U.S. & Great Britain: Restrictions on Homosexuals in the Military as a Barricade to Effectiveness

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I. Introduction

In 1994, Graeme Grady was a Royal Air Force sergeant with high-level security clearance.\textsuperscript{2} He was assigned to the British Embassy in Washington, D.C., where he served as a chief clerk for Britain’s defense intelligence liaison staff.\textsuperscript{3} Unfortunately, at a self-help group meeting for married homosexuals, he was noticed by a private employee of his commanding officer.\textsuperscript{4} Soon thereafter, Grady was discharged from service.\textsuperscript{5} Today, he is one of four plaintiffs in a landmark case seeking to overturn the ban on homosexuals in the British military.\textsuperscript{6} Like many other homosexuals

\begin{itemize}
  \item According to the Department of Defense (DoD), a homosexual is “a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.” \textit{United States General Accounting Office, Report to Congressional Requesters, Defense Force Management: DoD's Policy on Homosexuality}, 103d Cong., 1st Sess., 2 (1992) [hereinafter GAO, DoD's Policy on Homosexuality]. The DoD defines a homosexual act as “bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.” \textit{Id.} at 2.
  \item Bill Glauber, \textit{Ex-Servicemen Want to Toss Out Britain's Ban on Gays in Military}, \textit{Seattle Times}, May 19, 1995, at A18.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} \textit{See discussion infra} part II.B.3. The armed forces are comprised of the Royal Navy, the Royal Air Force, and the Army. \textit{U.K: Sacked Four Launch}
\end{itemize}
in the British Armed Forces, Grady was forced to keep his homosexuality a secret in order to avoid certain and immediate discharge upon discovery.

The debate over homosexuals in the military has sparked considerable interest over the last few years in the United States, as well as in Great Britain. In both countries, military and civilian life are fundamentally different because the military necessarily adheres to a different and stricter code of conduct and justice. In the United States, military service requires members to temper exercising their individual rights in order to meet the needs of national defense. Indeed, those who serve are called upon to make extraordinary sacrifices to provide for the common defense. Similarly, the armed services in Great Britain has no parallel to civilian life, with members of the armed forces expected to maintain discipline and morale in the defense of the country.

Homosexuals, irrespective of their willingness to serve their country in uniform, are not viewed as being a welcome part of military society. As such, this Comment analyzes the positions of the United States and Great Britain in their recent efforts concerning homosexuals in the military. Part II briefly discusses the historical background of U.S. and British policies regarding homosexuals in the armed forces. This Part also focuses on the new U.S. policy and its approach toward permitting homosexuals to serve, including the revision in the policy mandating that homosexuals keep their sexual orientation a secret. Additionally, Part II focuses on a recent attempt to remove the ban in Great Britain.

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8. See Glauber, supra note 2. The United Kingdom is commonly referred to as Britain or Great Britain, as it will be referred to in this Comment.
10. NAT’L DEF. AUTHORIZATION ACT FOR FISCAL YEAR 1994, S. REP. NO. 112, 103d Cong., 1st Sess. 272 (1993) [hereinafter S. REP. No. 112]. The primary mission of the armed forces is to defend our national interests by preparing for and, when necessary, waging war, using coercive and lethal force. Id.
11. Id.
Britain and includes an analysis of a current case challenging Great Britain’s policy.

Part III examines the existing military policies regarding enlistment and retention of homosexuals in the militaries of Israel, Canada, and Sweden. In particular, Part III also includes an analysis of the methods used to maintain unit cohesion and effective integration of homosexuals in the military. Part IV then compares the practical use of manpower of the countries that permit homosexuals to serve, with the ineffective exclusion of homosexuals from service in the U.S. and Great Britain. Finally, Part V discusses the likely direction the U.S. Congress and British Parliament will take with respect to modification of the existing policies. This Comment proposes that the U.S. “don’t ask, don’t tell” policy is an ineffective solution to the problem. Further, this Comment suggests that based on the outcome of a recent case upholding the ban, Great Britain has missed the opportunity to institute necessary change. This Comment concludes that Israel, Canada, and Sweden have made positive efforts toward equalizing homosexuals within their respective militaries, and, as such, serve as suitable examples to the United States and Great Britain.

II. United States and Great Britain: Similar Policies of Restricting Homosexuals in the Military

Great Britain and the United States have experienced similar histories with respect to prohibiting homosexuals from serving in their armed forces. Prior to a change in U.S. policy in 1993, only Great Britain and the United States retained policies that excluded lesbians and gay men from military service. Now, the United States no longer inquires into the sexuality of its service members upon enlistment. However, once it is discovered that a service member is homosexual, discharge immediately follows.

14. Homosexual will be used to refer to both gays (male) and lesbians (female).
15. See discussion infra part II.A.3.
17. See discussion infra part II.A.3.
Similarly, Great Britain has yet to allow homosexuals to join its forces. The British Defence Force, like the U.S. military, is an all-volunteer force and is opposed to having homosexuals serve in its military ranks.\textsuperscript{19} Fundamentally, the United States and Great Britain do not differ in policy toward homosexuals in the military. In both countries, homosexuals are not free to serve openly. Although the United States appears to have taken steps to change its policy toward homosexuals in the military,\textsuperscript{20} the new approach serves to perpetuate the status quo.

A. Overview of Policy on Homosexuality in the United States

Military: The Fifty Year Ban

Homosexuals have served in the U.S. military throughout its history.\textsuperscript{21} They have not, however, served openly.\textsuperscript{22} Homosexuals who choose the military as a profession are often caught in a web of homosexual purges, indirect investigations, and discrimination,\textsuperscript{23} except during time of war.\textsuperscript{24} Punishment for engaging in homosexual activity was recorded as early as 1444,\textsuperscript{25} thus the recent punishment of gays in the military is not unusual. Prior to World War II, the U.S. Army authorized separation from service for reasons such as "inaptness or undesirable habits."\textsuperscript{26} Since this regulation did not list any specific undesirable habits, homosexual conduct was traditionally prosecuted in the armed forces under the general article.\textsuperscript{27} This

\begin{enumerate}
  \item GAO, \textsc{DoD's Policy on Homosexuality}, \textit{supra} note 1, at 41.
  \item \textit{See} discussion \textit{infra} part II.A.3.
  \item Wilbur J. Scott & Sandra Carson Stanley, \textit{Introduction} to \textsc{Gays and Lesbians in the Military} xi (Wilbur J. Scott & Sandra C. Stanley eds., 1994).
  \item \textit{Id.}
  \item \textsc{Mary A. Humphrey}, \textit{My Country, My Right to Serve} xxii (1990).
  \item In wartime, if people are willing to put their lives on the line, the U.S. military has allowed them to do so. \textit{See} \textsc{Randy Shilts}, \textit{Conduct Unbecoming: Lesbians and Gays in the U.S. Military, Vietnam to the Persian Gulf} 17 (1993). For example, when the Army needed more men by the end of World War II, new edicts allowed for the military to retain "reclaimable" homosexuals, after an appropriate time of hospitalization. \textit{Id.} Because every willing man and woman was needed for the war effort, little emphasis was placed on discharge procedures. \textsc{Humphrey}, \textit{supra} note 23, at 2.
  \item \textsc{Humphrey}, \textit{supra} note 23, at xxii. Throughout history, homosexuals have been fined, banished, beheaded, hanged, drowned, burned, and dismembered. \textit{Id.}
  \item \textsc{S. Rep. No. 112, supra} note 10, at 265. Military regulations on administrative separation were drafted in a manner that gave commanders broad discretion to discharge members of the armed forces. \textit{Id.}
\end{enumerate}
article authorized trial by court-martial for conduct that was service-discrediting or prejudicial to good order and discipline.28

1. World War II and Beyond.— Since the beginning of World War II, United States forces had specific policies excluding homosexuals from serving in the military.29 At that time, the Army developed a medical approach to homosexuality, including efforts at identification and treatment.30 In order to establish guidelines that would identify those who might not be suitable soldiers, psychiatrists helped formulate regulations which, in effect, banned all those with “homosexual tendencies” from entering or remaining in the military.31 Homosexual individuals who attempted to enlist were excluded based on prevailing sodomy statutes which classified homosexuality not only as a criminal offense but also as a mental disorder.32 Those volunteers in the military who committed homosexual acts were subject to court-martial or administrative discharge,33 with the type of discharge depending on the nature of the act.34 Nonetheless, given the enormous manpower needs of the wartime military, many homosexuals served in World War II, often with distinction and without difficulty.35

28. S. REP. No. 112, supra note 10, at 265. Following the end of World War I, Congress enacted the Articles of War of 1920, which first named sodomy as a specific offense. David F. Burrelli, An Overview of the Debate on Homosexuals in the U.S. Military, in GAYS AND LESBIANS IN THE MILITARY 17 (Wilbur J. Scott et al. eds., 1994). The 1921 Manual for Courts-Martial addressed the issue of consent as it pertained to the sodomy laws enacted by Congress: “[b]oth parties are liable as principals if each is adult and consents.” Id. This language pertained to both homosexuals and heterosexuals. Id.
29. GAO, DOD’S POLICY ON HOMOSEXUALITY, supra note 1, at 2.
31. SHILTS, supra note 24, at 16. In 1942, the first regulation instructing military psychiatrists to discriminate between the homosexual and the “normal” person were publicized, with the notation that “persons habitually or occasionally engaged in homosexual or other perverse sexual practices” were “unsuitable for military service.” Id. This provision is currently codified in 10 U.S.C. § 875 (1993).
32. GAO, DOD’S POLICY ON HOMOSEXUALITY, supra note 1, at 10. The rationale was that the psychiatric screening of recruits for mental disorders would reduce the patient load of veterans’ hospitals after the war. Id. Many psychiatrists also felt that it was more humane to screen out homosexual recruits from the draft and separate homosexual persons already in the military services rather than imprison them under military sodomy regulations. Id.
33. Scott & Stanley, supra note 21, at xi. An undetermined number of homosexuals served during the war as a result of a combination of factors such as: (1) concealment of homosexuality because of social taboos; (2) the relative flexibility of personnel regulations; (3) wartime personnel needs; and (4) the inability of psychiatrists to determine who was homosexual. S. REP. No. 112,
In 1950, Congress enacted the Uniform Code of Military Justice,\textsuperscript{36} which launched the explicit ban on homosexual service.\textsuperscript{37} Thereafter the trend banning homosexuals from military service became increasingly restrictive.\textsuperscript{38} Each branch of the military had a specific regulation that addressed the issue of homosexuality.\textsuperscript{39} The regulations concerning homosexuality outlined the purpose, definition, and policy for discharge because of homosexuality.\textsuperscript{40} Consequently, in 1982, the Department of Defense (DoD)\textsuperscript{41} revised its original directive to provide uniformity throughout the military branches.\textsuperscript{42} The Department of Defense Directive 1332.14\textsuperscript{43} stated that homosexuality is incompat-

\textsuperscript{36} Article 125 of the Uniform Code of Military Justice (UCMJ) provided that "any person . . . who engages in unnatural carnal copulation with another person of the same or opposite sex . . . is guilty of sodomy." UCMJ Art. 125 (1951), reprinted in HUMPHREY, supra note 23, app. at 259.

\textsuperscript{37} Scott & Stanley, supra note 21, at xi. Service members who engaged in oral or anal sex with an opposite-sex partner were also in violation of the UCMJ's sodomy statute. The Army adopted a mandatory administrative separation policy, which stated that "[t]rue, confirmed, or habitual homosexual personnel, irrespective of sex, will not be permitted to serve in the Army in any capacity and prompt separation of known homosexuals from the Army is mandatory." S. REP. No. 112, supra note 10, at 266.

\textsuperscript{38} Scott & Stanley, supra note 21, at xi.

\textsuperscript{39} HUMPHREY, supra note 23, at xii.

\textsuperscript{40} Id. The definition of sodomy that applied to all branches of the military consisted of the following:

Sodomy is the engaging in unnatural carnal copulation, either with another person of the same sex, or opposite sex, or with an animal. Any penetration, however slight, is sufficient to complete the offense, and emission is not necessary.

It is unnatural carnal copulation for a person to take into his or her mouth or anus the sexual organ of another person or of an animal; or to place his or her sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation in any opening of the body of an animal.

UCMJ Art. 125 (1951), reprinted in HUMPHREY, supra note 23, app. at 259.

\textsuperscript{41} The DoD is an executive department of the United States and is composed of the Secretary of Defense, the Joint Chiefs of Staff, the Joint Staff, the Defense Agencies, the Department of Defense Field Activities, the Department of the Army, the Department of the Navy, the Department of the Air Force, the unified and specified combatant commands, and any other offices, agencies, activities, and commands as may be established by law or by the President. 10 U.S.C. § 111 (1986).

\textsuperscript{42} See S. REP. NO. 112, supra note 10, 265-67 for additional information regarding the history of the military position concerning homosexuality.

itable with military service. The revised directive reaffirmed the government’s position by ordering a total ban of homosexuals from military service. Accordingly, between 1980 and 1990, an average of 1,500 service members per year were discharged by the U.S. military under the separation category of “homosexuality.”

2. Recent Trend to Uplift the Ban on Homosexuals in the Military.— Although the language and administration of the military’s policy on homosexuals have varied since 1941, the policies’ underlying implications have not changed. During the 1992 election campaign, however, then— Presidential candidate Bill Clinton said that, if elected, he would take action to change the current policy restricting the service of gays and lesbians serving in the Armed Forces. Clinton specifically intended to lift the long-standing prohibition against homosexuals. Polls suggested that

44. GAO, DoD’s Policy on Homosexuality, supra note 1, at 2. DoD Dir. 1332.14 (1982) provided in pertinent part:
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. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security. Id. See Walter J. Krygowski, Homosexuality and the Military Mission: The Failure of the “Don’t Ask, Don’t Tell” Policy, 20 Dayton L. Rev. 875, 877 (1995). See generally Major Jeffrey S. Davis, Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives, 131 Mil. L. Rev. 55 (1991).

45. Krygowski, supra note 44, at 877. See GAO, DoD’s Policy on Homosexuality, supra note 1, at 2 for the DoD’s definition of a homosexual.

46. GAO, DoD’s Policy on Homosexuality, supra note 1, at 3. Separations for homosexuality did not require a determination that an individual’s behavior affected the military’s mission. Id. In terms of rank, gender race and ethnicity, the majority of those expelled between 1980 and 1990 were enlisted personnel; most were men, and most were white. Id. If one was discovered to be a homosexual and admitted to it, the individual was given an administrative discharge, which usually involved a board proceeding with presented evidence. Humphrey, supra note 23, at xxvi. Usually, the discharge was “honorable,” but the discharge form indicated that “admitted homosexuality” was the basis for discharge. Id.

47. GAO, DoD’s Policy on Homosexuality, supra note 1, at 10.


the public had become more accepting of both homosexuality in general and homosexuals serving in the military. On April 25, 1993, supporters of gay and lesbian rights marched in Washington, D.C. seeking, among other things, an end to the military’s policy of excluding homosexuals. Probably as a result of public sentiment and the increased number of service members who came “out of the closet” to challenge the pre-Clinton policy, an interim policy was announced on January 29, 1993, by President Clinton.

3. The “Don’t Ask, Don’t Tell, Don’t Pursue” Policy.— The debate over changing the policy restricting service of homosexuals in the military generated intense feelings in Congress and communities across the country, and particularly throughout court decisions considering the military’s policy on due process, equal protection, free speech, and privacy grounds upheld the then-existing policy. Burrelli, supra note 28, at 20. In addition, contested discharges for homosexuality were upheld both in the military administrative review process and in the civilian court system. The outcomes were the same even in cases involving personnel with exemplary service records. GAO, DoD’s Policy on Homosexuality, supra note 1, at 16.

50. GAO, DoD’s Policy on Homosexuality, supra note 1, at 3. In the United States, the public’s attitude about homosexuality appears to be changing. The General Accounting Office reviewed three national polls which indicated that more Americans believed that homosexuals should be allowed to participate in various occupations, including the armed forces. Id. A Gallup survey conducted in March, 1991 of a cross section of the American population of adults aged 18 and over showed that sixty nine percent of those interviewed felt that homosexuals should be allowed to serve in the armed forces, whereas only fifty one percent felt that way in 1977. Id. at 6.

51. Burrelli, supra note 28, at 23.

52. Scott & Stanley, supra note 21, at xi.

53. President’s Memorandum on Ending Discrimination in the Armed Forces, 1 PUB. PAPERS 20 (Jan. 29, 1993) [hereinafter Memorandum Ending Discrimination]. President Clinton signed a Memorandum directing the Secretary of Defense to “submit . . . prior to July 15, 1993, a draft of an Executive Order ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces.” The Presidential Memorandum also directed that any recommendation by the Secretary should be one that could be “carried out in a manner that is practical and realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.” Id.

This interim policy was to remain in effect until July 15, 1993, and retained then-existing rules restricting the service of gay men and lesbians in the Armed Forces. 141 Cong. Rec., supra note 48, at S5172. The policy also set forth two modifications that would apply during the interim: (1) new recruits would not be questioned about homosexuality during the enlistment process; and (2) gay and lesbian cases that did not involve homosexual acts would be processed through separation from active duty, and the individual would be placed in a nonpay status in the Standby Reserve. Id.

the ranks of the military.\textsuperscript{55} As a result, a congressional consensus emerged and formed what has been labeled the “don’t ask, don’t tell, don’t pursue” policy.\textsuperscript{56} Under this controversial policy, the military no longer asks recruits about their sexual orientation.\textsuperscript{57} In addition, homosexual members of the armed forces are obliged not to publicly disclose their sexual orientation.\textsuperscript{58} If they satisfy this requirement, the military will not pursue investigations leading to possible expulsions.\textsuperscript{59}

The basis for the “don’t ask, don’t tell” policy arises out of Article I, section 8 of the U.S. Constitution.\textsuperscript{60} The President may supplement, but may not supersede, the rules established by Congress for governing and regulating the armed forces.\textsuperscript{61} Traditionally, the courts defer to Congress in both the rule-making and control of the military.\textsuperscript{62} Even with this new policy, the military continues to be the only branch of government that explicitly prohibits the employment of homosexuals.\textsuperscript{63} Moreover, the number of nations that exclude homosexuals from military service is declining.\textsuperscript{64} In fact, the United States, along with Great Britain, remains one of the last members of the North Atlantic
Treaty Organization\textsuperscript{65} (NATO) to maintain a policy excluding homosexuals from the military.\textsuperscript{66}

Another ill-fated effect of the policy is that homosexuals continue to be restricted from openly serving in the military.\textsuperscript{67} Presently, the policy requires an investigation and discharge of any individuals who state that they are homosexual.\textsuperscript{68} Thus, homosexuals are forced to keep their sexual orientation a secret in order to remain in the services.

Furthermore, the “don’t ask, don’t tell” policy creates a dual standard where heterosexuals can announce their sexuality and have openly recognized relationships.\textsuperscript{69} Homosexuals, however, are forced to suppress their sexuality or face possible discharge.\textsuperscript{70} Therefore, the “don’t ask, don’t tell” policy indicates, regardless of any apparent policy changes, that the U.S. military’s tolerance for homosexuality remains repugnant and ineffectual.

\textbf{4. Case law—The Courts’ Reaction to the Ban.—} Since the “don’t ask, don’t tell” regulations were issued, there have been a number of judicial decisions addressing homosexuality in the Armed Forces, but most have dealt with the old administrative rules rather than the new legislation.\textsuperscript{71} Each of those cases found it unnecessary to decide any constitutional issues.\textsuperscript{72} In \textit{Able v. U.S.}, however, a judge for the U.S. District Court for the Eastern District of New York took a different approach with regard to the

\textsuperscript{65} The North Atlantic Treaty Organization is currently comprised of sixteen member states. EUROPA WORLD Y.B. 91 (36th ed. 1995). NATO countries that do not impose a ban on homosexuals in the military include: Belgium, Canada, Denmark, France, Germany, Iceland, Italy, Luxembourg, the Netherlands, Norway, and Spain. Harper, \textit{supra} note 16, at 23. In addition, Australia, Austria, Finland, Israel, Japan, and Sweden allow homosexuals in their militaries. \textit{Id.}

\textsuperscript{66} Partial Progress on Gay Ban, \textit{supra} note 57.


\textsuperscript{68} Burrelli, \textit{supra} note 28, at 23.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 24.

\textsuperscript{71} 141 CONG. REC., \textit{supra} note 48, at S5172. For decisions arising under the old policy, see Meinhold v. Dep’t of Defense, 34 F.3d 1469 (9th Cir. 1994) (holding that a service member could not be discharged solely because he said “I am gay” but could be discharged for making a statement which “manifests a concrete expressed desire or intent to engage in homosexual acts”). See Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (holding that the statement “I am gay” constituted sufficient evidence under the regulations of a propensity or intent to engage in homosexual acts to justify a discharge).

\textsuperscript{72} 141 CONG. REC., \textit{supra} note 48, at S5172.
new “don’t ask, don’t tell” policy. The Able court held that the act and the directives violate both the First Amendment, as a restriction on speech, and the Fifth Amendment, as a denial of equal protection.

Although the “don’t ask, don’t tell” policy discusses conduct, that is, what a person does or intends to do in terms of his sexual behavior, the court ignored the conduct-based definition in the statute. Rather, the court addressed homosexuality as “an innate feeling within that indicates the status of a homosexual.” In ruling that the legislation is unconstitutional, the court has instigated a new controversy in Congress over whether or not the legislative debate should be reopened with regard to the ban on homosexuals in the military. In addition, some argue that the only solution is to eventually reinstate the old policy completely banning homosexuals. Although the “don’t ask, don’t tell” policy does not provide for a complete lifting of the ban, it does give homosexuals the opportunity to serve without being questioned about their homosexual orientation, so long as they maintain a heterosexual facade.

Homosexuals continue to argue that the “don’t ask, don’t tell” policy perpetuates inequality between homosexuals and their heterosexual counterparts. They view the Able court’s ruling as an important victory for homosexuals and believe that the policy will eventually be overturned by higher courts. This belief is based on the contention that a statement of homosexual orientation is not sufficient proof of intent to commit acts which justify the initiation of discharge proceedings.

74. Id.
75. 141 Cong. Rec., supra note 48, at S5172. A statement that indicates a propensity to engage in homosexual acts will require separation from service unless the member rebuts a presumption that he or she engages in or intends to engage in “homosexual acts” or has a “propensity to do so.” Able, 880 F. Supp. at 971. Examples of statements giving rise to the presumption include: “I am a homosexual,” “I am gay,” “I am a lesbian,” and “I have a homosexual orientation.” Id.
76. Able, 880 F. Supp. at 975.
77. 141 Cong. Rec., supra note 48, at S5172.
78. Id.
81. Id.
82. Able, 880 F. Supp. at 976.
5. Congressional Response.— Surveys indicate that United States public opinion is divided over this issue. Until recently, roughly half of the population believed that homosexuals should not be allowed to serve. However, according to the Rand Corporation, a more recent poll indicates that only twenty-one percent of the population currently believes that gays and lesbians should not be allowed to serve under any condition. If the Supreme Court eventually determines that the “don’t ask, don’t tell” policy is unconstitutional, Congress will be forced to reconsider the issue. However, the role of the courts continues to be circumspect in matters concerning the control and discipline of the military, because such matters are constitutionally within the jurisdiction of the legislative and executive branches. Thus, change likely will come only by a new act of Congress.

B. Overview of Military Policy on Homosexuality in Great Britain—a Common Law Derivative

The traditional policy of the British government regarding the recruitment and retention of homosexuals in the armed forces was based primarily on the premise that military law should replicate common and statutory law. Thus, homosexual acts were a criminal offense in civil society as well as in the military. However, in 1967, Parliament enacted the Sexual Offenses Act. This Act no longer deemed homosexual acts undertaken between

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84. Id.
85. Id. This percentage is far below the sixty one percent who were against racial integration of the services at the time of President Truman’s order to desegregate the military. Id.
86. Burrelli, supra note 28, at 28.
88. Jenkins & Dandeker, supra note 13, at 192. While lesbian sexual activity was never explicitly a criminal offense, male homosexual relations were completely prohibited in Great Britain by the Sexual Offenses Act of 1956. See Clarice B. Rabinowitz, Proposals for Progress: Sodomy Laws and the European Convention on Human Rights, 21 BROOK. J. INT’L L. 425, 430 (1995) (proposing alternative methods for the European human rights legal system to use to invalidate sodomy statutes, as well as other discriminatory restrictions affecting lesbian and gay persons).
89. Sexual Offenses Act, 1967, ch. 60, § 1 (Eng.).
two consenting males over the age of twenty-one to be a criminal offense in the civil sector.\textsuperscript{90} Such conduct, however, remained an offense under the service discipline acts.\textsuperscript{91} Hence, service personnel could still be charged under military law for the commission of homosexual acts,\textsuperscript{92} while the same acts would not constitute an offense under British civil law.\textsuperscript{93} The military utilized both administrative discharges\textsuperscript{94} and the legal process of the court-martial to dismiss those who acted in violation of the military laws that prohibited homosexual relations.\textsuperscript{95}

1. \textit{Post 1990 Change}.— In 1991, upon review of the service discipline acts, the Ministry of Defence (MoD) accepted a change in the law and amended the Sexual Offences Act of 1967.\textsuperscript{96}

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\item Part I, s. 1 of the Sexual Offences Act of 1967 stated:
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\item (1)(1) a homosexual act in private is not an offence provided that the parties consent to it and have attained the age of 21 years. \textit{Id.} s. 1(1).
\item (1)(7) An act of buggery [anal intercourse] or gross indecency [another sexual activity] between two, but no more, consenting males over age 21 [is not an offence]. \textit{Id.} s. (1)(7).
\end{itemize}
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\begin{enumerate}
\item \textit{s. (2) of the Sexual Offenses Act also stated the following:}
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\item (2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done—
\begin{itemize}
\item (a) when more than two persons take part or are present;
\item (b) in a lavatory to which the public has or is permitted to have access, whether on payment or otherwise.
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\item Jenkins & Dandeker, \textit{supra} note 13, at 192.
\item Section 1(5) of the Act provided that:
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\item "(5) subsection (1) of this section shall not prevent an act from being an offence (other than a civil offence) under any provision of the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957." \textit{Sexual Offences Act 1967, ch. 60, s. 1(5) (Eng.).}
\end{itemize}
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\item Jenkins & Dandeker, \textit{supra} note 13, at 192. In addition, it was an offense under the relevant provisions of the respective Services' Acts to be guilty of "any disgraceful conduct of a cruel, indecent or unnatural kind" (s. 37 of the Naval Discipline Act and s. 66 of the other two Acts), or "any conduct to the prejudice of good order and discipline." (s. 39 of the Naval Discipline Act and s. 69 of the other two Acts.) \textit{Id.} at 192.
\item Issuance of an administrative discharge means that "services [are] no longer required." \textit{Id.}
\item \textit{Id.} at 192. Between 1988 and 1992, 39 service personnel were dismissed from the armed forces for conviction of offenses involving homosexual activity. Additionally, 296 were discharged on administrative grounds from the army during that period. \textit{Id.}
\item GAO, \textit{Practices of Foreign Countries, supra note 90, at 26.}
\end{enumerate}
Subsequently, the government conceded that the exemption for the military from the provisions of the Sexual Offences Act of 1967, the section 1(5) clause, was no longer viable. Thus, when a member of the armed services is found to have taken part in legal homosexual activity, the service member will not be prosecuted under military law. Instead, he will be given an administrative discharge.

Although homosexuality is no longer considered to be a criminal offense for service personnel, under the current Queen’s Regulations, homosexuals in the services still can be deprived of their careers. Moreover, homosexual acts continue to be treated as offenses under the service discipline acts if committed in conjunction with “other acts or circumstances.” These legal provisions set the armed services apart from all other employers within the United Kingdom.

From 1986 to 1991, nine servicemen were dismissed from the Navy, twenty-two from the Army, and eight from the Royal Air Force following conviction for an offense involving homosexual activity. Another two hundred ninety six service personnel were administratively discharged between 1989 and 1991 for their homosexual orientation.

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97. Sexual Offences Act 1967, ch. 60, s. 1(5) (Eng.). See supra note 92, for the relevant portion of s. 1(5).
98. Jenkins & Dandeker, supra note 13, at 193.
99. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 26.
100. Jenkins & Dandeker, supra note 13, at 192.
102. John Keegan, Why They Had to Say No. Homosexuality Can Undermine the Vital Authority That the Armed Forces Must Demand in War, DAILY TELEGRAPH, June 8, 1995, at 17.
103. Id.
104. Jenkins & Dandeker, supra note 13, at 192-93.
105. Keegan, supra note 102.
2. *Recent Trend to Change British Policy Toward Homosexuals.*— The 1991 modification left the government’s policy toward homosexuals in the military essentially untouched. 106 Despite the fact that the British military no longer criminalizes homosexuality, the potential for receiving an administrative discharge for one’s homosexual orientation still exists. 107 The British government’s position is that overt homosexuality continues to be incompatible with service in the armed forces, 108 because it undermines discipline and good order. 109 Irrespective of whether a homosexual engages in homosexual conduct or remains celibate, he is still subject to discharge solely because of his sexual orientation. 110

In other areas of life, British opinion regarding homosexual orientation has shifted. For example, in 1991, the British Government reviewed the then-existing policy barring recruitment of homosexuals to certain areas of employment including diplomatic services. 111 The Prime Minister determined that one’s homosexual

106. The British Government continues to emphasize that homosexual activity remains incompatible with military service, and that those who engage in it must expect to be discharged. Robert Wintemute, *Sexual Orientation Discrimination in Individual Rights and the Law in Britain* 491, 506 (Christopher McCrudden et. al. eds., 1994).

107. Harper, *supra* note 16, at 23. Section 146(1) of The Criminal Justice and Public Order Act was introduced in the House of Commons and provides in pertinent part:

(1) Section 1(5) of the Sexual Offences Act 1967 (homosexual acts in the armed forces) is repealed.

(3) Section 2 of the Sexual Offences Act 1967 (homosexual acts on merchant ships) is repealed.

Further, Section (4) of the Act specifies:

(4) “Nothing contained in this section shall prevent a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of Her Majesty’s armed forces from the service or dismissing a member of the crew of a United Kingdom merchant ship from his ship or, in the case of a member of Her majesty’s armed forces, where the act occurs in conjunction with other acts or circumstances, from constituting an offence under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.”

The Criminal Justice and Public Order Act 1994, s. 146(1) (Eng.).

108. Jenkins & Dandeker, *supra* note 13, at 194. In *Ministry of Defence*, 145 NLJ 887, THE TIMES at 6, Lord Justice Brown stated that s. 146 was an expression of parliamentary approval for the existing policy. He further stated that s. 146 indicates that the change in the criminal law should not be viewed as signalling any parliamentary desire for a change in the practice of administratively discharging homosexuals. *Id.*


110. *Id.*

111. *Id.*
ality should not be an automatic bar to security clearance or to the access of highly classified information. The Lord Chancellor has made similar announcements in relation to judicial offices. Thus, homosexuals are no longer excluded from high security government jobs. However, the legislation did not invalidate the existing Armed Forces law, which proscribes homosexual acts under the service disciplinary acts.

Additionally, non-discrimination policies have been adopted by a small number of police forces in England. In February, 1994, the British Parliament lowered the age of consent for sex between men from age twenty-one to age eighteen. In its first formal debate on homosexual law since 1967, Parliament recognized the need to abridge the disparity between Britain and the rest of Europe's acceptance of homosexual activity. For example, in Spain, gay men can legally have sex at age twelve, and in Germany, the legal age for sexual activity for gay men is eighteen. Nonetheless, this British legislation was a small victory for homosexuals, since the age of consent for heterosexual men and women in Great Britain is age sixteen as compared to age eighteen for homosexuals. Once again, this legislation did nothing to ameliorate the ban on homosexuals in the military, and as such, homosexuals remain second-class citizens.

3. The Courts Involvement: R. v. Ministry of Defence—The controversial ban on homosexuals serving in the British Armed Forces was upheld by the High Court on June
7, 1995, in the case of R. v. Ministry of Defence. This lawsuit marked the first legal challenge to the ban.\textsuperscript{121} Unfortunately, R. v. Ministry of Defence exemplifies the ill-fated status of homosexuality in Britain's military, as the court's ruling continues to prohibit the inclusion of gay and lesbian service personnel in the military.\textsuperscript{122}

In \textit{R. v. Ministry of Defence}, four former members of the military, three gay men and one lesbian woman, brought a class action suit after they received administrative discharges from the Services for violating the policy prohibiting homosexual men and women from service.\textsuperscript{123} The four former service members challenged the legality of their discharges, principally on the ground that the policy is irrational, as well as on the ground that it breaches both the European Convention of Human Rights\textsuperscript{124} and the Equal Treatment Directive.\textsuperscript{125} In none of the four individual cases was it suggested that the applicant's sexual orientation had in
any way affected his or her working capabilities or had any ill
effect on discipline.\textsuperscript{126} Lord Justice Simon Brown even stated
that “there is no reason to doubt that, but for their discharge on
the sole ground of sexual orientation, each would have continued
to perform their Service duties entirely efficiently and with the
continued support of their colleagues.”\textsuperscript{127}

Indeed, although the ban was upheld, Lord Justice Brown
expressed concern over the decision. In the opinion, he made the
following observation:

I have to say that the balance of the argument . . . appears to
me to lie clearly with the applicants. The tide of history is
against the Ministry. Prejudices are breaking down; old barriers
are being removed. It seems to me improbable, whatever this
court may say, that the existing policy can survive for much
longer. I doubt whether most of those present in court
throughout the proceedings now believe otherwise.\textsuperscript{128}

Although Lord Justice Brown rendered a decision against the
homosexual service members, he expressed the need for a change
in law that can come only through an act of Parliament.\textsuperscript{129} The
pivotal issue which turned the case against the four applicants was
whether the courts possessed the authority to invoke European
human rights legislation to suprervene the MoD policy.\textsuperscript{130} The
justices agreed that it was for Parliament, not the courts, to make
changes in military discipline.\textsuperscript{131} The courts may not second-guess
the military, unless the military’s defense “outrageously defies logic
or accepted moral standards.”\textsuperscript{132} Here, the Court did not find the
policy to be irrational, and thus did not have grounds to overrule

\begin{itemize}
\item 126. Marks & Jones, \textit{supra} note 121, at 1.
\item 127. \textit{Id.}
\item 129. Marks & Jones, \textit{supra} note 121, at 1. Subject to compliance with the
overriding legislation of the European Communities, Parliament is recognized as
sovereign and as possessing unlimited legislative power. R.J. WALKER, \textit{THE
ENGLISH LEGAL SYSTEM} 93 (1985).
\item 130. \textit{Ministry of Defence}, 145 NLJ 887.
\item 131. Marks & Jones, \textit{supra} note 121, at 1.
\item 132. The critical question was whether the Minister could show an important
competing public interest which could reasonably be judged sufficient to justify
the restriction on individual rights. The Court found the justification to be
reasonable and in conformity with accepted moral standards, and thus the Court
could not strike down the restriction. \textit{Ministry of Defence}, 145 NLJ 887, \textit{THE
TIMES} at 18.
\end{itemize}
HOMOSEXUALS IN THE MILITARY

However, the judgment of Lord Justice Brown signaled that although the law is clear, the policy is unjust.

The four ex-service members then appealed their case to the Court of Appeal. They specifically requested that the three justices rule that the High Court had erred in law and should have overruled the ban on homosexuals in the military. However, on November 3, 1995, the Court of Appeal upheld the British military’s ban on homosexuals, with the three justices ruling that the military policy was neither irrational nor illegal. Despite Sir Bingham’s argument, in his judgment, Sir Thomas Bingham, Master of the Rolls, implicitly criticized the ban. He stated that “to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behavior, would not appear to me to show respect for that person’s private and family life.” Nevertheless, the Court of Appeal held that the former service members’

133. Ministry of Defence, 145 NLJ 887. The Court deferred to its holding in R. v. NALGO, All ER 785, reprinted in Ministry of Defence, 145 NLJ 887, THE TIMES at 15, in which it held in relevant part that:

(2) Where fundamental human rights including freedom of expression are being restricted, the minister will need to show that there is an important competing public interest which is sufficient to justify the restriction.

(3) The primary judgment as to whether the competing public interest justifies the particular restriction is for the minister. The court is only entitled to exercise a secondary judgment by asking whether a reasonable minister, on the material before him, could reasonably make that primary judgment . . .

Id.

134. Lord Justice Brown concluded by stating that “[u]nless and until Parliament incorporates the Convention into domestic law there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country.” Ministry of Defence, 145 NLJ 887, THE TIMES at 16.

135. Section 16(1) of the Supreme Court Act 1981 provides: “Subject as otherwise provided by this or any other Act . . . the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.” WALKER, supra note 129, at 423.

136. Michael Evans, British Court Backs Military Ban on Gays, L.A. TIMES, Nov. 4, 1995, at A14. The Court of Appeal found that their claim could not be substantiated because at the time of their discharge, the ban on homosexuality was supported by both Houses of Parliament and by those to whom the Ministry of Defence properly looked for professional advice. Id.


138. The Master of the Rolls is the president of the civil division of the Court of Appeal. WALKER, supra note 129, at 189.

139. Evans, supra note 136.
claim that the government’s policy was “irrational” could not be substantiated.\textsuperscript{140}  

The Armed Forces’ right to discharge those members identified as homosexual remains legal under British law.\textsuperscript{141}  The Ministry of Defence can discharge homosexuals from the various branches of the Armed Forces without regard to either their work record or their ability to perform their duties.\textsuperscript{142}  Consequently, the military achievements of service members become secondary to their sexual orientation.

4. \textit{Parliament’s Likely Direction}.— The High Court ruling and the Court of Appeal’s affirmation prompted the Ministry of Defence to review the ban on homosexuals in the armed services.\textsuperscript{143}  The review itself was controversial, however, because it was conducted by those members of the Services who are committed to enforcing the current ban.\textsuperscript{144}  Indeed, although the views of the Chiefs of Staff and representatives from each rank and class were presented, the review was biased.\textsuperscript{145}  Undoubtedly, only an independent neutral review conducted by both detached outsiders and members of the Services could guarantee that an impartial determination regarding the future of the ban be made.\textsuperscript{146}  

Following the review, the Government decided that the ban on homosexuals in the Armed Forces will not be lifted.\textsuperscript{147}  According to Defence Minister Nicholas Soames, “[t]he view of the service chiefs and of Ministers is not based on any moral judgment, but on the impracticality of homosexual behaviour, which is clearly not compatible with service life.”\textsuperscript{148}  This decision is a victory for

\begin{itemize}
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Keegan, \textit{supra} note 102, at 17.
\item \textsuperscript{142} Sean Rayment, \textit{Gay Counter-Attack: Forces Ban is a Denial of Human Dignity}, \textit{Says QC}, \textit{DAILY MAIL} (England), May 16, 1995, at 15.
\item \textsuperscript{143} Sally Weale, \textit{UK: Navy Chief Leads Charge Against Lifting Ban on Gays}, \textit{GUARDIAN}, Sept. 9, 1995.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. This review included the Chief of the General Staff, General Sir Charles Guthrie, Air Chief Marshal, Sir Michael Graydon, and First Sea Lord Admiral, Sir Jock Slater. \textit{Id.}
\item \textsuperscript{146} The United States underwent a similar review in 1993 at the request of President Clinton. \textit{See} President’s News Conference, 1 PUB. PAPERS 20 (Jan. 29, 1993).
\item \textsuperscript{147} Sean Rayment, \textit{Ban on Gays in Forces Will Stay, Says Soames}, \textit{DAILY MAIL}, Feb. 7, 1996, at 7.
\item \textsuperscript{148} Id.
\end{itemize}
defence chiefs who believe that any relaxation of the ban will destroy morale in the Services.\textsuperscript{149}

In addition to the Ministry of Defence review, the Armed Forces Act is reviewed by Parliament every five years.\textsuperscript{150} The next Parliamentary review is scheduled for 1996.\textsuperscript{151} At that time, an ad hoc Select Committee will undertake a review in connection with the Armed Forces Bill, collecting evidence relating to the Armed Forces and reporting it to the House.\textsuperscript{152} Based upon the review Committee's findings, Parliament will then determine whether to renew the ban.\textsuperscript{153}

It has been suggested that the most likely alternative would be a code of sexual conduct such as the Royal Fleet Auxiliary's (RFA)\textsuperscript{154} "no touching" rule.\textsuperscript{155} The RFA introduced a policy prohibiting all sexual activity while on board a ship. Alleged violations of the rule are dealt with in accordance with the RFA code of conduct.\textsuperscript{156} In addition, the policy does not discriminate on grounds of homosexuality.\textsuperscript{157} Accordingly, when the British Parliament does revise the existing policy, possibly in 1996, a more sensible change to the current policy would be to introduce a sexual code of conduct into the military.\textsuperscript{158} However, if Parliament fails to reform the ban, it faces a potential unfavorable ruling on the basis of discrimination by the European Court of Human Rights in Strasbourg, France.\textsuperscript{159}

\begin{thebibliography}{9}
\bibitem{149} \textit{Id.}
\bibitem{150} GAO, PRACTICES OF FOREIGN COUNTRIES, \textit{supra} note 90, at 26.
\bibitem{151} \textit{Ministry of Defence}, 145 NLJ 887, \textit{THE TIMES} at 5.
\bibitem{152} \textit{Id.}
\bibitem{154} The Royal Fleet Auxiliary is a merchant navy service that works in conjunction with and supplies the Royal Navy. \textit{Ministry of Defence}, 145 NLJ 887, \textit{THE TIMES} at 8.
\bibitem{156} \textit{Ministry of Defence}, 145 NLJ 887, \textit{THE TIMES} at 8.
\bibitem{157} \textit{Id.}
\bibitem{159} \textit{A Change in the Order of the Day}, \textit{THE SCOTSMAN}, Sept. 5, 1995, at 10.
\end{thebibliography}
5. Potential European Court of Human Rights and Equal Treatment Directive Challenge.— The four ex-military personnel argue that the ban breaches Britain's obligations under the European Convention on Human Rights and violates the European Union's equal treatment directive. However, because the European Court of Human Rights is responsible for deciding issues under the Convention, the British Court of Appeals did not decide the case on those grounds. In order for the four plaintiffs to have standing before the Court of Human Rights, they must first exhaust all avenues of appeal in Britain. Thus, the case must be reviewed by the House of Lords before it can be brought before the Court of Human Rights. If the House of Lords fails to take measures to repeal the existing ban, the four plaintiffs in the case against the Ministry of Defence plan to appeal their case to the European Court of Human Rights in Strasbourg.

In 1983, the European Court of Human Rights addressed an argument similar to that in R. v. Ministry of Defence. In B. v. United Kingdom, the Court found a homosexual soldier's

160. The European Court of Human Rights was established under the European Convention on Human Rights and Fundamental Freedoms, which was signed in Rome on November 4, 1950, and became effective on September 3, 1953. The purpose of the Convention is to secure certain fundamental rights and freedoms. IGOR I. KAVASS, SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 25, 26 (1992).

161. Stephen Ward, Gays Served in Forces During National Service, THE INDEPENDENT, Oct. 12, 1995, at 10. Under article 1 of the Convention, an immediate obligation is placed upon the member states to "secure to everyone within their jurisdiction[s]" the rights defined in the Convention. Rabinowitz, supra note 88, at 433. However, both the Convention and general international law are silent as to the appropriate procedures such member states must follow in conforming their own municipal laws to accommodate the mandates of the treaty. Id. Since no uniform procedure exists, the Convention has the force of law in many countries, while in others, it does not. Id. Recently, a bill seeking to incorporate the Convention into United Kingdom law cleared the House of Lords. Id. However, the bill may be blocked due to opposition in the House of Commons. Id.

162. Directives are addressed to member states of the European Community, but it is left to the individual national authorities to implement them. WALKER, supra note 129, at 127. In the United Kingdom, implementation may be effected by Order in Council or by regulations made by a designated Minister or department by way of statutory instrument. Id. The European Court has sometimes given direct effect as conferring rights upon individuals even where member states have done nothing to implement the directive in question. Id.

163. Fairhall & Dyer, supra note 155.
164. WALKER, supra note 129, at 188.
165. Marks & Jones, supra note 121.
complaint under articles 8\textsuperscript{167} and 14\textsuperscript{168} to be inadmissible.\textsuperscript{169} Among the fundamental rights and freedoms guaranteed by the European Court of Human Rights is the right to respect for one's private and family life.\textsuperscript{170} Nevertheless, in that case, the Commission determined the Ministry of Defence argument, that the dismissal was necessary to exclude the potentially disruptive influence of homosexual practices, to be sufficient grounds for dismissing the complaint.\textsuperscript{171} That decision, however, was based specifically upon homosexual conduct as opposed to homosexual orientation.\textsuperscript{172} The Court may hold differently today, based upon the changing attitudes and circumstances that exist, as well as upon examination of the successful policy reforms instituted by other member countries.\textsuperscript{173} Moreover, in 1989, in Norris v. Ireland, the European Court of Human Rights held that the Irish Government was in violation of article 8 of the Convention because of its legislation penalizing homosexual acts between consenting male adults.\textsuperscript{174} Thus, in light of the more recent Norris decision, the Court of Human Rights may find Britain's exclusion of homosexuals based solely on sexual orientation to be a violation of article 8.

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\textsuperscript{167} Article 8 provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the county, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

\textsuperscript{168} Article 14 provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Id. at 294.

\textsuperscript{169} The complainant was dismissed from the military after having had homosexual relations with a soldier junior in rank to himself and under 21 years of age, which was the age of consent at that time. Ministry of Defence, 145 NLJ 887, THE TIMES at 20.

\textsuperscript{170} KAVASS, supra note 160, at 26. Article 8 of the Convention guarantees these rights. Id.

\textsuperscript{171} Ministry of Defence, 145 NLJ 887, THE TIMES at 20.

\textsuperscript{172} Id. The Commission accepted the Ministry of Defence assertion that homosexual conduct by members of the Armed Forces may pose a particular risk to order within the Forces which would not arise in civilian life. Id.

\textsuperscript{173} KAVASS, supra note 160, at 26.

\textsuperscript{174} Norris v. Ireland, 13 EHR 186 (1991).
In addition, the four plaintiffs contend that the ban violates the Directive, entitled “Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.” The Directive’s purpose is to remedy inequality between men and women. Nothing in the Directive indicates that it is applicable to sexual orientation discrimination. Rather, the Directive applies to employment discrimination based upon gender characteristics. It does not specifically apply to discrimination based upon the military’s refusal to accept homosexuals of either sex into its ranks. Because the military refuses to accept homosexuals of either sex, it is discrimination on grounds of sexual orientation. As such, it is unlikely that the four ex-service members will succeed in convincing the Court that the Directive applies to the equal treatment of homosexuals.

III. Countries Effectively Permitting Homosexual Service

Military officials in Canada, Israel, and Sweden find that the presence of homosexuals in the military has not generated problems in the ranks because homosexuality is not an issue in the military or in society at large. The key to their success is that these armed forces have amended their practices so that, while homosexual acts remain impermissible on duty, in the barracks, or


1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities . . . for which by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

Id. Article 5 states:

1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

176. Id.
177. Id.
178. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 10.
aboard a ship, the conduct of service members off duty and off base remains a private matter.179

A. Israel

Israel has an official policy that permits homosexuals to serve in the military.180 The policy of the Israeli Defence forces concerning military service of homosexuals developed over time, reflecting general changes in civilian law and social attitudes toward homosexuals.181 Unlike the United States, Israel does not have a constitution.182 However, the Declaration of the Establishment of the State of Israel provides protection from discrimination on the basis of sex, race, or religion.183

Israel’s parliament decriminalized sodomy in 1988.184 In 1992, a labor law was passed prohibiting discrimination against homosexuals in the workplace.185 However, until May, 1993, an Israeli military policy restricted known homosexuals from certain assignments in the military.186 This policy has been rescinded and there are no restrictions regarding the recruitment, assignment, or promotion of homosexual soldiers and civilians due to their sexual orientation.187

Current military regulations on sexual behavior state that sexual activity is not to take place in the barracks.188 Interestingly, the regulations do not distinguish between heterosexuals and homosexuals.189 Thus, homosexuals are afforded the same rights as those granted to heterosexual service members.

179. Keegan, supra note 102.
180. Rueven Gal, Gays in the Military: Policy and Practice in the Israeli Defence Forces in GAYS AND LESBIANS IN THE MILITARY 181 (Wilbur J. Scott et al. eds., 1994). The policy states that no restrictions shall be placed upon the recruitment, assignment, or promotion of homosexual soldiers and civilians, both males and females, due to their sexual orientation. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 40.
181. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 183. Israel has a full-draft system of conscription. Id. at 181.
182. Id.
184. Gal, supra note 180, at 183.
185. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 40.
186. Id. Under a military regulation, homosexuals were prohibited from serving in intelligence positions that required top security clearance. Id. at 41.
187. Id.
188. Id.
189. Gal, supra note 180, at 185.
B. Canada

Until 1992, homosexuals in the Canadian military faced severe career restrictions. In an action brought by a lesbian under Canada's Charter of Rights and Freedoms, the court enacted a declaration that provided for the removal of all barriers to homosexuals serving in the Canadian Defence Force (CDF). The previous Canadian policy, which prohibited homosexuals from serving in the all-volunteer military force, was deemed to be contrary to the Charter of Rights and Freedoms. It is likely that the popular belief that equality is one of the basic values within Canadian law and society contributed to a successful lifting of the ban. Presently, homosexuals in the military may openly declare their sexual orientation without fear of discharge due to the existence of civilian anti-discrimination laws.

Like Great Britain and the United States, the Canadian government feared that a large number of homosexuals would go public with their sexuality if the ban was repealed. In addition, the government expressed concern about the effect that a repeal of the ban would have on morale and unit cohesion. However, these fears proved to be unfounded. In implementing the policy change, the CDF has made it clear that the conduct of homosexuals when in uniform should conform to the same standards of decorum as that of heterosexual members. As a method to maintain order and cohesion, the CDF has instituted a policy whereby heterosexual service personnel who refuse to work

192. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 29.
193. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, ss. 15(1).
194. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 32.
196. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 30.
198. Id.
199. Id.
200. Park, supra note 195, at 173. In addition, a new order has been issued dealing with inappropriate or criminal sexual conduct committed by either heterosexual or homosexual members. Personal harassment and relationships between two service members have similarly been addressed. Id.
or bunk with homosexual members, or who make disparaging comments about homosexual members or homosexuality in general, are considered to have demonstrated a failure to adapt to a military requirement.201

In addition, the Canadian military leader's public support for the new policy and its unified front were significant factors in making a smooth transition to the new policy which allows homosexuals to serve.202 Accordingly, Canada has shown that admitting homosexuals into its armed forces can be effectuated without significant difficulty.

C. Sweden

Over an eleven year span, Sweden modified its military policies, and eventually formulated its current policy of non-discrimination against homosexuals.203 Until 1976, the military had automatically exempted homosexuals from service.204 In 1984, a Parliamentary commission concluded that homosexuality may not disqualify an individual from serving in the armed forces.205 Currently, discrimination based on sexual orientation is prohibited in Sweden.206 Furthermore, it is illegal for individuals to make derogatory comments about a person's homosexuality.207 Analogous to its civilian law, Sweden’s military policy now prohibits discrimination against homosexuals.208 Moreover, in recognition of changing attitudes toward homosexuals, Sweden has instituted major training programs designed to change the attitudes of influential personnel who would in turn promote anti-homosexual sentiment among those in the military.209

201. Id. at 173. The CDF leadership was encouraged to endorse the policy change and to motivate members to behave properly, as opposed to requiring members to change their basic values or beliefs regarding homosexuality. Id.
203. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 8.
204. Id. At that time, homosexuality was classified as an illness. In 1979, however, the National Board of Health and Welfare removed homosexuality from its Classification of Illness Handbook. Id.
205. Id.
206. Id.
207. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 6.
208. Id.
209. Jenkins & Dandeker, supra note 13, at 199.
IV. Flaws in U.S. and U.K. Analyses

The United States and Great Britain share very similar cultures, as well as the same historical approach toward treatment of homosexuals in the military. The arguments made by each country regarding the ban on homosexuals reflect the similarities between each country's position. In the United States, the notion that homosexuals are less capable or more prone to misconduct than heterosexual soldiers remains at the forefront of military beliefs. \(^{210}\) Likewise, in Great Britain, fierce debate has surrounded the question of whether homosexuals should be permitted to serve in the military. Members of the British Conservative Government have stubbornly maintained that the continuation of the ban on homosexuals is necessary to maintain order and discipline. \(^{211}\) In addition, the chiefs of staff of all three British Armed Forces, with the backing of Ministers, intend to fight any move to relax the existing ban. \(^{212}\)

A. U.S. Failure to Institute a True Change in Policy

As previously noted, the United States remains one of the few democratic countries to maintain a ban on homosexuals in the military. \(^{213}\) Although it may seem as though the U.S. has taken steps toward acceptance of homosexuals in the armed services, the "don't ask, don't tell" policy is little more than a mask for continued discrimination against homosexuals. \(^{214}\) Currently, if homosexuals wish to serve in the armed forces, they must, in essence, remain silent or lie about their sexual orientation. \(^{215}\)

However, the "don't ask, don't tell policy" indicates that the U.S. has begun to recognize a heightened need for equality between homosexuals and heterosexuals. \(^{216}\) Now, Congress must take the remaining steps to lift the ban and institute a policy.

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211. British High Court Upholds Ban on Gays Serving in Military, ORLANDO SENTINEL, June 8, 1995, at A9. Ban supporters continue to argue that the presence of homosexuals in the military could undermine morale and effectiveness. They cite to the problems of communal living, and assert that homosexuals and heterosexuals cannot live within closed quarters together. Id.
212. Marks & Jones, supra note 121, at 1.
213. See supra note 16 and accompanying text.
214. See discussion supra part II.A.3.
215. Id.
216. President's News Conference, supra note 7, at 21.
whereby homosexual and heterosexual members of the military are given an equal opportunity to serve. Arguably, homosexuals are already in the military. Therefore, homosexuals should not have to fear being exposed and military resources should no longer be wasted trying to discover those who are homosexual. The U.S. should look to Canada, Israel, or Sweden to serve as models on how to develop a more effective military. Change did not occur overnight in any of the aforementioned countries. For example, in Sweden, the current policy took eleven years to institute. In Israel, a series of reforms over a period of time led up to the existing non-discriminatory policy. Equality is essential. Those who predict that removal of the ban will result in failure should be prepared to offer a workable alternative. “Don’t Ask, don’t tell” is not the solution.

B. Great Britain’s Continued Opposition to Imminent Reform

The Ministry of Defence focuses on three areas in support of its position to maintain the all out ban on homosexuals. The Defence Council asserts that: (1) morale and unit effectiveness would be jeopardized by removing the ban; (2) the armed services act in loco parentis for new members; and (3) the communal living aspect of military life would be impinged upon by homosexuals serving as a part of the unit.

Notwithstanding evidence to the contrary, British lawmakers suggest that homosexual tendencies are both contradictory to the military self-image of masculinity and notion of conformity. Military personnel have been conditioned to believe that these male traits and this concept of masculinity are desirable quali-

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218. *Id.*
219. *See discussion supra part III.*
220. *See discussion supra part III.C.*
221. *See discussion supra part III.A.*
222. The notion is that the armed forces act in the place of a parent, and act with a parent’s rights, duties, and responsibilities. *WEBSTER’S NEW UNIVERSAL DICTIONARY* (2d ed. 1979).
ties. Moreover, commanders argue that homosexuality causes sexual tension, which is especially damaging to the unit because soldiers must work in close quarters in an atmosphere of complete trust. While these arguments may be reasonable on their face, upon closer examination, they are unfounded. Because the British policy is based solely upon homosexual orientation, a soldier's fitness and military performance become irrelevant. Moreover, a homosexual with shining records and respectable commendations must nevertheless be discharged. Dismissal is also not a question of conduct, because homosexual tendency or one's proclivity alone provides sufficient grounds for dismissal.

With these arguments in mind, it seems contradictory to assert the contention that homosexuals have no place in the military. While it may be true that the presence of open homosexual conduct will disconcert troops who do not like homosexuals, it should not be a reason to prohibit them from serving their country. If that is a fair reason to bar unpopular minorities, women, and blacks would not be serving today.

The root of the problem is based on an unwillingness to accept homosexuals as people who are able to function in close quarters with members of the same sex without attempting to engage in sexual activity with them. However, a 1993 study conducted by the U.S. Rand Corporation shows that it is unfair to presume that homosexuals behave inappropriately merely because they are

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225. Id. (citing John Hockey, Squaddies: Portrait of a Subculture [Exeter: Exeter University Press, 1986] 37-38.) "This self-image is one which combines traditional masculine values with a competence in the techniques of survival and liquidation. Recruits perceive themselves very much in the same fashion as the Corporal who saw that soldiers should be young and fit, rough and nasty, not powder puffs."


227. Id.

228. Id.

229. Id.

230. Id. The U.S. military began to accept women in the early 1940's. HUMPHREY, supra note 23, at xxvi. Arguments were made that women would destroy the morale, activate the sexual affinity of men, and destroy the decorum of the previously all-male, segregated environment. Id. Today, women make up about 12 percent of the total armed forces. Charles Moskos, Jr., From Citizens' Army to Social Laboratory, in GAYS AND LESBIANS IN THE MILITARY 53, 61 (Wilbur J. Scott et. al. eds., 1994). In addition, the armed forces were ordered to integrate all of its units in 1948. HUMPHREY, supra note 23, at xxvi. At that time it was argued that integration would destroy morale and affect the completion of the mission. Id.

231. Private's Privacy, supra note 226.
homosexual. Moreover, the study asserted that it is possible to change how troops behave toward previously excluded and despised minority groups, even if underlying attitudes toward those minority groups change very little. The Israeli and Canadian models, for example, have proven that change can occur without the chaos deemed imminent by the U.S. and Great Britain. If the change is publicly backed by military leaders, the transition can be a smooth one.

With respect to the loco parentis assertion, the military contends that thirty-five percent of new recruits to the Armed Forces are younger than twenty-one and thus below the new age of consent for homosexual sex. The military argues that if the ban were lifted “the confidence both of young people to join the Armed Forces, and their parents to permit them to join the Armed Forces, would be seriously damaged.” This argument assumes that homosexuals will behave more inappropriately towards young recruits than would heterosexuals. By implementing a policy similar to that of Canada, whereby homosexual and heterosexual service members are required to conform to equivalent standards while in uniform, the MoD will be able to overcome their traditional fear that young service members will be influenced by homosexual members to engage in homosexual activity.

Furthermore, although service personnel live and work in close proximity to one another in predominantly single sex communities, the homosexual community maintains that there is no existing evidence to support the contention that the homosexuals who have been discharged from the service have behaved inappropriately or that their colleagues have had problems living in close quarters with them. In fact, data collected by the Rand Corpo-

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232. According to the Rand Corporation, with respect to a study conducted regarding the military policies of other countries, few problems caused by the presence of homosexual service members were reported. Problems that did arise were generally resolved satisfactorily on a case-by-case basis. If a problem developed, action was taken to remove the individual, homosexual or heterosexual, from the unit. RAND, OPTIONS AND ASSESSMENT, supra note 83, at xix.
233. Id. at xxi.
234. See supra Part III.
235. Id.
236. GAO, PRACTICES OF FOREIGN COUNTRIES, supra note 90, at 32.
237. See discussion supra part II.B.2.
238. Bowley, supra note 223.
239. See supra note 200 and accompanying text.
240. Bowley, supra note 223.
241. Id.
ration demonstrates that homosexuals can serve in the military with no damage to unit cohesion.\(^{242}\) A unit's task cohesion or the ability to work together to accomplish a mission, is a more important factor in mission success than social cohesion.\(^{243}\)

Finally, in other disciplined forces such as police and fire departments, homosexuality is not an issue. In these forces, most believe that the key element in their practices is to hire based on previous job performance as opposed to sexual orientation.\(^{244}\) The majority of police forces in Great Britain and Wales now institute equal opportunities policies, including sexual orientation policies which have been introduced without opposition either from the police themselves or the public.\(^{245}\)

V. Future Implications

In the future, will the U.S. Congress and the British Parliament institute changes in the military policies toward homosexuals? In light of the case brought by the ex-service members against the Ministry of Defence in Great Britain, the answer to that question is not clear. The Court found in favor of the Ministry of Defence, and upheld the existing ban under domestic law. However, the justices indicated that had the Directive applied, the correct legal approach would be to consider whether the discrimination is appropriate and necessary for achieving the aim in view.\(^{246}\) They felt that banning homosexuals from military service, merely because they are homosexual, is not essential to maintaining a strong


\(^{243}\) Id. The Rand experts reached a common sense conclusion that contradicts the current rationale that homosexuals would have a negative effect on combat effectiveness and unit cohesion. The report provided that:

It is not necessary to like people in order to work with them, so long as members share a commitment to the group's objectives. First, research suggests that leaders play an important role in promoting and maintaining unit cohesion. Second, military roles, regulations, and norms all enhance the likelihood that heterosexuals will work cooperatively with homosexuals. Third, external threats enhance cohesion provided that the group members are mutually threatened and there is the possibility that cooperative group action can eliminate the danger.

\(^{244}\) GAO, DOD'S POLICY ON HOMOSEXUALITY, supra note 1, at 41.

\(^{245}\) Ministry of Defence, 145 NLJ 887, THE TIMES at 8. Young police officers often live in section houses with communal facilities. Id.

\(^{246}\) Id.
defense force and urged Parliament to take steps to correct the discriminatory policy.\textsuperscript{247}

In order for change to occur, many more steps need to be taken. As noted above, there are difficulties associated with adopting a policy permitting homosexuals to openly serve in the military. On the other hand, excluding homosexuals from service does not provide a viable solution to the problem, because homosexuals are as capable and qualified as their heterosexual counterparts. Furthermore, whether accepted or not, they are currently present within the ranks of the military.

In the United States, the "don’t ask, don’t tell" policy is a positive beginning to solving the problem, but is not an acceptable end. This policy is not a practical solution to the problem because it requires homosexuals to deny their sexuality. Other countries have proven that the traditional justifications for excluding homosexuals from service are unfounded. Preventing capable and willing homosexual men and women from participating in the military forces an injustice upon homosexuals, the military, and the nations maintaining the ban.

VI. Conclusion

In effect, the U.S. "don’t ask, don’t tell" policy is no better than Great Britain’s policy of excluding homosexuals from military service. In both countries, intolerance, as well as a refusal to move away from traditional military practices, has thwarted necessary modification. Moreover, the current regulations are not based on conduct, but rather on sexual orientation. Both countries should realize that liberal governments punish individuals and acts, not groups and "proclivities."\textsuperscript{248} That principle should not halt at the barracks door.\textsuperscript{249}

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\textsuperscript{247} \textit{See supra} note 128 and accompanying text.
\textsuperscript{248} \textit{Private’s Privacy, supra} note 226.
\textsuperscript{249} \textit{Id.}