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Taylor Flynn

Western New England University School of Law, tflynn@law.wne.edu

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Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military’s Anti-Gay Policy

Taylor Flynn

INTRODUCTION

In an attempt to escape from Bowers v. Hardwick’s apparent stranglehold on same-sex conduct, some opponents of the military’s exclusionary policy have searched for alternative, “status-based” arguments to support an equal protection challenge. In Hardwick, the Supreme Court held that a state’s criminalization of same-sex sodomy does not violate the rights to privacy and substantive due process. Federal courts have expanded Hardwick’s reach on two fronts. First, some federal courts have reasoned that Hardwick’s due process holding forecloses an equal...
protection challenge. In this manner, the courts have been able to apply Hardwick in this manner because they have used conduct to define a person's status as gay. See Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) ("The issue presented us is only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification . . ."); see also Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990) (noting that plaintiff had not admitted to engaging in same-sex conduct, but viewing her status as a lesbian as compelling evidence that she had engaged in or would engage in such conduct). By defining same-sex orientation so as to make conduct and status synonymous, the courts have been able to apply the Hardwick rationale to penalize status.

5. These decisions have held that, because Hardwick allows same-sex sodomy to be criminalized, there is no heightened protection for gay persons as a suspect or quasi-suspect class. See, e.g., Ben-Shalom, 881 F.2d at 464-65 (upholding Army's refusal to re-enlist sergeant on basis of homosexuality against First Amendment and due process challenges); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1005 (1990) (upholding FBI's refusal to hire applicant on basis of homosexuality against equal protection challenge); Padula, 822 F.2d at 103 (upholding Navy's discharge of reserve officer on basis of homosexuality against privacy and equal protection challenges).

6. Padula, 822 F.2d at 103.

7. Id.

8. An increasing number of federal decisions—even if overturned on appeal—have either held or suggested in dicta that the military's discharge policy violates equal protection on the ground that it impermissibly discriminates based on a person's sexual orientation. See, e.g., Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (stating that there is a "constitutionally significant danger of making status a surrogate for prohibited conduct"); Steffan v. Aspin, 8 F.3d 57, 70 (D.C. Cir. 1993) (holding that military classification on the status of sexual orientation was "not rationally related to any legitimate goal"); rev'd, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Able v. United States, 880 F. Supp. 968, 980 (E.D.N.Y. 1995) (holding the military's discharge policy unconstitutional under the First and Fifth Amendments); Selland v. Aspin, 832 F. Supp. 12, 15 (D.D.C. 1993) (granting injunction to prevent discharge based on same-sex status because of likelihood that an equal protection challenge will succeed); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1328-37 (E.D. Cal. 1993) (holding that the military's discriminatory policy on sexual orientation had no legitimate government purpose).

should always be on people’s conduct, not their status.”

The 1994 Directives’ vaunted distinction between status and conduct, however, seems to be in name only. Like its predecessor, the revised policy subjects same-sex conduct to more stringent regulation than different-sex conduct. This differential treatment acts as a public badge of subordination. Under the 1994 Directives, it remains possible to discriminate based upon sexual orientation in the guise of regulating conduct. The 1994 Directives conflate status and conduct by relying upon an ostensibly “rebuttable” presumption that, in effect, mandates discharge for servicemembers who identify themselves as gay. Because such self-identification—especially in defiance of a state-prescribed discharge policy—may act as a form of political dissent, the 1994 Directives’ prohibition against disclosing one’s gay identity seems to constitute discharge based upon a person’s status and beliefs.

In challenges to the 1994 Directives and its predecessor, a recent wave of decisions have held unconstitutional the exclusion of lesbians, bisexuals, and gay men when the only evidence of same-sex “conduct” is the servicemember’s self-identification as gay. These courts, as well as some pro-equality commentators, have drawn upon three criminal law models by characterizing same-sex orientation as akin to a status and a form of


12. As the policy’s nickname, “Don’t Ask, Don’t Tell,” suggests, the 1994 Directives do not permit servicemembers to disclose their sexual identity. The Directives also purport to prohibit the questioning of servicemembers or recruits about their sexual orientation in the absence of evidence of same-sex conduct. See Office of Assistant Secretary of Defense, Pub. No. 605-93, Overview of Directives Implementing the New DOD Policy on Homosexual Conduct in the Armed Forces I (Dec. 23, 1993) (discussing the five areas covered by the new policy) (on file with author) [hereinafter Pub. No. 605-93]. What the political process gave with one hand, however, it took away with the other. The National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 564 (Supp. V 1993), is subject to amendment to permit the Secretary of Defense to reinstate the questioning of recruits concerning their sexual identity whenever the Secretary deems it necessary. See Act of Nov. 30, 1993, Pub. L. No. 103-160, § 571(d), 107 Stat. 1673.

13. See infra notes 223-26 and accompanying text.

14. See infra note 44 and accompanying text.

15. By “pro-equality,” I mean to describe those individuals (or courts) who posit a model of equality for lesbians, bisexuals, and gay men. I use the term “pro-equality” rather than “pro-gay” because I believe that the underlying foundation for this position extends beyond support for the particular issue of sexual orientation and encompasses the broader principle of equal protection for all persons.
political expression. The first model relies upon Robinson v. California and Powell v. Texas, in which the Supreme Court announced the constitutional impermissibility of criminalizing the status of addiction to narcotics and alcohol. In the context of military litigation, this model posits the constitutional impermissibility of criminalizing the status of same-sex orientation. The latter two models depend upon a characterization of same-sex orientation—particularly "coming out," disclosing one's gay identity—as akin to a form of political expression. The second model is an analogy to the Supreme Court's restrictions upon the criminalization of subversive advocacy pursuant to statutes such as the Smith Act and the Subversive Activities Control Act. The final model looks to the development of the American law of treason, with its rejection of the early English law of constructive treason, which permitted conviction based upon one's thoughts alone. Because these three models may be gaining favor as precedent among courts holding the military's discharge policy


17. Numerous federal courts have invoked Robinson and Powell in the non-criminal context of the military's discharge policy. See, e.g., Watkins v. United States Army, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (invoking Robinson for the proposition that states may not penalize gay persons based solely upon sexual orientation); Selland v. Aspin, 832 F. Supp. 12, 15 (D.D.C. 1993) (same); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1335 (E.D. Cal. 1993) (same). For the argument that Robinson and Powell are directly applicable to the non-criminal sanctions imposed by the discharge policy, see Valdes, supra note 2, at 427-28 (arguing that it is irrelevant whether status-based sanctions are criminal or non-criminal in nature because the crux of the Robinson and Powell decisions is a prohibition against making a presumption of misconduct based on status).

Even assuming, arguendo, that Robinson and Powell do not directly apply in a non-criminal context, this should not foreclose reference to these decisions by analogy. See, e.g., Meinhold v. United States Dep't of Defense, 14 F.3d 1469, 1478 (9th Cir. 1994) ("While not controlling because the discharge process is not a criminal proceeding ... Robinson and Powell . . . nevertheless point out the constitutionally significant danger of making status a surrogate for prohibited conduct."); Steffan v. Aspin, 8 F.3d 57, 66-67 (D.C. Cir. 1993) (describing two areas of criminal law—treason and subversive advocacy—and arguing that the principles therein apply by analogy in a non-criminal context), rev'd, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Selland, 832 F. Supp. at 15 (stating that Robinson could apply in a non-criminal context).


20. For a discussion of the law of treason, see generally infra part IV.
unconstitutional, pursuing an in-depth examination of their implications is urgent.

This Article argues that, although at first glance these models may appear to be enticing bases for overturning the exclusionary policy, pro-equality advocates should not rely on them for two principal reasons. As a matter of doctrine, any value as precedent collapses under the weight of closer scrutiny; as a historical matter, gay persons have been and may continue to be associated with the stigmatized groups found in each model.

The doctrinal value of these models is weak because, in all three areas, the Supreme Court has upheld some convictions which it asserted were conduct-based but which arguably were based upon the defendant’s status or beliefs.\(^1\) These differing interpretations for the basis of the convictions stem from the instability of the categories of “status” and “conduct.” For example, the reasoning in both Robinson and Powell suggests that the state cannot penalize an alcoholic for the status of simply “being drunk,” yet the state may criminalize the act of “being drunk in public.”\(^2\) The ability of the state to narrowly circumscribe the “status” category suggests a line of argument for the government litigators in military litigation: That the 1994 Directives protect the status of “being gay,” while permissibly mandating discharge for the act of “being gay in public,” such as disclosing one’s same-sex orientation to a fellow servicemember. Reliance on these three models also may ignite in the minds of judges the longstanding, historical association of same-sex orientation with certain stigmatized groups. The Robinson and Powell decisions suggest the pathologizing trope of same-sex orientation as an addiction, mental illness, or irresistible compulsion to engage in sex. Similarly, the subversive advocacy and treason decisions may evoke the historical comparison of gay persons with Communists and traitors. Given McCarthyism’s demonization of Communists, traitors, and gay persons as threats to national security, these associations are especially potent in the context of military litigation. Judges who are presented with arguments that subtly reinforce historical notions that nonheterosexuals are somehow diseased or present a security risk may view the anti-gay policy as more reasonable than they otherwise might have. For instance, during the en banc rehearing for Steffan v. Perry\(^2\) in which the subversive advocacy analogy was presented—one judge asked why the military could not discharge someone for being gay, since it presumably could do so if a servicemember were Communist.\(^2\)

\(^{21}\) See e.g., infra part II.C.1 (arguing that Powell v. Texas failed to protect alcoholic status); infra part III.C.3 (arguing that Dennis v. United States failed to protect defendant’s Communist status); infra part IV.B.1.c (arguing that Haupt v. United States failed to protect defendant’s beliefs).

\(^{22}\) See infra notes 144-55 and accompanying text (discussing how Powell narrowed Robinson).

\(^{23}\) 8 F.3d 57 (D.C. Cir. 1993).

\(^{24}\) See infra notes 300-16 and accompanying text (discussing how, historically,
While it is not possible to ascertain whether the analogy prompted the question, the judge's question, at the very least, illustrates how these negative associations may influence judicial reasoning.

Part I of this Article considers the 1994 Directives and the ways in which it targets sexual orientation despite President Clinton's claim of a status versus conduct bifurcation. Parts II-IV examine, respectively, the analogies to Robinson and Powell, subversive advocacy, and treason decisions. Each part looks, first, to the doctrinal strengths and weaknesses when applied to the 1994 Directives and, second, to the historical associations that may (mis)inform judicial decisionmaking.

I. THE 1994 DIRECTIVES

In announcing the revisions to the 1994 Directives, President Clinton emphasized the "essential element" of the policy: "service men and women will be judged based on their conduct not their sexual orientation." Similarly, Attorney General Reno, in evaluating the 1994 Directives' legal defensibility, concluded that "the policy implements the distinction between 'status' and 'conduct' ..." The 1994 Directives do facially purport to mandate discharge only for same-sex conduct. Section H.1.a of the 1994 Directives provides: "A statement [that one is gay] ... is grounds for separation not because it reflects the member’s sexual orientation, but because the statement indicates a likelihood that the member ... will engage in homosexual acts." This change from the preceding policy, however, is superficial rather than substantive. The superficiality of the change is indicated in part by Clinton's eleventh hour concession to modify what had been the central tenet of the 1994 Directive's policy: "homosexual orientation is not a bar to military service." At a hearing in...
the first case considering the 1994 Directives, Judge Nickerson called the revised policy "a bit of a hoax."
29 In his written opinion, he observed that "the allegedly new policy makes the same distinction between homosexuals and heterosexuals as did the prior policy." 30

Both the language and government interpretation of the 1994 Directives support Judge Nickerson's conclusion. The revised policy regulates same-sex conduct more stringently than different-sex conduct, creating a governmentally sanctioned form of differential treatment which has no rational basis. While the 1994 Directives purport to regulate conduct alone, they nevertheless discriminate based upon sexual orientation. Finally and most significantly, the 1994 Directives collapse the categories of status and conduct by relying upon a supposedly "rebuttable" presumption that in effect requires discharge for servicemembers who state that they are gay. 31 The rebuttable presumption treats the statement "I am lesbian," made from one servicewoman to another, as substantially equivalent to "Let's have sex." 32 This prohibition against coming out constitutes discharge based upon one's sexual orientation while also suppressing political expression.

A. Public Symbol of Subordination

As did their predecessor, the 1994 Directives require differential treatment for similar conduct depending upon the sexual orientation of the servicemember. Directives 1332.14 and 1332.30 of the 1994 policy require discharge based upon same-sex conduct, but do not require comparable treatment for heterosexual conduct. 33 The 1994 Directives target same-sex conduct even though—as both the President and Secretary of Defense have conceded—proscribed sexual conduct "is already covered by the laws and rules which also cover activities that are improper by heterosexual members of the military." 34 This disparate treatment of gay
persons under both the former and revised policy functions as "an important public symbol of... subordination."

B. Locking the Closet Door: Rebuttable Presumption Against Coming Out

Section H.1.b(2) of the 1994 Directives, which sets forth the policy's rebuttable presumption, can be unpacked into five propositions. First, subject to rebuttal, section H.1.b(2) mandates discharge for a servicemember who discloses her same-sex identity: "A member shall be separated... if... [t]he member has made a statement that he or she is a homosexual..." Second, a servicemember can avoid discharge if she can demonstrate that she "is not a person who... has a propensity to engage in... homosexual acts." Third, section H.1.b(2) makes the tautological presumption that the servicemember's statement alone does in fact demonstrate such a propensity: "A statement by a Service member that he or she is a homosexual... creates a rebuttable presumption that the Service member engages in homosexual acts..." Fourth, although section H.1.b(2) specifies that "[p]ropensity... means more than an abstract desire to engage in homosexual acts," the 1994 Directives fail to require evidence of actual conduct: Section H.1.b(2) simply defines "propensity" as "a likelihood that a person engages in or will engage in homosexual acts." Finally, while section H.1.b(2) lists factors which "may be considered" in determining whether a servicemember has successfully rebutted the presumption, the military's own personnel guidelines suggest that, regardless of the evidence proffered by the member, it is virtually impossible to rebut the presumption.

Section H.1.b(2) of the 1994 Directives presumes future misconduct based solely upon a servicemember's statement of same-sex identity. Francisco Valdes has described the rebuttable presumption as requiring a "three-step inference" that views (1) a servicemember's statement (2) as an indication of a propensity to commit misconduct (3) which creates a

Reply Brief.

37. Id.
38. Id. Moreover, the 1994 Directives define "homosexual conduct" as including, inter alia, "a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts..." 1994 Directive 1332.30, supra note 9, at Definitions (9).
40. Id. (emphasis added).
41. Id. (emphasis added).
42. For a discussion of the factors which the military's personnel training manual considers and of the reasons it is virtually impossible for a servicemember to rebut the presumption, see infra text accompanying notes 60-68.
presumption of same-sex conduct. Judge Nickerson concluded that this presumption impermissibly conflates status and conduct: 

"[The 1994 Directives] go so far as to make any statement of homosexual orientation, wherever and whenever made, even a statement to this court, as proof of an intent to engage in homosexual acts." Under the current Directives, it is irrelevant whether a servicemember, by coming out, is making a political statement, confiding her thoughts to a therapist, or filing a lawsuit; the rebuttable presumption creates its own form of Orwellian "newspeak." The 1994 Directives, in effect, translate a statement of status or identity ("I am a lesbian") into a statement of conduct ("I intend to have sex with a woman").

1. Government's Rationale

In support of this rebuttable presumption, the government is likely to argue that it can make "administrative presumptions that rest on 'a sound factual connection between the proved and inferred facts.'" In Steffan v. Perry, the military argued that there is a "sound factual connection" between gay identity and same-sex conduct. Pro-equality advocates could disprove this assertion with expert testimony by psychologists who assert that no clear connection between act and identity exists. In Cammermeyer v. Aspin, the district court relied upon the testimony of Dr. Laura Brown when it granted summary judgment for Colonel Margarethe Cammermeyer, who was challenging her discharge from the military. Dr. Brown stated that "there is almost no relationship between an individual's orientation and his or her sexual conduct." Not all courts, however, would agree with the Cammermeyer court. Judge Reinhardt's dissent in Watkins v. United States Army states: "To pretend that homosexuality or heterosexuality is unrelated to sexual conduct borders on the absurd." Fortunately, a court need not resolve this question. The government's presumption against coming out fails in

43. Valdes, supra note 2, at 471.
44. Able v. United States, 847 F. Supp. 1038, 1040-41 (E.D.N.Y. 1994). The court granted the plaintiffs' request for a preliminary injunction prohibiting the military from taking further discharge actions against the plaintiffs during the pendency of the litigation. In fact, the military had already taken adverse action against several of the plaintiffs based upon the complaint's identification of their sexual orientation. Id. at 1045-46.
46. Id. at 15-16.
47. Cammermeyer v. Aspin, 850 F. Supp. 910, 919 (W.D. Wash. 1994). Colonel Cammermeyer was discharged after she acknowledged that she is lesbian in response to a question asked during a top secret security check required for admission to the Army War College. Id. at 913-12.
several ways. First, the government irrationally presumes that only gay persons will act upon their sexual desires in violation of military regulations. This leads to the odd presumption that a servicemember who states "I'm bisexual" will engage in prohibited same-sex acts, but not in prohibited different-sex acts. Second, the Directives' presumption is in effect irrebuttable. Finally, the presumption suppresses political dissent and participation.

2. Presumption is Factually Flawed

Even assuming a nexus between sexual orientation and sexual conduct, the government has shown no factual basis for assuming that same-sex conduct mandates discharge while different-sex conduct does not. The Uniform Code of Military Justice criminalizes sodomy and certain other forms of sexual behavior such as harassment, regardless of the gender of those involved. As the Ninth Circuit observed in Meinhold v. United States, "[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." This differential treatment leads to a particularly absurd result for bisexual servicemembers. The 1994 Directives presume, for instance, that a bisexual woman will engage in oral sex with women, but not with men. There is no factual support for this asymmetrical presumption. Dr. Gregory Herek, a respected research psychologist, has concluded:

There is no evidence to support the notion that lesbians and gay men are more likely than heterosexuals to engage in sexual harassment or open sexual activity or that gays are less able to control their sexual impulses than straights. Nor is there any basis for the belief that gays are sexually predatory or that they will try to convert or recruit heterosexuals.

Ironically, the most compelling evidence that sexual orientation does not correlate with capacity to serve or with sexual misconduct comes from the military itself. For instance, studies issued by the government consistently have undercut the basis for the military's anti-gay policy.

49. See supra note 34.
50. Meinhold v. United States, 34 F.3d 1469, 1478 (9th Cir. 1994).
51. Dr. Gregory Herek is currently an associate research psychologist at the University of California at Davis. Affidavit of Gregory Herek, published in slightly modified form in Gays in the Military: Joseph Steffan Versus The United States 129 (Marc Wolinsky & Kenneth Sherrill eds., 1993) [hereinafter Herek Affidavit]. In 1989, Dr. Herek received an award for Distinguished Scientific Contributions to Lesbian and Gay Psychology from a division of the American Psychological Association. Id.
52. Id. at 128.
Moreover, on the day that President Clinton announced the revised policy, he acknowledged that "there is no study showing [gay persons] to be less capable or more prone to misconduct than heterosexual soldiers." President Clinton also recognized that lesbians, bisexuals, and gay men have served in the military with honor, and that other nations have integrated nonheterosexuals into their armed forces with no discernable negative consequences. Thus, even if the government reasonably presumed a correlation between same-sex orientation and same-sex conduct, the military's own studies and remarks by its Commander-in-Chief indicate that there is no rational basis for selectively subjecting gay persons to differential treatment.

3. Presumption is Effectively Irrebuttable

Rebutting the 1994 Directives' presumption is nearly impossible; even "senior Pentagon officials acknowledge that [the presumption] would be difficult" for a servicemember to rebut. In effect, the 1994 regulations presume that servicemembers who have stated that they are gay will break the rules and must be discharged. To rebut the presumption, a servicemember must present "evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so." In addition, "[t]he member shall bear the burden of proving, by a preponderance of the evidence, that retention is warranted . . ." Proving a negative—that one did not do something—is particularly difficult because the military's investigation into sexual conduct is not limited to an allegation of specific acts which occurred on specific days. Even more significant, the servicemember must prove the absence, not of an act, but of a tendency to commit an act. The first judge to consider the revised policy concluded, "[W]hile in theory there is a slim chance that a plaintiff might be able to rebut [the military's presumption]," as a practical matter, "that presumption is virtually irrebuttable."
The Department of Defense's personnel training manual, which suggests how the revised regulations should function in practice, illustrates the difficulty of rebutting the presumption. For example, the manual describes an officer who confided in his best friend that he has recently come out to himself as gay, but that he has never engaged and never will engage in same-sex acts while in the military. At his hearing, several male officers and enlisted men testified that: the officer never suggested that he is gay or ever made any sexual advances toward them or anyone they know; the officer is a truthful and outstanding leader; and they believe that the officer will abide by the regulations which proscribe same-sex conduct.

In offering this evidence at his hearing, the officer introduced every category of evidence which the 1994 Directives specifically enumerate as relevant to the determination of whether a servicemember has rebutted the presumption. Section H.1.b(2) provides that a servicemember may submit testimony concerning, *inter alia*:

(a) whether the member has engaged in homosexual acts;
(b) the member's credibility;
(c) testimony from others about the member's past conduct, character, and credibility; [and]
(d) the nature and circumstances of the member's statement.

Because the officer is attempting to prove a "negative" propensity—that he has not and will not engage in same-sex acts—it is difficult to imagine any evidence which would be more effective than that which he proffered. However, such evidence is likely to be insufficient. As the personnel training manual explains, the 1994 Directives presume that "the statement [of same-sex orientation] . . . is evidence that the member engages in or is likely to engage in homosexual acts." In fact, the manual concludes that the evidence in this hypothetical is equivocal: the military could retain the member or could recommend separation.

The manual describes another situation in which a servicemember expressed confusion over his sexual identity and stated to his commanding

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61. *See* id. at hypothetical 13.

62. 1994 Directive 1332.14, supra note 9, at § H.1.b(2)(a)-(d). The list of factors is not exhaustive; section H.1.b(2)(e) states that the military may consider "any other evidence relevant to whether the member is likely to engage in homosexual acts." *Id.* at § H.1.b(2)(e).

63. Personnel Training Manual, supra note 60, at hypothetical 12. In this hypothetical, as in hypothetical 13, there was no evidence of proscribed conduct other than the servicemember's statement that he is gay.

64. *Id.* at hypothetical 13.
officer that he might be gay. In this situation, even the servicemember does not know whether he has a propensity to engage in same-sex conduct. The manual recommends that an investigation not be instituted because "[i]t is not at all clear that the Service member intended to make a statement that he is homosexual." Nonetheless, the manual leaves open the possibility that the commander may initiate a separation action, which is precisely what occurred in the case of Marine Corporal Kevin Blaesing. Believing his communication to be privileged, Blaesing confided to the military psychologist that, although he was not sure, he thought he might be gay. The psychologist reported this discussion to Lieutenant-Colonel Martin Martinson, Blaesing's commanding officer. Martinson, who acknowledged that he is not comfortable with gay persons, initiated discharge proceedings and sequestered Blaesing.

Although the Marine Corps has since withdrawn Blaesing's discharge recommendation, servicemembers in a similar situation have no assurance that they would be allowed to remain in the military. Blaesing's discharge proceedings illustrate the highly subjective nature of the 1994 Directives, which leave such decisions to the commanding officer's discretion. Blaesing's discharge had been approved by the then commander of the Marine Corps Forces Atlantic, General William Keyes. One month later, Keyes retired and was replaced by a new commander who withdrew the discharge recommendation. Blaesing, while happy about his reinstatement, believes that his military career has been harmed irrevocably.

Blaesing's situation demonstrates the ease with which the military has circumvented the status versus conduct distinction, particularly through its reliance upon the rebuttable presumption. Not only was there no evidence of same-sex conduct, but even Blaesing was uncertain whether his "status" was that of a gay, bisexual, or heterosexual man. The evidentiary

65. Id. at hypothetical 1.
66. Id.
67. Id.
69. Id. Blaesing has stated that he was never informed that his conversations with a military psychologist become part of his military health record. Id. Blaesing's commanding officer, Lieutenant-Colonel Martin Martinson conceded that he too had thought that such conversations were privileged. Id. Martinson acknowledged that he does not discuss the issue of doctor-patient confidentiality with the servicemembers. Id.
70. Id. Martinson claimed that he sequestered Blaesing for fear of "what other folks might do to [Blaesing] and how that would reflect on the Marines if they did." Id.
72. Id.
73. Id.
difficulties facing Blaesing were enormous: to rebut the military’s presumption, he had to prove that he did not have the propensity to engage in same-sex conduct when he might not have known the answer himself.

4. Presumption Deters Political Expression

Blaesing’s discharge proceeding also illustrates that the military’s prohibition against coming out suppresses expression at both an individual and a systemic level. At an individual level, Blaesing confidentially revealed to his psychologist that he was questioning his sexual orientation. Based upon this private disclosure of a core aspect of his personal identity, the military became actively engaged in some of Blaesing’s innermost thoughts—whether he is sexually attracted to men and whether he is likely to act upon any such attraction while in the armed services. In addition to this intrusion into Blaesing’s individual autonomy, military policy transformed Blaesing’s confidential disclosure into a statement bearing political significance. The socio-political significance of Blaesing’s statement stems largely from the symbolic weight of a governmentally-prescribed anti-gay policy. As Kenneth Karst observed, “Especially in the context of the central expressive function of the Army’s exclusion regulation, coming out is not just an act of self-definition but an act of political expression.”

The 1994 Directives’ rebuttable presumption not only limits the servicemember’s potential for political expression, its effects may ripple out to deter dissent on a broader social scale:

[T]he collective, communal impact of forced silence amounts to more than an accumulation of violations of individual integrity. It creates a form of state orthodoxy. If speaking identity can communicate ideas and viewpoints that dissent from majoritarian norms, then the selective silencing of certain identities has the

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74. The military will intrude more actively in Blaesing’s thought process if Blaesing attempts to rebut the presumption in the hope of salvaging his career. Nonetheless, even prior to the completion of Blaesing’s discharge, his private thoughts have been made public. As Blaesing stated, “It’s been humiliating that I’ve had my personal and private life discussed in offices at the barracks, that my personal and private life’s been put on documents and papers and doctors’ statements . . . .” See Morning Edition I, supra note 68.

75. See Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity, 36 UCLA L. Rev. 915, 973 (1989) (discussing several cases in which employers took action against employees upon indirectly learning of employees’ gay identity); see also Rowland v. Mad River Local Sch. Dist., 730 F.2d 444, 446-56 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985) (upholding termination of plaintiff who had confided to a co-worker that she was bisexual).

76. Karst, supra note 35, at 561. As early as 1979, the California Supreme Court recognized that coming out constitutes a form of protected political expression because it increases the visibility of gay persons and enables gay people to organize politically. Gay Law Students Ass’n v. Pacific Tel. & Tel., 595 P.2d 592, 610 (Cal. 1979) (ruling that job discrimination against nonheterosexuals was prohibited by a statute that barred utility from interfering with employees’ right to engage in political activity).
opposite, totalitarian effect of enforcing conformity.\textsuperscript{77}

The 1994 Directives arguably enforce conformity to an even greater extent than did their predecessor. On the face of the 1981 Directives, no gay persons, whether serving in silence or not, were permitted in the military. In contrast, the 1994 Directives condition the service of nonheterosexuals on their silence. The 1994 Directives thus accept "the closet" as the consensus on the appropriate expression of gay and lesbian identity, thereby creating an unjustifiable sense of consent on the part of the very persons oppressed by the regulations.

This mandate of silence is particularly significant because coming out is potentially one of the most powerful methods available to gay persons for effecting social change. Dr. Herek concluded that "knowing an openly gay person is predictive of supportive attitudes even in demographic groups where hostility is the norm. . . ."\textsuperscript{78} Moreover, because servicemembers may fear bearing a public identity as gay and risking discharge,\textsuperscript{79} the Directives' presumption is likely to deter all servicemembers—regardless of their sexual orientation—from entering the public debate about the military's exclusionary policy and other gay rights issues. Servicemembers perceived to be gay may suffer additional consequences, including the loss of physical safety, housing,\textsuperscript{80} and custody of children. Furthermore, individuals who disagree with the anti-gay policy may be dissuaded from serving in the armed forces, an opportunity associated with full citizenship and which traditionally has provided

\textsuperscript{77} Nan D. Hunter, Identity, Speech, and Equality, 79 Va. L. Rev. 1695, 1719 (1993) (discussing the suppression of speech which identifies oneself as gay).

\textsuperscript{78} Herek Affidavit, supra note 51, at 131. See also Gregory M. Herek, Stigma, Prejudice, and Violence Against Lesbians and Gay Men, in Homosexuality: Research Implications for Public Policy 60, 76-77 (John C. Gonsiorek & James D. Weinrich eds., 1991) (concluding that studies indicate that degree of prejudice against gay persons decreases as knowledge about gay people increases).

\textsuperscript{79} See generally Halley, supra note 75 (arguing that sexual identity is created through political and social discourse, and that, absent heightened protection for sexual identity, persons supportive of gay rights may be deterred from full political participation).

\textsuperscript{80} For instance, the commanding officer expressed concern that Blaesing might become a victim of anti-gay violence by fellow Marines. Morning Edition I, supra note 68; see also Evelyn C. White, Brutal Assaults Grow More Common, S.F. Chron., Apr. 27, 1994, at A1 (discussing upsurge in gay-bashing in San Francisco and nationwide). In the infamous case of Sharon Bottoms, the district court awarded custody of Ms. Bottoms' son to his grandmother, despite evidence that the grandmother's partner may have sexually abused Ms. Bottoms when she was a child. Lesbian Appeals Ruling Basing Child Custody on Sex Preference, L.A. Times, Feb. 17, 1994, at A27. The Virginia Supreme Court affirmed the district court's decision. Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (finding lesbian mother unfit and awarding custody of child to child's grandmother against mother's wishes).

educational and career opportunities frequently unavailable to lower-income persons. 81

The military's regulations also may deter servicemembers, particularly those who are gay, from participating in a forum quintessentially associated with political participation—demonstrations and parades. While the revised policy ostensibly permits servicemembers to attend a gay-rights parade, members can be discharged for carrying placards which suggest that they are gay. 82 The military's tautological reasoning that appearance at a parade may be used to launch an investigation if an observer considers this to be sufficient evidence that the attendee may be gay further deters participation in gay rights demonstrations and parades. 83 The 1994 Directives also proscribe same-sex handholding and kissing, 84 which at times may be a form of political expression: Gay activists have organized "kiss-ins" and handholding demonstrations to protest the marginalization of nonheterosexuals. 85 Thus, even in the wake of the revised 1994 Directives, it remains true that "the exclusion policy is, above all, political theater," 86 theatre which deters those most affected from meaningful participation in the political arena.

II. THE ANALOGY TO THE SUPREME COURT'S "STATUS" DECISIONS

In numerous challenges to the military's exclusionary policy, federal courts have relied by analogy upon the Supreme Court's status decisions, Robinson v. California 87 and Powell v. Texas, 88 for the proposition that the armed service's policy of selectively discharging servicemembers based upon the status of their same-sex orientation is unconstitutional. In Robinson 89 and Powell, 90 the Supreme Court held that criminalizing the

81. See, e.g., Karst, supra note 35, at 500 (arguing that the military's 1982 exclusionary policy violated the principle of equal national citizenship).
82. Personnel Training Manual, supra note 60, at hypothetical 6 (stating that the military may investigate a servicemember who carried a sign which read, "Lesbians in the military say, 'Lift the Ban,'" because the sign could be interpreted as making a statement that the member is lesbian).
83. At his confirmation hearing, Defense Secretary William Perry acknowledged that participation in a gay-rights parade, going to a gay bar, or reading gay literature—all of which the revised policy purportedly allows—may be used to initiate an investigation "if a reliable person observed behavior that he or she believes amounts to a nonverbal statement that the servicemember is a homosexual." Hanna Rosin, The Ban Plays On: the Fallacy of "Don't Ask, Don't Tell," The New Republic, May 2, 1994, at 12.
84. In the second of the hypothetical teaching scenarios, the Pentagon indicated that handholding by servicemembers of the same-sex may "constitute[] credible information of homosexual conduct." Personnel Training Manual, supra note 60, at hypothetical 2.
85. Valdes, supra note 2, at 494 n.395 (describing Queer Nation's kiss-ins as political expression (citing Partners, Summer 1992, at 8)).
86. Karst, supra note 35, at 546.
89. 370 U.S. at 667 (holding that a state law which criminalized narcotics
status of drug addiction violated the Eighth and Fourteenth Amendments’ prohibition against cruel and unusual punishment. A pro-equality examination of the wisdom of the Robinson/Powell analogy is necessary because of the recent wave of military discharge decisions invoking Robinson and Powell to support the conclusion that the exclusionary policy violates equal protection. The inclusion of the Robinson/Powell analogy in these recent decisions offers pro-equality advocates a false—and potentially damaging—promise.

There are three principal reasons for pro-equality advocates to reject reliance upon Robinson and Powell. First, the Supreme Court’s decision in Powell severely limited the scope of Robinson when it held that an alcoholic’s appearance in public while drunk constituted a proscribable act rather than a protected status. Powell arguably leaves a court free to uphold the penalization of “conduct,” which actually may be a protected “status.” Second, the Supreme Court upheld Powell’s conviction in part because it was concerned that little was known about the cause of alcoholism. Pro-equality litigators similarly may become trapped in the currently unresolvable issue of the etiology of sexual orientation.

Finally, the Robinson and Powell decisions are likely to invoke the long-held, stigmatic association of same-sex orientation with addiction, mental illness, and an irresistible compulsion to engage in sex. This possibility has troubling implications. There is a risk that these stigmatizing associations may inflame any pre-existing negative images of gay persons that judges may hold. Even assuming some utilitarian value to invoking Robinson and Powell, the utility is far outweighed by the likelihood that reliance upon these decisions could perpetuate the stigmatic misperceptions of lesbians, bisexuals, and gay men.

addiction absent evidence of an illegal act violated the Eighth Amendment’s prohibition against cruel and unusual punishment).

90. 392 U.S. at 533 (stating that Robinson prohibits criminalization of a status absent a proscribable act).

91. Recent military discharge decisions which have relied upon Robinson or Powell include: Cammermeyer v. Aspin, 850 F. Supp. 910, 927 n.25 (W.D. Wash. 1994) (noting that the plaintiff relied upon Robinson and that the court accepted the characterization of plaintiff’s discharge as based solely upon status); Selland v. Aspin, 832 F. Supp. 12, 16-17 (D.D.C. 1993) (ordering temporary injunction barring the military from discharging plaintiff based solely upon gay status); Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319, 1337 (E.D. Cal. 1993) (holding discharge policy unconstitutional on equal protection grounds). Earlier, in 1989, Justice Norris also mentioned Robinson. Watkins v. United States Army, 875 F.2d 699, 716 (9th Cir. 1989) (Norris, J., concurring) (holding that military was estopped from barring soldier’s reenlistment solely because of gay status).

92. Powell, 392 U.S. at 532-33.

93. Id. at 521-22.

94. See infra notes 164-201.
A. Robinson, Powell, and Status

1. Robinson

In *Robinson v. California*, the Supreme Court held that a California statute criminalizing the status of narcotics addiction violated the Eighth and Fourteenth Amendments' prohibition of cruel and unusual punishment. Characterizing "addiction" as an "illness," the Court invoked the traditional criminal requirement of an *actus reus* and held that the California statute criminalized mere status without the requirement of an act. The Court noted, "California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." Despite arguably probative evidence of prior narcotics use—needle marks on Robinson's arm—the Supreme Court overturned Robinson's conviction. The Court stated that, while California could proscribe criminal acts such as narcotics trafficking, there was no evidence that Robinson was engaged in illegal conduct at the time of his arrest.

2. Powell

Six years later, a plurality of the Court drastically narrowed Robinson's scope in *Powell v. Texas*, upholding the conviction of an alcoholic for appearing drunk in public. While the plurality reaffirmed Robinson's status/conduct distinction, the Justices were far from unanimous in their reasoning; there were two separate concurring opinions in addition

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95. Cal. Health & Safety Code § 11721 (West 1962) (providing, in part, "No person shall. . . be addicted to the use of narcotics. . . .") . In 1963, the quoted language was deleted.

96. Robinson v. California, 370 U.S. 660, 667 (1962). Under the doctrine of incorporation, the Eighth Amendment is applicable to the states via the Fourteenth Amendment. See, e.g., Valdes, supra note 2, at 391 n.21. Valdes has argued that the Eighth Amendment's status versus conduct distinction subsequently has been accepted as part of Fourteenth Amendment jurisprudence, which now prohibits status discrimination. Id. at 385, 448-49 (describing the contours of the "new Fourteenth Amendment jurisprudence").

97. Robinson, 370 U.S. at 667 (stating that narcotics addiction "is apparently an illness which may be contracted innocently or involuntarily.").

98. See, e.g., Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.2(b), at 8 (2d ed. 1986) (stating that criminal liability requires an actus reus and cannot be premised merely upon guilty thought).


100. Id. at 661.

101. Id. at 664.

102. Id. at 661 n.2 ("[A]t the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct . . . .").

103. Powell, 392 U.S. at 533.

104. Id. at 533 ("The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior . . . [or] has committed some actus reus.").
to the plurality opinion. The plurality distinguished Robinson on the ground that the Texas statute at issue in Powell did require an act—appearing in public while drunk: "The State of Texas thus has not sought to punish a mere status .... [but] has imposed ... a criminal sanction for public behavior ...." 107

3. Conceptions of Status

Despite the centrality of status in both decisions, neither the majority opinion in Robinson nor the plurality in Powell specifically defined the term. The concept of status dates back to the medieval period, in which each person was assigned a fixed status in the rigidly hierarchical society. The notion that persons were defined and limited by their status—for instance, that a serf could never become a landowner—gradually evolved into a conception of individual autonomy. Nevertheless, certain status categories remained for those who were economically or socially dependent, including married women, children, slaves, the poor, and the mentally ill.

Interestingly, the Robinson Court’s notion of status intersects with the historical concept of dependency: Robinson characterized narcotics addiction as akin to mental illness and leprosy, both of which may leave a person economically and socially dependent upon others. The concept of status utilized in Robinson and Powell, however, also diverges from the historical view. Both decisions imbue the term with meaning by opposing it with “conduct.” For example, the Court in Robinson relied upon the trial judge’s instructions to the jury, distinguishing a narcotic addict’s status from the act of using narcotics. The trial judge stated, “To be addicted ... is said to be a status or condition and not an act. It is a continuing offense ... and subjects the offender to arrest at any time before he reforms.”

In his Powell concurrence, Justice White set forth the Justices’ only
attempt to define status in either decision. In addition to relying upon the traditional criminal law dichotomy between status and act, Justice White incorporated the notion that the status be fairly long-lasting and have deep importance in an individual’s life: “[A status is] a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values.”

Most courts and commentators that invoked the Robinson/Powell analogy assumed with little discussion that sexual orientation fell within Justice White’s conception of status. In his dissent in Bowers v. Hardwick, for example, Justice Blackmun asserted that homosexuality constitutes a status, noting that “[h]omosexual orientation may well form part of the very fiber of an individual’s personality.” Studies support Justice Blackmun’s assertion that one’s sexual orientation is a fundamental and largely enduring component of one’s personal identity: “There is no reason to think that it would be any easier for homosexual men or women to reverse their sexual orientation than it would be for heterosexual[s]... The American Psychological Association likewise concluded that “homosexual orientation is not easily modified,” suggesting that it is of “relatively permanent duration.”

B. Pro-Equality Reliance Upon Robinson and Powell

Of the three analogies—Robinson/Powell, the subversive advocacy cases, and the law of treason—the Robinson/Powell analogy offers the most favorable precedent for pro-equality advocates. A primary advantage of the Robinson/Powell analogy is that it shifts the focus of inquiry from the permissible criminalization of sodomy, announced in Bowers v. Hardwick, to the consideration of sexual orientation as a

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113. Powell v. Texas, 392 U.S. 514, 550 n.2 (1968) (White, J., concurring). Francisco Valdes has incorporated the notions of personal significance, relative permanence, and the opposition to conduct in his definition of status: “[S]tatus becomes an attribute of the person that lingers even when he or she is not engaged in any specific category of conduct.” Valdes, supra note 2, at 395.
114. However, for a detailed discussion of the ways in which same-sex identity fulfills Justice White’s definition of status, see Millman, supra note 2, at 285-86, 295-300.
116. Millman, supra note 2, at 181 (citation omitted).
117. Id. at 297 & n.177 (citation omitted).
118. Powell, 392 U.S. at 550 n.2. Justice White’s requirement of “duration” does not necessitate either a determination of the etiology of sexual orientation or a finding of immutability; one’s sexual orientation simply needs to be “relatively” permanent. Moreover, the Court in Robinson recognized that the status of addiction may be acquired voluntarily or involuntarily. Robinson, 370 U.S. at 667 (stating that narcotics addiction “may be contracted... involuntarily.”) (emphasis added).
119. Seeinfra part III.
120. Seeinfra part IV.
121. 478 U.S. 186 (1986).
status. In addition, both Robinson and Powell include within their protection of status the notion that the state may not penalize a person’s assumed propensity to commit misconduct.

1. Escape from Hardwick

In the aftermath of Bowers v. Hardwick, many lower court decisions have assumed that Hardwick’s due process holding forecloses an equal protection challenge to the criminalization of same-sex conduct and to discrimination based upon same-sex orientation.\(^\text{122}\) In an attempt to escape from Hardwick, some courts and commentators have turned to the Robinson/Powell analogy, which protects status. For example, the district court in Cammermeyer v. Aspin rejected the D.C. Circuit’s reasoning in Padula v. Webster which held that discrimination against gay persons is constitutionally permissible because “the conduct . . . defines the class”:\(^\text{123}\) “[Robinson and Powell] stand for the proposition that status and conduct are distinct, and that it is inherently unreasonable to presume that a certain class of persons will violate the law solely because of their orientation or status.”\(^\text{124}\)

In Watkins v. United States Army, the Ninth Circuit relied in part upon Robinson to address the government’s argument that Hardwick foreclosed Sergeant Perry Watkins’ equal protection challenge to the military’s discharge policy.\(^\text{125}\) The court distinguished Hardwick, which it described as “a ‘conduct’ case,”\(^\text{126}\) from Robinson, which protected the status of narcotics addiction “even though the state could criminalize [narcotics] use . . . conduct in which narcotics addicts by definition are prone to engage.”\(^\text{127}\) Similarly, on a motion to temporarily enjoin the Navy from discharging the plaintiff based upon his sexual orientation, the district court in Selland v. Aspin remarked that “the Supreme Court may well invoke the Robinson precedent to condemn inferences of conduct from an unpopular condition . . . as distinguished from proven illegal acts . . . .”\(^\text{128}\) In addition, Laurence Tribe suggested that pursuant to Robinson and Powell, the Eighth and Fourteenth Amendments may forbid penalization of same-sex orientation and same-sex conduct.\(^\text{129}\)

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122. See supra notes 4-7 and accompanying text.
123. Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
125. Watkins v. United States Army, 875 F.2d 624, 716-17 (9th Cir. 1989).
126. Id.
127. Id.
129. Tribe, supra note 2, at 1424-25 n.32. For an extended analysis of the argument that Robinson and Powell proscribe the criminalization of sodomy, see Millman, supra.
2. Protection for "Status" or "Propensity"

Pro-equality advocates can argue that the Supreme Court's status decisions refute the government's claim that it is constitutionally permissible for the 1994 Directives to discharge servicemembers based upon a presumed propensity to commit misconduct. Included within the Supreme Court's conception of status in Robinson and Powell is the notion of status as a propensity or desire to engage in misconduct. Similarly, Francisco Valdes has argued that pro-equality advocates should rely upon Robinson, reasoning that the Supreme Court protected Robinson's status even though "the evidence of status [Robinson's needle tracks] was much more strongly probative of likely unlawful conduct than in the sexual minority cases." He further argues that "[b]oth Robinson and Powell prohibit[] penalization based on 'propensity' because 'propensity' is status." Consistent with Valdes' argument, even Justice Harlan in his carefully circumscribed Robinson concurrence concluded that it is impermissible to criminalize a propensity or desire to act: "[A]ddiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics [so that] the effect of [the trial judge's] instruction was to authorize criminal punishment for a bare desire to commit a criminal act." Accordingly, even though Robinson's addiction may have constituted evidence of prior criminal conduct and a propensity to commit illegal acts—the Supreme Court refused to allow the government to bootstrap indications of "propensity" as a substitute for evidence of proscribed conduct.

Pro-equality advocates can argue that the 1994 Directives fly in the face of Robinson and Powell by substituting indications of "propensity" for evidence of prohibited acts. Section H.1.b(2) of the 1994 regulations create a rebuttable presumption—based solely upon a servicemember's statement identifying herself as gay—that the member has a propensity to engage in same-sex conduct. Justice Black's concurring opinion in

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130. For a discussion of the government's defense of the rebuttable presumption in the 1994 Directives, see supra notes 45-48 and accompanying text.
131. Valdes, supra note 2, at 426.
132. Id. at 468.
133. Justice Harlan rejected the broader proposition that, as a general matter, "it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law." Robinson v. California, 370 U.S. 660, 678 (1962) (Harlan, J., concurring). Instead, he focused upon the evidentiary requirement of an act, which he found to be absent in the statute at issue in Robinson, id. at 678-79, but present in the statute at issue in Powell. Powell v. Texas, 392 U.S. 514, 538 (1968).
134. Robinson, 370 U.S. at 678 (Harlan, J., concurring).
135. See supra text accompanying note 100 (discussing needle marks on Robinson's arm as probative of prior illegal drug use).
136. See supra notes 36-44 and accompanying text (describing rebuttable
Powell, however, flatly rejects the penalization of propensity: "Punishment for a status is particularly obnoxious . . . because it involves punishment for a mere propensity, a desire to commit an offense."137

3. An Evidentiary Barrier Between Status and Conduct

Justice Black based his reasoning in Powell partially upon evidentiary grounds: "Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges."138 Valdes similarly has argued that Robinson and Powell erect an evidentiary barrier against presumptions about one's conduct based upon one's status.139 In the military context, pro-equality advocates can argue that the government is constitutionally required to erect an evidentiary barrier in the 1994 Directives and cannot simply rely upon an assumed propensity to commit proscribed conduct. Advocates can point to the difficulty of refuting the 1994 Directives' rebuttable presumption, a difficulty which senior Pentagon officials have acknowledged.140

Advocates can point out the extreme evidentiary difficulties faced by servicemembers such as Corporal Blaesing, who stated that he may be gay, but who was still questioning his sexual orientation.141 Such servicemembers must somehow prove—without necessarily knowing the answer themselves—that they do not have a propensity to engage in same-sex conduct. Particularly in a situation such as Blaesing's, pro-equality litigators could look to Justice Black's pronouncement that mere desire may not be punished: "When a desire is inhibited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal."142

C. Pro-Equality Rejection of Robinson and Powell

Although there are some strategic reasons for pro-equality advocates to invoke the Robinson/Powell analogy when challenging the exclusionary policy, any benefits from this invocation are outweighed by three significant drawbacks. First, Powell "is regarded as having all but overruled Robinson."143 The government can rely upon Powell to argue that the presumption's conflation of status and conduct).

137. Powell, 392 U.S. at 543 (Black, J., concurring).
138. Id.
139. Valdes, supra note 2, at 391-95.
140. See supra notes 56-59 and accompanying text (explaining why the presumption is virtually irrebuttable).
141. See supra notes 65-73 and accompanying text (discussing Blaesing's actual discharge as well as the personnel training manual's suggested response).
142. Powell, 392 U.S. at 543-44 (quoting Glanville Williams, Criminal Law—the General Part I (1961)).
Constitution permits discharge for all conduct, including identifying oneself as gay. Second, the Powell Court refused to denominate public drunkenness as a status in part due to the limited scientific knowledge concerning the nature of alcoholism; the scientific knowledge concerning the nature of sexual orientation is similarly limited. Reliance on Powell may encourage courts to defer protection of sexual orientation as a status until more complete scientific information is available. Finally, and most importantly, the invocation of Robinson and Powell is likely to evoke the stigmatic comparison of same-sex orientation with addiction, mental illness, and an irresistible compulsion to engage in sex. These associations are so damaging and deeply rooted that pro-equality advocates should eschew reliance on the Robinson/Powell analogy even assuming the precedent was supportive.

I. Powell Severely Curtails Robinson

As one commentator wrote shortly after the Supreme Court decided Powell, legal scholars had "freely predicted the [Powell] Court would hold . . . that the Eighth Amendment . . . prohibits . . . any punishment at all for public drunkenness of a chronic alcoholic."144 The Robinson Court's holding that a state may not criminalize the status of addiction would seem to suggest that a state likewise may not criminalize an addict for being drunk or high. Even Justice White, in his Powell concurrence, reasoned that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion."145 In light of these sentiments, the Powell plurality startled many by distinguishing Powell as a conduct case, limiting Robinson to instances in which "no conduct of any kind is involved."146 For instance, Justice White distinguished Powell from Robinson on the ground that Powell committed an act—the act "of being drunk in a public place."147 The juxtaposition of Robinson and Powell thus illustrates a significant weakness of the distinction between status and conduct: An unstable gray area exists in which "conduct and status slip ineluctably into one another."148

The line between the status of "being drunk" and the act of "being drunk in public" is at worst incoherent and at best too fine to truly protect an alcoholic's status. In a dissent joined by three others, Justice Fortas identified the intertwined nature of status and conduct by observing that public intoxication was a "characteristic part of the pattern of [Powell's]
Justice Fortas asserted that Powell's conviction should have been overturned because the defendant's status as an alcoholic inevitably led him to appear drunk in public. In his concurrence, Justice White likewise conceded that alcoholic status may be inextricably bound with public intoxication in some situations: (1) when "[the alcoholic] becomes so drunk that he loses the power to control his movements and for that reason appears in public," or (2) when the alcoholic is homeless and lacks a private place in which to drink.

The juxtaposition of Robinson and Powell thus suggests a narrowly circumscribed and highly fact-based understanding of status, which may fail to protect many discharged gay servicemembers. For example, Justice White simply did not believe as a factual matter that Powell was unable to avoid appearing drunk in public: "Powell had a home and a wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record." Such reasoning may provide an argument for the government in the military discharge decisions. Since the 1994 Directives categorize coming out as "homosexual conduct," the government could invoke Powell and claim that a servicemember's statement that she is gay constitutes not the status of "being gay," but the conduct of "being gay in public." Moreover, if courts hold that coming out constitutes conduct, the basis for many challenges to the policy would be eviscerated.

2. Etiology of Sexual Orientation

An additional reason to reject reliance upon the Robinson/Powell analogy is to obviate the need for a discussion of the etiology of sexual orientation. In Powell, the limited knowledge concerning the nature of alcoholism contributed to the Supreme Court's decision to uphold

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149. Powell, 392 U.S. at 558 (Fortas, J., dissenting).
150. Id. at 568 (stating that Powell "was powerless to avoid drinking" and that "he had an uncontrollable compulsion to drink") (Fortas, J., dissenting) (citation omitted). For a discussion of the stigmatic impact which Powell's "uncontrollable compulsion" inquiry may have in sexual orientation cases, see infra at notes 187-201 and accompanying text.
151. Powell, 392 U.S. at 551-52 (White, J., concurring).
152. Id. at 551.
153. Id. at 553.
154. See supra notes 36-44 and accompanying text.
155. Most of the recent challenges to the anti-gay policy have been made by servicemembers who had merely stated they were gay, with no evidence that the servicemember had engaged in same-sex acts. See, e.g., Meinhold v. United States Dept't of Defense, 34 F.3d 1469 (9th Cir. 1994) (discharging member solely for statement acknowledging same-sex orientation); Steffan v. Aspin, 41 F.3d 677 (D.C. Cir. 1994) (same); Able v. United States, 847 F. Supp. 910 (W.D. Wash. 1994) (same); Dahl v. Secretary of United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993).
Powell's conviction. The Powell plurality devoted nearly fifty percent of its opinion to this issue, repeatedly emphasizing the medical profession's lack of consensus concerning alcoholism's causation, manifestations, and treatment. Rejecting Powell's argument that the public intoxication statute criminalized his status as an alcoholic, the Court stated, "[I]t goes much too far on the basis of too little knowledge . . . . We know very little about . . . Powell's drinking problem, or indeed about alcoholism itself." Given the Powell plurality's intense focus on the nature of alcoholism, invocation of Powell in gay-rights litigation is almost certain to raise similar questions concerning sexual orientation.

To date, little is known about the etiology of sexual orientation: Scientific studies concerning causation are inconclusive and controverted. The Supreme Court rejected Powell's claim that alcoholism is a status. Challenges invoking the Robinson/Powell analogy in the context of the military's policy may well suffer the same fate. At the very least, pro-equality litigators are likely to become entangled in a presently unresolvable side-issue. In fact, Justice Black in Powell expressed frustration over the emphasis placed on the inquiry into alcoholism's causation, objecting that the arguments "read more like a highly technical medical critique than an argument for deciding a question of constitutional law . . . ." Moreover, because there are currently no answers to the etiology question, judges would be free to substitute their own (mis)conceptions for scientific fact.


For a thorough critique of the use of genetics studies in the pro-gay legal argument from Immutability, see Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. Rev. 503 (1994). Moreover, some recent research suggests that environment has a significant impact upon one's sexual orientation. See Martin S. Weinberg et al., Dual Attraction: Understanding Bisexuality 7-8 (1994) (relying upon research on bisexuality and concluding that sexuality is fluid, changing over time and with situations). 162. Powell v. Texas, 392 U.S. 514, 538 (1968) (Black, J., concurring).

163. For example, in Steffan v. Cheney, Judge Gasch rejected the plaintiff's claim based in part upon the judge's assumption that "some people exercise some choice in their own sexual orientation. . . . " Steffan v. Cheney, 780 F. Supp. 1, 6-7 n.12 (D.D.C. 1991) (emphasis
3. Medicalization of Same-Sex Orientation

The final and most significant reason to reject reliance upon Robinson and Powell is that both decisions discuss status in terms of addiction, mental illness, and an irresistible compulsion to engage in prohibited conduct—all three of which have long been stigmatically associated with same-sex orientation. These comparisons to same-sex identity are potent because they have been prevalent since the nineteenth century’s “medicalization” of same-sex orientation. While litigators could attempt to minimize the chance that such comparisons will arise by merely referring to the decisions without discussion, the court or government may engage in a more extensive treatment of the cases. At the very least, mentioning the decisions’ holdings will require reference to alcoholism and drug addiction, which frequently are compared with same-sex orientation.

a. Same-Sex Orientation as an Addiction

Comparisons of same-sex orientation to alcoholism and other addictions abound. Canon Barger of the Trinity Cathedral in Omaha, Nebraska wrote, “[W]e don’t know much about the developmental sequence of either [alcoholism or homosexuality].” He carried the association one step further and recommended using alcohol rehabilitation programs as a model for treating homosexuality. Similarly, in a letter to Newsweek magazine, Peter Langmuir stated that “describing homosexuality as an acceptable alternative lifestyle is like encouraging the alcoholic to return to the bottle.” Same-sex orientation has also been compared to crack cocaine and tobacco addiction. A New York City school board member who opposed the proposed Rainbow Curriculum (which included a discussion of children with gay parents) publicly stated, “We have a number of children... whose parents are crack addicts. Are we supposed to tell them that that’s OK?”

The pathologizing trope of same-sex orientation follows openly-gay
litigants into the courtroom. The plaintiff in Steffan v. Aspin, for example, chose to address the medicalization of homosexuality head-on by submitting to the district court the affidavit of Dr. Gregory Herek, which discussed contemporary studies indicating that there is no relation between same-sex identity and psychopathology. Steffan also submitted evidence that other unpopular minorities, such as African-Americans and Jews, similarly have been stigmatized as suffering from unique physical and mental illnesses. Because the holdings of Robinson and Powell concern addiction, invocation of the analogy would introduce these disturbing comparisons directly into the litigation.

b. Same-Sex Orientation as a Disease or Mental Illness

The Robinson court compared California’s criminalization of narcotics addiction to “mak[ing] it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.” Same-sex orientation likewise has been associated with illness. Historians estimate that the birth of the medical or psychiatric model of same-sex love occurred in the late 1800s. As Theodore Sarbin explained in a report prepared at the request of the Office of the Secretary of Defense: “The creation and elaboration of disease theories was based upon the all-encompassing notion that every human action could be accounted for through the application of the laws of chemistry and physics. In this context, homosexuality . . . [was] construed as sickness.”

The pathologizing view of same-sex orientation has become deeply rooted in society. In 1933, homosexuality was officially listed as a mental illness in the precursor to the American Psychiatric Association’s Diagnostic and Statistical Manual (DSM-I). As early as 1935, Sigmund Freud expressed the opinion that same-sex orientation was not a sickness; nonetheless, it was not until 1973 that the American Psychiatric Association retracted its view of homosexuality as a mental illness.

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173. Id. at 129.
175. See e.g., 1 Michel Foucault, The History of Sexuality 43 (Robert Hurley trans., 1978) (stating that the mental illness model of homosexuality arose in 1870).
177. Id. at 15. The DSM-I was published in 1952. Id.
178. Id. (quoting letter from Freud to mother of homosexual son).
179. Herek Affidavit, supra note 51, at 129. In 1975, the American Psychological Association (APA) passed a resolution supporting the psychiatrists’ action. Id. Nearly two decades later, in 1991, the APA passed a resolution condemning the military’s exclusionary policy. Id.
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While the retraction was a significant victory for the gay rights movement, some physicians continue to subscribe to the mental illness model, viewing same-sex love as a "personality disorder at best and a mental illness at worst."\(^{180}\)

Invocation of Robinson and Powell may spur this stigmatizing association to the front of the minds of the judges deciding military discharge cases. In addition, the government may attempt to use the pathologizing trope to its advantage. The government did so in Steffan v Aspin,\(^{181}\) when it relied on the discredited writings of therapist Paul Cameron, who reportedly resigned from the American Psychological Association to avoid an ethics investigation.\(^{182}\)

c. Same-Sex Orientation as an Irresistible Compulsion

i. "Irresistible Compulsion" in Robinson and Powell

In attempting to determine whether Powell's alcoholic status required reversal of his conviction, the plurality and both concurrences looked to whether Powell suffered from "an irresistible compulsion" to drink.\(^{183}\) The pervasiveness of the "irresistible compulsion" inquiry makes it difficult to discuss the decision without referring to this language. For example, Laurence Tribe quoted Justice Powell's concurrence which stated that "it cannot be a crime 'to yield' to 'an irresistible compulsion'" to support the argument that "even a day in jail for engaging in sexual intimacies inherent in homosexual orientation might violate the Eighth and Fourteenth Amendments."\(^{184}\) The rationale underlying constitutional protection of an "irresistible compulsion" is, in the words of Justice Fortas' dissent, that Powell "was powerless to avoid drinking."\(^{185}\)

180. An anti-gay physician, D. L. Forston, included this comment in his letter to The New Republic. Bawer, supra note 166, at 96.
182. The charges against Dr. Cameron were related to the medical/psychological model of same-sex orientation: They included that Cameron consistently misrepresented research data on same-sex orientation and that he reported to a Nebraska newspaper a fabricated account that a gay man had sexually mutilated a child. Baker v. Wade, 106 F.R.D. 528, 537 n.31 (N.D. Tex. 1985) (citations omitted). Additional charges of unethical conduct include that Cameron made inaccurate and inflammatory public statements about gay persons. Id. At least two federal courts have discounted Cameron's testimony. For example, the district court in Baker v. Wade stated that "[t]here has been no fraud or misrepresentations except by Dr. Cameron, the supposed 'expert.'" Id. at 536. See also Gay Student Servs. v. Texas A & M Univ., 737 F.2d 1317, 1330 (5th Cir. 1984) (noting that "[t]he speculative evidence offered by the defendants' experts [including Cameron] was unsupported by any empirical basis).\(^{186}\)
183. See, e.g., Powell, 392 U.S. at 535 ("irresistible compulsion") (plurality opinion); id. at 544 ("compulsion" and "irresistible impulse") (Black, J., concurring); id. at 548 ("irresistible compulsion") (White, J., concurring).
184. Tribe, supra note 2, at 1424-25 n.32.
185. Powell, 392 U.S. at 568 (stating that Powell "had an uncontrollable
One significant drawback to the Robinson/Powell analogy is that pro-equality advocates could be placed in the awkward position (for many) of arguing that lesbians, bisexuals, and gay men are "powerless to avoid" being gay. Such an assertion raises the issue of sexual orientation's etiology, discussed above, and implicitly suggests that being gay is an undesirable condition which nonheterosexuals would like to change. Even if advocates did not directly make such arguments, they nevertheless must confront the social reality that gay persons are frequently portrayed as suffering from an irresistible compulsion to seek sexual gratification incessantly and to prey upon young children. The language in Powell may elicit these negative associations in the minds of presiding judges.

ii. "Irresistible Compulsion" Stigma Applied to Lesbians, Bisexuals, and Gay Men

The view of lesbians, bisexuals, and gay men as hypersexual has persisted for years despite its factual repudiation. In 1964, for example, the Florida Legislature published a report which portrayed "the homosexual" as an uncontrolled sexual predator who molests the young. The Report warned, "Keep your hands off our children! The consequences will be terrible if you do not!" During the McCarthy era, the Senate issued a similar report which noted, "These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people ...." The stereotype surfaced again in the 1970s, when Anita Bryant suggestively entitled her crusade to repeal a Florida gay civil rights ordinance, "Save Our Children." Bryant also ran an advertisement stating that gay people engaged in "a hair-raising pattern of recruitment and outright seductions and molestations."

Little has changed in the 1990s. In the recent backlash against gay civil rights protection, some anti-gay ballot initiatives contain language comparing gay persons to child molesters. Oregon's Initiative 9, which was defeated in 1992, provided that "homosexuality, pedophilia, sadism, and masochism [are] abnormal, wrong, unnatural, and perverse ...." compulsion to drink") (Fortas, J., dissenting).

186. See supra note 161 and accompanying text (discussing debate about scientific studies, which suggest a link between genetics and sexual orientation).
187. See generally Herek Affidavit, supra note 51 (concluding that there is no basis for the belief that gay persons are sexually predatory).
191. Id.
192. William E. Adams, Jr., Pre-election Antigay Ballot Initiative Challenges, 55
Similarly, a proposed amendment to Arizona’s Constitution would proscribe statutes which protect persons of “pedophile, homosexual, lesbian, or bisexual orientation.”

iii. “Irresistible Compulsion” in Litigation

In military ban litigation, some plaintiffs have directly confronted the “irresistible compulsion” stereotype by way of expert testimony. The most significant evidence comes from the Department of Defense (DOD) itself. The DOD’s own 1988 PERSEREC Report, for example, concedes that the military policy is grounded upon the factually insupportable notion that gay persons have an irresistible compulsion to engage in sexual activity:

Buried deep in [the justifications of those who support the exclusionary policy] is the fearful imagery of homosexuals polluting the social environment with unrestrained and wanton expressions of deviant sexuality. It is as if persons with nonconforming sexual orientations were always indiscriminately and aggressively seeking sexual outlets. All the studies . . . that we have seen lead to contrary inferences.

Nonetheless, the military continues to invoke this misperception. In 1990, Vice Admiral Donnell stated that “young, often vulnerable female sailors” would be prey to “subtle coercion or outright sexual advances by more senior and aggressive female sailors.” As the plaintiff in Steffan indicated, however, the “hypersexual” stereotype similarly has been applied to other disfavored groups, such as African-Americans and Jews.

Reliance on the Court’s status decisions may reinforce an association—in the minds of judges or litigants—that gay people suffer from a sexual “irresistible compulsion.” For instance, in a discussion of information that is potentially damaging, but not easily verifiable, Chief Judge Wald compared mental illness with “child abuse . . . a homosexual
relationship... [and] Communist associations." Moreover, the Robinson decision already has been invoked to argue that a child molester cannot be convicted for molestation where the defendant suffered from an "irresistible compulsion" to molest children.\(^{199}\) Invoking the mental illness model of homosexuality, the government, in challenges to its anti-gay policy, could use the Robinson/Powell analogy to argue that protecting same-sex orientation may require the military to admit into its ranks other groups considered sexually deviant, such as child molesters or rapists. The Justices in Robinson\(^{200}\) and Powell\(^{201}\) were particularly concerned that these decisions contain a limiting principle; this concern may similarly prove to be a stumbling block for judges presiding over challenges to the military's anti-gay policy.

### III. THE ANALOGY TO SUBVERSIVE ADVOCACY DECISIONS

In holding the military's exclusionary policy unconstitutional, two federal courts recently relied upon the Supreme Court's subversive advocacy decisions involving the Smith Act and the Subversive Activities Control Act ("SACA"). The D.C. Circuit panel in Steffan v. Aspin and the district court in Cammermeyer v. Aspin looked to the Supreme Court's assertion that—absent some form of conduct—Communist Party membership and adherence to the Communist creed may not be criminalized.\(^{292}\) Reflecting the focus upon Party membership and political dissent, the subversive advocacy analogy incorporates a conception of same-sex orientation as akin to group membership and political expression.

While the "membership" and "expression" formulations are two strands of the subversive advocacy analogy, they are sufficiently distinct to merit separate attention. The view of homosexuality as group membership is similar to the view of same-sex orientation as a status under Robinson and Powell. Indeed, the premise of the membership and Robinson/Powell

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200. The Robinson majority expressly stated, as a limiting principle, that a state still retained the power to regulate drug trafficking in a variety of ways. Robinson, 370 U.S. at 664.

201. See, e.g., Powell, 392 U.S. at 534 (discussing concern that there is no limiting principle to prevent defendant's reasoning from excusing other criminal behavior committed while drunk).

analogy is the same: It is constitutionally forbidden to criminalize one's status or group membership based solely upon a presumption that the members have a propensity to commit misconduct. The expression analogy turns largely on the idea that coming out in the context of a governmentally prescribed anti-gay policy is a form of political dissent.203

This Part evaluates the merits and difficulties associated with the membership and expression strands of the subversive advocacy analogy. It concludes that while advocates may be able to extract a few pro-equality arguments from the SACA and Smith Act decisions, the utility of the arguments is far outweighed by the reasons to reject reliance upon the analogy. First, the subversive advocacy precedent is weak and likely to boomerang, becoming a tool for the government in military discharge litigation. Second, even assuming that the precedent was stronger, advocates nonetheless should reject the analogy since reliance upon the McCarthy era decisions is likely to invoke the longstanding, stigmatic associations of gay persons with Communists.

A. Pro-Equality Reliance Upon the Subversive Advocacy Decisions

The pro-equality argument based on group membership is that, just as the military's exclusionary policy singles out nonheterosexuals for discharge, so SACA and the Smith Act singled out members of the Communist Party for persecution. The group membership analogy posits that, just as the Supreme Court rejected the penalization of Party Membership in the absence of illegal conduct, so it would reject the military's penalization of same-sex orientation in the absence of proscribed conduct. The argument based on the understanding of same-sex orientation as political expression looks to the potential criminalization of unpopular belief by the Smith Act and SACA. Pro-equality invocation of the expression analogy emphasizes the Supreme Court's requirement of advocacy of action—rather than advocacy of belief—to convict a defendant of subversive advocacy. As examined in Part III.B, however, reliance upon either strand of the subversive advocacy decisions is fraught with pitfalls.

1. Same-Sex Orientation as Group Membership

In the Steffan panel decision and the Cammerrmeyer case, the courts relied upon two subversive advocacy decisions which most directly address the penalization of group membership: Scales v. United States, involving the Smith Act,204 and Aptheker v. Secretary of State, concerning SACA.205 These opinions may augur the beginning of a trend towards judicial application of the subversive advocacy analogy to the military discharge decisions. In

203. See supra notes 33-35, 75-76 (discussing the 1994 Directives as a symbol of public subordination and a deterrent to political expression).
Steffan I, the panel relied upon the Smith Act and SACA cases to support its conclusion that it is impermissible to presume that members of a certain group have a propensity to commit misconduct: "[T]he gay ban presumes that a certain class of persons will break the law or the rules solely because of their thoughts and desires. This is inherently unreasonable." Soon thereafter—in strikingly similar language—the Cammermeyer court referred to Aptheker for the proposition that "it is inherently unreasonable to presume that a certain class of persons will violate the law solely because of their orientation or status."

a. Necessity of "Active" Membership for Criminal Liability

The Smith Act, officially entitled "the Alien Registration Act," was passed in June 1940. A Supreme Court challenge to the Smith Act's membership clause was presented in Scales and its companion case, Noto v. United States. The membership clause provided: "Whoever . . . becomes or is a member of, or affiliates with any . . . society [which teaches the necessity of violent governmental overthrow] . . . knowing the purposes thereof—Shall be fined not more than $20,000 or imprisoned not more than 20 years, or both . . . ."

The Court in Scales expressly held that conviction pursuant to the membership clause required the elements of "active" membership and specific intent, specifying that "the heavy penalties imposed by the Smith Act" did not apply to "nominal [Communist Party] membership." As a matter of doctrine, at least, the Court rejected the notion that an individual could be prosecuted based solely upon Party membership: "In our jurisprudence, guilt is personal . . . ."

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209. On the same day that it decided Scales v. United States, 367 U.S. 203 (1961), the Supreme Court decided Noto v. United States, 367 U.S. 290 (1961), which also involved the Smith Act's membership clause. The Court discussed the bulk of its reasoning in Scales and addressed only the sufficiency of the evidence in Noto. Noto, 367 U.S. at 291 (stating that the defendant's statutory and constitutional challenges were disposed of by the opinion in Scales).
211. Scales, 367 U.S. at 222. Despite this cautionary note, the Court affirmed Scales' six-year sentence of imprisonment. Id. at 222 n.14.
212. For a discussion of the difficulties with pro-gay reliance upon Scales, see infra notes 280-89 and accompanying text.
b. Prohibition against Implying "Propensity" from Membership

The Supreme Court also considered the penalization of Communist Party membership in *Aptheker v. Secretary of State.* At issue in *Aptheker* was section six of the Subversive Activities Control Act, which made it a felony for a Communist Party member to apply for or use a passport. Emphasizing the impermissibility of predicting conduct from "the bare fact of membership," the Court held the passport provision facially invalid. The *Aptheker* Court determined that section six "establishe[d] an irrebuttable presumption that individuals who are members of the specified organizations will . . . engage in activities inimical to the security of the United States." Holding section six unconstitutional, the Supreme Court rejected the notion of "propensity" implicit in the section: "'[A]ssuming that some members of the Communist Party . . . engaged in illegal activities, it cannot automatically be inferred that all members . . . participated in their illegal conduct.'"

The *Aptheker* Court's rejection of SACA's irrebuttable presumption could be useful to pro-equality advocates in countering the 1994 Directives' "rebuttable" presumption that persons who have identified themselves as gay have "a propensity to engage in . . . homosexual acts." That the presumption in *Aptheker* was irrebuttable, while the Directives ostensibly permit a servicemember to rebut the presumption is not an obstacle. As discussed in Part I, pro-equality advocates have a convincing argument that the Directives' presumption is in effect irrebuttable. The DOD's training manual, for example, indicates that a servicemember who has offered all evidence imaginable that he will not engage in same-sex conduct nonetheless may be discharged. Senior Pentagon officials likewise have conceded that it would be extremely difficult for a member to rebut the presumption. The *Steffen* panel could have made the same observation of the 1994 Directives that it made of their predecessor, the 1981 Directives: "[E]ven [the Smith Act] cases manifestly stop short of allowing the kind of presumption that the Secretary [of the Navy] claims in

215. *Id.* at 501-02. Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993 (1950) (current version at 50 U.S.C. § 785 (1988)), provided in part: "[I]t shall be unlawful for any member [of the Communist Party] . . . to make application for a passport . . . or to use or attempt to use any such passport."
217. *Id.*
218. *Id.* at 510-11 (citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246 (1957)).
220. *See supra* part IB (discussing the policy's rebuttable presumption).
221. *See supra* notes 60-67 and accompanying text (discussing policy as explained in DOD training manual).
222. *See supra* text accompanying notes 56-59 (explaining why the presumption is virtually irrebuttable).
this case: A presumption of misconduct from mere status . . . ."228

2. Same-Sex Orientation as Political Expression

Implicit in the pro-equality analogy to subversive advocacy is the view that same-sex orientation is intertwined with one's thoughts and political beliefs. The Steffan panel, for example, asserted that the predecessor to the 1994 Directives—which facially excluded persons based upon their sexual orientation—targeted the thoughts and desires of gay persons.224 The panel concluded that "the primary focus of the Directives is not, in fact, the conduct itself, but the 'desire' to engage in that conduct."225 Pro-equality commentators also have characterized same-sex orientation as akin to political expression. For instance, Patricia Cain described "the conceptualization of . . . homosexuality as a political idea."226 David Richards went one step further and directly compared same-sex orientation to dissent and subversive advocacy:

Homosexuality is today essentially a form of political, social, and moral dissent on a par with the best American traditions of dissent and even subversive advocacy . . . . Those that support criminalization [of same-sex sodomy] find today in homosexuality what they found before in the family planning of Sanger, . . . the socialism of Debs, or the Marxist advocacy of the American Communist Party.227

a. Governmental Policing of One's Thoughts

Reliance upon the subversive advocacy analogy not only shifts the focus away from a servicemember's conduct to her thoughts, but places the focus on the government's power to suppress those thoughts. In the context of the criminalization of sodomy, Laurence Tribe similarly has attempted to shift the focus to the potentially Orwellian police power of the government: "[T]he relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there."228 Tribe, like the Steffan panel, looked to the Supreme Court's decision in Stanley v. Georgia229 for the proposition that

224. The panel looked to the former policy's definition of a "homosexual" as someone "who . . . desires to engage in . . . homosexual acts." Id. at 65 (quoting from § H.1.b(1) of the 1981 Directives).
225. Id.
228. Tribe, supra note 2, at 1428.
229. Stanley v. Georgia, 394 U.S. 557 (1969). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973) (stating that a person's inclinations and fantasies "are his own and beyond the reach of government").
one's innermost thoughts are protected from the machinations of governmental intrusion. Overturning the defendant's conviction for possession of obscene materials in his home, the Stanley Court stated, "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The Steffan panel applied Stanley to the discharge policy, characterizing the policy as a form of mind control: "By firing Mr. Steffan purely for his 'inclinations and fantasies,' the Secretary [of the Navy] seeks to exercise this very power over the minds of those in the military."

b. Requirement of Advocacy of Action, Rather Than Advocacy of Belief

The pro-equality political expression argument looks to the Supreme Court's attempt to balance the Communist Party members' potential for violent action against the potential for suppression of their beliefs. The Supreme Court considered the Smith Act's advocacy provisions in Dennis v. United States and Yates v. United States. In both cases, the defendants were convicted pursuant to sections two and three of the Smith Act for, inter alia, conspiring to advocate and teach the duty of violent governmental overthrow. The Supreme Court construed the provisions narrowly

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230. Tribe, supra note 2, at 1424-27.
231. Stanley, 394 U.S. at 565. Tribe suggested that the Court in Stanley placed what may be its "most significant limitation to date" upon governmental interference with one's thoughts. Tribe, supra note 2, at 1322.

Sec. 2(a)
It shall be unlawful for any person—

(1) to knowingly or willfully advocate... or teach the duty... of overthrowing... any government in the United States by force or violence...

(2) to print, publish... any written... matter advocating... or teaching the duty... of overthrowing... any government in the United States by force or violence...

(3) to organize or help to organize any society, group... of persons who teach, advocate or encourage the overthrow... of any government in the United States by force or violence; or to become a member of any such society... knowing the purposes thereof.

Sec. 3.

It shall be unlawful for any person to attempt to commit, or conspire to commit, any of the acts prohibited by the provisions of this title.

See, e.g., Dennis, 341 U.S. at 496-97.
236. Yates, 354 U.S. at 299; Dennis, 341 U.S. at 498. In Yates, the issue was whether the particular application of these sections of the Smith Act was unconstitutional. Yates,
and strengthened the requirements needed for conviction. The plurality in Dennis imported requirements of specific intent and active advocacy even though, as the court later acknowledged, the Act did not explicitly require either element.

In its discussion of Yates, the Supreme Court similarly distinguished between advocacy of action and advocacy of doctrine, explaining that “[t]he essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.” The Court reasoned: “[A]dvocacy [of doctrine], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action.... ” The Steffan panel relied upon the Supreme Court’s requirements of specific intent and active advocacy to support its pro-equality thought and political dissent analogy: “Only with these limits did the Court uphold [the advocacy] provision[s].... ”

Pro-equality advocates can also invoke the Supreme Court’s “membership clause” decisions, Scales v. United States and Noto v. United States, which likewise address the criminalization of advocacy. In Scales, the Supreme Court tightened the standard required for an advocacy conviction. The Court specified—for the first time—that “the Smith Act offenses, involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of proof... 245

354 U.S. at 299. In Dennis, the Court upheld the constitutionality of §§ 2-3. Dennis, 341 U.S. at 516-17.

237. While a general principle of statutory construction is that “[the Supreme] Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects,” Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964), there is no indication in the language of the Smith Act that the legislature intended to include the requirements of specific intent and active membership.

238. Dennis, 341 U.S. at 499 (“We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation... ”).  

239. Id. at 501-02; see also Yates, 354 U.S. at 318-20.


241. Id. at 324-25.

242. Id. at 321-22.

243. Steffan, 8 F.3d at 66.

244. The membership clause, § 2(a)(3) of the Smith Act, is quoted supra note 235. Another portion of the membership provision, not quoted above, prohibits the organization of, or membership in an organization that “teach[es], advocate[s], advise[s] or abet[s]” governmental overthrow. Scales v. United States, 367 U.S. 203, 205 n.1 (1961).

245. The Scales majority conceded that the Supreme Court had failed in Yates to specify that a stricter standard of proof was required: “[This requirement was] not articulated in the opinion, though perhaps it should have been.... “ Scales, 367 U.S. at 232.
needed to make out a case of illegal advocacy.\textsuperscript{246}

The stricter standard of proof which the majority set forth in \textit{Scales} offered protection to the defendant in \textit{Noto}.\textsuperscript{247} The Supreme Court reversed Noto's conviction due to insufficient evidence: the government had relied heavily upon excerpts from Communist texts and had failed to present sufficient evidence of advocacy of action.\textsuperscript{248} The Court rejected the prosecution's equation of belief in the Communist creed with the performance of prohibited acts: "[I]t is upon the particular evidence . . . that a particular defendant must be judged, and not upon . . . what may be supposed to be the tenets of the Communist Party."\textsuperscript{249} Furthermore, the Court explained its distinction between advocacy of belief and advocacy of action more clearly than it had in prior opinions: "[M]ere abstract teaching of Communist theory, including the . . . moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."\textsuperscript{250}

c. The Expression Analogy in Military Discharge Litigation

Pro-equality litigators and courts could invoke the Supreme Court's protection of Communist beliefs to argue that the military's anti-gay policy should be overturned. The \textit{Steffan} panel did so, concluding: "[T]he armed services have accorded Mr. Steffan differential treatment solely because of the content of his thoughts, as revealed by his truthful statement that he is a homosexual . . . . [T]his is repugnant to the . . . constitutional principles that guard the sanctity of a person's thoughts against governmental control. . . ."\textsuperscript{251} Pro-equality advocates could take this reasoning one step further to argue that the military's prohibition against disclosing one's sexual orientation impinges not only upon the (inward) workings of one's mind, but also upon the (outward) expression of political dissent.

As discussed in Part I, coming out—particularly in the military context in which the state penalizes such disclosure—is a form of political expression.\textsuperscript{252} It is also a tool for attempting to effect socio-political change.\textsuperscript{253} The anti-gay policy may deter all servicemembers, including heterosexuals, who are supportive of gay rights from publicly contesting the wisdom of the military's policy.\textsuperscript{254} Servicemembers additionally may

\textsuperscript{246} Id.
\textsuperscript{248} Id. at 291.
\textsuperscript{249} Id. at 299.
\textsuperscript{250} Id. at 297-98.
\textsuperscript{251} Steffan v. Aspin, 8 F.3d 57, 67 (D.C. Cir. 1993).
\textsuperscript{252} See supra part I at notes 74-86 and accompanying text.
\textsuperscript{253} See supra part I at note 78 and accompanying text (discussing studies that indicate greater support for gay rights where people know someone who is openly gay).
\textsuperscript{254} See supra notes 79-81 and accompanying text (discussing ways in which all servicemembers may be deterred from publicly supporting gay rights).
be deterred from political activities such as attending gay-rights demonstrations, participating in same-sex "kiss-ins," and filing suit to challenge the Directives. As Justice Frankfurter cautioned in his Dennis concurrence, silencing dissenting views eventually may undermine the fabric of our democracy:

[The urge to suppress a belief in Communism represents] a danger that something may occur in our own minds and souls which will make us no longer like the persons by whose efforts this republic was founded and held together, but rather like the representatives of that very power we are trying to combat: intolerant... and terrified of internal dissention. ...255

B. Pro-Equality Rejection of the Subversive Advocacy Decisions

Although advocates may be able to extract a few pro-equality arguments from the SAGA and Smith Act decisions, the reasons to reject reliance upon the subversive advocacy analogy far outweigh the utility of these arguments. Despite its reliance upon the Communist party cases, the Steffan panel conceded that the decisions "are not beloved of civil libertarians."257 Even during the McCarthy era, defenders of civil liberties—including Justice Black, Justice Douglas and some commentators—suggested that the subversive advocacy prosecutions reflected American intolerance of internal dissention.258

1. "Not Beloved of Civil Libertarians"

The subversive advocacy prosecutions are widely regretted and were criticized even during the height of Red Scare tensions. In 1961, for instance, Alexander Meiklejohn rejected the Supreme Court’s conclusion that the Smith Act’s restrictions on liberty are justified by the Communist threat to national security. His words could as easily apply to the military’s current claim that statements by servicemembers that they are gay jeopardize “unit cohesion” and hence our nation’s safety:259

[W]hen “the right of national self-preservation” is allowed to nullify the first amendment’s protection of political freedom[,] [i]t cannot be justified by any valid interpretation of the

\[255. \text{See supra notes 82-85 and accompanying text.} \]
\[257. \text{Steffan v. Aspin, 8 F.3d 57, 67 (D.C. Cir. 1993), rev’d, 41 F.3d 677 (D.C. Cir. 1994) (en banc).} \]
\[258. \text{Dennis, 341 U.S. at 555 (Frankfurter, J., concurring) (quoting Keenan, supra note 256). The Smith Act dissents by Justices Black and Douglas are discussed infra notes 265-67, 274-82 and accompanying text. As one commentator remarked in 1957, “[The Smith Act] remains as a threat to freedom. Only Black and Douglas have spoken out against it.” The Smith Act Reconsidered, 17 Law. Guild Rev. 85, 88 (1957).} \]
\[259. \text{See infra part III.B.3 (a-c) (discussing view of Communists and gay persons as a threat to national security).} \]
Constitution. ... On the contrary, it expresses ... a paranoiac fear which ... has come upon our national spirit ... a paranoia which sees human living through a blinding and distorting haze of anxiety [and] hostility. ...265

As early as 1951, one commentator objected to the Smith Act's selective targeting of the Communist Party: "[The Dennis] prosecution marks a turning point in the history of civil liberties in America. There have been many efforts in the past to punish particular utterances or actions. But never before has an attempt been made to outlaw an entire political party."261 Again, one could apply this criticism to the 1994 Directives: The policy singles out an entire group—lesbians, bisexuals, and gay men—for differential penalization.

Describing the Supreme Court's decisions in Scales and Noto, another commentator faulted the opinions for "strained reasoning and questionable judicial technique."262 The following examines the ways in which the Supreme Court's "strained reasoning" in the subversive advocacy cases creates numerous pitfalls for pro-equality advocates.

2. The Supreme Court's "Strained Reasoning"

a. Statutory Interpretation

From the outset, the Supreme Court gave wide latitude to Congress when it interpreted the language of the Smith Act to require specific intent and active advocacy.263 While the Steffan panel relied upon the Supreme Court's statutory interpretation as evidence that the subversive advocacy decisions protected belief and group membership, the panel failed to note that the Smith Act's language did not contain these requirements. The Supreme Court's inclusion of the elements of "activity" and "specific intent" violates a general principle of statutory construction: "[The Supreme] Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."264

The Supreme Court's interpretation of the Smith Act prompted Justice Black to remark in his Scales dissent, "the Court has practically rewritten the statute ... by treating the requirements of 'activity' and

261. Emerson, supra note 208, at 1.
263. See supra notes 237-39 and accompanying text (noting that the Supreme Court later acknowledged that the Smith Act did not explicitly require either element).
‘specific intent’ as implicit in words that plainly do not include them.”

Shortly after the Supreme Court decided *Scales*, one legal scholar likewise objected:

The *Scales* decision demonstrates the lengths to which the Court will go to save a congressional statute from unconstitutionality. Although insertion of the element of intent had precedent in the *Dennis* construction of the advocacy [clause] . . . , such a reading seems less justifiable as applied to the simple fact of membership . . . . The Court’s addition of “active” seems even more questionable.

Another commentator hinted that the Court’s interpretation, requiring active membership, may have been disingenuous: “[Scales] is not one of those cases where there is disagreement over the meaning of a word—both defendant and the Court know and agree upon what a ‘member’ is in the ordinary sense—but the Court simply refuses to believe that Congress meant what it said.”

b. The *Dennis* Decision

i. The Plurality’s Factual Determinations

The Supreme Court’s application of the Smith Act to the facts of particular cases further illustrates that—despite its articulated protection of Communist Party membership and belief—the Court has upheld some Smith Act convictions in the absence of illegal conduct. In fact, the Supreme Court in *Dennis* did not even consider the specific acts the defendants had committed. The *Dennis* plurality opened its opinion by stating that “[w]hether . . . petitioners did in fact advocate the overthrow of the Government by force and violence is not before us . . . .”

Instead, the plurality relied upon the broad conclusions set forth by the Court of Appeals, including that: “[T]he Communist Party is a highly disciplined organization, adept at infiltration into strategic positions [and] use of aliases . . . and the general goal of the Party was . . . to achieve a successful overthrow of the existing order by force and violence.”

Not all of the Justices agreed with the plurality’s adoption of such sweeping factual findings. In his concurrence, Justice Frankfurter objected, “[W]e may not treat as established fact that the Communist Party in this country is . . . conditioned to embark on unlawful activity when given the command.” Nonetheless, Justice Frankfurter took judicial notice of substantially equivalent “facts,” such as the assumption that “it would amply

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266. The Supreme Court 1960 Term, 75 Harv. L. Rev. 83, 114 (1961).
267. Note, supra note 262, at 162.
269. Id. at 498.
270. Id. at 547 (Frankfurter, J., concurring).
justified a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security."

**ii. Factual Findings Impact Presumption of Misconduct**

The *Dennis* Court thus relied upon the generalized conclusion that the Communist Party intended at some future time to overthrow the government. In fact, the plurality specified that the defendants may be convicted based upon a presumption of future illegal activity. Referring to the "clear and present danger" test, the *Dennis* plurality stated, "[T]he words cannot mean that before the Government may act, it must wait until the putsch is about to be executed...." This reasoning supplies a potentially powerful argument for the military in support of its exclusionary policy: The government should not have to wait until same-sex conduct has occurred before it can discharge servicemembers. Although pro-equality advocates would respond that consensual, adult same-sex conduct poses no danger—much less a danger on par with violent governmental overthrow—the military still may argue that same-sex acts threaten the cohesion of the military unit, which in turn adversely threatens national security.

Pro-equality advocates must invoke the *Dennis* dissents, rather than the plurality or concurring opinions, to support the proposition that servicemembers cannot be discharged based upon a presumption of likely future misconduct. In separate dissents, Justices Black and Douglas focused upon the absence of a required *actus reus* in both the Smith Act and the indictment.

Justice Black remarked:

> These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date....

Justice Douglas similarly objected, "If this were a case where [petitioners]... were teaching the techniques of... assassination of the President... [and] the planting of bombs... I would have no doubt

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271. *Id.*
272. *Id.* at 509.
273. *See* infra part III.B.3 (a-c) (discussing the government’s view of gay persons as a threat to national security).
274. For the language of §§ 2-3 of the Smith Act, see supra note 235.
275. *Dennis v. United States*, 341 U.S. 494, 579 (1950) (Black, J., dissenting). Justice Black, as the only free speech absolutist to sit on the Court, believed that pure speech was entitled to absolute First Amendment protection. Conversely, he believed that the First Amendment did not protect any form of conduct. *See* Hugo Black, *A Constitutional Faith* 45-58 (1968).
Furthermore, the Dennis dissents and contemporaneous commentary suggest that the defendants were convicted based upon their beliefs, rather than upon any illegal activity. Justice Douglas, in his dissent, warned that "when the illegality is made to turn on intent, not on the nature of the act," there is a danger that defendants would be "convicted not for what they did but for what they thought." Both Justice Douglas and a legal commentator, Thomas Emerson, emphasized that the Smith Act bestowed upon the government the power to intrude into one's thoughts. Emerson asserted that Dennis and "the Smith Act open[ed] the door to widespread suppression of new, unorthodox, or radical ideas...." As discussed in Part IV, Justice Douglas focused upon the Smith Act's suppression of belief by comparing the Dennis convictions to the old English law of constructive treason, in which "[m]en were punished not for raising a hand against the king but for thinking murderous thoughts about him."

c. The Scales Decision

As in Dennis, the Supreme Court in Scales affirmed the defendant's conviction for conspiring to organize the Communist Party in spite of little, if any, proof of illegal activity. While the Court concluded that "the petitioner's own utterances and systematic course of conduct as a high Party official" constituted sufficient evidence for conviction pursuant to sections two and three of the Smith Act, Justice Douglas's dissent is more convincing. He summarized the evidence adduced at Scales's trial and concluded that "[n]ot one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief—belief in the proletarian revolution, belief in Communist creed."

i. Factual Findings Impact "Active Membership" Determination

The evidence of Scales's active membership primarily concerned his attempts to recruit Party members by educating individuals about Communist Party doctrine. Scales furnished an undercover FBI agent

277. Id. at 583.
278. Emerson, supra note 208, at 7.
279. Dennis, 341 U.S. at 583 (Douglas, J., dissenting).
281. See supra note 235 (quoting §§ 2-3 of the Smith Act, pursuant to which Dennis was convicted).
283. Id. at 264-65. Scales also had stated that force was the only way to achieve revolution. Id. at 265. For the majority's discussion of the evidence at trial, see id. at 235-
with literature criticizing the American involvement in Korea and stated that the working class should be used to foment violent revolution. The activity in the record which came closest to an illegal action—showing students how to kill a person with a pencil—was a demonstration by a third party; Scales was merely present.

Scales's presence at the demonstration is arguably several steps removed from the traditional concept of a criminal actus reus. It was a (1) third-party observation, (2) of an instructor teaching students, (3) how to commit illegal conduct (assuming "pencil murders" are possible), (4) for potential use, (5) at some unspecified time in the future.

As with the fine line in Robinson and Powell between "being drunk" and "being drunk in public," Scales's conviction illustrates that the distinction between "active" and "nominal" Communist Party membership is easily blurred. If, as Justice Douglas concluded in his Scales dissent, the evidence which suffices for "active" Party membership looks largely indistinguishable from that which characterizes "nominal" membership, then Scales was convicted for his political affiliation: "We legalize today guilt by association, sending a man to prison when he committed no unlawful act. Today's break with tradition is a serious one. It borrows from totalitarian philosophy." Since membership in the Communist Party is inextricably linked with a belief in the tenets of Communism, the Supreme Court seems to have countenanced the prosecution of belief.

ii. Invocation of Scales in Military Discharge Litigation

The government may invoke Scales to defend the discharge of gay servicemembers as necessary to protect national security. The Scales decision, like other Smith Act opinions, suggests that the state may broadly define criminal "conduct" when there is a perceived threat to national security. The military's definition of "homosexual conduct" to include coming out may not appear to be unduly broad when compared to Scales's conviction for attending a class on how to potentially kill a person with a pencil. The armed services could raise the specter of national security concerns by arguing that the inclusion of openly gay servicemembers would impair combat effectiveness. Particularly since President Clinton sparked debate by proposing an end to the anti-gay

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284. Id. at 264-65.
285. Id.
286. Id. at 263.
287. The Scales majority emphasized the dangers posed by the Communist Party, particularly that it advocated violent overthrow of the government. Scales, 367 U.S. at 235-42.
288. See supra notes 36-44 and accompanying text (describing how section H.1.b(2) of the 1994 Directives effectively mandates discharge for a servicemember who states that she is gay).
policy, the military consistently has sounded the alarmed refrain of threatened “unit cohesion”—its anxiety that the morale of heterosexual servicemembers will be undermined, thus impacting its ability to protect the country.289

d. The Yates Decision: Expression Still Silenced

Even the Supreme Court's *Yates* opinion—in which the Court overturned the convictions of five of the fourteen defendants due to insufficient evidence—is not a helpful precedent for pro-equality advocates. All of the *Yates* defendants were forced to undergo a trial and were convicted on the basis of little concrete evidence. Justice Black remarked in his partial dissent that “[u]nder the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act.”290 Black's fears may have materialized in *Yates*. Although the *Yates* majority determined that sufficient evidence warranted remanding the cases of the remaining nine defendants for retrial,291 the prosecution eventually abandoned the charges due to insufficient evidence.292

Even though the *Yates* defendants' beliefs were ultimately protected, they all had to endure an initial conviction and the majority of the defendants had to endure re-indictment. Justice Black—echoing Justice Douglas's dissents in *Dennis* and *Scales*—analogized this situation to the law of constructive treason. He noted that a principal purpose of the "overt act" requirement in the law of treason "was to keep people from being convicted of disloyalty to government during periods of excitement when passions and prejudices ran high, merely because they expressed 'unacceptable' views."293 Likewise for Justice Douglas, the *Yates* majority had failed to protect political dissent:

> [A]fter all the expressed alarm about the peril into which the United States was being plunged ... the prosecution felt itself unable to show persuasively that the Communist spokesmen had engaged in forbidden incitements to illegality. This should stimulate a sober second look at the surface attractions of programs of suppression and coercion.294

289. For example, the National Defense Authorization Act for Fiscal Year 1994, which Congress passed in the wake of the Clinton Administration's revised policy, codifies the 1994 Directives and sets forth a Congressional finding that the presence of openly gay servicemembers "would create an unacceptable risk to the high standard of morale, good order, and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 645(a)(15) (Supp. V 1993).


291. Id. at 327.


293. *Yates*, 354 U.S. at 343 (Black, J., concurring in part and dissenting in part) (citations omitted).

294. Justice Douglas was discussing the *Yates* decision in his dissent from *Scales*. *Scales*,
3. **Stigmatic Association of Communists with Lesbians, Bisexuals, and Gay Men**

Even assuming that the subversive advocacy decisions adequately supported the argument that the discharge policy is unconstitutional, pro-equality advocates nonetheless should reject the analogy due to the longstanding, stigmatic association of gay people with Communists. As a contemporary American author remarked of his childhood, "[H]omosexual' and 'Red' were virtual synonyms." 295 This association is particularly potent in the military context. Since the McCarthy era, the government has portrayed both Communists and nonheterosexuals as a threat to national security. In military discharge litigation, the government could seize upon this stigmatic comparison to suggest that gay people, like Communists, cannot reliably serve in the military. Even if the government does not directly make a national security claim, the analogy may spark negative associations in the minds of presiding judges, especially those who lived through the McCarthy era's demonization of the "commie-queer bogeyman." 296

**a. Stigmatic Association with Communists in Military Discharge Litigation**

Certain judicial decisions and court hearings illustrate that the association of gay persons and Communists persists today. Most recently during the rehearing *en banc* for *Steffan II*, Judge Randolph analogized to Communists when discussing the fitness of gay persons to serve in the military. He reportedly asked Steffan's counsel, "If a C.I.A. agent stands up and says 'I am a Communist but I won't act on it while in the service,' must the C.I.A. keep him?" 297 While there is no way of knowing whether Judge Randolph's question was prompted by *Steffan I* 's subversive advocacy analogy, a pro-equality advocate's use of the Communist Party cases will, at the very least, increase the probability that a judge may equate Communists with lesbians, bisexuals, and gay men. Outside the military context, other courts, 298 including the Supreme Court, have disfavorably grouped gay

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298. See *e.g.*, Doe v. United States, 821 F.2d at 704-05 (D.C. Cir. 1987) (Wald, C.J., dissenting), discussed supra part II.C.3.c.iii. Dissenting from an opinion which concerned the plaintiff's denial in a job interview that she suffered from a mental illness, Chief Judge Wald suggested other examples of potentially damaging information which are
people with Communists. For example, in his dissent to Paul v. Davis—involving the police’s erroneous, public identification of the plaintiff as “an active criminal”—Justice Brennan contemplated other potential examples of “official stigmatization,” including the “branding of a person as a Communist, a traitor, an ‘active murderer,’ a homosexual, or any other mark that . . . carries social opprobrium.”

b. Presumed Commonality: Threat to National Security

The equation of Communism and same-sex orientation burst forth in full fury during the McCarthy era. The presumed commonality between gay persons and Communists was “a side effect of Cold War tensions and American fears about national security.” The government in large part based its assertion that nonheterosexuals posed a security risk upon its presumption that gay persons were more susceptible than heterosexuals to blackmail from Communist agents. While the federal government had been dismissing from its employ a significant number of suspected gay persons for several years, February 1950 marks the birth of the Cold War’s “homosexual purge.” Several days after Senator Joseph McCarthy claimed that the government was overrun with Communists, Undersecretary of State John Peurifoy declared that many of the federal employees recently dismissed for “moral turpitude” were homosexual. Senator Kenneth Wherry reflected the prevailing sentiment when he commented, “You can’t hardly separate homosexuals from subversives.”

not easily verifiable, including “communist associations, homosexual relations, or child abuse.”

299. Paul v. Davis, 424 U.S. 693, 721 (1976) (Brennan, J., dissenting). The Paul majority held that the police chief’s action in distributing the flyer did not deprive the plaintiff of any liberty or due process interests secured by the Fourteenth Amendment’s Due Process Clause. Id. at 713-14.

300. There also may have been some concern with same-sex orientation during the 1919-1920 "Red Scare." For example, the Senate launched an investigation into alleged "[l]mmoral . . . [homosexual] practices" at a Naval training station. S. Rep., 67th Cong., 1st Sess. (1921), reprinted in Government versus Homosexuals (Katz ed., 1975). In addition, Emma Goldman, who was the first American “to [have taken] up the defense of homosexual love before the general public,” Cain, supra note 226, at 1555 n.22 (quoting Jonathan Katz, Gay American History 378 (rev. ed. 1992)), was deported to Russia during the Red Scare together with a woman who was reportedly Goldman’s lover. Cain, supra note 226, at 1555 nn.24-25 (citations omitted).


In June 1950, the Senate Subcommittee on Investigations—of which Senator McCarthy was the ranking Republican member—launched an inquiry into the “homosexual menace.” Six months later, the Subcommittee issued its report, "Employment of Homosexuals and Other Sex Pervers in Government." The report ascribed characteristics to lesbians, bisexuals, and gay men that were similar to those ascribed to Communists: Both groups were believed to be immoral, desirous of recruiting others, and a threat to national security. This “congruence between the stereotype of Communists and homosexuals made the scapegoating of gay men and women a simple matter.” The Subcommittee report concluded that nonheterosexuals should be barred from government employment.

After issuance of the subcommittee report, dismissals of gay persons from civilian and military positions increased dramatically. The trend was exacerbated by President Eisenhower’s executive order banning lesbians, bisexuals, and gay men from all federal employment. Members of the House Un-American Activities Committee intensely pressured suspected Communists to name other Party members. The federal government, particularly the military, employed the same tactics to purge suspected gay persons from its ranks. The claim of a “homosexual security risk” seems to have been wielded in part as a political weapon:

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305. Herek Affidavit, supra note 51, at 133-34.
307. See D’Emilio, supra note 303, at 232 (explaining that “the incorporation of gay men and women into the demonology of the McCarthy era required little effort.”).
308. See id. In fact, Harry Hay, the primary founder of the Mattachine Society—one of the United States’ earliest important gay organizations—reportedly left the Communist Party “to avoid tarring either group [Communist or gay] with the other’s stigma.” Gross, supra note 296, at 13.
309. D’Emilio, supra note 303, at 228.
310. See id. at 229.
312. See e.g., Yates v. United States, 355 U.S. 66 (1957) In this opinion, which is different from the principal Yates decision discussed above, the Supreme Court affirmed one count of contempt where the defendant had refused to identify others as Communist. Id. Between 1945 and 1946 alone, the House Un-American Activities Committee initiated contempt proceedings against 22 people—a dramatic increase from Congress’ prior average of less than one citation per year. Alan I. Bigel, The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers, 19 Ohio N.U. L Rev. 885, 889 (1993).
313. Bérubé & D’Emilio, supra note 301, at 767 (“Investigating officers extracted [from servicewomen] confessions [of lesbianism] with promises of speedy discharge, and then used the self-incriminating statements to pressure women into naming names.”). A few years earlier during World War II, when the need for servicemembers was great, the military had relaxed substantially its anti-gay policies. Id. at 761-62. The military’s practice of relaxing its anti-gay policies likewise was followed during the Korean, Vietnam, and Persian Gulf wars. See, e.g., Randy Shilts, Conduct Unbecoming: Gays and Lesbians in the U.S. Military 17, 70, 198, 214, 295, 356, 419 (1993).
"Republican leaders exploited the homosexual issue as a means of discrediting the Truman administration's national security policy."\textsuperscript{314} Moreover, "the ability of Communists and gay persons to blend into society also seems to have heightened fears for national security."\textsuperscript{315} Historian John D'Emilio described the tenor of the times: "Since Communists bore no identifying physical characteristics, they were able to infiltrate the government . . . . Homosexuals, too could escape detection and thus insinuate themselves in every branch of the government."\textsuperscript{316}

\textbf{c. Repudiation of the National Security Rationale}

A long history of government studies, as well as comments by high-ranking officials, directly contradict the notion that a servicemember's same-sex orientation threatens national security by making the member more vulnerable to blackmail. The 1957 Crittenden Report published by the Department of Defense concluded: "A . . . concept which persists without sound basis in fact is the idea that homosexuals necessarily pose a security risk. . . . Some [intelligence officers] feel that certain homosexuals might be better security risks than heterosexuals . . . ."\textsuperscript{317} Even Secretary of Defense Richard Cheney testified in 1991 that the security risk argument was an "old chestnut."\textsuperscript{318} In its 1992 study on the military's discharge policy, the General Accounting Office flatly refuted the "security risk" rationale:

[T]wo DOD/service-commissioned study efforts have refuted DOD's position on the potential security risk associated with homosexual orientation as well as disclosed information that raised questions about the basic policy. Further, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have recently acknowledged that homosexual orientation is no longer a major security concern.\textsuperscript{319}

Furthermore, there has never been a single instance of successful "homosexual blackmail" recorded since the U.S. government created its security clearance programs forty years ago.\textsuperscript{320} In fact, in an Executive Order, President Clinton recently revised federal policy to provide that

\begin{itemize}
  \item \textsuperscript{314} Bérubé & D'Emilio, supra note 301, at 759.
  \item \textsuperscript{315} At least one author has argued that the 1948 publication of Alfred Kinsey's report, Sexual Behavior in the Human Male, "reinforced many heterosexuals' most basic fear: the invisible, undetectable enemy was everywhere." Michael Bronsky, Culture Clash: The Making of Gay Sensibility 77 (1984).
  \item \textsuperscript{316} D'Emilio, supra note 303, at 232.
  \item \textsuperscript{317} The Crittenden Report, supra note 53, at 8.
  \item \textsuperscript{318} Herek Affidavit, supra note 51, at 122. Cheney was testifying under oath before the House Budget Committee on July 19, 1991. Id.
  \item \textsuperscript{319} The 1992 Study, supra note 53, at 3. See also id. at 31-36 (discussing the DOD's findings in greater detail).
  \item \textsuperscript{320} Herek Affidavit, supra note 51, at 136.
\end{itemize}
security clearances will no longer be denied on the basis of sexual orientation. While the Executive Order provides that "no inference . . . may be raised solely on the basis of . . . sexual orientation," the security clearance policy may conflict with the 1994 Directives. Pursuant to the Executive Order, security clearances may be denied if federal employees have "any concealed activity or conduct" which could subject them to "coercion or compromise." Such concealment, however, may be mandated by the military's "don't tell" policy.

Although the government can no longer convincingly rely upon the notion of "homosexual blackmail," it has brought the "national security" argument in through the back door by claiming a threat to "unit cohesion." The Department of Defense claims that servicemembers must be discharged for same-sex conduct because such acts threaten the (heterosexual) troops' "standards of morale, good order and discipline, and unit cohesion that are essential for combat effectiveness." As the Steffan panel observed, the "unit cohesion" argument boils down to the military's assumption that "heterosexual soldiers will be appalled at the requirement that they serve alongside homosexuals," thereby reducing the troops' effectiveness and jeopardizing national security.

Even though the government may choose not to rely upon the claim of "homosexual blackmail" when defending military discharge cases, it nonetheless continues to invoke the similarly ominous possibility of impaired combat readiness. The persistent specter of the "national

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321. The Executive Order provides: "The U.S. government does not discriminate on the basis of race, color, religion, sex, national origin, disability or sexual orientation in granting access to classified information." Louis Freedberg, "Clinton Order Does Away with Security Ban on Gays," San Francisco Chron., August 5, 1995, at Al (emphasis added). Clinton's action overturns President Eisenhower's Executive Order which excluded all gay persons from federal employment. See supra note 311 and accompanying text.


323. Restrictions on Personal Conduct in the Armed Forces, in Department of Defense Directive 1304.26, Office of the Assistant Secretary of Defense, Pub. No. 605-93 (on file with author). A larger excerpt of this provision more fully illustrates the way in which the government has neatly linked (in a 3-step process) its exclusionary policy to a justification of national security:

1. [M]ilitary units and personnel must maintain the high standards of morale, good order, and discipline, and unit cohesion that are essential for combat effectiveness.

2. The Armed Forces must be ready at all times for world-wide deployment . . .

3. Members of the Armed Forces may be involuntarily separated before their term of service ends for various reasons . . . such as:

   d. A member may be separated for . . . engaging in . . . a homosexual act . . . [or] for stating that he or she is homosexual or bisexual . . .

Id. (emphasis added).

security” claim, and the culturally embedded presumption that Communists and gay persons present a security risk, make reliance upon the subversive advocacy decisions an especially poor litigation tactic. A pro-equality advocate’s reliance upon the SAGA and Smith Act decisions raises the stigmatic misperception to the forefront of a judge’s mind. When presented with the government's “unit cohesion” argument, a judge may (as did Judge Randolph in Steffan II) jump to the conclusion that nonheterosexuals, like Communists, can be discharged on national security grounds.

IV. THE ANALOGY TO THE LAW OF TREASON

The criminalization of treason, like that of subversive advocacy, brings with it the risk that the government may misuse the law to suppress unpopular belief. The Steffan panel invoked the law of treason to support its conclusion that the government may not discharge gay servicemembers based solely upon their same-sex desire or thoughts. This invocation of the law of treason in gay rights litigation is premised upon the Constitution’s repudiation of the early English law of constructive treason, in which an individual was subject to conviction and execution for “compass[ing] or imagin[ing]” the death of the king. The Framers rejected the law of constructive treason by limiting the Constitution’s treason clause, Article III, section three, to particular types of conduct and by requiring two witnesses to the same overt act: “[T]reason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

Drawing upon the law of treason, the Steffan panel concluded that the restrictions in Article III, section three, “express the constitutional principle that a person’s thoughts are his own—however distasteful they may be to the state.” In their Smith Act dissents, Justices Douglas and Black similarly relied upon the repudiation of constructive treason to support their position that the defendants had been convicted for their political views. Dissenting in Scales v. United States, for example, Justice Douglas stated that “[t]he crime of belief—presently prosecuted [under the Smith Act]—is a carryback to the old law of [constructive] treason where men were punished for compassing the death of the King.”

325. Id. at 66. As with the Communist Party cases, the treason analogy depends upon a conception of same-sex orientation as akin to one’s thoughts or to political dissent. For a discussion, in the context of the subversive advocacy decisions, of same-sex orientation as akin to thought, see supra notes 224-56 and accompanying text.
326. Steffan, 8 F.3d at 66 (quoting Statute of Treasons, 25 Edw. 3 (1350)).
327. U.S. Const. art. III, § 3.
328. Steffan, 8 F.3d at 66.
While the Steffan panel has issued thus far the only military discharge decision to have invoked the treason analogy, the similarity of the reasoning underlying the treason and Smith Act decisions suggests that increased pro-equality reliance upon the law of treason may only be a matter of time.

This Part attempts to dissuade advocates from embarking upon that course. While the safeguards in the treason clause have at times protected individuals, in some instances the state has utilized the law of treason to suppress dissenting views. Furthermore, the treason analogy—like the Robinson/Powell and subversive advocacy decisions—invokes the longstanding association of gay persons with a stigmatized group (here, traitors). Reliance upon the treason analogy risks evoking in the minds of presiding judges the view of nonheterosexuals as treacherous: a view which carries special weight in the context of military security.

A. Pro-Equality Reliance Upon the Law of Treason

This section presents historical information which tends to buoy a pro-equality claim that, as the law of treason protects an individual from prosecution based upon her thoughts, so the government is prohibited from discharging a servicemember based upon her same-sex thoughts or desires. The Framers did repudiate directly in the Constitution the law of constructive treason and placed specific limits upon the government's prosecutorial power. In the early treason cases, prosecutorial abuses abounded. In later prosecutions of some politically unpopular defendants—such as those of Aaron Burr in 1806 and Anthony Cramer in 1942—the law of treason seems to have protected the defendants from prosecution for their beliefs. Even apart from the stigmatic association of gay persons with traitors, however, the analogy is unsuitable. As discussed in Part IV.B, history suggests that the protections of the law of treason have been sporadic at best.

1. Early English and American Law of Treason

The conclusion of Justice Douglas, Justice Black, and the Steffan panel that the Framers repudiated the law of constructive treason appears to be historically accurate. Prior to the framing of the Constitution, the law of treason was a tool used to convict persons "during periods of excitement when passions and prejudices ran high, merely because they expressed 'unacceptable' views."330

   a. Early English Law of Treason

   The criminalization of treason originated in 1352 during the reign of

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Edward III, when the Statute of Treason was enacted. The Statute of Treason provided for the execution of a person committing any of seven offenses, including "compass[ing] or imagin[ing] the Death of... the King." In England, judicial construction consistently broadened the application of this already vague statutory provision, resulting in the crime of "constructive treason.

As stated in the 1592 trial of Sir John Perrot, mere thought alone—unaccompanied by action—was sufficient to warrant execution: "[I]magination was in itself High-Treason, albeit the same proceeded not to any overt fact." No act was required for prosecution; thus, "[c]onvictions were obtained... for pure speech, often for speech which only by the most bizarre, strained construction could be found to... reveal a threat against... the sovereign." Probably the most notorious example of a constructive treason prosecution is the fifteenth century execution of William Walker for telling a joke. Walker owned an inn called the "Crown" and had the misfortune to remark in jest to his son, "Tom, if thy behavest thyself well, I will make thee an heir to the Crown." Holding that no proof of actual desire to kill the king was required, the court convicted the defendant and ordered that he be hung, drawn and quartered.

b. Colonial Law of Treason

The colonies largely modeled their laws proscribing treason on England's Statute of Treason. The crime of constructive treason was incorporated into the laws of eleven of the colonies; moreover, colonial

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331. The Treason Act, 1352, 25 Edw. 3, st. 5, c.2 (1350).
332. Id.
334. Watts v. United States, 394 U.S. 705, 709 n.1 (1969) (Douglas, J., concurring) (quoting Trial of Sir John Perrot, 1 Sow.St.Tr. 1315, 1318 (1592)). Watts had been convicted for an act similar to treason: threatening the life of the President. Watts, 394 U.S. at 705-06. The Supreme Court held that the defendant's statement—that he would refuse induction into the armed forces and that "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," id. at 706—did not constitute a threat against President Johnson's life. Id. at 708.
337. Id. Justice Douglas, in his concurrence in Watts, noted that the Walker case, as well as that of Thomas Burdet, discussed immediately below, were examples of the abuses of the law of constructive treason. Watts, 394 U.S. at 709.
338. 1 Campbell, supra note 336, at 147-48.
339. Some of the earliest colonial references to the law of treason, however, were not modeled on the Statute of Edward III. See, e.g., Hurst, supra note 333, at 68-69; James G. Wilson, Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason, 45 U. Pitt. L. Rev. 93, 107 (1985).
definitions frequently broadened the scope of treason.\textsuperscript{340} For instance, Nicholas Bayard, a member of a defeated political faction, was tried for treason in 1702 for circulating petitions critical of the government.\textsuperscript{341} With the advent of the Revolution, the potential for treason prosecutions increased: many colonists simultaneously were exposed to prosecutions for disloyalty to the king and to the colonial government.\textsuperscript{342}

Prior to the drafting of the Constitution’s treason clause, little evidence indicates that the revolutionaries were much concerned that the government leaders could wield treason prosecutions as a political tool against their enemies.\textsuperscript{343} In fact, the revolutionaries themselves may have indicted nearly five hundred Quakers based upon their political beliefs and affiliation with the British.\textsuperscript{344} The Quakers refused to take a loyalty oath to the state of Pennsylvania, which by statute constituted “treason.”\textsuperscript{345} Although the state seized and redistributed some of the Quakers’ land,\textsuperscript{346} the grounds for prosecution were weak. Of the five hundred indictments, only two or three men were convicted.\textsuperscript{347}

2. The Constitution’s Treason Clause

When drafting the Constitution’s treason clause, the Framers “adopted every limitation that the practice of governments had evolved or that politico-legal philosophy to that time had advanced.”\textsuperscript{348} They likely were concerned with the potential for abuse of treason prosecutions because they “almost to a man had . . . been guilty of treason under any interpretation of British law.”\textsuperscript{349} In his papers, for instance, Thomas Jefferson angrily decried a British general’s 1774 proclamation that a gathering of Massachusetts residents to consider their grievances constituted treason.\textsuperscript{350} Jefferson described constructive treason as “that deadly weapon . . . which had drawn the blood of the best and honest men in the kingdom.”\textsuperscript{351}

In creating a federal crime of treason, the Committee of Detail

\textsuperscript{340} Hurst, supra note 333, at 75-77; Wilson, supra note 339, at 107.

\textsuperscript{341} Bradley Chapin, The American Law of Treason: Revolutionary and Early Origins 7-8 (1964); see also Cramer v. United States, 325 U.S. 1, 13 n.16 (1945).

\textsuperscript{342} Cramer, 325 U.S. at 11-12.

\textsuperscript{343} Hurst, supra note 333, at 82; Wilson, supra note 339, at 107-08.

\textsuperscript{344} Chapin, supra note 341, at 57; Wilson, supra note 339, at 110-11.

\textsuperscript{345} Wilson, supra note 339, at 110-11.

\textsuperscript{346} Id.

\textsuperscript{347} Chapin, supra note 341, at 57 (noting that all but two men acquitted); Wilson, supra note 339, at 110-11 (noting that all but 3 men acquitted).

\textsuperscript{348} Cramer v. United States, 325 U.S. 1, 23-24 (1945).

\textsuperscript{349} Id. at 14.

\textsuperscript{350} 1 The Writings of Thomas Jefferson 206, 210 (Ford ed. 1893) [hereinafter Writings of Jefferson]; see also Wilson, supra note 339, at 111-12.

\textsuperscript{351} 1 Writings of Jefferson, supra note 350, at 216; see also Wilson, supra note 339, at 111-12.
rejected an initial proposal to allow Congress to define the crime. In fact, treason was the only crime defined in the Constitution. The Committee narrowly defined treason to include only "levying war against the United States, or ... adhering to [their] Enemies." Franklin urged further restrictions, arguing that the Framers should include the requirements that there be two witnesses to an overt act because "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." The Framers later agreed to include the requirements. They thereby "combined all of [the] known protections and added two of their own which had no precedent [prohibition of the creation of new treasons and the requirement that two witnesses testify to the same overt act]."

Pro-equality advocates can assert, as has the Steffan panel, that the Framers' repudiation of constructive treason exemplifies a constitutional principle that an individual may not be penalized based upon one's thoughts and in the absence of an overt act. The 1994 Directives' rebuttable presumption violates this principle, advocates can argue, by effectively mandating the discharge of servicemembers who have merely identified themselves as gay. Discharge based upon a statement—particularly when it is not a statement of intent to act—bears some resemblance to prosecutions for constructive treason. During the reign of Edward IV, for instance, Sir Thomas Burdet was convicted of treason. Sir Thomas, distraught because the king had slaughtered his prized white buck, reportedly had stated, "I wish that the buck, horns and all, were in the belly of the man who advised the King to kill it." Not only was there no suggestion that Sir Thomas had committed an overt act, there also was conflicting evidence as to whether he had referred to the king (rather than to the king's advisor). Opponents of the military policy could compare such prosecutions to the military's discharge policy. As the DOD's training manual indicates, a
servicemember may be discharged in the absence of an act other than stating that she is lesbian, even if she has offered evidence which conflicts with the military’s presumption of likely misconduct.\textsuperscript{365} Because the government need not provide evidence of a “bad act” for discharge, it is nearly impossible for the servicemember to prove a negative—that she has no intent to engage in same-sex conduct.\textsuperscript{364} Similarly, it was effectively impossible for Sir Thomas to prove that he had no intent to kill the king. Moreover, in both constructive treason prosecutions and military discharges, the individual’s actual intent can be ignored entirely. This is evidenced by the conviction of William Walker for telling a joke and the discharge of servicemembers who identified their sexual orientation for the purpose of mounting a legal challenge against the anti-gay policy.\textsuperscript{366}

3. Treason Convictions Overturned: Burr and Cramer

Treason prosecutions are politically volatile because the accusation underlying such prosecutions—as with Smith Act prosecutions—is that the defendant is an enemy of the state. Pro-equality advocates could invoke the treason prosecutions of Aaron Burr and Anthony Cramer to challenge the military’s discharge policy. Burr and Cramer, like gay servicemembers, were politically unpopular. Just as the government claims that gay servicemembers present a threat to combat effectiveness (and hence our nation’s security),\textsuperscript{365} so it had asserted that Burr and Cramer’s acts of treason threatened our nation. Finally, pro-equality advocates could point to treason’s requirement of an overt act. Despite the asserted threat to national security, the Supreme Court overturned Burr’s indictment and Cramer’s conviction due to lack of evidence that either man committed the overt act charged.

a. Aaron Burr

In the infamous treason prosecution of Aaron Burr, the government indicted Burr for organizing a conspiracy to create a new nation in the western United States.\textsuperscript{367} His ill-fated term of Vice-President had concluded the previous year in 1805, after Burr killed Alexander Hamilton in a duel. Burr was rejected by Federalists and Republicans alike: “To many Federalists [Burr] appeared as Hamilton’s murderer; Republicans saw him

\begin{itemize}
  \item \textsuperscript{365} See supra notes 56-64 and accompanying text (noting that even if servicemember proffers all conceivable evidence, she nonetheless may be discharged).
  \item \textsuperscript{364} See supra notes 58-59 and accompanying text (discussing difficulty of disproving a purported tendency to commit an act at some unspecified time in the future).
  \item \textsuperscript{365} See, e.g., Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995) (gay plaintiffs brought suit to declare 1994 Directives invalid even though discharge proceedings had not been commenced against some of them).
  \item \textsuperscript{366} See supra notes 323-24 and accompanying text (arguing that the military’s “unit cohesion” rationale is simply the widely refuted “national security” rationale in another guise).
  \item \textsuperscript{367} Chapin, supra note 341, at 98-100.
\end{itemize}
as the would-be betrayer of Jefferson." The government asserted that Burr had organized an expedition of twenty armed men to raft down the Ohio River with the intention of conquering the American west to create a new nation. Evidence was conflicting. Eric Bollman, a Burr supporter who was also tried unsuccessfully for treason, claimed that Burr instead intended to conquer Mexico. The expedition party—while Burr was not present—assembled on Blennerhassett’s Island. Prior to the departure of the expedition party, the group pointed their rifles at and threatened to kill a man who was attempting to arrest one of the party’s leaders. The indictment charged that the group’s action constituted the requisite overt act of levying war. Burr was absent when the alleged act of levying war occurred. He later joined the party on their rafts further down the river. While en route, the army detained the expedition and arrested Burr, among others. “The capital seethed with rumor” after Burr’s arrest, and the President himself spearheaded Bur’s indictment. In fact, in a special message to Congress prior to Burr’s trial, Jefferson named Burr as “the principal actor, whose guilt is placed beyond question.” In the government’s haste to convict a presumed traitor, Burr was prosecuted pursuant to a faulty indictment. Marshall, sitting as circuit judge, concluded that Burr’s indictment was flawed. The indictment declared the overt act to be the activities at Blennerhassett’s Island, which occurred

368. Id. at 98.
369. Id.
370. Id. at 98-100.
371. Ex Parte Bollman and Ex Parte Swartout, 8 U.S. (4 Cranch) 75 (1807). Emphasizing the potential for abuse in treason prosecutions, Chief Justice Marshall held that there was insufficient evidence to support Bollman’s indictment. Id. at 135.
372. Wilson, supra note 339, at 117.
373. Chapin, supra note 341, at 99-100; Wilson, supra note 339, at 117-19.
374. Chapin, supra note 341, at 99; Wilson, supra note 339, at 117.
375. Chapin, supra note 341, at 99; Wilson, supra note 339, at 118-19.
376. Chapin, supra note 341, at 99.
377. Id. at 100.
378. Id.
379. Id.
380. See id. (stating that “[t]he initiative [for bringing Burr to trial] was Jefferson’s.”).
381. Chapin, supra note 341, at 100.
382. For example, the day after Jefferson named Burr in his special message, the Senate “rushed [a bill to suspend the writ of habeas corpus for two of Burr’s accused conspirators] through three readings in a single day.” Id. The bill ultimately failed to pass. Id. at 101.
383. Historian Bradley Chapin concluded that “[h]owever one approaches the issue, [one] must conclude that the indictment of Aaron Burr was faulty.” Id. at 112.
384. Wilson, supra note 339, at 118-19; see also Chapin, supra note 341, at 105 (noting that the Burr indictment was flawed).
in Burr's absence. Emphasizing the requirement of an overt act, Marshall rejected the prosecution's argument that Burr was constructively present on the island.

### b. Anthony Cramer

Although less notorious than Burr's treason prosecution, the prosecution of Anthony Cramer also was highly charged. Cramer was a German-born American accused of collaborating with the Nazis during World War II. Cramer was a friend of Werner Thiel, a member of a group of eight German saboteurs who arrived in the United States in 1942 via enemy submarine. Prior to Cramer's prosecution, the Supreme Court had affirmed the war crimes convictions of the saboteurs.

At Cramer's trial, the only evidence offered by the government was that, upon Thiel's clandestine arrival into the United States, Cramer met him twice for drinks. The government provided no evidence concerning the content of the men's conversations. This proved to be a fatal flaw in the prosecution's case. The Supreme Court held that evidence of the men's conversations must provide evidence of treasonable intent. The Court also rejected the prosecution's assertion that the conversations, regardless of their content, provided "psychological comfort" to the enemy: "The difficulty with this argument is that the whole purpose of the constitutional provision is to make sure that treason conviction shall rest on direct proof of two witnesses and not on even a little imagination." Cramer did confess at trial that he had agreed to hold Thiel's money belt containing $3,600. The government, however, could not rely on Cramer's testimony. Prior to trial it had withdrawn the "money belt" allegation for lack of proof. In dicta, the Supreme Court noted that receiving the money belt may have constituted sufficient grounds for treason. Nonetheless—and even though the American war effort was in full swing—the Justices overturned the conviction.

Of all the Court's treason decisions, Cramer exhibits the greatest concern over the government's potential to abuse its broad power to prosecute for treason. The majority extensively reviewed the history of the

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385. Chapin, supra note 341, at 105.
386. Id. at 112.
388. Id. at 3.
390. Id. at 35.
391. Id. at 37.
392. Id. at 38.
393. Id. at 38-39.
394. Id. at 39.
395. Id. at 39-39. ("If these acts had been submitted as overt acts of treason ... we would have a quite different case.").
396. Id. at 48.
treason clause, noting that the Framers, "having risked their necks under the law... feared despotism and arbitrary power more than they feared treason." The Supreme Court was careful to distinguish nonpunishable belief from punishable conduct. Cautioning that "mere mental attitudes or expressions should not be treason," the majority concluded: "A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason."

The Cramer Court's reasoning supports the pro-equality argument that servicemembers may not be discharged based upon the content of their thoughts or emotions in the absence of same-sex conduct. The Cramer majority recognized that the ability to suppress dissenting views is inherent in governmental power. It emphasized that a principle of tolerance is implicit in our democratic form of government: "The idea that... opposition to [the government's] abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world would have kept the hangman busy." Such a statement of judicial philosophy could be useful in military discharge litigation. The government has conceded that its anti-gay policy is based upon heterosexual intolerance of differences in sexual orientation and upon the presumed effect that such intolerance would have upon unit cohesion.

B. Pro-Equality Rejection of the Law of Treason

Justice Douglas, who invoked the English experience with constructive treason in his Scales dissent, warned of the dangers of state suppression of disfavored beliefs:

History shows in one example after another how excessive have been the fears of earlier generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows... Suppression, once accepted as a way of life, is likely to spread. It reinforces the herd urge toward orthodoxies of all kinds—religious, economic, and moral as well as political.

Even though the law of treason protected Burr and Cramer, examples of other treason prosecutions illustrate that the government may have utilized the law of treason to target dissenting views or may simply have failed to protect belief. Moreover, the treason analogy suffers from the longstanding

397. Id. at 15 (quoting 3 Henry Adams, History of the United States 468 (1838-1918)).


399. Id. at 29.

400. Id. at 13.

401. See supra note 289 (quoting congressional rationale of threat to unit cohesion as support for the discharge policy).

association of gay persons with traitors, an association which may (mis)inform judicial decisionmaking, particularly when judges are faced with claimed concerns for national security.

1. Failure to Protect Belief

According to one commentator, the misuse of treason began early in our post-revolutionary history: “[T]he leaders of the new government aggressively used treason prosecutions against their political enemies.” Continuing into the nineteenth and twentieth centuries, the state indicted religious and political dissenters even though the evidence of treason was weak. Two such nineteenth century cases are the prosecutions of Joseph Smith, founder of the Mormon Church, and Castner Hanway, an abolitionist. Both defendants were indicted despite scant evidence of specific intent to overthrow the government. More recently, the Supreme Court upheld the World War II conviction of Hans Haupt, even though the overt acts charged were largely indistinguishable from those the Court previously had held to be insufficient for conviction in Cramer. These prosecutions suggest that the law of treason does not provide sufficiently strong precedent for pro-equality advocates.

a. Joseph Smith

In 1838, Joseph Smith was indicted for committing treason against the state of Missouri. Espousing beliefs which sometimes diverged radically from the dominant Christian theology, Mormons had been involved in recurring violence with the non-Mormon majority. Following Smith’s indictment, the state of Missouri did not pursue the treason charge and Smith escaped. After moving the Mormon community to Illinois and declaring martial law, Smith again was arrested for treason. Soon after Smith’s arrest, however, a mob dragged him out of his jail cell and lynched

403. Wilson, supra note 339, at 116.
404. Hurst, supra note 333, at 264.
405. Wilson, supra note 339, at 119.
406. See infra notes 413-15 and accompanying text (arguing that treason charge against Smith was faulty); see also notes 428-31 and accompanying text (arguing that treason charge against Hanway was faulty).
407. Hurst, supra note 333, at 264.
408. One of the controversial beliefs of the early Mormon Church was that male Church members were commanded by God to practice polygamy. See Reynolds v. United States, 98 U.S. 145, 161 (1878) (noting Mormons’ belief that male members of the Church who do not practice polygamy are condemned to eternal damnation). Mormons were prosecuted for polygamy under various statutes. See Cleveland v. United States, 329 U.S. 14 (1946) (upholding Mormon polygamist’s conviction pursuant to federal statute that prohibited interstate transportation of women for immoral purposes); Reynolds, 98 U.S. at 165 (upholding criminalization of polygamy and rejecting free exercise challenge).
409. Hurst, supra note 333, at 264.
410. Id.
411. Id.
While the Mormons had engaged in violence, it is doubtful that either charge of treason was appropriate. As one legal historian observed:

Both charges seem severe, since they followed a long history of mutual recrimination and violence between the Mormons and their neighbors; and it seems likely that on a fair trial a limited purpose of self-defense, rather than intent to set up a rival government, could have been made out. Concerning the Illinois charge, even Illinois’s Governor Ford indicated that the charge was dubious because the Mormons may have been attempting to defend themselves. Ford wrote that Smith’s subsequent murder suggested that the militia may have intended “to use the process of the law... for the purpose of murdering [the Mormons] afterwards,” in which case “it might well be doubted whether [the Mormons] were guilty of treason.”

That Smith likely was indicted for his beliefs—and was subject to violence as well—argues against pro-equality reliance upon the treason analogy because gay persons may face similar risks. Smith’s incarcerations left him vulnerable to violence by private citizens, possibly with the connivance of the state militia. Similarly, anti-gay measures, such as sodomy statutes or the military’s exclusionary policy, may subject gay persons to violence. For instance, Michael Hardwick’s incarceration for sodomy left him vulnerable to violence by inmates, reportedly with the connivance of prison guards. Kendall Thomas has argued that sodomy statutes “legitimize homophobic violence and thus violate the right to be free from state-legitimized violence at the hands of private and public actors.” The same can be said of the military’s anti-gay policy: upon initiating discharge proceedings against Corporal Blaesing, is commanding officer sequestered Blaesing for fear of “what other folks might do to him.” The treason analogy would not necessarily offer gay litigants the protection which they seek.

b. Castner Hanway

Approximately a decade after Smith’s incarceration, Castner Hanway, an abolitionist who had written books and pamphlets opposing slavery and

412. Id.; Wilson, supra note 339, at 119.
413. Hurst, supra note 333, at 264.
414. Id. at 270-71.
415. Id. (quoting Ford, History of Illinois 337 (1854)).
416. Hardwick has recounted that the prison guards informed the inmates that he was gay, with the remark, “Wait until we put [him] into the bullpen. Well, fags shouldn’t mind—after all, that’s why they are here.” Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1439 (1992).
417. Id. at 1435.
418. See supra note 70 and accompanying text.
the Fugitive Slave Act, was prosecuted for treason. A confrontation arose when a United States Deputy and a slave “owner” attempted to forcefully recapture escaped slaves. Hanway was present and urged the posse to free the slaves and to leave. The Deputy ordered Hanway to assist him in recapturing the slaves; Hanway refused. The confrontation became violent and one person was killed; the slaves fled to Canada.

In reaction to the ensuing rage of white Southerners, President Fillmore stated that prosecuting Hanway would be useful politically, even if problematic legally. The federal government apparently desired to demonstrate to the South that the Fugitive Slave Act would help quell the abolitionist movement. The “opportunity to make an early example [of Hanway] led the Federal authorities to press the treason charge over the efforts of the state . . . to prosecute for murder or at least riot.” The government charged that Hanway’s forcible resistance to the Deputy constituted levying war against the United States.

One of the bases for the alleged treason was the publication of Hanway’s pamphlets and books, which the government claimed incited slaves to resist with violence the implementation of the Fugitive Slave Act. At trial, Justice Grier (on circuit) instructed the jury that forcible resistance to the law, in itself, does not constitute treason. The jury acquitted Hanway. Despite the acquittal, the government’s reliance upon Hanway’s writings as a basis for a charge of treason came dangerously close to punishing Hanway for his political views. This potential for prosecution based on belief argues against pro-equality reliance upon the treason analogy. Despite the protections inherent in the law of treason, Hanway and other abolitionists likely were deterred from expressing their opposition to the Fugitive Slave Act. There is no reason to believe that an analogy to treason would adequately protect servicemembers who are deterred from expressing their opposition to the armed services’ discharge policy.

420. Id.
421. Hurst, supra note 333, at 197; Wilson, supra note 339, at 119.
422. Id.
423. Hurst, supra note 333, at 197-98; Wilson, supra note 339, at 119.
425. Id. at 120 (citing 9 The Writings of Thomas Jefferson 211 (Ford ed. 1898)).
426. Hurst, supra note 333, at 268.
427. Id. at 197.
428. Id. at 120.
429. Id. at 197-98.
430. Id. at 197.
431. See supra notes 387-96 and accompanying text (describing the scheme of German sabotage and the conviction of the saboteurs).
c. Hans Haupt

The prosecution of Anthony Cramer, discussed above, and Hans Haupt arose from the same scheme of German sabotage for which eight Germans were convicted of war crimes. Even though the underlying facts in Haupt v. United States are similar to those in Cramer, the Supreme Court overturned Cramer's conviction but affirmed Haupt's sentence of life imprisonment. Haupt was the father of one of the eight saboteurs; his son already had been convicted and executed for treason. The government charged Haupt with three overt acts of treason: permitting his son to live for six days in Haupt's apartment; helping his son secure work in a munitions plant; and purchasing a car for his son.

i. The Haupt Decision: Statements of Belief Admitted as Evidence

Both the concurrence and dissent in Haupt asserted that no meaningful distinction existed between the acts alleged in Cramer and those alleged in Haupt, since neither set of acts evidenced a treasonable intent. In Cramer, the overt act was the defendant's conversations with an enemy agent, the content of which was unknown. In Haupt, the defendant's aid to an enemy agent, his son, could have sprung solely from fatherly love. Justice Douglas—concurring in Haupt despite the conflicting outcome of the two decisions saw no principled distinction between the two sets of acts:

Two witnesses saw the son enter Haupt's apartment house at night and leave in the morning. That act, without more, was an innocent as Cramer's conversation with the agent. For nothing would be more natural... than the act of a father opening the family door to a son. That act raised, therefore, no more implication that the father was giving his son aid and comfort in a treasonable project than did the meeting of the defendant with the enemy agent in the Cramer case.

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434. Id. at 646 (Murphy, J., dissenting).
435. Id. at 644 (Douglas, J., concurring).
436. Id. at 646 (Murphy, J., dissenting).
439. Id. at 645-46 (stating that the overt act requirement had been met in Cramer and that "[t]he Cramer case [had] departed from the rules"). Justice Douglas further distinguished Cramer by looking to evidence—which had not been proven by the testimony of two witnesses—that Haupt supported Germany and knew that his son was a saboteur. Id. at 645.
440. Id. at 644-45 (Douglas, J., concurring).
In fact, the concerns of the Haupt dissent seem to reflect more accurately those of the Cramer majority: "Only when the alleged overt act manifests treason beyond all reasonable doubt can we be certain that the traitor's stigma will be limited to those whose actions constitute a real threat to the safety of the nation."441

The crucial distinction between the outcomes in Cramer and Haupt thus seems not to turn on the defendants' acts; rather, it seems to turn on the Supreme Court's decision to admit into evidence "conversations [which had occurred] long prior to the indictment . . . showing sympathy with Germany and hostility to the United States."442 The Court's reliance upon Haupt's statements arguably runs counter to its assertion in Cramer that emotional support for the enemy does not constitute treason. While noting that Haupt's statements of sympathy for Germany had to be "scrutinized with care to be certain the statements are not expressions of mere . . . difference of opinion with our own government,"443 the Court nevertheless concluded that Haupt's statements should be submitted to the jury.444 The Supreme Court's reliance upon Haupt's support for Germany suggests that a defendant may be convicted based upon that which the Cramer majority held to be protected: one's "mere mental attitudes or expressions."445

ii. Military Discharge Litigation: Statements of Gay Identity Admitted as Evidence

The juxtaposition of Cramer and Haupt undercuts the pro-equality argument that the law of treason "express[es] the constitutional principle that a person's thoughts are his own."446 The Supreme Court upheld Haupt's conviction for acts similar to Cramer's non-treasonable conduct, relying, in addition, upon Haupt's statements of belief. In the context of the 1994 Directives, the military may argue that a servicemember's otherwise permissible act, such as attending a gay-rights demonstration, is grounds for discharge when coupled with evidence of the member's state of mind suggesting she is lesbian.447 Moreover, the government could support it's "don't tell" provision by invoking the Supreme Court's reliance

441. Id. at 648 (Murphy, J., dissenting).
442. Id. at 642.
443. Haupt, 330 U.S. at 642.
444. Id. at 641-42.
447. In fact, the military claims that permissible acts, such as participation in a gay-rights demonstrations or reading gay literature, translate into grounds for discharge if a reasonable person would believe that the servicemember is gay. See supra note 83 and accompanying text.
upon Haupt's statements of belief. If Haupt's statements of affiliation with Germany may be introduced to support his conviction, the argument runs, then a gay servicemember's statement of group identity likewise could be used as evidence for discharge.

2. Stigmatic Association of Traitors with Lesbians, Bisexuals, and Gay Men

In the same way that the government demonized Communists and gay persons as national security risks, concern with national security created a stigmatic association of nonheterosexuals with traitors. Even assuming that the law of treason provides pro-equality advocates with useful precedent, advocates should reject the analogy. Given the military's long-standing presumption that lesbians, bisexuals, and gay men were more likely to betray the government, the longstanding (mis)perception of gay persons as traitors makes a pro-equality treason argument particularly risky in military litigation. Even though the state can no longer credibly claim that there is a national security threat of "homosexual blackmail," the government continues to claim that the presence of gay servicemembers jeopardizes combat effectiveness.

The "peculiar intimidation and stigma carried by the mere accusation of treason," is made all the more potent by its "potentialities...as a political epithet." By making an analogy to treason in military discharge litigation, pro-equality advocates inadvertently may evoke this stigma. The identity of lesbians, bisexuals, and gay men is so closely intertwined with the identity of traitors that, in a contemporary work on treason by Chapman Pincher, an entire chapter is dedicated to consideration of the role of same-sex orientation in acts of treason. The chapter opens with the observation that "[t]here is a common belief that homosexuality is particularly widespread among traitors...." Likewise, in Sex and Reason, Judge Richard Posner discusses the "lurid claims redolent of the time when homosexuality and treason were thought two sides of the same coin...."

Both Pincher and Posner reject the view that same-sex identity

448. See supra part III.B.3 (a-c).
449. As discussed above, the DOD's own studies "have refuted DOD's position on the potential security risk associated with homosexual orientation..." See The 1992 Study, supra note 53.
450. See supra notes 324-25 and accompanying text.
451. See supra notes 295-316 and accompanying text (discussing the stigmatic association of communists with gay persons).
452. Hurst, supra note 333, at 149.
453. Id. at 150.
455. Id.
457. Pincher, supra note 454, at 103.
is prevalent among traitors. Judge Posner goes even further and asserts that an openly gay person does not present a security risk and thus should not be denied a security clearance: "[O]ne finds ... little evidence that homosexuality is particularly widespread among traitors. It is difficult to make a persuasive argument that a known (hence blackmail-proof) homosexual who satisfies all ... other criteria for a security clearance should be denied one." Pincher, however, seemed unable to free his analysis from an association of gay persons with treason (and Communism). Despite Pincher's conclusion that most traitors are not gay, he nonetheless claimed that there may be a relationship between same-sex orientation and a propensity towards treason:

"[T]he treatment of homosexuals as criminals and degenerates was hardly likely to encourage uncritical devotion to the established regime ... which they would see as inhuman and oppressive. The social and legal condemnation of homosexuals may well have converted some of them into 'outsiders' with a chip on the shoulder, deeply resentful of a society which made a serious offence of the sexual expression which they found natural. Psychologists suspect that such resentment can create a 'minority complex,' with the victim subconsciously or even consciously prepared to hit back at the privileged majority ... treachery being one way of doing so."

Pincher's analysis illustrates the tenacity of the association between gay persons and treason. He refuted the notion that same-sex orientation is widespread among traitors and presented a fairly sympathetic view towards the discrimination suffered by nonheterosexuals. Pincher nevertheless portrayed lesbians, bisexuals, and gay men as emotionally unstable rebels who may resort to treason out of resentment. The principal risk of the pro-equality treason analogy is that in spite of accurate factual information, judges may—like Pincher—be influenced by the stigmatic preconception that gay persons are treacherous.

CONCLUSION

For opponents of the 1994 Directives, the Robinson/Powell, Smith Act, and treason analogies are double-edged. In theory, these decisions prohibit conviction based solely upon one's status or beliefs in the absence of a criminal actus reus. In practice, however, the Supreme Court has construed the requirement of an act leniently, affirming convictions in spite of little or no evidence of prohibited conduct. In addition, all three models have troubling implications for pro-equality advocates because they evoke stigmatic associations of same-sex orientation which may negatively affect
judicial decisionmaking.

Under the Robinson/Powell analogy, which conceptualizes same-sex orientation as a status, pro-equality litigators could argue that Robinson and Powell prohibit status-based military discharges. The government, however, could respond that the conviction of Powell for "being drunk in public" would support military discharge for "being gay in public"—evidenced by servicemembers' statements that they are gay. Moreover, the Robinson/Powell medical model of status could inflame pre-existing negative images of same-sex orientation held by judges, particularly that homosexuality is akin to addiction, disease, mental illness, or an irresistible compulsion which one is powerless to avoid. Despite the surface attractiveness of the status approach, then, it may backfire by providing the government with a defense of its military policy and by evoking the pathologizing trope of same-sex orientation, thereby increasing judicial receptiveness towards the anti-gay policy.

The Smith Act and treason analogies share a conceptualization of same-sex orientation as a form of "political dissent" as well as a connection with the McCarthy era's attacks on homosexuality. In tandem with the Senate Subcommittee's attempts to ferret out suspected Communists, Senator McCarthy spearheaded a virulent campaign against suspected lesbians, bisexuals, and gay men. The reigning presumption during the Red Scare was that nonheterosexuals and Communists were more likely to be traitors and betray their country. The McCarthy era illustrates that—then as now—the government's fears regarding gay people are so grossly exaggerated as to be irrational. Inherent in governmental power is the ability to suppress dissent; during the McCarthy era, use of this power resulted in enforced orthodoxy.

Neither the Communist Party cases nor the treason decisions stand as a bulwark in defense of civil liberties. In both sets of cases, the Supreme Court affirmed some convictions even though there was little or no evidence of illegal acts; reliance upon these decisions would leave the government free to argue that the military may discharge servicemembers in the absence of same-sex conduct. Just as the Supreme Court affirmed Smith Act convictions relying in part upon generalized presumptions that the Communist Party intended to overthrow the government at some future date, the military could presume that gay servicemembers will engage in same-sex conduct at some future date. The government also could invoke Haupt's treason conviction. Haupt's statements of sympathy with Germany were used as evidence of treason; the statement "I'm gay" similarly could be used as evidence of same-sex conduct.

While the evocative power of the McCarthy era's hysteria and repression could prove useful to pro-equality litigators, that same power could boomerang. Since 1957, the military's own studies have refuted the notions that gay persons are more susceptible to blackmail and thus are more of a threat to national security. Nevertheless, via its "unit cohesion" argument, the government has brought the "security risk" specter in
through the back door. Presented with these analogies in military litigation, the stigmatic association of lesbians, bisexuals, and gay men with Communists and traitors (and hence as potential security risks) is likely to be fresh in a judge’s mind, potentially making discharge for one’s same-sex orientation—as for Communism or treachery—seem rational.