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Tobias B. Wolff

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# COMPELLED AFFIRMATIONS, FREE SPEECH, AND THE U.S. MILITARY'S DON'T ASK, DON'T TELL POLICY\*

*Tobias Barrington Wolff†*

## INTRODUCTION

Imagine the following scene. At an Air Force base outside Colorado Springs, Colorado, early in 1996, two young officers have gotten together after work to have some coffee and relax. One of the two, Anne, is a lesbian. Since the time she entered the service, Anne has assiduously avoided making any reference to her sexual orientation, as the Don't Ask, Don't Tell policy requires.<sup>1</sup> None of her friends or fellow officers know

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† Clerk, the Honorable Betty Binns Fletcher, Ninth Circuit Court of Appeals. Yale Law School, J.D., 1997.

There are many people—colleagues and mentors alike—to whom I am indebted for the assistance that they offered while I was writing this Article. I owe my greatest debt of gratitude, however, to the gay and lesbian servicemembers who agreed to lend me their experience and wisdom by granting the interviews around which this Article took shape. Because some of those servicemembers must remain anonymous, I have decided not to thank any of them by name; leaving any one of them out of such an acknowledgment would simply be unacceptable. This Article would not have been possible without their generosity. I dedicate this work to them and to the many tens of thousands of gay men and lesbians who continue to render honorable service to our country in the U.S. armed forces.

For his scholarly guidance, I am especially indebted to Owen Fiss, who taught me what the First Amendment is really all about. Glenn Edwards, whose knowledge in the field of gay rights eclipses my own, was a constant source of information, wisdom, and encouragement. Michelle Benecke of Servicemembers Legal Defense Network put me in touch with many of my interview subjects and enabled this Article to get off the ground. Greg Bowman, Betty Fletcher, Paul Gewirtz, Ryan Goodman, William Norris, John Pottow, William Rubenstein, Sandhya Subramanian, Cynthia Griffin Wolff, Robert Paul Wolff, Kenji Yoshino, and the members of the Spring 1997 Sexual Orientation Workshop at Yale Law School all gave the kind of serious critical attention to this Article that any scholar would be thankful for. All errors are my own.

<sup>1</sup> See Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (1997). The statute begins by listing fifteen legislative findings, the first fourteen of which essentially offer arguments for the proposition made in the fifteenth, that

that Anne is gay, and Anne never talks about "gay issues" around the base. The other officer, Nancy, is straight. Nancy

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"[t]he presence in the armed forces of persons who demonstrate 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." *Id.* § 654(a)(15). The statute goes on to require that a member of the armed forces be separated from the service on a finding of one or more of the following:

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

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

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

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

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

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

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

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

*Id.* § 654(b).

The statute's definition of "homosexual act" reads as follows:

(3) The term "homosexual act" means—

(A) *any bodily contact*, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) *any bodily contact* which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

*Id.* § 654(f) (emphasis added).

This definition includes not only sexual activity as traditionally understood, but also behavior such as hugging or hand-holding. See *Able v. United States*, 88 F.3d 1280, 1291 (2d Cir. 1996) (explaining that "homosexual conduct" includes "handholding"). In contrast, the only formal limitations that the military places on a heterosexual servicemember's choice of sexual acts (as distinguished from the servicemember's choice of sexual partners) are found in the Uniform Code of Military Justice's criminal penalties for sodomy—anal and oral sex. See 10 U.S.C. § 925(a) (1997), codified at U.C.M.J. art. 125; see also *Able*, 88 F.3d at 1291 ("[T]here is no doubt that the Act treats homosexuals and heterosexuals differently even though they have engaged in similar acts within a broad range (from handholding to intercourse).").

has known Anne since the two started officer training together a few years earlier. The following conversation—an unremarkable one for the two friends—takes place on a wintry Tuesday evening.

*Nancy:* So what are you doing for Easter next month?

*Anne:* Going to my folks' house, probably. [She smiles wryly.] Once I graduated from high school and actually left home, my parents decided that the holidays were Extremely Important Events that required my attendance. You?

*Nancy:* I'm going with Dave to visit his family in Michigan.

*Anne:* And are we happy about these plans?

*Nancy:* Oh, Dave's family is great. Dave himself, however, turns into a space alien whenever we go to visit them. [They laugh.] Oh, Annie, *you* know how a man acts when he takes you home to meet the family for the first time, right?

*Anne:* [Anne's eyes drop for a moment and her smile fades a bit.] I . . . guess we all know about that.

*Nancy:* Well, Dave hasn't quite managed to move beyond that phase yet. I figured that he would loosen up around his family after we got engaged last fall, but *that* hasn't happened. If anything, he's gotten more uptight.

*Anne:* At least it probably means that Dave won't make you visit the in-laws too frequently after you two get married.

*Nancy:* True, true. Still, I suggest you stand far away from the bouquet toss at our wedding this summer. Believe me, you have enough to worry about in "this man's Air Force" without also taking on a man's set of issues with his family! [Nancy laughs heartily; after a slight hesitation, Anne joins in.]

This is the most prosaic of scenes. It is the type of conversation that any one of us might expect to have with a friend or acquaintance. It also illustrates the heart of the First Amendment right that is burdened by the U.S. military's Don't Ask, Don't Tell policy ("DADT"): the right not to be compelled to make a false affirmation of one's identity, ideas or beliefs. Unlike the blanket exclusion that preceded it, the Don't Ask,

Don't Tell policy permits gay people to serve in the military.<sup>2</sup> It does so, however, only on condition that they acquiesce in lies—indeed, that they lie actively—about the most personal aspects of their lives and their identities. The new policy does more than mandate mere silence; it compels gay servicemembers to make involuntary and false affirmations of a heterosexual identity that is not their own. It imposes, in other words, what the Supreme Court pronounced in *West Virginia State Board of Education v. Barnette*<sup>3</sup> to be among the most serious of burdens on an individual's First Amendment rights: to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion [and] force citizens to confess by word or act their faith therein."<sup>4</sup>

It is impossible to be "agnostic" as to one's sexual orientation in the course of normal social interactions. Rather, there is a presumption of heterosexuality that pervades our lives. In all but the most unusual of circumstances, people will assume that any given individual is straight unless they have reason to believe otherwise. That assumption informs every conversation and interaction.<sup>5</sup> People's most ordinary statements and

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<sup>2</sup> Each branch of the service has issued regulations under the new policy that make it clear that gay men and lesbians are now allowed to serve in the military while at the same time imposing special burdens on their speech rights. For example, the Navy's implementing regulation under the policy reads, in pertinent part, as follows:

A person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct. During the accession process, all applicants, prospects and members of the dep [sic] shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual and will not be asked or required to reveal if they have engaged in homosexual conduct unless independent evidence is received indicating that the applicant engaged in such conduct or unless the applicant volunteers a statement that he or she is a homosexual or bisexual or words to that effect.

Navadmin 033/94 PP 4, 9.C(3). See also DoD Directive 1332.14.H.1.a (1993) ("Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct."); *Able*, 88 F.3d at 1298 ("[T]he Act does not bar those who have a homosexual orientation but are not likely to engage in homosexual acts.").

<sup>3</sup> 319 U.S. 624 (1943).

<sup>4</sup> *Id.* at 642.

<sup>5</sup> As Professor Janet Halley has written, "To borrow the language of semiology, the public status 'heterosexual' is an unmarked signifier, the category to which everyone is assumed to belong. Something has to happen to mark an individual with the identity, 'homosexual.'" Janet E. Halley, *The Politics of the Closet*:

questions regularly carry with them the presumption that those with whom they are speaking are straight, just like Nancy's half of the conversation does in the scene reproduced above. Moreover, a gay person's silence in such a situation is not a neutral response; rather, silence serves to reaffirm this "heterosexual presumption." When a gay person does not disabuse others of the erroneous presumptions of heterosexuality that they have made—when Anne is silent about her gay identity, for example, in the face of Nancy's comments and questions—she is affirming a straight identity as surely as if she actually framed the lie in words. And silence frequently is not sufficient—or even feasible—when one attempts to hide a gay identity. Gay people are sometimes forced to lie actively about who they are if they wish to keep their identities hidden. For a gay person, in other words, the experience of being in the closet is not an experience of having no public sexual identity at all; it is one of pretending to be straight. When silence as to one's gay identity is compelled, at all times and in all situations, this false affirmation of heterosexuality is compelled, as well. A policy that permits gay people to serve in the military but prohibits them ever from identifying themselves as gay is a policy that compels gay servicemembers falsely to identify themselves as straight.<sup>6</sup>

Among the Federal Courts of Appeals that have analyzed the constitutionality of the Don't Ask, Don't Tell policy under the First Amendment,<sup>7</sup> none has understood the nature, or the

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*Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 946 (1989).

<sup>6</sup> Professor Nan Hunter made this point concisely at the end of her *Commentary* in the *Virginia Law Review*.

[S]uppression of identity speech leads to a compelled falsehood, a violation of the principle that an individual has the right not to speak as well as to speak. In the absence of identity speech, most persons are assumed to be heterosexual. To paraphrase the ACT-UP slogan, silent = straight. To compel silence, then, is to force persons who are not heterosexual in effect to lie.

Nan D. Hunter, *Commentary, Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1718 (1993).

<sup>7</sup> See *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 118 S. Ct. 45 (1997); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 117 S. Ct. 358 (1996). Shortly before this Article went to press, the Ninth Circuit issued an order denying en banc review in *Holmes* that was accompanied by a dissent from the denial of rehearing

extent, of the burden that the policy places on gay servicemembers' speech rights. Those courts have framed their analysis in terms of the evidentiary use to which the military puts a servicemember's statement that she is gay. They have concluded that, if same-sex sexual behavior may be regulated, then a servicemember's speech about her gay identity may legitimately be used as sufficient evidence of her "propensity" to engage in the forbidden homosexual acts. Such an analysis, whatever its technical merits, fails to address the core of the policy's impact: the false affirmation of heterosexual identity that the policy constantly forces upon gay servicemembers.

This Article seeks to unite some of the Supreme Court's traditional First Amendment jurisprudence with a common-sense account of the lived experience of gay men and lesbians in order to provide the understanding that has heretofore been lacking in judicial review of the policy.<sup>8</sup> It takes as its starting

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en banc by Judge Harry Pregerson. See *Holmes v. California Nat'l Army Guard*, No. 96-15726 (9th Cir. Apr. 7, 1998) (order denying rehearing en banc). The dissent, which was joined by Judges Reinhardt, Kozinski, Hawkins and Tashima, touches briefly upon the thesis of this Article. See *id.* (Pregerson, J., dissenting) ("From another perspective, as a practical matter the silence that this policy imposes on gay and lesbian military personnel can lead others to presume that they assent to a view about their own sexuality that they do not espouse.").

<sup>8</sup> In his paradigm-shifting analysis of the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Professor Kendall Thomas properly criticizes those legal scholars who complacently accept the conceptual frameworks offered by the Supreme Court in conducting their analyses of individual claims of right, particularly in the realm of privacy.

[I]f one believes, as I do, that the intellectual concerns and commitments of students of constitutional jurisprudence overlap but are not congruent with those of the Supreme Court itself, one might well ask whether this strategy of assessing the Court's work exclusively or primarily on its own terms helps or hinders the distinctively critical project of constitutional scholarship.

Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992). Professor Thomas makes this criticism the launching-off point for his own, radical and virtuosic analysis.

This Article proceeds from the premise that, in the realm of the First Amendment, the Court's well-established doctrines are, in fact, entirely sufficient to produce a meaningful and sophisticated analysis of the Don't Ask, Don't Tell policy. It aims its challenge at the failure of those judges who have reviewed the policy to understand the lived experience of gay men and lesbians and to recognize the applicability of those doctrines to that experience—a species of challenge that Thomas also invokes, to powerful effect. See *id.* at 1498–99. I attribute this difference in approach to a meaningful difference in the state of the law in the areas of freedom of expression and of privacy, a subject that I will address, briefly, later on. See *infra* notes 81–92, 185 and accompanying text.

point, in Part I, the stories of gay and lesbian servicemembers—those who have served under the Don't Ask, Don't Tell policy and those who served under the blanket exclusion that preceded it. Their stories illustrate the impact that the forcibly imposed closet of the new policy has upon the gay people whom the military now formally invites to join its ranks. They give needed depth and substance to the harms that the Court first identified in *West Virginia v. Barnette*.<sup>9</sup> The Article then goes on to provide an approach for conducting a proper First Amendment analysis of Don't Ask, Don't Tell. Part II analyzes the policy's reliance on the expressive power of the silence of gay and lesbian servicemembers and discusses the Court's treatment of silence in its First Amendment jurisprudence. Part III examines the special relationship that exists between compelled affirmations and identity speech. Finally, Part IV draws these strands together and scrutinizes the policy through the lens of *West Virginia v. Barnette*.

## I. THE SOUNDS OF SILENCE: STORIES OF GAY SERVICEMEMBERS IN THE MILITARY

Any author who chooses to incorporate individual narratives into a legal analysis bears the burden of explaining the purpose for which those narratives are offered. This is especially true following the powerful critique that Professors Daniel Farber and Suzanna Sherry have levied at the haphazard use of personal narratives that they believe has characterized much recent scholarship.<sup>10</sup> Farber and Sherry take particular aim at feminist legal scholars and critical race theorists, whom they criticize for attempting to escape the scrutiny of traditional, rigorous scholarly standards.<sup>11</sup> Such scholars, they explain, frequently claim to write from a unique and distinctive per-

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<sup>9</sup> In her analysis of the Don't Ask, Don't Tell policy, Professor Halley has emphasized what she calls "an important aspect of [gay servicemembers'] bringing their challenge to the public forum of the federal district court: the opportunity to display to the court the actual human beings upon whom the Statute stood ready to operate." Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GAY L. Q. 159, 182 (1996).

<sup>10</sup> See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

<sup>11</sup> See *id.* at 809–19.



spective—to speak in a “different voice”<sup>12</sup> that cannot easily be translated into the analytic prose of legal analysis and so cannot be evaluated by traditional standards. Farber and Sherry reject such strong claims of narrative prerogative. Instead, they “suggest that *legal* scholarship should help the reader understand law, and that legal *scholarship* should comport with the goals and attributes of the academy.”<sup>13</sup> Thus, while they unreservedly embrace the proposition that “some storytelling is a legitimate form of legal scholarship,”<sup>14</sup> Farber and Sherry insist that scholars “take greater steps to ensure that their stories are accurate and typical, to articulate the legal relevance of the stories, and to include an analytic dimension in their work.”<sup>15</sup> “The crucial test of scholarly writing,” they conclude, “must be whether it provides an increased understanding of some issue relating to law.”<sup>16</sup>

For present purposes, this Article need not engage with the broader implications of Farber and Sherry’s challenge, as the purpose for which it offers the interviews that follow is a relatively conservative one. The Article seeks to demonstrate that the Don’t Ask, Don’t Tell policy imposes burdens on the expressive rights of gay and lesbian servicemembers that can readily be described under the Supreme Court’s existing First Amendment jurisprudence, but that the federal courts have failed to produce a meaningful analysis of the policy because they have simply failed to understand how the dynamics of the closet actually operate in the everyday lives of gay people.<sup>17</sup>

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<sup>12</sup> *Id.* at 809. The term comes from Carol Gilligan’s pathbreaking work of the same name. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

<sup>13</sup> Farber & Sherry, *supra* note, at 809.

<sup>14</sup> *Id.* at 808. For an example of Farber and Sherry’s own use of narrative in legal analysis, see Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 265 (1996).

<sup>15</sup> Farber & Sherry, *supra* note, at 809.

<sup>16</sup> Farber & Sherry, *supra* note 10, at 824. See also Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1030 (1991) (“[I]t seems reasonable to ask of narrators who are, in fact, legal scholars that their stories be framed in such a way as to shed light on legal questions.”).

<sup>17</sup> Thus, this Article utilizes individual narrative for a purpose that is narrower than those proposed by Professor William Eskridge in his response to Farber and Sherry. See William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). Eskridge argues that “gaylaw provides a particularly attractive field for narratives, even under the conservative criteria laid out by Farber and Sherry,” *id.* at 610, precisely because gay people and their stories have been actively repressed

Indeed, this failure of understanding has amounted to what Professor Eve Kosofsky Sedgwick has termed a "privilege of unknowing."<sup>18</sup> Sedgwick has observed that it can be an effective tool for wielding social power to remain ignorant of the cultural identity or experiences of others. "If M. Mitterand knows English but Mr. Reagan lacks French," for example, "it is the urbane M. Mitterand who must negotiate in an acquired tongue, the ignorant Mr. Reagan who may dilate in his native one."<sup>19</sup> More generally, "it is the interlocutor who has or pretends to have the *less* broadly knowledgeable understanding of interpretive practice who will define the terms of the exchange."<sup>20</sup> Sedgwick's observation certainly holds true in legal analysis, where the ability of a claimant to benefit from an established legal doctrine is always limited by the ability of a judge to recognize, after engaging in a formal dialogue with the claimant, that the doctrine in question should in fact apply.<sup>21</sup> Thus, the interviews in this Article are offered for the purpose of demonstrating a crucial fact about the lived experience of gay people that has heretofore been absent from judicial review of the policy: that forcing a gay person to remain silent about her sexual identity, at all times and in all places, in fact forces her to affirm a heterosexual identity that is not her own, and so to live a lie.

I take Professor Susan Bandes' recent article on the use of victim impact statements in capital sentencing hearings to offer a powerful endorsement of such a use of individual narrative.<sup>22</sup> In denouncing the Supreme Court's validation of victim

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in American jurisprudence, remaining hidden and invisible until very recently. He then provides a rich account of the particular difficulties that gay claimants can encounter in legal settings. Eskridge argues persuasively that gay narratives can have a transformative impact by demonstrating the hidden inequities in state policies, *see id.* at 611-17, or the connections among seemingly unrelated policies, *see id.* at 617-21; can offer challenges to the categorical assumptions upon which policies and legal doctrines frequently rest, *see id.* at 621-30; and can reinforce activist political movements, giving focus to radical challenges to the proper scope of law and state regulation, *see id.* at 630-40.

<sup>18</sup> Eve Kosofsky Sedgwick, *Privilege of Unknowing: Diderot's The Nun*, in *TENDENCIES* 23 (1993).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *See* Thomas, *supra* note 8, at 1456 ("It is precisely this 'ignorance effect' that provides an ideological anchor for the oppression of gays and lesbians, which the secrecy of the 'closet' has historically aimed to mitigate.").

<sup>22</sup> *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U.

impact statements,<sup>23</sup> Professor Bandes argues that the propriety of introducing individual narratives into formal legal analysis depends in large part on the extent to which those narratives have, or have not, already been taken into account in the process of articulating and administering a legal doctrine.<sup>24</sup> The impact of violent crime upon its victims, she concludes, suffers from no infirmity in this regard: "We do not need elaborate structures to assist us in feeling fear, pain, and grief for those like us who have suffered violence at the hands of the other. This is already the dominant narrative of the criminal trial."<sup>25</sup> Because the story of the victim of a violent crime is one of the primal, animating forces that gave rise to the criminal justice system in the first place, the heavy-handed reintroduction of that story into the ongoing administration of the system adds very little and threatens to distort or unbalance the decision making process. Similarly, in order for a newspaper to argue to a court that it ought to be able to invoke the doctrine forbidding prior restraints when it is threatened with a restrictive injunction, it need not provide a highly personalized account of the harms that the paper, its readership, and the larger community will suffer if it is enjoined from publishing its controversial story. The doctrine of prior restraint grew out of the Court's painfully adequate understanding of those precise harms. Rather, it is when courts demonstrate a complete inability to mediate between general rules and particular cases in this fashion that it is most clearly necessary for individual narrative to reenter legal analysis.<sup>26</sup>

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CHI. L. REV. 361 (1996).

<sup>23</sup> See *Payne v. Tennessee*, 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987)).

<sup>24</sup> See Bandes, *supra* note 22, at 382-90.

<sup>25</sup> Bandes, *supra* note 22, at 409.

<sup>26</sup> I borrow this phrase from Professor Mark Tushnet, who has written at length about the use of narrative in legal scholarship. See, e.g., Mark V. Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39 (1990); Mark V. Tushnet, *A Worthy Tradition: Freedom of Speech in America*, 14 L. & SOC. INQUIRY 539 (1989) (book review). In one essay, Tushnet summarizes his approach, arguing that "constitutional adjudication [should be] the vehicle we use to mediate particular cases and general rules." Mark V. Tushnet, *Colloquy, The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992). Acknowledging the particular capacity of narrative to ground legal analysis in concrete experience, Tushnet asserts that a proper use of narrative is one that facilitates this mediation between the particular and the general, rather than distorting or ob-

In theory, then, these interviews should be unnecessary to this Article's project. If a legal audience could be relied upon to recognize the most basic facts about the everyday lives of gay men and lesbians and to understand how those facts map onto the existing analytical framework of the First Amendment, then the Article could simply proceed directly to its constitutional analysis.<sup>27</sup> But the performance of the federal judiciary in its analysis of the Don't Ask, Don't Tell policy has made it clear that, at least for now, something more is needed in order to ensure that the claims of gay servicemembers are heard and understood.<sup>28</sup>

Twenty-one individuals from all different parts of the country and all different branches of the armed forces agreed to be interviewed for this Article. Most served under the Don't Ask, Don't Tell policy and have recently left the military. A number were litigants in challenges brought against the policy

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structing it. See *id.* at 256–58, 258–60, 297–310. Under Tushnet's approach, then, the function of the interviews in this Article is to inject into judicial review of the Don't Ask, Don't Tell policy some of the particularities of the lives of gay servicemembers that have thus far been absent. In other words, this Article's contention—to use Tushnet's terms—is that the necessary process of mediation has never occurred in judicial review of the policy because the relevant particularities have been entirely absent from the court's understanding. Thus, it is not simply the case that judges have engaged in the process of mediation that Tushnet calls for and have come up with flawed results; rather, through their ignorance, they have bypassed that process altogether.

<sup>27</sup> In some feminist legal scholarship, in contrast, narratives constitute a vital component of an article's thesis. The work of some feminist scholars emphasizes the importance of concreteness and particularity—as opposed to abstraction and generalization—in structuring normative arguments and rules of law. See Abrams, *supra* note 16, at 975–76 (discussing different strands of feminist methodology). Similarly, some feminist scholars have levied challenges at the legitimacy of the impartial, authoritative voice of linear reason in which most traditional legal scholarship grounds itself. See, e.g., Abrams, *supra* note 16, at 976, 987; Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (bringing these methods to bear on issue of women's reproductive rights). For these scholars, individual narrative is a vital component of their work; it is partly constitutive of their arguments. This Article makes no such claims.

<sup>28</sup> In characterizing that "something more," Professor Richard Delgado has written that "[s]tories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place." Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1988). See also Thomas, *supra* note 8, at 1498–99.

in federal court. A few are still serving on active duty. The interviews took place between February and August of 1997. The texts of the interviews are drawn from servicemembers' responses to broad, open-ended questions about their experiences living under the policy and, in particular, the ways in which the policy has forced them to prevaricate or lie. Every individual who agreed to participate in these interviews had already devoted a great deal of thought to the issues of identity and personal integrity that the Article explores—a fact that probably comes as no surprise to most gay and lesbians readers, whether they have served in the military or not. Gay men and lesbians must regularly make decisions about how to navigate their own personal closets—how to “manage” public knowledge of their sexual identities in the face of the persistent presumption that everyone is heterosexual unless proven otherwise.<sup>29</sup> It should come as no surprise to find that gay

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<sup>29</sup> Professor Kenji Yoshino provides a cogent description of this dynamic in questioning the propriety of the “closet” as a symbol for the problem of sexual self-definition:

Gays can never be out and done with it; they must continually reiterate their sexual orientation against a heterosexist presumption that reinstates itself at every pause. The most damaging failure of the closet symbol is perhaps that it misrepresents the continuum of a person's disclosure of his or her homosexual orientation as a binary constructed from the endpoints of that continuum. One is either “out” or “closeted”: the closet with its rigid door between the “outside” and the “inside” does not lend itself to subtler gradations. However, these gradations are not only relevant, but crucial to an understanding of gay oppression. First, gays come out in a gradual process that is misrepresented by a construct that marks some point as the point at which they “come out.” Second, most gays disclose their homosexuality to some but not to others—for example to their families but not their co-workers, or vice-versa—in a way that the closet, which does not perform such discrimination between audiences, fails to reflect. Finally, because it is impossible for any gay to be fully “out” or “closeted,” the endpoints of the continuum on which the binarism is based do not exist.

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1810-11 (1996). Professor Halley has given a similar account of the presumption's operation:

[B]ecause the assumption of heterosexuality applies in virtually every social interaction—from the encounter of teacher with student, salesperson with shopper, mother with daughter, Supreme Court Justice with clerk—even the most forthright and fearless gay man or lesbian cannot “come out” once and for all in a single public disclosure; as she moves from one social setting to another, she will have to come out afresh or acquiesce in the assignment to her of a nonreferential public identity.

Halley, *supra* note 5, at 947.

and lesbian servicemembers, whose careers frequently depend upon their success in managing their public identities, have devoted careful thought to that "identity management" process and the questions of honor and integrity that it raises.<sup>30</sup> The lies that gay and lesbian servicemembers are forced to tell about themselves under the Don't Ask, Don't Tell policy are, to say the least, a matter of active concern for them.

Under normal circumstances, members of the military regularly have free or unstructured time, and most servicemembers began their interviews by focusing on that portion of their duty. A consistent theme that runs throughout their accounts is the regularity with which the most ordinary of social discourse in the military can implicitly bring an individual's sexual orientation into issue. Indeed, this implicit introduction of sexual orientation into social discourse frequently does not lie far beneath the surface. The interview of former Navy Lieutenant Tracy Thorne speaks to this issue. Thorne entered the Navy after graduating from Vanderbilt University. He trained as a pilot and flew an A-6 Intruder fighter plane until being separated and discharged after coming out of the closet on the television show, "Nightline." He has brought a challenge to the policy in federal court that is still ongoing.<sup>31</sup> Speaking with hints of a light, formal Tennessee

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<sup>30</sup> As Professor Halley has pointed out, it is discrimination, in particular, that forces gay people to focus such scrupulous attention on both their private conceptions and the public's perception of their identities:

Antihomosexual discrimination encourages people to manipulate the identity they attach to themselves, both in the secrecy of their own minds and on the public stage, in what I shall call their subjective and their public identities. It ensures that personal desires, sexual behavior, subjective identity and public identity will frequently get out of sync with each other. However carefully an individual disposes these elements, they are all subject to sudden, either joyous or catastrophic, rearrangement.

Halley, *supra* note 5, at 933.

<sup>31</sup> In 1993, Thorne brought suit in the Eastern District of Virginia to challenge the constitutionality of the Don't Ask, Don't Tell policy. While he initially met with some success in district court, that favorable disposition was vacated in light of the Fourth Circuit's decision in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc). See *Thorne v. Dep't of Defense*, 916 F. Supp. 1358 (E.D. Va. 1996). On remand following *Thomasson*, Thorne lost his case. See *Thorne v. Dep't of Defense*, 945 F. Supp. 924 (E.D. Va. 1996). His appeal is currently pending in the Fourth Circuit.

accent, Thorne describes the atmosphere that prevailed among the "fly boys" who were his peers and buddies while he was still on active duty.

The general thing that you faced on a regular basis was that, particularly being in a Naval aviation squadron, there's this kind of swashbuckling mentality among the junior officers. For example, where I was stationed at Virginia Beach, they had what was considered to be the ultimate Officer's Club. When I was there, through the early 90s, it was filled with local women hunting for husbands, female strippers—it was one big party, with Navy pilots flying in from all around the country. The "thing to do" in your free time was to head down to the O' Club. If you didn't want to head down there and ogle the bare-breasted women with all the other guys, people would ask questions. Sometimes you could quietly sneak away, but, you know, you couldn't always do that, so you had to make like you were enjoying it.<sup>32</sup>

Moreover, as Thorne goes on to say, even those times when he could "quietly sneak away" were not free from difficulty. Friends naturally want to know how we spend our free time, and buddies in the military are no different. Spending time with gay friends, however, is something that no gay servicemember can speak about with any candor. Thorne describes the dilemma that he and many others have faced.

After a typical weekend, I would show up at the squadron on a Monday morning, and everyone would ask, "What did you do this weekend?" I couldn't tell them, for example, that I went to a movie on a date. I would have to make stuff up, like that I worked on my car or something.<sup>33</sup>

Indeed, one's sexual orientation is regularly brought into issue in settings that are less explicitly concerned with sexual titillation than the "O' Club" scene that Lieutenant Thorne describes. A story from former Air Force Captain Elizabeth Hillman is typical of many others. Hillman spent most of her active duty time working as an orbital analyst at Cheyenne Mountain Air Force Base in Colorado Springs, Colorado. She retired from the military after satisfying her obligation to the Air Force in 1996 and has since enrolled as a student at Yale Law School. Speaking methodically and with frank openness,

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<sup>32</sup> Telephone Interview with Tracy Thorne, former Lieutenant, United States Navy (Apr. 22, 1997) [hereinafter Thorne Interview].

<sup>33</sup> *Id.*

Hillman tells of the complications that the heterosexual presumption can cause in the close relationships that exist among peers in the service.

Because you can't speak up about your sexual orientation, you can't put people at ease if they feel uncomfortable with the amount of time you're spending with their partners. Wives and girlfriends can easily feel threatened by the close working conditions between men and women in the service, and there are times when you really want to put someone at ease and tell her that she doesn't have to worry about you going after her partner, but you can't do that if the reason is that you're gay. For that matter, a woman will often get even more nervous about your close working relationship with her partner because you're *not* reassuring her by telling her that you already have a boyfriend or a husband. You frequently wind up inventing stories anyway, to defuse a difficult situation. . . . One time in particular that this was a problem for me was when I was training for a marathon with [a male friend]. . . . Obviously, we were training together, alone, for hours every day. His wife was feeling threatened by the amount of time that we were spending together, and there was nothing I could say to explain that she didn't need to feel threatened unless I made something up or told her that I was a lesbian.<sup>34</sup>

Such dilemmas are not limited to servicemembers' free time. The workplace also presents many seemingly innocuous situations in which the sexual orientation of servicemembers is inexorably brought into issue, as a story from Anonymous Officer Number One can attest. Anonymous Officer Number One is a woman and a senior officer currently serving on active duty in the armed forces. She requested that her name, branch of service, and other identifying information be kept confidential because she feared that she would be vulnerable to reprisals if anyone suspected that she had made a contribution to this Article. Anonymous Officer Number One is an experienced and formidable professional, but her voice carried an edge of apprehension and fear throughout the entire course of our interview. In speaking of the conditions under which she must work as a closeted lesbian, she describes details that the most careful examination by an outsider seeking to understand the true impact of the Don't Ask, Don't Tell policy might easily overlook.

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<sup>34</sup> Interview with Elizabeth Hillman, former Captain, United States Air Force, in New Haven, Conn. (Mar. 31, 1997) [hereinafter Hillman Interview].



Another thing is photos on my desk, at work. It's a pretty standard thing in the office to put pictures of husbands and boyfriends—past or present—in prominent places on your desk. Usually, when I walk into another woman's office, if I see pictures of pets and family on her desk instead of men, I assume she might be gay. For the same reason, I don't put pictures like that on my own desk—even though I have a beautiful dog that I'd love to show off. In fact, I've thought about putting pictures of male friends on my desk and making like they're former boyfriends, just to deflect attention. I certainly have [lesbian] friends who have done that.<sup>35</sup>

The stresses on gay servicemembers to present a heterosexual identity at the workplace can also be applied in a less subtle fashion. Many of the men interviewed for this Article talked about the pervasiveness of homophobic jokes and comments among their peers in the military, and traditional workplace settings provided no respite from such banter. Former Naval Academy Midshipman Joseph Steffan describes such comments as constituting nothing less than an "institutionalized" practice.<sup>36</sup> Steffan was discharged from the Naval

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<sup>35</sup> Interview with Anonymous Officer Number One, Senior Officer, United States Military (April 17, 1997) [hereinafter Anonymous Interview Number One]. In a highly influential essay, Adrienne Rich discusses the impact of what she terms "compulsory heterosexuality" on lesbians as individuals and on the women's movement more generally. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD AND POETRY* 22 (1986). Expanding upon work begun by Katherine MacKinnon, Rich analyzes the particular set of enforced behaviors that gay women face in the workplace setting:

A lesbian, closeted on her job because of heterosexual prejudice, is not simply forced into denying the truth of her outside relationships or private life. Her job depends on her pretending to be not merely heterosexual, but a heterosexual *woman* in terms of dressing and playing the feminine, deferential role required of "real" women.

*Id.* at 41-42.

<sup>36</sup> Interview with Joseph Steffan, former Midshipman, United States Naval Academy, in Hartford, Conn. (Feb. 25, 1997) [hereinafter Steffan Interview]. Steffan's observation echoes Professor Thomas' account of the role that homophobic violence—whether realized physically or verbally—plays in the oppression of gay men and lesbians.

The terroristic dimensions of homophobic violence compel us to understand it as a mode of power. To put the point in slightly different terms, homophobic violence is a form of "institution." . . . Homophobic violence is a social activity "structured by rules that define roles and positions, powers and opportunities, thereby distributing responsibility for consequences."

Thomas, *supra* note 8, at 1467 (quoting Claudia Card, *Rape as a Terrorist Institution*, in *VIOLENCE, TERRORISM, AND JUSTICE* 296, 297-98 (R.G. Frey & Christopher

Academy in 1987 after revealing that he was gay. He unsuccessfully challenged the blanket-exclusion policy that preceded Don't Ask, Don't Tell.<sup>37</sup> Almost ten years after being formally separated from the military, Steffan's demeanor, appearance and surroundings are still highly ordered and efficient. Recalling the atmosphere of the Naval Academy, he describes the frequency with which he found it difficult not to "join in on the joke" when his peers would make homophobic comments because he could not give an honest account of his objections to such remarks without revealing his own sexual orientation. One incident in particular stood out in his mind during our interview.

I served at times on a battalion performance board—a board that reviewed and monitored the quality of individuals' work in the battalion. At one point, the board had to review the performance of a particular midshipman who was not doing very well. When the midshipman showed up for his review hearing, he had his hair parted straight down the middle. Another member of the Board—a senior battalion commander—took one look at him and said, "Go back and comb that part out of your hair, you look like a fucking faggot!" In that context, there was no way that I could object to a comment like that without calling my own sexual orientation into question. For that matter, I couldn't have explained why I found the comment inappropriate and offensive without explaining that I was gay. I had to continue with the review and act like I thought that telling someone that he looks like a "faggot" was an appropriate way to dress him down.<sup>38</sup>

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W. Morris eds., 1991)).

<sup>37</sup> See *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

<sup>38</sup> Steffan Interview, *supra* note 36. Michelle Benecke, the Executive Director of Servicemembers Legal Defense Network, confirms that Steffan's experience is a common one:

It's not enough, even, to be silent in the face of anti-gay harassment; they also have to participate or they're going to be thought to be gay. You cannot be neutral. When you're neutral, people notice. This is an environment where people work together very closely to accomplish a mission. If people are trying to mask a life or pretend they don't have one, it sticks out like a sore thumb. You have to affirmatively invent a heterosexual life. Part of that means joining in on the harassment that is about you.

Telephone Interview with Michelle Benecke, Executive Director, Servicemembers Legal Defense Network (Apr. 28, 1997) [hereinafter Benecke Interview]. Professor Marc Fajer has made similar observations. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 592 (1992). See also STUDS TERKEL, *THE GOOD WAR: AN ORAL HISTORY OF WORLD WAR TWO* 180 (1984);

Incidents like the one that Steffan relates—and the kinds of interactions that Thorne, Hillman and Anonymous Officer Number One describe as taking place in the workplace, in recreational spaces and during off-hours—combine to form a pervasive, unstructured background against which anything other than an explicitly avowed heterosexual identity would stand out in sharp relief. Feminist theorist Monique Wittig has observed that “to live in society is to live in heterosexuality. . . . Heterosexuality is always already there within all mental categories.”<sup>39</sup> Whether gay and lesbian servicemembers must affirm a heterosexual identity in words—as, frequently, they must—or whether their enforced silence is loud enough to claim the “default characterization”<sup>40</sup> of heterosexual identity that most conversations offer, the background of social relations in the military, as in most other contexts, is one of presumptive, compulsory heterosexuality.

The more structured activities of military existence are no less rife with occasions in which servicemembers are forced to make explicit, public affirmations of their sexual identities. Formal social events constitute perhaps the most important example of such a structured activity. Dances, balls and formal dinners are a regular and central element of the social life of every branch of the armed forces. Among officers, attendance at such events is necessary in order to enjoy any hope of advancement within the ranks. Every individual interviewed for this Article, without exception, made reference to this dynamic and described the conflicts that formal social events create for gay and lesbian servicemembers living inside the mandatory closet of the Don't Ask, Don't Tell policy. Anonymous Officer Number One's account is typical.

The service tends to be a fairly tight-knit environment—you socialize with the people that you work with, especially when you're stationed overseas. Every time there's a social event—and there tend to be at least two formal events every year, along with lots of informal get-togethers—there's interest on the part of your fellow officers

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Halley, *supra* note 5, at 934, 947-48 & n.67.

<sup>39</sup> MONIQUE WITTIG, *THE STRAIGHT MIND* 40, 43 (1992); see also Michael Warner, *Introduction* to *FEAR OF A QUEER PLANET*, at vii (Michael Warner ed., 1993).

<sup>40</sup> Janet E. Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET* 82, 83 (Michael Warner ed., 1993).

about who you're going to bring. It's not necessarily prurient interest, it's just friendly and curious. They want to know whether he's going to be military or non-military; if he's military, a fighter pilot is a lot better than a JAG lawyer; if he's not military, is he a businessman or is he a car mechanic? I tend to go stag, just to avoid a lot of these problems. But of course, going stag attracts attention, too. When people ask, I tell them I choose to go stag because, as I get more senior, the pool of available men gets smaller, and that I have a blanket rule against dating men I work with. The other option is to bring a safe date, but then people just continually ask you about how things are going with that guy that you brought to the dance, so it doesn't really avoid the problem.<sup>41</sup>

Tracy Thorne spoke in his interview of the consequences of not making appearances at such events.

Formal events are definitely a major part of a military career. If you're not seen going out to the Officer's Club on a somewhat regular basis, if you're not attending the Intruder Ball,<sup>42</sup> if you're not attending Dress Messes, eventually that's going to cut into you. You have to be a "team player" in order to advance. A [gay] friend of mine who's in the Marine Corps knows a lesbian couple, and one of them has agreed to attend functions with him on a regular basis, just because you need that in order to advance.<sup>43</sup>

Former Navy Lieutenant Paul Thomasson has similar stories to relate. Thomasson, a highly decorated and widely praised Naval officer, was separated and discharged after he came out of the closet immediately following the effective date of the Don't Ask, Don't Tell policy. He challenged the constitutionality of the policy in federal court, ultimately losing his case before the assembled judges of the Fourth Circuit Court of Appeals.<sup>44</sup> Thomasson now lives in Washington State and remains unabashedly angry at the treatment that he received, both in federal court and in the press, following his separation

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<sup>41</sup> Anonymous Interview Number One, *supra* note 35.

<sup>42</sup> The Intruder Ball was the premier social event at Virginia Beach, as Thorne had explained earlier in his interview: "We had a huge banquet every year called the 'Intruder Ball,' because the plane that we flew was called the A-6 Intruder. It was the biggest social event of the year—a must-attend." Thorne Interview, *supra* note 32.

<sup>43</sup> Thorne Interview, *supra* note 32.

<sup>44</sup> See *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 358 (1996).

and discharge. That sentiment is apparent in his tone and demeanor as he recalls some of the details of formal social events in the Navy.

There unquestionably is overt pressure to engage in unit functions. I can remember one of my commanders demanding that I go to a "dining out,"—one of the formal officers' dining occasions. As usual, I didn't want to go because of the "date" problem, but with the commander demanding that I go, I couldn't just not show up. This particular time, though, I had another excuse I could use. Some of the guys in the squadron had made a horrible international faux pas recently—[behaved really badly on a trip to Japan] . . . —so I told my commander that I was disgusted at the ward room for their behavior and I intended to boycott the event to upbraid the squadron. So that wasn't quite a lie, that time—I just made a much bigger deal of this other incident than I ever would have otherwise. Of course, my commander was very angry—when a commander says you should go to a dining out and you refuse, you had better have a good excuse. I was fortunate; had I performed less well at my job, my refusal would have hurt me, and I was just fortunate that I was a top performer.<sup>45</sup>

Formal social events are perhaps the most visible among those structured activities in the military that force servicemembers to make statements about their sexual orientation, but they certainly are not the only such activities to raise the issue. While Elizabeth Hillman has stories of her own to relate concerning social events,<sup>46</sup> she provides an account of another required activity in the military that involves somewhat less pageantry.

Women in the service have to go to a gynecologist and get a pap smear done, at least once a year. One standard question that the gynecologist has to ask is, "What form of birth control are you currently using?" Obviously, you couldn't just say, "None"—I don't think it was even an option on the form. For a straight woman, that would be crazy. You had to make up a more believable response. You also couldn't really claim to be using one of the safer methods of birth

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<sup>45</sup> Telephone Interview with Paul Thomasson, former Lieutenant, United States Navy (Apr. 21, 1997) [hereinafter Thomasson Interview].

<sup>46</sup> As Hillman said at one point:

Formal events—dances, or what have you—are a standard thing that every unit has. Everyone goes, and everyone is expected to bring a date. Every time it comes up, if you go without a date, or if you don't go at all, people ask questions—it raises eyebrows. So some gay people bring fake dates to quell suspicions.

Hillman Interview, *supra* note 34.

control, [since those might be relevant to health issues that your gynecologist would want to know about.] . . . Personally, I would say "abstinence" or "rhythm," as would some other lesbians I know, and we would have to go through sessions where the gynecologists would explain how risky those methods were, ask us whether the problem was that we felt uncomfortable with condoms or the pill, and so forth.<sup>47</sup>

Perhaps the greatest impact that the Don't Ask, Don't Tell policy has is not to be found in structured activities or in casual social settings, but within the confines of gay servicemembers' families and their close friendships with their fellow soldiers. Because members of the armed forces are considered to be on duty at all times, the policy forbids them from ever speaking truthfully about their identities, even in private moments.<sup>48</sup> While it is sometimes possible for gay

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<sup>47</sup> Hillman Interview, *supra* note 34. See also SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THIRD ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE," at 6 (1997) [hereinafter SLDN REPORT] ("The services . . . have reportedly instituted the disturbing practice of requiring health care providers in the military and those contracted to the military to turn in gay servicemembers who seek their help in private counseling sessions.").

<sup>48</sup> The Don't Ask, Don't Tell policy applies to servicemembers twenty-four hours a day. See 10 U.S.C. § 654(a)(9)-(10) (1997). This means that even a private acknowledgment by a gay servicemember of his sexual orientation, if discovered, can trigger a separation proceeding under the policy. See, e.g., *Thomasson*, 80 F.3d at 932 ("[S]ervice members who have not publicly declared their homosexuality are nevertheless subject to discharge if they have made private statements to that effect, when those statements are brought to the attention of commanding officers . . ."). As Servicemembers Legal Defense Network reports:

In their zealous pursuit of suspected gay military members Pentagon officials have expanded "Don't Tell" in ways that most Americans are not aware, to include private statements to family members, close friends, doctors and psychologists. Servicemembers must keep their sexual orientation an absolute secret, hidden even from their families, or risk investigation and discharge.

SLDN REPORT, *supra* note 47, at 5-6.

In her recent Article, Professor Halley quotes from a memorandum that the Judge Advocate General's office has distributed to Air Force investigators to guide them in gathering information once they have begun a formal investigation. Halley's research seems to corroborate SLDN's conclusions:

"If acts or other military members are discovered during the proper course of [an] investigation, . . . appropriate action may be taken. . . . Has the member told any of his family members? . . . Has the member been dating anybody (opposite or same sex)? How frequently has the member dated? How recently? How can these people be contacted? . . . Did the member belong to any homosexual student organizations at school? If so, which? How can other members of the organization, who knew of his membership, be contacted?"

servicemembers to avoid formal or social situations where they would otherwise be forced to put on a public appearance of heterosexuality, it is almost impossible to prevaricate in such a manner with close, intimate friends—and, of course, it is all the more painful to try. For some gay servicemembers, this can mean not forming close friendships at all, as Paul Thomasson explains.

When you're not having to lie actively, you spend your time avoiding the questions or changing the subject. The result is that—OK, if I look at gay people whom I know in the military, many of them are the over-achievers, the best and brightest, et cetera. A third to a half of the Joint Chiefs of Staff interns were gay when I was there. They got there because they had no life and poured all of their efforts into their jobs—to the point of having to avoid making too close attachments at work. You don't really get close to people when you can't speak freely with them.<sup>49</sup>

The experience of Anonymous Officer Number Two comports with Thomasson's observation. Anonymous Officer Number Two is a senior command officer and is still a member of the armed forces. He asked that his precise rank and the branch of the armed forces in which he serves not be revealed, as that information might suffice to identify him and render him vulnerable to reprisals. He is also the only gay servicemember interviewed for this Article who unapologetically approves of the Don't Ask, Don't Tell policy. His interview thus provided a rare and valuable perspective on the effects of the policy. Anonymous Officer Number Two has kept his personal life and his professional life in the armed forces completely separate, living in "many little rooms," as he puts it.<sup>50</sup> He has segregated the different parts of his life to such an extent that, by his own account, he has formed no open and lasting friendships with straight colleagues in the armed forces, despite a lifetime spent in military service.

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Halley, *supra* note 9, at 213 (quoting Department of the Air Force, Headquarters USAF/JAG, memorandum for all Staff Judge Advocates and Military Judges, Re: Commander Inquiries on Members Stating They are Homosexual, Nov. 3, 1993; and *id.*, attachment 2, "Sample Questions for Inquiry Concerning Member who States He is Homosexual After Receiving Advanced Education Benefits.").

<sup>49</sup> Thomasson Interview, *supra* note 45.

<sup>50</sup> Interview with Anonymous Officer Number Two, Senior Command Officer, United States Military, at an undisclosed location (July 19, 1997).

I've always been absolutely divorced, my sexual life from my professional life. . . . The greatest "sin" is the sin of omission sometimes, so I just omit talking about my personal life to anyone in the military, in my professional life.<sup>51</sup>

Anonymous Officer Number Two, unlike the other servicemembers interviewed for this Article, has found this social privation to be agreeable.<sup>52</sup>

Most gay and lesbian servicemembers do form close friendships, however, and those friendships can occasion some of the greatest pain that the Don't Ask, Don't Tell policy inflicts. As discussed above, gay and lesbian servicemembers often go to great lengths to avoid social functions so as not to appear conspicuously single. Anonymous Officer Number One explains that, while such strategies and "cover stories" may serve to deflect casual inquiries, they do not help in her interactions with close friends.

There are friends in my life—men and women—who are simply concerned about me because I am not dating somebody. Do I have somebody to take care of me? Am I lonely? Is there someone in my life to help me out? These friends are just expressing their concern, but I can't tell them the truth. I either tell them that I'm not interested in dating right now—that I don't have time for a man in my life, something like that—or else I invent a long-distance boyfriend. When your friends are persistently concerned about you, you have to tell them something.<sup>53</sup>

Michelle Benecke confirms that this experience is a com-

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<sup>51</sup> *Id.* In contrast, Anonymous Officer Number Two has found opportunities to develop friendships—and more—with gay servicemembers. As he explained: "I had a lover who was my 'personal assistant' for eleven years and lived with me in a military home. Nobody ever questioned it. His presence isn't even on my record. My sexuality just had nothing to do with my career."

*Id.*

<sup>52</sup> As he said at one point during our interview:

I'm not "gay," I'm homosexual, and there's a big difference. . . . If you come to my home, you'll see there's nothing about it that's "gay," and these "gay activists" that go around demanding "gay rights" really disgust me. . . . I knew what I was getting into when I went in [to the military]. I didn't join the [armed forces] to get a date. . . . I'll retire with a pension of \$120,000—you tell me what the payoff is. Do I feel deprived? No. . . . Would I do it all over again? Absolutely, and I wouldn't do anything differently.

*Id.*

<sup>53</sup> Anonymous Interview Number One, *supra* note 35.



mon one. Benecke served in the Army for six years, leaving the service in 1989 with the rank of Captain. She is now the Executive Director of Servicemembers Legal Defense Network, the organization that serves as the primary resource in the United States for gay and lesbian servicemembers, offering both counseling and legal advice. Benecke reports that almost every client she sees comes to her organization after the policy has provoked an unbearable ethical dilemma. In the majority of cases, this ethical dilemma grows out of a forced separation from close friends or family. In fact, in Benecke's experience, the problem is most acute during one of the times when family and friends are most important: the holiday season.

[W]hen people are deployed, gay people can't even be honest in any communication with anyone at home, unlike heterosexual soldiers, because everyone's mail is censored and their telephone calls are monitored. These people are not able to be out to their families because of DADT; they can't be out with their loved ones because of DADT; and they have to face the prospect of losing their lives in service of their country. Right around the holidays, when people are just coming back, we get a big spate of calls from people trying to figure out what to do.<sup>54</sup>

Sometimes, gay and lesbian servicemembers find the prospect of lying to their close friends too painful to bear. They resolve to tell the truth, despite the enormous risk to their careers, their futures, and their safety. Elizabeth Hillman recalls the time that she was faced with this difficult choice.

I had a close friend—[let's call him "Rick"]—who worked in the same office I did at Colorado Springs. [Rick] came into work one day with a sort of far-off look on his face and asked me, completely out of the blue, "Beth, when was the last time you were in love—I mean, *really*, head-over-heels in love?" It was a totally innocent, friendly question—he might even have meant it to be a little flirtatious. I blanched, had no idea what to say in response. The truth was that I had recently met [the woman with whom I'm now sharing my life] and fallen head-over-heels in love with her, but I wasn't allowed to tell him that. I managed to stutter some noncommittal answer and change the subject, but I felt extremely uncomfortable with that response. [Rick] was a friend, and I didn't like lying to him, for any reason. It finally led me to come out of the closet to him a few days later. I sat down with him to have a talk about our earlier conversation, and I told him, "I didn't quite know what to say, because I'm in

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<sup>54</sup> Benecke Interview, *supra* note 38. See also Fajer, *supra* note 38, at 597.

love right now, but it's not with a man."<sup>55</sup>

What price does the Don't Ask, Don't Tell policy exact from gay and lesbian servicemembers when it forces them to choose between telling lies about themselves and risking the sacrifice of their careers and their safety? The answer must necessarily be different for every individual. Even so, it would not be overstating the case to say that it is the rare gay or lesbian soldier for whom that toll is not a heavy one. Anger, quiet resentment, and sincere regret over the false identities they have been forced to adopt were common among the servicemembers who agreed to be interviewed for this Article. The armed forces are organized around an ethic of honor and respect. Being compelled to lie about the most personal aspects of one's life to the friends and associates who are supposed to be one's closest allies in guarding that ethic cannot help but do damage to a servicemember's spirit and her sense of self.<sup>56</sup> Perhaps nothing could provide a more appropriate illustration of this price than the words of a servicemember who is still living under the onus of that compelled dishonesty on a daily basis. Anonymous Officer Number One tells the following story of her life under the policy.

The job that I'm in now is one that's designated "high security." As part of my interview for my security clearance, I was asked to rate myself as to how honest of a person I am, on a scale from one to ten. My first reaction was, well, I don't believe in absolutes, but I think

<sup>55</sup> Hillman Interview, *supra* note 34.

<sup>56</sup> Indeed, Professor Halley invites us to reflect seriously upon the extent to which our creation of a public identity can become constitutive of the entirety of our social existence. She argues that we do not merely become less honest when we must lie about who we are—we become *less ourselves*, in social as well as legal intercourse.

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

Halley, *supra* note 5, at 934 (citation omitted). See also Fajer, *supra* note 38, at 596–97 (discussing impact of dishonesty and prevarication upon closeted gay men and lesbians).

I'm a very honest person; so I rated myself a nine. But then, as I was walking out of my interview, I thought, how could I possibly have rated myself a nine, this whole *thing* is a lie. I normally am such an honest person, but the military requires me to lie about this one part of my life that's so important. [She pauses.] I got my security clearance.<sup>57</sup>

Stories like these might properly shape one's assessment of the wisdom of Don't Ask, Don't Tell as a matter of policy, but it is not for that purpose that they are recounted here. They are recounted because understanding these stories is a prerequisite to producing a meaningful constitutional analysis of the policy, whatever the ultimate conclusion of that analysis might be. It is not simply the case that the interest of gay and lesbian servicemembers in not being compelled to make false affirmations of their identity has been undervalued in judicial review of the policy; it has been entirely overlooked. These stories provide the tools with which to begin the necessary, formal inquiry into the legal significance of that interest.

## II. SILENCE AS SPEECH

### A. *The Value of Silence*

The expressive power of the silence of gay and lesbian servicemembers is central to the operation of the Don't Ask, Don't Tell policy. To understand why this is so, it is necessary to understand the nature of the value structure that the military's policy was designed to defend. In his classic essay, *Nomos and Narrative*,<sup>58</sup> Robert Cover has offered a frame-

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<sup>57</sup> Anonymous Interview Number One, *supra* note 35. As Professor Halley has suggested, such deception can threaten more than a gay person's honesty and integrity; it can threaten her very sense of self. Halley describes the effects of a policy requiring mandatory dismissal of C.I.A. agents who admit to being gay, and the D.C. Circuit opinion (affirmed by the Supreme Court) that upheld it:

[The opinion] opens a pocket of legal protection for individuals who obey a prohibition on homosexuality not by eschewing homosexual acts or rejecting a homosexual subjective identity, but by appearing straight. One cost to them of accepting that protection is that they must also accept the public meaning of their equivocal position—the court's equation of their closetedness with the assumption that they have internalized the substantive determination that homosexuality is degrading to them.

Halley, *supra* note 5, at 958.

<sup>58</sup> See Robert M. Cover, *The Supreme Court, 1982 Term: Forward: Nomos and*

work within which to describe the norms and value structures of a community. Cover's approach looks to the depth of the commitment that a community demonstrates in defending a particular set of values or a particular, narrow definition of membership. As one paradigm, Cover identifies communities that embrace a diversity of individuals and institutions among their members and are structured around the enforcement of rule-based norms, exhibiting only a shallow, thin commitment to any particular moral or ethical precepts. He describes such groups as "imperial" in nature and offers the State—and, more broadly, legal communities—as the most visible examples.<sup>59</sup> In contrast, Cover describes what he calls the "paideic" community: a group that is characterized by a deeper form of commitment, one whose reason for existing centers around a particular conception of the good, a deeply held value structure, or a nonpluralistic definition of membership.<sup>60</sup> Cover suggests that paideic communities—which might include groups defined by their religious, cultural, or ethnic affiliations—are the most important sites for the creation of cultural meaning. As he puts it, such communities constitute the source of those "narratives that imbue [the legal] precepts [of modern, "imperial" nation-states] with rich significance."<sup>61</sup>

The institution of the military challenges the fixity of the distinction between the imperial and the paideic—and, concomitantly, the fixity of the distinction between pluralistic State institutions, on the one hand, and communities with deeply-held commitments to particular cultural values, on the other.<sup>62</sup> In form, the American military is, fundamentally, a

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*Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>59</sup> Cover writes:

In [the "imperial"] model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity—upon that which is external to the discourse itself. Interpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.

*Id.* at 13.

<sup>60</sup> As Cover puts it: "[T]he term ['paideic'] suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law." *Id.* at 12-13.

<sup>61</sup> *Id.* at 16.

<sup>62</sup> Cover recognizes that, in practice, these categories ordinarily are not realized

pluralistic institution. Unlike the armies of nobility in medieval Europe, where the honor of professional military service was reserved for the wealthy and the powerful,<sup>63</sup> the U.S. military embraces the principle that underlies most public institutions in America: Applicants are to be judged on their qualifications alone, and all those who are qualified are at least eligible to participate.<sup>64</sup> To be sure, the qualifications and requirements of service in the military interfere with servicemembers' deeply-held personal commitments, more so than do the requirements of any other public institution in America. The Supreme Court has observed that the armed forces constitute "a specialized society"<sup>65</sup> that requires "instinctive obedience, unity, commitment, and esprit de corps"<sup>66</sup> in aid of effective military service, even though these values sometimes require servicemembers to accept compromises in their ability to demonstrate their commitment to their paideic communities. It is for this reason that the Court accords great deference to the military whenever individuals bring claims under the First

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in "pure" form; he states: "Of course, no normative world has ever been created or maintained wholly in either the paideic or the imperial mode. I am not writing of types of societies, but rather isolating in discourse the coexisting bases for the distinct attributes of all normative worlds." *Id.* at 14. Indeed, Cover goes on to acknowledge the danger that the State poses when it embraces "paideic" commitments, and he praises *West Virginia v. Barnette* and other cases for the protections they provide from that danger. *See id.* at 61 ("Certain decisions have acknowledged the dangerous tendencies of a statist paideia and marked its boundaries through formal specification of the limits of public meaning.").

<sup>63</sup> *See, e.g.*, F.L. GANSHOF, *FEUDALISM* 16-19 (1952).

<sup>64</sup> In the Federal Constitution, this foundational norm finds expression in the Equal Protection Clause and in the abolition of Titles of Nobility and Bills of Attainder. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *id.* art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States."); *id.* art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."). The ideal of equality of opportunity for qualified applicants has consistently shaped the Supreme Court's jurisprudence of individual rights. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (opinion of Powell, J.), for example, the Court struck down a California affirmative action program on the grounds that the program left no opportunity for white applicants to compete for certain admission seats, regardless of how the qualifications for those admission seats were defined. "No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity," the Court explained, white applicants "are never afforded the chance to compete with applicants from the preferred groups for the special admission seats." *Id.* at 319.

<sup>65</sup> *Parker v. Levy*, 417 U.S. 733, 743 (1974).

<sup>66</sup> *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

Amendment, the Constitution's primary source of protection to paideic communities.<sup>67</sup> Even so, the military ordinarily administers even its most invasive restrictions in what Cover would call a "statist" or "imperialist" manner: It requires that all servicemembers satisfy the same neutral standards of ability, appearance, obedience and respect. In according deference to the military in its Speech and Religion Clause analysis, the Court has taken pains to reiterate that the First Amendment still applies to limit the actions of the military,<sup>68</sup> and it has consistently demanded even-handedness in the definition and administration of military regulations.<sup>69</sup>

In substance, however, the American military has exhibited a deep and consistent commitment to a norm that runs counter to the otherwise pluralistic tenor of its criteria for admission and service. The military is the primary site for the definition of manhood in American culture, and military service is the most important opportunity for citizens to attain to that virtue. Professor Kenneth Karst has written about the

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<sup>67</sup> The First Amendment, of course, guards the expressive, religious and associational interests of the citizenry. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); see also Cover, *supra* note 58, at 26-33, 60-67 (discussing importance of First Amendment protection of speech, association and religion to existence of paideic communities).

<sup>68</sup> See *Brown v. Glines*, 444 U.S. 348, 354 (1980) ("[M]embers of the military services are entitled to the protections of the First Amendment . . ."); see also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("[The special] aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."); *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("[T]he members of the military are not excluded from the protection granted by the First Amendment."); cf. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.") (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)).

<sup>69</sup> See, e.g., *Brown*, 444 U.S. at 358 n.15 (upholding regulation requiring official approval of petitions circulated on Air Force bases, but explaining: "Commanders sometimes may apply [such regulations] irrationally, invidiously, or arbitrarily, thus giving rise to legitimate claims under the First Amendment.") (internal quotation omitted); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (requiring that regulations restricting political demonstrations on military property be "objectively and evenhandedly applied"); *Goldman*, 475 U.S. at 513 (Stevens, J., concurring) (providing fifth vote to uphold application of Air Force dress code to yarmulke worn by observant Jew because "the rule that is challenged in this case is based on a neutral, completely objective standard—visibility").

American military's commitment, throughout its history, to the specification and enforcement of the qualities that are constitutive of manhood.<sup>70</sup> Those qualities, he points out, have been far from pluralistic. The military's definition of masculine virtue—a definition that has played a unique role in setting standards for citizenship status in America<sup>71</sup>—has repeatedly found expression in discriminatory restrictions on the qualifications for military service. Indeed, Karst argues that this institutional "pursuit of manhood" has been the primary cultural motivation for most of the major instances of discrimination in military personnel policies. During the period when African-American men were still openly dismissed in American popular culture as unacceptable exemplars of masculine virtue, the military defended that racist construction of manhood, first by excluding blacks from military service altogether, then by segregating them into second-class units.<sup>72</sup> Similarly, Karst argues, the exclusion and segregation of women has been the result of the military's commitment to a vision of masculine virtue that excludes women from its core. For many years, women were entirely barred from military service. Eventually, the claims of women to equal citizenship status gained sufficient force that the military, in its capacity as a pluralistic institution, felt compelled to make an accommodation and admit them among its ranks. Nonetheless, women continue to be largely excluded from active combat, the aspect of military

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<sup>70</sup> See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 500 (1991). For a further exploration of the importance of military service to defining the virtue of manhood, see, for example, RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS & GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF* 28-36 (1993).

<sup>71</sup> See Karst, *supra* note 70, at 502-03, 505-06. Professor Leisa Meyer characterizes the importance of military service to the definition of the rights of citizens in the following terms:

[B]ecause the military is a critical bastion of state power and service within it a determinant of the rights of citizens, allowing heterosexual women, lesbians, and gay men to participate within it fully and without harassment or discrimination increases expectations that those same groups will be treated with fairness and respect in the public sector.

LEISA D. MEYER, *CREATING G.I. JANE: SEXUALITY AND POWER IN THE WOMEN'S ARMY CORPS DURING WORLD WAR II*, at 1 (1996).

<sup>72</sup> See Karst, *supra* note 70, at 510-22.

service that serves as the primary site for the definition of manhood, permitting the military to maintain its commitment to traditional masculine virtues.<sup>73</sup>

Karst concludes that the policy that excluded all gay men and lesbians from military service sprang from the same source. The military has defended a conception of manhood that defines gay men as lesser, degenerate versions of their heterosexual peers and defines lesbians as aberrant, ambiguous transgressors of essential gender boundaries.<sup>74</sup> Such a vision of manhood depends upon the categorical exclusion of gay identity.<sup>75</sup> The acknowledged and open presence of gays and lesbians in military service would threaten that vision. Therefore, heterosexuality became a necessary qualification for military service. As Karst explains:

For those who want to keep the public's gaze fixed on "the manliness of war," the tensions of male bonding demand a clear expression of the services' rejection of homosexuality. This expression is not just a by-product of the policy that purports to exclude gay men and lesbians from the armed forces; it is the policy's main function. When a gay soldier comes to the Army's official attention, the real threat is not the hindrance of day-to-day operations, but rather the tarnishing of the Army's traditionally masculine image.<sup>76</sup>

Under the blanket exclusion of gay men and lesbians that was the subject of Karst's investigation, the policy's defense of masculinity was straightforward and unmediated. The explicit requirement of heterosexuality as a qualification for service operated to secure the traditional definition of manhood to

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<sup>73</sup> See Karst, *supra* note 70, at 523-45. Professor Meyer provides a description of the military at around the time that women were first admitted:

[T]he ideological construction of "soldier" as a man with a weapon who fights, and the military as a preeminently masculine institution, continued [when women were first admitted to the armed forces] to include all white men, whether or not they saw combat, and black men who were active combatants, while excluding all women entirely.

MEYER, *supra* note 71, at 12-13; see also MEYER, *supra* note 71, at 11-32.

<sup>74</sup> See Karst, *supra* note 70, at 546-47; see also ALLAN BÉRUBÉ, *THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* at 13-14 (1991).

<sup>75</sup> As Professor Cover writes: "The radical instability of the paideic *nomos* forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimensions of their common lives — to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning." Cover, *supra* note 58, at 15-16.

<sup>76</sup> Karst, *supra* note 70, at 545-46.



which the military was committed. It did so, however, at the expense of the pluralistic values that the military, as a State institution, has an obligation to promote.

The current policy originated as an accommodation to those pluralistic values. In 1993, Navy Lieutenant Keith Meinhold challenged the military's blanket exclusion of gay men and lesbians in a federal district court in California. The district court struck down the policy on equal protection grounds, reinstated Meinhold, and issued a nationwide injunction to prevent the military from discharging any other gay servicemembers.<sup>77</sup> The Ninth Circuit Court of Appeals quashed the injunction and affirmed Meinhold's reinstatement on much narrower grounds. The circuit court construed the policy to require a conduct violation in order to support a discharge, avoiding an interpretation that would have authorized discharges on the basis of status alone.<sup>78</sup> The court went on to suggest that a policy banning gay people from service solely on the basis of their sexual orientation would present serious constitutional problems.<sup>79</sup>

In response, the military sought to craft a policy that would satisfy its obligations as a pluralistic institution while still allowing it to continue to defend a heterosexual vision of manhood. What resulted was Don't Ask, Don't Tell, permitting gay people to serve but forcing them to do so in silence. Under the new policy, the military is able to defend its commitment to heterosexual manhood precisely because it can rely upon society's general presumption of heterosexuality to transform a gay servicemember's silence into an affirmation of heterosexual identity. The expressive power of silence in matters of sexual identity thus permits the military to maintain its paradoxical role as both an imperial public institution with pluralistic standards of admission and a paideic community that creates and defends a purely heterosexual vision of masculine virtue.

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<sup>77</sup> See *Meinhold v. U.S. Dept. of Defense*, 808 F. Supp. 1455, 1457-58 (C.D. Cal. 1993), *aff'd on different grounds*, 34 F.3d 1469 (9th Cir. 1994).

<sup>78</sup> See *Meinhold v. U.S. Dept. of Defense*, 34 F.3d 1469, 1478-80 (9th Cir. 1994).

<sup>79</sup> See *id.* at 1476-77.

By compelling gay servicemembers to remain silent about their true identities, the policy requires them to embrace and affirm that vision. This is the intended mode of the policy's operation.<sup>80</sup>

In calling for a recognition of the affirmative role that silence plays in maintaining the value structure that underlies the Don't Ask, Don't Tell policy, this Article embraces a project similar to the one that Professor Jed Rubenfeld has advanced in calling for a reconceptualization of the right to privacy.<sup>81</sup> Rubenfeld has argued that "the fundamental right to privacy is not to be found in the supposed fundamentality of what the law proscribes. It is to be found in what the law imposes."<sup>82</sup> Proscriptive models of the right to privacy, he explains, ultimately rest upon some theory of "personhood"—that is, an account of which activities are "fundamental" to our concept of personhood and, for that reason, should not ordinarily be subject to regulation by the State.<sup>83</sup> Rubenfeld convincingly argues that such theories suffer from severe problems of definition and administration, inevitably producing intractable disputes over, for example, what parts of our identities are "fundamental,"<sup>84</sup> or how an "identity" (or an identifying trait) is to

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<sup>80</sup> Compare Professor Halley's description of the holding of the D.C. Circuit Court of Appeals in *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986), *aff'd in part, rev'd in part on the other grounds, sub. nom. Webster v. Doe*, 108 S. Ct. 2047 (1987) in Halley, *supra* note 5, at 956–58. In *Casey*, the D.C. Circuit denied relief to a gay agent of the C.I.A. who claimed that the agency's policy of denying security clearance (and employment) to gay people denied him due process of law. In rejecting the agent's claim that the policy placed an impermissible stigma upon him, Halley observes, the court gave a reading to the policy that purported to demonstrate greater fidelity to the imperatives of fairness and due process but that actually operated to define the agent's interests out of existence:

The court purports to view the problem of stigma from Doe's point of view: if he disclosed his homosexuality, he clearly sees nothing scandalous in it; and if he sees nothing scandalous in his homosexuality, he has no liberty interest in evading its legal consequences. The apparent respect paid here to Doe's self-conception and self-description is revealed as a sham if we note the implication of the court's reasoning: a self-identified homosexual in government employment, in order to retain a liberty interest in his or her job, must (1) subjectively regard his or her homosexuality as degrading and (2) hide it.

Halley, *supra* note 5, at 957.

<sup>81</sup> See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

<sup>82</sup> *Id.* at 739.

<sup>83</sup> See *id.* at 738–39.

<sup>84</sup> See *id.* at 754–70.

be defined and limited.<sup>85</sup> As an alternative, Rubenfeld urges us to examine the affirmative impact that a regulation has upon its target when it affirmatively takes over their lives, forcing them into certain narrow channels. For example, where a woman's right to have an abortion is concerned, Rubenfeld argues that "[w]omen should be able to abort their pregnancies so that they may *avoid being forced into an identity*"—that of motherhood—"not because they are defining their identities through the decision itself."<sup>86</sup> It is those laws that "tend to *take over* the lives of the persons involved"<sup>87</sup>—to "occupy and preoccupy"<sup>88</sup>—that should require extraordinary justification from the State and provoke searching judicial scrutiny. Thus, Rubenfeld argues, to determine whether a law impermissibly infringes upon an individual's right of privacy, we should ask whether it "affirmatively and very substantially shape[s that] person's life."<sup>89</sup>

This Article meets Rubenfeld's challenge on different, but related, doctrinal ground. It identifies the silence that the Don't Ask, Don't Tell policy imposes upon gay servicemembers as an attempt not merely to proscribe the expression of gay identity in the military—Professor Karst's central insight<sup>90</sup>—but to require the affirmative expression of heterosexual identity by gay and straight servicemembers alike.<sup>91</sup> Under the terms of the policy, gay servicemembers are forced to participate in the project of defining and reaffirming a value structure that excludes them entirely from its core. Rubenfeld

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<sup>85</sup> See *id.* at 770–82.

<sup>86</sup> Rubenfeld, *supra* note 81, at 782.

<sup>87</sup> Rubenfeld, *supra* note 81, at 784.

<sup>88</sup> Rubenfeld, *supra* note 81, at 784.

<sup>89</sup> Rubenfeld, *supra* note 81, at 784.

<sup>90</sup> See Karst, *supra* note 70, at 545–46.

<sup>91</sup> Thus, in arguing that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided, Rubenfeld writes:

We tend, in measuring [the] morality [of laws prohibiting homosexual conduct], to form an image of either the homosexual imprisoned or the homosexual forced to give up his sexual acts. We ought, however, to give up the image of "the homosexual" in the first place and measure the law instead in terms of its creation of heterosexuals (and, in a different way, of homosexuals too) within the standardized parameters of a state-regulated identity.

Rubenfeld, *supra* note 81, at 801. See also Thomas, *supra* note 8, at 1497–98 (discussing Rubenfeld's treatment of *Bowers*)

properly instructs us to ask what affirmative acts of speech the forced silence of the policy imposes, and not merely what acts of speech it proscribes.<sup>92</sup>

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<sup>92</sup> See Rubenfeld, *supra* note 81, at 739. Having embraced the large-scale dimensions of Rubenfeld's project, I must register my dissatisfaction with his own application of his thesis to anti-gay regulations. While his analysis contains hints of a sophisticated understanding of the economy of public sexual identities in which closeted gay people must trade, Rubenfeld nonetheless seems to have an understanding of the impact gay people feel from restrictions on sexual intimacy that is at once overbroad and under-inclusive. He writes:

[T]he prohibition against homosexual sex channels individuals' sexual desires into *reproductive* outlets. . . . The proscription is against homosexual sex; the products are lives forced into relations with the opposite sex that substantially direct individuals' roles in society and a large part of their everyday existence. . . . [T]he real force of anti-homosexual laws, if obeyed, is that they enlist and redirect physical and emotional desires that we do not expect people to suppress.

Rubenfeld, *supra* note 81, at 800. This analysis is overbroad in the insularity that it ascribes to the lives of gay men and women. It seems to assume that a gay person's natural state of being is one in which "relations with the opposite sex" are not "a large part of [one's] everyday existence." Rubenfeld, *supra* note 81, at 800. Unless Rubenfeld means to use "relations" narrowly as a euphemism for sex—which, clearly, he does not, see Rubenfeld, *supra* note 81, at 799–801—then he has a vision of how gay people lead their lives that is, to say the least, contestable. See Thomas, *supra* note 8, at 1506–07 (criticizing Rubenfeld for simplistic understanding of life-choices of gay men and lesbians).

More importantly, Rubenfeld's analysis is under-inclusive in that it steadfastly refuses to allow the invasion into a gay person's intimate life that results from restrictions on adult, consensual sexual behavior to enter into its calculus. Under Rubenfeld's approach, such an invasion is prohibited, if at all, only by virtue of its fortuitous congruence with the institution-channeling aspects of the restrictive statute. This seems, fundamentally, to miss the point. In making this observation (with its invocation of the "fundamental"), I deliberately invite the rejoinder that my criticism is simply a gesture toward the "personhood" model of privacy analysis that Rubenfeld has so cogently criticized. Nonetheless, insofar as Rubenfeld rests his theory of privacy *entirely* on the capacity of a law to force an individual's life into certain institutional channels, it is simply incomplete. For example, Rubenfeld praises *Griswold v. Connecticut*, 381 U.S. 479 (1965)—in which the Court held the use of contraceptives by a married couple to merit protection under a right of privacy—as a vindication of his own privacy theory. As in the case of abortion, he explains, a contrary result would have meant forcing women to devote their lives to motherhood. See Rubenfeld, *supra* note 81, at 791. But does this suggest that, where abortion is freely available to women, the use of contraception should no longer receive privacy protection? Rubenfeld's own discussion of *Griswold* hints at this result. See Rubenfeld, *supra* note 81, at 791 ("At least at the time [*Griswold*] was decided, when abortion was still generally prohibited, the ban on contraception was equivalent in its positive aspect to enforced child-bearing."). But to suggest that the use of contraceptives is no longer a vital privacy right because women can just go out and get abortions should make us recoil. And why? Because the decision whether to continue or terminate a pregnancy is so personal and intimate that it would be unacceptable to predicate a policy (or a constitutional analysis) on

## B. *Silence as Speech*

The maxim that silence can constitute speech is one that pervades the Supreme Court's First Amendment jurisprudence—both in its Free Speech and Establishment Clause cases. In analyzing the Court's treatment of this dynamic, it is necessary at the outset to distinguish between two different issues that the Court has considered regarding silence. These might best be described as the issue of silence as a *speech interest*, on the one hand, and silence *as speech*, on the other. The distinction, in other words, is one between situations where a claimant asserts an interest in remaining silent and thereby not speaking, and situations where a claimant asserts that his silence effectively constitutes speech. It is the latter dynamic that drives the Don't Ask, Don't Tell policy. However, the former situation is also important to the present inquiry. The right not to speak is related to the jurisprudence of compelled affirmations embodied in *West Virginia v. Barnette* and its progeny,<sup>93</sup> and the Court has recognized that right as one that enjoys dignity and force equal to that of the right to engage in affirmative expressive acts. In *Riley v. National Federation of the Blind of North Carolina*,<sup>94</sup> for example—a case involving a state requirement that charities communicate certain information when making their requests for donations—Justice Brennan pronounced the frequently quoted maxim that “the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”<sup>95</sup> How this treatment of silence as a speech interest fits in to the present inquiry will be taken up later in the discussion of *Barnette*.<sup>96</sup>

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an easy willingness to force women regularly to resort to abortion as a contraceptive method. Rubenfeld's theory of privacy offers no answer to this problem.

<sup>93</sup> See Hunter, *supra* note 6, at 1719.

<sup>94</sup> 487 U.S. 781 (1988) (Brennan, J.).

<sup>95</sup> *Id.* at 796–97. See also *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (striking down Florida statute requiring newspaper to provide space for response by those they editorially criticize and holding that “[t]he Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter”).

<sup>96</sup> See *infra* Part IV.

One of the paradigmatic analyses of communication by silence involves the possibility of attribution or endorsement. When two potential speakers enjoy a relationship with each other that could lead an uninformed observer to assume that the two are voluntarily affiliated—even if that relationship is only an incidental or a spatial one—then the observer might also attribute the remarks of one speaker to the other in the absence of an express disclaimer. Where such a disclaimer is impractical or impossible, there may be a danger that one speaker will be forced to endorse, by her silence, the message of the other.

The capacity of silence to constitute an affirmation in this manner finds its clearest illustration in the Establishment Clause context, in the case of *Lee v. Weisman*.<sup>97</sup> In *Weisman*, a young student successfully challenged the constitutionality of a public school's decision to include a religious invocation as part of the commencement ceremonies that it conducted during graduation. The school system of Providence, Rhode Island had made a practice of inviting local members of the clergy to deliver prayers to its graduating middle and high school students. Students were admonished to stand and maintain a respectful silence while the clergyman delivered his invocation. Deborah Weisman, a student at a middle school in Providence, claimed that the practice violated the Establishment Clause in two respects. First, she maintained that the State's involvement with religion in the commencement ceremonies, which included a measure of editorial control over the invocation, was so pervasive as to create a "state-sponsored and state-directed religious exercise" and thus to constitute an impermissible governmental endorsement of religion.<sup>98</sup> Second, Weisman argued that the nature of the ceremony was such that she was effectively forced to endorse and participate in the prayer through her silence, and that such forced participation in a religious exercise was antithetical to the requirements of the Establishment Clause.<sup>99</sup> The majority in *Weisman* accepted both of

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<sup>97</sup> 505 U.S. 577 (1992).

<sup>98</sup> *Id.* at 587.

<sup>99</sup> *Id.* at 593-94.

these arguments in awarding Deborah Weisman her victory. It is the second argument that is of particular importance for present purposes.<sup>100</sup>

*Lee v. Weisman* is remarkable for its candid and explicit reliance on the operation of subtle cultural forces—social conventions—in recognizing the burden that the State-sponsored invocation in that case placed on the students' right of religious freedom. If the students in Providence had actually been coerced into making a plain statement of their endorsement of, and participation in, the religious invocation, such coercion would clearly have violated the Establishment Clause. The Court's ruling rested on its recognition that silence can sometimes have the same meaning and effect as a plain statement of this type. The majority observed that "in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others."<sup>101</sup> Here, the Court found that the State forced the students to convey a message of participation and endorsement merely by pressuring them to remain silent. That message, though perhaps not without ambiguity, was nonetheless sufficiently intelligible to render the ceremony and invocation constitutionally infirm. The Court explained:

There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to the dissenter, then, to be told that for her the act of standing or remaining in

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<sup>100</sup> Lest there be any ambiguity on the point, I do not mean to suggest that the actual holding in *Lee v. Weisman* is applicable to the Don't Ask, Don't Tell policy. The Establishment Clause raises unique constitutional concerns, for it prohibits the government from engaging in an entire category of expression (religious speech)—a proscription that runs directly contrary to the norms embodied in the First Amendment's Free Speech Clause. As the Court observed in *Weisman*:

Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. . . . The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.

*Id.* at 591. *Lee v. Weisman* is offered here, instead, for its clear recognition of the capacity of silence to constitute an affirmative act of speech.

<sup>101</sup> *Id.* at 593.

silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>102</sup>

It is important to note that the perception with which the Court is concerned here is that of the dissenter herself, whose silence may create in her "a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow."<sup>103</sup> If a student's enforced silence in a ceremony like the one reviewed in *Weisman* can create the perception in the student's own mind that she has endorsed and participated in a religious observance that violates her beliefs, then such enforced silence can certainly create that impression in the minds of others who observe her.<sup>104</sup>

In its Speech Clause analysis, the Court has likewise taken cognizance of the potential for messages to be attributed among speakers in this fashion. The case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>105</sup> pro-

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<sup>102</sup> *Lee*, 505 U.S. at 593. See also *id.* at 592 ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect [others'] religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.").

<sup>103</sup> *Id.* at 593.

<sup>104</sup> Thus far, commentators seem largely to have overlooked the importance of *Lee v. Weisman* for its contribution to the analysis of expressive silences. Rather, most commentators have focused on the question of whether *Weisman* can be read finally to have rejected the three-pronged test of *Lemon v. Kurtzman* in Establishment Clause analysis. See, e.g., Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 131 (arguing that *Lee v. Weisman* effectively rejected *Lemon* test); Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 68 n.374 (1995) ("It would seem that the clarion calls for the abandonment of *Lemon* have finally been heard.") (citing *Lee v. Weisman*; Sherry, *supra*). At least one commentator has discussed *Weisman*'s implications for the expressive power of silence, albeit in a field very different from that of the present inquiry. In his Article, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WIL. & MARY BILL RTS. J. 787 (1996), Robert Goldstein invokes *Weisman*'s treatment of what he calls the "captive audience" problem in analyzing the speech interests of doctors who are subject to restrictions on disseminating abortion information. See *id.* at 847-48 & n.185. Goldstein then goes on to tie this problem of the "captive audience" to the First Amendment's injunction against compelled affirmations, whether effectuated by compelled speech or by enforced silence. See *id.* at 853 ("[W]hen [an] individual assumes a professional or other work role, [*Planned Parenthood v. Casey*] suggests that reasonable regulation may diminish or eliminate this right not to be required to endorse—by words or silence—prescribed speech.").

<sup>105</sup> 115 S. Ct. 2338 (1995).



vides a ready example. The controversy in *Hurley* centered around the participation of gay and lesbian marchers in the Saint Patrick's Day Parade in Boston. In 1993, members of GLIB,<sup>106</sup> a support and advocacy group for gay, lesbian and bisexual descendants of Irish immigrants, requested that the group be allowed to march under its own banner at the parade. The parade's private organizers, the South Boston Allied War Veterans Council, denied the group's request. In response, GLIB invoked a Massachusetts public accommodations law and obtained a state court injunction requiring the parade organizers to allow its members to march.<sup>107</sup> The Supreme Judicial Court of Massachusetts affirmed the trial court's ruling, but the U.S. Supreme Court, led by Justice Souter, unanimously quashed the injunction. The Court found, first, that "[p]arades are . . . a form of expression, not just motion,"<sup>108</sup> and, second, that forcing the parade organizers to admit an openly gay contingent would alter the message that the organizers intended to communicate. As the Court put it:

[A] contingent marching behind [GLIB's] banner would at least bear witness to the fact that some Irish are gay, lesbian or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians . . . .<sup>109</sup>

Referring frequently to the case of *West Virginia v. Barnette*, the Court held that it would constitute the most serious possible violation of the First Amendment to require the parade organizers so to propound a message with which they disagreed.

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or,

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<sup>106</sup> As the name of the case indicates, the group's full name is the Irish-American Gay, Lesbian and Bisexual Group of Boston. *See id.* at 2341.

<sup>107</sup> *See id.* at 2341-43. GLIB had marched in the parade in 1992, also on the strength of a court order and against the wishes of the parade organizers. Their participation that year was "uneventful." *Id.*

<sup>108</sup> *Id.* at 2345.

<sup>109</sup> *Id.* at 2348.

indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.<sup>110</sup>

Here, the "propounding" of the contested message was accomplished by the parade organizers' silence.

Having determined that parades constitute an expressive activity with a sufficiently coherent message to warrant First Amendment protection,<sup>111</sup> the Court had to decide whether GLIB's presence threatened to alter that message. The dynamic of silence-as-endorsement drove the Court's inquiry into the relationship between parade participant and parade organizer. "Parades and demonstrations," the Court observed, "... are not understood to be ... neutrally presented or selectively viewed."<sup>112</sup> Rather, the Court concluded, a parade speaks with one voice: that of its organizer. This "univocal" character of the parade renders impractical any disclaimer as to an organizer's endorsement of a particular message in a parade. The organizer is effectively disabled from expressing any dissent; hence, he is forced to endorse every message that the individual parade units present. Exercising control over the parade's composition, the Court explained, is the only effective way to exercise control over the parade's message.

Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow any identity of viewpoints between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade.<sup>113</sup>

The holding in *Hurley* is entirely predicated upon this dynamic of silence-as-endorsement. By the opinion's terms, there would be no interference with the Council's message if "GLIB's participation would [not] likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."<sup>114</sup> A simi-

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<sup>110</sup> *Hurley*, 115 S.Ct. at 2350.

<sup>111</sup> *See id.* at 2345-46.

<sup>112</sup> *Id.* at 2349.

<sup>113</sup> *Id.* (quotation omitted).

<sup>114</sup> *Id.* at 2348.

lar treatment of the expressive power of silence has determined the outcome of many of the Court's Speech Clause cases.<sup>115</sup>

The Court has also applied this common-sense understanding of the meaning and effect of silence outside the realm of the First Amendment. A number of examples are to be found in the law of evidence. One is the common-law doctrine of "impeachment by silence." If a declarant has remained silent in a situation where she might reasonably be expected to speak or be forthcoming with certain information, that silence might serve to impeach any related testimony that she later offers as a witness. As the Court has pointed out, "[c]ommon law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."<sup>116</sup> The witness' past failure to state a fact is treated as evidence that the witness actually believes the converse of that fact to be true.

Similarly, an individual's failure to dispute a statement

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<sup>115</sup> For example, in *Pacific Gas & Electric*, the Court invalidated a state ordinance that forced utility companies to bundle conservationist environmental literature with the bills that they mailed to their customers. The literature conflicted with the companies' own viewpoints and, arguably, with their business interests. The company succeeded in having the ordinance struck down on Speech Clause grounds because of the possibility that the company's silence might be interpreted as an endorsement of the literature. The Court found that the company "may be forced either to appear to agree with [the literature] or to respond," and that the State cannot so "compel . . . speakers to propound political messages." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 15-16 (1986) (plurality opinion). Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (requiring owner of shopping mall to provide access for speakers and disallowing Speech Clause claim of owner on grounds that owner "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"); *Turner Broad., Inc. v. FCC*, 512 U.S. 622, 655 (1994) (disallowing claim of cable operators that "must-carry" provisions will lead to impermissible attribution of messages because, "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator").

<sup>116</sup> *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980). See also 3A J. WIGMORE, EVIDENCE § 1042, at 1056 (1970). This maxim finds an ironic and unfortunate counterpart in a recent series of cases in which the military has refused to believe a servicemember's admission that he or she is gay without further "corroborating proof." The military has apparently expressed a concern that a servicemember who has never before given the military any reason to believe that he or she is gay might make such an assertion "opportunistically," as a means of getting out of a service commitment. See SLDN REPORT, *supra* note 47, at 9.

that is made in his presence may sometimes constitute evidence of his acquiescence in that statement. In particular, the Court has suggested that such reticence is likely to be probative where accusations of wrongdoing go unanswered. Justice Marshall explored this dynamic in *United States v. Hale*.<sup>117</sup> In *Hale*, a criminal defendant had refrained from offering exculpatory evidence that was in his possession when the police first arrested him for a robbery, and the prosecution used the defendant's earlier silence against him when he offered that exculpatory evidence at trial. The Court held that the defendant's failure to offer exculpatory evidence during a police interrogation was not sufficiently probative to be used against him on the stand, but it went on to discuss the circumstances under which such a use of silence as evidence might be allowable.

Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation. Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question.<sup>118</sup>

As Justice Marshall's cautionary tone suggests, the cases discussed in this section should not be read for the proposition that silence always constitutes an affirmative endorsement of some identity or belief. If that were so, then state officials could not maintain decorum at public speeches or convocations without threatening to "compel orthodoxy" and trench on constitutional interests—a result that would be as unnecessary as it would be untenable.<sup>119</sup> What cases like *Hurley* and

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<sup>117</sup> 422 U.S. 171 (1975).

<sup>118</sup> *Id.* at 176. Of course, this line of cases implicates the criminal defendant's Fifth Amendment right not to testify in a proceeding against him. See *Grunewald v. United States*, 353 U.S. 391 (1957) (holding that defendant's invocation of privilege against self-incrimination before grand jury cannot be used to impeach his testimony at trial). These are not Speech Clause cases. Nonetheless, the Court's treatment of silence as constituting an affirmative utterance in these cases relies upon a common understanding of social interactions and not any particular analytical or constitutional framework. That treatment has transubstantive implications.

<sup>119</sup> As Justice Scalia colorfully writes in his dissent in *Lee v. Weisman*, "surely 'our social conventions' . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence." *Weisman*, 505 U.S. at 637 (Scalia, J., dissenting).

*Weisman* require is an inquiry that is sensitive to the context in which a contested silence appears. In *Hurley*, for example, Justice Souter locates this inquiry in the nature of the relationship that exists between a speaker and a message. He writes, "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."<sup>120</sup> In this formulation, it is the existence of an "intimate connection" between the speaker and the communication advanced that is the appropriate object of a careful and context-sensitive inquiry.

Framed in more general terms, this requirement is familiar to First Amendment jurisprudence. The Court has frequently noted that it has a responsibility to conduct a delicate and fact-sensitive inquiry in order to determine the import and meaning, in context, of the utterances that it is asked to review.<sup>121</sup> It is one of the distinctive features of the Court's analysis in Speech Clause cases that it conducts a *de novo* review of findings of fact, even those made by state trial courts, in the course of adjudicating litigants' free speech claims.<sup>122</sup> The obligation is one that "rests upon [the Court] simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace."<sup>123</sup> In *Hurley*, the Court deployed these maxims to justify its rejection of the Massachusetts trial court's finding that the Boston parade did not constitute expressive activity meriting First Amendment protection.<sup>124</sup> The Justices looked to historical, judicial and scholarly sources that treated parades as expressive public spectacles, finding that the Massachusetts courts had undervalued the expressive importance of the Boston event.<sup>125</sup>

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<sup>120</sup> *Hurley*, 115 S. Ct. at 2348.

<sup>121</sup> See, e.g., *Board of County Comm'rs, Wabaunsee County v. Umbehr*, 116 S. Ct. 2342, 2344 (1996) (acknowledging necessity for "fact-sensitive" review of record).

<sup>122</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (holding that Court has obligation to "make an independent examination of the whole record . . . so as to assure [itself] that [the lower court's factual determination] does not constitute a forbidden intrusion on the field of free expression") (quotation omitted).

<sup>123</sup> *Hurley*, 115 S. Ct. at 2344.

<sup>124</sup> See *id.* at 2344-46.

<sup>125</sup> See *id.* at 2344-45 (discussing S. DAVIS, PARADES AND POWER: STREET

While this type of inquiry is less attractive than one that can rely upon bright lines and clear distinctions, that infirmity is endemic to the field of First Amendment analysis as a whole. To assert that an informed understanding of the lived experience of gay servicemembers is necessary in order properly to analyze the effects of the silence that the Don't Ask, Don't Tell policy imposes is to place that analysis squarely within a jurisprudential tradition that the Court has elevated to the status of a "constitutional duty."<sup>126</sup>

Such an informed understanding of gay experience provides guidance in assessing the communicative weight of gay servicemembers' compelled silence in the face of the constant presumption of their heterosexuality. Justice Marshall's dictum in *Hale* makes the point aptly. "Silence gains . . . probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation."<sup>127</sup> One need not characterize the heterosexual presumption as an "accusation" to recognize that it constitutes a pervasive and forceful assertion about one of the most personal aspects of an individual's life, one that any individual would "be more likely than not to dispute [if it were] untrue."<sup>128</sup> Most frequently, when a gay person chooses not to dispute that false presumption, she is operating under some form of compulsion.<sup>129</sup> Of-

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THEATRE IN NINETEENTH-CENTURY PHILADELPHIA (1986); *Gregory v. Chicago*, 394 U.S. 111 (1969); and *Edwards v. South Carolina*, 372 U.S. 229 (1963)).

<sup>126</sup> *Hurley*, 115 S. Ct. at 2344. Justice Souter chose this phrase advisedly. As noted above, the Court reopens findings of fact made by federal district courts for de novo review in First Amendment cases, despite the clear command of Federal Rule of Civil Procedure 52(a) that findings of fact made by district courts be set aside only if they are clearly erroneous. See FED. R. CIV. P. 52(a). The impetus for this overriding of a federal rule proceeds directly from the First Amendment. See *Hurley*, 115 S. Ct. at 2344.

<sup>127</sup> *Hale*, 422 U.S. at 176.

<sup>128</sup> *Id.* See also EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 3 (1990) (" 'Closetedness' itself is a performance initiated as such by the speech act of a silence. ").

<sup>129</sup> For example, Professor Halley describes the plight of James Michael McConnell, who was fired from his job as a college librarian for refusing to remain silent about his relationship with another man—an action upheld by the Eighth Circuit Court of Appeals. See *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971). Halley writes, "Rather than force a helpless university to blazon its employee's political views, the court insists that the employee must remain silent about them and, by semiotic default, proclaim the ubiquity and normalcy of het-

ten, the compulsion arises from the fear of rejection and social disapprobation that keeps many gay people in the closet for large portions of their lives. In the case of the Don't Ask, Don't Tell policy, however, no such reference to social forces is required, for the compulsion is the avowed purpose of the policy.

### III. THE INTERSECTION OF AFFIRMATION AND IDENTITY

In order to analyze a restriction on an individual's ability to give voice to her identity—and to assess the weight of the burden that such a restriction might impose by compelling her to affirm a false identity—it is important to distinguish between the regulation of the modes of expressing an identity, on the one hand, and the regulation of identity itself, on the other. A restriction on one particular mode of expressing an identity will usually leave the speaker with ample alternative avenues for identifying herself. Thus, the silence that such a restriction requires ordinarily will not carry with it any forcibly imposed, implicit message. It is the direct regulation of an individual's identity that carries with it the greatest threat of a compelled affirmation.

The case of *Goldman v. Weinberger*<sup>130</sup>—a military First Amendment case—illustrates the effect of a regulation aimed primarily at the modes of expression of an individual identity, rather than the identity itself. Goldman, an ordained rabbi and orthodox Jew, was a doctor and officer on active duty in the Air Force. In 1981, he ran afoul of an Air Force dress regulation that prohibited servicemembers from wearing any unauthorized headgear, including the yarmulke that Goldman considered a necessary part of his religious observance.<sup>131</sup> After

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erosexuality." Halley, *supra* note 5, at 971. See also Rich, *supra* note 35, at 22.

<sup>130</sup> 475 U.S. 503 (1986).

<sup>131</sup> *Goldman* itself is framed primarily as a Free Exercise case. However, the Court has consistently conflated Speech Clause and Religion Clause analysis in its military cases, applying the same nebulous standard to all such claims. Thus, the Court cites its military Speech Clause cases when conducting military Religion Clause analysis, see, e.g., *Goldman*, 475 U.S. at 506–07 (citing *Parker v. Levy*, 417 U.S. 733 (1974)), and the Courts of Appeals have cited both types of cases, including *Goldman*, in their analysis of the Don't Ask, Don't Tell policy. See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 933 (4th Cir. 1996) (en banc) (relying on *Goldman* in analysis of Speech Clause claims). See also *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and

receiving a reprimand and poor evaluation for the dress code violation, Goldman brought suit, claiming that this application of the code to an orthodox Jew violated the First Amendment. The Court, per then-Justice Rehnquist, disallowed his claim. The majority acknowledged that the wearing of a yarmulke was "required by [Goldman's] religious beliefs" and that it constituted an important expressive act by which he sought to identify himself as Jewish.<sup>132</sup> Nonetheless, they found that the military's interest in promoting obedience by requiring outward uniformity outweighed Goldman's individual rights.

[T]he traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate individual distinctions except for those of rank.<sup>133</sup>

A holding that provides that the military may freely require soldiers to subordinate their "personal preferences and identities" might at first seem to present a difficult obstacle to a gay servicemember who seeks to challenge the Don't Ask, Don't Tell policy on the grounds that it forces him to affirm a false identity. However, recalling exactly what the Air Force was and was not empowered to do in *Goldman* places that apparent obstacle in perspective. The Air Force had not deprived Goldman of the right to identify himself as Jewish; it had deprived him of one particular mode of publicly expressing his Jewish identity. Even after the Air Force forced him to comply with its uniform dress code, Goldman remained free to tell anyone and everyone that he was a rabbi and an orthodox Jew. As important as the yarmulke was to Goldman as a form of religious observance, it was not the only means by which he could make his identity known.

To articulate the distinction in starker terms: The Air Force did not compel Goldman to pretend that he was Catholic. A regulation requiring Goldman to adopt a facade of Christianity would have been a literal "compelled orthodoxy"<sup>134</sup>—a

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worship that has close parallels in the speech provisions of the First Amendment . . .").

<sup>132</sup> See *Goldman*, 475 U.S. at 510.

<sup>133</sup> *Id.* at 508.

<sup>134</sup> *Barnette*, 319 U.S. at 642.



direct regulation of his identity—and would present a true parallel to the Don't Ask, Don't Tell policy. It was not Goldman's identity, but the method he chose to express that identity, that *Goldman v. Weinberger* empowered the Air Force to regulate. Thus, under *Goldman*, a gay man in the military could probably be prohibited from wearing a button bearing a pink triangle and the slogan, "SILENCE=DEATH," even if he were profoundly committed to the fight against AIDS and considered the button to be a uniquely meaningful expressive symbol.<sup>135</sup> But *Goldman* did not empower the military to require its Jewish soldiers to attend Christmas functions, go to church on Sundays, and bow their heads while their peers said grace at mealtime, all the while remaining completely silent as to their true, Jewish identity. By the same token, it does not lend support to a policy that directly regulates the identities of gay servicemembers, forcing them constantly to affirm a false, heterosexual identity.<sup>136</sup>

Indeed, Professor Cover would recognize the dress regulation that *Goldman* upheld as a natural incident of a strong imperial institution like the military. As Cover explains, his use of the term "imperial" is deliberately evocative of "the price that is paid in the often coercive constraints imposed on the autonomous realization of normative meanings."<sup>137</sup> Cover argues, in other words, that the commitment of an individual to her religious, cultural or personal identity is sometimes constrained or muted in a strong imperial institution in order to secure the stabilizing benefits that such an institution has to offer.<sup>138</sup> Cover distinguishes between such "critical[ly]

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<sup>135</sup> See generally Yoshino, *supra* note 29, at 1781–93 (discussing importance of pink triangle as symbol in gay community); HEINZ HEGER, THE MEN WITH THE PINK TRIANGLE (David Fernbach trans., 1994) (documenting persecution of gay men during Holocaust and use of pink triangle to identify gay prisoners in Nazi concentration camps).

<sup>136</sup> In her recent Article, Professor Halley has traced the conceptual and doctrinal steps that led to the Don't Ask, Don't Tell policy. See Halley, *supra* note 9. In what I take to be a similar observation to my own, Halley characterizes the "Don't Tell" component of the policy as "a pervasive and intimate system of identity regulation." Halley, *supra* note 9, at 179.

<sup>137</sup> Cover, *supra* note 58, at 13 n.36.

<sup>138</sup> As Professor Cover puts it:

Maintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoher-

objectiv[e]"<sup>139</sup> constraints on the expression of *all* individual identities, on the one hand, and the direct regulation or exclusion of just certain identities, on the other. He characterizes the direct regulation of certain identities as a proper activity only for nongovernmental, sectarian communities.<sup>140</sup>

The Supreme Court's identity jurisprudence has taken shape around a similar distinction. In contrast to *Goldman*, the Court did review—and strike down—a direct regulation of identity by the government in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>141</sup> Recall that in *Hurley*, the Court quashed an injunction requiring the Allied War Veterans Council to admit the GLIB parade unit, finding that the effect of the injunction would be to force the Council to propound a message with which it disagreed. In its analysis of the Council's claim, the *Hurley* Court reproduces the asseverations that the Council forwarded in litigation, accepts them as a legitimate account of the Council's intended message, and bases its analysis upon that message.<sup>142</sup> The message consists primarily in the Council's definition of its own Irish identity. As the Court says, "a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian or bisexual . . . . The parade's organizers may not believe these facts about Irish sexuality to be so . . . ." <sup>143</sup> What the Council wished to assert, in other

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ent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.

Cover, *supra* note 58, at 16.

<sup>139</sup> Cover, *supra* note 58, at 16.

<sup>140</sup> See Cover, *supra* note 58, at 33 ("Even an accommodationist sectarian position—one that goes to great lengths to avoid confrontation or the imposition upon adherents of demands that will in practice conflict with those imposed by the state—establishes its own meaning for the norms to which it and its members conform.").

<sup>141</sup> 115 S. Ct. 2338 (1995).

<sup>142</sup> The Court goes on, however, to disavow any requirement that a litigant pressing such a claim define its intended message with a high degree of particularity. See *id.* at 2345, 2348 ("[A] narrow, succinctly articulable message is not a condition of constitutional protection. . . . [W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view . . . .").

<sup>143</sup> *Id.* at 2348. I choose to concentrate here on the component of the Council's message that involves the composition of the Irish-American community rather

words, was that its Irish identity was a *heterosexual* one, unrelated to, and mutually incompatible with, homosexuality.

Upholding the right of the Council to exercise control over its message concerning its Irish identity necessarily entailed upholding the right of the Council to control the composition of the parade. Since "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade,"<sup>144</sup> the prospect of a visible gay presence in the parade threatened to alter the Council's message by "bear[ing] witness to the fact that some Irish are gay, lesbian or bisexual."<sup>145</sup> In order to march in the parade without presenting such a threat, gay and lesbian Irish-Americans would have had to march "dispersed throughout John Hurley's crowd," as Professor Eskridge has put it, so that "their sexual orientation would [be] invisible to the audience."<sup>146</sup> In awarding the Council a victory, the Court recognized that the group had a vital interest in controlling the public's perception of its identity as an Irishness that is naturally and necessarily heterosexual.<sup>147</sup> The "belief" that Massa-

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than the portion of its message that deals with the "social acceptance" of gay men and lesbians within that community, *see id.*, because the former component focuses more closely on individual identity rather than on matters of political and social disputation. That said, there are important arguments to be made for the proposition that speech concerning gay identity is necessarily political in nature, at least in contemporary America. *See, e.g.,* Thomas, *supra* note 8, at 1440-43, 1509-13. As Professor Yoshino has explained, because sexual orientation is an invisible identifying characteristic—one, moreover, that is collectively repressed in ordinary public discourse—gay identity is always already contested when it is brought out into the open. *See* Kenji Yoshino, *The Assimilationist Bias in Equal Protection*, 108 YALE L.J. (forthcoming 1998).

<sup>144</sup> *Hurley*, 115 S. Ct. at 2348. As Professor Eskridge has pointed out, the "customary" mode of determination that the Council employed in selecting units for the parade was one of almost automatic acceptance. Unlike in the New York Saint Patrick's Day parade sponsored by the Ancient Order of Hibernians, which also has been the subject of a battle over gay participation, the Boston group exercised very little discretion in the admission of units, rejecting only four applications (including GLIB's) in the parade's history. *See* 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, 2458-59 (1997).

<sup>145</sup> *Hurley*, 115 S. Ct. at 2348; *cf. Elzie v. Aspin*, 897 F. Supp. 1, 5 (D.D.C. 1995) ("[T]he Supreme Court made clear in [*Hurley*] that the statements of self-identification of sexual orientation may contain a quite specific message . . . . The *Hurley* Court recognized that the statement 'I am homosexual' expresses a viewpoint.").

<sup>146</sup> Eskridge, *supra* note 144, at 2461.

<sup>147</sup> Professor Eskridge has characterized the Council's message as one of "com-

chusetts could not "compel" the Council to "affirm[ ]"<sup>143</sup> was a belief in the particular nature of the ethnic and sexual identity that the Council claimed for itself and its members.

This result also entails a recognition of the operation of the heterosexual presumption. The marchers in the Boston Saint Patrick's Day parade carried no banners proclaiming the heterosexuality of the parade's organizers, its units, or its participants. Such banners were not necessary for the Council to communicate its message of heterosexual Irishness—and to do so in a fashion that the Court was able to recognize without difficulty—because a heterosexual identity is presumed to be a part of ordinary social interactions unless an individual chooses to disavow that identity explicitly. For the same reason, Justice Souter's reassurance that "open" gay and lesbian marchers were welcome in the parade depends for its logical coherence upon the operation of the heterosexual presumption.<sup>149</sup> It is only because the parade's audience would presume an otherwise-unidentified marcher to be heterosexual that individual gay and lesbian marchers could participate in the parade without altering the Council's message of heterosexual Irishness.<sup>150</sup>

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pulsory heterosexuality," see Eskridge, *supra* note 144, at 2459, aptly drawing upon the insights of Adrienne Rich that are discussed in the previous Part. See *supra* note 35 and accompanying text.

<sup>143</sup> *Hurley*, 115 S. Ct. at 2347.

<sup>149</sup> See *id.*

<sup>150</sup> Indeed, it appears that the Court is seeking to mitigate the less attractive implications of the analytical framework it has articulated with its suggestion that it was the "admission of GLIB as its own parade unit carrying its own banner" that truly drove the controversy in *Hurley* and not the mere "participation of openly gay, lesbian, or bisexual individuals in various [other] units admitted to the parade." *Id.* at 2347. While seemingly attractive as a means of downplaying the intolerance of the Council's position, however, the space that this distinction carves out is a very small one, indeed. What could the Court mean, after all, when it suggests that the participation of "openly" gay, lesbian or bisexual people was not contested in *Hurley*? Does it mean for "open" to refer only to the perceptions of other marchers, suggesting that gay men and lesbians remained "free," for example, to discuss their same-sex spouses with other parade participants, but only so long as they were not otherwise identifiable as gay and marched anonymously in the parade? Within the context of the Court's analysis, this constrained reading is necessary in order to make any sense of the assertion that "open" gay men and lesbians were free to march. The Court could not have meant "open" to refer to the perceptions of the parade's audience, for it would run directly contrary to the logic of the opinion to allow the State to require the participation of this latter kind of "openly gay" individual while forbidding the State to mandate the inclusion

Similarly, although the Don't Ask, Don't Tell policy contemplates that gay people will serve among the ranks of the armed forces, it relies upon the ideological imperative of the heterosexual presumption to place its brand upon them. By forbidding expressions of gay identity in any form, at any time, and with any individual—including a servicemember's family and friends—the policy compels servicemembers constantly and affirmatively to express a sexual identity of the military's choosing.<sup>151</sup> Indeed, some of the servicemembers interviewed for this Article suggested that the heterosexual presumption has dominated social interactions in the military even more actively since the Don't Ask, Don't Tell policy was put into place.<sup>152</sup> Since sexual orientation was made a matter of active concern in the military while the new policy was being debated, they have suggested, servicemembers are now more anxious to proclaim their heterosexuality loudly—and to put pressure on those around them to do the same—than they were

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of GLIB.

If any individual marcher in the parade were identifiably gay—if he held hands with his same-sex partner, for example, or if he were a famous public figure who was widely known to be gay because he had come out of the closet on national television—then the presence of that individual would as much “bear witness to the fact that some Irish are gay, lesbian or bisexual,” *id.* at 2348, as would a GLIB parade unit. Professor Eskridge makes a similar observation in pointing to the disturbing possibility that the Court's reasoning in *Hurley* could have been employed to exclude women or black people from the Boston parade altogether, since gender and racial identities are more clearly visible than is sexual orientation. See Eskridge, *supra* note 144, at 2460. The Court's opinion in *Hurley* rests on the understanding that whenever an identity is perceived to be present—whether that identity is implicit, like the presumed heterosexuality of the marchers in the Boston parade, or explicit, like a hypothetical Irish counterpart to Ellen DeGeneres or Congressman Barney Frank—the identity constitutes meaningful and intelligible speech.

<sup>151</sup> See *supra* note 48. As Professor Halley has said, “[t]he new policy apparently provides for the discharge of servicemembers who disclose *anything* about their relationship to homosexuality—even a desire for information about it—to *anyone*—even a single individual in the apparent privacy of a therapeutic relationship.” Halley, *supra* note 9, at 181. Indeed, the military has vigorously pursued this avenue of investigation and subpoenaed harmful testimony from the mothers and fathers of servicemembers, both under the Don't Ask, Don't Tell policy and under the blanket ban that preceded it. See SLDN REPORT, *supra* note 47, at 9 (detailing use by Navy investigators of conversations between seamen and family members as evidence in separation proceeding); SHILTS, *supra* note 70, at 99–204 (chronicling “witch hunts” for gay and lesbian servicemembers pursued under blanket exclusion).

<sup>152</sup> See, e.g., Benecke Interview, *supra* note 38.

under the blanket exclusion.<sup>153</sup> Whether or not this observation holds true as a general proposition, it remains the case that the Don't Ask, Don't Tell policy capitalizes upon the heterosexual presumption to enforce a direct regulation of the sexual identities of gay and lesbian servicemembers.

#### IV. COMPELLED SILENCE AS COMPELLED AFFIRMATION

The case of *West Virginia v. Barnette*, in which the Court struck down the practice of compulsory school flag salutes, is the necessary starting point for analyzing any compelled affirmation. Before beginning that analysis, however, a word about the impact of the military context on a servicemember's First Amendment rights is called for. The Court has frequently noted—though not without dissent—that servicemembers enjoy reduced First Amendment protections in the military.<sup>154</sup> There are some restrictions on speech that may be permissible in the armed forces even though they would be intolerable in civilian life.<sup>155</sup> This is no less true of *Barnette*-style claims

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<sup>153</sup> See Beneke Interview, *supra* note 38. As Professor Halley has observed:

In units where the 1993 revisions are vigorously or even intermittently enforced, . . . servicemembers who want the protection of heterosexual identity will have to strive very hard to signify their entitlement to it—and they are liable to be harmed rather than helped by the volatility of the semiotic system that the new rules provide (supposedly) for their benefit.

Halley, *supra* note 9, at 219.

<sup>154</sup> As the Court has written:

[W]hile members of the military services are entitled to the protections of the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The rights of military men must yield somewhat to meet certain overriding demands of discipline and duty . . . .

*Brown v. Glines*, 444 U.S. 348, 354 (1980) (citations omitted) (quotation marks omitted). *But see* *Goldman v. Weinberger*, 475 U.S. 503, 516 n.2 (1986) (Brennan, J., dissenting) ("I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation.").

<sup>155</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience [in the military], and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."). *But see* *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." ) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)).

than it is of limitations on political advocacy<sup>156</sup> or public demonstration<sup>157</sup>—a fact of which the *Barnette* Court itself explicitly made note.<sup>158</sup> There are some practices in the military that could properly be described as “compelled affirmations” that are entirely appropriate and could not be called into question by any useful treatment of the First Amendment. The requirement that soldiers salute their superior officers provides perhaps the most visible example. While the special considerations that apply in the military context are as present in this as in any other First Amendment analysis, I choose not to explore the possible impact of those considerations at length here. The primary purpose of this Article is to analyze the nature of the First Amendment interest that the Don’t Ask, Don’t Tell policy burdens, not to argue that existing case law absolutely compels a finding that the policy is unconstitutional. Indeed, given the state of the Court’s First Amendment jurisprudence in the military context, no such argument is possible. The Court has never articulated any sort of test for the First Amendment claims of military personnel, relying instead on a form of analysis that is distinctly impressionistic.<sup>159</sup> What is more, the one limitation that the Court has consistently imposed on the military’s ability to restrict servicemembers’ First Amendment rights is to require that any such restriction be applied in a neutral and evenhanded fashion.<sup>160</sup> The Don’t Ask, Don’t Tell policy, which targets only the identities of gay

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<sup>156</sup> See *Brown v. Glines*, 444 U.S. 348 (1980) (upholding regulation prohibiting members of Air Force from distributing written material on base without prior consent of superior officer); *Parker v. Levy*, 417 U.S. 733 (1974) (affirming conviction of Army captain who encouraged subordinates to refuse to fight in Vietnam because of racial discrimination in troop assignments).

<sup>157</sup> See *Greer v. Spock*, 424 U.S. 828 (1976) (upholding Army regulations allowing commanders to prohibit partisan political demonstrations on Army property otherwise open to civilian traffic).

<sup>158</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 n.19 (1943) (“The Nation may raise armies and compel citizens to give military service . . . . It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.”).

<sup>159</sup> See *Goldman*, 475 U.S. at 528 (O’Connor, J., dissenting) (“The Court rejects Captain Goldman’s claim without even the slightest attempt to weigh his asserted right to the free exercise of his religion against the interest of the Air Force in uniformity of dress within the military hospital. No test for free exercise claims in the military context is even articulated, much less applied.”).

<sup>160</sup> See *supra* note 69, and cases cited therein.

and lesbian servicemembers, clearly fails to satisfy this basic limitation. Thus, I limit the focus of this Article to the nature of the burden that the policy inflicts under *West Virginia v. Barnette* and leave the ultimate question of the policy's constitutionality to the federal judiciary.

*Barnette* involved a challenge to a West Virginia law<sup>161</sup> that required all students, in both public and private schools, to participate in courses on civics and government that included a mandatory salute and pledge of allegiance to the American flag.<sup>162</sup> The Court had recently upheld the practice of requiring such a pledge in the case of *Minersville School District v. Gobitis*,<sup>163</sup> assuming its propriety as a general matter and declining to afford an exemption on religious grounds to the litigants before it. The appellees in *Barnette*, like the claimants in *Gobitis*, were adherents to the Jehovah's Witness religion. They sought to convince the Court that they merited the religious exemption that the Court had previously declined to extend. The Court, however, handed the appellees an even broader victory, overruling its decision in *Gobitis* and striking down the compulsory flag salute statute, in its entirety, on Speech Clause grounds.<sup>164</sup>

The Court's language throughout *Barnette* is expansive and its reliance on precedent sparse,<sup>165</sup> reflecting both the

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<sup>161</sup> See W. VA. CODE § 1734 (1941).

<sup>162</sup> See *Barnette*, 319 U.S. at 626 n.1. The pledge, which should be familiar to anyone educated in an American public school, reads as follows: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." *Id.* at 628-629. The words "under God," were added to the pledge at a later time.

<sup>163</sup> 310 U.S. 586 (1940).

<sup>164</sup> See *Barnette*, 319 U.S. at 642. The recent currency of *Gobitis* made the *Barnette* Court's decision to overrule that case noteworthy in its own right. Indeed, the Court heard the case on appeal from a district court panel that had ruled for the petitioners on the more narrow grounds that the Free Exercise Clause required West Virginia to accommodate their religious beliefs. See *id.* at 630. Commentators frequently invoke *Barnette* in discussing the principle of *stare decisis* and the propriety of overruling recent, controlling precedent. See, e.g., Charles Alan Wright, *My Favorite Opinion—The Second Flag-Salute Case*, 74 TEX. L. REV. 1297, 1297 (1996).

<sup>165</sup> Aside from the *Gobitis* case itself, Justice Jackson cites only two cases involving free speech and freedom of conscience in his entire majority opinion: *Hamilton v. Regents*, 293 U.S. 245 (1934), which upheld the right of the State to prescribe military training for students at public universities, and *Stromberg v. California*, 283 U.S. 359 (1931), in which the Court held that the display of a red flag as a symbol of opposition constituted speech meriting First Amendment protection.



importance and the novelty of the First Amendment interest that the Court recognized in the case.<sup>166</sup> In framing the nature of that claim, the Court extended the reach of its "free speech" protection beyond the realm of simple speech or symbolic conduct and embraced freedom of conscience as a value lying at the core of the First Amendment.

[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . 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.<sup>167</sup>

At best, the Court found, such a compulsory exercise would force the appellees to "simulate assent by words without belief and by a gesture barren of meaning"<sup>168</sup> through an affirmation that they could disclaim after the exercise was over. At worst, it would force them to "forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony."<sup>169</sup> Either way, the result was the same: The statute imposed a burden on individual rights that was greater even than that imposed by "censorship or suppression of expression of opinion"<sup>170</sup>—a burden that could be warranted only "on even more immediate and urgent grounds"<sup>171</sup> than the

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See *Barnette*, 319 U.S. at 632-33.

<sup>166</sup> *Barnette* was decided during World War II, and anxiety over totalitarianism clearly served to inspire some of the Court's stirring rhetoric. Indeed, the Court devotes some text and a paragraph-long footnote to the question of how closely the physical component of the flag salute resembles the obeisances that Adolf Hitler required of the German people under Nazism, see *Barnette*, 319 U.S. at 627-28 & n.3, and it draws an explicit contrast between its holding in *Barnette* and the strategies of "our present totalitarian enemies." See *id.* at 641. Similarly, Justice Frankfurter, writing in lone dissent, makes claims for moral authority by beginning with a reminder that, as a Jew, he "belongs to the most vilified and persecuted minority in history." See *id.* at 646 (Frankfurter, J., dissenting). Even the Civil War was apparently weighing upon the Justices' minds in *Barnette*, as evidenced by their acknowledgment of the types of disagreement that the choice of terms in the pledge might be expected to provoke. See *id.* at 634 n.14 ("Use of 'Republic,' if rendered to distinguish our government from a 'democracy,' or the words 'one Nation,' if intended to distinguish it from a 'federation,' open up old and bitter controversies in our political history . . .").

<sup>167</sup> *Id.* at 633-34.

<sup>168</sup> *Id.* at 633.

<sup>169</sup> *Id.*

<sup>170</sup> *Barnette*, 319 U.S. at 633.

<sup>171</sup> *Id.* At the time the Court decided *Barnette*, the clear and present danger test still predominated in First Amendment analysis. See, e.g., *id.* ("[C]ensorship or

grounds that other speech restrictions would require. Rejecting the claim that the need for "national unity" as "the basis of national security"<sup>172</sup> could provide the requisite urgency, Justice Jackson articulated a broad condemnation of those who would seek to compel orthodoxy and radical uniformity in the service of a coerced unanimity:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>173</sup>

The core principles of *Barnette* have found wide application. Following its determination that the regulation of corporate speech is subject to the same kind of scrutiny as the regulation of an individual's speech,<sup>174</sup> for example, the Court has prohibited government from forcing corporations to propound messages with which they disagree. In *Pacific Gas & Electric v. Public Utilities Commission*,<sup>175</sup> a California utility company successfully argued that the State could not force it to include environmentalist literature with the newsletter that it sent with its customers' monthly bills. "Were the government freely able to compel corporate speakers to propound political mes-

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suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."); see also *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.") (Holmes, J.). The *Barnette* Court's holding that compelled affirmations may be justified only on a showing of "even more immediate and urgent grounds," *Barnette*, 319 U.S. at 633, indicates, within the language that framed First Amendment analysis at the time, the uniquely high degree of scrutiny that such affirmations must receive.

<sup>172</sup> *Barnette*, 319 U.S. at 640 (quoting *Gobitis*, 310 U.S. at 595).

<sup>173</sup> *Id.* at 642.

<sup>174</sup> See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("[Political speech] is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."). In *Bellotti*, the Court invalidated a Massachusetts statute that placed restrictions on the efforts of corporations to influence the outcome of popular referenda. See also *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.") (citation omitted).

<sup>175</sup> 475 U.S. 1 (1986) (plurality opinion).

sages with which they disagree," the Court found, the protections of the First Amendment "would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."<sup>176</sup> *Barnette* has also worked in tandem with the Court's determination that the use of money for political advocacy constitutes expressive activity that merits First Amendment protection.<sup>177</sup> The case of *Abood v. Detroit Board of Education*<sup>178</sup> established the proposition that workers cannot be forced, as a condition of their employment, to contribute money to a union when that money will be used for political advocacy that is unrelated to the union's role as a bargaining representative.<sup>179</sup> The "freedom of belief" that *Barnette* protects is, the Court said in *Abood*, is "no less applicable"<sup>180</sup> to such compulsory expenditures.

The most significant reaffirmation of *Barnette* as it applies to the individual's interest in personal expression is *Wooley v. Maynard*.<sup>181</sup> *Wooley* concerned the placement of a state motto on an automobile license plate. The plaintiffs, George and Maxine Maynard, were residents of the State of New Hampshire. Since 1969, that state has required vehicles to carry license plates displaying the state's official motto, "Live Free or Die."<sup>182</sup> The Maynards, who were adherents to the Jehovah's Witness religion,<sup>183</sup> objected to being forced to display the motto on their car and brought suit to enjoin the state from prosecuting them for their repeated attempts to cover the motto with tape. The Supreme Court granted the Maynards their injunction, grounding its holding firmly in the principles it first

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<sup>176</sup> *Id.* at 16.

<sup>177</sup> See *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976) (per curiam) ("Making a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals . . . [and so] implicates fundamental First Amendment interests."); see also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977) (reaffirming principle that "contributing to an organization for the purpose of spreading a political message is protected by the First Amendment").

<sup>178</sup> 431 U.S. 209 (1977).

<sup>179</sup> See *id.* at 234-35.

<sup>180</sup> *Id.* at 235.

<sup>181</sup> 430 U.S. 705 (1977).

<sup>182</sup> See *id.* at 706.

<sup>183</sup> Thankfully, the Court has never made any suggestion that the *Barnette* line of cases applies only to confirmed Jehovah's Witnesses. Cf. *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

articulated in *Barnette*. In particular, the Court reiterated that the First Amendment protects "freedom of thought"<sup>184</sup> as well as the freedom to engage in various forms of speech and conduct. "The right to speak and the right to refrain from speaking," it said, "are complementary components of the broader concept of 'individual freedom of mind.'"<sup>185</sup> While the Court recognized that "the affirmative act of a flag salute [that was compelled in *Barnette*] involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate," the latter requirement nonetheless "force[d] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The State may not, the Court held, so "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>186</sup>

The extent to which a forced message touches upon matters of conscience or intimate personal concern is the question with which *Barnette* and its progeny are, ultimately, the most concerned. That consideration almost certainly drives the individual speaker's indignation in most *Barnette* claims. But such an interest is also, by its very nature, defined in wholly subjective terms. In *Hurley*, for example, the parade organizers' simple assertion that the compelled affirmation occasioned by GLIB's participation violated their deeply held personal beliefs concerning Irish sexuality was sufficient to support a *Barnette* claim, despite the absence of any measurable external indicia of their demonstrated commitment to those beliefs.<sup>187</sup> Thus, although the dissonance between the speaker's beliefs and the content of a compelled affirmation is the engine that drives the *Barnette* doctrine, it does not provide a useful way of assessing the relative seriousness of the burdens that different compelled affirmations place upon involuntary speakers. For that, it is necessary to develop more objective criteria with which to compare such claims.

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<sup>184</sup> *Wooley*, 430 U.S. at 714 (1977).

<sup>185</sup> *Id.* (quoting *Barnette*, 319 U.S. at 637 (Murphy, J., concurring)). See *supra*, text accompanying notes 94-95.

<sup>186</sup> *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642 (Murphy, J., concurring)).

<sup>187</sup> See Eskridge, *supra* note 144, at 2459-60.

Together, *Barnette* and *Wooley* suggest at least two axes along which the seriousness of the burden imposed by a compelled affirmation may be measured: the degree of linkage (or attenuation) that exists between the message and the speaker; and the opportunity available to the speaker to make clear to others her disagreement with the message she is forced to propound. The first of these may be called the "intimacy axis"—the measure of how personally or intimately the speaker is implicated by a compelled affirmation. The second we can call the "dissension axis"—the measure of the opportunity that the involuntary speaker retains to make known her disagreement with the message.<sup>188</sup> The compelled affirmations in *Barnette* and *Wooley* are essentially complementary in the manner in which they play out along these two axes.

In *Barnette*, there was no attenuation at all between the mandatory pledge of allegiance and the individual student; rather, the message was both immediate and personal. The pledge itself was couched in solemn and earnest terms, and the student was required both to speak the pledge out loud and to accompany it with a salute indicating her sincerity in the words that she spoke. On the other hand, there was ample opportunity for the students in *Barnette* to make known to others their disagreement with the pledge. Since the pledge was conducted before classmates and teachers with whom the students interacted on a daily basis, they could quite effectively qualify their participation in the pledge with explanations to their peers that they were participating involuntarily and that the pledge ran counter to their own beliefs.<sup>189</sup> Thus, it appar-

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<sup>188</sup> This attempt to develop objectively quantifiable axes along which to measure the seriousness of a compelled affirmation bears some similarity to Professor Rubenfeld's attempt, in his privacy analysis, to use objective criteria to describe the extent to which a regulation "takes over" an individual's life. See Rubenfeld, *supra* note 81, at 784. Rubenfeld does briefly discuss *Barnette* in his Article, but he takes great pains to distinguish laws concerning speech and expression from the privacy rights that he seeks to address. See Rubenfeld, *supra* note 81, at 784-87. Rubenfeld's anxiety over the proximity of *Barnette* and its progeny to his own theory probably signals his desire to limit the scope of his theory and to insulate it from the charge that it will lead to an explosion of "newly discovered" constitutional rights. See, e.g., Rubenfeld, *supra* note 81, at 785 ("Because of the signal role that speech plays in political freedom and because of the express constitutional guarantee, government in this country can hardly forbid or compel citizens to utter a single opinion without violating their rights.").

<sup>189</sup> Recall that the *Barnette* Court did not consider it important to determine

ently was the weight of the burden imposed under the intimacy axis that drove the Court's decision in *Barnette*.

In *Wooley*, the degree of linkage, or intimacy, between speaker and message was less than that in *Barnette*, but the speakers were less able to qualify their apparent endorsement of the contested message. In addressing the former consideration, the Court noted the contrast between the "affirmative act of a flag salute" and the "passive act of carrying the state motto on a license plate" when it acknowledged that, between the two requirements, the motto constituted the less "serious infringement."<sup>190</sup> To render the distinction between the two more precisely: The Maynards were not required to speak the motto themselves but only to carry it on their property; the motto was couched in considerably less personal terms than was the pledge, employing a collective "we" rather than a solemn "I"; and the motto's ubiquity and its rather inauspicious placement on a license plate diminished the extent to which it would ever be perceived as the personal averment of any individual speaker, the Maynards included. On the other hand, the Maynards did not have the opportunity personally to disclaim their endorsement of the State's motto to all the motorists and pedestrians who would regularly see them displaying it—their ability to expressly dissent was curtailed.<sup>191</sup> They could certainly have placed a bumper sticker on their car with some sort of express disclaimer, but common sense suggests that such an item would be neither very practical nor very effective

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whether the statute before it required the students actually to believe the words that they spoke or merely to recite them along with their classmates. See *Barnette*, 319 U.S. at 633 ("It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning."). Cf. *Pacific Gas & Elec. Co.*, 475 U.S. at 16 (government cannot "require speakers to affirm in one breath that which they deny in the next").

<sup>190</sup> *Wooley*, 430 U.S. at 715.

<sup>191</sup> Compare *id.* ("New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message . . . . As a condition to driving an automobile . . . the Maynards must display 'Live Free or Die' to hundreds of people each day.") with *id.* at 717 n.15 ("It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, 'In God We Trust', from United States coins and currency. . . . [However,] [c]urrency is generally carried in a purse or pocket and need not be displayed to the public.").

and would make for a somewhat ridiculous spectacle in any event. Thus, although the burden that the New Hampshire statute imposed was lesser in "degree"<sup>192</sup> than that associated with the compulsory flag salute in *Barnette*, the weight of that burden under the dissension axis was sufficient to allow the Maynards to prevail.

When measured along these two axes, the affirmations of heterosexual identity that the Don't Ask, Don't Tell policy compels from gay servicemembers exhibit the worst characteristics of each of the affirmations in *Barnette* and *Wooley*. Concerning the intimacy axis, the link between speaker and message under the policy could not be more close. The facade of heterosexuality that the policy requires gay servicemembers to maintain serves to define the public identities by which they are known, implicating every aspect of their social interactions. Concerning the dissension axis, there is no opportunity for gay servicemembers ever to make known their "disagreement" with the heterosexual identity that the policy forces them to propound.<sup>193</sup> Moreover, the only neutral disclaimer that one can imagine a gay servicemember making—that is, a disclaimer that would not violate the terms of the policy—would be the repeated assertion, whenever a conversation carried intimations of a presumption of heterosexuality, that the servicemember "does not mean by her participation in this conversation to imply anything about her sexual orientation," or words to that effect. Even to frame the suggestion in words demonstrates how impractical any such disclaimer would be. More to the point, such a stultified and unnatural conversational handicap would reveal a servicemember's homosexuality almost as quickly as would a bald assertion of her sexual orientation.<sup>194</sup> In *Hurley*, the Court noted the unworkability of

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<sup>192</sup> *Id.* at 715.

<sup>193</sup> Recall that even those statements that a servicemember makes to her family and non-military friends can serve, without more, as the basis for a separation proceeding under the policy. See *supra* notes 48, 151 and accompanying text. The policy forces servicemembers to proclaim a false heterosexual identity, without qualification, at all times and to all people.

<sup>194</sup> See *Able v. U.S.*, 968 F. Supp. 850, 859 (E.D.N.Y. 1997) ("It is unlikely in the extreme that any enlisted member fit to serve would believe that closeted homosexuals are not serving or would long retain that belief after asking another enlisted member his or her sexual orientation and receiving the reply 'no comment.'").

any express disclaimer on the part of the parade organizers in its analysis of their *Barnette* claim, concluding, "Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."<sup>195</sup> In this respect, "practice follows practicability" under the Don't Ask, Don't Tell policy as well.

The Court singled out compelled affirmations for categorically different treatment in *West Virginia v. Barnette*, finding that they imposed an even greater burden on an individual's First Amendment rights than do censorship and other straightforward restrictions on speech and advocacy<sup>196</sup>—the paradigmatic infringements on freedom of expression against which we have traditionally understood the First Amendment to offer protection. Even within that unique category of disfavored state regulation, the Don't Ask, Don't Tell policy is extreme. The damage that the policy's compelled affirmations of heterosexual identity inflict on the personal autonomy of gay and lesbian servicemembers is more pervasive, more unrelenting and less subject to mitigation than any compelled affirmation that the Supreme Court has thus far been called upon to review.

## CONCLUSION

This Article began by using an imaginary conversation to illustrate its central thesis. Perhaps a second hypothetical will serve as an appropriate conclusion in order to account for the failure of the Federal Courts of Appeals to understand the nature of the First Amendment interest that the Don't Ask,

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<sup>195</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2349 (1995). Compare, also, the Court's reaction in *P.G. & E.* to the environmental group's suggestion that the inclusion of a disclaimer on its material would prevent any misattribution of its views to *P.G. & E.* and so would eliminate the *Barnette* problem:

The presence of a disclaimer on TURN's messages does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message.

*Pacific Gas & Elec. Co.*, 475 U.S. at 16 n.11 (citations omitted).

<sup>196</sup> See *supra* notes 165-173 and accompanying text.



Don't Tell policy burdens. The Second, Fourth, Eighth and Ninth Circuits have relied upon what might most charitably be described as a lawyer's argument in conducting their analysis. They have reasoned that the policy merely uses a gay servicemember's statement of her identity as evidence—that is, evidence that she probably stands in violation of the policy's prohibition on exhibiting a "propensity" to engage in homosexual acts.<sup>197</sup> Because there is a "strong[] correlation . . . between those who state that they are homosexuals and those who are at least likely to engage in [homosexual] acts,"<sup>198</sup> these courts have explained, the policy's evidentiary use of identity speech is an entirely rational one. That being so, they have concluded, the policy presents no problem under the First Amendment so long as the underlying conduct restriction is valid.<sup>199</sup> It is time, finally, to dispel the apparent magic of

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<sup>197</sup> See 10 U.S.C. § 654(b)(2) (Supp. 1997); *Able*, 88 F.3d at 1296. On the formal definition of the term "propensity," see DoD Directive No. 1332.14, encl. 3, pr. 1, at H.1.b(2) ("propensity" is "more than an abstract preference to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts"); *Able*, 88 F.3d at 1297–98 (deferring to government's definition of "propensity" as indicating "likelihood" of engaging in proscribed conduct).

<sup>198</sup> *Able*, 88 F.3d at 1296. See also *Thomasson*, 80 F.3d at 930 ("Such remarks provide evidence of activity that the military may validly proscribe."); *Richenberg*, 97 F.3d at 262 (adopting Fourth Circuit's reasoning).

<sup>199</sup> See *Able*, 88 F.3d at 1296 n.8, 1300 (stressing contingent nature of this First Amendment argument and remanding to district court for ruling on constitutionality of underlying conduct restriction).

Judge Kenneth Hall issued a vigorous dissent in *Thomasson v. Perry*. His opinion, which was joined by Judges Ervin, Michael and Motz, criticizes the policy primarily on equal protection grounds. See *Thomasson*, 80 F.3d at 949–52 (Hall, J., dissenting). Judge Hall takes aim at the validity of any restriction that purports to rest on a distinction between sexual orientation and a "propensity" to engage in broadly defined affectionate behavior. Arguing that this strained distinction has nothing to do with "conduct" in any ordinary sense of the word, *id.* at 950, Judge Hall concludes that Lt. Thomasson was discharged "only because he has said that he is homosexual." *Id.* In other words, Judge Hall argues, the policy singles out servicemembers based on status alone, an action that is highly suspect under the Equal Protection Clause. Regarding the First Amendment implications of the Navy's action, Judge Hall suggests that the only evidentiary value that Thomasson's "admission" possessed was with respect to his sexual orientation, and not with respect to any conduct that could legitimately have served as a basis for his discharge from the Navy. See *id.* at 953–54. The government's only possible response to this objection, the Judge argues, is to "define [the] speech as 'conduct.'" *Id.* at 954. At that point, the statute must be understood to "be targeted at suppressing the speech itself," and doing so for the impermissible purpose of accommodating "the prejudices of heterosexual servicemen." *Id.* Judge Hall concludes that, when the disingenuity of the distinction between homosexual "status" and a

this speech-as-evidence argument.

Imagine for a moment that the Don't Ask, Don't Tell statute gave a somewhat more narrow definition of the statements that constitute sufficient evidence to raise a presumption that an individual stands in violation of the "propensity" restriction. Suppose the statute provided that gay and lesbian soldiers remain free to identify themselves honestly, with no adverse effects, and that only statements indicating that a soldier actually *intends* to commit a "homosexual act" would raise the damning presumption. Thus, if an openly gay servicemember revealed to a friend that he planned to have a romantic encounter, or if he spoke excitedly of his plans to visit a brothel in a foreign port—if, in other words, the servicemember said anything to suggest that he was actively seeking to engage in a "homosexual act"—then the military could take this as sufficient evidence of the servicemember's "propensity" and initiate separation proceedings accordingly. A servicemember's mere acknowledgment that he was gay, however, would not trigger the policy, and all servicemembers would remain equally free to make their respective sexual orientations known whenever the occasion to do so might arise.

If the statute provided for this somewhat more refined strategy for enforcing the "propensity" restriction, then the policy would no longer compel gay servicemembers to affirm a false identity.<sup>200</sup> Nonetheless, if an openly gay servicemember

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"propensity" to engage in ordinary affectionate behavior is revealed, the speech-as-evidence argument simply becomes inapplicable.

The project of this Article is to analyze the Don't Ask, Don't Tell policy as it is written, to demonstrate the burden that the policy—by its own terms—places on the speech interests of gay and lesbian servicemembers, and to point out the inadequacy of the analytical framework offered by the Second, Fourth, Eighth and Ninth Circuits to recognize and describe that burden. Judge Hall's dissent in *Thomasson* takes aim at the very consistency and coherence of the policy's foundations. The Judge calls into question, not the adequacy, but the propriety of the majority's First Amendment analysis, arguing that the disingenuous and spurious nature of the status/propensity distinction renders the speech-as-evidence argument unavailable to the government. Judge Hall certainly has not been alone in making this argument. See, e.g., Halley, *supra* note 9, at 183–218; Halley, *supra* note 9, at 220 ("We need to be able to describe the discriminations of the new military anti-gay policy in terms of the *relationship* between status and conduct, not by occluding one or the other."). The fact that this Article has chosen an approach that differs from Judge Hall's should in no way be read as a repudiation of his powerful attack on the legitimacy of the policy and the motives that underlie it.

<sup>200</sup> I do not mean to suggest that the regime outlined in this hypothetical is a

living under this hypothetical policy were to tell a friend that she planned to have a romantic encounter, and the military used her statements as the basis for initiating a separation proceeding, the speech-as-evidence argument might well suffice to overcome any objection she might raise that this use of her statements impermissibly restricted her freedom of expression<sup>201</sup>—assuming, as always, that the double standard for conduct and “propensity” that underlies the policy is itself valid.<sup>202</sup> The availability of the speech-as-evidence argument has nothing to do with the question of whether the policy compels gay servicemembers to make false affirmations of their sexual identity. By the same token, when the policy does compel gay servicemembers to make such false affirmations, the speech-as-evidence argument does not serve to justify or mitigate the burdens associated with those compelled affirmations. The two analytical approaches simply address different First Amendment questions. Thus, it is not a contradiction to observe that the Don’t Ask, Don’t Tell policy compels gay servicemembers to make false affirmations of their sexual identities at the same time that it provides for what might otherwise be a permissible evidentiary use of their statements. It is, rather, another way of demonstrating that the very definition of the conduct/propensity restriction, and the statements that constitute sufficient evidence to raise a presumption that the restriction has been violated, constitute the mechanism by which the policy compels gay servicemembers to make these false affirmations.<sup>203</sup>

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desirable one. While it would constitute an improvement over the current policy, it would still punish a gay servicemember for conduct (and statements) that would be entirely permissible for a straight servicemember, and it would do so solely on the basis of the gay servicemember’s sexual orientation. Such a policy raises serious questions under the equal protection component of the Fifth Amendment’s Due Process Clause. See *infra* note 211 and accompanying text.

<sup>201</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 489-91 (1993) (reaffirming principle that “[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent” and upholding sentencing enhancement provision on grounds that it did not have effect of chilling protected speech).

<sup>202</sup> See *Able*, 88 F.3d at 1296 n.8, 1299.

<sup>203</sup> This observation has implications that far exceed the scope of this Article. For a deeper exploration of those implications, it is necessary to turn to the work of Professor Halley, who has written extensively on the relationship between act and identity—in particular, the relationship between sodomy and homosexual iden-

For this reason, the mode of analysis that the various Circuits have employed in their review of the policy is radically incomplete. None of these reviewing courts has recognized the expressive power of the silence that the policy compels gay servicemembers to maintain; none has analyzed the manner in which the policy compels gay servicemembers constantly to affirm a heterosexual identity.<sup>204</sup> Indeed, the Eighth Circuit panel that issued *Richenberg v. Perry* disposed of Captain Richard Richenberg's First Amendment claims in a section that measured only two short paragraphs.<sup>205</sup> That panel began its Speech Clause analysis with the following observation.

Under the prior policy, the military asked applicants if they were

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tity—in exploring the powerful change that *Bowers v. Hardwick* worked upon the legal landscape for gay, lesbian and bisexual people. See, e.g., Halley, *supra* note 5. Halley has repeatedly challenged the reflexive assumption that sodomy—or any particular sexual act—is properly definitive of the class of “homosexuals.” Rather, she argues, “[t]he patterns that emerge from recent empirical and theoretical work on the subject compel the conclusion that homosexual identity, far from being the equivalent of sodomy, is constituted in precisely the political process which, under the equal protection clause, the courts are pledged to protect.” Halley, *supra* note 5, at 923.

<sup>204</sup> In contrast, Judge Eugene Nickerson of the Federal District Court for the Eastern District of New York has evinced a deeper understanding of how the policy operates. Judge Nickerson wrote the opinion that the Second Circuit reversed in *Able*. See *Able v. U.S.*, 880 F. Supp. 968 (E.D.N.Y. 1995), *rev'd and remanded*, 88 F.3d 1280 (2d. Cir. 1996). While he rested his First Amendment analysis on a rejection of the status/propensity distinction, see *id.*, at 973–76—an approach similar to that adopted by Judge Hall in *Thomasson*, 80 F.3d at 930—Judge Nickerson's discussion of the government's unit cohesion argument displayed a welcome sensitivity to the degree of deception that is inherent in the policy. As the Judge wrote, “[c]ommon sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.” *Able*, 880 F. Supp. at 979. Judge Hall acknowledged the wisdom of this observation in his *Thomasson* dissent. See *Thomasson*, 80 F.3d at 952 (Hall, J., dissenting).

On remand, Judge Nickerson again struck down the policy, this time on equal protection grounds. In that opinion, the judge made a similar point without mincing words:

For the United States government to require those self-identifying as homosexuals to hide their orientation and to pretend to be heterosexuals is to ask them to accept a judgment that their orientation is in itself disgraceful and they are unfit to serve. To impose such a degrading and deplorable condition for remaining in the Armed Services cannot in fairness be justified on the ground that the truth might arouse the prejudice of some of their fellow members.

*Able v. U.S.*, 968 F. Supp. 850, 861 (E.D.N.Y. 1997).

<sup>205</sup> See *Richenberg v. Perry*, 97 F.3d 256, 262–63 (8th Cir. 1996).

homosexual and excluded those who answered affirmatively. The new policy is less restrictive—the military now ignores the issue unless a service-member affirmatively evidences a propensity to engage in conduct inconsistent with military service.<sup>206</sup>

Any court that concludes, after purportedly conducting a searching First Amendment inquiry, that the forcibly imposed closet of the new policy is “less restrictive” of servicemembers’ speech interests than was the blanket exclusion that preceded it, betrays a lack of understanding of the lived experience of gay and lesbian servicemembers that is inexcusable.<sup>207</sup> If this Article has one purpose, it is to help to eliminate this species of privileged ignorance.<sup>208</sup>

Gay servicemembers did suffer many of the injuries and indignities that this Article has described in equal measure under the blanket exclusion that preceded the Don’t Ask, Don’t Tell policy. Some gay people, when presented with an official policy of exclusion, chose to hide their identities and enter the military even though they knew that, in theory, they were not supposed to be there. Others came to realize that they were gay only after committing themselves to a life and a career in military service.<sup>209</sup> In many cases, the harms that the old pol-

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<sup>206</sup> *Id.* at 263.

<sup>207</sup> See also *Holmes*, 124 F.3d at 1136 (opining that, even when servicemembers are discharged for nothing more than identifying themselves as gay, “the First Amendment is not implicated.”); *Able*, 88 F.3d at 1299–1300 (characterizing policy as creating “a reasonable balance” between “a service member’s privacy interest and the military interest in prohibiting homosexual acts”).

<sup>208</sup> See Yoshino, *supra* note 29, at 1788–93 (discussing costs of “carefully cultivated” judicial ignorance of gay people and gay life); Sedgwick, *supra* note 18, at 23.

<sup>209</sup> Allan Bérubé discusses this dynamic in his pathbreaking investigation into the experiences of gay servicemembers during World War II. Bérubé’s description of the “psychological screening” process that the armed forces used in its attempt to exclude gay people (and others who were “mentally unbalanced”) provides a good example of the hapless position in which young servicemembers often found themselves then, and continue to now. Psychological “screeners” in the post-World War I era regularly asked inductees, with varying degrees of directness, whether they were gay. See BÉRUBÉ, *supra* note 74, at 8–32. Bérubé explains that many inductees simply had not yet confronted the issue:

Gay selectees who said ‘no’ sometimes believed that they were telling the truth. Some did not yet think of themselves as gay. In early 1942, right after Pearl Harbor was bombed, twenty-year-old Woodie Wilson enlisted in the Air Force at an induction station outside Harrisburg, Pennsylvania, where, he recalled, “I was asked the big question, ‘Are you a homosexual?’ And I certainly said ‘no’ and didn’t believe I was.” Others

icy inflicted were the direct result of the military's abusively selective enforcement of the blanket exclusion.<sup>210</sup> Even when the military did not deliberately abuse its authority, the impossibility of perfect enforcement—or even reasonably consistent enforcement—of a policy that sought to exclude a class of peo-

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could truthfully say no because they had not yet had any sexual experiences . . . . Still others had never heard the clinical term *homosexual* before and guessed that it didn't apply to them. "Going into the service the word 'homosexual' was used," recalled Raymond Mailloux, who in July 1943 was drafted into the Army in Fall River, Massachusetts, at the age of eighteen. "And like everyone else, of course, I said 'no'. Because I truly did not know what 'homosexual' meant. We didn't call it that. We called it more or less being 'queer' or 'fruit.' And it wasn't even till later that I knew it pertained to women also."

*Id.* at 23–24.

Coming to terms with one's sexuality and embracing an adult identity is a complicated process, and many of us do not complete the task before being confronted with important life decisions, including the decision of whether to join the military. This is no less true of the servicemembers who agreed to be interviewed for this Article. Among those who have already been introduced in the sections above, neither Elizabeth Hillman nor Anonymous Officer Number One knew that she was gay at the time that each entered her respective branch of the armed forces. See Hillman Interview, *supra* note 34; Anonymous Interview Number One, *supra* note 35; text accompanying note 213, *infra*. Indeed, as Michelle Benecke points out, coming to terms with questions about one's sexuality is made all the more difficult when one enters an environment where even discussing the issue can result in immediate discharge. See Benecke Interview, *supra* note 38.

<sup>210</sup> The story of Sergeant Perry Watkins provides one of the most extraordinary examples of this kind of selective enforcement. His saga is told in great detail in *Conduct Unbecoming*. See SHILTS, *supra* note 70, at 61–63, 79–80, 161–62, 218–19, 230, 241–43, 395–98. Watkins was inducted into the Army in 1968. From the first, he openly told anyone who might wish to know that he was gay, including the psychiatrist who conducted his induction interview. Even so, the Army did not initially attempt to bar Watkins from service; quite the contrary, it actively sought out his "non-heterosexual" services. Watkins was an accomplished drag queen, and the Army enthusiastically employed him during the Vietnam War to entertain the troops. The Army also repeatedly attempted to drum Watkins out of the service over the years because he was gay, periodically "discovering" this damning piece of information whenever it was convenient. Watkins' tenure in the Army is an almost comic series of smash-hit, Army-sponsored performances as the fabulous "Simone" interspersed with career-threatening discharge proceedings.

When the Army finally tried to kick Watkins out of the service once and for all, Watkins brought suit in federal court to fight his discharge. The Ninth Circuit Court of Appeals, sitting en banc, found the Army's course of conduct so outrageous that they applied an estoppel and refused to allow the military to use the fact that Watkins was gay as grounds for his discharge—an unprecedented use of this kind of equitable remedy against the military. See *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (en banc).

Sergeant Watkins died of complications resulting from the AIDS virus on March 17, 1996. See N.Y. TIMES, March 21, 1996, at 5.

ple on the basis of an invisible characteristic left gay servicemembers constantly exposed and vulnerable. It is for these and many other reasons that a blanket exclusion of gay people from a pluralistic State institution like the military raises serious questions under the equal protection component of the Fifth Amendment to the Constitution, particularly following the Supreme Court's recent decision in *Romer v. Evans*.<sup>211</sup>

Whatever else may be said about the blanket exclusion, however, it never purported to embrace the infliction of such harms upon gay servicemembers as the intended mode of the policy's operation, never codified the infliction of such harms into the letter of a regulation or statute. That is what the Don't Ask, Don't Tell policy has done. By inviting gay people to serve in the armed forces but compelling them to lie about the most personal aspects of their identities, the new policy places the power of the State behind an offense to servicemembers' First Amendment rights that the military could previously argue that most gay servicemembers were imposing upon themselves. That compulsion, and the harms that attend it, are now written into the definitions that drive the statute.<sup>212</sup>

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<sup>211</sup> 517 U.S. 620 (1996). See also *Meinhold v. U.S. Dep't. of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994) ("Construing the [blanket ban] to apply to the 'classification of being homosexual' clearly implicates equal protection."); *Able v. United States*, 968 F. Supp. 850, 860 (E.D.N.Y. 1997) (characterizing as "weak" the argument that "sexual tensions" engendered by mere presence of openly gay servicemembers might justify blanket exclusion of gay people from military).

I have argued elsewhere that the decision in *Romer* constitutes a conscious signal by the Court that it will henceforth be more solicitous of the civil rights claims of gay litigants, a signal that is deliberately evocative of the shift that the Court effected in its gender-discrimination jurisprudence in the case of *Reed v. Reed*, 404 U.S. 71 (1971). See Tobias Barrington Wolff, Case Note, *Principled Silence*, 106 YALE L.J. 247 (1996). Indeed, the insensitive treatment that the Federal Courts of Appeals have afforded to the First Amendment claims of gay litigants thus far, see *supra*, text accompanying notes 205-208, is indicative of the kind of "empathy failure" that suggests that some form of heightened scrutiny for the disfavored group might in fact be warranted. See Yoshino, *supra* note 29, at 1763-72, 1807; JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103, 160-64 (1980).

<sup>212</sup> Compare Professor Halley's description of an opinion by the New Hampshire Supreme Court construing and upholding a statute that forbids gay people to serve as foster parents. See *In re Opinion of the Justices*, 530 A.2d 21 (1987). In that case, the New Hampshire Court interprets the prohibition of the statute to provide an exception for people who have had same-sex sexual experiences but who "did not intend them in such a way as to merit the label 'homosexual.'" Halley, *supra* note 5, at 950; see *In re Opinion of the Justices*, 530 A.2d at 23-24.

More even than the plain language of the statute, however, it is the stories of the gay servicemembers who have served and who continue to serve under the Don't Ask, Don't Tell policy that most clearly demonstrate what it means to live inside the walls of a forcibly imposed closet. Anonymous Officer Number One—a courageous and honorable woman whose willingness to add her story to this Article touched the author very deeply—ended her interview with the following sentiment.

I didn't know I was gay when I joined the service. When I found out I was gay, I knew the service didn't appreciate it. I know they will kick me out if I don't stay quiet. But it feels rotten to have to lie every day. After all, I'm gay 24 hours a day, whether or not I have sex. It kills me to have to lie to my close friends in the service about such an important part of my life. These are people who think they're my very best friends. They don't even know me.<sup>213</sup>

Over fifty years ago, Justice Jackson warned us of the harm that could result from an attempt to compel complete orthodoxy in matters of opinion and identity. "Those who begin coercive elimination of dissent," he wrote, "soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard . . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."<sup>214</sup> The Don't Ask, Don't Tell policy invites gay men and lesbians to serve in the armed forces only at the cost of living under a constant compulsion to lie about who they are. It is to our great shame that the federal judiciary has not yet understood this fact and learned to employ an informed First Amendment analysis in describing and reviewing the policy. Let us hope that the "fixed star"<sup>215</sup> of *West Virginia v. Barnette* can finally begin to light the way.

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As Halley observes:

[This] category includes individuals whose desires may be predominantly homosexual, who have acted on them, but who have determined to mask these facts from themselves by embracing a purely heterosexual subjective identity, and from others by passing as straight. The court's example forgives these lies and builds them into the scheme of state enforcement.

Halley, *supra* note 5, at 950.

<sup>213</sup> Anonymous Interview Number One, *supra* note 35.

<sup>214</sup> *Barnette*, 319 U.S. at 641.

<sup>215</sup> *Id.* at 642.



