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Francine Banner

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“It’s Not All Flowers and Daisies”: Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of “Don’t Ask, Don’t Tell”

Francine Banner†

ABSTRACT: This Essay critiques from a feminist perspective the repeal of Public Law 103-160, 10 U.S.C. § 654, colloquially known as “Don’t Ask, Don’t Tell,” exploring previously unexposed connections between increasing rates of sexual assault in the U.S. military and the longstanding, disproportionate enforcement of military anti-homosexuality policies against female service personnel. The discourse surrounding the “Don’t Ask” repeal overwhelmingly has centered on issues regarding the integration of openly gay male soldiers into combat units. This Essay argues, however, that the historical overrepresentation of women as victims of military anti-homosexuality policies, the underrepresentation of women in crafting such policies, and rising rates of sexual assault among troops suggest that “Don’t Ask, Don’t Tell” was less about prejudice against serving in foxholes with gay male service members and more about the persistent reluctance to open high-level military careers to women. Uncritically embracing the repeal without carefully examining the discriminatory history of the armed services’ anti-homosexual policies, their effects on female service personnel, and the mechanisms in place to protect such personnel from discrimination in the future is shortsighted and risks further entrenching harmful sexist and heterosexist values.

† Assistant Professor of Law, Phoenix School of Law. Ph.D., Justice Studies, Arizona State University; J.D., New York University School of Law; B.A., Wellesley College. I wish to thank Diane H. Mazur for her thoughtful review of this essay, Tyler J. Wall and Keith Swisher for their feedback, and Melissa Ahlers for her untiring research assistance.
INTRODUCTION

"You're one of three things in the military - a bitch, a whore or a dyke..."¹

Pride festivals this year echoed the uniform refrain, “Do Ask, Do Tell!”, as gay and lesbian individuals in locations as diverse as Phoenix, Arizona; Jersey City, New Jersey; and Zurich, Switzerland celebrated the repeal of Public Law 103-160, 10 U.S.C. § 654, colloquially known as “Don’t Ask, Don’t Tell” (DADT). In the giddy aftermath of these celebrations, the DADT repeal has been lauded as an unequivocal victory, one step further in the linear march toward securing civil rights for all persons, gay and straight.² While the DADT


². See, e.g., Ed O’Keefe, “Don’t Ask, Don’t Tell” Repealed: Reactions, WASH. POST: FEDERAL EYE (Sept. 20, 2011, 9:00 AM), http://www.washingtonpost.com/blogs/federal-eye/post/dont-ask-dont-tell-repealed/2011/09/19/gQARuYBiK_blog.html (quoting Servicemembers Legal Defense Network Executive Director Aubrey Sarvis as saying, “[T]his is a monumental day for our service members and our nation. Indeed, we have taken a tremendous leap forward for LGBT equality in the military.”).
repeal does represent an important step toward acceptance of gays and lesbians in U.S. public life, this Article argues that, at best, the repeal should be met with cautious optimism. Unqualified celebration without careful consideration of the foundations underlying the military's anti-homosexual policies risks further entrenching harmful sexist and heterosexist stereotypes, legitimating an environment that is as or more hostile to non-conforming persons, particularly lesbian women, than that of the pre-repeal armed forces.

The U.S. military has long been a bastion of hegemonic masculinity, an institution that rewards aggressive, traditionally masculine values via rituals emphasizing honor, bravery, and courage. Unsurprisingly, discourse regarding the DADT repeal has highlighted these ideals, and focused heavily on the concept of "unit cohesion," interrogating whether introducing openly gay soldiers will affect troops' ability to act decisively and collaboratively on the field of battle. This dominant narrative about courage, masculinity, and sleeping arrangements obscures the fact that consistently, and across all major conflicts since World War II, a disproportionate number of discharges for homosexual activity have taken place during peacetime. More significantly, the inordinate attention paid to issues of cooperation during combat eclipses the fact that both the DADT policy and its precursor, the Section 8 discharge, disproportionately targeted female service members, with the percentage of women discharged for suspected lesbian activity increasing commensurate with women's access to better paid and more skilled positions in the armed forces. In the late 1980s, while women comprised approximately ten percent of the armed forces, they comprised over twenty-five percent of discharges due to homosexuality.3 Throughout the DADT era, women comprised just fourteen percent of enlisted personnel but thirty percent of discharges pursuant to the DADT policy.4 In 2009, a striking thirty-nine percent of those discharged under DADT were female.5

Although women comprise a greater and greater percentage of service personnel, they remain underrepresented at the top of the field. For example, in the Army, only five percent of general officers are women.6 The 200,000-person Marine Corps has only three female general officers, with the highest ranking at two stars.7 Women's underrepresentation in the construction of military policies likely has factored into their overrepresentation as targets.

5. Id.
Statistics regarding women's advancement—or lack thereof—cannot be considered outside the context of other bleak data regarding the position of women in the armed forces. The 2010 Department of Defense Annual Report on Sexual Assault in the Military observes that sexual assaults among service members have increased with the introduction of troops in Iraq and Afghanistan, with an estimated 19,000 military rapes and assaults occurring in fiscal year 2010.8

Although many feminists are reluctant to promote militarism and thus uncomfortable championing the position of gays and lesbians in the armed forces, the staggeringly disproportionate impact of military institutional policies on women suggests that there are good reasons to embrace the right to military service by all U.S. citizens as a feminist issue. The military is not an isolated organization but an important avenue into civic life, not to mention the largest employer in the United States. The fact that persons may earn citizenship via service is testament to the fact that soldiering is tied to equal citizenship and inclusion.9 The introduction of women into the organization, a move signaling the federal government’s ostensible commitment to equal citizenship for women, threatens a vital bastion of masculine power and creates an environment ripe for retaliation.

Since the 1940s, anti-homosexual policies disseminated by the U.S. military have functioned to divide and conquer military women and to inhibit and undermine women’s advancement into positions of responsibility. These same institutional strategies have rendered women more vulnerable to sexual harassment and assault and less likely to report such incidents to superiors. As I discuss herein, the fact that military anti-homosexual policies have been disproportionately enforced against female service members strongly suggests that the basis of these policies is not merely homophobia. The high rates of discharge of women pursuant to DADT, the policy’s historical precursors, and data regarding the policy’s application suggest that, despite legislative intent, DADT became less about serving in foxholes with gay male service members

8. U.S. DEPT’ OF DEF., DEPT’ OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 64, 97 (Mar. 2011), http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter SEXUAL ASSAULT REPORT]. This number takes into account the estimation that in fiscal year 2010, there were 2617 total reports of sexual assault on service members in the military. The Department of Defense estimates that, due to severe underreporting, this number only represents 13.5% of total assaults in 2010, making the total number of military rapes and sexual assaults in excess of 19,000 for the fiscal year. Most victims are women under the age of twenty-five. Id. at 76-81.

and more about a persistent reluctance to open high-level military careers to women.

I argue herein that the DADT repeal currently being implemented suffers from two significant issues which continue to perpetuate a hostile environment for service members who do not conform to the military's overtly heteronormative and masculine ideals. The first is the lack of legal "teeth" in the repeal. While the DADT policy has been officially abrogated, the repeal has not been accompanied by an Executive Order prohibiting discrimination against gay and lesbian service members. Nor have such service members been recognized as a protected class under military Equal Opportunity and Equal Employment Opportunity policies. To date, civilian appellate courts have not widely recognized gay men and lesbians as a protected class under the Fourteenth Amendment, nor is Title VII an avenue for redress for military personnel. Thus, harassment suffered in retaliation for being gay or lesbian is not actionable unless a plaintiff can specifically tie the retaliation to gender-based discrimination. Recent case law further suggests that causes of action under *Bivens* are unavailable to military personnel, thus limiting recourse even for gender-based discrimination to avenues provided within the military disciplinary structure itself.

To add insult to injury, despite the repeal of DADT, the Uniform Code of Military Justice (UCMJ) continues to penalize sodomy and conduct unbecoming an officer. While military tribunals have recognized *Lawrence v. Texas* as controlling precedent, gay and lesbian service personnel still risk criminal prosecution for engaging in consensual sexual relations under many

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11. The civilian Equal Employment Opportunity system differs significantly from military Equal Opportunity systems. For example, in the civilian system, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006), has been interpreted to protect individuals from discrimination based on factors such as age and physical disability that are not protected categories within the military Equal Opportunity systems. Although sexual orientation is not a protected category under Title VII, in the civilian context, advancements have been made toward recognizing Title VII claims by women who have suffered discrimination based either on gender stereotyping or perceived sexual orientation. See *Prowel v. Wise Business Forms*, 579 F.3d 285, 292 (2009) (holding that Title VII provides protection to those who are "harassed for ... failure to conform to gender stereotypes").

12. See Order Dismissing Cioca v. Rumsfeld, Case No. 1:11-cv-00151-LO-TCB (E.D. Va) (Dec. 9, 2011) (dismissing case based on the fact that a remedy pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) is not available when "special factors counseling hesitation" are present but acknowledging the "egregious allegations" within the plaintiffs' complaint).
branches have approached the circumstances.' The equivocation with which the executive and legislative branches have approached the DADT repeal has enabled the majority of Republican presidential candidates to run on platforms endorsing reinstatement of the ban on service by gays and lesbians.14

Even if the current administration’s reluctance to defend the Defense of Marriage Act signals that recognition of gays and lesbians as a protected class in civilian life is on the horizon, this will not necessarily lead to the alteration of military policies. In a series of cases after the Vietnam War, the Supreme Court recognized a “doctrine of constitutional separatism” shielding the military from the application of constitutional decisions as a “specialized society separate from civilian society.”15 Unlike the shift in the balance of legislative and judicial power that has occurred in other constitutional contexts, when it comes to the military, the Court traditionally has “recognize[d] that the Constitution itself requires . . . deference to congressional choice.”16 Although the judiciary has shown some inclination to

13. Military tribunals have recognized a protected liberty interest in private, consensual sexual activity between adults based on Lawrence v. Texas, 539 U.S. 558 (2003). See United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). However, convictions under Article 125 may still be upheld in cases where there are “factors unique to the military environment,” such as fraternization between officers and enlisted personnel or situations where “consent might not easily be refused,” i.e., any factor that would place the conduct outside any protected liberty interest recognized in Lawrence. See id. at 198 (citing Lawrence, 559 U.S. at 578).


involve itself in military affairs surrounding the constitutionality of DADT, recent decision-making suggests that the post-repeal judiciary is re-embracing a hands-off policy with regard to military affairs. Devoid of vital mechanisms providing access to the law, the policies disseminated after the DADT repeal risk the perpetuation of further injustices upon those personnel who do not fit into traditionally accepted norms. The second major issue I address herein is that the repeal of DADT has been ushered in with a discourse that promotes stereotypes rather than defies them and that exalts uniformity rather than embraces difference. As I highlight below, the DADT repeal provided a critical moment in which the military could have signaled its institutional commitment to inclusiveness, acknowledging the contributions diverse groups of persons have made to the armed forces. The opening up of military service to openly gay and lesbian persons reveals a key opportunity to recognize that successful soldiering is not (or at least not always) dependent upon the overt expression of masculinity or heterosexuality. Rather than embracing the diversity that has long existed in the contemporary armed forces, however, the inclusion of openly gay and lesbian individuals in military ranks has served as a tool for re-inscribing “traditional” values of the institution: bravery, courage, fearlessness. As I discuss below, these values have been and continue to be inculcated by denigrating and subordinating outsiders, particularly women, transgender persons, and non-masculine men. The growing presence of women in the military, coupled with rising rates of sexual assault, means that it is women in particular who are most likely to face retaliatory harassment in a post-DADT environment without any avenue for legal recourse.

Section I of this Article explores the culture of the U.S. military, foregrounding the ways in which masculine and heterosexist values have operated and continue to operate to silence and subordinate women in the armed forces. I highlight the pervasive “macho” rhetoric of the DADT repeal, and describe the ways in which such discourse deflects attention from the precarious position of women in today’s military. In Section II, I explore the history of military anti-homosexual policies, focusing on the ways in which such policies have been applied to and uniquely have impacted female service members. I argue that the aggressive promotion of masculine values coupled with the insulation of the military from legal accountability has fostered an environment in which women as a class, and particularly enlisted lesbian women, have been rendered vulnerable. In Section III, I highlight the ways in which the threat of being labeled a lesbian continues to be deployed in order to control and silence female service members and to inhibit their ability to form essential mentoring relationships with one another. I foreground the ways in which the reluctance of the Department of Defense to protect gays and lesbians

19. While it is beyond the scope of this essay, the rape of men in the armed services is a vital issue for further study.
as a class profoundly threatens the position of all military women in the future. Ultimately, I conclude that the repeal of DADT must not be celebrated without careful reflection and consideration of the ways in which anti-discrimination policies historically have been applied and the ways in which they will be implemented going forward, and I advocate for the inclusion of the right to military service as an issue for future feminist legal scholarship.

1. THE U.S. MILITARY: HEGEMONIC MASCULINITY

Tarzan and Jane were swingin' on a vine [x2]
Sippin' from a bottle of vodka double wine [x2]
Jane lost her grip and a-down she fell [x2]
Squared herself away as she let out a yell [x2]. . . .
—Christina Aguilera, Candyman

“17 Victims Sue Pentagon Over 'Plague' of Sexual Violence”
—AOL News Headline, Feb. 15, 2011

Randy Shilts observes that the “story of gays in the military is a story about manhood.” This statement echoes the position of numerous scholars who have documented the ways in which hegemonic masculinity historically has been and continues to be achieved and maintained through the culture and institution of the U.S. armed forces. The rituals enacted by the various branches serve to construct and reaffirm the identity of the military and its warriors as male and masculine. In particular, forced separation from loved ones, military training exercises, and inculcation of values at boot camp establish an environment in which an aggressive masculine identity is constructed and reinforced among soldiers within the context of collective practices. Gendered conventions, ranging from mandating the color of

20. CHRISTINA AGUILERA, Candyman, on BACK TO BASICS (RCA Records 2006).
22. SHILTS, supra note 3, at 5.
23. See, e.g., CYNTHIA H. ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES 218, 237 (2000) (discussing how war is legitimated as a “masculine activity” and volunteer soldiering constructed as inherently masculine); JOSHUA S. GOLDSTEIN, WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA 356 (2003) (observing the ways in which those higher up in military hierarchy are “coded” as masculine and those of lesser status as feminine); Valerie Vojdik, The Invisibility of Gender in War, 9 DUKE J. GENDER L. AND POL’Y 261, 265 (2002) (noting that the military fosters “rites of initiation” that “reinforce solidarity among men as a group”).
24. See Enloe, supra note 23; Goldstein, supra note 23; Vojdik, supra note 23, at 265.
25. See Enloe, supra note 23, at 262 (“Official memos fly back and forth debating the best color of women’s lips and the correct arch of their eyebrows. In this arena, the need to maintain soldiering’s masculine image will dictate how high should be the heel on the woman soldier’s shoe.”); Goldstein, supra note 23, at 264; Vojdik, supra note 23, at 265.
lipstick to be worn by female Marines, to demanding that female personnel in Saudi Arabia don the abaya, to encouraging female enlistees to run "the gauntlet" at the Tailhook Convention, serve to foster not only an anti-feminine but also an anti-female environment. Emphasis on alcohol and prostitution as recreational activities, combined with the absence of "normal" social controls, create a space in which an all-encompassing and stereotypical masculinity is promoted above all other behaviors. Today's military deliberately fosters an environment in which uniform, idealized images of both genders are promoted through collective sanctioning of ritualized (and often violent) behaviors. In this context, non-conformity with norms of gender and sexuality carries an extremely high price.

Cynthia Enloe offers the term "militarization" to describe the "step-by-step process by which a person or a thing gradually comes to be controlled by the military or comes to depend for its well-being on militaristic ideas." Militarization is evident in the stereotypical images of and recurrent tropes emphasizing "appropriate" roles for men and women in the armed services, which are so common that we may not give them a second thought. From World War I through today, images of pretty young women consistently have been deployed in order to entice young men into military service. A popular World War II recruitment poster promoted "Christy Girls," attractive young women dressed like sailors, with quotations like, "Gee!! I Wish I Were A Man. I'd Join the Navy." Below the woman, the popular poster admonishes, "Be A Man And Do It. United States Navy Recruiting Station." In 1987, pop singer Cher served a similar inspirational function when she donned a thong leotard while straddling a cannon aboard a Navy destroyer in her If I Could Turn Back Time video. Despite the fact that today female military presence is more than 600 times what it was in 1941, the image of the pin-up girl persists as perhaps the most prevalent image of U.S. women and war. Christina Aguilera donned

26. In 1952, the officially mandated color was "Montezuma Red." Today, it is simply recommended that female Marines' lipstick "harmonize with the scarlet trim" on dress uniforms. UNITED STATES MARINE CORPS, U.S. MARINE GUDBOOK OF ESSENTIAL SUBJECTS FILE 4 SECTION 4(B)(2), at 6-36 (2010); Margaret Vining, Shaping Military Women Since World War II, in A FEARSOME HERITAGE: DIVERSE LEGACIES OF THE COLD WAR 100 (John Schofield & Wayne Cocroft eds., 2007).
27. Vojdik, supra note 23, at 261.
29. See R.W. Connell & James W. Messerschmidt, Hegemonic Masculinity: Rethinking the Concept, 19 GENDER & SOC'Y 829 (2005). In addition, Cynthia Enloe discusses the ways in which prostitution is not only accepted by, but institutionalized in, areas where there has been significant U.S. military presence. For example, it is estimated that at the end of the Vietnam War between 300,000 and 500,000 Vietnamese women were serving as prostitutes. ENLOE, supra note 23, at 67.
30. ENLOE, supra note 23, at 3 (emphasis added).
attire evocative of 1940s girl group the Andrews Sisters for her 2008 *Candyman* video, updating the lyrics to include contemporary references to vodka sipping, "cherry" popping and panty dropping. In 2010, singers Katy Perry, Nicki Minaj and others participated in the program VH1 Divas Salute the Troops at the Naval Airstation in Miramar, California, during which performers donned costumes reminiscent of World War II "bombshells," albeit notably tighter, shorter and more revealing. In a similar endeavor, Harley Davidson ran an advertising campaign in 2009-2010 in which consumers were invited to send virtual postcards to the troops featuring scantily clad Victoria’s Secret "Angel" Marisa Miller draped over a bike bearing the slogan “American Bombshell.” Even the iconic image of Rosie the Riveter, originally associated with female factory workers engaging in non-traditional employment to aid the war effort during World War II has been transformed by pop stars such as Aguilera and Beyoncé into a large-breasted, midriff-baring babe.

While the most pervasive image of women and conflict is a sexualized, supportive one, the image of men in the military persists as one of leadership, unfailing courage and bravery, enforced via ritualized performances of traditionally “masculine” behaviors: drinking, carousing, fighting, killing. The stark distinction between images of women and men at war reflects the extent to which women are commonly absent from or, more accurately, sublimated in, our national war story. When we discuss women and conflict, it is most often as victims or supporters and not as agents. As conflicts escalate, gendered roles emerge in stronger relief, as women are transformed into the protected ones—the wives, mothers and sisters on whose behalf “the boys” go off to fight. Women are also objectified as pinups and “bombshells,” their images gracing lockers and airplanes to remind the boys of home.

This stark contrast between gendered roles is strategically deployed to shame young soldiers into fighting. Valorie Vojdik observes:

33. AGUILERA, supra note 20.
38. Even the bikini, popular among beach volleyball players and beauty contestants worldwide, is named after the nuclear testing site of Bikini Atoll, evidencing the ways in which militarism and female sexuality historically have been intertwined.
Warriors, the military teaches, are male. From the beginning, drill sergeants humiliate recruits by calling them “pussies,” “sissies,” “girls,” or “fags.” Cadence calls . . . often denigrate women or celebrate male sexual domination of women. At the Naval Academy in the late 1980s, the glee club favorite tune was “The S&M Man,” sung to the tune of “The Candy Man.” The first verse went: “Who can take a chain saw / Cut the bitch in two / Fuck the bottom half / and give the other half to you.”

During the Iraq War, similar images of male domination have emerged in the persona of the “Hadji girl,” described in a popular song recorded by U.S. Marine Joshua Belile. The lyrics proceed:

I was out in the sands of Iraq / And we were under attack / And I, well, I didn’t know where to go . . . / So I threw open the door and I hit the floor / Then suddenly to my surprise / I looked up and I saw her eyes / And I knew it was love at first sight / And she said . . . / Durka Durka Mohammed Jihad / Sherpa Sherpa Bak Allah / Hadji girl, I can’t understand what you’re saying . . . .

Then she said that she wanted me to see / She wanted me to go meet her family / But I, well, I couldn’t figure out how to say no / ‘Cause I don’t speak Arabic . . . .

And she threw open the door and I hit the floor / ‘Cause her brother and her father shouted . . . / Durka Durka Mohammed Jihad / Sherpa Sherpa Bak Allah / They pulled out their AKs so I could see . . . .

So I grabbed her little sister, and pulled her in front of me / As the bullets began to fly / The blood sprayed from between her eyes / And then I laughed maniacally / Then I hid behind the TV / And I locked and loaded my M-16 / And I blew those little f*ckers to eternity / And I said . . . / Durka Durka Mohammed Jihad / Sherpa Sherpa Bak Allah / They should have known they were f*ckin’ with a Marine.

The Hadji Girl lyrics are even more unsettling when one considers that just one recording of the video on YouTube has over 150,000 hits. One comment on the site notes, “[T]his was my favorite song when I went through MCT [Marine Corps Training] the instructors would play it.” Another poster responds, “yes corporal, every boot to pass through camp geiger [a Marine

40. Tyler Wall, Imperial Laughs: A Soldier’s Song and the Colonial Present, 37 SOC. JUST. 73 (2010-2011).
42. Id.
training camp in Whitehall, Pennsylvania] gets a laugh at this. The lyrics become incredibly disturbing when one parses out their eerie similarity to an actual incident, the 2006 gang rape by five U.S. Marines of fifteen-year-old Iraqi girl Abeer al-Janabi and the brutal murder of her entire family, including her seven-year-old sister.45

Like cadences endorsing brutality against women, the prospect that Marine trainees are being inculcated in military values by listening to Hadji Girl evidences the extent to which, as Vojdik notes, "[m]asculinity is ... enforced in the military through the feminization of enemies and the symbolic (and often real) enactment of rape as domination."46 After September 11, 2001, there has been a greater imperative to de-emphasize American weakness or helplessness.47 This has been accomplished through the promotion of masculinized images of heroism that have tended to place women even further in the background.

As Jasbir Puar and Amit Rai observe, the hegemonic discourse on the War on Terror depends upon "processes of quarantining a racialized and sexualized other."48 For example, Monica Casper and Lisa Jean Moore discuss the story of the "saving" of Jessica Lynch—a popular narrative which did little to reflect the truth—as a "screen where everything is projected," a tale of "female victimization and recovery by the masculine military."49 As I discuss in the following subsection, these types of narratives have been replicated over and over in the context of the DADT repeal.

A. Tough Soldiers Doing Tough Things: How Masculinity Permeates the Rhetoric of the DADT Repeal

Prior to the repeal of DADT, the Pentagon conducted a survey of 400,000 service members, spending hundreds of thousands of dollars on studies regarding the potential effect of allowing openly gay persons to serve in the military on "unit cohesion," the maintenance of morale, order, and discipline

46. Vojdik, supra note 23, at 266-67.
49. MONICA J. CASPER & LISA JEAN MOORE, MISSING BODIES: THE POLITICS OF VISIBILITY, 135, 150-51 (2009). Casper and Moore observe how, in the commonly disseminated narrative, "delicate Lynch is rescued [by U.S. troops] from the 'axis of evil,' like the princess in the tower." Id. at 135. They further discuss the ways in which the stories of the women of color—Shoshana Johnson, who was injured in the ambush, and Lori Piestewa, who was killed—were obscured by the "heroic" tale of the white female, Jessica Lynch.
among troops.\textsuperscript{50} The results of the survey were supported by data garnered from an extensive research project by the Rand Foundation as to whether allowing gays and lesbians to openly serve would affect unit cohesion and military readiness and effectiveness.\textsuperscript{51}

The Family Research Council (FRC), a conservative organization, cautions that the Pentagon Survey should be viewed with skepticism, observing that the document “ignores important questions.”\textsuperscript{52} Although this is likely to be the first and last time this happens, I am in agreement with the FRC that the Pentagon Survey contains significant biases. First, the survey utilized the terms “gay and lesbian” and “homosexual” interchangeably, conflating the interests of gay and lesbian soldiers without addressing concerns, such as behavior in combat, that are relevant to certain (male) personnel. Second, the survey appears to have been designed based on stereotypes of gay men as sexually predatory, with at least five or six leading questions asking different versions of, “Have you been assigned to share bath facilities with an open bay shower that is also used by a Service member you believed to be homosexual?” and “If you are assigned to share a room or berth with a gay or lesbian service member, what will you do?”\textsuperscript{53}

As Diane Mazur observes, this preoccupation with whether straight men will be able to competently serve alongside gay male counterparts is rife with “fear, ignorance, and an adolescent level of immaturity about homosexuality.”\textsuperscript{54} Although the vast majority of troops—over two-thirds—reported that they would not object to serving with a gay or lesbian service member or had already done so, several respondents reported concerns about “open” homosexuality leading to “widespread and overt displays of effeminacy among men, homosexual promiscuity, harassment and unwelcome advances within units, invasions of personal privacy, and an overall erosion of

\begin{itemize}
\item \textsuperscript{51} NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY (2010), http://www.rand.org/pubs/monographs/MG1056.html. This study won the 2011 Policy Impact Award from the American Association for Public Opinion Research.
\item \textsuperscript{53} PENTAGON SURVEY, supra note 50.
\item \textsuperscript{54} Diane H. Mazur, Re-making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even if Gay Men Are Not?, 58 OHIO ST. L.J. 953, 983 (1997). This juvenile attitude was apparent in May 2011, when three Army colonels were reprimanded for performing a skit mocking the DADT repeal at a dinner for the Eighth Army in Korea. The officers used effeminate gestures to portray musicians Elton John and George Michael as soldiers and lip-synched to a song by Boy George. Ironically, the Eighth Army had scheduled post-DADT training for its brigade leaders the following day. See Joe Gould, Three Colonels Punished Over Skit Mocking Gays, ARMY TIMES (May 23, 2011), http://www.armytimes.com/news/2011/05/army-3-colonels-punished-over-skit-mocking-gays-052311w/.
\end{itemize}
standards of conduct, unit cohesion, and morality." This is unsurprising because the questions posed by the survey seem designed to reinforce stereotypical conceptions rather than defy them.

The belief in and promotion of the military as a bastion of masculine values continues to permeate discourse about the repeal of DADT; there is little to no discussion about the negative effect of DADT on military women. Critics such as Senators John Kyl and John McCain have jumped on the "unit cohesion" bandwagon, with Kyl observing that "[w]hen it comes especially to the small units that do the fighting on the ground . . . [the repeal] could . . . cost lives." McCain observed that he agrees with the DADT policy, which "unambiguously maintains that open homosexuality within the military services presents an intolerable risk to morale, cohesion and discipline." One of the strongest opponents of the repeal has been General James Amos, Commander in Chief of the U.S. Marine Corps, the branch of service historically most hostile to the entrance of women recruits. Amos defends his position based on the idea that sexual affairs among troops would affect combat readiness: "I don't want to lose any marines to the distraction . . . I don't want any marines that I'm visiting at Bethesda [a military hospital] with no legs be the result of any type of distraction." In 2010, Retired Marine Corps General John Sheehan blamed the Bosnian Massacre at Srebrenica on Dutch troops, arguing that the "socialization" of troops, including openly gay service members, "led to a force that was ill-equipped to go to war." Opposition to DADT has been premised on the same foundations. Senator Kirsten Gillibrand repeatedly noted that there was no scientific evidence to support the claim that unit cohesion would be harmed if homosexuals served openly, making no mention of the disparate impact of the policy and its precursors on female

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service personnel. Senate Majority Leader Harry Reid also did not offer the policy's effect on women as a rationale for repealing DADT.

The other prominent narrative to emerge in the context of the DADT repeal has been premised on questions about the ability of individual homosexual soldiers to conform to the ideals of bravery and courage inherent in U.S. military service. General Amos of the Marine Corps said, "We recruit on a warrior ethos . . . We live hard, we train hard. We do tough things . . . We recruit men and women for that kind of ethos . . . It's never, 'We're going to give you a college education.'" Media reports have focused on the relative bravery of male, homosexual soldiers vis-à-vis heterosexual counterparts. As an op-ed published in The Washington Post observes,

[A] reason that male troops sign up . . . is to prove their masculinity. This has been true since hunter-gatherer days, when a warrior facing death was the ultimate proof of courage and, yes, maleness . . . .

The scores of gay servicemen I have interviewed over the years express an identical desire to prove their strength, courage and masculinity. It isn't about proving sexual prowess, both straight and gay troops say, but about adulthood and, ultimately, male virtue.

One soldier told National Public Radio, "'[I]f you like flowers and daisies, like flowers and daisies, but don't do it while we're trying to stick together so we can come back alive.'" In discussing the need to slowly implement the DADT repeal, a Marine Captain notes, "[I]n the Marines and in Army Infantry units, 'gay' and 'homosexual' have only ever been strongly pejorative descriptions for weakness and disgrace . . . Just as ending racial segregation in the military did not happen overnight, many of these issues could take years to resolve." Other soldiers foreground the fear of predatory homosexual advances occurring in tight quarters; "Coming from a combat unit . . . we're packed in a sardine can . . . . There's no doubt in my mind that openly gay

65. NPR Staff, Soldiers Mixed on 'Don't Ask Don't Tell Repeal, NAT'L PUB. RADIO (Dec. 20, 2010), http://www.npr.org/2010/12/20/132210120/soldiers-mixed-on-dont-ask-dont-tell-repeal.
Marines can serve [but] . . . [m]aybe they should just take the same route they take with females and stick them to noncombat units.67 Embracing the stereotype of gay men as sexual predators, conservative commentators worried that an October 2011 conference of “out” service members would turn into a lecherous “Malehook” convention.68

The repeal of DADT has been lauded as a victory for the LGBT community. However, it largely has been gay men who are at the forefront in the discourse regarding the policy. The conflation of gay, lesbian and transgender concerns in connection with the repeal obscures that the hurdles faced by lesbian and transgender persons in the military are vastly different than those of gay men. First and foremost, the combat exclusion means that discourses regarding foxhole accommodations and battle readiness are inapplicable to female troops. Women currently are excluded from thirty percent of all active-duty positions in the Army and thirty-eight percent of such positions in the Marine Corps.69 In 2009, women comprised only 16.2% of the active component officer force across the armed services.70 Openly transgender persons are not permitted to serve at all. The DADT repeal has been embraced as an opening up of the armed forces to all; however, the debate has focused only on the realities for one small subset of personnel. As I discuss below, these individuals—gay men serving during active conflicts—actually have been among the least likely persons to have been expelled pursuant to the military’s anti-homosexual policies.

The prevailing discourse regarding the DADT repeal promotes masculinity over femininity, denigrating “sissified” men and exalting “macho” behaviors. Both Department of Defense research and commentary by troops and civilians is grounded in an assumption that openly gay men are more “feminine” and thus less courageous and less fit to serve than straight male counterparts. The

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70. SWAN WIC FACTSHEET, supra note 69, at 1. SWAN observes that, despite the fact that women are officially excluded from combat positions:
The lack of clear front lines combined with the tactical need for U.S. women to engage with Afghan and Iraqi women places U.S. servicewomen in positions where combat is inevitable. The disconnect between what the U.S. military says women are allowed to do and what they are actually doing is not only a blatant act of gender discrimination, it fosters a hostile work environment where women’s capabilities are assumed rather than assessed.

Id.
bulk of time and energy of those promoting the repeal has been centered on dispelling these inaccurate assumptions, refocusing the debate away from the objective of securing equal rights.

The acceptance of ubiquitous stereotypes can be seen in the form of common jokes acknowledging gender differences among military personnel. For example, Michelle Benecke and Kirstin Dodge observe that female Marines historically were called “BAMs or Bammies,” short for “Broad Assed Marines,” while female paratroopers in the Army were called “BAPs.” West Point graduates run an online t-shirt shop offering a selection of shirts reading, “You Can’t Spell Trouble Without TROU,” a term coined to describe female cadets by the fit of their military-issue slacks. Less innocently, the repeated, ritualized denigration of one gender versus another plays a profound role in sanctioning treatment of some classes of persons as less deserving of respect. I discuss some of the tangible effects on female service personnel below.

B. Salute the Tropes: The Precarious Status of Women in Today’s Military

The 2010 Department of Defense Annual Report on Sexual Assault in the Military, which provides data on sexual assaults within each branch of the service, reports that, in fiscal year (FY) 2010, there were over 2600 reports of sexual assault. Due to rampant underreporting, the Department of Defense estimates that this number represents only approximately 13.5% of total assaults that fiscal year, making the total number of military rapes and sexual assaults in excess of 19,000 for FY 2010. This means that, according to Pentagon data, fifty-two women or men were sexually assaulted every day in the military last year. As of 2003, nearly a third of female veterans seeking healthcare through the Veteran’s Administration reported that they had been raped or faced attempted rape as service members. Department of Defense researchers documented that women who endured sexual assault were more likely to develop post-traumatic stress disorder (PTSD) than those who were


72. While these shirts have been critiqued by SWAN as conveying sexist messages, the owners of the shop argue that the shirts convey a pro-female message. The site also offers shirts reading “Old TROU” which are marketed specifically to female West Point grads. See Joe Gould, T-Shirt is Offensive: West Point, Women’s Group, Army Times (Nov. 28, 2011, 9:51 AM), http://www.armytimes.com/news/2011/11/army-tshirt-is-offensive-west-point-womens-group-112811.

73. This heading is shamelessly and gratefully adapted from Avital Ronell. See Avital Ronell, Support Our Tropes: Reading Desert Storm, in RHETORICAL REPUBLIC: GOVERNING REPRESENTATIONS IN AMERICAN POLITICS 13, 13-37 (Frederick M. Dolan & Thomas L. Dumm eds., 1993).

74. SEXUAL ASSAULT REPORT, supra note 8, at 97.

75. Corbett, supra note 1 (“Of that group, 37 percent said they were raped multiple times, and 14 percent reported they were gang-raped.”).
actually exposed to combat.76 Despite an official “zero tolerance policy” and a directive from Congress to “develop and implement a comprehensive plan to eliminate military sexual assault and provide oversight of investigations and adjudications,” almost nothing has been done to curb rising rates of sexual assault, and, particularly, sexual assaults against military women. Of the over 3000 complaints filed in 2010, only 529 went to trial.77

In addition to the Annual Report on Sexual Assault, the Department of Defense recently released the 2010 Workplace and Gender Relations Survey of Active Duty Members, which surveys service members regarding sexual assault and sexual harassment in the workplace. Of over 26,000 respondents to the survey, 4.4% of women and 0.9% of men disclosed that they had experienced unwanted sexual contact.78 Strikingly, only twenty-nine percent of women and fifteen percent of men who admitted to experiencing such contact stated that they had reported the incident to an authority. Of those respondents who indicated they experienced unwanted sexual contact, reasons for not reporting included being “uncomfortable” (sixty-five percent of females and thirty-two percent of males), “fear[ing] reprisal” (fifty-four percent of females and twenty-seven percent of males), and believing that sexual assault was “not important enough” to report (forty-six percent of respondents).79 This reluctance to report sexual violence likely is due to the fact that assault victims tend to be among the most vulnerable persons in the military; an estimated eighty-five to ninety percent of victims are female, and sixty-three percent of those victims are in the lowest enlisted ranks.80

In February 2011, seventeen female veterans and active-duty service members filed a suit against the Pentagon, naming former Defense Secretary Donald Rumsfeld and his successor, Robert Gates, and alleging that the two secretaries of defense had condoned, ignored and implicitly encouraged sexual abuse among military personnel.81 The suit, Cioca v. Rumsfeld, accused the

76. Id.
77. SEXUAL ASSAULT REPORT, supra note 8. Reporter Sara Corbett similarly found that, of the 3038 investigations of military sexual assault charges completed in 2004 and 2005, 329, or approximately one-tenth of them, resulted in a court-martial of the perpetrator. Milder administrative punishments, such as demotions, transfers and letters of admonishment, were used to resolve 617 investigations. Corbett, supra note 1.
78. DEP’T OF DEF., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT No. 2010-025 iv-v (Mar. 2011) [hereinafter WORKPLACE HARASSMENT SURVEY]. The weighted response rate was thirty-two percent of active duty service members. This appears on a cursory level to comport with statistics regarding a reported sexual assault incidence of over 3000.
79. Id. at vi.
81. Stone, supra note 21; see also Complaint at 1, Cioca v. Rumsfeld, No. 1:11-cv-00151 (E.D. Va. Feb. 15, 2011) [hereinafter Cioca Complaint]. By the time of the case’s dismissal in December 2011, the suit had twenty-eight named plaintiffs. The examples of gender-based discrimination cited in the suit were myriad. For example, the lead plaintiff, Kori Cioca, alleged that, after she made a mistake during a
Pentagon of “systemic failure to stop rape and sexual assault” and failure to “eradicate a well-entrenched misogynistic military culture that permits Command to scoff at rape allegations, threaten victims with courts martial, and exercise unfettered discretion to decide to use ‘non-judicial punishment’ to penalize rape and sexual assault.” The Pentagon’s own statistics were cited as evidence of widespread discrimination. The suit also specifically accused Rumsfeld of granting “moral waivers” to recruits arrested or convicted of domestic and sexual violence despite a federal law making it a felony for such individuals to possess firearms. Although the presiding judge acknowledged that the plaintiffs’ allegations were “troubling” and “egregious,” the suit was dismissed in December 2011, on the grounds that Supreme Court precedent “advised against judicial involvement” in cases of military discipline.

The ruling is being appealed to the Fourth Circuit. In March 2012, another class action, Klay v. Panetta, was filed in the District Court for the District of Columbia alleging claims similar to those alleged in the Cioca case.

Service Women’s Action Network (SWAN) Executive Director Anu Bhagwati characterizes sexual violence as “a plague upon the United States military” that “threatens our national security by undermining operational readiness, draining morale, harming retention and destroying lives.” She observes that commanding officers frequently “shirk their responsibilities to their own troops . . . transfer sexual predators out of the units instead of prosecuting them, promote sexual predators during ongoing investigations and accuse highly decorated enlisted service members of lying.” Both Pentagon officials and the U.S. Congress have recognized both the occurrences and underreporting of sexual assault as massive and intractable problems. In 2005, Congress attempted to stem rising tides of sexual violence among military personnel by altering UCMJ provisions to make it easier to prosecute sexual

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82. Cioca Complaint, supra note 81, at 30; see also First Amended Complaint at 46, Cioca v. Rumsfeld, No. 1:11-cv-00151 (E.D. Va. Sept. 6, 2011).
83. Cioca Complaint, supra note 81, at 34.
84. Id. at 30-33.
87. Klay, which currently lists eight named plaintiffs, alleges that the current and former Secretaries of Defense and military leadership have a “long-standing pattern of ignoring Congressional mandates designed to ameliorate the Armed Services’ dismal record of rape,” and that the defendants are “personally responsible for the culture of retaliation that pervades the Navy and Marine Corps,” Complaint at 3, 24, Klay v. Panetta, No. 1:12-cv-00350-ABJ (D.D.C. Mar. 6, 2012).
88. Stone, supra note 81.
89. Id.
assault cases. Both of these adjustments were resounding (and arguably unconstitutional) failures, and a revised defense bill eliminating these provisions but allocating over $300 million to hiring additional sexual assault response personnel passed in the House in December 2011.

Despite these efforts, the outlook on preventing sexual assaults is not positive. For one thing, the changes to the UCMJ recently approved by Congress have been approved with little or no discussion. Of more than a hundred congressional hearings held this year, none have considered the UCMJ. More importantly, there is no reason to believe that additional funding alone will ameliorate the rampant sexual assaults and harassment or increase troops’ likelihood to report such incidents. Reported incidences of sexual assault have increased despite the quadrupling of the budget for the Department of Defense’s Sexual Assault Prevention and Response Office (SAPRO) from $5 million to $23 million. Bhagwati observes that the development of the SAPRO has not been effective in curbing the sexual assault epidemic for two primary reasons: the agency’s lack of law enforcement and judicial authority and the department’s messaging on sexual assault, which she characterizes as “questionable.”

When one reviews the recent approaches SAPRO has taken to the issue, it is apparent that current strategies drastically minimize the severity of the crimes of sexual violence. For example, classes currently offered by SAPRO bear disturbingly lighthearted titles such as “Sex Signals” and “Can I Kiss You?” According to the Army Public Affairs Office, “Sex Signals” “might be described as part stand-up comedy, part skit and part question-and-answer session. The actors beg[in] the presentation with a routine fashioned to loosen up the crowd, using language more evocative of an MTV reality show than Army training.” In the same vein, the Oklahoma Army National Guard’s

90. See Michael Doyle & Marisa Taylor, Congress Tries Again To Get Military Sexual Assault Laws Right, McClatchy Newspapers (Dec. 13, 2011), http://www.mcclatchydc.com/2011/12/13/133000/congress-tries-again-to-get-military.html. Congress legislatively changed the UCMJ provisions on sexual assault to shift the burden of proving consensual sexual relations onto defendants in sexual assault cases and to make it easier for prosecutors to demonstrate victims were incapacitated due to intoxication.
91. Id.
"It's Not All Flowers and Daisies"

Sexual Assault Response Coordinator and Victim Advocates Manual, Facilitator’s Guide offers "ice-breakers" for service members to use in order to negotiate workplace sexual relationships:

There are sexy ways to ask for consent that don’t spoil the mood. Get creative. Some suggestions to start the conversation:

- You are so hot, I want to ______. Is that okay?
- You have me so turned on – I really want to ______. Are you with me on that?
- Would you like to have some mind blowing sex? (Meant to be funny)

The skits promulgated by the Department of Defense reflect gendered stereotypes, with men consistently portrayed as aggressors, and female actors rebuffing their advances. (Primarily male) troops are not encouraged to cease sexually pursuing (primarily female) co-workers but to become better at recognizing the “signals” those co-workers are sending.

The jovial presentations crafted by the military promote the idea that rape is a “gray area,” a question of “mixed signals” rather than a violent crime. Disturbingly, one trainee featured on the Army website observes that what he learned from the Sex Signals presentation was that perpetrating rape is “an average-Joe kind of thing...it could happen to a buddy.” Bhagwati critiques this approach:

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- "So when I saw she was drunk, I told my (see Service specific name here, ex: Battle buddy, Marine, Sailor, Shipmate, or Wingman): Ask her when she’s sober."
- Ask her what?
  - If she wants to have sex, find somewhere private to have sex, go back to the room, etc.
  - Why is “asking” important?
    - It’s respectful
    - It’s the “right” thing to do.
    - It’s the law!
- Under the UCMJ, if you have sex with someone without having gotten their consent, that can be construed as a sexual assault

Id. at 2.

97. Harding, supra note 95.

98. Recent reports indicate that rape of male service members also is a rampant and underreported issue. See Lucy Broadbent, Rape in the US Military: America’s Dirty Little Secret, GUARDIAN (Dec. 9, 2011), http://www.guardian.co.uk/society/2011/dec/09/rape-us-military. The same promotion of masculine and heteronormative ideals discussed in this article also likely inhibits men from coming forward as victims of rape.

99. Bell, supra note 95.
Nowhere do they say, let's prosecute sexual predators and put them behind bars. Instead, they have a poster that says, “Ask Her When She’s Sober.”

The military acts like rape is something that happens by accident. It’s truly absurd that the second most violent crime after murder is treated by [the Department of Defense] as a misunderstanding.100

The military’s current strategies for coping with sexual assaults stem from a history of placing the blame for such assaults on victims rather than perpetrators. One soldier details the briefing on sexual assault delivered during basic training at Fort Knox, Kentucky in 1982:

They would gather the women officers who were in charge of us and the male NCOs would tell us, “You’re in Fort Knox, Kentucky. There’s not a lot of women here, and those men come out of the field, and they haven’t seen a woman in weeks, so they can’t handle themselves. So you should not travel in groups smaller than five people, and do not wear shorts. Don’t wear tight clothing. Because if you get raped, we’re sending you home.”101

The descriptions of sexual assault prevention training offered by Army Sergeant Rebekah Havrilla nearly, thirty years later in the complaint filed in Cioca v. Rumsfeld echo appallingly similar attitudes:

As the instructor would describe prohibited conduct, one or more of the class participants would begin to engage in the prohibited conduct. One soldier stripped completely naked and got on the table during the break in the middle of class. Command decided that his “punishment” for this conduct was to serve as the Equal Opportunity representative and . . . the next instructor for the sexual assault and harassment training.102

The Tailhook incident of 1991 provides a graphic illustration of the situation of women in the armed services. According to Department of Defense data, eighty-three women and seven men were assaulted during the 1991 Tailhook Symposium in Las Vegas.103 PBS’s description of its Frontline

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102. Cioca Complaint, supra note 81, at 9-10.
103. Tailhook ’91, supra note 28.
documentary about Tailhook describes an area of the hotel known as “the Gauntlet”:

The gauntlet was a loosely-formed group of up to two hundred men who lined the corridor outside the hospitality suites around 10:30 each night of the convention, and “touched” women who passed down the corridor. The touching ranged from consensual pats on the breasts and buttocks to violent grabbing, groping, clothes stripping and other assaultive behavior as the women were funneled down the line [sic] of men.

The men would start by pounding the walls and chanting “gauntlet, gauntlet,” and the noise level would increase as women walked down the hallway. Military code words such as “clear deck,” “foul deck,” “wave off,” and “bolter,” were used among the men to orchestrate group behavior. For example “wave off” was thought to indicate the approach of an unattractive female, and the men would respond by leaving her alone. Often one individual acted as “master of ceremonies” whose duty it was to coax women to walk down the corridor, sometimes even picking them up on his shoulder and carrying them into the crowd.104

Of the 149 cases referred for disciplinary action out of Tailhook ‘91, not one resulted in a conviction.105 A Pentagon report concluded that incidents such as this were not isolated but had occurred at Tailhook conventions since at least 1988.106 In what Kingsley Browne identifies as a blatant double standard, although women are documented to have participated as willing participants—or even as aggressors—at Tailhook, no women were censured for their participation in the events.107

Although Elaine Donnelley categorizes the military’s reluctance to prosecute female perpetrators at Tailhook as favoritism or the result of a pro-feminist agenda,108 I argue that the lack of attention to female offenders at

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108. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL’Y 815, 823 (2007) (categorizing the post-Tailhook ‘91 investigation as “spin[ning] so out of control as to violate the due process rights of the male aviators”). Both Donnelly and Browne accuse feminists of taking advantage of the Tailhook scandal to promote the advancement of women into combat positions. Browne, supra note 105, at 752-54; Donnelly, supra note 108, at 820-21, 826, 833. Donnelly suggests that there may have been significant adverse effects after this feminist agenda – for example, she stresses that Jessica Lynch was raped as a consequence of her being placed in an ostensibly non-combat position close to the front lines in Iraq. Donnelly, supra note 106. These arguments are akin to those
Tailhook is not mere favoritism. Rather, like the consistent adherence to traditional gender roles in SAPRO skits, the failure to prosecute women at Tailhook importantly reveals an institutional reluctance to locate women as agents as well as victims of oppression. Other scholars have explored the ways in which the widespread acceptance of the gendered discourse of war has had the “fundamentally patriarchal consequence” that women are “maneuvered” into certain roles—usually non-decision-making roles—in the armed services. Agency, however, can be expressed not only by resisting or challenging social norms, but by inhabiting such norms. Many women have participated in and benefited from the structures and policies in place in the U.S. military. Acknowledging the existence of patriarchy and the central role that men have played in shaping the ways in which war is conducted and narrated does not preclude the recognition that women can also be perpetrators. As Baghwati compellingly states regarding our societal obsession with “girls with big boobs and big guns”: “Don’t fool yourselves into thinking society’s conscious or unconscious obsession with women’s sexual and physical power is irrelevant to our discomfort with women in combat, or that men are solely to blame here for the manipulation of women.” Recent decisions to allow women officers on submarines, as well as comments by Admiral Eric T. Olson advocating that women be allowed to serve in combat roles as Navy SEALs, show a depth of commitment by many to women’s advancement within the institution. Further, that some women may have participated as 

made recently by Fox News commentator Liz Trotta, who argues that the position of “hardline feminists” advocating combat positions be opened to women has led and will lead to increasing rates of sexual assault. See Rebecca Shapiro, Fox News’ Liz Trotta Doubles Down on Statements About Rape in the Military, HUFFINGTON POST (Feb. 21, 2012, 11:24 AM), http://www.huffingtonpost.com/2012/02/20/fox-news-liz-trotta-rape-military_n_1288769.html.

109. See ENLOE, supra note 23, at 293, 298; see also ZILLAH R. EISENSTEIN, SEXUAL DECOYS: GENDER, RACE AND WAR IN IMPERIAL DEMOCRACY xviii (2007) (discussing the discourse of the military as “masculinist” and “heteronormative”); Carol Cohn, Sex and Death in the Rational World of Defense Intellectuals, 12 SIGNS 687 (1987) (discussing the gendered system of symbols that governs U.S. foreign relations, military training and defense operations, and describing the process by which women in military service or defense professions become complicit in perpetuating patriarchy via the discourse of war).


aggressors in Tailhook or other incidents of sexual harassment against other women does not weaken arguments that the military is a masculinist and heteronormative institution harmful to women as a group. Although a few may benefit, the existence of deeply entrenched institutionalized policies that overlook the concerns of all women—and particularly all lesbian women—means that only a very small subset of women are able to gain a seat at the table.

Former Air Force Technical Sergeant Mary Gallagher, a plaintiff in Cioca v. Rumsfeld, expresses the personal and professional cost of sexual assault in an op-ed to The Huffington Post:

Today, as I continue the painful process of moving on, my attacker still wears the Air Force uniform . . . . Standing in line at the Naval Clinic, I feel like a stranger even though I am [a] veteran like them. My service was tainted and I do not always feel like I should be in the company of such men and women . . . . My attacker took away my military career, but he also stole . . . . my sense of belonging to something bigger than myself.115

Websites such as “My Duty to Speak” offer countless, similar stories from women and men who experienced sexual trauma at the hands of peers and superiors and either were ostracized or faced further sexual violence as a result of reporting such incidents.116

Due to horrific mass rapes that have taken place in Rwanda, Bosnia, and Sudan in recent years, sexual violence committed by troops against civilian women during war has begun to receive media attention. However, sexual violence against female soldiers has been significantly less visible. There is a tendency among officials, legislators, and the general public to dismiss sexual assault as an unfortunate side effect of war, a crime perpetrated by a few renegade individuals.117 It is a mistake, however, to view the rampant sexual harassment and rape of women in the military as anything other than what it is—a symptom of an institutionalized policy of gendered hierarchies and sex discrimination.

117. See, e.g., Jay Kernis, Interview with Anu Bhagwati, CNN: IN THE ARENA (June 27, 2011, 11:45 AM), http://inthearena.blogs.cnn.com/2011/06/27/bhagwati-senior-commanders-sweep-sexual-harassment-and-sexual-assault-allegations-under-the-carpet-instead-of-investigating. As Bhagwati notes, unfortunately, a lot of commanding officers are under the impression that sexual assault just “happens” when you put women and men together in a unit. It is not only offensive to suggest that men, by virtue of being near women, become violent sexual predators, there’s also no evidence to back that up.

Id.
Catharine MacKinnon highlights that, in the case of rape, there is a particular historical tendency to separate “private” crimes of violence against women from more public crimes of war. Rather than being treated as a serious crime unto itself, rape is treated as the “inevitable by-product of armed conflict”—as collateral damage. Discussion of rapes often becomes an either/or situation in which rape is thought to be either an attack of soldiers on civilians or an individualized act of men against women. She writes:

[W]omen are not typically raped by governments but by what are called individual men. The government just does nothing about it. This may be tantamount to being raped by the state, but it is legally seen as “private,” therefore not a human rights violation. In an international world order in which only states can violate human rights, most rape is left out.

Just as states play a vital part in promoting mass sexual violence against civilian women, one must not overlook the state’s role in sanctioning violence by military men against military women. In fact, the duty of the state to prevent and protect (straight) male soldiers from harassment and assault by other males is clearly promoted as an institutional objective. As discussed above, heterosexual male service members’ fears of being subjected to sexual propositions from fellow male soldiers have not only been acknowledged as harassment but have been a primary rationale for keeping GLBT people from military service. Harassment of military women, however, is accepted as part and parcel of the armed forces experience. The ways in which military anti-homosexuality policies have operated to effect such harassment and impede women’s advancement in the military is discussed in the following section.

II. DRUMMING HER OUT: MILITARY ANTI-GAY AND ANTI-LESBIAN POLICIES IN HISTORICAL PERSPECTIVE

DADT, repealed by a statute passed in December 2010 and made effective in September 2011, was the final in a series of policies enacted by the U.S. military targeted at rooting out homosexual service members based on various combinations of status and conduct. Prior to World War II, homosexuals were not discharged from the armed forces based on status. Rather, any soldier who committed misconduct such as sodomy could be discharged, gay or not. The

119. Id. at 9.
120. Id. at 14.
general procedure for dismissing such persons, exemplified by the first expulsion of a homosexual soldier, Gotthold Frederick Enslin, in 1778, was “drumming out,” a ritual in which offending individuals were paraded in front of fellow troops, stripped of insignias, and told never to return. The first codification of military policy against homosexual soldiers took place during World War I, as the Articles of War of 1916 included assault with intent to commit sodomy as a felony. It is important to note that these early policies did not exclude gays from serving per se. Rather, they dealt with sodomy as a criminal act, punishable by imprisonment.

During World War I, the development of psychiatric research categorizing homosexuality as a mental illness led to the development of policies aimed at excluding and expelling homosexual persons from the military based on status. In 1919, the first purge of homosexual soldiers was conducted at the Naval Training Station in Newport, Rhode Island. At the time, a Senate subcommittee condemned the purge, opining that homosexuality was a disease better treated in a hospital than through criminalization.

It was during World War II that policies penalizing homosexual soldiers as homosexuals really took off, as military leaders sought ways to identify those persons who would be most fit for combat. New policies drafted with input from psychiatrists led to the inclusion of homosexuality under Section 8 of Army Regulation 615-30. This form of discharge, which resulted in the loss of Veteran’s Benefits, was colloquially referred to as an “Eight Ball,” or a “blue ticket,” because of the blue paper it was printed on. There was an exception to the Section 8 discharge for “non-confirmed perverts” (those “straight” men who claimed to only have engaged in homosexual activity in an isolated incident) and those with “salvage value,” soldiers who were viewed as providing essential services to the military. As advancements in psychology led to new categories of homosexual—"latent, self-confessed, well-adjusted, habitual, undetected or known, true, confirmed"—these were added to the Section 8 criteria. However, these policies were seldom employed until after

123. SHILTS, supra note 3, at 15; see also NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 5 (2009). The 1919 revised Articles of War included sodomy itself as a felony, even if consensual. See REVISION TO THE ARTICLES OF WAR 1912-1920, Sec. III, Art. 93, at 24.
124. SHILTS, supra note 3, at 16.
125. Section 8(a) of Executive Order 10450 provided for an undesirable discharge to be given to any individuals “mentally unfit” for service, including those found guilty of “sexual perversion.” Exec. Order No. 10,450 § 8(a), 18 FR 2489, 3 C.F.R. (1949-1953).
126. BÉRUBE, supra note 121, at 139.
127. Id. at 140.
128. Id. at 146. Allan Bérubé observes that debates arose as to who should be making this diagnosis: psychiatrists, commanding officers, or soldiers themselves.
the conclusion of World War II. The real significance of these policies is that they began a shift from the criminalization of homosexual conduct to the treatment of homosexual status as a mental illness. This radical shift in thought continues to shape contemporary societal views of gays and lesbians and the policies that are drafted to reflect these views.

Until DADT was passed in 1993, homosexuality in the military was regulated and restricted through a combination of criminal prohibitions in the UCMJ and military personnel regulations. As a policy matter, homosexuality was viewed as “incompatible with military service,” as the presence of homosexual personnel would “seriously [impair] the accomplishment of the military mission.” From 1947 to 1955, twenty-one states enacted sexual psychopath laws criminalizing homosexual status alongside “degenerate” and “sex deviate.” Based on the Army’s first diagnostic model developed during World War II, in 1952, the American Psychological Association released the DSM I, listing homosexuality as a “sociopathic personality disorder.” In response, the armed services collaborated on Project M-46, standardizing anti-homosexual policies across the branches. Guidelines divided homosexuals into three types: those who used force, those who were consenting adults, and those with tendencies but who had committed no provable acts. Service members who were investigated as alleged homosexuals were given two options: to sign a statement of consent to being discharged, acknowledging that receipt of a Section 8 discharge would result in their being deprived of rights as a veteran and subjected to prejudice in civilian life, or to be tried by a court-martial for the crime of sodomy and conduct unbecoming an officer. In 1959, the Department of Defense issued Directive 1332.14, Administrative Discharges, listing homosexual acts and sodomy as “sexual perversion” and, therefore, reason for discharge from military service; in 1975, the language of the directive was altered to describe

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129. Id. at 33, 147. During World War II, approximately 5000 sailors and soldiers were rejected from the military for being homosexual. In addition, more than 9000 sailors and soldiers were discharged from the military with the label “homosexual” on their official records. While this was a significant increase from before World War II, when discharges for homosexuality only numbered in the hundreds, discharges for homosexuality remained a relatively small percentage of overall discharges, given the fact that over 18 million men were screened for entry into the services during World War II. Id.

130. DADT REPORT, supra note 55, at 20. In 1950, Congress enacted the UCMJ, which was based upon and replaced the Articles of War. ARMY STUDY GUIDE, http://www.armystudyguide.com/content/army_board_study_guide_topics/military_justice/military-justice-study-gu.shtml (last visited Feb. 27, 2012).

131. DADT REPORT, supra note 55, at 20-21.

132. BERUBÉ, supra note 121, at 258.

133. Id. at 259.

134. Id. at 261.

135. Id.
“homosexual acts or other aberrant sexual tendencies” as grounds for dismissal. 136

Beginning in the 1950s and continuing through today, gay and lesbian service members also could be subject to criminal courts-martial for violating the UCMJ, which replaced the Articles of War as the code defining military criminal conduct in 1951. 137 Articles 77 through 134 of the UCMJ, including Article 125, Sodomy and Article 133, Conduct Unbecoming an Officer and a Gentleman, are known as the “punitive articles.” If violated, these can result in several years’ imprisonment.

While anti-gay policies were further entrenched across all branches of the military throughout the 1950s and 1960s, the percentage of gay discharges remained low until the 1970s, after the Vietnam War. The surge in post-war dismissal of troops coincided with a societal backlash against gays and lesbians, as sodomy was decriminalized across the United States. 138 In 1975, 937 persons were dishonorably discharged from the armed services for being homosexual. In 1977, 1442 persons were discharged under the anti-gay policy. 139 In 1980, the number of persons discharged for being gay rose to 1966, more than twice the number from five years prior. 140 During the recession of the early 1980s, the number discharged continued to rise. 141

As I discuss in Section A(i) below, when one examines anti-homosexual policies on an historical basis, rising numbers of homosexual discharges appear to have been based more on pragmatic, economic considerations than on combat effectiveness. The tide of discharges ebbs during active military engagements, then flows when such conflicts are over. In Section A(ii), I discuss how a steady uptick in discharges also has coincided with women serving in greater numbers and in more prominent positions across the armed forces.

A. Gender Troubling: Military Anti-Gay Discharges 1950 to the Present

i. Contradictory Enforcement in War and Peace

As I describe above, the discourse regarding the passage of DADT and rhetoric surrounding the policy’s repeal have focused primarily on issues of

136. DADT REPORT, supra note 55, at 20.
138. SHILTS, supra note 3, at 294-95.
139. Id.
140. Id. at 356.
141. Id. at 419.
unit cohesion, asking whether gay male soldiers have the mettle to “cut it” in combat and whether they would interfere with the functioning of military units. The real story of the military’s anti-gay policies, however, is vastly different. Data regarding discharges of soldiers pursuant to Section 8 and, later, DADT, suggest a pragmatic military that is responding to economic constraints and practical necessities rather than concerns regarding courage and battle-preparedness. A review of the discharges for homosexuality across all conflicts reveals some striking statistics.

One can identify a marked rise in peacetime versus wartime discharges for homosexuality beginning in the years immediately following World War II. Although fewer in number than discharges during the war, the rate at which homosexuals were discharged from both the Army and the Navy during the post-war years of 1947 to 1950 was triple the wartime rate. The only exception during this period was a sharp drop in Naval discharges during the Korean conflict. The difficulty of obtaining a Section 8 discharge during and immediately after this time was encapsulated in the character of Corporal Klinger on the television series M.A.S.H., who dressed in women’s clothes in order to (unsuccessfully) avoid military service.

The Vietnam War period tells a similar story of persistent reluctance to discharge allegedly gay personnel during active conflicts. From 1963 to 1966, the Navy discharged between 1600 and 1700 enlisted personnel per year for homosexuality; from 1966 to 1967, only 1094 gay discharges took place. In 1968, discharges for homosexuals from the Navy numbered 798. In 1969, at the peak of the Vietnam conflict, there were only 643 such discharges. And in 1970, there were a mere 461, even though, due to the draft, membership in the service across these years had been increasing. Military personnel specifically were instructed to treat persons admitting to homosexual tendencies with suspicion, labeling such persons “hoaxosexuals.”

These trends in retaining individuals in wartime and letting them go immediately post-conflict continued through the 1990s. For example, in the six months following the 1991 Gulf War conflict, over 1000 gays and lesbians were fired, many of whom had performed admirably and whose sexuality was

142. As discussed in this Article, this is a question that necessarily excludes lesbian soldiers due to the continuing prohibition on women serving in combat positions.
143. BÉRUBÉ, supra note 121, at 262. During these years, both the Army and Navy were discharging approximately 1000 men and women as homosexuals per year, about half the average number of persons who were discharged for such conduct during the war. Id.
144. Id.; see also SHILTS, supra note 3, at 70. In 1950, at the height of the Korean War, Navy discharges were numbered at 453. Upon the signing of the armistice at the conclusion of the war, 1353 sailors were immediately discharged on grounds of homosexuality. Id.
146. SHILTS, supra note 3, at 70.
147. Id. at 68.
148. Id.
It's Not All Flowers and Daisies. During the DADT era, the largest number of discharges—around 1200 across the armed forces—occurred prior to September 11, 2001, during peacetime. From 2002 to 2007, discharges under DADT lingered around 650, or roughly half the peacetime number. Data repeatedly and compellingly demonstrate that it is not during combat where the stresses and fissures of gay/straight relationships occur. Although the primary arguments against the inclusion of gays and lesbians in military service rely upon combat readiness, it is when military lives are most precarious that regulations against homosexuality fall by the wayside.

ii. The Riptide of Enforcement: Gendered Effects of Military Anti-Homosexual Policies

When one takes an historical approach, it becomes clear that the story of the impact of anti-homosexual policies is not a narrative about serving in combat but a story about pragmatic, economic and political considerations. More precisely, what has been artfully presented as a tale about service in war is actually a story about serving in peacetime. It is also a story about gender. As military women’s opportunities to take on jobs initially reserved for men have expanded—as women have edged closer to being engaged in active combat—women increasingly have been targeted and discharged pursuant to military anti-gay policies.

Because women did not serve in the military, except as nurses, until World War II, early policies regarding gays in the military were focused on identifying and expelling male service personnel. During World War II, approximately 300,000 women served in separate units such as the Navy Women Accepted for Volunteer Service (the WAVES) and the Women’s Army Corps (the WACs). Across all branches, the requirements for women to join the military were tougher than those for men; for example, women were required to have high school diplomas to join. Shilts estimates that up to eighty percent of early female enlistees in the military may have been lesbian, based on the fact that married women were prohibited from serving, and women would have been discharged immediately upon pregnancy.

During World War II, there were almost no policies specifically regarding the identification or expulsion of lesbians from the armed services. The policies that were beginning to be developed to root out gay males focused on characteristics such as effeminacy in dress or manner, a “patulous rectum,” or

149. FRANK, supra note 123, at 12.
150. Id. at 169.
151. BÉRUBÉ, supra note 121, at 28.
152. SHILTS, supra note 3, at 182.
153. Id. at 140. Shilts appears to assume here that many unmarried, non-childbearing women would have been lesbians.
whether entrants identified as "mama's boys." These stereotypical conceptions not only did not apply to women, but actually may have fostered lesbians' entrance into the service. Selection of women officers and drill instructors were based on existing, traditionally masculine standards, such as having a strong attitude and an "aggressive manner." During the War, a Marine Corps examiner at Camp LeJeune noted, "Women showing a masculine manner may be perfectly normal sexually and excellent military material." Interviews with gay and lesbian veterans of World War II indicate that "effeminate" men and "mannish" women may purposefully have been assigned to stereotypical duties because it would help the war effort.

It was the conclusion of World War II that saw the beginning of military policies specifically addressing the presence of lesbians among the troops. In part, these policies developed from leadership in women's branches who, desirous of greater acceptance of women in the military, pressed for closer examinations of entering women. Beginning in 1944, a policy was developed to secure fitter female soldiers by focusing on nine undesirable traits of character, one of which was homosexual tendencies. Even before this, the military had been seeking to screen out lesbians by asking questions such as whether women were joining the military to be with other girls. The WAC Recruiting Station Neuropsychiatric Examination explicitly established homosexuality as grounds of discharge from WACs but, strikingly, included no guidelines whatsoever for identifying potential lesbians. Despite the presence of anti-lesbian policies throughout the 1950s and 1960s, the entrenchment of gendered stereotypes in the post-World War II "baby boom" era and a lack of focus on recruitment of women meant that women's presence in the military remained low. Thus, there were fewer incentives to enforce these policies. Further, widespread anti-homosexual sentiment in civilian life likely influenced those accused of homosexual conduct to quietly accept discharge rather than publicly protest or challenge accusations.

Beginning in 1973, however, after the end of the highly unpopular draft instituted during the Vietnam conflict, the military shifted recruitment strategies to focus more on women. The desire to make the armed forces a

155. Id. at 59-60.
156. Id. at 29.
157. Id. at 256.
158. Id. at 30.
160. Bérubé, supra note 121, 31-32. In 1944, General Marshall disseminated TB MED 100, the first explicit instructions for screening out lesbians from the WACs. Id. at 32 n.69.
161. Id. at 32.
162. Id. at 269-71.
more attractive career option for women, coupled with the advancements wrought by the women's movement, meant that numerous positions were rapidly opened to women across all branches of service, with the exception of the Marines. As a federal institution, the military was on the front lines of battles regarding gender integration. In just five years from 1968 to 1973, the number of women in military grew from 7000 to 17,000. By 1982, enlisted women numbered over 67,000, a 550% increase from ten years prior. The number of female officers nearly doubled. From 1975 to 1978, federal laws mandating integration of women into the workforce meant radical changes for the armed forces, including the end of mandatory expulsion of women upon pregnancy, the institution of weapons training for female soldiers, the end of separate service branches for women and the opening up of U.S. military academies to female cadets. Women’s exclusion from combat continued to mean that no women could attain the same performance standards as male officers and thus, women have been less likely to be promoted. Nonetheless, even conservatives could not stem the trajectory of women’s increased participation in the U.S. military.

The fact that the military—a historically slow-moving and overwhelmingly male-centered institution—was forced to the forefront of gender integration meant that some individual women paid a heavy price for the collective advancement of women in general. During the period of rapid integration of the 1970s, for example, sexual harassment was rampant. For example, the last all-male class to graduate from the Air Force Academy adopted the motto “Last Class With Bravado,” which they changed informally to “last class with balls.” As I discussed above, the promotion of core, masculine values that persists as a defining aspect of military culture has meant that, rather than subsiding, the sexual harassment of women has remained a constant—and sometimes rising—problem.

With the increasing number of women in the services in the 1970s came a significant threat to the patriarchal power structure that had not existed in prior years. Despite initial claims that the Carter administration supported non-discrimination on the basis of sexual orientation, the administration ultimately

163. SHILTS, supra note 3, at 183.
164. Id. at 415.
165. Id.
166. Id. at 267-68, 316.
167. Id. at 317. For a discussion of the current status of women in the military, see Martha McSally, Women in Combat: Is the Current Policy Obsolete?, 14 DUKE J. GENDER & POLICY 1011 (2007); see also Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (holding that the combat exclusion necessarily precludes certain claims for gender-based discrimination within the U.S. military because “the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.”).
168. SHILTS, supra note 3, at 268.
strengthened defense policies, including expelling gays and lesbians. The existence of military anti-gay policies provided a path for those officers who desired to limit women's engagement in the military to make it clear that women were not welcome among their ranks.

The narratives of lesbians who served during World War II tell a strikingly different story than those of lesbians serving in the 1970s though today. Predictably, women serving in World War II report that they were subjected to propaganda emphasizing the importance of femininity and warning against "dancing together in public places in uniform" and "mannish haircuts"; however, lesbian WACs and WAVES often report having had a rewarding time in the service. One veteran of the WACs fondly remembered her commanding officer, whom she referred to as "‘Minnie the gym teacher.’" In 1944, Captain Alice E. Rost, one of Army's sixteen female psychiatrists, examined three female couples in the WACs who were accused of homosexual activity. Rost argued in her report that homosexuality was "part of the personality, but not an illness." She noted that the women in question had "conducted themselves inconspicuously" and "with discretion" and recommended that they not be discharged. Other psychologists agreed with Rost, arguing that "well-adjusted" homosexuals were not necessarily poor soldiers. During World War II, "witch hunts" against women soldiers were explicitly discouraged, mainly because of the perceived need to protect women from smear campaigns that would create unwholesome images and damage recruitment, dissuading parents who might otherwise send their daughters into the military. Bringing an "unjust or unproveable charge against a woman" was "severely reprimanded."

169. Id. at 274, 295-96.
170. BÉRUBÉ, supra note 121, at 59. Sociologist Allan Bérubé interviewed World War II WAC veteran Pat Bond, who served at Camp Lejeune; she observed of her time in the service, "We got sideburns shaved over the ears, my dear . . . . We really carried on!" Id.
171. Id. at 60.
172. Id. at 170. Only "confirmed butch lesbians . . . whose entire emotional and sexual interest focused on girls" were deemed detrimental to the service. Id.
174. Id. at 226; see also EVELYN M. MONAHAN & ROSEMARY NEIDEL-GREENLEE, A FEW GOOD WOMEN: AMERICA'S MILITARY WOMEN FROM WORLD WAR I TO THE WARS IN IRAQ AND AFGHANISTAN 107-11 (2010). Monahan and Neidel-Greenlee discuss military concerns regarding a 1943 slander campaign against the WACs that led to a sharp decline in women's applications to join the armed services. The authors hypothesize that rampant rumors during the time, such as rumors that all women in the WACs or WAVES were prostitutes, abounded as a result of the widespread fear that growing employment of women in non-combat positions would lead to an increase in numbers of young men being sent overseas. Id.
175. Benecke & Dodge, supra note 71, at 218 (citing Allan Bérubé & John D’Emilio, The Military and Lesbians During the McCarthy Years, 9 SIGNS 759-75 (1984)).
Immediately after World War II, the military began what Bérubé refers to as an "about-face" in the treatment of lesbians. When the need for troops sharply declined following the war, women began to be discharged for homosexual misconduct at a rate roughly three times their presence in the military. In the late 1940s and 1950s, the military began to conduct purges of lesbian soldiers modeled on the 1919 purge of homosexual sailors on the Newport Navy base. These purges were a relatively simple way for the military to expel female enlistees, as unmarried women could not point to their spouse to refute allegations of same-sex attraction and were easily stereotyped as lesbian. The lack of guidelines for defining women’s behavior as homosexual made it easier for officers to identify a broad range of misconduct. Conduct historically construed as signs of female homosexuality has included patting on the back, hugging, or consoling a distraught colleague.

By the mid-1950s, Navy documents noted that the homosexual discharge rate was “much higher for the female than the male.” Data from 1956 show women being discharged from the Navy for homosexuality at a rate four times higher than their male counterparts. The expert conclusion was that the rate of homosexuality was higher for women than for men: “Military service may be more attractive to females with latent homosexual tendencies . . . . Homosexual activity of female service members has appeared to be more disruptive of morale and discipline . . . than similar male activity.” Military brass did not consider that disproportionate discharges of lesbian personnel might be, at best, an unintended consequence of policies drafted to net male homosexuals, and, at worst, part and parcel of protectionist strategies to retain the most skilled and lucrative jobs for male soldiers and sailors.

With the increased entry of women into the armed services in the 1970s, discharges of women for homosexuality once again increased. In 1979, for example, women constituted less than five percent of Naval forces but ten percent of gay-related discharges. During the same period, in the Army, women were six times as likely to be discharged for homosexuality than men. During the 1970s and 1980s, the purges of female personnel took on the character of the Salem Witch Trials, as specific geographic locations and professions were identified as hotbeds of lesbianism. Shilts notes that “[t]he hunt for lesbians in the U.S. military . . . was not merely a preoccupation, it was

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176. BÉRUBÉ, supra note 121, at 262.
177. Id.
178. SHILTS, supra note 3, at 283.
179. Benecke & Dodge, supra note 71, at 225.
180. BÉRUBÉ, supra note 121, at 263.
181. SHILTS, supra note 3, at 282. The discharges during that year numbered 1 in every 450 sailors, but 1 in every 122 WAVES. Id. at 122.
182. Id. at 282.
183. Id. at 318.
184. Id.
an obsession."185 Throughout the 1980s, the mythology about lesbians evolved
disproportionate to their presence. Lesbians gained reputation as a “cult,” with
a 1979 Army position paper noting that “gangs” of female homosexuals
“inflict[ed] or threaten[ed] bodily harm to female heterosexuals” who resisted
their advances.186 In 1977, every woman enrolled at the Navy Officer
Candidate School in Newport, Rhode Island, was interrogated by the Naval
Investigative Service for suspected lesbian activity.187 In 1980, eighteen
women were investigated for potential homosexual activity at the North Island
Naval Station.188 That same year, at the request of Congress, the Naval
Investigative Service (NIS) began an investigation into allegations of
misconduct, including stabbings, drug dealing and loan sharking on the USS
Norton Sound. The investigation into these crimes revealed nothing; however,
during the investigation, an interviewee gave a statement claiming that twenty-
three of the sixty-one women serving on the carrier, including eight of nine
African-American women, were lesbians.189 Eight women ultimately were
tried on sodomy charges.190 In 1986, eight women were dismissed from the
military police at West Point.191 And, in 1988, twenty-one female drill
instructors at Parris Island were ousted from the service or imprisoned.192
Traditionally lesbian organizations, such as softball teams, were specifically
targeted for investigations.193

If a woman could refute the allegations that she herself was a lesbian, pre-
DADT policies provided that she could still be expelled for her “poor
judgment” in associating with known homosexuals.194 If a person under
investigation declined to accept a Section 8 discharge and elected to be tried on
criminal charges by court martial, the penalty could be severe. For example,
Air Force Lieutenant Joanne Newak, convicted of sodomy in 1982, was

185. Id. at 414.
186. Id. at 318.
187. Id. at 317.
188. Id. at 356.
189. Id. at 336-37.
190. Id. at 344.
191. Id. at 560.
192. FRANK, supra note 123, at 11.
193. SHILTS, supra note 3, at 418; see also MARY ANN HUMPHREY, MY COUNTRY, MY RIGHT TO
SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY: WORLD WAR II TO THE PRESENT 12
(1990). Benecke & Dodge discuss the case of Marine Corps Captain Judy Meade, who, during
interrogation by NIS at Camp Lejeune, was asked why her “antenna did not go up” because the women
with whom she had been associating “looked like homosexuals” and Meade “should [have] know[n]”
that women who played softball were lesbian because of how “aggressive” they were. Benecke &
Dodge, supra note 71, at 231 (quoting Testimony of Judith Meade, Defense Advisory Committee on
194. See SHILTS, supra note 3, at 318. This “guilt by association” paradigm is present in numerous
cases of lesbians being dismissed pursuant to DADT, such as that of Captain Meade, discussed by
Benecke & Dodge, supra note 71, at 231, and that of Air Force enlistee Mary Ann De Palo, discussed by
SHILTS, supra note 3, at 318.
sentenced to six years hard labor in Fort Leavenworth. By the end of the 1980s, women comprised ten percent of the armed forces but made up twenty-six percent of gay discharges. In the exceedingly “macho” Marine Corps, statistics were even more striking. In 1989, for example, white females comprised 3.1% of the Marine Corps and thirty-one percent of gay discharges, a rate ten times higher for women than for men. By 1993, the rate of discharge for female versus male Marines pursuant to anti-homosexual policies remained seven times higher. Despite the primarily male-oriented intent in crafting military anti-homosexual policies, a lack of uniform standards in “on the ground” application of such policies rendered women easy targets. In addition, somewhat ironically, the fact that women as a group were an afterthought in the drafting of the military’s anti-homosexual policies put them at the forefront of enforcement.

The invisibility of women in the formulation of the military’s anti-gay policies is apparent even on the face of the military’s statutes concerning homosexual conduct, which refer specifically to sodomy and “conduct unbecoming an officer and a gentleman.” The fact that the UCMJ’s punitive provisions were drafted without female soldiers in mind has made easier for the military to target female soldiers, because investigators have been able to interpret such statutes to encompass a broad range of conduct between women as worthy of criminal penalty. For example, Section 125 of the UCMJ, the military’s anti-sodomy statute, refers to “unnatural carnal copulation with another person of the same or opposite sex or with an animal,” then clarifies that “[p]enetration, however slight, is sufficient to complete the offense.” It was only in 1979, after numerous women had been dismissed from the military, that the Military Court considered whether cunnilingus constituted sodomy.


196. Shilts, supra note 3, at 595.

197. It is not clear why data was collected specifically regarding “white” females. I was unable to locate corresponding data regarding minority females.

198. Shilts, supra note 3, at 595.

199. Id. at 5.

200. See UCMJ, 10 U.S.C. § 933, art. 133 (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”). The Explanation to Section 933 in the Manual for Courts-Martial defines “gentleman” as “includ[ing] both male and female commissioned officers, cadets, and midshipmen.” See MANUAL FOR COURTS-MARTIAL UNITED STATES, § 59(c)(1) (2008) [hereinafter MCM].

201. UCMJ, 10 U.S.C. § 925, art. 125 (“(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.”). If one is found guilty pursuant to the statute, the penalties may include a dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to five years. MCM, § 51(e)(4).

202. United States v. Harris, 8 M.J. 52, 58 (C.M.A. 1979) (contact between the “female organ” and the mouth of another is “sodomy”), United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978) (consensual heterosexual fellatio is “sodomy”); see also Greer et al., supra note 69, at 1156 (observing that, in contrast to civilian courts, “straight” people are also regularly prosecuted for engaging in sodomy with
The lack of attention to defining what the term "sodomy" precisely means when applied to the conduct of two women meant that, as applied to lesbians, sodomy statutes could have been interpreted to include "unnatural" acts as any sexual acts outside the missionary position.

The ways in which Article 133, "Conduct Unbecoming an Officer and a Gentleman," applies to women officers is even more vague. The prohibition against "Conduct Unbecoming" first was codified during the Revolutionary War, when it was adapted from standards disseminated in the British military. The "Conduct Unbecoming" standards, which emerged out of social class divisions between officers and enlisted men in the British military, were adapted into the UCMJ in the 1950s and still exist today. Starting in 1951, misconduct by female personnel was specifically identified as being encompassed within these standards. Historically, however, the application of the statute has been associated with gendered behaviors such as associating with prostitutes or failing to provide for one's family. Hillman notes that the broadly-drafted statute has been used to prosecute any officer engaging in behavior thought to bring dishonor on the military, such as speaking out against war, having excessive debts, and, increasingly, engaging in sexual misconduct such as homosexuality. Women officers have been charged pursuant to Article 133 for as little as having a friendship with a civilian lesbian.

Ironically, purges of lesbian service members continued to rise as the percentage of lesbians serving may have been decreasing as the military became a more acceptable career path for married women and women with children. Some researchers estimate a sharp decline in lesbian military presence from a high of up to eighty percent during World War II to perhaps ten percent today.

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other heterosexuals pursuant to military statutes). In United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), the Court of Appeals for the Armed Forces ruled that the Lawrence decision does apply to the military. However, the court noted that the military may continue to prosecute consensual sodomy if the conduct falls outside protections provided under Lawrence, or if the conduct is prohibited because of "additional factors relevant solely in the military environment." Id. at 207.


204. Hillman observes that the statute reflects the belief that misconduct by officers would be particularly embarrassing and damaging to the military. Id. at 6-7, 27-28.

205. Id. at 43 (noting that, in 1951, the UCMJ observed that "gentleman is the equivalent of gentlewoman"). Today, Article 133 simply notes that it includes women within the definition of "gentleman." Id.

206. Id. at 44.

207. Hillman notes that, in recent years, prosecutions for "conduct unbecoming" increasingly have been associated with sexual (mis)behavior, particularly homosexual sexual behavior. Id. at 38, 51-52.

208. See Benecke & Dodge, supra note 71, at 229 (discussing the NIS investigation of Captain Meade at Parris Island). Ultimately, the charges were dropped after Meade spent $16,000 in legal fees. Id. at 231.

209. Shilts, supra note 3, at 140. Shilts does not provide data to support this claim that eighty percent of women serving were lesbian. See also Bernard D. Rostker, Susan D. Hosek & Mary E. Vaiana, Gays in the Military: Eventually, New Facts Conquer Old Taboos, RAND REVIEW (Spring
B. *The False Promise of "Don’t Ask, Don’t Tell"*

As enacted in 1993, Section 654 of Title 10 of the United States Code, commonly known as “Don’t Ask, Don’t Tell,” mandated a member’s separation from the armed forces if a finding were made that the member, subject to certain exceptions, “engaged in, attempted to engage in, or solicited another to engage in a homosexual act” or “stated that he or she [was] a homosexual or bisexual.”

The policy made one key shift from earlier policies, changing the word “homosexuality” to “homosexual conduct.” The DADT policy also included a directive explicitly banning harassment based on sexual orientation, equating the military’s stance on harassment based on sexual orientation to that based on race or gender.

Although an incremental, yet positive, change from preexisting statutes, it was, in fact, hardly progress. Nathaniel Frank observes that the DADT policy actually resulted in “toxicity,” “needless devastation” and “skyrocketing” rates of discharges. As described above, the military’s prior anti-gay policies penalized status as well as conduct; under military policies, a person could be discharged for simply being homosexual, while under criminal sodomy

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210. See 10 U.S.C. § 654(b), repealed by Pub. L. No. 111-321, H.R. 2965, S. 4023. A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—
   (A) such conduct is a departure from the member’s usual and customary behavior;
   (B) such conduct, under all the circumstances, is unlikely to recur;
   (C) such conduct was not accomplished by use of force, coercion, or intimidation;
   (D) under the particular circumstances of the case, the member’s continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
   (E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

Id. 211. Greer et al., supra note 69, at 1155.


213. FRANK, supra note 123, at 167-68.
statutes, a person could be discharged for committing homosexual acts. DADT as initially proposed sought to move away from penalizing status to solely penalizing conduct—a person would be discharged only for what he or she did and not who she was. In fact, however, the DADT policy as drafted was nearly identical to the policy that had been in effect since 1982. The only real change that the DADT policy effected was regulatory, as service personnel were now restricted from asking about a service member’s sexual orientation. In addition, credible evidence of homosexuality was no longer supposed to be premised on association, such as being part of a softball team or bowling league.

Janet Halley observes that the DADT policy amounted to a “Trojan horse”; it looked like a conduct regulation but in fact continued to focus on a person’s status in ascertaining whether the policy was violated. As David Richards notes, the “war [was] . . . disingenuously on gay and lesbian identity much more than on gay sex acts.” The most important part of DADT was the provision that “all discharges for homosexuality [would] be grounded on the servicemember’s commission of conduct that would manifest, to a reasonable person, a propensity to engage in homosexual acts.” This wording echoed the shift in the definition of homosexual during the 1980s from someone having “homosexual tendencies or associations” to having “desire or intent” to engage in homosexual acts. Rather than making it more difficult to discharge gay and lesbian service personnel, the revised definition moved from penalizing actual behavior to punishing thoughts.

In addition, although under DADT superior officers could not ask about homosexuality, “telling” took on a new character in which a limitless and undefined number of acts—hand holding, embracing, refusing sexual advances of opposite sex service members—could indicate to a “reasonable person” a propensity to engage in homosexual sex. Although “expressive activities,”

215. JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 35 (1999). Halley observes that, while President Clinton initially proposed to prosecute felony sodomy in an evenhanded manner and discharge servicemembers engaging in such conduct without regard to sexual orientation, Congress defeated this provision, adopting language strikingly similar to existing anti-homosexual policies. Id.
216. Id. at 87 (observing that DADT shifted regulatory attention from status to conduct).
217. RICHARDS, supra note 214, at 414.
219. RICHARDS, supra note 214, at 430.
220. HALLEY, supra note 215, at 4.
221. Id. at 7 (discussing the distinction between status and conduct made by the Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986)).
222. SHILTS, supra note 3, at 380.
223. See 10 U.S.C. § 654(f)(3) (1994). Under DADT, a “homosexual act” was defined as, “(A) any bodily conduct, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; or (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).”
such as attending a gay rally or going to a lesbian bar, were excluded as grounds for expulsion under DADT, if while at the bar or rally, one grasped the hand of a colleague of the same gender or kissed or danced with him or her, grounds for separation would arise. The service member then faced a "rebuttable presumption"—he or she would be discharged unless he or she could prove that he or she had no such propensity. Halley notes that this meant that personnel were required to prove heterosexual status in order to disprove allegations of misconduct. Christin Damiano adds, further, that the "'reasonable person' standard takes the motivation out of the hands of the actor, and makes it possible for even platonic actions, if construed by a reasonable person to be actions for sexual gratification, to be grounds for an investigation or inquiry." Extending the exception to Section 8 for "non-confirmed perverts," DADT provided a "queen for a day exception," allowing heterosexual violators to claim that their one-time sexual misconduct was not indication of propensity.

Despite the expressed intention of DADT to end witch hunts such as those that occurred on the USS Norton Sound, during the DADT period from 1994 to 2010, discharges of gay personnel did not decrease and during certain periods actually increased both in number and in percentage of the armed forces. Overall, approximately 13,000 service members were discharged under the DADT policy. Although it is beyond the scope of this Article, minorities represented approximately thirty percent of military personnel and between thirty-four and forty-five percent of DADT discharges during the last five years in which the DADT policy was in effect—a fact that deserves more than treatment in a footnote. The Department of Defense notes that, following the implementation of DADT, an average of 700–800 service members per year were separated from the military on the basis of homosexual conduct.

As with prior anti-homosexual policies, women were all but absent from discourse regarding the passage of DADT. In testimony before Congress, even Charles Moskos, the primary drafter of the policy, emphasized its focus on male-dominated combat units, noting that the policy would be unnecessary were there an all-female force. Predictably, women's absence from the
discourse regarding DADT did not protect them. Women continued to be disproportionately targeted as homosexual between 1993 and 2010, with discharges of women enlistees running at a rate roughly three times their presence in the military. \(^{233}\) Strikingly, the Williams Institute at University of California Los Angeles found that, despite advancements in the civilian GLBT rights movement, the proportion of ethnic minorities and women discharged pursuant to the military's anti-gay policies actually increased over time. In the late 1990s, approximately one-fourth of discharges pursuant to DADT were women. In recent years, women comprised around one-third of such discharges. \(^{234}\) In 2009, thirty-nine percent of those discharged were women, although women made up only fourteen percent of the military. \(^{235}\) In the most striking statistic, in 2008, women represented twenty percent of all Air Force personnel but sixty-one percent of those expelled pursuant to DADT, marking the first time that women in any branch of the military constituted a majority of those dismissed under the policy. \(^{236}\)

Despite the rhetoric surrounding DADT and its repeal focusing on men, the impact of the policy has been clearly—and harshly—borne by female service personnel. At least with regard to lesbians, the issues go beyond homophobia, suggesting, in addition, a significant and deeply entrenched policy (or policies) of sex-based discrimination. The military's anti-homosexual policies are not unique but are part and parcel of an institution that consistently promotes sexist values harmful to the advancement of women. As I discuss in the following section, without a significant commitment to altering the deeply entrenched, profoundly biased values of the military, mere discontinuation of one harmful policy is unlikely to appreciably improve the position of women.

**IV. REFORM WITH TEETH: THE NECESSITY OF INSTITUTIONALIZING ANTI-DISCRIMINATION PROTECTIONS IN POST-"DON'T ASK, DON'T TELL" U.S. MILITARY POLICIES**

Lesbians should be allowed to serve, gay men should not . . . [This] would get the distaff part of our homosexual population off our

Although Don’t Ask, Don’t Tell officially ended on September 20, 2011,\footnote{238. In July 2011, President Obama signed a statement certifying that the DADT policy would end in sixty days. \textit{See Certification of Repeal of Don’t Ask, Don’t Tell} (July 21, 2011), http://www.whitehouse.gov/sites/default/files/uploads/dadtcert.pdf (last visited Apr. 6, 2012). In September 2011, the Court of Appeals for the Ninth Circuit dismissed the Log Cabin Republicans’ challenge to the constitutionality of Don’t Ask Don’t Tell as moot. \textit{Log Cabin Republicans v. United States}, 658 F.3d 1162, 1166 (9th Cir. 2011).} the road to securing full equal rights for GLBT people in the armed services remains an arduous one. One primary reason is that the repeal abrogates the DADT policy, but it does not provide a legal remedy for gays, lesbians, and transgender persons who continue to be the victims of harassment based on sexual orientation. Over the past several years, legislators and policymakers have reflected on the best way to institute a repeal of DADT. In 2005, a bipartisan Congressional committee proposed the Military Readiness Enhancement Act, which would have replaced DADT with a sexual orientation non-discrimination provision covering each of the branches.\footnote{239. \textit{See Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (2009).}} There is no trace of this policy in the repeal as currently implemented. In fact, the DADT Report specifically disavows incorporating anti-discrimination provisions regarding sexual orientation, premised on the military’s fear of inspiring retaliatory action by heterosexual service members should they perceive that gay and lesbian personnel are being granted “special treatment.”\footnote{240. \textit{See DADT REPORT, supra note 55, at 13-14 (“We do not recommend that sexual orientation be placed alongside race, color, religion, sex, and national origin, as a class eligible for various diversity programs, tracking initiatives, and complaint resolution processes under the Military Equal Opportunity Program. We believe that [protecting gays and lesbians from discrimination as a class] could produce a sense, rightly or wrongly, that gay men and lesbians are being elevated to a special status as a ‘protected class’ and will receive special treatment.”).}} The Report trumpets equality over equity, observing: “[Openly gay and lesbian service members] will be accepted more readily if the military community understands that they are simply being permitted equal footing with everyone else.”\footnote{241. \textit{Id.} at 14.} The Department of Defense notes that complaints regarding discrimination or harassment “can be dealt with through existing mechanisms—primarily the chain of command—available for complaints not involving race, color, sex, religion, or national origin.”\footnote{242. The mechanisms that exist for remedying discrimination and harassment in the military context are not the same as those existing for civilians. \textit{DADT REPORT, supra note 55, at 14-15; see}
Despite an appalling and lengthy record of purges directed specifically at lesbians, and rampant sexual harassment and assaults of female military personnel, Clifford Stanley, Undersecretary of Defense for Personnel and Readiness, comments, "[t]here’s no special policy needed to address the things that we’re talking about here with regard to taking care of people and treating them with dignity. That’s so fundamentally basic. So the remedies you have are the remedies that already exist. There’s no need to create new remedies." Stanley’s comments particularly resonate given the recent dismissal of the “egregious” complaints in Cioca v. Rumsfeld. Disturbingly, the Department of Defense report spends almost as much space discussing bathroom facilities for gay men and lesbians—two pages—as it does discussing equal protection of service members. The depth of analysis devoted to bathroom facilities also highlights the extent to which the state is concerned with preventing one type of sexual harassment only, harassment by gay men of their heterosexual counterparts. As Suzanna Walters observes, the report serves to reassure its readers that “moral and religious objections to homosexuality deserve respect.”

The repeal of DADT also has not been accompanied by a repeal or adjustment of the sodomy or conduct unbecoming provisions in the UCMJ. In a “love the sinner, but hate the sin” sort of maneuver, the status of being homosexual is officially accepted while some homosexual conduct remains grounds for being sentenced to five years of hard labor in Leavenworth. Although the military’s highest court has held that Lawrence v. Texas does apply in the military context, the Servicemembers Legal Defense Network (SLDN) warns that there remains a risk “that those who wish to target gay and lesbian service members may make false allegations or misuse sections of the UCMJ to continue to discriminate against LGB service members.” Further, the SLDN cautions that, with the abolition of DADT, “investigations and prosecutions under Article 133 (“Conduct Unbecoming”) “should become more common, and service members should take the threat seriously. Not only sex acts, but virtually any physical act with another person can be criminally
prosecuted if it can be shown that the act was committed for a sexual or romantic purpose." In December 2011, Congress considered whether to repeal Article 125 as part of the National Defense Authorization Bill. However, after lobbying by conservative groups and animal rights advocates, who opposed striking the article’s provisions outlawing bestiality, a decision was made to retain the anti-sodomy provision for at least another year.

For both gay men and lesbians, the failure to institute anti-discrimination protections as part of military Equal Opportunity policies may have significant effects on the recruitment, retention and morale of such individuals. At least twenty-four other countries have successfully integrated gays and lesbians into their militaries without incident. However, in most of these cases, rhetorical policy changes have been accompanied by the “teeth” of legal provisions explicitly prohibiting discrimination against gays and lesbians. For example, when the South African National Defense Force (SANDF) integrated gays and lesbians in 1998, it also implemented its Policy on Equal Opportunity and Affirmative Action, which prohibited discrimination against such persons. Evidence suggests that the integration of gay and lesbian personnel in the SANDF has not had a negative effect on troops’ cohesion or effectiveness. This is at least in part because gay and lesbian personnel in the SANDF report that knowing they are protected by the anti-discrimination policy has empowered them to deal more effectively with instances of harassment. For example, one captain in the force observes that, upon hearing that other soldiers had joked about his sexual orientation, he was able to immediately stop the harassment by conveying to the individuals in question that, he could “make an example of them through the legal channels.”

The armed forces of European Union (EU) member nations have been impacted by the EU’s broad anti-discrimination directives. Great Britain was

247. Id. at 19.
249. See, e.g., Sarah Lyall, Gay Britons Serve in Military with Little Fuss, as Predicted Discord Does Not Occur, N.Y. TIMES (May 21, 2007), http://www.nytimes.com/2007/05/21/world/europe/21britain.html. European nations such as Great Britain were forced to incorporate gay service members into the military after a European Court of Human Rights (ECHR) ruling that the policy of excluding homosexuals violated the European Convention on Human Rights. In a series of cases, the ECHR declared that discharging lesbians, gay men and bisexuals from the military forces because of their sexuality violated Article 8 of the Convention—the right to a private life. See Lustig-Prean and Beckett v. United Kingdom, 29 Eur. Ct. H.R. 548 (2000); Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96, 29 Eur. H.R. Rep. 493 (1999).
251. Id. at 14.
252. Id. at 12.
forced to lift its ban on gay and lesbian service members when the European Court of Human Rights ruled that the ban on homosexuals in the military violated the fundamental human right to privacy.\textsuperscript{254} The British Parliament recently passed the Equality Act of 2010, which replaces prior antidiscrimination policies with a single law based on principles of equality and protects all persons from discrimination on the basis of sexual orientation.\textsuperscript{255} Richard Ball observes that the 2010 Act has continued a vital process of “integrating the military as part of society rather than as a separate and different society within a society.”\textsuperscript{256}

A British lesbian service member recently won a lawsuit for £200,000 due to harassment by a superior officer who repeatedly claimed he could convert her to heterosexuality, a claim that likely would not be actionable in the United States military.\textsuperscript{257} Debra Luker notes that the effectiveness of the repeal of anti-homosexual policies in EU member nations has had a lot to do with the strong direction of leaders who have clearly articulated from the top downwards that they will not tolerate harassment among troops.\textsuperscript{258}

Particularly for those personnel who do not fit into the “macho,” straight-acting ideal of the U.S. military, the repeal of DADT without the creation of avenues to pursue legal recourse for discrimination or harassment may engender an environment more ripe for retaliation than that fostered under DADT. The repeal has been widely praised as a GLBT victory; however, transgender individuals, effeminate gay men, women—anyone not conforming to the (illusory) ideal soldier paradigm—risk being victimized by continuing or even escalating harassment in the post-repeal environment. Transgender people are particularly left out in the cold in the repeal, which makes no

disability, age or sexual orientation, as regards access to employment or occupation and membership of certain organisations.”).

\textsuperscript{254} On September 27, 1999, the ECHR held that the United Kingdom’s policy of excluding homosexuals from the armed forces based solely on their sexual status violated provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and was illegal. Lustig-Prean, 29 Eur. Ct. H.R. 548 (2000).


\textsuperscript{256} Ball, supra note 255, at 24 (noting that integration between civilian and military life “opened the way to service personnel being able to register their civil partnerships and having access to the same welfare benefits and service allowances as married heterosexual personnel (e.g. access to Service Family Accommodation, pension rights, travel benefits etc.)”).


reference to reforming military policies excluding such individuals from service.

Although data is hard to come by, anecdotal evidence suggests that a significant number of personnel discharged under military anti-gay policies were dismissed based on self-reporting as homosexual. The National Review cites data collected by Charles Moskos that, by 1993, prior to the institution of DADT, approximately eighty percent of separations for violations of anti-homosexual policies had been initiated on the basis of statements by the discharged service member.259 While the National Review interprets the data as indicating that DADT “was widely used as way to get out of contracts,” the data may well suggest other things, such as a desire of service members to be honest with superiors regarding their sexual orientation or the wide range of “telling” permissible under DADT.260 The data may also suggest that service members were utilizing DADT as a vehicle to escape harassment.261 Just as the DADT repeal was being instituted, four airmen voluntarily discharged from the Air Force. Airman 1st Class Albert Pisani asked for an expedited discharge because of anti-gay harassment.262 His rationale for seeking discharge was that a supervisor had told him to expect an increase in anti-gay “friendly fire” deaths after the repeal was lifted.263

As has been the case historically, those who most clearly conform to the military ideals will continue to be the least affected by the lack of legal protections, while those who least fit in will be most likely to face “drumming out.” The particular lacuna in legal protection in regard to women, and especially lesbian women, is discussed below.


260. Charles Moskos, a close friend of President Clinton’s and the primary architect of the DADT policy, observed that: “[H]omosexual separations for whatever reason are one-tenth of 1 percent of military personnel. Of those discharges, more than 80 percent are the result of voluntary ‘statements’ by service members.” Charles Moskos, The Law Works—And Here’s Why, ARMY TIMES (Oct. 27, 2003), http://www.armytimes.com/legacy/new/0-ARMYPAPER-2300631.php. However, Gilreath cautions that one must be cognizant of the fact that a broad range of behaviors could constitute “statements” or “telling” under DADT. For example, “telling” could mean a co-worker overhearing a gay or lesbian soldier chatting with friends about his or her weekend plans. Gilreath, supra note 224, at 955-56, 966.

261. Greg Jeloudov, a plaintiff in Cioca v. Rumsfeld, provides an example of the “false reporting” that has occurred in order for heterosexual persons to escape military service by utilizing DADT. Jeloudov, a private in the Army, was repeatedly harassed by fellow service members, who accused him of being a “faggot.” The harassment escalated into an incident where Jeloudov was raped by a fellow enlisted man while in his barracks. When he reported the incident, Jeloudov’s supervisor observed to a fellow officer, “Can you believe this shit?” Command then encouraged Jeloudov to sign a statement falsely admitting that he was a homosexual. In 2009, Jeloudov was discharged under DADT. Cioca Complaint, supra note 81, at 14.


263. Id.
A. Women in the Military: The Double Bind of Female Masculinity

Kenji Yoshino hypothesizes that two characteristics—immutability and visibility—have been essential to gaining status as a protected class worthy of Fourteenth Amendment protections. He notes that, in recognizing protected status, courts distinguish between “corporeal” and “social” traits: “If a trait is perceived to be defined by nature rather than by culture, then the courts will be more likely to call it immutable . . . . If, on the other hand, the trait is perceived to be more defined by culture, the courts will withhold the immutability designation.” This distinguishes race and sex—immutable and corporeal traits—from, for example, religion and alienage, which are, in the Court’s view, social and changeable. Linda Martin Alcoff similarly identifies race and gender as “visible identities,” forms of social identity that are fundamental to the self and visual markers that are consistently highlighted.

Lesbians may be increasingly socially and, arguably, politically visible in civilian society, but lesbians are not, according to the Yoshino definition, corporeally visible. As evidenced by the comments of Joe Rehynsky prefacing this section, lesbianism is not widely considered an immutable characteristic. We can see traces of the perceived changeability of lesbian status in, for example, Katy Perry’s top-40 hit, “I Kissed A Girl” or Madonna and Britney Spears’s staged smooch at the 2003 Grammy Awards, both of which imply that lesbianism is a lark, an act put on to impress men. Judith Halberstam similarly observes how “tomboyism” in girls is generally more accepted than “sissified” behavior in boys, because it is presumed that, in males, femininity may be an inherent characteristic, while girls upon puberty “grow out of” tomboy identity.

In civilian life, at least a third of lesbian, gay and bisexual individuals currently are not out to all or most of their coworkers. The majority of people who remain closeted note that they do so based on fear of harassment or
reprisals at work. The Williams Institute observes that the “prejudice, stigma, and discrimination [experienced by LGBT people] create a social environment characterized by excess exposure to stress, which, in turn, results in health disparities for sexual minorities compared with heterosexuals.”

Psychologists caution that lesbian women frequently experience “‘invisibility,’ the failure of others to recognize the significance of their sexuality and partnership relations.” Historically, economic and social reasons have prompted a large percentage of lesbians to enter into heterosexual marriages. For wealthier women, pressure to marry stemmed from the perception of familial obligations and pressures, while the wage gap between women and men in the workforce has meant that women of lesser economic means often could not easily live together on the money they earned.

If lesbianism is not acknowledged on a regular basis in civilian society, it has been even less visible in military culture. In 1943, Colonel Howard Clark, Post Commander at Fort Oglethorpe in Georgia, bemoaned the challenges of developing a policy for excluding lesbians from the armed forces, observing: “These women don’t wear armbands . . . they are not branded on the forehead, they all look alike, the decent women and the bad ones, you can’t tell them apart, until you catch them in the overt act.” Colonel Clark’s complaint about the lack of guidelines for identifying lesbians highlight that the justifications offered for implementing DADT and its precursors—unit cohesion, combat readiness, and fears of aggressive sexual behaviors—were focused solely on male service members. Within the armed forces, the social realities faced by lesbian couples, combined with the constant push toward the “heterosexualization of women”—stereotypical efforts to make women conform to gendered stereotypes—provide unique challenges for enlisted lesbian women.

Mazur argues that the extent of differences between the situation of lesbians in the military and similarly situated gay men may mean that the separation of lesbians from the services pursuant to the DADT policy was unconstitutional. The exclusion of gay service members has always been assumed to apply identically to lesbians without question. However, there is a history holding differential treatment of men and women in the U.S. military to be constitutional, including exclusions of women from the draft and from

269. Id. at 13.
270. Id. at 14.
274. Bérubé, supra note 121, at 32.
275. Mazur, supra note 54, at 998.
276. Id. at 966.
Mazur argues that the extent to which lesbians were treated as invisible and/or exceptional in the Congressional hearings surrounding the implementation of DADT suggests the existence of an historical pattern of discrimination against women, precisely the criteria for recognizing women as a distinct class for the purposes of equal protection analysis. "Women are disproportionately burdened in an effort to reduce harms that are purportedly caused by and affect only men." If not rising to the level of unconstitutionality, the necessarily underground nature of lesbianism in the military certainly has enabled those in power to use the category of lesbian as a way to subordinate or subdue powerful or successful women. Words such as "dyke," "slut," or "whore" have long been deployed to keep women in a subservient role to men. Today, the label of "dyke" or "lesbian" retains a significant stigma. This is particularly true when the term is associated with engagement in "manly" or "aggressive" behaviors. The label "butch," for example, remains a pejorative term even among some lesbians. In the context of continuing debates in the U.S. military over "proper" attire for female enlistees, Enloe observes, "To be 'mannish' is to be a freak, a defiler of femininity, an offender of both respectable women's and respectable men's sensibilities."

While gay male soldiers may have to face the stigma that they are more cowardly or less "manly" than their heterosexual counterparts, lesbian soldiers confront the opposite stereotype. As a visible minority in non-traditional jobs, women in the military face accusations that they are less womanly or more masculine than other women. Historically, "non-feminine" behavior has been a requirement for succeeding in the U.S. military.

277. In Rostker v. Goldberg, 453 U.S. 57, 78 (1981), where the Court considered application of the draft to women, the Court noted that identical treatment of men and women in that instance would be a "gesture of superficial equality."
278. Mazur, supra note 54, at 985-86.
279. Id. at 1002.
280. HALBERSTAM, supra note 267, at 269.
281. ELOE, supra note 23, at 263. Enloe rather amusingly recounts the intense preoccupation among all branches of the service in 1997 regarding the use of umbrellas. In the Air Force and the Navy, both male and female personnel were permitted to carry umbrellas. In the more "macho" Army and Marines, however, only female service members were allowed to carry umbrellas. Male personnel were only permitted to utilize the cover of an umbrella when held by a female service member. Id. at 262.
lesbianism. Military women must balance, on the one hand, being masculine enough to conform to the ideal soldier paradigm and to be accepted as a colleague or superior by peers, and, on the other hand, being feminine enough to avoid the pejorative label of lesbian.

In 1995, Dana Britton and Christine Williams conducted a study critiquing DADT as a legal instrument privileging heterosexual military men and disadvantaging military women, regardless of their sexual orientation. They observe that:

[DADT] place[d] women in a complex catch-22 situation: The fact that they are women presumably makes them incapable of meeting the demands of military service; yet if they distinguish themselves through their military service (which is viewed as masculine behavior), they are labelled [sic] lesbians, therefore also unsuitable for military service.

As Melissa Herbert observes, female service personnel face a double-bind: they must be “masculine” enough to be taken seriously at their jobs, but not “too masculine” as to raise suspicions of their sexual orientation. They also must be “feminine” enough in order to retain respect from male peers, but not “too feminine” as to raise questions about their proficiency as a soldier. During her testimony to Congress advocating against enactment of DADT, former U.S. Army Captain Tanya Domi similarly voiced her experience of “holding back” and not being “too aggressive” in order to avoid harassment. Just as they were overlooked in DADT’s implementation, these concerns have been absent from conversations regarding the repeal, reflecting what Halberstam identifies as a preoccupation in American culture with “male femininity” at the expense of recognition of the existence of “female masculinity.”

Fear of being labeled a lesbian not only affects the behaviors of women as individuals, it has also interfered with women forming essential mentoring relationships with one another. The disruption of bonding and cohesion among female service members serves the essential purpose of discouraging women to support one another in claims of sexual harassment and discrimination. As I discuss above, the “witch hunt” nature of DADT investigations, where inquiry

284. Damiano, supra note 226, at 516; Stiehm, supra note 282, at 158.
287. Id.
289. HALBERSTAM, supra note 267, at xi.
into the conduct of one service member could lead to the indictment of countless others, fostered a culture of “an Army of One,” as opposed to a spirit of camaraderie among female troops. Sara Corbett, a New York Times reporter who interviewed women serving in the Army in 2007 observed, “[t]here appears to have been little, too, in the way of female bonding in the war zone: most [interviewees] reported that they avoided friendships with other women during the deployment, in part because of . . . the ridicule that came with having a close friend.”

Despite the official repeal of the policy, “labeling a woman a ‘lesbian’ can still constitute an intimidating threat or loss of power and privilege, of abandonment, and of being outside mainstream society and its protections and comfort.”

As I have echoed herein, while much attention has been devoted to heterosexual soldiers’ fears of being “distracted” by the presence or unwelcome sexual advances of gay male colleagues, less notice has been given to female soldiers’ documented concerns regarding sexual assault. Further, almost no attention has been paid by policymakers to the fact that such assaults may have been encouraged under recent anti-gay policies, which forced women into the position of having to actively rebut the presumption of lesbianism. Within the institutionalized gendered hierarchy of the military, a culture of “lesbian baiting” has prevailed, in which the specter of lesbianism has functioned as a powerful “tool to keep women in an inferior role in the military, and furthermore, to reaffirm the military’s patriarchal power structure.” The military’s anti-gay policies have taken a particular toll on women, because they meant that sexuality could be used as a threat to prevent women from reporting sexual harassment. Reporting of sexual assaults is also discouraged by the military culture itself, which views divulging misconduct by one’s colleagues as hurting the collective morale. Women, for example, have found that investigations were initiated against them after reporting unwanted conduct instead of against their harassers or abusers.

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290. Corbett, supra note 1.
291. Damiano, supra note 226, at 508.
292. ld. at 501 (defining lesbian baiting as “the practice of pressuring and harassing women through calling, or threatening to call them, lesbians”); see also Benecke & Dodge, supra note 71, at 216; Luker, supra note 258, at 296 (noting that non-sexual conduct between female service members may be reported “by a male servicemember who feels his female colleague must be a lesbian because she is not interested in him”). But see Diane H. Mazur, A Call to Arms, 22 HARV. WOMEN'S L.J. 39, 52-53 (1999) (arguing that concerns regarding “lesbian baiting” are overstated and that heterosexual women are much less likely to adapt behaviors in order not to be labeled lesbian than legal scholars have assumed).
293. For example, one former enlisted soldier posted on the My Duty to Speak website:

After a year and a half [Air Force Office of Special Investigations] came back and said that yes, they found evidence on the rape kit that there was sexual intercourse HOWEVER after interviewing the Colonel [who allegedly attacked the victim] they concluded that the sex was consensual. I flipped out, why would I a lesbian in her early 20s consent to have sex with a male who is more than twice her age—and not to mention an entire foot taller than me and weighed more than twice my weight. . . . [H]ere I was 5’1, 110 pounds why would I consent
regarding the DADT policy referred to DADT as “the atomic bomb tool of sexual harassment” based on the use of accusations of lesbianism to marginalize successful women in the armed forces and penalize women who step out of traditional norms.294

The repeal of DADT unquestionably will help many service members, enabling them to be open about their personal lives and, thus, to have richer workplace relationships. However, the repeal of the policy is not a panacea. Today, just as in the DADT era, military women suffering gender-based discrimination have the option to make a legal complaint; however, there remains no similar avenue for a woman accused of being a “dyke.”295 Lesbians, and particularly, non-feminine lesbians, have a long way to go before they are fully visible in American society or in the military. Further, the assumptions that lesbians can be “converted,” or that a woman is a lesbian if she does not welcome the advances of male colleagues, are deeply-seated in American society and difficult to overcome. That the rhetoric surrounding the implementation of the DADT repeal overwhelmingly focuses on the preservation of masculinity and historically masculine values means that the road to demystifying these assumptions may be harder rather than easier.

In December 2011, the media widely reported the first same-sex welcome-home kiss, as Naval Petty Officer Second Class Marissa Gaeta, winner of a ship-wide lottery, greeted her partner on a Virginia Beach dock in a contemporary version of the famous Times Square V-J Day kiss. Publications reported the “kiss heard round the world,” lauding the “torpedoing” of DADT.296 Barack Obama’s official 2012 campaign blog reposted the Associated Press photo commemorating the moment.297 Eisenstadt’s photograph of the V-J Day Kiss at the end of World War II, of course, did more than commemorate the Allies’ victory. The kiss encapsulated the euphoric

to sex with him? That [is] basically what I told them. Within two weeks I was being discharged for violation for Don’t Ask, Don’t Tell. Nothing happened to the Colonel.


295. According to the SLDN, a complaint may be made to the Military Equal Opportunity (MEO) office by any personnel in the armed forces experiencing sexual harassment or “sex stereotyping”; however, discrimination based on sexual orientation has not been recognized as actionable by the MEO. SERVICEMEMBERS LEGAL DEFENSE NETWORK, Freedom to Serve: The Definitive Guide to LGBT Military Service 6 (July 27, 2011), http://sldn.3cdn.net/5d4dd958a62981cf18_v5m6bw1gx.pdf.


return to the homefront and ushered in the post-War baby boom. Similarly, the kiss by Gaeta and her partner can be viewed as a microcosm of the issues inhering in the DADT repeal. Yes, “the kiss” was highly visible, which means that the lives of certain formerly closeted individuals—including Gaeta herself—will likely improve. However, upon closer scrutiny, one can see how the same photo used to advance gay and lesbian rights might also be fodder to set women apart, to isolate them as “non-conforming,” and slow the pace of their entry into higher-paid positions with greater responsibility in the armed forces. While greetings between heterosexual couples generally feature men in fatigues, favor emphasizing their role in combat and distinguishing between the public and private spheres, in the widely disseminated photo, Gaeta, trim, with smartly bobbed hair, dons her dress uniform and hat, and her partner, also an officer, wears civilian garb, including a flowered scarf. Rather than a “masculine” woman in camouflage or a “feminine” man holding a rifle, we see—yet again—two attractive young women kissing before an audience of cheering young men, an image with which we have become quite comfortable. More importantly, the fact that “the kiss” has been so widely celebrated as evidence of a “victory” diverts attention from the fact that more work needs to be done to secure equal rights for military personnel. As Walters notes, activists must be wary of the “trap of tolerance”; even if outward disdain for homosexuality is (arguably) unpopular, it does not mean that homophobia has vanished. At the same time as Gaeta’s photo was widely circulated, the Army was investigating the suicide of Danny Chen, hazed by fellow troops in Afghanistan who threw rocks at him and called him, among other slurs, “the dragon lady.” The institution also has been attempting to institute a court-martial against Bradley Manning, who argues that the abuse he endured as a transgender person drove him to leak classified military secrets.
V. CONCLUSION

In 1993, Assistant Secretary to the Navy Barbara Pope testified before Congress, proclaiming that she did not understand how the “gay issue” was also a “women’s issue,” arguing that gays and women were being “rolled up together” in the rancorous DADT debates. This Article has attempted to demonstrate that, contrary to Pope’s conclusions, the military’s institution and execution of anti-homosexual policies has always been a women’s issue, and it is the duty of feminist legal scholars to interrogate these policies and to ensure that they do not continue to disproportionately impact female service members in the future.

The story of women’s entrance into the U.S. military has been one of attempting to fit women into a deliberately masculine organizational structure that is reluctant to adapt to their presence. Job categories are explicitly defined so that women cannot “be all they can be.” Although the campaign to include women in combat has been waged longer than the push for allowing gays and lesbians to openly serve, gay men have gained the dubious right to access the front lines more quickly than their female counterparts. Criminal policies pursuant to the UCMJ, such as sodomy and conduct unbecoming an officer, were clearly designed with men in mind, with little or no thought devoted to developing concrete standards for applying such policies to female service members. Anti-homosexual regulations and policies such as DADT similarly have been drafted without concern to the distinct issues faced by female, and particularly lesbian, personnel.

Although the road to repeal is often treated as a trajectory of continuous improvements in the position of gay and lesbian service members, in fact the DADT policy passed in 1993 made the situation worse than it had been for lesbians serving in the early 1940s. Similar dangers inhere in the repeal. It is striking the extent to which, despite the advancements made by and increasing acceptance of gays and lesbians in civilian life, the rhetoric regarding inclusion of gays and lesbians in the military has remained remarkably unchanged from that of 1993, and even from that of 1944.

The military is unique in that the changes mandated by the law may in fact precede those developed through grassroots evolutions stemming from shifts in economic or cultural norms. Unlike in American society at large, change in the military must be effected from the top down. The Pentagon has been wringing

303. Mazur, supra note 54, at 1000.
304. The issue of women in combat was the subject of open, political debate more than thirty years ago. See The Role of Women in the Military: Hearings before the Subcommittee on Priorities and Economy in Government, 95th Cong., 96 (1977). Yet today, at least thirty percent of jobs in the armed forces, however, remain closed to female personnel. See Andrew Tilghman & Lance Bacon, DOD to Open 14,000 Army Jobs to Women, ARMY TIMES (Feb. 18, 2012), http://www.armytimes.com/news/2012/02/army-dod-to-open-14000-army-jobs-women-021812w.
its hands as to how to address the epidemic of sexual assaults; however, there has been no effort to treat the problem pragmatically or holistically. The start to ameliorating the situation for women in the military is the recognition that sexual assault is not an isolated problem but part and parcel of an institution that relies upon the systematic denigration of outsiders, particularly women. In order to ensure a safe environment not only for women, but for all individuals in the U.S. military, it is vital that legal remedies be provided to service personnel for claims of harassment based on sexual orientation. Such legal remedies would be the clearest way to send a message that such harassment will not be tolerated. In addition to providing legal recourse via military channels, decisions such as the recent dismissal of Cioca v. Rumsfeld should prompt Congress to consider broadening military plaintiffs’ access to the federal judiciary or providing plaintiffs with additional avenues for recourse within the service. The doctrine of constitutional separatism must not extend so far as to insulate the country’s largest federal institution from claims of egregious and endemic sexual harassment.

Appreciably improving the position of women in the military and, ultimately, opening up avenues for more individuals to serve, will require more than the institution of legal protections. There must be a sea change. Although official statements focus on decreasing the prevalence of sexual assault and ameliorating what has devolved into a culture of gay bashing, there has been little conversation about meaningfully addressing an ethos that emphasizes a masculine-warrior paradigm. In fact, the argument for including gays and lesbians is that gay male soldiers will be able to uphold existing standards of bravery and manliness at the front, thus reinforcing rather than challenging masculine, heteronormative stereotypes. As Mario Barnes importantly notes regarding racial integration in the military:

Belief in the continued veracity of an unchanging narrative of successful integration undermines a commitment to uncovering and solving such problems [of unconscious bias]. By dislodging the story . . . the Armed Forces will be better able to identify the ways in which some use identity . . . as a tool to stigmatize, dishonor, and disfavor group members based on their perceived characteristics.305

For the DADT repeal to effect changes for all GLBT people, the military must alter its hyper-masculine culture, a culture which renders masculinity and sexuality so inextricably entwined that persons who do not conform to the archetype of the good (hypermasculine, aggressive) soldier remain exceedingly vulnerable to discharge and harassment. To date, however, the discourse

regarding the repeal has emphasized how gay men can fit into that culture rather than the need to alter the culture itself. Within this warrior ideal, and without radical intervention, it is likely that female service members will continue to bear the disproportionate burden of the U.S. military’s policies.