

THE PRACTICAL AND CONCEPTUAL PROBLEMS WITH REGULATING HARASSMENT IN A DISCRIMINATORY INSTITUTION

**A draft report commissioned by the
Center for the Study of Sexual Minorities in the Military
University of California, Santa Barbara**

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May, 2004



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The Practical and Conceptual Problems with Regulating Harassment in a Discriminatory Institution

Introduction

In 1993, Congress enacted and the Department of Defense implemented the “Don’t Ask, Don’t Tell” policy, allowing gay men and lesbians to serve in the armed forces, but authorizing their discharge as soon as they state they are gay or engage in “homosexual conduct.”¹ The Department of Defense regulations implementing Don’t Ask, Don’t Tell included a directive explicitly banning harassment of gay and lesbian service members.² This prohibition was noteworthy because it signaled the military’s interest in protecting gay men and lesbians from group-based discrimination. The ban targeted not just harassing conduct—which was already outlawed through a variety of generally applicable provisions³—but specifically, harassing conduct motivated by anti-gay animus.

In recent years, military leaders have further emphasized the notion that gay men and lesbians are worthy of anti-discrimination protection by analogizing sexual minorities to racial minorities and women. Specifically, the military has likened harassment based on sexual orientation to harassment based on race and sex.⁴ Moreover, Department of Defense officials have publicly asserted that the military is just as committed to eradicating anti-gay harassment as it is to combating racial and sexual harassment.⁵

This study shows that despite these assertions likening the ban on sexual orientation harassment to the prohibitions on racial and sexual harassment, an examination of the military’s policies and practices reveals markedly different enforcement efforts for these three forms of harassment. The Pentagon’s policies and practices—regarding 1) training and education; 2) measurement; 3) reporting; 4) processing of complaints; 5) anti-retaliation; and 6) accountability—demonstrate far more meaningful efforts on the part of the military to address racial and sexual harassment than to address anti-gay harassment.

¹ 10 U.S.C. § 654 (providing for the discharge of any member who “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts,” “has stated that he or she is a homosexual or bisexual, or words to that effect,” or “has married or attempted to marry a person known to be of the same biological sex”); Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, and Air Force and the Chairman of the Joint Chiefs of Staff, *Policy on Homosexual Conduct in the Armed Forces* (July 19, 1993) [hereinafter Aspin Memo].

² Applicant Briefing Item on Separation Policy, addendum to Dep’t of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (1993); Aspin Memo, *supra* note 1.

³ *See infra* Part III.B.A.

⁴ *See infra* Part I.

⁵ *See id.*

Further, this paper argues that the military's failure to meaningfully enforce the ban on anti-gay harassment results from the practical and conceptual problems with regulating harassment in a discriminatory institution. As a practical matter, the Don't Ask, Don't Tell policy prevents the military from instituting certain measures that would give meaning to the harassment ban, such as allowing victims to report harassment without the fear of being discharged. More fundamentally, Don't Ask, Don't Tell precludes meaningful enforcement of the ban on anti-gay harassment because it is legally incoherent to ban harassment alongside a policy of outright discrimination.

Legally, harassment is regarded as a form of prohibited discrimination against members of protected social groups. A ban on harassment is only coherent when it furthers an overarching mandate against discrimination. The military's bans on racial and sexual harassment are logical because they further the military's broader policies against race and sex discrimination. The military's ban on anti-gay harassment, on the other hand, is conceptually incoherent because it is not only unconnected to any overarching mandate against anti-gay discrimination, but it stands in stark contrast to the Don't Ask, Don't Tell policy, which affirmatively *authorizes* discrimination against gay men and lesbians.

Don't Ask, Don't Tell prevents effective enforcement of the ban on sexual orientation harassment because the harassment ban contradicts the very purpose of Don't Ask, Don't Tell. The goal of a harassment prohibition is not solely to prevent hostile treatment of individuals, but rather to prevent discrimination against members of protected social groups. Harassment against gay and lesbian service members is wrong because, aside from harming the victims as individuals, it impedes gay men and lesbians' advancement in the military and sends them a message of exclusion. But these are precisely the harms produced by the Don't Ask, Don't Tell policy, under which the military has fired nearly 10,000 people just because they are gay.⁶

Although the military's comparison of sexual orientation, racial, and sexual harassment rings hollow in practice and fails as a conceptual matter, the very fact that the military asserts the equivalence of these forms of harassment is significant in its own right. The ban on anti-gay harassment, and the military's rhetoric comparing this conduct with racial and sexual harassment, is notable because it invokes a conception of gay men and lesbians as a social identity group worthy of antidiscrimination protection. To condemn harassment against gay men and lesbians requires condemning anti-gay discrimination. This paper contends that the military cannot effectively eradicate harassment against gay men and lesbians until it condemns anti-gay discrimination more broadly, which would require repealing Don't Ask, Don't Tell.

Part I of the paper recounts the military's comparison of sexual orientation harassment to racial and sexual harassment, and its asserted commitment to addressing anti-gay harassment in the same manner as it addresses racial and sexual harassment.

⁶ John Files, *Gay Ex-Officers Say "Don't Ask" Doesn't Work*, N.Y. TIMES, Dec. 10, 2003, at A18.

Part II demonstrates that, contrary to the military's assertion, the Pentagon's efforts to enforce the ban on anti-gay harassment pale in comparison to its efforts to enforce the racial and sexual harassment prohibitions. Part III argues that these empirical differences in enforcement stem from practical and conceptual problems with regulating harassment against the backdrop of institutional discrimination. It also addresses potential challenges to the incoherence argument. The paper concludes that the only coherent, meaningful way of combating anti-gay harassment is to repeal Don't Ask, Don't Tell and affirmatively recognize the right of gay men and lesbians to serve their country openly, free from all forms of discrimination.

I. The Military's Comparison of Sexual Orientation Harassment with Racial and Sexual Harassment

In 1993, after congressional and military leaders voiced strong opposition to President Clinton's proposal to lift the ban on gays in the military,⁷ Congress and the Department of Defense (DoD) adopted the "Don't Ask, Don't Tell" policy.⁸ Under this "compromise"⁹ solution, the U.S. government for the first time recognized that gay men and lesbians have served and continue to serve the armed forces with distinction.¹⁰ The policy also amended the military's outright ban on homosexual service members to permit gay men and lesbians to enter and remain in the military as long as they do not 1) make a statement revealing their sexual orientation; or 2) engage in any homosexual conduct.¹¹

Included within the Don't Ask, Don't Tell policy was a directive prohibiting harassment against gay and lesbian service members.¹² In recent years, in response to the 1999 murder of a gay soldier¹³ and reports of pervasive harassment against gay and

⁷ See Susan Baer, *Clinton Reaffirms His Promise to End Military's Ban on Gays*, BALT. SUN, NOV. 12, 1992, at 1A; John H. Cushman, Jr., *The Transition: Gay Rights; Top Military Officers Object to Lifting Homosexual Ban*, N.Y. TIMES, NOV. 14, 1992, at 9; Susan Baer, *Clinton is Urged to Slow Down on Gays in the Military*, BALT. SUN, NOV. 16, 1992, at 1A.

⁸ Family and Medical Leave Act of 1993, Pub. L. No. 103-03, § 601 (Sense of Congress statement); 10 U.S.C. § 654 (1993) (codifying National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547 (1994)); Aspin memo, *supra* note 1; see also 32 C.F.R. Ch. 1, Part 41 ("Enlisted Personnel Separations"); Dept' of Defense Directive 1304.26 ("Qualification Standards for Enlistment, Appointment, and Induction" (Feb. 5, 1994); Dep't of Defense Directive 1332.14 ("Enlisted Administrative Separations") (Feb. 5, 1994); Dep't of Defense Directive 1332.30 ("Separation of Regular Commissioned Officers" (Feb. 5, 1994).

⁹ JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 21 (1999) (noting that Clinton referred to the policy as a "compromise" and stated it was "not everything I would have hoped for or everything that I have stood for, but it is plainly a substantial step in the right direction").

¹⁰ See President William Clinton, *Remarks Announcing the New Policy on Gays and Lesbians in the Military*, WEEKLY COMP. PRES. DOC. 29 at 1369-73 (July 19, 1993).

¹¹ See 10 U.S.C. § 654.

¹² Applicant Briefing Item on Separation Policy, addendum to Dep't of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (1993); Aspin Memo, *supra* note 1.

¹³ In July 1999, Private Barry Winchell, who had endured months of anti-gay harassment, was bludgeoned to death with a baseball bat by two fellow soldiers. See SERVICEMEMBERS LEGAL DEFENSE NETWORK (SLDN),

lesbian service members,¹⁴ then-Secretary of Defense William Cohen added the words “Don’t Harass” to the title of the military’s Don’t Ask, Don’t Tell policy¹⁵ and promulgated a 13-point Anti-Harassment Action Plan aimed at curbing sexual orientation harassment in the armed forces.¹⁶

Significantly, in condemning anti-gay harassment, military leaders have analogized sexual orientation harassment to harassment based on race and sex, suggesting that the military is equally committed to combating all three forms of harassment. For example, Pentagon officials have stated:

“Harassment on the basis of sexual orientation is wrong, just as it’s wrong on the basis of race or religion or whether a person is male or female.”¹⁷

“The military has very strong policies against harassment for any reason involving sexual orientation, race, religion, language, ethnic background. And it’s up to commanders to enforce these rules no matter what the cause of harassment.”¹⁸

“The leadership of each Service must continue to work to ensure that everyone in the Armed Forces understands that harassment, whether based on race, religion, gender, perceived sexual orientation, or any other basis, is unacceptable.”¹⁹

“[T]here’s no room for harassment in the military. And this applies to harassment based on race, harassment based on sex, and harassment based on sexual orientation. . . . [J]ust as racial harassment is inappropriate, harassment based on sexual orientation is inappropriate.”²⁰

I. Comparing The Military’s Policies and Practices Addressing Racial, Sexual, and Sexual Orientation Harassment

While the Pentagon purports to treat all harassment equally, an examination of its policies and practices reveals that its efforts to address anti-gay harassment pale in comparison to its treatment of racial and sexual harassment. This Part first describes the military’s racial, sexual, and sexual orientation harassment bans. Second, it compares the

CONDUCT UNBECOMING: THE NINTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” AT 21 (2003).

¹⁴ See SERVICEMEMBERS LEGAL DEFENSE NETWORK (SLDN), CONDUCT UNBECOMING (1994-2000); DEP’T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, EVALUATION REPORT: MILITARY ENVIRONMENT WITH RESPECT TO THE HOMOSEXUAL CONDUCT POLICY, Report No. D-2000-101 (Mar. 16, 2001) [hereinafter “MILITARY ENVIRONMENT EVALUATION REPORT”].

¹⁵ Linda D. Kozaryn & Jim Garamone, *Cohen Adds “Don’t Harass” to Homosexual Policy, Says it Can Work*, AM. FORCES PRESS SERV., Dec. 1999.

¹⁶ Dep’t of Defense, *Anti-Harassment Action Plan* (Jul. 21, 2000).

¹⁷ Kozaryn & Garamone, *supra* note 15.

¹⁸ Kenneth Bacon, Ass. Sec’y of Defense for Public Affairs, *DoD News Briefing*, Dec. 7, 1999.

¹⁹ Dep’t of Defense, *Secretary Cohen Calls for Action Plan to Reduce Harassment*, Mar. 24, 2000.

²⁰ Kenneth Bacon, Ass. Sec’y Defense for Public Affairs, *DoD News Briefing*, Dec. 14, 1999.

military's specific policies and practices addressing racial, sexual, and sexual orientation harassment with regard to six aspects of enforcement: 1) training and education; 2) measurement; 3) reporting; 4) processing of complaints; 5) anti-retaliation; and 6) accountability. Based on this comparison, this Part concludes that, despite its assertions to the contrary, the military does not address anti-gay harassment to the same extent as it addresses racial and sexual harassment. Rather, bans on the latter two are much more meaningfully enforced than the ban on sexual orientation harassment.

A. The Military's Bans on Racial, Sexual, and Sexual Orientation Harassment

The military's bans on racial and sexual harassment are codified by executive order, congressional statutes, Department of Defense directives, and regulations issued by individual military departments. The Pentagon's ban on racial harassment is encompassed within its broader mandate against race discrimination. This mandate was first embodied in President Truman's 1948 executive order desegregating the military, which guaranteed "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin."²¹ The ban on race discrimination has since been reinforced by a variety of provisions, including the Department of Defense Human Goals Charter²² and the Department of Defense Equal Opportunity Directive.²³ These provisions do not treat racial harassment and race discrimination separately; rather, racial harassment is considered a form of prohibited race discrimination. For instance, the Air Force's policy on unlawful race discrimination provides that racial jokes or the use of racially disparaging terms constitutes unlawful discrimination.²⁴

Likewise, the military's ban on sexual harassment is codified by a variety of provisions, including congressional statute,²⁵ the Department of Defense Equal Opportunity Directive,²⁶ and individual military department regulations.²⁷ Sexual harassment is considered a form of prohibited sex discrimination.²⁸

²¹ Exec. Order No. 9981 (July 26, 1948).

²² Dept of Defense Human Goals Charter, *available at* http://www.defenselink.mil/news/Jul1998/n07291998_9807293.html (last visited Feb. 25, 2004) (providing that the Department of Defense strives "to make military service in the Department of Defense a model of equal opportunity for all regardless of race, color, sex, religion or national origin").

²³ Dep't of Defense Directive 1350.2 ¶ 4.6, encl. 2 (providing that "[p]ersons should be evaluated only on merit, fitness, and capability regardless of race, color, gender, national origin, age, or handicap except as prescribed by statute").

²⁴ Air Force Pamphlet 36-270, *Discrimination and Sexual Harassment* at 28 (Feb. 28, 1995) (defining disparaging terms as "terms used to degrade or connote negative statements pertaining to race, color, gender, national origin, religion or age. These terms include insults, printed material, visual material, signs, symbols, posters, or insignia").

²⁵ 10 U.S.C. § 1561.

²⁶ *See* Dep't of Defense Directive 1350.2 ¶ 4.6, encl. 2.

²⁷ *See, e.g.*, 32 C.F.R. § 700.1166 (Navy regulation banning sexual harassment).

The military's ban on sexual orientation harassment, on the other hand, is not codified in any executive order or federal statute, including the statute enacting Don't Ask, Don't Tell.²⁹ Rather, the harassment ban initially was tacked onto Department of Defense documents outlining the military's Don't Ask, Don't Tell policy.³⁰ These provisions stated:

“The Armed Forces do not tolerate harassment or violence against any service member, for any reason”;³¹

“Harassment or violence against other servicemembers will not be tolerated”;³² and

“Hostile treatment or violence against a servicemember based on a perception of his or her sexual orientation will not be tolerated.”³³

In 2000, Defense Secretary William Cohen promulgated an action plan ordering the DoD to issue a single Department-wide directive strongly condemning anti-gay harassment.³⁴ According to the action plan, the directive “should make clear that mistreatment, harassment, and inappropriate comments or gestures, including that based on sexual orientation, are not acceptable.”³⁵ As of February 2004, however, the Pentagon had not issued this directive as required by the plan.³⁶

In late 1999 and early 2000, after the murder of a gay soldier and in response to repeated requests by Servicemembers Legal Defense Network (SLDN),³⁷ each military service issued a message against anti-gay harassment. These statements provided:

Army: “Harassment of soldiers for any reason, to include perceived sexual orientation, will not be tolerated.”³⁸

²⁸ See 10 U.S.C. § 1561 (defining sexual harassment as “conduct (constituting a form of sex discrimination”).

²⁹ See 10 U.S.C. § 654.

³⁰ See *supra* note 2.

³¹ Applicant Briefing Item on Separation Policy, addendum to Dep't of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (1993).

³² See Aspin memo, *supra* note 1.

³³ “Policy Guidelines on Homosexual Conduct in the Armed Forces” (attachment to Aspin memo, *supra* note 1).

³⁴ See *Anti-Harassment Action Plan*, *supra* note 16. The Action Plan also required the DoD to adopt an “overarching principle regarding harassment, including that based on perceived sexual orientation: Treatment of all individuals with dignity and respect is essential to good order and discipline. Mistreatment, harassment, and inappropriate comments or gestures undermine this principle and have no place in our armed forces. Commanders and leaders must develop and maintain a climate that fosters unit cohesion, esprit de corps, and mutual respect for all members of the command or organization.” *Id.*

³⁵ *Anti-Harassment Action Plan*, *supra* note 16.

³⁶ See SLDN, CONDUCT UNBECOMING 2 (2003).

³⁷ SLDN is the leading organization advocating on behalf of gay and lesbian service members' rights.

³⁸ Secretary of the Army, *Dignity and Respect for All* (Jan. 2000).

Navy: “Commanding officers must not condone homosexual jokes, epithets, or derogatory comments, and must ensure a command climate that fosters respect for all individuals.”³⁹

Air Force: “Harassment, threats or ridicule of individuals or groups based upon real or perceived differences, including sexual orientation, have no place in the United States Air Force and will not be tolerated.”⁴⁰

Marine Corps: “All Marines learn in their earliest basic training, mistreatment of any Marine is incompatible with our core values and is unacceptable conduct that must be dealt with quickly and appropriately by commanders.”⁴¹

A. The Military’s Enforcement Policies and Practices Addressing Racial, Sexual, and Sexual Orientation Harassment

This Section compares the military’s policies and practices addressing racial, sexual, and sexual orientation harassment with regard to six areas of enforcement: 1) training and education; 2) measurement; 3) reporting; 4) processing of complaints; 5) anti-retaliation; and 6) accountability.

1. Training and Education

a. Policies

The Department of Defense Equal Opportunity Directive requires the Secretary of each military department to implement training and education measures regarding racial and sexual harassment, including posting all harassment policies and ensuring that they are understood and executed at all levels of military command,⁴² and providing adequate training for all military personnel regarding harassment prevention.⁴³

In contrast, the initial anti-gay harassment provision contained no mention of training.⁴⁴ In fact, the military working group memorandum proposing the current Don’t Ask, Don’t Tell policy explicitly prohibited sensitivity training geared at changing service members’ anti-gay views. The working group concluded that any DoD education regarding the policy “should be factual in nature and should not include sensitivity

³⁹ Navy Admin., *Continuing Guidance Concerning Proper Application of DOD Homosexual Conduct Policy* (Oct. 1999).

⁴⁰ Secretary of the Air Force, *Memorandum for All Air Force Personnel* (Jan. 10, 2000).

⁴¹ Marine Admin., *Homosexual Conduct Policy* (Jan. 2000).

⁴² Dep’t of Defense Directive 1350.2, ¶¶ 6.2.1, 6.2.4.

⁴³ *Id.* ¶ 6.2.14.

⁴⁴ See Aspin memo, *supra* note 1; Applicant Briefing Item on Separation Policy, addendum to Dep’t of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (1993).

training or attempt to change deeply held moral, ethical, or religious values.”⁴⁵ The memorandum further contended that the military is incapable of changing straight service members’ anti-gay views:

As citizen soldiers, military members bring their values with them when they enter the Service. Whether based on moral, religious, cultural, or ethical considerations, those values and beliefs are often strongly held and not amenable to change. While we indoctrinate and train recruits, leadership and discipline cannot—and generally should not—attempt to counter the basic values which parents and society have taught. Indeed, efforts to do so will likely prove counter-productive.⁴⁶

Consistent with the working group’s proposal, the DoD’s initial policy required training on the exclusion of gay and lesbian service members, but required no training regarding prevention of harassment.⁴⁷

The armed forces made no mention of anti-harassment training until the murder of Private Barry Winchell in 1999. After being subjected to months of anti-gay harassment, Private Winchell was bludgeoned to death by fellow soldiers.⁴⁸ After this tragedy, and after repeated requests by SLDN, each of the military departments developed, and Secretary Cohen approved, training plans on anti-gay harassment.⁴⁹ The Anti-Harassment Action Plan approved by Secretary Cohen in 2000 offered three training-related recommendations:

The Services shall ensure feedback or reporting mechanisms are in place to measure homosexual conduct policy training and anti-harassment training effectiveness in the following three areas: knowledge, behavior, and climate.

The Services shall review all homosexual conduct policy training and anti-harassment programs to ensure they address the elements and intent of the DoD overarching principle⁵⁰ and implementing directive.

⁴⁵ Secretary of Defense, *Military Working Group Memorandum: Recommended DoD Homosexual Policy Outline*, at 12 (June 8, 1993); *see also id.* at 15 (“The education package will focus on the changes to the DOD policy and will not be an attempt to change any deeply held, religious and ethical beliefs; that is sensitivity training.”).

⁴⁶ *Id.* at 2.

⁴⁷ *See* 10 U.S.C. § 654.

⁴⁸ *See* SLDN, CONDUCT UNBECOMING, *supra* note 13.

⁴⁹ *See, e.g.*, Fort Bliss Military Justice, “Homosexual Conduct Policy Refresher Training, Information Sheet ATZC-JA (Jan. 25, 2000), at <http://www.bliss.army.mil> (last visited Dec. 23, 2003); *see also* Memorandum from the Undersecretary of Defense for Personnel and Readiness, *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).

⁵⁰ *See supra* note 34 for the text of the Action Plan’s recommended “overarching principle.”

The Services shall review homosexual conduct policy training and anti-harassment training programs annually to ensure they contain all information required by law and policy, including the DoD overarching principle and implementing directive, and are tailored to the grade and responsibility levels of their audiences.⁵¹

a. Practices

The military's training practices with regard to racial and sexual harassment have been far more substantial than its training efforts on anti-gay harassment. According to the 1997 Armed Forces Equal Opportunity Survey (1997 EO Survey), 77 percent of respondents said that they had received training on racial harassment and discrimination in the last 12 months. Fifty-four percent believed this training was moderately or very effective in reducing discriminatory or harassing behaviors.⁵²

The 2002 Armed Forces Sexual Harassment Survey (2002 Sexual Harassment Survey) revealed similar percentages reporting having received training on sexual harassment: 75 percent of service members said they had received training in the last 12 months.⁵³ Further, 90 percent of women and men reported that the training was effective in conveying what words and actions constitute sexual harassment.⁵⁴

In contrast, according to a Pentagon study regarding anti-gay harassment, 57 percent of respondents stated they had not been trained on any aspect of the homosexual conduct policy.⁵⁵ Although 54.5 percent of respondents said they understood the policy to a large or very large extent, only 26.5 percent answered correctly three questions about the policy.⁵⁶ The Pentagon report conceded that "the large percent of Service members who stated they had not received Policy training indicates a need for greater emphasis in that area."⁵⁷ Likewise, Pentagon spokesperson Kenneth Bacon admitted that "the services have not taken a uniform approach, and some services have been more aggressive in designing training against harassment than other services have."⁵⁸ Moreover, the Pentagon has conceded that training on anti-gay harassment "has been handled less diligently than other personnel policies, such as sexual harassment."⁵⁹

⁵¹ *Anti-Harassment Action Plan*, *supra* note 16.

⁵² 1997 Armed Forces Equal Opportunity Survey, DMDC Report No. 97-027 [hereinafter 1997 EO Survey].

⁵³ Armed Forces 2002 Sexual Harassment Survey, DMDC Report No. 2003-026 (Nov. 2003), at 64 [hereinafter 2002 Sexual Harassment Survey].

⁵⁴ *Id.* at 65.

⁵⁵ at 17.

⁵⁶ MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at 16.

⁵⁷ *Id.* at 17.

⁵⁸ Kenneth Bacon, Ass. Sec'y of Defense for Public Affairs, *DoD News Briefing*, Dec. 14, 1999.

⁵⁹ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 16 (citing Art Fine, *Few Benefit from New Military Policy on Gays*, L.A. TIMES, A1, A8).

Although each of the Services developed training plans regarding Don't Ask, Don't Tell in late 1999 or early 2000, a review by SLDN found that the training "rarely meets the standards set forth by the AHAP. The Army has come closest to meeting those guidelines. The Marine Corps openly acknowledged its training is inadequate. The Navy and Air Force have blatantly failed to meet the requirements altogether."⁶⁰

Moreover, according to SLDN, Don't Ask, Don't Tell training often is conducted in a manner offensive to gay and lesbian service members. For instance,

In Late August 1999, following the murder of Private Winchell, a Fort Campbell Army sergeant conducted a class on Don't Ask, Don't Tell. The Sergeant called the class a "fag briefing" and referred to gay soldiers as "fags."⁶¹

During an Army equal opportunity training session in January 2003, instructors told anti-gay jokes, after which the unit commander asked "anyone who is gay to raise their hand if they felt offended by the jokes."⁶²

Don't Ask, Don't Tell training at the Judge Advocate General School in 2001 contained video clips demeaning gay people and including the word "faggot."⁶³

1. Measurement

a. Policies

As with training, disparities exist between the military's measurement of racial and sexual harassment on the one hand, and sexual orientation harassment on the other. Federal law requires the Department of Defense to conduct quadrennial surveys regarding the incidence of both race and sex discrimination, including racial and sexual harassment.⁶⁴ Specifically, the Secretary of Defense is required to conduct "Armed Forces Workplace and Equal Opportunity Surveys . . . to solicit information on racial and ethnic issues, *including issues related to harassment*,"⁶⁵ as well as "Armed Forces Workplace and Gender Relations Surveys . . . to solicit information on

⁶⁰ *Id.* at 5. For instance, although an Army IG report found that 71 percent of soldiers had said they had received some sort of training on the policy between April 2001 and April 2002, most of the soldiers with whom SLDN spoke reported that "the training, to the extent it happened at all, was brief and made little to no mention of the policy's 'Don't Harass' provisions." *Id.* at 15.

⁶¹ SLDN, CONDUCT UNBECOMING (2000), *supra* note 14, at 52.

⁶² SLDN, CONDUCT UNBECOMING, *supra* note 13, at 16.

⁶³ SLDN, CONDUCT UNBECOMING (2002), *supra* note 14, at 14.

⁶⁴ 10 U.S.C. § 481(a).

⁶⁵ *Id.* § 481(b).

gender issues, including issues relating to *gender-based harassment*.⁶⁶ Further, the Secretary of Defense is required to report the findings of these surveys to Congress.⁶⁷

In addition to this statutory mandate, the Department of Defense is bound by its own internal directive to assess the climate surrounding discrimination and harassment, including complaints and discipline.⁶⁸ These assessments are mandated by individual service regulations and are coordinated through the Defense Equal Opportunity Management Institute.⁶⁹

These mandates do not apply to anti-gay harassment.⁷⁰ It was only after the murder of Private Winchell that Secretary of Defense William Cohen ordered the first assessment of the military climate with respect to anti-gay harassment.⁷¹ As a result of this report's findings, Secretary Cohen promulgated the Anti-Harassment Action Plan, which required the services "to ensure inspection programs to assess adherence to the AHAP and assess the effectiveness of efforts to address anti-gay harassment."⁷² However, the Action Plan does not specifically require military departments to measure the incidence of sexual orientation harassment.⁷³

b. Practices

The military regularly measures the incidence of both racial and sexual harassment. In addition, the services track disciplinary actions taken against perpetrators of harassment.⁷⁴ Each of the military departments also conducts "diversity exit interviews," in which they ask members leaving the military about their experiences with discrimination.⁷⁵

⁶⁶ *Id.* § 481(c).

⁶⁷ *Id.* § 481(e) (2003).

⁶⁸ Dep't of Defense Directive 1350.2, ¶ 6.2.2.

⁶⁹ Secretary of the Navy John H. Dalton, *A Holistic Navy Approach to Curbing Sexual Harassment*, 12 Defense Issues (Feb. 4, 1997), at www.defenselink.mil/speeches/1997/t19970204-dalton.html ("The Navy Equal Opportunity and Sexual Harassment Survey, and the Marine Corps Equal Opportunity Survey are key assessment tools, providing us biennially with a comprehensive look at our equal opportunity climate.").

⁷⁰ See 10 U.S.C. § 481; Dep't of Defense Directive 1350.2, ¶ 6.2.2.

⁷¹ See MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14.

⁷² *Anti-Harassment Action Plan*, *supra* note 16; see also SLDN, CONDUCT UNBECOMING, *supra* note 13, at 5.

⁷³ See *id.*

⁷⁴ See Dep't of Defense, Manual for Incident-Based Reporting (July 2002); Secretary of the Air Force Sheila E. Widnall, *Air Force's Approach to Ending Sexual Harassment* (statement to the Senate Armed Services Committee), DEFENSE ISSUES, Vol. 12, No. 10 (Feb. 4, 1997) ("We track nonjudicial and judicial punishment actions against military members who have violated the UCMJ [Uniform Code of Military Justice] through our data base system the Automated Justice Analysis and Management System. Since August 1992, AMJAMS has included a special code to identify offenses that constitute sexual harassment.").

⁷⁵ Steven B. Knouse, *A Diversity Exit Interview/Survey for the Military* (Summer 2001).

A 1997 EO Survey found that 75 percent of African Americans, 78 percent of Hispanics, 69 percent of Asian Pacific Islanders, and 74 percent of Native Americans reported having been subjected to an offensive encounter based on their race or ethnicity.⁷⁶ Further, 13 percent of African Americans, 13 percent of Hispanics, 16 percent of Asian Pacific Islanders, and 15 percent of Native Americans reported having been subjected to threats or physical harm because of their race or ethnicity.⁷⁷

A 2002 Sexual Harassment Survey found that 24 percent of women had experienced sexual harassment during the prior year.⁷⁸ Between 1990 and 1998, 10,012 complaints of sexual harassment were filed.⁷⁹

Although the AHAP requires all services to conduct assessments, according to SLDN, “[n]one of the Services have evaluated the level of anti-gay harassment.”⁸⁰ In 2000, a DoD spokesperson admitted that the military has not implemented any mechanism for tracking incidents of harassment.⁸¹ When asked how he could nonetheless dispute SLDN’s report that incidents of harassment had increased over the past year, he responded, “Well, you would feel it in readiness reporting. . . . You would feel it in a variety of ways, and we’ve just simply not seen that.”⁸² The Pentagon also concedes that it does not track the number of complaints of anti-gay harassment lodged, the number of investigations conducted, nor the number of people found to have engaged in anti-gay harassment.⁸³

The military also does not track harassment of gay and lesbian service members who are discharged from the military. Over 80 percent of discharges under Don’t Ask, Don’t Tell are “statement cases;” that is, instances where gay and lesbian service members come out to their commanders.⁸⁴ According to SLDN, anti-gay harassment is one of the main reasons why gay service members decide to make homosexual

⁷⁶ 1997 Armed Forces EO Survey, *supra* note 52.

⁷⁷ *Id.*

⁷⁸ 2002 Sexual Harassment Survey, *supra* note 53.

⁷⁹ *Equal Opportunity Discrimination Complaints* (adding complaints from 1990 through 1998), available at http://www.defenselink.mil/execsec/adr2000/tablef1_f2.html. Although the DoD does not specify the number of racial harassment complaints that fall within its larger category of reported incidents of discrimination, its overall figures reveal that 12,872 discrimination complaints were filed during this same period. *Id.*

⁸⁰ *Id.* at 5.

⁸¹ Rear Admiral Craig Quigley, Deputy Ass. Sec’y of Defense for Public Affairs, *DoD News Briefing*, Mar. 9, 2000.

⁸² *Id.*

⁸³ Kenneth Bacon, Ass. Sec’y of Defense for Public Affairs, *DoD News Briefing*, Feb. 1, 2000 (Q: “How many such complaints have been lodged, and how many investigations into that kind of harassment have been conducted? A: “That’s something that we have not tracked. . . . But it is not something that’s terribly easy to track or that – we have.”); *see also id.* (Q: “If you do not keep records on the reports of harassment, do you have a record on how many people have been found to have harassed someone for homosexuality? Do you have a record for that in the services? A: “No, we don’t.” Q: “Is there a reason for not having it? Is it –“ A: “Because we haven’t tracked or asked that question. . . .”).

⁸⁴ *See id.*

statements. “After months, sometimes years, of being subjected to constant harassment they have lost faith that their chain of command will protect them. They have no confidence that they will not lose their careers and be subject to more intense harassment if they file a complaint.”⁸⁵ SLDN recounted the story of one such service member:

SPC Brad Powell was compelled to reveal his sexual orientation to escape harassment that threatened his physical safety. His NCO told soldiers to visualize ‘blowing up a gay bar’ during a grenade training exercise. SPC Powell heard NCOs say ‘the only way to decrease our nuclear arsenal is to put all fags on an island and nuke it’ and ‘the only thing a good fag needs is a good fag bashing.’ To escape this hostile climate, SPC Powell revealed his sexual orientation to his command. Shortly thereafter, he received a note on his car stating ‘fags die,’ reaffirming for SPC Powell that the only way to protect himself was to reveal that he is gay.⁸⁶

Although the DoD acknowledges SLDN’s observation that many service members make statements to escape a climate of anti-gay harassment, the military nonetheless has decided not to ask service members who make homosexual statements whether they have been subjected to anti-gay harassment. As one Pentagon official admitted, “if someone makes a statement, they – we don’t – the services do not go beyond that statement and say, ‘Well why are you making this statement?’ If they say that they are a homosexual or have a homosexual orientation, then that is usually a limited or no inquiry [W]e don’t look behind the statement.”⁸⁷

The DoD has only conducted one military-wide assessment of anti-gay harassment, which it conducted after the murder of Private Winchell. This survey revealed overwhelming rates of anti-gay harassment. Over 80 percent of the more than 75,000 respondents reported that they had heard derogatory anti-gay remarks during the past year, and 37 percent said they witnessed or experienced targeted incidents of anti-gay harassment.⁸⁸ Moreover, evidence gathered by SLDN demonstrates that anti-gay harassment is pervasive in the armed forces. SLDN’s annual reports reveal a total of 4,619 incidents of anti-gay harassment from 1994 through 2002.⁸⁹ These incidents range from death threats and physical assaults to daily incidents of verbal abuse.⁹⁰

1. Reporting

⁸⁵ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 48; *see also id.* at 47 (“Many lesbian, gay and bisexual service members are compelled to ‘tell’ as their only recourse to escape harassment, including threats of physical violence.”); *id.* at 35 (“In our experience, most Marines who make coming out statements do so in response to anti-gay harassment.”).

⁸⁶ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 48.

⁸⁷ DoD *News Briefing*, *supra* note 83.

⁸⁸ MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at i (executive summary).

⁸⁹ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 2 (adding number of violations reported from 1994 through 2002).

⁹⁰ See SLDN, CONDUCT UNBECOMING (1994-2003), *supra* note 14.

a. Policies

Reporting is another area of disparity in the enforcement of the military's harassment prohibitions. The DoD Equal Opportunity Directive requires the secretaries of all military departments to provide a central point of contact to receive formal complaints of racial and sexual harassment,⁹¹ and to establish toll-free or local hotlines or advice lines providing information on how and where to file complaints and regarding what kinds of behaviors constitute harassment.⁹² Further, the directive requires military departments to establish and publish procedures for filing both formal and informal complaints of racial and sexual harassment, including complaints for reprisals.⁹³

In contrast, no central point of contact is required for the reporting of anti-gay harassment, and the agencies that receive complaints of racial and sexual harassment are not required to receive complaints of sexual orientation harassment.⁹⁴ In fact, the Army has stated that it *prohibits* its Equal Opportunity representatives from assisting service members who are targeted by anti-gay harassment.⁹⁵ The Anti-Harassment Action Plan requires the services to provide clear training regarding avenues for reporting anti-gay harassment. However, the Plan fails to specify what these avenues should be or to require confidentiality in reporting.⁹⁶

b. Practices

Each individual service uses complaint forms that guide and document the process for filing racial and sexual harassment complaints, “from the filing of the complaint to the end of the investigation.”⁹⁷ Moreover, individual services have established sexual harassment hotlines, which victims can call to report incidents of harassment.⁹⁸

⁹¹ Dep't of Defense Directive 1350.2, ¶ 6.2.8.

⁹² *Id.*

⁹³ *Id.* ¶¶ 6.2.4, 6.2.5.

⁹⁴ Dep't of the Army Inspector General, Fort Campbell Task Force, *DAIG Special Assessment / Investigation of Allegations of Violations of the DOD Homosexual Conduct Policy at Fort Campbell* (July 2000), available at <http://www.army.mil/ig/8report.htm> (last visited Jan. 2, 2004) [hereinafter “*DAIG Special Assessment*”].

⁹⁵ SLDN, CONDUCT UNBECOMING (2000), *supra* note 14, at 5.

⁹⁶ *Anti-Harassment Action Plan*, *supra* note 16.

⁹⁷ 1996 GAO Report; *see, e.g.*, Navy Equal Opportunity/Sexual Harassment Formal Complaint Form (NAVPERS 5354/2).

⁹⁸ *See, e.g.*, Sheila E. Widnall, *Air Force's Approach to Ending Sexual Harassment*, *supra* note 74 (“The establishment of the Headquarters Air Force Personnel Center sexual harassment ‘1-800’ hot line reinforces the Air Force’s commitment to investigate equal opportunity and treatment complaints.”); *Sexual Harassment in Armed Services*, 1997 WL 8218692 (Feb. 4, 1997) (statement by Togo D. West, Jr., Secretary of the Army) (“On November 7, 1996, we established a toll-free hotline number of [sic] our soldiers to use to report instances of sexual harassment and misconduct. As of January 30, 1997, 6979 calls had been placed to the hotline. Since the inception of the hotline, 1,025 calls have been referred to CID (Criminal Investigation Command)”).

The 1997 EO Survey found that although most respondents knew how to report racial/ethnic harassment, the vast majority of those reporting a “most bothersome” incident (79 percent of African Americans and 86 percent of Asian/Pacific Islanders) chose not to report it, either because they felt nothing would be done, or because they felt it was not important enough to report.⁹⁹

According to the 2002 Pentagon Sexual Harassment Survey, 30 percent of women who experienced an incident of harassment chose to report the incident.¹⁰⁰ Over 90 percent of service members said that procedures for filing complaints of sexual harassment were publicized, and more than half of service members said there was a specific office that investigated sexual harassment complaints and that provided an advice/hotline for reporting such complaints.¹⁰¹

In contrast, in 2003, SLDN reported that most gay troops “indicate they are afraid to report harassment for fear of becoming the target of an anti-gay investigation or of worsening harassment.” Although the Pentagon survey found that 78 percent of respondents said they would feel free to report anti-gay harassment,¹⁰² of those respondents who had witnessed or experienced harassment, only 16 percent said the incident had been reported.¹⁰³ However, no data exists on the actual reporting rates of anti-gay harassment.

The Army has designated legal assistance attorneys and chaplains as confidential means of reporting anti-gay harassment; however, 70 percent of soldiers were unaware of these designations.¹⁰⁴ According to SLDN, the Army “has come closest to meeting AHAP’s requirement of providing training regarding avenues for reporting harassment; “[t]he Marine Corps has taken small steps, and the other services, have done nothing.”¹⁰⁵

1. Processing of Complaints

a. Policies

The military’s provisions regarding the processing of racial and sexual harassment complaints are far more numerous and detailed than those addressing anti-gay harassment. The DoD Equal Opportunity Directive requires all military departments

⁹⁹ 1997 Armed Forces EO Survey, *supra* note 52.

¹⁰⁰ 2002 Sexual Harassment Survey, *supra* note 53, at 30.

¹⁰¹ *Id.* at 64.

¹⁰² MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at 15.

¹⁰³ *Id.* at 13 (listing percentages of respondents who stated that the harassment was reported to one or more of five officials or offices).

¹⁰⁴ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 16.

¹⁰⁵ *Id.* at 16 (citing “*Don’t Ask, Don’t Tell: Army Homosexual Conduct Policy*, HOT TOPICS: CURRENT ISSUES FOR ARMY LEADERS 8 (Winter 2000) (“A soldier can discuss any topic regarding sexual orientation with a legal assistance attorney or chaplain.”)); *id.* at 5.

to ensure fair, impartial and prompt investigation of all complaints of racial and sexual harassment. Military departments also must review formal complaints for legal sufficiency,¹⁰⁶ provide feedback to complainants regarding the status and outcome of the complaint,¹⁰⁷ and allow for appeals of administrative findings of formal complaints.¹⁰⁸

A federal statute requires commanding officers who receive complaints of sexual harassment, within 72 hours to begin an investigation, to forward the complaint to the next superior officer with authority to convene a court-martial, and advise the complainant that an investigation has begun.¹⁰⁹ The law requires that such investigations be completed within 14 days, and that commanding officers submit a report on the results within 20 days.¹¹⁰

Moreover, each individual service has rules regarding the processing of racial and sexual harassment complaints. For instance, the Air Force Military Equal Opportunity Technician's Guide provides detailed guidelines regarding complaint verification, interviewing witnesses, interviewing the alleged offender, completing clarification reports, and outbriefing complainants.¹¹¹

In contrast, there is no military-wide policy regarding the processing of anti-gay harassment complaints. It was not until 1997 that the Pentagon issued a memorandum stating that threats based on perceived sexual orientation should be investigated at all. This memorandum made no mention of "harassment," and it was not distributed to the services for over two years.¹¹² After Private Winchell's murder, a Pentagon internal report recommended that the memorandum be revised to specifically mention harassment, and that it be distributed to the services.¹¹³ The revised memo, which was distributed in 1999, provided: "Commanders must take appropriate actions in such instances [of reports of threats or harassment], with due consideration given to the safety of persons who report threats or harassment, and see that persons found to have made threats or engaged in threatening or harassing conduct are held fully accountable."¹¹⁴ The Army Inspector General has conceded,

¹⁰⁶ Dep't of Defense Directive 1350.2 ¶ 6.2.5.

¹⁰⁷ *Id.* ¶ 6.2.6.

¹⁰⁸ *Id.* ¶ 6.2.10.

¹⁰⁹ 10 U.S.C. § 1561(a)(b).

¹¹⁰ *Id.* § 1561(c)(d).

¹¹¹ See Air Force Personnel Center, *Military Equal Opportunity Technician Guide*, available at <http://www.afpc.randolph.af.mil/meo/MEOTechGuide/MainGuide.htm> (last visited Jan. 2, 2004).

¹¹² Office of the Under Secretary of Defense (Personnel and Readiness), *Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military* (Apr. 1998).

¹¹³ See *id.*

¹¹⁴ Memorandum from Under Secretary of Defense Rudy de Leon, *Guidelines for Investigating Threats Against or Harassment of Service Members Based on Alleged Homosexuality* (Aug. 12, 1999) [hereinafter "De Leon Memo"].

“There is no guidance for commanders on how to take a complaint of harassment based upon sexual orientation.”¹¹⁵

b. Practices

The 1997 Armed Forces Equal Opportunity Survey revealed that about half of those who reported racial harassment or discrimination said that their complaints were substantiated.¹¹⁶ Thirty-eight percent of African Americans, 39 percent of Hispanics, 45 percent of Asian American/Pacific Islanders, and 39 percent of Native Americans felt that the investigation of their complaints were thorough.¹¹⁷

In 1998, 53 percent of sexual harassment complaints were substantiated.¹¹⁸ According to the 2002 Sexual Harassment Survey, about one-third of the service members who reported sexual harassment were satisfied with the complaint process overall.¹¹⁹

Only 21.7 percent of respondents to the 2000 Pentagon study on anti-gay harassment said that complaints of harassment were even investigated.¹²⁰ SLDN has documented numerous instances in which the military has failed to adequately investigate reports of anti-gay harassment. For example, after SLDN reported to the Army Inspector General that a lesbian service member was told by a chaplain that she was “going to hell” and that “homosexuality is a curable disease,” the IG disposed of the allegation without conducting a thorough investigation. The IG failed to interview the only eye-witness to the incident, but concluded that the allegation was “not substantiated.”¹²¹ No data exists regarding satisfaction with processing of anti-gay harassment complaints.

1. Anti-retaliation

a. Policies

The military’s protections against reprisals are much stronger for the reporting of racial and sexual harassment than for anti-gay harassment. A federal statute prohibits the military from retaliating against those who complain of racial and sexual harassment:

¹¹⁵ *DAIG Special Assessment*, *supra* note 94.

¹¹⁶ 1997 Armed Forces EO Survey, *supra* note 52.

¹¹⁷ *Id.*

¹¹⁸ *Equal Opportunity Discrimination Complaints*, *supra* note 79.

¹¹⁹ 2002 Sexual Harassment Survey, *supra* note 53, at 37.

¹²⁰ MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at 15 fig.9 (showing that 15.7 percent of respondents said complaints were not investigated, and 62.2 percent said they did not know whether complaints were investigated).

¹²¹ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 17 (citing Letter from Carlos Ramos to LTG Michael Ackerman, Inspector General, to Jeffery Cleghorn, SLDN (Mar. 19, 2002)).

No person may take (or threaten to take) an unfavorable personnel action, or withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing . . . [a communication regarding] a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.¹²²

Further, a Department of Defense directive protects from retaliation service members who report “a violation of law or regulation, including sexual harassment or unlawful discrimination.”¹²³ Unlawful discrimination is defined as “Discrimination on the basis of color, national origin, race, religion or sex, as set forth in Section 1034 of 10 U.S.C. (reference (b)).”¹²⁴

Meanwhile, service members who report anti-gay harassment have no statutory protection from retaliation. However, a 1999 Pentagon memorandum states that “[s]ervice members should be able to report crimes and harassment free from fear of harm, reprisal, or inappropriate or inadequate governmental response.”¹²⁵

b. Practices

About half of racial/ethnic minorities responding to the 1997 EO Survey felt to a large or very large extent that they could file a report of racial/ethnic harassment or discrimination without the fear of negative consequences.¹²⁶ The 2002 Sexual Harassment Survey found that 28 percent of women who did not report sexual harassment chose not to because they feared retaliation by the offender.¹²⁷ In 1995, 20 percent of women who reported sexual harassment said they received a performance rating that was unfairly lowered, 12 percent said their supervisor or others in their chain of command were hostile to them, and 20 percent felt they were not free to report sexual harassment without fear of bad things happening to them.¹²⁸

SLDN has documented widespread reluctance on the part of gay and lesbian service members to report harassment because of fear that such reports will lead to their discharge from the military.¹²⁹ According to the Pentagon study on anti-gay harassment, of the 22 percent of respondents who said they would not feel free to report anti-gay harassment, 41.4 percent said they would be concerned other unit members would engage in retaliation, and 29.6 percent said they would fear retaliation by a supervisor.¹³⁰

¹²² 10 U.S.C. § 1034.

¹²³ Dep’t of Defense Directive 7050.6; *id.* encl. 1, at 13.

¹²⁴ *Id.* encl. 1, at 14.

¹²⁵ De Leon Memo, *supra* note 115.

¹²⁶ 1997 Armed Forces EO Survey, *supra* note 52.

¹²⁷ 2002 Sexual Harassment Study, *supra* note 53, at 41.

¹²⁸ 1995 Sexual Harassment Study.

¹²⁹ *See* SLDN, CONDUCT UNBECOMING, *supra* note 13.

¹³⁰ MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at 16.

1. Accountability

a. Policies

The military's provisions addressing accountability for perpetrators of racial and sexual harassment far outnumber and outweigh those addressing accountability for anti-gay harassment. The DoD Equal Opportunity Directive requires military departments to ensure that appropriate disciplinary and corrective actions are taken for substantiated incidents of racial or sexual harassment or reprisal,¹³¹ and to provide for punishment through the Uniform Code of Military Justice for violations of the policies set forth in the equal opportunity directive.¹³² Further, all rating and reviewing officials are required to evaluate service members' compliance with directives prohibiting harassment and document serious deviations from such directives in performance reports.¹³³ Finally, the equal opportunity directive states that military departments are responsible for equal opportunity and for ensuring compliance with the directive, and "[c]ommanders shall be held accountable for the EO climates in their commands."¹³⁴

Although a document entitled "Restrictions on Personal Conduct in the Armed Forces" states that "[a] member may be separated for harassment or violence against any servicemember,"¹³⁵ the DoD concedes that the anti-harassment policy does not "include any specific guidance or penalties for those who may violate the 'no harass' policy."¹³⁶ The initial ban on anti-gay harassment stated only that "[c]ommanders remain responsible for maintaining good order and discipline."¹³⁷ Under Secretary de Leon's August 1999 memorandum states that commanders should ensure that "persons found to have made threats or engaged in threatening or harassing conduct are held fully accountable."¹³⁸ Likewise, the Anti-Harassment Action Plan requires the services "to ensure that commanders and leaders take appropriate action against anyone who engages in mistreatment, harassment, and inappropriate comments or gestures."¹³⁹ The Plan also requires the DoD to issue a directive to "make clear that commanders and leaders will be held accountable for failure to enforce this directive."¹⁴⁰

¹³¹ Dep't of Defense Directive 1350.2 ¶ 6.2.5.

¹³² *Id.* ¶ 6.2.4.

¹³³ *Id.* ¶ 6.2.15.

¹³⁴ *Id.* ¶ 6.2.2.

¹³⁵ Memorandum from Edward Dorn, Assistant Secretary of Defense for Personnel and Readiness, *Briefing Armed Forces Applicants*, (USMEPCOM Reg. 601-23).

¹³⁶ Kenneth Bacon, Ass. Sec'y of Defense for Public Affairs, *DoD News Briefing*, Feb. 1, 2000.

¹³⁷ Aspin Memo, *supra* note 1.

¹³⁸ De Leon Memo, *supra* note 115.

¹³⁹ *Anti-Harassment Action Plan*, *supra* note 16.

¹⁴⁰ *Id.*; SLDN, CONDUCT UNBECOMING, *supra* note 13, at 2.

b. Practices

According to the 1997 EO Survey, 36 percent of African Americans, 41 percent of Hispanics, 46 percent of Asian/Pacific Islanders, and 41 percent of Native Americans reported that penalties were enforced against the offenders.¹⁴¹ Additionally, over half of African American and Hispanic respondents who reported a “most bothersome” incident to a military official said that the person was talked to about the situation.¹⁴²

A 1995 survey on sexual harassment in the military found that half of the women who reported incidents of sexual harassment said the person who harassed them was talked to about the behavior, and 20 percent said the person who harassed them was counseled.¹⁴³

In contrast, according to the DoD study on anti-gay harassment, only 23.2 percent of respondents said that penalties were enforced against harassers.¹⁴⁴ Only 18.4 percent of respondents said that penalties were enforced against unit commanders or supervisors who tolerated harassment.¹⁴⁵ Further, 85 percent believed offensive speech, derogatory names, jokes, or remarks about homosexuals were tolerated to some extent.¹⁴⁶ Twenty-two percent of service members said the most significant situation of anti-gay harassment they observed was witnessed by someone senior to the victim or perpetrator.¹⁴⁷ Of these respondents, 73 percent stated that the senior person did nothing to immediately stop the harassment.¹⁴⁸

The military’s response to the anti-gay climate surrounding the murder of Private Barry Winchell, a gay soldier at the Fort Campbell Army base, is a powerful example of the lack of accountability for those who engage in or tolerate sexual orientation harassment. On July 5, 1999, Barry Winchell’s fellow soldiers bludgeoned him to death with a baseball bat.¹⁴⁹ Winchell had been victimized by anti-gay harassment for months before his death.¹⁵⁰ An Army Inspector General report found that anti-gay joking and bantering occurred on a regular basis at Fort Campbell.¹⁵¹ Winchell had sought help from the Inspector General at his base, but was turned away.¹⁵²

Official Pentagon statements regarding Private Winchell’s murder revealed a lack of concern regarding anti-gay conduct. For instance, DoD spokesperson Kenneth Bacon

¹⁴¹ 1997 Armed Forces EO Survey, *supra* note 53.

¹⁴² *Id.*

¹⁴³ 1995 Sexual Harassment Study.

¹⁴⁴ MILITARY ENVIRONMENT EVALUATION REPORT, *supra* note 14, at 15.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 11.

¹⁴⁸ *Id.*

¹⁴⁹ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 21.

¹⁵⁰ *Id.*

¹⁵¹ See generally DAIG Special Assessment, *supra* note 95.

¹⁵² SLDN, CONDUCT UNBECOMING, *supra* note 13, at 21.

stated, “I don’t think that you can declare the policy a failure based on one gruesome murder at one Army post.”¹⁵³

Following the murder, Major General Robert Clark, the top of the chain of command at Fort Campbell, failed to hold accountable any person who engaged in or tolerated anti-gay harassment.¹⁵⁴ One of the non-commissioned officers in Winchell’s unit whom the Pentagon labeled as “abusive” was merely “counseled” about “what was wrong with this leadership style,” given an opportunity to correct his behavior, and when he did not, was administratively transferred.¹⁵⁵

A climate of anti-gay hostility persisted after Winchell was killed. Graffiti featuring a picture of a baseball bat with the caption, “fag-whacker,” appeared in public places,¹⁵⁶ a sergeant taught a class on the Don’t Ask, Don’t Tell policy, which he called a “fag briefing,”¹⁵⁷ and another sergeant forced soldiers to march to an anti-gay chant: “Faggot, faggot, down the street. Shot him, shot him, til he retreats.”¹⁵⁸ The number of discharges under the Don’t Ask, Don’t Tell policy following Winchell’s murder increased exponentially: In 2000 and 2001, respectively, 160 and 222 people were discharged from Fort Campbell under the policy, compared to 17 people in 1999.¹⁵⁹ According to SLDN, “[s]ervice members fled the base in an attempt to escape the environment Clark had created. They were literally running for their lives.”¹⁶⁰

As Senator Ted Kennedy (D-Mass.) recently noted, “It seems clear that if General Clark had exercised his responsibility to deal with the serious anti-gay harassment that was prevalent at Fort Campbell during his 17 months of command leading up to the murder of Private Winchell, the murder would probably not have occurred.”¹⁶¹ Following Winchell’s murder, Major General Clark did not issue a single statement condemning anti-gay conduct. In fact, Clark denied its existence. He wrote in an op-ed article in the New York Times, a year after the murder, that, “There is not, nor has there ever been during my times here, a climate of homophobia on post.”¹⁶²

¹⁵³ Kenneth Bacon, Ass. Sec’y of Defense for Public Affairs, *DoD News Briefing*, Dec. 9, 1999.

¹⁵⁴ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 21.

¹⁵⁵ See Chief of the Staff of the Army General Eric Shinseki, *DoD News Briefing*, July 21, 2000.

According to one soldier at Fort Campbell, “People use the term faggot all the time, but, like, if you use the term nigger, if you didn’t get your ass beat right then and there you’d get brought up on an Article Thirty-two [disciplinary action] or a court martial. You’d be fucked. But call a guy a faggot—nothing. They’d laugh at it. That’s just normal.” Thomas Hackett, *The Execution of Private Barry Winchell: The Real Story Behind the ‘Don’t Ask, Don’t Tell’ Murder*, ROLLING STONE, Mar. 2, 2000.

¹⁵⁶ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 22.

¹⁵⁷ See *supra* note 61 and text accompanying.

¹⁵⁸ SLDN, CONDUCT UNBECOMING (2000), *supra* note 14, at 51.

¹⁵⁹ *Id.* at 16.

¹⁶⁰ *Id.* at 22.

¹⁶¹ Senator Kennedy, *Nomination of Maj. Gen. Robert T. Clark to be Lieutenant General*, CONG. REC. S15029 (Nov. 18, 2003).

¹⁶² *Id.*

Additionally, Clark publicly blamed the increase in gay discharges on gays' "seeking an easy way out of the Army."¹⁶³ Despite repeated requests, Clark also refused to meet with Barry Winchell's parents and with SLDN. He failed to implement anti-harassment training, and he refused to allow publication of an ad informing soldiers about anonymous avenues for reporting anti-gay harassment.¹⁶⁴ Rather than being held accountable for these actions and omissions, Clark was rewarded with a nomination to Lieutenant General, the second highest position in the Army.¹⁶⁵

The military's response to Winchell's murder pales in comparison to its reactions to other egregious, bias-motivated incidents, such as the 1995 murder of two African American civilians at Fort Bragg and the recent sexual assaults and harassment in the Air Force Academy.¹⁶⁶ Following the murders at Fort Bragg, General John Keane publicly offered his condolences, held an anniversary remembrance, met with national civil rights groups to discuss ways to improve the racial climate, implemented sensitivity training, and publicly condemned racism.¹⁶⁷ Likewise, following the revelation about sexual assaults, the senior leadership of the Air Force has been held accountable, "from the Commandant of the Academy, to the Secretary of the Air Force."¹⁶⁸

According to one commentator, "Racist behavior in the Army effectively terminates one's career."¹⁶⁹ Likewise, Under Secretary of Defense for Personnel and Readiness, Dr. David Chu, has stated, "to put it as bluntly as possible, [sexual harassment is] a career killer and we make sure that we enforce those standards." Notwithstanding its assertions to the contrary, "[t]he Pentagon has not made the same commitment regarding anti-gay harassment."¹⁷⁰

A. Summary

The above examination of the military's policies and practices regarding enforcement of its harassment prohibitions contradicts the military's assertion that it addresses anti-gay harassment to the same extent as it addresses racial and sexual harassment. Rather, with respect to six areas of harassment enforcement—1) training and education; 2) measurement; 3) reporting; 4) processing of complaints; 5) anti-retaliation; and 6) accountability—the bans on racial and sexual harassment are much more meaningfully enforced than the ban on sexual orientation harassment.

¹⁶³ Elizabeth Becker & Katharine Q. Steelye, *Policy on Gays Part of the Drill at Army Base*, N.Y. TIMES, Feb. 14, 2000, at A1.

¹⁶⁴ SLDN, CONDUCT UNBECOMING (2000), *supra* note 14, at 54.

¹⁶⁵ SLDN, CONDUCT UNBECOMING (2003), *supra* note 13, at 21.

¹⁶⁶ Kennedy, *supra* note 161.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Charles Moskos & John Sibley Butler, *Lessons on Race from the Army*, CHI. TRIB., July 26, 1998, at C15.

¹⁷⁰ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 5.

I. Explaining the Military's Failure to Meaningfully Enforce the Ban on Anti-Gay Harassment: The Practical and Conceptual Problems With Regulating Harassment in a Discriminatory Institution

This Part offers an explanation for the disparity in the military's enforcement efforts with respect to racial and sexual harassment and sexual orientation harassment. It argues that the ban on anti-gay harassment is not meaningfully enforced because it is practically and conceptually incompatible with Don't Ask, Don't Tell, a policy of outright discrimination against gay men and lesbians.

A. Practical Impediments to Curbing Anti-Gay Harassment in the Context of Don't Ask, Don't Tell

The Don't Ask, Don't Tell policy prevents the military from instituting certain practices that would give meaning to the harassment ban, such as measurement, reporting, and anti-retaliation protection.

First, Don't Ask, Don't Tell's prohibition on asking service members' sexual orientation bars the military from effectively measuring the incidence of anti-gay harassment, evaluating gay service members' experiences with harassment, and assessing how the military responds to harassment complaints. As legal scholar Tobias Wolff has noted, "Don't Ask, Don't Tell has thus prevented the military itself from obtaining what is arguably the most important datum in assessing the impact of the policy upon unit cohesion: the extent to which gay soldiers experience harassment or abuse and feel safe in seeking redress when they do."¹⁷¹

This problem affected both the Pentagon's military-wide survey regarding anti-gay harassment and the Army Inspector General's study of the climate at Fort Campbell, where Private Winchell was murdered. When asked how confident he was that the IG report offered an accurate assessment of the climate with respect to anti-gay harassment, General Shinseki conceded, "I would have no way of answering that, because, as you know, by the policy, there's no way for us to go on and decide who might be, you know, inclined homosexually or not. . . . But . . . hopefully there was a cross-section that represented the population there at Fort Campbell."¹⁷²

Second, Don't Ask, Don't Tell deters the reporting of sexual orientation harassment because reports of anti-gay conduct could lead to the discovery of the victim's sexual orientation, warranting her discharge from the military. "Any policy that includes

¹⁷¹ Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell* (forthcoming 2004). While the Don't Ask, Don't Tell policy prevents the military from fully evaluating the extent of harassment among currently serving members, it does not bar the military from tracking and addressing harassment against service members who have already revealed their sexual orientation and are in the process of being discharged. As noted above, the military chooses not to track the incidence of such harassment. See *supra* note 88 and text accompanying.

¹⁷² See *DoD News Briefing*, July 21, 2000, *supra* note 157.

penalties for revealing one's homosexual status may further discourage reporting."¹⁷³ Victims of anti-gay harassment who report such conduct must refrain from stating they are gay. As a Pentagon spokesperson explained, "They can get into the details of the nature of the harassment, but there is no need for them to say, 'And I am homosexual.' They could say, 'Someone harassed me and said I was homosexual.' That's very different from saying, 'And I am homosexual.'"¹⁷⁴ Even if a service member refrains from revealing her sexual orientation, she cannot be sure that complaining about harassment will not lead to discovery of her sexual identity. Although a DoD memorandum states that reports of harassment do not constitute credible information justifying an investigation into whether the victim is gay, it is likely that any investigation of anti-gay harassment would reveal this information. Thus, the only victims who can feel safe reporting harassment are straight service members wrongly perceived to be gay.

For the same reason, effective protection against retaliation is impossible within the confines of Don't Ask, Don't Tell because reporting harassment could lead to the ultimate form of retaliation for gay and lesbian service members: discharge from the military.

In addition to impeding effective enforcement of the ban on anti-gay harassment, the Don't Ask, Don't Tell policy also hinders enforcement of the military's prohibition on sexual harassment. Evidence indicates that the military's Don't Ask, Don't Tell policy excluding homosexual service members aggravates the incidence of sexual harassment because of "lesbian-baiting"; that is, the reporting of woman as lesbian if they refuse a harasser's sexual advances or report sexual harassment.¹⁷⁵ Commentators have suggested that lesbian-baiting, a form of sexual and sexual orientation harassment, explains why women are disproportionately targeted under Don't Ask, Don't Tell.¹⁷⁶ The anti-gay policy also may perpetuate sexual harassment by encouraging male service members to attempt to prove that they are straight by harassing women.¹⁷⁷

¹⁷³ RAND, *SexualOrientation and U.S. Military Personnel Policy: Options and Assessment* (1993), at 280-81.

¹⁷⁴ See DoD News Briefing, July 21, 2000, *supra* note 157.

¹⁷⁵ SLDN, CONDUCT UNBECOMING, *supra* note 13, at 44; see generally Michelle M. Benecke & Kirstin S. Dodge, *Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARVARD WOMEN'S L. J. 215 (1990); Christin M. Damiano, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under "Don't Ask, Don't Tell, Don't Pursue,"* 7 AM. U.J. GENDER & SOC. POL'Y 499 (1998-1999).

¹⁷⁶ Women are discharged at almost twice the rate of their presence in the military. SLDN, CONDUCT UNBECOMING, *supra* note 13, at 43-44.

¹⁷⁷ See Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOKLYN L. REV. 1141, 1154 (1997) (quoting one service member as stating, "If you didn't want to head down there and ogle the bare-breasted women with all the other guys, people would ask questions. Sometimes you could quietly sneak away, but, you know, you couldn't always do that, so you had to make like you were enjoying it").

B. The Conceptual Problem of Enforcing the Anti-Harassment Ban While Simultaneously Enforcing the Discriminatory Don't Ask, Don't Tell Policy

In addition to the practical impediments to curbing harassment posed by Don't Ask, Don't Tell, the policy excluding openly gay men and lesbians from the military also poses a fundamental conceptual barrier to eradicating anti-gay harassment. The anti-gay harassment ban cannot be meaningfully enforced because it is legally incoherent to prohibit anti-gay harassment within an institution that practices outright discrimination against gay men and lesbians.

1. The Harassment-Discrimination Link: Harassment as a Form of Discrimination

The legal doctrine of harassment regards harassment as a form of discrimination. Courts and commentators first recognized racial and sexual harassment as unlawful discrimination because they found that such conduct produces discriminatory effects for racial minorities and women. Racial and sexual harassment, like other discriminatory practices, impedes the advancement of racial minorities and women in the workplace, and sends a message to members of these groups that they do not belong. Thus, banning harassment furthers the goal of ending discrimination in the workplace.

Since the early 1970s, civilian courts have regarded harassment as a form of discrimination barred under Title VII of the Civil Rights Act.¹⁷⁸ The principle that racial harassment constitutes race discrimination can be traced back to the 1971 case of *Rogers v. EEOC*.¹⁷⁹ The principal opinion in *Rogers* held that Title VII was broad enough to “sweep[] within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.”¹⁸⁰ The opinion noted that racial harassment produces discriminatory harms that Title VII's ban on race discrimination was meant to prevent: “One can readily envision working environments so heavily polluted with discrimination as to destroy completely the

¹⁷⁸ Title VII, 42 U.S.C. 2000e-2(a), is the centerpiece of civil rights law. It provides in pertinent part:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

¹⁷⁹ *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

¹⁸⁰ *Id.*

emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.”¹⁸¹

In the mid-1970s, lawyers, activists, and academics urged the judiciary to extend this theory of racial harassment to sexual harassment, arguing that it is a form of prohibited sex discrimination.¹⁸² Feminist legal theorist Catherine MacKinnon argued that sexual harassment is sex discrimination because it subordinates women to men, expressing and reinforcing their social inequality.¹⁸³ According to MacKinnon and others, “workplace harassment keeps women subordinate—segregating them in ‘women’s work,’ keeping their salaries low, and impeding their advancement—and thereby reinforces a patriarchy of female subordination to male power.”¹⁸⁴

In 1977, a federal appellate court in Washington, D.C. became the first to adopt this argument, holding that sexual harassment was an actionable form of sex discrimination barred under Title VII.¹⁸⁵ About a decade later, the Supreme Court, in *Meritor Savings Bank v. Vinson*, followed the D.C. Circuit’s lead, holding that “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”¹⁸⁶ The Court stated that Title VII “affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”¹⁸⁷

More recently, in the 1993 case of *Harris v. Forklift Systems*, the Court explained that harassment is an actionable form of discrimination because it produces both material

¹⁸¹ *Id.* The Equal Employment Opportunity Commission (EEOC) defines racial harassment as an unlawful form of race discrimination:

Harassment on the basis of race and/or color violates Title VII. Ethnic slurs, racial “jokes,” offensive or derogatory comments, or other verbal or physical conduct based on an individual’s race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment or interferes with the individual’s work performance.

See EEOC, *Race/Color Discrimination*, available at <http://www.eeoc.gov/types/race.html> (last visited Jan. 2, 2004).

¹⁸² Reva B. Siegel, *Introduction to DIRECTIONS IN SEXUAL HARASSMENT LAW* 9 (Catharine A. MacKinnon & Reva B. Siegel, eds. 2004).

¹⁸³ CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 77-81, 174 (1979).

¹⁸⁴ William N. Eskeridge, Jr., *Theories of Harassment “Because of Sex,”* in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, at 160; see also Kathryn Abrams, *Subordination and Agency in Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, at 114 (“Sexual harassment, as analyzed by MacKinnon and others, is a practice that enacts the subordination of women in the workplace.”).

¹⁸⁵ See *id.*; *Barnes v. Costle*, 561 F.2d 983, 995 (D.C. Cir. 1977). The concurring opinion emphasized that “We are not here concerned with racial epithets or confusing union authorization cards, which serve no one’s interest, but with social patterns that to some extent are normal and expectable.” 561 F.2d at 1001 (MacKinnon, J., concurring).

¹⁸⁶ 477 U.S. 57, 64 (1986).

¹⁸⁷ *Id.* at 65. Since *Vinson*, courts have drawn on sexual harassment cases to develop racial harassment doctrine. See CATHARINE A. MACKINNON, *SEX EQUALITY: SEXUAL HARASSMENT* 960 (2004).

and expressive discriminatory harms for members of protected groups in the workplace:

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.¹⁸⁸

Doctrinally, then, harassment is regarded as a form of discrimination because harassment, like other discriminatory practices, disables members of protected social groups from achieving equality in the workplace and sends a message of exclusion to the victims based on their membership in such groups.

Importantly, harassment law targets not just conduct that expresses hostility toward individuals as individuals, but conduct that subordinates individuals as members of social groups protected from discrimination. For this reason, courts often point out that "Title VII is not a general civility code." As one court explained,

Although Title VII "protects employees from improper discriminatory intimidation[,] it does not reach so far as to protect plaintiffs from undiscriminating intimidation by bullish and abusive supervisors." Rather, plaintiff must produce evidence that she was treated differently than others because of her sex.¹⁸⁹

Thus, harassment law is not a mandate that people be nice to one another. Rather, what justifies a ban on harassment is the law's overarching antidiscrimination mandate protecting social groups. As MacKinnon notes, sexual harassment claims are "made not by individuals as such (as they were in tort precursors)¹⁹⁰ but by individuals in their capacity as members of groups, and no longer of 'bad' behavior but of practices integral to a social system of gendered group-based inequality that produces injuries of second-class citizenship."¹⁹¹ Because the material and expressive harms produced by harassment are precisely what antidiscrimination law seeks to prevent—relegating members of social groups to second-class citizenship—courts have held that racial and sexual harassment are coherently proscribed under broader mandates against race and sex discrimination.

¹⁸⁸ *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993).

¹⁸⁹ *Bennette v. Cinemark U.S.A., Inc.*, 2003 WL 22966117 (W.D.N.Y. Nov. 17, 2003).

¹⁹⁰ "Tort precursors" refers to laws that provide a cause of action for hostile treatment regardless of the victim's membership in a social group, such as intentional infliction of emotional distress.

¹⁹¹ Catharine A. MacKinnon, *Afterward* to DIRECTIONS IN SEXUAL HARASSMENT LAW 678.

Consistent with this doctrine, courts have held that the lack of an overarching ban on anti-gay discrimination under Title VII bars the recognition of a cause of action for anti-gay harassment.¹⁹² These courts have held that harassment is only actionable when it constitutes a form of prohibited discrimination. Because Title VII does not list sexual orientation as a protected class, like race and sex, courts have refused to find a cause of action for sexual orientation harassment. As a result, some commentators have urged courts to recognize anti-gay harassment as a form *sex* discrimination, since this form of discrimination is prohibited under Title VII.¹⁹³ These theorists have noted the connections between homophobia and sexism:

[I]t is clear that without sex discrimination, there would not appear to be much need for homophobia. Without those gender hierarchies which are at the core of sex discrimination, there would be no need to penalize those men and women who do not conform to the notion that sexuality must be hierarchical—men and women whose very existence threatens the power imbalances so crucial to maintaining sexual inequality.¹⁹⁴

Although the Supreme Court in the 1998 case of *Oncale v. Sundowner Offshore Services* held that same-sex harassment may constitute sex discrimination in certain circumstances,¹⁹⁵ courts have largely rejected the notion that anti-gay harassment is sex discrimination.¹⁹⁶ In fact, some courts have attempted to discern the precise

¹⁹² MacKinnon, *SEX EQUALITY*, *supra* note 181, at 939; *see also* Carreno v. Local Union No. 226, 54 Fair Empl. Prac. Cas. (BNA) 81, 81-83 (D. Kan. 1990) (holding that harassment of a gay man, including statements calling him “Mary” and a “faggot” was not actionable as sex discrimination because it was based on his homosexuality, not his sex); Dillon v. Frank, 952 F.2d 403, 1992 WL 5436, at **5-7 (6th Cir. 1992) (holding harassment of plaintiff based on coworker’s belief that he was gay was not actionable as sex discrimination).

¹⁹³ *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (“[I]n contemporary American society, discrimination against lesbians and gay men reinforces the hierarchy of males over females and thus is wrong because it oppresses women.”); Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 24-25 (1992) (“[A]ntigay harassment . . . is ‘targeted’ at women because it reinforces stereotypes about appropriate gender roles. The reinforcement of stereotypes is antithetical to the purposes of Title VII. The Supreme Court has held that employment decisions based upon stereotyped gender classifications are unlawful under Title VII. Thus, even more than most sexual harassment, that which is directed at gay men and lesbians in the workplace fits the paradigm of sex discrimination, for it is based upon the ultimate stereotype of proper sexual roles.”).

¹⁹⁴ Christopher N. Kendall, *Gay Male Liberation Post Oncale*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* at 230.

¹⁹⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[N]othing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”).

¹⁹⁶ *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979).

motivation for harassing conduct, holding that conduct motivated by anti-gay animus is not actionable, but conduct motivated by sexism is.¹⁹⁷

In sum, as a matter of legal doctrine, harassment is a form of discrimination. Thus, a prohibition on harassment is only coherent when it forms part of an overarching mandate against discrimination.

2. The Legal Incoherence of Banning Anti-Gay Harassment While Enforcing Don't Ask, Don't Tell

Consistent with civilian harassment doctrine, the military's policies banning racial and sexual harassment are connected to broader mandates against race and sex discrimination. As noted above, the ban on racial harassment is subsumed within the larger prohibition on race discrimination.¹⁹⁸ Likewise, the military's policy against sexual harassment explicitly defines sexual harassment as "a form of sex discrimination."¹⁹⁹

Civilian courts have made clear that harassment cannot be banned in the *absence* of an anti-discrimination mandate. Thus, the ban on sexual orientation harassment is incoherent because the military not only lacks an anti-discrimination policy but enforces a policy of outright discrimination against gay and lesbian service members. Harassment prohibitions seek to prevent discriminatory effects—relegating members of social groups to second-class citizenship, impeding their advancement, and sending a message of nonbelonging. But these harms are precisely the effects of Don't Ask, Don't Tell, which not only impedes the advancement of gay men and lesbians in the military, but provides for their discharge as soon as they reveal they are gay.

Don't Ask, Don't Tell also serves an expressive function, serving as a symbol of gay men and lesbians' subordination.²⁰⁰ As Kenneth Karst has noted about the previous iteration of the ban on gays in the military, "The policy is an authoritative statement

¹⁹⁷ Jeremy S. Barber, *Re-orienting Sexual Harassment: Why Federal Legislation is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 496-97 (Dec. 2002) (noting that "the cases are fraught with confusion over how to determine whether an employee is harassed because of his or her sexual orientation, or rather because of his or her sex" and recommending that "to resolve [this] judicial confusion . . . and to protect both heterosexual and homosexual employees from improper workplace harassment, Congress needs to pass legislation that prohibits employment discrimination on the basis of both actual and perceived sexual orientation.").

¹⁹⁸ Exec. Order 9981 (July 26, 1948); Dep't of Defense Human Goals Charter, *supra* note 22; DoD Directive 1350.2; *see also* Air Force Pamphlet 36-270, "Discrimination and Sexual Harassment," at 19 (Feb. 28, 1995).

¹⁹⁹ 10 U.S.C. § 1561; *see also* DoD Directive 1350.2, encl. 2 (defining sexual harassment as "A form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . .").

stigmatizing homosexuality. Every discharge of a gay soldier is an official degradation ceremony, and invitation to the troops—and especially to very young men—to participate in further acts of group subordination.”²⁰¹ Anti-gay harassment is consistent with the discrimination inherent in Don’t Ask, Don’t Tell, because, like the policy itself, harassment subordinates gay men and lesbians and sends a powerful message of exclusion.²⁰² As a 1993 study, commissioned by the Pentagon, concluded, “one of the most important factors in effecting a change in policy and minimizing negative consequences such as anti-homosexual violence is a clear message from leadership of zero tolerance for such violence and an assurance that those convicted of committing it will be severely penalized.”²⁰³

Meaningful enforcement of the anti-gay harassment ban would call into question the discrimination inherent in Don’t Ask, Don’t Tell. If it is unacceptable to impede gay men and lesbians’ advancement or to send them a message of exclusion through harassment, why is it acceptable to eject gay men and lesbians from the military altogether through Don’t Ask, Don’t Tell? Simultaneous enforcement of Don’t Ask, Don’t Tell and the ban on harassment sends service members mixed signals—Don’t Ask, Don’t Tell perpetuates the notion that gay men and lesbians deserve to be treated as second-class citizens, while the harassment ban sends the message that gay men and lesbians warrant equal treatment as members of a protected social group.²⁰⁴

This tension is revealed in the services’ repeated references to the distinction between perceived and actual homosexuality, implying that harassment based on actual homosexual orientation is justified, whereas harassment based on perceived (presumably falsely) homosexuality is unacceptable. This contradiction is also apparent in the military’s reluctance to define harassment. If harassment is defined as a form of discrimination, whose wrong lies in its subordination of gay men and lesbians, any articulation of the Don’t Ask, Don’t Tell policy would potentially qualify

²⁰⁰ Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 509 (1991).

²⁰¹ *Id.* at 546. Martha Chamallas has suggested that the exclusion of women in combat serves a similar expressive function in the subordination of women in the military: “[T]he combat exclusion plays a symbolic or expressive role. As long as it is in place, the prototype of the soldier remains the male hand-to-hand combatant, reinforcing the view that ‘to be a ‘real soldier,’ a fighter, one must be a man.’” Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 329 (1998).

²⁰² See *Sims v. Montgomery County Comm’n*, 766 F. Supp. 1052 (M.D. Ala. 1990) (finding that “the department has a policy of discouraging women from remaining in the department and seeking advancement” and that “sexual harassment furthered this policy by making it as uncomfortable and unpleasant as possible for women to remain officers in the department”).

²⁰³ RAND, *supra* note 173, at 280.

²⁰⁴ The Pentagon has failed to explain this tension. In 2000, a reporter asked Undersecretary of the Air Force Carol DiBattiste: “Is there an internal contradiction that . . . you’re sending a message of ‘treat these people with respect, people who may be perceived to be gay, people who may be gay; treat all people with respect, but these are the very same people that, if we find out they’re gay, we’ll take them out of the service?’” DiBattiste replied: “It’s not an internal contradiction, but it is a difficulty in putting this together.” See *DoD News Briefing*, July 21, 2000, *supra* note 157.

as harassment, as would many statements made by members of Congress and Pentagon officials during the debate over whether to lift the ban on gays in the military. For instance, Representative Bob Dornan (R-Cal.) commented, “And you gentlemen all know that the best of our troops would never take orders from someone who likes taking it up the bum.”²⁰⁵

Furthermore, effective enforcement of the anti-gay harassment ban would undermine a primary assumption underlying Don’t Ask, Don’t Tell: that straight service members would engage in violence against gay and lesbian service members, and that the military would be incapable of controlling such violence. DoD officials and members of Congress contended that integration would lead to violence and harassment against gay and lesbian service members. For instance, Senator Sam Nunn (D-Ga.), chair of the Senate Armed Services Committee, stated that he would “fear for the lives of people in the military themselves” if the ban were lifted too quickly.²⁰⁶ Marine Corps Colonel Frederick Peck testified that a main reason he would not want his gay son to join the Marines was fear of violence: “I would be very fearful that his life would be in jeopardy from his own troops. . . . Fratricide is something that exists out there, and there are people who would put my son’s life at risk in our own armed forces.”²⁰⁷ One Army official testified, “There is a large percentage of individuals who have a propensity toward violence in that regard.”²⁰⁸ Likewise, a spokesperson for the National Guard asserted that the “sanctioned integration of homosexuals . . . will create explosive situations both in the work and living environments.”²⁰⁹

Significantly, supporters of the ban further argued that the military would be unable to control straight service members’ anti-gay hostility.²¹⁰ As noted above, the military working group that proposed the Don’t Ask, Don’t Tell policy explicitly recommended against sensitivity training, arguing that straight service members’ anti-gay views could not be changed.²¹¹ Similarly, an official statement by the U.S. Army explained, “Heterosexual animosity toward known homosexuals can cause latent or even overt hostility. . . . [While] this animosity is unfortunate, it is a fact of society at large, and cannot be changed by the military.”²¹² Effective deterrence and punishment of anti-gay harassment would undermine this rationale for maintaining a ban on gays in the military, by demonstrating that the military *can* change anti-gay hostility.²¹³

²⁰⁵ Statement of Representative Bob Dornan, *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the House Committee on Armed Services*, 103d Cong. (July 21-23, 1993), at 378.

²⁰⁶ Susan Baer, *Clinton is Urged to Slow Down on Gays in the Military*, *BALT. SUN*, Nov. 16, 1992, at 1A.

²⁰⁷ RAND, *supra* note 173, at 272.

²⁰⁸ Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Committee on Armed Services, 103rd Cong. (1993) (May 4, 1993), at 170-71.

²⁰⁹ *Id.* (May 5, 1993).

²¹⁰ See James Allon Garland, *The Low Road to Violence: Governmental Discrimination As a Catalyst for Pandemic Hate Crime*, 10 *LAW & SEXUALITY* 1, 57 (2001).

²¹¹ See *supra* notes 45-46 and text accompanying.

²¹² See *supra* note 203.

²¹³ Garland, *supra* note 210, at 58 (“[T]he DoD’s current opposition to anti-gay violence is . . . a confession that the DoD could have controlled, or attempted to control, decades of antigay violence committed by

In sum, to effectively and coherently condemn anti-gay harassment would entail condemning anti-gay discrimination, including Don't Ask, Don't Tell. As long as the military enforces a policy of outright discrimination against gay men and lesbians, it will be unable to eradicate anti-gay harassment.²¹⁴

3. Evaluating Possible Responses to the Incoherence Argument

a. The Harassment Ban as Code of Conduct Rather than Antidiscrimination Tool

One potential response to this observation is that the military's ban on harassment is not linked to the civilian-law concept of group-based discrimination but rather to the military's code of conduct for service members. Civilian courts often point out that harassment law is not intended to be "a general code of civility" or a code of conduct.²¹⁵ However, the military regularly imposes codes of conduct on service members. The military thus might argue that the ban on anti-gay harassment is intended to further these codes, not any policy against anti-discrimination.

Still, the military's ban on anti-gay harassment must invoke antidiscrimination principles in order to avoid redundancy with previously existing regulations that already apply generally to hostile conduct. The Uniform Code of Military Justice (UCMJ) contains a variety of generally applicable provisions that could be used to address such behavior. For instance, the UCMJ bans cruelty and maltreatment,²¹⁶

service members." The RAND report noted that the military is uniquely able to control anti-gay harassment: "the military setting, with its hierarchical culture and its broad control of many aspects of soldiers' lives and behavior, may provide opportunities to prevent anti-homosexual interpersonal violence that are not as feasible in the civilian world."). RAND, *supra* note 173, at 279. Likewise, Garland has argued, "In light of the military's ability to overcome cohesion threats from integration African Americans or women into service, the only justification for tolerating cohesion threats posed by heterosexual dislike of lesbians and gay men is the assumption that gay men and lesbian service members are especially deserving of differential treatment, that gay and lesbian identity is not fit for the image of the United States and its military at all." Garland, *supra* note 204, at 72.

²¹⁴ This is not to say that the military cannot take measures to curb anti-gay harassment in the meantime. For instance, as the Army Inspector General recognized, "Standardized procedures for processing all complaints of harassment would assist agencies and commanders in conducting thorough and fair investigations into allegations of harassment irrespective of the basis for the harassment." *DAIG Special Assessment*, *supra* note 94.

²¹⁵ See, e.g., *Bennette v. Cinemark U.S.A., Inc.*, 2003 WL 22966117 (W.D.N.Y. Nov. 17, 2003).

²¹⁶ UCMJ Art. 93 (providing for punishment of any person guilty of "cruelty toward, or oppression or maltreatment of, any person subject to his orders"). This prohibition applies where the maltreatment, "viewed objectively, results in physical or mental pain or suffering and is abusive or otherwise unwarranted, unjustified or unnecessary for any lawful purpose." *United States v. Hanson*, 30 M.J. 1198

provoking speeches or gestures,²¹⁷ conduct unbecoming an officer,²¹⁸ and disruption of good order and discipline.²¹⁹ The ban on harassment adds nothing to these provisions aside from proscribing behavior motivated by animus toward gay men and lesbians, a concept grounded in group-based antidiscrimination law. Moreover, the military's statements likening the ban to prohibitions on racial and sexual harassment bring to mind a conception of gay men and lesbians as a social group that deserves antidiscrimination protection.

b. The Unit Cohesion Rationale

Another response to the incoherence argument is that the military's ban on anti-gay harassment *is* coherent in that a concern for unit cohesion underlies both the harassment ban and the exclusion of openly gay and lesbian service members. The primary rationale offered for Don't Ask, Don't Tell is that the presence of openly gay men and lesbians in the military erodes unit cohesion.²²⁰ Similarly, military officials have justified the ban on anti-gay harassment by arguing that such conduct degrades unit cohesion.²²¹

The unit cohesion rationale fails to reconcile the contradiction in the military's policies, however, because it obscures the fact that unit cohesion is only eroded by the presence of known homosexuals if straight service members respond to their presence with anti-gay harassment. That is, in reality, it is *harassment* that diminishes unit cohesion, not the mere presence of known gay men and lesbians. Indeed, where gay service members have been reinstated in the military pursuant to court order or board determinations, they have been welcomed with open arms, and unit cohesion has not been eroded whatsoever.²²² Further, the DoD's insistence that it can enforce the ban

(A.F.C.M.R.), *aff'd*, 32 M.J. 309 (C.M.A. 1990). Cruelty and maltreatment include assaults and improper punishment.

²¹⁷ 10 U.S.C. 917 (prohibiting the use of "provoking or reproachful words or gestures towards any other person").

²¹⁸ See UCMJ Art. 133 (providing for punishment of a commissioned officer, cadet, or midshipman for "conduct unbecoming an officer and a gentleman" or gentlewoman; see *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd*, 34 M.J. 112 (C.M.J. 1992)).

²¹⁹ The "General Article" of the UCMJ, Article 134, allows for the prosecution of service members for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

²²⁰ 10 U.S.C. § 654 ("The presence in the Armed Forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."); HALLEY, *supra* note 9, at 31 (noting that the most frequently expressed rationale for the policy was the need for unit cohesion).

²²¹ See, e.g., Undersecretary of Defense for Personnel and Readiness Bernard D. Rostker, *DoD News Briefing*, July 21, 2000 ("When individual dignity and respect are violated, mutual trust and cohesion erodes. Harassment of any kind violates individual dignity and tears at the fabric of this trust and the cohesion in our Army. It will not be tolerated for any reason."); see also *Anti-Harassment Action Plan*, *supra* note 16 (stating that harassment undermines unit cohesion).

²²² SLDN, CONDUCT UNBECOMING, *supra* note 13; see also *Gay Soldier Returns From Middle East: Reports Acceptance From Peers But Hardships From "Don't Ask, Don't Tell,"* ASCRIBE NEWS, Oct. 15, 2003 (quoting gay soldier, most of whose unit knew he was gay, as saying, "It was a non-factor. Especially in a

on anti-gay harassment by requiring “service members to work with others perceived to be gay . . . has effectively wiped out claims that unit cohesion is threatened by the presence of known gay service members.”²²³ On the other hand, harassment targeted at gay men and lesbians does erode the cohesiveness of a unit, disrupting good order and discipline and weakening victims’ commitment to an institution that treats them as second-class citizens.²²⁴

As demonstrated above, the military fails to meaningfully enforce its ban on anti-gay harassment. This failure to address behavior that demonstrably erodes unit cohesion, juxtaposed against the military’s success in targeting that which demonstrably does not (the mere presence of gay and lesbian service members), undermines any contention that a consistent goal of preserving unit cohesion underlies the military’s policies.

c. Harassment as Asking or Telling

Another way the military could attempt to reconcile its ban on harassment with the Don’t Ask, Don’t Tell policy is by arguing that harassment is proscribed because it often constitutes a hostile way of “asking” and/or leads gay and lesbian service members to “tell.” Indeed, harassment often does simultaneously violate the “Don’t Ask” component of Don’t Ask, Don’t Tell. Gay service members often are asked harassing questions about their sexual orientation, such as, “Are you a fucking faggot?”²²⁵ Additionally, the bulk of “Don’t Tell” violations are the direct result of anti-gay harassment; that is, gay and lesbian service members revealing to their commanders that they are gay in order to escape a climate of anti-gay harassment.²²⁶

The argument that the military’s policy is coherent because harassment is targeted as a violation of Don’t Ask, or Don’t Tell might be persuasive if the military actually enforced violations of Don’t Ask or Don’t Harass. But the record is bare of evidence that Don’t Ask violations are punished,²²⁷ and as is demonstrated above, the same is true with respect to violations of Don’t Harass.²²⁸ Meanwhile, the military vigorously enforces violations of Don’t Tell, by discharging gay people from the military as soon as they

combat situation, it’s really the last thing on anyone’s mind. It’s just a question of doing your job.”). RAND, *supra* note 173, at 273 (“We conclude that the evidence does not allow us to make any firm predictions about the likelihood of increased anti-homosexual violence if homosexuals were allowed to serve.”).

²²³ Garland, *supra* note 210, at 69. Garland points out that “units are not falling apart” even though the Don’t Ask, Don’t Tell policy has communicated to straight service members that they may be working along side closeted gay men and lesbians. *See id.* at 70.

²²⁴ *See* SLDN, CONDUCT UNBECOMING, *supra* note 13.

²²⁵ *See* HALLEY, *supra* note 9, at 50.

²²⁶ *See supra* note 86 and text accompanying.

²²⁷ HALLEY, *supra* note 9, at 50 (“If ‘don’t ask’ is a right, it is a right without a remedy. Servicemembers who have been asked have no recourse.”); SLDN, CONDUCT UNBECOMING, *supra* note 13 (noting that don’t ask violations are not punished).

²²⁸ *See* Part II, *supra*.

reveal their sexual orientation. Nearly 10,000 people have been discharged in ten years of enforcing the policy, and the vast majority of these service members were fired because they stated they were gay.²²⁹ Thus, although the military might assert that it prohibits anti-gay harassment because such conduct constitutes hostile “asking” and/or leads to “telling,” the fact that the military only punishes the telling, and not the asking or the harassing that leads to the telling, undermines this claim.

Conclusion

In the wake of the murder of Private Barry Winchell and reports of pervasive anti-gay harassment in the armed forces, Pentagon officials have stated that the military is equally as committed to ending harassment against gay and lesbian service members as it is to eradicating racial and sexual harassment. However, an examination of the military’s policies and practices addressing these three forms of harassment—with regard to 1) training and education; 2) measurement; 3) reporting; 4) processing of complaints; 5) anti-retaliation; and 6) accountability—belies the military’s assertion. Rather, the evidence shows that the military’s efforts to address anti-gay harassment are far less meaningful than its efforts to address racial and sexual harassment.

This paper suggests that the military’s failure to meaningfully enforce its ban on anti-gay harassment stems from both practical and conceptual problems with enforcing a harassment prohibition within an institution that enforces a policy of outright discrimination. The Don’t Ask, Don’t Tell policy, excluding openly gay and lesbian service members from the military, poses practical barriers to enforcement of the military’s ban on sexual orientation harassment. Furthermore, because as a legal matter harassment prohibitions further antidiscrimination goals, it is conceptually incoherent to enforce a ban on harassment while simultaneously enforcing the discriminatory Don’t Ask, Don’t Tell policy.

Thus, the anti-gay harassment ban is both practically and conceptually incompatible with Don’t Ask, Don’t Tell. Yet, the fact that the military nonetheless asserts a commitment to eradicating anti-gay harassment—and that in doing so, it compares gay men and lesbians to racial minorities and women—is significant in its own right. Both the harassment ban and the military’s rhetorical comparison invoke a conception of sexual minorities as a social group deserving of protection from government-sponsored discrimination. Although this conception has not yet been fully recognized by equal protection jurisprudence, both the Supreme Court and public opinion are increasingly heading in this direction.²³⁰

²²⁹ See Files, *supra* note 6.

²³⁰ Recent Supreme Court decisions have held that anti-gay animus alone is an illegitimate basis for government action discriminating against gay men and lesbians. See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). According to a Wall Street Journal/NBC poll, at least 70 percent of Americans support gays in the military. Ronald G. Shafer, *The Wall Street Journal/NBC News Poll*, WALL STREET J., at A1: “Don’t Care: The public, by 74% to 22%, favors allowing gays to serve in the military.”

The military must live up to its promise of protecting gay men and lesbians from discriminatory harassment. The only meaningful and coherent way for the military to eradicate such conduct is to repeal Don't Ask, Don't Tell and fully affirm the right of gay and lesbian service members to serve their country, free from all forms of discrimination.²³¹

²³¹ It is true that such a recognition would place the military ahead of civilian law, which has not yet fully protected gay men and lesbians from discrimination. However, this would not be the first time that the military has successfully led the nation in a battle against discrimination. President Truman's executive order ending racial segregation in the military preceded *Brown v. Board of Education* by six years. Exec. Order No. 9981 (1948); *Brown v. Board*, 347 U.S. 483 (1954); *see also* *United States v. Hurlum*, 15 M.J. 261, 266 n.3 ("Even before some other institutions in our society, the Armed Services committed themselves to the elimination of racial discrimination.").