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WORD GAMES, WAR GAMES

Diane H. Mazur*

DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY.

In 1993, the country’s interest in the issue of military service by gay citizens escalated to a level that can only be described as a national obsession, and “obsession” is by no means too strong a term. The subject of gay servicemembers was debated within all three branches of government, all ranks of the military, and all walks of civilian life. The issue of military service by gay citizens became a line in the sand, a cultural standoff on issues as sensitive and disparate as sexuality, patriotism, civil rights, and civic obligation.

Janet Halley returns to that time of obsession in Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy. The title derives, of course, from “Don’t Ask, Don’t Tell,” the popular name reflective of a somewhat simplified understanding of the military policy that eventually emerged from the debate. Halley’s work compiles a painstaking and meticulous “archaeology” (p. 14) of the layers of influence that progressively shaped the nature of the military’s policy on gay servicemembers, from the earliest days of President Clinton’s intention to lift the ban through the final statutory codification of what is still described, perhaps misleadingly, as “Don’t Ask, Don’t Tell.” In explaining the process by which “Don’t Ask, Don’t Tell” became the legacy of a failed attempt to end the exclusion of gay citizens from national service, Halley unearths its interpretive history “controversy by controversy, line by line, and at times even word by word” (p. 14).

The centerpiece of Don’t is the firm conclusion that the present policy is “much, much worse” for gay servicemembers than the policy in effect when President Clinton assumed office (p. 1). In answering the question “What went wrong?,” Halley seeks to trace cause and effect to discover the independent semantic influences that were brought to bear on the 1993 policy revisions. Potential sources of influence — President Clinton, Congress, the military, legal challenges

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brought by gay servicemembers, defenses to those challenges crafted by the Department of Justice, and judicial rulings in response to those challenges and defenses — are investigated and assigned varying amounts of blame for acts of commission or omission that, in Halley's view, led to the enactment of the more burdensome “Don't Ask, Don't Tell.”

It is undoubtedly true that the climate for gay servicemembers has become much, much worse since the 1993 debate. That change in climate, however, has very little to do with the intricate legal semantics, scope, or substance of the legislative revisions leading to “Don't Ask, Don't Tell.” The legacy of the failed debate is not a statute that is in scope or substance any different from the previous policy; rather, it is a military with a greater institutional commitment to enforcing the exclusionary policy.

Halley's archaeology is as important for its unintentional illustrations as it is for its intentional ones. Its exhaustive chronology of years of legal advocacy on behalf of gay servicemembers is illuminating more for what it fails to find than for what it does find. It reveals, but only in a between-the-lines fashion, an important aspect of “What went wrong?” in the attempt to bury a policy of exclusion. This unexamined factor is the failure to understand the institutional context of the military, or the practical, factual ways in which military policy impacts the lives of gay servicemembers.

The door to “Don't Ask, Don't Tell” as the prevailing understanding of a gay citizen's opportunity for national service was first cracked opened, surprisingly, by legal advocates for gay plaintiffs. Years before President Clinton's involvement precipitated a more acute controversy, those seeking to overturn the ban had already initiated a high-stakes legal game of “chicken” with the military over its exclusionary policy. This was a game in which both sides seemed content to trade legal arguments confined to less-than-honest semantics — “word games” — rather than engage each other on a level that would recognize the practical effect their efforts would have on gay servicemembers. In this battle of word games, gay servicemembers were ultimately the only losers, and Halley's book is an accidental archaeology of this strategic conflict as well.

3. See SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON “DON'T ASK, DON'T TELL, DON'T PURSUE,” (Mar. 15, 1999) <http://www.sldn.org/reports/fifth/> (documenting increases in anti-gay harassment, violations of investigatory restrictions, and discharges of gay personnel in the years since “Don't Ask, Don't Tell” was enacted).

4. See Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).
I. UNDERSTANDING THE RULES OF THE GAME

The twin linchpins of the legal controversy concerning military service by gay citizens have been the words "status" and "conduct" — their meaning, their distinction, and their correlation with each other. It is shameful that such an important issue of civic obligation should be decided on the interpretation of two small words, but these two words now constitute the whole of the debate.

Halley's archaeology begins when the issue became a matter of public concern: when President Clinton declared his intention, shortly after his inauguration, to end the categorical exclusion of gay citizens from military service. The common understanding of Clinton's objective was that a better, fairer policy would "mark[] the end of discharging servicemembers for their status and the beginning of discharging them for their conduct" (p. 1). Under such a policy, servicemembers would be sanctioned not for "who they are" (in other words, simply because they are gay) but instead for "what they do" (if they behave in a way harmful to the military mission) (p. 1).

As Halley explains, one rational way to illustrate the difference between a policy based on status and one based on conduct would be to highlight the significance of misconduct in a military environment (p. 35). Acts of misconduct such as sexual harassment or sexual assault, for example ("what they do"), would be punishable whether committed by straight or gay servicemembers ("who they are"); individuals who do not engage in misconduct and who are otherwise qualified should be equally eligible to serve. This simple and intuitive understanding of the relationship between concepts of status and conduct, however, was fleeting and largely disregarded during the debate, despite President Clinton's naively persistent belief that a misconduct-oriented policy would be the central objective of any revision.5

Once any rational distinction between "who they are" and "what they do" is lost, concepts of status and conduct can be manipulated to justify exclusion as easily as to justify inclusion. Halley observes that "[e]very moving part of the new policy is designed to look like conduct regulation in order to hide the fact that it turns decisively on status" (p. 2). "What actually emerged from the legislative process was a complex new set of regulations that discharge people on grounds that

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5. See, e.g., The Transition: Excerpts from President-Elect's News Conference in Arkansas, N.Y. TIMES, Nov. 13, 1992, at A18 ("[T]he issue ought to be conduct. Has anybody done anything which would disqualify them, whether it's [the] Tailhook Scandal or something else."); William J. Clinton, Remarks Announcing the New Policy on Gays and Lesbians in the Military, in 29 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1369, 1370 (1993) ("The policy I am announcing today is, in my judgment, the right thing to do and the best way to do it. It is right because it provides greater protection to those who happen to be homosexual and want to serve their country honorably in uniform, obeying all the military's rules against sexual misconduct.").
tie status to conduct and conduct to status in surprising, devious, ingen­ious, perverse, and frightening ways” (p. 4).

How was such a simple and intuitive understanding of the relationship between status and conduct lost? How did the definition of conduct become so malleable and elusive that it could no longer be distinguished from status? Because the thesis of Don’t follows an intricate semantic path through the language of military policy, any review must set out at least the beginning and the end of the exercise — the language of the regulatory and statutory schemes that defined the military’s treatment of gay servicemembers both before and after the origin of “Don’t Ask, Don’t Tell.” Only then can the book’s claim that the current policy is “much, much worse than its predecessor” (p. 1) be put in context.

The military’s policy concerning gay servicemembers prior to its reexamination during the “Don’t Ask, Don’t Tell” debate was incorporated in the Department of Defense regulation\(^6\) that Halley terms “the Old DOD Policy” (pp. 19-20). The Old DOD Policy opened with precatory language asserting a military necessity for the exclusion of gay servicemembers: “Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.”\(^7\) The operative section of the regulation, however — the section setting out the elements that had to be proved to discharge an individual — required the following specific findings:

A member shall be separated under this section if one or more of the following approved findings is made:

1. The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . .
2. The member has stated that he or she is a homosexual . . . unless there is a further finding that the member is not a homosexual . . . . \(^8\)

Two definitional sections in the Old DOD Policy elaborated on the above disqualifying elements. A “homosexual act” was defined as “bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.”\(^9\) A “homosexual” was defined as “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.”\(^10\)

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\(^7\) § H(1)(a).
\(^8\) § H(1)(c)(1)-(2).
\(^9\) § H(1)(b)(3).
\(^10\) § H(1)(b)(1).
Under this prior regulatory scheme, therefore, the military could prove a basis for discharge in either of two ways. A servicemember could be separated upon a finding that he or she committed a "homosexual act" (a "conduct" case) or made a statement acknowledging his or her homosexuality (a "status" case). Halley describes the Old DOD Policy as "explicitly status-based" (p. 3) in that an individual's statement concerning his or her status ("that he or she is a homosexual") was service-disqualifying. Furthermore, the only defense to that disqualifying statement was equally status-based, requiring the military to find that the individual "is not a homosexual."

The federal codification of "Don't Ask, Don't Tell," which Halley terms "the Statute" (p. 20), largely tracks the Old DOD Policy in its basic form. The Statute similarly disqualifies citizens from military service on the basis of certain acts and certain statements. It differs, however, in its attempt to remove any connotation of status regulation. The Statute seeks to limit the legal significance of terms such as "homosexuality" and "homosexual," confining its reach to disqualifications that, in the military's view, can arguably be described as what people do and not who they are:

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

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . .

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.13

A definitional section similarly elaborates on the operational elements, with the same objective of removing status-based charges and defenses:

(f) Definitions. — In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" or "lesbian". [sic]

(3) The term "homosexual act" means —

...
(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).14

A reader of the "before" and "after" versions of the military's policy on service by gay citizens could not be faulted for failing to notice much of a difference. Acts of physical intimacy and statements acknowledging homosexuality still constitute bases for discharge. Disqualifying acts of intimacy, however, are now somewhat more broadly defined. As Halley notes, a nonplatonic holding of hands with someone of the same sex would support discharge from the military under the Statute because it would "demonstrate a propensity" to engage in prohibited sexual conduct (p. 4), even though handholding would not have constituted a "homosexual act" as previously defined. A much more subtle textual revision was also made with respect to "statement" or "status" cases. Under the Statute, a servicemember who has made a statement acknowledging his or her homosexuality can be retained in the military provided the servicemember can demonstrate that he or she has no propensity to engage in same-sex intimacy; the servicemember does not need to prove, as under the Old DOD Policy, that he or she is not a homosexual.

If one were searching for the ultimate definition of a distinction without a difference, it seems one could find it in the revisions made to military policy as a result of the "Don't Ask, Don't Tell" debate. Halley argues, however, that the present Statute is more "arbitrary, wide-reaching, and unpredictable" (p. 2) than its predecessor. She also contends that the Statute's coercive manipulation of status and conduct against gay servicemembers has its origin in the Justice Department's disingenuous application of an even more disingenuous opinion of the Supreme Court.

II. A WAR OF WORDS: STATUS AND CONDUCT

Halley finds the beginning of "Don't Ask, Don't Tell" in Bowers v. Hardwick,15 the uniformly criticized decision16 that declined to find any constitutional right to privacy that would protect two adults of the same sex from criminal prosecution for consensual sexual intimacy. "The new regulations ... translate the rhetoric of that baneful decision into rules of conduct for everyday life in the military" (p. 5). Halley

explains that *Hardwick* provided the model for the military’s later manipulation of the status/conduct distinction by refusing to recognize that the Georgia statute at issue defined sodomy without reference to the sex of the partners (pp. 7-8). The Court had to deliberately disregard the law’s application to heterosexual sodomy to justify its decision on the basis of historical animus toward gay people. Only then, as Halley explains, could a sex-neutral sodomy provision be upheld on the basis that it “rationally expressed a popular judgment that homosexuality was morally wrong” (p. 9). This facile interchange between conduct and status, according to Halley, is what made *Hardwick* such a perfect vehicle for anti-gay military policy. “[T]he Court’s logic appears to depend on acts, but actually depends on persons.”17

Why the importance of concepts of status and conduct? Legal maneuvering over status and conduct with respect to gay servicemembers actually predates *Hardwick*,18 arising instead from earlier criminal “status” cases such as *Robinson v. California*19 and *Powell v. Texas*.20 *Robinson* and *Powell* stand for the proposition that an individual cannot be criminally prosecuted merely for having a “status” such as addiction to drugs or to alcohol; a criminal conviction must be based on specific provable conduct, such as the possession or sale of narcotics or an incident of public intoxication.21

These criminal status cases have always been a poor fit with military discrimination cases because proceedings against gay servicemembers rarely involve criminal charges. Although the Uniform Code of Military Justice includes a criminal sodomy law22 — applica-

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17. P. 9; see also pp. 71-72 (finding the genesis of “Don’t Ask, Don’t Tell” in *Hardwick*’s “management of the status/conduct distinction”). It may be a stretch to characterize *Hardwick* as a “status” case in the same sense that status is employed in cases concerning the military’s exclusionary policy. Halley states that *Hardwick* provides “an offer of immunity to anyone willing to identify as heterosexual,” p. 10, but that is almost certainly incorrect. A self-identified heterosexual who engaged, for whatever reason, in an act of same-sex sodomy would not be immunized from prosecution based on his or her sexual orientation. It would be more accurate to state that the opinion rewrote the sodomy statute as if it were limited by biological sex, with sodomy constituting a crime only when committed, for example, by two males. While *Hardwick* is factually and legally illogical, based on a “very sloppy, inaccurate, self-blinding history,” p. 9, it does not rely on confusion between status and conduct.

18. See Matthews v. Marsh, 755 F.2d 182, 183 (1st Cir. 1985) (“Matthews has not challenged the Army’s right to disenroll her for her homosexual conduct, but only for her status . . . .”); Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964, 976 (E.D. Wis. 1980) (“[T]he Army’s policy of discharging people simply for having homosexual personalities also offends privacy interests . . . .”).


21. See *Powell*, 392 U.S. at 532; *Robinson*, 370 U.S. at 666.

ble to both heterosexual and homosexual conduct — discharges of gay servicemembers very rarely involve sodomy charges.23 Under the language of the military's policy governing the administrative discharge of gay servicemembers, whether before or after the "Don't Ask, Don't Tell" revisions, a range of behavior far more comprehensive than an act of sodomy constitutes a basis for discharge.

More importantly, criminal status cases have been a poor fit because, outside the criminal context, status and conduct can never be neatly separated from each other. In criminal cases, conduct can be set apart from status because some particular conduct must always be specifically identified, charged, and proven. In military discrimination cases, in contrast, specifically charged conduct is often not at issue. Status and conduct are not as easily distinguished when, for example, the controversy concerns proof that a servicemember is not a homosexual (under the Old DOD Policy) or has no propensity to engage in homosexual acts (under the Statute). The practical difficulty of defining these elements solely in terms of status, however, has not prevented advocates for gay military plaintiffs from forcing an artificial distinction from conduct in an attempt to establish some status-based constitutional protection. That effort has contributed to the current state of "Don't Ask, Don't Tell" as much as the efforts of those opposed to the service of gay citizens.

Advocates for gay plaintiffs have traditionally chosen to litigate pure "statement" cases when challenging the military's exclusionary policies, for the most part conceding the military's interest in excluding those who engage in, or have an intent or propensity to engage in, any form of same-sex intimate conduct.24 The battle is drawn on plaintiffs' contention that a servicemember's gay sexual orientation, or status, is unrelated to any intent or propensity to engage in gay intimacy or conduct. As a result, according to this argument, servicemembers who make statements identifying themselves as gay should


24. One notable exception has been Chai Feldblum, a law professor at Georgetown University Law Center. See Chai R. Feldblum, Sexual Orientation, Morality, and the Law: Devlin Revisited, 57 U. PITT. L. REV. 237, 294 (1996) ("The intense effort on the part of some gay legal advocates to avoid the Hardwick trap by decoupling sexual orientation from sexual conduct leads to some Alice-in-Wonderland claims, which might be amusing if the outcome of the effort were not so potentially destructive."); see also Chandler Burr, Friendly Fire: How Politics Shaped Policy on Gays in the Military, CAL. LAW., June 1994, at 54 (highlighting Professor Feldblum's service as the legal adviser for the Campaign for Military Service and her singular effort to discourage reliance on a distinction between status and conduct).
not be subject to discharge because their statements demonstrate nothing about the risk that is the military's purported concern: the risk that same-sex intimacy is more likely to occur within the military if self-identified gay citizens are permitted to serve.

The fundamental weakness of the status/conduct distinction as employed in discrimination cases extends beyond its faulty application to gay servicemembers. Its weakness is that “status” never exists in a vacuum; it is always defined, at some level, by reference to the conduct from which it is generated. Halley offers several examples of legal status akin to sexual orientation, such as husband and wife, serf and prince, and felon (p. 29). None of these statuses, of course, can be achieved without some form of associated conduct; one cannot “be” a husband or wife, for example, without taking part in a ceremony of marriage and subsequently engaging in the activities of life as a couple rather than as a single individual. The mistake in adopting a forced distinction between status and conduct on behalf of gay servicemembers is found in the assumption that it is possible to be just metaphysically gay — a sterile, stark orientation or status — and not engage in conduct, or have any propensity to engage in conduct, that is inextricably associated with that status.

In Don’t, Halley has a conflicted perspective on the status/conduct distinction as employed in military discrimination cases. She does recognize the absurdity of arguing that statements of sexual orientation are irrelevant to military judgments concerning future sexual behavior when she writes that:

> While it might have been plausible for [plaintiffs] to claim that a servicemember should not be discharged on the basis of conduct for which there is no proof, it is quite a different matter to claim that his or her self-description as “homosexual” refers to “status” alone and has nothing to do with homosexual conduct.

(p. 62)

At the same time, however, she lapses into frustration over the legal consequences of practical reality, characterizing any suggestion that statements concerning sexual orientation are indicative of propensity for conduct as “merest supposition” (p. 113) or “freewheeling lawyering” (pp. 138-39 n.12). “The overarching mechanism of the new military anti-gay policy is not status or conduct, but a newly volatile, artifactual relationship between them” (p. 126).

As much as Halley criticizes the military’s interpretation of the relationship between status and conduct, she seems to admit that the concepts cannot be separated. Her objection may be instead that the status/conduct distinction, initially employed by advocates for gay plaintiffs despite its artificiality, was ultimately turned around and used to construct an equally irrational “Don’t Ask, Don’t Tell” regime that left no realistic window for military service by gay citizens. Halley aptly captures the centrality of “propensity” to this exclusionary effort, a concept that highlights the link between status and conduct and
allows the military to sweep a "truly startling" (p. 108) range of behavior within the scope of the Statute.

Halley saves particular criticism for the Statute's use of propensity as a disqualification for military service. Recall that, under the Statute, a servicemember who makes a statement that he or she is gay must disprove any propensity to engage in same-sex intimacy to avoid discharge. Halley argues that this burden, also termed the "opportunity to rebut" (p. 86), is unfair to the servicemember because propensity "is an ambiguous term, referring just as much to homosexual status as to homosexual acts" (p. 16). While Halley is correct that propensity is well described as a hybrid of status and conduct, it is hardly ambiguous. The status of being gay (an issue under the Old DOD Policy) can reasonably be described as comprising a propensity to engage in the conduct of same-sex intimacy (the substituted linguistic focus of the Statute).25 Taking the reverse perspective, having a propensity to engage in certain behavior is just another way of describing one's orientation or status. The terms of the Statute are neither "new" (p. 57) nor a "novelty" (p. 66); they are merely the playing pieces of word games designed to exclude the same servicemembers as before while creating the appearance of concern for conduct rather than status.

It is ironic that Halley complains of the unfairness of having to prove a negative: proof that an individual has no propensity for same-sex intimacy despite his or her self-identification as gay. This burden was the inevitable end point of a litigation strategy on behalf of gay servicemembers arguing that statements of status indicated nothing about propensity for conduct.26 The military may have discovered an advantage in co-opting this strategy and asking that gay servicemembers be forced to prove what their lawyers had always insisted was true. The strategy backfired, of course, once plaintiffs realized that they now carried the burden of proving something that was always inherently ridiculous. It should not be surprising that attempts by gay

25. One need not believe that "status define[s] conduct" or that "the possibility of conduct was conclusive proof of its actuality," p. 85, to accept that sexual orientation serves as a means to describe propensity for conduct. Professor Halley has employed this common-sense understanding of sexual orientation in an earlier analysis of sexual identity issues. See Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. REV. 915 (1989). "Thus, 'gays' and 'gay men and lesbians' refer to people who have acknowledged, at least to themselves, that their sexual desires or practices are often, predominantly, or entirely homoerotic." Id. at 916 n.5.

26. See, e.g., Steffan v. Perry, 41 F.3d 677, 689 (D.C. Cir. 1994) (en banc) ("Nevertheless, Steffan, in order to make his point, would have us see homosexual status — which is all that he should be thought to have acknowledged — as conceptually unrelated to homosexual conduct.") (affirming 1987 discharge under pre-"Don't Ask, Don't Tell" regulations).
servicemembers to disprove any propensity to lead gay lives have been largely unsuccessful.  

The disaster of relying on a distinction between status and conduct demonstrates the danger of crafting legal arguments without reference to practical consequence. Once status and conduct were outlined as nonoverlapping entities, unrelated to and uncorrelated with each other, it became a much smaller step for the military narrowly to define "mere status" as some imperceptible state of being. Conveniently, as soon as status becomes perceptible, it potentially becomes conduct subject to the military's control. By rigidly defining status as "not conduct," and conduct as "not status," status itself could be drained of all significance. Halley recognizes the military's theft and redeployment of the status/conduct distinction, noting that "[c]onduct is, at least in a military context, always public while status is an inner and hence potentially secret characteristic of persons" (p. 30). She fails, however, to assign responsibility for its creation. Both sides attempted to win points with irrationality; an irrational policy should have been a foreseeable result.

III. THE DANGERS OF ISOLATIONISM: LAW OUT OF CONTEXT

To understand the "legal discourses" of "Don't Ask, Don't Tell," Halley counsels the reader to "pay attention to the peculiarities of particular institutional settings" (pp. 11-12). Left unstated in her history, however, is the fact that advocates for gay servicemembers have made little effort to understand the military institutional setting within which the exclusionary policy has operated both before and after "Don't Ask, Don't Tell." Given the historical bias against the military and military service held by gay advocacy groups, it is likely that this experiential gap contributed to litigation choices that, in the long run, were counterproductive to the cause.

Why, for example, did the policy that emerged from the debate center on notions of "Don't Ask" and "Don't Tell"? The Statute is asymmetrically silent with respect to "Don't Ask," its benefits, such as

27. See pp. 99-105. Halley also notes with disapproval that the most successful rebuttal strategy to counter the presumption of propensity arising from a servicemember's statement that he or she is gay has been the production of evidence that the servicemember is, in fact, fundamentally heterosexual. These "affirmations of heterosexual status" would demonstrate, in essence, that the original statement was an incorrect self-characterization. P. 100. Halley believes this is an inappropriate distinction based on status, but in what other way could a servicemember rebut a propensity for gay conduct, when gay orientation is another way to describe a propensity for gay conduct?

28. See pp. 23-24; see also Diane H. Mazur, The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation, 29 U.C. DAVIS L. REV. 223, 272 (1996) [hereinafter Mazur, Unknown Soldier] ("While [gay activists] realized the importance of equal access to the performance of public service, military service was not the kind of public service they were interested in performing." (footnote omitted)).
they are, are found within implementing regulations by the Department of Defense. First, new recruits are no longer asked at induction whether they are gay or have engaged in same-sex intimacy. Second, current servicemembers should be questioned only if a commander has "credible information that there is a basis for discharge" under the Statute — something more than "rumor, suspicion, or capricious claims" or "the opinions of others" that a servicemember is gay. Halley concludes that President Clinton made a very poor trade when he acceded to "Don't Tell" in exchange for the relatively trivial benefits of "Don't Ask." "[W]hat he did not anticipate was that between 'don't ask' and 'don't tell' lay ample territory for anti-gay status-based regulation" (p. 48).

The military's determination to eliminate any opportunity for "telling" is in part the continuation of a policy that already prohibited statements of self-identification by gay servicemembers. More significantly, however, the military's focus on the importance of "Don't Tell" was likely a reaction to the nature of test cases advanced by gay servicemembers. By the time of the national conversation concerning "Don't Ask, Don't Tell," the standard legal challenge to the exclusionary policy had taken the form of a "pure status" claim, initiated by a servicemember's public announcement that he was gay. Halley observes that the "chief unresolved issue" in drafting revisions to the policy was "whether the military could discharge servicemembers who had engaged in no provable same-sex erotic acts but who stated that they were gay" (p. 70). This issue received the most attention, however, only because advocates had been framing their claims in terms of latitude for public announcement, a context that was unrepresentative of the manner in which the policy routinely af-

29. See Qualification Standards for Enlistment, Appointment, and Induction, DOD Directive 1304.26, enclosure 1.2.8.1 (Dec. 21, 1993) <http://web7.whs.osd.mil>. This procedural change, however, was the smallest of concessions by the military, carrying no practical consequence whatsoever. I doubt the induction questions were effective in excluding any gay citizens from the military; everyone, obviously, answers in the negative.


fected the lives of gay servicemembers. Advocates could have chosen instead to defend servicemembers who had been discharged after discovery that they, like their heterosexual colleagues, led lives that included intimacy, but those cases were largely disregarded because they failed to fit within artificial parameters that required a bare statement of self-identification coupled with a denial (however incredible) of interest in intimacy. As Halley notes, “advocates are under rhetorical constraints that make such an assertion of a right to status protection almost *de rigueur*” (p. 116).

Once Congress became obsessed with the revelations gay servicemembers might make about themselves in a military context, the discussion shifted to the military’s investigatory interest in the discovery and deterrence of this prohibited “telling.” Unfortunately, when investigations can be initiated on the basis of any information more substantive than mere rumor, suspicion, or opinion, a simple failure of secrecy may become indistinguishable from “telling.” Perhaps this threshold of required evidence provides some limited protection against the most indiscriminate intrusions, but it still leaves gay servicemembers with the impossible obligation to maintain complete secrecy concerning the routine nature of what they do, where they go, and whom they see, far exceeding the scope of information more directly associated with intimate behavior. Kay Kavanagh has eloquently explained why the policy’s prohibition of statements concerning sexual orientation is not its most intrusive burden: “Rather, it involves making truly unremarkable disclosures, such as *with whom* one goes grocery shopping, shares a checking account, takes a vacation . . . *from whom* one receives a phone call, a message, or flowers on one’s birthday; and *with or without whom* one goes home for the holidays.”

Advocates for gay servicemembers have never completely understood the consequences of their decision to favor public statements of orientation over the inescapably ordinary conduct of everyday life — conduct that is almost always private but almost never secret. Latitude for public announcement offers nothing to gay servicemembers if unaccompanied by latitude for the routine indicia of intimate life. Status protection can shield only the most superficial of statements; matters of greater significance will inevitably be construed as conduct subject to investigation.

32. *See* Mazur, *Unknown Soldier, supra* note 28, at 231-32 (discussing Walmer v. United States Dep’t of Defense, 52 F.3d 851 (10th Cir. 1995), in which a female officer was discharged four years prior to retirement after her partner in a previous long-term relationship reported their involvement to the Army).

One of the weaknesses of advocacy on behalf of gay servicemen under "Don't Ask, Don't Tell" is a tendency to exaggerate the irrationality of the policy, and Don't succumbs to that same temptation. Exaggeration is hardly necessary, as the policy is quite irrational on its own. Unfortunately, hyperbole can take the place of considered criticism, just as the semantics of status and conduct took the place of attention to practical consequence in devising litigation strategy.

As an example, Halley mischaracterizes the difference between conduct that, under DOD regulation, can trigger an investigation and conduct that, under the Statute, can constitute a basis for discharge. Conduct that can trigger an investigation comprises a much broader category than conduct that warrants discharge, in the same sense that the scope of information subject to discovery is broader than the scope of evidence admissible at trial. Discharges must be based on prohibited statements or conduct, while investigations designed to discover prohibited statements or conduct can be initiated solely on the basis of credible information tending to suggest a servicemember's propensity for same-sex intimacy.

Halley is absolutely correct to criticize a regulatory scheme that permits commanders to initiate an investigation "on the basis of conduct that makes them think a servicemember is gay" (p. 110). This is the very reason that "Don't Ask, Don't Tell" is no different in scope from its earlier, presumably more status-based, version. It takes a good point too far, however, to allege that the military is actually discharging people on the basis of behavior that merely "looks gay" (pp. 2; 5; 51-52; 109; 115). No discharge proceeding under "Don't Ask, Don't Tell" has ever imposed a burden to disprove propensity for same-sex intimacy on any basis other than the servicemember's verbal or written statement to the effect of "I am gay." Therefore, it is extremely misleading to suggest, for example, that servicemembers can...

34. "Credible information" justifying further investigation includes a report of "behavior that amounts to a non-verbal statement by a member that he or she is a homosexual..." Guidelines for Fact-Finding Inquiries, supra note 30, at enclosure 3.A4.1.3.4.3. The potentially limitless range of pedestrian behavior that would be probative of a servicemember's intimate life is, paradoxically, restricted only by an express exemption for some of the most stereotypically gay (and disproportionately male) associational activity, such as going to gay bars, reading gay magazines, and marching in gay rights parades. "Such activity, in and of itself, does not provide evidence of homosexual conduct." Id. at enclosure 3.A4.1.3.3.4. In her congressional testimony, Jamie Gorelick, General Counsel for the Department of Defense, emphasized that commanders in the field would have the discretion to determine whether information was sufficiently credible to initiate an investigation, particularly under "gray area" circumstances not specifically addressed by regulation. See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103d Cong. 178-79 (1993) [hereinafter House Military Forces Hearings]. The nature of the conduct that would justify the initiation of a factual investigation by a commander is perhaps the most important aspect of how "Don't Ask, Don't Tell" will affect gay servicemembers on a routine basis. Once an investigation begins, given enough interest, time, and effort, it is likely that disqualifying statements or conduct will be discovered.
be discharged for the style of their haircuts or their failure to fit the expected gender stereotype (p. 2). Such hyperbole obscures the effort to explain how the policy impacts servicemembers on a routine and not a test-case basis.\(^\text{35}\)

Exaggerations of the way in which the policy operates inevitably lead to assertions that, by association, weaken credible arguments. One strategy is to contend that "Don't Ask, Don't Tell" will result in discharges of heterosexual servicemembers, presumably justifying reform either because the Statute is inaccurate in its identification of gay individuals or, more realistically, because the Statute is now harming citizens of concern to the military. Halley speculates, for example, that "[w]hen a commander thinks that women who want to serve in the military are probably lesbians, every act of every woman in that unit manifests a propensity" (p. 5) and that "few servicemembers can possibly be so unambiguously straight that they will never wonder whether a reasonable person might construe their actions as homosexual conduct" (p. 118).

Advocates have consistently failed to offer representative examples of how the exclusionary policy most commonly affects gay servicemembers, so Don't cannot be entirely faulted for following that lead. These arguments are harmful, however, not only because there is absolutely no evidence that "Don't Ask, Don't Tell" is leading to discharges of straight servicemembers,\(^\text{36}\) but also because they trivialize the effect the policy actually does have on gay servicemembers. When people lead heterosexual lives their everyday behavior routinely tends to indicate a propensity for heterosexual conduct and routinely tends to immunize them from scrutiny under "Don't Ask, Don't Tell."\(^\text{37}\) The reason that gay servicemembers are so severely affected

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35. What is the benefit, for example, of raising spurious allegations that the military violates "Don't Ask" restrictions when advocates could instead focus on actual violations or, even more productively, highlight the unconscionable effect of the Statute even when applied according to its terms? Halley criticizes the military for questioning servicemembers about their sexual status and conduct after they had already made public statements acknowledging that they were gay. See pp. 50-51, 113-14. The original idea was, of course, "Don't Ask," not "Don't Ever Ask." It is certainly a lesser intrusion, and one authorized by the regulatory scheme, to "ask" once a servicemember has already violated the Statute by making a statement.

36. See Diane H. Mazur, A Call to Arms, 22 HARV. WOMEN'S L.J. 39, 52-54 (1999) [hereinafter Mazur, A Call to Arms] (examining the assumption that servicemen frequently retaliate against servicewomen who refuse their sexual advances by threatening their careers with accusations of homosexuality).

37. See Melissa S. Herbert, Guarding the Nation, Guarding Ourselves: The Management of Hetero/Homo/Sexuality Among Women in the Military, 15 MINERVA: Q. REP. ON WOMEN & MIL. 60 (1997) <http://www.softlineweb.com/bin/KaStasGw.exe?k_a=ncmq.t.1.searchwin.w> (surveying whether female servicemembers and veterans, both gay and straight, had altered their behavior while in the military to avoid accusations of homosexuality; finding that only one in ten straight women engaged in behavior designed to create an aura of heterosexuality, while five in ten gay women did so). "Although homophobia affects all women, there is no reason we would expect a significant number of heterosexual women
by "Don't Ask, Don't Tell" is that the most routine aspects of their everyday conduct will eventually reveal credible information that they do, in fact, lead gay lives. When legal arguments emphasize theoretical harms to straight servicemembers rather than pragmatic consequences for gay servicemembers, they blur the actual reach of the policy and dilute the strength of arguments for its revision or repeal.

IV. THE IMPORTANCE OF DISCRETION

There is no question that the environment in which gay citizens perform military service has grown more burdensome and more intrusive in the years since the enactment of "Don’t Ask, Don’t Tell." The more difficult question is why this circumstance has come to be. Halley finds the cause in subtle revisions to the language of the military's exclusionary policy that now permit the manipulative exercise of military discretion (p. 107). This legalistic perspective, however — one that had to be stretched to identify even small semantic differences — prevents consideration of larger institutional influences that shape the way in which the policy operates in practice. Perhaps it is the special weakness of lawyers to focus on the significance of words to the exclusion of context, but in this instance that weakness has made it more difficult to construct a persuasive case for reform.

An analogy based on a comparison of "Don't Ask, Don't Tell" to the small number of remaining criminal statutes prohibiting adultery may illustrate this distinction between language and institutional context. The handful of state adultery statutes not yet repealed are obsolete and no longer enforced; the military's adultery prohibition, however, is still actively prosecuted. If one were interested in examining the comparative burden that these statutes impose on the sexual lives of citizens of various jurisdictions, the most significant factor for study probably would not be any subtle drafting differences in how these crimes were statutorily defined. The far more significant factor in assessing comparative burden would be the degree to which, and the manner in which, the statutes were enforced. Two statutes that defined adultery in different ways, but were equally without enforcement, would impose equally negligible burdens. Two identically drafted statutes, however, would impose very different burdens on citizens if one was enforced and the other was not.

"Don't Ask, Don't Tell" is analogous in that the exclusionary policy has been subject to great variation in discretionary enforcement.

to be so sensitive to this fact that they would consciously work to avoid such labeling. It may be that their everyday behaviors are enough to allay suspicions.” Id. at 72.

Much as it may be a surprise to advocates whose first exposure to the policy came in the era of “Don’t Ask, Don’t Tell,” the military has in the recent past exercised a significant amount of discretion in nonenforcement of the policy. This is not to suggest, of course, that gay servicemembers were unaffected by their official exclusion, but rather that the policy was leavened during the previous generation by a significant level of awareness of the service of gay citizens and a significant degree of sentiment that the policy should not be enforced.

Randy Shilts’s Conduct Unbecoming illustrates the conflicted combination of widespread nonenforcement and sporadic overenforcement of the policy that characterized the era between the Vietnam and Persian Gulf conflicts. Shilts documents the not uncommon understanding of both commissioned and noncommissioned officers that the gay servicemembers within their units were necessary to the mission and that it would be counterproductive to seek their discharge. As just one of a number of examples, Shilts cites the experience of one former Pentagon official who found consistently strong support for reversal of the exclusionary policy throughout the senior officer and enlisted ranks during his presentations on Air Force bases, under circumstances in which public posturing was unnecessary. It was also not particularly uncommon during this era for senior officers to recognize implicitly the gay partners of servicemembers and include them in social events. Enforcement of the exclusionary policy was driven much more by individual predilection or bias than institutional understanding.

This is the institutional discretion we have lost in the era of “Don’t Ask, Don’t Tell,” a discretion that historically has been found not in the policy’s language but in its nonenforcement. The reason we see tremendous increases in the numbers of gay servicemembers discharged after the enactment of a policy that was presumably designed to provide some small window of opportunity for service is because the military now operates with a clear institutional mandate of full, even obsessive, enforcement.

Halley’s work does examine the military’s use of discretion, but she searches for the source of that discretion within the language of “Don’t Ask, Don’t Tell” rather than within the institution itself. Her statutory analysis disregards the reality that the military is an inher-


40. The discretionary enforcement of the policy might be compared to the danger of being hit by lightning. While it was statistically unlikely that an individual gay servicemember would be hit, if that servicemember was hit, he or she was really going to get burned.


42. See id. at 460.

43. See id. at 532-34.
ently discretionary world, with a commander's discretion nearly sacro-
sanct; the degree of discretion exercised outside the language of mili-
tary law will certainly exceed that exercised within it.

Halley overestimates the relationship between statutory language
and the exercise of military discretion when, for example, she criticizes
the Statute's "starkly different procedural tracks for personnel ac-
cused of same-sex sodomy and those accused of cross-sex consensual
sodomy" (pp. 37-38). In an effort to ameliorate what was perhaps the
most severe application of the exclusionary policy, the military agreed
as part of "Don't Ask, Don't Tell" that it would no longer refer for
criminal prosecution — and potential imprisonment — allegations of
consensual sodomy between individuals of the same sex. Instead the
matter would be handled as an administrative violation justifying dis-
charge under "Don't Ask, Don't Tell."44

This shift from "a formally neutral procedure," under which both
heterosexual and homosexual servicemembers would theoretically be
subject to criminal prosecution for sodomy, to "an explicitly discrimi-
natory one," under which commanders can make a discretionary
choice to retain heterosexual violators, draws Halley's criticism (p.
38). But certainly she could not have preferred the alternative. This
revision does not establish "starkly different procedural tracks"; it
continues the long-standing discretionary understanding of nonen-
forcement against heterosexual violators of the sodomy law. "Proce-
dure" cannot be a relevant factor when allegations of consensual het-
erosexual sodomy are nonexistent and commanders are never asked to
make conscious decisions whether to prosecute those violations. Het-
erosexual sodomy is not protected by a procedural privilege; it is pro-
tected by an accepted practice of nonenforcement.

Similarly, Halley charges that the Statute provides an explicitly
status-based, procedural privilege for self-identifying heterosexuals to
engage in homosexual intimate conduct (p. 39). Halley refers to a
provision of "Don't Ask, Don't Tell" carried forward from its prede-
cessor that allows a servicemember to be retained despite having en-
gaged in same-sex intimacy if the conduct "is a departure from the
member's usual and customary behavior," "is unlikely to recur," and
"was not accomplished by use of force"; the servicemember's reten-
tion is consistent with "proper discipline, good order, and morale";
and the servicemember "does not have a propensity or intent to en-
gage in homosexual acts."45 Halley argues that this procedural privi-
lege "protects heterosexual persons from any status-like consequences
of their homosexual acts" (pp. 46-47).

44. See Investigations of Sexual Misconduct by the Defense Criminal Investigative Or-
ganizations and Other DOD Law Enforcement Organizations, DOD Instruction 5505.8 (Feb.

This provision is a common focus of criticism for advocates challenging the policy. Why should self-identified heterosexuals be permitted to engage in same-sex intimacy if that conduct is detrimental in a military environment? One could question how large a problem the military has with self-identified heterosexuals seeking protection for their same-sex intimate conduct. But even disregarding this particular logical weakness, Halley fails to cite a single instance in which this statutory defense has been applied. The likelihood that servicemembers who engage in same-sex intimacy will be able to convince the military that they are, in fact, heterosexual is almost nil. "Don't Ask, Don't Tell" actually provides a certain linguistic symmetry (in contrast to Halley's charge of "subtle asymmetry" (p. 47)) in its treatment of prohibited statements and conduct. In both cases, the opportunity to demonstrate a lack of propensity for same-sex intimacy leaves a statutory window for retention of gay servicemembers that is technically open but practically closed.

The statutory revisions to the military's exclusionary policy leading to "Don't Ask, Don't Tell" are irrelevant to the deterioration of the conditions under which gay servicemembers live. The policy has not changed; the military has changed, and for two reasons. First, the "Don't Ask, Don't Tell" debate itself changed the nature of the military. For the duration of the winter, spring, and summer of 1993, the military held, in effect, an institutional "teach in" that conveyed to its members the complete incompatibility of homosexuality with military service and the importance of discovering and expelling gay servicemembers within their midst. Statements by some of the military's most respected representatives contributed to an atmosphere of fear, disgust, and violence, and the recent tragedy in which a young Army enlisted man was beaten to death by his fellow servicemembers simply

46. See, e.g., Steffan v. Perry, 41 F.3d 677, 712-13 (D.C. Cir. 1994) (en banc) (Wald, J., dissenting); Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478 n.11 (9th Cir. 1994) ("However, DOD is prepared to take the risk that a servicemember who has committed a homosexual act but isn't homosexual won't do so again. For that reason, its argument is not wholly rational.").

47. The exception is probably intended to apply to circumstances in which the consensual or intentional nature of the sexual conduct is unclear. See Matlovich v. Secretary of the Air Force, 591 F.2d 852, 856 (D.C. Cir. 1978) (citing, in dicta, intoxication, youth, and undue influence as relevant factors under an earlier, but analogous, exception to the military's exclusionary policy).

48. See Mazur, Re-Making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?, 58 OHIO ST. L.J. 953, 983-91 (1997). Ultimately, it was the personal animus that straight servicemembers held for their gay colleagues that formed the most effective legal justification for the exclusionary policy. "The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(14) (1994). No court, however, has ever questioned the degree to which the military fostered the very climate it would use to justify "Don't Ask, Don't Tell."
because they thought he was gay\textsuperscript{49} can fairly be seen as the continuing legacy of the strategy of animus the military employed.\textsuperscript{50} The very existence of “Don’t Ask, Don’t Tell” is a continuing lesson for young servicemembers that their gay colleagues have no place within the military.

Second, research indicates that the military has become less and less politically representative of civilian society over the last twenty years.\textsuperscript{51} With the end of military conscription now one generation past, we have lost the draft-era officers and enlisted men that made the military a much more representative force. In its place we have a military in which young officers are increasingly “hard-right Republican, largely comfortable with the views of Rush Limbaugh,”\textsuperscript{52} an ideological shift that is more extreme in degree than the increasing conservatism of American society as a whole. The increasingly partisan conservatism of today’s military is remarkable in that it has developed despite the greater representation of women, and alarming in that political neutrality was once a professional ethic of military officers. “On the face of it, a large military that is becoming more politically active at the same time that it is increasingly concentrated on one end of the partisan and ideological spectrum is a cause for concern.”\textsuperscript{53} Given this convergence of social conservatism and military culture, the military’s fundamental(ist) resistance to national service by gay citizens is unsurprising. The disappointment is that we may have been politically closer to an acceptance of the contribution of gay servicemembers twenty years ago than we are today.

\textsuperscript{49} See Francis X. Clines, For Gay Soldier, a Daily Barrage of Threats and Slurs, N.Y. TIMES, Dec. 12, 1999, § 1, at 33.

\textsuperscript{50} There is some hope that this animus could diminish when the military no longer reminds servicemembers quite so often of the dangers presented by the presence of gay colleagues. According to periodic surveys taken by Professors Charles Moskos and Laura Miller, opposition to military service by gay citizens has steadily declined in the years since “Don’t Ask, Don’t Tell.” The percentage of male servicemembers who “strongly disagree” with a proposal to end the exclusionary policy has declined precipitously from 62% in April 1992 to 36% in August 1998. The percentage of men who are “not sure” whether gay servicemembers should be admitted or excluded has almost quadrupled, from 6% in April 1992 to 22% in August 1998. See Charles Moskos & Laura L. Miller, Nonrandom Surveys of Army Personnel (1998) (unpublished survey data, on file with the Michigan Law Review).

\textsuperscript{51} See OLE R. HOLSTI, A WIDENING GAP BETWEEN THE MILITARY AND CIVILIAN SOCIETY? SOME EVIDENCE, 1976-1996 (Project on U.S. Post Cold-War Civil-Military Relations Working Paper No. 13, 1997). The increasing ideological gap between the United States military and the society it is sworn to protect has become such a matter of concern that the October 1999 biennial conference of the Inter-University Seminar on Armed Forces and Society, the preeminent association dedicated to military research and scholarship, devoted two panels to the topic (“The Role of Institutions in the Civil-Military Culture Gap”; “What Is the U.S. Civil-Military Gap and What Does It Matter?”).

\textsuperscript{52} THOMAS E. RICKS, MAKING THE CORPS 280 (1997); see also Mazur, A Call to Arms, supra note 36 (arguing that increased distance between feminists and the military has contributed to a less representative military).

\textsuperscript{53} HOLSTI, supra note 51, at 18.
V. CONCLUSION: FINDING IRRATIONALITY

The solution to "Don't Ask, Don't Tell" may be, in a sense, as institutional as the problem. Even though these legislative revisions amounted to a distinction without a difference with respect to the scope of the policy as applied, the road to improvement is no less a legal one. Halley believes that the most significant opportunity for a reversal of "Don't Ask, Don't Tell" is in a judicial finding that "it is irrational to protect against conduct-based harm to military effectiveness when homosexuals engage in the conduct but not when heterosexuals do, or when open homosexuals rather than closeted ones commit it" (p. 128). There is no shortage of what could be found lacking in rational basis under an equal protection challenge to the policy, and Halley reviews several of the most likely possibilities: the idea that unit cohesion is somehow strengthened by the "legitimation of servicemembers' homophobic sensibilities"; that privacy is somehow protected by "secretive homosexual presence"; or that exclusion is somehow justified as an "accommodation[] to existing anti-gay animus" (pp. 128-29).

What Halley does not measure, however, is the influence of institutional deference. The military has been the beneficiary of an extraordinary level of judicial deference to its professional judgment in matters of national defense and military affairs. The Supreme Court, for example, stated:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Every judicial decision upholding the constitutionality of the military's exclusionary policy has relied on this obligation of deference in crediting the military's proffered justifications; it may be the single most important factor that prevents significant judicial review.

No one has ever questioned, however, whether the military's competence with respect to the service of gay citizens is any greater than, or even equal to, that of the courts. The military's assertion of professional judgment has never been questioned and the scope of military

55. Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (finding no justiciable controversy with respect to claim seeking judicial evaluation and supervision of Ohio National Guard training and operations following the Kent State incident).
56. See, e.g., Able v. United States, 155 F.3d 628, 632-34 (2d Cir. 1998); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1133 (9th Cir. 1997), cert. denied, 119 F.3d 794 (1999); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 925-27 (4th Cir. 1996) (en banc); Steffan v. Perry, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (en banc).
competence has never been defined; it is almost as if any subject in which the military asserts an interest becomes one in which the military enjoys special competence. With respect to the service of gay citizens, however, the military has demonstrated a particular lack of competence.

General Colin Powell, Chairman of the Joint Chiefs of Staff at the time "Don't Ask, Don't Tell" was adopted, revealed a breathtaking depth of ignorance when he testified to his belief that in three decades in the military he had never served with a gay servicemember — except for those who had been discovered and discharged. It is very difficult to reconcile General Powell's deliberate ignorance (or untruthfulness) with any judicial conclusion that the military deserves deference on the basis of its professional competence. The military purports to understand the effect that gay servicemembers have on mission effectiveness even though it drives the routine lives of those individuals underground and fosters fear and misunderstanding as a substitute. The military's professional judgment with respect to gay servicemembers has not been complex, subtle, or professional; there is perhaps no institution with less competence on the subject.

57. See Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan J., joined by Marshall, J., dissenting) ("If a branch of the military declares one of its rules sufficiently important to outweigh a service person's constitutional rights, it seems that the Court will accept that conclusion, no matter how absurd or unsupported it may be.").

58. See House Military Forces Hearings, supra note 34, at 62 (testimony of Gen. Colin Powell) ("I do not know any who were not discharged in the course of their service. I don't personally know of any who completed service."). Three other members of the Joint Chiefs professed a similar level of ignorance. See id.

59. General Powell's testimony was not challenged during the hearing, and it is possible that he sincerely believes he has never personally known a gay servicemember who has completed a term of military service. Given the tens of thousands of servicemembers with whom General Powell would have had some level of personal contact during his distinguished career, however, I find his testimony incredible — and convenient. Had General Powell admitted he knowingly served with gay people, he would have had to explain why he failed to seek their discharge, given his stated belief that open awareness of homosexuality is detrimental to military effectiveness.

My personal experience in military service during the late 1970s and early 1980s is that the vast majority of servicemembers were well aware of the sexual orientation of at least some of their gay colleagues. Recent statements by presidential candidate (and former naval aviator) John McCain are consistent with my experience. McCain noted in a very matter-of-fact fashion that he served with a number of gay people in the military. He explained that he was aware of that ordinary reality during his years of service because "we know by behavior and by attitudes." "I think that it's clear to some of us when some people have that lifestyle." Mike Allen, McCain Says He Can Identify Gays By Behavior, Attitudes, WASH. POST, Jan. 18, 2000, at A4; see also Scott Shuger, The Mark of McCain, SLATE MAG., Jan. 18, 2000, available in LEXIS, News Library, News Group File (interpreting McCain's statement to mean that "gaydar is pretty much universal").

McCain's statements underscore the difficulty for gay servicemembers under "Don't Ask, Don't Tell." The same ordinary behavior that informed him some of his colleagues were gay would constitute "credible information" warranting investigation by the military. See Guidelines for Fact-Finding Inquiries, supra note 30, at enclosure 3.A4.1.3.A.3.
Judicial deference to military policy decisions should be inappropriate under circumstances in which the "professional competence" at issue is derived from little more than assumptions about the characteristic behavior of groups of people. Professional judgment with respect to matters of a military nature has had a questionable history when based on predictions concerning how certain groups of people will most likely behave or how significantly their predicted behavior will affect military readiness.

*Korematsu v. United States*⁶⁰ is the infamous example. The military chose a policy of internment for American citizens of Japanese ancestry based on a professional judgment that some might contribute to the Japanese war effort. Another professional judgment concerning military readiness was upheld in *Rostker v. Goldberg*,⁶¹ in which Congress concluded that women would be of insufficient utility in a war effort to justify their registration for the draft. Without the protection of judicial deference that excuses military decisionmaking from any serious review, courts would be significantly more likely to discuss openly the irrationalities of professional judgment under "Don't Ask, Don't Tell."

When causation is institutional in origin, the solution is likely institutional as well. The word games that resulted in "Don't Ask, Don't Tell" failed to engage more fundamental questions of why the place of gay citizens within the military is eroding and why the lives of gay servicemembers are more difficult. Those word games also failed to engage the manner in which the military itself is changing. If citizens who serve in the military are becoming less and less politically representative of the citizens they protect and more partisanly conservative in their influence, the consequences are important not only for gay servicemembers but for women in the military as well. If a critical examination of "Don't Ask, Don't Tell" leads to reconsideration of how we as a society choose who will serve in the military and the conditions under which those citizens serve, a broken policy might someday be seen as the beginning of positive reform.

⁶⁰ 323 U.S. 214 (1944).