SEXUAL MINORITIES IN THE MILITARY: CHARTING THE CONSTITUTIONAL FRONTIERS OF STATUS AND CONDUCT

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INTRODUCTION

It was one of those rare occasions in United States history that truly can be pin-pointed to a single date. On July 19, 1993, the status/conduct distinction was pushed into America's face. On that day, both a state and the Federal Government focused on the distinction and issued dramatically different pronouncements.

On that day the Colorado Supreme Court upheld the injunction of Amendment Two, adopted during the prior November by voters. Amendment Two was designed to abolish existing municipal ordinances prohibiting "sexual orientation" discrimination and also to preclude the future passage of any such state or local legislation. Challenged in the state courts immediately after the vote, the trial court enjoined the enforcement of the Amendment. Even though the challengers had not urged violation of the status/conduct distinction, the court, sua sponte, reasoned that the Amendment effectively punished status and thus was unconstitutional.

On that same day, President Bill Clinton announced his long-heralded new policy on sexual minorities serving openly in the armed services. This announcement brought to a close the latest chapter in a tortured process. Initiated by candidate Clinton's unqualified vow that if elected he would "lift the ban," the policy fell far short of the mark set by the President-elect after his election. Though the President-elect had affirmed in rousing terms that his reforms would distinguish "status" from "conduct" and that they would allow sexual minorities to serve in the military under precisely the same standards applied to the sexual majority, his final compromise failed on both counts. Despite presidential assertions to the contrary, the new pol-

2. Id. at 1272.
5. And, immediately, a new chapter opened when the American Civil Liberties Union brought suit in the United States District Court for the District of Columbia challenging the compromise policy. At the same time, the official response of the Republican Party to Clinton's announcement decried the compromise and vowed efforts to overturn the executive action with legislation. Charles Aldinger, GOP Vows to Wage War for Gay Ban, SAN DIEGO UNION-TRIBUNE, July 18, 1993, at A5.
6. Immediately after his victory, President-elect Bill Clinton emphatically asserted the status/conduct distinction as the basis for his pledged reforms. See Melissa Healy, Clinton to Stress Conduct as Key for Gays in the Military, L.A. TIMES, Nov. 13, 1992, at A1. However, the final compromise blurred the President-elect's vaunted distinction.
icy continues to permit punishment on the basis of status and continues to treat sexual minorities differently from the sexual majority.  

While striking different notes in the larger controversy over the rights and place of sexual minorities in American law and society, both events highlighted the status/conduct distinction in the sexuality context. Both events also brought into sharp relief the nuances that mark the treatment of sexual minorities. Despite the apparent difficulty that American law and society display over “sexual orientation” as the status-trait that defines sexual minorities, the two events also display an intuitive understanding on the part of social and legal institutions of the distinction between orientation/status and practice/conduct.

However, this intuitive appreciation of the status/conduct distinction also exhibits a tightly focused targeting of, and antipathy for, sexual minority status rather than for same-sex conduct. In other words, despite the intuitive sense of distinction between sexual orientation and sexual behavior generally, American law and society collapse status into conduct strategically in order to rationalize and exonerate the punishment of the disfavored status of homosexuality. Indeed, conduct becomes a means to an end. In practice, same-sex conduct is taken as presumptive evidence of the disfavored status, and disfavored status is taken as presumptive evidence of same-sex conduct, but the wheels of official discrimination begin to grind in earnest only when intensive investigations of such evidence in fact produces a conclusion as to sexual minority status.

Thus, the status/conduct distinction has percolated and sometimes ricocheted in various cases reported during the past few decades but generally has been left untouched. Until now. This newfound attention to this status/conduct distinction is largely fortuitous. In the long term, this new awareness may be the most beneficial by-product of President Clinton’s politics on this issue because the new awareness results in great measure from the attention that his early statements and initial efforts commanded.

Though initially established by the United States Supreme Court under the Eighth Amendment to prohibit criminal law “punishment” based on status, the status/conduct distinction has been accepted as part of Fourteenth Amendment jurisprudence to prohibit “discrimination” based on status. Consequently, the status/conduct distinction may now fairly be viewed as a “given” aspect of Fourteenth Amend-

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7. See infra notes 397-438 and accompanying text.
ment law, and also as specifically applicable to lesbian and gay discrimination cases.

Additionally, the cases show that the status/conduct distinction actually has two components. The first component is the substance of the rule itself: Punishment and discrimination must be based on conduct, not status. The second component is evidentiary: Status itself cannot be used as the "evidence" of conduct. In other words, the state cannot rely on the status per se to impute underlying criminal conduct. Instead, the state needs direct evidence of the conduct in order to punish its commission as conduct. This evidentiary component is necessary to the integrity of the distinction as a substantive principle because, if "status" could be used as evidence of "conduct," the distinction between "status" and "conduct" would collapse. In effect, the state simply could point to "status" and, on that basis alone, purport to be punishing "conduct."

However, because the courts imported the status/conduct distinction into the Fourteenth Amendment without much discussion (or thought, perhaps), they have blurred analyses under the distinction with analyses under other Fourteenth Amendment doctrines, such as equal protection and due process. Consequently, while acknowledging the viability of the status/conduct distinction, the courts have slipped into conventional discussions regarding "levels of scrutiny" and "balancing tests" that overlook the fact that the bar against status punishment/discrimination is an independent and absolute prohibition. The seminal Supreme Court opinions teach that even a status clearly attained through criminal(izable) conduct is immune from punishment, regardless of the uncontested state interest in preventing and punishing such conduct. The state simply cannot punish or discriminate on the basis of "status" regardless of the "class" or "interest" involved in the case. Consequently, levels of scrutiny and balancing tests cannot be interposed to justify status punishment or status discrimination.

In attempting to unpack the convoluted and unprincipled treatment of the status/conduct distinction in sexual minority cases, this article strives to help chart the constitutional frontiers that meet at the crossroads of status, conduct, and sexuality.

Part I introduces two basic points to contextualize the doctrinal discussions that follow. Part II sketches the origins and dimensions of the status/conduct distinction as a general principle of constitutional law. Part III presents a detailed critique of military and other cases that depict the manner in which the status/conduct distinction has become a part of Fourteenth Amendment jurisprudence, as well as an inchoate new jurisprudence, through the courts' (mis)application of it in sexual minority settings. Part IV outlines the Sodomy-as-Lifestyle
Sexual minorities in the military

Fiction that underlies judicial (mis)applications of the distinction in sexual minority settings, and which embodies the larger cultural perceptions of sexual minority identity. Part V provides a First Amendment postscript to the substantive discussion of the status/conduct distinction as constitutional doctrine. Finally, Part VI applies the insights and lessons of the preceding discussions to the new gays-in-the-military policy announced by the President in 1993.

I. PRELIMINARY NOTES

The discussion presented below seeks to demonstrate that the application of established constitutional doctrines to sexual minority equality claims ought to produce very different results than presently is the case. This discussion therefore does not attempt to argue for changes in the law. This article argues instead for principled applications of existing law and doctrine. This article thus limits its ambitions to the promotion of intellectual honesty in the application of the law and, by extension, to the vindication of basic civil rights for sexual minorities.

Given this scope, two preliminary points must open the discussion. The first point strikes a note of caution about the ultimate interplay of status, conduct, and sexuality. The second point presents a clarification on a term that appears incessantly in judicial analyses of sexual minority claims and that hence appears incessantly here as well: "sodomy."

A. A NOTE OF CAUTION ON "STATUS" AND "CONDUCT"

Because this discussion accepts existing doctrine as a given, the points argued here exploit the status/conduct distinction in order to help sexual minorities overcome entrenched heterosexist biases both in the legal system and in society at large. However, this exploitation must be tempered with a note of caution because "status" and "conduct" ultimately do not separate into neat or tidy categories. On the contrary, status and conduct ultimately converge in ways that may require at least a partial rejection of the distinction. Additionally, "sexual orientation" and "sexuality" are themselves concepts that re-

9. A contemporary example may be seen in the recent efforts of the American Association of Law Schools to implement a bar against sexual orientation discrimination. These efforts became mired in the status/conduct distinction when religiously affiliated schools insisted on reserving the right to punish conduct. The identification of properly proscribable conduct became difficult. The question became whether such sanctionable conduct should be confined to "sodomy" or whether such conduct could include statements referring to a same-sex domestic partner? Both types of conduct, of course, may be deemed to reveal sexual minority status. The final articulation of the issue left the question ambiguous. See Final Report of the AALS Executive Commit-
main in flux. Although rising awareness over the nuances of sexual

...
orientation and sexuality raise still-unanswered questions, the state of existing doctrine makes their exploration unnecessary in the short term, at least for purposes of analyzing status/conduct issues within existing doctrinal frameworks. For the longer term, however, a further exploration of conceptual and theoretical questions is pursued elsewhere.  

B. On "Sodomy"

"Sodomy" has no fixed or universal meaning. It is simply a term of art defined by statute. Because statutory definitions vary from state to state, the meaning of the word "sodomy" depends on the specific statutory setting. Generally, the term "sodomy" connotes both oral and anal intercourse and in some instances also extends to sexual contacts between humans and other species. Generally, the term also applies equally both to same-sex couplings and to cross-sex couplinges.
plings. In fact, of the twenty-one jurisdictions that criminalize “sodomy” today, only seven limit the statute to same-sex coupleings.14

Therefore, this note of clarification serves to point out several important facts that run counter to persistent cultural suppositions. First, “sodomy” is a particularized act. Second, “sodomy” as an act is not just, or even primarily, anal intercourse. Third, “sodomy” is an act that both “heterosexuals” and “homosexuals” perform. Fourth, the act of “sodomy” is a “crime” only in less than half of the states. Fifth, the act of “sodomy” is a “crime” for “homosexuals” specifically in only seven of the states. These facts are critical for a sensible and informed discussion of status/conduct legal issues because ignorance of them typically drives legal analyses toward blatantly wrong outcomes.

Two obvious conclusions necessarily follow from these facts. First, “sodomy” does not and cannot encompass the whole range of sexual or affectional activity or “conduct” that humans perform in intimate situations. Second, the vast majority of Americans live in jurisdictions where “sodomy” is not a “crime” when committed between consenting adults, regardless of the genital configuration of the coupling.15 These conclusions are key because prevailing analyses hinge on contrary preconceptions; currently prevailing analyses, as discussed below, first assume a false equivalency between “sodomy” and


15. According to United States Census figures, as of 1991 the total population for the jurisdictions that criminalize sodomy for all individuals, see supra note 14, is approximately 42 million, the total population for the jurisdictions that criminalize same-sex sodomy exclusively, see supra note 14, is approximately 17 million, and the total population for the 30 jurisdictions that do not criminalize consensual sodomy for adults, see supra note 14, is approximately 178 million. See UNITED STATES DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 22 (112th ed. 1992).
sexual "conduct" and then move to a presumption of criminality regarding such conduct.

II. THE STATUS/CONDUCT DISTINCTION AS SUBSTANCE AND (NON)EVIDENCE

The prohibition against the punishment of status originates in the Eighth Amendment bar against cruel and unusual punishments and has been sketched by the United States Supreme Court in two well known cases. These two cases establish and focus on the status/conduct distinction as a substantive principle of constitutional law. However, these two cases also show how the distinction includes an evidentiary component that prohibits inferences based on status itself and that government officials otherwise may find convenient to draw in order to justify their actions. Therefore, the status/conduct distinction is both a substantive concept and an evidentiary device.

A. ROBINSON v. CALIFORNIA

The seminal case, Robinson v. California, held that a state could not punish a person for being a drug addict. In Robinson, the defendant was arrested with numerous needle marks on his right arm and charged with violating the statute making it unlawful for any person to "be addicted to the use of narcotics." At trial, the court instructed the jury that the defendant could be convicted if "he was of the 'status' or had committed the 'act' denounced in the statute." The jury returned a general verdict of guilty without specifying whether its decision was based on a finding of status or of action.

On appeal, the United State Supreme Court noted that the statute could be construed to mean that convictions had to be supported with "proof of actual use" but that state courts had not so construed it. While acknowledging the states' broad power to regulate or prohibit narcotics trafficking, the Court strongly rejected the proposition that status alone could be punished without actual proof of a criminal act on the defendant's part. The Court held that the Eighth and Fourteenth Amendments to the United States Constitution require proof of actual criminal conduct.

18. Id. at 660. The statute provided in relevant part that "[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics." CAL. HEALTH & SAFETY CODE § 11721 (1962).
20. Id. at 665.
21. Id. at 666. The Fourteenth Amendment was implicated because it makes the Eighth Amendment applicable to the states through the doctrine of incorporation. See
Justice John M. Harlan's concurrence, focusing on the evidentiary aspects of the status/conduct distinction, noted that the statute allowed conviction "on no more proof than that the defendant was present in California while he was addicted to narcotics."22 The problem was that the State of California was attempting to punish Robinson because at some time in some place he probably had used narcotics. Moreover, Justice Harlan further reasoned that "addiction alone cannot reasonably be thought to amount to more than a compelling propensity to use narcotics."23 As a matter of substantive criminal law however a "crime" requires some action that takes the defendant beyond a "propensity," even if the propensity is deemed "compelling."24 Therefore, Justice Harlan concluded that the statute impermissibly authorized "punishment for a bare desire to commit a criminal act."25

In dissent, Justice Thomas C. Clark noted that the status of narcotics addiction was acquired by volitional acts of a criminal nature and thus was properly punishable because the statute in effect relied on the defendant's addicted status to target the acts.26 Similarly, Justice Byron R. White's dissent emphasized the evidentiary nexus between the status and the underlying conduct, noting that addiction is the "regular, repeated or habitual use of narcotics" and that therefore "the jury had to believe that [the defendant] had frequently used narcotics in the recent past."27 Interestingly, Justice White added that he would have had other thoughts if he had perceived the punishment at issue as in fact targeting "sheer status."28

Thus, the decision of the United States Supreme Court in Robinson established the principle that, though the state could punish the manufacture, transportation, sale, purchase, possession, or use of narcotic contraband, the state's power to punish ended where the status of addiction began. Instead, the United States Constitution required the state to prove actual criminal conduct. Even though the facts in Robinson centered around status that resulted directly from criminal activity — in other words, a status from which criminal conduct was rationally inferable — the bar against status punishments applied.

Jerold H. Israel, Selective Incorporation Revisited, 71 Mich. L. Rev. 253 (1982); Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949).
22. Id. at 678 (Harlan, J., concurring).
23. Id. at 678-79 (Harlan, J., concurring).
24. WAYNE R. LaFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.2(b), at 8 (2d ed. 1986) (explaining that "there can be no criminal liability for bad thoughts alone; there is a requirement of some sort of action . . . sometimes expressed as a requirement of an actus reus or (guilty act)").
27. Id. at 686 (White, J., dissenting).
28. Id. at 685 (White, J., dissenting).
Simply phrased, status, even if acquired through criminal (or criminally sanctionable) conduct, is beyond the reach of the state's punitive powers. Only proven criminal conduct is punishable.

In addition to introducing the status/conduct distinction as a substantive principle of constitutional law, the various opinions in *Robinson* established that the distinction creates a bar against evidentiary inferences that would serve to circumvent the distinction. The evidentiary dimensions of the status/conduct distinction erect a barrier against inferences, conclusions, or presumptions about conduct based on status because, if allowed, such inferencing effectively would permit the circumvention of the distinction as a substantive principle of constitutional law. In other words, if the state may characterize evidence of pure status as evidence of actual conduct, the distinction would not have any meaningful application. This type of inferencing is precisely what the *Robinson* dissenters urged, and what the *Robinson* Court refused to permit. Therefore, the evidentiary bar against the presumption of conduct based on evidence of status is a necessary aspect of the status/conduct distinction as a substantive concept.

As applied by the Supreme Court in *Robinson*, this evidentiary bar prohibits the state from converting evidence of status, without more, into evidence of conduct; even though Justice White and Justice Harlan correctly noted that the status of drug addiction is probative of unlawful conduct — the use of illegal drugs — the Court in *Robinson* held that status alone could not be used as evidence of that conduct's occurrence. Rather than drawing convenient inferences from status in order to presume conduct, the state was required to prove actual criminal conduct.

B. *Powell v. Texas*

In the follow-up case, *Powell v. Texas*,29 the United States Supreme Court struggled with the application of this principle in its consideration of a statute that criminalized public drunkenness.30 The slew of differing and somewhat conflicting opinions in *Powell* struggled over the status/conduct principle's application to the facts of this case — over the meaning, not the vitality, of the status/conduct distinction in that factual setting. Clearly, the Court in *Powell* did not question the status/conduct distinction itself; instead, it divided over the boundaries of status and conduct as legal concepts, in that specific context.

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In *Powell*, the defendant was arrested for staggering on a sidewalk while intoxicated and was fined under a statute that made it unlawful to "be found in a state of intoxication in any public place."^{31} The plurality opinion viewed the statute as targeting and punishing "public behavior which may create substantial health and safety hazards" and thus affirmed the conviction.^{32} The dissent took a diametrically opposed view, concluding that the narrow issue was whether the state could criminalize "the mere condition of being intoxicated in public." Thus, the dissent suggested that the *Robinson* status/conduct analysis mandated reversal of the conviction.^{33} Justice White, staking a centrist position, reasoned that the statute would constitute an impermissible status punishment only as applied to homeless chronic alcoholics who, unlike Powell, had no private place in which to be intoxicated.^{34} However, none of the opinions questioned the viability or applicability of the status/conduct distinction.

In his concurrence, Justice Hugo Black explained the differences between *Robinson* and *Powell* to reconcile the two results. Affirming the principle from *Robinson*, Justice Black explained that "[p]unishment for a status is particularly obnoxious . . . because it involves punishment for a mere propensity, a desire to commit an offense" but that "[e]vidence of propensity . . . [is] unreliable . . . the requirement of a specific act thus provides some protection against false charges."^{35} Continuing, Justice Black cited to the "more fundamental" problem of distinguishing "between desires of the day-dream variety and fixed intentions that may pose a real threat to society" and concluded that "extending the criminal law to cover both types of desire would be unthinkable, since [t]here can hardly be anyone who has never thought evil."^{36} Finally, Black explained that "none of these special problems" arise when the state is required to "prove that the defendant actually committed some proscribed act."^{37} Because the statute in *Robinson* did not require the state to prove the act of drug use, it could not stand. However, the statute in *Powell* required the state to prove the act of proceeding into a public space while intoxicated and therefore could stand. Thus, the Court in *Powell* basically decided that the statute at issue punished the acts of becoming intoxicated and then proceeding into public places, rather than the status of public intoxication itself.

31. *Id.* at 517.
32. *Id.* at 532.
33. *Id.* at 559 (Fortas, J., dissenting).
34. *Id.* at 551 (White, J., concurring).
35. *Id.* at 543 (Black, J., concurring).
36. *Id.* (citations omitted).
37. *Id.* at 544.
The Court in *Powell* thus affirmed that the state cannot punish on the basis of status. This rule has been employed in subsequent decisions as well.\(^{38}\) Additionally, Justice Black's concurrence highlighted that *Powell* also affirmed the evidentiary dimensions of the status/conduct distinction. Justice Black's emphasis on the "fundamental" problems raised by the use of "propensity" or "desire" in order to presume or infer actual conduct underscores the adherence in *Powell* to the status/conduct distinction as a bar against improper inferences, conclusions, or presumptions. Thus, the reasoning of the Supreme Court in *Powell*, like that in *Robinson*, disapproved evidentiary bootstrapping that would hollow the distinction between status and conduct as applied. Rather, *Powell* affirmed that the state must not only prove actual conduct, but that such proof could not be evidence of status.

C. A STATUS/CONDUCT SKETCH

As *Robinson* and *Powell* indicate, the distinction between "status" and "conduct" may be slippery in application. However, these two opinions do sketch the basic contours of each. Generally, "status" is a condition of being that, even though perhaps acquired initially through conduct, takes on an existence of its own at some point. In other words, status becomes an attribute of the person that lingers even when he or she is not engaged in any specific category of conduct. *Robinson* and *Powell* teach that "status" is a state of being that is defined more accurately or precisely by notions of propensity, disposition, inclination, desire, proclivity or orientation than by current or on-going instances of specific action or conduct. Although the two concepts are interrelated in self-evident ways, they are capable of distinction, and the Supreme Court's interpretation of the United States Constitution in fact makes distinction between the two obligatory.

III. THE STATUS/CONDUCT DISTINCTION AND SEXUAL MINORITY IDENTITY

Ironically, the application of the status/conduct distinction to sexual minority identity first seeped into the legal system during the 1970s via First Amendment cases. Basically, the First Amendment cases involved situations wherein university officials refused to permit the formation of gay and lesbian student groups on the grounds that such organizations would serve as breeding grounds for sod-

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Thus, the university officials proffered a conduct-based rationale for a status-based action. The courts, however, declined to accept this status/conduct equation. In retrospect, this initial seepage is ironic because the courts subsequently disavowed the First Amendment dimensions of the status/conduct distinction. Instead, as the following discussion illustrates, in more recent cases the courts have folded status/conduct considerations into their otherwise conventional equal protection analyses. Consequently, the status/conduct distinction has evolved primarily under the Fourteenth Amendment.

The distinction, as developed under the Fourteenth Amendment, has been applied expressly (even if sometimes disingenuously) in various cases involving gay males or lesbians penalized without any showing of unlawful conduct—that is, gay males or lesbians penalized on the basis of sexual minority identity, or status. Indeed, even those analyses that circumvent the results mandated by the distinction in sexual minority cases do not question the applicability of the principle to the cases. Thus, the courts generally have accepted that the prohibition against status punishment applies equally to status discrimination, and they specifically have accepted the application of the distinction to sexual minority discrimination cases.

A. THE FOURTEENTH AMENDMENT BAR AGAINST STATUS DISCRIMINATION

The first sexual minority case to consider the status/conduct distinction offered great promise because the court distinguished persons from actions and rooted its analysis in Robinson, thereby avoiding the conceptual and doctrinal confusion that mark the subsequent opinions. Despite this promising beginning, the later cases fell into analytical chaos. The status/conduct distinction thus was threaded into Fourteenth Amendment law gradually and fitfully.

Most of this unfortunate history actually is quite recent because it unfolds through cases brought by members of sexual minorities to challenge the anti-sexual minority policies instituted when Ronald Reagan became President, and afterwards continued by George

39. See infra notes 352-62 and accompanying text.
40. However, perhaps blinded by their equal protection foci, the courts also have remained conspicuous in their failure to recognize Robinson and Powell explicitly while engaging in a status/conduct discussion. Thus, even though Robinson and Powell tower over status/conduct law, and even though the courts generally continue to recognize the vitality of the status/conduct distinction, the courts have failed to cite or rely on Robinson and Powell in the sexual minority cases. Instead, the courts consider and apply the distinction without grounding their analysis to the Supreme Court's seminal precedents. See infra notes 53-314 and accompanying text.
Bush. Until then, as the facts of the cases demonstrate, the military’s exclusionary policies were relatively lax, yielding a tenuous "live and let live" coexistence between the military establishment and sexual minorities. However, the zeal of the Reagan Administration, as evidenced by its new rules, broke this uneasy arrangement and launched a series of protracted courtroom wars where each side won some battles.

This decade of courtroom battles is presented below in detail for several reasons. First, these cases manifest the larger struggle over sexual minority civil rights in American law and society. Second, these cases document the incremental and fitful integration of the status/conduct distinction into the Fourteenth Amendment. Third, the opinions portray the perfidy and hypocrisy of the government, and the courts’ complicity, in the handling of these cases during the 1980s.


The intensification of homophobic policies during the Reagan/Bush era should not obscure the fact that sexual minorities always have suffered at the hands of the military establishment. See, e.g., RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY (1993); ALLAN BERUBE, COMING OUR UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO (1990); MARÍA ANN HUMPHREY, My COUNTRY, My RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT (1990).

42. Terms such as “perfidy” and “hypocrisy” are not imprecise, nor hyperbolic. Recent disclosures revealed that the Pentagon had commissioned several studies, beginning in 1957, to help create justifications for its discrimination against homosexuals. Yet because every study failed to reach the desired outcome, the Pentagon suppressed them. The office of an openly gay United States Representative obtained copies and released them to the press. The more recent studies are now available in GAYS IN UNIFORM: THE PENTAGON’S SECRET REPORTS (Kate Dyer ed., 1990).

More recently, two new government studies again have confirmed the conclusions of the earlier studies. See GENERAL ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DEPARTMENT OF DEFENSE’S POLICY ON HOMOSEXUALITY (June 12, 1992); GENERAL ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: STATISTICS RELATED TO DEPARTMENT OF DEFENSE’S POLICY ON HOMOSEXUALITY (June 12, 1992). The most recent study was commissioned by the government and prepared by the RAND “think tank” in conjunction with the Clinton Administration’s reformulation of the anti-sexual minority policy. The RAND study again confirms the basic conclusions of all the prior reports: sexual minorities are “suitable” for military service. See RAND, SEXUAL ORIENTATION AND U.S. MILITARY POLICY: OPTIONS AND ASSESSMENT (1993) (copy on file with author).

These latest studies also report that, despite knowing that the policy had no basis in fact or experience, the Pentagon has spent over $500 million to discharge gay, lesbian, and bisexual service members such as those whose cases are reviewed below. See Pentagon Cost of Discharging Gays Put at $500 Million, L.A. TIMES, June 19, 1992, at A14. Moreover, this figure is limited to direct costs of actual discharges, and does not include the loss of investment in training and experience that was rejected along with the ser-
These cases, in short, record, depict, and constitute American legal and social history in the making.

Most recently, the 1990s cases have begun to take a new look at the mangled treatments of the status/conduct distinction that had characterized the decisions of the prior decade. Indeed, and almost as if on cue, these cases seem to signal the passing of the Reagan/Bush years. Most importantly, the recent cases demonstrate that the status/conduct distinction, as applied to sexual minority identity, now is treated as a given component of Fourteenth Amendment law.

1. Cyr v. Walls

Though not a status/conduct case on its merits, Cyr v. Walls\footnote{439 F. Supp. 697 (N.D. Tex. 1977).} focused on status/conduct distinctions for two reasons. First, because the litigation was presented as a class action, the court was required to consider the nature and scope of the class before certifying it, and this analysis entailed a consideration of the trait or feature that defined the class. Second, because the police department argued that its surveillance was necessary to prevent the commission of criminal acts, the court was required to consider the nexus between gay or lesbian status and the specified criminal act — sodomy. Cyr therefore occasioned the earliest treatment, albeit a relatively light one, of the status/conduct distinction as applied to sexual minority identity. As the discord and confusion of the subsequent cases will illustrate, Cyr turns out to be remarkable because it quickly crystallized a straightforward application of the Robinson and Powell status/conduct framework in this context.

In 1974, Ken Cyr attended a “peaceful and lawful” meeting of the Texas Gay Conference at the Community of Hope Lutheran Church, where “three officers of the Fort Worth Police Department circled the church repeatedly, recorded the license plate numbers of numerous parked automobiles, and stopped some of the participants leaving the meeting for questioning and driver’s license checks.”\footnote{Cyr v. Walls, 439 F. Supp. 697, 699 (N.D. Tex. 1977).} The attendees, among other things, alleged that their names and license numbers “were later released for publication to Fort Worth newspaper reporters.”\footnote{Id.} In response, a group of gays and lesbians filed a law suit re-
questing that the police be enjoined from similar activities in the future.

After reviewing the First Amendment cases, the Cyr court observed that the United States Supreme Court’s summary affirmance of the Virginia sodomy statute in Doe v. Commonwealth⁴⁶ left no doubt that sodomy could be outlawed. Yet, “[w]hile Virginia law proscribes the practice of certain forms of homosexuality . . . Virginia law does not make it a crime to be a homosexual.”⁴⁷ Citing to Robinson, the court emphasized that “a statute criminalizing such status and prescribing punishment therefor would be invalid.”⁴⁸ Echoing the precise terminology used in Robinson and Powell, the court reasoned that, even though Texas criminalized sodomy and could prosecute and imprison proven sodomites, a “mere propensity or desire” to engage in the proscribed conduct could not serve as the predicate for “state interference with [an] individual’s freedom.”⁴⁹

In applying the status/conduct distinction to sexual minority identity, the court thus invoked the logical distinction between people with a sexual minority status and people who practice sodomy. The court therefore concluded that it could certify the class before it because the class did not seek relief from police interference with unlawful activities. The class simply sought protection from harassment aimed at individuals believed by the police to be gay rather than protection for individuals whom authorities could prove to be sodomites. Thus, in resolving the first status/conduct-related question — class certification — the court emphasized the status/conduct distinction as a substantive principle of constitutional law.

To consider the second question — the nexus between status and conduct — the court in Cyr turned to the second aspect of the status/conduct distinction: the evidentiary bar against impermissible inferences that effectively equate status with conduct. Following up on its discussion thus far, the court observed that the police department’s “convoluted argument [effectively was] that there can be no such thing as a ‘law-abiding’ gay individual.”⁵⁰ However, the court pointed out, an “individual does not become a law violator until he commits an overt criminal act.”⁵¹ A contrary result, the court concluded, “would be tantamount to recognizing homosexuality as a ‘status’ crime” in violation of the Constitution.⁵²

⁴⁸. Id.
⁴⁹. Id. at 702.
⁵⁰. Id.
⁵¹. Id.
⁵². Id.
The Cyr analysis was remarkable for its clarity and coherence. The court did not mire itself in questions that properly belong in substantive due process or equal protection analyses. The court did not trip itself with analytical gymnastics regarding sodomy and (non)sodomites. Instead, the court honed in on Robinson and squarely applied the status/conduct distinction, as established by the Supreme Court, on its own merits both as a substantive principle and as an evidentiary bar. However, the analysis in Cyr was destined for neglect.

2. Ben-Shalom v. Secretary of the Army

Filed in the late 1970s, the Ben-Shalom litigation spanned over a decade and, in retrospect, also marked the opening engagement of the struggle over status and conduct to be waged during the upcoming years between the military establishment and the nation's sexual minorities. It is important to note however that Miriam Ben-Shalom's part in this struggle actually generated two distinct cases. The first, in which she prevailed, centered on her discharge from the Army. The second, in which the Army prevailed, centered on the subsequent denial of her re-enlistment.

a. Ben-Shalom I

Miriam Ben-Shalom enlisted in the United States Army for a period of three years in 1974 and was the only woman in her graduating class at the Leadership Academy of the 84th Division. After graduation, she commenced her duties as an instructor at the Fourth Brigade Drill Sergeant Academy, acknowledging at various times that she was homosexual. In December of 1975, Ben-Shalom was informed by letter that she was being charged with "engaging in homosexual activities."

After she demanded a hearing, the Army revised its charges, seeking to separate Ben-Shalom from service on the grounds that she "evidence[d] homosexual tendencies, desire, or interest, but [was] without overt homosexual acts." A hearing on the revised charges was convened in 1976, and the evidence established that she "had publicly acknowledged her homosexuality during conversations with fellow reservists, in an interview with a reporter for her division news-

54. Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964, 969 (E.D. Wis. 1980). The facts of the cases are summarized in the first opinion generated by the litigation.
55. Ben-Shalom I, 489 F. Supp. at 969.
56. Id.
57. Id.
paper, and in class, while teaching drill sergeant candidates. However, no evidence existed that "she engaged in homosexual acts, or had done anything that could be interpreted as a homosexual advance." Thus, Ben-Shalom's "homosexual tendencies" amounted to verbal acknowledgements of her sexual minority status.

At the hearing, the Army did not "dispute the fact that she was . . . a capable soldier and an excellent instructor." However, at the hearing's conclusion, the board of officers recommended that she be discharged as "unsuitable" but that the discharge be classified as honorable. Ben-Shalom requested rejection of the recommendation, but her plea was denied, and she was honorably discharged effective on December 1, 1976. She therefore brought this action.

District Court Judge Terence T. Evans commenced the analysis by noting the absence of any proof that Ben-Shalom "engaged in homosexual conduct on or off duty" but that the Army nonetheless maintained, again without the offer of proof, that the retention of sexual minorities, per se, was "detrimental to the unique mission of the Army." The court observed, however, that "the record [was] clear that her sexual preferences made no difference to her immediate supervisors or her students." The court therefore concluded that the factual record contradicted the Army's unsupported contentions by stating, "the Court is satisfied from the record that [Ben-Shalom's] sexual preferences had as much relevance to her military skills as did her gender or the color of her skin." Because the only conduct present on the record was her remarks, the district court closed the first portion of its opinion by holding that the "[b]road sweep of this regulation substantially impinges the First Amendment rights of every soldier to free association, expression, and speech" despite the unique setting of military life.

Additionally, Judge Evans enunciated a status-based analysis grounded in privacy jurisprudence. Noting that Ben-Shalom "was treated in the same way as one who openly engages in homosexual activity, even though she is 'guilty' of nothing more that having a homosexually-oriented personality," the court focused on whether the

58. Id. Ben-Shalom was discharged pursuant to chapter 7-5b(6) Army Regulation 135-178 of the United States Army (providing for the discharge of any soldier who evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts).
60. Id.
61. Id.
62. Id. at 973.
63. Id.
64. Id. at 973-74.
65. Id. at 974.
Army's attempt to regulate personality, as such, constituted an intrusion offensive to privacy principles.\textsuperscript{66} Reasoning that human interests, tastes, and personality are quintessentially personal and private, the court concluded that "the Army's policy of discharging people simply for having homosexual personalities" offended constitutionally protected privacy interests unless such personality "actually manifests itself in the form of unlawful conduct."\textsuperscript{67}

In reaching this conclusion, the court explained that personality, or status, if not manifested by unlawful conduct, was protected, even if the status or personality itself was deemed chosen, because the nation's "constitutional heritage rebels at the thought of giving government the power to control [human] minds."\textsuperscript{68} This analysis, predating the United States Supreme Court's \textit{Bowers v. Hardwick}\textsuperscript{69} ruling by six years, thus joined status/conduct issues with substantive due process considerations in the sexual minority context.

Finally, Judge Evans considered whether Ben-Shalom's personality, or status, in fact rendered her unsuitable to be a soldier. Acknowledging the peculiar nature of military life, the court focused on whether a nexus existed between Ben-Shalom's status or personality and her suitability to be a soldier. Noting that the Army had not attempted to prove that such a nexus existed, the court refused to defer blindly to the Army's conclusory assertions. Instead, the court emphasized that the "extensive record [showed] that her performance as a soldier was not only suitable, it was indeed exemplary."\textsuperscript{70} In 1980, four years after the action commenced, the court therefore overturned Ben-Shalom's discharge and ordered her immediate reinstatement.\textsuperscript{71}

Despite this ruling, the Army refused to reinstate Ben-Shalom. The Army's refusal prompted a six-year procedural battle that finally ended in the United States Court of Appeals for the Federal Circuit, which concluded that it had no jurisdiction and therefore ordered the case transferred to the United States Court of Appeals for the Seventh Circuit.\textsuperscript{72} The Army continued to resist reinstatement until 1987 — eleven years after Ben-Shalom's discharge — when the Seventh Circuit sternly ordered it to comply with the district court's 1980 ruling.\textsuperscript{73} However, when Ben-Shalom's enlistment period expired eleven months later, the Army denied her timely application for re-enlist-
ment based on the same verbal acknowledgements of sexual minority status that had prompted her unlawful discharge. Therefore, a new round of litigation commenced.

b. Ben-Shalom II

In Ben-Shalom v. Marsh [Ben-Shalom II], a different judge of the United States District Court for the Eastern District of Wisconsin entered a preliminary injunction directing the Army to consider Ben-Shalom's re-enlistment without regard to her sexual orientation in order to preserve the status quo pending the disposition of the action. The Army then “determined that she otherwise satisfie[d] all criteria for reenlistment [but still] . . . refused to” approve her re-enlistment. Instead, the Army extended the term of her original enlistment until, having been adjudged in contempt of court, it relented and finally re-enlisted her in 1988.

In considering the substance of the claim, Judge Myron L. Gordon noted that the new action was very similar to the first one because the Army's discrimination was based on the same events as the earlier action. A potentially significant difference between the two actions, however, was that the Army had modified its regulations, and sought to place a new spin on the analysis based on this change. Whereas the earlier regulation targeted soldiers who “evidence[d] homosexual tendencies, desire, or interest, but [were] without overt homosexual acts,” the new regulations targeted soldiers who actually committed same-sex acts as well as those who “by statements demonstrated a propensity to engage in homosexual conduct.” The crux of the Army's position in Ben-Shalom II was simple: By acknowledging that one has a homosexual orientation, one admits that one is likely to engage in criminal acts of sodomy, and the Army has a substantial interest in preventing such criminal acts. Therefore, the Army argued that the First Amendment infringements identified in the first action were justified.

However, Judge Gordon, like Judge Evans in Ben-Shalom I, rejected the Army's equation of status and conduct. Even though the Army “continuously characterized homosexuals as a group defined by the desire and intent to engage in criminal acts of sodomy,” the district court observed that the Army had not attempted to offer “one shred of evidence . . . to show that homosexuals as a group share a

74. 703 F. Supp. 1372 (E.D. Wis. 1989), rev'd, 881 F.2d 454 (7th Cir. 1989).
75. 690 F. Supp. 774, 778 (E.D. Wis. 1988).
77. Id. at 1377 (quoting Ben-Shalom I, 489 F. Supp. at 969).
78. Id. at 1379.
compelling desire to commit that particular form of sexual conduct."  
Instead, the Army's argument invited the court to "hold that homosexual orientation is inherently intertwined with a desire and intent to commit criminal acts of sodomy."  

Given the Army's lack of evidence, the court concluded that the Army's argument amounted to a euphemism for prejudice that invited the court "to create a class based on prejudicial notions of what homosexuals are supposedly like."  

Refusing the invitation, the court pointedly noted that the Army's argument was "precisely the type of discrimination" to which courts must apply a high standard of judicial scrutiny.  

Even more troubling for Judge Gordon was the caveat of the new regulations. This caveat allowed the military to excuse same-sex acts if performed by a service member that later was deemed not lesbian, not gay, or not bisexual, thereby affirmatively approving of known same-sex sex acts when performed by soldiers with a cross-sex orientation or status. The court consequently concluded that "the regulation . . . does not penalize the commission of homosexual acts per se [because] . . . a person with a heterosexual orientation may engage in conduct which is prohibited on the part of a person with a homosexual orientation."  

The modified regulation, like the original one, thus targeted "one's sexual desires" because the actual commission of a homosexual act was never dispositive; in cases of same-sex orientation, conduct was not even required whereas in cases of cross-sex orientation, conduct was wholly excusable. The court therefore held that the new regulation still infringed on First Amendment rights to expression and association.

The court next considered Ben-Shalom's claim that the regulation violated equal protection principles because "homosexuals, as defined by the status of having a particular sexual orientation" and absent any allegations of sexual misconduct, constitute a suspect class.  

This claim thus joined status with equal protection, and the court did likewise in its ruling. Reasoning that the caveat of the regulation (which excused homosexual acts committed by soldiers with a heterosexual orientation) effectively created a status-based classification, the court concluded that sexual minorities were "not subject to strict scrutiny when defined by homosexual conduct that rises to the level of criminal sodomy" but that, "as defined by the status of having a particular sexual orientation, [sexual minorities] constituted a suspect class."

79. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 1375.
84. Id. at 1380.
class” for equal protection purposes.\textsuperscript{85} This joining of status and conduct, as elaborated more fully below, produced a doctrinal commingling that has pervaded (and misguided) judicial rulings in recent years but that also shows how the status/conduct distinction may dovetail analytically with conventional equal protection considerations.\textsuperscript{86}

Concluding its opinion, the district court in \textit{Ben-Shalom II} acknowledged the government’s “legitimate interest in the regulation of sexual conduct” within the military, but held that “such regulation must be targeted at the conduct itself and cannot be based on prejudicial stereotypes of what people with certain orientations are like.”\textsuperscript{87} Noting that the Army’s entire position could be reduced to an insistence “that the regulation [was] aimed at conduct and that [the courts] must presume a correlation between orientation and conduct,” the court concluded that the regulation could survive even the most deferential judicial scrutiny “only if [the Army was] correct in the assertion that the status-conduct distinction is bogus.”\textsuperscript{88} The court therefore entered summary judgment for Ben-Shalom.

On appeal, the Army finally found solace in the Seventh Circuit.\textsuperscript{89} Although reversing the district court’s decision, the court of appeals acknowledged that “actual lesbian conduct ha[d] not been admitted . . . and the Army ha[d] not offered evidence of such conduct.” The Seventh Circuit simply concluded that the lesbian admission constituted “compelling evidence that plaintiff has in the past and is likely to again engage in such conduct.”\textsuperscript{90} Moreover, the court exclaimed that the “Army need not shut its eyes to the practical realities of this situation” nor “try to fine tune a regulation to fit a particular lesbian’s subjective thoughts and propensities.”\textsuperscript{91} The Seventh Circuit accordingly informed the Army that it was “at liberty to apply its current regulation.”\textsuperscript{92}

Despite its unwarranted conclusions, the Seventh Circuit’s opinion did contain a telling omission: The court did not question the status/conduct distinction’s existence or viability as a rule of constitutional law in this context. Given the United States Supreme Court’s pronouncements in \textit{Robinson} and \textit{Powell}, the Seventh Circuit hardly could have gone that far. Instead, the Seventh Circuit simply

\begin{footnotes}
\item[85] \textit{Id.} at 1379-80.

\item[86] \textit{See infra} \textit{notes} 324-29 and accompanying text.

\item[87] \textit{Ben-Shalom II}, 703 F. Supp. at 1380.

\item[88] \textit{Id.}


\item[90] \textit{Id.} at 464.

\item[91] \textit{Id.}

\item[92] \textit{Id.} at 466.
\end{footnotes}
embraced the Army's evidentiary inferences to link Ben-Shalom's admitted status and her presumed, unproven conduct. In so doing, the Seventh Circuit allowed the Army to do precisely what Robinson and Powell prohibited: rely on evidence of status to presume unproven criminal conduct, and then rely on the presumed conduct to justify the punishment of status.

Of course, this approach effectively skirted the status/conduct distinction in application while not directly challenging the Supreme Court's earlier rulings. Thus, the Seventh Circuit's ruling implicitly recognized the bar against status discrimination but analyzed its way around the mandated result by indulging the evidentiary inferences that both Robinson and Powell found impermissible. The Seventh Circuit opinion thereby illustrates the very dangers against which Robinson and Powell cautioned, and demonstrates the way in which strategic evidentiary bootstrapping can evade the substance of the status/conduct distinction in practice.

3. Watkins v. United States Army

While Ben-Shalom wound its way through the federal courts, a similar action was unfolding at about the same time at the other end of the country. Unlike Miriam Ben-Shalom, Perry Watkins actually spent a number of years in military service. Indeed, it was his career. He joined the Army when he was nineteen years old, and over the next fourteen years became, in the words of his commanding officer, "one of our most respected and trusted soldiers" who built an exemplary service record. Nonetheless, he was discharged just a few years before becoming eligible for retirement benefits.

The Watkins litigation, spanning nearly a decade, is based on Perry Watkins' induction into the United States Army in 1967. At

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93. See supra notes 16-38 and accompanying text.
94. A final note about Ben-Shalom's struggle must be underscored. Due to its byzantine history, Ben-Shalom's struggle in fact generated two distinct actions. In the first action, involving her discharge, the district court's judgment in her favor was upheld by the Seventh Circuit, albeit on collateral grounds. Of course, in the second action, involving her re-enlistment, the Seventh Circuit overturned the district court. However, Judge Evans' decision remains on the books as the final ruling in the first action.
95. 847 F.2d 1329, 1331 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989).
96. 721 F.2d 687, 691 (9th Cir. 1983) (Norris, J., concurring), vacated, 875 F.2d 699 (9th Cir. 1989).
98. Watkins I, 541 F. Supp. at 252 (W.D. Wash. 1982). The undisputed facts are summarized in the first of many opinions generated by this litigation. See id. at 252-54.
that time, he truthfully and affirmatively answered the question on the Report of Medical History that inquired whether he “had homosexual tendencies or had experienced homosexual tendencies.” A psychiatrist then examined him and found him “qualified for admission.” During his tour of duty, Watkins did not hide his sexual orientation; in fact, in November 1968 he stated to an Army investigator that he “had been a homosexual since the age of 13 and had engaged in homosexual relations with two servicemen.” However, the Army did not discharge Watkins, and in 1971 he re-enlisted for a period of three years.

During his re-enlistment period, and with the approval of his commanding officers, Watkins performed as a female impersonator in highly publicized military venues on several occasions though in 1972 he was denied a security clearance based on his 1968 comments regarding homosexual status and relations. Nonetheless, Watkins finished his second tour of duty, re-enlisted for an additional period of six years, and was re-assigned as a company clerk to a post in South Korea. While there, his new commander initiated elimination proceedings because Watkins was gay. In 1975, a discharge hearing convened. The commander testified that he had discovered Watkins' sexual orientation status through a background records check, but that Watkins was “the best clerk I have known.” Others in Watkins' company testified that “everyone in the company knew that plaintiff was a homosexual and that [it] had not caused any problems or elicited any complaints.” Therefore, Watkins was retained, but his duties were limited to clerical or administrative positions.

Following this incident, Watkins went through several re-assignments and in 1977 received a security clearance from his commanding officer for information classified as “Secret,” which qualified him for new positions. Watkins therefore applied for a new position but was rejected because his “medical records showed he had homosexual tendencies.” Watkins appealed this rejection, supported by his new commander, who requested Watkins’ re-qualification because of Wat-

100. Id.
101. Id. The Army investigated Watkins' (homo)sexual activities after he was charged with sodomy pursuant to Article 25 of the Code of Military Justice. Id. The sodomy charges were later dropped due to the insufficiency of the evidence. Id.
103. Id.
104. Id.
105. Id. at 252-53.
106. Id. at 253.
107. Id.
108. Id.
109. Id.
kins' "outstanding professional attitude, integrity, and suitability for assignment." Moreover, Watkins' commander pointed out the earlier incidents and hearings, and noted that Watkins always had been medically cleared and retained for service. When an examining physician concluded that Watkins' sexuality "appeared to cause no problems" and that earlier proceedings and investigations had concluded with "positive results," the Army relented and in 1978 approved his eligibility for the Nuclear Surety Program.

However, Watkins' repose was short-lived. In 1979, he was notified that his security clearance was being revoked because he had acknowledged his homosexuality at yet another interview earlier that year. At this point, the Army's regulatory machinery became concerned that Watkins' absolution during the earlier proceedings might violate its internal "double jeopardy" regulations. However, the Judge Advocate General's office rendered an opinion that new proceedings would not violate the regulations if the Army could show subsequent homosexual conduct. The Army therefore initiated another discharge action and convened a new hearing to investigate Watkins' subsequent homosexual conduct.

At the hearing, a fellow soldier testified that, while hitchhiking in 1980, a "black staff sergeant in a silver or gray car with light colored license plates" had provided him with a ride and had "squeezed his leg in a homosexual advance." A second soldier testified that Watkins had "asked him if he'd like to move into plaintiff's apartment with him, and that [Watkins] used to come by the mail room and stare" at the soldier. The first soldier could not identify Watkins in a lineup, and Army authorities admitted that "thousands" of black staff sergeants served at Watkins' post and that "many of them probably drove automobiles fitting the description of Watkins' automobile." The second soldier conceded that "he was not sure that plaintiff had been making an advance toward him" and that he was "prejudiced against black people and against homosexuals, having once had a bad experience with a homosexual, and [having] been disciplined once by a board of which plaintiff was a member." Therefore, the discharge board discounted this testimony and made the "single finding that plaintiff

110. Id.
112. Id.
113. Id. at 254.
114. Id. at 257.
115. Id.
116. Id.
had stated he was a homosexual." Relying exclusively on that finding, the hearing recommended Watkins' discharge.

Because Watkins' statement acknowledging that he was a homosexual during the 1979 interview took place after his 1975 discharge hearing, the Army took the position that his words constituted "subsequent conduct" and moved to discharge him on that basis. Watkins appealed initially through Army channels but in 1981 filed suit in federal court to halt his discharge and remain in the Army. The district court held in Watkins' favor, indirectly incorporating into its analysis key status/conduct considerations. In effect, the district court held that Watkins' statement did not constitute "subsequent conduct" because the statement merely repeated a fact that had been considered during the 1975 proceedings. Five months later, in a subsequent proceeding, the district court further held that the Army's conduct in allowing Watkins to remain in the Army after his 1967 admission and 1975 restatement of his homosexuality estopped it from discharging Watkins.

On appeal, the United States Court of Appeals for the Ninth Circuit overturned the district court's estoppel analysis and remanded the case. The district court then reversed itself and upheld the discharge, causing Watkins to file an appeal with the Ninth Circuit. During this second appeal, the Ninth Circuit turned its attention squarely to the status/conduct distinction. At this point, as indicated above, the only "conduct" on the record was Watkins' statement acknowledging his sexual minority status during the 1979 interview. The court therefore opened its analysis by considering whether the Army's regulation, as applied to these facts, discriminated on the basis of "sexual orientation" per se and hence on the basis of status.

Initially, the court noted that the Army's regulations used the term "homosexuality" rather than phrases such as "sexual conduct" to describe what was proscribed, and that they defined a "homosexual" as a "person, regardless of sex, who desires bodily contact between persons of the same sex." The court further noted that, "[u]nder the regulations any homosexual act or statement of homosexuality gives rise to a presumption of homosexual orientation, and anyone who fails

117. Id.
118. Id. at 257 n.3.
119. Id. at 257-58.
121. 721 F.2d 687, 691 (9th Cir. 1983), vacated, 875 F.2d 699 (9th Cir. 1989).
122. 837 F.2d 1428 (9th Cir. 1988), superseded, 847 F.2d 1329 (9th Cir. 1988).
123. Watkins v. United States Army, 847 F.2d 1329, 1336-39 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989).
to rebut that presumption is conclusively barred from Army service."¹²⁵ As in Ben-Shalom, the court in Watkins also took notice of the regulation's special caveat for the benefit of the sexual majority: "Persons may still qualify for the Army despite their homosexual conduct if they prove to the satisfaction of Army officials that their orientation is heterosexual rather than homosexual."¹²⁶ The court therefore reasoned that the regulations targeted homosexual orientation itself.¹²⁷

More pointedly, the court emphasized that the regulation expressly stated that the exemption for heterosexuals who committed homosexual acts was intended to "permit retention only of nonhomosexual soldiers."¹²⁸ Therefore, the court explained, "[i]f a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature, or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated" even though both had engaged in identical and mutual conduct.¹²９ In short, the court concluded that "the regulations do not penalize soldiers for engaging in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay."¹³⁰

Though insightful, this passage, which assumes the occurrence of homosexual acts as a prerequisite for the penalization of soldiers who are actually gay, overlooked that the record of "subsequent conduct" in Watkins' case was devoid of any "homosexual acts."¹³¹ In this instance, as well as in Ben-Shalom's, only a statement acknowledging homosexual status was present. Thus, the Army's scheme was even more pernicious than the court seemed to appreciate. The Army's regulations contemplated the excuse of same-sex acts if committed by soldiers with a cross-sex status, the punishment of identical acts if committed by soldiers with a same-sex status, and the discharge of soldiers with a same-sex status despite the absence of any act.

Despite this oversight, the Ninth Circuit's analysis concluded with a finding of unconstitutionality.¹³² Reasoning that the Army's

¹²⁵. Id. at 1337.
¹²⁶. Id. at 1338 (emphasis in original).
¹²⁷. Id. at 1338.
¹²⁸. Id.
¹²⁹. Id. at 1339.
¹³⁰. Id.
¹³¹. Although the court refers to Watkins' 1968 statement admitting to same-sex acts, the Army's regulations forbade reliance on that comment because they occurred prior to the 1975 hearings and therefore did not constitute "subsequent conduct." Additionally, the Army's discharge was based expressly and exclusively on Watkins' 1979 statement acknowledging sexual minority status.
regulatory scheme effectively created classifications based on status, the court held that status-based classifications were suspect and struck down the regulations as violative of equal protection. However, instead of grounding itself in the reasoning of Robinson and Powell, the Ninth Circuit in Watkins engaged in a conventional equal protection analysis of the status-based classification. The discussion again commingled status/conduct considerations with suspect classification concerns, and thus once again created a mixed precedent based technically on equal protection grounds but grounded conceptually in status/conduct considerations. As in Ben-Shalom, this analysis commingled various principles, concepts, and doctrines under the Fourteenth Amendment, which, in turn, obscured the proper and still potential role of the status/conduct distinction in sexual minority cases, apart from and independently of equal protection issues.

Like Ben-Shalom, Watkins' struggle against the Army's penalization of sexual minority status was generally successful but the Army still had the last word: Petitioning for, and obtaining, a rehearing en banc, the Army secured another ruling, which decided that the district court's estoppel analysis of seven years earlier had been correct after all. Holding that the Army's acceptance of Watkins' sexuality over a number of years estopped it from discharging him, the court concluded that a narrow ruling on this basis obviated consideration of broader constitutional issues, including the status/conduct distinction. The en banc court therefore withdrew the appellate decisions, vacated the district court's reversal of its estoppel ruling, and reinstated the 1982 estoppel ruling.

The estoppel ruling, though analytically plausible given the facts of the case, amounted to evasive judicial action because the Army's regulatory regime, on its face, mandated status punishment. Therefore, estoppel or no, the regulatory regime was unconstitutional on its face. The en banc court's belated embrace of the district court's estoppel ruling simply evaded a definitive ruling on the merits, and thus granted a judicial lease on life to the unconstitutional regulation.

133. This status classification analysis, preceding Judge Gordon's similar analysis in Ben-Shalom by six months, of course also followed the sodomy ruling in Bowers; like Ben-Shalom, this analysis was wholly distinct from Bowers because it addressed classifications defined by status rather than classifications defined by conduct.
134. Id. at 1339-52.
135. See infra notes 324-29 and accompanying text.
4. Matthews v. Marsh

The judicial preference for evading rulings on the merits that animated the en banc Watkins ruling was displayed more bluntly in a case that began after and ended before Watkins. When Diane Matthews completed her four-year tour of duty in the Army in 1980, she had “received numerous awards and high performance ratings.” She then enlisted in the Army Reserve. Later, when she enrolled in the University of Maine, Matthews joined the Reserve Officer Training Corp (“ROTC”).

In 1981, Matthews asked her ROTC lab instructor to excuse her from a lab session so that she could attend a student senate meeting. Her instructor questioned her about the purpose of the meeting, and she honestly responded that it involved the budget allocation for the Wilde-Stein Club. Upon the instructor’s further inquiry, she truthfully explained that the club was “a campus homosexual organization of which she was a member.” In “further explaining her relationship to the club, Matthews also stated that [she] ‘was a lesbian.’” The instructor then “told Matthews that he would have to report that fact to his superiors.” Later that same day Matthews was notified that an investigation into “her homosexuality” was being initiated.

The Army first sent Matthews to a psychiatric consultation after which the psychiatrist concluded that Matthews’ refusal to remain closeted “was necessary for her as a matter of principal [sic].” The Army then completed its investigation and concluded that “Matthews came within the Regulation’s definitions,” excluding from service those persons who “[engage] in, [desire] to engage in, or [intend] to engage in homosexual acts.” Consequently Matthews was involuntarily removed from the ROTC program, and a Bar to Reenlistment in her Army Reserve records was entered. Matthews pursued administrative remedies to no avail and then filed her lawsuit.

During the course of the subsequent trial, the Army neither alleged nor offered proof that Matthews had engaged in homosexual conduct. Instead, the Army contended that “Matthews was properly disenrolled solely on the basis of her ‘intent or desire’ for homosexual activity.” The district court ruled for Matthews, and held

139. Id. at 183.
140. Id.
141. Id.
142. Id.
143. Id. (quoting United States Army Regulations 135-175, 635-100).
144. Matthews, 755 F.2d at 183.
145. Id.
146. Id.
that "Matthews' statement about her sexual preferences and her status as a homosexual both [fell] under the general ambit" of the First Amendment. The Army then appealed.  

On appeal, the Army adhered to its position that the Constitution generally, and the First Amendment specifically, condoned punitive action solely based on "intent or desire" regarding homosexual activity. During the pendency of the appeal, however, Matthews had reapplied for entry into the ROTC program pursuant to the district court's order and, in doing so, had signed a statement that described her as having recently engaged in homosexual acts. This statement thus served as the springboard for turning Matthews' status claim into a conduct issue.

Because "Matthews ha[d] not challenged the Army's right to disenroll her for homosexual conduct, but only for status as a homosexual," the United States Court of Appeals for the First Circuit reasoned that her statement might supply alternate grounds for her disenrollment. Conceding the impropriety of appellate review of "new evidence not in the record," the court nonetheless concluded that "it would be preferable" to indulge the impropriety than to "undertake a review of the serious constitutional issues presented in the district court opinion." Consequently, Matthews, like Ben-Shalom and Watkins, effectively ratified punitive action based on status.

The court's closing comments emphasized with remarkable bluntness that its maneuver into a conduct discussion was rooted in its discomfort over the "serious constitutional issues" that confronted it on the merits. However, the statement about conduct was wholly irrelevant to the merits of Matthews' claim, which the facts of the case unambiguously showed was based on the Army's actions against her status. Subsequent conduct simply and logically could not cure the unconstitutional nature of the Army's earlier action against Matthews' sexual minority status.

147. Id. The district court therefore ordered Matthews re-enrolled in the ROTC program. Id.  
148. Matthews, 755 F.2d at 182.  
149. Id.  
150. Id. (emphasis in original).  
151. Id. at 183-84.  
152. As in Watkins, the First Circuit's resort to post-facto conduct additionally evaded the real problem: using the Supreme Court's prohibitory words in Robinson and Powell with uncanny precision — "desire" or "intent" — the Army regulation, both on its face and as applied, specifically targeted and actually punished pure status. Thus, its reach was overly broad. Even though the regulation might be deemed constitutional as applied to (perceived) "conduct" that is properly proscribable, its overbreadth trammels on constitutionally protected interests, such as status or nonproscribable conduct. Because the regulation was unconstitutional on its face due to its overbreadth, Matthews' post-facto statement regarding conduct could not redeem the regulation's infirmity. See
Finally, the evasive leap taken in Matthews disclosed a dangerous judicial (and cultural) tendency, which is the unthinking equation of "homosexual acts" or "homosexual activity" with sodomy. Of course, the same-sex variety of sodomy is a "homosexual act" but not all "homosexual acts" qualify as sodomy. Simply phrased, the same-sex variety of "sodomy" is a much narrower category of behavior that normatively does not and that logically cannot include all types of "homosexual conduct" or "homosexual activity." Therefore, Matthews' "homosexual acts" were not necessarily sodomy. Despite this self-evident distinction, the tendency toward a blithe reduction of all same-sex relations into "sodomy" was fully realized in Matthews, as well as in the subsequent cases. As illustrated by Matthews and the later cases, this tendency is used to help rationalize punitive action based on, and directed at, pure status.

5. Pruitt v. Weinberger

The Reverend Dusty Pruitt served as a captain in the United States Army Reserve until she was discharged in 1986 because "she was a homosexual." Her sexual orientation status became known to the authorities when she was featured in a newspaper article that described her as a "lesbian and the pastor of a non-denominational Christian church" and reported that she had twice gone through a same-sex marriage ceremony. Consequently, the Army launched an investigation to determine whether to suspend a pending promotion and remove her from service. The investigation resulted in a formal hearing, which concluded that Pruitt ought to be separated from the reserves because she had acknowledged her homosexuality.

Pruitt then filed suit, complaining that the Army's action violated the First Amendment because it had punished her "solely on the basis of her assertion of her status rather than because of any conduct in which she had engaged." The district court, noting that the military policy made no distinction between status and conduct, concluded that it therefore made "little difference whether a person has committed homosexual acts, or would like to do so, or intends to do so" be-

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Zwickler v. Koota, 389 U.S. 241, 249-50 (1967) (emphasizing that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"); Auburn Police Union v. Tierney, 756 F. Supp. 610, 617 (D. Maine 1991) (acknowledging the existence of a species of per se overbreadth if a statute is not narrowly tailored to serve legitimate state ends).

153. See, e.g., infra notes 250-314 and accompanying text.
156. Id. at 628.
cause, according to the Army, persons in all three categories were "incompatible" with military service. Concluding that the court would not consider the wisdom of the Army's policy, the court dismissed Pruitt's complaint.

Pruitt appealed the dismissal, but the United States Court of Appeals for the Ninth Circuit held her case in abeyance until the en banc ruling in Watkins was released. Because that ruling ultimately was based on narrow estoppel grounds, the court then reactivated Pruitt's appeal and held that the Army's action did not violate the First Amendment, but that it did violate the Equal Protection Clause of the Fourteenth Amendment. The court disposed of Pruitt's claim of First Amendment protection with the summary conclusion that "Pruitt was discharged not for the content of her speech, but for being a homosexual." That reasoning, of course, focused the court on the status/conduct distinction squarely, while at the same time displaying how the courts may discount the First Amendment implications of the status/conduct distinction.

Noting that the Army had advanced no specific allegation of homosexual activity on Pruitt's part, the court concluded that the Army was not discharging service members merely because of same-sex conduct, or even primarily for alleged same-sex conduct. Instead, the court reasoned that the Army "is discharging members because of their status as homosexuals" in violation of the Fourteenth Amendment. Following the examples set by Judge Evans and Judge Gordon in Ben-Shalom, and by the penultimate Ninth Circuit ruling in Watkins (Watkins II), this court commingled the doctrines as well, discussing equal protection in conventional "suspect classifications" terms, rather than discussing the status/conduct distinction under the framework established by Robinson and Powell.

The court, however, did not reach any substantive Fourteenth Amendment conclusions. Instead, having reviewed the recent case law and decided that Pruitt's allegations stated a colorable equal protection claim, the Ninth Circuit decided that dismissal of the complaint was erroneous. The court therefore remanded the case for further proceedings, including a determination of rationality for the Army's status-based discrimination. Pruitt remains pending.

157. Id.
158. Pruitt v. Cheney, 963 F.2d 1160, 1163-64 (9th Cir. 1992), superseding, 943 F.2d 989 (9th Cir. 1991), and cert. denied, 113 S. Ct. 655 (1992).
159. Pruitt, 963 F.2d at 1163.
160. Id. (emphasis in original).
161. Id. at 1164-66.
162. Id. at 1167.
6. *Steffan v. Cheney*

In the spring of 1987, Joseph Steffan was scheduled to graduate from the United States Naval Academy within two months. At that time, Steffan was "academically . . . in the top ten percent of his class . . . slated for one of the most prestigious assignments after graduation."\(^{163}\) However, Academy officials discovered his status as a gay male, and when called in for questioning, Steffan answered truthfully that he was a homosexual. Though Steffan requested permission to proceed with his graduation as scheduled, Academy authorities promptly moved to expel him on grounds of "insufficient aptitude" based solely on his verbal acknowledgement of sexual minority status.\(^{164}\) Faced with formal proceedings, badgered by warnings that his resistance to expulsion was "futile," and pressured by threats that "the Academy's power [could] make his situation much more unpleasant than it already was," Steffan capitulated to the Academy's demands for a resignation on the eve of his graduation,\(^{165}\) but subsequently requested permission to withdraw his resignation. Steffan filed suit shortly before the reinstatement was denied.

As with so many of these cases, Steffan's case initially was tied up in procedural wrangling.\(^{166}\) However, the wrangling in this instance centered precisely on status/conduct issues. Shortly before a court-ordered briefing on the constitutionality of the regulations, the Navy sought to depose Steffan. His lawyer balked because the deposition violated a discovery agreement between the parties that had caused the plaintiff's discovery requests to be held back.\(^{167}\) The discovery dispute eventually reached the court, which ordered Steffan to submit to the deposition despite his counsel's objection that the purpose of the deposition was to "turn a status case into a conduct case."\(^{168}\) Interestingly, the judge became annoyed with Steffan and called him a "homo" on the record. Steffan moved for the judge's disqualification, but this motion was denied.

Steffan eventually submitted to the deposition. He testified that he had never engaged in homosexual activity as defined by the Navy regulations prior to entering the Academy in 1983. Steffan declined to


\(^{165}\) Steffan, 733 F. Supp. at 116-17. The Assistant Secretary of the Navy accepted Steffan's resignation on May 6, 1988. *Id.*


answer a series of questions regarding whether he "engaged in homosexual acts while attending the Academy or since departing from the Academy." When the Navy moved for sanctions, Steffan argued that conduct questions were not relevant to the litigation because the Navy in fact had based its actions against him on the basis of pure status, and his complaint in turn was based on that fact. However, the district court dismissed his complaint.

On appeal, the United States Court of Appeals for the District of Columbia Circuit emphasized that the district court's dismissal expressly had "acknowledged that [t]he record [was] clear that [Steffan had been] separated from the Naval Academy based on his admissions that he [was] a homosexual rather than on any evidence of misconduct." Moreover, the court of appeals emphasized that Steffan was "challenging the Navy's administrative determination that he [was] unfit for continued service because he stated he [was] a homosexual." As framed, the "allegedly invalid separation [did] not put into issue the question of whether [Steffan] engaged in potentially disqualifying conduct unless such conduct was a basis for his separation." Because misconduct clearly was not on the record, the court agreed with Steffan's irrelevancy analysis, reversed the district court's dismissal, and remanded the case for further proceedings in accordance with its ruling.

On remand, the parties submitted their summary judgment motions without any evidence of conduct, prompting the district court to acknowledge that Steffan's case was "primarily . . . about the plaintiff's status as a homosexual." Then, yet again, the court's discussion veered into a conventional equal protection analysis. Disclaiming that "[i]t [was] not for this Court to say definitively whether sexual orientation is always chosen by the individual, but [that] it [was] apparent that sometimes it [was] chosen," the court concluded that homosexual persons are not a suspect class entitled to strict scrutiny under the equal protection clause.

The equal protection analysis of the district court in Steffan thus introduced a new twist to the courts' commingling of status/conduct and equal protection issues. Whereas prior courts had concluded that

169. Steffan, 733 F. Supp. at 123.
170. Id. at 128.
172. Id. at 76.
173. Id.
174. Id. The court of appeals ordered the district court to reconsider the grounds upon which the status/conduct issue must be decided. Id.
175. Steffan, 780 F. Supp. at 5.
176. Id. at 3-10 (emphasis in original).
a status-based classification was suspect because the United States Constitution forbids status punishment, Steffan concluded, for the first time, that a status-based classification was not suspect because it was “apparent” to the court that the status itself “sometimes” was “chosen.” The court supported its conclusion by offering this analogy: the “realization” that sexual orientation is “sometimes . . . chosen puts sexual orientation closer to the category of alien adults who are not a suspect class, than to their children who did not choose their status.”177 The court did not explain the connection it was seeking to draw, but clearly it's conclusion is contrary to Robinson, where even a chosen status was held absolutely protected.

In a remarkable but typical shift from status to conduct, the court also cited to Dronenburg v. Zech,178 which involved actual conduct, and summarily asserted that Dronenburg’s analysis had “equal application to this non-conduct case.”179 The court then emphasized that the military policy barred those who “demonstrate a propensity to engage in homosexual conduct,” and concluded that Steffan’s statements acknowledging his sexual orientation status “thereby demonstrated a propensity to engage” in proscribed conduct.180 The district court’s use of “choice” in this ruling, coupled with its reliance on Dronenburg’s conduct analysis, thus positioned it to justify the Army’s punishment of mere “propensity,” or status.

In a final jab, the district court took judicial notice of the Human Immunodeficiency Virus (“HIV”) pandemic and concluded that the exclusion of sexual minorities from the military “constitutes a reasonable step towards the protection” of the health of the armed forces, even though the court previously had noted that Steffan had tested negative for the HIV virus three times.181 The court therefore ruled in the Navy’s favor.

Steffan then appealed to the United States Court of Appeals for the District of Columbia Circuit. The appellate court agreed with his status arguments and reversed the district court’s judgment.182 Pointing out that Steffan “was, by all accounts, an exceptional midshipman” who had “earned . . . numerous honors and the respect and praise of his superior officers” and who had “received consistently outstanding marks for his leadership and military performance,” the ap-

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177. Id. at 7 (citing Plyler v. Doe, 457 U.S. 202 (1982)).
180. Id. (quoting Department of Defense Regulation 1332.14, 1.a) (emphasis in original).
181. Id. at 16. See Steffan, 733 F. Supp. at 123.
pellate court ruled that the military’s exclusionary policy had no rational basis and was facially unconstitutional. This conclusion, the court emphasized, was inescapable even under the lenient “rational basis” test because, despite his consistently “stellar evaluations,” the Academy had changed Steffan’s military performance rating from an “A” to an “F” to render him unsuitable for service solely because he “truthfully answered, ‘Yes, sir’ to a superior officer’s question, ‘Are you a homosexual?’”

Underscoring the centrality of status to the military’s policy, the court also took note of the caveat in the policy that excused same-sex conduct by nongay, nonlesbian, or nonbisexual service members. Comparing a situation wherein two service members engage in identical “homosexual” conduct, as the Ninth Circuit had done in Watkins, the court here observed that the policy mandated the punishment of the service member whose “thoughts are in accord with his conduct” and the exoneration of the service member who showed that he or she was not a “homosexual.” This differential treatment of identical conduct due to a difference in status, the court concluded, exhibited how the policy “attacks status, not conduct.”

Although status played a paramount role in the opinion, the status/conduct distinction did not figure into the analysis as an independent source of protection against the state’s action. In other words, despite its recognition that status was central to this case, the court’s analysis did not appear to apply the status/conduct distinction as such in a conscious way. Instead, as in Ben Shalom and in Watkins, the court focused on equal protection, and applied equal protection law to protect Steffan: The court focused on a class of sexual minorities “defined by homosexual orientation, not conduct” and then proceeded with a conventional equal protection analysis.

Of course, the court was correct in noting that Steffan’s “superiors never asserted that [he] had engaged in homosexual conduct, and [that Steffan] never admitted to any,” thereby situating Steffan (like Ben Shalom and Watkins) in a class truly defined by pure status. However, the existence of such a class or classification cannot — should not — obscure a critical fact: In addition to the role of status in an equal protection analysis, the status/conduct distinction nevertheless stands as an independent principle that forbids the state from penalizing status. In other words, the status/conduct distinction is directly applicable, regardless of the equal protection issues that such a

183. Id. at *2-4, 6.
184. Id. at *22-23. See also, supra note 83 and accompanying text.
185. Id. at *24-25.
186. Id. at *20.
penalization may also raise. The commingling of status/conduct issues and of equal protection concepts, as Steffan again shows, tends to result in the courts’ neglect of the status/conduct distinction as an independent principle of constitutional law.

However, unlike Ben Shalom or Watkins the appellate court’s opinion elaborated—indeed, reiterated—precisely the same concerns that were raised by the Supreme Court in Robinson and Powell, even though Steffan cited neither of these cases. Most notably, this court rejected the imputation of conduct on the basis of status, as embedded in the policy. To do so, the court reviewed extensively the history of other statutes that courts had struck down because the statutes had relied on “thoughts” and “desires” or on membership in disfavored groups to impose a penalty. Like Justice Harlan in Robinson187 and like Justice Black in Powell,188 the court here concluded that this history compelled the conclusion that a “person’s status alone, whether determined by his thoughts or by his membership in a certain group, is an inadequate basis upon which to impute misconduct.”189

In this sense, the court effectively (and probably unwittingly) was upholding the evidentiary component of the status/conduct distinction—even though the court was not applying the status/conduct distinction as a substantive principle of law, it was adhering to the distinction’s prohibition against the use of status as evidence of (mis)conduct. By upholding this aspect of the distinction, the court concluded that the military simply could not justify the policy on the presumption that “a certain class of persons will break the law or the rules solely because of their thoughts and desires.”190 Accordingly, the status/conduct distinction openly and directly motivated the court’s holding, even though the analysis was couched in equal protection terms.

A final sidenote bears mention: In order to minimize the importance of status in this case, and to circumvent the evidentiary problems raised by the policy’s equation of status and (mis)conduct, the Navy also attempted to “draw a distinction between ‘attraction’ and ‘desire.’”191 The Navy argued that “attraction” was permissible but “desire” was not because a “person might be attracted to members of the same sex, and thus have a ‘homosexual orientation,’ yet that person might not ‘desire’ to engage in homosexual conduct.”192 In essence, the Navy’s argument was that a “person with a homosexual orientation [who therefore had an “attraction” to same-sex partners]

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187. See supra notes 22-25 and accompanying text.
188. See supra notes 35-37 and accompanying text.
190. Id. at *26.
191. Id. at *21.
192. Id.
might not be a homosexual under the [policy] because that person lacked a ‘desire’ to engage in prohibited conduct.” The court explained, “[e]vidently the Navy believes that the difference between “attraction” and “desire” determines whether a service member has a propensity to engage in this misconduct.”

Although visibly skeptical of this distinction, which the court pointedly noted was raised for the first time at oral arguments, the court accepted it for purposes of its analysis. Still, the court concluded that the “disingenuousness of this argument [was] plain” from the face of the policy because the entire regulatory scheme, including most conspicuously its caveat excusing same-sex conduct by non-homosexuals, was aimed at identifying service members who were gay, lesbian, or bisexual rather than on rooting out and punishing instances of actual misconduct.

As this opinion shows, the status/conduct distinction loses some, if not all, of its independent force and vitality when status is subsumed into an equal protection analysis. Rather than applying the distinction as an independent principle of constitutional law that absolutely prohibits status penalties, the use of status in a more limited way, and as a means toward an equal protection ruling, triggers choices about “levels” of scrutiny and “balancing” of interests that lower constitutional protections, and that also are irrelevant to the distinction’s bright-line bar against status penalties. This case therefore provides a current illustration of the ease with which status/conduct considerations and conventional equal protection rules are commingled, and how such commingling may lead to the dilution of constitutional protections. However, this opinion, in tandem with Ben Shalom and Watkins also points to some of the analytical connections that properly may be drawn between these two areas of law when status itself is used to define a class or classification.

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193. Id. at *22.
194. Id. at *21-22.
195. Id. at *22.
196. Therefore, an alert litigator in a case involving governmental actions directed at status would include in the complaint two counts. The first count would address the use of status to create a class or classification in violation of equal protection rules. The second count would address the attack on status as a violation of the status/conduct distinction as an independent principle of constitutional law.

As this article was being published, the court announced that the Navy’s request for a re-hearing en banc had been granted. See Paul M. Barrett, Ruling on Pentagon’s Gay Ban is Set Aside, W. St. J., Jan. 10, 1994. The en banc tactic was used successfully in Watkins to suppress the panel opinion that explored the status/conduct issues in that case, and some expect the “conservative majority” of judges appointed during the Reagan and Bush years to do likewise here. Id. This expectation is fueled by the fact that the re-hearing will “rethink the panel’s entire ruling” even though the Clinton Administration had sought a reconsideration on much narrower grounds. Id. Though becoming
7. *Schowengerdt v. United States*

As the cases presented thus far reveal, the courts will go to extraordinary lengths to sustain a fictional adherence to the status/conduct distinction. Using improper evidentiary inferences to disguise status punishment as conduct punishment, the courts simultaneously acknowledge and ignore the status/conduct distinction. Yet, this disguise is sometimes discarded altogether, and the targeting of status, or identity, then comes into full view. In *Schowengerdt v. United States*, the United States Court of Appeals for the Ninth Circuit provided a breath-taking example.

Schowengerdt was a Navy reservist and civilian engineer working for the United States Navy on secret weapons-related projects. Responding to an anonymous tip, Navy security officer secretly searched Schowengerdt's office and discovered a sealed manila envelope. The envelope was marked “Strictly Personal and Private. In the event of my death, please destroy this material as I do not want my grieving widow to read it.” Naval personnel later opened the envelope, which revealed photographs and correspondence “indicating Schowengerdt's involvement in heterosexual and bisexual activities.” The Navy admonished Schowengerdt after considering the contents of the envelope in light of its effect on Schowengerdt as a security risk.

However, upon a change in employment, his security file was reviewed again. The Naval Reserve then commenced discharge proceedings “pursuant to its regulations requiring discharge of homosexuals, including bisexuals.” Though Schowengerdt denied he was bisexual, he was discharged on that basis. Ultimately, the court approved the Navy’s discharge of Schowengerdt with the astonishing comment that Schowengerdt was discharged for “being a bisexual.” In light of *Robinson*, this acknowledgment is stunning in its frankness because it admits that the discharge was based on Schowengerdt’s presumed status rather than on specific (homosexual) acts.

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relatively common in this type of case, the *en banc* procedure is rarely exercised elsewhere.

199. *Schowengerdt*, 944 F.2d at 485.
200. *Id.*
201. *Id.* at 486.
202. *Id.* at 489 (emphasis in original).
8. Meinhold v. United States Department of Defense

Keith Meinhold enlisted in the Navy when he was seventeen years old and enjoyed an exemplary twelve-year career. Rising through the ranks, Meinhold became an outstanding technician and instructor. In 1992, Meinhold was "rated in the top ten percent of all Navy instructors," and was six years away from qualifying for retirement.\footnote{203}{Meinhold v. United States Dep't of Defense, 808 F. Supp. 1453, 1454 (C.D. Cal. 1992), remanded by 991 F.2d 808 (Cir. 1993).}

During his twelve-year military career, the Navy never asked Meinhold about his sexual orientation status, even although Meinhold "publicly acknowledged his [same-sex] . . . orientation" on numerous occasions and to "various Navy representatives, including senior officers."\footnote{204}{Meinhold, 808 F. Supp. at 1454.} His same-sex orientation was "common knowledge within his unit," but the Navy did not take action against him until he acknowledged his same-sex orientation during an interview on a national news program. Three months later, the Navy discharged Meinhold "on the basis of his sexual status," prompting him to file a lawsuit seeking reinstatement.\footnote{205}{Id.} Noting that the Navy had, among other things, disregarded various administrative policies and violated traditional estoppel principles, the district court entered a preliminary injunction ordering Meinhold's reinstatement.\footnote{206}{Id. at 1455.}

Both Meinhold and the Navy then moved for summary judgment, and the court granted Meinhold's motion, emphasizing that "Meinhold was discharged not because he engaged in prohibited conduct, but because he labeled himself as gay."\footnote{207}{Id. at 1455.} However, once again the opinion and analysis veered away from the status/conduct analysis articulated in \textit{Robinson} and \textit{Powell}, and as in \textit{Ben Shalom Watkins}, and \textit{Steffan}, instead slipped into a conventional equal protection analysis. Nonetheless, the balancing test in this instance produced a different twist because the court took judicial notice of governmental studies that had unsuccessfully attempted to establish statistical data supporting the policy. These reports, the court stated, established that "[g]ays and lesbians have served, and continue to serve, the United States military with honor, pride, dignity, and loyalty."\footnote{208}{Id. at 1458.} The court therefore reasoned that the military's "justifications . . . are based on cultural myths and false stereotypes" rather than on rational considerations\footnote{209}{Id.} and concluded that members of sexual minorities
“should not be banned from serving . . . in the absence of conduct which interferes with the military mission.” The court then permanently enjoined the Department of Defense from discriminating on the basis of sexual orientation.\textsuperscript{210}

The Navy appealed, and sought a stay of the injunction pending an appellate ruling on the merits. The Ninth Circuit declined to issue a stay, but the Supreme Court did so as applied to all service members except Meinhold himself, thus narrowing drastically the effects of this ruling until a final disposition of the appeal is rendered.\textsuperscript{211} The appeal on the merits remains pending before the Ninth Circuit.

9. \textit{Dahl v. Secretary of the Navy}

In August of 1993, the United States District Court for the Eastern District of California discerned the significance of the status/conduct framework established by \textit{Robinson} and \textit{Powell} in the context of a sexual minority case. Mel Dahl enlisted in the Navy in 1980, and disclosed in response to questioning during an interview the following year that he was a homosexual.\textsuperscript{212} However, Dahl “denied engaging in any homosexual conduct” while in the Navy. Nonetheless, the Navy convened a hearing to discharge him because Dahl was “a stated homosexual.” Dahl was discharged in 1982 and then pursued administrative appeals, finally filing suit in 1989. The court dismissed his complaint, but the United States Court of Appeals for the Ninth Circuit reversed and remanded in light of \textit{Pruitt}.\textsuperscript{213}

On remand, the Navy “did not dispute that the homosexual exclusion policy discriminates against persons on the basis of their sexual orientation.” However, following this opening observation, this court also veered into a conventional equal protection analysis, applying the rational basis standard of review. The policy’s caveat proved fatal once again because the court saw it was devoid of any rationality. The policy’s intolerance of “a homosexual who has not engaged in any prohibited conduct” but its acceptance of “someone who has violated the code of conduct, yet insists that he or she is not homosexual,” the court explained, was “patently illogical.”\textsuperscript{214} Relying on the same previously suppressed reports that proved critical in \textit{Meinhold}, the court in \textit{Dahl} additionally concluded that the policy “cannot conceivably be based on

\begin{itemize}
  \item \textsuperscript{210} \textit{Id.}
  \item \textsuperscript{211} \textit{United States Dep't of Defense v. Meinhold}, 114 S. Ct. 374 (1993).
  \item \textsuperscript{213} \textit{Id.} at *3.
  \item \textsuperscript{214} \textit{Id.} at *53. In reaching its decision under an equal protection analysis, the court specifically noted that it was not prepared to expand the breadth of First Amendment protection in such cases without guidance from higher courts. \textit{Id.} at *64.
\end{itemize}
any government interest other than illegitimate prejudice and that it is therefore irrational as a matter of law."\textsuperscript{215}

Notably, this court, for the first time in this line of cases, specifically cited to Robinson.\textsuperscript{216} Thus, despite its doctrinal commingling, Dahl suggests a nascent judicial awakening to the Fourteenth Amendment implications of the status/conduct distinction as an independent rule of law under the reasoning and holding of Robinson and Powell. However, citing Pruitt, the court here rejected Dahl's claim that the First Amendment protected his statements as "evidence of status." Thus, Dahl also indicates a continuing judicial resistance to the First Amendment implications of the status/conduct distinction.

10. \textit{Colorado's Amendment Two}

Finally, on a state level, the status/conduct distinction stopped the enforcement of Colorado's Amendment Two, which state voters approved in 1992 to prevent the enactment of municipal or county ordinances outlawing discrimination on the basis of sexual orientation.\textsuperscript{217} In granting a motion for a preliminary injunction against the Amendment's enforcement, Colorado Judge Jeffrey Bayless concluded that the law "addresses status, not conduct" in violation of the Fourteenth Amendment and rested its ruling on that point even though the distinction had not been raised or briefed by either side to the litigation.\textsuperscript{218} On appeal, the Colorado Supreme Court upheld the injunction, though emphasizing a different substantive analysis, and the case then proceeded to trial on the merits.\textsuperscript{219}

In December 1993, after deliberating for two months following the trial's conclusion, state district court Judge Bayless ruled the measure unconstitutional and made permanent his injunction blocking the law's enforcement.\textsuperscript{220} However, noting that the "Colorado Supreme

\textsuperscript{215} Dahl, 1993 U.S. Dist. LEXIS 12102, at *63.
\textsuperscript{216} Id. *55.
\textsuperscript{217} See supra notes 1-3 and accompanying text.
\textsuperscript{218} See supra note 3 and accompanying text.
\textsuperscript{219} The Colorado Supreme Court focused on the Amendment's tendency to diminish the ability of sexual minorities to participate in the political process and to obtain civil rights, thus infringing on a "core democratic value ... recognized from the very inception of our Republic to the present time." The court emphasized that Amendment Two sought to "fence out" sexual minorities from the process of government and thus distorted the process itself. Evans v. Romer, 854 P.2d 1270 (Colo. 1993). See also Hans A. Linde, \textit{When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality} 72 Or. L. Rev. 19 (1993) (Senior Judge Linde of the Oregon Supreme Court discusses the Oregon initiative that was defeated at the same time that Colorado's Amendment Two was approved and considers when lawmaking by popular referenda may violate the Constitutional guarantee of "republican government.").
Court did more than merely affirm the granting of the preliminary injunction” when it focused on equal protection rather than the status issue, Judge Bayless also shifted the focus in his final ruling. The final trial court ruling thus tracked the state supreme court’s concern over the way in which the strictures of the Amendment would “fence out” sexual minorities from the political process, thereby unfairly dis-advantaging sexual minorities’ efforts to obtain protection from discrimination via the political process. Although the status/conduct distinction did not play a central role in this final analysis and outcome, the unfolding of this litigation, and especially the judge’s initial ruling, nevertheless show how status/conduct considerations tend to pervade and to influence sexual minority equality cases.

B. THE STATUS/CONDUCT STATUS QUO

Though both state and federal courts have recognized, either explicitly or implicitly, that the status/conduct distinction prohibits discrimination on the basis of sexual orientation per se, the distinction has not yet made it into the mainstream of legal culture. Instead, the distinction is ignored or manipulated more often than not in sexual minority equality cases. Despite the promise of early opinions like Cyr and more recent opinions such as Dahl, at present the distinction exists with vitality mainly in theory. In practice the distinction remains mostly unrealized because of disuse or misuse. This disuse and misuse, as elaborated below, results mainly from judicial attempts to bifurcate the substantive and evidentiary components of the status/conduct distinction. Substantively, the status/conduct rule requires that punishment and discrimination must be based on conduct, not status. The evidentiary component prohibits status from being used as evidence of conduct. Once bifurcated in this manner, the status/conduct distinction becomes highly susceptible to results-oriented manipulation, a susceptibility that the cases show is judicially welcomed.

1. The Substance/Evidence Bifurcation

As presented above, judicial disabling of the status/conduct distinction in sexual minority cases occurs through analyses that, in effect, either ignore the distinction or circumvent its mandated results with the insistence that evidence of status perform double duty as evidence of conduct. This practice allows the state to impute improperly

221. Evans, No. 92 CV-7223, slip op. at 4.
222. See supra note 1 and authority cited therein.
223. See Claude Millman, Note, Sodomy Statutes and the Eighth Amendment, 21 COLUM. J.L. & Soc. PROBS. 267, 294-300 (1988) (arguing that the Robinson/Powell analysis should be incorporated into sexual minority cases).
conduct from status, and thereby to assert (disingenuously) that it is penalizing the imputed conduct rather than the status itself. In other words, the courts circumvent the distinction as a substantive principle of law by disregarding its evidentiary bar. Clearly, this practice improperly bifurcates the substantive and evidentiary components of the status/conduct distinction and thus flies directly in the face of Robinson and Powell.

In Robinson, the United States Supreme Court specifically and expressly ruled that evidence of status could not serve as conclusive evidence of conduct. Indeed, in that case the evidence of status was much more strongly probative of likely unlawful conduct than in the sexual minority cases. Recall that in Robinson the evidence regarding the status of drug addiction focused on the numerous needle marks found on the defendants' right arm. Normatively, needle “tracks” are in fact a concomitant of drug use and therefore, logically, may be probative of drug use. However, the state in Robinson did not attempt to prove that the needle tracks in fact were created by drug use — insulin injections, for instance, can produce the same evidence — nor did the state attempt to prove that the presumed drug use occurred within its jurisdiction. Instead, the state relied on the tracks as evidence of addiction, or status, and then deduced from that status the occurrence of the underlying conduct. The United States Supreme Court soundly rejected that bootstrapping approach.

Emphasizing the long-established requirements of criminal law, the Supreme Court in Robinson held that the state had to prove the commission of some act before it could rely on the commission of some crime in order to penalize a person. In doing so, the court rejected Justice Clark’s dissent which strongly urged judicial acceptance of the bootstrapping inferencing. In short, the Robinson Court expressly rejected in that seminal precedent precisely the same thinking that the lower courts subsequently accepted in the sexual minority cases to permit the punishment of status via a presumption of underlying criminal activity.

The conduct requirement arose again in Powell, where the United States Supreme Court upheld both the status/conduct distinction recognized in Robinson, as well as the statute challenged by Powell. Because the public intoxication statute required the state to show a defendant's public behavior while intoxicated, the statute did not offend the distinction. The Powell holding therefore confirmed that proof of actual criminal conduct was a constitutional prerequisite for

state action that relied, expressly or impliedly, on the commission of criminal conduct as the rationale for the state action.

Moreover, in emphasizing the long-standing and widely accepted inadequacy of even a demonstrated "propensity" or "desire" to commit unlawful acts as proof of actual criminality, Justice Black's concurrence in Powell underscored the bright evidentiary line that the status/conduct distinction created. Of course, the precise terminology used by Justice Black in his dissent turns out to be uncanny because the military regulations are couched in exactly his terms: "propensity" and "desire." Given this direct symmetry of language, the courts' recent allowance of "propensity" and "desire" as evidentiary anchors to rationalize the punishment of status is inexplicable. Given that the military has merely asserted in conclusory fashion the existence of alleged "propensity" and "desire" the courts' acceptance of this analytical house of cards is untenable and inexcusable.225

Because the courts have accepted the applicability of the status/conduct distinction as a bar to discrimination or to noncriminal sanctions based on status, their refusal to honor its evidentiary bar is undisciplined and impracticable. Simply put, judicial acceptance of the distinction cannot be selective and principled at the same time because disregard for the evidentiary bar amounts to disregard for the principle as a whole. However, this selectivity is precisely the state of the law. The analytical chaos in the reviewed cases therefore stems not from disagreement over the vitality of the distinction as a substantive principle of law, but over the unprincipled bifurcation and manipulation of the evidentiary bar.

2. From Bifurcation to Manipulation

Experience suggests that judicial bifurcation of the status/conduct distinction has the effect of condoning the subordination of sexual minorities. For instance, beginning with the Ben-Shalom and Watkins cases, and despite the very recent exceptions established by Pruitt, Meinhold, and Dahl, the courts consistently have employed the bifurcation technique to ratify governmental presumptions of illegal con-

225. Even though Robinson and Powell concerned the imposition of a criminal sanction in the absence of proven criminal conduct, the military cases involved the imposition of noncriminal sanctions. This distinction is irrelevant because the evidentiary component of the status/conduct distinction prohibits the use of status to presume criminal activity, and no reason exists for believing that this bar may be overcome simply by characterizing as "noncriminal" the consequences of the otherwise impermissible presumption. In other words, a bedrock principle of the American legal system, and an integral component of the status/conduct distinction, is that the commission of criminal acts is never assumable; criminal acts always must be proven before the state may rely on their commission to impose any sanctions on an individual. See generally supra note 24 and accompanying text.
duct that were based on nothing but acknowledgments of pure status. In doing so, bifurcation turned the status/conduct distinction topsy turvy — instead of checking governmental overreaching, as Robinson and Powell illustrated, the bifurcated distinction checks the individual's ability to protect herself from governmental overreaching. Recent judicial treatments of the status/conduct distinction in the sexual minority cases therefore indulge precisely that which Robinson and Powell forbade.

These (mis)treatments of the distinction collectively have generated three types of judicially validated status/conduct scenarios in the sexual minority context:

1) The first scenario recognizes and applies the status/conduct distinction in order to shield from state action individuals who are admitted or proven sodomites but who ultimately are identified as members of the sexual majority. This scenario therefore occasions judicial validation of military regulations that are formally justified by the state's interest in the prevention of sodomy but that exonerate heterosexual sodomites.

2) The second scenario invokes but violates the status/conduct distinction in order to justify state actions against individuals who are proven or admitted sodomites and who ultimately are identified as members of sexual minorities. This scenario corroborates official assertions of concern over the commission of sodomy as a form of conduct, and would be plausible but for its contradiction by the excuse of identical conduct under the first scenario.

3) The third scenario ignores or disregards the status/conduct distinction in order to condone state actions against individuals who are not admitted, proven, or even accused sodomites but whom have been identified as members of sexual minorities. This third scenario, perhaps the most pernicious, allows judicial acceptance of the sophistry that status punishments are transformed into conduct punishment because status, as such, proves conduct.

These three categories of cases, and their contradictory outcomes, demonstrate the malleability, and the manipulability, of the bifurcated status/conduct distinction in the sexual orientation setting. In permitting the state to target sexual minorities as people, the courts have disabled the distinction between status and conduct and thus have distorted status/conduct jurisprudence, while validating unconstitutional state acts.
C. THE FOURTEENTH AMENDMENT PROMISE OF AUTONOMY AND EQUALITY

Judicial (mis)treatment of the distinction also occurs through analyses that commingle substantive due process, equal protection, and status/conduct considerations. This commingling blurs the lines of analysis called for by various Fourteenth Amendment doctrines and by the status/conduct distinction as an independent rule of law. As the preceding review of decisions shows, this commingling more specifically tends to subsume the distinction into conventional Fourteenth Amendment doctrines. Thus commingling tends to complicate principled adjudication of meritorious claims. Yet, as the appellate opinion in Steffan shows, this commingling also points to the way in which the distinction and the Fourteenth Amendment may complement each other. The following discussion, which focuses on the Fourteenth Amendment, further illustrates both of these points, and concludes with a call for the courts to recognize a new jurisprudence created, perhaps randomly, by the accumulation of these rulings.

Generally, substantive due process rulings have settled that the Fourteenth Amendment protects from governmental interference some aspects of human life and liberty while equal protection principles guard against the government's differential treatment of similarly situated persons. However, substantive due process and equal protection are most strict in their safeguards whenever the court declares that either a "fundamental interest" or a "suspect classification" is at stake. The first category is a product of substantive due process doctrine while the latter is a product of equal protection doctrine.

Historically, sexual minority equality claims tended to be brought under these provisions for obvious reasons. Yet the courts have thus far reached two critical conclusions to rebuff the efforts of sexual minorities. The first conclusion denies the existence of any "fundamental interest" in same-sex settings under substantive due process law. The second conclusion denies the existence of suspect class

227. See id. § 11.4, at 378-79.
228. Although the courts have not clearly delineated the characteristics of either category, several "factors" have been established as parts of the formula for the analysis of claims under each. Generally, fundamental interests are those aspects of human life that may be viewed as implicit in the concept of ordered liberty or rooted in the traditions of the nation. Similarly, suspect classifications are characterized by a history of subordination based on an immutable trait coupled with political powerlessness. Under these formulations, a classic example of a "fundamental interest" is privacy, and a classic example of a "suspect classification" is race.
229. See infra notes 232-49 and accompanying text.
characteristics in sexual minority contexts under equal protection law. These two conclusions are inter-related both conceptually and analytically; the two depend on prevailing confusion in the courts regarding the status/conduct distinction conceptually, and each depends on the other, both doctrinally and analytically.

1. Substantive Due Process and "Fundamental Interests"

In Bowers v. Hardwick, the United States Supreme Court held that privacy principles developed under substantive due process have no place whatever in same-sex settings. In Bowers, Michael Hardwick was arrested when a police officer entered his bedroom to serve an invalid arrest warrant for a traffic citation and found Hardwick and another adult male engaged in consensual acts of oral sodomy. At the time, these facts seemed to pose the quintessential scenario underlying conceptions of personal privacy because the activity literally took place in the most private of sanctums, the bedroom, and involved two consenting adults. Although the State of Georgia chose not to prosecute Hardwick under the Georgia sodomy statute, Hardwick sued in an attempt to challenge the constitutionality of the statute. However, the district court granted the state's motion to dismiss for failure to state a claim. On appeal, the United States Court of Appeals for the Eleventh Circuit reversed the dismissal and invalidated the statute. The State of Georgia then appealed to the United States Supreme Court, which reversed the Eleventh Circuit, ridiculing Hardwick's privacy claim as, "at best, facetious."

The Court's conclusion in Bowers flowed from its outright refusal to acknowledge any connection between same-sex intimacy and the formation of family units. In essence, the Court asserted that privacy is limited somewhat strictly to behavior that is marital in nature, or at least that pertains to cross-sex relations. Because state marriage statutes typically preclude same-sex couples from forming le-

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230. See infra notes 252-314 and accompanying text.
231. However, arguments based on the first conclusion — regarding a substantive due process attack — are unlikely to carry the day, at least for the moment, in light of the decision of the United States Supreme Court in Bowers v. Hardwick. On the other hand, the second conclusion — regarding equal protection — is relatively open to question because, as of yet, it has not been definitively settled by the high court.
234. These facts are not noted in the opinion. The facts surrounding this case are detailed in Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court 381 (1988).
236. Id. at 194.
237. Id. at 191.
238. See id. at 190-91.
gally recognized families, same-sex couplings that in practice give rise to families are thus characterized as qualitatively less authentic.\textsuperscript{239} The technical and legal preclusion of same-sex couples from the institution of marriage, in other words, was converted into an automatic and supposed exclusion from the scope of family life. The Supreme Court's reasoning in \textit{Bowers} therefore is wholly circular; \textit{Bowers} rests on a tautology that recycles the forced exclusion of sexual minorities from marriage and "family" life into a perceived incapacity to form family bonds and structures. Indeed, the Supreme Court's characterization of same-sex relationships in \textit{Bowers} does not square with contemporary discussions of same-sex relationships and families; but, as elaborated below, this opinion does project dominant control myths about sexual minorities.\textsuperscript{240}

Most significant to this discussion is that the \textit{Bowers} holding ignores the status/conduct distinction. In fact, the Court's opinion blithely skips back and forth between "homosexual sodomy" and "homosexuals" as if conduct and status were fungible. Whereas the Court initially frames the issue as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy" the Court immediately goes on to register its disagreement with "a right of privacy that extends to homosexual sodomy."\textsuperscript{241} The question raised in \textit{Bowers}, then, is whether only "homosexuals" are prohibited from committing sodomy, even with cross-sex partners, or whether all persons, including heterosexuals and bisexuals, are prohibited from commit-

ting same-sex sodomy. However, these internal inconsistencies are never resolved by or within the opinion. Instead, these unresolved inconsistencies make the decision internally incoherent; they simply make it impossible to decipher with confidence whether the court was writing about “homosexual” acts or about “homosexual” people.\textsuperscript{242} Ultimately, the Court's chronic textual shifts between references to conduct and to status render the opinion conceptually unintelligible.

Despite this confusion, \textit{Bowers} has been applied, either explicitly or implicitly, as if it had spoken consciously and coherently \textit{both} about “homosexuals” as people, as well as about sodomy as an act.\textsuperscript{243} This interpretation turns on the premise that sodomy as a behavior defines the person as a being. In other words, this interpretation presumes that sodomy is something that only homosexuals do, and that to speak about one is to speak about the other. This interpretation thus is rooted in the notion that status \textit{is} conduct, or at least compelling evidence of conduct. Of course, this view disregards the obvious fact that sodomy is a type of specific conduct that demonstrably is performed by heterosexuals, bisexuals, and homosexuals.\textsuperscript{244}

Moreover, despite its explicit grounding in substantive due process, some courts have held that \textit{Bowers}' rejection of a fundamental interest under that substantive due process analysis forecloses suspect class status for sexual minorities under an equal protection analysis. Thus, the Supreme Court's substantive due process holding in \textit{Bowers} has been infused with equal protection meanings through later decisions that have blended the two distinct areas of constitutional doctrine.\textsuperscript{245} This blending in turn exacerbates the confused blurring of the status/conduct distinction in \textit{Bowers}.\textsuperscript{246}

Ultimately, the Supreme Court's decision in \textit{Bowers} puts the courts into a double bind: If the courts uphold sodomy statutes as applied to the sexual majority, then blatant equal protection problems arise; but if the courts strike down the sodomy statutes, then a clear conflict with established privacy jurisprudence is created.\textsuperscript{247} Both of

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\textsuperscript{243} See infra notes 243-314 and accompanying text.
\textsuperscript{244} See infra notes 316-18 and accompanying text.
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these scenarios, and their problems, in fact already have been realized.\textsuperscript{248} Thus, the Supreme Court's decision in \textit{Bowers} convolutes status/conduct issues and creates added tensions in constitutional law.\textsuperscript{249}

2. \textit{Equal Protection and Suspect Classifications}

As noted earlier, the second conclusion falls under the purview of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The second conclusion, that sexual minorities do not constitute a suspect or quasi-suspect class, operates to relieve the courts of the burden of having to apply either the strict or heightened standards of equal protection scrutiny. Basically, the courts have defined sexual minorities as a class or classification that is based on criminal(izable) conduct and that, therefore, properly may be stripped of constitutional protections enjoyed by other traditionally subordinated or marginalized groups of citizens.\textsuperscript{250} Consequently, the courts have consistently denied equal protection of the laws to sexual minorities.\textsuperscript{251}

This denial of equal protection stems from two sources. First, the blending of substantive due process and equal protection, based on the \textit{Bowers} decision, has resulted in summary denials of equal protection for sexual minorities. The second source is the courts' general indifference to the status/conduct distinction. In effect, the courts' extrapolations from \textit{Bowers} serve to impose the same burdens on status that \textit{Bowers} imposed for a particular act.\textsuperscript{252}

a. \textit{Padula v. Webster}

In 1982, Margaret Padula submitted an application to become a special agent with the Federal Bureau of Investigations ("FBI"). Padula was ranked thirty-ninth out of 303 female applicants, and 279th out of 1273 total applicants.\textsuperscript{253} During her background check, the FBI discovered that Padula was a "practicing homosexual."\textsuperscript{254} At the time Padula applied, the FBI had in place an "absolute policy of dismissing proven or admitted homosexuals."\textsuperscript{255} The FBI rejected Padula's application officially "due to intense competition" and denied
her request for reconsideration. Padula then filed suit alleging that the FBI’s rejection of her application was based solely on her status as a member of a sexual minority. The district court denied Padula’s claim, and entered summary judgment for the FBI.

The substance of the appeal focused on equal protection. At the outset, the court paused to note the definitional disagreement raised by the parties. The FBI’s argument was that its “hiring policy focuses only on homosexual conduct, not homosexual status” and the court understood the “government to be saying that it would not consider relevant for employment purposes homosexual orientation that did not result in homosexual conduct.” Padula rejected the status/conduct distinction, arguing that “homosexual status is accorded to people who engage in homosexual conduct, and people who engage in homosexual conduct are accorded homosexual status.” The court declined to resolve this disagreement, noting that it was irrelevant to the case at hand because Padula herself was a “practicing homosexual.” Therefore, the court concluded that the issue was whether sexual minorities, “when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification.”

However, the court did not stop with the case-specific finding of Padula’s factual situation. Instead, emphasizing that Bowers had upheld a sodomy statute, the court explained that it “would be quite anomolous, on its face, to [protect] status defined by conduct that states may constitutionally criminalize.” If the Supreme Court was “unwilling to object to state laws that criminalize the behavior that defines the class,” then how could a lower court protect the class of criminals? The court concluded that “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.” The court thus relied on the underlying substantive due process analysis in Bowers to propel its equal protection analysis in Padula, and to equate status with conduct in the process. This reliance led the court to the paradoxical position of accepting Padula’s argument in order to reject her claim: in essence, the court agreed with Padula that homosexual status attaches to individuals who have engaged in homosexual conduct, and vice versa, in order to characterize the discrimination against sexual minorities as

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256. Id. at 99.
257. Id.
258. Id. at 102 (emphasis in original).
259. Id.
260. Id.
261. Id. at 103.
262. Id. at 103. Accord Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984).
263. Padula, 822 F.2d at 103.
conduct-based and thus rational. Thus, Padula pivots on a simple announcement that sexual minorities constituted a "class defined by [unspecified but presumably criminal] conduct."

Of course, the court's approach appeared plausible only on the surface. In fact, this superficial treatment sidestepped two underlying problems. The first and most evident problem is the fallacy of equating status and conduct. The second and more subtle problem is the fallacy of reducing all same-sex intimacy to sodomy. Taken individually, either of these problems reveals fundamental flaws in the court's analysis; taken together, these problems create a virtually incoherent opinion.

The first problem results from an affirmative judicial act: The courts own equation of status with conduct. Of course, the court's conclusory equation is at odds with the conceptual distinction between status and conduct recognized by the Supreme Court since Robinson. Moreover, the status/conduct distinction has been confirmed by numerous courts since then.264 A more dramatic rebuke to this conduct-as-status equation is provided by the backhanded recognition of the status/conduct distinction embedded in the military's exclusionary policy, which expressly contemplates same-sex conduct between soldiers with a heterosexual status.265 Clearly, status and conduct are not necessarily co-extensive.

The second problem results from the court's conspicuous silence on a key point. Specifically, the court omitted any mention of the conduct that assertedly defined the class. Instead, the court spoke in bare assertions, leaving unresolved the question of what constitutes a "practicing homosexual." Even though the FBI's background investigation revealed that Padula was a "practicing homosexual" no proof existed that she was a "practicing sodomite." It thus would appear that one could be designated as a "practicing homosexual" even in the absence of specific acts of sodomy. In other words, the Padula court indulged the premise that Padula's status as a lesbian, even a "practicing" one, automatically proved that she had violated a specific statute. This use of status as evidence of conduct of course violates the evidentiary component of the distinction. Thus, by circumventing the evidentiary component of the status/conduct distinction, a federal court once again transgressed the distinction as a substantive principle of law.

b. Woodward v. United States

James Woodward enlisted in the Naval Reserve in 1972, and acknowledged in his fitness questionnaire that he "was attracted sexu-

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264. See supra note 38 and authorities cited therein.
265. See supra note 83 and accompanying text.
ally to, or desired sexual activity with, members of his own sex [but that he had never] engaged in homosexual conduct." 266 Despite this acknowledgment, the Navy accepted Woodward for flight school. After completing flight school, he was assigned to a squadron in the Philippine.

In 1974, Woodward visited the Subic Bay Officers' Club "in the company of an enlisted man who was awaiting discharge from the Navy because of homosexuality." 267 Subsequently, Woodward's commanding officer "questioned him about the incident," and Woodward again frankly acknowledged his "homosexual tendencies." 268 The commander then requested Woodward's resignation. Upon Woodward's refusal, the commander recommended Woodward's discharge. In response, Woodward wrote that he would "continue to associate with other homosexuals." 269 After an independent administrative review, the Navy released Woodward from active duty and reassigned him to reserve duty. Woodward then sued the Navy for reinstatement to active duty.

The United States District Court for the District of Columbia entered summary judgment for the Navy, stating that military officers "have no constitutional right to be... retained and their service may be terminated at any time with or without reason." 270 However, in granting Woodward's motion for reconsideration, the district court reversed itself. Recognizing that, in spite of its formal policy, the Navy's practice was to retain some members of sexual minorities despite "homosexual tendencies" and that the record of Woodward's case left "little doubt that [Woodward's] release was the result of his admission that he had homosexual tendencies," the court concluded that the Navy owed Woodward a rationale for denying him the benefit of its retention practice. 271 Woodward's case was eventually transferred to the United States Claims Court. The claims court concluded that the Navy could have terminated Woodward on other grounds relating to the performance of his duties, and therefore Woodward's complaint was deemed without merit. 272

On appeal, the United States Court of Appeals for the Federal Circuit concluded that Woodward could not rely on the Navy's inconsistency between policy and practice because his case centered on "re-

268. Woodward, 871 F.2d at 1069.
269. Id.
271. Id.
lease” and “reassignment” rather than “retention” or “discharge.” 273 However, the court also noted that Woodward’s performance of his duties, while not outstanding, had not constituted the sole criterion for his discharge. 274 The Federal Circuit then turned to the merits of the case, and to the status/conduct issues.

Striking an increasingly familiar judicial pose, the court cited to Bowers at the outset, noting that “homosexual conduct” is not protected by the Constitution. This pronouncement, of course, misstated Bowers. The Bowers decision involved a specific and statutorily defined act — same-sex sodomy — not a general or undefined category of possible behaviors that might be labelled “homosexual conduct.” The court’s broad view thus homogenized the entire range of social, affectional or intimate acts that may give rise to perceptions of same-sex status into a single act.

The court then ventured a remarkable thought. Reciting Woodward’s frank acknowledgment of same-sex orientation, his desire to “associate with other homosexuals,” and his visit to the Officers’ Club in the company of a known homosexual, the court pointed out that Woodward had failed to claim “that he [was] celibate.” 275 Therefore, the court explained, “even though Woodward’s counsel had attempted to characterize Woodward as having only homosexual tendencies” and even though “acts of sodomy [had] not been expressly admitted,” the court concluded that it “need not address the factual situation where there is action based solely on status.” 276 In essence, the court assumed what the Navy had neither charged nor proven simply because Woodward had not specifically denied the uncharged and unproven assumption. The court’s strained analysis underscored the fact that the Navy acted solely on a status that, in turn, had been deduced from purely social and undeniably lawful behaviors.

The court’s opinion in Woodward thus added yet another layer to the status/conduct complications spawned by Padula and the military cases reviewed earlier. The Padula holding illustrates how unspecific behavior of a presumably sexual nature but other than sodomy could be reduced to “sodomy” and how that reduction in turn could be converted into the invocation of criminal conduct to help justify discrimination against a whole class of persons. The Woodward holding illustrates how nonsexual conduct may give rise to a perception of sexual minority status or identity and how that perception may then be used to impute sodomy toward the same end.

273. Id. at 1071 n.3.
274. See id. at 1073-74.
275. Id. at 1074 n.6.
276. Id. (first emphasis supplied, second emphasis in original).
In Woodward's instance, this conduct was simple enough — being observed in the company of someone thought or known to be a member of a sexual minority. Thus, purely social, nonsexual, nonintimate, nonsodomistic conduct, after being transformed into evidence of status, was then transmuted into evidence of criminality. In effect, this evidentiary dynamic transformed social conduct into homosexual status and homosexual status into criminal conduct. The evidentiary alchemy performed by the Woodward court thereby violated the status/conduct distinction both as a substantive principle and as a bar against attenuated inferencing. This alchemy also demonstrates the lengths to which the courts will strain in order to avoid a forthright status/conduct analysis on the merits, and to evade the results mandated by the application of the distinction as an independent rule of law. The court in Woodward consequently managed to compound the fundamental misconceptions in Padula and to multiply its distortion of equal protection case law.


Timothy Dooling, Joel Crawford, and Robert Weston were civilian employees for defense contractors whose professional opportunities had been limited because they had been identified as gay. Under the Department of Defense rules for the civilian workers of defense contractors, “homosexuality” constituted a disqualifying factor for security clearances, which were a prerequisite for career advancement. The rules defined “homosexuality” as a “general term that encompass[ed] all types of homosexual experience.” Included were “long-term affectional, emotional, and sexual relationship[s] between two openly gay people” as well as “simple, casual dating relationship[s].” Also included within this definition were “sexual misconduct,” and “aberrant sexual behavior,” and “deviant sexual activities.” The definitional net thus ensnared both status and conduct.

Under this regulatory scheme, the discovery of sexual minority status or conduct automatically subjected applicants to dilatory security investigations, which typically rendered the applicants ineligible

277. Moreover, this alchemy serves to atomize heterosexism as a unique and somehow unproblematic form of discrimination. The Woodward court isolated discrimination against sexual minorities from the overarching repudiation of discrimination incorporated into the rejection of racism and sexism. Indeed, as evidenced by Woodward, this atomization serves to depict discrimination against sexual minorities as conceptually compatible with basic notions of equality that support the Fourteenth Amendment.


for required security clearances. Moreover, the rules required all members of sexual minorities to “out” themselves to their families, co-workers, and supervisors, even if they were celibate, because concealment or attempted concealment of homosexuality from any of the mentioned persons also disqualified the applicant.\footnote{281} Of course, non-concealment or disclosure, in turn, would trigger investigatory actions. Consequently, the rules constructed a “Catch-22” for homosexual applicants: Discovery, concealment, attempted concealment, or self-disclosure of the disfavored sexual orientation created an automatic career ceiling, regardless of actual conduct. To break through that ceiling, the class action challenged the rules and procedures that used sexual orientation status as the basis for adverse governmental actions.

As in so many other status/conduct cases, it appears that sodomy was never alleged or proven in this litigation. Indeed, consensual adult sodomy is not even a crime in California, where all of the relevant events took place. Instead, Dooling and Weston were targeted because they “belonged to a gay organization.”\footnote{282} Crawford was denied a clearance based on homosexual activity of an unspecified nature. Because conduct in the form of sodomy was not specifically before the court, the district court understood the issue as whether the government could “subject citizens to expanded investigations because they seek and engage in emotional, affectional, and sexual relationships with people of their own sex.”\footnote{283} Because “all homosexual activity [was] subject to investigation” while allegations of heterosexual conduct normally were not investigated, the analysis focused on equal protection. The court consequently faced the standard definitional questions regarding the subject class or classification seen in the earlier cases.

However, the district court carefully sifted through the status/conduct nuances that had confounded the Padula and Woodward courts and placed Bowers in perspective at the outset. Noting that the Supreme Court in Bowers specifically posited the issue as “whether the [United States] Constitution confers [a] fundamental right upon homosexuals to engage in sodomy,” the court reasoned that Bowers “simply did not address the issue of all homosexual activity.”\footnote{284} For instance, the court explained, Bowers did not hold that “two gay people have no right to touch each other in a way that expresses their affection and love for each other . . . [or] to engage in homosexual ac-

\footnote{281. See id. at 1365.} \footnote{282. High Tech Gays, 668 F. Supp. at 1366, 1377.} \footnote{283. Id. at 1362.} \footnote{284. Id. at 1370 (emphasis in original).}
tivity such as kissing, holding hands, caressing, or any other number of sexual acts that do not constitute sodomy." Because the Supreme Court had limited Bowers to sodomy but the rules under challenge had not, the court viewed the class or classification created under the rules as defined by any homosexual activity or by sexual orientation itself.

Having clarified that Bowers answered the sodomy question but "simply did not address the issue of discrimination based on sexual orientation . . . itself," or on nonsodomistic conduct, the court undertook a full equal protection analysis, focusing on discrimination based on status or noncriminal associations. Because the central rationale of the Supreme Court in Bowers had been that sodomy was "traditionally proscribed" and that sodomy continued to be outlawed among various states, the court canvassed the relevant law and found that "the same cannot be said about other types of homosexual activity." The court stated that "[n]one of the fifty states outlaws the act of two people of the same sex kissing one another, holding hands together, or caressing each other." With the substantive due process underpinning of Bowers absent here, the court concluded that a class defined by status or by lawful associations and intimacies was suspect and therefore subject to, and invalid under, strict scrutiny.

Nonetheless, the court proceeded with its analysis under the more deferential rational-basis level of scrutiny in order to determine whether the regulations served any legitimate state interest. The government had offered three justifications for its policy. First, the government argued that homosexual conduct may constitute a criminal violation, and therefore, sexual minority status could "call into question an individual's willingness to uphold public law." Second, the government argued that sexual minorities were emotionally unstable and vulnerable to blackmail. Third, the government contended that investigations of same-sex conduct were connected to investigations of "extramarital relations, sex with minors, prostitution, sex through force" and other normatively unsavory activities.

Considering the "respect for law" justification, the court noted that none of the states made homosexual conduct a crime, and pointed out that "over half" of the states did not even criminalize "sodomy."

285. Id.
286. Id. at 1370, 1367-77.
287. Id. at 1371-72.
288. Id.
289. Id. at 1370-77.
290. Id. at 1373.
291. Id. at 1374-76.
292. Id. at 1376.
Furthermore, among the twenty-four states that actually criminalized sodomy at that time, all but six included the cross-sex variety, thus making heterosexuals just as vulnerable to concerns over proper respect for public law. The court therefore concluded that the different treatment accorded under the rules to those with a sexual majority status or record and those with a sexual minority status or record could not be rationalized on this basis.

The court next evaluated governmental concerns over presumed emotional stability and blackmail, and noted the lack of evidence showing that sexual minorities, per se, are “particularly subject to blackmail.” The court specifically rejected the credibility of an excerpt from a sensationalistic spy thriller that “baldly claimed without support that the [Soviet] KGB believes” homosexuality is accompanied by “personality disorders,” which in turn render members of sexual minorities “vulnerable to adroit manipulation.” In fact, the court emphasized, the record in the case was “absolutely clear . . . [t]here is simply no evidence of either a gay [or lesbian] applicant . . . having been tempted by blackmail . . . or having transmitted classified information improperly.” Indeed, despite the “fictionalized history” professed by the government in the spy thriller, the record established the opposite of the government’s contentions: Dooling himself had “unequivocally rejected [a] blackmail attempt.” The court therefore concluded that an individualized showing of susceptibility to emotional instability or blackmail could support an expanded investigation, but that the Constitution would not protect prejudices and stereotypes.

Similarly, the court considered the government’s third justification, which connected same-sex relations to conventionally unsavory activities. The court viewed the indiscriminate and unsupported assertion of this connection to be indicative of the prejudice and discrimination underlying the rules. In this regard, the court explained that “[g]overnment may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.”

Finally, the court saw no rational purpose for the rule’s requirement that “a person who is merely attracted to people of his own sex,
but who engages in no activity . . . must reveal his [sexual orientation status] to all immediate family members, close associates, coworkers, or supervisors.\textsuperscript{302} Accordingly, the court enjoined the government’s enforcement of the rules based on sexual orientation status, on same-sex activity that did not constitute sodomy, and on membership in organizations identified with sexual minority concerns.\textsuperscript{303}

On appeal, the United States Court of Appeals for the Ninth Circuit overturned the ruling in all respects, opting instead for the \textit{Padula} and \textit{Woodward} approach.\textsuperscript{304} While acknowledging that “homosexuals have suffered a history of discrimination” the Ninth Circuit concluded that sexual minorities failed to satisfy the other two equal protection factors underlying strict scrutiny review: immutability and political powerlessness.\textsuperscript{305} Citing to \textit{Woodward}, the court briefly asserted that “[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes.”\textsuperscript{306} In this way, \textit{High Tech Gays}'s echo\textsuperscript{ed} \textit{Padula}’s (mis)construction of sexual minorities as a group defined by conduct. The court further asserted that sexual minorities do not satisfy the political powerlessness element of a suspect classification because several states and cities have passed local laws to prevent discrimination against sexual minorities.\textsuperscript{307} Consequently, as in \textit{Padula} and \textit{Woodward}, the court concluded that minimal scrutiny under the rational-basis test would be applied to discrimination against members of sexual minorities.\textsuperscript{308}

However, the Ninth Circuit strained to find even this lenient test satisfied. Reviewing the extensive evidence of irrationality cited in the district court’s opinion, the court agreed that the record pointed to the “irrationality of the KGB’s” alleged targeting of homosexuals for blackmail attempts based on its ignorance and prejudice.\textsuperscript{309} However, the court decided that, because the KGB may in fact target homosexuals, the military was justified in doing likewise as a counter-measure.\textsuperscript{310} The court stated that, “[i]f hostile intelligence efforts are targeted at homosexuals,” then the military must respond, “even if

\textsuperscript{302} High Tech Gays, 668 F. Supp. at 1376.
\textsuperscript{303} Id. at 1379.
\textsuperscript{305} Id. at 573-74.
\textsuperscript{306} Id. at 573.
\textsuperscript{307} Id. at 574 n.10.
\textsuperscript{308} Id. at 570-73.
\textsuperscript{309} Id. at 578.
\textsuperscript{310} See id.
based on continuing ignorance or prejudice."\textsuperscript{311} In effect, the court concluded that this case presented a situation where two wrongs made a right.

Turning to the specifics of the case, the court diverted its analysis away from the rationality of the rules themselves, as challenged in the complaint, and toward the rationality of investigative practices under those rules. In other words, the court limited itself to whether the expanded investigations were justified by the rules as written.\textsuperscript{312} This shift effectively narrowed the discussion to whether the rules, as written, justified intensive investigations of the named plaintiffs. Of course, they did — that was the problem. Thus, as in \textit{Watkins} and in \textit{Woodward}, the court shifted the focus of its analysis and narrowed the scope of its discussion so as to avert the results mandated by a straightforward application of the distinction. Despite a blistering dissent that decried the analytical and doctrinal "skew" of the ruling, the Ninth Circuit denied the plaintiff's petition for a rehearing \textit{en banc},\textsuperscript{313} and thus, like \textit{Ben-Shalom}, \textit{Watkins}, \textit{Matthews}, and even \textit{Bowers}, this meritorious and once-promising claim drew to a close on a forced and sour note.

The most significant aspect of the appellate court's decision in \textit{High Tech Gays} was its distillation of the status/conduct conundrum created by \textit{Padula} and \textit{Woodward}. In a single phrase, the Ninth Circuit unwittingly captured the circularity of this analysis and the way in which status and conduct are collapsed into each other via this circularity. Observe the progressive leaps of categorization, as signified by the italicized terms: because \textit{Bowers} held that "the Constitution confers no right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class."\textsuperscript{314} In this single phrase, the Ninth Circuit betrays the three-step fallacy of the approach that projects "sodomy" as a specific act into the broader category of unspecified "homosexual conduct" and, finally, projects the broadened conduct category into "homosexuals" as a class of citizens. Thus, the analysis inflates first on a quantitative level — from sodomy to conduct — and then on a qualitative level — from conduct to status. Working from the particularized criminalization of a discrete act, this analysis distorts the significance of \textit{Bowers} by approving the wholesale oppression of a class of persons. This distortion, expanding its

\begin{footnotes}
\item[311] \textit{Id.} at 578.
\item[312] \textit{Id.} at 579-80.
\item[313] \textit{High Tech Gays} v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 376 (9th Cir. 1990).
\item[314] \textit{High Tech Gays}, 895 F.2d at 571.
\end{footnotes}
reach from conduct to status, indubitably violates the status/conduct distinction.

D. Conduct-as-Status and Status-as-Sodomy

In each of the cases reviewed thus far, the state clung to its ultimate focus on status while simultaneously striving to wrap its actions in conduct-based phraseology. By and large, these cases also showed the judicial acquiescence to this strategy. These cases therefore defined the currently prevailing approach to the status/conduct issues in the sexual minority setting. As shown above, this approach asserts that status is defined by conduct and equates that conduct with sodomy while also using status itself as evidence of sodomy. Thus, cases such as Padula demonstrate how a mere reference to unspecified behavior may be used as a proxy for status. And, cases such as Woodward demonstrate how the labeling of a status based on generic social conduct can be used as a proxy for sodomy. These cases, in tandem, project a conduct-as-status and status-as-sodomy analysis.

The conduct-as-status and status-as-sodomy analysis rests on four premises. The first posits the existence of majority/minority conduct dichotomy. The second assumes that the dichotomy is based on personal choice or self-selection. The third perceives sodomy as the touchstone of the dichotomy. The fourth presumes the criminality of sodomy and by extension, the criminality of the class that exists on the wrong side of the dichotomy. Each premise is outlined below.

1. The Majority/Minority Conduct Dichotomy

Moving from the premise that conduct is the foundation of the class in question, the first premise of the analysis divides humanity into two basic camps: Those who “commit” the conduct and those who do not. The holding in Padula exemplifies the way in which this initial premise allows courts to condone discrimination. By asserting that sexual minorities are defined by conduct, the court in Padula was implying that this conduct was somehow peculiar to the class.315 Therefore, in Padula the court implied that the defining conduct distinguished the minority from the majority. Under this distinction, the minority class could be deemed to be “different” and accordingly could be treated differently.

This premise therefore advances the supposition that the defining conduct is somehow peculiar or particular to members of sexual minorities and widely disdained by members of the sexual majority. In this way, this premise creates a sharp dichotomy between the pur-
ported conduct of sexual minorities and the purported conduct of the sexual majority. This majority/minority conduct dichotomy thus manufactures and imposes an artificial "otherness" on sexual minorities to help the majority justify its oppression of the minority.

2. Sodomy as the Touchstone of the Dichotomy

The second premise is that sodomy is the conduct that defines the dichotomy. Woodward tells us as much; the court's specific notation that Woodward had failed to claim that he was "celibate" reveals explicitly the type of conduct that swirls through the judicial imagination in this type of case.\(^{316}\) However, behaviors that some statutes define as "sodomy" undeniably are performed by members of the sexual majority as well.\(^{317}\) Indeed, the occurrence of sodomy among and between members of the sexual majority is documented by the case law itself. An apt and pointed example is Moseley v. Esposito.\(^{318}\)

In Moseley, Superior Court Judge Robert Castellani of DeKalb County, Georgia, declared unconstitutional, as applied to a cross-sex couple, the same sodomy statute previously upheld by the Supreme Court in Bowers as applied to a same-sex couple. In both cases, the commission of the act was not disputed, and the statute on its face does not differentiate between cross-sex sodomy and same-sex sodomy. Moseley not only demonstrated that sodomy actually is committed among and between members of the sexual majority, it also showed that the commission of sodomy could not serve as the bright line that demarcates the majority from the minority. Sodomy simply is not peculiar to sexual minority couplings and therefore cannot be deemed to distinguish the minority from the majority. The minority/majority behavioral split thus miscasts the conduct that supposedly makes humans lesbian, gay, or bisexual as a behavioral election peculiar or unique to sexual minorities.

\(^{316}\) See supra notes 266-77 and accompanying text.
\(^{317}\) See supra notes 12-15 and accompanying text.
\(^{318}\) Civ. Action No. 89-6897-1, slip op. (Ga. Super. Ct. Sept. 6, 1989). Nor is the Moseley fact pattern unique. In United States v. Fagg, 34 M.J. 179 (CMA 1992), Fagg, a heterosexual serviceman, was convicted of sodomy with a heterosexual female and appealed the conviction as an invasion of his privacy rights under the Fourteenth Amendment. The courts rejected his argument, but Fagg argued that 90% of American heterosexual couples engage in sodomy. Indeed, Fagg's counsel argued that sodomy is a basic component of heterosexual relations among both married and unmarried couples. On the other hand, a similar fact pattern involving cross-sex sodomy prompted the courts of Maryland to conclude that the Supreme Court's privacy jurisprudence precluded the application of a facially neutral sodomy statute to the sexual majority. See Schochet v. State, 580 A.2d 176 (Ma. App. 1990). These three cases—Moseley, Fagg, and Schochet—show that the sexual majority practices sodomy, even though the practice of sodomy may be forbidden to sexual minorities.
Moreover, Moseley signified that the United States Constitution contemplates the commission of sodomy, and protects the act when performed among and between members of the sexual majority. Moseley thus presented a spectacle of irony: The sexual majority specifically privileges sodomy for itself while outlawing the act among and between members of sexual minorities. Thus, Moseley teaches that the dichotomy not only is factually false and conceptually unsound, it also is intellectually dishonest.

3. The Presumption of Criminality

The third premise of this analysis is the presumption that sodomy, taken as the touchstone of the dichotomy, is a crime. High Tech Gays illustrated the role of this presumption in the analysis. In High Tech Gays, the Ninth Circuit relied squarely on the Supreme Court's validation of state sodomy statutes to rationalize more general types of discrimination. In effect, the court concluded that discrimination against sexual minorities was permissible because sodomy is criminally punishable.

In High Tech Gays, however, the court overlooked two critical facts. First, the discrimination was based on membership in sexual minority organizations, and not on the commission of sodomy. Although the plaintiffs may (or may not) have been sexually active adults, the commission of sodomy was not asserted, much less proven, as the basis for the discrimination. Second, and most importantly, even if the commission of sodomy had been asserted or proven as the basis for the discrimination, sodomy is not a crime in California, where all of the events underlying High Tech Gays occurred. Therefore, not only was the act missing, the statute thought to criminalize the act was missing as well.

As High Tech Gays illustrated, the conclusory presumption of criminality is factually tenuous because the great majority of American jurisdictions do not criminalize consensual sodomy between adults, regardless of the genital configuration of a couple. Indeed, in some states the state constitution does not permit the state to treat as criminal consensual sodomy, including same-sex sodomy. Therefore, this presumption of criminality is warranted only in a distinct and diminishing minority of cases.

An even more pernicious aspect of this analysis is that it transforms the presumed criminality of an act into the perceived culpability

319. High Tech Gays, 895 F.2d at 570-81.
320. See supra notes 14-15 and authorities cited therein. The bottom line is that most Americans live in jurisdictions where "sodomy" is legal.
321. See, e.g., Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992).
of a person or class. In other words, the presumption of criminality marks the whole class as criminal, or at least blameworthy. In this way, the presumption of criminality provides a veneer of righteousness to the validation of overt inequality.

4. Self-Selected “Choice” and (Im)mutability

The fourth premise of the conduct-as-status and status-as-sodomy analysis concludes with the notion that every person’s position in the majority/minority dichotomy, as defined by conduct presumed to be criminal, reflects a self-selected choice. Indeed, the courts in Padula, Woodward, and High Tech Gays uniformly ended on this note, invoking selective conceptions of (im)mutability as the definitive barrier to equality for sexual minorities, while the district court in Steffan similarly invoked Steffan’s presumed “choice” of minority sexual orientation to exonerate the Naval Academy’s discrimination against him. This final premise, in practice, circumvents Robinson’s prohibition of status punishments, a prohibition that Robinson unmistakably showed applies even if the status is rooted in elective or criminal(izable) conduct.

E. BEYOND COMMINGLING AND MANIPULATION: RECOGNIZING A NEW JURISPRUDENCE

As the cases demonstrate, by commingling and manipulating the various Fourteenth Amendment doctrines that implicate status, the courts place sexual minorities in an analytical vise that shuts all constitutional doors on equality claims. A breakdown of this combined commingling and manipulation brings into sharp relief the centrality of Bowers to the conduct-as-status and status-as-sodomy analysis. This breakdown also underscores the constitutional exclusion of sexual minorities.

The baseline of the Supreme Court’s decision in Bowers was that sodomy, at least same-sex sodomy, does not constitute a fundamental interest for purposes of substantive due process protection, but this relatively narrow holding in Bowers has led to extreme extrapolations. Cast in the language of choice, Bowers has been used to exclude same-sex sodomy from the list of individual “choices” judicially protected under substantive due process, protection which covers choices such

322. See supra notes 250-314 and accompanying text.
323. See supra notes 16-38 and accompanying text.
324. At the same time it must be noted that the parties often frame the issues in this way, thus inviting the courts to overlook the independent force of the status/conduct distinction and facilitating the court’s ability to commingle and manipulate the various doctrines.
as contraception or abortion.\textsuperscript{325} As illustrated by \textit{Padula}, \textit{Woodward}, and \textit{High Tech Gays}, the other Fourteenth Amendment doctrine that protects against discrimination and injustice, equal protection, generally excludes “choice” from its universe of conceptions regarding suspect classifications.\textsuperscript{326} Therefore, the courts’ use of \textit{Bowers}’ substantive due process holding in equal protections rulings situate sexual minorities in a “Catch-22.”

This dilemma is contrived because it is grounded in courts’ unjustified insistence that sexual minorities constitute a class defined by (mis)conduct. In other words, by defining this class of persons according to presumed (mis)conduct and by casting the presumed (mis)conduct as an unprotected “choice,” the courts have pushed sexual minorities beyond the reach of the status/conduct distinction, of substantive due process, and of equal protection. In short, as defined by judicial (mis)conceptions, sexual minorities may never aspire to privacy, to equal protection, or to status immunity.

Despite this commingling and manipulation, the decisions effectively create a new Fourteenth Amendment jurisprudence. This new jurisprudence stands for the proposition that courts should view with suspicion any governmental classifications based on status and may therefore heighten the level of scrutiny when reviewing status-based classifications under an equal protection analysis. This new jurisprudence furthermore affirms that no person may be forced to suffer either punishment or discrimination on the basis of status. The cases additionally stand for the more specific proposition that members of sexual minorities are included within this protection and may not be punished or penalized properly on the basis of that status or identity.

Finally, this new jurisprudence demonstrates a point that has gone unnoticed despite, or perhaps because of, its enormous significance: even though these cases typically involved due process or equal protection claims, the prohibition against status discrimination does not turn on a judicial finding (or rejection) of either a fundamental interest or suspect classification. Beginning with the principle laid down by the United States Supreme Court in \textit{Robinson v. California},\textsuperscript{327} even status achieved directly and foreseeably through criminal conduct is protected. Accordingly, the status/conduct distinction illuminates a path beyond the analyses used to stymie sexual minority equality claims. These analyses as seen in cases such as \textit{Padula}, \textit{Woodward}, and \textit{Hi Tech Gays}, typically interject notions of “immuta-


\textsuperscript{326} See supra notes 226-28 and accompanying text.

\textsuperscript{327} 370 U.S. 660 (1962).
bility” and “behavioral choice” to conclude that the “trait” supposedly defining sexual minorities is unworthy of constitutional protection.\textsuperscript{328} Although conventional equal protection concepts have eclipsed the independent role of the status/conduct distinction in the cases to date,\textsuperscript{329} the status/conduct distinction makes the nature or origins of status generally irrelevant, and therefore the nature or origins of same-sex sexual orientation are specifically irrelevant in a status/conduct case. Perceptions of “choice” and “immutability” that preoccupy conventional equal protection analyses simply have no place or role in a status/conduct analysis. In short, a status/conduct analysis should not and cannot turn on “if” or “why” a person is lesbian, gay, or bisexual, nor on whether society traditionally or presently values, condemns, or criminalizes the status or its cultural underpinnings.

The recognition of this new jurisprudence therefore is significant precisely because the protection of status does not depend on findings of fundamental interests or suspect classifications. Instead, the status/conduct distinction erects an absolute bar to the cognitive and normative processes of identification and discrimination that are utilized to locate and oppress members of sexual minorities. Thus, once recognized as a new jurisprudence, the status/conduct distinction, as developed in recent years, has the potential to counter-act discrimination against sexual minorities.

IV. THE SODOMY-AS-LIFESTYLE FICTION

As shown in the preceding discussion, the courts thus far have denied the equality claims of the nation’s sexual minorities though various practices and techniques. This state of the law, in turn, is intimately tied to broader cultural suppositions that fairly may be described as the sodomy-as-lifestyle fiction. Because this fiction animates judicial (mis)applications of the status/conduct distinction to deny equality, the sodomy-as-lifestyle fiction encompasses some of the same premises as the conduct-as-status and status-as-sodomy analysis. Indeed, the two reflect each other and thus unfold along similar paths. Thus, awareness and understanding of the sodomy-as-lifestyle fiction is a necessary step toward more principled and sensible judicial treatments of status/conduct issues.

Conceptually, the sodomy-as-lifestyle fiction hinges on three overlapping premises about the nature and composition of sexual minorities: 1) commonality and 2) uniqueness based on 3) sodomy. The first premise is that members of sexual minorities share a common “lifes-

\textsuperscript{328} See, e.g., supra notes 304-14 and accompanying text.
\textsuperscript{329} See supra notes 324-26 and accompanying text.
tye.” The second premise suggests that this lifestyle is unique to the sexual minority. The third premise concludes that the commonality and uniqueness of this lifestyle are defined by the commission of sodomy. However, the courts also have held that the Constitution protects the commission of sodomy so long as those committing the act are male and female and thus presumably members of the sexual majority. In application, the three premises that underlie the sodomy-as-lifestyle fiction unfold in six sequential steps.

A. PERCEIVED HOMO-GENETY

The first step is the attribution of a homogenous social profile to gay, lesbian, and bisexual individuals. In other words, the sodomy-as-lifestyle fiction presupposes that members of sexual minorities live alike and are alike, and thus may be dismissed as a group based on this perception of similitude. Of course, this perception of homogeneity is unproven, as well as highly implausible. The obvious richness of variety in age, cultural background, economic class, geographic location, and other attributes of humans differentiate the lifestyles of widely dispersed and numerous persons who otherwise share a single trait, such as sexual orientation. Moreover, common sense and human experience show that no person or group can be one-dimensional. Yet the sodomy-as-lifestyle fiction manufactures a sameness that is imposed on all members of sexual minorities and then uses this forced similitude to exonerate discrimination against individuals based on this contrivance.

330. See supra note 318 and authorities cited therein.

331. However, this diversity has not escaped the attention of other commentators. See, e.g., John Balzar, Why Does America Fear Gays?, L.A. TIMES, Feb. 4, 1993, at A1 (noting that members of sexual minorities “cannot be isolated by race, gender, economics, social strata, region, religion, or politics” and that, “given that some homosexuals are celibate, the only thing that actually separates them as a group are their private feelings”).

B. STRATEGIC STEREOTYPING

The second step of the sodomy-as-lifestyle fiction is the construction of a group caricature or stereotype, that, like all caricatures or stereotypes, is intended to denigrate and disempower its object.333 One typical stereotyping tactic is to depict the so-called lifestyle via film footage from gay and lesbian parades in cities such as San Francisco or New York. The footage is spliced strategically to evoke the imagery of “leather queens” and “drag queens,” or “butch dykes” and “motorcycle lesbians.”334 In practice, the selective footage then is used to upset unsuspecting Americans by creating the false impression that sexual minorities are miscreants who live to corrupt the American way of life.335 These stereotypes calculatedly, and successfully, deceive the nation into fearing its sexual minorities, thus producing acquiescence or support for discriminatory policies from a generally unconcerned and uninformed public.336 Yet this stereotyping is akin to the use of film or photos from, say, Mardi Gras revelries in New Orleans to portray the “lifestyle” of the sexual majority. These stereotypes therefore are grossly simplistic and deceptive.

C. INSINUATION AND IMAGINATION

The third step employs insinuation to enlist the power of individual imagination in the process of stereotyping. This step includes the use of film and propaganda not only to depict odd or inflammatory images, but to invite every mind to imagine the most lurid things. This appeal effectively urges members of the sexual majority to feel unbothered by the social and legal mistreatment of sexual minorities because it allows everyone to justify the mistreatment in terms of per-
sonal dislike. This use of insinuation and imagination therefore is an appeal to naked prejudice.

D. THE ALLUSION TO PROMISCUITY AND SODOMY

The next step emphasizes sexual promiscuity and sodomy, alluding that sodomy constitutes the foundation, if not the entirety, of the sexual minority lifestyle. However, no single act, such as sodomy, credibly can or should be deemed to define or constitute a whole lifestyle. Furthermore, as noted earlier, both sexual promiscuity and sodomy are behaviors undeniably performed by members of the sexual majority, and thus logically could not be the defining act that demarcates the “lifestyle” of the sexual minority from the “lifestyle” of the sexual majority.\(^3^3^7\) The allusion to promiscuity and sodomy therefore is not only unfounded, it also is untrue.

E. THE ILLUSION OF CRIMINALITY

The next step projects an illusion of criminality around promiscuity and sodomy as definitive characteristics of sexual minorities. However, sexual promiscuity \textit{per se} is not a criminalized behavior, and sodomy itself is a behavior that is criminalized in less than half of American jurisdictions.\(^3^3^8\) Thus, the sodomy-as-lifestyle fiction projects an unfounded sense of criminality despite the fact that the vast majority of Americans live in jurisdictions where neither same-sex sexual activity generally nor same-sex sodomy specifically is criminal.\(^3^3^9\) In this way, members of sexual minorities incorrectly are branded and portrayed as outcasts and criminals that deserve discrimination and punishment.

F. TRANSPOSING STATUS AND CONDUCT

Finally, the sodomy-as-lifestyle fiction blurs the distinction between status and conduct by transposing the two. This last step of the sequence effectively substitutes status or identity for the conduct that is imagined to constitute the lifestyle, and vice versa. By cross-equating unspecified, and not necessarily criminalized, behaviors with sexual minority status or identity, this step completes the alignment of pure status with criminal conduct. Thus, the sodomy-as-lifestyle fiction, as applied through these six steps, encourages analyses that excuse the penalization of status or identity despite the constitutional prohibition against status-based penalties.\(^3^4^0\)

\(^3^3^7\). See \textit{supra} notes 12-15, 318 and accompanying text.
\(^3^3^8\). See \textit{supra} notes 12-15 and accompanying text.
\(^3^3^9\). See \textit{supra} note 15 and accompanying text.
\(^3^4^0\). See \textit{supra} notes 16-38 and accompanying text.
G. "Fictionalizing" the Law

The bundle of suppositions that comprise the sodomy-as-lifestyle fiction infects legal culture, and thus serves to fictionalize the courts' reasoning and rulings in order to comport with these suppositions. For instance, in Bowers\textsuperscript{341} the disconnection of "homosexuals" from the rest of society reflects the sodomy-as-lifestyle fiction: Implicit in the Supreme Court's reasoning is a vision of sexual minorities as abominable sodomites with a lifestyle that is different from, and antithetical to, the idealized notion of American family values. Similarly, Padula's declaration that sexual minorities constitute a class defined by conduct reflects the supposed sameness and uniqueness of "homosexuals" based on the commission of sodomy. These cases, and their progeny — Matthews v. Marsh,\textsuperscript{342} Woodward v. United States,\textsuperscript{343} High Tech Gays v. Defense Industrial Security Clearance Office\textsuperscript{344} — illustrate the grip that the sodomy-as-lifestyle fiction has on the judicial imagination. Judicial perspective and analyses thus rely on, indeed they recycle through the legal system, the sodomy-as-lifestyle fiction that more generally envelops American society.

Additionally, the manner in which the sodomy-as-lifestyle fiction operates on and through legal culture also highlights the crucial significance of sodomy statutes in the continuing subordination of sexual minorities. As discussed above, the sodomy-as-lifestyle fiction relies on a trio of premises that portray sodomy as a common and unique lifestyle attribute that defines the difference between the sexual majority and sexual minority. Although these premises lack foundation, the fiction ultimately depends on the criminality of sodomy to justify punishment of sexual minority status and identity. The act of sodomy itself, (mis)characterized as a crime, justifies discrimination against the person, and casts him or her as a criminal. Consequently, even though state sodomy statutes are not frequently activated to prosecute sodomy as a crime, the statutes routinely are marshalled to justify oppression on a broad scale. In this way, the sodomy-as-lifestyle fiction manages to expand the reach of criminal sodomy statutes to include a whole person or an entire class of persons, even when no criminal acts are alleged or proven. In other words, the statutory condemnation of sodomy as a type of conduct effectively is transferred to sexual minorities as a type of human being. This shift transforms the object of prosecution — a type of act — into an object of persecution — a type of person.

\textsuperscript{341} 478 U.S. 186 (1986).
\textsuperscript{342} 755 F.2d 182 (1st Cir. 1985).
\textsuperscript{343} 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).
\textsuperscript{344} 895 F.2d 563 (9th Cir. 1990).
On a more process-oriented level, these cases demonstrate how the sodomy-as-lifestyle fiction diverts and distorts the adjudicative process. The sodomy-as-lifestyle fiction diverts judicial attention away from the crucial considerations: (1) that actual acts of sodomy may not be an aspect of the case before it; (2) that sodomistic acts are not unique to sexual minorities; (3) that sodomy is not the defining feature of a sexual minority lifestyle; and (4) that sodomy is an act, not a person. This diversion of attention tugs at the courts' cultural prejudices, as influenced by the sodomy-as-lifestyle fiction, and invites rejection of sexual minority equality claims with unthinking alacrity.345

As such, the nation's cultural rejection of its sexual minorities via the sodomy-as-lifestyle fiction is enforced through the law. Employing the misconceptions behind the fiction, legal rules help to marginalize and to subordinate sexual minorities both normatively and legally. In this way, dominant norms and rules construct a set of mutually reinforcing and validating frameworks. This circular dynamic forms a self-perpetuating barrier to inclusion and equality that, until recently, sealed sexual minorities off from the rest of society to impose control.346

Accordingly, the sodomy-as-lifestyle fiction within legal culture must be viewed as an illegitimate device in all of its particulars and applications. It is illegitimate because it substitutes fiction for fact. It is illegitimate because it forces unfounded and illusory commonalities

345. As discussed above, the nation's tribunals have drawn two conclusions to effectuate this result. First, the courts have concluded that same-sex love cannot have any connection to the nation's traditional ideal of family life. In terms of doctrine, the courts have concluded that same-sex love does not involve any "fundamental interest" protected by the Fourteenth Amendment substantive due process jurisprudence. Second, the courts have concluded that discrimination against sexual minorities does not merit the same type of judicial vigilance that is triggered by discrimination against racial/ethnic minorities and women. Again, phrased doctrinally, the courts have concluded that sexual minorities do not constitute a suspect classification under the Equal Protection Clause.

and distinctions upon broad categories of persons. It is illegitimate because it condones discrimination that is arbitrary and invidious. In short, it is illegitimate because it is merely an artifice used to justify historic and current inequalities based only on sexual orientation status.

V. A FIRST AMENDMENT POSTSCRIPT

As noted at the onset, the protection of expressive and associational activities provided by the First Amendment also is relevant to the status/conduct distinction in the sexual minority context.\textsuperscript{347} However, the courts have turned their backs on the role of the First Amendment in status/conduct analyses.\textsuperscript{348} Because this article accepts current doctrinal frameworks as a given, this First Amendment postscript is limited to demonstrating how status and conduct may operate as legal concepts within traditional First Amendment purviews. However, a detailed and comprehensive critique similar to the Fourteenth Amendment discussion presented above is beyond the scope of this article.

Generally, the First Amendment to the United States Constitution forbids the state from burdening expression because of its content or viewpoint, with the principal exception of calls to imminent lawlessness.\textsuperscript{349} The rule generally extends both to verbal acts (pure speech) and expressive conduct (symbolic speech).\textsuperscript{350} Likewise, the First Amendment also guards against state intrusion into the social affiliations or living arrangements between individuals.\textsuperscript{351} These two areas of doctrine — expression and association — are distinct yet intersecting because the two often overlap in human life. The First Amendment to the United States Constitution forbids the state from burdening expression because of its content or viewpoint, with the principal exception of calls to imminent lawlessness. The rule generally extends both to verbal acts (pure speech) and expressive conduct (symbolic speech). Likewise, the First Amendment also guards against state intrusion into the social affiliations or living arrangements between individuals. These two areas of doctrine — expression and association — are distinct yet intersecting because the two often overlap in human life.

\textsuperscript{347} See supra notes 39-40 and accompanying text.
\textsuperscript{348} See, e.g., supra notes 154-62 and accompanying text.
\textsuperscript{350} See United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (holding that where both "speech" and "nonspeech" components are joined in the actor's overall course of conduct, the government may restrict the "nonspeech" element of the act given a justifiable governmental interest). See generally William E. Lee, Speaking Without Words: The First Amendment Doctrine of Symbolic Speech and the Supreme Court, 15 COLUM.-VLA J.L. & ARTS 495 (1991); Melville B. Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. Rev. 29, 30-38 (1973) (discussing the emotional impact of some protected "nonspeech" expression, i.e. flag-burning).
Amendment thus encompasses two jurisprudential strands that are significant to the status/conduct distinction.

A. Expression, Politics, and Sexuality

During the 1970s, a line of cases sketched the basic contours of expression and association protections for sexual minorities. These cases arose from the attempts of university officials to prevent lesbian and gay students from forming student organizations akin to groups formed by other students. The universities argued that such organizations abetted the commission of criminal acts — sodomy — because the organizations were formed for the purpose of allowing homosexuals to congregate and fraternize. Therefore, in order to inhibit criminal behavior, the universities prohibited the homosexual students groups from forming under the auspices of the university. The courts generally rejected that argument, reasoning that the universities were striking at the wrong target if, in fact, their concern was sodomy. The courts therefore directed the universities to tailor their prohibitions more carefully toward the precise criminal conduct they sought to deter rather than interfere with the noncriminal associational activities of the presumed student sodomites-to-be.

The opinion of the United States Court of Appeals for the Fourth Circuit in Gay Alliance of Students v. Matthews exemplifies this line of cases. In Gay Alliance of Students, Virginia Commonwealth University (“VCU”) refused to register the Gay Alliance of Students (“GAS”) as an official student organization because “as a matter of logic, the existence of GAS as a recognized campus organization would increase the opportunity for homosexual contacts,” and because the “existence of GAS would tend to attract other homosexuals to VCU.” The GAS sued, arguing that the expressive and associational rights of its members under the First Amendment were infringed by VCU’s refusal. The United States District Court for the Eastern District of Virginia agreed, and the United States Court of Appeals for the Fourth Circuit affirmed.

“[T]o the extent that registration [as a student organization] would serve to encourage membership in GAS,” the Fourth Circuit ob-

352. See, e.g., Gay Lib v. University of Missouri, 416 F. Supp. 1350, 1366-69 (W.D. Mo. 1976), rev’d, 558 F.2d 848 (8th Cir. 1977), cert. denied 434 U.S. 1080 (1978); Gay Students Organization of the University of New Hampshire v. Bonner, 367 F. Supp. 1088, 1094-96 (D. N.H. 1974), modified, 509 F.2d 652 (1st Cir. 1974). Then-Associate Justice William Rehnquist dissented from the denial of certiorari in the Gay Lib case, arguing that the Court had improperly failed to defer to the university’s finding that the student group would “tend to expand homosexual behavior which will cause increased violations of [the State’s sodomy statute].”

353. 544 F.2d 162 (4th Cir. 1976).
served that such a “result would be in accord with the purposes of the [F]irst [A]mendment.” Therefore, this fear could not lend support to the action of VCU. While noting that VCU’s fear of increased opportunities for homosexual contacts was not entirely clear, the court pointed out that VCU simply could not attempt to prevent sexual minorities from congregating “so long as there is no incitement to imminent lawless action.” The court further noted that “[t]here is no evidence that GAS is an organization devoted to carrying out illegal, specifically proscribed sexual practices.” Therefore, although “Virginia law proscribes the practice of certain forms of homosexuality . . . Virginia law does not make it a crime to be a homosexual.” Relying on Robinson, the Fourth Circuit concluded that “a statute criminalizing such status and prescribing punishment therefor would be invalid.”

This opinion, crystal clear in its distinction between status and conduct in the sexual minority context, sets an example that, like Cyr, still awaits long-overdue recognition. Moreover, its clear-cut grounding in the holding of the United States Supreme Court in Robinson v. California stakes out a compelling logic. As precedent, it remains on the books. However, as exemplified by Pruitt v. Weinberger, courts in recent years have eschewed this straightforward approach to assert either outright or finessed rejections of First Amendment claims.

355. Id. at 165.
356. Id. at 166 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969)).
357. Gay Alliance of Students, 544 F.2d at 166.
358. Id. (citing Robinson v. California, 370 U.S. 660 (1962)).
361. In Pruitt, as noted earlier, the United States Army instituted the discharge of a service member solely on the basis of words she uttered acknowledging lesbian status. The Army, in fact, made no allegation or showing of criminal conduct, such as sodomy. Indeed, the “conduct” giving rise to the status or identity was the statement acknowledging sexual minority status or identity.

In Pruitt, the court recognized that the First Amendment protected Pruitt’s speech, but asserted an Orwellian distinction to avert the logical conclusion that Pruitt was discharged for being a homosexual, not for the content of her utterances. Thus, in Pruitt the court acknowledged that the action against Pruitt was based on status, not conduct. Yet the court asserted a distinction between the statement acknowledging status and the status itself that is elusive because the statement was the sole indicia of status. In other words, because the statement was the sole basis for the action against the status, the action also was against the statement.

Logically, actions based on expressions of disfavored status are actions calculated to suppress expressions of disfavored status. Such actions therefore amount to content-based or viewpoint-directed regulations of speech, which of course are viewed with suspicion under traditional First Amendment principles. Consequently, Pruitt notwithstanding, the status/conduct distinction assumes First Amendment significance in cases that present facts wherein lawful, and perhaps even constitutionally protected, speech is used as the predicate for arbitrary discrimination that necessarily burdens both expression and status.
Even though the recent opinions have failed to grasp the overlap of the First Amendment with the status/conduct distinction, the Fourth Circuit's decision in Gay Alliance of Students is instructive because the case illustrates the very same status/conduct analytical dynamic validated in recent Fourteenth Amendment cases. In Gay Alliance of Students, the university officials imputed conduct from status; the university's position folded pure status into conduct because it equated sexual minority status with a specific act — sodomy. Having effectively defined sexual minorities as a class defined by conduct, the university officials proffered a conduct-based rationale to justify their burdening of lesbian and gay status. Moreover, the university officials sought to impose the burden on the entire group that held the disfavored status, without any attempt to prove proscribable activity on the part of any GAS members. Although the courts' recent equal protection rulings reward this type of official intemperance, the 1970s First Amendment cases, as exemplified in Gay Alliance of Students, teach that the First Amendment forbids the punishment of persons identified as members of sexual minorities simply because such status may indicate that such persons might engage in, or might have engaged in, sodomy.

Moreover, the 1970s cases also indicate a rarely explored nexus between status, identity, expression, conduct, politics, sexuality, and the First Amendment. This nexus remains under-recognized, but was understood by the Fourth Circuit, which unambiguously confirmed that the "very essence" of the First Amendment is to protect individual choices regarding associational and expressive activity. This nexus has been understood by other courts as well.

In Gay Law Students Association V. Pacific Telephone & Telegraph Co., the California Supreme Court considered this nexus between the status/conduct distinction and the values or interests underlying the First Amendment. In Gay Law Students Association, the telephone company was charged with discriminating against applicants and employees on the basis of sexual orientation status, as well as on the basis of expressive and associational activities that revealed or identified that status. The California Supreme Court held that the discrimination violated the California Constitution and the California Labor Code.

Because the California Labor Code specifically prohibited interference with political activity, the court's discussion of this point il-

362. Gay Alliance of Students, 544 F.2d at 164-66.
363. 595 P.2d 592 (Cal. 1979). Although technically based on the Unruh Act, a state civil rights statute barring discrimination due to political activity and other factors, the analysis is germane to equivalent First Amendment concerns. See also infra notes 368-70 and accompanying text.
luminates the nexus between identity and expression. The court first explained that a principal barrier to civil rights for sexual minorities was the "common feeling" that homosexuals must remain concealed in order to escape discrimination. The court then reasoned that "one important aspect of the struggle for equal rights is to induce homosexuals to 'come out of the closet,' [to] acknowledge their sexual preferences, and to associate with others in working for equal rights." The revelation of sexual minority identity or status, in other words, was part of the "coming out" process that helps to make sexual minorities socially visible and thus able to organize politically. Observing that such revelations frequently were entwined with political advocacy or action because sexual minority identity is a highly politicized issue in this society, the court concluded that the statute barred discrimination against persons who had self-identified as gay or lesbian on the basis of such identification.

Like the statute at issue in Gay Law Students Association, the First Amendment is designed to protect expression, and especially political expression, whether verbal or physical, and this protection continues so long as the expressive activity does not present a clear and present danger of real and imminent harm. Thus, even though the facts of Gay Law Students Association involved a state statute that barred discrimination on the basis of political activity, the reasoning is equally applicable in the First Amendment setting. Indeed, the Gay Law Students reasoning would seem even more compelling today, following the invocations of "cultural war" against sexual minorities that punctuated the 1992 political campaign season and that still re-

365. Id.
367. This reasoning captures the essence of sexual minority politics from the pioneering organizational efforts of Harvey Milk, who was the first openly gay or lesbian person in American history to become an elected official. See RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK (1988 ed.).
368. See supra notes 349-50 and accompanying text.
369. See, e.g., Adolph Coors Co. v. Wallace, 570 F. Supp. 202, 209, n.24 (N.D. Cal. 1983) (stating that the First Amendment protected the members of a sexual minority organization from forced disclosures of their status via discovery requests when the litigation involved the efforts of a hostile employer to identify sexual minorities for discriminatory treatment).
verberate in on-going campaigns for enactment of exclusionary laws modeled on Colorado's Amendment Two.\textsuperscript{370}

Naturally, under \textit{Bowers}, acts of same-sex sodomy would not constitute protected political speech because the case permits states to criminalize same-sex sodomy.\textsuperscript{371} However, the cases show that individual gay or lesbian status is revealed through expressive conduct that is not specifically sodomy. It is this non-sodomistic behavior that amounts to "coming out," and that attracts discriminatory attention. For instance, in \textit{Ben-Shalom v. Secretary of the Army},\textsuperscript{372} and \textit{Watkins v. United States Army},\textsuperscript{373} the status was disclosed through truthful self-revelations. In \textit{Matthews}, the revelation occurred through disclosure of active involvement in a group devoted to sexual minority issues. In \textit{Pruitt} and \textit{Meinhold v. United States Dept. of Defense},\textsuperscript{374} the revelations occurred through press interviews and reports. In \textit{Woodward v. United States},\textsuperscript{375} the status was revealed through a visit to the Officers' Club with a known homosexual. In \textit{High Tech Gays v. Defense Industrial Security Clearance Office},\textsuperscript{376} the status was perceived through passive membership in gay-identified organizations. Thus, the conduct or behavior that discloses sexual minority status oftentimes is activity that properly must be viewed as falling within the ambit of the First Amendment. In time, the nexus between status, identity, expression, politics, and sexuality will become undeniable.

B. \textit{ASSOCIATION, "CHOICE," AND "LIFESTYLE"}

The associational guarantees of the First Amendment have taken three basic forms.\textsuperscript{377} Economic associations, such as labor unions or trade and professional organizations, are protected associational units.\textsuperscript{378} Additionally, political, religious, or social associations, such as activist, church, and community groups, are fully protected entities.\textsuperscript{379} Finally, the First Amendment also guards intimate associations based on personal bondings.\textsuperscript{380} Sexual minority equality cases may implicate more than one of these categories simultaneously.\textsuperscript{381}

\textsuperscript{370.} See Michael Murphy, \textit{State Called Key in Gay-Rights Fight}, \textsc{Phoenix Gazette}, July 15, 1993, at B1 (reporting that a "national conservative lobbying group has aligned itself with a Phoenix man's effort to launch a Colorado-style anti-gay rights initiative").
\textsuperscript{371.} See supra notes 232-49 and accompanying text.
\textsuperscript{372.} 847 F.2d 1329 (9th Cir. 1988), \textit{vacated}, 875 F.2d 699 (9th Cir. 1989).
\textsuperscript{373.} 826 F.2d 722 (7th Cir. 1987).
\textsuperscript{374.} 808 F. Supp. 1453 (C.D. Cal. 1992), \textit{remanded} by 991 F.2d 808 (Fed. Cir. 1993).
\textsuperscript{376.} 895 F.2d 563 (9th Cir. 1990).
\textsuperscript{377.} NOWAK \& ROTUNDA, supra note 226, § 16.41 at 1063.
\textsuperscript{378.} Id.
\textsuperscript{379.} Id.
\textsuperscript{380.} Id.
\textsuperscript{381.} See infra notes 395-96 and accompanying text.
It is important to realize that, under each category, the First Amendment protects behavioral choices or conduct (again, short of sodomy). Under the third category, the First Amendment specifically protects behavioral choices regarding the formation of intimate associations and the ordering of living arrangements. Indeed, the intimate association strand of the First Amendment effectively protects against "lifestyle" discrimination.\textsuperscript{382} This protection therefore is akin to the protection that, but for \textit{Bowers}, might have been afforded to sexual minorities under substantive due process privacy principles. However, as doctrine, this protection is grounded in First Amendment jurisprudence that is well established independently of \textit{Bowers} and that shelters from state interference the choices that humans make about living arrangements generally.\textsuperscript{383} Because the decision of the Supreme Court in \textit{Bowers} prevents sexual minorities from enjoying privacy under the substantive due process rules of the Fourteenth Amendment, the protection of intimate associations provided by the First Amendment is an especially vital alternative for sexual minorities; the First Amendment views with relative skepticism official discrimination based on personal choices over basic living arrangements and thus may protect what the courts have deemed is unprotected by the Fourteenth Amendment.\textsuperscript{384}

The significance of intimate association jurisprudence under the First Amendment was shown most recently in \textit{Shahar v. Bowers},\textsuperscript{385} wherein the district court expressly confirmed that a lesbian relationship "constitutes a constitutionally-protected intimate association."\textsuperscript{386}

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\textsuperscript{382} Although the term is rarely defined, "lifestyle" implicates the status/conduct distinction because it conjures visions of unspecified, yet lurid, doings and presumptively associates those visions to a type of human. Thus, lifestyle insinuates sodomy. Of course, as previously discussed, the lifestyle framework is incoherent: The sodomy-as-lifestyle fiction manufactures a cultural and judicial construct that is impossible to sustain either factually or conceptually when subjected to critical analysis. \textit{See supra} notes 330-40 and accompanying text.

\textsuperscript{383} \textit{See}, e.g., Katie Watson, \textit{An Alternative to Privacy: The First Amendment Right of Intimate Association}, \textit{19 Rev. L. & Soc. Change} 891 (1992); Kenneth L. Karst, \textit{The Freedom of Intimate Association}, \textit{89 Yale L.J.} 624 (1980) (discussing the growth of First Amendment protection as that amendment came to encompass speech and non-speech expression as well as associational considerations).

\textsuperscript{384} \textit{Compare} \textit{Moore v. City of East Cleveland}, 431 U.S. 494, 498-500 (1977) (striking down a city ordinance because it discriminated between members of a single family) \textit{with} Village of Belle Terre v Boraas, 416 U.S. 1 (1974) (upholding a similar ordinance because it affected only unrelated individuals). This distinction illustrates the way in which definitions of "family" and the exclusion of sexual minorities from those definitions may serve as a cornerstone for far-reaching consequences. Nonetheless, the state's regulation of living arrangements through its broad zoning powers must be rational, which means this power cannot be used to discriminate arbitrarily. \textit{Cleburne v. Cleburne Living Center, Inc.}, 473 U.S. 432, 447-50 (1985).


\textsuperscript{386} \textit{Id.} at *3.
Robin Shahar graduated sixth in her class at Emory Law School and was an editor of the law review. After completing a summer clerkship in the office of the state attorney general, she was offered a permanent position, which she accepted. However, the attorney general withdrew the offer when he discovered that Shahar was planning a "marriage" ceremony with another woman. The court rejected the argument that the relationship was unprotected because it did not "involve a heterosexual relationship connected with (or simulating) . . . a family" but nonetheless upheld the attorney general’s withdrawal of the offer because the court failed to comprehend the status/conduct implications entailed by this analysis. More specifically, the ruling’s language and reasoning fairly tracked the status/conduct controversies in the military cases. Therefore, this opinion also illustrates the way in which the protection of intimate associations may be vitiated through judicial misapprehensions about status/conduct issues.

Basically, the State argued that the offer was withdrawn because Shahar’s wedding plans were “inconsistent” with Georgia law, and therefore she was engaged in “particular activity” that was incompatible with the contemplated employment. The court agreed, concluding that assistant attorneys general “must take great pains to refrain from conduct which could be interpreted as contrary to” the law, or contrary to the position of the Attorney General’s office on a particular issue. Therefore, the court concluded that the defendant’s interest in “the efficient operation of the [office] outweigh[s] plaintiff’s interest in her intimate association.

Naturally, the court noted that same-sex unions did not violate any laws. Nonetheless, the specter of “sodomy” clouded the analysis — even though acts of sodomy were neither alleged nor proven nor admitted, the imputed commission of sodomy was deemed incompatible with employment as an assistant attorney general. In effect, Shahar lost her job because her status as a lesbian, which was revealed through her same-sex marriage plans, gave rise to an imputation of sodomitical (mis)conduct. Of course, this type of imputation is precisely what the status/conduct distinction prohibits.

Thus, as Shahar demonstrates, the protection of intimate associations and lifestyle choices also shows how the First Amendment over-
laps with the status/conduct distinction. Because living arrangements, or lifestyle, often are the “conduct” through which lesbian and gay status is noted culturally, the First Amendment effectively seeks to protect status that is deduced from lifestyle. Accordingly, the status/conduct distinction plays a real role in First Amendment law.

C. THE INTERSECTION OF EXPRESSION AND ASSOCIATION

Although the expression and association strands of the First Amendment are distinct, the strands may overlap in their applications to particular facts. For instance, same-sex hand-holding is behavior that is not criminal and that, generally speaking, is not proscribable. Yet, same-sex hand-holding may disclose sexual minority status and trigger acts of discrimination against the individual(s) so perceived. However, hand-holding may be protectable under each strand of First Amendment presented above.

First, same-sex hand-holding clearly may be political expression, as illustrated by the hand-holding “kiss-ins” staged by activist groups as a means of helping to overcome the marginalization, and consequent disempowerment, of sexual minorities. In these kiss-ins, willing adult participants stage non-sodomitical acts of same-sex intimacy in order to help overcome the invisibility of sexual minorities. In this sense, the hand-holding activity must be understood as a quintessential political expression that is intended and understood as political speech. Therefore, such political speech may not be suppressed absent a clear and present danger of real and imminent harm. At the same time, same-sex hand-holding — as distinct from sodomy — may also trigger First Amendment protection under the intimate association strand of the analysis because it is related to associational activities that present no threat to society. Thus, the expression and association components of the First Amendment may intersect in their applications, and, in a principled analysis, properly may align to afford protection for sexual minorities where none might otherwise be extended.

395. In recent years the bisexual, lesbian, gay activist group, Queer Nation, has engaged in “kiss-in” and hand-holding demonstrations to dramatize and protest subordination based on sexual orientation. See PARTNERS, Summer 1992, at 8.

VI. GAYS IN THE MILITARY: A STATUS/CONDUCT CASE STUDY

On July 16, 1993, one day after President Clinton's self-imposed deadline for announcing his much-heralded and long-awaited policy on sexual minorities in the military, the White House explained that the delay in its promulgation was caused by "unresolved legal questions," and said that the policy would be "formally unveiled . . . as soon as the Justice Department" completed its review.397 Behind the scenes, United States Attorney General Janet Reno had warned the President that the proposed policy might not be "restrictive enough to satisfy military leaders without running afoul of the Constitution."398 In her final memo to the President, the Attorney General registered little more than a formal "OK."399

Barely one page long, the memo is a masterpiece of subtext. Opening with the correct observation that the "Supreme Court has repeatedly stated that the courts must review decisions by the President and by military commanders deferentially," the memo observes that the change in policy "will make decisions made under the policy appear fairer, more even-handed, and conduct-based, and therefore easier to defend."400 The Attorney General never suggests, or attempts to suggest, that the policy is in fact constitutional. The Attorney General merely states that, based on appearances and on the Supreme Court's ideological bent, the policy will be "easier to defend." Thus, never once addressing the policy substantively or on its merits, the memo is aptly titled: "Defensibility of the New Policy on Homosexual Conduct in the Armed Forces." One can only speculate why Attorney General Reno, with a widely admired reputation for not mincing words, would hedge to such a degree in this instance. However, one need not speculate why the new policy is unconstitutional under a principled application of the status/conduct distinction.

A. THE STATUS/CONDUCT DISTINCTION: THE TEXT

Considering the time, energy, and resources invested in the effort to make military policy more inclusive, the results reached by the President and the Department of Defense are relatively puny. The reforms come packaged as a two-page "policy" accompanied by a four-
page set of “policy guidelines.” Because the ink is barely dry, no cases or decisions exist to guide an understanding of what the policy portends. The record consists entirely of the text (and sub-text) of the policy and its guidelines.

1. The Policy

The text of the policy is much ado about nothing. The new policy states that, as before, “[s]ervice members will be separated [from military service] for homosexual conduct.” Additionally, and substantially as before, “homosexual conduct” is defined as a “homosexual act, a statement by the service member that demonstrates a propensity or intent to engage in a homosexual act, or a homosexual marriage or attempted marriage.” The new policy further defines a “homosexual act” in two ways. The first definition extends to “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.” This definition thus covers “primary” contacts. More broadly, under the new policy a “homosexual act” also includes “any bodily contact which a reasonable person would understand to demonstrate” a “propensity” toward “homosexual acts.” This second definition thus extends to “secondary” contacts. Finally, as before, “a statement that he or she is a homosexual creates a rebuttable presumption that the service member is engaging in homosexual acts or has a propensity or intent to do so.”

2. The Guidelines

The guidelines state unambiguously that “[s]exual orientation will not be a bar to service.” But, the guidelines contain a caveat. The caveat provides that a same-sex or bi-sex sexual orientation will not bar service “unless manifested by homosexual conduct.” The guidelines amplify this “manifestation” notion and its relationship to “homosexual conduct” by explicitly identifying “handholding” or “kissing” as being sufficient manifestations to bar military service in “most circumstances.” However, “association with known homosexuals, presence at a gay bar, possessing or reading homosexual publications,

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402. Id. at 2.
403. Id.
404. Id.
405. Id.
407. Id.
or marching in a gay rights rally in civilian clothes will not, in and of themselves" suffice.\textsuperscript{408} Thus, the net result of the new policy guidelines is to preclude inquiries or investigations solely to ascertain the sexual orientation of an individual. However, a military commander may still act against a service member when "credible information" suggests "homosexual conduct."

B. THE STATUS/CONDUCT CONUNDRUM: THE SUBTEXT

The core element of the new policy guidelines, in keeping with the apparent emphasis on conduct, is "homosexual conduct." This element of "homosexual conduct" can be broken down into the three types of "homosexual conduct" specified in the policy and guidelines: 1) "homosexual acts;" 2) statements that demonstrate "a propensity or intent to engage in homosexual acts;" and 3) "homosexual marriage or attempted marriage."\textsuperscript{409} Each is considered immediately below in light of the status/conduct distinction.

1. "Homosexual Acts"

This first type or category of "homosexual conduct" is not limited to "sodomy." Instead, it encompasses two general species of "acts." First, "any bodily contact . . . for the purpose of satisfying sexual desire." Second, "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage" in the first species of "bodily contacts." Each of these two types of "bodily contacts" are considered below.

a. "Primary" Contacts — Gratification

Although \textit{Bowers} permits same-sex sodomy to be criminalized, the opinion does not provide a basis for a wholesale ban on any bodily contact that might satisfy human needs for intimacy. \textit{Bowers} emphatically was anchored to the historic criminalization of sodomy, a history that simply does not exist for this more sweeping prohibition against "any bodily contact" of an intimate nature. The new military policy, in other words, reaches beyond even the loose license granted by \textit{Bowers}. This overbreadth suggests that the underlying purpose of the policy is not the prohibition of sodomistic acts, as proscribed by the Uniform Code of Military Justice,\textsuperscript{410} because the policy simply is not focused on locating instances of criminal conduct. The policy's "conduct" sweep is so broad that it shows a concern for locating persons

\begin{footnotes}
\item[408] Id.
\item[409] Id.
\end{footnotes}
rather than acts. The only logically deducible purpose for such a broad regulatory sweep is to locate members of sexual minorities.\textsuperscript{411} Despite its “conduct” mantra, the new policy’s treatment of primary bodily contacts leaves the status/conduct status quo intact.\textsuperscript{412}

b. “Secondary” Contacts — Propensity

The secondary type of “homosexual acts” are defined as those “which a reasonable person would understand to demonstrate a propensity” for engaging in the primary type of bodily contact.\textsuperscript{413} In effect, this secondary type of contact is merely something that might imply that something else — a primary contact — might occur. Ironically, this language harkens back to the very inception of the status/conduct distinction: Both Robinson and Powell prohibited penalization based on “propensity” because “propensity” is status. Of course, the requirement of a secondary contact does not mean that “conduct” is the object of the penalization. The policy, on its face, focuses on “propensity.” In other words, the only type of “conduct” defined as constituting a secondary contact is the type that indicates “propensity.” Therefore, “propensity” is the true object of the penalization, which means that status is the actual and ultimate target of penalization under the new guidelines.

Even more problematic is the guidelines’ further specification that this second species of “homosexual acts” could include “handholding” and “kissing.”\textsuperscript{414} Additionally, executive branch officials commented to the press that “living in a one-bedroom apartment with a member of the same sex” could be considered “suggestive” behavior that would fall within the “propensity” net.\textsuperscript{415} Even more telling is the suggestion that members of sexual minorities “could display a photograph of a partner, but if asked, he or she would be expected to deflect inquiries about the relationship.”\textsuperscript{416} These comments reveal that the object of the policy and guidelines is sexual minority status.

\textsuperscript{411} The status-based focus of this new scheme crystallizes when viewed in the context of its stated purpose: avoidance of disruptions to the military mission. The President’s point is that his policy is conduct-based because it dispenses with the previous policy’s assertion of pure status as being \textit{per se} disruptive. However, the policy does not require any conduct that actually disrupts as a predicate for adverse action. All the new policy requires is knowledge of a service member’s sexual minority status, which is now regarded as disruptive. Thus, the new policy targets and penalizes status.

\textsuperscript{412} \textit{See supra} notes 223-25 and accompanying text.

\textsuperscript{413} Secretary of Defense, Policy Guidelines on Homosexual Conduct in the Armed Forces (July 19, 1993) (on file with author).

\textsuperscript{414} Secretary of Defense, Policy Guidelines on Homosexual Conduct in the Armed Forces (July 19, 1993) (on file with author).


\textsuperscript{416} \textit{Id}. 
itself because they contemplate the effacement of this specific status rather than the prevention or punishment of specific acts.417

2. "Statements" Demonstrating "Propensity"

The second type of "homosexual conduct" is pure speech — statements that would lead a reasonable person to think that an individual might at some point and in some place perform an actual act. This category, like the secondary bodily contacts category, is couched in classical status/conduct language.418 Specifically defined in terms of a "statement," this category of "homosexual conduct" removes the need for some specific "act" or conduct as a predicate for action against the individual. This category of "homosexual conduct" is especially insidious because it expressly dispenses with physical, much less sexual, conduct, and, instead targets both pure speech as well as pure status.419


The final category of "homosexual conduct" set out in the policy is "a homosexual marriage or attempted marriage."420 This category entails physical conduct, but does not focus on sodomy or on any sort of sexual, much less criminal, behavior. Of course, it must be noted that no such thing as same-sex "marriage" actually exists because every jurisdiction in the country employs statutes to preclude such marriages from coming into legal existence. Perhaps, the policy's reference to "marriage" signifies a "committed relationship" akin to a "marriage" that may, or may not, have been commemorated or cele-

417. Palmore v. Sidoti, 466 U.S. 429, 431-34 (1984) (holding that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Moreover, as noted by the district court in High Tech Gays, such acts have never been prohibited by any jurisdiction in the nation's history, and therefore the United States Supreme Court's rationale for validating sodomy prohibitions lends support to a finding of unconstitutionality here. See supra notes 284-94 and accompanying text. Likewise, as noted earlier, hand-holding has been used intentionally as political expression, and thus, in that context, properly may not be proscribable absent an accompanying call to imminent lawlessness. See supra notes 395-96 and accompanying text. Therefore, in addition to its status/conduct flaws, the new policy's treatment of secondary bodily contacts may be unconstitutional on other grounds as well.

418. Again, both Robinson and Powell specifically rule out "propensity" and "intent" as sufficient bases for governmental action purportedly based on an individual's "conduct." See supra notes 16-38 and accompanying text.

419. This category is more accurately described as "homosexual speech" and is properly understood as intending to punish expression based on the content or viewpoint of such speech. Therefore, in addition to status/conduct problems, this category of so-called "conduct" may trigger constitutional questions over the validity of the policy's effort to regulate or burden expression as well. See generally supra notes 347-70 and accompanying text.

brated via some sort of event, as in Shahar. If so, then the policy creates tremendous constitutional problems.

First, no state actually proscribes the existence of committed same-sex relationships. Moreover, even considering the overall conservative ideology of the Justices presently sitting on the United States Supreme Court, it seems unthinkable that an absolute prohibition on the mere existence of committed same-sex relationships could be upheld under the First or Fourteenth Amendments. Additionally, it seems equally unthinkable that an absolute ban on "peaceful or lawful" gatherings to commemorate or celebrate committed relationships could be upheld under the protection of an individual's right to associate provided by the First Amendment. If such marriage were recognized under the auspices of organized religion, then the First Amendment guarantee of freedom of religion could create additional problems for the policy. If the ("attempted") conduct is an expressive act intended to denounce the exclusionary rules of the state that creates and maintains the institution of marriage, then the Expression Clause of the First Amendment also could create problems for the policy. Finally, numerous localities have enacted "domestic partnership" laws specifically to recognize the fact that committed relationships embody core "family values" that the nation purports to prize and reward, and at least one state may soon recognize same-sex marriage as such. Therefore this third category of "homosexual conduct" may violate the Constitution in various ways.

421. See generally Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 737-40, 752-82 (1989) (discussing both the fact that the judiciary unhesitantly struck out against laws oppressive of First Amendment freedoms as well as the First Amendment freedom to define oneself in the sexual minority context); Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 545-74 (1983) (discussing the constitutional and jurisprudential backdrop behind the notions of interpersonal relationships and family); Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 5-22 (1976) (arguing that the United States Supreme Court remain vigilant against discrimination through application of equal protection safeguards); Louis Henkin, Privacy and Autonomy, 74 Colum. L. Rev. 1410 (1974) (discussing the constitutional tension between private rights and the public good).


424. See Barbara J. Cox, Same-Sex Marriage and Conflicts of Laws: If We Marry in Hawaii, Are We Still Married When We Get Home (forthcoming) (Aug. 1993) (on file with author).
C. THE REBUTTABLE PRESUMPTION PROVISO

The new policy also gives rise to a highly attenuated presumption of “conduct” based on “statements.” That is, the policy asserts that the “statement” indicates “propensity” which in turn gives rise to a presumption that the service member is “engaging” in “homosexual acts.” This three-step inference cannot disguise the fact that the ultimate end actually is about status. In other words, statements that reveal sexual orientation status create a presumption about status based on sexual orientation. Then, and only then, do questions of “homosexual conduct” arise because then, and only then, do perceptions of sexual minority status or identity attach.

In effect, the opportunity to rebut the presumption of “conduct” vitiates the constitutionality of the policy because this proviso reflects the caveat of the previous policy. The caveat in the previous policy exempted service members with a sexual majority status from punishment for same-sex conduct after showing that they were not homosexual. Thus, the rebuttal proviso continues the practice of allowing sexual majority service members to “prove” that they really do not possess the status, or the “propensity” for “homosexual conduct,” that the policy equates with sexual minorities. The opportunity to rebut, in short, is in fact an opportunity to rebut inferences about sexual minority status drawn from self-revelatory statements so that the behavior automatically imputed to sexual minorities may be excused as imputed to the sexual majority.

D. A NOTE ON “RATIONALITY”

As discussed above, the courts typically have opted for the lowest level of equal protection scrutiny embodied in the “rational relation” test. As also noted above, the courts have begun to question how a policy refuted repeatedly by the military’s own studies could be “rational” as a matter of law. The new military policy will have to satisfy the basic question of rationality as well. However, the new policy carries added burdens.

First, the proponents of the new policy will be required to rationalize the political balancing act embodied in the policy itself. The policy expressly recognizes that sexual minorities are and will be in the military, yet asserts without qualification that homosexuals are “incompatible” with the military ideal. Additionally, the policy mandates that the actual presence of these incompatible service members can-

426. See supra notes 250-314 and accompanying text.
427. See supra notes 203-15 and accompanying text.
not serve as grounds for discharge. In other words, the policy at once condemns and accepts sexual minorities in the military. This paradox is rational only when filtered through an understanding of the laborious political process that birthed it. However, this policy is irrational in logical terms because it accords a safe haven within the military to a group that assertedly is incompatible with the well-being of the military.

Second, this policy has the added burden of imposing a duty of deception on members of sexual minorities within a culture that otherwise demands strict adherence to the ideals of honor and duty. Indeed, the popular name of the new policy — "Don't Ask, Don't Tell" — sets the tone for the conspiracy of silence and pretense contemplated by this compromise. Additionally, by expecting and demanding that members of sexual minorities "deflect" inquiries about status to conceal important aspects of their lives, personalities, and identities, the policy creates a duty to participate in officially sanctioned deception. In turn, this institutionalized deception invites the formation of an underground group within military culture defined by dishonesty. The intentional cultivation of deception and dishonesty embodied in the policy makes its rationality extremely suspect because deception and dishonesty generally are recognized as vices, not virtues.

Finally, the proponents of the policy must rationalize the numerous statements issued by President Clinton and other high-ranking officials recognizing the honorable and courageous military service rendered by sexual minority service members during the past several decades. Most remarkably, President Clinton emphasized five "central facts" in the announcement of the new policy. First, the President acknowledged that, "notwithstanding the ban, there have been and are homosexuals in the military service who serve with distinction." Second, he recognized that "there is no study showing [sexual minorities] to be less capable or more prone to misconduct than [sexual majority] soldiers." Third, he reported that "misconduct is already covered by the laws and rules which also cover activities that are improper by [sexual majority] members of the military." Fourth, he observed that "the ban has been lifted in other nations and in police and fire departments in our country with no discernible negative impact on unit cohesion or capacity to do the job." Fifth, "even

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428. See Remarks by the President at the National Defense University, Fort McNair, Washington, D.C. (July 19, 1993) (announcing the new policy) (on file with author).
429. Id. at 2.
430. Id.
431. Id.
432. Id.
if the ban were lifted entirely, the experience of other nations and police and fire departments in the United States indicates that most [members of sexual minorities] would probably not declare their sexual orientation openly. 433 Having had its Commander in Chief recite these five “central facts,” the question becomes why the nation needed any type of policy specifically addressed to a minority group that, in the President’s own words, has shown itself to be equal to the majority in terms of “suitability” for military service.

The President therefore unwittingly confirmed what his policy is, and what it is not — the policy accommodates bigotry at the expense of rationality. Indeed, the President’s five “central facts” indicate that the policy serves absolutely no purpose other than to appease majority bias and prejudice regarding sexual orientation status because the President’s facts conceded the proper conduct and capable performance of sexual minorities as they have served throughout the decades. Moreover, the President acknowledged that any real problems were already covered by pre-existing “laws and rules” that applied equally to the sexual majority. Therefore, based on the President’s own remarks, the “compromise” is but a euphemism for culturally and politically dominant bigotries. 434 This tacit admission is critical to rationality issues because state rules predicated on and catering to bigotry are not rational as a matter of law. 435

Taken as a whole, the President’s “central facts” demonstrate that the new policy has nothing to do with the “conduct” of, or with the ability of, sexual minorities. In fact, the President’s remarks confirm what various observers already had concluded: That the controversy is neither about sexual minorities nor about military cohesion. Instead, the controversy centers around the reaction of entrenched forces within the military establishment to the growing visibility of gay men and lesbian women in American society at large.

E. The Bottom Line

Finally, it must be noted that the bottom line of the new policy is identical to that of its predecessors. The admitted brinkmanship of
this policy is geared toward targeting members of sexual minorities without appearing to be unconstitutional. Despite any appearances to the contrary, however, the policy, like its predecessors, is unconstitutional because it (1) violates the established distinction between status and conduct; (2) infringes on First Amendment rights; (3) is irrational; and (4) lends the government's imprimatur to virulent private biases. If the courts allow the policy to stand, then they will merely be proving the Attorney General's cynical, but perhaps prescient, suggestion that deference and appearance will allow the triumph of prejudice.436

Moreover, this bottom line did not change in the codified version of the policy. Senator Sam Nunn introduced an amendment to the National Defense Authorization Act for fiscal year 1994,437 which allows the Secretary of Defense to reinstate questioning regarding sexual orientation at time of enlistment or recruitment whenever he or she deems it “necessary.” This grant of broad discretionary authority sets the stage for the military to renege on the “don't ask” part of the compromise, which was the sole improvement of President Clinton's policy. Because the statute does not define “necessary,” this change ultimately sets the stage for an arbitrary reintroduction of intrusive questions that facilitate discrimination on the basis of sexual orientation status. The codification also includes a laundry list of conclusory “findings” apparently intended to enhance the policy's “appearance” of constitutionality. However, the bill expressly retained the caveat that excuses same-sex conduct when performed by a nonhomosexual. For these reasons, the codified version of the compromise remains fixated with status, and therefore is as unconstitutional as were its predecessors.438

CONCLUSION

The status/conduct distinction is a well-established feature of constitutional law and has been recognized as applicable in sexual orien-

436. See supra notes 397-400 and accompanying text.
438. The same conclusion applies with equal force to the newest version of the regulations, which the Department of Defense hastily issued on December 22, 1993 in reaction to the appellate opinion in Steffan. See supra notes 182-95 and accompanying text. Though the newest regulations purport to further de-emphasize “status” in favor of “(mis)conduct,” they simply reiterate the substance of the “don't ask, don't tell” compromise policy. See Secretary of Defense, Directives Implementing the New DOD Policy on Homosexual Conduct in the Armed Forces (Dec. 22, 1993) (on file with author). Therefore, these new “directives” also will be challenged as unconstitutional. Art Pine, Military Policy on Gays Issued; Lawsuit Joined, L.A. TIMES, Dec. 23, 1993, at A1. However, the continuing status/conduct incoherence of the various versions of the policy seems to be producing a softening of the policy as applied. See Art Pine, Pentagon Offers Some Dismissed Gays a Chance to Seek Review, L.A. TIMES, Jan. 8, 1994 at A16.
tation contexts. The status/conduct distinction also is wholly independent of substantive due process and of equal protection principles generally: The distinction simply and absolutely bars status punishment and discrimination. Although the status/conduct distinction has not yet been used effectively to uphold sexual minority equality claims, the recent and continuing controversy over the right of openly lesbian, gay, and bisexual Americans to serve in the military has focused attention on it, and on the broader topic of the disparate treatment dispensed to sexual minorities in law and society. Perhaps in this way the attention of courts finally will be focused on the merits of the claims to social inclusion and civic equality, including military service, posed increasingly in recent times by sexual minorities. Perhaps the United States and its laws soon will come to terms with a fundamental truth: That members of sexual minorities, like members of the sexual majority, are individuals who live individual and varied lives and lifestyles and who merit the same respect and dignity under the Constitution and laws of the nation accorded to the sexual majority.