Political Representation and Accountability Under Don’t Ask, Don’t Tell

Tobias Barrington Wolff

ABSTRACT: The U.S. military’s Don’t Ask, Don’t Tell policy constitutes a singular type of speech regulation: an explicit prohibition on identity speech by a defined population of individuals that mandates a state of complete social invisibility in both military and civilian life. The impact of such a regulation upon the public speech values protected by the First Amendment should not be difficult to apprehend. Yet, as the tenth anniversary of the policy passes, First Amendment scholars have largely ignored this seemingly irresistible subject of study, and the federal courts have refused to engage with the policy’s implications for public speech values in any serious way. The Supreme Court’s landmark decision in Lawrence v. Texas makes the time ripe to fill this analytical breach.

In this Article, I explore three important conceptual issues that converge under Don’t Ask, Don’t Tell. First, I provide an overview of the true nature
and scope of the speech regulations that the policy imposes upon gay and lesbian soldiers and map out the public speech values that those regulations offend, with a particular focus on political representation and accountability. Second, I explore an important issue in free speech theory—the relationship between a speaker’s public identity and the meaning and political impact of the speaker’s contributions to public discourse—that has gone largely unexamined in the continuing debate between collectivist and individualist First Amendment scholars. And third, I illustrate and analyze the deep relationship between the form of subordination that Don’t Ask, Don’t Tell imposes upon gay soldiers and the reiteration of that form of subordination in the impoverished analysis of the policy that the federal judiciary has offered thus far. With the greater insight that ten years of enforcement provides into the policy’s true impact upon public speech values, Don’t Ask, Don’t Tell offers an important opportunity to explore the broader change that Lawrence v. Texas promises to bring about in the review of claims by gay and lesbian litigants.

INTRODUCTION ................................................................. 1635

I. DON’T ASK, DON’T TELL ON PAPER AND IN PRACTICE ........ 1640
   A. THE SCOPE OF THE POLICY ON PAPER ...................... 1642
   B. THE SCOPE OF THE POLICY ON THE GROUND .............. 1644
      1. Conversations with Family Members ....................... 1645
      2. Friends, Organizations, and Associations ............... 1646
      3. Sessions with Chaplains and Psychotherapists .......... 1648
      4. Public Statements ........................................... 1649

II. REPRESENTATION, ACCOUNTABILITY, AND INDIVIDUAL IDENTITY .. 1650
   A. POLITICAL REPRESENTATION AND PUBLIC DISCOURSE ...... 1652
      1. Communication with Elected Representatives .......... 1655
      2. Participation in Associations and Advocacy Groups .. 1669
   B. POLITICAL ACCOUNTABILITY .................................... 1679
   C. SPEECH IN THE SERVICE: SOME POINTS OF COMPARISON .... 1688

III. WILFUL BLINDNESS AND THE PROMISE OF LAWRENCE .......... 1692
    A. JUDICIAL AVOIDANCE STRATEGIES .......................... 1694
       1. No Speech, No Problem ..................................... 1694
       2. Military Deference .......................................... 1698
          a. Justification or Need .................................... 1699
          b. Impacts on Constitutional Values ..................... 1701
          c. Levels of Constitutional Protection ................. 1706
    B. THE PROMISE OF LAWRENCE ................................... 1708

CONCLUSION ................................................................. 1715
INTRODUCTION

The job of an academic is sometimes to state the obvious and then to restate the obvious, and then restate it again, and to continue in this task until he succeeds in making the obvious comprehensible. If this observation sounds counterintuitive or seems an attempt at clever irony, it is intended as neither. The most obvious facts can also be the ones that we are least able to acknowledge openly or the significance of which we are least able to appreciate. The job of the academic is sometimes to employ persistent analysis as a tool for piercing willful blindness.

As the tenth anniversary of the U.S. military’s Don’t Ask, Don’t Tell policy passes,1 this observation has a dual significance. It is relevant, first, to the distinctive dynamic that characterizes much antigay discrimination, of which Don’t Ask, Don’t Tell is a prominent example. The subordination of gay men and lesbians often depends upon an outright denial of their existence, despite the fact—certainly obvious in modern America—that gay people exist as a ubiquitous presence in society. This phenomenon of denial is often described as a “heterosexual presumption”—a pervasive assumption that people are straight unless proven otherwise.2 I think, however, that “denial of the homosexual possibility” is a more accurate term. The phrase better captures the active quality of the refusal to acknowledge that a person whose sexual self-identification is unknown might, in fact, identify as something other than straight.3 This active refusal is inscribed, explicitly, into the Don’t Ask, Don’t Tell policy, which contemplates the presence of gay, lesbian, and bisexual soldiers in the military4 and yet relies for its


4. See Able v. United States, 88 F.3d 1980, 1298 (2d Cir. 1996) (listing the three circumstances that “require[. . .the discharge of a service member”); DEF’T OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS § E3.1A.18.1.1, at 26 (1998) (“[S]exual orientation is considered a personal and private matter [under the policy], and is not a bar to
operation upon the widespread, consensual hallucination that these soldiers will simply disappear when they are compelled to silence. A policy that counts upon straight soldiers to deny the possibility that their fellow soldiers might be gay, despite the fact that the policy itself expressly permits gay soldiers to serve, would seem to embody "denial" in its most literal form.

My observation also bears upon the distinctive dynamic that has characterized judicial review of the military's policy thus far. That review has suffered from a willful blindness that is, if anything, even more breathtaking than the conceit underlying the policy itself. The weight of the burden that Don't Ask, Don't Tell lays upon speech values in its regulation of gay and lesbian servicemembers is both singular and intense. The policy levies categorical, content-based restrictions against a limited class of speakers on the most personal of topics, restrictions that are applicable twenty-four hours a day, outside military property as well as inside, off active duty as well as during, when speaking with family members and friends as well as with military personnel. Yet most of the federal appeals courts that have analyzed Don't Ask, Don't Tell have concluded that the policy does not even implicate the Speech Clause of the First Amendment. 1 I feel obliged to repeat this observation, lest it be misunderstood. These courts have not held

continued service... unless manifested by homosexual conduct.

6. The late Judge Eugene Nickerson has offered the most memorable judicial recognition of the illogical foundations of the policy, noteworthy for its singularity as well as its eloquence. He wrote, "[i]t is unlikely in the extreme that any enlisted member fit to serve would believe that closeted homosexuals are not serving or would long retain that belief after asking another enlisted member his or her sexual orientation and receiving the reply 'no comment.'" Able v. United States, 968 F. Supp. 850, 859 (E.D.N.Y. 1997), rev'd, 155 F.3d 628 (2d Cir. 1998). Presumably, the hypothetical straight soldier who cannot bear the thought of being spied upon in the shower also would take little comfort from such a reply. But see Aaron Bellin & Melissa Sheridan Ember-Herbert, A Modest Proposal: Privacy as a Flawed Rationale for the Exclusion of Gays and Lesbians from the U.S. Military, at http://www.gammilitary.ucsb.edu/Publications/2003_BellinEmberHerbert2.htm (Jan. 2003) (arguing that the privacy rationale is factually unsupported given the current state of military facilities) (on file with the Iowa Law Review).

6. Indeed, the apparent irrationality of the policy's justification—officially permitting gay soldiers to serve, yet insisting that their avowed presence would interfere with unit cohesion—suggests that "denial" may not be the governing dynamic at all. Don't Ask, Don't Tell may in fact retain a population of gay soldiers precisely so that the military can treat those men and women as whipping boys, defining them as second-class citizens and encouraging military units to "cohere" around the harassment and persecution of their gay peers. Cf. Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431 (1992) (reading Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 106 S. Ct. 2172 (2003), as lending government sanction to violence against sexual minorities). Unfortunately, the record of abuse heaped upon gay servicemembers in the last ten years—and the disproportionate targeting of women under the policy—lends support to this disturbing possibility. I explore this issue in Part II.B. See infra text accompanying notes 201–16.
that the First Amendment simply is not violated in these cases—for example, that compelling military interests render necessary these burdens upon servicemembers' speech rights. Rather, they have held that the Amendment is not even implicated—that no serious speech issue exists for the court to consider. The degree of self-deception that is required for a federal judge to conclude that this policy—entitled “Don’t Ask, Don’t Tell,” no less—does not even implicate speech values simply beggars description.

I believe that these two phenomena are deeply linked. Indeed, Don’t Ask, Don’t Tell has given rise to a situation that properly warrants the use of the term “meta-phenomenon”: The species of willful blindness that federal judges have adopted in their analysis of the policy is a reiteration of the very same mode of subordination—the willful refusal to acknowledge the existence and the human experience of gay men and lesbians—that makes it possible for the policy to operate in the first place. That willful judicial blindness is traceable, at least in part, to the Court’s decision in Bowers v. Hardwick, which trivialized the life experiences of gay people and gave other judges a broad license to do the same. Thus, the Court’s dramatic opinion in Lawrence v. Texas may have a vivid impact upon the manner in which the speech claims of gay litigants will be heard and received in future cases.

In an earlier article on Don’t Ask, Don’t Tell, I focused on one particular expressive harm that the policy imposes upon gay soldiers—the requirement that they proclaim a false straight identity to the world, either by remaining silent in the face of a persistent “heterosexual presumption” or by actively claiming a heterosexual identity as the only realistic method of
complying with the policy.11 This dynamic implicates the First Amendment in its role as a protector of individual autonomy, violating the principle that government may not invade the "individual freedom of mind" by compelling a person to affirm a false identity, faith, or belief.12 But there are other important First Amendment issues implicated by the policy, as well—those flowing from the role that the Court has assigned the Amendment as a promoter of public speech values and guardian of the political process. In particular, the military policy offers an important opportunity to study the relationship between individual identity and the ability of a speaker to make contributions to public discourse that carry authority and persuasive force—an issue that has received inadequate attention in First Amendment scholarship and that I analyze at length here. Indeed, the striking bluntness of the policy in restricting the speech of gay servicemembers renders the principles associated with the First Amendment exceptionally visible—visible, that is, to those who are willing to see them. In this regard, the Don't Ask, Don't Tell policy offers an important opportunity for First Amendment scholars to examine the shape and content of those principles; and the sea change heralded by Lawrence v. Texas provides a particularly appropriate occasion to examine the application of those principles to the claims of gay citizens.

I will use this Article to explore two core speech values associated with the First Amendment that the Don't Ask, Don't Tell policy offends: the ability of citizens to communicate effectively with their political representatives, and the imperative that a democratic system of government be responsive to criticism and calls for political change. The arguments for each depend upon a basic fact about the operation of the policy that is often misrepresented or misunderstood: Don't Ask, Don't Tell prohibits gay and bisexual servicemembers from ever discussing their gay identities, with anyone, for any reason, whether in the military or in civilian life, on duty or off, in public or in private. This total regulation of gay identity prevents gay servicemembers from identifying themselves in circumstances where self-identification is necessary for the effective exercise of important First Amendment rights.

One such right is the ability to participate in the political process. A key requirement for effective self-government in a representative democracy is the ability of citizens to identify themselves to government officials, whether alone or through organized action, and to make known their needs and interests in personal terms. The military policy, by its terms and in practice, prohibits non-heterosexual servicemembers from identifying themselves honestly to their elected representatives. It thus prohibits them from describing their distinctive needs and interests—whether as gay

servicemembers or simply as gay citizens—and from urging changes in those legislative policies that affect them personally. In so doing, the policy prevents gay and lesbian servicemembers from participating meaningfully in one of the most basic activities of representative government: communication with the officials charged with promoting their welfare.

In addition, the policy has the perverse effect of shielding itself from any systematic assessment of the costs that it imposes, the benefits that it achieves, or the success (or lack thereof) with which it is administered. Don’t Ask, Don’t Tell silences the very population of individuals in possession of the most pertinent information about the policy’s workability: the active-duty gay and lesbian servicemembers who live and work under its mandates every day. Theirs is the one voice that is consistently absent from public debates about the policy, because the policy itself forbids them to speak about their experiences. One of the most important functions that the First Amendment serves is to preserve accountability and responsiveness in government. The light of public scrutiny exposes corrupt, outdated, or unworkable policies and thereby makes political correctives possible. Laws that prohibit criticism of government, or that suppress the information necessary to develop such criticism, stand in derogation of this imperative. Don’t Ask, Don’t Tell prohibits its targets from providing any personal account of the impact that the policy has upon their lives, their performance and their units. In so doing, the policy shields itself from the most basic mechanism of political accountability.

My purpose in this Article is twofold. My principal aim is to explore the content of these essential First Amendment values—political participation and accountable, responsive government—and to describe the manner in which Don’t Ask, Don’t Tell’s selective prohibition on identity speech derogates from those values. To that end, Part I seeks to dispel the misunderstanding that frequently dominates consideration of these issues by briefly describing the full sweep of the absolute restrictions that the policy imposes upon the identities of non-heterosexual servicemembers. Part II then offers an in-depth examination of the burdens on public speech values imposed by those restrictions. Part II.A discusses the importance of honest communication with one’s elected leaders and fellow citizens in a representative democracy and the surpassing barrier that the policy imposes to such communication. Part II.B details the important role of the First Amendment in preserving accountability and responsiveness in government and the incompatibility of the military policy with those values. And Part II.C briefly canvasses the range of speech activities commonly engaged in by other members of the military in order to place the restrictions on gay and lesbian soldiers into sharper relief.

It is also my hope, in Part III, to illustrate and begin to analyze the extent of the willful blindness that has been required for the federal judiciary to conclude, repeatedly, that Don’t Ask, Don’t Tell does not even
implicate these speech values or any other values relevant to the First Amendment. This willful judicial blindness has entailed a refusal to acknowledge the distinctive human experience—and, hence, the humanity—of non-heterosexual litigants. The Court’s opinion in Bowers v. Hardwick both condoned and encouraged this sort of dehumanizing treatment, a fact that the Lawrence majority understood and addressed with unusual candor. Though it does not speak to the First Amendment directly, Lawrence forcefully removes the blinders that many members of the judiciary have heretofore chosen to wear when reviewing the claims of gay litigants in a broad range of legal categories. Part III.A describes the strategies that courts have employed to avoid the First Amendment implications of Don’t Ask, Don’t Tell. Part III.B then offers some thoughts about the effect that Lawrence’s shift in paradigm may have on future challenges to the policy. This paradigm shift may not guarantee a different outcome, but it carries the promise of an end to the willful blindness that has prevented any serious assessment of the policy’s cost to constitutional values.

I. DON’T ASK, DON’T TELL ON PAPER AND IN PRACTICE

Given the importance of the issue, one might reasonably expect constitutional and political debates over Don’t Ask, Don’t Tell to demonstrate an informed understanding of the actual scope and impact of the policy. The statutory framework that the policy sets forth is quite clear on the matter. The enforcement strategies employed by the military have been carefully documented—most consistently by the Servicemembers Legal Defense Network (SLDN), the preeminent organization providing guidance and representation to gay soldiers, in its series of much noted annual reports. And the lived experience of servicemembers under the policy has been described by advocacy groups, scholarly commentators, and grassroots organizations alike. Yet most public debates over Don’t Ask, Don’t Tell persist in the false assumption that the policy applies only to the conditions under which gay and lesbian soldiers undertake their active-duty service. Participants in these debates wrongly assume (or even proclaim) that the

policy preserves the privacy interests of gay soldiers in their personal lives;\textsuperscript{16} it strikes a balance between the demands of "unit cohesion" in a military setting and the speech and associational activities of gay servicemembers in a civilian setting; or otherwise confines the burdens that it imposes to the battlefield, the barracks, and the military workplace.\textsuperscript{17} It is thus necessary to begin this Article with a return to basics.

I preface this discussion of the policy's scope with an important reminder. As I said above, the current military policy does not prohibit gay men and lesbians from serving in the military; rather, it expressly contemplates and authorizes their presence.\textsuperscript{18} Thus, when a gay soldier says, "I am gay," he is not "admitting" to doing (or being) anything wrong, as would have been the case under the old policy, which declared that only heterosexuals were allowed to enter military service.\textsuperscript{19} Gay men and lesbians are now officially allowed to serve. Courts routinely ignore this fact and behave as though a statement of gay identity constitutes an "admission" of wrongdoing—a maneuver that no doubt helps to mitigate the cognitive dissonance that would otherwise result from disregarding the manifest First Amendment concerns raised by the policy. Indeed, given the invasive quality of the enforcement procedures that I describe below, some commentators have concluded that Don't Ask, Don't Tell must be understood to impose a complete ban on gay servicemembers, despite the policy's repeated disavowal of that position.\textsuperscript{20} I give closer attention to this issue in Part III. For

\begin{itemize}
\item \textsuperscript{16} See, e.g., Able v. United States, 88 F.3d 1280, 1299 (2d Cir. 1996) (characterizing the policy as creating "a balance between a service member's privacy interest and the military interest in prohibiting homosexual acts"); David Crary, 'Don't Ask' Policy Resurfacing, SALT LAKE TRIB. (Mar. 11, 2003) (describing public debate surrounding policy in which "public" declarations of gay identity are the primary focus), http://www.sltrib.com/2003/Mar/03112003/nation_w/37182.asp (on file with the Iowa Law Review); Tom Philpott, Don't Ask, Don't Tell Architect Says Gore Stopped Into 'Briar Patch,' MIL. UPDATE (Dec. 16, 1999) (noting that Charles Moskos, author of the military policy, characterizes restrictions on gay soldiers as "don't ask, don't tell, don't seek, don't flaunt").
\item \textsuperscript{17} See SERVICEMEMBERS LEGAL DEF., CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 9 (2003) [hereinafter SLDN NINTH REPORT] ("Many Americans view 'Don't Ask, Don't Tell' as a benign gentlemen's agreement with discretion as the key to job security. That is simply not the case.").
\item \textsuperscript{18} See supra note 4 and accompanying text.
\item \textsuperscript{19} See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 456-57 (7th Cir. 1989) (describing the exclusionary policy under old regulations); see also Wolff, supra note 2, at 1209-10 (discussing this distinction between old and new policies). But see Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1477-78 (9th Cir. 1994) (interpreting the old policy to require discharge only in the case of a conduct violation in order to avoid constitutional problems raised by regulating the "status" of gay soldiers).
\item \textsuperscript{20} Prominent presentations of this argument may be found in the work of two very different commentators: an academic critic of the policy, see generally JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999), and a judge who views an absolute ban as both acceptable and appropriate, see Thomasson v. Perry, 80 F.3d 915, 934-49 (4th Cir. 1996) (en banc) (Luttig, J., concurring). Cf. Wolff, supra note 2, at 1209-10 (pointing
now, I take the policy on its own terms. Within the framework upon which Congress and the Defense Department have insisted, the discharge policies described below do not involve the "discovery" of gay and lesbian soldiers who are not supposed to be in the military and have been "found out" by their commanders. These are speech restrictions, imposed upon a population of soldiers whose presence in the military is both avowed and sanctioned.

A. THE SCOPE OF THE POLICY ON PAPER

The Don't Ask, Don't Tell policy, which appears at 10 U.S.C. § 654 ("Policy concerning homosexuality in the armed forces"), imposes two essential restrictions upon gay and lesbian servicemembers. The first restriction, often referred to as the "acts" provision, requires that a gay soldier be separated and discharged if he "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," where the term "homosexual act" includes any form of same-sex physical contact that is motivated by sexual desire, and also any physical contact that a "reasonable person" would believe to demonstrate a "propensity" to commit such a sexually motivated act (like holding hands, or hugging). Translation: No touching, at all. The second restriction, the "statements" provision, requires separation and discharge if a gay soldier states honestly "that he or she is homosexual or bisexual, or words to that effect." Translation: No telling, at all.

out that Don't Ask Don't Tell, if taken at its word, "places the power of the State behind an offense to servicemembers' First Amendment rights that the military could previously argue that most gay servicemembers were imposing upon themselves".

21. 10 U.S.C. § 654(b)(1), (f)(3)(A)–(B) (2000); see also Able v. United States, 88 F.3d 1280, 1291 (2d Cir. 1996) (explaining that the policy prohibits any affectionate conduct "from handholding to intercourse").

22. Id. § 654(b)(2). In theory, a servicemember can avoid being discharged under the statement's provision if she can demonstrate that despite saying that she is gay, she does not have a "propensity" to commit homosexual acts. See id. § (b)(1) (A)–(E). This is commonly referred to as "rebutting the presumption." See Thomas, 80 F.3d at 920 (discussing the factors that may be considered in "rebutting the presumption"). In theory, the military discharges soldiers who speak about being gay not because of the statement itself, but because the statement constitutes evidence that the soldier is likely to violate the policy's conduct restrictions. See infra Part III. In theory, therefore, if a soldier can rebut the presumption raised by her statement—the presumption, that is, that she possesses a "propensity" to commit homosexual acts—then she can avoid discharge. See, e.g., Thomas, 80 F.3d at 920. In practice, however, an honest and unretracted statement about being gay virtually guarantees that a servicemember will be discharged. See, e.g., Thorne v. United States Dep't of Def., 916 F. Supp. 1358, 1366 (E.D. Va. 1996) (explaining that the rebuttal of presumption is a practical impossibility unless a soldier recants his statement).

23. The policy also contains a third restriction that requires separation and discharge if a soldier "has married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(3). While this provision has rarely, if ever, been invoked, its addition to the policy demonstrated foresight. See, e.g., Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (Sup.
The statutory framework for the policy is similarly blunt in describing the policy's actual and intended scope, which is detailed in a series of fifteen congressional findings that appear in the first section of the Act. Finding nine sets forth the times during which Don't Ask, Don't Tell applies: "The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces." The next finding, number ten, details the circumstances in which the policy's restrictions are applicable: "Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty." And, lest any doubt remain, finding eleven makes clear that application of the Don't Ask, Don't Tell policy is intended to be "pervasive" in the lives of gay and lesbian servicemembers, in both a civilian and a military setting. Translation: No touching and no telling, at all, anywhere, ever.

The Department of Defense has promulgated regulations and policy statements to implement the statute, as have all branches of the service. Some of these regulations purport to place limitations on the scope of the policy's restrictions (sometimes by incorporating other provisions of military law by reference). Thus, within the military, statements made to chaplains, statements made to some medical professionals, and answers to questions asked during the course of a security clearance interview are

Jud. Ct. 2003) (ruling that the Massachusetts Constitution entitles gay and lesbian couples to equal access to the state institution of marriage).
25. Id. § (a)(10).
26. Id. § (a)(11).
28. See Mil. R. Evid. 503 (setting forth the exclusionary rule for statements made to military chaplains).
29. See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999) (clarifying that the 513 privilege has no application outside criminal proceeding: "Rule 513 is not a physician-patient privilege. . . . In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces."); DEPT OF DEF., DIRECTIVE NO. 6458.1, HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) § E3.2.1-1.9, at 18 (1991) ("Information obtained from a Service member during, or as a result of, an epidemiological assessment interview may not be used against the Service member [in adverse criminal or administrative actions.").), available at http://www.dtic.mil/whs/directives/corres/pdf/d64581wch1_031991/ d64581p.pdf (on file with the Iowa Law Review); Mil. R. Evid. 513 (prohibiting the use of communications with a psychotherapist in a criminal proceeding under the Uniform Code of Military Justice).
supposed to be confidential. More broadly, the Defense Department has established some parameters as to the circumstances in which investigations under the policy should be initiated and the manner in which those investigations should be conducted. Even these modest limitations, however, have been honored almost entirely in the breach. As discussed below, for example, many soldiers have been discharged on the basis of statements made to chaplains, exclusionary rules notwithstanding, and commanders routinely overstep even the modest boundaries contemplated by these regulations in conducting their investigations. The implementing regulations, moreover, expressly provide that gay soldiers enjoy no substantive or procedural right to enforce any of the provisions contained therein, and if there has been a single instance in which the military has punished a commander or investigator for violating the limits set forth in those regulations, it has never come to light. It thus remains the case that the actual scope of the policy is best captured by the terms set forth in the broad, unqualified language of the statute itself: No touching and no telling, at all, anywhere, ever.

B. THE SCOPE OF THE POLICY ON THE GROUND

Over the last ten years, the enforcement strategies that the military has employed have borne out the apparent breadth of the statutory language. Military authorities regularly invoke the provisions of Don’t Ask, Don’t Tell in a broad array of speech situations—even those that would ordinarily receive the greatest degree of constitutional protection, whether because of their private character or because of their public importance. In its most

---


31. See DEPT OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS § E3.A4.1.1, at 67 (1993) (directing that a commander should only initiate an investigation upon receiving “credible information” that a servicemember has violated the statute), available at http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf; id. § E3/A4.3.3.4, at 69 (setting policy that credible information does not exist when “[t]he only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, [or] associating with known homosexuals”).

32. See id. § E3/A4.1.3, at 67 (directing that the scope of a commander’s investigation should not reach beyond circumstances of specific credible allegations).

33. See id. § E3/A4.1.5, at 71 (“The procedures in this enclosure create no substantive or procedural rights.”); HALLEY, supra note 20, at 112 (discussing the insistence of the military on this point).

34. See SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE SIXTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 19 (2000) [hereinafter SLDN SIXTH REPORT] (“The ‘Don’t Ask’ rules are not being enforced…. [S]uperiors, subordinates and peers ask service members about their sexual orientation with impunity and hound service members out of the military.”); see also SLDN NINTH REPORT, supra note 17, at 5 (“Accountability for those who harass or condone anti-gay harassment is little more than empty words from military leaders.”).
recent report, SLDN offers a succinct assessment of the regulatory sweep of
the policy as it is applied on the ground: "An honest statement of one's
sexual orientation to anyone, anywhere, anytime may lead to being fired."35
A brief overview of these "on the ground" strategies is in order to permit a
realistic assessment of the impact of Don't Ask, Don't Tell upon the political
process values discussed in the following sections.

1. Conversations with Family Members

Private conversations with family members and loved ones have often
served as the basis for discharge proceedings under the policy. On many
occasions, investigators have interviewed the parents of servicemembers to
determine whether their children have ever spoken about being gay at
home.36 Don't Ask, Don't Tell prohibits a member of the military from
talking about being gay in a conversation around the family dinner table,
and such conversations have served as a basis for discharge under the
policy.37 Some military prosecutors have threatened family members with
subpoenas if they will not report on these conversations voluntarily.38 The
Air Force, in particular, has been notorious for instructing its investigators to
question family members in an attempt to elicit evidence of forbidden
conversations.39

35. SLDN NINTH REPORT, supra note 17, at 9.
36. See, e.g., SLDN NINTH REPORT, supra note 17, at 37 (detailing the investigation of
Marine helicopter pilot Captain Kira Zielinski); SERVICEMEMBERS LEGAL DEF. NETWORK,
CONDUCT UNBECOMING: THE EIGHTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T
PURSUE, DON'T HARASS" 33 (2002) [hereinafter SLDN EIGHTH REPORT] (describing
the persistent questioning of parents in an attempt to elicit reports of statements about sexual
orientation); SLDN SIXTH REPORT, supra note 34, at 24 (relating an occasion on which Marine
investigators questioned the mother of a Marine private about her son's statements concerning
sexual orientation).
37. See SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: SECOND ANNUAL
REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" 5 (1996) [hereinafter SLDN SECOND
REPORT] (discussing a servicemember discharged for revealing his sexual orientation to his
brother in a private conversation); id. at 6 (noting that the Air Force discharges airmen for
revealing sexual orientation to parents in private conversations); SERVICEMEMBERS LEGAL DEF.
NETWORK, CONDUCT UNBECOMING CONTINUES: THE FIRST YEAR UNDER "DON'T ASK, DON'T
Brown's parents were asked in detail about their son's sexual orientation and statements made
by Capt. Brown to his mother and father were included among the statements for which he was
to be discharged.").
38. See SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THREE ANNUAL
REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" 46 (1999) [hereinafter SLDN
FIFTH REPORT],
39. See id. at 40 (describing an Air Force memo instructing investigators to question family
members and friends). The Air Force recently issued a clarification under which investigators
are supposed to obtain formal, high-level approval before conducting a "substantial inquiry,"
which would include the questioning of family members. See SERVICEMEMBERS LEGAL DEF.
NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL,
DON'T PURSUE, DON'T HARASS" 52-53 (2001) [hereinafter SLDN SEVENTH REPORT] (describing
Conversations with spouses have likewise provided grounds for discharge under the policy. Some servicemembers come to terms with being gay only later in life, after entering into an opposite-sex marriage, and this can lead to difficult separations. When divorce proceedings ensue, disgruntled spouses sometimes "out" their military husbands or wives as a form of retaliation, reporting their private conversations to command authorities. The policy prohibits gay servicemembers from speaking about their sexual identity with their husbands and wives. As a consequence, these retaliatory outings can lead to discharge, and angry spouses can use the threat of outing to gain an advantage in divorce proceedings. Other servicemembers are bisexual and have full and satisfying opposite-sex marriages. The policy prohibits these servicemembers from having private discussions with their spouses about their bisexuality.

2. Friends, Organizations, and Associations

Conversations with friends and acquaintances in civilian life, like conversations with family members, are also subject to the policy's restrictions and have frequently served as the basis for discharge. Even though the Department of Defense has promulgated regulations suggesting that "associational" activities like going to a gay bar or belonging to a gay organization are not themselves grounds for discharge or investigation, gay servicemembers are frequently interrogated about such activities, and they remain as subject to discharge if they speak about being gay in these settings as in any other. The policy also forbids students who are enrolled in ROTC

40. See Wolff, supra note 2, at 1208-09 n.209 (discussing the difficult position of gay servicemembers who come to terms with sexuality late in life, and citing further authorities discussing the same issue).

41. See, e.g., SLDN SEVENTH REPORT, supra note 39, at 36-37 (noting that military bicycle "outed" to command by her husband after revealing to him that she realized she is a lesbian).

42. See SLDN SIXTH REPORT, supra note 34, at 26-27 (discussing three such instances of retaliatory revelation by spouses); id. at 44 (noting that the Air Force initiated an investigation against a senior airman following a revelation by his wife that the airman had said he was gay).

43. See 10 U.S.C. § 654(b)(2) (prohibiting statements of "bisexual" identity).

44. See, e.g., DEPT OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS § E3A4.3.3.4, at 69 (1993) (stating that "associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes," without more, is not sufficient to initiate investigation or discharge), available at http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf (on file with the Iowa Law Review).

45. See, e.g., SLDN NINTH REPORT, supra note 17, at 29 (discussing reports of Navy supervisors asking sailors whether they went "to a gay bar"); SLDN SEVENTH REPORT, supra note 39, at 26-27 (discussing three such instances of retaliatory revelation by spouses).
programs from speaking about being gay with their fellow students on campus, and it forbids soldiers from discussing their sexual identities privately with civilian friends or roommates.

Written statements to friends and family about being gay are also forbidden under the policy, and soldiers have been investigated and discharged for statements made in their private correspondence and their diaries. In 1998, for example, a Marine commander initiated an investigation against a corpsman under his command when the corpsman's former roommate stole her journal and turned it over to the commander in apparent retaliation for adverse testimony that the corpsman offered in a disciplinary hearing. The corpsman had talked about being a lesbian in her journal, and Don't Ask, Don't Tell prohibits such statements, even when written in a diary. As a result, the corpsman's career was placed in jeopardy. In another case, the Coast Guard initiated discharge proceedings against a petty officer based, in part, on a private email in which the PO had talked about being gay. And a West Point cadet became a target for investigation when her commander seized her diary during a room search and discovered statements indicating that she was gay. The cadet resigned rather than face a condemnation hearing. Those servicemembers who wish to attempt honest communication with their friends and family sometimes write in code and change the pronouns they use in an attempt to avoid the policy's speech restrictions, and there is no guarantee that even such strategies will allow meaningful communication with loved ones.

39, at 56 (reporting that the Air Force inquired whether an airman is "a member of any homosexual organization" and requested "addresses, telephone numbers" and "points of contact" so that organizations may be "interview[ed]"); id. at 62-63 (reporting that the Navy sends investigators to "gay friendly establishments" to search for Navy personnel and seeks, inter alia, to elicit statements); SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: FOURTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" 8-10 (1998) [hereinafter SLDN FOURTH REPORT] (noting that an Air Force interrogation of a sergeant's civilian roommates included questions about whether the sergeant has "ever been to a gay bar").

46. See, e.g., SLDN NINTH REPORT, supra note 17, at 24-25 (reporting that two Air Force ROTC cadets disenrolled after a friend reported to command that they spoke about being gay on campus).

47. See, e.g., SLDN SEVENTH REPORT, supra note 39, at 61-62 (detailing the pursuit of a Navy officer for discharge on the basis of a conversation in which the police misidentified a civilian roommate as a "boyfriend" and reported the conversation to command); SLDN FOURTH REPORT, supra note 45, at 8-10 (reporting that an Air Force officer interrogated the civilian roommates of a sergeant, asking whether the sergeant "[h]as . . . ever stated that she is gay").

48. See SLDN FIFTH REPORT, supra note 38, at 49-51.

49. See SLDN FOURTH REPORT, supra note 45, at 29-33 (detailing the case of Petty Officer Tim Bauer).

50. See SLDN THIRD REPORT, supra note 39, at 12-13.

51. See, e.g., SLDN SEVENTH REPORT, supra note 39, at 93 (noting a petty officer second class disguised the identities of friends, both in conversation and in private correspondence, as
3. Sessions with Chaplains and Psychotherapists

The completeness of the policy's restrictions upon speech within traditional military settings is confirmed by the manner in which the armed forces treats conversations with chaplains and therapists. Despite the general proposition that conversations with clergy are supposed to be confidential in the military, gay soldiers are investigated and discharged when chaplains decide for themselves to report the contents of their private conversations to commanders, as sometimes happens. In 2000, the Pentagon actually instructed gay soldiers to speak with clergy if they had questions about the policy, implicitly suggesting that confidentiality would be respected. But this instruction provided little security, as the military has continued to initiate discharge proceedings against gay soldiers when chaplains report the statements that the soldiers make during counseling sessions.

In the case of doctors and psychotherapists, there is not even a formal pretense of general confidentiality, and gay soldiers speak about their sexual identities to health-care professionals at their peril. Indeed, some military commanders instruct doctors and therapists that they are required to report any soldier who speaks about being gay during treatment, and

an attempt to avoid harassment); Wolff, supra note 2, at 1155-56 (recounting a similar story from an anonymous officer on active duty).

52. See Wolff, supra note 2, at 1164 (discussing the inability of gay servicemembers who are deployed overseas to communicate with loved ones).

53. MIL. R. EVID. 503(a) ("A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.").

54. See, e.g., SLDN FIFTH REPORT, supra note 38, at 38-39 (describing the problem of discharges following revelations by chaplains); SLDN FOURTH REPORT, supra note 45, at 18-19 (describing a similar problem, though with less frequency than appears in subsequent years).

55. See SLDN SIXTH REPORT, supra note 34, at 25.

56. See SLDN NINTH REPORT, supra note 17, at 25 (noting that discharge proceedings were initiated when an assistant chaplain broke the confidence of an airman); id. at 4 ("[C]haplains ... must be given clear instructions not to out service members who seek their help."); SLDN SEVENTH REPORT, supra note 39, at 35-38 (describing incidents of discharge and harassment following conversations with chaplains).

57. See, e.g., SLDN FIFTH REPORT, supra note 38, at 35-37 (discussing DEP'T OF THE NAVY, NAVMED P:5134, GENERAL MEDICAL OFFICER (GMO) MANUAL (May 1996) and noting that conversations with medical professionals are not confidential and some doctors consider reporting of gay soldiers mandatory). But see id. (indicating that the Pentagon denies that reporting by medical professionals is ever mandatory).

58. See, e.g., SLDN NINTH REPORT, supra note 17, at 36 (quoting a gay Marine stating "I was depressed, and I couldn't even talk to a psychiatrist because they'd be obligated to report me for being gay"); see also Wolff, supra note 2, at 1160-61 (noting that an Air Force captain experienced difficulties associated with mandatory gynecological appointments due to the threat of disclosure).

59. See, e.g., SLDN SEVENTH REPORT, supra note 39, at 33 (detailing Army briefing in which the Major assigned to provide training for the Don't Ask, Don't Tell policy instructed health care providers that they were required to report gay soldiers).
soldiers are regularly investigated and discharged when doctors or therapists report conversations in which the soldiers speak about being gay. In one remarkable incident in 2001, an Air Force airman sought the assistance of a military psychiatrist after a civilian raped him. The psychiatrist announced that the airman must be gay if he allowed himself to be raped, and he threatened to out the soldier to his command if he spoke about being gay during their therapy session. (The airman was later able to secure the assistance of a more sympathetic counselor.)

4. Public Statements

Open and notorious public statements about being gay, of course, fall squarely within the restrictions of the Don’t Ask, Don’t Tell policy and practically guarantee separation and discharge. This mode of operation for the policy is a matter of common understanding. Even so, it is important to remember the range of speech situations in civilian life that are encompassed by such “open and notorious” public statements—situations in which speech regulation might be expected to provoke high levels of constitutional scrutiny.

The military has sought to discharge one reservist, Steve May, for identifying himself as gay during the course of a political debate on the floor of a state legislature. (I discuss the May case at length in Part II.A, below.) Another soldier, who brought a prospective challenge to Don’t Ask, Don’t Tell in federal court, had to proceed anonymously in her suit. Identifying herself in a federal district court as a potential target of the policy would itself have been a violation of the policy that would render her subject to discharge. The policy, in other words, even reaches into civilian courtrooms to prohibit gay servicemembers from discussing their sexual identities. In a similar fashion, the active-duty officers who contributed their stories to my earlier article on the policy asked that their names be withheld. They violated the terms of the policy merely by speaking about their sexual identities with me in their interviews and had good reason to fear that they would be discharged if those interviews could be traced to them.

Don’t Ask, Don’t Tell, in short, does not merely dictate standards of conduct and speech within the confines of a “military environment,” however broadly one might define that term. Don’t Ask, Don’t Tell constitutes a total regulation of the speech of all gay men and lesbians connected with the military. The policy prohibits gay soldiers from

---

60. See, e.g., SLDN SIXTH REPORT, supra note 34, at 22–24 (describing outing incidents involving doctors and therapists); SLDN FOURTH REPORT, supra note 45, at 15–16 (same).
61. See SLDN EIGHTH REPORT, supra note 36, at 25.
62. See id.
63. See infra notes 119–31 and accompanying text.
64. See Able v. United States, 88 F.3d 1280, 1284 n.1 (1996).
65. See Wolff, supra note 2, at 1155, 1162–63.
identifying themselves as gay, talking about their sexual identities, or otherwise speaking honestly about the relationship between their sexuality and their emotional or spiritual lives, to anyone, under any circumstances, ever. Gay soldiers must erase their identities in civilian as well as military settings or else they will violate the terms of the policy. They may not discuss their experiences in living under the policy, whether in public or in private. Nor may they report those experiences to their own superiors within the military, for even that act would itself subject them to separation and discharge. They must remain silent about the difficulty of complying with the policy's mandates, the effects of the policy upon their own performance or that of their units, even the possibility that the policy might be contributing to an environment of physical threat and danger for gay soldiers.\(^{66}\)

It bears noting here that the justifications that the military has offered for the policy—primarily, a need for “unit cohesion” and “morale” in service of the military mission—are indeed confined to the military environment.\(^{67}\) Not surprisingly, the Defense Department has never suggested that it has a military interest in eradicating gay identity from civilian life. But the means that the government has claimed as necessary to carry out its military goals extend promiscuously into the civilian world, restricting conversations in the media, the courts, the home, and the legislative process. A speech restriction that sweeps much more broadly than the immediate subject of its stated goals is a familiar phenomenon in First Amendment disputes and not one that should be expected to obfuscate clear analysis. Yet this disjunction between the military justifications for the policy and the much broader sweep of its restrictions seems to have befuddled many who have attempted to assess the policy's impact upon First Amendment values.\(^{68}\) As a result, the extraordinary restrictions that the policy imposes upon the speech of gay and lesbian servicemembers in their civilian lives, and even the restrictions that the policy imposes upon communication within the military itself, have received little attention in popular discussions and have been practically ignored in the courts.

The frequent repetition of a mistake, however, does not render the mistake correct. It merely indicates that the mistake is tenacious.

II. REPRESENTATION, ACCOUNTABILITY, AND INDIVIDUAL IDENTITY

I begin my account of the public speech values burdened by the policy with a qualification that I also issued in my previous examination of the

---

\(^{66}\) See infra text accompanying notes 201–16.

\(^{67}\) See, e.g., 10 U.S.C. § 654(a)(7)–(8) (2003) (offering the need for “unit cohesion” as a justification for the policy); Thomason v. Perry, 80 F.3d 915, 921–22 (1996) (describing the “carefully crafted national political compromise” purportedly aimed at protecting these values).

\(^{68}\) See infra Part IIIA.
policy’s cost to individual autonomy: My aim is to analyze the policy’s impact upon those norms that the First Amendment protects, not to argue that the resulting constitutional calculus will necessarily result in the policy’s invalidation. As a doctrinal matter, at least, this is an inevitable concession, for the imprecise mode of “deference” that the Court has exhibited in its analysis of the constitutional claims of military personnel renders any bold proclamations of unconstitutionality largely aspirational. I examine these issues in Part III.A, below, and mention only two points for now. First, all of the First Amendment cases that the Supreme Court has placed in the category of “military deference” have involved speech restrictions within physical or discursive spaces that were themselves clearly “military” (a protest on an army base, command instructions issued by an officer to his subordinates, and so forth). The Court’s willingness to defer to the military’s judgment about the necessity and appropriateness of a speech restriction may well depend to a large degree upon such locational self-restraint. When the military enforces speech restrictions that sweep broadly into civilian life—as the Don’t Ask, Don’t Tell policy does—the deferential posture that the Court has adopted in those cases might prove inapposite. Second, it is a common assumption that many of the speech activities upon which I focus in this Part are not available to any members of the military, whether gay or straight. In fact, as I will explain, members of the military enjoy broad latitude to engage in all the speech activities that are forbidden to gay and lesbian servicemembers. The widespread contention that the military context renders ordinary analysis under the First Amendment

69. In that earlier analysis, I offered the following observations about the qualifications that the Court has placed upon the constitutional rights of military personnel and the relationship of those qualifications to the speech restrictions imposed by Don’t Ask, Don’t Tell:

The Court has frequently noted—though not without dissent—that servicemembers enjoy reduced First Amendment protections in the military. There are some restrictions on speech that may be permissible in the armed forces even though they would be intolerable in civilian life.... [However,] the one limitation that the Court has consistently imposed on the military’s ability to restrict servicemembers’ First Amendment rights is to require that any such restriction be applied in a neutral and evenhanded fashion. The Don’t Ask, Don’t Tell policy, which targets only the identities of gay and lesbian servicemembers, clearly fails to satisfy this basic limitation.

Wolff, supra note 2, at 1199–95. These observations remain true today, and they apply as forcefully to burdens on public speech values as to burdens on individual autonomy.

inapplicable is thus mistaken and certainly does not offer a sufficient answer to the harms to public speech values that I describe below.

A. POLITICAL REPRESENTATION AND PUBLIC DISCOURSE

My discussion of the military policy's impact on political representation and public discourse rests upon a basic assertion about political speech: There is sometimes an essential and necessary relationship between the individual identity of a speaker, on the one hand, and the speaker's interactions with the political process—that is, the set of institutions, procedures and practices by which agents of the State acquire legitimacy in their interactions with the governed—on the other. Citizens do not come to the political process as fungible units, each possessing an equal capacity to articulate and advocate any set of views or policy positions that may require debate. Rather, citizens engage with politics from a position of personal experience and identity. Personal experience provides the font of information that nourishes the formation of political beliefs; identity offers a vernacular through which those beliefs can find expression. To single out and silence a group of speakers who possess a distinctive identity that is germane to an issue of public importance—like active-duty gay and lesbian servicemembers in the case of Don't Ask, Don't Tell—is to distort the terms of political debate and call into question the legitimacy of the State's authority.

Free speech commentators frequently draw a sharp distinction between two types of argument: those invoking the First Amendment as a guardian of public speech values, and those invoking the Amendment as a protector of individual autonomy or privileged social practices. The first asks whether restrictions on speech constrain the terms of robust public debate in ways that may interfere with truth-seeking and political self-governance. The second focuses upon individual dignity and assigns ontological value to the preservation of a zone of non-interference for human cognition and expression. I employed these terms myself in the introductory section of this Article. Alexander Meiklejohn was among the first to articulate the

71. But see Robert C. Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1124 (1993) (employing these categories for analytical purposes but also critiquing proponents of "collectivist" First Amendment approaches who believe that "private autonomy is logically distinct from democratic self-government," and hence that "public discourse [can] be managed so as to improve its quality and diversity") (quoting Cass R. Sunstein, Free Speech Now, 59 U. CHI. L. REV. 255, 277 (1992)).

72. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (describing the First Amendment as embodying "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").


74. See supra text accompanying notes 11–12.
distinction clearly,75 and his taxonomy has largely defined the terms of debate among First Amendment theorists ever since.76 And while the Supreme Court has shown an unfortunate lack of consistency in observing these analytical forms,77 the distinction between autonomy and public speech values does sometimes play a role in explaining the disposition of its cases, as well.78 I mean to reaffirm this analytical framework and to situate the present discussion firmly within the realm of the public and the political.

Within this analytical framework, the harm associated with a particular speaker being denied an opportunity for self-expression—as distinct from the silencing of particular viewpoints or ideas—is usually conceptualized exclusively in terms of the speaker's autonomy. Under this view, a commentator's sympathy with the claim that an individual has been impermissibly "silenced" usually rises or falls with the importance that the commentator attaches to the subjective experience of expressive activity and its relationship to individual flourishing.79 The analytical separation of the


76. Compare C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) (defending the proposition that the First Amendment should be understood as a protector of individual freedom and autonomy), and Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1250 (1995) (rejecting the protection of "speech as such" as an incoherent basis for developing First Amendment jurisprudence and calling instead for a doctrine that "focuses clearly on the nature and constitutional significance of . . . [particular social] practices"), with OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) (arguing that the First Amendment aims principally to safeguard robust public debate and should incorporate antisubordination principles in defining speech protections), and Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 20 (1971) (contending that there are no principled justifications or limiting principles for speech arguments based in autonomy and hence that First Amendment protections should be available only to speech that is purely "political").


78. See, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 775-78 (1978) (utilizing the distinction between autonomy values and public speech values to frame the analysis in reviewing the Massachusetts limitation on corporate expenditures during referendum campaigns).

79. Thus, Owen Fiss and Robert Bork (despite their wildly divergent views) both see the grounding of a speaker's prerogatives in "autonomy" as a reason to accord those prerogatives little weight in free speech analysis, while Ed Baker attaches much greater value to the role of self-expression in the pursuit of individual fulfillment. See sources cited supra note 76. Professor Fiss offers his critique in the following terms in a discussion of pornography regulation:

[Some] critics view the First Amendment as a protection of individual autonomy; a freedom to speak, to say whatever one wishes. To me, however, such an interpretation of the First Amendment is unappealing either as a rule of law or as a philosophic principle, for no reason is given to prefer the autonomy of the speaker over that of those who might be harmed or offended by the speech.
private interests of the speaker from the public interest in speech, in other
words, often carries with it an implicit suggestion that the individual
characteristics of speakers are a matter of concern only where private
autonomy interests are at issue. And, finally, the notorious difficulty of
deriving a workable First Amendment doctrine from the starting point of
autonomy means that the distinctive characteristics of individual speakers
often play only an atmospheric and not a determinative role in this received
view of First Amendment analysis.

But conducting a First Amendment analysis through the focused lens of
public speech values need not result in the relegation of the speaker’s
distinctive identity to an analytical backwater. Quite apart from any
questions of autonomy or individual flourishing, the identity of a speaker
can have a profound impact upon the meaning and impact of a message.
Hence, even a First Amendment analysis grounded entirely in a “collectivist”
view of the political must be attentive to the role of individual identity in
shaping the terms of debate.\footnote{Fiss, supra note 76, at 82-83. Then-Professor Bork levied a similar critique, in broader terms, in his influential 1971 article: “An individual may develop his faculties... from trading in the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors.” Bork, supra note 76, at 25.}

In making this assertion, I depart sharply from a central tenet of
Meiklejohn’s vision of political discourse—one that has had a pervasive
impact upon the field. Meiklejohn famously envisioned the political process
as a town meeting governed by rules of parliamentary procedure, where
“abridgments” of the “freedom of speech” would be identified and assessed
against neutral rules of order.\footnote{See Cass R. Sunstein, Democracy and the Problem of Free Speech 141 (1993) (“[A]n autonomy principle will be able to account for all the features of a well-functioning system of free speech law. It is only part of the picture.”).} In this arena, speakers do not have value as rights-bearing individuals, but rather as possessors of viewpoints. (Meiklejohn was among those who ascribed little value to the autonomy interests of speakers.)\footnote{Id. at 25-26.} As a result, in Meiklejohn’s view, speakers are essentially fungible so long as all arguments can be “covered” by available debate participants. “What is essential,” Meiklejohn wrote in summarizing
his philosophy, “is not that everyone shall speak, but that everything worth
saying shall be said.”\footnote{Meiklejohn, supra note 75, at 21-28.} While some scholars have critiqued the low value that
Meiklejohn attached to expressive autonomy,\footnote{Id. at 26.} and others have questioned

\footnote{E.g., David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 351-52, 553-60 (1991) (exploring the inadequacies of the Meiklejohnian approach, which leaves no role for autonomy-based arguments).}
the possibility of developing truly neutral criteria for constraining political speech, Meiklejohn's assumption that the meaning of speech may readily be divorced from the identity of the speaker has received little sustained attention.

One of my purposes in this Article is to aid in dislodging Meiklejohn's assumption. The posture that I adopt—embracing the distinction between public speech values and individual autonomy, but then focusing closely on the impact of a speaker's identity upon those public speech values—is an underutilized one in First Amendment analysis. In the present context, it is the very bluntness of the military's speech regulations that demonstrates the need for such analytical refinement.

1. Communication with Elected Representatives

I turn first to the impact of the military's speech restrictions upon communications with government officials. That impact is as stark in the political context as in any other: Don’t Ask, Don’t Tell categorically prohibits gay and lesbian servicemembers from identifying themselves honestly to their elected representatives. As Part I’s overview of the policy’s scope makes clear, the military regularly applies its speech restrictions in civilian settings and enforces those restrictions vigorously. Thus, Don’t Ask, Don’t Tell prohibits a gay soldier from contacting his representative in Congress and saying, “The military policy on homosexuality inflicts great harms upon me and the other gay soldiers I work with—I urge you to lead an effort to have it repealed,” and the threat of discharge attached to that prohibition is very real. A lesbian servicemember is likewise prohibited from contacting her state senator and saying, “Our State prohibits lesbians from adopting children, and that policy is preventing me from starting a family. I urge you to reconsider your support for this harmful law.”

86. See, e.g., Post, supra note 71, at 1117 (questioning the coherence of Meiklejohn's theory as, among other things, "reflect[ing] an insufficiently radical conception of the reach of [collective political] self-determination, which encompasses not merely the substance of collective decisions, but also the larger framework of function within which such collective decisionmaking is necessarily conceived as taking place").

87. See, e.g., SLDN THIRD REPORT, supra note 50, at 22-23 (recounting the story of a "Dedicated Army Warrant Officer" who felt the need to write a letter to Senator Diane Feinstein anonymously, rather than identify herself or schedule an in-person visit, in order to describe the hardships of living under the policy).

88. There are currently three states that impose categorical prohibition on the adoption of children by gay people. Nat'l Ctr. for Lesbian Rights, Lesbians and Gay Men as Adoptive and Foster Parents: An Information Sheet, at http://www.nclrights.org/publications/adoptive-information.htm (last visited Mar. 22, 2004) (on file with the Iowa Law Review). In Florida, the prohibition is complete—gay men and lesbians cannot adopt under any circumstances, whatever their relationship status. Id. In Utah, couples who live together cannot adopt unless they are married (an institution that is denied to gay couples). Id. In Mississippi, same-gender couples are prohibited from adopting, whether they cohabit or not. Id.; see also Lofton v. Sec'y
can a gay soldier go to the local law enforcement authorities, explain that he feels unsafe from the threat of gay bashing in his neighborhood, and request that the police step up their efforts to reduce bias-related crime. Indeed, even a soldier who was himself gay bashed would have good reason to fear discharge under the policy if he were to report that crime to the civilian authorities (as evidenced by the airman who was threatened with discharge when he sought treatment for a sexual assault). Whether the issue relates to a soldier's status and conditions of employment within the service itself or his circumstances within the larger civilian community, Don't Ask, Don't Tell threatens gay servicemembers with immediate separation and discharge if they disclose their identities to the officials charged with representing their interests and setting and enforcing state policy.

Any student of free speech doctrine will readily identify these scenarios as lying at the proverbial "core" of First Amendment concern. Since it first invoked the First Amendment to impose substantive limits on the actions of the State, the Court has identified the "free discussion of governmental affairs" as a central commitment of that provision. Petitions directed to state officials and criticism of government officials both define essential

of Dep't of Children and Family Servs., 358 F.3d 804, 806 (11th Cir. 2004) (upholding Florida adoption ban).

89. Non-military law enforcement authorities often share information with military officials, making honest communications with the police exceedingly dangerous for gay and lesbian soldiers. See, e.g., Complaint of Loren Stephen Loomis at 4-5, Loomis v. United States (Fed. Cl. July 7, 2003) (describing the events leading to Loomis's discharge, in which police and fire officials came to Loomis's burned-out home following an arson, happened upon materials indicating that he was gay, and forwarded those materials to military authorities), http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1006.pdf (last visited Mar. 22, 2004) (on file with the Iowa Law Review); supra note 47 and accompanying text (recounting the sharing of information between civilian law enforcement authorities and military officials, leading to discharge proceedings).

90. SLDN EIGHTH REPORT, supra note 36, at 11-19 (detailing instances of violence and harassment in the U.S. Army during 2001, including the aftermath of the murder of PFC Barry Winchell at Fort Campbell, Kentucky); see supra text accompanying notes 61-62.

91. Mills v. Alabama, 384 U.S. 214, 218 (1966). The full text of this passage from Mills is worthy of reproduction:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Id. at 218-19. Mills itself involved an Alabama regulation prohibiting newspapers and magazines from printing editorials on election day urging citizens to cast their votes in a particular manner. Id. at 215.

92. See McDonald v. Smith, 472 U.S. 479, 482 (1985) (noting that the Petition and Speech Clauses of the First Amendment together preserve substantial (though not absolute) protection for "people [to] 'communicate their will' through direct petitions to the legislature and government officials") (quoting James Madison, in 1 ANNALS OF CONGRESS 738 (1789)); see also
parameters of the “political process” that the Amendment covers with its mantle. As with all else under the First Amendment, these areas of concern do not receive absolute protection, but intrusions into these speech situations—especially intrusions that target particular speakers or messages—provokes intense scrutiny.

A defender of Don’t Ask, Don’t Tell might offer two types of response to this apparent affront to political process values. First, the policy does not absolutely forbid gay and lesbian servicemembers from communicating with their representatives and government officials; rather, it only forbids them from speaking about their own sexual identities. Thus, one might argue that a gay soldier could still make effective use of government processes under the policy, albeit with a more limited vocabulary, simply by avoiding any mention of his own identity. (The irony of arguing that a speech restriction is less troubling because it only restricts discussion on a particular subject should not be lost upon the reader.) Second, the policy does not place any restriction upon the ability of civilian speakers to have discussions with government officials concerning the military policy, or gay adoption, or hate crimes, or any other topic; rather, it only limits the speech of military personnel. One might thus suggest (following Meiklejohn) that the policy’s harm to public speech values is minimal so long as non-military personnel remain free to press these issues before political representatives and state authorities. In other words, the Meiklejohnian argument would go, the political process does not suffer substantial harm when particular speakers are silenced (whatever the impact upon the autonomy of the affected individuals), so long as the State does not totally suppress particular viewpoints or topics of discussion. Both of these rejoinders, however, seek to disaggregate individual experience and identity from the meaning and effectiveness of speech. For this reason, both are descriptively untenable and analytically inadequate.

Political speech operates on multiple levels. To be sure, one of its functions is simply to inform: to communicate facts and set forth reasoned arguments. These are, as J.L. Austin would have it, the “locutionary” goals of

Meiklejohn, supra note 75, at 38 (“[A] petition, whatever its motivation, raises definitely a question of public policy. It asserts an error in public decision. The petitioners have found, or think they have found, that in the adoption of a government policy, some private interest has been misjudged or overlooked.”).

93. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (finding that attempts to limit commentary on official policies must be considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

94. See, e.g., McDonald, 472 U.S. at 485 (permitting libel action to proceed even when an objectionable statement is contained in a petition to a government official); United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 556 (1973) (upholding the authority of government to impose carefully defined restrictions on partisan political activities of federal employees).
speech—the set of communicative purposes bound up with the denotative meanings of the words spoken. As to these, Meiklejohn’s assertion about the potential fungibility of speakers in a political debate may come closest to having merit. But locutionary goals comprise only a part of the meaning conveyed by a political entreaty. Political speech can have powerful “illocutionary” effects, as well: The communicative act can effect changes in the status or condition of the speaker, or of his interlocutor or audience. Thus, a political speaker may draw upon reputational capital that only he possesses by personalizing the terms of his support for an issue, thereby transforming his own moral status in a manner that, in turn, can engender in the audience a feeling of gravitas in the moment. (Imagine Representative John Lewis of Georgia saying: “This is the most important civil rights issue on which I have ever taken a stand.”) Or, a speaker may take the irrevocable step of supporting a position that he has previously opposed with consistency and vigor, once again effecting a change in his public identity that will mark his message as one of singular importance for an audience. (Imagine Professor Richard Epstein of the University of Chicago saying: “I have always opposed the enactment of antidiscrimination laws because I think them inefficient and immoral, but this issue convinces me that I must make an exception.”) Such illocutionary effects form a part of the “meaning” that is communicated to the listeners as surely as the denotative meanings associated with the words spoken. And political speech also serves “perlocutionary” goals: that further set of results (like the formation of political coalitions, or the reform of state policies) that the speaker seeks to bring about by delivering her message. A speech that conveys only sterile facts and arguments on the anonymous printed page can issue a powerful call to action when delivered by the right speaker. By taking a public position on a particular issue, for example, a speaker may call upon his allies to make the issue a high priority and, at the same time, make implicit offers for political coalition with other groups. (Imagine the President of the AFL-CIO giving a public address in which he argues, “The interests of labor and the interests of the women’s movement are closely tied.”) Once again, such goals are as much a part of speech’s “meaning” as the denotative content of the message itself. “Free trade in ideas,” the Court

95. Austin, a philosopher of language, gave a series of lectures at Harvard in 1955 that have become the classic text in describing the “performativie” aspects of speech. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 94 (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975). My own discussion of the heuristics that Austin introduced—the locutionary, illocutionary and perlocutionary goals of speech—derives greater influence from Professor Rae Langton, who has done important work in translating Austin’s terminology for use in analyzing speech disputes within a legal framework. See, e.g., Rae Langton, Speech Acts and Unspeakable Acts, 22 PHIL. & PUB. AFFS. 291, 305–30 (1993).
has said, "means free trade in the opportunity to persuade to action, not merely to describe facts."  

When a class of speakers with a professional or personal identity that is highly pertinent to a particular issue is prevented from delivering a political message about that issue, the distinctive illocutionary and perlocutionary meanings that they would have contributed to public discourse will not be conveyed by the mere presence of other speakers in the town meeting (or the Senator’s office, or the police department) who are prepared to offer the same set of information and arguments. Thus, in some instances, Meiklejohn’s assertion is exactly wrong. Quite apart from any concern over individual autonomy, it may be essential that a particular individual or group have the opportunity to speak in order that a particular, worthy message be contributed to public discourse.

Consider again, in this light, the scenarios outlined above:

- A gay soldier contacts his Senator and seeks to convince her that the Don’t Ask, Don’t Tell policy is unjust and should be repealed. If he were free to speak openly, the soldier could explain in personal terms the hardship that he suffers under the policy. He could convey the reluctance that he ordinarily feels in complaining about the conditions of military service—an ethic of stoic fortitude that is common among career soldiers—but explain that the dignitary and emotional harms that the policy imposes have convinced him that he needs to ask his elected officials for assistance. He could detail the impact that the policy has upon his morale, and, by extension, that of his unit in the United States’s current military operations in Afghanistan or Iraq. He could, in other words, place the weight of his own character and experience—his distinctive identity—behind a personal appeal to reconsider an important issue of public policy having an immediate impact upon U.S. interests. And the Senator, in turn, could incorporate that message into her own entreaty on the Senate floor. She could craft her arguments around the story of this soldier who is being treated so unjustly even as he serves his country in a foreign theater of war—an anecdotal mode that has become a favorite rhetorical style of Presidents in their State of the Union addresses.

Neither a concerned civilian, unable to describe

97. See, e.g., President George W. Bush, State of the Union Address (Jan. 29, 2002), in The State of the Union; President Bush’s State of the Union Address to Congress and the Nation, N.Y. TIMES, Jan. 30, 2002, at A22 (inviting Shannon Spann, the wife of a CIA operative killed during operations in Afghanistan, to be personally acknowledged during the presentation of policy prescriptions in the region); President William J. Clinton, State of the Union Address (Jan. 27, 2000), in Transcript of President Clinton’s State of the Union Address (2/5), U.S. NEWSWIRE, Jan. 28, 2000, available at 2000 WL 4140719 (inviting Tom Mauser, the father of a student killed during
the policy's impact in personal terms, nor a gay veteran, unable to convey a sense of immediacy or ongoing personal investment, could capture this distinctive set of emotive and political appeals. The message can be conveyed only by a speaker for whom the policy is a source of immediate, personal concern: a gay soldier currently serving on active duty.

- A lesbian soldier, stationed in a state that prohibits gay people from adopting children, contacts her state senator in order to ask that he lobby for the repeal of that ban. Were she free to speak openly, the soldier could explain the need that members of the military feel for the stability and emotional connection of a family and the harm that she will suffer if she must wait to start her own family until she is stationed in a more hospitable community. She could express the particular sense of outrage that she feels in contributing her efforts to her country's defense and yet being denied full citizenship status in civilian life—a type of argument that had a major impact on the reduction in the national voting age during the Vietnam War. And she could invoke her dedication and accomplishment in military service as a demonstration of her fitness to be a parent (and, hence, of the irrationality of denying her that opportunity simply because she is gay). Only her status as an active-duty lesbian would permit the soldier to invest these arguments with immediacy and affect.

- A gay soldier who feels terrorized in his local community contacts the police or other officials to request their assistance. If he were able to speak openly, he could explain the special vulnerability that he feels as a gay soldier in a neighborhood that exhibits both homophobia and patriotic fervor. He could argue that the civilian authorities would seriously betray their duty if they failed to protect a soldier from bias-related violence on the streets of his own home. And sympathetic civilian authorities, in turn, could use the experiences of this gay soldier to construct a powerful coalition of city officials, across ordinary lines of political

---

98. As Professor Elaine Scarry has explained: "Both the House and Senate judiciary hearings on the twenty-sixth amendment repeatedly cite the participation of those fighting in Vietnam and of those exercising power to consent by refusing to be drafted having earned for that generation and all that followed the right to vote at a younger age." Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U. PA. L. REV. 1257, 1304-05 (1991); see also id. at 1304 n.148 (assembling portions of the congressional record surrounding the proposal of the Twenty-Sixth Amendment that make emphatic references to this dynamic).
affiliation, to aim at combating homophobia and making the streets safer for gay citizens. The stark juxtaposition embodied in the soldier’s story—a man pledged to defend his country yet unwelcome and unsafe on the streets of his own home—would carry a message similar to the appeal that Black soldiers made to powerful effect after returning home from combat in World War II. It is the soldier’s status as an active-duty gay man that gives him access to this rich vocabulary.

In arguing that the distinctive identity of the active-duty gay soldier is central to the meaning and effectiveness of the political message in each of these cases, I rely upon some broad assumptions about the relationship between the production of knowledge and the particular set of social orderings of which a speaker is a part. Many thinkers have raised incisive questions about such an epistemology of identity. Kendall Thomas and others have suggested, for example, that people of color are often the objects of a racialized epistemology of identity rather than its subjects, and hence that they should be wary of claiming to possess a distinctive “racial voice” lest their claims lend indirect credence to repressive outcomes. The relationship between gender identity and the production of knowledge has been a subject of active debate since Carol Gilligan published her influential work on the subject. And Judith Butler has challenged the extent to which an individual should be treated as the “author” of her own identity when engaging in social discourse, and hence the role that individual identity should play in shaping First Amendment claims. While these debates are


102. In her examination of hate speech, for example, Butler argues that individuals do not generate the injurious meanings associated with bigoted speech in the way that judicial treatment of that speech generally assumes. Rather, she argues, an individual who employs bigoted speech is best understood as invoking, and inscribing himself within, an ongoing history of injury that preceded the speaker, but as to which he enjoys only a transient prerogative of authorship. Butler writes:

The subject as sovereign is presumed in the Austinian account of performativity: the figure for the one who speaks and, in speaking performs what she/he speaks,
important, it is enough for me merely to acknowledge them here and not engage them deeply. My concern is with the current impact of the military policy upon existing political institutions. Whatever normative criticisms one might levy at the use of identity in epistemological analysis, those very criticisms indicate the continued salience of personal identity in political debate—a proposition that finds ample support in the political and social sciences, as, for example, in studies demonstrating the importance of social cues in message perception during political advertising. \(^{103}\) When a political system is steeped in a contested epistemology, one cannot avoid employing that same epistemology in measuring the full range of internal distortions that a restriction on identity speech will impose upon political discourse.

The Supreme Court has, at times, demonstrated an appreciation for these principles of meaning and identity. \(^{104}\) To date, however, it has not incorporated them into the ornate structure of First Amendment doctrine in any meaningful way. Its clearest statement concerning the relationship between the identity of a speaker and the meaning of her message appears in a case where the issue served a role that was more illustrative than

---

as the judge or some other representative of the law. . . . If performativity requires a power to effect or enact what one names, then who will be the "one" with such a power, and how will such a power by thought? . . . Does the "one" who speaks the term cite the term, thereby establishing him or herself as the author while at the same time establishing the derivative status of that authorship? . . . Indeed, iterability or citationality not precisely this: the operation of that metalepsis by which the subject who "cites" the performativity is temporarily produced as the belated and fictive origin of the performativity itself? The subject who utters the socially injurious words is mobilized by that long string of injurious interpellations: the subject achieves a temporary status in the citing of that utterance, in performing itself as the origin of that utterance.


103. See, e.g., Shanto Iyengar & Nicholas A. Valentino, Who Says What? Source Credibility as a Mediator of Campaign Advertising, in ARTHUR LUPIA ET AL., ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 108, 109 (2000) ("[C]ues can be derived from the gender or race of the sponsoring candidate [and] the spokesperson making the 'pitch' for the candidate . . . . The evidence from attitude change research indicates that in everyday situations involving efforts to persuade, cue-based processing predominates."); id. at 109-10 (discussing the social science literature on cues and attitude formation); id. at 128-29 (concluding that a political message is particularly effective when delivered by an individual possessing identity traits commonly perceived to bear an intrinsic connection to the message, as with a female Democrat and child care or a male Republican and national defense).

determinative. In *City of Ladue v. Gilleo*, the Court struck down a “visual clutter” ordinance that barred residents of a St. Louis suburb from posting signs on their property. The Court based its holding principally on a finding that the ordinance prohibited too much speech by “completely foreclos[ing] a venerable means of communication.” A resident who is prohibited from posting a sign on his property might find no other convenient means of public expression readily at hand, the Court observed, and hence might not bother to communicate his message at all. This observation led the Court to conclude that the ordinance did not “leave open ample alternative channels for expression”—a prosaic type of inquiry in the review of content-neutral regulations on the time, place, or manner of speech. But the Court expanded upon this reasoning somewhat further in *City of Ladue*, explaining that the availability of alternatives was particularly threatened under the anti-sign ordinance because of the “unique and important” opportunity for expression that a residential sign offers: the built-in chance to associate a message with the identity of a particular speaker (the owner of the property).

Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the “speaker.” ... The identity of the speaker is an important component of many attempts to persuade. A sign advocating “Peace in the Gulf” in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

As it turns out, these observations were somewhat tangential to the holding of *City of Ladue* itself. The distinctive identity of Margaret Gilleo (the

---

106. Id. at 54. There was some dispute in the case as to whether certain selective exemptions rendered the prohibition on signs content based rather than content neutral, but the Court ducked that issue, finding that the ordinance was invalid even if content neutral. Id. at 52–53.
107. Id. at 56.
108. *See*, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear... that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions... leave open ample alternative channels for communication of the information.”).
110. Id. at 56–57 (citation omitted).
homeowner challenging the ordinance) was not a focal point of either the lawsuit or the Court's opinion. The Court could have made its point about "ample alternative channels" simply by observing that, with ubiquitous noise restrictions[111] and prohibitions against posting signs on public property,[112] a homeowner would have few opportunities of any kind to display a message to her neighbors if she could not put a sign on her lawn or window. The street corner, as Owen Fiss tells us, is frequently empty in the modern era.[113]

Thus, while City of Ladue may indicate the Court's readiness to consider the relationship between speaker and message in the abstract, it says little about how the issue might influence the Court's analysis in a difficult case.

For an example of a dispute in which that relationship appears to have played a more determinative role, albeit within a different juridical context, one might point to Grutter v. Bollinger[114]—the Court's landmark opinion upholding certain affirmative-action programs against an equal protection challenge. Grutter was concerned with the question of "diversity" and the legitimacy of using race in the admissions process of a state university as one factor in assembling an entering class. One of the interests that the majority found to constitute a legitimate justification for race-conscious admissions was "diminishing the force of [racial] stereotypes" by seeking to admit a sufficient number of non-White students to dispel the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[115] The Court upheld Michigan Law School's affirmative action program in part because of its conclusion—never explicitly stated in the opinion, surprisingly enough, but necessarily implied by its holding—that only students who are themselves non-White can effectively communicate the message that non-White students do not all share "some characteristic minority viewpoint."[116]

In setting forth its reasoning, the Grutter Court implicitly invites a comparison between an all-White class in which the participants attempt to explore minority stereotypes from a secondhand or hypothetical posture, on the one hand, and, on the other, a racially heterogeneous class in which non-White students are actually present to demonstrate the inaccuracy of such stereotypes through their own expression of a wide range of opinions. Michigan defended its policy of assembling a "critical mass" of non-White students by asserting that the latter scenario offers a much greater hope of dismantling the "minority viewpoint" stereotype than the former, because

---

111. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding volume and time restrictions on the use of amplification in residential neighborhood).
113. Fiss, supra note 76, at 49.
115. Id. at 335.
116. Id.
the relationship between identity and expression will empower the non-White students not just to communicate, but to exemplify a counter-message about that stereotype. The Court deferred to this assertion. Indeed, the majority characterized the University’s pursuit of diversity under this theory as a pedagogical choice of “constitutional dimension, grounded in the First Amendment.”

Thus, to the extent that the Grutter decision really is about pedagogy, the linkage between the speaker’s identity and the meaning and effectiveness of the message appears to have played a determinative role in the majority’s ruling.

In this connection, the case of Steve May has presented one of the most dramatic illustrations of the Don’t Ask, Don’t Tell policy’s impact upon the range of voices in public discourse. From 1999 to 2002, May was a member

117. Id. at 332-33. One might well ask what exactly the phrase “of constitutional dimension” means in this context. It seems unlikely that the present Court would afford a university a broad First Amendment right to resist any outside interference with its admissions policies—a claim that the Burger Court rejected out of hand in Runyon v. McCrary, 427 U.S. 160, 175-76 (1976). Rather, this reference to a First Amendment freedom “of constitutional dimension” might better be understood as a gesture toward the “positive” function that Owen Fiss and others have ascribed to that provision—that is, the responsibility that the Amendment lays upon state officials to take affirmative steps for the promotion of robust debate in public discourse, and the added license that it gives them when they legislate toward that end. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (describing the First Amendment as embodying a “profound commitment” that the terms of public debate remain “wide open” and “robust”); Owen M. Fiss, State Activism and State Censorship, 100 YALE LJ. 2087, 2087-88 (1991) (“The principle of freedom that the First Amendment embodies is derived from the democratic nature of our society and reflects the belief that robust public debate is an essential precondition for collective self-determination.”). But see First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 790-92 (1978) (rejecting the proposition that the state can restrict one voice in order to augment another that might otherwise go unheard); Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”).

118. It is worth noting that Grutter may well be about more than just pedagogy. While the majority in Grutter forcefully reiterates earlier statements from Adarand and Croson in which the Court has said that a desire to remedy the general societal effects of past discrimination provides an insufficient justification for “benign” uses of race in the public sphere. See Grutter, 123 S. Ct. at 2337-38 (citing Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 227, 229-30, 237 (1995); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)). The Court goes on to discuss the valuable social goods for which an elite education often serves a gateway function and the importance of ensuring “visible” equal access to those social goods for non-White citizens. See id. at 2341. This species of argument sounds distinctly remedial. See Robert Paul Wolff & Tobias Barrington Wolff, The Pimple on Adonis’s Nose: A Dialogue on the Concept of “Merit” in the Affirmative Action Debate 72-73 (Aug. 15, 2003) (unpublished manuscript, on file with the Iowa Law Review) (suggesting that the Court may have adopted a less rigid “predominance” approach in reviewing race-conscious programs in education); cf. Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals, 117 HARV. L. REV. 113, 123 (2003) (emphasizing “the dominant role that upward mobility plays in understanding the democratic mission of higher education”).
of the Arizona State House of Representatives. On most issues, May—a Republican and a Mormon—is quite conservative. He is also an out gay man and, during a part of the relevant time period, was a first lieutenant in the U.S. Army Reserves. Though he was open about being gay when he campaigned for political office, the issue received no apparent attention from the military at that time. In February 1999—while he was still on “inactive” status in the Reserves—Representative May gave an impassioned speech before the Arizona House Government Reform Committee in which he urged his fellow legislators to reject a proposed bill that would have prohibited Arizona state agencies from extending domestic partner benefits to gay and lesbian employees. May’s remarks were prompted by a strongly antigay speech given by one of his Republican colleagues, Representative Karen Johnson, and he couched his opposition to the bill in personal terms, offering himself as a counterexample to the picture of “homosexual promiscuity” painted by Johnson and describing the impact that denial of benefits would have upon his own relationship.121

Two months later, May was called back to active reserve status and placed on call for deployment to Kosovo, where the U.S. was then conducting peacekeeping operations. Shortly thereafter, May’s earlier speech on the floor of the legislature came to the Army’s attention through an anonymous complaint. The military conducted an investigation, read the transcript of May’s committee remarks, and initiated discharge proceedings against him for speaking about being gay to his legislative

---


122. DoD regulations specify that an anonymous tip does not constitute “credible information” sufficient to initiate an investigation under the policy, but, as discussed in Part I, such limitations are honored largely in the breach and do not confer any enforceable rights upon servicemembers in any event. See DEP’T OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS § E3.A4.1.5, at 69 (1993) (explaining that “rumor, suspicion, or capricious claims” are not “credible information” warranting investigation), available at http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf (on file with the Iowa Law Review); id. § E3.A4.1.5, at 71 (giving no enforceable rights).
For two years, the military vigorously pursued its case against May in an effort to expel him from the reserves and punish him for his statements with a "general" rather than an "honorable" discharge. Eventually, however, mounting political pressure at the national level forced the military to compromise and permit May to separate from the Army voluntarily, with full honors and benefits.

It is worth taking a moment to catalog the implications of the Army's discharge proceedings in the May case. Most striking, of course, is the fact that May was prosecuted for statements he made in his capacity as a state legislator, on the floor of the Arizona House, while debating pending legislation. He was also prosecuted for statements made while he was not an active member of the armed forces. May had been honorably discharged from the Army in 1995 and was on inactive status in the reserves when he gave his address to the committee. The Army reactivated May about two months after the address, then initiated discharge proceedings when the address was brought to its attention. The lesson that the military's actions thus offered to May (and to gay civilians generally) was that self-censorship is required if one ever intends to enter the service, since even pre-enlistment statements can serve as a basis for initiating discharge proceedings. This lesson is neither a fanciful nor an isolated one.

As Professor Janet Halley has revealed, military authorities conducting discharge investigations sometimes seek out statements about gay identity that soldiers may have made to friends or family prior to enlistment. Finally, May's discussion of his identity was not secondary or tangential to his advocacy in the Arizona House. It was of central importance to the emotive and political impact of his speech. While any legislator might have spoken secondhand about his gay constituents who would be harmed by the bill under discussion, or about his gay friends who did not conform to the unflattering picture of


124. See Gay Arizona Legislator Will Leave Military Reserves on Own Terms, THE DALLAS MORNING NEWS, Jan. 21, 2001, at 41A (describing the resolution of the case resulting from political pressure in Washington).

125. The "prosecution" was not a criminal one, of course, but an administrative proceeding. Still, the punitive nature of the military's action (and the penalties that the military sought) makes the term seem apt.

126. See, e.g., SLDN FIFTH REPORT, supra note 38, at 46 (quoting the defense attorney for a soldier subject to discharge under Don't Ask, Don't Tell who reported that the prosecutor in a proceeding "went so far as to question members of the respondent's pre-service place of employment" from four years earlier).

“promiscuity” that Representative Johnson was painting, only May could characterize the bill as a personal affront to “my family and my freedom;” indeed, an “attack” that May would not take “sitting in my office quietly”—martial imagery that May, an experienced soldier, was able to employ with particular salience. May’s invocation of the personal was not an isolated instance in this regard. After the discharge proceedings against him were dismissed, he successfully sponsored a bill to have Arizona’s sodomy law repealed, once again invoking his identity and personal experience in his support for the measure.

Finally, I note that this correlation between military identity and the ability to speak with authority about matters of military policy is one that members of the military themselves insist upon frequently. The attitude is common among servicemembers that only those who have actually served in the armed forces have the specialized knowledge required to speak with authority about matters of internal policy, and, more importantly, that only they have “earned the right” to contribute to such debates. To offer one example among many, I recently encountered this attitude in response to my own work, in a letter sent to me by a retired Naval commander following an op-ed essay that I wrote about the policy’s impact on working-class gay men and lesbians. After registering his disagreement with a comparison that I drew between employment policies in the civilian workforce and within the military, the commander ended his letter with the following sentiment: “It is obvious to me that you have never served in the armed forces or you would never have made such a comparison. Until you have so served, you would be well advised to be silent on the matter.” I take this admonition to spring from the same basic observation that underlies my analysis throughout this Part: the close relationship between individual experience or identity and the ability to communicate certain messages with authority in public debate. Indeed, the particular resistance of military personnel to external civilian

128. Up to the Minute News and Commentary, supra note 121 (emphasis added).
129. Id.
130. Journalist David Moats recounts another instance in which a gay state legislator invoked his own identity and experience to powerful effect in a legislative debate—the speech by Representative Bill Lippert on the floor of the Vermont Legislature when that body was crafting its response to the Vermont Supreme Court decision that led to the institution of “civil unions.” See David Moats, Civil Wars: A Battle for Gay Marriage 215–21 (2004).
132. See, e.g., Wolff, supra note 2, at 1163 n.52 and interview cited therein (relating an interview with Anonymous Officer Number Two, a homosexual senior command officer, in which he expresses contempt for the ability of civilian “gay activists” to understand, or speak meaningfully to, gay men and lesbians in the military).
criticism is an issue to which I will return in my discussion of accountability in Part II.B, below.

2. Participation in Associations and Advocacy Groups

I turn next to the impact of the policy upon private associations in civilian life. To avoid confusion, let me begin by specifying the type of "associational" interests upon which I wish to focus. The Court has fashioned associational rights of constitutional magnitude under the authority of both the Due Process Clauses of the Fifth and Fourteenth Amendments and the Speech Clause of the First Amendment. The distinction between the two recalls the divide between autonomy rights and public speech values that I emphasized in the last Part. Among the modes of association that the Court has protected under the Due Process Clause are certain forms of close personal relationships—"intimate associations"—that play an important role in human self-realization. Thus, marriages, families, and other favored kinship arrangements enjoy constitutional protection under this theory because they are said to bear an intrinsic correlation to important modes of individual flourishing, like the development of emotional and developmental bonds or the private exploration of sexuality. The associational rights that the Court has located in the First Amendment, in contrast, are more purely instrumental in nature. When the First Amendment protects an association, it is not because of any benefit toward individual flourishing that the association provides to its members, but because of the role that the association plays in fostering those expressive activities of its members that facilitate political discourse.

There is much to say about the impact that Don’t Ask, Don’t Tell has upon the intimate associations of gay and lesbian servicemembers. A policy that prohibits private discussions about personal sexual identity between a bisexual soldier and his wife or a lesbian daughter and her parents would seem to pose at least as great a threat to intimacy and individual

135. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 388-89 (1978) (stating that the right to marry is "fundamental" and cannot be categorically prohibited as punishment for failure to satisfy child-support obligations).
138. See, e.g., NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (protecting a civil rights organization from intimidation through compelled disclosure of membership lists where "compelled disclosure ... is likely to affect adversely the ability of [the organization] and its members to pursue their collective effort to foster beliefs").
139. See supra notes 41-42 and accompanying text.
140. See supra notes 36-39 and accompanying text.
flourishing as do laws that place limits on family cohabitation or prohibit parents from placing their children in foreign-language classes or sending them to private schools. And, of course, the “acts” provision of the policy totally prohibits gay and lesbian servicemembers from exploring any form of sexual or quasi-sexual gratification in their private lives, prerogatives that *Lawrence v. Texas* has now brought squarely under the protection of the Liberty Clause. My principal focus for the moment, however, is not “association” as a form of individual self-realization, but rather those First Amendment associational activities that the Court has found to play a vital role in facilitating expressive activities in the public sphere.

In this latter mode, the distorting effects that Don’t Ask, Don’t Tell has upon associational activity and advocacy groups come in at least two basic forms. The first derives from the dynamic described in the previous Part: the elimination of the unique emotive and political appeal that a gay soldier on active duty could contribute to the public advocacy that an organization undertakes. Civil rights organizations, for example, have found great value in shaping political appeals around the cases of active-duty gay soldiers, like Steve May, whom the military has sought to discharge following a forbidden statement. “Coming out under fire” in a discharge case (to adapt Allan

141. See generally *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (recognizing the right of family to resist government prohibition on cohabitation).

142. See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right of parents to direct the upbringing of children through instruction in a foreign language).

143. See generally *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (recognizing the right of parents to send children to private school).


145. Upon his retirement from the federal bench, former Ninth Circuit Judge William A. Norris was given the Liberty Award by the Lambda Legal Defense and Education Fund. In a much-noted speech, Judge Norris invoked this connection between the stories of individual servicemembers and the ability of civil rights organizations to raise awareness (and funds) around the issue of Don’t Ask, Don’t Tell.

I believe most of the credit for our country’s shift in attitudes belongs to all the countless gay men and lesbians—including those who have served with honor and dignity in our armed forces—who have had the fortitude to expose themselves to the forces of bigotry, just as the Little Rock Nine did 40 years ago on the steps of Central High. In coming out, they have helped clear the air of irrational fear by putting the lie to baseless stereotyping. And, of course, credit goes as well to the lawyers from gay and lesbian civil rights organizations—Lambda most prominent among them—who, with the generous financial support of many like you here tonight, have tirelessly represented these courageous individuals, against tremendous odds, in fighting to secure the Constitution’s promise of equal rights for every American, not just some of us.

Bérubé’s memorable phrase now constitutes the only circumstance under which active-duty gay soldiers can contribute their stories to public discourse through group-based advocacy. (Recall the case of Jane Able who could not even bring a lawsuit in her own name to challenge Don’t Ask, Don’t Tell, much less lend her name and story to a political appeal by a private advocacy group, because of the policy’s prohibition on self-identification.) One might term this an “external” effect—a limitation on the ability of associations to put forward uniquely effective voices in promoting their goals in the public sphere. The Court’s long-standing recognition that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” invites the conclusion that the policy’s impact upon individual speech will also cascade through those advocacy groups that could otherwise provide a powerful collective platform for the voices of gay servicemembers.

This “external” effect of the policy on the contributions of advocacy groups is amplified by the freedom that heterosexual soldiers retain to express their views about gay people and the military, as they regularly do. It is a commonplace that restrictions on speech pose the greatest threat to public speech values when they artificially unbalance debate on issues of public importance. Don’t Ask, Don’t Tell does not generally prohibit discussions about sexuality or even homosexuality within the military. It prohibits discussions about these topics only from the viewpoint of an active-duty gay servicemember.

Perhaps the starkest illustration of this cascading impact of the policy may be seen in the situation of Gay and Lesbian Service Members for...
Equality (GLSME), the only formal advocacy group consisting of active-duty gay men and lesbians that has ever existed in the United States. It is a violation of Don’t Ask, Don’t Tell for gay and lesbian servicemembers to identify themselves even for the purpose of forming an advocacy group. As a result, GLSME’s members must remain anonymous, and the fear of discovery has made it almost impossible for the group to attract fellow soldiers. While the most conservative estimates suggest that there are tens of thousands of gay men and lesbians in the military, GLSME currently claims only fifteen members. The group has made just one public appearance since its formation in 2002, when its President appeared on the ABC program Primetime to be interviewed by Diane Sawyer. He appeared in shadow, behind a screen, with his voice disguised, as he would have been subject to immediate discharge if identified.

But these external effects, though important, are not the whole story. The policy’s absolute restriction on identity speech can also have important effects on the internal operations of private associations themselves. If the members of a distinct subpopulation within a larger group are prevented from speaking on their own behalf—or if they are effectively prevented from participating in the group at all—then their needs and interests may receive a less effective hearing and hence become a lower priority for the group itself. The group’s agenda, in other words, will be altered—its internal politics distorted. Such distortion will in turn affect the contributions that the group makes to public discourse. These “internal” effects are germane both to groups engaged in traditional forms of advocacy and to more informal cultural associations.

Consider first the distortions that the policy introduces into the activities of a political advocacy group. The Defense Department’s frequently cited reassurance that gay soldiers will not be discharged for “associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes” has created the widespread impression that gay and lesbian soldiers are allowed to participate and speak freely in these venues. As should be clear by now, that is not the case. While a member of the military may, in theory, be permitted to “possess[] or read[] homosexual

---

152. See GLSME, About GLSME, at http://www.glsme.org/about.html (last visited Mar. 22, 2004) (“We are a unique group of about 15 actively serving members of the United States armed forces, with a basic goal: to lift the ban on gays in the military and allow them to serve without fear or prejudice in the armed services.”) (on file with the Iowa Law Review).
153. See id. (noting interview).
publications” from the Human Rights Campaign,\textsuperscript{155} he certainly cannot identify himself with the contents of those publications, whether he is speaking with fellow soldiers or with members of the organization that wrote the materials. The prohibition against gay soldiers speaking about their identities extends into the conference rooms of political organizations and advocacy groups just as surely as it extends into police stations and marital bedrooms. Even if the letter of the policy allows a soldier to attend a local PFLAG\textsuperscript{156} meeting, it forbids him from identifying himself as a gay man or contributing the perspective of an active-duty gay soldier to the group’s deliberations.

And it would be well to recall the difference between what Don’t Ask, Don’t Tell technically countenances and what it realistically permits. When courts examine the impact of a regulation upon First Amendment values, they typically ask about the speech and expressive activities that the regulation threatens to “chill” as well as those that it prohibits outright.\textsuperscript{157} The enforcement history of Don’t Ask, Don’t Tell can leave little doubt in the minds of gay and lesbian servicemembers as to the tenuous nature of the “freedom” that they enjoy to participate in gay organizations and attend gay clubs and rallies, whatever the safe harbor that various unenforceable Defense Department regulations theoretically preserve.\textsuperscript{158} The sweep of the policy’s explicit restrictions is already so broad that it would be easy to lose sight of the even broader impact that the policy has through its in terrorem effect as it “pervasive[ly]”\textsuperscript{159} regulates the expressive activities of gay servicemembers. Thus, while it is important to consider the paradigm case of a lesbian soldier who attends an organizational meeting or event (or a gay bar or parade) with a denuded presence, unable to identify herself or contribute her distinctive perspective to the group’s discussions, it is more accurate to imagine the complete absence of any gay military voice in these settings, anonymous or otherwise.

\textsuperscript{155} The Human Rights Campaign ("HRC") is a national political organization that engages in extensive lobbying and advocacy work for gay and lesbian issues. See generally Human Rights Campaign Web Site, at http://www.hrc.org/about/index.asp (last visited Feb. 15, 2004) (on file with the Iowa Law Review).

\textsuperscript{156} Parents, Families and Friends of Lesbians and Gays ("PFLAG") is a national organization that offers support to gay men and lesbians and their friends and loved ones and engages in advocacy on their behalf. See PFLAG, Mission Statement, at http://www.pflag.org/about/mission.html (last visited Feb. 15, 2004) (on file with the Iowa Law Review).

\textsuperscript{157} See, e.g., Reno v. ACLU, 521 U.S. 844, 871-72 (1997) (indicating that a vague statute “raises special First Amendment concerns because of its obvious chilling effect on free speech”).

\textsuperscript{158} See, e.g., SLDN SEVENTH REPORT, supra note 39, at 67-68 (describing the punitive investigation of a Marine observed in attendance at “gay-friendly restaurant”); Wolff, supra note 2, at 1155-56 (describing the pressure felt by an active-duty officer to avoid any appearance of affiliation with gay people).

When gay members of the military are barred—or erased—from the activities of private associations, the impact of that erasure extends beyond the reduction in the vocabulary of stories that the association will be able to draw upon in making appeals to an external audience. Associations are themselves political entities. They make decisions and set priorities on the basis of internal deliberations, and they respond to the personal entreaties of members as well as to external demands or pressures. When an organization sets its agenda—when it makes decisions about which issues it will focus upon and which issues it will leave for another day—those decisions will be guided, if not driven, by the personal commitments of the organization's members. In prohibiting active-duty gay and lesbian servicemembers from participating openly in private associations (and largely prohibiting even clandestine participation, by making the cost of discovery too high), Don't Ask, Don't Tell deprives those associations of a distinctive voice that would otherwise contribute to their internal governance.

It is not difficult to apprehend the impact of this distortion upon organized political activism. In the ten years since Don't Ask, Don't Tell went into effect, gay rights organizations have been presented with an increasingly wide array of constituencies and issues demanding their attention and efforts. Gay couples are seeking greater recognition for their relationships and their families. Gay teens are seeking opportunities to organize within public schools. HIV-positive men want more protection in the workplace as improvements in medical technology allow them to live longer. African-Americans, Latinos, and Asians who pursue same-sex relationships are drawing attention to the particular forms of discrimination and isolation that they experience in both their ethnic and cultural groups.


162. See generally Onisheav v. Hopper, 171 F.3d 1289 (11th Cir. 1999) (en banc) (hearing suit brought by the ACLU under the Americans with Disabilities Act on behalf of HIV-positive prison inmates).

At the very least, these multiple constituencies place advocacy groups in the position of making difficult decisions about resource allocation as the needs of the ever-less-unitary “gay community” continue to diversify. And, frequently, the conflict among constituencies goes deeper than the limits of time and money. There is great variation among the value systems that gay rights advocates embrace and champion. For some gay people, maintaining a sex-positive message in the face of the ongoing AIDS epidemic is of paramount importance, while others place a higher value upon increasing the opportunities for gay families to enjoy safety and stability, even if messages of sexual liberation must be dampened in the process. Some men who have sex with men want to reject the label “gay” altogether but still make use of the social structures that enable them to meet and explore their sexuality, while others condemn this maneuver as a false dichotomy born of self-hatred and insist that gay rights organizations must continue to place a premium on “coming out” and reinforcing alliances. Because gay men and lesbians are born into every ethnic, socio-economic, and religious group, the values and priorities that flourish among gay people are enormously variegated. As the level of social and physical hostility directed toward those who speak openly about same-sex attraction has slowly diminished, and gay Americans have been freed to expend concomitantly less time and energy on their common interest in collective safety, those variegated interests have taken the ascendant and translated into competition and discord in setting the priorities of advocacy groups.

The issue of gays in the military is no less subject to this type of disputation. While some advocates believe that opening the way for gay men and lesbians to serve in the military would constitute an unambiguous good, others find their enthusiasm for securing the equal citizenship status of gay soldiers tempered by their disapproval of militarism and their hesitance to

164. See generally Robert Weisberg, Restorative Justice and the Danger of “Community,” 2003 UTAH L. REV. 343. Weisberg distinguishes “the [insert group name] community” from other more abstract or normative, less political usages of the term. Id. at 348 (brackets in original). As to the political usage of “community,” Weisberg writes that the term can be misleading or even perilous, as it “can mask fundamental ambiguities of group definition (is ‘the Jewish community’ one of religion, ethnicity, culture?) or serious political conflicts within what otherwise seems a determinate group (i.e., liberal vs. conservative African-Americans or gays).” Id.


167. See Denizet-Lewis, supra note 163, at 28.
lend even indirect sanction to institutionalized violence.\textsuperscript{168} For people of modest means, the economic benefits of a military career may overshadow such considerations, trumping any ethical reservations that they might otherwise feel.\textsuperscript{169} There is no unanimity of opinion within the gay community (however that “community” is defined) concerning the desirability of an open gay presence in the military, and there is nothing resembling a consensus as to how advocacy groups should prioritize Don’t Ask, Don’t Tell in the face of competing demands from couples and families, minority populations, teens, or people with HIV.

Of course, this is as it should be. The meaning of group identity and the terms of group membership are always subject to debate, disagreement, and dissent within private associations. As Professor Madhavi Sunder has written, diversity within groups, as well as diversity among groups, is an inevitable and appropriate component of associational freedom.\textsuperscript{170} “[C]ultures, now more than ever,” Sunder explains, “are characterized by cultural dissent: challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership.”\textsuperscript{171} Sunder has detailed the ways in which overly reductive definitions of associational rights under the First Amendment can serve to smother, rather than permit or foster, disputation and dissent within private communities. In this connection, it is no coincidence that the polyglot experience of gay Americans is one of Sunder’s principal vehicles for elucidating her arguments. The demographics of sexual minorities in America make them a rich source of intra-community dissent.

But dissent requires voice.\textsuperscript{172} Disputation can only occur within a community when the members of that community are able to identify themselves and assert their distinctive cultural demands. Don’t Ask, Don’t Tell prohibits active-duty gay soldiers from setting forth, and insisting upon, the priority of their concerns within private advocacy groups. It thereby erases them as an active presence in the political life of gay society.


\textsuperscript{171} Id. at 498.

\textsuperscript{172} See id. at 535-44 (arguing that “exit” from associational or cultural groups is an inadequate option for those who wish to retain their membership but dissent from, or even transform, majority views); id. at 568-69 (“Cultural dissenters are presumed to be either voluntary members of a culture despite the culture’s discriminatory norms, or free to exit the cultural group if equality is more important to them. But in the real world, individuals are rejecting these binary options.”).
And such political erasure is just one component of the policy’s larger removal of gay soldiers from the broad sweep of social and cultural life in the United States. Consider, for example, how daunting it would be for a gay soldier to take advantage of the Defense Department’s promise that he is free to “associate[] with known homosexuals” in common social settings. While a soldier may (in theory) be allowed to frequent gay bars and gay pride parades during his off hours, he cannot speak honestly about being gay or bisexual in these venues any more than he can discuss his identity with his civilian roommates or his wife. The explicit terms of the policy are reinforced in this regard by the common understanding among military personnel that enforcement authorities sometimes go undercover at gay bars or other establishments near military bases in hopes of catching soldiers in forbidden statements, despite the existence of regulations disapproving such fishing expeditions. Nor, of course, can a gay soldier hug another person of the same sex, or hold hands, or do anything else at a bar, parade, or “associational” venue that might lead a reasonable person to conclude that the soldier has a “propensity” to engage in “homosexual acts.” Other than standing off to the side and laughing at other people’s jokes, one is hard pressed to imagine just what a soldier is permitted to do when he “associates with known homosexuals” at gay bars or rallies. Indeed, as Professor Halley points out, the policy’s “reasonable person” proviso might render even such self-imposed isolation ineffective as a shield for a soldier who attempts to travel in gay circles. “The . . . regulations provide no check on a commander’s decision about what a reasonable person would think manifests a propensity,” Halley explains. Thus, “[w]hen a commander thinks that befriending a ‘known homosexual’ manifests a propensity, that’s de jure reasonable.” So much for laughing at jokes.

Just as the internal deliberations of a formal political association are distorted by the erasure of gay servicemembers from its membership, so too does the erasure of gay soldiers from social and cultural life distort the
norm-generating activities that occur in those settings. Consider, for example, the struggle that many gay men experience in crafting a positive vision of their own masculine identity in a society that frequently defines masculine virtue and homosexuality as mutually exclusive concepts. The opportunity to speak with a gay man currently serving in the armed forces—the institution that has traditionally served as the primary marker of citizenship status and masculine identity in the United States—could be a transformative event for a gay civilian searching for an exemplar around which to model his own sense of self. And finding that exemplar in a member of the military might in turn transform the individual's attitude toward the position that the armed forces should occupy in American society. Among many lesbians, the story of Colonel Margarethe Cammermeyer—a highly accomplished career officer and the highest ranked servicemember ever to be discharged under the military ban—has served a similar inspirational function, offering a compelling exemplar of the compatibility of womanhood, motherhood, and lesbian identity with superior military performance. In this and countless other settings, the


185. See generally MARGARETHE CAMMERMEYER, SERVING IN SILENCE (1994) (detailing Cammermeyer's career, her personal journey in understanding her sexuality, and her discharge from the military).

186. One reviewer wrote the following about Cammermeyer's book:

I am an out lesbian who's been involved with queer politics and HIV issues for 15 years, but I just recently got around to reading Dr. Cammermeyer's book. Even after all my years of being "out," I found her story and life so far to be fascinating and inspiring. It's wonderful to have another role model for my own life! I encourage anyone interested in finding out how women can change society and military policy to read this book. It's also a good read for the role of women in the Vietnam war and in the National Guard. Dr. Cammermeyer is truly a "great American," as the military admitted while in the same breath sanctioning her discharge. Her story is all about one person having the integrity and strength to stand up for what she believes to be right, using the legal system to out-maneuver
expression of individual identity is bound up with the development of norms in social intercourse. Yet, as Cammermeyer’s example illustrates, the Don’t Ask, Don’t Tell policy prohibits gay and lesbian servicemembers from bearing witness to their own experience. The Colonel was subjected to discharge proceedings shortly after she revealed the truth of her journey toward self-acceptance.\footref{notef185}

**B. POLITICAL ACCOUNTABILITY**

The effects of Don’t Ask, Don’t Tell that I have explored under the heading of “political representation”—restrictions on communication with politicians, governmental officials, private advocacy groups and so forth—are felt largely outside the military. Within the military, the policy has another feature that bears on the question of its political legitimacy: The requirement that gay soldiers remain silent about their identity shields the policy from basic mechanisms of accountability. Political correctives depend upon the availability of information. Politicians (and the people whom they represent) cannot develop an informed opinion about a governmental policy without having access to information about the policy’s workability, its effectiveness, its costs, and its benefits. The design of Don’t Ask, Don’t Tell operates to suppress the primary source of such information: It silences the very population of individuals who are actually subject to its mandates. I am unaware of any other example of a law that imposes restrictions upon a defined group of people and then prohibits that very group from identifying themselves as the target of the regulation and describing the regulation’s impact upon them.\footref{notef188}

---

\footnotetext[185]{See Cammermeyer, supra note 185, at 228–35 (explaining that Cammermeyer was discharged following her disclosure in a military security clearance interview that she was gay).}

\footnotetext[187]{See generally Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 YALE L.J. 485 (1998).}
Consider, as a point of comparison, the effect of drug laws upon the expressive activities of the population whom those laws affect most directly—drug addicts. The criminalization of drug use imposes harm upon addicts, both through the denial of the substance itself (certainly perceived by the individual as a harm) and through the increased risks that attend drug use when harm-reduction programs like needle exchanges are not available. Crafting an informed policy about the criminalization of drug use and the desirability of needle-exchange and other programs requires an assessment of these harms. If the condition of drug addiction could itself be criminalized, however, then the regulated population would not be able to offer this information, since identifying themselves as the regulated population—that is, those who are suffering harms from the criminalization of the drugs they wish to use—would itself subject them to punitive action. Thus, Robinson v. California—in which the Supreme Court held that the condition of drug addiction could not be criminalized—is not merely an expression of equality and anti-cruelty norms, the rubrics under which the Court issued its holding. The decision also reinforces public speech values in the realms of drug policy and criminal justice. While drug addicts unquestionably experience some “chill” in identifying themselves openly (from social ostracism, or a desire not to attract the attention of law enforcement officials), they nonetheless retain the ability to do so free from the threat of direct punishment. Under the military policy, in contrast, the population that suffers harm under the policy is, by precise definition, the population that is forbidden to self-identify.

To illustrate, consider the impact of the policy upon the public’s ability to assess one of the policy’s principal justifications: the preservation of “unit cohesion.” The military has argued that the total suppression of gay identity among servicemembers is necessary to preserve the “high morale, good order and discipline, and unit cohesion” of the armed forces. One might well ask, however, what effect Don’t Ask, Don’t Tell itself has on the morale of the gay and lesbian soldiers whom it regulates; and, consequently, on the morale and cohesion of the units in which those men and women serve. Indeed, the stress that the policy imposes upon gay soldiers in this regard is particularly acute when those soldiers are deployed abroad, as Michele Benecke, former Executive Director of SLDN, has explained:

[When people are deployed, gay people can’t even be honest in any communication with anyone at home, unlike heterosexual]
soldiers, because everyone’s mail is censored and their telephone calls are monitored. These people are not able to be out to their families because of DADT; they can’t be out with their loved ones because of DADT; and they have to face the prospect of losing their lives in service of their country. Right around the holidays, when people are just coming back [from foreign deployments, SLDN gets] a big spate of calls from people trying to figure out what to do.\(^\text{192}\)

Studies from leading sociologists, and a report by the Inspector General of the Defense Department, offer further reason to think that Don’t Ask, Don’t Tell may constitute a serious threat to the combat readiness and morale of the U.S. military, as I discuss below.\(^\text{193}\) If the “cure” is worse than the symptom—if morale and unit cohesion will suffer more under Don’t Ask, Don’t Tell than they would in a military that placed no special restrictions on gay soldiers—then the policy would be revealed as counterproductive and the case for a political corrective would be strong. But how are we to ascertain the impact of the policy on the morale of gay soldiers and their units when the policy prohibits those soldiers from identifying themselves? Not even commanders are permitted to know whether the soldiers under their charge are gay or lesbian. (When Colonel Cammermeyer’s commander learned that she was a lesbian, for example, the commander was disheartened that the disclosure would necessarily lead to discharge proceedings against one of his top officers, but the policy left

\(^\text{192}\) Telephone Interview with Michele Benecke, Executive Director, Servicemembers Legal Defense Network (Apr. 28, 1997), in Wolff, supra note 2, at 1161.


In contrast, the military’s gay ban has another effect on combat readiness that has been all too apparent: the loss of human capital that results from the discharge of highly trained gay and lesbian servicemembers in vital positions. The discharges of Alastair Gamble and Rob Hicks offer two among many possible examples. Gamble and Hicks were linguists in training at the Monterey Defense Language Institute until fall of 2002. Gamble was a specialist in Arabic; Hicks, in Korean. The two entered into a relationship after they met, and they were promptly discharged after their relationship was discovered, despite the military’s professed need for expert translators in languages spoken in regions of the world where some of America’s greatest security concerns are currently centered: Arabic (for terrorism concerns relating to Al Qaeda) and Korean (for the nuclear crisis in North Korea). See Christopher Heredia, Army Discharges 6 Gay Foreign Language Students, S.F. CHRON., Nov. 15, 2002, at A2.
no choice. How, then, is it possible to assess the military's claim that the policy is "necessary" to preserve unit cohesion? How can the political branches apply a corrective if the policy is, in fact, unnecessary or even harmful to that goal?

Lest my argument be misunderstood, I do not mean to suggest that the First Amendment always compels disclosure of proprietary information about the administration of government policies, even in civilian settings. Courts have placed significant weight upon the interest that government claims in the uninterrupted functioning of its internal machinery. At the same time, however, courts have been skeptical of attempts by government to reach out and affirmatively restrict the ability of the public to collect information regarding the operation of government. In First Amendment doctrine, the press access line of cases maps this distinction well. Members of the press have generally failed in their attempts to gain entrance to closed installations, like prisons, for the purpose of conducting interviews—the Court has denied them any broad constitutional right of compelled access.

But that same line of cases has found the public speech values of the First Amendment to be strongly implicated when the state affirmatively restricts the collection of information about the operation of government in situations where the public would ordinarily enjoy free passage. Thus, when states have attempted to close their courtroom proceedings and mandate the exclusion of the press and the public, the Supreme Court has found that the resulting harm to public speech values can be justified only in the narrowest of circumstances and for the most immediately pressing of reasons.

The analogy to the military policy is somewhat imperfect but instructive nonetheless. The Court has protected the ability of military commanders to

---

194. See Cammermeyer v. Perry, 97 F.3d 1235, 1236-37 (9th Cir. 1996) (describing attempts by the Governor of Washington, who is also Commander of the Washington National Guard, to retain Cammermeyer); CAMMERMEYER, supra note 185, at 235-36 (indicating that after the interaction with the commander "[the message from Cammermeyer’s commanders] was clear: [e]ach person at the meeting knew my sexual orientation . . . [e]ach person wanted me to continue to serve").


   It is one thing to say that a journalist is free to seek out sources of information not available to members of the public . . . . It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.


196. See, e.g., Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986) (holding that a newspaper has a First Amendment right to view transcripts of a preliminary hearing in a criminal prosecution absent a robust showing of immediate harm to the defendant's right to a fair trial); Landmark Communications, Inc., v. Va., 435 U.S. 829 (1978) (invalidating the state's attempt to prosecute the newspaper for publishing proceedings of the judicial inquiry commission).
close their facilities to political demonstrators, deferring to the asserted need for a controlled and predictable military environment.\footnote{197}{See Greer v. Spock, 424 U.S. 828 (1976) (upholding Fort Dix's prohibition of partisan political speeches in areas where civilians are given free access).} For similar reasons, the Court would probably not hesitate to reject a reporter's request for compelled access to a military base for the purpose of interviewing the soldiers who work there. These policies are analogous to the denial of reporter access to prisons. If the U.S. were to prohibit soldiers from ever speaking to civilians about the conditions under which they work, however, public speech values like those recognized by the Supreme Court in the courtroom closure cases would be strongly implicated. (Indeed, the Court has already suggested as much, as I discuss below.\footnote{198}{See infra text accompanying notes 226-37 (discussing Brown v. Glines and the right of servicemembers to express dissent and circulate petitions in civilian settings).})

Don't Ask, Don't Tell compounds this interference with the external mechanisms of accountability by adding a severe restriction on the military's own ability to assess the policy from within, as gay soldiers are forbidden to speak to their own commanders about the policy's effects upon their morale and their performance. The mandate of absolute silence that the policy lays upon gay and lesbian soldiers prevents both the public and the military itself from measuring the policy's impact upon the soldiers whom it regulates, and hence from discerning its sustainability and efficacy.

The effect of this mandate of silence is perhaps most dramatic where harassment of gay and lesbian soldiers is concerned. In the ten years since its implementation, it has become clear that Don't Ask, Don't Tell is intimately bound up with violence—both the threat of violence and its consummation. Gay men have been killed, beaten, and threatened in the military; women (gay and straight) have been raped and assaulted; and both have been subjected to verbal harassment, sometimes on a constant basis. All the while, Don't Ask, Don't Tell has hovered over these mistreated individuals with an ever-present threat of condemnation and punishment should they seek to hold their abusers accountable.

On a theoretical level, this problem of harassment under the policy should not be surprising. As Sharon Terman has observed, the pathbreaking work of Professor Catherine MacKinnon in defining "harassment" as a category of proscribed behavior rests upon an interpretation of antidiscrimination principles according to which harassing behavior relegates its targets to an inferior, subordinated position of power and status.\footnote{199}{See generally CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (setting forth her theory of workplace harassment as a mode of discrimination).} The U.S. military, however, has no commitment to antidiscrimination principles in setting policy toward its gay and lesbian soldiers. To the contrary, it embraces an official policy of broad
discrimination, making explicit their subordinated, disempowered status within military institutions. Terman has trenchantly observed that, given its open embrace of the policy and practice of discrimination toward non-heterosexual soldiers, it is analytically incoherent and pragmatically unrealistic for the military to profess a commitment to eradicating harassing behavior toward those same individuals. The behavior is a predictable expression of the very normative system to which the military has claimed allegiance.200

The truth of Terman’s observations is borne out by empirical work undertaken by non-governmental organizations and the Defense Department alike. Servicemembers Legal Defense Network has compiled a long record of the abuse and harassment suffered by gay soldiers, and also by straight women, under Don’t Ask, Don’t Tell. Harassment of soldiers who are perceived to be gay is ubiquitous in the military, and the policy makes it prohibitively difficult for soldiers to report such abuse without drawing suspicion upon themselves.201 Indeed, commanders have often taken punitive action against the very soldiers who report that they have been harassed, initiating investigations and seeking evidence of forbidden statements that would warrant discharge, a practice that has persisted following the publication of Defense Department edicts purporting to forbid it.202 And even when commanders refrain from taking punitive actions against soldiers who report misconduct, the policy prohibits gay soldiers from giving a personalized account of the impact that the harassment has upon them, their performance, and their units—the most important information that a commander needs in order to determine the threat that the misconduct poses to morale and the best way to respond.

SLDN reports one particularly extraordinary example of the policy’s threat to individual morale in this regard, which arose following the gay-bashing murder of an enlisted soldier at Fort Campbell, Kentucky. Private First Class Barry Winchell, a gay soldier in the Army, was beaten to death by fellow soldiers after having suffered months of relentless anti-gay


201. See, e.g., SLDN SEVENTH REPORT, supra note 39, at 72–102 (describing the persistent problems of antigay harassment and the military’s acknowledgement of problems).

202. See, e.g., SLDN FIFTH REPORT, supra note 38, at 75–76 (detailing the story of a Navy sergeant who reported incidents of antigay harassment and was subjected to criminal investigation for sodomy violations, and possible discharge, as a consequence); id. at 3 & n.6 (describing an official statement of Defense Department policy that reporting harassment or abuse should not give rise to an investigation of the victim); Memorandum from Under Secretary of Defense Edwin Dorn, Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality (Mar. 24, 1997) (making a policy statement of the Defense Department regarding harassment) (on file with author).
harassment.\textsuperscript{203} The Army surgeon who was on duty when Winchell was brought into the emergency room happened also to be gay, and the event presented him with a serious crisis of conscience about which Don’t Ask, Don’t Tell forbade him to speak. The surgeon, Major Paul Gott, chose to violate the policy and inform his command of the impact of these events on his morale. His letter eloquently captures the harm that the policy imposes in discouraging gay soldiers from reporting anti-gay harassment or violence and preventing them from discussing its impact upon their working conditions.

I am writing to inform you that I am gay... I had the misfortune to be the surgeon on call the night Private First Class Winchell was brought to the emergency room at Fort Campbell. The obvious brutality and hatred that must have motivated his attacker struck me deeply. In the days that followed, the knowledge that the attack was an anti-gay hate crime filled me with outrage and disgust. Yet I remained silent. Imagine the stress and anxiety of working in an environment where the brutal murder of a person simply for being gay was the topic of casual conversation... the response I perceived was that it was a tragic, though not unexpected, consequence of gays serving in the military. I am sure I am not alone among gay servicemembers who sat silently through these conversations with a sense of nausea and fear.\textsuperscript{204}

SLDN has also documented regular problems with “lesbian baiting” under the policy. When male soldiers harass or abuse their female peers, they can use the threat of an accusation of lesbianism as a tool for securing compliance or silence. The tactic has an insidious logic: Demand sexual favors from a woman and explain that, if she refuses and reports the incident, you will say that she refused your advances because she is a lesbian and admitted as much to you at the time. Lesbian baiting has been a consistent problem throughout the life of the policy and has severely impeded the ability of women in the military to report instances of harassment or abuse.\textsuperscript{205}

A study and report on the harassment of gay soldiers issued recently by the Inspector General of the Department of Defense provides a particularly apt illustration of the manner in which Don’t Ask, Don’t Tell cripples

\textsuperscript{203} See SLDN SIXTH REPORT, \textit{supra} note 34, passim; Sue Ann Pressley, \textit{Hate May Have Triggered Fatal Barracks Beating}, WASH. POST, Aug. 11, 1999, at A1 (reporting the murder of Winchell and the investigation into the motivations of the killers).

\textsuperscript{204} SLDN SEVENTH REPORT, \textit{supra} note 39, at 39 (alterations in original).

\textsuperscript{205} See, e.g., SLDN NINTH REPORT, \textit{supra} note 17, at 42–43 (describing the problem of lesbian baiting in light of the disproportionate impact of the policy upon women generally); SLDN SECOND REPORT, \textit{supra} note 37, at 22 (describing an instance of harassment and “gay baiting” against a female soldier); SLDN SIXTH REPORT, \textit{supra} note 34, at 61–63 (detailing the continued persistence of lesbian baiting under the policy).
internal mechanisms of accountability on these problems. The report summarizes the results of a study that sought to evaluate the extent to which “harassment of Service members based on perceived or alleged homosexuality” occurs and is tolerated.\textsuperscript{206} Secretary of Defense William Cohen commissioned the study in 1999, explaining that “disparaging speech or expression with respect to sexual orientation . . . can undermine good order and discipline,” and it is the most extensive internal investigation of the policy ever undertaken.\textsuperscript{207}

The report bears out SLDN’s long-standing admonitions, detailing a pervasive atmosphere of disparaging remarks and harassment against gay and lesbian soldiers coupled with a fear of reporting such harassment to commanders or other officials. Eighty percent of the 71,570 soldiers who took part in the study reported hearing disparaging remarks about gay people in the twelve preceding months, eighty-five percent reported that such remarks were tolerated in their units, and thirty-seven percent reported having personally witnessed or experienced an incident of harassment in their chain of command.\textsuperscript{208} At the same time, twenty-two percent of soldiers said that they would not feel safe in reporting such acts of harassment if they experienced them personally.\textsuperscript{209} This last figure is particularly significant. Women make up fourteen percent of the armed forces,\textsuperscript{210} and while there is no official estimate of the number of soldiers who identify as gay or bisexual, estimates in the general population usually run from three to eight percent.\textsuperscript{211} Thus, the proportion of soldiers who feel unsafe in reporting sexual-orientation abuse corresponds closely to the proportion who are the targets of that abuse—gay soldiers and straight women who are “lesbian baited” to keep them from reporting other types of harassment.\textsuperscript{212}

Even more telling, however, is the methodology that the Department of Defense employed to conduct the study. The Department designed its survey to permit a breakdown of the results along three indices: branch of service,
rank (or “pay grade”), and gender. What’s missing here? The Department’s own Evaluation Report on the Military Environment with Respect to the Homosexual Conduct Policy does not permit the Department to assess the impact of the policy according to sexual orientation! The Department cannot ask soldiers to identify themselves by sexual orientation because the policy forbids non-heterosexual soldiers to disclose that information. For the same reason, the survey clusters two distinct inquiries into a single question: its inquiry about soldiers “witnessing” abuse, and its inquiry about soldiers “experiencing” abuse, which together produce the figure of thirty-seven percent mentioned above. This design feature introduced uncertainty into the interpretation of that key index, as the report takes pains to point out. The reason for conflating these two inquiries, of course, is that admitting that you have experienced harassment because you are perceived to be gay comes dangerously close to an actual statement that you are gay. Although the Inspector General’s (IG) Office took elaborate steps to ensure the anonymity of the survey participants, Don’t Ask, Don’t Tell still forced the IG to disclaim any attempt to ascertain the respondents’ sexual identities, perceived or actual—a disclaimer that the IG insists upon in the report. Don’t Ask, Don’t Tell has thus prevented the military itself from obtaining what is arguably the most important datum in assessing the impact of the policy upon unit cohesion: the extent to which gay soldiers experience harassment or abuse and feel safe in seeking redress when they do.

Such a structural limitation on the mechanisms of accountability takes on a special significance in the military context. As I discuss below, the Supreme Court (and particularly the Rehnquist Court) has crafted a doctrine of judicial deference in its review of challenges to military policies. Pleading both a lack of expertise and an obligation to observe the prerogatives of the political branches, the Court has placed significant limitations on the ability of civilian judges to restrict the actions of the military. Underlying that doctrine of deference, as one of its key

213. See IG Report, supra note 193, at 3; see also id. at 30 (reproducing the first page of the survey).
214. See id. at 31 (addressing both “witnessed” and “experienced” harassment in survey question sixteen).
215. See id. at 5, which states:
   The number of Service members who acknowledged witnessing a particular type of harassment toward a perceived homosexual [or experiencing such harassment—the report itself seeks to erase the experience] and the number of actual harassment incidents are not necessarily the same. For example, a single incident involving a perceived homosexual might have been witnessed by numerous Service members.”

   Id.
216. See id. at 21 (“In addition to protecting the anonymity of the survey respondents, administration of the survey was designed to avoid the appearance that Service members were being surveyed because of their attitude, behavior, or preference.”) (emphasis added).
217. See infra Part III.A.2.
justifications, is the assumption that civilian authorities will, in fact, have the
capacity to apply appropriate limits and correctives to the military through
the political branches. Thus, in one of the earliest statements of the modern
doctrine of military deference, the Court explained that its respect for the
“professional . . . judgments” of military authorities in governing “complex,
subtle, and professional decisions as to the composition, training,
equipping, and control of a military force” rested on the assumption that
military forces would be “subject always to civilian control of the Legislative
and Executive Branches.”

Don’t Ask, Don’t Tell actively frustrates this opportunity for civilian
control. The policy’s speech restrictions prevent civilian and military officials
alike from developing an informed understanding of the effects that the
policy has upon the population whom it regulates.

C. SPEECH IN THE SERVICE: SOME POINTS OF COMPARISON

As is the case with all matters of constitutional disputation, an analysis
of the speech restrictions that the military policy imposes on gay and lesbian
servicemembers benefits from being placed in a larger context. One
response that defenders of the policy frequently offer when faced with First
Amendment arguments is the assertion that members of the military are
never permitted to engage in the forms of political speech and associational
activity outlined above. In fact, this is quite untrue. Members of the armed
forces enjoy the right to organize, petition, and express their views about
matters of public importance, even when those views take the form of
protest. While military personnel must sometimes operate under more
restrictive limitations than would be the case for civilians, there is a well
established tradition of political dissent by active-duty soldiers.

Some of the most vocal protest by soldiers in the modern era centered
on the Vietnam War. Discontent among soldiers who had served combat
duty in Vietnam became widespread during the course of that conflict, and
large numbers of military personnel took part in demonstrations and protest
activities after returning to the United States. While many soldiers were
disciplined or even prosecuted for violating certain military regulations
(wearing their uniforms while engaging in protest, or combining their
protest with civil disobedience), thousands of soldiers made their critical

219. See David Cortright, Soldiers in Revolt 50–75 (1975) (offering a highly critical
view of military restrictions on servicemembers’ speech that nonetheless documents
opportunities for protest and dissent); Richard R. Moser, The New Winter Soldiers: GI and
and disobedience among active-duty soldiers).
220. See, e.g., Cortright, supra note 219, at 58–61 (discussing the case of the “Fort Jackson
8”); Moser, supra note 219, at 82–84 (soldiers disciplined for protesting while in uniform); id.
views known through the available public avenues. Associations such as the American Servicemembers Union, the Concerned Officers Movement, and the United States Servicemembers Fund formed to support servicemembers with dissenting views and to serve as a vehicle for their expression. And, to this day, soldiers regularly speak with the press or write letters to military and general-interest newspapers expressing their dissatisfaction with the conditions under which they must work. Throughout the Second Iraq War, for example, the *Stars & Stripes* newspaper has served as a forum for soldiers to air grievances about their working conditions, their morale, and the policies that brought them to Iraq in the first place. The shift from a draft-based military to an all-volunteer force has changed the character of protest and dissent by soldiers, but not the fact of it. While servicemembers must sometimes adhere to restrictions aimed at maintaining decorum, order, and clear lines of authority, they can and do regularly make themselves heard on divisive political issues.

The persistence of these types of expression and dissent in military-civilian relations throws the speech restrictions under which gay and lesbian soldiers now serve into sharp relief. One of the Supreme Court’s military First Amendment cases provides a particularly useful point of comparison in

---

221. See, e.g., MOSER, supra note 219, at 81-88 (describing demonstrations in which large numbers of active-duty servicemembers protested U.S. policy in Vietnam).

222. See CORTRIGHT, supra note 219, at 54-66 (providing a broad overview of organizational activities of soldiers); id. at 69-73 (discussing the formation and activities of ASU); id. at 88-93 (same for COM and USSF).


224. *Stars and Stripes* has summarized the first six months of GI expression in the following terms:

The letters page was filled with stories from servicemembers raising concerns in the Middle East. Many complained about living conditions, inequities and problems with the mail. As the warfighting force evolved into a stabilization force, the letters continued to flow into Stripes offices. Between June and September, Stripes printed 200 letters from troops in the deserts of Iraq and Kuwait and other remote outposts that have led the fight against terrorism. Roughly 60 percent complained about various things, ranging from living conditions to redeployment dates back home. The remaining 40 percent urged the others to get on with their duty.


225. See Diane H. Mazur, Why Progressives Lost the War When They Lost the Draft, 32 HOFSTRA L. REV. (forthcoming 2004) (manuscript at 10-11, on file with the Iowa Law Review) (“A fundamental shift in military culture and in constitutional civil-military relations began when a draft-based military was transformed into an all-volunteer force thirty years ago.”).
this regard. In the 1980 decision of *Brown v. Glines*, the Court upheld an Air Force regulation concerning the ability of airmen to circulate petitions within the confines of a military base. The regulation required airmen to obtain the prior permission of a base commander before seeking support for such petitions on military property, and it authorized commanders to deny permission where circulation of the petition on base would present "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with accomplishment of a military mission." Albert Glines, a captain in the Air Force reserves, was displeased with the Air Force's standards relating to hair length, and he organized a petition addressed to several members of Congress and the Secretary of Defense to have the grooming regulations changed. Glines limited himself to circulating the petition among civilians at first, but he later decided to distribute the document to soldiers on a military base while he was on a training flight through Guam, and he did so without first obtaining permission. Glines was disciplined for his failure to have the petition approved before circulating it, and he brought a facial First Amendment challenge to the prior restraint provision. The Supreme Court reversed two lower federal courts and sustained the regulation.

Although the Air Force obtained the limited right of censorship that it sought in *Brown v. Glines*, the opinion offers a detailed map of the avenues for expression and dissent that members of the armed forces nonetheless retain, even during active duty. Glines was disciplined only when he sought to circulate his petition on a military base without first obtaining the commander's approval—he was entirely free to collect support for his vocal disapproval of military grooming policies in civilian settings, as he in fact did. Indeed, he had a statutory right to do so. The U.S. Code for the Armed Forces provides that "[n]o person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General," and it specifically protects the rights of servicemembers to bring evidence of "unlawful discrimination" to the attention of such officials.

---

227. *See id.* at 350 n.2.
228. *See id.* at 351-52. The reported opinions from the district court, appellate court, and Supreme Court do not specify the exact nature of Glines's complaint. It appears, however, that the dispute centered around modes of cultural expression and race. At one point in his petition, Glines wrote: "We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy." *Id.* at 351 n.3. *See also Glines v. Wade*, 586 F.2d 675, 677 (9th Cir. 1978) (explaining that Glines violated a hair-length regulation by shaving his head), rev'd sub nom. *Brown v. Glines*, 444 U.S. 348 (1980).
231. *Id.* § (c)(2)(A).
One of the disputed issues in Glines was whether the prior restraint on circulating petitions within a military base violated this very statute. The Court found that the challenged regulation was consonant with the statute precisely because it preserved the right of servicemembers to collect civilian support for petitions and send those petitions directly to their elected representatives. What is more, the regulation itself specified that commanders could not refuse permission for the on-base circulation of petitions solely because the petitions were "critical of Government policies or officials."

Glines thus illustrates multiple avenues of dissent that are enjoyed by members of the armed forces—avenues that are qualified only by limitations specific to controlled military spaces, like bases, foreign theaters, and activities undertaken while in uniform. The opinion presumes the ability of soldiers to criticize government policies, to complain about working conditions within the service, even to question the actions of military commanders, and Congress preserves as sacrosanct the ability of servicemembers to communicate such grievances directly to their elected representatives. And finally, Glines reiterates the principle adhered to in every free speech challenge that the Court has considered in the military context: that any speech restriction be administered in a neutral fashion, free from discrimination against disfavored viewpoints or speakers.

A comparison of this mode of analysis with the form and scope of the speech restrictions that Don't Ask, Don't Tell imposes is telling. The policy targets only one form of expression by one group of soldiers—speech by gay, lesbian, or bisexual soldiers about their own identities—and it prohibits those soldiers from discussing their sexual identities "24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces, "

---

232. See Glines, 444 U.S. at 375-76.
233. See id. at 359-61. Soldiers wishing to marshal civilian support for such a petition were required to doff their uniforms before doing so. See id. at 349 (citing Air Force Reg. 30-1(9) (1971)). Additional restrictions applied to active-duty soldiers while in a foreign country. See id.
234. See id. at 350 n.2 (quoting Air Force Reg. 35-15(3)(a)(4) (1970)).
235. See, e.g., 10 U.S.C. § 1031(c)(2)(B) (2003) (preserving the ability of soldiers to bring complaints about ".[g]ross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety".
236. See also Goldman v. Weinberger, 475 U.S. 503, 508-09 (1986) (forbidding an Air Force captain from wearing a yarmulke while on duty at the military base, but imposing no similar restriction in private, off-duty spaces).
237. See Glines, 444 U.S. at 358 n.15.
238. See 10 U.S.C. § 654(b)(2) (2000) (requiring discharge if a soldier states "that he or she is homosexual or bisexual, or words to that effect, unless [soldier demonstrates] that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts").
member is on duty or off duty. The restraint that the military has shown in preserving civilian spaces and the political process as avenues of expression and dissent for soldiers—a restraint that the Court clearly viewed as an important prerequisite to sustaining the speech regulation in Brown v. Glines—is entirely absent under Don’t Ask, Don’t Tell.

III. WILLFUL BLINDNESS AND THE PROMISE OF LAWRENCE

Writing in 1996, the Department of the Navy instructed its medical professionals in how to respond to gay and lesbian soldiers who wished to talk about their sexual identities during a consultation. In its General Medical Officer Manual—the official policy manual for medical personnel—the Navy offered the following guidance:

One way of looking at homosexuals in the military is to distinguish between those who adapt to the military environment and those who do not. The adapters are invisible and do not seek to disclose their homosexuality. The nonadapters realize that they made a mistake in joining the military, and they need to get out.

It is not often that the distinctive dynamic of subordination experienced by gay men and lesbians—their compelled invisibility or erasure—is articulated and embraced so forthrightly.

The federal courts of appeals, in summarily rejecting the First Amendment claims of gay and lesbian soldiers under the policy, have reiterated this same form of erasure. Navy Lieutenant Richard Watson and National Guard Lieutenant Charles Holmes were both discharged from the service for identifying themselves as gay. The Ninth Circuit concluded that this application of Don’t Ask, Don’t Tell raised no speech issues under the First Amendment: “[B]ecause Watson and Holmes were discharged for their conduct and not for speech [the totality of that “conduct” being the utterance of the words, “I am gay”], the First Amendment is not implicated.” Navy Lieutenant Paul Thomasson, too, was discharged from the service solely for identifying himself as gay, yet the Fourth Circuit saw no First Amendment issue: “The statute [Don’t Ask, Don’t Tell] does not target speech declaring homosexuality; rather, it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue.” And when Air Force Captain Richard Richenberg was discharged for identifying himself as gay, the Eighth Circuit curtly denied his Free Speech challenge: “Richenberg’s First Amendment

240. 1d. § (a)(10).
241. SLDN Fifth Report, supra note 38, at 36 (quoting DEP’T OF THE NAVY, NAVMED P-5134, GENERAL MEDICAL OFFICER (GMO) MANUAL (May 1996)).
argument is without merit. [Don't Ask, Don't Tell does] not target mere status or speech. The policy seeks to identify and exclude those who are likely to engage in homosexual acts. Only the Second Circuit has given any serious attention to the claim that Don't Ask, Don't Tell implicates important speech values, and that court rejected a facial challenge to the policy by focusing narrowly on the autonomy rights of servicemembers and reaching the somewhat fantastic conclusion that the policy "restricts no more speech than is reasonably necessary" and adequately protects "a service member's privacy interest."

Professor Eve Sedgwick has written about the central role that silence often plays in the subordination of gay men and lesbians. In her pathbreaking Epistemology of the Closet, Sedgwick discusses the dynamic of aggressive silence and studied ignorance that those in positions of power can employ to erase non-heterosexual identity—or, to use the term I introduced earlier, to deny the homosexual possibility—within the frame of reference that they control. This erasure confers a "Privilege of Unknowing," as Sedgwick has put it: a license to employ ignorance, whether feigned or actual, as a means of limiting the terms within which a dialogue can unfold. In its most aggressive form, such chosen ignorance denies the most elemental features of the human experience of the disempowered interlocutor. In discussing Bowers v. Hardwick, for example, Sedgwick describes the majority’s seemingly deliberate misconstrual of Michael Hardwick’s privacy claim as a “contemptuous demonstration... of how obtuseness itself arms the powerful against their enemies.”

244. Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996).
245. Able v. United States, 88 F.3d 1280, 1299 (2d Cir. 1996). In fairness to the Second Circuit, the plaintiffs in Able brought a facial challenge and at the time they filed suit much of the record of invasive regulation, described in the sections above, had not yet been compiled. See id. at 1297-98 & n.11. While the broad scope of the written policy is explicit and unambiguous, the Second Circuit might have believed that the "military deference" doctrine required it to accept the Defense Department’s representation that it would implement the policy in a manner that would respect the "privacy interests" of gay servicemembers. While erroneous, the Second Circuit’s analysis was less egregious than that of its peers.
247. See id. at 8 & n.13.
248. In her most frequently cited example of this dynamic, Sedgwick writes, “If M. Mitterand knows English but Mr. Reagan lacks... French, it is the urbane M. Mitterand who must negotiate in an acquired tongue, the ignorant Mr. Reagan who may dilate in his native one.” Id. at 4; see also Wolff, supra note 2, at 1149.

Sedgwick’s observation certainly holds true in legal analysis, where the ability of a claimant to benefit from an established legal doctrine is always limited by the ability of a judge to recognize, after engaging in a formal dialogue with the claimant, that the doctrine in question should in fact apply.

Id.
249. SEDGWICK, supra note 246, at 7.
Don’t Ask, Don’t Tell, and the judicial opinions that have turned aside First Amendment challenges to the policy, partake equally of this “contemptuous obtuseness.” The policy instructs heterosexual soldiers to participate in the fantasy that the gay, lesbian, and bisexual soldiers in their midst will simply cease to exist when they are compelled to absolute silence. And the judiciary protects that fantasy from any serious constitutional scrutiny by erasing the human experience of these mute soldiers and defining their self-identifying speech—their “I am,” that most primal, intimate, and basic form of self-expression, the necessary prerequisite for establishing a distinct social existence—as “conduct,” “evidence,” anything but speech. Justice Blackmun’s words were prophetic: *Bowers* did indeed herald, and authorize, a period of “willful blindness” to the lived experience of gay men and lesbians seeking relief in the federal courts.

For the remainder of this Article, I will seek to map the contours of that willful judicial blindness. I begin that task by examining the doctrinal strategies that the courts of appeals have utilized to avoid any serious engagement with the manifest harms that Don’t Ask, Don’t Tell imposes upon public discourse. I will end with an exploration of the true promise of *Lawrence v. Texas*: the extirpation from our judicial culture of the contemptuous obtuseness that has made such dehumanizing treatment of gay litigants possible.

A. JUDICIAL AVOIDANCE STRATEGIES

I. No Speech, No Problem

The primary avoidance strategy that the federal courts have employed in their review of the policy exhibits a certain seductive simplicity. The Fourth, Eighth, and Ninth Circuits have simply defined the speech of gay and lesbian servicemembers as “conduct,” rather than speech, and hence concluded that it is not a proper subject for First Amendment analysis at all. Each of these courts has employed the same doctrinal mechanism in

250. Professor Halley’s observation on this score remains among the most cogent:

[H]omosexuals who experience their sexual desire as immutably oriented toward persons of their own sex nevertheless may be coerced to pretend that they conform to the norm of heterosexuality. Such a result is no mere fib; it is a change. To be sure, what has changed is not the supposed essence of sexual orientation, but the representation of it available for social interpretation. But essences, conceding for a moment their existence, are not visible to legislatures, judges, employers, or police. Social agents work with social meaning; the fairness and indeed the constitutionality of their acts must be measured in the context of the practical, not the ideal, epistemology of their decisionmaking.


banishing the speech of gay servicemembers from the protection of the First Amendment in this fashion. That mechanism has rested on an astonishingly facile distortion of Wisconsin v. Mitchell\(^2\) the Supreme Court's leading decision on hate-crime laws. It is worth taking a moment to map out this bit of judicial legerdemain.

In Mitchell, the Court unanimously upheld a sentencing enhancement statute that imposed harsher penalties on offenders who commit a violent crime "because of" the victim's race, religion, sexual orientation, or other specified traits.\(^3\) Mitchell and several other Black defendants, who were convicted of assault, had their sentences enhanced for singling out a White victim on the basis of his race after they saw the movie Mississippi Burning.\(^4\) In order to establish the defendants' motive in choosing their victim, the State offered a statement by Mitchell, made immediately prior to the attack, in which he said that he was looking for a "white boy" to attack because he was angry about the images of lynching in the film.\(^5\) Mitchell challenged the sentencing enhancement provision, arguing that it impermissibly punished him for his thoughts and his protected speech.\(^6\)

In explaining its unanimous rejection of Mitchell's challenge, the Court made three observations. First, the Court considered whether hate-crime laws constitute punishment for "bad thoughts" (which would be impermissible) or, instead, the identification of particularly dangerous or injurious motives for committing a crime (which would constitute an acceptable basis for enhancing a criminal sentence).\(^7\) It concluded that a properly drawn hate-crime law was more accurately characterized as targeting particularly dangerous motives, rather than politically unpopular thoughts.\(^8\) Next, the Court asked whether the existence of hate-crime laws would chill protected speech by dissuading people from expressing bigoted views.\(^9\) The Court concluded that a hate-crime provision (unlike a hate-speech law) posed no serious danger of chilling speech because bigoted expressions did not themselves provoke any sort of immediate sanction.\(^10\) Rather, the sentencing enhancement provision came into operation only after a person had committed a violent offense. In other words, a hate-crime law would only chill the speech of someone who thought to himself: I would

\(^3\) See id. at 480 (discussing statute).
\(^4\) Id.
\(^5\) See id. (quoting Mitchell as saying, "You all want to fuck somebody up? There goes a white boy; go get him").
\(^6\) Id. at 481-82.
\(^7\) Mitchell, 508 U.S. at 487.
\(^8\) See id. at 487 (recognizing that antidiscrimination statutes that target particular motives have been upheld against constitutional challenge).
\(^9\) Id. at 488.
\(^10\) Id. at 488-89.
like to express my ideas about race, but if I do, my ideas about race might be used as evidence for the motivation behind my assault, so I'd best remain silent. Because it viewed "the prospect of a citizen suppressing his bigoted beliefs" in such a fashion to be entirely "speculative," the Court rejected this First Amendment argument.

Third, and finally, the Court explained that the First Amendment imposes no categorical prohibition against the use of a defendant's own speech as evidence in a criminal proceeding. That is, using Mitchell's statements to prove his bad intent did not constitute some sort of per se violation of the First Amendment. This was an utterly prosaic conclusion, and the Court offered it as a sort of toss-off at the end of its opinion.

It is the language associated with this last, prosaic conclusion that the Fourth, Eighth, and Ninth Circuits have put to such extraordinary work in their review of Don't Ask, Don't Tell. In confirming that the entire foundation of the law of testimonial evidence had not, in fact, been unconstitutional all along, the Mitchell Court said in its closing paragraphs 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." The Fourth, Eighth, and Ninth Circuits have seized upon this passage and cited it for the proposition that the First Amendment never prohibits the evidentiary use of speech to prove motive or intent—in other words, that the Speech Clause never imposes limits on government regulations that are framed as rules of evidence. Of course, the Court's opinion in Mitchell makes perfectly clear what common sense would dictate: While the use of speech as evidence does not constitute a per se violation of the First Amendment, an evidentiary provision that has the effect of chilling protected expression among a defined population of regulated individuals (as Don't Ask, Don't Tell obviously does) raises a serious First Amendment issue, as would any other law with such an effect.

If a further illustration of this point is needed, one might compare the posture adopted by these courts of appeal to the Supreme Court's treatment of alleged Communists at the height of the McCarthy era. In the 1940s and

261. Id. at 489.
263. See id. at 489 (offering this conclusion in the last paragraph of the opinion).
264. Id. at 489.
265. See Holmes v. Cal. Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (citing the passage and stating its equal application to Don't Ask, Don't Tell); Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996) (citing the passage in its agreement with the conclusion reached by the Fourth Circuit in Thomassen); Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996) (en banc) (citing the passage's statement that "[t]he use of speech evidence in this manner does not raise a constitutional issue").
266. See Mitchell, 508 U.S. at 488-89; cf. generally R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a hate-speech law that outlaws only certain "fighting words" and hence imposes speech restriction that discriminates on the basis of content and viewpoint).
In the 1950s, Congress enacted laws purportedly aimed at identifying and prosecuting citizens who were working toward the violent overthrow of the U.S. government.\textsuperscript{267} Enforcement authorities focused their primary efforts on those who claimed membership in the Communist Party or who espoused the teachings of Marxian economics and philosophy, often using their statements (of membership, or of philosophy and advocacy) as the sole “evidence” of their “intent” to commit treasonous acts. For a time, it was essentially a crime to belong to the Communist Party, and many people were deterred from espousing any political views that might provoke a subpoena and a punitive investigation.\textsuperscript{268} In its decisions reviewing these enforcement efforts, the Supreme Court sometimes upheld the actions of federal authorities against First Amendment challenge and sometimes struck them down, but it never entertained any illusion that the government could shield the penalties that it was imposing upon group membership or political advocacy from careful analysis under the Speech Clause by its framing of those penalties as rules of “evidence.”\textsuperscript{269} To the contrary, the Court eventually rejected its own suggestion from decades earlier in \textit{Whitney v. California} that a legislative designation could resolve the First Amendment problems that arise when the State takes punitive action based solely on a statement of membership or identity.\textsuperscript{270}

There are some difficult issues of theory, doctrine, and policy surrounding Don’t Ask, Don’t Tell. This \textit{Wisconsin v. Mitchell} argument is not one of them. The clever trick of definition by which the courts of appeals have conjured away the speech of gay and lesbian servicemembers (and the serious impact upon public discourse that has resulted from their compelled silence) is an act of avoidance, not analysis.


\textsuperscript{268} See generally ALBERT FRIED, MCCARTHYISM: THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY (1997) (examining case studies of ACLU advocacy during the period and examining cases involving blacklists and imprisonment of academics and essayists).

\textsuperscript{269} See, e.g., \textit{Noto v. United States}, 367 U.S. 290, 300 (1961) (construing evidentiary provisions of the Smith Act narrowly in order to avoid First Amendment problems); \textit{Scales v. United States}, 367 U.S. 203, 230 (1961) (same); \textit{Dennis v. United States}, 341 U.S. 494, 505 (1951) (plurality opinion) (“[W]here an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a ‘clear and present danger’ of attempting or accomplishing the prohibited crime.”).

\textsuperscript{270} See \textit{Brandenburg v. Ohio}, 395 U.S. 444, 449 (1969) (per curiam) (overruling \textit{Whitney v. California}, 274 U.S. 357 (1927)) (permitting prosecution for particular forms of assembly and advocacy where the legislature has determined that they may lead to proscribed conduct). \textit{But see} \textit{Dennis}, 341 U.S. at 509-10 (indicating that congressional determination of a dangerous form of advocacy may possibly factor into the constitutional calculus); \textit{Brandenburg}, 395 U.S. at 447, 447 n.2 (indicating that \textit{Dennis} remains good law).
2. Military Deferece

Any judicial attempt to analyze or restrain the internal policies of the military must also navigate the doctrine of “military deference.” It will come as no surprise that the courts of appeals have relied heavily upon this doctrine in turning aside challenges to Don’t Ask, Don’t Tell. Unlike the distortions of Wisconsin v. Mitchell described above, the principles underlying military deference do pose some legitimate and serious questions that require close attention, though the doctrine ultimately does much less work than the courts of appeals have assumed.

In its current form, military deference constitutes both a statement about limited judicial competence in assessing the conditions under which members of the military serve and an expression of separation-of-powers principles to the effect that primary responsibility for restraining the military should lie with the political branches of civilian government. The “deference” contemplated under the military doctrine is broad: The Supreme Court has at times suggested that some questions sounding in military expertise may be largely beyond the power of civilian judicial review, and some lower courts have seized upon these suggestions to disclaim all responsibility for policing the actions of the military. Thus,

---

271. See, e.g., Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Able v. United States, 88 F.3d 1280, 1293 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 925 (4th Cir. 1996) (en banc). The only court of appeals ever to invalidate the military’s exclusion of a gay soldier on constitutional grounds was the Ninth Circuit, in the much-noted case of Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc). Watkins concerned the blanket exclusion of gay soldiers that preceded Don’t Ask, Don’t Tell. The three-judge panel in that case found that gay men and lesbians constitute a suspect class, applied strict scrutiny to the military’s ban on gay soldiers, and declared the policy unconstitutional. Id. at 704. The en banc Ninth Circuit affirmed on a different theory, applying a virtually unheard of estoppel to the military on the grounds that the plaintiff, Perry Watkins, had consistently told the Army that he was gay and the Army repeatedly reenlisted him nonetheless. Id. at 705–11.

Ironically, the “narrower” opinion of the en banc court arguably constituted a much more aggressive rejection of the doctrine of military deference. The original panel was enforcing a constitutional right—the circumstance where a court would seem to have the strongest duty to conduct an independent review. The en banc court, in contrast, avoided the constitutional issue by relying upon general principles of fairness and equity—a circumstance in which the military would seem to have the strongest argument that civilian notions of fairness and consistency of treatment have no application, as this Part will make clear. Cf. United States v. Mendoza, 464 U.S. 154, 164 (1984) (forbidding the use of non-mutual issue preclusion against repeat-litigant government where important public policies would be frustrated).

272. Professor Diane Mazur has demonstrated that the current manifestation of the military deference doctrine is a recent creation with a pedigree of only a few decades and owes much of its existence to Justice Rehnquist. See Diane H. Mazur, Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law, 77 IND. L.J. 701, 734–40 (2002).


274. See, e.g., Thomasson, 80 F.3d at 922–24 (articulating an almost nonexistent role for judges to review military policies that result from national political “compromise”).
“military deference” offers a clear path to any court that is inclined to dismiss the claims of gay servicemembers.

While this is not the place for a comprehensive review of military deference, my analysis of the constitutional values burdened by Don’t Ask, Don’t Tell does invite a reconsideration of the contours of that doctrine. In particular, my focus on the policy’s impact upon public speech values in civilian life calls for more precise questions than the Court has asked heretofore about the circumstances under which judicial deference to the military is factually supportable and, perhaps more importantly, when such deference is consonant with a constitutional tradition that has always been wary of military intrusions into civilian life.  

There are three distinct components to the “deference” that the military claims in seeking to limit judicial review of its policies: (1) deference in reviewing the need, or justification, for a policy; (2) deference in reviewing the impact that a policy has upon constitutional values; and (3) deference in determining the level of individual constitutional protection that members of the military enjoy while on active duty. Federal courts often treat these elements of deference interchangeably. The case for deference where Don’t Ask, Don’t Tell is concerned, however, looks quite different under each of these distinct inquiries.

a. Justification or Need

The first consideration, deference in reviewing the justification or need for a military policy, will generally present the strongest case for deferring to military judgment and expertise.  This element of deference looks to the

---

275. See, e.g., U.S. Const. amend. III (forbidding the quartering of troops in civilian homes during peacetime and imposing limits on such quartering during wartime); Padilla v. Rumsfeld, 352 F.3d 695, 714-15 (2d Cir. 2003) (“[T]he Third Amendment’s prohibition on the quartering of troops during times of peace reflected the Framers’ deep-seated beliefs about the sanctity of the home and the need to prevent military intrusion into civilian life.”), cert. granted, 124 S. Ct. 1353 (2004). On this point, Professor Jonathan Turley has written:

The acceptance of... a semi-autonomous [military] system within the larger republic may be the ultimate testament to the military’s reputation of professionalism and political subordination. This degree of tolerance is all the more impressive given the extent that the military system expressly rejects some of the founding principles of the Madisonian system. The tolerance of such a system was all but unthinkable at the formation of our government. The establishment of a military society was a subject of considerable concern among the Framers and almost universally viewed as one of the greatest dangers to liberty.

Jonathan Turley, Trials and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 Geo. Wash. L. Rev. 649, 652 (2003); see also Jonathan Turley, The Military Pocket Republic, 97 Nw. U. L. Rev. 1 (2002) (arguing that the modern shape of the military, both in size and scope and in political influence, is inconsistent with the vision of the drafters of the Constitution as to the role military should play).

276. See, e.g., Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (“The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force
impact that the regulated behavior, if left unchecked, would have on military effectiveness, along with the relative weight of military priorities in assessing whether the costs associated with the military’s chosen corrective are justified.\textsuperscript{277} As a threshold matter, Don’t Ask, Don’t Tell does implicate this concern, for the claim that the military offers in the policy’s defense is that heterosexual American soldiers would be less able to do their jobs if they knew that certain of their peers were gay—a claim that the preamble to the statute goes to great lengths to couch in terms of the special “laws, rules, customs, and traditions” of “military society.”\textsuperscript{278}

Even in the matter of justification and need, however, there are reasons to be somewhat skeptical of the military’s claim for deference where Don’t Ask, Don’t Tell is concerned. First, the policy creates structural impediments to the military’s own ability to assess the net impact of the policy upon “morale, good order and discipline, and unit cohesion”\textsuperscript{279}—its primary rationale. As discussed in the previous Part, the policy silences the very population of people whom it regulates: If operating as intended, the policy makes it impossible for military commanders themselves to know whether there are gay soldiers under their command, and hence what impact the policy’s invasive restrictions are having upon the morale of their units.

That being so, the military must rely upon a broad claim that military effectiveness is so dependent upon the exclusion of openly gay soldiers that any other threats to morale created by the policy itself are categorically outweighed by that central imperative.\textsuperscript{280} While that broad claim might be entitled to some deference (on the theory that it involves specialized knowledge), it is strongly at odds with the experience of the militaries in Great Britain, Israel, Australia, Canada, and twenty other developed nations that have removed their restrictions on gay soldiers and yet recorded no erosion to good order, discipline, or morale.\textsuperscript{281} It is also at odds with the

---

\textsuperscript{277} See, e.g., Chappell v. Wallace, 462 U.S. 296, 305 (1983) (noting that the federal judiciary is “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have”).


\textsuperscript{279} Id. § 654(a)(14).

\textsuperscript{280} See Wolff, supra note 2, at 1164 & n.54 (discussing feelings of isolation that gay and lesbian soldiers feel when deployed overseas and unable to communicate openly with loved ones).

\textsuperscript{281} See, e.g., Aaron Belkin, Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?, PARAMETERS, Summer 2003, at 110–16 (detailing the effect that the lifting of the gay ban had in the militaries of Australia, Canada, Israel, and Britain). Professor Belkin summarizes the report’s findings as follows: “Not a single one of the 104 experts interviewed believed that the Australian, Canadian, Israeli, or British decisions to lift their gay bans undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops.” Id. at 110; see also id. (lifting of the ban in Australia “was ‘an absolute non-event’”); Aaron Belkin & Jason McNichol, Effects of the 1992
increasingly large number of cases in which openly gay soldiers have continued to serve in the U.S. armed forces while judicial challenges to their discharges were pending, once again with no recorded instance of erosion to unit cohesion or effectiveness. And, finally, the morale justification is belied by the military’s consistent practice of reducing the rates of gay discharges (or suspending them entirely) during times of war or armed combat, when “unit cohesion” is most important, only to resume discharges at full tilt once combat operations have ceased and the contributions of gay and lesbian soldiers are no longer immediately vital. The “specialized society” of military life may justify the government in claiming some measure of deference in assessing its own personnel needs, but there are threshold reasons for questioning the reliability, and good faith, of the military’s invocation of this argument where Don’t Ask, Don’t Tell is concerned.

b. Impacts on Constitutional Values

The second consideration, deference in reviewing the impact of a military policy on constitutional values, makes reference to the manner in which the policy is implemented and the context in which it operates. The basic insight here is that one must understand both a policy’s operative effect—the activities that it will mandate or prohibit, the groups that it will impinge upon, and so forth—and the significance of that operative effect in context—that is, how it operates in light of the other limitations that

282. See Meinhold v. United States Dep’t of Def., 34 F.3d 1469, 1473 (9th Cir. 1994) (describing Meinhold’s continued service following disclosure of his homosexuality); Watkins v. United States Army, 875 F.2d 699, 701–04 (9th Cir. 1989) (en banc) (describing Watkins’s long and successful tenure in the U.S. Army as an out gay man before being discharged); SLDN SECOND REPORT, supra note 37, at 21–22 (“An ironic exception to the prevalence of anti-gay harassment in the ranks is found in the more than one dozen units where gay men and lesbians are and have been serving openly for one to fourteen years. In those units, harassment has become almost nonexistent.”); Interview with Keith Meinhold, in Berkeley, Cal. (Aug. 2003) (describing successful service in the U.S. Navy as an out gay man following disclosure); Interview with Zoe Dunning, in San Francisco, Cal. (Aug. 2003) (describing successful service in the U.S. Marine Corps following disclosure of lesbian identity); Rhonda Evans, U.S. Military Policies Concerning Homosexuals: Development, Implementation and Outcomes, at 36–73, at http://www.gaymilitary.ucsb.edu/Publications/evans1.htm (Nov. 2001) (detailing the continued success of gay and lesbian servicemembers and their units while challenges to discharge proceedings remain pending) (on file with the Iowa Law Review).

283. See Evans, supra note 282, at 22–26 (describing the inverse relationship between gay discharge rates and manpower needs during times of war or military crisis).
characterize a servicemember's environment. If a policy imposes restrictions that would stand out as highly intrusive in civilian life, but that merely constitute one part of a larger web of limitations on behavior in military life, that fact might be highly relevant to any analysis of the impact on constitutional values attributable to the policy itself. To the extent that a challenged policy operates internally to the military—regulating on-duty activities, or establishing rules for behavior on military property—the argument is stronger that an assessment of the policy's impact on constitutional values requires proprietary knowledge of the exigencies of combat or the working conditions that attend the "specialized society" of military life. In Goldman v. Weinberger, the Court upheld a dress regulation that prevented Captain Simcha Goldman from wearing a yarmulke while on duty at an Air Force base. Since the regulation applied only to the physical spaces of the military work environment itself (Goldman was not prevented from wearing his yarmulke in civilian life), the military could argue that the regulation's effect upon individual autonomy had to be considered against the backdrop of the other homogenizing regulations that characterize a military workplace. Similar arguments have obtained in most of the military cases in which the Court has applied an explicitly deferential mode of constitutional analysis.

In cases involving military policies with effects in the civilian world, in contrast, the Court has seen much less need to defer to the judgment of the military concerning the policy's impact on constitutional values. While the Court has not been entirely consistent in its approach to such cases, a distinction between civilian and military impacts does appear to have guided its analysis. In this connection, consider three opinions that are included in every constitutional law casebook, each growing out of a military policy that posed some threat to constitutional values in the civilian context: Frontiero v. Richardson, United States v. O'Brien, and Rostker v. Goldberg.

284. Parker v. Levy, 417 U.S. 738, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history.").


286. See id. at 507-08 (discussing the effect of uniform requirements and other regulations that pervasively restrict opportunities for individual expression within a military environment).


288. 411 U.S. 677 (1973) (plurality opinion).


Frontiero involved a statute requiring the husbands of female servicemembers to prove actual financial dependence in order to claim entitlement to spousal-employment benefits, but permitting the wives of male servicemembers to enjoy those benefits without any special showing. The provision was clearly “military” in nature—it related only to the benefits available to servicemembers and their spouses. But the statute did not regulate any feature of the servicemembers’ official duties; rather, it concerned monetary payments and access to medical and other services that were analogous to the employment benefits enjoyed by ordinary civilians.291

There was thus no particular reason to think that assessing the harm to constitutional values that the policy imposed—applying a different standard to men and to women in awarding prosaic employment benefits and making stereotyped assumptions about the relative abilities of men and women to be primary breadwinners—required any special expertise to assess,292 and the Court struck the statute down on a vote of eight to one with no mention in any of the opinions about a need for deference to military expertise.

U.S. v. O'Brien follows a similar pattern. O'Brien, the draft-card burning case, established the doctrine of “symbolic speech” under the First Amendment. David Paul O'Brien, a civilian, was prosecuted for burning his draft card as a protest to the Vietnam War, and he challenged the statute under which that action was made criminal, arguing that the statute had been passed for the purpose of stifling protest. While rejecting O'Brien's argument on the facts, the Court recognized in principle that “symbolic speech” enjoys protected status under the First Amendment, and it articulated a test for the protection of expressive conduct that has become the governing standard.293 Once again, the provision in question was clearly

291. In fact, the purpose of the military-benefits scheme, as the Court described it, was to provide “fringe benefits to members of the uniformed services on a competitive basis with business and industry.” Frontiero, 411 U.S. at 679–80.

292. One might argue that availability of on-base housing, which was one of the benefits at issue in the case, constituted an exception to this assertion. See id. at 680. Had the military claimed, for example, that the presence of female servicemembers with dependent husbands on military bases would threaten the manhood of male soldiers and harm their morale and unit cohesion, it might have had a stronger claim for “deference” in assessing both the justification for the policy and the harm to constitutional values in context. (If this sounds like a fanciful argument, recall the justification for the Don't Ask, Don't Tell policy itself.) The military does not appear to have taken this position, however, and no member of the Court gave the on-base housing issue any special attention.

293. The Court stated:

[We] think it clear that a government regulation [prohibiting expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.
“military” in nature—it was part of the statutory scheme governing forcible conscription. But the impact on constitutional values that O’Brien brought before the Court concerned speech and protest in the public sphere, and there is no hint in the Court’s opinion that it would be appropriate to defer to the military in assessing the burden that restricting O’Brien’s expressive conduct placed on First Amendment values.

The Court employed the same mode of analysis in another case two years later, finding that the First Amendment prohibited the military from punishing a civilian actor for wearing a military uniform in a dramatic production that was critical of the Vietnam War. Once again, the regulation in question was “military” (prohibiting the misuse of official uniforms), but the harm to public speech values occurred within the civilian world, and the Court unanimously agreed that the First Amendment prohibited this military intrusion into public discourse with no mention of any need for deference.

Rostker v. Goldberg, in which the Court offered one of its strongest statements of military deference, does undermine the operative force of this distinction somewhat, though only in a limited fashion. Rostker involved a challenge to Congress’s policy of registering men, but not women, for the selective service. In rejecting an equal protection challenge to this sex-based classification, the Court explicitly considered the civilian context in which the classification operated—that is, the use of segregated administrative procedures for men and women before they were inducted into the military—and found that the doctrine of “military deference” still operated to shield the policy from constitutional challenge. More precisely, the majority explicitly rejected the assertion that an identifiable harm to constitutional values in the civilian world rendered the doctrine of military deference wholly inapplicable. Even in Rostker, however, the broad

294. See id. at 370 (describing statutes under which O’Brien was prosecuted, which was “part of the Universal Military Training and Service Act of 1948”).

295. The only reference to Congress’s special role on military matters in O’Brien concerns the ability of Congress to institute a draft and the apparatus necessary to sustain it. See id. at 377 (“The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.”); id. at 377-79 (confirming the authority of Congress to maintain selective service). The Court’s extended discussion of this issue (now uncontroversial) appears to have been provoked by Justice Douglas, who wrote in dissent that the power of Congress to maintain a draft in the absence of a formal declaration of war was in doubt and hence should have been a particular focus of the Court’s attention. See id. at 389-91 (Douglas, J., dissenting); see also Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (stating that Congress must formally declare war before the U.S. can engage in non-defensive hostilities).


297. See id. at 62-63, 65 (Harlan, J., concurring) (agreeing with the majority’s First Amendment analysis); id. at 69 (White, J., concurring in the result) (same).

deference that the Court afforded to Congress centered on the justification and need for the challenged provision, not its impact upon constitutional norms. On the latter issue, the Rostker Court retained for itself the prerogative of measuring the normative significance of the challenged sex classification and its impact on the civilian population, and it refused the invitation to adopt a lower level of scrutiny for such claims as a formal matter. The Court then went on to conduct a thorough analysis of the legislative justifications for the policy (with deference to the legislative findings underlying them) and it assessed the policy’s harm to constitutional values in light of those justifications. Thus, even Rostker—the most robust statement of the Court’s deference doctrine—retains an active role for the judiciary in assessing the harms that result when the military reaches out to impose constitutionally disfavored regulations in civilian settings.

Consider Don’t Ask, Don’t Tell in light of these familiar precedents. The policy’s impact upon public speech values does not derive exclusively, or even primarily, from its regulation of behavior within the military itself. Rather, the greatest part of that impact flows from the restrictions that the policy imposes upon the speech of gay servicemembers in their communication with government officials, advocacy groups, and others in civilian society—the subject of Part II.A, above. While gay servicemembers are “special” in that their distinctive identities empower them to contribute a unique and important voice to public discourse, no “specialized knowledge” is required to appreciate the harm to public discourse that results from silencing these soldiers in civilian life. As in Rostker, the military’s justifications for this feature of the policy might make some claim to

---

Appellees also stress that this case involves civilians, not the military, and that the impact of registration on the military is only indirect and attenuated. We find these efforts to divorce registration from the military and national defense context, with all the deference called for in that context, singularly unpersuasive. Registration is not an end in itself in the civilian world but rather the first step in the induction process into the military one, and Congress specifically linked its consideration of registration to induction.

Id. (citations omitted).

299. See id. at 68–69. The Court indicated that deference is required when military need is an issue.

Congressional judgments concerning registration and the draft are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well. Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization.

Id. (citations omitted).

300. See id. at 69–72; id. at 70 (reasserting “constitutional responsibility” to assess the military policy’s harm to constitutional values).

301. See id. at 72–83.
specialized knowledge (as I discuss below), but its effects are a matter of common understanding.

As to the questions of accountability that I explore in Part II.B, the argument for deference in assessing the policy’s impact on constitutional values is somewhat stronger. While the basic hostility that the First Amendment exhibits toward the suppression of information about governmental policies would seem to transcend any boundaries between military and civilian life, the military might take the position that systems of accountability—mechanisms for bringing complaints, systems of internal review, and so forth—operate in a fundamentally different fashion in the military. The impact of Don’t Ask, Don’t Tell upon the value of political accountability, this argument might go, is less remarkable than might first appear when viewed in the context of the military’s distinctive reporting structures. A fair argument can be made that assessing the merits of this assertion would require some specialized knowledge of military culture. To my knowledge, however, the military has never made such an argument in defense of the policy. What is more, the substance of any such argument would be undermined by the recent report of the Inspector General of the Defense Department, discussed earlier, which identifies Don’t Ask, Don’t Tell as embodying singular problems of accountability and reporting even within the military context.\footnote{See supra text accompanying notes 206–16.}

c. Levels of Constitutional Protection

Finally, the concept of military deference includes the assertion that members of the military enjoy lesser protection for their individual rights than do civilians. This is not, strictly speaking, a matter of “deference” in the narrow sense of that term—that is, judicial reticence in reviewing the factual premises underlying a military policy due to lack of expertise.\footnote{The Court does sometimes characterize this issue as one of “ deference” to Congress’s determination as to the rights that a servicemember should enjoy. See, e.g., Middendorf v. Henry, 425 U.S. 25, 43 (1976) (explaining that servicemembers enjoy less robust due process protection in a court-martial proceeding than a civilian would in criminal prosecution, and that the Court “defers” to Congress’s determination as to appropriate protections). Having distinguished the issue of justification or need from the issue of levels of individual protection, however, it seems more appropriate to characterize the broad ability of Congress to confer lesser protection on soldiers as a threshold issue of constitutional policy rather than deference to any particular form of expertise.} Rather, this element of deference embodies a broader proposition: that the paradigm of rights enforcement—an individual asserting her own prerogatives and seeking judicial assistance in establishing the primacy of those prerogatives over state policies—is structurally inconsistent with military life, where individuality must be subordinated to secure the benefits of a cohesive
group in which soldiers are willing to sacrifice their lives to accomplish a larger mission.\textsuperscript{304}

There are established limits even to this feature of military deference. Most notably, in the case of the First Amendment, the Supreme Court has consistently held that the military must restrict speech in a "neutral" and "even-handed" manner if it wishes those restrictions to be understood as a proper step toward the creation of a cohesive military unit.\textsuperscript{305} Don't Ask, Don't Tell obviously fails to satisfy that requirement of neutrality. More broadly, limitations on personal autonomy in the military are largely inapposite to a review of the policy's impact upon public speech values. The subjective experience of individual servicemembers, while of unquestioned importance, does not form the basis of my analysis here. My focus is the public interest in preserving the political legitimacy and effectiveness of government policies. That interest is not limited by the individual prerogatives of the speaker asserting a constitutional claim. As the Court said in \textit{First National Bank of Boston v. Bellotti}, a case involving attempts by a state to place restrictions on the expressive activities of artificial entities (like corporations) during a referendum campaign:

The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge. The Court has declared, however, that speech concerning public affairs is more than self-expression; it is the essence of self-government. And self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources.\textsuperscript{306}

A restriction on "open and informed discussion" does not cause "self-government" to "suffer[]" any less when it is effectuated through a military policy. Indeed, there is reason to think that a military regulation of speech in a civilian setting is made more troubling by that provenance, not less.\textsuperscript{307}

\textsuperscript{304} See, e.g., Goldman v. Weinberger, 475 U.S. 348, 508 (1986) (discussing the importance of "eliminating outward individual distinctions" in the military environment); Chapman v. Wallace, 462 U.S. 296 (1983) (refusing to recognize a \textit{Bivens} remedy for individual constitutional violations in the special context of the military).

\textsuperscript{305} See, e.g., Goldman, 475 U.S. at 513 (Stevens, J., concurring) (explaining that speech restriction in the military can only be upheld when "based on a neutral, completely objective standard"); Brown v. Glines, 444 U.S. 348, 358 n.15 (1980) ("Commanders sometimes may apply [such] regulations irrationally, invidiously, or arbitrarily, thus giving rise to legitimate claims under the First Amendment.") (internal quotation omitted); Greer v. Spock, 424 U.S. 828, 838 (1976) (requiring that regulations restricting political demonstrations on military property be "objectively and evenhandedly applied").


\textsuperscript{307} See Thomasson v. Perry, 80 F.3d 915, 949 (4th Cir. 1996) (en banc) (Hall, J., dissenting).
The component of military deference that rests on the reduced autonomy interests of active-duty soldiers is simply inapposite here.

Military deference is, in short, a mixed bag for Don’t Ask, Don’t Tell. Those features of the doctrine that involve claims of military justification and necessity present the strongest case for judicial reticence. But there are both structural and empirical reasons to doubt the adequacy (and good faith) of the military’s invocation of “unit cohesion” as a justification for the policy, even if one accepts the general proposition that the military has a superior ability to assess its own internal dynamics. And those features of military deference that involve an assessment of a policy’s impact on constitutional values—and the content and scope of those values themselves—have little application to the broad effects that the policy’s speech restrictions impose upon political and cultural discourse in civilian life.

Thus, despite the heavy reliance that the courts of appeals have placed upon the shield of military deference, the doctrine does not offer anything like a complete answer to the constitutional problems associated with Don’t Ask, Don’t Tell. And even the partial answer that deference offers is equivocal, at best, when viewed against the growing body of evidence from foreign militaries, which have lifted their gay bans and yet experienced no recorded problem of morale or cohesion. Given the extraordinary burdens on public speech values that the policy imposes, it is not an exaggeration to say that the casual invocation of military deference to avoid all meaningful First Amendment analysis of the policy amounts to the type of judicial nonfeasance that the Supreme Court has disclaimed in even its most aggressively deferential moments.  

B. THE PROMISE OF LAWRENCE

What is the likelihood that the federal courts can be shaken from this “abdication of [their] ultimate responsibility to decide constitutional questions” and induced to perform a serious assessment of the profound harms to public speech values that Don’t Ask, Don’t Tell imposes? The answer to that question changed dramatically on June 26, 2003, when the Supreme Court issued its decision in Lawrence v. Texas. If the Court does not turn aside from the path it has mapped, the case may play a role similar to that of Brown v. Board of Education in transforming the manner in which the claims of a previously disfavored group of litigants will be heard and assessed on a broad array of claims in American courtrooms. Precisely what impact Lawrence will have upon the shape of substantive due process

309. Rostker, 453 U.S. at 89.
doctrine remains to be determined, as the Court was, in the words of one commentator, "magisterial but vague" in describing the liberty interest that it was vindicating. But the opinion's intended impact upon the claims of gay litigants, across doctrinal categories, is clear. The promise of Lawrence is to root out and abolish the judicial mindset of casual neglect toward the humanity of gay citizens that has made possible the impoverished analysis characteristic of constitutional challenges to Don't Ask, Don't Tell and its predecessors.

The parallels between Brown and Lawrence exist partly on the level of analytical methodology. In both cases, the Court made a conscious break from a mode of interpretation under which traditional social mores had created presumptive limitations on the quality and the scope of the individual rights that the Constitution was understood to protect. Where Plessy v. Ferguson had upheld racial segregation as an appropriate expression of "the established usages, customs, and traditions of the people," the Brown Court refused to "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written," in addressing the question of school segregation before it. Instead, the Court defined its task as discerning the principles that underlie the Amendment's broad statement of equality and asking how those principles operated to constrain, rather than confirm, the State's enforcement of accepted social orderings.

In a similar fashion, the Lawrence majority identified and rejected its earlier conclusion in Bowers that the historical condemnation of same-sex sexuality in most Western societies offered a sufficient answer to the claims of gay men and lesbians for liberty in their intimate lives. Where Bowers asserted that "[p]roscriptions against [same-sex sexuality] have ancient roots" and invoked the Due Process Clause to confirm that historical hierarchy of status, Lawrence rejected that formulation and asked instead how the Liberty Clause might serve to constrain the State's enforcement of

312. Pamela S. Karlan, Loving Lawrence, 102 MICH. L. REV. (forthcoming 2004) (manuscript at 5, on file with author); see also Robert C. Post, Forward: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 HARV. L. REV. 4, 11 (2003) (arguing that "Lawrence is best interpreted as an opening bid in a conversation between the Court and the American public" as to what place gay people should have in civil society).


315. See Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 COLUM. L. REV. 973, 976 (2002) ("Custom and usage were a sufficient response to a constitutional challenge under the dispensation to which the Plessy majority subscribed. One of the revolutionary changes wrought by Brown was a deliberate rejection of this interpretive method."); id. ("In concluding that legally enforced segregation in educational facilities is inherently unequal, the Brown Court dramatically rejected custom and tradition, holding that the Fourteenth Amendment embodied substantive principles that do not automatically defer to established social norms.") (internal quotations omitted).

Implementing a shift in constitutional methodology that it had foreshadowed in Romer v. Evans, and apparently rejecting the pervasive “gay exception” to the Constitution that commentators have often complained of, the Lawrence Court definitively brought the claims of gay men and lesbians into the post-Brown dispensation. In the process, the Court significantly eroded the distinction between the forward-looking and traditional mores.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

Lawrence, 123 S. Ct. at 2480 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). See also id. (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)) (Kennedy, J., concurring).

In an early essay on Romer, I pointed out the majority’s quiet suggestions that a reaffirmation of the methodological principles of Brown might be necessary in a future case involving gay men and lesbians.

The majority’s judgment [in Romer] that Amendment 2 is a “denial of equal protection . . . in the most literal sense,” and hence not amendable to the type of balancing normally required by the Equal Protection Clause, echoes its holding in Brown that “[s]eparate educational facilities are inherently unequal.” Likewise, the Romer majority’s admonition that “[i]t is not within our constitutional tradition to enact laws of this sort” is powerfully evocative of the Court’s judgment in Bolling v. Sharpe, the companion case to Brown, that “[c]lassifications based solely upon race . . . are contrary to our traditions and hence constitutionally suspect.” The Romer majority clearly invites the comparison with Brown and Bolling: It opens its opinion with Justice Harlan’s ringing dissent in Plessy v. Ferguson, the case that Brown rejected, and conspicuously cites to Sweatt v. Painter, one of Brown’s progenitors, for a proposition of law that originated, not in Sweatt, but in Shelley v. Kraemer.

See Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. Pol’y 107, 162 (1996) (“Anyone who has ever represented lesbian and gay parents knows that there is always a gay exception to family law rules.”); Evan Wolfson, The Freedom to Marry: Our Struggle for the Map of the Country, 16 Queer L.Q., Spring & Summer 1996, at 209 (“[A]s many of us know, there is a gay exception to virtually every constitutional proposition as well as every common sense proposition one can think of . . . .”).
backward-looking roles that Professor Cass Sunstein has ascribed to the Equal Protection and Due Process Clauses in his much-noted essay seeking to make sense of the result in *Bowers.*\(^{321}\)

Even more significant is the breathtaking shift in tone that *Lawrence* introduced in its review of the claims before it—a shift that also recapitulates *Brown* in important ways. Legal rights, even in their most high-minded and abstract formulation, always depend upon the assessment of facts for their vitality and substance. No litigant can hope to benefit from a legal entitlement unless she can explain in a convincing fashion why her circumstances entitle her to the relief she seeks under the rules defining her entitlements and obligations. It is for this reason that the most basic tenet of the Due Process Clause requires that a litigant enjoy the "opportunity to be heard" before the State can deprive her of liberty or property.\(^{322}\) "Due process of law" describes a deeply embedded requirement that the State recognize the humanity of individual litigants and exhibit a capacity to hear and understand the experience of those litigants in adjudicating their claims for relief.\(^{323}\)

As the military cases demonstrate, one of the principal mechanisms that a court employs when it relegates a disfavored group to a subordinate legal status is to deprive the group's speech of power and render its claims unhearable. This type of silencing may derive from an explicit power relation between favored and disfavored individuals, as Professor Langton has explained in describing the effects of a master-slave relationship upon the speech of enslaved individuals.\(^{324}\) Or it may operate in a less overt

---

321. Sunstein offers the following summary of his conclusions at the start of the essay:

The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks.


322. Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard.") (citation omitted).


324. Langton discusses the limited range of speech acts that a slave is capable of performing as a result of his enslaved status, describing this form of subordination as "illocutionary disablement."

The master can order the slave or advise him. The master can grant or deny the slave permission to act in certain ways. The slave cannot grant or deny his master permission. He cannot order the master, though he may entreat him. The asymmetry of the power balance is reflected in the asymmetry of their abilities to perform certain illocutionary acts. Attempts by the slave to order or forbid will
fashion, as an implicit but widely understood prerogative on the part of
courts to give little or no serious attention to the life experiences of a
disfavored group of litigants, blinding themselves to the possibility that
established legal doctrines might warrant judicial intervention. In this
respect, *Bowers* was reminiscent of *Plessy v. Ferguson*, not just in the analytical
methodology that it employed, but also in its tone of disregard for the
experience of the litigants before it. In one of its most famous statements,
the *Plessy* Court went out of its way to cabin the legal significance of the
dignitary harms suffered by Black citizens under segregation, pronouncing
that “[i]f the enforced separation of the two races stamps the colored race
with a badge of inferiority . . . , it is not by reason of anything found in the
act, but solely because the colored race chooses to put that construction
upon it.”325 The *Plessy* Court literally defined the experience of Black citizens
under segregation as irrelevant to its analysis, giving its sanction to a period
of aggressive judicial indifference toward the citizenship status of Black
Americans. The *Brown* Court, in turn, offered the experience of the
segregated children themselves as the principal reason for its rejection of
separate but equal, precisely in order to extirpate this consequence of *Plessy*
from the landscape of American law326 and signal to lower courts and
political actors in a definitive manner that such disregard of Black citizens
would no longer be tolerated in any juridical category.327

always be unhappy in Austin's sense. Such acts are unspeakable for the slave.
Something has silenced his speech. Not in the sense of rendering his spoken words
inaudible or written marks illegible, but in the sense of depriving those sounds and
marks of illocutionary force: of preventing those utterances from counting as the
actions they were intended to be.

Langton, *supra* note 95, at 315-16.

325. 163 U.S. 537, 551 (1896).

326. The *Brown* Court reproduced and embraced the following passage from the Kansas
trial court in resolving the question it framed.

Segregation of white and colored children in public schools has a detrimental
effect upon the colored children. The impact is greater when it has the sanction of
the law; for the policy of separating the races is usually interpreted as denoting the
inferiority of the negro group. A sense of inferiority affects the motivation of a
child to learn. Segregation with the sanction of law, therefore, has a tendency to
(retard) the educational and mental development of Negro children and to
deprive them of some of the benefits they would receive in a racial(ly) integrated
school system.

the Court makes clear, it is this passage that constitutes the opinion's most direct rejection of
the substantive foundations of *Plessy*. See id. at 494-95 ("Whatever may have been the extent of
psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by
modern authority. Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected.").

327. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on
(describing judicial implementation of *Brown* in a broad array of legal contexts). This
"signaling" feature of *Brown* reached its apotheosis in *Cooper v. Aaron*, 358 U.S. 1 (1958). In
**POLITICAL REPRESENTATION AND ACCOUNTABILITY**

*Bowers* played a role similar to that of *Plessy* in defining the subordinate legal status of the litigants before it. The *Bowers* Court refused even to consider the impact that criminalizing sexual intimacy would have upon Michael Hardwick's ability to lead a satisfying life, famously dismissing his claims for equal dignity and privacy as, "at best, facetious."328 *Bowers* thus licensed other courts to blind themselves to the human experience of the gay litigants who came before them—an invitation that many accepted with enthusiasm, including those asked to assess the constitutionality of the military policy.329 This broad license resulted in the relegation of gay and lesbian litigants to a formally subordinate status in their ability to prosecute claims of right.330 As Judge Stephen Reinhardt noted in dissent in *Holmes*, the decisions of the Fourth, Eighth, and Ninth Circuit Courts of Appeals in their review of *Don't Ask, Don't Tell* are the inheritors of this tradition of willful blindness.331 The passages quoted at the beginning of this Part

---

328. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), overruled by *Lawrence v. Texas*, 106 S. Ct. 2445 (2003); see *Sedgwick*, supra note 246, at 7; *Thomas*, supra note 6, at 1431-60 (describing the manner in which *Bowers* and sodomy statutes licensed acts of private and judicial violence, respectively, against gay men and lesbians).

329. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 685-92 (D.C. Cir. 1994) (en banc) (offering a clinical assessment of inferences of "conduct" to be drawn from a statement of "status" and relying on *Bowers* as sufficient authority to support categorical exclusion of gay people from civic institutions); see also, e.g., *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (relying on *Bowers* and affirming the authority of state officials to fire an attorney because she is a lesbian and contemptuously rejecting the suggestion that a "purported 'marriage'" to another woman is entitled to any associational protection); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (relying on *Bowers* and rejecting constitutional claims of an "avowed homosexual, a lesbian" who was discharged from the military, even while acknowledging that "prejudice" may partially account for the military policy); *Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998) (relying on *Bowers* for the proposition that a lesbian mother in a committed relationship is a presumptive felon and hence that her ex-husband can keep her daughter from being exposed to that relationship). For a detailed sociological analysis of the impact of sodomy laws on individual identity formation in South Africa, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001).

330. Professor Karlan makes this point in her discussion of *Lawrence*.

The real problems with prohibitions on same-sex intimacy... come from the collateral consequences of such laws: the way in which they undergird "discrimination both in the public and in the private spheres" and tell gay people that their choices about how to live their lives are unworthy of respect.

Karlan, supra note 312, at 9 (quoting *Lawrence*, 123 S. Ct. at 2482).

331. See *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1137 (9th Cir. 1997) (discussing *Bowers* as playing a role similar to that of *Plessy* in defining the status of disfavored litigants and chastising the majority for permitting the spirit of *Bowers* to infect Speech Clause analysis).
embody the refusal of those courts to acknowledge and engage with the
policy's manifest impact upon the speech activities of gay soldiers and the
civilian communities with which they interact.

As in Brown before it, the majority in Lawrence understood the far-reaching consequences of its earlier decision in excluding the lived experience of a vast group of citizens from the realm of legal significance,\(^{332}\) and it set about the task of undoing the damage with forensic meticulousness,\(^{333}\) repeatedly insisting upon the equal dignity of gay men
and lesbians—in their persons and in their relationships—as the basis for
this extirpation of Bowers from the legal landscape.\(^{334}\) The effects of this

---

\(^{332}\) Justice O'Connor, though not joining the majority in overruling Bowers, also
recognized the impact of sodomy statutes in criminalizing gay men and lesbians and made the eradication of that mode of subordination an explicit component of her equal protection
decision.

And the effect of Texas' sodomy law is not just limited to the threat of prosecution
or consequence of conviction. Texas' sodomy law brands all homosexuals as
criminals, thereby making it more difficult for homosexuals to be treated in the
same manner as everyone else. Indeed, Texas itself has previously acknowledged
the collateral effects of the law, stipulating in a prior challenge to this action that
the law "legally sanctions discrimination against [homosexuals] in a variety of ways
unrelated to the criminal law," including in the areas of "employment, family
issues, and housing."

citations omitted) (alterations in original).

\(^{333}\) The opinion for the Court identifies and dismantles each component of Bowers with
which it finds fault: Bowers's misframing of the privacy issue presented by the regulation of
intimate sexual relationships, Lawrence, 123 S. Ct. at 2478; its reliance upon an historical record
that the Lawrence majority finds equivocal, id. at 2478-79; and its failure to acknowledge the
"emerging recognition," clear even in 1986, that sexual privacy constitutes an aspect of
protected liberty, id. at 2480.

\(^{334}\) The Court first criticizes Bowers's framing of the issue before it as one concerning a
right of homosexual sodomy:

That statement, we now conclude, discloses the Court's own failure to appreciate
the extent of the liberty at stake. To say that the issue in Bowers was simply the right
to engage in certain sexual conduct demeans the claim the individual put for
ward, just as it would demean a married couple were it to be said marriage is simply
about the right to have sexual intercourse.

Id. at 2478. It then acknowledges the impact that Bowers has had upon the status of gay men and
lesbians in civil society:

When homosexual conduct is made criminal by the law of the State, that
declaration in and of itself is an invitation to subject homosexual persons to
discrimination both in the public and in the private spheres. The central holding
of Bowers has been brought in question by this case, and it should be addressed. Its
continuance as precedent demeans the lives of homosexual persons.

Id. at 2482. The Court acknowledges and affirms the role that sexuality plays in the lives of gay
people. Id. at 2484 ("The petitioners are entitled to respect for their private lives. The State
cannot demean their existence or control their destiny by making their private sexual conduct a
crime."). Lest any doubt remain, the completeness of the extirpation is made manifest in a final
repudiation promise to extend far beyond the constitutional doctrines of privacy to effect a fundamental shift in the reception that gay men and lesbians will receive when they invoke the benefits of well-established legal doctrines.\footnote{See Karlan, supra note 312, at 13 (“The real question in Lawrence was whether gay people should be included in the idea of ‘everyone.’”).}

In fact, despite the hostility of some commentators to the doctrinal decision to locate privacy rights in the Due Process Clause, there is a sense in which \textit{Lawrence} is a “due process” opinion in the most traditional sense of that term. In proclaiming the equal dignity and humanity of gay people and gay relationships, the Court has, for the first time, offered gay and lesbian litigants a meaningful “opportunity to be heard” in pressing their claims for relief. If the promise of \textit{Lawrence} is fulfilled, then the life experiences of gay litigants now stand on an equal footing in American courts.

\section*{Conclusion}

Near the beginning of this Article, I disclaimed any intent to argue that a proper constitutional analysis of Don’t Ask, Don’t Tell would necessarily result in the policy’s invalidation.\footnote{See supra text accompanying note 69.} At this point, that qualification may sound somewhat hollow. While a decision about the constitutionality of Don’t Ask, Don’t Tell must ultimately involve the resolution of deep issues of constitutional policy that are not subject to mechanical legal calculation, one thing is clear: If the First Amendment does not require the invalidation of this policy as it is currently structured and enforced, then there is no First Amendment in the U.S. military. Don’t Ask, Don’t Tell is deeply offensive to both the public interests in political representation and accountability that I have explored in this Article and the private interests in autonomy and freedom of mind that I have examined in earlier work.\footnote{See generally Wolff, supra note 2.} Together, these impacts exhaust the range of values over which the First Amendment has been assigned as guardian.

Judge Kenneth Hall, dissenting in the Fourth Circuit’s opinion in \textit{Thomasson v. Perry}, spoke directly about one of the primary issues of constitutional policy that Don’t Ask, Don’t Tell implicates: the relationship between the military and the Constitution in our democratic state. Judge Hall wrote:

\begin{quote}
[T]hough raising the armies and commanding them are the exclusive tasks of the Congress and President, we have a role—a vital one—in ensuring that the military remains submissive to the Constitution and civil authority. We have now had a large standing
\end{quote}
army for half a century, and the Republic has endured. In the annals of history, our experience must be counted as the exception rather than the rule, and I am convinced that the presence of a strong and independent judiciary, upon which the people may rely to guard individual rights, deserves much of the credit for this good fortune. Freedom is not inherited; it is earned through eternal vigilance. The military is a sentinel in its way, and we in ours.\footnote{Thomasson v. Perry, 80 F.3d 915, 949 (4th Cir. 1996) (en banc) (Hall, J., dissenting).}

Before Romer and Lawrence, it was possible to argue that gay men and lesbians could not claim a legitimate place in civil society, and hence that judicial authorization of the systematic abuse of gay and lesbian soldiers was a singular phenomenon with no larger implications for our constitutional traditions. That argument—never correct as a matter of theory or practice—can no longer be sustained as a matter of constitutional policy or doctrine, either. To authorize Don’t Ask, Don’t Tell is to relinquish utterly the role of the First Amendment in ensuring that the military will remain subordinate to the Constitution and the civil authorities. If I have succeeded in making that fact obvious during the course of this Article, then I will consider my task complete.