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HOMOSEXUALS IN THE MILITARY

I. INTRODUCTION

The homosexual in the armed services presents, at the least, a unique situation. In the past armies have actively tried to assimilate this group with varying success.¹ The attitude of the United States military toward the homosexual began to receive concerted study during World War II, when investigations were made of the applications of the well-known "section VIII"² discharge, which provided prompt separation from service for those exhibiting various types of deviant behavior, under the heading: "Inaptness or Undesirable Habits or Traits of Character."³

Then, as today,⁴ cases involving enlisted men were handled primarily through administrative procedures other than courts-martial, except when the offense was aggravated.⁵ All cases of deviant behavior were processed before a board of three officers. When possible, one of these would be a medical officer, and a psychiatrist's report was utilized in lieu of testimony as to his examination of the accused and his findings.⁶ Special courts-martial rules of procedure governed during board hearings, but counsel was not authorized.⁷

If the board decided that discharge was the appropriate remedy, the discharge could be either "White" (with honor) or "Blue" (without honor).⁸ Discharge under section VIII was usually White, because "the conduct of the enlisted man during his current period of service has been such as would render his retention in the service desirable were it not for his inaptitude or lack of required adaptability for military service."⁹ If the accused, however, had evinced psychopathic behavior, chronic alcoholism, or sexual perversion including homosexuality, he

1. Plato, *The Symposium* 48 (Penguin ed. W. Hamilton transl. 1951).

2. AR 615-360, Section VIII, 26 Nov. 1942 [hereinafter cited as Section VIII].

3. *Id.* West & Glass, *Sexual Behavior and the Military Law*, in *Sexual Behavior and the Law* 250, 251 (R. Slovenko ed. 1965) [hereinafter cited as West & Glass]. See generally McNiece & Thornton, *Military Law from Pearl Harbor to Korea*, 22 *Fordham L. Rev.* 155 (1953).

4. Everhard, *Problems Involving The Disposition of Homosexuals In The Service*, 2 *JAG Bull.* No. 6 at 20, 21 (U.S.A.F. Nov. 1960) [hereinafter cited as Everhard].

5. West & Glass at 251. See also Section VIII, ¶ 51(c).

6. "Whenever available, a trained psychiatric examiner, or officer possessing such experience, will be called as a witness in the case and present his testimony to the board." Section VIII, ¶ 51(c). See *Clackum v. United States*, 296 F.2d 226, 228 (Ct. Cl. 1960) for a psychiatrist's finding of "sexual deviate manifested by homosexuality latent," based on a half-hour interview.

7. Section VIII, ¶ 51(d)(1).

8. West & Glass at 252.

9. Section VIII, ¶ 55(b). The provision is somewhat similar in effect to the current AR 635-200, 15 July 1966, which provides that the type and character of separation issued upon administrative separation from current enlistment or period of service is to be determined solely by the member's military record, including behavior, during that enlistment or period of service.

received a Blue certificate.¹⁰ Whether the certificate was White or Blue the discharge would contain a reference to section VIII as the reason for the discharge.¹¹ The *explicit* reason for the separation would not be noted. A Blue discharge only indicated that the exhibited maladjustment was more severe from a moral standpoint.¹² Officers falling within the proscriptions of section VIII were similarly dealt with either by courts-martial or appropriate administrative procedure.¹³

A study¹⁴ of ineffective soldiers found that homosexuals separated during World War II were usually given Blue discharges since "[w]hatever the root of their aberrant behavior, the Army found them guilty of serious breaches of discipline and since they were mentally responsible for their actions, they were punished—at least to the extent of being discharged without honor."¹⁵ They were discharged as soon as possible after their aberrant behavior was brought to the attention of a responsible officer.¹⁶ The study argued that the Blue discharge was often a benefit to the soldier in question since, if he had been charged before a court-martial, conviction would be almost certain, with the resulting loss of suffrage and the probability of a prison term.¹⁷

The Surgeon General's office conducted several studies during the War. In 1943 for example, the Army processed 20,620 "constitutional psychopaths" of whom 1,625 were presumably of the "homosexual type."¹⁸ A National Research Council report followed 183 known homosexuals and found that 51 were rejected at induction (but only 29 of these for neuro-psychiatric reasons); 14 were prematurely discharged from service for various reasons; and 118 served from one to five years (58% as officers), concealed their homosexuality effectively, and had good records.¹⁹

Policies toward the homosexual became more liberal toward the end of the War, primarily through the efforts of the Surgeon General's Office.²⁰ Regula-

10. West & Glass at 252.

11. "Section VIII, AR 615-360; not eligible for reenlistment or induction." Section VIII, ¶ 54(a). In all papers other than the discharge certificate the actual cause of discharge was given, with reference to the appropriate regulation. Id. ¶ 54(b).

12. West & Glass at 252.

13. Id.

14. 1 E. Ginzberg, *The Ineffective Soldier: The Lost Divisions* (1959).

15. Id. at 92-93.

16. Id. at 93.

17. Id.

18. West & Glass at 252. William Menninger questioned the significance of these figures on the grounds that for every homosexual discovered by the Medical Department 5 or 10 were never detected. W. Menninger, *Psychiatry in a Troubled World* 225 (1948). Kinsey attributed the low figures to the announcement at the beginning of the war of the official policy of exclusion of homosexuals, who were thus induced to conceal their tendencies. 58 *Sci. News Letter*, July 1, 1950, at 5.

19. West & Glass at 252.

20. Id. at 253.

tions related to the separation from service of the homosexual were directed to be applied only to those who were "*apprehended or were reported to have performed homosexual acts. . .*"²¹ Soldiers who merely sought advice or treatment from a psychiatrist or doctor were excluded.²² Certain persons considered "reclaimable" were provided hospitalization.²³ Six months after these directives were promulgated, section VIII was superseded.²⁴ Aberrant behavior remained a cause for discharge, but deviant sexual behavior was specifically referred to as: "psychopathic personality manifested by antisocial or amoral trends, criminalism, chronic alcoholism, drug addiction, pathological lying, or sexual misconduct in the service. . ."²⁵ The type of discharge to be given was still not specified, but the form of discharge certificate was Blue.²⁶

Further liberalizations in Army policy developed following the War. Enlisted men who were found to be inadaptable because of homosexual tendencies received an Honorable Discharge if they had committed no sexual offense while in the service and if their record of service otherwise justified an Honorable Discharge.²⁷ Officers were permitted to resign under the same conditions.²⁸

21. *Id.* True or confirmed homosexual officers could resign for the good of the service; enlisted men were processed under section VIII and given a Blue discharge; either officers or enlisted men could demand a court-martial. War Dep't Circular No. 3, §§ 2(a)(1)-(3) (3 Jan. 1944).

22. West & Glass at 253.

23. *Id.* These were usually first offenders, those under undue influence, especially by a person of superior age or grade, and those acting as a result of intoxication, immaturity, use of drugs, or curiosity. The confirmed homosexual would probably not have been considered "reclaimable" considering military attitudes and facilities for treatment, since a cure usually requires "psychiatric-psychoanalytic treatment of one to two years' duration, with a minimum of three appointments each week—provided the patient really wishes to change." E. Bergler, *Homosexuality: Disease or Way of Life?* 188 (1956) (emphasis deleted).

24. AR 615-368, 20 July 1944, as revised 7 March 1945. This regulation also superseded those sections of War Dep't Circular No. 3, *supra* note 21, which pertained to enlisted men. The three-officer board was retained, one being a medical officer, and psychiatric testimony was required.

25. AR 615-368, 7 March 1945, ¶ 1(a)(2).

26. *Id.* ¶ 5. West & Glass noted that the Surgeon General's office tried to change this practice but failed since, "[i]t was apparently feared that many homosexuals who were well adjusted would seek to be discharged and that others might claim to be homosexual for the purpose of getting out of the Army with honorable discharges." West & Glass at 254. The authors argue that the belief that non-homosexuals would feign homosexuality is fallacious, pointing out the possibility of more socially acceptable forms of simulation of cause for discharge, such as physical illness. *Id.*

27. West & Glass at 254-55. As before, the enlisted man could not be separated on the sole basis of a confession of homosexuality; "adequate evidence of psychological maladjustment due to homosexual tendencies which rendered the individual inadaptable for service" was sufficient. *Id.* See AR 615-368, 10 April 1945, ¶ 2½.

28. West & Glass at 255.

II. DEVELOPMENT OF CURRENT REGULATIONS

Military attitudes toward the homosexual began to shift after 1947 as the lenient applications of the rather liberal rules and regulations gave way to much stricter procedures.²⁹ The new Department of Defense issued a directive to be applied uniformly by all services "in all cases involving homosexual tendencies or acts."³⁰ A Department policy statement recited that "known homosexual individuals were military liabilities and security risks who must be eliminated."³¹ As this policy became effective in the early 1950's, three "classes" of homosexuals were defined in military regulations.³² A Class I homosexual is a person who, while under military jurisdiction, has engaged in a homosexual act involving force, fraud, intimidation, or a minor.³³ Class I homosexuals are subject to a general court-martial, and are usually sentenced to fines, imprisonment, and punitive discharges, either Dishonorable or Bad Conduct.³⁴ A Class II homosexual is a person who, while in the service, has wilfully engaged in one or more homosexual acts, or has proposed or attempted to do so under conditions not involving force, fraud, intimidation, or minors. Such a person usually

29. *Id.*

30. *Id.* at 256.

31. *Id.* West & Glass argue that the new policy was attributable at least in part to the Senate investigations on homosexuals in government. See Senate Comm. on Expenditures in the Executive Departments, *Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 241, 81st Cong., 2d Sess. (1950); SECNAV Instruction 1900.9(4)(a), 20 April 1964.

32. See AR 635-89, 15 July 1966; AFR 35-66, 17 March 1959; AF Man. 39-12, 1 September 1966; SECNAV Instruction 1900.9, 20 April 1964.

33. Military law defines a minor as a person under 16. E.g., SECNAV Instruction 1900.9(6)(b)(2), (c)(1).

34. West & Glass at 256-57. Army regulations, which parallel those of the other services, provide the following types of separation: Honorable Discharge under AR 635-200, 15 July 1966 (enlisted men) and AR 635-5, 23 January 1967 (officers), given for the convenience of the government, expiration of enlistment, minority, resignation, dependency or hardship, disability, revocation or termination of appointment, or discharge to accept appointment; General Discharge under AR 635-200, 15 July 1966 (enlisted men) and AR 635-5, 23 January 1967 (officers), given for the convenience of the government, disability, disloyalty or subversion, expiration of enlistment, minority, resignation-unsuitability, and homosexuality; Undesirable Discharge under AR 635-200, 15 July 1966 (enlisted men), given for misconduct, homosexuality, qualified resignation-unfitness, disloyalty, subversion, absence without leave, or desertion; Discharge (under other than honorable conditions) under AR 635-5, 23 January 1967 (officers), given for conviction of a felony by civil authorities or a security violation; Bad Conduct Discharge, ordered by general or special courts-martial; Dishonorable Discharge ordered by general courts-martial. Officers found to be homosexuals may resign for the good of the service in lieu of court-martial under AR 635-89, 15 July 1966. Note that Honorable, General and Undesirable discharges may be given by administrative procedures. Dismissal is an appropriate sentence only for an officer, and is equivalent to a Dishonorable Discharge. Bednar, *Discharge and Dismissal as Punishment in the Armed Forces*, 16 *Military L. Rev.* 1, 34 (1962) [hereinafter cited as *Bednar*]; see M. Edwards & C. Decker, *The Serviceman and the Law* 43 (1951).

receives an Undesirable Discharge, with the reason for discharge incorporated by reference on the certificate to the appropriate regulation.³⁵ Most current cases are Class II.³⁶ A Class III case is a person who exhibits, professes, or admits to homosexual tendencies, or habitually associates with persons known to him to be homosexuals, but who has not, so far as is known, engaged in a homosexual act, or attempted or proposed to another to do so either while in the service or before his induction. Current regulations mandate an Honorable or General Discharge in Class III cases.

A study³⁷ of 201 soldiers investigated for homosexuality found that 74.6% received Undesirable Discharges, 16.4% were retained in the service, 5% received General Discharges, 1.5% resigned (these were all officers), and 2.5% received other discharges. Investigation of these cases through the Office of Special Investigations from initiation until final disposition varied from one to fifteen months, with an average period of five months.³⁸

Retention in the service has been permitted by a series of modifications to the regulations beginning in 1955.³⁹ Problems involving disclosure of confidential interviews by psychiatrists and doctors were alleviated.⁴⁰ In Class III cases Honorable or General Discharges, depending on the character of the accused's service, have been made mandatory.⁴¹

III. INTERPRETATIONS OF REGULATIONS AND ARTICLE 125, UCMJ

Homosexuals who fall within Class I or Class II may also⁴² be subject to courts-martial under article 125 of the Uniform Code of Military Justice,⁴³

35. See Army and Air Force Regulations, *supra* note 32; SECNAV Instruction 1900.9 (4)(b), 20 April 1964.

36. West & Glass at 257. Class II cases often accept the Undesirable Discharge through a waiver of general court-martial charges. *Id.* at 258-59. Officers may resign for the good of the service. Both officers and enlisted men who resign or accept an Undesirable Discharge must sign a waiver recognizing that separation will be under conditions other than honorable, that federal and state veterans' rights will be lost, and that they expect to find difficulty in civilian life due to the character of their separation. E.g., SECNAV Instruction 1900.9(6)(c)(2)(b)(1)(2), 20 April 1964.

37. Reported in West, Doidge & Williams, *An Approach to the Problem of Homosexuality in the Military Service*, 115 *Am. J. Psychiatry* 392 (1958).

38. *Id.*

39. West & Glass at 258. But see, e.g., AR 635-89, 15 April 1955, as modified, 8 Sept. 1958, as further modified, 14 April 1959.

40. West & Glass at 258. But see Manual for Courts-Martial, United States, 1969, ¶ 150(b), ¶ 151(c)(2), which would suggest that the doctor-patient privilege is not as stringent as during the post-war "liberal" period. See generally Uniform Code of Military Justice, art. 31, 10 U.S.C. § 831 (1964) [hereinafter cited as UCMJ].

41. West & Glass at 268-69; see, e.g., AR 635-200, 15 July 1966.

42. Some cases have gone so far as to report a stipulation that the accused under UCMJ, art. 125, 10 U.S.C. § 925 (1964), was a Class II homosexual. *United States v. Rivera*, 12 U.S.C.M.A. 507, 31 C.M.R. 93 (1961); *United States v. Sheehan*, 29 C.M.R. 887 (1960).

43. UCMJ, art. 125, 10 U.S.C. § 925 (1964). This article states: "Sodomy. (a) Any

which condemns sodomy and bestiality. This article, however, has not served to pre-empt administrative discharge procedures in many cases involving homosexuals.⁴⁴ Cases arising under this article and relevant regulations illustrate the military procedures used in dealing with them. In addition to prosecution under article 125, officers may also be subject to prosecution under article 134, as in one Navy case.⁴⁵ There a commander was found not guilty of sodomy but guilty of committing an indecent, lewd and lascivious act, and was dismissed under article 134⁴⁶ with forfeiture.⁴⁷

In another case⁴⁸ petitioner, charged with certain violations of articles 125 and 134, had not been permitted to submit a signed statement requesting an Undesirable Discharge in lieu of undergoing court-martial, as permitted under an Army regulation.⁴⁹ On petitioner's habeas corpus request after conviction by the court-martial, the court discussed *Burns v. Wilson*,⁵⁰ noting that it was limited by that Supreme Court decision to examining whether the general court-martial had jurisdiction, and whether all the contentions of petitioner had been heard and considered fully and fairly by the military tribunals. The petition was denied.

A rather interesting Air Force procedure was examined by the Court of Claims

person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct." *Id.* See W. Aycock & S. Wurfel, *Military Law Under The Uniform Code of Military Justice* (1955). See also *United States v. Cook*, 15 U.S.C.M.A. 436, 35 C.M.R. 408 (1965); *United States v. Bennington*, 12 U.S.C.M.A. 565, 31 C.M.R. 151 (1961).

44. West & Glass at 271; see *Grant v. United States*, 162 Ct. Cl. 600, 611 (1963). AFR 35-66, 17 March 1959, concerning Air Force discharge procedures for homosexuals, see text accompanying note 32 *supra*, did "no more than set up an extraordinary procedure for the administrative elimination of homosexual persons if resort to this method, rather than trial by court-martial, is determined to be the preferred action by those empowered to make such decision." *United States v. Sheehan*, 29 C.M.R. 887, 889 (1960).

45. *Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), cert. granted, 390 U.S. 1038 (1968).

46. UCMJ, art. 134, 10 U.S.C. § 934 (1964). Note that "[a]n officer who publicly associates with known sexual deviates to the disgrace of the Armed Forces is guilty of an offense against Article 133, UCMJ." Murphy, *The Soldier's Right to a Private Life*, 24 *Military L. Rev.* 97, 119 n.128 (1964); see *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

47. "Forfeiture" means loss of pay and allowances. *Augenblick v. United States*, 377 F.2d 586, 607 (Ct. Cl. 1967).

48. *Bokoros v. Kearney*, 144 F. Supp. 221 (E.D. Tex. 1956).

49. AR 600-443, April 10, 1954. As a Class II homosexual, had petitioner been offered an Undesirable Discharge and had he refused to accept it, he could have been given a Bad Conduct Discharge after a court-martial. *United States v. Betts*, 12 U.S.C.M.A. 214, 30 C.M.R. 214 (1961).

50. 346 U.S. 137 (1953).

in *Clackum v. United States*.⁵¹ Petitioner, accused of homosexuality, had been given an opportunity to resign.⁵² She refused and demanded trial by court-martial. Charges were preferred against her but were not referred for investigation, as the court found was required by courts-martial statutes.⁵³ Instead, she was summarily discharged under an Air Force regulation⁵⁴ which provided that if the evidence was so insubstantial that a conviction by court-martial would be unlikely the executive officer of the Air Force could in effect convict the person and impose a penalty, in this case a discharge under conditions other than honorable with resulting loss of reputation, rights and benefits.⁵⁵ Interestingly, the charges and evidence, which included a psychiatric evaluation reflecting "a diagnosis of sexual deviate manifested by homosexual latent,"⁵⁶ based on a half-hour interview, were revealed to the petitioner only after her discharge. The government contended that this "remarkable arrangement," as the court characterized it, was necessary "in the interest of an efficient military establishment for our national defense."⁵⁷ The court found that the "Air Force had the undoubted right to discharge her whenever it pleased, for any reason or for no reason, and by so doing preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties."⁵⁸ The court further found that "[t]he so-called 'hearing' before the Air Force Discharge Board was not a hearing at all, in the usual sense of that word. It was a meaningless formality, to comply with the regulations."⁵⁹ The court vacated the discharge and awarded petitioner back pay.⁶⁰ In contrast, the same court in *Grant v. United States*⁶¹ found that article 125 did not mandate a court-martial in every

51. 296 F.2d 226 (Ct. Cl. 1960).

52. See AFR 35-66(5)(b)(1), 17 March 1959.

53. 296 F.2d at 227.

54. AFR 35-66(5)(b)(1), 17 March 1959. The court noted that the regulation "is as if a prosecuting attorney were authorized, in a case where he concluded that he didn't have enough evidence to obtain a conviction in court, to himself impose the fine or imprisonment which he thought the accused person deserved." 296 F.2d at 228.

55. See text accompanying notes 76-88 *infra*.

56. 296 F.2d at 228.

57. *Id.*

58. *Id.*

59. 296 F.2d at 229; see *Van Bourg v. Nitze*, 388 F.2d 557, 564 (D.C. Cir. 1967). In another case, failure to notify the accused of various procedural rights as required by regulations was not sufficient to reverse the sodomy conviction of a Class II homosexual. *United States v. Sheehan*, 12 U.S.C.M.A. 507, 509, 29 C.M.R. 887, 889 (1960). See also Note, *Judicial Review of Discharge Classifications Determined in Military Administrative Proceedings*, 70 *Harv. L. Rev.* 533 (1957).

60. Back pay is commonly awarded in illegal discharge cases. See, e.g., *Egan v. United States*, 158 F. Supp. 377 (Ct. Cl. 1958); *Boruski v. United States*, 155 F. Supp. 320 (Ct. Cl. 1957); *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947).

61. 162 Ct. Cl. 600 (1963).

case of sodomy, and that the Navy was not precluded from discharging petitioner through administrative procedures.⁶²

IV. PUNISHMENT THROUGH DISCHARGE

The Class II homosexual is usually given an Undesirable Discharge.⁶³ There has been much discussion about the punitive nature of this type of discharge.⁶⁴ The court in *Grant*, while upholding petitioner's General Discharge, argued that "[o]nly a court-martial can impose a punitive discharge"⁶⁵ One writer noted that "there are only three forms of discharge recognized as punitive (dismissal [Officers], dishonorable and bad conduct)"⁶⁶ On the other hand, since approximately 90% of all discharges issued are honorable, there is truth in the statement "anything less than an honorable discharge is viewed as derogatory, and inevitably stigmatizes the recipient."⁶⁷ The inevitable loss to reputation caused by a discharge less than honorable may make it difficult for the recipient to find civilian employment.⁶⁸ The recipient of an Undesirable Discharge also faces losing valuable post-separation benefits, such as pay for accrued leave⁶⁹ and burial in a national cemetery.⁷⁰ The recipient of an Undesirable Discharge may receive numerous other veterans' benefits, such as pensions for disabilities,⁷¹ vocational rehabilitation,⁷² loans,⁷³ special housing,⁷⁴ hospitalization,⁷⁵ out-patient medical or dental treatment,⁷⁶ and compensation for service-connected and non-service-connected death,⁷⁷ if cleared by the agency administering his benefit. His eligibility for seeing-eye dogs and mechan-

62. Petitioner had admitted to sodomous acts as a passive partner with a female prostitute. The appellate procedure in this case involved reviews by a field board, Enlisted Performance Evaluation Board, Chief of Naval Personnel, Navy Discharge Review Board and Board for Correction of Naval Records. The Court of Claims affirmed the validity of his General Discharge. *Id.*

63. See notes 35 & 36 *supra*. See also note 34 *supra*.

64. See, e.g., Dougherty & Lynch, *The Administrative Discharge: Military Justice?*, 33 *Geo. Wash. L. Rev.* 498 (1964).

65. 162 Ct. Cl. at 609.

66. *Bednar* at 12.

67. *Bland v. Connally*, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961).

68. Post separation difficulties are recognized by the military. See note 36 *supra*.

69. 37 U.S.C. §§ 501(a)(1)(A)-(B) (1964).

70. 24 U.S.C. § 281(a)(1) (1964). He is also ineligible for a headstone marker. 24 U.S.C. § 279(a) (1964).

71. *Bednar* at 37-38. See generally 38 U.S.C. §§ 301, 501 *et. seq.* (1964).

72. *Bednar* at 38. See generally 38 U.S.C. § 1501 *et. seq.* (1964).

73. *Bednar* at 38. See generally 38 U.S.C. § 1801 *et. seq.* (1964).

74. *Bednar* at 39. See generally 38 U.S.C. § 801 *et. seq.* (1964).

75. *Bednar* at 39. See generally 38 U.S.C. § 601 *et. seq.* (1964).

76. *Bednar* at 40.

77. *Id.* at 41. See generally 38 U.S.C. § 501 *et seq.* (1964). He is also eligible subject to review for domiciliary care, *Bednar* at 39; prosthetic appliances, *id.* at 40; and burial expenses, *id.* at 41.

ical electronic equipment,⁷⁸ and for automobiles⁷⁹ depends upon his entitlement to disability compensation. In general holders of Honorable or General Discharges are entitled to all of the above benefits, if needed; holders of Bad Conduct or Dishonorable Discharges are entitled to none of them.⁸⁰

V. PSYCHOLOGICAL ASPECTS OF THE HOMOSEXUAL IN THE MILITARY AND SUGGESTED METHODS OF SEPARATION

It is generally agreed that in civilian life most homosexuals are able to assimilate themselves and circumvent the predominantly anti-homosexual attitudes.⁸¹ Even before induction into the services, however, the homosexual is forced to choose between concealing his tendencies, if possible, or revealing them.⁸²

It is much more difficult for the homosexual to maintain his dual identity while in the armed services, which assume total control, especially of enlisted men.⁸³ The concept that the greater isolation of military living and working conditions contributes to a higher incidence of homosexuality than that found in civilian life has been questioned,⁸⁴ but is generally accepted.⁸⁵ Many homosexuals who were adjusted to civilian life "broke down either immediately after induction or after they had tried without success to cope with their problems in what was a demanding and unsympathetic environment."⁸⁶ Studies reveal that the homosexual fears bodily harm, is constantly tempted, and faces the pressure of immediate discharge, perhaps without honor, if exposed.⁸⁷ The service records reveal, however, that "homosexuality per se has no relationship to ability to perform good military service."⁸⁸ Indeed, many, concealing their

78. Bednar at 40. See generally 38 U.S.C. § 614 (1964).

79. Bednar at 41. See generally 38 U.S.C. § 1901 (1964).

80. Bednar at 34-42. For a complete list of post-separation benefits in relation to type of discharge, see Hearings on S. 3096 Before the Senate Armed Services Comm., 83d Cong., 2d Sess. 28-29 (1954). See also Lerner, Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits, 13 Military L. Rev. 121 (1961).

81. 2 E. Ginzberg, *The Ineffective Soldier: Breakdown and Recovery* 11, 12 (1959).

82. "The last of 70 items on the medical-history form prospective draftees must fill out when they report for physicals reads, 'Have you ever had or have you now . . . homosexual tendencies?' If a homosexual checks the 'no' box, he violates a federal law and risks fine and imprisonment. If he checks 'yes,' he is disqualified . . . [H]omosexuals are ineligible for 2.5 million federal jobs under Civil Service." Sanford, *Boxed In*, *New Republic*, May 21, 1966, at 8. The federal sanction for falsely completing the medical-history form is a fine of not more than \$10,000 and imprisonment for not more than 5 years, or both. 18 U.S.C. § 1001 (1964).

83. 2 E. Ginzberg, *supra* note 81, at 11-12.

84. West & Glass at 251.

85. 3 E. Ginzberg, *The Ineffective Soldier: Patterns of Performance* 42 (1959).

86. *Id.*

87. 2 E. Ginzberg, *supra* note 81, at 232.

88. Everhard at 20.

homosexuality, served commendably.⁸⁹ Once the homosexual was separated from service he often was able to adjust again to civilian life.⁹⁰

The Army through World War II maintained the strict policy of prompt separation in almost every case regardless of the service record of the individual.⁹¹ "The Army would not expose normal men to possible seduction by homosexuals, especially since the latter might be in a position to take advantage of rank."⁹² Organizational difficulties and a sensitivity to public intolerance of the homosexual made him "a distracting, disturbing element in an organization where distractions and disturbances can have no place at the risk of the loss of discipline."⁹³ Assuming that prompt separation is required in cases of confirmed homosexuality,⁹⁴ by what means should the termination from service be effected?

There seems to be little argument with the current treatment of Class I cases. The Class is well defined and the proscribed actions certainly constitute legitimate cause for courts-martial and Bad Conduct or Dishonorable discharges.

In Class II cases, however, the benefit to the services in providing for an Undesirable Discharge, a "punitive" discharge, is more difficult to justify.⁹⁵ It may be argued that the homosexual has contributed to his situation through falsely stating that he did not have such tendencies when he was inducted.⁹⁶ It is reasonable to assume, however, that an individual who had adapted himself in civilian life could believe, however incorrectly, that he could adapt as well in the military.⁹⁷ Furthermore, such falsehood, where intentional, itself constitutes a federal crime⁹⁸ involving adequate sanctions without recourse to a punitive discharge.

Essentially, the Class II definition proscribes consensual sodomy. The same arguments against punishment of this act in civilian life can be applied to its commission while under military jurisdiction.⁹⁹ In general the civilian arguments for outlawing such acts stress the right of society to protect itself against the homosexual.¹⁰⁰ Homosexuals are so "nervous, secretive, and undepend-

89. 2 E. Ginzberg, *supra* note 81, at 232. See generally I. Bieber, *Homosexuality* 255-76 (1962) ("latent" homosexuals); M. Guttmacher & H. Weihofen, *Psychiatry and the Law* 112-13 (1952); K. Menninger, *The Human Mind* 286 (3d ed. 1946) (overcompensation by homosexuals).

90. 2 E. Ginzberg, *supra* note 81, at 11-12. As to "normal post-separation adjustment" compare case histories *id.* at 246-48 & 117-19, with *id.* at 60-63.

91. *Id.* at 103-04.

92. *Id.* at 112.

93. Everhard at 20. "They are, in short, military liabilities and must be discharged." *Id.*

94. Cures are not a service responsibility and the prognosis is almost always poor. Everhard at 20. See note 23 *supra*.

95. West and Glass at 271.

96. See note 82 *supra*.

97. See text accompanying notes 92-94 *supra*.

98. See note 82 *supra*.

99. See, e.g., Sadoff, *Sexually Deviated Offenders*, 40 *Temp. L.Q.* 305, 315 (1967); Comment, *Sodomy Statutes—A Need for Change*, 13 *S.D.L. Rev.* 384, 395-97 (1968).

100. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *Yale L.J.* 986, 989 (1966).

able¹⁰¹ that their usefulness to society is lost.¹⁰² Proponents¹⁰³ of anti-homosexual legislation have also contended that such behavior menaces the health of society and has a deleterious effect on family life, and that the consensual offenders, if not punished, would eventually turn to molestation of minors. Repeal of existing statutes, they have argued, would suggest toleration by the state and result in a license to commit the condemned acts.

These arguments justifying such legislation of morality have been rebutted by arguments stressing the mental illness usually related to the commission of homosexual acts.¹⁰⁴ To repeal the statutes, it is contended, would not give social or moral approval to the acts but would merely reflect the understanding that legislation cannot affect the tendencies of homosexuals.¹⁰⁵ Moreover the laws may be used to blackmail or coerce the offender.¹⁰⁶ The rationality of the latter approach is supported by the weight of current authority,¹⁰⁷ and seems to be the more logical treatment.

Another correlation with civilian treatment accorded the homosexual may be made in considering the developing law of the status offender. Constitutional objections to the indefinite confinement of sexual psychopaths have not met with much success.¹⁰⁸ Such statutes are generally found to be civil in nature and thus the periods of confinement are not subject to the eighth amendment ban on cruel and unusual punishments.¹⁰⁹ *Punitive* confinement of a status offender, however, has been successfully challenged on constitutional grounds. In *Robinson v. California*¹¹⁰ a statute making it a misdemeanor for a person "to be addicted to the use of narcotics" was found to effect cruel and unusual punishment.¹¹¹ Punishment for the status must of course be distinguished from punishment for the commission of an overt act necessarily related to that status. Under the Uniform Code of Military Justice, for example, wrongful, conscious possession of narcotics is a court-martial offense.¹¹²

101. Cantor, *Deviation and the Criminal Law*, 55 J. Crim. L.C. & P.S. 441, 450 (1964).

102. *Id.*

103. The arguments most often advanced by proponents of such legislation are collected in *id.* at 449-52.

104. Comment, *supra* note 99, at 395. See also Comment, *Deviate Sexual Behavior: The Desirability of Legislative Proscription*, 30 Albany L. Rev. 291 (1966).

105. Comment, *supra* note 99, at 397.

106. "Statutory reform would at least eliminate the state from partnerships in blackmail." *Id.* at 396.

107. See, e.g., Report of the Committee on Homosexual Offenses and Prostitution, Cmd. No. 247 (1957) (The Wolfenden Report).

108. See, e.g., *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

109. *In re Kemmerer*, 309 Mich. 313, 15 N.W.2d 652 (1944), cert. denied, 329 U.S. 767 (1946).

110. 370 U.S. 660 (1962).

111. *Id.* at 666. But see, e.g., *People v. Nettles*, 34 Ill. 2d 52, 213 N.E.2d 536 (1966), holding that *Robinson* did not bar prosecution for possession of narcotics.

112. See UCMJ, arts. 92, 134, 10 U.S.C. §§ 892, 934 (1964). See also Stubbs, *Narcotic Offenses*, JAG J., June 1956, at 7-8.

The Class II homosexual in the military has presumably committed an overt act, so the "punishment" meted out through the type of discharge given would not contravene the eighth amendment. This distinction between the status and the overt act has been criticized as one "more important to law than medicine and one which conveniently ignores causative factors of homosexuality"¹¹³

Viewed in the context of the historical development of the military regulations affecting homosexuals, current treatment is harsh. "Perhaps the punitive discharge satisfies the general hostility and prejudice against homosexuality."¹¹⁴ Retention in service, which was provided for in some cases during the relatively lenient period immediately following World War II,¹¹⁵ would not appear to have been a desirable solution in Class II cases, since the military atmosphere is so conducive to a recurrence of the incident prompting separation.¹¹⁶ An analogy to retention in service may be drawn to the imprisonment of the civilian homosexual.¹¹⁷ Since fast separation is a valid military objective in these cases, the form of discharge which most speedily effects separation should be adopted. Despite current practice, use of the Undesirable Discharge often delays physical separation because the accused individual, aware of the severe consequences attending such a discharge, may appeal through procedures which may keep him in uniform for more than a year.¹¹⁸ Such practical considerations, as well as consideration of the absurdity of punishing an individual for what is likely to be but a symptom of his mental illness, suggest that the Honorable or General Discharge mandate should be extended to Class II cases.

In Class III cases even the relatively mild censure of the General Discharge seems harsh on the individual who has only confessed to the *possibility* of a future violation. The separation policy of the military is frustrated so long as the Class III individual attempts to hide his inclinations because of fear of a less than Honorable Discharge. The Honorable Discharge should be mandated in Class III cases.

The foregoing discussion raises some of the problems and inequities in the military treatment of the homosexual. At the least a re-evaluation of military objectives, attitudes, and procedures is needed in this area, with the result, hopefully, of a more rational approach in the future.

113. *Perkins v. North Carolina*, 234 F. Supp. 333, 337 (W.D.N.C. 1964). Compare *Perkins*, supra, with *State v. Stubbs*, 266 N.C. 295, 145 S.E.2d 899 (1966).

114. West & Glass at 272. See H. Weihofen, *The Urge to Punish* 28 (1956), a discussion of the unconscious motivation at work on those who punish the sex offender.

115. See text accompanying notes 20-23 supra.

116. See text accompanying notes 83-86 supra.

117. "Putting [a homosexual] into the North Carolina prison system is a little like throwing Brer Rabbit into the briarpatch." *Perkins v. North Carolina*, 234 F. Supp. 333, 339 (W.D.N.C. 1964) (footnote omitted).

118. See Comm. on the Uniform Code of Military Justice, *Good Order and Discipline in the Army*, Report to Honorable Wilbur M. Brucker 286-87 (1960).