A Unique Propensity to Engage in Homosexual Acts

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After stating "I am gay," Navy Lieutenant Paul G. Thomasson was honorably discharged from the military. In Thomasson v. Perry (1996), the United States Court of Appeals for the Fourth District affirmed Thomasson's discharge. Thomasson is now considered the leading case evaluating the U.S. military's "don't ask, don't tell" policy. In this paper, Anderson shows that the court's analysis of the Department of Defense policy rests on two unarticulated and undefended assumptions about sexuality. The first is that an act of sex is essentially defined in terms of the sexual orientation of the persons engaging in that act. The second is that whether or not a person is an open homosexual determines the essential nature of the homosexual acts of others. Anderson concludes that both assumptions are untenable, therefore, the "don't ask, don't tell" policy is indefensible.

In 1994, Navy Lieutenant Paul G. Thomasson questioned the constitutionality of the Department of Defense Directive (hereafter DoD Directive) that outlines the military's policy on homosexuality.[1] The so-called "don't ask, don't tell" policy states that service members will be removed from the armed services if one of three findings is made: (1) the service member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act; (2) the service member has made a statement that he or she is a homosexual or bisexual, or words to that effect; or (3) the service member married or attempted to marry a person of the same sex.[2] In early March 1994, Thomasson presented a letter to the four Admirals with whom he served. In the letter, Thomasson wrote of his strong disagreement with the military's policy and that "the time has come when I can remain silent no longer . . . I am gay."[3] The Navy then proceeded to initiate "separation proceedings" against Thomasson. A three person Board of Inquiry conducted a two-day hearing, evaluating Thomasson's "enviable" service record, but ultimately recommended that Thomasson be discharged. Thomasson appealed that decision and subsequent ones, arguing that the military policy violates his Fifth Amendment right to equal protection, his First Amendment right to free speech, and the Constitutional guarantees of a right to due process and procedural fairness. His case eventually made it to the United States Court of Appeals for the Fourth District. This court, in a 6–4 decision, affirmed Thomasson's honorable discharge.[4]

Thomasson is now considered the leading case evaluating the "don't ask, don't tell" policy. Why? The outcome of *Thomasson* is not extraordinary. Prior to the "don't ask, don't tell" policy, the number of discharges from the military for gay-related reasons was steadily decreasing; however, since the enactment of the policy in 1994 the number of discharges each year for gay-related reasons has increased dramatically. Thus Thomasson's honorable discharge is in keeping with recent military policy implementation.[5] The *Thomasson* case does raise interesting questions about the constitutionality of military policy, but these same issues had been raised in earlier cases.[6] Though the debates concerning the constitutionality of the directive are fascinating, for the purposes of this paper I will be setting aside those questions.[7] Rather than focus on the arguments that are explicitly addressed in the *Thomasson* case, I want to focus on the ideas *not* explicitly addressed by either the court's majority or minority. The court's analysis of the DoD Directive rests on two unarticulated and undefended assumptions about sexuality. The first is that an act of sex is essentially defined in terms of the sexual orientation of the persons engaging in that act. The second is whether or not a person is an open homosexual determines the essential nature of the homosexual acts of *others*. I conclude that both assumptions are untenable, therefore the "don't ask, don't tell" policy is indefensible.

To see what role these two assumptions about sexuality play in the DoD Directive, we need to look closer at how the directive is implemented.

HOMOSEXUAL ACTS AND HOMOSEXUAL STATEMENTS

As the name implies, the "don't ask, don't tell" policy does not exclude homosexuals from the military. The DoD Directive explicitly states that "sexual orientation is considered a personal and private matter, and

homosexual orientation is not a bar to continued service."[8] However, as stated earlier, homosexual conduct is grounds for separation from the military—and homosexual "conduct" includes making a statement to the effect that one is a homosexual.

Some have argued that to consider a homosexual statement such as, "I am gay." as homosexual conduct is to collapse the distinction between a person's *status* (having a homosexual orientation) and a person's *actions* (engaging in homosexual activities). Circuit Court Judge Wald, in her dissenting opinion in *Steffan v. Perry* (1994) writes:

> The nub of the majority's argument appears to be that when Steffan admitted his "homosexuality," he was actually "saying" any one of three things: (1) "I have already engaged in homosexual conduct"; (2) "I intend to engage in homosexual conduct"; or (3) "I desire to engage in homosexual conduct, but I do not engage or intend to engage in such conduct—I am simply homosexual by orientation."

Wald claims that, in regarding a homosexual statement as an act, the military is interpreting the claim "I am gay": to mean either (1) or (2) only, while disallowing the possibility of (3). Yet, (3) is a perfectly reasonable way to understand a homosexual statement. It is clearly distinct from (1) and (2); and (3) would provide insufficient reason to separate a service member from the military given that the military explicitly states that having a homosexual orientation is "*not* a bar to continued service."[9]

Wald is surely right to claim that a statement that informs another of one's sexual orientation is not necessarily a statement that informs another of one's sexual experiences or intentions. However, the military (and the court majority in *Thomasson*) argues that a person with a homosexual orientation "has a propensity to engage in, or intends to engage in homosexual acts."[10] What is it to have a *propensity* to engage in a homosexual act? To explain this claim, Judge Wilkinson, writing the majority opinion for *Thomasson*, claims that the "most sensible inference" one can draw from the claim that one has a homosexual orientation is that one intends to engage in (if one has not already engaged in) homosexual acts. He writes, "It would be irrational to develop military personnel policies on the basis that all gays and lesbians will remain celibate."[11] Since the assumption that all gays and lesbians will remain celibate is irrational, Wilkinson is implying that it is rational to act on the assumption that all gays and lesbians will engage (or presently intend to engage) in homosexual sex. Thus, to inform another of one's homosexual orientation *is* to inform another of one's sexual experiences—those one has had, those one will have, or those one intends to have.

This line of reasoning is fallacious. First, the fact that all lesbians and gays will not remain celibate does not mean that no lesbians and gays will remain celibate while they are in the military. Clearly some will, and justice would presumably require that we assume all homosexuals are "innocent until proven guilty." Second, to infer that because a person has a kind of desire that that person intends to act on the desire is unwarranted. The objects of one's sexual desires can be nonspecific and inchoate. Therefore, the mere existence of a homosexual desire does not necessarily cause a person to act or even form the intention to act on that desire. Third, as Judge Wald argued,

> The irrationality of the government's inference is particularly patent in the military, where

> homosexual conduct is grounds for automatic discharge and, in the case of homosexual sodomy, punishable by incarceration. Indeed, it is much more reasonable to infer that a servicemember who admits to 'homosexuality' will thereafter assiduously forego homosexual conduct. After all, servicemembers are surely aware that statements of homosexual orientation or desire will trigger close scrutiny of their subsequent behavior for evidence of homosexual 'conduct' or 'intent' . . . [12]

Surely the grave consequences of acting on homosexual desires provide adequate motivation to deter military personnel from acting on homosexual desires.

Thomasson also objected to the military's claim that only homosexuals have a "unique propensity" to engage in homosexual sex. Noting that heterosexuals can and do engage in homosexual sex, to claim that only homosexuals have this tendency is unsupportable. Judge Wilkinson responded by noting that the military does not separate homosexuals who do not openly state their sexual orientation. Thus, the military does permit individuals who have a "propensity" to engage in homosexual acts to remain in the military.[13] So it is not the case that merely having a propensity to engage in homosexual acts is incompatible with remaining in the military. So what *is* the concern?

I believe that the answer to that question is found, in part, in the statements made during the Congressional Hearings out of which the DoD Directive arose.[14] Many reasons were offered to explain why the military could not accept open homosexuals, yet one reason was given over and over: homosexuality threatens "unit cohesion." Retired General Norman Schwartzkopf stated:

> It is called unit cohesion, and in my 40 years of army service in three different wars I have become convinced that it is the single most important factor in a unit's stability to succeed on the battlefield. Anyone who disputes this fact may have been to war, but certainly never led troops into battle. Whether we like it or not, in my years of military service I have experienced the fact that the introduction of an *open* homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.[15]

Marine Colonel Frederick Peck attested:

> I can work with homosexuals, shoulder to shoulder. But I do not think I can live with them and coexist with them in a military environment. It is one thing to share an office with someone; it is quite another thing to share a lifestyle; and that is what the military is: It is a way of life.[16]

Peck claimed that his views were typical of those held by military personnel.

It was claimed that the presence of open homosexuals not only destroys the "special bond" that exists among the soldiers in a unit, but undermines the military's capacity to adequately defend the country. Given what was claimed to be at stake, it is not too surprising that the courts are hesitant to require the military to accept open homosexuals in the service.

Circuit Court Judge Hall, in his dissenting opinion in *Thomasson*, criticized the notion that the chain of command in the military is so fragile that the mere presence of open homosexuals would necessarily destroy unit cohesion and in turn weaken the Armed Forces. He wrote:

> 'Unit cohesion' is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs. The concept has therefore been a favorite of those who, through the

> years, have resisted the irresistible erosion of white male domination of the armed forces. Though the prejudices underlying such resistance have doubtless outlived the erosion, they have not manifested themselves in a loss of 'unit cohesion.'[17]

Thus, Peck's claim that he cannot live with homosexuals means simply that he does not want to live with homosexuals, and he is exerting the power he has to ensure that he does not have to. In addition, we could argue that just as racist service members are required to live with members of other races and sexist service members must accept the presence of the "opposite sex" in the military, so should homophobes be required to tolerate open homosexuals.

What is perhaps the most paradoxical feature of the unit cohesion argument is that it is a rationale offered to keep homosexuals closeted, but not excluded, from the military. Since homosexuals are permitted in the military, those intolerant of homosexuality cannot console themselves with the belief that, simply because there are no *open* homosexuals that there are no homosexuals in their unit. If anything, the requirement that all homosexuals remain closeted would seem to cause intense homophobic anxiety since no one knows who is and who is not a homosexual.[18]

The DoD Directive can be explained in part by appealing to anti-homosexual feeling, but it cannot be explained fully. This is because, while the commission of a homosexual act is grounds for separation, a service member is permitted to rebut the charge of homosexuality. In other words, a service member who commits a homosexual act or makes a homosexual statement is given the opportunity to prove that he or she is not in fact a homosexual. And, if the charge of homosexuality is adequately rebutted, the service member is not separated from the military. Let's look at the DoD Directive more closely.

First of all, what is a "homosexual act"? The military defines a homosexual act as:

> (A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).[19]

Thus a homosexual act includes not only anal and oral sex, but also kissing, holding hands, hugging, and squeezing knees, as well as many other acts of physical intimacy.[20]

If a service member commits a homosexual act (by engaging in, attempting to engage in or soliciting another to engage in a homosexual act) he or she can rebut the charge of homosexuality by showing that

a. such acts are a departure from the member's usual and customary behavior
b. such acts under all circumstances are unlikely to recur
c. such acts were not accomplished by use of force, coercion, or intimidation
d. the member's continued presence is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and
e. the member does not have a propensity or intent to engage in homosexual acts.[21]

To meet requirement (a), a service member is expected to provide evidence of a spouse or a long-time significant other of the opposite sex or of a series of well-known one-night stands.[22] To meet (b), the service member would need to point to behaviors that imply an intention to engage in heterosexual behaviors in the future

(such as conversations with others about the intention to engage in heterosexual sex). To meet (c), the service member is expected to prove that the homosexual act was the result of an aberration in character. The military accepts intoxication, immaturity, ignorance, and an interest in experimentation as adequate explanations of the commission of homosexual acts. To explain the military's tolerance of the engagement of homosexual acts, General Gordon Sullivan stated that:

> Many soldiers experience a forced association 24 hours a day. They work together; they eat together; they share living space together; they train together; they shop for groceries together; they worship together. Same-gender sexual attraction in such a 'forced association' environment is something that civilians rarely experience and cannot fully understand.[23]

To meet (d), the service member would need to provide evidence that his or her presence is not disruptive. Presumably such evidence could be provided by testimony by superior officers evaluating the member's service record. To meet requirement (e), however, a service member would have to be a heterosexual or, if a homosexual, he would have to lie about his or her sexual orientation. For "to have a propensity or intent to engage in homosexual acts" is to have a homosexual orientation. So, although there is no way to verify the truth of a person's claim to be a heterosexual, what (e) makes clear to homosexuals is that, if they are caught engaging in homosexual act, they must lie about their sexual orientation to remain in the service. What all this shows is that homosexual acts are not unusual in the military but are claimed to be entirely the result of the unusual circumstances military life imposes on heterosexual individuals. Therefore the military can and does permit its members to engage in homosexual acts so long as they are or claim to be heterosexuals.

THE MEANING OF BEING AN OPEN HOMOSEXUAL

From this discussion of the DoD Directive, we can draw two conclusions. One is that it is believed that closeted homosexuals do not threaten unit cohesion, but open homosexuals do. The second is that it is believed that neither homosexual acts committed by heterosexuals nor homosexual acts committed by homosexuals who provide evidence of a heterosexual orientation threaten unit cohesion, *but* homosexual acts committed by homosexuals who admit having a homosexual orientation *do* threaten unit cohesion.[24] Why the difference? What does an open homosexual bring to a sexual situation that neither the closeted homosexual nor the heterosexual bring?

As I said at the start of this paper, the DoD Directive rests on two unarticulated and indefensible assumptions about sexuality. Now that I have explained the DoD policy, I can explain that claim.

If homosexuality was regarded as being as morally acceptable as heterosexuality, then the two conclusions I have drawn from the cases illustrating how the DoD Directive operates would be utterly inexplicable. Yet, once we build into our reasoning the assumption that homosexuality is wrong (perverse, dirty, sick, unnatural or whatever) and we take into account the fact that many service personnel will have a strong desire to deny the existence of homosexuality—in themselves and in the acts in which they engage—the two conclusions start to make sense.[25] According to military reasoning, heterosexuals can commit homosexual acts, but

those acts are not *genuinely* homosexual, therefore they are not a threat to the Armed Forces. It was as if they were pretending to be homosexuals, or playing homosexual "dress up." However a genuine homosexual (a person with a homosexual orientation) who engages in homosexual acts is committing a *genuinely* homosexual act. He isn't "dressing up" as a homosexual, he *is* a homosexual. Therefore, he is a threat because what was believed to be play is revealed to not be play; it is real sex, a sign of a real homosexual orientation.

An open homosexual, it is presumed, is a person who does not morally disapprove of homosexuality. (Hence the fact that open homosexuals are referred to as "avowed" homosexuals, as if merely admitting a homosexual orientation necessarily means that they accept and affirm a "homosexual lifestyle" and "homosexual ideas".) If he does not disapprove of homosexuality, he has no reason to deny the existence of homosexuality in himself, in the actions in which he engages or, more significantly, in the actions in which others engage. So, it is supposed, the open homosexual sees the "play" homosexual acts committed by heterosexuals as *genuinely* homosexual. In seeing those acts as genuine homosexual acts, those acts are at risk of *becoming* homosexual acts. In other words, his presence changes the meaning of the sex acts of others. As long as homosexuals are closeted, however, heterosexuals are free to play at being homosexuals.

These assumptions, that the gaze of the open homosexual (and only the open homosexual) transforms the nature of the sex acts of heterosexuals—from innocuous to nefarious—is the only way to explain why the military separates individuals who make homosexual statements but who have not engaged in homosexual acts. Their presence is perceived as a threat to unit cohesion. Why? The anxiety that open homosexuals create is not (or not merely) the anxiety heterosexuals feel at the thought of homosexuals engaging in homosexual acts; instead it is the anxiety homophobic heterosexuals feel at the thought that there may be no difference between themselves and the homosexuals they despise.

THE UNIQUE PROPENSITY TO DO WHAT?

Judge Hall remarked in the *Thomasson* dissent that the DoD Directive imposes a deception in the name of "unit cohesion." He questioned the plausibility of the claim that a "policy of pretense" creates a "bond of trust."[26] Neither the court majority nor the military has responded to his question. I think the function of that deception is that it allows heterosexuals to make claim to heterosexuality and, as long as homosexuals are in the closet, that claim will remain unchallenged. Earlier I mentioned Thomasson's objection to the military's assumption that homosexuals have a unique propensity to engage in homosexual acts. Surely he is correct. I am arguing, however, that the real concern of the military is not the propensities of all homosexuals, but the propensities of *open* homosexuals. What the military is assuming is that open homosexuals will refuse to participate in and will call into question the presumption of heterosexuality made by military personnel engaging in homosexual acts. Such assumptions provide a patently inadequate foundation for military policy. Consequently, the "don't ask, don't tell" policy is unjustifiable.

Notes

1. The Department of Defense Directive Number 1332.14 was issued in December 1993 and became effective starting in 1994.
2. 10 U.S.C. § 654 (b) (1), (2), and (3) and DoDD 1332.14 H.b.(1), (2) and (3).
3. See *Thomasson v. Perry*, 80 F.3d 915 (1996).
4. *Thomasson v. Perry*, 80 F.3d 915 (1996).
5. Consider the following:

Fiscal Year	Discharges, gay-related
1994	597
1995	722
1996	850
1997	997
1998	1145

   This is public information, published by the Defense Department.
6. One constitutionality issue is whether or not separating a service member for making a homosexual statement violates his or her First Amendment right to free speech. According to Judge Wilkinson, who wrote the court opinion in *Thomasson*, service members are not prohibited from making statements that have a homosexual content, for such a prohibition *would* violate their First Amendment right to free speech. Thus, service members are permitted to discuss the morality of homosexuality, the acceptability of the don't ask, don't tell policy, and to express a viewpoint about any other homosexuality issue. They simply cannot report having a homosexual orientation. Since to give a report of a homosexual orientation is not to express a viewpoint about homosexuality, regulating such reports does not infringe on one's constitutionally guaranteed right to free speech.

   Judge Wilkenson's extraordinarily narrow conception of sexual orientation statements does not fit well with non-military court cases concerning sexual identity statements. For one example, see *Gay Law Students Association et. al. v. Pacific Telephone and Telegraph Co.* (1979). For a discussion of First Amendment rights in a military setting, see *Steffan v. Perry* 309 U.S. App. D.C. 281 (1994).
7. I believe that the DoD Directive is patently unconstitutional. The courts have a long history of deferring to the Department of Defense in matters of the constitutionality of military policy, so the decision in *Thomasson* is well in line with that tradition.
8. DoD Directive 1332.14 H.b.
9. Joseph C. Steffan enrolled in the Naval Academy in 1983. He successfully completed three of his four years of training, consistently ranked near the top of his class. His superiors described him as "gifted," "professional," an "outstanding performer" who "exhibited excellent leadership", and an "asset to the Academy." In March 1987 a superior officer asked Steffan, "Are you willing to state at this time that you are a homosexual?" Steffan responded "Yes, sir." Because of the long and complicated history of this case, it did not reach the United States Court of Appeals for the District of Columbia until 1994, after the don't ask, don't tell policy came into effect. It is this policy that the court used to decide Steffan's case. The court affirmed his discharge from the Naval Academy. *Steffan v. Perry* 309 U.S. App. D.C. 281 (1994).
10. This definition of "homosexual" comes from the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (f)(1). This Act was approved by Congress and signed by President Clinton in July 1993 and is the basis for the DoD Directive concerning homosexuals.
11. Wilkinson quoting the Senate Committee, S. Rep. No. 112, at 284.
12. *Steffan v. Perry* 309 U.S. App. D.C. 281 (1994).
13. One could attempt to salvage this line of reasoning by claiming that only *open* homosexuals have this propensity. Closeted homosexuals, since they are not motivated to come out of the closet, do not have such a propensity. However, such an argument is surely question begging and neither the military nor the courts have advanced it.
14. "During the first seven months of 1993, both the Executive Branch and Congressional committees engaged in an extensive review of the military's policy. The Senate Armed Services Committee held no less than nine days of hearings, including a field hearing at the Norfolk Naval Complex, taking testimony from nearly fifty witnesses. The House Armed Services Committee held five days of hearings. Witnesses who appeared at these hearings represented a broad range of views and backgrounds. They included: Secretary of Defense and the Chairman of the Joint Chiefs of Staff; military and legal experts; enlisted personnel, officers and senior military leaders; and activists supporting and opposing the military's policy." *Thomasson v. Perry* (1996).
15. 103d Congress, 2d Session, May 11, 1993, emphasis added.
16. Ibid.
17. *Thomasson v. Perry* (1996).
18. As Judge Nickerson observed, "To the extent that some heterosexuals abhor homosexuals they will be suspicious of and uneasy with *all* their fellows in the unit because each might be a secret homosexual—hardly a prescription for

'unit cohesion.' " *Able v. U.S.* 968 F. Supp. 850 (1997), emphasis added.

19. Like the definition for "homosexual," this definition for "homosexual act" comes from the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (f)(1). This Act was approved by Congress and signed by President Clinton in July 1993 and is the basis for the DoD Directive concerning homosexuals.
20. Sergeant Perry J. Watkins was accused of squeezing the knee of another man. The charge was eventually dropped because of a lack of evidence. *Watkins v. United States Army*, 847 F.2d 1329 (1988).
21. DoD Directive 1332.14 H.b.(1) (a)-(e).
22. What this means is that the service member who is discreet about a heterosexual sex life or is sexually inexperienced will have a difficult time fulfilling requirement (a) to rebut the charge of homosexuality. The military is, in effect, encouraging promiscuity and sexual indiscretion.
23. Senate Hearings.
24. By "heterosexual" I mean a person who is self-identified and other-identified as a heterosexual. By "homosexual" I mean a person who is self-identified as a homosexual. He may or may not be other-identified as a homosexual, depending on whether or not he is an open homosexual. I am assuming that not all service members who engage in homosexual acts and claim a heterosexual orientation are deceitful—either to themselves or others about a "true" homosexual orientation. While it is tempting to claim that persons who engage in homosexual acts are necessarily homosexuals (and the sister claim that the most vocal homophobes are closeted homosexuals), I think sexual orientation is far more complicated than such a simple analysis permits. Given that many service members are young and sexually inexperienced, their sexual experiences and desires tell only part of the story about their sexual identity.
25. Even if a particular service member does not believe that homosexuality is wrong, he will know full well that most others in the military do. Thus, as long as he wishes to be accepted by others (and such a wish is probable given the "forced association" General Gordon spoke of), he will deny that he is a homosexual or that he engages in homosexual acts.
26. *Thomasson v. Perry*.