

# **The British Army and Homosexuality**

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## **1 Introduction**

Some of the most sensitive issues in public policy today are those concerned with sexual and gender politics.<sup>1</sup> It is not surprising therefore that the Army's policy towards homosexuality causes some controversy.<sup>2</sup> Whilst civilians are largely free to practise homosexuality as long as they are adults and do so in private, the Army's stance, like that of the other Services, is one of total exclusion of known homosexuals. The Army argues that it is a special case since it derives much of its fighting power and effectiveness from high morale, team work and leadership that stems from and is based upon trust, mutual respect and social cohesion. It argues that the admission of homosexuals would undermine these qualities and hence lessen its ability to defend the nation state. Its critics argue that the Army's policy is prejudiced and

discriminatory, that homosexuals should have the right to serve their country as members of the armed forces, that the Army's community will not be harmed by the admission of homosexuals and that the Army should be bound by the same law as civilians in this area. Each side in this dispute has strong arguments and it is very unlikely that a solution can be found that will satisfy each of them.

## **2: Historical Background**

For a long period, almost certainly due to the predominance of Christianity, homosexual practice was illegal in Britain since it was regarded as both immoral and harmful to society. However, there was growing pressure, after the Second World War to abolish this prohibition. In 1954 the Wolfenden Committee was appointed to consider the legal position of homosexual practice and prostitution and it reported in 1957.<sup>3</sup> With regard to homosexual practice the Committee concluded that, in some circumstances, it should no longer be a crime. One of the Committee's key arguments was to identify an area of private morality in which, it argued, the law should not intrude and in which, consequently, there should be individual freedom of choice. The Government rejected this proposal because it argued that public opinion was not ready for this change. However, a decade later, the Sexual Offences Act 1967 changed the law and allowed that in most cases homosexual practice conducted between two consenting adults, over the age of 21, in private, was no longer a crime. The Criminal Justice and Public Order Act 1994 lowered this age to 18 years. Section 1 (2) of the 1967 Act delineated what is meant as private; a sexual act is not done in private if more than two people are present nor if it is done in a lavatory to which the public have access. The result of this 1967 Act is that, in many circumstances, adult civilians have legal freedom to practise homosexuality if they so wish.

A notable exception to this new liberty were members of the armed forces; they were explicitly excluded from the immunity provided by the Sexual

Offences Act 1967. Section 1 (5) of the Act maintained that the newly decriminalised homosexual acts in civilian law would, nevertheless, remain criminal for military personnel subject to military law. Military law regards both known homosexual and lesbian orientation, or activities, as incompatible with military service. Admitting to being a homosexual or being found behaving in this way leads to dismissal from the Army. There is however no specific offence of homosexuality in military law, the charge is usually one of disgraceful conduct of an indecent kind, or conduct prejudicial to good order and discipline, or scandalous conduct by officers. Hence, under the provisions of the 1967 Act, if two adult consenting civilians engage in homosexual behaviour in private they are not guilty of a criminal act; but military personnel doing so break military law.

This distinction between civilians and military personnel is not simply a theoretical one, military authorities have taken the offence of homosexual or lesbian behaviour seriously and they have often acted to enforce military law. For example, statistics of courts-martial and discharges for homosexual activity were provided for the 1990-91 Select Committee on the Armed Forces Bill. It found that in the previous four years 22 Servicemen had been dismissed from the Army, 9 from the Navy and 8 from the Royal Air Force on conviction of homosexual activity. An additional 296 people, over half of them female, were discharged by administrative action, although no formal disciplinary charge was made against them of homosexual activity.<sup>4</sup>

The 1990-91 Select Committee on the Armed Forces Bill recommended a change of policy that was accepted by Government.<sup>5</sup> The Committee acknowledged the strength of military objections to allowing homosexual activity in the Services on the grounds that this would weaken units' fighting effectiveness.<sup>6</sup> It did however call for a change in military law in relation to homosexual practice. For, it suggested, '...we see no reason why Service personnel should be liable to prosecution under Service law for

homosexual activity which would be legal in civilian law'.<sup>7</sup>

This proposal was accepted by the Government in 1992 when the Minister of State for Defence Procurement outlined the change in policy which was to be made, and which was later implemented in the Criminal Justice and Public Order Act 1994.<sup>8</sup> Section 1 (5) of the Sexual Offences Act 1967 was to be repealed and homosexual acts that were not criminal under civil law were no longer to be criminal under military law. Hence military personnel no longer commit a criminal offence if they engage in homosexual activity which is not illegal in civilian law. (One exception to this, found in the Criminal Justice and Public Order Act 1994, is that a homosexual act which occurs in circumstances where, for example, heterosexual or homosexual behaviour is inappropriate is still liable to constitute an offence.) However the Minister emphasised that although military personnel would no longer be prosecuted under military law for activity which was legal in civilian law they would still be discharged from the Service. So even though a criminal offence no longer exists for military personnel found engaging in homosexual acts, evidence of such activity either in the work place, or privately elsewhere, will result in discharge from the military by administrative process. This means that the person concerned must leave the service, but that their dismissal papers will make no mention of homosexuality, they will not have a criminal record and subsequent employers will be unaware of the reason for their leaving. The Minister stressed that this decriminalisation measure was aimed at making military and civil law more compatible and that there was no intention in so doing of altering policy towards homosexuals in the military.

A further development in policy, in 1994, was the publication by the Ministry of Defence of its 'Armed Forces Policy and Guidelines on Homosexuality' paper.<sup>9</sup> The policy emphasised that homosexuality is incompatible with military service but stressed that homosexuals should receive psychological support and sympathetic treatment since disclosure of

their sexuality could lead to pain and possibly even self harm. In 1993 the Army restated its policy in an important internal policy document, The Discipline and Standards Paper that covered a number of personnel and moral issues and with regard to the issue of homosexuality it stated that, 'Anyone who admits to, or displays the orientation of, or indulges in homosexuality will be required to resign or be discharged'<sup>10</sup>. The election of a Labour Government in 1997 may lead to policy changes in this area as may the challenge to the policy, by former service people dismissed on grounds on homosexuality, that is currently, at the time of writing, being considered by the Court of Human Rights in Europe.

The existence of the Army is approved by Parliament every year, and in practice this leads to a five yearly examination of military procedures and discipline through the Select Committee on the Armed Forces Bill and subsequent Parliamentary debate. The reports of the five yearly Select Committee on the Armed Forces Bill are an important source of information for the arguments used about the British military and homosexuality. It appears that the issue of homosexuality and the military was first discussed by the Committee in 1966.<sup>11</sup> Since then in each successive Report the issue has assumed greater prominence and the submissions of the Ministry of Defence and those representing the homosexual case have become ever more sophisticated. In what follows use is made of the latest 1995-96 Select Committee Report, henceforth referred to as the 1996 Report, as a source from which to identify those arguments that currently seem to emerge strongly from discussion of the issue.<sup>12</sup> The Committee called as witnesses the Ministry of Defence, Rank Outsiders, a pressure group representing homosexuals in the military, and Stonewall, a national organisation committed to legal equality and social justice for homosexuals. Stonewall's evidence to the Committee is complex and sophisticated and it is used here to represent the current homosexual viewpoint in this debate.

### **3: The Case For Homosexuality**

Stonewall's case to the Committee involved a detailed rebuttal of the Ministry of Defence's testimony. However, there are two principal arguments that seem to be central to its submission: they are equal treatment and human rights, and secondly, the right to sexual privacy. There is also an important argument that is missing from Stonewall's presentation: group rights. Stonewall wished the Committee to begin its analysis with the principle of equal treatment and non-discrimination against homosexuals;

'...our starting point, in looking at this issue, and we hope, indeed, the starting-point of the whole Committee, is that discrimination on any grounds not related to individual merit and capacity is morally wrong and economically wasteful'.<sup>13</sup>

and,

'Everyone is entitled to equal treatment and, at work, to be assessed on merit against objective criteria, not on the basis of prejudice and stereotyping. The question which the Select Committee must ask is whether there are any compelling arguments, based on evidence, as opposed to prejudice and stereotype, to justify Parliament allowing the armed forces to continue to depart from this principle?'.<sup>14</sup>

Stonewall supported its case by appeal to Article 14 of the European Convention on Human Rights that forbids discrimination on many grounds, including sex.<sup>15</sup> Consequently, Stonewall argued, there is nothing about lesbian and gay homosexuals as a group that justifies the ban on them serving in the military.<sup>16</sup>

That people should be treated equally and have equal rights and that they should not be discriminated against in the work place is so much part of contemporary thinking that it seems simply a self evident, unassailable, argument. That anyone, women, heterosexuals, or homosexuals, should be treated other than on the grounds of merit and individual capacity is seen as wrong. Sexuality is viewed as an irrelevant ground for discrimination in contemporary British civilian society. The results of such arguments often give

us what we want: none of us wishes to be treated unequally, or unfairly, or to be discriminated against on irrelevant sexual grounds. However, no public policy is cost free and in the context of this debate about homosexuals and the Army some of the standard criticisms of rights-based thinking generate interesting issues.

One of the most well known critic of rights thinking is the conservative philosopher Edmund Burke in his Reflections on the Revolution in France (1790)<sup>17</sup>. Burke did not deny natural rights, but he saw them as simply conventions arising out of custom and practice rather than from them being anything intrinsic to humans. Burke argued that society was a complex organic institution that benefited from the application of tradition, conventions, prejudices, sentiment, experience and wisdom on a case by case basis, rather than from the application of universal abstract principles such as the rights of man that allow individuals to govern themselves.<sup>18</sup> The outcome of this conservative tradition is liable to be quite different from that of the equal rights, equal treatment practice. In a conservative Burkean style community there will likely be equality before the law rather than equal rights, because the community will wish to discriminate and to treat some people unequally to achieve community goals. Ideals such as promoting, public morality, the individual moral character of citizens, making judgements between right and wrong and asserting the public good will be prominent.

In contrast, the universal application of equal treatment and equal rights, emphasises the individual rather than the community. Indeed it seems to detach the individual from many community, moral and religious influences and pressures by giving universal equal rights to them.<sup>19</sup> The implicit view of the person here is one of an independent individual, choosing freely how to live, subject only to the similar equal rights of others. The individual is isolated and the state provides a neutral framework of equal rights, but it is increasingly unable to make traditional moral judgements about right and

wrong, and thereby to discriminate to achieve such a public good.<sup>20</sup> This way of thinking is part of a broad tradition of thought that rejects traditional moral reasoning, that there are moral codes with universal application, and replaces it with an, apparently, neutral code.<sup>21</sup> This ethos of state neutrality about traditional morality allows one commentator to remark on the 'demoralisation of discourse'<sup>22</sup> and another on the 'demoralisation of society',<sup>23</sup> and another that people have, 'lost the confidence with which they once spoke publicly about morality'.<sup>24</sup>

This movement towards individualism and moral neutrality can be seen in the way public policy in Britain deals with sexual issues that were once considered traditional moral ones, such as: marriage, divorce, abortion, homosexuality, sex education for children, welfare availability and the like. Behaviour in these areas is seen as a matter of individual personal choice, derived from individual's equal rights and need for equal treatment, rather than from traditional morality.<sup>25</sup> Stonewall's case, similarly, is that homosexuality and heterosexuality should be viewed as comparable activities, equally valid and equally meritorious,<sup>26</sup> and that therefore any discrimination against homosexuals is wrongful and based on prejudiced stereotyping. Stonewall wishes the current British military ban to be replaced with a neutral policy that restricts both heterosexual and homosexual unacceptable behaviour, akin to the one adopted in Australia.<sup>27</sup> Acceptance of this moves the argument from the earlier, pre 1967 view, that homosexuality should be discriminated against because it is wrongful and harms the community, to one where prejudice and discrimination against homosexuals is wrong.

This sketch of an aspect of contemporary public policy in Britain is relevant to the issue of homosexuality and the Army. The claim to equal treatment in the Army work place based on merit alone would prohibit the Army from making judgements about the employee except in the, often quite narrow, sense of individual merit measured by objective criteria. Here,

individuals receive equal treatment however they behave, unless their behaviour can be shown to be directly relevant to their job, and they choose how they want to live themselves. But service, not work, in the British Army has traditionally been seen as a much more holistic and fully rounded concept than this, a vocation, involving duty, honour, tradition, military virtue, self sacrifice, courage and unlimited liability to give of one's life for the greater good of the community if that is necessary; the motto of the Royal Military Academy Sandhurst, "Serve to Lead", expresses this thought succinctly.<sup>28</sup> This community of service theme resonates with Burke's argument that society involves a partnership, in virtue, over many generations, between the living, the dead and the yet to be born.<sup>29</sup> The words on the British Second World War memorial to those who fell in battle at Kohima seem perfectly to capture this sentiment:

'When you go home  
Tell them of us and say,  
For their tomorrow  
We gave our today'.<sup>30</sup>

These are communitarian ideals and they are, subtly, challenged by the individualism inherent in equal treatment and equal rights arguments. Framing discussion in these individualistic terms makes it very difficult for the Army to sustain its traditional principles and thereby homosexuality becomes a matter of personal individual choice, detached from the reach of the wider, Army, community.

Community is a slippery and highly politicised concept capable of many meanings, but it might be possible to get broad agreement for the assertion that the closer and more united a community the greater the price expected and required of its members. Scruton has remarked on, 'the real price of community: which is sanctity, intolerance, exclusion and vigilance against the

enemy'.<sup>31</sup> The British Army's policy towards many issues and with regard to homosexuality echoes this type of thinking. The Army's argument is that it is a tightly bounded group and it must create a strong community with a clear vision of its public good; 'fighting power': and it can't afford to be neutral about homosexuality since it regards it as something that will affect its community's cohesion deeply. The, probably, unsolvable dilemma here is that whilst the British Army is a close community, equipped, trained and paid to defend the nation state and its interests, the nation state is increasingly composed of an individualistic, equal-rights, morally-neutral civilian society.

The other central argument apparent in Stonewall's case is the right to sexual privacy. The removal of the Army's ban is not seen by Stonewall as encouraging licence, but rather as respecting the privacy of individual's sexual lives.

'Our case, and it is the crux of the court case which will go to the European Court of Human Rights, is that we are arguing for a right of privacy, we are not arguing for licence, we are arguing for respect for people's private sexual lives'.<sup>32</sup>

'For many lesbians and gay men, particularly those in the armed forces, their sexual relationships are a private matter. The effect of the changes we advocate will not mean that they will all rush to make their sexuality public knowledge....In practice the effect of the policies we propose will not transform the armed forces. Life for everybody will be very much as it was'.<sup>33</sup>

The Army's policy gives it an interest in preventing those whose homosexuality is public from becoming what it believes would be a disruptive influence and this may lead to it investigating people's sexual lives and subsequently to their dismissal from their employment. Stonewall disagrees and argues that the privacy of homosexual's sex lives should be respected and it is able to appeal for support to the European Convention on Human Rights that gives a right of privacy.<sup>34</sup> This claim for sexual privacy is discussed in the context of the Army's argument, considered below; however the appeal

to privacy raises an important issue that is best examined here.

One impression gained from examining the debate in the 1996 Select Committee Report is that the possible expression of homosexuality under consideration is not fully clarified. Broadly, there are two prominent ideals of the homosexual life in contemporary debate. One can be seen as the liberal one that argues that people have the right to be homosexuals as long as they don't harm others and this will occur if they are consenting adults and they practise in private. This view was famously expressed in the 1957 Wolfenden report into homosexuality and prostitution where an area of private morality was identified that was not the business of public policy: 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the laws (sic) business'.<sup>35</sup> There always was an area of private morality, free from the law, but this argument sought to extend the boundaries of moral privacy and public morality. In doing so it was part of an ethos, that adults can do what they like with their own bodies as long as demonstrable harm is not caused to others, that has deeply shaped British social policy since the 1950s. It is this liberal view of privacy, that there is an area of private morality, in this case soldiers' homosexual behaviour, that is not the business of military law, that Stonewall represents in its evidence to the 1996 Committee.

However the other prominent model of the homosexual lifestyle, a group based one, is worth examining in some detail, since group understandings are of growing importance in British politics. Also, whilst this argument is not prominent in Stonewall's account, it is, perhaps somewhat surprisingly, implicit in the Army's argument. The goal of homosexual activists in the 1950s and 1960s was a liberal one of achieving civil rights, removing discrimination barriers and gaining public acceptance of the idea that what homosexuals did in private was their own business. However, for many, there was a move on from there, to support ideals of group rights, or 'Gay Pride'. An American philosopher has put this case for 'Gay Pride' succinctly:

'Today most gay and lesbian liberation advocates seek not merely civil rights, but the affirmation of gay men and lesbians as social groups with specific experiences and perspectives. Refusing to accept the dominant culture's definition of healthy sexuality and respectable family life and social practices, gay and lesbian liberation movements have proudly created and displayed a distinctive self-definition and culture....Gay pride asserts that sexual identity is a matter of culture and politics, and not merely "behaviour" to be tolerated or forbidden'.<sup>36</sup>

On this view homosexuality is not simply a private matter, but rather it is a symbol of group identity that should be carried into the public arena and be affirmed.<sup>37</sup> It envisages a group based pluralistic society bargaining in a manner that shows equal respect and affirmation for each group and its standards and its desires. It rejects the idea of common standards, or the dominant group's culture, that will, inevitably, impose its-self onto other autonomous groups. Peter Tatchell, a well known supporter of Gay rights in Britain, appears to illustrate this view when he argues in his book about homosexuals and the military that;

'The modern queer agenda is post-equality. It's geared to a wholesale renegotiation of sexual values and laws. We want...more than mere equal treatment...the whole (italics in the original) system has to change. That demands social transformation. It means, in the words of the Gay Liberation Front, moving "beyond civil libertarian goals" to achieve a "revolutionary change" which "abolishes the gender system" and creates a "new social order" which is not based on "straight male privilege"....The military is the incarnation of the gender system and the ultimate defender of that system. Its whole ethos is based on the straight male machismo which oppresses women and queers'.<sup>38</sup>

These two models, liberal and radical, of the homosexual life seem to affect the argument about the British Army's prohibition on homosexuality a good deal. The liberal argument makes the issue of homosexuality a matter of individual private behaviour outside the purview of the wider, in this case, Army community's, opinions and laws. This argument is assimilationist; it denies any great differences between heterosexual and homosexuals and encourages meritorious competition along individualistic equality of opportunity lines within the established heterosexual order. The radical Gay

Pride argument rejects the existing heterosexual social order and brings homosexuality to the forefront of politics and allocates to it the role of a badge or symbol of group identity within a society that it wants to change. Stonewall's evidence to the Select Committee is expressed along liberal lines of seeking tolerance for what it argues to be private behaviour and personal choices. However the politics of group rights are gradually becoming more important in Britain not least in the common claim that Britain is a pluralistic, multi-cultural, multi-religious, multi-racial society. It is not known, and no one can know, what model, the liberal or the radical, would eventually predominate if the ban on homosexuals in the British Army were lifted. Will homosexuals in the Army simply argue that their sexuality is a private matter and it is none of the Army's business as long as it is kept private? Or will they, in the Gay Pride tradition, argue that Army must recognise their sexuality formally as a group within the Army and that the Army must therefore change its structure?

Traditionally, there are groups in the Army, indeed the regimental system makes a particular strength of group identity.<sup>39</sup> If Gay Pride became the ruling practice amongst homosexuals in the Army then probably regiments would eventually have groups within them based on sexual identity which would have an agenda that must be taken into account by other groups within the regiment and the Army. This Gay Pride argument raises deep issues about Army community and social unity, and indeed fighting power, since it allocates important loyalties to the sexually identified group rather than to the wider community of the Army, and in doing so it raises concerns about the nature of common goals in such a community.<sup>40</sup>

The Army's case, although it is not presented as such, can also be seen to rest partly on a group rights basis. It is arguing that it is a group that has the duty and a preference to discriminate in its employment procedures with regard to homosexuality and that not being able to do this will cause

great offence to its existing members and impaired efficiency in its performance of its group task. If this is true, then few things are likely to be more offensive or to cause more outrage than Gay Pride sentiments within the Army. Stonewall argues that nothing much will change if the ban is relaxed. However in a group rights based community there is much room for members of groups to take offence at the activities of other groups. Stonewall's argument that not much will change rests, understandably in its case, on the idea that homosexuality should no longer be considered a significant issue, but so much here depends on the strength of opinion of those heterosexuals already serving in the Army.

#### **4. The Army's Case**

The Army's case, and it is the same as that of the other two Services and the Ministry of Defence, was also presented to the Select Committee on the Armed Forces Bill in 1996. As with Stonewall's submission, much of the Army's case consisted of rebuttal of its opponents' detailed arguments. The crux of the Army's justification for its ban on homosexuals, was, however simply and succinctly expressed; it was on the grounds that military life is very different from civilian life:

'...the special nature of Service life precludes the acceptance of homosexuality in the Armed Forces. The conditions of military life, both on operations and within the Service environment, are very different from those experienced in civilian life. To meet the exceptional demands of military operations members of the Armed Forces must work together as a close-knit and effective team. Their morale and ethos are crucial for their effectiveness. Service personnel can be required to live in close proximity with each other in shared, single-sex accommodation with very limited personal privacy. They may also be required to work together in physically close quarters sometimes under great stress. ...these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate...policy towards homosexuality...the primary concern...is thus the maintenance of an operationally effective and efficient force. Coupled with this is the maintenance of discipline....the policy derives from a practical assessment of the implications of homosexual orientation for Fighting Power'.<sup>41</sup>

In support of this argument the Ministry of Defence submitted to the

Committee its 1996 Report on Homosexuality that contained an internal survey that found that currently serving military personnel overwhelmingly did not wish to work alongside known homosexuals.<sup>42</sup> Of male Army respondents, 85% agreed or strongly agreed that they would find the presence of known homosexuals offensive in a Service Environment, 3% did not, and the overall figure agreeing or strongly agreeing for all three Services was 84%.<sup>43</sup> Females were more accepting of homosexuals, with 59% of Army respondents finding homosexuals offensive.<sup>44</sup> Army males were also strongly offended by the thought of sexual acts between men with 83% agreeing or strongly agreeing that they found this revolting and 81% of the tri-Service sample were of the same view.<sup>45</sup> This Report made much of the thinking, feeling and sentiments of existing personnel towards homosexuals, and the Army's professional military judgement that known homosexuality would be harmful in its community. The Army's case is that future change in civilian society's attitudes towards homosexuals will possibly reduce the implications for fighting power, although it also suggests that there may be something immutable about the military environment that means that known homosexuals can never be accepted without adversely affecting fighting power.<sup>46</sup> More broadly, the Army's case is that its values should be the same as those of civilian society except when it is necessary to have different ones because of its function that necessitates a special military ethos.<sup>47</sup>

The Army is arguing here that its personnel are heterosexual, that they would be disturbed and offended by having to work in enforced close circumstances with known homosexuals, and that this would then consequently diminish fighting power. Stonewall, naturally, disputes the accuracy of the Army's internal survey<sup>48</sup> and views this argument as a weak justification for the ban on homosexuals in the military and one that rests on prejudice, stereotype and lack of factual evidence.<sup>49</sup> The Army justifies its policy by making two central, but overlapping, arguments for discriminating

against homosexuals; one is for sexual privacy, the other is for fighting power.

In this debate both the Army and its critics are making claims for sexual privacy, but in different ways. Stonewall's desire is for a private homosexual sex life, free from the intervention of the Army. Gay Pride adherents, currently silent in this official debate, regard their sexuality as a very public issue and consequently can be seen to have a different concept of privacy. Their claim to privacy is in effect the privacy not to be stopped from making their sexuality public and having it recognised in the public arena. The Army's case is for a community that has little sexual privacy in it at all. The Army argues that its fighting effectiveness is based on being a close knit community whose members have no choice but to work together in enforced closeness and who deserve privacy from unhelpful sexuality, be it homosexual or heterosexual. Indeed the Army's 1994 Discipline and Standards Paper does not necessarily recognise a private area of morality in some heterosexual relationships; for example it forbids heterosexual adultery and describes such behaviour in the following terms, 'The most serious cases of social misconduct involve adultery within the military community'.<sup>50</sup> Officers, married or single, who have adulterous relationships outside the military community hazard their jobs if this becomes publicly known.<sup>51</sup> So the Army discriminates against heterosexual behaviour when it believes that this serves its community purpose. Soldiers are expected to live open lives and for the Army to have access, if and when it desires, to all their lives. Yet the Army does support sexual privacy in that, as does civilian society, it separates men and women in accommodation and bathroom facilities, for all sorts of commonly accepted reasons, ranging from sexual privacy to the desire not to stimulate sexual activity between workplace colleagues.

Such considerations allow the Army, in turn, to make a claim for the rights of its heterosexual soldiers to sexual privacy.<sup>52</sup> Whilst Stonewall's case is that homosexuality is a private matter, the Army's case is the reverse: that,

within the Army, homosexuality is a public matter. Its, known, public existence, it argues, engenders hostile responses in the heterosexual soldier and diminishes fighting power and fighting spirit. Part of a judgement of the Master of the Rolls in the Court of Appeal was used by Stonewall to support its analysis;

'To dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to me to show respect for that person's private and family life'.<sup>53</sup>

This argument rests on the premiss that homosexuality is a private sexual preference; something that the Army's argument rejects. From the perspective of the Army, the Master of the Rolls' argument can be easily reversed and then it can be argued that allowing known homosexuals to serve in the enforced closeness of military life does not show respect for majority heterosexual private and family life in the Army.

The Army's argument is not necessarily about overt actual homosexual behaviour, but it is about an attitude of mind; it is the thought of serving in enforced closeness with known homosexuals that is particularly offensive to soldiers. For example, the thought of heterosexual soldiers showering with a known homosexual, makes them feel threatened and, they argue, diminishes cohesion, unity and morale.<sup>54</sup> Stonewall strongly rejects this sense of military apprehension towards homosexuals and suggests that it is totally unwarranted and unnecessary.<sup>55</sup> In the circumstances of enforced communal living in the Army there would seem to be no way of resolving this dispute over privacy that will satisfy all the parties and ensure the right of privacy for each. This illustrates one of the dilemmas with anti-discrimination proposals; they almost inevitably curtail freedom of choice for someone or some group. Positively protecting one group very easily discriminates against another group that belongs to a different category. In this case there can be seen to

be a clash of two public goods: the right of heterosexuals to sexual privacy and the right of homosexuals to sexual privacy. Even an appeal to equal human rights and equal treatment will not help here, since if they are allocated equally there will still be deadlock.

The other central claim of the Army is that fighting power or effectiveness depends on team work, leadership, discipline, mutual trust, morale and a military ethos, and that the presence of known homosexuals undermines these essential characteristics. This argument has a long history: it was supported in 1957 by the Wolfenden Committee which, whilst it argued for the decriminalization of homosexuality in civilian society, argued that the military should be excluded from this.

'We recognise that within services and establishments whose members are subject to a disciplinary regime it may be necessary, for the sake of good management and the preservation of discipline and for the protection of those of subordinate rank or position, to regard homosexual behaviour, even by consenting adults in private, as an offence'.<sup>56</sup>

James Adair's minority dissenting view in the Wolfenden Report included his belief that the removal of the ban on homosexuals in the military would create a situation where:

'...an increase in the trend towards homosexual practices would be marked and intense while the effect on the morale of members of the services would be adverse and corrupting'.<sup>57</sup>

This line of argument was characteristic of that of military speakers in Parliamentary debates during the legislative initiatives that eventually became the Sexual Offences Act 1967. For example Field Marshal Lord Montgomery said:

'What is the greatest single factor making for success in battle or for efficient and well trained armed forces in peacetime? It is morale. And what is the very foundation of morale? It is discipline. If these unnatural practices are made legal a blow is struck at the discipline of the British armed forces'.<sup>58</sup>

In more recent times the same argument has been deployed, as, for example,

in the Army's 1994 Standards and Discipline Paper which when referring to male or female homosexuality argued that it is:

'...incompatible with military service because of the close physical conditions in which soldiers often have to live and work. Homosexual behaviour can cause offence, polarise relationships, induce violence and as a consequence morale and unit effectiveness suffer'.<sup>59</sup>

It is this argument, that the presence of known homosexuals will harm the military community, that Stonewall is seeking to overthrow.

The Army's case is strikingly similar to one side of an important earlier debate about homosexuality in Britain. Following the Wolfenden Committee report in 1957, Lord Justice Devlin and Professor Hart debated the issue of homosexuality and the law.<sup>60</sup> Professor Hart argued in the liberal tradition that there are areas in life, such as homosexuality amongst adults, which are simply not the law's business since they both are private and do not cause harm to others: and it is this viewpoint that has shaped contemporary civilian law. However, Devlin argued, in a conservative tradition, that society is held together by a common or public morality that acts as a unifying agent and which, or at least important parts of which, should be enforced or society will disintegrate.<sup>61</sup> Hence,

'What makes a society of any sort is community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. ...If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail....without shared ideas on politics, morals and ethics no society can exist...Societies disintegrate from within more frequently than they are broken by external pressures. There is disintegration when no common morality is observed...'.<sup>62</sup>

Devlin sees a moral basis to social order and he argues that the law should preserve this order. He does not accept that a private area of morality exists in any real sense. Even some things, he suggests, done completely privately may ultimately be harmful to society, for they may harm the social order,

social stability or individuals: things done privately, are he argues, a matter of concern to the wider community. Consequently he proposes that homosexuality done even in a concealed manner, if it becomes sufficiently widespread, will corrupt and harm the family and this could ultimately destroy or harm society. Hence in Devlin's view the law should be used to protect public morality from acts which are believed to threaten it.

Devlin argued from a traditional, Christian inspired, moral position, but the Army's case in 1996, although it appears very similar to Devlin's, explicitly avows any moral stance or indeed any suggestion that homosexuals are less effective than heterosexuals as soldiers.<sup>63</sup> However, notably, Stonewall's argument is that the ban on homosexuals in the Army is a moral issue and that very little will actually change, except for the better, if homosexuals are allowed to serve openly in the Army.<sup>64</sup> Despite the Army's claim it does seem to be arguing for common, or majority heterosexual standards, or indeed morals, implicit in existing Army morale, discipline and military ethos. Its views are those of the Army 'man on the Clapham omnibus', the reasonable man through whom Devlin would have society make moral judgements.<sup>65</sup> Known homosexuality, clearly, is viewed by the Army as introducing conflict, tension and disunity. Stonewall's case is based on the premise of equality between the two sexualities that therefore necessitates equal treatment. The Army's case is somewhat terse here and it does not directly challenge this argument of equality.<sup>66</sup> Rather, it can be seen to be reporting that open homosexuality in the enforced close context of Army life hooks into heterosexuals' emotions, their sexuality, psychology and sense of the person and leads to opposition to homosexuals. A remark by Peter Tatchell, in his book about homosexuals and the military in Britain, can be used to give support to this argument when he suggests that, 'At a deep unconscious level, there is a fundamental difference between the psyches of heterosexual males and queer men'.<sup>67</sup>

An important problem for the Army's argument here is that Britain, and

indeed the Army, is increasingly pluralistic in outlook and practice. Homogenous solutions are currently unpopular in contemporary Britain and there is diversity rather than homogeneity in peoples' behaviour as the British official statistics, Social Trends, reveal.<sup>68</sup> The considerable homogeneity of the past has been replaced with a pluralism that involves diversity, not uniformity, of morality, practices and standards. A dilemma for the Army must be that it is maintaining here, out of what it argues is military necessity, a homogeneity of traditional moral standards. However, the civilian society that it protects and serves, and draws its recruits from, increasingly celebrates diversity and heterogeneity, as of course is likely if individuals are encouraged within a neutral moral framework to decide their own goals. One of the problems for any pluralistic society is what limits to set on diversity; where to set the boundaries of acceptable behaviour, since there is unlikely to be agreement about this in many cases. This problem seems to be particularly acute in the case of a British Army serving a pluralistic society. An effective Army like the British one accepts some diversity, but within a tightly bounded community that insists on much conformity. In such an organisation, individualism, self interest, tension and conflict, especially if they are given precedence, are viewed as disloyal, whereas uniformity, cohesion, trust and team work are seen as vital to success. The emphasis is on bonding together around shared virtues and goals, with unity of spirit, and of individuals deferring themselves to the whole. But these principles are significantly at odds with those of pluralistic society.

Another difficulty here is that the issue of fighting power is so hard to grapple with as, indeed, the Army concedes.<sup>69</sup> It is noticeable also that Stonewall, in its submission to the 1996 Select Committee, places its emphasis on discussion of communal living within the military, rather than on analysing issues of fighting power. Fighting power is defined by the Army as having three characteristics, concepts of war, the physical means to fight and the

moral component.<sup>70</sup> It is this last that is troublesome here. The Army argues that morale is one of its ten Principles of War, both in war and peace, and that it fosters the 'will to win'.<sup>71</sup> The Army views morale as a mental state whose primary element is trust.<sup>72</sup> Cohesion is part of morale and cohesion is seen as stemming from high standards in training, the will to win, and from 'an ethically based code of personal conduct, in peace, which does not threaten or undermine cohesion on operations'.<sup>73</sup> Clausewitz argued somewhat similarly; he saw the moral components in war, which he identified, principally, as the skill of the commanders, the experience and courage of the troops and their patriotic spirit, as an essential part of the spirit of war, but one that was a mystery:

'...the moral elements are among the most important in war. They constitute the spirit that permeates war as a whole and at an early stage they establish a close affinity with the will that moves and leads the whole mass of force, practically merging with it, since the will is itself a moral quantity. Unfortunately they will not yield to academic wisdom. They cannot be classified or counted. They have to be seen or felt... it is paltry philosophy if...one lays down rules and principles in total disregard of moral values'.<sup>74</sup>

The Army views known homosexuality as adversely harming morale and cohesion and hence fighting power and it uses its survey of the views of existing military personnel as support for this contention.<sup>75</sup> This must be a matter of military judgement, since, if Clausewitz is correct, the spirit of war can only be 'seen and felt'. It is unlikely that the harm that the Army sees in allowing known homosexuality could be measured, or proven, as indeed Stonewall has emphasised when it attacks what it regards as prejudice, stereotype and lack of empirical evidence in the Army's account.<sup>76</sup> It is possible to argue that the major European powers which retained laws forbidding homosexuality until the 1960s, that is Britain, Germany and the Soviet Union, were the only ones able to fight the long Second World War with a mass Army whose morale did not break.<sup>77</sup> However, morale, cohesion

and fighting power are obviously subject to so many differing variables that making a causal link between them and allowing known homosexuality in soldiers is almost certainly impossible.<sup>78</sup>

This emphasis on trust resonates with the recent upsurge in interest in the place of trust in civil society and the discovery of social capital. Fukuyama argues for the importance of trust in civil society for creating the conditions necessary for prosperity. Societies with low trust he argues spend much effort protecting themselves from internal problems.<sup>79</sup> Social capital consists of those informal principles and rules that facilitate cooperation for the common good.<sup>80</sup> This argument is not new in military circles; a classic comparative study of the German and American armies in the Second World War found the German one to have had much more fighting power.<sup>81</sup> The main reason for this was that the German Army placed the creation of mutual trust between soldiers at the centre of its organisation in a way that the American Army did not.

This idea of the spirit of the effective military, a spiritual bond, is quite common. One authority speaks of new soldiers joining a 'mystical fraternity'.<sup>82</sup> Clausewitz suggested that soldiers see themselves as members of '...a special guild, in whose regulations, laws and customs the spirit of war is given pride of place'.<sup>83</sup> Winston Churchill once said of the British Army, 'The Army was not an inanimate substance, it was a living thing...That was true of any Army, and it was still more true with regard to a voluntary army'.<sup>84</sup> In Burma during the Second World War, General, later Field-Marshal, Slim developed three principles; spiritual, intellectual, material, and in that order, to raise the fighting spirit of the 'Forgotten' British army that then went on to victory over the Japanese.<sup>85</sup> His spiritual principle, he argued was not necessarily religious, although he did view Christianity as very valuable in soldiers. Even the arch-realist Machiavelli wanted soldiers to be religious and to make oaths of allegiance to God and to the state to ensure their loyalty and obedience.<sup>86</sup>

The argument that morale, trust and cohesion constitute the spirit of war that must be seen and felt rather than measured is a Burkean style argument about the wisdom of the ages and practical experience being more important than abstract rules. It resonates with the contemporary debate about homosexuality and the British Army, with one side making appeals to rules of human rights and the other to professional military judgement about the spirit of war. This understanding of the mystical bonds that bind together soldiers in the Army does not of course tell us much in itself about what effect known homosexuals might have on this unity. However these intuitive, enigmatic, bonds that unite soldiers together pose a great difficulty for the arguments of homosexual rights, sexual privacy and equal treatment. For these arguments lean towards individualism, factual analysis and measurement: I have rights or I do not: I have sexual privacy or I do not. These are concepts that see individuals as rational actors independently achieving their own, measurable, goals as long as they don't hurt others. However the appeal to soldiers' mysterious metaphysical instinctive bonds that hold them together not by individualistic self interest, but by membership, duty and moral obligation to the community are quite different.

## **5. Conclusion**

The arguments that are used by the Army and by supporters of the homosexual argument in this debate raise a great many issues about the relationship between the British Army and civilian society. This is a controversy that reveals two differing views of the effective military and indeed of politics. For the Army, the ban on known homosexuals is about fighting power and sexual privacy which it believes involves morale, cohesion, trust, and heterosexual relationships. The Army's argument is a Devlin-like one that seeks the views of the Army reasonable man on the Clapham omnibus and honours unity and common standards and a social glue that holds its community together. Indeed this is an ideal of the good community which is a

time honoured one in British political thought.<sup>87</sup> The Army uses its experience of, and need to prepare for, effective fighting in battle to justify this ideal and its view that known homosexual practice weakens this community. Supporters of the homosexual case use a different perspective, one that emphasises individualism, human rights, equal treatment, sexual privacy, non-discrimination and legitimating homosexual activity. They can see no evidence that admittance of known homosexuals will adversely affect or harm morale and cohesion in the Army.

The two sides in this debate use different political languages and do not convince each other. One view is individualistic, the other is communitarian. However there is little reason to suppose that the arguments deployed by Wolfenden in 1957 and accepted by Parliament in the debates that led to the Sexual Offences Act 1967 have lost their power when they are applied to the military. Military life is different from civilian life and this difference sometimes justifies different policies. It is not clear that an emphasis on individualism, sexual privacy and human rights will lead to a better or more fully effective military performance by the British Army. Given the evidence that serving Army personnel would find the presence of known homosexuals strongly offensive their presence in the Army would lead to diminished trust and social cohesion. The Army reflects society in many ways, but its prime task is efficiently to defend the nation state.

## References

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<sup>1</sup> I am grateful for helpful suggestions from Brigadier Currie, Director of Personnel Services (Army) in 1998 and from my colleagues Alan Ward and Nigel de Lee. As ever, responsibility for the argument is the author's alone. In places this paper draws on an earlier publication, see, Stephen Deakin, "The

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British Military: Community, Society and Homosexuality". British Army Review No 110. August 1995. pp.27-33.

<sup>2</sup> Since policy amongst the three Services and the Ministry of Defence is the same on this issue, I conflate Army and Ministry of Defence sources in this paper, unless a reference is specifically an Army one.

<sup>3</sup> Wolfenden Committee, Report of the Committee on Homosexual Offences and Prostitution London. HMSO. 1957. Cmmd. 247.

<sup>4</sup> Select Committee on the Armed Forces Bill London. HMSO. 1991. para. 38.

<sup>5</sup> Select Committee 1991 para. 40.

<sup>6</sup> ibid.

<sup>7</sup> Select Committee 1991 para. 41.

<sup>8</sup> House of Commons, 17 June 1992, columns, 989-996.

<sup>9</sup> Ministry of Defence. 1994. For details of these guide-lines see, The Guardian 11th May 1994.

<sup>10</sup> The Discipline and Standards Paper Ministry of Defence internal document, 1993.

<sup>11</sup> The issue does not seem to have been discussed in the 1961 Report. See, Special Report from the Select Committee on the Army and Air Force Bill.

London, HMSO, 1961. For subsequent discussions see, Special Report from the Select Committee on the Armed Forces Bill. London, HMSO, 1966.

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Select Committee on the Armed Forces Bill London. HMSO. 1991.

<sup>12</sup> Select Committee on the Armed Forces Bill London. HMSO. 1996.

<sup>13</sup> Select Committee 1996. p.99.

<sup>14</sup> Select Committee 1996. p.178.

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- <sup>15</sup> Select Committee 1996. p.182-183.
- <sup>16</sup> Select Committee 1996. p.99.
- <sup>17</sup> Edmund Burke, Reflections on the Revolution in France See, G. H. Sabine, A History of Political Thought London. Harrap. 1963. pp.607-619.
- <sup>18</sup> ibid.
- <sup>19</sup> See, Jonathan Sachs, The Politics of Hope London. Jonathan Cape. 1997. p.102.
- <sup>20</sup> See, Michael J Sandel, Democracy's Discontent Harvard University Press. 1996. p.7.
- <sup>21</sup> James Q Wilson, The Moral Sense Free Press. Macmillan. 1993. p.225. This morally neutral state may get into difficulties if it is asked to apply rights thinking to traditional moral disputes, such as the rights of the unborn child versus the right of the mother to choose abortion.
- <sup>22</sup> Jonathan Sachs, The Persistence of Faith London. Wiedenfeld and Nicholson. 1991. p.42.
- <sup>23</sup> Gertrude Himmelfarb, The Demoralization of Society London. IEA. 1995.
- <sup>24</sup> Sandel, Democracy's p.8.
- <sup>25</sup> Sachs, Politics p.42.
- <sup>26</sup> Select Committee 1996 p.186. para.57. 'The prevailing and most respected scientific view is that homosexuality is a normal dimension of human sexuality and that homosexual conduct and behaviour is analogous to heterosexual behaviour'.
- <sup>27</sup> Select Committee 1996 p. 180. The relevant part of the Australian code reads, 'Sexual relations are a part of adult life and are predominantly a private matter for each individual'. See, Unacceptable Sexual Behaviour By Members of the Australian Defence Force DI(G) PERS 35-3 November 1994. AL 1.
- <sup>28</sup> Moskos' I / O model is useful here and the British Army is usually viewed as an example of a very traditional army. See, Charles Moskos and Frank Wood,

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ed. The Military More Than Just a Job? London. Pergammon. 1988. Cathy Downes examines the British case in this work see, pp.153-176. For the idea of 'unlimited liability' applied to the military see, General Sir John Hackett, The Profession of Arms Times Publishing. London. 1962. p.63. For a recent article arguing the case for a traditional Army see, 'How soon could our Army lose a war?', Sir Michael Rose, The Daily Telegraph 16.12.97.

<sup>29</sup> Sabine, History, p.607-619.

<sup>30</sup> Arthur Swinson, Kohima London. Cassell. 1966. p.254.

<sup>31</sup> Roger Scruton, 'In Defence of the Nation', in Roger Scruton, The Philosopher on Dover Beach Manchester. Carcanet. 1990. p.310.

<sup>32</sup> Select Committee 1996 p.99.

<sup>33</sup> Select Committee 1996 p.185.

<sup>34</sup> Select Committee 1996 p.182.

<sup>35</sup> Wolfenden Committee para. 61.

<sup>36</sup> Iris Marion Young, Justice and the Politics of Difference Princeton. 1990. p.161. I owe this source to David Miller, Nationality Oxford. Clarendon. 1997. p.131. Miller's discussion of multiculturalism is very stimulating.

<sup>37</sup> Miller, ibid. p.132.

<sup>38</sup> Peter Tatchell, We Don't Want to March Straight London. Cassell. 1995. p.32-33.

<sup>39</sup> See, John Keegan, "Regimental Ideology" in Geoffrey Best and Andrew Wheatcroft ed. War Economy and the Military Mind London Croom Helm. 1976 pp. 3-18.

<sup>40</sup> For discussion of the difficulty of pluralistic societies having common goals see, Raymond Plant, "Community: Conception and Ideology" Politics and Society Vol. 8. No.1. 1978. pp.79-107.

<sup>41</sup> Select Committee 1996 p.217.

<sup>42</sup> Report of the Homosexuality Policy Assessment Team Ministry of Defence.

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1996.

<sup>43</sup> ibid. p.116. The question was, 'In a Service Environment, heterosexuals would find the presence of known homosexuals offensive'.

<sup>44</sup> ibid p.116.

<sup>45</sup> ibid p.116. The question was, 'The thought of sexual acts between two men revolts me'.

<sup>46</sup> Report of the Homosexuality Policy Assessment Team p.227.

<sup>47</sup> British Military Doctrine London HMSO. 1997 p.5:10-11.

<sup>48</sup> Select Committee 1996 p.99.

<sup>49</sup> Select Committee 1996 p.186. para.55.

<sup>50</sup> Discipline and Standards Paper

<sup>51</sup> ibid.

<sup>52</sup> Select Committee 1996 p.91. para.700.

<sup>53</sup> Select Committee 1996 p.183. para. 23.

<sup>54</sup> The Report of the Homosexuality Policy Assessment Team took considerable narrative evidence from serving military personnel along these lines.

<sup>55</sup> Select Committee 1996 p.102. para.776.

<sup>56</sup> Wolfenden para. 144. The replacement of military leadership by military management in this argument is revealing and possibly indicates a misunderstanding of military life.

<sup>57</sup> James Adair in Wolfenden p.122. para.11.

<sup>58</sup> House of Lords Vol. 266. Col. 247. 1965.

<sup>59</sup> Discipline and Standards Paper

<sup>60</sup> Partrick Devlin, The Enforcement of Morals Oxford University Press. 1965. (Twelfth Impression, 1990.)

H.L.A. Hart, Law, Liberty and Morality Oxford University Press. 1963.

<sup>61</sup> Devlin, Enforcement p.13.

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<sup>62</sup> Devlin, Enforcement pp. 9-14.

<sup>63</sup> 'It is not a question of moral judgement, nor is there any suggestion that homosexuals are any less courageous than heterosexual personnel'. Select Committee 1996 p.217.

<sup>64</sup> Select Committee 1996 p.181.

<sup>65</sup> Devlin, Enforcement p.15

<sup>66</sup> The section in the Ministry of Defences' own report that deals with health issues and homosexual serviceman foresees relatively few health problems if homosexuals are admitted to the Services. See, Report of the Homosexuality Policy Assessment Team pp.181-186. However conservative and pro-family supporters have little difficulty in making a case based on published medical journal papers to show the inequality of outcomes of the heterosexual and homosexual lifestyles. See for example, Ronald Ray. Gays in or Out? London. Brassey's. 1993. Stephen Green. The Sexual Dead End London. Broad View. 1992. For an alternative interpretation of health issues in this area see Gwyn Harries-Jenkins and Christopher Dandeker, 'Sexual Orientation and Military Service: The British Case', in W.J Scott and S. C. Stanley eds. Gays and Lesbians in the Military New York. Aldine de Gruyter. 1994. pp.191-204.

<sup>67</sup> Tatchell, We don't want, p.21.

<sup>68</sup> Social Trends London. HMSO. 1996.

<sup>69</sup> Report of the Homosexuality Policy Assessment Team p.18-19.

<sup>70</sup> Report of the Homosexuality Policy Assessment Team p.18-19.

<sup>71</sup> British Military Doctrine p.A3.

<sup>72</sup> ibid p.A3

<sup>73</sup> ibid.

<sup>74</sup> Carl Von Clausewitz On War edited and translated by Michael Howard and Peter Paret, Princeton. 1976. p.184

<sup>75</sup> Report of the Homosexuality Policy Assessment Team

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<sup>76</sup> Select Committee 1996 p.178.

<sup>77</sup> Christie Davies, Permissive Britain London. Pitman. 1975. p. 138.

<sup>78</sup> A useful and accessible overview of these issues is Gerald Garvey and John Dilulio, 'Only Connect' in The New Republic 26th April 1993. pp.18-21. A critique of the argument that homosexuals affect military cohesion and morale can be found in Lois Shawves, And the Flag was Still There Harrington Park Press. 1995. Chapter 7.

<sup>79</sup> Francis Fukuyama, Trust: The Social Virtues and the Creation of Prosperity London. Hamish Hamilton. 1995.

<sup>80</sup> Francis Fukuyama, The End of Order London. Social Market Foundation. 1997. p.4.

<sup>81</sup> Martin Van Creveld, Fighting Power London, Arms and Armour Press. 1983.

<sup>82</sup> Richard Holmes, Firing Line London. Penguin. 1984.

<sup>83</sup> Clausewitz, On War p.187.

<sup>84</sup> Winston Churchill, House of Commons, Official Report, 8 August 1904; Vol. 139, c.1415.

<sup>85</sup> Field-Marshal Slim, Defeat into Victory London. Cassell. 1956. pp. 182-183.

<sup>86</sup> See, Sebastian de Grazia, Machiavelli in Hell London. MacMillan. 1996. p.97.

<sup>87</sup> One illustration of this in the legal debate about law and homosexuality is Hart's criticism of Devlin's views that they are typical, historically, of the English judiciary. Hart Law,Liberty p.63. and Devlin Enforcement p.125.