 Nevertheless, in Padula v. Webster, an influential court decision that followed in the wake of Hardwick, the court deliberately ignored the gender-neutral language of most sodomy laws to conclude that sodomy is
“the behavior that defines the class” of homosexuals. It is precisely this view that has been adopted, implicitly and explicitly, by military leaders as the key to sustaining the ban. Linking homosexuality with sodomy sets it in opposition to the military, which presumably stands for “normal” heterosexual sex—which is represented, not incidentally, by those acts in which men penetrate the territory of the female body. The opposition between gay sex and military sex is further reinforced by a number of references to AIDS during the military hearings that associate the disease with homosexuality. By characterizing homosexual sex as perverted and diseased and heterosexual sex as normal and wholesome, the military debate forwards the same potent contrast of plague and health, moral bankruptcy and moral purity, that the Boy Scout discussion put forth in the Achtenberg debate. Importantly, this argument is advanced even in the face of evidence that the particular sexual acts being performed by heterosexuals and homosexuals do not differ significantly, if at all (see “Sodomy and Sexuality,” below).

**Homophobia, Racism, and Sexism**

The parallel between the segregation of African Americans and the exclusion of gays from military service has been heavily drawn upon by those who support lifting the ban and vehemently rejected by those who wish to maintain it. Operation Desert Storm commander General Colin Powell, one of the most famous and most frequently quoted opponents of lifting the ban, is unequivocal in his rejection of any similarity between these groups. Powell insists, “Skin color is a benign, nonbehavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument” (in Burrelli 1994, 63).

Nevertheless, some of these denials themselves provide the best evidence for recognizing the validity of the comparison. For example, Lieutenant John Burnham, a military leader who testified at the Senate hearings, denies that anti-gay sentiment is an example of prejudice, explaining:

> Prejudice against somebody because of their skin color or the fact that they are a woman or because of their nationality is the result of an attitude that you have because of what you have experienced, what you have been taught by your parents or your community or any kind of an outside influence. That can be educated away, and that is why they call it prejudice. (*Policy Hearings* 1993, 547)
It is difficult to read such a definition without thinking of the subtle but pervasive ways in which heterosexism and homophobia are instilled in each of us by dominant institutions.

Burnham further weakens his point when he argues that this issue is unlike the question of allowing women to serve. He insists that although “some people may have reservations about different issues involving women serving,” permitting men and women to work together “does not go against the grain” in the same way that integrating homosexuals and heterosexuals does (Policy Hearings 1993, 547). History, of course, proves him wrong; until very recently, the thought of women serving on active duty with men went entirely “against the grain.” As the ongoing debate over women in combat illustrates, for many people it remains so.

Whether or not these groups themselves can be seen as comparable, their situations in relation to the military share an undeniable resemblance, as do the military rationales that have been used to exclude them. Supporters of lifting the ban have identified a number of striking similarities between the rhetoric historically used to keep African Americans segregated within the military and the justifications that currently uphold the ban on gays and lesbians (Adam 1994; Cammermeyer 1994; Department of the Army 1991; Horner and Anderson 1994; Korb 1994; Robson 1992; Rolison and Nakayama 1994). Cammermeyer’s lawyers argue in a legal brief that “virtually every justification used for the military’s ban on gays was used to justify the military’s discrimination against African-Americans in World War II” (Memo in Support 1994, 43). These justifications include the rationales, frequently cited in both cases, that white or heterosexual service members will object to sharing intimate space with members of the black or gay/lesbian minority; that they will refuse to take commands from or respect the authority of members of the minority group; that the presence of these outsiders will disrupt the cohesion of the unit and thereby decrease military effectiveness; that the military will experience difficulties sending integrated forces to foreign countries because of the negative attitudes of those countries toward the minority group; and, finally, that integrating the forces will ultimately cause good soldiers to refuse to serve in the armed forces (Horner and Anderson, 1994).

While there is much to learn from analogies with groups such as African Americans and women, it is equally important to keep in focus the ways in which this issue is distinct. Most notably, African Americans and women were historically placed in separate, segregated units in the military, forbidden from serving in the same units as white male service members. These
groups therefore sought desegregation of the military, whereas gays and lesbians already serve in every military branch and unit. They therefore seek recognition for the service they already provide, arguing “not from the premise of suppliance, but of success, of proven ability of prowess in battle, of exemplary conduct and ability” (Sullivan 1993, 36). Gays and lesbians have served in the military throughout its history, as writers such as historian Allan Bérubé (1990) and journalist Randy Shilts (1993) have painstakingly documented. Even General Norman Schwarzkopf, who adamantly opposes lifting the ban, admits, “I have finally come down to the fact that yes, homosexuals have served in the military and can serve in the future if they are not openly admitting so” (Policy Hearings 1993, 613).

However, although even most military leaders now concede that gays and lesbians already serve in the armed forces, not everyone with influence does. Senator Lauch Faircloth, for example, comments on the eighth day of the Senate hearings that “in all of the hearings I have been to, not one person has said that the service would be improved by bringing homosexuals into it” (Policy Hearings 1993, 795). In light of the evidence presented in the hearings, however, the issue is not whether to add a new group of people to the existing military. Instead, it is whether to recognize the members of this group who are already in uniform, to acknowledge their historical and contemporary contribution to all branches of military service, and to accept their right to serve, openly and without fear, as gay and lesbian service members.

Resistance to lifting the ban relates directly to the military’s symbolic force in society, and the intensity of the resistance suggests how deeply such a change would challenge the existing military ethos. This challenge lies at the heart of both the military’s frequent denial, in the face of copious evidence, of the presence of lesbians and gays and its unwillingness to permit open gays and lesbians to enlist. The military perceives itself as the stronghold of heterosexual masculinity and the soldier as the epitome of what it is to be an American, which is to say an American male. The U.S. military is the quintessential instance of a gendered organization, and its gender is unquestionably male, as is that of the nation it serves (Adam 1994). Moreover, war itself, like the role of the soldier, constitutes a traditionally male rite of passage. “For generations . . . the military has been an institution that has promised to do one thing, if nothing else, and that is to take a boy and make him a man” (Shilts 1993, 5).

Just as the military tasks of protecting the nation and defeating aggressors are gendered masculine, those entrusted with these responsibilities are per-
ceived and often perceive themselves, in terms of their heterosexual man-
hood. A comment from a former Marine Corps commandant in 1982 illus-
trates just how integral this self-image has been: “War is man’s work. . . .
When you get right down to it, you have to protect the manliness of war”
(in Benecke and Dodge 1996, 81). Gay men, however, are seen as failing or
refusing to conform to the rules and image of heterosexual masculinity. The
presence of gay soldiers performing their duties with skill is thus particularly
galling to military officials who want to maintain the military’s masculine
image, and who fear that gay men will undermine ideals of masculinity
(Shilts 1993). Whoever or whatever threatens the military ethos is perceived
as undermining the military mission as well. “The crux of the issue in the
United States is the culturally embedded view that homosexuality represents
a feminization of men and that this feminization entails a world of implica-
tions debilitating to military effectiveness, namely, all of the traditional traits
assigned to the feminine . . . all of which detract from military readiness”
(Adam 1994, 104).

The perception of gay men as effeminate is linked to the idea that any
man who willingly submits himself sexually to another man places himself
in the passive, “feminine” role, the role of the woman who is penetrated
rather than the role of the aggressor (Mohr 1994, 116). “Many non-gay peo-
ple believe that gay men and lesbians exhibit ‘cross-gender’ behavior: be-
havior stereotypically associated with the other gender. In this view, gay men
behave like ‘normal’ women and lesbians like ‘normal’ men” (Fajer 1992,
515). The belief that homosexuality is characterized by “inverted” or op-
posite-gender traits leads to a stereotype of gay men as effeminate: weak,
“swishy,” overemotional, and generally frail of mind and body. These qual-
ities are seen as antithetical to military service and destructive to the mili-
tary’s image and effectiveness. “The construction of a ‘homosexual threat to
the military’ is a story about the perceived potential emasculation of Amer-
ican masculinity” (Adam 1994, 104).

The fear of a loss of masculinity is a fear of men losing control over
women as well. The ban strengthens such control by authorizing sexual ha-
rassment and reinforcing male dominance and female submission, sexually
and otherwise. Under its terms, “the way women can prove themselves to
be nonlesbians is to have sex with men. Thus antigay regulations have en-
couraged sexual harassment of women. Those who will not acquiesce to a
colleague’s advances are routinely accused of being lesbian and are subject
to discharge” (Shilts 1993, 5). Cammermeyer herself reports, “As women
have attained more rights and opportunities in the military, the accusation
of being a lesbian has become a weapon of sexual harassment. Continuing
the ban is a perfect mechanism to perpetuate sexism either by keeping
women out of the military or by controlling and abusing women who do
serve” (1994, 294).

These observations are supported by the comments of other female ser-
vice members, as related by Congressman Gerry Studds: “We’ve heard a lot
of women say, especially aboard a big ship, if they’re not willing to put out
for sailors, they’re accused of being a lesbian, whether they are or not” (in
Gallagher 1992, 21). Representative Patricia Schroeder likewise reports, “If
you’re a woman in the military, you can’t make sexual-harassment charges,
because you’re going to face the countercharge that you’re a lesbian” (“Les-
bians” 1993, A23). By enabling and abetting sexual harassment, the ban en-
courages not only homophobia but also sexism. It thus serves as an effective
means of keeping all women, regardless of their sexual orientation, “in line”
and submissive, as well as sexually available, to men (Benecke and Dodge
1996).

Despite the advances of women in the military, the institution and many
of its members remain at best ambivalent about having women as military
colleagues, as evidenced by revelations of sexual harassment and rape in such
military settings as Tailhook and the Aberdeen Proving Ground. Histori-
cally, heterosexual women, like gay men, have been perceived as su-
ffering a failure of masculinity, which serves as the basis for their exclusion. However,
heterosexual women are somewhat redeemed through their conformity to
traditional sexual roles. While, in the eyes of some male soldiers, women re-
maintain inferior to men, particularly in the fulfillment of military duties, their
presence is acceptable only because—and as long as—they participate
within their assigned gender role. It is instructive to note that the remaining
conflicts over women’s role in the military fall into two main categories: the
question of implementing a female draft during wartime and the issue of al-
lowing women to perform combat roles. The former issue hints at what the
latter makes explicit: the violation of the gender taboo that forbids women
to become military aggressors, “penetrating” the territory of foreign lands.

The vigilance of the military in safeguarding gender roles directly con-
flicts with its need to recruit women who will be skilled in military service.
It is exactly those qualities that make a good soldier—Independence,
strength, skill, resourcefulness—that, when displayed by a woman, suggest
the transgression of an appropriate female gender role. The resulting irony
is that “women who show independence, resistance to sexual harassment,
or the ‘masculine’ qualities so valued by the military are particularly vulner-
able to the charge of lesbianism” (Adam 1994, 112). Lesbians are frequently stereotyped as “masculine” women, or women who display character traits stereotypically associated with heterosexual masculinity. Yet these are precisely the characteristics one must possess to be an effective soldier.

In a military that bans lesbians, this situation places all women in a double bind. A woman’s success in the military and her ability to convince others that she can be a good soldier require her to exhibit those qualities that could also get her summarily dismissed as a lesbian—regardless of the sexual practices she engages in and with whom. The consequences of this catch-22 are aptly illustrated by a memo written by Vice Admiral Joseph S. Donnel. Although Donnel characterized lesbians as generally “hardworking, career-oriented, willing to put in long hours on the job, and among the command’s top performers,” he offered this description not as praise for their work but as a means of helping senior officers identify possible lesbians for investigation and discharge (Lehring 1996, 274). The better a soldier she is, the more a female service member risks being targeted as a lesbian.

The congruence between the qualities that make a good soldier and the characteristics associated with female gender-role transgression thus encourage the identification of female soldiers as lesbians (Halley 1991). This phenomenon undoubtedly accounts in part for the disproportionate number of women who are discharged for homosexuality in all branches of the military (Benecke and Dodge 1996; Robson 1992). One report indicates that in the decade from 1980 to 1990, women accounted for 10 percent of all military personnel but made up 23 percent of all discharges for homosexuality in all branches of the military (Stiehm 1994, 158). In 1996, under “Don’t Ask, Don’t Tell,” women accounted for 13.1 percent of the armed forces but made up 29 percent of those discharged from all branches (Moss 1997); in the army they accounted for 41 percent (“Could It Be a Witch-Hunt?” 1997, 15).

The statistics on female dismissals are particularly notable in light of service member polls that show significantly less resistance to lifting the ban among female than among male service personnel (Robb 1993, 12). According to the RAND Report, an independent study commissioned by the Clinton administration in 1993, 37 percent of male and 72 percent of female military personnel would not object to lifting the ban (Plaintiff’s Reply Memo 1994, 28n. 14). One possible explanation for this disparity is that “some servicewomen feel this debate has advanced their own concerns about sexual harassment and women in combat roles” and thus welcome the lifting of the ban or at least profit from the national discussion this issue has engendered (Miller 1994, 69). In addition, polls indicate that even among
civilians, “a significant majority of men in America are opposed to lifting
the ban, and a significant majority of women are in favor” (Policy Hearings
1993, 620). Thus, although the argument against gays in the military is largely
premised on the anticipated negative reactions of other service members,
the largest percentage of separations is taking place precisely where service
member opposition is at its lowest—among the ranks of women.

Thus, although the argument against gays in the military is largely
premised on the anticipated negative reactions of other service members,
the largest percentage of separations is taking place precisely where service
member opposition is at its lowest—among the ranks of women.

For women of color in the military, racial discrimination magnifies the
intensity of the discrimination and oppression they experience. Kendall
Thomas, a professor of law at Columbia University, observes that “the dis-
criminatory policies of the military strike disproportionately women—es-
pecially women of color” (in Deitcher 1995, 180). Given the existence of
pervasive racism as well as a disproportionate number of women of color in
the military, there is little cause to question such a claim. Although there are
no statistics on homosexual discharges broken down by race, some activists
have compiled interviews and other anecdotal evidence to illustrate the
difficulties women of color confront in the military (Benecke and Dodge
1996).

Thomas’s assertion is further supported by evidence from the earliest in-
vestigations of lesbianism, instigated shortly after women were first in-
tegrated into active duty. In a 1980 incident aboard the USS Norton Sound,
twenty-four of the sixty women on board were investigated for lesbian ac-
tivity (Deitcher 1995). Two of these women, both of whom were African
American, were discharged. Eight of the nine black women serving on the
ship were targeted in the initial charges. Susan McGrievy, American Civil
Liberties Union (ACLU) counsel in the case, observed, “It just smelled of
racism. . . . They were convicted because people believe that African-Amer-
icans are oversexed” (in Deitcher 1995, 169).

These statistics and observations on women’s separations suggest that gen-
der and race, as well as sexual orientation, operate in applications of the ban.
Significantly, “the branches of the service most resistant to allowing women
in their ranks—the Navy and Marines—are the branches that drum out the
most women for being gay. The Navy releases twice as many women as men
on grounds of homosexuality. In the Marine Corps, the figure is seven times
higher for women than for men.” These figures demonstrate that,

especially for lesbians, the issues are far more complex than simple homo-
phobia, because they also involve significant features of sex-based discrimina-
tion. There are many men who never wanted women in their Army or their
Navy in the first place, and the military regulations regarding homosexuality
have been the way to keep them out for the last decade.
As a result, “until proven otherwise, women in the military are often suspected of being lesbian” (Shilts 1993, 4–5).

The inordinate number of women discharged may seem to discredit the hypothesis that *masculinity* is at stake here. (One might argue that gay men should pose the greater threat and evoke the more intense purging.) In fact, this inequality supports the hypothesis. The very entry of women into a traditionally male preserve constitutes a transgression, and thus the presence of women who refuse sexual or other submission to men is particularly subversive of male authority and superiority. The inclusion of women who are perceived to “act like men,” sexually or otherwise, introduces the threat that such women will demand access to male privilege and power.

While this threat alone may justify the ban in the minds of many military leaders, it is insufficient as a rationale to satisfy the courts. In recent years, the success of legal challenges presented by Cammermeyer and others has necessitated a more explicit rationale for continuing the ban. In light of Clinton’s promise to lift the ban, military leaders were forced either to justify the existing blanket ban or to articulate a new policy that would hold up in the civil courts. At this historical moment, the military was called on to establish a compelling concern that necessitated unequal treatment but was not based on identity or “status,” a category that had repeatedly been extended legal protection for other minority groups. Instead, the military had to justify its apparent discrimination based on a realm in which the U.S. courts had always given it a great deal of leeway: the arena of conduct (Burrelli 1994, 28). However, in Cammermeyer’s case and a number of others, no evidence of “conduct” per se exists. To uphold dismissals like hers, the new policy would have to outlaw declarations of identity by defining such statements as a category other than status. Indeed, this is precisely what the military did. In its effort to maintain its ban, it presented the issue with a new twist, defining statements of gay, lesbian, or bisexual self-identity not as references to an individual’s status but as conduct in and of themselves.

**Speech and Sexuality: Constructing the Homosexual**

The issue that Cammermeyer’s case brings to the fore is one that has for centuries engaged scholars of communication, law, philosophy, psychology, and linguistics: What does speech *do*? What is it that silence contains and
speech releases? This question also lies at the heart of legal challenges to the new military policy, contests that focus largely on reclaiming speech as an artifact of protected status rather than as an instance of prohibited and actionable conduct. In the distinction the new military policy draws between status and conduct, status is characterized first and foremost by silence and inactivity. The “compromise” the new policy announces is the tolerance of this silent status, which Attorney General Janet Reno refers to in a memo as “unmanifested orientation” (Policy Hearings 1993, 706). Under the old policy, officers and recruiters were required to root out status by asking questions and conducting aggressive investigations. Under the new policy, at least in theory, military personnel are no longer asked direct questions or subjected to “witch-hunts” regarding their sexuality, as long as their status does not manifest itself through word or deed.

According to the new policy’s supporters, the restriction on speech relates to military leaders’ concern that gay and lesbian soldiers will be gay first, soldiers second, and that the primacy of their gay or lesbian identity will disrupt military readiness and unit cohesion. Strom Thurmond, in his opening statement at the hearings before the Committee on Armed Services, offers his perspective on the importance of silence, at the same time accounting for the apparent hypocrisy of the “Don’t Ask, Don’t Tell” compromise:

This is not an issue of being for or against homosexuals as a group or homosexuality as a lifestyle. This is not an issue of whether individuals who are gay can serve on active duty. The record is replete with instances of dedicated and heroic service by many gays in the ranks of our armed services. The difference is that they served then and serve now as soldiers, sailors, airmen and marines and not as gays in the military. This should be a question of military readiness and determining the best course of action to enable our military, from general to private, to provide the security and stability necessary for America to continue to be a world leader and ensure the American way of life. (Policy Hearings 1993, 519)

The words of Lieutenant Burnham reinforce the prevalence of this concern. While acknowledging that “homosexuals have served with distinction,” Burnham offers this qualification: “But one of the primary reasons that they have served for full careers is that they served with discretion. And again, that was one of the aspects of their lifestyle that they subordinated to the overall good of [the] unit—was the fact that they were homosexual and it was not open” (Policy Hearings 1993, 556).

Later in the hearings, Senator Joseph Lieberman counters the claim that
if soldiers are permitted to be openly gay or lesbian, “the homosexual orientation will become a more dominant part of that person’s service.” Referring to the testimony of the chief psychiatrist at Walter Reed Hospital, he argues that as long as gays in the military identify primarily as soldiers, and secondarily as gay or lesbian, their presence ought not disrupt unit cohesion (Policy Hearings 1993, 465). However, he concedes, in the reverse case, the existence of individuals with a “confrontational sexual orientation” would indeed disrupt the bonding and overall readiness of the unit. From this perspective, self-identification amounts to advocacy; advocacy is confrontational; and confrontation is, by definition, disruptive. Such a framework permits no conceptual space for statements of identity that are not interpreted immediately as having that identity “rammed down my throat,” in the phraseology of one Department of Defense representative (Otjen 1994, 270). Senator John Warner’s comments illustrate this leap from self-identification to activism and even recruitment when he states, “Homosexuals have served in many instances in a commendable way.... But the transition from the quiet manner in which they perform their duties to an open advocacy of their sexual preferences is the difficulty that this Senator, and I think many others, have” (Policy Hearings 1993, 468).

When speech is defined as indistinguishable from sexual conduct, declaring one’s sexual orientation constitutes improper public behavior. “The new policy’s ideology would have us believe that saying one is gay is itself an act of sex” (Mohr 1994, 64). This link between speech and sex is particularly striking when viewed through the lens of public address history—in particular, the traditional prohibition against women’s speech. Feminist rhetorical scholars such as Karlyn Kohrs Campbell (1989) have established the role of sexism in mandating women’s silence, as public discourse has historically been considered the exclusive domain of middle-class, heterosexual white men. The construct of the orator is traditionally gendered masculine, and public address has consequently been viewed as a singularly unfeminine activity. Historically, a woman who spoke publicly, especially to a “promiscuous” audience, where the clear separation of the sexes was not maintained, was looked upon as immoral and sexually impure (Zaeske 1995). This longstanding association links women’s public speech with the specter of uncontrolled female sexuality. Thus the connection between speech and sexuality, particularly abnormal, unnatural, or hypersexuality, is well supported by historical precedent.

Just as Roberta Achtenberg’s opponents saw lesbian activism as antithetical to a politician’s role and threatening to a male-dominated government,
the military ban’s supporters view the expression of homosexuality as anti-
thetic to the soldier’s role and subversive to the patriarchal military. In both
cases, the claim to identity is read, probably accurately, as marking an absence
of shame and the assertion of self-esteem and pride. In a context that deems
homosexuality a cause for secrecy and silence, to speak without shame of
being lesbian or gay is to challenge, if not reject, political and military ide-
ologies. “To break silences that are systematically and ubiquitously enforced
in public life, is profoundly political,” so that affirming a lesbian or gay iden-
tity can be construed only as advocacy or “flaunting it” (Gamson 1996, 
79–80). Such an assertion of pride, moreover, is correctly viewed as a threat
to the dominant belief system that insists on the inferiority and marginality
of gays and lesbians.

What gives the military’s anti-gay discourse and its appeal to shame such
a profound resonance is the sometimes implicit, sometimes explicit connec-
tion of homosexual orientation with the practice of sodomy. The very term
conduct has come to be a military code word for sodomy, as has its popular
equivalent, lifestyle. The courts have identified sodomy as “the behavior that
defines the class” of homosexuals, and from this perspective, the declaration
of a lesbian or gay sexual orientation is read as a statement that one has com-
mitted or intends to commit sodomy or has at least a propensity or desire to
do so. In Padula v. Webster, as discussed above, the Washington, D.C., circuit
court judge denied legal protections to lesbians and gays, arguing that “prac-
ticing homosexuals” could not constitute a suspect classification. The judge
concluded that “if criminal or criminalizable sodomy is the inevitable con-
sequence or the essential characteristic of homosexual identity, then the class
of homosexuals is coterminous with a class of criminals or at least of per-
sons whose shared behavior is criminalizable” (Halley 1989, 919–20).

The Padula decision, however, is based on a misapplication of the prece-
dent set by Bowers v. Hardwick (Halley 1991). Although the authors of the
Hardwick decision explicitly asserted that they were not setting a precedent
for equal protection rulings, their decision was applied as a precedent for
such rulings through the linking term of sodomy. The Padula judge reasoned
that if there is no right to commit sodomy (the finding of the Court in
Hardwick), and if sodomy is the behavior that defines the class of homosex-
uals, then there can be no legal protection for homosexual status. According
to Padula, the Hardwick case “forecloses [any] effort to gain suspect class sta-
tus . . . for practicing homosexuals” (Halley 1991, 354). However, there is no
support for this definition of homosexuals even in the sodomy statutes
themselves, the majority of which do not equate sodomy with a particular
sexual orientation. Indeed, “the peculiar slippages that attend this definition of the class of ‘homosexuals’ all seem to require some sort of willful blindness to the actual scope of most sodomy prohibitions” (Halley 1991, 355).

The equation of homosexuality with sodomy has widespread significance for withholding gay and lesbian rights. Nan Hunter, former director of the ACLU’s Lesbian and Gay Rights Project, explains that “sodomy laws have functioned as the linchpin for denial of employment, housing, and custody or visitation rights; even when we have proved that there was no nexus between homosexuality and job skills or parenting ability, we have had the courts throw the ‘habitual criminal’ label at us as a reason to deny relief” (in Deitcher 1995, 146). Thus, despite its misinterpretation of Hardwick, the Padula ruling has had devastating effects. Through its precedent, speech and sodomy are inextricably linked, so that the act of identifying oneself as a lesbian or a gay man is akin to, and as incriminating as, committing sodomy. The category of “conduct” provides the bridge joining the otherwise disparate concepts of “speech” and “sodomy.” Moreover, the military has taken this equation one step further. Whereas the court linked sodomy directly to homosexual status, the military—legally required to demonstrate a disruption to its mission—equates sodomy with all forms of “homosexual conduct,” broadly defined.

What is perhaps most intriguing about this connection is that the trajectory from statements of self-identity to conclusions about conduct does not work as decisively in the other direction. Identifying oneself as lesbian or gay constitutes homosexual conduct sufficient for military discharge, whether or not one ever has or ever intends to commit sodomy or participate in other acts that are defined as homosexual conduct. Nevertheless, the reverse is not true. Committing sodomy or other sexual acts with a partner of the same sex is not automatically considered sufficient evidence to classify one as a homosexual or to qualify one for dismissal. Almost unbelievably, in light of the vehement rhetoric that decries the effects of homosexual conduct on the military mission, even “the courts . . . found no problem with the Department of Defense directive that exempts heterosexuals who engage in homosexual conduct from dismissal” (Currah 1995, 67).

The reference here is to a provision in the military’s policy on gays which states that a service member who is found to have committed same-sex sodomy will not be discharged under the policy if “such conduct is a departure from the member’s usual and customary behavior” (Policy Hearings 1993, 70). This extenuating circumstance has been nicknamed the “Queen for a Day” rule (Otjen 1994, 339). It provides that a service member who has
committed a sexual act or acts with a member of the same sex will not be
dismissed from the military if he or she is found to be a heterosexual en-
gaged in homosexual sex. In contrast, a service member whom the military
identifies as gay or lesbian who is engaged in precisely the same act is sub-
ject to investigation and dismissal. Given the military’s definitions, “an indi-
vidual who identifies as heterosexual may engage in homosexual acts and
experience homosexual attraction, while a homosexual person who engages
in heterosexual conduct nonetheless remains a homosexual person” (Plain-
tiff’s Memo 1994, 38).

The argument the military advances is that gays and lesbians are inher-
ently more likely to violate the UCMJ’s sodomy statute, even if they have never
engaged in an act of homosexual sodomy, than are heterosexual soldiers who
have admitted to or even been caught engaging in such an act. The expla-
nation for what appears a blatant hypocrisy lies in the interpretation of sex-
ual orientation as an essential and immutable element of character. This es-
ternal quality is inseparable from sexual conduct when such an association
is convenient, that is, when arguing that homosexuals “by definition” com-
mit sodomy. But such a quality is entirely distinct from sexual conduct when
this dissociation is convenient, in the case of heterosexuals caught “slum-
mimg.” From the perspective of military policy, clues to one’s immutable
inner self are provided more reliably by self-identification than by con-
duct—even sexual conduct.

The “Queen for a Day” rule illuminates and perpetuates the essentialist
understanding of sexual orientation that underlies military policy. It suggests
the existence of inflexible, a priori categories that allow the classification of
individuals finally and certainly into two distinct and opposite categories of
sexual orientation.21 The internal incoherence of this policy reveals that it
is not the acts themselves but the status to which they presumably refer that
is subject to condemnation. “These actions are simply markers of sexual ori-
entation status . . . rather than acts which are despised and censurable inde-
pendently of reference to despised sexual orientation status . . . These are
homosexual acts only in that despised homosexuals perform them” (Mohr
1994, 64). This perspective is expressed vividly in the deposition given by
Department of Defense representative General John Otjen in Cammer-
meeyer’s civil court case. When confronted with evidence that large numbers
of heterosexuals violate the sodomy statute, Otjen defended the military
ban by arguing that “there is a sense of core values that exist in the group
that think that homosexuality, that sex of any nature between two people of
the same sex, is inappropriate, [and] unnatural” (Otjen 1994, 216; emphasis
Immutability and the Privacy Principle

The view of sexual orientation as an immutable characteristic of individuals has a certain legal utility for lesbian and gay rights initiatives. Legal arguments based on this principle “have been encouraged by the courts supporting gay rights that have justified their rulings by pointing to the supposed immutability of homosexuality, as well as by hostile courts that have based their decisions to deny protection to homosexuals on the supposed mutability of sexual preference” (Halley 1991, 360). Establishing immutability is the key to earning suspect class status for lesbians and gays, which would compel courts to apply the strictest scrutiny to any distinctions made on the basis of sexual orientation as they do for distinctions based on race, religion, or physical disability. Although, thus far, all efforts to attain such status have failed, ironically, the military’s view of sexual orientation as essential and immutable might actually fortify arguments for extending equal protection laws to gays and lesbians. Whether or not an individual lesbian or gay man personally shares the view that sexual orientation is immutable, this perspective is undeniably attractive in its potential for gaining the sympathy of the courts.

Despite their popularity, however, arguments based on immutability have numerous drawbacks and even dangers when employed in the cause of gay and lesbian rights, as evidenced by Padula. To begin with, despite claims to the contrary, immutability is not a necessary prerequisite for classification as a suspect class (Halley 1991). In fact, “recent Supreme Court opinions have conceded that the trait in question need not be the result of nature but can be the product of social or even legal constructions” (Currah 1995). This provision is evident, for example, in the cases of religion and physical disability (Mohr 1994; Phelan 1994). Religion may be deeply rooted, but it can also be chosen or changed, and religious conversion or “rebirth” (both examples of chosen status) does not exempt individuals from protection under the law. Likewise, while one may be born with a disability, both physical and mental disabilities may develop over time or may result from events such as a careless accident, a self-inflicted wound, or drunk driving (Mohr 1994). The law does not distinguish among various “causes” of one’s religion or disability in extending equal protection. The argument that if homosexual-
ity is “chosen” it is a matter of personal responsibility, and therefore need not or cannot be protected, fails to acknowledge elements of choice and responsibility in other protected classes.

Moreover, as discussed in the previous chapter, the very concept of an immutable or biological category is based on the paradigm of race, which is problematic in light of recent scholarship that deconstructs “biological” categories such as gender and race. To argue for immutability is to ignore an abundance of scholarship on sexuality, race, and other social categories that rejects essentialism and argues for the constructed nature of all social distinctions (Plaskow 1994). This includes the division of people into classes based on the gender of their sexual partners (Butler 1990; Foucault 1978). As illustrated by the “Queen for a Day” rule, challenging essentialist arguments may be a necessary step toward revealing the injustices built into the military policy. The concept of immutability may serve prejudice and discrimination to a greater degree than it can ever enhance minority interests. It may also play directly into the hands of those who would perpetuate and further entrench homophobia:

It seems that arguments for lesbian and gay rights based on the presumed givenness of homosexuality are attractive precisely because they disrupt as little as possible the culture’s deeper assumptions about sexuality. They allow us to see gays and lesbians as a “them” who are in some way different from the general population. They allow us to focus on the “causes” of homosexuality to the neglect of the “causes” of heterosexuality. They allow us to debate the religious and social acceptance of gays and lesbians, but to avoid the question of how heterosexuality comes to be constructed and accepted as normative. (Plaskow 1994, 31–32)

In this way, an essentialist view of sexuality, while advantageous in some respects, upholds the “Otherness” of gays and lesbians and reinforces the rigid categories established by and for a heterosexist, homophobic dominant ideology.

The risks of the immutability and associated right-to-privacy arguments are illustrated all too clearly by the majority opinion in *Hardwick*, which appropriates these claims and uses them against lesbians and gays. Despite its occasional legal successes, the immutability argument inherently constrains gay and lesbian freedoms because it rests on a premise that “‘homosexuals’ constitute a distinct class of persons existing in human nature and they must, by their very nature, commit sodomy.” This view authorizes the homophobic construction of “a natural homosexual, a preexisting human class persis-
tently marked and thus adequately defined by the act of sodomy” (Halley 1991, 358). The right-to-privacy argument attempts to protect a class of gays and lesbians while bracketing discussions of “conduct” (read “sodomy”). However, by attempting to sidestep the issue of conduct, the privacy argument leaves intact—and thus unintentionally reinforces—the belief that “gay identity emerges ineluctably from an irresistible propensity to commit sodomy” (Halley 1989, 921). Sodomy emerges as an uncontrollable, specifically homosexual desire, in need of privacy and legal protection. By reinforcing the equation of homosexuality with the illegal activity of sodomy, privacy arguments undermine efforts to obtain heightened scrutiny under equal protection laws.

Given the minefield laid down by the Hardwick decision that strikes down any legal argument for sodomy, “judges are far more likely to be sympathetic to arguments about status than to those regarding conduct” (Bull 1994, 30). Evan Wolfson, a senior staff attorney for a gay and lesbian legal organization, warns that “when we get to conduct, we will run smack into Hardwick” (in Bull 1994, 30). Consequently, arguments for equal protection generally distinguish status from conduct and challenge the presumption that conduct can be predicted by status. Such a legal strategy appears in a brief written by Cammermeyer’s attorneys, who claim that “sexual orientation and sexual conduct are truly distinct” (Plaintiff’s Memo 1994, 34). They support this assertion with the statement from Dr. Laura Brown, a well-known psychologist specializing in the study of sexual orientation, that “there is almost no relationship between an individual’s orientation and his or her sexual conduct” (Cammermeyer v. Aspin 1994, 31).

According to Mary Newcombe, one of Cammermeyer’s civilian lawyers, the intent of this argument was to challenge the presumption that particular, prohibited sexual acts—including sodomy, hypersexuality, promiscuity, unwanted sexual advances, and fraternization—follow from a given sexual orientation (1996). Just as one’s self-identification as a heterosexual tells us nothing about that individual’s sexual proclivities, the acknowledgment that one is gay or lesbian offers no clue as to the particulars of his or her sexual conduct. In fact, it does not even tell us what would seem to be the most obvious information—the sex of the individual’s sexual partners. Again, just as those who identify as heterosexual may never have had sex or may occasionally or frequently engage in sexual activity with people of the same sex (a possibility made abundantly clear by the “Queen for a Day” rule), individuals who identify as gay or lesbian may never have had sex or may engage occasionally or frequently in sexual activity with members of the op-
posite sex. These observations support the claim that what we identify as sexual orientation is indeed distinguishable from sexual conduct.

This is not to say, as Cammermeyer’s attorneys undoubtedly did not wish to argue, that gays and lesbians should be expected or required to refrain from engaging in expressions of same-sex affection, up to and including sexual intimacy. However, that is precisely how the separation of status from conduct has been interpreted by the military and the civil courts, including the court in the Cammermeyer case. Cammermeyer’s lawyers sought to prove that homosexual status did not indicate a propensity to commit criminal acts, because a gay or lesbian sexual orientation can be expressed in many ways that are not outlawed by the military’s definition of sodomy. But the courts, working with an implicit definition of sodomy as any expression of homosexuality, (mis)interpreted the splitting off of conduct from status to mean that being gay or lesbian need not result in the expression of same-sex desire through any behavior whatsoever. As a result, Judge Thomas S. Zilly’s decision in Cammermeyer’s favor is based, in part, on his conclusion that “there is no rational basis for the Government’s underlying contention that homosexual orientation equals ‘desire or propensity to engage’ in homosexual conduct” (Cammermeyer v. Aspin 1994, 33). Cammermeyer’s acknowledgment of her status, in the view of the court, “is not reliable evidence of her desire or propensity to engage in homosexual conduct.”

Zilly’s judgment that homosexual status does not indicate a propensity to engage in homosexual conduct, combined with Cammermeyer’s insistence that hers is an “emotional orientation,” both broadens and narrows the possibilities for understanding gay and lesbian lives. The separation of gay or lesbian self-identity from particular sexual acts, or even (in the case of Cammermeyer’s statement) the evasion or dismissal of sexuality altogether, diverts the obsessive focus on sex that grips the public’s thinking about gays and lesbians. It forces us to look elsewhere for an understanding of what might more accurately be labeled, for some, “affectional orientation.” Zilly’s statement dissociates the insistent coupling of homosexuality with sexual practices and so invites us to reconsider this narrow definition. Such a definition excludes, for example, individuals who identify as gay or lesbian but choose celibacy or who do not engage in same-sex sexual behavior for any number of reasons: because they live with their parents or their children, are still heterosexually married, have not yet met a suitable partner, are nuns or priests, are HIV positive or fear contracting HIV. Moreover, Zilly’s assertion raises the question of what it means to assign someone else or oneself a gay or lesbian identity if we can no longer rely on a simplistic equation of same-
sex sexual contact and homosexuality. In the absence of a reliable sign that identifies a preexisting class of individuals who can be labeled “homosexuals,” we might examine instead the way in which this class and its members are constituted as having a particular identity based on the fallible sign of sexual activity.

Zilly’s statement adds an alternative to the original equation of homosexual status with prohibited sexual acts, specifically sodomy. Whereas the military claimed that acknowledging a gay or lesbian identity was tantamount to committing the forbidden and immoral act of sodomy, Zilly’s decision establishes the possibility, even the likelihood, that acknowledging a gay or lesbian identity does not mean one is likely to engage in such an act. Embedded in this possibility, again, are potential gains and losses for gay and lesbian rights. What is gained is the distancing of gays and lesbians from a condemned behavior and the rescuing of the category of “homosexuality” from complete submergence in the potent discourse of sex. What is lost is the acceptance of gay and lesbian difference, and with it any possibility of gaining legal protections for and public recognition of same-sex relationships. If status and conduct are unrelated, as Zilly suggests, then gays and lesbians can legitimately be asked to refrain from engaging in any expression of affection, even as their identities are presumably protected.

This is precisely the situation implemented by the new military policy. The double bind for gays and lesbians is abundantly clear, as is their second-class status with respect to military and civil law: winning protection for identity means sacrificing one’s right to express or share that identity. Again, homosexuality is presented as the difference that must make no difference as a condition of its tolerance. For lesbians and gays, as for no one else, the sacrifice of intimate relationships, love, and sexuality is demanded in return for the most fundamental of constitutional rights.

**Sodomy and Sexuality**

The equation of homosexuality with sodomy causes lesbians to vanish under the sign gay or homosexual. With both terms ambiguously gendered, they are read alternately as male or gender neutral. The result is that a stereotype of gay male sexual practices is translated without examination into an account of lesbian behavior. In his testimony in the Cammermeyer case, Otjen, who was a member of the Military Working Group (MWG) that crafted the new policy, conveys the MWG’s conviction that homosexuals are more likely than heterosexuals to commit sodomy. He concedes, however,
that the group did not distinguish between lesbians and gay men in their study of the issue. In response to a question about whether lesbians are more or less likely than heterosexual men to violate the UCMJ sodomy law, Otjen circuitously replies, “I haven’t frankly thought about that. . . . But my opinion is that when you tell me that you are a lesbian or you tell me that you’re a homosexual is that you are [sic], in that you participate in those things which, those activities which identify that group. And if sodomy is part of that, then I believe my statement holds true” (Otjen 1994, 414–15).

In fact, substantial research suggests that sodomy is not a predominant activity in the lives of many lesbians. One study, for example, reports that 23 percent, or about one-quarter, of lesbians rarely or never engage in oral sex (Blumstein and Schwartz 1983, 236). A recent survey of a nationwide sample of lesbians found that 36 percent, or over one-third of respondents, had never performed fellatio (Lever 1995, 29). To suggest that sodomy “defines the class” of lesbians singles out an activity that might be relatively infrequent or unimportant to the subjective experience of self-identified lesbians, defining all members of this group in terms of a behavior that large numbers of lesbians may never even practice. Lest we think, however, that the stereotype paints an accurate picture of the sexual lives of gay men, this, too, may be misleading. In the age of AIDS, many gay men are forgoing sodomy as part of the practice of safe sex (Martin 1987).

The definition of homosexuals as those who commit sodomy is distorted not only because it excludes many self-identified gays and lesbians. It also vastly overincludes individuals who have never considered themselves gay or lesbian and who have never engaged in same-sex sexual behavior. If sodomy is the behavior that defines the class, then a huge number of heterosexual couples will suddenly find themselves classified as homosexuals. The numbers representing heterosexual acts of sodomy are striking, if not surprising. One survey found that 90 to 93 percent of heterosexuals have engaged in oral intercourse (Blumstein and Schwartz 1983, 236, 242). The respected Hite Report on Male Sexuality (1981) likewise reported that “approximately 96 percent of all [male] respondents had orally stimulated a female partner” (Editors of the Harvard Law Review 1990, 59). Similarly, The Redbook Report on Female Sexuality (1977) found “that 85 percent of women surveyed perform fellatio with their husbands ‘often’ or ‘occasionally,’ and 20.3 percent had engaged in anal intercourse with their husbands more than once” (Editors of the Harvard Law Review 1990, 59).

These statistics suggest that sodomy can legitimately be identified as the behavior that defines the class of heterosexuals. As Michael Himes, one of
Cammermeyer’s civilian attorneys, observes, in light of such findings, it is logical to assume that when people announce their heterosexuality, they are declaring that they have a propensity to engage in sodomy (Otjen 1994, 209–11). The statement that one is a heterosexual, and particularly a heterosexual male, provides good predictive evidence that one is at high risk of violating the UCMJ. Statistically speaking, it makes even more sense to say that sodomy defines the class of men, independent of sexual orientation. In this case, the identification of oneself as a male permits a strong presumption that one will engage in sodomy, whereas if one is a woman, one is statistically less likely to engage in this conduct. Given the rationale that dismisses gays and lesbians from the military because of a presumed propensity to commit sodomy, there is no defensible basis for not dismissing “avowed males” as likely criminals who are at a high risk of violating the UCMJ regulation.

The distinction between the homosexual “propensity” to commit sodomy and an equal, if not more pronounced, heterosexual propensity is upheld by the confusion surrounding the meaning of the term sodomy, and the peculiar and persistent slippage in the meaning of this term. The Alyson Almanac, a reference book on gay and lesbian subjects, defines sodomy as “sexual acts deemed unnatural by the person using the term. . . . Sodomy is variously used to mean any sex between two men; any sex between two men or two women; anal intercourse involving a man and a partner of either sex; or sexual acts involving a human and an animal” (Alyson 1993, 97–98). The ambiguity of the term permits and even encourages inconsistent legal interpretations. “Sodomy statutes maintain themselves in part by their equivocal reference to identities and/or acts. The duality of the sodomy statutes—sometimes an index of identity, sometimes an index of acts—is a rhetorical mechanism in the subordination of homosexual identity and the superordination of heterosexual identity” (Halley 1993, 1722). In light of this definitional instability, it is little wonder that Foucault referred to sodomy as “that utterly confused category” (in Halley 1993, 1740).

While the term sodomy is often used as if it encompasses any and all same-sex sexual behavior, “the criminality of sodomitical acts involving persons of different genders is simply assumed out of existence” (Halley 1991, 357). The equation of homosexuality with sodomy supplies the necessary diversion so that the question of heterosexual sodomy is willfully ignored or simply never raised. Through this mechanism, “designating homosexual identity as the personal manifestation of sodomy confirms its subordination,” while “the ways in which homosexual identity is not sodomy are subject to
an organized forgetting” (Halley 1993, 1722). The effectiveness of this strategic mental block is aptly illustrated by Thurmond’s assertion that “heterosexuals do not practice sodomy” (Policy Hearings 1993, 493).24

Thus it is not surprising that in both formal and informal discussions of the military ban on gays, and even in the testimony presented before the Senate Armed Services Committee, the term sodomy was applied loosely, without reference to the legal definition upon which the argument was based, to mean all homosexual sex and only homosexual sex.25 This identification is pervasive: “Sodomy in these formulations is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym” (Halley 1993, 1737). The argument that bans gays and lesbians from the military because of an inherent tendency to commit sodomy is based on precisely this tautology, resting on the misunderstanding that sodomy refers to any sexual act that occurs between two members of the same sex; that is, that sodomy “is” gay or lesbian sex. Again, this definition is underinclusive of heterosexuals, overinclusive of gays and lesbians, and relentlessly circular. Its utility for maintaining the military status quo lies in the fact that, in the absence of statutes that specifically discriminate against homosexual (as opposed to heterosexual) sexual acts, this loose application of the term creates a dividing line that maintains the apparent distinction between “us” and “them”—a distinction that is then deployed to keep “them” out and “us” in.

This discussion returns us to one of the principal dynamics of gay and lesbian oppression: the fear or hatred of the “Others” who are always already among “us” and the need decisively to cast out, both symbolically and literally, those “Others.” Precisely because of the almost desperate insistence on upholding these distinctions, we must view them with suspicion. The presentation of sexual categories as clear-cut and rigidly bounded is illusory, if not deliberately misleading. “Acts do not translate, one-for-one, into identities. Once that equation is gone, it becomes difficult to maintain the corollary assumptions that the world properly provides two and only two sexual-orientation identities, and that heterosexuality is pure of sodomitic practice and homoerotic impulse” (Halley 1993, 1738).

The need to maintain rigid boundaries around arenas of sexual activity in order to preserve difference and distance between heterosexuality and homosexuality is but a symptom of a deeper affliction. The category of “heterosexuality” is based on the most tenuous of foundations, constructed not from internally consistent characteristics but entirely through its status as “not homosexual” (Butler 1990; Foucault 1978; Halley 1991; Halley 1993).
The class of heterosexuals is “a default class, profoundly heterogeneous, unstable, and provisional” (Halley 1991, 372). Heterosexuality therefore remains entirely dependent on the existence of an abstract homosexual “Other” for its own definition. At the same time, it is threatened by the presence of the real men and women who engage in same-sex sexual practices—a threat based on the ambiguity of definition, on the pervasiveness of homoerotic desire and activity throughout a much broader population than that identified as “homosexual,” and on the inability of anyone to distinguish reliably those who are gay or lesbian from those who are not. Homosexual “status” is thus a particularly untrustworthy foundation on which to erect an edifice of difference. In contrast, the military’s definition of homosexual “conduct” as gay sex, and of gay sex as sodomy, provides clearly delineated and differentiated categories. This misleading categorization conveniently forestalls confusion, uncertainty, or (worse yet) overlap of sexual orientation, sexual identities, or sexual activity.

Redefining sodomy as homosexual sex and reinterpreting sodomy statutes to apply exclusively to gays and lesbians thus provide the means by which to maintain a binary system, comprised of two mutually exclusive categories of sexuality and two distinct modes of sexual practice. The slip-page in the meaning of sodomy is not accidental, then, but deliberately upholds an apparent, if illusory, difference between same- and cross-gender sexual practice. It thereby suggests that, although not distinguished by the UCMJ rules of conduct, one form of sexual practice is nevertheless legally forbidden and morally abhorrent while the other is acceptable, appropriate, even natural (see Plaintiff’s Memo 1994, 26).

Because it presumes an exclusive link between sodomy and homosexuality, this framing of the issue begs the real question raised by the outlawing of sodomy. The crux of the military’s problem is how to reconcile its moral condemnation and institutional prohibition of sodomy with the widely held knowledge that this practice is prevalent among heterosexuals. The military’s construction of the sodomy argument fails to acknowledge that sodomy is practiced by many groups, of which homosexuals are only one. It also fails to consider the possibility that this practice may be linked to a group defined by a characteristic other than sexual orientation. Such a logical fallacy is the equivalent of claiming that in the winter, many gays and lesbians get the flu. This may be an entirely true statement; however, when it is phrased this way, we are led to believe that lesbians and gays are particularly susceptible to catching the flu, based on their membership in the class of homosexuals. Of course, this is not the case. It would be equally true to say that in the win-
ter, many heterosexuals catch the flu. The fallacy lies in linking an irrelevant characteristic with a particular outcome and inferring a causal relationship.

In the flu example, it is obvious that an illogical conclusion has been reached, but only because there is no stereotype linking sexual orientation to the flu in the public imagination. (For evidence of the power of stereotypes in shaping our acceptance of such associations, simply substitute “HIV” for “flu.” Suddenly, the implications of the statement and the causality it implies will no longer seem questionable to many readers.) The question is not whether gays and lesbians will get the flu. The question is whether the flu will be prevalent this winter, for if so, we might expect it to be equally present across populations of varying sexual orientation. Having reached this conclusion, we can abandon the analogy but retain its message. Such reasoning narrows the scope of the argument to a false dichotomy—gays and lesbians will, or gays and lesbians will not, commit sodomy. This erases the possibility of a third standpoint: that those who identify themselves as gays and lesbians are no more or less likely to commit sodomy than those who identify themselves as heterosexuals, and that sodomy, whether deemed acceptable or not, is not accurately viewed as a manifestation of a particular sexual orientation.

Moreover, nowhere in the two options delineated above is there space for imagining homosexual acts, sexual and nonsexual, that are not acts of sodomy, and that are therefore not prohibited by the UCMJ. This construction of the argument is, needless to say, both highly reductive and fundamentally misleading. The alternatives provided establish gays and lesbians as either hypersexual—their sexuality uncontrolled and uncontrollable, their identity and desires expressed exclusively through sodomitic acts—or as asexual, cursed victims of unnatural urges that they valiantly succeed in overcoming through sheer strength of will. Missing and desperately needed here are a multitude of other options that would account for other kinds of lesbian and gay identities, other expressions of lesbian and gay love, intimacy, and sexuality.

Simply stated, sexual orientation and sodomy “are two entirely separate phenomena: sexual orientation classifications are based on the direction of an individual’s sexual and affectional attractions, while sodomy statutes prescribe particular sexual acts in which persons of any sexual orientation may participate” (Editors of the Harvard Law Review 1990, 58–59). Cammermeyer’s own words illuminate this distinction, when she describes her love for women as an “emotional orientation” and “explicitly reject[s] the notion that her identification as a lesbian can be reduced to the mere presumption
of sexual acts with women” (Plaintiff’s Memo 1994, 33). The very concept of a sexual orientation may be revealed, under closer scrutiny, to be a patriarchal concept organized around the assumed centrality of sexual, specifically genital, interaction to the formation and maintenance of intimate relationships. For many lesbians, “a relationship with another woman can provide a far richer and more supportive intimacy than that possible with most men.” Nevertheless, we find repeatedly that “this aspect of our lives is reduced, in culture and in law, to sexual preference, as though the only advantages of a same-sex relationship were genital” (Becker 1995, 149).

This is not to deny that sex is a focal point of intimate relationships for many people of diverse sexual orientations. Yet for many others, sex may be or become less important, even unimportant, compared to other facets of their relationship. It is surely the case that no single standard of sexual activity exists that ensures the success of all intimate relationships; nor are intimacy and sexuality identical. Thus even to designate one’s emotional/affectional choice(s) as a “sexual” orientation denies the existence of a vast variety of primary, intimate relationships in which sexual/genital contact plays a relatively minor role.

To make such an argument is not to accede, reassuringly, to what Mary Newcombe has called a “sex-phobic” culture that sex and sexuality are, after all, insignificant or that they are best repressed (1991, 9). Nor is it to desexualize lesbians or gay men and thus to deny difference yet again. It is, however, to question the classification of individuals based on whom they engage in genital contact with and to challenge the hierarchy of traits that places sexual acts at the core of a person’s being and identity, as the key to an essential or immutable self. The “sexual orientation” model derives from a focus on sexual activity, narrowly defined as genital contact (with its attendant and apparently necessary goal of orgasm), as the defining moment in intimate relationships and the defining characteristic of classes of people. However, this is but one of many possible criteria for categorizing intimate relationships. Alternatively, such partnerships could be classified according to whether they are monogamous or nonmonogamous, respectful or abusive, loving or indifferent, egalitarian or unequal, or according to whether they provide opportunities for individual growth or foster mutual stagnation—all without reference to sexual orientation. Each of these classifications may provide a more relevant and useful means of categorizing intimate relationships than does a system of classification based solely on the gender of the two participants.

In contrast to this narrow view, lesbians themselves have offered a broad variety of definitions of lesbianism. The notion of a lesbian continuum pro-
posed by Adrienne Rich (1986), alongside widely varying perspectives on who “is” and who “isn’t” a lesbian, suggests a more complex and less stable phenomenon than can be captured by reference to a particular sexual behavior or set of behaviors, let alone encompassed by a military regulation.

As more than one lesbian writer has observed, the terms of the patriarchy and the concepts provided by patriarchal thought offer miserably inadequate means to express ways of living and loving that lie outside patriarchal institutions and beyond heterosexist understandings, imagination, and language (Lorde 1984; Newcombe 1991; Robson 1990; Robson 1992; Vaid 1995). By inviting us to contemplate the difficulties of simple classification and to investigate the intricacies of human emotional expression, Zilly’s and Cammermeyer’s statements uncoupling homosexuality and sodomy extend the horizons within which gay and lesbian lives can be seen and understood.

There is nevertheless an undeniably negative aspect to these well-intended assertions. In a society or a military that is phobic about gay and lesbian sexuality, Zilly’s and Cammermeyer’s words offer reassurance that gays and lesbians are not doing anything that undermines patriarchal power or heterosexual masculine dominance. They suggest that gays and lesbians are not, in fact, doing much of anything at all. This suggestion reinforces the dominant ideology in at least two ways. First, it maintains the priority of heterosexual, vaginal intercourse as the natural, original, and perhaps only kind of sex worthy of the name, while removing any potential disruption or threat that the presence and pervasiveness of alternate sexual forms pose. Second, it deliberately separates status from conduct and protects status at the cost of our right to engage in various forms of conduct. Such a sacrifice, however vigorously demanded and valiantly offered, is ultimately both impractical and inhumane.

**The Great Divide: Distinguishing Status and Conduct**

Defending homosexual identity on the grounds that it is private and therefore off-limits to the long arm of military law accomplishes for Cammermeyer’s supporters precisely what arguing for private, protected identity achieved for Achtenberg’s Senate proponents: it leaves the public domain, broadly defined, open to attack. Achtenberg’s opponents seized on the public/private distinction to hold her to a highly limited voice and visibility. In a military context, the public/private distinction translates easily into a delineation between conduct and status. This division produces a legal decision
in Cammermeyer’s favor that nevertheless subjects her, and the gay and lesbian constituency she represents, to similarly rigid constraints. These restrictions exact silence as the cost of individual rights and invisibility as the price of “affirmation.” Difference may be protected only if it remains entirely hidden—a difference that makes no difference, that cannot even be acknowledged as such. The dissociation of identity from conduct enforces gay and lesbian invisibility and silence both within the military and beyond.

This protection of homosexual status but not conduct quickly becomes “a prescription for closetry” (Altman 1982, 135), a reminder that victories may be partial and produce potentially harmful outcomes. Zilly’s ruling permitted Cammermeyer to remain in uniform after identifying herself as a lesbian, undermining the blanket ban under which she was discharged. However, this decision granted Cammermeyer and other soldiers permission to speak only with the most extreme limitations: they must not indicate their status in any other manner, and their statements must refer to status alone. Although handing the military a legal defeat, by upholding the separation of status from conduct Zilly paved the way for continuing discrimination against gay and lesbian service members. His decision carries the premise of civil rights to its logical extreme. He allows gays and lesbians to identify themselves as such only if no further evidence comes to light to support their claim; only if all the evidence, in fact, denies it. This legal ruling and others like it thus mandate a kind of closed, circular discourse in which the words gay and lesbian no longer signify anything concrete. The cost of being able to say the words is the sacrifice of their meaning. Gay and lesbian self-identification must refer not to observable behaviors in the external world but only to an inner world that is not otherwise expressed or shared.

The argument for protecting status alone exhibits the same fundamental flaw in the military case that it did in the political arena. By defending a distinct and severely limited private realm, this approach abandons the struggle to claim a public voice and virtually invites restrictions on public behavior. Moreover, the very concept of a private realm is foreign to the unique situation of military employees, who are considered to represent their government and the military at all times and who may have to live under conditions entirely lacking in privacy. In such situations, their conduct is inherently “public” and subject to censure. Thus the military context provides an extreme example of the dangers of separating private from public identity: the public arena constantly encroaches on an ever-narrowing private realm, threatening to overtake it entirely. Virtually any activity can be construed as “nonprivate” and thereby subject to censure.
The status/conduct distinction is appealing because it appears to refute the equation of homosexuality with sodomy and the consequent indictment of homosexuality on legal and moral (often biblical) grounds. It dissociates the individual from the act. The military’s circular reasoning goes as follows: (1) homosexuals, by definition, have a propensity to engage in “homosexual conduct”; (2) homosexuals are defined by their sexual activity; (3) the conduct of homosexuals is therefore inherently sexual; (4) all sexual acts gays and lesbians engage in, and only these acts, constitute sodomy (i.e., sodomy and homosexual sex are coterminous); (5) homosexual conduct is therefore equivalent to committing sodomy; (6) engaging in homosexual conduct (sodomy) prevents one from being a good soldier.

The status/conduct distinction does not challenge the overall illogic of the formula. It simply circumvents, without confronting, the troublesome equation of sodomy with gay or lesbian identity. By equating status with sexual or emotional desire and conduct with any visible manifestation of this desire, this distinction disputes only claim 1. It suggests that homosexuals do not have a propensity to engage in homosexual conduct, that is, that desire need not manifest itself through word or deed. The military uses this split to police sexual activity and enforce a separate homosexual standard. It legitimizes continuing discrimination against gays and lesbians with the presumption that if one’s sexual orientation becomes known, through any means, then the individual must be culpable for an act of “homosexual conduct.” In this circular definition, public knowledge provides evidence of improper conduct, regardless of the means by which this knowledge was actually obtained.

Zilly’s decision echoes the praise offered by Achtenberg’s Senate supporters: Cammermeyer is rewarded for being “mainstream,” for refraining from homosexual conduct despite her lesbian status. Cammermeyer’s appeal is successful because she is one of the “good lesbians” who was never identified as engaging in any form of homosexual conduct, and whose status came to light only as a result of a direct question. Zilly’s decision thus advances acceptance for only those who, like Cammermeyer, are successful in concealing their status. By refusing to dispute the condemnation of gays and lesbians who do engage in homosexual conduct of any sort, Zilly’s judgment reinforces the view that there is something condemnable about them.

Of course, given the military prohibition, individuals who commit sodomy are subject to reprimand and dismissal. At issue, however, is a failure to distinguish between the broad meanings encompassed by the phrase
“homosexual conduct” and the specific practice of sodomy. The equation of these terms reinforces a “‘sex-as-lifestyle’ assumption,” the idea that gay and lesbian sexuality “is all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure” (Fajer 1992, 514). By dissociating status from conduct broadly defined, rather than from sodomy in particular, gay men and lesbians are dissociated from all the other behaviors involved in the everyday living of our lives: participation in families, communities, friendships, and intimate relationships; the pursuit of an education and a career; involvement in political and social organizations; fulfilling a religious or spiritual dimension of our lives; and simply loving other human beings.

By refusing to enumerate the ways in which conduct is not sex, and by failing to defend the right of gay men and lesbians to make visible all aspects of our multifaceted lives, the status/conduct distinction implicitly denies the need for voice and visibility. Upholding this distinction permits the condemnation of “avowed” gays and lesbians as aberrant, unnatural, and immoral beings even while professing tolerance toward homosexual status. It suggests that there is something at best unacceptable or abnormal, at worst shameful or reproachful, about gay and lesbian love and sexual expression. It requires us to jettison claims that nonheterosexual love and nontraditional families are legitimate and healthy alternatives to heterosexual nuclear families and must be recognized as such. It obligates us to abandon efforts to affirm a multitude of family structures, for gays and lesbians and for others, and to cease attempts to educate people about these alternatives. It prohibits expression of the joy and pride that emerge from being gay or lesbian. Such affirmation may be especially crucial to convey to gay and lesbian youth, as well as to many others who are tentatively beginning to claim a gay or lesbian identity. Lacking this affirmation during the critical coming-of-age years or during the process of coming out as an adult can make life seem dreary and hopeless and the future void of love.

Reducing gay or lesbian identity to sex thoroughly distorts understandings of gay and lesbian lives. Just as the meaning of heterosexual love is not exhausted by reference to the sexual acts in which men and women engage, neither is the love of gay or lesbian partners encapsulated by reference to their sexual practices. The love between two men or two women is no more reducible to sex (sodomitic or otherwise) than is the love between a woman and a man. Lesbian and gay relationships can be as stable or unstable, long- or short-term, monogamous or nonmonogamous as the full range of heterosexual relationships. Like any other intimate relationships, they can be
highly or not at all sexual, involving any, all, or none of the range of possible sexual acts. For many gay men and lesbians, as for many heterosexual men and women, sex is only one part of a loving relationship that includes many other facets of intimacy and connection.

Equating homosexuality with sodomy distorts public understanding of gays and lesbians by reducing an enormous range of possibilities for emotional and sexual intimacy to a particular sexual behavior that many gays and lesbians never even practice. The status/conduct distinction perpetuates this distortion by adopting a legal classification and attempting to apply it to the understanding of individuals in a manner far too simplistic to encompass the complexity and variety of human sexual identity and behavior (Vaid 1995). The construction of a relationship between status and conduct as either directly causal or entirely unrelated offers a miserably inadequate conception of sexual desire. Moreover, it fails to provide anything close to an exhaustive classificatory scheme for sexual practice. The adoption of patriarchal categories of law—a law established by and for men, supporting what Ruthann Robson labels the “rule of men” (1992)—is an inadequate and possibly dangerous means of trying to encompass the feelings, behaviors, and self-understandings of individuals who do not fit neatly within the law’s expectations. We must therefore be vigilant in identifying the limits of a system that is “premised on normative assumptions about who people are, what they need, and how they should live their lives—assumptions developed primarily to support and maintain the patriarchy” (Newcombe 1991, 7). We must employ the utmost caution when using this system to represent ourselves, to ourselves or to others.

The separation of status from conduct enables the armed forces to protect outwardly the constitutional rights of gays and lesbians while nevertheless placing an absolute limit on their self-expression. Such a policy eludes the confines of the First Amendment by defining speech itself as conduct. This equation is still under debate in numerous legal challenges to the policy; it will likely be resolved only by a Supreme Court decision. In regulating speech, the military effects yet another division: the separation of status from self-identification. It attempts to prohibit the latter, including all acts of self-definition, self-naming, and self-expression. What is left “protected,” though only in a relative sense, is the ambiguous category of “status.” This comes to mean less and less, until it seems to encompass precisely nothing, except what lies in the recesses of the human mind, so deep and so hidden that it is not identifiable even by the person whose thoughts it inhabits.
The Perils of Privacy

The argument that supports protecting “private” status while relinquishing the right to “public” conduct leaves intact another problematic binary that underlies military policy: the false opposition between openness and secrecy. The “Don’t Ask, Don’t Tell” policy portrays “telling” as a willful act, with secrecy, or “not telling,” as the effortless default category. It presumes that asking the military to “not ask” and a soldier to “not tell” are comparable directives, accomplished by refraining from certain undesirable behaviors. Yet this assumption is misleading, for the silence demanded of gay and lesbian personnel is excessive, and maintaining this silence requires constant deception and lies (Policy Hearings 1993, 569). The premise underlying “don’t tell” suggests that gays and lesbians are the only ones who “come out” and make others aware of their sexual orientation, while heterosexual orientation lacks this public facet because heterosexuals rarely make such declarations. Senator John McCain, for example, describes the “Don’t Ask, Don’t Tell” policy as establishing a situation in which “one’s sexual preference was not asked; in that way, we tolerate all sexual preferences” (Policy Hearings 1993, 692).

Such a claim is grossly misrepresentative, because the default is not silence but acknowledgment; it is silence that requires an act of will. A presumption of heterosexuality operates in this culture such that individuals are assumed to be heterosexual unless they specifically refute that assumption. Thus heterosexuals can be “out” without a word, while gay and lesbian visibility requires a more concerted effort. Just as important, however, heterosexual men and women announce or “flaunt” their sexuality in countless ways every day. Sometimes these statements are verbal: a reference to a lover or spouse by name or gender, the use of gender-specific pronouns when referring to a sexual attraction, or a statement of affection made to one’s lover or spouse in a public setting. Heterosexual women and men may openly discuss with others the activities they engage in with a lover or spouse, such as having and raising a child, buying a house, taking a vacation, visiting relatives, celebrating a birthday or holiday, or simply going out for the evening. They may indicate their sexual orientation through numerous nonverbal messages as well: adopting their spouse’s last name or hyphenating it with their own, displaying their lover’s or spouse’s picture on their desk, wearing an engagement or wedding ring, or publicly displaying affection through touching, hand-holding, hugging, or kissing. This sharing of one’s supposedly private life occurs many times every day, without a second thought, in the lives of
heterosexuals. The command to hide one’s sexuality thus forbids not only explicit statements of identity but also hundreds, if not thousands, of everyday forms of verbal and nonverbal expression. “Don’t tell” in this way demands an all-encompassing silence about one’s own life, a silence that can be maintained only by unwavering vigilance and ceaseless self-censorship.

This situation is exacerbated by the living conditions of active-duty military personnel, whose work may require them to live together twenty-four hours a day in very close quarters. In such an environment, there is literally no distinction between supposedly private space and shared, public space. Yet this incursion of public into ostensibly private space is not unique to the military context. In fact, the public/private split, which has its roots as far back as the Greek polis, hearkens to a societal structure that no longer exists.29 Given rapid technological expansion, the number and magnitude of the private spaces that a right to privacy ostensibly protects are quickly dwindling, and such spaces may soon be difficult to find at all. At a minimum, the advent of the Information Age and the encroachment of technology into many of our everyday activities mean that it is no longer possible to manage and restrict the dissemination of information about ourselves. Despite our best efforts, such information invariably reaches sources beyond our knowledge or control.

The line between public and private space is being challenged by sophisticated technological advances in ways it has never been before. Already there is dissension about whether and how such spaces should be regulated. Electronic mail, the Internet, the World Wide Web, and other developments have created a new kind of space: “cyberspace.” This shared space may be inhabited by an enormous number of people from all over the globe simultaneously, a concept that is already challenging the ways in which we think about the division of public and private.30 These changes and others ensure that whatever boundaries remain between public and private realms will be increasingly fluid and elastic.

Moreover, while the potential for securing a protected, private space may be appealing, privacy arguments are just as easily used to silence gays and lesbians as to liberate us. The pliant boundaries between public and private allow opponents to define any expression of same-sex orientation to any other human being as a public act, no matter how private the setting might appear. This definition narrows the realm of private life to encompass only that which goes on inside an individual’s head, so that all words and behaviors fall outside the realm of protected private expression. The structure of daily life and interactions, both in and out of the military, is such that there
is little space for such secrets to be kept, even with great effort. There is very little information about an individual that cannot be accessed by a determined pursuer, and the more one tries to hide information, the stronger will be the resolve of others to discover it. For these reasons, the private realm referenced by the privacy argument, with its impermeable, clearly delineated boundaries, no longer exists, and it would be nearly impossible for anyone to re-create or sustain.

By examining the connotations of secrecy in our culture, we can begin to understand the real costs of Nunn’s advice to gays and lesbians to keep their “private behavior private” (Policy Hearings 1993, 501). In American society, we are expected to share good news, to speak of accomplishments of which we are proud, to celebrate publicly our achievements or good fortune. We are also helped through sorrowful times—divorce, heartache, illness, death—by our ability to share our grief with others. Our life cycles are built around public rituals and ceremonies, bringing people together to recognize and rejoice in happy occasions and to commemorate sadness or loss. Advocating legal protection on the basis of privacy discounts the amount of public discourse that swirls around our so-called private lives. It ignores the ambiguity of the dividing line between these realms and the personal cost of attempting to keep secret the nature of one’s home and family life, including one’s intimate relationships, in a context where such information is usually shared.

If we lived in a culture where discussions of personal life, family relationships, and social life were widely prohibited or rarely present in the workplace or other public settings, it might be possible and even reasonable to maintain this degree of secrecy. But in American culture, where these elements of so-called private life are frequently, even constantly, discussed, the idea that a particular group of people can maintain silence in such discussions, and that such a silence will not in itself be read as incriminating evidence, is entirely implausible. Abstention itself can be implicit admission. “No comment” is itself a highly charged comment, and there are moments of silence that communicate far more than speech. Imposing the silence of privacy on one particular group and not another is unjust and unequal, a prescription for second-class citizenry. It is also impractical, as a pointed silence can be nearly as incriminating as a forthright declaration. The testimony of gay navy lieutenant Richard Dirk Selland illustrates vividly this phenomenon. When asked by the senators how others in his unit knew he was gay, he responded that there was “no conduct, no action . . . one lieutenant told me afterwards just simply the fact that on Friday nights, not
hanging out with him and a few others, and not discussing women at the
wardroom table, discussing my dates and so forth” (Policy Hearings 1993, 575).

Within this culture, then, secrecy is never neutral. The need for inordinate
secretiveness or deception about one’s personal life conveys, both to the
circumspect individual and to others who perceive this caution, a sense of
something wrong, the sign of a troubled life. We associate secrecy about our
personal lives with shameful problems: alcoholism, child abuse, domestic vi-
olence, drug abuse, mental illness. We hide that which we judge disgraceful:
our weaknesses, embarrassments, failings, the “skeletons in our closets”—
those things of which we are ashamed. Our culture maintains an implicit
equation between shame and secrecy, such that those things that cause us
shame lead us to keep secrets while those things that we are forced to keep
secret take on, by virtue of their hiddenness and our deception, an aura of
shamefulness. Those things that are not shameful we need not keep secret.
Only that which is stigmatized needs to be hidden from public view. The
more shocking the characteristic or deed, the more secretive we must be,
and the fewer people we are able to tell. Our most shameful sins are those
we can confess to no one, those we cannot and do not tell.

To the extent that it clears the way for a policy such as “Don’t Ask, Don’t
Tell,” the privacy argument implies that gay or lesbian identity is, by its na-
ture, offensive and disgraceful and best kept well hidden. Here, then, lies the
heart of the problem of the right-to-privacy arguments that abound in les-
bian and gay civil rights discourse generally and in the rhetoric of the mil-
itary debate particularly. The separation of status from conduct both is
premised upon and invites a defense of privacy and the attendant sacrifice
of the right to voice or visibility. Right-to-privacy arguments are antitheti-
cal to the achievement of the right to speak or be seen. They argue for legal
protection that extends only to what one does out of earshot and out of
sight, both in relation to the law and in relation to others who might be
likely to report one to the law. Such an approach to gay and lesbian rights
reinforces shame and undermines self-respect, precluding the achievement
of individual or collective pride and empowerment. At the same time, it
bolsters the efforts of anti-gay forces to portray homosexuality as a sordid
lifestyle and gays and lesbians as engaging in reproachable and scandalous
behavior.

By arguing for gay and lesbian rights based on the right to privacy, advo-
cates dispense with several of the most powerful and effective tools of social
change we have at our disposal. The means of empowerment available to us
are the same strategies that have been utilized in the struggles of other op-
pressed minorities: the freedom to assemble and to protest the denial of our rights through marches and other actions; the ability to lobby for political change and to pursue legal redress through the courts; and, crucially, the freedom to tell the stories of our lives by coming out. The freedom to speak openly about our lives influences directly those in our immediate environments, and indirectly a much broader community. If gay and lesbian oppression is characterized by invisibility and silence, arguing for rights based on privacy not only fails to undermine that oppression but actually codifies it into policy. While some civil rights can be won for individual gays and lesbians on the basis of a right to privacy, significant social change has never been accomplished while the group striving to bring about and reap the benefits of that change has remained hidden. If “coming out made gay liberation possible” (Cruikshank 1994, 9), then a return to the closet threatens to forestall further gains.

Awarding rights based on privacy represents a stringently limited concession to an oppressed minority group, and any victory on these grounds must be considered a highly qualified success. Perhaps nowhere are the tremendous constraints on gays and lesbians clearer than in General Norman Schwarzkopf’s explanation of what it would mean to accept gays in the military under the provisions of the “Don’t Ask, Don’t Tell” policy. He states:

If a person chooses to come into the military and does not practice a homosexual lifestyle, practices celibacy, does not try and announce openly that they are homosexual, does not choose to marry someone of the same sex and does not engage in homosexual acts, then for all intents and purposes they are not acting like a homosexual. And if they are serving their country honorably, I see no reason why they should not continue to do so. (Policy Hearings 1993, 618)

Yet even this extensive list of restrictions does not exhaust the possible constraints. Despite attorney Gorelick’s assertion that “something like marching in a gay rights parade, having known homosexual friends, making a speech, or reading books are not, in and of themselves, evidence or credible information of homosexual conduct,” she adds, “Now, that is not to say that they cannot be considered among other pieces of information by the commander in making his or her assessment” in an investigation of homosexuality (Policy Hearings 1993, 806). These statements jointly support the assertion that despite a “compromise” that ostensibly allows gays and lesbians...
to serve, ultimately it remains the policy of the U.S. military that “as a general rule . . . homosexuality is incompatible with military service” (Policy Hearings 1993, 790).

The “don’t tell” directive employs the fluid boundaries of an ever-shrinking private realm and an ever-growing domain of public life to obscure the questions it raises. The concept of “not telling” at first glance seems simple; it is a directive that prohibits statements acknowledging homosexuality. Yet the difficulties embedded here are innumerable, including the clarification of what constitutes a statement, what constitutes homosexuality, and what constitutes acknowledgment. Despite the military’s goal of a policy characterized by the utmost clarity, each of these questions is far more contentious, and the answers far more ambiguous, than the policy’s catchy nickname implies.

Insofar as the “don’t tell” directive rests on the underlying right-to-privacy argument, it raises the myriad difficulties enumerated above. An exchange between Senator William Cohen and Gorelick illustrates how much is conceded in the privacy argument. When Cohen asks Gorelick whether the new policy is designed as a measure that allows gays to “engage in a homosexual act or activities, provided it is not disclosed or discovered,” she replies, “No. The policy prohibits homosexual conduct.” She then confirms Cohen’s understanding that the measure of privacy is intended to “prevent the military from prying into the private life . . . but not to allow any activity on the part of that individual” (Policy Hearings 1993, 786).

The consequence, if not the purpose, of privacy arguments is to maintain, first, a clear line between self and Other and, second, the appearance of uniform heterosexuality and the absence of lesbians and gays, regardless of the fact that everyone knows they are present. “The military is far less concerned with having no homosexuals in the service than with having people think there are no homosexuals in the service” (Shilts 1993, 6). The privacy argument concentrates on accommodating fearful and prejudiced heterosexuals who, pressured to extend civil rights to gays and lesbians in the military, do so only under the condition that they need not see, hear, or in any way confront this issue or this group of people. Such accommodation perpetuates compulsory heterosexuality and its attendant privilege while ensuring the continued erasure of gay and lesbian existence. It neither challenges stereotypes nor encourages heterosexuals to change their attitudes or actions. On the contrary, it affirms the acceptability of their present behavior, resolutely reinscribing the military status quo.
Conclusion: “Outing” Homophobia in Military Policy

One of the most evident implications of the Cammermeyer case and the military ban generally is that the prejudices of heterosexuals, rather than the actual requirements of national security, govern military policy. This is a key point argued by Cammermeyer’s lawyers, as well as by other opponents of the ban. In written testimony submitted to the Senate, a group of legal scholars argues that the ban is unconstitutional based on precedents in which “the U.S. Supreme Court has ruled that the government cannot discriminate against an unpopular group based solely on the hostility of others toward that group” (Policy Hearings 1993, 838). More specifically, they note, “Even if the government could show that the hatred of others might cause some disruption in military efficiency, it would still not be legitimate for the government to discriminate against lesbians, gay men and bisexuals to minimize the disruption” (Policy Hearings 1993, 857).

The words of military leaders themselves attest to the attitudes of some heterosexual soldiers (in addition to their own negative attitudes) that lie at the heart of the ban. In his testimony to the Senate committee, Captain James Pledger admits, “I do not think there is any physical or mental or any other difference in [homosexual] capabilities compared with the heterosexual. But . . . it is the attitudes of the majority of the heterosexuals and their reactions to this type of behavior or orientation which begets behavior. Once it becomes known, it creates the problem that we would face” (Policy Hearings 1993, 557). Both the “behavior” and the “problem” here refer not to the conduct of gays and lesbians but to the reactions of heterosexuals to the knowledge of gay and lesbian soldiers.

Despite the relatively open acknowledgment of homophobia as the basis for the military’s exclusionary policy, military leaders design creative, if at times absurd, rationales that blame gay and lesbian service members for the reactions of their peers. In his testimony to the Senate committee, Commander Lin Hutton calls it “a real tragedy” when good soldiers come out. He states, “What those individuals have done is betrayed a trust, and they have betrayed that level of respect that their peers had for them by acknowledging their sexual orientation. . . . They have broken the bond with the rest of the group. And the rest of the group will just not trust them and they will not respect them” (Policy Hearings 1993, 557).

Similarly, Captain Gordon Holder identifies the prejudices of heterosexuals as responses that are intentionally evoked by gays and lesbians, a line of
argument that bears a striking similarity to the “logic” that blames women who are battered or raped for “provoking” male attacks. Holder asserts, “In the case of a homosexual person who suddenly declares themselves [sic] homosexual, I would ask what is the motive…. Is it possible that you are seeking a power move here to gain an advantage or to cause a divisiveness in the cohesion that we have worked very hard and that we need in order to effectively do our jobs?” (Policy Hearings 1993, 557). In light of the baldness of such statements in revealing the underpinnings of the military ban, Barry Adam asks rhetorically: “Can one avoid the conclusion then that the gays in the military question is not about gays in the military but about the dynamics and practices of the heterosexist mind?” (1994, 107).

The answer is readily supplied by the testimony of General Otjen. In his deposition for the Cammermeyer case, the general “candidly admitted” to have used terms of ridicule, such as fag, fairy, queer, and dyke, to refer to gays and lesbians. Even more to the point, as summarized in a legal brief submitted on behalf of Cammermeyer, the general “further candidly admitted that heterosexual servicemembers’ fear of and prejudice against homosexuals forms the basis for heterosexuals’ claimed unwillingness to serve with homosexuals, testifying that if there were no such prejudice there would be no basis for the military’s concerns” (Plaintiff’s Memo 1994, 15).

The recognition that heterosexual prejudice lies at the heart of the military ban is of great legal significance, because the motive of satisfying majority prejudice fails to fulfill the rational basis requirement. “A cardinal principle of equal protection law is that the federal government cannot discriminate against a class in order to give effect to the prejudice of others” (Cammermeyer v. Aspin 1994, 55). Despite the considerable latitude granted to the military by the civil courts in deference to its uniqueness as an institution (Robson 1992), the military is expressly forbidden to deny the constitutional rights of its members: “There is not and must never be a ‘military exception’ to the Constitution” (Cammermeyer v. Aspin 1994, 15). Thus, if the military’s various rationales boil down to a sanctioning of heterosexual prejudice against an unpopular group, its ban cannot be legally upheld. “Mere negative attitudes, or fear, are constitutionally impermissible bases for discriminatory government policies” (Cammermeyer v. Aspin 1994, 52). There is no justification for the ban that can withstand such a challenge.

It is on this basis that legal scholar Janet Halley argues that “the key to winning such [gay rights] cases is shifting the debate away from same-sex intercourse to antigay discrimination” (in Bull 1994, 30). By continuing to focus on “gays in the military” as opposed to prejudice against lesbians and
gays in the military, we locate the source of the problem in gay and lesbian service members rather than in the attitudes of homophobic military leaders and service members. As long as lesbians and gays are identified as the problem, they will likewise be the focus of the solution. The solutions implemented thus far have resulted in their removal or marginalization. Similarly, the military’s emphasis on homosexual sodomy alerts us only to the prohibited behavior of this group and makes it appear that the behavior is specific to them. It diverts our attention from the practice of sodomy by other populations, even if this practice is more prevalent among these other groups.

As long as we fail to undermine the discourse that frames the situation in terms of a “gay problem,” we leave unchallenged the underlying “homophobia problem” that truly needs resolution. Just as we ought not punish women for the pervasiveness of sexist behavior or blame people of color for the persistence of racism, we can find no acceptable rationale for eliminating gays and lesbians from military service, no matter what the sentiment against them. We need look no further than recent history to find examples of the magnitude of tragedy and injustice that ensue when an argument for “national security” is employed to give credence to national hatred and fear. Nazi concentration camps and World War II internment camps for Japanese Americans were “justified” under precisely such a rationale.

As this chapter illustrates, the assignment of group identity on the basis of a particular sexual behavior is not only controversial but inaccurate. The subsequent exclusion of members of that classification from the rights of citizenship is patently unconstitutional. Legal challenges to the ban will benefit from a mindfulness that “the equal protection clause requires courts to scrutinize not classes but acts of classification—not preexisting, given biological groupings of human persons but governmental determinations that certain persons shall belong and others shall not belong to a special favored or disfavored group” (Halley 1991, 356). More generally, a broad range of lesbian and gay rights initiatives would benefit from this same mindful focus. Arguments for gay and lesbian rights would be well served by expending less energy on establishing claims about the immutability of sexual orientation and directing greater effort toward challenging heterosexist biases and homophobic fears. In doing so, we open up the categories through which others see us and broaden the horizons within which we are able to view ourselves.