

SEXUALLY SPEAKING: "DON'T ASK, DON'T TELL" AND THE FIRST AMENDMENT AFTER *LAWRENCE V. TEXAS*

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INTRODUCTION

A couple of years ago, a good friend of mine, a man who is involved with a male enlisted member of the military, watched his partner leave for Iraq. Naturally, my friend and his partner are involved in a very discreet relationship because of the military's ban on openly gay service members—the so-called "Don't Ask, Don't Tell" policy. My friend phoned me to express how painful their parting was. Interestingly, the most stinging part for my friend was his detachment from the heterocentric drama unfolding around him at the military base. Everywhere he looked, it seemed, opposite-sex couples embraced, and some wept openly and kissed. But as the transport carrying my friend's partner of five years left Fort Bragg, North Carolina, he could only stare silently. My friend and his partner could not share one last embrace or one last goodbye kiss because of "Don't Ask, Don't Tell." Such public displays of same-sex affection trigger separation proceedings under current military regulations.¹

At that same time, across the country in Washington State, Major Margaret Witt was finding herself at the mercy of those same regulations.² In 2004, the military began separation proceedings against Witt—a reservist and decorated nineteen-year veteran with the Air Force—when an anonymous tip revealed that she was in a long-term lesbian relationship. By all accounts, Witt was an exemplary service member. She was a stellar operating-room and flight nurse; President Bush awarded her the Air Medal for service in the Middle East and, later, the Air Force Commendation Medal. Even as the military scrambled to find qualified nurses to fill open positions, Witt was discharged.

In 2006, a federal district judge dismissed the suit that Witt brought to get her job back. Witt argued that "Don't Ask, Don't Tell" was unconstitutional "as applied" to her, and that *Lawrence v. Texas*³ and *United States v. Marcum*⁴

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1. For similar stories, see Kathi Westcott & Rebecca Sawyer, *Silent Sacrifices: The Impact of "Don't Ask, Don't Tell" on Lesbian and Gay Military Families*, 14 DUKE J. GENDER L. & POL'Y 1123 (2007).

2. See Tan Vinh, *Lesbian Challenges Military Policy*, SEATTLE TIMES, April 13, 2006, at B2, available at http://seattletimes.nwsourc.com/html/localnews/2002927616_lawsuit13m.html.

3. 539 U.S. 558 (2003).

4. 60 M.J. 198 (C.A.A.F. 2004).

established a liberty interest in the off-base private conduct for which she was punished. The judge disagreed:

The majority opinion in *Lawrence* did not change the framework within which ["Don't Ask, Don't Tell"] should be evaluated. Accordingly, prior case law approving [the policy] is not affected and ["Don't Ask, Don't Tell"] remains constitutional as a regulation on individual conduct. Moreover, plaintiff fails to demonstrate that her interest in liberty is affected by the government's effort to separate her from military service.⁵

The judge also tersely dismissed the notion that Witt's separation implicated the First Amendment.⁶

This article argues that the military's ban on gays—currently embodied in the "Don't Ask, Don't Tell" policy—is facially unconstitutional because it violates the First Amendment's guarantees of free speech and expression.⁷ The argument that the military's ban on gays, the "Don't Ask, Don't Tell" policy, and the military's underlying criminalization of sodomy are all unconstitutional under the First Amendment has been brilliantly examined before.⁸ Certainly, prior to *Witt*, the courts rejected the idea that First Amendment heightened scrutiny should apply to "Don't Ask, Don't Tell."⁹ Traditionally, the government has argued that service members are not being punished for the statement, "I

5. *Witt v. U.S. Dep't of the Air Force*, 444 F. Supp. 2d 1138, 1148 (W.D. Wash. 2006) (alterations added).

6. *Id.* at 1146–47.

7. "Don't Ask, Don't Tell," codified at 10 U.S.C. § 654 (2000), is the result of a compromise between the Clinton administration and Congress. Clinton made campaign promises indicating that he would lift the ban, but the issue became a political lightning rod. For a discussion of the Clinton efforts and the ensuing backlash, see SHANNON GILREATH, *SEXUAL POLITICS: THE GAY PERSON IN AMERICA TODAY* 28 (2006) [hereinafter GILREATH, *SEXUAL POLITICS*].

The "Don't Ask, Don't Tell" compromise (officially, "Don't Ask, Don't Tell, Don't Pursue, Don't Harass") maintains that merely having a homosexual orientation is not itself a bar to military service, but that engaging in, or possessing the propensity to engage in, homosexual conduct may be. See Dep't of Defense Directive No. 1332.14, Enlisted Administrative Separations, at encl. 3 ¶ E3.A1.1.8.1.1 (1994) [hereinafter DoDD 1332.14], available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>; cf. Dep't of Defense Instr. 5505.8, Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations, at §§ 4, 6, & encl. 2 (2005) [hereinafter DoDI 5505.8], available at http://www.dtic.mil/whs/directives/corres/pdf/i55058_012405/i55058p.pdf.

8. See, e.g., David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

9. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991); *Schowengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991), cert. denied, 112 S. Ct. 1514 (1992); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

Under the old outright ban on gays, the military purported to focus on the "status" of being homosexual. That alone was justification for separation from the service. That position certainly had its constitutional problems, but courts were content to reject any First Amendment challenges precisely because it was "the identity that makes [service members] ineligible for military service, not the speaking of it aloud." *Marsh*, 881 F.2d 454 at 462.

The free-speech argument has also been rejected subsequent to *Witt*. See *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (2006), appeal argued *sub nom* *Cook v. Gates*, Nos. 06-2313, 06-2381 (1st Cir. Argued Mar. 7, 2007).

am a homosexual." Rather, the government argues that it merely uses this statement as an evidentiary admission that the speaker will engage in homosexual sex acts, which are illegal under the Uniform Code of Military Justice.¹⁰ But in this article, I argue that the Supreme Court's decision in *Lawrence v. Texas*¹¹ makes "Don't Ask, Don't Tell" unconstitutional by significantly altering the reality in which "Don't Ask, Don't Tell" operated—formerly, a reality in which the Court held that no constitutional interest in privacy protected individuals from harassment by the law when they engaged in sex practices that the "moral" majority of their fellow citizens found "depraved" or "unnatural."¹² This was so even when the basis for that judgment was moral sentiment formed at a time when religious dissenters were burned at the stake and those daring to suggest that the earth revolved round the sun were likewise branded moral degenerates.¹³ *Lawrence*, when read with integrity, went a long way toward obliterating this *ancien régime* of moral enslavement.¹⁴ Certainly, *Lawrence* ruled that state laws that continued to criminally punish consenting adults engaging in "sodomy" in private were unconstitutional.¹⁵

The continuation of "Don't Ask, Don't Tell," which allegedly treats an admission of homosexual conduct (through expressive activity or verbal utterance) as an evidentiary indication that the speaker has the propensity to engage in a criminal act ("sodomy"), when the underlying act ("sodomy") can

10. See 10 U.S.C. § 925 (2000) (codifying Uniform Code of Military Justice, Article 125); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, at pt. IV, Art. 125, ¶ 51 (2005), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

11. 539 U.S. 558 (2003).

12. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. at 558.

13. Of course, Church-sponsored homophobia is not a thing of the past, but the illusory logic on which it is based—that homosexuality is unnatural—certainly is. See, e.g., Dean H. Hamer et al., *A Linage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991); J. Michael Bailed & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 38 ARCHIVES GEN. PSYCHIATRY 1089 (1991); see generally TIMOTHY F. MURPHY, *GAY SCIENCE* (1997); Shannon Gilreath, *Of Fruit Flies and Men: Rethinking Immutability in Equal Protection Analysis—With a View Toward a Constitutional Moral Imperative*, 9 J. L. & SOC. CHANGE 1, 8–10 (2006); GILREATH, *SEXUAL POLITICS*, supra note 7, at 116–22 (2006). The Catholic Church finally got around to reversing the excommunication of Galileo in 1992 (a little more than 350 years after he faced the Inquisition) and, one assumes, the Church must feel a similar embarrassment over the thousands of "heretics" burned at the stake. Perhaps in another 350 years it will come to par on the gay question.

14. Some courts continue to take a crabbed view of *Lawrence*, reinvigorating anti-sodomy statutes by treating *Lawrence* as a sort of legal sieve—an opinion full of holes that allows states to criminalize sexual activity not falling strictly within the factual situation before the *Lawrence* Court. See, e.g., *In re R.L.C.*, 635 S.E.2d 1, 3 (N.C. Ct. App. 2006) (holding that prosecution for the "crime against nature" was constitutionally permissible for consensual oral sex between a male minor and his minor girlfriend, despite the fact that the state had a comprehensive statute excepting from criminal punishment sex acts between minors separated by less than three years in age).

15. 539 U.S. at 578.

The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id.

no longer be constitutionally criminalized, shifts the focus of the policy. It now emphasizes that same-sex kissing, hand-holding, cuddling, etc. sends the message that "I am gay" and presumes an uncomfortable reception of that message by the majority of heterosexual soldiers. In other words, "Don't Ask, Don't Tell" is no longer afforded its convenient cover as a conduct-based regulation.¹⁶ "Don't Ask, Don't Tell" is exposed for what it is: a constitutionally-impermissible effort to silence gays in the military.

16. In this essay, I contend that *Lawrence* has rendered homosexual sex acts protected even in the military setting. But in an amicus brief filed in the *Cook* litigation (and after I finished this essay), a group of First Amendment scholars argue that (assuming *arguendo* that homosexual sex can still be regulated in the military), "[w]hen government uses protected speech as the sole basis for shifting the burden to the speaker to prove that he has *not* violated a law or policy . . . that statutory presumption require[s] careful scrutiny under the First Amendment[.]" See Brief for Constitutional Law Professors as Amici Curiae Supporting Appellants at 13, *Cook v. Gates*, Nos. 06-2313, 06-2381 (1st Cir. argued Mar. 7, 2007) [hereinafter First Amendment Brief] (emphasis in original, alterations added), available at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3309.pdf.

For this premise, they cite the Supreme Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958). *Speiser* involved a California law which provided a tax exemption to discharged veterans but withheld the benefit unless the potential recipient signed an oath disavowing that he had ever advocated for "the overthrow of the Government . . . by force or violence or . . . the support of a foreign government against the United States in event of hostilities." *Id.* at 514-15. Anyone who refused to sign was presumed ineligible for the exemption. They could, however, attempt to rebut the presumption. *Id.* at 522-23. The Court invalidated the regulation, holding that it would "necessarily produce a result which the State could not command directly," i.e., chilling speech and advocacy. *Id.* at 526, 528-29.

The *amici* professors argue that "*Speiser* made it crystal clear that chilling protected speech through an evidentiary presumption offends the First Amendment, just as chilling speech through a direct regulation would. . . . For nearly fifty years, *Speiser* has confirmed what common sense dictates: "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." First Amendment Brief, *supra*, at 15 (citing *Speiser*, 357 U.S. at 526).

The *amici* distinguish the seemingly contradictory precedent of *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), which held that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Id.* at 489. The *amici* argue that *Mitchell* is much narrower than many courts have believed, standing only for "the prosaic proposition that government may sometimes use a person's speech as evidence in a criminal or disciplinary proceeding, provided that the method it employs does not chill protected expression." First Amendment Brief, *supra*, at 16.

The *amici* professors, I believe, make a very convincing point. The speech at issue in *Mitchell* was used only as evidence in the sentencing phase of Mitchell's conviction, as evidence that Mitchell's actions constituted a "hate crime." *Mitchell*, 508 U.S. at 489. "The Court concluded that the particular evidentiary use to which speech was put under the provision did not chill protected speech. The Wisconsin law merely used the defendant's contemporaneous statement that he was selecting his victim on the basis of race as evidence that his motive in that case was indeed racial." First Amendment Brief, *supra*, at 17.

The harm of "Don't Ask, Don't Tell" is at once more apparent and more finely sinuous than that at issue in *Mitchell*. There is no need merely to "speculate" on the chilling effects of "Don't Ask, Don't Tell." Cf. *Mitchell*, 508 U.S. at 488. The military has proven that the expression of a gay identity will be met with immediate discharge, unless the service member can perform the Herculean task of rebutting the presumption. At best, the military has a history of medicalizing homosexuality in war time, only to unceremoniously discharge the gay service member when he is no longer useful. See GILREATH, SEXUAL POLITICS, *supra* note 7, at 15. The attendant stifling of peaceful social debate with "Don't Ask, Don't Tell" makes it a far different scenario than the one at issue in *Mitchell*.

Part I of this article examines the First Amendment implications of “Don’t Ask, Don’t Tell” and points out an important but oft-overlooked fact: “Don’t Ask, Don’t Tell” purports to be focusing on conduct—not speech. I discuss the *Lawrence* decision’s effects on the military’s evidentiary defense for “Don’t Ask, Don’t Tell.” Part II explains why a traditional posture of deferring to military decision-making does not save “Don’t Ask, Don’t Tell.” Part III explains why “Don’t Ask, Don’t Tell” is appropriately evaluated under heightened First Amendment review. Part IV subjects the oft-cited defenses of “Don’t Ask, Don’t Tell” to First Amendment scrutiny and finds that, in addition to failing heightened scrutiny, the defenses also fail rational basis review.

I. FIRST AMENDMENT VALUES AND “DON’T ASK, DON’T TELL”: WHAT’S DIFFERENT NOW?

The framers of “Don’t Ask, Don’t Tell” carefully tried to avoid First Amendment problems by excluding expressive activities such as participating in a gay rally in civilian attire, associating with known homosexuals, possessing or reading homosexual publications, or being present at a gay bar, from the expressive activity that constitutes a basis for discharge.¹⁷ Of course, grounds for separation arise if, while at that gay bar, a member grasps the hand of someone of the same gender, or dances with someone of the same gender, or kisses someone of the same gender.¹⁸ As such, the Department of Defense maintains that “Don’t Ask, Don’t Tell” is focused only on conduct: “[S]exual orientation is considered a personal and private matter, and [a homosexual orientation] is not a bar to continued service . . . unless manifested by homosexual conduct . . .”¹⁹ So, says the military, expressive conduct is used as a sort of evidentiary apparatus to measure an individual’s likelihood of engaging in homosexual sex acts, which, at the time “Don’t Ask, Don’t Tell” was promulgated, were criminal in the military setting (and in some parts of civilian society). This evidentiary expression includes even pure speech such as “I am gay,” because the military defines “homosexual conduct” to include “a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts. . . .”²⁰

The military brass believes that “Don’t Ask, Don’t Tell” does not implicate First Amendment values because, in its view, “Don’t Ask, Don’t Tell” targets the underlying criminal conduct. At a Congressional hearing on the implementation of “Don’t Ask, Don’t Tell,” law professor Cass Sunstein told the Subcommittee, “I think one ought not to worry about judicial challenges. . . . There is no impermissible content discrimination when the government uses words as evidence of regulable behavior or status.”²¹ Sunstein indicated that the “question

17. See DoDD 1332.14, *supra* note 7, at encl. 3 ¶ E3.A4.3.3.4. These examples are taken from the *Guidelines for Fact-Finding Inquiries into Homosexual Conduct*, which constitute Attachment 4 of Enclosure 3 of DoDD 1332.14.

18. See *id.* at encl. 3 ¶¶ E3.A4.2.4.1, E3.A4.3.4.3.

19. *Id.* at encl. 3 ¶ E3.A1.1.8.1.1 (alteration added).

20. *Id.* at encl. 3 ¶¶ E3.A4.2.4.1–2.

21. *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearing Before the Subcommittee on Military Forces and Personnel of the House Committee on Armed Services*, 103d Cong. 322 (1993) (statement of Prof. Cass R. Sunstein).

is whether homosexual conduct, as defined, is regulable behavior or status."²² He opined that because the government could permissibly criminalize homosexual sex acts, it could use expressive conduct and statements as evidence of that underlying criminal activity. I think Sunstein was wrong, constitutionally speaking, even in 1993, but he told members of Congress exactly what they hoped to hear. He agreed that "Don't Ask, Don't Tell" was a mechanism for excluding from armed service those who would engage in criminal activity, i.e., sodomy. With that as its purported aim, "Don't Ask, Don't Tell" was cast as concerning criminal conduct—not expression *qua* expression.

But this clever ruse was deflated by the U.S. Court of Appeals for the Armed Forces in *United States v. Marcum*.²³ In *Marcum*, an Air Force officer was convicted of violating Article 125 of the Uniform Code of Military Justice (the provision prohibiting sodomy) by engaging in sodomy with a military subordinate.²⁴ The highest military court held that the privacy interest explicated in *Lawrence v. Texas* extended to military personnel when the sex takes place between consenting adults and when no coercion is involved.²⁵ As discussed above, the landmark *Lawrence* decision was a watershed for gay rights, holding that criminalizing sodomy that occurs between consenting adults in private is unconstitutionally inconsistent with the liberty protected by the Due Process Clause of the Fourteenth Amendment.²⁶ The *Lawrence* and *Marcum* decisions leave "Don't Ask, Don't Tell" in a strange place: The policy currently operates as an evidentiary mechanism for the military to target conduct that, according to the military's own courts, can no longer be criminalized. Despite this curious position, "Don't Ask, Don't Tell" continues.

Now that there is no underlying criminal conduct, it is unclear what reason the military could have for its continuation of "Don't Ask, Don't Tell," except that expressions of homosexuality are banned because of the unpopular message they send to other service members. The statement "I am gay" (and the challenge to heteronormativity inherent in "coming out") is a particular viewpoint that the military leadership believes its rank and file could not stomach. *Lawrence* and *Marcum* have drawn back the curtain on this real objective and exposed it as the most egregious First Amendment error the government can commit: "Don't Ask, Don't Tell" is viewpoint discrimination. The government regulates homosexual expressive conduct purely for its communicative content—targeting homosexual expression *qua* expression, while parallel expression by heterosexuals, i.e., "I am straight," goes unrestrained. The fact that the "Don't Ask, Don't Tell" policy's definition of "conduct" includes a verbal statement of sexual identity exposes its aim to regulate pure speech. This type of speech restriction strikes at the First Amendment's very core.

The liberty to engage in consensual sex acts—protected under *Lawrence*—and the right to express one's proclivity to engage in such constitutionally-

22. *Id.*

23. 60 M.J. 198 (C.A.A.F. 2004).

24. *Id.* at 199.

25. *Id.* at 205–06. The court declined to strike *Marcum*'s conviction, however, because it viewed the officer/subordinate relationship as inherently coercive.

26. 539 U.S. 558, 578 (2003).

protected acts—implicated in traditional First Amendment analysis—are linked in important ways. Each explication of liberty is concerned with more than just the ability to “be.” The liberty interests in question also involve the ability to have that state of being recognized and respected by majoritarian society—even one that may be hostile to it. To that end, the First Amendment’s guarantee of free expression serves two primary and related purposes. One purpose is the basic communicative interest—the essential right to speak one’s mind—that we most often think of when thinking of the First Amendment.

The other purpose is developmental.²⁷ Expression is a prized component of liberty because it allows us to define ourselves on our own terms; it allows us to make the statement—to foes and detractors, loves and beloveds: “This I am; and here I make my stand.” Moreover, the act of publicly affirming or rejecting any given identity is developmental in the strictest sense. It is part of the great human effort to chart one’s own destiny; the Supreme Court itself recognized this in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.²⁸ *Hurley* involved a gay group wishing to march, as a group under their own identifying banner, in a concededly private parade and against the parade organizer’s wishes. The Court held that the forced inclusion of the gay group would violate the speech rights of the parade organizers by forcing the organizers to implicitly convey a message that they did not wish to send. Particularly, the Court held that the inclusion of the group, whose message was essentially, “We are gay,” “suggest[s] the view that [gay] people . . . have as much claim to unqualified social acceptance as heterosexuals”²⁹

In much the same way, requiring a gay member of the armed services to feign a heterosexual identity is compelled speech. In *Hurley*, gays had many other avenues for their expression. In the military they do not. As *Hurley* recognizes, the denial of the right to affirm one’s sexual identity denies gays the right to express their claim for social acceptance—a claim others have a right to reject but not to suppress. For more than sixty years, it has been bedrock First Amendment jurisprudence that forcing an individual to avow a creed to which he does not subscribe is as injurious to liberty as prohibiting him from speaking altogether.³⁰ “Don’t Ask, Don’t Tell” prohibits the gay service member from living an authentic existence and requires him, by the implicit approbation of his silence, to espouse the message that only heterosexuals are fit to serve in the armed defense of the nation. Even in the face of direct questioning about her own sexual identity, the service member may at best respond with “no

27. See Cole & Eskridge, *supra* note 8, at 326.

Sexual conduct is also important to the developmental feature of the liberty values. The First Amendment protects the individual’s freedom to explore, develop, and expand upon her identity. It assures that the state may not seek to control a person’s thoughts or beliefs, those intellectual characteristics that are central to our identities.

Id.

28. 515 U.S. 557 (1995).

29. *Id.* at 574–75 (alterations added). The Court’s unanimous opinion suggests that the statement “I am gay” is inextricably linked with the greater moral debate about the place of the gay person in American society.

30. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compulsory recitation of the Pledge of Allegiance violates the First Amendment).

comment."³¹ Forcing gay and lesbian service members to remain silent in the face of heterosexist assertions of superiority violates their First Amendment rights.³²

Hurley also suggests that, as much as the expression of a homosexual identity is developmental in the individual sense, it is developmental in the societal sense as well. Freedom of speech ensures that interpersonal understanding grows as individuals are confronted by the truth as other people see it.³³ It provides, for most of us who contemplate only our own way of being, a glimpse of the other—a glimpse of the life behind the words. Alice Walker, the African-American activist and feminist, might call it "learning to sit with one another's truths."³⁴

Professor Tobias Wolff explored a related point in his assessment of the scope of "Don't Ask, Don't Tell," which he concluded reached far beyond the

31. See *Able v. United States*, 968 F. Supp. 850, 859 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998); see also First Amendment Brief, *supra* note 16, at 9–12 (elaborating a similar argument).

32. The Supreme Court has ruled that this sort of compulsory, silent compliance violates the First Amendment's Establishment Clause in school prayer cases, because "remaining silent can signify adherence to a view." See *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

33. As illustrative of this point, consider this description of the results of the racial integration of the military in the 1940s:

A mere three years after President Truman's 1948 order, the proportion of white soldiers opposing racial integration had dropped from 80 percent to 44 percent. The military's model for sensitivity training on racial and other diversity issues has been lauded and unabashedly copied in the civilian world. Moreover, there are striking similarities between the obstacles faced by the military in enforcing President Truman's directive and that which will be faced by the military should the Supreme Court find the current homosexual ban unconstitutional. As then NAACP President William Gibson told the Nunn committee [the congressional sub-committee investigating the efficacy of "Don't Ask, Don't Tell"]. The very same arguments seen now for keeping the homosexual ban had been used two generations ago: "They said whites would not shower with blacks, they would not sleep in the same barracks, they would not take orders from black superiors."

... These data are very consistent with the often reported finding that persons who are knowingly acquainted with at least one gay person are much less likely to report antigay animus than are those who do not believe they have any gay friends or acquaintances.

Paul Siegel, *Dry-Cleaning the Troops and Other Matters: A Critique of "Don't Ask, Don't Tell,"* in *SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY* 274, 280 (John Corvino ed., 1997) (alteration added).

Of course, it is true that many gay and lesbian members of the armed service do not think of themselves as advocates for a cause. The same was probably true of black enlistees who wanted to serve in an integrated military. Many gays, like my friends mentioned in the Introduction, want only to serve their country, while doing no disservice to the loving relationships that sustain them when they are forced to go to unenviable places like Iraq.

Some gays and lesbians, however, do wish to contribute to the debate. Their contribution to what is perhaps the defining social debate of our time is of no diminished importance and is no less normatively valuable simply because they have voluntarily joined in the armed defense of their nation. Moreover, how can we rationalize a policy that allows them to march in civilian clothes in a gay pride parade but which will not allow them to admit to fellow service members that they are gay?

34. ALICE WALKER, *WE ARE THE ONES WE HAVE BEEN WAITING FOR: INNER LIGHT IN A TIME OF DARKNESS* 186 (2006).

military setting.³⁵ Wolff details the case of Steve May. From 1999 to 2002, May, a gay man, served as a Representative in the Arizona legislature.³⁶ While on reserve status in the Army Reserves, May rose to challenge a particularly virulent anti-gay speech by another legislator, who supported a bill that would prohibit state agencies from providing domestic partnership benefits to same-sex employees.³⁷ In his speech on the floor of the Arizona House, May employed a very effective rhetorical tool: He explained why the anti-gay bill was a bad idea and offered himself, a stable, successful, non-promiscuous, state Representative as the foil to the picture of gays as depraved moral degenerates painted by the opposing Representative.³⁸ This courage cost May his position in the military. Just a few months later, based upon his speech, the military began separation proceedings against May.³⁹ The “Don’t Ask, Don’t Tell” policy’s unlimited scope, applying “24 hours each day” to expression “on or off base” and “on duty or off duty,”⁴⁰ reached even the political speech of an elected representative of the people of Arizona.⁴¹

May’s story is a drastic example of the damage that “Don’t Ask, Don’t Tell” does to the public debate about what is perhaps the defining civil rights issue of our day—equality for gays and lesbians in the United States. Of course, the same can be said for the effect of “Don’t Ask, Don’t Tell” on the ability of active-duty gays to contribute to the debate on this issue of momentous import. Who better to speak about the oppressive harm of “Don’t Ask, Don’t Tell” than the people who labor daily under its constraints in the desperation of Iraq? Who better to speak in general opposition to the slurs and slander of the anti-gay camp, painting gays as weak misfits incapable of contributing to their country, than the brave gay men and lesbians who have chosen the armed defense of their nation?

35. See Tobias Barrington Wolff, *Political Representation and Accountability Under Don’t Ask, Don’t Tell*, 89 IOWA L. REV. 1633, 1665–68 (2004).

36. *Id.* at 1665–66.

37. *Id.*

38. *Id.*

39. *Id.* May eventually negotiated a voluntary separation agreement with the military. Professor Wolff reiterates this point beautifully in the amicus brief filed in the *Cook v. Rumsfeld* appeal.

When a federal law reaches onto the floor of a state assembly to penalize an elected official for expressing a disfavored viewpoint in a legislative debate, the First Amendment is placed in serious jeopardy. “Don’t Ask, Don’t Tell” does not just restrict speech within military spaces or among military personnel. It silences gay service members in every walk of civilian and political life. Steve May’s case is remarkable only in that he refused to be silenced when his voice was needed. For that and that alone, he was discharged.

First Amendment Brief, *supra* note 16, at 8–9.

40. 10 U.S.C. § 654(a)(9)–(11) (2000).

41. It also contravenes the Speech and Debate protections of the federal and most state constitutions. The federal Speech and Debate Clause, U.S. CONST. art. I, § 6, cl. 1, provides that members of Congress “shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to an from the same, and for any Speech or Debate in either House, they shall not be questioned in any other Place.” On speech and debate protections, see MICHAEL KENT CURTIS, *FREE SPEECH, THE PEOPLE’S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* 175–83, 343–48 (2000).

As it stands, the only soldiers who may speak in favor of the ability of gays and lesbians to live authentic lives while serving their country are straight soldiers, or gays who are secreting their authentic selves. It is a curious debate indeed when the only people prohibited from debating are the victims of the policy the debate addresses. Like Representative May, gay and lesbian service members may not identify themselves to the electorate even to speak on behalf of the Military Readiness Enhancement Act of 2007, which aims to repeal "Don't Ask, Don't Tell."⁴² "Don't Ask, Don't Tell" ensures that the only viewpoint missing in the debate is the point of view of the gay or lesbian service member. But the central contribution of the First Amendment to American society is that it ensures every viewpoint has a chance to be heard. Surely, this philosophy is why the courts have held that viewpoint discrimination—the very kind of discrimination wrought by "Don't Ask, Don't Tell"—is the greatest of First Amendment sins.⁴³

These concepts of identity and destiny, central to over two centuries of First Amendment jurisprudence, were also central to the *Lawrence* Court's invalidation of sodomy laws, because such laws "demean [gays'] existence [and] control their destiny."⁴⁴ The *Marcum* court recognized that this liberty interest extends to the military setting. And yet, "Don't Ask, Don't Tell" remains, leaving us with some unsettling questions. What good is the ability to write one's destiny if the script can never be read? Is a mute liberty anything other than a fraud? In this way, "Don't Ask, Don't Tell" strikes at our constitutional foundations. For that reason, it ought to be evaluated under strict First Amendment scrutiny and struck down.

II. FIRST AMENDMENT SCRUTINY AND THE "DEFENSE IS DIFFERENT" RATIONALE

My thesis that "Don't Ask, Don't Tell" should be invalidated on First Amendment grounds will immediately be met with what I call the "Defense is

42. Military Readiness Enhancement Act (MREA) of 2007, H.R. 1246, 110th Cong., 1st Sess. (Feb. 28, 2007). Rep. Martin Meehan (D-Mass.) first introduced the MREA in the 109th Congress in March, 2005; the bill amassed 122 bipartisan cosponsors but did not make it past the House Armed Services Committee. See H.R. 1059, 109th Cong., 1st Sess. (Mar. 2, 2005). Rep. Meehan is now Chairman of the House Armed Services Personnel Subcommittee and has reintroduced the bill with 110 original cosponsors.

43. *Brown v. Glines*, 444 U.S. 348 (1980), makes plain that the importance of the voice of military personnel in civilian debate is a vital constitutional interest. *Glines* upheld an Air Force regulation because its restriction of speech was limited to receiving prior approval before circulating a petition on a military base. The very regulation at issue preserved the right of the officer to circulate his petition among the civilian population and, indeed, to do so on base, subject to limited restriction, and in no event was he prohibited from petitioning purely because his petition was "critical of Government policies or officials." *Id.* at 350 n.2.

More broadly, *Glines* involved 10 U.S.C. §§ 1034(a), (c)(2)(A) (West Supp. 2004), which guarantees the right of service members to "communicat[e] with a Member of Congress or an Inspector General." The *Glines* opinion presumed that service members have the right to dissent in matters of public concern because of this statute. By preventing service members from testifying to Congress about a bill that could repeal the policy, "Don't Ask, Don't Tell" contravenes the Court's opinion and Congress's express command.

44. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (alterations added).

Different” argument. Consequently, I will deal with this claim before discussing the application of First Amendment heightened scrutiny to the military’s policy.

The “Defense is Different” argument is essentially a rationale for allowing government actions that would otherwise be blatantly unconstitutional, on the grounds that (1) the military is a very special environment requiring an especial surrender of personal liberty and (2) military officials have superior expertise to determine how the proper balance between uniformity and personal liberty is struck.⁴⁵ Courts often embrace this argument through a policy of judicial deference to military decision-making—even in the face of a constitutional challenge. Thus, any claim that “Don’t Ask, Don’t Tell” should be declared unconstitutional as a violation of First Amendment speech rights will be more difficult than a similar challenge made outside the military context. However, no court has held that deference to the military is limitless.⁴⁶

In *Goldman v. Weinberger*, the Supreme Court adopted the “Defense is Different” rationale when it upheld an Air Force regulation barring the wearing of headgear indoors, over the objection of an orthodox Jew who wanted to wear a yarmulke.⁴⁷ Professor Michael McConnell discusses *Goldman* in his essay, *What Would It Mean to Have a “First Amendment” for Sexual Orientation?*⁴⁸ McConnell believes that application of the First Amendment to “Don’t Ask, Don’t Tell” would make no difference in terms of the constitutional validity of the policy, precisely because the judiciary must give deference to the expertise of military decision-makers in the special military environment. To illustrate his point, McConnell cites *Goldman* for the proposition that, “even when fundamental [First Amendment] freedoms are involved, the military enjoys wide discretion to limit conduct that it deems injurious to morale or otherwise inconsistent with the military mission.”⁴⁹ McConnell summarizes the *Goldman* holding thusly: “It is permissible for soldiers to wear religious symbols under their clothing, where they cannot be seen, or in the privacy of their living quarters, but not in the

45. The special-ness of the military is crucial, because the Supreme Court has held that public employees generally have a First Amendment right to comment on matters of public concern. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570–72 (1968); *Connick v. Myers*, 461 U.S. 138, 145–46 (1983).

46. “[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.” *Goldman v. Weinberger*, 475 U.S. 503, 515 (1986) (alteration added). “[M]en and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.” *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) (alteration added). “[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.” *United States v. Jacoby*, 11 C.M.A. 428, 430–31 (1960) (alteration added).

47. 475 U.S. 503 (1986).

48. Michael W. McConnell, *What Would It Mean to Have a “First Amendment” for Sexual Orientation?*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 234–57 (Saul M. Olyan & Martha C. Nussbaum eds., 1998). McConnell’s piece, the inspiration for my own, discusses as analogy the application of the principles underlying the First Amendment’s Religion Clauses to sexual orientation. My piece, obviously, discusses the actual application of the First Amendment’s guarantee of free speech to render “Don’t Ask, Don’t Tell” unconstitutional. Despite these differences, Professor McConnell’s treatment of *Goldman* is instructive for the purposes of this essay.

49. *Id.* at 241.

open, where they might generate feelings of sectarian division rather than military unity."⁵⁰

But McConnell's deference argument is an oversimplification. *Goldman's* holding is narrower than McConnell suggests. Justice Rehnquist wrote, "The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and *evenhandedly* regulate dress in the interest of the military's perceived need for uniformity."⁵¹ Justices Stevens, Powell, and White concurred, making it clear that they voted with Rehnquist because "the rule that is challenged in this case is based on a neutral, completely objective standard—visibility."⁵² Furthermore, the concurrence explained that, "The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application."⁵³

There are obvious and crucial differences between a policy that forbids the wearing of apparel that disrupts the uniformity of military attire and a policy that would exclude self-identifying Jews—*qua* Jews—from the military, or a policy that would exclude Jews but not Catholics from military service. After *Goldman*, Jews may still identify as Jews and not be barred from service. A Jew may make the statement "I am a Jew" to fellow service members and not be threatened with separation. Presumably, the military could not say that the presence of a Jew upsets our mostly Catholic and Baptist forces and, therefore, Jews cannot be allowed. But the "Don't Ask, Don't Tell" definition of conduct bars even this sort of self-identification speech on the part of lesbians and gays.

Professor McConnell also believes that the inherent non-neutrality in a regulation that forbids yarmulkes might be acceptable because it does not purposefully target religious minorities—although it happens to be congruent with the habits of our predominately Christian populace. He believes that this logic extends to "Don't Ask, Don't Tell." In his view, it does not "necessarily reflect bias, prejudice, or even insensitivity."⁵⁴ Again, Professor McConnell leaves unspoken an important distinction between military dress regulations and "Don't Ask, Don't Tell." Even the most willfully blind observer must acknowledge that "Don't Ask, Don't Tell" is aimed at the unpopular lesbian and gay minority. The regulation at issue in *Goldman* forbade wearing yarmulkes, but it would have also forbidden Catholics from emblazoning their uniforms with a cross, Hindus from wearing a turban, or female Muslim soldiers from covering their heads. "Don't Ask, Don't Tell" is quite different. It intentionally singles out the lesbian and gay minority and targets conduct (kissing, hand-holding, vocal expression of romantic feeling—and even speech identifying one's sexual orientation) deemed innocuous when it is performed in an identical manner by heterosexual service members. The neutrality buttressing the *Goldman* decision is sorely lacking from "Don't Ask, Don't Tell." Like Professor

50. *Id.* at 242.

51. *Goldman*, 475 U.S. at 510 (emphasis added).

52. *Id.* at 513 (Stevens, J., concurring).

53. *Id.*

54. McConnell, *supra* note 48, at 242.

McConnell,⁵⁵ I believe that *Goldman* was wrongly decided. Even so, *Goldman* should not prevent the application of heightened First Amendment scrutiny to “Don’t Ask, Don’t Tell.”

Decisions dealing specifically with speech rights in the military setting offer little additional support for “Don’t Ask, Don’t Tell.” The limited factual scenarios resulting in the opinions in *Parker v. Levy*⁵⁶ and *Greer v. Spock*⁵⁷ do not buttress the pernicious legal regime currently targeting gay and lesbian service members.⁵⁸ In each of these cases, the Court recited the “Defense is Different” litany and ultimately upheld the military’s regulation of speech. But nothing in these opinions suggests that the military is *so* different from civilian life as to warrant the pointed and selective circumscription of gays’ and lesbians’ First Amendment rights that “Don’t Ask, Don’t Tell” demands.

Parker v. Levy, decided by a 5–3 split (Justice Marshall did not participate), held that, when an army officer urged otherwise lawfully conscripted men to evade the draft in a time of war, his speech was “unprotected under the most expansive notions of the First Amendment.”⁵⁹ Given its highly specific facts, *Parker’s* holding should be read as narrowly as it was intended. Gays and lesbians desiring to serve in the military do not want to evade military service, nor do they wish to encourage others to do so. In today’s volunteer military and unsettled world climate, they are rushing toward a job that many of us do not covet. They are not urging desertion or other vice to the United States—they are trying to serve!

Greer involved candidates for national political office who were denied the right to distribute campaign materials on a military base. In upholding the military’s regulations barring the respondents from the base, the Court held: “With respect to [the regulations], there is no claim that the military authorities discriminated in any way among candidates for public office based upon the

55. *Id.*

56. 417 U.S. 733 (1974).

57. 424 U.S. 828 (1976).

58. I have always thought that *Parker* and *Greer* were wrongly decided and ought to be overruled. Too many dictatorships are supported by militaries lacking access to the truth. But even as decided, the cases are not obstacles to heightened First Amendment scrutiny of “Don’t Ask, Don’t Tell.”

59. 417 U.S. at 761. Specifically, the officer said:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don’t see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Id. at 736–37.

I made very similar comments about gay soldiers’ involvement in the Iraq War, urging gays and lesbians in the military to “come out” and to be discharged. See Shannon Gilreath, *Know Thine Enemy*, PRIDE & EQUALITY, Jan./Feb. 2006, at 3. Mercifully, I made my comments as a civilian; thus I was not subject to a loss of my job, loss of retirement benefits, and confinement for three years at hard labor.

candidates' supposed political views."⁶⁰ The Court also held that the regulations had been "objectively and evenhandedly applied."⁶¹ The policy, the Court continued, was "wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."⁶²

By comparison, even the most ardent defender of "Don't Ask, Don't Tell" could not honestly assert that "Don't Ask, Don't Tell" is a neutral policy—it doesn't even *feign* neutrality. It is not "objectively and evenhandedly applied," and it does not even purport to be objective. It targets expression—kissing, hand-holding, self-identification—that is entirely permissible when performed by heterosexual service members and makes it a basis for discharge from military service when performed by homosexual service members.⁶³ The *Greer* Court summed up thusly: a commanding officer "may not prevent distribution of a publication simply because he does not like its contents This case, therefore, simply does not raise any question of unconstitutional application of the regulation to any specific situation."⁶⁴ Can anyone—even the most tenacious anti-gay proponent of "Don't Ask, Don't Tell"—seriously make that claim about "Don't Ask, Don't Tell"?

Two other decisions are instructive in determining how "Don't Ask, Don't Tell" should be treated. In *Employment Division v. Smith*,⁶⁵ the Court held that generally-applicable, neutral laws would be safe from First Amendment challenge.⁶⁶ Presumably, under the *Smith* rationale, a public ban on all headgear indoors, even in the civilian context, would not be unconstitutional for failing to include a religious exemption. But the Court took a different view of the regulation at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁶⁷ In that case, the Court struck down an ordinance making animal sacrifice illegal inside the city limits of Hialeah, Florida. The Court held that the ordinance was directly aimed at the Santeria cult, which practiced animal sacrifice, and thus failed the generally-applicable, neutral criteria used in *Smith* (and in *Goldman*).⁶⁸ The fact that the law specifically targeted the expressive conduct of an unpopular religious minority was enough to condemn it on constitutional grounds. Likewise, "Don't Ask, Don't Tell" does not pretend at neutrality. Like the ordinance at issue in *Hialeah* (and unlike the law in *Smith*), it is a law aimed specifically at an unpopular group's expression.

Additionally, *Marcum* itself complicates application of the "Defense is Different" rationale to "Don't Ask, Don't Tell." In *Marcum*, the government argued that the Court of Appeals for the Armed Forces should "apply traditional principles of deference to Congress's exercise of its Article I authority

60. *Greer*, 424 U.S. at 838–39 (alteration added).

61. *Id.* at 839.

62. *Id.*

63. Professor McConnell believes that neutrality is not constitutionally significant in the military setting. However, the *Parker* and *Greer* Courts both held otherwise.

64. *Greer*, 424 U.S. at 840.

65. 494 U.S. 872 (1990).

66. *Id.* at 885.

67. 113 S. Ct. 2217 (1993).

68. *Id.* at 2222.

and not apply the *Lawrence* holding to the military.⁶⁹ In determining that *Lawrence* should apply in the military context, the court specifically asked, “[A]re there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?”⁷⁰ By finding that the sexual relationship in question was inherently coercive, the court declined to strike Marcum’s conviction.⁷¹ Nevertheless, the court did hold that, because the conduct occurred off-base, in private, and non-forcibly, it therefore was protected within the scope of *Lawrence*.⁷² The court suggested that, but for the coercion inherent in a sexual relationship between a superior and subordinate officer, the conduct would have been covered by *Lawrence*. Indeed, in *United States v. Humphreys*,⁷³ the Navy-Marine Corps Court of Criminal Appeals reversed a sodomy court martial, holding that *Lawrence* precluded the prosecution of a male navy member for having anal sex with a female navy member in a barracks bedroom.⁷⁴ If the military is not *so* different as to preclude a substantive due process challenge to the criminalization of consensual acts of sodomy, why is it *so* different as to justify a policy of ousting service members who hold hands with or kiss members of the same gender, or who otherwise signify that they would engage in same-sex sexual activity? The answer is, the military is *not* so different, and no bow to military deference saves “Don’t Ask, Don’t Tell.”⁷⁵

III. STRICT SCRUTINY AS THE APPROPRIATE STANDARD

Having dealt with the issue of military deference, we now see that strict scrutiny emerges as the appropriate evaluative standard for the government’s regulations of expression via “Don’t Ask, Don’t Tell.” Governmental regulation of expressive conduct warrants strict scrutiny when (1) the regulation of speech or conduct targets the message that the speech or conduct communicates to others and (2) similar expression is regulated differently based on the

69. *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004).

70. *Id.* at 207.

71. *Id.* at 208.

72. *Id.* at 207.

73. NMCA 200300750, 2005 WL 3591140 (N-M. Ct. Crim. App. Dec. 29, 2005).

74. *Id.*

75. It is also worth noting that the sweeping effect of “Don’t Ask, Don’t Tell” on civilian discourse, discussed in Part I, *supra*, may also destroy any claim to military deference. In *United States v. O’Brien*, 391 U.S. 367 (1968), the Court upheld a statute banning the burning of a draft card. Even though the regulation was obviously related to the mission of the military, the Court recognized the myriad effects of the regulation on public debate and proceeded with no mention of deference to military mission. Rather, the Court indicated that, had the regulation been designed for the suppression of expression, it would have been evaluated under traditional First Amendment analysis and strict scrutiny. Ultimately, the Court upheld the regulation, finding that it was not aimed at the suppression of expression, because it did not target *only* expressive public burnings of the draft card and because it was designed to effectuate an orderly administration of the draft in a time of war. “Don’t Ask, Don’t Tell” is the antithesis of the regulation at issue in *O’Brien*: It is designed specifically for the suppression of expression—even expression that reaches the realm of public, civilian debate—and it does not even feign another purpose. Following *O’Brien*, strict scrutiny is therefore appropriate. *See also* First Amendment Brief, *supra* note 16, at 24–25 (elaborating a similar argument).

communicated viewpoint of the speaker. Regulation of expression may be upheld when the regulation is sufficiently divorced from the communicative content of the expression or expressive conduct. The government may, for example, constitutionally prohibit the burning of a draft card during a time of military conscription, because the government has a strong interest in ensuring the proper functioning of the draft system—an interest independent from any desire to squelch the dissenting message that burning the draft card in public necessarily entails.⁷⁶ The government may not, however, prohibit the burning of the American flag, even when it is burnt in close proximity to a crowd of people presumably offended by its having been burnt.⁷⁷ To allow this type of expressive conduct to be punished or restricted would establish a “heckler’s veto” and thus would commit the cardinal First Amendment sin—that of viewpoint discrimination. In the *Johnson* flag burning case, the Court stated that the critical criterion for evaluating the regulation of expressive conduct is whether the government’s regulation is “related to the suppression of expression.”⁷⁸ In the post-*Lawrence* military environment—one in which consensual sodomy is no longer punishable—no one can seriously suggest that “Don’t Ask, Don’t Tell” is not related to the suppression of expression.⁷⁹ The policy’s very name is

76. *O’Brien*, 391 U.S. at 367. As Cole and Eskridge point out, even that decision was based, in part, on the fact that the questioned regulation did not “distinguish between public and private destruction.” *Id.* at 375. In other words, the first clue as to whether the regulation is related to the suppression of expression is the neutrality of the regulation itself. Similarly, the statute at issue in *Texas v. Johnson*, 491 U.S. 397 (1989), prohibited only that flag-burning which would likely offend “one or more persons likely to observe or discover” the burning; the ban was therefore facially discriminatory as to a specific kind of expressive conduct. “Don’t Ask, Don’t Tell” is the antithesis of *O’Brien* and the mirror of *Johnson*: The military is *only* concerned with the *public* acknowledgement of homosexuality, thus constituting a content-specific regulation of a particular type of expressive conduct.

77. *Texas v. Johnson*, 491 U.S. 397, 408 (1989).

78. *Id.* at 407.

79. Even before *Marcum*’s extension of the *Lawrence* liberty interest to the military setting, “Don’t Ask, Don’t Tell” (as separate and apart from the military’s criminal prohibition of sodomy) professed only to be concerned with public expressions of homosexuality. The military’s ban on sodomy, however, was in place to take care of private expressions of homosexuality as well. Of course, the sodomy ban itself is less problematic when evaluated under a free speech rubric, because it prohibits the conduct by both homosexual and heterosexual actors.

It is important to note that the military’s insistence that the concern is one of public expression, and claiming that what a service member does in private falls beyond the scope of “Don’t Ask, Don’t Tell,” is a poor effort to transmute “Don’t Ask, Don’t Tell” into a permissible “time/place/manner” regulation of expression. But when the regulation of place and manner is so stringent that it effectively relegates the expression to an impenetrable “closet,” it becomes impermissible. The Court has never upheld as constitutional a place and manner restriction that is so stringent as to render the message effectively unutterable in public *or* in private. That was the principle underlying the *Johnson* decision. If we rewrote the statute at issue in *Johnson* in a “Don’t Ask, Don’t Tell” framework, we might have a statute that reads: “Flag burning is legal as long as the flag is burned at the hearth of one’s own residence when no one else is present to witness the act.” The Court would have just as surely invalidated this content-based restriction in the guise of a time and manner regulation as it did the statute at issue in *Johnson*.

This discussion of “Don’t Ask, Don’t Tell” in traditional First Amendment terms is made more difficult because of the government’s conflation of pure speech and expressive conduct. As noted above, “Don’t Ask, Don’t Tell” defines “statements” as “conduct.” Restrictions on “time, place, and manner” are traditionally the parlance of speech cases, while restriction “unrelated to the

suggestive of the fact that it was designed to regulate the mere telling—the expressing—of a homosexual sexual orientation.⁸⁰ The fact that the military disclaims any interest in the private sexual proclivities of its members and focuses only on public declarations is also indicative of the central concern of preventing gay and lesbian service members from “telling” about their sexual orientation. The government maintains that it is not interested in orientation, but rather in the public manifestations of that orientation—that is, the government is interested in the expression primarily on account of its communicative content. The military’s policy of expressive exclusion, thus, warrants First Amendment strict scrutiny at every turn.

Moreover, a policy targeting only the homosexual viewpoint conflicts with the Supreme Court’s decision in *R.A.V. v. City of St. Paul*.⁸¹ In striking a city ordinance that punished particular expressions of hate speech but not others, the Court held, “[t]he First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.”⁸² *R.A.V.* expands the principle the Court laid down in *Police Department of Chicago v. Mosley*, in which the Court struck down an anti-picketing ordinance because it included an exemption for labor pickets.⁸³ The Court held that picketing was plainly expressive and within the protections of the First Amendment, and that any selective ban would have to serve a substantial state interest.⁸⁴ In much the same way that the *Lawrence* Court relied on the Due Process Clause to effectuate equal protection, the *Mosley* Court relied heavily on both the First Amendment and the Equal Protection Clause in its opinion. The selective expression of some points of view failed both constitutional tests. *R.A.V.* made an even more forceful application of the equal expression guarantee by applying the concept to “fighting words” and similar expression that had formerly been outside First Amendment parameters.

“Don’t Ask, Don’t Tell” evinces the same equality anathema. The policy is founded on precisely the sort of naked selectivity that troubled the *Mosley* and *R.A.V.* Courts. Under “Don’t Ask, Don’t Tell,” homosexual service members are prohibited from speaking about their sexual orientations, while heterosexuals may speak of their orientations so frequently and casually that they often do not even realize they are doing it. Heterosexual service members need not secret their opposite-sex romances. They are privileged to embrace and kiss openly. However, the same conduct performed by homosexuals is grounds for discharge. This worse-than-*R.A.V.*-type selectivity is yet another reason that

suppression of expression” has been the talisman phrase of expressive conduct cases. But the Court noted in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), that evaluating a time, place, and manner restriction concerning speech is essentially the same test as evaluating whether the regulation of conduct is “unrelated to the suppression of expression.” For illustrative purposes, and because “Don’t Ask, Don’t Tell” defines speech as conduct, I have used the terminology interchangeably.

80. See Cole & Eskridge, *supra* note 8, at 332.

81. 505 U.S. 377 (1992).

82. *Id.* at 382 (citations omitted).

83. 408 U.S. 92 (1972).

84. *Id.* at 99.

"Don't Ask, Don't Tell" should be invalidated under heightened First Amendment review.

IV. THE MILITARY'S JUSTIFICATIONS FOR "DON'T ASK, DON'T TELL" FAIL STRICT SCRUTINY REVIEW

Having arrived at the appropriate level of scrutiny, why does "Don't Ask, Don't Tell" fail to pass muster? The government has consistently argued two reasons why "Don't Ask, Don't Tell" is necessary for the function of the military: privacy of the soldier and unit cohesion. Each of these reasons amounts to a lot of puffing. Certainly, they do not amount to compelling interests accomplished by the narrowly-tailored means required by the First Amendment when quintessentially political expression is targeted because of its message.⁸⁵

A. Privacy Rights for Heterosexuals

A common but silly argument to justify "Don't Ask, Don't Tell" is the so-called privacy argument. One might also term this the "shower argument." In essence, it claims that heterosexual men will feel sexually objectified and violated if they are forced to allow their gay comrades to see them naked. This argument has been embraced by judges hostile to sexually integrating the armed services.

The embarrassment of being naked between the sexes is prevalent because sometimes the other is considered to be a sexual object. The quite rational assumption in the Navy is that with no one present who has a homosexual orientation, men and women alike can undress, sleep, bathe, and use the bathroom without fear or embarrassment that they are being viewed as sexual objects.⁸⁶

The argument is particularly nonsensical because heterosexual soldiers are already showering with gay soldiers. And so what? Such a silly argument deserves an equally dismissive reply: Grow up. Obeying orders is part and parcel of military service. That is the case even when an order demands that one risk life and limb in a dangerous battle. And yet soldiers cannot be expected to obey an order requiring them to shower beside a homosexual person? Moreover, why would *knowing* the man showering next to you is gay be a greater invasion of privacy? Wouldn't it, in fact, be less so? Does the objectification come only when one knows he is being objectified?

Perhaps heterosexual men are simply afraid that the treatment they reserve for women will somehow be visited on them. The idea that we separate the genders in changing rooms is less about eroticism than it is about the historic

85. Regardless of the justifications the military fabricates to support its bigoted policies, it is hard to conceive of any of them as even "rational," considering that, over the last ten years, "Don't Ask, Don't Tell" has deprived the armed services of thousands of qualified military personnel during a time of heavy deployment and sagging recruitment, while simultaneously wasting \$364 million of public funds. See Josh White, *'Don't Ask' Costs More Than Expected*, WASH. POST, Feb. 14, 2006, at A4.

86. *Steffan v. Cheney*, 780 F. Supp. 1, 13 (D.D.C. 1991), *aff'd en banc sub nom.*, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

objectification of women.⁸⁷ Any eroticism that comes from cross-gender undress is found less in the nakedness and more in the expectation. Men have historically eroticized women. Even today we see billboards and posters of women in suggestive poses. We rarely see men advertised in quite the same way. Featuring a bare-breasted woman in movies is considered mainstream, but we are still shocked to see male frontal nudity. Women do not want to undress in front of men because they are keenly aware of this cultural pattern. Men are less concerned about undressing in front of women because they do not share the same history of objectification. If men are concerned, they are concerned about the sudden role reversal. Yet, if openly gay men and women are allowed in the military, we will still segregate the genders as we do now. Men will continue treating men (and women will treat women) with the same "etiquette of disregard"⁸⁸ that has always attended instances of same-gender undress.

In any case, the privacy-in-the-shower argument is little more than "a raw appeal to prejudice"⁸⁹ It insults gays by asserting that all gays are sexually predatory, and it defies common sense by assuming that all heterosexuals are sexually appealing to all gays. It does not amount to a compelling interest. It is also severely under-inclusive, because gay and straight soldiers have been showering together since "at least the time of Julius Caesar."⁹⁰ Allowing gays into the communal shower as long as they profess to be straight hardly solves the problem. "Don't Ask, Don't Tell" merely lets heterosexual men continue to deny the reality that they have lived with all along. Pretending that the world is different than it really is cannot constitute a compelling interest.

The "privacy" argument is exactly the sort of double-speak common from the military establishment when it comes to recognizing gay and lesbian service members. Consider that a group of military personnel sued the U.S. government when they realized they had been the subjects of certain dangerous experimental testing without their knowledge or consent.⁹¹ The government successfully argued that the soldiers were not entitled to damages for these indignities.⁹² Today, the government argues that if openly gay people are allowed into the military, straight soldiers would lose the privacy and dignity they enjoy in civilian life. This juxtaposition isn't rational—it's almost laughable.

87. One might say the historic subjection of women. Consider the following passage from a popular Victorian-era book:

One of the first things that a mother seeks to instill into the mind of her little girl, is a feeling of shame which centers about the pelvic organs and their functions. This feeling, together with shyness, bashfulness, timidity, etc., develops a modesty which constitutes one of the chief, if not the greatest, of feminine charms. The mother is paving the way for her daughter's future happiness, for this commendable virtue not only acts as a shield and protection to the girl, but, by giving play to the imagination, provides for the happiness of her future lover.

C.W. MALCHOW, *THE SEXUAL LIFE* 60–61 (22d ed. 1923), *quoted in* *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 230 (Gregory M. Herek et al. eds., 1996).

88. *OUT IN FORCE*, *supra* note 87, at 231.

89. *See* Cole & Eskridge, *supra* note 8, at 341.

90. Barry Goldwater, *The Gay Ban: Just Plain Un-American*, *WASH. POST*, June 10, 1993, at A23.

91. *United States v. Stanley*, 479 U.S. 1005 (1986).

92. *Id.*

B. Unit Cohesion

The most persuasive of the government's arguments in support of "Don't Ask, Don't Tell" is the argument that the cohesion and effectiveness of the military will be undermined by the presence of openly gay service members. During the 1993 congressional hearings, Colonel William Henderson opined that unit cohesion was the "central factor" in the military's success. If openly gay soldiers were present, the "discipline, good order, and morale" of the armed services would suffer.⁹³ Of course, none of us, especially in this age of color-coded terrorist threats and the inability to board a plane carrying much more than a tube of toothpaste, wants to undermine the effective defense of our nation. The problem is not in the military's bald assertion of the defense interest; the problem is found in the false logic inherent in the characterization. "Don't Ask, Don't Tell" proponents would have us read the argument this way:

- (a) An effective defense of the nation is of paramount importance.
- (b) Demoralized troops will not provide cohesive, effective armed service.
- (c) Gays will demoralize the troops.
- (d) Therefore, openly gay service members will undermine the defense of the United States.

When the argument is characterized in this way, a ban on openly gay service members might appear rational. But when we fill in the missing pieces of the argument, its irrationality is quickly exposed.

The easiest way to see that irrationality is to replace the argument's reference to "gays" with reference to "blacks."⁹⁴ This requires no great feat of imagination, because it was precisely the argument made in resistance to racial integration of the military in the 1940s. The Army maintained that

[t]he soldier on the battlefield deserves to have, and must have, utmost confidence in his fellow soldiers. They must eat together, sleep together, and all too frequently die together. There can be no friction in their every-day living that might bring on failure in battle. A chain is only as strong as its weakest link, and this is true of the Army unit on the battlefield.⁹⁵

Indeed, the overwhelmingly racist feelings of enlisted men in the 1940s seemed to foreshadow just the sort of tempest the Army feared. Polls conducted in 1942 showed that 90 percent of white soldiers opposed unit integration, as did

93. *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings before the House Committee on Armed Services*, 103d Cong. 265-70 (1993).

94. The comparison of hetero-supremacy to white supremacy has been hotly contested. See GILREATH, *SEXUAL POLITICS*, *supra* note 7, at 128-29. Gays hoped that the ascendancy of a black man to a leadership position in the military would bring about beneficial change. But Colin Powell, Chairman of the Joint Chiefs of Staff at the time "Don't Ask, Don't Tell" was debated, was no ally. Powell rejected the comparison, opining that sexual orientation was not a "benign" characteristic in the same way that he viewed race. He remained true to the neo-conservatism that would make him Secretary of State for George W. Bush and true to the Joint Chiefs of Staff track record of often being on the wrong side of history. (The Joint Chiefs supported the internment of Japanese-Americans during World War II and opposed racial desegregation of the military in the 1940s.) See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 192 (1999).

95. RICHARD DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES* 189 n.38 (1969); *see also* ESKRIDGE, *supra* note 94, at 192.

approximately forty percent of enlisted blacks, nearly all of whom were serving in segregated units.⁹⁶ And yet when the Army did deploy integrated units at the end of World War II, not only did the United States and its allies emerge as victors, but the Army found that it provided “better utilization of manpower.” Surveys showed that seventy-seven percent of those involved in the experiment found after serving with blacks that integrated units were preferable. Virtually no soldiers found it less preferable.⁹⁷ When President Truman finally ordered full-scale desegregation of the military in 1948,⁹⁸ the military did not disintegrate. On the contrary, it has remained the undisputed preeminent military power on the globe. A recent poll shows that seventy-three percent of military personnel polled are comfortable with gays and lesbians and that seventy-eight percent of respondents currently serving would still have joined if gays and lesbians were allowed to serve openly. Only ten percent reporting that they would not have joined.⁹⁹

Moreover, the military’s selective enforcement of the gay ban also counsels that gays do not actually undermine unit cohesion or effectiveness. The military has a history of retaining gays in times of war—when they suddenly become a useful resource.¹⁰⁰ If gays were really a hindrance to military effectiveness, they would be discharged even—perhaps especially—during wartime.

Far from satisfying strict-scrutiny review, the unit-cohesion argument does not even pass rational-basis review. The government’s own studies, long repressed, show no negative impact from employing gay and lesbian service members.¹⁰¹ Even those studies cited by Colonel Henderson in the hearings do not support the idea that gays would undermine unit cohesion.¹⁰² The Stouffer

96. Polling data reprinted in MORRIS MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940–1965*, at 40 (1981); ESKRIDGE, *supra* note 94, at 192.

97. MACGREGOR, *supra* note 96, at 54.

98. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948) (“There shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin . . .”).

99. Zogby International, *Opinions of Military Personnel on Sexual Minorities in the Military* (2006), <http://www.palmcenter.org/files/active/0/ZogbyReport.pdf>.

100. See GILREATH, *SEXUAL POLITICS*, *supra* note 7, at 15 (noting World War II and subsequent policies of retaining gays under a “medicalization” policy in wartime); see also *Watkins v. United States*, 875 F.2d 699 (9th Cir. 1989). Perry Watkins had been drafted to serve in Vietnam despite his openness about his homosexuality. He was allowed to reenlist several times. Fifteen years later, just short of pension eligibility, the military began separation proceedings against Watkins, declaring known homosexuals to be incompatible with military service. The Ninth Circuit ruled *en banc* that the army was estopped from this procedural trickery.

Additionally, in response to questioning, a military spokesperson put a different spin on the policy of retaining gays in wartime. Kim Waldron, of the U.S. Army Forces Command at Fort McPherson, said, “The bottom line is some people are using sexual orientation to avoid deployment. So in this case, with the Reserve and Guard forces, if a soldier ‘tells,’ they still have to go to war and the homosexual issue is postponed until they return to the U.S. and the unit is demobilized.” *Pentagon Acknowledges Sending Openly Gay Service Members to War*, Sept. 23, 2005, http://www.palmcenter.org/press/dadt/releases/pentagon_acknowledges_sending_openly_gay_service_members_to_war_acknowledgement_follows_discovery_of_regulat (last visited Feb. 19, 2006).

101. See *GAYS IN UNIFORM: THE PENTAGON’S SECRET REPORTS* xv (Kate Dyer ed., 1990).

102. *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong. 268 (1993).

study found that shared religious belief was the unifying element for U.S. soldiers during World War II. In fact, it revealed high instances of anti-Semitism.¹⁰³ But no one would seriously suggest that we could constitutionally bar Jews from military service because of the possibility that a majority of Christian soldiers would negatively react to their presence. To give the example a modern twist, could we bar Muslim soldiers because of possible negative reaction in the current climate? Other studies cited by Colonel Henderson showed that "primary group solidarity in the Wehrmacht" was based in part on "latent homosexual tendencies" among soldiers.¹⁰⁴ Henderson's conclusion hardly reinforces the untruth that gays undermine cohesion. Rather, it is reminiscent of the prowess of the Sacred Band of Thebes.¹⁰⁵ In the United States, there is considerable anecdotal evidence that the sexual orientation of many gay soldiers has been known to their comrades with no negative effect on cohesion or morale.¹⁰⁶

It is also worth noting that the United States is virtually alone among its allies in sexually segregating its troops. The United States has not complained about Great Britain's aid in the Iraq War, even though Great Britain has a sexually-integrated military, as do most other Western nations. The Pentagon has made no complaints about the "ineffectiveness" of our allies in the "War on Terror."¹⁰⁷ Moreover, police forces serve a quasi-military purpose in the United States, and yet the nation's largest police forces, in New York City and Los Angeles (among others), have no restrictions on openly gay personnel.

Another missing piece of the pro-silence argument is the effect that it has on gays and lesbians who are forced to live the lie. Gay and lesbian service members are demoralized by "Don't Ask, Don't Tell," but these morale-debasing effects are rarely discussed.¹⁰⁸ Nineteen-year-old Seaman Apprentice John Graff spoke for countless voiceless gay and lesbian service members when he said, "It's emotionally distressing, because you constantly have this weight on you, that someone is going to find out somehow, that you could lose your job."¹⁰⁹ Gays cannot object when they hear heterosexist slurs. Like Major Witt, they cannot be honest about the relationships that likely sustain them. They

103. See Cole & Eskridge, *supra* note 8, at 339

104. *Id.*

105. According to Plutarch, the Sacred Band was an army of 150 homosexual couples (300 gay men) famous for their bravery and ferocity. The Thebans employed them strategically, believing that the bond between lovers would inspire more bravery than mere masculine friendship or even familial ties. See PLUTARCH, *LIFE OF PELOPIDAS* (Bernadotte Perrin trans., Harv. Univ. Press. 1967).

106. See generally Cole & Eskridge, *supra* note 8, at 339 (sources cited).

107. It is also true that some sixty-four percent of the U.S. population believes that gays and lesbians should be able to serve openly in the military. (See GILREATH, *SEXUAL POLITICS*, *supra* note 7, at 32 (gathering polling data)). Unless we assume that military enlistees are far more ignorant or prejudiced than the general population (an untenable assertion), we cannot assume that service members will react negatively to a repeal of "Don't Ask, Don't Tell." Indeed, recent polling data suggests the opposite reaction. See *supra* note 99 and accompanying discussion.

108. Retired Rear Admiral John D. Hutson, a former Navy judge advocate general, was recently quoted as saying, "The real cost is the cost in human dignity, in self-respect, and in the image of the military held by the American public, the world community and itself The dignity of the armed forces is at stake." See White, *supra* note 85, at A4.

109. *Id.*

cannot even object to the smothering heterosexism so endemic of this culture by saying simply, "You are assuming I am straight, but I am not." Of course it is true that men and women who voluntarily enlist in the military know they will sacrifice individuality. But regulations about how long your hair can be or how shiny your boots must be are a far cry from regulations that make you hide a core part of your identity. What is more demoralizing than that?

There are significant morale (and moral) problems with a policy that purports to separate the significance of an underlying identity from the expression of that identity. In Part I of this essay, I argued that a chief First Amendment aspiration is that of personal development. The First Amendment ensures that the United States is not a society of secret creeds and whispered identities. Each citizen's definition of self is, at least theoretically, given a comparable value. In that regard, "Don't Ask, Don't Tell" represents the opposite of First Amendment values. In essence, it is akin to the "love the sinner, hate the sin" mantra of my Southern Baptist youth. The smug superiority, often part and parcel of being one of the "majority," made it difficult for my moral mentors to understand how truly impossible it was for them to love me and yet "hate" a core part of my identity as a human.

I was recently reminded of the hopelessness I felt in my youth when a colleague sent me a cartoon snipped from the local newspaper. The cartoon depicted a priest on the steps of a church with outstretched arms under a banner that read: "Welcome to the Inherently Disordered"—referencing the Catholic Church's recent pronouncement (reiteration?) that gays are "inherently disordered." "Don't Ask, Don't Tell," like the Catholic Church, only welcomes those gays who refuse to act on or acknowledge their orientation and innate human nature. Gays and lesbians are told that, in order to be part of the greater good (church, military, etc.), they must sacrifice who they are. I know from experience that the psychological effects of being forced to live that kind of lie are overwhelmingly detrimental. Considering that the military does not deny that gays and lesbians currently serve in its ranks, it is curious that the military has no regard for the morale problems inherent in perpetuating a policy of enforced silence. Far from satisfying strict scrutiny, the military's justifications for "Don't Ask, Don't Tell" are not even rational.

CONCLUSION

There is a palpable link between the *Lawrence* liberty interest in having one's sexuality respected and the First Amendment interest in having one's expression respected. *Lawrence* stands for the proposition that sodomy laws demean the existence of gay people. For this reason, criminal proscriptions of homosexual sex are no longer constitutionally permissible. "Don't Ask, Don't Tell" similarly demeans gay people's existence. What is more demeaning than telling someone that they may "exist," but only in secret? For gays and lesbians, more than any other group, expression is a key component of existence. Because gays are not a discrete minority, easily visible in the same way as race or gender, they must be able to express their identity in order to live authentically. This has been the central theme of the gay struggle: the right to "come out" and to identify as gay in a heterocentric society.

At bottom, "Don't Ask, Don't Tell" is bigotry. And of course, "Don't Ask, Don't Tell" is extreme censorship—including censorship of speech that goes to the very heart of the First Amendment. That should be no surprise: hatred, intolerance, and suppression of speech have gone hand-in-hand throughout history. "Don't Ask, Don't Tell" tells Americans that the very expression of a gay or lesbian identity is disgusting. It sends the message that, because gays are so disgusting, straight soldiers will not want to work with them and should not be required to do so. It provides a legal "heckler's veto" for service members who do not want to hear the unpleasant realities of a sexually-diverse America. They do not even want to hear that gay people exist. "Don't Ask, Don't Tell" squelches gay people's identities, based entirely on the fear that a (presumably) hostile audience will have a (presumably) negative reaction. This offends the very core of the constitutionally-protected liberty at issue in *Lawrence* and at the heart of the First Amendment: the liberty to define ourselves and to publicly express that self-definition. When subjected to First Amendment scrutiny without the benefit of deference to military policy, "Don't Ask, Don't Tell" must fall as constitutionally defective.