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The Seventh Circuit in Ben-Shalom v. Marsh: Equating Speech with Conduct

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THE SEVENTH CIRCUIT IN \textbf{BEN-SHALOM V. MARSH}: EQUATING SPEECH WITH CONDUCT

I. INTRODUCTION

Sergeant Miriam Ben-Shalom of the United States Army Reserve said she was a lesbian.\(^1\) As a result, the United States Army (the Army) discharged her.\(^2\) The Army offered no evidence that Ben-Shalom had ever engaged in homosexual conduct; rather, it justified Ben-Shalom’s discharge on the basis of her lesbian status, as revealed by her statements alone.\(^3\) Ben-Shalom sued for wrongful discharge.\(^4\) The district court, in granting her motion for summary judgment,\(^5\) held that the Army had violated Ben-Shalom’s constitutional rights to free speech,\(^6\) privacy\(^7\) and

\begin{footnotesize}
\footnote{1. \textit{Ben-Shalom v. Secretary of Army (Ben-Shalom I)}, 489 F. Supp. 964, 969 (E.D. Wis. 1980), \textit{aff'd on other grounds}, 826 F.2d 722 (7th Cir. 1987). It should be noted that the courts have not spelled Ben-Shalom’s name consistently.}
\footnote{As used in this Note, “lesbians” are homosexual women and “gays” or “gay men” are homosexual men. A “homosexual person” is an individual of either gender who acknowledges, at least internally, that his or her sexual orientation is almost exclusively directed towards persons of the same sex. Conversely, a “heterosexual person” is an individual of either gender who acknowledges that his or her sexual orientation is directed almost exclusively towards persons of the opposite sex.}
\footnote{For purposes of this Note, the terms “homosexual conduct” or “homosexual acts” denote same-sex sexual activity regardless of the sexual orientation of the participants. “Heterosexual conduct” or “heterosexual acts” refer to sexual activity between persons of the opposite sex, regardless of their sexual orientation.}
\footnote{The issue of whether private, sexual conduct between consenting adults should be punishable, either by military or civilian authorities, is beyond the scope of this Note. For a discussion of the negative impact on social morality caused when law is used to enforce a particular moral attitude toward private, consensual sexual conduct, see generally H.L.A. HART, \textit{LAW, LIBERTY, AND MORALITY} (1963).}
\footnote{2. \textit{Ben-Shalom I}, 489 F. Supp. at 969.}
\footnote{3. \textit{Id.}}
\footnote{4. \textit{Id.}}
\footnote{5. \textit{Id.} at 977.}
\footnote{6. \textit{Id.} at 974-75; \textit{U.S. CONST. amend. I.}}
\footnote{7. \textit{Ben-Shalom I}, 489 F. Supp. at 976; \textit{U.S. CONST. amends. I, IX}. Distinguishing sexual preference from sexual conduct, the court found that the Army had abridged Ben-Shalom’s privacy interests by intruding upon her autonomous control over her personality as protected by the ninth amendment, and by restricting manifestations of her personality as protected by the first amendment. \textit{Ben-Shalom I}, 489 F. Supp. at 975-76.}
\end{footnotesize}
substantive due process and ordered the Army to reinstate her.\(^9\)

After completing her initial term of enlistment, Ben-Shalom decided to reenlist.\(^{10}\) The Army rejected her application.\(^{11}\) Again, the Army based its action on Ben-Shalom’s verbal acknowledgment of her lesbian orientation and did not allege that she had committed any homosexual acts.\(^{12}\) This time, the district court concluded that the Army had violated Ben-Shalom’s constitutional rights to free speech and equal protection under the first and fifth amendments, respectively.\(^{13}\) On appeal, however, a three-judge panel of the Seventh Circuit reversed, holding that it was not unconstitutional to deny Ben-Shalom’s reenlistment on the basis of her statements alone.\(^{14}\)

This Note criticizes the reasoning of the Seventh Circuit panel in *Ben-Shalom v. Marsh (Ben-Shalom II).*\(^{15}\) By refusing to distinguish sexual orientation from sexual behavior and, thus, to distinguish speech from conduct,\(^{16}\) the panel failed to address issues central to a determination of whether the Army had violated Ben-Shalom’s first and fifth amendment rights.\(^{17}\) Moreover, the panel’s reasoning was limited by its assumption that traditional judicial deference to the military required automatic acceptance of the Army’s justifications for excluding homosexual

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8. *Ben-Shalom I,* 489 F. Supp. at 976-77; U.S. CONST. amend. V. The phrase “substantive due process” encompasses those enumerated or implied rights in *The Bill of Rights* to the United States Constitution that the United States Supreme Court, in defining the “liberty” interests protected by the fifth and fourteenth amendments, U.S. CONST. amend. V, XIV, § 1, has identified as fundamental to a free human being. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ¶¶ 11-2, 15-3 (2d ed. 1988).


11. *Id.*

12. *Id.*


16. *See* *id.* at 460, 462, 464.

17. For example, with respect to the first amendment, the panel never inquired whether verbal self-identifications of homosexuality might be political speech worthy of the highest protection. *See infra* notes 231-40 and accompanying text. Similarly, the panel failed to discuss the impact of the Army’s regulation on freedom of thought. *See infra* notes 241-49 and accompanying text. The panel also did not discuss whether acknowledgments of homosexual orientation might be manifestations of personality protected by the inherent first amendment right to privacy. *See infra* notes 250-57 and accompanying text.

The panel’s fifth amendment equal protection analysis was similarly marred by the conflation of speech with conduct. *See infra* notes 307-36 and accompanying text.
individuals.  

This Note presents a brief overview of recent legal events pertaining to the military’s antihomosexual policy. It then sets forth the facts of *Ben-Shalom II* and the appellate panel’s reasoning. The analysis focuses on first amendment issues and discusses judicial deference and equal protection in that context. Finally, the author concludes that the Seventh Circuit panel’s holding not only abridges the first and fifth amendment rights of homosexual military personnel, but also imperils these rights in the civilian population.

II. BACKGROUND

A. Historical Overview

The military’s policy of excluding gays and lesbians originated during World War II. Before that time, the military had focused on homosexual conduct rather than homosexual personalities. Any individual, regardless of sexual orientation, who committed an act of homosexual sodomy was subject to imprisonment pursuant to court martial. During World War I. Before that time, the military had focused on homosexual conduct rather than homosexual personalities. Any individual, regardless of sexual orientation, who committed an act of homosexual sodomy was subject to imprisonment pursuant to court martial.

18. *See Ben-Shalom II*, 881 F.2d at 460-61, 466. *See infra* notes 258-306 and accompanying text for a discussion of the panel’s overly expansive interpretation of the deference due to assertions of military necessity.


20. *Id. But see* Chauncey, *Christian Brotherhood or Sexual Perversion? Homosexual Identities and the Construction of Sexual Boundaries in the World War One Era*, 19 J. SOC. HIST. 189, 197 (1985) (“The fact that naval and civilian authorities could prosecute men only for the commission of specific acts of sodomy should not be construed to mean that they viewed homosexuality simply as an act rather than as a condition characteristic of certain individuals . . . .”).


   Article 125 of the UCMJ proscribes sodomy which it defines as “unnatural carnal copulation with another person of the same or opposite sex or with an animal.” *Id.* § 925(a) (emphasis added). Both cunnilingus and fellatio have been held to be sodomy as defined by article 125. United States v. Harris, 8 M.J. 52, 58 (C.M.A. 1979) (cunnilingus); United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978) (fellatio). Article 80 punishes attempts to commit sodomy. *See* 10 U.S.C. § 880.

   The other UCMJ articles that are used in court martials for homosexual or heterosexual acts are less specific about the acts prohibited. Article 133 provides for court martial of persons engaging in “conduct unbecoming an officer and a gentleman.” *Id.* § 933. Article 134 authorizes court martial for “all disorders and neglects to the prejudice of good order and discipline.” *Id.* § 934. Pursuant to the Manual for Courts-Martial, United States, 1984, article 134 includes crimes of “indecency.” Exec. Order No. 12,474, 49 Fed. Reg. 17,154, 17,409 (1984). With respect to acts, “indecency” is defined as “that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.” *Id.*
ing World War II, the military’s focus changed due to its reliance on psychiatrists in developing military personnel policies. Under the influence of the then-current psychiatric theory that homosexuality was a mental disorder, the military switched from a court martial procedure to an administrative discharge procedure for known, or suspected, homosexual personnel. Although court martial remained a threat for those who refused to cooperate and accept their dishonorable discharges, the military limited use of the court martial to cases involving coerced or adult-minor sexual encounters.

According to Professor Rhonda Rivera, before 1973, civilian court challenges to military court martial and administrative discharge proceedings involving homosexual personnel generally focused on questions of guilt or innocence or on procedural issues. In 1973, however, gays and lesbians began using the civilian courts to raise constitutional challenges to the military’s antihomosexual policy. For awhile, it seemed that the courts would insist that the military show a connection between homosexuality and job performance in order to justify discharges of ho-

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Indecency may also take the form of offensive language that has a “tendency to incite lustful thought.”

22. A. BERUBE, supra note 19, at 2, 33.
23. Id. at 13. The American Psychiatric Association (the Association) finally removed homosexuality from its list of mental disorders in 1974. Defense Personnel Security Research and Education Center (PERSEREC), Non-Conforming Sexual Orientations and Military Suitability (Dec. 1988), reprinted in GAYS IN UNIFORM 5, 22 (K. Dyer ed. 1990) [hereinafter PERSEREC Report]. In reaching this decision, the Association may have been motivated by political considerations rather than scientific findings, even though, as early as 1957, scientific research justified the conclusion that homosexuality is not a mental illness. Id. at 22-23.
24. A. BERUBE, supra note 19, at 136-37, 143-44.
25. Until the 1970’s, military personnel automatically received dishonorable discharges for homosexuality. Rivera, Queer Law: Sexual Orientation in the Mid-Eights, Part II, 11 DAYTON L. REV. 275, 299 (1986). Some homosexual individuals, however, escaped this stigma and obtained honorable discharges by convincing military psychiatrists to diagnose them as psychoneurotics. A. BERUBE, supra note 19, at 202.
26. A. BERUBE, supra note 19, at 137, 144.
27. In 1979, Professor Rhonda Rivera began a series of articles which present a comprehensive review of the legal situation of homosexual persons throughout the United States. Rivera, supra note 25, at 275 n.1.
28. Id.
mosexual individuals. This trend culminated in 1980 with Ben-Shalom's successful challenge to the Army's attempt to discharge her during her initial enlistment period.

Professor Rivera has isolated four events which reversed this trend toward requiring the military to show some reasonable link between in-service performance and homosexuality. First, the Ninth Circuit upheld the Navy's discharge of two gay men and one lesbian on the ground that the special nature of the military required the court to give great deference to the Navy's reasons for excluding homosexual personnel. Second, as a result of this decision, two other gay servicemen, who had successfully appealed summary judgments granted to the Air Force and Navy, accepted out-of-court monetary settlements in lieu of pursuing their wrongful discharge claims. Third, the Department of Defense (DoD) rewrote its directives in order to close regulatory loopholes which had allowed known homosexual servicepersons to remain in the military under certain circumstances. Fourth, for almost seven years, the Army

30. Rivera, supra note 25, at 289.
31. Id. at 291.
32. Id.
33. Id. at 291-95; see Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980), cert. denied, 452 U.S. 905, cert. denied, 454 U.S. 855 (1981).
34. Rivera, supra note 25, at 291, 295 (discussing plaintiffs' decisions to forego remands granted in Matlovich v. Secretary of the Air Force, 591 F.2d 852, 861 (D.C. Cir. 1978) and Berg v. Claytor, 591 F.2d 849, 851 (D.C. Cir. 1978)).
35. Id. at 291, 298. Matlovich v. Secretary of the Air Force and Berg v. Claytor revealed that, because exclusion of homosexual personnel was discretionary under Air Force and Navy regulations, both services would have to specify their reasons when opting to discharge a homosexual person so that the reviewing court could determine the legitimacy of the dismissal. See Matlovich v. Secretary of the Air Force, 591 F.2d 852, 857 (D.C. Cir. 1978); Berg v. Claytor 591 F.2d 849, 851 (D.C. Cir. 1978). Ben-Shalom I showed that the Army's regulation requiring discharge of those who evidenced a homosexual "tendency, desire or interest" was too broad to pass constitutional muster. See Ben-Shalom I, 489 F. Supp. at 974.

Thus, the rewritten DoD directives mandated discharge of homosexual individuals and narrowed the definition of a homosexual person to include only someone "who engages in, desires to engage in, or intends to engage in homosexual acts."
was able to forestall compliance with the district court's order to reinstate Ben-Shalom for the remainder of her initial enlistment term. These events marked the end of a period of progress toward gay and lesbian rights in the armed forces.

B. The Legal Significance of Distinguishing Homosexual Orientation from Homosexual Conduct

In 1986, another event occurred that significantly influenced cases concerning homosexual servicepersons, even though it did not involve the military: The United States Supreme Court decided Bowers v. Hardwick. In Hardwick, the Court reviewed a Georgia statute criminalizing


Furthermore, a presumption of homosexuality could be rebutted only if all five of the following findings were made with respect to preservice, prior service or current service conduct or statements:

(a) Such conduct is a departure from the member’s usual and customary behavior;
(b) Such conduct under all the circumstances is unlikely to recur;
(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;
(d) Under the particular circumstances of the case, the member’s continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and
(e) The member does not desire to engage in or intend to engage in homosexual acts.


DoD directives governing separation for homosexuality of enlisted personnel and commissioned officers are the same in all essential respects. Compare id. pt. 1(H)(1)(b)-(c) with Dept. Def. Directive No. 1332.30 encl. 1(7), encl. 2(B)(4). Each branch of the military promulgates its own regulations to implement these directives. 32 C.F.R. § 41.4 (1989); Dept. Def. Directive No. 1332.30. Army Regulation (AR) 135-178 10 (1989) (governing discharge) and AR 140-111, table 4-2, rule E (1989) (governing reenlistment) are the Army’s implementing regulations.

36. Ben-Shalom v. Marsh (Ben-Shalom II), 881 F.2d 454, 456-57 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990); see Rivera, supra note 25, at 291.

37. See Rivera, supra note 25, at 303-24 (discussing subsequent cases involving homosexual military personnel).

38. 478 U.S. 186 (1986). Pursuant to a Georgia antisodomy statute, Hardwick was arrested in the privacy of his bedroom while engaging in a consensual act of homosexual sodomy. Id. at 187-88. The District Attorney did not pursue the matter further than the preliminary hearing stage and Hardwick was, therefore, never indicted. Id. at 188. Nevertheless, Hardwick decided to challenge the constitutionality of the statute and initiated suit. Id. Although the Georgia statute on its face applied to both heterosexual and homosexual sodomy, Georgia’s exclusive focus on the statute’s value as a tool for prosecuting homosexual people suggested discriminatory enforcement. Id. at 202 n.2 (Blackmun, J., dissenting).
both heterosexual and homosexual consensual sodomy.\textsuperscript{39} The Court held that the statute, as applied to homosexual sodomy, did not violate substantive due process because the fundamental right of privacy\textsuperscript{40} did not extend to consensual acts of homosexual sodomy.\textsuperscript{41}

Post-Hardwick gay and lesbian challenges to antihomosexual laws have focused on two issues not addressed in \textit{Hardwick}: equal protection, provided by the fifth and fourteenth amendments,\textsuperscript{42} and freedom of speech, guaranteed by the first amendment.\textsuperscript{43} Yet, \textit{Hardwick} had a major impact on these challenges, as Ben-Shalom’s pre- and post-Hardwick suits illustrate.\textsuperscript{44}

\textit{Hardwick}’s most significant effect was on the issue of whether gays and lesbians can ever constitute a “suspect” or “quasi-suspect” class for

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\item<39> Id. at 188.
\item<40> The fifth amendment explicitly bars the federal government from depriving an individual of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The fourteenth amendment imposes an identical prescription on the states. Compare U.S. CONST. amend. XIV, § 1 with U.S. CONST. amend. V. See supra note 8 for a definition of substantive due process.
\item<41> \textit{Hardwick}, 478 U.S. at 191-92, 196. The Court based its holding solely on the due process clauses of the fifth and fourteenth amendments. Id. at 191. As the Court specifically noted, it did not address the issue of equal protection because Hardwick had not challenged the statute on that basis. Id. at 191 n.8. The Court also reserved the question of whether the Georgia statute would be constitutional if applied to heterosexual sodomy. Id. at 188 n.2.
\item<42> \textit{E.g.}, Webster v. Doe, 486 U.S. 592 (1988) (equal protection, right to privacy, and due process liberty and property interest claims by Central Intelligence Agency employee); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (equal protection challenge to Army discharge of gay sergeant), \textit{cert. denied}, 111 S. Ct. 384 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (equal protection and right to privacy challenges by homosexual Navy officer), \textit{cert. denied}, 110 S. Ct. 1295 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (equal protection challenge to FBI refusal to hire lesbian); Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990) (equal protection challenge to county prison rules denying visitation to boyfriends or girlfriends of homosexual, but not heterosexual, inmates). Unlike the first section of the fourteenth amendment, which is addressed only to the states, the fifth amendment does not contain an equal protection clause. Compare U.S. CONST. amend. XIV, § 1 with U.S. CONST. amend. V. Nevertheless, the federal government is bound to the concept of equal protection through the fifth amendment’s due process clause. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The treatment of equal protection claims is essentially the same under both amendments. Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975).
\item<43> \textit{E.g.}, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (first amendment and equal protection challenges to DoD regulations subjecting all gays and lesbians to expanded security investigations); Ben-Shalom v. Marsh (Ben-Shalom II), 881 F.2d 454 (7th Cir. 1989) (free speech and equal protection challenges to Army refusal to reenlist lesbian), \textit{cert. denied}, 110 S. Ct. 1296 (1990); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987) (first amendment challenge to Army discharge of lesbian chaplain), \textit{appeal filed}, No. 87-5914 (9th Cir. May 5, 1987).
\item<44> \textit{Compare Ben-Shalom II}, 881 F.2d at 462, 464 (no first amendment or equal protection violations) \textit{with} Ben-Shalom v. Secretary of the Army (Ben-Shalom I), 489 F. Supp. 964, 976 (E.D. Wis. 1980) (first amendment and substantive due process violations), \textit{aff’d} on other grounds, 826 F.2d 722 (7th Cir. 1987).
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purposes of equal protection. The Hardwick Court held it was permissible for states to criminalize homosexual sodomy, conduct popularly identified as defining homosexuals. Therefore, some courts have reasoned that homosexuals can never constitute a suspect or quasi-suspect class because homosexuals are defined by behavior which may be criminalized. This reasoning has been applied even in cases in which the issue involved homosexual status, rather than conduct. Other courts, however, limiting Hardwick to its facts, have concluded that Hardwick does not support an inference that laws directed at homosexuals solely on the basis of their sexual orientation also would be constitutional.

45. See, e.g., Padula, 822 F.2d at 103. "Suspect" or "quasi-suspect" classes are those groups of persons who historically have been victims of discrimination, who "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and who are "a minority or politically powerless." Lyng v. Castillo, 477 U.S. 635, 638 (1986). Once the Court has identified a group as suspect or quasi-suspect, legislation authorizing differential treatment of that group is subject to heightened judicial scrutiny. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985); Castillo, 477 U.S. at 638.

46. Hardwick, 478 U.S. at 196.

47. Ben-Shalom II, 881 F.2d at 464-65; Woodward, 871 F.2d at 1075-76; Padula, 822 F.2d at 103-04; see Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915, 919-20 (1989). For a discussion on why it is false to assume that acts of homosexual sodomy define homosexually oriented individuals, see infra notes 105-16.

48. See, e.g., High Tech Gays, 895 F.2d at 571; Ben-Shalom II, 881 F.2d at 464-65; Woodward, 871 F.2d at 1075-76; Padula, 822 F.2d at 103-04. Contra Watkins, 875 F.2d at 716 (Norris, J., concurring); cf. L. Tribe, supra note 8, § 15-21, at 1431 & nn.70-71 (on its face, Georgia statute did not distinguish between heterosexual and homosexual acts of sodomy; because Hardwick's challenge to statute was "facial," not "as applied" Court mischaracterized issue by framing it as "a fundamental right to engage in homosexual sodomy." (quoting Bowers v. Hardwick, 478 U.S. 186, 191 (1986))).

49. See, e.g., Ben-Shalom II, 881 F.2d at 464-65 ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny . . . ."); Woodward, 871 F.2d at 1076 ("After Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); Padula, 822 F.2d at 103 ("It would be quite anomalous [sic] . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.").

50. Watkins, 875 F.2d at 719 (Norris, J., concurring) ("Whether homosexual conduct is protected by the due process clause is an entirely separate question from whether the equal protection clause prohibits discrimination against homosexuals."); Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986) ("[The Supreme Court in Hardwick] did not reach the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual orientation."); aff'd in part and rev'd in part on other grounds sub nom. Webster v. Doe, 486 U.S. 592 (1988); BenShalom v. Marsh, 703 F. Supp. 1372, 1379 (E.D. Wis.) ("Hardwick can only be reasonably construed as standing for the proposition that classifications are not subject to strict scrutiny when defined by homosexual conduct that rises to the level of criminal sodomy."); rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361,
In the context of the first amendment, Hardwick's impact has been indirect. Even before Hardwick, the distinction between sexual orientation and sexual conduct played a role in first amendment challenges to antihomosexual military regulations because the first amendment protects speech, in the form of words or expressive acts, rather than conduct as such. Some courts, recognizing this distinction between communication and conduct, have held that a person's acknowledgment of his or her homosexual identity is protected expression under the first amendment. Other courts, however, have found no meaningful first amendment infringements in acknowledgments of homosexual orientation because they have viewed such statements as admissions that the individual "engages in, desires to engage in, or intends to engage in homosexual acts." Hardwick's influence concerning this latter view can be seen in the Ben-Shalom II court's use of Hardwick to justify the presumption that the Army's regulation actually targeted legitimately forbidden conduct rather than protected communication.

Thus, in light of Hardwick's denial of the fundamental right of privacy with respect to consensual homosexual sodomy, the distinction between orientation and conduct takes on added importance for protecting the rights of homosexual persons. Ben-Shalom II is particularly significant because Ben-Shalom was the first self-identified homosexual litigant to challenge the military's policy of excluding homosexual individuals solely on the basis of sexual orientation.

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51. E.g., Matthews v. Marsh, 755 F.2d 182 (1st Cir. 1985) (vacating as advisory, in light of new evidence suggesting conduct, district court's opinion that dismissal of member of Reserve Officer Training Corps merely on basis of statement "I am a lesbian" violated first amendment); Ben-Shalom I, 489 F. Supp. at 975 ("[T]he petitioner was treated in the same way as one who openly engages in homosexual activity, even though she is 'guilty' of nothing more than having a homosexually-oriented personality.").

52. Conduct receives first amendment protection as expression if the conduct is intended to communicate a message which an observer most likely would understand in the given context. Spence v. Washington, 418 U.S. 405, 409-11 (1974).


57. See Halley, supra note 47, at 966-71 (public sexual identification implicates free speech and equal protection because both doctrines involve protection of political process).

58. Rivera, supra note 25, at 290. Other post-Hardwick cases involving plaintiffs who
III. STATEMENT OF THE CASE

In 1974, Miriam Ben-Shalom enlisted in the United States Army Reserve for a three-year period. She graduated from the Army's Leadership Academy and became an instructor at the Fourth Brigade Drill Sergeant Academy. On several occasions, she publicly announced that she was a lesbian. She was an excellent instructor, and neither her immediate supervisors nor her students seemed concerned about her lesbianism. Nevertheless, Ben-Shalom's statements acknowledging her lesbian orientation led to her honorable discharge in 1976. The grounds for her discharge were set forth in an Army regulation which authorized "discharge of any soldier who 'evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts.'"

After being discharged, Ben-Shalom initiated her first suit against

were discharged on the basis of orientation alone include Watkins, 875 F.2d at 709-11 (estopping Army from refusing to reenlist plaintiff on basis of his sexual orientation because Army had known for fourteen years that plaintiff was gay); Woodward, 871 F.2d at 1074-76 & 1074 n.6 (upholding Navy discharge of reserve officer and noting discharge not based solely on orientation because officer made no claim to celibacy, had expressed his intention to socialize with other homosexual individuals, and had "visited an Officers' Club with an enlisted man who was awaiting discharge from the Navy for homosexuality"); Steffan v. Cheney, 733 F. Supp. 121, 122-26 (D.D.C. 1989) (dismissing former midshipman's claim that United States Naval Academy disenrolled him solely on basis of his sexual orientation, after midshipman refused court's order to answer deposition questions as to whether he had engaged in homosexual conduct during or since his enrollment); Pruitt, 659 F. Supp. at 626-27 (dismissing first amendment challenge by Army Reserve chaplain who revealed lesbian orientation during newspaper interview about gay church).

59. BenShalom v. Secretary of Army (Ben-Shalom I), 489 F. Supp. 964, 969 (E.D. Wis. 1980), aff'd on other grounds, 826 F.2d 722 (7th Cir. 1987). At the time of her enlistment, Ben-Shalom was in college and needed extra income to support her six-year-old daughter. P. JOHNSON, PROFILES ENCOURAGE 10 (1988). Ben-Shalom joined the Army Reserve in part because it fits the demands of her schedule better than other employment and in part because she wanted to show that women could bear the same responsibilities as men and that gays and lesbians could serve with honor. Id.

60. Ben-Shalom I, 489 F. Supp. at 969.

61. P. JOHNSON, supra note 59, at 10. On her enlistment application form, Ben-Shalom revealed her membership in the Milwaukee Gay People's Union and in the New York Radical Lesbians but answered "No" to the query, "Do you have any homosexual tendencies" on the theory that she was a homosexual person and thus had no "tendencies." Id. Ben-Shalom acknowledged her lesbianism in conversations with her colleagues, in an interview with an Army newspaper reporter, and while teaching her class for drill sergeants. Ben-Shalom I, 489 F. Supp. at 969.


63. Id. at 973.

64. Id. at 969.

65. Id. (emphasis added) (quoting AR 135-178 ¶ 7-5(b)(6)). Initially, the Army charged Ben-Shalom with homosexual conduct, but this charge was soon dropped, and the Army made no further allegations concerning sexual conduct. Id.
the Army. The district court granted Ben-Shalom's motion for summary judgment and ordered the Army to reinstate her. In 1987, after delaying almost seven years, the Army complied with the order, and Ben-Shalom completed the eleven remaining months of her initial enlistment period.

When her original term of enlistment neared its end, Ben-Shalom applied for reenlistment. The Army rejected her application, however, and Ben-Shalom filed a second suit against the Army. During the time between Ben-Shalom's initial discharge and the time of her application for reenlistment, the DoD had reworded its directives concerning homosexuality, and these changes were reflected in the Army's implementing regulations. Thus, after Ben-Shalom applied for reenlistment, the Army informed her that homosexuality was a nonwaivable disqualification under its new regulation (Reenlistment Regulation), and that she

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66. See id. at 964.
67. Id. at 977. The district court held that the Army's regulation was overbroad because it "chilled" the first amendment, U.S. CONST. amend. I, rights of every soldier to associate freely with homosexuals and to discuss or read about homosexuality. Ben-Shalom I, 489 F. Supp. at 974. In failing to distinguish homosexual "personality" from homosexual activity, the Army regulation also abridged the right to privacy inherent in the first amendment because the regulation attempted to control thought and manifestations of personality. Id. at 975-76. Finally, by neglecting to show a link between homosexual status and unfitness for service, the Army's action was arbitrary and capricious, and violated Ben-Shalom's fifth amendment, U.S. CONST. amend. V, right to substantive due process. Ben-Shalom I, 489 F. Supp. at 976-77.
68. Ben-Shalom v. Marsh (Ben-Shalom II), 881 F.2d 454, 456-57 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990). The seven-year delay was not due to an appeal on the merits. Id. at 456. Rather, the delay was caused by the Army's refusal to comply with the district court's order and subsequent attempt to have the judgment set aside pursuant to a Rule 60(b) motion. Id.; Fed. R. Civ. P. 60(b). The Seventh Circuit ultimately affirmed the reinstatement order on the ground that a Rule 60(b) motion could not be used to relitigate the merits in lieu of appeal. Ben-Shalom II, 881 F.2d at 456.
69. Ben-Shalom II, 881 F.2d at 457.
70. Id.
72. AR 140-111, table 4-2, rule E (1989). The following characteristics automatically disqualify a reenlistment applicant:

E. Questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence that they [sic] have engaged in homosexual acts either
would be ineligible for military service unless she rebutted the presumption of her homosexuality within thirty days.\textsuperscript{73} Ben-Shalom once again stated that she was a lesbian, and, when the Army denied her reenlistment, she sought judicial relief.\textsuperscript{74}

The district court found no cognizable difference between the Reenlistment Regulation and the regulation that had been declared unconstitutional eight years earlier in \textit{Ben-Shalom I}.\textsuperscript{75} The district court concluded that the argument that "acknowledgment of status equals reliable evidence of [a] propensity" to engage in prohibited conduct was "little more than a euphemism for prejudice."\textsuperscript{76} Thus, the district court

\textit{before or during military service}, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies.

\textit{Id.} (emphasis added).

An accompanying note further defines the criteria for excluding individuals on the basis of homosexuality:

1. Homosexual acts consist of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. \textit{Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.}

\textit{Id.} n.1 (emphasis added). AR 135-178, governing separation is similar to this reenlistment regulation. \textit{Compare AR 135-178 §§ 10-4(a) (1989) with AR 140-111, table 4-2, rule E.}

In turn, the separation regulation is essentially the same as the DoD directive regarding enlisted personnel. \textit{Compare AR 135-178 §§ 10-4(a) with 32 C.F.R. pt. 41 app. A, pt. 1(H)(1)(c)(1).} The separation regulation, however, includes the following example of circumstances which might indicate that an individual would be unlikely to engage in further homosexual conduct: "[T]he act occurred solely as a result of immaturity, intoxication, coercion, or a desire to avoid military service." AR 135-178 § 10-4(a)(2).

In addition, the separation regulation specifies that:

To warrant retention of a member after finding that he or she engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, the board must specifically make all five findings listed . . . . The intent of this policy is to permit retention only of nonhomosexual soldiers . . . .

\textit{Id.} §10-4(a)(5) note. See \textit{supra} note 35 for the five findings which are required to successfully rebut the presumption of homosexuality. The separation regulation also applies to bisexuals and persons who marry someone "known to be of the same biological sex." AR 135-178 §§ 10-4(b), (c).

\textit{73. Ben-Shalom II}, 881 F.2d at 457.


\textit{76. Id.}
held that the Reenlistment Regulation facially violated the first amendment by "unreasonably" chilling speech.\(^7\) Furthermore, because sexual orientation was unrelated to a person's "ability to perform or contribute to the military," the Reenlistment Regulation did not rationally serve the Army's interests and, thus, could not survive an equal protection challenge.\(^7\) On appeal, however, a three-judge panel of the Seventh Circuit reversed.\(^7\)

IV. REASONING OF THE COURT

A. The First Amendment

The foundation for the Seventh Circuit's first amendment analysis was its acceptance of the Army's "common sense" argument\(^8\) that an admission of homosexual orientation "reasonably implies... a 'desire' to commit homosexual acts" and that this desire might lead to action.\(^8\) Therefore, the panel found that the Reenlistment Regulation was aimed primarily at conduct and concluded that the incidental restriction on speech was not of constitutional magnitude.\(^8\)

Furthermore, the panel felt constrained to defer to the determination by military authorities that the presence of homosexual individuals "might imperil" the military mission.\(^8\) Such determinations were not to be "second-guessed" by the courts.\(^8\) Even though some prejudice against homosexual persons existed in the Army and even though judges were "opponents of prejudice," judges lacked the military knowledge necessary for evaluating the dangers posed by a change in military policy.\(^8\)

B. Equal Protection

As with its first amendment analysis,\(^8\) the critical assumption in the Seventh Circuit's equal protection analysis was that homosexual orientation implied homosexual conduct.\(^8\) Because criminalization of homo-
sexual conduct was constitutionally acceptable, the panel reasoned that homosexual persons could not constitute a suspect or quasi-suspect class. Therefore, the Reenlistment Regulation did not merit heightened scrutiny, and the panel was obliged to apply only the most deferential level of review, the rational basis test. Under that test, the challenged regulation was rationally related to the Army's objectives.

The panel concluded its equal protection analysis by stressing again that Ben-Shalom II arose in a military context. Thus, any change in military policy was properly within the purview of the legislative and executive branches of government.

V. Analysis

The Seventh Circuit's reasoning in Ben-Shalom v. Marsh (Ben-Shalom II) was based on misconceptions about sexuality, a misunderstanding of first amendment principles, an overbroad reading of precedent concerning judicial deference to the military and miscategorization of the relevant classification for equal protection purposes. This section discusses popular misconceptions about sexuality, and homosexuality in particular, which appear to have guided some of the panel's reasoning. Then, this section analyzes the panel's use of first amendment precedent regarding freedom of speech, thought and personality and judicial deference to the military. Finally, this section addresses the issue of equal protection raised by the Army's discriminatory suppression of speech on the basis of sexual orientation.

89. Ben-Shalom II, 881 F.2d at 464. See supra note 45 for a definition of suspect and quasi-suspect classes.
91. Ben-Shalom II, 881 F.2d at 464.
92. Under a rational basis test, a restriction does not violate equal protection if "the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne, 473 U.S. at 440. Courts tend to presume that the state's interest is legitimate and will find a "rational relationship" if there is any conceivable set of past, present or future facts which might justify delineating the classification. See, e.g., Lyng v. Castillo, 477 U.S. 635 (1986); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, 348 U.S. 483 (1955); see L. Tribe, supra note 8, § 16-2, at 1442-43, § 16-3, at 1443.
93. Ben-Shalom II, 881 F.2d at 465. See supra note 33 for a list of the objectives which form the basis for the military's exclusion of homosexual persons.
95. Id. at 466.
97. See infra notes 105-31 and accompanying text.
98. U.S. CONST. amend. I; see infra notes 146-75 and accompanying text.
99. See infra notes 238-306 and accompanying text.
100. U.S. CONST. amend. V; see infra notes 307-36 and accompanying text.
A. Misconceptions About Sexuality

Three misconceptions about sexuality seem to underlie the court's analysis in *Ben-Shalom v. Marsh (Ben-Shalom II).*\(^{101}\) First, the panel equated sexual orientation with sexual conduct, at least where homosexual persons were concerned.\(^{102}\) Second, the panel seems to have assumed that homosexual individuals are more preoccupied with sex and, thus, less likely to control their sexual conduct than heterosexual persons.\(^{103}\) Third, the panel impliedly approved the notion that, because homosexual acts could be criminalized, the Army could exclude homosexual individuals just as it could exclude other persons likely to engage in criminal conduct, such as arsonists and kleptomaniacs.\(^{104}\)

1. Misconception: sexual orientation predicts conduct

The appellate court accepted the Army's "common sense" argument that a homosexual person's "desire" will probably ripen into action, and that expressions of sexual orientation are reliable indicators of sexual conduct.\(^{105}\) The Army, however, has known since the *Crittenden Report*,\(^{106}\) a 1957 report on homosexuality prepared under the auspices of all branches of the military, that this "common sense" argument was not

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\(^{101}\) 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).
\(^{102}\) See id. at 460-62, 464.
\(^{103}\) Compare id. at 464 (admission of homosexual desire is sufficient for predicting probable conduct; thus, "[t]he Army need not try to fine tune a regulation to fit a particular lesbian's subjective thoughts and propensities.") with *BenShalom v. Secretary of Army (Ben-Shalom I)*, 489 F. Supp. 964, 975 (E.D. Wis. 1980) ("Just as some heterosexuals have, throughout human history, chosen to forego sexual activity for a variety of reasons, it cannot be assumed that all who have personalities oriented toward homosexuality necessarily engage in homosexual conduct."); aff'd on other grounds, 826 F.2d 722 (7th Cir. 1987).
\(^{104}\) See *Ben-Shalom II*, 881 F.2d at 460-61, 464. In accepting the Army's "common sense" argument that conduct rationally could be inferred from orientation, the appellate panel impliedly accepted the analogy to kleptomaniacs and arsonists that the Army made in oral argument. See Separate Appendix at 27, *Ben-Shalom II* (Nos. 88-2771, 89-1213) (transcript of oral argument before district court on Oct. 4, 1988) (on file at Loyola of Los Angeles Law Review).
\(^{105}\) *Ben-Shalom II*, 881 F.2d at 459-61.

based on fact. The Crittenden Report acknowledged that "[i]t cannot be said, as a generalization, that one or more instances of homosexual behavior makes an individual either more likely or less likely to participate in homosexual acts in the future."\textsuperscript{107}

The Crittenden Report relied heavily on Dr. Alfred C. Kinsey's research during the late 1940s and early 1950s.\textsuperscript{108} Kinsey's studies showed that a significant number of people are not exclusively heterosexual in their sexual practices,\textsuperscript{109} and that an individual's sexual conduct is not necessarily congruent with the individual's public or private sexual identity.\textsuperscript{110}

A disparity between sexual orientation and conduct also has been found in studies limited to persons who identified themselves as gay or lesbian.\textsuperscript{111} For example, one psychologist, reporting on college women,

\textsuperscript{107} Crittenden Report, supra note 106, at 5. The Board's chief finding was that "[m]any common misconceptions pertaining to homosexuality have become exaggerated and perpetuated over the years . . . [T]he fallacies inherent in these concepts are being demonstrated with increasing frequency." \textit{Id.} at 4-5. Although the Board suggested that the Navy adopt a "forward-looking program," the Board did not recommend any real changes, probably because it felt constrained by its original directive which was to find ways of implementing the Navy's exclusionary policy. E. Gibson, supra note 106, at 365-66.


\textsuperscript{109} Kinsey's findings were based on case studies of 5,300 males and 5,940 females. \textit{Human Male}, supra note 108, at ix; \textit{Human Female}, supra note 108, at 43. These studies yielded the following results:

<table>
<thead>
<tr>
<th>Accumulative Incidences</th>
<th>Males</th>
<th>Females</th>
</tr>
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<tbody>
<tr>
<td>Homosexual psychological responses</td>
<td>50%</td>
<td>28%</td>
</tr>
<tr>
<td>Homosexual overt contacts to point of orgasm</td>
<td>37%</td>
<td>13%</td>
</tr>
</tbody>
</table>

\textsuperscript{110} See \textit{Human Male}, supra note 108, at 616-17; \textit{Human Female}, supra note 108, at 469. Subsequent researchers also have observed a disparity between sexual identity and conduct. Halley, supra note 47, at 941-46 (discussing "social-constructionist" studies of self-identified gays and lesbians).

observed:

Among women who identified themselves to me as lesbians, there were some whose sexual behavior was explicitly and exclusively lesbian, and some whose behavior was exclusively heterosexual or bisexual (these latter also described themselves as "political lesbians"). In addition, I spoke with sexually inexperienced women who considered themselves to be lesbians. Although no student ever self-consciously identified herself as a celibate lesbian, this is a distinct possibility . . . . 112

Another researcher found similar distinctions among gay men.113 Some men identified themselves as gay without ever having participated in homosexual sex while others only accepted a gay identity after a long-term homosexual relationship had ended.114

Even without the benefit of such studies, the Seventh Circuit should have realized, as did the lower court,115 that sexual orientation and sexual conduct are separate issues. The distinction is implicit in society's recognition that people do not lose their sexual orientation when they are celibate—asexuality and celibacy are not synonymous.116

2. Misconception: homosexual persons are more preoccupied with sex than heterosexual persons

A corollary to the assumption that homosexual orientation reliably indicates a person's "propensity"117 to engage in proscribed sexual conduct is the assumption that sex is necessarily a major focus of homosex-

113. McDonald, supra note 111, at 52-53.
114. Id. Out of a group of 199 gay men, 18% acknowledged they were gay without ever having had a homosexual experience, 10% recognized they were gay at the time of their first same-sex sexual encounter, 22% defined themselves as gay while involved in a long-term homosexual relationship, and 23% identified themselves as gay only after such a relationship had ended. Id.
116. Compare WEBSTER'S THIRD NEW INT'L DICTIONARY 127 (1976) (defining "asexuality" as "absence of sex") [hereinafter WEBSTER'S] with id. at 359 (defining "celibacy" as "abstention from sexual intercourse"). The problem with the Seventh Circuit's conflating of orientation and conduct may be illustrated by applying the panel's reasoning to a case of disqualification of a bisexual soldier, which is also required under Army regulations. See AR 135-178 ¶ 10-4(b) (1989); AR 140-111, table 4-2, rule E n.1 (1989). If this hypothetical soldier identified himself as bisexual but was currently involved in a monogamous, heterosexual relationship and had never had a homosexual encounter, would his self-identifying statement still be an admission of probable homosexual conduct?
117. The Seventh Circuit never specifically defined "propensity" in terms of any statistical probabilities. Therefore, it is reasonably assumed that the court used the word in its general
ual individuals. Homosexual persons, however, are no more preoccupied with sex than heterosexual persons.

Nevertheless, the Seventh Circuit seems to have assumed that homosexual individuals generally are more sex-driven than heterosexual individuals when it implied that homosexual servicepersons would engage in sexual conduct in communal quarters or other public places. The panel did not explain how it arrived at this conclusion, nor why extant military regulations prohibiting certain sexual acts were effective for controlling the sexual conduct of heterosexual persons yet ineffective for controlling the sexual conduct of homosexual personnel. In addition, the panel did not offer any support for its apparent assumption that sex-

sense as “a natural inclination: innate or inherent tendency.” WEBSTER’s, supra note 116, at 1817.

The panel’s use of a word which implies “tendency” to justify its conclusion that speech reflects probable conduct is somewhat ironic. The panel took pains to distinguish the Army’s current regulation from the one held unconstitutional in Ben-Shalom I. See Ben-Shalom II, 881 F.2d at 460. The Ben-Shalom II panel noted that the new regulation had been purged of the constitutionally offensive “tendency” language. Id. Yet, in relying on the concept of “propensity,” the panel interjected the notion of “tendency” into the new regulation. See WEBSTER’s, supra note 116, at 1817 (defining “propensity”).

Additionally, the Army seems to have retained the concept of “tendency.” A previous “discharge for homosexual tendencies” is still a nonwaivable disqualification for reenlistment applicants, AR 140-111, table 4-2, rule M (emphasis added), even though “tendency” is not used in rule E. See AR 140-111, table 4-2, rule E.

Those who resist changing the traditional policies support their position with statements of the negative effects on discipline, morale, and other abstract values of military life. Buried deep in the supporting conceptual structure is the fearful imagery of homosexuals polluting the social environment with unrestrained and wanton expressions of deviant sexuality. It is as if persons with nonconforming sexual orientations were always indiscriminately and aggressively seeking sexual outlets. All the studies conducted on the psychological adjustment of homosexuals that we have seen lead to contrary inferences.

Id.

119. Id. “Whether in an Army platoon or in a brokerage office, people are generally selective in their choice of intimate partners and in their expression of sexual behavior.” Id. Homosexual individuals may even be less preoccupied with sex than heterosexual individuals. Id. (citing Bell, Homosexualities: Their Range and Character, 21 NEB. SYMP. ON MOTIVATION 1-26 (1973)).

120. See Ben-Shalom II, 881 F.2d at 465. In addition to referring to “privacy” in its constitutional sense, the Seventh Circuit also seemed to use the term in its more literal sense. See id. The panel noted that, in Bowers v. Hardwick, 478 U.S. 186 (1986), Hardwick’s conduct had occurred within the confines of his bedroom. Ben-Shalom II, 881 F.2d at 465. In contrast, Ben-Shalom presumably would engage in conduct that would have an “impact on other soldiers.” Id. The implication of this comparison is that if Ben-Shalom were to engage in sexual activity she would do so in a place where her fellow soldiers could observe her conduct.

121. See Ben-Shalom II, 881 F.2d at 465.

ual orientation is a determinative factor for deciding whether an individual is likely to refrain from sexual activity.\textsuperscript{123}

3. Misconception: all homosexual expressions of affection involve criminal conduct

The Seventh Circuit also upheld the Reenlistment Regulation on the theory that homosexual conduct only involves acts that may be criminalized,\textsuperscript{124} such as sodomy.\textsuperscript{125} Homosexual conduct, however, encompasses a variety of erotic and affectionate acts, such as kissing and hugging,\textsuperscript{126} which Congress and state legislatures have not defined as criminal.\textsuperscript{127}

Furthermore, if it is correct to presume that a homosexual orientation suggests a tendency to commit criminal sexual acts, heterosexual persons may be equally vulnerable to expulsion on the basis of their sexual orientation. The Uniform Code of Military Justice (UCMJ)\textsuperscript{128} criminalizes both homosexual and heterosexual sodomy,\textsuperscript{129} and the United States Supreme Court has not yet held that sodomy laws are inapplicable to heterosexual persons.\textsuperscript{130} No factual basis exists for assuming conduct. See 10 U.S.C. §§ 880, 925(a), 933, 934 (1988). See supra note 21 for the relevant provisions of the UCMJ.

\textsuperscript{123} Compare Ben-Shalom II, 881 F.2d at 464 (dismissing importance of individual lesbian's ability to remain celibate) with Ben-Shalom, 703 F. Supp. at 1377 and Ben-Shalom I, 489 F. Supp. at 975 (noting that differences in sexual orientation do not warrant assumption that ability to "forego sexual activity" will be different).

\textsuperscript{124} Hardwick, 478 U.S. at 196 (sodomy); United States v. Harris, 8 M.J. 52, 58 (C.M.A. 1979) (cunnilingus); United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978) (fellatio); 10 U.S.C. § 925(a) (sodomy).

\textsuperscript{125} See Ben-Shalom I, 881 F.2d at 461, 464.

\textsuperscript{126} See Watkins v. United States Army, 875 F.2d 699, 714 (9th Cir. 1989) (Norris, J., concurring), cert. denied, 53 U.S.L.W. 3340 (U.S. Nov. 6, 1990) (No. 89-1806); Comment, The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples, 23 Loy. L.A.L. Rev. 1055, 1070 n.99 (1990). Lesbians may define eroticism without reference to specific physical acts. Adrienne Rich, poet and feminist thinker, asserts that patriarchal definitions of eroticism are quite different from female definitions. See Rich, Compulsory Heterosexuality and Lesbian Existence, 5 Signs 631, 650 (1980). The patriarchal perception is "clinical," whereas the female vision of eroticism "is unconfined to any single part of the body or solely to the body itself." Id.

\textsuperscript{127} See Watkins, 875 F.2d at 715 n.6 (Norris, J., concurring); PERSEREC Report, supra note 23, app. A at 77. The federal proscription against sodomy is primarily limited to the military. 10 U.S.C. § 925(a). Congress, however, also proscribes homosexual acts indirectly by providing that state law will define offenses not otherwise enumerated in the federal statute pertaining to crimes committed on Indian reservations by one Indian against another. 18 U.S.C. § 1153 (1988). If one considers that, as of 1988, 25 states had no laws against sodomy between consenting adults, see PERSEREC Report, supra note 23, app. A at 75, the scope of the prohibition against homosexual sodomy on Indian lands is quite limited.


\textsuperscript{129} See 10 U.S.C. § 925(a). See supra note 21 for the relevant portion of section 925.

\textsuperscript{130} See Hardwick, 478 U.S. at 196 n.8.
that homosexual people are more likely than heterosexual people to participate in sodomitic or other criminal sexual acts.\(^{131}\)

### B. Legal Precedent for Equating Sexual Orientation with Conduct

The common theme of the foregoing misconceptions is that homosexual individuals constitute a discrete population reliably defined by conduct. While the Seventh Circuit did not expressly rely on these misconceptions, it similarly equated homosexual status with conduct.\(^{132}\) Not only does this equation contravene basic principles of criminal law, it also subverts the protection given to communication, as distinct from mere conduct, under the first amendment.

1. Punishment on the basis of status

The notion that a person's actions can be presumed from his or her status is clearly unsound according to criminal law concepts.\(^{133}\) In *Robinson v. California*,\(^ {134}\) the Supreme Court struck down a California statute which imposed criminal penalties on narcotics addicts solely on the basis of their status as addicts.\(^ {135}\) As Justice Harlan made clear in his concurrence:

> Since addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of [the trial court's] instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

> If the California statute reaches this type of conduct . . . it is an arbitrary imposition which exceeds the power that a state may exercise in enacting its criminal law.\(^{136}\)

The Army has argued that *Robinson* is inapposite to cases involving exclusion of homosexual persons because the Army's regulation imposes

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131. See PERSEREC Report, *supra* note 23, app. A at 77 (UCMJ proscription against sodomy usually applied “to punish acts which involve force and/or a minor or nonconsenting partner. The larger percentage of such prosecuted acts are heterosexual.”).

132. See Ben-Shalom v. Marsh (Ben-Shalom II), 881 F.2d 454, 460, 462 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).

133. See Robinson v. California, 370 U.S. 660, 666 (1962); see also W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 4, at 16-17 (1972) (discussing criminal intent and criminal act as essential elements of any crime).


135. *Id.* at 666-68.

136. *Id.* at 678-79 (Harlan, J., concurring).
no criminal sanctions. While this is technically correct, fairness demands that, if the Army wishes to treat homosexual persons as criminals, comparing them to arsonists and kleptomaniacs, it should not be allowed to avoid the most basic precept of criminal law—guilt must be shown by proof of criminal intent and a criminal act.

Aside from the fact that the Army's regulation is not penal in nature, the Army's comparison of homosexuality with arson and kleptomania is also inappropriate because homosexuality is neither a crime against person or property, nor a mental disorder. Even though certain homosexual conduct may be criminalized, as one commentator has noted, the statements "I am a lesbian" and "I am a burglar" carry quite different implications. The first statement, unlike the latter, not only implies many activities which are not criminal, but also constitutes an integral part of the public discourse on political and social issues.

In light of this public discourse aspect to public acknowledgments of homosexual orientation, it would be more appropriate to analogize homosexual persons to Communist Party members than to arsonists or kleptomaniacs. As cases dealing with the Communist Party hold, mere membership in an organization which advocates action to overthrow the

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137. See Matthews v. Marsh, No. 82-0216 P, slip op. at 14 (D. Me. Apr. 3, 1984), vacated, 755 F.2d 182 (1st Cir. 1985). Matthews was a first amendment challenge, and the facts surrounding Matthews' discharge were very similar to the facts in Ben-Shalom's case. Compare id. at I-3 with BenShalom v. Marsh, 703 F. Supp. 1372, 1373-74 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990). Matthews told her commanding officer that she was a lesbian when the officer questioned her about why she needed to attend a gay student organization meeting. Matthews, No. 82-0216 P, slip op. at 2. Ben-Shalom revealed her lesbianism during a military class on minority and race relations and also identified herself as a "radical lesbian feminist" in an interview for a military newspaper. P. JOHNSON, supra note 59, at 10.

The First Circuit vacated the district court's opinion, in which the lower court had ordered Matthews' reinstatement, because subsequently Matthews had admitted to having committed homosexual acts. Matthews v. Marsh, 755 F.2d 182, 183 (1st Cir. 1985). In light of this new evidence, the circuit court held that the lower court's decision was an impermissible advisory opinion. Id. at 184.

138. Matthews, No. 82-0216 P, slip op. at 14.

139. See Separate Appendix at 27, Ben-Shalom II (Nos. 88-2771 & 89-1213). The district court found that the Army's comparison of homosexuality with arson and kleptomania exemplified the "purposeful discrimination" directed against homosexual people. BenShalom v. Marsh, 703 F. Supp. 1372, 1379 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).

140. See W. LAFAVE & A. SCOTT, JR., supra note 133, § 4, at 16-17.


143. Halley, supra note 47, at 974-75.

144. Id. See infra notes 232-38 for a discussion concerning statements of sexual orientation as political speech.
government does not support a presumption that a member will take such action at the first opportunity.\textsuperscript{145} For similar reasons, a person's homosexual status should not be a legitimate basis for presuming that he or she will engage in proscribed sexual conduct.

2. Speech versus conduct: the \textit{O'Brien} test

In a civilian context,\textsuperscript{146} the threshold question\textsuperscript{147} in a first amendment analysis is whether the regulation at issue is a content-based restriction,\textsuperscript{148} merit\textsuperscript{149} or a content-neutral restriction,\textsuperscript{150} reviewable under a more relaxed standard.\textsuperscript{151} If a regulation is facial content-neutral, the court should inquire whether the governmental interest served is truly unrelated to the suppression of speech.\textsuperscript{152} In making this determination, it is irrelevant whether the communication is in the form of words or in the form of conduct which may be characterized

\begin{itemize}
\item \textsuperscript{145} E.g., Scales v. United States, 367 U.S. 203, 227-28 (1961); Yates v. United States, 354 U.S. 298, 331-32 (1957).
\item \textsuperscript{146} See infra notes 258-306 and accompanying text for a discussion of the effect of a military context on a first amendment analysis.
\item \textsuperscript{147} Frisby v. Schultz, 487 U.S. 474, 481 (1988).
\item \textsuperscript{148} Content-based restrictions are those that are "aimed at communicative impact." See L. Tribe, \textit{supra} note 8, § 12-2, at 789-90. Generally, such regulations restrict the flow of ideas or information by suppressing speech on the basis of the topic involved, the viewpoint expressed, or the identity of the speaker. Id. § 12-3, at 803.
\item \textsuperscript{149} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). To survive strict scrutiny, a content-based regulation must be "necessary to serve a compelling state interest and... narrowly drawn to achieve that end." Id.
\item \textsuperscript{150} Content-neutral regulations are those that are directed toward achieving a goal unrelated to the suppression of information or ideas but nevertheless limit "communicative opportunity." See L. Tribe, \textit{supra} note 8, § 12-2, at 789-90. Typically, such restrictions impose limits on the time, place or manner of speech. E.g., Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (regulation of volume of amplified music at concerts in park near residential area); City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (restricting location of adult-movie houses); Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (bar on posting election campaign posters on public utility poles).
\item \textsuperscript{151} A content-neutral restriction "must be narrowly tailored to serve the government's legitimate content-neutral interest but... it need not be the least-restrictive or least-intrusive means of doing so." Rock Against Racism, 109 S. Ct. at 2757-58.
\item \textsuperscript{152} See Texas v. Johnson, 109 S. Ct. 2533, 2540-41 (1989). A regulation which is facially neutral demands further inquiry because the government will tend to justify a facially neutral but content-based restriction on the ground that it is really targeting a nonspeech-related danger. See L. Tribe, \textit{supra} note 8, § 12-3, at 794; Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 Harv. L. Rev. 1482, 1496 (1975). If the court looks only at this purported ultimate interest, almost any restriction can survive judicial review because the standard of review for content-neutral restrictions is less demanding. See Ely, \textit{supra}, at 1496. Therefore, a court's first inquiry should be whether the harm the government is trying to prevent would occur regardless of the content of the communication. Id. at 1497. If the answer is negative, the regulation is most likely content-based and should be strictly scrutinized. Id.
\end{itemize}
as expressive.\(^{153}\)

The Seventh Circuit in *Ben-Shalom v. Marsh (Ben-Shalom II)*\(^{154}\) displayed a misunderstanding of these principles by reviewing the Army’s regulation according to the standard enunciated in *United States v. O’Brien*.\(^{155}\) The panel selected *O’Brien* as the appropriate test on the grounds that the challenged regulation was aimed at conduct and that Ben-Shalom’s verbal expressions could be deemed conduct in two ways.\(^{156}\) The panel reasoned that Ben-Shalom’s statement that she was a lesbian was in effect an admission that she had a propensity to commit homosexual acts.\(^{157}\) This characterization of Ben-Shalom’s statement as conduct conformed with the “common sense” argument that the Army had presented to the court.\(^{158}\) In an apparent attempt to solve the riddle of how words could be conduct, however, the panel also isolated the conduct as being Ben-Shalom’s “act of identification.”\(^{159}\) Having thus removed Ben-Shalom’s statement from the realm of speech to conduct, the panel applied the *O’Brien* formula.\(^{160}\)

The *O’Brien* test is a weak standard of review identical to the standard used for content-neutral regulations involving restrictions related to the time, place or manner of protected speech.\(^{161}\) The *O’Brien* test is designed for regulations that are unrelated to expression but which, nev-

\(^{153}\) See *Johnson*, 109 S. Ct. at 2540; *Spence v. Washington*, 418 U.S. 405, 409-10 (1974). Conduct is protected as expression if it is intended to convey a particular message which, in the context, a viewer would be likely to understand. *Spence*, 418 U.S. at 410-11.

\(^{154}\) 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).

\(^{155}\) 391 U.S. 367, 376-77 (1968). In *O’Brien*, the United States Supreme Court announced the following test for determining whether a regulation aimed at conduct unconstitutionally abridges freedom of expression:

> [W]hen “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.*

\(^{156}\) *Ben-Shalom II*, 881 F.2d at 464.

\(^{157}\) See id. at 460-61.

\(^{158}\) See id. at 461.

\(^{159}\) See id. at 462 (emphasis added).

\(^{160}\) See supra note 155 for the *O’Brien* test.

\(^{161}\) *Rock Against Racism*, 109 S. Ct. at 2757. Although *O’Brien* requires that any incidental restriction on speech be no greater than that which is necessary for serving the governmental interest, *O’Brien*, 391 U.S. at 377, in practice this requirement is given little strength. See *Rock Against Racism*, 109 S. Ct. at 2758 (regulation valid if government’s interest served more effectively with than without regulation).
Nevertheless, have an incidental impact on speech.162

The United States Supreme Court formulated the O'Brien standard in response to a regulation prohibiting the destruction of draft cards.163 O'Brien had burned his draft card to express his antiwar beliefs and argued that his act was protected "symbolic speech."164 The Court, however, found that the regulation was meant to ensure efficient operation of the Selective Service system and, thus, served the government's legitimate interest in raising armies.165 Because the law was indifferent as to a person's reason for destroying a draft card, it was not aimed at suppressing the communicative impact of any particular act of destruction.166 Therefore, O'Brien's right to free speech had not been abridged.167

The Seventh Circuit's choice of O'Brien as the standard of review was inappropriate. The O'Brien test is not always relevant when a regulation restricts conduct rather than speech per se.168 As with facially content-neutral time, place or manner restrictions, the initial query is whether the restriction is aimed at communicative impact.169 When, as in Ben-Shalom II, the regulation on its face targets both speech and conduct,170 O'Brien is inapposite to the portion dealing with speech because that portion clearly is aimed at communicative impact.171 O'Brien is only relevant to the portion of a regulation that restricts conduct, and then only if the statutory aim is unrelated to suppressing the communicative impact of such conduct.172

The Seventh Circuit's equation of speech with conduct was a return to the type of thinking embodied in the discredited173 eighteenth century English concept of constructive treason.174 Under that doctrine, speech was deemed evidence of the treasonous act of imagining the sovereign's death.175 In choosing to apply O'Brien to the Army's regulation, the

162. See O'Brien, 391 U.S. at 376.
163. Id. at 370.
164. Id. at 376.
165. Id. at 381-82.
166. Id. at 375.
167. Id. at 382.
168. Johnson, 109 S. Ct. at 2540.
169. Id.
170. AR 140-111, table 4-2, rule E (1989). See supra note 72 for the text of rule E.
171. See Johnson, 109 S. Ct. at 2540.
172. Id. at 2540-41.
175. Id. The verbal crime of treason was, thus, similar to the crime of seditious libel. Id. at 123. Under common law, seditious libel was an "accordion-like concept, expandable or contractible at the whim of judges..." and generally consisted of defaming or contemning or
Seventh Circuit resurrected this doctrinal anomaly of speech as the equivalent of conduct. The panel should have recognized Ben-Shalom's statements for what they were—verbal expressions—and directly addressed the issue of whether such speech was protected communication under the first amendment.

C. Communicative Impact and the Army's Interests

In conformity with a DoD directive, the Army excludes persons "who [are] admitted homosexual[s] but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service" in order to:

a. Maintain discipline, good order, and morale.

b. Foster mutual trust and confidence among service members.

c. Insure the integrity of the system of rank and command.

d. Facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy.

e. Recruit and retain members of military service.

f. Maintain the public acceptability of military service.

g. Prevent breaches of military security.

Courts have generally accepted the substantiality of these military interests. This list, however, suggests that the military's overriding interest is to avoid potential prejudicial reactions to homosexuality from both

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177. AR 140-111, table 4-2, rule E (1989). See supra note 72 for the full text of rule E.
military personnel and the general public.\textsuperscript{180}

All branches of the armed forces have known for a long time that homosexual individuals can serve honorably and well.\textsuperscript{181} Therefore, poor job performance is not the concern that underlies the military's antihomosexual policy.\textsuperscript{182} Rather, the Army's per se ban of gays and lesbians is based on the assumption that commonly held prejudice against homosexual persons will prevent the group bonding which is a necessary prerequisite for successful military performance.\textsuperscript{183} The Army has stated that the presence of homosexual soldiers creates morale and discipline problems because heterosexual personnel in the lower ranks "despise and detest" homosexuals.\textsuperscript{184} For similar reasons, homosexual officers pre-

\textsuperscript{180} Watkins v. United States Army, 875 F.2d 699, 728-29 (9th Cir. 1989) (Norris, J., concurring) (discussing Army reenlistment regulation identical to AR 140-111), \textit{cert. denied}, 111 S. Ct. 384 (1990); \textit{Rich}, 735 F.2d at 1227 n.7 ("[F]orcing heterosexuals to live and work with homosexuals would produce friction . . . permitting homosexuals in the military would decrease its prestige and image resulting in an adverse impact on recruiting."); Matthews v. Marsh, No. 82-0216 P, slip op. at 33 (D. Me. Apr. 3, 1984) (discussing identical Army regulations governing separation of Army Reserve officers), \textit{vacated}, 755 F.2d 182 (1st Cir. 1985).


\textsuperscript{182} See \textit{Gross}, \textit{supra} note 181, § II, at 1, col. 1; \textit{Rivera}, \textit{supra} note 25, at 323-24.

\textsuperscript{183} See \textit{Rich}, 735 F.2d at 1227 n.7; PERSEREC Report, \textit{supra} note 23, at 30-31. The PERSEREC Report suggests that more studies are needed to test the military's hypothesis that prejudicial reactions will cause "insurmountable problems." PERSEREC Report, \textit{supra} note 23, at 39. Similar predictions about the negative impact of integrating African Americans and including women proved untrue. \textit{Id.} at 31, 35.

The PERSEREC Report was the result of a DoD request for a study on the security risks associated with homosexual military personnel. \textit{See id.} at 5. Finding that the security issue was ultimately related to the broader question of suitability for service, the researchers produced a comprehensive report including "a historical review of the various social constructions that have been placed on homosexuality, the effects of legal decisions and changing folkways, and a summary of the scientific literature." \textit{Id.} The DoD was dissatisfied with the PERSEREC Report's conclusions that homosexual persons were as suitable for service as heterosexual persons and posed no greater security risks. \textit{GAYS IN UNIFORM} xvi (K. Dyer ed. 1990). Just as they had done earlier with the Crittenden Report, E. \textit{GIBSON}, \textit{supra} note 106, app. E, at 366-67, Pentagon officials tried to suppress the PERSEREC Report, \textit{GAYS IN UNIFORM}, \textit{supra} at xvi, and even attempted to hide it from a member of Congress. \textit{Id.} at ix-x.

\textsuperscript{184} \textit{Watkins}, 875 F.2d at 728-29 (Norris, J., concurring) (citing Army's Opening Brief incorporating Navy's argument in \textit{Beller v. Middendorf}, 632 F.2d 788, 811 (9th Cir. 1980). It is estimated that gays and lesbians constitute approximately ten percent of the armed forces; yet, only a small percentage of that number are discharged for homosexuality. PERSEREC Report, \textit{supra} note 23, at 30.

For example, the following figures represent the Army's averaged discharge rates for homosexuality for 1985, 1986 and 1987:
sumably would be unable to command effectively. Additionally, homosexuality might inspire "ridicule and notoriety," and thus damage recruiting efforts.

With respect to its interest in preventing breaches of security, the Army does not attempt to justify its claim that homosexual personnel are an unacceptable security risk on the grounds of prejudice. Instead, the claim is that homosexual personnel are security risks because they are vulnerable to blackmail. The only reason, however, that homosexual servicepersons might be subject to blackmail on the basis of their homosexuality is if they are forced to hide their sexual orientation because of policies like the Army’s—where openness leads to loss of employment. Thus, the Army creates the potential for blackmail through its own regulations and then justifies those same regulations by raising the specter of blackmail.

This circular justification suggests that the assertion that gays and lesbians are security risks, like the Army’s other reasons for excluding homosexual persons, is ultimately based on prejudice. In 1957, the Crittenden Report found no evidence to support the theory that homosexual individuals pose greater security risks than heterosexual individuals, and this finding has not been disturbed by any new data since that time.

<table>
<thead>
<tr>
<th>Average Discharge Rate</th>
<th>Averaged Total Personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enlisted men</td>
<td>597,791</td>
</tr>
<tr>
<td>Enlisted women</td>
<td>69,422</td>
</tr>
<tr>
<td>Male officers</td>
<td>98,233</td>
</tr>
<tr>
<td>Female officers</td>
<td>11,220</td>
</tr>
</tbody>
</table>

This averred discharge rate figures suggest that almost all homosexual personnel perform their duties without incident. See id. at 29. Thus, the Army’s fear that prejudicial reactions will impair military performance seems to be unfounded.

185. Watkins, 875 F.2d at 728-29 (Norris, J., concurring) (citing Army’s Opening Brief incorporating Navy’s argument in Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980)).

186. Id. at 729 (Norris, J., concurring) (citing Army’s Opening Brief incorporating Navy’s argument in Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980)).


188. Id. at 197.

189. Id. at 197-98.

190. Id. at 198-99.


192. PERSESEC Report, supra note 23, at 35. But cf. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (DoD’s expanded security clearance checks for gays and lesbians rational in light of proof that counterintelligence agencies target homosexuals; whether counterintelligence agencies were motivated by ignorance or prejudice irrelevant to legitimacy of DoD’s policy).
The Army's seldomly revealed reasons for barring homosexual individuals\textsuperscript{193} show that acknowledgments of homosexual orientation are the bases for exclusion because the Army fears homophobic\textsuperscript{194} responses. Such responses may occur when the individual's homosexual orientation becomes known—that is, when this information is communicated to others.\textsuperscript{195} The Army automatically disqualifies a person who reveals his or her homosexual status solely by speech,\textsuperscript{196} yet, under certain circumstances, permits a person who disavows having a homosexual orientation to serve despite evidence of actual homosexual conduct.\textsuperscript{197} The language of the Army regulations\textsuperscript{198} and the Army's rationale for promulgating them\textsuperscript{199} thus both show that the Army's primary aim is to suppress a particular message—admissions of homosexual orientation—not to prevent homosexual conduct.

The Army's apprehension that a serviceperson's "coming out" statement\textsuperscript{200} will elicit negative reactions in the listener is an insufficient reason for suppressing speech.\textsuperscript{201} It is well established in the civilian context\textsuperscript{202} that the first amendment does not permit censorship of ideas simply because the majority finds them offensive.\textsuperscript{203} Instead, the government must control hostile audience reactions rather than punish the speaker.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item[193.]See supra notes 183-86 and accompanying text.
\item[194.]"Homophobia" connotes an "unreasoned resistance to learning about or interacting with homosexuals" and, to a certain extent, shapes "the conventional attitude structure of American males." PERSEREC Report, supra note 23, at 36.
\item[195.]See Watkins, 875 F.2d at 714 (Norris, J., concurring); Matthews, No. 82-0216 P, slip op. at 33.
\item[196.]See supra note 72 for the texts of the relevant Army provisions.
\item[197.]See AR 140-111, table 4-2, rule E n.1. "[I]ndividuals who have been involved in homosexual acts in an apparently belated episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service." Id.
\item[198.]See supra note 72 for the text of the relevant Army provisions.
\item[199.]See supra notes 183-86 and accompanying text.
\item[200.]The term "coming out" refers to a homosexual individual's public acknowledgment of his or her sexual orientation. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 488, 595 F.2d 592, 610, 156 Cal. Rptr. 14, 32-33 (1979).
\item[202.]See infra notes 258-306 and accompanying text for a discussion of how judicial deference to the military affects this analysis.
\item[203.]Johnson, 109 S. Ct. at 2544; Boos, 485 U.S. at 321; Cohen, 403 U.S. at 25; Tinker, 393 U.S. at 508-09.
\item[204.]See Cox v. Louisiana, 379 U.S. 536, 550-51 (1965); Feiner v. New York, 340 U.S. 315, 326-27 (1951) (Black, J., dissenting); Terminello v. Chicago, 337 U.S. 1, 4-5 (1949). Requiring the Army to address the issue of hostile responses by heterosexual personnel would not
\end{enumerate}
\end{footnotesize}
The Army has attempted to justify catering to antihomosexual feelings on the ground that such attitudes reflect traditional majoritarian values.\textsuperscript{205} Even though traditional beliefs and attitudes may validly inform much governmental action,\textsuperscript{206} traditions founded upon prejudice are not legitimate justifications.\textsuperscript{207} "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."\textsuperscript{208} Even the most deferential standard of review requires assertion of a legitimate interest, whether in a civilian\textsuperscript{209} or military context.\textsuperscript{210} Thus, those portions of the DoD directive and the Army's operational regulations that exclude individuals "who by their statements demonstrate a propensity to engage in homosexual conduct,"\textsuperscript{211} are unconstitutional because they indirectly give effect to private bias.\textsuperscript{212}

Although the Ben-Shalom II panel briefly acknowledged that prejudice against homosexual persons might exist in the Army, it did not find that this was the ultimate rationale for the Army's policy.\textsuperscript{213} Rather, under the rubric of deference to military judgment, the panel accepted the Army's purported interests\textsuperscript{214} and, thus, avoided having to engage in any meaningful inquiry.

create an undue burden on military resources. The Army already has educational mechanisms in place for controlling racial prejudice. PERSEREC Report, \textit{supra} note 23, at 31. Homophobia could be addressed by these, or similar, programs. \textit{See id.}\textsuperscript{205} \textit{See Watkins}, 875 F.2d at 729-30 (Norris, J., concurring). The Army's good faith in making this assertion must be questioned. \textit{R. Mohr, supra} note 187, at 192-96. The arguments the Army now uses for excluding homosexual persons are the same arguments it used to justify segregating African Americans and excluding women. \textit{Id.} at 196; PERSEREC Report, \textit{supra} note 23, at 31, 35.


\textit{207. See Palmore v. Sidoti,} 466 U.S. 429, 433 (1984) (rejecting widely held racial prejudice as justification for removing infant from interracial household); \textit{accord United States Dep't of Agric. v. Moreno,} 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a \textit{legitimate} governmental interest.").

\textit{208. Palmore,} 466 U.S. at 433.


\textit{210. See Goldman,} 475 U.S. at 506 (1986) (implying approval of need for " 'legitimate military ends' ") (quoting Goldman \textit{v. Secretary of Defense,} 734 F.2d 1531 (D.C. Cir. 1984)).

\textit{211. 32 C.F.R. pt. 41 app. A, pt. 1(H)(1); AR 135-178 ¶ 10-2; see AR 140-111, table 4-2, rule E. See supra note 72 for the text of the relevant provisions.}

\textit{212. See Palmore,} 466 U.S. at 433.


\textit{214. See id.} at 459-60.
D. Strict Scrutiny of the Army’s Antihomosexual Regulations

As the foregoing discussion reveals, the Army’s enlistment and separation regulations are concerned with communicative impact. Thus, they are the kinds of restrictions that ordinarily require strict scrutiny.\textsuperscript{215}

Even if the panel correctly concluded that the Army’s interests were legitimate, the challenged Reenlistment Regulation still would fail both the “compelling interest” and “narrowly tailored” requirements of strict scrutiny. The Army offered no proof that homophobic responses would prevent formation of a unified force. No such facts were presented because the Army has never fully studied this issue.\textsuperscript{216} Strict scrutiny, however, requires a \textit{factual} showing of the compelling nature of the governmental interest.\textsuperscript{217} The Army’s interest in avoiding the negative impact of private bias is based on speculation and, thus, is insufficient for establishing that the restriction on speech is necessary.\textsuperscript{218}

In addition, the regulation is not the least restrictive\textsuperscript{219} means for serving the Army’s asserted interest in preventing homosexual conduct.\textsuperscript{220} The regulation disqualifies an individual on the basis of statements acknowledging homosexual orientation \textit{regardless} of whether the speaker has ever engaged in any homosexual conduct.\textsuperscript{221} Given that acknowledgments of homosexual orientation are neither admissions of conduct nor reliable indicators of probable conduct,\textsuperscript{222} the Army regulation unduly burdens protected speech.\textsuperscript{223}

Although it may discourage some homosexual conduct, the primary

\textsuperscript{215} See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).

\textsuperscript{216} See PERSEREC Report, supra note 23, at 31, 39 (suggesting future research examine effects of nonconforming sexual orientations on group cohesion). The available research suggests that homophobia is not an insurmountable problem. \textit{See id.} at 31 (studies show job performance of homosexual military personnel is satisfactory). The dynamics of prejudice are similar whether the prejudice is racially motivated or based on homophobia. \textit{See id.} at 24. Thus, the history of racial integration in the military suggests that the Army has overpredicted negative consequences from the presence of openly homosexual individuals. \textit{Id.} at 31.

In addition, the experiences of the West German, Dutch and Israeli armed forces give credence to the idea that openly homosexual individuals may be successfully integrated into the military. R. MOHR, \textit{supra} note 187, at 196. West Germany admits homosexual individuals in the noncommissioned ranks; The Netherlands includes homosexual personnel at all levels; and Israel allows homosexual persons to fill noncombat posts. \textit{Id.}


\textsuperscript{218} \textit{See id.}

\textsuperscript{219} \textit{See} Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.").

\textsuperscript{220} \textit{See Ben-Shalom} \textit{II}, 881 F.2d at 460-61.

\textsuperscript{221} \textit{See supra} note 72 for the text of relevant provisions.

\textsuperscript{222} \textit{See supra} notes 105-16 and accompanying text.

\textsuperscript{223} \textit{See infra} notes 231-57, 294-306 and accompanying text.
effect of the Army’s antihomosexual policy is to chill speech. A homosexual soldier who remains silent can, if discrete, engage in a great deal of sexual activity and remain in the Army. In contrast, a soldier who announces his or her homosexual orientation, but who does not engage in homosexual conduct, will be dismissed for merely having homosexual desires. Thus, homosexual soldiers who are not anxious to lose their jobs will probably choose to remain silent. Statistics on the number of discharges for homosexuality compared with the probable number of homosexual Army personnel would seem to confirm this prospect.

A less restrictive alternative for deterring homosexual conduct would be a regulation which was limited to proscribing homosexual acts, but not speech. Arguably, as long as Hardwick remains good law, such a regulation would not abridge any constitutionally protected right. It even would be permissible to restrict announcements of sexual orientation while on duty or while on military property. Such restrictions, however, would be inappropriate if they drew distinctions on the basis of the type of sexual orientation being announced.

E. First Amendment Interests Implicated by Acknowledgments of Homosexual Orientation

While strict scrutiny is the required standard of review for content-based restrictions on speech in a civilian setting, it is a well-established principle that governmental restrictions which would be invalid in a civilian context may be constitutional in a military environment due to the special needs of the military. Before examining the impact of the military context on the appropriate standard of review for the Army’s Reen-
listment Regulation, however, it is essential to understand the nature of the first amendment interests at stake.

1. Political speech

The Seventh Circuit in Ben-Shalom v. Marsh (Ben-Shalom II)\(^231\) ignored the political character of statements acknowledging homosexual orientation. As the California Supreme Court has observed, a homosexual person's coming-out statement is not only an expression of sexual preference, it is also an "aspect of the struggle for equal rights," particularly in matters concerning employment.\(^232\) Commentators similarly have noted that coming out is perhaps the most effective way of combating prejudice against homosexual persons.\(^233\) Coming-out statements by military personnel are especially political in nature since the issue of whether gays and lesbians should be allowed to serve is "a matter of intense public debate."\(^234\)

Acknowledgments of homosexual orientation are thus classic examples of political speech. Such speech merits the highest constitutional protection\(^235\) given that one of the basic goals of the first amendment is to

\(^{231}\) 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).

\(^{232}\) Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32-33 (1979); see Matthews v. Marsh, No. 82-0216 P, slip op. at 24 (D. Me. Apr. 3, 1984), vacated, 755 F.2d 182 (1st Cir. 1985). Institutionalized homophobia has a recognized political impact. See Rich, supra note 126, at 657; PERSEREC Report, supra note 23, at 36. With respect to men, it motivates those who are uncertain about their sexual orientation to publicly condemn homosexuality in order to affirm their masculinity. PERSEREC Report, supra note 23, at 36. This, in turn, perpetuates the ignorance which leads to prejudice against homosexual persons. Id.

With respect to women, antilebianism has a negative impact on the freedom and equality of all women, regardless of their sexual orientation. Rich, supra note 126, at 657. Rich suggests that heterosexuality is a political institution, as well as a sexual preference. Id. at 637. Socially enforced compulsory heterosexuality (a separate phenomenon from freely chosen heterosexuality) is designed to ensure the privileged economic and cultural status of men in society. Id. at 647. Lesbians, by their very existence, threaten institutionalized heterosexuality because they evidence the deep connections women can form with each other. See id. at 648-49.

Another commentator has noted that bisexuality represents a choice "to act against heterosexist cultural constraints." Shuster, Sexuality as a Continuum: The Bisexual Identity, in LESBIAN PSYCHOLOGIES 56, 57 (Boston Lesbian Psychologies Collective ed. 1987). Some bisexual women even call themselves "political lesbians." See Golden, supra note 111, at 30.

\(^{233}\) PERSEREC Report, supra note 23, at 36; R. Mohr, supra note 187, at 177; Halley, supra note 47, at 970-73.

\(^{234}\) Matthews, No. 82-0216 P, slip op. at 24.

\(^{235}\) Various kinds of speech are perceived as lying on a continuum. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (regulation of commercial speech less likely to chill speech than regulation of other forms of speech because profit motive spurs advertisers to take risks). Political speech occupies the high end of the spectrum and merits the utmost protection, whereas indecent speech usually is on the low
ensure democratic social and political change. Social visibility of gays and lesbians helps reduce homophobia. Regulations that discourage "coming out" statements violate the principle that content-based restrictions should not be used to avoid an "evil" when more speech could effect a cure.

Although the military may impose restrictions on political discourse, those restrictions are limited. The challenged Army regulation results in total suppression of speech with a high political content and, consequently, violates even the limited first amendment rights of Army personnel.

2. Acknowledgments of homosexual orientation: freedom of thought

In addition to unduly burdening political speech, the Army's regulations directly affect other first amendment rights which are related to, yet distinguishable from, speech per se. Under the Army's definition, "[a] homosexual is a person, regardless of sex, who engages in or desires to engage in, or intends to engage in sexual acts with one's own sex." Thus, the Army's restriction applies to un consummated "intent[s]" and "desire[s]" and to unspoken thoughts, as well as outward expressions.

The Ben-Shalom II court concluded that admissions of homosexual orientation were admissions of a desire to engage in homosexual acts, and that the existence of the desire indicated a propensity to commit such acts. Desires, however, are often unfulfilled, and the connection between desires and conduct can be quite weak.

end of the continuum and deserves less protection. Compare Cohen v. California, 403 U.S. 15, 20-21 (1971) (jacket bearing phrase "Fuck the Draft" was form of political protest) with FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (comedian's monologue entitled "Filthy Words" was indecent speech with little political or social meaning).

237. PERSEREC Report, supra note 23, at 36; R. MøHR, supra note 187, at 177; Halley, supra note 47, at 970-73.
238. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). One of the primary justifications for strict scrutiny of content-based restrictions derives from the premise that "debate on public issues should be uninhibited, robust, and wide-open." Sullivan, 376 U.S. at 270.
240. See infra notes 294-301 and accompanying text.
242. See Matthews, No. 82-0216 P, slip op. at 36-37.
243. Ben-Shalom II, 881 F.2d at 460.
244. Matthews, No. 82-0216 P, slip op. at 32. Furthermore, both heterosexual and homosexual people are quite selective about their sexual partners and the time, place and manner of
The first amendment protects thought and emotion as well as speech. Suppression of unvoiced desires and intents is an impermissible intrusion on thought and emotion. As the Supreme Court has noted, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Thus, to paraphrase Professor Laurence Tribe, the question in Ben-Shalom II was not what Miriam Ben-Shalom may have been doing in her mind, but rather, what the United States Army was doing there.

3. Privacy and personality

In BenShalom v. Secretary of Army (Ben-Shalom I), the district court recognized that sexual identity is a component of personality. The district court noted that the first amendment, in particular, protects manifestations of personality as a penumbral right. "One's personality develops and is made manifest by speech [and] expression . . . . It is only when one's personality, no matter how bizarre or potentially dangerous, actually manifests itself in the form of unlawful conduct, that the government may intercede in an effort to control the personality or restrict its manifestation." Consequently, the district court concluded that, in attempting to suppress Ben-Shalom's statements of self-identification, the Army had abridged her first amendment right of privacy, as expressing sexual behavior. PERSEREC Report, supra note 23, at 37. Consequently, it is false to assume that a general "desire" will translate into conduct.

247. Matthews, No. 82-0216 P, slip op. at 39-40 ("[T]he existence and expression of thought and emotion are critical First Amendment interests that . . . outweigh the military interest in seeking to avoid negative reactions through the simple expedient of universally prohibiting the existence or expression of unpalatable thoughts and emotions among servicepersons.").
248. Stanley, 394 U.S. at 565 (overturning conviction of defendant charged with private possession of obscene films seized in his bedroom because government has no "right to control the moral content of a person's thoughts").
249. See L. Tribe, supra note 8, § 15-21, at 1428.
250. 489 F. Supp. 964 (E.D. Wis. 1980), aff'd on other grounds, 826 F.2d 722 (7th Cir. 1987).
251. Id. at 975.
252. Id. ("[A]utonomous control over the development and expression of one's intellect, interests, tastes, and personality' are among the most precious of rights protected by the First Amendment." (emphasis added) (quoting Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring))).
well as her right to speech.255

The Seventh Circuit panel did not examine this issue in Ben-Shalom II.256 Although the Supreme Court has held that the fundamental right of privacy does not extend to acts of homosexual sodomy,257 the first amendment right of privacy relating to personality should still protect expressions of homosexual identity.

F. Deference to the Military

The doctrine of "military necessity" cautions judicial restraint particularly in reviewing professional military determinations regarding military personnel.258 Nevertheless, the question remains as to the extent of this judicial deference.259 In concluding that the Army's regulation did not abridge any first amendment rights, the Ben-Shalom II panel relied on two cases involving military restrictions on speech260 that, upon close examination, support different standards: Brown v. Glines261 and Goldman v. Weinberger.262 Although the panel failed to recognize the distinction between these cases, the Reenlistment Regulation at issue in Ben-Shalom II fails under either standard.

1. The Glines test

The language of the Glines test is almost identical to that used in the O'Brien test.263 Thus, Glines seems to endorse a relaxed level of scrutiny appropriate to content-neutral restrictions. The Glines Court's analysis, however, suggests that the Court actually applied a stricter standard of review than the one it enunciated.

The issue in Glines was whether an airman could circulate a petition

255. Id.
256. The district court in Ben-Shalom II also did not address the issue of manifestations of personality, but the court did hold that Ben-Shalom's right to speech had been abridged. See BenShalom v. Marsh, 703 F. Supp. 1372, 1377 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).
259. See id. at 187-88.
263. Compare Glines, 444 U.S. at 354-55 ("substantial Government interest unrelated to the suppression of free expression . . . restrict[ing] speech no more than is reasonably necessary.") with United States v. O'Brien, 391 U.S. 367, 376-77 (1968) ("substantial governmental interest . . . unrelated to the suppression of free expression [with] incidental restriction no greater than is essential").
on an Air Force base without the base commander's prior approval. The Supreme Court noted that the challenged regulation only allowed base commanders to bar distribution of materials posing a "clear danger to military loyalty, discipline, or morale." The Court also observed that the regulation only applied to materials circulated on the military base itself and that permission to circulate could not be denied to materials that "merely criticize[d] the Government or its policies." Consequently, the Court held that the Air Force regulation did not violate the first amendment.

The Court's approval of the "clear danger" limitation in the regulation suggests a fairly strict standard of review because the phrase "clear and present danger" sometimes is used as a substitute for strict scrutiny. The Court's emphasis on the physically limited scope of the regulation in Glines also suggests that the Court would have favored a stricter test if the restriction on speech had not been confined to military property. Finally, the Court's approval of the exemption for materials that "merely criticize[d] the Government" also indicates that the Court was not rejecting strict scrutiny for content-based restrictions by the military. Thus, contrary to the Ben-Shalom II court's assumption, Glines does not stand for the proposition that all military restrictions of speech need only pass a low-level reasonableness test.

264. Glines, 444 U.S. at 349. Glines arranged for the circulation of several petitions on the United States Air Force base in Guam. Id. at 351. The petitions were addressed to the Secretary of Defense, two United States Senators, and a Congressman, respectively, and requested the recipients' assistance in revising Air Force grooming standards which the signators alleged contributed to racial tensions. Id. at 351 n.3.

While holding that the Air Force regulation did not facially violate the first amendment, the Court recognized that a soldier might raise a colorable claim of abridged first amendment rights if a base commander withheld approval "irrationally, invidiously, or arbitrarily." Id. at 357 n.15. Glines, however, could not avail himself of this argument because he had never submitted his petitions for approval. Id.

265. Id. at 355.
266. Id. at 355-56.
267. Id. at 358.

268. The United States Supreme Court has delineated several categories of speech which fall outside the protection of the first amendment. L. Tribe, supra note 8, § 12.2, at 791-92. One of these categories is speech that creates a "clear and present danger." Schenck v. United States, 249 U.S. 47, 52 (1919). As currently defined, speech presents a "clear and present danger" when it advocates and is likely to produce immediate lawless action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), which is of a serious nature. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842-45 (1978).

269. See Ben-Shalom II, 881 F.2d at 459-61.
270. See Miller v. Rumsfeld, 647 F.2d 80, 87 (9th Cir.) (Norris, J., dissenting) (objecting to denial of rehearing en banc reasoning that Court in Glines applied close scrutiny, and thus Glines could not support mere rational basis review of Navy regulation concerning discharge of homosexual personnel), cert. denied, 452 U.S. 905, cert. denied, 454 U.S. 855 (1981).
Unlike the Air Force regulation in Glines, the Army regulation that Ben-Shalom challenged does not contain language limiting the scope of the restriction. Rather, the Army regulation facially restricts communication on an entire topic—self-acknowledgments of homosexual identity. Such regulations must be narrowly tailored so that "each activity within the proscription's scope is an appropriately targeted evil." Nothing in Glines suggests a contrary conclusion simply because a military authority, rather than a civilian one, has imposed the restriction on protected speech.

2. The Goldman test

In contrast to its appraisal of the level of deference required under Glines, the Ben-Shalom II panel correctly identified the standard used in Goldman v. Weinberger as highly deferential. In Goldman, a sharply divided Supreme Court upheld an Air Force regulation which provided that airmen, other than military police, could not wear headgear indoors while on duty. Goldman, an Orthodox Jewish rabbi, challenged the regulation after his commanding officer had threatened him with a court martial for violating the dress code by continuing to wear his yarmulke. The majority accepted the Air Force’s claim of military necessity and held that there was a reasonable connection between the dress code and the Air Force’s asserted interests in discipline and unity. In effect, the Court rejected a strict scrutiny test in favor of

271. Compare Glines, 444 U.S. at 349 n.1 (quoting Air Force regulation) with 32 C.F.R. pt. 41 app. A, pt. 1(H) (1989) and AR 140-111, table 4-2, rule E (1989) and AR 135-178 ¶ 10 (1989). See supra notes 35 and 72 for the text of the relevant Army provisions. Statements acknowledging homosexual orientation are unlikely ever to come within the “clear and present danger” category of unprotected speech unless the speaker urges the listener immediately to commit sodomy, heterosexual or homosexual, and the listener is likely to comply immediately. See supra note 268 for the elements of the “clear and present danger” test.


275. Chief Justice Burger, and Justices White, Powell and Stevens joined in the majority opinion delivered by Justice Rehnquist. Id. at 503. Justices Brennan, Blackmun and O’Connor filed separate dissenting opinions. Id. at 513 (Brennan, J., dissenting), 524 (Blackmun, J., dissenting), 528 (O’Connor, J., dissenting). Justice Marshall joined in dissent with Justices Brennan and O’Connor. Id. at 513 (Brennan, J., dissenting), 528 (O’Connor, J., dissenting).

276. Id. at 505.

277. Id. at 505-06. A yarmulke is a skullcap worn by Orthodox Jewish men. WEBSTER’S, supra note 116, at 2647. Orthodox Jewish tradition requires males “to cover [their] head[s] before an omnipresent God.” Goldman, 475 U.S. at 513 (Brennan, J., dissenting).


279. See id. at 528 (O’Connor, J., dissenting).
what one dissenter called a “subrational-basis standard” of review.\textsuperscript{280}

Even if it is assumed that the Court applied the proper standard of review in Goldman, Ben-Shalom \textit{II} warranted application of a stricter standard for several reasons. First, although Goldman’s right to observe an important practice of his religion was seriously impaired, he still could identify himself verbally as an Orthodox Jewish person and remain in the Air Force.\textsuperscript{281} He could also wear his yarmulke as long as he was off-duty and not in uniform.\textsuperscript{282} Under the Army’s regulation, however, Ben-Shalom could not say she was a lesbian, or even harbor unspoken lesbian desires, at anytime or anywhere, and still remain in the Army.\textsuperscript{283}

Second, the Air Force regulation, while targeting conduct, did not exclude Orthodox Jewish men for “having a propensity” to engage in the prohibited activity of wearing headgear indoors.\textsuperscript{284} In contrast, the Army’s regulation focuses on the individual’s status,\textsuperscript{285} and excludes homosexually oriented soldiers merely for “having a propensity” to engage in forbidden homosexual conduct.\textsuperscript{286}

Finally, even if one assumes that prohibiting airmen from wearing yarmulkes indoors effectively excluded Orthodox Jewish men from serving in the Air Force,\textsuperscript{287} the regulation in Goldman differs from the one in Ben-Shalom \textit{II} in another respect. The Air Force regulation evenhandedly forbade visible variations of dress;\textsuperscript{288} the prohibition was not inspired by animosity towards any particular religion.\textsuperscript{289} In contrast, the Army’s regulation suppresses communication of sexual orientation by homosexual soldiers only; heterosexual soldiers are completely free to acknowledge their sexual orientation.\textsuperscript{289} Yet, heterosexually oriented

\begin{footnotesize}
\begin{enumerate}
\item[280.] \textit{Id.} at 515 (“absolute, uncritical ‘deference to the professional judgment of military authorities.’”) (Brennan, J., dissenting) (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1985) (majority opinion)).
\item[281.] See \textit{id.} at 505.
\item[282.] \textit{Id.}
\item[284.] Brief for American Civil Liberties Union Foundation and American Civil Liberties Union of Wisconsin Foundation, Inc. as Amici Curiae Supporting Appellee at 16, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (Nos. 88-2771 & 89-1213), \textit{cert. denied}, 110 S. Ct. 1296.
\item[285.] \textit{See supra} notes 193-99 and accompanying text.
\item[286.] Ben-Shalom \textit{II}, 881 F.2d at 459.
\item[287.] \textit{See Goldman}, 475 U.S. at 524 (Brennan, J., dissenting) (“[T]he military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country.”). The distinction noted between Goldman and Ben-Shalom \textit{II} is still valid, however, since homosexually oriented soldiers are compelled to leave the Army Reserves whereas Orthodox Jews \textit{may choose} to remain in the military.
\item[288.] \textit{See Goldman}, 475 U.S. at 510.
\item[289.] \textit{Id.} at 513 (Stevens, J., concurring).
\item[290.] \textit{See supra} note 72 for the text of A.R. 140-111 and its accompanying note.
\end{enumerate}
\end{footnotesize}
soldiers may also have a “propensity to engage” in illicit sexual conduct. Furthermore, the Army ultimately justifies its restriction on the basis of the animosity that some soldiers and potential recruits may feel toward homosexual soldiers and officers.

3. Balance between the Army's and the individual's interests

Neither Glines nor Goldman support the panel’s total deference in *Ben-Shalom II*. As Justice Brennan observed in his dissent in Glines, although judges lack military expertise, “it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment.”

Coming-out statements and unspoken homosexual desires are forms of highly-valued protected speech. Assuming that the military’s reasons for excluding homosexual individuals were legitimate, the military’s interest in maintaining a strong fighting force is also significant. Thus, because both parties' interests are important, the determinative factor should be the extent to which the Army burdens otherwise protected rights.

The Army's regulation imposes a total ban on any coming-out statements and even any unspoken homosexual desires, regardless of whether the statements or desires were made or felt “preservice, prior service, or [during] current service.” Furthermore, the regulation does not limit

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291. Matthews v. Marsh, No. 82-0216 P, slip op. at 29 n.28 (D. Me. Apr. 3, 1984), vacated, 755 F.2d 182 (1st Cir. 1985). The record in Matthews revealed that the Army had no prohibitions against un consummated “desire[s]” and “intent[s]” with regard to any other proscribed sexual acts, nor was expulsion mandatory for those who committed such acts. *Id.* For example, drill sergeants who used their positions to procure sexual favors from soldiers of the opposite sex were not discharged. *Id.*

292. Watkins v. United States Army, 875 F.2d 699, 728-29 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990); Matthews, No. 82-0216 P, slip op. at 33. See *supra* notes 183-86 and accompanying text.

293. *Glines*, 444 U.S. at 370 (Brennan, J., dissenting).

294. See *supra* notes 231-55 and accompanying text.

295. Matthews, No. 82-0216 P, slip op. at 34-35.

296. There are three factors courts will consider in determining the extent of the burden placed on protected rights: (1) the nature of the speech, see *supra* note 235 (discussing levels of protection given to kinds of speech); (2) the quantum of restriction, compare FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978) (upholding ban on broadcasting indecent material partially because ban was limited to hours when children might be listening) with Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2837-29 (1989) (invalidating portion of statute banning indecent dial-a-porn telephone messages in part because ban was total); and (3) the nature of the penalty imposed for violations. Compare Cohen v. California, 403 U.S. 15, 16 (1971) (ordinance imposed criminal penalty) with *Pacifica*, 438 U.S. at 730 (FCC placed letter concerning offending broadcast in radio station's file but imposed no sanctions).

the ban to military property, hours of duty, or any other time or place which might be relevant to the military’s interests.298

This level of intrusion surpasses any other imposed by the military.299 For example, no regulations exist which similarly penalize individuals who have either openly acknowledged or silently contemplated a desire at some moment in their lives to commit other illegal acts.300 Even in the context of the military, case law offers no precedent in support of such a pervasive level of intrusion.301

Finally, the Army’s policy cannot survive the less stringent review normally associated with facially content-neutral restrictions because the penalty for acknowledging a homosexual orientation—loss of employment—is severe.302 In fact, the regulation not only causes loss of immediate employment, but it also burdens future employment opportunities since many government jobs have veteran preference hiring criteria.303

Thus, the military’s exclusion of persons solely on the basis of their homosexual orientation fails even the highly relaxed standard of review under Goldman not only because the regulation abridges highly-valued first amendment rights, but also because it places a total burden on the exercise of these valued rights.305

G. Equal Protection for Expressive Rights

The Seventh Circuit’s equal protection analysis in Ben-Shalom v. Marsh (Ben-Shalom II),307 like its first amendment analysis, was based on the conflation of status with conduct.308 The appellate panel reasoned that laws that treat homosexual persons differently from heterosexual persons do not merit heightened judicial scrutiny because homosexuals are defined by behavior which can be criminalized—same-sex sodomy.309 Thus, the panel applied the weakest standard of review, the rational basis

298. Matthews, No. 82-0216 P, slip op. at 38-40.
299. See id. at 38-39.
300. Id. at 39.
301. See id. at 38-39; see supra notes 263-92 and accompanying text.
302. See AR 140-111, table 4-2, rule E (homosexuality a nonwaivable disqualification). See supra note 72 for the text of rule E.
305. See supra notes 278-80 and accompanying text.
306. Matthews, No. 82-0216 P, slip op. at 39-40; see also supra notes 220-26 and accompanying text.
308. See id. at 463-64.
309. Id. at 464-65 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).
test.\textsuperscript{310} Under that standard, Ben-Shalom's lesbian status provided a basis for "reasonable inferences about her probable conduct in the past and in the future."\textsuperscript{311} Accordingly, the panel found that the Reenlistment Regulation, which disqualifies homosexual persons on the basis of their sexual orientation even in the absence of proof of homosexual conduct,\textsuperscript{312} did not violate principles of equal protection.\textsuperscript{313}

As previously mentioned, this Note does not discuss whether laws singling out homosexual persons, as defined by conduct, merit the strict scrutiny given to legislation based on suspect or quasi-suspect classifications.\textsuperscript{314} Rather, this Note is limited to discussing the issue of equal protection only from the standpoint of the discriminatory interference with protected speech.

First amendment and equal protection interests are often intertwined, and constitutional analysis can proceed along either strand.\textsuperscript{315} The emphasis of each analysis, however, is somewhat different. The usual first amendment analysis focuses on the level of \textit{impingement} on the individual's interest in free expression in relation to the governmental interest served.\textsuperscript{316} In contrast, an equal protection analysis focuses on the \textit{discriminatory} nature of the interference\textsuperscript{317} with an individual's fundamental right to free speech.\textsuperscript{318}

The \textit{Ben-Shalom II} court did not question whether the Reenlistment Regulation raised equal protection concerns regarding the exercise of the fundamental right of speech because the panel found that the regulation presented only a "border-line" first amendment case and did not impinge on any first amendment rights.\textsuperscript{319} The panel's first amendment

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\textsuperscript{310} \textit{Id.} at 464. See \textit{supra} note 92 for a brief description of the rational basis test.

\textsuperscript{311} \textit{Ben-Shalom II}, 881 F.2d at 464.

\textsuperscript{312} See \textit{supra} note 72 for the text of AR 140-11, Table 4-2, rule E (1989).

\textsuperscript{313} \textit{Ben-Shalom II}, 881 F.2d at 464.

\textsuperscript{314} See \textit{supra} note 45 for a description of the factors relevant to classifying a group as suspect or quasi-suspect. For a comprehensive analysis of why classifications based on homosexuality should be considered suspect, like classifications based on race, alienage and national origin, see Watkins v. United States Army, 875 F.2d 699 724-28 (9th Cir. 1989) (en banc) (Norris, J., concurring), \textit{cert. denied}, 111 S. Ct. 384 (1990).

\textsuperscript{315} Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94-95 (1972).

\textsuperscript{316} \textit{See, e.g.}, Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2836-39 (1989).

\textsuperscript{317} \textit{See, e.g.}, \textit{Mosley}, 408 U.S. at 100-02.

\textsuperscript{318} Fundamental rights are those which the United States Supreme Court has recognized as forming "the matrix, the indispensable condition" of a free society. Palko v. Connecticut, 302 U.S. 319, 327 (1937). In defining such rights, the Court has relied heavily on \textit{The Bill of Rights} of the United States Constitution, Duncan v. Louisiana, 391 U.S. 145, 148 (1968), and has specifically recognized first amendment rights as "fundamental." \textit{E.g.}, Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

\textsuperscript{319} \textit{Ben-Shalom II}, 881 F.2d at 462.
analysis, however, was seriously flawed. The Army's regulation does indeed interfere with the fundamental right of speech.\textsuperscript{320} Moreover, the interference is discriminatory and, thus, violates the basic premise of equal protection that all similarly situated persons should be treated alike.\textsuperscript{321} The challenged regulation allows heterosexual persons to talk freely about their sexual orientation and to feel sexual desires, but penalizes homosexual persons for talking about their sexual orientation and for feeling their sexual desires.\textsuperscript{322}

Just as laws that burden speech on the basis of communicative impact merit strict scrutiny,\textsuperscript{323} laws that interfere in a discriminatory manner with the exercise of a fundamental right also requires strict scrutiny.\textsuperscript{324} Therefore, from the standpoint of equal protection, AR 140-111 violates the first amendment unless the restriction of expressive rights serves a legitimate and compelling military interest\textsuperscript{325} and the regulatory classification on the basis of homosexual orientation is neither underinclusive\textsuperscript{326} nor overinclusive.\textsuperscript{327} Assuming that the Army's purported interests\textsuperscript{328} are legitimate and compelling,\textsuperscript{329} it is doubtful that a regulation based on homosexual orientation, which bars individuals solely because of their speech, demonstrates a sufficiently close means-end fit.\textsuperscript{330}

The challenged regulation is simultaneously under- and overinclusive, as can be seen when one examines the relationship between the defining "trait," (T) homosexual orientation, and the "mischief" (M) it

\textsuperscript{320} See supra notes 294-305 and accompanying text.
\textsuperscript{322} AR 140-111, table 4-2, rule E. See supra note 72 for the text of AR 140-111.
\textsuperscript{323} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
\textsuperscript{325} See supra notes 294-306 and accompanying text.
\textsuperscript{326} An "underinclusive" classification is one which does "not include all who are similarly situated with respect to a rule, and thereby burden[s] less than would be logical to achieve the intended government end." L. Tribe, supra note 8, § 16-4, at 1447.
\textsuperscript{327} An "overinclusive" classification includes persons who are not similarly situated and consequently imposes a greater burden than necessary to achieve the government's goal. See id. at 1449-50. Courts tend not to invalidate a statute for being under-or overinclusive unless the statute clearly manifests an abuse of power—the Constitution does not require "mathematical nicety." Id. at 1446. When, however, a fundamental right is infringed, courts require a close means-ends fit between the regulation and the interest served, and unevenly imposed burdens are suspect. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Mosley, 408 U.S. 92 (freedom of speech).
\textsuperscript{328} See supra note 178 and accompanying text.
\textsuperscript{329} See supra notes 179-214 and accompanying text for an analysis of the Army's interest in excluding persons on the basis of their homosexual orientation alone.
\textsuperscript{330} See, e.g., Mosley, 408 U.S. at 101 ("interest in preventing disruption" insufficient to justify "wholesale exclusion of picketing on all but one preferred subject.").
allegedly targets, homosexual conduct. An arguably sizable percentage of persons having a homosexual orientation do not engage in homosexual conduct. Moreover, a fairly large percentage of persons engaging in homosexual conduct do not have a homosexual orientation, or some Ms are not Ts. Because the selected trait is not substantially related to the targeted conduct, the regulation fails the narrowly-tailored requirement of strict scrutiny in an equal protection context and results in unjustified discriminatory interference with the ability of similarly situated persons—those who do not engage in homosexual conduct—to exercise their first amendent rights.

VI. CONCLUSION

The Seventh Circuit’s conclusion in Ben-Shalom v. Marsh (Ben-Shalom II)—that the Army may exclude homosexual persons on the basis of their sexual orientation alone—rests on the theory that speech is conduct. This theory eviscerates the first amendment because it poten-

331. Joseph Tussman and Jacobus tenBroek, in discussing the theory of equal protection, identified five possible relationships between persons as defined by the trait (T) and persons as defined by the targeted mischief (M):
(1) All Ts are Ms, and all Ms are Ts
(2) No Ts are Ms
(3) All Ts are Ms but some Ms are not Ts
(4) All Ms are Ts but some Ts are not Ms
(5) Some Ts are Ms; some Ts are not Ms; and some Ms are not Ts

Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 347. The first category represents a statute in which the classification is reasonably related to the asserted goal. Id. at 348. The second category exemplifies an unreasonable classification because there is no correlation between the classification and the interest served. Id. The third category describes an underinclusive statute, id., the fourth category an overinclusive one, id. at 351, and the fifth category reflects a statute which is both under- and overinclusive. Id. at 352.

332. For example, in one study of 199 gay men, 18% identified themselves as gay before they had ever participated in homosexual acts. McDonald, supra note 114. For a discussion of various studies of self-identified homosexual individuals which suggests that homosexual self-identification may be unrelated to homosexual conduct, see supra notes 111-14 and accompanying text.

333. See Tussman & tenBroek, supra note 331, at 347.
334. In Kinsey’s studies, 37% of the males and 13% of the females had engaged in homosexual conduct leading to orgasm, and about half of the men and slightly over a quarter of the women had experienced homosexual psychological responses. HUMAN FEMALE, supra note 108, at 474-75. Yet, only 1-3% of the females and 3-16% of the males were exclusively homosexual. Id. at 488.

335. See Tussman & tenBroek, supra note 331, at 347.
336. See Mosley, 408 U.S. at 101-02.
338. See supra notes 147-75 and accompanying text.
tially makes punishable as conduct all speech and thought that may refer to disapproved behavior.

The primary constitutional defect of the Army's regulation is that it was motivated by an illegitimate purpose: the avoidance of hostile listener response based on prejudice. The Army, as a government entity, is proscribed from directly or indirectly encouraging private bias. Existing Army training programs which are designed to eliminate racial prejudice can serve as models for dealing with homophobic reactions among service personnel.

Although the Army may have legitimate authority to regulate homosexual conduct, precedent does not support the pervasive intrusion on highly-valued first amendment rights permitted under the Army's separation and enlistment regulations. The Seventh Circuit also failed to recognize that the Army's regulation interferes in a discriminatory manner with the exercise of the fundamental right of speech. The trait of homosexual orientation, as revealed by speech, is not sufficiently related to the targeted interest of preventing homosexual conduct. Consequently, the substantial under- and overinclusiveness of the regulation violates the principle of equal protection.

Finally, in totally deferring to military necessity, the Seventh Circuit abrogated its duty of constitutional review. The danger inherent in the panel's assumption that the military is beyond the reach of the Constitution has already been demonstrated by subsequent courts' citations to Ben-Shalom II, in a civilian context, for the proposition that classifications based on homosexual status do not violate equal protection if they can pass a low-level rational basis test. When the judiciary unquestioningly bows to military necessity as a justification for laws that would ordinarily be deemed unconstitutional, "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

339. See supra notes 180-212 and accompanying text.
343. See supra notes 293-306 and accompanying text.
344. See supra notes 307-36 and accompanying text.
345. See supra notes 331-36 and accompanying text.
346. See supra notes 325-36 and accompanying text.
Thus, *Ben-Shalom II* makes President Eisenhower's thirty-year-old warning timely once again:

We must never let the weight of the military industrial complex endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the ... machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.\(^3\)

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It seems particularly fitting to use a quote from President Eisenhower in support of the rights of homosexual servicepersons in light of the following anecdote about Johnnie Phelps, who served as a Women's Army Corps sergeant during World War II:

"[T]here was a tolerance for lesbianism if they needed you. If you had a job to do that was a specialist kind of job or if you were in a theatre of operations where bodies were needed, then they tolerated anything, just about."

Sergeant Phelps had the opportunity to test this tolerance on one occasion when General Eisenhower, her commanding officer, asked her to ferret out the lesbians in her WAC battalion. She replied: "Sir, I'll be happy to do this investigation for you but you'll have to know that the first name on the list will be mine ... I think the General should be aware that among those women are the most highly decorated women in the war. There have been no cases of illegal pregnancies, there have been no cases of AWOL, there have been no cases of misconduct, and as a matter of fact, every six months the General has awarded us a commendation for meritorious service."

Eisenhower, knowing better than to look a gift horse in the mouth, simply said, "Forget the order."


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