
**RIGHT TO SERVE OR RESPONSIBILITY TO PROTECT?
CIVIL RIGHTS FRAMING AND THE DADT REPEAL**

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INTRODUCTION

Despite documented cases of military discharges on the basis of sodomy that date back to the Revolutionary War, it wasn't until the 1920s that the U.S. military began to take a vested interest in criminalizing consensual same-sex encounters.¹ At the time, the Department of Defense ("DOD") justified this exclusion as a medical one—individuals engaging in homosexual sex were seen as mentally ill, and therefore unfit for service.² As homosexuality became de-medicalized in the late 1960s, the DOD maintained the ban by asserting that the presence of homosexuals in the ranks would be a threat to national security and unit cohesion.³ Finally, in 1993, President Clinton attempted to end the military's ban on homosexuality, only to find himself stymied by extreme

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¹ RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF 15 (1st ed. 1993); 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, 190 (2010).

² See GREGORY M. HEREK, JARED B. JOBE & RALPH M. CARNEY, OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197 (Gilbert Herdt ed., 1996) (referring to the DOD's "past arguments that homosexual men and women are psychologically impaired . . . and therefore are inherently unfit for military service"). Participation in sodomy acts lead to dismissal prior to 1920, but prohibitions against homosexual behavior did not become part of formal military policy until the idea of "the homosexual"—a kind of person, not merely one who participates in a particular set of sex acts—began to gain popular traction. *Id.* at 17.

³ See Nathaniel Frank, *The President's Pleasant Surprise: How LGBT Advocates Ended Don't Ask, Don't Tell*, 60:2-3 J. HOMOSEXUALITY 159, 163 (2013).

military opposition.⁴ The resulting compromise, known as Don't Ask, Don't Tell, Don't Pursue ("DADT"), allowed lesbian, gay, and bisexual ("LGB") people to serve, as long as they did not engage in homosexual behavior (very broadly defined) or outwardly profess an LGB identity.⁵

For over a decade, gay rights activists fought for the repeal of DADT, largely based on the claim that military inclusion was a civil rights issue.⁶ Unfortunately, anti-gay activists who supported DADT were able to mobilize homophobic sentiment in the military to great effect, thereby scaring away would-be supporters in Congress.⁷ What ultimately secured the 2010 DADT repeal was a complete change in tactic on the part of reformers. In the late 2000s, rather than arguing a civil rights justification, repeal activists directly challenged the very basis of the ban's justification.⁸ Through empirical research disseminated to policymakers and the general public by savvy policy entrepreneurs, reformers made a convincing case that allowing open service in the military would not hurt unit cohesion as the DOD had previously claimed.⁹ In fact, they argued, it was LGB *exclusion* that was actually harming military readiness and national security.¹⁰ Below, I show how and why reformers moved away from a civil rights tactic for achieving military inclusion and discuss what this case tells us about the feasibility of LGBT civil rights claims going forward.

⁴ JANET E HALLEY, DON'T TELL: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 21 (1999).

⁵ See *id.* at 29 ("[T]he 1993 revisions hold out to gay men, lesbians, and bisexuals in uniform the promise of a safe haven for sexual orientation provided it be kept 'personal and private.'"). Throughout the article, I will use "LGB" when referencing the DADT repeal, as it did not include provisions for transgender service members. When referring to the sexuality and gender expression rights-based movement, I use "LGBT," because it is (at least nominally) inclusive of transgender rights.

⁶ See Frank, *supra* note 3, at 163 ("The problem with framing the issue as a violation of gay rights was that it was convincing only to those who already believed that gay rights were civil rights and, even more importantly, only to those who prioritized gay rights over military readiness.").

⁷ See HALLEY, *supra* note 4, at 21 (describing staunch congressional majority opposition, including threats to codify the anti-gay policy, despite the number of pro-gay activists supporting Clinton at the time).

⁸ AARON BELKIN, HOW WE WON: PROGRESSIVE LESSONS FROM THE REPEAL OF "DON'T ASK, DON'T TELL" (2011) (Kindle ed.) (on file with author); Frank, *supra* note 3, at 164; Christopher L. Neff & Luke R. Edgell, *The Rise of Repeal: Policy Entrepreneurship and Don't Ask, Don't Tell*, 60:2-3 J. HOMOSEXUALITY 232, 244 (2013).

⁹ See Neff & Edgell, *supra* note 8, at 244.

¹⁰ See BELKIN, HOW WE WON, *supra* note 8; Frank, *supra* note 3, at 196 ("The new rhetoric turned the old frame on its head: Gay people don't threaten national security; the ban does—and the deployment of this rhetoric by LGBT advocates in the political arena meant, ultimately, enlisting the government in a successful attack against its own policy."); Patrick J. Murphy, *The Political Battle for Repeal: Personal Reflections from the Frontlines*, 60:2-3 J. HOMOSEXUALITY 152, 154 (2013).

I. DON'T ASK, DON'T TELL, DON'T PURSUE

The U.S. military began to criminalize consensual sodomy in the 1920s, with the rationale that it indicated mental illness and therefore made soldiers unfit for service.¹¹ Enforcement of this anti-sodomy statute dwindled during the period between World Wars I and II, no doubt due to the shortage of soldiers after World War I.¹² But by the early 1940s, the U.S. Army (followed shortly thereafter by the Navy) developed regulations for investigating and discharging homosexual service members.¹³ In 1950, the Uniform Code of Military Justice (“UCMJ”) defined sodomy as a court-martial-worthy offense.¹⁴ Afterward came a flurry of ever-evolving policies pertaining to homosexuality and homosexual sex across the branches of the U.S. military. Inconsistencies in the application of these various regulations led the DOD to issue a new directive on homosexuality in 1981, intended to clarify the military’s position.¹⁵

Prior to the new directive, it was up to the discretion of commanding officers to decide how to handle accusations of homosexual behavior, but the 1981 DOD Directive issued an unequivocal prohibition.¹⁶ This new directive mandated discharge of any soldier who “engaged in, has attempted to engage in, or has solicited another to engage in a homosexual act.”¹⁷ The directive also moved from the post-war rationale for prohibition (homosexuality as a mental illness) to more of a socially based justification—it stated that if homosexuals were allowed to serve, it would be a threat to morale and unit cohesion, thereby weakening the military and threatening our national security.¹⁸ According to then-Assistant Secretary of Defense Lawrence Korb, the directive succeeded because it fit squarely within the national climate of homophobia of the time.¹⁹

¹¹ Borch, *supra* note 1, at 190.

¹² ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 176 (1990) (“As the war heated up, manpower needs, the inability of any screening system to filter out most homosexuals, and the desire of gay soldiers to see action led thousands into combat zones around the world.”).

¹³ Borch, *supra* note 1, at 193-94.

¹⁴ *Id.* at 195 (“The new UCMJ retained consensual sodomy as a court-martial offense under Article 125, thus continuing to give commanders an option to deal with a Soldier’s homosexual acts at courts-martial.”).

¹⁵ *Id.* at 202.

¹⁶ Lawrence J. Korb & Alexander Rothman, *Formalizing the Ban: My Experience in the Reagan Administration*, 60:2-3 J. HOMOSEXUALITY 273, 275 (2013).

¹⁷ Borch, *supra* note 1, at 202 (quoting U.S. DEP’T OF DEF. DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (Jan. 15, 1981)).

¹⁸ *See id.* at 197 (addressing the DOD’s shift from grounding the ban in psychopathy to a concern for weakening morale and cohesion, and ultimately, about the ability to prevent security breaches).

¹⁹ Korb & Rothman, *supra* note 16, at 276.

Between 1981 and 1993, the directive was challenged in a number of court cases, none of which succeeded in overturning it.²⁰ When Bill Clinton became president in 1993, he vowed to end the ban on military service entirely.²¹ Unfortunately, he was met with swift and unequivocal resistance from the DOD that made it impossible for him to carry out this commitment.²² When Clinton commissioned Secretary of Defense Les Aspin to draw up a new policy that would allow for open service, the DOD rejected this initial proposal outright.²³ After a long and protracted battle, the compromise policy that emerged suggested some movement forward, but in reality, promised very little. That policy, what we now call DADT, continued the ban on open homosexual service but attempted to curtail the witch-hunts of decades past by prohibiting military personnel from asking about homosexual identity or behavior.²⁴ Anyone caught participating in or admitting to homosexual acts or identities would still be removed from military service under DADT.²⁵

Legal scholar Janet Halley argues that while DADT is remembered as an improvement over the previous DOD policy, it was actually a step backwards.²⁶ With this compromise, Clinton intended to rein in the ability to discharge service members on the assumption of homosexual status or identity by prohibiting asking, telling, or pursuing, instead focusing on conduct, i.e., violations of the UCMJ anti-sodomy policy.²⁷ However, by the time the DOD began to enact the new policy, Congress had passed, as part of the 1993 Defense Authorization Act, regulations that weakened this initial separation between status and conduct, thereby expanding the reach of DADT dismissals.²⁸ Individuals accused of violating DADT had to then prove “no propensity” toward homosexuality to avoid discharge.²⁹ Halley argues this is incredibly difficult—how does one prove a negative? As a result, DADT not only made it difficult to successfully avoid removal once allegations were reported, but also it contributed to a more virulently anti-gay military culture,

²⁰ HALLEY, *supra* note 4, at 75-76; HEREK, JOBE, & CARNEY, *supra* note 2, at 58.

²¹ See Borch, *supra* note 1, at 204 (referring to “newly elected President William J. Clinton’s pledge—‘a staple of his rhetoric’ as a presidential candidate—to end the ban on homosexuals in the military”).

²² See HALLEY, *supra* note 4, at 20.

²³ See Borch, *supra* note 1, at 204.

²⁴ Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don’t Ask, Don’t Tell*, 18 WM. & MARY J. WOMEN & L. 35, 38 (2011).

²⁵ *Id.* at 41.

²⁶ HALLEY, *supra* note 4, at 1 (“The new [DADT] military policy is *much, much worse* than its predecessor.”).

²⁷ *Id.* at 27.

²⁸ RHONDA EVANS, THE CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, U.S. MILITARY POLICIES CONCERNING HOMOSEXUALS: DEVELOPMENT, IMPLEMENTATION, AND OUTCOMES 14 (2001).

²⁹ HALLEY, *supra* note 4, at 57.

as service members tried to distance themselves from the possibility of having to prove “no propensity.”³⁰ Since declaring pro-gay sentiment or participating in gender atypical behavior were considered proof of possible “propensity,” even heterosexual service members were hindered in what they could safely say or do. In the end, more than 13,000 service members, disproportionately women and people of color, were removed from the military under DADT.³¹

II. REPEAL STRATEGIES OVER TIME

Early opponents of DADT faced an unfavorable political and cultural climate for repeal. In 1994, Republicans won the Congressional majority and handily defeated any legislative attempts at repealing or modifying the dictates of DADT.³² In 1996, Representative Duncan Hunter passed a repeal through the House, but failed in the Senate.³³ Around the same time, Congress successfully passed an anti-gay bill that would expel soldiers diagnosed with HIV (though this bill was repealed the following year).³⁴ In such a climate, politicians at the time began to treat the issue of military inclusion as “political plutonium,” to be avoided at all costs.³⁵ After the 1996 attempt to repeal DADT failed in the Senate, no major challenges to DADT arose for almost a decade.³⁶

In 2004, three judicial challenges—*Log Cabin Republicans v. United States*,³⁷ *Cook v. Rumsfeld*,³⁸ and *Witt v. Dep’t of the Air Force*³⁹—attempted to undermine DADT. While none of these challenges succeeded in overturning DADT, they did incite new public and political interest in the issue. Further, the *Witt* case provided new leverage for challenging DADT dismissals. When Sgt. Witt was removed from the military subsequent to her unsuccessful court

³⁰ See HALLEY, *supra* note 4, at 68; Benecke, *supra* note 24, at 37 (“Gay men and women in the armed forces had to carefully, consciously hide the truth of their lives from their friends, family members and colleagues; a discovered diary, using the wrong pronoun or simply having suspected gay friends could lead to one’s investigation and dismissal.”).

³¹ Gary J. Gates, *Discharges Under the Don’t Ask, Don’t Tell Policy: Women and Racial/Ethnic Minorities*, THE WILLIAMS INSTITUTE (Sept. 2010), <http://williamsinstitute.law.ucla.edu/research/military-related/discharges-under-the-dont-ask-dont-tell-policy-women-and-raciaethnic-minorities-2/>, archived at <http://perma.cc/N6ED-5UDF>.

³² See Neff & Edgell, *supra* note 8, at 235.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Antony Barone Kolenc, *Pretend to Defend: Executive Duty and the Demise of Don’t Ask, Don’t Tell*, 48 GONZ. L. REV. 107, 112-13 (2012) (referring to the “Trio of Challenges” to DADT brought between late 2004 and 2006).

³⁷ 658 F.3d 1162 (9th Cir. 2004).

³⁸ 429 F. Supp. 2d 385 (D. Mass. 2006).

³⁹ 527 F.3d 806 (9th Cir. 2008).

challenge, she appealed, and the ruling in that appeal ultimately set what would come to be known as the “*Witt* standard.”⁴⁰ According to the standard, the military must prove that the accused service member posed a specific threat to order and morale rather than rely on the more general assumption that the mere existence of an LGB soldier would be enough of a threat.⁴¹

Meanwhile, a team of policy entrepreneurs⁴² led by the Servicemembers Legal Defense Network (“SLDN”) began lobbying members of Congress to introduce a repeal bill.⁴³ From 1993 to the early 2000s, activists interested in repeal had framed it as a civil rights issue by “trumpeting the freedom of all Americans to serve.”⁴⁴ These policy entrepreneurs, though, began to rethink the strategic efficacy of this tactic and to consider other ways to push for repeal—namely, through a shift from rhetorical to more empirically supported appeals. When Clinton first attempted to remove the ban on LGB service, he had commissioned the RAND Corporation to assess whether or not allowing open service would harm the military.⁴⁵ RAND’s comprehensive study definitively concluded that no harm would be done.⁴⁶ Unfortunately, the Pentagon-based Military Working Group issued a report at the same time, arguing the opposite; although this report was not research-based as the RAND study was, Congress ultimately endorsed the Military Working Group report and passed DADT into law.⁴⁷

In 1998, activists opened the Center for the Study of Sexual Minorities in the Military (now called The Palm Center).⁴⁸ The purpose of the center was to

⁴⁰ See Kolenc, *supra* note 36, at 116.

⁴¹ *Id.* at 123.

⁴² JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 192 (1984) (discussing the role of policy entrepreneurs in advocating for and negotiating between political and policy objectives in hope of future substantive and purposive gain from their efforts).

⁴³ Benecke, *supra* note 24, at 44.

⁴⁴ BELKIN, HOW WE WON, *supra* note 8, at 191.

⁴⁵ Bernard D. Rostker et al., *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, 1993 RAND CORPORATION’S NATIONAL DEFENSE RESEARCH INSTITUTE xvii (“On April 1, 1993, the Secretary of Defense [per President Clinton’s instruction to prepare a report] asked RAND to provide information and analysis that would be useful in helping formulate the required draft Executive Order.”).

⁴⁶ *Id.* at xviii.

⁴⁷ See DEPARTMENT OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 21 (Nov. 30, 2010), available at [http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf), archived at <http://perma.cc/D6LJ-4465> (“The 1993 Military Working Group concluded that homosexuality remained inconsistent with military service, and that the presence in the military of individuals identified as homosexuals would have a significantly adverse effect on both the readiness of the force and unit cohesion.”).

⁴⁸ *Palm Center History (1998 – Present)*, PALM CENTER, <http://www.palmcenter.org/about/history>, archived at <http://perma.cc/6H8Y-TNU3> (last

produce new research reinvestigating the claim that military readiness would be harmed by open service that had been refuted in the 1993 RAND study.⁴⁹ The Center's director, Aaron Belkin, explained in his book, *How We Won*, why they decided to shift from a civil rights to a military readiness framing:

I felt that, as a community, we should get away from rhetoric about fairness, freedom, and the suffering of gay troops. It's not that these weren't crucial topics. But in order to win repeal, I believed we had to prevail on the national security argument. And instead of coming up with a new frame, we should use the one that conservatives had invented. But, we should flip it on its head. My message was this: It wasn't gay soldiers that harmed the military. It was discrimination.⁵⁰

The Center commissioned a series of studies that approached the question from a variety of disciplinary and methodological angles.⁵¹ As Belkin had hypothesized, these studies overwhelmingly supported RAND's previous claim that the military readiness justification at the heart of DADT was unfounded.⁵² In fact, this research suggested, DADT actually *threatens* readiness and security.⁵³ Belkin and others then took every opportunity to disseminate the findings through academic, professional, and media outlets.⁵⁴ As repeal became more of a political reality, the Senate Armed Services Committee commissioned RAND to update its previous study. The updated findings reiterated that recruitment and retention would not be negatively affected by a DADT repeal.⁵⁵

In 2009, Lt. Dan Choi's dismissal became an important rallying point for open-service advocates. After coming out on *The Rachel Maddow Show*, the U.S. National Guard began proceedings to dismiss him from service.⁵⁶ Choi became an outspoken activist who practiced attention-grabbing tactics, most

visited Feb. 3, 2015).

⁴⁹ See Frank, *supra* note 3, at 163 (describing the Palm Center's model as "not just to conduct research, but to use research aggressively and repeatedly to earn media attention and reframe the national narrative, beating the ban's champions on their own terms").

⁵⁰ BELKIN, *HOW WE WON*, *supra* note 8, at 191.

⁵¹ See *DADT Project*, PALM CENTER, http://www.palmcenter.org/dadt_project, archived at <http://perma.cc/58AU-DC8Z> (last visited Feb. 3, 2015).

⁵² See Frank, *supra* note 3, at 195.

⁵³ *Id.* at 164 (referring to the Palm Center's finding that "the policy itself hurt readiness by wasting talent and forcing troops to lie").

⁵⁴ *Id.* at 201 ("The strategic, research-based and media-driven reframing of the national dialogue from one of equal rights to one of the efficacy of the policy and its impact on the nation was critical to this effort.").

⁵⁵ Bernard D. Rostker et al., *Sexual Orientation and U.S. Military Personnel Policy: An Update of RAND's 1993 Study*, 2010 RAND CORPORATION'S NATIONAL DEFENSE RESEARCH INSTITUTE 188 ("American youth reported that the repeal of DADT ranks near the bottom in importance among factors that might affect their enlistment decision.").

⁵⁶ Frank, *supra* note 3, at 170.

notably handcuffing himself to the White House fence in protest of DADT and his own dismissal.⁵⁷ Choi's actions brought attention to the fifty-nine other Arabic language specialists who, like himself, had been removed from military service under the auspices of DADT.⁵⁸ Policy entrepreneurs and activists seized on this opportunity, arguing that dismissing service members with skills so valuable to the ongoing "war on terror" actually made the U.S. military weaker and more vulnerable.⁵⁹ The Palm Center, SLDN, and the Williams Center, an LGBT public policy institute, continued to engage in an extensive public information campaign that helped create a more favorable political environment for once again challenging DADT doctrine.⁶⁰

In 2009, Belkin publicly raised the suggestion that President Obama, who had made a campaign promise to end DADT, issue an executive order to repeal it.⁶¹ In advocating for the "executive option," Belkin was able to exert renewed pressure on Obama to take action, either through an executive order or by nudging Congress toward repeal legislation.⁶² As part of a dual attack strategy, repeal advocates simultaneously put renewed pressure on members of Congress.⁶³ While Obama continued to demur on an executive order, despite mounting public pressure, he publicly advocated a legislative repeal.⁶⁴ In 2009, members of Congress, led by Rep. Patrick Murphy, began to push repeal via an amendment to the National Defense Authorization Act with Obama's support.⁶⁵ The amendment, which would have ended DADT and added a sexuality nondiscrimination policy to the UCMJ, passed the House in May 2010, but was filibustered in the Senate by Sen. John McCain.⁶⁶ Fortuitously, the DOD Comprehensive Working Group issued a report in November 2010, urging Congress to repeal DADT on the basis that the repeal presented a low to minimal risk of military disruption.⁶⁷ As a result, members of Congress moved

⁵⁷ Brian Montopoli, *Dan Choi, Other Gay Rights Protesters Arrested After Chaining Selves to White House Fence*, CBS (Apr. 20, 2010, 5:03 PM), <http://www.cbsnews.com/news/dan-choi-other-gay-rights-protesters-arrested-after-chaining-selves-to-white-house-fence/>, archived at <http://perma.cc/9R7T-PL73>.

⁵⁸ Daniel Nasaw, *Don't Ask, Don't Tell: Gay Veteran of Iraq Takes on US Army*, GUARDIAN, June 30, 2009, at 17.

⁵⁹ *Id.*

⁶⁰ See, e.g., Frank, *supra* note 3, at 171; Neff & Edgell, *supra* note 8, at 241.

⁶¹ See Aaron Belkin, *Obama To Fire His First Gay Arabic Linguist*, HUFFINGTON POST (June 7, 2009), http://www.huffingtonpost.com/aaron-belkin/obama-to-fire-his-first-g_b_199070.html, archived at <http://perma.cc/6QCC-9PUE> ("Obama could sign an executive order today. With roughly three-quarters of the public, including a majority of republicans, in favor of open gay service, a meaningful public backlash is unlikely.").

⁶² Frank, *supra* note 3, at 175-76.

⁶³ Benecke, *supra* note 24, at 43.

⁶⁴ Frank, *supra* note 3, at 174.

⁶⁵ *Id.* at 179.

⁶⁶ *Id.* at 203.

⁶⁷ *Id.* at 198.

quickly to reintroduce the repeal, but it again faced a successful filibuster in December.⁶⁸ Murphy and supporters introduced one more last-minute bill, The Don't Ask Don't Tell Repeal Act, which pushed repeal without an explicit nondiscrimination policy provision.⁶⁹ The bill passed in the very last days of legislative session on December 18.⁷⁰

III. HISTORIAL SIGNIFICANCE OF CIVIL RIGHTS FOR LGBT ORGANIZING

In the past fifty years, civil rights as an organizing and advocacy strategy has been critical to U.S. LGBT politics. In the late 1970s, the pro-gay movement began to shift from the liberationist political model of the post-Stonewall moment, which took a more revolutionary and radical approach to social change, to a rights-based political model, which capitalized on the successes of the emerging civil rights doctrine.⁷¹ Gay rights activists re-conceptualized queer sexualities as a marker of belonging to a quasi-ethnic group deserving of civil rights protections.⁷² In the United States, these activists drew on the language of and legal protections established in the Civil Rights Act of 1964. They argued that just as the Act established the right to protection from discrimination based on race, color, sex, religion, or national origin, so too do gay, lesbian, and bisexual (and later, transgender) citizens deserve the same protections. This new rights-based tactic quickly gained traction, and by 1977, a number of local governments had enacted gay rights ordinances that afforded protections similar to the Civil Rights Act.⁷³ In fact, this civil rights-oriented strategy was *so* startlingly successful that it incited an organized and well-funded anti-gay backlash movement that orchestrated the repeal of such ordinances almost as quickly as they had emerged.⁷⁴ Still, the gay civil rights framing has, by and large, proved incredibly fruitful for the LGBT movement.

Today, this framing predominates almost every organized effort toward LGBT equality. Organizations such as the Human Rights Campaign have lobbied for LGBT access to the institutions of marriage, family, employment, and, of course, the military by arguing that barring entrance into or

⁶⁸ *Id.* at 203.

⁶⁹ *Id.* at 194.

⁷⁰ *Id.* at 201.

⁷¹ See Steven Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 42 (Barry D. Adam et al., eds., 1999); Suzanna Danuta Walters, *The Few, the Proud, the Gays: Don't Ask, Don't Tell and the Trap of Tolerance*, 18 *WM. & MARY J. WOMEN & L.* 87, 99 (2011).

⁷² Walters, *supra* note 71, at 110-11.

⁷³ RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK* 155 (1982).

⁷⁴ *Id.* at 157.

discriminating within these institutions violates the principle of civil rights.⁷⁵ Even the name—Human Rights Campaign—adopts a civil rights strategy by suggesting that LGBT rights are fundamental human rights. Often such organizations and activists draw an explicit parallel between LGBTs and other groups who have experienced (and continue to experience) institutional exclusion, most often drawing on the black civil rights struggle in particular.⁷⁶

For example, marriage equality advocates often draw on the historical analogy of antimiscegenation laws, which prohibited interracial marriages and families until they were declared unconstitutional in 1967 in *Loving v. Virginia*.⁷⁷ When gay rights advocates declare that marriage equality is “our *Loving*,” they attempt to legitimize gay rights by invoking a comparison to the kinds of institutional racism that now appear shameful in this so-called post-racial era.⁷⁸ Despite the possibly troubling implications of such a facile comparison between the disparate histories of racism and homophobia,⁷⁹ gay rights advocates continue to use such parallels successfully as part of a larger civil rights framing project.

So why didn’t the civil rights strategy work in the case of the DADT repeal? Why did activists reject this strategy in favor of a military readiness framework, and what can this tell us about the limits and boundaries of civil rights as a legal and social movement construct? There were, in fact, some attempts to draw parallels between racial and gender integration in the military and the sexuality integration that a repeal of DADT would enable, similar to the efforts of marriage equality activists.⁸⁰ Still, we know from firsthand accounts from the policy frontlines that the decision to shift away from these

⁷⁵ Walters, *supra* note 71, at 93.

⁷⁶ See, e.g., Frank, *supra* note 3, at 169 (expressing the negative effect of racial desegregation of the military taking five years to accomplish under President Truman, “making some advocates apoplectic about the prospects of imminent [DADT] repeal”); Walters, *supra* note 71, at 99 (“While segregation and exclusion are not exactly the same as closeted presence and formal rejection, they are close cousins, both in their structural motivations (to instantiate second-class status, to legally discriminate) and their experiential effects (resentment, fear, isolation, loss of employment).”).

⁷⁷ 388 U.S. 1 (1967).

⁷⁸ Siobhan B. Somerville, *Queer Loving*, 11 GLQ: J. LESBIAN & GAY STUD. 335, 336 (2005) (“[A]dvocates have argued that the strongest precedent for a constitutional right to same-sex marriage can be found in earlier decisions on interracial marriage.”). See generally EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (3d ed. 2009).

⁷⁹ Somerville, *supra* note 78, at 336 (“The miscegenation analogy seems to have widespread appeal, but whatever its rhetorical power, it has obscured the complicated ways in which race and sexual orientation have been intertwined in U.S. law.”).

⁸⁰ Craig Rich, Julie Kalil Schutten & Richard A. Rogers, “*Don’t Drop the Soap*”: *Organizing Sexualities in the Repeal of the US Military’s “Don’t Ask, Don’t Tell” Policy*, 79 COMM. MONOGRAPHS 269, 284 (2012); Rostker et al., *supra* note 55.

civil rights framing strategies was consciously chosen and grounded in a sense of frustration with the difficulties of making civil rights claims.⁸¹

Repeal advocates quickly discovered that a key limitation of advancing a civil rights-based LGBT movement is that it first requires buy-in to the idea that people deserve sexuality-based protections.⁸² In the 1980s and 90s, anti-gay activists were able to rebrand LGBT civil rights claims as “special rights” claims.⁸³ In the process, they reframed gay rights initiatives from attempts to redress inequalities to attempts to claim exception and advantage over heterosexuals.⁸⁴ This rebranding strategy was in full effect during the passage of DADT, and helped to secure public disapproval of a full repeal.⁸⁵ Belkin argues that when it comes to LGBT issues, politicians and policymakers must contend with a “politics of paranoia”—in this case, a fear amongst constituents of a conspiracy (often called the “gay agenda”) hell-bent on destroying traditional values and sacred institutions of heterosexuality.⁸⁶ Belkin characterizes the battle over military inclusion as predominated by these paranoid politics—for example, the arguments made by DADT supporters that the innate hypersexuality, amorality, and predaciousness of gay soldiers would put their heterosexual counterparts at great risk.⁸⁷ Repeal activists seem to have recognized the impossibility of combating these paranoid politics on the basis of a civil rights claim and shifted tactics accordingly.

Still, these politics of paranoia are present across the spectrum of LGBT political battles, so why hasn’t there been an overall shift away from civil rights framing? Certainly the politics of paranoia are at play when anti-gay activists evoke the demise of “traditional” marriage and forecast catastrophic social deterioration resulting from marriage equality. Yet marriage activists continue to rely on a civil rights framing, to largely positive effect. What makes the DADT repeal different? In part, the difference can be attributed to

⁸¹ BELKIN, HOW WE WON, *supra* note 8, at 191; KINGDON, *supra* note 42, at 178; Murphy, *supra* note 10, at 153.

⁸² See KINGDON, *supra* note 42, at 116-17 (discussing the issue advocates generally face when the amount of value placed on particular policy modification differs drastically between opposing parties).

⁸³ Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 594 (1998).

⁸⁴ *Id.* The rhetoric of “special rights” also plagued racial equity projects, including affirmative action programs. See TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 87 (2004). Critics of affirmative action policies argued that they granted “special rights” to employment and education that created an unfair advantage for candidates of color. *Id.* at 90. The rhetorical power of the “special rights” framing was in fact instrumental in the dismantling affirmative action programs in the past twenty years. *Id.* at 107.

⁸⁵ Marian Meyers, *Defining Homosexuality: News Coverage of the “Repeal the Ban” Controversy*, 5 DISCOURSE & SOC’Y 5, 321, 329 (1994); Walters, *supra* note 71, at 95.

⁸⁶ Aaron Belkin, *The Politics of Paranoia*, 60 J. HOMOSEXUALITY 214, 216 (2013).

⁸⁷ *Id.*

the more conservative institutional context. The heightened context of homophobia in the military, compared to its civilian context in virtually any historical moment, has been well documented.⁸⁸ From the strenuous opposition Clinton faced from the DOD and high-profile figures like Colin Powell,⁸⁹ to the more recent resistance to the DADT repeal by the likes of Sen. John McCain⁹⁰ and more than one thousand active and retired military generals,⁹¹ the distance activists would need to bridge to get buy-in to the concept of military inclusion as a civil rights issue was perhaps just too far to cross.

Additionally, the strategy shift makes sense in the context of the battle for LGBT employment rights more generally. Versions of the Employment Nondiscrimination Act (“ENDA”) have been introduced in every congressional session since the early 1990s, to no avail.⁹² While civil rights framing seems to be fairly successful in convincing policymakers and the public that LGBTs should be accepted into the domestic institutions of marriage and family—which we think of as fundamentally private—this framing has not proven as successful when it comes to convincing the public that LGBTs should have equal access to the public sphere and civic engagement via employment and military service. Perhaps the civil rights framing is more palatable when it is constrained to the private domestic realm, and less so when it means that employers, coworkers, and fellow soldiers need to suppress their preference for heterosexual-exclusive public spaces in the name of fair and equal access.⁹³ The corresponding judicial reticence toward expanding the constituency of the Civil Rights Act solidifies this resistance; with some exception, most of the legal attempts to expand civil rights

⁸⁸ BERUBE, *supra* note 12, at 264; HEREK, JOBE, & CARNEY, *supra* note 2, at 10; SHILTS, *supra* note 1, at 5; L. Michael Allsep, Jr., *The Myth of the Warrior: Martial Masculinity and the End of Don't Ask, Don't Tell*, 60 J. HOMOSEXUALITY 381, 392 (2013); Francine Banner, *“It's Not All Flowers and Daisies”: Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of “Don't Ask, Don't Tell,”* 24 YALE J.L. & FEMINISM 61, 102 (2012); Belkin, *supra* note 86, at 218; Dana M. Britton & Christine L. Williams, *“Don't Ask, Don't Tell, Don't Pursue”: Military Policy and the Construction of Heterosexual Masculinity*, 30 J. HOMOSEXUALITY 1, 9 (1995).

⁸⁹ HALLEY, *supra* note 4, at 19.

⁹⁰ Frank, *supra* note 3, at 187.

⁹¹ Belkin, *supra* note 86, at 217.

⁹² See, e.g., Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397 (2009).

⁹³ If so, this would be a reversal of the way that employment and marriage rights operated with the fight for black civil rights—in the 1960s, there was considerably more resistance to ending antimiscegenation laws than there was to offering employment protections to black citizens. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (20th anniversary ed. 1962).

legislation to include sexuality, or even to interpret the Civil Rights Act's "sex" protection to be more inclusive in its meaning, have been rebuffed.⁹⁴

CONCLUSION

What does the tactical shift of DADT repeal supporters tell us about the limitations of using a civil rights framework to redress sexuality-based inequalities? First, it highlights the high bar of buy-in that such a strategy requires; in such a gay-hostile context as the military, using a tactic that requires acceptance that gay rights are on par with race, sex, or religious rights is a near-impossible mission (especially given the sizable resistance to the protection of civil rights for women or people of color in recent history). The success of this tactical transition suggests that other gay rights initiatives might also consider alternative organizing frameworks. Short of an amendment to the Civil Rights Act to include sexual orientation and gender expression, LGBT claims to civil rights protections will always be precarious, partial, and hard fought. Perhaps it is time to consider that civil rights framing is not the best one for LGBT politics—perhaps even an inappropriate one, as some critics of rights-based organizing have argued.⁹⁵

Still, I would caution against adapting the DADT repeal strategy wholesale without further critical reflection. By shifting away from inclusiveness as the guiding rationale to instead emphasizing national security, repeal activists reinforce the increasing militarization of U.S. politics. This reflects a troubling trend within LGBT political organizing that queer theorist Jasbir Puar coined "homonationalism"—using patriotism as a "normalizing gesture" in order to secure LGBT rights for a privileged few.⁹⁶ Homonationalism links U.S. LGBT identities to the conservative and imperialist politics of war at the expense of more marginalized others.⁹⁷ Given the normalizing turn that has predominated most gay rights strategizing in recent decades,⁹⁸ this aspect of the repeal's success is not as unique as it might seem on the surface. Nor is it a tactic that would provide a productive way forward toward achieving sexual justice. Homonationalist strategizing exacerbates global power asymmetries while at the same time constraining queer possibilities within domestic sexual politics.

Nonetheless, the DADT Repeal Act is instructive as a test of the boundaries of a tactical civil rights strategy. Civil rights, as an organizing strategy for

⁹⁴ See, for example, the history of LGBT teachers' tentative rights to be out in the classroom. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 47 (2010).

⁹⁵ See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 20 (2011).

⁹⁶ JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* 43 (2007).

⁹⁷ *Id.*

⁹⁸ See SUZANNA DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 229 (2014).

social movements, are not infinitely elastic and perhaps are not the most efficacious (or appropriate) strategy for increasing opportunity for LGBTs, especially in gay-hostile contexts. The LGBT social movement could benefit from taking this lesson to heart in future battles, without losing sight of the possible risks such a tactical shift might engender.