

Wisconsin Journal of Law, Gender & Society

VOL. 24

2009

ARTICLES

THE STATES AS LABORATORIES FOR SOCIAL EXPERIMENTS: A PROPOSAL ASKING PRESIDENT OBAMA TO USE THE NATIONAL GUARDS AS LABORATORIES TO REASON OUR WAY OUT OF “DON’T ASK, DON’T TELL”

*Rufino Gaytán III**

INTRODUCTION

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

* J.D. Candidate 2009, University of Wisconsin Law School, Sergeant, United States Army Reserve (USAR), Operation Iraqi Freedom Veteran, Al-Taji, Iraq. Motivated by a desire to serve in the military, and in small part by the USAR’s many educational benefits, I enlisted in the USAR after completing my freshman year at the University of Texas at Austin. I actively served in the USAR for over six years and also deployed to Iraq for one year as part of Operation Iraqi Freedom, for which I was awarded the Army Commendation Medal and the Combat Action Badge. I would like to express my gratitude to my wife Melissa for her incredible patience as I spent countless hours writing this article. I am indebted to Rayen Pierattini, Jennifer Clark, Richelle Ladwig, Crystal Banse, Kasey Deiss and Kate Flannery for their insightful comments throughout the many iterations of this article. Any mistakes or shortcomings, of course, are my own.

rest of the country If we would guide by the light of reason, we must let our minds be bold.¹

Without a doubt, the issue of gay² men and women serving in our armed forces can stir up a heated debate. While many Americans see no justification great enough for ever excluding an entire group of individuals from voluntary military service based solely on one characteristic,³ many of the concerns expressed by military leaders and politicians in evaluating this issue deserve full and careful consideration. Therefore, it is necessary to consider all the possible effects that integrating homosexuals into the armed forces may have. The solution to this divisive issue will require creativity, respect for opposing views, and a real concern for the possible military implications.

Many of the justifications given for discriminating against homosexuals in the military are the same ones military officials and politicians used to keep black and white men segregated⁴ and exclude women from combat roles in the military.⁵ Further, the military has always been free to march "to the beat of its

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing the value of the process of trial and error); but see Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event*, 17 TEMPLE POL. & CIV. RTS. L. REV. 387, 387-88 (2008) (noting that state-by-state differences regarding same-sex marriage are not the result of federalism).

2. For the sake of simplicity, use of the words "gay" and "homosexual" throughout this article is intended to refer to both men and women.

3. In using "characteristic," I refer only to personal traits, such as race and religious or sexual preferences. This article is in no way intended to question the validity of military service exclusions based on medical diagnoses, such as sleepwalking, narcolepsy, alcohol and drug dependence or other ailments. See AR 40-501, *Standards of Medical Fitness*, at 14-15 (Dec. 10, 2007), available at http://www.usapa.army.mil/pdffiles/r40_501.pdf. Unlike excluding individuals based on their sexuality, excluding individuals from military service for medical conditions bears a very rational and immediate relationship to the military implications of their conditions. For example, sleepwalking could easily result in a soldier getting killed if he wanders into enemy territory, or narcolepsy could result in a soldier not performing guard duty properly, thereby endangering his fellow soldiers' safety.

4. Compare RAND NAT'L DEF. RESEARCH INST., *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 171-73 (1993) (hereinafter RAND STUDY) (citing unit cohesion as essential to combat effectiveness and as justification for segregating black soldiers from white soldiers) with S. REP. NO. 103-112, at 274-82 (1993) (summarizing numerous military officials' belief that the introduction of homosexuals into the military would disrupt unit cohesion). The Pentagon commissioned the RAND Study after Secretary of Defense Les Aspin received a memorandum from President Bill Clinton on January 31, 1993, in which the President "directed Secretary Aspin to submit the draft of an Executive Order 'ending discrimination on the basis of sexual orientation in the Armed Forces' by July 15, 1993" RAND STUDY, *supra*, at iii.

5. James D. Milko, *Beyond the Persian Gulf Crisis: Expanding the Role of Servicewomen in the United States Military*, 41 AM. U. L. REV. 1301, 1323-24 (1992) (stating that supporters of excluding women from combat often cite unit cohesion as a factor).

own drummer”⁶ when crafting its own policies, and often ignores the sentiments of the public and Congress. Although both sides of the “don’t ask, don’t tell”⁷ debate present compelling arguments, only one of those sides has ever been given a chance – the homosexual-free military.⁸

Despite the recruiting troubles the military has faced in recent years,⁹ our military and political leaders continue to exclude homosexuals.¹⁰ This article will focus on the benefits of individual states implementing, if they wish to do so, homosexual-friendly policies in their respective National Guards. Based on the analysis of this article,¹¹ the federal government will have to make one of two choices with respect to states implementing a policy contrary to DADT: 1) end funding tied to militia spending for any state implementing a homosexual-friendly policy,¹² or 2) allow each state, on a voluntary basis, to serve as a laboratory in the social experiment of integrating open homosexuals into the American military ranks without any threat of losing federal funds for choosing to do so.

Part I of this article provides a historical context for the accepted segregation of black soldiers from white soldiers that used to pervade the military, and considers the continued exclusion of women from combat roles. Part II focuses on historical justifications given by political and military leaders, as well as members of the judiciary, for discriminating against homosexuals. Part III discusses the present-day reasons political and military leaders give for excluding homosexuals from military service, whether states may legally refuse federal monies used to fund state militias, and the reasons why federal policy regarding homosexuals in the military should shift to a state-by-state approach as a transition toward a fully integrated military. The focus of Part IV is on the language of 10 U.S.C. § 654(e), which exempts from discharge individual soldiers who engage in homosexual conduct solely for the purpose of avoiding their military obligations, and the parallel focus of courts on conduct as the primary reason for discharge. Part IV presents a new

6. Corey Rayburn Yung, *Is Military Law Relevant to the “Evolving Standards of Decency” Embodied in the Eighth Amendment?*, 103 NW. U. L. REV. COLLOQUY 140, 146 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/36>.

7. Throughout this article, the “don’t ask, don’t tell” policy is referred to as “DADT” or “the current policy.”

8. See discussion *infra* Part III.

9. See, e.g., Thom Shanker, *Army, Shedding a Slump, Met July Recruiting Goal*, N.Y. TIMES, Aug. 11, 2007, at A8.

10. See Maureen Dowd, *Outing the Out of Touch*, N.Y. TIMES, June 10, 2007, at 15.

11. This analysis assumes that it is constitutionally permissible for states to sacrifice federal funds for the National Guard if Congress refuses to suspend DADT in exchange for a more inclusive policy or a state-by-state approach. For a detailed discussion on the constitutionality of DADT, see *Holmes v. Cal. Army Nat’l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), *rev’d on other grounds*, 124 F.3d 1126 (9th Cir. 1997); see also Sam Ruby, “Don’t Ask, Don’t Tell” and the National Guard: Federal Policies on Homosexuality in the Military vs. the Militia Clauses of the Constitution, 85 CAL. L. REV. 955 (1997).

12. See Ruby, *supra* note 11, at 965-70 (discussing the historical evolution of federally funding state militias). Funding issues are discussed further *infra*, at Part IV.B.

argument, one that has been completely overlooked, against the courts' extreme deference to military officials and Congress regarding the rationality of the policy – namely, that *acting* gay does not pose the same risks as *being* gay. Finally, this article concludes that if the federal government simply allowed states to implement homosexual-friendly policies in their respective National Guards, political and military leaders could adequately evaluate the current policy, determine the negative and positive effects of including homosexuals in the military, and avoid the costs of training service members for naught by discharging them, all while simultaneously protecting the military's concerns about open homosexuality by constraining any possible negative effects to those states willing to experiment.

I. UNIT COHESION IS THE MILITARY'S HISTORICAL BASIS FOR EXCLUSION

A. *Blacks and Whites Just Don't Mix*

1. The Insubordinate White Soldier Theory

One of the main arguments presented against integrating blacks into the military claimed that cultural differences between whites and blacks would lead to problems with unit cohesion and task performance. Military officers and commentators emphasized the historical disparity between the two racial groups and the widespread antagonism that existed in civilian life as reasons against integration.¹³ They feared that integration would create acrimonious situations where whites would be forced to take orders from black officers, ultimately undermining cohesion and the effectiveness of the unit as a combat force.¹⁴

The Navy was first to test racially integrated military units on supply ships in 1944 and 1945.¹⁵ All the data reviewed from these ships was positive, revealing high morale and efficient performance.¹⁶ For military officials originally hesitant to racially integrate,¹⁷ this evidence played a key role in convincing them otherwise, thus clearing the way for the naval integration policy adopted in 1946.¹⁸

13. RAND STUDY, *supra* note 4, at 171-72.

14. *Id.* at 172.

15. *Id.* at 173.

16. *See id.*

17. See Mario L. Barnes, "But Some of [Them] are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story, 14 DUKE J. GENDER L. & POL'Y 693, 694 n.3 (2007) (stating that the Secretary of the Army believed black soldiers were less capable than white soldiers) (internal citations omitted).

18. RAND STUDY, *supra* note 4, at 173. This policy took effect two years before President Truman's military-wide integration directive. *Id.*

The Army also tested racially integrated units during World War II.¹⁹ The motivation for these test units developed out of sudden necessity for the military.²⁰ Due to a shortage of infantry troops in Europe, then General Dwight Eisenhower devised a plan to train black soldiers, who traditionally only served in non-combat roles, and organized them into platoons that served alongside white infantry platoons.²¹ These integrated platoons were successful, and no incidents of racial tensions or non-cooperation were reported.²² In 1945, the Army conducted a survey of 250 white officers and non-commissioned officers (NCO's) who had experience with these integrated infantry companies, and the vast majority recommended future integration.²³

The positive feedback from this initial experiment led the Army to expand its integration efforts. In 1950 and 1951 in the Korean Theater, some commanders began integrating black soldiers into white combat units.²⁴ In a report codenamed Project Clear, the Operations Research Office of Johns Hopkins University presented the Army with proof that racial integration did not detrimentally affect combat effectiveness or performance of other tasks.²⁵ More importantly, Project Clear concluded that racial integration did not degrade unit morale.²⁶

2. Reality Chimes in and Begs to Differ

Of course, there were isolated incidents of racially motivated hostility and violence, but they were certainly not the norm.²⁷ In fact, Project Clear dispelled the notion that white soldiers would not take orders from black officers or NCO's.²⁸ The report also concluded, as did the earlier 1945 Army study, that the common notions white soldiers had about black soldiers regarding their military capabilities were changing.²⁹

19. *Id.*

20. *Id.*

21. *See id.* A modern infantry platoon typically consists of four 9-soldier rifle squads, a Platoon Leader, Platoon Sergeant, a Radiotelephone Operator, a Forward Observer, and a Platoon Medic. DEP'T OF THE ARMY, THE INFANTRY RIFLE PLATOON AND SQUAD FM 3-21.8, at 1-11 to -20 (Mar. 2007), available at http://usmc.mil/news/publications/Documents/FM%20321.8%20%20The%20Infantry%20Rifle%20Platoon%20and%20Squad_1.pdf. Therefore, platoons are usually troops of about forty soldiers.

22. RAND STUDY, *supra* note 4, at 174 (“[B]lack [combat] platoons performed very well, working in close conjunction with whites in a variety of combat operations . . .”).

23. *Id.*

24. *Id.* at 174-75.

25. *Id.* at 175.

26. *Id.*

27. *Id.*

28. *Id.* at 175-76.

29. *Id.* at 176-77 (“These findings suggested that shared experience in performing military tasks could actually generate a sense of social cohesion -- a sense of mutual respect, trust, and even liking -- among members of different racial groups who had previously had little contact with one another.”).

More recently, the military officers have officially supported a policy of seeking officer candidates from all racial backgrounds.³⁰ In *Grutter v. Bollinger*, the Supreme Court addressed the constitutionality of affirmative action policies at public universities.³¹ In that case, several military officers submitted an *amicus curiae* brief advocating for affirmative action programs at public universities in order to effectively recruit qualified minority officer candidates.³² The officers stated that the military needed public institutions of higher education to use "race-conscious recruiting and admissions policies" in order to achieve a "highly qualified and racially diverse" officer corps.³³

B. Women in the Foxhole: A Brief History

Historically, politicians and career military officials frowned upon the idea of women serving in the armed forces at any level.³⁴ Women were excluded for reasons based entirely on their gender.³⁵ Although women now serve in many different occupations and contribute greatly to our national defense, our military continues to exclude women from many combat roles.³⁶

The role of women in the military was initially restricted to nursing and administrative positions.³⁷ Even with these restrictions, thirty-three thousand women served during World War I, although most of them served in the Army or Navy Nurse Corps.³⁸ During World War II, 350,000 women served in some capacity to aid the war effort.³⁹ However, this influx of women resulted out of necessity for additional manpower and reports of success from countries that allowed women to serve in the military, rather than equal status.⁴⁰ Allowing women to serve in these nursing and administrative roles, both tasks in line

30. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

31. *Id.* at 311.

32. See *id.* at 331 (noting that high-ranking retired military officers and civilian leaders believe that racial diversity is essential to national security) (citing Brief for Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2002 U.S. Briefs 241, 5).

33. See *id.* (emphasis in original). Compare Barnes, *supra* note 17, at 695 (theorizing that racial integration has not been as successful as most commentators believe).

34. See Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303, 325 (2005).

35. Milko, *supra* note 5, at 1311 n.49 (internal citations omitted).

36. See, e.g., MEGAN K. BECKETT & CHIAYING SANDY CHIEN, RAND NAT'L DEF. RESEARCH INST., THE STATUS OF GENDER INTEGRATION IN THE MILITARY 45 tbl.D.1 (2002) (hereinafter GENDER INTEGRATION STUDY) (listing Military Occupation Specialties (MOS) that remain closed to women in the Army). Nevertheless, there have been two isolated instances in which women participated in combat-related roles. Cpt. Pamela E. Kirby, *Female Soldiers – Combatants or Noncombatants?*, 100 MIL. L. REV. 165, 172 (1983). The first was an anti-aircraft artillery unit deployed to protect Washington, D.C. in 1942, and the second was the creation of the Women Air Force Service Pilots (WASPs). *Id.*

37. GENDER INTEGRATION STUDY, *supra* note 36, at 5.

38. The Army and Navy Nurse Corps were not part of the regular Army and Navy. *Id.*

39. *Id.*

40. See *id.*

with accepted occupations for women in the civilian workforce, made more men available for combat.⁴¹

Although military service by women during World War II was seen as temporary, the great contributions made by women led Congress to pass the Women's Armed Services Integration Act of 1948.⁴² Despite the great limitations this Act placed on how many women could serve in the enlisted ranks, in the officer corps, and the complete exclusion of women from combat roles, the Act marked the starting point of many legislative and policy changes regarding women in military service.⁴³ As a result of these advances, over 40,000 women served honorably during the first Gulf War in 1991.⁴⁴ The latest culmination of women participating in national defense as a result of these legislative and policy changes can be seen in the Global War on Terrorism, with over 155,000 women deploying to Afghanistan and Iraq since 2002.⁴⁵ With the passage of the National Defense Authorization Act for Fiscal Year (FY) 1992 and 1993,⁴⁶ Congress finally allowed women to be permanently assigned to combat aircraft posts by repealing the combat exclusion law that had prevented women from serving in those capacities. The National Defense Authorization Act for FY 1994⁴⁷ followed suit, lifting the ban on women serving aboard combatant vessels.⁴⁸ And in January 1994, Secretary of Defense Les Aspin directed the armed services to integrate women into "all units except those 'below the brigade level whose primary mission is to engage in direct combat on the ground.'"⁴⁹ Presumably, this change in policy enables

41. *Id.*

42. Ch. 449, Pub. L. No. 80-625, 62 Stat. 356 (1948); see also Milko, *supra* note 5, at 1305.

43. See GENDER INTEGRATION STUDY, *supra* note 36, at 5-6.

44. THE PRESIDENTIAL COMMISSION ON THE ASSIGNMENT OF WOMEN IN THE ARMED FORCES, WOMEN IN COMBAT: REPORT TO THE PRESIDENT iii (Nov. 15, 1993) (hereinafter WOMEN IN COMBAT). The Commission was formed in response to the political debate regarding the exclusion of women from most combat roles that followed the effective participation of many women in the first Gulf War. *Id.*

45. Martha McSally, *Women in Combat: Is the Current Policy Obsolete?*, 14 DUKE J. GENDER L. & POL'Y 1011, 1013 (2007).

46. Pub. L. No. 102-190, § 531, 105 Stat. 1290, 1365 (1991) (repealing 10 U.S.C. § 8549).

47. Pub. L. No. 103-160, 107 Stat. 1547 (1993).

48. See GENDER INTEGRATION STUDY, *supra* note 36, at 7.

49. *Id.* (quoting Memorandum from Sec'y of Def. Les Aspin to the Sec'ys of the Army, Navy, and Air Force et al., regarding Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994)), available at <http://cmrlink.org/cmrnotes/lesaspin%20dgc%20defassign%20rule%20011394.pdf>. Secretary Aspin defined direct ground combat as "engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's [sic] personnel. Direct ground combat takes place well forward on the battlefield while locating and closing with the enemy to defeat them by fire, maneuver, or shock effect." *Id.*

women to serve in every possible MOS except infantry, armor, cavalry, or other combat arms specialties.⁵⁰

1. The Drooling Private Theory

Unit cohesion is often cited by military leaders as the primary reason to exclude women from ground combat roles.⁵¹ According to those in favor of excluding women from combat roles, male bonding is crucial to unit cohesiveness.⁵² Therefore, including women in combat units will interfere with the male bonding that is so essential to prevailing in combat and jeopardize the likelihood of mission success.⁵³

In connection with preventing men from bonding, supporters of combat exclusions assert that the presence of women on the battlefield will distract the men from the mission's requirements and endanger the unit as a whole.⁵⁴ The "drooling private theory" is that the men will compete for the women's affection and overprotect them, and therefore engage in unnecessary risk-taking that diverts attention from the objective of the mission.⁵⁵ Presumably, these kinds of distractions will impair the men from bonding, and instead, force them to compete with each other. Those who favor the current policy of excluding women from ground combat roles also argue that once unit cohesion is disrupted, military readiness is diminished.⁵⁶

2. The Weak Woman Theory

In addition, supporters of this policy claim that women are not as physically able as men, carry the risk of pregnancy, not as psychologically aggressive as men, and therefore, are not likely to perform as well as men in combat.⁵⁷ Several federal courts have relied on the belief that women are not as physically capable as men to justify combat exclusions.⁵⁸ Because of these perceived physical differences, combat exclusion supporters contend that women's exclusion from combat is necessary to protect them from the dangers of warfare.⁵⁹ Further, the Presidential Commission on the Assignment of

50. See *supra* note 36 and accompanying text.

51. See Milko, *supra* note 5, at 1323; WOMEN IN COMBAT, *supra* note 44, at 25.

52. Milko, *supra* note 5, at 1323.

53. *Id.* at 1323-24; see also WOMEN IN COMBAT, *supra* note 44, at 25 (discussing that cohesion problems may develop because of women's physical abilities, forced intimacy, lack of privacy, dysfunctional relationships, and the possibility of pregnancy).

54. See Milko, *supra* note 5, at 1324.

55. See *id.*; WOMEN IN COMBAT, *supra* note 44, at 65.

56. See Milko, *supra* note 5, at 1323-24.

57. See *id.* at 1314-21.

58. See *id.* at 1314 n.65 (listing cases that relied on the physical and psychological differences between men and women to justify female combat exclusion).

59. *Id.* at 1314; see also WOMEN IN COMBAT, *supra* note 44, at 25, 63-65 (referring to testimony establishing that women have less aerobic capacity than men, are shorter and have less muscle mass than men, and are at higher risk for exercise-induced injuries).

Women in the Armed Forces found that countries that allow women to serve in combat roles “have done so only because of grave threats to their national survival.”⁶⁰ Even so, the Commission cited unsuccessful integration attempts by other countries.⁶¹

3. Reality Beggars to Differ Once Again

Although our military continues to exclude women from ground combat roles, there have been numerous situations in which women have actually engaged in ground combat.⁶² For instance, in Operation Just Cause, eight hundred women participated in the invasion of Panama.⁶³ Within this group, Lieutenant Kimberly Thompson led her platoon during a gunfire exchange in which three men were killed.⁶⁴ Another example is Captain Linda Bray, who directed several platoons and successfully infiltrated a compound secured by enemy forces without suffering loss of life or injury.⁶⁵

In the Global War on Terrorism in Iraq and Afghanistan, women are actively involved in ground combat and even earning medals for their courage.⁶⁶ In the current conflicts in Iraq and Afghanistan, the lines between combat service support, combat support, and combat arms units have begun to blur.⁶⁷ Because of the nature of modern warfare, there are no front lines or safe rear areas.⁶⁸ In the view of many, the debate over women in combat is no longer an issue because it is already happening.⁶⁹

60. WOMEN IN COMBAT, *supra* note 44, at 26 (referring to the Soviet Union, Germany, and Israel).

61. *Id.* at 26, 46. Specifically, the Commission relied in part on Canada’s results when it attempted to integrate women into infantry units. *Id.* at 64-65. Only one out of 103 women who volunteered to join infantry units graduated from the initial training course. *Id.* at 64.

62. See, e.g., Lydia Zaidman, *Combatting the “Warrior Mentality”: A Review of Ground Zero: the Gender Wars in the Military*, 20 WOMEN’S RTS. L. REP. 33, 33-36 (1998) (book review); McSally, *supra* note 45, at 1012, 1015-17 (for more recent examples of women engaging in ground combat).

63. Zaidman, *supra* note 62, at 33.

64. *Id.*

65. *Id.* at 34.

66. See McSally, *supra* note 45, at 1017 (“Women are displaying great courage and skill in ambushes, firefights, and battles on the ground. They are not just surviving, but earning medals for valor in combat.”).

67. See *id.* at 1015-16.

68. *Id.* at 1015.

69. JAMES E. WISE, JR. & SCOTT BARON, WOMEN AT WAR: IRAQ, AFGHANISTAN, AND OTHER CONFLICTS ix (2006) (“The insurgency war in Iraq . . . has made the debate regarding women in combat irrelevant.”). See also David Moniz, *Female Amputees Make Clear That All Troops are on Front Lines*, USA TODAY, Apr. 28, 2005, at 1A (“Women in combat is not really an issue . . . It is happening.”).

II. THE HISTORICAL BASES FOR DISCRIMINATING AGAINST HOMOSEXUALS IN THE MILITARY

A. Gender Biases Dating Back to World War II⁷⁰

Throughout our American military history, gender biases have existed to keep certain groups from military service.⁷¹ During World War II, many gay men were discharged solely because of their sexual orientation,⁷² even as the military began training blacks to fill manpower shortages.⁷³ In some cases, men were discharged based on an "objective" belief that they were gay because they displayed characteristics traditionally thought of as feminine.⁷⁴ Homosexuality was thought of as a mental illness.⁷⁵ In a few cases, these men were considered treatable and allowed to remain in the service; however, in most cases, gay men were deemed untreatable and subsequently discharged.⁷⁶

B. The Evolution of Punishing and Excluding Homosexuals

Although the process of excluding homosexuals from the military has been discussed thoroughly in other articles,⁷⁷ it is important to understand this evolution in order to effectively attack the propriety of DADT. Prior to DADT, the policy of the Department of Defense accused openly gay service members of seriously interfering with the goals of the military mission.⁷⁸ Prior to the post-World War II period, military regulations gave commanders broad discretion regarding discharge.⁷⁹ Under the current Uniform Code of Military Justice,⁸⁰ a service member may very well be court-martialed and prosecuted for homosexual conduct.⁸¹ Although many variations to these conduct-focused

70. For an in depth study that chronicles the struggle of homosexuals in the U.S. military during World War Two, see generally ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990).

71. See S. REP. NO. 103-112, at 265-68 (1993).

72. *Id.* at 265-67.

73. See *supra* Part II.A.2.

74. See S. REP. NO. 103-112, at 266; BÉRUBÉ, *supra* note 70, at 17-18.

75. Kenneth S. McLaughlin, Jr., *Challenging the Constitutionality of President Clinton's Compromise: A Practical Alternative to the Military's "Don't Ask, Don't Tell" Policy*, 28 J. MARSHALL L. REV. 179, 181 (1994).

76. *Id.* at 182; S. REP. NO. 103-112, at 265-66.

77. See, e.g., McLaughlin, *supra* note 75, at 182-83; Ruby, *supra* note 11, at 972.

78. S. REP. NO. 103-112, at 263 ("Current Department of Defense policy provides that 'the presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission.'").

79. *Id.* at 265.

80. 10 U.S.C. ch.47 (2006) [hereinafter UCMJ].

81. Military officials have discretion to seek prosecution of homosexual conduct under the general article of the UCMJ. See 10 U.S.C. § 934 (1998). For a historical perspective on homosexual conduct and its classification as a military crime, see S. REP. NO. 103-112, at 265-66 ("The Articles of War of 1916 established a specific article proscribing assault with

regulations have come and gone, they have persisted in American military history, from World War I through the first Gulf War in 1991.⁸² The current policy is no different.

III. USING STATE NATIONAL GUARDS AS LABORATORIES IS THE ONLY REASONABLE AND SAFE APPROACH TO ENDING THE MILITARY BAN ON GAYS.

A. The One-Sided Findings of Congress⁸³

Section 654(a) rattles off a list of purported findings⁸⁴ that compelled Congress to codify the exclusion of men and women tending to partake in homosexual conduct from military service.⁸⁵ Nevertheless, history shows that the military has never functioned with openly gay men and women.⁸⁶ All of Congress's findings assume that homosexuals will disrupt unit cohesion, morale, good order, and hinder military readiness.⁸⁷ These findings rely solely on the opinions of military officials who refuse to allow homosexuals into the ranks of the military.⁸⁸ Yet, there is no concrete evidence to *know* that homosexual service members will *actually* disrupt the military and its ultimate purpose of implementing the national security strategy of the nation⁸⁹ when the need arises because the military has never taken a chance on them.

1. Homosexuals and the Divisiveness They Bring with Them

Military officials cite unit cohesion as one of the most important aspects of military life.⁹⁰ General H. Norman Schwarzkopf⁹¹ testified before the Senate

intent to commit sodomy. In the aftermath of World War I, Congress established the offense of sodomy, including consensual sodomy, as Article 93 of the Articles of War In 1947, the policy was revised to discharge individuals who had 'homosexual tendencies').

82. S. REP. NO. 103-112, at 265-67.

83. Again, I refer to these findings as one-sided because the military has never allowed openly gay service members to serve without restricting their conduct as homosexuals. *See supra* Part II. Therefore, these findings can only focus on the effects of having to discharge a service member because of his homosexuality and not the positive contributions he could have made.

84. 10 U.S.C. § 654(a)(1)-(15).

85. § 654(b)(1)-(3).

86. This is an obvious assertion, especially since we continue to discharge gay service members. *See, e.g., Holmes v. Cal. Army Nat'l Guard*, 920 F. Supp. 1510, 1517 (N.D. Cal. 1996). Even when a gay service member is allowed to continue serving, it is only because he has demonstrated that he will not engage in homosexual conduct. *Id.*; *see also* 10 U.S.C. § 654(b)(1)-(2).

87. *See* § 654(a).

88. *See* S. REP. NO. 103-112, at 278-81(1993).

89. 2008 United States Army Posture Statement (Feb. 26, 2008), *available at* <http://www.army.mil/aps/08/APS2008.pdf>.

90. *See* S. REP. NO. 103-112, at 274-75.

Armed Services Committee that "unit cohesion 'is the single most important factor in a unit's ability to succeed on the battlefield.'"⁹² General Gordon Sullivan, then Chief of Staff of the Army, also touted unit cohesion as the driving force to military success.⁹³ General Colin Powell, then Chairman of the Joint Chiefs of Staff, added that "[w]e cannot allow anything to happen which would disrupt that feeling of cohesion within the force."⁹⁴

While the statements made by these Generals certainly carry a lot of weight behind them,⁹⁵ they all assume that heterosexual soldiers will not trust homosexual soldiers as they would a heterosexual comrade. In fact, General Powell stated that the presence of open homosexuals would be disruptive and detrimental.⁹⁶ Other than speculation, General Powell offered no concrete evidence for these assertions. Citing personal experience, General Schwarzkopf testified that the presence of open homosexuals instantly polarizes the unit and destroys potential for bonding,⁹⁷ and that his opposition grew out of an honest concern about how this would affect the ability of the armed forces.⁹⁸ Major Kathleen Bergeron reasoned that sensitivity training will not suffice to ease the concerns of service members about homosexuals,⁹⁹ and

91. General Schwarzkopf was the allied commander of U.S. troops during the first Persian Gulf War in 1991. Patrick E. Tyler, *After the War; Bush Aims Rebuke at Schwarzkopf for Truce Remark*, N.Y. TIMES, Mar. 28, 1991, at A1.

92. S. REP. NO. 103-112, at 274. Further, General Schwarzkopf stated that "[w]hat keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hill under withering machinegun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to let down their buddies on the left or on the right." *Id.*

93. *Id.* at 275. General Sullivan testified before the Committee that "[e]very officer in the United States Army, . . . every soldier [and] noncommissioned officer, . . . everyone in the services must know that . . . I will give up my life for them; and they, in turn will give up their life for me." *Id.*

94. *Id.*

95. Having experienced life in a combat zone, I do not purport to question or in any way disagree with the statements of Generals Schwarzkopf, Sullivan, or Powell regarding unit cohesion.

96. S. REP. NO. 103-112, at 278 ("[O]pen homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.").

97. *Id.* at 280 ("[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . . [I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.").

98. *Id.* at 279-80 ("[M]y opposition [grew] out of honest concern for the impact that such a measure would have on the men and women of the armed forces and the resultant reduction in our Nation's ability to protect our vital interests.").

99. *Id.* at 281 ("[No] amount of sensitivity training or reeducating will change the way [service members] think or feel about homosexual behavior because there is nothing more basic to an individual than his or her sexuality.").

civilians have an easier time accepting homosexuals because they can separate their work life from their private life.¹⁰⁰

These are all valid points. Nonetheless, high-ranking military officials made these same observations about the integration of black soldiers.¹⁰¹ The only way to find out if homosexuals pose a threat to unit cohesion is to experiment, just as the Navy and Army did in the late stages of World War II with racial and female integration.¹⁰² While there is no question that unit cohesion is of the utmost importance in warfare, Americans should question why the Department of Defense spent \$1 million commissioning the RAND study only to suppress its findings and conclusions.¹⁰³ As Representative Jerrold Nadler alluded to, it is likely that the reason for ignoring the RAND Study's recommendation to lift the ban on homosexuals was simply because military officials continue to ignorantly believe the stereotypes of gay men and women.¹⁰⁴

Military readiness is cited as another reason why openly gay men and women should not be allowed to serve in the military.¹⁰⁵ Following the argument that unit cohesion is the driving force for military success,¹⁰⁶ military leaders argue that once homosexuals disrupt unit cohesion, military readiness will decline.¹⁰⁷ Nevertheless, military leaders who testified before Congress never argued that homosexuals were physically or psychologically incapable of effectively performing military duties; instead, they focused on how their heterosexual comrades would react to the presence of open homosexuals.¹⁰⁸

100. *Id.* ("Civilians go home at night and distance themselves from the workplace.").

101. *See supra* Part II.A.

102. *See supra* Part II.B.

103. 139 CONG. REC. H3924 (daily ed. June 23, 1993) (statement of Rep. Schroeder).

104. *See* 139 CONG. REC. H4785 (daily ed. July 20, 1993) (statement of Rep. Nadler).

105. S. REP. NO. 103-112, at 278-79.

106. *Id.*

107. *Id.* at 278-80.

108. *Id.* at 274-82. *See also* *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (employer rescinded offer due to the applicant's male-to-female transsexualism). Although not a military discrimination case, the facts in *Schroer* provide sufficient support to argue that sexual identity or sexual preference are not indicative of a soldier's performance. *See id.* at 205-06. Schroer was a veteran with twenty-five years of military experience. *Id.* at 205. Throughout her military career, Schroer served in "combat operations in Panama, Haiti, and Rwanda." *Id.* Schroer graduated from the National War College and the Army Command and General Staff College. *Id.* She "spent the last seven and a half years of her military career with the United States Special Operations Command . . . , which plans, directs, and executes special operations in the conduct of the War on Terrorism in order to disrupt, defeat, and destroy terrorist networks that threaten the United States[.]" *Id.* at 205-06 (internal quotations omitted). By all indications, Schroer was a superior soldier — one whose performance was not affected by her sexual identity. However, just as the leaders who testified before Congress did not focus on a homosexual soldier's ability to perform his or her duties, *see* S. REP. NO. 103-112, at 274-82, Schroer's employer also focused on her co-worker's reaction to her sexual identity, *see Schroer*, 424 F. Supp. 2d at 206 (stating that she would not be a "good fit"). For a similar case involving a Vietnam veteran combat pilot, *see Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

Once again, General Schwarzkopf's, General Powell's, and the statements of all military leaders deserve careful consideration, but their arguments beg several questions. Why should an entire class of Americans be deprived of the honor that comes with serving in the military solely because of their sexual preference? Why should homosexuals be deprived of the honor that accompanies military service because the heterosexual population feels uncomfortable around them? Why have opponents to lifting the ban not presented any evidence that homosexuals are less proficient in performing their military duties?

The only way military leaders were convinced about the positive effects and lack of negatives that racial integration would have on the military was through the courage and conviction of political and military leaders who were willing to take the chance. As General Powell stated in his testimony to the Senate Armed Services Committee, "[s]kin color is a benign, non-behavioral characteristic. Sexual orientation is perhaps the most profound of human characteristics. Comparison of the two is a convenient but invalid argument."¹⁰⁹ Because these characteristics are so different in nature, General Powell's concern is worthy of careful consideration, and only a well-reasoned policy that protects those concerns will effectively calm the legitimate fears of military and political leaders.

2. Yet Again, Reality Shows Us Otherwise

Many other countries allow openly gay men and women to serve without detriment. The British military began allowing open homosexuals to serve in 2000.¹¹⁰ In addition, twenty-four foreign nations, including U.S. allies in the Global War on Terrorism, let homosexuals serve openly.¹¹¹

In addition, the RAND Study presented an extensive review of countries that allow openly gay men and women to serve.¹¹² Although every country's military is different and heavily influenced by cultural norms,¹¹³ the RAND Study found that the inclusion of homosexuals into the militaries of Canada, France, Israel, the Netherlands, and Norway did not produce any disruptions.¹¹⁴

I use these cases only to illustrate the point that performance of military duties is not affected by sexual identity or sexual preference. I do not mean or intend to equate transgender/transsexual issues with homosexual issues.

109. S. REP. NO. 103-112, at 282.

110. See Dowd, *supra* note 10 ("[The British] military reports that none of its fears 'about harassment, discord, blackmail, bullying or an erosion of unit cohesion or military effectiveness have come to pass.'").

111. John M. Shalikashvili, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, at A17.

112. RAND STUDY, *supra* note 4, at 65-105.

113. See *id.* at 65.

114. *Id.* at 104.

In fact, the change in policy to include homosexuals in the French military "went almost unnoticed, and implementation was not an issue."¹¹⁵

Other than relatively few homosexuals who have been allowed to continue their service after providing assurances that they would not engage in homosexual conduct,¹¹⁶ there is no reality to portray in the U.S. because the military continues to discharge homosexuals who refuse to abstain from homosexual conduct.¹¹⁷ Despite the findings of the RAND Study and public opinion favoring a policy allowing homosexuals to serve in the armed forces,¹¹⁸ military officials and politicians alike continue to refuse openly gay men and women the opportunity to serve.

On March 3, 2009, Democratic Representative Ellen Tauscher of California introduced House Resolution 1283.¹¹⁹ This proposed legislation would effectively end discrimination in the armed services based on sexual preference.¹²⁰ As of April 6, 2009, this resolution has only garnered the support of 135 legislators.¹²¹ Additionally, the proposal has received little attention in the form of any activity.¹²² The Bill Tracking Report shows that the only action taken by Congress was to refer the resolution to committee on March 3, 2009.¹²³ As of March 2009, most politicians, President Obama included, continue to avoid the issue.¹²⁴ Because of the issue's political volatility, the 2008 presidential candidates shied away from taking a firm stance on gays in the military or avoided the issue altogether.¹²⁵ Given the current economy and the immense attention that the so-called "bailouts" have garnered in the

115. *Id.*

116. See, e.g., *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (1997). But see Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment after Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL'Y 953, 973 (May 2007) (discussing the selective enforcement of the gay ban in times of war and questioning whether gays really are a hindrance to the military).

117. 10 U.S.C. § 654(b)(1)-(3) (2006); *Holmes*, 124 F.3d at 1132.

118. See generally RAND STUDY, *supra* note 4; Nathaniel Frank, *Don't Ask*, SLATE, Mar. 13, 2007, <http://www.slate.com/id/2161764/index.html>.

119. Military Readiness Enhancement Act of 2009, H.R. 1283, 111th Cong. (1st Sess. 2009). Democratic Representative Martin T. Meehan of Massachusetts introduced an identical resolution on February 28, 2007. Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong. (1st Sess. 2007).

120. H.R. 1283.

121. *Id.*

122. *Id.*

123. *Id.* The 2007 resolution suffered a similar fate. H.R. 1246. That resolution only received the support of 149 representatives. *Id.*

124. See, e.g., John Roberts & Scott J. Anderson, *Obama Aide: Ending 'don't ask, don't tell' Must Wait*, CNN, Jan. 15, 2009, <http://www.cnn.com/2009/POLITICS/01/14/obama.gays.military>.

125. See Elaine Donnelly, *Presidential Candidates Change Answers on Homosexual Issues*, HUMAN EVENTS, Dec. 18, 2007, <http://www.humanevents.com/article.php?id=24013> (discussing the volatility of the issue for presidential candidates during the 2008 election season).

national media, the bill will likely continue to receive little, if any, attention in the House.¹²⁶

In keeping with the attitudes of General Colin Powell when he served as Chairman of the Joint Chiefs of Staff, the present Chairman, Admiral Mike Mullen, has made it clear that a change in the policy will not come from within the Department of Defense, and must come from the Legislature.¹²⁷ Ironically, Congress and the courts claim to follow the lead of military officials when it comes to military matters.¹²⁸ However, after military officials conducted the RAND Study, it is likely they rejected the findings because they were not in line with longstanding military tradition. Therefore, Congress and the public cannot rely on the military to change the policy, and gay men and women wishing to serve in the military cannot wait on Congress either.

Despite this apathy by Congress, the President, and current military leaders, the opinions of retired military officers may trigger a change in policy.¹²⁹ In a letter submitted to Congress on December 7, 2007, twenty-eight retired generals and admirals urged Congress to act and repeal DADT.¹³⁰ According to these retired officers, the American military currently employs 65,000¹³¹ gay men and women, and the number of gay veterans exceeds one million.¹³² These numbers are proof that gay men and women are not disruptive to military readiness. There is no indication that these men and women could not perform their military duties effectively.

B. To Avoid a Constitutional Confrontation, Congress or the President Should Allow States to Refuse DADT Without Losing Militia Funding.

Currently, the federal government funds, at least in part, all state National Guards.¹³³ Through this funding, the federal government exercises substantial power over the training, discipline, and organization of the state-run National

126. See, e.g., David Stout & Brian Knowlton, *Geithner Seeks Broader Powers over Financial Firms*, N.Y. TIMES, Mar. 24, 2009, at A1.

127. In responding to the shift in position of former Chairman, General John Shalikashvili, Admiral Mullen stated that “[i]f the American people want to change this policy and change this law, bringing it up through [Congress] and changing that policy and changing that law is the right answer.” Brad Knickerbocker, *U.S. Military More Open to Gays Serving Openly*, CHRISTIAN SCI. MONITOR, Dec. 4, 2007, at 3.

128. See, e.g., *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1133-34 (1997).

129. Compare Thom Shanker & Patrick Healy, *Let Gays Serve Openly, Generals Say*, INT’L HERALD TRIB., Dec. 1, 2007 with David Crary, *Retired Military Officers: Keep Ban on Gays*, SEATTLE TIMES, Mar. 31, 2009, available at http://seattletimes.nwsource.com/html/politics/2008943859_apgaymilitary.html.

130. Shanker & Healy, *supra* note 129.

131. Other sources estimate that at least 60,000 homosexuals currently serve in the military. See e.g., Barnes, *supra* note 17, at 709.

132. Shanker & Healy, *supra* note 129.

133. Ruby, *supra* note 11, at 968.

Guards.¹³⁴ If a state does not submit to federal authority, Congress can simply stop funding that state's militia.¹³⁵

In *Holmes v. California Army National Guard*,¹³⁶ the Northern District of California discussed whether a state agency like the National Guard is bound by federal policies.¹³⁷ The plaintiff in *Holmes* sued several military agencies after being discharged because he was a homosexual.¹³⁸ The defendants claimed that they were not liable to Holmes because they were simply obeying federal laws and policies regarding the commissioning of homosexual military officers.¹³⁹ The court held that the state was not bound by federal policies because states willingly limit their exercise of power in exchange for federal funds.¹⁴⁰ Despite the fact that the Ninth Circuit reversed part of the *Holmes* District Court ruling,¹⁴¹ their opinion did not address the district court's holding that states are free to refuse militia funding.¹⁴² Since the district court found that acceptance of federal funds was voluntary, the state defendants could not pass liability onto to the federal government.¹⁴³

Regardless of whether Congress can condition militia funding on accepting DADT under the disciplinary power found in the federal Constitution,¹⁴⁴ states are free to refuse these funds in order to implement a policy favorable to gay men and women.¹⁴⁵ This kind of state action, of course, is easier said than done. It is hard to imagine any reason why a state would forgo millions, if not billions, of dollars to implement a homosexual-friendly policy in its National Guard. Even in liberal states, any suggestion by a local politician to give up federal militia funding based on principles of equality would likely result in political suicide. Because of these risks, Congress or the President should allow state officials to pursue a more inclusive policy without facing these drastic consequences.

C. The Path of Least Resistance: The Case for Experimenting at the State Level

The federal government should allow states to implement homosexual-friendly policies, for several crucial reasons. First, allowing a willing state to "serve as a laboratory" will provide real data to consider, as opposed to the

134. *Id.*

135. *Id.*

136. 920 F. Supp. 1510 (N.D. Cal. 1996).

137. *Id.* at 1522. For a detailed discussion of *Holmes*, see Ruby, *supra* note 11, at 975-81.

138. 920 F. Supp. at 1517.

139. *Id.* at 1522.

140. *Id.* at 1523-24.

141. *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1137 (9th Cir. 1997).

142. *Holmes*, 920 F. Supp. at 1523-24.

143. *Id.* at 1525.

144. See U.S. CONST. art. I, § 8, cl. 16.

145. Ruby, *supra* note 11, at 976-77; *Holmes*, 920 F. Supp. at 1523-24 (stating that states voluntarily accept federal funds).

speculative findings of Congress,¹⁴⁶ on the effects openly gay service members have on unit cohesiveness.¹⁴⁷ Consequently, this state-by-state approach would allow federal military commanders and politicians to assess the actual effects in reconsidering the soundness of DADT. The worst case scenario for gay men and women is that the federal government will have *real* justifications¹⁴⁸ for implementing its discriminatory policy. On the other hand, this experiment may lead a future Congress to overturn the policy or give a future president enough confidence to integrate homosexuals into the military through an executive order.¹⁴⁹

Second, only willing National Guards will bear any negative effects if homosexuality is really detrimental to unit cohesion. Third, based on the unique demographics of individual National Guards, these units provide the path of least resistance for integrating homosexuals into the military.¹⁵⁰ By beginning the integration process at the National Guard level, military and political leaders will either find real justifications for excluding homosexuals, or as many in this country hope, find the historical reasons for excluding open homosexuals to be simply off-the-mark.

146. See 10 U.S.C. § 654(a) (2006). The Congressional findings expressed in the Code are purely speculative because the U.S. military has never given homosexuals the opportunity to openly serve in the military. *But see* Gilreath, *supra* note 116, at 973 (positing that homosexuals are somewhat tolerated in times of need). Even under DADT, men and women who are known to be homosexual must provide reassurance to their commanders that they will not engage in homosexual conduct. See 10 U.S.C. § 654(b)(2). Therefore, the fear that the presence of homosexuals will cause disruption to unit cohesion or morale is unfounded.

147. For a list of concerns regarding the service of homosexuals in the military, see 10 U.S.C. § 654(a).

148. The "real" justifications are the potential negative effects on the National Guard units that allow openly gay men and women to serve. However, it is possible that there will be no negative effects. See RAND STUDY, *supra* note 4, at 392. The success of an inclusive policy "depends on understanding the military as a large organization with a unique culture, on a carefully developed and actively monitored implementation plan, and on a sense of the importance of perceived fairness in the development of the policy and in its implementation." *Id.* Any glitches that may arise can be minimized by military leaders if they take the implementation of a new policy seriously. See *id.* at 394.

149. President Bill Clinton promised during his first presidential campaign to issue an executive order lifting the military's complete ban on homosexuals. See, e.g., Jeffrey Schmalz, *The 1992 Elections: The States -- The Gay Issues*, N.Y. TIMES, Nov. 5, 1992, at B8. Clinton would have done for homosexuals what President Harry Truman did for black men, however, once elected, President Clinton ran into fierce opposition from political and military leaders. See Eric Schmitt, *The Transition: News Analysis -- Challenging the Military; In Promising to End Ban on Homosexuals, Clinton is Confronting a Wall of Tradition*, N.Y. TIMES, Nov. 12, 1992, at A1.

150. See *infra* Part IV.C.2-3.

1. The State-by-State Approach Gives Military and Political Leaders the Real Data Necessary to Make a fair and Sound Determination about Open Homosexuality in the military

Congress should at a minimum suspend the policy to allow states to experiment regardless of whether Congress can constitutionally condition spending and whether states may decline to follow DADT despite Congress's power to "discipline" the militia.¹⁵¹ Once a willing state implements an inclusionary policy, the President, Congress, and military leaders can re-evaluate DADT. The most obvious benefit of a state including homosexuals in the National Guard is that this experiment will produce concrete data. Military officials will no longer have to speculate about the long term effects of including homosexuals at the national level. Furthermore, it is unlikely that different state National Guards will react differently.¹⁵² Even if only one state experiments with a more tolerant policy, there is no reason to believe that the military culture will vary significantly, if at all, from state to state. Therefore, the results in other states would probably be the same.

2. Using the National Guard Restricts the Negative Effects

As Justice Brandeis aptly pointed out in *New State Ice Co. v. Liebmann*,¹⁵³ an added benefit of this state-by-state approach to deal with social or economic experiments is that any negative effects will be contained in a concentrated area and not hurt the entire nation.¹⁵⁴ Similarly, if Congress were to allow states to experiment with more inclusive policies, the whole military will not suffer if the inclusion of homosexuals causes insurmountable disruption. By restricting these potential negative effects to the National Guards of willing states, the national military's overall preparedness will not be negatively impacted. If the results are as detrimental as many military and political leaders fear, Congress could simply reinstate DADT without significant consequences.¹⁵⁵

151. U.S. CONST. art. I, § 8, cl. 16.

152. Based on my own experiences (the unit that I deployed with to Iraq included soldiers from Michigan, Illinois, and Texas), military culture does not vary significantly from state to state. All recruits attend the same Basic Combat Training schools, regardless of whether they will ultimately serve in the National Guard, the Reserve, or the regular Army. Therefore, serving alongside a soldier originally from the Michigan National Guard and others from Texas makes no difference.

153. 285 U.S. 262 (1932).

154. *Id.* at 311 (Brandeis, J., dissenting).

155. If implemented, this proposal would raise the questions of what to do with openly gay soldiers in experimental states when they attend basic training, their Military Occupational Specialty schools, or when their units are mobilized for federal service, e.g., deploying to Iraq or Afghanistan. Would they be required to "not tell" while at these schools or during deployment? Addressing these issues is beyond the scope of this article. However, at least in the deployment context, the military could impose a rule similar to the Department of the Army's current policy of precluding pregnant women from deploying overseas. See Memorandum for Team Chief, Personnel Contingency Cell, Army Operations Center, regarding Predeployment Pregnancy Testing Policy and Procedure (Jan. 21, 2003), available

3. The National Guard is unique in its demographics

Another reason to grant individual National Guards the power to include homosexuals is that soldiers enlisted in the National Guard tend to have higher levels of education. According to the U.S. Army's 2005 Demographics Report, the percentage of enlisted personnel in the Reserve and National Guard who have at least a bachelor's degree is double that of the regular Army.¹⁵⁶ With that increased level of education, it is possible that these soldiers will be more tolerant of homosexuals than the soldiers who make up the regular Army, thereby providing the path of least resistance to fully integrating the military.¹⁵⁷ Once we begin to show as a country that we are committed to providing everyone with equal opportunities in the military, the integration of homosexuals will no longer be an issue.

By effectuating a policy of tolerance in a state that offers the locale of least resistance,¹⁵⁸ and assuming that none of the resulting effects of an inclusionary policy are detrimental to unit cohesion or military readiness, other states will likely join the bandwagon. If the results at the state level are positive, it would be difficult for federal military officials to continue to claim that the presence of homosexuals will negatively impact the armed forces.

at <http://www.pdhealth.mil/downloads/pptpp.pdf>. A policy similar to the pregnancy policy would avoid having to deal with the issue of full integration, but would still allow openly gay soldiers to serve in some capacity. The easy way out of the basic training dilemma is to force gay soldiers to keep quiet. However, the military could also create experimental units in which heterosexual recruits, instructors, and commanders could voluntarily participate. Even under a non-voluntary scheme, the units could work with strict enforcement by commanders for tolerant behavior and could eventually lead to full integration, just like the racially experimental units used by General Eisenhower during World War II. See *supra* Part II.A.2.

156. See OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE, 2005 DEMOGRAPHICS REPORT (2005), available at <http://www.militaryhomefront.dod.mil/reports> (follow "2005 Demographics Report" hyperlink). The report states that in the regular Army, 4.1 percent of enlisted soldiers have a college degree. *Id.* at 24. In the officer corps in the regular army, 86.2 percent have at least a bachelor's degree. *Id.* at 23. On the other hand, 7.9 percent of enlisted personnel and 85.5 percent of officers in the Reserve and National Guard have at least a bachelor's degree. *Id.* at 78.

157. College students are more likely to accept gay and lesbian students. See, e.g., Jeanne DeQuine, *Out of the Closet and On to Fraternity Row; Gay College Kids are Making Their Brotherhood Official on U.S. Campuses*, TIME, Mar. 17, 2003, at 8 (discussing the acceptance of gay and lesbian students in the conservative Greek system); David Wharton, *Young Gay Athletes Find a Place Out on the Field; An Emerging Generation of Players is More Open About Sexual Orientation. Often, It's Not a Big Deal, They Say*, L.A. TIMES, July 28, 2007, at A1 (suggesting that college-aged students are more open to homosexuality). Assuming that the typical college experience for a National Guard soldier is the same as any other college student's, National Guard soldiers would follow the same trend. Even if the tolerance of National Guard soldiers is overestimated, the other reasons (e.g., gathering real data and limiting negative effects to only experimental states) for experimenting with other policies at the state level still make these units the most attractive starting points.

158. The overall political leanings of a state and the willingness of state-level military and political officials will inevitably play a role in whether a state decides to implement a homosexual-friendly policy.

Therefore, Congress should not refuse federal funding to a state that implements an inclusive policy.

D. Why the Time is Now: The Recruiting and Retention Shortfall

Recently, the military has been stretched thin because of the U.S.'s extensive involvement in the Middle East.¹⁵⁹ Yet, many key service members have been discharged because of their homosexual orientation.¹⁶⁰ Once again, if the federal government were to allow the states to experiment with their own policies, we could assess just how detrimental DADT really is. By finding out how many service members actually are homosexual, it would be possible to evaluate the potential costs to the military in terms of recruiting, having to retrain soldiers, and the decreased efficiency by increasing the number of new recruits, as opposed to allowing experienced personnel to continue to serve.¹⁶¹

Even former supporters of DADT have changed their minds in recent times. The former Chairman of the Joint Chiefs of Staff, General John M. Shalikashvili, has questioned the reasonableness of DADT.¹⁶² The General believes that allowing homosexual men and women to serve would no longer undermine the ability of the armed forces given societal changes and the need for increased manpower due to our involvement in the Middle East.¹⁶³ Although General Shalikashvili opined that the timing for lifting the ban completely may not be right, that day is on the horizon.¹⁶⁴ But the timing is right. American military forces are under tremendous strain, so allowing perfectly capable volunteers to serve their country would ease the current burden.

V. SINCE MOST COURTS REFUSE TO FIND THAT DADT VIOLATES
CONSTITUTIONAL PROTECTIONS, MAYBE IT IS TIME TO ATTACK THE STATUTE
WITH ITS OWN WORDING

Although the preferable method to changing DADT is through Congressional action or Presidential order, all lawyers who have litigated this policy have overlooked one key argument – the patent irrationality of section

159. See e.g., Bob Deans, *National Guard Under 'Tremendous Strain'*, ATLANTA J.-CONST., Feb. 1, 2008, at 1C.

160. Since the enactment of DADT, the military has discharged more than 58 Arabic linguists because of their homosexuality. Dowd, *supra* note 10.

161. See RAND STUDY, *supra* note 4, at 395-407 (concluding that the actual effect of the removal of DADT depends on many different factors).

162. Shalikashvili, *supra* note 111.

163. *Id.* ([I] believe that if gay men and lesbians served openly in the United States military, they would not undermine the efficacy of the armed forces. Our military has been stretched thin by our deployments in the Middle East, and we must welcome the service of any American who is willing and able to do the job.”).

164. *Id.* (“When that day comes, gay men and lesbians will no longer have to conceal who they are, and the military will no longer need to sacrifice those whose service it cannot afford to lose.”).

654(e) and courts' deference to the military on the policy. Congress's findings regarding the military and the negative effects of homosexual conduct in the military are inconsistent with the idea that a service "member engaged in [homosexual] conduct . . . for the purpose of avoiding or terminating military service"¹⁶⁵ will not have those very same effects. Apparently, the only conduct that has negative effects on morale, unit cohesion, and all of the other factors Congress considered is the conduct of real homosexual service members. Given that most courts have emphasized homosexual conduct and not speech related to homosexuality in finding the policy constitutional,¹⁶⁶ Congress and the courts must believe that the homosexual conduct of a gay man or woman has a more significant impact than the homosexual conduct of a heterosexual man or woman who engages in such conduct solely to shirk a military obligation. The logic, or lack thereof, in this line of reasoning certainly minimizes political and military leaders' concerns regarding homosexual conduct in the military.

In codifying DADT, Congress apparently found that homosexual conduct can cause disruptions in military units, but only when that conduct is undertaken by actual homosexuals.¹⁶⁷ In upholding the constitutionality of DADT, courts have repeatedly stated that the policy is only subject to a "rational basis" review because homosexuals are not a protected class.¹⁶⁸ Additionally, courts have emphasized the constitutionality of the current policy based on the fact that it excludes homosexuals from military service for their conduct, and not based on the fact that they are homosexual.¹⁶⁹ The purported rational basis is anything but rational: Congressional and military leaders insist that homosexual conduct is detrimental to unit cohesion, yet when a heterosexual soldier engages in the same conduct no one seems to think it has those same negative effects. For some reason, this discrepancy in the purported rationality of the statute and policy has gone overlooked all these years.¹⁷⁰ On its face, the "rationality" that courts and Congress have attributed to DADT loses a lot of its punch based on section 654(e).

The main purpose of section 654(e) is to preclude service members and possible draftees from avoiding service in the military by falsely claiming that they are gay.¹⁷¹ However, there is no reason to believe that engaging in

165. 10 U.S.C. § 654 (e)(1) (2006).

166. See, e.g., *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996).

167. Compare 10 U.S.C. § 654(a) with § 654(e).

168. See, e.g., *Holmes*, 124 F.3d at 1132; *Richenberg*, 97 F.3d at 260; *Thomasson*, 80 F.3d at 928.

169. See, e.g., *Holmes*, 124 F.3d at 1135; *Richenberg*, 97 F.3d at 261; *Able*, 88 F.3d at 1296-99; *Thomasson*, 80 F.3d at 928-29.

170. This particular section of the Code has only been cited in two cases, but has never been discussed in depth. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 407 (Mass. Dist. Ct. 2006); *Philips v. Perry*, 883 F. Supp. 539, 544 (W.D. Wash. 1995).

171. See 10 U.S.C. § 654(e)(1).

homosexual conduct, even if only to avoid a military obligation, would not have the same disruptive effects that Congress found could be devastating to the unit cohesion, morale, discipline, and military readiness of any military outfit.¹⁷² If Americans are to believe General Schwarzkopf's concern that injecting homosexual behavior into a military unit has devastating effects,¹⁷³ then it should not matter whether the individual is actually homosexual or a heterosexual simply acting as a gay man or lesbian would.

The discrepancy between Congress's findings listed in section 654(a) and the exception made by section 654(e) for homosexual conduct simply evinces the current policy's blatant discrimination against homosexual service members. Although the courts and Congress claim to act in the interest of the military, § 654(e) provides a solid basis to argue that the true fear is simply homosexuality, not homosexual conduct.

CONCLUSION

While the concerns expressed by political and military leaders about allowing open homosexuals to serve in this nation's armed forces are valid and crucial to the smooth operation of the American military, there is no reason to deny the states the ability to serve as laboratories in regard to gays in the military. Just as those who held incorrect beliefs about the impact that racially integrated units would have on unit cohesion and military readiness were convinced to believe that skin color has nothing to do with military capability, it is possible that an inclusionary policy regarding homosexuals will bring around those who believe sexuality plays some part in the efficiency and combat readiness of the military today. Similarly, despite the documented arguments against women serving, women have proven their vitality throughout American military history, especially in the current conflicts in Iraq and Afghanistan. Given the opportunity, gay men and women will prove to be just as essential and contributory to American military effectiveness.

On the other hand, given the importance of having a well-disciplined and effective military, it is imperative that we also take our military officials' concerns into consideration when rewriting military policies. In order to prevent the negative effects, if any, of open homosexuality from spreading throughout the entire military, and to make the transition to a more tolerant policy a smooth one, we should begin by experimenting with individual National Guard forces. The individual National Guards offer the best vehicle for implementing a better policy that can enhance our military needs and boost military preparedness, while at the same time enable patriotic gay men and women to serve in the military without fear of repercussions. Because they are state entities, the National Guards provide the safest route to containing any negative effects of including homosexuals in the military. The National Guards are also the paths of least resistance for change, given that National Guard

172. See, e.g., Frank, *supra* note 118.

173. S. REP. NO. 103-112, at 280 (1993).

soldiers may be more tolerant of homosexual behavior than their regular Army counterparts.

In order to avoid the constitutional question of whether a state may refuse to implement DADT within its boundaries, the best approach to start this conversation, and the only one that gives full consideration to the concerns of military leaders, is for Congress to grant individual states the liberty to enact homosexual-friendly policies. The ball has been in Congress's corner for many years now, but the timing for change could not be better. In a way, Congress and the President can pass the buck to the states and hope that a brave governor takes on the risks.

General Schwarzkopf was correct in pointing out that unit cohesion is the most important factor in assessing combat readiness. However, the General underestimated the power of camaraderie. Just as in politics, the close quarters of military life can make strange bedfellows, but also comrades out of the oddest couples.