Don't Ask, Don't Tell: Employment Discrimination as a Means for Social Cleansing

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DON'T ASK, DON'T TELL: EMPLOYMENT DISCRIMINATION AS A MEANS FOR SOCIAL CLEANSING†

BY
E. GARY SPITKO*

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I. INTRODUCTION: DON'T ASK, DON'T TELL

From its enactment in 1993 until the effective date of its repeal in September 2011, America’s “Policy Concerning Homosexuality in the Armed Forces,” better known as “Don’t Ask, Don’t Tell,” provided for the separation of any military service member who acknowledged that he is gay. More precisely, the Don’t Ask, Don’t Tell statute provided that a service member “shall be separated from the armed forces” if the military finds that he has engaged in a homosexual act or attempted to do so, has married a person of the same sex or attempted to do so, or has stated that he is homosexual.¹ A service member who

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A member of the armed forces shall be separated from the armed forces ... if one or more of the following findings is made . . .:
(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 . . . 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 in-
had engaged in a homosexual act or attempted to do so could avoid discharge under the statute if he could demonstrate, among other things, that he "does not have a propensity or intent to engage in homosexual acts." Similarly, a service member who had stated that he is gay could avoid discharge under the statute if he could demonstrate that he "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

The Don't Ask, Don't Tell statute was grounded on the express congressional finding that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."4 The "Don't Tell" aspect of the statute was clear enough: A service member who acknowledged that he is gay was subject to separation. The "Don't Ask" aspect of the statute originally related to a "sense of Congress" that, under the policy, military recruiters were supposed to no longer ask military recruits if they were gay. In fact, the legislation left to the Secretary of Defense the final decision as to whether to ask military recruits if they were gay.5 Between 1993 and 2010, more than 13,000 service members were discharged under Don't Ask Don't Tell pursuant to this statute and pursuant to Department of Defense Directives 1332.14 (covering enlisted personnel separations) and 1332.30 (covering officer separations), which set forth the procedures for implementing the statute.6

4. Pub. L. No. 103-160, 107 Stat. 1673 ("It is the sense of Congress that ... the suspension of questioning individuals for accession into the Armed Forces under the interim policy of January 29, 1993 should be continued, but the Secretary of Defense may restate that questioning ... as he considers appropriate ... "); see also RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY 748 (1994).
5. U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 22-23 (2010), available at...
Almost two decades after the enactment of Don’t Ask, Don’t Tell, then-Senator Barack Obama promised during his campaign for President that, if elected President, he would work to repeal Don’t Ask, Don’t Tell. In his first State of the Union Address, on January 27, 2010, President Obama reiterated that promise and pledged to work in 2010 with Congress and the military to repeal Don’t Ask, Don’t Tell. Shortly thereafter, on March 2, 2010, Secretary of Defense Robert M. Gates established an inter-service “Working Group” to “conduct a comprehensive review of the issues associated with repeal of [Don’t Ask, Don’t Tell]” and specifically “to assess and consider the impacts, if any, a change in the law would have on military readiness, military effectiveness and unit cohesion, and how to best manage such impacts during implementation.” The Secretary specifically requested that the 2010 Working Group “engage the force” by soliciting “[t]he participation of a range of age, rank and warfare communities in this study.” Secretary Gates directed the 2010 Working Group to submit its report and recommendations to him by December 1, 2010.

Much of the empirical support for the principal argument set out in this Article derives from the efforts of the 2010 Working Group, as well as from the work of a similar 1993 Working Group, and from two studies undertaken at the Pentagon’s request by the RAND Corporation in 1993 and 2010, respectively. A basic appreciation of the nature and extent of these efforts may be helpful for understanding and evaluating the argument set out below. I begin, therefore, by describing the efforts of the 2010 Working Group, the 1993 Working Group, and the RAND Corporation in 1993 and 2010.

In response to Secretary Gates's charge, the 2010 Working Group conducted one of the largest surveys of U.S. military personnel
The 2010 Working Group solicited input from service members in a variety of ways. Of primary importance, the 2010 Working Group engaged the Westat Corporation to conduct a large-scale survey of military personnel and to conduct a separate large-scale survey of the spouses of service members. The service member survey focused on the impact of the proposed repeal of Don’t Ask, Don’t Tell on various aspects of military effectiveness, including unit cohesion, military readiness, recruiting, and retention. More than 115,000 service members responded to the survey. The spouse survey was designed to assess the attitudes of military spouses concerning the impact of the proposed repeal of Don’t Ask, Don’t Tell on recruiting, retention, and family readiness. More than 44,000 spouses of service members responded to the spouse survey.

In addition to the Westat surveys, the 2010 Working Group conducted ninety-five “information exchange forums” or discussion groups typically involving between 150 and 300 service members. In total, these discussion groups involved roughly 24,000 service members at fifty-one military installations. The 2010 Working Group also involved 1400 service members in 140 smaller “focus groups,” typically involving nine to twelve service members each. In these focus groups, a trained discussion facilitator led the group in an informal discussion aimed at understanding the views of military personnel relating to gays in the military. The 2010 Working Group also established an “online inbox” to allow any service member to express anonymously to the Working Group his or her views on repeal of Don’t Ask, Don’t Tell. Nearly 71,000 service members used this mechanism to comment. Finally, in an effort to solicit the views of gay and lesbian military personnel, the 2010 Working Group created a second “confidential communication mechanism” that allowed for service members to use a PIN and a computer of their choosing to engage in a confidential online dialogue with a Westat moderator.

12. U.S. DEP’T OF DEF., supra note 6, at 3, 63.
13. Id. at 63.
14. Id. at 37, 63.
15. Id. at 38.
16. Id. at 38, 63.
17. Id. at 33, 49.
18. Id. at 34-35, 49.
19. Id. at 35. Through the use of a website accessible only by means of a Department of Defense smart card, the Working Group sought to ensure that only service members entered comments on their own behalf or on behalf of their family members. Id.
20. Id.
Nearly 2,700 service members or family members of service members utilized this mechanism. Of those who did so, 296 self-identified as gay, lesbian, or bisexual.\(^{21}\)

On November 30, 2010, the 2010 Working Group submitted its 266-page *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell”* (hereinafter 2010 Pentagon study). The 2010 Working Group concluded, based upon its study, that “while a repeal of Don’t Ask, Don’t Tell will likely, in the short term, bring about some limited and isolated disruption to unit cohesion and retention, we do not believe this disruption will be widespread or long-lasting, and can be adequately addressed by the recommendations we offer . . . .”\(^{22}\)

The conclusions of the 2010 Working Group stand in sharp contrast to the report and conclusions of a similar group that had studied the implications of allowing gays to serve openly in the military during the 1993 debate on gays in the military that ultimately led up to enactment of Don’t Ask, Don’t Tell. On January 29, 1993, President Bill Clinton ordered Secretary of Defense Les Aspin to draft by July 15, 1993 an executive order that would end the armed forces’ discrimination against gay service members.\(^{23}\) Shortly thereafter, Secretary Aspin formed a “Military Working Group” to advise him with respect to this task by developing and assessing alternative policy options to meet President Clinton’s requirement that the new policy be implemented in a manner that is “practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain.”\(^{24}\) In the end, of course, things did not turn out as President Clinton had wished.

The 1993 Military Working Group was composed of senior officers from each branch of the military as well as numerous officers, enlisted personnel, and civilian employees. In its efforts to understand

\(^{21}\) Id. at 38-39.

\(^{22}\) Id. at 119.


the implications of allowing openly gay men and women to serve in the U.S. military, the 1993 Military Working Group interviewed military personnel and civilian experts on the military and studied the experiences of other nations that had integrated openly gay service members into their militaries. Ultimately, the 1993 Military Working Group essentially endorsed the rationale of the then-in-effect 1981 Department of Defense Directive 1332.14, which governed the military's treatment of gay service members: The 1993 Military Working Group concluded that "homosexuality is incompatible with military service," and the presence of openly gay service members in the military would undermine unit cohesion and military readiness.

In the detailed marching orders, known as the "terms of reference," that Secretary Gates gave to the 2010 Working Group when he ordered its creation, Gates directed the Working Group to engage the RAND Corporation to update RAND's 1993 report on "Sexual Orientation and U.S. Military Personnel Policy." RAND is a nonprofit think tank that frequently conducts research and performs analyses for the U.S. military. In 1993, Secretary of Defense Aspen had asked RAND to provide him with advice pertinent to the executive order that President Clinton had asked Secretary Aspin to draft ending sexual orientation discrimination in the armed forces. In response, RAND submitted to Secretary Aspin a report titled Sexual Orientation and U.S. Military Personnel Policy which recommended that military policy should consider sexual orientation "as not germane to determining who may serve in the military." The report further recommended that the military "establish clear standards of conduct for all military personnel, to be equally and strictly enforced, in order to maintain the military discipline necessary for effective operations."

The Department of Defense and the Clinton Administration sat on the 1993 RAND report until August 26, 1993. This was more than

27. Memorandum from Robert M. Gates, supra note 9; see supra RAND, supra note 23.
29. RAND, supra note 23, at 1-2.
30. Id. at 2.
31. Id.
a month after President Clinton had announced his support for the 1993 Military Working Group's approach to dealing with gays in the military and nearly a month after both the Senate Committee on Armed Services and the House Committee on Armed Services had issued their reports on dealing with gays in the military. Consequently, the 1993 RAND study favoring the integration of openly gay persons into the military had almost no impact on the public debate over adoption of Don't Ask, Don't Tell.\(^\text{33}\)

In the summer of 2010, to better understand the views of current military personnel concerning Don't Ask, Don't Tell and issues surrounding its possible repeal, RAND conducted twenty-two focus groups with current service members from each of the services at ten military installations across the country. Roughly 200 service members in total participated in the focus groups. RAND focused the discussions on how well the current Don't Ask, Don't Tell policy was working, problems that might arise if the policy were scrapped so that gay men and lesbians could serve openly in the military, and advice on how the military might manage any such problems.\(^\text{34}\)

On May 27, 2010, the House of Representatives voted to add to the National Defense Authorization Act for Fiscal Year 2011 (NDAA) an amendment that would repeal Don't Ask, Don't Tell.\(^\text{35}\) On May 28, 2010, the House passed the NDAA.\(^\text{36}\) Also on May 28, the Senate Armed Services Committee voted to add to the Senate version of the NDAA language identical to the House amendment that would repeal Don't Ask, Don't Tell.\(^\text{37}\)

For reasons seemingly unrelated to repeal of Don't Ask, Don't Tell, the NDAA ran into significant opposition in the full Senate. Thus, in the waning days of the 111th Congress, new “clean” or “stand-alone” repeal bills were introduced in both the House and the

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33. See H.R. REP. NO. 103-200, at 493 (1993) (additional views of Representatives Schroeder and Furse complaining that the House Committee on Armed Services had disregarded the conclusions of the RAND study, as they had been reported in the press, and that the Department of Defense still had not released the RAND study although one of the representatives had requested it on June 23); id. at 506-07 (additional views of Representatives Meehan, Abercrombie, Andrews, and Farr noting that “the Rand Corporation's findings were completely absent from our deliberations” and expressing an understanding that no member of Congress had seen the study).

34. RAND, supra note 24, at 22, 233-36. RAND also utilized a “peer-to peer recruiting approach” to conduct an internet survey of gay, lesbian, and bisexual military personnel aimed at incorporating the insights of such personnel into RAND's analysis. Id. at 255-56.

35. 156 CONG. REC. H4062-63 (daily ed. May 27, 2010).

36. 156 CONG. REC. H4198-99 (daily ed. May 28, 2010).

On Wednesday December 15, 2010, the U.S. House of Representatives voted 250 to 175 to repeal Don’t Ask, Don’t Tell. Four days later, on December 18, as time nearly expired on the lame duck session of the 111th Congress, the Senate voted sixty-five to thirty-one to repeal Don’t Ask, Don’t Tell. Eight Republican senators joined all fifty-seven Democratic and independent senators present in voting to end the ban on openly gay service members. After the vote, Admiral Michael Mullen, Chairman of the U.S. Joint Chiefs of Staff, remarked that “[n]o longer will able men and women who want to serve and sacrifice for their country have to sacrifice their integrity to do so.”

II. EMPLOYMENT DISCRIMINATION AS A MEANS FOR SOCIAL CLEANSING

The Don’t Ask, Don’t Tell policy concerning homosexuality in the armed forces is perhaps the best-known example of an employment law aimed at coercing gay persons to pass as straight. What is implicit or merely understood with respect to sexual orientation and other role model occupations is most explicit with Don’t Ask Don’t Tell: A gay person can be an excellent soldier – until it is known that he is gay. At that point, he becomes unfit to serve and a threat to the military mission.

What made the known gay person unfit to be in the military under Don’t Ask, Don’t Tell most certainly was not that he was gay. Rather, it was that he was known to be gay. The 2010 Pentagon study related well this mindset: The authors reported that “a frequent response among Service members... when asked about the widespread recognition that gay men and lesbians are already in the mili-

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38. See H.R. 6520, 111th Cong. (2010); S. 4022, 111th Cong. (2010); S. 4023, 111th Cong. (2010). The stand-alone Don’t Ask, Don’t Tell repeal bill that eventually passed was H.R. 2965, 111th Cong. (2010), which was an amendment of an earlier-introduced bill relating to small business.
41. Id.
43. “Passing” involves one’s denying or hiding a distinguishing trait – such as his race, gender, religion, ethnicity, disability, or sexual orientation. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 18 (2006). A gay man who lives in the closet is passing as straight.
tary, were words to the effect of: 'yes, but I don’t know they are gay.' This is because I don’t know they are gay.' Thus, the authors concluded, “Put another way, the concern with repeal among many is with ‘open’ service.”

This ban on open service stigmatized gay people as less than full citizens, perhaps more so than any other federal legislation. Notably, it also removed gay men from the public social space that more than any other helps to define masculinity – the military. Thus, it served as a powerful means to perpetuate the association of gay men with effeminacy. In so doing, it simultaneously well served its principal reason for being – to preserve the masculine identities of the military and its heterosexual servicemen. In sum, for eighteen years, the Don’t Ask, Don’t Tell statute codified the military’s long-standing policy requiring the “social cleansing” of gays from the military in order to reinforce and perpetuate cherished social norms.

I use the term “social cleansing” to refer to the intentional exclusion of a disfavored group from an otherwise shared or public social space. Social cleansing often has as its purpose defining the character of a community, whether dominant or disfavored, or its institutions. Social cleansing is distinct from “ethnic cleansing,” although the two often have gone hand in hand, with the former sometimes intended to ensure that the latter is permanent. Ethnic cleansing is the physical elimination of a group from a territory through genocide, forced expulsion, or other means. Social cleansing sometimes involves the destruction of a group’s material culture – for example, its architecture, places of worship, museums, libraries, monuments, and even graves – that otherwise would evidence the group’s history in a territory. In such cases, the intent is to dissociate the territory from the group that is being cleansed and simultaneously to strengthen the association between the territory and the cleansing group.

Thus, in the 1990s, during the wars in the former Yugoslavia, the Serbian and Croat ethnic cleansing of Bosniaks went hand in hand with Serbian and Croat destruction of Bosnian mosques, libraries,

44. U.S. DEP’T OF DEF., supra note 6, at 4 (emphasis in original).
45. Id.
46. See Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 U.C.L.A. L. REV. 499, 501 (1991) (asserting that “[m]asculinity is traditionally defined around the idea of power [and the armed forces are the nation’s preeminent symbol of power”).
48. Id. at 27.
49. Id.
and bridges. Leading up to and during World War II, the Nazis demolished or burned hundreds of synagogues and destroyed Jewish homes, shops, and community buildings as a prelude to the Holocaust. And in Turkey, the 1915 Turkish genocide of the Armenian people was accompanied by and followed by the systematic erasure by the Turks of 1800 years of Armenian architecture — including churches, monastic sites, monuments, and even whole towns.

Employment laws and practices too can and have been used as a means for social cleansing — as a tool for removing a disfavored group from a prominent public social space. The public social space at issue when employment discrimination is used for social cleansing is not one defined by a physical place. Rather, the public social space at issue is one defined by or associated with personal qualities and values, such as government or military service. Thus, employment discrimination, when used to socially cleanse a disfavored group, helps to establish and maintain social norms and simultaneously to define both the dominant socially cleansing group and the disfavored group that is being cleansed.

Because the public social space at issue is not a physical space when employment discrimination is used as a means for social cleansing, its parameters often defy easy delineation. The parameters of the public social space at issue will vary depending on a number of factors, most importantly the identity of the disfavored group that the law or practice targets and the purpose of the exclusion. A variety of sources provide clues to the rough scope of the public social space at issue, including statutory language, legislative histories, court opinions, and public commentaries relating to the employment practices at issue.

Most notoriously, in Germany from 1933 to 1938 the Nazis enacted a series of employment laws systematically banning Jews from working in certain occupations. The Nazis banned Jews from holding public office. The Nazis also removed and excluded Jews from the civil service, the armed forces, the practice of law, the practice of medicine, and the newspaper, tax consultant, and patent agent profes-

50. Id. at 8, 42.
51. Id. at 8, 26, 28-31.
52. Id. at 53-56.
54. 1 Id. at 297.
Finally, in late 1938, the Nazis banned Jews "from the operation of individual retail shops, exporting firms, sales agencies . . . , as well as the independent operation of a trade . . . ." The exclusion of Jews from these occupations served multiple purposes, including furthering a program of ethnic cleansing. The discrimination acted as an incentive for Jews to emigrate voluntarily from Germany. These laws also served the purpose of social cleansing. They were intended to teach Germans that Jews were others; Jews were not Germans, were not citizens, were a threat to Germany, and were inferior. In this way, these employment laws facilitated the Holocaust to follow. A racial expert at the Nazi Ministry of the Interior, Dr. Achim Gercke, commented at the time of the first wave of anti-Jewish legislation:

The laws are mainly educational and give direction. The aspect of the law should not be underestimated. The entire nation is enlightened on the Jewish problem; it learns to understand that the national community is a blood community; it understands for the first time the racial idea, and is diverted from a too theoretical treatment of the Jewish problem and faced with the actual solution. Dr. Gercke further explained: "Nevertheless the laws published thus far cannot bring a final solution of the Jewish problem, because the time has not yet come for it, although the decrees give the general direction and leave open the possibility of further developments."

Social cleansing through employment discrimination also has long been an American practice. And gay people have long been a favorite target of this social cleansing. Indeed, gay people have long been the target of social cleansing across civilizations.
In the United States, the federal government was for many years the most prominent perpetrator of employment discrimination as a means to cleanse gay people from public social spaces. The federal government’s systematic effort to exclude gay people from federal employment had several motivations. The historical record supports the argument that one of those reasons was a desire to socially cleanse gay people from a public social space defining values such as allegiance to country and, especially, morality.61

For example, beginning in the early 1950s the Civil Service Commission’s Federal Personnel Manual expressly included homosexuality and sexual perversion as grounds for immediate dismissal from federal employment.62 In February 1966, Commission Chairman John W. Macy, Jr. wrote a letter to the Mattachine Society of Washington, a gay civil rights group, in which he rejected the Mattachine Society’s request to rescind this policy banning gay people from federal employment and offered a justification for the policy.63 Macy’s justification was grounded mainly in public revulsion toward gay people and the consequent impairment of government efficiency that would result from employing gay people. His justification would become the Civil Service Commission’s official defense asserted in litigation brought by affected applicants and employees challenging the exclusion of gay people from the federal civil service:

Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of the common toilet, shower, and living facilities, the offense to means that censors have used to erase gay people from history and literature: Gender pronouns have been altered or deleted, words and verses have been inserted or removed to change meaning, the significance of words has been twisted in translation, details in historical accounts have been suppressed, and entire works have been excised from translations.

61. See, e.g., Employment of Homosexuals and Other Sex Perverts in Government: Hearing Before the Subcomm. on Investigations of the S. Comm. on Expenditures in the Exec. Dept’t, 81st Cong. no. 241, at 3, 19 (1950) (asserting that homosexuality “is so contrary to the normal accepted standards of social behavior that persons who engage in such activity are looked upon as outcasts by society generally” and that “[t]here is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct”).

62. See Letter from John W. Macy, Chairman, Civil Serv. Comm’n, to the Mattachine Soc’y of Wash. (Feb. 25, 1966), reprinted in John W. Macy, The Issue of Homosexuality and Government Employment, DEP’T OF STATE NEWSLETTER, Apr. 1966, at 44 (quoting the personnel manual’s language providing that “[p]ersons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment”).

63. Id.
members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.\textsuperscript{64}

Thus, the Commissioner’s justification of the policy had nothing to do with the gay person’s intrinsic ability to perform the job. Rather, the justification centered on the offense to co-workers and the public arising from the existence of gay people in federal employment and, relatedly, the potential for embarrassment to and loss of public confidence in the government arising from such employment of gay people in the civil service. One federal judge sympathetic to the government’s position concisely summed up the government’s justification:

The belief and policy of the executive branch, as it emerges clearly in the record now before us, and in the numberless other cases involving homosexuals that stain the pages of our reports, is that the presence of known homosexuals in an executive agency will bring the agency into hatred, ridicule, and contempt, to the grave detriment of its ability to perform its mission.\textsuperscript{65}

The Civil Service Commission’s purge of gay people from the civil service extended to all federal government employment irrespective of job category. Thus, the exclusion of gay people from federal employment was intended to dissociate the idea of gay people from the idea of “the Government” (specifically government service, but more generally the U.S. government) thereby simultaneously preserving the image of the government as moral while reinforcing the image of gay people as immoral and, indeed, as agents of the contagion of perversion. In this way, the social cleansing of gay people from the public social space occupied by the civil service helped to define both the perpetrator and the object of the discrimination.

This last point is equally true of the Don’t Ask, Don’t Tell policy: As argued below, the social cleansing of openly gay service members from the military had as its primary purpose the preservation of the military’s masculine identity and the masculine identity of its warriors. The collateral damage inflicted by the policy included the reinforcement and perpetuation of the disempowering stereotype of the gay man as effeminate.

\textsuperscript{64} Id.
\textsuperscript{65} Schlegel v. United States, 416 F.2d 1372, 1382 (Ct. Cl. 1969) (Nichols, J., concurring).
III. SOCIAL CLEANSING OF GAY SERVICE MEMBERS AS A MEANS TO PROTECT THE MASCUINE IDENTITIES OF THE MILITARY AND ITS WARRIORS

The qualities and values most frequently publicly associated with American military service members include patriotism, bravery, selflessness, and (with apologies to the women who serve and have served in the armed forces) masculinity. The disassociation of openly gay people from military service would tend naturally to disassociate gay people from those qualities and values as well. But with the possible exception of "masculinity," this disassociation is almost certainly more of an effect than a purpose of either the ban on openly gay service members or the debate over the ban.

To a much greater degree, the contemporary debate on gays in the military has played on, and no doubt exacerbated, the stereotype of gay men as hypersexual predators. The charge is that gay men, like kids in a candy store, will make unwanted sexual advances toward their straight fellow servicemen. As one academic testified before the Senate Committee on Armed Services during the 1993 hearings on gays in the military, "To admit homosexuals into the military arguably advances their personal privacy interests, but it raises concerns about the ability of heterosexual service members to be free from unwanted advances or unnatural attention from those who find them sexually attractive."

Thus, the authors of the 2010 RAND study reported that "[o]ne of the more common concerns [expressed by focus group participants] was that the presence of gay men would create an uncomfortable work environment for straight men. Specifically, several men were concerned that gay men would display sexual interest in them." Similarly, the authors of the 2010 Pentagon study reported that service members participating in the Westat survey "often" focused on the stereotype that gay men in particular would make unwanted sexual advances toward straight service members. The authors wrote

67. See SHILTS, supra note 5, at 744 (commenting, with respect to the debate over President Clinton's proposal to let gay service persons serve openly, that "[t]he debate was a barometer of the persistence of the old stereotype of gay men as sexual predators").
69. RAND, supra note 24, at 244.
70. U.S. DEP'T DEF., supra note 6, at 102.
further of hearing in their discussions at information forums with service members "widespread perceptions that, if permitted to be open and honest about their sexual orientation, gay Service members would behave as sexual predators and make unwelcome sexual advances on heterosexuals." The comments of one service member participating anonymously in the 2010 Pentagon study evidence the intensity of this concern: "Tell him if he hits on me I will kick his ***!"

This fear relating to the gay sexual predator is often raised, implicitly or explicitly, in connection with arguments about the lack of privacy in the military. Gay men, it is charged, will take advantage of group showers and close living quarters to prey sexually on unwilling straight servicemen who will have no choice but to endure the unwanted advances. During his 1993 testimony before the Senate Committee on Armed Services, General Colin Powell argued that "the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." When asked how he could square that position with the fact that military personnel work with gay and lesbian Department of Defense civilians, General Powell explained, "We place unique demands and constraints upon our young men and women, not the least of which are bathing and sleeping in close quarters."

Gay service men in the shower clearly touch a nerve. Thus, participants in the 2010 RAND focus groups "most typically" raised their concerns about sexual advances by gay servicemen in the context of common showers and roommate situations. Indeed, the RAND study's authors noted that such "concerns about nudity, showers, and roommates were widespread." Similarly, the authors of the 2010 Pentagon study reported that "the most prevalent" concern in their

71. Id. at 122; see also id. at 53.
72. Id. at 51.
73. Id. at 13 ("Most concerns we heard about showers and bathrooms were based on stereotype - that gay men and lesbians will behave as predators in these situations."); SHILTS, supra note 5, at 744 ("Supporters of the ban talked darkly [in 1993] of showers and bathrooms where gay men would seduce young recruits.").
75. See id. at 279; see also id. at 283 (quoting testimony of General Powell before the House Budget Committee in 1992: "It is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of [gay] individuals . . . and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers").
76. RAND, supra note 24, at 244.
discussions with service members and the concern "typically on the top of the list" related to unwanted sexual advances in shared bathroom facilities, living quarters, or berthing arrangements.77 "[A] frequent concern expressed by some Service members was personal privacy in settings where they may be partially or fully unclothed in the presence of another Service member they know to be gay or lesbian – for instance, shared showering facilities or locker rooms."78

While it is understandable that a person – straight or gay – would feel uncomfortable about the prospect of being undressed around someone who shows unwanted sexual interest in him, it is nonetheless striking that this would be service members' top concern over ending sexual orientation discrimination in the military. As the 2010 Pentagon study acknowledged, "[t]he reality is that people of different sexual orientation[s] use shower and bathroom facilities together every day in hundreds of thousands of college dorms, college and high school gyms, professional sports locker rooms, police and fire stations, and athletic clubs."79 Thus, the obsessive focus on gay soldiers in group showers suggests that something more than personal modesty is at issue.80

Indeed, the argument that focuses on the lack of privacy in the military and on gay men as sexual predators may be more tactical than central. It is an argument that no doubt resonates with a homophobic American public that can easily identify with and be sympathetic to the heterosexual soldier who seeks to serve his country and in the process finds himself the object of homosexual lust.81 This simple privacy argument, however, betrays a more central concern.

77. U.S. DEP'T OF DEF., supra note 6, at 50; see also id. at 140 ("Throughout our engagements with the force, we heard a number of Service members express discomfort about sharing bathroom facilities or living quarters with someone they know to be gay or lesbian.").

78. Id. at 141; see also id. at 12 ("In the course of our review we heard from a very large number of Service members about their discomfort with sharing bathroom facilities or living quarters with those they know to be gay or lesbian."); James Dao, Backing "Don't Ask" Repeal, With Reservations, N.Y. TIMES, Dec. 19, 2010, at A1 (reporting comment of one nineteen-year old marine private that "[j]showers will be awkward" if openly gay men are allowed to serve in the military).

79. U.S. DEP'T OF DEF., supra note 6, at 141.

80. For an example of the obsessive focus on gay soldiers in the shower, see Tamar Lewin, Pteas Evolve for Conscientious Objector Status, N.Y. TIMES, July 18, 2010, at A13 (reporting that soldier who is concerned that he will have to shower and bunk with homosexuals is asking about ways to get out of the army should Don't Ask, Don't Tell be repealed).

81. See, e.g., Clarence Page, The "Corporal Klunger" Effect. CHI. TRIB., Jan. 31, 1993, at C3 (reporting in 1993 at the start of the debate on President Clinton's proposal to allow gays to serve openly in the military that "radio call-in shows have been filled with hypothetical questions raised by callers about what will happen when the ban is lifted . . . like, what happens if gay soldiers . . . make a pass at fellow GIs or sailors in the shower?").
That central objection to openly gay men serving in the military centers on the value of masculinity.\textsuperscript{82} Despite the integration of women into the military in greater and greater numbers, the link between military service and masculinity remains. As author Randy Shilts succinctly put it, "Boys go to war to prove they are men."\textsuperscript{83}

Two related concerns centered on masculinity have motivated the modern effort to socially cleanse the military of gay people. First, openly gay soldiers threaten to emasculate heterosexual soldiers. Second, openly gay soldiers also threaten to undermine the military's masculine image.\textsuperscript{84} Thus, much support for Don't Ask, Don't Tell has been motivated by a desire to preserve the nature of a public social space that is associated with and helps define masculinity.

Arguments relating to the lack of privacy in the military and sexually predatory gay soldiers betray a concern about threatened masculinity in that many would view being the object of male sexual desire to be extremely feminizing. This is particularly so when the objectifying male is sexually dominant. For obvious reasons grounded in the realities of anatomy, we associate penetrating a sexual partner with masculinity, and we associate being penetrated by a sexual partner with femininity. Thus, the man who is anally or orally penetrated is, in the minds of many, simultaneously emasculated.

Even in societies such as ancient Greece and Rome that were tolerant of sexual relations between men, a stigma attached to male sexual passivity. As Leo Bersani concludes in his influential essay "Is the Rectum a Grave?," "the moral taboo on 'passive' anal sex in ancient Athens is primarily formulated as a kind of hygienics of social power. To be penetrated is to abdicate power."\textsuperscript{85} Professor John Boswell, speaking of the Germanic peoples of the Early Middle Ages, made precisely this point with respect to sexually passive warriors: "As in most military societies in which courage, strength, and physical aggressiveness were prized, the Germanic peoples considered passivi-

\textsuperscript{82} See SHILTS, supra note 5, at 5 (arguing that "the presence of gay men [in the military] – especially so many who are thoroughly competent for military service – calls into question everything that manhood is supposed to mean").

\textsuperscript{83} Id. at 32.

\textsuperscript{84} See DAVID MIXNER & DENNIS BAILEY, BRAVE JOURNEYS: PROFILES IN GAY AND LESBIAN COURAGE 240 (2000) (reporting the comment made by former Assistant Secretary of Defense Lawrence Kolb in 1992 that the military views gay service members as inconsistent with the military's macho self-image); Karst, supra note 46, at 546 ("When a gay soldier comes to the Army's official attention, the real threat is not the hindrance of day-to-day operations, but rather the tarnishing of the Army's traditionally masculine image.").

\textsuperscript{85} Leo Bersani, Is the Rectum a Grave?, AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM, Winter 1987, at 197, 212 (emphasis in original).
ty [that is, assuming the sexually passive position in homosexual intercourse] in warriors to be shameful. No man could be sexually passive with another and retain the respect accorded a fighting adult male."86

In this way, to be the object of an aggressive male sexual desire threatens to emasculate the male warrior. Thus, the primary concern is not so much with the effeminate gay soldier in the group shower. The primary concern is with the gay soldier in the group shower who is strong enough, aggressive enough, indeed masculine enough, to dominate the heterosexual soldier sexually and, thus, to emasculate him.

The problem of male-on-male rape in the military is instructive. In 2010, 110 male service members made confidential reports of sexual assault by other men. The evidence suggests, however, that the number of male service members sexually assaulted by other men in the military is much higher. A study released in March 2011, for example, reported that only one in fifteen men in the Air Force would report being sexually assaulted.87

Experts theorize that much male-on-male sexual assault in the military is motivated not by sexual desire but rather by a desire to intimidate and dominate. For the victim and for the military, shame and feelings of emasculation arising from the sexual assault may result in the assault going unreported. Aaron Belkin, the director of a think tank on gays in the military, argues, "The military doesn't want to talk about [male-on-male sexual assault] because, as embarrassing as male-female rape is [from the military's perspective], this is even worse. The very fact that there's male-on-male rape in the military means that there are warriors who aren't strong enough to fight back."88

While the sexually predatory yet masculine gay soldier may be seen as a challenge to the masculinity of fellow heterosexual soldiers, many see the effeminate gay soldier as a threat to emasculate the military as a whole. For example, columnist Bruce Fein, writing in 1989, grounded his argument for excluding gay people from the military on the effeminate image that gay men evoke:

The lifeblood of a soldier is an esprit stemming from a common sense of masculinity, bravery and gallantry. The battlefield soldier is inspired to risk all by the pride of fighting with comrades whose

86. BOSWELL, supra note 60, at 183-84.
88. Id.
attributes conform to his view of manhood. . . . [I]t is inarguable that the majority of a fighting force would be psychologically and emotionally deflated by the close presence of homosexuals who evoke effeminate or repugnant but not manly visions. . . . Excluding homosexuals from the military is, like exclusion of women from combat units and wartime conscription, simply one of a large array of burdens a nation must exact from citizens to safeguard its survival.89

The military has been concerned with effeminate soldiers as far back as 1923 when the Army's physical exam manual called for screening out candidates with certain "anatomical stigmata of degeneration" such as a feminine general body conformation: Thus, the Army's physical exam standards for entrance into service in 1923 informed that a male degenerate's physique "may present the general body conformation of the opposite sex, with sloping narrow shoulders, broad hips, excessive pectoral and pubic adipose deposits, with lack of masculine hirsute and muscular marking."90 The same paragraph of these regulations also listed "sexual perversion" as a "functional stigmata of degeneration" and listed "sexual psychopathy" as a mental disorder that should be used to screen out applicants for service.91 These terms most certainly encompassed the behavior of men who had sex with men.92

In 1942, when the Army first defined the term "homosexual" and established new anti-homosexual screening procedures, its regulations listed three means for identifying gay men, each linking male homosexuality with effeminacy or with assuming the passive role in anal intercourse: "feminine bodily characteristics," "effeminacy in dress or manner," and a "patulous rectum."93 While the regulations pointed out that a homosexual might not display such signs, the regulations also directed that "where present, [such signs] should lead to careful psychiatric examination."94 As discussed below, this concern with effeminate gay male soldiers has remained widespread up to the present day.

89. Bruce Fein, Gays in the Armed Forces; Keep the Military's Ban on Homosexuals, USA TODAY, May 12, 1989, at A8.
90. Army Reg. 40-105 § XX, ¶ 93a (1923).
91. Id. ¶¶ 93b, p(6).
92. See RAND, supra note 23, at 4 (asserting that sexual psychopathy included sexual relations between men).
93. War Dep't, Basic Field Manual, Mobilization Reg. 1-9, Standards of Physical Examination During Mobilization, § 20(93)(h) (1942); see also ALLAN BERUBE, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO 19 (1990).
94. War Dep't, Basic Field Manual, Mobilization Reg. 1-9, Standards of Physical Examination During Mobilization, § 20(93)(h).
Relatedly, the potential negative effect on the military's image resulting from gays serving openly in the military clearly has been a concern of military personnel at all levels and over time. As author Randy Shilts concluded from his study of the military's treatment of gay soldiers up through 1993, "[w]hat is clear is that the military is far less concerned with having no homosexuals in the service than with having people think there are no homosexuals in the service." An early draft of the rationale for revising Department of Defense Directive 1332.14 in 1981 stated bluntly:

Allowing known homosexuals to be members of the Armed Services also would damage the image of the military in the eyes of the American people, our allies, and our potential adversaries and make military service less attractive. . . . This impact on the military's public image would also cause great difficulties in recruitment and retention of service members.

Similarly, the Military Working Group that in 1993 studied the issue of gays in the military concluded that "[o]pen homosexuality in the military would likely reduce the propensity of many young men and women to enlist due to [among other factors] a military image that would be tarnished in the eyes of much of the population from which we recruit." Many participants in the 2010 RAND study expressed concerns that the presence of openly gay servicemen would negatively affect the military's public image: "It's going to make the military as a whole look differently. What are other countries going to think?" Some in the 2010 RAND study expressed the fear that the presence of openly gay men in the military would lead to a loss of prestige and thereby hamper military recruitment. In the 2010 Pentagon study, service members who responded to the Westat survey and who provided open-ended responses suggesting opposition to repeal of Don't Ask, Don't Tell, most frequently expressed concerns about repeal tarnishing the military's image, along with concerns about flamboyant gay men in the military, and about privacy in show-
er and living facilities.\footnote{U.S. Dep't of Def., supra note 6, at 79; see also 1 Westat, Support to the DOD Comprehensive Review Working Group Analyzing the Impact of Repealing "Don't Ask, Don't Tell" 135 (reporting that of those who provided comments to the open-ended question at the end of the service member survey, "respondents appeared to be most concerned about the possibility of showering or rooming with someone who was known to the respondent to be gay or lesbian"); 2 id. at 31, 34, 42-43, 63-64, 75, 80-81, 86, 100-101 (setting out numerous comments from participants in the DOD's focus groups and online inbox expressing concerns that repeal of Don't Ask, Don't Tell would tarnish the military's image, lead to displays of "flamboyant" behavior by gay male service members, subject heterosexual service members to homosexual advances and assaults, and give rise to discomfort in light of shared showers and sleeping quarters).}

As that list of top three concerns suggests, there is a strong link between the concern that repeal of Don't Ask, Don't Tell would tarnish the military's image and the concern that such repeal would allow "flamboyant" and "effeminate" gay men to serve in the military. One columnist, during the 1993 debate on Don't Ask, Don't Tell, captured the gist of this linkage perfectly well when he relabeled the policy "don't ask, don't make a spectacle of your homosexuality."\footnote{101. See David Reinhard, Gay Militants' War on Any Standards, THE OREGONIAN, July 9, 1993, at C10.} The authors of the 2010 Pentagon study noted that "when expressing generalized concerns about repeal, Service members often focused on stereotypes [including] that gay men in particular would act in an effeminate manner inconsistent with the common image of a warfighter."\footnote{102. U.S. DEP'T OF DEF., supra note 6, at 102.} At the Department of Defense information forums, "[t]he most prevalent concern expressed" was that openly gay servicemen would "behave in a stereotypically effeminate manner."\footnote{103. Id. at 122; see also id. at 53-54 (setting forth service members' comments evidencing concerns about "flamboyant" gay military personnel).} Indeed, the authors reported that it had become apparent to them during the course of their assessment that "much of the concern" about gays serving openly in the military was grounded in part on the fear that open service "would lead to widespread and overt displays of effeminacy among men."\footnote{104. Id. at 5.} In the 2010 RAND study, specific concerns expressed focused on "flamboyant" and "effeminate" gay men who would lack the proper military bearing and demeanor.\footnote{105. RAND, supra note 24, at 245-46.}

In both the 2010 RAND study and the 2010 Pentagon study, the concern also was expressed that gay service members would accessorize their uniforms in a nonstandard and effeminate way.\footnote{106. Id. at 245; U.S. DEP'T OF DEF., supra note 6, at 53, 55, 122.} The authors of the 2010 Pentagon study reported, for example, that "[s]ome
Service members were troubled by the potential for flamboyant behavior and questioned whether 'pink boas' would be authorized with uniforms.\textsuperscript{107} One service member participating in the 2010 Pentagon study asked and commented "do they get to wear a rainbow flag on their uniform? If that is the case, this uniform isn't worth wearing."\textsuperscript{108}

In thinking about the connection between the military's masculine identity and the hostility to gay men serving openly in the military, it is also instructive to consider that both the 2010 RAND study and the 2010 Pentagon study support the view that service men in warfighting units and Marines were most opposed to serving next to openly gay service members. For example, RAND focus group participants shared a consensus that problems most likely to occur if Don't Ask, Don't Tell were repealed would be "most acute among men in the Army and Marines, specifically the infantry."\textsuperscript{109} The 2010 Pentagon study strongly evidences that, in general, Marines were more negative about repeal of Don't Ask, Don't Tell than were members of the other branches of the armed forces.\textsuperscript{110} The study's authors summarized their findings: "Marine Corps members were consistently more likely than other Service members to perceive negative effects of repeal [of Don't Ask, Don't Tell] across all major subject areas."\textsuperscript{111} Moreover, the 2010 Pentagon study shows that both Marine combat arms units and Army combat arms units were more negative about repeal as contrasted with others in their respective branches of the armed forces and especially as contrasted with the U.S. military overall.\textsuperscript{112}

Thus, the Westat survey demonstrates that negative feelings about serving with an openly gay service member were highest in the combat arms units and were higher in the Marines as contrasted with the U.S. military overall.\textsuperscript{113} For example, when asked how the presence of an openly gay person in their unit would affect their unit's ability "to work together to get the job done," 58 percent of respond-
ents serving in Marine combat arms units and 48 percent of respondents serving in Army combat arms units predicted negative or very negative effects.\textsuperscript{114} In comparison, in response to the same question, 43 percent of Marine Corp respondents overall and only 30 percent of U.S. military respondents overall predicted negative or very negative effects.\textsuperscript{115}

Similar results were found with respect to other questions in the Westat survey: Thus, for example, when asked about the effect of an openly gay service member in their unit on (1) "your immediate unit's readiness," or (2) "how Service members in your immediate unit trust each other," or (3) the unit's effectiveness at completing its mission "in a field environment or out to sea," those in Marine combat units were most likely to predict negative or very negative effects, followed by those in Army combat units. Marines overall were more likely to predict negative or very negative effects than were members of the U.S. military overall.\textsuperscript{116}

The authors of the 2010 RAND study analyzed other questions in the Pentagon's service member survey that focused on a service member's likelihood of leaving the military in response to a repeal of Don't Ask, Don't Tell. The questions inquired into such variables as a service member's plans to leave or remain in the military at the end of his current obligation, whether he would be more or less inclined to leave the military sooner if Don't Ask, Don't Tell were repealed, and how important an influence repeal of Don't Ask, Don't Tell would be on his decision in comparison to other factors that might influence his decision. The RAND study authors concluded that those most likely to leave in response to repeal of Don't Ask, Don't Tell were Marines in combat arms occupations, followed by soldiers in Army combat arms occupations. Moreover, across all occupations, Marines were most likely to be in the "most likely to leave" group, followed by soldiers in the Army.\textsuperscript{117}

The authors of the 2010 Pentagon study concluded that certain of these survey results "reveal to us a misperception that a gay man does not 'fit' the image of a good warfighter."\textsuperscript{118} This mispercep-

\textsuperscript{114} \textit{Id.} at 6.
\textsuperscript{115} \textit{Id.} at 6, 75.
\textsuperscript{116} \textit{Id.} at 74-75.
\textsuperscript{117} RAND, supra note 24, at 182-86; \textit{see also} 1 WESTAT, supra note 100, at 6 ("Among all Service members, Marine Corps members were most likely to say they will consider leaving sooner or will leave sooner than planned (38.1\%) if repeal occurs.").
\textsuperscript{118} U.S. DEP'T OF DEF., supra note 6, at 126.
tion has endured over time. Allan Berube authored a comprehensive history of gay men and lesbians in the military during World War II. Speaking of the prevailing attitudes that grounded military policy during that time period, Berube concluded:

The screening and discharge policies that branded gay men as unfit for the job of killing were based on exaggerated stereotypes of both the combat soldier and the sissy “queer.” The combat soldier was portrayed as everything a sissy was not – aggressively masculine and sexual, brave, strong, and tough – he had guts, determination, nerves of steel, and a taste for battle. The popular caricature of the sissy described him as everything a combat soldier was not – passively effeminate and asexual, timid, weak, and soft – he was a frivolous mama’s boy, a crybaby, and fought like a woman. … [I]t was the simplistic equation of male homosexuality with effeminacy that led to the general belief that “queers” could not become fighting men.

Several plausible explanations for the greater likelihood of this “misperception” of gay wartimegers among Marines and among combat arms units present themselves in the Westat survey data. Part of the explanation surely relates to gender. The study’s results demonstrate that “[i]n general, female Service members were substantially less likely to perceive negative impacts following repeal than male Service members not only for unit cohesion, effectiveness, personal morale, and readiness, but for all of the issues asked about in the survey.” Moreover, women make up a smaller percentage of the Marines than they do of any other service, and combat arms units, which exclude women altogether, obviously are even more predominantly male.

The survey data, however, suggest that factors in addition to gender may be at play. First, the data show that those in warfighting units were less likely to report that they were currently serving with or had ever served with someone they believe to be gay. One might hypothesize that serving closely with a gay service member (or a ser-

119. See Karst, supra note 46, at 557 (“For nervous men who look into the mirror of Mars for reassurance, the gay warrior may reflect an incongruous image.”).
120. BERUBE, supra note 93, at 176.
121. WESTAT, supra note 100, at 6; see also id. at 36, 84.
123. U.S. DEP’T OF DEF., supra note 6, at 125; see also 1 WESTAT, supra note 100, at 76 (“Marine Corps Service members were least likely to report currently serving with a Service member they believe to be gay or lesbian.”).
vice member one believes to be gay) should tend to lessen concern about serving closely with a gay service member.\textsuperscript{124}

The Westat survey data also show that men who were serving in mixed-gender units were less likely to predict a negative effect from repeal of Don't Ask, Don't Tell than were men who were serving in male-only units.\textsuperscript{125} Moreover, Marines are less likely to serve in mixed-gender units than are U.S. military personnel overall, while those in Marine combat arms units and Army combat arms units are even less likely to serve in mixed-gender units.\textsuperscript{126} Thus, one might hypothesize that serving in an all-male environment tends to support homophobia.

Both of these explanations, however, present a chicken-or-egg problem. While it might be that warfighters are more likely to be homophobic because they are less likely to know a gay warfighter, it also might be that a gay warfighter is less likely to come out to those in his unit because his fellow warfighters are more likely to be homophobic. Indeed, given the nature and often remote location of the warfighter's work, it would seem that coming out within a warfighting unit, as contrasted with coming out within any non-warfighting unit, would entail a greater risk to the gay service member of "accidentally" getting a bullet in his back.\textsuperscript{127} Finally, while it might be that the presence of women in a unit tends to undermine homophobia, it also might be that a homophobic man is more likely to end up in an all-male unit.

Indeed, quite simply, Marines and warfighters — who are the most likely to be male, the most likely to be in an all-male unit, and the most likely to believe that no gays serve immediately around them — also might be the most opposed to repeal of Don't Ask, Don't Tell because they are the most concerned with maintaining the military's masculine identity. As one private who predicted in December 2010 that repeal of Don't Ask, Don't Tell "won't be totally accepted" put it: "Being gay means you are kind of girly. The Marines are, you

\textsuperscript{124} U.S. DEP'T OF DEF., supra note 6, at 125 (suggesting that those who have not served with someone they believe to be gay "are left to only imagine what service with an openly gay person would be like — the circumstances in which misperceptions and stereotypes fill the void").

\textsuperscript{125} Id. at 76.

\textsuperscript{126} Id.; 1 WESTAT, supra note 100, at 28.

\textsuperscript{127} See 2 WESTAT, supra note 100, at 41 (noting the comments of some participants in DOD focus groups that with repeal of Don't Ask, Don't Tell harassment of gays and lesbians would increase "with some suggesting that the 'accidental' killing of a gay Service member was not out of the question").
Another marine, a combat veteran in Afghanistan, in commenting on the repeal of Don’t Ask, Don’t Tell in December 2010, took the equation of warfighting with masculinity and the equation of male homosexuality with effeminacy a step further: “There’s no doubt in my mind that openly gay Marines can serve, it’s just different in a combat unit. Maybe they should just take the same route they take with females and stick them to noncombat units.” A common rationale for excluding women and gay men from combat, of course, is the set of stereotypes that label both women and gay men as too passive and weak for combat.

Finally, it should be noted that the concern with effeminate gay soldiers is focused on how such effeminacy would undermine the military’s masculine image: It does not reflect a broader concern with gender non-conformity. Thus, while the Army’s regulations dating from World War II called for screening out effeminate men, directives relating to the Women’s Army Corp (WAC) from the same time period did not call for screening out masculine women even though one such directive did warn the examining officer to “be on guard against the homosexual who may see in the WAC an opportunity to indulge her sexual perversity.” The modern debate and surveys concerning Don’t Ask, Don’t Tell are nearly devoid of any concern that lesbians are hyper-masculine. Indeed, the authors of the 2010 RAND study reported that in their focus groups there was a “consensus” that integrating open lesbians into the military would present fewer challenges than integrating openly gay men. The authors further reported: “Many of the most prevalent concerns about openly gay men were that they might act in a stereotypically female manner – that they would be ‘dainty’ or ‘feminine.’” In contrast, several male participants thought that lesbians were a better fit for the military than straight women. Specifically, lesbians were thought to be more ‘masculine’ than straight women, displaying better military ‘bearing and demeanor’ and meeting higher physical fitness stand-
This greater openness to lesbians in the military itself suggests that opposition to gays in the military is grounded in substantial part in concerns about masculinity.\textsuperscript{136}

This is not to minimize the reality that for decades lesbians have been the victims of systemic sexual orientation discrimination in the military. In his book \textit{Conduct Unbecoming: Gays and Lesbians in the U.S. Military}, author Randy Shilts documented in great detail many of the witch hunts that fervently targeted lesbians, often while ignoring gay men serving in the same unit or on the same ship or military installation. Shilts spent five years reviewing many thousands of pages of documents and interviewing 1100 people while researching his book.\textsuperscript{137} From this investigation, he concluded that “[t]he profound victimization of lesbians in the military has less to do with homophobia than with sexual discrimination and harassment, the kind faced by women breaking into occupations once reserved for men.”\textsuperscript{138} Indeed, Shilts argued, “The issue of women in the military was never about women; it was about men and their need to define their masculinity.”\textsuperscript{139} Shilts went on to conclude that “lesbian investigations were aimed more at getting women out of the services than merely eliminating gays.”\textsuperscript{140} Thus, the military’s efforts to socially cleanse itself of lesbians can be seen as supporting rather than undermining the conclusion that the effort to purge openly gay service members from the military has been driven in large part by a desire to maintain the masculine identity of the military and its service men.\textsuperscript{141}

\begin{itemize}
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} See id. (“It is important to note that, even among those who anticipated substantial problems caused by allowing gay men in the military, these problems were expected to be isolated to gay men and generally not expected to extend to the integration of lesbians.”); see also \textit{Shilts}, supra note 5, at 744 (noting with respect to the debate in 1993 over allowing gays to serve openly in the military that “[l]esbians were hardly discussed at all”).
  \item \textsuperscript{137} \textit{Shilts}, supra note 5, at xv.
  \item \textsuperscript{138} Id. at 5.
  \item \textsuperscript{139} Id. at 492.
  \item \textsuperscript{140} Id. at 495.
  \item \textsuperscript{141} See Michelle M. Benecke & Kirstin S. Dodge, \textit{Military Women in Nontraditional Fields: Casualties of the Armed Forces’ War on Homosexuals}, 13 \textit{Harv. Women’s L.J.} 215, 217 (1990) (arguing that the military’s policy excluding gay people from military service “is used to justify campaigns of sexual harassment against women in nontraditional job fields and that[,] in its application, the policy controls and confines women’s presence and behavior in the military”); Karst, supra note 46, at 557 (“The central purpose of the exclusion of gay men, and of lesbians, too, is to express the ideology of masculinity.”).
\end{itemize}

The U.S. military’s official purges of openly gay service members formally ended in September 2011. On December 22, 2010, President Obama signed into law the bill that allowed for the repeal of Don’t Ask, Don’t Tell. The repeal legislation provided that Don’t Ask, Don’t Tell would end sixty days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff each certified that changing the law to allow gay service members to serve openly would not harm military readiness. On July 22, 2011, President Obama, Secretary of Defense Leon Panetta, and the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, formally issued the certifications to the Armed Services committees of both houses of Congress necessary to trigger the final repeal of Don’t Ask, Don’t Tell. Thus, on September 20, 2011, the repeal of Don’t Ask, Don’t Tell became final.

Among those present at the December 2010 bill-signing ceremony for the Don’t Ask, Don’t Tell Repeal Act of 2010 was eighty-five-year old Frank Kameny. Kameny had enlisted in the Army during World War II when he was seventeen years old. He later saw frontline combat in Nazi Germany. In 1957, Kameny lost his job as an astronomer with the U.S. Army Mapping Service pursuant to the Civil Service Commission’s policy banning gay civilian government employees.

After the government fired Kameny from his government astronomy job for being gay, Kameny worked to end the civil service ban on gay employees. He also worked to end the military’s exclusion of gay service members. In fact, he helped orchestrate one of the first test cases to challenge the military regulations banning gays from military service – the case of Leonard Matlovich, which drew national attention in the mid-1970s and made Matlovich arguably the most famous gay man in America at the time.

145. SHILTS, supra note 5, at 194-95, 198, 227, 363.
At the time of Kameny’s enlistment, the Army had asked Kameny if he had “homosexual tendencies.” Kameny wanted to serve and so he said that he did not. “They asked, and I didn’t tell,” he recalled, “and I resented for 67 years that I had to lie.”

The repeal of Don’t Ask, Don’t Tell has removed perhaps the most significant incentive for gay service members to lie about their sexual orientation, although other incentives for circumspection no doubt remain. Thus, the end of Don’t Ask, Don’t Tell will have obvious, immediate, and practical consequences for gay service members who no longer risk discharge by coming out. This obvious benefit to current and future gay service members is important in its own right, as the more than 13,000 service members discharged under Don’t Ask, Don’t Tell no doubt could attest.

But repeal also certainly will have more universal, profound, and long-term consequences far removed from the military context. Indeed, Congressman Barney Frank (D-MA) called President Obama’s signing of the legislation allowing for repeal of “Don’t Ask, Don’t Tell,” “the biggest civil rights moment in the nation since the signing of voting rights legislation in the 1960s.” Congressman Frank explained: “If you can fight for your country, you can do anything.” Similarly, author Randy Shilts predicted almost two decades before repeal that “[t]he symbolic value of the military finally allowing openly gay soldiers and sailors to serve would go far toward asserting that homosexuals should be allowed employment rights in all jobs and full participation in every aspect of American life.”

Don’t Ask, Don’t Tell stigmatized every gay American, regardless of his or her connection to the military. Indeed, perhaps only the statutes that criminalized consensual gay sex have stigmatized gay people more than the military’s exclusion of gay people. This is so because of the high profile nature of the policy, because the policy related to one of the nation’s most respected institutions, and because of the explicit and implicit pronouncements that grounded the policy.

146. Stolberg, supra note 144.
147. See U.S. DEP’T OF DEF., supra note 6, at 22-23.
148. Stolberg, supra note 144.
149. Id.
150. SHILTS, supra note 5, at 703-04.
151. Cf. Karst, supra note 46, at 558-59 (arguing that “the exclusion of gay men and lesbians from the armed forces ... has been the single most important government action in maintaining public attitudes that stigmatize homosexual orientation”).
152. Cf. id. at 509 (positing that “[n]owhere is the law’s expressive function more visible
Don’t Ask, Don’t Tell taught by example that gay people are inferior, and that heterosexual people are justified in feeling uncomfortable around gay people, in wanting to maintain their distance from them, and in discriminating against them to impose that distance.¹⁵³ Don’t Ask, Don’t Tell also taught that being gay is something that should be hidden and that gay people who nonetheless choose to be open about their sexuality deserve to be segregated from the heterosexual majority. Repeal of Don’t Ask, Don’t Tell removes a stigma and calls into question each of these lessons.

Moreover, repeal of Don’t Ask, Don’t Tell allows for openly gay service members to serve as gay role models for both gay people and the heterosexual majority. Professor Adeno Addis has described the utility of role models – those whom society admires as examples to be imitated for their behavior, achievements, and qualities – in “countering [a] web of narratives that has constructed the identity of marginalized groups”:

[T]he organized exclusion of minorities in this country has constructed an identity of these excluded groups that simultaneously justified their marginalization and exclusion to the majority group while inducing the minority group to adopt, often unconsciously, a deprecatory self-image. An individual from the marginalized group who occupies a prominent position in society can counter that imprisoning narrative and thus fuel a process of reassurance for members of the out-group and a process of relearning for members of the in-group.¹⁵⁴

Indeed, it is precisely the role model’s power to undermine the dominant narrative defining a disfavored minority that makes the role model a favorite target of social cleansing.¹⁵⁵

Excluding openly gay people from the military long served the greater purpose of excluding gay people from the public social space that is defined by the socially-admired qualities and values related to the military. More generally, denying openly gay people access to this role model occupation long served as a means for influencing nega-

¹⁵³. See id. at 546 (labeling “[e]very discharge of a gay soldier [as] an official degradation ceremony, an invitation to the troops – and especially to very young men – to participate in further acts of group subordination”); id. at 555 (arguing that “[t]hrough its policy of exclusion, government teaches service members and civilians alike that the prejudice is legitimate, and so extends the circle to new rounds of private gay-bashing”).


¹⁵⁵. See generally E. Gary Spitko, Where Have All the Gay Cowboys Gone?: Sexual Orientation Discrimination in Role Model Occupations as a Tool for Social Cleansing (unpublished manuscript) (on file with author).
tively how society – both straight and gay – conceives of gay people. In contrast, repeal of Don’t Ask, Don’t Tell allows for the explicit and simultaneous equation of homosexuality with masculinity, patriotism, and bravery, and also with unquestioned selflessness, honor, and integrity. Last but not least, repeal also brings the U.S. military into closer alignment with the still unrealized ideals of the nation and Constitution that it exists to defend.