

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

District Court Case No. C 00 1793 (WHA)

JOHN D. HENSALA,
Plaintiff and Appellant,

vs.

DEPARTMENT OF THE AIR FORCE, F. WHITTEN PETERS,
Secretary of the Air Force, et al.
Defendants and Appellees.

Appeal from a Judgment of the United States District Court,
for the Northern District of California,
the Honorable William H. Alsup, presiding

REQUEST FOR JUDICIAL NOTICE OF AMICI CURIAE
LHR: THE LESBIAN AND GAY BAR ASSOCIATION AND
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM

CATHERINE D. WHITING
(State Bar No. CA 190436)
P.O. Box 480318
Los Angeles, CA 90048
Telephone: (213) 486-4443

MANATT, PHELPS & PHILLIPS, LLP
VANESSA H. EISEMANN
(State Bar No. CA 210478)
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000

Attorneys for Amici Curiae
LHR: THE LESBIAN AND GAY BAR ASSOCIATION and BAY
AREA LAWYERS FOR INDIVIDUAL FREEDOM

COPY

Amici Curiae LHR: The Lesbian and Gay Bar Association and Bay Area Lawyers for Individual Freedom respectfully request this Court to take judicial notice of magazine and newspaper articles reporting on the Department of Defense's policies on homosexuals serving in the armed forces and academic publications addressing the "coming out" process of lesbians and gay men. True and correct copies of the following materials are attached:

Exhibit Title

Newspaper and Magazine Articles

- | | |
|----------|------------------------------------------------------------------------------------------------------------------------|
| A | "Administration Won't Fight Gay Officer's Reinstatement," <i>Los Angeles Times</i> , November 29, 1994 |
| B | "Gay Sailor Scores Another Court Win Government Misses Deadline," <i>The San Francisco Examiner</i> , October 17, 1994 |
| C | "Gay Sailor's Victory to Go Unchallenged," <i>The Washington Post</i> , November 29, 1994 |
| D | "Lesbian Colonel Returning to Duty," <i>The San Francisco Chronicle</i> , July 9, 1994 |
| E | "Lesbian is Reinstated in National Guard Job," <i>The Washington Post</i> , July 10, 1994 |
| F | "Navy Board Backs Lesbian," <i>The Washington Post</i> , December 2, 1994 |

- G** "Navy Deciding Lesbian's Fate Co-Workers Testify On Dunnings Behalf At Discharge Hearing," *The San Francisco Examiner*, December 1, 1994
- H** "Navy to Bring Murder Charge in Gay's Death," *Los Angeles Times*, February 4, 1993 at A4
- I** "Soldier Guilt of Premeditated Murder Charge," *Los Angeles Times*, December 9, 1999 at A22.
- J** "Tribunal Urges Navy Not To Discharge Lesbian," *Los Angeles Times*, December 2, 1994
- K** "U.S. Doesn't Appeal Ruling Reinstating Gay Sailor," *The Washington Post*, October 18, 1994
- L** "What's New," *The Wall Street Journal*, September 1, 1994
- M** John Balzar, "Lesbian Army Officer Wins Battle in Court Military: Federal Judge Orders Reinstatement of Col. Margarethe Cammermeyer; Ruling Raises Questions About 'Don't Ask, Don't Tell' Policy," *Los Angeles Times*, June 2, 1994
- N** Bettina Boxall and Sebastian Rotella, "Court Upholds Reinstatement of Gay Sailor Appeal," *Los Angeles Times*, September 1, 1994
- O** Lincoln Caplan, "Don't Ask, Don't Tell -- Marine Style," *Newsweek*, June 13, 1994
- P** John F. Harris, "Court Blocks Discharge of Sailor Merely for Saying He is Gay," *The Washington Post*, September 1, 1994

- Q John F. Harris, "U.S. Judge Reinstates Gay Colonel; Military's Exclusion Of Homosexuals Held To Be Based On Bias," *The Washington Post*, June 2, 1994
- R Wade Lambert, "U.S. Court Upholds Ban On Gays In Military," *The Wall Street Journal*, November 23, 1994
- S Carol Ness, "Court Upholds Gay Sailor's Reinstatement But Judges Lift Order Barring Ban On Homosexuals," *The San Francisco Examiner*, September 1, 1994
- T David G. Savage, "Military Can Oust Gays," *Los Angeles Times*, November 23, 1994
- U Eric Schmitt, "Military Told to Reinstate Lesbian Nurse," *The San Francisco Chronicle*, June 2, 1994
- V David Van Biema, "Military Ins And Outs; The Pentagon Ponders Its Options After A Court Orders The Reinstatement Of A Gay National Guard Colonel," *Time Magazine*, June 13, 1994

Book

- W Randy Shilts, *Conduct Unbecoming: Gays & Lesbians in the U.S. Military*, at 7-18 (1993)

Academic Articles

- X Vivienne Cass, Ph.D., "Sexual Orientation Identify Formation, A Western Phenomenon," *Textbook of Homosexuality and Mental Health* (Robert Cabaj and Terry Stein, eds., 1996)

- Y Marc A. Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbians and Gay Men," 46 *U. Miami L. Rev.* 511, 595 (1992)
- Z Kenji Yoshino, "Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays," 96 *Colum. L. Rev.* 1753, 1810-15 (1996)

Appellate courts have the same power as trial courts to take judicial notice of a matter properly subject to such notice. *See Papai Harbor & Tug Barge Co.*, 67 F.3d 203, 207 n.5 (9th Cir. 1995). Judicial notice may be taken at any stage of the proceeding, including on appeal. Fed.R.Evid. §201(f).

Rule 201 of the Federal Rules of Evidence permits a court to take judicial notice of a fact not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned. Fed.R.Evid. §201(b).

In this case, the newspaper articles are illustrative of the widespread media coverage of successful lawsuits brought by discharged homosexual servicemembers against various sections of

the Department of Defense, and of media coverage regarding the “don’t ask, don’t tell” policy. The articles reflect what was common knowledge in 1994, the period of time relevant in this case, as well as events which were commonly known at the time of their occurrences, such as the Matthew Shepard murder.

The law review articles may be noticed as they are not subject to reasonable debate, as it is common knowledge that gays and lesbians are commonly disparaged as a result of their sexual orientation, and therefore the process of identifying as gay or lesbian often takes time and is a difficult process.

Thus, the Court has discretion to grant request of Amici Curiae to take judicial notice of the above articles from the popular media and academic articles.

Dated: January 31, 2002

Respectfully submitted,

CATHERINE D. WHITING
VANESSA H. EISEMANN
MANATT, PHELPS &
PHILLIPS, LLP

By: 

Catherine D. Whiting

Attorneys for Amici Curiae
**LHR: THE LESBIAN AND
GAY BAR ASSOCIATION
and BAY AREA
LAWYERS FOR
INDIVIDUAL FREEDOM**

40463659.1

A

Citation
 11/29/94 LATIMES 2
 11/29/94 L.A. Times 2
 1994 WL 2372753

Search Result

Rank 11 of 23

Database
 LAT

Los Angeles Times

Copyright, The Times Mirror Company; Los Angeles Times 1994 All Rights Reserved

Tuesday, November 29, 1994

Metro; PART-B; Metro Desk

Metropolitan Digest / LOS ANGELES COUNTY NEWS IN BRIEF

LOS ANGELES Administration Won't Fight Gay Officer's Reinstatement

The Clinton Administration announced Monday that it will accept a Los Angeles federal judge's ruling reinstating a Naval petty officer who said on television that he is gay. Solicitor General Drew S. Days III said the Administration will allow tomorrow's deadline for filing a U.S. Supreme Court appeal in the case of Keith Meinhold to lapse.

In November, 1992, U.S. District Judge Terry Hatter Jr. ruled that the Navy sonar operator's statement about his sexual orientation did not, in and of itself, violate the Pentagon's former regulations against homosexuality.

In response to a question on the May 19, 1992, edition of "ABC World News Tonight," Meinhold said: "Yes, in fact, I am gay." He was given an honorable discharge Aug. 12 that year, then sued, claiming the Pentagon policy regarding homosexuality was unconstitutional.

In October of this year, the government ignored a deadline to appeal the 9th U.S. Circuit Court of Appeals decision upholding Hatter's ruling about the 13-year veteran's status.

In the same opinion, the appeals court, which rules on issues of federal law for nine Western states and two territories, struck down the judge's decision to extend the ruling nationwide.

---- INDEX REFERENCES ----

KEY WORDS: COURT RULINGS; HOMOSEXUALS; NAVY (U.S.); PERSONNEL; MEINHOLD, VOLKER KEITH

NEWS SUBJECT: Lifestyle; Labor, Personnel Issues (LIF LAB)

NEWS CATEGORY: COLUMN; BRIEF

11/29/94 LATIMES 2

GOVERNMENT: Defense Department (DEF)

REGION: United States (US)

EDITION: HOME

Word Count: 192

11/29/94 LATIMES 2

END OF DOCUMENT

B

Source: [All Sources](#) > [States Legal - U.S.](#) > [California](#) > [General News & Information](#) > [San Francisco Examiner](#) **i**
Terms: "gay sailor scores another court win" ([Edit Search](#))

The San Francisco Examiner, October 17, 1994

Copyright 1994 The Hearst Corporation
The San Francisco Examiner

◆ [View Related Topics](#)

October 17, 1994, Monday; Fourth Edition

SECTION: NEWS; Pg. A-2

LENGTH: 654 words

HEADLINE: **Gay sailor scores another court win ;**
Government misses deadline, has 45 days to appeal reinstatement to Supreme Court

SOURCE: ASSOCIATED PRESS

DATELINE: LOS ANGELES

BODY:

The Defense Department didn't meet the deadline for challenging a federal appeals court ruling that homosexuals in the armed forces can't be discharged simply for "coming out," an attorney said.

The Defense Department and Department of Justice allowed Friday's deadline for further review to expire without any action, said attorney John McGuire, who represents Navy seaman Keith Meinhold.

"For 21/2 years, the Pentagon has fought tooth and nail to kick me out of the Navy because I'm gay," said Meinhold, now stationed at Naval Air Station Whidbey Island in Washington. "By this decision, they finally have admitted that I can say I am gay and proudly serve my country in the military." The 9th U.S. Circuit Court of Appeals in San Francisco ruled 3-0 on Aug. 31 to uphold the reinstatement of Meinhold, a sonar operator who revealed his homosexuality on national television.

Only a statement that shows a "concrete, fixed or expressed desire to engage in homosexual acts despite their being prohibited" justifies an involuntary discharge, the court said.

"I got a call Friday afternoon and was told there was a recommendation to not seek further review," McGuire said.

The deadline applied only to requests for review by the 9th Circuit Court, and the government still has 45 days from Friday to decide whether to appeal to the Supreme Court, Justice Department spokesman Joe Krovinsky said Monday.

He said Solicitor General Drew Days had not yet decided whether to take the Meinhold case to the high court.

Meinhold was discharged under former military regulations that tolerated no homosexuals in the military.

The appellate court said it was deciding only the validity of the former policy. But because it

ruled that coming out isn't grounds for discharge, the ruling also had implications for the "don't ask, don't tell" law enacted last year.

That law prohibits the military from asking about sexual orientation, but allows the discharge of declared homosexuals. It gives people a chance to stay in the service by proving that they will remain celibate.

Retired Army Maj. Aristides "Chris" Gonzalez, who heads the 2,000 -member national Minority Officers' Association, said he was heartened by Sunday's news.

"As far as I'm concerned discrimination is discrimination is discrimination," Gonzalez said. "It's a decision that seems to be very right."

Asked how he felt Sunday's decision would play in the ranks, Gonzalez said, "It will depend on the way that it is relayed by their leadership. We know that the rank and file will follow the lead. Soldiers follow orders."

The court also said military officials cannot presume that only declared homosexuals will commit acts that violate the code of conduct.

After Meinhold was discharged in August 1992, Los Angeles U.S. District Judge Terry Hatter ordered his reinstatement three months later, saying there was no rational basis for excluding service members solely because of their sexual orientation.

GRAPHIC: PHOTO (ASSOCIATED PRESS / 1992)

Caption 1, Keith Meinhold: "I can say I am gay and proudly serve my country."

LOAD-DATE: October 19, 1994

Source: [All Sources](#) > [States Legal - U.S.](#) > [California](#) > [General News & Information](#) > [San Francisco Examiner](#) 

Terms: "gay sailor scores another court win" ([Edit Search](#))

View: Full

Date/Time: Tuesday, January 29, 2002 - 9:17 PM EST

[About LexisNexis](#) | [Terms and Conditions](#)

Copyright © 2002 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

C

D



Citation
7/9/94 SFCHR A2
7/9/94 S.F. Chron. A2
1994 WL 4076322

Search Result

Rank(R) 1 of 2

Database
SFCHR

The San Francisco Chronicle
Copyright 1994

Saturday, July 9, 1994

NEWS

Lesbian Colonel Returning to Duty
Associated Press

A lesbian colonel who was discharged from the Washington National Guard two years ago because of her sexual orientation will return to her old job today.

The order came after the U.S. Court of Appeals in San Francisco issued an order this week rejecting the Clinton administration's latest attempt to block the reinstatement of Margarethe Cammermeyer as chief nurse of the Washington National Guard.

Cammermeyer, 52, a decorated Vietnam veteran, was ordered reinstated June 1 by U.S. District Judge Thomas Zilly, who said her discharge was based on prejudice and violated her constitutional rights.

The Justice Department asked the appellate court to delay that reinstatement while it appeals Zilly's ruling, or at least until the court rules in a similar case involving Keith Meinhold, a gay Navy sonar instructor at Moffett Field Naval Air Station in Sunnyvale.

But on Thursday, the appeals court denied the request to block Cammermeyer's reinstatement.

"I never knew the military to move so fast," Cammermeyer said yesterday. "I'm more disappointed that it's taken two years to get here. I would have liked to have continued straight through, but of course I'm pleased with the outcome."

National Guard spokeswoman Donna Hubbard said Cammermeyer will return to her old job in what the Guard hopes will be a smooth transition under the military's new "don't ask, don't tell" policy toward gays.

"She won't be asked," Hubbard said. "We're certainly not going

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw.

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.

Westlaw.

7/9/94 SFCHR A2

to ask her, and we're not going to bring it up."

----- INDEX REFERENCES -----

KEY WORDS: BIOGRAPHY; COURTS; RULING; DISCRIMINATION; US; MILITARY;
LESBIANS; GAYS;

NEWS SUBJECT: BIOGRAPHY; LAW & LEGAL ISSUES; LABOR & PERSONNEL ISSUES ;
LIFESTYLE; LIFESTYLE (BIO LAW LAB LIF LIS)

STORY ORIGIN: SEATTLE

GOVERNMENT: DEFENSE DEPARTMENT (DEF)

REGION: UNITED STATES; NORTH AMERICA (NME US)

EDITION: FINAL

Word Count: 246
7/9/94 SFCHR A2
END OF DOCUMENT

E

Citation
 7/10/94 WASHPOST A10
 7/10/94 Wash. Post A10
 1994 WL 2429200

Search Result

Rank 2 of 16

Database
 WP

The Washington Post
 Copyright 1994

Sunday, July 10, 1994

A SECTION

AROUND THE NATION

Lesbian Is Reinstated In National Guard Job
 From News Services

Two years after Col. Margarethe Cammermeyer was kicked out of the National Guard for being a lesbian, the highly decorated Vietnam veteran was back at her old job yesterday.

A federal court ordered her reinstatement last month, ruling her discharge based on her sexual orientation was unconstitutional. The 9th U.S. Circuit Court of Appeals in San Francisco on Thursday refused to delay that order.

A smiling Cammermeyer, dressed in a camouflage uniform, arrived in a white Mercedes-Benz and entered the main gate at Washington National Guard headquarters, south of Tacoma.

She returned to her job as chief of nursing services for the 164th Mobile Army Surgical Hospital. As a regular reservist, her work obligation is two days per month and a 15-day annual training mission. The job pays about \$12,000 a year.

"She has to catch up on some administrative things. She has to get a new ID card. She has to get a physical because she's overdue," Guard spokeswoman Donna Hubbert said.

The Guard commander, Maj. Gen. Greg Barlow, asked Cammermeyer to report to work after the appeals court rejected the Justice Department's latest effort to block her reinstatement.

"I never knew the military to move so fast," Cammermeyer said Friday night in a telephone interview.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

PHOTO, Ap

Caption: Col. Margarethe Cammermeyer drives through gate to resume duty at Camp Murray near Tacoma, Wash.

7/10/94 WASHPOST A10

----- INDEX REFERENCES -----

NAMED PERSON: MARGARETHE CAMMERMEYER
KEY WORDS: SUBJECTS: NATIONAL GUARD; HOMOSEXUALS
NEWS SUBJECT: LIFESTYLE (LIF)
STORY ORIGIN: CAMP MURRAY, WASH.
NEWS CATEGORY: NEWS
GOVERNMENT: DEFENSE DEPARTMENT (DEF)
EDITION: FINAL

Word Count: 207
7/10/94 WASHPOST A10
END OF DOCUMENT

F

Citation
12/2/94 WASHPOST A14
12/2/94 Wash. Post A14
1994 WL 3186717

Search Result

Rank 4 of 23

Database
WP

The Washington Post
Copyright 1994

Friday, December 2, 1994

A SECTION

AROUND THE NATION

Navy Board Backs Lesbian
From News Services

In a surprising decision, a Navy tribunal decided yesterday that Lt. Zoe Dunning's career in the Reserves should not end with the statement "I am a lesbian."

A board of inquiry unanimously ruled that Dunning had proved she would not engage in homosexual acts, in line with the military's "don't ask, don't tell" policy.

Dunning, 31, exulted at the decision. "I feel fantastic," she said.

The board's recommendations will go to naval authorities and eventually to the secretary of the Navy.

Dunning's attorneys had maintained that when she made the statement "I am a lesbian" at a January 1993 rally, she was not broadcasting her intentions to practice homosexuality, but merely indicating her sexual orientation.

Navy sonar operator Keith Meinhold was discharged after he announced he is gay, but won a court battle for reinstatement. The Clinton administration said it will not appeal the reinstatement. That leaves intact an appellate court ruling that simply saying one is homosexual does not express a desire to engage in prohibited sexual conduct.

----- INDEX REFERENCES -----

NAMED PERSON: ZOE DUNNING;
KEY WORDS: NAVY; HOMOSEXUALS; RESERVES
NEWS SUBJECT: Lifestyle (LIF)

12/2/94 WASHPOST A14

STORY ORIGIN: SAN FRANCISCO

NEWS CATEGORY: NEWS

GOVERNMENT: Defense Department (DEF)

EDITION: FINAL

Word Count: 170

12/2/94 WASHPOST A14

END OF DOCUMENT

G

San Francisco Examiner
Copyright 1994

Thursday, December 1, 1994

METRO

Navy deciding lesbian's fate Co-workers testify on
Dunning's behalf at
discharge hearing
ASSOCIATED PRESS

A Navy tribunal on Thursday began considering whether lesbian reservist Zoe Dunning should remain in the service or be booted out for violating the new "don't ask, don't tell" policy.

The board of inquiry, meeting at Treasure Island Naval Station, began deliberating after lawyers for both sides argued about what Dunning meant when she publicly stated, "I am a lesbian."

Dunning's attorneys say the statement simply indicated her sexual orientation.

"She said who she was, not what she was doing," Greg Bonfiglio said.

But Navy prosecutors said the policy means service members who say they are gay must be separated unless they can prove they don't engage in homosexual acts.

"Why would you make the statement 'I am a lesbian' unless you have the propensity to engage in homosexual acts?" Lt. Ingrid Turner asked.

On Wednesday co-workers of Dunning testified that they had no qualms about working with her at close quarters and thought ousting her would be a loss to the service.

"I am proud to serve with her," Navy Cmdr. Marshall Graves Jr. said.

"She always did a good job. She was a team player. She got in there and pitched in," said Navy Reserve Capt. James Kraft, who recently recommended Dunning for promotion.

Navy Reserve Lt. Melna Jones, who is married, said she had shared a room with Dunning on an out-of-town assignment and had no problems.

Co-workers' reactions to Dunning's announcement ranged from "a bit shocking at first," to "I thought it was a courageous act," but all said they did not have a problem serving with her and do not think she should be discharged.

Dunning faces discharge because in January 1993 she publicly announced that she was a lesbian. At that time she expected that President Clinton would shortly fulfill a campaign promise to lift the ban on homosexuals in the military.

Instead, a furious debate erupted in Congress and the nation, resulting in a compromise policy of "don't ask, don't tell."

Dunning works one weekend a month as a supply officer at the Naval Aviation Depot in Alameda.

----- INDEX REFERENCES -----

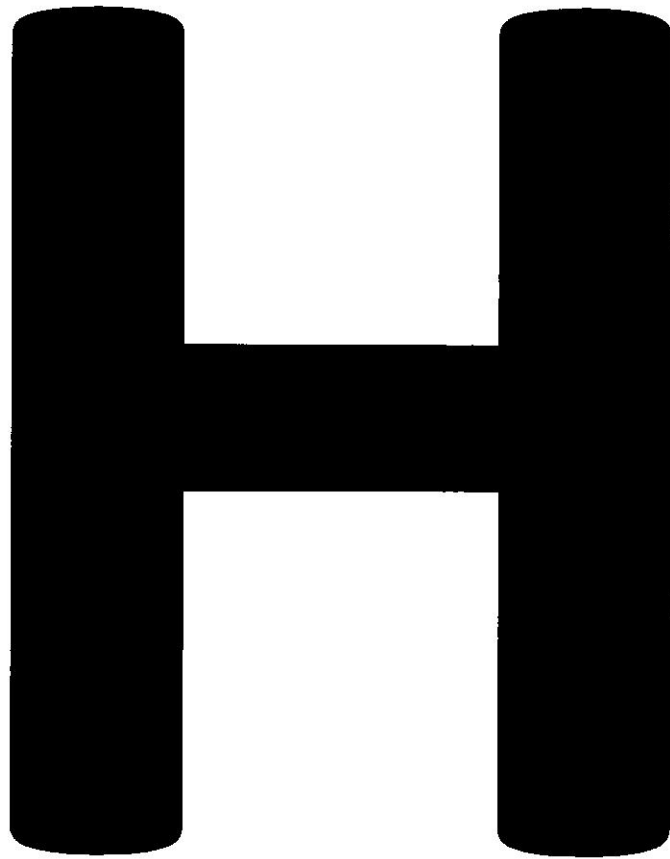
KEY WORDS: HOMOSEXUALS; MILITARY OFFICERS;
MILITARY LAW; U.S. ARMED FORCES

EDITION: FOURTH

Word Count: 345

12/1/94 SFEX A22

END OF DOCUMENT



The San Francisco Chronicle
Copyright 1993

Thursday, February 4, 1993

NEWS

Navy to Bring Murder Charge In Gay's Death
Associated Press

The U.S. Navy said yesterday that it will bring murder charges against an airman accused of killing and mutilating a homosexual sailor in a case that has become a rallying point for gay-rights groups.

The Navy said a four-day hearing, similar to a civilian grand jury investigation, determined that murder charges should be brought against Airman Apprentice Terry Helvey, 21, of Westland, Mich.

A court-martial will be held as soon as possible, the service said.

The case stems from the beating death of Allen Schindler, 22, of San Diego. He was killed October 27 in a public bathroom near a U.S. naval base in Sasebo, Japan, the home port of his amphibious assault ship, the Belleau Wood.

Schindler's face was badly beaten, his skull crushed, his genitals mutilated and all but two of his ribs broken, according to the autopsy report.

Gay-rights advocates say the killing illustrates the hostility toward homosexuals in the military at a time when the Clinton administration is considering lifting a ban on homosexuals in the armed services.

2/4/93 SFCHR A4
2/4/93 S.F. Chron. A41993 WL 6393255

A month before his death, Schindler told his commanding officer that he was gay and requested a discharge. Supporters say he had been harassed by shipmates, although the Navy says it was unaware of any threats against him.

Helvey will be charged with murder, assault of two shore patrolmen the night of the death, false testimony and obstructing justice, the Navy said. The maximum penalty under the charges was not announced.

The militant gay-rights group Queer Nation has accused the Navy of trying to cover up a hate crime and said five sailors may have been involved in Schindler's death.

In a statement yesterday, the Navy said it was "committed to ensuring justice is served as quickly and fairly as possible."

---- INDEX REFERENCES ----

KEY WORDS: GAYS; MURDER; MILITARY; US; NAVY;
PROBE; ORGANIZATIONS;

STORY ORIGIN: TOKYO

REGION: UNITED STATES; NORTH AMERICA (NME US)

EDITION: FINAL

Word Count: 294

2/4/93 SFCHR A4

END OF DOCUMENT



Los Angeles Times
Copyright 1999 / The Times Mirror Company

Thursday, December 9, 1999

National Desk

Soldier Guilty of Premeditated Murder Charge
From Associated Press

FT. CAMPBELL, Ky. -- An Army private was found guilty of premeditated murder Wednesday for bludgeoning to death a fellow soldier in a beating prosecutors said was motivated by his hatred of homosexuals.

Pvt. Calvin N. Glover, 18, was convicted of using a baseball bat to crush Pfc. Barry Winchell's skull as he slept on a cot at their barracks July 5. The military jury deliberated for little more than an hour.

A sentencing hearing for Glover, who is from Sulphur, Okla., was set for today. The conviction carries a mandatory penalty of life in prison, and jurors will decide whether he will ever be eligible for parole.

Glover showed no reaction as the verdict was read. His mother, Kathy Roundtree, started weeping moments later.

Defense attorneys argued that another soldier, Spc. Justin R. Fisher, 25, who is charged as an accessory, goaded Glover into the attack.

Before the start of the court-martial, Glover admitted to a lesser charge of unpremeditated murder in hopes of receiving a lighter sentence. But prosecutor Capt. Gregg Engler went ahead with the court-martial on the more serious charge of premeditated murder.

---- INDEX REFERENCES ----

KEY WORDS: ARMY (U.S.) -- PERSONNEL; HOMOSEXUALS;
CRIME VICTIMS; MURDERS -- KENTUCKY; VERDICTS; HATE CRIMES
-- KENTUCKY

NEWS SUBJECT: Crime; Los Angeles Times (CRM LATM)

STORY ORIGIN: FT. CAMPBELL, KY.

NEWS CATEGORY: WIRE

GOVERNMENT: Defense Department (DEF)

REGION: Kentucky (KY)

EDITION: HOME EDITION

Word Count: 187

12/9/99 LATIMES A22

END OF DOCUMENT

J

Los Angeles Times
Copyright, The Times Mirror Company; Los Angeles Times
1994 All Rights Reserved

Friday, December 2, 1994

PART-A; Metro Desk

**Tribunal Urges Navy Not to Discharge Lesbian
Associated Press**

A Navy tribunal decided Thursday that Lt. Zoe Dunning's career in the Reserves should not end with the statement "I am a lesbian."

The board of inquiry meeting at Treasure Island Naval Station unanimously found that although Dunning had made the statement that she is a homosexual, she also had proven that she would not engage in homosexual acts.

"The board of inquiry recommends retention in the Naval service," said Capt. Thomas Berns, senior member of the board.

Dunning stood with her back to the courtroom audience while the findings were being read, her hands clenched. Afterward she smiled briefly as she clasped the hands of her lawyer, Greg Bonfiglio.

Dunning's attorneys had maintained that when Dunning declared her homosexuality at a January, 1993, rally, she was not broadcasting an intention to practice homosexuality but merely indicating her sexual orientation.

"She felt that to continue to hide who she was would be a lie," Bonfiglio said. But Navy prosecutors told the board that they had no choice but to order Dunning separated from the service, regardless of her achievements.

Prosecutors said that under a "don't ask, don't tell" policy, service members who declare that they are homosexual face discharge unless they can prove that they will not engage in homosexual acts while in the service. Dunning did not do that, prosecutors said.

---- INDEX REFERENCES ----

KEY WORDS: NAVY (U.S.) - PERSONNEL - WOMEN;
HOMOSEXUALS

NEWS SUBJECT: Labor, Personnel Issues; Lifestyle (LAB
LIF)

STORY ORIGIN: SAN FRANCISCO

NEWS CATEGORY: WIRE

GOVERNMENT: Defense Department (DEF)

REGION: United States (US)

EDITION: HOME

Word Count: 223

12/2/94 LATIMES 25

END OF DOCUMENT

K

Citation
 10/18/94 WASHPOST A05
 10/18/94 Wash. Post A05
 1994 WL 2445020

Search Result

Rank 6 of 23

Database
 WP

The Washington Post
 Copyright 1994

Tuesday, October 18, 1994

A SECTION

AROUND THE NATION

U.S. Doesn't Appeal Ruling Reinstating Gay Sailor
 From news services

The Clinton administration has backed off its legal battle against gay sailor Keith Meinhold, whose dismissal from the Navy was blocked in August by a panel of federal appeals judges in San Francisco.

The Justice Department let an Oct. 14 deadline for appealing Meinhold's case pass without taking action. A three-judge panel of the 9th U.S. Circuit Court of Appeals in California had ruled earlier this summer that Meinhold's public declaration of homosexuality - "Yes, I am, in fact, gay," he told ABC News in 1992 - was not by itself valid grounds for throwing him out of the military.

There was a debate yesterday about the broader implications of the decision not to appeal. Meinhold's lawyer, John McGuire, said it was a tacit admission by the Pentagon that its ban on homosexuals, including the Clinton administration's "don't-ask, don't-tell" compromise, is not legally sustainable.

But Air Force Lt. Col. Doug Hart, a Pentagon spokesman, said such speculation was wrong. Lawyers from the Defense and Justice departments, he said, didn't appeal because the appeals court decision applied only to Meinhold and not to other military personnel, and because he was thrown out under the military's old rules on homosexuals, not the new one crafted after Clinton backed off his campaign pledge to end the the gay ban.

---- INDEX REFERENCES ----

NAMED PERSON: KEITH MEINHOLD;
 KEY WORDS: HOMOSEXUALS; NAVY
 NEWS SUBJECT: Lifestyle (LIF)

10/18/94 WASHPOST A05

NEWS CATEGORY: NEWS

GOVERNMENT: Defense Department (DEF)

EDITION: FINAL

Word Count: 216

10/18/94 WASHPOST A05

END OF DOCUMENT



Citation
9/1/94 WSJ A1

Search Result

Rank(R) 1 of 3

Database
WSJ

9/1/94 Wall St. J. A1

1994 WL-WSJ 342692

The Wall Street Journal
Copyright (c) 1994, Dow Jones & Co., Inc.

Thursday, September 1, 1994

What's News

World-Wide

NORTHERN IRELAND MOVED toward peace as the IRA declared a cease-fire.

The Irish Republican Army announced a "complete cessation" of its 25-year war against British rule in Northern Ireland. The IRA's supporters called the declaration a historic opportunity for peace in the British province. However, the paramilitary group isn't relinquishing any weapons, and there were worries about whether Protestant gunmen will halt their own attacks. The truce was hailed by the U.S., which has been involved in behind-the-scenes talks with London and Belfast.

Clinton will meet with Ireland's deputy prime minister tomorrow in Massachusetts to discuss the IRA cease-fire and possible economic aid from the U.S.

THE U.S. SHARPENED its rhetoric about a pending invasion of Haiti.

With Haiti's military regime still defiant about stepping down, Washington officials all but promised a U.S.-led invasion of the Caribbean nation. One way or another, "the multinational force is going to Haiti," Deputy Defense Secretary Deutch told reporters. He said the U.S. would enter either peaceably or, if "the illegal government in Haiti doesn't come to its senses," by force. Senior U.S. military planners are scheduled to meet soon to review the invasion plans.

There has been some discussion about whether the U.S. should lay down an ultimatum, but officials thus far have refused to set a date for action.

Japan unveiled a 10-year, \$1 billion program of cultural exchanges and research intended to convince other Asian nations of Japan's

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

9/1/94 WSJ A1

remorse for its World War II activities.

Cuban delegates left for New York talks and said they would raise broad policy issues, instead of confining their discussion to immigration as the U.S. has insisted. The head of the group said that if Washington wants to resolve the refugee problem, it will have to end its economic embargo.

Serbia's Milosevic has agreed to allow international observers to monitor his blockade of arms and fuel to Bosnian Serbs, Belgrade newspapers said. But the reports added that the Serbian leader also wants observers to be posted on Croatia's border with Bosnia, to monitor the flow of arms to his foes, the Muslim-led Bosnian army.

Scientists successfully transferred a normalizing gene into defective lung cells of a cystic fibrosis patient, a milestone on the path to gene therapy for the lethal hereditary disease.

Mexican guerrilla leaders demanded that the ruling party give up its victory in gubernatorial elections in Chiapas, saying the official results were fraudulent. The demand came in a letter to Gov.-elect Robledo, who was the ruling PRI's candidate.

China briefly detained a leading dissident, Wang Dan, one day after Beijing promised Commerce Secretary Brown it would resume talks with Washington on human rights. The State Department said it was "very distressed" by the incident.

Heart researchers said that a new blood test may help physicians determine within two hours whether a patient with chest pain has actually suffered a heart attack.

A U.S. appeals court in California upheld the reinstatement of sailor Keith Meinhold in the Navy, ruling that the armed forces can't bar **homosexuals** just for saying they are **gay**. But the court overturned a lower court's nationwide ban on discrimination against **homosexuals** in the military.

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.

~~Down~~ Westlaw

9/1/94 WSJ A1

U.N. officials launched a defense against charges that next week's Cairo population conference undermines family values. The U.N. disputed claims that a conference document endorses abortion, homosexuality and promiscuity. Lebanon became the third Muslim nation to boycott the meeting, and Pakistan's Bhutto may not attend.

Somali gunmen opened fire on a field hospital in Somalia, killing three Indian doctors who were part of the U.N. peacekeeping force there, a U.N. spokesman said. Several other people were wounded.


Egypt's foreign minister pressed Israel to begin talks on making the Mideast a nuclear weapons-free zone. Moussa, ending a visit to Israel, said Egyptian experts would visit Israel this month to discuss the issue.

----- INDEX REFERENCES -----

LAYOUT CODES: PAGE ONE UMBRELLA; WORLD-WIDE (PGO WLD)

Word Count: 646
9/1/94 WSJ A1
END OF DOCUMENT

M

Source: [All Sources](#) > [States Legal - U.S.](#) > [California](#) > [General News & Information](#) > [Los Angeles Times](#) 
Terms: "lesbian army officer wins battle in court" ([Edit Search](#))

Los Angeles Times, June 2, 1994

Copyright 1994 The Times Mirror Company
Los Angeles Times

June 2, 1994, Thursday, Home Edition

SECTION: Part A; Page 3; Column 4; National Desk

LENGTH: 749 words

HEADLINE: LESBIAN ARMY OFFICER WINS BATTLE IN COURT;
MILITARY: FEDERAL JUDGE ORDERS REINSTATEMENT OF COL. MARGARETHE
CAMMERMEYER. RULING RAISES QUESTIONS ABOUT 'DON'T ASK, DON'T TELL' POLICY.

BYLINE: By JOHN BALZAR, TIMES STAFF WRITER

DATELINE: SEATTLE

BODY:

The highest-ranking military officer ever to challenge the armed forces over sexual orientation was ordered reinstated Wednesday in a ruling so broad as to cast doubt on the Clinton Administration's "don't ask, don't tell" policy for homosexuals.

Army Col. Margarethe Cammermeyer, a Vietnam War veteran and Bronze Star recipient, won at least the first step in her case to resume her 26-year military career. U.S. District Judge Thomas Zilly's order held that the military could not discriminate against homosexuals just because of society's prejudices.

"Mere negative attitudes, or fear, are constitutionally impermissible bases for discriminatory governmental policies," Zilly wrote in his 51-page ruling. "Prejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes or erroneous assumptions, cannot be the basis for a discriminatory classification." Under longstanding but now revised rules of military service, Cammermeyer had been forced out of the military in 1992 after she was asked about her sexual orientation and replied that she was a lesbian. The question arose while she was being interviewed for a security clearance.

At the time, her distinguished service in the Army and the National Guard won her a great many sympathizers, including the governor of Washington and the chief nurse of the Army, who described Cammermeyer as a "great American."

Even in discharging her, the military rated her as qualified to lead the Army nurse corps and to represent her profession "anywhere in the world."

Zilly's decision followed at least two other federal court rulings on behalf of members of the armed forces who were discharged for being homosexuals. All resulted from a 1991 decision by the U.S. 9th Circuit Court of Appeals, which held that the Pentagon would have to show a "rational basis" to sustain its policy against homosexuals.

Zilly said arguments presented by two military officials -- one a general and one a former defense secretary -- failed to meet that test.

"The rationales offered by the government to justify its exclusion of homosexual service

members are grounded solely in prejudice," he said.

"Both witnesses testified to the effect that the government's objections to homosexual service is based solely on the fears and prejudices of heterosexual service members."

Cammermeyer appeared before Zilly in April. "I served for 26 years. To get all that thrown in my face at this point about being unfit or undermining morale -- haven't I in some way shown that's not the case?"

Since Cammermeyer's discharge, the military has changed its rules regarding sexual orientation. The current policy of the Administration is not to ask uniformed personnel about their sexual orientation but to continue to forbid homosexual behavior by men and women in the military.

Attorneys who represent homosexuals said Zilly's ruling was significant not only because of Cammermeyer's high rank and long service, but because it was so sweeping as to invite a challenge to any type of military discrimination against homosexuals.

"This is a terrific ruling; it's very strong," said Mary Newbombe, who worked on Cammermeyer's case as cooperative council for the Lambda Legal Defense and Education Fund, a homosexual-rights group.

"The rationale that Zilly used, the evidence that he considered, would apply equally to the 'don't ask, don't tell' policy," she said.

So far, there have been no court rulings on the Administration's military policy toward homosexuals, although a federal judge in April issued a temporary injunction forbidding the discharge of six members of the armed forces who filed suit to fight the policy.


Cammermeyer, 52, the mother of four, now works at the Department of Veterans Affairs hospital at American Lake, near Tacoma, Wash. She described herself Wednesday as "absolutely ecstatic. I feel like a kid. . . . The first thing I did was holler so everybody at the hospital knew what was going on."

"It seems like a vindication of all the struggles so many of us have had. I can't say that I'm speechless -- I can't afford to be. It's just very exciting."

Her attorneys said they hoped Cammermeyer might instantly be reinstated with the state National Guard. But in the two previous 9th Circuit cases -- including that of sailor Keith Meinhold, who won a lower-court ruling saying the military's exclusion of homosexuals was unconstitutional -- the Pentagon has appealed and very well may do so in this case too.

GRAPHIC: Photo, COLOR, Margarethe Cammermeyer ; Photo, COLOR, (Southland Edition, A1) Margarethe Cammermeyer Associated Press

LOAD-DATE: June 3, 1994

Source: [All Sources](#) > [States Legal - U.S.](#) > [California](#) > [General News & Information](#) > [Los Angeles Times](#) 

Terms: "lesbian army officer wins battle in court" ([Edit Search](#))

View: Full

Date/Time: Tuesday, January 29, 2002 - 9:24 PM EST

n

Citation	Search Result	Rank 15 of 23	Database
9/1/94 LATIMES 3			LAT
9/1/94 L.A. Times 3			
1994 WL 2340436			

The Los Angeles Times
Copyright, The Times Mirror Company; Los Angeles Times 1994 All Rights Reserved

Thursday, September 1, 1994

PART-A; Metro Desk

Court Upholds Reinstatement of Gay Sailor Appeal: Federal judges agree that man's declaration of homosexuality alone was not sufficient for discharge. But they throw out ruling that said military's policy is unconstitutional.

BETTINA BOXALL; SEBASTIAN ROTELLA
TIMES STAFF WRITERS

In an opinion that contained good and bad news for gay activists, a federal appeals court Wednesday upheld the reinstatement of a gay sailor, while throwing out part of a lower court decision in the case that declared the military's gay policies unconstitutional.

Affirming the reinstatement, the San Francisco appeals panel said it is improper for the military to bar gay men and lesbians based solely on their statements that they are homosexual—a conclusion that carries troubling implications for the Clinton Administration's "don't ask, don't tell" regulations.

The ruling, issued by the U.S. 9th Circuit Court of Appeals, was the latest in a series of judicial opinions that have, to at least some degree, come down on the side of gay service members challenging the military's policy on homosexuals.

In this case, the judges upheld a District Court opinion reinstating Navy Petty Officer Keith Meinhold, who was discharged in 1992 after he disclosed during a TV news show that he is homosexual.

The military can bar homosexual conduct, the opinion said, but the Navy went too far in assuming that Meinhold would engage in such illegal conduct simply because he identified himself as gay.

Only a statement that shows a "concrete, fixed or expressed desire to commit homosexual acts despite their being prohibited" justifies an involuntary discharge, the appeals panel said.

Although the decision applies to military regulations replaced last year by the Clinton Administration, legal scholars said it holds significance for the new policy as well. "The 'don't tell'

9/1/94 LATIMES 3

part of the new policy is brought into serious question by this decision," said Stanford Law School professor Kathleen Sullivan.

Under the new rules, the military no longer asks recruits about their sexual orientation, but if a service member says he or she is gay, they have to prove they are not engaging in prohibited homosexual conduct to stay in the service.

Touching on the distinction drawn between homosexuals and heterosexuals by the military, Judge Pamela Rymer noted in the 3-0 decision that "no similar assumption" is made that heterosexuals will engage in prohibited conduct such as adultery simply because they are heterosexual.

"At least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not," Rymer wrote.

"That is a stunning statement—for a conservative judge to say that there's a serious equal protection question here," said Sullivan, who described all three judges who signed the opinion as conservative.

At the same time, Rymer said the court would defer to the Navy's judgment that the presence of people who engage in homosexual conduct or who demonstrate a propensity to do so by their statements "impairs the accomplishment of the military mission."

Moreover, the panel struck down part of U.S. District Judge Terry Hatter's ruling forbidding the government to take any action against gay service members based solely on their sexual orientation.

Meinhold, the judges noted, had not filed a class-action lawsuit and Hatter was unnecessarily sweeping in applying his order to all service members. "Beyond reinstatement, and not separating Meinhold on that basis, (the Department of Defense) should not be constrained from applying regulations to Meinhold and all other military personnel," they said.

At a news conference in San Diego, where Meinhold is on temporary assignment, he and his lawyer praised the appellate court ruling. They said it will bolster future challenges to the "don't ask, don't tell" policy, even though the court did not address the constitutionality of that rule directly.

"This decision says quite explicitly that it's improper for the government to make presumptions about improper conduct based upon a service member's acknowledgment that they are gay or lesbian," said

John McGuire, Meinhold's lawyer. "That presumption is exactly the linchpin of the Clinton Administration's 'don't ask, don't tell' policy. And that is exactly what this court has said the government can't do."

McGuire said the reversal of the sweeping lower court decision against military gay policies was not a major setback, arguing that Wednesday's ruling prevents the military from discharging people for simply saying that they are gay.

Sullivan saw a far more limited impact, saying the opinion would take legal precedent within the 9th Circuit in cases pending against the old military policy on gays.

A spokesman for the U.S. Justice Department declined comment on the decision, saying department attorneys were reviewing the opinion and had not decided their next step in the case.

Ultimately, the challenges against the military gay regulations will be settled by the U.S. Supreme Court, which is expected to take up one of the dozen or so cases making their way through the court system.

Meinhold said that during his legal battle he has "learned to have more faith in the system of justice, the military and even the politicians."

Meinhold, who works as a sonar operator on combat flights, is stationed at a base at Whidbey Island, Wash. He cited his current assignment-classified anti-submarine warfare research in San Diego-as proof of good treatment by the Navy.

---- INDEX REFERENCES ----

KEY WORDS: MEINHOLD, VOLKER KEITH; NAVY (U.S.); HOMOSEXUALS; MILITARY DISCHARGES; DISCRIMINATION; COURT RULINGS

NEWS SUBJECT: LIFESTYLE (LIF)

GOVERNMENT: DEFENSE DEPARTMENT (DEF)

REGION: UNITED STATES (US)

EDITION: HOME

Word Count: 850
9/1/94 LATIMES 3
END OF DOCUMENT

O

Source: [All Sources](#) > [News](#) > [Magazine Stories, Combined](#) 6

Terms: "don't ask, don't tell" and date(aft 6/1/1994 and bef 6/30/1994) ([Edit Search](#))

Select for FOCUS™ or Delivery



Newsweek, June 13, 1994

Copyright 1994 Newsweek
Newsweek

June 13, 1994 , UNITED STATES EDITION

SECTION: NATIONAL AFFAIRS; Gays; Pg. 28

LENGTH: 881 words

HEADLINE: 'Don't Ask, Don't Tell' -- Marine Style

BYLINE: LINCOLN CAPLAN

HIGHLIGHT:

Commanders still have leeway to do both

BODY:

COL. MARGARETHE CAMMERMEYER WAS a walking recruiting poster. A decorated veteran from Vietnam, where she supervised a hospital for wounded and dying soldiers, Cammermeyer was chosen as Nurse of the Year by the Veterans Administration in 1985. She was chief nurse of the Washington state National Guard until she was forced out of the military two years ago for admitting she was a lesbian. Last week a federal judge ordered the Pentagon to reinstate her, ruling that the military's policy at the time on homosexuals was based solely on prejudice.

Cases like Cammermeyer's aren't supposed to happen anymore. She was asked about her sexual orientation during a routine security check in 1989. Under the Pentagon's new "Don't Ask, Don't Tell, Don't Pursue" policy, gays are now supposed to be left alone, as long as they remain discreet about their conduct. At least that's the idea. The practice on many U.S. military bases around the world is different. Consider the case of Marine Sgt. Robert S. Nadel, who learned last week that he was being court-martialed for alleged homosexual acts. For Nadel, and for many marines and soldiers like him, the real policy is more like "Pursue, Ask and Force to Tell."

'Very scared': Nadel was interrogated twice at his base, Camp Hansen in Okinawa. The first time he was asked if he had committed anal intercourse with a male friend. He denied it. Three days later he was accused of lying and was told he'd better talk. He was informed that he had been accused of touching the crotch of another marine without his consent. Nadel, who says he was "very scared," admitted touching the marine. But he told NEWSWEEK that the other marine had come on to him, and that he believes investigators compelled the man to make the charge against him. Nadel's room was searched, and his friends were grilled. Col. John Hertel, the top Marine lawyer at Camp Hansen, denies that Nadel was the subject of a "witch hunt" and says that his case fell well within the Marine Corps's rules on investigating homosexuality.

According to the Service-members Legal Defense Network, a gay-rights group, Nadel's case is typical of a campaign by the Marine Corps to ferret out gays among the 20,000 marines stationed on Okinawa. Investigators routinely ask soldiers to name other marines rumored to be gay and threaten them if they don't confess to homosexual acts. The Marines have been

known to use base psychiatrists to turn in homosexuals -- remarkably, the military concedes, the new rules permit this invasion of the doctor-patient relationship.

That is precisely what happened to Kevin Blaesing, a Marine corporal who sent to see a psychologist at the naval hospital in Charleston, S.C. Blaesing wanted confidential counseling on questions he had about his sexual orientation. The psychologist found him "fit for full duty" -- but Blaesing's command concluded from her report that the young corporal was a homosexual, according to his lawyer, Peter Tepley.

At first, Blaesing took the psychologist's advice to seek a discharge. But when he changed his mind and tried to remain, the Marines moved to have him discharged two weeks ago "by reason of homosexual admission."

The "Don't Ask, Don't Pursue" rules give base commanders considerable leeway to do both. When Blaesing's case first arose, his commander was Lt. Col. Ronald Rueger. Rueger was not interested in pursuing Blaesing. "I felt the young fella gave us really good service," said Rueger. Blaesing's tour was up in a year, and he "deserved to go all the way through." Blaesing had given "no inkling of homosexual conduct."

Legal attack: But then Rueger retired, and Blaesing came under the command of Lt. Col. M. J. Martinson. The new commander pressured Blaesing to quit, telling him that he brought shame to the corps. According to notes Blaesing made at the time, he was told by Martinson that the colonel had lived in Key West, Fla., and found homosexuals to be "disgusting." (Said Martinson: "I never made that statement, or anything like it.") Blaesing also says that Martinson warned him that he might be harmed in the barracks. Said Martinson: "I told him if I brought him back to the barracks, I don't know what would happen. There are people who are strongly anti-homosexual. If someone did something to him, I said, I'd prosecute them under the code of military justice."

Blaesing is appealing, and it's possible that he will not be discharged. The military's policy on gays is under heavy legal attack. The judge who ordered Cammermeyer reinstated last week was ruling on the old policy, but as the Marine cases show, the new rules are not much different from the old ones. There are now several cases working their way to the Supreme Court. Many legal experts predict that the high court will force the Pentagon to rewrite the rules to make them less discriminatory. That would be fine with Ronald Rueger, the now retired marine who would have left Corporal Blaesing alone. The military is "five to 10 years behind" the rest of society, he said. "We need to catch up." Changing attitudes in the barracks might take longer. Blaesing's lawyer says his client has gotten anonymous phone calls warning him to "get out or get hurt."

GRAPHIC: Picture 1, Reinstated: Cammermeyer, GARY STEWART -- AP; Picture 2, Marine Corporal Blaesing, MARY LOUISE MILLER

LOAD-DATE: June 14, 1994

Source: [All Sources](#) > [News](#) > [Magazine Stories, Combined](#) 

Terms: "don't ask, don't tell" and date(aft 6/1/1994 and bef 6/30/1994) ([Edit Search](#))

View: Full

Date/Time: Wednesday, January 30, 2002 - 12:10 AM EST

[About LexisNexis](#) | [Terms and Conditions](#)

P

Citation

9/1/94 WASHPOST A09
9/1/94 Wash. Post A09
1994 WL 2437484

Search Result

Rank 13 of 216

Database
WP

The Washington Post
Copyright 1994

Thursday, September 1, 1994

A SECTION

Court Blocks Discharge of Sailor Merely for Saying He Is Gay

John F. Harris

Washington Post Staff Writer

A federal appeals court yesterday ruled the military cannot discharge sailor Keith Meinhold solely for announcing he is a homosexual, a decision that gay rights advocates say spells legal trouble for the Clinton administration's new "don't-ask, don't-tell" policy.

Meinhold told a national news broadcast two years ago, "Yes, I am in fact gay," but the 9th U.S. Circuit Court of Appeals in San Francisco ruled this statement alone does not prove he acts on his desires and struck down the Navy's decision to throw him out of the service.

The Navy tried to discharge Meinhold under the old ban on homosexuals, but his case has implications for the new policy, which allows gays to serve as long as they keep their orientation private and do not act upon it.

"On the merits, we defer to the Navy's judgment that . . . people who engage in homosexual conduct or who demonstrate a propensity" to do so do not belong in uniform, the appeals court said. But the judges ruled the Navy was wrong to "discharge Meinhold solely because of a statement or orientation devoid of any concrete, expressed desire or intent to act on his homosexual propensity."

U.S. District Judge Terry J. Hatter in Los Angeles earlier had struck down not only Meinhold's dismissal but - in a decision that drew nationwide attention - issued an injunction prohibiting the military from discharging anybody simply for saying he or she is gay. The Pentagon quickly asked and received from the Supreme Court a temporary stay of Hatter's broader ruling until the appeals court could issue an opinion. Yesterday, the appeals court said Hatter went too far in applying the case to the entire military. The court noted Meinhold had sued only on his own behalf and had not filed a class-action suit on behalf of all homosexual service members.

Even this narrower ruling, however, was celebrated by gay advocates.

"The new [don't-ask, don't-tell] policy allows people to be thrown out simply if they say they're gay," said Dixon Osburn of the Servicemember's Legal Defense Network. "That wouldn't fly under this."

Justice Department and Pentagon spokesmen declined comment on the ruling, saying officials were still reviewing it.

Meinhold, a 32-year-old petty officer who operates airborne sonar equipment, said he has not experienced hostility from fellow sailors after they learned he is gay, a fact he says argues against the military's position that mixing heterosexuals and homosexuals would be bad for morale.

"I've been treated very well," he said in a telephone interview yesterday. "My experience has been that there are no problems with morale and unit cohesion."

Ultimately, people on both sides of the issue say the fate of Clinton's compromise policy - crafted after he backed off a campaign pledge to remove the ban on gays in the military - is going to remain uncertain until the Supreme Court rules.

Several other high-profile cases are under review in the 9th Circuit. One is the case of Margarethe Cammermayer, an Army nurse fired by the Washington National Guard after acknowledging she is a lesbian. A federal judge reinstated her, and the Justice Department plans to appeal.

The same issue decided by the appeals court yesterday was at the heart of another case last month. Lt. Tracy Thorne, a Navy aviator, was recommended for dismissal under the new policy in July. Navy lawyers noted he had announced his homosexuality on ABC's "Nightline" but they did not produce other evidence. Thorne is appealing.

---- INDEX REFERENCES ----

NAMED PERSON:	KEITH MEINHOLD; TERRY J. HATTER
KEY WORDS: LAW; VERDICTS	NAVY; MILITARY PERSONNEL; HOMOSEXUALS; MILITARY DISCIPLINE AND
NEWS SUBJECT: LIF LAW)	LABOR, PERSONNEL ISSUES; LIFESTYLE; LAW & LEGAL ISSUES (LAB
NEWS CATEGORY:	NEWS

Q

Citation
 6/2/94 WASHPOST A01
 6/2/94 Wash. Post A01
 1994 WL 2290280

Search Result

Rank 23 of 216

Database
 WP

The Washington Post
 Copyright 1994

Thursday, June 2, 1994

A SECTION

U.S. Judge Reinstates Gay Colonel; Military's Exclusion Of Homosexuals Held To
 Be Based on Bias

John F. Harris

Washington Post Staff Writer

A highly decorated Army nurse who was thrown out of the military after declaring she was a lesbian was reinstated in the Washington State National Guard yesterday by a federal judge who said the prohibition on gay service members is "grounded solely in prejudice."

Col. Margarethe Cammermeyer, who earned a Bronze Star in Vietnam, was discharged from military service in 1992 after 26 years in uniform because she acknowledged her homosexuality in a security clearance interview. Her celebrity grew later that year when President Clinton, then campaigning for election, saluted her in a televised town meeting and vowed he would end the ban against homosexuals in the military.

U.S. District Judge Thomas Zilly's summary judgment in favor of Cammermeyer was the latest in a succession of at least a half-dozen legal victories by gay service members over the past year.

Zilly was ruling on the military's old policy against homosexuals, not the "don't ask, don't tell" compromise that emerged after Clinton backed off his campaign pledge. But jubilant gay rights advocates said the reasoning and uncompromising language of Zilly's ruling adds momentum to their argument that the new policy also should be declared unconstitutional.

"The government has discriminated against Col. Cammermeyer solely on the basis of her status as a homosexual and has failed to demonstrate a rational basis for doing so," Zilly said, adding that, "the rationales offered by the government to justify its exclusion of homosexual service members are grounded solely in prejudice."

Cammermeyer, who was one of the highest-ranking officers ever to be thrown out of the service for homosexuality, struck a triumphant tone. "It's so powerful and so vindicating, not just of

my own struggle but thousands of others," she said in a telephone interview from Seattle.

Cammermeyer said she was not by temperament a crusader, but was thrust into the role "by accident." She said she remains a believer in the military life and has tried to change the minds of people who have told her they despise the military because of its homosexual policies.

"It's not the military that's wrong, but policies within the system," she said. "It's been a wonderful career, and I'm looking forward to finishing it."

A spokesman for the Justice Department yesterday declined to comment on Cammermeyer's case. The government has appealed similar cases that it has lost at the District Court level and lawyers who have followed the Cammermeyer case said it is likely it will do the same in this instance.

All sides agree that the gays-in-the-military controversy won't be resolved until the Supreme Court weighs in. At least two cases pending in appeals courts are likely candidates to reach the high court.

The 9th U.S. Circuit Court of Appeals in California is weighing the case of sailor Keith Meinhold, who won a lower court ruling saying that the military's exclusion of homosexuals was unconstitutional. The appeals court here, meanwhile, is reviewing the case of Joseph Steffan, who resigned under pressure from the U.S. Naval Academy after admitting he was gay.

A three-judge appeals panel initially ruled in Steffan's favor. But the full appeals court vacated that decision and last month heard the case anew.

Although Cammermeyer was ousted under the old policy, Zilly offered broad hints that his reasoning could also apply to the new policy. The policy, which took effect last year, allows gay people to serve as long as they keep their sexual orientation to themselves and do not act upon it.

Government lawyers, Zilly noted, cited a series of "legislative findings" reached by Congress as it was devising the new "don't ask, don't tell" compromise last year. One of the findings declared that letting openly gay people serve "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."

Zilly said that such an argument was not valid if the reason for the decline in morale was simply that heterosexuals were

prejudiced.

Michael Himes, an attorney for Cammermeyer, said one of the noteworthy aspects of her case is that Zilly allowed top Pentagon officials to testify in depositions. The officials were Edwin Dorn, assistant secretary of defense for personnel, and Army Lt. Gen. John P. Otjen.

In the end, Zilly wrote, the Pentagon officials helped seal the case against the government. "Both witnesses testified to the effect that the government's objection to homosexual service is based solely on the fears of and prejudices of heterosexual service members," he said.

"If this reasoning is followed by other courts, the new policy will not be upheld," predicted Himes.

"This is a foreboding signal to the Clinton administration that the new policy is in trouble," agreed Tanya Domi, legislative director for the National Gay & Lesbian Task Force.

Cammermeyer, a divorced mother of four, became a prominent spokesperson for gay rights - featured on a myriad of network news shows - in part because her military background was so exemplary.

Zilly noted this background approvingly. "All who had the opportunity to serve with Margarethe Cammermeyer agree that she was an outstanding officer and army nurse," he said.

---- INDEX REFERENCES ----

NAMED PERSON: BILL CLINTON; MARGARETHE CAMMERMEYER; KEITH MEINHOLD; JOSEPH STEFFAN

ORGANIZATION: JUSTICE DEPARTMENT; NATIONAL GAY AND LESBIAN TASK FORCE

KEY WORDS: SUBJECTS: HOMOSEXUALS; ARMY; MILITARY PERSONNEL; NATIONAL GUARD; MILITARY DISCIPLINE AND LAW; FEDERAL COURTS

NEWS SUBJECT: LIFESTYLE; LABOR, PERSONNEL ISSUES; LAW & LEGAL ISSUES (LIF LAB LAW)

NEWS CATEGORY: NEWS

GOVERNMENT: DEFENSE DEPARTMENT (DEF)

EDITION: FINAL

Word Count: 854
6/2/94 WASHPOST A01

R

Citation	Search Result	Rank(R)	1 of 1	Database
11/23/94 WSJ B4				WSJ
11/23/94 Wall St. J. B4				

1994 WL-WSJ 2058583

The Wall Street Journal
Copyright (c) 1994, Dow Jones & Co., Inc.

Wednesday, November 23, 1994

Law

Legal Beat

U.S. Court Upholds Ban on Gays In Military, Reversing '93 Ruling
By Wade Lambert
Staff Reporter of The Wall Street Journal

The federal appeals court in Washington, in an unusual full-court review, upheld the government's authority to ban homosexuals from military service.

The 7-3 decision came in the closely watched case of Joseph Steffan, a U.S. Naval Academy honor student who was expelled in 1987 after acknowledging that he was gay. The decision reversed a three-judge panel of the same court, which had ruled a year ago that the military had acted unconstitutionally in banning Mr. Steffan simply because of his sexual orientation.

Advocates for gay rights denounced the decision, which followed several victories in the courts for gay and lesbian soldiers. "It is out of step with all recent federal-court decisions in the past two years on lesbians and gay men in the military service," said Kevin Cathcart, executive director of the Lambda Legal Defense and Education Fund, a gay-rights group that represented Mr. Steffan. "We had seen steady progress in courts' recognizing the right to serve in the military."

Marc Wolinsky, an attorney for Mr. Steffan, said a decision hasn't been made on whether to ask the Supreme Court to hear the case. But gay-rights advocates say the split in the courts makes it likely that the Supreme Court eventually will have to grapple with the controversial issue. A federal appeals court in California ruled in September that the government can't discharge a sailor, Keith Meinhold, solely for announcing that he's gay.

The latest ruling also is a strong boost for the Defense Department's current policy toward homosexuals, sometimes referred to as "don't ask, don't tell." Under that policy, lesbians and gay men can serve in the military only if they keep their sexual orientation secret.

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw.

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.



11/23/94 WSJ B4

The Steffan and Meinhold cases don't directly affect the current policy, which is being challenged in a separate case in federal court in Brooklyn, N.Y. But the federal appeals court in Washington said it agreed with the government's position that soldiers who say they are gay can be presumed to be likely to engage in banned sexual conduct.

"The appropriate question, it seems to us, is whether banning those who admit to being homosexual rationally furthers the end of banning those who are engaging in homosexual conduct or are likely to do so," the court said. "The military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct."

The decision also rejected the argument that Mr. Steffan was being punished for who he is rather than what he does. That puts it at odds with the Meinhold ruling, in which the Ninth Circuit Court of Appeals in San Francisco said it's improper to assume that a member of a certain group, such as gays, is necessarily likely to engage in misconduct.

Disagreeing with its colleagues on the West Coast and with its dissenting members, the Washington court's majority said it was "preposterous" to maintain that a person's sexuality doesn't have a strong correlation to sexual conduct.

In their dissent, the three judges compared the military's treatment of Mr. Steffan to the persecution of suspected communists during the Cold War, noting that Mr. Steffan was penalized for membership in a group rather than for any alleged conduct.

"For the government to penalize a person for acknowledging his sexual orientation runs deeply against our constitutional grain," said the dissenting judges. "It has, we believe, no precedent or place in our national traditions, which spring from a profound respect for the freedom to think and to be what one chooses and to announce it to the world."

Maj. Tom Schultz, a spokesman for the Department of Defense, said, "The DOD is pleased with the court decision." But he added that lawyers for the military haven't reviewed the ruling to determine what impact it might have beyond the Steffan case.

(Steffan vs. William Perry, Secretary of Defense, U.S. Court of Appeals for the District of Columbia Circuit, En Banc, No. 91-5409)

AZT Patent Ruling

In a ruling that could mean AIDS patients will continue paying high prices for AZT, a federal appeals court upheld most of a ruling that awarded Burroughs Wellcome Co. exclusive patents for the drug.

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw.

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.

Westlaw.

11/23/94 WSJ B4

The U.S. Court of Appeals for the Federal Circuit in Washington, D.C., the country's most important patent court, ruled that Burroughs was the sole inventor for five of the six patents it holds simply because it conceived of the idea of using AZT on AIDS patients before learning the results of early tests. The same determination couldn't be made for the sixth patent without a trial, according to the appeals court opinion. That dispute was sent back to a lower court for resolution.

Burroughs' exclusive rights to the patents were challenged by two generic manufacturers that promised to sell the drug at lower prices if they won. A federal judge ruled in July 1993 that Burroughs, a unit of Wellcome PLC, was the exclusive patent holder. The two generic companies -- Barr Laboratories Inc. and Novapharm Inc. -- had argued that Burroughs should share the patent rights because tests by the National Institutes of Health were critical to the development of the drug. (NIH authorized Barr to litigate its rights in the AZT patents in exchange for a portion of the royalties if Barr prevailed.)

Lawyers for Burroughs and company executives couldn't be reached for comment. Barr President Bruce Downey expressed disappointment and said the company would study the opinion before deciding what to do. Mr. Downey said he couldn't assess the impact of the decision on his company without discussing it first with his lawyers.

The case had been closely watched by patent lawyers because it dealt with a much-debated question: who gets patent rights when many scientists contribute to a drug's development. In its ruling, the appeals court found that an idea must be "definite and permanent" and supportable with corroborating evidence for it to be legally conceived. But the court also found that an inventor doesn't need to know whether an invention will work for "conception to be complete." (Burroughs Wellcome v Barr Laboratories, Inc. 93-1503, U.S. Court of Appeals for the Federal Circuit, Washington, D.C.)

--- Royalties for TV Classics

Syndicators of some classic television shows may have to pay royalties because of a policy shift at the U.S. Copyright Office.

The office is making it easier for the creators of some shows syndicated before 1978 to claim copyrights -- and therefore royalties -- on certain programs for the first time. It's unclear how many shows the change affects.

The change came in a case involving "Battleline," a documentary series on battles that was syndicated in 1963 and runs on the Arts & Entertainment network. If a television program was syndicated before 1978 and didn't carry copyright notices, the Copyright Office generally had refused to grant a copyright registration.

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw.

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.

~~Dow Jones~~ Westlaw.

11/23/94 WSJ B4

Yesterday, the Copyright Office granted copyright registrations for 39 "Battleline" episodes to International Creative Exchange, Hollywood, Calif.

Copyright Office officials weren't available for comment. Some people familiar with its policy said the change will affect only shows that were distributed in limited ways. "Battleline" originally was allowed to be shown only on particular stations, which received episodes one by one and had to return them afterward.

Milo Geyelin and Junda Woo contributed to this article.

(See related letter: "Letters to the Editor: Copyright Rules On Syndicated Films" -- WSJ Jan. 24, 1995)

941123-0094

YY95 MM01

---- INDEX REFERENCES ----

NEWS SUBJECT: Law & Legal Issues; Lifestyle; Lawsuits; Trade Groups (LAW LIF LWS TRG)

GOVERNMENT: Defense Department; Justice Department (DEF JUS)

REGION: North America; United States (NME US)

LAYOUT CODES: Legal Beat Column; Law; Large Majors (LGB LLW LMJ)

Word Count: 1239
11/23/94 WSJ B4
END OF DOCUMENT

Copr. (C) West 2002 No Claim to Orig. U.S. Govt. Works

Westlaw.

Copyright © 2000 Dow Jones & Company, Inc. All Rights Reserved.

~~Down~~ Westlaw.

S

At the same time, the court overturned U.S. District Judge Terry Hatter's order last year barring the military from banning gays. The court left the military room to prove its argument - in another of the many cases in the works, or ultimately before the Supreme Court - that the safety of its military mission, not prejudice, governs its policy toward gays.

Justice Department spokesman Joe Krovisky said the government was reviewing the ruling.

Dixon Osburn of the Servicemembers Legal Defense Network in Washington, D.C., said, "To the extent that the court said a service member who simply states that he or she is gay can't be kicked out, this is a great victory for us."

Military rules outlaw oral and anal sex, adultery and bigamy by any service members without regard to sexual orientation, even married couples.

"The military has traditionally enforced this only against gay people," including thousands who simply say they are gay, said Kevin Cathcart, executive director of the Lambda Legal Defense and Education Fund in New York.

"Even though (the appeals court has) allowed the regulations against gay people to stand, they have at least raised the burden on the military - and I think frequently it's a burden of proof the military will not be able to make. Now you have to prove (intent or) conduct - which is what you have to do with heterosexual conduct.

"It is a step forward, but it's a step backward from Judge Hatter's decision."

13 other cases before courts

Meinhold's is one of 14 cases in the federal court system challenging the government's policy on gays. All involve service members discharged for saying they were gay or lesbian. All but one were filed before the Clinton administration's "don't ask, don't tell" policy took effect in February.

The new ruling applies only to Meinhold's case, but it serves as precedent for four cases pending in 9th Circuit courts, lawyers said.

Coming up behind are a handful of new cases by service members like Navy Reserve Lt. Zoe Dunning, whose

9/1/94 SFEX A17

discharges were stalled while the new policy was put in place. Dunning faces a second Navy hearing Sept. 26.

The ruling's effect on the sole case filed under "don't ask, don't tell," involving six service members who simply stated that they are gay, was not immediately clear.

But Gregory Bonfiglio, San Francisco lawyer for Dunning, said he would argue that the new policy includes the same presumption of intent to break military rules, and "the court is saying you can't do that."

Osburn said discharges for homosexuality show no signs of slackening under the new policy. The Navy alone discharged 153 gay sailors from October 1993 through April. His legal aid network, now a year old, has fielded 190 requests for help, 123 since February.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

PHOTO;

Credit:

AP / DENIS POROY;

Caption:

Keith Meinhold wishes the court ruling was "more broad-based."

----- INDEX REFERENCES -----

KEY WORDS: COURT RULINGS; HOMOSEXUALS; MILITARY LAW; U.S. ARMED FORCES

EDITION: FOURTH

Word Count: 691

9/1/94 SFEX A17

END OF DOCUMENT

T

Citation
11/23/94 LATIMES 8
11/23/94 L.A. Times 8
1994 WL 2368974

Search Result

Rank 13 of 23

Database
LAT

Los Angeles Times
Copyright, The Times Mirror Company; Los Angeles Times 1994 All Rights Reserved

Wednesday, November 23, 1994

PART-A; National Desk

Military Can Oust Gays, Court Rules Pentagon: Federal panel says admission of homosexuality is grounds for dismissal. Case involved Navy's move to discharge a cadet.

DAVID G. SAVAGE
TIMES STAFF WRITER

In a setback for gay-rights activists, a federal appeals court ruled Tuesday that the Constitution does not bar the military from discharging a serviceman simply because he admits that he is a homosexual.

In their legal challenges to the Pentagon's ban on gays in the ranks, gay-rights lawyers have contended that the government cannot punish persons solely because of their "status," or sexual orientation.

But on a 7-3 vote, the judges of the U.S. Court of Appeal for the District of Columbia rejected that argument, and ruled that a serviceman's admission that he is gay is, for all practical purposes, the same as admitting he has engaged and will continue to engage in homosexual acts.

"The military may reasonably assume that, when a (service) member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct," wrote Judge Lawrence H. Silberman.

The decision upholds the Navy's move to discharge Joseph C. Steffan, a midshipman at Annapolis who had a stellar record but admitted in 1987 that he is gay.

Since then, lawyers for gay-rights groups have fought his discharge as a test case challenging the Pentagon's discriminatory policy.

Beatrice Dorhn, legal director for the Lambda Legal Defense Fund in New York, said that the new ruling in Steffan's case is "obviously disappointing" because it endorses a policy that "subjects gay and non-gay service members to completely different

rules."

She said that her organization has not decided whether to appeal to the Supreme Court.

If nothing else, Tuesday's ruling demonstrates again that gay-rights activists have an uphill fight in challenging as unconstitutional the military's ban on admitted gays.

None of the federal judges who have ruled on this issue has concluded that gays deserve special protection under the Constitution, similar to blacks, Latinos or women.

The judges have split, however, on whether it is "rational" to discharge gays based on the mere admission of their sexual orientation.

The generally liberal U.S. 9th Circuit Court of Appeals in San Francisco has taken the view that it is unfair and irrational to punish gays or lesbians who do nothing more than acknowledge their orientation. In August, a three-judge panel of the 9th Circuit upheld an order requiring the Navy to reinstate Keith Meinhold, a sailor who admitted his homosexuality on a TV show.

Since the military does not make "the assumption" that heterosexual members of the military will engage in prohibited acts such as adultery or sodomy, it should not make the automatic assumption that gays will engage in prohibited homosexual acts, Judge Pamela Rymer said.

The more conservative appeals court in Washington dismissed that view. "The government's presumption is certainly rational given that the human sexual drive is enormously powerful and that an open declaration that one is a homosexual is a rather reliable indication as to the direction of one's drive," wrote Silberman, an outspoken conservative and an appointee of President Ronald Reagan.

Last year, a panel of the same court ruled for Steffan in an opinion authored by then-Chief Judge Abner J. Mikva, now White House counsel to President Clinton. The dissenters Tuesday were Judges Patricia M. Wald and Harry Edwards, both of whom were appointed by President Jimmy Carter, and Judge Judith Rogers, a Clinton appointee.

----- INDEX REFERENCES -----

KEY WORDS: UNITED STATES; ARMED FORCES; HOMOSEXUALS; COURT RULINGS; CIVIL RIGHTS; MILITARY DISCHARGES

NEWS SUBJECT: Lifestyle; Law & Legal Issues (LIF LAW)

11/23/94 LATIMES 8

Page 19

STORY ORIGIN: WASHINGTON

GOVERNMENT: Defense Department (DEF)

REGION: United States (US)

EDITION: HOME

Word Count: 547

11/23/94 LATIMES 8

END OF DOCUMENT

U

Citation
6/2/94 SFCHR A1
6/2/94 S.F. Chron. A1
1994 WL 4076966

Search Result

Rank 137 of 216

Database
SFCHR

The San Francisco Chronicle
Copyright 1994

Thursday, June 2, 1994

NEWS

Military Told To Reinstate Lesbian Nurse / Judge says homosexual ban based
solely on prejudice
Eric Schmitt
New York Times

A federal judge in Seattle ordered the military yesterday to reinstate a highly decorated nurse who was forced out of the Washington state National Guard after acknowledging that she is a lesbian.

U.S. District Judge Thomas Zilly ordered Colonel Margarethe Cammermeyer back to the job she held in 1992, ruling that the military's policy on homosexuals at that time was based solely on prejudice and was a clear violation of the Constitution's equal-protection clause.

At a hastily convened news conference in Seattle, Cammermeyer beamed with delight and told reporters: "I feel a little bit like a general who has won a war. There is exoneration."

Zilly's decision dealt with the Pentagon's old policy on homosexuals, not the new regulations that Congress and the Clinton administration agreed on last year. The new rules, known as "don't ask, don't tell, don't pursue," permit homosexuals in the military as long as they remain silent about their sexual orientation.

But the new rules share many similarities with the old ones, and the administration is defending the old policy in court to set precedents that would make challenges to the new policy more difficult.

Pentagon officials said last night that they are reviewing Zilly's decision and considering whether to appeal.

Gay rights advocates hailed the ruling as one of a growing number of federal court challenges to the old policy that, collectively, could cut away at the undergirding of both old and new rules.

"This is yet another statement from the courts that they're looking at the constitutionality of this policy, and it's failing the test," said William Rubenstein, director of the American Civil Liberties Union's Lesbian and Gay Rights Project.

Indeed, Zilly struck at a basic assumption in the old and the new policy: that homosexual orientation signifies an intent to engage in homosexual conduct. The judge concluded that "there is no rational basis for the government's underlying contention that homosexual orientation equals 'desire or propensity to engage' in homosexual conduct."

Zilly ordered the National Guard to expunge any record of Cammermeyer's sexual orientation in order to prevent the military from taking any further action against her when she returns to service.

Cammermeyer's case drew special attention because of the way the military discovered that she was homosexual and the widespread support among her commanders to ignore the ban and let her stay on duty.

During a top-secret security clearance review in 1989 that was required for admission to the Army War College, Cammermeyer was asked about her sexual orientation, and she told the interviewer that she was gay. Under the administration's new policy, that question is no longer asked. And if it were asked, she would not be required to answer.

But under the old policy, her statement was ground for discharge. Even so, Cammermeyer's superiors at the Washington state National Guard told her that she could continue to serve as the guard's chief nurse unless the Army Department pressed the issue.

Cammermeyer's record was the stuff of recruiting posters. When she was a child, her family fled the Nazis after they invaded her native Norway in World War II. After coming to the United States, she joined the Army as a nurse in 1961.

She was awarded the Bronze Star after serving 15 months in Vietnam, supervising a hospital for wounded and dying soldiers. In 1985, she was chosen from 34,000 candidates nationwide as the Veterans Administration's Nurse of the Year.

Cammermeyer, 52, served as chief nurse for three years after she admitted her homosexuality, while military review boards debated her fate. Governor Booth Gardner of Washington appealed to Defense Secretary Dick Cheney to retain Cammermeyer.

But on June 11, 1992, Cammermeyer was dismissed with an honorable

discharge, apparently becoming the highest-ranking officer to be discharged solely because of homosexual orientation. Speaking to reporters at the time at Washington National Guard headquarters, Cammermeyer wept, as did her commanding officer, Major General Gregory Barlow, and she vowed to fight the military's ban.

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

PHOTO;

Caption: MARGARETHE CAMMERMEYER / 'There is exoneration' / BY ASSOCIATED PRESS

---- INDEX REFERENCES ----

KEY WORDS: LESBIANS; GAYS; MILITARY; COURTS; RULING; US; NATIONAL GUARD;
BAN; BIOGRAPHY;

NEWS SUBJECT: LIFESTYLE; LIFESTYLE; LAW & LEGAL ISSUES; CONSUMER ISSUES;
BIOGRAPHY (LIF LIS LAW CSU BIO)

STORY ORIGIN: WASHINGTON

GOVERNMENT: DEFENSE DEPARTMENT (DEF)

REGION: UNITED STATES; NORTH AMERICA (NME US)

EDITION: FINAL

Word Count: 660
6/2/94 SFCHR A1
END OF DOCUMENT

v

Copyright 1994 Time Inc.

Time

June 13, 1994, U.S. Edition

SECTION: JUSTICE; Pg. 66

LENGTH: 579 words

HEADLINE: Military Ins and Outs;
The Pentagon ponders its options after a court orders the
reinstatement of a gay National Guard colonel

BYLINE: By DAVID VAN BIEMA ;
Reported by Ellis E. Conklin/Seattle and Mark
Thompson/Washington

BODY:

Some would suggest it was a silly question to bother her with, at this stage in a brilliant career; a little like pestering a star athlete who has led his team to a brace of championships about his religious preference. National Guard Colonel Margarethe Cammermeyer had earned a Bronze Star for supervising a hospital during the Vietnam War; in 1985 the Veterans Administration named her Nurse of the Year over 34,000 other candidates; and most recently, she had served as chief nurse of the Washington National Guard. But somebody's curiosity got the better of him: during a security clearance in 1989 for her admission to the Army War College, Cammermeyer was quizzed about her sexual preference. And so she answered: she is gay.

Her subsequent discharge from the armed forces in 1992 attracted headlines around the country and eventually helped persuade the Clinton Administration to change its policy on gays in the military last year. At the time, her superiors fought her ouster; on the day of her departure, her commanding officer wept. And last week Federal District Judge Thomas S. Zilly ordered her reinstated. The judge, a Reagan appointee, explained that the old military policy was "based on heterosexual members' fear and dislike of homosexuals." Given the Constitution's equal-protection clause, Zilly continued, such feelings "are . . . impermissible bases for governmental policies." Said a jubilant Cammermeyer: "This is what we've been waiting for. We won!"

The battle, if not the war. Zilly's decision was the seventh lower-court ruling against the old military rules on homosexuality; and, like several of the other decisions, it has implications for the new regulations negotiated by Bill Clinton and Senator Sam Nunn last summer. The events that led to Cammermeyer's discharge might not have occurred under the new "don't ask, don't tell" policy, since she might never have been asked. But her answer would break the new as well as the old regulations. The current policy holds that although homosexual "status" is theoretically permissible, admitting to it signals an impermissible intent to engage in homosexual "conduct."

Judge Zilly's ruling heartened gay-rights activists. "Change in this policy is inevitable," said Joseph Steffan, whose 1987 expulsion from the U.S. Naval Academy on similar grounds was overturned by an appeals court late last year." The only question is when, and decisions like this lead to the conclusion that it may be sooner rather than later." The military itself seems torn about whether to appeal the Cammermeyer verdict. "We have to press ahead," said one official. "If we let this decision stand . . . we'd be barred from enforcing our own policy." Yet Pentagon spokesman Dennis Boxx was more cautious. "We disagree with the judge's conclusions in the Cammermeyer case," he said, but "we need to look very hard -- along with the Justice Department -- to see how far we want to pursue that disagreement."

The hidden reference in that statement was doubtless to the Supreme Court, which is expected to encounter several appeals-court rulings on both the old and new rules on military homosexuality in the next few years. Which case it chooses to hear and how it rules may well be the final word on the topic for some time. Until then, admits Tanya Domi, a retired Army captain who is now legislative director for the National Gay and Lesbian Task force, "we're stuck. You have to continue to hide and lie."

GRAPHIC: Picture, READY-TO-WEAR: Cammermeyer, in a 1992 photo, can return as the Washington National Guard's top nurse descColor: National Guard uniform on door, Margarethe Cammermeyer in background., RICH FRISHMAN FOR TIME

LOAD-DATE: June 14, 1994

w

CONDUCT UNBECOMING

LESBIANS AND GAYS IN THE U.S. MILITARY
VIETNAM TO THE PERSIAN GULF

Randy Shilts

ST. MARTIN'S PRESS | NEW YORK

CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY. Copyright © 1993 by Randy Shilts. All rights reserved. Printed in the United States of America. No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles or reviews. For information, address St. Martin's Press, 175 Fifth Avenue, New York, N.Y. 10010.

Design by Jaye Zimet

Library of Congress Cataloging-in-Publication Data
Shilts, Randy.
Conduct unbecoming : gays and lesbians in the U.S. military /
Randy Shilts.

p. cm.
ISBN 0-312-09261-X

1. United States—Armed Forces—Gays. I. Title.
UB418.G38S55 1993
355'.008'664—dca20

93-9670
CIP

First Edition: May 1993
10 9 8 7 6 5 4 3 2 1

for the homosexual minority. The story of homosexual America is therefore the story of heterosexual America.

The record that follows poses the question: What kind of nation will we be? In the most narrow sense, it asks us to define the purpose of our military institutions and the hundreds of billions of dollars spent every year to finance them. Is the purpose of the armed forces primarily to offer men an opportunity to define their manliness? Or does our military exist to provide the nation with the most cost-effective means of national defense?

EVEN BEFORE THE ARMED FORCES of the United States were formally organized, gays were bearing arms for the yet unborn nation. The United States might never have become a nation, in fact, were it not for the services of one particular gay general in the first difficult years of the American Revolution.

In 1777, the rebellion was going badly. General George Washington made a dashing figure on horseback and was revered by his troops, but he had little background in the art of military drills and training. Thirteen disparate and mutually suspicious colonies had contributed soldiers for what were, in effect, thirteen different armies. Though all fought under the fraying banner of the Continental Army, they were not yet one unified and disciplined force. The army desperately needed training, and in Paris, Benjamin Franklin plotted to supply the one man he believed could save them: Baron Frederick Wilhelm Ludolf Gerhard Augustin von Steuben, one of Europe's leading military prodigies.

Steuben was the son of a Prussian army officer of high enough rank to be able to secure King Frederick William I as the godfather for the infant. At sixteen, young Steuben followed his father into the army, and distinguished himself in the Seven Years War, in which he was taken prisoner by the Russians. While a prisoner, history records, Steuben became a favorite of Czar Peter III and Peter's ambitious wife, who soon overthrew her husband and became Czarina Catherine the Great. After his release, Steuben was a particularly valuable aide to the greatest military genius of his era, King Frederick II of Prussia.

Steuben's acceptance into Frederick's all-male court was the first historical suggestion of his homosexuality. Frederick was Europe's most notorious gay ruler at the time and had been known as such since his youth. From his earliest days, Frederick had evinced an interest in poetry, music, and art that enraged his overbearing, militaristic father. When he had attempted to escape his father's public beatings by running off to England with his lover, Lieutenant Hans Hermann von Katte, the son of an important Prussian general, King Frederick William had both his son and his lover court-martialed and sentenced to death. The king ordered a scaffold erected outside the window of his son's prison cell, and guards forced the crown prince to watch while an executioner chopped off his

lover's head. Frederick blew the lieutenant a kiss and shouted his oath of love as the executioner's sword fell. Ultimately, the king granted his son clemency and sent a soldier to be his valet, but those two also apparently became lovers. Once Frederick became king, he banished women from his palace and surrounded himself not only with handsome soldiers and pages but with the greatest cultural figures of his day, most notably Voltaire.

In the following years, Frederick turned to military matters and soon emerged as one of the most brilliant strategists in European history. His prowess transformed Prussia from a weak backwater to the strongest military power in Europe and made the Prussian army the most feared fighting machine on the Continent. The king also set about to formalize the instruction of his officers. He personally directed the military tutelage for thirteen handpicked officers, among them Steuben. His education, at the forerunner of the famous *Kriegs Akademie*, made Steuben a charter member of the royal "Great General Staff" and perfected his military skills. In 1763, for reasons never made public, Steuben abruptly left the Prussian service and spent the next years as chief minister for the prince of Hohenzollern-Hechingen, who named him a baron in 1771.

Benjamin Franklin was convinced that the Prussian penchant for order and discipline was precisely what the American forces needed if they were to prevail in their uphill fight against the well-trained British army. His first meeting with Steuben in Paris, however, proved unsuccessful. The Continental Congress was already bristling at having two major generals of foreign birth, Lafayette and De Kalb, and were reluctant to commission a third, so Franklin could not guarantee Steuben a commission in the Continental Army, or even a salary. Steuben could accept that; when Franklin indicated the Americans could not even pay travel expenses across the Atlantic, however, Steuben declined Franklin's entreaties and instead took a position with another royal family in Baden. But as he was returning to Germany, he heard news that sent him back for another meeting with Franklin.

The identity of the author of the crucial letter was later lost to history, but it is known that it arrived at the desk of the prince of Hohenzollern-Hechingen in August 1777. "It has come to me from different sources that M. de Steuben is accused of having taken familiarities with young boys which the law forbids and punishes severely," the letter said. The dispatch further noted that "the clergy . . . intend to prosecute him by law as soon as he may establish himself anywhere." That Steuben would be hounded for homosexuality during the reign of Frederick was no small irony, as was noted even by his contemporaries. A newspaper article in 1796 commented, the "abominable rumor which accused Steuben of a crime the suspicion of which, at another more exalted court of that time (as formerly among the Greeks) would hardly have aroused such attention." Still, the impending scandal forced Steuben out of Europe. As his biographer, John McAuley Palmer, wrote, "Whether true or false, it is

certain the charge was made and that it was a final determining influence in sending Steuben to America."

The scandals that exiled Steuben did not receive broad circulation in Europe until more than a decade after the Revolutionary War, and it is unlikely that the Americans knew of them when Franklin negotiated an arrangement with Steuben. The French government secretly agreed that it would compensate Steuben for his services if the Continental Congress did not.

There remained the delicate test of promoting the baron to the Americans. Though Steuben had risen only to the rank of captain in the Prussian army, Franklin did not think this position grand enough to impress the Continental Congress, so he spread word that Steuben was a lieutenant general. Silas Deane, who served with Franklin as a Colonial commissioner to France, wrote Congress that Steuben had left behind the "certificates of service" that attested to his status as a lieutenant general when he departed Germany, and that it would take too long to retrieve them. But, Deane said, he had seen the certificates himself and could attest to Steuben's credentials. Never one to question his own importance, the garrulous Steuben went along with the ruse, though keeping his stories about his past straight would cause him no small amount of difficulty in his later life. Before leaving France, Steuben had Parisian designers sew a set of impressive-looking uniforms that were largely of his own invention. If he was going to be a lieutenant general, he wanted to look the part.

When Steuben arrived in America, it was in the company of a handsome seventeen-year-old French nobleman who served as his secretary and interpreter. The pair was entertained by Governor John Hancock in Boston and was immediately the toast of the revolutionary leadership. With his long, thin patrician nose and erect bearing, the forty-seven-year-old Steuben looked like everything a European military genius was supposed to be. He also had a self-deprecating wit that charmed even the most skeptical colonist. To the Continental Congress, Steuben suggested that he be paid only if he actually helped the Americans win some battles, a proposal the cash-strapped Congress enthusiastically accepted.

Great expectations greeted Steuben when he arrived at George Washington's encampment at Valley Forge on February 23, 1778, in the last months of the Continental Army's most bitter winter. The American cause was imperiled. The British occupied Philadelphia, and the Americans had sustained losses at Brandywine and Germantown. The colonists' lines of supply were ravaged, and the army was scarcely clothed and even less disciplined. Washington asked Steuben to review his troops and offer his frank suggestions for improvement. Communication was difficult; Steuben's teenage protégé quickly proved to be so ignorant of military ways that he was an inept interpreter, so Washington assigned Steuben two French-speaking colonels from his own staff, twenty-year-old Alexander Hamilton and twenty-four-year-old John Laurens.

The assignment was uniquely appropriate. Hamilton was Washing-

ton's most trusted aide and Laurens was the son of Henry Laurens, president of the Continental Congress. The pair was inseparable, to the point that some later historians have surmised they were lovers. Their letters to each other swore undying love and included numerous double entendres, such as Hamilton complaining that during a separation their written correspondence was "the only kind of intercourse now in my power." (Laurens was later killed in a minor skirmish with the British.) At Valley Forge, both Laurens and Hamilton became close friends of Steuben and his most effusive admirers.

After his first review of Washington's troops, Steuben was discouraged. There was no uniformity among the regiments. Some drilled in the French style, others in the English, others in the Prussian. He set about writing a drill book. Every day, he issued new chapters in French, which were translated and then laboriously hand-copied for each brigade and regiment and company in the Army. Once the first chapter was completed, General Washington ordered one hundred top soldiers selected from the fourteen infantry brigades to form a model training brigade.

The first uniform drills of the Continental Army began on the morning of March 19, 1778. Steuben led them himself. Though he knew no English, he had memorized the words for each drill and shouted the orders—load musket, fix bayonet, and charge—eliminating the Prussian flourishes so the American Army would use the minimum number of motions.

The fact that Steuben led the drills himself greatly impressed the enlisted men, since American officers, like their English counterparts, did not perform such menial tasks. When the training went poorly, Steuben swore in French and Prussian, with frequent *goddamns*, the only English oath he knew. He asked his translator to put the better profanities in English for the sake of the troops. All this made Steuben immensely popular. This was no effete European adventurer, but a military man who was going to win battles.

Three days after the first drills were performed in what would become the United States Army, General Washington was impressed enough that he ordered Steuben's training be extended to his entire command. No general in the Continental Army would do any more drills, he added, until they had Steuben's specific instructions. Two days later, the whole army at Valley Forge was drilling under Steuben's guidance. Members of the model brigade became the drill masters who trained other drill masters as they had been trained. Five weeks after the first drill, Washington appointed Steuben the first Inspector General of the Army. Six days after that, Congress commissioned him a major general at a salary of \$166.67 a month. A year later, Congress enacted Steuben's "Regulations for the Order and Discipline of the Troops of the United States." In 1780, he received his coveted field command, and was a division commander during the war's final siege at Yorktown.

His impact on the Revolutionary cause was incalculable. Some historians have counted Steuben, along with General Washington, as one of

only two men whose services were "indispensable" to the success of the Revolution. When the American cause was won at Yorktown and Washington issued his congratulatory order, Steuben was one of only three commanders he singled out for praise. In 1783, General Washington's last official act as Commander in Chief of the Continental Army was to write a letter thanking Steuben. As Colonel Hamilton later wrote, "Tis unquestionably to his efforts we are indebted for the introduction of discipline in the Army."

THE ACCEPTANCE OF GENERAL STEUBEN and his contributions to the fledgling American military did not mean there was even tacit acceptance of homosexuality. On March 11, 1778, just sixteen days after Steuben arrived at Valley Forge, drums and fifes assembled on the Grand Parade in the brisk morning air to conclude the punishment ordered by a general court-martial and approved by General Washington himself. On that morning, Lieutenant Gotthold Frederick Enslin became the first known soldier to be dismissed from the U.S. military for homosexuality.

Enslin had arrived in the United States on September 30, 1774, aboard the ship *Union*, which had sailed from Rotterdam to Philadelphia. He was in his late twenties or early thirties. He arrived alone, according to the ship's records, suggesting that he was single. Three years later he enlisted in the Continental Army; within a few months, he was serving as an officer in Lieutenant Colonel William Malcolm's regiment.

Though little is known of Enslin's earlier life, the exacting penmanship he used on his company's muster sheets and his command of the English language indicate that he was an educated man of some financial means. The Continental Army preferred its officers to be educated and able to provide their own supplies.

Under the bunking arrangements at Valley Forge, enlisted men lived in communal barracks while officers resided in small cabins with officers of similar rank. It was in Enslin's cabin that Ensign Anthony Maxwell apparently discovered the lieutenant with Private John Monhart. Maxwell reported this to his commanding officer, Lieutenant Colonel Aaron Burr. Enslin responded that Maxwell was lying in an attempt to impugn his character.

On February 27, 1778, the company commander being in New York, Burr presided first at a court-martial of Ensign Maxwell, charged with "propagating a scandalous report prejudicial to the character of Lt. Enslin." In his orderly book, Burr later wrote, "The court after mature deliberation upon the evidence produced could not find that Ensign Maxwell had published any report prejudicial to the character of Lt. Enslin further than the strict line of his duty required and do therefore acquit him of the charge."

Eleven days later, on March 10, Burr presided over Enslin's court-martial, in which the lieutenant was found guilty of sodomy and perjury,

the latter presumably stemming from his charges against Maxwell. According to General Washington's general order of March 14, Enslin was "to be dismiss'd with Infamy. His Excellency the Commander in Chief approves the sentence and with Abhorrence and Detestation of such Infamous Crimes orders Lieutt. Enslin to be drummed out of the Camp tomorrow morning by all the Drummers and Fifers in the Army never to return; The Drummers and Fifers to attend on the Grand Parade at Guard mounting for that Purpose."

Drumming a soldier out of the Army was a dramatic event in those times. According to custom, an officer's sword was broken in half over the head of the disgraced soldier, while drummers played a very slow tattoo. So did Lieutenant Enslin leave the Continental Army on that cold morning in March, trudging away alone on the deeply rutted and muddy road out of Valley Forge, not far from where Major General von Steuben was shouting orders in broken English.

Some observers have suggested that Enslin's sentence is evidence that Washington held a lenient view of homosexuality, since such transgressions could have been punishable by imprisonment or even death in the conventions of the day. (Thomas Jefferson demonstrated his liberalism by proposing a year earlier that sodomy be punished by castration instead of death in the new penal code that would replace Virginia's Colonial charter.) This, however, remains speculation.

PROSCRIPTIONS AGAINST HOMOSEXUALITY did not alter the presence of gays among the armed forces, including some of the most celebrated American military heroes. In the United States' next war, against the Barbary pirates, Stephen Decatur and Richard Somers became two of the nation's earliest Naval heroes. Decatur and Somers had been fast friends since grade school and were commissioned together in 1798 as third and fourth midshipmen in the new United States Navy. They shared a berth on their first ship assignment, the USS *United States*. James Fenimore Cooper, who served as a midshipman in the early Navy, wrote that "they loved each other as brothers." Both distinguished themselves early in their careers, and in 1803 Decatur took command of the USS *Enterprise*.

It was the Barbary pirates' demands that American ships pay tithes in the pirate-controlled portion of the Mediterranean that brought Decatur's ship and several other Naval ships to the shores of Tripoli. There, Decatur performed a number of daring feats as both a ship's commander and in hand-to-hand combat with Tripolitan pirates. In one such battle he captured a Tripolitan ketch, which the Navy rechristened the USS *Intrepid*. Though Decatur was only twenty-five, President Jefferson ordered him promoted to the rank of captain, then the highest rank in the Navy. Decatur became the youngest person ever to achieve this rank. Then Somers's heroism in a gunboat attack on Tripoli won him his captain's bars.

The seminal event of the Barbary conflicts occurred on the night of September 4, 1804, when Somers and a dozen other sailors volunteered to sail the *Intrepid*, disguised to look like a Tripolitan ship and loaded with 100 barrels of gunpowder and 150 charged shells, into Tripoli harbor. The plan was to slip into the harbor and ignite a fifteen-minute fuse, long enough to allow Somers and his crew to escape. When the ship exploded, it would destroy a good number of the Barbary pirate ships, as well as the Tripolitan fortifications.

Moments before boarding the *Intrepid*, Somers gave Decatur a gold ring. Decatur slipped the band on his finger as he watched Somers sail away.

Just what happened to the *Intrepid* became the source of much speculation. Perhaps the fuse malfunctioned; perhaps the ruse was spotted by Tripolitan sailors who fired upon the ketch, setting it ablaze. Some historians have suggested that Somers and his crew may have ignited the ship themselves; they had sworn they would die rather than let the huge cache of explosives fall into enemy hands. What is certain is that one hour and forty-seven minutes after Somers left, a huge flash lit up the harbor and an explosion echoed over the sea. Outside the harbor, Stephen Decatur stood on the deck of the *Enterprise* and waited for a sign of Somers and his crew.

Naval historians record that Decatur fell into inconsolable grief after Somers's death. "For a time there was little satisfaction for him in his promotion to the captaincy," according to one. Decatur became one of the early Navy's most acclaimed heroes, most notably for his service during the War of 1812, in which he commanded the USS *United States*. He retired from the Navy at the rank of commodore, though he continued to sit on the nation's Naval Advisory Committee, which met at the Washington Naval Yard not far from the monument erected to Somers and the other Navy crewmen who lost their lives in the Barbary wars.

All his life, Decatur wore the ring that Somers had given him, inscribing the legend *Tripoli 1804* on the outside of the band and *R.S. to S.D. 1804* on the inside. The issue of the two men's relationship has been treated gingerly by biographers, when it has been discussed at all. At the age of twenty-seven, Decatur married a woman he had never met, who had fallen in love with his picture. Decatur is reported to have told his wife that his first mistress would always be the sea and his country—not she. The couple never had any children. James Fenimore Cooper reported with some bemusement that Somers was never known to have relationships with women. "Although it is scarcely possible that a warm hearted young man, like Somers, should not have felt a preference for some persons of the opposite sex, it is now known that he had a serious attachment when he lost his life," Cooper wrote, adding poetically, "Glory appears to have been his mistress."

After leaving the Navy, Decatur demonstrated a flair for design and decoration, and devoted much of his energy to the Federal-style home he

had built across the street from Lafayette Square in Washington, D.C., just one block from the White House, where Decatur frequently dined with his friends President James and Dolly Madison. Decatur was killed in 1820 at the age of forty-one in a duel with a former Naval officer who felt he had been mistreated by a commission that had included the commodore.

AS THE AMERICAN MILITARY'S SIZE GREW in the generations that followed, so did the presence of gays in uniform. Numerous documents cite the service of homosexual soldiers during the Civil War. While living in Washington, D.C., in 1862 and 1863 poet Walt Whitman recorded in his diaries that he "slept with" a soldier named Daniel Spencer, a "somewhat feminine" man from the Second New York Light Artillery, as well as soldiers from two other regiments, one of whom he met at Fort Greene. That war also records the first apparent lesbians documented to have served in the U.S. military. In his memoirs, Union General Philip Sheridan wrote of two women disguised as men who fought in the Fifteenth Missouri Regiment. Sheridan learned of the pair after they got drunk on applejack one day and nearly drowned in the Stone River. The soldiers who resuscitated them discerned the truth. "An intimacy had sprung up between" the women, Sheridan wrote, adding that one was so masculine as to be able to pass as a man with ease while the other was much more "prepossessing." Both women were transported behind friendly lines.

The Confederate Army also appeared to have a celebrated gay general in Major General Patrick Ronayne Cleburne, a daring fighter whose attacks on the western fronts of the Civil War made him known as the "Stonewall Jackson of the West." A native of Cork, Ireland, Cleburne served in the British army before emigrating to Arkansas, where he became a successful attorney. The lifelong bachelor enlisted as a private in the Confederate Army when war broke out. He soon became captain of his company and then colonel of his regiment. The drilling and organization skills he had learned in the British army made him a valuable asset to the Confederacy, and by 1862 he was promoted to brigadier general and later to major general.

Cleburne's intimate relationship with his twenty-two-year-old adjutant, Captain Irving Ashby Buck, drew the notice of the general's colleagues. Cleburne's biographer John Francis Maguire wrote that the general's "attachment" to Buck "was a very strong one" and that Buck "for nearly two years of the war, shared Cleburne's labors during the day and his blankets at night." Buck himself wrote that the pair were "close and confidential. I habitually messed with him and shared his tent and often his blankets."

When Buck was wounded in September 1864, Cleburne ordered the surgeons at his hospital to give him special care because "he is the best adjutant general in the Army." Buck survived his wounds, but he never

saw his general again. On November 30, 1864, Cleburne was killed while leading his troops against the Union front line in the Battle of Franklin, Tennessee.

WHEN THE CIVIL WAR ended and the Army's concerns shifted to battling the Indians, stories of gay soldiers moved westward. There was, for example, the story of Mrs. Nash, who, according to writer Don Rickey, Jr., lived with "a succession of soldier-husbands" between 1868 and 1878 in western forts. Though her husbands left the service, Mrs. Nash stayed at the Army fort and would marry another soldier. In 1878, Mrs. Nash was married to a corporal in General George Armstrong Custer's Seventh Cavalry stationed at Fort Meade, Dakota Territory. While the corporal was on a prolonged campaign, Mrs. Nash passed away. As other soldiers' wives prepared her body for burial, they discovered that Mrs. Nash was a man. When her husband returned and the story became public, he shot himself with his Army revolver.

Gays also served in World War I, in all the armies involved. Author Radclyffe Hall memorialized the work of British lesbian ambulance drivers on the Allied front in her book *The Well of Loneliness*, now considered the earliest lesbian novel. Poet Wilfred Owen, a British soldier, wrote homoerotically of other male soldiers before his death at the front in France in 1918. The German sex researcher Dr. Magnus Hirschfeld documented the stories of a number of gay soldiers who performed heroics for the German army during that conflict.

It was during World War I that the punishment of homosexual soldiers was first codified in American military law. The Articles of War of 1916, which became effective the next year, included assault with the intent to commit sodomy as a felony crime. This law, the first revision of the Articles of War in more than a century, did not name sodomy itself as a crime, but a new revision of the Articles of War three years later did, for the first time, include sodomy as a specific felony, the crime now being the sexual act itself, whether it involved assault or was consensual. Through the 1920s and 1930s, homosexuality was dealt with as a criminal act, a move that saw huge numbers of gay sailors and soldiers imprisoned.

The idea of excluding people for having a homosexual orientation, as opposed to punishing only those who committed homosexual acts, was born during World War I, and advanced by practitioners in the fledgling field of psychiatry. After San Francisco police found a number of soldiers during a raid on a gay club, a San Francisco psychiatrist, Dr. Albert Abrams, wrote in September 1918 that while "recruiting the elements which make up our invincible army, we cannot ignore what is obvious and which will militate against the combative prowess of our forces in this war. . . . From a military viewpoint, the homosexualist is not only dangerous, but an ineffective fighter. . . . It is imperative that homosexualists be recognized by the military authorities."

It was in this period that the first attempt to purge an installation of homosexuals was recorded. Upon his assignment to the Naval Training Station in Newport, Rhode Island, in 1919, Chief Machinist's Mate Ervin Arnold, who had been a police investigator in civilian life before enlisting in the Navy, decided to launch his own investigation of gays in the Navy there. He eventually secured approval for the plan from superiors, and then persuaded seven enlisted men to entrap suspected gays, largely at the local YMCA. After three months, Arnold expanded his investigation, until a number of presumably gay sailors had been caught, court-martialed for sodomy, and sentenced to prison terms, usually of five to six years.

Civilians were caught up in Arnold's investigation, too, most notably the Reverend Samuel Neal Kent, who had been commended by the Army for his work in tending ailing soldiers during the deadly Spanish influenza outbreak a year earlier. The charges brought Newport's clergy to Neal's defense, which provoked national press coverage of the purge. Rather than siding with the Navy, newspaper editorials questioned why sailors were being dispatched to have sex with others. Two courts of inquiry investigated the operation. The latter censured Arnold, who was soon discharged, and the Navy officials who approved the operation.

A Senate subcommittee held hearings in 1920. With a Republican majority, the Senate was particularly interested in the involvement of Assistant Navy Secretary Franklin D. Roosevelt, who had approved the operation and who was the Democratic nominee for Vice President that year. The subcommittee condemned the probe and called upon the Navy to offer better treatment to those accused of "perverted acts," including an end of imprisonment of gays. "Perversion is not a crime in one sense, but a disease that should properly be treated in a hospital," the senators concluded. The report, however, marked the last time that the government would condemn a purge of homosexuals in the military for the next seventy years.

THE MOVE TO TRANSFORM HOMOSEXUALITY from crime to illness occurred during the great mobilization of World War II. The armed forces were faced with the gargantuan task of enlisting 16 million soldiers and sailors between 1941 and 1945, and turned to the field of psychiatry to help establish guidelines that would help winnow out those who might not be fit to be soldiers. For psychiatry, a relatively new field still held in disrespect in many scientific circles, this task was a mark of its legitimization. Since almost all psychiatrists, from the days of Freud on, had viewed homosexuality as a pathology, the psychiatrists helped formulate regulations that banned all those with "homosexual tendencies" from the military. In 1942, the first regulations instructing military psychiatrists to discriminate between the homosexual and the "normal" person were promulgated, with the notation that "persons habitually or occasionally engaged in homosexual or other perverse sexual practices" were "unsuitable

for military service." In 1943, the final regulations were declared, banning homosexuals from all branches of the military, and they have remained fundamentally unchanged in the half century since then. Though the exclusions would lead to untold injustices and horrors in later years, they were initially written as an enlightened and even compassionate treatment of homosexuality.

FROM THE START, the regulations—and rationale offered for them—were clearly designed to bend with the needs of the time. When the Army needed more men by the end of the war, for example, new edicts allowed for the military to retain "reclaimable" homosexuals, after an appropriate time of hospitalization. Though the policy remained the same over the years, the rationale for it changed to reflect prevailing attitudes. During the anti-Communist hysteria of the McCarthy era, for example, "national security" was advanced as the central reason for keeping gays out of government service. In more recent years, when the notion that gays are potential traitors has seemed less plausible, the most often articulated reason for excluding homosexuals from the military is that their presence would undermine the "good order, discipline and morale" of the fighting forces.

For all the talk against them, gays remained a significant component of the U.S. armed forces. In fact, the refusal of homosexual recruits to declare their "tendencies" had brass in World War II worrying for the first time about the problem of the "reverse malingerer." There has not been a military operation in the last half century in which gay soldiers have not played a part, very often with honor.

In World War II, gay soldiers died on the decks of the USS *Arizona* in Pearl Harbor and spilled their blood on the sands of innumerable South Pacific islands. They died at Inchon and in the rice paddies of Vietnam. In more recent years, they parachuted into Grenada, suffocated in the rubble of Marine barracks in Beirut, and dug foxholes in the shifting sands of Saudi Arabia, Iraq, and Kuwait.

THE FATE OF LIEUTENANT ENSLIN, the first man known to be cashiered from the American military for homosexuality, remains a mystery. His name does not appear on any of the young nation's census rolls from 1790, 1800, or 1810, indicating that he probably abandoned whatever dreams he might have had for a new life in America and returned to Germany.

History seemed determined to tie together the disparate stories of early homosexual heroes in the American military. Decatur's first achievements in the Barbary wars, for example, were overshadowed in the United States by the news that Vice President Aaron Burr, who had presided over the first court-martial of a gay American soldier, had killed Alexander

Hamilton, the presumably homosexual colonel who had befriended the nation's first gay general. A monument commemorating the service of Baron von Steuben now sits in Lafayette Square, directly across the street from the redbrick home Stephen Decatur took such pains to redecorate in his last years.

After the Revolution, and after the Continental Army became the United States Army, Steuben retired to a farm in upstate New York and a government pension, but he still had ambitious plans for the American military. His proposals led to the creation of the United States Military Academy at West Point. The blue book he authored was the Army's official drilling manual until the War of 1812.

He remained devoted to two young captains who had served as his aides-de-camp, and his last will named them his "adopted children" and only heirs. When he died at the age of sixty-four in 1794, one of those captains laid his body in an unmarked grave in a forest near Utica, New York. By then, he was a national hero. The key Army post in the new territory of Ohio was named for him, Fort Steuben, and the nearby town was called Steubenville. Near the general's grave, a bronze plaque was fixed on a granite boulder with the inscription "Indispensable to the Achievement of American Independence."

X

95340-0001

Textbook of Homosexuality and Mental Health

Edited by
Robert P. Cabaj, M.D.
Terry S. Stein, M.D.

1996



Washington, DC
London, England

Note: The authors have worked to ensure that all information in this book concerning drug dosages, schedules, and routes of administration is accurate as of the time of publication and consistent with standards set by the U.S. Food and Drug Administration and the general medical community. As medical research and practice advance, however, therapeutic standards may change. For this reason and because human and mechanical errors sometimes occur, we recommend that readers follow the advice of a physician who is directly involved in their care or the care of a member of their family.

Books published by the American Psychiatric Press, Inc., represent the views and opinions of the individual authors and do not necessarily represent the policies and opinions of the Press or the American Psychiatric Association.

Copyright © 1996 American Psychiatric Press, Inc.

ALL RIGHTS RESERVED

Manufactured in the United States of America on acid-free paper

99 98 97 96 4 3 2 1

Chapter

American Psychiatric Press, Inc.

1400 K Street, N.W., Washington, DC 20005

Chapter

Library of Congress Cataloging-in-Publication Data

Textbook of homosexuality and mental health / edited by Robert P. Cabaj, Terry S. Stein.

Chapter

p. cm.

Includes bibliographical references and index.

ISBN 0-88048-716-X

1. Gays—Mental health. 2. Bisexuals—Mental health.

3. Psychotherapy. 4. Homosexuality. 5. Bisexuality. I. Cabaj,

Robert P., 1948— II. Stein, Terry S., 1945—

RC451.4.G39G656 1996

616.89'008'664—dc20

95-47271

CIP

Chapter

British Library Cataloguing in Publication Data

A CIP record is available from the British Library.

14

Sexual Orientation Identity Formation

A Western Phenomenon

Vivienne Cass, Ph.D.

In the past 25 years concepts such as "lesbian identity," "gay identity," "bisexual identity," and "coming out" have become an established part of the Western mental health practitioner's vocabulary. Without question we now assume that being lesbian, gay, bisexual, or heterosexual is a real event or experience, that being heterosexual is the default identity, and that homosexual and bisexual identities emerge after a unique process of psychological development.

These assumptions have been reinforced by a now considerable body of literature that has focused on the process by which individuals acquire a lesbian or gay identity (Ponse 1978; Raphael 1974; Schafer 1976, drawing on a sociological career-path approach; Plummer 1975; Trolden 1979; Weinberg 1983, drawing on symbolic interactionism; Cass 1979, 1984, 1985, 1990; Coleman 1981-2; Malyon 1982; Minton

and McDonald 1983-4; Schippers 1989, taking a psychological perspective). Some of these models of homosexual identity formation have been adopted by mental health professionals as a useful tool in helping clients "find themselves," "feel better about being lesbian, gay, or bisexual," "come to terms with a lesbian or gay sexual orientation," "find their true selves," and so on.

However, many mental health professionals (as well as theorists and researchers, unfortunately) have taken an ethnocentric viewpoint, making the incorrect assumption that all these concepts and processes are universal "truths" or "facts" that may be found in the psychology of all people, regardless of culture and social background. This viewpoint has been called the "essentialist approach" (see Chapter 6 by Stein; E. Stein 1992).

As a result of anthropological and historical evidence published in the last decade, we now know that many non-Western cultures take quite different viewpoints. Concepts such as sexual preference and orientation, sexual identity, coming out, homosexual identity formation, and bisexual identity, as well as some of the behaviors that (from a Western perspective) express these notions, do not exist in many of the world's sociocultural contexts. We also know that these concepts have not always existed in Western settings. From this it must be concluded that our ideas on sexual orientation and identity are specific to Western cultures at this particular period in our history (or to cultures that have been influenced by modern Western cultures). Such conclusions represent the social constructionist approach.

It is important for Western mental health practitioners to understand this broad context as they work with clients on issues of homosexual and bisexual identity formation. Several important implications arise from the constructionist understanding, such as the need to be aware of imposing our cultural norms on people from different sociocultural contexts and the need to recognize that ideas of sexual orientation, identity, and identity development may alter over time and hence may lead to changes in behavior.

Nevertheless, we cannot ignore the fact that practitioners regularly encounter clients who exhibit essentialist attitudes and behaviors—believing, for example, that their sexual attractions are a fixed part of their inner psychology and believing that the development of a lesbian, gay, or bisexual identity is a logical extension of this orientation. Hence, Western mental health professionals are required to work within a framework that accommodates the essentialist thinking

of their clients on which the

The approach described in this constructionist approach (Shot this perspective dictionary per

Social

Constructive relativist. much of psychological and sociocultural contexts (The latter which most

Within this system human psychology is integrated accepted as information of psychological concepts and nations, and theories direct about them. Psychology defines intricate relations of the

Part of knowledge of sexual c

logical per-
 ation have
 in helping
 gay, or bi-
 on," "find

orists and
 int. mak-
 cesses are
 ogy of all
 point has
 : E. Stein

lished in
 ke quite
 orienta-
 tion, and
 Western
 e world's
 e not al-
 led that
 Western
 hat have
 is repre-

under-
 homo-
 ications
 d to be
 ent so-
 al orie-
 ne and

s regu-
 behav-
 a fixed
 ent of
 orien-
 red to
 inking

of their clients, while recognizing the constructed nature of the issues on which their work is based.

The author's theory of lesbian and gay identity formation, described in this chapter, lies within such a framework. Known as *social constructionist psychology* (Bond 1988; Gergen 1985; Semin and Gergen 1990; Shotter 1991; Shweder and Levine 1992; Stigler et al. 1992), this perspective seems most able to integrate these seemingly contradictory perspectives.

Social Constructionist Psychology and Sexual Orientation Identity Formation

Constructionist psychology, although neither antiuniversalist nor anti-relativist, has identified broad-based support for its basic premise that *much of psychological functioning and human behavior is specific to the sociocultural environment in which people live, rather than the result of inner psychological mechanisms that can be found universally in all human beings.* (The latter view epitomizes the traditional psychology perspective in which most mental health practitioners have been trained.)

Within each sociocultural environment, setting, or world there exists an *indigenous psychology* (Heelas and Lock 1981), a system of psychological knowledge that forms part of the culture in which it resides. This system contains everything each world holds as the truth about human psychology (why human beings act the way they do) and is so integrated within the culture as to be taken for granted, that is, simply accepted as "the way things are." The indigenous psychology includes information about what constitutes a psychological concept; the kinds of psychological processes that occur; the behaviors that define these concepts and processes; and even the psychological problems, explanations, and solutions that exist in that culture. Indigenous psychologies direct and constrain the way individuals act, feel, think, and talk about themselves and others. In other words, each indigenous psychology defines a specific psychological reality for its people, a reality that is intricately linked with the ideological, moral, and historical foundations of the sociocultural setting.

Part of Western indigenous psychology is a system of "sexual" knowledge that informs us of the existence of sexual orientations and of sexual orientation identities, identifying behaviors, processes, and

explanations that allow us to hold an understanding of what these concepts mean. We are acculturated with this knowledge, taking for granted a psychological reality that is assumed to have sexual orientations and related types or identities. Expressed in the language of essentialism, we perceive that lesbian, gay, bisexual, and heterosexual types of people exist and experience themselves as such; that development of a lesbian, gay, bisexual, or heterosexual identity occurs in a fairly predictable way; and so on. Hence some individuals are led by their Western indigenous psychology to experience *being* homosexual, bisexual, or heterosexual.

According to social constructionist psychology, *behavior (including actions, thoughts, and feelings) arises out of the relationship between individuals (both their biological and psychological capacities) and their sociocultural environments (including the indigenous psychology)*—a relationship that may be characterized as a process of *reciprocal interaction*, in which human beings simultaneously influence and are influenced by their environments during continual interchanges. Although biological and psychological capacities may include human processes that are universal as well as specific, the constructionist perspective recognizes that these factors can never be taken on their own as causes of behavior but must be seen as part of a larger process of reciprocal interaction.

According to this proposal, *lesbian, gay, or bisexual identity formation* is not a process of simply "finding an inner sense of self," as it has been traditionally formulated. Rather, *it is one in which people translate the everyday understanding of lesbian, gay, or bisexual identity provided by the Western indigenous psychologies into knowledge, behaviors, beliefs, and experiences about themselves via the process of reciprocal interaction.*

This understanding of identity formation calls for a shift in the thinking of mental health practitioners who have previously adopted the traditional psychological approach that a lesbian, gay, or bisexual identity is the result of inner developmental processes. Rather than a focus solely on inner psychological processes, it is the relationship between individual and environment, represented often in patterns of interaction between people, that now requires our attention.

Constructionist psychology directs us to ask quite different questions: What are the processes by which people come to move from a third-person approach to homosexuality or bisexuality ("Some people are lesbian, gay, or bisexual") to a first-person perspective ("I am a lesbian, gay, or bisexual")? How is it that Western individuals come to translate societal knowledge about sexual orientation into self-knowledge.

making se
of lesbian

Lesbi
stant und
lesbian."
of constar
relationsh

Howe
homosex
must also
Derived fr
our client
"needing
cant West
identity ir
personal
practition
lesbian, g
guided by
structed c
hand, mu
and signif

Stage

Within the
widely hel
the questi
feelings of
ing on the
emerges a
uality and

Identi
bility that
relevant to
called hor
interaction
and his or
change th

these con-
 cking for
 l orienta-
 ge of es-
 rosexual
 develop-
 curs in a
 re led by
 rosexual,

including
 individu-
 ocultural
 hip that
 hich hu-
 eir envi-
 ical and
 univer-
 zes that
 vior but
 on.
 ormation
 has been
 state the
 d by the
 nd expe-

in the
 dopted
 usexual
 than a
 hip be-
 erns of

t ques-
 from a
 people
 a les-
 trans-
 ledge,

making sense of and accounting for themselves by claiming the identity of lesbian, gay, or bisexual?

Lesbian, gay, or bisexual identity, in this sense, is a relatively constant understanding (perception, feeling, and experience) of self as "a lesbian," "a gay man," or "a bisexual" that arises (is constructed) out of constant and stable elements and processes within the interactional relationship between individuals and their environment.

However, against this understanding of the constructed nature of homosexual or bisexual identity formation, mental health practitioners must also recognize their clients' perceptions of what is happening. Derived from the indigenous psychology, the psychological reality for our clients is that they are "searching for identity," "finding myself," "needing to be a whole person." Their understanding draws on significant Western indigenous concepts such as personal growth, maturity, identity integration, and self-development to direct their needs and personal desires. We must give weight to these experiences. Hence practitioners, on the one hand, must acknowledge the formation of a lesbian, gay, or bisexual identity as a Western phenomenon that is guided by the directive of Western indigenous psychologies and constructed out of the reciprocal interaction process, and on the other hand, must simply accept their clients' psychological realities as real and significant experiences for them.

Stages in Lesbian and Gay Identity Formation

Within the lesbian and gay communities, the coming-out story is a widely held fact or truth. For the mental health practitioner, however, the question arises as to how this narrative becomes translated into feelings of identity. The following model describes this process, focusing on the evolving understanding of self as a lesbian or gay man that emerges as individuals confront and internalize notions of homosexuality and coming out that exist within their social environment.

Identity formation begins when someone first considers the possibility that the Western indigenous concept of homosexuality may be relevant to self ("There is something about my behavior that could be called homosexual, gay, or lesbian"). This awareness enters into the interactional relationship that exists between the individual concerned and his or her sociocultural setting. The ensuing sequences of interchange that result are never random but are constrained by the Western

indigenous psychology as well as by the biological and psychological capacities of human beings.

As a result of these constraints, it is possible in Western cultures to identify patterns of interaction that give rise to differing degrees of cognitive awareness, self-understanding, and sense of identity in relation to the concept of homosexual sexual orientation and the impact these levels of self-knowledge have on the management of social interchanges.

The author has described these patterns as the six stages of identity formation (Cass 1979). The markers for each stage are provided by different levels of self-understanding that indicate an increasingly first-person account of self as lesbian or gay. These stages of identity formation are titled as follows: Stage 1—Identity Confusion, Stage 2—Identity Comparison, Stage 3—Identity Tolerance, Stage 4—Identity Acceptance, Stage 5—Identity Pride, Stage 6—Identity Synthesis.

Within each stage several pathways of interaction have been outlined, although these can be mentioned only briefly in this chapter. Although not detailed here, the process of reciprocal interaction leading to identity formation is complex and multivariable as individual factors (such as needs, desires, and learned behaviors) interact with biological factors (such as level of sexual desire) and environmental variables (such as social class, race, and location).

Each stage brings with it the following changes: 1) increasing use of the concept of homosexual, lesbian, or gay to account for and understand self; 2) use of terms "lesbian" or "gay" as an explanation of self within an increasingly wider number of interpersonal interchanges; 3) development of increasingly positive feelings about *being* a lesbian or gay man; 4) increasing belief that one belongs to the lesbian or gay social group and strengthening social ties with other lesbians or gay men; 5) gradual acceptance of positive values about homosexuals as a social group; 6) increasing independence from heterosexual values; and 7) a gradual shift in use of the concept of homosexual, lesbian, or gay from a means of labeling self to description of an inner belief in self.

Several factors (also defined by Western indigenous psychology) motivate people to adopt an understanding of self that is viewed negatively by (some) others: the need to maintain consistency in who we are; the need to increase and maintain positive feelings about ourselves or enhance self-esteem; adherence to the implicit cultural theory that if we experience sexual or emotional attraction to someone of the same sex we must *be* a lesbian or gay man; belief in other cultural "truths"

about the importance of the imperative behavior by refer

Because human capacity to act or some individuals to prevent the process is term

In addition, sure, the occurrence can be restricted when necessary to enable people, the ability to recognize activities within the conditions, emotions, capacities are limited, disabled, mental formation and

Although lesbian and gay fronting personalized social categories of the model individuals.

■ Prestige

Before the concept of personal relevance, understanding of a sociocultural set of "not lesbian or supposed to part of the male; and they able and hon

However, formation process sociocultural fa

about the importance of finding one's identity and being true to self; the imperative in some Western languages to describe persistent behavior by reference to a noun, for example, "I am a tennis player."

Because human beings are intentional creatures who have the capacity to act on as well as be acted on by their sociocultural context, some individuals will dynamically engage with their environment so as to prevent the acquisition of a lesbian or gay self-understanding. This process is termed "foreclosure."

In addition to individuals directing their actions toward foreclosure, the occurrence of homosexual identity formation processes will be restricted where there is an absence of those psychological capacities necessary to engage in the process of reciprocal interaction; for example, the ability to be self-aware; to learn and use language and meaning; to recognize actions for which one is held responsible; to be acculturated within the indigenous psychology; and to identify physical sensations, emotions, and cognitions as linked to homosexuality. Where such capacities are lacking—as may be seen in very young, developmentally disabled, mentally ill, and cognitively impaired individuals—identity formation and the maintenance of identity will not take place.

Although the following description applies to the development of lesbian and gay self-understanding, the psychological process of confronting personal information that relates to membership in a stigmatized social category is considered a generic one. Informal adaptations of the model have already been made to bisexual and cross-dressing individuals.

■ Prestage 1

Before the concept of homosexual, lesbian, or gay has acquired any personal relevance, Western individuals have already developed an understanding of themselves from previous engagement with the sociocultural setting: They assume their sexual orientation identity is that of "not lesbian/gay" or "not lesbian" or "not gay" and "heterosexual" or *supposed* to be heterosexual; they consider themselves more or less part of the majority group (heterosexuals) or recognize that they should be; and they understand that heterosexuality is desirable and acceptable and homosexuality is stigmatized and has minority status.

However, each individual also brings a uniqueness to the identity formation process. Differences exist in relation to personal and sociocultural factors such as the degree of negativity or positivity with

of psychological
tern cultures to
ing degrees of
identity in rela-
and the impact
of social inter-

ages of identity
provided by dif-
creasingly first-
es of identity
on, Stage 2—
e 4—Identity
ynthesis.

ive been out-
this chapter.
raction lead-
is individual
interact with
environmental

using use of
and under-
ation of self
interchanges;
a lesbian or
or gay social
"gay men;
as a social
s; and 7) a
gay from
self.

psychology)
wed nega-
how we are;
rselves or
ry that if
the same
"truths"

which homosexuality and heterosexuality are perceived, the specific personal needs of individuals, levels and types of social support, personal styles in conflict management and communication patterns, and gender- and race-related experiences.

■ Stage 1—Identity Confusion

Stage 1 is marked by the first attempt to translate the concept of homosexual, lesbian, or gay from a third-person to a first-person perspective. Individuals observe, "There is something about my behavior (acts, thoughts, and feelings) that could be called homosexual, lesbian, or gay." When the observation has strong impact or when the homosexual interpretation of behavior persists, there is a questioning of self: "Does this mean I may be a lesbian/gay man?" "Am I really heterosexual?" "Who am I?" These are powerful questions to ask in a society such as ours and result in emotional reactions ranging from curiosity, bewilderment, and confusion to extreme turmoil.

The primary focus at Stage 1 is to cope with the confusion about who one is, to resolve the inconsistency brought about by attaching homosexual meaning to one's own behavior, and to reduce the discomfort that arises if this meaning is seen as undesirable; in other words, to deal with the impact on personal interchanges of labeling one's own behavior as "lesbian" or "gay."

Three patterns or pathways of interaction can be described at this stage (Figure 14-1), leading to two alternative end points: *either* the claim, "I may be a lesbian or gay man; I may not be heterosexual" *or* the rejection of any homosexual meaning as being relevant to one's own behavior (foreclosure). *Pathway 1* occurs for those individuals who accept the meaning of homosexual, lesbian, or gay to be an accurate and desirable account of their behavior. Using strategies to neutralize society's negativity toward homosexuality, they are led to consider, "I may be a lesbian/gay man; I may not be heterosexual" and to view this self-image positively.

Pathway 2 takes place when individuals accept the correctness of the homosexual meaning they place on their behavior but find this meaning undesirable. They then engage in actions to stop all relevant behaviors and so remove this undesirable element. If successful, they can return to an account of their behavior as nonhomosexual (foreclosure). If unsuccessful, the possibility of being lesbian or gay is acknowledged, although from a negative perspective.

Meaning of behavior
'not lesbian/gay'
FORECLOSURE

Meaning of behavior
'lesbian/gay'

Figure 14-1.

the specific support, patterns, and

of homorespective, behavior (acts, lesbian, or homosexual self: "Does homosexual?" identity such as bewildered-

vision about attaching the discom- her words, one's own

ed at this either the sexual" or t to one's duals who accurate neutralize insider. "I view this

ctness of find this relevant ful, they foreclo- acknowl-

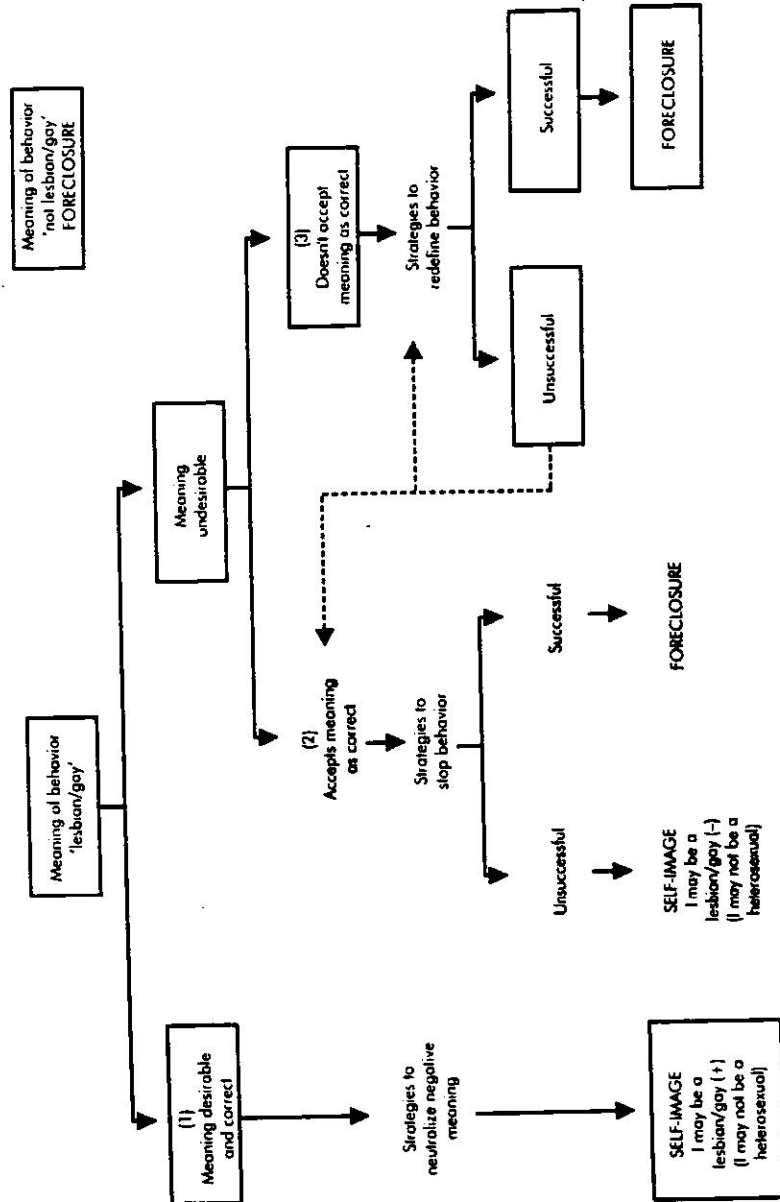


Figure 14-1. Stage 1 pathways of lesbian/gay identity formation.

Pathway 3 occurs when the meaning of one's behavior is considered neither correct nor desirable. The focus then becomes one of redefining this behavior to mean nonhomosexual. This redefinition can be done by changing either the meaning of the actions engaged in ("It was just the kiss of loving friends") or the meaning of the situation in which the behavior occurred, so that a stance of personal innocence can be adopted ("I was taken advantage of"). If successfully done, the original meaning of "heterosexual" is regained (foreclosure). Individuals unable to redefine their behavior are forced to accept that the meaning of lesbian or gay is applicable, and so they continue along Pathway 2.

■ Stage 2—Identity Comparison

Emerging from Stage 1 are two groups of individuals expressing the first tentative shift toward a homosexual, lesbian, or gay account of themselves: those positively disposed toward the self-image of "may be homosexual and may not be heterosexual" and those feeling negatively. Both groups now begin to consider the implications of this potential identity. Given Western approaches to lesbians and gay men, concerns surface about being different, ostracized, part of a minority, and at odds with society. The weight of possible membership in a negatively valued minority group is strongly felt. Feelings of alienation and estrangement are experienced. Furthermore, because the previously assumed heterosexual identity is now questioned, there is growing recognition that all plans and expectations linked with the heterosexual sexual orientation—for example, having children—may no longer apply. The continuity among past, present, and future is gone, leaving a sense of loss. Responses vary from intense feelings of rejection and grief to a sense of comfort as previous feelings of being different from others become clarified by the new self-understanding.

Individuals at Stage 2 engage in behaviors aimed at coping with the loss of direction, managing feelings of alienation and difference, and dealing with the incongruency provided by these events ("My behavior is lesbian/gay: I may be lesbian/gay but others see me as heterosexual"). Most pertinent to the way social interchanges are now handled is the degree to which individuals see the holding of a lesbian or gay self-image as bringing more positive consequences for them than negative ones (that is, more rewards than costs).

Four pathways of social interchange can now be described taken by those with 1) positive evaluation of self-image and perceived high

ALTH

dered
defin-
on be
It was
which
in be
ginal
s un-
ning
y 2.

the
t of
be
ely.
tial
rns
lds
ed
nt
to-
all
a-
ri-
s.
e
e

rewards relative to costs: 2) positive evaluation and perceived low rewards; 3) negative evaluation and perceived high rewards; and 4) negative evaluation and perceived low rewards (Figure 14-2). The end point of these processes, when foreclosure does not occur, is the acceptance of the self-image: "I probably am a lesbian/gay man" (accompanied by positive or negative affect).

In *Pathway 1* the positive outlook and perceptions allow individuals to begin to recognize the personal value of lesbians and gay men and homosexuality, and correspondingly, the lack of personal relevance of heterosexuality. This leads to the understanding of self as "I probably am a lesbian/gay [positive evaluation]/probably am not heterosexual." However, those people with positive feelings toward themselves who anticipate costly results from holding a lesbian or gay account of self (*Pathway 2*) attempt to inhibit those overt and covert behaviors considered lesbian or gay in order to be able to reject the self-image of "may be a lesbian" or "may be a gay man." When this is difficult to do, the help of mental health practitioners may be enlisted. If successful, foreclosure will occur. If unsuccessful, the individual will conclude, "I probably am a lesbian/gay man [some degree of negative evaluation]" and adopt strategies to discount or lessen personal responsibility for his or her actions.

In *Pathway 3* attempts are made to deal with this personal conflict by finding ways of making the lesbian or gay account of themselves more palatable. This is done by placing the self-image of "may be a lesbian" or "may be a gay man" into frameworks that allow for an assessment of self as *potentially* heterosexual. There are four such frameworks: *special case* ("If not for this special person whom I love, I would be heterosexual"); *bisexual* ("I can also enjoy relationships with members of the opposite sex if I meet someone I really like"); *temporary* ("I'm just thinking or acting this way [homosexual] for now"); and *personal innocence* ("It's not my fault I've been made this way; with help I could be heterosexual"). *Bisexual* is used in this context as a strategy for reducing the sense of alienation and is distinct from the process of bisexual identity formation. If any of these strategies are successfully carried out, individuals make a partial commitment to the self-image: "I probably am (*partly*) a homosexual/probably not (*entirely*) heterosexual," and they feel less negative about the lesbian or gay account of themselves. If unsuccessfully applied, individuals are forced to move toward acceptance of the self-understanding, "probably a homosexual/probably not heterosexual," with accompanying negative affect.

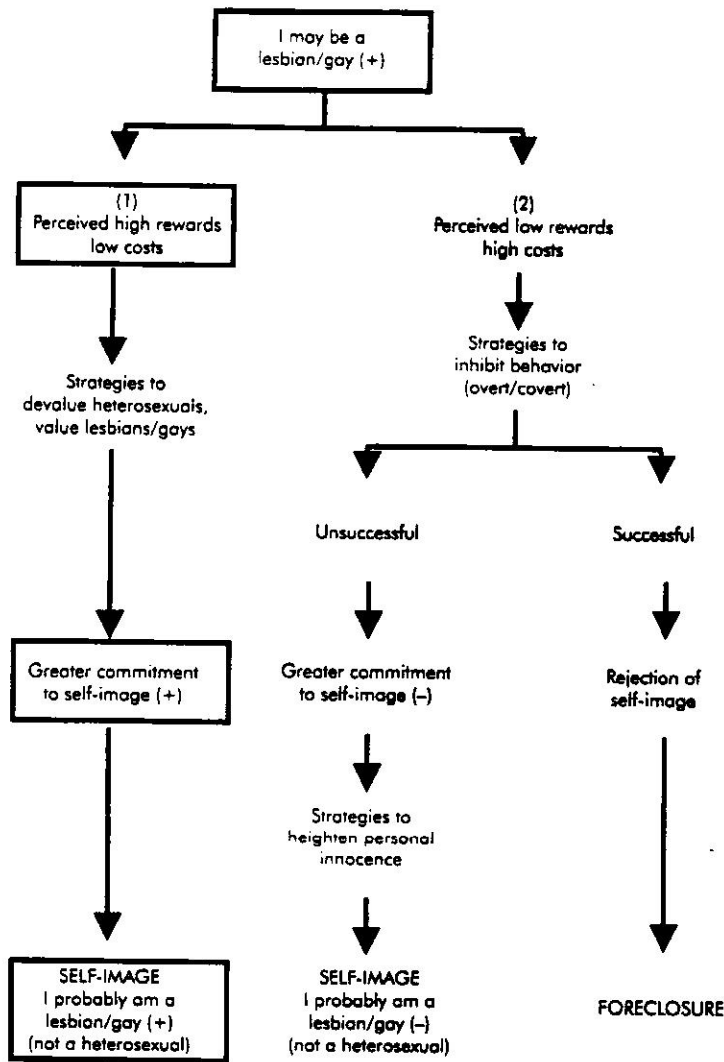


Figure 14-2. Stage 2 pathways of lesbian/gay identity formation.

In *Pathway* understanding actions are ren erosexuality pr closure). If uns of "probably le ation of self), t lead to suicide

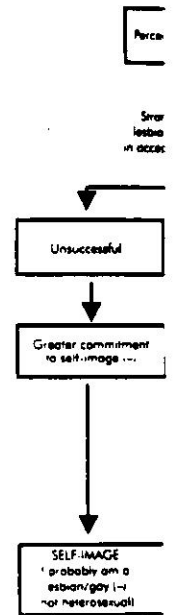


Figure 14-2. 5

In *Pathway 4* there is a move to inhibit all behaviors leading to the understanding of self as "maybe lesbian" or "maybe gay," and these actions are reinforced by devaluing homosexuality and evaluating heterosexuality positively. If successful, the account of self is rejected (foreclosure). If unsuccessful, individuals are forced to accept the self-image of "probably lesbian" or "probably gay" (with increased negative evaluation of self), typically holding extreme levels of self-hatred that may lead to suicide or self-mutilation.

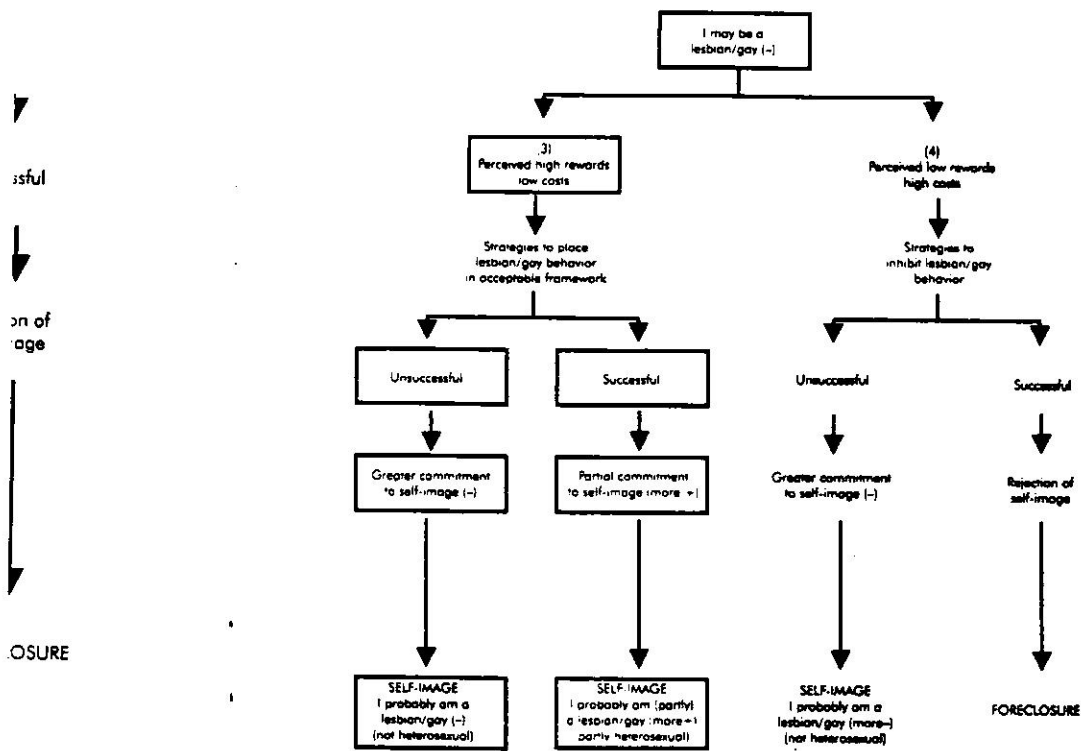


Figure 14-2. Stage 2 pathways of lesbian/gay identity formation. (continued)

■ Stage 3—Identity Tolerance

At Stage 3, three groups of people acknowledge, "I probably am a lesbian/gay man": those who perceive this account as desirable, those who consider it undesirable, and those who feel fairly positive about themselves by adopting the "probably (partly) a lesbian" or "probably (partly) a gay man" account.

Freed from the previous search for an explanation of themselves, individuals at Stage 3 become more focused on social, sexual, and emotional needs that arise from seeing self as probably homosexual. This leads to considered disclosure of their self-image to some others in an attempt to have these needs fulfilled. All actions are guided, however, by awareness of the difference between self as a likely member of a group that is given negative minority status in society and members of the (valued) heterosexual majority with whom they interact. This sense of the heterosexual Goliath residing powerfully over the homosexual David/Dianne leads to an account of self that is couched in a context of *tolerance* of self. Needing to increase self-esteem and to reduce the intensity of alienation feelings, individuals begin to focus on making contact with other lesbians and gay men.

As attempts are made to juggle personal needs within this framework of tolerance, shifts begin to occur in the way individuals perceive themselves. For those who do not foreclose at Stage 3, the self-account "I am a homosexual/gay/lesbian" emerges. The quality of social contacts made with others is a vital factor in the development of this understanding. *Positive* social interchanges provide further evidence of the benefits of accounting for self as lesbian or gay, while *negative* ones are indicative of the high costs that may accompany such an identity. However, even negative contacts with others can have some benefits—for example, hearing positive attitudes about a homosexual sexual orientation—and with time there is increased likelihood of having positive experiences.

Six pathways are available to those who hold 1) a positive account of self as probably lesbian or gay and experience positive contacts, 2) a positive account and negative contacts, 3) a negative account of self and positive contacts, 4) a negative account and negative contacts, 5) a positive account of self as partly lesbian or gay and positive contacts, and 6) a positive account as partly lesbian or gay and negative contacts (Figures 14-3A and 14-3B). Although *Pathway 1* leads to increasing acceptance of the self-image, "I am a gay man/lesbian," *Pathway 2* highlights the personal costs of adopting an understanding of self as lesbian

Pos

Hig
IMore
lesbian
Increase
gay, devc

Incre

SE
les

Figure 1

ly am a les-
those who
about them-
"probably

themselves.
al, and emo-
sexual. This
others in an
ed, however,
number of a
members of
t. This sense
homosexual
in a context
o reduce the
s on making

is framework
ceive them-
count "I am a
ontacts made
nderstanding.
benefits of ac-
licative of the
even negative
hearing posi-
th time there

sitive account
contacts. 2) a
int of self and
acts. 3) a posi-
contacts, and
ative contacts
to increasing
thway 2 high-
self as lesbian

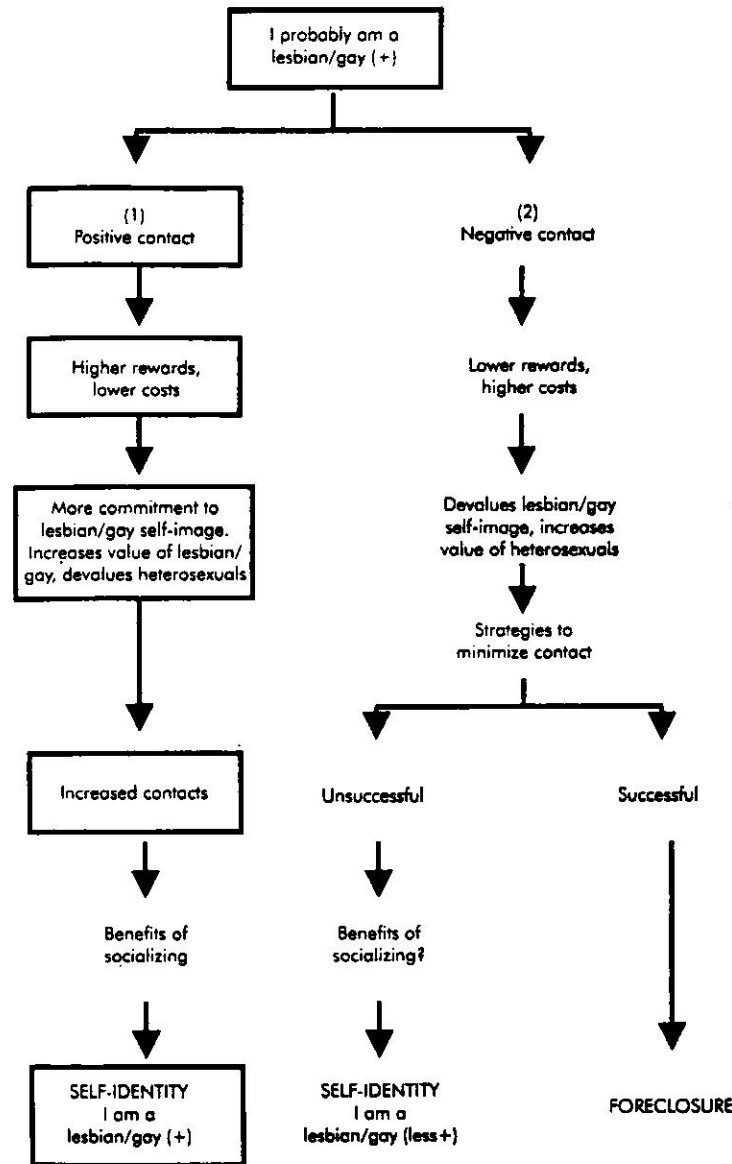


Figure 14-3A. Stage 3 pathways (1-4) of lesbian or gay identity formation.

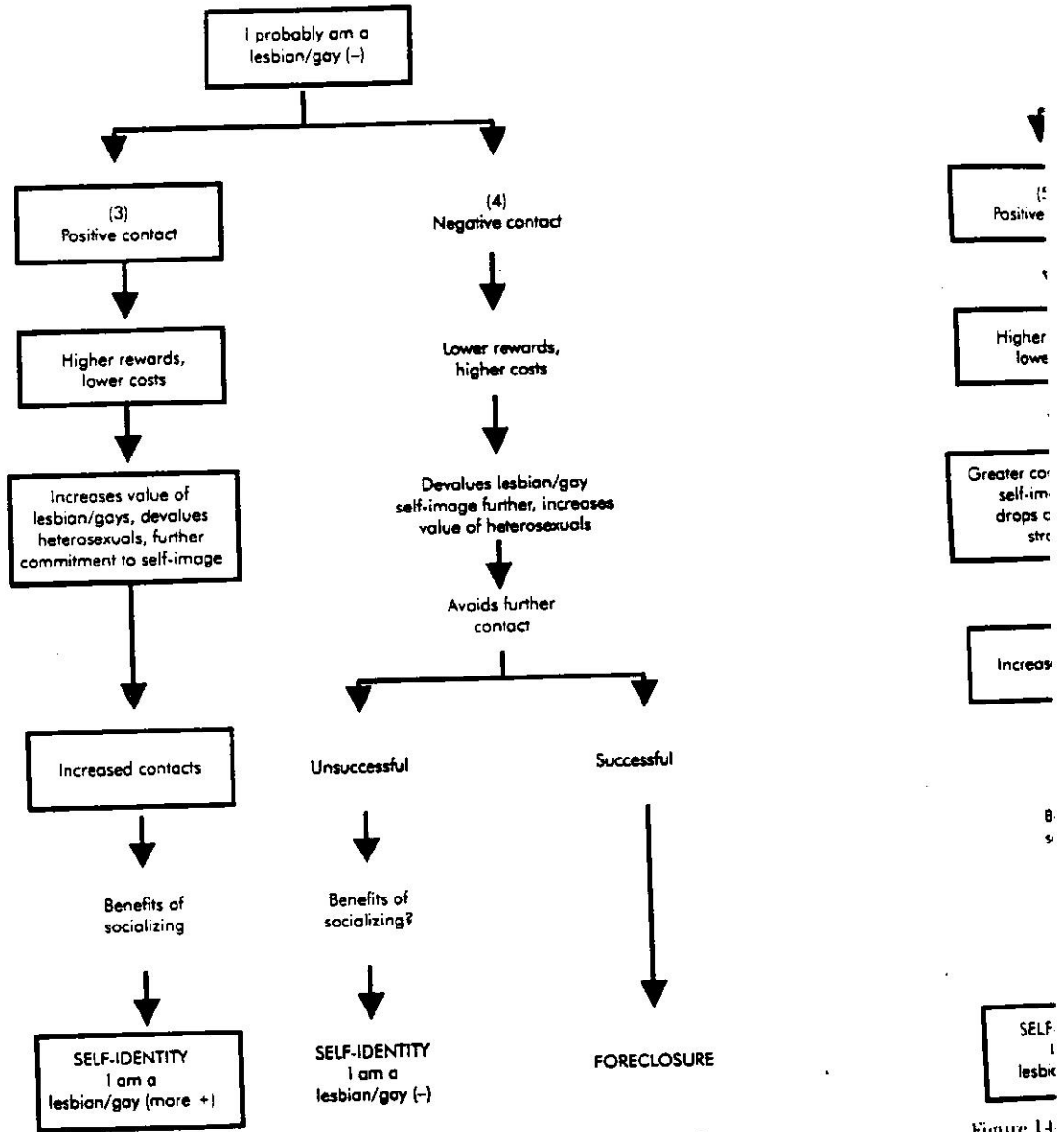


Figure 14-3A. Stage 3 pathways (1-4) of lesbian or gay identity formation. (continued)

Figure 14-

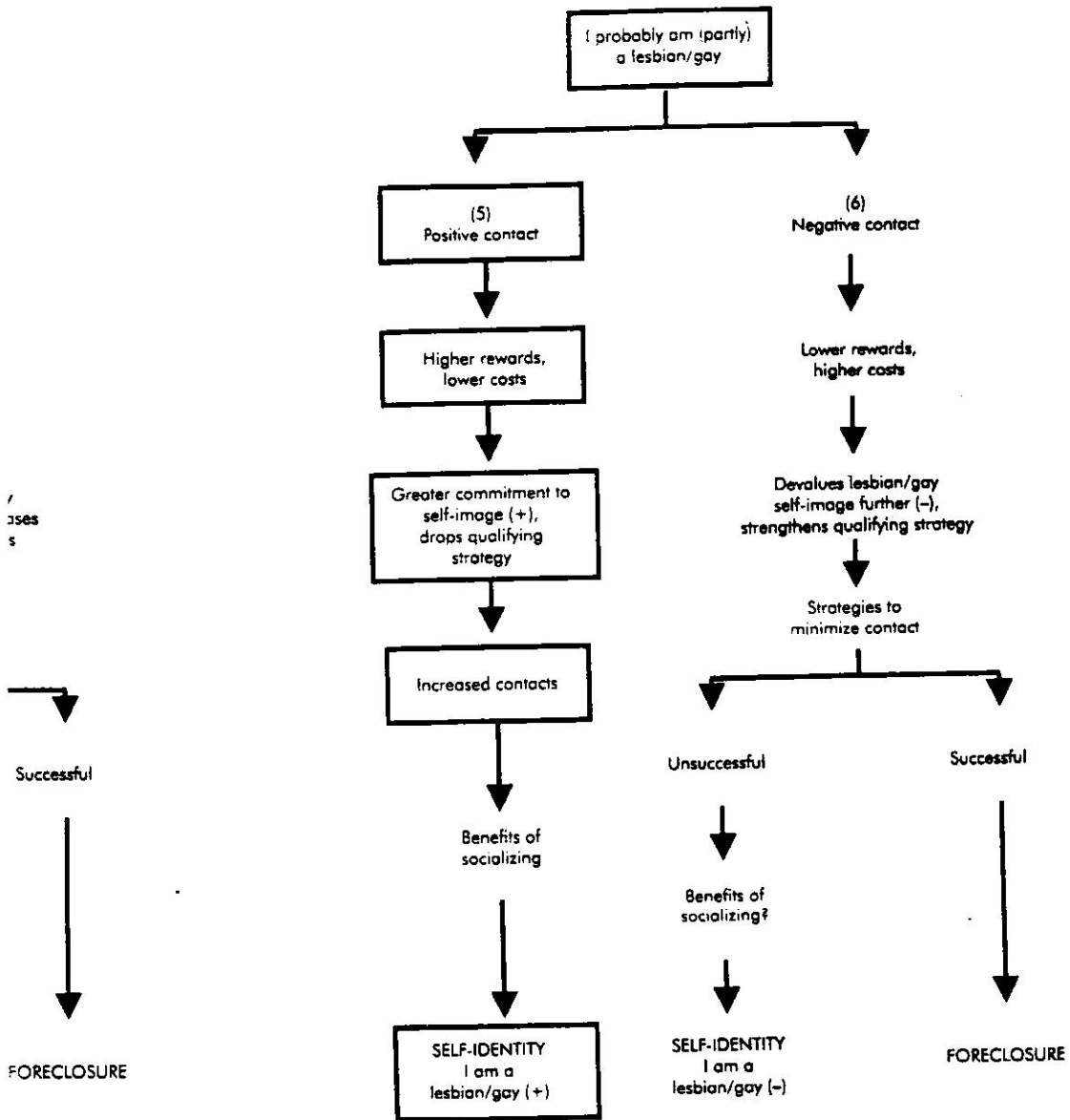


Figure 14-3B. Stage 3 pathways (5 and 6) of lesbian or gay identity formation.

ity formation.

or gay. Strategies are adopted to minimize contact and devalue homosexuality so as to disengage from this account of self. If successful, foreclosure occurs. If unsuccessful, an understanding of self as lesbian or gay emerges that is evaluated less positively than previously.

Similarly, in *Pathway 3* the negativity of the "probably lesbian" or "probably gay" self-understanding is lessened by positive contacts with others, leading to an acceptance that "I am lesbian/gay [more positive evaluation]." On the other hand, the layering of negative experiences on an already negative view of self, as seen in *Pathway 4*, leads to strategies to avoid further contacts and, if successful, leads to foreclosure. If not, a negative understanding of self as lesbian or gay emerges that may be modified if positive contacts with others are experienced.

For those individuals who had previously adopted the strategy of partly lesbian or gay, positive contacts (*Pathway 5*) lead to a greater commitment to self as a lesbian or gay man without use of the qualifier. However, negative contacts will lead to a devaluation of homosexuality (*Pathway 6*) and renewed efforts to maintain the existing account of self as partly lesbian or gay. If these strategies are successful, foreclosure occurs. If not, a somewhat negative account of self as lesbian or gay is adopted.

■ Stage 4—Identity Acceptance

At the beginning of Stage 4 we see individuals who have come to understand themselves as lesbian or gay and hold varying degrees of acceptance in regard to this self-account. However, although the perception of self is clearly formed, the *inner sense of self as lesbian or gay* is still tenuous. Given that individuals at this point are entrenched in the societal belief that heterosexuality is where power and acceptability lie, it is not surprising that little internalization of this experience of self has occurred. During the processes that make up the remaining stages, this inner sense of self as a lesbian or gay person emerges.

With increasing and continued contact with other lesbians and gay men, more and more people come to identify the individual as lesbian or gay, and this encourages a stronger sense of being that kind of person. There is also increased disclosure to selected nonhomosexuals, and this broadens the network of people who reinforce the lesbian or gay understanding of self. These processes allow homosexuality and

homosexuals to be valued as just as good as straight at a personal level by a valid. The sense of being a member of an "out" group in Stage 3 is changed to

For many people, the lack of fulfillment. Provision of support that support the individuals to fit in with a stable account of self and sexuality are anticipated strategies of deliberate (carefully choosing supportive and preparatory certain situations). Supportive people to a

Where carried over, buffered from the current account for themselves; this, I can live with a stance that is reinforcing a private matter. However, these strategies (*Pathway 5*) ("I accept myself as lesbian or gay") The need to resolve the conflict and protect one's self-esteem to the interactional

■ Stage 5—Identity

At Stage 5 individuals experience a differentiation between the perception of this self and the reality. They recognize that this process is made extremely difficult by sexuality.

A "them and us" dynamic from the positionality were rated as

homosexuals to be valued more positively, leading to a belief that "gays are just as good as straights." The power of heterosexuality is diffused at a personal level by the individual seeing homosexuality to be equally valid. The sense of oppression that comes from seeing oneself as a member of an "out group" is offset by these shifts, and the *tolerance* of Stage 3 is changed to *acceptance*.

For many people this stage is characterized by a sense of peace and fulfillment. Provided there is a continuation in the patterns of interaction that support the lesbian or gay understanding of self and that allow individuals to fit in with their sociocultural environment, a settled and stable account of self results. When negative reactions toward homosexuality are anticipated; the status quo is maintained by the use of strategies of deliberate passing as heterosexual, selective disclosure (carefully choosing to disclose one's identity to those likely to be supportive and prepared to uphold the individual's desire for secrecy in certain situations), and limited contact (keeping contact with unsupportive people to a minimum).

When carried out successfully (*Pathway 1*), individuals become buffered from the negativity or oppression of society and are able to account for themselves—"I am a lesbian/gay man and happily accept this; I can live with the minority status that goes with this identity"—a stance that is reinforced by a belief that being a lesbian or gay man is a private matter. However, when individuals cannot or will not maintain these strategies (*Pathway 2*), their minority status is fully experienced ("I accept myself as homosexual, but when others don't I feel awful"). The need to resolve this inconsistency between self and others and to protect one's self-esteem from the heightened sense of alienation leads to the interactional processes found at Stage 5.

■ Stage 5—Identity Pride

At Stage 5 individuals enter interactions with others aware of the difference between their own total acceptance of themselves and the rejection of this self by the sociocultural environment in which they live. They recognize that the desire to fully express a lesbian or gay identity is made extremely difficult because of the dominant focus on heterosexuality.

A "them and us" attitude results in which the scales are tilted away from the position of Stage 4, in which homosexuality and heterosexuality were rated equal. Heterosexuality is markedly devalued, and

homosexuality is given preferred status. The world is now divided into credible or significant lesbians and gays and discredited or devalued heterosexuals. Interactions with the latter are limited, heterosexuals are rejected as a legitimate reference group, and the perceived ideological base on which heterosexuality rests in Western society is attacked. A lesbian or gay account of self is the *preferred* identity. Individuals immerse themselves in the gay and lesbian subculture and experience a strong sense of group identification, expressed in feelings of pride, loyalty, and companionship.

The combination of pride and anger is empowering and leads to the abandonment of strategies to deliberately pass as heterosexual, although nonconcealment may be used as a compromise strategy. However, when thwarted in the drive toward validation as a lesbian or gay man, confrontation results. Lesbian or gay identity has now become a public pronouncement that is at odds with the ideological and moral framework of the sociocultural world in which it emerged. Two pathways are available as individuals process the reactions to their confrontational interactions with others. Those who receive consistently negative reactions take this as predictable evidence that the "them and us" understanding of the world is correct (*Pathway 1*). Feelings of oppression and anger are increased, and heterosexuality is further devalued. The status quo is maintained and foreclosure occurs. For those who receive positive reactions to their confrontational actions (*Pathway 2*), the clear division between them and us cannot be easily upheld. If such reactions are consistent or significant, these bring an incongruent element into the picture, and this element is processed in Stage 6.

■ Stage 6—Identity Synthesis

When personal and ideological understanding of homosexuality is accepted by at least some heterosexuals, the simplistic belief that divided the world into "good" lesbians and gay men and "bad" heterosexuals is rejected (although opposition to heterosexuality as an ideology may still be upheld). Supportive heterosexuals are reevaluated positively and nonsupportive ones further devalued. This has the effect of increasing the network of others with whom the individual interacts positively as a lesbian or gay man. The level of anger, alienation, and frustration is lessened as the "enemy" is reduced in number at a per-

sonal level
manner
seen in 5

Inter-
public le
ence of i
of being
lesbian c
self-este
as the in
something
as a men
to restor
person v

The
Stage 6
driven b
develop
thinking

Imp

The mo
a numb
ing with
formati
gay, lesl
client is
or "I m

Sec
scribe t
18-year
(end of
know,"

Th
behavi
gay ma
ample,

divided into
or devalued
heterosexuals
ceived ide-
society is at-
ed identity.
eculture and
d in feelings

and leads to
rosexual, al-
ategy. How-
bian or gay
ow become a
d and moral
d. Two path-
o their con-
consistently
t the "them
l). Feelings
ity is further
occurs. For
onal actions
not be easily
these bring
ent is proc-

sexuality is ac-
that divided
heterosexuals
deology may
ed positively
effect of in-
teracts posi-
enation, and
ber at a per-

sonal level. Issues of oppression are now addressed in a less defensive manner and the level of identification with the lesbian or gay group seen in Stage 5 is reduced.

Interacting with others as openly lesbian or gay at an increasingly public level deepens and strengthens the inner psychological experience of identity. There is a sense of belonging to the world at large and of being "more than just a lesbian or gay man." Accounting for self as lesbian or gay is now an integrated part of the whole self and reinforces self-esteem and position in the world. This stance will be maintained as the individual's life continues in this way from day to day, unless something occurs to bring the focus back toward an image of the self as a member of the lesbian or gay group. Strategies will then be adopted to restore the individual's sense of being an independent, functioning person who is capable of being in control of his or her life.

The end points of "wholeness" and "personhood" achieved in Stage 6 are directed by the current Western indigenous psychology, driven by notions of individuality, self-actualization, personal maturity, development, and other concepts that form the cornerstone of our thinking.

Implications for Counseling and Psychotherapy

The model described above provides mental health practitioners with a number of counseling guidelines. First, care must be taken when talking with clients to use terms that are appropriate to the stage of identity formation into which they appear to fit. Describing someone as *being* gay, lesbian, or bisexual, for example, is quite inappropriate when the client is actually saying, "I'm confused about what I'm *doing*" (Stage 1) or "I might be . . ." (beginning of Stage 2).

Second, clients should be accepted as being in the stage they describe themselves to be, not where the counselor wants them to be. An 18-year-old woman, for example, who happily claims, "I'm a lesbian," (end of Stage 3 and onward) should not be told, "You're too young to know," because identity formation is already in progress.

Third, the theory indicates that there is a huge difference between behaving in a homosexual way and feeling oneself to be a lesbian or gay man. Behavior does not indicate the existence of identity, for example, as seen in prison situations. On the other hand, lack of apparent

homosexual behavior does not indicate a lack of identity. People may proceed through the early stages of identity formation without ever having any sexual or emotional contact with another person (covert behaviors such as fantasies and bodily responses often provide the impetus to entering Stage 1).

Fourth, people who describe themselves via reference to lesbian or gay behaviors or identity should not be treated as identical on the basis of these characteristics. Both within and between stages, considerable differences may be apparent. The theory accommodates distinctions such as may be found between men and women and among different ethnic and religious groups. Practitioners need to take time to explore where clients may be in the process of identity formation, rather than to assume the label "homosexual/lesbian/gay" provides all the information they need.

Fifth, the theory indicates the importance of appropriate contacts with other lesbians and gay men. Mental health practitioners need to work with personal, social, and cultural issues that may prevent clients from making such contact successfully or at the appropriate time.

Sixth, identifying the stage at which clients are currently functioning allows the mental health professional to focus on the particular issues of that stage, rather than addressing homosexuality in general. For example, talking about the ideological aspects of lesbian and gay oppression is inappropriate when someone feels he or she has no future (Stage 2) or wants to meet other homosexuals (Stage 3).

Seventh, counselors should not judge any stage as better than other stages, or any individual as better than any other because his or her feelings and behaviors correspond with any particular stage. Our ideas about identity formation are guided by Western indigenous concepts such as maturity and self-actualization, and the practitioner must be alert to imposing clinical and personal judgment on clients who are in the early stages.

Finally, it is important to remember that homosexual identity formation does not occur in isolation from other processes and issues taking place. Coping with illness, aging, career changes, marriage, issues of ethnic difference, family dynamics, psychological dysfunction, and moving to another country are all examples of personal, social, and cultural factors that may interact with the development of an understanding of self as gay, lesbian, or bisexual. For example, a client in psychotherapy had great difficulty coping with the thought that she might be a lesbian because a childhood history of being teased for

having la
Her iden
pain of t
indisting
home for
from an
parents l
his homo
progress
the intric
ing adult

The
of compl
tic interv

The thet
understa
front the
we shoul
action, r
inasmuc
individu

Nor
tity form
tion of i
future sh

We n
ognizing
ate with
complex
senting
norm, o
is curiou
liefs ab
mental
New

People may
without ever
erson (covert
vide the im-

to lesbian or
d on the basis
considerable
s distinctions
ong different
me to explore
n, rather than
d the informa-

ropriate contacts
ersons need to
prevent clients
appropriate time.

ently function-
the particular
lity in general.
lesbian and gay
e has no future

etter than other
ause his or her
tage. Our ideas
enous concepts
itioner must be
ents who are in

ual identity for-
s and issues tak-
marriage, issues
lvsfunction, and
onal, social, and
ent of an under-
nple, a client in
hought that she
being teased for

having large ears had left her sensitized to being alienated and isolated. Her identity formation experiences had raised to the surface all the pain of those early experiences so that past and present had become indistinguishable. Another client, who was 19 years old, had just left home for the first time, and was beginning to separate emotionally from an overprotective family. As part of this process, he had told his parents he was gay and was attempting to cope with their rejection of his homosexuality. The client then became HIV positive, which quickly progressed to AIDS. Working with him required an understanding of the intricate intertwining of homosexual identity formation, developing adulthood, and adjustment to illness and death.

The mental health practitioner should be mindful of the existence of complexities such as these and be aware that experienced therapeutic intervention is required.

Conclusion

The theory of homosexual identity formation can be a useful tool for understanding and helping individuals in Western cultures who confront the concept of gay, lesbian, or bisexual in a personal way. However, we should not forget that what is being addressed is a *process* of interaction, not a set of stagnant categories. Reference to stages is useful inasmuch as it allows us to recognize significant shifts occurring in individual cognitions and interactional relationships.

Nor should we forget the constructed nature of lesbian or gay identity formation. Because the indigenous psychologies directing our notion of identity formation can vary over time, we need to be alert to future shifts and changes that may occur in our Western sexual realities.

We must also be sensitive to cultural differences—for example, recognizing when discussion of sexual orientation identity is inappropriate with people from other cultures and being sensitive to the complexity of mixed-culture couples. Care must be taken to avoid presenting the concept of gay, lesbian, or bisexual identity as a universal norm, or the concept sexual orientation as necessarily being fixed. It is curious how often examples of behaviors that do not fit Western beliefs about sexual orientation will present themselves to the attentive mental health worker.

Nevertheless, while keeping in mind the larger cultural picture, we

must also be able to accept that our clients often wish to hold on tightly to their essentialist beliefs. This need to balance the essentialist and constructed qualities of sexual orientation can create dilemmas for the mental health practitioner. Do we, as caring professionals, empathize with our clients' essentialist experiences of being lesbian, gay, or bisexual as the truth they hold about themselves (but contribute to maintenance of the ideological status quo); encourage them to abandon or change their beliefs related to the fixed nature of sexual orientation and sexual orientation identities (but deny the reinforcing qualities of sexual response and risk rejecting our clients' experiences); or try some kind of balancing trick between the two?

Unfortunately, there are no easy solutions to this dilemma, which itself has become a new element of our psychological reality. Indeed, the mental health professional must avoid grabbing at quick answers. We live in dynamic times. The theoretical grounds on which we work are being questioned, and our indigenous psychology, which continues to evolve, demands our attention. It would seem more important that we remain open to these changes and the discussion they generate, rather than become too quickly embroiled in the need to find simple solutions.

References

- Bond M (Ed): *The Cross-Cultural Challenge to Social Psychology*. Newbury Park, CA, Sage, 1988
- Cass V: Homosexual identity formation: a theoretical model. *J Homosex* 4:219-235, 1979
- Cass V: Homosexual identity formation: testing a theoretical model. *J Sex Res* 20:143-167, 1984
- Cass V: Homosexual identity formation: the presentation and testing of a socio-cognitive model. Unpublished doctoral dissertation, Murdoch University, Perth, Western Australia, 1985
- Cass V: The implications of homosexual identity formation for the Kinsey model and scale of sexual preference, in *Homosexuality/Heterosexuality: Concepts of Sexual Orientation*. Edited by McWhirter D, Sanders S, Reinisch R. New York, Oxford University Press, 1990, pp 239-266

- Coleman E: *D
mosex* 7:31-
- Gergen K: *The
ogy. Americ*
- Heelas P: *Lock
the Self. Lon*
- Malyon A: *Bip
therapy The*
- Minton H, McI
mental proe
- Plummer K: *Se
ledge and K*
- Ponse B: *Identi
the Self. Lo*
- Raphael S: "C
Unpublishe
sity, Clevela
- Schafer S: *Sex
1976*
- Schippers J: *I
in Homose
al. London.*
- Semin G, Ger
tific Implic.
- Shotter J: *The
tionist acco
Cognitive I
vester Whe*
- Shweder R. I.
Emotion. C
- Stein E (ed):
structionis
- Stigler J. *Shv
Comparat:
University*
- Troiden R: *Be
Psychiatry*
- Weinberg T: *C
sexual Ide*

Y

Service: Get by LEXSEE®
Citation: 46 U. Miami L. Rev. 511

46 U. Miami L. Rev. 511, *

Copyright (c) 1992 University of Miami Law Review
University of Miami

January, 1992

46 U. Miami L. Rev. 511

LENGTH: 63867 words

SYMPOSIUM: GENDER AND LAW ESSAY AND ARTICLE: Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men

MARC A. FAJER *

* Associate Professor, University of Miami School of Law. I wish to thank Anthony Alfieri, John Cairns, Kenneth Casebeer, Mary Coombs, Michael Fischl, Steve Diamond, Amy Horton, J.M. Huffman, Lynne Henderson, Lisa Iglesias, Lili Levi, Christine Littleton, Raquel Matas, Nancy Rapoport, Stephen Schnably, Susan Stefan, and Steven Winter for helpful comments on earlier drafts, and Brian Adler, Kathy Gibson, Mindy Krauss, Timothy Moffatt, David Pollack, David Rosendorf, and Jeanette Smith for valuable research assistance. I particularly wish to thank the lesbians who reviewed the manuscript for pointing out when I generalized too much from gay male experience. Any errors that remain in this regard, or any other, are attributable solely to me.

SUMMARY:

... Lynne Henderson, in her critique of *Bowers*, suggested that more personalized and vivid storytelling about the lives of gay people might have changed the outcome of that case. ... Justice White's pre-understanding clearly included the common non-gay belief that gay people experience sexual activity differently from non-gays. ... Second, many non-gay people believe that gay men and lesbians exhibit "cross-gender" behavior: behavior stereotypically associated with the other gender. ... In Part IV, I attempt to show that society sends a strong message to gay people -- that they should keep their sexual orientation hidden -- and that the resulting concealment has severe costs. ... Those who self-identify by their same-sex sexual or affectional preferences, I call "gay men and lesbians" or "gay people." ... Occasionally discrimination against gay people arises when someone inadvertently discovers their sexual orientation. ... Violence against lesbians and gay men often occurs outside gay bars, which are places where gay people come to look for relationships and sex, and to establish community. ... Because many non-gay people assume that homosexuality is simply about sexual activity, they view public discussion of gay issues as inappropriate discussion of sexual acts. ... As one writer commented on Provincetown, Massachusetts, admittedly a magnet for lesbians and gay men: "Gay people are everywhere in Provincetown. ...

TEXT:

[*512] I. INTRODUCTION

As long as we don't mention anything explicitly, the "outside world" is willing to tolerate us, in fact, to like and value us. We know, though, that they have little conscious awareness, really, of who we are. And if they did know, we fear their friendship and support would evaporate. We maintain a constant vigilance, no less damaging just because it has become second nature. ⁴⁶³

As the next Subpart demonstrates, substantial costs accompany the concealment, the "constant vigilance," that results from discrimination against public behavior and society's concern with flaunting.

B. *Gay Stories: Concealment and Its Costs*

[W]e were woefully uninformed and unutterably lonely. Hiding from heterosexuals, we simultaneously succeeded in concealing who we were from one another. And, of course, the homosexual [*592] physicians on the faculty hid, too. Thus, there was not a single older homosexual we could talk to or in whose life we could find a model on which to pattern our own. We were a doubly lost generation. ⁴⁶⁴

This reminiscence of a gay medical student demonstrates the natural result of the discrimination against public gay behavior: most gay people lead a hidden existence with significant details of their lives kept from most, if not all, of their acquaintances, friends, and family members. This Subpart details the lengths gay people go to remain in the closet and the serious emotional costs that concealment generates.

1. SELF-CONCEALMENT

At a gay-pride parade in Fort Lauderdale last year, one man "wore a lone ranger mask to avoid recognition. 'I'm proud to be in this campaign,' he said, 'but I don't want to lose my job either. I have to make a living.'" ⁴⁶⁵ Although there is more openness about sexual orientation today than there has been in the past, ⁴⁶⁶ gay people still often feel that they must mask aspects of their lives, though not often in quite so literal a fashion.

Homophiles who have not self-identified as gay rarely advertise their same-sex sexual attractions or sexual activity. ⁴⁶⁷ Many who do self-identify as gay pretend to be heterosexual in most public situations. ⁴⁶⁸ This often can be done merely by being secretive about one's private life; ⁴⁶⁹ most people will assume a person is heterosexual in absence of contrary "evidence," such as behavior "appropriate" to the other gender. ⁴⁷⁰

However, since people tend to discuss their family life and romantic interests with their relatives and co-workers, extended silence on these topics may raise suspicions. Rather than deal with [*593] curious questions or the potential costs of coming out to family ⁴⁷¹ or employers, ⁴⁷² some gay people employ deception of one form or another. Some will participate in anti-gay joking. ⁴⁷³ Some change the relevant pronouns when they refer to their lovers. ⁴⁷⁴ Others may "date" members of the other sex. ⁴⁷⁵ One woman recalled:

I got by for years with made-up boyfriends. I had to have something to tell the women I worked with. Finally, after they kept pressing to meet this fabulous guy, I invented a fiance in the war in Vietnam to keep them off my back. On the day I split up with my lover I couldn't hide my heartbreak from my coworkers. I told them my fiance had been killed in the war. That got me by for about a year. Then I quit and moved on to another job. ⁴⁷⁶

The sanctions for public behavior are sufficiently strong that people are discouraged from connection with any gay activity, gay literature, or, worst of all, advocacy of gay issues. ⁴⁷⁷ Every gay organization to which I have belonged has had to go through complex machinations to notify its members of events without letting anyone [*594] else know that the members were part of a gay organization. ⁴⁷⁸

Gay couples constantly deal with issues of self-disclosure.⁴⁷⁹ They may invent stories to explain their spending time together.⁴⁸⁰ When together in public places, they often refrain from public displays of affection that might be considered normal for heterosexual couples.⁴⁸¹ When relatives visit, gay couples may rearrange the furniture to make it appear as though they have separate bedrooms and may hide items they believe are "incriminating."⁴⁸² One lesbian couple that lived together installed a timer for the lights in the unused bedroom "so our neighbors, should they look, would see that two bedrooms appeared to be in use."⁴⁸³ Sometimes couples will live apart to avoid detection.⁴⁸⁴

Perhaps the ultimate form of concealment for homophiles is to enter into a heterosexual marriage,⁴⁸⁵ perhaps under the impression [*595] that marriage will end same-sex attractions.⁴⁸⁶ These marriages can be disastrous for the participants because the element of sexual desire may be totally lacking on the part of one party.⁴⁸⁷ Many of these marriages end in divorce,⁴⁸⁸ although sometimes the parties work out amicable arrangements within the marriage.⁴⁸⁹

Even for those of us who choose to be completely open about our sexual orientation, the choice to hide constantly recurs. Each time gay men and lesbians meet a new person or interact with a new group of people, we must decide whether to come out yet again.⁴⁹⁰ This repeated decisionmaking and coming out can be quite stressful. Yet avoiding the costs of concealment, detailed in the next Subpart, make the tensions of coming out worthwhile for many of us.

2. COSTS OF CONCEALMENT

The concealment that gay people impose on ourselves and that is imposed on us by society harms us in several respects.⁴⁹¹ It puts at [*596] risk our self-esteem and mental health. It limits our ability to build community. And it prevents young homophiles from coming to terms with their gay identities. This Subpart documents some of these costs.⁴⁹²

a. Individual Mental Health

Many gay people speak of coming out as liberating and emotionally helpful.⁴⁹³ One commentator noted: "The most tangible, personal result of coming out is being more comfortable with ourselves about being gay. Because then we discover how much better it feels to be honest than to hide. Less nervous. More relaxed. Happier."⁴⁹⁴ Conversely, the inability to talk about one's life yields high emotional costs. The pressure to maintain a concealed identity can be extremely stressful.⁴⁹⁵ As one lesbian noted, "the need to lie to the world about the most important part of my life has always been painful."⁴⁹⁶ If you must make sure that your family or co-workers are in the dark, you must constantly think about everything you say and much of what you do to insure both secrecy and consistency with whatever stories you are telling.⁴⁹⁷

Being out makes it easier to find potential partners and to enter and carry on long-term relationships.⁴⁹⁸ In addition, the stresses of concealment often make it difficult to maintain those relationships that do form.⁴⁹⁹ One man who believes his most significant relationship [*597] was undermined by concealment, suggested that "[b]y bowing to the constant, needling reminder that no matter how happy and natural they feel, theirs is a socially unacceptable union, homosexuals themselves undermine what could be the most rewarding aspect of their lives."⁵⁰⁰ Since relationships add to the self-esteem and mental stability of the participants,⁵⁰¹ the negative effects of concealment are compounded when they interfere with the process of finding and maintaining a lover.

The negative effects of leading a closeted life become particularly acute when a person is upset by gay-related problems, such as the separation from, or the death or illness of, a

long-term companion. Distraught gay people may have no outlet for their grief without going through the dangerous process of coming out. One man reported having to sit alone in the back of the church at his lover's funeral because he couldn't explain his relationship to the family. ⁵⁰² One World War II soldier whose lover was killed recalls, "I couldn't cry and I couldn't tell anybody. Just alone. No way I could release any of the emotion or express any of it. It was the most terrible day I've spent [in my life]." ⁵⁰³

The following letter, written by a closeted man in response to a questionnaire on gay issues, gives some sense of the complex emotions created by hiding:

What makes it something to hide? How long must this nonsense go on? Hiding generation after generation? Won't someone tell someone it is a nice, pleasant, friendly thing to relate to another human being as a human being. Oh, I know you know the answers, so many of us do. Please don't forget those of us out here with families and wives and jobs that pay well, that we enjoy. Smile at us. Please understand us. We understand. Believe me, we understand. And in our way we are raising sons and daughters who will understand too. Don't you realize, we are the future? Please speak to me! I love you and wish you good fortune. Will I join you? Sorry, but I guess I must stay behind. I *am* sorry. I [*598] can't sign my name. I'm sorry and I'm crying. God bless you gentle people. ⁵⁰⁴

b. Costs to the Gay Community

Concealment also interferes with the creation and cohesion of a gay community. Closeted gay men and lesbians generally are afraid to take the steps necessary to join gay organizations or participate in gay events. ⁵⁰⁵ This deprives them of an important potential source of support. Participating in gay community activities improves mental health directly, ⁵⁰⁶ and also makes possible and strengthens gay relationships. ⁵⁰⁷ Thus, closeted gay people who do not join the community lose these benefits as well.

Another cost of concealment is tension within the gay community about the issue of concealment itself. Closeted gay men and lesbians often voice the same concerns about "flaunting" as non-gays. ⁵⁰⁸ They may resent visible and politically active lesbians and gay men, who they feel bring undue attention to gay rights issues and harm those who perceive themselves to be getting along adequately in the closet. ⁵⁰⁹ This resentment can extend even to those who engage in litigation to try to vindicate common rights. One gay man said after the *Bowers* decision, "Why did Michael Hardwick do this, why did he [*599] have to push this? If he just stayed quiet we would all be OK. Now we have this decision and this is terrible." ⁵¹⁰ Those who are out, in turn, can be resentful (and often not particularly understanding) of those who do not feel able to come out for emotional, or often financial, reasons. ⁵¹¹ This tension can prevent the two groups from providing necessary mutual support. ⁵¹²

Concealment also can hinder personal connection between people who are out and those who are not. I remain vaguely surprised that closeted students are uncomfortable around me. The phenomenon is fairly easy to explain, however. When closeted people meet in semi-public places (gay bars, for example) there is an element of mutual vulnerability that acts as a bond. "I don't have to worry about your telling anyone I'm gay; you cannot tell without effectively giving *yourself* away." People who are out do not provide this security to closeted individuals; because I am out, I arguably have little to lose by "outing" other people. Indeed, closeted people (as well as heterosexuals concerned with their image) are often afraid to be seen in public with gay men and lesbians who are out; they fear that mere proximity will lead others to believe they are gay. ⁵¹³ This has the unfortunate effect of limiting the usefulness of those of us who are out as bases of support and encouragement to lesbians and gay men who are not. ⁵¹⁴

Concealment also has larger political costs to the gay community. It prevents non-gay people

attempts to raise public support after he was transferred to a non-teaching position as "repeated, unnecessary, appearances on local and especially national news media."

¶n458 See, e.g., LEWIS, *supra* note 102, at 115-16; Law, *supra* note 18, at 190 & n.12; Walters & Elam, *supra* note 371, at 109. Gay people involved in custody situations have to be careful not to let their ex-spouse know of their sexual orientation to avoid the risk of losing rights to custody or visitation. See, e.g., KLEINBERG, *supra* note 96, at 75.

¶n459 See Law, *supra* note 18, at 191 & n.15 (citing cases).

¶n460 *In re J., S. and C.*, 384 A.2d 90, 92, 97 (N.J. Super. 1974). Parents sometimes reach similar arrangements in settlements without judicial intervention. See JAY & YOUNG, *supra* note 104, at 135.

¶n461 DAVID ROSEN, LESBIANISM: A STUDY OF FEMALE HOMOSEXUALITY 74 (1974); see also Brown, *supra* note 144, at 127 (noting situation where ex-wife threatened to cut off visitation unless gay man sees children without lover present); MCWHIRTER & MATTISON, *supra* note 96, at 100 (reporting arrangement in which gay man could see his children only once a month and only without his lover present).

¶n462 In the context of constant strong messages about flaunting, liberal arguments that focus on abstract neutral principles often feel like variations on the same theme. These arguments begin to sound a lot like: "We will tolerate you because of the principles for which we stand, which include the tolerance of those we despise, but we have no interest in hearing your stories or doing anything others might see as validating your lives." This certainly was my gut-level reaction to the Respondent's Brief in *Bowers*.

¶n463 JOHNSON, *supra* note 136, at 286-87.

¶n464 BROWN, *supra* note 144, at 39.

¶n465 *1,500 March in Gay Pride Parade*, MIAMI HERALD, July 1, 1991, at 3B. Similarly, in Idaho, an organizer of the first gay march in Boise in 1990 warned that people would wear paper bags over their heads to preserve their jobs. See *Activists Plan Boise's 1st Gay Pride March*, WKLY. NEWS, May 30, 1990, at 31.

¶n466 See, e.g., BROWN, *supra* note 144, at 244-46; LEWIS, *supra* note 102, at 182.

¶n467 We know this not because of any studies of non-gay homophiles, but rather because we have never seen it happen. Try to remember the last time you heard a man say to a group of apparently non-gay people, "Well, I'm straight, but I have slept with other men a few times." As Janet Halley has pointed out, "The legal burdens imposed on homosexuality in our society deter people from *appearing* gay." Halley, *supra* note 4, at 947.

¶n468 See *Seebol v. Farie*, No. 90-923-CA18, slip op. at 15 (Fla. Cir. Ct. Mar. 15, 1991); BLUMENFELD & RAYMOND, *supra* note 93, at 30; PHARR, *supra* note 20, at 72.

¶n469 See BLUMENFELD & RAYMOND, *supra* note 93, at 369.

¶n470 See Herdt, *supra* note 121, at 5. For discussion of the cross-gender stereotype, see *infra* part V.A.

¶n471 Gay people find coming out to their families extremely difficult. See, e.g., LEWIS, *supra* note 102, at 107-08. The process is not aided by the knowledge of horror stories of what happens when families find out. Parents tell their children they would rather see them dead than gay. See, e.g., *id.* at 109; PHARR, *supra* note 20, at 68. One Jewish family read

the Prayer for the Dead for their daughter after she came out to them. LEWIS, *supra* note 102, at 12. One teenager was beaten and thrown out of his house with his arm broken by his parents after they discovered gay informational literature in his bedroom. See Hentoff, *supra* note 326, at 166.

Perhaps the worst story I came across concerned a fire in a New Orleans gay bar in which 32 gay men lost their lives. One gay man recalled, "Relatives were asked to come to the city morgue to identify the bodies. Do you know that many of the parents of these gay men refused to come down and identify the bodies of their own children? That is the very lowest point of tolerance on the human scale -- to refuse to claim the remains of your own flesh and blood." BERGER, *supra* note 201, at 75.

This rejection by family distinguishes us from most other disadvantaged groups. As one writer bluntly put it, "Other disrespected groups of people -- Blacks, Jews, women -- though they suffer stigma and injustice, learn at least a feeble sense of self-worth and belonging from their families. At worst they have a meager social place. Gays have none." Darrell Y. Rist, *On Hating Ourselves, in GAY LIFE*, *supra* note 107, at 45, 50.

Not all family responses are negative. See, e.g., BERGER, *supra* note 201, at 83. Some families, including my own, have been loving and supportive.

¶n472 See, e.g., Law, *supra* note 18, at 192 (federal and state governments frequently deny employment to openly gay people and most jurisdictions tolerate private discrimination). Again, not everyone's experiences are negative. See, e.g., SILVERSTEIN, *supra* note 72, at 132 (co-workers held reception for two gay men when they married).

¶n473 See, e.g., JAY & YOUNG, *supra* note 104, at 75, 141; LEWIS, *supra* note 102, at 90; Troiden, *supra* note 42, at 57.

¶n474 See BLUMENFELD & RAYMOND, *supra* note 93, at 369.

¶n475 See LEWIS, *supra* note 102, at 89; SEARS, *supra* note 40, at 126-27.

¶n476 LEWIS, *supra* note 102, at 89.

¶n477 See, e.g., *ben Shalom v. Secretary of the Army*, 489 F. Supp. 964, 974 (E.D. Wis. 1980); *Seebol v. Farie*, No. 90-923-CA18, slip op. at 15 (Fla. Cir. Ct. Mar. 15, 1991); BERGER, *supra* note 201, at 9; SEARS, *supra* note 40, at 32-33.

¶n478 I remember one meeting of a gay organization at which we discussed putting notices in people's mail slots. Because the slots were open to the public, we decided to staple any correspondence so that a non-gay person thumbing through the materials in someone else's slot would not inadvertently see the contents. Someone then expressed concern that word would get out that the gay organization used staples and that stapled material in the mail slot would then give people away.

A related concern exists about press interviews. For example, at the opening of a Connecticut gay community center, a local reporter was generally given only the first names of those attending. See Hentoff, *supra* note 326, at 98. This type of concern exists even for people who are not gay. Janet Halley notes a story about a group of New York lawyers who did not wish to be photographed at a gay rights benefit, for fear others would assume they were gay. See Halley, *supra* note 4, at 370 (citing *Concern Over AIDS Helps Rights Unit*, N.Y. TIMES, May 3, 1987, at 43).

¶n479 MCWHIRTER & MATTISON, *supra* note 96, at 3.

¶n480 See, e.g., SILVERSTEIN, *supra* note 72, at 309 (reporting that one member of a couple called the older man his uncle to avoid detection).

¶n481 See PALLONE & STEINBERG, *supra* note 208, at 156-57; Jane Gross, *A Milestone in the Fight For Gay Rights: A Quiet Suburban Life*, N.Y. TIMES, June 30, 1991, at 16 (noting that suburban men and women curb displays of affection "in deference to their heterosexual neighbors"). This is true even with couples who are open about and comfortable with their sexual orientation. MCWHIRTER & MATTISON, *supra* note 96, at 224.

¶n482 See, e.g., Richard Plant, *I Was a Double Alien: An Emigre Faces Gay Life in America*, in GAY LIFE, *supra* note 107, at 267, 271; Rist, *supra* note 471, at 51-52.

¶n483 LEWIS, *supra* note 102, at 90.

¶n484 See, e.g., BROWN, *supra* note 144, at 8.

¶n485 See, e.g., BARRETT, *supra* note 191, at 98; see also KLEINBERG, *supra* note 96, at 71 (noting that gay men who have been married avoid suspicion or detection far more easily than those who have not); ISAY, *supra* note 139, at 65; JAY & YOUNG, *supra* note 104, at 130; SILVERSTEIN, *supra* note 72, at 225; Halley, *supra* note 4, at 934 ("[H]omosexuals who experience their sexual desire as immutably oriented towards persons of their own sex nevertheless may be coerced to pretend that they conform to the norm of heterosexuality."). Sometimes gay men and lesbians will marry each other as a form of joint concealment. See, e.g., BERUBE, *supra* note 96, at 262; LEWIS, *supra* note 102, at 92.

¶n486 See, e.g., JAY & YOUNG, *supra* note 104, at 58-59, 120; BERGER, *supra* note 201, at 131.

¶n487 See, e.g., BROWN, *supra* note 144, at 113; COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, GREAT BRITAIN, WOLFENDON REPORT (1957), *quoted in* ISAY, *supra* note 139, at 108; see also BROWN, *supra*, at 26 (reporting belief of a gay man who was married and had three children that "a man's failure to discover his sexual nature before he married could result only in bitterness and pain for both partners"). Many stories exist about gay people unhappy in marriages with heterosexual partners. See, e.g., BERGER, *supra* note 201, at 132; MCWHIRTER & MATTISON, *supra* note 96, at 98; SILVERSTEIN, *supra* note 72, at 99.

¶n488 ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES* 161, 163, 167 (1978).

¶n489 See *supra* text accompanying notes 291-93.

¶n490 See, e.g., JAY & YOUNG, *supra* note 104, at 144; LEWIS, *supra* note 102, at 161. This constant set of choices makes our experience different from that of other excluded groups such as racial minorities, who have no choice about whether to disclose their status as "other." While some have argued that this makes our experience easier (and perhaps less worthy of empathy) than that of, for example, African-Americans, see, e.g., Paul Varnell, *Observer's Notebook*, WKLY. NEWS, June 27, 1990, at 5 (citing examples), I would argue that the experience simply is different and that trying to decide who has it "easier" is an unhelpful exercise. Gay men and lesbians are not generally instantly identifiable and therefore often are spared disdainful looks and remarks from people they do not know. On the other hand, the costs of hiding otherness are high, see *infra* part IV.B.2., and gay people must face the stress of constantly making decisions about coming out.

Perhaps a comparable experience in our society is the extent to which women need to make decisions about "where and when to walk, whom to talk with, and what to wear" in order to try to avoid being subject to male violence. Dick Bathrick & Gus Kaufman, Jr., *Male Privilege*

and Male Violence: Patriarchy's Root and Branch, in *MEN & INTIMACY*, *supra* note 89, at 111, 114.

¶n491 Concealment does have certain limited advantages. Because many people don't suspect people of being gay unless they conform to certain stereotypes, same-sex couples can often carry on relationships or sexual activity without arousing suspicion. See *Sears*, *supra* note 40, at 319. One woman reported that she and her lover never had trouble checking into the same room in a hotel because they were "two nice looking women" -- "Who would suspect [we] were going to go up and make love!" *BERUBE*, *supra* note 96, at 105-06.

¶n492 Concealment also can interfere with assertion of some legal claims. Karen Thompson found people questioned her claim that she and Sharon Kowalski were lovers because they hadn't been public. See *supra* text accompanying notes 399-400. She commented bitterly, "I spent four years hiding [the relationship] and 4 1/2 years trying to prove it." Murdoch, *supra* note 133, at A1. One gay advocate said "the lesson to be learned is not to hide your relationships." Linsley, *supra* note 390, at 15. A number of gay people who did not report anti-gay violence to the police expressed fear that reporting might result in disclosure of their sexual orientation to the public at large. See Henthoff, *supra* note 326, at 96.

¶n493 *TIMMONS*, *supra* note 143, at 29 (quoting one boy, after realizing that there were other gay men: "Suddenly my world was transformed into a whole wonderful different place. . . ."); see also *Law*, *supra* note 18, at 212; *Varnell*, *supra* note 100, at 4 (reporting gay man's description of coming out as "exhilarating," noting that it made him feel "liberated").

¶n494 Mort Jonas, *We Have Special Role to Play*, *WKLY. NEWS*, Oct. 31, 1990, at 5, 19.

¶n495 See *Herek*, *supra* note 97, at 146.

¶n496 *KEHOE*, *supra* note 96, at 15; see also *PALLONE & STEINBERG*, *supra* note 208, at 56 (author's "toughest chore" while he was a major league baseball umpire was "living a lie"); *PHARR*, *supra* note 20, at xiii (author's alienation due to "life of invisibility" was "extreme and dangerous to [her] mental health").

¶n497 See *PHARR*, *supra* note 20, at xiii-xiv.

¶n498 See *ISAY*, *supra* note 139, at 91-92 (noting that fear of being visible makes entering into long-term relationships harder); see also *INVENTING OURSELVES*, *supra* note 39, at 152-53 (noting woman who broke off relationship for fear that social workers would discover it and take her children away).

¶n499 See *Herek*, *supra* note 97, at 146-47.

¶n500 *BROWN*, *supra* note 144, at 139-40.

¶n501 See, e.g., *ISAY*, *supra* note 139, at 61 (stating that positive sexual and nonsexual relationships are essential to healthy integration of the gay identity and positive self-image); *Sandel*, *supra* note 315, at 535 (noting that gay relationships recreate positive effects of marriage); *Coombs*, *supra* note 43, at 1596-97 (commenting that we "need to . . . share with others to become fully human" and "draw [] from our relationships much of our sense of identity"); cf. *De Cecco*, *supra* note 194, at 2 (remarking that in the gay community, a gay relationship "has become a symbol of self-acceptance of one's homosexuality, an index of psychological health, of self-esteem").

¶n502 *PALLONE & STEINBERG*, *supra* note 208, at 190.

¶n503 *BERUBE*, *supra* note 96, at 199; see also *KEHOE*, *supra* note 96, at 49 (reporting

positive experience coming out, making grieving for lost partner easier).

¶n504 JAY & YOUNG, *supra* note 104, at 128.

¶n505 This is a common problem for members of excluded groups: "people who fit within a category of 'difference' often choose not to avail themselves of programs designed for them because they fear the risk of stigma or other negative social attitudes if they identify themselves by the difference. MINOW, *supra* note 28, at 91.

¶n506 See Gerstel et al., *supra* note 422, at 86; Schneider, *supra* note 40, at 123; Troiden, *supra* note 42, at 62; see also Herek, *supra* note 97, at 146 (noting that isolation from community can cause "significant psychological distress").

¶n507 See, e.g., JOHNSON, *supra* note 136, at 252-53, 280-81 (noting that being part of lesbian community helped keep relationships together).

¶n508 See, e.g., JAY & YOUNG, *supra* note 104, at 145; JOHNSON, *supra* note 136, at 130; Rist, *supra* note 471, at 45-46; see also JAY & YOUNG, *supra* note 104, at 139 (reporting one gay male respondent to survey who said, "I don't feel that gays should raise their children in an *open* gay lifestyle. [The children] should be free to choose their own sexuality without undue influence.").

This concern is not limited to those completely in the closet. A group of AIDS activists expressed concern, according to one account, that the National March on Washington for Lesbian and Gay Rights would be "a political embarrassment for AIDS lobbyists." See Rist, *supra* note 366, at 200.

¶n509 One writer to Ann Landers said, "I have never been discriminated against at work or anywhere else. Maybe it's because I don't march in parades, make speeches, or dress in a bizarre fashion that would draw attention to myself." Ann Landers, *Some Parents Don't Disapprove of Gay Children*, MIAMI-HERALD, June 25, 1991, at 3D. It also seems possible that few people are aware the writer is gay. Cf. BERUBE, *supra* note 96, at 117-18 (noting disagreement in gay community during World War II about the extent to which one should be at gay hangouts and concern about more open or stereotypical gay people revealing the hangouts and causing raids and arrests).

¶n510 Abby R. Rubenfeld, *Lessons Learned: A Reflection upon Bowers v. Hardwick*, 11 NOVA L. REV. 59, 62 (1986).

¶n511 See, e.g., *Boating Club Shows Signs of Homophobia*, WKLY. NEWS, June 12, 1991, at 7, 17 (reporting gay man's complaint that gay boating club would not use words "gay" or "homosexual" in its newsletter).

¶n512 This problem is somewhat different from the concern within the women's movement about the exclusion of race issues. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Women of color may resent the exclusion, but they still share some common goals and methods with their cohorts. By contrast, closeted gay people often see silence as the best strategy for gay people, a strategy almost completely incompatible with the coming-out tactics espoused by many activists.

¶n513 It is intimidating to involve yourself with other gay people while you are in the coming-out process. See MAPOTTA, *supra* note 72, at 12. For most of my freshman year in college, I carefully avoided a student who lived in my dorm who was out and politically active.

¶n514 In addition, gay men often are reluctant to help gay teens in part because of the

Z

Service: **Get by LEXSEE®**
Citation: **96 Colum. L. Rev. 1753**

*96 Colum. L. Rev. 1753, **

Copyright (c) 1996 The Columbia Law Review
Columbia Law Review

November, 1996

96 Colum. L. Rev. 1753

LENGTH: 50486 words

ARTICLE: SUSPECT SYMBOLS: THE LITERARY ARGUMENT FOR HEIGHTENED SCRUTINY FOR GAYS

Kenji Yoshino *

* Law Clerk to Judge Guido Calabresi, United States Court of Appeals for the Second Circuit. J.D. Yale Law School, 1996. A previous version of this Article was part of a body of work that was awarded the Theron Rockwell Field Prize by Yale University. I am indebted to many people for their help throughout this project, including Bruce Ackerman, Akhil Reed Amar, Peter Brooks, Guido Calabresi, Thomas B. Colby, Laura A. Dickinson, Glenn C. Edwards, William N. Eskridge, Jr., Owen M. Fiss, Ryan Goodman, Rachel Harmon, Melissa R. Hart, Katharine A. Huffman, Neal Katyal, Harold Hongju Koh, Bob Newman, Alison Peck, Richard A. Primus, Chris Sclafani Rhee, Jeannie Sclafani Rhee, William B. Rubenstein, Shilpa S. Satoskar, Reva B. Siegel, and Tobias B. Wolff. Nestor M. Davidson provided outstanding editorial assistance. All errors are mine.

SUMMARY:

... So I responded: "My understanding is that it's a term once used in a derogatory way towards homosexuals that has been co-opted by the gay-rights movement, like the pink triangle." ... The political-powerlessness prong implicates the symbol of the closet insofar as the closet captures the invisibility and isolation that hinder gays in their political mobilization. ... When we consider whether gays have suffered a history of discrimination, the analogy that the pink triangle evokes between gays and Jews may drive home the nature of that persecution. ... Step One. - The pink triangle provides an answer to the impasse the pro-gay argument encounters under the first step of the history prong by linking gays to Jews. ... It is hard to talk about homosexuality without talking about the symbol of the closet. ... Ely thus tries to harmonize the immutability prong with his now-familiar empathy-failure theory of the Clause. ... Unlike the pink triangle and the closet, the body has not been self-consciously deployed as a gay symbol. ... While the story works on many levels as a defense of homosexual love, its primary contribution may be its ability to quiet the homophobic imagination by positing the immutability of homosexuality. ... Courts should deepen their inquiries into the history of discrimination prong and the political powerlessness prong, but need not question the legitimacy of these prongs. ...

TEXT:

[*1753]

Introduction

This Article can be read as a response to a question a federal appellate judge asked me. During a clerkship interview, the judge inquired about a course on my transcript subtitled "Queer Theory." I told him it was a course on legal, political, and sociological theories of sexual orientation and mapped some of its themes. He listened attentively, then stated: "Actually, what I wanted to know was what the word queer means." Quick to rationalize authority, I assumed he knew what the word meant, and was attempting to gauge the subtlety of my understanding of it. So I responded: "My understanding is that it's a term once used in a derogatory way towards homosexuals that has been co-opted by the gay-rights movement, like the pink triangle." ¹ I was about to continue, when he interrupted: "What's the pink triangle?" A beat. I replied: "The pink triangle was used by the Nazis during the Holocaust to designate homosexuals." The judge said: "I didn't know that."

I knew that the judge recently had heard a controversial case considering whether gays should be accorded heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment, and therefore assumed he had a certain modicum of cultural literacy about gays. ² My [*1754] immediate reaction to his question about the word "queer" was to interpret it as a test given by a teacher. When he asked about the pink triangle, I could no longer sustain the illusion. Like the thirteenth chime of the clock that calls all that preceded it into question, the query forced me to rethink the turns the conversation had taken.

I would not blame the reader who thought I was naive to be shocked at this interchange. Judges constantly decide matters in which they are inexpert, regulating identities, as this judge did in the gay Equal Protection case, without knowing the basics of those identities. ³ My shock was [*1755] fueled, however, less by the judge's ignorance about gays than by the thought that his ignorance of the pink triangle had pointed relevance to the doctrinal analysis in the case he had just decided. One of the three prongs of the heightened scrutiny inquiry mandated by the Equal Protection Clause asks whether the group in question has suffered a history of discrimination. It struck me that the pink triangle responded directly to this inquiry, as it symbolizes the persecution gays suffered during the Holocaust, much in the way the yellow star stands as an emblem of the persecution suffered by Jews. More subtly, the pink triangle speaks to the invisibility of gay history by rendering evident its invisible Holocaustal moment much in the way that the symbol itself, during that moment, rendered evident the invisible homosexual. I did not think it fanciful to believe that knowledge of the pink triangle, laden as it is with such associations, might have changed the judge's doctrinal analysis.

This made me wonder about how the application of the other two prongs of the Equal Protection Clause to gays might be enriched by other gay symbols. ⁴ Courts interpret the Equal Protection Clause to require a three-prong inquiry to determine whether a group deserves heightened scrutiny. That inquiry asks (1) whether the group has suffered a history of discrimination, (2) whether the group is politically powerless, and (3) whether the group is marked by an immutable characteristic. ⁵ Just as the [*1756] first prong resonates with the pink triangle, the other two prongs resonate with symbols common in the gay-rights movement. The political-powerlessness prong implicates the symbol of the closet insofar as the closet captures the invisibility and isolation that hinder gays in their political mobilization. The immutability prong implicates the symbol of the body insofar as the body traditionally has been a way of conceiving of both immutability and sexual deviance. In all three instances, judicial discussions of these prongs as applied to gays have not adverted to these symbols.

In the near future, the United States Supreme Court is likely to consider the argument that

himself out as "straight" is suspect. Straights who support gays thus risk being cast as gay themselves, and are [*1808] deterred from expressing pro-gay sympathies. As Janet Halley notes, "one's mere participation in political action to alter laws affecting gays and lesbians can precipitously earn one a public homosexual identity."²⁴⁹ Straights who feel that they cannot afford to be perceived as gay thus will eschew any association with gays. As the Ben-Shalom v. Secretary of the Army court noted:

No soldier would dare be caught reading anything that might be construed as a homosexually-oriented book or magazine. No soldier would want to be observed in the company of any person suspected of being a homosexual. Most importantly, no soldier would even want to make any statements that might be interpreted as supporting homosexuality.
250

The invisibility of homosexuality forces all pro-gay advocates, straight or gay, to assume the social costs of being gay. The military makes gay advocacy potentially career-ending, and therefore prohibitively costly. Even when the consequences of gay advocacy are not career-ending, they will dissuade those with limited political capital from investing it in pro-gay causes. Consider a politician faced with the choice of forming a coalition with a gay group or a racial group of comparable power.²⁵¹ Given that both groups have the same power, the politician will get the same benefit from either of them. However, the costs the politician incurs by allying with gays are much higher than those he incurs by allying with the racial group. The white who defends blacks is a "nigger-lover," but not a "nigger"; the straight who defends gays is a "queer-lover," and a possible "queer." Viewed solely from a utility-maximizing perspective, therefore, a rational straight legislator will never form an alliance with gays if a comparable group with a visible differentiating characteristic can be found.

3. The Carolene Products Test. - A third test for political powerlessness asks whether gays are a "discrete and insular" minority. This standard comes from the famous footnote in Carolene Products, which states in part that "prejudice against discrete and insular minorities may be a special condition ... curtailing the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry."²⁵²

Bruce Ackerman has criticized the "discrete and insular" language as having outlived its usefulness.²⁵³ He argues that "discrete and insular" minorities, in actuality, may be more politically powerful than "anonymous and diffuse" minorities, because the former have less of a free-rider [*1809] problem,²⁵⁴ lower organizational costs,²⁵⁵ and greater influence over election outcomes.²⁵⁶ Ackerman further warns that the "discrete and insular" standard may be deployed to withhold protection from groups that are disadvantaged in the bargaining process in the precise manner the Carolene Products Court sought to correct.²⁵⁷

Even if one attempts to argue within the doctrinal language, its implications for gays are not clear. Gays might be characterized as "anonymous and diffuse" or as "discrete and insular."²⁵⁸ On the one hand, many "closeted" gays live out their lives without ever disclosing their homosexuality to another person. In order to protect the integrity of their closets, they must eschew the company of other homosexuals. Such gays might be characterized as "anonymous and diffuse."²⁵⁹ On the other hand, "out" gays band together by living in the gay ghettos of major urban areas like New York or San Francisco, frequenting gay establishments, and establishing social networks of "families they choose" consisting of other gay persons.²⁶⁰ After relinquishing the protection of the closet, homosexuals are so threatened with prejudice that they need an [*1810] alternative mechanism of protection.²⁶¹ Many find this in numbers; that is, in insularity. These gays may be described as "discrete

and insular." ²⁶²

Having thus complicated the picture of the gay political community, it is tempting to summarize by describing that community as comprised of two kingdoms - one discrete and insular, one anonymous and diffuse - divided by the closet door. Yet even this more sophisticated characterization will not lie pat, for it implies that each individual gay can be placed definitively inside or outside the closet. However, this is one of the ways in which the closet metaphor, by positing a binary of "in" and "out," fails to describe the experience of gay men and lesbians. As Sedgwick writes:

Even at an individual level, there are remarkably few of even the most openly gay people who are not deliberately in the closet with someone personally or economically or institutionally important to them. Furthermore, the deadly elasticity of heterosexist presumption means that, like Wendy in Peter Pan, people find new walls springing up around them even as they drowse: every encounter with a new classful of students, to say nothing of a new boss, social worker, loan officer, landlord, doctor, erects new closets whose fraught and characteristic laws of optics and physics exact from at least gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure. Even an out gay person deals daily with interlocutors about whom she doesn't know whether they know or not; it is equally difficult to guess for any given interlocutor whether, if they did know, the knowledge would seem very important. Nor - at the most basic level - is it unaccountable that someone who wanted a job, custody or visiting rights, insurance, protection from violence, from "therapy," from distorting stereotype, from insulting scrutiny, from simple insult, from forcible interpretation of their bodily product, could deliberately choose to remain in or to reenter the closet in some or all segments of their life. The gay closet is not a feature only of the lives of gay people. But for many gay people it is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence. ²⁶³

Gays can never be out and be done with it; they must continually reiterate their sexual orientation against a heterosexist presumption that reinstates itself at every pause. ²⁶⁴ The most damaging failure of the closet symbol is [*1811] perhaps that it misrepresents the continuum of a person's disclosure of his or her homosexual orientation as a binary constructed from the endpoints of that continuum. One is either "out" or "closeted": the closet with its rigid door between the "outside" and the "inside" does not lend itself to subtler gradations. However, these gradations are not only relevant, but crucial to an understanding of gay oppression. First, gays come out in a gradual process that is misrepresented by a construct that marks some point as the point at which they "come out." Second, most gays disclose their homosexuality to some but not to others - for example to their families but not their co-workers, or vice versa - in a way that the closet, which does not perform such discrimination between audiences, fails to reflect. Finally, because it is impossible for any gay to be fully "out" or "closeted," the endpoints of the continuum on which the binarism is based do not exist.

This reinforces Ackerman's thesis that the "discrete and insular" test derived from the Carolene footnote is of limited use in the evaluation of political powerlessness. Moreover, even if the test were generally appropriate, it would be hard to apply in the case of gays, since gays are both "discrete and insular" and "anonymous and diffuse." Once again, when we use a traditional test to measure gay political powerlessness, we discover that it fails to capture the shaping influence of the closet, and therefore fails to capture gay identity.

4. Closet Cases: Sipple and Coors. - Any inquiry about gay political powerlessness that does not consider the effects of the closet is necessarily reductive. No court considering an Equal Protection claim has invoked the closet explicitly in its discussion of heightened scrutiny for gays. However, a pair of cases outside the Equal Protection context demonstrate the practical consequences of an understanding of the closet. Each case weighed the right of gays to keep their homosexuality private against the right of others to disclose it. In the first, *Sipple v. Chronicle Publishing Co.*, the court failed to consider the closet in its analysis favoring disclosure, although the symbol might have resolved one of the seeming contradictions in the opinion.²⁶⁵ In the second, *Adolph Coors Co. v. Wallace*, the court appeared to privilege privacy over disclosure (although it remanded the case for further consideration of the issue) by relying heavily on the symbol of the closet.²⁶⁶ Obviously, there are numerous ways of explaining why these courts reached their different results, but a juxtaposition of these cases shows that an understanding of the closet might explain that difference. [*1812]

Oliver "Bill" Sipple foiled an assassination attempt on President Ford, and newspapers reporting on the event disclosed that he was gay.²⁶⁷ Sipple brought suit against these newspapers alleging tortious invasion of privacy.²⁶⁸ He stated that publication of his sexual orientation was offensive to him "inasmuch as his parents, brothers and sisters learned for the first time of his homosexual orientation; and that as a consequence of disclosure of private facts about his life [he] was abandoned by his family, exposed to contempt and ridicule causing him great mental anguish, embarrassment and humiliation."²⁶⁹ The trial court granted summary judgment to the defendants.²⁷⁰ The court of appeals affirmed, resting its determination in part on the finding that Sipple's homosexuality was not a private fact.²⁷¹ In making this finding, the court noted that Sipple spent time in areas of San Francisco and other cities known to be gay haunts, that he marched in gay parades, that he was friends with prominent homosexuals, and that his name and sexual orientation had been reported in various gay magazines.²⁷² The court concluded that because Sipple's "sexual orientation was already in the public domain and since the articles in question did no more than to give further publicity to matters which appellant left open to the eye of the public, a vital element of the tort was missing, rendering it vulnerable to summary disposal."²⁷³

The court's reasoning seems cogent: after all, if one discloses some information to a large group of people, it seems reasonable that one thereby assumes the risk that this information may be made generally public by the media. Yet this train of reasoning does not explain a fundamental contradiction in the two pictures of Sipple that emerge from the case. One picture is of a person who has integrated his homosexuality into his public life: Sipple marches in parades, hobnobs with gay activists, and figures in the gay press.²⁷⁴ The other is of a person who keeps his homosexuality intensely private from his parents, brothers, and sisters.²⁷⁵ Far from attempting to resolve this contradiction between Sipple's public and private homosexual identity, the court catches him in it. The court portrays Sipple as the most irrational of actors - the politically active fig

ure who is afraid that someone will tell his mother on him.

"Irrationality" may be one explanation of this contradiction, but the closet provides a better one. In avoiding any discussion of the closet, the court refused to entertain the possibility that Sipple's seemingly paradoxical management of his homosexual identity had a deep logic to it. In choosing to lead his double life, Sipple had to calculate the probability [*1813] that his activities in San Francisco would come to the attention of his family, multiply that probability by the great harm he would suffer if discovered, and weigh that product against the benefits of his activism. Given that he probably could intuit the likely reaction of his family and the possible benefits of his activism, the crucial variable that Sipple had to estimate was the likelihood that his family would discover his homosexuality. Sipple appears to have assumed that news of his political advocacy was unlikely to travel beyond the community in which he was active. Sipple banked on the fact that the readership of *Data Boy*, *Pacific Coast Times*, and *Male Express* was unlikely to be the same as the readership of

¶n252. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

¶n253. See Ackerman, *supra* note 40, at 717.

¶n254. See *id.* at 72426.

¶n255. See *id.* at 726.

¶n256. See *id.* at 72628.

¶n257. See *id.* at 74546. Judge Posner notes that some groups that traditionally have been thought to be "discrete and insular" no longer merit that description. However, he disagrees with Ackerman's conclusion that the standard has outlived its usefulness. Rather, he contends that the groups have outlived their need for protection. He states: "It is no longer true that blacks or Jews or Orientals or even American Indians constitute discrete and insular minorities&csq; despised by a politically, economically, and socially dominant majority ... or that these groups lack political power" Richard A. Posner, *The Federal Courts: Crisis and Reform* 188 (1985) (quoting Carolene Products, 304 U.S. at 152 n.4).

¶n258. See Hunter, *supra* note 8, at 97.

¶n259. It would be an oversimplification to say that closeted gays relinquish all of their political power. One notable way in which closeted gays are not politically powerless is the manner in which they vote. The anonymity of the American voting process allows even the closeted citizen to wield power at the polls. The voting booth itself may be seen as a kind of protective closet, safeguarding gays under the more general mantle of giving people the privacy to vote their conscience. Yet two counterpoints should also be noted. First, closeted gays themselves must be divided into gays who are closeted to themselves or who admit their homosexuality but suppress it and those who are closeted to others out of fear of external repercussions but who have a pro-gay consciousness. Anonymity will not make the former group vote pro-gay, while it might well allow the latter group to do so. Treating closeted gays as a uniform group that can take advantage of the anonymity of the voting booth is thus an error. Second, as Ackerman notes, the Carolene Products footnote was not directed solely at persons who were denied the vote. See Ackerman, *supra* note 40, at 71517. To the contrary, the footnote specifically aims to protect enfranchised persons disempowered in other ways. Thus, even if all closeted gays voted pro-gay in the voting booth, their disempowerment in other aspects of their life would still make them a cause for concern under Carolene Products.

¶n260. See Hunter, *supra* note 8, at 97.

¶n261. See *id.*

¶n262. See *id.*

¶n263. Sedgwick, *supra* note 131, at 68.

¶n264. Gays tired of doing the work of coming out verbally sometimes choose to do it performatively. Signs like an earring in the right ear, a pink triangle button, a "fag tag," a necklace of freedom rings, are used to counter default presumptions of heterosexuality in ways that words cannot. Such a relinquishment of control over one's identity, however, may have severe costs, as stories of gays bashed simply for such visible proof of identity indicate. See, e.g., *American Values*, Orlando Sentinel, July 3, 1993, at A16, available in 1993 WL 5231148.

¶n265. See 201 Cal. Rptr. 665 (Ct. App. 1984).

¶n266. See 570 F. Supp. 202, 209 n.24 (N.D. Cal. 1983).

¶n267. See Sipple, 201 Cal. Rptr. at 666.

¶n268. See id. at 667.

¶n269. Id.

¶n270. See id.

¶n271. See id. at 668.

¶n272. See id. at 669.

¶n273. Id.

¶n274. See id.

¶n275. See id.

¶n276. See id.

¶n277. Sedgwick's presentation of the story of Powell's gay clerk as a hypothetical is one example of this, as is Jeffries's (and for that matter my) decision not to name the clerk. See supra note 141 and accompanying text.

¶n278. Sipple, 201 Cal. Rptr. at 669 (emphasis added).

¶n279. But even this is open to debate. Evidence for the proposition that gays perceive the "gay" public to be distinct from the "general" public precisely in the way that Sipple did can be found by going to any gay pride parade and watching how the marchers respond to television cameras. Stationary cameras are often trained on the marchers as they pass, and many marchers will avert their faces as they march by these cameras. Again, this seems like a contradiction. Marchers in gay parades are engaged in a "public" act of asserting their support for gays such that television coverage giving "further" publicity to the act should not be a cause for their concern. Indeed, as the marchers presumably intend to demonstrate public solidarity with gays, one might legitimately expect that further publicity would be welcome. That this is not the case indicates that the marchers are drawing a distinction between the two publics to which they are making their statement. The public comprised of persons physically present at the parade, whether as marchers or onlookers, is being distinguished from the more general public that may catch the parade on television. That distinction seems sensible. After all, those who march in or who come out to watch gay-pride parades (with the exception of protestors and some persons who accidentally happen on it) are generally those who are sympathetic to gays. Marchers can thus sustain a legitimate expectation that their disclosure of solidarity will not lead (at least directly) to negative repercussions. In sharp contrast, marchers cannot sustain a similar expectation of television viewers, who may happen upon the gay pride parade while channel surfing.

¶n280. See Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 205 (N.D. Cal. 1983).

¶n281. See id. at 204.

¶n282. See id.

¶n283. See id.

1 **PROOF OF SERVICE**

2 I, Carlyn Mitchell, declare:

3 I am a resident of the State of California and over the age of eighteen years, and
4 not a party to the within action; my business address is 11355 West Olympic Boulevard, Los
5 Angeles, CA 90064-1614. On February 1, 2002, I served the within documents **REQUEST
FOR JUDICIAL NOTICE OF AMICI CURIAE**

- 6 by transmitting via facsimile the document(s) listed above to the fax number(s)
7 set forth below on this date before 5:00 p.m.
- 8 by placing the document(s) listed above in a sealed envelope with postage thereon
9 fully prepaid, in the United States mail at Los Angeles, California addressed as set
10 forth below.
- 11 by placing the document(s) listed above in a sealed FEDERAL EXPRESS
12 envelope and affixing a pre-paid air bill, and causing the envelope to be delivered
13 to a FEDERAL EXPRESS agent for delivery.
- 14 by personally delivering the document(s) listed above to the person(s) at the
15 address(es) set forth below.

16 *Please see attached Service List*

17 I am readily familiar with the firm's practice of collection and processing
18 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
19 Service on that same day with postage thereon fully prepaid in the ordinary course of business. I
20 am aware that on motion of the party served, service is presumed invalid if postal cancellation
21 date or postage meter date is more than one day after date of deposit for mailing in affidavit.

22 I declare that I am employed in the office of a member of the bar of this court at
23 whose direction the service was made.

24 Executed on February 1, 2002.

25 
26 _____
27 Carlyn Mitchell

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Service List

By Overnight Mail:
E. Roy Hawkins
Department of Justice
601 D. Street NW
Room 9544
Washington, D.C. 20530

By Regular Mail:
Stephen L. Collier, Esq.
126 Hyde Street
Second Floor
San Francisco, CA 94102

By Regular Mail:
Christopher Stoll
Heller Ehrman White
& McAuliffe LLP
333 Bush Street
San Francisco, CA 94104-2878