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SECOND HAND PREJUDICE, RACIAL ANALOGIES AND SHARED SHOWERS: WHY "DON'T ASK, DON'T TELL" WON'T SELL

PAUL SIEGEL*

I. INTRODUCTION

Marine Colonel Fred Peck earned his fifteen minutes of fame back in May of 1993 when he was one of several witnesses testifying before the Senate Armed Services Committee chaired by Senator Sam Nunn of Georgia. Peck's Senate appearance played prominently on the network television news programs. His name and photo adorned front page stories the next day in major newspapers nationwide. His family's saga was the focus of Larry King's program on CNN.

Colonel Peck told the committee that he is proud of the Marine Corps, but he would strongly advise his son Scott not to enlist, for fear that the younger Peck's life would be in danger from the outset—not from Iraqi Scud missiles or terrorist bombs,

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but at the hands of his fellow Marines. The reason for this dire prediction: his son is gay.\(^4\)

Colonel Peck's testimony was remarkable in part because of its counterintuitive posture (an argument that one's own son should properly suffer employment discrimination). His was a textbook example of a speaker's credibility derived from appearing to argue against his own interests. This is the same principle that makes our ears perk up when a prison inmate argues in favor of longer jail sentences.

A second feature of Peck's testimony seemed to escape media commentary, perhaps because of its obviousness. Peck predicted that openly gay soldiers would be physically abused, perhaps even assassinated, by their heterosexual counterparts. He did not suggest, however, that hostility towards homosexuals is an appropriate response. He did not suggest that gays are immoral and vile creatures who deserve to die. Instead, Peck went out of his way to distance his own feelings about homosexuality from those of the Marines who he feared would do his son harm. He began by describing his own military career, including a stint as director of the Corps' public affairs office in Los Angeles:

I worked with the entertainment industry out there. And let me tell you, I probably don't need to say this, but I worked with a lot of people in Hollywood whose sexual ori-

\(^4\) Colonel Peck maintained:

[I]f the ban on gays and lesbians serving in the military were to be dropped, I would counsel all three of my sons to stay out of the military. Absolutely. My oldest son, Scott, is a student at the University of Maryland. He's just about to graduate. If he were to walk into a recruiter's office, it would be the recruiter's dream come true. He's 6'1", blue-eyed, blonde hair, great student . . . . But if he were to go and seriously consider joining the military, I would have to, number one, personally counsel against it, and number two, actively fight it because my son Scott is a homosexual. And I don't think there's any place for him in the military. I love him. I love him as much as I do any of my sons. I respect him. I think he's a fine person. But he should not serve in the military. And . . . that's the strongest testimonial I think I can give. I'm a father of a homosexual . . . young man, and I don't think he should serve in the military. I spent 27 years of my life in the military, and I know what it would be like for him if he went in. And it would be hell, and if we went into combat . . . he'd be at grave risk. If he were to follow in my footsteps as an infantry platoon leader or a company commander, I would be very fearful that his life would be in jeopardy from his own troops.

entations and a lot of other things about their personal lifestyles were much, much different than my own. I think I was successful there. I think I've been successful in the civilian educational environment. And I'm saying this to tell you that I'm not a homophobe, I'm not the kind of person who's lived some cloistered, sheltered military life, who's never had to deal with homosexuals before, work with them all the time.  

Colonel Peck's testimony may have been more dramatic than that of the other career military leaders who came in front of the Nunn committee. The basic thesis of his remarks, however, was repeated again and again by those favoring the military's ban against lesbians and gay males. The reason we need the ban, supporters argued, was not because the military leadership is disgusted by homosexuality or by gay people. Instead the raw recruits, who are barely out of their teens, and often from the lower ends of the socioeconomic continuum—they would have an enormous difficulty in dealing with gay coworkers (and especially gay bunkmates). To maintain the morale of the nation's forces, the ban must not be lifted.

This Article's thesis is that those who support the military's gay ban using this kind of reasoning are manifesting a form of "second hand prejudice" that is inimical to basic constitutional principles. Part II will examine the nature of "prejudice once removed" in various legal contexts. First, it reviews the two leading Supreme Court decisions rejecting the state's reliance upon second hand prejudice as a violation of constitutionally guaranteed equal protection under law. Next it examines the second hand prejudice argument as an instance of the "heckler's veto" developed in First Amendment jurisprudence. Finally it presents a sampling of lower court cases from the gay rights movement in which courts have rejected second hand prejudice arguments.

Part III argues that the military's "don't ask, don't tell" policy is simply one more manifestation of second hand prejudice

6. Colonel Peck noted that he too would have difficulty "living with" gays or "coexisting with them in a military environment." Yet he did not beat his son or disown him for being gay. Colonel Peck's own actions around a gay person differ dramatically from the dismal report he made regarding how other Marines would react.
7. "I can guarantee you that these young people who are young — in their 20s, 22, 23 or even younger, will spot a homosexual a mile away as soon as he comes in ..." Hearing of the Republican Research Committee's Task Force on Military Personnel, Feb. 4, 1993 [hereinafter Republican Research Comm.] (Testimony of Admiral Thomas Moorer, former Chair, Joint Chiefs of Staff).
and that the military’s view of “homosexual conduct” as incompatible with military service is a disingenuous and insupportable posture. This section is not intended as an exhaustive review of caselaw and commentaries aimed at refuting all governmental arguments in favor of keeping the gay ban. Rather it will focus on the two pro-ban arguments that seem to have succeeded more than any other in crossing over from the Senate hearing rooms into the public consciousness. The first of these is the “communal showers” argument, the notion that just as we would not force male and female soldiers to shower together and to use toilets during the same hours, so too would it be an invasion upon the privacy of heterosexual soldiers to have them share such facilities with lesbians and gay males. The second argument, offered in its strongest form by former Chair of the Joint Chiefs of Staff Colin Powell, is that sexual orientation is different from race in ways that make the military’s experience of desegregating the armed forces in decades past inapplicable to the gay ban.

II. SECOND HAND PREJUDICE AND THE LAW

A. The Palmore and Cleburne Decisions

When Linda Sidoti and her husband Anthony, both Caucasians, divorced, the court gave Linda custody of the couple’s 3-year-old daughter. Sometime later, Anthony returned to court, seeking custody of his daughter once again. Among the “changed circumstances” he brought to the court’s attention was his former spouse’s having taken up residence with (and later marrying) a new lover of African-American descent named Clarence Palmore. The judge gave custody to Anthony, basing his decision, in part, upon the level of prejudice the child would encounter by dint of her mother’s interracial marriage. “Despite the strides that have been made in bettering relations between the races in this country,” the judge wrote, “it is inevitable that

8. The military often raises the more global argument that it is a special setting, and that its leadership should receive a high level of deference because it is uniquely qualified to ascertain the special needs of that setting. Able I v. United States, 847 F. Supp. 1038, 1042 (E.D.N.Y. 1994). Yet even in these situations the military leadership will be called upon to articulate the interests in jeopardy. The interest in maintaining unit cohesion has been the military’s main response to this inquiry. However, the refutations offered in Part III of this Article to the unit cohesion rationale (refutations aimed at showing that we need not fear the prospect of straights and gays sharing showers together, and that Colin Powell’s rejection of the historical analogy to the military’s successful experience in racially desegregating is mistaken) constitute refutations of the global appeals to deference as well.
Melanie will . . . suffer from the social stigmatization that is sure to come.9 Chief Justice Burger's unanimous opinion overturning the lower court ruling illustrated the Supreme Court's desire to weed out injustice in a category of caselaw (child custody disputes) that rarely merits its review. The Court made clear that it was not making this decision out of naïveté:

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.10

Other issues raised by this case, Burger continued, transcended the immediate question of what placement would seem, at first blush, to be in the best interests of the child:

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them.11

The facts in Palmore emphasize the case's relevance to the gay military issue.12 Many who favor the military ban argue that the armed forces should not be forced to be the laboratory for "social engineering," however laudable the goals of such reform might be.13 In Palmore the Court unanimously accepted a situa-

10. Id. at 433.
11. Id.
12. The holding in Palmore is tied to the heightened scrutiny standard required by the Court's Fourteenth Amendment equal protection analysis as applied to race. Id. at 432. The Court has never held that sexual orientation discrimination requires the same level of scrutiny. In this sense, this Article argues by analogy, often from dicta. Yet the reasoning of the Court could not be more clear—second hand prejudice is not permitted. Part II, Subsection C of this Article will demonstrate that the same conclusion has often been drawn by lower courts called upon to adjudicate gay rights issues.
13. See, e.g., Senate Hearing May 11, 1993, supra note 4 (testimony of General Norman Schwarzkopf) ("The armed forces' principal mission is not to be instruments of social experimentation. The first, foremost, and all-eclipsing mission of our military is to be ready to fight our nation's wars, and when called upon to do so, to win those wars."); see also Charles Moskos, Mandating Inclusion: The Military as a Social Lab, 354 CURRENT 20 (1993) ("The justification of the military remains—at least to date—national defense, not welfare or social engineering.").
tion in which an innocent child was to be the vehicle by which the goal of racial equality would be “engineered.”

In its next term, the Court used *Palmore* to invalidate a zoning ordinance in Cleburne, Texas that required a “hospital for the feebleminded” (a group home for retarded adults) to obtain a special use permit. The permit was only obtainable if none of the homeowners within 200 feet of the facility objected. That such a restrictive procedure was almost never used to resolve other kinds of zoning issues, Justice White concluded for the Court, “appears to us to rest on an irrational prejudice against the mentally retarded . . .” In his opinion, Justice White also quoted *Palmore*’s maxim that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

The *Cleburne* decision is especially instructive. The Court was able to invalidate the local zoning ordinance at issue without finding mental retardates a suspect class or even a quasi-suspect class. Thus, Justice White’s opinion suggests that irrational prejudices cannot alone form the basis for disparate treatment of even unprotected groups, such as lesbians and gays.

Both *Palmore* and *Cleburne* were adjudicated under Fourteenth Amendment equal protection analyses. The notion that second hand prejudices on the part of private parties should not be embraced and furthered by the state emerges even more strongly in the context of the “heckler’s veto” in First Amendment jurisprudence. A review of this caselaw is the subject of the next section.

**B. Second Hand Prejudice and the First Amendment**

The maxim that a constitutionally recognizable interest cannot be abridged by the state merely in deference to the prejudices of others is a firmly established principle of First Amendment jurisprudence. Decades ago, Professor Harry Kalven coined the term “heckler’s veto” to refer to this principle of constitutional law. Although the Supreme Court has rarely used the phrase, it has consistently embraced the principle.

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15. *Id.* at 450.
16. *Id.* at 448 (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984)).
Early "heckler's veto" cases involved outdoor speeches delivered by orators of one radical stripe or another to highly volatile crowds of supporters, critics, or both. The speaker in Terminiello v. Chicago\(^19\) delivered a diatribe against Jews, Communists and others. The Court overturned Terminiello's disorderly conduct conviction. Justice Douglas made clear that the First Amendment was designed to protect even the most unruly speakers:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.\(^20\)

Two years later, Justices Black and Douglas dissented from a decision that upheld a "breach of the peace" conviction against a left-wing speaker.\(^21\) The dissenter argued that before the police "ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him."\(^22\) Speakers who confront hostile audiences need government protection. If they do not receive it and if the state permits the mob to dictate the acceptability of speech topics, then the state will have "become the new censors . . ."\(^23\) A corollary argument could be raised in the context of the gay military debate. If the military leadership fails to instill values of tolerance and mutual respect in recruits, then the leadership will have become the allies of those few recruits who might strike out at their openly gay comrades.

The logic of the Black/Douglas dissent in Feiner has generally\(^24\) become the Supreme Court majority doctrine. In 1966, the
Court overturned a breach of the peace conviction where the defendants had conducted a "sit-in" to protest a public library's segregationist policies.\textsuperscript{25} Justice Fortas' plurality opinion explained that "participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."\textsuperscript{26} Three years later, Dick Gregory's disorderly conduct conviction in Chicago was similarly overturned.\textsuperscript{27} Gregory and his followers had picketed Mayor Daley's residence and the immediate neighborhood in protest of the city's failure to desegregate its schools. The Court found that the disorder had come not from Gregory but from the Mayor's neighbors, who had pelted the demonstrators with rocks and other objects and had turned their garden hoses on them.

The issue of how to properly define patriotism often seems to be at the core of the gay military debate. Ban supporters claim that gays inappropriately emphasize the "individual rights" aspects of the debate to the detriment of the common good, while ban opponents counter that they are the true patriots, willing to risk their lives for their country even in the face of a continuing pattern of prejudice against them. The flag burning cases that became so much a part of the 1988 Presidential campaign rhetoric similarly forced the Court to deal with the relationship between the First Amendment and patriotism. In the first case,\textsuperscript{28} the Court held that Texas's flag desecration statute was unconstitutionally applied to a demonstrator protesting President Reagan's policies outside of the Republican National Convention in Dallas. The government may not punish a speaker simply because the audience "takes serious offense at particular expression," Justice Brennan wrote for the Court, nor may it assume that such an audience "is necessarily likely to disturb the peace . . . ."\textsuperscript{29}

In its next term, \textit{United States v. Eichman}\textsuperscript{30} called upon the Court to determine the constitutionality of the recently enacted

\begin{itemize}
\item \textsuperscript{25} Brown v. Louisiana, 383 U.S. 131 (1966).
\item \textsuperscript{26} \textit{Id.} at 133 n.1.
\item \textsuperscript{27} Gregory v. City of Chicago, 394 U.S. 111 (1969).
\item \textsuperscript{28} Texas v. Johnson, 491 U.S. 397 (1989).
\item \textsuperscript{29} \textit{Id.} at 408.
\item \textsuperscript{30} 496 U.S. 310 (1990).
\end{itemize}
federal Flag Protection Act of 1989. The lower court had thrown out Mr. Eichman's conviction under the Act, a result affirmed by Justice Brennan's majority opinion, in which he allows that "desecration of the flag is deeply offensive to many." Yet many other kinds of expressive conduct are equally offensive—"virulent ethnic and religious epithets" and "scurrilous caricatures" among them. Just as these and other viewpoints (or manners of expressing them) cannot be categorically criminalized on the basis of the audience's sensibilities, neither may Congress so grossly restrict the communicative options open to anti-government protesters.

The most recent case in which the Court has refused to countenance a heckler's veto was decided during the 1991-1992 term. Forsyth County v. Nationalist Movement invalidated an ordinance that mandated permits for demonstrating on public property. The fee for such permits (not to exceed $1,000) was to be determined by the local magistrates partially on the basis of the predicted audience reaction to the demonstration and the resulting need for police services. Justice Blackmun's majority opinion questioned the constitutionality of any ordinance that would charge more for expressing viewpoints "unpopular with bottle-throwers."

This section has chronicled the development of the "heckler's veto" doctrine from the 1940s onward. Before building an argument to the effect that the military's current antigay policy amounts to a heckler's veto, we will examine "civilian" caselaw from the gay rights movement in which antigay litigants have attempted unsuccessfully to impose a heckler's veto on homosexual expression.

31. The statute criminalized the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag." Id. at 317. As Justice Brennan pointed out, each of the specifically proscribed actions, with the possible exception of "burning" the flag, suggests that the lawmakers had set out to punish a specific viewpoint (disrespect for the flag or for that which the defendant takes it to represent).

32. Id. at 318-19.

33. A more recent case involving the sending of unpopular messages (specifically the burning of a cross in violation of a local Bias-Motivated Crime Ordinance) was not treated by the Court as a "heckler's veto" controversy. Justice Scalia's majority opinion in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), invalidated the ordinance as underinclusive, suggesting that the St. Paul lawmakers might have been able to more evenhandedly criminalize the display of any symbols likely to cause a breach of the peace.


35. Id. at 2403.
C. The Heckler’s Veto and the Gay Rights Movement

Most of the time, a young man’s choice of a date for the senior prom is of no great interest to anyone other than the student, his companion, and, perhaps, a few of their classmates. But in Aaron Fricke’s case, the school authorities actively disapprove of his choice, the other students are upset, the community is abuzz, and out-of-state newspapers consider the matter newsworthy. All this fuss arises because Aaron Fricke’s intended escort is another young man.36

Aaron Fricke’s classmates were “upset” by his decision to take Paul Gilbert to the senior prom. One of his classmates physically attacked him in school, necessitating five stitches under his right eye.37

Not surprisingly, Judge Pettine took note of this incident in his opinion. Nonetheless, he ruled for Fricke after determining that the school administration had it within its power to protect Aaron and his date from any of the tiny minority of his schoolmates who would be predisposed towards violent response. “To rule otherwise,” he added, “would completely subvert free speech in the schools by granting other students a ‘heckler’s veto,’ allowing them to decide — through prohibited and violent methods — what speech will be heard. The First Amendment does not tolerate mob rule by unruly school children.”38

Also manifesting features of the heckler’s veto is the long and complicated litigation commenced by Dignity (a group of gay Catholics) seeking to demonstrate their feelings about the church leadership. Dignity conducts vigils on the steps of St. Patrick’s Cathedral during New York’s Gay Pride Parades.39 When the case reached the federal appellate level the first time in 1985, the majority held that the Police Department’s fears about likely violence were well justified, necessitating the Department’s decision to close the Cathedral steps to all demonstrators during the

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37. I telephoned Aaron a few days after the filing of his federal lawsuit had hit the national press. Almost as soon as I stated my name and ascertained that it was indeed Aaron on the other end of the phone, he asked, “Are you a reporter?” When I explained that I was a graduate student doing research on court cases such as his, he told me he had just gotten back from the hospital. Telephone interview with Aaron Fricke (1980).
38. Fricke, 491 F. Supp. at 387.
Gay Pride march. Judge Cardamone pointed to several exigen-
cies which collectively validated the Police Department's caution:

First, several lawsuits have been commenced against the
City by groups attempting to enjoin the holding of the
parade. Second, Catholic War Veterans and Knights of
Columbus members have expressed strong opposition to
gays gathering near the Cathedral. They and a group des-
ignated as the Committee to Defend the Cathedral are
sending literature and mailings in an effort to recruit anti-
gay demonstrators. Last year, some members of these
groups overran the police barriers and claimed the police
had "double-crossed" them by permitting Dignity to hold a
service. Third, over the past year the Catholic Archdiocese
of New York has taken a strong stand publicly against the
economic interests of gay people by refusing to hire them.
Fourth, Dignity members in the past year have demon-
strated more than once at the Cathedral. Fifth, this year's
parade organizers met with the police in late May 1985 to
inform them that according to their own "highly reliable"
sources a large number of Orthodox Jews from Brooklyn
planned to block the parade route near 49th Street. The
Grand Marshall of last year's parade said that if the police
failed to remove the Jewish demonstrators forcibly, the
marchers would. The police have considered all this infor-
mation and as a result of their own investigation credit
much of it. The police believe that the parade this year will
be more volatile than in the past.40

Judge Kearse wrote a stinging dissent to the majority's will-
ingness to permit the abridgment of First Amendment liberties
by the most antigay members of Dignity's audience:

[I]t becomes clear that the only reason the Department
seeks to bar plaintiffs' group from the Cathedral sidewalk
is because of the threats of the anti-gay groups. This
response by the Department, in lieu of reliance on its more
usual policy of providing a one-block buffer zone from
whatever the site of plaintiffs' demonstration may be,
plainly has given the Catholic anti-gay groups a classic
"heckler's veto." Such a veto has consistently been rejected
by the courts as a valid basis for restricting the exercise of
free speech in a traditional public forum.41

40. Olivieri, 766 F.2d at 692-93.
41. Id. at 696.
When the same issue presented itself on the eve of the 1986 Gay Pride March, an appellate panel (including two of the same three judges as the previous year) decided to permit Dignity members to demonstrate up to one hundred strong for that year and every year thereafter.42

If an antigay heckler's veto was not permitted to stifle free speech even in the presence (as in the Olivieri cases) of strong evidence that violence will result, it is no surprise that courts have an easier time defusing the heckler's powers in the absence of such evidence. This was a lesson learned several years ago by the Washington D.C. Metro system's governing body when it refused to place a series of pictorial ads submitted by the local Gay Activists Alliance on subway cars. Metro argued that the poster ads, which pictured a wide array of Washingtonians of different races and ages with the one-sentence caption, "Someone in your life is gay," would offend commuters. Judge Pratt would not permit such second hand prejudice to trump the First Amendment, despite the fact that "many riders will undoubtedly take umbrage" upon viewing the posters.43

The heckler's veto doctrine has not always prevailed when gay activists have litigated First Amendment issues.44 One particularly tragic case emerged from Bangor, Maine, in 1985, where a high school administrator decided to cancel "Tolerance Day" (organized by a teacher in response to an incident wherein a group of teenage thugs pushed a gay teen over a bridge to his death).45 Townspeople expressed strong displeasure with the invitation extended to a local lesbian activist as a participant/

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42. Olivieri, 801 F.2d at 607-08. Counterdemonstrators in equal numbers would also be able to use the steps thirty minutes after the Dignity members had moved on. The police would be granted authority to impose more restrictive measures "if in their professional judgment circumstances at or near the site posed a danger to public safety." Id.

43. Gay Activists Alliance v. Washington Metro, 78-2217, Slip op. at 11 (D.D.C. 1979). During my tenure as Executive Director of the ACLU's Western Missouri affiliate office in the early 1980s, only a threatening letter from a volunteer attorney was needed to compel the local transit system to permit a gay rights group to advertise on buses. Their message, perhaps a reflection of the difference between East Coast and Midwest sensibilities, was that "Someone in your life may be gay."

44. For a more extensive review of First Amendment gay rights litigation, see Paul Siegel, Lesbian and Gay Rights as a Free Speech Issue, in GAY PEOPLE, SEX, AND THE MEDIA (Wolf & Kielwasser, eds. 1991). For a less optimistic view of the current status of the gay rights agenda as a free speech movement, see Brent H. Allen, The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation, 47 VAND. L. REV. 1073 (1994).

lecturer for the special day. The Maine Supreme Court determined that the townspeople's displeasure could turn violent, and therefore the school administrator's act was justified. The ruling legitimized second hand prejudice.

Solmitz is a special context case because it concerns a local government's affirmative obligation to protect the children in its charge, children who after all attend under compulsion of law. Although the United States military is currently a volunteer force, military commanders, and the courts that ultimately review their actions, often treat the armed forces as a special context as well. The next section suggests why, nonetheless, the military's gay exclusionary policy should be seen as a classic heckler's veto, a manifestation of second hand prejudice.

III. "DON'T ASK, DON'T TELL" AS SECOND HAND PREJUDICE

A. A Difference Without a Difference?

Within the field of constitutional law, it is well-accepted that First Amendment free speech claims and Fifth Amendment or Fourteenth Amendment equal protection claims are often inextricably intertwined.46 The interrelatedness of the two kinds of claims emerges clearly in the gay military debate:

The only reasons the government offers for the military's regulation of homosexual conduct are based on what that conduct communicates to other service members who may be offended by knowledge that some of their fellow soldiers are gay or lesbian. Moreover, the military policy treats the very same conduct—hand-holding, kissing, marriage, and sexual conduct—differently depending on whether it sends a heterosexual or homosexual message.47

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Just as the child in *Palmore* would face hostility by dint of what her custodial parents' interracial marriage might "communicate" to onlookers, so too the military argues that identical behaviors communicate quite different messages depending upon the gender (rather than the color) of the senders. As critics from both sides of the issue have pointed out, there is very little difference between the pre-Clinton Administration policy and current military policies concerning gay soldiers. Whereas the bold assertion from the old policy that "homosexuality is incompatible with military service" is gone, "homosexual conduct" is still grounds for separation from the service. Moreover, "homosexual conduct" is defined so broadly not only to include same-sex physical contact whose purpose is sexual release, but also many kinds of physical contact (including hand-holding) that might "demonstrate a propensity" to engage in such acts. The important difference between the old and new policies is encapsulated in the catchphrase, "don't ask, don't tell." The military and the gay recruit enter into a winking dance of deception. Questions about one's sexual orientation are generally not permitted in the recruitment process (though the military's policies regarding homosexual conduct will be explained to recruits), and the recruit is not to volunteer such information then or at a later date.

At first blush it might seem that the military leadership's part of the bargain amounts to burying its collective head in the sand ("if they don't come out as gay, we can pretend we don't have gays among us"). Something quite different is afoot, however. Military spokespersons and even the most antigay members

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48. Speaking of the soon to be publicly released "don't ask, don't tell" policy, Congressman Barney Frank indicated that "it does not meet the kind of minimum standards that I was hoping for or that several of us reiterated a couple of weeks ago." He thus "urged the President not to accept it in the form that I see it." *Gays in the Military* (News Conf. with Barney Frank (D-MA), Fed. News Serv., July 16, 1993). Reacting to the feature of the new policy warning soldiers that telling anyone of their gay orientation will create a strong presumption that they will engage in prohibited homosexual conduct, Senator Thurmond told the Senate Committee: "I believe homosexuality is incompatible with military service. I was glad to see a similar statement in Secretary Aspin's policy memorandum." *Gays in the Military, Hearing of the Senate Armed Serv. Comm.* (Fed. News Serv., July 21, 1993).


of Congress are on record openly admitting that gays and lesbians have served in the military with distinction for as long as anyone can remember, and that they likely will continue to do so.\textsuperscript{51} The only gays who need to be separated from the service are those whose orientations become known, those who "come out" as gay.

The military leadership offers two main reasons for refusing to enlist open gays. Both reasons rely upon a prediction of negative reaction from the majority of heterosexual troops. The first argument is the privacy rationale, usually presented in a context that includes reference to the cramped quarters and shared shower and toilet facilities forced upon some soldiers. We separate men and women, so the reasoning goes, so won't we also have to separate gays and straights?

The second reason is the more global claim that the presence of open gays will jeopardize "unit cohesion." The presence of open gays, opponents assert, would lower the morale of the vast majority of the troops.\textsuperscript{52} Proponents of this line of argument recognize the need to distinguish antigay prejudice from racial prejudice because the military has done a remarkable job of creating a highly racially integrated environment. The military accomplished this feat even though the majority of white soldiers favored continued segregation when President Truman's directive was issued back in 1948.

The argument for continuing the military's gay ban, whether phrased as an issue of sexual modesty or as one of morale, is a textbook example of the kind of second hand prejudice that the Supreme Court so critically examined in the \textit{Palmore}

\textsuperscript{51} Even before the first of his hearings on the gay military issue, Senator Nunn indicated he has "no doubt that homosexuals have served, and are serving today, in our armed forces with distinction, and many times with courage and valor." \textit{Gays in the Military}, (CNN Television Broadcast, Jan. 27, 1993), available in LEXIS, News Library, Script File. Senator Warner of West Virginia testified: "History has shown that they have served side by side in many capacities. And in my experience in the Department of the Navy, I think most of those services which were quite commendable I said the other day, it took a special type of patriotism going in, knowing you're violating the law, subjecting yourself to humiliation from fellow service persons, and indeed being tossed out." \textit{The Role of Unit Cohesion in Developing Combat Effectiveness in Relation to the Ban on Homosexuals in the Military}, Senate Armed Servs. Comm., Reuter Transcript Rep., Mar. 31, 1993, available in LEXIS, News Library, Script File [hereinafter \textit{Role of Unit Cohesion}]. This viewpoint has been echoed by Colin Powell and others among the upper echelons of the military. Cole & Eskridge, \textit{supra} note 47, at 332.

\textsuperscript{52} \textit{Role of Unit Cohesion}, \textit{supra} note 51 (testimony of Dale Henderson, Former Commander, Army Research Institute; David Marlowe, Military Psychiatrist, Walter Reed Hospital).
line of cases. Moreover, because the predicted catastrophic results would come about only as a result of gays' "coming out" openly, the military ban raises First Amendment issues. As Cole and Eskridge point out, "the very name given to the military's policy—'don't ask, don't tell'—reveals that it is designed to regulate expression."\(^5^3\) The next two sections will offer refutations to the military's privacy and unit morale arguments.

B. *Stop Looking At Me That Way! Sexual Modesty and the Military*

The gay military issue has tended to proceed by analogy. To determine whether or not the military would be able to adjust to having openly gay soldiers in their midst without suffering diminished morale, analogies have been made to the racial desegregation of the armed forces after World War II and to the experience of other nations that have permitted openly gay soldiers to serve. Arguments for keeping the gay ban in deference to the privacy needs of the majority of (presumably heterosexual) soldiers have been based on an analogy to the armed forces' relatively recent experience of more fully integrating women into military roles.

Advocates seeking to justify a continuation of the gay ban find it necessary to argue that many privacy issues accruing to the military are unique to that setting. Thus, for example, Congressman John Doolittle (R-CA) testified in front of the Republican Research Committee's Task Force about his recently having visited the Naval Academy at Annapolis for the first time:

> It's truly impressive to see the caliber of young people that serve there in the Academy. It also was driven home to me the conditions in which they live. They're close quarters . . . . It's two to a room. I understand at West Point it's three to a room.\(^5^4\)

Professor David Schlueter of the St. Mary's School of Law echoed this sentiment in his testimony before the Nunn committee:

> It is critical that it be understood - the potential importance of this issue. Unlike most civilian jobs, servicemembers typically do not leave the installation at the end of the work day to return to civilian life. The servicemembers' home is often a small two-person tent, a cramped berth in a submarine, or an open-bay barracks where a large number of individuals share not only a com-

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\(^5^3\). Cole & Eskridge, *supra* note 47, at 332.

\(^5^4\). *Republican Research Comm.*, *supra* note 7.
common sleeping area but a common shower and restroom facilities as well. What little physical privacy exists in such conditions is highly treasured.  

It is precisely because of the close quarters in which some categories of military personnel must serve that our policy has been to separate living and bathing facilities for men and women. Several participants in the gay military debate argued that the same reasoning would mandate separating gays from straights. Congressman Henry Hyde (R-IL) chided his colleagues:

Anyone who has a daughter has to imagine your daughter living in a barracks with a bunch of men and dressing and showering. You'd say that's unconscionable, that's wrong. I am unable to distinguish the difference between having to do that with people whose sexual orientation and arousal level is exactly the same and maybe more, for all I know.

Congressman Hyde's reference to sexual "arousal levels" carries with it the presumption that the main reason we segregate males and females in military settings is to avoid sexual mingling. This is a sentiment that several senators emphasized time and again in questioning witnesses before the Nunn committee. Consider this exchange between Senator William Cohen and Lawrence Korb, former Assistant Secretary of Defense:

SEN. COHEN: Let me just ask you: Should there be separate facilities for women on board submarines or aircraft carriers?
MR. KORB: I think there already are separate facilities.
SEN. COHEN: But, should there be?
MR. KORB: I think there should be.
SEN. COHEN: Why?
MR. KORB: Well, because of the way in which society expects us to separate people.
SEN. COHEN: No, no. But, why? What would be the rational basis for society demanding a separation of the sexes?


56. Republican Research Comm., supra note 7. Speaking to the same body, Representative Floyd Spence (R-SC) added: "With the women in the military we have to have separate facilities for bathing and toilets and so forth, sleeping quarters. What would we have to contend with in separating facilities with homosexuals in the military?" Id.
MR. KORB: I think it's based upon the moral values that we have.

SEN. COHEN: Does it have to do with sexual attraction of male and female?

MR. KORB: Certainly. That's one component of it.  

At another point in the hearings, Senator Dan Coats is questioning William Dale Henderson, former commander of the Army Research Institute:

MR. HENDERSON: So, sex does have a negative effect on military activities.

SEN. COATS: Is that then the basis essentially for segregating men and women in close living situations?

MR. HENDERSON: Well, you have other issues too. You have the privacy issues —

SEN. COATS: But it's the sexual attraction, tension, that could either undermine or destroy the unit. That is the basis for separate living quarters.

Senator Coats clearly wished to elicit a response to the effect that the main reason for segregating men and women in the armed forces is the desire to dampen heterosexual attractions. Sexual modesty, however, is not simply the opposite of sexual lasciviousness. The genders shield their bodies from each other for reasons far more complex than to avoid signalling a desire for sexual comingling.

Sexual modesty, especially women from men, is often a very physical manifestation of a much larger phenomenon. Our society's long history of complementary sex roles assigns males and females to separate spheres. Our genders define which doors we are permitted to enter and which are closed to us, which conversations we will be privy to, and which will be denied us:

The separation of men and women allows them to play complementary roles. They are mysteries to each other. "What does a woman want?" asked Sigmund Freud, one of the most insightful men of his time. It was a question that could still be understood well by teenage boys in the 1950s and 1960s. In the traditional sex-divided world, men and women cannot fully understand each other's experiences.

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57. Role of Unit Cohesion, supra note 51.
58. Id.
Their meetings are explorations and adventures into the unknown.\(^6^0\) The ramifications of this deceptively complex truth — that men and women function in quite different worlds — can be as playful as the frequent jokes in the *Cathy* comic strip about how men and women manifest fundamentally different life coping styles, or as serious as the Supreme Court’s ruling that sexual harassment claims must sometimes be judged using the perspective of a “reasonable woman.”\(^6^1\) In any event, so widespread are the effects of gender segregation in our society that some linguists treat communication between the sexes as a form of intercultural communication.\(^6^2\) Males and females shield their naked bodies from each other, then, sometimes simply to maintain their status as the “other.”\(^6^3\)

Meyrowitz refers in the quote above to teenage boys from the 1950s and the 1960s. A central tenet of his book is that the kinds of candid entertainment programming that were produced on television in the 1970s and beyond have served to merge the separate spheres. Television in the 1970s permitted men and women to see each other’s secrets or “backstages.” Yet even in the 1990s there is much resistance to having some aspects of the opposite sex’s private sphere exposed to public view. This is perhaps most apparent in the controversy over breast feeding in public. While some of the resistance to public breast feeding stems from men’s “inability to make a distinction between what is female and what is sexual, . . . the truth is that there’s nothing sexy about nursing in public, a process that usually includes a

\(^{60}\) Joshua Meyrowitz, No Sense of Place: The Impact of Electronic Media on Social Behavior 204-05 (1985).


\(^{62}\) See generally Deborah Tannen, You Just Don’t Understand: Women and Men in Conversation (1990) (arguing that male and female communication systems are so different that they can be thought of as “genderlects” of a common language).

\(^{63}\) The shielding of one’s eyes from the opposite sex’s naked form occurs in a host of contexts that are largely devoid of sexual tension. As a graduate student in the late 1970s, I shared a double room with three others — a classmate and two faculty members (all female) — at an academic conference. It became a running joke during our week or so together that the most frequently heard utterance was “Paul, turn around” (because at any given time, the chances are one of my roommates was changing clothes). The incident springs to mind because it shows that sexual modesty is not practiced solely to stem sexual desire. The only male in the room, openly gay, was being told to avert his eyes from the female form.
deft disarrangement of garments and . . . is quite like hiding a soccer ball beneath your shirt.”

The societal norm against exposure of the naked body to the opposite sex is applied asymmetrically. We are far more concerned with protecting women from having to reveal their naked bodies to men than vice versa. We do this out of a recognition of the difference in power between men and women. Thus, while many police departments have established policies dictating that strip searches of suspects will be conducted only by officers of the same gender, the rules are seen as a means of protecting female suspects. When hospitals debate whether or not to employ mixed-sex wards as a cost-cutting move, it is the privacy of their female patients that weighs more heavily on the side of sex segregation. Similarly, the California Fair Employment and Housing Commission recently held that a hospital which forbade male nurses to care for pregnant women during labor and delivery was not in violation of that state’s employment discrimination statutes. Even at such venues as swimsuit-optional beaches, women are often quite reluctant to expose their naked bodies.

64. Anna Quindlen, To Feed or Not To Feed, N.Y. TIMES, May 25, 1994, at A21.

65. This is a reality that manifests itself not only in life, but in art as well. Professor Kathleen Lant contrasts the depiction of nudity as a metaphor in male versus female poets: “The unclothed male body is — in terms of the dominant figurative systems of Western discourse — powerful in that it is sexually potent, sexually armed; the naked female body is . . . vulnerable in that it is sexually accessible, susceptible to penetration, exploitation, rape, pregnancy.” Kathleen Lant, The Big Strip Tease: Female Bodies and Male Power in the Poetry of Sylvia Plath, 34 CONTEMP. LITERATURE 620, 626 (1993).


67. Jenny Hope, Are Single-Sex Hospital Wards Becoming a Thing of the Past?, DAILY MAIL, Aug. 16, 1994, at 36; Andrew Cole, Health: A Mixture of Fear and Embarrassment in Hospital, THE INDEPENDENT, Nov. 2, 1993, at 22. Congressman Joseph P. Kennedy’s admonition to his colleagues at a recent hearing is also instructive: The VA will testify that it has “always opened its door to the nation’s women veterans.” But, the sad fact is that is literally the case. One female veteran said, “I was the only female . . . I had to undress in a room with a door that would not close while men were lined up and down the hallway.” This sort of “open door policy” has got to stop. Improving Health Care for Women Veterans, House Veterans Affairs/Oversight and Investigations, Mar. 9, 1994 (citations omitted).


69. Liz Hodgkinson has observed:
Men and women experience nakedness differently. It is no surprise, then, that Congressman Hyde asked us to imagine the horror of his daughter being forced to share close quarters in the military with members of the opposite sex.\textsuperscript{70} Indeed, it would have seemed quite odd for him to have expressed a parallel concern about his son. We seek to protect our daughters, and women in general, because of their perceived powerlessness. We should feel no corresponding need to protect heterosexual servicemen and women from their lesbian and gay counterparts because the latter groups wield the lesser power.

The analogy between gender segregation and the posited need for segregation based on sexual orientation thus is at best an imperfect one. There is no history of segregating lesbians from heterosexual females, or gay males from heterosexual ones, that corresponds to the long history of segregating the sexes themselves. As Congressman Barney Frank explained in a debate with Senator Dan Coats on a \textit{Face the Nation} broadcast:

\begin{quote}
I have to point out to people that gay men and straight men have been sharing dormitories, showers, health clubs for a very long time. I mean, gay men and lesbians throughout this country join health clubs, they live in college dormitories. We don't have ourselves dry-cleaned. We've been taking showers for a long time.\textsuperscript{71}
\end{quote}

Thus far we have treated the shared showers analogy as if it were on all fours, intended as an argument for the need to provide separate bathrooms and living spaces for openly gay soldiers. But the analogy was always intended instead as an argument in support of maintaining the ban against openly gay soldiers altogether. Segregated barracks of heterosexual males and of heterosexual females would presumably be devoid of sexual tensions.

\textsuperscript{70} See supra text accompanying note 56.
\textsuperscript{71} \textit{Face the Nation} (CBS television broadcast, Jan. 31, 1993), Reuter Transcript Report, available in LEXIS, News Library, Script File.
By the same reasoning, lesbian and especially gay male barracks would be hotbeds of orgiastic expression.

It remains for us to address the second argument used in favor of continuing the military gay ban. The claim that integrating "known homosexuals" into the military will damage troop morale in ways that racial integration of the forces did not is the subject of the next section.

C. Benign Is as Benign Does: Can't We Just All Get Along?

Many gay activists hoped that then-Chairman of the Joint Chiefs of Staff, Colin Powell, by dint of his own minority status, would manifest a special sensitivity to members of sexual minority groups.72 Such hopes proved naive when Powell testified in front of Congressman Hamilton's committee. Homosexuality is not a "benign" characteristic such as race or color, he told the Committee.73 Rather, homosexuality is a matter of conduct. It is one of the most "fundamental" aspects of human behavior imaginable.74

General Powell seems to be saying that racial prejudices are intolerable, while prejudices against gays are at least understandable if not excusable. The difference between the two kinds of prejudice hinges on the "benign" nature of race. It is possible that Powell intended by this choice of words to focus on the immutability of race or the lack of choice involved. However, such a posited contrast between race and sexual orientation does not fit currently available evidence. It is fairly uniformly accepted within the biologic and social sciences communities that sexual orientation is neither a matter of choice nor generally changeable.75

72. Congressman Barney Frank [D-MA], Address at the National Lesbian and Gay Journalists Association Annual Convention (Sept. 1994) (attended by author).
73. House Hearings, supra note 49 (opening statement of General Colin Powell).
More likely, Powell intended to emphasize that racial differences are matters of status, while sexual orientation translates into behavior. This behavior offends many heterosexuals. If this is Powell's argument, his is a sadly ironic oversimplification of racism and of prejudice generally. Prejudices may be triggered by "benign," non-behavioral characteristics such as skin color, but the prejudice itself is an attribution of behaviors and attitudes to members of the group manifesting the benign characteristic. For example, Jews are stereotyped as greedy, women as overly emotional, Asians as brainy but rigid, etc.

In a brief scene in the motion picture, Mississippi Burning, the sheriff's deputy observes his wife playing with their black neighbor's toddler. "Their kids are so cute," he later confides to his spouse. This is the same character who is later sentenced to ten years imprisonment for his part in the killing of the three civil rights workers. Yet even his brand of racism is not directed at the "benign" characteristic of skin color itself. Racism does not stem from color, it stems from behavioral attributions associated with color. When racists say negative things about African-Americans, such statements generally do not focus on skin color or Negroid physical characteristics. Racism is every bit as much a negative reaction to "conduct" as is discrimination on the basis of sexual orientation.

In our own society, the two most fundamental threads of anti-black racism are attributions of dangerousness and of unproductiveness (the latter being sometimes manifested in the belief that blacks are not as intelligent as whites, sometimes in the belief that they are lazy).

76. Powell never explained what he meant when he referred to homosexuality as an issue of "conduct." It is unlikely that he intended reference to overtly harassing behaviors by gays towards straights, such as unwelcome touching or offensive ogling in the showers, because the military would not need a complete ban on openly gay soldiers to prevent such conduct. For the purposes of this Article, it is assumed that Powell was making implicit reference to the scope of "homosexual conduct" in the main part of the policy itself, i.e., same-sex physical contact engaged in for sexual release. For Powell, then, antigay prejudice is different from racial prejudice in that the former is triggered by the knowledge that the object of the prejudice is known or presumed (perhaps by dint of his having "come out" as openly gay) to engage in this kind of sexual conduct (even if exclusively off-base), while the latter is triggered by the mere fact of the object's skin color. This section of the Article is intended as a refutation of Powell's posited distinction.

"There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery . . . . Then look around and see somebody white and feel relieved." These words, spoken by none other than the Reverend Jesse Jackson at a meeting of the PUSH organization on Chicago's south side in 1993, encapsulate the first of the two threads of anti-black racism in our society, the attribution of violent criminal intent to African-Americans, especially to young male African-Americans. It is the same attribution that created a cause célèbre at the offices of the Washington Post several years earlier when Richard Cohen's magazine column expressed sympathy with white jewelry shop owners who used an electric buzzer entry system to exclude young black males from their shops. These shopkeepers were not acting out of unadorned racism, Cohen claimed. Rather they were reacting to a fear of the combination of race, age and gender. Such a reaction is not entirely unfounded, in that "[y]oung black males commit an inordinate amount of urban crime." Cohen, usually viewed as one of the Post's more liberal writers, certainly had misgivings about his own logic:

Of course, all policies based on generalities have their injustices. A storekeeper might not know that the youths he has refused to admit are theology students — rich ones at that. But then insurance companies had no way of knowing I was not a typical teen-age driver. I paid through the nose anyway.

The Post columnist revisited the issue recently in the context of a column criticizing, of all things, the Clinton Administration's "trial balloon" suggesting the possibility of the military's admitting gays into the military but putting them in separate dormito-


81. Id.

82. Id.
ries. Cohen reflected on some of the lessons he had learned since 1986:

No column of mine has ever generated as much controversy. Little wonder. I condoned a pernicious generalization, and while I heard from many people who simply called me a bigot, the ones I remember best were young black males who told tales of being locked out of stores, being watched constantly while shopping or — a story that stays with me still — the young lawyer who emptied the laundry room in his apartment house simply by showing up. Women fled.

The assumption of black dangerousness forces upon African-Americans a coping style that makes it "folly to compete for a taxi on a street corner with whites. It means realizing that prudence dictates dressing up whenever you are likely to encounter strangers (including clerks, cops, and doormen) who can make your life miserable by mistaking you for a tramp, a slut, or a crook." The crucial point again is that these "strangers" are reacting not to "benign" racial features but rather to behavioral attributions based upon those features.

There is a second thread of racist attributions borne by African-Americans in this society. Whereas young black males are feared as potentially violent, almost all blacks are presumed less competent than whites. In responding to a Times-Picayune poll in New Orleans, for example, whites reported their belief that blacks are not only more violent, but also less intelligent and more lazy than themselves. The majority of white respondents attributed blacks' relatively low socioeconomic standing to a "[lack of] motivation or willpower." More recent data from the National Opinion Research Center supports these results. In addition, it emphasizes that the various racial minorities in America all have rather negative images of the others.

Even those African-Americans who have seemingly "made it" in the corporate world are not spared the presumption of relative incompetence. Author and journalist Ellis Cose tells of a visit

84. Id.
86. Elizabeth Mullener, Race Relations In and Around New Orleans, TIMES-PICAYUNE, Nov. 18, 1993, at A16.
to his office by an African-American colleague, an assistant managing editor for the New York Times:

I took him to lunch, and after a few drinks we fell into a discussion of people at the Times, among them a talented black editor whose career seemed to have stalled. Was he in line, I asked, for a high-level editorship that would soon be vacant? My companion agreed that the editor would probably do very well in the job, but then he pointed out that a black person had never held such a post at the New York Times. The Times would have to think hard, he indicated, before changing that, for they could not afford to have a black journalist fail in such a visible position . . . . Failure at the highest levels of the Times was a privilege apparently reserved for whites. 88

Such racist assumptions are quite different from white people's attribution to blacks of criminal intent:

It is unlikely that discrimination against certifiably "safe" blacks stems primarily from fear of black violence. Black executives, for instance, are not barred from private country clubs because white members fear their African-American peers will rob them. Nor do black associates in law firms have such difficulty in advancing because white partners fear that black lawyers will rape their wives. 89

An analysis of racial discrimination, then, reveals precisely what General Powell contends does not exist. The dynamics of discrimination, almost by definition, require behavioral attributions. They do not flow solely or directly from such "benign" personal characteristics as skin color. The specific behavioral attributions may be ludicrous, as when we presume that to be born with a dark skin color is to be born stupid or to be genetically predisposed towards violence, or both. Or the attributions might have more than a kernel of truth to them. 90 The crucial

88. Cose, supra note 85, at 61-62.
89. Id. at 12-13.
90. Consider, for example, a cross-cultural truism from the field of "chronemics," the study of how we treat time. Unlike Americans from Northern European backgrounds, African Americans (as well as persons from most Middle Eastern and Latin American cultures) manifest a tendency to treat time in a "polychronic" fashion. Time is "experienced," it is not "used," "spent," "lost," or "made up." The Northern European's mania about punctuality is not a part of polychronic cultures. It thus makes sense to speak of "colored people's time." From the Northern European perspective, persons who do not show up on time, or who take their time socializing and do not seem to show "respect" for others' felt "need" to not waste time (persons who, for example, socialize while double-parked, as if to say that the few seconds of
point is that General Powell’s posited distinction between attributions based upon skin color and attributions based upon declared sexual orientation — such as the common-sense assumption that most openly gay soldiers are not celibate\(^91\) — is unpersuasive.

If the state has no legitimate interest in fostering racial animus (as the Court made clear in *Palmore*), so too the fact of off-base, private, consensual, sexual conduct among gays is not properly the government’s concern. This should be seen as an unremarkable proposition, given that the government has openly admitted in the course of the gay military debate that its only reason for wanting to regulate such sexual conduct is that some heterosexual soldiers might feel queasy knowing of its existence. This is precisely the kind of second hand prejudice that the government has no business legitimizing.

IV. Conclusion

This Article’s thesis has been that the military’s recently revamped policies concerning homosexuality, which provide for exclusion of openly gay soldiers whose “homosexual conduct” becomes known, amount to granting a government imprimatur to second hand prejudice. Such governmental acquiescence to others’ personal animus against recognizable minority groups has been rejected by the Supreme Court in numerous circumstances, especially when such animus takes the form of a “heckler’s veto” aimed at squelching acts of speech (such as coming out as openly gay).

None of this is to suggest that liberalizing the armed forces’ gay exclusion policies will be an easy task. By most accounts, the vast majority of American soldiers oppose lifting the homosexual ban.\(^92\) Survey data on the acceptance of “the homosexual lifes-
While General Powell's attempt to contrast the nature of antigay and antiblack prejudice was unconvincing, a silver lining emerges from looking back to the military's long struggle with racial integration begun in the 1940s. A mere three years after President Truman's 1948 order, the ratio of white soldiers opposing racial integration had dropped from 80 percent to 44 percent. The military's model for sensitivity training on racial and other diversity issues has been lauded and unabashedly copied in the civilian world.

Although it is possible that negative attitudes towards gays are more widely and deeply felt than are racist attitudes, there are striking similarities between the obstacles faced by the military in enforcing President Truman's directive and that which will be faced by the military should the Supreme Court find the current homosexual ban unconstitutional. As NAACP President William Gibson told the Nunn committee (through Senator Kennedy), the very same arguments seen now for keeping the homosexual ban had been used two generations ago: "They said whites would not shower with blacks, they would not sleep in the same barracks, they would not take orders from black superiors."

There is no reason to conclude that the military is incapable of devising sensitivity training that, together with leadership by

93. Id. (Testimony of William Dale Henderson).
94. Id. (Testimony of Lawrence Korb).
96. While a detailed review of gay military caselaw is not the purpose of this Article, suffice it to say that there have been some notable exceptions to the general pattern of judicial deference to the military. See Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994) (asserting one's sexual orientation not sufficient to justify separation); Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994) (striking down "old" exclusion policy as violative of Equal Protection and Due Process); Able I v. United States, 847 F. Supp. 1038 (E.D.N.Y. 1994) (granting preliminary injunction against enforcement of new "Don't Ask, Don't Tell" policy); Able II v. United States, No. CV 94-0974, 1994 U.S. Dist. LEXIS 13519 (E.D.N.Y. Sept. 14, 1994) (rejecting government's motion to dismiss complaint). Moreover, some of these exceptional cases manifest a strong "heckler's veto" texture. In Cammermeyer, Judge Zilly required the military to reinstate plaintiff, based upon Equal Protection and Due Process grounds. The heckler's veto is found in his assertion that "the rationales offered by the Government to justify its exclusion of homosexual servicemembers are grounded solely in prejudice." Cammermeyer, 850 F. Supp. at 926.
97. Role of Unit Cohesion, supra note 51.
example, would serve to smooth the transition to a more liberal policy. Much research in the civilian sector indicates that such training can be highly effective.98 This data is very consistent with the often reported finding that persons who are knowingly acquainted with at least one gay person are much less likely to report antigay animus than are those who do not believe they have any gay friends or acquaintances.99 The upside of being part of an invisible minority may thus be that to know us is to love us.

Prior to the 1992 Presidential campaign, few in the gay rights movement would have guessed that the likely next battle to be felt nationwide, and most likely to produce a Supreme Court ruling, would be the military issue.100 None in the movement would have wished it, with the courts’ longstanding tendency to defer to the military. Still, that is where we are. The next year or two should show whether or not the Supreme Court will recognize the military’s “don’t ask, don’t tell” policy as an unadorned heckler’s veto, a form of prejudice once removed.


99. Affidavit of Gregory Herek, in GAYS AND THE MILITARY, supra note 75, at 121, 123.
