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“DON’T ASK, DON’T TELL”: A QUALIFIED DEFENSE

Eugene R. Milhizer*

I. INTRODUCTION

When I was asked to participate in the “Don’t Ask, Don’t Tell: 10 Years Later” conference at Hofstra University, I was honored and pleased to share my thoughts and experiences relating to the current policy for military service by homosexuals with the conferees and others in attendance. When I learned that I was slated to appear in a roundtable entitled “Justifications for the Policy,” however, I became a little less sanguine. The source of my concern was that the “Don’t Ask, Don’t Tell” approach toward military service by homosexuals cannot really be justified, at least in terms of it being a coherent expression of unadulterated principles. This should not be surprising, as even those involved in

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1. Apparently the full title of the current Pentagon policy is “Don’t Ask, Don’t Tell, Don’t Harass.” Linda D Kozaryn & Jim Garamone, Cohen Adds ‘Don’t Harass’ to Homosexual Policy, Says it Can Work, AM. FORCES PRESS SERVICE, Dec. 29, 1999, available at http://www.defenselink.mil/news/Dec1999/ n12291999_9912291.html (Former Defense Secretary William S. Cohen expanded “Don’t Ask, Don’t Tell” to “Don’t Ask, Don’t Tell, Don’t Harass”); see GARY L. LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY BY THE U.S. MILITARY 141 (2003). The much more familiar nomenclature—“Don’t Ask, Don’t Tell”—was coined after the policy was initially implemented in 1993, and it has become a shorthand and generic reference to all of the contemporary legislation and policies relating to military service by homosexuals. Unless otherwise indicated, the phrase “Don’t Ask, Don’t Tell” is likewise used in this general sense in this article.
establishing the policy never claimed that their final product rested on
firm moral bedrock. Quite to the contrary, the “Don’t Ask, Don’t Tell”
regime, as ultimately implemented, is an awkward and transparent com-
promise, cobbled together by those holding diametrically opposing
views toward military service by homosexuals in particular, and homo-
sexuality in general. That the policy is incoherent and unprincipled can
easily be demonstrated—ask anyone on either side of the issue and they
candidly will tell you that “Don’t Ask, Don’t Tell” is fundamentally
misguided and, ultimately, fatally flawed.

But despite its many faults, the “Don’t Ask, Don’t Tell” approach is
explainable. More than this, it is even defensible in the limited sense that
it is a relatively workable and effective approach to the contentious set
of issues it addresses, especially when it is contrasted with the philoso-
phically pristine alternatives suggested by ideologues of different
stripes.2 It is also largely reconcilable with the deeply conflicted atti-
dutes and beliefs of the American public with respect to homosexuality
generally, and to the variety of attendant issues relating to military ser-
vice by homosexuals. In order to understand this measured defense of
the “Don’t Ask, Don’t Tell” regime, it is first necessary to appreciate the
forces that lead to its creation.

2. Critics on both sides argue that “Don’t Ask, Don’t Tell” has an adverse impact on military
efficiency, and thus it is unworkable and ineffective. Those in favor of lifting or relaxing the ban
point out that many homosexuals have served with distinction in the armed forces, and that the sepa-
ration of some homosexuals has seriously damaged the military’s ability to fill certain critical spe-
cialties. See, e.g., Kevin Howe, Gay Soldiers Booted From Defense Language Institute, MONTEREY
COUNTY HERALD, Nov. 15, 2002 (six of nine gay soldiers discharged were students of the in-
on the opposite side argue that the time, cost, and effort associated with the current policy is much
more draining upon military effectiveness and resources than was the prior, more restrictive policy.
See Robert H. Knight, Don’t Ask, Don’t Tell . . . Don’t Discharge, CITIZEN, 2002, available at
http://www.family.org/cforum/citizenmag/features/a0020962.cfm (although not arguing in favor of
a ban, the author refers to the estimated cost of $35,000 per discharged service member, who might
not have been accepted if screened for homosexuality as done prior to “Don’t Ask, Don’t Tell,” and
to the recoupment sought based on a $70,000 judgment against a doctor educated using military
funds, who “came out” twelve days before reporting for duty). Neither side, however, can seriously
claim that the current policy has significantly compromised military effectiveness. In this regard, it
should be noted that little more than 1000 service members are separated annually for homosexuality.
Jim Garamone, DoD Approves ‘Don’t Ask, Don’t Tell, Don’t Harass’ Plans, FDCH FED. DEP’T
Ask, Don’t Tell” legislation provides:

Nothing in [this statute] shall be construed to require that a member of the armed forces
be processed for separation from the armed forces when a determination is made in ac-
cordance with regulations prescribed by the Secretary of Defense that . . . separation of
the member would not be in the best interest of the armed forces.
of alternative approaches to “Don’t Ask, Don’t Tell” is beyond the scope of this article.
II. THE ORIGINS OF THE POLICY

The origins of the “Don’t Ask, Don’t Tell” approach, in many ways, typify how the contemporary American political processes address contested moral issues. It was forged in a maelstrom of two clashing cultural ideologies, each based on an irreconcilable normative imperative. A series of tactics and counter-tactics ensued, ultimately resulting in a compromise of sorts that none dared call victory. As I distinctly remember one wag remarking at the time, the only thing “Don’t Ask, Don’t Tell” had to recommend it is that it was universally despised.3

The first step in the chain of events that led to the removal of the military’s old policy on homosexuality,4 and the implementation of the “Don’t Ask, Don’t Tell” regime, was the campaign promises of then-Presidential candidate Bill Clinton. Clinton pledged during his 1992 campaign to “lift the ban” on homosexuals in the military,5 which had

3. Conservatives and liberals agree that President Bill Clinton’s effort to lift the military’s gay ban was perhaps one of the greatest blunders of his tenure in office. Conservatives argue that Clinton should have left well enough alone; liberals believe that he should have ordered the military to accept homosexuals rather than agreeing to the compromise ‘Don’t Ask, Don’t Tell’ policy.


4. A Reagan Administration policy regarding military service by homosexuals was passed in the early 1980s. JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 19, 27-34 (1999). In essence, the old policy provided that “[h]omosexuality is incompatible with military service.” The policy, therefore, “authorized military officials to determine not only what servicemembers did but what they desired and intended, all with the aim of determining who they were.” Id. at 27. In this sense, the underlying premise for the military’s homosexual policy was unchanged by “Don’t Ask, Don’t Tell,” although its implementation proved to be quite different. See id. at 48-56.

5. “With the presidential election of 1992, the issue of gays in the military rose to the forefront when President-elect Bill Clinton stated during his campaign that he was in favor of repealing the regulations prohibiting homosexuals from serving in the armed forces.” Aaron A. Seamon, The Flawed Compromise of 10 U.S.C. § 654: An Assessment of the Military’s “Don’t Ask, Don’t Tell” Policy, 24 U. DAYTON L. REV. 319, 324 (1998). “One of President Clinton’s 1992 campaign promises was to eliminate the ban on Gays in the military . . . .” Scott Morris, Europe Enters a New Millennium with Gays in the Military While the United States Drowns in Don’t Ask, Don’t Tell: Twin Decisions by the European Court of Human Rights, 9 AM. U. J. GENDER SOC. POL’Y & L. 423, 431 (2001). As Lou Cannon reported at the time, Former Army colonel Margarethe Cammermeyer is awaiting the inauguration of President-elect Clinton in confidence that he ‘absolutely’ will carry out his promise to end the ban against homosexuals in the military.

Cammermeyer, who served 27 years in uniform and won the Bronze Star in Vietnam, has been fighting a different kind of battle since she was discharged six months ago for
officially existed in varying forms in the United States since World War II.\textsuperscript{6} This ignited a firestorm of political activity even before Clinton took office which was enthusiastically stoked by those on all sides and threatened to paralyze the new administration before it even began.\textsuperscript{7} Legislators from both parties proposed a bill codifying the then-existing homosexual ban.\textsuperscript{8} The Joint Chiefs of Staff were openly opposed to change,\textsuperscript{9} acknowledging during a 1989 security-clearance interview that she is a lesbian.

During his campaign, Clinton saluted her at a televised town meeting and told her that he would end the ban against homosexuals in the military if elected.

Lou Cannon, \textit{Discharged Gay Colonel Pins Hopes on Clinton's Promise}, WASH. POST, Dec. 29, 1992, at A3 (emphasis added). Indeed, from the moment Clinton was elected, speculation began with respect to his campaign promise to end the ban and whether he would fulfill it.

Bill Clinton's victory on Tuesday may render moot the controversy over the ban on gays in the Reserve Officers Training Corps (ROTC), a Department of Defense policy which conflicts with MIT's nondiscrimination policy. If Clinton ends the ban, MIT will continue to allow the three ROTC units to remain on campus, according to MIT officials.

Reversing the military's gay ban has been one of Clinton's campaign promises. "Clinton has said publicly that he would reverse the directive, which means the change could be as simple as signing an executive order \ldots{} Also, groups [including MIT] that have been following the issue will provide pressure on the Clinton administration," said Sarah E. Gallup, staff person of the ROTC Working Group at MIT.


6. Morris, \textit{supra} note 5, at 431. Before World War II, there was no official policy in the United States concerning military service by homosexuals. Instead, the military used sodomy statutes and other unofficial policies to exclude and separate homosexuals from service. See Walter John Krygowski, Comment, \textit{Homosexuality and the Military Mission: The Failure of the "Don't Ask, Don't Tell" Policy}, 20 U. DAYTON L. REV. 875, 879 (1995). Sodomy was first proscribed by military criminal law in 1917. See id. at n.37 (tracing the development of prohibitions on sodomy from 1917 to present); \textit{see also infra} note 45.

7. As Barton Gellman explains:

President-elect Clinton, torn between gay rights supporters and advisers who fear upheaval in the U.S. armed forces, yesterday reaffirmed a campaign pledge to permit acknowledged homosexuals in military service but said he would "consult with a lot of people" for an indefinite time "about what our options are."

His statement, which soft-pedaled a more specific promise to sign an "immediate repeal" of the ban on homosexuals, gave hope to both sides of the most explosive social question to face the uniformed services in decades. It may buy him time in his presidential transition, but he cannot easily dodge the question once he takes office.


8. \textit{HALLEY, supra} note 4, at 21.

9. Some retired officers, who were not bound by the chain of command, were even more vocal. As former Chief of Naval Operations, Admiral Thomas H. Moorer said in an interview at the time,

"Mr. Clinton is making a big mistake,
\ldots{} as he will damn well find out." Moorer \textit{says} what the Chairman of the Joint Chiefs of Staff \textit{means} when he says allowing gays in the military has "significant issues of privacy associated with it.

"Soldiers and sailors," Moorer drawls, "don't like to take showers with those who like to take showers with soldiers and sailors."
with some even threatening resignation. Democratic Majority Leader, George J. Mitchell, reported a block of 70 senators who objected to relaxing the prohibitions. Most importantly, a solid majority of the American public disapproved of both homosexuality and Clinton's initiative, and this sentiment was swiftly and vociferously communicated to members of Congress. As Gary Lehring writes:

Larry Doyle, *Hey Sailor: I Want You for the U.S. Navy*, SPY, Mar. 1993, available at http://www.davidclemens.com/gaymilitary/spy93.htm (emphasis in the original). Currently serving military members were less vociferous but no less determined. "Refusing to concede defeat on integrating gays into the military, members of the Joint Chiefs of Staff are quietly promoting a policy that would discourage homosexuals from openly declaring their sexual orientation by barring those that do from combat units, a senior defense official said Tuesday." Richard H.P. Sia, *Top Military Officers Favor Gays Staying in Closet*, BALT. SUN, Feb. 23, 1993, at 4.

10. HALLEY supra note 4, at 20.

Yesterday's statement followed a behind-the-scenes campaign by members of the Joint Chiefs of Staff, working through retired Adm. William J. Crowe Jr. and Rep. Dave McCurdy (D-Okla.) to convince Clinton that he will face serious repercussions in military ranks if he makes the change. Army Gen. Gordon R. Sullivan and other chiefs are urging Clinton to appoint a presidential commission "to study it for a year or two," according to an official knowledgeable about the lobbying effort. The alternative could be costly. Two members of the Joint Chiefs are said by associates to be ready to resign over the issue, though such reports may prove exaggerated. "Strategically, given his background, he [Clinton] can't afford this fight with his military establishment," the official said. "Politically, he just can't do it. So what you do is you study it. You say, 'I want to get the right answer but I want to do what's best for the national security.' That takes it off the agenda."


11. HALLEY, supra note 4, at 21.

12. As Tom Smith, the Director of the General Social Survey at the National Opinion Research Center at the University of Chicago, observed at the time, "The basic survey finding is that moral approval of homosexuality during the past 20 years has shown very little change, and what little change there is has been a slight hardening of attitudes." Richard Morin, *American Attitudes Toward Gays Remain Steady*, WASH. POST, Feb. 15, 1993. Smith was commenting on survey results that showed that a strong majority of Americans believed that homosexual relations between consenting adults should not be legal. Id. A Gallup poll taken July 9, 1993 through July 11, 1993 asked: In order to deal with the issue of gays in the military, President Clinton has adopted a plan called "Don't Ask, Don't Tell." According to this plan, the military no longer asks personnel whether or not they are homosexual. But if personnel reveal that they ARE homosexual, AND they engage in homosexual activity, they will be discharged from the military. Do you support or oppose that plan?

GALLUP POLL OF PUB. OPINION OF MILITARY AND NAT'L DEF., SATELLITE NEWS GOV'T PROCUREMENT REPORT (2000), available at http://www.defensedaily.com/reports/pub_opinion.htm [hereinafter GALLUP POLL 2000]. The responses were evenly divided—48% supported the plan,
Clinton's attempt to lift the military ban provided political drama for weeks. Pressure groups, both pro and con, organized White House and congressional telephone and letter-writing campaigns. Even the Joint Chiefs of Staff, in efforts that bordered on insubordination and the subversion of civilian authority over the military, entered the political process unabashedly, lobbying members of Congress behind the scenes and opening up their phone lines for public comment. The organized opposition came from conservative religious groups and other members of the political right. The Reverend Louis Sheldon of the Traditional Values Coalition boasted that his group's numerous calls virtually shut down the telephone lines at the Capitol, and Oliver North made public pleas for money to stop the Clinton plan.14

Clinton intended to lift the ban via an executive order.15 Those in favor of such an order included advocates for the gay, lesbian, bisexual, and transgender (GLBT) community, who urged a policy of equal treatment for homosexuals in the armed forces, contending that sexual orientation and consensual conduct has no bearing on a person's ability to serve in the military.16 The GLBT constituency was important to President Clinton's election,17 and, not surprisingly, Clinton was initially in-

49% opposed it, and 3% had no opinion. Id. Interestingly, there was little change in attitude when the same question was asked in December 1999—50% supported the plan, 46% opposed it, and 4% had no opinion. Id.


14. LEHRING, supra note 1, at 137.

15. Presumably, this executive order would have been similar to the order issued by President Truman that mandated the racial desegregation of the military.

16. See HALLEY supra note 4, at 20.

17. See id.
tent on fulfilling his promise to them. Accordingly, only days after assuming office Clinton directed Secretary of Defense Les Aspin to prepare a draft executive order revising the existing Department of Defense (DoD) policy, and to submit it to him by July 15, 1993.18

Congress, however, seized the initiative by adopting a separate plan proposed by Senate Majority Leader George Mitchell.19 Among other provisions, the legislation required the Secretary of Defense to review the homosexual policy then in place and submit recommended changes to the President and to Congress.20 In addition, it required the Senate Armed Services Committee to hold hearings during the Secretary's review and, later, to examine the Secretary's report and recommendations.21 Accordingly, this plan involved Congress intimately in the pol-

In the 1992 presidential campaign, President Clinton went out of his way to court the support of the lesbian/gay community in this country by saying that he supported the right of lesbians and gays to enter the military. As the first major party presidential candidate to take this stand, lesbians and gays flocked to his campaign with their time, money, and votes.


19. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 601, 107 Stat. 28-29 (1993). This was part of the so-called “Sense of the Congress” legislation, which provided in pertinent part: It is the sense of the Congress that:

(a) The Secretary of Defense shall conduct a comprehensive review of current departmental policy with respect to the service of homosexuals in the Armed Forces;

(b) Such review shall include the basis for the current policy of mandatory separation; the rights of all service men and women, and the effects of any change in such policy on morale, discipline, and military effectiveness;

(c) The Secretary shall report the results of such review and consultations and his recommendations to the President and to the Congress no later than July 15, 1993;

(d) The Senate Committee on Armed Services shall conduct

(i) comprehensive hearings on the current military policy with respect to the service of homosexuals in the military services; and

(ii) shall conduct oversight hearings on the Secretary's recommendations as such are reported.

Id.

20. Id. at 28.

21. Id. at 29.
icy-making process, and it could have portended legislation and implementation requirements that categorically banned homosexuals from serving in the military.

In early summer 1993, following hearings before the Senate Armed Services Committee and much debate, a compromise solution of sorts emerged that was quickly dubbed "Don’t Ask, Don’t Tell." It was comprised of the basic legislation addressing military service by homosexuals, and several implementing directives and regulations.

The statute set forth a comprehensive list of findings, which were decidedly disapproving of military service by homosexuals. Among the

22. See Halley, supra note 4, at 15.
25. In passing the bill, Congress made the following findings:
   (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.
   (2) There is no constitutional right to serve in the armed forces.
   (3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.
   (4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.
   (5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.
   (6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.
   (7) 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 greater than the sum of the combat effectiveness of the individual unit members.
   (8) Military life is fundamentally different from civilian life in that –
      (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
      (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
   (9) 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
findings was that the "prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service";\textsuperscript{26} and, that "persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards or morale, good order and discipline, and unit cohesion that are the essence of military capability."\textsuperscript{27} Based on these findings, Congress required, with some exceptions, that a service member be separated from the military for engaging in homosexual acts, for making a statement indicating status as a homosexual or bisexual, or for marrying or attempting to marry someone of the same biological sex.\textsuperscript{28} Advocates on both sides of the issue have

armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) 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 high standards or morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a). The Secretary of Defense later formed a Military Working Group (MWG) to help in the development and implementation of the statute; the MWG likewise found that allowing open homosexuals to serve in the Armed Forces would be detrimental to unit cohesion, readiness, military effectiveness, recruiting and retention. OFFICE OF THE SECRETARY OF DEFENSE, REPORT 5, SUMMARY REPORT OF THE MILITARY WORKING GROUP, § III (Findings) (July 1, 1993), available at http://donl.stanford.edu/regulations/milworkgroup.pdf [hereinafter MWG SUMMARY REPORT].

27. Id. § 654(a)(15).
28. The legislative policy was expressed as follows:
   (b) POLICY. -- A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
characterized this codification as a failure on Clinton’s part to advance the GLBT agenda, and as a future limitation on the power of the President to remove or change the policy by executive order.29 This statute remains in effect today, without change.30

The Department of Defense (DoD) was left with the unenviable task of fashioning and implementing a policy that both conformed to Congress’ expressed disapproval of military service by homosexuals31

(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).

29. See HALLEY, supra note 4, at 23-24.


31. “The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).” § 654(c)(1). Later, in a memorandum for members of the Republican Conference, Rep. Steve Buyer (R-IN), the Chairman of the Military Personnel Subcommittee wrote,

[T]here is no evidence to suggest that the Congress believed the new law to be anything other than a continuation of a firm prohibition against military service for homosexuals that had been the historical policy.

The law, as well as the accompanying legislative findings and explanatory report language, makes absolutely clear that known homosexuals, identified based on acts or self admission, must be separated from the military. After extensive testimony and debate, the Congress made a calculated judgment to confirm the continued bar to the service of homosexuals in the military.

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Those that claim the “Don’t Ask, Don’t Tell” policy has failed simply do not understand
and accommodated the desires and promises to lift the ban of a retrenching Commander-in-Chief. Leaving the particulars of resulting DoD implementing procedures aside, its clear thrust was to distinguish between homosexual conduct and homosexual orientation, with only the former serving as a legitimate basis for separation from the service. The implementation regime also forbade unfounded (or under-founded) investigations of alleged homosexuality, requiring that certain particularized thresholds of certainty be satisfied before a command-directed inquiry could even be undertaken. It likewise prohibits inquiry of service

the underlying law. The prospect of a homosexual openly serving in the military was never contemplated by the Congress and any policy that suggests that the military should be receptive to the service of homosexuals is in direct violation of the law.


32. For example, one DoD Directive instructs:

E1.2.8 Provisions Related to Homosexual Conduct

E1.2.8.1 A person's sexual orientation is considered a personal and private matter, and is not a bar to [military] service entry or continued service unless manifested by homosexual conduct . . . . Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual. Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an 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.

E1.2.8.2 Homosexual conduct is grounds for barring entry into the Armed Forces . . . . Homosexual conduct is a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

DOD DIR. 1304.26, supra note 24, at ¶¶ E1.2.8.1-E1.2.8.2.

33. 6.2 Upon the receipt of any allegation of adult private consensual sexual misconduct, the commander shall review the allegation. If the commander determines that there is credible information of adult private consensual sexual misconduct, the commander may request a criminal investigation by the DCIO or other DoD law enforcement organization, as appropriate.

6.2.1 If a commander requests that a DCIO initiate a criminal investigation into adult private consensual sexual misconduct, the Commander or Director of the DCIO, and those managers or supervisors approved by the Commander or Director to do so, shall independently evaluate and make a determination whether the request is based on credible information of adult private consensual sexual misconduct prior to initiating a criminal investigation.

6.2.2 If a DCIO determines that a request from a commander lacks credible information of adult private consensual sexual misconduct, or is not in keeping with established policy, the matter will be returned to the commander, without action, for appropriate disposition.

U.S. DEP'T OF DEFENSE, INSTR. 5505.8, INVESTIGATIONS OF SEXUAL MISCONDUCT BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DoD LAW ENFORCEMENT ORGANIZATIONS, ¶ 6 (June 6, 2000) [hereinafter DOD. INSTR. 5505.8].
members and prospective recruits concerning homosexual acts and orientation.  

Although some of the procedures have been modified from time to time, the aim of the DoD policy remains substantially the same as when it was first introduced about a decade ago.  

The DoD's approach to implementation had a sort of superficial respectability and coherence, at least in the abstract. Personal thoughts or beliefs concerning homosexuality were not to be pried into or punished, and intimate conduct that was purely private in nature was not to be investigated. Moreover, the DoD conspicuously avoided taking a stand.

34. Applicants for enlistment, appointment, or induction shall not be asked or required to reveal their sexual orientation. DOD Dir. 1304.26, supra note 24, at ¶ 1.2.8.1.  

35. In April 1997, Secretary of Defense William Cohen ordered a review of the “Don’t Ask, Don’t Tell” policy, which was prompted by reports of increased military discharges due to homosexuality. The review, completed a year later, concluded that discharges for homosexuality have increased since “Don’t Ask, Don’t Tell” had been implemented, but offered no definitive explanation for this increase. Report from the Office of the Under Secretary of Defense (Personnel and Readiness), to the Secretary of Defense (Apr. 1998), available at http://www.dod.mil/pubs/rpt040798.html. Certain DoD officials speculated that some service members declared themselves to be homosexual solely to leave the military with an honorable discharge. Elizabeth Becker, Harassment in the Military is Said to Rise, N.Y. TIMES, Mar. 10, 2000, at A14. In the summer of 1999, Army Private First Class (PFC) Barry Winchell was beaten to death with a baseball bat because he was rumored to be a homosexual. See United States v. Fisher, 58 M.J. 300, 301 (2003). Prompted by this and other allegations of violence and harassment toward homosexuals, DoD officials published a series of memoranda insisting that “Don’t Ask, Don’t Tell” can be successfully implemented provided commanders and others are properly trained on the policy, and that its provisions are effectively communicated at all levels. Jim Garamone, DoD Clarifies “Don’t Ask, Don’t Tell” Policy, A.M. PRESS SERVICE, Aug. 1999, available at http://www.defenselink.mil/news/Aug1999/n08131999_9908133.html. Secretary Cohen stated: “I’ve instructed the military services to make sure that the policy is clearly understood and fairly enforced.” News Release, United States Department of Defense, Defense Department Issues More Guidelines Concerning Implementation of Homosexual Conduct Policy (Aug. 13, 1999), available at http://www.defenselink.mil/news/Aug1999/b08131999_bt381-99.html. The memorandum required that the “Don’t Ask, Don’t Tell” policy be incorporated in the training of commanders, supervisors, and law enforcement personnel. Id. Some sources report, however, that anti-homosexual harassment in the military has substantially increased in recent years. See Becker, supra; Gregory Vistica, One, Two, Three, Out: How Two Topflight Soldiers Lost Their Dream, and the Army Lost Them, NEWSWEEK, Mar. 20, 2000, at 57. See John W. Bicknell, Jr., Study of Naval Officers’ Attitudes Toward Homosexuals in the Military 1-3 (2000) (unpublished M.S. thesis, Naval Postgraduate School) (on file with author), for a collection of many of the quoted sources cited in this footnote. The policy has been repeatedly challenged as unconstitutional in the courts, but to no avail. See, e.g., Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998); Philips v. Perry, 106 F.3d 1420, 1421 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256, 258 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996).  

36. See MWG SUMMARY REPORT, supra note 25, § IV (Conclusions) (determining that service members would not be required to answer questions concerning their orientation), at http://dont.stanford.edu/regulations/milgroup.pdf. See also Pat Towell, The Fine Points of Controversy, 51 CONG. Q. 1967 (July 24, 1993) (reporting that associating with gays, marching in a gay rights’ parade while wearing civilian clothes or subscribing to a homosexual publication would not be grounds for initiating an investigation).
on the morality of homosexuality. The policy’s stated objectives were instead couched in strikingly pragmatic and non-judgmental terms — overt homosexuality was to be purged because it damaged unit cohesion, moral and discipline, and not because it was immoral or illegal. Even the broader policy goals that purportedly undergirded the implementation regime, such as promoting recruiting and enhancing retention, were described in a dispassionate and utilitarian fashion.

The predictable impact of the implemented policy might likewise appear to be both reasonable and benign. Military effectiveness presumably would not be undermined by the compromise approach because it correctly recognized that mere thoughts, beliefs or orientation relating to homosexuality, unaccompanied action or overt expression, would not be harmful to military effectiveness. Similarly, homosexuals’ privacy interests seemingly would be fully respected, as intimate homosexual conduct would be outside the purview of official action provided it remained discreet. Only obvious and public expressions of homosexuality —unambiguous actions or words—were supposed to be investigated or used as a basis for separation or adverse action. The policy thus achieved an ostensibly prudent accommodation for military service by homosexuals—they could serve consistent with the goal of military effectiveness if, with respect to their sexuality, they did so surreptitiously. This, it was argued, was not too steep a price to pay for one who was truly motivated to serve in an all-volunteer force.

Although the above referenced concerns about unit cohesion, morale and the like were no doubt relevant to many law makers and their constituents, these matters were not, in my judgment, the driving force behind the intensity of the debate and the creation of the compromise solution. The issue of military service by homosexuals was not the typical

37. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to military service, entry, or continued service unless manifested by homosexual conduct. DOD DIR. 1304.26, supra note 24, at E1.2.8.1.
39. See Garamone, supra note 2 (reporting that in fiscal year 1999, about 83.5% of the 1034 service members discharged pursuant to “Don’ t Ask, Don’t Tell” went to their commanders and declared their homosexuality), at http://www.lexis.com.
40. See Towell, supra note 36 at 1967 (describing the compromise policy as one in which the military must not “ask” or “hunt,” and homosexual service members must not “tell” or “touch”).
41. See Policy Concerning Homosexuality in the Armed Forces Hearings Before the House Committee on Armed Services, 103d Cong. (2d Sess. 1993) (statement of Les Aspin, Secretary of Defense), available at http://dont.stanford.edu/doclist.html (“Military service requires sacrifice. . . . [This] compromise permits gays and lesbian Americans to serve if they are willing to keep their orientation a private matter. It’s a sacrifice we ask them to make, and it’s a sacrifice that we believe is necessary for the overall good of the service.”).
grist for the legislative mill, where costs and benefits are routinely calibrated with the goal of achieving optimal (or at least relative) utility or efficiency.\textsuperscript{42} Here, the governmental processes operated in a fundamentally different way than in the more mundane case, as, for example, when the political branches determine the amount of a tax, subsidy, or appropriation.\textsuperscript{43} For those who cared most deeply, the issue could be distilled to a single, straightforward, often unspoken proposition—one’s position on whether military service by homosexuals was damaging to military effectiveness corresponded directly with one’s position on the morality of homosexuality itself.\textsuperscript{44}

Accordingly, the laissez-faire veneer toward homosexuality reflected in “Don’t Ask, Don’t Tell” was and is disingenuous at best. On the one hand, the “Don’t Ask, Don’t Tell” regime evinces an unmistakable animus toward homosexuality. The newly implemented policy begins with the proposition that heterosexuals and homosexuals ought to be treated differently, and it reiterates that homosexuality and military service are generally incompatible. Beyond this, the policy did not disturb Article 125 of the Uniform Code of Military Justice (UCMJ),\textsuperscript{45}

\begin{footnotesize}
\begin{enumerate}
\item This is not to say that a taxation policy, for example, does not have an important ideological component. However, the ideological issues raised by a proposed tax bill are generally less proximate and stark as compared to the circumstances involving “Don’t Ask, Don’t Tell.” Even with respect to less emotionally charged issues, the government’s approach often lacks coherence and unity of purpose. One example is tobacco, where laws and policies simultaneously provide subsidies to tobacco growers, engage in a vigorous anti-smoking campaign, and sue cigarette manufacturers.
\item Parallels can be drawn between the debate about homosexuals serving in the armed forces and the contemporary debate about abortion. Proponents on both sides make a variety of arguments in support of their respective positions, such as those relating to the health of the mother, the right to choose, gender discrimination, equality, and so forth. No doubt these arguments are sincerely made and may have traction with some who are conflicted or undecided. But reduced to its essence, the core principle of the abortion debate—another hot spot in the culture war—is whether an unborn child is actually a human being. If the answer is yes, then few would argue that abortion is moral, and those who did would be largely disowned by pro-abortion advocates. \textit{See}, e.g., Naomi Wolf, \textit{Our Bodies, Our Souls}, \textit{THE NEW REPUBLIC}, Oct. 16, 1995, at 27, 33 (“But how, one might ask, can I square a recognition of the humanity of the fetus, and the moral gravity of destroying it, with a pro-choice position? The answer can only be found in the context of a paradigm abandoned by the left and misused by the right: the paradigm of sin and redemption.”) All of the arguments and counter-arguments about abortion rights seem to emanate from this fundamental question about the status—biological, philosophical, and theological—of the unborn child.
\end{enumerate}
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which provides, *inter alia*, that private sodomy between consenting adults is a criminal offense. The statutory language of Article 125, which describes the *actus reus* of the crime as "unnatural carnal copulation," clearly expresses a negative moral judgment about homosexual sodomy. Indeed, that private and consensual homosexual sodomy is proscribed by an enumerated offense under the UCMJ means that the conduct it reaches has been deemed to be presumptively prejudicial to good order and discipline, and of a nature to bring discredit to the armed forces. Further, the fact that forcible sodomy and rape are charged as

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see United States v. Harris, 8 M.J. 52, 53-59 (C.M.A. 1979).

46. § 925(b).

47. The statute expresses the same moral judgment about heterosexual sodomy and bestiality, providing in pertinent part:

> Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.


48. The UCMJ, 10 U.S.C. §§ 801-946, includes the so-called "Punitive Articles," which is a listing of crimes and theories of criminal culpability under military law. 10 U.S.C. §§ 877-934 (2000). The last of these offenses is found in Article 134, the so-called General Article, which provides, *inter alia*,

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces ... of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

*Id.* § 934 (emphasis added). The enumerated offenses, including sodomy under Article 125 of the UCMJ, are presumed to be prejudicial to good order and discipline, and of a nature to bring discredit to the armed forces, and thus these detrimental consequences are not set out as explicit elements of proof. In United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994), the court found,

> The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles. Although the Government is not required to prove these elements in an enumerated-article prosecution, they are certainly present.

In contrast, these consequences must be explicitly pled and proved for unenumerated offenses charged under Article 134. For example, adultery is punished pursuant to the General Article, and, therefore, in order for the prosecution to obtain a conviction of adultery, it must plead and prove beyond a reasonable doubt that the charged misconduct is prejudicial to good order and discipline or of a nature to bring discredit to the armed forces. MCM, *supra* note 45, at pt. IV, ¶ 62. In United States v. Poole, 39 M.J. 819, 821 (A.C.M.R. 1994), the court found,

> In order to sustain a conviction for adultery under Article 134, UCMJ, not only must the government prove the existence of a valid marriage and an act of sexual intercourse with another by one of the parties to the marriage, but also that the act of sexual intercourse constituted conduct that was prejudicial to good order and discipline.

49. The military's rape statute, § 920(a), provides in pertinent part that "[a]ny person subject
separate enumerated offenses under military law, consistent with the traditional distinction between these crimes,\textsuperscript{50} expresses a legislative determination that they violate important but different societal norms.\textsuperscript{51} Put simply, the retention of Articles 120 and 125, without change, is irreconcilable with a benign characterization of "Don't Ask, Don't Tell," and no one seriously disputes this.\textsuperscript{52}

The incoherence of "Don't Ask, Don't Tell" cuts both ways. For example, if consensual homosexual sodomy were truly a serious offense—as Article 125 provides and 10 U.S.C. \textsection 654 indicates—then one

to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape." \textit{Id.} "Sexual intercourse," for purposes of the crime of rape, is defined as "any penetration, however slight." \textit{Id.} \textsection 920(c). The statute also proscribes carnal knowledge, describing this offense as sexual intercourse not amounting to rape, with a person other than the spouse of the accused, or with a person who has not attained the age of 16 years. \textit{Id.} \textsection 920(b).

\textsuperscript{50} Under the common law, rape was defined as "the carnal knowledge of a woman forcibly and against her will." 4 \textsc{William} \textsc{Blackstone}, \textsc{Commentaries} on \textsc{the} \textsc{Laws} of \textsc{England} 210 (1966). In other words, the crime was limited to the penetration of the female sex organ by the male sex organ, \textit{i.e.}, sexual intercourse. See Wayne R. \textsc{LaFave}, \textsc{Criminal} \textsc{Law} 850 (4th ed. 2003). There appears to be some disagreement of whether sodomy was a crime under English common law. Some scholars argue that it was not, but sodomy was instead left to the jurisdiction of the ecclesiastical courts and "was made a felony there by early statutes [and] generally assumed to be part of the American common law." Ronald Boyce \& Rollin M. Perkins, \textsc{Criminal} \textsc{Law} and \textsc{Procedure} 359 (8th ed. 1999). Others argue that sodomy was part of the English common law. Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986), overruled by \textsc{Lawrence} v. Texas, 123 S. Ct. 2472 (2003). In any event, rape and sodomy were traditionally treated as separate and distinct offenses, with Blackstone calling sodomy an offense of "deeper malignity" than rape. Blackstone, \textit{supra} at 215. Consistent with the modern approach to sexual offenses, "newer statutes [addressing the traditional offenses of rape and sodomy] are often drawn in gender-neutral terms and cover not only genital copulation but also anal and oral copulation and, sometimes, digital and mechanical penetration as well." LaFave, \textit{supra} at 849.

\textsuperscript{51} The appellate courts of all of the military services have long held that rape and sodomy violate different societal norms. United States v. Rogan, 19 M.J. 646, 648 (A.F.C.M.R. 1984), \textit{petition denied}, 20 M.J. 189 (C.M.A. 1985) (Air Force appellate court holds rape and sodomy arising out of the same transaction are separately punishable); United States v. Dearman, 7 M.J. 713, 715 (A.C.M.R. 1979), \textit{petition denied}, 7 M.J. 376 (C.M.A. 1979) (Army appellate court holds attempted rape and forcible sodomy arising out of the same transaction are separately punishable, because "attempted rape is an offense against the person [and] [s]odomy is an 'offense against morals' or a 'crime against nature'’); United States v. Rose, 6 M.J. 754, 757 (N.M.C.M.R. 1978), \textit{petition denied}, 7 M.J. 56 (C.M.A. 1979) (Navy Marine Corps appellate court holds rape is a crime against the person and sodomy is an offense against morals or nature).

\textsuperscript{52} One could rationalize the retention of Article 125 in conjunction with "Don't Ask, Don't Tell" as follows: (1) consensual homosexual sodomy is criminalized because it is immoral and harmful; (2) the harm caused by investigating under-founded allegations of consensual homosexual sodomy is, in the aggregate, more harmful to military effectiveness than the sodomy itself, and, therefore, (3) it is prudent to retain Article 125, for expressive reasons and to punish indiscreet homosexual conduct, while prudentially determining not to investigate under-founded allegations. I am unaware of anyone who has defended the coherence of "Don't Ask, Don't Tell" with the retention of Article 125 in these terms, and there is no convincing evidence to suggest that any of the legislators or policy makers involved in fashioning "Don't Ask, Don't Tell" had this in mind.
would expect that commanders would be empowered to exercise their customary authority to investigate such allegations in order to identify and punish the offenders. A Qualified Defense

"Don't Ask, Don't Tell," however, severely restricts a commander's investigative prerogatives with respect to the felony of consensual homosexual sodomy, and to this felony alone. In fact, a commander is empowered to pursue suspected jaywalkers and litterers much more aggressively and proactively than those whom he suspects of engaging in consensual homosexual sodomy. One would likewise expect that military authorities would be encouraged to cull prospective recruits to ensure that they did not have a propensity to engage in felonious conduct. Again, however, unique rules apply to consensual homosexual sodomy, and the "Don't Ask, Don't Tell" regime expressly forbids such screening solely for this felony.

As this brief summary makes apparent, "Don't Ask, Don't Tell" simply papers over an enormous array of inconsistencies and incongruities involving the implementation and application of the military's policy toward homosexuals. More than this, it seeks to mask fundamental philosophical differences concerning homosexuality itself, while failing to even acknowledge its existence. It is as if competing proponents at a city council meeting were urging that a newly installed traffic sign be painted either red (to direct motorists to stop) or green (to advise them to proceed), and their resolution was to mix red and green paint and color it.

53. The MCM directs generally, "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses." MCM, supra note 45, at ch. III, R.C.M. 303 (emphasis added). The commander can conduct the investigation personally, direct a member of his command to investigate and report to him, or refer the matter to appropriate law enforcement officials. Id. The investigation itself may be informal and, depending on the circumstances, relatively cursory. Id. But in any case, the immediate commander is obligated to ensure that all allegations are appropriately investigated. Id.

54. See DOD DIR. 1304.26, supra note 24, at ¶ E1.2.8.1. "Applicants also will not be asked or required to reveal whether they have engaged in homosexual conduct, unless independent evidence is received indicating that an 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." Id.

55. The military justice system does not distinguish between felonies and misdemeanors. The maximum punishment for consensual sodomy under military law is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. MCM, supra note 45, at pt. IV, ¶ 51e(4). In civilian systems, a felony is defined as being a "serious crime, usually punishable by imprisonment for more than one year or by death." BLACK'S LAW DICTIONARY 633 (7th ed. 1999).

56. See SLDN, WHAT IS DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS? (stating that there are "[m]ore than a dozen specific investigative limits . . . laid out in DoD instructions and directives"), at http://www.sldn.org/templates/dont/record.html?section=42&record=749 (last visited Apr. 5, 2004).

57. See id. at ¶ 4.

58. See DOD DIR. 1304.26, supra note 24, at ¶ E1.2.8.1.
brown. The compromise solution utterly fails to express any normative judgment about the rightness or wisdom of stopping or going, nor does it evince any principled rationale for the color that was chosen. The same can seemingly be said for "Don't Ask, Don't Tell." In order to understand the policy and its ramifications more fully, it is necessary to appreciate the red and the green of it, i.e., the underlying moral debate.

III. THE MORAL DEBATE

Those on both sides of the moral divide relating to "Don't Ask, Don't Tell" oftentimes share at least one defining characteristic—disregard, if not contempt, for the opposing view. In some respects, this reaction is the logical consequence of the moral certainty that these proponents have in their respective incompatible beliefs. But the vitriol and enmity reflected in much of the discourse is nonetheless remarkable and unnecessary, and it is an impediment to any practical progress or understanding.59

59. For example, Pat Robertson is well known for his irrational and harsh statements about homosexuality, such as: "Many of those people involved with Adolph Hitler were Satanists, many of them were homosexuals—the two things seem to go together." Pat Robertson, THE 700 CLUB, Jan. 21, 1993, at http://www.geocities.com/CapitolHill/7027/quotes.html. Mr. Robertson has also stated: "If the widespread practice of homosexuality will bring about the destruction of your nation, if it will bring about terrorist bombs, if it'll bring about earthquakes, tornadoes and possibly a meteor, it isn't necessarily something we ought to open our arms to." Pat Robertson, THE 700 CLUB, June 8, 1998, at http://www.gainesvillehumanists.org/par.htm. Jerry Falwell has purportedly said, "[Homosexuals are] brute beasts...part of a vile and satanic system [that] will be utterly annihilated, and there will be a celebration in heaven." JIM HILL & RAND CHEADLE, THE BIBLE TELLS ME SO 69-70 (1996).

Some pro-homosexual sources are equally vitriolic in characterizing those who disagree with them. See e.g., Scott Bidstrup, Homophobia: The Fear Behind the Hatred ("[Heterosexual men] fear [homosexual men which] leads to a subconscious reaction: hate and/or kill the queer and you're not like him, because you've distanced yourself from him. Irrational, isn't it? Yet that's the subconscious logic involved." at http://www.bidstrup.com/phobia.htm (last revised Sept. 30, 2000); Fr. Ed Ingebretsen, ACC, Rainbow Sash Movement—Gay Catholic Activists at http://www.rainbowsashmovement.org/Stocking%20hate.html (last visited Mar. 4, 2004); N. McLean, Letter to the Editor of Globe and Mail, Religious Tolerance.Org (posting a letter to an editor which accuses the Catholic Church of engaging in a "witch hunt against homosexuals" and compares the Church to the Nazi party), at http://www.religioustolerance.org/hom_fuel.htm (last visited Mar. 4, 2004); World Pride Roma 2000 March (discussing a "huge banner" in the march which said: "In Memory of All Those Homosexuals Persecuted and Killed by the Catholic Church"), at http://http://astroqueer.tripod.com/charts/romc.html (last visited Mar. 4, 2004). Some even go so far as to characterize heterosexual men as brutes and homosexual men as being the prime repository of intellect and humanity (the so-called "Homo Homo Sapiens"):

I suggest a prehistoric origin of..."the gay little brother effect" of the last members of a large child-flock. The mothers [sic] hormonal warfare against the child in her womb was
These proponents have something else in common— a considerable philosophical tradition that supports their respective positions concerning homosexuality in general, and the “Don’t Ask, Don’t Tell” approach in particular. Because each side is so routinely dismissive of the other’s beliefs, it is worthwhile to pause, for a moment, to consider the magnitude, depth, and import of the clashing philosophies that are at play in the “Don’t Ask, Don’t Tell” controversy. 60

A. The Traditional Arguments Against Homosexuality

The Jewish and Christian traditions have for over two thousand years, in a clear and sustained manner, judged homosexual behavior to be morally wrong. 61 Although many Americans continue to hold this...

Nature’s way of birth control and means of installing female values intravenously in stead [sic] of lecturing tin-eared males. Born was the care-bear, the purser, the servant, the hairdresser, the pedagogue, the nurse, the scientist, the humanist, the Renaissance Man, the creative man, the social adept ape, the social climber, the interior decorator. Gone was the aggressive, the criminal, the muscle man, the psychopath, the wifebeater, the absent father. The new kind of ape-man fits better into social hierarchies than aggressive males . . . .

I suggest that the cultural dominance of homosexual males in history (going back 4800-4900 years ago) dates back to the emergence of culture, in fact it is human civilization. And culture is the missing link between man and apes, as man is a cultural chimp, no more, no less. The “cultural revolution” in the last 30,000 years is unexplained as the fossil reflection of this is missing. A gay source for this is close at hand as they were responsible for all other revolutions of civilization. The first evolutionary consequential [sic] use of tools was the beginning of culture and man alike. It was the whole-brained approach of gay manapes that was the driving force behind all cultural development from 5,000,000 B.C. till now. Not only 5,000 years of history or the 100 years of social constructivists. The evolutionary balance sheet with non-reproducing gays does not add up, so the missing link had to be found. Take out the gay contribution to all kinds of culture in historic times and we would still live in caves. We would have little culture, hardly any science, and no democracy, the Greek contribution can be stricken, as would be the Renaissance, Humanism and the Enlightenment.

Jim McKnight, Origin of “Homo,” at http://users.cybercity.dk/~dko12530/qstudies.htm (last visited Mar. 4, 2004). Indeed, even one of my roundtable co-panelists disparagingly commented that during our discussion, “I sometimes think the most dangerous man on the planet is a white, male, Protestant Army Colonel, who was an Eagle Scout when young.” Also, one questioner was rendered “speechless” and was “terrified” that military chaplains played a role in the implementation of “Don’t Ask, Don’t Tell.” See also Homosexual Leader Vows to “Torture” Opponents, World Net Daily (April 30, 2004) at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=38275 (indicating that Matt Foreman, executive director of the National Gay & Lesbian Task Force, declared his intent to seek “retribution against ‘local legislators and leaders’ who oppose the homosexual agenda . . . .”)

60. For religious, philosophical and practical reasons, I am firmly in the natural law/traditional camp. My personal position and beliefs, however, are unimportant to the basic thesis of this article, which could be offered by someone holding diametrically opposed views.

61. For a comprehensive survey of the ancient roots of the proscription against sodomy, see
same belief because of moral principles derived from religious convictions and teachings, many also take the same position based, in whole or in part, on reasoned arguments premised on the natural law or other sources that can stand independent of revealed truth or theological dogma. It is primarily these traditional philosophical objections to homosexuality, rather than theological or religious demurrals, that are summarized here.

Of course, any historical review of the law as it relates to sodomy necessarily includes the consideration of religious sources. The Bible itself repeatedly and consistently refers to homosexuality and homosexual acts as being immoral and sinful. By the fourth century A.D. the Roman Empire had formally adopted the Christian faith as its official state religion, thereby incorporating the received theological and revelational tradition of the Old and New Testaments. The English Common

Yao Apasu-Gbotsu et al., Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity, 40 U. MIAMI L. REV. 521, 525-26 (1985). John Boswell has taken issue with this premise, contending that early Christians were not hostile or disapproving of homosexuality. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980). Others have convincingly criticized Boswell’s historical reconstruction. See e.g., Richard B. Hays, Relations Natural and Unnatural: A Response to John Boswell’s Exegesis of Romans 1, 14 J. RELIGIOUS ETHICS 184, 202-04 (1986).

62. The inter-relationship between the natural law and religion is complex. In one sense, the natural law holds that morality is knowable by reason alone, as human reason can identify that which is in accord with nature without resort to any divine revelation. On the other hand, every law presupposes a lawgiver, and thus the “natural law makes no sense . . . without God as its author.” CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 30 (1993). This section focuses on the philosophical, rather than primarily religious, objections to homosexuality.

63. See, e.g., 1 Corinthians 6:10 (“neither fornicators, idolaters or adulterers, nor sodomites . . . will inherit God’s kingdom”); Genesis 19:1-29 (destruction of Sodom and Gomorrah); Leviticus 19:22 (“You shall not lie with a male as with a woman; such a thing is an abomination.”); Romans 1:24-27 (“Men did shameful things with men and thus received in their own persons the penalty for their perversity.”); 1 Timothy 1:10 (stating the lawless include fornicators and sodomites). See also Catholic Study Bible: New American Bible (Donald Senior, gen. ed. 1990).

64. In the Edict of Milan, 313 A.D., the Emperor Constantine, then a recent convert to Christianity, declared that Christians “were free to worship as they pleased, and they would not be required to participate in the rites of the state cult.” See JO-ANN SHELTON, AS THE ROMANS DID: A SOURCEBOOK IN ROMAN SOCIAL HISTORY 416 (1998); see also NORMAN DAVIES, EUROPE: A HISTORY 209 (1996). Later, Theodosius the Great (346 A.D. – 395 A.D.) enacted laws that effectively recognized the Christian faith as the official state religion of the Roman Empire. See Theodosius I, THE OXFORD CLASSICAL DICTIONARY 1055-56 (N.G.L. Hammond & H.H. Scullard eds., 2d ed. 1970).

65. Homosexual sodomy was declared a crime by the Emperor Theodosius of the Roman Empire, THEODOSIUS, THE THEODOSIAN CODE 9.7.6 (Clyde Pharr, trans., Greenwood Press 1969). Emperor Justinian also declared homosexual sodomy to be a crime. JUSTINIAN, THE INSTITUTES OF JUSTINIAN 291 (William Grapel, Esq., trans., Wm. W. Grant & Sons, Inc., 1994) (1855). Justinian had codified the earlier lex Julia de adulteries, which punished adultery and “unmentionable crimes
Law tradition, which has had a singularly important impact upon American jurisprudence, was in turn influenced by Roman law. The English Common Law continued to describe sodomy in the most disapproving terms, with Blackstone calling it "the infamous crime against nature" and "a crime not fit to be named." The English legal tradition, including its laws against sodomy, came to North America with the settling of the Thirteen Colonies.

Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy.

Homosexual rights advocates, based on this historical record, sometimes mistakenly assert that the opposition to homosexual conduct is purely a byproduct of Christianity, and that secular moralists in ancient Greece and Rome had a much more "enlightened" acceptance of homosexual conduct. Notwithstanding a general acquiescence toward homo-
sexuality among cosmopolitan Greek society, such conduct was condemned as immoral by the three great philosophers of the pagan west—Aristotle, Plato and Socrates⁷⁴—as well as by other early and prominent secular writers.⁷⁵ Moreover, pre-Christian Roman law, while not proscribing homosexuality in its entirety, clearly disapproved of homosexual conduct, and in particular it punished the homosexual seduction of youth.⁷⁶

This general antipathy toward homosexuality during the last two millennia has not always been well articulated, perhaps because to do so was largely unnecessary given the general agreement over time that homosexuality is fundamentally wrong. Contributing to this cultural consensus was the common perception of homosexual conduct as being aesthetically unpleasant or worse.⁷⁷ Aesthetics is arguably a largely personal and subjective matter, however, and that which is subjectively displeasing is not necessarily immoral.⁷⁸

youths to engage in homosexual acts in the Gymnasium.

When Jason received the king’s approval and came into office, he immediately initiated his countrymen into the Greek way of life . . . he abrogated the lawful institutions and introduced customs contrary to the law. He quickly established a gymnasium at the very foot of the acropolis, where he induced the noblest young men to wear a Greek hat.


⁷⁴. Socrates, as portrayed by both Plato and Xenophon, unequivocally condemned homosexual copulation. See John M. Finnis, Law, Morality, and "Sexual Orientation," 69 NOTRE DAME L. REV. 1049, 1055-57 (1994). Plato likewise was clear "that all forms of sexual conduct outside heterosexual marriage are shameful, wrongful, and harmful." Id. at 1057. In The Laws, Plato describes homosexual intercourse as an "unnatural" crime and compares it to incest. Id. at 1057 n.17. Aristotle was also disapproving of homosexuality, concluding that homosexuality is an indulgence in pleasure that is contrary to human good. IX ARISTOTLE, ETHICA NICOMACHEA (W.D. Ross trans., Oxford University Press 1963). Professor Nussbaum instead argues that Socrates, Plato, and Aristotle never disapproved of homosexual conduct per se. See Nussbaum, supra note 72, at 1555-97. However, the sources upon which she most relies (A.W. Price, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE (1989) and KENNETH J. DOVER, GREEK HOMOSEXUALITY (1990)), seem to hold otherwise. See Finnis, supra at 1055-63.

⁷⁵. For example, the great Roman historian Plutarch condemns homosexual intercourse as well as masturbation in his Erotikos. See Finnis, supra note 74, at 1062 n.33, 1062-63.


⁷⁷. As noted earlier, Blackstone described homosexuality as "a crime against nature" and "a crime not fit to be named." 4 BLACKSTONE, supra note 50, at 215-16. Blackstone was able to describe certain infamous crimes in detail—such as murder, theft, and rape—but homosexual acts were so repugnant to him and his contemporaries that he would not do the same for these.

I will not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in it’s very indictments, as a crime not fit to be named.

Id.

⁷⁸. The relationship between aesthetics and ethics is quite complex and controversial. While
The more serious commonly held objection to homosexuality is that it involves using the sex organs in an unnatural manner, i.e., contrary to their design and purpose. Put simply, males were not "made" to have sex with males, and females were not "made" to have sex with females, and from this self-evident premise it follows that what is biologically discordant is therefore morally wrong. Although this syllogism is certainly consistent with some traditional natural law objections to homosexuality, the natural law approach is more sophisticated and nuanced, and it rests upon an impressive and venerable intellectual tradition.

1. The Natural Law and Homosexuality

The dominant traditional natural law theory is rooted in the moral and metaphysical philosophy of Aristotle, which culminated in the work of St. Thomas Aquinas. Aristotle held that all things have a natural end or purpose (telos), the satisfaction of which is virtuous. For example, a good sword is virtuous if it is a proficient weapon. Similarly, the "good" person is one who fulfills the end, goal, or purpose of a human life. It is distinctively human to be rational, and thus the end or purpose of a human life is to be "maximal rational," i.e., living in harmony with all the basic needs and inclinations of our nature and restraining the often conflicting excesses of bodily cravings and emotional longings by way of a rational ordering to the good of the whole individual.

The natural law views each person as having a rational nature that determines his or her fulfillment, and it is this capacity for rational thought and action that distinguishes human beings from irrational creatures or things. Virtue is the habit of choosing what is rational in terms of a mean or equilibrium, relative to the individual person, between ex-

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modern philosophers tend to view beauty as wholly subjective and nominal, the classical and pre-modern philosophers find beauty to be a real thing—a form in the world as real as numbers. The Thomistic tradition believes in the unity of the Good, the True, and the Beautiful, which means that what is true is both good and beautiful. Similarly, Hans Urs von Balthasar argued that beauty ("splendor") is a transcendental property that can be found in all things. I HANS URS VON BALTHASAR, THE GLORY OF THE LORD 34-45 (1982). A more detailed discussion of aesthetics and ethics is beyond the scope of this article.

80. See IX ARISTOTLE, supra note 74, at Book 1, 1094a1.
81. Id. at Book 1, 1098a.
82. All things have a function or activity proper to its being, and their fulfillment or perfection is realized in carrying out that activity. In man, that activity is the exercising of and being obedient to the rational principle. Id.
83. Id.
tremes and excesses of desires. A virtuous person is one who chooses to express maximally the mean among all desires. This is what Aristotle called "eudaimonia," which is typically translated as "happiness." This "happiness" refers to more than a psychological state; it means having a truly fulfilled or virtuous life.

Human laws result from practical reason as it moves from the natural law to particular applications, providing training to perfect one's natural aptitudes for virtue. The law, in other words, can help to cultivate good habits, and accordingly, the promulgators of human law should intend to encourage virtue. Lawmakers should also seek to discourage vice through fear, which in contemporary terms is known as deterrence. The law, by holding human audacity in check, helps to maintain order and promote the common good. Human laws are seen as legitimate only when they are in accord with justice, and "a law that is unjust seems like no law at all."

The most obvious and basic of the human goods are those that we share with all creatures and things, i.e., self-preservation and self-defense. Other human goods are evident given the objective content of

84. *Id.* at Book 2, 1106a-1107b.
85. *Id.* at Book 2, 1109b.
87. According to Aristotle, an incomplete life cannot be judged happy because happiness is only fully known after a person has died. Happiness, in other words, cannot be judged before the fact. See, e.g., FRANKLIN I. GAMWELL, THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD 27 (1990).
88. Of course, the law is not the only mechanism in society that influences human action. Other institutions, such as the family, church, and societal norms, may be more effective in regulating human conduct than the law. Indeed, the law must necessarily prohibit only those things that are most gravely wrong, such as murder and theft. Although the law may theoretically "command every virtue and prohibit every vice," prudence counsels that laws should be made only if they are effective in leading the people to virtue. See THOMAS AQUINAS, THE SUMMA THEOLOGICA 207 (Fathers of the English Dominican Province, trans., Encyclopedia Britannica, Inc. 1952).
89. *Id.* at 227 (quoting Augustine, *De lib. Arb.* i, 5).
90. According to Aquinas, self-preservation and self-defense are the most basic inclinations to the good under the natural law, as these are in accordance with that "which [one] has in common with all substances." AQUINAS, supra note 88, at 222. For Aristotle, knowledge comes from the senses. Sense perception provides a basis from which the mind can abstract the essential nature of the individual appearances that the senses encounter. The abstract essential nature is universal in the sense that it is something one predicates of many individuals. The unity of nature is also a feature of our abstract knowing. It is something we conceive over and against the individuals we perceive. This is not to say that universals are merely mental constructs, but rather that what individuates individuals is excluded through abstraction. Being can be studied qua being through abstraction by seeking the most general and universal terms that predicate being. And thus in the *Categories,* sub-
human nature, such as knowledge, friendship, and the care and education of offspring. Sexual intercourse is likewise an objective human good. Reason directs people toward these human goods through virtuous activities that are both proper to the individual and shared in common with other rational beings.

Temperance is the virtue of rightly ordering the physical goods and appetites of a person according to reason. Animals instinctually fulfill their needs with regard to these physical goods, but people are instead generally guided by reason rather than instinct. This is what it means to be a rational being—one can choose to be virtuous and act temperately, or choose to act intemperately by using physical goods in an unreasonable or “disordered” fashion, such as in a manner that is excessive in amount or discordant with purpose. For example, for most people eating two large pizzas would be unreasonable (and thus objectively wrong), not only because of the self-inflicted discomfort or pain caused by such over-eating, but also because the action is inconsistent with the end for which eating is ordered, i.e., good health and nutrition. Choosing to eat dirt or sand would likewise be objectively wrong because it is disordered to the end of eating. A well-formed person desires what is reasonable because it is reasonable, and not because he fears the law.

Human reason is of course not infallible; it can fail regarding the things that a person should do. This usually involves the obfuscation of reason by a bad disposition of the appetites and desires. Virtuous habits help keep one's appetites in accord with reason, and bad habits can lead to unreasonable choices. Although acting in accord with reason reinforces right habits, virtue can also be enhanced and promoted through

stance is said to be of two kinds, individual substance and universal substance. See, e.g., JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 1-36 (1988); see also RALPH MCINERNY, A FIRST GLANCE AT ST. THOMAS AQUINAS: A HANDBOOK FOR PEEPING THOMISTS IX (1990) (discussing Thomism's basic assumption on knowledge through the senses).

91. The first principles of any science must be known in some way to be true without proof, as they would otherwise be required to prove themselves. Either nothing is known to be true or something must be known to be true without proof. ARISTOTLE, POSTERIOR ANALYTICS 5-7 (Jonathan Barnes trans., Clarendon Press 1975).

92. AQUINAS, supra note 88, at 222.

93. Id.

94. See ARISTOTLE, supra note 74, at Book II, 1105a-1106a.

95. AQUINAS, supra note 88, at 223. The natural bodily appetites regulated by temperance include the natural desire for food, drink, and sexual intercourse.

96. Id.

97. Although the first principle "do good and avoid its contrary" is known by many, disordered passions can impede the application of this first principle to particular actions.

98. IX ARISTOTLE, supra note 74, at Book II, 1114a-1115a.

99. Id.
external mechanisms, such as parents, teachers and, as noted earlier, the law. Ultimately, one acts virtuously not out of fear of others or the law, but from an understanding of and appreciation for the reasonableness of the act itself. In other words, a person acts virtuously because he takes pleasure in doing so, just as he is pained by acting contrary to what is objectively good. Eating dirt or sand is unreasonable regardless of whether the law prohibits this, and regardless of whether a person desires to do so. Further, a law requiring the eating of dirt or sand would be considered illegitimate and thus no law at all.

According to this view, the expression of human sexuality through acts, as the product of a rational human choice, thus may be reasonable (or unreasonable) as judged in light of immutable human nature. Some misunderstand the natural law as holding that that which occurs in nature is by definition "natural," and it therefore must be objectively moral. Although nature can serve as a useful guide for human action, reason requires that people order their sexual desires in light of the self-evident end of sexual congress, i.e., the procreation of new life and the continuation of the human species, and not for some other unreasonable purpose. Sexual congress between persons of the same sex is thus objectively unreasonable because it is discordant with right reason and human nature. As the law is intended to lead citizens to virtue, while at the

100. See discussion supra Part III. A.

101. Like speech, virtuous habits are most easily developed in the young (prior to the formation of disordered habits).

102. Numerous writers have criticized the "natural law" prohibition of homosexual sex on the grounds that other animals have homosexual sex, and therefore homosexuality is "natural." See, e.g., Susan McCarthy, The Fabulous Kingdom of Gay Animals, SALON IVORY TOWER, March 15, 1999, at http://www.salon.com/it/feature/1999/03/cov_15featurea.html. Though some animals may sometimes instinctually fulfill their sexual appetites through homosexual activity, this does not make it reasonable for humans to do the same. That apes and other creatures sometimes assault or take the property of another creature does not necessarily imply that such actions are accord with correct reasoning for human beings. Particularly, it would certainly be unreasonable to accept the animal kingdom as a guide for the reasonableness of human sexuality; although it may be reasonable for the mantis to eat her mate in the throws of passion, this is not particularly instructive for human conduct even though it is "natural" in the sense that it occurs in nature.


104. Id. at http://www.ccel.org/a/aquin/summa/SS/SS153.html. The sexual act is intrinsically procreative and reproductive. Under this rule, however, it would be objectively unreasonable for spouses who are temporarily or permanently unable to generate human life to engage in sexual intercourse, since such an act is intrinsically oriented toward procreation.

105. An explicit intent to procreate is not necessary at the time of sexual union, as long a general habit to have sex for procreation is present. See id. at http://www.ccel.org/a/Aquinas/summa/SS/SS153.html. Sexual intercourse also has a secondary pur-
same time discouraging vice, lawmakers can justly criminalize purely personal vice, such as homosexual acts, even in the absence of direct social harm, and even though the law is primarily concerned with the common good of society. Further, a law that is discordant with justice by encouraging vice would be illegitimate.

2. "The New Natural Law" and Homosexuality

When most people speak of natural law, they have in mind the traditional understanding that "morality can be derived from human nature." This understanding implies that moral virtues are discoverable through human reason and actions are reasonable in light of our human nature. The "new natural law" theorists approach the concept of objective morality in a different way. These theorists argue that the traditional natural law adherents have committed the "naturalistic fallacy" of presuming that moral propositions can be derived from factual propositions about human nature. These "new natural law" theorists instead use the concept of self-evident "basic goods" as a touchstone for objective moral norms.

106. The metaphysical foundations of the natural law have been undermined in contemporary society because modern science has replaced Aristotelian teleology with a materialist worldview that considers only efficient causes. See ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURALISM: AN ANALYTIC RECONSTRUCTION 52 (1996). The goal of the "new natural law," rather than appealing directly to metaphysical claims that were rejected by the Enlightenment, is to work within the Kantian limits of human knowledge. Id. at 57-58. The "new natural law," in other words, establishes that "moral property, cannot be defined analytically by reference to a natural property." Id. at 61-62.


108. Id.

109. Id. (noting that "new natural law" theorists reject the old concept of natural law).

110. See LISSKA, supra note 106, at 59 (stating that traditional law adherents, such as Moore, suggest that Mill has committed the naturalistic fallacy).

111. See id. St. Thomas would reply to this assertion that one cannot derive an "ought" from an "is" by arguing that moral judgments arise from understanding the relation between the real good of man that corresponds to his being and a particular action. See AQUINAS, supra note 88, at 246-47.

112. Gordon, supra note 107, at http://www.mises.org/misesreview_detail.asp?control=129&sortorder=issue (noting that "[t]he basic goods... are incommensurable.... The answer lies in the fundamental principle of morality, which is never to act directly against a basic good").
“Basic goods” include life, health, marriage, religion, play, and knowledge.\textsuperscript{113} These goods are self-evident first principles, which are derived not from any factual understanding of human nature, but instead are manifestly known.\textsuperscript{114} They alone provide the rational grounds for human activity, and thus any action directed toward some other end is, by definition, objectively irrational.\textsuperscript{115} For example, because pleasure is not one of the “basic goods,” it would be irrational to engage in an activity solely because it gives pleasure.\textsuperscript{116} The “new natural law” thus expresses the moral imperative in the negative—one should not act in a way that compromises or hinders a “basic good.”\textsuperscript{117}

According to the “new natural law,” homosexual activity is objectively wrong because it damages “integral human fulfillment.”\textsuperscript{118} “All who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, [their sexual] organs and acts as instruments for gratifying the individual ‘selves’ who have them.”\textsuperscript{119} In other words, participants in homosexual acts necessarily mistreat “their one personal reality,” \textit{i.e.}, their bodies, by misus-

\begin{itemize}
\item \textsuperscript{113} See id; see also Robert P. George & Gerald V. Bradley, \textit{Marriage and the Liberal Imagination}, 84 GEO. L. J. 301, 307 (1995).
\item \textsuperscript{114} George & Bradley, supra note 113, at 307.
\item \textsuperscript{115} Gordon states: These goods serve as rational grounds for action. If you act for some ultimate end that is not on [a “new natural law” theorist]’s “A” list then you are irrational. If, say, you do something just because it gives you pleasure, you have no ground in reason for your act. Gordon, supra note 107, at http://www.mises.org/misesreview_detail.asp?control=129&sortorder=issue.
\item \textsuperscript{116} JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 95-97 (1980) (arguing that the experience of pleasure is not a basic good, although it may make us want to do or participate in a basic good).
\item \textsuperscript{117} Similarly, no “other real or imagined internal feeling” based on experiences “such as ‘pleasure’, ‘peace of mind’, or ‘freedom’... or sets of experiences such as ‘happiness,’” can constitute a basic good or value. Id. at 95.
\item \textsuperscript{118} See Finnis, supra note 74, at 1068-69. Because the “basic goods” are incommensurable, it is difficult to conceive how one should act when they conflict.
\item \textsuperscript{119} As explained by George and Bradley,
\begin{quote}
The body, as part of the personal reality of the human being, may not be treated as a mere instrument without damaging the integrity of the acting person as a dynamic unity of body, mind, and spirit. To treat one’s own body, or the body of another as a pleasure-inducing machine... is to alienate one part of the self, namely, one’s consciously experiencing... self, from another, namely, one’s bodily self. ... [This] disintegrates the acting persona as such. ... In reality, whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity. ...
\end{quote}
George & Bradley, supra note 113, at 314 (quoting Finnis, supra note 74, at 1067).
\item \textsuperscript{120} Finnis, supra note 74, at 1070.
\end{itemize}
ing them as an instrumental means to some partial and ultimately unsatisfying end, i.e., pleasure.\footnote{Id. at 1069, 1070.} This misuse of the body harms the participants of homosexual sex by damaging their personal integrity; as all sex that is undertaken solely for the sake of pleasure is wrong.\footnote{Patrick Lee & Robert P. George, What Sex Can Be: Self-Alienation, Illusion or One-Flesh Union, 42 AM. J. JURIS. 135, 138-39 (1997).} Only sexual intercourse between spouses has, as its purpose, an object that does not alienate the person as bodily and intellectual agent.\footnote{Id. at 145.} In marriage, "this bodily unity is not extrinsic to [the spouses'] emotional and spiritual unity,"\footnote{Id. at 144.} and thus marital congress "actualizes the multi-leveled personal communion" intrinsic to marriage, which is itself a basic good.\footnote{Id. Other variants of the natural law objection to homosexuality have been made. For example, Michael Pakaluk begins with the proposition that sexual intercourse has a special status, which is reflected, for example, in the different treatment of rape as compared to other assaults. Sex is special because it is a natural sign of the union of the persons who engage in it. It has two distinctive characters: a reciprocal unitive character (i.e., a real physical union involving the "containment of the woman and man" via their reproductive organs), and a reproductive character. Homosexual sex is lacking in both of these components. Michael Pakaluk, Presentation, Why is Homosexual Activity Morally Wrong?, in HOMOSEXUALITY: CHALLENGES FOR CHANGE AND REORIENTATION, J. PASTORAL COUNSELING 53-56 (1993). Pakaluk's thinking has been criticized by Gregory Baum, who argues that the meaning of sexuality cannot be defined apart from culture and historical experience. Gregory Baum, Homosexuality and the Natural Law, 1 THE ECUMENIST 33, 34 (Jan.-Feb. 1994). The criticism by Baum of Pakaluk and like thinkers is generally inseparable from a broader critique of natural law theory. There are other philosophical approaches that find homosexual activity to be immoral and inherently damaging to the human person, including philosophical personalism, which reaches similar conclusions as the natural law, by focusing on the dignity of the human person. See generally Janet E. Smith, Natural Law and Personalism in Veritatis Splendor, at http://www.aodonline.org/aodonlineqlImages/SHMS/Faculty/SmithJanet/Publications/MoralPhilosophy/NaturalLawandPersonalism.pdf (last visited Mar. 28, 2004).} \footnote{Id. as an adjective characterizes a person or position of latitude in moral matters. Originally applied in the 17th through 19th centuries, it has now taken on a broader meaning of "holding or expressing broad or tolerant views." See AMERICAN HERITAGE DICTIONARY (4th ed. 2000), available at http://www.bartleby.com/61/49/L0064900.html.}

B. The Latitudinarian Arguments in Favor of Homosexuality

Much of modern philosophy, and modern biology for that matter, challenges the Aristotelian conception of metaphysics (i.e., hylomorphic metaphysics), and especially the Thomistic formulation of Aristotelian metaphysics.\footnote{See MCINERNY, supra note 90, at 32-35.} This is related to the story of the rise of Protestantism...
and modern philosophy. Martin Luther was trained in the teachings of William of Ockham and other nominalism. Against the Thomistic/Aristotelian belief in essential natures knowable by the human mind, instead the nominalists believed that universals have no metaphysical status. The ability of the mind to apprehend the divine Being through abstraction from individual instances of being is entirely illusory to nominalists. Will takes priority over intellect in ethical thought because the intellect is no longer held to have access to the authentically real as it is for Thomists. This is the position known as voluntarism. Thus, the sciences of philosophy, and especially metaphysics, as they were known were completely divided from theology. Philosophical speculation about the nature of God was viewed as fruitless. No rational inquiry into the nature of the divine Being could be derived through the senses or through natural reason. Revelation is, therefore, the only source of knowledge about God.

Immanuel Kant would later make a similar claim as the nominalists, arguing that all previous metaphysics had not accounted for the roles that such innate concepts play in forming knowledge and in limiting the legitimate scope of knowledge. Because the conceptual struc-


133. See PINCKAERS, supra note 131, at 191, 193-94.

134. See id. at 345-46.


136. This is Kant’s famous “Copernican revolution.” See generally IMMANUEL KANT, CRITIQUE OF PURE REASON (J. M. D. Meiklejohn trans., Prometheus Books 1990); IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS THAT WILL BE ABLE TO PRESENT ITSELF AS A SCIENCE 27-28 (Peter G. Lucas trans., Manchester Univ. Press 1966). Anthony Kenny explains Kant’s revolution in philosophy as follows:

To become scientific, Kant believed, philosophy needed a revolution similar to that by which Copernicus placed the sun, rather than the earth, at the centre of the system of the heavens. Copernicus showed that when we think we are observing the motion of the sun round the earth, what we see is in fact the consequence of the rotation of our own earth. Kant’s Copernican revolution will do for the mind what Copernicus did for the sense of vision. Instead of asking how our knowledge can conform to its objects, we must start from the supposition that objects must conform to our knowledge. Only thus can we justify the claim of metaphysics to a priori knowledge, which unlike a posteriori knowl-
tured that underlie knowledge are those used for common discourse about substances, causation, and events, they are relevant only when applied to the common phenomena of experience.\textsuperscript{137} Although metaphysics seeks knowledge of the being of things-in-themselves (noumena) and especially non-material being,\textsuperscript{138} the conceptual structures of representation, however, do not provide the conditions for such knowledge.\textsuperscript{139} Therefore, since the conditions for knowledge are not satisfied with respect to the subject matter of metaphysics, Kant denies that there can be any genuinely scientific knowledge of things in themselves.\textsuperscript{140} In place of such metaphysical speculation, Kant provided a prescriptive proposal for critical metaphysics that could properly be called a science.\textsuperscript{141} Whereas traditional metaphysics was “transcendental” in the sense that it sought knowledge of a reality that transcends experience,\textsuperscript{142} Kant proposed a science of metaphysics that would seek to identify the most general feature of our thought and representations, and the relations among concepts and presuppositions of knowledge.\textsuperscript{143}
At the end of the day, most “enlightenment philosophers” argue from the premise of an egocentric individualism, which presupposes that each person is free to establish his own truth based on whatever he finds pleasing or useful, employing nothing but his own reason. Truth is no longer objective; it is instead discerned by each person from the perspective of his unique point of view. Truth (and virtue, or morality) are thus situational, and can rightly depend on culture, experience, and other relevant circumstances. Freedom is seen as emancipation from all of the conditions and traditions that prevent each person from following his own reason; it is no longer seen as a striving for a good that reason helps to uncover with reference to tradition.

The numerous contemporary arguments put forth in support of the proposition that homosexuality is not immoral, and those who are “openly” homosexual should not be prohibited from serving in the military, have, in one sense or another, sprung from these philosophical sources. Although the specific contentions are diverse and eclectic, a few common threads have emerged to which most homosexual proponents subscribe. The three most widely held and serious arguments are: 1) the state should only proscribe those actions that objectively harm others, and homosexuality (both generally and in the ranks) is not objectively harmful; 2) individual rights, including a right to engage in homosexual sex, must be recognized and protected in the context of military service; and 3) the military is not significantly separate from the

146. See id.
147. See id.
148. PINCKAERS, supra note 131, at 340-41.
150. These positions are not necessarily exclusive of each other and, in fact, they often share adherents. They are prescinded here, however, to show their logical distinction from each other.
rest of society, and thus discrimination based on homosexual orientation or acts cannot be justified on this basis.\(^{153}\)

The first argument—that the state should only proscribe actions that objectively harm others—is directly traceable to the 1957 Wolfenden Report\(^{154}\) and the Mill/Stephens debate that presaged it.\(^{155}\) John Stewart Mill argued that all crimes require a victim.\(^{156}\) Although Mill allowed for some moral restraints, his central thesis was that the only justification of criminal law is to prevent activities that harm others, such as murder, theft, and battery.\(^{157}\) Some homosexual advocates, consistent with Mill’s approach, assert that the basis for punishing homosexuality, which is founded only on unconvincing historical and moral concerns,\(^{158}\) is inva-
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lid because homosexuality does not harm others. 159 Hence, homosexuality falls outside the purview of that which the criminal law may legitimately proscribe. 160 It is important to mention this contention first—specifically the premise that homosexuality does not harm others—because a majority of other arguments for homosexual rights proponents implicitly rest upon this no-harm predicate. 161

A second common argument in support of total decriminalization of homosexual acts is that individual rights are of paramount importance and should be fully respected; this includes a right to privacy in sexual practices whether it be heterosexual or homosexual sex. 162 This approach draws upon notions of privacy, liberty, and equality, and it seeks to attach itself to constitutional principles. 163 It asserts that homosexuals have the same rights under the Constitution as heterosexuals, and that homosexual activity should not be circumscribed simply because it is practiced by a minority of people or is objectionable to some. 164

At the out-

159. "From their [homosexual advocates] perspective of benign sexual variation, homosexuality was a misfortune only because of social intolerance; the condition itself was no more problematic than being left-handed." William N. Eskridge, January 27, 1961: The Birth of Gay Legal Equality Arguments, 58 N.Y.U. ANN. SURV. AM. L. 39, 44 (2001-2003); see also HART, supra note 154, at 13 (discussing the Wolfenden Report which held, by a 12 to 1 majority, that homosexuality should no longer be illegal because it causes no harm to others and prostitution should be limited in its public application only because it is "an offensive nuisance to ordinary citizens").

160. This becomes more interesting in the context of the "Don't Ask, Don't Tell" dispute because Congress has specifically found that homosexual conduct is detrimental to the military. 10 U.S.C. § 654 (a)(15) (2000).

161. Theoretically, one could argue on the basis of utility that homosexuality is harmful, but excluding homosexuals from military service is even more harmful to military effectiveness, society, or some other relevant and important interest or concern. I have not found any proponent of homosexual rights or opponent to "Don't Ask, Don't Tell" who takes such a position. See Eskridge, supra note 159, at 44-46 (discussing Dr. Franklin Kameny's brief to the Supreme Court in which he argued that homosexuality is a "benign sexual variant" and not a threat and how as a result homosexuals should be afforded various constitutional rights). A table depicting various stereotypical views of homosexuals compared to Kameny's arguments help to elaborate this point. Id. at 46.

162. Bowers v. Hardwick, 478 U.S. 186, 190, 195 (1986) overruled by Lawrence v. Texas, 123 S. Ct. 2472 (2003). Hardwick argued that homosexual conduct occurring in the privacy of the home should be protected under the Constitution because privacy is a fundamental right. Id.


164. See id. at 376-78; see also Lawrence v. Texas, 123 S. Ct. 2472 (2003). Justice Kennedy stated: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression,
ermost edge of this position is the idea that homosexual orientation is equated with race. Accordingly, the denial of homosexual "rights"—to engage in sodomy, adopt children, enter into same-sex marriage, etc.—is wrong, and even to hold the private belief that homosexuality is immoral is equated with bigotry and hatred.

A third position, specifically directed in opposition to the "Don't Ask, Don't Tell" regime, is that the military should not have a separate policy allowing it to exclude homosexuals that is contrary to the practice in the civilian sector. This assertion necessarily depends upon two premises: 1) that homosexuality is an insufficient basis for criminal sanction or social exclusion in the general society, and 2) that there are no special considerations regarding the military that create a sufficient reason—viewed as either a justification or an excuse—for an exception to this rule. Concomitant with this thinking, some subscribing...
to this position claim that there is a right to military service,170 and may refer to the ostensibly pro-homosexual policies of other militaries.171 They also typically assert that “open” homosexuality is fully compatible with military service,172 and they generally discount concerns that het-

170. Some “right to serve” advocates and critics of “Don’t Ask, Don’t Tell” acknowledge that Congress has the authority to exclude certain people from military service for certain reasons. The military institution is recognized as a “legitimately unique society” that is not governed by civilian employment principles. Article I of the Constitution authorizes Congress to “make Rules for the Government and Regulation of the land and naval forces.” Pursuant to this power, Congress formulated guidelines that serve as the foundation of military practices. Additionally, Article I empowers Congress to formulate laws governing the entrance of civilians into the armed forces. Krygowski, supra note 6, at 878 (citations omitted). These advocates nonetheless criticize the exercise of this authority to exclude individuals on the basis of homosexual orientation or actions. Id. at 932. Congress, on the other hand, has expressed the opposite position, finding that “[t]here is no constitutional right to serve in the armed forces.” 10 U.S.C. § 654 (a)(2) (2000). A more detailed and thorough discussion of rights and responsibilities, as pertaining to citizenship and military service, is beyond the scope of this article.

171. The adjective “ostensibly” is used in the text because some proponents overstate the pro-homosexual policies and practices of some nations’ military forces. As the MWG reported, “[t]he policy and practice of foreign militaries regarding homosexuals actively serving do not always match.” MWG SUMMARY REPORT, supra note 25, at § III, B(5)(a)(1). The MWG observed, “In countries where policies are ‘accepting,’ practice typically involves exclusion of homosexuals for medical/psychological reasons. Even where policy and law allow homosexuals to serve, few servicemembers openly declare their homosexuality due to fears of baiting, bashing, and negative effects to their careers.” Id. The MWG also recognized that, extended deployments and berthing/billeting privacy are not significant issues for most foreign militaries. Additionally, no country has as high a proportion of its servicemembers billeted/berthed together on military installations and deployed aboard ships or overseas at any given time as does the United States. Most importantly, no other country has the global responsibilities, operational tempo, or worldwide deployment commitments of the Armed Forces of the United States. Id. at ¶ B(5)(a)(2). Indeed, some have even pointed to the more accepting policies of other nations as posing a potential problem for the United States.

European views on the issue of Gays in the military are progressing toward full acceptance at a quicker pace than appears to be the case in the United States, where Don’t Ask, Don’t Tell appears to be a permanent fixture in the American military establishment. The widening gap between civil rights for Gays in the United States versus other countries of the Western World poses potential problems for the United States. For instance, given the United States’ history of using allegations of human rights abuses by Communist and Third World countries in negotiating economic and political agreements, laws such as Don’t Ask, Don’t Tell put American foreign policy at risk for chastisement by the international community as being hypocritical. Perhaps more fundamentally threatening to the United States is the fact that the European frontier of civil liberties may be advancing more quickly than that of the United States, a nation that prides itself on being the leader of the free world.

See Morris, supra note 5, at 434-35 (citations omitted).

172. As Gary Young writes:
The historical claim that “[h]omosexuality is not compatible with military service” will no doubt be unpersuasive in the long run. “Incompatibility” is a purely practical claim;
erosexual service members will feel distressed if required to live in circumstances involving intimate contact (such as showering) with those who are "openly" homosexual. Based on these arguments, one can conclude that drawing any distinction between heterosexuals and homosexuals, in either civilian or military society, is equally unsupportable and unacceptable.

IV. CONTEMPORARY ATTITUDES ABOUT HOMOSEXUALITY

As the data in this section shows, and in part as a consequence of these competing philosophical approaches and their tenets, the American people are divided and conflicted with respect to their beliefs about homosexual rights in general, and military service by homosexuals in particular. Attitudes have generally trended slowly toward greater support as such it avails only so long as the empirical evidence regarding homosexual participation in the military bears out the problematic consequences cited by the military. It is easy for homosexuals to refute these claims by pointing out the widespread career successes of homosexuals in the military.


173. As Peter Nixen puts it:

Thus, in the military at least as much as in civilian life, the public activity—whether at attention or at ease—commands the expected behavior without regard to social orientation. "Opponents [to removing the military ban on gays] argue that the right to privacy requires keeping the ban in place, citing as examples the difficulty of living in close quarters and using same-sex showers. But the fact is that gay and straight soldiers have been thrown together in such situations since the beginning of time. The only question is whether heterosexual soldiers know about another soldier's homosexuality. How is the issue of privacy changed depending on whether the gay soldier in the next bunk is closeted or open?"


174. As one critic of the current military policy writes:

Likewise, the claim that the permissibility of open homosexual identification in the ranks will undermine unit cohesion also rings hollow. The military's claim is that if the military permits homosexuals to self-identify, heterosexual servicemembers who work closely with avowed homosexuals will be uncomfortable being forced to work and live with them.

This is a weak justification for a restriction on open homosexual identification. Americans do not ordinarily formulate restrictions on people's actions based solely upon how other people might react to them. In the political speech context, for example, the potentially hostile and even violent reaction to a speaker by his enemies is not a sufficient justification for restraining the speaker. Instead, we regulate the heckler's violence, should it occur. The "heckler's veto" is no more persuasive in the regulation of homosexual self-identification in the military than it is in the marketplace of ideas.

Young, supra note 172, at 105.
for "homosexual rights" during the last decade, and there is no strong and continuing consensus among the public at large regarding whether homosexuality is immoral, or whether certain specific types of discrimination based on homosexuality ought to be permitted. This section further examines how Americans remain closely divided on whether homosexuals should be allowed to serve in the military, especially if this involves permitting homosexuals to serve "openly" with respect to their sexual orientation and behavior.

Although the data varies, most opinion surveys and empirical research indicates that heterosexual Americans generally held negative attitudes toward homosexuals and homosexuality in the decades immediately preceding the inception of "Don't Ask, Don't Tell." A substantial sample of the research on attitudes toward homosexuality during this period is collected in a paper by Armando Estrada and David Weiss, in which the authors catalog the results from over a dozen surveys conducted from the mid-1970s through the early 1990s. The sample populations surveyed in the studies vary, with some directed toward the general public and others focusing on students. Differences in attitude were found between certain population subsets across several studies; for example, heterosexual men tended to view homosexuality more negatively than heterosexual women. Based on a review of all the studies they cited, Estrada and Weiss concluded that, "[i]n sum, surveys of... both the general population and of university students reveal that attitudes toward homosexuals are negative." In one 1991 survey, 75% of adults believed that same-sex sexual relations are either "always wrong" or "almost always wrong." A 1991 study of college students, both male and female, found that many respondents had a significant concern that they would be labeled homo-

176. Id. Many of the surveys cited in this section are discussed in Estrada and Weiss' paper.
177. Id.
179. Estrada & Weiss, supra note 175, at http://instructional1.calstatela.edu/dweiss/Psy542/Attitudes.htm
180. Id. "[A] probability sample of non-institutionalized adults (1941 men, 2163 women) aged 18 and older were asked if they believe homosexuality to be 'always wrong, almost always wrong, sometimes wrong or not wrong.'" Id.
 sexual. A 1990 survey of college freshmen reported that about half the respondents considered homosexual men "disgusting" and believed "homosexual behavior to be plain wrong." Similar attitudes among high school seniors were disclosed in another study conducted in 1982. In this earlier study, respondents tended to agree with the statement "homosexuality was unnatural." A more comprehensive survey, which measured attitudes and behavior relating to a variety of sexual issues between 1974 and 1985, found that a majority of the respondents viewed homosexuality as an "illness."

Although there is some empirical evidence that suggests public attitudes toward homosexuality have become increasingly negative over time, the overwhelming majority of recent studies indicate that the American public has grown more tolerant, and even sometimes more approving, of homosexuality. The 2000 National Elections Study (NES), for example, reflects greater public support for a variety of homosexual rights initiatives. In particular, the NES indicates a strong majority of Americans support laws prohibiting discrimination based on sexual orientation. Another poll shows that Americans also believe that homo-

183. Price, supra note 178 at 471 (noting agreement with the statement "homosexuality is unnatural").
184. Id. (noting slightly less agreement with the statements that "homosexuality was a sin" and "if homosexuality is allowed to increase it will destroy our society").
186. For example, a 1990 study reported that attitudes toward homosexuals had become more negative from 1986 to 1988, which the authors attributed to AIDS related beliefs. Eugene P. Sheehan et al., An Examination of Change in Reports of AIDS-Related Knowledge and Attitudes in 1986 and 1988, 1990 PSYCHOL. REP. 723, 727-28. Negative attitudes were also reflected in a recent referendum amending the Colorado state constitution by repealing local ordinances prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships," which was declared unconstitutional by the United States Supreme Court. See Romer v. Evans, 517 U.S. 620, 624 (1996).
188. Id. The NES reports 63.9% favor nondiscrimination laws, 30.9% oppose them, and
sexual sex between consenting adults should be legal.\textsuperscript{189} While a recent Harris poll reflects the same trend, it finds the public to be much more closely divided with respect to nondiscrimination legislation.\textsuperscript{190} As a recent Gallup poll concludes:

Substantial numbers of Americans continue to say—as they have for the past quarter century—that homosexual relations should be neither acceptable nor legal. There have been some changes in these attitudes, but not enough to signal [a] wholesale shift of societal norms. Gallup has recorded a gradual increase in the belief that homosexuality is an acceptable orientation or lifestyle, but this perception has only risen from 34\% in 1977 to 51\% today. At the same time, there has been even less long term change in attitudes about the legality of homosexuality, with Americans continuing to be closely divided on the question; 52\% think it should be legal today compared to 43\% in 1977.\textsuperscript{191}

The NES also found that although a majority of Americans still oppose adoption by homosexuals, support for homosexual adoption has

\textsuperscript{189}One poll shows that 59\% of the public says homosexual relations between consenting adults should be legal, while 37\% says they should not be. Frank Newport, \textit{Six in 10 Americans Agree That Gay Sex Should Be Legal}, The Gallup Organization (June 27, 2003), at http://www.gallup.com/poll/releases/pr030627.asp?Version=p. However, a Gallup poll conducted shortly thereafter reflects "a significant shift in public opinion on gay and lesbian rights over the past two months.... [with] a significant drop in the percentage of Americans supporting legalized homosexual relations." Frank Newport, \textit{Public Shifts to More Conservative Stance on Gay Rights}, The Gallup Organization (July 30, 2003), at http://www.gallup.com/poll/releases/pr030730.asp?Version=p.

\textsuperscript{190}The poll found that in 2000, 56\% of Americans favored nondiscrimination laws, 34\% opposed them, and 6\% were undecided. In 1998, 52\% favored such laws, 41\% opposed them, and 6\% were undecided. Humphrey Taylor, \textit{Attitudes to Gays and Lesbians Have Become More Accepting, But Most People Still Disapprove of Single-Sex Marriage and Adoption by Same Sex Couples}, The Harris Poll #9 (Feb. 9, 2000), at http://www.harrisinteractive.com/harris_poll/index.asp?PID=1 [hereinafter Harris Poll #9]. A more recent Harris Poll indicates that, by more than a 2-to-1 margin, most Americans favor legislation to prohibit job discrimination against homosexuals. Humphrey Taylor, \textit{By More than 2-to-1 Most Americans Favor Legislation to Prohibit Discrimination Against Gays and Lesbians}, The Harris Poll #27 (June 13, 2001), at http://harrisinteractive.com/harris_poll/index.asp?PID=236 [hereinafter Harris Poll #27].

grown considerably since 1992. Americans likewise disapprove of other homosexual advocacy initiatives, such as single-sex marriage and employment in certain occupations. Further, a very slight plurality of Americans continues to believe sexual orientation can be changed through will power, therapy, or religious convictions.

Regarding military service by homosexuals in general, the NES indicates that 71.2% of Americans support this, with only 22.9% opposed to it, and 5.9% undecided. Similarly, by a 70% to 26% margin, respondents in a recent Gallup poll indicated that homosexuals should be "hired" by the armed forces.

Whether these responses reflect dissatis-
faction with the "Don't Ask, Don't Tell" policy is unclear, however, as the questions used in both the NES and Gallup polls did not specify whether respondents were expressing an opinion on military service by "open" homosexuals, or service consistent with "Don't Ask, Don't Tell," or both.

The data reflects that attitudes are far more negative towards allowing those who are "openly" homosexual to serve in the military. In a 2000 Gallup poll, only 41% supported homosexuals serving "openly" in the military, while 38% supported the current policy, and 17% favored an outright ban. In a 2000 Harris poll, 46% of respondents opposed the current "Don't Ask, Don't Tell" policy, with 34% in favor the policy, and 20% undecided. A recent study by Miller and Williams found 56.4% favoring "open" service by homosexuals, with 36.7% opposed and 6.9% having no opinion. Even among a group of respondents who strongly support homosexuals serving in the military, a majority favored the "Don't Ask, Don't Tell" approach as compared to a policy that allowed for their "open" service.

More important than the results of any particular study or survey is the overall picture that they collectively portray. The accumulated data, discussed herein, reflects that the American public remains deeply divided and even conflicted about homosexuality in general, and military

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198. See GALLUP POLL 2000, supra note 12, at http://www.defensedaily.com/reports/pub_opinion.htm. Four percent had no opinion. Id.

199. News Release, Harris Interactive, A Call to Attention on Gays in the Military: Is It Time to Revise "Don't Ask, Don't Tell?" (Feb. 15, 2000), at http://www.harrisinteractive.com/news/downloads/pr_gml1.pdf. Of those who responded that they favored the current policy, 35% actually support a more stringent policy of prohibiting all homosexuals from serving in the military. Id.


201. On August 27, 2001, Zogby International and Hamilton College in New York released the results of a nation-wide Hamilton College Gay Issues Poll, involving a random sampling of 1000 "class of 2001" high school graduates. Although 92% of the respondents said homosexuals ought to be allowed to serve in the military, they preferred by a 52% to 40% margin the current "Don't Ask, Don't Tell" policy to "open" service by homosexuals. Dennis Gilbert, Hamilton College Gay Issues Poll, Hamilton College, at http://www.hamilton.edu/printable.cfm (Aug. 27, 2001).
service by homosexuals in particular.\textsuperscript{202} Although the public strongly favors nondiscrimination against homosexuals in the abstract, it clearly supports discriminating on the basis of homosexuality in certain circumstances.\textsuperscript{203} More specifically, the public seems far less receptive to the idea of homosexuals serving "openly" in the military than it does to the notion of military service by homosexuals in general.\textsuperscript{204} Put another way, the public's complex and even paradoxical attitudes and beliefs about homosexuality seem, in many ways, to be reflected in the legislation and implementation of policies and regulations that comprise the "Don't Ask, Don't Tell" regime. "Don't Ask, Don't Tell" more closely comports with contemporary attitudes toward homosexuality than would the ideologically pristine alternatives of either an outright ban against military service by homosexuals, or alternatively, removing all distinctions between heterosexuals and homosexuals and allowing homosexuals to serve "openly."

The data also confirms that there is a stunning gap—in reality, a chasm—between civilian and military elites on issues relating to sexual orientation.\textsuperscript{205} Miller and Williams found that among civilian elites, 54.3% favored allowing homosexuals to serve "openly" in the military, while 35.6% opposed it, and 10.1% had no opinion.\textsuperscript{206} In sharp contrast, among military elites, only 18.1% favored military service by those who are "openly" homosexual, while 72.8% opposed it, and 9.1% had no opinion.\textsuperscript{207} This gap between civilian and military attitudes is also reflected in other studies.\textsuperscript{208} As Miller and Williams conclude:

Military leaders surveyed were less concerned with the effect of gender integration than they were about the possibility of known gay men and lesbians being allowed to serve among the troops. Civilian leaders and respondents from the general public demonstrated a greater concern about the impact of gender than did the military elite, but they were far less worried about the incorporation of homosexuals than were military elites. Given the similarity of responses among military elites, reserv-
ists, officer trainees, and veterans, it is clear that military service has an effect on attitudes on this issue.\textsuperscript{209}

The civil-military gap is also a consequence of the all-volunteer force, which causes the military to be self-selecting, and tends to perpetuate and reinforce attitudes and values traditionally held by the military culture.\textsuperscript{210} This attitudinal gulf with respect to homosexuality portends that any liberalized policy toward homosexual service imposed upon the military by civilian elites could prove to be especially problematic within the ranks, and could seriously harm recruiting and retention.\textsuperscript{211}

V. IN DEFENSE OF “DON’T ASK, DON’T TELL”

As previously discussed, “Don’t Ask, Don’t Tell” cannot be supported as an expression of pristine principle, because it is rife with inconsistencies and incongruities, which are in no small part traceable to the absence of an underlying moral consensus. The gist of the “Don’t Ask, Don’t Tell” approach can nonetheless be defended as a comparatively practical and reasonable approach to a momentous matter that is not yet ripe for a definitive and principled resolution. It is a compromise solution, which was appropriately born of a political process and generally reflects contemporary public attitudes.

The question of military service by homosexuals can, as a matter of normative first principle, be addressed in one of two ways. Each is a logical extension of the opposing positions in the morale debate about homosexuality itself. One resolution, based on the traditional or natural law approach, is logically derived from the belief that homosexuality is objectively immoral. It follows from this that lawmakers can prudently decide to exercise their legitimate authority to criminalize immoral behavior—in this case consensual homosexual conduct—in order to deter harmful conduct, promote the common good, and influence people to be more virtuous.\textsuperscript{212} Lawmakers could likewise decide to impose admin-

\textsuperscript{209} Miller & Williams, supra note 200, at 386.


\textsuperscript{211} See Cohn, supra note 210, at 11, at http://www.poli.duke.edu/civmil/cohn_literature_review.pdf.

\textsuperscript{212} As traditionally and correctly understood, all legitimate laws, including criminal laws, are
administrative sanctions and other restrictions upon individuals because they engage in or have a propensity to engage in harmful and immoral conduct, including prohibiting them from serving in the military. This would constitute a rational exercise of legislative prerogative, especially given the substantial (albeit conflicting) support for such action provided by the data and opinions pertaining to military service by homosexuals. Of course, a contrary judgment, allowing unencumbered military service by homosexuals, could likewise be adopted based on the same information. The Constitution grants to Congress the authority to make such decisions about the armed forces. Thus any rational judgment by Congress in military matters, especially if it is to adopt a policy that is explicitly in accord with an objective moral truth, is constitutionally defensible in this representative democracy. Further, in order to implement such a decision effectively, lawmakers could require that the mili-

derived from and consistent with moral principles and norms. This is not to suggest that the criminal law’s proper purpose is to codify morality, i.e., to describe comprehensively moral behavior and punish all departures from it. Much of what is deemed immoral is left unregulated because of countervailing interests involving individual liberty and freedom, because the conduct is not sufficiently harmful to society to warrant regulation or punishment, or because of other prudential reasons. For example, although lying is immoral, the criminal law stigmatizes only certain lies that are especially harmful, such as perjury and false official statements. This traditional understanding of law and morality also recognizes that some laws, such as traffic regulations, lack an obvious moral content, and that the body of law must regulate the mundane as well as the profound. There is no doubt, however, that a proper understanding of the inter-relationship between law and morality recognizes that the former’s very legitimacy depends upon its adherence to and consistency with moral norms. The positive law, as properly understood, is a derivative and selective extension and expression of the moral law that undergirds it. This explains the Supreme Court’s traditional willingness to uphold the constitutionality of laws that advance public morals. See, e.g., McGowan v. Maryland, 366 U.S. 420, 444-45, 452 (1961) (upholding a Maryland law requiring certain businesses to close on Sundays). In the words of Professor Chemerinsky, “[T]he government has a legitimate purpose [to legislate] if it advances a traditional ‘police’ purpose: protecting public safety, public health, or public morals.” ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 536 (1997).

213. The very nature of the matter under consideration—the impact, if any, on military effectiveness by the service of “open” homosexuals—makes it a difficult subject for empirical research, and thus much of the “data” available to decision makers is necessarily in the form of opinion. See Nathaniel Frank, Real Evidence on Gays in the Military, WASH. POST, Dec. 3, 2002, at A25. It is certainly fair to say, however, that the opinion evidence offered in support of reinstating or completely removing the ban is mixed. For a collection of opinion evidence opposed to relaxing the traditional ban against military service by homosexuals, see Senate Debate on Homosexuals in the Military, 139 CONG. REC. S13,517-21 (daily ed. June 22, 1993) (statement of Sen. Coats).


215. Of course, mere rationality may not suffice if Congress decided to discriminate with respect to a fundamental right. Even then, discrimination such as that found in the “Don’t Ask, Don’t Tell” regime may pass constitutional muster under the applicable strict scrutiny test. See generally infra notes 218-22 (describing Supreme Court jurisprudence pertaining to fundamental rights, strict scrutiny, judicial deference, morals legislation, and the potential impact of Lawrence, with respect to “Don’t Ask, Don’t Tell”).
tary aggressively investigate allegations of homosexuality, and, that recruits and military personnel be questioned and screened based on their sexual conduct, and perhaps, their orientation and predisposition, consistent with the constitutional right against compelled self-incrimination. All of this is contingent, either directly or indirectly, on the premise that homosexuality is objectively immoral.

The second resolution, based on the latitudinarian approach, begins with the premise that private and consensual homosexuality is not objectively immoral or intrinsically harmful, but rather that it is deserving of constitutional protection as a fundamental right. It follows from this...
that the state may not prohibit or unduly regulate such activities and expression, at least in the absence of a compelling reason for doing so.\footnote{219} Leaving aside questions of judicial deference with respect to military matters,\footnote{220} the syllogism continues that a sufficient case has not been made for discriminating against homosexuals with respect to military service, precisely because the data and opinions relating to the costs and benefits of disallowing military service by homosexuals is so sharply conflicting.\footnote{221} Accordingly, the ban should be lifted because it is unconstitutional and unprincipled, and thus "open" homosexuals should be allowed to serve in the armed forces within the same parameters as heterosexuals. All of this flows, either directly or indirectly, from the premise that homosexuality is not objectively immoral.\footnote{222}

\footnote{Beyond the scope of this article, it should be noted that the United States Court of Appeals for the Armed Forces has granted review on the issue of whether Lawrence overrules Article 125 of the U.C.M.J. with respect to consensual sodomy in United States v. Marcum, ACM 34216, 2002 CCA LEXIS 173 (Jul. 25, 2002). See United States Court of Appeals for the Armed Forces, Daily Journal No. 03-219, available at http://www.armfor.uscourts.gov/journal/2003Jnl/2003Aug.htm (Aug. 23, 2003).}

\footnote{219. The state may legislate to limit a fundamental right only if its action can pass "strict scrutiny" analysis. This requires the state to demonstrate that the governmental interest is "compelling," and that the means chosen to achieve the end (i.e., the statute and implementing policy in the case of "Don't Ask, Don't Tell") are "necessary" and "narrowly tailored." CHEMERINSKY, supra note 212, at 416. Even when the Supreme Court has used the strict scrutiny analysis with respect to military matters, it has "employed special deference and respect for the judgment and reasoning of military leaders due to the national security implications of the case." James M. Winner, Comment, Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery, 31 LOY. L.A. L. REV. 1073, 1098 (1997) (commenting on Korematsu v. United States, 323 U.S. 214 (1944), which applied strict scrutiny to an exclusion order and held such order justified by a wartime emergency, and Goldman v. Weinberger, 475 U.S. 503 (1986), which affirmed the reversal of a free exercise of religion claim in deference to the military's compelling interest in headgear uniformity).}


\footnote{221. See supra note 161.}

\footnote{222. There is a third approach, which rejects the idea of objective truths relating to homosexuality. It would hold that the question of military service by homosexuals, like any other legislative or policy choice, is simply a matter of majority consensus, based on certain criteria (such as utilitarian cost versus benefit analysis), as expressed through political mechanisms. Put another way, might makes right, and law and policy is no more than an imposition of efficacious will. See Bowers, 478 U.S. at 192-94, 196; Steven G. Gey, The Unfortunate Revival of Civic Republicanism, 141 U. PA. L.

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These summaries of the competing approaches are, concededly, simplistic and rudimentary. They underestimate both the sophistication of the principles involved and the intricacies and potential variation of their applications. But they do sketch the framework and parameters for two diametrically opposed—albeit internally principled and reasonable—approaches to military service by homosexuals. In addition, these two approaches and their variants are the only options that truly embody normative first principles. Any other approach—such as the current "Don’t Ask, Don’t Tell" regime—is, in comparison, philosophically and ideologically infirm.

Upon what basis can the philosophically and ideologically infirm "Don’t Ask, Don’t Tell" approach be countenanced, let alone justified? The defense begins with the proposition that authoritatively adopting either of the competing principled alternatives described above would constitute a paradigm shift from the unsettled status quo. Choosing one of these two principles would represent more than a mere modification of military policy—it would necessarily amount to choosing sides in a hot spot in the so-called "culture war" and confer upon one set of beliefs the imprimatur of societal norm. This would be widely and correctly seen as constituting a profound and authoritative normative judgment having far-reaching significance and implications. It would, in short, be a fundamental statement about who we are as a society and where we are going (and ought to go) in the future.

Prudence counsels that sea-changing normative declarations should normally be made only when they are in accord with the culture (or at least are not counter-cultural), and then only by democratic institutions that reflect society and are directly accountable to the people. Criminalizing murder, rape, and, robbery, for example, is unremarkable in contemporary America. The same is true for incest (even if only involving adults), carnal knowledge, bestiality, and polygamy. This is because in each case, a critical mass of Americans agrees that such behavior is immoral and harmful, and that the law may be used to discourage and punish it. Even though individual Americans may arrive at these conclusions based on widely divergent rationales, moral legislation is nonetheless infused with practical legitimacy when a solid majority of the public

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REV. 801, 873-76 (1992-1993). Such an approach, however, would be rejected on principle by the principled proponents on both sides of the "Don’t Ask, Don’t Tell" issue.

223. The term "culture war" has become a ubiquitous reference to the clash between traditional and latitudinarian approaches and arguments toward questions of morals and values. See, e.g., ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH (1996); CHARLES E. RICE, THE WINNING SIDE (1999).
agrees that the proscribed conduct is immoral and deserving of criminal sanctions.

Of course, sometimes the popular culture is unambiguously wrong as a matter of objective truth. In such circumstances there is a salutary benefit, and perhaps even an obligation for lawmakers to become leaders in moving an unreceptive or resistant society toward that which is true. For example, race-based slavery and racial discrimination are and have always been, as an unequivocal matter of principle, immoral. The proponents of racial discrimination could never point to any legitimate basis for their position, in the natural law or elsewhere, because none exists. Likewise, racists have never been able to cite any authentic Christian authority that supports their beliefs; such sentiments are self-evidently immoral, and the Church has never authoritatively taught otherwise.

224. According to genuine Christian teachings, "The equality of men rests essentially on their dignity as persons and the rights that flow from it . . . ." CATECHISM OF THE CATHOLIC CHURCH 470 § 1935 (United States Catholic Conference, Inc., trans., Liberia Editrice Vaticana, 1994). Specifically with respect to racial discrimination, the Catholic Church instructs, "With respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." Gaudium et Speo, Pastoral Constitution on the Church in the Modern World, Pope Paul VI § 29 (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_council/documents/vat-ii_cons_196. On the other hand, certain utilitarian arguments could be made to justify racism. Indeed, under the right conditions certain types of utilitarianism could conceivably justify almost anything, including punishing the innocent and slavery. See generally Guyora Binder & Nicholas J. Smith, Framed.- Utilitarianism and Punishment of the Innocent, 32 RUTGERS L.J. 115 (2000); R.M. Hare, What is Wrong with Slavery, 8 PHIL. & PUB. AFF. 103 (Winter 1979).

225. Perhaps one of the greatest contemporary expressions of the natural law is found in Dr. Martin Luther King’s moving Letter from the Birmingham Jail, in which Dr. King champions racial equality. MARTIN LUTHER KING, JR. WHY CAN’T WE WAIT 77-100 (1964).

226. This is not to deny that religion and the Bible have been misused from time-to-time to justify immoral beliefs and acts, such as slavery and racism. During the period of slavery in the American South, Paul’s letter to Philemon, among other passages from the Bible, was used to justify race-based slavery. See Philemon 1:16; see Martin v. Roy, No. 93-07137, 1998 Mass. Super. LEXIS 703, at *5 (Mass. 1998) (citing plaintiff’s opinion that “Jews, like others, resorted to the Bible to rationalize slavery”). More recently, the trial judge in Loving v. Virginia, 388 U.S. 1 (1967), invoked religion in explaining the rationale for Virginia’s anti-miscegenation statute: Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.” Id. at 3. But repeating this false reliance on a religious justification for that which is objectively immoral does not make it so. Authentic Christianity unambiguously teaches that slavery and racism are always wrong: “The seventh commandment forbids acts or enterprises that for any reason—selfish or ideological, commercial, or totalitarian—lead to the enslavement of human beings . . . .” CATECHISM OF THE CATHOLIC CHURCH, supra note 224, at § 2414. Further, in his letter to Philemon, Paul directed a Christian master to treat his Christian slave “no longer as a slave but more than a slave, a beloved brother . . . both as a man and in the Lord.” Philemon 1:16. Religion and the Bible have also been misused to justify a number of other immoral beliefs or actions, including anti-
Racist sentiments are self-evidently immoral. With respect to matters such as these involving immutable norms, a lawmaker could prudently decide to get ahead of the curve and try to move the culture to a better place.

But even where the circumstances are morally clear, radical change does not occur in a cultural vacuum and may have great costs. Slavery was ended in America only in exchange for much bloodshed and misery, and putting the very existence of the nation in jeopardy.\(^2\)\(^2\)\(^7\) Even today, laws and policies designed to end racial discrimination are, in some sense, only as efficacious as the culture will allow and accept. Certainly, the Fourteenth Amendment\(^2\)\(^2\)\(^8\) and anti-discrimination laws have helped ameliorate racial discrimination and made American society more moral, even if this was accomplished over the objection of some Americans.\(^2\)\(^2\)\(^9\) When the driving first principle is unequivocally moral, then any consequential friction and dissonance can be deemed a cost worth bearing. Determining how far and how fast to move toward a moral imperative, and the acceptability of the costs occasioned by the pace, is essentially a prudential judgment committed to the legitimate decision-making authority.\(^2\)\(^3\)\(^0\)

But different normative dynamics are at play in the case of discrimination based on homosexuality as compared to discrimination based on race, especially as this relates to military service.\(^2\)\(^3\)\(^1\) This can be


\(^{228}\) U.S. CONST. amend. XIV. The Amendment, which was designed to address slavery and racial discrimination, provided, *inter alia*, for due process and equal protection under law. See General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982).


\(^{231}\) Important differences between race, and sexual orientation and conduct, can be readily
illustrated with a simple and practical example involving policy implementation. One could hypothesize that no moral American—either now or at the time of President Truman’s executive order to end racial segregation in the military—would question a requirement that military personnel be instructed that a belief in racial superiority is objectively immoral, and that such an attitude will not be tolerated in the ranks. This not only makes good practical sense, but it also expresses an objective moral truth.

Now consider a requirement that military personnel be instructed that homosexual conduct is either objectively moral or objectively immoral, and that any dissent from the newly established orthodoxy is not permitted. Is there any doubt that such an approach to homosexuality would engender staunch opposition from a considerable number of respectable Americans? Is there any question that such indoctrination would contravene protected religious freedom, as this is now understood, and would cause significant practical problems for the armed forces? The best that could be hoped for, consistent with the spectrum of attitudes held by Americans today, is instruction that emphasizes the importance of respecting privacy, tolerating different sexual orientations and views toward homosexuality, and opposing harassment or maltreatment based on sexual orientation. This is precisely the sort of lowest-common-denominator accommodation that typifies the present “Don’t Ask, Don’t Tell” approach.

It is quite a different matter to impose a radically new and different moral compact absent moral consensus, or even some agreement as to what is intended and the reasons for it. Regardless of one’s position on the question of the morality and constitutionality of homosexuality, one would have to acknowledge that the opposing view is not baseless and has a significant constituency. This is not an argument for the moral equivalence of the opposing beliefs. Proponents on both sides advocate from the premise of moral certainty, and, as an irreducible matter of logic, one of the two mutually inconsistent views must be morally superior to the other. But the certainty and seriousness of the irreconcilable beliefs involved provides further support for the proposition that it

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drawn. Race is an immutable characteristic; sexual orientation and action is a behavior and a choice, which can change over time. Further, race is a necessarily “open” aspect of a person; sexuality need not be “open.” See generally Eugene T. Gomulka, Homosexuality in Uniform: Is It Time?, 30 FIRST THINGS J. RELIGION & PUB. LIFE 41-42 (Feb. 1993) (comparing and contrasting discrimination based on race and homosexuality), at http://www.firstthings.com/tissues/t9302/articles/gomulka.html. A fuller discussion of the differences between race, and sexual orientation and conduct, are beyond the scope of this article.
would be precipitous, perhaps even reckless, for lawmakers to decide, authoritatively and categorically, here and now, in favor of one or the other. It would be even more dubious for the courts to intervene and seek to settle this cultural dispute, given that the culture is so deeply divided based on principle. The Congress and the President are “popularly” elected and popularly accountable, and thus their actions ought to be both reflective of and responsive to the will of the people. Federal judges are, for good reason, far more insulated from public opinion and attitudes. Their role is to interpret the laws made by the representatives of the people, and not to choose sides in the popular debate. Unless a law or policy is clearly unconstitutional, the role of the court should be to interpret and faithfully apply it, and not to disapprove of it based on philosophical differences dressed up as constitutional interpretation. Virtually any approach to the issue of military service by homosexuals—be it a complete ban, the end to all restrictions, or the intermediate “Don’t Ask, Don’t Tell” regime—ought to pass constitutional muster by an appropriately deferential court.

Proponents on both sides of the issue would have to concede that the moral debate is not a simple matter of esoterica or high philosophy, which resides above and beyond the public’s collective consciousness. The American people are engaged on issues pertaining to homosexuality, and a critical mass of Americans are presently unwilling to accept fully either ideological absolute, with all of its attendant implications and consequences. Rather, the public seems deeply conflicted about homosexuality, especially when questions about individual privacy and military service are mixed into the equation. This is contested terrain in the culture war, and the battle for hearts and minds of the American public has been actively joined. Recasting military policy consistent with either of the opposing views would represent a great victory for one of the

232. See U.S. CONST. art. II, § 1; U.S. CONST. amend. XII; see also Committee of Seventy, How the System Really Works: The Electoral College (Oct. 1996), at http://www.seventy.org/nycu/1996/electoral.html (explaining how the President, although elected using an electoral college system, is indirectly elected by popular vote, and therefore, his election is an adequate representation of the popular election of each state).


235. See Understanding the Federal Courts, supra note 233, at http://www.uscourts.gov/understand02/content_1_0.html.
competing protagonists, for obvious reasons. But an ideological triumph for either side at the present time—especially for proponents of lifting the ban—would likely be at the expense of the best interests of military effectiveness. It is the best interests of the military, and not some broader philosophical agenda, that ought to be the touchstone for military personnel policy, at least when the moral underpinnings of an issue are in popular dispute. Prudence suggests that lawmakers should wait for the fog of culture war to lift and the political dust to settle before stamping their imprimatur upon either of the antithetical first principles that lead to the "Don't Ask, Don't Tell" compromise.

VI. CONCLUSION

Perhaps my initial, disparaging characterization of the "Don't Ask, Don't Tell" regime needs to be reconsidered in light of the above commentary. The inconsistencies and incongruities of the present regime may simply be an accurate and appropriate reflection of an ambivalent and unsettled American body politic, which has reached no definitive consensus regarding the morality and acceptability of homosexuality. Given this state of affairs, it is not surprising that a contemporary resolution of the normative questions implicated by "Don't Ask, Don't Tell," made by those who can be held politically accountable, would fall short of resolving or even addressing the irreconcilable ideologies at play. In other words, "Don't Ask, Don't Tell" is more akin to a yellow yield sign, a sort of philosophical armistice that warns those on both sides of the ideological impasse to proceed with caution.

When all is said and done, "Don't Ask, Don't Tell," or some refined variation of it, is probably the best that can be hoped for at the present time. It accommodates, albeit uneasily, the strongly held and sharply opposing views of those who care the most. It comports, generally, with a divided and unsure American public. It can be internalized and implemented, without unbearable cost, by military leaders and the distinct and special society they lead. It defers, in principle and in practice, to legitimate values involving privacy and religious freedom. And, as nearly all would agree, it is not a permanent solution.

Someday, perhaps sooner rather than later, lawmakers will be able to definitively act, based on unambiguous first principle, in fashioning a policy for homosexual service in the military. It will be coherent and consistent. It will express ideological clarity. It will harmonize the criminal law, administrative sanctions and actions, and practical implementation. It will be widely supported by the American public, and by
those who serve in harm’s way. It will be better than what we have now because the times will allow for a better approach. That day will no doubt come, but it has yet to arrive.