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“For Any Reason”: Paper Promises to Protect Service Members

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“For Any Reason”: Paper Promises to Protect Service Members

Tami A. Martin

The 21-year-old victim, Pfc. Barry Winchell of Kansas City, Mo., was beaten to death with a baseball bat as he slept in his barracks bed early last July 5 after what fellow soldiers testified was months of vile name calling, rumor mongering and an inquiry into his private life that was supposed to be forbidden under military policy. . . . Witnesses testified that the assault was so severe that Private Winchell's face was unrecognizable, with his eyes swollen shut and his head cracked open.

Francis X. Clines, *Killer's Trial Shows Gay Soldier's Anguish*, N.Y. TIMES, Dec. 9, 1999.

Due to the “hate crime” death of a homo in the Army, we now have to take extra steps to ensure the safety of the queer who has ‘told’ (not kept his part of the DOD “don’t ask, don’t tell” policy). Commanders now bear the responsibility if someone decides to assault the young backside ranger. Be discreet and careful in your dealings with these characters. And remember, little ears are everywhere.

Conduct Unbecoming: The 6th Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass, 2000 SERVICEMEMBERS LEGAL DEF. NETWORK 55; Chris Plante, *Marine Officer Investigated for Allegedly Slurring Gays in E-mail*, CNN HEADLINE NEWS, Dec. 16, 1999; E-mail from Marine Lieutenant Colonel Melton (Oct. 1999).

Introduction

In short, "Don't Ask, Don't Tell" (DADT) is the law¹ that prohibits lesbian, gay, and bisexual (LGB)² individuals from serving openly in the military. Despite the fact that the Obama

¹ 10 U.S.C. § 654 (1993). More specifically, “Don’t Ask, Don’t Tell” is often used as a term encompassing “a 1993 government [Pentagon] policy, together with its implementing regulations and directives, and to a federal statute that Congress passed the same year.” NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA xiii, xvii-xviii (2009) [hereinafter UNFRIENDLY FIRE].

² The statutory definition of “homosexual” in 10 U.S.C. § 654 is “a person . . . who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms ‘gay’ and ‘lesbian.’” Although this definition specifically refers to “gay” and “lesbian,” the law’s focus on conduct, or propensity to engage in conduct, means that it can indirectly apply regardless of sexual orientation or gender identity. This brings those who identify as heterosexual, transgender, or otherwise within the scope of this law. See UNFRIENDLY FIRE, *supra* note 1, at 10 (“The ban criminalizes both heterosexuals and homosexuals engaging in anal or oral sex . . . despite a 2003 Supreme Court ruling that states may not outlaw sodomy between consenting adults. As a separate society . . . the military is exempt from the decision.”); KARL BRYANT & KRISTIN SCHILT, PALM CENTER, TRANSGENDER PEOPLE IN THE U.S. MILITARY: SUMMARY AND ANALYSIS OF THE 2008 TRANSGENDER AMERICAN VETERANS ASSOCIATION SURVEY (2008), <http://www.palmcenter.org/node/1137>; *Does “Don’t Ask, Don’t Tell” Impact Transgender Service Members?*, <http://palmcenter.org/blog/jscheper> (Dec. 10, 2008, 17:54 EST), <http://www.palmcenter.org/node/1184>; SERVICEMEMBERS LEGAL DEFENSE NETWORK, TRANSGENDER SERVICE MEMBERS (2008), <http://www.sldn.org/pages/about-dont-ask-dont-tell-fact-sheets> (follow “Transgender People and Military Service” hyperlink) (describing the indirect and adverse impact “Don’t Ask, Don’t Tell” has on transgender service members who are perceived to be lesbian or gay even though the law focuses on sexual orientation and not gender identity). Cf. UNFRIENDLY FIRE, *supra* note 1, at xiv (recognizing the unique experiences of transgender service members and limiting analysis to gays, lesbians, and bisexuals).

Administration has yet to fulfill the campaign promise of ending DADT, many believe the question is more "when" than "if" it will be repealed. Much attention has focused on ending the policy, but it is also important to consider what might happen after repeal. This article briefly examines the history of DADT, major policies meant to protect service members from harassment they experience because of their actual or perceived sexual orientation, and the reality of service members' experiences with such harassment in order to determine whether anti-harassment policies have been effective. How can we best prepare for and deal with what might happen in the wake of potential DADT repeal?³ It concludes that prominent recommendations, while useful and appropriate, emphasize some approaches that have been ineffective in the past. It also examines some of these approaches in order to determine possible sources of past inadequacies as well as elements that should be especially addressed in the future.

History of “Don’t Ask, Don’t Tell”

In a country that prides itself on its citizens' right to free speech, it seems particularly ironic that a law known as “Don’t Ask, Don’t Tell” would exist at all. How did such a law develop?

DADT⁴ is by no means the earliest incarnation of government-sanctioned discrimination against gay⁵ service members. The military has long excluded gay individuals from service,⁶ but

³ It is the author's position that DADT is detrimental to the military and the country and should be repealed.

However, this article does not focus on the pros and cons of repeal but rather takes the position that harassment is unacceptable regardless of the utility of DADT.

⁴ 10 U.S.C. § 654.

⁵ For simplicity's sake alone, this article uses the term “gay” to refer to all those who might be targeted under DADT. *See supra* note 2 (describing the range of groups DADT directly or indirectly affects).

⁶ *See, e.g., UNFRIENDLY FIRE, supra* note 1, at 1 (stating that homosexual acts have been the basis for discharge since the Revolutionary War).

this exclusion has not stopped many from serving their country with honor.⁷ Before World War I, discharge, separation, or exclusion was based on civilian criminal laws against sodomy.⁸ The first military laws and regulations that criminalized homosexual conduct debuted around World War I with the revised Articles of War of 1917.⁹ During World War II, the military went one step further when it released the first administrative regulations prohibiting gay individuals from the military, regardless of whether or not they ever engaged in homosexual conduct.¹⁰ Gays and lesbians were thought to be “unsuitable for military service.”¹¹ This remained the general state of things throughout the Cold War and the creation of the Uniform Code of Military Justice (UCMJ).¹² People who were, or were suspected of being, gay were screened out before enlisting and “disciplined or even discharged” after enlisting,¹³ but the military generally had discretion regarding who to discharge. A 1981 Directive eliminated this discretion and made discharge mandatory.¹⁴

⁷ See, e.g., UNFRIENDLY FIRE, *supra* note 1, at 1-13 (describing the broader context of same-sex conduct in the military prior to and through the twentieth century). For another detailed examination of the history of gays and lesbians in the U.S. military, see Timothy Haggerty, *History Repeating Itself: A Historical Overview of Gay Men and Lesbians in the Military Before “Don’t Ask, Don’t Tell,”* in DON’T ASK, DON’T TELL: DEBATING THE GAY BAN IN THE MILITARY 9, 9-49 (Aaron Belkin & Geoffrey Batemann eds., 2003).

⁸ See UNFRIENDLY FIRE, *supra* note 1, at 1 (describing the “first recorded incident of a discharge for homosexuality” in 1778, based on the crime of sodomy).

⁹ UNFRIENDLY FIRE, *supra* note 1, at 5.

¹⁰ *Id.* at 7-8 (arguing that these regulations “systematized discrimination against homosexual people” and relied on stereotypes and “the language of identity and mental illness” to formalize the distinction between heterosexual and homosexual candidates for service). See also *id.* at 9 (discussing the fact that by the end of World War II, homosexuality itself, rather than homosexual conduct, was the basis of the ban); Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of “Don’t Ask, Don’t Tell,”* HOFSTRA LAB. & EMP. L.J. 403, 406 (2004) (“homosexuality itself—regardless of conduct—served as a disqualifier for military service”).

¹¹ UNFRIENDLY FIRE, *supra* note 1, at 9.

¹² *Id.* at 9-10.

¹³ *Id.* (describing the punishment for the crime of homosexual acts as “five years of hard labor and dishonorable discharge without pay”).

¹⁴ See *id.* at 10 (describing the Carter Administration’s stance on LGBT service members); NATIONAL DEFENSE RESEARCH INSTITUTE, RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL AND POLICY: OPTIONS AND ASSESSMENT 381 (1993) [hereinafter RAND].

Time went on. Society's attitude toward homosexuality grew more positive.¹⁵ In October 1992, Petty Officer Allen R. Schindler's brutal murder at the hands of his shipmates in an "anti-gay hate crime"¹⁶ brought the military's policy toward gay service members to the forefront of the 1992 presidential campaign. Bill Clinton, then-candidate for President, made it a campaign promise that he would "end institutionalized discrimination" against gay and lesbian Americans in the military.¹⁷ On July 19, 1993, President Clinton announced a policy prohibiting asking military applicants questions about their sexual orientation, and Secretary of Defense Les Aspin implemented the policy on the same day.¹⁸ This became the "Don't Ask" provision of "Don't Ask, Don't Tell."

Months of debate, proposals, House and Senate hearings, and heated controversy¹⁹ resulted in the compromise known as "Don't Ask, Don't Tell."²⁰ While the text of the statute distinguishes between homosexual status and conduct, in practice, Congress codified²¹ "the first statutory prohibition on gays in the military in American history."²² The new law was certainly not the great "liberalization" hoped for. Indeed, it is even worse than the prohibitions that

¹⁵ See, e.g., UNFRIENDLY FIRE, *supra* note 1, at 10, 12.

¹⁶ SERVICEMEMBERS LEGAL DEFENSE NETWORK, 10 YEAR TIMELINE OF "DON'T ASK, DON'T TELL" (2003), <http://www.sldn.org/pages/history-of-the-issue> (follow "10 Year Timeline of 'Don't Ask, Don't Tell' [PDF]" hyperlink) [hereinafter 10 YEAR TIMELINE].

¹⁷ Alexander, *supra* note 10, at 408; 10 YEAR TIMELINE, *supra* note 16. Cf. UNFRIENDLY FIRE, *supra* note 1, at 14-25 (describing other likely reasons candidate and President Clinton made LGBT service members a priority).

¹⁸ UNFRIENDLY FIRE, *supra* note 1, at 109, 171; Alexander, *supra* note 10, at 408.

¹⁹ See, e.g., UNFRIENDLY FIRE, *supra* note 1, at 68-109; JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999).

²⁰ 10 U.S.C. § 654 (1993). "Don't Harass" was not added to the name until the year 2000, following the brutal murder of Private First Class Barry Winchell. Alexander, *supra* note 10, at 416; SERVICEMEMBERS LEGAL DEFENSE NETWORK, WHAT IS "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS?" (<http://www.sldn.org/pages/what-is-dont-ask-dont-tell-dont-pursue-dont-harass>) [hereinafter SLDN WHAT IS DADT].

²¹ UNFRIENDLY FIRE, *supra* note 1, at 110-12 (describing the process the policy took through Congress up until the time it took effect on March 1, 1994).

²² Alexander, *supra* note 10, at 409. See also UNFRIENDLY FIRE, *supra* note 1, at xvii-xviii (describing how "Don't Ask, Don't Tell" is not only a ban on homosexual conduct, but on homosexuals themselves, and asking, by way of illustration, "Is a restaurant that bars creatures that bark not a restaurant that bars dogs?").

preceded it.²³ This is the only law under which an American must be fired simply for being gay.²⁴

Major Efforts to Address Harassment Related to Sexual Orientation

This article focuses on the “Don’t Harass” prong of the policy known as “Don’t Ask, Don’t Tell, Don’t Harass, Don’t Pursue.”²⁵ For ease of reading, the term “harassment” will encompass all of the following: violence, threats of violence, direct verbal abuse, death threats, and vandalism directed against others because of their actual or perceived sexual orientation. Reformers hoped that these extreme forms of harassment would inspire the most sweeping and sincere changes, but this has not happened.²⁶ Some changes have been made to the policy, but as described below, these changes have not always translated into a safer military environment.

Several regulations, policies, and procedures relating to harassment currently exist. From the time DADT was implemented in 1993, the Department of Defense (DOD) made general statements that “[t]he Armed Forces do not tolerate harassment or violence against any service

²³ Alexander, *supra* note 10, at 410. See Halley, *supra* note 19, at 1-2 (stating that “[t]he new military policy is *much, much worse* than its predecessor,” and describing ways in which it is “more arbitrary, wide-reaching, and unpredictable” than the previous policy).

²⁴ Alexander, *supra* note 10, at 411; *Conduct Unbecoming: The 9th Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass*, 2003 SERVICEMEMBERS LEGAL DEF. NETWORK 9 [hereinafter SLDN NINTH]; SERVICEMEMBERS LEGAL DEFENSE NETWORK, TEN YEARS OF “DON’T ASK, DON’T TELL”: A DISSERVICE TO THE NATION 13 (2003), <http://www.sldn.org/pages/history-of-the-issue> (follow hyperlink by same name) [hereinafter DISSERVICE].

²⁵ 10 U.S.C. § 654.

²⁶ See, e.g., *Conduct Unbecoming: The Third Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass*,” 1997 SERVICEMEMBERS LEGAL DEF. NETWORK 23 (quoting Chief Warrant Officer Virginia Bueno as saying “To be the victim of sexual harassment [in reference to the practice of “lesbian-bating”] is, in its own right, one of the most degrading and emotionally injurious positions one can be placed in, especially in the military”) [hereinafter SLDN THIRD].

member, for any reason.”²⁷ In 1999, Secretary of Defense William S. Cohen reemphasized that “there is no room for harassment or threats in the military.”²⁸

The 1997 “Dorn Memorandum” contained more concrete guidelines and tried to shift the focus away from victims who decided to report threats of harassment and toward the threat itself.²⁹ It also required that commanders act on reports and contribute to an environment in which service members feel they can make reports without fear of retribution or continued threats.³⁰ In April 1998, the Pentagon reissued the Dorn Memo and took the opportunity to specify that the Memo covered harassment as well as threats.³¹ In 1999, the “de Leon Memorandum” was released to strengthen the Dorn Memo, reaffirm the emphasis on the report rather than the reporter, and require the effective dissemination of such information and its

²⁷ Applicant briefing item addendum to Dep’t of Def., Dir, 1304.26 (1993), *Briefing Armed Forces Applicants*, available at <http://www.docstoc.com/docs/23066726/SUBJECT-Briefing-Armed-Forces-Applicants> [hereinafter DOD Dir. 1304.26]. The text of the actual directive can be found at http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/d130426wch1_122193/d130426p.pdf. DOD Directives “[e]xclusively establish policy, assign responsibilities, and delegate authority to DOD Components.” In contrast, DOD Instructions may also “contain overarching procedures.” For the distinction and information on other categories, see the Official Department of Defense Web Site for DOD Issuances, Frequently Asked Questions, “What are the differences between each of the DOD Issuances?,” available at http://www.dtic.mil/whs/directives/corres/writing/DOD_Issuances.ppt. See also Alexander, *supra* note 10, at 416 (quoting the directive); SERVICEMEMBERS LEGAL DEFENSE NETWORK, *THE SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO “DON’T ASK, DON’T TELL” AND RELATED MILITARY POLICIES 9* (2007) (quoting the directive), available at <http://www.sldn.org/pages/survival-guide> [hereinafter SURVIVAL GUIDE].

²⁸ DOD News Release, Defense Department Issues More Guidelines Concerning Implementation of Homosexual Conduct Policy, Aug. 13, 1999, No. 381-99 (<http://www.defense.gov/Releases/Release.aspx?ReleaseID=2171>). Secretary Cohen made this comment in response to guidelines released after an extensive 1998 Defense Department review of DADT to assess its effectiveness and implementation (report can be found at http://dont.stanford.edu/casestudy/appendixG_short.pdf).

²⁹ Memorandum from Edwin Dorn, Under Secretary of Defense, Department of Defense (Mar. 24, 1997), available at <http://www.defense.gov/Releases/Release.aspx?ReleaseID=2171> [hereinafter Dorn Memo].

³⁰ Dorn Memo, *supra* note 29 (“Service members should be able to report crimes free from fear of harm, reprisal, or inappropriate or inadequate governmental response. Please ensure that commanders take appropriate actions in such instances, with due consideration given to the safety of persons who report threats, and see that commanders hold fully accountable persons found to have made threats or engaged in threatening conduct.”).

³¹ *Conduct Unbecoming: The 6th Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* 2000 SERVICEMEMBERS LEGAL DEF. NETWORK 48 [hereinafter SLDN SIXTH].

incorporation into training at various levels of the armed forces.³² However, just because regulations exist does not mean that they will be enforced.

Despite these directives, memos, and news releases, it was not until after the bludgeoning death of Private First Class Barry Winchell in a hate crime in 1999³³ that a study was conducted to assess the level of harassment throughout the military.³⁴ The subsequent report was the first to recognize that “harassment of members perceived as gay was widespread.”³⁵ In response to this study, the Defense Department commissioned and approved a promising thirteen-point “Anti-Harassment Action Plan” (“AHAP”) in July of 2000.³⁶ The Plan’s requirements include training, more effective avenues of reporting, enforcement of the anti-harassment directives, and measurement of the effectiveness of the steps taken.³⁷ AHAP also inspired President Clinton to

³² Alexander, *supra* note 10, at 416, 429; Memorandum from Rudy de Leon, Under Secretary of Defense, Department of Defense, “Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality” (Aug. 12, 1999), *available at* <http://www.defense.gov/Releases/Release.aspx?ReleaseID=2171> (“The report of a threat or harassment should result in the prompt investigation of the threat or harassment itself. . . . Please ensure that this guidance is effectively disseminated to all levels of command and is made part of training programs for law enforcement personnel, commanders, supervisors and incorporated in the training required by section 654(d) of title 10, United States Code.”) [hereinafter de Leon Memo]; Memorandum from Rudy de Leon, Under Secretary of Defense, Department of Defense, “Implementation of Recommendations Concerning Homosexual Conduct Policy” (Aug. 12, 1999), *available at* <http://www.defense.gov/Releases/Release.aspx?ReleaseID=2171>.

³³ Alexander, *supra* note 10, at 416; SLDN WHAT IS DADT, *supra* note 20. For a more detailed description of Private First Class Barry Winchell’s murder and its aftermath, see UNFRIENDLY FIRE, *supra* note 1, at 193-197, 276.

³⁴ Alexander, *supra* note 10, at 429, 430; OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY (2000) [hereinafter Evaluation Report].

³⁵ *Conduct Unbecoming: The 7th Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* 2001 SERVICEMEMBERS LEGAL DEF. NETWORK 73 [hereinafter SLDN SEVENTH]. For the actual report, see Evaluation Report, *supra* note 34.

³⁶ Alexander, *supra* note 10, at 416; Memorandum from Bernard Rostker, Under Secretary of Defense, Department of Defense, Approval and Implementation of the Action Plan Submitted in Response to the DOD Inspector General’s Report on the Military Environment With Respect to the Homosexual Conduct Policy (July 21, 2000), *available at* <http://www.sldn.org/page/-/Website/Directives,%20Memos/Other%20Memos%20-%20Anti%20Harassment%20Action%20Plan.pdf> [hereinafter AHAP].

³⁷ AHAP, *supra* note 36.

issue Executive Order 13140, allowing harsher sentences for hate crimes under the Uniform Code of Military Justice.³⁸

Still, the development of more concrete guidelines and plans did not necessarily translate into change, and the Servicemembers Legal Defense Network (SLDN) maintains a DADT Survival Guide describing options service members have when facing sexual orientation-related harassment.³⁹ Under the current system, victims typically report harassment to their chain of command,⁴⁰ which is a substantial barrier to relief if the harassment is originating with or being condoned by command.⁴¹ Mr. Aaron Tax, SLDN's Legal Director, described the current complaint system in this way: "It is very command specific. Some commands deal with harassment in a timely and effective manner. Other commands do not address the harassment properly. Just like the application of DADT, the harassment front is fraught with arbitrary enforcement."⁴² SLDN recommends that service members document harassment but not confide their sexual orientation or details of their personal lives to anyone because doing so risks discharge under DADT.⁴³ If questioned about their personal lives, service members can invoke their rights under Article 31 of the UCMJ to not answer questions and to speak to a defense attorney.⁴⁴ In situations involving immediate physical harm, the military police or the chaplain's office are two potential sources of protection.⁴⁵

³⁸ 64 Fed. Reg. 55115 (Oct. 12, 1999); Alexander, *supra* note 10, at 430; 10 YEAR TIMELINE, *supra* note 16; *Conduct Unbecoming: The 8th Annual Report on "Don't Ask, Don't Tell, Don't Pursue, Don't Harass,"* 2002 SERVICEMEMBERS LEGAL DEF. NETWORK 22.

³⁹ SURVIVAL GUIDE, *supra* note 27.

⁴⁰ *Id.* at 27 ("The first line of defense for all service members is their chain of command.").

⁴¹ Where chain of command is causing or condoning the harassment, service members may file an Article 138 Complaint against the commanding officer. *Id.* at 28.

⁴² Email interview with Aaron Tax, Legal Director, Servicemembers Legal Defense Network, Washington, D.C. (Mar. 15, 2010).

⁴³ SURVIVAL GUIDE, *supra* note 27, at 24.

⁴⁴ *Id.*

⁴⁵ SURVIVAL GUIDE, *supra* note 27, at 23-24.

Other options exist but are inadequate in their own ways. Complaints can be submitted to inspectors general or equal opportunity officers, but these options are not usually geared toward addressing harassment related to sexual orientation.⁴⁶ Filing charges and asking command to discipline another service member leaves the decision to remedy the situation up to command, which runs the same risks discussed earlier if the command is participating in or condoning the harassment.⁴⁷ Congressional inquiries and interaction with the media or press are also options, but the risks of exposing oneself to an investigation are such that service members should be careful with these options and pursue them with legal counsel.⁴⁸

By now, three things are evident: (1) the military has had a long-standing policy, whether official or unofficial, of excluding gay individuals from service; (2) gay individuals have served their country honorably for just as long as the military has tried to keep them out; and (3) options exist for service members to address harassment they face as a result of their actual or perceived sexual orientation. The remaining inquiries then become whether these options have proven sufficient to protect our service members and, if not, how they need to be altered in a post-DADT military.

Effectiveness: What is the reality?

DADT did differ from prior regulations in that “President Clinton, Congress and military leaders . . . agreed to take steps to prevent anti-gay harassment.”⁴⁹ However, despite this attitude and the mechanisms described above, sexual orientation-related harassment remained frequent

⁴⁶ *Id.* at 28.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ DISSERVICE, *supra* note 24, at 15; SURVIVAL GUIDE, *supra* note 27, at 8.

during the first few years that DADT was in place.⁵⁰ Death threats received because of one's perceived or actual sexual orientation increased dramatically, and anti-gay harassment in general remained a serious problem.⁵¹ In the early years of DADT, the details of the law and the way in which it was to be implemented were not well-disseminated. Lack of information and training meant that many commanders were confused regarding how to properly implement it and how to report abuse.⁵² Consequently, avenues for redress at this time were not very effective, and little was done at first to improve the situation. The DOD's statement that "[t]he Armed Forces do not tolerate harassment or violence against any service member, for any reason"⁵³ seemed to have little impact.

During the mid-to-late-1990s, training and education regarding the limits and requirements of DADT were somewhat improved.⁵⁴ The "Evaluation Report" in 2000 found that 71% of senior officials said "action had been taken on their installment or ship to make it clear that harassment is prohibited. 59% of junior enlisted said the same."⁵⁵ Nonetheless, "[h]arassment reached its highest levels yet."⁵⁶ Almost no one had heard of the "Dorn Memo,"⁵⁷ which is unsurprising, considering that in April 1998, more than a year after its release, the Dorn Memo had still not been distributed.⁵⁸ Attempts to improve the situation during this period were slight and mostly consisted of wider, though still insufficient, dissemination of regulations.⁵⁹

⁵⁰ Alexander, *supra* note 10, at 417; SLDN THIRD, *supra* note 26.

⁵¹ Alexander, *supra* note 10, at 417, 419, 420; SLDN THIRD, *supra* note 26.

⁵² Alexander, *supra* note 10, at 417.

⁵³ DOD Dir. 1304.26, *supra* note 27.

⁵⁴ Alexander, *supra* note 10, at 424.

⁵⁵ Evaluation Report, *supra* note 34.

⁵⁶ Alexander, *supra* note 10, at 417, 425.

⁵⁷ Dorn Memo, *supra* note 29.

⁵⁸ See, e.g., SLDN SIXTH, *supra* note 31, at 47-48.

⁵⁹ Alexander, *supra* note 10, at 428 ("dissemination of what little guidance there was on anti-gay harassment was lacking").

The tragic death of Barry Winchell illustrates the reality that existing regulations were insufficient to protect service members from harassment and violence. On July 5, 1999, Winchell was murdered by fellow sailors for being gay.⁶⁰ He was beaten to death with a baseball bat while he slept. The beating was so severe that “his skull had been cracked open, his eyes swollen shut, and his face beaten beyond recognition.”⁶¹ Winchell’s death followed in the wake of a long-standing tradition at his base of name-calling, threats, anti-gay abuse and a general climate of homophobia that discouraged service members like Winchell from reporting abuse.⁶²

Winchell’s death catalyzed the Pentagon’s AHAP in 2000.⁶³ The survey⁶⁴ leading up to AHAP sought to assess the command climate in the military and found that such harassment was widespread and that attempts to prevent it were minimal.⁶⁵ It found that, among other things, 80% of respondents had “heard offensive speech, derogatory names, jokes, or remarks about homosexuals in the last 12 months.”⁶⁶ Of these respondents, 85% believed that the comments they had heard were “tolerated to some extent,” and 5% believed that harassment was tolerated by someone in their chain of command.⁶⁷ Beyond verbal harassment, 37% of respondents had “witnessed or experienced an event or behavior toward a Service member that they considered to be harassment based on perceived homosexuality,” and 73% of respondents said that when a senior person witnessed the harassment, the senior person “did not do anything to immediately

⁶⁰ Alexander, *supra* note 10, at 416; DISSERVICE, *supra* note 24, at 13; SLDN WHAT IS DADT, *supra* note 20. For a more detailed description of Private First Class Barry Winchell’s murder and its aftermath, see UNFRIENDLY FIRE, *supra* note 1, at 193-197, 276.

⁶¹ UNFRIENDLY FIRE, *supra* note 1, at 194.

⁶² *Id.* at 194-95.

⁶³ AHAP, *supra* note 36.

⁶⁴ Evaluation Report, *supra* note 34. See also Alexander, *supra* note 10, at 418 (stating that Winchell’s murder sparked the DOD to conduct a Service-wide study of harassment).

⁶⁵ Alexander, *supra* note 10, at 418.

⁶⁶ Evaluation Report, *supra* note 34, at 6.

⁶⁷ *Id.* at 14.

stop the harassment.”⁶⁸ This stands in sharp contrast to the finding, mentioned earlier, that 71% of senior officials said “action had been taken on their installment or ship to make it clear that harassment is prohibited.”⁶⁹ While 97% of everyone surveyed responded that they had some understanding of the policy, about 57% admitted that they “had not had training on the policy.”⁷⁰ Views on effectiveness were fairly even, with about 50% believing the policy reduced or prevented harassment and about 46% believing that the policy was “slightly or not effective.”⁷¹

Despite the fact that some of the services have implemented their own anti-harassment programs,⁷² as of 2003 the Pentagon had still refused to issue Directives and Instructions in order to fully implement the AHAP and streamline existing anti-harassment programs.⁷³ Even as of 2007, however, little had been done to implement the AHAP, and little had been done to improve enforcement of anti-harassment regulations that already existed.⁷⁴ President Clinton’s Executive Order 13140 enhancing sentences under the UCMJ for sexual orientation-related hate crimes seemed a hopeful but inadequate attempt to better protect service members from harassment.⁷⁵ Such was the disregard for sexual orientation-related harassment in the military that “Don’t Harass” was not added to the name of the law until some six years after it was initially created, following the murder of Barry Winchell in 2000.⁷⁶

⁶⁸ *Id.* at 18.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.* at 16.

⁷¹ *Id.* at 18.

⁷² *See, e.g.*, Electronic Message from Headquarters, Department of the Army, to ALARACT, Dignity and Respect for All (Jan. 10, 2000) (HQDA WASHINGTON DC 101800Z JAN 00 (ALARACT 008/00)); Memorandum from Gen. Michael E. Ryan, Chief of Staff et al. to All Air Force Personnel, Air Force Policy on Harassment (Jan. 10, 2000). Notably, the Air Force actually endorsed and ordered the implementation of AHAP on October 2, 2000. SLDN SEVENTH, *supra* note 35, at 74.

⁷³ 10 YEAR TIMELINE, *supra* note 16.

⁷⁴ SURVIVAL GUIDE, *supra* note 27, at 9; DISSERVICE, *supra* note 24, at 22.

⁷⁵ 64 Fed. Reg. 55115 (Oct. 12, 1999).

⁷⁶ UNFRIENDLY FIRE, *supra* note 1, at 168.

Between the time of Winchell's death and the 9/11 attacks, harassment "became an even greater problem than it had been in the first six years."⁷⁷ In general, discharges, witch hunts, and harassment tend to decrease during times of war.⁷⁸ Still, the discharge of a significant number of highly trained gay linguists during a shortage of linguists⁷⁹ represented a dysfunctional system, and anti-gay harassment continued to be a significant problem after the September 11 attacks.⁸⁰

Future: What are we missing?

It has been argued that harassment, violence, and disorder in the military are not likely to increase, and may actually decrease significantly after repeal of DADT.⁸¹ Certainly, repealing

⁷⁷ Alexander, *supra* note 10, at 429. See also UNFRIENDLY FIRE, *supra* note 1, at 195 (describing the climate after Winchell's murder).

⁷⁸ SLDN NINTH, *supra* note 24, at 1-2 (stating that "During any time of war or conflict for America, gay discharges have dropped" but noting that "decline in harassment does not, however, reflect an elimination of serious anti-gay hostility in the armed forces").

⁷⁹ Alexander, *supra* note 10, at 432; SLDN NINTH, *supra* note 24, at 1, 7-8.

⁸⁰ SLDN NINTH, *supra* note 24.

⁸¹ Aaron Belkin, *Abandoning 'Don't Ask, Don't Tell' Will Decrease Anti-Gay Violence*, NAVAL INSTITUTE: PROCEEDINGS MONTHLY (2005), available at <http://www.palmcenter.org/node/300> [hereinafter *Abandoning*]. The success of integration in foreign militaries is also often referenced. See RAND, *supra* note 14, at 10-22, 65-106. For specific country examples, see also Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, *Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence* (2000) [hereinafter *Canada*]; Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence* (2000); Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 ARMED FORCES AND SOCIETY 4 (2001) [hereinafter *Israel*]. There are problems with using examples from other countries, such as divergent cultures and organizational structures. However, even if one disagrees with the use of foreign experiences to predict what will happen domestically, the experiences of American police and firefighter units that have lifted their bans also suggest that doing so will probably not result in a dramatic increase in anti-gay violence in America's military. See RAND, *supra* note 14, at 120-158. Foreign and domestic experiences with integration suggest that the level of anti-gay harassment will not change if DADT is repealed and that the level could decrease with effective implementation of the repeal. Britain, Australia, Israel, and Canada all lifted their bans "without experiencing any increase in anti-gay violence." Belkin, *Abandoning*, *supra*. See also UNFRIENDLY FIRE, *supra* note 1, at 145-166 (describing the experience of integration in other countries as "so uniform, so uneventful, so tediously boring and repetitive that they are almost too dull to describe" and discussing how those examples relate to America's potential experience). For another discussion of the relevance of foreign military experiences, see *Are Foreign Military Experiences Relevant to the United States?*, in *DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY* 103-138 (Aaron Belkin & Geoffrey Batemann eds., 2003). For a more recent evaluation of foreign experiences, see Nathaniel Frank et al., Center for the Study of Sexual Minorities in the Military, *Gays in Foreign Militaries 2010: A Global Primer* 4 (2010), available at <http://www.palmcenter.org/files/GaysinForeignMilitaries2010.pdf> [hereinafter *Global Primer*].

DADT should be a national priority, and evidence from the integration of foreign militaries and domestic police and firefighter units suggests that integration will have no detrimental effect on unit cohesion, morale, or order.⁸² Nonetheless, when lives are at stake, all potential outcomes must be considered. The fact that harassment has remained such an issue in some segments of the military suggests that the government's approach to this problem is still dysfunctional.⁸³

In March 2010, Senator Joe Lieberman (I-CT) and others introduced the Military Readiness Enhancement Act (MREA), which would repeal DADT, in the U.S. Senate.⁸⁴ Section 7(c)(2)(C) states:

Such revisions [required of the Secretary of each military department] shall include the following: . . . (C) Revision of Department of Defense and military department regulations governing victims' advocacy programs to include sexual orientation discrimination among the forms of discrimination for which members of the Armed Forces and their families may seek assistance.⁸⁵

This portion of the Act is meant to ensure that Victims' Advocacy Programs will be available to those who suffer from violence or discrimination because of their actual or perceived sexual orientation. Is this section, and the MREA in general, enough to address existing problems? Section 7 of the MREA also requires the Secretary of Defense to revise DOD regulations and to direct "the Secretary of each military department" to do the same for their departments "as may be necessary to implement" the MREA.⁸⁶ With the exception of the provision on Victims'

⁸² *Id.*

⁸³ *See, e.g.*, UNFRIENDLY FIRE, *supra* note 1, at 167-68 (saying, "the policy has failed").

⁸⁴ Elisabeth Bumiller, *Repeal of "Don't Ask, Don't Tell" Policy Filed in Senate*, N.Y. TIMES, Mar. 3, 2010, available at <http://www.nytimes.com/2010/03/04/us/politics/04military.html>; Kerry Eleveld, *Exclusive: Lieberman Introduces DADT Repeal Bill*, Mar. 3, 2010, available at http://www.advocate.com/News/Daily_News/2010/03/03/Lieberman_Introduces_DADT_Repeal_Bill/; Senator Mark Udall, *Finally, a Bill to Repeal DADT*, HUFFINGTON POST, Mar. 3, 2010, available at http://www.huffingtonpost.com/sen.-mark-udall/finally-a-bill-to-repeal_b_484131.html.

⁸⁵ S. 3065, 111th Cong. § 7(c)(2)(C) (2010).

⁸⁶ *Id.* at § 7(a)(1).

Advocacy Programs, the Secretary of Defense maintains wide discretion regarding how best to implement an anti-harassment policy under the MREA.

Even though Section 7 requires the revision and issuance of new regulations as necessary to implement the changes, will the proper changes be made to the extent necessary to be effective? Or should the MREA more specifically require certain changes? Mr. Aaron Tax noted that the “MREA as it is written is the most effective vehicle for appeal. If any more detailed changes need to be made, or specifics need to be laid out, they could be worked out in the implementation guidance that DOD will issue.”⁸⁷

Determining the changes that the DOD should make requires analyzing why harassment has persisted for so long.⁸⁸ Sometimes, a lack of awareness is to blame. In the early years of DADT, the details of the law and the way in which it was to be implemented were not well-disseminated. Lack of information and training meant that many commanders were confused regarding how to properly implement it and how to deal with reports of abuse.⁸⁹ Awareness may have improved over time, but the Dorn Memo⁹⁰ is an example of the fact that information was often lacking, and the information that existed was not widely known.⁹¹

At the same time, the fact that efforts were made and failed to increase awareness suggests that lack of information was not the only problem. Perhaps what was lacking was the willingness to actually disseminate and abide by the regulations. The existence of this problem

⁸⁷ Tax, *supra* note 42.

⁸⁸ Many of the suggestions in this section are embraced by various scholars. See UNFRIENDLY FIRE, *supra* note 1, at 160-166; Aaron Belkin, et al., Center for the Study of Sexual Minorities in the Military (Palm Center), *How to End ‘Don’t Ask, Don’t Tell’: A Roadmap of Political, Legal, Regulatory, and Organizational Steps to Equal Treatment* (2009) [hereinafter Roadmap]; Gregory Herek & Aaron Belkin, *Sexual Orientation and Military Service: Prospects for Organizational and Individual Change in the United States* 20-22 (2006) [hereinafter Prospects]; RAND, *supra* note 14; SLDN NINTH, *supra* note 24, at 4-6 (supporting AHAP and specifically recommending several of these things); AHAP, *supra* note 36. However, as discussed later, these suggestions may not fully appreciate the military’s previous experience with similar attempts at improvement.

⁸⁹ Alexander, *supra* note 10, at 417; Halley, *supra* note 19, at 19-26.

⁹⁰ Dorn Memo, *supra* note 29.

⁹¹ See, e.g., SLDN SIXTH, *supra* note 31, at 47-48 (stating that virtually no one had heard of it).

of will is supported by the results of the survey leading up to the AHAP.⁹² The survey found that harassing comments were “tolerated” a significant amount of time, that the vast majority of those in senior positions did not act to immediately stop harassment when they witnessed it, and that over half of the respondents admitted they had not had proper or any training (despite some 70% of senior officials reporting that they had taken action to disseminate the anti-harassment policy).⁹³ Further, command participation in or disregard of harassment at times made it impossible to report problems.⁹⁴ Lack of enforcement, along with command participation in or disregard for harassment, continued even after Barry Winchell was murdered.⁹⁵

Neither awareness nor will would automatically improve upon repeal. It seems that the only problem that would be resolved just by virtue of repeal is the reluctance to report harassment for fear of being investigated and discharged from the military.⁹⁶ Even when avenues existed to report abuse in the early years of DADT, allies as well as victims of harassment were reluctant to report abuse for fear that it would spark an investigation against them.⁹⁷ It was even rare for those in command positions to feel comfortable standing up for those accused or suspected under DADT. Elimination of the ban would eliminate fear of discharge, though the risk of retaliation from other biased individuals requires that compliance be monitored, problems with implementation be identified, and new solutions be formulated when necessary.

⁹² Evaluation Report, *supra* note 34.

⁹³ Evaluation Report, *supra* note 34, at 15.

⁹⁴ Disservice, *supra* note 24.

⁹⁵ Alexander, *supra* note 10, at 429. *See also* UNFRIENDLY FIRE, *supra* note 1, at 195 (describing the climate after Winchell’s murder).

⁹⁶ Tax, *supra* note 42 (stating that DADT “gives license to SMs [service members] to treat their LGBT counterparts in discriminatory or disrespectful fashion. In addition, the law prevents LGBT SMs from coming forward and reporting harassment. If an LGBT SM reveals his or her sexual orientation in the course of reporting harassment, he or she has just outed him or herself, and as a result, s/he should expect to be discharged under DADT.”).

⁹⁷ *See, e.g.,* Alexander, *supra* note 10, at 419.

On the awareness front, information must be simple, clear, easy to understand, and properly disseminated. Beyond this, affirmative organizational and regulatory changes must be made to ensure that consequences for noncompliance or for failing to properly educate service members on the policy are definite and credible. Some kind of oversight mechanism must be implemented to ensure the new policy is being disseminated properly and is actually being absorbed by service members at all levels. Likewise, past problems with lack of will demonstrate that mere policy statements that harassment will not be tolerated need to be supported by affirmative steps to ensure support of military leadership⁹⁸ and to implement reliable reporting procedures, strong accountability and oversight mechanisms, and credible disciplinary consequences for harassing someone or for command-failure to properly handle complaints.⁹⁹ Efforts should be measured regularly and reported to an independent oversight body. Complaints that are corroborated should be taken seriously and acted upon, regardless of the object of the complaint. Retaliation must be guarded against and punished, and positive change must be rewarded.

Indeed, leadership compliance with and support for anti-harassment policy is crucial. Despite the existence of an anti-harassment policy, some leaders have not met their responsibilities to enforce and disseminate it.¹⁰⁰ Leadership support and optimism must be so strong that it actually helps shape a healthy military culture that is safe for all and that protects all

⁹⁸ Roadmap, *supra* note 88; Prospects, *supra* note 88; SLDN NINTH, *supra* note 24, at 4-6 (supporting AHAP and specifically recommending several of these things); RAND, *supra* note 14; AHAP, *supra* note 36.

⁹⁹ *Id.*

¹⁰⁰ See, e.g., UNFRIENDLY FIRE, *supra* note 1, at 187 (going so far as to say that “leaders charged with training their subordinates on what the law says and how to enforce it have been missing in action, and their lackluster performance when they did go through the motions was the mark of those with a vested interest in the policy’s failure”).

members from harassment. Leadership support has always been a crucial element of military change, whether it is racial integration, integration of women, or open service of homosexuals.¹⁰¹

Some scholars argue that because training materials already clearly prohibit harassment, including orientation-related harassment, only minimal changes in training should be necessary to ensure that anti-harassment policies are followed in the wake of repeal—but this argument is not firmly rooted in experience.¹⁰² Training materials already contain the prohibition, yet harassment continues to be a significant problem. This contradiction suggests that it is more lack of will than lack of knowledge that has allowed sexual orientation-related harassment to remain a problem since DADT was implemented. While some still believe that repeal will not require “extensive retraining in order to prevent or limit harassment or abuse of openly gay or lesbian service members,”¹⁰³ SLDN finds that past and present training “rarely meets the standards set forth by the AHAP”¹⁰⁴ and would probably need to be reformulated. Despite the existence, on paper, of guidelines, training requirements, and mandated investigations, the reality is that refresher training is not always held after basic training, and some instructors skip over DADT policies in training altogether.¹⁰⁵ The Defense Equal Opportunity Management Institute (“DEOMI”) is one possible office that could provide training and oversight for sexual

¹⁰¹ Indeed, examinations of the persistence of sexual harassment in the military in the past have found that policy is meaningless without leadership support. *See, e.g.*, Sue Guenter-Schlesinger, *Persistence of Sexual Harassment: The Impact of Military Culture on Policy Implementation*, in BEYOND ZERO TOLERANCE 195 (Mary Fainsod Katzenstein & Judith Reppy eds., 1999) (“In the wake of the recent barrage of sexual harassment and sexual assault allegations in the armed forces, coupled with gender-based hazing incidents at some of the academies, one is left stunned that gender bias of this sort still persists at unacceptably high levels in the military. This is especially troubling in light of the fact that the Department of Defense (DOD) has had specific policy prohibiting sexual harassment of military personnel for over fifteen years.”).

¹⁰² Roadmap, *supra* note 88, at 18.

¹⁰³ *Id.* at 17.

¹⁰⁴ SLDN NINTH, *supra* note 24, at 5.

¹⁰⁵ UNFRIENDLY FIRE, *supra* note 1, at 187 (describing one air force officer’s experience of receiving one DADT training in eight years, despite the fact that it was required annually).

orientation-related harassment policies.¹⁰⁶ However, its stated mission involves “equity education, diversity, cultural competency, research and consultation worldwide,”¹⁰⁷ not enforcement or oversight. Not only would special care have to be taken to ensure that the DEOMI can transition to handle sexual orientation-related, as well as race and gender-related harassment, but either the DEOMI or another body would also have to ensure that mechanisms were in place to monitor compliance and effectiveness, not merely provide courses on homosexuality in the military.

The application of equal standards of conduct to everyone regardless of sexual orientation or gender identity is certainly necessary. It must be emphasized that harassment is unacceptable, regardless of target or perpetrator, that changes in housing policies are not necessary, and that everyone is evaluated based on merit alone. However, it is important to recognize that the most basic of these equal standards—that harassment (of any kind, of any person, for any reason) is prohibited—has existed since DADT was implemented. The fact that harassment remains a significant problem signals a need for either something more or different in order to ensure that protections against harassment do not remain paper promises. Either the policy in place is not credible, clear, and sufficiently supported, or the policy is simply being ignored.

One possible way to improve responsiveness to reports of harassment would be to include LGBT service members “under each branch’s [equal opportunity, or EO] policy,” as Mr. Tax suggests.¹⁰⁸ That way, “LGBT SMs should be able to report harassment not only to their chain of commands (as they do now) but they should also be able to avail themselves of the EO

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; Mission statement on website <http://www.deomi.org/AboutDEOMI/mission.cfm>.

¹⁰⁸ Tax, *supra* note 42.

process. They will no longer risk being fired simply for reporting harassment.”¹⁰⁹ The option of reporting to a neutral third party would eliminate the conflict of interest that potentially arises when victims of harassment are only able to report to their chain of command.

Problems with attitude as well as conduct could arise if heterosexuals find themselves uncomfortable with changes brought by repeal.¹¹⁰ While admitting that new post-repeal policies would probably focus heavily on conduct, some researchers foresee a need to change heterosexual “attitudes and beliefs” about homosexuality in the military.¹¹¹ These researchers suggest turning to social psychology to learn how best to implement new policy.¹¹²

One argument from the realm of social psychology is known as the “contact hypothesis.”¹¹³ The idea that lifting the ban would in itself improve the relationship between homosexuals and heterosexuals in the military¹¹⁴ seems persuasive in that the ability to interact amicably with others regardless of their sexual orientation and without the fear of consequences for doing so would seem to improve relations by default. This openness allows people to become familiar and comfortable with each other when they otherwise would not have been able to completely be themselves.

However, the contact hypothesis in relation to DADT assumes that, following repeal, a significant number of gay service members will come out as such, or that more will enlist and serve openly from the outset. Absent such an increase, the nature of the interaction would not change significantly, the basis of the hypothesis is lost, and hope for improvement based on

¹⁰⁹ *Id.*

¹¹⁰ Prospects, *supra* note 88, at 19.

¹¹¹ *Id.* at 23.

¹¹² *Id.* at 23-24.

¹¹³ *Id.* at 27.

¹¹⁴ *Id.*

increased contact alone would have to be abandoned.¹¹⁵ If the experience of the Canadian military is any guide, it suggests that gay service members are unlikely, at least for a while, to publicly identify as such or change their behavior much, even after repeal.¹¹⁶

Furthermore, the utility of researching “heterosexual personnel’s knowledge, beliefs, and attitudes related to homosexuality, gay people, and the new policy” is probably low.¹¹⁷ Instead, focus must be on “how well a new policy is understood by the officers who are responsible for implementing it,” and on their dedication to implementing and adhering to the spirit of it, regardless of their personal views.¹¹⁸ In the debate between regulating conduct versus appealing to the “hearts and minds” of opponents of integration, Mr. Tax recognizes that “[t]here will always be SMs with their own, individual biases in the military,” but agrees that, “just as with those who hold negative feelings towards others based on gender, religion, etc...they cannot let their opinions impact their work.”¹¹⁹ Furthermore, “military leaders must signal clearly that they expect all members of the armed forces to adhere to the new policy, regardless of their personal

¹¹⁵ UNFRIENDLY FIRE, *supra* note 1, at 157, 161, 163; Israel, *supra* note 81; Aaron Belkin, *Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS (2003) (describing the “flawed assumption that culture and identity politics are the driving forces” behind the decision to come out, and contradicting the argument that cultural acceptance and lifting the ban would result in drastic changes in the behavior, dress, etc, of gay service members); Global Primer, *supra* note 81, at 134 (“In no case did a formal change in policy result in a mass ‘coming out.’”).

¹¹⁶ See, e.g., Canada, *supra* note 81, at 16, 17, 20, 23, 35 (summarizing various reports that found, among other things, “no instances of people acknowledging or talking about their homosexual relationships” or that “no one has come out of the closet” as of half a year after repeal).

¹¹⁷ UNFRIENDLY FIRE, *supra* note 1, at 162, 164-165 (“[A]ttitudes people express about homosexuality frequently do not predict how they will actually behave.... The focus on individual responsibility and behavior—instead of... the beliefs or attitudes of heterosexual troops—is an essential part of this lesson... [R]esearchers found that the sensitivity training and educational programs designed to achieve [racial integration] caused resentment and even hostility and so failed to resolve the problems.”). Cf. UNFRIENDLY FIRE, *supra* note 1, at 185 (arguing that education on how similar gays and straights are can be the best thing to do, though expecting that the best “education” will come merely from coming into contact with LGBT individuals who will then be serving openly).

¹¹⁸ UNFRIENDLY FIRE, *supra* note 1, at 161 (“social tolerance, while it may be an advantage in making the transition from gay exclusion to gay inclusion, is not required for such a change to work effectively”).

¹¹⁹ Tax, *supra* note 42.

beliefs.”¹²⁰ Indeed, “[i]mplementation will also take leadership—words from the military leadership—that LGB SMs should be treated with respect.”¹²¹

Conclusion

It is not possible to make a policy like “Don’t Ask, Don’t Tell,” which is unfair by definition, “fairer.” The only way to recognize the worth of every service member and move toward an integrated system that will benefit everyone, whether gay or straight, is to repeal “Don’t Ask, Don’t Tell.” With repeal seemingly on the horizon, it is sometimes easy to look so eagerly toward a brighter future that we fail to see the shadows that we have dragged along behind us. While the prominent recommendations discussed here are all substantively on the mark, they often incorporate past reforms that have been insufficient, and we must learn how to improve upon, rather than perpetuate, past efforts. Post-repeal emphasis should be on regulations and organization, not on individual beliefs, and care should be taken to follow through on all changes or continuations to ensure that they actually materialize into a safer environment for all service members and result in improvements not only on paper, but in practice as well.

¹²⁰ Roadmap, *supra* note 88, at 6.

¹²¹ Tax, *supra* note 42.