

**STRAIGHT TALK: THE IMPLICATIONS OF REPEALING  
“DON’T ASK, DON’T TELL” AND THE RATIONALE FOR  
PRESERVING ASPECTS OF THE CURRENT POLICY**

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*“There is a certain relief in change, even though it be  
from bad to worse! As I have often found in traveling in  
a stagecoach, that it is often a comfort to shift one’s  
position, and be bruised in a new place.”<sup>1</sup>*

I. Introduction

After graduating at the top of his class at the U.S. Military Academy at West Point with degrees in environmental engineering and Arabic, Infantry Second Lieutenant Daniel Choi proceeded swiftly through Airborne, Air Assault, Ranger School, and the Scout Leader’s Course.<sup>2</sup> He then completed a 15-month deployment to the “Triangle of Death” in South Baghdad, Iraq, where he served with the 10th Mountain Division as an Iraqi-Arabic language instructor.<sup>3</sup> Now-First Lieutenant (1LT) Choi left active duty in 2008 and attended Harvard University while continuing his military service in the New York Army National Guard.<sup>4</sup> After falling in love with another man, 1LT Choi became concerned with

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<sup>1</sup> WASHINGTON IRVING, *TALES OF A TRAVELLER*, at xi (1824).

<sup>2</sup> See Charles Karel Bouley, *Why is Obama Firing Dan Choi?*, HUFFINGTON POST, Oct. 6, 2009, [http://www.huffingtonpost.com/charles-karel-bouley/why-is-obama-firing-dan-c\\_b\\_311084.html](http://www.huffingtonpost.com/charles-karel-bouley/why-is-obama-firing-dan-c_b_311084.html).

<sup>3</sup> *Id.*

<sup>4</sup> See T.M. Lindsey, *Lt. Dan Choi: “Don’t Ask, Don’t Tell” Is a “Disease of Shame,”* IOWA INDEP., Feb. 2, 2010, <http://iowaindependent.com/28399/lt-dan-choi-don%E2%80%99t-ask-don%E2%80%99t-tell-is-a-%E2%80%98disease-of-shame%E2%80%99>.

the military's policy on open homosexuality.<sup>5</sup> Volunteering as the spokesperson of "Knights Out," a group of West Point alumni who support open service of lesbian, gay, bisexual, and transgender (LGBT) servicemembers in the armed forces,<sup>6</sup> 1LT Choi appeared on MSNBC's *Rachel Maddow Show* on 20 March 2009, and announced to millions of the show's viewers that he was gay.<sup>7</sup> Within a matter of months, a military board composed of four officers recommended that 1LT Choi be discharged from the military for making the televised statement in violation of the military's "Don't Ask, Don't Tell" (DADT) policy.<sup>8</sup>

Despite the fact that the board had not finalized its recommendation and no separation had been directed, 1LT Choi commenced a new "full time job" publicly protesting the policy.<sup>9</sup> With a calendar of public speaking engagements, gay pride parades, and protests, Choi stood out among several of his similarly-situated peers to become the poster-child for repealing DADT.<sup>10</sup> A strong, physically fit, mentally-agile, and combat-tested officer, Choi garnered the support of many influential people in Washington, D.C., as well as some of his fellow Soldiers.<sup>11</sup> After months of publicly fighting DADT, Choi, along with many LGBT servicemembers, celebrated the Commander-in-Chief's State of the

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<sup>5</sup> See Delena Wickerson, *Dan Choi and Matthew Kinsey: The Story Continues*, 10,000 COUPLES, Nov. 30, 2009, <http://10thousandcouples.com/issue/december-2009/article/love-and-romance-dan-and-matthew> (describing 1LT Choi and partner Matthew Kinsey's courtship).

<sup>6</sup> See Mission Statement, Knight's Out, available at <http://www.knightsout.org/> (last visited Mar. 28, 2010). "Knight's Out is an organization of West Point Alumni, Staff and faculty who are united in supporting the rights of Lesbian, Gay, Bisexual, and Transgender Soldiers to openly serve their country." *Id.*

<sup>7</sup> See Interview of Lieutenant Dan Choi, Mar. 18, 2009, available at <http://www.msnbc.msn.com/id/26315908/#29807116> (last visited Mar. 28, 2010).

<sup>8</sup> See Martin Wisckol, *Military Board Calls for Discharge of Gay Tustin Soldier*, ORANGE COUNTY (BETA) REG., June 30, 2009, <http://www2.ocregister.com/articles/choi-military-don-2480161-gay-national>. The discharge recommendation followed hours of deliberation and consideration of over 260,000 letters of support. *Id.* Currently, the National Guard bureau has not made an official decision. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Between 1 April and 27 June 2010, 1LT Choi scheduled nine public speaking events. See 1LT Dan Choi's press kit/calendar, available at <http://www.ltdanchoi.com/press.html> (last visited Mar. 28, 2010). From March 2009 to the time of this writing, 1LT Choi has participated as a public speaker in opposition of DADT at over fifty conferences, gay pride marches, and gay rights protests. See 1LT Dan Choi's Biography, available at <http://www.ltdanchoi.com/bio.html> (last visited Mar. 28, 2010).

<sup>11</sup> See Wisckol, *supra* note 8. During his statement to the administrative board, Choi declared he was speaking for ". . . all the deployed soldiers or anyone who feels isolated, that indeed NO soldier stands alone." *Id.*

Union address, in which the President publicly demanded repeal of the policy.<sup>12</sup>

Only weeks later, on 2 February 2010, Secretary of Defense Robert Gates and Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, voiced their personal objections to the policy and announced that the armed forces would commence a year-long study to better prepare for the repeal of DADT.<sup>13</sup> With Senate hearings underway and some of the highest ranking military officers ready to defend personal beliefs at odds with a majority of the military,<sup>14</sup> many expected exhilaration and celebration from opponents of the ban that their day had finally arrived.<sup>15</sup> Events soon demonstrated that this was far from reality.

On 18 March 2010, unsatisfied with the pace of congressional efforts and perceiving limited presidential support, 1LT Choi mobilized with Captain Jim Pietrangelo, an officer who had already been discharged under DADT, wearing the Army Combat Uniform. Flanked by nearly one hundred protesters, Choi hugged the gate surrounding the White

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<sup>12</sup> See Remarks by the President in the State of the Union Address, Jan. 27, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (last visited Mar. 28, 2010). President Obama pledged during the 2010 State of the Union Address, “[t]his year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It’s the right thing to do.” *Id.*

<sup>13</sup> See Barbara Starr, *Gates: Pentagon Preparing Repeal of “Don’t Ask, Don’t Tell” Policy*, Feb. 2, 2010, available at <http://www.cnn.com/2010/POLITICS/02/02/gays.military/index.html> (last visited Mar. 28, 2010). In his statement before the Senate Armed Services Committee, Admiral Mullen said it was his “personal belief” that “allowing gays and lesbians to serve openly [in the military] would be the right thing to do.” *Id.* Additionally, Secretary Gates testified, “The question before is not whether the military prepares to make this change, but how we best prepare for it . . . We have received our orders from the commander in chief and we are moving out accordingly.” *Id.*

<sup>14</sup> On 18 March 2010, the following witnesses testified regarding their beliefs about current application of DADT and the potential impact of DADT’s repeal: General John J. Sheehan, USMC (Ret.), Former Supreme Allied Commander, Atlantic, and Former Commander in Chief, U.S. Atlantic Command; Michael D. Almy, Former Major, U.S. Air Force; Jenny L. Kopfstein, Former Lieutenant Junior Grade, U.S. Navy. See Witness List for the U.S. Senate Armed Services Committee hearing, Mar. 28, 2010, available at [http://armed-services.senate.gov/e\\_witnesslist.cfm?id=4476](http://armed-services.senate.gov/e_witnesslist.cfm?id=4476) (last visited Mar. 28, 2010).

<sup>15</sup> See Joe Solmonese, *U.S. Senate Committee Hears Testimony from Military Veterans on “Don’t Ask, Don’t Tell,”* Mar. 18, 2010, available at <http://www.hrc.org/14212.htm> (last visited Mar. 28, 2010). Joe Solmonese, as President of the Human Rights Campaign (HRC) organization, “hailed” the discussions at the Senate Armed Service Committee hearing on DADT and the military veterans that addressed the dilemmas posed by the current application of DADT. *Id.*

House and received assistance handcuffing himself to its iron bars in an effort to “send the President a message.”<sup>16</sup> Reminiscent of a martyr, Choi now declared war on the Commander-in-Chief in a series of acts that violated not only the civilian law of the District of Columbia,<sup>17</sup> but ones—that even the freshest West Point Plebe is trained from the first days of indoctrination<sup>18</sup> are—in defiance of the Uniform Code of Military Justice.<sup>19</sup>

After his arrest and booking, 1LT Choi pleaded “not guilty.”<sup>20</sup> Opting for a public trial, rather than paying a fine, Choi solemnly announced to the public:

There was no freer moment than being in that prison. It was freeing for me . . . but the message was very clear to all of the people who think that equality can be purchased with a donation . . . . We are worth more than tokens. We have absolute value. And when the person who is oppressed by his own country wants to find out

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<sup>16</sup> Killian Melloy, *Lt. Dan Choi's White House Arrest Sparks Debate About HRC's (Non?) Activism*, Mar. 19, 2010, available at <http://www.edgesanfrancisco.com/index.php?ch=news&sc=&sc2=&sc3=&id=103647> (last visited Mar. 28, 2010). At a public protest rally sponsored by HRC, Choi gathered protestors for his march by urging continuation of the protest at the White House. “You’ve been told that the White House has a plan. . . . But we learned this week that the president is still not fully committed . . . . Following this rally, I will be leading [the protest] to the White House to say ‘enough talk.’ . . . I am still standing, I am still fighting, I am still speaking out, I am still gay.” *Id.*

<sup>17</sup> Choi was cited with a violation of the District of Columbia Municipal Regulations, providing that “[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer, police cadet, or civilian crossing guard invested by law with authority to direct, control, or regulate traffic. This section shall apply to pedestrians or to the operators of vehicles.” D.C. MUN. REGS. tit. 18, § 2000.2 (2010).

<sup>18</sup> See U.S. Military Academy at West Point, Admissions Information for Plebe Summer, available at [http://admissions.usma.edu/prospectus/wpe\\_military.cfm](http://admissions.usma.edu/prospectus/wpe_military.cfm) (last visited Mar. 28, 2010) (“The bulk of ‘hands on’ military training occurs during the summer. Freshmen, or ‘plebes,’ begin their West Point experience with Cadet Basic Training. This six-week program of instruction focuses on basic Soldier skills and courtesies, discipline, personal appearance, military drill and ceremony, and physical fitness.”).

<sup>19</sup> Under Article 88, Uniform Code of Military Justice (UCMJ), “Any commissioned officer who uses contemptuous words against the President . . . shall be punished by court-martial.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 12 (2008) [hereinafter MCM].

<sup>20</sup> Eve Conant, *This Is My Mission*, Mar. 22, 2010, available at <http://www.newsweek.com/id/235290> (last visited Mar. 28, 2010) (“Choi and Pietrangelo spent one night in jail. Both men appeared in court the next day, in shackles and handcuffs, and pleaded not guilty to the charge of failing to obey a lawful order. A trial date is set for April 26.”).

how to get dignity back—being chained up and being arrested—that’s how you get your dignity conferred back upon you.<sup>21</sup>

Lieutenant Choi continued, growing visibly agitated:

And so I think that by actions, my call is to every leader—not just talking gay leaders—I’m talking any leader who believes in America, and the promises of America can be manifest. We’re gonna do it again. And we’re going to keep doing it until the promises are manifest. And we will not stop. This is a very clear message to President Obama and any other leader who supposes to talk for the American promise and the American people. We will not go away.<sup>22</sup>

With these comments, 1LT Choi’s defiance marked a new era in DADT reform attempts. Threats, violations of civil and military law, and public comments against the President now characterized the posture of this commissioned officer. Respectful dialogue had devolved, with many proponents of DADT’s repeal wondering whether 1LT Choi’s deeds had undone decades’ of coordinated efforts and sacrifices.<sup>23</sup>

Especially now, as policymakers contemplate the elimination of DADT, 1LT Choi’s actions are relevant, not just because of his personal history and message, but, more importantly, because of what these actions signify on a larger scale. Lieutenant Choi’s tactics demonstrate the powder keg waiting to erupt in the face of any policy change instituted without a cautious and deliberate plan. Will there ever be enough accommodation to satisfy the opponents, or will the threats and defiance by 1LT Choi and his followers continue on each point of contention as an eventual plan takes shape? Ultimately, time will tell. However, this most recent episode foreshadows the controversy, high emotion, and conflict facing an already thinly-stretched military in the wake of an impulsive repeal. Now more than ever, it is critical for the nation’s leadership to consider the second- and third-order effects of

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<sup>21</sup> Joe Sudbay, *Dan Choi and Jim Pietrangelo Are Out of Jail, Plead Not Guilty*. *Dan Says*: “We will not go away,” Mar. 19, 2010, available at <http://gay.americablog.com/2010/03/dan-choi-and-jim-pietrangelo-are-out-of.html> (last visited Mar. 28, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> See Melloy, *supra* note 16.

DADT's repeal. They must consider the context of the international armed conflicts in progress—and on the horizon—that surround our armed forces, as well as the need for a unified defensive armed force.

This article contemplates a range of issues surrounding the possible repeal of DADT. Part II explores the scope and inherent limitations of any change to the current policy. While some presume that elimination of DADT will automatically invalidate various military administrative and criminal provisions, this part considers the fundamental difference between statements, acts, or marriage—the inconsistent and incomparable behaviors now prohibited by DADT. For example, the momentum surrounding the repeal efforts have centered around those servicemembers subject to separation merely for openly stating their sexual preference—those who claim that they must lie about themselves in order to serve.<sup>24</sup> These debates have not touched upon a servicemember's right to sexually proposition another member of the same sex, display homosexual pornography, or engage in sexual acts now prohibited by a wide array of criminal statutes that are equally applicable to heterosexual servicemembers. Here, especially, it is naive to assume that a statement of one's identity automatically is part-in-parcel with deliberate and calculated physical conduct.

Part III addresses issues of applicability. The key question here is whether any policy change can adequately and proportionately address concerns related to bisexual and transgender servicemembers or recruits. As only one example, consideration of the "T" aspect of "LGBT" requires exploration of unique psychological needs related to Gender Identity Disorder, the complications of hormonal treatments, and the real possibility of gender reassignment surgery—with its requisite mental health evaluations. If legislators paint with a broad brush, assuming that repeal applies equally to all sexual minorities, they must be able to address such complex biomedical and psychosocial concerns.

Part IV addresses the interrelationship between non-legislative provisions in housing and other benefits and legislative changes. This part considers, for example, the dependence of criminal statutes like

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<sup>24</sup> Present and former servicemembers, such as First Lieutenant Dan Choi, Michael Almy, James Pietrangelo, and Jenny L. Kopfstein, assert that DADT forces them to lie about themselves in order to serve in the military. See, e.g., Chuck Colbert, *DADT Subject to Hearing, Protests in DC, SF*, BAY AREA REP., Mar. 25, 2010, <http://www.bayareareporter.net/news/article.php?sec=news&article=4655>.

wrongful cohabitation on modifications to the living arrangements of servicemembers who self-identify as homosexual. After exploring these non-legislative considerations, Part V considers additional organizational accommodations that may be necessary to effectuate repeal, such as separate housing, changing areas, or shower facilities.

Having exposed limitations of many implicit assumptions about repeal of DADT, and the host of administrative and organizational changes that will inevitably influence the reach of any legislative action, Part VI addresses the experience of foreign nations repealing similar provisions and the inapplicability of their experience to the United States. Part VII explores the problem of inconsistent statutory definitions of key terms like “husband and wife,” “marriage,” and other concepts related to the LGBT community. This Part also considers important lessons from state jurisdictions, which collectively signal the great difficulty—if not impossibility—of developing equitable, all-encompassing definitions. Completing the overall consideration of precursors to and issues surrounding specific legislative changes, Part VIII explores the constitutional dimension of DADT repeal, including the application of *Lawrence v. Texas*<sup>25</sup> and its recognition of privacy rights in adult, consensual, sexual activity, as well as concerns over the implications of *voir dire* and the right to a fair trial.

Part IX contemplates the effect of DADT repeal on the marital privilege now recognized in Military Rule of Evidence (MRE) 504, especially in light of varying types of unions now permitted in some, but not all, jurisdictions. Part X next explores a range of military criminal provisions that might be affected by the repeal of DADT, including adultery, bigamy and polygamy, wrongful cohabitation, and other offenses that would impair good order and discipline in the armed forces or which would be service discrediting under the provisions of General Article 134. Part XI addresses a full range of additional policy considerations, from faulty analogies to racial integration and partial integration of women to misplaced reliance on statistics about homosexual discharges from the armed forces. This article concludes with an eye toward mission effectiveness and a plea to withhold sweeping changes until a time when failed experiments in political correctness will not accrue to our enemies on the battlefield and result in the unnecessary loss of American lives.

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<sup>25</sup> 539 U.S. 558 (2003).

## II. The Potential Scope of Repeal: Homosexual Acts are Not Necessarily Related to One's Identity and Can Be Addressed in an Entirely Separate Manner

As noted by one historian, “[i]t is clear that a common way of life involves a common view of life, common standards of behavior, and common standards of value.”<sup>26</sup> A universal approach to sexual expression in the military, whether by heterosexuals or homosexuals is essential to both unit cohesiveness and the *esprit de corps* necessary to fight our enemies and win. Now challenged with the repeal of DADT, the military must tackle how and to what extent homosexuals are integrated into the armed forces by balancing the need for common standards in military life necessary to accomplish the mission.<sup>27</sup> At all times, no one can lose sight of the fact that military service requires servicemembers to exercise a tremendous degree of restraint over their verbal and physical expressiveness to meet countervailing necessities of military readiness.<sup>28</sup>

The repeal of DADT poses multiple issues for the armed forces that touch on moral, fiscal, political, and practical effects of integration. When deciding how and to what extent homosexuals will be integrated into the armed forces, several questions must be addressed. First, who should be the ultimate decision-maker for aspects of repeal? Should it be the Commander-in-Chief, the military leadership (as a group or individually), the U.S. Congress, society, some other entity, or a

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<sup>26</sup> WILLIAM J. BENNETT, *THE DEVALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN* 25 (1999) (quoting Christopher Dawson).

<sup>27</sup> This balance is required in several dimensions of personal, physical, and spiritual expressiveness. For example, Soldiers are prohibited from publicly displaying body piercings, to include areas as the “tongue, lips, inside mouth, and other surfaces of the body which might not be readily visible” when they “in uniform, in civilian clothes on duty, or in civilian clothes off duty (this includes earrings for male soldiers).” U.S. DEP’T OF ARMY, REG. 670-1, *WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA* ¶ 1-14c (3 Feb. 2005).

<sup>28</sup> See *Parker v. Levy*, 417 U.S. 733, 759 (1974) (citing *United States v. Gray*, 42 C.M.R. 255 (1970) (“In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.”)). See also *United States v. Womack*, 29 M.J. 88, 91 (C.A.A.F. 1989) (holding that the First Amendment and other privacy concerns apply differently to the military community, allowing the armed forces to constitutionally protect or regulate conduct which might be permissible elsewhere).

combination of these? This determination involves a host of other concerns. For example, in evaluating the position of some DADT opponents that society is now tolerant of homosexuality, what do the phrases “society” and “tolerant” really mean? “Society” surely does not include the majority of California voters who passed a constitutional amendment prohibiting gay marriage,<sup>29</sup> despite the California Supreme Court’s ruling that gay marriage is constitutionally protected.<sup>30</sup> Nor does “society” include the legislatures of the great majority (82%) of states who similarly prohibit gay marriage.<sup>31</sup> “Society” likewise cannot include the majority of states (58%) who, even to this day, have refused to enact employment antidiscrimination laws to protect homosexuals, specifically.<sup>32</sup>

Whoever makes the final decision on DADT repeal, he (or they) must keep in mind a crucial distinction. Don’t Ask, Don’t Tell is criticized by many, including the Commander-in-Chief, for promoting “lies” among servicemembers who must suppress the expression of their sexual preferences in order to serve.<sup>33</sup> In a society that treasures freedom of expression and diversity of personal ideologies, DADT opponents say such limitations are not only offensive to servicemembers, but also the

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<sup>29</sup> On 4 November 2008, Proposition 8 added a new amendment to the California Constitution, which provided that “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

<sup>30</sup> Prior to the passage of Proposition 8, the California Supreme Court heard the *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), which held that it was a state constitutional violation to deny same-sex couples the ability to marry. After the passage of Prop 8, on 25 May 2009, the California Supreme Court issues its decision in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), which upheld the proposition but validated all marriages performed before 5 November 2008.

<sup>31</sup> Those states *without* marriage prohibitions, either from statutory law or amendments to their respective state constitution are Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont. See HRC Map of Statewide Marriage Prohibitions, Jan. 13, 2010, available at [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) (last visited Mar. 28, 2010).

<sup>32</sup> Those states with employment laws prohibiting employment discrimination on the basis of sexual orientation and/or gender identity are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See HRC Map of Statewide Employment Laws & Policies, Feb. 3, 2010, available at [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf) (last visited Mar. 28, 2010).

<sup>33</sup> See Christine Simmons, *Obama HRC Speech: “I Will End Don’t Ask, Don’t Tell,” Says President Obama*, Oct. 10, 2009, available at [http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do\\_n\\_316524.html](http://www.huffingtonpost.com/2009/10/10/obama-says-he-will-end-do_n_316524.html) (last visited Mar. 28, 2010).

fundamental values that undergird our Republic.<sup>34</sup> Just as it enhances a Soldier's morale and dignity to freely worship a particular faith, so too would free and open expression of his sexual preference, argue the opponents of DADT.<sup>35</sup>

Overwhelmingly, the issue of personal sexual identity and its expression has taken center stage in the public discourse and has fueled the fire that now envelopes DADT. Opponents of DADT have strategically offered officers like Second Lieutenant Sandy Tsao<sup>36</sup> and 1LT Daniel Choi in an effort to carefully and narrowly frame the issue as one of "identity."<sup>37</sup> But this clean, sanitized picture has been cropped neatly to avoid the more controversial issues. While a key issue focuses on the right to "say who he or she is" by announcing an affinity for a member of the same sex,<sup>38</sup> public discussions have focused far less on the relationship between sexual identity and physical acts in furtherance of that identity—whether those acts include propositioning the same sex to engage in dates or sexual acts or engaging in the actual sexual acts. The obvious connection between beliefs and acts raises the question of whether policymakers *must* treat both issues as a unified whole, rather than two entirely separate issues.

Addressing the repeal of DADT requires policymakers to first distinguish between beliefs and acts. A belief is entirely a product of the

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<sup>34</sup> See NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 291–95 (2009).

<sup>35</sup> See *id.*

<sup>36</sup> Second Lieutenant Sandy Tsao revealed her sexual orientation to her commanding officer while at the same time writing a personal letter to President Obama, urging the Commander-in-Chief to repeal DADT. On 5 May 2009, Tsao received a handwritten letter from President Barack Obama stating: "Thanks for the wonderful and thoughtful letter. It is because of outstanding Americans like you that I committed to changing our current policy. Although it will take some time to complete (partly because it needs Congressional action) I intend to fulfill my commitment." Andy Marra, *A Personal Promise from President Obama on "Don't Ask, Don't Tell,"* May 7, 2009, available at <http://glaadblog.org/2009/05/07/a-personal-promise-from-president-obama-on-dont-ask-dont-tell/> (last visited Mar. 31, 2010). See also Spencer Ackermen, *DADT: LT Choi Not Back on Active Duty After All*, WASH. INDEP., Feb. 10, 2010, <http://washingtonindependent.com/76243/dadt-lt-choi-not-back-on-active-duty-after-all>.

<sup>37</sup> See Bridgette P. LaVictoire, *Dan Choi's Actions at White House Largely Lacking Support in LGBT Community*, Mar. 23, 2010, available at <http://lezgetreal.com/?p=29204> (last visited Mar. 29, 2010).

<sup>38</sup> Many advocates for repeal of DADT and former gay and lesbian servicemembers explain how the current policy accounts for their inability to "tell" fellow servicemembers that they are homosexual, which is separate from discussions of homosexual acts. See, e.g., FRANK, *supra* note 34, at 258–90.

mind and need not be expressed. Acts are either voluntary or involuntary. That society and the military do not punish a person for thinking even the most horrendous criminal thoughts evidences the sanctity of belief.<sup>39</sup> Debates have raged about whether being gay is voluntary or involuntary—that is, whether biochemical or other conditions are responsible for creating homosexual urges.<sup>40</sup> While this determination is well beyond the scope of the DADT debate, it illuminates the difference between beliefs and acts: even if a homosexual servicemember has no iota of control over his homosexual desires, he always retains the ability to regulate how, when, where, and to what intensity those desires are expressed.

A Soldier who is homosexual and wants to express her identity verbally may desire to tell close friends during the process of “coming out” in a very private and personally significant way.<sup>41</sup> Alternatively, she may want to announce her homosexual identity during a formation to ensure that everyone in her unit is aware of it. Because she always maintains the ability to time and control her verbal expression and the very words she uses, the Soldier is always responsible and accountable for her errors in judgment. We hold heterosexual Soldiers to the same standard, as evident in prohibitions on harassing language,<sup>42</sup> and must, therefore, apply these standards and restrictions uniformly. As reflected

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<sup>39</sup> See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 206 (4th ed. 2003) (providing that “[b]ad thoughts alone cannot constitute crime [and] there must be an act, or omission to act, where there is a legal duty to act”).

<sup>40</sup> See, e.g., Peter S. Bearman & Hannah Brueckner, *Opposite-sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. SOC. 1179, 1181 (2002) (discussing findings that “adolescent males who are opposite-sex twins are twice as likely as expected to report same-sex attraction”); Brian S. Mustanski et al., *A Genome-wide Scan of Male Sexual Orientation*, 116 HUM. GENETICS 272, 273–78 (2005); Dean H. Hammer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321, 322–25 (1993); S. LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1035–37 (1999).

<sup>41</sup> Many homosexuals have described the coming-out process as an integral part of one’s self-development. See generally ROB EICHBERG, *COMING OUT: AN ACT OF LOVE* (1990) (discussing how gays and lesbians can use methods such as letter writing and formal meetings to ease the difficulty of the coming out process). See generally MARY V. BOHREK, *COMING OUT TO PARENTS: TWO-WAY SURVIVAL GUIDE FOR LESBIANS AND GAY MEN AND THEIR PARENTS* (1983).

<sup>42</sup> “Sexual harassment” under the UCMJ includes “influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature.” UCMJ art. 92 (2008). See also U.S. DEP’T OF DEF, DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (EO) PROGRAM (21 Nov. 2003).

in the Model Penal Code<sup>43</sup> and the Uniform Code of Military Justice,<sup>44</sup> a sexual advance, such as flirtation or a request for a date, is a matter entirely of volition, deliberation, and calculation. It is paramount to recognize that being gay does not “cause” a servicemember to reach for the same sex’s crotch, any more than being heterosexual “causes” one to reach for the opposite sex’s crotch.

In fact, given that there are homosexuals who know their sexual identity but who have never acted on it,<sup>45</sup> it cannot be said that being homosexual necessarily includes or involves engaging in a particular sexual act. To presume so would devalue the experiences of a great many members of the LGBT community, who have recognized, sometimes since the earliest days of their childhood, that something was “different” about the way they felt inside—about their spirituality and the concept of who they were as people and individuals.<sup>46</sup> If it is a discriminatory mindset that repeal of DADT is supposed to eliminate, addressing the issue of sexuality in a respectful and nondiscriminatory manner also requires recognition of the cheapening effects of labeling.<sup>47</sup> Homosexuals must not be defined by the sexual acts in which they could potentially engage, no more than Jews are defined by the wearing of

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<sup>43</sup> See MODEL PENAL CODE, § 2.02 (Official Draft 1962).

<sup>44</sup> See *United States v. Axelson*, 65 M.J. 501, 513 (A.C.C.A. 2007) (“A bodily movement, to qualify as an act forming the basis of criminal liability, must be voluntary.” (citing *LAFAVE*, *supra* note 39, at 208)).

<sup>45</sup> See, e.g., *SKI HUNTER, COMING OUT AND DISCLOSURES: LGBT PERSONS ACROSS THE LIFESPAN* 29 (2007) (identifying cases in which “some women and men identify as lesbian, gay, or bisexual and experience both affectional and sexual desire for others of the same sex-gender but currently have no sexual partners” and further explaining that “[t]his could be a desired or undesired state”). For a military example, Marine Staff Sergeant Eric Alva, the first American wounded in the war in Iraq, came out after being medically discharged from the military. See Eric Alva, *Coming Out Against Don’t Ask, Don’t Tell*, available at <http://www.hrc.org/alva/index.htm> (last visited Mar. 30, 2010).

<sup>46</sup> See, e.g., *DANA ROSENFELD, THE CHANGING OF THE GUARD: LESBIAN AND GAY ELDERS, IDENTITY AND SOCIAL CHANGE* 14 (2003) (observing the experiences of people who knew of their sexual orientation “during the early years, often in childhood”); Julie Bolcer, *Bono to ET: “I Always Felt Male,”* Oct. 29, 2009, available at [http://www.advocate.com/Arts\\_and\\_Entertainment/Entertainment\\_News/Chaz\\_Bono\\_Talks\\_with\\_Entertainment\\_Tonight/](http://www.advocate.com/Arts_and_Entertainment/Entertainment_News/Chaz_Bono_Talks_with_Entertainment_Tonight/) (last visited Mar. 31, 2010); Matt Sedansky, *Gay Seniors Come Out Late, Start Second Lifetime*, ASSOCIATED PRESS, Mar. 15, 2010, available at [http://www.google.com/hostednews/ap/article/ALeqM5g4EmbNtiFqVvMnsVPU\\_z\\_4LTVSbQD9EETR283](http://www.google.com/hostednews/ap/article/ALeqM5g4EmbNtiFqVvMnsVPU_z_4LTVSbQD9EETR283) (last visited Mar. 31, 2010) (addressing several senior citizens “different” feelings they felt throughout life was the realization that they were gay).

<sup>47</sup> See FRED L. PINCUS, *UNDERSTANDING DIVERSITY: AN INTRODUCTION TO CLASS, RACE, GENDER, AND SEXUAL ORIENTATION* 169–70 (2d ed. 2010).

Yarmulkes.<sup>48</sup> For the military to assume that identifying oneself as a homosexual automatically includes engagement in specific sexual acts has precisely this prohibited, marginalizing, and stereotyped effect.

The examples from religion are also instructive on the issue of DADT’s repeal. Allowing a Soldier to serve openly as a Christian currently may involve many things. It may involve identifying oneself as a practicing member of the faith and attending religious services.<sup>49</sup> But even with these allowances, come restrictions that acknowledge overriding communal aspects of military service.<sup>50</sup> Being a Christian does not allow a Soldier to proselytize persons of other faiths or to baptize an unwilling peer.<sup>51</sup> Ultimately, it would be rash and illogical to assume that repeal of DADT necessarily requires elimination of prohibitions on homosexual conduct. Just as it is illegal to shout “fire” in a crowded auditorium, even despite freedom of speech,<sup>52</sup> prohibitions on homosexual banter, solicitation to engage in homosexual acts, the display of homosexual pornographic materials, graphic discussions of homosexual sexual activities, display of one’s genitals to a member of the same sex, or sexual touching, groping, or grabbing—occurring in public social settings or the military workplace—all have an independent

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<sup>48</sup> See generally Iddo Tavary, *Of Yarmulkes and Categories: Delegating Boundaries and the Phenomenology of Interactional Expectation*, 39 THEORY & SOC’Y 49 (2009).

<sup>49</sup> See U.S. DEP’T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (10 Feb. 2009) [hereinafter DoDI 1300.17]. See also U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ¶ 5-6 (7 June 2006) [hereinafter AR 600-20].

<sup>50</sup> The Department of Defense specifies that each of the branches “should” grant requests for religious accommodations but only “when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.” DoDI 1300.17, *supra* note 49. Although the language is slightly different, the Army, Air Force, Navy and Marines, and Coast Guard apply the same general principle. See AR 600-20, *supra* note 49; U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 1730.8B, ACCOMMODATION OF RELIGIOUS PRACTICES (2 Oct. 2008); U.S. DEP’T OF AIR FORCE, INSTR. 36-2706, MILITARY EQUAL OPPORTUNITY AND TREATMENT PROGRAM (29 July 2004); U.S. COAST GUARD, INSTR. 1730.4B, RELIGIOUS MINISTRIES WITHIN THE COAST GUARD (30 Aug. 1994).

<sup>51</sup> See Headquarters, Dep’t of Army, Gen. Order No. 1 (4 Apr. 2009).

<sup>52</sup> *Schenck v. United States*, 249 U.S. 47 (1919). During World War I, Charles Schenck, the General Secretary of the Socialist Party of America, was convicted for violating the Espionage Act when he mailed about 15,000 circulars to draftees suggesting they resist the draft. See *id.* at 49. In a unanimous decision, Justice Oliver Wendell Holmes, Jr., wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre causing panic.” *Id.* at 52.

basis for prohibition, irrespective of one's sexual identity.<sup>53</sup> Even if policymakers must make some accommodations for the "expression" of one's homosexuality, they must acknowledge the independent justifications for separation of acts from identity and addressing those acts entirely independently.

### III. Matters of Inclusiveness: Repeal of DADT Would Apply Inconsistently to Bisexual and Transgender Servicemembers

A visit to almost any college campus in America would probably reveal the way sexual minorities in the LGBT community have been lumped together as a single entity and interest group.<sup>54</sup> The acronym LGBT, alone, is suggestive of this prevailing view.<sup>55</sup> However, a careful analysis of the unique concerns related to each of these groups evidences dissimilar experiences, needs, and reactions from the public.<sup>56</sup> As opposed to homosexuality, which characterizes an affinity and attraction to solely the same sex,<sup>57</sup> bisexuality is characterized mainly by the transitory nature of one's sexual affinity and the desire and ability to shift sexual attention to members of both sexes.<sup>58</sup> Contrarily, the diagnosis of transgender involves an element of dissatisfaction with one's own biologically assigned gender, which might involve affinity towards members of either sex, but, at its heart, generally involves an expressive

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<sup>53</sup> Under Article 134, the military may punish acts which are "prejudicial to good order and discipline" or "service discrediting". UCMJ art. 134 (2008). Acts such as the display of one's genitals may also be punishable as an Indecent Exposure under Article 120. *Id.* art. 120(n).

<sup>54</sup> Campus Pride is a nonprofit organization and online community devoted to "develop necessary resources, programs, and services to support LGBT and ally students on college campuses across the United States." CampusPride.org, *available at* <http://www.campuspride.org/aboutus.asp> (last visited Mar. 31, 2010).

<sup>55</sup> *See generally* LGBT Rights: Lesbian, Gay, Bisexual and Transgender Project, American Civil Liberties Union, *available at* <http://www.aclu.org/lgbt-rights> (last visited Mar. 31, 2010). However, there are activists from separate communities who have argued for separate consideration based on the incongruity of various interests. *See* The National Gay and Lesbian Task Force, Bisexual Issues, *available at* <http://www.thetaskforce.org/issues/bisexuality>, and Transgender Issues, *available at* <http://www.thetaskforce.org/issues/transgender> (last visited Mar. 31, 2010).

<sup>56</sup> *See* Mary Bradford, *The Bisexual Experience: Living in a Dichotomous Culture*, 4 J. BISEXUALITY 7, 8–13 (2004).

<sup>57</sup> *See* MERRIAM WEBSTER'S MEDICAL DICTIONARY (ONLINE) (2010), <http://www.merriam-webster.com/medical/homosexual> (defining "homosexual").

<sup>58</sup> *See id.* (defining "bisexual").

component in the desire to appear outwardly as the opposite gender of one’s birth.<sup>59</sup>

Bisexual servicemembers present unique concerns that cannot easily be addressed by policy regimes solely applicable to their homosexual and heterosexual counterparts. If the military institutes accommodations for homosexual servicemembers based solely on same-sex attraction, such as segregated barracks, the question still remains as to how the military accommodates its bisexual servicemembers. This determination potentially hinges on the individual practices of each bisexual servicemember, as a bisexual servicemember may be attracted to both sexes concurrently or sequentially.<sup>60</sup> Further complicating matters is the unpredictable nature of a bisexual person’s sexual attraction. While some may suggest that gays and lesbians are not sexually attracted to heterosexuals, thereby negating any reason to provide separate accommodations, a bisexual’s sexual attraction is often determined by factors besides sexual orientation or gender.<sup>61</sup> Additionally, homosexual servicemembers could reasonably oppose the inclusion of bisexuals in such accommodations because of their affinity for members of the opposite gender and the desire to maintain an individual identity without the discomfort of exposure to a heterosexual lifestyle. Bisexual servicemembers could likewise voice opposition to such arrangements for much the same reason. Ultimately, the consideration of bisexuality will require not only additional accommodations, but also different treatment, above and beyond changes instituted specifically for homosexual servicemembers.

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<sup>59</sup> As an official diagnosis, a transgender person, or one diagnosed with gender dysphoria, “[a] persistent aversion toward some or all of those physical characteristics or social roles that connote one’s own biological sex.” See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 823 (text rev., 4th ed. 2000) [hereinafter DSM-IV-TR].

<sup>60</sup> See MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 147 (1995) (“Clinicians these days tend to characterize bisexuality as either ‘sequential’ or ‘concurrent,’ depending upon whether the same-sex/opposite sex relationships are going on at the same time . . . what, precisely, is ‘the same time’? Alternate nights? The same night? The same bed?”).

<sup>61</sup> See MARTIN S. WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY 55 (1994) (“I don’t think it has much to do with pitting a good-looking man against a good-looking woman. I think it has more to do with my own feelings of whether I’m attracted to men or women more at a particular point.”).

Although bisexual servicemembers add a layer of complexity to DADT repeal efforts, transsexual servicemembers add several more. While, in modern times, most clinicians no longer treat homosexuality as a disease or disorder,<sup>62</sup> the same cannot be said for the psychological condition related to transgender persons. Not only is this lifestyle associated with a clinically diagnosable condition—“gender dysphoria,”<sup>63</sup> also known as “Gender Identity Disorder.”<sup>64</sup> Gender Identity Disorder (GID) is a basis for disqualification from service in the U.S. armed forces on entirely medical grounds.<sup>65</sup> For a person to be diagnosed with GID under the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), that person must meet all of the following four diagnostic criteria:

- (1) Evidence of a “strong and persistent” identification with another gender;<sup>66</sup>
- (2) Evidence of a persistent anxiety or unease with the gender assigned at birth;<sup>67</sup>
- (3) No concurrent physical intersex characteristics;<sup>68</sup>
- (4) Significant clinical distress or impairment with work, social situations, or other aspects of life.<sup>69</sup>

Although some transgender personnel may be gay, lesbian, or bisexual, the resulting gender identification is not comparable to homosexuality; gender identity refers to one’s sense of “maleness” or “femaleness,”<sup>70</sup>

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<sup>62</sup> In 1973, the American Psychiatric Association altered its classification of homosexuality as a mental disease or disorder. See Am. Psychiatric Ass’n, Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II (Position Statement Retired), available at [http://www.psychiatryonline.com/DSMPDF/DSM-II\\_Homosexuality\\_Revision.pdf](http://www.psychiatryonline.com/DSMPDF/DSM-II_Homosexuality_Revision.pdf) (last visited Mar. 31, 2010). But see U.S. DEP’T OF DEF., INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION (10 July 2006) (classifying homosexuality as a mental disorder for the purposes of the DoD physical disability evaluation, even though homosexuality is not classified as a mental disease).

<sup>63</sup> See DSM-IV-TR, *supra* note 59, at 823.

<sup>64</sup> *Id.*

<sup>65</sup> See U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS ¶ 3-35 (10 Sept. 2008) (rendering the individual administratively unfit for military service).

<sup>66</sup> See DSM-IV-TR, *supra* note 59, at 581.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See generally Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. INT’L & COMP. L. ANN. 599, 600–02 (1998) (discussing the difficulties faced by transgender prisoners when the Federal Bureau of Prisons placed persons with like-

while homosexuality refers to one’s sexual attraction to a member of a specific gender.<sup>71</sup>

For a majority of transgender persons, simply living a stable life requires extensive medical treatment and clinical assistance.<sup>72</sup> Necessary care normally includes “ongoing psychotherapy and counseling sessions, periodic hormone treatment, long-term electrolysis sessions, periodic outpatient body-counteracting procedures, and other medically necessary procedures to effectuate and maintain the transition from one sex to another.”<sup>73</sup> Required hormone therapy may range from infrequent to weekly or even daily depending on one’s physical composition.<sup>74</sup> Hormone treatments further regulate a range of physiological functions, including one’s “mood, eating, and sleeping.”<sup>75</sup> Without such therapeutic intervention, transgender personnel can suffer extensive psychological trauma that not only interferes with their well-being, but also the well-being of co-workers or people in close physical proximity.<sup>76</sup>

Of significance to military service, especially in deployed areas or field training settings, hormone treatments can, and frequently do, result in significant complications. For example, estrogen therapy has resulted in the increased risk of thromboembolic disease, myocardial infarction, breast cancer, abnormal liver function, and fertility problems.<sup>77</sup> Testosterone therapy likewise results in the increased risk of strokes and heart attacks, abnormal liver function, renal disease, endometrial cancer, and osteoporosis.<sup>78</sup>

Costs of accommodating the unique needs of transgender servicemembers under a repealed DADT would be monumental, especially considering the price tag accompanying gender reassignment surgery. The costs of hormone therapy, simply in preparation for the

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gender physical attributes, to include pre-operative transgender prisoners, in the same holding facilities).

<sup>71</sup> *Id.*

<sup>72</sup> See Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 85 (Paisley Currah et al. eds., 2006).

<sup>73</sup> *Id.*

<sup>74</sup> See *id.*

<sup>75</sup> See generally <http://depts.washington.edu/hiv aids/spop/case4/discussion.html> (last visited Mar. 31, 2010) [hereinafter *Transgender Issues*].

<sup>76</sup> See Levi & Klein, *supra* note 72, at 86.

<sup>77</sup> See generally *Transgender Issues*, *supra* note 75.

<sup>78</sup> *Id.*

operation, can range from \$300 to \$2,400 per year,<sup>79</sup> while surgery on just the genitals costs approximately \$15,000.<sup>80</sup> More extensive work on the genitalia, face, and chest may exceed \$50,000, solely for those procedures,<sup>81</sup> exclusive of the psychotherapy required to acclimate to the demands of this tremendous transition. These costs also do not contemplate corrective surgery, which is often required for procedures of this sensitive nature, especially the construction of a prosthetic penis in a female-to-male conversion and treatment for urinary tract infections.<sup>82</sup>

For anyone doubting that transgender personnel may desire to enter military service, or are already serving silently like homosexuals, a 2008 study conducted by the Palm Center, a research organization at the University of California, Santa Barbara, provides important guidance.<sup>83</sup> Basing its findings on information obtained from members of the Transgender American Veterans Association (TAVA), the Palm Center concluded that the DADT policy was of primary concern to transgender servicemembers,<sup>84</sup> whose numbers on active duty accounted for some of the 660 self-identified responses.<sup>85</sup> Buttressing these findings is the fact that many open transgender community activists formerly served in the armed forces.<sup>86</sup>

Concerns over transgender personnel serving openly in the military include not only issues of physical appearance, but more importantly, the emotional highs and lows commonly experienced during the course of one's transition, which pose problems even if these servicemembers do not deploy. Military courts have commented on some of the problems related to cross-dressing in the military community. In the case of

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<sup>79</sup> See, e.g., Sex Reassignment Surgery Costs, available at <http://www.costhelper.com/cost/health/sex-reassignment-surgery.html> (last visited Mar. 31, 2010) [hereinafter Reassignment Costs]. For a range of procedures that transgender reassignment surgery may entail, including surgery and additional cosmetic procedures, see The Cost of Transition: The High and the Low Road, available at <http://www.tsroadmap.com/reality/finance/fintrncost.html> (last visited Mar. 31, 2010).

<sup>80</sup> Reassignment Costs, *supra* note 79.

<sup>81</sup> *Id.*

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

<sup>83</sup> See Karl Bryant & Kristen Schilt, *Transgender People in the U.S. Military: Summary and Analysis of the 2008 Transgender American Veterans Association Survey*, Aug. 2008, available at <http://www.palmcenter.org/files/TGPeopleUSMilitary.pdf> (last visited Mar. 31, 2010).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

*United States v. Davis*, the U.S. Navy prosecuted Electrician’s Mate Second Class Charles Marks<sup>87</sup> for wearing women’s clothing (a skirt, nylons, a women’s blouse, a bra, women’s fashion jeans, nail polish, a purse, and a wig) on numerous occasions while at the Puget Sound Naval Shipyard.<sup>88</sup> In two instances, Davis wore women’s attire in public areas such as outside the Bachelor Enlisted Quarters and the Motion Picture Exchange.<sup>89</sup> Davis defended his conduct on the grounds that the wearing of women’s attire is not “criminal conduct.”<sup>90</sup> While agreeing that the wear of women’s attire by a male is not “inherently unlawful,” the Court of Military Appeals rejected Davis’s assertions, largely due to Davis’s admissions that “he was aware of the adverse effects created by his conduct.”<sup>91</sup> In rejecting his defense, the Court of Military Appeals, upheld his conviction under Article 134 on the grounds that:

The particular facts and circumstances . . . in this case describe conduct on a military installation which virtually always would be prejudicial to good order and discipline and discrediting to the Armed Forces. The fact that there are some conceivable situations—such as a King Neptune ceremony and Kibuki theater—where “cross-dressing” might not be prejudicial to good order and discipline is not significant. These occasions do not generally occur in or near a barracks or a theater, the locations describe in the specifications.<sup>92</sup>

Objections that servicemembers can freely attend gay bars, which customarily feature performances by “drag queens,” and that such “performers” have changed public opinion on transgender persons, represent a mere trivialization of a serious issue. One need only review documentary films about the experiences of post-operative transgender people, who, despite full conversion to the living conventions of their new physical identity, are routinely shunned from the workplace, subject

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<sup>87</sup> At the time of appellate review, Electrician’s Mate Second Class Charles Marks had changed his name to Ms. Karen Davis. *See United States v. Davis*, 26 M.J. 445 (C.M.A. 1988).

<sup>88</sup> *Id.* at 447.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 448. During the court-martial, Davis “admitted that his co-workers had refused to work with him as a result of his cross-dressing and that the command would not use him in his rating because of this.” *Id.*

<sup>92</sup> *Id.* at 449.

to harassment, and even abandoned by their former friends and their current family members.<sup>93</sup> Any efforts to repeal DADT or replace it with a new policy must contemplate the complex issues generated by transsexual and bisexual servicemembers who prefer sexual activities with members of either gender. If the armed services are fashioned as a mere Petri dish for uninformed social experimentation, the policymakers responsible for such experimentation must be ready to shoulder responsibility if their experiments fail and the resulting reactions limit the effectiveness of our military at a time of war and global terrorism.

#### IV. DADT's Repeal Will Depend on Non-Legislative Policy Changes

While DADT came about as the result of congressional enactments,<sup>94</sup> its repeal can only be effectuated through a variety of actions, only some of which relate to Congress. If the repeal of DADT is predicated upon the desire to permit not only a servicemember's ability to enter into a gay marriage, but also official recognition thereof, repeal of DADT would necessarily require administrative action to provide housing and other allowances for homosexual married couples.<sup>95</sup> At a minimum, meeting desired objectives would require amendments to housing regulations, assuming this could be done in a fair manner.<sup>96</sup>

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<sup>93</sup> For example, the eight-part documentary *TransGeneration* covers the difficulties that four college students face with their family, friends, and daily lives, as they undergo gender transition. See *TRANSGENERATION* (Sundance Channel 2005).

<sup>94</sup> See Fred L. Borch, *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).

<sup>95</sup> Military regulations typically refer to a servicemember's ability to obtain additional Basic Allowances for Housing (BAH) at the "with dependent" rate, only after the servicemember establishes the dependent through official documentation. See U.S. DEP'T OF ARMY, REG. 680-300, REPORTING OF DEPENDENTS OF ACTIVE DUTY MILITARY PERSONNEL AND US CITIZEN EMPLOYEES ¶ 3 (12 Jan. 1976).

<sup>96</sup> See, e.g., Kathi Westcott & Rebecca Sawyer, *Silent Sacrifices: The Impact of "Don't Ask, Don't Tell" on Lesbian and Gay Military Families*, 14 DUKE J. GENDER L. & POL'Y 1121, 1121-26 (2007). In this article, the authors note some examples of areas requiring fundamental changes, such as: (1) U.S. DEP'T OF DEF., INSTR. 1000.13, IDENTIFICATION (ID) CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (1997); (2) U.S. DEP'T OF DEF., INSTR. 1341.2, DEFENSE ENROLLMENT ELIGIBILITY REPORTING SYSTEM (DEERS) PROCEDURES (1999) (requiring the enrollment of military dependents, usually lawful spouses and minor children, in order to receive military benefits as a result of their recognized relationship to the servicemember). These are only a few examples of the multiple administrative policies that would require changes following the repeal of DADT.

Whether predicate action is necessary to address housing allowances<sup>97</sup> or the construction of gay, bisexual, and/or transgender housing facilities,<sup>98</sup> policymakers must explore not only the nature of administrative action but also the source of funding to accommodate such objectives.<sup>99</sup> Comparing rates across the military in 2007, the Tenth Quadrennial Review of Military Compensation reported that the average housing allowance for a married servicemember ranged from \$1,064.00 for an E-1 to \$2,285.00 for a Flag Officer, while the average housing allowance for single servicemember ranged from \$877.00 for an E-1 to \$1,953.00 for a Flag Officer.<sup>100</sup> Over time, with an unknown number of gay, bisexual, or transgender recruits joining the forces or emerging from within to take advantage of these benefits,<sup>101</sup> it will be impossible to plan effectively for the administrative and non-legislative action required to truly effectuate DADT’s repeal. Without addressing the full range of issues in a prudent manner, repeal of DADT may only sound good on paper, but in effect, may do nothing more than permit someone to self-identify their sexual preference, even if the new policies are supposed to do far more.

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<sup>97</sup> See *infra* Part VII.

<sup>98</sup> See *infra* Part V.A.

<sup>99</sup> Without exploring funding considerations, integration of homosexuals into the military could result in a situation similar to “No Child Left Behind.” Although that program was enacted as an incentive to standardized testing and close student achievement gaps, absence of federal funding has essentially made the program ineffective. See Dan Lips & Evan Feinberg, *The Administrative Burden of No Child Left Behind*, FOX NEWS, Apr. 6, 2007, <http://www.foxnews.com/story/0,2933,264700,00.html>.

<sup>100</sup> These rates represent the average amount that all servicemembers receive. 1 AVERAGE MONTHLY BASIC ALLOWANCE FOR HOUSING (BAH) RATES BY PAY GRADE AND DEPENDENCY STATUS, DoD TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION (QRMC), CASH COMPENSATION 82 (2008).

<sup>101</sup> Although it is unknown to what extent the LGBT population may increase if DADT is repealed, or to what extent benefits will increase for LGBT personnel and their dependents, it is logical to assume that there will be more LGBT servicemembers who take advantage of military benefits for their dependents. After all, LGBT servicemembers often cite to the fact that their partner was unable to take advantage of the military’s benefits. See NATHANIEL FRANK, GAYS AND LESBIANS AT WAR: MILITARY SERVICE IN IRAQ AND AFGHANISTAN UNDER “DON’T ASK, DON’T TELL” (2004), available at [http://www.palmcenter.org/system/files/Frank091504\\_GaysAtWar.pdf](http://www.palmcenter.org/system/files/Frank091504_GaysAtWar.pdf) (last visited Mar. 31, 2010).

V. The Organizational Accommodations Required for DADT's Repeal are Fiscally and Practically Unattainable

A. Structural Accommodations

Military service requires close and intimate living and working arrangements. Servicemembers must often sleep, bathe, and work in close quarters under extremely strenuous conditions, which are only amplified in deployed environments or field training settings. Consider, for example, the vivid description of living arrangements in a part of Fallujah, Iraq, on 26 August 2007:

The Marines of Fox Company, 1st Platoon, literally don't have a pot to piss in. Staying in a makeshift police station at the northeastern end of Fallujah, they fill bottles instead—and load up plastic “wag bags,” draped around netted toilets, when they need to turn around. Marines sleep eight to a room. Shaving means staring into a Humvee mirror. Communication with the outside, non-military world is basically impossible. There is some kind of jury-rigged shower, allegedly.<sup>102</sup>

Those urging repeal of DADT argue that allowing the practice of open homosexuality will not detrimentally impact the privacy interests of other servicemembers or result in a hostile work environment for heterosexuals.<sup>103</sup> In making this argument, opponents of the current policy suggest that homosexual servicemembers will not “hit on” or “leer at” every other servicemember of the same gender.<sup>104</sup> Logically, this argument makes sense. Surely, a heterosexual male Soldier will not be attracted to every female Soldier he serves with, at least in the great majority of cases. However, because a heterosexual male Soldier *may* be attracted to some female Soldiers, the military has taken significant affirmative action to minimize opportunities for intimate sexual contact and communication between male and female Soldiers. Women sleep and shower in segregated quarters.

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<sup>102</sup> Noah Shachtman, *Iraq Diary: No Showers, No Toilet, No Problem*, WIRED, 27 Aug. 2007, <http://www.wired.com/dangerroom/2007/08/iraq-diary-no-s/>.

<sup>103</sup> See, e.g., AARON BELKIN & GEOFFREY BATEMAN, DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 51–67 (2003).

<sup>104</sup> See *id.* at 52.

While there are limited instances where men and women have shared sleeping accommodations,<sup>105</sup> these instances are far outweighed by the numerous personal accounts whereby close training and living accommodations increased sexual tension among servicemembers.<sup>106</sup> Although females may now serve on submarines, which had once been reserved only for male sailors, even in this environment, living accommodations are severely restricted, with separate dorms, separate bathing facilities, and strict penalties for even walking into gender-segregated areas.<sup>107</sup> Collectively, these instances demonstrate fundamental flaws in the argument that homosexual servicemembers would *never* be attracted to heterosexuals during slumber or bathing or act on such attraction.<sup>108</sup> Not surprisingly, among servicemembers convicted of same-sex forcible sodomy, many of the reported cases address situations where sex acts were performed as the victims slept or were highly intoxicated.<sup>109</sup> The true number of such cases may be far more widespread, as victims of homosexual assault have great incentive not to report crimes for fears that they too will be considered homosexuals.<sup>110</sup> These historical events all support the fact that shared

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<sup>105</sup> See Suzanne Fields, *Self-Discipline or Cohabitation—Which is Military Fantasy?*, INSIGHT ON NEWS, Feb. 13, 1995, [http://findarticles.com/p/articles/mi\\_m1571/is\\_n7\\_v11/ai\\_16679996/](http://findarticles.com/p/articles/mi_m1571/is_n7_v11/ai_16679996/). During operations in Haiti in the 1990s, men and women shared tents with no barriers, resulting in outrage by many family members and senior leaders. *Id.* 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](http://www.nytimes.com/2009/08/17/us/17women.html?_r=1) (reporting that women sometimes share sleeping quarters with men).

<sup>106</sup> See Fields, *supra* note 105. The 2009 Department of Defense Report on Sexual Assaults in the armed forces reported that 279 sexual assaults had occurred in combat areas, a sixteen percent increase from 2008, with seventy-seven percent of those sexual assaults occurring in Iraq and Afghanistan. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 85–86 (MAR. 2010) [hereinafter 2009 DoD SAPR REPORT].

<sup>107</sup> See David Kerley & Luis Martinez, Navy to Lift Ban on Women Serving Aboard Submarines, 23 Feb. 2010, *available at* <http://abcnews.go.com/Politics/navy-end-ban-women-serving-aboard-submarines-congress/story?id=9921378> (last visited 31 Mar. 2010).

<sup>108</sup> Additionally, writers such as Steven Zeeland provide support for the idea that there are homosexuals who consider themselves “military chasers,” actively seeking military men as the “object” of their sexual desire. See *generally* STEVEN ZEELAND, MILITARY TRADE (1999).

<sup>109</sup> See 2009 DoD SAPR REPORT, *supra* note 106, tab A (Army), 54–131; tab B, Attachment 5 (Navy), 1–41; tab B, Attachment 5 (Marines) 1–13; tab C, Attachment 5 (Air Force) 1–24.

<sup>110</sup> See 2009 DoD SAPR REPORT, *supra* note 106. Of the 2516 unrestricted reports filed in 2009, the number of men reporting sexual assaults increased by forty percent, from 128 to 173. *Id.* at 58. Additionally, the number of women reporting sexual assaults by other women increased from nine to seventeen. *Id.* at 89. However, because there were

living arrangements which pair open homosexuals with heterosexuals will increase the opportunity for the creation of a hostile work environment.<sup>111</sup> Simultaneously, drinking habits of many Soldiers create additional opportunities for same sex sexual assaults, as alcohol consumption and loss of consciousness among both genders is a factor that repeatedly arises in military sexual assault cases.<sup>112</sup>

Policymakers contemplating repeal of DADT must inevitably address whether to provide separate living and bathing facilities based on the gender and sexual preferences of open homosexuals, bisexuals, heterosexuals, and—quite possibly—transgendered persons. In order to adequately protect servicemembers' privacy interests and prevent hostile environments, the military would *minimally* need to provide separate living and bathing facilities for heterosexual men, heterosexual women, gay men, lesbians, bisexual men, bisexual women, and potentially transgender men and women. Providing facilities for each of these distinct categories could result in staggering costs and require physical expansion of most housing areas.

Policymakers would likewise need to address how living accommodations could be assigned to prevent gays, lesbians, and bisexuals from sharing rooms with their unmarried partners in a manner consistent with prohibitions on uniformed heterosexual couples.<sup>113</sup> Even in the event that the military adopts a “sour grapes” option, in which roommates must share quarters with members of the same gender, regardless of differences in sexual preference or orientation, such a policy would be inconsistent with existing policies that prohibit males and females from sharing the same quarters or bathing facilities. In essence, same sex heterosexuals would have to bear the burden of the same behaviors that are now feared in heterosexual arrangements, with little means of recourse. Such inconsistent policies would run counter to the very reason why heterosexual couples are not now intimately paired, unless the ultimate concern is merely avoidance of pregnancy, which would seem to be a very uncalculated response to such an important issue.

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837 restricted reports, it is impossible to determine exactly how many same-sex assaults occurred as well as how many were not reported at all. *Id.* at 58.

<sup>111</sup> See Fields, *supra* note 105.

<sup>112</sup> See generally 2009 DoD SAPR REPORT, *supra* note 106.

<sup>113</sup> See generally U.S. DEP'T OF ARMY, REG. 210-50, HOUSING MANAGEMENT (3 Oct. 2005) [hereinafter AR 210-50].

Considerations are not merely limited to garrison environments. Especially for those in the deployed environment, the challenge of structural accommodation becomes exponentially greater due to the constraints on space and locations of units. In any environment fathomable, if separate living and bathing facilities are not provided, the military must decide whether it will force cohabitation if a servicemember is morally or religiously opposed to the practice of open homosexuality.

#### B. Medical Considerations

A concern stemming from the repeal of DADT is the degree to which homosexuality can affect the medical readiness of the military force. During the 1980s, the military became extremely concerned about the impact of Acquired Immune Deficiency Syndrome (AIDS) on readiness.<sup>114</sup> The disease AIDS was a devastating medical development for society in general, and the military was no exception.<sup>115</sup> At that time, due to the increase of Human Immunodeficiency Virus (HIV)-positive servicemembers and the increase of AIDS-related deaths,<sup>116</sup> the military made concerted efforts to reduce HIV and AIDS by implementing new standards for testing members of the armed forces, screening blood donors, creating educational programs, and increasing access to contraceptives.<sup>117</sup>

While any sexual acts, by a male or female heterosexual or homosexual can lead to the spread of contagious disease,<sup>118</sup> an increase in sexual behaviors that are common among homosexuals could substantially impact the medical readiness of the armed forces. These

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<sup>114</sup> See Major Elizabeth Beard McLaughlin, A “Society Apart?”: *The Military’s Response to the Threat of Aids*, ARMY LAW., Oct. 1993, at 3–5.

<sup>115</sup> Memorandum from Sec’y of Def., Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (Apr. 20, 1987) (providing that “[f]rom October 1985 to August 1989, more than 6200 service members were diagnosed as positive for HIV. As of August 1989, nearly 300 service members have died of AIDS.”).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> E.g., MICHAEL SHERNOFF, WITHOUT CONDOMS: UNPROTECTED SEX, GAY MEN & BAREBACKING 11 (2006) (“It is now freely admitted that even ‘safer sex’ is not without its risks.”).

behaviors sometimes involve multiple partners.<sup>119</sup> Some of the sexual practices necessitated by anatomical differences in homosexual pairing increase the likelihood of disease transmission, genital trauma, and infection. As one example, male homosexual acts, such as “penile-anal, mouth-penile . . . hand-anile” and “mouth-anal” contact can all increase the risk of diseases caused by bowl pathogens, especially when practiced fluidly, without cleansing between such contacts.<sup>120</sup> In addition, certain conventions in lesbian sexual practices also raise unique concerns. While many lesbians avoid public discussion about their common sexual practices,<sup>121</sup> studies of behavior reveal a higher likelihood of disease transmission tied to sadomasochism (S/M) and “intense penetration” of the genitals.<sup>122</sup> As one lesbian scholar observes,

Despite a growing awareness that there are lesbians with AIDS, many of us believe we are safe from the transmission of STDs or HIV. Women who use penetrating sex toys or engage in S/M practices involving urine, feces, fisting, whipping, cutting, or piercing are at risk because of breaks in the mucosal and skin barriers that usually protect us against infection. In the same way, untreated STDs provide a potential route for HIV transmission because disrupted genital tissue is more likely to bleed during sexual activity.<sup>123</sup>

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<sup>119</sup> Kitty Tsui, *Lesbian Marriage Ceremonies: I do*, in DYKE LIFE: A CELEBRATION OF THE LESBIAN EXPERIENCE 111, 122 (Karla Jay ed., 1995) (“Relationships that are both long-term and monogamous are often hard to find in the lesbian community and perceived to be difficult . . .”).

<sup>120</sup> See JOHN R. DIGGS, JR., THE HEALTH RISKS OF GAY SEX, CORPORATE RESOURCE COUNCIL 2-3 (2002).

<sup>121</sup> Karen F. Kerner, *Health Care Issues*, in DYKE LIFE, *supra* note 119, at 313, 320 (“Lesbians are often reluctant to talk about what we do in bed. As [one authority] puts it ‘it’s very controversial for a lesbian to talk about whether or not she uses sex toys, she fu\*\*ks men, or whether or not she rims or is rimmed by her girlfriend.’ But it is precisely our sexual activity that defines our risk.”).

<sup>122</sup> Marny Hall, *Clit Notes*, in DYKE LIFE, *supra* note 119, at 197, 217 (“When the vaginal lining or the delicate rectal lining has been traumatized by fisting or intense penetration, it is especially important to avoid introducing a partner’s blood or vaginal fluid into the vagina or rectum.”).

<sup>123</sup> Kerner, in DYKE LIFE, *supra* note 119, at 321. See also ANN CVETKOVICH, AN ARCHIVE OF FEELINGS: TRAUMA, SEXUALITY, AND LESBIAN PUBLIC CULTURES 60 (2003) (“Lesbian sexuality requires a language for penetration with dildos, fingers, or fists, and it faces the challenge of expanding the erotics of penetrating objects or body parts, which is too often limited to a focus on penises or phallic substitutes.”).

Despite the possibility that heterosexuals could engage in the very same acts, these concerns are far more relevant in homosexual relationships because of the impossibility (in non-heterosexual couplings) of vaginal-penile penetration.<sup>124</sup>

Although some assume that all servicemembers educated on safe-sex practices will automatically understand, appreciate, and implement safer practices in their own sexual relationships, knowledge does not dictate sexual practice, nor does it prevent safer sex from eliminating the risk of sexually transmitted disease. While screening and education of the force is extremely important, these measures completely ignore the overriding power of sexual impulse, alcohol or other intoxication, individual choice, or a host of other factors that contribute to unsafe sex.<sup>125</sup> For many people, HIV, AIDS, and STDs are diseases that “other people” contract and are often a fleeting thought until it becomes a stark reality.<sup>126</sup> Let us not forget that the armed forces are challenged daily with higher rates of alcohol and drug use, incidents of suicide, and other mental illnesses due to the challenges of coping with numerous deployments, all of which may impact the mental faculties of a servicemember and impair his or her ability to make sound decisions about sexual practices.

The ability of servicemembers to deploy at a moment’s notice is of primary concern for their health and effectiveness. Servicemembers who are HIV-positive cannot deploy or serve overseas and require extensive precautions to prevent other co-workers from contracting their condition.<sup>127</sup> While advocates of DADT’s repeal suggest that the military’s mandatory bi-annual and predeployment testing are sufficient

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<sup>124</sup> See GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* 112 (1998) (“Anal intercourse is the sine qua non of sex for many gay men.”). This author, Gabriel Rotello, wrote from his personal experiences as an open homosexual. *Id.*

<sup>125</sup> See, e.g., SHERNOFF, *supra* note 118, at xiv (describing various factors, which individually and collectively, have contributed to the spread of sexually transmitted diseases among gay men); *id.* (“One night when a gay HIV prevention educator named Seth Watkins got depressed, he met an attractive stranger, had anal intercourse without a condom—and became HIV positive in spite of his job training.”).

<sup>126</sup> MARK J.K. WILLIAMS, *SEXUAL PATHWAYS* 105–08 (1999) (referencing interviews with numerous homosexual couples who ignored the risk of contracting HIV/AIDS until one partner contracted an STD or HIV). For example, one particular male involved in a homosexual relationship noted, “I don’t think the thought of AIDS necessarily ever crossed my mind until I got in a three-way relationship where I started thinking that things can get passed back and forth very easily between two people.” *Id.* at 107.

<sup>127</sup> U.S. DEP’T OF ARMY, REG. 600–110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) (15 July 2005) [hereinafter AR 600–110].

to address the spread of HIV among homosexual servicemembers,<sup>128</sup> this position completely ignores two important facts: First, simply based on the allowance of homosexual acts, more servicemembers will express their sexuality and ultimately engage in a higher number of homosexual liaisons.<sup>129</sup> Second, and in relation to the first point, those servicemembers who do not know they have contracted a disease may continue to engage in risky behavior while unknowingly exposing others to it.<sup>130</sup> The DADT opponents' position certainly ignores servicemembers who feel that sexually transmitted diseases are something "other people contract"<sup>131</sup> or those who would intentionally avoid using protection during high-risk encounters.<sup>132</sup> Policymakers must therefore consider the potential risks posed by the open practice of homosexuality and homosexual acts in the military. Ironically, avoidance of these concerns—stemming from a desire to avoid appearing homophobic—could prove deadly for the very population of homosexuals intended for increased protection and respect.

As a final medical consideration, discussions about DADT's repeal must also touch upon the financial costs necessary to treat homosexual servicemembers or family members infected with sexually transmitted diseases. Importantly, adequate medical treatment for the average HIV-positive patient ranges from \$14,000 to \$37,000 per year, with

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<sup>128</sup> Major Laura R. Kesler, *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*, 203 MIL. L. REV. 284, 306–307 (2010).

<sup>129</sup> Lesbian scholar Marny Hall observes how the celebration of coming out of the closet as a lesbian often involves impulsive homosexual behavior that is subject to feelings of deep regret after the fact:

For Flynn, casual sex was linked to her first heady whiff of sexual freedom: "I wanted to be more than a lesbian in theory. A woman in my group made it clear she was interested in me. After a dance party, we came to my place and had sex. It was impulsive. I wasn't feeling romantic, but it was fine sexually . . . mutually orgasmic . . . . Afterward, I got nervous that she would expect to have sex again, and I didn't particularly want to."

Hall, *in* DYKE LIFE, *supra* note 119, at 197–98.

<sup>130</sup> See, e.g., U.S. Ctrs. for Disease Control & Prevention, HIV Testing, *available at* <http://www.cdc.gov/hiv/topics/testing/index.htm> (last visited Mar. 31, 2010).

<sup>131</sup> See WILLIAMS, *supra* note 126, at 107.

<sup>132</sup> E.g., SHERNOFF, *supra* note 118, at 12 ("Since the onset of the AIDS epidemic, there have always been some gay men who refused to practice safer sex, though aware that condoms could mitigate the risk of contracting HIV through anal sex.").

substantial cost increases if HIV progresses to full-blown AIDS.<sup>133</sup> These are just some of the costs associated with an increase in sexual acts capable of compromising the medical fitness of our fighting forces.

### C. Other Accommodations

It may be impossible to contemplate the full range of accommodations required, or somehow related to, the repeal of DADT. However, the common concern is accounting for the time, money, personnel, and planning required to implement any significant changes. Just as policymakers must consider the re-entry of veterans previously discharged under DADT and whether they must provide grade increases or back pay to account for lost time or grade, they must likewise consider issues related to the allocation of housing or pension benefits. In an Army where same-sex marriage is permitted, would any prohibitions exist to stop a male Soldier from marrying another male who suffers from AIDS or advanced HIV, simply to provide for state-of-the-art medical treatments or hospice care? Although answers are difficult to come by, these are precisely the hard questions that must be asked when contemplating the repeal of DADT.

## VI. The Experiences of Foreign Militaries, That Have Allowed Open Homosexual Service, Are Inapplicable to the U.S. Military

Critics of DADT often point to permitted open homosexual service in foreign militaries as a basis for encouraging repeal of the U.S. policy.<sup>134</sup> At the writing of this article, twenty-five foreign countries either allow homosexuals to openly serve among the ranks or place minimal limitations on open homosexual service.<sup>135</sup> Many of these foreign

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<sup>133</sup> See U.S. Ctrs. for Disease Control & Prevention, Statistics Regarding Costs of HIV/AIDS, available at <http://www.cdc.gov/hiv/topics/basic> (last visited Mar. 2, 2010).

<sup>134</sup> See, e.g., MELISSA SHERIDAN EMBSEY-HERBERT, THE U.S. MILITARY’S “DON’T ASK, DON’T TELL” POLICY: A REFERENCE HANDBOOK 58, 59–80 (2007).

<sup>135</sup> See NATHANIEL FRANK, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 2 (Feb. 2010), available at <http://www.palmcenter.org/files/GaysinForeignMilitaries2010.pdf>. These countries include: Australia, Austria, Belgium, Canada, The Czech Republic, Denmark, Estonia, Finland, France, Germany, United Kingdom of Great Britain, Ireland, Israel, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and Switzerland. *Id.*

militaries have integrated not only gays and lesbians, but bisexual and transgender personnel.<sup>136</sup>

Out of the twenty-five foreign countries that allow homosexuals to serve openly, Canada, Australia, Great Britain, and Israel are commonly offered as examples of successful LGBT integration for the United States to follow.<sup>137</sup> Although each of these countries allows open service, not all aspects of their cultures, governments, or laws, are comparable to the U.S. armed forces.<sup>138</sup> Without an in-depth analysis of each foreign military's size, mission, structure, and the circumstances surrounding their integration of LGBT servicemembers, purported justifications for U.S. repeal are premature at best, and, at worst, entirely misplaced.

#### A. The United Kingdom's Experience

The British armed forces are all-volunteer, comprised of approximately 200,000 members in the active components.<sup>139</sup> The minimum age for recruitment is 15.9 years, with the maximum being 32 years.<sup>140</sup> The most recent statistics from 2007–2008 show that approximately 30,000 members of the British Armed Forces deployed during that timeframe.<sup>141</sup> Due to a European court's ruling that the exclusion of homosexuals from the military violated the European Convention on Human Rights, the United Kingdom (U.K.) has allowed gays, lesbians, and transgender soldiers to serve openly since 12 January

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<sup>136</sup> See EMBSER-HERBERT, *supra* note 134, at 58–60. See also TARYNN M. WHITTEN, GENDER IDENTITY AND THE MILITARY—TRANSSEXUAL, TRANSSEXUAL, AND INTERSEX-IDENTIFIED INDIVIDUALS IN THE U.S. ARMED FORCES 5 (Feb. 2007), <http://www.palmcenter.org/files/active/0/TransMilitary2007.pdf>.

<sup>137</sup> See, e.g., FRANK, *supra* note 135, at 138–43.

<sup>138</sup> In a discussion with several notable scholars from advocating for LGBT inclusion and acceptance into foreign militaries, Aaron Belkin, advocate for repealing DADT, states, “Many people who oppose gays and lesbians raise credible arguments that U.S. culture is different from Israeli culture or British culture.” See BELKIN & BATEMAN, *supra* note 103, at 105.

<sup>139</sup> See U.K. Armed Forces: Full Time Strengths and Requirements, available at <http://www.dasa.mod.uk/applications/newWeb/www/apps/publications/pubViewFile.php?content=41&date=2008-11-27&type=html&PublishTime=09:30:00> (last visited Mar. 31, 2010) [hereinafter U.K. Full Time Strengths]. These numbers encompass members of the active component that are considered both trained and untrained. *Id.*

<sup>140</sup> See CIA Field Listing: United Kingdom Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/uk.html> (last visited Mar. 31, 2010).

<sup>141</sup> U.K. Full Time Strengths, *supra* note 139.

2000.<sup>142</sup> It is virtually impossible to determine the number of open homosexuals in the U.K.’s military or the number the U.K. has gained through recruiting efforts because the necessary polls might constitute discrimination under their law.<sup>143</sup> While many British servicemembers opposed LGBT integration, because of the court’s ruling, the military had no choice. By allowing open service, the resulting changes did not prevent discharges or punishment for homosexual acts like fellatio, cunnilingus, and consensual sodomy, if such acts were deemed disruptive to mission accomplishment.<sup>144</sup> Instead, British military regulations require a commanding officer to inquire into all instances of questionable conduct, regardless of sexual orientation.<sup>145</sup>

In addressing such conduct, commanders apply the “service test,” which directs them to consider whether “the actions or the behavior of an individual adversely impacted or are . . . likely to impact on the efficiency or the operational effectiveness of the service.”<sup>146</sup> Commonly referred to in the British community as “Don’t Ask, Can Tell,” the policy empowers commanding officers to decide whether a soldier’s actions warrant punishment or discharge.<sup>147</sup> According to Christopher Dandeker, a Professor of Military Sociology in the Department of War Studies at London’s King’s College, the service test implicitly includes a “don’t flaunt it” component.<sup>148</sup> Professor Dandeker has further commented about the context surrounding this rule: “This is a process of change and transition[; m]ost of those involved in the European Court of Human Rights case were aware that the price to be paid for lifting the ban was discretion, even reticence, with regard to sexual orientation until such time as the glacial pace of cultural change shifts the nature of the heterosexual culture in the armed services.”<sup>149</sup> Because the “shifts” continue, the overall effects of the policy are still debatable.

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<sup>142</sup> See HEW STRACHAN, *THE BRITISH ARMY, MANPOWER, AND SOCIETY IN THE TWENTY-FIRST CENTURY* 120 (2000).

<sup>143</sup> See Sarah Lyall, *British Navy Seeks More Gays and Lesbians*, N.Y. TIMES, 23 Feb. 2001, <http://www.nytimes.com/2005/02/22/world/europe/22iht-britain.html>.

<sup>144</sup> See EMBSEHER-HERBERT, *supra* note 134, at 72–73.

<sup>145</sup> *Id.* at 74.

<sup>146</sup> See AARON BELKIN & R.L. EVANS, *EFFECTS OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE BRITISH ARMED FORCES* 26–27 (Nov. 1, 2000), available at [http://www.palmcenter.org/publications/dadt/british\\_soldier\\_motivation](http://www.palmcenter.org/publications/dadt/british_soldier_motivation) (referencing British Ministry of Defence 2000a Report).

<sup>147</sup> See BELKIN & BATEMAN, *supra* note 103, at 115.

<sup>148</sup> *Id.* at 134.

<sup>149</sup> *Id.* at 120.

Any suggestion that the U.K.'s policy has been completely successful is quite misleading. Frequently absent from the discussions of DADT opponents is the impact of resignations that occurred in the British units after the ban on gays was lifted.<sup>150</sup> In a document retrieved under the U.K.'s open records laws, a 2002 review by the British Service Personnel Board disclosed that, even though the Navy officially reported no significant problems, several senior warrant officers and NCOs immediately resigned after the policy changed.<sup>151</sup> The report also indicated that many junior members within the infantry indicated they felt "that homosexuality undermined unit or team cohesion."<sup>152</sup> Army Trooper James Wharton, an openly gay U.K. soldier, who appeared on the front cover of an official British military magazine, acknowledged that integration has created some problems because, even in the U.K., ". . . there are still people who can't accept the change."<sup>153</sup> While celebrated by many as a success, internal reviews and key insights by British officials show that the integration of homosexuals into the British military has caused some discord within the ranks.<sup>154</sup>

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<sup>150</sup> See Dominic Kennedy, *Officers Quit Navy After Forces Lifted the Ban on Gays, Secret Paper Revealed*, TIMES ONLINE, Oct. 15, 2007, <http://www.timesonline.co.uk/tol/news/uk/article2658127.ece>. Additionally, Center for Military Readiness Director Elaine Donnelly refers to public accounts whereby the British experienced some form of "recruiting and disciplinary problem" due to repealing of the ban on homosexuals in the British Armed Forces. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 926 (2007). Critics, such as Professors Frank and Belkin, minimize these accounts by stating that these are "isolated adjustment problems" that have not impacted the countries "overall military effectiveness." Jeanne Scheper et al., *The Importance of Objective Analysis on Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military*, 15 DUKE J. GENDER L. & POL'Y 419, 428 (2008). Ironically, neither Professors Frank nor Belkin acknowledge whether these incidents detrimentally impacted the military effectiveness of the individual units in which they occurred.

<sup>151</sup> See BRITISH SERVICE PERSONNEL BOARD, TRI-SERVICE REVIEW OF THE ARMED FORCES POLICY ON HOMOSEXUALITY AND CODE OF SOCIAL CONDUCT 13 (Dec. 2002), [http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact\\_studies\\_homosexuality.pdf](http://www.mod.uk/NR/rdonlyres/ACED4F62-2C04-4B19-AC50-E49552732385/0/impact_studies_homosexuality.pdf) [hereinafter BRITISH TRI-SERVICE REVIEW].

<sup>152</sup> *Id.* at 6.

<sup>153</sup> Trooper James Wharton appeared in his military uniform on the front cover of Soldier magazine, the British Army's official publication. See Terri Judd, *How the Forces Finally Learnt to Take Pride*, U.K. INDEP., July 27, 2009, <http://www.independent.co.uk/news/uk/home-news/how-the-forces-finally-learnt-to-take-pride-1762057.html>.

<sup>154</sup> In fact, some of the very concerns addressed by those opposing any change to DADT surfaced when the British changed their policy. Two and a half years after the integration, the British Army reported that while the British military had made successful changes, there were still multiple concerns regarding favoritism, benefits, and shared accommodations, all of which created concerns about the "possibility of greater problems

Wharton’s open display of gay “pride” demonstrates another stark difference between British and U.S. military cultures:<sup>155</sup> The British are far more permissive than the United States in areas such as public celebration, protest, and displays of affection while in uniform.<sup>156</sup> Examples of acceptable conduct by British soldiers include hugging and kissing in uniform and marching in uniform at public protests.<sup>157</sup> Recently, the U.K. even agreed to pay expenses for its servicemembers who marched in gay pride events,<sup>158</sup> while the branches of their armed forces actively recruited at these very same events.<sup>159</sup>

Another difference between the U.K. and the United States is the treatment of homosexual marriage. As of December 2005, homosexuals in the U.K. have had the ability to engage in civil partnerships, but not same-sex marriage.<sup>160</sup> At sixteen years of age, anyone in the U.K. desiring to enter into a civil partnership with their same-sex partner can do so, entitling the couple to the same benefits as heterosexuals.<sup>161</sup> Even with the ability to enter civil partnerships, advocates of gay marriage in the U.K. continue to push for the ability to “marry” a person of the same-sex.

#### B. The Canadian Experience

The Canadian Forces (CF) are all-volunteer, comprised of approximately 68,000 members in the active ranks and approximately

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arising during High Intensity Operations.” BRITISH TRI-SERVICE REVIEW, *supra* note 151, at 12–16.

<sup>155</sup> See Judd, *supra* note 153.

<sup>156</sup> See Jonathan Leake & Philip Cardy, *Army on Parade for Gay Recruits*, TIMES ONLINE, Aug. 28, 2005, [http://www.timesonline.co.uk/tol/news/uk/article\\_559936.ece](http://www.timesonline.co.uk/tol/news/uk/article_559936.ece).

<sup>157</sup> See STRACHAN, *supra* note 142, at 128.

<sup>158</sup> See Rupert Neate, *Gay Soldiers to be Paid Expenses for Attending Pride Marches*, TELEGRAPH.CO.UK, July 2, 2008, <http://www.telegraph.co.uk/news/newsttopics/onthe frontline/2235672/Gay-soldiers-to-be-paid-expenses-for-attending-Pride-marches.html> (last visited Apr. 1, 2010).

<sup>159</sup> *Id.*

<sup>160</sup> See Editorial, “*Gay Weddings*” *Become Law in UK*, BBC NEWS, Dec. 5, 2005, [http://news.bbc.co.uk/2/hi/uk\\_news/4493094.stm](http://news.bbc.co.uk/2/hi/uk_news/4493094.stm).

<sup>161</sup> See British Ministry of Defence, *available at* <http://www.mod.uk/DefenceInternet/AboutDefence/People/Speeches/MinAF/20100308ModernSocietyMilitaryTraditionsAndEffectiveArmedForcesInTodaysBritain.htm> (last visited Apr. 1, 2010).

20,000 in supplementary reserve ranks.<sup>162</sup> The minimum age for recruitment is 17 years-old, although a minor at the age of 16 years can join the Reserves with parental permission.<sup>163</sup> The maximum age for recruitment is 34.<sup>164</sup> The most recent deployment statistics revealed that approximately 2500 members of the CF deployed to Afghanistan during the past year.<sup>165</sup> Due to a 1992 ruling that CF's gay service ban violated Canada's Charter of Rights and Freedoms, federal courts forced the CF to lift the ban on homosexuality in the armed forces.<sup>166</sup> Like the U.K., it is impossible to determine the number of openly gay servicemembers serving in the CF because the necessary polls might constitute discrimination under Canadian law.<sup>167</sup> However, such service may be confirmed through open displays of affection, protests and rallies, and attendance at gay pride events, in which homosexual and transgender CF members may participate like their U.K. counterparts.<sup>168</sup>

Although many of the servicemembers within the CF opposed the change, the CF leadership has reported little trouble with the integration of homosexuals and transgender personnel.<sup>169</sup> However, the CF leadership has emphasized that a huge component of successful integration was "the fact that the implementation had been accomplished in a low-profile fashion, without numerous public pronouncements or media scrutiny."<sup>170</sup> In addition, while changes were slowly implemented, the CF required no mandatory sensitivity training, no demands for living in the same barracks and same bathing areas, and no "zero-tolerance"

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<sup>162</sup> See Canadian Forces, available at <http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=3240> (last visited Apr. 1, 2010) [hereinafter Canadian Forces Website].

<sup>163</sup> See CIA Field Listing: Canadian Forces Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html> (last visited Apr. 1, 2010).

<sup>164</sup> See *id.*

<sup>165</sup> See Editorial, *Canada Won't Rethink 2011 Afghanistan Pullout after Obama Win: Cannon*, CBC NEWS, Nov. 5, 2008, <http://www.cbc.ca/canada/story/2008/11/05/obama-afghanistan.html>.

<sup>166</sup> See EMBESHER-HERBERT, *supra* note 134, at 60–61.

<sup>167</sup> See Tobi Cohen, *Canada Quietly Marks Anniversary for Gays in Military While U.S. Debate Rages*, COAST REP., Oct. 24, 2009, <http://www.coastreporter.net/article/GB/20091022/CP02/310229819/-1/sechelt/canada-quietly-marks-anniversary-for-gays-in-military-while-us&template=cpArt>.

<sup>168</sup> See Editorial, *Soldiers March in Toronto Gay Pride Parade*, CBC NEWS, June 29, 2008, <http://www.cbc.ca/canada/story/2008/06/29/gay-pride.html>.

<sup>169</sup> See EMBESHER-HERBERT, *supra* note 134, at 63–64.

<sup>170</sup> *Id.*

approach to the non-acceptance of the homosexual lifestyle.<sup>171</sup> While CF military personnel were adamantly opposed to integration, those advocating for the ability to serve openly did so without the expectation that change would occur overnight or that heterosexual servicemembers would immediately accept and accommodate every demand of homosexuals who desired inclusion.<sup>172</sup>

One notable difference between the CF and the U.S. military is the required length of service for military personnel. In the CF, most personnel leave the service before the end of the first year, or once they have become eligible for a military pension—normally after 25 years of service.<sup>173</sup> Contrastingly, in the U.S. military, most personnel, unless discharged for other reasons, complete their initial military obligation, which ranges from two to five years of service.<sup>174</sup>

Unlike the United States, on 20 June 2005, Canada granted same-sex couples the ability to marry.<sup>175</sup> Since this change, same-sex marriages have been allowed and recognized in every province and territory within Canada.<sup>176</sup> Couples in Canada can opt for a civil or religious ceremony.<sup>177</sup> Recently, the first same-sex couple married in a church at a Canadian military base.<sup>178</sup> In addition, same-sex marriages, civil unions, and domestic partnerships are afforded identical benefits as heterosexual marriages, and Canada recognizes all same-sex marriages and other similar same-sex partnerships.<sup>179</sup>

While the integration of homosexuals into the CF is seemingly persuasive, the CF experience lacked the meddling of politicians and

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<sup>171</sup> See CTR. FOR MIL. READINESS, FOREIGN NATIONS THAT ACCOMMODATE HOMOSEXUALS IN THEIR MILITARIES ARE NOT AN EXAMPLE FOR AMERICA’S MILITARY (Sept. 2009), <http://cmrlink.org/CMRdocuments/CMRPolicyAnalysis-September2009.pdf> [hereinafter CMR FOREIGN MILITARIES REPORT].

<sup>172</sup> *Id.*

<sup>173</sup> See Canadian Forces Website, *supra* note 162.

<sup>174</sup> See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPPORTUNITIES IN THE ARMED FORCES (11th ed. 2010), <http://www.bls.gov/oco/ocos249.htm>.

<sup>175</sup> See Gay & Lesbian Advocates and Defenders, Canadian Marriage Facts: What Do I Need to Know About Getting Married in Canada?, Mar. 2010, *available at* <http://www.glad.org/uploads/docs/publications/canada-marriage-faq.pdf> (last visited Mar. 28, 2010) [hereinafter Canadian Marriage Facts].

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

<sup>177</sup> *Id.*

<sup>178</sup> See Editorial, *Canada’s First Same-Sex Military Wedding*, *CBC News*, CBC NEWS, Jun. 15, 2005, <http://www.alterheros.com/english/edito/index.cfm?recordID=85>.

<sup>179</sup> See Canadian Marriage Facts, *supra* note 175.

LGBT advocates jockeying for votes and support.<sup>180</sup> In fact, once ordered to integrate, external pressure and interest regarding the CF's integration of homosexuals ceased to be of concern.<sup>181</sup> However, integration of homosexuals into the U.S. armed forces appears to be but one rung on the ladder to LGBT "equality," with politicians and gay rights advocates demanding immediate results before reasoned analysis.<sup>182</sup> For these reasons, the CF experience is simply inapplicable to the repeal of DADT.

### C. The Australian Experience

The Australian military is an all-volunteer force, comprised of approximately 80,000 members.<sup>183</sup> The minimum age for recruitment is 17 years-old, although there are options for entry at 16-and-a-half years of age, with the maximum age for recruitment being 34.<sup>184</sup> The most recent deployment statistics showed that approximately 1550 members of the Australian military were deployed to Afghanistan during April 2010.<sup>185</sup> In November 1992, due to the adoption of a number of international human rights conventions in Australian domestic law, the Australian government lifted the ban on open homosexuality in the military.<sup>186</sup> In Australia, like the U.K. and Canada, data on the number of open LGBT servicemembers are severely limited by the perception that polling on sexual preference might violate antidiscrimination laws. Australia, therefore, cannot be compared to the United States situation either.<sup>187</sup> If, for example, only one hundred Australian servicemembers elected to serve openly, the issue of integration would clearly be less

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<sup>180</sup> See FRANK, *supra* note 34, at 165.

<sup>181</sup> See BELKIN & BATEMAN, *supra* note 103, at 122.

<sup>182</sup> See Michael Riley, *Dems in Congress Unwilling to Wait on Lengthy Repeal of military "Don't Ask, Don't Tell"*, DENVER POST, Apr. 21, 2010, [http://www.denverpost.com/search/ci\\_14925042](http://www.denverpost.com/search/ci_14925042).

<sup>183</sup> See Australian Recruitment Center, Age and Gender, Defense Jobs, *available at* <http://www.defencejobs.gov.au/recruitmentCentre/canIJoin/ageAndGender/> (last visited 1 Apr. 2010).

<sup>184</sup> See CIA Field Listing: Australian Military Forces Military Service Age and Obligation, *available at* <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html> (last visited Mar. 28, 2010).

<sup>185</sup> See Australia in Afghanistan, Global Collaborative, *available at* <http://gc.nautilus.org/Nautilus/australia/afghanistan/australia-in-afghanistan-q-and-a> (last visited Apr. 8, 2010).

<sup>186</sup> See FRANK, *supra* note 34, at 137.

<sup>187</sup> See generally FRANK, *supra* note 135.

concerning because it would not affect a large cross-section of the Australian armed forces.

While the Australian military opposed the change to its policy, the government implemented an immediate transition to allow homosexual and transgender personnel to serve openly.<sup>188</sup> This swift change occurred in the backdrop of a military culture that differs substantially from the U.S. military. In 2008, the Australian Navy completely shut down to provide a two month break for Christmas, demonstrating how the distinction between military and civilian life is far less prominent than in the United States<sup>189</sup> Furthermore, Australian military members are allowed to openly march in gay pride events.<sup>190</sup> Australian military forces rarely undertake long deployments, and it is common for members of these forces to return home after two or three months of deployment.<sup>191</sup> For these reasons, it cannot be said that Australia provides a roadmap for social terrain that can easily be traversed in the U.S.

#### D. The Israeli Experience

The Israeli Defense Force (IDF) is a conscripted military force.<sup>192</sup> The minimum age for entry is 18 years, with Israeli enlisted men obligated to serve 36 months, enlisted women 24 months, and officers 48 months.<sup>193</sup> The military lifted its gay ban in June 1993 after dramatic Knesset hearings prompted a public outcry against the armed forces’ exclusion of gay and lesbian soldiers.<sup>194</sup> While none of the other foreign militaries explored above have defense responsibilities similar to the

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<sup>188</sup> See EMBESHER-HERBERT, *supra* note 134, at 67–68.

<sup>189</sup> See generally CMR FOREIGN MILITARIES REPORT, *supra* note 171.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> See IDF Background Information, available at <http://www.mahal-idf-volunteers.org/information/background/content.htm> (last visited Apr. 1, 2010).

<sup>193</sup> See CIA Field Listing: Israeli Defense Forces Military Service Age and Obligation, available at <https://www.cia.gov/library/publications/the-worldfactbook/fields/2024.html> (last visited Apr. 1, 2010).

<sup>194</sup> See, e.g., MARY FAINSOD KATZENSTEIN & JUDITH REPPY, BEYOND ZERO TOLERANCE: DISCRIMINATION IN MILITARY CULTURE 235 (1999). Prior to 1980, while homosexuality was never formally prohibited in the IDF, most open homosexuals were discharged. *Id.* In 1983, the Israeli Manpower Division issued an order addressing that the military service of homosexuals would only be limited in positions regarding a security issues. *Id.*

IDF, the IDF's military responsibilities require nearly the number of personnel that the U.S. military does for its national defense.<sup>195</sup>

Interestingly, while the IDF's formal, written policy on homosexuality states that homosexual soldiers may serve openly and under conditions of equality with heterosexual servicemembers, the paper implementation of the policy vastly differs from its practical application.<sup>196</sup> Israeli culture, as well as military practices within the IDF, plays an important role in assignments to elite military forces.<sup>197</sup> Although not specifically prohibited, homosexuals are not assigned to such positions within the IDF.<sup>198</sup> Additionally, when a homosexual soldier lives in the barracks, commanders often give heterosexual soldiers the option to live off base if there are objections to rooming arrangements.<sup>199</sup> Likewise, homosexual soldiers in the IDF have the option to live on a closed post, but may request the ability to live on an open post to provide a more private living environment.<sup>200</sup> Most importantly, these provisions meld with the IDF's goal to "socialize" its men and women into society.<sup>201</sup> For these reasons, the IDF experience is inapplicable to the U.S. armed forces.

#### E. Overarching Concerns of Inapplicability

While the U.K., Canada, Australia, and Israel all allow for some degree of homosexual conduct in their militaries, the laws of each country vary, representing different ideas on the acceptability of sexual conduct. While polygamy is illegal in all four countries, it is not prosecuted in Israel because enforcement of such laws would infringe on the religious practices of the Bedouin culture.<sup>202</sup> These nations also differ in their liberal views on sexuality in general, perhaps best reflected in toleration for sexual relationships that would be entirely illegal in the United States.

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<sup>195</sup> See CMR FOREIGN MILITARIES REPORT, *supra* note 171.

<sup>196</sup> *Id.*

<sup>197</sup> See Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces; Did Lifting the Gay Ban Undermine Military Performance?*, 27 ARMED FORCES & SOC'Y 541, 553–55 (2001).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See BELKIN & BATEMAN, *supra* note 103, at 112.

<sup>202</sup> See KATZENSTEIN & REPPY, *supra* note 194, at 234–36.

In Israel, for example, while the age of consent for sexual intercourse is sixteen,<sup>203</sup> a person can enter into a sexual relationship between the ages of fourteen and sixteen as long as the age difference is not greater than three years.<sup>204</sup> In Australia and Great Britain, the age of consent is also sixteen.<sup>205</sup> Despite the Canadian age of consent at sixteen, a twelve- or thirteen-year-old can consent to sexual intercourse with a person that is up to two years older, and a fourteen or fifteen-year-old can consent to sexual intercourse with a person that is no more than five years older.<sup>206</sup> These standards are not comparable to the Uniform Code of Military Justice or most state laws in the United States.

Despite acceptance of transsexuals in some of the surveyed nations, many foreign militaries, aside from the United States, believe a transgender person suffers from a mental disorder, and prohibit entry into the service on that very basis.<sup>207</sup> It is noteworthy that supporters of DADT’s repeal compare our military to these foreign militaries, yet fail to acknowledge the major differences. Each of the above countries differs on the extent to which members of their militaries can protest in uniform, whether homosexuals can serve in certain positions, whether homosexuals and their same-sex partners can reside in military housing, whether homosexuals can marry, and whether the country recognizes same-sex marriage.<sup>208</sup>

Of the twenty-five foreign militaries that allow open homosexuality, not one country has the number of personnel, disciplinary structure, or number of global commitments as the U.S. military.<sup>209</sup> The current trend for U.S. military forces is multiple and prolonged deployments.<sup>210</sup>

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<sup>203</sup> See Worldwide Ages of Consent, Avert, available at <http://www.avert.org/age-of-consent.htm#below> (last visited Mar. 27, 2010).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

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

<sup>207</sup> KARL BRYANT & KRISTEN SCHILT, TRANSGENDER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENDER AMERICAN VETERAN’S ASSOCIATION SURVEY (2008), available at [http://www.palmcenter.org/publications/dadt/transgender\\_people\\_us\\_military](http://www.palmcenter.org/publications/dadt/transgender_people_us_military) (last visited Mar. 27, 2010).

<sup>208</sup> See generally GARY L. LEHRING, OFFICIALLY GAY 165–77 (2003).

<sup>209</sup> See generally BELKIN & BATEMAN, *supra* note 103, at 103–37.

<sup>210</sup> See LEONARD WONG & STEPHEN GERRAS, THE EFFECTS OF MULTIPLE DEPLOYMENTS ON ARMY ADOLESCENTS (Jan. 2010), <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=962> (last visited Apr. 4, 2010). General Charles Campbell, Commander of U.S. Army Forces Command, stated in the forward to this article that “[m]ultiple deployments have become a way of life for our Soldiers.” *Id.*

Because of this high op-tempo, many U.S. servicemembers spend significant parts of their lives in close proximity to their peers, and have little, if any, privacy.<sup>211</sup> While foreign militaries may have experienced few difficulties implementing their repeal of prohibitions on open homosexual service, there is hardly a guarantee that the U.S. military, with its significant differences will respond in a similar manner.

## VII. Inconsistent and Undefined Terms will Limit the Reach of DADTs Repeal

### A. The Federal Defense of Marriage Act

Enacted in 1996, the Federal Defense of Marriage Act (DOMA) defines marriage at the federal level.<sup>212</sup> The legislative intent for DOMA was to protect the institution of traditional marriage as well as the rights of states to recognize same-sex unions.<sup>213</sup> The second section of DOMA affords states the ability to recognize homosexual marriages or other similar same-sex relationships, but does not require such recognition.<sup>214</sup> Because DOMA defines marriage in this manner, only heterosexual marriages are guaranteed federal benefits under the law, while states may permit or limit the benefits of homosexual relationships.<sup>215</sup> The third section of DOMA is most applicable to DADT's repeal because it defines marriage:

In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is husband or wife.<sup>216</sup>

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<sup>211</sup> See discussion *supra* Part V.A.

<sup>212</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)) [hereinafter DOMA].

<sup>213</sup> See H.R. REP. NO. 104-664, at 1-18 (1996) ("The legislative history reflects congressional concern about the effect that legalizing same-sex 'marriage' in Hawaii would have on other states, federal laws, the institution of marriage, traditional notions of morality, and state sovereignty.").

<sup>214</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>215</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

<sup>216</sup> 1 U.S.C. § 7; 28 U.S.C. § 1738C.

In the absence of this provision, under the Full Faith and Credit Clause,<sup>217</sup> states might otherwise be required to recognize same-sex marriages contracted in different states, affording those marriages the benefits and protections conferred on heterosexual married couples.<sup>218</sup> These provisions have been frequently litigated in the federal courts, with one of the most recent cases filed in the District of Massachusetts.<sup>219</sup>

For much the same reason that DOMA has entered the federal courts, DOMA raises important concerns about the interpretation of military crimes and military privileges, which are addressed below. At the more global level, however, conflicts between various states have helped to shed light on the broader array of considerations.

#### B. Interstate Concerns

Even though DOMA does not bar states from instituting homosexual marriage or other similar same-sex relationships, thirty-seven states have their own Defense of Marriage Acts (DOMAs) with two additional states defining “marriage” as an act that can only be accomplished between one man and one woman.<sup>220</sup> Similarly, at least thirty states have passed constitutional amendments defining marriage as an act that can be accomplished only between one man and one woman.<sup>221</sup> Only five states have responded differently to DOMA, effectively permitting same-sex marriage.<sup>222</sup> Thus far, Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont are the only states that have legalized same-sex

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<sup>217</sup> U.S.CONST. art. IV, § 1.

<sup>218</sup> See Julia Halloran McLaughlin, *DOMA and the Constitutional Coming Out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC’Y 145, 150 (2009).

<sup>219</sup> On 6 May 2010, the Federal District Court in Boston will hear the case of *Gill et al. v. Office of Pers. Mgmt.* In this case, the Gay & Lesbian Advocates and Defenders (GLAD), on behalf of eight married same-sex couples and three surviving spouses, asserts that “DOMA Section 3 violates the federal constitutional guarantee of equal protection as applied to federal income taxation, Social Security benefits, and federal employee and retirement benefits.” See GLAD’s DOMA Challenge Heads to Court May 6, Apr. 8, 2010, available at <http://www.glad.org/current/news-detail/glads-doma-challenge-heads-to-court-may-6/> (last visited Apr. 8, 2010).

<sup>220</sup> See DOMA Watch, Issues by State, available at <http://www.domawatch.org/stateissues/index.html> (last visited Mar. 28, 2010) [hereinafter DOMA issues].

<sup>221</sup> See DOMA Watch, Marriage Amendment Summary, available at <http://www.domawatch.org/amendments/amendmentssummary.html> (last visited Mar. 28, 2010).

<sup>222</sup> See DOMA Issues, *supra* note 220 (listing Massachusetts, New Jersey, New Mexico, New York, and Rhode Island).

marriage.<sup>223</sup> While New Hampshire and Vermont passed legislation, Massachusetts, Connecticut, and Iowa legalized marriage as the result of court decisions.<sup>224</sup> California, for a short time, permitted gay marriage as the result of a ruling by the State's highest court.<sup>225</sup> However, voters soon prohibited the practice.<sup>226</sup>

More revealing than the institution of DOMAs in the majority of states are the conflicts that have arisen from spouses in homosexual relationships who have relocated to other states. A representative sample of conflicts includes recognition of adoptions,<sup>227</sup> child support/visitation,<sup>228</sup> inheritance, healthcare insurance, and decision-making authority. Because military families are inherently mobile, moving from one state to another as the result of military need,<sup>229</sup> the federal DOMA and state DOMAs will significantly impact homosexual military members, especially if the military recognizes forms of homosexual marriages or other unions that a majority of states have legally rejected. Historically, and today, the military has been concerned with "preventive law" and the desire to eliminate the number of legal conflicts experienced by servicemembers to permit them to focus on their military duties. In this light, Army Regulation 27-3, *The Legal Assistance Program*, which addresses the need for Army preventive law programs, observes: "Personal legal difficulties may cause low morale and disciplinary problems and may adversely affect combat readiness. Prompt legal assistance in resolving these difficulties is an effective

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<sup>223</sup> *See id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See generally* California DOMA Watch, available at <http://www.domawatch.org/stateissues/california/index.html> (last visited Mar. 28, 2010) (highlighting the key controversial cases and timeline of same-sex marriage in California).

<sup>226</sup> *See id.* *See also* discussion *supra* Part II and notes 29 and 30.

<sup>227</sup> In Maine, a non-biological lesbian partner won the right to have full parental rights and responsibilities when the child's biological mother attempted to terminate the legal relationship. Both women were involved in raising the child. Maine's highest court ruled it is the parent-child relationship, and not just the biological or adoptive relationship, that governs the best interests of the child. *See C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004).

<sup>228</sup> The parties T.F. and B.L., two lesbian women, decided to have a child together, with both parents agreeing to raise the child. However, the partners separated prior to the child's birth. The Massachusetts Supreme Court held that the non-biological parent does not have an obligation to support the child, even though she agreed to do so. *See T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004).

<sup>229</sup> Although servicemember relocations may vary and servicemembers typically are able to request certain duty assignments and locations, military needs ultimately dictate the servicemember's place of assignment.

preventive law measure.”<sup>230</sup> The military recognition of homosexual marriage in geographic duty locations where non-federal jurisdictions may lawfully and simultaneously prohibit the same invites legal conflicts in servicemembers’ lives and violates the very principles embodied in the ages-old concept of preventive law.

Servicemembers in long-term homosexual relationships, particularly ones with children, will inevitably face complex and, potentially, recurring legal issues as they move around the world. Unfortunately, these problems will not only cause morale issues, but they will also keep Soldiers in court, in legal offices, and, at the very least, not focused on the mission. Furthermore, attorneys will require education in these complex legal issues, which, by their nature, require a level of expertise not easily learned.

#### VIII. Constitutional Considerations

##### A. The Right to Engage in Consensual Sodomy, Under Certain Circumstances, Does Not Support DADT’s Repeal

Historically, the military prohibited consensual and forcible sodomy, even though it was not until the 1920 Articles of War that the single act of sodomy became a criminal offense.<sup>231</sup> Article 125 of the Uniform Code of Military Justice now criminalizes all consensual and forcible acts of “unnatural carnal copulation with another person of the same or opposite sex.”<sup>232</sup> Under a plain reading of the statute, acts of sodomy are criminal whether “consensual or forcible, heterosexual or homosexual, public or private.”<sup>233</sup> A servicemember may receive a dishonorable discharge and five years of confinement even for totally consensual acts that fall under Article 125’s sodomy prohibitions.<sup>234</sup>

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<sup>230</sup> U.S. DEP’T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM ¶ 2-1, 3 (21 Feb. 1996). *See also* U.S. DEP’T OF ARMY, REG. 600-14, PREVENTATIVE LAW PROGRAM ¶ 1, at 1 (10 Jan. 1963) (“An effective program will result in the saving of countless man-hours now used in remedial counseling and the processing of courts-martial and administrative actions. Further, this program will enhance the morale, efficiency, and prestige of the individual soldier.”). Other services recognize this same mandate. *See, e.g.*, Lieutenant Colonel Michael A. Rodgers, *Preventive Law Programs: A SWIFT Approach*, 47 A.F. L. REV. 111 (1999) (applying this principle to the U.S. Air Force).

<sup>231</sup> *See* FRANK, *supra* note 34, at 5.

<sup>232</sup> UCMJ art. 125.

<sup>233</sup> *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

<sup>234</sup> UCMJ art. 125.

In 2003, the Supreme Court issued its historic *Lawrence v. Texas* ruling, which invalidated state sodomy statutes on the basis of the right to engage in adult, private, consensual sexual activity.<sup>235</sup> While, under various circumstances, sodomy can still be punished, such as acts in the course of prostitution or accomplished in a situation where consent could not be obtained, the holding severely restricted the reach of most American criminal statutes.<sup>236</sup> Shortly after *Lawrence*, the U.S. Court of Appeals for the Armed Forces (CAAF) issued its own decision regarding consensual sodomy in the military.<sup>237</sup> In *United States v. Marcum*, Technical Sergeant Marcum engaged in acts of sodomy with a junior servicemember under his direct supervision, while both men were off-post and off-duty.<sup>238</sup> Upon finding Marcum “not guilty of forcible sodomy, but guilty of consensual sodomy,”<sup>239</sup> a panel of officer and enlisted members sentenced Marcum to “confinement for 10 years, a dishonorable discharge, total forfeitures, and reduction to the lowest enlisted grade.”<sup>240</sup>

Using the rationale provided in *Lawrence*, the CAAF upheld the constitutionality of Article 125, asserting that the *Lawrence* Court “did not expressly identify the liberty interest as a fundamental right.”<sup>241</sup> In applying the decision in *Lawrence* to *Marcum*, the CAAF explained that “. . . an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life.”<sup>242</sup> Accordingly, the CAAF refused to recognize “a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right.”<sup>243</sup> The CAAF, in *Marcum*, while applying the decision in *Lawrence*, essentially held that all homosexual sexual conduct is not prohibited by Article 125.<sup>244</sup> Additional cases addressing sodomy, occurring in public or linked to adulterous behavior, have established that *Lawrence* and *Marcum* do not permit all instances of

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<sup>235</sup> 539 U.S. 558 (2003).

<sup>236</sup> *See id.* at 578.

<sup>237</sup> *See generally Marcum*, 60 M.J. at 198.

<sup>238</sup> *Id.* at 200.

<sup>239</sup> *Id.* at 201.

<sup>240</sup> *Id.* at 199.

<sup>241</sup> *Id.* at 205.

<sup>242</sup> *Id.* at 206.

<sup>243</sup> *Id.* at 205.

<sup>244</sup> *Id.* at 206.

sodomy committed by servicemembers.<sup>245</sup> Reconciliation of these cases, therefore, requires careful analysis of the conduct surrounding any given sexual act performed in the military environment.<sup>246</sup> Those urging that *Lawrence* mandates the repeal of DADT incorrectly imply that the policy of DADT and Article 125 are somehow co-dependent.<sup>247</sup> The CAAF’s analysis in *Marcum* assists in demonstrating the flaws in such an argument.<sup>248</sup>

In addressing whether *Lawrence* applied to the set of facts in *Marcum*, the CAAF identified three questions to determine the constitutionality of Article 125. First, the CAAF assumed that Marcum’s private, consensual sex with another man fell within the liberty interest prescribed in *Lawrence* because the panel found Marcum guilty of non-forcible sodomy.<sup>249</sup> Second, the CAAF analyzed whether Marcum’s conviction of non-forcible sodomy encompassed any conduct outside the liberty interest identified by the *Lawrence* Court.<sup>250</sup> Drawing attention to the Air Force fraternization policy and Marcum’s potential violation of a lawful order under Article 92, the CAAF explained how Marcum’s consensual sexual acts with an adult fell outside the zone of protection established by *Lawrence*.<sup>251</sup> Here, the CAAF stated “. . . this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.”<sup>252</sup> Comparing Marcum’s consensual sexual conduct with a subordinate to an act in

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<sup>245</sup> See *United States v. Johns*, 2007 WL 2300965 (A.F. Ct. Crim. App. 2007) (holding that Article 125 was constitutional as applied to consensual *heterosexual* sodomy between an accused servicemember and the wife of another deployed servicemember because of the effect on good order and discipline).

<sup>246</sup> See generally *Marcum*, 60 M.J. at 207 (observing that “the nuance of military life is significant”).

<sup>247</sup> See Mick Meehan, *Military Ban on Gays Turns Ten*, Dec. 18, 2003, available at [http://www.palmcenter.org/press/dadt/in\\_print/military\\_ban\\_on\\_gays\\_turns\\_ten](http://www.palmcenter.org/press/dadt/in_print/military_ban_on_gays_turns_ten) (last visited 29 Mar. 2010) (quoting Pat Logue, legal director at Lambda Legal Defense, “I am convinced that Article 125 is unconstitutional and there has been no compelling argument on the part of the military why there should be restrictions on private sexual conduct.”). See also Palm Center Press Documents, *Legal Scholars Question whether Sodomy Ruling will Affect Military Gay Ban*, 26 Jun. 2003, available at <http://www.palmcenter.org/files/active/0/LegalScholarsQuestionWhetherSodomyRulingWillAffectBan6-26-03.pdf> (last visited Mar. 29, 2010) (“The Government has just lost its weapon of mass destruction. . . . As of today, all sodomy laws are unconstitutional.”).

<sup>248</sup> See generally *Marcum*, 60 M.J. at 198.

<sup>249</sup> *Id.* at 207.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 208.

<sup>252</sup> *Id.* at 209 (citing *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)).

which a person “might be coerced” or “where consent might not easily be refused,” the CAAF held that Article 125 was constitutional as it applied to *Marcum*.<sup>253</sup>

*Lawrence* and *Marcum* highlight the flaws in DADT opponents’ assertion that *Lawrence* granted a fundamental right to engage in homosexual acts, thereby making Article 125 unconstitutional. *Lawrence*, in fact, granted a personal liberty interest under the Due Process Clause, and not a fundamental liberty under the Equal Protection Clause.<sup>254</sup> Under the Due Process Clause, the determination of whether a liberty interest is reasonably related to a legitimate government interest requires a low level of scrutiny.<sup>255</sup> By holding the Texas anti-sodomy statute unconstitutional, but caveating that the facts in *Lawrence* did not involve certain types of conduct, the Supreme Court implied that a state may have a legitimate interest in regulating private sexual conduct under certain circumstances.<sup>256</sup> Given the nature of excepted circumstances defined by *Lawrence* and the military’s need to maintain good order and discipline, the military’s criminalization of private, consensual sodomy under Article 125 indeed meets the low level of scrutiny required to withstand a constitutional challenge.<sup>257</sup>

Opponents of DADT further argue that *Lawrence* prohibits the punishment of consensual sodomy under Article 125 and allows the practice of open homosexuality.<sup>258</sup> These arguments are equally flawed; they confuse the policy of DADT with the rationale for criminalizing acts of sodomy. While consensual sodomy between adults is not criminal under the facts in *Lawrence*, in other circumstances, consensual sodomy between adults in the military is still a crime.<sup>259</sup> Along the same lines permitting these sodomy punishments—the “fundamental necessity for obedience, and the consequent necessity for imposition of discipline”<sup>260</sup>—other acts which may be permitted in civilian society are,

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<sup>253</sup> *Id.* at 208 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

<sup>254</sup> *Id.* at 205.

<sup>255</sup> *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 818 (2008) (“Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases.”).

<sup>256</sup> *Marcum*, 60 M.J. at 206.

<sup>257</sup> *Id.* at 208.

<sup>258</sup> See *supra* note 241 and accompanying text.

<sup>259</sup> *Marcum*, 60 M.J. at 207.

<sup>260</sup> See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render

nonetheless, criminal in the military, including desertion,<sup>261</sup> disrespect to superiors,<sup>262</sup> adultery,<sup>263</sup> and disobeying orders.<sup>264</sup>

The *Lawrence* and *Marcum* decisions deal with the ability to criminalize consensual sexual acts between consenting adults and not with the military’s ability to enforce policies necessary to maintain good order and discipline.<sup>265</sup> In recognition of unique military needs, the Supreme Court has routinely upheld the armed forces’ ability to enforce policies and procedures that reduce servicemembers’ abilities to engage in otherwise constitutionally permissible conduct.<sup>266</sup> Although it is legal for a citizen to possess adult pornography that is not obscene, military commanders may prohibit servicemembers from displaying pornography in barracks rooms or common living areas,<sup>267</sup> on government computers,<sup>268</sup> or from possessing pornography in certain deployed areas.<sup>269</sup> While it may also be permissible for a civilian to possess and display adult pornography, the military prohibits this conduct to protect the good order and discipline of military units.<sup>270</sup> On this basis, and in

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permissible within the military that which would be constitutionally impermissible outside it.”).

<sup>261</sup> UCMJ art. 85 (2008). *See also* United States v. Deller, 12 C.M.R. 165 (C.M.A. 1953) (affirming conviction of an accused for intending to permanently avoid “completion of basic training and useful service as a soldier”).

<sup>262</sup> UCMJ art. 89. *See also* United States v. Najera, 52 M.J. 247 (C.A.A.F. 2000) (holding that an accused’s statement to a superior commissioned officer, “You can’t make me, you can give me any type of discharge you want, you can give me a DD, I would rather have a dishonorable discharge than return to training, I refuse,” made in a manner that was “contemptuous, cocky, and sarcastic,” was disrespectful and sufficient to find the accused guilty of violation Article 89, UCMJ.)

<sup>263</sup> UCMJ art. 134. *See also* United States v. Green, 39 M.J. 606 (A.C.M.R. 1994) (holding that acts of adultery in the barracks were prejudicial to good order and discipline).

<sup>264</sup> UCMJ art. 92. *See also* United States v. Kisala, 64 M.J. 50 (C.A.A.F. 2007) (upholding the lawfulness of a direct order to receive an anthrax vaccination in the absence of any notice by the Secretary of Defense because the anthrax vaccine was not an investigational drug).

<sup>265</sup> *See* United States v. Marcum, 60 M.J. 198, 208 (C.A.A.F. 2004).

<sup>266</sup> *See* Parker v. Levy, 417 U.S. 733, 758 (1974).

<sup>267</sup> *See* AR 600-20, *supra* note 49, ¶ 4-12c (“Commanders have the authority to prohibit military personnel from engaging in or participating in any other activities that the commander determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to, the authority to order the removal of symbols, flags, posters, or other displays from barracks. . . .”).

<sup>268</sup> *See* U.S. DEP’T OF ARMY, REG. 25-1, ARMY KNOWLEDGE MANAGEMENT AND INFORMATION TECHNOLOGY ¶ 6-1.f(1) (4 Dec. 2008) [hereinafter AR 25-1].

<sup>269</sup> *See* Headquarters, Dep’t of Army, Gen. Order No. 1 (4 Apr. 2009).

<sup>270</sup> *See generally* AR 600-20, *supra* note 49.

furtherance of the need to promote good order and discipline, if DADT is repealed, the military could still prohibit acts of sodomy under certain conditions or in certain locations.<sup>271</sup> In repealing DADT, the military could prohibit any sexual display or act of homosexuality in the barracks, common areas, or other military areas on an installation. Therefore, contrary to assertions made by opponents of DADT, Congress could decriminalize sodomy and yet prohibit openly homosexual behaviors if doing so protects the good order and discipline of the armed forces.

#### B. *Voir Dire* Will Result in Discord Among Military Units Following DADT's Repeal

Repealing DADT will likely result in additional criminal cases involving issues of homosexuality, especially considering the increased number of sexual assaults since women were integrated into various occupational specialties.<sup>272</sup> In addressing these concerns, some legislators have referred to the explosive rates of sexual assault as a “horrifying” trend in the armed forces.<sup>273</sup> With an increase in homosexual behaviors after a repeal of DADT, logically, homosexual servicemembers will participate in courts-martial as either victims or witnesses. Likewise, considering the already existing problem of homosexual assaults,<sup>274</sup> it is unlikely that there will be no further criminal

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<sup>271</sup> See *United States v. Marcum*, 60 M.J. 199, 202 (C.A.A.F. 2004). The military’s imposition of limitations on acts of sodomy under certain circumstances would apply equally to heterosexuals and homosexuals. See UCMJ art. 125 (“Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.”) (emphasis added).

<sup>272</sup> Sexual assaults against women have drastically increased over the past three years. In 2009, there were 2302 unrestricted reports of sexual assault against women. 2009 DOD SAPR REPORT, *supra* note 106, at 89. In 2008, there were 2105 unrestricted reports of sexual assaults against women. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 79 (Mar. 2009) [hereinafter 2008 DOD SAPR REPORT]. In 2007, there were 1355 unrestricted reports of sexual assaults against women. U.S. DEP’T OF DEF., REPORT, SEXUAL ASSAULT PREVENTION AND RESPONSE 32 (Mar. 2008) [hereinafter 2007 DOD SAPR REPORT].

<sup>273</sup> See *Testimony before the House Oversight and Government Reform Subcommittee on National Security and Foreign Affairs’ Oversight Hearing on Sexual Assault in the Military* (July 31, 2008) (Rep. Louise Slaughter, Chairwoman, House Comm. on Rules).

<sup>274</sup> In 2009, there were 190 same-gender sexual assaults. 2009 DOD SAPR REPORT, *supra* note 106, at 89. In 2008, there were 132 same-gender sexual assaults. 2008 DOD SAPR REPORT, *supra* note 272, at 79. In 2007, there were 152 same-gender sexual assaults. 2007 DOD SAPR REPORT, *supra* note 272, at 32.

acts committed by homosexual servicemembers in the wake of a repeal of DADT.

Although homosexuality is not frequently encountered at courts-martial, most likely due to the stigma of DADT, military courts-martial do, at times, involve homosexuality.<sup>275</sup> In these cases, appellate courts have typically supported a military judge’s decision to completely prohibit or substantially curtail evidence that may expose the sexual orientation of a servicemember based on the severe consequences of admissions in violation of DADT.<sup>276</sup> By repealing DADT and removing such roadblocks, counsel may have more leniency to inquire about a witness’ or accused’s homosexuality.

In addition to possible changes of permissible questions for witnesses and victims, the repeal of DADT would necessitate changes to *voir dire*. A functioning military justice system requires a court-martial free from bias and partiality.<sup>277</sup> In courts-martial, *voir dire* is the primary method for the military judge and counsel to “ferret out facts” and “make conclusions about panel members’ sincerity,” and, furthermore, “adjudicate members’ ability to sit as part of a fair and impartial panel.”<sup>278</sup> Upon electing trial by members, an accused exercises the right to seat a panel free of outside influences.<sup>279</sup> Through *voir dire*, the military judge and counsel can acquire spontaneous information from the members about the essential issues related to the case.<sup>280</sup>

In certain cases, bias may prevent a servicemember from sitting as a panel member.<sup>281</sup> When a member demonstrates either actual or implied bias, the bias may impermissibly infringe on an accused’s right to a fair

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<sup>275</sup> See, e.g., *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009); *United States v. Elfayoumi*, 66 M.J. 354 (C.A.A.F. 2008); *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

<sup>276</sup> *Collier*, 67 M.J. at 353.

<sup>277</sup> MCM, *supra* note 19, R.C.M. 912(f)(1)(N). See also *United States v. Brown*, 13 M.J. 890 (A.C.M.R. 1982) (holding position as law enforcement officer, absent any additional evidence of bias, is insufficient to challenge a member for cause).

<sup>278</sup> *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008).

<sup>279</sup> See, e.g., *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987) (“We find it difficult to believe that either appellant or the public could be convinced that he received a fair trial when he was not apprised of the fact that a member of the staff judge advocate’s family was sitting on his court-martial.”).

<sup>280</sup> MCM, *supra* note 19, R.C.M. 912(d) Discussion.

<sup>281</sup> See *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001).

trial by members.<sup>282</sup> Actual bias deals with a panel member's specific beliefs:<sup>283</sup> "The test for actual bias is 'whether any bias is such that it will not yield to evidence presented and judge's instructions.'"<sup>284</sup> In determining whether a panel member's actual bias is sufficient to challenge him or her for cause, the military judge will evaluate the member's "credibility and demeanor."<sup>285</sup>

Alternatively, implied bias is "intended to address the perception or appearance of fairness of the military justice system."<sup>286</sup> Implied bias exists when a reasonable person in the panel member's position could not fairly evaluate the evidence or listen and adhere to the military judge's instructions.<sup>287</sup> Viewed objectively, through the eyes of the public, this inquiry addresses whether a person outside the court-martial process would have reservations about the impartiality of the court-martial.<sup>288</sup> If a reasonable person could listen to the trial proceedings and evaluate the evidence in a fair and impartial manner, regardless of his or her personal beliefs, the military judge will most likely deny a challenge for cause.<sup>289</sup>

Repealing DADT could impact the *voir dire* process by exposing a member's personal beliefs in opposition to the repeal of DADT, which could promote a hostile environment for members of the unit who are privy to the member's comments. Because the topic of homosexuality can evoke emotions grounded in moral and religious beliefs,<sup>290</sup> most cases now involving homosexual issues require extensive *voir dire* to ensure that personal beliefs do not affect one's ability to evaluate the evidence.<sup>291</sup> In these cases, *voir dire* about members' personal and

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<sup>282</sup> *Id.* See also *United States v. Napoleon*, 46 M.J. 279, 282–84 (C.A.A.F. 1997).

<sup>283</sup> *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005).

<sup>284</sup> *Napoleon*, 46 M.J. at 284 (internal citations omitted).

<sup>285</sup> *Id.*

<sup>286</sup> *Wiesen*, 56 M.J. at 174.

<sup>287</sup> See *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000).

<sup>288</sup> See *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999).

<sup>289</sup> *Id.*

<sup>290</sup> See *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008).

<sup>291</sup> For example, in the case of *United States v. Elfayoumi*, the following line of questioning by the military judge was sufficient to ensure that the member's personal beliefs did not affect his ability to evaluate the evidence:

- MJ: Earlier you indicated you had some strong objections to homosexuality?  
MEM: That is correct, sir.  
MJ: Could you explain a little bit about that.

religious beliefs may be necessary.<sup>292</sup> Ordinarily, personal moral and religious beliefs are insufficient to challenge a member for cause.<sup>293</sup> When a member expresses the “capacity to hear a case based on the four corners of the law and as instructed by the military judge,” that member is presumed to have the ability to fairly and impartially hear the case and follow the military judge’s instructions.<sup>294</sup>

*Voir dire* after DADT’s repeal may very well impact the command climate for an entire unit based on the open nature of a court-martial.<sup>295</sup>

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- MEM: I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it.
- MJ: You notice . . . on the [charge sheet] that the word “*homosexual*” is not there?
- MEM: Yes, sir.
- MJ: But there is male on male sexual touching alleged.
- MEM: Yes, sir.
- MJ: Let’s say we get to sentencing and the accused is convicted of some or all of the [offenses]. . . . Let’s talk about these offenses involving indecent assault and the forcible sodomy. If it got to that point in the trial and the accused was convicted of some or all of those offenses, do you think you could fairly consider the full range of punishments?
- MEM: Yes, sir.
- MJ: Do you think you could honestly consider not discharging the accused even with that kind of conviction?
- MEM: I would have a hard time with that, sir.
- MJ: Could you consider it though?
- MEM: Yes, sir.
- MJ: After hearing the entire case, you wouldn’t [categorically] exclude that?
- MEM: No, sir.
- MJ: Now understanding there may be administrative . . . consequences and we all know those, but as a court member, that’s not your concern. Do you understand that?
- MEM: Yes, sir.

*Elfayoumi*, 66 M.J. at 355 (emphasis added).

<sup>292</sup> *Id.* at 356.

<sup>293</sup> *Id.* at 357 (“The law anticipates this human condition. Thus, the question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law. . . .”).

<sup>294</sup> *Id.*

<sup>295</sup> MCM, *supra* note 19, R.C.M. 806 (“Except as otherwise provided in this rule, courts-martial *shall* be open to the public.”) (emphasis added).

Currently, those expressing personal or religious opposition to homosexuality are essentially stating beliefs that are congruent with the military's DADT policy.<sup>296</sup> By reflecting aspects of existing law, the members' position reiterates the military's policy that "homosexuality is incompatible with military service."<sup>297</sup> After repeal of this policy, those very panel members will have personal and moral religious beliefs that exist in stark contrast to the military's official position. A panel member who shares her opposition to the new policy under oath, and who is personally or religiously opposed to homosexuality, will be forced to choose between disclosing an opinion that appears discriminatory and contradictory to military policy, providing an equivocal answer, or rationalizing a politically-correct response that may conceal the whole truth. Because of the public nature of military courts-martial, closing the court-martial to save face will not likely be a viable option.<sup>298</sup>

Assuming that a court-martial member would answer questions about homosexuality honestly, and that the court-martial would remain open, there is great potential for negative effects resulting from public disclosure of a member's personal, moral, and religious beliefs. Generally, military panels are composed of senior officer and enlisted servicemembers, many of whom hold leadership positions.<sup>299</sup> Junior servicemembers, who desire to abide by the military's new policy, may view the policy as a triumph in antidiscrimination and expect their commanders to uphold the Army's official positions. These servicemembers may be surprised or offended to learn about the divergence between a leader's closely-held beliefs and military initiatives.

For example, consider the situation where two panel members sit on the same case with one in the supervisory chain of the other. The junior

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<sup>296</sup> A panel member's opposition to homosexuality is not at odds with the military's policy concerning homosexuality in the armed forces. *See generally* 10 U.S.C. § 654 (2006) (DADT).

<sup>297</sup> *Id.* § 654(a).

<sup>298</sup> *See United States v. Short*, 41 M.J. 42, 43 (C.M.A. 1994) ("The right to an open and public court-martial is not absolute, however, and a court-martial can be closed to the public . . . . Nonetheless, 'exclusion must be used sparingly with the emphasis always toward a public trial.'" (citing *United States v. Grunden*, 2 M.J. 116, 120 (C.M.A. 1977)). *See also MCM, supra* note 19, R.C.M. 806.

<sup>299</sup> UCMJ art 25(d)(2) (2008) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

member is personally opposed to homosexuality, while the senior member is homosexual. The senior member hears the junior member disclose moral and religious opposition to homosexuality. Although the junior member is the most successful and talented officer in the organization, this experience leads the senior member to downgrade the junior member’s officer evaluation report, subtly through mediocre comments. Additionally, word about the junior officer’s personal beliefs becomes public knowledge within his unit based on shared observations from the bailiffs, escorts, and viewers in the gallery. Other homosexual soldiers become upset upon knowing the junior officer’s personal beliefs, causing mounting tension within the unit. As a result of these combined factors, the command climate within the unit deteriorates. Homosexual Soldiers avoid the junior officer for fear that he is homophobic and will penalize them, ironically, in much the same way he was penalized by his rater. Evidence of this dissatisfaction appears in command climate surveys, disregard for the junior officer’s orders, and speculative gossip perpetuated about the junior officer.

The previous example is only one way in which *voir dire* could negatively impact a command climate in the aftermath of a repeal of DADT. At the very outset, policymakers must determine whether the military can withstand the consequences of open homosexual service. If the answer is affirmative, will any precautions or protections exist to prevent *voir dire* from fractionalizing military units and perpetuating a sense of distrust, homophobia, or a hostile environment for both homosexual servicemembers and opponents of repeal who undergo inquiry? Must the military judge and counsel be required to inquire into each member’s sexual preference at the outset of cases in order to address these types of issues, or will selected panel members be required to disclose their sexual preference on panel questionnaires in the absence of the existing prohibition? These are precisely the types of questions required by the constitutional right to a fair trial. Worse yet, any distraction and concern caused by simple answers to the most basic questions about one’s beliefs will only be multiplied as additional questions are propounded on the same issue.

#### IX. Marital Privilege and Military Rule of Evidence 504

Although no legislation explicitly applies DOMA to the military, at the recent Armed Service Committee Hearings, Representative Howard P. “Buck” McKeon, the ranking Republican on the House Armed

Services Committee, along with several other political representatives, debated whether DOMA would extensively limit the military's ability to provide benefits to gay spouses.<sup>300</sup> While Secretary Gates declined to comment on whether DOMA would apply, supporting this discussion, Mr. Austin Nimocks, a lawyer for the Alliance Defense Fund, explained, "It's most likely under the current scenario that the military would follow DOMA because the marriage license held by a same-sex couple is a state-conferred right and not a federal-conferred right."<sup>301</sup> Because DOMA provides federal definitions for "marriage"<sup>302</sup> and "spouse,"<sup>303</sup> a servicemember's same-sex marriage would likely be eligible for federal benefits predicated upon a state-recognized relationship.<sup>304</sup> The DOMA was enacted precisely to prevent this type of result.<sup>305</sup>

The application of DOMA to same-sex marriages also raises significant concerns regarding MRE 504's provisions on marital privilege. Although MRE 504 has neither explicitly applied nor rejected DOMA's definition of marriage, DOMA applies to all federal laws,<sup>306</sup> defining "marriage" as "a legal union exclusively between one man and one woman."<sup>307</sup> It further defines a spouse as "a husband or wife of the opposite sex."<sup>308</sup> By restricting the definition of marriage and spouse, DOMA prohibits same-sex partners from receiving over 1138 federal benefits normally derived from a marriage under federal law.<sup>309</sup> One

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<sup>300</sup> See Rowan Scarborough, Group Wants Same Military Benefits for Gay Spouses, Mar. 8, 2010, available at <http://www.washingtontimes.com/news/2010/mar/08/group-wants-same-military-benefits-for-gay-spouses//print/> (discussing comments by Rep. McKeon regarding a potentially "wide diversity of benefits between legally married heterosexual couples and families and legally married gay couples and families").

<sup>301</sup> *Id.*

<sup>302</sup> "Marriage" under DOMA is defined as the "legal union exclusively between one man and one woman." 1 U.S.C. § 7 (2006).

<sup>303</sup> "Spouse" under DOMA is defined as "a husband or a wife of the opposite sex." *Id.*

<sup>304</sup> In enacting DOMA, Congress supported three underlying rationales: (1) protecting the "institution of marriage," (2) the birth of children to heterosexual married couples, and (3) state sovereignty. H.R. REP. NO. 664 (1996), reprinted in 1996 U.S.C.C.A.N. at 2905, 2916, 2920.

<sup>305</sup> *Id.*

<sup>306</sup> 1 U.S.C. § 7.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> See The Economics of Equal Marriage, The National Organization for Women (June 2009), available at [http://www.now.org/issues/marriage/marriage\\_economics\\_factsheet.pdf](http://www.now.org/issues/marriage/marriage_economics_factsheet.pdf) (last visited Apr. 2, 2010).

such benefit is marital privilege.<sup>310</sup> This is an important evidentiary consideration.

As an exception to the general rule that all relevant evidence is admissible at courts-martial,<sup>311</sup> the spousal privileges provided by MRE 504(a) and (b)(1) solely exist to protect and preserve the confidence and trust involved in a recognized marital relationship.<sup>312</sup> This rule provides two distinct privileges to protect the marital relationship.<sup>313</sup> First, under MRE 504(a), a legally married person has the right to refuse to testify against a spouse about private information exchanged during the marital relationship.<sup>314</sup> To invoke this privilege, a valid marriage must exist at the time of trial.<sup>315</sup> Upon proof of a valid marriage, the witness-spouse decides whether to testify against the accused spouse.<sup>316</sup> The second privilege contained in MRE 504 protects confidential communications made during a valid marriage.<sup>317</sup> Under this provision, one spouse may prevent the other spouse from testifying about such communications made during a valid marriage, even after the termination of the marital relationship.<sup>318</sup> Ironically nowhere in the text of the rule is a valid marriage defined.<sup>319</sup>

If DOMA is applicable to the military, then repeal of DADT may adversely affect the application of privileges provided for under MRE 504(a) and (b)(1). The federal definitions in DOMA could preclude application of marital privileges to same-sex couples because “marriage” and “spouse” are defined in a manner only applicable to heterosexual relationships.<sup>320</sup> Furthermore, military courts cannot simply redefine terminology or create a similar privilege for same-sex couples because it is the President—not members of the military justice system—who has the authority to create a new privilege.<sup>321</sup> Therefore, if DOMA remains

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<sup>310</sup> *Id.*

<sup>311</sup> *See* United States v. Custis, 65 M.J. 366, 370–71 (C.A.A.F. 2007).

<sup>312</sup> *See id.* at 371.

<sup>313</sup> MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>314</sup> *Id.* MIL. R. EVID. 504(a).

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* MIL. R. EVID. 504(b).

<sup>318</sup> *See* United States v. McCollum, 53 M.J. 323, 337 (C.A.A.F. 2003).

<sup>319</sup> *See generally* MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>320</sup> *See supra* notes 298–300 and accompanying text.

<sup>321</sup> *See* United States v. Custis, 65 M.J. at 372. *See also* McCollum, 58 M.J. at 342 (holding that the question of whether an exception to a particular privilege applies “is a legal policy question best addressed by the political and policy-making elements of the

in effect after a repeal of DADT, servicemembers practicing open homosexuality in a same-sex marriage may be unable to invoke privilege under MRE 504(a) or (b)(1).

An oft-neglected concern related to same-sex spouses is the problem of domestic violence and spousal abuse. In 2006, several studies conducted by the National Coalition Against Domestic Violence revealed twelve major cities across the United States in which there were reports of 3534 cases of domestic violence between same-sex couples (including incidents ranging from verbal and physical abuse to sexual assault).<sup>322</sup> In comparison, in Fiscal Year 2007, out of 708,178 military couples, domestic abuse reports surfaced in 15,260 cases referred to the Department of Defense Family Advocacy Program.<sup>323</sup> One may infer from these reports that, in the wake of a repeal of DADT, some incidence of crime between same-sex couples is likely, whether or not these couples are married or involved in another kind of same-sex relationship. When cases involving same-sex marriages are brought to courts-martial, MRE 504's lack of clarification on privileges could substantially impact the evidence at trial as well as the marital relationship. Over the past seven years alone, MRE 504 has resurfaced in litigation five times before the military's highest court, reflecting the complexity of these evidentiary issues, even on matters of heterosexual spousal privilege.<sup>324</sup>

If DOMA is repealed and a new privilege is created for same-sex marriages, civil unions, and other same-sex partnerships, the resulting impact may prove equally as disruptive to the military justice system. The privileges under MRE 504 "reflect a delicate balance between

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government"). *See also* United States v. Rodriguez, 54 M.J. 156, 160-61 (C.A.A.F. 2000) (recognizing the scope and limitations on those privileges not specified in the Military Rules of Evidence rest with the President, and not the courts).

<sup>322</sup> *See* KIM FOUNTAIN & AVY SKOLNIK, NATIONAL COALITION ANTI-VIOLENCE PROGRAM REPORT (2007), [http://www.ncavp.org/common/document\\_files/Reports/files/Reports/2006NationalDVReport\(Final\).pdf](http://www.ncavp.org/common/document_files/Reports/files/Reports/2006NationalDVReport(Final).pdf). The twelve cities covered in this report were Tucson, San Francisco, New York, Denver, Los Angeles, Chicago, Boston, Minneapolis, Kansas City, Columbus, Philadelphia, and Houston. *Id.*

<sup>323</sup> *See* Information Paper, Child Abuse and Domestic Abuse Data Trends from Fiscal Year 1998 to Fiscal Year 2007, available at [http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF\\_DETAIL\\_0?current\\_id=20.20.60.70.0.0.0.0.0](http://www.militaryhomefront.dod.mil/portal/page/mhf/MHF/MHF_DETAIL_0?current_id=20.20.60.70.0.0.0.0.0) (last visited Apr. 3, 2010).

<sup>324</sup> *See, e.g.,* United States v. Durbin, 68 M.J. 271 (C.A.A.F. 2010); United States v. Custis, 65 M.J. 366 (C.A.A.F. 2007); United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003).

competing interests: the desire to admit helpful evidence at trial and the public’s interest in protecting certain relationships or information.”<sup>325</sup> However, MRE 504 is far more restrictive than federal marital privilege, suggesting that the intent behind MRE 504 was to minimize the amount and type of evidence withheld from the trier-of-fact.<sup>326</sup> Because the privileges listed under MRE 504 are an exception to the type of evidence a military courts-martial may consider, expanding the scope of the privilege to cover same-sex partnerships may drastically reduce the amount of evidence available at courts-martial. This may also cause military courts-martial to spend substantially more time evaluating the status of personal relationships rather than the criminal allegations.

The most disturbing result of creating a privilege similar to MRE 504(a) is the potential for unwanted disclosures. Even prior to the current hearings on the repeal of DADT, “outing” of a homosexual servicemember by a “jilted lover” has caused extreme discomfort with the military leadership opposed to open homosexuality in the military.<sup>327</sup> Because, under MRE 504(a), the holder of the privilege is the witness-spouse and not the accused, in certain cases,<sup>328</sup> recognition of a new privilege might allow a same-sex partner to intentionally expose an accused’s homosexual practices, even in instances when the accused makes a conscious decision to conceal his or her sexual orientation.

The military’s prohibitions on the open practice of homosexuality has prevented military courts from addressing whether same-sex marriages, civil unions, or other same-sex partnerships are entitled to the privileges provided for under MRE 504. Based on DOMA’s limitations and the military courts’ inability to create new privileges, it is unlikely that military courts will apply the privileges contained in MRE 504 to same-sex relationships unless the President provides a specific privilege for same-sex marriages.<sup>329</sup> Therefore, if DOMA is applied to the

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<sup>325</sup> STEPHEN A. SALTZBURG ET AL., *MILITARY EVIDENTIARY FOUNDATIONS* 304 (4th ed. 2007).

<sup>326</sup> *See* *United States v. James*, 63 M.J. 217, 220 (C.A.A.F. 2006) (holding that the rules of statutory construction require analysis of the Military Rules of Evidence in particular, rather than in general).

<sup>327</sup> *See* Dan Popkey, *Gay Boise Air Force Pilot “Outed” by False Accusation*, *IdahoStatesman.com*, Aug. 23, 2009, available at <http://www.idahostatesman.com/2009/08/23/874410/gay-boise-air-force-pilot-outed.html> (last visited Mar. 28, 2010) (“Secretary of Defense Gates is voicing misgivings about discharging personnel identified by third parties with questionable motives.”).

<sup>328</sup> MCM, *supra* note 19, MIL. R. EVID. 504.

<sup>329</sup> *See supra* note 317 and accompanying text.

military, and if it remains the federal law, repealing DADT without addressing such shortfalls could severely limit the application of evidentiary privileges under MRE 504.

## X. Military Criminal Statutes

### A. Adultery

Repeal of DADT may pose problems for commanders and courts wishing to apply the adultery statute because of the anatomical differences between men and women. Because adulterous behavior potentially impacts the cohesion, morale, and readiness of a military unit by devaluing the institution of marriage and the military family,<sup>330</sup> commanders may punish these acts if they are prejudicial to good order and discipline or service discrediting.<sup>331</sup> As Article 134 provides, the offense of adultery criminalizes sexual intercourse between a married person and another person who is not the lawful spouse.<sup>332</sup>

If DOMA is applicable to the military and remains in force after the repeal of DADT, those servicemembers practicing open homosexuality and engaging in adulterous acts might evade punishment for adulterous acts as they are currently defined. In proving the crime of adultery, the Government must establish that “the accused or the other person was married to someone else.”<sup>333</sup> However, in a definition of marriage, such as the one in DOMA, same-sex relationships would be excluded from the statute’s reach.<sup>334</sup> Imagine a commander faced with a homosexual Soldier engaged in adulterous acts with the knowledge of the unit. The offending Soldier is legally married to another male in the state of Massachusetts. Although the commander wants to prefer charges for adultery, he cannot because the military does not recognize the Soldier’s marriage to another male absent a new legislative enactment. Inevitably, this type of result may create significant problems for unit morale, especially by perpetuating an unequal standard that punishes heterosexual Soldiers for engaging in nearly identical conduct.

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<sup>330</sup> See, e.g., *United States v. Green*, 39 M.J. 606 (A.C.M.R. 1994) (holding that acts of adultery in the barracks were prejudicial to good order and discipline).

<sup>331</sup> See, e.g., *Solorio v. United States*, 483 U.S. 435, 452–55 (1987).

<sup>332</sup> See UCMJ art. 134 (2008).

<sup>333</sup> *Id.*

<sup>334</sup> See 1 U.S.C. § 7 (2006). See also *supra* notes 298–300 and accompanying text.

Even if DOMA is repealed in the wake of DADT’s repeal, the manner in which federal law distinguishes between same-sex marriage, civil unions, and other same-sex partnerships may prove troublesome. Civil unions and domestic partnerships are defined differently from state to state.<sup>335</sup> A domestic partnership, as defined by one state, may be accorded virtually every benefit as another state’s same-sex civil union, while a domestic partnership in another state may be entitled to very limited benefits.<sup>336</sup> Specifically, if policymakers treat civil unions differently from other same-sex partnerships, adulterous acts occurring outside those partnerships could still fail to meet the elements of adultery. This result would create separate standards for similar homosexual relationships, perpetuating fundamental concerns of fairness. In certain cases, there is at least a possibility that different standards for homosexual adultery could encourage homosexual partners to forum-shop for a state that would accord military financial benefits while evading the culpability that would accrue for adulterous conduct.<sup>337</sup>

Regardless of the federal definition of marriage, determining the sexual act necessary to commit adultery will be problematic in the wake of DADT’s repeal. To prove adultery, the Government must currently establish “[t]hat the accused wrongfully had sexual intercourse with a certain person.”<sup>338</sup> However, sexual intercourse is not defined under the offense of adultery.<sup>339</sup> In fact, the only definition for sexual intercourse is located under the previous version of Article 120, providing for “any penetration, however slight, of the female sex organ by the penis.”<sup>340</sup> By this definition, sexual intercourse cannot refer to homosexual sex because it requires the coupling of a “female sex organ” and a “penis.”<sup>341</sup>

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<sup>335</sup> See McLaughlin, *supra* note 218, at 150.

<sup>336</sup> See Human Rights Campaign, Questions About Same-Sex Marriage, *available at* <http://www.hrc.org/issues/5517.htm> (last visited Apr. 2, 2010) (“Domestic partner laws have been enacted in California, Maine, Hawaii, Oregon, Washington and the District of Columbia. The benefits conferred by these laws vary; some offer access to family health insurance, others confer co-parenting rights. Some offer a broad range of rights similar to civil unions.”).

<sup>337</sup> As addressed by the author in this section, concerns about adulterous acts have also been raised in military cases addressing heterosexuals.

<sup>338</sup> UCMJ art. 134 (2008).

<sup>339</sup> See *id.*

<sup>340</sup> *Id.* art. 120, amended by National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256. Article 120 was previously known as “Rape and carnal knowledge” and addressed forcible sexual intercourse. *Id.* The current Article 120 redefines sexual intercourse as a sexual act. UCMJ art. 120.

<sup>341</sup> *Id.*

Unless sexual intercourse is redefined, only adulterous acts of heterosexual intercourse will be punishable under the current offense of adultery.

Even though homosexual acts do not meet definitional requirements of adultery, some may argue that the General Article 134 provides a means to charge the adulterous acts of homosexuals involved in same-sex relationships.<sup>342</sup> While the General Article 134 sometimes permits analogies to defined crimes for non-enumerated criminal conduct, it cannot be said that the UCMJ is silent on such conduct.<sup>343</sup> While the UCMJ defines “sexual acts” to include a penis inserted into a vagina,<sup>344</sup> Article 120 further expands the definition of sexual acts to reach either “contact between the penis and the vulva” or “penetration, however slight, of the genital opening.”<sup>345</sup> Article 120 further defines “sexual contact” as “intentional touching . . . of the genitalia, anus, groin, breast, inner thigh, or buttocks.”<sup>346</sup> With incongruous definitions smattered among different UCMJ articles, it becomes far more difficult to resolve the question of punishments for homosexual adulterous behavior.

To highlight the problem of inconsistent standards, consider that one of the servicemembers in each of the following examples is involved in a same-sex marriage and further that the related conduct is prejudicial to the good order and discipline of a unit. In the first scenario, a homosexual male servicemember uses his penis to penetrate another male servicemember’s anus. In the second scenario, a lesbian servicemember uses her fingers and another device to penetrate another female’s vagina. In the third scenario, a bisexual male servicemember uses his penis to penetrate another female servicemember’s vagina, making contact with the vulva. In the fourth scenario, a homosexual male servicemember engages in fellatio on another male servicemember.<sup>347</sup> In the fifth scenario, a lesbian servicemember gives fellatio to another female. Each of these examples demonstrates how the gender of the servicemember could potentially result in a different result

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<sup>342</sup> *Cf.*, Kesler, *supra* note 128, at 334 (making a similar argument regarding polygamy and bigamy).

<sup>343</sup> See generally Major Howard H. Hoeger, III, *Flying Without a Net: United States v. Medina & Its Implications for Article 134 Practice*, ARMY. LAW., June 2008, at 37.

<sup>344</sup> UCMJ art. 120.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> Such conduct is currently criminalized under Article 120 and Article 125. *Id.* art. 120; *id.* art. 125.

under the current crime of adultery. In the first scenario, penetration of the anus by the penis is a sexual contact, and not sexual intercourse.<sup>348</sup> In the second scenario, penetration of the vagina by a finger or another device constitutes a sexual act and not a sexual intercourse.<sup>349</sup> In the third scenario, penetration of a vagina by a penis is the very definition of sexual intercourse.<sup>350</sup> In the fourth and fifth scenarios, fellatio and cunnilingus comprise sexual contact<sup>351</sup> as well as sodomy.<sup>352</sup>

In light of these examples, adulterous acts by homosexuals may not be punishable under the current crime of adultery. Using the most recent definitions provided in Article 120, acts of homosexual sex—such as anal sex—are sexual contacts or sodomy, and not sexual acts.<sup>353</sup> Hence, by virtue of the offender’s gender and anatomy, homosexual acts outside the union lead to potentially different results. Redefining adultery to include sexual contact is just as troublesome. Additionally, criminalizing sexual contact between homosexuals for the purpose of the crime of adultery would subject homosexuals to criminal punishment for a less serious act than the crime of heterosexual adultery; with heterosexual adultery acts of sexual contact are not sufficient to prove adultery.<sup>354</sup> Amending the crime of adultery to include sexual contact instead of sexual intercourse, therefore, would completely change the scope of acts punished under this crime.

To permit different standards for ostensibly the same conduct, which would hold females or males less culpable based on anatomical differences promotes a result that marriage is a less important institution

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<sup>348</sup> *Id.* art. 120a(t)(2) (“Sexual contact means the intentional touching, either directly or through the clothing, of the . . . anus . . . of another person . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>349</sup> *Id.* art. 120a(t)(1)(B) (“Sexual act means the penetration, however slight, of the genital opening of another by a hand or a finger or an object . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>350</sup> *Id.* art. 120a(t)(1)(A) (“Sexual act means contact between the penis and the vulva. . . however slight.”).

<sup>351</sup> *Id.* art. 120a(t)(2) (“Sexual contact means the intentional touching, either directly or through the clothing, of the . . . genitalia. . . of another person . . . with the intent to . . . arouse or gratify the sexual desire of any person.”).

<sup>352</sup> *Id.* art. 125. *See also* *United States v. Henderson*, 34 M.J. 174 (1992) (holding that Article 125(a) includes acts of fellatio). Although *Henderson* dealt with consensual acts of heterosexual fellatio, years before the decision in *Lawrence*, the court stated that fellatio “fell within the scope of Article 125. *Id.*”

<sup>353</sup> *See supra* notes 347–52 and accompanying text.

<sup>354</sup> *See* *United States v. Williams*, 25 M.J. 854 (A.F.C.M.R. 1988), *pet. denied*, 27 M.J. 166 (C.M.A. 1988).

for some servicemembers than for others. Moreover, on the issue of marital sanctity, an entirely separate concern arises in relation to lesbian reproductive rights.

It is generally the case that lesbian couples desire to raise children over the course of long-term relationships.<sup>355</sup> Because it is physically impossible for two women to impregnate one another without the involvement of male sperm, debates now rage in LGBT communities about how lesbian couples should bear children. Although artificial insemination is a possible avenue to impregnation, the scholarship surrounding lesbian parenting reveals that many lesbian mothers desire to know and involve the donor in aspects of the child's life, sometimes like an uncle.<sup>356</sup> In some cases, because of concerns about privacy, or for other reasons, lesbian couples turn to gay male friends to accomplish the task, oftentimes through intercourse rather than a medical professional.<sup>357</sup> In the military, more than other environments, it is a very real possibility that lesbian servicemembers will enlist male Soldiers in the act of impregnation.<sup>358</sup> Exemplifying the position that the involvement of donors usually depends on "what's available,"<sup>359</sup> policymakers should address the concern of extramarital sexual intercourse for the purpose of impregnation and whether restrictions on these practices would interfere with the reproductive rights of lesbian servicemembers involved in unions or marriages.

Proponents of repealing DADT may argue that the concerns regarding adultery are unfounded because adultery occurs frequently among heterosexual servicemembers, and it is rarely prosecuted at courts-martial. This argument fails to address two key points. First, the military justice system, and the commanders responsible for it, must have

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<sup>355</sup> Heather Conrad & Kate Colwell, *Creating Lesbian Families*, in *DYKE LIFE*, *supra* note 119, at 149, 152 (Karla Jay ed., 1995) ("Getting pregnant is often the first choice of lesbians who want children, but it can be a complex process.").

<sup>356</sup> *Id.* at 153 (describing benefits of using a "known" versus an "unknown" donor).

<sup>357</sup> *Id.* at 155 (addressing complex situations that arise where the "sperm does not go through a doctor"); *id.* ("Some lesbians have gay friends who can be approached as potential donors, and ads in the gay press looking for sperm donors are another popular route.").

<sup>358</sup> An incentive for straight servicemembers might be the pleasure of intercourse rather than depositing their sperm into a Petri dish, a fact that many lesbians desirous of children would surely capitalize on.

<sup>359</sup> Conrad & Colwell, *supra* note 355, at 155 ("Sometimes the choice of donors can be made on philosophical principle, but often it comes down to pragmatic decisions about what's available.").

the ability to adequately deal with instances of misconduct that directly impact the morale, welfare, and discipline of a unit.<sup>360</sup> If same-sex marriages, civil unions, and other same-sex partnerships are not held to the same standard as heterosexual marriages, then commanders lack the ability to deal with potentially similar criminal acts in a like manner. This inability to address heterosexual and homosexual adultery in a similar manner may cause commanders to question the value of punishing *any* acts of adultery even when detrimental to the morale, welfare, and discipline of a unit. Unequal treatment by commanders toward servicemembers may also increase the number of congressional inquiries or other types of complaints, causing the military leadership to spend more time justifying its decisions than on preparing its servicemembers to perform their mission.

The argument that repealing DADT will not impact the offense of adultery also fails to consider that the concept of monogamy in homosexual relationships is sometimes different than in heterosexual relationships.<sup>361</sup> Several studies indicate that same-sex marriages, civil unions, and other same-sex partnerships have a much higher incidence of infidelity and promiscuity.<sup>362</sup> While multiple sexual liaisons can be seen as a detriment on grounds of loyalty to one’s partner, they can simultaneously be seen as a celebration of one’s sexual orientation.<sup>363</sup> Consider the account of a married man and woman regarding the meaning of their extramarital liaisons:

In the years before their marriage, Lori had a serious relationship with another woman, and Steven with another man. Their marriage now is a home invention that they describe as “body-fluid monogamous.” In conversation, they discuss condoms as matter-of-factly as the weather. Lori has an ongoing sexual relationship with another man and is looking for another woman; Steven has a friendship with a man that is sometime sexual. Lori says “At the time that I was coming out I was more interested in men, and now I’m more interested in women.” Steven is “much more interested” in men right now. He still has sex with his wife, but he

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<sup>360</sup> See generally UCMJ art. 134 (2008).

<sup>361</sup> See DAVID H. DEMO ET AL., HANDBOOK OF FAMILY DIVERSITY 73 (2000).

<sup>362</sup> See *id.* at 74–80.

<sup>363</sup> *Id.*

now identifies himself as gay, though he calls himself a “once and future bisexual.”<sup>364</sup>

While, certainly, no set standard applies to a given homosexual couple, the prominence of these practices in gay, lesbian, and bisexual culture requires serious consideration.

Ultimately, if DADT is repealed and the military recognizes same-sex marriage, military commanders may have a need to hold servicemembers accountable for these adulterous acts, especially when they directly impact the morale, welfare, and discipline of a unit.<sup>365</sup> Unequal treatment by commanders toward servicemembers may increase the dissension among unit members and detract from those servicemembers performing their assigned duties.

#### B. Bigamy and Polygamy

Although bigamy and polygamy—both of which relate to marriage of one person with multiple spouses—have been used “interchangeably” in various state criminal statutes,<sup>366</sup> “technical differences” exist between the two terms.<sup>367</sup> “Bigamy” generally defines entrance “into a marriage with one person while still legally married to another,”<sup>368</sup> while “polygamy” generally defines “marriage in which a spouse of either sex may have more than one mate at the same time.”<sup>369</sup> Polygamy, differs from bigamy in that the spouses and children of a polygamous relationship often form one family, whereas the spouses married to a bigamist are likely unaware of the multiple marriages.<sup>370</sup> Under Article 134, the offense of bigamy criminalizes wrongfully marrying two spouses at the same time if the conduct is prejudicial to the good order and discipline of the unit or service discrediting.<sup>371</sup> Although the

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<sup>364</sup> John Leland et al., *Bisexuality Emerges as a New Sexual Identity*, in *BISEXUALITY IN THE UNITED STATES* 560–61 (Paula C. Rodriguez Rust, ed. 2000).

<sup>365</sup> See generally UCMJ art. 134.

<sup>366</sup> Ryan White, Note, *Two Sides of Polygamy*, 11 J. L. FAM. STUD. 447, 449 (2009).

<sup>367</sup> Timothy K. Clark, Note, *Criminal Law and Procedure: A Child Bigamy Amendment*, 2004 UTAH L. REV. 278, 279 (2004).

<sup>368</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 120 (11th ed. 2003).

<sup>369</sup> *Id.* at 962.

<sup>370</sup> See DAVID P. MCWHIRTER & ANDREW M. MATTISON, *THE MALE COUPLE: HOW THE MALE RELATIONSHIP DEVELOPS* 8 (1985).

<sup>371</sup> UCMJ art. 134 (2008).

criminal act of polygamy is not explicitly covered under the UCMJ, polygamy is a federal crime and most likely punishable under the general Article 134.<sup>372</sup>

In contemplating these acts, similar to the problem for adultery, the version of bigamy prohibited by the UCMJ requires a “lawful spouse” and that “the accused wrongfully married another person.”<sup>373</sup> Because DOMA does not recognize a same-sex marriage as a valid marriage or the persons involved in those same-sex partnerships as spouses, a servicemember could have multiple same-sex partnerships without technically committing the offense of bigamy. Also similar to adultery, the reasoning for prohibition of both bigamy and polygamy arises from the need to preserve the sanctity of a marital union. After all, multiple simultaneous marriages have been recognized as an assault on the virtues of marriage since 1788, when such acts were punishable, even by death.<sup>374</sup>

Repealing DADT may pose significant problems in the military by inviting conduct amounting to bigamy and polygamy. If DOMA is applicable to the military after DADT’s repeal, persons engaged in multiple same-sex marriages could not be charged for bigamy as it is currently defined. The repeal of DADT creates concerns of bigamy and polygamy because multiple sexual relationships are often central to homosexual practice.<sup>375</sup> Importantly, because most states have defense of marriage statutes, preventing the recognition of same sex marriages and unions among different states, homosexuals can easily enter into unions and/or marriages to different partners in different geographic

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<sup>372</sup> See *id.* art. 134 (cl. 3).

<sup>373</sup> *Id.* art. 134 (defining adultery).

<sup>374</sup> See *Reynolds v. United States*, 98 U.S. 145, 165 (1879) (observing further “we think it may safely be said that there never has been a time in any state of the Union when polygamy has not been an offence against society . . .”).

<sup>375</sup> See MARJORIE GARBER, *BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 480 (2000):

To me the special pleasure in a threesome wasn’t in me screwing one and then the other, but that all three people were interrelated. It was especially exciting if the two women had homosexual relations. By the way, none of the girls had a homosexual history. Our threesomes were an introduction for all of them. For anyone, getting close to your erotic nature involves homosexuality. I never had a triangle with another man. I almost did back in those days, but I realized my prejudice against it.

locations with practically no threat of civil criminal prosecution for conduct that would be criminal in heterosexual relationships.<sup>376</sup> This conduct is worthy of attention because homosexual marriage or civil unions, if recognized by the military, will potentially result in multiple financial and other incentives. As highlighted in the illuminating chapter of *Dyke Life*, “Lesbian Marriage Ceremonies: I do,” author Kitty Tsui identifies various “entitlements” of marriage, potentially including,

. . . foster care advantages, custody and visitation rights for nonbiological parents, and divorce protection . . . health insurance coverage . . . [t]he sharing of Social Security benefits, veterans’ benefits, and inheritance (barring a prenuptial agreement) . . . legal protections for hospital visitation privileges, survivorship benefits, and housing rights . . . the ability to invoke immunity from testifying against a spouse . . . residency in the United States [for a foreigner who marries a citizen] . . . and [the ability to] apply for priority citizenship.<sup>377</sup>

Given the many windfalls that could result solely from the act of marriage, it is foreseeable that openly practicing LGBT servicemembers might attempt to avail themselves of marriage or civil union benefits more than once, evident in the existing problem of “sham” or “convenience” marriages.<sup>378</sup>

Whether bigamy or polygamy could be charged under the General Article 134 would depend on the military’s recognition of same-sex marriage, civil unions, and domestic partnership equivalents of heterosexual marriage. A decision not to recognize same-sex marriage would remove it from the ambit of bigamy prohibitions, permitting a servicemember to have multiple same-sex partnership arrangements. In such a case, this behavior could only be punished if it became known throughout the unit or caused others to view the military in a more negative light.

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<sup>376</sup> *E.g.*, DAVID RAYSIDE, QUEER INCLUSIONS, CONTINENTAL DIVISIONS: PUBLIC RECOGNITION OF SEXUAL DIVERSITY IN CANADA AND THE UNITED STATES 148 (2008) (“By the time of the 2004 election, thirty-eight states had defense of marriage statutes on the books denying recognition to same-sex marriages performed elsewhere.”).

<sup>377</sup> Tsui, *supra* note 119, at 115.

<sup>378</sup> *E.g.*, United States v. Phillips, 32 M.J. 268, 270 (C.A.A.F. 2000) (addressing the connection between homosexuality and “sham” marriages).

As in the case of adultery, a byproduct of DADT’s repeal may be the promotion of bigamy and polygamy. Here, the military’s tolerance of open homosexuality and same-sex marriages or partnerships would remove the rationale for prohibiting the same conduct among heterosexual married couples. While advocates for gay marriage criticize this notion, challenging such arguments as the byproduct of uninformed homophobia,<sup>379</sup> the concern is supported by recent events in Europe. In 2001, the Netherlands became one of the first countries to permit same-sex marriages and civil unions.<sup>380</sup> Just four years later, the same county permitted the first civil union of three people, in direct contrast to prohibitions on bigamy and polygamy.<sup>381</sup> The rationale provided for this unprecedented development was the fact that relationships defined by homosexual civil unions were not sanctioned marriages, and, therefore, were not eligible for treatment as polygamy or bigamy.<sup>382</sup> Similar arguments pervaded the polygamy trial of Tom Green, a “self-proclaimed ‘fundamentalist Mormon’” who was sentenced to six years confinement for the crimes of bigamy and child rape. In Green’s trial, supporters of Green’s right to be “married” to five different women and father twenty-nine children defended his acts on much the same basis in the Utah criminal courts as advocates for same-sex marriage have in courtrooms across the United States.<sup>383</sup>

If policymakers repeal DADT on the rationale that the private lives of servicemembers will not measurably impact the military mission, it will be difficult for them to prevent servicemembers from marrying or entering civil unions with multiple consenting partners. The incentives for such behavior may be too tempting for entrepreneurial gay couples to ignore, especially if they perceive that resulting benefits might represent backpay for the costs of suppressing their sexuality while serving under DADT. Despite arguments that homosexual bigamy and polygamy should be permitted, it is hard to fathom how a commander could punish a heterosexual servicemember for marrying two people, but simultaneously allow a homosexual servicemember to have multiple civil unions. Even considering the objective of political correctness, the negative and fractionalizing impact on military units, disrespect for the

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<sup>379</sup> See EMBSER-HERBERT, *supra* note 134, at 34.

<sup>380</sup> See Paul Belien, *First Trio “Married” in the Netherlands*, BRUSSELS J., Sept. 27 2005, at 11.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> See Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love is Many Splendored Thing,”* 15 DUKE J GENDER L. & POL’Y 315, 330 (2008).

sanctity of martial unions, and negative public perception of the military would weigh heavily against such allowances.

### C. Wrongful Cohabitation

Another offense prohibited by Article 134 is the crime of wrongful cohabitation, which requires the Government to establish that, although unmarried, two servicemembers are living “together as husband and wife.”<sup>384</sup> Unlike the crime of adultery, no requirement exists for an actual marriage.<sup>385</sup> Although infrequently prosecuted at courts-martial, the crime of wrongful cohabitation remains important to maintaining good order and discipline within the military. As the Air Force Court of Criminal Appeals explained, cohabitation can be wrongful in military settings in certain circumstances because, “knowledge or problems associated with [an accused’s] cohabitation with a woman not his wife [could] impact good order and discipline in the unit or bring discredit on the Air Force.”<sup>386</sup>

Unless DOMA is repealed in conjunction with DADT, cohabitation between same-sex partners could create incentives for wrongful cohabitation. Like the crimes of adultery and bigamy, wrongful cohabitation would not be chargeable in same-sex partnerships because it requires the Government to establish the partners acted as “husband and wife.”<sup>387</sup> Repeal of DADT with the allowance for same-sex partners to cohabit would result in some conduct amounting to wrongful cohabitation, especially in situations where sexual relationships develop between same-sex roommates. By allowing same-sex partners to reside together and receive benefits without a formal marriage, some unmarried heterosexual servicemembers may demand similar treatment, which would be a crime under military law.

Without clarifying the interplay between repeal of DADT, different forms of homosexual unions short of marriage, and eligibility for various benefits, obtaining financial benefits without a formal marriage for some homosexual servicemembers may simply amount to living in a

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<sup>384</sup> UCMJ art. 134 (2008).

<sup>385</sup> *Id.*

<sup>386</sup> *United States v. Bristol*, No. 36956, 2009 CCA WL16204436 (A.F. Ct. Crim. App. 11 June 2009) (unpublished).

<sup>387</sup> *See generally supra* Part X.A, B, & C.

partnership-like arrangement, making it difficult to distinguish wrongful cohabitation from sincere partnerships. If the military allows same-sex servicemembers to cohabit with less than formalized marriage, it is unclear the extent to which this conduct will impact unmarried homosexual servicemembers who are involved in long-term committed relationships. Without detailed studies of whether and how the military might afford benefits to same-sex marriages, civil unions, and domestic partnerships—similar to BAH fraud cases—a hasty repeal of DADT will limit the military’s ability to prevent fraud. Same-sex cohabitation, held-out as a spousal relationship, will ultimately raise issues of wrongful cohabitation and create the potential for widespread and systemic abuses.

## XI. Other Policy Considerations

### A. Analogies Between Repeal of DADT and Racial Integration are Misplaced

The debates surrounding repeal of DADT often include analogies between homosexuals and African-Americans. Advocates of repeal point to the military’s experience with racial integration in the 1950s as a model for the inclusion of open homosexuals.<sup>388</sup> The fact that these efforts worked, despite fears that racial integration would fail (mainly based on similar concerns over shared living arrangements) foreshadows the success of DADT repeal, they argue.<sup>389</sup> Although the analogy represents wishful thinking and highlights attributes of the military’s forward-thinking during times of cross-racial angst in America, it is entirely misplaced.

In considering this faulty analogy between race and sexual preference, policymakers must keep three important facts in mind. First, the analogy fails because it draws no distinction between immutable

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<sup>388</sup> See, e.g., Kesler, *supra* note 128, at 300–01, 336–61. See also FRANK, *supra* note 34, at 61 (“Racial integration was a challenge, but not an impossibility. In fact, desegregation was ordered and implemented *even though* it cause enormous problems with cohesion, morale, and discipline.”); BELKIN & BATEMAN, *supra* note 103, at 83 (“I believe that in the short run, issues and processes of integration would arise that would be similar to those encountered in the integration of African-American men in the past.”); COMMANDER ARTHUR M. BROWN, DON’T ASK, DON’ TELL: INEVITABLE REPEAL 11 (2008) (quoting President William J. Clinton’s comparison between the challenges of DADT and “racial integration of the military”).

<sup>389</sup> See Kesler, *supra* note 128, at 300–01, 336–61.

characteristics at birth, such as the color of one's skin, and premeditated acts over which a person has control. Perhaps Professor Stephen Saltzburg addressed this issue best during the congressional hearings regarding open homosexuality in the military:

There is a difference; and that is that sexual orientation does go to the core of one's being. It does influence most of us in the kinds of actions that we want to take and activities that we want to engage in. And I think anyone who would deny that is denying what psychologists and psychiatrists and sociologists tell us about human motivation.<sup>390</sup>

Aside from the involuntary nature of, perhaps, one's identity and inner feelings of affinity for the same sex, homosexual behavior is purely the result of choice.<sup>391</sup> If one can be a heterosexual and yet simultaneously abstain from sexual activity, then one's sexuality is an entirely separate issue from physical action. The great number of virgins in society tend to prove this point, including those who are adolescent and prepubescent and those who elect not to engage in sexual activity, even after they have achieved the age of maturity.<sup>392</sup>

Second, living together with members of different races does not necessarily involve exposure to particular sexual practices or behaviors. Nor does it involve a religious or moral component the way homosexuality does. Making these assumptions about race, as DADT opponents often do, requires these advocates to adopt a prejudiced and stereotypical view.<sup>393</sup> While I too have suggested that one should not equate homosexuality with particular sexual acts,<sup>394</sup> any authorization of homosexual acts or marriages in the armed forces raises a unique set of

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<sup>390</sup> Professor Stephen Saltzburg, Testimony at 1993 Congressional Hearings on Impact of Homosexuality in the Armed Forces (June 22, 1993), *available at* <http://dnt.stanford.edu/regulations/HomosexualityDebate.html> (highlighting the difference in this debate regarding prior integration of racial minorities and the potential integration of homosexuals).

<sup>391</sup> CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* 249–52 (1996).

<sup>392</sup> *See, e.g.*, HUNTER, *supra* note 45, at 29; Stephanie A. Sanders & June Machover Reinisch, *Would You Say You "had sex" If . . . ?*, 281 J. AM. MED. ASS'N 275, 276 (1999).

<sup>393</sup> *See, e.g.*, Kesler, *supra* note 128, 300–01, 336–61. *See also* FRANK, *supra* note 34, at 161–62.

<sup>394</sup> *See supra* Part I.

considerations for shared communal environments, including showers and sleeping bunks, that do not arise in the context of racial integration.

With permission to engage in homosexual acts and to conduct open homosexual romances—including kissing, fondling, flirting, and other courting behaviors—to the extent that these activities occur in the presence of heterosexual servicemembers, such actions may be offensive and invasive to heterosexuals precisely because they relate to *acts* rather than one’s personal identity.<sup>395</sup> Some heterosexuals, who have moral or religious opposition to homosexuality object to homosexual conduct, not how a person self-identifies. These heterosexuals may feel particularly vulnerable or compromised whenever they sleep or expose their bodies during the course of normal living arrangements, not because the person in the same room self-identifies as gay or lesbian, but rather because that person is permitted to engage in homosexual acts, which are separate from their innermost affinity.

Third, comparisons to racial integration in the 1950s are extremely limited because these early experiments in military society occurred during a lull in international armed conflict.<sup>396</sup> The Second World War had come to an end<sup>397</sup> and the Korean War would not come about for two years.<sup>398</sup> In America, this time period was considered to be one of economic growth, as post-war industries profited and veterans used their college and housing benefits in unprecedented numbers.<sup>399</sup> Consequently, the military, during this time, had the opportunity to incrementally integrate the services and to evaluate changes that might be necessary. Even though President Truman gave the directive to integrate African Americans in 1948, it was not until 1953 that all Army units had completely desegregated.<sup>400</sup> Presently, we have neither the luxury of time nor the luxury of international stability. A common sentiment, even from those in the military who would wish to eliminate DADT, is that such efforts should wait until a time when it is possible to

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<sup>395</sup> See Gregory M. Herek, *Gender Gaps in Public Opinion About Lesbians and Gay Men*, 66 PUB. OPINION Q. 40, 41–66 (2002).

<sup>396</sup> Charlie C. Moskos, Jr., *Racial Integration in the Armed Forces*, 72 AM. J. SOC. 132, 132–35 (1976). President Truman issued his executive order to integrate African Americans into the armed forces on 28 July 1948. *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> The Korean War began on 25 June 1950 and ended on 27 July 1953. *Id.*

<sup>399</sup> See generally Richard E. Schumann, *Compensation from World War II through the Great Society*, COMPENSATION & WORKING CONDITIONS (Fall 2001), available at <http://www.bls.gov/opub/cwc/cm20030124ar04p1.htm>.

<sup>400</sup> Moskos, *supra* note 396, at 132–35.

evaluate the success of incremental changes. Soldiers have deployed multiple times since 2001, rates of Posttraumatic Stress Disorder and suicide among servicemembers have hit record numbers,<sup>401</sup> and conflicts in the Middle East will continue for some time, one cannot say that times now are similar to the 1950s, when military racial integration occurred. Such analogies lack a basis in fact.

#### B. Analogies to the Partial Integration of Women in the Armed Forces are Also Misplaced

Opponents of DADT not only cite to racial integration but also gender integration as the basis for predicting the success of DADT's repeal. To this end, it is important to recognize that the military is not completely gender-integrated. Aside from the fact that women are still prohibited from serving in several areas within the combat arms branches,<sup>402</sup> there are no housing plans in which women and men shower together or sleep in the same bunks. Even on the larger Naval submarines, where female junior officers are now able to serve, living arrangements have been segregated to the point that women have separate berthing and bunking areas, as well as the additional requirement that female officers must be assigned in pairs for duty.<sup>403</sup>

For those who would point to combat and other environments in which women and men have served in closer proximity than the past, they should consider the consequences of these arrangements, which tend to support keeping DADT in place. In recent years, the number of unwanted sexual comments, advances, and assaults have skyrocketed to the point where the Army has actually implemented a "bystander

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<sup>401</sup> See Captain Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 153–155 (2009) (discussing rising PTSD diagnoses).

<sup>402</sup> See U.S. DEP'T OF ARMY, PAM. 611-21, MILITARY OCCUPATIONAL CLASSIFICATION AND STRUCTURE ¶ 2-13 (22 Jan. 2007) (women are precluded from serving in infantry, armor, special forces, cannon field artillery, short-range air defense artillery, and in units below brigade level whose primary mission is ground combat).

<sup>403</sup> See David Kerley & Luis Martinez, *Navy to Lift Ban on Women Serving Aboard Submarines*, Feb. 23, 2010, available at <http://abcnews.go.com/Politics/navy-end-ban-women-serving-aboard-submarines-congress/story?id=9921378> (last visited Mar. 31, 2010).

intervention” program called “my duty” reiterating the need for intervention by witnesses to sexual harassment and assault.<sup>404</sup>

Whereas in 2007, the number of sexual assaults against women in the military was 1355,<sup>405</sup> only two years later, the number rose to 2302,<sup>406</sup> with an increase of thirty-eight same-sex sexual assaults.<sup>407</sup> Furthermore, expert researchers fear that the reported incidents, though staggering, only represent the tip of the sexual assault iceberg. As much as opponents would wish to deny it, the allowance of homosexual flirting and dating in relations between Soldiers of the same sex—up to and including gay marriage—will expand the types of situations which fuel sexual harassment and sexual assault. This is a recurring lesson provided by the military’s experience with *partial* gender integration. Consequently, whether opponents of DADT compare homosexual conduct to race or womanhood, both of these arguments confuse the issue of identity and acts and improperly play on the notions of equality that many Americans hold near and dear to their hearts.

### C. Statistics on Homosexual Discharges from the Military are Misleading

Almost universally, opponents of DADT cite “staggering” statistics on discharge of active duty personnel under DADT as a basis for claiming the loss of qualified and experienced personnel.<sup>408</sup> These statistics fail to support the assertions of DADT opponents for a number of reasons. First, actual statistics indicate that the military discharges far less servicemembers for homosexuality than those urging repeal suggest.<sup>409</sup> From 1994 to 2003, military discharges for homosexual conduct or statements encompassed approximately 0.37 percent of the total discharges in the armed forces.<sup>410</sup> From 2004 to 2008, the same types of

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<sup>404</sup> See My Duty, available at <http://myduty.mil/> (last visited Apr. 14, 2010).

<sup>405</sup> See 2007 DoD SAPR REPORT, *supra* note 272, at 32.

<sup>406</sup> See 2009 DoD SAPR REPORT, *supra* note 106, at 89.

<sup>407</sup> See *supra* notes 268–70 and accompanying text.

<sup>408</sup> See FRANK, *supra* note 34, at 169.

<sup>409</sup> See CTR. FOR MIL. READINESS, FALSE “NATIONAL SECURITY” ARGUMENT FOR GAYS IN THE MILITARY: SMALL NUMBER OF DISCHARGES DO NOT JUSTIFY REPEAL OF 1993 (Nov 1, 2009), <http://www.cmrlink.org/HMilitary.asp?docID=360>.

<sup>410</sup> *Id.*

discharges comprised less than one percent of the total number of discharges for the armed forces.<sup>411</sup>

From 1993 to 2008, discharges for reasons other than homosexuality contributed to the loss of significantly more servicemembers.<sup>412</sup> Compared to discharges for homosexuality, discharges for drug use were 7 times more frequent, discharges for serious offenses were 4.4 times more frequent, discharges for overweight conditions were 4.3 times more frequent, discharges for pregnancy were 3.3 times more frequent, and discharges for parenthood were 2.6 times more frequent.<sup>413</sup> From 1980 to 2008, discharges due to homosexuality accounted for only 0.063 percent of the total discharges for the Armed Forces, with the most occurring in 1982 at 0.095 percent, and the least occurring in 1994 at 0.038 percent.<sup>414</sup>

The second reason to discount opponents' use of statistics is the large proportion of separations that resulted from voluntary admissions by the discharged homosexual servicemembers.<sup>415</sup> In fact, each year, over half the discharges for open homosexuality were attributable to voluntary admissions.<sup>416</sup> Within this group of discharges, some ostensibly include heterosexual servicemembers who used voluntary claims of homosexuality as a reason to evade their military commitments, especially with looming deployment dates. The military has fielded widespread concerns about fraudulent claims of homosexuality for these purposes, especially because persons discharged under DADT, who have not met their enlistment obligations, must be discharged under honorable conditions.<sup>417</sup> Ultimately, these realities of discharges under DADT make opponents' arguments far less compelling, and should not be adopted without careful scrutiny when evaluating bases for repeal.

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<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See FRANK, *supra* note 34, at 192–93. Professor Frank infers that many “voluntary” admissions are forced out of servicemembers and that many servicemembers fear for their life when they make admissions. *Id.* However, other advocates of repeal acknowledge that a voluntary admission of homosexuality is “the fastest way to avoid further military commitment and receive an honorable discharge.” Colonel Om Prakash, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCE Q. 88, 89–91 (2009) (discussing the necessity of repealing DADT).

<sup>416</sup> See Prakash, *supra* note 415, at 90.

<sup>417</sup> *Id.* See also Captain Chad C. Carter & Major Antony Barone Kolenc, “Don’t Ask, Don’t Tell:” *Has the Policy Met Its Goals,* 31 U. DAYTON L. REV. 10–15 (2006).

## XII. Concluding Remarks

Currently, Secretary Gates has established a panel, led by Defense Department General Counsel Jeh Johnson and U.S. Army Europe Commander, General Carter Ham, to explore how the armed services might implement the integration of openly gay personnel in the event DADT is repealed.<sup>418</sup> In the interim, on 25 March 2010, Secretary Gates announced immediate changes to DADT, reserving the initiation of investigations concerning allegedly homosexual servicemembers to general and flag officers, as well as the requirement that credible evidence from third parties be taken under oath.<sup>419</sup> Additionally, the new changes provided that confidential disclosures concerning sexual orientation made to attorneys, psychotherapists, doctors, and clergy, would now be protected, even though rules of evidence do not normally apply to administrative investigations.<sup>420</sup> During the press conference announcing the new rules, Secretary Gates made it clear that the military’s review is about the “implement[ation]” of DADT’s repeal, not whether repeal should be initiated.”<sup>421</sup>

In this article, discussions of how and when to repeal DADT have only scratched the surface of possible financial, social, and military implications. Esteemed military leaders, such as Admiral Mullen and General David Petraeus, have publicly acknowledged support for repeal,<sup>422</sup> while over 1100 retired flag and general officers from all branches and levels of experience have signed a letter urging President Obama to reconsider his support for the repeal of DADT.<sup>423</sup> And, 1LT

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<sup>418</sup> See Leo Shane III, *Gates: Panel has One Year to Plan for End to “Don’t Ask, Don’t Tell,”* STARS & STRIPES, Feb. 3, 2010, available at <http://www.stripes.com/article.asp?section=104&article=67741>.

<sup>419</sup> See Thom Shanker, *Military to Revise “Don’t Ask, Don’t Tell” Rules*, N.Y. TIMES, Mar. 25, 2010, at A19.

<sup>420</sup> *Id.*

<sup>421</sup> Spencer Ackerman, *Gates Sharply Limits “Don’t Ask, Don’t Tell,”* MINN. INDEP., Mar. 25, 2010, available at <http://minnesotaindependent.com/56770/gates-sharply-limits-dont-ask-dont-tell>.

<sup>422</sup> See Jason Linkins, *David Petraeus on DADT: “The Time Has Come,”* Mar. 16, 2010, available at [http://www.huffingtonpost.com/2010/03/16/david-petraeus-on-dadt-th\\_n\\_500928.html](http://www.huffingtonpost.com/2010/03/16/david-petraeus-on-dadt-th_n_500928.html) (last visited Mar. 29, 2010).

<sup>423</sup> See Posting of Letter from Flag and General Officers for the Military on Opposition to the Repeal of 10 U.S.C. § 654 (“Don’t Ask, Don’t Tell”), Mar. 31, 2009, available at <http://www.flagandgeneralofficersforthemilitary.com> (last visited Mar. 29, 2010). Currently, advocates for repeal of DADT have publicly criticized this letter, stating that it is “peppered with inconsistencies and errors” and contains “a number of scandals and controversies associated with members of this list which indicate gross failures of

Choi continues to advocate for prompt repeal, when he is not preparing for trial.

Often, 1LT Choi, whose experiences protesting DADT introduced many issues surrounding this article, references the West Point Cadet Prayer during his rallies.<sup>424</sup> This prayer, which has been a staple of the cadet experience since it was written in 1920, asks not only for the blessing of “never [being] content with a half truth when the whole can be won,” but, moreover, to always “choose the harder right instead of the easier wrong.”<sup>425</sup> The Cadet Prayer is appropriate for the conclusion of this article. To ensure that the military maintains focus on its current wartime missions, the decision to repeal DADT requires choosing the “harder right over the easier wrong.” For our elected leadership, this choice for the welfare of our entire armed forces may include selecting a particular course of action that appears unfair to homosexual servicemembers or in opposition to campaign promises. For homosexual servicemembers, it may mean the ability to serve without benefits for partners. For heterosexual servicemembers, it may mean stifling strong feelings about the morality of homosexuality to accord proper respect to fellow servicemembers. Undoubtedly, the hard choice may not be the most popular.

Simply put, now is not the time to repeal all aspects of DADT instantaneously and simultaneously. If repeal is to occur, this Nation cannot afford for it to occur haphazardly. All servicemembers, whether homosexual, heterosexual, bisexual, or transgender, deserve and depend on the military and elected leadership to make the best decisions for the entire armed forces, not just a select group of servicemembers, or simply to serve the ends of political correctness. It is critical to analyze the

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judgment and leadership by some of its members.” *See also* Servicemembers United Newswire, New Report Raises Doubts About Flag Officer Letter Supporting DADT, Mar. 9, 2010, *available at* <http://www.sdgl.com/causes/2010/03/09/new-report-raises-doubts-about-flag-officer-letter-supporting-dadt> (last visited 29 Mar. 2010). However, these criticisms address roughly 200 out of the 1163 signatories. *Id.*

<sup>424</sup> *See* 1LT Dan Choi’s biography, *available at* <http://www.ltdanchoi.com/bio.html> (last visited Mar. 29, 2010). *See also* Christina Caron, Dan Choi Explains “Why I Cannot Stay Quiet,” May 13, 2009, *available at* <http://abcnews.go.com/US/story?id=7568742&page=1> (last visited Mar. 29, 2010).

<sup>425</sup> Colonel (Retired) Clayton E. Wheat was the head Chaplain and English Department professor at West Point from 1918 to 1926. *See* JAMES P. MOORE, JR., PRAYER IN AMERICA: A SPIRITUAL HISTORY OF OUR NATION 245–46 (2007). A complete version of the West Point Cadet Prayer is *available at* <http://www.usma.edu/chaplain/cadetprayer.htm> (last visited Mar. 31, 2010).

potential impacts of repeal and, only with that knowledge in hand, should Congress cast a decisive vote. Arguing that repeal must occur now because DADT seems unfair ignores the potential ramifications that haphazard decisions and impulsive actions could impose on the military. In addition, one must remember that many aspects of military service, including restrictions on heterosexual servicemembers, are permissible despite perceptions that they do not reflect societal practice or seem unfair.

The integration of open homosexuality in the military will not be successful unless and until this debate encompasses the realities of everyday life in the military. This expanded focus calls for professional debate of the tough issues, like the sexual acts in which homosexuals normally engage and behaviors unique to the homosexual community. When discussions begin, the leadership must not become engulfed in a philosophical or emotional debate about homosexuality in society, but must, instead, discuss the actual impact that repeal of DADT will have on military servicemembers and, especially, the combat effectiveness of our armed forces. Name-calling, lack of respect for command authority, and refusal to candidly address the potential detrimental effects of repeal will result in a caustic atmosphere that erodes the cohesion needed to maintain good order and discipline.

As alluded to by Washington Irving in *Tales of a Traveler*, a collection of essays and short stories from 1824, repealing DADT without intensely analyzing its impacts will result in new “bruises” for the military.<sup>426</sup> Those urging repeal should ask themselves, what if repeal of the policy results in far more than a simple bruise? What if it severs the very lifelines of *esprit de corps* and unit cohesion? What then? The answer is simple: Until the Nation’s leadership can implement DADT’s repeal without inflicting more strain on an already thinly-stretched force, DADT’s provisions on acts and marriage should remain unchanged.

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<sup>426</sup> IRVING, *supra* note 1, at xi.