

HETEROSEXUALITY AND MILITARY SERVICE

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INTRODUCTION

The Kentucky National Guard's 940th Military Police Company is based in Walton, Kentucky, just south of the Kentucky-Ohio border.¹ In November 2004, in anticipation of its deployment to Iraq, the 940th was mobilized and stationed at Fort Dix, New Jersey.² Love was in the air at Fort Dix that fall. While the 940th was preparing for its year of service in Iraq, five couples in the unit got married.³ Amanda and Todd McCormick were one of those couples.⁴ The McCormicks spent their first year of marriage in an active war zone, where their duties included training the Iraqi police force, providing base security, and guarding detainees for the Army.⁵ And they did all this without being able to kiss, hold hands, or even be alone together in the same room.

Shortly before the unit shipped out to Iraq, the commander of the 940th issued a new policy for the unit. Concerned that sexual relationships would interfere with the work to be done in Iraq, the commander decided to prohibit the members of the 940th from having sex.⁶ Under the unit's new "no contact" policy, members of the 940th could not engage in "sexual contact, hand holding or kissing" while the unit was deployed to Iraq.⁷ For the McCormicks and the four other dual-serving couples in the 940th, their marriages did not excuse them from the new policy. According to the

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¹ See Jim Warren, *Now Guard Members Can Kiss: Husband and Wife Among Troops Back from Iraq*, LEXINGTON HERALD-LEADER, Jan. 10, 2006, at B1.

² See Valarie Honeycutt Spears, *Guard Member Challenges Sex Policy: Couple Not Allowed Contact While Serving Together in Iraq*, LEXINGTON HERALD-LEADER, June 23, 2005, at A1; Warren, *supra* note 1, at B1.

³ Honeycutt Spears, *supra* note 2, at A1.

⁴ *Id.*

⁵ Warren, *supra* note 1 at B1.

⁶ Honeycutt Spears, *supra* note 2, at A1.

⁷ *Id.* The no contact policy applied without regard to whether a unit member's sexual partner is a fellow service member or a civilian. In other words, if a member of the unit has sex with anyone during deployment, then the unit member would be in violation of the unit's no-contact policy. See *id.*

memo outlining the policy, although married couples in the unit could have sex on leave, they could not engage in sexual conduct of any kind during active deployment.⁸

In the summer of 2005, about halfway through her year of service in Iraq, Amanda McCormick emailed her congressman to complain about her unit's no contact policy.⁹ In the email, she referred to an incident where Todd came to visit her in her living quarters while she was on a down day.¹⁰ Although they were fully dressed and the lights in the room were on, a superior discovered them together and told Todd to leave.¹¹ The risks of violating the policy were substantial. Simply for being alone together, the McCormicks could have lost rank, had their pay docked, or been put on restricted duty.¹² "We are not allowed to live together. We are not allowed to spend time alone together. Basically, in a nutshell, we are not allowed to be married,"¹³ McCormick wrote in the email. All the couple wanted was some private time together.¹⁴ "We are stationed on the same base, in the same unit. Instead of that fact being comforting, it has made us sick with worry."¹⁵

The McCormicks' experience in Iraq highlights an underappreciated, if not completely overlooked, fact about military life: the military regulates a considerable amount of heterosexual sex. For the McCormicks and the rest of the 940th, the military completely banned engaging in any kind of sexual conduct while they were deployed to Iraq. This is just one way in which the military regulates heterosexual sex. As this Essay shows, the military's rules regulating sex come in various shapes and sizes, from blanket rules against sex altogether, like in the McCormicks' case, to criminal laws targeting specific sexual acts and relationships, to a criminal penalty for becoming pregnant during active duty. The goal of this Essay is to examine the implications of the military's regulation of heterosexual sex for its current policy toward homosexuality—the "Don't Ask, Don't Tell" policy (DADT).¹⁶ Heterosexuality is largely missing from the national debate over DADT, which has heated up in recent months due to President Obama's

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Warren, *supra* note 1, at B1.

¹³ Honeycutt Spears, *supra* note 2, at A1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73 (codified as amended at 10 U.S.C. § 654 (2006)) (link); DEP'T OF DEF., DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (2008) (link).

open hostility toward the policy.¹⁷ Yet heterosexuality holds the key to understanding why DADT is based on a faulty premise.

DADT is built around the idea that because gay sex disrupts unit cohesion¹⁸—that is, because it prevents service members from forming the bonds of trust needed to succeed in combat—lesbians and gay men cannot be allowed to serve openly in the military.¹⁹ The policy rests on the idea that gay sex is more harmful to military effectiveness than other kinds of sexual conduct. Yet the military's various rules regulating heterosexual sex are also aimed at protecting unit cohesion. If the military regulates a considerable amount of heterosexual conduct as a means to protect unit cohesion, why does DADT presume that gay sex poses a greater threat to unit cohesion than heterosexual sex? The military's existing policies regulating heterosexual sex suggest that DADT's focus on homosexuality is misplaced. What the military thinks of as a problem with homosexuality is really a problem with sexual conduct in general.

This Essay makes two distinct contributions to the scholarly literature. First, it provides a new way of approaching the issue of gay military service. To date, the issue of gay service has been debated primarily in terms of whether the presence of openly gay service members would hinder military effectiveness. Indeed, the bulk of scholarly writing on DADT approaches the issue of gay service from this perspective.²⁰ This Essay breaks

¹⁷ See Sheryl Gay Stolberg, *On Gay Issues, Obama Asks to Be Judged on Vows Kept*, NYTIMES.COM, June 30, 2009, <http://www.nytimes.com/2009/06/30/us/politics/30obama.html> (link).

¹⁸ The *Dictionary of U.S. Army Terms* defines unit cohesion as the forces that “lead to solidarity within military units, directing soldiers towards common goals with an express commitment to one another and the unit as a whole.” U.S. DEP'T OF ARMY, REG. 310-25, *DICTIONARY OF UNITED STATES ARMY TERMS*, at 204 (Oct. 15, 1983), available at <http://www.fas.org/irp/doddir/army/ar310-25.pdf> (link).

¹⁹ See 10 U.S.C. § 654(a)(7) (“One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.”); *id.* § 654(a)(15) (“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.”).

²⁰ See, e.g., NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* (2009) (arguing that the policies supporting the policy are not sound); Aaron Belkin, “Don't Ask, Don't Tell”: Does the Gay Ban Undermine the Military's Reputation?, 34 *ARMED FORCES & SOC.* 276 (2008) (arguing that the policy hurts the military in the realm of public opinion); Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military*, 103 *MICH. L. REV.* 150 (2004) (arguing that DADT should be replaced with a system of voluntary integration for heterosexuals to serve alongside lesbians and gay men in fully integrated units); Diane H. Mazur, *The Unknown Soldier: A Critique of “Gays in the Military” Scholarship and Litigation*, 29 *U.C. DAVIS L. REV.* 223 (1996) (arguing that the proper way to critique the policy is to focus on the ways in which service members' cases arose); Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 *IOWA L. REV.* 1633 (2004) (arguing that the policy restricts public speech values protected by the First Amendment); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell*

from this trend by steering the conversation away from sexual orientation—and, in particular, homosexuality—and refocusing it on sexual conduct. After all, DADT is but one of the military's many sex regulations, most of which impose considerable restrictions on the sexual lives of service members without regard to sexual orientation. By viewing DADT through this broader lens, this Essay paves the way for a more meaningful conversation about the military's interest in regulating the sexual conduct of all the men and women serving in the armed forces, not just the ones who engage in same-sex sexual conduct.

At the same time, this Essay also makes a stand-alone contribution to the growing field of what scholars are calling “critical heterosexual studies” (CHS).²¹ CHS is part of a new generation of critical scholarship that studies insider identities, such as whiteness²² and masculinity.²³ From a methodological standpoint, CHS offers a dual benefit: not only does it provide insights into an identity that is largely taken for granted, but it also uses heterosexuality as a lens through which to reconsider the cultural—and in the case of DADT, legal—construction of homosexuality. This Essay touches on both aspects of CHS. Not only does the Essay document the extensive ways in which the military regulates heterosexual sex, but it then uses these regulations to show that DADT is based on a faulty understanding of the relationship between sex and unit cohesion.

This Essay proceeds in three parts. Part I considers the relationship between homosexuality and military service, including a detailed account of DADT's discharge provisions. Part II turns to the relationship between heterosexuality and military service, considering the different ways the military regulates heterosexual sex. Finally, Part III reconsiders DADT in light of the Essay's argument that sexual conduct, rather than homosexuality, poses the real threat to unit cohesion. Specifically, the Essay makes two interrelated proposals. First, it proposes that the military should get out of the business of regulating sexual orientation altogether. Second, it urges the military to reconsider its regime of sexual regulations. Once the military has shifted its focus from sexual orientation to sexual conduct, the military should have an internal conversation about its existing regime of sex regulations. This would be a prospective conversation, designed to facilitate the transition from a regime that regulates both sexual orientation and sexual

Policy, 63 BROOK. L. REV. 1141 (1997) (arguing that the policy amounts to compelled speech which implicates the First Amendment).

²¹ See, e.g., STEVI JACKSON, *HETEROSEXUALITY IN QUESTION* (1999); JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995); José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1 (2006).

²² See, e.g., *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997). In the legal literature, the foundational work on whiteness studies is Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

²³ See, e.g., *CONSTRUCTING MASCULINITY* (Maurice Berger et al. eds., 1995); MICHAEL S. KIMMEL, *THE GENDER OF DESIRE: ESSAYS ON MASCULINITY* (2005).

conduct to a regime that regulates sexual conduct exclusively. The purpose of such a discussion would be to provide the military an opportunity to reexamine the relationship between sex and unit cohesion and, to the extent the military deems it necessary, to develop a new regime of sex regulations that is tailored to its interest in regulating sexual conduct that disrupts unit cohesion.

I. HOMOSEXUALITY AND MILITARY SERVICE

The United States military has always regulated homosexuality in one form or another. Lieutenant Gotthold Frederick Enslin was the first service member to be discharged from the U.S. military because of homosexuality.²⁴ The year was 1778, and General George Washington signed the discharge order while the Continental Army was camped at Valley Forge.²⁵ At a court-martial presided over by Enslin's commanding officer, Lieutenant Colonel Aaron Burr, Enslin was convicted of engaging in sodomy with a male private, in violation of the Articles of War of 1775.²⁶ Washington's discharge order called for Enslin "to be drummed out of the Camp tomorrow morning by all the Drummers and Fifers in the Army never to return."²⁷ The discharge ceremony, a bizarre affair by current standards, went off without a hitch. After an officer's sword was broken in half over his head, Enslin followed the road out of Valley Forge while the drummers literally drummed him out of the Army.²⁸

These days, lesbians and gay men are not drummed out of the military but rather administratively discharged under DADT. DADT is the latest in a series of U.S. military policies aimed at homosexuality,²⁹ a history that dates back to Lt. Enslin's discharge for sodomy in 1778. Rather than reconstruct this history in its entirety, this Part instead offers a detailed account of DADT's discharge provisions and its unit cohesion rationale. Such a detailed account is necessary in this case, as the goal of this Part is to provide a thorough description of the military's legal regime for regulating homosexuality. To put DADT in its proper historical and political context, this Part begins with a brief discussion of the policy that preceded DADT.

²⁴ See RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE MILITARY* 11–13 (1993).

²⁵ See *id.* at 11.

²⁶ See *id.* at 11–12; Matthew K. Brown, Note, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006), 29 U. ARK. LITTLE ROCK L. REV. 345, 349–50 (2007).

²⁷ SHILTS, *supra* note 24, at 12.

²⁸ See *id.*

²⁹ See NATIONAL DEFENSE RESEARCH INSTITUTE, *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 3–10 (RAND 1993) (discussing the history of the military's various policies on homosexuality).

A. *The 1981 Policy*

When President Clinton took office in 1993, he inherited a military policy that had been in place since the final days of the Carter administration.³⁰ President Carter had vowed to “get tough on gays,” and one week before Carter left office, Carter’s deputy secretary of defense pushed through a service-wide ban on gay service.³¹ The heart of the policy was the claim that “[h]omosexuality is incompatible with military service.”³² To elaborate on this claim, the 1981 policy listed reasons why lesbians and gay men could not serve in the military, citing concerns about the effect of gay service on heterosexual service members’ privacy, the military’s recruitment effort, the public image of the military, and possible security breaches (presumably on the theory that enemies of the United States could use a closeted service member’s homosexuality as a basis for blackmail).³³ Unlike earlier policies, the 1981 policy denied unit commanders the discretion to determine whether a particular service member should be discharged because of homosexuality.³⁴

While campaigning during the 1992 presidential election, then-Governor Clinton pledged that, if elected, he would repeal the 1981 Policy.³⁵ Initially, President Clinton assumed that he could integrate the military by executive order, just as President Truman had done in 1948 with Executive Order 9981.³⁶ But once in office, President Clinton stumbled. Almost immediately, his proposal met strong opposition from the Joint Chiefs of Staff and Senator Sam Nunn, a conservative Democrat from Georgia, who—in his capacity as chairman of the Senate Armed Services Committee—organized congressional hearings on the issue of gay military service.³⁷ General Colin Powell, the Chairman of the Joint Chiefs, figured prominently in the debate over gay service. Not only did he testify in support of the gay ban at Senator Nunn’s congressional hearings, but he also used the media to garner support for his position. In what could have been seen as an act of insubordination, Powell told reporters that, “the military leaders in the armed forces of the United States—the Joint Chiefs of Staff

³⁰ See FRANK, *supra* note 20, at 10; NATIONAL DEFENSE RESEARCH INSTITUTE, *supra* note 29, at 8.

³¹ See FRANK, *supra* note 20, at 10;

³² DEP’T OF DEF., DIRECTIVE 1332.14(1)(H)(1)(a), ENLISTED ADMINISTRATIVE SEPARATIONS (Jan. 28, 1982).

³³ See *id.*

³⁴ NATIONAL DEFENSE RESEARCH INSTITUTE, *supra* note 29, at 8.

³⁵ See Todd S. Purdum, *The 1992 Campaign: Voters; Democrats’ Efforts to Lure Gay Voters Are Persistent but Subtle*, NYTIMES.COM, Apr. 7, 1992, <http://www.nytimes.com/1992/04/07/us/1992-campaign-voters-democrats-efforts-lure-gay-voters-are-persistent-but-subtle.html?pagewanted=1> (link).

³⁶ See Om Prakash, *The Efficacy of “Don’t Ask, Don’t Tell,”* 55 JOINT FORCE QUART. 88, 88 (2009) (link). Executive Order 9981 integrated the armed forces along racial lines. *Id.*

³⁷ See JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY 19–26 (1999) (discussing the political fight over President Clinton’s plan to lift the 1981 policy); FRANK, *supra* note 20, at 13, 86.

and the senior commanders—continue to believe strongly that the presence of homosexuals within the armed forces would be prejudicial to good order and discipline. And we continue to hold that view.³⁸

Once it became clear that he lacked the political capital to make good on his promise to completely repeal the 1981 policy, President Clinton softened his stance on gay service by putting his support behind a compromise policy proposed by Professor Charles Moskos, a military sociologist and close friend of Senator Nunn.³⁹ The thrust of the compromise policy—which ultimately became DADT—was to permit lesbians and gay men to serve in the military so long as they concealed their homosexuality.⁴⁰ DADT was an improvement on the 1981 policy, the Clinton administration insisted, because it targeted gay conduct rather than gay status. Secretary of Defense Lee Aspin highlighted the shift from status to conduct in his testimony before the Senate Armed Services Committee: “Under the new policy, homosexual conduct will continue to be grounds for discharge from military service. On the other hand, sexual orientation is considered to be a personal and private matter.”⁴¹

B. DADT

DADT is built around the idea that homosexual conduct disrupts unit cohesion.⁴² According to the policy, unit cohesion refers to “the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.”⁴³ There are two dimensions to unit cohesion.⁴⁴ The first, what psychologists call “task cohesion,” refers to the shared commitment of a group to accomplish a specific objective.⁴⁵ In the military setting, task cohesion is directly related to the military’s system of rank and hierarchy, in which orders flow according to a top-down, binding structure.⁴⁶ Although service members must accomplish many objectives, both large and small, during their military service, DADT explicitly states that the military’s ultimate objective is “to prepare for and to prevail in combat

³⁸ John H. Cushman Jr., *The Transition: Gay Rights; Top Military Officers Object to Lifting Homosexual Ban*, NYTIMES.COM, Nov. 14, 1992, <http://www.nytimes.com/1992/11/14/us/the-transition-gay-rights-top-military-officers-object-to-lifting-homosexual-ban.html?pagewanted=1> (link); see also FRANK, *supra* note 20, at 58–85 (discussing Powell’s role in the debate over gay service).

³⁹ See FRANK, *supra* note 20, at 66–67.

⁴⁰ See *id.*

⁴¹ See HALLEY, *supra* note 37, at 28 (quoting Secretary of Defense Lee Aspin, Statement Before the H. Comm. on Armed Serv. (July 21, 1993)).

⁴² See 10 U.S.C. § 654(a)(15) (2006) (link).

⁴³ *Id.* § 654(a)(7).

⁴⁴ Prakash, *supra* note 36, at 91.

⁴⁵ *Id.* (citing NATIONAL DEFENSE RESEARCH INSTITUTE, *supra* note 29, at 283).

⁴⁶ See Robert J. MacCoun, *Sexual Orientation and Military Cohesion: A Critical Review of the Evidence*, OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 157 (Gregory M. Herek et al., 1996), at 171–72.

should the need arise.”⁴⁷ The second dimension of unit cohesion is what psychologists call “social cohesion.”⁴⁸ Social cohesion refers to the “nature and quality of the emotional bonds within a group—the degree to which members spend time together, like each other, and feel close.”⁴⁹ The theory behind social cohesion is that groups that get along well perform better than groups that do not.

With unit cohesion as the backdrop, DADT articulates three grounds for discharging lesbian and gay service members on the basis of homosexuality: acts, statements, and same-sex marriage. This section considers each of these grounds for discharge in turn. The section concludes with a brief discussion of DADT’s “queen for a day” defense, which gives service members an opportunity to avoid discharge by presenting evidence of heterosexuality.

1. Homosexual Acts

The first ground for discharge under DADT is triggered when a service member engages in a “homosexual act,”⁵⁰ which the policy defines as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.”⁵¹ Note how broad this definition is. Not only does the homosexual act provision reach conduct that is obviously sexual in nature, such as kissing or engaging in oral sex, but it also captures conduct that is less overtly sexual in nature. For instance, in a training manual accompanying DADT, the Department of Defense poses a hypothetical scenario whereby hand-holding constitutes a homosexual act under DADT.⁵² Hypothetical Teaching Scenario 2 involves two male service members who are seen walking in a public park and holding hands while both are off-duty and on liberty.⁵³ The manual concludes, without elaboration, that “hand-holding in these circumstances indicates a homosexual act.”⁵⁴

Not all conduct involving homosexuality falls under DADT’s homosexual act provision, however. The Department of Defense training manual also provides hypothetical teaching scenarios in which service members do not run afoul of DADT. For instance, Hypothetical Teaching Scenario 3

⁴⁷ 10 U.S.C. § 654(a)(4).

⁴⁸ Prakash, *supra* note 36, at 91.

⁴⁹ *Id.*

⁵⁰ 10 U.S.C. § 654(b)(1).

⁵¹ *Id.* § 654(f)(3)(A). The definition of “homosexual act” also captures “any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).” *Id.* § 654(f)(3)(B).

⁵² Memorandum from Asst. Sec’y of Def. Edwin Dorn on DOD Policy on Homosexual Conduct Training Plan to Asst. Sec’y of the Army, Asst. Sec’y of the Navy, Asst. Sec’y of the Air Force, Hypo. Teaching Scenario 2, Dec. 22, 1993 (link).

⁵³ *See id.*

⁵⁴ *Id.*

involves a service member who has been seen entering, leaving, and otherwise hanging around a local gay bar.⁵⁵ Similarly, Hypothetical Teaching Scenario 7 involves a service member who attends “military night” at a local gay bar.⁵⁶ And Hypothetical Teaching Scenario 6 involves a service member who is seen marching in a gay rights parade, carrying a handmade placard with the words “Lesbians in the military say, ‘Lift the Ban!’” written on it.⁵⁷ None of these examples, the manual concludes, would constitute a homosexual act under DADT.⁵⁸

2. Homosexual Statements

Lesbian and gay service members can be discharged not only for what they do, but also for what they say. The second ground for discharge attaches when a service member “has stated that he or she is a homosexual or bisexual, or words to that effect.”⁵⁹ On its face, the homosexual statements provision seems inconsistent with DADT’s overall goal of focusing on gay conduct rather than status. From the military’s point of view, however, the statement “I am gay” is not merely a declaration of a service member’s homosexuality, but rather evidence that the service member will engage in prohibited conduct. According to a Department of Defense directive that outlines separation procedures under DADT, a homosexual statement “create[s] a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”⁶⁰ The directive goes on to explain that a *propensity* to engage in homosexual acts is “more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.”⁶¹ In this regard, DADT collapses the distinction between gay status and conduct.⁶² Moreover, it is worth noting that, on several occasions, this formulation of homosexual statements—not as speech *per se* but as evidence of prohibited conduct—has saved DADT from being struck down as unconstitutional under the First Amendment.⁶³

⁵⁵ *Id.*, Hypo. Teaching Scenario 3.

⁵⁶ *Id.*, Hypo. Teaching Scenario 7.

⁵⁷ *Id.*, Hypo. Teaching Scenario 6.

⁵⁸ *Id.*, Hypo. Teaching Scenarios 3, 6, 7.

⁵⁹ See 10 U.S.C. § 654(b)(2) (2006).

⁶⁰ DEP’T OF DEF., INSTRUCTION NO. 1332.14, ENCLOSURE 3(8)(a)(2)(b), ENLISTED ADMINISTRATIVE SEPARATIONS (Aug. 28, 2006).

⁶¹ *Id.*

⁶² See HALLEY, *supra* note 37 (arguing that DADT is a status regulation in disguise).

⁶³ See, e.g., *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (link), *cert. denied*, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420, 1430 (9th Cir. 1997) (link); *Richenberg v. Perry*, 97 F.3d 256, 263 (8th Cir. 1996) (link), *cert. denied*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996) (link), *cert. denied*, 519 U.S. 948 (1996).

3. Same-Sex Marriage

The final ground for discharge under DADT attaches when a service member either enters into or attempts to enter into a marriage with a person “of the same biological sex.”⁶⁴ Back when DADT became law in 1993, same-sex marriages were not recognized in any state. This was the case until 2004, when Massachusetts became the first state to permit same-sex couples to marry.⁶⁵ Since then, four other states have made marriage available to same-sex couples.⁶⁶ DADT and related documents say next to nothing about the same-sex marriage provision, except for a small note in the Department of Defense directive outlining administrative procedures under DADT, which addresses how to determine a person’s biological sex for purposes of the marriage provision. According to the directive, biological sex is “evidenced by the external anatomy of the persons involved.”⁶⁷ Because most states do not yet recognize same-sex marriage, of the three grounds for discharge under DADT, the same-sex marriage provision has the least burdensome effect on the day-to-day lives of lesbian and gay service members.

C. “Queen for a Day”

Even if a service member has violated DADT, the service member can still avoid discharge by proving that, regardless of whatever he did or said, he was only a “queen for a day.”⁶⁸ The queen for a day defense provides a safety valve for service members who identify as heterosexual but engage in an isolated act that violates DADT. In cases involving discharge for homosexual conduct, a service member can avoid discharge by showing that such conduct was a departure from the member’s customary behavior and, as such, is not likely to recur.⁶⁹ In cases involving discharge for a homo-

⁶⁴ 10 U.S.C. § 654(b)(3) (2006).

⁶⁵ Massachusetts took this step in response to two decisions of the Massachusetts Supreme Judicial Court, which, taken together, concluded that the state constitution compels marriage equality for different-sex and same-sex couples. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004).

⁶⁶ These states are Connecticut, Iowa, Vermont, and New Hampshire. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009); *Kerrigan v. Comm. of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, NYTIMES.COM, June 3, 2009, <http://www.nytimes.com/2009/06/04/us/04marriage.html> (link); Abby Goodnough, *With Victories, Gay Rights Groups Expand Marriage Push*, NYTIMES.COM, Apr. 7, 2009, http://www.nytimes.com/2009/04/08/us/08webvermont.html?_r=1&pagewanted=print (link).

⁶⁷ DEP’T OF DEF., INSTRUCTION NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 19 (Aug. 28, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf> (link).

⁶⁸ See *Mary Anne Case*, *Of “This” and “That” in Lawrence v. Texas*, 55 SUP. CT. REV. 75, 90 n.66 (2003) (describing the queen for a day exception) (link); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 376–77 (2000) (same) (link).

⁶⁹ 10 U.S.C. § 654(b)(1)(A)–(E) (link). The provision requires the service member to demonstrate that:

sexual statement, a service member can avoid discharge by proving that, regardless of whatever statements to the contrary, the member does not engage in homosexual acts.⁷⁰ In effect, the queen for a day defense requires service members to prove that they are heterosexual, which of course is exceptionally hard, if not impossible, to do once there is credible evidence that a service member has engaged in homosexual conduct or made a homosexual statement. For this reason, the queen for a day defense affords lesbian and gay service members limited protection against discharge.

II. HETEROSEXUALITY AND MILITARY SERVICE

When Brandon McNeese, the commander of the 940th Military Police Company, issued the no contact order for his unit, he was worried that sex would interfere with the 940th's mission in Iraq. "Sexual relationships between soldiers in a unit," McNeese explained in a memo announcing the policy, "have the potential to negatively affect morale, readiness and the good order and discipline of a unit during a deployment."⁷¹ For McNeese, the risks associated with having sex during deployment must have outweighed the potential benefits, which is why he refused to make an exception for the five married couples in the unit, including the newly married and newly deployed Amanda and Todd McCormick.⁷² The McCormicks soon found themselves in a situation familiar to most lesbian and gay service members—they could not hold hands, kiss, or be alone together in the same room, let alone have sex.⁷³ Even the most routine acts of intimate conduct—such as a committed couple sharing a quiet moment alone—posed an unnecessary threat to unit cohesion under the unit's no contact policy.

For the McCormicks and the rest of the 940th, the military imposed a complete ban on heterosexual conduct.⁷⁴ In other situations, by contrast, the military regulates specific heterosexual acts, such as oral and anal sex. There are also situations where the military regulates specific heterosexual relationships, such as adulterous relationships and sexual relationships be-

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- (A) such conduct is a departure from the member's usual and customary behavior;
 - (B) such conduct, under all the circumstances, is unlikely to recur;
 - (C) such conduct was not accomplished by use of force, coercion, or intimidation;
 - (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
 - (E) the member does not have a propensity or intent to engage in homosexual acts.

Id.

⁷⁰ *Id.* § 654(b)(2) (allowing the member to demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts").

⁷¹ See Honeycutt-Spears, *supra* note 2.

⁷² See *supra* notes 1–8 and accompanying text.

⁷³ *Id.*

⁷⁴ *Id.*

tween officers and enlisted service members. Although they take different forms, these heterosexuality regulations share an important thing in common with DADT: they are designed to protect unit cohesion. This raises a question about DADT's fundamental premise. DADT rests on the idea that gay sex is more harmful to unit cohesion than other forms of sexual conduct, most notably heterosexual conduct. But if the military regulates a wide range of heterosexual conduct, and it does so in the interest of protecting unit cohesion, why does DADT presume that gay sex is more problematic than heterosexual sex? This Part argues that DADT's fundamental premise is faulty. The military does not have a problem with homosexuality so much as it has a problem with sexual conduct.

A. *Regulating Heterosexuality*

This section considers the different ways in which the military regulates heterosexual conduct. These regulations come in four basic forms. The first is the military's criminal sodomy law, which targets specific sexual acts. The second form of regulation involves laws that prohibit specific sexual relationships. The third form imposes blanket rules against sexual conduct, such as the no contact policy in the McCormicks' unit. The fourth prohibits sexual encounters that result in pregnancy.

1. Specific Sexual Acts

As the statutory code governing all aspects of military life, the Uniform Code of Military Justice (UCMJ) includes a criminal prohibition against sodomy. Article 125 of the UCMJ proscribes both oral and anal sex—as well as, rather curiously, bestiality.⁷⁵ The provision does not take into account the service member's sex or the other party's military status, which means that the provision applies equally to men and women and that a service member cannot commit sodomy with either a fellow member of the service or a civilian.⁷⁶ The maximum punishment for an act of garden-variety sodomy is a dishonorable discharge and up to five years in prison.⁷⁷ In cases where the sodomy is either non-consensual or involves a minor (or both), the punishment can be as severe as a life sentence without the possibility of parole.⁷⁸

In 2003, the Supreme Court held in *Lawrence v. Texas* that the Constitution prohibited the states from criminalizing private, consensual sodomy.⁷⁹ Although *Lawrence* seems to foreclose military prosecutions for sodomy, in

⁷⁵ Uniform Code of Military Justice, 10 U.S.C. § 925(a) (2006) (link); MANUAL FOR COURTS-MARTIAL UNITED STATES, Part IV, Art. 125, ¶ 51 (2008 ed.) [hereinafter MANUAL FOR COURTS-MARTIAL] (link).

⁷⁶ See MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 125, ¶ 51(a).

⁷⁷ *Id.* ¶ 51(e)(4).

⁷⁸ See *id.* ¶ 51(e)(1)–(3).

⁷⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003) (link).

United States v. Marcum the Court of Appeals for the Armed Forces concluded that the military can continue to prosecute service members for engaging in sodomy.⁸⁰ According to the court in *Marcum*, even if a service member engages in sexual conduct that fits within the liberty interest recognized by the *Lawrence* Court, “this right must be tempered in a military setting based on the mission of the military, the need for obedience of orders, and civilian supremacy.”⁸¹ In other words, after *Lawrence*, a service member’s right to engage in sodomy is balanced against the military’s interest in maintaining good order and discipline among its ranks. Lower courts have interpreted *Marcum* to require a case-by-case inquiry for prosecutions of sexual conduct in light of *Lawrence*.⁸²

2. Prohibited Relationships

In addition to prohibiting specific sexual acts, the military also proscribes two forms of sexual relationships—those involving adultery or fraternization.⁸³ Although neither of these is expressly mentioned in the UCMJ, the military prosecutes them under UCMJ General Article 134, which prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces”⁸⁴

Adultery. Paragraph 62 of the Manual for Courts-Martial (MCM) implicitly incorporates the adultery prohibition into Article 134 of the UCMJ by concluding that adultery “is clearly unacceptable conduct, [which] reflects adversely on the service record of the military member.”⁸⁵ According to the MCM, a service member commits adultery by having sexual intercourse with another person if, at the time of the sexual act, either the service member or the sexual partner is married to someone else.⁸⁶ In addition, for adulterous conduct to constitute a violation of the UCMJ’s Article 134, the sex must be “directly prejudicial to good order and discipline or service discrediting.”⁸⁷ The maximum punishment for adultery under the MCM is a dishonorable discharge and up to one year in prison.⁸⁸

⁸⁰ 60 M.J. 198, 200 (C.A.A.F. 2004).

⁸¹ *Id.* at 208 (quoting *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996) (internal quotation marks omitted)).

⁸² See *United States v. Bart*, 61 M.J. 578, 581 (C.M.A. 2005) (quoting *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004); see, e.g., *id.* at 582 (C.M.A. 2005) (holding that the “direct and obvious impact” of the crimes of sodomy and adultery on “the military interests of discipline and order” is apparent where a sailor murdered his civilian wife to continue a romantic relationship with another service member).

⁸³ MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 134, ¶¶ 62, 83.

⁸⁴ Uniform Code of Military Justice, 10 U.S.C. § 934 (2006) (link).

⁸⁵ MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 134, ¶ 62(c)(1).

⁸⁶ *Id.* ¶ 62(b)(1)–(2).

⁸⁷ *Id.* ¶ 62(b)(3), (c)(2).

⁸⁸ See *id.* ¶ 62(e).

It is worth noting that the military does indeed enforce its prohibition against adultery. For example, First Lieutenant Kelly Flinn, the first female to pilot the B-52 bomber,⁸⁹ was charged with adultery after she had an affair with a civilian man who was married to an airwoman at the same base.⁹⁰ Despite a stellar service record, Flinn ultimately resigned and accepted a general (as opposed to honorable) discharge in order to avoid a court-martial.⁹¹ Similarly, four-star Army General Kevin Byrnes was relieved of his command of Fort Monroe because he had an extra-marital sexual relationship.⁹² The Army's decision to relieve Byrnes came just a few months before he was set to retire as head of the Army Training and Doctrine Command, the culmination of a thirty-six-year career in the Army, during which Byrnes also served as the director of Army staff in Washington, D.C. and as the commander of the First Cavalry Division.⁹³ The military's adultery prohibition applied even though Byrnes and his wife were separated at the time (and subsequently divorced)⁹⁴ because the MCM notes that, for purposes of interpreting the adultery provision, "[a] marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction."⁹⁵ As with sodomy, military courts have concluded that *Lawrence v. Texas* does not foreclose prosecutions for adultery under military law.⁹⁶

Fraternization. Like adultery, the military prosecutes fraternization as a violation of the UCMJ's general Article 134, as incorporated by Paragraph 83 of the MCM.⁹⁷ In the military context, fraternization refers to an inappropriate relationship between an officer and an enlisted service member.⁹⁸ To constitute fraternization, the relationship in question need not be

⁸⁹ Nancy Gibbs, *Wings of Desire*, TIME.COM, June 24, 2001, <http://www.time.com/time/magazine/article/0,9171,137779,00.html> (link).

⁹⁰ See Elaine Sciolino, *From a Love Affair to a Court-Martial*, NYTIMES.COM, May 11, 1997, <http://www.nytimes.com/books/97/12/14/home/airwoman-court-martial.html>.

⁹¹ See Elaine Sciolino, *For Dishonorable Discharge, B-52 Pilot Will Resign and Avoid Court-Martial*, NYTIMES.COM, May 18, 1997, <http://www.nytimes.com/books/97/12/14/home/051897airforce-pilot.html>.

⁹² See David S. Cloud, *Adultery Inquiry Costs General His Command*, NYTIMES.COM, Aug. 11, 2005,

http://www.nytimes.com/2005/08/11/politics/11general.html?_r=1&scp=1&sq=kevin%20byrnes%20adultery&st=cse (link); Josh White, *4-Star General Relieved of Duty: Rare Move Follows Allegations of an Extramarital Affair*, WASHINGTONPOST.COM, Aug. 10, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/09/AR20050809000515.html> (link).

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 134, ¶ 62(c)(3).

⁹⁶ See *United States v. Orellana*, 62 M.J. 595, 598 (N-M. Ct. Crim. App. 2005); *United States v. Bart*, 61 M.J. 578, 581 (N-M. Ct. Crim. App. 2005); *cf. United States v. Meredith*, 2006 WL 1500001, at *1 (N-M. Ct. Crim. App. 2006) (upholding an aviation instructor's conviction under the UCMJ for rape and adultery).

⁹⁷ See MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 134, ¶ 83.

⁹⁸ *Id.* ¶ 83(b)–(c).

sexual in nature; other examples of fraternization include gambling, lending money, sharing a living space, and engaging in a business venture.⁹⁹ The justification for prohibiting fraternization is that unprofessional relationships—including sexual relationships—are prejudicial to good order and discipline.¹⁰⁰ The maximum punishment for committing fraternization is dismissal from the armed forces and up to two years in prison.¹⁰¹

William Kite could have faced just such a prison sentence when the Air Force prosecuted him for fraternization in 1997.¹⁰² A Second Lieutenant in the Air Force, Kite was serving as the supervisor of security police for the 509th bomb wing at Whiteman Air Force Base when he fell in love with Rhonda Kutzer, an enlisted service member who worked as a security officer on the base.¹⁰³ Although the couple planned on keeping their relationship a secret until Rhonda left the service, Kite's supervisors learned of the couple's relationship and approached him about it.¹⁰⁴ Despite Kite's initial denials, an investigation turned up ample evidence of a sexual relationship and Kite was charged with fraternization.¹⁰⁵ Three days before Kite and Kutzer were married, Kite confessed and the Air Force added two counts of making false official statements.¹⁰⁶ Neither the couple's marriage nor the fact that Kutzer voluntarily resigned from the service could save Kite from the fraternization prosecution. Rather than risk a court-martial, Kite ultimately resigned and accepted a general (as opposed to honorable) discharge.¹⁰⁷

3. Blanket Rules

The third type of military regulations on heterosexuality comes in the form of blanket rules. Compared to the other regulations, the blanket rules impose the greatest restriction on heterosexual service members' sex lives. In this regard, the blanket rules are akin to the restrictions imposed by DADT on lesbian and gay service members. Like DADT, the blanket rules prohibit intimate conduct that is overtly sexual, as well as conduct that is not sexual on its face. Moreover, the blanket rules are designed to protect

⁹⁹ See JUDGE ADVOCATE GENERAL'S OFFICE, *THE MILITARY COMMANDER AND THE LAW* 239–40 (2008).

¹⁰⁰ *Id.* at 239.

¹⁰¹ See MANUAL FOR COURTS-MARTIAL, *supra* note 75, at Art. 134, ¶ 83(e).

¹⁰² See Elaine Sciolino, *Courtship Leads to Marriage and Maybe Officer's Ouster*, NYTIMES.COM, July 2, 1997, <http://www.nytimes.com/1997/07/03/us/courtship-leads-to-marriage-and-maybe-officer-s-ouster.html> (link).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Linda Kramer, *Another Fraternization Case: 'You Can't Control Who You Fall In Love With,' ex-airman says*, CNN.COM, Oct. 10, 1997, <http://www.cnn.com/ALLPOLITICS/1997/10/10/widnall.kramer/frat.html> (link).

unit cohesion, on the theory that sex—in particular here, heterosexual sex—distracts service members from the unit’s ultimate combat goals. The principal difference between the blanket rules and DADT is that, unlike lesbian and gay service members, heterosexual service members do not have to conceal their sexual orientation from their comrades. After all, even under the strictest no contact policy, heterosexual service members can still talk openly about their heterosexuality. Along the axis of sexual conduct, however, there is no real difference between a no contact policy and DADT, except that the no contact policy effectively targets heterosexual conduct and DADT targets homosexual conduct.

Unit commanders have the authority to issue blanket rules as they see fit, and with the military currently engaged in combat on multiple fronts, unit commanders have been turning to blanket rules as a means to maintain unit cohesion during deployment.¹⁰⁸ Lieutenant Colonel David Poirier, commander of the 720th Military Police Battalion based at Fort Hood, Texas, instituted a blanket rule against sexual conduct during his unit’s deployment to Iraq.¹⁰⁹ Like the policy in the McCormicks’ unit,¹¹⁰ Poirier’s no contact policy applied with equal force to single members of the unit and the unit’s dual-serving married couples, all of whom were explicitly barred from engaging in any sexual conduct during their deployment.¹¹¹ The no contact policy was necessary, Poirier explained, in part because “you can’t be ready for combat with your pants down.”¹¹²

In April of 2008, Major General Jeffrey Schloesser, commander of the Army’s Combined Joint Task Force-101 in Afghanistan, paved the way for service members stationed in Afghanistan to have sex.¹¹³ Schloesser did so by amending General Order No. 1, which outlines the standard of conduct for service members and civilians working for the military in Afghanistan.¹¹⁴ The previous version of General Order No. 1 imposed a complete ban on “intimate behavior” between men and women who were not married to each other and restricted unmarried men and women from entering each other’s living quarters.¹¹⁵ Schloesser’s amended version of General Order No. 1 replaced the ban on sex with the warning that sex during deployment

¹⁰⁸ Cf. Chuck Yarborough, *Iraq No Honeymoon for Couples: Married Soldiers Struggle with Ban on Sexual Activity*, CLEVELAND PLAIN DEALER, Feb. 25, 2004, at A2 (“[H]aving sex . . . is a violation of a battalion policy enacted halfway through the 720th Military Police Battalion’s deployment to Iraq and could mean loss of rank or more.”).

¹⁰⁹ *See id.*

¹¹⁰ *See supra* notes 1–8 and accompanying text.

¹¹¹ *See* Yarborough, *supra* note 108.

¹¹² *Id.*

¹¹³ Drew Brown, *Ban on Sex for Soldiers in Afghanistan Lifted . . . Sort Of*, STRIPES.COM, May 14, 2008, <http://www.stripes.com/article.asp?section=104&article=54774> (link).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

is “highly discouraged.”¹¹⁶ Sex in a combat zone, the amended order explained, “can have an adverse impact on unit cohesion, morale, good order and discipline.”¹¹⁷ The amended order did not, however, supplant existing sex regulations; service members could only engage in sexual conduct that was “not otherwise prohibited” by the UCMJ.¹¹⁸ This meant that although men and women serving in Afghanistan could now have sex, they were still subject to the prohibitions against sodomy, adultery, and fraternization.

4. Pregnancy

For a short time last winter, in addition to regulating sexual conduct, the military also regulated pregnancy. On November 4, 2009, Major General Anthony Cucolo III, a commander of U.S. forces in Northern Iraq, put into effect a policy that added pregnancy to the list of prohibitions for troops serving under his command.¹¹⁹ According to the policy, service members would be punished for “becoming pregnant, or impregnating a soldier.”¹²⁰ The order imposed a criminal sanction, so service members who violated it would have faced a court-martial and possibly even jail time.¹²¹ Army spokesperson Major Lee Peters explained that the goal of the order was to prevent service members from leaving their units shorthanded during deployment: “When a soldier becomes pregnant or causes a soldier to become pregnant through consensual activity, the redeployment of the pregnant soldier creates a void in the unit and has a negative impact on the unit’s ability to accomplish its mission. Another soldier must assume the pregnant soldier’s responsibilities.”¹²² Although General Cucolo couched the policy in terms of penalizing pregnancy, it was really an attempt to ban sex acts resulting in pregnancy, which of course only applies to procreative, heterosexual sex. And like the no contact policy in the McCormicks’ case,¹²³ marriage was not a defense to General Cucolo’s policy.¹²⁴ In December 2009, General Cucolo softened his stance on pregnancy, explaining that, while he would still use nonjudicial punishments to enforce the order, there is “absolutely no circumstance where [he] would punish a female soldier by court-martial for a violation . . . none.”¹²⁵

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *See* Teri Weaver, *U.S. Personnel in Iraq Could Face Court-Martial for Getting Pregnant*, STRIPES.COM, Dec. 19, 2009, <http://www.stripes.com/article.asp?section=104&article=66764> ([link](#)); Anne Flaherty, *Pregnancy in Iraq Could Mean Court-Martial*, ARMYTIMES.COM, Dec. 23, 2009, http://www.armytimes.com/news/2009/12/ap_iraq_pregnant_soldiers_court_martial_121809/ ([link](#)).

¹²⁰ Weaver, *supra* note 119 (quoting the Nov. 4 policy) (quotation marks omitted).

¹²¹ *See* Flaherty, *supra* note 119.

¹²² Weaver, *supra* note 119 (quoting Army Spokesman Major Lee Peters).

¹²³ *See supra* notes 1–8 and accompanying text.

¹²⁴ *See* Weaver, *supra* note 119.

¹²⁵ Posting of Jim Dao to At War, <http://atwar.blogs.nytimes.com/2009/12/22/general-backs-off->

B. Sex and Unit Cohesion

DADT is premised on the idea that homosexual sex poses a greater threat to unit cohesion than other kinds of sexual conduct. But the heterosexuality regulations discussed above suggest that DADT's unit cohesion rationale misses the larger picture. Considering all the sex regulations the military has on its books, it would appear that the military does not have a problem with homosexuality so much as it has a problem with sexual conduct. After all, the military's argument that the mere presence of openly gay service members in the armed forces poses a unique threat to unit cohesion is doubtful when we consider the full extent to which the military regulates heterosexual sex. From the military's perspective, sex not only distracts service members from their ultimate goal of preparing for and ultimately fighting in combat, but it breeds disorder in the unit and, in the worst cases, puts lives at risk. This explains why, for example, the McCormicks' unit commander thought it necessary to impose a complete ban on sexual conduct while his unit was deployed to Iraq. And it also helps to explain the military's other restrictions on heterosexual sex, all of which seek to protect unit cohesion against the risks associated with having sex while serving in the armed forces.

If the real threat to unit cohesion is sex, and not sexual orientation, then why does the military think that homosexuality poses a greater threat to unit cohesion than other sexual conduct? The answer to this question lies in what I call the "paradox of privilege."¹²⁶ A framework for understanding the invisibility of heterosexuality in our culture, the paradox of privilege explains that heterosexuality is at once everywhere and nowhere—everywhere because it is normative, yet nowhere because its normativity renders it invisible.¹²⁷ Take the everywhere prong first. As the normative standard for sexual orientation, heterosexuality is embedded in the fabric of our culture.¹²⁸ Indeed, one of the primary lessons of modern feminist and queer theory is that the norms of heterosexuality affect nearly every aspect of our lives.¹²⁹ Yet the normativity of heterosexuality also works to render

court-martial-threat-for-pregnant-soldiers/ (Dec. 22, 2009 17:24) (link).

¹²⁶ See Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 227–29 (2009) (identifying the paradox of privilege at work in employment discrimination law) (link).

¹²⁷ My formulation of the paradox of privilege borrows from the work of Professor Michael Selmi. See Michael Selmi, *Privacy for the Working Class: Public Work and Private Lives*, 66 LA. L. REV. 1035, 1035 (2006) ("At the turn of the twenty-first century, privacy has become the law's chameleon, seemingly everywhere and nowhere at the same time.").

¹²⁸ See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980) (link).

¹²⁹ See Michael Warner, *Introduction*, FEAR OF A QUEER PLANET, at vii, xxi (Michael Warner ed., 1993) ("Het[erosexual] culture thinks of itself as the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist.") (link); see generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (arguing, among other things, that the social construction of

it invisible. Because our culture is steeped in the norms of heterosexuality, heterosexuals tend not to think of themselves as having a sexual orientation.¹³⁰ In this regard, heterosexuality is an example of what sociologists call an unmarked identity trait—that is, a socially generic or mundane trait that is largely taken for granted.¹³¹ Homosexuality, by contrast, is a marked identity trait—one that is highly articulated and exaggerated.¹³² Because it deviates from the heterosexual norm, homosexuality tends to receive “disproportionate attention relative to its size or frequency” in the population, whereas heterosexuality is largely taken for granted.¹³³ Thus we can say that heterosexuality is nowhere, as it has ceased to exist apart from mainstream cultural norms.

Consider two examples of how the paradox of privilege works in practice. To begin with, take the term “sexual orientation.” By definition, sexual orientation is a broad category, capturing a wide spectrum of sexual preferences and desires. In practice, however, sexual orientation has come to be associated primarily with sexualities that deviate from the heterosexual norm, such as homosexuality and, to a lesser extent, bisexuality.¹³⁴ Indeed, when people speak of sexual orientation these days, they almost always mean homosexuality. After all, if people do not think of heterosexuals as having a sexual orientation, then the term sexual orientation effectively becomes synonymous with homosexuality. For instance, in my Law and Sexuality seminar I assign a casebook titled “Sexual Orientation and the Law.”¹³⁵ Currently in its third edition, the casebook was originally published under the name “Lesbians, Gay Men, and the Law.”¹³⁶ Although it has been updated several times since its first publication in 1993, the title “Sexual Orientation and the Law” is inapt, as the casebook is almost entire-

sexuality, as well as power dynamics between the sexes more generally, is based on a heterosexual dynamic) (link).

¹³⁰ See Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN’S L.J. 76, 109 (2000); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 31–32 (Leslie Bender & Daar Braveman eds., 1995).

¹³¹ See Wayne Brekhus, *A Sociology of the Unmarked: Redirecting Our Focus*, 16 SOCIOLOGICAL THEORY 34, 34–36, 39 (1998) [hereinafter Brekhus, *Unmarked*] (link); Wayne Brekhus, *Social Marking and the Mental Coloring of Identity: Sexual Identity Construction and Maintenance in the United States*, 11 SOCIOLOGICAL FORUM 497, 501 (1996) [hereinafter Brekhus, *Social Marking*].

¹³² See Brekhus, *Social Marking*, *supra* note 131, at 501. The distinction between marked and unmarked identities can be traced to the work of Emile Durkheim, one of the founding fathers of sociological theory, who distinguished between the “sacred” and the “profane.” See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* xxi–xxii (Mark S. Cladis, ed., Carol Cosman trans., Oxford Univ. Press 2001) (1912) (link).

¹³³ See Brekhus, *Unmarked*, *supra* note 131, at 36.

¹³⁴ See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (discussing the invisibility of bisexuality relative to homosexuality and heterosexuality) (link).

¹³⁵ WILLIAM B. RUBENSTEIN, CARLOS A. BALL, & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (3d ed. 2008).

¹³⁶ WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN, AND THE LAW* (1993).

ly concerned with the legal regulation of homosexuality rather than the legal regulation of sexual orientation in general. That even experts in the field of law and sexuality use sexual orientation and homosexuality interchangeably suggests that the invisibility of heterosexuality is firmly embedded in our culture.

A second example of how the paradox of privilege works in practice is that we tend not to see heterosexuality. In an earlier work, I gave an example of two wedding announcements, laid out side-by-side, in the newspaper.¹³⁷ The first announces the wedding of a same-sex couple, the second a different-sex couple. Upon seeing the same-sex couple, the first thing that comes to a viewer's mind is that the couple is gay. Because homosexuality is a marked identity trait, the gay couple's homosexuality stands out among the other wedding announcements on the page. This is not the case with the different-sex couple. Because we tend to take heterosexuality for granted, we see them as bride and groom, or husband and wife, or perhaps just as man and woman. We do not, however, see their heterosexuality. Obscured by the paradox of privilege, the couple's heterosexuality is hiding in plain view.

The military is a particularly useful context in which to observe the dynamics of the paradox of privilege. Under DADT, heterosexuality is more than just the cultural norm; it is the law. By expressly codifying the presumption of heterosexuality, DADT mandates that all service members live a heterosexual lifestyle while they are in the military. For lesbians and gay men, this means having to pass as straight while they are in the service. And because DADT applies to service members at all times, the requirement that they maintain a heterosexual identity is all-encompassing. As Professor Tobias Wolff has argued, "[b]y forbidding expressions of gay identity in any form, at any time, and with any individual—including a servicemember's family and friends—the policy compels servicemembers constantly and affirmatively to express a sexual identity of the military's choosing."¹³⁸ It goes without saying that the military has chosen to compel heterosexuality among its ranks. From the perspective of the paradox of privilege, then, heterosexuality is quite literally everywhere in the military.

Yet in its pursuit of heterosexuality,¹³⁹ the military also renders heterosexuality invisible. By compelling all service members to live a heterosexual lifestyle, the military effectively erases homosexuality from its ranks.

¹³⁷ See Kramer, *supra* note 126, at 228.

¹³⁸ Tobias Barrington Wolff, *Compelled Affirmation, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1192 (1997).

¹³⁹ In a classic article, Professor Ken Karst argues that the military's discriminatory practices—whether aimed at race, sex, or sexual orientation—are all rooted in the military's pursuit of manhood. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991). Published in 1991, Karst's article predates DADT by a few years, though it is nevertheless applicable to DADT. The military's approach to sexual orientation is rooted in both its pursuit of manhood and its pursuit of heterosexuality.

For if everyone serving in the military either is heterosexual or is passing as heterosexual, then heterosexuality ceases to exist apart from the military's work culture. This helps to explain why the military views homosexual sex as posing a greater threat to unit cohesion than heterosexual sex. Because expressions of homosexuality violate the military's heterosexual norm, homosexuality is marked as deviant behavior and is therefore thought to be especially harmful to military effectiveness. By contrast, because it is taken for granted, heterosexuality escapes any sort of critical inquiry and is therefore presumed to have no effect on unit cohesion. Thus, the paradox of privilege underlies DADT's faulty premise, obscuring the reality about sex and military life: that the military has a problem with sexual conduct, not sexual orientation.

III. REFRAMING THE CONVERSATION

Given that DADT is based on a faulty premise, it is time to rethink the policy. DADT's opponents have long sought to overturn the policy by challenging the policy in court¹⁴⁰ and by seeking repeal of the policy in Congress.¹⁴¹ The problem with these attempts to overturn the policy, however, is that they presuppose that lesbian and gay service members will be free from regulation once DADT is off the books. Unfortunately, this is not the case. The sexuality regulations discussed above—save perhaps for the pregnancy penalty—apply with equal force to heterosexual and homosexual sex. This means that even after DADT has been overturned, lesbian and gay service members are still going to be subject to a wide range of restrictions on their sexual liberty, perhaps even to the extent of being barred completely from having sex while they are in the service. Since the national conversation regarding sex and military life is almost entirely concerned with DADT, the goal of this final Part is to reframe the conversation. Specifically, this Part argues that the proper way of thinking about the regulation of sex and sexuality in military life is in terms of regulating sexual conduct, not sexual orientation.

With that goal in mind, this Part makes two interrelated proposals. First, it is time for the military to get out of the business of regulating sexual orientation. While DADT purports to have made the shift from status to

¹⁴⁰ See, e.g., *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (considering claims that DADT violates substantive due process, equal protection, and procedural due process rights) ([link](#)); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (holding that DADT does not violate substantive due process or equal protection rights under the Fifth Amendment, or free speech rights under the First Amendment) ([link](#)); see also *id.* at 45 (collecting cases in which similar challenges to DADT were rejected).

¹⁴¹ See, e.g., Jackie Gardina, *Let the Small Changes Begin: President Obama, Executive Power, and "Don't Ask Don't Tell,"* 18 B.U. PUB. INT. L. J. 237, 245–49 (2009) (describing proposals to repeal DADT, including the Military Readiness Enhancement Act) ([link](#)); Elisabeth Bumiller, *Repeal of "Don't Ask, Don't Tell" Policy Filed in Senate*, NYTIMES.COM, March 3, 2010, <http://www.nytimes.com/2010/03/04/us/politics/04military.html> (describing a bill introduced by Sen. Lieberman) ([link](#)).

conduct, the persistence of the prohibition against homosexual statements suggests that the military is still targeting gay status. Thus it is time to reorient DADT by eliminating the restrictions against homosexual statements and same-sex marriage. Second, the military needs to reconsider its regime of sexual regulations. This is not to say that the military necessarily needs to stop regulating sex altogether, but rather that the military needs to have an internal conversation about the extent to which it should be regulating service members' sexual lives. Assuming the military is correct that sex does indeed pose a considerable threat to unit cohesion, then it should revisit its rules regarding sexual conduct. After having such a conversation, the military may decide to ban all sexual conduct during deployment, like the no contact rule in the McCormicks' unit, or perhaps to leave the existing regime of sexual regulations substantially intact. However the military chooses to proceed, the important point is that the burden should be put on the military to think through the question of how it regulates service members' sexual conduct.

A. *Reorienting DADT*

The Clinton administration grounded its support for DADT on the promise that DADT marked a shift in the military's policy toward homosexuality. While earlier policies were aimed at gay status, the Clinton administration argued that gay conduct was the real threat to unit cohesion, and therefore DADT would target gay conduct rather than gay status.¹⁴² Yet DADT has not realized this promise. By prohibiting homosexual statements and same-sex marriage, DADT imposes a status-based regime on lesbian and gay service members. In this regard, DADT is effectively no different than its predecessor policy—the 1981 policy—which was organized around the claim that “[h]omosexuality is incompatible with military service.”¹⁴³ Although DADT does not endorse that view of homosexuality in theory, it does give effect to it in practice. If lesbian and gay service members can be discharged solely for identifying as gay, then DADT's discharge provisions sweep more broadly than the policy's stated goal, which is to exclude from the service those service members who, through their sexual conduct, disrupt unit cohesion.¹⁴⁴ This is especially problematic given the nature of the military's other sexual regulations.

When we consider the military's interest in unit cohesion, one thing becomes clear: DADT's homosexual statements and same-sex marriage provisions are out of step with the rest of the military's sexual regulations, which primarily target sexual conduct rather than service members' status. If DADT's stated goal is to target disruptive sexual conduct, and if the rest of the military's sexual regulations target sexual conduct, then the military

¹⁴² See *supra* notes 39–41 and accompanying text.

¹⁴³ See 32 C.F.R. § 41.13 (1981).

¹⁴⁴ See 10 U.S.C. §§ 654(a)(7), (a)(15) (2006) (link).

should abandon its practice of regulating homosexual statements and same-sex marriage. Whether by repealing or not enforcing these provisions, the military should get out of the business of regulating sexual orientation. Doing so would accomplish two things. First, it would satisfy the majority of DADT's critics, whose primary objection to DADT is that the policy does not allow lesbian and gay service members to serve openly. With the homosexual statement and same-sex marriage provisions off the books, lesbian and gay service members could serve openly but would still be subject to DADT's homosexual provisions. Second, abandoning the homosexual statements and same-sex marriage provisions would recalibrate the military's policy on homosexuality, bringing it in line with the rest of the military's sexual regulations, which target sexual conduct rather than service members' status.

B. Reconsidering Sex

The second proposal is that, once the homosexual statements and same-sex marriage provisions are out of the picture, the military needs to reconsider its regime of sexual regulations. The value of such a conversation is twofold. First, it will allow the military as a whole to begin the process of shifting its focus from regulating homosexuality to regulating sexual conduct. Second—and more importantly—it will give the military an opportunity to revisit and possibly modernize its regime of sexual regulations. As things stand currently, the military regulates sexual conduct through a hodgepodge of criminal laws (sodomy, adultery, fraternization) and local orders (no contact policy, pregnancy penalty). After reconsidering these policies, the military may decide that it needs to change the way it regulates sex. Perhaps it will conclude that it would be best to ban all sexual conduct while service members are deployed, or perhaps it will leave the rules substantially intact. Moreover, it is important that the military use its own expertise to determine what restrictions on sex are necessary to protect unit cohesion. The military, however, should have to articulate its reasons for adopting any new regime of sexual regulations, if only because the imposition of such a burden on the military will help to facilitate a genuine deliberative process.

When all is said and done, it is important to keep in mind that the military is a workplace and that, like any employer, the military has an interest in regulating its employees' social conduct. What sets the military apart from most workplaces, however, is that the military has completely collapsed the distinction between service members' public and private lives. Service members live what organizational theorists refer to as fully integrated lives, in that there is no meaningful distinction between a service member's work life and the service member's life away from work.¹⁴⁵ Ac-

¹⁴⁵ See Christena Nippert-Eng, *Calendars and Keys: The Classification of "Home" and "Work,"* 11 SOCIOLOGICAL FORUM 563, 567–68 (1996). Integration contrasts with segmentation, where employees

ording to military law, service members are always on the job, even when they are on temporary leave.¹⁴⁶ And recruits are fully aware that the military will restrict their liberty during their period of service.¹⁴⁷ Thus it may well be reasonable for the military to regulate service members' sexual lives, and it should come as no surprise to service members when the military does in fact seek to regulate their sexual conduct. But the fact that the military has an interest in regulating service members' sexual conduct does not mean that the military should be able to impose sexual restrictions arbitrarily. This is why the military should have to articulate its reasons for imposing restrictions on sexual conduct. In the end, the goal is for the military to develop a sex policy that is specifically tailored to its ultimate goal of preparing for and ultimately succeeding in combat.

C. A Concern

Before concluding, it is necessary to respond to an anticipated concern about my argument thus far. In recent years a group of scholars—whom I will refer to as sex positivists—have been developing a critique of the prevailing view of sex in our culture.¹⁴⁸ Although they approach the issue from different perspectives, the sex positivists all share the concern that the rising tide of sex negativity spells trouble not only for sexual minorities, who deviate from the heterosexual norm, but also for anyone who engages in what is seen to be a deviant sexual practice, such as voyeurs, transvestites, and people who practice sadomasochism.¹⁴⁹ The goal of the sex positivists is to encourage a positive sexual ethic, one that celebrates, rather than sup-

draw a clear boundary between the work and private spheres of their lives. *See id.* In earlier work, I discuss integration and segmentation in the context of how employees respond to employment discrimination. *See* Zachary A. Kramer, *After Work*, 95 CAL. L. REV. 627, 642–44 (2007).

¹⁴⁶ *See* Uniform Code of Military Justice, 10 U.S.C. §§ 802(a)(1), (b), (c) (establishing the points at which new service members become subject to the UCMJ and the points at which they are no longer subject to military law, and making no exceptions to UCMJ jurisdiction for service members on leave) (link).

¹⁴⁷ The military enlistment agreement states that military service members are subject to military laws, including the UCMJ, during their period of service. DD Form 4, Enlistment/Reenlistment Document, Armed Services of the United States, Oct. 2007, www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0004.pdf (link).

¹⁴⁸ *See, e.g.,* LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (1995); JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) (link); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999) (link); Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* (Abelove, Barale, and Halperin eds. 1993) (link); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (link).

¹⁴⁹ *See, e.g.,* DUGGAN & HUNTER, *supra* note 148; HALLEY, *supra* note 148; WARNER, *supra* note 148; Rubin, *supra* note 148; Schultz, *supra* note 148. Professor Rubin's *Thinking Sex*, perhaps the most influential piece in the sex positivist literature, relies heavily on the work of philosopher Michel Foucault. *See* Rubin *supra* note 148, at 10, specifically his history of sexuality; MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION* (Random House, Inc. trans., Vintage Books ed. 1990) (1976).

presses, people who resist the social pressure to conform to dominant sexual norms. Turning back to the military context, those who subscribe to the sex positivist ethic may view my argument as lending support to the dominant—that is to say, deeply negative—view of sex and sexuality in our culture. In particular, sex positivists may be troubled by my proposal for dealing with DADT, which leaves open the possibility of imposing a complete ban on sex during active military service.

This is indeed a legitimate concern. My response is that, as discussed above, the military is a unique work environment and should be treated accordingly. The military is not like a law firm, for instance. From a workplace governance perspective, it is hard to imagine any reason why a law firm would feel the need to institute a no contact policy for its employees. While it may consider imposing a rule forbidding employees from having sex with their fellow coworkers,¹⁵⁰ or a rule targeting sex between employees in a supervisory relationship,¹⁵¹ the law firm does not have any reason to ban its employees from having sex altogether. The military, by contrast, may be able to articulate a legitimate reason why it needs to impose such severe restrictions on service members' sexual behavior. Or it may not. My point is merely that we should give the military an opportunity to have this conversation and see what comes out of it.

CONCLUSION

DADT is based on the idea that homosexual conduct poses a greater threat to unit cohesion than heterosexual conduct. For this reason, under DADT, service members who engage in homosexual acts, make homosexual statements, or enter into a same-sex marriages will be discharged from the service. Yet DADT's unit cohesion rationale is doubtful in light of the many ways in which the military regulates sex without regard to sexual orientation. As this Essay has argued, the military's focus on homosexuality is misplaced. What the military regards as a problem with homosexuality is in fact a problem with sexual conduct. Thus this Essay proposes that the military revisit DADT to make it more consistent with the military's overarching interest in regulating sexual conduct rather than sexual orientation. At the same time, this Essay seeks to initiate a broader conversation about the place of sex in military life. If sex does indeed pose such a serious threat to unit cohesion, then the military should craft rules that are tailored to its interest in maintaining military effectiveness.

¹⁵⁰ See Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL'Y 237, 247–52 (2006) (considering employment policies that regulate employees' sexual relationships, including so called "love contracts") (link).

¹⁵¹ See Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 552–53 (2009) (arguing for the development of a workplace taboo against sexual relationships between supervisors and subordinates) (link).