

**SERVING WITH INTEGRITY: THE RATIONALE FOR THE
REPEAL OF “DON’T ASK, DON’T TELL” AND ITS BAN ON
ACKNOWLEDGED HOMOSEXUALS IN THE ARMED FORCES**

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“I will end ‘don’t ask-don’t tell.’”

—President Barack H. Obama¹

*“The question before us is not whether the military is
prepared to make this change, but how we best prepare
for it.”*

—Joint Chiefs of Staff Chairman Admiral Mike Mullen²

“I am straight, but I’m not narrow.”

—Congresswoman Carol Shae-Porter³

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¹ Sheryl Stolberg, *Obama Pledges Again to End ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Oct. 10, 2009, at A24 (quoting President Obama in an October 2009 speech).

² Editorial, *Gates: Pentagon Preparing Repeal of ‘Don’t Ask, Don’t Tell’ Policy*, CNN, Feb. 2, 2010, <http://www.cnn.com/2010/POLITICS/02/02/gays.military/index.html> (quoting Joint Chiefs of Staff Chairman Admiral Mike Mullen).

³ Steve Ralls, *Straight but Not Narrow in the House*, HUFFINGTON POST, Jul. 23, 2008, http://www.huffingtonpost.com/steve-ralls/straight-but-not-narrow-i_b_114650.html (quoting Congresswoman Carol Shae-Porter in a 2008 hearing on Don’t Ask, Don’t Tell).

I. Introduction

On 1 April 2003, an elite group comprised of Army Rangers, Army Special Forces, and Navy Seals rescued injured prisoner of war Private First Class Jessica Lynch.⁴ Although military spokespeople explained aspects of the daring rescue operation that had been broadcast to millions of American viewers, most members of the public never knew that one of the Rangers participating in the operation—Sergeant Brian Hughes—was gay.⁵ A Yale-educated Soldier who joined the military out of a sense of duty to his country, Hughes rose to the rank of sergeant in only three years and participated in numerous combat missions in Afghanistan and Iraq.⁶ Despite his successful and honorable first term of service, Hughes reported that he left the military because it became too painful for him to constantly hide his sexual orientation under “Don’t Ask, Don’t Tell.”⁷ For Hughes, military service meant living a lie. It also precluded his partner from accessing support networks upon which heterosexual servicemembers and their loved ones commonly rely, and ones he surely required.⁸ When he left the Army, Hughes’ institutional knowledge and talent left with him—to the detriment of his unit, its mission, and the country.⁹

⁴ E.g., Editorial, *Safe—GIs Rescue POW Teen Jessica—Battle for Karbala Rages as U.S. Drives to Baghdad*, N.Y. POST, Apr. 2, 2003, at 1; Editorial, *POW Rescue a Rare Feat*, CHI. TRIB., Apr. 3, 2003, at 8.

⁵ NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 205 (2009).

⁶ *Id.* at 205. Brian Hughes, *Gays Have Served Honorably in the War on Terror*, WALL ST. J., May 21, 2009, at A17.

⁷ Jay Blotcher, *Life After Iraq*, ADVOCATE, Nov. 9, 2004, at 25; FRANK, *supra* note 5, at 205.

⁸ *Id.* at 7. Unlike the spouses of heterosexual servicemembers, who enjoy access to family support networks, health care services, legal assistance, and casualty affairs assistance, partners of gay servicemembers must bear the stresses of military life and deployments alone and in secret, and are denied all these essential services. See, e.g., IN THEIR BOOTS: SILENT PARTNERS (2009), available at http://www.intheirboots.com/itb/index.php?option=com_content&view=article&id=85&Itemid=149 (last visited Apr. 12, 2010) (examining the experiences of partners of homosexual deployed servicemembers).

⁹ Brian Hughes, *Gays Have Served Honorably in the War on Terror*, WALL ST. J., May 21, 2009 at A17, <http://online.wsj.com/article/SB124286225508241195.html>. See also Bryan Bender, *Policy on Gays Seen Hurting Military, Others with Same Skills are Recalled*, BOSTON GLOBE, July 9, 2004, at A3 (asserting that critical jobs left unfilled due to the discharge of gays, lesbians, and bisexuals [GLB] have had to be filled by former servicemembers recalled to active duty).

An estimated 66,000 gays, lesbians, and bisexuals (GLB) are currently serving the American military.¹⁰ Many of them, like Sergeant Hughes, find it difficult to bear the heavy burdens of “Don’t Ask, Don’t Tell” (DADT), which is a federal statute and military policy prohibiting recruiters from asking individuals about their sexual orientation and preventing GLB servicemembers from revealing their sexual orientation through word or deed.¹¹ Don’t Ask, Don’t Tell bans GLB servicemembers from (1) engaging in homosexual acts, (2) stating that they are homosexual, or (3) marrying a person of the same sex.¹² Underlying the statute, 10 U.S.C. § 654, is the proposition that allowing the service of individuals who have a “propensity or intent to engage in homosexual acts [will] create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”¹³

Despite its stated rationale, DADT has come under fire in recent years by active duty servicemembers,¹⁴ civilians, veterans,¹⁵ and political and military leaders, some of whom were involved in its very

¹⁰ Brendan McGarry, *Scholar: About 66,000 Gays Are in Military*, MIL. TIMES, Jan. 27, 2010, http://www.militarytimes.com/news/2010/01/military_gays_inservice_012710w/; see also, Gary Gates, *Gay Men and Lesbians in the U.S. Military: Estimates from Census 2000*, URBAN INST., Sept. 28, 2004, <http://www.urban.org/publications/411069.html> (providing an earlier estimate of 65,000, based on the 2000 Census).

¹¹ Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+10USC654 (last visited Feb. 20, 2010).

¹² *Id.* § 654.

¹³ *Id.* § 654(a)(15).

¹⁴ See, e.g., Captain Tim Hsia, “*Don’t Ask, Don’t Tell: Don’t Keep*,” N.Y. TIMES, Jan. 27, 2010, <http://atwar.blogs.nytimes.com/2010/01/27/dont-ask-dont-tell-dont-keep/> (discussing an active duty infantry officer’s observations as the negative impact DADT has on the military); Craig Whitlock & Greg Jaffe, *Let Gays Serve Openly in Military*, WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020200251.html?sid=ST2010020201834> (citing the opinion of an active duty military officer that the presence of acknowledged GLB troops will not be a “big deal” among the majors he is serving with or with most junior soldiers because today’s military has “become accustomed to the idea that gays have served honorably alongside us for some time”).

¹⁵ E.g., Editorial, *Former Joint Chiefs Chairman: Time to Include Gay Troops*, CNN, Jan. 30, 2007, <http://www.cnn.com/2007/US/01/30/pysk.shalikashvili/index.html> [hereinafter Former Chairman] (discussing former Chairman of the Joint Chief of Staff John Shalikashvili’s belief that the presence of acknowledged GLBs will not undermine the efficacy of the Armed Forces); Erica Demarest, *Gay Veterans Share stories, Advocate Repeal of “Don’t Ask, Don’t Tell,”* available at <http://news.medill.northwestern.edu/chicago/news.aspx?id=153428&print=1> (last visited Nov. 23, 2009).

implementation in 1993.¹⁶ Current military leaders publicly dispute the policy rationale that has supported DADT since the early 90s.¹⁷ Gay, lesbian, and bisexual combat veterans returning from deployments have publicly “come out of the closet,” providing testimony about their experiences that many members of Congress have considered with great interest.¹⁸ Moreover, public support for lifting the ban, even among political conservatives, is high,¹⁹ prompting legislation in support of

¹⁶ See, e.g., FRANK, *supra* note 5, at 115–17. General Mintor Alexander, U.S. Army [Ret.], who led the Army’s DADT advisory group in 1993, recalls it had no empirical data on which to base its recommendation but recommended implementing the ban anyway. Their advice, he recalls, was based on fears and subjective data. Alexander now believes the ban is harmful to military readiness and morale and should be repealed. *Id.* See also *id.* at 122–23 (discussing Navy Rear Admiral John Hutson’s involvement with DADT’s development in 1992, and his recollection that, “the decisions were based on nothing. It wasn’t empirical, it wasn’t studied,” and “[n]o one had the moral courage to stand up say, let’s step back, think it through. . . .”). See also Editorial, *Time to Review Policy on Gays in the US Military*, REUTERS, July 5, 2009 at 1, <http://www.reuters.com/article/topNews/idUSTRE5641A920090705> (discussing General (ret.) Colin Powell’s assertion in 2009 that “a lot has changed” since 1993 and that the ban should be reconsidered); Former Chairman, *supra* note 15 (discussing former Chairman of the Joint Chief of Staff John Shalikashvili’s change of heart as to the presence of acknowledged GLBs in the military).

¹⁷ E.g., Admiral Mike Mullen, *My View on Don’t Ask, Don’t Tell* (Feb. 3, 2010), <http://www.jcs.mil/newsarticle.aspx?ID=221>; Rick Maze, *McHugh: Army Can Handle Lift of Gay Ban*, ARMY TIMES, Oct. 29, 2009, http://www.armytimes.com/news/2009/10/army_mchugh_dadt_102709w/ (discussing Secretary of the Army John McHugh’s recent statement that lifting the ban will likely not cause turmoil and that the Army has a history of successfully taking on similar issues); Colonel Om Prakash, U.S. Air Force, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCES Q. 88, 93 (2009), http://www.ndu.edu/inss/Press/jfq_pages/editions/i55/14.pdf.

¹⁸ Deb Price, *Help Military by Letting Gays Serve Openly*, DETROIT NEWS, July 28, 2008 at A13 (discussing Eric Alva, a gay former Marine staff sergeant who was the first servicemember wounded in the Iraq war); David Welna, *Congress Revisits Military’s Policy on Gays*, NPR, July 24, 2008, <http://www.npr.org/templates/story/story.php?storyId=92864149>.

¹⁹ Lymari Morales, *Conservatives Shift in Favor of Openly Gay Servicemembers*, Gallup (Jun. 5, 2009), <http://www.gallup.com/poll/120764/Conservatives-Shift-Favor-Openly-Gay-Service-Members.aspx> (last visited Mar. 2, 2010); Aaron Belkin, *Don’t Ask, Don’t Tell: Does the Gay Ban Undermine the Military’s Reputation?*, 34 ARMED FORCES & SOC’Y 276, 278 (2007) (discussing: [a] eight national polls administered by five different polling organizations, all indicating that between fifty-eight and seventy-nine percent of the public believes gays should be permitted to serve openly, [b] a Fox News poll indicating that fifty-five percent of Republicans believe gays should be able to serve openly, and [c] Gallop poll results indicating that ninety-one percent of young adults believe gays should be able to serve openly); *id.* at 285 (discussing a 2006 survey of 545 troops who had served in Iraq and Afghanistan, 73% of whom indicated they were comfortable interacting with gays and lesbians; also discussing the findings of a 2000 study conducted by Major John W. Bricknell of the Naval Postgraduate School,

repeal at both the House and Senate levels.²⁰ Even the Commander-in-Chief has pledged to eliminate the policy based on its detrimental effects.²¹ Given these significant concerns and ideological shifts, many contend, as does this author, that all three prongs of the ban against acknowledged GLB personnel should be lifted immediately and in their entirety.

This article explores considerations pertinent to the debate surrounding DADT that—until recently—have been largely ignored within the military community. It highlights research demonstrating that that, despite fears and arguments to the contrary, America's military is well-suited to handle the integration of acknowledged GLB servicemembers and will successfully adapt to their inclusion.²² In fact, when the ban is lifted, military readiness will likely increase and our Armed Forces will be better and stronger for it.²³ This article also provides counterarguments and information pertinent to the most common assertions made by DADT's proponents.

Part II of this article discusses DADT's cost in terms of talent, experience, and fiscal losses, and addresses the illusory disconnect

indicating that from 1994 to 1999, the percentage of U.S. Navy officers who felt uncomfortable in the presence of homosexuals decreased from 57.8% to 36.4%); Rick Maze, *Obama Restates Plans: Leave Iraq, End Gay Ban*, ARMY TIMES, Jan. 29, 2010, http://www.armytimes.com/news/2010/01/military_state_of_the_union_012710w/ (discussing widespread, bipartisan political support for DADT's repeal).

²⁰ Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1283ih.txt.pdf (last visited Mar. 2, 2009); Kevin Nix, History Made as Sen. Lieberman Introduces "Don't Ask, Don't Tell" Repeal Bill (Mar. 3, 2010), <http://www.sldn.org/news/archives/history-made-as-sen.-lieberman-introduces-dont-ask-dont-tell-repeal-bi/>.

²¹ Ed Hornick, *Activists Praise Obama's "Don't Ask, Don't Tell" Repeal Pledge*, CNN, Jan. 28, 2010, <http://www.cnn.com/2010/POLITICS/01/28/obama.dadt.react/index.html>.

²² Because Don't Ask, Don't Tell (DADT) does not address transgendered individuals, they are outside the scope of this article. It should be noted, however, that such individuals serve in some of our allied countries, including the United Kingdom. See, e.g., *Gays in the Military: The UK and US Compared*, BBC, Feb. 2, 2010, <http://news.bbc.co.uk/2/hi/8493888.stm>.

²³ See, e.g., Kayla Webley, *A Brief History of Gays in the Military*, TIME, Feb. 2, 2010, <http://www.time.com/time/nation/article/0,8599,1958246,00.html> (discussing former Chairman of the Joint Chiefs of Staff John Shalikashvili's belief that America's Armed Forces will be stronger and more cohesive if DADT is repealed); "Don't Ask, Don't Tell" To Get Senate Committee Review, CNN, July 27, 2009, <http://www.cnn.com/2009/POLITICS/07/27/gay.military/index.html> (discussing Senator Kirsten Gillibrand's position that repealing DADT will increase America's military strength).

between homosexual identity and homosexual conduct. While many of DADT’s proponents suggest that homosexuality is merely a feeling that need not be realized with sexual acts, the consequence of such a narrow interpretation is the reduction of GLBs to asexual beings and the requirement for a norm of celibacy that perpetuates the lies and unhealthy suppression that necessitate DADT’s repeal in the first place. Here, it will be shown that the right to express one’s sexual orientation must encompass the right to share a physical level of intimacy with another person, as such expression is inextricably linked to and a necessary component of personal identity.

Part III clarifies the limited scope of DADT’s repeal. While homosexuality and bisexuality clearly fall within the prohibitions of DADT and will be affected by its repeal, transgenderism does not. Infusion of the issue of transgender rights serves only to muddy the waters surrounding DADT’s repeal and to present an exaggerated and misleading analysis of the issues. While at some point, the discussions surrounding DADT’s repeal may assist in resolving matters unique to transgender personnel, medical and mental health professionals will need to be consulted on such matters given the clinical classifications that govern their service. Furthermore, policies—separate and distinct from DADT—will have to be changed.

Having discussed the limits on the policy considerations raised by DADT’s repeal, Part IV considers the connection that DADT’s proponents claim exists between legislative action required for repeal and additional administrative action that might be required to effectuate it.²⁴ Part V demonstrates that, contrary to such claims, DADT’s repeal will not require significant changes to housing accommodations or financial benefits. While some housing policies may eventually require revision to recognize gay marriages, no such changes will be required unless and until the Defense of Marriage Act (DOMA)²⁵ is repealed.

²⁴ Some proponents of DADT, for example, claim its repeal will “necessarily require administrative action to provide Basic Housing and other allowances for homosexual married couples” as well as “separate living and bathing facilities for heterosexual men, heterosexual women, gay men, lesbians, bisexual men, bisexual women, and potentially transgender men and women.” Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing “Don’t Ask, Don’t Tell” and the Rationale for Preserving Aspects of the Current Policy*, 203 MIL. L. REV. 207, 226, 230 (2010).

²⁵ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The DOMA precludes the Federal Government from recognizing state-sanctioned same-sex marriages and civil unions. *Id.*

Furthermore, it is not necessary to provide separate quarters or to make structural changes to barracks to accommodate the presence of acknowledged GLB servicemembers.

Part VI discusses lessons learned from American paramilitary organizations and foreign militaries, demonstrating that repeal can be implemented with no disruption to current military operations. Although policymakers may be considering instituting a phased repeal that will take place over the course of months or years, the experience of many countries with militaries and cultures similar to ours reveals the tremendous success of instantaneous repeal even when implemented over protests similar to those being made by DADT's proponents. The latter portion of Part VI focuses on legal considerations that are unique to the United States.

Part VII addresses the DOMA and state marriage laws pertinent to DADT's repeal. Next, Part VIII addresses constitutional considerations in the wake of *Lawrence v. Texas*²⁶ and military precedents recognizing the right to privately engage in consensual homosexual acts. Part IX addresses evidentiary considerations unique to the marital privilege in the Military Rules of Evidence. Part X discusses the application of various provisions of the Uniform Code of Military Justice (UCMJ) and addresses changes that should be considered should both DADT and DOMA be repealed. Parts XI and XII reveal the striking similarities between the military's exclusion of acknowledged GLBs and its historical exclusion of African-Americans and women. A bird's eye perspective of the interrelated concerns surrounding the exclusion of acknowledged GLBs from military service favors DADT's swift and complete repeal, rather than procrastination, which will only serve to widen the divide between supporters and opponents of repeal. Not only do we owe this to our military members, but also the many members of the American public, who require a unified fighting force.

²⁶ 539 U.S. 588 (2003).

II. The Potential Scope of Repeal: DADT Should be Repealed in its Entirety

A. Cost of the Ban

A starting point for determining the scope of DADT’s repeal is consideration of the ban’s cost. Since its implementation in 1993, more than 12,500 homosexual servicemembers, including nearly 800 mission-critical troops, fifty-nine Arabic linguists, and nine Farsi linguists, have been discharged under DADT, costing taxpayers more than \$400 million.²⁷ Perhaps more significant than the monetary cost, however, is the loss of experience, training, and talent as each troop discharged under the ban leaves military service.²⁸

Examples of servicemembers who have been affected by the ban include Lieutenant Colonel (LTC) Fehrenbach, an active duty Air Force F-15 pilot with eighteen years’ experience who is currently facing discharge under DADT after military leaders found out he is gay.²⁹ Lieutenant Colonel Fehrenbach has flown numerous combat missions in Iraq and Afghanistan, is the recipient of nine air medals, including one for heroism under fire, and was handpicked to patrol Washington D.C.’s airspace after the terrorist attacks of 11 September 2001. If discharged,

²⁷ Press Release, Congressman Jim Moran (8th District of Virginia), ‘Don’t Ask, Don’t Tell’ Letter Sent to President Obama (Jun. 22, 2009), *available at* http://moran.house.gov/list/press/va08_moran/DADTObama.shtml (asserting that the ban needlessly costs the nation by reducing the number of specialists trained to combat urgent national security threats); *see also* UNITED STATES GOV’T ACCOUNTABILITY OFF., FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 3 (Feb 2005) [hereinafter GAO FINANCIAL COSTS], *available at* <http://www.gao.gov/new.items/d05299.pdf> (stating the total cost of the ban cannot be completely estimated because cost data on investigations, counseling, discharge reviews, and other related actions is not tracked).

²⁸ Alan K. Simpson, *Bigotry that Hurts Our Military*, WASH. POST, Mar. 14, 2007, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031301507.html> (discussing shortage of linguists and other troops needed to perform required missions); UNIV. OF CAL., MICHAEL D. PALM CENTER, REPORT OF THE GENERAL/FLAG OFFICERS’ STUDY GROUP 2 (2008) [hereinafter GENERAL/FLAG OFFICERS’ STUDY GROUP], *available at* <http://www.palmcenter.org/system/files/NEWDESIGNFlagOfficersBookle071808.pdf>. This study, conducted by a “nonpartisan national study group comprised of retired General/Flag Officers from different branches of service,” found that DADT has caused the military to lose talented GLB servicemembers, and recommends its repeal. *Id.* at 1–2.

²⁹ Steve Vogel, *Decorated Airman Anxiously Awaits New Policy on Gays*, WASH. POST, August 3, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/08/02/AR2009080202152.html.

he will be unable to retire and will lose medical benefits and nearly \$50,000 a year in retirement pay.³⁰ More significantly, the military will lose the benefit of his heroism, combat experience, and technical expertise. Former Army combat engineer Robert Stout is another such servicemember.³¹ After sustaining injuries from a grenade blast in Iraq in 2004, Stout was medically evacuated to Landstuhl, and while recovering, publicly acknowledged his sexual orientation. As a result of his admission, he was denied the opportunity to reenlist.³² Finally, DADT is costing us troops like Alex Nicholson, a former Army human intelligence collector and Arabic linguist who was discharged under DADT when his sexual orientation was discovered by military leaders in his chain of command.³³ Repealing DADT will allow America's Armed Forces to reap the talent and experience of these and other similarly qualified GLB servicemembers, many of whom are combat-tested and serve in critical job specialties, including doctors, nurses, infantrymen, linguists, and military intelligence specialists.³⁴

B. The Ban Should Be Lifted in its Entirety

The overwhelming majority of psychological and psychiatric literature and research indicate that that sexual orientation is not a choice and is formed early on in a child's life pursuant to a myriad of factors including biological and environmental ones.³⁵ According to the

³⁰ *Id.*

³¹ FRANK, *supra* note 5, at 206.

³² *Id.*

³³ *Alex Nicholson: Talking About 'Don't Ask, Don't Tell,'* NPR, June 16, 2009, <http://www.npr.org/templates/story/story.php?storyId=105443003>.

³⁴ Simpson, *supra* note 28; UNITED STATES GENERAL ACCOUNTING OFFICE, FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 4 (Feb 2005) [hereinafter GENERAL ACCOUNTING OFFICE, FINANCIAL COSTS OF BAN CANNOT BE COMPLETELY ESTIMATED], *available at* <http://www.gao.gov/new.items/d05299.pdf>.

³⁵ *See, e.g.,* Am. Psychol. Ass'n, Sexual Orientation and Homosexuality, *available at* <http://www.apa.org/helpcenter/sexual-orientation.aspx> (last visited Apr. 10, 2010) [hereinafter Psychological Association Orientation] ("Most scientists today agree that sexual orientation is most likely the result of a complex interaction of environmental, cognitive, and biological factors. In most people, sexual orientation is shaped at an early age."). Am. Psychiatric Ass'n, Let's Talk Facts About Sexual Orientation, *available at* <http://www.healthyminds.org/Document-Library/Brochure-Library/Lets-Talk-Facts-Sexual-Orientation.aspx> [hereinafter Psychiatric Association Orientation] (last visited Apr. 10, 2010) (observing "[s]tudies have suggested that both genetic and non-genetic factors" determine each person's sexual orientation).

American Psychological Association, for example, “human beings cannot choose to be either gay or straight,” and sexual orientation is not a “conscious choice that can be voluntarily changed.”³⁶ The American Psychiatric Association similarly contends that “sexual orientation is determined for most people early in life, or even before birth,” “is not likely to change,” and that any “efforts to try to force an individual to change his or her orientation are very likely to be unsuccessful.”³⁷ The American Academy of Pediatrics, American Counseling Association, and National Association of Social Workers have taken similar positions, and contend that reparative therapy (therapy designed to eliminate same-sex desires) is not only ineffective but harmful and unhealthy to the patients going through it.³⁸

While homosexuality can be defined in many ways to touch upon individual beliefs or the practices of an entire community,³⁹ the thread linking all definitions is sexual attraction to members of the same sex.⁴⁰ It is important to note that there is a distinction between sexual orientation and sexual identity: “Whereas sexual orientation has to do with sexual dispositions, sexual fantasies, sexual desires, and sexual behaviors, sexual identity has to do with what one identifies oneself to be.”⁴¹ Proponents of DADT fail to appreciate this distinction and would rather focus on concepts that exist purely within the mental construct. They likewise fail to appreciate the fact that without the ability to engage in romantic and sexual relationships, GLB servicemembers are forced to either (a) suppress their emotional and physical needs and serve as asexual beings with lives devoid of the emotional and sexual connections that heterosexual servicemembers enjoy, or (b) engage in same-sex relationships but shroud themselves in lies and secrecy in all aspects of their military lives.

Some may suggest, for example, that homosexual acts are no more integral to GLBs than is the wearing of a Yarmulke by Jews or the act of

³⁶ Psychological Association Orientation, *supra* note 35.

³⁷ *Id.*

³⁸ See, e.g., Pacific Sch. of Religion, Professional Organization Statements, <http://www.clgs.org/resources/professional-organization-stmts> (last visited Apr. 10, 2010) (containing links to the official statements of these organizations in relation to reparative therapy).

³⁹ SKI HUNTER, COMING OUT AND DISCLOSURES: LGBT PERSONS ACROSS THE LIFESPAN 28–29 (2007).

⁴⁰ Stanford Encyclopedia of Philosophy, Homosexuality (Nov. 29, 2006), <http://plato.stanford.edu/entries/homosexuality/>.

⁴¹ HUNTER, *supra* note 39, at 27.

facing Mecca by Muslims.⁴² In the religious context, however, consider whether one can truly express Judaism if he has no ability to partake in Shabbat or celebrate Passover, Christianity if he has no ability to be baptized or celebrate Christmas, or Islam if he is denied the ability to pray five times a day and face Mecca while doing so.⁴³ Although Jews, Christians, and Muslims may elect to practice their religions in different ways, a person cannot reasonably express his religious beliefs unless he has the freedom to act on his innermost spiritual beliefs with a wide range of religious practices. While the military, along with the Federal and state governments, prohibits certain religious practices (proselytizing, for example, is prohibited in the Armed Forces,⁴⁴ as is any act of religious expression that violates criminal laws), such prohibitions are narrowly tailored, and military and civilian personnel alike have, for the most part, the right to openly acknowledge and practice their faith.⁴⁵

In the realm of love and sexuality, the link between one's sexual orientation and his ability to acknowledge and express it is no different. For example, while inappropriate expressions of heterosexuals' sexual orientation are prohibited (sexually inappropriate comments and gestures, for example, are prohibited by regulations pertaining to sexual harassment, and acts of sexual expression that violate criminal laws are not permitted), heterosexual troops are free to acknowledge their orientation and do so on a regular basis in both word (e.g., acknowledging that they have a spouse or significant other who may need assistance or information during unit deployments) and deed (e.g., displaying family photos on desks, lockers, and computer monitors; bringing their spouses or significant others to deployment and promotion ceremonies). Gay, lesbian, and bisexual servicemembers must be permitted to acknowledge and express their sexual orientation in the same way as heterosexual servicemembers. The consequence of artificially erecting a barrier to any otherwise lawful act, including marriage—which is the ultimate consummation of one's emotional and sexual bond—would only increase DADT's negative consequences and

⁴² See, e.g., Bunn, *supra* note 24, at 218–19.

⁴³ FRANK, *supra* note 5, at xviii (making a similar analogy and asking, “Is a policy that bars people who engage in homosexual behavior not a policy that bars homosexuals?”).

⁴⁴ Bunn, *supra* note 24, at 219.

⁴⁵ See, e.g., Michelle Roberts, *Sikh Captain Graduates: Tejdeep Singh Rattan is First Sikh U.S. Army Officer in Decades*, HUFFINGTON POST, Mar. 22, 2010, http://www.huffingtonpost.com/2010/03/23/sikh-army-captain-graduat_n_509294.html; Def. Equal Opportunity Mgmt. Inst., *Religious Accommodation in the U.S. Military*, <http://www.deomi.org/diversitymgmt/RelAccomMilitary.cfm>.

propel GLB servicemembers deeper into a climate of dishonesty, inferiority, and prejudice.

Proponents of DADT assert that advocates of its repeal have artificially “cropped” the debate to avoid discussions of homosexual practices.⁴⁶ This is incorrect. Many of the books, articles, and public discussions supporting DADT’s repeal describe in great detail how its prohibitions against same-sex acts restrict a wide variety of both sexual and non-sexual acts in which GLBs and heterosexuals alike engage, and point out that this is one of the primary reasons it should be repealed.⁴⁷ Moreover, many of the cited “homosexual practices” are, in reality, sexual acts in which many heterosexuals similarly engage with members of the opposite sex. Many heterosexuals, for example, engage in oral sex,⁴⁸ anal sex,⁴⁹ and sometimes non-traditional sex acts such as rough sex, sadomasochism (S/M), bondage, and fetish sex.⁵⁰ Some

⁴⁶ Bunn, *supra* note 24, at 216.

⁴⁷ See, e.g., *Out in Military*: “*Not the Time*” (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2> (showing Dr. Nathaniel Frank and Tony Perkins debating various issues surrounding DADT and discussing the act of sodomy on national television in 2010); Sharra E. Greer et al., “*Rum, Sodomy, and the Lash*”: *What the Military Thrives On and How It Affects Legal Recruitment and Law Schools*, 14 DUKE. J. GENDER L. & POL’Y 1143, 1156–9 (2007) (comments of Sharra E. Gerrer, Dir. of Law and Pol’y for the Servicemembers’ Legal Defense Network) (discussing sodomy in a public conference regarding DADT in 2007).

⁴⁸ See, e.g., Discovery Health, Sexual Health Center: Oral Sex, available at <http://health.discovery.com/centers/sex/sexpedia/oral-sex.html> (last visited Apr. 7, 2010) (“Some people incorrectly think that cunnilingus and fellatio are homosexual acts”); *id.* (“While homosexual couples do engage in oral sex, so do a majority of heterosexual couples. The activity itself is neither homosexual nor heterosexual.”); Joyce Abma et al. The National Survey of Family Growth, available at www.cdc.gov/nchs/ppt/duc2006/abma_26.ppt (last visited May 10, 2010) (reporting, on slide 45, the results of a 2002 which revealed that 90% of male and 88% of female respondents, aged 25–44, had engaged in oral sex with someone of the opposite sex that year).

⁴⁹ See, e.g., Discovery Health, Sexual Health Center: Anal Sex, available at <http://health.discovery.com/centers/sex/sexpedia/analsex.html> (last visited Apr. 7, 2010) (“[M]any people, regardless of sexual orientation, regard [anal sex] as a legitimate form of sexual expression and as one of the fulfilling ways in which people can express their desire and affection for each other.”); Abma et al., *supra* note 48 (reporting, on slide 32, the results of a 2002 study which revealed that 40% of male and 35% of female respondents, aged 25–44, engaged in anal sex with someone of the opposite sex that year); Editorial, *The Bottom Line*, N.Y. MAG., Dec. 31, 2006, <http://nymag.com/nightlife/mating/25988/> (reporting that anal sex has become an increasingly popular form of sexual expression between heterosexuals).

⁵⁰ See, e.g., ALEX COMFORT, *THE JOY OF SEX* 81, 136–81 (30th ed. 2002) (describing various forms of heterosexual non-traditional sexual activity, including rough sex,

heterosexuals also use sex toys⁵¹ and view pornography.⁵² One has only to look at today's headlines to find examples of heterosexuals who participate or are interested in these types of sexual activities.⁵³ None of these forms of sexual expression are exclusive to GLBs—some of whom do not participate in any of these acts outside of oral sex and mutual masturbation.⁵⁴ Moreover, some segments of the American population consider some or all of these practices to be commonplace.⁵⁵ While a

bondage, discipline, mutual masturbation, and the use of sex toys); Brian Alexander, *One Preacher's Message: Have Hotter Sex*, MSNBC, Dec. 4, 2006, <http://www.msnbc.msn.com/id/13834042/> (discussing the fact that some married Christian couples engage in oral sex, anal sex, mutual masturbation, and various forms of non-traditional sexual); Bonnie Erbe, Opinion, *Evangelical Churches Push Kinky New Sex Challenges—But For Married Couples Only*, U.S. NEWS & WORLD REP., Feb. 25, 2009, <http://www.usnews.com/blogs/erbe/2009/02/25/evangelical-churches-push-kinky-new-sex-challenges--but-for-married-couples-only.html> (discussing evangelical churches that advocate “risqué” sex within the context of marriage); PATRICK CALIFIA, *SENSUOUS MAGIC: A GUIDE TO S/M FOR ADVENTUROUS COUPLES*, at vii–viii (2001) (describing how the “SM/D&S/B&D/fetish/leather/kink community includes people of all genders and sexual orientations”).

⁵¹ See, e.g., Susan Seliger, *Why Women Lose Interest in Sex—and 10 Tips to Rekindle Desire*, GOOD HOUSEKEEPING, <http://www.goodhousekeeping.com/family/marriage-sex/women-sexual-desire-0307> (discussing the use of sex toys in rekindling passion in marriages); Editorial, *The Joy of Christian Sex Toys*, NPR, Mar. 21, 2008, <http://www.npr.org/templates/story/story.php?storyId=18975616> (discussing the use and purchase of sex toys by Christians).

⁵² See, e.g., Seliger, *supra* note 51 (discussing the use of pornography in rekindling passion in a marriage); Cindy Chupack, *Pornophobic? The Dish About Dirty Movies*, OPRAH MAG., Jan. 15, 2008, <http://www.oprah.com/relationships/Do-Women-Watch-Porn> (discussing the fact that some heterosexual married couples enjoy watching pornography).

⁵³ See, e.g., Ruth Marcus, *RNC Staffer at Strip Club Was . . . a Woman*, WASH. POST, Mar. 31, 2010, http://voices.washingtonpost.com/postpartisan/2010/03/rnc_staffer_at_strip_club_wasa.html (discussing a recent visit by a group of Republican National Committee Young Eagle program donors to a club in which performers acted depict bondage and sadomasochistic scenes).

⁵⁴ See, e.g., Ramon Johnson, *Ramon's Gay Life Blog*, Myth: All Gay Men Have Anal Sex (Apr. 12, 2008), <http://gaylife.about.com/b/2008/04/12/myth-all-gay-men-enjoy-anal-sex.htm> (stating that there are many ways gay men can be intimate with each other without having anal sex); Ramon Johnson, *Gay Men and Intercrural or Non-Penetrative Sex*, available at <http://gaylife.about.com/od/gaysexadvice/g/intercruralsex.htm> (last visited Apr. 11, 2010) (discussing non-penetrative gay sex); JANEL L. CARROLL, *SEXUALITY NOW: EMBRACING DIVERSITY* 271 (3d ed. 2010) (2007) (citing to the results of a 1994 study indicating that not all gay men engage in anal sex). The two most common methods of gay sex are fellatio and mutual masturbation, not anal sex. *Id.*

⁵⁵ See, e.g., Brian Alexander, *Sexual Exploration Goes Mainstream*, MSNBC, Dec. 1, 2006, http://www.msnbc.msn.com/id/14061675/ns/health-sexual_health/; Carrie Haymore, *Sadomasochism: The Pleasure of Pain*, 15 UNDERGRADUATE J. PSYCHOL. 50 (2002), <http://www.psych.uncc.edu/UJOP2002.pdf> (asserting that, despite the negative

few of these behaviors among heterosexuals may be illegal in the military,⁵⁶ troops are not usually prosecuted for them absent aggravating circumstances.⁵⁷ It is, in fact, the policy of the Criminal Investigation Command not to investigate illegal consensual acts (aside from statutory rape), even though such acts would constitute felonies under the UCMJ.⁵⁸ Such matters are considered conduct more appropriate for disposition at the command level, precisely because so many heterosexuals are now engaging in these activities that it would overwhelm law enforcement to investigate all of them.

Finally, concerns by proponents of DADT that its repeal will open the door to unwanted same-sex propositions, displays of homosexual pornography, inappropriate genital exposure, and exposure to the intimate details of all homosexual relationships,⁵⁹ fail to recognize that military administrative regulations and criminal statutes govern all such acts and subject those who commit them to adverse action and sometimes criminal punishment. Any servicemember—heterosexual or GLB—who makes an unwanted sexual proposition, displays pornography to another, inappropriately exposes his genitals, or publically discusses intimate details of his sexual relationships, subjects himself to sexual harassment complaints, adverse administrative action, and in some cases, criminal prosecution.⁶⁰ Furthermore, making sexual

myths some associate with sadomasochism, “researches agree that sadomasochistic desires and activities are normal, albeit not socially prominent, components of sexual functioning.”). Some heterosexuals commonly engage in oral sex, anal sex, and unconventional sexual acts such as spanking and role-playing. *Id.* at 53.

⁵⁶ Consensual oral and anal sex, for example, are prohibited by the Uniform Code of Military Justice. UCMJ art. 134 (2008).

⁵⁷ Aggravating factors such as adultery, sexual activity with a subordinate or a minor, or sexual activity in a non-private location, all subject servicemembers to criminal and administrative liability even when the underlying sexual activity in itself, would not.

⁵⁸ See U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES ¶ 3-3(a)(8), at 6 (15 May 2009) (“The USACID and the installation law enforcement activity will not normally initiate an investigation into adult private consensual misconduct where such misconduct is the only offense involved. The offenses will be reported to the appropriate commander.”).

⁵⁹ See, e.g., Bunn, *supra* note 24, at 212, 219–20.

⁶⁰ See, e.g., U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chs. 7 & 8 (18 Mar. 2008) [hereinafter AR 600-20] (discussing the prevention of sexual harassment and assault). “Sexual harassment is a form of gender discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” *Id.* para. 7-4(a). Sexual harassment can be verbal, nonverbal, or consist of physical contact. *Id.* para. 7-5. “Hostile environment sexual harassment occurs when a person is subjected to offensive, unwanted, an unsolicited comments and behavior of a sexual nature that . . . creates and intimidating, hostile, or offensive working

comments, whistling in a sexually suggestive manner, using terms of endearment, blowing kisses, winking, licking one's lips in a suggestive manner, staring, "undressing someone with one's eyes," bumping, grabbing, and providing unsolicited back or neck rubs are all explicitly prohibited forms of sexual harassment under Army Regulation 600-20.⁶¹ Military prohibitions against sexual harassment apply to all troops, twenty-four hours, seven days per week, both on and off-post, and in the barracks.⁶²

III. Matters of Inclusiveness: Repeal of DADT Only Applies to Gays, Lesbians, and Bisexuals

Because DADT only prohibits acknowledged GLB personnel from serving in the Armed Forces, it is only these personnel who will be granted the right to serve alongside heterosexuals if Congress repeals the ban. While proponents of DADT assert that repeal will open the floodgates to transgender personnel, this contention is incorrect in that it confuses gender identify with sexual orientation.⁶³ Unlike heterosexuality and homosexuality, which relate to a person's sexual orientation, transgenderism relates to a person's identity as a male or a female, and implicates a range of medical and psychological diagnoses.⁶⁴ As recognized in other publications, Gender Identity Disorder (GID) is governed by military medical regulations, not the DADT policy and statute, and is based on scientific and psychological factors rather than moral judgments.⁶⁵ Transgender personnel are barred from military

environment." *Id.* para. 7-6(b). *See also* U.S. Army, Sexual Assault Prevention and Response Program, available at <http://www.sexualassault.ary.mil/content/faqs.cfm> (last visited Apr. 11, 2010).

⁶¹ AR 600-20, *supra* note 60, para. 7-5.

⁶² *See, e.g., id.* para. 7-6(b) ("If these behaviors unreasonably interfere with . . . performance, regardless of whether the harasser and the victim are in the same workplace, then the environment is classified as hostile.").

⁶³ Boulder County Pub. Health, Definition of Terms and Concepts Related to Sex, Gender, and Sexual Orientation, available at <http://www.bouldercounty.org/health/Comm.hlth/safezone/LGBTIQ/definitions.htm> (last visited Apr. 7, 2010) (discussing the difference between sexual orientation and gender identity).

⁶⁴ *E.g.,* WebMD, Sexual Health Center: Gender Identity Disorder, available at <http://www.webmd.com/sex/gender-identity-disorder> (last visited Apr. 7, 2010); Norman Spack, Transgenderism, available at http://www.lahey.org/NewsPubs/Publications/Ethics/JournalFall2005/Journal_Fall2005_Feature.asp (last visited Apr. 7, 2010).

⁶⁵ Bunn, *supra* note 24, at 222–23. *See also* Servicemembers Legal Defense Network, Transgender Service Members, available at <http://www.sldn.org/page/Website/Fact%20Sheets/Transgender%20Service%20Members.pdf> (last visited Mar. 27, 2010).

service not by DADT’s restrictions but by medical regulations, and will therefore continue to be precluded from service even when DADT is repealed. Assertions to the contrary are not only misplaced, but refuted by transgender personnel themselves, as well as the staunchest advocates of repeal.⁶⁶

IV. Successful Repeal of DADT is not Dependent on Non-Legislative Policy Changes

Supporters of DADT assert that its repeal will be too difficult and complex to accomplish without first instituting numerous administrative measures, such as benefit adjustments and allocation of financial entitlements, and without constructing “gay, bisexual, and/or transgender housing facilities.”⁶⁷ Such assertions, however, are overly-broad and misleading. The inclusion of transgendered personnel in the debate over DADT, for example, is a red herring because, as previously discussed, such personnel are precluded from military service by medical regulations and by diagnosis of GID—not based on DADT’s ban against acknowledged GLBs. Even if DADT is repealed, transgender personnel will not be permitted to serve in the military, and their inclusion in this debate serves only to muddy the waters.

Likewise, the claim that DADT’s repeal will unduly burden commanders and senior non-commissioned officers by forcing them to deal with billeting and privacy issues is similarly misleading in that it fails to recognize that such issues are already a routine and mandatory part of their leadership responsibilities. According to Major General (Ret.) Dennis Laich, these issues “are dealt with by first line supervisors, every day, in all branches of service as to heterosexual troops already,” as reflected by Army command policies and Army regulations alike.⁶⁸

⁶⁶ Paula M. Neira, RN, Esq., Lieutenant, USNR (1985–1991) is one such individual. Lieutenant Neira is a post-operative transgender nurse, lawyer, U.S. Naval Academy graduate, and Navy combat veteran. As such, she is an advocate of DADT’s repeal but states its repeal will not affect the military ban against transgender personnel because these individuals are precluded from service based on medical and mental health regulations, not by DADT. Telephone Interview with Paula M. Neira, Registered Nurse, member of the Maryland Bar, and Servicemembers Legal Defense Network governing board member (Apr. 8, 2010).

⁶⁷ Bunn, *supra* note 24, at 226–27, 230.

⁶⁸ Telephone Interview with Major Gen. (Ret.) Dennis Laich, U.S. Army Reserve (Apr. 14, 2010). *See, e.g.*, Command Policy Memorandum from Lieutenant General Robert W. Cone, Commander, Headquarters, III Corps and Fort Hood, to III Corps and Fort Hood

Military leaders already address these issues concerning heterosexual servicemembers on a regular basis. More significantly, the military has successfully contended with similar concerns in the past, when African-Americans⁶⁹ and women⁷⁰ were integrated into regular military units and service academies. Although inclusion of these groups required policy changes, their integration was not postponed until the changes had first been completely identified, resolved, or instituted.

As discussed in great detail in Part XI of this article, the emotions and heated arguments surrounding military racial integration in particular were even greater than that which now surrounds the repeal of DADT. Billeting and privacy issues, and related effects on military readiness, were among the primary reasons cited in opposition to integration of

leaders, subject: Single Soldier Quarters Living Standards (2 Nov. 2009), *available at* <http://pao.hood.army.mil/leaders/policies/corps/CSM-02.pdf> (providing detailed instructions regarding the housing of single troops Fort Hood and factors leaders must consider when making room assignments). These instructions include various factors and considerations. *E.g., id.* (explaining that the “chain of command has an inherent responsibility to ensure proper living standards . . . and must be involved to the degree necessary,” all the while ensuring that “[t]here are no arbitrary limits to this involvement . . .”); *id.* (charging leaders with the responsibility of clearly defining and reinforcing “single Soldier living standards); *id.* (providing that “[r]ooms may be arranged to allow . . . Soldiers a degree of personal freedom . . .”); *id.* (prohibiting the display of “[p]ictures that show male or female genitalia”); *id.* (prohibiting residents from having overnight guests of either gender). *See also* U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4 to 4-6 (30 Nov. 2009) (discussing leadership responsibilities regarding Soldier conduct, unit order, and the exercise of military authority). In all cases, commanders must ensure that Soldiers who fail to maintain their housing areas properly are corrected. *Id.* para. 4-6(b).

⁶⁹ President Truman ordered the military to integrate African-Americans in 1948. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). Although it was initiated in 1948, it took several years for military racial integration to be carried out. Jim Garamone, *Historian Charts Six Decades of Racial Integration in U.S. Military* (July 23, 2008), *available at* <http://www.defense.gov/news/newsarticle.aspx?id=50560>. Issues surrounding military racial integration had to be resolved during the course of the Korean War, which began in 1950. *See, e.g.,* PBS, *Chronology of U.S. Military Actions and Wars*, *available at* <http://www.pbs.org/wgbh/amex/warletters/timeline/timeline3.html> (last visited Mar. 27, 2010).

⁷⁰ *See, e.g.,* Linda S. Murnane, *Legal Impediments to Service: Women in the Military and the Rule of Law*, 14 DUKE J. GENDER L. & POL’Y 1061, 1065 (2007) (discussing policies regarding pregnancy, pay, entitlements, dependent benefits, and promotion policies that have all changed in order to better accommodate female troops); Juanita M. Firestone, *Sexist Ideology and the Evaluation Criteria Used to Assess Women’s Integration into the Army*, 3 POPULATION RES. & POL’Y Rev. 77 (1984) (discussing issues pertinent to the integration of women into the Army).

African-Americans and women by those seeking their exclusion.⁷¹ These challenges did not, however, prove to be insurmountable or to reduce military effectiveness, nor did the military wait to integrate African-Americans or women until the issues were first completely resolved. Issues surrounding racial integration were still being resolved while America was fighting in the Korean War.⁷² Additionally, issues surrounding the inclusion of female servicemembers have incrementally continued to be resolved through the present day.⁷³ Despite housing, privacy, and other concerns involving the inclusion of both groups, the military has successfully adapted, and is a stronger fighting force because of the integrated service of both groups.⁷⁴

Finally, the assertion that DADT’s repeal will create complicated fiscal issues in terms of housing benefits is also misleading, for three

⁷¹ See, e.g., RAND, NATIONAL DEFENSE RESEARCH, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 160 (1993) [hereinafter RAND SEXUAL ORIENTATION POLICY], http://www.rand.org/pubs/monograph_reports/2009/MR323part1.pdf (stating that in the 1940s and 1950s, many white Americans “responded with visceral revulsion to the idea of close physical contact with blacks”). It was feared that quartering “whites and blacks together” in the Armed Forces, and forcing “compulsory interracial associations” would create tension, disrupt work, distract military personnel, impair morale, and undermine unit cohesion and readiness. *Id.* at 172.

⁷² Military units were still undergoing integration during the Korean War. See, e.g., Integrating the Armed Forces, available at <http://www.digitalhistory.uh.edu/historyonline/integrating> (last visited May 7, 2010). In units that were integrated, troops “were able to function effectively in all sorts of situations, even in the most demanding battlefield situations, and even if the individuals involved has not experienced prior social integration.” RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at xxi.

⁷³ See, e.g., Michelle Tsai, *Do Female Soldiers Get Any Privacy?*, SLATE, Mar. 22, 2007, <http://www.slate.com/id/2162464/fr/rss/> (describing a variety of situations and locations around the world in which male and female troops are quartered together and the creative solutions they use to create privacy in shared sleeping quarters; also describing how they deal with conditions in certain missions, e.g., convoys, that require them to urinate in each others’ presence, with little to no privacy); Steven Lee Myers, *Women at Arms: Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 16, 2009, http://www.nytimes.com/2009/08/17/us/17women.html?_r=2&nl=todaysheadlines&emc=a1 (discussing the challenges commanders face at remote military outposts in Iraq and Afghanistan, including housing and privacy issues and the need to provide female troops with access to gynecological care, especially since female and male troops sometimes share sleeping quarters and have little to no privacy). Other issues, such as “harassment, bias, hardship, even sexual relations,” are, according to at least one deployed non-commissioned officer, “a matter of discipline, maturity, and professionalism, rather than an argument for separating the sexes.” *Id.*

⁷⁴ See, e.g., U.S. Army, Information Paper: Army Workforce Diversity, available at http://www.army.mil/aps/08/information_papers/sustain/Diversity.html (last visited Apr. 11, 2010) (asserting that the Army “draws strength from its ethnic and cultural diversity”).

reasons. First, unless and until DOMA is repealed or changed, the military will be precluded from recognizing state-sanctioned same-sex marriages and therefore precluded from providing related housing and financial benefits to GLB couples. Second, marriage can occur among any number of heterosexual couples in the military, without limitation. Third, and related to the second point, preexisting budgeting considerations must accommodate for an unlimited number of marriages based on the number of troops serving, regardless of whether the marriages are heterosexual or homosexual. As a result of these last two points, GLB marriages require no special budgetary considerations because the potential for marriage by all single troops currently serving has presumably been factored into the approved budget for national defense. This author is unaware of any Department of Defense or service-specific policies restricting marriage to only a certain numerical percentage of troops currently serving. Furthermore, benefits now accorded to heterosexual marriage are automatically conferred based on the act of marriage, regardless of couples' reasons for getting married. Absent fraud, heterosexual couples are permitted to marry for a wide variety of reasons (e.g., the financial benefits and stability that come with marriage or as a solution for dealing with unplanned pregnancy), some having little or nothing to do with love.⁷⁵ In sum, because the financial benefits of marriage are often a motivating factor for heterosexual couples, nothing should preclude the same considerations among GLB couples.

⁷⁵ See, e.g., DAVID KNOX & CAROLINE SCHACHT, CHOICES IN RELATIONSHIPS: AN INTRODUCTION TO MARRIAGE AND THE FAMILY 207–09 (10th ed. 2010) (discussing various reasons for marriage, including economic security and parenthood); Editorial, *View Poll Results: Should the USMC Implement a Marriage Class for E-5 and Below?*, MIL. TIMES, <http://militarytimes.com/forum/showthread.php?1559611-Marriage-For-E-5-And-Below-USmc> (last visited Apr. 11, 2010) (discussing military marriages based on unanticipated pregnancies and other factors); Tanya Von Essen Robinette, *Top 3 Reasons Not to Get Married in Your Twenties*, CHARLOTTESVILLE EXAMINER (Va.), Nov. 9, 2009, <http://www.examiner.com/x-28716-San-Jose-Twenty-something-Relationships-Examiner~y2009m11d9-Top-3-reasons-not-to-get-married-in-your-twenties> (discussing pregnancy and other factors used by some couples as the basis for marriage).

V. No Additional Accommodations Are Required for the Successful Repeal of DADT

A. Repeal Will Not Necessitate Structural Changes

Proponents of DADT suggest that repeal of DADT necessitates total reconfiguration of military barracks and showers and the physical separation of GLBs. This assertion, however, totally disregards the fact that tens of thousands of GLB servicemembers are now—today—living, showering, working, and socializing with heterosexual servicemembers, without incident.⁷⁶ Civilian employees, contractors and troops from allied countries—any of whom may be acknowledged GLBs⁷⁷—also share quarters, showers, and workplaces with U.S. troops.⁷⁸ Likewise, GLB civilians who share the use of civilian and military gyms across the world already shower with heterosexual servicemembers.⁷⁹ Such an

⁷⁶ McGarry, *supra* note 10 (reporting that there are an estimated 66,000 GLB troops currently serving in the Armed Forces).

⁷⁷ See, e.g., U.S. DEP’T OF DEF., DIR. 1020.02, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY (EO) IN THE DEPARTMENT OF DEFENSE 1 (5 Feb. 2009), http://www.deomi.org/EOAdvisorToolkit/documents/DoD_Directive102002p.pdf (prohibiting military departments and combatant commands from discriminating against civilian employees on the basis of sexual orientation); UNIV. OF CAL., MICHAEL D. PALM CTR., GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 136 (Feb. 2010) [hereinafter FOREIGN MILITARIES 2010], <http://www.palmcenter.org/files/GaysinForeignMilitaryes2010.pdf> (identifying allied countries which permit GLBs to serve, including Britain, Canada, Australia, and Israel).

⁷⁸ This occurs, for example, at the Combined Readiness Center (CRC) at Fort Benning, GA, where deploying Soldiers, civilians, and allied troops share living quarters and open bay showers. Interview with Lieutenant Colonel Nigel Heppenstall, U.K. Army Legal Servs., U.K. Army, at the U.S. Army Legal Ctr. & Sch., Charlottesville, Va. (Mar. 2, 2010) [hereinafter Heppenstall Interview] (describing his experiences at CRC when assigned to the 101st Airborne Division as a British exchange officer); CONUS REPLACEMENT CENTER DEPLOYMENT INFORMATION PACKET 15 (Sept. 28, 2009) https://www.benning.army.mil/crc/content/CRCmissions_deployment.htm [hereinafter CONUS INFORMATION PACKET] (describing how military and civilians are housed in the same billets). This practice also occurs at deployment locations, where U.S. troops sometimes share the same rooms and showers with troops from foreign militaries which allow GLBs to serve. Interview with Lieutenant Commander Theron R. Korsak, Joint Operational Law Navy Liaison, at the U.S. Army Legal Center & School, Charlottesville, VA (Mar. 2, 2010) (describing his experiences in Afghanistan, where he shared a room and shower facilities with troops from Canada).

⁷⁹ This author is unaware of the existence of any gym that provides separate shower and locker room facilities for acknowledged GLBs, including civilian gyms for which the military contracts for servicemember use. Furthermore, military gyms that allow certain civilian employees to use facilities also do not now provide separate shower/locker room for those employees who may be acknowledged GLBs.

assertion fails to recognize the success of existing housing arrangements, and implicitly presumes that post-repeal homosexual acts could freely take place anywhere at any time without being subject to the rules and regulations that govern barracks life. Current provisions of the UCMJ, military regulations, and command policies, including prohibitions on sexual harassment—which pertain to conduct both in and out of the barracks and community showers—prohibit the most feared scenarios.⁸⁰

Supporters of DADT suggest that if DADT is repealed, servicemembers who are religiously opposed to homosexual practices and who are forced to reside in the barracks may be forced to view or tolerate gay pornography and acts. This claim fails to recognize that these activities are governed by various, overlapping statutes and regulations that apply equally to servicemembers regardless of their gender or sexual orientation. None of these regulations require drastic changes in order to adequately govern misconduct by acknowledged GLB servicemembers who live in the barracks with heterosexual servicemembers. Furthermore, in deployed environments, where sexual conduct is even more restricted, existing policies regulate and prohibit the types of concerns voiced by opponents of repeal.⁸¹ Additionally, in such environments, most servicemembers are more concerned about staying alive than with sexual activity.⁸²

⁸⁰ See, e.g., AR 600-20, *supra* note 60, paras. 7-5 & 7-6(b). In deployed areas, particularly, personnel of all genders and sexual orientations are regularly precluded from an even wider range of sexually-related activities, such as the private possession and viewing of any form of pornography. See, e.g., Headquarters, Multi-National Corps-Iraq, Gen. Order No. 1 (4 Apr. 2009), *available at* http://www.tac.usace.army.mil/deploymentcenter/tac_docs/GO-1.pdf. Violations of AR 600-20 and Gen. Order No. 1 are punishable under the Uniform Code of Military Justice. UCMJ art. 92 (2008).

⁸¹ Pornography of all types, for example, is prohibited in many deployed areas. See, e.g., Gen. Order No. 1, *supra* note 80. See also sources cited *supra* note 68.

⁸² See, e.g., Letter from a Mountain Soldier, MSNBC, *available at* http://www.msnbc.msn.com/id/35571422/ns/msnbc_tv-rachel_maddow_show (last visited Mar. 2, 2010) (stating that despite his sexual orientation, the only thing the author—an active duty officer currently serving in Afghanistan—thinks about while showering in group showers is getting clean and getting out). This letter was originally posted on 15 February 2010 on the U.S. Army's 10th Mountain Division website, in response to a question from Major General James Terry. Posting from Mountain Soldier (fwd) to "Don't Ask, Don't Tell," *available at* <http://www.taskforcemountain.com/mountain-sound-off/19/4047-qdont-ask-dont-tellq> (Feb. 15, 2010, 12:42). See also Hughes, *supra* note 9 (stating that, despite his sexual orientation, there was "nothing remotely sexual" about having to share showers or quarters with fellow male troops during his deployment to Afghanistan).

B. Medical Considerations

1. DADT Reduces the Quality of Medical Care for GLB Troops

Although GLB servicemembers have access to medical and mental health care systems, their ability to fully use these services is limited because service providers sometimes report evidence of their clients’ homosexuality to commanders or note it in records to which commanders have access.⁸³ According to the American Medical Association (AMA), DADT impedes honest and open patient-physician communication, leading to poorer healthcare.⁸⁴ Without assurances of confidentiality, GLBs are not free to seek medical or psychological care without putting themselves at risk for discovery. This creates an unhealthy and potentially dangerous situation for them and their loved ones. For instance, GLB troops whose personal relationships are unraveling due to the stress of multiple deployments, may refuse to seek help because doing so will likely result in exposure of their sexual orientation. Although recent limitations on DADT appear to address medical and mental health confidentiality, such protections are untested.⁸⁵

Multiple deployments put tremendous stress on servicemembers and their families,⁸⁶ including those who are GLB. According to the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, the key to effectively dealing with this is “getting people who need [mental health care] to seek [it] without fear that it will damage their reputation or

⁸³ GENERAL/FLAG OFFICERS’ STUDY GROUP, *supra* note 28, at 7 (describing how DADT prevents some GLB troops from obtaining psychological care, medical care, and religious counseling).

⁸⁴ AM. MED. ASS’N RESIDENT AND FELLOW SEC., RESOLUTION 1: MEDICAL CONFIDENTIALITY IN “DON’T ASK, DON’T TELL” (Nov. 2009), <http://www.ama-assn.org/ama1/pub/upload/mm/16/i-09-soa.pdf> (indicating the AMA’s support for the repeal of DADT).

⁸⁵ See, e.g., Leo Shane III, *Changes in DADT Enforcement Could Leave Outed Troops in the Ranks*, STARS & STRIPES, Mar. 26, 2010, <http://www.stripes.com/article.asp?section=104&article=68912>.

⁸⁶ Press Release, Donna Miles, U.S. Department of Defense Military Health System, Mullen Encourages Troops to Seek Mental Health Care When Needed (Feb. 10, 2009), <http://www.health.mil/Press/Release.aspx?ID=541>; Campbell Robertson & Ray Rivera, *Strain of Military Service Meets Resolve to Carry On*, N.Y. TIMES, Dec. 2, 2009, at A15; Kimberly Hefling, *Increase in Suicide Rate of Veterans Noted*, ARMY TIMES, Jan. 12, 2010, http://www.armytimes.com/news/2010/01/ap_vet_suicide_011110/ (discussing the fact that the Army’s suicide rate reached an all-time high in 2009, and that there has been a 25% increase in the suicide rate of Army veterans aged 18–29).

military career.”⁸⁷ Enabling GLB troops to communicate fully and honestly with physical and mental health care providers will contribute to their physical, mental, and emotional health, thereby strengthening our Armed Forces.

2. *The Presence of GLB Servicemembers Has Not Been Shown to Affect the Rate of Sexually Transmitted Diseases Within the Military*

Proponents of DADT claim that its repeal will affect military medical readiness because acknowledged GLB servicemembers will increase AIDS, other sexually transmitted diseases, and physical injuries within the military. The estimated 66,000 GLBs already serving, however, have not had this effect.⁸⁸ Some may claim that GLBs engage in promiscuous sex, sex with “multiple partners,” acts of “penile-anal, mouth-penile . . . hand-anile” and “mouth-anal” contact, S/M, and “intense genital penetration,” and that the presence of acknowledged GLBs will affect military medical readiness in the wake of DADT’s repeal.⁸⁹ This argument is misplaced though because it relies on overarching stereotypes that have no proven basis for all GLBs or those already serving in the military. This rhetoric completely ignores the fact that many GLBs do not engage in such acts⁹⁰ while many heterosexuals do. Heterosexuals, including those in the military, sometimes engage in promiscuous sex, sex with multiple partners, oral sex, anal sex, and S/M, the very same behaviors often criticized and mischaracterized as predominantly homosexual.⁹¹

⁸⁷ Donna Miles, Mullen Encourages Troops to Seek Mental Health Care When Needed, U.S. Department of Defense (Feb. 9, 2009), <http://www.defense.gov/news/newsarticle.aspx?id=53012>; Sergeant First Class Michael J. Carden, Mullen Voices Concern with Military Suicide Rate, Joint Chiefs of Staff, Jan. 13, 2010, <http://www.jcs.mil/newsarticle.aspx?id=208> (discussing the growing problem of suicide within the military community, the toll multiple deployments have taken on troops and their families, and the need to take care of them).

⁸⁸ Bunn, *supra* note 24, at 231–35.

⁸⁹ *Id.* at 232.

⁹⁰ Many GLBs, for example, elect not to engage in sexually promiscuous behavior or partner swapping—instead electing to marry and remain in monogamous long-term relationships—as evidenced by the current civil rights movement for the GLB right to marry. Similarly, not all gay men engage in anal sex. JUNE M. REINISCH & RUTH BEASLEY, THE KINSEY INSTITUTE NEW REPORT ON SEX 137 (1991) (citing to the results of a study on the issue). See also CARROLL, *supra* note 54, at 271 (citing to the results of a 1994 study indicating that not all gay men engage in anal sex). The two most common methods of gay sex are fellatio and mutual masturbation, not anal sex. *Id.*

⁹¹ *Supra* Part II.B.

The military has always contended with the threat of sexually transmitted diseases and sexual injuries apart from the issue of homosexuality. Many heterosexual troops historically frequented prostitutes and, today, continue to engage in sexually promiscuous behaviors that expose them to a variety of dangerous and deadly communicable diseases, including Acquired Immune Deficiency Syndrome (AIDS), Syphilis, Chlamydia, Gonorrhea, and other illnesses.⁹² As a result of the various sexual activities of all servicemembers—male and female, gay, and straight—the military has implemented extensive preventative education programs and mandates routine Human Immunodeficiency Virus (HIV) testing to prevent the spread of sexually transmitted diseases and to identify and treat those who contract them.⁹³ These programs keep America’s troops in healthy fighting condition and will continue to do so when DADT is repealed. Just as the military does not, based on these medical concerns, preclude military service for the thousands of GLBs currently servicing in silence, neither should it preclude their service based on a choice to acknowledge sexual orientation and live free from the burden of secret, hidden, double lives.

VI. The Experience of American Paramilitary Organizations and Westernized Foreign Militaries Supports Repeal of DADT

A. GLBs in American Paramilitary Organizations

Many American paramilitary organizations—including the Federal Bureau of Investigation, Central Intelligence Agency, municipal fire and police departments, and Department of Defense (DoD) contractors—currently allow acknowledged GLB individuals to serve in their organizations.⁹⁴ While there are clearly differences between civilian and

⁹² See, e.g., Choe Sang-Hun, *Ex-Prostitutes Say South Korea and U.S. Enabled Sex Trade Near Bases*, N.Y. TIMES, Jan. 7, 2009, http://www.nytimes.com/2009/200901/08/world/asia/08korea.html?_r=1; MARILYN E. HEGARTY, VICTORY GIRLS, KHAKI-WACKIES, AND PATRIOTUTES 28, 33 (2008); Staff Sergeant Kathleen T. Rhem, *STDs Still a Real Threat, Even at Home* (May 31, 2000), available at <http://www.defense.gov/news/newsarticle.aspx?id=45172>.

⁹³ See, e.g., U.S. DEP’T OF DEF., INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS para. 6 (17 Oct. 2006) (mandating HIV testing at various intervals); U.S. DEP’T OF DEF., DIR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) (19 Mar. 1991).

⁹⁴ Central Intelligence Agency (CIA), Application Process, <https://www.cia.gov/careers/application-process/index.html#Clearance> (last visited Mar. 7, 2010) (stating that the CIA “does not discriminate on the basis of . . . sexual orientation”); Fed. Bureau of

military organizations, such as better control over privacy in the paramilitary workplace, and different missions and operational approaches,⁹⁵ the paramilitary experiences are both pertinent and instructive to the U.S. military in two important ways.

First, despite the differences above, these organizations share many similarities with military units: They conduct hazardous and potentially life-threatening training and operations, rely on a high degree of teamwork, have hierarchical structures with a well-defined chain of command, and feature shared locker rooms, showering facilities, and living space with minimal privacy.⁹⁶ Many members of these paramilitary organizations even “have a military background and share values held by military servicemembers.”⁹⁷ A 1993 study observed that some of these organizations emphasize traditional family values and conservative religious beliefs, much like segments of the Armed Forces.⁹⁸ Despite the presence of openly gay personnel in their ranks, close quarters, and intense missions, however, researchers found no known homosexual assaults and far fewer problematic incidents involving homosexual employees than those involving “heterosexual men harassing women.”⁹⁹

Second, members of paramilitary organizations—including those who are acknowledged GLBs—currently serve with American troops in carrying out many official duties. Many U.S. servicemembers work side-by-side with paramilitary employees, any number of whom may be GLB, at locations throughout the world, sometimes sharing the very same quarters and shower facilities,¹⁰⁰ with no reported problems associated with such living arrangements.

Investigation (FBI), Diversity, *available at* <http://www.fbijobs.gov/1114.asp> (stating that the FBI employee selection process is done “without regard to . . . sexual orientation”); U.S. GEN. ACCOUNTING OFF., DOD’S POLICY ON HOMOSEXUALITY 6 (1992) [hereinafter GAO HOMOSEXUALITY POLICY], <http://archive.gao.gov/d33t10/146980.pdf> (stating that since the 1970s, police and fire departments have increasingly hired GLB personnel and adopted policies prohibiting discrimination based on sexual orientation); RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 71, at 106.

⁹⁵ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 108, 157.

⁹⁶ *Id.* at 108.

⁹⁷ *Id.*

⁹⁸ *Id.* at 117.

⁹⁹ *Id.* at 18.

¹⁰⁰ *See supra* note 78 (discussing the observations of Lieutenant Colonel Heppenstall and military policies regarding shared housing in CONUS).

B. GLBs in the Armed Forces of Westernized Foreign Nations

At least twenty-five nations allow homosexuals to serve openly in their Armed Forces, including the United Kingdom.¹⁰¹ Although the United States military is—by virtue of its size, missions, structure, and worldwide deployments—different from the military forces of other nations, it shares with them a concern for military effectiveness, the well-being of its servicemembers, and the need to minimize stressors within the ranks.¹⁰² Like American forces, many of these foreign militaries are hierarchical, conduct life-threatening missions, rely on teamwork, discipline, and unit cohesion, and require servicemembers to share locker rooms, shower facilities, and quarters with minimal privacy. Some nations once banned GLBs from military service based the same rationale underlying DADT.¹⁰³ This is significant because (a) as is the case with American paramilitary organizations, the subsequent presence of acknowledged GLB personnel within their ranks has been relatively problem-free, with no negative impact on unit cohesion or military effectiveness, and (b) these nations deploy, serve alongside, and sometimes share quarters and showers with American troops in a broad spectrum of operations and locations.¹⁰⁴

¹⁰¹ PALM CTR. GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 135. Nations allowing acknowledged GLBs to serve in the military include Australia, Austria, Canada, France, Germany, Ireland, Israel, Italy, Lithuania, Netherlands, New Zealand, Norway, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. *Id.*

¹⁰² RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY, *supra* note 71, at 65.

¹⁰³ *See, e.g., id.* at 75 (stating that, prior to 1992, GLBs were banned from Canadian military service based on the belief that homosexuality is incompatible with military service); *id.* at 100 (stating that Britain’s former ban was based on claims that homosexuality undermines cohesion and good military order; undermines recruiting, and interferes with bonding); PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2.

¹⁰⁴ PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2–3 (observing how allied nations that lifted similar bans have experienced improved command climates and no negative impact on morale, recruitment, retention, readiness, or overall combat effectiveness); CAPTAIN M. SUHRE, CHANGING THE DEPARTMENT OF DEFENSE’S POLICY ON HOMOSEXUALS 9–10 (Feb. 19, 2008) (unpublished research paper), <http://www.dtic.mil/cgibin/GetTRDoc?AD=ADA508994&Location=U2&doc=GetTRDoc.pdf> (discussing the fact that U.S. forces deploy with foreign troops and American civilians, any of whom may be acknowledged GLB). Heppenstall Interview, *supra* note 78 (stating that he shared a room and shower facilities with a U.S. military officer while deployed to Afghanistan); Interview with Lieutenant Commander Theron R. Korsak, Joint Operational Law Navy Liaison, in Charlottesville, Va. (Mar. 2, 2010) (stating that he shared rooms, tents, and shower facilities with Canadian officers and enlisted troops while deployed to Afghanistan).

Proponents of DADT discount the value of examining other countries' experiences and suggest that America's Armed Forces did not become the strong fighting force they now are by following the practices of foreign nations.¹⁰⁵ Consideration of other countries' experiences is vital, however, not as a basis for uninformed duplication of policies, but as direct evidence of the successful integration of acknowledged GLBs in military organizations with structures, cultures, values, and concerns similar to our own.¹⁰⁶ Foreign experiences provide the only existing evidence of this kind and signal that the U.S. military will successfully adapt to the repeal of DADT.

1. *United Kingdom*

While there are certainly differences between the United Kingdom and the United States, cultural, moral, and military similarities between the two make the United Kingdom's experience relevant to DADT's repeal. For instance, while the U.K. is significantly smaller than the United States in terms of land mass, population, and number of military troops, its religious, educational, and health demographics are strikingly similar to ours.¹⁰⁷ Like the United States, it has four national military

¹⁰⁵ See, e.g., Elaine Donnelly, *Foreign Militaries Are Not Role Models for U.S.*, Oct. 12, 2009, <http://cmrlink.org/HMilitary.asp?docID=357> (urging readers to disregard the experiences of the United Kingdom because it "demonstrated fundamental differences with American culture" when it "capitulat[ed]" to a court order forcing its military forces to allow GLBs to serve); Captain L.S. Christian, Jr., *Military Gay Ban Revisited: Is Our Military Ready for Change?* (Feb. 20, 2009) (unpublished research paper), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA509883&Location=U2&doc=GetTRDoc.pdf>.

¹⁰⁶ American military leaders routinely study the experiences of foreign countries when analyzing and studying military issues. See, e.g., Ctr. for Law & Mil. Operations (CLAMO), *Mission*, <https://www.jagcnet.army.mil/8525751D00557EFF/0/DF50565CF3AB391D852574A2004C3A7B?opendocument> (last visited Apr. 19, 2010) (discussing the CLAMO's mission of collecting and synthesizing "data relating to legal issues arising in military operations" and describing the CLAMO as a "multinational legal center"). Although policies have been successfully instituted in foreign militaries, this does not guarantee their successful implementation in America's Armed Forces. Telephone Interview with Dr. Donald P. Wright, Chief of Research and Publ'ns, U.S. Army Combat Studies Inst. (Apr. 19, 2010). The success of such policies, however, still provides crucial insight on pivotal issues and aids in their analysis. *Id.* ("If we can learn tactical lessons from foreign militaries, we can learn policy lessons as well.")

¹⁰⁷ In terms of religion, both nations are predominantly Christian. U.S. Central Intelligence Agency, *The World Factbook: United Kingdom*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> [hereinafter *CIA Factbook U.K.*] (last visited Mar. 3, 2010); U.S. Central Intelligence Agency, *The*

organizations—an Army, Air Force, Navy, and Marine Corps (the Marines fall under the Navy, much as they do in the United States).¹⁰⁸ Like America’s Armed Forces, the United Kingdom’s military is comprised of all-volunteer troops who view their service as a profession.¹⁰⁹ The United Kingdom’s armed forces are “strong, voluntary, and combat tested” and train, deploy, conduct joint missions, and sometimes share living quarters with American forces.¹¹⁰ Most significantly, the United Kingdom has a history, like the United States, of banning gays from military service based on the same reasons cited in support of DADT.

Prior to January 2000, gays were completely banned from military service.¹¹¹ Unlike other European countries, the United Kingdom’s societal and military opposition to homosexuals was framed in terms of morality, and was just as strong—if not stronger—than it has been in the United States.¹¹² Troops who engaged in homosexual behavior risked not only being administratively discharged, but criminally charged with “‘conduct prejudicial to good order or discipline’ or ‘scandalous conduct by officers.’”¹¹³ Heterosexual troops were expected to “inform on anyone they suspected of being gay” and gay troops who chose to serve did so in secret.¹¹⁴ They were required to lie “to close friends and

World Factbook: United States, [hereinafter CIA Factbook U.S.], available at <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (detailed information on the United States). In the United States, approximately 20% of churchgoers attend church on a weekly basis. N. Am. Mission Bd., Special Report: The American Church in Crisis, available at <http://www.namb.net/site/apps/nl/content3.asp?c=9qKILUOzEpH&b=1594355&ct=2350673> (last visited Mar. 4, 2010). In Britain, approximately 10% of churchgoers attend church on a weekly basis. Religion in the United Kingdom (July 5, 2007), available at <http://www.vexen.co.uk/UK/religion.html>.

¹⁰⁸ CIA Factbook U.K., *supra* note 107; *see also* CIA Factbook U.S., *supra* note 107 (providing detailed information on the United States).

¹⁰⁹ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 71.

¹¹⁰ FRANK, *supra* note 5, at 142.

¹¹¹ Terri Judd, *How the Forces Finally Learnt to Take Pride*, INDEP., July 27, 2009, <http://www.independent.co.uk/news/uk/home-news/how-the-forces-finally-learnt-to-take-pride-1762057.html>.

¹¹² RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (stating that unlike the citizens of other European nations studied, those in the United Kingdom, like many in the United States, view homosexuality in terms of morality, and that many British GLBs have historically been more uncomfortable than Americans in terms of revealing their sexual orientation).

¹¹³ FRANK, *supra* note 5, at 142; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 100–01.

¹¹⁴ Judd, *supra* note 111.

bosses,” lived in constant fear of the Special Investigation Branch, and worried about losing their careers, income, and retirement.¹¹⁵

In support of its ban, United Kingdom’s military and political leaders made the same arguments and voiced the same concerns that have been offered by proponents of DADT, including privacy, morality, and the belief that homosexuals were deviant carriers of sexually transmitted diseases.¹¹⁶ In the 1990s, military leaders and military courts rejected challenges to the ban based on the widely-held belief that heterosexual Soldiers disliked gays and that allowing gays to serve would “undermine cohesion and threaten recruitment.”¹¹⁷ The British Ministry of Defense asserted that homosexuality was offensive and detrimental to discipline, morale, and unit effectiveness, a sentiment publicly echoed in the media by at least one retired British general.¹¹⁸ Proponents of the ban cited the results of a 1996 poll of 13,500 troops, in which two-thirds of respondents indicated they would refuse to serve with gays.¹¹⁹ The sentiment of some U.K. servicemembers was a fear that “they would get raped in their beds” following repeal of the ban.¹²⁰ According to one officer, “the thought of two men dancing at a mess function was more than some people could cope with.”¹²¹ Despite these concerns, the European Court of Human Rights agreed to hear a 1999 case challenging the United Kingdom’s ban on gays, and ultimately ruled that the ban violated the European Convention (to which the United Kingdom is a party). It was only then, based on a judicial ruling, that the United Kingdom lifted its ban.¹²²

¹¹⁵ *Id.*

¹¹⁶ PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 9–11; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (discussing the fact that the United Kingdom, unlike other European nations, has historically viewed homosexuality as a moral issue); FRANK, *supra* note 5, at 142, 146.

¹¹⁷ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 100 (stating that “[m]any of the arguments put forward by the United Kingdom military establishment against allowing homosexuals to serve are similar to those used in the United States” and that “it is claimed that homosexuality undermines cohesion and good military order . . . recruiting . . . and interferes with confidence building and bonding in small groups”); FRANK, *supra* note 5, at 143.

¹¹⁸ FRANK, *supra* note 5, at 142.

¹¹⁹ *Id.* at 147.

¹²⁰ Judd, *supra* note 111.

¹²¹ *Id.*

¹²² Editorial, *Britain Ends Ban on Gays in Military*, DESERET NEWS, Jan. 13, 2000, at A4, <http://news.google.com/newspapers?id=n7ERAAAIAAJ&sjid=ee0DAAAIAAJ&pg=2365,682540&dq=uk+history+gays+in+military&hl=en>.

When the United Kingdom lifted its ban, “none of the [predicted] crisis in recruitment, retention, resignations, morale, cohesion, readiness, or ‘operational effectiveness’ came to pass.”¹²³ Contrary to the assertion that the ban’s repeal led to resignations that significantly impacted the U.K.’s armed forces,¹²⁴ current reports indicate that no widespread spate of resignations or any significant impact occurred.¹²⁵ In an internal review conducted more than two years after the ban’s repeal, a government official found that, although not all troops approved of the new policy, its implementation was successful and caused “no real problems of harassment or victimization.”¹²⁶ Navy commanders reported that “the problems initially perceived have not been encountered,” and Air Force leaders reported there was “no tangible impact on operational effectiveness, team cohesion, or service life generally.”¹²⁷ Army leaders commented that the new policy caused no significant changes.¹²⁸ The British Government, instead, found it to be a “solid achievement” with a “marked lack of reaction.”¹²⁹ Assistant Chief of the Navy Staff, Rear-Admiral James Burnell-Nugent, reported that while some did not welcome the ban’s repeal, it did not cause “any degree of difficulty.”¹³⁰

Contrary to the dire, drastic predictions made by proponents of its ban, United Kingdom troops experienced less anxiety about gays than predicted, greater openness in their interactions with one another, and increased access to recruiting pools at schools and universities that had previously excluded recruiters from their campuses.¹³¹ According to a study conducted by the Ministry of Defence, servicemembers “demonstrated a mature and pragmatic approach,” with no reported incidents of homosexuals harassing heterosexuals and no negative impact

¹²³ FRANK, *supra* note 5, at 145.

¹²⁴ Bunn, *supra* note 24, at 238.

¹²⁵ PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 35.

¹²⁶ U.K. MINISTRY OF DEF. SERVICE PERSONNEL BOARD, TRI-SERVICE REVIEW OF THE ARMED FORCES POLICY ON HOMOSEXUALITY AND CODE OF SOCIAL CONDUCT (Dec. 2002) [hereinafter U.K. MINISTRY OF DEF.] (on file with author). The author wishes to thank Dr. Nathaniel Frank for providing a copy of this report. For additional information regarding reports pertaining to the United Kingdom’s post-2000 policy on GLBs in the military, see Aaron Belkin, *DADT: Is the Gay Ban Based on Military Necessity?*, 33 PARAMETERS 108, 111 (2003).

¹²⁷ U.K. MINISTRY OF DEF., *supra* note 126.

¹²⁸ *Id.*

¹²⁹ Belkin, *supra* note 126, at 111 (citing to a British Government report).

¹³⁰ *Id.*

¹³¹ FRANK, *supra* note 5, at 145.

on recruiting.¹³² Accordingly, former leading proponents of the ban have since conceded that its repeal did not damage the Armed Forces.¹³³

2. *Canada and Australia*

Like the United States and United Kingdom, Canada and Australia historically banned gays from serving in the military based largely on moral beliefs as to the nature of homosexuality.¹³⁴ Prior to repeal of the Canadian ban, Canadian troops who suspected peers of being gay were required to report their suspicion to their chain of command.¹³⁵ Sixty-two percent of Canadian troops surveyed indicated they would refuse to share sleeping and shower areas with GLBs and forty-five percent said they would refuse to work with or for a GLB Soldier if the ban was lifted.¹³⁶ In line with these opinions, researchers predicted that the presence of GLBs would cause a “serious decrease in operational effectiveness.”¹³⁷ Even after the ban was lifted, the Department of National Defence continued arguing for its reinstatement, claiming that the presence of openly gay troops violated the privacy rights of others and put military morale, discipline, recruiting, and medical fitness at risk.¹³⁸ In Australia, alike, spokesmen for the country’s largest veterans’ group similarly opposed repeal of its ban, citing risks to morale and military performance.¹³⁹ Australian military officers threatened to resign if forced to serve with gays,¹⁴⁰ voicing vehement opposition to gay troops based on concerns over unit cohesion, military effectiveness, and the spread of AIDS through battlefield blood transfusions.¹⁴¹

¹³² *Id.*

¹³³ Belkin, *supra* note 126, at 111 (based on interviews of 104 experts from the United Kingdom, Canada, Israel, and Australia and a review of 662 related documents and articles).

¹³⁴ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (documenting how Canada, the United Kingdom, and the United States all share this similarity).

¹³⁵ U.S. GEN. ACCOUNTING OFF., HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES 29 (June 1993) [hereinafter GAO FOREIGN COUNTRY PRACTICES], <http://archive.gao.gov/t2pbat5/149440.pdf>. There is a typographical error in the pagination of the online report with two pages numbered “29.” This citation refers to the second of these two pages.

¹³⁶ PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 51.

¹³⁷ *Id.* at 15.

¹³⁸ FRANK, *supra* note 5, at 138.

¹³⁹ Belkin, *supra* note 126, at 111.

¹⁴⁰ *Id.* at 110.

¹⁴¹ PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 17.

When the bans against gays were lifted in both countries in 1992, however, none of these dreadful predictions materialized.¹⁴² A comprehensive study conducted in 2000 by the Palm Center at the University of California, Santa Barbara, assessed the effect of openly gay troops in Canada, Australia, Israel, and the United Kingdom. The study found no reported reduction in military cohesion, recruitment, or retention in any of their military organizations, nor any reported increase in HIV rates.¹⁴³ A Canadian military assessment stated that, “despite all the anxiety that existed . . . about the change in policy, here’s what the indicators show—no effect.”¹⁴⁴ Similarly, Australian military and defense officials reported that repeal of the ban was accepted in “true military tradition,”¹⁴⁵ resulting in “an absolute non-event.”¹⁴⁶ According to Bronwen Grey, an Australian Defence Ministry official, “There was no increase in complaints about gay people or by gay people. There was no known increase in fights, on a ship, or in Army units. . . . The recruitment figures didn’t alter.”¹⁴⁷

While some may assert that Australian military forces are too different from American forces for any valid comparison to be drawn, highlighting how, in 2008, the Australian Navy “completely shut down to provide a two month break for Christmas,”¹⁴⁸ this comment is based on an overly-broad misstatement of fact. While the Australian Navy did go to minimal manning for a two-month period over Christmas of that year, it did not completely shut down. Australia’s naval ships and submarines that had been serving on deployments continued with their missions during this time, and the remaining non-mission essential navy vessels maintained crews of sailors on board to man them.¹⁴⁹ The Navy furthermore maintained all of its operational taskings and emergency

¹⁴² FRANK, *supra* note 5, at 148; RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 73 (implementing the change in policy in Canada did not pose any major problems); PALM CTR., GAYS IN FOREIGN MILITARIES 2010, *supra* note 77, at 2, 6.

¹⁴³ FRANK, *supra* note 5, at 148; Belkin, *supra* note 126, at 109–1.1

¹⁴⁴ *Id.* at 147 (citing to an assessment conducted by a bureau of the Canadian military).

¹⁴⁵ Belkin, *supra* note 126, at 110 (quoting Professor Hugh Smith, an academic expert on homosexuality in the Australian military).

¹⁴⁶ *Id.* (quoting Australian Commodore R.W. Gates [the equivalent of a one-star admiral]).

¹⁴⁷ *Id.*

¹⁴⁸ Bunn, *supra* note 24, at 243.

¹⁴⁹ Editorial, *Australia’s Navy Is Awarded a Two-Month Christmas Holiday*, DAILY MAIL ONLINE, Nov. 18, 2008, <http://www.dailymail.co.uk/news/article-1086984/Australias-navy-awarded-month-Christmas-holiday--pay.html>.

standby requirements.¹⁵⁰ It should be noted that American military troops, too, are sometimes granted extensive blocks of paid, uncharged administrative time off—for a month or longer, in some cases—such as the uncharged leave granted to troops redeploying from tours in Afghanistan.¹⁵¹ Additionally, American units also typically go down to minimal manning, sometimes taking block leave, over the Christmas holiday.¹⁵²

3. Israel

Despite its conscription-based military force, Israel, too, has struggled with the issue of gays in the military. Although recruiting is not a significant issue within the Israeli Army (all citizens, with few exceptions, are required to serve), retention, operational effectiveness, and unit morale and cohesion are, as Israel is reportedly the most battle-tested, experienced army in the world.¹⁵³ Although Israel has had no outright ban against GLBs in the military, they were, until recently, typically dismissed because many commanders believed homosexuality rendered them incompatible with military service.¹⁵⁴ Traditional Jewish religious thought considers homosexuality to be an “egregious sin,” and

¹⁵⁰ Adrian Crawford, *Navy Personnel Deserve Time Off*, AUST. BROADCASTING CORP., Nov. 18, 2008, <http://www.abc.net.au/news/stories/2008/11/18/2423225.htm>.

¹⁵¹ William H. McMichael, *A New Deployment Compensation Plan*, ARMY TIMES, Apr. 20, 2007, http://www.armytimes.com/news/2007/04/military_deploymentpay_leave_070418w/.

¹⁵² See, e.g., Luke Waack, *Holiday Block Leave Begins*, GUIDON, Dec. 20, 2007, http://www.myguidon.com/index.php?option=com_content&task=view&id=6201 (describing the exodus of more than 6500 Soldiers from Fort Leonard Wood in December 2007 during “Holiday Block Leave,” and stating that block leave allows personnel to spend the holiday season with their families); Don Kramer, *Soldier Train on New Strykers* (June 27, 2008), available at <http://www.army.mil/-news/2008/06/27/10429-soldiers-train-on-new-strykers/> (discussing a break in a Stryker battalion’s operational tempo during holiday block leave); Major T.G. Taylor, *Ivy Division: Forward Deployed, Preparing to Deploy*, NEWS BLAZE, Oct. 6, 2008, <http://newsblaze.com/story/20081006070242zmil.nb/topstory.html> (discussing an infantry brigade’s scheduled holiday block leave).

¹⁵³ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 85–97 (discussing conscription, and the fact that Israel’s defense forces have “unparalleled” warfighting experience based on its involvement, since 1948, in at least four major wars, countless major operations against hostile enemies, and more recent occupation of the West Bank and Gaza strip); Joseph Fitchett, *And Interwoven with Civil Life: An Army Forged by Wars*, N.Y. TIMES, Apr. 29, 1998, <http://www.nytimes.com/1998/04/29/news/29iht-isdef.t.html?pagewanted=1> (asserting that no army forces are as battle-tested as Israel’s).

¹⁵⁴ FRANK, *supra* note 5, at 140.

Israeli attitudes toward homosexuality have historically been more negative than those in America.¹⁵⁵ In spite of religious, cultural, and military resistance, Israel passed a law in 1993 prohibiting discrimination against GLB troops. Since then, Israel’s military forces have successfully adapted to the change with no reported decline in unit morale, cohesion, or effectiveness.¹⁵⁶

4. “Overarching Concerns”

Some may assert that differences between U.S. criminal laws and foreign criminal laws create “overarching concerns” that make the experience of foreign militaries inapplicable. They may claim, for example, that foreign nations differ in their “liberal views on sexuality in general,” which are “reflected in toleration for sexual relationships that would be entirely illegal in the United States.”¹⁵⁷ In support of this contention, they may provide examples of foreign laws that assess no criminal liability for those who engage in sexual intercourse with minors between the ages of twelve and sixteen, when the would-be offender is close in age (e.g., within two years), and claims such standards are “not comparable to the Uniform Code of Military Justice or most state laws in the United States.”¹⁵⁸ This assertion, however, is based on incorrect and overly-broad statements of fact. Most states in the United States, like Israel, Britain, Canada, and Australia, have provisions which provide an affirmative defense to the crime of statutory rape where the age difference between the sexual partners is only a few years apart. In New York, for example, a defendant accused of having sex with a minor as young as thirteen-years-old has an affirmative defense to the crime of rape if his age is within four years of the minor’s.¹⁵⁹ Most states have

¹⁵⁵ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 86 (stating the majority of Israelis are non-observant but nevertheless heavily influenced by traditional Judaic views on homosexuality [and] because of this, “homosexuality is perceived in Israel to be aberrant behavior and homosexuals are not generally accepted”); Amia Lieblich & Gitza Friedman, *Attitudes Toward Male and Female Homosexuality and Sex-Role Stereotypes in Israeli and American students*, 12 SEX ROLES 1573 (1985) (discussing findings indicating that Israelis are more homophobic and conservative in terms of sex-role orientation than are Americans).

¹⁵⁶ FRANK, *supra* note 5, at 145; RAND SEXUAL ORIENTATION POLICY, *supra* note 71.

¹⁵⁷ Bunn, *supra* note 24, at 244.

¹⁵⁸ *Id.*

¹⁵⁹ Telephone Interview with Anthony J. Colleluori, Attorney and past President of the Nassau County Criminal Courts Bar Association, Anthony J. Colleluori & Associates (May 14, 2010). *See also* Anthony John Colleluori, Understanding New York Statutory

similar provisions and age-range affirmative defenses to the crime of statutory rape.¹⁶⁰ Even the UCMJ provides an affirmative defense to statutory rape for servicemembers who engage in sexual intercourse and other sexual acts with their spouse when the spouse is under the age of sixteen.¹⁶¹

Other countries' experiences provide compelling evidence about the outcome of repealing military gay bans in units with cultures, structures, and missions similar to ours. According to Brigadier General Dennis Laich, a retired Army general with decades of experience leading American Soldiers, proponents of the ban who claim otherwise are "ignoring the long standing opinion of historians, sociologists, economists, and political scientists who maintain that there are legitimate . . . links between the United States and . . . and other countries . . . that have recently allowed gays and lesbians to openly serve."¹⁶² These foreign experiences are not only relevant, but indicative of the fact that the U.S. military will successfully adapt when DADT is repealed.¹⁶³

VII. Neither State Nor Federal Statutes Preclude DADT's Repeal

A. DOMA Does Not Preclude DADT's Repeal

Since 1996, state marriage laws have been subject to Public Law 104-199, the Federal Defense of Marriage Act.¹⁶⁴ The DOMA contains two key parts aside from its definition:

Section two relieves states from any legal obligation to recognize, legalize, or give effect to same-sex marriages or civil unions—though it does not prohibit states from legalizing or recognizing same-sex marriages or unions if they choose to do so.

Rape Laws: The Age of Consent, *available at* <http://www.avvo.com/legal-guides/New-York-Age-Consent> (last visited Apr. 6, 2010).

¹⁶⁰ 1 SEX AND SOCIETY 54 (Marshall Cavendish 2010) ("Ages of consent range from . . . 15 to 18 across the United States. Most states have age-span provisions that exempt young people who are close in age from prosecution.")

¹⁶¹ UCMJ art. 120a(t)(9) (2008).

¹⁶² E-mail from Brigadier General (Ret.) Dennis Laich, U.S. Army Reserve, to author (Feb. 21, 2010) (on file with author).

¹⁶³ Prakash, *supra* note 17, at 93.

¹⁶⁴ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

Section three provides a federal definition of marriage (“only a legal union between one man and one woman as husband and wife”) and spouse (“only a person of the opposite sex who is a husband or wife”), effectively precluding the federal government from extending to same-sex spouses the same benefits and rights available to heterosexual married spouses.¹⁶⁵

According to the U.S. Government Accountability Office, the DOMA prevents same-sex spouses and partners from receiving 1138 federal benefits, rights, and privileges contingent on marital status as defined in DOMA.¹⁶⁶ The Gay & Lesbian Advocates & Defenders, a legal organization representing of eight married couples and three surviving spouses denied federal benefits based on their homosexual marriages, has challenged DOMA in the U.S. District Court, but has not obtained a ruling at the time of this writing.¹⁶⁷ Despite DOMA’s restrictions, President Obama has directed the extension of federal benefits for same-sex partners of federal employees, within DOMA’s limitations.¹⁶⁸

When considering DOMA, it is essential to distinguish between DADT’s marriage prohibition and DOMA’s provisions precluding federal recognition of state-sanctioned same-sex marriages. First, DADT does not rely on, mention, or incorporate DOMA’s provision anywhere within its four corners. In fact, DADT predated DOMA by three years.¹⁶⁹ Similarly, nowhere in DOMA is DADT a factor.¹⁷⁰ Consequently, the two statutes are not explicitly related to or dependent

¹⁶⁵ *Id.*; see also Gay & Lesbian Advocates and Defenders, “DOMA” Means Federal Discrimination Against Married Same-Sex Couples 1, available at <http://www.glad.org/uploads/docs/publications/doma-overview.pdf> (last visited Mar. 4, 2010) [hereinafter Gay & Lesbian Advocates and Defenders].

¹⁶⁶ Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen Accounting Off., to Senator Bill Frist (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁶⁷ Gay & Lesbian Advocates and Defenders, *supra* note 165.

¹⁶⁸ Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, subject: Federal Benefits and Non-discrimination (June 17, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/.

¹⁶⁹ Don’t Ask, Don’t Tell was established in 1993. See, e.g., Fred Borch III, *The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is*, 203 MIL. L. REV. 189 (2010). The DOMA was passed in 1996. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹⁷⁰ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

on one another. Although the DOMA will preclude extension of statutory federal benefits to same-sex GLB servicemembers and their spouses, it will have no bearing on their ability to serve in, be retained in, or retire from the Armed Forces. If there is concern that such consequences would be unfair to GLB servicemembers and their spouses, then it would be even more unfair to make service by GLBs contingent upon the harmonization of DOMA.

B. State Laws Pertaining to Gay Marriage and Domestic Partnerships Do Not Preclude DADT's Repeal

The policy of DADT is not connected in any way to the marriage and domestic partnership laws of any particular state. As of this writing, five states—Massachusetts,¹⁷¹ Connecticut,¹⁷² Iowa,¹⁷³ Vermont,¹⁷⁴ and New Hampshire¹⁷⁵—plus the District of Columbia¹⁷⁶—permit marriage for

¹⁷¹ Mass. Trial Court Law Libraries, Same-Sex Marriage, available at <http://www.lawlib.state.ma.us/subject/about/gaymarriage.html> (last visited Mar. 1, 2010) (“The same laws and procedures that govern traditional marriage also apply to same-sex marriages.”); see also Gay and Lesbian Advocates & Defenders, How to Get Married in Massachusetts (Nov. 2009), available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-ma.pdf>.

¹⁷² Conn. Dep’t of Pub. Health, State Office of Vital Record–Marriage License and Certificate, available at <http://www.ct.gov/dph/cwp/view.asp?a=3132&q=390672> (last visited Mar. 1, 2010) (stating, “[t]he eligibility requirements and application process for same sex marriage are identical to the requirements for opposite sex marriage”); see also Gay and Lesbian Advocates & Defenders, How to Get Married in Connecticut (Nov. 2009), <http://www.glad.org/uploads/docs/publications/how-to-get-married-ct.pdf>.

¹⁷³ Iowa Dep’t of Health, IDPH News: Updated Marriage Forms Issued, Apr. 17, 2009, available at <http://www.idph.state.ia.us/IdphNews/Reader.aspx?id=3EE35557-F781-4B42-ADCE-EAD34DF2F200> (describing how Iowa no longer limits marriage to heterosexuals); see also Iowa–Marriage FAQ, Lambda Legal, Apr. 23, 2009, available at http://data.lambdalegal.org/publications/downloads/fs_iowa-marriage-faq.pdf.

¹⁷⁴ Vt. S.B. 115, 2009 Vt. Laws 3 (Apr. 7, 2009) (effective Sept. 1, 2009), available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf> (how do I cite to this?); Vt. Sec’y of State, Marriage Equality Act, available at http://www.sec.state.vt.us/municipal/Marriage_equality.htm (last visited Mar. 1, 2010); see also, How to Get Married in New Hampshire, Gay and Lesbian Advocates & Defenders, Dec. 2009, available at <http://www.glad.org/uploads/docs/publications/how-to-get-married-nh.pdf> [hereinafter GLAD N.H. Website].

¹⁷⁵ N.H. H.B. No. 436 (2009), 2009 N.H. ch. 59, available at <http://www.gencourt.state.nh.us/legislation/2009/HB0436.html>; see also GLAD N.H. Website, *supra* note 174.

¹⁷⁶ See, e.g., Superior Court of D.C., Marriage Bureau, available at <http://www.dccourts.gov/dccourts/superior/family/marriage.jsp> (last visited Apr. 19, 2010) (“Pursuant to the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 . . . effective

both opposite and same-sex spouses. At least seven other states, including New Jersey,¹⁷⁷ Hawaii,¹⁷⁸ Maine,¹⁷⁹ Washington,¹⁸⁰ Oregon,¹⁸¹ California,¹⁸² and Nevada,¹⁸³ permit same-sex civil unions or domestic partnerships, while precluding same-sex marriage. These state-sanctioned marriages and partnerships entitle same-sex spouses and partners to reap various benefits normally reserved for heterosexual

March 3, 2010, same sex couples may apply for a marriage license in the District of Columbia.”); Ian Urbina, *Gay Marriage Is Legal in U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/04/us/04marriage.html>.

¹⁷⁷ N.J. Dep’t of Health & Senior Servs., How to Apply for a Civil Union License, available at http://www.state.nj.us/health/vital/civilunion_apply.shtml (last visited Mar. 1, 2010) (discussing New Jersey’s legal requirements for same-sex civil unions, and authorizing such unions for persons under the age of sixteen with parental and judicial consent).

¹⁷⁸ Haw. Dep’t of Health, Reciprocal Beneficiary Relationships, available at <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html> (last visited Mar. 1, 2010) (providing instructions and forms for persons of any sexual orientation seeking to enter a “reciprocal beneficiary relationship,” which is described as legal relationship between two people who are otherwise prohibited by law from marrying each other).

¹⁷⁹ ME. REV. STAT. ANN. tit. 22, § 2710 (2003), available at <http://www.mainelegislature.org/legis/statutes/22/title22sec2710.html>.

¹⁸⁰ Substitute S. B. 5336, 60th Leg., Reg. Sess. (Wash. 2007), <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Passed%20Legislature/5336-S.PL.pdf> (last visited Mar. 1, 2010) (authorizing same-sex partners to enter domestic partnerships in Washington); WASH. REV. CODE § 26.60.010 (2010), <http://apps.leg.wa.gov/RCW/default.aspx?cite=26.60.030> (last visited Mar. 1, 2010) (detailing the legal requirements and responsibilities for state-registered domestic partners); see also WASH. COURTS., FAMILY LAW HANDBOOK: UNDERSTANDING THE LEGAL IMPLICATIONS OF DOMESTIC PARTNERSHIPS AND DISSOLUTION IN WASHINGTON STATE (2009), <http://www.courts.wa.gov/newsinfo/content/pdf/FamilyLawHandbook%20Domestic%20Partner.pdf#xml=http://206.194.185.202/texis/search/pdfhi.txt?query=domestic+partnerships&pr=www&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&id=4b20e5d611> (describing the legal status and responsibilities of same-sex domestic partners).

¹⁸¹ Oregon Family Fairness Act, 2007 Or. Laws, ch. 99 § 7 (2007) (authorizing same-sex domestic partnerships in the state of Oregon); see also Or. Dept. of Human Servs., Domestic Partnership Forms/Instructions, available at <http://www.oregon.gov/DHS/ph/chs/order/dp.shtml> (last visited Mar. 1, 2010).

¹⁸² California Domestic Partner Rights and Responsibilities Act, CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2008) (authorizing same-sex domestic partnership in the state of California); see also Cal. Sec’y. of State, Domestic Partners Registry, available at <http://www.sos.ca.gov/dpregistry/> (last visited Mar. 1, 2010) (providing forms and instructions for domestic partnerships).

¹⁸³ S. B. 283, 2009 Leg., 75th Sess. (Nev. 2009); Nev. Sec’y of State, Domestic Partnership—FAQ, available at <http://www.nvsos.gov/index.aspx?page=274#283> (last visited Apr. 12, 2010) [hereinafter Nevada Domestic Partnership].

spouses.¹⁸⁴ One state, New York, does not permit same-sex marriage within its situs, but nevertheless recognizes same-sex marriages performed in other jurisdictions.¹⁸⁵

Proponents of DADT speculate that if DADT is repealed while DOMA is still in effect, complicated legal issues related to interstate moves, child custody issues, and adoption, divorce, and other family law disputes will arise within the military.¹⁸⁶ When evaluating such fears, however, it is important to recognize that a purpose of the military's legal assistance programs is to address these very same routine, pervasive concerns with heterosexual servicemembers and their families. Disputes regarding paternity, child support, child custody, inheritance, divorce, alimony, and annulments are subjects encountered by legal assistance attorneys on a daily basis.¹⁸⁷ In resolving these state-specific issues within jurisdictions permitting same-sex marriages, military legal assistance attorneys and commanders will, for the most part, be able to rely on the same laws pertaining to heterosexual couples on which they currently do, since most of the laws apply equally to homosexual couples under state law. Legal assistance attorneys will have the option of referring unique and unusually complicated family law issues, including

¹⁸⁴ Holly Hartman, A Primer on Same-Sex Marriage, Civil Unions, Domestic Partnerships, and Defense of Marriage Acts, *available at* <http://www.infoplease.com/ipa/A0922609.html#civil> (last visited Mar. 1, 2010).

¹⁸⁵ *See, e.g.*, Michael Gormley, *New York Must Recognize Gay Marriage in Other States*, HUFFINGTON POST, Nov. 19, 2009, http://www.huffingtonpost.com/2009/11/19/new-york-must-recognize-g_n_364212.html. *See also* Nat'l Gay & Lesbian Task Force, Relationship Recognition for Same-Sex Couples in the U.S., National Gay and Lesbian Task Force, Nov. 4, 2009, *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_11_4_09.pdf.

¹⁸⁶ Bunn, *supra* note 24, at 248–49.

¹⁸⁷ *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6(a) (3 Dec. 2009) [hereinafter AR 27-3] (stating that legal assistance is provided as to marriage, annulment, legal separation, divorce, financial nonsupport, child custody and visitation, and paternity cases, and may be provided in adoption and other family law cases based on the availability of expertise and resources); U.S. Navy, Legal Servs. FAQ, *available at* http://www.jag.navy.mil/legal_services/legal_services_faq.htm#lq1 (last visited Mar. 1, 2010) (stating that while Navy attorneys are precluded from representing clients in family law proceedings, they can provide general advice about separation and divorces and assist in finding a civilian attorney); U.S. Air Force, U.S. Armed Forces Legal Assistance Frequently Asked Questions, *available at* <http://legalassistance.law.af.mil/content/afla.php?view=faqs> (last visited Mar. 1, 2010) (stating that military legal assistance attorneys typically provide advice as to domestic relations, including divorce, legal separation, annulment, custody, and paternity).

those pertaining to civil unions, to private attorneys, just as they now do for similar heterosexual family law issues.¹⁸⁸

VIII. Constitutional Considerations

A. The Constitutional Right to Engage in Sodomy Supports DADT’s Repeal

Even though aspects of this discussion will touch upon criminal provisions of the UCMJ, which is discussed later in this article, concerns related to sodomy are addressed here because of their link to constitutional privacy rights. Don’t Ask, Don’t Tell makes sexual acts between GLB troops, including sodomy, a basis for separation from the Armed Forces.¹⁸⁹ Additionally, Article 125 of the UCMJ criminalizes any act of “unnatural carnal copulation with another person,” regardless of the gender of the other person and regardless of whether the act is consensual.¹⁹⁰ Oral sex and anal sex are both acts of sodomy under the UCMJ, whether the person is the “giver” or “receiver.”¹⁹¹

A sodomy conviction is punishable by a dishonorable discharge, reduction to the lowest pay grade, forfeiture of all pay and allowances, and five years confinement.¹⁹² If the act is accompanied by one of three aggravating factors, the maximum punishment increases to confinement for twenty years (when committed with a child over the age of twelve-years-old but under the age of sixteen) or life without parole (when committed by force and without consent, or with a child under the age of twelve).¹⁹³ Absent aggravating factors, Article 125—on its face—criminalizes *consensual* oral and anal sex, regardless of the gender of

¹⁸⁸ See, e.g., AR 27-3, *supra* note 187, para. 3-7(h)(1) (stating that legal assistance attorneys may refer clients to an attorney to another military office, a civilian lawyer, or to another office or agency whenever referral is in the best interest of the client). Clients may be referred to a civilian lawyer on any matter “within or outside the legal assistance program” when such a referral is in their best interests. *Id.* para. 3-7(h)(5)(b). Eligible clients may be refused legal assistance altogether if their matter requires expertise that local legal assistance attorneys do not possess. *Id.* para. 3-5(c)(2)

¹⁸⁹ Policy Concerning Homosexuality in the Armed Forces, 10 U.S.C. § 654 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+10USC654 (last visited Feb. 20, 2010).

¹⁹⁰ UCMJ art. 125(a) (2008).

¹⁹¹ *Id.* art. 125(c).

¹⁹² *Id.* art. 125(e)(4).

¹⁹³ *Id.* art. 125(e).

those involved or the fact that it was done in a private place, such as one's home.

Historically, the military and all fifty states had criminal prohibitions on sodomy.¹⁹⁴ By 2003, however, only thirteen states outlawed private, consensual sodomy, with nine applying prohibitions to both heterosexual and homosexual acts and the remaining four selectively applying it only to homosexual acts.¹⁹⁵ Despite this trend of decriminalization, and the fact that both heterosexuals and GLBs, alike, engage in private, consensual sodomy, the military has maintained Article 125 based on “the need to prevent negative impact to morale and discipline . . . unit cohesion . . . and national security,” and to prevent discredit to the military.¹⁹⁶ In recent years, however, military courts have restricted the application of Article 125 based on the Supreme Court's landmark *Lawrence v. Texas*¹⁹⁷ ruling in 2003.

In *Lawrence*, the Supreme Court struck down state sodomy laws criminalizing consensual, private homosexual sodomy and held that consenting homosexual adults have a privacy right in their sexual lives.¹⁹⁸ The Court compared this privacy right to the reproductive rights protected in *Griswold v. Connecticut*¹⁹⁹ and stated that this type of private act

involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The[y] . . . are entitled to respect for their private lives. The State cannot demean their

¹⁹⁴ JOINT SERV. COMM. ON MIL. JUSTICE, SEX CRIMES AND THE UCMJ 48 (2004) [hereinafter SEX CRIMES & UCMJ], <http://www.dod.mil/dodgc/php/> (containing a link to the report, titled “DoD 2004 Review of Sex Offenses under the UCMJ and MCM, Tab G: JCS Subcommittee Report to JCS Chairman (Colonel) Mark Harvey”).

¹⁹⁵ *Id.* at 49

¹⁹⁶ James S. Leichter et al., *Prevalence and Correlates of Heterosexual Anal and Oral Sex in Adolescents and Adults in the United States*, 196 AM. J. OF INFECTIOUS DISEASES 1852 (2007), <http://www.ncbi.nlm.nih.gov/pubmed/18190267> (discussing the results of a survey of 12,571 heterosexual men and women, in which 75% of respondents indicated they had engaged in oral sex and 35% indicated they had engaged in anal sex); Letter from the Am. Civ. Lib. Union to Captain Kenneth R. Bryant, U.S. Navy, Chairman of the J. Servs. Comm. on Mil. J. (Oct. 31, 2003), available at http://www.aclu.org/lgbt-rights_hiv-aids/coalition-letter-joint-services-committee-military-justice-urging-revision-arti.

¹⁹⁷ 539 U.S. 588 (2003).

¹⁹⁸ *Id.* at 560; see also SEX CRIMES AND THE UCMJ, *supra* note 194, at 48.

¹⁹⁹ 381 U.S. 479 (1965) (striking down state prohibitions on the use of birth control).

existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.²⁰⁰

While the *Lawrence* Court did not extend its holding to gay marriage, it stated that the right to engage in consensual same-sex sodomy and relationships is a “liberty protected by the Constitution.”²⁰¹

The Court of Appeals for the Armed Forces (CAAF) has since considered *Lawrence*’s applicability in *United States v. Marcum*, a 2004 case involving homosexual conduct between a non-commissioned officer and the subordinate he rated.²⁰² In *Marcum*, the CAAF indicated that homosexual sodomy between consenting adults, conducted privately in one’s off-post residence, may fall within the liberty interest identified in *Lawrence* when not accompanied by aggravating factors (i.e., one of the participants is coerced, injured, or a minor, or the relationship is one in which consent might not easily be refused).²⁰³ The CAAF also provided a three-prong test for analyzing the applicability and constitutionality of Article 125’s prohibitions in future cases:

- First, is the alleged conduct of a nature to bring it within the liberty interest identified by the Supreme Court?

²⁰⁰ *Lawrence*, 539 U.S. at 578.

²⁰¹ *Id.* at 567.

²⁰² 60 M.J. 198 (C.A.A.F. 2004); see also Captain Jeffrey S. Dietz, *Getting Beyond Sodomy: Lawrence and Don’t Ask, Don’t Tell*, 2 STAN. J. CIV. RTS. & CIV. LIB. 63 (2005) (providing detailed discussion of the *Marcum* decision and its potential implications on Don’t Ask, Don’t Tell).

²⁰³ *Marcum*, 60 M.J. at 207.

The first question . . . is whether Appellant’s conduct was of a nature to bring it within the Lawrence liberty interest. Namely, did [it] involve private, consensual sexual activity between adults? . . . Appellant engaged in non-forcible sodomy [that] occurred off-base in Appellant’s apartment and it occurred in private. We will assume without deciding that . . . this case satisfies the first question of our . . . analysis.

Id. See also SEX CRIMES AND THE UCMJ, *supra* note 194, at 49–50 (discussing the current status of Article 125).

- Second, does the alleged act encompass any behavior or factors identified by the Supreme Court in *Lawrence* that remove it from a protected status?
- Third, are additional factors present, related solely to the military environment, that remove the conduct from the liberty interests defined in *Lawrence*?²⁰⁴

Because the petitioner in *Marcum* engaged in sodomy with a subordinate, the CAAF held the charged misconduct involved consent that might not easily be refused, and affirmed the conviction. The prima facie constitutionality of Article 125 was not definitively resolved, but, in *Marcum*, the CAAF sufficiently narrowed its applicability to withstand constitutional scrutiny, at least for the time being.

In 2009, a panel of legal scholars known as the Cox Commission recommended that Congress repeal Article 125 based on the criminal prohibitions contained in the recently-revised Article 120, which they opined already criminalizes forcible sodomy, nonconsensual sodomy, and sodomy with a minor.²⁰⁵ Based on *Lawrence*, *Marcum*, and the persuasive findings and recommendations of the Cox Commission, to include anticipated appellate rulings along the same lines, military lawmakers have every incentive—regardless of the status of DADT—to repeal Article 125 in its entirety. The withering support for Article 125, even in the military’s highest court, is a factor that must be acknowledged in any analysis of DADT’s repeal.

B. DADT’s Repeal Will Not Significantly Affect *Voir Dire*

Opponents of repeal may assert that it will cause “discord” within military units²⁰⁶ in that it will “impact the *voir dire* process by exposing a member’s personal beliefs in opposition to the repeal of DADT,” in turn, promoting “a hostile environment for members of the unit who are privy to the member’s comments.”²⁰⁷ While such commentators assert that potential panel members will be required to share personal, privately-

²⁰⁴ *Marcum*, 60 M.J. at 206–07.

²⁰⁵ NAT’L INST. MIL. J. & MIL. J. COMM., CRIM. JUSTICE SEC. AM. BAR ASS’N, REPT. OF THE COMM. ON MIL. J. 14–15 (Oct. 2009), http://meetings.abanet.org/webupload/CR207500/otherlinks_files/coxreport_body.pdf.

²⁰⁶ Bunn, *supra* note 24, at 254.

²⁰⁷ *Id.* at 256.

held beliefs about homosexuality following DADT’s repeal, this point fails to acknowledge that panel members are already required to reveal such information about a variety of issues that are equally as sensitive and controversial and which may be politically incorrect and inconsistent with Army and command policy. Take, for example, *voir dire* that typically occurs in a “he-said, she-said” rape case involving a female complainant who has engaged in promiscuous behavior prior to and/or following the alleged rape. During questioning, prospective panel members may be required to express any number of personal biases they may have toward promiscuous female troops, female servicemembers in general, the concept of marital or “date rape,” and possibly their views on interracial dating and relationships.²⁰⁸ Although some of these opinions may be shared in the presence of spectators and, perhaps, in front of subordinates, this does not prevent such *voir dire* from taking place. Nor does it prevent women from serving in the Armed Forces. When DADT is repealed, the same standards that apply to courts-martial involving gender or sexual acts will apply to cases in which sexual orientation is a relevant factor.

IX. Marital Privilege and Other Evidentiary Considerations

The Military Rules of Evidence (MRE) govern admissibility of evidence in courts-martial.²⁰⁹ They were drafted by a military working committee in the late 1970s following enactment of the Federal Rules of Evidence (FRE) in 1975, and were codified as part of the Manual for Courts-Martial (MCM) in 1980.²¹⁰ These rules provide certainty and predictability for attorneys practicing in military courts.²¹¹ Pursuant to Article 36 of the UCMJ, the MREs are largely consistent with the FREs.²¹² Although the FRE have not been redrafted to account for state-sanctioned, same-sex civil marriages and partnerships, the military legal community should be prepared for changes to MRE 412 and 504. While

²⁰⁸ See, e.g., Major John I. Winn, *A Practitioner’s Guide to Race and Gender Neutrality in the Military Courtroom*, ARMY LAW., May 1995, at 40, 40–41 (discussing *voir dire* of panel members in sexual assault cases and questions that may need to be asked regarding members’ views on interracial dating and whether they believe a woman has an obligation to “tell a man no”).

²⁰⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(a) (2008) [hereinafter MCM].

²¹⁰ *Id.* at A22-1; Lieutenant Colonel Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 10 (1990).

²¹¹ Lederer, *supra* note 210, at 37.

²¹² *Id.* at 10.

MRE 412 may be revised regardless of the status of the DOMA, MRE 504 will likely not be subject to revision unless and until DOMA is repealed.

A. MRE 504: Husband-Wife Privilege

Military Rule of Evidence 504 grants husbands and wives evidentiary protection in two ways. First, it gives them the right to refuse to testify against each other in military judicial proceedings.²¹³ Second, it gives them the right, even after a marriage has ended, to refuse to testify about their confidential communications made during the course of the marriage.²¹⁴ This second privilege can be invoked by either the military spouse whose testimony is sought, or the other spouse on his or her own behalf.²¹⁵ Applicability of these two privileges turns on the existence of a “marriage,” “marital relationship,” and “spouse.”²¹⁶ If DADT and DOMA are both repealed, this evidentiary rule may require revision to ensure equity based on the marriage-like nature of lawful same-sex marriages and domestic partnerships.

B. MRE 412: Victim’s Sexual Behavior or Predisposition

Military Rule of Evidence 412 protects sexual assault victims from having their reputations unnecessarily attacked by attorneys during military judicial proceedings. Under this Rule, evidence of an alleged victim’s sexual predisposition is inadmissible at trial unless such evidence falls within one of three specified exceptions.²¹⁷ Prohibited evidence pertains to “an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder.”²¹⁸ The policy justification for this prohibition is to prevent unfettered inquiry into irrelevant facts that may distract the fact-finder and discourage reporting or prosecution of sexual misconduct.²¹⁹ Due to the oftentimes controversial nature of a victim’s sexual orientation, lawmakers should

²¹³ MCM, *supra* note 209, MIL. R. EVID. 504(a).

²¹⁴ *Id.* MIL. R. EVID. 504(b)(1).

²¹⁵ *Id.* MIL. R. EVID. 504(b)(3).

²¹⁶ *Id.* MIL. R. EVID. 504(b), 504(b)(1) & 540(a).

²¹⁷ *Id.* MIL. R. EVID. 412(a)(2).

²¹⁸ *Id.* MIL. R. EVID. 412(d).

²¹⁹ *Id.* at A22–35.

consider adding sexual orientation as an enumerated type of prohibited evidence detailed in MRE 412(d).

X. Military Criminal Statutes

Servicemembers and their spouses are entitled to various rights, privileges, and protections under the MRE and UCMJ. In the wake of DADT’s repeal, the DOMA will likely preclude extension of spousal privileges and protections to GLB troops and their spouses. Only if DOMA is repealed or revised will military policymakers be required to determine, from a military justice perspective, what rights and protections will be granted to GLB troops and their spouses and lawful partners. Fairness may dictate extending the same evidentiary and penal code protections now available to married heterosexual troops, especially if the federal evidentiary and penal codes change in response to increased protection of gay marriages and state-sanctioned unions.²²⁰ In consideration of these possibilities, the parts below address statutes and sections of the MRE and UCMJ that may require revision. It is important to note that DADT’s repeal will not invalidate existing criminal prohibitions against the many forms of misconduct in which one’s sexual orientation is not a factor. The GLB servicemembers whose conduct falls outside of the *Lawrence* protections, or whose conduct otherwise violates criminal prohibitions, will still be subject to adverse action and criminal penalties just as heterosexual servicemembers are.

A. Uniform Code of Military Justice

The UCMJ, enacted in 1950, is the military’s penal code.²²¹ Its violation can result in a federal criminal conviction and a sentence

²²⁰ As of the date of this writing, they have not. It should be noted that when the military integrated African-Americans in 1949, many states still criminally prosecuted the act of interracial marriage and prohibited African-American children from attending the same schools as white children. The military did not base its policy decisions as to racial integration, or as to marriage or the desegregation of DOD schools, on such prohibitions. The DOMA may restrict the military’s ability to extend various rights and privileges to GLB troops.

²²¹ Lib. of Cong., Military Legal Resources: Uniform Code of Military Legislative History, available at http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html (last visited Mar. 1, 2010).

ranging from no punishment to death.²²² The UCMJ is one of the military's primary mechanisms for maintaining good order and discipline within its ranks.²²³ Like the MRE, the UCMJ is patterned after the Federal Criminal Code.²²⁴ It differs, however, from civilian provisions in its prohibition of uniquely military offenses. The UCMJ, for example, criminalizes any act that brings discredit to the service or is deemed to be prejudicial to good order and discipline—even if the act in and of itself is not criminal in nature (e.g., speaking disrespectfully to one's supervisor, or not showing up for work).²²⁵ The UCMJ also criminalizes any act that is “unbecoming of an officer and gentleman,”²²⁶ regardless of the criminality of the underlying act itself.

Following DADT's repeal, Special Assistant United States Attorneys (SAUSAs) at the installation level will need to be familiar with the marriage laws of the states in which they are practicing, as jurisdictions which permit or recognize same-sex marriages may have spousal provisions in their criminal codes and laws that affect military prosecutions in magistrate courts.²²⁷ Additionally, if the ban on GLBs is lifted, the following UCMJ provisions may require revision to maintain fairness and equity in the military criminal justice system, notwithstanding DOMA, which remains current law at the writing of this article.

²²² MCM, *supra* note 209, R.C.M. 1003; *see also* Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW., Dec. 2007, at 30, 47.

²²³ Gen. (Ret.) William C. Westmoreland & Major Gen. (Ret.) George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 9 (1980).

²²⁴ *Id.* at 3.

²²⁵ UCMJ art. 134 (2008).

²²⁶ *Id.* art. 133.

²²⁷ Special Assistant U.S. Attorneys are military attorneys who have been detailed to prosecute civilians accused of committing crimes on military bases or otherwise within the military's jurisdiction. *See, e.g.*, Andrew Christensen, *JAG Corps Service Provides Opportunity to Serve Country*, *Practice Law*, VA. L. WKLY., Feb. 17, 2006, http://www.lawweekly.org/?module=displaystory&story_id=1029&edition_id=27&format=html. *See also* Captain Eric D. Placke, *Prosecuting Civilian Misdemeanor Offenders Before United States Magistrate Judges: A Guide for Air Force Judge Advocates*, 39 A.F. L. REV. 73, 80 (1996) (discussing the use of state laws in magistrate court proceedings).

B. UCMJ Article 134: Adultery

Article 134 of the UCMJ criminalizes sexual intercourse between a married servicemember and someone other than his spouse and sexual intercourse between an unmarried servicemember and a married person.²²⁸ An additional element of this crime requires that this conduct be service discrediting or prejudicial to good order and discipline in the Armed Forces.²²⁹

Kissing, sexual touching, oral sex, anal sex, and other forms of romantic and sexual contact that take place between a married person and someone other than his or her spouse are arguably all forms of “cheating.” Indeed, it is hard to imagine that such behavior, if practiced by a Soldier’s wife or husband with another Soldier in the same unit, would be perceived as anything other than that, or would be any less disruptive to good order and discipline within the unit, simply because it was not accompanied by the act of sexual intercourse. None of these forms of sexual activity, however, constitute adultery under Article 134. Because Article 134 does not criminalize these acts for married heterosexuals, it would be unfair to both heterosexuals and GLBs alike to criminalize them in only same-sex marriages or domestic partnerships. Any revisions to Article 134’s adultery provisions, to include conduct that falls short of heterosexual intercourse, therefore, should apply equally to heterosexuals and GLBs. Don’t Ask, Don’t Tell’s repeal, however, requires no such revisions in the first place.

In discussing adultery, supporters of DADT may contend that the existence of same-sex marriages and civil unions within the military, without a simultaneous revision of Article 134, will result in an unfair application of adultery provisions.²³⁰ They may assert that GLB servicemembers will be able to evade accountability for cheating on their spouses or partners via sexual acts that do not involve sexual intercourse by virtue of the fact that the military does not consider such acts to be adulterous.²³¹ This argument does not, however, provide a compelling reason for DADT’s retention or delayed repeal. As discussed above, heterosexuals are free to engage in the same type of sexual infidelity without incurring any liability under Article 134 either. Furthermore,

²²⁸ Bunn, *supra* note 24, at 264.

²²⁹ UCMJ art. 134(b).

²³⁰ Bunn, *supra* note 24, at 264–68.

²³¹ *Id.* at 264, 266–67.

heterosexual servicemembers who enter into state-sanctioned civil unions in states such as Nevada, which allows heterosexuals and GLBs alike to enter domestic partnerships,²³² are similarly free of liability under Article 134 for the aforementioned acts of infidelity and sexual intercourse itself because they are not married.

Finally, regarding the contention that lesbian servicemembers will recruit heterosexual male or gay male Soldiers to impregnate them through intercourse,²³³ any such act would be handled the same way it is when heterosexual female troops intentionally engage in sexual intercourse with someone not their spouse to get pregnant. Married heterosexual and lesbian servicemembers who have sexual intercourse with a man not their spouse, for whatever reason, are liable under whatever applicable adultery or other punitive statutes and regulations exist at the time. If DOMA is repealed and the UCMJ is revised to include same-sex marriage and unions, married heterosexual and homosexual women alike will be criminally liable for adultery if they engage in sexual intercourse with a man who is not their spouse. Without revisions, a heterosexual woman will be liable for adultery if she, or the man she engages in intercourse with, is married. A lesbian woman, on the other hand, will be treated in the same way as a heterosexual woman who is part of a domestic partnership with a heterosexual man in states like Nevada that permit heterosexual partnerships.²³⁴

Neither the same-sex marriage nor the heterosexual domestic partnership is now recognized by the Federal Government or the military as a marriage. Therefore, neither individual will be subject to criminal prosecution for adultery under Article 134. If this discrepancy is cause for concern, policymakers should address it regardless of DADT based on the ability of heterosexual troops to enter into domestic partnerships and civil unions with one another.

²³² See, e.g., Nevada Domestic Partnership, *supra* note 183 (stating that “Nevada domestic partnerships may be entered into by couples of any sexual orientation”); Cy Ryan, *With Veto Override, Domestic Partnership Bill Becomes Law*, LAS VEGAS SUN, May 31, 2009, <http://www.lasvegassun.com/news/2009/may/31/veto-override-domestic-partners-bill-becomes-law/>.

²³³ Bunn, *supra* note 24, at 268.

²³⁴ See, e.g., Nevada Domestic Partnership, *supra* note 183 (stating that “Nevada domestic partnerships may be entered into by couples of any sexual orientation”); Ryan, *supra* note 232.

As an aside, heterosexual and lesbian females alike may face reproductive barriers to pregnancy. These women, however, have a variety of options available to them to overcome such barriers, including adoption, artificial insemination, and in-vitro fertilization (IVF) by a sperm donor. The DoD, for example, has four facilities that provide fertility treatments, including IVF: Wilford Hall Medical Center in San Antonio, Tripler Army Medical Center in Honolulu, Walter Reed Army Medical Center in Washington, D.C., and the Naval Medical Center in San Diego.²³⁵ Despite the fact that women seeking treatment at these facilities must pay for their own travel, lodging, medications, embryologist, IVF coordinator fees, and other associated costs, these facilities provide a financially viable option for fertility treatments greater than those available at public facilities, keeping associated government costs to a minimum.²³⁶

C. UCMJ Articles 133 and 134 in Bigamy and Polygamy Cases

Some proponents of DADT assert that repealing the ban against GLBs in the military without repealing DOMA will result in a scheme whereby GLBs servicemembers can engage in bigamy and polygamy without criminal liability for their acts under the UCMJ.²³⁷ In support of this argument, they suggest that, because DOMA prohibits the Federal Government from recognizing same-sex marriages and civil unions, GLB servicemembers who engage in bigamy or polygamy will escape military criminal prosecution.²³⁸ This assertion is misleading because every state that permits same-sex marriages or civil unions prohibits bigamy and polygamy, and requires, as a condition for entering into marriage or a civil union, that both parties not be in any such a relationship with anyone else at the time the new union takes place.²³⁹

²³⁵ Press Release, TRICARE, A Tricare Reminder About Covered Infertility Treatments (May 28, 2009), available at <http://www.tricare.mil/pressroom/news.aspx?fid=530>.

²³⁶ *Id.* See also Michele Case Huddleston, Fertility Treatment Options for Military Families, available at <http://www.conceiveonline.com/assisted-reproduction-infertility-ivf/military-ivf/> (last visited Apr. 11, 2010) (stating that women are required to pay for the cost of their treatment).

²³⁷ See, e.g., Bunn, *supra* note 24, at 270–74.

²³⁸ E.g., *id.*

²³⁹ See, e.g., Editorial, *Sen. Reid Says Polygamy is “Form of Organized Crime,”* FOX NEWS, Jul. 24, 2008, <http://www.foxnews.com/story/0,2933,390070,00.html> (reporting that “polygamy is illegal in all 50 states under state laws”); Ken LaMance, Legal Match, available at <http://www.legalmatch.com/law-library/article/bigamy-lawyers.html> (last visited Apr. 12, 2010) (reporting that bigamy is illegal in all 50 states).

Gay, lesbian, and bisexual servicemembers who violate these state prohibitions are not only subject to criminal prosecution in jurisdictions where they commit the offense, but are likewise criminally liable for their actions under UCMJ Article 134, clauses 1 and 2, which provide that any “act in violation of a local civil law . . . may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces.”²⁴⁰ While the DOMA will likely preclude military recognition of same-sex marriages and, therefore, preclude prosecution under federal and military marital-related laws, it would not preclude prosecution under clauses 1 and 2 of Article 134 for violations of related state laws.

D. UCMJ Article 134: Wrongful Cohabitation

Uniform Code of Military Justice Article 134 makes it a crime for a servicemember and another person to openly and publically live together as husband and wife when they are not legal spouses and when such conduct is service discrediting or prejudicial to good order and discipline.²⁴¹ This statute does *not* criminalize a couple from living together and sharing a home as companions and sexual partners, nor does it criminalize the act of living together as domestic partners. The act of living together with someone is only prohibited under this statute when it is accompanied by behavior that leads others to believe that the living arrangement is the result of a marriage.²⁴² If DADT is repealed and DOMA is not, military lawmakers will likely be required to narrow the scope of prosecutions under this Article to avoid prosecuting GLBs who are in state-sanctioned same-sex marriages that are lawful and legally-binding but not recognized under federal law pursuant to the DOMA. Those who enter into civil unions or domestic partnerships, on the other hand—including heterosexual troops who do the same—will not be liable under this statute if they are honest about their status as lawful but unmarried partners, nor will they be entitled to marriage-based entitlements.

²⁴⁰ UCMJ art. 134, pt. IV-120 (2008).

²⁴¹ *Id.*

²⁴² *Id.*

E. UCMJ Article 120a(q): Marriage as an Affirmative Defense

Article 120a(q)(1) of the UCMJ makes marriage an affirmative defense to numerous sexual offenses, including aggravated sexual assault, aggravated sexual assault of a child (a person under the age of sixteen²⁴³), indecent liberty with a child, wrongful sexual contact, and wrongful sexual exposure.²⁴⁴ Under Article 120a(q)(1), if a servicemember is accused of or charged with a violation of one of the enumerated offenses, and can prove he is married to the alleged victim, it may result in dismissal of charges, acquittal at trial, or no charges being preferred in the first place.

In some states, persons under the age of sixteen are permitted to marry as long as they have parental, judicial, or state approval, or some combination thereof.²⁴⁵ For a servicemember, or other person subject to the UCMJ, who happens to be married to someone under the age of sixteen, the affirmative defense provided by Article 120a(q)(1) is extremely important. Without it, the servicemember spouse is criminally liable for engaging in sexual intercourse and other sexual acts with his spouse pursuant to Article 120a.

To assert this defense, an accused must be in a marriage as it is defined in Article 120a(q): “a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses.”²⁴⁶ Based on the DOMA, same-sex spouses and domestic partners will be precluded from asserting this defense even if they are in a lawful spousal-like relationship. This will potentially create an unfair prosecution scheme whereby a heterosexual eighteen year-old servicemember who is lawfully married to a fifteen year-old can raise the defense if prosecuted for consensual sexual intercourse with his spouse, whereas a homosexual eighteen year-old servicemember who is lawfully married or partnered to a fifteen year-old could not (e.g., where the civil union took place in New Jersey, which permits persons under the age of sixteen to enter into civil unions as long as they have parental consent

²⁴³ *Id.* art. 120a(t)(9).

²⁴⁴ *Id.* art. 120a(q)(1).

²⁴⁵ Find Law, State-by-State Marriage “Age of Consent” Laws, *available at* <http://family.findlaw.com/marriage/marriage-basics/state-age-of-consent-laws.html> (last visited Mar. 1, 2010) (indicating that the states include Alabama, Alaska, Arizona, California, Connecticut, Hawaii, Kansas, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, South Carolina, Tennessee, Texas, and Utah).

²⁴⁶ UCMJ art. 120a(q)(2).

and judicial approval).²⁴⁷ If DADT and the DOMA are repealed, this statute will likely require revision so that it is equally applicable to same-sex and heterosexual spouses and domestic partners.

XI. Arguments against Inclusion of GLBs and African-Americans

A. Nature of the Comparison

While the qualities of sexual orientation and skin color are different, the arguments against inclusion of both GLBs and African-Americans in the military have historically been the same. Some proponents of DADT assert that this is not a valid comparison.²⁴⁸ According to researchers with the RAND National Defense Research Institute (NDRI), however, to deny the validity of the comparison is to misread history.²⁴⁹ In 1993, NDRI analysts conducted a comprehensive study on the issue, and noted in their final report:

²⁴⁷ N.J. Dep't of Health & Senior Servs., How to Apply for a Civil Union License, available at http://www.state.nj.us/health/vital/civilunion_apply.shtml (last visited Mar. 5, 2010) ("For two people to establish a civil union in New Jersey, they must . . . be at least 18 years of age, except that applicants under 18 may enter into a civil union with parental consent. Applicants under age 16 must obtain parental consent and have the consent approved in writing by any judge of the Superior Court, Chancery Division, Family Part.").

²⁴⁸ General (Ret.) Colin Powell, for instance, stated in 1993 that the qualities of skin color and sexual orientation are so different in nature that any comparison of the two is "convenient but invalid." FRANK, *supra* note 5, at 63. See also Statement of Elaine Donnelly, Homosexuals Are Not Eligible to Serve in the Military 30 (July 23, 2008), available at http://armedservices.house.gov/pdfs/MilPers072308/Donnelly_Testimony072308.pdf [hereinafter Donnelly Statement] (reprinting her statement submitted at a recent congressional hearing and stating that the DoD should not be "intimidated" by civil rights analogies, and citing Colin Powell's 1993 opinion on the issue.). Although Colin Powell was a proponent of DADT in 1993, he now supports its repeal. Martina Stewart, *Powell in Favor of Repealing "Don't Ask, Don't Tell"*, CNN, Jan. 3, 2010, <http://www.cnn.com/2010/POLITICS/02/03/powell.gays.military/>.

²⁴⁹ See, e.g., RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 160 (stating that to perceive racial integration as being so different from the issue of gays in the military is to misread history). Racial integration "inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today," in that most whites held a "visceral revulsion" to the idea of close physical contact with African-Americans. *Id.* See also Lorry M. Fenner, *Either You Need These Women or You Do Not: Informing the Debate on Military Service and Citizenship*, 16 GENDER ISSUES 5, 12 (1998) ("Historical information is not a blueprint for progress, but certainly using past experiences to inform out thinking is preferable to ignorance and amnesia.").

It is widely perceived today that the racial integration of the Armed Forces was a fairly simple, straightforward matter in comparison with the numerous complexities involved in integrating homosexuals. In reality, racial integration during the 1940s and 1950s was a . . . convoluted process which inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today. Many white Americans . . . responded with visceral revulsion to the idea of close physical contact with blacks. . . . In light of the historical evidence, any assertion that racial integration was inherently less problematic than the integration of homosexuals today must be viewed with skepticism.²⁵⁰

In 2008, Retired Army Major General Vance Coleman, an African-American who spent thirty years of his life in service to the military and our nation, testified similarly in a hearing on DADT before the U.S. House of Representatives Armed Services Committee. In explaining his support for the repeal of DADT, General Coleman discussed how the ban on GLBs mirrors the exclusion and restrictions placed on African-Americans during his early years of service. He testified about what it was like to be excluded from all-white units and devalued “because of who you are.”²⁵¹ According to General Coleman, DADT is disruptive to military commanders in that, “no matter how well a person does his or her job . . . no matter how integral to their unit they are . . . they must be removed . . . and dismissed because of who they happen to be, or who they happen to love.”²⁵² It is time, he contends, “to end this modern-day prejudice and embrace all of our troops as first-class patriots with an important contribution to make.”²⁵³

Mildred Loving, too, has compared prohibitions against blacks to prohibitions against gays. Ms. Loving was the African-American co-

²⁵⁰ *Id.* Reprinted with permission of the Rand Corporation.

²⁵¹ Written Statement of Major General (Ret.) Vance Coleman to the Subcommittee on Military Personnel House Armed Servs. Comm., U.S House of Representatives (June 23, 2008) [hereinafter Coleman Statement], *available at* http://armedservices.house.gov/pdfs/MilPers072308/Coleman_Testimony072308.pdf.

²⁵² *Id.*

²⁵³ *Id.*

plaintiff (her white husband was the other) in *Loving v. Virginia*²⁵⁴—the historic 1967 Supreme Court case overturning race-based legal restrictions on marriage. In 2007, on the 40th anniversary of that landmark case, Ms. Loving described how modern day restrictions on gay marriage parallel historical restrictions on interracial marriage:

Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom. . . . Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights. I am . . . proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white . . . gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and loving, are all about.²⁵⁵

B. Behavioral-Based Arguments for Exclusion of GLB's and African-Americans

The arguments and military prohibitions against integration of gays and African-Americans have been based on behavioral, moral, and physical characteristics attributed to both groups. African-Americans, for instance, were not victims of white discrimination based merely on the color of their skin; they were discriminated against based on *behavioral attributes* whites associated with the color of their skin. In the years preceding military integration, many whites reportedly believed African-Americans possessed, savage natures and inferiorities that "prevented [them] from rising above their violent passions, passions that

²⁵⁴ 388 U.S. 1 (1967). For an overview of this case and its aftermath, see Editorial, *Loving Decision: 40 Years of Legal Interracial Unions*, NPR, June 11, 2007, <http://www.npr.org/templates/story/story.php?storyId=10889047>.

²⁵⁵ Public Statement by Mildred Loving (June 12, 2007), available at http://freedomtomarry.org/pdfs/mildred_loving-statement.pdf.

erupted unpredictably and with staggering brutality.”²⁵⁶ African-Americans were believed by many to be sexually promiscuous²⁵⁷ and to have “deadened sensibilities . . . [that] responded only to swift and harsh physical punishment.”²⁵⁸

In the 1940s, military and political leaders opposing military integration did so based on statistics showing that African-Americans carried sexually transmitted diseases at a higher rate than whites, committed crimes of sexual aggression at a higher rate than whites, and were less capable Soldiers than whites.²⁵⁹ And, contrary to the concept that the military’s limitations on African-Americans were based on the benign, non-behavioral quality of skin color, Lieutenant General Edward M. Almond wrote, “[t]he basic characteristics of Negro[s] are fundamentally different. . . . There is no question in my mind of the inherent difference in the races. This is not racism—it is common sense and understanding. Those who ignore these differences merely interfere with the combat effectiveness of battle units.”²⁶⁰ Interracial socializing, sexual intercourse, and marriage were considered to be so harmful to white society that they were prohibited by civil laws and criminalized in penal codes for more than a decade after President Truman’s 1948 executive order mandating full military integration.²⁶¹ “Intermarriage,” it was claimed, would “lead inevitably to a loss in the intellectual and cultural assets of this country,” which would further “make the difference between victory and defeat in any future conflict.”²⁶²

Similar arguments pertaining to morality, sexual misconduct, AIDS, and other sexually transmitted diseases, for instance, have all been cited as a basis for exclusion of acknowledged GLBs. In his book, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America*,

²⁵⁶ WILLIAM FITZHUGH BRUNDAGE, *LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930*, at 5 (1993).

²⁵⁷ HEGARTY, *supra* note 92, at 65.

²⁵⁸ BRUNDAGE, *supra* note 256, at 5.

²⁵⁹ FRANK, *supra* note 5, at 61-2.

²⁶⁰ MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES: 1940–1965*, at 440–41 (1985) (quoting from Lieutenant General Almond’s archived letter).

²⁶¹ See, e.g., Nat’l Park Serv., *Jim Crow Laws*, available at http://www.nps.gov/malu/forteachers/jim_crow_laws.htm (last visited Feb. 6, 2010); Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); Staff Sergeant Kristofer Baumgartner, *Korean War Vets Celebrate Leadership and Integration*, Mar. 19, 2009, available at <http://www.army.mil/news/2009/03/19/18450-korean-war-vets-celebrate-leadership-and-integration/>.

²⁶² HENRY E. GARRETT, *HOW CLASSROOM DESEGREGATION WILL WORK* 19 (Patrick Henry Press, n.d.).

Dr. Nathaniel Frank explores the resemblance of the arguments made against both groups:

In the 1940s, Americans were told . . . whites would not respect or obey commands by an African American; that integration would prompt violence against a despised minority that the military would be helpless to stop; that integration would lower public acceptance of the military and the federal government; that the military should not be used for “social experimentation”; that military integration was being used to further a larger minority rights agenda that would ultimately break the armed forces; [and] that the military is unique and not a democracy Every last one of these arguments [has also been] used, in some instances with frighteningly similarity, against letting gays serve.²⁶³

In addition to General Coleman and Dr Frank, officials from the U.S. General Accounting Office (GAO) noted, in an official 1992 report, that the same rationale used to exclude gays from the military was used to justify limitations in the integration of African-Americans.²⁶⁴

According to Dr. Frank, just as the beliefs and arguments cited in opposition to military integration of African-Americans weren't true, they aren't true respecting gays.²⁶⁵ Army Secretary John McHugh has echoed this assertion, pointing out—in response to questions about gays in the military—that the Army has taken on similar issues in the past and, despite predictions of “doom and gloom,” the military successfully adapted.²⁶⁶ This section analyzes these predictions and arguments and their underlying claims and beliefs.

²⁶³ FRANK, *supra* note 5, at 62. Reprinted with permission of Dr. Nathaniel Frank.

²⁶⁴ GAO HOMOSEXUALITY POLICY, *supra* note 94, at 5 (citing to comments from an earlier report that indicating the “DoD policy prohibiting homosexuals from serving in the military was based on the same rationale used to limit the integration of blacks”).

²⁶⁵ FRANK, *supra* note 5, at 61.

²⁶⁶ Rick Maze, *McHugh: Army Can Handle Lift of Gay Ban*, ARMY TIMES, Oct. 29, 2009, http://www.armytimes.com/news/2009/10/army_mchugh_dadt_102709w/.

C. Analysis of the Arguments

1. “Homosexuality is Immoral”

Some military and religious leaders believe homosexuals are immoral and therefore should not be allowed to serve openly in the Armed Forces. In 2007, for instance, Former Marine General Peter Pace, while serving as Chairman of the Joint Chiefs of Staff, publicly stated: “I believe that homosexual acts between individuals are immoral . . . [and] I do not believe the armed forces of the U.S. are well served by saying through our polices that it is OK to be immoral in any way.”²⁶⁷ A religious document on the Vatican’s official website similarly states that “[a] person engaging in homosexual behavior . . . acts immorally,” and that homosexuals have a “moral disorder.”²⁶⁸

In the early 1900s, African-Americans, too, were considered by many to have low moral character.²⁶⁹ Marine Lieutenant General Thomas Holcom, for example, testified before the General Board of the Navy that “an infantry battalion is the very last place [blacks] would be put. There is no branch of the service that requires more character and a higher degree of morality than the infantry.”²⁷⁰ African-Americans reportedly had “10 times as many illegitimate children as white people” and had character limitations that arose from “inborn traits—or the lack

²⁶⁷ Jonathan Karl, *Top U.S. General Calls Homosexuality “Immoral,”* ABC NEWS, Mar. 13, 2007, <http://abcnews.go.com/GMA/story?id=2946397> (quoting former Chairman of the Joint Chiefs of Staff, Marine General Peter Pace).

²⁶⁸ Letter from Prefect Joseph Cardinal Ratzinger & Archbishop Alberto Bovone, Vatican, to the Bishops of the Catholic Church (Oct. 1, 1986), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (discussing this in paragraph 7); *see also* Cardinal Zenon Grocholewski and Archbishop J. Michael Miller, *Instruction Concerning the Criteria for the Discernment of Vocations with Regard to Persons with Homosexual Tendencies* (Nov. 4, 2005), *available at* http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html (discussing this at paragraph 2).

²⁶⁹ *See, e.g.,* JACK ROGERS, *JESUS, THE BIBLE, AND HOMOSEXUALITY* 19–25 (2006) (discussing assertions made by religious leaders in the late 1800s that African-Americans are morally inferior to whites); Debra A. Kuker, Comment, *The Homosexual Law and Policy in the Military: “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” . . . Don’t be Absurd!*, 3 SCHOLAR 267, 312 (2001) (discussing historical state prohibitions on interracial marriage and the once widely-held public perception that interracial marriage is immoral).

²⁷⁰ David A. Bianco, *Echoes of Prejudice*, in *GAY RIGHTS, MILITARY WRONGS* 54 (Craig A. Rimmerman, ed., 1996).

of them.”²⁷¹ Interracial marriage was considered so dangerous and harmful to society that many states continued to criminally prosecute it for nearly twenty years after President Truman’s 1948 Executive order that fully integrated the military. It was only in 1967 that the Supreme Court, in *Loving v. Virginia*, struck down state laws criminalizing interracial marriage.²⁷²

Morality is difficult to define. Religious leaders and people from all walks of life have contrasting views on what is moral and what is not. In terms of homosexuality, many religious denominations and leaders—presumably experts in morality—are split on whether homosexuality is “right” or “wrong.”²⁷³ Some mainstream Christian denominations allow homosexuals to marry and to serve as religious leaders within their organizations, while others denounce homosexuality as a sin and ban them from marrying and ministering. The United Church of Christ,²⁷⁴ Episcopal Church,²⁷⁵ Evangelical Lutheran Church,²⁷⁶ and Unitarian Universalist Association,²⁷⁷ for instance, all bless same-sex unions and have member churches that allow gay clergy. The Roman Catholic

²⁷¹ GARRETT, *supra* note 262, at 23.

²⁷² 388 U.S. 1 (1967).

²⁷³ Interview with Colonel (Ret.) Fred Borch, U.S. Army, Army JAG Corps Historian, in Charlottesville, Va. (Oct. 2009).

²⁷⁴ United Church of Christ, LGBT Ministries, available at http://www.ucc.org/lgbt#The_LGBT_Ministries_of_the_United_Church (last visited Feb. 13, 2010) (indicating that membership, church leadership, and employment are open to those of all sexual orientations); see also Editorial, *United Church of Christ Endorses Gay Marriage*, MSNBC, July 4, 2005, <http://www.msnbc.msn.com/id/8463741/>.

²⁷⁵ See, e.g., Laurie Goodstein, *Episcopal Vote Reopens a Door to Gay Bishops*, N.Y. TIMES, July 14, 2009, at A11 (discussing the church’s “mainline” status, its July 2009 vote to allow consecration of openly gay bishops, and its measure to “create a liturgy to bless same-sex couples,” which, until then, had been occurring unofficially in many dioceses); Ed Stoddard, *Episcopal Church Moves Toward Blessing Gay Unions*, REUTERS, July 18, 2009, <http://www.reuters.com/article/idUSTRE56H01120090718>; Human Sexuality, Official Website of the Episcopal Church, available at http://www.episcopalchurch.org/infoline_10414_ENG_HTM.htm (last visited Mar. 2, 2010) (containing links to articles discussing various religious views on homosexuality).

²⁷⁶ Evangelical Lutheran Church, Homosexuality and the ELCA, available at <http://www.elca.org/What-We-Believe/New-or-Returning-to-Church/Dig-Deeper/Homosexuality-and-the-ELCA.aspx> (last visited Mar. 2, 2010). The church has no prohibition on the blessing of same-sex unions, and expresses trust in its pastors and congregations who bless such unions. *Id.* See also Josh Levs, *Lutherans Accept Clergy in “Lifelong” Same-Sex Relationships*, CNN, Aug. 21, 2009, <http://www.cnn.com/2009/US/08/21/lutheran.gays/index.html>.

²⁷⁷ Barbara J. Pescan, Unitarian Universalist Affirmation of Gay, Lesbian, Bisexual, and Transgender People, Unitarian Universalist Association of Congregants, available at <http://www.uua.org/visitors/uuperspectives/59581.shtml> (last visited Mar. 2, 2010).

Church, Methodist Church,²⁷⁸ Southern Baptist Convention,²⁷⁹ Seventh-Day Adventists,²⁸⁰ and Church of Jesus Christ of Latter Day Saints do not (although Latter Day Saints do not oppose civil unions that grant limited rights pertaining to hospitalization, employment, and housing).²⁸¹ Islam similarly prohibits gay marriage and gay religious leaders.²⁸² The American Baptist Church²⁸³ and Conservative Movement’s Committee on Jewish Law and Standards²⁸⁴ are split on the issue. Not only are churches split on the morality of homosexuality, biblical scholars are split as well. Some assert, based on scripture, that homosexuality is a sin,²⁸⁵ while others disagree, and point out that scripture was also used to

²⁷⁸ Daniel Burke, *Methodists Defeat Gay-Related Membership Policy*, USA TODAY, July 31, 2009, http://www.usatoday.com/news/religion/2009-07-31-methodist-gay_N.htm. The church rejected a membership amendment that would have made membership “open to all Christians regardless of sexual orientation.” *Id.* But see United Methodist Church, Church to Be in Ministry to Persons of All Sexual Orientations, available at http://www.umc.org/site/apps/nlnet/content2.aspx?c=IwL4KnN1LtH&b=4951419&content_id={CAF9E91C-06A0-4D90-8AC2-97E9A0102D1B}¬oc=1 (last visited Mar. 2, 2010) (stating that the church dedicates itself to hospitality toward those of all sexual orientations, and welcome sexual minorities, their friends, and their families).

²⁷⁹ Southern Baptist Convention, Sexuality, available at <http://www.sbc.net/aboutus/pssexuality.asp> (last visited Mar. 2, 2010).

²⁸⁰ Seventh-Day Adventist Church, Seventh-Day Adventist Position Statement on Homosexuality, available at http://www.adventist.org/beliefs/statements/main_stat_46.html (last visited Mar. 3, 2010).

²⁸¹ See, e.g., Jennifer Dobner, *Film Focuses on Mormon Role in Gay Marriage Ban*, ABC NEWS, Jan. 23, 2010, <http://abcnews.go.com/Entertainment/wirestory?id=9643209&page=2> (asserting that the church has indicated it does not oppose civil unions or other limited rights); Church of Jesus Christ Latter-Day Saints, Same-Gender Attraction, <http://www.newsroom.lds.org/ldsnewsroom/eng/public-issues/same-gender-attraction> (last visited Mar. 3, 2010) (stating that the church opposes any “legally sanctioned relationship with the [same] bundle of legal rights traditionally belonging to marriage,” but has “no objection to” certain other partnerships or pairings without the right to adopt).

²⁸² Editorial, *Pro-Gay-Marriage Muslim Delegate Stirs Conservatives*, NPR (Aug. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=111770008> (discussing traditional Islam beliefs as to homosexuality).

²⁸³ See, e.g., Gregory Tomlin, *Split Among Baptists Over Homosexuality Is Final*, BAPTIST PRESS, May 18, 2006, <http://www.bpnews.net/bpnews.asp?ID=23275> (discussing the split that started in the 1990s, with the formation of the Association of Welcoming and Affirming Baptists); Ass’n of Welcoming & Affirming Baptists, *Who We Are*, available at <http://www.wabaptists.org/> (last visited Mar. 3, 2010).

²⁸⁴ Alan Cooperman, *Conservative Rabbis Allow Ordained Gays, Same-Sex Unions*, WASH. POST, Dec. 7, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/06/AR2006120601247.html>.

²⁸⁵ See, e.g., Stephen Dove, *Baylor University Defends Stance on Homosexuals*, BAYLOR UNIV. LARIOT ONLINE, Jan. 30, 2002, <http://www.baylor.edu/Lariat/news.php?action=story&story=17692>.

wrongly justify suppression of women and the enslavement of African-Americans for decades.²⁸⁶

Within the military, chaplains provide pastoral counseling to all troops regardless of sexual orientation and will continue to do so following repeal of DADT.²⁸⁷ They are not, however, required to perform religious rites or marriages that violate the tenets of their distinct faith group.²⁸⁸ If the military elects to recognize same-sex marriages and civil unions, chaplains will be free to perform or refuse to perform them in accordance with the mandates of their individual denominations, just as they are today.²⁸⁹

America's Armed Forces exist to fight and win wars, not to provide a workplace for servicemembers with any single set of religious beliefs.²⁹⁰ Troops from all walks of life serve effectively alongside those whose beliefs or private behaviors they may find offensive or immoral.²⁹¹

²⁸⁶ ROGERS, *supra* note 269, at 18–25 (providing in-depth discussion); *see also* Rev., Dr. Kathlyn James, *Is Homosexuality a Sin?* (1997), available at http://www.jesumcc.org/resource/rev_james.html (last visited Mar. 4, 2010) (discussing Paul's letter to the Romans in which he not only condemns homosexuality but also directs slaves to obey their masters and women not to teach, cut their hair, or speak in church).

²⁸⁷ Telephone Interview with Chaplain (Colonel) Michael A. Hoyt, Chief of Chaplain Corps Operations, U.S. Army (Mar. 4, 2010) [hereinafter Hoyt Interview]. *See also* Press Release, Chaplains Back Repeal of Don't Ask, Don't Tell (Nov. 16, 2009), available at <http://www.votevets.org/news?id=0263> (explaining that military chaplains are already required to provide pastoral counseling to gay troops, and citing the joint position of three retired military chaplains that DADT should be repealed).

²⁸⁸ *See, e.g.*, U.S. DEP'T OF DEF., DIR. 1304.19, APPOINTMENT OF CHAPLAINS FOR THE MILITARY SERVICE para. C (18 Sept. 1993) [hereinafter DODD 1304.19], available at <http://www.maaf.info/regs/DODD1304-19pv1993.pdf>; U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 3-2(5) (3 Dec. 2009) [hereinafter AR 165-1]; Hoyt Interview, *supra* note 287. Pursuant to these and other applicable regulations, military chaplains are not required to perform marriages. They are free to perform weddings on a case-by-case basis and to refrain from performing religious rites when doing so violates any tenet of their faith (i.e., those who believe divorce is a sin do not perform marriage rites for divorced troops). In these cases, troops are referred to another chaplain or an appropriate non-military resource. *Id.*

²⁸⁹ DoD DIR. 1304.19, *supra* note 288, para. C; AR 165-1, *supra* note 288, para. 3-2(5); Hoyt Interview, *supra* note 287.

²⁹⁰ Terrence K. Kelly, *Transformation and Homeland Security: Dual Challenges for the US Army*, 33 PARAMETERS 36 (2003), available at <http://www.carlisle.army.mil/USAWC/Parameters/03summer/kelly.pdf>.

²⁹¹ For example, abortion, sexual promiscuity, sex outside of marriage (to include sex between single, consenting, heterosexual adults), sex for non-procreation purposes, masturbation, use of birth control, and the act of viewing adult pornography are all considered to be immoral and sinful by troops who practice Catholicism and troops who

Servicemembers are trained to overlook cultural, religious, ethnic, and gender differences and focus instead on institutional service values such as integrity, honor, selfless service, and courage. This is reflected in the Army’s diversity policy, which states “men and women who serve our great Army come from all walks of life. While each thinks differently and brings different attributes and characteristics, together they make up the best Army in the world.”²⁹² Army leaders are further directed to “develop and maintain an inclusive environment that will sustain the Army as a relevant and ready Force.”²⁹³ Diversity is valued and celebrated in the military, rather than discouraged.²⁹⁴ The high quality of America’s military forces is based in large part on inclusion, rather than exclusion.

2. “GLBs Will Lower Morale, Unit Cohesion, and Good Order & Discipline”

Opponents of gays in the military state that concerns over unit cohesion, morale, discipline, and privacy should preclude openly gay individuals from serving.²⁹⁵ In the 1940s Secretary of the Army Kenneth Royall cited these very same factors as primary reasons why the

follow traditional Christian teachings. Yet, none of these activities are prohibited by the military outside of deployed environments. See, e.g., CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1997); Janet Smith, The Christian View of Sex, <http://www.catholiceducation.org/articles/sexuality/se0004.html> (last visited Mar. 3, 2010).

²⁹² U.S. Military Acad., Army Policy on Diversity, available at <http://www.eecs.usma.edu/webs/events/diversity/dlc2009/GENWard.html> (providing text of the Army’s diversity policy, which is signed by Sergeant Major of the Army Kenneth O. Preston, Chief of Staff George W. Casey Jr., and Secretary of the Army Pete Geren).

²⁹³ Sergeant Major of the Army Kenneth O. Preston et al., Army Policy on Diversity (Apr. 1, 2009), available at https://www.deomi.org/DiversityMgmt/documents/Diversity_Policy_Memo_000.pdf.

²⁹⁴ See, e.g., Sec’y of the Navy David C. Winter, Dep’t of the Navy Diversity Policy Statement (Aug. 27, 2007), available at <https://www.deomi.org/DiversityMgmt/Documents/SECNAVDiversityPolicyStatement2007.pdf>; Admiral Thad W. Allen, Coast Guard Diversity Policy Statement, available at <https://www.deomi.org/DiversityMgmt/documents/USCGDiversityPolicyStatement.pdf> (last visited Mar. 3, 2010); GERRY J. GILMORE, DIVERSITY, EQUALITY PROGRAMS STRENGTHEN AMERICA’S MILITARY (Feb. 22, 2007), <http://www.defense.gov/News/NewsArticle.aspx?ID=3145>.

²⁹⁵ Statement of Support for the 1993 Law Regarding Homosexuals in the Military (2009), Center for Military Readiness, available at <http://cmrlink.org/CMRDocuments/FlagOfficersLetterPOTUS-033109.pdf> (last visited Mar. 3, 2010) (containing a statement sent to President Obama and Congress by a group of retired flag and general officers, expressing their support for the ban on gays based on concerns regarding unit cohesion, morale, discipline, and effectiveness).

President and Congress should think twice before integrating African-Americans into all-white units. In a letter to the White House, he wrote, "Soldiers live and work closely together. They are not only on the same drill field but also in the same living and eating quarters. . . . Any change in our [segregation] policy would adversely affect the morale of many Southern [S]oldiers and other [S]oldiers now serving."²⁹⁶ General Omar N. Bradley, too, contended that "complete integration might seriously affect morale and thus affect battle efficiency,"²⁹⁷ and expressed concern not for its effect during the workday, but for the "big problems" that would "arise after work or training hours, in living quarters and social gatherings."²⁹⁸ Opponents of integration predicted that white Soldiers would refuse to voluntarily work, sleep, or eat with black Soldiers and that forced integration would negatively impact team work, and discipline.²⁹⁹ The Chairman of the General Board of the Navy wrote:

How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that the answer is "few, if any," and further believes that if the issue were forced, there would be a lowering of contentment, teamwork, and discipline in the service.³⁰⁰

The Secretary of the Navy predicted that if African-American troops were given positions of leadership, they would be unable to maintain discipline among white subordinates and would cause a loss in

²⁹⁶ Memorandum from Sec'y of the Army Kenneth Royall to the Honorable Clark Clifford (Mar. 29, 1949), available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100 (last visited Feb. 6, 2010) [hereinafter Royall Memorandum].

²⁹⁷ General Omar N. Bradley, Statement Before the President's Comm. on Equality of Treatment and Opportunity in the Armed Forces 5 (Mar. 28, 2009), available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/index.php?pagenumber=5&documentid=10-1&documentdate=1949-03-28&study_collectionid=coldwar&groupid= (last visited Feb. 6, 2010) [hereinafter General Bradley Statement].

²⁹⁸ *Id.* at 3.

²⁹⁹ Huong Thien Nguyen, Note, *Irrational Prejudice: The Military's Exclusion of Gay, Lesbian, and Bisexual Servicemembers After Romer v. Evans*, 28 HASTINGS CONST. L.Q. 461, 500 (2001).

³⁰⁰ Bianco, *supra* note 270, at 47, 57 (quoting from the Chairman's written document).

“teamwork, harmony, and efficiency.”³⁰¹ Despite these warnings and predictions, however, integration did not have a negative impact,³⁰² and today, the military prides itself on its “ability to integrate different races within its ranks more successfully than the civilian sector.”³⁰³

Proponents of DADT are correct in their assertion that unit morale, cohesion, and discipline are critical to military effectiveness and success, and that the military must have rules and policies in place that protect them.³⁰⁴ However, as pointed out by Congressman Patrick Murphy (a combat veteran and former Army Judge Advocate), excluding an entire class of otherwise qualified individuals is not necessarily the best or only way to achieve this. In a July 2008 congressional hearing on the issue, Congressman Murphy pointed out that current military laws, rules, and structure protect good order and discipline and will continue to do so when the ban is lifted.³⁰⁵ Military and political leaders such as Former Chairmen of the Joint Chiefs of Staff General John Shalikashvili and General Colin Powell, former Senator San Nunn, and General Minton Alexander—who were all at one time were involved in the implementation of DADT and believed it necessary for preservation of unit cohesion, morale, and good order and discipline—have changed their position on the issue and support its repeal.³⁰⁶

³⁰¹ *Id.* at 57.

³⁰² Michael K. Kauth & Dan Landis, *Applying Lessons Learned from Minority Integration in the Military*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 86, 88 (Gregory M. Herek et al. eds., 1996) (discussing a 1951 Army-sponsored university study finding that desegregation had caused no significant effect on unit effectiveness, and a subsequent 1963 DoD directive stating that racial discrimination is *harmful* to morale and unit effectiveness).

³⁰³ Nguyen, *supra* note 299, at 500.

³⁰⁴ Captain John A. Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1, 65 (1999).

³⁰⁵ Comments of Representative Patrick Murphy (July 23, 2008), *available at* <http://www.youtube.com/watch?v=tjqs1SqVVSQ> (depicting his statement at the congressional hearings on Don’t Ask, Don’t Tell).

³⁰⁶ *See, e.g.*, Press Release, General (Ret.) John M. Shalikashvili, Statement to Pentagon Leadership (Jan. 27, 2010), *available at* <http://gillibrand.senate.gov/newsroom/press/release/?id=60c1b742-f0ff-4397-83a8-49adf322e77b>; Karen DeYoung, *Colin Powell Now Says Gays Should be Able to Serve Openly in Military*, WASH. POST, Feb. 4, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/02/03/AR2010020302292.html>; Owen West, *An About-Face on Gay Troops*, N.Y. TIMES, Feb. 8, 2009, <http://www.nytimes.com/2009/02/09/opinion/09west.html>; FRANK, *supra* note 5, at 115–17.

Moreover, a 1992 GAO report states that there is no empirical evidence to support the contention that lifting the ban on gays will negatively impact these components of military readiness.³⁰⁷ In its response to this report, the DoD concurred, stating that the ban “is based solely upon concerns about homosexuality itself” and on “professional judgment that the exclusionary policy promotes overall combat effectiveness.”³⁰⁸ General Mintor Alexander, U.S. Army (Ret.), who initially led the Army’s DADT advisory group in 1993, recalls the group had no empirical data on which to base its recommendation and explained that its recommendation on implementation was based solely on fears and subjective data.³⁰⁹ Alexander believes the ban is harmful to military readiness and morale and should be repealed.³¹⁰

Military leaders and lower-enlisted Soldiers alike are adaptable and disciplined. Day in and day out, on bases, ships, remote, and deployed locations around the world, they demonstrate their ability to follow rules and policies with which all individuals do not necessarily agree. Servicemembers work, train, and fight side-by-side with those whose personalities or religious, moral, or behavioral traits they may dislike or of which they disapprove. It is their ability to do so successfully that makes the U.S. military one of the most effective fighting forces in the world, and well suited for the inclusion of acknowledged GLB servicemembers.³¹¹

A Special Note on Privacy Considerations

Proponents of the ban also worry that the presence of gay troops in barracks rooms and group showers will violate the privacy and modesty of others. There is concern that heterosexuals and homosexuals showering together will lead to inappropriate sexual stares, uncontrollable erections, and lewd behavior. Privacy is, indeed, an important component of morale. These fears and concerns, however, assume that all homosexuals are sexual predators, and fail to recognize

³⁰⁷ GAO HOMOSEXUALITY POLICY, *supra* note 94, at 7 (noting the DoD’s statement that the ban is not based on scientific or sociological evidence). *See also id.* at 59; Aaron Belkin, *supra* note 126, at 116–17 (discussing the lack of scientific and sociological evidence).

³⁰⁸ GAO HOMOSEXUALITY POLICY, *supra* note 94, at 27 (citing DoD comments).

³⁰⁹ FRANK, *supra* note 5, at 116.

³¹⁰ *Id.* at 117.

³¹¹ Coleman Statement, *supra* note 251.

that many homosexuals value modesty and privacy just as much as heterosexuals do.³¹² Moreover, gays are already showering and rooming with heterosexual Soldiers when accommodations force them to do so, and have been doing so for years, with no widespread patterns of sexual misconduct reported. While there are occasional instances of same-sex sexual assaults, the perpetrators involved are addressed individually, under applicable criminal laws, as are the many more heterosexuals who are accused of sexual harassment and misconduct.³¹³ While some same-sex sexual assaults may go unreported due to a perceived stigma associated with homosexuality, many heterosexual sexual assaults are similarly underreported due to the perceived stigma of being sexually assaulted and other factors.³¹⁴ Don’t Ask, Don’t Tell itself hinders gay troops from reporting sexual assaults against them because doing so may compel them to discuss their sexual orientation with military investigators risking subsequent discharge under the policy.³¹⁵

Furthermore, DADT does not protect privacy. As noted above, heterosexual troops are already serving, showering, rooming and living with homosexual troops. Heterosexual Soldiers have no way, of knowing who among them is homosexual, however, since gay Soldiers

³¹² See, e.g., Letter from a Mountain Soldier, *supra* note 82 (stating that despite his sexual orientation, “the only thing I’ve ever thought about while showering [at places like Ranger School and deployed locations] was getting in and getting out” quickly); Hughes, *supra* note 6 (stating that despite his sexual orientation, there was “nothing remotely sexual” about having to share showers or quarters with fellow male troops during his deployment to Afghanistan).

³¹³ See, e.g., Roger Simon, *Arguments Against Gays in Military Don’t Hold Up*, BALTIMORE SUN, Mar. 31, 1993, http://articles.baltimoresun.com/1993-03-31/news/1993090078_1_sam-nunn-gays-in-military-showers).

³¹⁴ See, e.g., Michael Rand & Shannan Catalano, *Criminal Victimization: 2006*, BUREAU OF JUSTICE STATISTICS BULLETIN 5 (Dec. 2007), <http://www.rainn.org/pdf-files-and-other-documents/News-Room/press-releases/2006-ncvs-results/NCVS%202006-1.pdf> (rape and sexual assaults are less likely to be reported to police than other crimes); Gordon Block, *Sexual Assault Goes Underreported*, COLLEGIATE TIMES, Feb. 5, 2009, <http://www.collegiatetimes.com/stories/12903/sexual-assault-goes-underreported> (factors such as intoxication and a preexisting relationship between victim and offender sometimes cause underreporting); McCollum Addresses Under-Reporting of Sexual Assaults in the Military, available at http://www.mccollum.house.gov/index.php?option=com_content&view=article&id=115&catid=43&Itemid=125 (last visited Mar. 3, 2010) (sexual assaults often go unreported based on fears of ostracism, harassment, gossip, ridicule, or that nothing will be done).

³¹⁵ See, e.g., Stephen M. Silverman, *Lance Bass’s Beau: I Was Assaulted in the Military*, PEOPLE, Oct. 23, 2006, <http://www.people.com/people/article/0,1549383,00.html> (former Air Force Academy graduate and Air Force officer Reichen Lehmkuhl discusses being sexually assaulted as a cadet and his initial decision to remain silent about the incident).

are prohibited from indicating their sexuality and troops are prohibited from asking about it. In addition, many troops now, even on ships and in deployed areas, have access to private shower stalls.³¹⁶ Although a few locations, such as temporary training sites and deployment hubs, do not have private shower stalls, some of these (such as the Army's Combined Readiness Center at Fort Benning, Georgia) require troops to shower in open bays with deploying DoD civilians and contractors,³¹⁷ who have no restrictions prohibiting them from acknowledging their sexual orientation.³¹⁸ At these locations, troops seeking privacy typically use poncho liners, towels, or other items, and when possible, shower during off-peak times.³¹⁹ Don't Ask, Don't Tell does not protect privacy; instead, it prevents commanders from creating solutions to provide for it. Only if the ban is lifted can these issues be openly and effectively discussed and ideas for increased privacy be created and implemented.

3. "Recruiting and Retention will Suffer"

In a 2009 letter to President Obama, a group of retired general and flag officers (some who have subsequently asked that their names be retracted) warned that repealing the ban will "undermine recruiting and

³¹⁶ Three e-mail messages from Lieutenant Commander Paige Ormiston, U.S. Navy (Mar. 3, 2010) (on file with author) (discussing, based on her military experience on Navy vessels, the availability of private shower stalls on at least five Navy carriers, six cruisers, eight destroyers, two fast combat support ships, three coastal patrol craft, and two amphibious assault ships); Telephone Interview with, and e-mail from, Captain Timothy Hsia, U.S. Army (Feb. 8, 2010) (email message on file with author) (discussing, based on his experiences as a deployed infantry officer, the availability of private shower stalls on at least eight Iraq forward operating bases, including Mosul, Balad, Baghdad, and Baqubah). This assertion is also based on author's observations over the course of more than ten years of active duty military service (including enlisted service in the Signal Corps and as an officer in the Military Police and JAG Corps) in locations such as Saudi Arabia (Dhahran and King Kalid Military City), Kuwait (Camp Arifjan and Ali al Saleem Air Base), and Iraq (Camp Victory and Camp Liberty) [hereinafter Author's Observations].

³¹⁷ Author's Observations, *supra* note 316; e-mail messages from three active duty military officers (Feb. 2010) (on file with author). See also sources cited *supra* note 78 (describing shared living arrangements).

³¹⁸ U.S. DEP'T OF DEF., DIR. 1020.02, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY (EO) IN THE DEPARTMENT OF DEFENSE 1 (Feb. 5, 2009), available at http://www.deomi.org/EOAdvisorToolkit/documents/DoD_Directive102002p.pdf (prohibiting military departments and combatant commands from discriminating against their civilian employees on the basis of sexual orientation).

³¹⁹ E-mail messages from two active duty Army officers (Feb. 2010) (on file with author); Author's Observations, *supra* note 316.

retention . . . and eventually break the All-Volunteer Force.”³²⁰ In 1949, Secretary of the Army Royall made the same prediction as to the integration of African-Americans, stating, “it is a well known fact that close personal association with Negroes is distasteful to a large percentage of Southern whites. A . . . substantial and sudden change in the Army’s partial segregation policy [will] in my opinion adversely affect enlistments and reenlistments . . . probably making peacetime selective service necessary.”³²¹ Vice Admiral F.E.M. Whiting voiced his concern more strongly, stating, “The minute the negro is introduced into general service . . . [the] type of man that we have been getting for the last twenty years will go elsewhere and we will get the type of man who will lie in bed with a negro.”³²² General Omar Bradley also cautioned that “complete integration might very seriously affect voluntary enlistments. . . .”³²³ None of these dire predictions, however, came to pass.

The current predictions of the “breaking” of the United States’ volunteer military if openly gay troops are allowed to serve are unsupported by evidence or studies. Federal and private research studies point to this lack of evidence and make no such predictions.³²⁴ There is, however, evidence—including our experiences with racial and gender integration and the United Kingdom’s experiences with the integration of gays—that allowing openly gay individuals to serve will improve the

³²⁰ Flag & General Officers for the Military Statement to the President and Congress (Apr. 9, 2009), *available at* <http://www.flagandgeneralofficersforthemilitary.com/>. Several of the flag and general officers who signed this petition have reportedly denied signing it or asked to have their names removed; others are deceased. At least one had reportedly been dead for at least six years prior to his name appearing on the petition. Servicemembers United and the Servicemembers United Defense Policy Council, Flag and General Officer for the Military: A Closer Look, *available at* <http://www.servicemembersunited.org/closerlook> (last visited Apr. 12, 2010).

³²¹ Sec’y of the Army Kenneth C. Royall, Statement before the President’s Comm. on Equality of Treatment and Opportunity in the Armed Servs. (Mar. 28, 1949), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/documents/pdf/4-17.pdf#zoom=100 (last visited Feb. 6, 2010) [hereinafter Royall Statement].

³²² Bianco, *supra* note 270, at 55 (quoting Admiral Whiting).

³²³ General Bradley Statement, *supra* note 297, at 5.

³²⁴ *See, e.g.*, RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 395–97 (citing the lack direct evidence, and stating any such predictions as the effect of GLBs in the military “are inherently speculative”); GAO FOREIGN COUNTRY PRACTICES, *supra* note 135 (finding no adverse affect on retention or recruiting in several foreign military organizations that now allow gays to serve); Gregory M. Herek, *Sexual Orientation and Military Service: A Social Science Perspective*, 48 AM. PSYCHOLOGIST 538, 544 (1993).

military's ability to recruit and retain more talented, qualified troops and that America's military forces will successfully adapt.

4. "GLBs Spread Sexually Transmitted Diseases"

Some supporters of DADT express concern that its repeal will result in increased health care costs and the spread of AIDS and other sexually transmitted diseases throughout the military.³²⁵ Similar arguments were made against integration in the 1940s. In 1948, for example, Senator Richard Russell, an opponent of military desegregation, "cast African Americans as disease-riddled outsiders who threatened innocent young white boys with deadly health risks, particularly sexually transmitted diseases. Syphilis, gonorrhea, chancre, and tuberculosis, he said, 'are appallingly higher among the members of the Negro race than among the members of the white race.'"³²⁶ He "took to the floor of the Senate with charts to demonstrate how African-Americans had, 'high rates of venereal disease,' and how mingling the races in the armed forces would expose white people to this health threat."³²⁷ In a conversation with General Dwight D. Eisenhower, Russell explained that his objections to integration were not based on racial prejudice, but on the "vital factors as the morale, discipline, and health of the troops" and African-Americans' "incidence(s) of venereal diseases."³²⁸ These concerns had been so worrisome that military leaders forced the Red Cross to maintain separate blood banks—one for whites, another for African-Americans—during all of World War II.³²⁹

³²⁵ See, e.g., Bunn, *supra* note 24, at 234; Sean O'Donnell, Commentary, *Why the "Don't Ask, Don't Tell" Policy Should Stay*, EXAMINER (Balt.), Feb. 3, 2010, <http://www.examiner.com/x-3108-Baltimore-Republican-Examiner-y2010m2d3-Why-the-Dont-ask-dont-tell-policy-should-stay>.

³²⁶ FRANK, *supra* note 5, at 61; see also Phyllis W. Jordan, Commentary, *When the Military Mixed*, VA.-PILOT & LEDGER STAR (Norfolk), Mar. 14, 1993 (describing Russell's emphasis on the disease rate among African-American Soldiers and citation of statistics that bolstered his arguments regarding rates of tuberculosis and venereal disease).

³²⁷ Judy Holland, *Activists Take on Russell Building over Racism*, SEATTLE POST-INTELLIGENCER, Feb. 1, 2003, at A2.

³²⁸ Alexander Cockburn, *Same Song, Different Verse*, L.A. TIMES, Jan. 31, 1993, at 5.

³²⁹ E.g., MACGREGOR, *supra* note 260, at 36 (citing to a 1942 memo by Rear Admiral Ross T. McIntire to the Secretary of the Navy regarding segregated blood banks); SPENCIE LOVE, ONE BLOOD: THE DEATH AND RESURRECTION OF CHARLES R. DREW 32, 49 (1996). In 1941, Drew established the first American Red Cross blood bank, but was unable to donate his own blood because it refused donations from African-Americans. In 1942, the Red Cross changed its policy permitting African-Americans to donate, but kept

Medical fitness and the prevention of infectious diseases are critically important in maintaining an effective fighting force. Don’t Ask, Don’t Tell, however, does not serve this function. Educational programs and routine medical screening (including biennial AIDS testing for all current Soldiers) already in place are the military’s method to identify, treat, and limit the spread of contagious diseases within its population, including the portion that is gay. According to the American Medical Association (AMA), repealing the ban will result in more honest and open communications between GLB troops and their health care providers, and better overall health care for these troops.³³⁰ That, in turn, will increase military effectiveness, not harm it.

5. “GLBs Will Cause an Increase in Sexual Assaults and Misconduct”

Supporters of DADT assert that its repeal will result in an increase in sexual misconduct by GLBs against heterosexual troops. One general officer testified in 1993, for example, that gays should not serve because they may solicit others to commit homosexual acts.³³¹ In 1948, this same argument was made by Senator Richard Russell of Georgia in opposition of racial integration. Russell asserted that integration would “‘increase the rate of crime committed by servicemen,’ since ‘Negro troops,’ reportedly committed rape thirteen times more often per capita than whites”³³² and sodomy two-and-a-half more times.³³³

their blood separate from that of whites. Ironically, Drew later bled to death after being refused treatment at a whites-only hospital following an automobile accident. *Id.*

³³⁰ Am. Med. Ass’n, AMA Policy Regarding Sexual Orientation, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advisory-committee/ama-policy-regarding-sexual-orientation.shtml> (last visited Mar. 3, 2010) (stating, in Policy H-65.972, Repeal of “Don’t Ask, Don’t Tell,” that the association will advocate for repeal of DADT); Kevin B. O’Reilly, *AMA Meeting: “Don’t Ask, Don’t Tell” Said to Hurt Patient Care; Repeal Urged*, AM. MED. NEWS, Nov. 23, 2009, <http://www.ama-assn.org/amednews/2009/11/23/prsc1123.htm> (discussing passage of a resolution calling for complete repeal of DADT); Editorial, *AMA Opposes Military Gay Policy*, WASH. TIMES, Nov. 11, 2009, <http://www.washingtontimes.com/news/2009/nov/11/ama-opposes-military-gay-policy/> (reporting on doctors who say DADT forces GLB troops to keep their sexual orientation a secret creating a chilling effect on open communication between them and their health care providers).

³³¹ Bianco, *supra* note 270, at 50.

³³² FRANK, *supra* note 5, at 61.

³³³ Bianco, *supra* note 270, at 50.

Crime rate statistics were not reliable indicators of how well African-American Soldiers would perform, nor did they accurately predict integrated Soldiers' ability to comply with the rules and discipline imposed by the military. Similarly, there is no proof that similar statistics regarding homosexuals (or any other group serving in the military) are an accurate indicator of how well they—as a group—will perform. There are military mechanisms in place for dealing with those from all walks of life—including gays—who commit misconduct. The UCMJ criminalizes sexual offenses, and provides a mechanism for the prosecution and punishment of those who engage in fraternization, abuse of power, sexual harassment, assault, and other crimes.

Moreover, if homosexuals are all sexually aggressive predators and unable to control their sexual urges and behavior, then what of the 66,000 currently serving against whom no such allegations have been made? What of the thousands who have been administratively discharged under DADT with no such allegations? Or the ones administratively discharged prior to the policy's enactment? What of GLB veterans like retired Commander Zoe Dunning (a lesbian Navy officer who served openly for fourteen years),³³⁴ retired Petty Officer First Class Keith Meinhold (a gay Sailor who served openly from 1992 until his retirement in 1996),³³⁵ and retired Colonel Margarethe Cammermeyer (a lesbian Army nurse who served openly from 1994 until her retirement in 1997),³³⁶ who served honorably with no such incidents? While sexual assaults involving homosexual behavior do sometimes occur in the military, the vast majority of sexual misconduct is committed by males against females.³³⁷ It is noteworthy that American

³³⁴ Cynthia Laird, *Out Navy Commander Retires*, BAY AREA REP., June 7, 2007, <http://ebar.com/news/article.php?sec=news&article=1884>; see also Willie Monroe, *Strong Reactions to General's Gay Remarks*, ABC NEWS 7, Mar. 13, 2007, http://abclocal.go.com/kgo/story?section=news/national_world&id=5119262.

³³⁵ Nancy A. Youssef, *U.S. Military Moves to End Ban on Gays*, MIAMI HER., Feb. 2, 2010, <http://www.miamiherald.com/2010/02/02/1459853/us-military-moves-to-end-ban-on.html>;

³³⁶ COLONEL (RET.) MARGARETHE CAMMERMEYER & CHRIS FISHER, *SERVING IN SILENCE* (1995) (discussing Colonel Cammermeyer's military service as a nurse); see also *Breaking the Silence . . . Grethe Cammermeyer*, available at <http://www.cammermeyer.com/bio.htm> (last visited Feb. 27, 2010).

³³⁷ U.S. DEP'T OF DEF., *FY08 REPORT ON SEXUAL ASSAULT IN THE MILITARY* 74 (Mar. 2009) [hereinafter *FY08 SEXUAL ASSAULT REPORT*], available at http://www.sapr.mil/Contents/ResourcesReports/AnnualReports/DoD_FY08_Annual_Report.pdf (discussing 2265 unrestricted allegations of sexual assault investigated in 2008, 1864 of which were male-on-female, 14 which were female-on-male, 123 which were male-on-male, and 9 which were female-on-female [the remaining 255 involved gender-

paramilitary organizations and the military organizations of countries like the United Kingdom have experienced no reported increases in homosexual sexual harassment or assault since the repeal of their bans.³³⁸

The DADT policy has never been shown to prevent sexual assaults, nor was it designed to do so. This author has found no reports or studies indicating that sexual predators—whether homosexual or heterosexual—base their decision to commit a sexual assault on personnel policies or potential loss of employment. The possibility of job loss certainly did not prevent the alleged 2908 military-wide sexual assaults reported in fiscal year 2008.³³⁹

6. “*Heterosexual Troops will Commit Acts of Violence Against GLBs*”

Some proponents of DADT express concern over the safety of openly gay troops.³⁴⁰ During desegregation, proponents of segregation voiced similar concerns; fear that “integration would prompt violence against a despised minority that the military would be helpless to stop.”³⁴¹ Such an assertion, however, presumes that heterosexual troops so lack discipline and self control that they are—as a group—unable to follow disfavored rules, and incapable of overcoming personal prejudices

unknown assailants)]; *see also* Or. State Univ., Myths & Facts About Male Victimization, available at <http://oregonstate.edu/sexualassault/myths-amp-facts-about-male-victimization> (last visited Mar. 3, 2010) (stating that homosexual men are less likely than heterosexual men to commit sexual assault).

³³⁸ Sen. Carl Levin, Opening Statement before the Senate Armed Servs. Comm. (Feb. 2, 2010), available at <http://levin.senate.gov/newsroom/release.cfm?id=322020> (stating that the presence of openly gay troops in the military organizations of other westernized countries have not been shown to cause any negative impact on unit cohesion or morale).

³³⁹ FY08 SEXUAL ASSAULT REPORT, *supra* note 337, at 33 (discussing 2265 unrestricted reports and 753 restricted reports); *see also* U.S. Army Sexual Assault Prevention & Response Program, What is Acquaintance or “Date” Rape?, available at http://www.sexualassault.army.mil/content/prev_date_rape.cfm (last visited Feb. 13, 2010) (asserting that approximately two-thirds of sexual assault victims in the United States know their assailants).

³⁴⁰ Richard Sisk, *Military Less Resistant to Ending Anti-Gay “Don’t Ask, Don’t Tell” Policy for Soldiers*, N.Y. DAILY NEWS, Nov. 29, 2009, http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29_military_less_resistant_to_ending_antigay_dont_ask_dont_tell_policy_for_soldiers.html (reporting that some proponents of the ban believe its repeal may result in violence against GLB troops).

³⁴¹ FRANK, *supra* note 5, at 62.

to the extent necessary to serve with gay troops.³⁴² Current and former military leaders dispute this presumption, citing how American troops, as a whole, have proven themselves adaptable, resilient, and disciplined, and able to comply with rules that they do not necessarily like or agree. According to U.S. Representative Patrick Murphy (the first Iraq war veteran elected to Congress), for instance, “to say that other countries’ Soldiers are professional enough to handle this and American Soldiers aren’t is really a slap in the face.”³⁴³ Currently, military laws provide for the prosecution and punishment of troops—gay or straight—who engage in violent or harassing behavior. Perpetrators of violence against gays or any other troops are subject to the UCMJ and can be prosecuted and punished accordingly.

7. “*The Military Isn’t the Place for Social Experimentation or Evolution*”

Supporters of DADT argue that lifting it is akin to social experimentation and that the military is not the place for it.³⁴⁴ Former Marine and current President of the Family Research Council, Tony Perkins, for example, claims that “this is not the time to be tinkering with the military and making it a playground of social experimentation.”³⁴⁵ Former Marine Lieutenant Colonel Oliver North recently wrote that allowing gays to serve openly will turn the military into a “radical social experiment” with troops serving as “lab rats,” and would subject the military to same-sex marriages and military housing for same-sex married couples.³⁴⁶ Opponents of racial integration voiced the same argument in opposition of integration of African-Americans in the 1940s.³⁴⁷ In 1941, for example, Colonel Eugene R. Householder of the Army Adjutant General’s Office publicly responded to criticism of military restrictions on African-Americans by stating that the military

³⁴² Herek, *supra* note 324, at 547.

³⁴³ David Crary, *Allies’ Stance Cited in Gays-in-Military Debate*, USA TODAY, July 12, 2009, http://www.usatoday.com/news/washington/2009-07-12-military-gay_N.htm.

³⁴⁴ See, e.g., Bunn, *supra* note 24, at 226.

³⁴⁵ Editorial, *Out in Military: “Not the Time”* (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2>.

³⁴⁶ Lieutenant Colonel (Ret.) Oliver North, *Military Lab Rats*, FOX NEWS, Feb. 5, 2010, <http://www.foxnews.com/story/0,2933,584955,00.html>.

³⁴⁷ FRANK, *supra* note 5, at 62.

was made of up of troops with “pronounced views with respect to the Negro” that military orders would not change, and that:

The Army is not a sociological laboratory; to be effective it must be organized and trained according to the principles which will insure success. Experiments, to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to efficiency, discipline, and morale and would result in ultimate defeat.³⁴⁸

Shortly after President Truman issued his 1948 Executive order to integrate the military, Army Chief of Staff General Omar N. Bradley expressed public opposition based on his belief that it would make the Army an “instrument of social change in areas of the country which still rejected integration.”³⁴⁹ Despite military and societal opposition, the Army nevertheless became a testing ground for one of the biggest social experiments conducted in the history of the United States: the integration of African-Americans in an era when the entire country was still segregated. In response to President Truman’s order to integrate the military, a “Proposed Experimental Plan for Integration” was drafted and integration began.³⁵⁰ Military integration began six years before African-Americans were granted the legal right to attend white schools,³⁵¹ seventeen years before their voting rights were enforced by the Voting Rights Act of 1965 (forcing states to abide by the 15th Amendment),³⁵² and nineteen years before the Supreme Court struck down laws prohibiting and criminalizing interracial marriage.³⁵³

³⁴⁸ ULYSSES LEE, *THE EMPLOYMENT OF NEGRO TROOPS* 141 (2000) (1966), available at <http://www.history.army.mil/books/wwii/11-4/>.

³⁴⁹ MACGREGOR, *supra* note 260, at 317 (citing to comments made by General Bradley in a media interview).

³⁵⁰ Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948); U.S. Army, *Army Proposed Experimental Plan for Integration* (1949), Record Group 220, available at http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/document_s/pdf/10-3.pdf#zoom=100.

³⁵¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also Nat’l Park Serv., *Brown v. Board of Education National Historic Site*, available at <http://www.nps.gov/nr/travel/civilrights/ka1.htm> (last visited Mar. 2, 2010) (stating that the Supreme Court’s decision in *Brown* forced the desegregation of public schools in twenty-one states).

³⁵² 42 U.S.C. § 1973–1973aa-6 (2006); U.S. Dep’t of Justice, *The Voting Rights Act of 1965*, U.S. Department of Justice, available at http://www.justice.gov/crt/voting/intro/intro_b.php.

³⁵³ *Loving v. Virginia*, 388 U.S. 1 (1967).

If the ban against GLBs is lifted, the military may elect to grant housing and other benefits to GLB troops and their lawful same-sex partners (based on state-recognized civil domestic partnerships or marriages) that are bestowed on heterosexual troops and their spouses. Such logistical issues are not new to the military. President Truman's integration order forced the military to deal with the contentious issue of integrating African-American families into all-white military housing areas years before the rest of the country began the long process of desegregation. It integrated African-American children into all-white DoD schools six years before the rest of the country was forced to do so pursuant to *Brown v. Board of Education*.³⁵⁴ It forced the military to deal with the issue of whether or not to recognize interracial marriages performed in states that permitted it, at a time when interracial marriages were illegal in most states. The military successfully dealt with all these issues despite opposition by military and political leaders and the visceral repulsion many white troops and their families had toward African-Americans.³⁵⁵

The military was also forced to deal with housing and benefits issues when it integrated women into the regular military and service academies. In response to this integration, policymakers created rules, housing regulations, and benefits pertinent to women (such as maternity leave), and created solutions to address fraternization and sexual harassment. Had the military refused to integrate African-Americans and women based on arguments against "social experimentation" and concerns over housing issues and benefits, America's military would not be the diverse fighting force it is today. The contributions, skills, talent and leadership of troops like General Colin Powell (65th U.S. Secretary of State and former Chairman of the Joint Chiefs of Staff), Vernice Armour (female African-American Marine combat pilot who graduated number one in her flight school and flew combat missions during two tours in Iraq), and others like them would have been lost to the military.³⁵⁶ The presence of African-Americans and women, and their

³⁵⁴ 347 U.S. 483 (1954).

³⁵⁵ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 93 (stating that racial integration was a "process which inspired many of the strong emotional reactions that the possibility of integrating homosexuals provokes today" in that most whites held a "visceral revulsion" to the idea of close physical contact with African-Americans).

³⁵⁶ See, e.g., General Colin L. Powell, *available at* <http://www.achievement.org/autodoc/page/pow0bio-1> (last visited Mar. 4, 2010); *First African-American Female Combat Pilot* (CNN television broadcast), http://www.youtube.com/watch?v=XuYWvNkEF_c (last visited Mar. 5, 2010).

many contributions, have increased military effectiveness, not reduced it.³⁵⁷ If the military’s integration of these groups is any indicator, the military will successfully adapt to the inclusion of acknowledged GLB troops and similarly benefit from their service.

8. “Now Isn’t the Time”

Proponents of DADT also assert that, based on our current posture in Iraq and Afghanistan, now is not the time for its repeal. Army Chief of Staff General George Casey recently stated that he has “serious concerns about the impact of [DADT’s repeal] on a force that is fully engaged in two wars and has been at war for eight-and-a-half years.”³⁵⁸ Others contend that while DADT is not perfect, it has worked satisfactorily since its inception in 1993 and therefore should not be changed.³⁵⁹ Opponents of racial integration made similar arguments about integration, which began shortly after America’s participation in two world wars and continued through a new war in Korea.³⁶⁰ Political leaders warned President Truman to move very slowly on the issue.³⁶¹ At least one Army staff officer publicly opposed the change based on his assessment that segregation had proven “satisfactory” and “[t]o change now would destroy morale and impair preparations for a national defense.”³⁶² However, despite racial friction and predictions of reduced

³⁵⁷ Brigadier General John W. Miller II, Commander, The Judge Advocate Gen’s Legal Ctr. & Sch., 2010 National Women’s History Month (on file with author) (encouraging military judge advocates to consider the “countless recorded and unrecorded contributions [American women make] to the growth and strength of our nation” and to military service).

³⁵⁸ Editorial, *Army Opposes Immediate End to Gay Ban*, MILITARY TIMES, Feb. 23, 2010, <http://www.military.com/news/article/army-to-oppose-suspension-of-gay-firings.html?ESRC=eb.nl&ESRC=army-a.nl>.

³⁵⁹ Michael D. Shear, *McCain Appears to Shift on “Don’t Ask, Don’t Tell,”* WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020202588.html>.

³⁶⁰ Neil Schoenherr, *Korean War Had Major Impact on Race Relations in the United States*, Jul. 25, 2003, available at <http://news.wustl.edu/news/Pages/304.aspx> (discussing the overlap of integration with the Korean War in the 1950s).

³⁶¹ See, e.g., MACGREGOR, *supra* note 260, at 299–301 (discussing Secretary of Defense James Forrestal’s advice to President Truman that he move slowly on integration and that he not force it on the military); *id.* at 310 (discussing presidential specialist Philleo Nash’s argument against the President’s use of an executive order to force integration, and his advice military integration be achieved instead through small steps by each service department).

³⁶² Bianco, *supra* note 270, at 54.

military efficiency, the military successfully integrated servicemembers of different races during wartime conditions.³⁶³

The fact that our Armed Forces have been engaged in simultaneous wars in two countries for nearly ten years, deployed multiple times in the same conflict, and are facing growing threats from countries like Iran, arguably make now an ideal time to lift the ban against otherwise qualified GLB troops. According to Army counterinsurgency expert Lieutenant Colonel John Nagl, the military is “putting more strains on the all-volunteer force than it was ever designed to bear.”³⁶⁴ Shortages in critical job specialties and maintaining “troop levels needed to fight two wars” have stretched the capacity of our Armed Forces, causing the military to lower the educational and background qualifications for new recruits and to raise the maximum enlistment age from thirty-four to forty-two.³⁶⁵ In addition to these challenges, Defense Secretary Robert Gates recently announced plans to increase the size of the U.S. Army by 22,000 Soldiers.³⁶⁶ In 2010, the United States will reportedly deploy approximately 30,000 additional troops to Afghanistan, thereby tripling its presence in the region.³⁶⁷ According to Sergeant Major of the Army Kenneth Preston, these and other demands threaten to exceed the capabilities of our all-volunteer force.³⁶⁸ The only way to meet the growth requirements of the Army, he stated last year, is to “retain good Soldiers.”³⁶⁹ Clearly, there is a need for retention and recruitment of fit,

³⁶³ RAND SEXUAL ORIENTATION POLICY, *supra* note 71, at 173 (reporting findings of the same).

³⁶⁴ Andrew Gray, *U.S. Military Stretched Dangerously Thin by War: Poll*, REUTERS, Feb. 19, 2008, <http://www.reuters.com/article/topNews/idUSN1930361920080219>.

³⁶⁵ Steward M. Powell & Gary Martin, *Army Standards Under Scrutiny*, HOUS. CHRON., Nov. 15, 2009, at A1; *see also* Greer et al., *supra* note 47, at 1153 (comments of Professor Elizabeth L. Hillman) (discussing the Army’s increased acceptance of “category four” recruits with low test scores and aptitude assessments).

³⁶⁶ John J. Kruzal, *Gates Calls for Increase of 22,000 Soldiers*, U.S. Army, July 21, 2009, available at <http://www.army.mil/-news/2009/07/21/24678-gates-calls-for-increase-of-22000-soldiers/>.

³⁶⁷ Eric Schmitt, *Obama Gives Troop Orders Before Speech*, N.Y. TIMES, Dec. 1, 2009, at A1, <http://query.nytimes.com/gst/fullpage.html?res=9E04E7DC1638F932A35751C1A96F9C8B63>.

³⁶⁸ Bridgett Siter, *Force Out of Balance, Preston Says*, FORT HOOD SENTINEL, Oct. 1, 2009, at AA2, <http://www.forthoodsentinel.com/edition/20091001/Page%20E02.pdf> (“Right now, the demands exceed our capabilities. With the current pace and tempo, many question our ability to sustain an all-volunteer force.”).

³⁶⁹ *Id.* (citing to Sergeant Major of the Army Preston).

qualified troops.³⁷⁰ Retention of qualified, competent, battle-tested GLB troops like LTC Fehrenbach, SGT Hughes, and others like them will enhance our combat effectiveness, not harm it.

It should be noted that former Senator Sam Nunn, a former Chairman of the U.S. Senate Committee on Armed Services and a key figure in the implementation of DADT in 1993, contends that the ban is now preventing the military from filling empty slots with talented personnel.³⁷¹ Lifting it will result in increased retention of competent, combat-seasoned, specially-trained infantrymen, linguists, fighter pilots, intelligence specialists, doctors, nurses, and other critical personnel, and a larger pool of fit, qualified recruits.

VII. Potential for “Eros” in the Workplace: How the Experience of Women in the Military is Relevant to the Inclusion of GLB

A. Maintaining a Professional Military Environment

Proponents of DADT further claim that allowing gays to serve will harm good order, discipline, and unit cohesion by creating an inappropriate sexually-charged military environment. Retired Marine officer Mackubin Thomas Owens, for instance, recently wrote that “[t]he presence of open homosexuals in the close confines of ships or military units opens the possibility that eros, which . . . is sexual, will be unleashed into the environment” and that this will result in “sexual competition, protectiveness, and favoritism, all of which undermine the nonsexual bonding essential to unit cohesion, good order, discipline and morale.”³⁷² Assuming, for the sake of argument, that the potential for sexual attraction does cause an environment of possible “eros,” this argument is not compelling because it fails to recognize that America’s

³⁷⁰ See also David Wood, *New Afghan War Headache: Not Enough Troops Available?*, POLITICS DAILY, Nov. 6, 2009, <http://www.politicsdaily.com/2009/11/06/new-afghan-war-headache-not-enough-troops/> (discussing shortage of available troops for overseas missions).

³⁷¹ FRANK, *supra* note 5, at 289. Nunn has recently stated that public and military opinions have evolved and that DADT is “getting in the way” of filling the military’s empty slots with talented personnel.” *Id.* See also Jonathan Capehart, *Don’t Ask Nunn*, WASH. POST, June 11, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/10/AR2008061002527.html>.

³⁷² Mackubin Thomas Owens, *The Case against Gays in the Military*, WALL ST. J., Feb. 2, 2010, http://online.wsj.com/article/SB10001424052748703389004575033601528093416.html?mod=googlenews_wsj&mg=com-wsj.

Armed Forces already operate in an environment where the potential for sexual attraction exists.

Heterosexual men and women—who presumably have a natural emotional, physical, and sexual attraction to each other—serve together and have been doing so effectively for years. They do so on ships, remote camps and forward operating bases, and in high-risk training and operations.³⁷³ They do so in countries like Saudi Arabia and Afghanistan, where local national women have none of the same fundamental rights that American women do, and in locations where men and women, alike, are confined on bases together. They not only share workplaces and common areas, but foxholes and sometimes even sleep areas.³⁷⁴ Innocent but unwanted romantic advances that sometimes occur are rebuffed in the military just as they are in civilian society. Advances that cross the line in terms of physical contact (such as an unwanted touch or kiss), offensiveness, or sexual harassment are punishable under administrative rules and criminal statutes. Consensual romantic and sexual relationships that involve favoritism, fraternization, or other misconduct are likewise addressed by the UCMJ, administrative prohibitions, and through organizational equal opportunity, sexual harassment prevention, and inspector general programs.³⁷⁵

³⁷³ See, e.g., Sheree Callahan, *Navy Celebrates 25 Years of Women at Sea*, *U.S. Navy Sealift Command*, available at <http://www.msc.navy.mil/sealift/2003/December/women.htm> (last visited Mar. 2, 2010); Michelle Norris, *Roles for Women in U.S. Army Expand*, NPR, Oct. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=14869648> (stating women have been allowed to serve on combat ships since the 1990s); Jack Zahora, *Army Polices Don't Keep Women Off Front Lines*, NPR, Aug. 26, 2007, <http://www.npr.org/templates/story/story.php?storyId=13961298&ps=rs> (reporting that female troops, including sixty-one killed by hostile fire in Iraq, are increasingly filling dangerous positions); Michelle Norris, *Roles for Women in U.S. Army Expand*, NPR, Oct. 1, 2007, <http://www.npr.org/templates/story/story.php?storyId=14869648> (reporting that since 2002, women have served nearly 170,000 tours of duty in Iraq and Afghanistan).

³⁷⁴ E-mail messages from two Marine and five Army officers (Feb. 2010) (on file with author) (recounting instances when they have shared sleeping quarters with troops of the opposite sex); see also Steven Lee Myers, *Living and Fighting Alongside Men, and Fitting In*, N.Y. TIMES, Aug. 16, 2009, http://www.nytimes.com/2009/08/17/us/17women.html?_r=1 (reporting that women sometimes share sleeping quarters with men).

³⁷⁵ See, e.g., UCMJ art. 120 (2008) (criminalizing rape, sexual assault, unwanted sexual touches, and other forms sexual misconduct); *id.* art. 134 (criminalizing fraternization); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chs. 6, 7, & 8 (18 Mar. 2008) (detailing command responsibilities in the prevention and handling of sexual harassment/assault, and the Army's equal opportunity program); *id.* para. 4-14 to 4-16 (governing relationships between Soldiers); U.S. DEP'T OF ARMY, PAM. 600-35, RELATIONSHIPS BETWEEN SOLDIERS OF DIFFERENT RANKS (21 Feb. 2000) (containing examples of prohibited relationships); Army Sexual Harassment/Assault Response &

B. Sexual Assault by GLBs

Since 2007, thousands of incidents of male-on-female sexual assault have reportedly been committed within America’s Armed Forces.³⁷⁶ This fact does not preclude men and women from deploying together, working together, training together, sharing foxholes and bunkers together, and living in co-ed barracks and field quarters. That certain males or individuals from any group—white, black, male, female, Christian, atheist, officer, enlisted, heterosexual and homosexual—are sexually aggressive or demonstrate an inability to control their behavior and actions hardly means that all members from these groups possess the same traits. That is why the military allows members of all these groups, and others, to serve together in a large variety of training, deployment, and living environments. The military solution to the broad spectrum of possible acts of inappropriate sexual behavior (from a relatively innocuous but nevertheless inappropriate sexual stare or leer to a violent sexual assault) is to deal with those concerned individually with administrative and/or criminal sanctions—not to exclude an entire group based on the actions of a few. Tensions that exist due to personality, gender, ethnic, religious and behavioral differences are addressed with preventative educational programs and with swift consequences for those unable to overcome their personal feelings to the extent necessary to co-exist in the melting pot of America’s Armed Forces.³⁷⁷ This system makes America’s military well-suited for the service of acknowledged GLB individuals.

Prevention Program, *available at* www.sexualassault.army.mil/policy_reg.cfm (last visited Mar. 3, 2010) (discussing the goals of the program and providing links to applicable regulations and policies); U.S. Navy, Naval Inspector Gen., Sexual Harassment, *available at* [http://www.ig.navy.mil/Complaints/Complaints%20%20\(SexHarassment\).htm](http://www.ig.navy.mil/Complaints/Complaints%20%20(SexHarassment).htm) (last visited Mar. 2, 2010) [hereinafter Naval Inspector Gen., Sexual Harassment].

³⁷⁶ See, e.g., FY08 SEXUAL ASSAULT REPORT, *supra* note 337, at 74 (discussing the investigation, in fiscal year 2008, of 1864 reports of male-on-female sexual assaults); U.S. DEP’T OF DEF., FY07 REPORT ON SEXUAL ASSAULT IN THE MILITARY 31 (Mar. 2008), *available at* <http://www.sapr.mil/contents/references/2007%20Annual%20Report.pdf> (discussing the investigation, in fiscal year 2007, of 1742 instances of male-on-female sexual assaults).

³⁷⁷ See, e.g., Army Sexual Harassment/Assault Response & Prevention Program, www.sexualassault.army.mil/policy_reg.cfm (last visited Mar. 3, 2010) (discussing the Army’s Sexual Harassment and Assault Response and Prevention Program, and providing links to applicable regulations and policies); Naval Inspector Gen., Sexual Harassment, *supra* note 375.

C. Where Will They Live?

Opponents of racial integration, women in the military, and gays in the military have all raised this concern as a basis for exclusion. During integration, the thought of African-Americans sharing the same living quarters as whites was untenable to many whites, including military leaders and troops.³⁷⁸ Similarly, the thought of women serving on ships and remote forward operating bases with men, and attending service academies and co-ed basic training, made many military leaders and troops extremely uncomfortable. Critics protested the increased presence of women in these settings based on logistical and disciplinary concerns, and concerns about unit cohesion, sexual misconduct, and pregnancy.³⁷⁹

The military created solutions for inclusion of African-Americans and women—groups whose presence was objected to, in part, based on privacy concerns and the fact that some Soldiers would not want to serve with or live amongst them. It will no doubt be able to do so for GLBs when DADT is repealed. As a starting point, policymakers should look at how homosexual troops in countries like ours, such as Great Britain, have done it. Britain, Canada, Australia, Israel, and many other nations that allow acknowledged GLB troops to serve and house them with heterosexual servicemembers of the same gender.³⁸⁰ To date, none of these countries has experienced reported increases in harassment, assaults, or similar related misconduct.³⁸¹

XII. Conclusion

Societal views toward homosexuality have evolved since 1993, as have the views of many military and political leaders who implemented DADT that same year. As evidenced by our experience with racial integration in the 1950s, and the experiences of paramilitary

³⁷⁸ Royall Memorandum, *supra* note 296 (stating the morale of white troops would suffer if they had to live with African-American troops); General Bradley Statement, *supra* note 296, at 5 (explaining that integration would harm the morale of white troops forced to live with African-Americans).

³⁷⁹ See, e.g., Rowan Scarborough, *Pentagon Urged to Separate Sexes in Basic Training*, WASH. TIMES, Aug. 7, 2001, at A1; Daniel F. Drummand, *Just 13 More "Rat Line" Survivors, VMI's First Class of Women Feel Part of School's Tradition*, WASH. TIMES, May 19, 2001, at A1.

³⁸⁰ PALM CTR., *GAYS IN FOREIGN MILITARIES 2010*, *supra* note 77, at 3.

³⁸¹ *Id.* at 2–3.

organizations and foreign nations similar to ours that allow acknowledged GLBs to serve, America's Armed Forces will successfully adapt to and benefit from their service. Furthermore, the quality and professionalism of our troops and our current force structure make America's Armed Forces well-suited for the inclusion of acknowledged GLB troops. The service of leaders like LTC Fehrenbach is needed now more than ever. It is time to repeal the ban on GLB personnel in the military.

Appendix

This appendix compares the primary arguments made by those seeking to limit or exclude African-Americans, women, and GLBs from military service. Although many of the arguments are stated in the present tense, those made against African-Americans are predominantly from the 1940s.

I. Morality Issues

A. African-Americans

Because of their behaviors and beliefs, African-Americans are morally inferior.³⁸² Because of their poor character, whites should not have to serve with them in integrated units.³⁸³ The act of interracial marriage is so dangerous and harmful to society that it is criminalized in nearly every state.³⁸⁴

B. Women

Because of their gender difference, women should not be fully integrated into the military. The presence of female troops causes immoral behavior between male and female troops, including sexual misconduct and promiscuity.³⁸⁵ Single female troops who get pregnant are immoral and therefore cannot serve.³⁸⁶

³⁸² See, e.g., ROGERS, *supra* note 269, at 19–25 (discussing assertions made by religious leaders in the late 1800s that African-Americans are morally inferior to whites); Debra A. Kuker, *supra* note 269, at 312 (discussing historical state prohibitions on interracial marriage and the once widely-held public perception that interracial marriage is immoral).

³⁸³ Bianco, *supra* note 270, in GAY RIGHTS, MILITARY WRONGS 54 (Craig A. Rimmerman, ed., 1996) (citing Lieutenant General Thomas Holcom's testimony before the General Board of the Navy in 1942 that "an infantry battalion is the very last place [blacks] would be put" because "there is no branch of the service that requires more character and a higher degree of morality than the infantry").

³⁸⁴ *Loving v. Virginia*, 388 U.S. 1 (1967). Interracial marriage continued to remain criminalized in many states for nearly 20 years after the military was fully integrated. This 1967 case struck down all state laws criminalizing interracial marriage.

³⁸⁵ See, e.g., BRIAN MITCHELL, WOMEN IN THE MILITARY: FLIRTING WITH DISASTER 348 (1998) (stating that "the disadvantages of substituting women for men are many,"

C. GLBs

Because of their behaviors and beliefs, acknowledged GLBs should not be allowed to serve in the Armed Forces.³⁸⁷ Homosexuality is immoral and, therefore, heterosexuals should not have to serve with those who practice it.³⁸⁸ The act of act of same-sex marriage is so harmful to society that the federal government refuses to recognize state-sanctioned same-sex marriages.³⁸⁹

D. Analysis of the Argument as to GLBs

Religious leaders and troops alike have differing views on what is moral and what is not, including homosexuality. It is adherence to institutional values, such as integrity, honor, and courage—not adherence to any particular set of religious or moral beliefs—that makes our military forces effective.

II. Morale, Unit Cohesion, and Good Order & Discipline

A. African-Americans

Troops don’t just work together; they also have to live together. Because of this, “any change in . . . policy [will] adversely affect the morale of many Southern soldiers and other soldiers now serving”³⁹⁰ and negatively impact battle efficiency.³⁹¹

including “in-service marriages, fraternization, sexual harassment, [and] sexual promiscuity”); *id.* at 66–67 (asserting [in support of Mitchell’s overall contention that women should not be fully integrated in the military] that the presence of female cadets at service academies caused pregnancies, sexual misconduct, fraternization, and sexual promiscuity).

³⁸⁶ See, e.g., Murnane, *supra* note 70, at 1072–03 (discussing the discharge of a female Seaman who, despite her “professional performance and her strong desire to remain in the Navy,” was involuntarily discharged solely because she became an unwed mother, which the Navy considered to be immoral). Only in 1975, after being forced to do so because of lawsuits surrounding this and similar issues, did the Department of Defense change its policies to make separations for pregnancies voluntary. *Id.* at 1074.

³⁸⁷ See generally Bunn, *supra* note 24.

³⁸⁸ See, e.g., Karl, *supra* note 267.

³⁸⁹ *Id.*

³⁹⁰ Royall Memorandum, *supra* note 296.

³⁹¹ General Bradley Statement, *supra* note 297.

B. Women

Troops don't just work together; they also have to live together. The presence of female troops will have a "deleterious" effect on a unit's cohesion and fighting spirit, and on "the loyalty and respect that servicemen feel toward" the military.³⁹² They will be a "toxic kind of virus," create sexual tension, and "feminize the boys."³⁹³

C. GLBs

Troops don't just work together; they also have to live together in a communal environment. Because of this, repealing DADT will adversely affect "discipline and morale."³⁹⁴

D. Analysis of the Argument as to GLBs

There is no evidence to support the contention that lifting the ban on gays will negatively impact these components of military readiness.³⁹⁵ Furthermore, U.S. troops are used to working, training, and fighting side-by-side with those whose personalities or religious, moral, or behavioral traits they may dislike or of which they do not approve. It is their ability to do so successfully that makes the U.S. military one of the most effective fighting forces in the world, and well suited for the inclusion of acknowledged GLB servicemembers.³⁹⁶

³⁹² MITCHELL, *supra* note 385, at 349. See also Firestone, *supra* note 70, at 86 (discussing the belief that the presence of women will disrupt the male bonding that is "necessary for maintaining social order and defense"); Nancy Goldman, *The Utilization of Women in the Military*, 406 ANNALS AM. ACAD. POL. & SOC. SCI. 107, 115 (1973) (stating that the integration of women "into the social life of the base presents a problem" because "military life is a form of communal living").

³⁹³ See, e.g., Michael Kimmel, *Saving the Males: The Sociological Implications of the Virginia Military Institute and the Citadel*, 4 GENDER & SOC. 494, 502 (2000) (discussing such assertions made by Major General Josiah Bunting III and by psychologist G. Stanley Hall).

³⁹⁴ Elaine Donnelly, *Homosexuals in the Military* (Aug. 22, 2008), <http://cmrlink.org/HMilitary.asp?docID=337>.

³⁹⁵ GAO HOMOSEXUALITY POLICY, *supra* note 94, at 7 (noting the DoD's statement that the ban is not based on scientific or sociological evidence); *id.* at 59; Belkin, *supra* note 126, at 116–17 (Summer 2003) (discussing the lack of scientific and sociological evidence).

³⁹⁶ Coleman Statement, *supra* note 251.

III. Privacy

A. African-Americans

White men will not consent to sharing private quarters with African-Americans. One military leader, for example, stated,

How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun’s crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The . . . answer is “few, if any,” and . . . if the issue [is] forced, there [will] be a lowering of contentment, teamwork, and discipline in the service.³⁹⁷

B. Women

Women should not be integrated into service academies or regular military units because their gender difference creates a need for privacy in a communal society.³⁹⁸

C. GLBs

Heterosexual troops should not have to share quarters with GLB troops.³⁹⁹

³⁹⁷ Bianco, *supra* note 270, in *GAY RIGHTS, MILITARY WRONGS* 54 (Craig A. Rimmerman, ed., Routledge, 1996) (quoting from Chairman of the General Board of the Navy’s written document).

³⁹⁸ See, e.g., MITCHELL, *supra* note 385, at 58; Firestone, *supra* note 70, at 82 (discussing factors that may cause female troops to seek privacy); Goldman, *supra* note 392, at 115.

³⁹⁹ Editorial, Marine Officer: Gays, Straights Shouldn’t Share Housing, CNN, Mar. 26, 2010, <http://www.cnn.com/2010/US/03/26/marines.gay.housing/index.html>. “I would not ask our Marines to live with someone that’s homosexual if we can possibly avoid it.” *Id.* (quoting Marine Commandant General James Conway).

D. Analysis of the Argument as to GLBs

DADT does not protect privacy. Heterosexual troops are *already* serving, showering, and sharing private quarters with GLB troops.

IV. Recruiting and Retention

A. African-Americans

Integration will harm recruiting and retention because “close personal association with Negroes is distasteful,” and any “change in the Army’s partial segregation policy [will]...adversely affect enlistments and reenlistments . . . probably making peacetime selective service necessary.”⁴⁰⁰ It will “very seriously affect voluntary enlistments. . . .”⁴⁰¹

B. Women

Full integration will affect recruiting and retention. Good troops will resign if women are fully integrated.⁴⁰²

C. GLBs

Repeal will harm “recruiting and retention . . . and eventually break the All-Volunteer Force.”⁴⁰³

⁴⁰⁰ Royall Statement, *supra* note 321.

⁴⁰¹ General Bradley Statement, *supra* note 296, at 5

⁴⁰² See, e.g., Harold E. Cheatham, *Integration of Women into the U.S. Military*, 11 SEX ROLES 141, 144 (1984) (discussing the threatened resignation of a past superintendent of the U.S. Military Academy during a debate over admitting women); Editorial, *The Sexes: Beauties and the Beast*, TIME, Jul. 19, 1976, <http://www.time.com/time/magazine/article/0,9171,914360,00.html> (reporting that Lieutenant General Sidney B. Berry, former Superintendent of the U.S. Military Academy threatened to resign if women were accepted at West Point and his subsequent statement that his threat “was rather adolescent on my part . . . I got over it and decided to do what a good [S]oldier does—get on with the job.”).

⁴⁰³ Flag & General Officers for the Military Statement to the President and Congress (Apr. 9, 2009), available at <http://cmrlink.org/HMilitary.asp?docID=350>.

D. Analysis of the Argument as to GLBs

The current predictions of the “breaking” of the United States’ volunteer military if openly gay troops are allowed to serve are not supported by evidence or studies. Federal and private research studies point to this lack of evidence and make no such predictions.⁴⁰⁴ There is, however, evidence—including our experiences with racial and gender integration and the United Kingdom’s experiences with the integration of gays—that allowing openly gay individuals to serve will improve the military’s ability to recruit and retain more talented, qualified troops and that America’s military forces will successfully adapt.⁴⁰⁵

V. Disease, Medical Issues, and Increased Medical Care

A. African-Americans

Integration will expose white troops to increased health threats in that syphilis, gonorrhea, chancre, and tuberculosis, are “appallingly higher among the members of the Negro race than among the members of the white race,”⁴⁰⁶ and African-Americans have “. . . high rates of venereal disease.”⁴⁰⁷

⁴⁰⁴ See, e.g., RAND, SEXUAL ORIENTATION POLICY, *supra* note 71, at 395–97 (citing the lack of direct evidence, and stating any such predictions as the effect of GLBs in the military “are inherently speculative”); see also GAO FOREIGN COUNTRY PRACTICES, *supra* note 135 (finding no adverse affect on retention or recruiting in several foreign military organizations that now allow gays to serve); Herek, *supra* note 324.

⁴⁰⁵ For example, the experience of forced military integration (which was successful despite the same arguments against it as those cited in opposition to inclusion of gays) and the United Kingdom’s experience when forced to allow GLBs to serve (which was successful despite resistance from military leaders based on the same arguments cited by proponents of DADT).

⁴⁰⁶ FRANK, *supra* note 5, at 61; see also Phyllis W. Jordan, Commentary, *When the Military Mixed*, VIRGINIA-PILOT & LEDGER STAR (Norfolk, Va.), Mar. 14, 1993 (observing how Russell emphasized the disease rate among African-American Soldiers and cited statistics that bolstered his arguments as to their rates of tuberculosis and venereal diseases).

⁴⁰⁷ Judy Holland, *Activists Take on Russell Building over Racism*, SEATTLE POST-INTELLIGENCER, Feb. 1, 2003, at A2.

B. Women

Inclusion of women will reduce readiness in that they lack testosterone,⁴⁰⁸ may get pregnant,⁴⁰⁹ and have psychological differences that make them “[un]impressed with physical prowess,” disinterested in competition, and not want “to hide their weaknesses.”⁴¹⁰ Women also have “higher rates of morbidity” and are less willing than male troops to ignore illness and to endure pain.⁴¹¹ American female troops have higher rates of mental disorders, infective and parasitic diseases, and digestive, diarrheal, and genitourinary disorders.⁴¹²

C. GLBs

Repealing DADT will result in increased health care costs and the spread of AIDS and other sexually transmitted diseases throughout the military.⁴¹³

D. Analysis of the Argument as to GLBs

The military already uses educational programs and routine medical to identify, treat, and limit the spread of contagious diseases within its population, including the portion that is gay.

VI. GLBs Will Commit Sexual Misconduct and/or Assaults

A. African-Americans

Integration will cause an “‘increase the rate of crime committed by servicemen,’ since ‘Negro troops,’ reportedly [commit] rape thirteen

⁴⁰⁸ MITCHELL, *supra* note 385, at 172.

⁴⁰⁹ *Id.* at 151, 335.

⁴¹⁰ *Id.* at 169–70.

⁴¹¹ *Id.* at 170.

⁴¹² *Id.* at 148; *see also* Firestone, *supra* note 70, at 78–81 (discussing opposition to the integration of women based on their body composition, “menses”-related hygiene issues, “emotionality,” and “psychiatric syndromes”); *id.* at 85 (discussing the assertion that “soldiering is detrimental to women’s self-image[s]”).

⁴¹³ *See, e.g.*, Sean O’Donnell, Commentary, *Why the “Don’t Ask, Don’t Tell” Policy Should Stay*, EXAMINER, Feb. 3, 2010, <http://www.examiner.com/x-3108-Baltimore-Republican-Examiner~y2010m2d3-Why-the-Dont-ask-dont-tell-policy-should-stay>.

times more often per capita than whites⁴¹⁴ and sodomy 2-1/2 more times.⁴¹⁵

B. Women

Integration of women into regular military units will cause an increase in sexual fraternization because women will engage in sexual misconduct.⁴¹⁶

C. GLBs

Repeal will cause an increase in the rate of sexual misconduct and assaults by GLB troops.⁴¹⁷

D. Analysis of the Argument as to GLBs

Crime statistics regarding African-Americans, women, GLBs, or any other group serving in the military are not an accurate indicator of how well they—as a group—perform or abide by military rules and laws. Furthermore, there are military mechanisms in place for dealing with those from all walks of life—including GLBs—who commit misconduct.

VII. Other Troops Will Assault Them

A. African-Americans

Integration will “prompt violence against a despised minority that the military would be helpless to stop.”⁴¹⁸

⁴¹⁴ FRANK, *supra* note 5, at 61 (quoting Senator Russell).

⁴¹⁵ Bianco, *supra* note 270, at 50 (quoting Senator Russell).

⁴¹⁶ See, e.g., Firestone, *supra* note 70, at 86.

⁴¹⁷ See, e.g., *id.* at 50 (discussing General Norman Schwartzkopf’s assertion that the presence of GLBs will result in solicitations of unwanted homosexual acts).

⁴¹⁸ FRANK, *supra* note 5, at 62.

B. Women

Women should not be permitted to serve because they are at risk for sexual assault.⁴¹⁹

C. GLBs

Repeal will jeopardize the safety of openly gay troops.⁴²⁰

D. Analysis of the Argument as to GLBs

There are military mechanisms in place for dealing with those who commit violence against others, including those who are assaulted for their skin color, ethnicity, or sexual orientation.

VIII. The Military Is Not the Place for Social Experimentation or Evolution

A. African-Americans

“The Army is not a sociological laboratory; to be effective it must be organized and trained according to the principles which will insure success. Experiments to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to efficiency, discipline, and morale and [will] result in ultimate defeat.”⁴²¹

⁴¹⁹ MITCHELL, *supra* note 385, at 335.

⁴²⁰ Richard Sisk, *Military Less Resistant to Ending Anti-Gay “Don’t Ask, Don’t Tell” Policy for Soldiers*, N.Y. DAILY NEWS, Nov. 29, 2009, http://www.nydailynews.com/news/politics/2009/11/29/2009-11-29_military_less_resistant_to_ending_antigay_dont_ask_dont_tell_policy_for_soldiers.html (reporting that some proponents of the ban believe its repeal may result in violence against GLB troops).

⁴²¹ LEE, *supra* note 348, at 141 (quoting Colonel Eugene R. Householder of the Army Adjutant General’s Office).

B. Women

“[The military is] not the place where an ideology, unproved no matter how worthy, should be imposed so that the rest of society will follow.”⁴²²

C. GLBs

“This is not the time to be tinkering with the military and making it a playground of social experimentation.”⁴²³ Allowing acknowledged gays to serve will turn the military into a “radical social experiment” with troops serving as “lab rats.”⁴²⁴

D. Analysis of the Argument as to GLBs

This argument is raised every time the military elects to include a group that others harbor prejudices against. Had the military refused to integrate African-Americans and women based on arguments against “social experimentation,” America’s Armed Forces would not be the diverse fighting force that it is today. The contributions of African-Americans, women, and GLBs have increased military effectiveness, not reduced it.

IX. Now Is Not the Time

A. African-Americans

Military integration began shortly after America’s participation in two world wars and had to be implemented during a new war in Korea.⁴²⁵

⁴²² MITCHELL, *supra* note 385, at 334 (citing Richard Cohen, *Duty, Gender, Country*, WASH. POST, Apr. 24 1997).

⁴²³ Editorial, *Out in Military: “Not the Time”* (CNN television broadcast Feb. 2, 2010), available at <http://www.cnn.com/video/#/video/politics/2010/02/02/gays.in.military.debate.cnn?hpt=C2> (televising this public statement made by former Marine, Tony Perkins).

⁴²⁴ Editorial, North, *supra* note 346.

⁴²⁵ Neil Schoenherr, *Korean War Had Major Impact on Race Relations in the United States*, July 25, 2003, <http://news.wustl.edu/news/Pages/304.aspx> (discussing the overlap of integration with the Korean War in the 1950s).

Political leaders warned President Truman to move very slowly on the issue⁴²⁶ and at least one Army staff officer publicly opposed integration based on his assessment that segregation had proven “satisfactory” and “[t]o change now [will] destroy morale and impair preparations for a national defense.”⁴²⁷

B. Women

An argument that may not pertain to this particular group.

C. GLBs

There are “serious concerns about the impact of [DADT’s repeal] on a force that is fully engaged in two wars and has been at war for eight-and-a-half years.”⁴²⁸ While DADT isn’t perfect, it works satisfactorily and therefore should not be changed.⁴²⁹

D. Analysis of the Argument as to GLBs

The fact that our Armed Forces have been engaged in simultaneous wars in two countries for nearly ten years, and are forced to deploy multiple times in the same conflict, make now an ideal time to lift the ban against otherwise qualified GLB troops.

⁴²⁶ See, e.g., MACGREGOR, *supra* note 260, at 299–301 (discussing Secretary of Defense James Forrestal’s advice to President Truman that he move slowly on integration and that he not force it on the military); *id.* at 310 (discussing presidential specialist Philleo Nash’s argument against the President’s use of an executive order to force integration, and his advice military integration be achieved instead through small steps by each service department).

⁴²⁷ Bianco, *supra* note 270, in *GAY RIGHTS, MILITARY WRONGS* 54 (Craig A. Rimmerman, ed., 1996).

⁴²⁸ Editorial, *Army Opposes Immediate End to Gay Ban*, MIL. TIMES, Feb. 23, 2010, <http://www.military.com/news/article/army-to-oppose-suspension-of-gay-firings.html?ESRC=eb.nl&ESRC=army-a.nl>.

⁴²⁹ See, e.g., Michael D. Shear, *McCain Appears to Shift on “Don’t Ask, Don’t Tell,”* WASH. POST, Feb. 3, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/02/AR2010020202588.html>.

X. Eros in the Workplace

A. African-Americans

An argument that may not pertain to this particular group.

B. Women

“The presence of women inhibits male bonding, corrupts allegiance to the hierarchy, and diminishes the desire of men to compete for anything but the attentions of women. Pushing women into the military academies made a mockery of the academies’ essential nature and most honored values.”⁴³⁰

C. GLBs

“The presence of open homosexuals in the close confines of ships or military units opens the possibility that eros, which . . . is sexual, will be unleashed into the environment” and that this will result in “sexual competition, protectiveness, and favoritism, all of which undermine the nonsexual bonding essential to unit cohesion, good order, discipline and morale.”⁴³¹

D. Analysis of the Argument as to GLBs

This argument fails to take into account the fact that America’s Armed Forces already operate in an environment where the potential for sexual attraction exists. Heterosexual men and women—who presumably have a natural emotional, physical, and sexual attraction to each other—serve together and have been doing so effectively for years.

⁴³⁰ MITCHELL, *supra* note 385, at 175.

⁴³¹ Mackubin Thomas Owens, Opinion, *The Case against Gays in the Military*, WALL ST. J., Feb. 2, 2010, http://online.wsj.com/article/SB100014h24052748703389004575033601528093416.html?mod=googlenews_wsj&mg=com-wsj.

XI. Cost of Accommodation Is Too High

A. African-Americans

An argument that may not pertain to this particular group.

B. Women

The cost of accommodation is too high. Military child care facilities cost too much money, and dual-military couples cause too much logistical work for assignment managers.⁴³² The cost of women's health care is too expensive.⁴³³

C. GLBs

The cost of accommodation is too high.⁴³⁴

D. Analysis of the Argument as to GLBs

The inclusion of acknowledged GLBs will not require a significant increase in costs associated with housing, family, medical, or other benefits compared to those that are bestowed on heterosexual servicemembers. It should be noted that women are permitted to serve despite the costs associated with their service, to include childbirth, maternity leave, subsidized childcare, gynecological care in deployed regions, and other appropriate accommodations.

XII. Exclusion Is Not Based on Bigotry

A. African-Americans

African-Americans are fundamentally different from whites in ways that go beyond mere skin color. Their exclusion is not based on racism, but on "common sense and understanding. Those who ignore these

⁴³² MITCHELL, *supra* note 385, at 159–60.

⁴³³ *Id.* at 345–46.

⁴³⁴ *See, e.g.*, Bunn, *supra* note 24, at 227, 230.

differences merely interfere with the combat effectiveness of battle units.”⁴³⁵

Their exclusion isn’t based on racial prejudice, but on the “vital factors [of] the morale, discipline, and health” of troops based on the African-Americans’ “incidence(s) of venereal diseases.”⁴³⁶

B. Women

Women are too “fundamentally different” from men to be fully integrated into the military.⁴³⁷ This belief isn’t based on bigotry, but on “sexual difference[s]” that are simply too disruptive for our troops to handle and that human nature cannot overcome.⁴³⁸

C. GLBs

The military exclusion against GLBs is different, because it’s based on behavior, not on skin color or gender.

D. Analysis of the Argument as to GLBs

The arguments and military prohibitions against African-Americans, women, and GLBs have been based on behavioral, moral and physical characteristics attributed to all three groups by those opposed to their full and open presence in the ranks.

⁴³⁵ MACGREGOR, *supra* note 260, 440–41 (quoting from Lieutenant General Almond’s archived letter).

⁴³⁶ Alexander Cockburn, *Same Song, Different Verse*, L.A. TIMES, Jan. 31, 1993, at 5 (discussing Senator Russell’s statements to General Dwight D. Eisenhower asserting that the exclusion of African-Americans wasn’t based on racism).

⁴³⁷ MITCHELL, *supra* note 385, at 346–47 (quoting Brian Mitchell’s testimony before the Presidential Commission on the Assignment of Women in the Armed Forces in 1992, in opposition to expanding roles for women in the Armed Forces).

⁴³⁸ *Id.* at 334 (citing to articles written by Stephanie Guttman and Richard Cohen).

XIII. They Do Not Have the “Right” to Serve

A. African-Americans

An argument that may not pertain to this particular group.

B. Women

The military does not “owe anyone a military career,” including women.⁴³⁹

C. GLBs

There is no constitutional right to serve in the military, and the only people who are “pushing this issue” are GLB individuals themselves.⁴⁴⁰

D. Analysis of the Argument as to GLBs

The fact that no particular group in American society has the right to serve does not, in itself, justify any group’s exclusion. Furthermore, those advocating DADT’s repeal include heterosexual civilians and military servicemembers with no personal connection to the issue.

⁴³⁹ *Id.* at 347 (quoting Brian Mitchell’s testimony before the Presidential Commission on the Assignment of Women in the Armed Forces in 1992, in opposition to expanding roles for women in the Armed Forces).

⁴⁴⁰ Elaine Donnelly, *Misusing the Military*, Feb. 1, 2010, <http://corner.nationalreview.com/post/?q=YTFiYmE4MjNmMTRjYWZlYmEzNWU0ZTc5ZTdhZTBkNmQ=>.