

**CHANGES IN LATITUDES, CHANGES IN ATTITUDES:
IS THERE A ROLE FOR CANADIAN JURISPRUDENCE IN
ENDING DISCRIMINATION IN THE U.S. MILITARY?**

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I. INTRODUCTION

In 1992, Canada lifted its ban on the military service of gay men and lesbians.¹ In 1993, the U.S. Congress enacted legislation

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1. CBC News, *Indepth: Same Sex Rights, Canada Timeline*, http://www.cbc.ca/news/background/samesexrights/timeline_canada.html (last visited Nov. 30, 2005); see also, Aaron Belkin & Jason McNichol, *Homosexual Personnel Policy in the Canadian Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 56 INT'L J. 73, 77 (2001). The authors acknowledge the fluid terrain of identity politics and the fact that U.S. military policy does refer to bisexuality. Herein the authors use the descriptors "gays in the military," "gay men and lesbians," or "gays and lesbians" as they believe that the terms more accurately reflect the historical, as

making the disclosure of homosexuality by a servicemember grounds for dismissal.² How is it that the United States and Canada, two nations, in many ways so similar,³ have reached such divergent places in terms of social policies regarding gays and lesbians? In this Article, the authors explore the Canadian experience, both legal and societal, around gays and lesbians in the military and ask whether that experience might ultimately play a role in ending the U.S. policy that prohibits gays and lesbians from openly serving in the military.⁴

The authors write from the position that any policy prohibiting military service solely on the basis of sexual orientation is a discriminatory policy that should be eliminated. Even those who have opposed permitting openly gay and lesbian servicemembers acknowledge that, throughout history, gay men and lesbians have served with distinction.⁵ And, while the authors agree with the various constitutional arguments that have been made regarding the U.S. policy,⁶ the authors' contention is much simpler. While the military must, of course, discriminate on the basis of some characteristics (e.g., physical and mental ability), discrimination on the basis of sexual orientation is unwarranted, especially in an organization that rests its very existence on claims of freedom and democracy.⁷

well as contemporary, framing of the issue to the public.

2. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (1993).

3. See Similarities & Differences Between Canada & the United States, <http://www.unitednorthamerica.org/simdiff.htm> (last visited Oct. 27, 2005) (listing interesting comparisons). The goal of this website is the promotion of a stronger integration of the two nations.

4. What the authors do not offer in this Article is an assessment of the degree to which changes in Canadian military policy have been successful. Interested readers are referred to an excellent work on the subject: Belkin & McNichol, *supra* note 1, at 73-88.

5. Ray Rivera, *An About-Face on Gays in the Military: Md.'s Gilcrest Voted for 'Don't Ask, Don't Tell' in 1993, but Now Rejects Policy*, WASH. POST, June 18, 2005, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/17/AR2005061701582.html>.

6. See, e.g., Ann Rostow, *Lawsuit Challenging Military Policy Gets Hearing in Federal Court*, TXT NEWSMAGAZINE, July 15, 2005, <http://www.sldn.org/templates/press/record.html?section=5&record=2292> (discussing arguments made against government's motion to dismiss in *Cook v. Rumsfeld*); see also Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633 (2004) (discussing the First Amendment implications of Don't Ask, Don't Tell).

7. See About the Army, <http://www.goarmy.com/about/index.jsp?hhref=tn> (last visited Nov. 3, 2005).

The authors begin the discussion by looking briefly at each country's policy regarding gays and lesbians in the military and their political and legal histories regarding sexuality.⁸ The authors then consider each country's fundamental legal documents: the Canadian Charter of Rights and Freedoms and the U.S. Constitution, exploring the differing ways law is drawn from these documents in their respective countries.⁹ Finally, the authors look to how the military of each country reflects or resists the social changes occurring within the civilian community, how incorporating social change into the military culture is viewed to affect military readiness, and the extent to which deference is given to the military on questions regarding military policies.¹⁰

II. THE BAN: CANADA

Canada's policy banning military service by gay men and lesbians had been under scrutiny since 1978, when Canada passed its Human Rights Act.¹¹ Until 1988, the Canadian Forces (CF) had, in fact, maintained a broad prohibition on the service of gays and lesbians.¹² Similar to policy in the United States, Canada had maintained the position that "homosexuality was incompatible with military service."¹³ From 1988 to 1992, what would prove to be an interim policy held that "if servicemen or women were discovered or announced themselves to be gay, they would be asked to leave but they would not be dismissed."¹⁴ Yet, those who chose to remain would find their careers virtually halted as they would be ineligible for "training courses, security clearances, transfers, promotions, or re-enlistment."¹⁵

Michelle Douglas, a CF lieutenant, had graduated from basic training at the top of her class and later graduated first in her security officer training class.¹⁶ But, regardless of her superior

8. See *infra* Parts II, III, and IV.

9. See *infra* Part V.

10. See *infra* Part VI.

11. Belkin & McNichol, *supra* note 1, at 75.

12. *Id.* at 74.

13. RAND Corp.'s Nat'l Def. Research Inst., *Analogous Experience of Foreign Military Services*, in *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 65, 74 (1993).

14. Belkin & McNichol, *supra* note 1, at 76.

15. *Id.* (citing Clyde Fransworth [sic], *Canada Ending Anti-Gay Rules*, N.Y. TIMES, Oct. 11, 1991, at A3).

16. *Douglas v. R.*, [1993] 1 F.C. 264.

performance, her admission that she was a lesbian meant that she either had to agree to the release from service that had been recommended by a career review board or accept the restricted employment provided for under the interim policy.¹⁷ Douglas reluctantly accepted the release and then filed for damages claiming that the policy violated her rights as guaranteed by the Charter of Rights and Freedoms.¹⁸ Pressure to comport with the Human Rights Act and the Canadian Charter of Rights and Freedoms, combined with several legal challenges, such as Douglas', led to the 1992 repeal of this policy.¹⁹

III. THE BAN: THE UNITED STATES

Regulations concerning the military service of gays and lesbians existed throughout the twentieth century. The policies tended to vary from one branch to another and changed over time, but, generally speaking, it was understood that gays and lesbians were prohibited from military service.²⁰ For example, in 1982, Department of Defense Directive 1332.14 stated, "[h]omosexuality is incompatible with military service."²¹ This policy, in fact, was a change that sought to tighten the loopholes in an earlier policy under which high-performing gays and lesbians might actually be retained. But, it was "just" policy. It was only in 1993 that what had been confined to branch regulations and Department of Defense directives became codified as law.

In October 1991, a year before the *Douglas* decision in Canada, then U.S. presidential candidate Bill Clinton spoke at a forum at Harvard University. In response to the question of whether he would issue an executive order to rescind the ban on gays and lesbians in the military, Clinton responded, "Yes."²² He then said,

17. *Id.*

18. *Id.*

19. For a synopsis of the overall transition, see Belkin & McNichol, *supra* note 1, at 76-77.

20. See generally ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990) (accounting the prejudices against and bans on gays and lesbians in the military before 1990); RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF* (1993) (same).

21. KATE DYER, *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS* 63 (1990).

22. Kevin Connors, *Clinton's Policy Relating to Gays in the Military: A Lesson in Politics at the National Level 1-2* (1999) (paper from the National Defense University, National War College), available at <http://www.ndu.edu/library/n1/99-E-33.pdf> (last visited Jan. 7, 2006).

“I think people who are gay should be expected to work, and should be given the opportunity to serve their country.”²³ The issue would surface throughout the campaign and, at about the same time that Canada was dismantling its policy, Clinton reaffirmed the commitment he had made to end the ban in the U.S. armed forces.²⁴ Yet, soon after his inauguration in January, 1993, the country became engaged in a protracted debate over whether gays and lesbians were fit for military service.²⁵

Testifying before the Senate Committee on Armed Services, General Colin Powell, Chair of the Joint Chiefs of Staff, made this statement:

We have successfully mixed rich and poor, black and white, urban and rural. But open homosexuality in units is not just the acceptance of benign characteristics such as color or race or background It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.²⁶

In addition to testimony from military personnel, the senators also heard from alleged experts on topics such as unit cohesion, combat effectiveness, and the experiences of foreign militaries.²⁷ In fact, the debate centered on the alleged deleterious effect that the presence of openly gay or lesbian military personnel would have on unit cohesion—an allegation that has been largely disproved in the years since.²⁸

23. *Id.* at 2.

24. Barton Gellman, *Clinton Reaffirms Pledge on Homosexuals in Military*, WASH. POST, Nov. 13, 1992, at 3, available at <http://www-tech.mit.edu/V112/N57/pledge.57w.html>.

25. For the transcript of President Clinton’s press conference announcing a six-month period of study, see President’s News Conference & Memorandum on Ending Discrimination in the Armed Forces: 29 WEEKLY COMP. PRES. DOC. 108-112, available at <http://dont.stanford.edu/regulations/pres1-29-93.pdf> (last visited Nov. 3, 2005). For transcripts of the Senate hearings that took place during this time, see <http://dont.stanford.edu/hearings/hearings.htm> (last visited Nov. 3, 2005).

26. *DOD Policy on Homosexuality in the Armed Forces, Hearing Before the Senate Comm. on Armed Services*, 103d Cong. 708 (1993), available at <http://dont.stanford.edu/hearings/Hearings7-20-93.pdf> (last visited Nov. 3, 2005).

27. Memorandum from Steve Jackson to Janet Halley, Professor, Stanford Law School, Presenting Legislative History Research on the Issues of Intent to Censor Speech and Intent to Accommodate Troop Prejudices, <http://dont.stanford.edu/hearings/memo.pdf> (last visited Oct. 27, 2005).

28. See Center for the Study of Sexual Minorities in the Military, <http://www.gaymilitary.ucsb.edu/Publications/PublicationsHome.htm> (last visited Oct. 27, 2005) (listing a variety of resources addressing the inadequacy of

The result of this debate was the passage of Congressional legislation that, as military policy, is known informally as “Don’t Ask, Don’t Tell” (DADT).²⁹ Under DADT, those seeking to join the military, as well as those already serving, are not to “tell” that they are gay or lesbian, nor are they to be asked.³⁰ Under some earlier regulations the documents completed for entry to military service asked each applicant whether she or he had “engaged in homosexual activity.”³¹ Thus, somewhat ironically, while gays and lesbians have for over a decade been permitted to serve openly in the Canadian military, just next door in roughly the same period of time—1994-2004—the U.S. military had discharged 10,335 service

the unit cohesion argument).

29. See 10 U.S.C. § 654 (1993). The policy concerning homosexuality in the armed forces is legislation requiring the Department of Defense to maintain regulations concerning the separation of military personnel who identify or are identified as gay, lesbian, or bisexual:

(b) Policy. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member’s usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id.

30. *Id.*

31. Dep’t of Def. Form 1966/4 (Aug. 1, 1975). “37. Character and Social Adjustment. 5f. Have you ever engaged in homosexual activity (sexual relations with another person of the same sex)?” Items 5a through 5e addressed applicant history with regard to issues such as narcotic use, glue sniffing, marijuana use, alcohol related job loss or arrest, and hospitalization for mental illness. *Id.*

members under DADT.³²

IV. A COMPARISON OF THE TWO CASES

Military policies regarding same-sex marriage illustrate the extreme differences in the current policies of the two nations. Under U.S. law, one of the reasons for separation³³ is if a service member “has married or attempted to marry a person known to be of the same biological sex.”³⁴ With same-sex marriage now legal in Massachusetts,³⁵ as well as four nations,³⁶ it is certainly now possible that a gay or lesbian servicemember would seek to marry. Contrast this aspect of the U.S. policy with the fact that, in May, 2005, two Canadian military men were married at Nova Scotia’s Greenwood airbase.³⁷ Chaplain Colonel Stan Johnstone, who helped draft the CF’s policy, said, “Members of the Canadian forces are also Canadian citizens, and we must also follow the laws of the land, and the laws of the province in which we reside.”³⁸ Even setting aside

32. Servicemembers Legal Defense Network, Total “Don’t Ask, Don’t Tell” Discharges 1994-2004, http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1454.pdf (last visited Oct. 17, 2005). The military discharged 653 men and women in 2004 under the gay ban, the second lowest total since “Don’t Ask, Don’t Tell” was implemented. The Pentagon discharges include at least 41 healthcare professionals, 30 sonar and radar specialists, 20 combat engineers, 17 law enforcement agents, 12 security guards and 7 biological and chemical warfare specialists who were fired because of sexual orientation. At least 9 language specialists were also discharged. Servicemembers Legal Defense Network, New Data Reveals Military Losing Mission Critical Specialists Under ‘Don’t Ask, Don’t Tell,’ (June 13, 2005), <http://www.sldn.org/templates/press/record.html?record=2204>.

33. Separation is the military term for removal from service.

34. 10 U.S.C. § 654(b)(3). It is worth noting that this part of the Code does not require that there be any connection between the marriage or attempted marriage and service, job performance, etc. *Id.*

35. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *see also* Massachusetts Trial Court Law Libraries, Mass. Law About Same-Sex Marriage, <http://www.lawlib.state.ma.us/gaymarriage.html> (last visited Oct. 17, 2005).

36. These nations include Canada, Spain, the Netherlands, and Belgium. *Canada Legalizes Gay Marriage*, CNN.com, July 20, 2005, <http://www.cnn.com/2005/WORLD/americas/07/20/canada.gay.marriage/>.

37. *Airbase Hosts 1st Military Gay Wedding*, CBC NEWS, June 14, 2005, <http://www.cbc.ca/story/canada/national/2005/06/14/militarygaywedding0614.html>.

38. *Canada’s Military to Allow Gay Weddings on Bases*, CTV.CA, Jan. 20, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1106181280527_52 (last visited Oct. 18, 2005). At the time of the statement, same-sex marriage was legal only provincially. As of this writing, it is now legal across the nation. *Same-Sex Marriage Now Officially the Law*, CTV.CA, July 21, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20050721/same_sex_law_050720/20050721.

DADT, recent legislative changes in the United States make imagining such an event on a U.S. military installation nothing short of fantastical.³⁹

There are multiple points of comparison that one might make when considering the U.S. and Canadian experiences. First, to what degree does each nation's military desire to follow evolving social values? And, second, to what extent do the United States and Canada share social values *and* what is the degree and direction of change in their respective values?⁴⁰ The CF, it appears, wishes to move in sync with broader social change. For reasons related to the second point, conclusions regarding the United States are a bit less easy to draw. That is, in the United States, is there consensus regarding what one might believe to be the nation's dominant values?

While Canada's government has clearly moved in the direction of increasing support for equality for all people, including gays and lesbians, this is not the case in the United States. In terms of the general citizenry, most agree that the evidence does show increased acceptance for gays and lesbians.⁴¹ But, others suggest that while

39. As of this writing, seventeen states have amended their state constitutions to prohibit same-sex marriage. Steve DiLella, *State Laws Regarding Same-Sex Marriage*, Apr. 7, 2005, <http://www.cga.ct.gov/2005/rpt/2005-R-0374.htm>. Fourteen of these states did so in 2004 or 2005. *Id.* Ten of these amendments include language that goes beyond marriage to prohibit other types of partner recognition, such as civil unions and/or domestic partnerships. *Id.* It is important to note that some of these amendments also affect heterosexuals; for example, by prohibiting common-law marriage. *Id.* Most recently, "[o]n July 25, 2005 the California Attorney General approved petition language for a ballot measure that would amend the state constitution to repeal and permanently ban existing domestic partnership benefits and ban marriage for same-sex couples in California." National Center for Lesbian Rights, *National Center for Lesbian Rights Denounces Mean-Spirited Ballot Initiative to Enshrine Discrimination in the California Constitution*, <http://www.nclrights.org> (last visited Oct. 17, 2005).

40. Myriad publications, both popular and scholarly, address the alleged similarities and differences between the social values of the two nations. *See, e.g.*, MICHAEL ADAMS, *FIRE AND ICE* (2004). Recent research by sociologists Robert Andersen and Tina Fetner suggests that, at least since 1981, Canadians, especially younger Canadians, have become more tolerant than those in the United States. Robert Andersen and Tina Fetner, *Birth Cohort and Tolerance of Homosexuality: Attitudinal Change in Canada and the United States, 1981-2000* (Aug. 2005) (unpublished manuscript presented at the annual meeting of the American Sociological Association and on file with author).

41. Human Rights Campaign, *HRC Hails New Gallup Poll Showing Continuing Positive Trend in US Public Opinion on Some Gay Issues; Equality Opportunity in Workplace Enjoys Broad Support, Says HRC*, June 4, 2001, <http://www.commondreams.org/news2001/0604-06.htm>.

acceptance may have in fact increased, a majority still believes that gays and lesbians are not entitled to equal protection under the law.⁴² What is unfailingly clear is that when it comes to the U.S. government, there is absolutely no mandate to ensure that all citizens are treated equally regardless of sexual orientation.⁴³

V. POLITICS AND THE LAW

To understand the divergent nature of the military policies in Canada and the United States, the authors first consider a major difference in the political and legal history of the respective nations with regard to sexuality more generally. In short, the two nations appear to have been moving in very different directions for much of the late twentieth century.⁴⁴ One specific example is the issue of sodomy—a substantive issue of sexuality with which the laws in Canada and the United States have followed very different timelines.⁴⁵

In response to questions about his efforts to liberalize laws regarding abortion and homosexuality, then-Canadian Minister of Justice Pierre Trudeau made the now oft quoted remark, “The state has no place in the bedrooms of the nation.”⁴⁶ In 1969, his efforts

42. There is little to no agreement on these points. “Surveys show the extent to which Americans are conflicted. Most say the government should treat homosexuals and heterosexuals equally. Yet most Americans say the government should not get involved in the issue of homosexuality, and more than half oppose gay marriage. The vast majority of Americans say gays should have equal rights in terms of job opportunities, yet support declines when elementary school teachers are [sic] clergy are mentioned.” Public Agenda, *Gay Rights: Overview*, http://www.publicagenda.org/issues/overview.cfm?issue_type=gay_rights. As Andersen & Fetner, *supra* note 40, point out, the relationship between changes in policy and tolerant attitudes is likely much more complex than generally suggested.

43. For example, in his 2005 State of the Union address, President Bush said, “I support a constitutional amendment to protect the institution of marriage,” meaning an amendment to define marriage as an option only for one man and one woman. President George W. Bush, *State of the Union Address* (Feb. 2, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

44. Andersen & Fetner, *supra* note 40.

45. At this point it seems reasonable to clarify that DADT does not prohibit sodomy, per se. Prohibitions against sodomy are contained in the military criminal code, The Uniform Code of Military Justice (UCMJ), and apply to both same sex and “opposite” sex behaviors. Uniform Code of Military Justice art. 125, 10 U.S.C. § 925 (1956). While the term “opposite” is that used in the UCMJ, the authors choose to put the word in quotes as a way of contesting the sex binary that pervades society.

46. CBC News, *Pierre Trudeau Biography*, <http://www.cbc.ca/greatest/top>

were successful and, among other things, Canada decriminalized consensual sodomy.⁴⁷ Yet, seventeen years later, in 1986, the Supreme Court of the United States, in *Bowers v. Hardwick*,⁴⁸ upheld the right of the state to prohibit consensual sodomy. When current president George W. Bush was campaigning for governor of the state of Texas in 1994, he was quoted as saying that he would veto any legislation that sought to repeal that state's sodomy law.⁴⁹ Referring to the law he said, "I think it's a symbolic gesture of traditional values."⁵⁰ Not until 2003 did the U.S. Supreme Court, in *Lawrence v. Texas*,⁵¹ hold sodomy laws to be unconstitutional. Thus, for over thirty years, private consensual sexual behavior that was legal in Canada was illegal in many, though not all, states across the United States.

Civilian statutes and case law regarding sodomy have served as somewhat of a social barometer for the climate regarding homosexuality. And, it is important to acknowledge the degree to which laws against sodomy have been used to argue against equality for gays and lesbians, including opportunities for military service.⁵² But sodomy laws are, of course, only one specific arena of statutory and case law. The authors now turn to a consideration of the broader constitutional backdrop of each nation.

Canada passed the Human Rights Act in 1977.⁵³ The Act prohibited discrimination on the basis of a variety of characteristics, but did not include sexual orientation.⁵⁴ In 1982, the Charter of

_ten/nominee/trudeau-pierre.html (last visited Oct. 17, 2005).

47. The authors do not mean to imply that Canada has eliminated all differential treatment on the basis of sexual orientation, but, rather, that it has moved toward equality at a far greater pace than has the United States. It is, the authors believe, important to point out that Canada continued—and continues—to debate issues regarding heterosexuality and homosexuality (e.g., differences in age of consent laws, differences in what constitutes obscenity, same-sex marriage, etc.).

48. 478 U.S. 186 (1986).

49. Dana Milbank, *As 2004 Nears, Bush Pins Slump on Clinton*, WASH. POST, July 1, 2003, at A11, available at <http://www.washingtonpost.com/ac2/wpdyn?pageName=article&contentId=A54318-2003Jun30¬Found=true>.

50. *Id.*

51. 539 U.S. 558 (2003).

52. Sodomy laws have been used to characterize gay men and lesbians as criminals and to deny or limit custody, visitation, and employment opportunities, to name a few. See Effect of Sodomy Laws, <http://www.sodomylaws.org/effects.htm> (last visited Oct. 18, 2005).

53. Canadian Human Rights Act, R.S.C., ch. H-6 (2004), available at <http://www.laws.justice.gc.ca/en/H-6/index.html>.

54. See Dep't of Justice Can., *Minister of Justice Announces Review of Canadian*

Rights and Freedoms was adopted as part of the constitution⁵⁵ and in 1985, section 15 was enacted, guaranteeing equality of rights for all persons.⁵⁶ Although sexual orientation was not explicitly included here either, it has been noted that:

[S]ubsection 15(1) was worded to ensure that its guarantee of equality was open-ended: "Every individual is equal before and under the law and has the right to equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."⁵⁷

Today, the government of Canada maintains a "special website dedicated to celebrating the 20th anniversary of Section 15 of the *Canadian Charter of Rights and Freedoms*."⁵⁸ The title and banner running across the top of the page is "Equality: The Heart of a Just Society."⁵⁹ A message from the Minister of Justice and Attorney General of Canada, Irwin Cotler, reads:

Section 15 says much about Canadians. It says we recognize that protecting and promoting equality is a fundamental aspect of the pursuit of justice. Discrimination against any individual or group diminishes us all. It says we embrace the notion that equality is an organizing principle for the establishment of a just society in which every person is deserving of equal respect and consideration.⁶⁰

Human Rights Act (1999), available at <http://canada.justice.gc.ca/en/news/nr/1999/chra.html>. The Act was amended in 1996 to prohibit discrimination on the basis of sexual orientation.

55. Canada Act, 1982, ch. 11 (U.K.), available at <http://www.laws.justice.gc.ca/en/charter>.

56. See Cherie S. Lewis, *Note and Comment: The Canadian Approach to the Integration of Mentally Handicapped Children in Mainstream Classrooms: Quebec (Commission Des Droits De La Personne) v. Chauveau (Commission Scolaire Regionale)*, 2 SW.J.L. & TRADE AM. 593, 597 (1995).

57. Mary C. Hurley, *Sexual Orientation and Legal Rights* (2005), <http://www.parl.gc.ca/information/library/PRBpubs/921-e.htm#Background> (last visited Jan. 7, 2006).

58. Irwin Cotler, *Equality: The Heart of a Just Society*, http://www.justice.gc.ca/en/s15/a_minister_message.html (last visited Nov. 6, 2005).

59. *Id.*

60. *Id.* As noted earlier, the reader should note that the authors do not mean to imply that Canadians have eliminated discrimination and solved the problems associated with social inequality. Rather, the authors suggest that the Canadian government appears to be taking a more pro-active approach to recognizing *some* of what needs to happen to move forward in this regard.

The site contains a link to a page celebrating the top fifteen cases concerning section 15.⁶¹ The first case noted is *Andrews v. Law Society of British Columbia*.⁶² Although this case did not address sexual orientation, it was a significant case for future decisions regarding the applicability of section 15.⁶³ In the *Andrews* decision, the Supreme Court of Canada established a framework for section 15 analyses and created a context within which courts would be able to hold that, although not specifically enumerated, sexual orientation was covered by section 15.⁶⁴

Similarly, in 1992, the plaintiffs in *Haig v. Canada*⁶⁵ asked the courts to find the omission of sexual orientation from the Human Rights Act to violate section 15 of the Charter.⁶⁶ The federal government agreed that although sexual orientation was not included in section 15, as permitted under *Andrews*, it should be included by analogy.⁶⁷ However, the government also argued that its omission from the Act did not constitute discrimination.⁶⁸ That is, the government “said that while it *can’t* pass laws that discriminate against homosexuals, it can pass laws that don’t include protection for homosexuals.”⁶⁹ The court held for the plaintiffs, agreeing that “omitting sexual orientation from the *Canadian Human Rights Act* constituted discrimination because it led to a failure to provide an adequate manner in which to deal with the prejudicial treatment of homosexual members of society. In short, by not including sexual orientation, the Act suggests that discrimination is acceptable.”⁷⁰ On June 20, 1996, the Human Rights Act was amended to explicitly include sexual orientation as a protected category.⁷¹

Despite the earlier nods in this direction (e.g., *Andrews*), it was

61. The Top 15 on 15, http://www.justice.gc.ca/en/s15/g_top15.html (last visited Nov. 6, 2005).

62. [1989] 1 S.C.R. 143.

63. *See id.* at 144.

64. *Id.*

65. [1992] 94 D.L.R. (4th) 1.

66. The interplay between the Act and the Charter, particularly section 15, is very interesting as it regards to sexual orientation. *See Hurley, supra* note 57.

67. Canadian Hum. Rights Comm’n, *Sexual Orientation and the Canadian Human Rights Act*, Aug. 6, 1992, <http://www.chrc-ccdp.ca/en/timePortals/milestones/131mile.asp>.

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.*

71. *Id.*

not until 1995, when the Canadian Supreme Court issued its ruling in *Egan v. Canada*,⁷² that it became clear that sexual orientation was covered by the Charter. The Court held that “sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of section 15 protection as being analogous to the enumerated grounds.”⁷³ Thus, although it took a number of years to clarify, by 1995, it was absolutely clear that with regard to both the Act and the Charter, discrimination on the basis of sexual orientation was prohibited by federal law.

Most recently, in *Reference re Same-Sex Marriage*,⁷⁴ the Supreme Court of Canada held that proposed federal legislation permitting same-sex marriage was consistent with section 15. Additionally, the Court held that the extension of rights to one group (e.g., gays and lesbians) cannot be held, in and of itself, to violate the rights of another group (e.g., religious organizations).⁷⁵

The courts have clearly held that the Charter of Rights and Freedoms, a part of the Canadian Constitution, and the Canadian Human Rights Act provide federal protection against discrimination on the basis of sexual orientation.⁷⁶ It is critical to note that since the introduction of the Charter, “the Supreme Court of Canada has undergone a radical transformation, actively developing a jurisprudence of rights under the authority of the Charter.”⁷⁷ As Sheldon Pollack has written, “[w]here a constitutional text is amended or augmented, the opportunity arises for a change in the role of the judiciary—for example, in pursuing a jurisprudence of rights. This has been the case in Canada.”⁷⁸ Pollack goes on to say that “[w]ith the entrenchment of the Charter of Rights and Freedoms, the Supreme Court began to address entirely new issues involving the balance between governmental power and the rights of individuals or groups of

72. [1995] 2 S.C.R. 513.

73. *Id.*

74. [2004] 3 S.C.R. 698.

75. The Top 15 on 15, *supra* note 61.

76. See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Haig v. Canada*, [1992] 94 D.L.R.(4th) 1; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

77. Sheldon D. Pollack, *Constitutional Interpretation from Two Perspectives: Canada and the United States*, in *CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES* 36 (Stephen L. Newman ed., 2004).

78. *Id.* at 53.

citizens.”⁷⁹

Such a shift to a jurisprudence of rights has not been the case under judicial interpretation of the Constitution of the United States or any federal legislation. The closest the United States has come to the federal protections set forth under the Charter or the Act is via the Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁸⁰

Yet, as anyone even vaguely familiar with constitutional law understands, there is little clarity over what “equal protection” means and to whom and how the law shall be applied. Unlike Canada, there is no list of protected categories contained within the Constitution or related documents. And, while a body of law that illustrates when and how some classifications will be analyzed has emerged, sexual orientation is largely absent from that discussion.

There have been U.S. Supreme Court cases that have dealt with the subject of sexual orientation, but none have granted sexual orientation, as a category of classification, the same status as classifications such as race, sex, or gender.⁸¹ Race, for example, demands a standard of review of strict scrutiny, while gender is most typically reviewed at an intermediate level.⁸² To show that

79. *Id.*

80. U.S. CONST. amend. XIV, § 1.

81. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996). Some commentators note that *Romer* may have given rational basis review “sharper teeth.” Kathryn Ann Barry, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 BERKELEY WOMEN’S L.J. 157, 167 n.74 (2001).

82. *Compare Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”) (internal quotation marks and citation omitted), *with Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (“To withstand scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”) (internal quotation

discrimination on the basis of sexual orientation is permissible, the government must pass only a rather low standard of review—rational basis.⁸³ Granting different classifications (e.g., race, gender, sexual orientation) different standards of review creates a hierarchy among classifications. Thus, unlike Canada, where the courts have stated that “a hierarchical approach to rights . . . must be avoided, both when interpreting the *Charter* and when developing the common law,”⁸⁴ equal protection analysis in the United States, via standards of review, appears explicitly hierarchical in its approach.

Not surprisingly, even in Supreme Court decisions that have dealt with sexual orientation,⁸⁵ the holdings have typically relied on other issues, not the status of sexual orientation as a protected category, *per se*. That is, while the Court has addressed issues such as expressive association, participation in the political process, and privacy in the context of sexual orientation, in no instance did the Court veer toward simply saying that equality on the basis of sexual orientation is guaranteed by the Constitution.⁸⁶ Thus, with regard to securing civil rights on the basis of sexual orientation, the political and legal context in the United States is very different from that of Canada. While military personnel in Canada had an emerging body of civil rights jurisprudence on which to base claims regarding equality, no such basis exists in the United States.⁸⁷

If one looks only at the law, it might appear indisputable that Canadian jurisprudence has little to offer the United States in

marks omitted).

83. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); see also Barry, *supra* note 81.

84. *Dagenais v. Canadian Broad. Corp.*, [1994] 3 S.C.R. 835.

85. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding sodomy laws to be unconstitutional, overturning *Bowers v. Hardwick*); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (dealing with whether the BSA could prohibit openly gay scoutmasters from participating); *Romer*, 517 U.S. 620 (dealing with Colorado's Amendment 2, which prohibited the passage of legislation prohibiting discrimination on the basis of sexual orientation).

86. See generally *Lawrence*, 539 U.S. at 558; *Dale*, 530 U.S. at 640; *Romer*, 517 U.S. at 620.

87. As with the aforementioned cases, challenges to DADT have relied on constitutional arguments. In *Cook v. Rumsfeld*, filed in the U.S. District Court of Massachusetts, in December, 2004, the plaintiffs asserted that the policy “denies gay, lesbian, and bisexual service members several Constitutional rights, including the right of privacy, equal protection of the law, and freedom of speech.” Service Member Legal Network, *Cook v. Rumsfeld*, <http://www.sldn.org/templates/law/record.html?section=92&record=1864> (last visited Nov. 12, 2005). On July 8, 2005, a hearing was held on the government's motion to dismiss. *Id.* As of this writing, no decision has been made public. *Id.*

terms of practical application. That is, the law—both case law and the texts of the guiding documents (e.g., the constitutions)—is so different, there is little with which to analogize. Yet, perhaps it is possible that the United States might look to Canada, as have other nations, as a guide for what is possible—and reasonable. The question is whether the U.S. judiciary is willing to look elsewhere for such guidance.

This issue was recently addressed by Associate Justices Antonin Scalia and Stephen Breyer in a debate that took place at American University: “Constitutional Relevance of Foreign Court Decisions.”⁸⁸ Earlier, in *Roper v. Simmons*,⁸⁹ Scalia had taken the Court to task for considering the laws of other nations when debating the constitutionality of the death penalty for juvenile offenders.⁹⁰ Scalia asserted that unless the United States are willing to bring all of their laws in sync with other nations, they cannot pick and choose when they might find reflection on foreign laws to offer some utility to U.S. jurisprudence. “The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the *reasoned basis* of its decisions.”⁹¹

In considering the ways in which the Canadian experience may influence U.S. policy, it is critical to keep in mind the degree to which the U.S. judiciary, and the Supreme Court in particular, is willing to consider the experiences of other nations when making decisions, especially those that deal specifically with constitutional questions.⁹² In sum, different guiding documents lead, not surprisingly, to different bodies of law. And, while the jurisprudence of one nation could be informative to the inquiry and understandings of another, one must be willing to listen. In the case of the U.S. Supreme Court, the debate continues with regard to whether courts can, and should, examine the laws and experiences of other nations, at least when it comes to interpreting the U.S. Constitution.

88. Justice Antonin Scalia & Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), <http://www.wcl.american.edu/seclc/founders/2005/050113.cfm> (follow “Press release and full transcript” hyperlink).

89. 125 S. Ct. 1183 (2005).

90. *Id.* at 1217-30 (Scalia, J., dissenting).

91. *Id.* at 1228.

92. See, e.g., Anthony S. Winer, *A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights*, 32 WM. MITCHELL L. REV. 509 (2006).

VI. THE MILITARY AND THE LAW

There is little question that, when it comes to questions of the political and legal landscape, Canada and the United States share some common ground as well as significant differences. Does the specific context of a given debate—in this case the military—matter? How might the fact that the debate concerns a nation's armed forces shape the role of politics and law? As suggested at the outset, while both Canada and the United States pride themselves on a prepared military, capable and ready of providing national defense, there may be significant differences in the importance that each military places on reflecting the changes taking place in civilian society.

Emily Merz and Amy Wilson write that while “combat-capable,” “Canada is not a militaristic nation.”⁹³ The focus of Canada's military is that of peacekeeping⁹⁴ Although Merz and Wilson describe the Canadian military as possessing values (e.g., duty, courage, discipline) and doctrine (e.g., high standards of conduct, fitness, dress) similar to those of the U.S. military, they significantly note:

Many legal, economic and social changes occur constantly in Canadian society and the Canadian Forces must respect these changes, such as respect for women's rights and the rejection of discrimination on the basis of race and sexual orientation. The CF must conform to Canadian legislation involving social values, such as the Charter, in order to reflect and represent Canadian society.⁹⁵

After the recent move to permit same-sex marriage on Canadian military installations, one military officer said, “I think our people understand that the country has changed a lot and it will continue to change, and the armed forces will reflect that.”⁹⁶ And, perhaps of greatest comparative interest, the Canadian Minister of National Defence, in his March 2001 report to the Prime Minister on the Leadership and Management of the Canadian Forces, wrote, “the Forces must respect women's rights, reject discrimination based on

93. EMILY MERZ & AMY WILSON, *MILITARY TRADITIONS AND LAWS AS EXERCISED IN THE FRAMEWORK CREATED BY CANADIAN SOCIAL LEGISLATION* 7 (2002).

94. *Id.*

95. *Id.* at 12.

96. *Canada's Military to Allow Gay Weddings on Bases*, CTV.CA, Jan. 20, 2005, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1106181280527_52?hub=Canada.

race or sexual orientation and conform to other Canadian legislation reflecting evolving social values.”⁹⁷

Contrast this position with that of the United States, where numerous politicians, pundits, and others decry such changes in the military (i.e., increased roles for women, inclusion of gays and lesbians) as “social experimentation.” During the 1993 hearings before the U.S. Senate, General Norman Schwarzkopf testified that, “The Armed Forces’ principal mission is not to be instruments of social experimentation.”⁹⁸ Another author has written,

The military has been “social engineered” by a politically motivated effort to create an armed force that “looks like America.” That is, it has been treated as a reservoir for vast social change that promotes “equal opportunity” and “affirmative action” above readiness. The nation’s military has been “feminized,” “minority-ized,” and “sexualized,” beyond belief.⁹⁹

Finally, consider this excerpt from a July 2001 interview between *The Washington Times* newspaper and Secretary of Defense Donald Rumsfeld:

Q: The gay ban, do you see any reason to review it, change it—

Rumsfeld: That is not on our radar screen.

Q: Is it safe to say that these [women and gays] are not front burner issues for this Administration? I mean since you’re saying you haven’t had time to review it or think about it—

Rumsfeld: I’ve had an awful lot of other peas on my knife during this period. I don’t know that I can speak for the administration. I can say for myself, it happens that neither of those subjects are something that has come roaring up in the first period of months

Q: These were big issues for the previous president, for your predecessors in the two Clinton administrations. The social issues of the military, whether that be gays or

97. Report to the Prime Minister on the Leadership and Management of the Canadian Forces, <http://www.forces.gc.ca/site/minister/eng/pm/mndvalues.html> (last visited Nov. 12, 2005).

98. *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Serv.*, 103d Cong. 595-97 (1993), reproduced in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2004).

99. Gerald L. Atkinson, *The Military Civilian Culture Gap*, July 4, 2003, <http://www.newtotalitarians.com/MilitaryCivilianCultureGap.html>.

women or families in the military. Those were issues that certainly in our discussions with those gentlemen came up over and over. So it's maybe a little surprising that this seems to be so absent—

Rumsfeld: Maybe it's a sign of the times.

Q: A sign of the times?

Rumsfeld: I don't know.¹⁰⁰

What is it that Secretary Rumsfeld does not know? Perhaps his uncertainty is over the degree to which the military should adhere to changing societal norms and values.

Exactly how separate are the Canadian and U.S. armed forces from their respective societies? The Canadian military, as with most professional cultures, does have its own set of values and expectations. One Canadian National Defence document states that “the Canadian military sees itself as ‘a distinct sub-set of the entire Canadian fabric.’”¹⁰¹ Yet, the same report goes on to describe a shift from the “traditional institutional values of the military” to “occupational values” and the potential dangers that may result from such a shift. “This raised concern among military analysts that officers, in particular, were acquiring skills and an orientation characteristic of civilian administrators or political leaders.”¹⁰² Further reading reveals that the Canadian analysis is focused upon, and questioning, *not* the degree to which the military reflects a set of shared national values, but the narrower question of civilian control of military action. While the latter is, unquestionably, related to military decision making (e.g., allowing gays and lesbians to serve in the military), it is the former that the authors believe is illustrative of key differences between the armed forces of the U.S. and Canada.

In 2004, two studies of the Canadian Army were commissioned as part of a larger program aimed at shaping army culture. The Army Sociocultural Survey “mapped the core values of soldiers against those of Canadian society and examined the predominant values of different groups within Canada's Army.”¹⁰³ The report

100. Interview by reporters and editors of the *Washington Times* with Donald H. Rumsfeld, U.S. Sec'y of Def. (July 24, 2001), *available at* http://www.defenselink.mil/transcripts/2001/t07252001_t0724wta.html.

101. Military Culture and Ethics, http://www.forces.gc.ca/site/reports/somalia/vol1/V1C5_e.asp (last visited Nov. 12, 2005).

102. *Id.*

103. M. CAPSTICK ET AL., CANADA'S SOLDIERS: MILITARY ETHOS AND CANADIAN

suggests that “soldiers tend to be traditionalists in regard to gender and minorities . . . and are less supportive of affirmative action”¹⁰⁴ Yet, the report ultimately concludes that “Canada’s soldiers reflect the values, attitudes and beliefs of Canadian society at large while, at the same time, subscribing to a military ethos and values.”¹⁰⁵ Can the same be said of the U.S. military? If so, what are the values, attitudes, and beliefs of U.S. society? If not, how do they differ?

Originating in the mid-twentieth century, a rich literature now exists that explores the notion of a “gap” between military and civilian cultures. There are multiple positions advocating that civilians become more like the military, that the military become more like civilians, and various points in between.

Those who speak of a gap classify it two ways. The first is the traditional culture (or “values” in modern parlance) gap This is the oft-stated idea that the military has a different set of values as a whole The second gap is not so much a substantive difference between the military and civilians, but a lack of contact and understanding between them¹⁰⁶

A number of authors have shown concern “about the military simply losing touch with the society it was meant to serve and protect.”¹⁰⁷ While explaining the significance of this gap is well beyond the scope and focus of this Article, it is important to recognize that many on both sides of the debate have expressed concern that such a gap may exist. As Lindsay Cohn writes, “[t]he danger of the cultural difference lies in the fact that the civilian officials may require a cultural change (like integrating open homosexuals) so provocative to the military’s culture that its obedience becomes uncertain.”¹⁰⁸

In 1999, the Triangle Institute for Security Studies conducted research examining whether or not there exists such a civil-military

VALUES IN THE 21ST CENTURY, REPORT iii (2004). The second study, THE ARMY CULTURE AND CLIMATE SURVEY, focused on soldiers’ attitudes toward their work environment. *Id.*

104. *Id.* at 9.

105. *Id.* at 57.

106. Lindsay Cohn, The Evolution of the Civil-Military “Gap” Debate 9 (1999) (Paper prepared for the TISS project on the Gap Between the Military and Civilian Society), available at http://www.poli.duke.edu/civmil/cohn_literature_review.pdf.

107. *Id.* at 4.

108. *Id.* at 11.

“values gap.”¹⁰⁹ In a brief summary of the results, Pete Kilner writes, “[t]he civilians showed greater support for women serving in combat roles; [t]he civilians held that homosexuals should be permitted to serve openly in the military, while the military leaders disagreed. [And t]he civilians disagreed with military officers’ position that a ‘warrior culture’ is good for the military.”¹¹⁰ Thus, though disputed by some, it seems clear that *some* type of cultural gap between the military and civilian worlds does exist.¹¹¹ And, not only is there a gap, but there appears little demand to bridge that gap.

In Canada, as suggested above, there appears to be a mandate that the military reflect not only the values of the nation as expressed through its constitution, but that it also reflect societal change. In contrast, neither the U.S. Constitution nor case law provides guidance that would suggest equality on the basis of sexual orientation is a value to be upheld, either in the military or society generally.¹¹² And, with regard to societal change, the military seems granted an “exemption” from keeping up with changes that take place in civilian society. This has been achieved in several ways, but two major avenues are central to the discussion presented here.

First, the legislative process has been used to limit military participation. Since, under the Constitution, Congress possesses the power to “raise and support Armies,”¹¹³ it has long been involved in creating legislation regarding military service. While this legislation is, understandably, focused primarily in the context of budgets and national security, it would be foolish to believe that the process is somehow lacking a “values component”—somebody’s

109. Triangle Institute for Security Studies: Project on the Gap Between the Military and Civilian Society, <http://www.poli.duke.edu/civmil/> (last visited Nov. 12, 2005). Versions of the studies have been published in *The National Interest* (2000), *Armed Forces & Society* (2001), and in Peter D. Feaver & Richard H. Kohn, *Soldiers and Civilians: The Civil-Military Gap and American National Security* (2001).

110. Pete Kilner, The Alleged “Civil-Military Values Gap”: Ideals vs. Standards (Jan. 25-26, 2001) (paper presented to The Joint Services Conference on Professional Ethics), *available at* <http://atlas.usafa.af.mil/jscope/JSCOPE01/Kilner01.html>.

111. See Richard D. Hooker, Jr., *Soldiers of the State: An Alternative View of Civil-Military Relations in America Today* (2003), <http://www.ndu.edu/library/n4/n03AHookerAlternative.pdf>. Hooker describes the current critique of civil-military relations as “largely inaccurate and badly overwrought.” *Id.* at 2.

112. And, as efforts continue to amend the U.S. Constitution to prohibit same-sex marriage, it seems clear that at the highest seats of power there is little agreement that everyone is to be treated equally.

113. U.S. CONST. art. I, § 8, cl. 12.

values. Women, for example, are not required to register for the draft. This is the result of Congressional legislation, albeit with judicial approval,¹¹⁴ and is clearly value laden. In early 2005, when a few members of Congress sought to roll back opportunities for women in the military, the conversation was centered on “appropriate” roles for women in society, yet another value-laden debate.¹¹⁵ And, of course, when the current policy on gays and lesbians in the military became law, it was only after months of contentious debate, much of which centered on “values.” The authors do not contend, then, that U.S. congressional action is void of values, but, rather, that it may just be that the values themselves are both less explicit and less inclusive than those evident in the Canadian legislative process and government mandates.

A second mechanism is, of course, the judiciary, specifically the U.S. Supreme Court. Its impact occurs in two slightly different ways. First, the Court can simply refuse to hear a case. In each term there are between 7000 and 8000 cases on the docket.¹¹⁶ Of those, oral argument is heard in about 100 cases, with eighty to ninety receiving a formal, written opinion.¹¹⁷ The vast majority of cases which petition for review go unheard. Thus far, the Court has refused to hear *any* case challenging the ban on gays and lesbians in the military.¹¹⁸ And, as long as the Court refuses to rule,

114. *Rostker v. Goldberg*, 453 U.S. 57 (1981).

115. Dave Eberhart, *Battle Lost, War Continues on Women in Combat*, NEWSMAX.COM, May 30, 2005, <http://www.newsmax.com/archives/articles/2005/5/29/141547.shtml>. “Rep. Duncan Hunter, R-Calif., had sought to codify in federal law a 1994 Pentagon policy that barred women from serving in most direct combat roles in armor, artillery, infantry or Special Forces units. Instead of the stronger measure, however, Congress simply instructed the Pentagon to keep it informed about the status of women deployed in war zones, a duty it ostensibly already has under the law.” *Id.*

116. A Brief Overview of the Supreme Court, <http://www.supremecourtus.gov/about/briefoverview.pdf> (last visited Nov. 12, 2005).

117. The Justices’ Caseload, <http://www.supremecourtus.gov/about/justicecaseload.pdf> (last visited Nov. 18, 2005).

118. The court has denied certiorari in a number of cases addressing gays and lesbians in the military. See *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997), *cert. denied*, 525 U.S. 1067 (1999); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996); *Ben-Shalom v. Stone*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981); *Selland v. Perry*, 905 F. Supp. 260 (D. Md., 1995), *aff’d without opinion*, 100 F.3d 950 (4th Cir. 1996), *and cert. denied sub nom. Selland v. Cohen*, 520 U.S. 1210 (1997).

the law will be vulnerable only to congressional repeal.¹¹⁹

The second way in which the Court has tremendous impact is in the tradition of granting deference to the military. In a plethora of cases, the Court explains the need to defer to military authorities on questions regarding military policy.¹²⁰ In *Rostker v. Goldberg*,¹²¹ then-Associate Justice Rehnquist wrote, “[t]he case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”¹²² Several years later, in *Goldman v. Weinberger*,¹²³ Rehnquist wrote, “courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”¹²⁴ As long as the courts maintain the position that, on some issues, military leadership knows best, regardless of constitutional questions, the military will be permitted to remain “out of sync” with contemporary social values and related social change.¹²⁵

Diane Mazur asserts that, under Rehnquist, the Court developed an “understanding that the military is not bound by constitutional requirements in the same way that other governmental institutions are bound.”¹²⁶ Mazur argues that, prior

119. On March 2, 2005, Representative Marty Meehan (D-MA) introduced the “Military Readiness Enhancement Act of 2005.” The Library of Congress, <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.1059.IH>. This legislation seeks repeal of “Don’t Ask, Don’t Tell” and, as of July 2005, has 89 co-sponsors. *Taking “Don’t Ask Don’t Tell” to Court*, July 5, 2005, <http://thecarpetbaggerreport.com/archives/4613.html>.

120. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *Orloff v. Willoughby*, 345 U.S. 83 (1953).

121. 453 U.S. 57 (1981) (upholding the constitutionality of male-only draft registration).

122. *Id.* at 64-65.

123. 475 U.S. 503 (1986).

124. *Id.* at 507 (upholding the constitutionality of military regulations prohibiting the wearing of the yarmulke while on duty and in uniform).

125. The Supreme Court has, of course, heard some cases concerning military personnel and civil rights. E.g., *Rostker*, 453 U.S. 57. However, no cases have addressed the policy excluding gays and lesbians from the military. On November 29, 2005, the Court is scheduled to hear oral argument in the case of *Forum for Academic & Institutional Rights v. Rumsfeld*. 390 F.3d 219 (3d Cir. 2004), cert. granted, 125 S. Ct. 1997 (2005). This case deals with the Solomon Amendment, the federal law that requires colleges and universities to grant access to military recruiters. Although the underlying motivation for opposition to Solomon is opposition to the military ban, it is unlikely that the merits of the ban will come before the court in any, save the most oblique, of ways.

126. Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 703 (2002). For a synopsis of

to the Rehnquist era, “[d]eference to the military was a question of constitutional structure and separation of powers, not a means of resisting cultural change. Today, in contrast, judicial deference to the military serves as a vehicle for social conservatism, and nothing more.”¹²⁷ Mazur contends that “[b]road judicial deference to military discretion is only a creation of the post-Vietnam, all-volunteer military and, more specifically, only a creation of one single Justice of the Supreme Court, William H. Rehnquist.”¹²⁸ In *Parker v. Levy*,¹²⁹ a military case involving freedom of speech, Rehnquist essentially created the notion that the military is truly an entity separate and apart from the rest of society.¹³⁰ Rather than sharing a common set of values and a common constitution, the military, under Rehnquist, appears to have a separate, and superior, standard.¹³¹ Thus, not only has there emerged an ethos of difference across the United States, but that ethos appears entrenched in the opinions of the highest court in the nation. Unlike the Canadians who, it appears, accept a mandate that the military follow societal change as it occurs across the nation, the United States, via both social attitudes and the Court, reject such an approach.

Ran Hirschl has written:

[I]n spite of the powerful centripetal forces of convergence found within Canadian and American constitutional rights jurisprudence, there still remains a significant difference between the two countries’ constitutional rights adjudication pertaining to group rights. Over the past two decades, certain types of group rights . . . have been awarded wider constitutional recognition and relatively more generous judicial interpretation in Canada than in the United States.¹³²

Mazur’s article and its relevance to the issue of gays and lesbians in the military, see John M. Olsen, Comment, *Evading the Constitution: The Solomon Amendment’s Violation of Free Speech and the Military as Warrior in the Kulturkampf*, 3 DARTMOUTH C. UNDERGRAD. J.L. 2 (2005), available at http://rockefeller.dartmouth.edu/assets/pdf/dcujl_s05_olsen.pdf.

127. Mazur, *supra* note 126, at 737.

128. *Id.* at 704.

129. 417 U.S. 733 (1974).

130. *See id.*

131. Readers are encouraged to see Mazur’s article for a careful and engaging analysis of this trend and its implications for civil-military relations. Mazur, *supra* note 126.

132. Ran Hirschl, *Constitutional Rights Jurisprudence in Canada and the United States: Significant Convergence or Enduring Divergence?*, in CONSTITUTIONAL POLITICS IN

Similarly, Sheldon Pollack asserts:

In interpreting the Charter, The [Canadian] Supreme Court has been even more aggressive than the U.S. Supreme Court in promoting a jurisprudence of rights. . . . The terse and scant language in both the Canadian and American constitutional texts grants the judiciary broad discretion in deciding whether to pursue a jurisprudence of rights. The Supreme Court of Canada has accepted the challenge, while the more conservative post-Reagan Supreme Court in the United States has backed off from the role it played during its more activist days in the 1960s. This reflects the different temperament and political philosophy of those justices who sit on the bench today.¹³³

One can only guess how the addition of John Roberts and the replacement of Sandra Day O'Connor will add to or change the divergence.

VII. CONCLUSION

Although the legislation known as "Don't Ask, Don't Tell" may eventually fall into disuse, it will disappear completely only through congressional repeal or by the Supreme Court holding it to be unconstitutional. While a number of elected officials from both "sides of the aisle" have, in these times of international conflict, indicated their support for a repeal,¹³⁴ it is unlikely that such a goal can be reached, especially in a Republican-controlled Congress under a Republican President. If that is the case, then those who hope to see the end of DADT must rely on the Supreme Court. This means that the future of DADT is, if they so desire, and like so many other issues of national importance, in the hands of nine individuals.

In this Article, the authors have offered a brief comparison between the jurisprudence and military policies of Canada and the United States with regard to the service of gays and lesbians. The

CANADA AND THE UNITED STATES 63, 65 (Stephen L. Newman ed., 2004).

133. Pollack, *supra* note 77, at 54-55.

134. To amend title 10, United States Code, to enhance the readiness of the Armed Forces by replacing the current policy concerning homosexuality in the Armed Forces, referred to as "Don't Ask, Don't Tell", with a policy of nondiscrimination on the basis of sexual orientation, H.R. 1059, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01059:@@@P>. The names of cosponsoring Representatives are included on the website.

authors have also outlined the hurdles that must be overcome for the Court to fairly consider the constitutionality of the current law regarding gays and lesbians in the military. In sum, (1) the Court must agree to hear a case, and (2) the Court must not use military deference as a means of avoiding the constitutional question at hand. Should the government appeal a lower court ruling against DADT, it is quite possible that the Supreme Court will ultimately hear such a case. While it is likely that the Court would invoke a deference argument in such a case, this is not inevitable. If such a case were to come before the Court, the Canadian experience, both in terms of jurisprudence and the day-to-day reality of military operations, might prove useful. But, there is the debate over the utility of international law in questions regarding U.S. constitutional law. It may be that the greatest value of the Canadian experience, and Canadian jurisprudence in particular, will be found in "the court of public opinion." Perhaps the real difference between the two nations is not seen in the legislative process, the judiciary, or even the military, but rather in the values that each nation believes serve as the guiding principles of law and national security.