Is "Don't Ask, Don't Tell" Unconstitutional after Lawrence? What It Will Take to Overturn the Policy

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Diane H. Mazur*

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I. INTRODUCTION

There can be a certain politeness to legal challenges to "Don't Ask, Don't Tell," the congressional policy that attempts — fitfully, incompletely, and arbitrarily — to exclude gay citizens from both the responsibilities and privileges of military service.¹ We consider whether the military has articulated a "rational basis" for the policy — some explanation of the military's belief that it is at least rational (as opposed to irrational) to classify servicemembers as straight or gay and accept or reject them accordingly, all in the interest of military effectiveness. We accept the fact that judges assume there is a need for "deference" to

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military or congressional expertise in the serious business of raising and preparing military forces to fight and win wars. We speak about “Don’t Ask, Don’t Tell,” unfortunately, as if its justifications reflected informed and thoughtful judgment, as if they were honest and truthful, and as if they were offered in good faith for the purpose of maintaining military readiness.

The justifications advanced in defense of “Don’t Ask, Don’t Tell,” however, fail to meet any of these reasonable and minimal expectations. The judgments underlying the policy are not military judgments, and neither are they informed, thoughtful, honest, truthful, or made in good faith. The policy, in fact, has absolutely nothing to do with military readiness. Indeed, its effect is one that is fundamentally harmful to military readiness, to national security, to our servicemembers and veterans, to values of constitutional equality, and to robust civilian control of the military under the Constitution. Impolite observations such as these, rare as they may be, are a necessary and constitutionally healthy exercise in examining why our civil-military relations have deteriorated and why policies such as “Don’t Ask, Don’t Tell” persist.

The recent U.S. Supreme Court decision, Lawrence v. Texas, provides an occasion for reassessment of the constitutionality of “Don’t Ask, Don’t Tell.” In Lawrence, the Court held that substantive guarantees of liberty found in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution include the right to engage in consensual sexual intimacy without interference from the government. The Court invalidated a Texas criminal statute that prohibited certain sexual conduct, often broadly referred to as “sodomy,” if engaged in by persons of the same sex, but not if engaged in by persons of the opposite sex. In invalidating the statute, the Court also expressly overruled Bowers v. Hardwick, a decision that affirmed a criminal sodomy conviction and established a foundation for a wide variety of legal disabilities imposed against gay people as individuals and as partners in same-sex relationships.

3. Id. at 2484.
4. Id. at 2476.
6. Lawrence, 123 S. Ct. at 2484.
II. IS *LAWRENCE V. TEXAS* RELEVANT TO “DON’T ASK, DON’T TELL”?

The majority opinion in *Lawrence* did not specifically mention the military at all. The closest the Court came to saying anything that might be construed as a potential reference to the military was its statement that the government generally steps beyond constitutional limits when it attempts to “define the meaning of [a personal] relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.” Someone, I suppose, might argue the Court was suggesting that same-sex relationships could be regulated if they were found to “abuse” the military, which presumably is an institution (like schools, hospitals, or banks, for example) that the law in some sense “protects.” In the context of the opinion, however, such an interpretation makes little sense. It seems more likely that the Court was referring to institutions that are specifically defined by the existence of personal relationships, such as the institutions of marriage, family, and kinship.

Justice O’Connor’s concurrence and Justice Scalia’s dissent mentioned national security or military concerns, but only in a passing fashion. Neither Justice directly addressed whether *Lawrence* would invalidate military policies regulating sexual behavior or affect the eligibility of gay people to serve in the military. Justice O’Connor observed, vaguely, that “Texas cannot assert any legitimate state interest here, such as national security.” She left unexplained, however, what circumstances might trigger national security concerns. Justice Scalia’s dissent cited “Don’t Ask, Don’t Tell” for the proposition that if direct, facial discrimination on the basis of sexual orientation was permissible, then the indirect discriminatory effects that result from the existence of sodomy statutes could not possibly raise constitutional concern. He also objected to the overruling of *Bowers*, claiming that society has a vested interest in its ability to express moral disapproval by imposing legal disabilities on gay people. Justice Scalia offered “Don’t Ask, Don’t Tell” as but one example of societal reliance on the principles of *Bowers*.

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7. *Id.* at 2478 (emphasis added).
8. *Id.* at 2488 (O’Connor, J., concurring).
9. *Id.* at 2490 (Scalia, J., dissenting).
10. *Id.* at 2487–88 (O’Connor, J., concurring).
11. See *Lawrence*, 123 S. Ct. at 2497 (Scalia, J., dissenting) (“[I]n most States what the Court calls ‘discrimination’ against those who engage in homosexual acts is perfectly legal . . . [I]n some cases such ‘discrimination’ is mandated by federal statute.”).
12. See *id.* at 2490 (Scalia, J., dissenting) (asserting that “societal reliance” on the principles confirmed in *Bowers* and discarded today has been overwhelming”).
The fact that *Lawrence* failed to say much about the military does not mean the opinion has little significance for the constitutionality of the "Don't Ask, Don't Tell" policy. Neither does the fact that *Lawrence* addressed a narrow issue concerning the criminal prosecution of sodomy mean that it lacks relevance for the much broader issue of the eligibility of gay citizens for military service. In fact, the opinion holds great significance for that question, for three reasons. First, *Lawrence* has relevance for the continued vitality of "Don't Ask, Don't Tell" because it spoke in a fundamental sense of *people* and, as the military is so fond of saying, the military runs not on its equipment, but on its people. Shortly after September 11, 2001, the Army Chief of Staff, General Eric Shinseki, explained:

People are central to everything else we do in the Army. Institutions don't transform, people do. Platforms and organizations don't defend this nation, people do. And finally, units don't train, they don't stay ready, they don't grow and develop leadership, they don't sacrifice, and they don't take risks on behalf of the nation, people do.  

*Lawrence* defined those same people in terms of their dignity, in terms of the importance of their private lives, and in terms of their enduring personal bonds with others:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

These are the same people from whom the military must draw its members, and the same people on whom the military must rely to carry out its missions effectively. It will be for the military to explain why only some of its members — the heterosexual ones — retain a claim to dignity, to a private life, and to an enduring personal bond.

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Second, Lawrence made clear that there are limits to the reach of governmental intrusion into matters of personal intimacy. Absent sufficient justification, the power of government cannot be used to coerce the decisions of individuals with respect to this central component of personal autonomy. "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" The opinion made no categorical exception from this constitutional command for the military, or for any other function of government. This lack of categorical exception was sensible, even necessary, given the basis for the Court's ruling. To conclude otherwise would be to hold that there are some stations within our society, or some responsibilities of citizenship, that are fundamentally inconsistent with constitutionally protected dignity, the existence of private life, and the enjoyment of enduring personal bonds. Only if that fundamental inconsistency exists should the government be permitted to intrude upon those decisions reserved to the liberty of individuals by the Due Process Clause, and Lawrence gave no indication that such an all-encompassing government interest exists, military or otherwise.

Third, and most significantly, Lawrence expressly held that the maintenance of a shared moral code is not, in and of itself, a legitimate government interest. This is an extraordinarily powerful statement because it extends far beyond the suggestion that maintenance of a shared moral code is an interest that is less important than the liberty interest of an individual; instead, the Court held that the maintenance of a shared moral code is not even a legitimate activity of government. Under Lawrence, it is simply not within the power of government to make distinctions among groups of persons for the purpose of enforcing majority conceptions of "moral" and "immoral" choices within the realm of private intimacy, absent articulation of an independent harm that is within the government's power to control. In the Court's words, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Justice O'Connor added, in a concurring opinion, her belief that the Court has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection

15. Id. at 2484 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).
16. Id. at 2483 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).
Clause to justify a law that discriminates among groups of persons.\textsuperscript{17} Lawrence now completes a trilogy of cases standing for the proposition that moral disapproval alone cannot justify unequal treatment.\textsuperscript{18}

III. IS THE MAINTENANCE OF A SHARED MORAL CODE A LEGITIMATE MILITARY INTEREST?

The disqualification of moral disapproval as a legitimate government interest is relevant to the constitutional validity of "Don't Ask, Don't Tell" because moral disapproval underlies much of the current justification for the exclusion of gay servicemembers. I qualify the reference to the justification as "current" because the reasons offered by the military (and with the enactment of "Don't Ask, Don't Tell," the reasons offered by Congress) in defense of the policy have been constantly shifting targets, with new reasons constructed as old ones were eventually discredited.\textsuperscript{19} The principal justification underlying "Don't Ask, Don't Tell" today seems to center on the assertion that the presence of gay servicemembers (at least those who are known to be gay) adversely affects unit cohesion, which leads to deterioration of military effectiveness:

Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit

\begin{itemize}
  \item \textsuperscript{17} See Romer v. Evans, 517 U.S. 620, 635 (1996) ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."); id. at 644 (Scalia, J., dissenting) (characterizing the "animus" identified by the majority as merely "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers"); Planned Parenthood of Southeastern Pa., 505 U.S. at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code.").
  \item \textsuperscript{18} See \textit{generally} DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY (Aaron Belkin & Geoffrey Bateman eds., 2003) (discrediting rationales based on unit cohesion and privacy); C. Dixon Osburn, \textit{A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals}, 64 UMKC L. REV. 199 (1995) (reviewing past reasons, now discredited and abandoned, for excluding gay citizens from military service; noting that the military has at various times insisted that gay citizens were mentally ill, were a security risk, were unfit or unsuitable for service, had a greater propensity for sexual misconduct, and adversely affected the cohesion of military units).
  \item \textsuperscript{19} See generally DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY (Aaron Belkin & Geoffrey Bateman eds., 2003) (discrediting rationales based on unit cohesion and privacy); C. Dixon Osburn, \textit{A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals}, 64 UMKC L. REV. 199 (1995) (reviewing past reasons, now discredited and abandoned, for excluding gay citizens from military service; noting that the military has at various times insisted that gay citizens were mentally ill, were a security risk, were unfit or unsuitable for service, had a greater propensity for sexual misconduct, and adversely affected the cohesion of military units).
\end{itemize}
greater than the sum of the combat effectiveness of the individual unit members.

The 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 standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.\(^2\)

The military presumes that servicemembers will not establish cohesive bonds with others — their gay colleagues — if they morally disapprove of them. This concern for unit cohesion, however, is nothing more than an insistence that the government enforce a shared moral code within the military, a task that, under Lawrence, the government cannot generally undertake. The difficult question for purposes of applying Lawrence to "Don't Ask, Don't Tell" is whether the maintenance of a shared moral code might be a legitimate military interest in a military environment, even if the enforcement of moral views would not be a legitimate interest of government with respect to civilian society.

The Uniform Code of Military Justice (UCMJ) is a general criminal code enacted by Congress pursuant to its Article I power to govern and regulate the military.\(^2\) One of its provisions, Article 134, prohibits servicemembers from engaging in "all disorders and neglects to the

\(^2\) 10 U.S.C. § 654(a)(6), (7), (15) (2004). Congress also offered another justification, less prominently featured, grounded in the privacy interests of heterosexual servicemembers who must "accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy." Id. § 654(a)(12). This justification, more commonly known as the shower problem, is based on a centrally flawed assumption. In our society we have never segregated shower, toilet, and sleeping activities on the basis of sexual orientation; we are socialized to do so on the basis of sex. Males (and females) grow up performing these activities in the company of others of the same sex in schools, colleges, camps, locker rooms, and shared bathrooms, without any expectation that their gay peers will be excluded. Only in the military is there the unique expectation that these activities cannot be performed in groups of mixed sexual orientation. See Aaron Belkin & Melissa Sheridan Embser-Herbert, A Modest Proposal: Privacy as a Flawed Rationale for the Exclusion of Gays and Lesbians from the U.S. Military, 27 INT. SECURITY 178 (2002). Moreover, combat exigencies tend to erase even established social conventions. See Gordon Lubold, Band of Sisters: Army Lionesses Hit Streets with Marines on Combat Ops, MARINE CORPS TIMES, Aug. 9, 2004 (noting that women in the First Engineer Battalion headquarters company in Iraq live in close quarters with the men in their platoons), available at http://www.worldaffairsboard.com/showthread.php?goto=newpost&t=2641 (last visited Aug. 10, 2004).

prejudice of good order and discipline in the armed forces” and “all
conduct of a nature to bring discredit upon the armed forces.” Article
134, also known as the “General Article,” is designed to enforce
“longstanding customs and usages of the services” by prohibiting
misconduct not otherwise specifically enumerated as a criminal offense
elsewhere within the UCMJ. The Manual for Courts-Martial describes
fifty-seven illustrative applications of the very general Article 134,
including speech offenses (disloyal statements, indecent language);
duty-related misconduct (drinking liquor with a prisoner, straggling on a
march or maneuvers); common criminal acts (negligent homicide, kidnapping);
and a host of misdeeds involving inappropriate relationships (adultery,
bigamy, fraternization, gambling with a subordinate, wrongful
cohabitation). What all offenses under Article 134 have in common is the
requirement that the military prove a specific element demonstrating the
misconduct was in fact 1) prejudicial to good order and discipline or 2) of
a nature to bring discredit upon the armed forces. The military cannot
simply assume or assert that offenses charged under Article 134 meet one
of these elements.

The general article illustrates the wide latitude Congress has granted to
the military to determine when it is necessary to punish conduct criminally
in order to preserve and maintain good order and discipline. Congress
certainly intended to tap this same reservoir of discretion when it grounded
the administrative sanctions of “Don’t Ask, Don’t Tell” in terms of the
military’s fundamental need for good order and discipline. Good order and
discipline are the most basic currency of military effectiveness, and it was
the intent of Congress to justify the exclusion of gay servicemembers in
a manner that relied upon expertise presumably only the military could
provide, protecting the policy from further scrutiny by civilians. Congress,
however, received a great deal of assistance in that venture from what was
perhaps a counterintuitive source, the federal courts. The judicial branch
was complicit in ensuring that “Don’t Ask, Don’t Tell” was a decision
made solely on the basis of purported military judgment, not constitutional
judgment.

constitutionality of Article 134 against a challenge that it was vague and overbroad in violation of
the First and Fifth Amendments. See id. at 752-62.
25. Id. ¶ 60b.
IV. WHAT IS THE BASIS FOR THE DOCTRINE OF JUDICIAL DEFERENCE TO THE MILITARY?

In a series of cases decided after the end of the Vietnam-era military draft, the Supreme Court constructed a doctrine of constitutional separatism that shields military-related decisions from the usual scrutiny of judicial review. In *Parker v. Levy*, the Court upheld the conviction by court-martial of an Army physician who had refused an order to conduct dermatology training for Special Forces personnel and had also encouraged enlisted personnel to resist combat duty in Vietnam. The opinion would have been unremarkable had it relied on the military’s discretionary authority to control breaches of internal discipline, a category which certainly would have included Captain Levy’s failure to obey orders and his promotion of disloyalty among subordinates.

The Court, however, used *Parker v. Levy* to lay the foundation for a new doctrine of judicial deference to military judgment, even though it was completely unnecessary to the result and inconsistent with constitutional precedent and text. The opinion changed the balance of civil-military relations by characterizing the military as not just an institution with distinctive disciplinary requirements, but as a separate society with a different relationship to the Constitution than civilian society. The Court seized on language from an earlier case observing only that the military was “a specialized community governed by a separate discipline” (the provisions of the UCMJ) and misrepresented it in *Parker v. Levy* as stating that the military was “a specialized society separate from civilian society” and “a society apart from civilian society.”

The difference may seem small, but it was dramatic in effect because it was designed to set the military apart as a constitutionally separate entity.

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27. The First Amendment does not provide unlimited protection to public employees, military, or civilian. School teachers, for example, can be dismissed from employment for speaking on matters of public concern if their statements have “impeded the teacher’s proper performance of his daily duties in the classroom” or “interfered with the regular operation of the schools generally.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-73 (1968).

28. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). In *Orloff*, the Court upheld the Army’s discretion to choose the particular medical duties assigned to a drafted physician. The petitioner complained that the Army assigned him to work as an enlisted laboratory technician rather than as a commissioned physician after he refused to provide information about his association with “subversive” organizations in his application for an officer’s commission. The Court declined to step into the middle of what it saw as an argument between the Army and one dissatisfied draftee about whether his assigned duties were beneath his qualifications. It concluded that “judges are not given the task of running the Army.” *Id.* at 93.

Parker v. Levy was the first in a new generation of case law analyzing constitutional civil-military relations in which the military's supposed "separateness" from civilian society justified its exemption from the usual constitutional expectation of civilian judicial review.

The constitutional separatism between military and civilian worlds endorsed in Parker v. Levy provided the basic framework for a doctrine of judicial deference that would make it possible for the government to use the military as a platform for resistance to constitutional values of equality. By establishing a distant military as a "society apart" from the rest of us, the Court would be able to hide behind professions of ignorance of all things of a military nature:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.31

Moreover, if judges were unable to understand the internal disciplinary needs of the military, then it would make little sense to ask the military (or Congress, when legislating on its behalf) to articulate the specific purposes or justifications underlying its decisions. As a result, the Court discarded its usual standards of review when evaluating the constitutionality of decisions made in a military context. Instead of taking into account the specific context of the military environment in measuring the reach of the Constitution within that environment — an analysis which prevailing standards of review would have easily accommodated — the Court instead chose to make actual military context irrelevant. Provided the military or Congress was willing to assert there was a military necessity for a particular decision, the Court would not ask for factual explanation or justification of that assertion and would not test it under the usual constitutional standards of review. Mere assertion of military necessity became the ultimate trump card, and the card has been played most often as a means of resistance to constitutional values of equality.


Rostker v. Goldberg\(^{32}\) and Goldman v. Weinberger\(^{33}\) are the principal examples of how the post-Vietnam doctrine of judicial deference to the military has changed constitutional civil-military relations. In Rostker, the Court upheld the decision of Congress to register men, but not women, for the military draft. Rather than following existing precedent concerning equal protection on the basis of sex, which would have required the rejection of any justification based on "archaic and overbroad generalizations"\(^{34}\) concerning appropriate roles for women, the Court instead embraced reasoning that excluded women from the obligation of national defense for the very purpose of maintaining traditional gender relationships within civilian society. Women could be excluded from the responsibilities of citizenship, according to the Court, because "[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."\(^{35}\) The opinion made mocking reference to the idea that classifications based on sex were deserving of enhanced judicial scrutiny,\(^{36}\) and it failed to question factually incredible assertions that women would be of little use to the military in the event of a future draft.\(^{37}\) Ultimately, the opinion dissolved into platitudes, relying on protestations of incompetence in military concerns, superficial insistence about the needs of national defense, and the importance of "the current thinking as to the place of women in the Armed Services."\(^{38}\)

Goldman v. Weinberger\(^{39}\) followed a similar path. In that case, an Air Force psychologist who was also an Orthodox Jew was punished for wearing a yarmulke indoors while in uniform. In upholding the Air Force's action, the Court noted it had "repeatedly held"\(^{40}\) ("repeatedly misrepresented" would have been more accurate) that the military is a separate society, not just an institution governed by a different criminal code. The military's constitutional separateness left courts, according to Goldman, "ill-equipped to determine the impact upon discipline that any

\(^{32}\) Id. at 57.
\(^{33}\) 475 U.S. 503 (1986).
\(^{34}\) Craig v. Boren, 429 U.S. 190, 198 (1976).
\(^{36}\) See id. at 69 (referring, with sarcastic quotation marks, to levels of "scrutiny").
\(^{37}\) See id. at 97-101 (Marshall, J., dissenting) (describing personnel needs that could have been filled by women in the event of a draft).
\(^{38}\) Id. at 71.
\(^{39}\) 475 U.S. 503 (1986).
\(^{40}\) Id. at 506.
particular intrusion upon military authority might have." As a result, it was unnecessary for the Court to apply the prevailing standard of review, which would have required the military to demonstrate a compelling reason for interfering with Captain Goldman's free exercise of his religion. Provided the Air Force was willing to assert its belief that "standardized uniforms encourage[] the subordination of personal preferences and identities in favor of the overall group mission," the Court would accept that judgment at face value, because military officials have "no constitutional mandate to abandon their considered professional judgment." The doctrine of judicial deference in military matters was the deciding factor — the only factor — in the case. "[Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." For good measure, the Court also suggested that Captain Goldman's claims to free exercise of his (non-majority) religion were selfish and indicated a lack of commitment to duty, a suggestion that echoes in the military's opposition to the claims of gay servicemembers today.

There is something about the subject matter of the military that causes the Court to wax illogical about the Constitution. Searching for a textual justification for its creation of a doctrine of deference, the Court has claimed it has no role in deciding constitutional issues in a military context because Article I of the Constitution expressly assigns the power to govern and regulate the military to Congress alone, "under an explicit constitutional grant of authority." The Court, however, seemed to forget that Congress always acts under an explicit grant of authority under Article I. If this principle of judicial deference is correct, then the Court should similarly defer on a consistent basis to all exercises of congressional power under Section 8 of Article I. This, obviously, the Court does not do. It recognizes that judicial power exists to enforce all provisions of the Constitution, even if a particular subject matter, such as patents and

41. Id. at 507 (quoting Chappell v. Wallace, 462 U.S. 296, 305 (1983)).
42. See Sherbert v. Verner, 374 U.S. 398, 406-10 (1963) (holding that a compelling state interest is required to justify substantial infringement of a person's right to free exercise of religion).
43. Goldman, 475 U.S. at 508, 509.
44. Id. at 508 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1986)).
45. See id. at 507 (citing the importance of "instinctive obedience, unity, commitment, and esprit de corps" to military effectiveness). "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" Id. (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).
copyrights, for example, is mentioned expressly only in Article I, and not in Article III. 47

V. A PREVIEW OF HOW THE GOVERNMENT WILL DEFEND "DON'T ASK, DON'T TELL" AFTER LAWRENCE V. TEXAS

The government’s response to any constitutional challenge to “Don’t Ask, Don’t Tell” following Lawrence v. Texas is likely to rely on the same themes that underlie the Court’s thirty-year doctrine of deference to judgments of a military nature: 1) a constitutional distance between military and civilian worlds that leaves civilian courts incompetent to apply the Constitution in a military environment; 2) reliance on superficial assertions of military necessity and avoidance of any specific discussion of military context; and 3) the inevitable misrepresentation that has become an indispensable part of the practice of judicial deference to the military.

The key to the government’s defense of “Don’t Ask, Don’t Tell” will be to blur the distinction between considering military context when engaging in judicial review of constitutional claims and granting the military immunity from judicial review of constitutional claims. If the doctrine of deference can be pierced to permit consideration of actual military context, then Lawrence v. Texas has made it much more likely that “Don’t Ask, Don’t Tell” can be successfully challenged. If, however, the government is able to exclude consideration of actual military context, congressional judgment will be affirmed. The irony is significant, but the principle is undoubtedly accurate.

47. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). The Constitution makes only one explicit textual distinction between rights accorded within and without the military. In the Fifth Amendment, the Constitution exempts “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger” from the requirement for presentment or indictment by a grand jury.

Justice Scalia has also crafted a textual justification for judicial deference to the military that relies on tallying the number of clauses within Article I, Section 8 that reference the military. Under his analysis, which to my knowledge has not been applied in any other context, the fact that the drafters of the Constitution chose to separate the military powers into five different clauses, rather than consolidate them into fewer clauses, counsels greater judicial deference to legislative choice. “What is distinctive here is . . . the insistence (evident from the number of Clauses devoted to the subject) with which the Constitution confers authority over the Army, Navy, and militia upon the political branches.” United States v. Stanley, 483 U.S. 669, 682 (1987).

A government brief filed in a case now pending before the U.S. Court of Appeals for the Armed Forces (USCAAF), the highest court in the military’s Article I system of criminal justice, provides a glimpse of how the government is likely to defend “Don’t Ask, Don’t Tell” after Lawrence.\(^4\) In United States v. Marcum,\(^5\) the defendant appealed from a court-martial conviction for consensual sodomy on the basis that his conduct can no longer be criminalized after Lawrence. Granted, the military’s criminal prohibition of sodomy under Article 125 of the UCMJ\(^5\) is distinguishable in many ways from “Don’t Ask, Don’t Tell,” a policy which makes gay people civilly ineligible for military service and requires their administrative discharge from the military should they be discovered. However, the grounds underlying the government’s defense of Article 125 in Marcum are so similar to the grounds that are likely to be raised in defense of “Don’t Ask, Don’t Tell” that the case is instructive for post-Lawrence challenges to the policy.

In justifying the need for “Don’t Ask, Don’t Tell,” Congress has relied on the substantial divide of experience and understanding that has developed between the military and civilian society. This distance, exacerbated by the Court’s doctrine of judicial deference, has allowed Congress to justify the policy with assertions that make little sense in a military context, but sound “military” enough to pass muster. For example, one of the congressional findings offered in support of “Don’t Ask, Don’t Tell” states that military service is a 24-hour-a-day obligation in which “on-duty” and “off-duty” distinctions are irrelevant:

The standards of conduct for members of the armed forces regulate a member’s life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times

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51. 10 U.S.C. § 925 (2004). The UCMJ sodomy provision applies to both same-sex and opposite-sex intimacy, as did the sodomy statute at issues in Bowers v. Hardwick. Bowers v. Hardwick, 478 U.S. 186 (1986). In Marcum, the defendant was originally charged with forcible sodomy, but the members (the military jury) found the conduct was consensual.
that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.\textsuperscript{52}

These findings were intended to address the criticism that no military justification existed for regulating personal relationships when servicemembers were off-duty and off-base, absent undue influence. The government’s portrayal of military life in these findings, however, is nonsensical. Obviously, the military routinely carves out zones of private life for military families and unmarried servicemembers. Unmarried servicemembers are allowed to date, and the military provides family housing for married servicemembers at their permanent duty stations. The fact that standards of conduct would prohibit a servicemember from engaging in intimacy with a heterosexual spouse or partner when on duty or when residing in a military facility does not mean the servicemember cannot do so at the appropriate time and place. The military offers the “24-hour-a-day” rationale only for the purpose of asserting that gay servicemembers have no expectation of private life when in military service, even though all others do. \textit{Lawrence} expressly invalidates this assumption.\textsuperscript{53}

In \textit{Marcum}, the government similarly had to explain why the commission of private, consensual sodomy, in and of itself, has any relationship to military concerns. Having absolutely no rational explanation to offer,\textsuperscript{54} the government’s brief instead misrepresented the law. The government first quoted a portion of a congressional “finding,” codified in 1993 as part of “Don’t Ask, Don’t Tell,” that the presence of gay servicemembers “creates an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”\textsuperscript{55} It then cut-and-pasted the word “sodomy” to replace the finding’s reference to gay servicemembers, deliberately creating the false impression that Congress has tied sodomy restrictions enacted almost a half-century earlier to military effectiveness.\textsuperscript{56} The

\textsuperscript{53} See supra text accompanying note 16.
\textsuperscript{54} Social scientists who specialize in military issues filed an amicus brief stating that the military’s claim that sodomy undermines military discipline “is incorrect and unsupported by social scientific data.” See Brief of Social Scientists and Military Experts as Amici Curiae at 1, United States v. Marcum, No. 02-0944/AF (C.A.A.F. filed Oct. 2, 2003). One of the experts was Dr. Charles Moskos of Northwestern University, the most prominent military sociologist in the United States and a principal architect of “Don’t Ask, Don’t Tell.”
\textsuperscript{56} See infra text accompanying note 63. The government’s brief stated, “Congress has specifically found that sodomy ‘creates an unacceptable risk to the high standards of morale, good
government's brief consistently and misleadingly equated the commission of sodomy with the presence of gay servicemembers, clinging stubbornly to Bowers and ignoring the clear command of Lawrence. 57 Apparently, the military's sodomy provision is so difficult to justify constitutionally that its defenders see no option other than misrepresentation of the law.

The heart of the government's defense of the military's sodomy provision in Marcum was its expectation that judicial deference to the military would protect conclusory, unexplained assertions of military necessity from constitutional review. 58 The brief attempted to create military necessity by sheer insistence, without more:

[I]t is clear that there is a rational basis for criminalizing unnatural carnal copulation between members of the same or even the opposite sex when that conduct is engaged in by members of the military. The needs of good order and discipline, the needs of unit cohesion, and the need to avoid bringing discredit on the military give rise to a rational basis for criminalizing private consensual sodomy. 59

The only tenuous connection between sodomy and military discipline offered by the government appeared in its warnings that "[p]rivate order and discipline, and unit cohesion that are the essence of military capability." The brief then attempted to excuse the misrepresentation by adding: "Although these findings specifically apply to a policy permitting administrative separation of [gay servicemembers], the findings accurately demonstrate Congress' recognition that military needs differ from those of civilian society when regulating otherwise private sexual conduct." Government Brief, supra note 49, at 6-7. The same cut-and-paste misrepresentation appeared again later in the brief, without the correction afterward. Id. at 10-11.

57. The government wrote: "Although reversing the holding in Bowers, the Court in Lawrence did not specifically hold there is a fundamental right to engage in homosexual sodomy." Id. at 5. This statement was a gratuitous insult toward gay servicemembers and reflective of the degree of candor and respect with which the government treats controlling authority. Lawrence recognized that "[t]o say that the issue in Bowers was simply the right to engage in certain sexual conduct demeaned the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

58. See Government Brief, supra note 49, at 3-5, 7-12 (framing judicial deference to the military as the central argument throughout the brief).

59. Id. at 11-12. The government mischaracterized the level of judicial scrutiny applied in Lawrence as rational-basis review. When the Court speaks of "the full right" of liberty under the Due Process Clause to engage in conduct "without intervention of the government," it is not applying rational-basis review. See Lawrence, 123 S. Ct. at 2484. It was unnecessary to identify the degree of enhanced scrutiny applied when Texas failed to offer any legitimate government interest whatsoever.
consensual sodomy between superior and subordinate is highly detrimental to military necessity, effectiveness and discipline and, in a military environment, relationships might exist in which "consent might not be easily refused." But these are concerns that relate to inappropriate sexual relationships across-the-board, heterosexual and homosexual, and not to any specific means of sexual intimacy. The military already prohibits inappropriate relationships that may be subject to undue influence, such as fraternization between those of different ranks. The bottom line is that the UCMJ's sodomy statute has never been justified by the needs of military discipline, and it is dishonest to argue, as the government does, that it ever has been. The sodomy statute in fact undermines military discipline, because it invites arbitrary and vindictive prosecution of conduct that is commonly practiced.

In defending "Don't Ask, Don't Tell" after Lawrence, the government will rely on the same expectation that the doctrine of judicial deference in matters relating to the military prevents courts from actually considering military context in measuring the constitutionality of military policies. Policies such as "Don't Ask, Don't Tell" persist not because they have any value in maintaining discipline in a military context, but because the doctrine of deference has completely erased military context as a relevant factor in constitutional review. Ironically, we seem to express our respect for military concerns by assuming they are not sufficiently persuasive to withstand open discussion. As a result, deference has permitted — even encouraged — military policy to be used for purposes that actually weaken military readiness. We live with that weakened military readiness because it is more important to Congress to use military policy as a means of endorsing socially conservative values outside the reach of the Constitution, particularly with respect to women and gay people.

"Don't Ask, Don't Tell" weakens military readiness for more than just the direct and obvious reason, by requiring the discharge of talented gay

61. Id. at 12 (quoting Lawrence, 123 S. Ct. at 2484).
62. See MANUAL FOR COURTS-MARTIAL, supra note 24, pt. IV, ¶ 83.
63. Some provisions of the UCMJ identify offenses that are uniquely military in nature, but others duplicate typical common-law criminal offenses that are also punishable in civilian life. The legislative history of the UCMJ, enacted in 1950, shows that Congress adopted the language of the sodomy provision from the then-existing criminal code of Maryland. See United States v. Henderson, 34 M.J. 174, 176 (C.A.A.F. 1992).
A military that defines itself in terms of a moral code based on constitutional resistance discourages the enlistment of quality youth, male and female, gay and straight, white and non-white, who value constitutional equality. It sends a message that citizens who value constitutional equality are not welcome in the military. Fortunately, I believe this message will eventually lead to the end of “Don’t Ask, Don’t Tell.” The military will one day tire of its enforcement and realize the policy is discouraging rather than encouraging enlistment, and this will probably happen before courts are ready to pierce the doctrine of deference and reveal there never was a military justification behind the policy. Either way, the reality of military readiness will control, whether through recognition by courts or the exigency of the military’s own operational needs.

VI. CONCLUSION: ARE LAW SCHOOLS COMPLICIT IN THE CONSTITUTIONAL SEPARATISM THAT FUELS “DON’T ASK, DON’T TELL”?

The constitutional separatism that is the central foundation of judicial deference has been enormously corrosive to civil-military relations and to civilian control of the military under the Constitution. It is a constitutional harm, surprisingly, that legal academics have largely failed to notice. For example, not one of the cases upholding “Don’t Ask, Don’t Tell” in federal circuit courts of appeal reflects any challenge by the plaintiffs to the constitutionality of judicial deference itself, even though just thirty years ago — a blink in constitutional history — the Court departed from both text and precedent in establishing the military as a constitutionally separate entity. The creation of the military as “a separate society” that operates outside usual constitutional limits has been so effective that law professors now seem incapable of reading the Constitution any other way. The doctrine of judicial deference to the military relies on maintenance of a divide of experience and knowledge between the military and civilian society for its continued vitality. Without that divide, there would be no reason to bar courts from openly considering military context, and


66. See, e.g., Able v. United States, 155 F.3d 628, 632-34 (2d Cir. 1998); Holmes v. Cal. Army Nat’l Guard, 124 F.3d 1126, 1133 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 925-27 (4th Cir. 1996) (en banc); Steffan v. Perry, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (en banc).
therefore no reason to excuse courts from applying prevailing judicial standards to constitutional challenges raised in a military context. Deference rises or falls on whether we see the military as a part of society or apart from society. A separatist military is the necessary prerequisite to a military that is permitted by law to resist shared values of constitutional equality.

Unfortunately, law professors and law schools may be complicit in maintaining the very separatism that permits policies like “Don’t Ask, Don’t Tell” to exist. Law schools are now engaged in a controversy with the Department of Defense concerning their ability to affirm values of nondiscrimination by excluding employers who discriminate on the basis of sexual orientation — including the military — from school-sponsored career-placement programs.67 I understand and support the desire of law schools and law professors to affirm values of nondiscrimination by excluding employers who refuse to comply with the law school’s nondiscrimination policies. The military, however, is not just another employer. The military is the only employer for which we all share a constitutional obligation of civilian control. To the extent that we express disagreement with military policy by limiting the military’s presence in our most influential institutions of legal reform, we contribute to an unexamined assumption that the military is a constitutionally separate entity, an assumption that will only extend the time before “Don’t Ask, Don’t Tell” is invalidated. Shunning of the military is a counterproductive solution when the military will be able to rely on that shunning to insulate itself from judicial review.

67 A recent lawsuit filed by the Forum of Academic and Institutional Rights, an association of law schools and law faculties, charges that the Solomon Amendment, which withdraws federal funding from schools that deny access to military recruiters, is unconstitutional. See generally Solomon Amendment Response and Protest (listing pleadings and other materials related to Solomon Amendment litigation), available at http://www.law.georgetown.edu/solomon/ (last visited July 23, 2004).