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Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context

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SEXUAL IDENTITY AS PERSONHOOD:
TOWARDS AN EXPRESSIVE LIBERTY IN THE
MILITARY CONTEXT

DANIEL RYAN KOSLOSKY*

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Human beings are compelled to live within a lie, but they can be compelled to do so only because they are in fact capable of living in this way. Therefore not only does the system alienate humanity, but at the same time alienated humanity supports this system as its own involuntary master-plan, as a degenerate image of its own degeneration, as a record of people's own failure as individuals.¹

— Vaclav Havel

I. INTRODUCTION

In his celebrated play *Largo Desolato*, Vaclav Havel tells the story of Professor Leopold Nettles.² The Professor is a reluctant revolutionary, a sort of dissident living a hollow existence of fear within the cogs of a totalitarian regime. His work, indeed his identity, conflicts with his surroundings so that normal human interactions become forced and awkward; his paranoia-go-obsession with what may happen spirals him into intellectual and personal stagnation. The political oppression in Havel's Czechoslovakia and that of modern gays and lesbians draws a unique parallel: they both require assimilation to the normative expectations of a higher authority. The Eastern European proletariat was forced to capitulate to the will of a government who ostensibly acted on his behalf. Similarly, American gays and lesbians have long been forced to conceal their identities by altering their expressive behaviors. That is, to communicate to the world, by their demeanor, speech, and associations that they too were heterosexual. They, in a word, "passed."³

In no context is "passing" more omnipresent than in the military. The military's long blanket prohibition on homosexual identity has forced gay and lesbian soldiers to remain silent with regard to their sexual orientation.⁴ Forced silence regarding one's sexuality, however, is effectively a proscription of personhood. The formation of identity, sexual or otherwise, is inherently a communicative process, the prohibition of which attacks the very essence of one's sense of personhood. Like Professor Leopold Nettles, gay

1. VACLAV HAVEL, *THE POWER OF THE POWERLESS* (1978), reprinted in VACLAV HAVEL, *OPEN LETTERS* 144-45 (Paul Wilson ed. & trans., Vintage Books 1992).

2. VACLAV HAVEL, *LARGO DESOLATO passim* (Tom Stoppard trans., Grove Press 1987).

3. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUT CIVIL RIGHTS* 69-70 (2006) [hereinafter YOSHINO]; Kenji Yoshino, *Covering*, 111 *Yale L.J.* 769, 772, 813 (2002); 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, 500 (1998).

4. See discussion *infra* Part II.C.1 (discussing the military's prohibition on homosexuals from serving openly in the military).

and lesbian service members are relegated to an existence of paranoia; an omnipresent fear of what may happen.⁵

Prior to 2003, the Supreme Court of the United States permitted the criminalization of homosexual intercourse.⁶ However, in the seminal case of *Lawrence v. Texas*,⁷ the Court reversed itself by holding that Americans could not be prosecuted for same-sex intimacy.⁸ There has been considerable debate regarding the reach and applicability of *Lawrence*, including whether the military's policy regarding homosexual service members is constitutional.⁹

Yet before any definite conclusion is reached regarding Don't Ask, Don't Tell, *Lawrence* must be unpacked in light of the nature of the group it is meant to protect. Thus, the nature and the development of homosexual identity must be examined to ascertain the core of the Supreme Court's decriminalization of sodomy. Because the formation of identity occurs in a social context, and is thus communicative, *Lawrence* implicates the First Amendment by the nature of the identity it seeks to protect. This article seeks to demonstrate that the prohibition on disclosing one's sexual identity while in the military violates the First Amendment.

Much of the post-*Lawrence* debate has concentrated on the level of judicial scrutiny afforded to gays and lesbians.¹⁰ As discussed later, this paradigm has been observed in post-*Lawrence* challenges to Don't Ask, Don't Tell.¹¹ The standard of review fixation created by the majority's

5. See Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1143-44 (1997) (describing the burdens of making false affirmations regarding one's sexual identity).

6. See generally *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia criminal statute forbidding sodomy); EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS 6* (1999) (noting that gays and lesbians were not afforded "affirmative constitutional protection against discrimination" under the equal protection jurisprudence of the federal courts); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1020-47 (2005) (discussing the rhetoric and jurisprudence of "disgust" and "contagion" in gay rights litigation).

7. 539 U.S. 558 (2003).

8. *Lawrence*, 539 U.S. at 578-79.

9. See *infra* note 192 (noting various studies analyzing the implications of *Lawrence*).

10. See, e.g., *Lofton v. Sec'y of the Dept. of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) (en banc) (upholding the Florida prohibition on homosexuals adopting children); *Williams v. King*, 420 F. Supp. 2d 1224, 1238-39 (N.D. Ala. 2006) (upholding an Alabama criminal statute prohibiting possession of certain sexual paraphernalia); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305-07 (M.D. Fla. 2005) (finding that homosexuals do not constitute a suspect or quasi-suspect class in upholding the Defense of Marriage Act and a Florida statute recognizing only heterosexual marriages entered into in Florida or elsewhere); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (finding that homosexuals do not constitute a suspect or quasi-suspect class in a Tenth Amendment claim against the Defense of Marriage Act).

11. See, e.g., *Witt v. U.S. Dep't of Air Force*, 444 F. Supp. 2d 1138, 1144 (W.D. Wash. 2006) (concluding that "*Lawrence* is based on rational basis review"); *Cook v. Rumsfeld*, 429 F.

articulation and application of due process, and especially Justice O'Connor's concurring opinion, does not adequately address the case's true holding.¹² In fact, the rationale of Justice Kennedy's majority opinion has deeper implications than the strict confines of the Equal Protection and Due Process Clauses. Yet for potential plaintiffs seeking to aggrieve a wrong based on their sexual orientation, arguing for heightened equal protection scrutiny is an uphill battle, particularly since it technically falls under the rubric of a "rational basis" analysis.¹³ Thus, new avenues of litigation must be pursued not only to vindicate plaintiffs who suffer sexual orientation-based discrimination, but also to establish a firm constitutional basis on which to adjudicate and clarify those rights. The First Amendment may provide one such avenue.

This article seeks to demonstrate how a First Amendment framework to gay and lesbian rights is workable in the military context. Part II of this article will outline the Supreme Court's jurisprudence regarding the military and the First Amendment. Traditional notions of judicial deference to military policy will be examined in the context to the right of free speech. Additionally, Don't Ask, Don't Tell will be examined along with its constitutionality as held in the Federal Circuit Courts of Appeal. Part III will attempt to construct gay identity and its expression using the policy sciences framework. Indeed, because both law and sexual identity are inherently communicative in nature, the prohibition on expressing sexuality is tantamount to a compelled affirmation of social expectations of sexuality: heteronormativity. The policy sciences provide a jurisprudential foundation for the construction of a group deprivation, and are particularly suited to understanding gay identity because of their focus on law as communication and group deprivations. Part IV of this article will look at *Lawrence* and its implications on the prohibition of homosexuality in the military. Specifically, the First Amendment implications of the *Lawrence* majority's treatment of identity will be examined. Furthermore, post-*Lawrence* challenges to Don't Ask, Don't Tell will be surveyed. Finally, Part V of the article concludes and explains the implications of a First Amendment approach to Don't Ask, Don't Tell litigation.

Supp. 2d 385, 395 (D. Mass. 2006) (holding that although "the matter is not free from doubt," *Lawrence* did not call for a heightened level of judicial scrutiny); *Loomis v. United States*, 68 Fed. Cl. 503, 519 (Fed. Cl. 2005) (applying rational basis review in light of *Lawrence*); *United States v. Marcum*, 60 M.J. 198, 204-07 (C.A.A.F. 2004) (discussing the applicable standard of review).

12. See discussion *infra* Parts IV.A.1, IV.B (analyzing *Lawrence* and its application to Don't Ask, Don't Tell).

13. See *infra* Part IV.B for a discussion of how courts have applied rational basis scrutiny to challenges to Don't Ask, Don't Tell.

II. THE JURISPRUDENCE OF THE CLOSET: HOMOSEXUALS, THE CONSTITUTION, AND THE MILITARY

Any approach to establishing a liberty in the military must account for two things. A constitutional basis for the liberty must, of course, be ascertained. However, the Supreme Court's jurisprudence with regard to the military must also be considered. Specifically, the federal judiciary has been deferential in their review of military policies and practices even when constitutional rights have been burdened. Any challenge to Don't Ask, Don't Tell must thus account for the judiciary's reluctance to interfere with military policy. The following sections will discuss the judiciary's deference to military policy, analyze the Supreme Court's First Amendment jurisprudence as applied to the military, and provide an outline of the Don't Ask, Don't Tell policy.

A. JUDICIAL DEFERENCE TO MILITARY POLICY

The contemporary jurisprudence of the federal judiciary relating to military matters has been marked by deference to the policies and practices of the armed forces, yet this precedence was not established by the Supreme Court until the later quarter of the twentieth century. For instance, the Court held in *United States ex rel. Toth v. Quarles*¹⁴ that military courts-martial jurisdiction was limited to active members of the armed forces.¹⁵ Justice Black's reasoning was based on separation of powers; extending courts-martial jurisdiction to ex-soldiers for conduct done in a time of war would be an encroachment on the jurisdiction of federal courts granted under Article III of the Constitution.¹⁶ This would be an unnecessary grant of congressional power to regulate the armed forces.¹⁷

The judicial oversight and review of the military continued throughout the 1970s. For instance, the Supreme Court held that the conviction by a military court-martial of a serviceman's civilian wife, who was accused of murdering her husband while they were stationed overseas, was unconstitutional.¹⁸ The Supreme Court rested its rationale on the framers' belief that

14. 350 U.S. 11 (1955).

15. *Quarles*, 350 U.S. at 23.

16. *Id.* at 15.

17. *Id.* See U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"). It is to be noted, however, that the Supreme Court had recognized that military personnel were "governed by a separate discipline" that was applicable to civilians in civil courts. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

18. *Reid v. Covert*, 354 U.S. 1, 41 (1957). The court-martial exercised jurisdiction pursuant to Article 2(11) of the Uniform Code of Military Justice which provides in part that "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States." 50 U.S.C. § 552(11) (repealed 1956).

the proper sphere of the military is “subordinate to civil authority,”¹⁹ and that the broad discretionary powers of military commanders restricted itself to the battlefield.²⁰ The Supreme Court also reached similar conclusions by subsequently holding that military tribunals have no jurisdiction over dependents of military personnel,²¹ nor their overseas civilian employees.²²

The high water mark of Article III supervision of the military came in *O’Callahan v. Parker*,²³ however. At issue was an active duty soldier who was court-martialed and convicted for the attempted rape of a civilian woman.²⁴ The Supreme Court reasoned that disciplining soldiers by courts-martial was “merely incidental” to the primary purpose of the military.²⁵ Nor were military tribunals equipped to provide the same level of due process protections as civilian courts.²⁶ The Supreme Court restricted the jurisdiction of military tribunals to “cases arising in the land or naval forces.”²⁷

After the conclusion of the Vietnam War, the Supreme Court began to reverse its active review of military policy and procedures by deferring to the military. This deference was based upon the idea that the armed forces, as a matter of necessity, constituted a “specialized separate society” distinct from that in which civilians reside.²⁸ The distinction was evident in differences between the Uniform Code of Military Justice (UCMJ) and civilian law, as well as the different cultures of military and civilian life.²⁹

19. *Reid*, 354 U.S. at 30.

20. *Id.* at 33.

21. *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (holding the provisions of the Uniform Code of Military Justice permitting a court-martial to exercise jurisdiction over a civilian dependent of a service member for a non-capital offense were unconstitutional in light of the Fifth and Sixth Amendments).

22. *See McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284 (1960) (holding that a civilian employee of the armed services could not be convicted by a court-martial); *Grisham v. Hagan*, 361 U.S. 278, 279-80 (1960) (holding that overseas civilian employees were not subject to the military’s court-martial jurisdiction).

23. 395 U.S. 258 (1969).

24. *Parker*, 395 U.S. at 260.

25. *Id.* at 262.

26. *Id.* at 262-63.

27. *Id.* at 272. The Supreme Court also noted that the military’s jurisdiction over the militia extended only to “actual service in time of war or public danger.” *Id.* *See Ex parte Mason*, 105 U.S. 696, 700-01 (1881) (holding that the “time of war” limitation on the application of the Fifth Amendment was applicable only to the militia); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 83-84 (1857) (upholding the jurisdiction of a court-martial over a service-member who was acquitted of a military charge yet convicted of a non-military offense).

28. *Parker v. Levy*, 417 U.S. 733, 743, 757-58 (1974) (upholding the military conviction for voicing dissent of American military involvement in Vietnam). *See Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (stating that “great deference” should be afforded to the judgments of the Court of Military Appeals).

29. *See Levy*, 417 U.S. at 744 (“Just as military society has been a society apart from civilian society, so ‘[m]ilitary law... is a jurisprudence which exists separate and apart from the law

An early example of the judicial bifurcation of civilian and military culture occurred in *Rostker v. Goldberg*.³⁰ At issue was the constitutionality of a Military Selective Service Act provision requiring only males to register for the draft. In upholding the male-only draft, the Court reasoned that the constitutional authority vested in Congress to raise and support armies was “broad and sweeping.”³¹ The broad powers of Congress to regulate military and national defense policy consequentially left the Article III judiciary without competence in adjudicating matters of military concern.³²

The Supreme Court articulated its deference to military necessity and congressional policy by overturning its *O’Callahan* precedence in *Solorio v. United States*.³³ The Supreme Court in *Solorio* held that the military did in fact have the power to try service members, regardless of the nature of the crime, by virtue of their status as United States military personnel.³⁴ Justice Rehnquist, speaking for the majority, stated that “judicial deference. . . is at its apogee” when there is a challenge to legislation drafted pursuant to congressional authority to raise and support armies.³⁵ The Supreme Court reasoned that the plenary power of Congress to raise and support the armed forces necessarily contemplated a plenary power to regulate conduct of soldiers.³⁶

which governs in our federal judicial establishment.’” (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion))).

30. 453 U.S. 57 (1981).

31. *Rostker*, 453 U.S. at 65 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

32. *Id.* at 64-65.

33. 483 U.S. 435, 436 (1987) (overruling *O’Callahan*, which held that courts-martial jurisdiction extended only to cases arising under the armed forces). See *supra* notes 16-27 and accompanying text.

34. *Solorio*, 483 U.S. at 436-39.

35. *Id.* at 447 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508, (1986); *Rostker*, 453 U.S. at 70).

36. *Id.* at 441. Justice Rehnquist, speaking for the Court, stated:

The constitutional grant of power to Congress to regulate the Armed Forces, Art. I, § 8, cl. 14, appears in the same section as do the provisions granting Congress authority, *inter alia*, to regulate commerce among the several States, to coin money, and to declare war. . . . [T]here is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section. Whatever doubts there might be about the extent of Congress’ power under Clause 14 to make rules for the “Government and Regulation of the land and naval Forces,” that power surely embraces the authority to regulate the conduct of persons who are actually members of the Armed Services.

Id.

B. THE FIRST AMENDMENT AND THE MILITARY

Judicial deference to military policy has also applied to a significant extent to cases involving assertions of First Amendment protections. In 1966 Captain Howard Levy, posted as Chief of Dermatological Services at an army hospital, made several statements protesting American involvement in Vietnam.³⁷ He was subsequently tried and convicted for, *inter alia*, violating Articles 133 and 134 of the UCMJ sanctioning conduct unbecoming an officer,³⁸ and “all disorders and neglects to the prejudice of good order and discipline in the armed forces,” respectively.³⁹ Captain Levy challenged his conviction on the grounds that the First Amendment required the UCMJ to be narrowly tailored in *Parker v. Levy*.⁴⁰ The Supreme Court disagreed. The Court stated that the military community, distinct from its civilian counterpart, necessitated different standards of First Amendment protection.⁴¹ As such, the special requirements of the military constituted a sufficient countervailing policy to not extend First Amendment protections in the military context to the same extent as civilian speech jurisprudence.⁴²

The Supreme Court in *Brown v. Glines*⁴³ reached a similar result. At issue was an Air Force regulation requiring prior approval for the circulation of petitions on Air Force bases.⁴⁴ Citing *Levy*, the Court noted that the First Amendment protection afforded to military personnel was necessarily more restricted than the protections applicable to civilians.⁴⁵ Military commanders were deemed within their right to prevent the distribution and circulation of a petition that presented a threat to military readiness.⁴⁶ As such, the scope of the protections of the First Amendment did not encompass the circulation of unauthorized petitions on Air Force bases.⁴⁷

37. *Parker v. Levy*, 417 U.S. 733, 736-37 (1974).

38. *Id.* at 736; 10 U.S.C. § 933 (2000).

39. 10 U.S.C. § 934 (2000).

40. 417 U.S. 733, 752 (1974).

41. *Levy*, 417 U.S. at 758. Justice Rehnquist, speaking for the Court, stated that “[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” *Id.*

42. *Id.* at 760.

43. 444 U.S. 348 (1980).

44. *Glines*, 444 U.S. at 349. See Air Force Reg. 35-15(3)(a)(1) (1970) (“No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee.”).

45. *Glines*, 444 U.S. at 354-55.

46. *Id.* at 353.

47. *Id.* at 355-56. See *Greer v. Spock*, 424 U.S. 828, 839 (1976) (holding that there was no unqualified First Amendment right to deliver political speeches or to distribute political literature on military reservations).

Moreover, in 1986 the Supreme Court upheld an Air Force regulation restricting the wearing of religious clothing. In *Goldman v. Weinberger*,⁴⁸ the Court rejected the claim that the Establishment Clause barred restricting a service member from wearing a yarmulke while in uniform.⁴⁹ The Court stated that judicial deference should be given to military necessity even when it burdens a constitutional right.⁵⁰ Because uniforms “encourage a sense of hierarchical unity” and discipline essential to military preparedness, judicial review of First Amendment claims should give “great deference to the professional judgment of military authorities.”⁵¹ The Court, in building on both *Levy* and *Glines*, refused to apply the level of judicial scrutiny afforded to civilians regarding a fundamental right.⁵² Effectively, the Supreme Court’s First Amendment jurisprudence regarding individual service members has been the passive, non-articulation of a coherent standard. The judicial identification of a bright-line standard, of when expression deserves protection, ought to be delineated when military policy burdens rights considered most fundamental to personal freedom and identity.

C. THE ARTICLE I KULTURKAMPF: DON’T ASK, DON’T TELL

1. *The Blackletter Prohibition*

Homosexuality has long been perceived as incompatible with military service.⁵³ Prior to 1993, the military imposed a blanket prohibition of homosexuals from serving, which was routinely upheld by the courts against due process and equal protection challenges.⁵⁴ Yet in 1993 the

48. 475 U.S. 503 (1986).

49. *Goldman*, 475 U.S. at 509-10.

50. *Id.* at 507 (stating that the “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society”).

51. *Id.* at 507-08. See Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court’s Traditional Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 923-24 (2006) (arguing that *Weinberger* was one of the “most blatant” instances of judicial deference to the military).

52. *Goldman*, 475 U.S. at 509-10.

53. Sir Winston Churchill personified the history of homosexual activity in the armed forces with his infamous quote that naval tradition was “nothing but rum, sodomy and the lash.” SIR PETER GREYTON, *FORMER NAVAL PERSON: WINSTON CHURCHILL AND THE ROYAL NAVY* 2 (1968). “Homosexual proclivities” were first codified in the United States as a disqualification for military service by the Army and Selective Service in 1941. ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 121 (1990). However, the first documented case of separation from the military for alleged homosexuality occurred in 1778. RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF* 11 (1993).

54. DoD Directive No. 1332.14 (1982). See 32 C.F.R. § 41, app. A (1993) (excluding any soldier “who engages in . . . homosexual acts”). The pre-1993 general prohibition on homosexual

blanket ban was revisited on the initiation of President Clinton and subsequently altered by Congress to allow gay and lesbian service members to continue active duty in the military on the condition that their sexual orientation is not disclosed.⁵⁵ The policy became appropriately known as Don't Ask, Don't Tell.⁵⁶

Interestingly, the prohibition on homosexuality in the armed forces does not constitute a ban in the classical sense. Rather, Don't Ask, Don't Tell precludes gay and lesbian soldiers who have *disclosed* their sexual identity from serving in the branches of the armed forces. In fact, military directives have stated that homosexuality is not a *per se* bar to military service.⁵⁷ The policy is effectively a compelled affirmation of heterosexuality; a modern *kulturkampf*—"a state struggle to assimilate a threatening minority, or to force conformity upon it."⁵⁸ In other words, the policy of presuming heterosexuality forces gay and lesbian service members to actively conceal their sexual identity by projecting a façade of heteronormativity.

The operative rationale of Don't Ask, Don't Tell is that service members demonstrating "a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."⁵⁹ "Homosexual acts" are defined broadly as including "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires."⁶⁰ Moreover, any conduct that serves to "demonstrate a propensity" to engage in homosexual conduct is also covered by the ban.⁶¹ Thus, Don't Ask, Don't Tell goes beyond traditional notions of sexual misconduct in the

service members successfully withstood constitutional challenges on equal protection and due process grounds. *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994); *Steffan v. Perry*, 41 F.3d. 677, 686-87 (D.C. Cir. 1994) (en banc); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989); *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1226-27 (10th Cir. 1984).

55. Kenneth Williams, *Gays in the Military: The Legal Issues*, 28 U.S.F. L. REV. 919, 920-22 (1994).

56. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1993), codified as 10 U.S.C. § 654 (1993).

57. Wolff, *supra* note 5, at 1144 n.2.

58. William N. Eskridge, Jr., *A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2413-14 (1997).

59. 10 U.S.C. § 654(a)(15) (2000).

60. *Id.* § 654(f)(3)(A).

61. *Id.* § 654(f)(3)(B).

armed forces and precludes homosexual intimacy and affection regardless of the circumstances.⁶²

The disclosure of sexual orientation by a soldier, however, does not automatically result in separation from the armed forces. Rather, under the policy it creates a rebuttable presumption that a propensity to engage in “homosexual conduct” exists.⁶³ However, the mere statement that one is a homosexual is sufficient to begin administrative separation proceedings.⁶⁴ The service member in question has the burden of presenting evidence to rebut the presumption in order to successfully prevent separation from the armed forces.⁶⁵ Of course in practice, soldiers are only likely to successfully rebut the presumption if it is believed that they were lying when they disclosed their homosexuality to a superior officer.⁶⁶

Commanding officers are vested with broad discretion under the policy to commence an investigation to ascertain the veracity of a soldier’s sexual orientation. The procedures outlining such inquisitions state that only the commanding officer has the authority to initiate an inquiry based on “credible information.”⁶⁷ The procedures state that informal fact-finding methods are preferred, and that the commanding officer has the sole responsibility of determining what information is credible.⁶⁸ After an officer determines that such credible information exists, the officer may then ask the service member whether he or she is a homosexual.⁶⁹ The enforcement of the policy and the manner in which an inquiry is conducted is contingent on the will of individual commanders. This has led to the selective and inconsistent targeting of suspected gay and lesbian service members.⁷⁰

62. Diane H. Mazur, *The Unknown Soldier: A Critique of “Gays in the Military” Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 233 (1996).

63. 10 U.S.C. § 654(b)(2), (b)(1)(E) (2000); DoD Directive 1332.30, encl. 2, § C & C.1.b., at 2-1, 2-2 (Mar. 14, 1997).

64. See DoD Directive 1332.14, encl. 2, § E2.1.7 (Mar. 14, 1997) (defining homosexual conduct as “[a] homosexual act, a statement by the [s]ervice member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage”); DoD Directive 1332.14, encl. 3, attach. 4x, § 4.5 (Mar. 14, 1997) (“A statement by a [s]ervice member that he or she is a homosexual or bisexual creates a rebuttable presumption that the [s]ervice member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”).

65. *Id.* at encl. 3, attach. 1, § 1.8.1.2.2.

66. See, e.g., *Hensala v. Dep’t of the Air Force*, 343 F.3d 951, 954 (9th Cir. 2003) (noting that the commanding officer recommended that the service member under investigation not be separated because the purpose of disclosing his homosexuality was to avoid active duty).

67. DoD Directive 1332.14, encl. 3, attach. 4, § 1.1 (Dec. 21, 1993).

68. *Id.* at encl. 3, attach. 4, § 1.3 (Dec. 21, 1993).

69. *Id.*

70. See discussion *infra* Part IV.B (discussing individual cases of separation pursuant to the Don’t Ask, Don’t Tell policy).

2. *Constitutionality: Manifestations of Judicial Deference*

Military readiness and necessity have proven insurmountable to plaintiffs asserting that Don't Ask, Don't Tell is constitutionally incompatible with the First Amendment. Early attacks of the policy met with the judicial adherence to the precedence of granting deference to military policy even when a fundamental right is burdened.⁷¹ The uniqueness of the mission of the armed forces and the necessity to maintain readiness, unit cohesion, and general morale constituted a government interest greater than the burden that Don't Ask, Don't Tell places on the First Amendment.⁷²

The Court of Appeals for the Fourth Circuit reviewed the constitutionality of Don't Ask, Don't Tell in *Thomasson v. Perry*.⁷³ Lieutenant Paul Thomasson was discharged from the Navy, despite having an exemplary service record, after he made known his sexual orientation, in disagreement with the policy, to four admirals under which he served.⁷⁴ A Board of Inquiry convened to conduct separation proceedings and found that Lieutenant Thomasson failed to rebut the presumption that he had a propensity to engage in homosexual acts.⁷⁵ An appeal was subsequently filed and alleged, *inter alia*, that Don't Ask, Don't Tell was an unconstitutional burden on his First Amendment right to free speech.⁷⁶

Much of the Fourth Circuit's reasoning was grounded in the federal judiciary's relatively nouveau deference to military policy. The opinion stated that "military life is fundamentally different from civilian life."⁷⁷ Moreover, the court held that the First Amendment challenge by Lieutenant Thomasson could not be separated from "the special legal status of military

71. See *Selland v. Perry*, 905 F. Supp. 260, 263-65 (D. Md. 1995) (stating that First Amendment claims involving the armed forces must be analyzed in light of Congress' "plenary control" over the military). Recall that this was the same rationale of the Supreme Court in *Rostker v. Goldberg* in holding that judicial scrutiny of military matters was more deferential than in the civilian context. See *supra* notes 30-32 and accompanying text. The *Selland* Court reached the same conclusion by holding that the "professional judgment" of military commanders necessitated judicial deference. *Selland*, 905 F. Supp. at 264. See *Steffan v. Perry*, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc) (citing *Goldman v. Weinberger*, *Parker v. Levy*, and *Brown v. Glines* in concluding that "even the First Amendment must yield at times to the exigencies of military life").

72. *Steffan*, 41 F.3d at 692; *Stelland*, 905 F. Supp. at 265.

73. 80 F.3d 915 (4th Cir. 1996).

74. *Thomasson*, 80 F.3d at 920. Lieutenant Thomasson received the highest possible performance ratings and was selected to participate in the highly selective Joint Chiefs of Staff Internship. *Id.* Moreover, in an evaluation of Lieutenant Thomasson, Rear Admiral Lee F. Gunn stated that he was "a true 'front runner' who should be groomed for the most senior leadership in tomorrow's Navy." *Id.*

75. *Id.* at 920-21.

76. *Id.* at 922.

77. *Id.* at 920 (quoting 10 U.S.C. § 654(a)(8) (2000)).

life.”⁷⁸ As such, the circuit court upheld Don’t Ask, Don’t Tell on First Amendment grounds.⁷⁹ The court in *Thomasson* acted in congruence with the federal judiciary by conceptualizing the military as a *de facto* “pocket republic” within the federal system.⁸⁰ The belief that the military culture is so distinct from that in which civilians live has manifested itself as a general reluctance to interfere in the processes of the armed forces. It is because of this reluctance that gay rights litigation in the military context has been so unsuccessful.⁸¹

Notwithstanding its declaration that the First Amendment must be construed in light of the military’s distinctiveness, the court held that Don’t Ask, Don’t Tell does not target the spoken words of proclaiming one’s homosexuality.⁸² Rather, the spoken words “I am gay” serves an evidentiary purpose in demonstrating propensity to engage in homosexual conduct.⁸³ Don’t Ask, Don’t Tell is not considered a content-based restriction on speech because it does not suppress any viewpoint of homosexuality.⁸⁴ The Department of Defense Directives relating to homosexuality in the military permit such activities as attending gay parades and reading gay literature.⁸⁵ Accordingly, there is no valid constitutional issue raised by the policy because the First Amendment, according to the Fourth Circuit, is not implicated because it does not prohibit speech. Rather, declarations of homosexuality serve only as evidence “to prove motive or intent.”⁸⁶ Subsequent decisions upholding Don’t Ask, Don’t Tell against First

78. *Id.* at 924. The court cited the traditional notion that “success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion” in justifying the military necessity to preclude open homosexuals from serving in the military. *Id.* at 920.

79. *Id.* at 931-32.

80. See Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 31-54 (2002) (arguing that the Supreme Court has acknowledged a distinct military culture and deferred to military policy in furtherance of this distinction).

81. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 128-29 (1999).

82. *Thomasson*, 80 F.3d at 931.

83. *Id.*

84. See *id.* at 932 (stating that Don’t Ask, Don’t Tell “aims at . . . propensity, not at speech, it is not a viewpoint-based or content-based regulation”).

85. See DoD Directive 1332.14, encl. 4, § E(4) (stating that credible information does not exist when “the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, [or] associating with known homosexuals”); DoD Directive 1332.30, encl. 8, § C.3.d., at 8-2 (stating that associational activities alone are an insufficient basis for separation); *Thomasson*, 80 F.3d at 932 (holding that Don’t Ask, Don’t Tell is “not a viewpoint-based or content-based regulation”).

86. *Thomasson*, 80 F.3d at 931 (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)).

Amendment challenges utilize similar reasoning as the Fourth Circuit in *Thomasson*.⁸⁷

III. EXPRESSIVE HOMOSEXUALITY

Professor Kenji Yoshino recently articulated a juridical philosophy regarding the expression of an individual's identity: so long as there is a right to be a particular type of person, there is a corresponding right to express it.⁸⁸ Of course the history of the military's policy regarding the status of homosexuals within its cadres does not support this proposition. Yet when one accounts for the construction of a "gay identity" and the expressive speech jurisprudence of the Supreme Court, it becomes more of a challenge to find that the First Amendment lacks protection for "coming out" in any context.

A. GAY IDENTITY

Any understanding of a group-based deprivation necessarily begins with a construction of the group's identity.⁸⁹ A person's identity is based on their individual beliefs, feelings, and emotions vis-à-vis social ascriptive norms.⁹⁰ This identity, however, can only be conceptualized in terms of interpersonal communication, expression, and interaction. A basic human need, affection, can be understood as a construction vis-à-vis another person.⁹¹ Personal identification of oneself as heterosexual or homosexual lays in the affection toward another person in social context. Such affection necessarily entails a corresponding expression of love, which goes beyond mere words spoken in private. Affection rather manifests itself in the general expression inherent in the discourse of a relationship. The

87. *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1134-36 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1429-30 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 261-64 (8th Cir. 1996).

88. YOSHINO, *supra* note 3, at 70.

89. See Winston P. Nagan & Vivile F. Rodin, *Racism, Genocide, and Mass Murder: Towards A Legal Theory About Group Deprivations*, 17 NAT'L BLACK L.J. 133, 139-46 (2004) (articulating a comprehensive theory on the jurisprudential and anthropomorphic foundations of group identity formation, and the dynamics of group domination and subjugation).

90. *Id.* at 144.

91. *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984). In *Roberts*, the Court stated that constitutional protections afforded to relationships "[reflect] the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* The Court also stated that the "ability independently to define one's identity that is central to any concept of liberty." *Id.* Justice Blackmun came to a similar conclusion in his dissent in *Bowers*. *Bowers v. Hardwick*, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting).

communication of love is not only directed at the object of one's desire but to third parties—the world at large.⁹²

Indeed, sexual identity is inextricably linked to one's sense of self or personhood.⁹³ The act of self-definition is one fundamental to human existence that is inviolable against the state,⁹⁴ a right to “metaprivacy” regarding one's human identity.⁹⁵ A corresponding prohibition on state action that restricts personal identity is the expression of such identity.⁹⁶ Sexual identity only becomes genuine in a Foucaultian sense when it is transmitted externally.⁹⁷

An individual thus not only identifies as gay or straight with respect to internal feelings of affection towards another, but also through the public manifestation of affection towards another of either the same or opposite gender. Identity in a sense vests when that identity is transmitted or expressed towards third persons. The expression of affection towards others

92. See Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Law*, 94 CAL. L. REV. 1271, 1273 (2006) (arguing that homosexual identity is linked to relationships in certain social groups); Tom Boellstorff, *The Perfect Path: Gay Men, Marriage, Indonesia*, 5 GAY & LESBIAN Q. 475, 496 (1999) (asserting sexuality only becomes genuine identity when a third party “interprets and acknowledges [the] confession”).

93. Lau, *supra* note 92, at 1282-83; Terry S. Stein, *Overview of New Development in Understanding Homosexuality*, 12 REV. PSYCHIATRY 9, 20-23 (1993); John C. Gonsiorek & James R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 161, 163 (John C. Gonsiorek & James D. Weinrich eds., 1991); Rachel Franke & Mark R. Leary, *Disclosure of Sexual Orientation by Lesbians and Gay Men: A Comparison of Private and Public Processes*, 10 J. SOC. CLINICAL PSYCHOL. 262, 263-69 (1991); HAROLD LASSWELL & ABRAHAM KAPLANA, POWER AND SOCIETY 10-13 (1950). Lasswell and Kaplan, in discussing the process of group identity, stated that:

An ego is an actor using symbols. . . . Identification is the process by which a symbol user symbolizes his ego as a member of some aggregate or group of egos. . . . Symbolizing distinguishes the process but does not exhaustively characterize it: other acts, externalized as well as internalized, occur in conformity with the symbolic relationship. . . . The self is the ego and whatever it identifies with that ego. The concept is close to what William James designated as the “social self”: A man ‘has many different social selves as there [are] distinct groups of persons about whose opinions he cares.’ He generally shows a different side of himself to each of these different groups.’ The self as here defined is the set of these ‘different sides’ in their inter-relatedness. It thus compromises all the roles which the ego adopts, and is characterized by specifying the individuals and groups with which the ego identifies.

Id. (emphasis and internal citations omitted).

94. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989).

95. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1867 (2006); *Roberts*, 468 U.S. at 619. Indeed, the Supreme Court in *Lawrence* stated: “Liberty gives substantial protection to adult persons in deciding how to conduct their *private* lives in matters pertaining to sex.” *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

96. ESKRIDGE, *supra* note 81, at 123.

97. Boellstorff, *supra* note 92, at 496. See MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 61-63 (Robert Hurley trans., 1978) (arguing that communication regarding sexual identity is essentially expression occurring in the context of a power relationship which defines and reconstructs the identity).

outside of the relationship is a proclamation of the relationship and indeed the sexual identity of the parties to society. It is also the search and request of social acceptance and recognition of the relationship. A state's recognition of a heterosexual marriage performs the same function; it is the embodiment of society's acknowledgment and approval of a unit of affection. The corollary to that recognition of a system of affection is social approval and acceptance of the identities of the parties. Namely, to formalize a heterosexual relationship by obtaining the state's recognition of the relationship—i.e., marriage—is to obtain social acceptance of the parties' heterosexuality.⁹⁸ Because of the inherent communicative function of self identity and affection, a court cannot restrict the expressive attributes of personhood; expression of identity and the identity itself are inseparable.⁹⁹

Indeed, this concept is found throughout cultures and various jurisprudential systems. For instance, the African concept of *ubuntu*—the principle that individual worth is expressed or manifested through their relationships with others—demonstrates this clearly.¹⁰⁰ Archbishop Desmond Tutu famously stated that:

A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are.¹⁰¹

The focus on human inter-connectedness relationships has also been influential in South African case law.¹⁰²

98. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 160-61 (1990) (“[M]ost gay and lesbian liberation advocates seek not merely civil rights, but the affirmation of gay men and lesbians as social groups with specific experiences and perspectives.”).

99. See David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325-27 (1994) (discussing the First Amendment implications on sexual expression).

100. For a background of the *ubuntu* philosophy see generally LOVEMORE MBIGI & JENNY MAREE, *UBUNTU: THE SPIRIT OF AFRICAN TRANSFORMATION MANAGEMENT passim* (1995); Mogobe B. Ramose, *The Philosophy of Ubuntu and Ubuntu as a Philosophy*, in *The African Philosophy Reader* 230 (P.H. Coetzee & A.P.J. Roux eds., 2d ed. 2003); Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725, 754-55 (2007).

101. DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 31 (1999).

102. See, e.g., *S. v. Makwanyane*, 1995 (3) SA 391 (CC) at 484A (S. Afr.); *City of Johannesburg v. Rand Properties (Pty.) Ltd. and Others*, 2006 (1) SA 78 (W) at 63 (S. Afr.) (“[T]he culture of *ubuntu* is the capacity to express compassion, justice, reciprocity, dignity [sic] harmony and humanity in the interests of building, maintaining and strengthening the community. *Ubuntu* speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection.”).

Yet when we begin to discuss humanist philosophy and human development as a function of relationships, the individualist paradigm of rights begins to erode. When there is judicial protection of an individual's identity to the extent that identity is based on group affiliation and interpersonal relationships, then protection by logic must also extend to the group itself.¹⁰³ This is because identity, a sense of self, is so integrally linked to group identification and relationships. Of course, sexual identity is no exception to this. To identify as a gay, lesbian, or bisexual person, an individual must at some point develop intimate feelings towards others of the same gender. Moreover, as the individual develops, he or she also affiliates with and befriends individuals in society who have similar attitudes and share his or her sexual preference.

The policy sciences provide a useful jurisprudential foundation to analyze group-based deprivation. Developed by Professors Myres McDougal, Harold Lasswell, and Michael Reisman, the policy sciences demarcate how power operates in society and within nations.¹⁰⁴ The policy sciences view the state as a continuum in which individual and political entities are interconnected through communication.¹⁰⁵ This takes place within the

103. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 76 (1995). There is a rich academic debate regarding individualist and collectivist rights paradigms. *Id.* Will Kymlicka, for instance, has argued that "societal culture" is one that "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres." *Id.* As such the goal of protecting individual rights can only be reached with group based protections. *Id.* at 26-35. See Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 *WORLD POL.* 343, 343 (1977) (stating that an "individualist conception [of rights]—is unduly limited . . . [c]onsidering the heterogeneity of mankind . . . it is also necessary to think of ethnic communities and certain other kinds of groups, and to include them among the kinds of right-and-duty-bearing units whose inter-relationships are to be explored"); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 *NOTRE DAME L. REV.* 1219, 1246 (1991) (noting that individual identity does not form in an asocial vacuum). For a discussion of early conceptualizations of group rights see C.A. MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* 157-59 (1934).

Although the focus is on cultural liberties, a group rights paradigm is also conducive to sexual minorities. One commentator noted that:

If a group enjoys a distinct mode of life and if that mode of life takes a collective form, perhaps our moral recognition of that mode of life has to be directed towards the group collectively rather than to its members severally. . . . [S]ome of that is fundamentally important for people to relate to identities that they can possess and to practices in which they can engage only in association with others. Consequently, it can seem merely arbitrary to insist that people can have rights only to goods that they can enjoy only collectively.

Peter Jones, *Group Rights and Group Oppression*, 7 *J. POL. PHIL.* 353, 353 (1999).

104. See Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *AM. J. INT'L L.* 1, *passim* (1959) (discussing the relationship between law and power).

105. See HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 240-67 (1930) (describing the "state as a manifold of events"). The policy sciences look to signs and symbols to

confines of social process, defined by the policy sciences as human beings pursuing values through institutions based on resources.¹⁰⁶ Of course various “values” or ends are pursued based on the individual’s subjectivities. These can be wealth, power, rectitude, and affection.¹⁰⁷ As individuals with like preferences such as sexual orientation pursue affection, group associations form across borders without regard to legal jurisdictions. This is why a gay man in Los Angeles, for instance, shares a commonality with a gay man in London even though the men are subject to different sovereigns, social dynamics, and domestic laws.

A problem that one must confront is group “dominance” and group “subjugation.”¹⁰⁸ As groups begin to form and constitute their preferences through law, groups representing a majority preference may attempt to dominate or exclude the preference of minority groups. To begin to understand such a group deprivation requires one to begin with the construction of the identity of both the majority and minority groups.¹⁰⁹ A past example illuminates how the formation of a minority group’s identity, and the instillation of a majoritarian perception of “otherness” toward that group, can lead to its subjugation. The first gay rights law was not enacted until 1972 when East Lansing, Michigan included a sexual orientation clause in a local ordinance.¹¹⁰ Predictably, as various jurisdictions began to protect

demarcate the meaning of interaction between persons. See MYRES S. MCDUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* xii (1967) (theorizing that “[s]igns are materials or energies that are specialized to the task of mediating between the subjective events of two or more persons”).

106. Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807, 809-10 (1988). It is notable that the “perception of interdependence” within the social process “leads participants to appreciate the relevance of pursuing common interests and motivate them to clarify it.” *Id.* at 810. For an orientation of the social process see generally HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 149-50 (1935).

107. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 268-75 (1966-67). See MYRES MCDUGAL & HAROLD LASSWELL, *JURISPRUDENCE FOR A FREE SOCIETY: LAW SCIENCE AND POLICY* 375-507 (1992) (discussing the various base values pursued in the social process).

108. See MYRES MCDUGAL, HAROLD LASSWELL, & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 521-60 (1980) (outlining the dynamics of group domination and subjugation). It is notable that the anthropomorphic, jurisprudential foundation of group deprivation is applicable in a variety of contexts. Winston P. Nagan has, for example, applied this model to group-based deprivations along racial and ethnic parameters in examining the roots of the South African Apartheid system as well as instances of genocide. Nagan & Rodin, *supra* note 89, at 139-44. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 1 (1982) (viewing slavery as a system “structured and defined by the relative power of the interacting persons”).

109. See Nagan & Rodin, *supra* note 89, at 139-40 (discussing the process of identifying markers in the context of constructing group identity).

110. See Peter M. Cicchino, Bruce R. Deming & Katherine M. Nicholson, *Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 563-99 (1991) (discussing the legislative obstacles facing gay rights proponents).

homosexuals, a multitude of anti-gay organizations began to coalesce against legislating gay liberty. One such infamous example was Anita Bryant's 1977 "Save Our Children" campaign in Florida. Despite the campaign's aim of repealing a Miami housing ordinance prohibiting discrimination against homosexuals, its rhetoric served to construct a distinctive "we" and "them" duality that is essential to community identity.¹¹¹ The campaign portrayed homosexuals as "immoral and against God's wishes,"¹¹² who could recruit children into their lifestyle.¹¹³ Further, the campaign conveyed the message that it was a protector of those associated with the majority group; namely that "our" children must be protected from homosexuals, the "them." The success of group construction was evident: the Miami ordinance was repealed by a two-to-one margin and successive anti-gay campaigns followed throughout the nation.¹¹⁴

The military prohibition of homosexual service members is no different. For instance, the World War II prohibition on homosexuality in the military was based on such expression of homosexuality. Persons with "feminine bodily characteristics" or those who exhibited "effeminacy in dress and manner" were precluded from military service.¹¹⁵ Professor Ken

111. CARL COON, *ONE PLANET, ONE PEOPLE: BEYOND "US VS. THEM"* 30 (2004).

112. ANITA BRYANT, *THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY* 41, 47 (1977).

113. See Eskridge, *supra* note 6, at 1014-18 (providing an overview and analysis of the Save our Children campaign). Several others joined Bryant's efforts in Florida. Jerry Falwell, for instance, stated at a Miami rally that "[s]o called gay folks [would] just as soon kill you as look at you." DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 306 (1999). See BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 103-04 (1987) (discussing anti-gay campaigns in their greater social context); Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 *NOVA L. REV.* 793, *passim* (2000) (reviewing the history of Florida's gay rights movement as well as the state's anti-sodomy laws).

114. Eskridge, *supra* note 6, at 1017.

115. BERUBE, *supra* note 53, at 19. Different courts have approached homosexual identity differently. Some jurisdictions have equated homosexuality with homosexual conduct; to be gay means to have gay sex. The direct criminalization of homosexual conduct is the epitome of such an approach. See *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986) (viewing homosexual identity in terms of homosexual conduct); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (defining homosexuals as "persons who engage in homosexual conduct"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (holding that gay conduct did not warrant quasi-suspect classification); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (holding that gay conduct does not warrant a suspect or quasi-suspect classification because states are permitted to criminalize such activity). Other jurisdictions have looked to conformity with homosexual stereotypes as dispositive of homosexuality. For instance, in *Beller v. Middendorf*, a service member was retained in the armed forces even after he committed homosexual conduct because he "did not appear to be 'a homosexual' and . . . he found no evidence of psychosis or neurosis." *Beller v. Middendorf*, 632 F.2d 788, 794 (9th Cir. 1980). For a discussion of the differing judicial treatments of homosexual identity see Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 *STAN. L. REV.* 269, 283-87 (1995).

Karst has asserted that with regard to the military, the identity that is to be projected is that of a masculine male.¹¹⁶ Again, the “we” versus “them” bifurcation prerequisite to group subjugation is evident.

Yet the social stereotyping of homosexuals as “feminine”—a form of group construction—is supplemented by the government’s condemnation of homosexual identity. Until *Lawrence*, sodomy laws were kept on the books notwithstanding their rare enforcement.¹¹⁷ Indeed, law can be viewed as a form of communication. It originates from the communicator and is directed at a target audience. However, contained in the communication that is law are three components: its policy content, authority signal, and control intention.¹¹⁸ The policy content is the prescription, the intent of the law. The authority signal is the basis of legitimacy in which the law originates, such as the federal government in the case of Don’t Ask, Don’t Tell. Lastly, the control intention describes the enforcement power behind the law.¹¹⁹ Thus to be considered legitimate, the policy content of the law must originate from a legitimate basis and be accompanied by symbols or markers indicating general community acceptance.¹²⁰

At the essence of Don’t Ask, Don’t Tell is a group deprivation. The policy content of Don’t Ask, Don’t Tell is a condemnation of homosexuality. Because the law must rest on a legitimate basis (a popularly elected government), and be accompanied by general community acceptance (the majority, non-homosexual group), the law serves as the basis for a majority group dominating a minority group. Interestingly however, Don’t Ask, Don’t Tell is a law that begs not to be enforced; it says you may serve if you are gay, just so long as the military does not know. The prohibition on homosexuals from serving in the military only operates upon the disclosure of a service member’s sexual identity.¹²¹ Furthermore, even when such

116. Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 279 (1995). See Michelle M. Benecke & Kirstin S. Dodge, *Recent Development, Military Women in Nontraditional Job Fields: Casualties of the Armed Forces’ War on Homosexuals*, 13 HARV. WOMEN’S L.J. 215, 237-38 (1990) (discussing the expectation of conforming with a gender-specific norm in the military).

117. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 35, 114 (2000).

118. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 PROC. AM. SOC’Y INT’L L. 101, 108-10 (1981); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. IN WORLD. PUB. ORD. 249, 250 (1980).

119. Reisman, *supra* note 118, at 108-10.

120. *Id.*

121. See discussion *supra* Part II.C.1 (discussing the blackletter prohibition).

disclosures are made, the policy is selectively enforced, subject to the discretion of commanding officers.¹²²

The policy sciences also shed light on the participants and mechanisms of law as communication by asking a series of questions: who, says what, about what, in which channel, to whom, and with what effect?¹²³ When we begin to analyze the structure of the legal communication of Don't Ask, Don't Tell, the model of group deprivation becomes clearer. The initiator of the communicator (the "who") and the content of the communication (the "says what") do not require elaboration. More interesting is the question of the channel of the communication and social context in which the communication take place. The channel of the communication examines how the targets of the communication (the public and service members) understand its intended effect.¹²⁴ The question of "about what" looks at the prescriptive content of a law in its broader context.¹²⁵

It does not seem that there is a community expectation that homosexuals will be prevented from serving in the military. The government, by the nature of the policy itself, does not likewise seem to want to prevent homosexuals from serving in the military. Thus, the prescription of the policy is against open homosexuality. Considering the channel of the communication and its social environs is essential to understanding the nature of group deprivation.¹²⁶ Don't Ask, Don't Tell is at its most basic a condemnation of being openly gay. Indeed, law (ideally) reflects social norms; a government or majoritarian ban on gay *identity* is the foundation of a group deprivation.¹²⁷

Don't Ask, Don't Tell also functionally replicates sodomy laws within the military context in that it criminalizes same-sex intimacy. Pre-*Lawrence* sodomy laws did, like Don't Ask, Don't Tell, contain a message of societal disapproval of homosexual intimacy. Additionally, both sodomy

122. See discussions *supra* Part II.C.1 & *infra* Part IV.B (discussing command discretion in, and the selective enforcement of, Don't Ask, Don't Tell).

123. Harold D. Lasswell, *The Structure and Function of Communication in Society*, in *THE COMMUNICATION OF IDEAS: A SERIES OF ADDRESSES* 37, 37 (Lyman Bryson ed., 1964).

124. *Id.*

125. *Id.*

126. KENNETH KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* 209 (1993). Professor Karst notes that "[t]he principle of equal citizenship [is not] substantively neutral; its values of respect, responsibility, and participation . . . look toward a society that embraces all Americans as full members. . . . [E]qual citizenship implies tolerance." *Id.*

127. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 191 (1985) ("Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.").

laws and Don't Ask, Don't Tell go further by creating a "criminal class."¹²⁸ The policy content also works negatively in that it reinforces social meanings. Professor Andrew Koppelman observed that:

The social meanings that societies reproduce sometimes include meanings which divide members of a society into classes on the basis of ascribed characteristics and assign some of these classes lower status, in terms of power and prestige, than others. These meanings stigmatize the people at the bottom of the hierarchy, branding them as intrinsically less worthy of concern and respect than others. . . . Members of the privileged groups will . . . [use] their greater powers in ways that maintain the stigmatized groups' subordinate status symbolically, politically, and materially.¹²⁹

Thus, to the extent that Don't Ask, Don't Tell formalizes government condemnation of homosexuality, it also reinforces social stereotypes and attitudes toward homosexuals and homosexuality. The policy perpetuates the "we" versus "them" by reinforcing social construction of a minority group identity. This is why the criminalization of homosexual conduct and identity in the military stigmatizes homosexuality and perpetuates homophobic attitudes against gay and lesbian service members.¹³⁰

The military regulations do not punish service members for gay "associational activity," however. Credible evidence, which serves as the basis of an inquiry in the propensity of a service member to engage in homosexual acts, does not include going to a gay bar, possessing or reading gay-oriented publications, associating with open homosexuals, or even attending a gay rights parade.¹³¹ Don't Ask, Don't Tell permits non-sexual, associational conduct of a gay soldier's identity but not the expression of

128. Leslie, *supra* note 117, at 110. See Terl, *supra* note 113, at 794-805 (discussing the effects of Florida's anti-sodomy statute).

129. ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 94-95 (1996). Professor Koppelman also notes that "state efforts to reduce any kind of discrimination will implicitly tell those whose . . . beliefs sanction such discrimination that their . . . beliefs are false and that they ought to change them. . . ." *Id.* at 152. Thus, the continuation of the policy will reinforce "social mores" and decrease the "likelihood that eventually homosexuality [will] be regarded as in no way inferior to heterosexuality." *Id.* at 3.

130. See KARST, *supra* note 126, at 186 (1993) (noting that "Stigma—especially stigma propagated by government—produces harms that are both immediate and consequential. The immediate harms are psychic: insult, humiliation, indignity for the people stigmatized."); DONALD WEBSTER CORY, THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH 10 (1975) ("A person cannot live in an atmosphere of universal rejection, of widespread pretense, of a society that outlaws and banishes his activities and desires, of a social world that jokes and sneers at every turn, without a fundamental influence on his personality.").

131. DoD Directive 1332.14, encl. 4, § E(4); DoD Directive 1332.30, encl. 8, § C.3.d., at 8-2; *Thomasson v. Perry*, 80 F.3d 915, 932 (4th Cir. 1996).

the identity itself.¹³² There seems to be an inherent non sequitur in the policy; it is okay to engage in group-based activities essential for the formation of an identity that is illegal.

Condoning associational activity is demonstrative that the military recognizes that being homosexual or supporting homosexuals implicates the First Amendment. The third party expression of sexual identity is permitted under Don't Ask, Don't Tell, yet the expression of sexual identity in intimate associations so fundamental to a person's sense of self is precluded. This is done notwithstanding the military's own belief that "sexual orientation is considered a personal and private matter" and "is not a bar to continued service."¹³³ Thus, an inherent contradiction emerges. The military permits the expression of sexual identity only when it does not arise from an intimate association fundamental to a person's identity. These expressive associations lay at the heart of the First Amendment.¹³⁴

B. SILENCE AS COMPELLED AFFIRMATION

The First Amendment approach to protecting sexual identity is strengthened further by the fact that silence can equate to speech as well as a compelled affirmation.¹³⁵ For instance, in *West Virginia State Board of Education v. Barnette*,¹³⁶ the Supreme Court held that requiring adolescent pupils to recite the pledge of allegiance was unconstitutional on First Amendment grounds.¹³⁷ The Court stated that an "involuntary affirmation" to a belief could be more sinister than requiring silence in the face of a clear and present danger.¹³⁸ The First Amendment is implicated in both cases of

132. See Mazur, *supra* note 62, at 248 (arguing that the associational exception was motivated by the desire to protect heterosexual soldiers rather than grant homosexual service members a realm of protection).

133. DoD Directive 1332.30, encl. 2, § C, at 2-1.

134. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Justice Brennan noted that freedom of association is judicially protected in two ways. *Id.* Supreme Court jurisprudence has first "concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* He also noted that the "Court has recognized a right to associate for the purpose of engaging in those activities protected by the First—Amendment speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.*

135. Wolff, *supra* note 5, at 1174.

136. 319 U.S. 624 (1943).

137. *Barnette*, 319 U.S. at 642.

138. *Id.* at 633. *Barnette* involved a West Virginia law requiring the public "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism." *Id.* at 626 n.1 (quoting W. VA. CODE ANN § 1734 (1941 supp.)). Pursuant to the law, the School Board adopted a resolution mandating a compulsory flag salute. *Id.* The Supreme Court, in invalidating the law, stated that:

It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is

compelled silence and compelled affirmations. The Court further articulated this point in a subsequent term by stating that compelled affirmative acts are a more serious encroachment on personal liberty than passive acts.¹³⁹ *Barnette* and its progeny, according to Professor Tobias Wolff, can be read to hold that the seriousness of a compelled affirmation may be measured along two dimensions. The first is the extent to which the speaker is “intimately” related to the compelled affirmation.¹⁴⁰ The second is the extent a speaker can dissent from the message.¹⁴¹

Homosexual identity is by its very nature expressive. Don’t Ask, Don’t Tell not only forbids speech, but also creates the presumption of heterosexuality, thereby burdening both dimensions of *Barnette*. By forcing one to remain silent about his or her homosexuality, gay and lesbian soldiers are effectively compelled to make false affirmations regarding their sexual identities. Such affirmations regarding one of the most fundamental aspects of personhood lie at the center of the First Amendment: fundamental personhood cannot be infringed upon.¹⁴²

Recall the military uniform regulations at issue in *Goldman v. Weinberger*.¹⁴³ The ban on wearing yarmulkes while in uniform did not target religious identity.¹⁴⁴ No one told Goldman that he was unable to proclaim or otherwise conceal the fact that he was Jewish; he was only deprived of one “mode” of identity expression, not the identity itself.¹⁴⁵ He was not forced to assimilate his identity as a *kulturkampf* would otherwise require.

invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Id. at 633-34. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (holding that a newspaper has a First Amendment right to omit or print materials in its publication).

139. *Wooly v. Maynard*, 430 U.S. 715, 717 (1977). The New Hampshire state motto “Live Free or Die” was required to be printed on every noncommercial license plate, and it was deemed a misdemeanor to obscure any part of the license plate including the slogan. N.H. REV. STAT. ANN. § 263:1 (Supp. 1975); N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975). Two Jehovah’s Witnesses, finding the motto offensive to their moral and religious sensibilities, covered that portion of the license plate and were convicted of a misdemeanor. *Wooly*, 430 U.S. at 707-08. The Court held that the statutes required, in effect, the use of “private property as a ‘mobile billboard’ for the State’s ideological message or suffer a penalty.” *Id.* at 715. Because the First Amendment protects against compelled speech, the statute was invalidated. *Id.* at 717.

140. Wolff, *supra* note 5, at 1200.

141. *Id.*

142. Rubinfeld, *supra* note 94, at 782-84.

143. *Goldman v. Weinberger*, 475 U.S. 503, at 504-06 (1986). See *supra* notes 48-51 and accompanying text.

144. *Goldman*, 475 U.S. at 518-19.

145. Wolff, *supra* note 5, at 1187.

Homosexual soldiers are, however, subject to the entire scope of what the *kulturkampf* seeks to attain: forced assimilation of the minority's identity to that of the majority. The policy does not necessarily condone homosexuality *per se*, only when it is communicated vis-à-vis another person by words, affection, or physical conduct. Yet since that communication is an essential part of personhood and gay identity itself, the communication of identity cannot be separated from the identity itself.

IV. THE CASE FOR A FIRST AMENDMENT PROTECTION OF SEXUAL IDENTITY IN THE MILITARY CONTEXT

Challenging Don't Ask, Don't Tell in light of the foregoing construction of gay identity would be difficult without a concrete constitutional basis upon which a claim might be asserted. This is particularly true considering the deference the federal judiciary has given to military policy. However, *Lawrence v. Texas*¹⁴⁶ may serve as such a basis.¹⁴⁷ In addition to *Lawrence*'s blackletter commands, the opinion signifies something much deeper: the protection of identity and the formation thereof. To formulate a First Amendment litigation pathway, which could possibly overcome the judicial reluctance to interfere with military policy, *Lawrence* must be analyzed in the context of its jurisprudential predecessors. The following sections provide such an analysis of *Lawrence* and its military application, as well as a survey of recent post-*Lawrence* challenges to Don't Ask, Don't Tell.

A. LAWRENCE V. TEXAS: *THE BEGINNING OF THE END?*

In 1986 the Supreme Court upheld a Georgia criminal statute criminalizing consensual sodomy.¹⁴⁸ The Supreme Court held, over a learned dissent,¹⁴⁹ that neither due process nor considerations of privacy

146. 539 U.S. 558 (2003).

147. See *Lawrence*, 539 U.S. at 578-79 (holding that a state statute which makes it a crime for two people of the same sex to engage in sexual conduct violates the Due Process Clause).

148. *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986). See GA. CODE ANN. § 16-6-2 (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . [A] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.").

149. *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting). Justice Stevens in dissent stated that:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of

granted homosexuals a fundamental right to engage in consensual intimacy.¹⁵⁰ However, that holding was reversed in 2003 when the Supreme Court held that the Due Process Clause granted a privacy interest encompassing homosexual sodomy. As such, a state could not constitutionally criminalize sodomy. However, as it will be seen, the mandates of *Lawrence* go far beyond the confines of the Due Process and Equal Protection Clauses.

1. *Lawrence and Expressive Personhood*

It would appear from the foregoing that the federal judiciary is disinclined to spontaneously reverse its trend of deference to military and congressional policy regarding homosexual service members. Enter *Lawrence v. Texas*; it is improbable that when the Houston Police broke down their door, John Lawrence and Tyron Garner fully conceptualized the moment's immense implications on the constitutional status of gay and lesbian individuals. Some legal commentators have gone so far as to compare the significance of *Lawrence* to that of *Brown v. Board of Education*.¹⁵¹

At issue in *Lawrence* was a Texas statute illegalizing same-sex sodomy.¹⁵² The Supreme Court, in invalidating the statute, stated that the conduct at issue—homosexual intimacy—was within the “realm of personal liberty which the government may not enter.”¹⁵³ The majority based its rationale on the Due Process Clause of the Fourteenth Amendment, but did not clearly articulate the precise standard by which due process was to be applied.¹⁵⁴ The Court noted that the Due Process Clause had substantively

“liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Id. (citations omitted).

150. *Id.* at 190-92.

151. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399-1400 n.2 (2004) (noting the commentators who have recognized the potential immense implications of *Lawrence*); ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 138-40 (2004) (noting the potential impact *Lawrence* has on future gay rights litigation).

152. *Lawrence*, 539 U.S. at 564. See TEX. PENAL CODE ANN. § 21.06 (2003) (“A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”).

153. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

154. *Id.* at 573-78. There is some dispute as to whether the majority relied on a heightened form of rational basis review. *Id.* Justice Kennedy stated the Texas statute at issue “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* at 578. However the majority did not explicitly state that rational basis review was appropriate for classifications drawn on the basis of sexual orientation. In his dissent, Justice Scalia read rational basis into the majority’s opinion. *Id.* at 586 (Scalia, J., dissenting). Yet the

been extended to protect the privacy of marital relationships and decisions of contraception between consenting adults.¹⁵⁵ The Court ruled that there was a due process liberty “concerning the intimacies of their physical relationship, even when not intended to produce offspring,” relying on the rationale of Justice Stevens’s dissent in *Bowers v. Hardwick*.¹⁵⁶

The language of the opinion was not confined to merely the privacy of gays and lesbians, criminality of sexual conduct, or substantive rights under the Fourteenth Amendment. Rather, Justice Kennedy spoke in terms of dignity and personhood as dispositive elements whereby the state could not regulate. The Court stated that the aspects of personhood—“one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”—cannot be formed under compulsion of the State.¹⁵⁷ Moreover, criminalizing actions so fundamental to the formation of identity invites public and private discrimination towards homosexuals¹⁵⁸ and “demeans the lives of homosexual persons.”¹⁵⁹ The Court created a liberty interest encompassing private sexual relations, including relations between consenting homosexuals.

However, the Court did not restrict the applicability of *Lawrence* to the confines of the bedroom, as would otherwise be the logical extension of the privacy jurisprudence on which the majority rested its due process rationale. On the contrary, Justice Kennedy noted that the liberty interest he was about to articulate extended “beyond spatial bounds.”¹⁶⁰ He added that:

[T]here are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an

majority consistently spoke of something “fundamental.” *Id.* at 565. Justice Kennedy quoted *Eisenstadt v. Baird*, which stated: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added)). Justice Kennedy also took note that Supreme Court precedence “recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.” *Id.* (emphasis added). Justice Scalia noted the majority’s discussion of “fundamental propositions” and “fundamental decisions” but took pains to note that the majority did not expressly declare that homosexual sodomy was a fundamental right when it applied “an unheard-of form of rational-basis review.” *Id.* at 586 (Scalia, J., dissenting).

155. *Id.* at 564-65.

156. *Id.* at 578 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

157. *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

158. *Id.* at 575.

159. *Id.*

160. *Id.* at 562.

autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.¹⁶¹

Although the Court expressly invalidated a criminal statute inconsistent with the Due Process Clause of the Fourteenth Amendment, the language of the opinion went much further. *Lawrence* spoke of the burdens that the law placed on personhood. In essence, the “privacy of the closet” was rejected in *Lawrence* in favor of an “expressive and declarative space.”¹⁶² Emancipation from the confines of the closet is essential for the self-realization of personhood because of the inherent expressive nature of identity formation.¹⁶³ Because the formation of sexual identity is realized through human interactions and the outward expression of such identity and intimacy, there must also be a corresponding liberty that extends beyond “being” to “expressing.” Justice Kennedy recognized this fact and thus began the opinion in terms of liberty outside the realm of a bilateral relationship. The Court recognized that social norms had shifted to include homosexuality within the definition of citizenship,¹⁶⁴ and thus was “protecting the right of adults to define for themselves the borders and contents of deeply personal human relationships.”¹⁶⁵

As the majority noted, an attractive alternative ground for attacking the holding of *Bowers* was the Equal Protection Clause.¹⁶⁶ Justice O’Connor,

161. *Id.*

162. Sonia K. Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1441-42 (2006) (citing EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71 (1990)).

163. *See id.* at 1442 (“By ‘coming out,’ one crosses the border from a ‘love that dare not speak its name’ to gay self-actualization, gay personhood. What is invisible and therefore non-existent becomes visible, expressive and present: as a result, the personal declaration of ‘coming out’ becomes instead a politicized statement of personhood.”).

164. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1062 (2004).

165. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1915 (2004). Professor Tribe further stated that *Lawrence* did not hold that homosexual acts were fundamental, but rather that “the relationships and self-governing commitments out of which those acts arise—the network of human connection over time that makes genuine freedom possible.” *Id.* at 1955. Sonia Katyal notes that *Lawrence’s* “framework of deliberative autonomy and expressive liberty” rests on cultural and social norms for its “execution and attainment,” and may yield the biggest efficacy benefits. Katyal, *supra* note 162, at 1479-80. *See* Sonia K. Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 108 (2002) (arguing that successful pre-*Lawrence* gay rights litigation depended on “propagating a model of ‘gay personhood’ or ‘gay essentialism’”).

166. *Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003). The Court found an equal protection challenge to *Bowers* to be a “tenable argument” but concluded that such a challenge would lead some “question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” *Id.* at 574-75. Indeed, the Texas

however, chose to rest her concurrence on such a rationale. Where the majority left the question open as to what due process standard is applicable to homosexual relationships, Justice O'Connor saw rational basis to be appropriate for purposes of equal protection.¹⁶⁷ The command of the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."¹⁶⁸ Because the Texas statute criminalized homosexual sodomy but not sodomy between heterosexuals, it violated the Equal Protection Clause.¹⁶⁹

The traditional, high-degree of judicial deference inherent in rational basis scrutiny was not applied in *Lawrence*.¹⁷⁰ Indeed, Justice O'Connor aimed to preserve *Bowers*' holding that due process was not violated by a state law criminalizing sodomy.¹⁷¹ Her concurrence rested on the precept that because moral disapproval is insufficient to pass rational basis review under the Equal Protection Clause, the Texas statute criminalizing only homosexual sodomy was unconstitutional.¹⁷² Interestingly, the concurrence looked to the operation of the law. Justice O'Connor noted that "the effect of Texas' sodomy law is not just limited to the threat of prosecution . . . [it] brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else."¹⁷³ Moreover, the concurrence took note that Texas had stipulated that the statute "'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.'"¹⁷⁴ In her rational basis application to the facts, Justice O'Connor looked beyond the "legitimate purpose" required by the Court's rational basis jurisprudence to how the law operated.

statute did not criminalize sodomy between consenting heterosexuals. The Texas statute in question read: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (2003).

167. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

168. *Id.* at 579 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)).

169. *Id.* at 581.

170. Rational basis review usually involves a high degree of judicial deference in that "[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland*, 366 U.S. 420, 426-27 (1961). The presumption of validity can "only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981).

171. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

172. *Id.* at 580 (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

173. *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring).

174. *Id.* at 582 (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992)).

A similar application of rational basis scrutiny was made in *Department of Agriculture v. Moreno*.¹⁷⁵ At issue in *Moreno* was the constitutionality of a provision in the Food Stamp Act of 1964, which prevented households domiciling unrelated individuals from participating in the program.¹⁷⁶ The legislative record, however, suggested that the provision was designed to prevent “hippies” and “hippie communes” from receiving food stamps despite the government’s assertion that its purpose was to prevent fraud.¹⁷⁷ Justice Brennan, writing for the majority, looked to the “practical effect” of the legislation as part of his equal protection analysis, although he noted the highly deferential rational basis scrutiny was applicable.¹⁷⁸ He famously stated that “[f]or if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹⁷⁹ The Court found no independent rational basis on which the legislation stood, other than to exclude otherwise eligible participants who, by their economic circumstances, could not afford to alter their living arrangements to maintain eligibility in the program.¹⁸⁰

The Supreme Court extended and refined this application of equal protection to a classification based on homosexuality in *Romer v. Evans*.¹⁸¹ *Romer* involved the validity of Amendment 2, a publicly-adopted referendum to the Colorado constitution forbidding municipalities from passing any ordinance protecting homosexuals.¹⁸² The Supreme Court invalidated the amendment on equal protection grounds, ostensibly using rational basis scrutiny.¹⁸³ However, as in *Moreno*, the *Romer* majority looked between

175. 413 U.S. 528 (1973).

176. *Moreno*, 413 U.S. at 529.

177. *Id.* at 534 (citing H.R. Conf. Rep. No. 91-1793, at. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland)).

178. *Id.* at 537.

179. *Id.* at 534.

180. *Id.* at 538.

181. *Romer v. Evans*, 517 U.S. 620 (1996).

182. *Id.* at 624. Amendment 2 stated that:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art II, § 30b (repealed 1996).

183. *Romer*, 517 U.S. at 632.

the lines of the amendment to its functional operation and “ultimate effect.”¹⁸⁴ The Supreme Court noted that Amendment 2 imposed “a broad and undifferentiated disability on a single named group” based on its broad and unqualified language.¹⁸⁵ Moreover, its “breadth” was so broad that its rationale was “inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”¹⁸⁶

When read in conjunction with *Moreno* and Justice O’Connor’s concurrence in *Lawrence*, it is evident why arguing for heightened equal protection scrutiny is so enticing. The language of *Romer*, like that of the majority in *Lawrence*, speaks to something deeper: a group deprivation. Justice Kennedy, speaking for the majority in *Romer*, stated that Amendment 2 “does no more than deprive homosexuals of special rights. . . . [It] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”¹⁸⁷ Furthermore, the Court noted that Amendment 2 “identifies persons by a single trait and then denies them protection across the board.”¹⁸⁸ The majority concluded its opinion by stating that:

[I]n making a general announcement that gays and lesbians shall not have any particular protections from the law, [Amendment 2] inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. . . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. “Class legislation. . . [is] obnoxious to the prohibitions of the Fourteenth Amendment. . . .” We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.¹⁸⁹

The Supreme Court discussed the impropriety of a group deprivation.¹⁹⁰ Indeed, the identification of a single group—the “we” versus “them” duality

184. *Id.* at 627 (citation omitted).

185. *Id.* at 632.

186. *Id.*

187. *Id.* at 631.

188. *Id.* at 633.

189. *Id.* at 635 (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

190. For an excellent discussion of equal protection and citizenship implications of *Romer* see generally Joseph S. Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, *passim* (1997); see also KARST, *supra* note 126, at 187

inherent in a group deprivation—is violative of the promise of equal protection “that government and each of its parts remain open on impartial terms to all who seek its assistance.”¹⁹¹

Romer’s promise of invalidating group-based deprivations does not cure its inherent shortcoming, however. It takes group deprivation at face value without deconstructing the nature of the group. *Romer* failed to construct the nature of homosexual identity, namely its communicative nature. This is why *Lawrence* was such an important development; it took note of the communicative nature of sexual identity and sought to protect it. Yet as the constitutional basis of *Lawrence* and *Romer* focused on the Due Process and Equal Protection Clauses, litigation avenues have continued to rely on their juridical confines. The unsuccessful challenges regarding a major piece of legislation such as Don’t Ask, Don’t Tell is somewhat predictable, however. Lower courts do not seem receptive to providing homosexuals with a heightened level of judicial scrutiny. Thus, as will be demonstrated in the following sections, the traditional presumption of validity and deference permeates Don’t Ask, Don’t Tell jurisprudence.

2. *Military Application of Lawrence*

There has been considerable debate about what *Lawrence v. Texas* actually means, including within the context of the United State military.¹⁹² The first instance in which the military had to reconcile *Lawrence* with the

(“[J]udges need to be alert to the expressive qualities of law, particularly the capacity of law’s expression to inflict the direct harms of stigma and stereotype.”).

191. *Romer*, 517 U.S. at 633. As the Court noted, Amendment 2 had “the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . .” *Id.* at 632. See Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996) (“If *Romer* is to be defended, it must be because the grounds for Amendment 2 are, in a deliberative democracy, properly ruled off-limits, because the Amendment reflects a judgment that certain citizens should be treated as social outcasts.”).

192. See, e.g., Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 25 (2005) (arguing that *Lawrence* is significant because it was the first case to bring fundamental rights doctrine and due process balancing cases together); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1231 (2004) (stating that *Lawrence* opens the door to due process obligations on the part of states to recognize same-sex marriage); Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN’S L.J. 311, 319-20 (2004) (asserting that the rights in *Lawrence* are not absolute and do not encompass gay marriage); Berta E. Hernandez-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1263 (2004) (stating that *Lawrence*, despite ambiguity, maps out an antisubordinate model of jurisprudence because *Lawrence* “at its foundation . . . embraces the radical idea that gays and lesbians are people, too”); Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 112 (2003) (arguing that *Lawrence* was revolutionary in the respect that the judicial inquiry shifted from one examining the “traditions of our ancestors” to measuring the daily impact of a law, disregarding “[p]opular notions of morality” as a sufficient justification for discriminatory legislation).

prohibitions on sodomy within the military was in the case of Sergeant Eric P. Marcum. Sergeant Marcum was convicted of engaging in homosexual sodomy with a lower grade soldier within his chain of command.¹⁹³ The government asserted that *Lawrence* did not apply to the military ban on homosexual sodomy because of the distinctiveness of military life as recognized in *Parker v. Levy*.¹⁹⁴ The Court of Appeals for the Armed Forces in *United States v. Marcum*¹⁹⁵ upheld the conviction, but not before conceding that *Lawrence* has applicability in the military context.¹⁹⁶

The court of appeals in *Marcum* acknowledged the established wisdom of *Levy* that civilian culture is distinct from military life, thus the context of any action must be judged in terms of military readiness.¹⁹⁷ The court also acknowledged that soldiers “may not be stripped of basic rights simply because they have doffed their civilian clothes.”¹⁹⁸ As such, the Bill of Rights was applicable to members in the armed forces except in instances where the “express terms” of the Constitution require such application.¹⁹⁹ It was noted that the ban on homosexual sodomy in the armed forces, enacted pursuant to Congress’s constitutional authority, was done prior to *Lawrence*.²⁰⁰ Prior courts-martial and separation proceedings involving Don’t Ask, Don’t Tell occurred while the “operative constitutional backdrop” was still *Bowers v. Hardwick*.²⁰¹

The court of appeals made another observation regarding the core holding of *Lawrence*. It noted that *Lawrence* rejected the notion that *Bowers* stood only for the right to engage in particular sexual practices.²⁰² Rather, the court acknowledged that “[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”²⁰³ *Marcum* also held that the liberty interest of *Lawrence* was not constructed by the Supreme Court in such a way as to preclude its application to the military.²⁰⁴ Thus, private intimacy between two consenting

193. *United States v. Marcum*, 60 M.J. 198, 200-01 (C.A.A.F. 2004).

194. *Id.* at 202. See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (discussing the differences between civilian and military life).

195. 60 M.J. 198 (C.A.A.F. 2004).

196. *Marcum*, 60 M.J. at 208.

197. *Id.* at 205.

198. *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

199. *Id.*

200. *Id.* at 206 (citing 10 U.S.C. § 654 (2000)).

201. *Id.*

202. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

203. *Id.* (quoting *Lawrence*, 539 U.S. at 567).

204. *Id.*

adults was held to fall within the liberty interest created by the Supreme Court in *Lawrence*.²⁰⁵

The court of appeals was not prepared to apply *Lawrence en masse* to the military context. What emerged from the opinion was a three part test to ascertain the legality of consensual sexual relations in the armed forces. After a service member's conduct is found to be in the zone of liberty created by *Lawrence*, the military tribunal will look to any factors that the Supreme Court held were outside the decision's purview.²⁰⁶ Lastly, any additional factors "relevant solely in the military environment" affecting the scope of *Lawrence* will be considered.²⁰⁷

Sergeant Marcum's conduct involved a subordinate airman within his chain of command.²⁰⁸ It thus not only fell outside the protections of *Lawrence*, but was also prohibited by Air Force policy applicable to both homosexuals and heterosexuals.²⁰⁹ The court of appeals acknowledged that the relationship was the type in which "consent might not easily be refused."²¹⁰ Thus, the conviction was affirmed not on the grounds that *Lawrence* did not apply to the military, but rather because the liberty interest at stake in *Lawrence* did not encompass relationships characterized by power asymmetries.

B. A SURVEY OF RECENT CHALLENGES

A true portrait of Don't Ask, Don't Tell is incomplete without examining the stories of individual soldiers, and detailing how the policy actually operates. Some service members prosecuted under the policy engaged in conduct deemed reprehensible regardless of their sexual orientation.²¹¹ Others, like Major Margaret Witt have been subjected to manifest injustice stemming from the burdens imposed by the policy on

205. *Id.* at 206. The dissent in *Marcum* acknowledged the majority's holding that the conduct of Sergeant Marcum fell within the *Lawrence* liberty interest. *Id.* at 212 (Crawford, C.J., dissenting). A similar result was reached in *United States v. Stirewalt* in which the court of appeals held that a soldier's conduct regarding sodomy fell within the liberty interest of *Lawrence v. Texas*. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

206. *Marcum*, 60 M.J. at 206-07.

207. *Id.* at 207.

208. *Id.*

209. *Id.* at 208.

210. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). The court of appeals in *Stirewalt*, however, held that the liberty interest of *Lawrence* did not extend to consensual homosexual relationships occurring on a coast guard cutter on active duty. *Stirewalt*, 60 M.J. at 304. The court of appeals also held that the relationship in *Stirewalt* was analogous to that in *Marcum* in that the relationship was between a commissioned department head and subordinate enlisted crewman. *Id.*

211. *See, e.g., Marcum*, 60 M.J. at 200-01 (discussing whether a sexual encounter between two service members was consensual).

service members and the discretion vested with individual commanders. To say Major Witt was an exemplary Air Force service member is an understatement.²¹² Yet in the summer of 2004, the Air Force began investigating an anonymous allegation that Major Witt was a lesbian.²¹³ Specifically, the investigation sought to ascertain whether Witt was in a relationship with a civilian partner from 1997 to 2003.²¹⁴ During the inquiry Major Witt never spoke or otherwise disclosed her sexual orientation to her commander.²¹⁵ The Air Force found no instances in which Major Witt engaged in homosexual conduct on base, nor that her partner was, or had ever been, a member of the armed forces.²¹⁶ Nevertheless, separation proceedings commenced pursuant to Don't Ask, Don't Tell.²¹⁷ Major Witt sought a preliminary injunction to allow her to earn points toward promotion and her pension.²¹⁸ She alleged that Don't Ask, Don't Tell post-*Lawrence* was unconstitutional on First Amendment, Equal Protection, and substantive Due Process grounds.²¹⁹

The District Court for the Western District of Washington rejected Major Witt's claims and upheld Don't Ask, Don't Tell as constitutional.²²⁰ Specifically, the district court stated that the *Marcum* criteria were applicable only in cases that dealt with the criminalization of sodomy.²²¹ The court further held that *Lawrence* "did not change constitutional jurisprudence in a way that impacts the validity" of Don't Ask, Don't Tell.²²² The court considered the implications of *Lawrence* only in the context of its due process and equal protection analyses.²²³ The opinion stressed that *Lawrence* stood for rational basis review; since homosexuals were not subject to a suspect or quasi-suspect classification, Don't Ask,

212. Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1141 (W.D. Wash. 2006), *vacated in part by* Witt v. U.S. Dep't of Air Force, No. 06-35644, slip op. (9th Cir. May 21, 2008). Among the medals Major Witt was awarded in her nineteen years of service were: Meritorious Service Medal, Air Medal, Aerial Achievement Medal, Air Force Commendation Medal, Air Force Achievement Medal, Air Force Outstanding, Unit Award With Valor, Combat Readiness Medal, National Defense Service Medal, Armed Forces Expeditionary Medal, Air Force Overseas Ribbon Long, Armed Forces Reserve Medal, and Small Arms Expert Marksmanship Ribbon. Compl. of Pet. at ¶ 20, Witt v. U.S. Dep't of Air Force, Case 3:06-CV-05195 (W.D. Wash., 2006).

213. Witt, 444 F. Supp. 2d at 1141.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1148.

221. *Id.* at 1143.

222. *Id.* at 1144.

223. *Id.* at 1142-45.

Don't Tell was subject to pre-2003 equal protection analysis.²²⁴ Relying on the traditional notion of judicial deference to military policy, the court stated that precluding homosexuals from openly serving in the military was valid.²²⁵

The district court further found that the First Amendment did not render Don't Ask, Don't Tell unconstitutional.²²⁶ The court stated that the right to intimate associations has not been extended to the context of homosexual relationships.²²⁷ Moreover, the court cited to *Thomasson* for the proposition that the spoken proclamation of one's sexual identity was not, in effect, speech protected by the First Amendment.²²⁸ Rather, admissions served only as evidentiary purposes for the purpose of ascertaining a soldier's propensity to engage in prohibited homosexual contact.²²⁹

The district court failed to account for a fundamental point articulated in *Marcum*. Previous challenges to Don't Ask, Don't Tell were adjudicated when *Bowers* served as the jurisprudential underpinning.²³⁰ The court only considered the impact of *Lawrence* on the level of equal protection review rather than its impact on all claims asserted.²³¹ Thus, the implications of *Lawrence* on the First Amendment rights of service members escaped the analysis. More specifically, the court's analysis failed to read the Supreme Court's holding in *Lawrence* with expressive identity cases. *Lawrence* held that there was a liberty interest in consensual homosexual relationships—a realm of privacy that is free from government intrusion.²³² Yet the operation of Don't Ask, Don't Tell is compelled affirmation—a *de facto* intrusion into the sexual identity of a person.²³³ The Supreme Court held that homosexuality cannot be criminalized. As such, there seems to emerge a corresponding liberty inherent in personal identity that prevents

224. *Id.* at 1145. The district court stated that “*Lawrence* is based on rational basis review; the same level of scrutiny applied by the Ninth Circuit Court of Appeals in upholding the constitutionality of [Don't Ask, Don't Tell] prior to *Lawrence*.” *Id.* at 1144.

225. *Id.* at 1145. The district court noted that “[t]he government's rationale for [Don't Ask, Don't Tell] is that excluding from military service homosexuals who engage in or have the propensity to engage in homosexual acts further discipline and combat readiness in the military by preventing risks to unit cohesion posed by the presence of such homosexuals.” *Id.*

226. *Id.* at 1146-47.

227. *Id.* at 1146.

228. *Id.*

229. *See id.* (“The Fourth Circuit held that the statement prong of [Don't Ask, Don't Tell] is not directed at speech and therefore does not violate the First Amendment.”). For a discussion of *Thomasson v. Perry*, *see supra* text accompanying notes 73-87.

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

231. *Id.* at 205.

232. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

233. *See* discussion *supra* Parts III.A-B (discussing the formation and dynamics of gay identity).

penalizing the expression of one's sexual identity, which the district court failed to recognize.

A similar result was reached by the Massachusetts Federal District Court in *Cook v. Rumsfeld*.²³⁴ At issue was the discharge of twelve service members pursuant to Don't Ask, Don't Tell.²³⁵ One of these service members was Specialist (SPC) Thomas Cook, who had joined the U.S. Army in April 2001, was given an intelligence specialty, and was deployed to Kuwait in April 2002.²³⁶ He and his company were ordered to deploy to Iraq in the lead-up to Iraqi Freedom.²³⁷ During a field training exercise, SPC Cook's team leader stated that "[i]f I ever found out someone in my crew was gay, I would kill him."²³⁸ Unaware of any channel by which confidentiality could be assured, SPC Cook informed his battalion commander that he was a homosexual.²³⁹

Another service member, Lieutenant Jenny Lynn Kopfstein, entered the U.S. Navy in 1995.²⁴⁰ She had previously graduated from the Naval Academy and was assigned to the *U.S.S. Shiloh*.²⁴¹ Despite the fact that Lieutenant Kopfstein disclosed her homosexuality to her commanding officer, she was not separated from the armed forces. Rather, she was re-assigned to support operation Enduring Freedom and was kept on the ship for twenty-two months, during which time she received numerous awards and honors.²⁴² Nineteen months after Lieutenant Kopfstein disclosed her homosexuality, a board of inquiry convened and recommended that she be separated from the Navy under Don't Ask, Don't Tell, notwithstanding the fact that her Captain testified on her behalf.²⁴³

SPC Cook, Lieutenant Kopfstein, and ten other service members in comparable circumstances challenged their discharges and alleged that in light of *Lawrence*, Don't Ask, Don't Tell was unconstitutional under the Equal Protection Clause, the Due Process Clause, and the First Amendment.²⁴⁴ Like their counterparts in *Witt*, the district court held that

234. 429 F. Supp. 2d 385 (D. Mass., 2006)

235. *Cook*, 429 F. Supp. 2d at 386.

236. Complaint at ¶ 63-64, *Cook v. Rumsfeld*, No. 04-CV-12546-GAO (D. Mass., filed Dec. 6, 2004). SPC Cook had also been awarded the Army Achievement Medal for his service. *Id.*

237. *Id.*

238. *Id.* ¶ 66.

239. *Id.* ¶ 66-67.

240. *Id.* ¶ 110.

241. *Id.* ¶ 110-11.

242. *Id.* ¶ 111-13. Kopfstein was, during this time, qualified as "Officer of the Deck Underway," giving her the authority to take command of the *U.S.S. Shiloh* in certain circumstances. *Id.* ¶ 113.

243. *Id.* ¶ 114-16.

244. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 390-91 (D. Mass., 2006).

Lawrence did not warrant treating “plaintiffs’ articulated liberty interest as a ‘fundamental’ interest calling for heightened scrutiny in judicial review of the legislative decision-making.”²⁴⁵ Moreover, traditional notions of judicial deference necessitated finding that Don’t Ask, Don’t Tell was a legitimate policy of Congress.²⁴⁶

Also like their counterparts in *Witt*, the district court held that Don’t Ask, Don’t Tell did not target speech.²⁴⁷ The court noted that speaking about one’s propensity, intent, or conduct, “does not mean that a governmental regulation pertaining to the conduct is also an impermissible restriction on speaking about it.”²⁴⁸ The district court interpreted expressive identity speech in *Thomasson* terms as only evidence of propensity.²⁴⁹ As such the First Amendment was not implicated.²⁵⁰

The district court thus missed the essential holding of *Lawrence*, that there exists an interest of sexual intimacy which extends beyond private realm. *Lawrence* was only read by the district court in terms of the level of review applicable to the equal protection and due process claims asserted.²⁵¹ It did not consider *Lawrence* in light of gay identity, and thus expression, as an element of personhood, which was free from government interference. Moreover, the district court failed to account for *Lawrence*’s applicability in the military context as articulated in *Marcum*.²⁵² The district court accordingly upheld Don’t Ask, Don’t Tell as compatible with the First Amendment.²⁵³

Of course, one would be remiss not to highlight the immense financial stake many service members have in continuing their military careers; receiving pensions and education reimbursements are such considerations. Lieutenant Colonel Steve Loomis, for instance, began his military career with a tour of duty in Vietnam, during which he was awarded two Bronze Stars for valor and a Purple Heart.²⁵⁴ In March of 1995 Lieutenant Colonel

245. *Id.* at 395.

246. *Id.* at 397-98.

247. *Id.* at 409-10.

248. *Id.* at 407.

249. *Id.*

250. *Id.* at 408.

251. *Id.* at 404.

252. The district court only mentioned *Marcum* in two footnotes as standing for the proposition that *Lawrence* did not articulate a fundamental right. *Id.* at 384 n.10, 396 n.13. The court stated that in “‘*Lawrence*, the Court did not expressly identify the liberty interest as a fundamental right.’” *Id.* at 395 n.13 (quoting *United States v. Marcum*, 60 M.J. 198, 204-05 (U.S. Armed Forces, 2004)).

253. *Cook*, 429 F. Supp. 2d at 410.

254. *Loomis v. United States*, 68 Fed. Cl. 503, 505 (Fed. Cl. 2005). Lieutenant Colonel Steve Loomis was also awarded two Army Achievement Medals, two Army Commendations Medals,

Loomis began an affair with 19-year-old Private First Class (PFC) Michael Burdette while both were stationed at Fort Hood Military Reservation.²⁵⁵

During an early intimate encounter, a series of explicit photographs and videos were consensually taken.²⁵⁶ The affair progressed until August 2006 when PFC Burdette broke into Lieutenant Colonel Loomis's home in order to recover the photographs and tapes.²⁵⁷ Being unable to locate them, PFC Burdette set the house on fire.²⁵⁸ The local fire marshal discovered the videos and turned them over to the Army's Criminal Investigation Division (CID).²⁵⁹ Notwithstanding multiple inconsistencies in PFC Burdette's statements to CID and local police officials, the Army chose to initiate separation proceedings against Lieutenant Colonel Loomis.²⁶⁰ He was separated from the Army five days prior to being eligible for retirement benefits.²⁶¹

Lieutenant Colonel Loomis elected to bring the action in the United States Court of Federal Claims pursuant to the Tucker Act.²⁶² He alleged that pursuant to military regulations, he should have been afforded the opportunity to elect retirement in lieu of being forcibly separated from the armed services.²⁶³ Because the elimination proceedings were based upon the prohibition of homosexual sodomy, Lieutenant Colonel Loomis challenged the constitutional validity of Don't Ask, Don't Tell in light of *Lawrence*.²⁶⁴

and four Meritorious Service Medals. Compl. of Pet. ¶ 11, *Loomis v. United States*, Case 1:03-CV-01653 (Fed. Cl. 2005) (filed on July 7, 2003).

255. *Loomis*, 68 Fed. Cl. at 506.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* Separation was recommended by the Board of Inquiry for homosexual acts under Don't Ask, Don't Tell as well as for conduct unbecoming of an officer. *Id.* The Board also recommended that Lieutenant Colonel Loomis be discharged "Under Other Than Honorable Conditions" because their "finding of force, coercion, or intimidation in conjunction with homosexual acts and conduct unbecoming of an officer." *Id.* at 510.

261. *Id.*

262. *See* 28 U.S.C. § 1491 (2000). The Act provides in part that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim . . . upon the Constitution, or any Act of Congress or . . . upon any express or implied contract with the United States." *Id.* § 1491(a)(1). The Court of Federal Claims also has the authority to "issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records." *Id.* § 1491(a)(2).

263. *Loomis*, 68 Fed. Cl. at 508. *See* Army Reg. 600-8-24, § VI, ¶ 4-24a ("An officer identified for elimination may, at any time during or prior to the final action in the elimination case, elect one of the following options. . . (3) Apply for retirement in lieu of elimination if otherwise eligible.").

264. *Loomis*, 68 Fed. Cl. at 513.

The Court of Federal Claims considered the constitutionality of Don't Ask, Don't Tell on both due process and equal protection grounds. The court held that *Lawrence* did not create a fundamental right to engage in consensual homosexual sodomy.²⁶⁵ It cited *Marcum* for the proposition that the Supreme Court “did not expressly identify the liberty interest as a fundamental right.”²⁶⁶ Moreover, the court ascertained that the standard of review for an equal protection claim based on sexual orientation was rational basis.²⁶⁷ The pre-*Lawrence* usual suspects were relied upon to support the proposition that Don't Ask, Don't Tell is rationally related to the legitimate government interest in “promoting unit cohesion” and “reducing (presumably intra-unit) sexual tension.”²⁶⁸ Thus, the ban on open homosexuality in the military did not violate the Equal Protection Clause.²⁶⁹ The court in *Loomis* trapped itself, as did the district courts in *Witt* and *Cook*, into following *Lawrence*'s red herring: what standard of review is used for equal protection analysis?²⁷⁰

Notwithstanding setbacks in the district courts, there has been a more positive reaction to administrative law challenges to the constitutionality of Don't Ask, Don't Tell. Captain John Hensala completed his medical degree at Northwestern University Medical School prior to receiving his commission in the Air Force Reserve, Medical Corps.²⁷¹ Captain Hensala had participated in the Armed Forces Health Professions Scholarship Program in which educational expenses are paid for health professionals in exchange for military service.²⁷² Prior to starting active duty, he disclosed during his preliminary medical exam that he was a homosexual.²⁷³ The Air Force did not respond to the admission, and his commanding officer even

265. *Id.* at 518.

266. *Id.* at 517 (quoting *United States v. Marcum*, 60 M.J. 198, 205 (2004)).

267. *Id.* at 521.

268. *Id.* at 521-22 (citing *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996)).

269. *Id.*

270. *See supra* notes 212-29, 234-61 and accompanying text.

271. *Hensala v. Dep't of the Air Force (Hensala I)*, 148 F. Supp. 2d 988, 991 (N.D. Cal. 2001). Captain Hensala served in the Air Force Reserves for twenty weeks prior to his graduation. *Id.* He deferred his active duty while he completed a psychiatric residency at Yale University in 1993 and a child psychiatry fellowship at the University of San Francisco in 1995. *Id.*

272. *Id.* *See* 10 U.S.C. §§ 2120-27 (2000) (establishing the scholarship program). The statute also provides that “if such person, voluntarily or because of misconduct, fails to complete the period of active duty specified in the agreement . . . such person will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided such person.” 10 U.S.C. § 2005(a)(3) (2000) (emphasis added).

273. *Hensala v. Dep't of the Air Force (Hensala II)*, 343 F.3d 951, 953-54 (9th Cir. 2003).

permitted Captain Hensala's same-sex partner to live on base with him on the condition that they did not "publicize" their relationship.²⁷⁴

However, two years later the Air Force sought to separate Hensala from the armed services and ordered recoupment of \$71,429.53 in educational expenses paid by the government.²⁷⁵ The District Court for the Northern District of California affirmed the recoupment order and declined to determine whether Don't Ask, Don't Tell was constitutional in light of pre-*Lawrence* precedence.²⁷⁶ However, the Court of Appeals for the Ninth Circuit cast serious doubt as to the continuing constitutionality of Don't Ask, Don't Tell.

Captain Hensala asserted that the recoupment policy under Don't Ask, Don't Tell was violative of the Administrative Procedure Act (APA).²⁷⁷ Federal courts are granted authority under the APA to set aside agency decisions where they are either "arbitrary, capricious . . . or otherwise not in accordance with law,"²⁷⁸ or "contrary to constitutional right."²⁷⁹ In addition to claiming that his due process and equal protection rights had been violated, Captain Hensala asserted that the recoupment policy violated his rights under the First Amendment.²⁸⁰ The Ninth Circuit concluded that the district court was correct in dismissing the claim that the Air Force was arbitrary and capricious in ordering the recoupment of educational expenses.²⁸¹

274. *Id.* at 954.

275. *Id.* at 955. An investigation was conducted into the background of Captain Hensala. *Id.* at 954. In 1994 Deputy Secretary of Defense John M. Deutch issued a memorandum outlining the circumstances in which recoupment of educational expenses is proper. *Id.* at 954-55. The memorandum stated that

[A] member's statement that he or she is a homosexual, though grounds for separation under the current policy if it demonstrates a propensity or intent to engage in homosexual acts, does not constitute a basis for recoupment, as defined above. This does not preclude recoupment, however, if the member making such a statement has otherwise failed to complete his or her term of service "voluntarily or because of misconduct." In particular, recoupment would be appropriate where, based on the circumstances, it is determined that the member made the statement for the purpose of seeking separation.

Id. at 958.

276. *Hensala I*, 148 F. Supp. 2d at 997, 1004. The Ninth Circuit upheld Don't Ask, Don't Tell in *Holmes v. California Army National Guard*. See *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (reasoning that Don't Ask, Don't Tell regulates only conduct and does not impose a burden on speech under the First Amendment).

277. *Hensala II*, 343 U.S. F.3d at 955.

278. 5 U.S.C. § 706(2)(A) (2000).

279. *Id.* § 706(2)(B).

280. *Hensala II*, 343 F.3d at 955.

281. *Id.* at 956. The Ninth Circuit examined the statistics of recoupment orders pursuant to discharges commanded under Don't Ask, Don't Tell. *Id.* at 955. The Air Force ordered recoupment of expenses in twenty-three of twenty-eight similar cases. *Id.* Moreover, where discharge

The Ninth Circuit noted that unlike Don't Ask, Don't Tell, the recoupment policy did not provide a rebuttable presumption of impermissible sexual conduct.²⁸² Because the recoupment policy effectively targeted homosexual service members based on *status* rather than conduct, the court declined to follow its previous precedence upholding Don't Ask, Don't Tell.²⁸³ The recoupment policy did not create a rebuttable presumption of misconduct, but rather targeted only those service members who identified themselves as homosexuals without inquiry into whether there had been an instance of misconduct.²⁸⁴ Furthermore, the recoupment policy did not apply to heterosexual service members as the court had previously attempted to explain.²⁸⁵ The recoupment policy targeted only the declaration of one's homosexuality rather than the propensity to engage in homosexual conduct.²⁸⁶ As such, the court held that the issue of whether the Air Force was directing policy toward only gay and lesbian service members presented a colorable issue on remand in light of the First Amendment implications of *Lawrence*.²⁸⁷

The present state of litigation challenging Don't Ask, Don't Tell is still largely confined to the traditional bases of equal protection and due process.²⁸⁸ Moreover, First Amendment challenges to Don't Ask, Don't Tell to

was not based on a service member's statement of sexual orientation, recoupment was ordered 274 times in 277 cases. *Id.*

282. *Id.* at 958.

283. *Id.* See *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1135 (upholding Don't Ask, Don't Tell on due process, equal protection, and First Amendment grounds). The *Holmes* court stated that Don't Ask, Don't Tell was not violative of the Equal Protection Clause because of the military's legitimate interest in separating service members because of "homosexual conduct." *Id.* at 1134 (emphasis added). The court further noted that the policy was rationally related to a legitimate government interest because the presumption that a statement indicating a service member who identifies themselves as homosexual will not be celibate is rebuttable, and is applicable to both heterosexuals and homosexuals. *Id.* at 1136. Lastly, *Holmes* held that the First Amendment was not implicated because statements of sexual orientation were evidence of conduct only. *Id.*

284. *Hensala II*, 343 F.3d at 957-58.

285. *Id.* at 958; *Holmes*, 124 F.3d at 1136. See Karst, *supra* note 116, at 278 ("Defense Department strongly indicated that discharge would result only where homosexual conduct was indicated, and not because of a service member's homosexual status.").

286. *Hensala II*, 343 F.3d at 958.

287. *Id.*

288. See *Witt v. U.S. Dep't of Air Force*, 444 F. Supp. 2d 1138, 1144-45 (W.D. Wash. 2006) (holding that rational basis review was applicable because "homosexuals do not constitute a suspect or quasi-suspect class" and that "*Lawrence v. Texas* did not change constitutional jurisprudence in a way that impacts the validity of [Don't Ask, Don't Tell]"); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 395 (D. Mass. 2006) ("*Lawrence* nor any other relevant precedent requires treating the plaintiffs' articulated liberty interest as a 'fundamental' interest calling for heightened scrutiny in judicial review of the legislative decision-making."); *Loomis v. United States*, 68 Fed. Cl. 503, 520 (Fed. Cl. 2005) ("[Don't Ask, Don't Tell] does not implicate a fundamental right and thus will be reviewed under the rational basis standard for substantive due process purposes.").

date have not taken into account *Lawrence*'s protection of identity.²⁸⁹ Neither course of litigation has successfully overcome judicial deference to military policy. To do so requires more than applying *Lawrence* to a *Bowers* jurisprudential paradigm. Rather, it requires considering identity as a fundamental right under the purview of the First Amendment.

V. CONCLUSIONS AND IMPLICATIONS

The full implications of *Lawrence* for gay rights litigation are still unknown. The Supreme Court's opinion may yield different litigation avenues previously unexplored. The judicial protection of gay identity affords plaintiffs an avenue by which they may challenge burdens on such identity, such as Don't Ask, Don't Tell. However, the dispositive question seems to be whether courts will overcome their post-Vietnam deference to defend a First Amendment right. Thus far, judicial deference to military and congressional policy regarding homosexual soldiers has proved insurmountable in both pre- and post-*Lawrence* constitutional challenges.²⁹⁰ The district courts in *Cook* and *Witt*, for instance, failed to apply the substance of *Lawrence* to the military context, as did the Court of Federal Claims in *Loomis*.²⁹¹ Future challenges to Don't Ask, Don't Tell may be able to rectify this misreading by asserting that the First Amendment, post-*Lawrence*, forbids burdening the formation and expression of sexual identity in any context.

Indeed, *Lawrence* fundamentally altered protection afforded to gays and lesbians, and affords potential plaintiffs the prospect of successfully challenging discriminatory legislation including Don't Ask, Don't Tell. The decision itself endorses the idea that the Constitution protects gay identity in addition to homosexual intimacy. In essence, the Supreme Court stated that it is no longer permissible to require gays and lesbians to "live within a lie."²⁹² The liberty interest articulated extends not only to

Most recently, the Ninth Circuit vacated and remanded only the district court's due process holdings. *Witt v. U.S. Dep't of Air Force*, No. 06-35644, slip op. At 5868 (9th Cir. May 21, 2008). The court concluded that "*Lawrence* applied something more than traditional rational basis review." *Id.* at 5861. The Ninth Circuit did not, however, address the district court's First Amendment analysis or the First Amendment implications of *Lawrence*. *Id.*

289. *See, e.g., Witt*, 444 F. Supp. 2d at 1146-47 (holding that Don't Ask, Don't Tell does not violate the First Amendment); *Cook*, 429 F. Supp. 2d at 407-08 (noting that because Don't Ask, Don't Tell targets conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968))).

290. *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996); *Steffan v. Perry*, 41 F.3d 677, 686-87 (D.C. Cir. 1994) (en banc); *Selland v. Perry*, 905 F. Supp. 260, 263-66 (D. Md. 1995).

291. *See supra* notes 215-232, 237-272 and accompanying text.

292. HAVEL, *supra* note 1, at 144.

interpersonal intimate relationships but also toward the world at large. Thus, emerging from *Lawrence* is a First Amendment protection of identity expression. This strikes the Don't Ask, Don't Tell policy at its core; the requirement of suppressing identity expression while permitting identity associations may now prove untenable, and may subject the policy to higher judicial scrutiny. Litigating identity expression in the military context may bear the fruits of years of hard work and sacrifice by homosexual advocates and their allies. It may also prove a crucial step toward true equality for civilians and soldiers alike.