The Effects of Repealing Don’t Ask, Don’t Tell:
Is the Combat Exclusion the Next Casualty in the
March Toward Integration?

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In many ways, the U.S. military represents a remarkable example of an equal opportunity institution. Commentators widely acknowledge, for example, that the military was one of the first bastions of racial integration in American society.\(^1\) Likewise, the military has arguably outpaced even the private sector in

\(^1\) See David J. Armor & Curtis L. Gilroy, Changing Minority Representation in the U.S. Military, 36 Armed Forces & Society 223, 226 (2010) (noting that by 1954, “the military had moved . . . far ahead of civilian society in racial equality” and that “[t]he military offered opportunities [for
promoting women into meaningful leadership positions.\textsuperscript{2} With the recent repeal of the policy colloquially known as Don’t Ask, Don’t Tell (DADT),\textsuperscript{3} the military is once again opening its ranks to those seeking an opportunity to develop leadership skills, obtain occupational expertise, and express their patriotism and love of country by serving in the armed forces. In short, despite “all of its failures, the military is one of the great equalizers in America.”\textsuperscript{4}

Notwithstanding these advances, at least one significant barrier remains. While women now comprise approximately 15% of the active fighting force,\textsuperscript{5} they are still technically prohibited from serving in roughly two-hundred military occupations related to either direct ground combat or combat support.\textsuperscript{6} A wide variety of explanations—from perceived challenges regarding unit cohesion to a supposed lack of physical prowess—have been offered to justify the ban on women serving at the tip of the spear.\textsuperscript{7} Increasingly, though, these explanations have been challenged as “confer[ring] on women a different legal status than men.”\textsuperscript{8}

Importantly, many of the arguments offered to support the prohibition against

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African-Americans]—training, steady employment, higher earnings, and leadership—that were simply unavailable in the civilian sector”); Mario L. Barnes, “But Some of [Them] Are Brave”: Identity Performance, the Military, and the Dangers of an Integration Success Story, 14 Duke J. Gender L. & Pol’y 693, 694 (2007) (suggesting that President Harry Truman’s military integration order was “a harbinger for increased civil rights for people of color, inside and outside the military”); Maia Goodell, Physical-Strength Rationales for De Jure Exclusions of Women from Military Combat Positions, 34 Seattle U. L. Rev. 17, 18 (2010) (“[S]ome argue the military ultimately achieved the integration of African-Americans more successfully than civil society, or indeed drove desegregation in nonmilitary areas.”).
\end{quote}

2. See, e.g., Aline O. Quester & Curtis L. Gilroy, Women and Minorities in America’s Volunteer Military, 20 CONTEMP. ECON. POL’Y 111, 111 (“Although strides have been made by many organizations in the civilian sector, the equal opportunity record for the armed services is one that stands out. The military is the only large organization in which large units (comprised mostly of men) are led by women, and large units (comprised largely of whites) are led by minorities. It is a testimony to how well integration and equal opportunity work in the armed forces.”).


4. Jo Ann Hoenniger, Women Warriors, 20 BERKELEY J. GENDER L. & JUST. 346, 350 (2005). This is not to suggest, of course, that in practical terms, there is not more work to be done. As particularly concerning women, while they constitute roughly 48% of the civilian workforce, they represent only 15% of active military service members. GOV’T ACCOUNTABILITY OFF., MILITARY PERSONNEL: REPORTING ADDITIONAL SERVICE MEMBER DEMOGRAPHICS COULD ENHANCE CONGRESSIONAL OVERSIGHT 42 (2005) [hereinafter GAO REPORT, MILITARY PERSONNEL], http://www.gao.gov/new.items/d05952.pdf. Part of this problem can arguably be corrected, though, by lifting the ban on women in combat. According to the Government Accountability Office (GAO), for instance, the overall underrepresentation of women in the armed forces is at least partly the result of those “military policy and federal statutes denying women access to military specialties involving ground combat.” Id.

5. GAO REPORT, MILITARY PERSONNEL, supra note 4, at 38. While this percentage may seem small given the overall percentage of women in the civilian workforce (48%), the percentage of females in the military has grown significantly over the past four decades—from 1% in 1964 to 15% in 2003. Id. at 38, 10.

6. Id. at 45. For context, this equates to roughly 15 to 20% of all military positions. Id. at 39. A comprehensive list of prohibited positions can be found at id. at 145–51.

7. These arguments are explored in more detail below. See infra Part II.

women serving in combat-related occupations parallel those made by proponents of the ban on “open service” by homosexuals. This is unsurprising, perhaps, given the belief held by many scholars that “[h]omophobia and sexism go hand in hand.” With this in mind, it might seem as if the repeal of DADT necessarily dictates that the combat exclusion is the next casualty in the march toward full military integration. The fact is, though, that because the repeal of DADT is a relatively recent development, legal scholars have yet to thoroughly consider the practical implications the repeal might have on the combat exclusion for women.

This Article fills that void. Specifically, it examines the articulated rationale for DADT and the combat exclusion for women and argues that, to the extent these justifications mirror one another, opening the military to homosexuals may lead to increased opportunities for women to serve in combat. Moreover, this Article also explores the conditions that led to the repeal of DADT and draws parallels between those developments and similar happenings related to the combat exclusion. Ultimately, this Article submits that while the repeal of DADT does support the argument for opening all combat-related positions to women, other developments are also necessary before such a change is likely to occur.

To establish these arguments, the Article proceeds as follows. Part I provides the significant historical and legal background for properly understanding the role of homosexuals and women in the U.S. armed forces. Specifically, it sets forth the context for the implementation of the military’s exclusionary rules and explains how these policies have been enforced in recent years. Part II explores the doctrinal justifications the Department of Defense (DoD) has traditionally offered in support of the bans on open service by homosexuals and the assignment of women to combat positions. Part II also discusses the challenges that have been lodged against these justifications by proponents of full integration. Part III examines the circumstances that led Congress to repeal DADT and establishes the foundation for considering the impact of this development on the combat exclusion. Part IV contemplates the future of women in combat given repeal of DADT.

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9. In this Article, “open service” implies “that a person can be open about his or her sexual orientation without fear of repercussions by the military.” RAND CORP., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 80 (2010) [hereinafter RAND 2010 STUDY]. Moreover, as used in this Article, the terms “homosexual,” “gay,” and “lesbian” are simply used to refer to individuals who would self-identify as either homosexual or bisexual.

I. Significant Historical & Legal Background

In order to fully appreciate the contours of DADT and the combat exclusion, it is important to understand the historical background at the foundation of these policies. Accordingly, this Part provides an overview of the legal status held by both homosexual and female service members throughout the military’s recent history. Following that overview, this Part presents a summary of current laws and regulations related to both DADT and the combat exclusion.

A. Homosexuals in the U.S. Military

1. Historical Context

Despite a long-standing ban against military service by homosexuals, there is little doubt that gays and lesbians have served honorably throughout the existence of the U.S. armed forces. Given a legal framework that has traditionally authorized discrimination based on sexual orientation, however, homosexuals have largely been compelled to serve in silence. This has created a legal record best described as “a struggle between two intransigent facts—the persistent presence of gays within the military and the equally persistent hostility toward them.”

The first legislative action related to homosexuality in the U.S. military appeared in the Articles of War of 1916. By prohibiting both consensual and non-consensual sodomy, these Articles emphasized the military’s initial focus on homosexual conduct. Soon, however, the Army began using its medical regulations to exclude recruits based on orientation. This change in perspective—from a focus on acts to mere orientation—was ushered in largely by the emerging belief in the psychiatric community that homosexuality was a mental

12. See, e.g., RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY VIETNAM TO THE PERSIAN GULF 7 (1994) (“Even before the armed forces of the United States were formally organized, gays were bearing arms for the yet unborn nation.”); Fred L. Borch, III, The History of “Don’t Ask, Don’t Tell” in the Army: How We Got to It and Why It Is What It Is, 203 MIL. L. REV. 189, 189 (2010); Major Laura R. Kesler, Serving with Integrity: The Rationale for the Repeal of “Don’t Ask, Don’t Tell” and Its Ban on Acknowledged Homosexuals in the Armed Forces, 203 MIL. L. REV. 284, 285 (2010) (chronicling the story of Sergeant Brian Hughes, a former Army Ranger who participated in the rescue of Pvt. Jessica Lynch, but who left the military because of his homosexuality). By necessity, this Article can only provide a brief review of the historical context of homosexuality in the U.S. military. For a far more comprehensive review, see SHILTS, supra.
13. See generally MARGARETHE CAMMERMEYER & CHRIS FISHER, SERVING IN SILENCE iii (2005) (recounting the experience of Colonel Cammermeyer, the highest ranking military officer to proclaim her homosexuality while still in service).
14. SHILTS, supra note 12, at 3.
15. See id. at 15; Plane, supra note 11, at 381.
16. See Borch, supra note 12, at 192.
17. Id. at 193.
illness. Military officials essentially adopted the position articulated by psychiatrists of the time like Dr. Albert Abrams, who asserted that the military could not “ignore what [wa]s obvious and which [would] militate against the combative prowess of [U.S.] forces in [World War I] . . . . From a military viewpoint, the homosexualist is not only dangerous, but an ineffective fighter.” As a result of such perspectives, gay men were routinely denied access to, or discharged from, the armed forces throughout the 1930s and 1940s based on the belief that their sexual orientation constituted a “sexual psychopathy” that made them “unsuitable for military service.”

During the late 1940s and early 1950s, the U.S. government enacted major changes in the realm of military law that laid the foundation for the policy that ultimately became DADT. Arguably, the most significant change occurred in 1950 when Congress scrapped the Articles of War and enacted the Uniform Code of Military Justice (UCMJ). Still in place today, Congress included Article 125 in the UCMJ, which prohibited consensual sodomy and made it an offense subject to military court-martial.

By 1958, the Army finally began to acknowledge that gays and lesbians were not being excluded from military service based solely on psychiatric evaluations. Instead, then-existing Army regulations indicated that “[h]omosexuals [were] unfit for military service because their presence impair[ed] the morale and discipline of the Army.” Nevertheless, the fact that the military viewed homosexuality as deviant behavior was not entirely rooted out. This is evidenced most strikingly by language in the same regulation that indicated that “homosexuality [was] a manifestation of a severe personality defect, which appreciably limit[ed] the ability of such individuals to function effectively in a military environment.” Only after the American Psychiatric Association removed homosexuality from its list of mental disorders in 1973 did the military move entirely away from using its medical regulations as a rationale for

18. See Shilts, supra note 12, at 15; Borch, supra note 12, at 193.
19. Shilts, supra note 12, at 15 (quoting Dr. Albert Abrams). Interestingly, Shilts suggests that “[t]hough the exclusions would lead to untold injustices and horrors in later years, they were initially written as an enlightened and even compassionate treatment of homosexuality.” Id. at 17. This view is perhaps supported by the fact that regulations permitted some homosexuals during this period to receive honorable rather than dishonorable discharges, especially if they had not engaged in homosexual conduct. See Borch, supra note 12, at 196.
20. U.S. War Dep’t, Army Reg. 40-105, Standards of Physical Examination for Entrance into the Regular Army, National Guard, and Organized Reserves (1923). The emphasis here on gay men, and not lesbians, is important. The Army does not appear to have acknowledged the presence of homosexual females in its ranks until roughly 1950. See Borch, supra note 12, at 195. Only then did the Army emphasize that homosexuality was prohibited, “irrespective of sex.” U.S. Dep’t of Army, Army Reg. 600-443, Personnel—Separation of Homosexuals § 1.2 (1953) (emphasis added).
21. See Borch, supra note 12, at 194–95.
22. See id. at 195.
24. See Borch, supra note 12, at 197.
26. Id.
excluding homosexuals from service.\textsuperscript{27} Thenceforth, the primary justification for the policy was that the presence of gays and lesbians was prejudicial to “good order and discipline.”\textsuperscript{28}

From this new justification emerged a 1981 DoD regulation that governed homosexual military service from that time until the implementation of DADT. The regulation was an effort to explain the government’s compelling interest in excluding gays and lesbians from serving in the armed forces. In fact, the rationale for the ban was explicitly included in the regulation itself:

Homosexuality is incompatible with military service. The presence of such members adversely affects the ability of the Armed Forces to maintain discipline, good order, and morale; to foster mutual trust and confidence among the members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of members who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the military services; to maintain the public acceptability of military services; and, in certain circumstances, to prevent breaches of security.\textsuperscript{29}

2. Don’t Ask, Don’t Tell

Such was the state of affairs when Bill Clinton began campaigning for the 1992 presidential election. As part of his platform, Clinton had promised that he would lift the ban on gays and lesbians serving openly in the U.S. military.\textsuperscript{30} These pledges “unleashed a firestorm of criticism,”\textsuperscript{31} though, and led both military and congressional leaders to voice vigorous opposition.\textsuperscript{32} Even the public was deeply divided.\textsuperscript{33} Undeterred, almost immediately upon assuming office, Clinton directed his Secretary of Defense, Les Aspin, to prepare an executive order that would end the ban.\textsuperscript{34} Clinton also ordered Aspin to modify the DoD’s military enlistment papers to remove inquiries regarding the sexual orientation of military recruits.\textsuperscript{35}

Again, reaction to these directives was vehement largely because many

\textsuperscript{27}. See Borch, \textit{supra} note 12, at 199–200.
\textsuperscript{28}. \textit{Id.} at 200.
\textsuperscript{29}. U.S. DEP’T OF DEF., DIRECTIVE 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (1981). A thorough discussion of each of these rationales is beyond the scope of this Article. Readers interested in this issue can see SHILTS, \textit{supra} note 12.
\textsuperscript{31}. Borch, \textit{supra} note 12, at 204.
\textsuperscript{32}. Belkin, \textit{supra} note 30, at 108.
\textsuperscript{34}. Eric Schmitt, \textit{The Inauguration; Clinton Set to End Ban on Gay Troops}, \textit{N.Y. Times}, Jan. 21, 1993, at 1.
viewed Clinton’s “approach in dealing with the military [as] not to ask whether lifting the ban was wise, but rather ‘to ask how it could be done and minimize the effect on combat effectiveness.’”36 In responding to the furor, Congress held numerous hearings and drafted proposals to codify into law the government’s position regarding homosexuality in the armed forces.37 By this time, the debate basically revolved around how significantly the new policy would depart from the DoD’s 1981 regulation.38 On one hand, Clinton pressed for legislation based on the notion that “homosexual orientation [was] not a bar to service entry or continued service unless manifested by homosexual conduct.”39 On the other hand, numerous senior military officials and members of Congress argued that “[i]f homosexuality [was] not a disqualifying characteristic . . . the armed forces [could not] justify dismissal of a person who merely reveal[ed] the presence of such a characteristic.”40

Given the lack of public, military, and congressional support for outright removal of the ban, what ultimately emerged from these debates was “a politically expedient policy that pleased no one.”41 Nonetheless, this policy—popularly referred to as Don’t Ask, Don’t Tell (DADT)—was enacted into law in 1993, thus becoming the vehicle through which the military would address the issue of homosexuality until the law’s repeal in December of 2010.42 In essence, the law mandated that troops would be discharged from the military if they engaged in homosexuals acts, if they stated that they were homosexual, or if they married a member of the same sex.43 While DADT still dictated that “open homosexuality or homosexual conduct [was] a service-disqualifying condition,”44 the law prohibited military personnel from asking questions related to a person’s sexual preference.45 Thus, if recruits and service members did not discuss (or tell of) their orientation,46 they were not subject to exclusion or discipline.

Although efforts to completely lift the ban continued after its 1993 enact-

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36. Borch, supra note 12, at 204–05 (quoting Dan Balz, A Promise that Held Inevitable Collision, WASH. POST, Jan. 28, 1993, at A6 (emphasis added)). One author notes that public reaction was so fierce that “[m]any congressional offices needed extra staff to answer thousands of phone calls and letters protesting the president’s move.” Donnelly, supra note 35, at 901.

37. See Donnelly, supra note 35, at 903.

38. See id. at 904–05.

39. Memorandum from Les Aspin, U.S. Secretary of Defense, to the Secretaries of the Army, Navy, and Air Force, and the Chairman of the Joint Chiefs of Staff (July 19, 1993) [hereinafter Aspin memo] (emphasis added). In fact, this memo, issued under the direction of President Clinton, pronounced that “it is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct.” Id.

40. See Donnelly, supra note 35, at 904–05 (emphasis in original).

41. Belkin, supra note 30, at 108 (emphasis added).


43. Id.

44. Plane, supra note 11, at 377.

45. Id.

ment, DADT remained in effect until December of 2010. While the law was in effect, over 14,000 gays and lesbians were discharged from the military for violating the policy. An estimated 66,000 homosexuals were in uniform when the law was finally repealed.

B. Women in the U.S. Military

1. Historical Context

As with homosexuals, the DoD has also had a checkered history in responding to women who wished to join the ranks of the armed forces. Such recruits have challenged the perception held by many senior military officials that “[t]he American tradition is that a woman’s place in the home.” Notwithstanding such notions, however, when the country has needed them, women have been ready to serve. Indeed, like homosexuals, women have a long and distinguished record of service in the U.S. armed forces. They have participated in every significant military engagement since the Revolutionary War—sometimes, as with gays and lesbians, having to serve in silence or secret. Despite this long pedigree, it was not until the Second World War that their unprecedented “performance laid the foundation for [their] formal integration.”

On June 12, 1948, Congress passed the Women’s Armed Services Integration

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47. Servicemembers Legal Defense Network, About “Don’t Ask, Don’t Tell,” http://www.sldn.org/pages/about-dadt. Beyond the devastating impact these discharges had on the individual service members, they have wreaked significant financial and readiness consequences on the overall institution. One author notes, for example, that discharges have resulted in over $400 million in losses, with an even more deleterious “loss of experience, training, and talent as each troop discharged under the ban [left] military service.” Kesler, supra note 12, at 291.


49. Interestingly, the feminist community itself has also had a schizophrenic history in reaction to such women. See Diane H. Mazur, A Call to Arms, 22 HARV. WOMEN’S L.J. 39, 42 (1999) (noting that “[m]ilitary service by women is considered troubling to feminism”) (internal quotation omitted). Indeed, Mazur argues that the lack of full engagement by the feminist movement has negatively affected “[t]he ability of feminists to criticize the military’s treatment of servicewomen credibly and constructively.” Id. at 41.


52. See id. at 1020 (recounting the story of Deborah Sampson, who “disguised herself as a man and served for three years” during the Revolutionary War).

53. Id. After the war, military officials who had seen the feats of women during campaigns in Europe and the Pacific began to press for their inclusion. Dwight D. Eisenhower, for example, wrote a personal letter in 1947 to the Chairman of the House Armed Services Committee explaining that “women of America must share the responsibility for the security of their country in a future emergency.” BETTIE J. MORDEN, WOMEN’S ARMED FORCES, 1945–1978 46 (1990) (quoting then-General Dwight D. Eisenhower). He, like other high-ranking officers, urged Congress to approve a bill that would integrate women into the military. See id. at 45. Other officers who pressed for integration included the Commanders of the U.S. Army Air and Ground Forces, the Surgeon General of the Army, and the Army Chief of Chaplains.
Act.54 On the surface, the Act stood as a beacon of the inclusive nature of the U.S. military. Underlying the façade, however, were numerous provisions that reflected prevailing stereotypes about women and their ability to serve in the armed forces. For instance, the Act “capped women’s participation at a maximum of two percent of the military; excluded women from registration, conscription, upper officer ranks, and combat position; and permitted involuntary discharge for motherhood or pregnancy.”55 Even supporters of the Act insisted that it was not an especially groundbreaking piece of legislation because “women’s ultimate responsibilities were familial.”56 Thus, while many had hoped that the Integration Act would open opportunities for women in the armed forces, “[i]nstead, women’s roles in the military in the 1950s and 1960s reflected women’s struggle to be accepted outside their traditional roles.”57

In the 1970s, though, the legal status of women in the armed forces finally began to see remarkable improvement.58 Scholars have suggested that there are two primary reasons for this revolution.59 First, women fighting for greater participatory rights in the U.S. military benefited from the more general feminist movement of the 1970s and the challenge to traditional gender roles.60 Second, in 1973, with the Vietnam War winding down, the government terminated involuntary conscription via the Selective Service draft.61 With the ushering in of the all-volunteer force the “military [was] more eager to attract women,”62 and doing so required radical policy changes. The 1970s thus witnessed women’s entrance into the Reserve Officers’ Training Corps (ROTC), the military service academies, and the Army, Navy, and Air Force flight training programs.63 In 1978, women were also integrated into the Army’s airborne units.64 Despite these advances, however, the combat exclusion remained entrenched.

2. The Combat Exclusion

Ironically, as noted above, the formal prohibition on women in combat had its genesis in the somewhat inaptly named Women’s Armed Services Integration

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56. Id.
57. McSally, supra note 51, at 1023. Of note, though, the Women’s Armed Services Integration Act was amended in 1967 to “remove[ ] the cap on rank and total number of women allowed in uniform.” Id. at 1023–24.
58. Hasday, supra note 55, at 108.
59. Id.
60. Id.
61. Id.
62. Id.
63. McSally, supra note 51, at 1024.
64. MORDEN, supra note 53, at 385.
Act.\textsuperscript{65} But while it was clear from the Act’s legislative history that women were not permitted in combat, Congress had specifically declined to more precisely delineate the exact positions that were unavailable to females.\textsuperscript{66} In fact, \textit{combat} remained undefined in the Integration Act because the military “was unable to come up with an adequate, acceptable definition.”\textsuperscript{67} As a result, until the 1980s there was “no clear single legal statement”\textsuperscript{68} excluding women from combat positions. Occupational prohibitions were instead contained in a patchwork of statutes and DoD regulations that each service interpreted in light of its unique mission.\textsuperscript{69} What emerged was widespread inconsistency between the various branches of the armed forces regarding the positions each held open for women.\textsuperscript{70}

This changed in 1988 when the DoD finally adopted a rule standardizing the combat exclusion across the services.\textsuperscript{71} Aside from banning women from engaging in “direct combat,” the new policy—known as the Risk Rule—also dictated that certain \textit{non-combat} occupations would thenceforth be available only to men.\textsuperscript{72} In determining which positions to designate as unavailable to females, Service Secretaries were explicitly instructed that “risks of direct combat, exposure to hostile fire, or capture [were] proper criteria for closing non-combat positions or units to women, when the type, degree, and duration of such risk [were] equal to or greater than the combat units with which they [were] normally associated within a given theater of operations.”\textsuperscript{73} In other words, not only were women prohibited from serving in billets designated as direct combat positions, they were also barred under the Risk Rule from entering combat \textit{support} specialties if such occupations put them at a risk of

\textsuperscript{65} See supra note 54 and accompanying text.
\textsuperscript{66} See \textsc{Jeanne Holm}, \textsc{Women in the Military: An Unfinished Revolution} 118–19 (1993).
\textsuperscript{67} Id.
\textsuperscript{69} For example, 10 U.S.C. § 6015 mandated that women in the Navy and Marines “may not be assigned duty on vessels or in aircraft that are engaged in combat missions.” Further, 10 U.S.C. § 8549 established that “[f]emale members of the Air Force . . . may not be assigned to duty in aircraft engaged in combat missions.” While gender integration in the Army was not initially governed by statute, the Army “developed policies for excluding women from routine engagement in direct combat” based on the “implied congressional intent behind the Navy and Air Force statutes.” \textsc{Dep’t of Def., Report: Task Force on Women in the Military 9} (1988). Importantly, these specific statutory prohibitions were later repealed. \textsc{See National Defense Authorization Act of 1991, Pub. L. No. 102-190, 105 Stat. 1365 (1991) and National Defense Authorization Act of 1994, Pub. L. No. 103-160, 107 Stat. 1659 (1993).}
\textsuperscript{70} For a detailed review of each Service’s combat exclusion, see \textsc{Dep’t of Def., Report: Task Force on Women in the Military 11–14} (1988). Overall, this Task Force “identified 29 specific areas where potential inconsistencies exist[ed] in application of policy, either between two or more Services of with Secretary of Defense guidance.” Id. at 15.
\textsuperscript{72} See id.
\textsuperscript{73} \textsc{Presidential Comm’n on the Assignment of Women in the Armed Forces, Report to the President B-2} (1992) [hereinafter \textsc{Presidential Comm’n}].
harm equal to or greater than that of the combat units they served.\footnote{See Krystyna M. Cloutier, Note, \textit{Marching Toward War: Reconnoitering the Use of All Female Platoons}, 40 CONN. L. REV. 1531, 1545 (2008).}

It did not take long for the inadequacies of the Risk Rule to become clear. Indeed, just two years after its adoption, the Persian Gulf War commenced and military officials realized that “everyone in the theatre of operation was at risk.”\footnote{Gov’t Accountability Off., Gender Issues: Information on DOD’s Assignment Policy and Direct Ground Combat Definition 2 (1998) (emphasis added) [hereinafter GAO REPORT, Gender Issues].} As other commentators have explained, “[t]he combat exclusion proved dubious during [the Persian Gulf] conflict, [since] women served in logistics bases forward of all-male infantry and armor units, but not on aircraft carriers hundreds of miles to the rear of the front lines.”\footnote{Marron & Whitford, \textit{supra} note 68, at 245.} The failings of the Risk Rule were made all the more apparent given the fact that the Gulf War witnessed historic mobilizations of female service members. During the seven-month-long engagement, over 40,000 women—constituting roughly 7% of all deployed personnel—served in Operations Desert Shield and Desert Storm.\footnote{Id. Sixteen female service members were killed during the Gulf War, and two were held as prisoners of war (POWs). See Alice W.W. Parham, \textit{The Quiet Revolution: Repeal of the Exclusionary Statutes in Combat Aviation – What We Have Learned from a Decade of Integration}, 12 WM. & MARY J. OF WOMEN & L. 377, 384 (2006).} Thus, just as the role women played in World War II led to passage of the Integration Act, real-world conflict once again sparked major reform related to the combat exclusion.

The developments in military policy that followed in the wake of the Persian Gulf War established the combat exclusion rules currently in effect. The most significant of these reforms was embodied in a 1994 directive from then-Secretary of Defense Les Aspin to the various Service Secretaries.\footnote{Memorandum from Les Aspin, U.S. Secretary of Defense, to the Secretaries of the Army, Navy, and Air Force, and the Chairman of the Joint Chiefs of Staff, and the Assistant Secretaries of Defense for Reserve Affairs and Personnel and Readiness (Jan. 13, 1994) [hereinafter Aspin 1994 memo], available at http://cmrlink.org/cmrmnotes/lesaspin\%20dgc\%20defassign\%20rule\%2011394.pdf.} In that directive, the DoD formally abandoned the Risk Rule and instituted a policy designed to “expand opportunities for women.”\footnote{Id.} In pertinent part, the DoD directive indicated:

\begin{enumerate}
\item[A. Rule.] Service members are eligible to be assigned to all positions for which they are qualified, except that women shall be excluded from assignment to units below the brigade level whose primary mission is to engage in direct combat on the ground, as defined below.
\item[B. Definition.] Direct combat is engaging an enemy on the ground with individual or crew served weapons, while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force’s personnel. Direct ground combat takes place well forward on the battlefield while...
locating and closing with the enemy to defeat them by fire, maneuver, or shock effect.80

The technical jargon of this rule unfortunately belies its dramatic effect. By jettisoning the Risk Rule and opening to women all positions above the brigade level (and many more below it), Aspin instantly made “a total of 259,199 positions in all the military services” available to women.81 Importantly, this development was wrought not by congressional effort, but rather by an immediately effective executive directive.

As noted, this 1994 regulation essentially captures the policy in effect today.82 Despite the monumental expansion of opportunities it ushered in, it bears emphasis that even under this progressive action, scores of positions still remain closed to women. Beyond those directly addressed in the Aspin directive, Service Secretaries have also been permitted to exclude women where “the cost of appropriate berthing and privacy arrangements are prohibitive; [w]here units and positions are doctrinally required to physically collocate and remain with direct ground combat units that are closed to women; [w]here units are engaged in long range reconnaissance operations and Special Forces missions; and [w]here job-related physical requirements would necessarily exclude a vast majority of women service members.”83 In 2008, the DoD estimated that, in practical terms, this equated to roughly 20% of all military occupational specialties for which women technically remained ineligible.84

II. JUSTIFICATIONS FOR DON’T ASK, DON’T TELL AND THE COMBAT EXCLUSION

As alluded to above, proponents of the military’s exclusionary policies related to homosexuals and women have offered numerous explanations to support them. This Part explores the most prominent of those justifications in greater detail, focusing specifically on those adopted—either explicitly or implicitly—by the DoD in its rules, regulations, and doctrine.85 This Part also

80. Id. For context, the Army’s organizational structure is generally as follows: army, corps, division, brigade, regiment, company. See generally JOHN B. WILSON, ARMIES, CORPS, DIVISIONS, AND SEPARATE BRIGADES viii (1999).

81. Donnelly, supra note 70, at 634.

82. It is worth highlighting that this policy is captured in a regulation. In other words, there is currently no statutory bar preventing women from serving in combat. See McSally, supra note 51, at 1015.

83. Aspin 1994 memo, supra note 78.


85. The theories that have been presented in support of these bans are seemingly endless. Of necessity, however, the scope here must be somewhat limited. The rationale for focusing exclusively on the DoD perspective is that the Department has historically had significant influence on debates regarding military legal issues. For further information about alternative explanations for the combat exclusion and DADT, see Patricia J. Thomas & Marie D. Thomas, Integration of Women in the
discusses the challenges opponents have lodged against these explanations and suggests that, to the extent these justifications were ever tenable, this is largely no longer the case.

A. Unit Cohesion and Effectiveness

Policies preventing full military participation by women and homosexuals have frequently rested upon the notion that their integration would be disruptive to unit cohesion and effectiveness.\textsuperscript{86} In military parlance, unit cohesion has two distinct components: task cohesion and social cohesion.\textsuperscript{87} “Task cohesion is a unit’s ability to work together effectively, whereas social cohesion is a unit’s ability to get along and trust one another.”\textsuperscript{88} While both aspects of unit cohesion are of some degree of significance in a military environment, as discussed below, there is significant debate regarding the relative importance of each of these components.

1. The Presumed Effect of Integrating Homosexuals

Almost immediately upon jettisoning the contention that homosexuals were psychopathic, government statutes and regulations banning gays and lesbians from the armed services suggested that their presence in the military would be disruptive to unit cohesion.\textsuperscript{89} This belief rested largely on the emphasis placed on social cohesion and the fact that this type of connection requires “emotional bonds of friendship, liking, caring, and closeness among group members.”\textsuperscript{90} More to the point, supporters of DADT have stressed the dominance of social cohesion over task cohesion by suggesting that the inability of heterosexual troops to socially accept homosexuals ultimately undermines unit effectiveness.\textsuperscript{91}


\textsuperscript{86.} See, e.g., Jamie R. Abrams, \textit{The Collateral Consequences of Masculinizing Violence}, 16 WM. & MARY J. WOMEN & L. 703, 745 (2010) (“Fears about unit cohesion . . . were important themes of integration opponents.”); Levi Bennett, Comment, \textit{Is it Time? Reform of “Don’t Ask, Don’t Tell” and Article 125 of the Uniform Code of Military Justice}, 34 S. ILL. U. L.J. 175, 190 (2009) (“The common rationale for this continued limitation of women’s service roles, the promotion of unit cohesion, is similar to the rationale for preserving the ‘Don’t Ask, Don’t Tell’ statute . . . .”); Rufino Gaytán III, \textit{The States as Laboratories for Social Experiments: A Proposal Asking President Obama to Use the National Guards as Laboratories to Reason Our Way Out of “Don’t Ask, Don’t Tell,”} 24 WIS. J.L. GENDER & SOC’Y 1, 8 (2009) (“Unit cohesion is often cited by military leaders as the primary reason to exclude women from ground combat roles.”).

\textsuperscript{87.} RAND CORP., \textit{SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT} 290 (1993) [hereinafter RAND 1993 STUDY].


\textsuperscript{89.} See 10 U.S.C. § 654 (2006) (“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.”); U.S. DEP’T OF DEF., \textit{DIRECTIVE 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS} (1981).

\textsuperscript{90.} RAND 1993 STUDY, supra note 87, at 312.

\textsuperscript{91.} See RAND 2010 STUDY, supra note 9, at 144. Perhaps not surprisingly, similar arguments arose in the context of racial integration in the 1940s. See Kesler, supra note 12, 345–47.
Importantly, this perspective has been captured in federal statutes and DoD regulations. The National Defense Authorization Act of 1994 indicated, for example, that “[t]he presence in the armed forces of persons who demonstrate[d] a propensity or intent to engage in homosexual acts . . . create[d] an unacceptable risk to . . . unit cohesion that [is] the essence of military capability.”92 While striking in its candor, this language simply represented longstanding military doctrine also contained in the 1981 DoD regulation. That policy had explained, for instance, that “the presence of [homosexuals] adversely affect[ed] the ability of the Armed Forces . . . to foster mutual trust and confidence among the members.”93

Finally, it is worth emphasizing that the spirit of these policies trickled down to individual service members, who seemingly gave credence to them. One said, for example, “I cannot rely on someone who I don’t feel comfortable with, nor can they trust me. A lack of trust turns into a lack of cohesion which eventually leads to mission failure.”94 Such views generated predictions among proponents of DADT that lifting the ban on open service would lead to heterosexual soldiers refusing “to work, bunk, or shower with homosexuals.”95

2. The Presumed Effect of Permitting Women to Serve in Combat

Likewise, proponents of the combat exclusion have repeatedly used similar arguments related to unit cohesion to justify excluding women from combat-related positions.96 While the DoD clearly subscribes to the notion that allowing women in combat would undermine unit cohesion, there are virtually no formal documents explaining precisely why this would be the case. This deficiency is likely due to the fact that “[t]here are no authoritative military studies of mixed-gender ground combat cohesion, since available cohesion research has been conducted among male-only ground combat units.”97 This notwithstanding, many service members have expressed clear disdain for the idea of integrating women into their units. Much of their concern seems to center on the fact that introducing women into combat would “fundamentally challenge[,] the identity of the warrior as male.”98 Service members have expressed concern, for example, that the “warrior mentality will crumble if women are placed in

94. DoD DADT REPORT, supra note 88, at 51 (quoting an anonymous service member).
95. RAND 1993 STUDY, supra note 87, at 322.
96. See Valorie K. Vojdik, Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat, 57 ALA. L. REV. 303, 339 (2005) (describing the unit cohesion argument against women in combat and noting that “the military has made the same argument in support of its exclusion of homosexual service members”); Valorie K. Vojdik, The Invisibility of Gender in War, 9 DUKE J. GENDER L. & POL’Y 261, 267 (2002) (“The decision to exclude women from combat explicitly has rested, inter alia, on the military’s claim that women, like homosexuals, would undermine male bonding and the cohesion of troops.”).
97. PRESIDENTIAL COMM’N, supra note 73, at 25.
98. See Vojdik, The Invisibility of Gender in War, supra note 96, at 267.
combat,” and that “[n]o man with gumption wants a woman to fight his nation’s battles.” Thus, from their perspective, introducing women into combat teams would again lead to a breakdown in social cohesion and decline in overall military effectiveness.

Doctrinally, these sentiments have yet again weaved their way into significant military policies and reports related to the role of women in the armed forces. In 1994, for example, when the Army reaffirmed its stance on excluding women from combat, it cited “bonding and unit cohesion” as primary reasons for its decision. In fact, the Army bluntly explained that unit cohesion is “best developed in a single gender all male environment.” Similar justifications for the combat exclusion were expressed by a 1992 presidential commission charged with investigating the role of women in the military. In its report, the commission recommended against allowing women in combat given “cohesion problems [that] might develop.” In specifically discussing ground combat, the report further indicated that “[t]he overriding importance of small unit cohesion to ground military success, and the unknown but probably negative effect that the presence of women would have in those units were of critical concern . . . .” Interestingly, as was implicit in this finding, the commission acknowledged the dearth of empirical data on the point. Nevertheless, commissioners felt confident drawing this conclusion given the number of male service members who had expressed in interviews that men and women simply could not bond in combat situations.

3. Challenging the Unit Cohesion Argument

(i) The Social and Task Cohesion Debate  As noted above, the military considers unit cohesion to be comprised of both social and task cohesion. While intuition might suggest that these elements are necessarily inseparable, and that both are vital to successful military operations, sociological evidence indicates otherwise. Indeed, studies demonstrate that “it is task cohesion rather than social cohesion that has a direct influence on performance.” Some scholars
have even suggested that “high social cohesion actually undermines the effectiveness of group decision-making processes, [by] promoting a state of ‘group-think’” or “excessive socializing.”\textsuperscript{110} Moreover, experts emphasize that task cohesion is more important when shared threats are thrust upon a group.\textsuperscript{111 “[M]utual threat, combined with the possibility of eliminating the danger, could produce increased task cohesion and an increased need for affiliation (enhancing social cohesion) . . . .”\textsuperscript{112}

In the context of military operations, the consequences of these studies are clear; while homosexuality or the notion of women in combat might remain personally objectionable to a certain population of the military, evidence indicates that “these concerns diminish when a strong focus on mission accomplishment is required.”\textsuperscript{113} In other words, the apprehension some proponents of exclusionary policies have that heterosexuals simply will not accept homosexual peers, or that men will not bond with women in combat, is arguably overblown. This is especially true, perhaps, in combat situations where military units face a potentially mortal threat in the form of a common enemy.

\textit{(ii) Other Integration Efforts} The conception that fully integrating women and homosexuals into the military will negatively impact unit cohesion and effectiveness is also undermined by patterns that have emerged in the aftermath of other military integration efforts. In one study of foreign military experiences, for example, over one-hundred experts were consulted as to the impact to these militaries of lifting their bans on homosexual service.\textsuperscript{114} “Not a single one of the . . . experts interviewed believed that the . . . decisions to lift . . . gay bans undermined military performance, readiness, or cohesion” in these foreign military organizations.\textsuperscript{115} Assessments made within the DoD have reached the same conclusion based on discussions with foreign military personnel who explained that opening their ranks to homosexuals ultimately proved to be a “non-issue” despite expectations to the contrary.\textsuperscript{116}

Even within the U.S. military, previous integration efforts predicted to have deleterious effects on unit cohesion have not resulted in such. Despite fears, for example, that integrating African-Americans would “create an impossible social
problem," efforts to racially integrate the U.S. armed forces “occurred in large part without negative consequences for unit cohesion and effectiveness.” Similarly, while opponents of gender integration have historically suggested that the presence of females would undermine unit cohesion, the DoD itself has recognized that “the expansion of women’s roles in the military [has] not brought a degradation in military readiness, military effectiveness or unit cohesion.” Indeed, the DoD acknowledges that “it is clear that the introduction and integration of women into the force has made [the] military stronger.”

(iii) The Root of the Problem? Finally, in an effort to attack what might be the most insidious aspect of the unit cohesion argument, many proponents of an open military have suggested that the problem merely lies in a failure by the DoD to acknowledge the actual root of the problem. In discussing this issue in a case challenging the constitutionality of DADT, one judge argued, for example, that the asserted interest of unit cohesion is based on nothing more than pure hostility directed at a disfavored class. Others have similarly suggested that unit cohesion is simply a moniker used by the military to preserve its tradition of masculinity: “[U]nit cohesion’ is a kind of code word for the hypermasculine culture within the military that not only defines warriors as male and masculine, but that denigrates women and celebrates symbolically sexualized violence against women.” In short, the argument goes, “[u]nit cohesion’ is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs. The concept has therefore been a favorite of those who, through the years, have resisted the irresistible erosion of white male domination of the armed forces.”

B. Unit Discipline, Order, and Morale

Closely related to concerns about unit cohesion are those based on the notion that homosexual service members and women in combat will undermine unit discipline, order, and morale. Most prominently, these contentions are based on the notion that greater integration will lead to a breakdown in discipline that

117. Memorandum from the Commander of Army Air Corps, Employment of Negro Personnel in Air Corps Units (May 31, 1940).
118. DoD DADT REPORT, supra note 88, at 85. This is not to suggest, of course, that these efforts proceeded with absolutely no racial strife. See id. at 83-84 (noting the “racial discrimination, tension, and stereotypes” that remained in the ranks after President Harry Truman’s integration order). While racial tension did still exist, however, the argument here is that it did not have the deleterious effect predicted by anti-integrationists.
119. Id. at 87.
120. Id.
121. Philips v. Perry, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J. dissenting). In fact, Judge Fletcher explained that “the ‘unit cohesion’ rationale proffered in support of the ‘don’t ask/don’t tell’ policy is disturbingly similar to the arguments used by the military to justify the exclusion from and segregation of African Americans in military service.” Id.
will manifest itself in the form of harassment and violence. As explained below, though the arguments offered in relation to women diverge slightly from those made regarding homosexuality, they nevertheless share common threads.

1. The Presumed Effect of Integrating Homosexuals

There is little doubt that gay and lesbian troops face the very real threat of physical and emotional violence and harassment as a result of their service. In 1992, for example, Seaman Allen Shindler was brutally beaten to death by fellow servicemen after rumors emerged that Shindler was a homosexual. Similarly, in 1999, Private First Class Barry Winchell was killed after a beating “by fellow soldiers who believed he was gay.” Numerous other examples of violence, harassment, and gay-baiting have been documented since the implementation of DADT, and proponents of excluding gays and lesbians suggest that this type of behavior disrupts unit discipline.

2. The Presumed Effect of Permitting Women to Serve in Combat

As with proponents of DADT, advocates of the combat exclusion also argue that greater integration will lead to increased sexual harassment and violence against women from within the U.S. armed forces. From the perspective that “one of the many functions of sexual harassment and sexual abuse is to serve as a mechanism for preserving male control,” one can easily see how placing women in combat might lead to a breakdown in discipline and order that manifests itself in the form of increased violence against females by fellow male troops. Indeed, observers suggest that this is in fact the very perspective from which the DoD operates—that once women are introduced into the combat environment, “the biological urges of men get triggered, [and] all hell breaks lose.” One scholar has gone so far as to argue, for example, that the presence of servicewomen in Iraq precipitated the breakdown in order and discipline that led to the mistreatment of detainees at Iraq’s Abu Ghraib prison. In her view, the incident was the result “of a social experiment” to integrate women that had “gone wrong.” Such perspectives effortlessly lead

124. DoD DADT REPORT, supra note 88, at 53; see also Kesler, supra note 12, at 355–56.
125. See John J. Mileitch, Homicide Investigation: An Introduction 10–11 (2003). In describing the viciousness of the attack, “[f]orensic pathologist Commander Edward Kilbane states he had never before seen a beating as severe as Shindler’s.” Id. at 11.
129. Chamallas, supra note 10, at 338.
130. Id. at 341–42.
132. Id. at 700.
to the conclusion made by some decision-makers that “the way to get rid of the sex scandals is to get rid of or segregate the women.”

Proponents of the combat exclusion, however, express perhaps even greater apprehension that women captured during combat will suffer sexual torture at the hands of the enemy. This argument gained special traction after Private First Class Jessica Lynch was captured and sexually abused by Fedayeen troops during the early days of Operation Iraqi Freedom. Indeed, defenders of the combat exclusion used the incident to support their cause by making comments like, “[I]f we say it’s O.K. to put women in combat, we’re saying it’s O.K. for sex abuse by the enemy.”

On the other hand, because some view men as benevolent guardians of women, critics of opening combat positions have also suggested that a woman’s vulnerability to such sexual assault disrupts military discipline, order, and morale. From their perspective, male combat troops lose focus on the mission because “decent men are determined to protect the weaker sex,” even at the expense of mission failure. Female troops themselves have even expressed this concern. One servicewoman held captive during the Persian Gulf War suggested, for example, that she was less concerned about the threat of rape than that her fellow male captive “might get himself shot trying to defend her.”

These arguments have been reinforced by observers who seize upon seemingly reasonable statements made by female service members who admit they feel more endangered by the threat of an enemy’s sexual rather than physical abuse.

3. Challenging the Unit Discipline, Order, and Morale Argument

While advocates of the combat exclusion add the element of sexual torture to support their stance, fundamentally the arguments related to unit discipline, order, and morale are the same for homosexuals and women. Each rests, for instance, upon the elemental notion that heterosexual servicemen are so undisciplined that they make full integration impossible. Moreover, each assumes that since homosexuals and women are unable to protect themselves, they must be

133. Chamallas, supra note 10, at 340. The irony of this argument—that because men misbehave, women should be excluded—seems to be lost on those holding this perspective.

134. See Jodi Wilgoren, Women in the Military: A New War Brings New Role for Women, N.Y. Times, Mar. 28, 2003, at B1 (stating that “perhaps the most common concern” about having women in combat “is over the prospect of P.O.W.’s being raped”).

135. See Donnelly, supra note 71, at 637–39.


137. Presidential Comm’n, supra note 73, at C-45-56.

138. A Woman’s Burden, Time (Mar. 28, 2003), http://www.time.com/time/nation/article/0,8599,438760,00.html. This article recounts the experience of Major Rhonda Cornum, an American service member captured during the Gulf War. For more on Cornum’s story, see infra note 150 and accompanying text.

139. See Wilgoren, supra note 134, at B1.
protected from themselves.

Proponents of DADT, for example, have used the regrettable incidents of violence recounted above to spark fear that repealing the ban on homosexuals openly serving would undermine discipline and order by generating epidemic levels of “hate crimes and violence against gays.” However, while these occurrences are obviously unfortunate, there is ample evidence to suggest that extrapolating too much from them would be imprudent. First, as discussed above, homosexuals have served in the military for decades without extensive violence ensuing. While most have presumably served in silence out of necessity, studies suggest that this will not change simply as a result of the repeal of DADT. As one homosexual service member explained, if the policy “is repealed, everyone will look around their spaces to see if anyone speaks up. They’ll hear crickets for a while . . . . After a little time has gone by, then a few of us will speak up. And instead of a deluge of panic and violence . . . there’ll be [a] ripple on the water’s surface that dissipates quickly.”

Even if a service member does decide to disclose her sexual orientation, several military leaders highlight that “American troops, as a whole, have proven themselves adaptable, resilient, and disciplined, and able to comply with rules that they do not necessarily like” or with which they do not necessarily agree. Suggesting otherwise is not to submit that the problem lies with homosexuals, but rather with heterosexuals who are unable to conform to the rigors of military discipline. In other words, as with harassment against women, focusing on violence carried out against homosexuals places blame on the victim rather than the misbehaving perpetrator.

As for violence against women, the unfortunate reality is that even with the combat exclusion, “military sexual assault rates are twice as high as civilian rates and the majority of the assailants in the military setting are fellow service members.” In fact, some suggest that the combat exclusion itself perpetuates sexual harassment and violence against women. One female officer stated, for instance, that banning women from combat “allows the military to control how servicewomen view themselves, how they are viewed by servicemen, and how they are viewed by society. This view reflects a lesser, second-class soldier: One who cannot fight; one who cannot defend herself, her troops, or her

140. See Don’t Ask, Don’t Tell: Debating the Gay Ban in the Military 75 (Aaron Belkin & Geoffrey Bateman eds., 2003); see also DoD DADT Study, supra note 88, at 11.
141. See supra note 12 and accompanying text.
142. RAND 1993 Study, supra note 87, at 279 (noting that few homosexual soldiers “will publicly acknowledge their homosexuality”).
144. Kesler, supra note 12, at 356.
146. Blythe Leszkay, Feminism on the Front Lines, 14 HASTINGS WOMEN’S L.J. 133, 143 (2003) (“[T]he combat exclusion itself instigates an atmosphere conducive to sexual harassment.”).
country; one who is not equal.” Indeed, this attitude is probably the most
direct connection linking the two camps that support exclusionary policies
related to homosexuals and women. As one scholar explains, “the exclusion of
women . . . is not purely based on incorrect stereotypes or assumptions about
women’s abilities, but in fact it is part and parcel of the institution of masculin-
ity and hyper-masculinity that operates to reinforce and define the role of
warriors in our society as both male and socially masculine.” Clearly, such a
culture also has implications for homosexuals who do not fit the stereotypical
image of the manly warrior.

Regarding the supposedly unique sexual threat faced by women who might
be captured by enemy forces, observers highlight that while “the risk exists for
women, it also exists for men, and both accept that risk as part of their job.” On
this point, the story of Major Rhonda Cornum is instructive. During the
Persian Gulf War, Cornum was deployed to Iraq to serve as a flight surgeon for
search and rescue operations. During one mission, Iraqi soldiers shot down
Cornum’s helicopter and seized her as a prisoner of war (POW). Cornum—
held as a POW for eight days—was “interrogated and sexually molested” by her
Iraqi captors. After her release, Cornum spoke of the experience and the
emphasis placed on enemy sexual abuse by proponents of the combat exclusion.
“You’re supposed to look at [assault] as a fate worse than death. Having faced
both, I can tell you it’s not. Getting molested was not the biggest deal of my
life.” In fact, Cornum has argued that

“[e]very 15 seconds in America, some woman is assaulted.

Why are they worried about a woman getting assaulted once every 10 years
in a war overseas? It’s ridiculous . . . . It’s clearly it’s [sic] an emotional

147. Id. at 138.
148. Vojdik, supra note 122, at 343. Vojdik represented Shannon Faulkner and Nancy Mellette in
their efforts to enter, respectively, the then all-male Virginia Military Institute and the Citadel. See id. at
342. Vojdik has spoken in detail about the hyper-masculine environment that surrounded these
institutions. She has noted, for instance, that cadets at the Citadel “actually constructed their own class
of women from among the male cadets . . . considered effeminate, weak, or gay.” Id. at 345. Ultimately,
Vojdik concludes that these institutions, like the military, were “not only structurally but metaphorically
gendered.” Id. at 344.
149. McSally, supra note 51, at 1043; see also Leszkay, supra note 146, at 164 (“[M]en are captured
with the possibility of being raped and tortured as well.”); Cathy Booth Thomas, Prisoner of War: Taken by Surprise, TIME (Apr. 7, 2003), http://www.time.com/time/magazine/article/0,9171,1004600-1,00.html (“[I]f rape is the concern, men too have been victims while in captivity.”).
150. Parham, supra note 77, at 384-85.
152. Id. at 55.
argument they use (to argue that women should be kept away from the frontlines) because they can’t think of a rational one.”

In sum, given the failure of the DoD to protect servicewomen from abuse coming from within the U.S. military, some scholars argue that it is disingenuous of the Department to simultaneously pursue a policy of apparent benevolence in protecting women from assault at the hands of the enemy. In other words, “[u]nlike the prototypical image of a soldier captured by the enemy and subject to rape . . . really the greatest danger is to be subjected to assault by a fellow soldier.” Further, to the extent that the combat exclusion exists to shield women from enemy abuse, it in fact perpetuates the denigration of women by implying that they are in need of greater protection than men.

C. Homosexuals and Women Simply Don’t Belong

Finally, it is worth exploring one more set of rationalizations offered by proponents of the military’s exclusionary policies. These explanations can best be summarized by the frequently invoked mantra that homosexuals and women simply “don’t belong” in the armed forces. As discussed below, these arguments rest in large part on stereotypical views regarding proper gender roles and the physical and psychological capabilities of homosexuals and women.

1. The Presumed Effect of Integrating Homosexuals

While not usually precisely articulated, those who suggest that homosexuals simply do not belong in the military appear to rest their arguments on the perception that integrating homosexuals would be detrimental to military effectiveness because gays are weak and effeminate. Historically, this perspective was explicitly evident in DoD doctrines that prohibited military service by homosexuals because they were “ineffective fighter[s]” and would therefore

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154. Id. After the war, Cornum’s story served as the basis for the main character in the film Courage Under Fire. See Angela K. Smith, Gender and Warfare in the Twentieth Century: Textual Representations 200 (2004).


156. Gary L. Bauer, Gays Don’t Belong in the Military, Wash. Post, June 26, 1993, at A23; Hoenninger, supra note 4, at 348 (discussing the view held by some that “[w]omen just don’t belong in the military”); McSally, supra note 51, at 1028 (noting that one of “[t]he most typical argument] against women in ground combat [i]s . . . women just don’t belong”); Yxta Maya Murray, Sexual Harassment in the Military, 3 S. Cal. Rev. L. & Women’s Stud. 279, 296 (1994) (quoting Rowan Scarborough, PC Ranks in the Military Ranks, Wash. Times, Nov. 16, 1992, at A1) (“The argument against women in combat has been stated quite badly: ‘Women don’t belong in combat. Women don’t belong in the close confines of military lifestyle. The military is not the great social experiment of the ‘90s.’”).

157. See Yvonne Zylan, Passions We Like . . . and Those We Don’t: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body, 16 Mich. J. Gender & L. 1, 33 (2009). A related aspect of this argument not explored here—due to space constraints—is the argument made by some that homosexuals upset the moral compass that is presumed to be guiding military operations.
undermine “the combative prowess of [U.S.] forces.” 158 While doctrinal adherence to such a perspective has fallen out of favor, the underlying animus toward homosexuals has not. During the congressional hearings preceding enactment of DADT, for instance, one senior military official stated that homosexuals should be barred from serving since “their unmistakable effeminate characteristics would render them ineffective as soldiers or military leaders.” 159 More recently, DoD studies indicate that troops opposed to integration largely base their resistance on views “that gay men in particular would act in an effeminate manner inconsistent with the common image of a warfighter.” 160 Service members are indoctrinated early with such perspectives—at one military training academy, a former cadet explained that “the worst term of criticism . . . used against a [male] cadet [is] to call the cadet a female . . . a faggot, a queer, weak, [or] a woman.” 161

2. The Presumed Effect of Permitting Women to Serve in Combat

This same hyper-masculine view of the proper image of service members also explains the objection to allowing women to serve in combat. This attitude was especially evident, for instance, in the recruiting slogan used until 1976 by the U.S. Marine Corps: “We’re looking for a few good men.” 162 Though the Marines have changed their motto, 163 those supporting the combat exclusion essentially still hold that view. For example, one supporter said that while the military might be able to “find one woman in 10,000 who could lead in combat, . . . she would be a freak.” 164 Others have expressed the sentiment that women are simply incapable of engaging in warfare. “Combat is finding and closing with and killing or capturing the enemy. It is killing, that is what it is . . . . It is uncivilized, and women cannot do it. Nor should they be even thought of as doing it . . . . I may be old fashioned, but I think the very nature of women disqualifies them from doing it. Women give life, sustain life, nurture

158. Shilts, supra note 12, at 15 (quoting Dr. Albert Abrams). Interestingly, Shilts suggests that “[t]hough the exclusions would lead to untold injustices and horrors in later years, they were initially written as an enlightened and even compassionate treatment of homosexuality.” Id. at 17. This view is perhaps supported by the fact that regulations permitted some homosexuals during this period to receive honorable rather than dishonorable discharges, especially if they had not engaged in homosexual conduct. See Borch supra note 12, at 196.


160. DoD DADT STUDY, supra note 88, at 102.

161. Vojdik, supra note 122, at 344.

162. Abrams, supra note 86, at 707 (emphasis added).


life, they do not take it.”165 In fact, the combat exclusion has often been sustained by Congress on the perceived fundamental “principle that women should not intentionally and routinely engage in combat.”166

Of course military exclusionists also argue that women are simply physiologically incapable of performing operations required of personnel engaged in combat. To be sure, it should go without saying that there are undeniable biological differences between men and women. Proponents of the combat exclusion suggest that these distinctions make women “smaller and weaker than men” and that integrating them in combat would thus “hinder combat effectiveness.”167 Once again, this argument has made its way into official doctrine. The 1992 Presidential Commission on the Assignment of Women concluded, for instance, that “physiological differences place women at a distinct disadvantage when performing tasks requiring a high level of muscular strength and aerobic capacity, such as hand-to-hand fighting, digging, carrying heavy loads, lifting, and other tasks central to ground combat.”168 Advocates of excluding women therefore argue that the only way to integrate women into combat positions is to lower the physical requirements, which “would inevitably lead to a less-effective fighting force, which in turn would lead to a loss of lives.”169

3. Challenging the Argument that Homosexuals and Women Simply Don’t Belong

A common theme underlying the arguments made by proponents of exclusionary policies is that neither homosexuals nor women constitute effective combatants. Such notions have been challenged, however, on the basis that they are both under- and over-inclusive.170 In other words, some men do not possess the capabilities necessary to succeed in combat, while some homosexuals and women do.171 As the Supreme Court has explained, the problem with the perspective held by advocates of exclusion is that “generalizations about ‘the way [people] are,’ estimates of what is appropriate for most [people], no longer justify denying opportunity to [those] whose talent and capacity place them outside the average description.”172

Moreover, implicit in this reasoning is the reality that integration would not
necessarily lead to the doomsday scenarios noted above. In other words, many proponents of greater integration do not argue for lowered physical requirements. Instead, they suggest that creating the most effective military necessitates admission of the finest candidates—male or female, homosexual or heterosexual. “Men should not be deemed qualified for physical demands of combat positions on the basis of their gender[,] and women who possess the requisite physical strength and stamina should not be excluded from combat assignment on the basis of their gender.” This argument applies to homosexuals as well.

Finally, it is also worth highlighting that many supporters of exclusionary policies view the archetypical warrior as fundamentally masculine, based on the presumption that brute strength wins wars. Thus, when it comes to analyzing what constitutes an effective fighter, “[b]oth the measures and the tasks are designed to fit men.” Instead of simply relying on raw power, however, those favoring greater integration have called upon the military to engage in “test validation” to determine the actual skills and physical requirements necessary for any particular military occupation. This seems especially prudent in light of significant developments over the last few decades regarding the very nature of warfare itself. By and large, opposing armies no longer line up against one another to engage in hand-to-hand combat. Rather, today’s conflicts are increasingly fought with advanced weapons systems on battlefields with no precise front lines. The capabilities of an effective soldier in this environment may well differ from the prototypical image of the warrior that was required in past conflicts.

III. THE REPEAL OF DON’T ASK, DON’T TELL

Historically, developments in military integration have occurred not principally because of groundbreaking judicial decisions, but rather because of a perfect storm of circumstantial, pragmatic, and attitudinal changes within soci-

173. In fact, it has been noted that “the Army does not submit male recruits to physical strength examinations before assigning them to ground combat positions.” McSally, supra note 51, at 1029. Instead, males are assigned to the occupational specialties “based on a combination of aptitude scores, medical evaluations, and personal preferences.” Id.

174. See, e.g., id. at 1030.

175. Id.

176. Goodell, supra note 1, at 44.

177. Id. at 39–40.

178. See Lucinda Joy Peach, Gender Ideology in the Ethics of Women in Combat, in It’s Our Military Too!: Women and the U.S. Military 168 (Judith Hicks Stiehm ed., 1996) (“Physical size and strength has minimal, if any, consideration when weapons are being fired at the touch of a button from a location far removed from the combat theater. Equipment redesign and technological innovations can eliminate most needs for intense physical strength in many combat assignments.”). But see Cloutier, supra note 74, at 1565 (“[D]espite advances in technology, the physical demands on combat soldiers are high.”).

179. See Marron & Whitford, supra note 68, at 247.
ety at large and amongst senior government officials in particular. \(^{180}\) Though actions by the judiciary perhaps influenced the debate related to the repeal of DADT, \(^{181}\) the pattern of integrating homosexuals essentially mirrors other inclusion efforts. This Part explores the repeal of DADT, specifically focusing on the circumstances that led to removal of the ban.

### A. Rejection of the Underlying Justifications

As outlined in the previous Part, in recent years the underlying justifications for DADT have been subjected to increasing suspicion and outright rejection. Mounting evidence obtained from the integration efforts of foreign militaries, \(^{182}\) surveys of U.S. military personnel, \(^{183}\) and studies conducted by the DoD \(^{184}\) gave credence to the view that the presence of open homosexuals would not actually be detrimental to the armed forces. Perhaps the most significant support for this position came in the form of a DoD study conducted in 2010 at the behest of Secretary of Defense Robert Gates. \(^{185}\)

As part of its assessment, the DoD working group conducting the study considered the impact that lifting the ban would have on unit cohesion and effectiveness, good order and discipline, and morale. \(^{186}\) Importantly, the study included a survey that revealed significant differences between respondents who believed they had served with homosexual troops and those who believed they had not. \(^{187}\) In analyzing such data, the DoD working group concluded that it was often “generalized perceptions of gay Service members [that] led to a fear that unit cohesion, morale, and good order and discipline will erode” in the face of open service by homosexuals. \(^{188}\) Ultimately, the study deemed the overall risk to military effectiveness of lifting the ban to be low. \(^{189}\) Citing the ability of the armed forces to adjust to the previous integration of African-Americans and women, the DoD study asserted confidence “that the U.S. military can adjust and accommodate” to the entry of homosexuals “just as it has others in history.” \(^{190}\)

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180. See Hasday, supra note 55, at 97.
181. See infra Part III.C.3.
182. See Belkin, supra note 30, at 118.
183. One survey regarding the impact of repealing Don’t Ask, Don’t Tell recently reached over 100,000 responding service members. DoD DADT REPORT, supra note 88, at 3–4. While the results indicated that there is a “significant minority” opposed to lifting the ban, 70% suggested that repealing Don’t Ask, Don’t Tell would have “a positive, mixed, or no effect.” Id.
184. Id.; RAND 2010 STUDY, supra note 9. The RAND study was conducted under the direction of Secretary of Defense Robert Gates.
185. DoD DADT REPORT, supra note 88.
186. Other areas of consideration were privacy, recruitment and retention, and family readiness. Id. at 101–15.
187. Id. at 102.
188. Id.
189. Id. at 3.
190. Id.
B. Changing Public Opinion

Beyond the shift within the DoD, there was also momentum within the public at large for repealing DADT. When the policy was implemented in 1993, only 38% of surveyed Americans felt that homosexuality was “an acceptable alternative lifestyle.”\(^\text{191}\) By 2009, this number had reached 57%.\(^\text{192}\) Moreover, when asked whether “gays should have equal rights in job opportunities,” 89% of 2009 survey participants responded in the affirmative.\(^\text{193}\) As pertaining specifically to military service, surveys indicated as much as a 31% increase from 1993 to 2010 in public support for allowing open service by gays and lesbians.\(^\text{194}\) While perhaps conceding that societal attitudes towards homosexuality had evolved, advocates of DADT still defended the policy on the grounds that the military was not a place for social experimentation.\(^\text{195}\)

This reasoning was rejected, however, in DoD studies highlighting the fact that the integration of homosexuals would not in fact constitute social experimentation. In considering the issue, the DoD focused specifically on the military’s experience with racial integration and emphasized that the efforts of the armed forces in that realm had indeed occurred “in advance of American civilian society.”\(^\text{196}\) In 1954, for example, the Army was already over 95% integrated.\(^\text{197}\) That same year, the Supreme Court decided the case of Brown v. Board of Education, which was an effort to commence racial integration in America’s public schools.\(^\text{198}\) In other words, when it came to racial integration, “the military did serve as a social experiment . . . for the rest of society.”\(^\text{199}\) By contrast, the DoD itself acknowledged that lifting the ban on open military service for gays and lesbians would simply mean treating them “in a manner similar to what already exists in civilian workplaces.”\(^\text{200}\)

C. Practical Considerations

1. The Realities of War

As explained in Part II, the prohibition on homosexual service in the U.S. military has a long pedigree. Nevertheless, formal bans have often appeared less formal in the face of compelling operational requirements. “From the start, the

\(^{191}\) RAND 2010 Study, supra note 9, at 77.
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id. at 82 (citing ABC News/Washington Post surveys).
\(^{195}\) See, e.g., Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103d Cong., 2d Sess. 595 (1993) (statement of General H. Norman Schwarzkopf) ("The Armed Forces' principal mission is not to be instruments of social experimentation.").
\(^{196}\) DoD DADT Report, supra note 88, at 84 (emphasis in original).
\(^{197}\) Id.
\(^{198}\) 347 U.S. 483 (1954).
\(^{199}\) DoD DADT Report, supra note 88, at 84.
\(^{200}\) Id.
regulations—and rationale offered for them—were clearly designed to bend with the needs of the time. When the Army needed more men . . . , for example, new edicts allowed the military to retain ‘reclaimable’ homosexuals . . . .”\textsuperscript{201} Observers cite numerous incidents of homosexuality-related discharges that were delayed or altogether lost when the troop was “someone whom the service need[ed].”\textsuperscript{202} Even more, gays and lesbians were often placed in the untenable position of facing court-martial, but nevertheless being “ordered to serve at the risk of their own lives” when their units deployed.\textsuperscript{203}

This was especially true as staffing was stretched thin at the height of military deployments in support of Operations Enduring and Iraqi Freedom. Following 9/11, reports suggest, for example, that “the military allowed an increasing number of service members identified as gay to remain in” the military because of a need for the particular expertise of the troops under suspicion.\textsuperscript{204} Critics understandably pounced on this apparently disingenuous U.S. policy—advocates of open service suggested that if gays and lesbians were indeed undermining unit cohesion and effectiveness, the last place the DoD would want to send them is an active combat zone.\textsuperscript{205}

2. Political Will

As Bill Clinton had done before him, Barack Obama campaigned for the presidency on a promise to repeal DADT.\textsuperscript{206} After Obama won the 2008 election, many had hoped he would act quickly to fulfill his pledge to lift the ban.\textsuperscript{207} In what ultimately appears to have been a politically savvy strategy, however, Obama moved more deliberately—in part to “avoid an early conflagration involving the military.”\textsuperscript{208} In other words, while he remained a “fierce advocate” of eliminating DADT, as President, Obama appears to have recog-

\textsuperscript{201} SHILTS, supra note 12, at 17.

\textsuperscript{202} Id. at 6.


\textsuperscript{204} NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 229 (2009).

\textsuperscript{205} Id.

\textsuperscript{206} See Charlie Savage, Obama Seeks Stay on Don’t Ask, Don’t Tell Ruling, N.Y. TIMES, Oct.14, 2010, at A22 (“Mr. Obama campaigned against the ‘don’t ask, don’t tell’ law and has asked Congress to repeal it. But his efforts have been criticized by supporters of equal rights for gay men and lesbians as too slow and insufficient . . . .”).

\textsuperscript{207} Id.

\textsuperscript{208} Elisabeth Bumiller, After Campaign Push, Obama Cultivates Military, N.Y. TIMES, Jan. 30, 2009, at A14. See also Peter Baker, Economy May Delay Work on Obama’s Campaign Pledges, N.Y. TIMES, Jan. 10, 2009, at A19 (suggesting that while the economy was proving to be a distraction to President Obama, “some Democratic strategists said Mr. Obama would be wise to take his time repealing” Don’t Ask, Don’t Tell anyway).
nized the necessity of building a coalition for repealing the law. Accordingly, the President worked throughout 2009 and early 2010 to garner support from both the military and Congress for such action.

Indeed, it was in the midst of this effort that in early 2010 Obama ordered the commencement of the DoD study mentioned above. Though the results of the study would not be released until November of 2010, the campaign to sway Congress also gained momentum in early 2010. In February of that year, for instance, Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, testified before the Senate Armed Services Committee that he supported repealing DADT. In so testifying, Mullen became “the first sitting chairman of the Joint Chiefs to support a repeal of the policy, and his forceful expression of his views seemed to catch not only gay rights leaders but also [Senators] by surprise.” During the same congressional session, Secretary Gates also indicated that he was engaged in efforts, under the direction of the President, to move toward greater military integration. Nevertheless, he emphasized that the DoD could “take the process only so far, as the ultimate decision rested with . . . the Congress.”

By May of 2010, the House of Representatives was on board with lifting the ban. Efforts in the Senate initially stalled, however, and it appeared that gay rights activists were once again in for a disappointment. A large part of the Senate’s hesitation appears to have been grounded in the fact that several members thought it prudent to delay action until release of the DoD’s study related to repealing DADT. Significantly, this cautious approach was even supported by the Service Secretaries; they “urged Congress to delay voting on the issue until after the Defense Department completed its report.”

Two ensuing developments appear to have finally changed the tide in the Senate. The first was “the growing legal confusion”—in light of the judicial
opinion discussed below—about the constitutionality of DADT. The second, and perhaps more important, was that on November 30, 2010, the DoD finally released the study Secretary Gates had initiated in early 2010. With the report’s expression of DoD support for repealing the ban, it became virtually impossible to sustain support for the policy.

3. Judicial Scrutiny

Since DADT’s enactment, numerous suits have been filed challenging its constitutionality. While the policy weathered scrutiny for years, on October 12, 2010 a federal district judge in California held DADT unconstitutional and enjoined the military from further enforcement of it. Eight days later, the Ninth Circuit stayed the injunction against the military’s enforcement of DADT. This stay was subsequently upheld in November of 2010 by the U.S. Supreme Court, but by then, the momentous tide toward repeal had begun. As one commentator explained, for politicians who wished to continue supporting the policy, there was going to “be an increasingly high price to pay politically for enforcing a law which 70 percent of the American people oppose and a core Democratic constituency abhors.”

D. Summary

This brief synopsis demonstrates that the repeal of DADT was clearly not the result of any single development. Instead, the policy met its demise due to a confluence of pragmatic concerns, political determination, judicial scrutiny, changing societal attitudes, and an overall rejection of the rationales that had served to justify the exclusion of homosexuals. Importantly, as discussed below, many of these same circumstances are shaping the debate regarding women in combat.

IV. THE FUTURE OF WOMEN IN COMBAT

As explained throughout this Article, the arguments for excluding women from combat have often paralleled those made by proponents of DADT. The recent repeal of DADT thus raises the question of whether the combat exclusion itself remains tenable. This Part explores that topic by drawing comparisons

220. See Herszenhorn, supra note 215, at A1 (noting that when the vote for repeal originally failed in the Senate, some lawmakers “suggested they might be open to supporting the change later in the year, once the military has finished a study of the likely effects of the proposed policy shift”).
221. DoD DADT REPORT, supra note 88.
222. See, e.g., Witt v. Dep’t of the Air Force, 527 F.3d 806 (9th Cir. 2008).
224. Log Cabin Republicans v. United States, 2010 WL 4136210 (9th Cir. 2010).
between the circumstances leading to repeal of DADT and recent developments related to the combat exclusion.227

A. Rejection of the Underlying Justifications

As discussed above, one of the driving factors that led Congress to lift the ban on homosexual military service was a rejection of the rationales that had previously sustained the policy.228 Part II explains that many of the same justifications have also been rejected in the context of the combat exclusion. Where the comparison arguably diverges, however, is that, unlike with homosexuality, until recently, no official government study had expressed endorsement for lifting the combat exclusion.

That said, new developments on this front indicate that the time is ripe for a renewed national dialogue regarding the combat exclusion. In 2009, for instance, Congress established the Military Leadership Diversity Commission (MLDC) to review “issues regarding diversity in the military services.”229 The MLDC issued its final report on March 15, 2011.230 In it, the Commission recommended that the DoD “eliminate the combat exclusion policies for women . . . to create a level playing field for all qualified servicemembers.”231 This recommendation was based in large part on the Commission’s finding that “there has been little evidence that the integration of women into previously closed units or occupations has had a negative impact on important mission-related performance factors, such as unit cohesion.”232 In fact, the Commission noted that “[t]he blanket restriction for women limits the ability of commanders in theatre to pick the most capable person for the job.”233 Moreover, the MLDC report also emphasized the impropriety of maintaining the combat exclusion in today’s military environment. It noted, for instance, that the bar on full integration was no longer “appropriate given the changes in warfare and doctrine that have occurred over the last decade.”234 This reference was an allusion to the reality explained above that war is no longer fought on a “well-defined, linear battlefield.”235

In sum, the report highlighted that the debate surrounding the combat exclusion is fundamentally about “American citizen[s] being . . . considered for anything that they are qualified to do. It’s about discrimination at its very

227. Notably, in contrast to Don’t Ask, Don’t Tell, the judiciary has not been heavily involved in the combat exclusion debate. For more information on the very limited litigation in this area, see Hasday, supra note 55, at 131–34.
228. See supra Part III.A.
230. MILITARY LEADERSHIP DIVERSITY COM’N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY (2011) [hereinafter MLDC REPORT].
231. Id. at 71 (internal quotation marks omitted).
232. Id. at 71–72.
233. Id. at 72.
234. Id.
235. Id.
As detailed above, DoD support for repealing DADT was arguably a vital development in the demise of that policy. To the extent that the MLDC report conveys similar DoD support for greater integration of women, it similarly may signal the death knell for the military’s exclusionary policy.

### B. Changing Public Opinion

As with homosexuals serving openly in the military, societal attitudes regarding women in combat have also changed in recent years. In 1981, when the Supreme Court heard a challenge to the all-male draft, the Court noted that “[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people.”

After military engagements during the 1990s, however, public opinion polls evidenced pervasive support for permitting women to serve in combat. One poll found, for example, “that seventy-two percent of those surveyed thought that military women should be allowed to serve in combat units.” Other observers have suggested that “[g]rowing segments of the government and public appear to have abandoned the notion that women have special familial responsibilities incompatible with military service, especially in combat.”

Though support within the military has historically been limited, more recent surveys indicate that this attitude may also be shifting. For instance, the MLDC report mentioned above highlighted that there is growing evidence that service members feel “that women serving in combat in Iraq and Afghanistan have had a positive effect on mission accomplishment.”

### C. Practical Considerations

#### 1. The Realities of War

The military’s practice of finagling regulations regarding homosexual service in times of increased operational requirements was explained above. Likewise, “[a] recurring theme in women’s military history is that opportunities frequently opened to women not by force of social change or demands for equal treatment, but rather from military necessity.” This has been especially true in today’s military environment of prolonged wars on multiple fronts. “[W]omen are sorely needed in this modern-day insurgent conflict [and as] has happened many times in war, circumstances have outpaced arguments.” In fact, the Army has at times been so desperate for troops that it has rather blatantly “circumvent[ed]...
the current law preventing the assignment of women to direct combat units . . . [by] assign[ing] female soldiers to larger gender-integrated units on paper, but then collocat[ing] female soldiers with all-male infantry battalions in reality.

Further, just as they have done in previous conflicts, women are serving with distinction and valor. The only thing unique about today’s environment is that they are in fact operating in conditions that constitute combat. In one engagement, for example, Sergeant Leigh Ann Hester, in receiving the Silver Star, became the first female “to be cited for close combat.” In the face of such feats, and given the operational reality that women are already engaged in combat, it is becoming increasingly difficult to retain official policies suggesting otherwise.

2. Political Will

As discussed above, President Obama campaigned in part on a platform to repeal DADT. Similarly, during his march toward the presidency, then-candidate Obama had expressed—via a spokesperson—support for women in combat. “Women are already serving in combat and the current policy should be updated to reflect realities on the ground. Barack Obama would consult with military commanders to review the constraints that remain.” This campaign promise may come to fruition with the recent release of the MLDC study detailed above. As noted, the Commission recommended to the President and Congress that the combat exclusion be eliminated. Commentators suggest that with the release of the Commission’s final report, “months of contentious congressional hearings” will follow, “just like the season of ‘Don’t Ask, Don’t Tell’ of 2010.” In other words, just as with DADT, DoD support for lifting the combat ban could have a significant impact on the ultimate outcome of these congressional debates.

D. Summary

In many respects, then, recent developments surrounding women in combat mirror those that served as precursors to the repeal of DADT. Specifically, the justifications undergirding both the combat exclusion and the ban on open service by homosexuals have been subjected to increasing scrutiny or outright

244. Cloutier, supra note 74, at 1550.
245. See McSally, supra note 51, at 1017 (“As of December 18, 2006, the Army had awarded women warriors one Silver Star, seven Bronze Stars with Valor, thirteen Air Medals with Valor, and sixty-eight Army Commendation medals with Valor.”).
rejection. Further, since the time that these policies were first enacted, public perception has likewise shifted in such a manner that neither can be said to enjoy the support of the majority of the American public. Practical concerns related to these policies have also paralleled one another insofar as the realities of war have demonstrated the necessity of permitting all willing and able citizens to serve in order to meet operational requirements.

That said, there are also key differences between these two debates. First, in contrast to DADT, the combat exclusion has not been subject to judicial scrutiny. To the extent, then, that the judiciary is necessary to drive change, the combat exclusion is arguably more stable than was DADT. Further, while there has been some political support for lifting the combat exclusion, it has thus far not paralleled that garnered by proponents of open service by gays and lesbians. Such congressional support may emerge in the near future, however, given the recent release of the MLDC’s report. Finally, though a detailed discussion of this issue is beyond the scope of this Article, any practical effort to lift the combat exclusion for women must include consideration of the impact such action has in relation to the Selective Service draft.249

**CONCLUSION**

For proponents of a truly integrated military, the repeal of DADT represents a major victory. Obviously the policy’s demise will facilitate open service by homosexuals who wish to serve their country. Perhaps just as significantly, however, repealing DADT also appears in many respects to pave the way for elimination of the combat exclusion for women. There are still important battles to be fought before the combat exclusion is likely to be completely rescinded. Nevertheless, given the momentum toward greater integration, there is reason to believe the combat exclusion is indeed the next casualty in the battle for equality.

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249. In *Rostker v. Goldberg*, the Supreme Court upheld the operation of the draft despite its exclusive impact on males. 453 U.S. 57 (1981). In reaching this conclusion, the Court relied heavily on the fact that the draft was designed largely to recruit personnel for combat. *Id.* at 76. Since women are not permitted in combat, the Court reasoned that the government had a compelling interest in excluding them from the draft. *Id.* at 77–79. Should the combat exclusion be lifted, there is considerable reason to doubt the continued viability of the *Rostker* decision.