CHAPTER FIVE

PROGRESS WHERE YOU MIGHT LEAST EXPECT IT: THE MILITARY'S REPEAL OF "DON'T ASK, DON'T TELL"

In 1993, Congress passed an Act affirming the longstanding ban on military service by openly lesbian, gay, and bisexual (LGB) individuals.[1] To support this policy, which became known as "Don't Ask, Don't Tell" (DADT), Congress included fifteen factual findings. It started with the obvious: the Constitution gives Congress authority over the armed forces; members of the military must make extraordinary sacrifices; servicemembers must be able to trust one another.[2] But the Act built up to a much more controversial finding: "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."[3] At the time, most federal courts deferred to Congress's finding, accepting it as fact.[4] Less than two decades later, however, all three branches of government rejected that finding as grounded in animus and as inconsistent with empirical evidence. In 2010, Congress repealed the Act,[5] abolishing an exclusion that had been a part of U.S. law since World War II.

This Chapter tells the story of the repeal of DADT. It begins with a brief history of U.S. military service by LGB persons. Next, the Chapter looks forward at problems the military has yet to address. Finally, it considers the model for social change used to effect the repeal. The story of the repeal demonstrates that neither evidence nor litigation alone is sufficient to create change. In combination with grassroots education and dialogue, however, both evidence and litigation can transform what politicians, judges, and ordinary citizens perceive as factual truth.

A. A Brief History of LGB Military Service

The story of DADT is riddled with misconceptions. Contrary to popular belief,[6] the U.S. military had not always banned service by

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[1] 10 U.S.C. § 654 (2006) (repealed 2010).

[2] *Id.* § 654(a).

[3] *Id.* § 654(a)(15).

[4] *See, e.g.*, Able v. United States, 155 F.3d 628, 635–36 (2d Cir. 1998); Thomasson v. Perry, 80 F.3d 915, 922–23 (4th Cir. 1996) (en banc).

[5] *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

[6] *See, e.g.*, Anne Flaherty, *Lift Ban on Gays in Military, Top Defense Officials Say*, PRESS ATLANTIC CITY, Feb. 3, 2010, at A3 ("It's time to repeal the military's 'don't ask, don't tell' policy and allow gay troops to serve openly for the first time in history . . . .").

LGB persons. Likewise, despite the assertions of DADT's supporters,[7] evidence has never indicated that the mere presence of a homosexual or bisexual servicemember disrupts military operations. Additionally, notwithstanding public perceptions,[8] DADT reflected very little change from the straightforward ban enacted during World War II. Further, when DADT was finally repealed, President Obama played a far smaller role than many believed.[9] This section A debunks these common misunderstandings and provides a narrative history in three sections: the outright ban in place from 1945 until 1993, the DADT policy enacted in 1993, and the repeal, passed in 2010, which allowed LGB individuals to serve openly.

1. The Outright Ban. — Gay men have served in the U.S. military since the nation's inception in the Revolutionary War.[10] In fact, the government did not bar LGB persons from military service until the 1940s.[11] Further, this outright ban was not rigorously enforced at first, so many LGB persons continued to serve throughout World War II.[12]

The original policy prohibiting military service by LGB individuals had myriad justifications. Some supporters of the ban appealed to traditional notions of sexual morality, arguing that homosexuality is immoral and that allowing LGB persons to serve would indicate tacit approval of homosexuality.[13] Similar, some supporters relied on stereotypes and asserted that gay men were too effeminate to be good soldiers.[14] Still other supporters argued that parents would not allow their children to enlist in a military with gay servicemembers or that foreign nations would react negatively.[15] To ground the policy in law rather than morality or stereotypes, many government officials claimed

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[7] *See, e.g.*, Lee A. Casey & David B. Rivkin Jr., Op-Ed., *'Don't Ask, Don't Tell': The End Is Near*, WASH. POST, Feb. 13, 2010, at A21 ("When Congress enacted the ban in 1993, it justified the restrictions based on the military's need for 'unit cohesion.' Openly gay soldiers, Congress concluded, 'would create an unacceptable risk.'").

[8] *See, e.g.*, Ethan Klapper, *On This Day in 1993, Bill Clinton Announced 'Don't Ask, Don't Tell,'* HUFFINGTON POST (July 19, 2013, 11:01 AM), http://www.huffingtonpost.com/2013/07/19/bill-clinton-dont-ask-dont-tell_n_3623245.html ("Clinton called DADT 'a major step forward.'").

[9] *See, e.g.*, Editorial, *Barack Obama for Re-Election*, N.Y. TIMES, Oct. 28, 2012, at SR12 ("The military's odious 'don't ask, don't tell' rule was finally legislated out of existence, under the Obama administration's leadership.").

[10] Pamela Lundquist, *Essential to the National Security: An Executive Ban on "Don't Ask, Don't Tell,"* 16 AM. U. J. GENDER SOC. POL'Y & L. 115, 118 (2007).

[11] *Id.* Additionally, although states have banned sodomy since the founding, *see* Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986), the federal government did not criminalize sodomy in the military until 1916, Lundquist, *supra* note 10, at 118.

[12] JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 26–31 (2d ed. 1998).

[13] *See Developments in the Law — Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1561 (1989) [hereinafter *Developments*].

[14] Lundquist, *supra* note 10, at 119–20.

[15] *See* Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980) (Kennedy, J.); *Developments*, *supra* note 13, at 1561.

that LGB persons were more susceptible to blackmail because acts of sodomy violated criminal laws in most jurisdictions.[16]

Soon after the end of World War II, servicemembers discharged under the outright ban began challenging the policy in court.[17] The earliest suits demanded procedural due process rights but did not contest the military's authority to discharge individuals for engaging in same-sex sexual conduct.[18] Litigation challenging the substance of the ban emerged in the 1970s.[19] Suits typically included three types of arguments: First, plaintiffs argued that the ban violated their substantive due process–based right to engage in private, consensual homosexual conduct.[20] Second, plaintiffs claimed that the ban violated the right to equal protection by treating homosexual and heterosexual servicemembers differently.[21] Third, plaintiffs asserted that, by punishing individuals for stating that they are gay or lesbian, the ban ran afoul of the First Amendment.[22]

Almost all challenges to the outright ban were unsuccessful. Plaintiffs faced an uphill battle because courts afford special deference to the military and enforce rights less vigorously in that context.[23] Courts adjudicating challenges to the ban recognized that "one does not surrender his or her constitutional rights upon entering the military" but analyzed claims "in light of the special circumstances and needs of the armed forces."[24] Balancing "restricted" constitutional protections[25] against "the exigencies of military life"[26] made it easy for courts to find for the government.

Further, courts almost never found for LGB plaintiffs at that time — they routinely upheld bans on sodomy[27] and decisions to deny security clearances based on sexual orientation[28] — so the chances of prevailing in *any* context were slim. Rejecting substantive due process

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16 *See* Lundquist, *supra* note 10, at 119; *Developments*, *supra* note 13, at 1560.

17 *See* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS 18 & n.5 (2006).

18 *See id.*

19 *See id.* at 30 tbl.1.

20 *See, e.g.*, Dronenburg v. Zech, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *Beller*, 632 F.2d at 807.

21 *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 463–66 (7th Cir. 1989); Watkins v. U.S. Army, 875 F.2d 699, 712 (9th Cir. 1989) (en banc).

22 *See, e.g.*, *Ben-Shalom*, 881 F.2d at 457; Elzie v. Aspin, 897 F. Supp. 1, 1 (D.D.C. 1995).

23 *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding a military regulation prohibiting Orthodox Jewish servicemembers from wearing yarmulkes while in uniform); Brown v. Glines, 444 U.S. 348 (1980) (upholding a regulation requiring members of the Air Force to obtain permission before circulating petitions on bases).

24 *Beller*, 632 F.2d at 810.

25 *Elzie*, 897 F. Supp. at 5.

26 Steffan v. Perry, 41 F.3d 677, 692 (D.C. Cir. 1994) (en banc).

27 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

28 *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 565 (9th Cir. 1990); Padula v. Webster, 822 F.2d 97, 98 (D.C. Cir. 1987).

claims, courts argued that "[i]f a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context."[29] Likewise, courts determined that sexual orientation was not a suspect classification, so rational basis review applied, "and the Army satisfie[d] that standard without any difficulty."[30] Finally, courts uniformly rejected First Amendment claims, noting that each servicemember "is free under the regulation to say anything she pleases *about* homosexuality and about the Army's policy toward homosexuality."[31] Since "it is the identity that makes her ineligible for military service, not the speaking of it aloud," any impact on speech is merely incidental.[32] Undisturbed by these fruitless challenges, the military maintained the outright ban for nearly half a century and used it to discharge more than 100,000 servicemembers.[33]

2. Don't Ask, Don't Tell. — In the early 1990s, President Clinton sought to end the military's exclusionary policy and allow LGB individuals to serve openly.[34] He promised to repeal the ban while on the campaign trail, and he attempted to change the policy through executive order once in office.[35] However, he faced intense opposition, both from Republicans and from within his own party.[36] Public discourse fixated on the possibility of straight and gay soldiers showering together,[37] suggesting that barracks would become rife with sexual tension[38] and that heterosexual servicemembers might find themselves unable to resist homosexual liaisons.[39] Most government officials adopted a less salacious justification for the ban and focused on the purported threat to unit cohesion.[40] As Colin Powell, then President Bush's Chairman of the Joint Chiefs of Staff, explained, "[t]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies" — allowing LGB persons to join the military could

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29 Dronenburg v. Zech, 741 F.2d 1388, 1392 (D.C. Cir. 1984).

30 Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989).

31 *Id.* at 462.

32 *Id.*

33 *See* Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35, 37 (2011).

34 *See* PATRICIA A. CAIN, RAINBOW RIGHTS 196 (2000).

35 Lundquist, *supra* note 10, at 118–19.

36 *See* Mark Thompson, *'Don't Ask, Don't Tell' Turns 15*, TIME (Jan. 28, 2008), http://www.time.com/time/nation/article/0,8599,1707545,00.html.

37 Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 227–28 (2012).

38 *See* Lundquist, *supra* note 10, at 120.

39 JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 31 (1999).

40 *See* CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM 145 (2010).

"disrupt that feeling of cohesion."[41] Though the unit cohesion rationale faced intense criticism,[42] including because analogous arguments had been used to justify excluding African Americans and women from military service decades earlier,[43] it quickly became ubiquitous.

The policy now known as DADT — short for Don't Ask, Don't Tell, Don't Pursue, Don't Harass — was intended to reflect concessions from each side.[44] It was supposed to be a "compromise" that "allow[ed] gay men and lesbians to serve as long as they ke[pt] quiet about their sexual orientation and abstain[ed] from homosexual conduct."[45] In practice, however, DADT resembled the outright ban. Violating the bargain that military officers would not "ask" about sexual orientation as long as servicemembers did not "tell," DADT gave commanders vast discretion to initiate investigations any time a servicemember did or said something that would demonstrate homosexual proclivities to a "reasonable person."[46] These discretionary decisions were effectively unreviewable,[47] so the "don't ask" prong at best provided a right without a remedy.[48]

Democratic supporters of DADT also understood the policy to target conduct instead of status, allowing LGB individuals to serve as long as they abstained from homosexual acts, but status-based discharges persisted.[49] Under the so-called "queen for a day" exception, heterosexuals caught engaging in same-sex sexual conduct could avoid discharge by proving that those acts were isolated incidents and were

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41 S. REP. NO. 103-112, at 275 (1993).

42 *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 952 (4th Cir. 1996) (en banc) (Hall, J., dissenting) ("'Unit cohesion' is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs."); *id.* at 951 (quoting Dr. Lawrence J. Korb, Assistant Secretary of Defense under President Reagan, who described DADT as "kowtowing to the prejudices of some by excluding others" and arguing that it "represents a severe and somewhat defeatist underestimation of the ability of today's servicemembers to keep their focus on professional military concerns").

43 *See* Ashby Jones, *More on 'Don't Ask, Don't Tell' and Executive Orders*, WALL ST. J. L. BLOG (Feb. 3, 2010, 12:56 PM), http://blogs.wsj.com/law/2010/02/03/on-dont-ask-dont-tell-and-executive-orders.

44 *See* CAIN, *supra* note 34, at 196; Lundquist, *supra* note 10, at 116.

45 James Vicini, *U.S. Decides Against Appeal on Gays in the Military*, REUTERS, Dec. 30, 1993.

46 *See* HALLEY, *supra* note 39, at 129.

47 *Id.*; *see also, e.g.*, Cook v. Gates, 528 F.3d 42, 69 (1st Cir. 2008) (Saris, J., concurring and dissenting) (noting the plaintiff's argument that "it is 'functionally impossible' to rebut the presumption short of recanting one's status").

48 HALLEY, *supra* note 39, at 50; *see also, e.g.*, Turner v. Dep't of Navy, 325 F.3d 310, 316–17 (D.C. Cir. 2003) (noting that "the Navy staunchly denies enforceability" of the regulations limiting investigations into "homosexual misconduct").

49 HALLEY, *supra* note 39, at 3–4. This distinction was also significant from a legal perspective: the Supreme Court had held that criminal punishments targeting status rather than conduct violated the Eighth Amendment's bar on cruel and unusual punishment. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

not likely to recur.[50] Accordingly, "same-sex erotic acts [were] deemed to be *differently* harmful depending on the *sexual status of the people who perform*[*ed*] *them*."[51] Two servicemembers who had engaged in identical *conduct* could face different disciplinary outcomes based on their *status* as homosexual or heterosexual. Moreover, DADT required discharge of any servicemember who stated that he or she is homosexual or bisexual, even if there was no evidence indicating that the person had engaged in forbidden conduct.[52] By "making a servicemember's admission that he or she is a homosexual sufficient grounds for presuming that the servicemember is likely to or intends to engage in prohibited conduct," this element of the policy "blur[red] the line between status and conduct."[53]

These problems made the "new" and "old" policies difficult to distinguish.[54] Individuals were separated from military service after confiding in family members, nonmilitary friends, chaplains, doctors, and therapists.[55] The "don't pursue" and "don't harass" prongs were quickly forgotten as aggressive investigatory practices common under the outright ban continued uninterrupted. Frequent "witch hunts" targeted as many as sixty servicemembers in a single unit at a time.[56] Servicemembers accused of homosexuality were pressured to inform against others, and any word or deed that could be construed as suggesting a propensity toward homosexuality put individuals at risk of scrutiny and discharge.[57]

The consequences of DADT also resembled outcomes under the outright ban. In less than two decades, the military discharged approximately 4500 servicemembers.[58] These discharges were often classified as other-than-honorable, usually involved a loss of benefits, and

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[50] AARON BELKIN, HOW WE WON: PROGRESSIVE LESSONS FROM THE REPEAL OF 'DON'T ASK, DON'T TELL' 49 (2012); CAIN, *supra* note 34, at 193, 197.

[51] HALLEY, *supra* note 39, at 47.

[52] CAIN, *supra* note 34, at 197.

[53] Richenberg v. Perry, 97 F.3d 256, 264 (8th Cir. 1996) (Arnold, C.J., dissenting).

[54] *See* Robert I. Correales, *Unfinished Business: A Discussion of Remedies for Victims of Involuntary Dismissal Under Don't Ask, Don't Tell and Its Predecessor, Toward a True Reconciliation*, 22 S. CAL. REV. L. & SOC. JUST. 1, 13 (2012); Alvin Lee, *Assessing the Korean Military's Gay Sex Ban in the International Context*, 19 LAW & SEXUALITY 67, 83 (2010).

[55] *See* HALLEY, *supra* note 39, at 52 (discussing a servicemember who was discharged after telling a Navy psychologist that he might be gay).

[56] *See* Benecke, *supra* note 33, at 50; *see also id.* at 50–53.

[57] *See* HALLEY, *supra* note 39, at 118.

[58] Lisa Daniel, *Nine Months After Repeal, Gay Troops Slowly Come Out*, AM. FORCES PRESS SERV. (June 20, 2012), http://www.defense.gov/news/newsarticle.aspx?id=116825. The discharge rate might have been even higher but for a rule forbidding commanders from discharging servicemembers under DADT if the unit was preparing to deploy. BELKIN, *supra* note 50, at 52–53. Perhaps related to this rule, DADT discharges decreased by thirty percent following the invasion of Afghanistan and by a total of forty percent after the start of Operation Iraqi Freedom. Lundquist, *supra* note 10, at 127.

sometimes came paired with criminal charges under the Uniform Code of Military Justice (UCMJ).[59] But the discharges did not harm only LGB persons: The military sacrificed exemplary servicemembers,[60] including dozens of linguists and other highly skilled individuals.[61] These discharges harmed military preparedness and wasted resources on additional recruiting and training. Additionally, through what commentators dubbed a "backdoor draft," heterosexual servicemembers who had returned to civilian life were involuntarily recalled to active duty to fill vacancies created by DADT-related discharges.[62]

Through rigorous enforcement, DADT also created a culture of fear in the military. To avoid accusations, many servicemembers felt pressure to keep their same-sex friends at literal arm's length and to conform to gender norms.[63] The burdens of this culture fell disproportionately on women, who were often accused of being lesbians if they refused male coworkers' advances or performed well in stereotypically masculine jobs.[64] Moreover, closeted servicemembers were reluctant to report homophobic harassment for fear of being labeled homosexual. In at least one instance, unreported harassment escalated until it culminated in the murder of a gay soldier.[65] As Professor Janet Halley has argued, DADT not only tolerated this sort of virulent homophobia; it affirmatively produced it: "[a]cting viciously anti-gay" helped individuals avoid suspicion, so the policy functioned as "a one-way ratchet ever tightening the screw of homophobia."[66]

Considering the problems that persisted under the "new" policy, it is unsurprising that a second generation of legal battles began as soon as the military implemented DADT.[67] By 1996, lawsuits were pending in seven circuits.[68] Plaintiffs generally presented the same three arguments their predecessors had made to challenge the outright ban in the 1970s and 1980s: that DADT violated rights to substantive due

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[59] Benecke, *supra* note 33, at 55, 61 n.163, 64 n.185.

[60] Courts recognized this problem even as they affirmed discharges. *See, e.g.*, Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1129 (9th Cir. 1997) (observing that the discharged plaintiff's "fourteen-year Naval career is marked with many awards and honors"); Thomasson v. Perry, 80 F.3d 915, 920 (4th Cir. 1996) (en banc) (noting that the discharged plaintiff's "service record has been a commendable one").

[61] *See* BELKIN, *supra* note 50, at 16.

[62] *Id.* at 25.

[63] *See* HALLEY, *supra* note 39, at 118.

[64] Benecke, *supra* note 33, at 56–57.

[65] *Id.* at 69.

[66] HALLEY, *supra* note 39, at 3.

[67] *See* Benecke, *supra* note 33, at 36 n.4 (collecting cases); Lundquist, *supra* note 10, at 122 n.40 (same).

[68] CAIN, *supra* note 34, at 198.

process, equal protection, and free speech.[69] Also as before, most suits were unsuccessful. Courts continued to afford special deference to the military.[70] Additionally, some courts quickly dismissed claims under *Bowers v. Hardwick*,[71] a Supreme Court decision holding that state sodomy laws did not violate the Constitution. Courts reasoned that if "homosexual conduct may constitutionally be prohibited,"[72] then sodomy cannot be a fundamental right protected by the substantive element of the Due Process Clause,[73] and sexual orientation cannot be a protected classification for equal protection purposes.[74] To reject First Amendment claims, courts reiterated arguments about the incidental impact on speech[75] and noted that statements can be used as evidence of propensity to commit prohibited conduct without infringing on the right to free speech, as they are in several other contexts.[76] As of the late 1990s, no appellate court had ruled against the military, and the Supreme Court had consistently refused to grant certiorari when the plaintiffs appealed.[77]

The flood of litigation tapered off for several years, then gradually resumed after the Supreme Court's 2003 decision in *Lawrence v. Texas*.[78] By explicitly overruling *Bowers* and condemning that decision for "demean[ing] the lives of homosexual persons,"[79] *Lawrence* changed the legal landscape and forced courts to consider substantive due process and equal protection challenges to DADT anew.[80] Despite this favorable development, the judiciary continued to reject most challenges.[81] Meanwhile, the government declined to appeal its occasional

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[69] *See, e.g.*, Cook v. Gates, 528 F.3d 42, 45 (1st Cir. 2008); Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996) (en banc).

[70] *See, e.g.*, Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) ("[W]e are required to give great deference to Congressional judgments in matters affecting the military."); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence." (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973))).

[71] 478 U.S. 186 (1986).

[72] Watson v. Perry, 918 F. Supp. 1403, 1407 (W.D. Wash. 1996).

[73] *See, e.g.*, *id.* at 1416–17.

[74] *See, e.g.*, *id.* at 1412–16.

[75] *See, e.g.*, *id.* at 1417.

[76] *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 931 (4th Cir. 1996) (en banc) (providing examples including the admission of statements to prove criminal motive or violation of an employment discrimination statute).

[77] CAIN, *supra* note 34, at 201.

[78] 539 U.S. 558 (2003). *Lawrence* held that criminal prohibitions on private, consensual acts of sodomy violated the Due Process Clause because the "liberty protected by the Constitution" includes "intimate conduct with another person." *Id.* at 567.

[79] *Id.* at 575.

[80] *See, e.g.*, Cook v. Gates, 528 F.3d 42, 45 (1st Cir. 2008) ("*Lawrence* has reinvigorated the debate over the [DADT] Act's constitutionality."); Witt v. Dep't of Air Force, 527 F.3d 806, 813–21 (9th Cir. 2008) (analyzing due process and equal protection claims in light of *Lawrence*).

[81] *See, e.g.*, *Cook*, 528 F.3d at 65.

losses, terminating cases that could have been victories for LGB servicemembers in a court of appeals or in the Supreme Court.[82]

3. The Repeal of DADT. — While litigation was starting and stalling, other leaders were working toward extrajudicial resolutions. In 1999, Professor Aaron Belkin founded the Palm Center to perform empirical studies of LGB persons in the military.[83] Generating high-quality data was not a new idea: The Navy conducted a study of gay servicemembers as early as 1957.[84] The RAND Corporation, founded by the Air Force, produced a massive study before Congress enacted DADT in 1993.[85] (Again defying expectations, both of these studies indicated that LGB soldiers posed no threat to the military.) Courts ruling on DADT challenges often emphasized the fourteen days of congressional hearings and the various factual findings included in the statute.[86] But the Palm Center brought an unprecedented focus to the evidence-based approach. Belkin argued that DADT was "grounded in a single, causal lie" — that LGB servicemembers would harm the military — and that lie "could easily be assessed with evidence."[87] Accordingly, the Palm Center's mission was "to tell the truth and continuously back it up with credible data."[88]

Making good on that promise, the Palm Center published nearly fifty studies over the course of a decade.[89] The studies demonstrated, among other things, that DADT wasted hundreds of millions of taxpayer dollars on recruiting and training replacements for discharged soldiers.[90] They showed that the military had granted several hundred waivers for felony convictions, allowing individuals convicted of making "terrorist threats" to serve while continuing to discharge gays and

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[82] *See* CAIN, *supra* note 34, at 201. In *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), for instance, the Ninth Circuit held that DADT was subject to intermediate scrutiny and remanded to the Western District of Washington for a determination under that standard. *Id.* at 318. Following the Ninth Circuit's decision, the Department of Defense recommended that then–Solicitor General Elena Kagan decline to petition for certiorari, and she agreed. Jeh C. Johnson, *Implementation of "Don't Ask, Don't Tell" Repeal*, 5 ALB. GOV'T L. REV. 407, 409 (2012). On remand, the district court found that the application of DADT to the plaintiff, Major Margaret Witt, had violated her right to substantive due process. Witt v. Dep't of Air Force, 739 F. Supp. 2d 1308, 1317 (W.D. Wash. 2010). The remedy granted was specific to Major Witt, so the government opted to accept the loss rather than to appeal. *See* Witt v. Dep't of Air Force, No. 06–cv–05195 RBL, 2012 WL 1747974, at *1 (W.D. Wash. May 16, 2012).

[83] BELKIN, *supra* note 50, at 5.

[84] *Developments*, *supra* note 13, at 1561–62.

[85] BELKIN, *supra* note 50, at 4.

[86] *See, e.g.*, Able v. United States, 155 F.3d 628, 635–36 (2d Cir. 1998); Thomasson v. Perry, 80 F.3d 915, 922–23 (4th Cir. 1996) (en banc).

[87] BELKIN, *supra* note 50, at 87.

[88] *Id.* at 19.

[89] *See Publications by Topic*, PALM CENTER, http://www.palmcenter.org/publications/all (last visited Mar. 1, 2014).

[90] BELKIN, *supra* note 50, at 19–20.

lesbians.[91] More affirmatively, they indicated that foreign militaries had abolished similar bans without harming military preparedness or unit cohesion.[92] Further, evidence established that repeal could be implemented quickly and cheaply.[93] In the aggregate, these studies indicated that LGB soldiers did not harm the military, but discrimination did. Using these studies, Belkin and other advocates worked behind the scenes to attract media attention,[94] to solicit op-eds,[95] and to persuade as many military leaders as possible to support DADT repeal.[96]

Despite mounting evidence and popular support, change did not occur immediately. Numerous individuals called for President Obama to end DADT through an executive order akin to President Truman's order desegregating the military in 1948.[97] Though President Obama had promised to end DADT in campaign speeches and in his 2010 State of the Union Address,[98] he rejected the executive solution.[99] The constitutionality of such an order was disputed: law professors,[100] journalists,[101] and pundits from Rachel Maddow[102] to Bill O'Reilly[103] defended the permissibility of an executive order, but President Obama responded that "Congress explicitly passed a law that took away the power of the executive branch to end this policy unilaterally."[104] Reflecting on the appeal in 2013, he also argued that he had wanted to take more time to build support for the change.[105] Without President

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[91] *Id.* at 26.

[92] *Id.* at 22–23.

[93] *See id.* at 80.

[94] *Id.* at 22.

[95] *Id.* at 32.

[96] *Id.* at 5.

[97] *Id.* at 64–65.

[98] Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop 'Don't Ask, Don't Tell,'* N.Y. TIMES, Feb. 1, 2010, at A1.

[99] BELKIN, *supra* note 50, at 66.

[100] *See generally* AARON BELKIN ET AL., HOW TO END "DON'T ASK, DON'T TELL" (2009); *see also* BELKIN, *supra* note 50, at 62 (arguing that under a "stop-loss" law passed in 1983, "the president has the right to modify or suspend any statute relating to military separations during times of national emergency," defined as "periods when reserve forces are involuntarily mobilized on active duty").

[101] *See, e.g.*, Anna Quindlen, *The End of an Error*, NEWSWEEK, Apr. 13, 2009, at 60.

[102] BELKIN, *supra* note 50, at 65.

[103] *O'Reilly: Obama Should 'Sign the Executive Order' Ending DADT, 'It's Just Not Fair, We Should Stop This Nonsense,'* THINK PROGRESS (July 28, 2010, 2:00 PM), http://thinkprogress.org/politics/2010/07/28/110073/oreilly-dadt-not-fair.

[104] Jane Hamsher, *Obama Says He Can't Issue Executive Order Ending DADT*, FIREDOGLAKE (Oct. 14, 2010, 4:23 PM), http://firedoglake.com/2010/10/14/obama-says-he-cant-issue-executive-order-ending-dadt.

[105] Franklin Foer & Chris Hughes, *Barack Obama Is Not Pleased*, NEW REPUBLIC (Jan. 27, 2013), http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president.

Obama's backing, efforts to attach DADT repeal to the Department of Defense (DOD) budget bill also failed.[106]

In the end, successful litigation spurred Congress to action.[107] In the fall of 2010, a federal district judge in California held DADT unconstitutional and issued a broad injunction forbidding discharge of LGB servicemembers.[108] The court's opinion in the case, *Log Cabin Republicans v. United States*,[109] devoted painstaking attention to scrutinizing every piece of evidence presented by the parties.[110] Whereas most opinions in prior cases had deferred to the government's interpretation of testimony and reports, the *Log Cabin Republicans* opinion noted that much of the purportedly supporting evidence had no empirical basis, did not address the propositions the government relied on it for, or even contradicted the military's position.[111] Accordingly, the court concluded that DADT did not promote military preparedness or unit cohesion.[112] The Ninth Circuit suspended the district court's injunction a week later,[113] but it was only a matter of time before the appellate court would fully review the case.

Military leaders sought to change the policy on their own terms, through legislation rather than "judicial fiat."[114] To this end, the Obama Administration DOD conducted its own study. Based on an extensive survey and numerous focus groups, it issued a 250-page report concluding that ending DADT would generate little threat to military functionality.[115] One month later, in December 2010, Congress passed a standalone repeal bill.[116] Expressing continued deference to the military, the repeal did not go into effect until the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff had certified that implementation of the policy was "consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruit-

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106 *See* BELKIN, *supra* note 50, at 71–73; Nathaniel Frank, *Obama's False 'Don't Ask, Don't Tell' Narrative*, NEW REPUBLIC (Feb. 19, 2013), http://www.newrepublic.com/article/112457/obamas-false-dont-ask-dont-tell-narrative.

107 BELKIN, *supra* note 50, at 75–78.

108 *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011) (per curiam).

109 716 F. Supp. 2d 884.

110 *See id.* at 911–19.

111 *See id.*

112 *See id.* at 918–24.

113 *See* Log Cabin Republicans v. United States, No. 10-56634, 2010 WL4136210, at *1 (9th Cir. Oct. 20, 2010).

114 *See* Johnson, *supra* note 82, at 419. As the Fourth Circuit has argued, "change emanat[ing] from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged societal division." Thomasson v. Perry, 80 F.3d 915, 926 (4th Cir. 1996) (en banc).

115 Johnson, *supra* note 82, at 412.

116 *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

ing and retention of the Armed Forces."[117] Leaders made the required certifications, and the repeal took effect on September 20, 2011.[118]

B. Looking Forward

The repeal of DADT was an important victory for the LGB rights movement, but the fight is not over. Yet again confounding popular belief, the military continues to prohibit sodomy and deny equal benefits to LGB servicemembers. Further, the military continues to exclude transgender individuals. This section provides a very brief overview of these core remaining issues.[119]

The continued fight for equal treatment for LGB servicemembers is at least threefold. First, the UCMJ still contains a provision prohibiting sodomy.[120] The sodomy ban applies to gay and straight soldiers alike, but the UCMJ does not contain a parallel provision prohibiting vaginal intercourse, suggesting bias against LGB individuals. Further, if Professor Halley is correct about the military's homophobic culture, there may be a substantial risk of selective prosecution. Military officials could use the sodomy ban to target and punish LGB servicemembers for private, consensual sexual conduct, even conduct that occurs while servicemembers are away from military property and with civilian partners.[121]

This reality is surprising since the Supreme Court struck down state sodomy laws as unconstitutional invasions of privacy in 2003.[122] The following year, however, the Court of Appeals for the Armed Forces in *United States v. Marcum*[123] held that it is constitutionally permissible to continue applying UCMJ sodomy laws in some circumstances because of the special nature of the military.[124] Courts-martial now consider the *Marcum* factors: whether the conduct fell within the liberty interest identified in *Lawrence*, whether the conduct included any behavior or factors the *Lawrence* Court identified as unprotected, and whether "there [are] additional factors relevant solely in the mili-

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117 *Id.* § 2(b), 124 Stat. at 3516.

118 Benecke, *supra* note 33, at 35.

119 For more comprehensive analysis, see, for example, SERVICEMEMBERS LEGAL DEF. NETWORK, FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE (2011) [hereinafter SLDN]; Correales, *supra* note 54; David Barnes, Note, *Ask, Tell, but Do Not Get Greedy: The Inequalities that Pervade in the Military in Light of the Repeal of "Don't Ask, Don't Tell,"* 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 121 (2012); Ashley L. Behre, Note, *Coming Out to Fight for Our Country: Achieving Equality for Gay Service Members in a Post–"Don't Ask, Don't Tell" Military*, 29 HOFSTRA LAB. & EMP. L.J. 189 (2011).

120 10 U.S.C. § 925 (2012) ("Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.").

121 *See id.* § 802(a), (c) (defining the scope of the UCMJ); Benecke, *supra* note 33, at 60–63.

122 *See* Lawrence v. Texas, 539 U.S. 558 (2003).

123 60 M.J. 198 (C.A.A.F. 2004).

124 *See id.* at 205–06.

tary environment that affect the nature and reach of the *Lawrence* liberty interest."[125] Under this test, servicemembers have faced prosecution for consensual sodomy as recently as June 2013.[126] The DOD has proposed repealing the general sodomy prohibition,[127] but prosecutions may persist until that change occurs.

The UCMJ provision prohibiting "conduct unbecoming an officer" presents an even graver threat to LGB servicemembers.[128] In addition to adding "conduct unbecoming" charges to cases involving offenses such as rape or possession of child pornography, the military has used the provision to punish conduct that is not otherwise criminal and could not be punished under *Marcum*.[129] In *United States v. Harvey*,[130] for instance, a military chaplain was convicted under this provision for engaging in private, consensual oral and anal sex with a civilian foreign national while serving abroad.[131] The appellate court recognized that the "conduct may fall within a recognized liberty interest under the Constitution" but held that it evinced a "degree of indecorum that disgraced and dishonored the appellant and seriously compromised his standing as an officer."[132] It is difficult to imagine a court using similar language to describe any of the millions of heterosexual male soldiers who have engaged in sexual activity with female citizens of foreign nations. Following decisions like *Harvey*, implementing the proposed change to the sodomy provision alone will not suffice; Congress, the DOD, or the military courts must establish a penal standard more demanding than deviation from "conduct expected of officers" that may generate "public opprobrium."[133]

Second, despite rapid progress, there is lingering uncertainty about whether servicemembers with same-sex spouses will receive the same rights as servicemembers with different-sex spouses. In the first years after DADT repeal, section 3 of the federal Defense of Marriage Act (DOMA) prohibited the government from providing equal benefits to

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[125] *Id.* at 207.

[126] *See* United States v. Williams, ARMY 20090619, 2013 WL 3357896, at *1 (A. Ct. Crim. App. June 26, 2013).

[127] Behre, *supra* note 119, at 224. Under the proposed change, the DOD would replace the existing provision with a prohibition on forcible sodomy against children. *Id.*

[128] 10 U.S.C. § 933 (2012) ("Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.").

[129] *See* United States v. Harvey, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009) ("[C]onduct that is permissible and survives scrutiny under *Marcum* can nonetheless be proscribed as conduct unbecoming an officer and a gentleman.").

[130] 67 M.J. 758.

[131] *See id.* at 760.

[132] *Id.* at 762–63.

[133] *Id.* at 762.

same-sex spouses.[134] Following the Supreme Court's June 2013 determination that section 3 of DOMA is unconstitutional,[135] the DOD changed its regulations to provide equal financial and housing benefits for all spouses of currently enlisted servicemembers.[136] Further, since not all LGB servicemembers can marry in their home states,[137] the military now recognizes all marriages valid in the place of celebration and will grant leave for servicemembers to travel to jurisdictions where they can marry.[138] Additionally, although the law governing veterans' benefits includes a mini-DOMA provision,[139] the Obama Administration has announced that it will provide the same benefits to same-sex and different-sex spouses.[140]

While admirable, these policy changes leave some complicated questions unanswered. For instance, what happens to servicemembers with same-sex spouses stationed in states or countries that do not recognize their marriages? These jurisdictions could attempt to deny same-sex couples benefits like hospital visitation or could prosecute LGB individuals under anti-gay laws. The military has not yet explained what steps it will take to protect same-sex couples or whether it will consider sexual orientation in determining assignments. Likewise, while the DOD will follow the celebration rule, the Department of Veterans Affairs might not. Advocates have expressed concern that spouses of LGB veterans who reside in states that do not recognize their out-of-state marriages may not receive benefits.[141]

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134 *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining "marriage" as "between one man and one woman," and "spouse" as "a person of the opposite sex who is a husband or a wife").

135 *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

136 Memorandum from Chuck Hagel, Sec'y, U.S. Dep't of Def., to Sec'ys of the Military Dep'ts and Under Sec'y of Def. for Pers. & Readiness on Extending Benefits to the Same-Sex Spouses of Military Members (Aug. 13, 2013) [hereinafter DOD Memorandum], *available at* http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf.

137 *See* Daniel Pasek, Essay, *Love and War: An Argument for Extending Dependent Benefits to Same-Sex Partners of Military Service Members*, 6 HARV. L. & POL'Y REV. 459, 470 (2012).

138 DOD Memorandum, *supra* note 136, at 1.

139 *See* 38 U.S.C. § 101(3) (2012) (defining "surviving spouse" as "a person of the opposite sex"). Just as *Lawrence* did not automatically invalidate the sodomy prohibition in the UCMJ due to the unique conditions of the military context, courts have found that *Windsor* does not control military-specific "defense of marriage" clauses. *See, e.g.*, Cooper-Harris v. United States, No. 2:12-00887-CBM, 2013 WL 4607436, at *2 (C.D. Cal. Aug. 29, 2013) (finding that the Supreme Court's decision in *Windsor* "does not address Title 38's constitutionality" but holding that the definition of "surviving spouse" lacked a rational basis).

140 *See* Press Release, U.S. Dep't of Justice, Attorney General Holder Announces Move to Extend Veterans Benefits to Same-Sex Married Couples (Sept. 4, 2013), *available at* http://www.justice.gov/opa/pr/2013/September/13-ag-991.html.

141 *See, e.g.*, *After DOMA: Veteran's Spousal Benefits*, LAMBDA LEGAL, http://www.lambdalegal.org/publications/after-doma-veterans-spousal-benefits (last visited Mar. 1, 2014).

Third, the military has not adequately provided for servicemembers who were discharged under DADT. Many would like to return to service, but the DADT Repeal Act does not provide for automatic reinstatement.[142] Instead, individuals must reapply through recruiters. There is no guarantee that individuals will be reinstated to the same positions; in fact, there is no guarantee of reacceptance at all.[143] For individuals who cannot or do not wish to return to service, the military has not created policies regarding upgrading discharges or revising discharge narratives.[144] Servicemembers discharged under DADT sometimes received general, other-than-honorable, or less-than-honorable discharges instead of honorable ones.[145] Likewise, the documents often listed the reason for separation as "homosexual conduct" or "homosexual admission."[146] These discharges can have lasting ramifications: when former servicemembers apply for jobs, for example, they are often required to produce this paperwork.[147] Further, the military has not restored veterans' benefits to individuals discharged under DADT,[148] nor has it offered reparations such as compensation or credit for time that would have been served.[149]

Further, despite the momentum created by DADT repeal, the military has not abolished or revised the outright ban on service by transgender persons. Individuals may not enlist if they identify as transsexual or have had any type of genital surgery. Current servicemembers are typically discharged if they begin identifying as transgender or seeking transition-related care, and even gender-nonconforming conduct or dress can lead to disciplinary action.[150] Though the medical community has recognized that transgender identity and transsexuality are not mental disorders[151] and has revised the

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142 *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; Correales, *supra* note 54, at 32.

143 *See* SLDN, *supra* note 119, at 33.

144 *See id.* at 31–33; Correales, *supra* note 54, at 3.

145 SLDN, *supra* note 119, at 31–32; *see also* Benecke, *supra* note 33, at 64–65.

146 SLDN, *supra* note 119, at 32.

147 *Id.*

148 *See* Correales, *supra* note 54, at 6. Pursuant to a class action settlement agreement, the military will restore full separation pay to servicemembers who were discharged under DADT and granted only partial pay at that time. *See* Settlement Agreement at 5, Collins v. United States, No. 10-778C (Fed. Cl. Jan. 7, 2013).

149 SLDN, *supra* note 119, at 33.

150 *See, e.g.*, Department of Defense Instruction No. 6130.03, § E4.15(h) (Sept. 13, 2011) (stating that a "[h]istory of penis amputation" is grounds for rejection of military service); SLDN, *supra* note 119, at 29–30 (noting that gender-nonconforming dress can lead to disciplinary action).

151 *See, e.g.*, E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165, 169 (2011).

Diagnostic and Statistical Manual accordingly,[152] the military continues to stigmatize and exclude trans men and women.

Both the Palm Center and the Williams Institute have published papers about transgender individuals in the armed forces. Their research indicates, among other things, that the ban prevents the U.S. military from working with transgender persons in foreign militaries[153] and that closeted transgender persons already serve in the U.S. military.[154] Currently, the Palm Center is commissioning eleven additional studies that will address issues including transgender service in foreign militaries and the expected cost of meeting the medical needs of transgender servicemembers.[155] If advocates use these studies to attract media attention and inspire op-eds, as they did when working to repeal DADT, the policy excluding transgender persons could change. For the foreseeable future, however, the military will persist in enforcing this discriminatory ban.

C. Lessons from DADT Repeal

Advocates have argued that the model used to repeal DADT applies to other contexts, both within and beyond the LGBT rights movement.[156] While this claim is likely correct, it is possible to draw the wrong lessons from the story of DADT repeal. Though legal challenges to DADT were often unsuccessful, at least until *Log Cabin Republicans*, earlier litigation efforts advanced the repeal movement in myriad subtle ways. Additionally, while advocates' reliance on empirical evidence contributed to their success, the evidence-based approach also presented challenges. Finally, though LGB advocates have engaged in grassroots activism relatively infrequently, the benefits of that strategy emerged clearly during the DADT repeal fight.

1. The Value of Impact Litigation. — After decades of frustrating and generally unsuccessful litigation, the U.S. Congress repealed

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[152] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

[153] TARYNN M. WITTEN, PALM CTR., GENDER IDENTITY AND THE MILITARY - TRANSGENDER, TRANSSEXUAL, AND INTERSEX-IDENTIFIED INDIVIDUALS IN THE U.S. ARMED FORCES 4 (2007), *available at* http://www.palmcenter.org/files/active/0/TransMilitary2007.pdf.

[154] JACK HARRISON-QUINTANA & JODY L. HERMAN, WILLIAMS INST., STILL SERVING IN SILENCE 5 (2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Harrison-Quintana-Herman-LGBTQ-Policy-Journal-2013.pdf.

[155] *See Transgender Military Service Initiative: Call for Proposals*, PALM CTR., http://www.palmcenter.org/call_proposals_2013 (last visited Mar. 1, 2014). As compared to cisgender servicemembers, transgender servicemembers are more likely to need certain forms of medical care such as hormone therapy and genital surgery.

[156] *See, e.g.*, BELKIN, *supra* note 50, at 84 ("It's my hope that the strategies that worked so well over the years will be equally effective for other progressive movements fighting for change."); Benecke, *supra* note 33, at 40 ("We developed a model integrating legal, policy, watchdog, media and grassroots advocacy efforts.").

DADT. Despite this apparent failure to overturn the policy through the courts, advocates should not dismiss litigation as a valuable means of social change. As a threshold matter, DADT litigation involved unusual obstacles and does not provide a representative example. Moreover, litigation — including litigation loss — can help mobilize and educate the public, increasing the rate of change.

DADT was particularly poorly suited to challenge through litigation. Suing an employer is always difficult, but LGB servicemembers who filed lawsuits — even ones who sought protective orders and used pseudonyms — risked outing themselves, thereby rendering themselves dischargeable.[157] As a result, the pool of potential plaintiffs was limited, and most cases were brought by individuals who had already been discharged.[158] The federal judiciary's longstanding policy of affording heightened deference to the military also made challenges to DADT unusually difficult.[159] As the Supreme Court has explained, "judicial deference to . . . congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[160] These problems were further compounded by the Department of Justice (DOJ) policy of declining to appeal its occasional losses, prematurely terminating otherwise promising cases.[161]

Of course, advocates could have challenged the deference to the military prevalent in the courts and at the DOJ. Like women during World War I and African Americans during World War II, LGB plaintiffs made the "Faustian choice" to glorify the military in pursuit of equality.[162] By emphasizing the honor of military service and arguing that the honor should be available to everyone, DADT repeal efforts "undeniably ennobled the military" and made it "harder to question some of the downsides."[163] Evincing this glorification, plaintiffs challenging DADT presented a range of creative constitutional and administrative arguments yet never challenged the extraordinary level of deference given to military decisions; they worked within that framework instead of attempting to change it. Challenging the level of deference afforded could have made it easier to challenge discriminatory policies.

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157 HALLEY, *supra* note 39, at 52–53.

158 *See id.*

159 *See* CAIN, *supra* note 34, at 117–18; Jeffrey S. Dietz, *Getting Beyond Sodomy:* Lawrence *and Don't Ask, Don't Tell*, 2 STAN. J. C.R. & C.L. 63, 70 (2005); Lundquist, *supra* note 10, at 123.

160 Rostker v. Goldberg, 453 U.S. 57, 70 (1981).

161 *See supra* note 82 and accompanying text.

162 BELKIN, *supra* note 50, at 89–90.

163 *Id.* at 89 (citing CYNTHIA H. ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES (2000)).

Despite these problems and frequent litigation losses, courts remained an important locus of activism.[164] Major lawsuits attracted the attention of the media and the public at large, prompting many individuals to reconsider their positions on the issues at stake and to engage in more thoughtful discourse.[165] Even when advocates lost important cases, those losses served as rallying points for further action.[166] As Professor Douglas NeJaime has argued, "loss may contribute to mobilization and fundraising by inspiring outrage and signaling the need for continued activism in light of courts' failure to act."[167] Accordingly, the continual losses chronicled in section A may have benefited the repeal efforts by "highlight[ing] more intensely the injustice suffered by the group" and "strengthening resolve."[168] Per NeJaime's account, these positive indirect effects can make litigation worthwhile even if the plaintiffs never prevail.[169]

Additionally, commentators have argued that *Log Cabin Republicans* signaled the beginning of the end for DADT.[170] The courts may not have moved ahead of public opinion, but the California district court moved ahead of Congress. Following the *Log Cabin Republicans* decision, the legislature moved quickly to control the terms of the repeal, achieving the same outcome months or years before the Supreme Court would have resolved the issue. At a minimum, then, litigation increased the rate of change.

2. Limits of an Evidence-Based Approach. — Generating objective, high-quality data serves several valuable purposes including refuting the opposition's evidence,[171] influencing the opinions of persuadable decisionmakers and members of the public,[172] and giving sympathetic jurists material to work with.[173] Nonetheless, the decades of unsuccessful challenges to the outright ban and to DADT demonstrate that evidence does not guarantee progress. Further, reliance on empirical evidence can force advocates into uncomfortable positions.

Recent federal court decisions suggest that judges are receptive to data. The two most successful challenges to DADT both relied on empirical evidence. In *Witt v. Department of the Air Force*,[174] the

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164 *See* ANDERSEN, *supra* note 17, at 25.

165 *See id.* at 171.

166 *See id.* at 95, 228; Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011).

167 NeJaime, *supra* note 166, at 969.

168 *Id.* at 984–85.

169 *Id.* at 1011.

170 *See, e.g.*, BELKIN, *supra* note 50, at 78; Johnson, *supra* note 82, at 418–19.

171 *See* BELKIN, *supra* note 50, at 29 ("[T]he right has pumped hundreds of millions of dollars into research centers and think tanks over the past four decades.").

172 *See id.* at 31, 40.

173 *See id.* at 76–77.

174 527 F.3d 806 (9th Cir. 2008).

Ninth Circuit held that heightened scrutiny applied and that the military could not rely solely on Congress's findings.[175] On remand, the district court found that the application of DADT to Major Witt did not adequately further the government's interests in unit cohesion and military preparedness.[176] To support this conclusion, the court relied on expert testimony about foreign militaries that allow LGB soldiers to serve openly and on data regarding the attitudes of servicemembers.[177] The eighty-six-page opinion in *Log Cabin Republicans* did even more. After a two-week trial, the district court picked apart the reports and testimony presented by the government,[178] analyzed all the evidence presented by the plaintiffs, and concluded that the policy failed to further any legitimate purpose.[179]

Similarly, in the same-sex-marriage context, a federal district court in California required renowned attorneys Theodore Olson and David Boies to conduct an extensive trial despite their desire to proceed to the Supreme Court without developing a record.[180] A federal district court in Michigan recently took a similar approach.[181] Perhaps these judges genuinely needed more information to reach decisions; perhaps they merely hoped to obtain evidence to confirm and legitimate what they had already decided. Either way, the trial orders indicate support for an evidence-based approach in the federal judiciary.

Yet history has proven that data alone is not sufficient: A study conducted by the Navy in 1957 indicated that gay military personnel performed better than average,[182] but the exclusionary policy persisted for the next fifty-three years. Likewise, when Congress enacted DADT in 1993, it ignored a 500-page RAND study that supported allowing LGB individuals to serve openly and instead relied on a fifteen-page Military Working Group "study" that included no empirical data.[183] The RAND study was also available to courts deciding DADT challenges but had no influence on most cases.[184] As these examples illu-

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175 *Id.* at 821.

176 Witt v. Dep't of Air Force, 739 F. Supp. 2d 1308, 1315 (W.D. Wash. 2010).

177 *Id.*

178 *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 911–14 (C.D. Cal. 2010).

179 *See id.* at 914–19.

180 *See* Howard Mintz, *Proposition 8 Case: Judge Who Struck Down California's Gay Marriage Ban Speaks Out*, SAN JOSE MERCURY NEWS (Feb. 19, 2013, 5:40 AM), http://www.mercurynews.com/ci_22616312/proposition-8-case-judge-who-struck-down-californias (noting that Judge Walker "ordered a full trial to establish a complete record on the arguments from both sides").

181 *See* Steve Friess, *Gay Parenthood Goes on Trial in Detroit*, AL JAZEERA AM. (Feb. 24, 2014), http://america.aljazeera.com/articles/2014/2/24/gay-parenthood-goesontrialindetroit.html.

182 *Developments*, *supra* note 13, at 1561–62.

183 BELKIN, *supra* note 50, at 4.

184 *See, e.g.*, Cook v. Gates, 528 F.3d 42, 58–59 (1st Cir. 2008) (mentioning the RAND study to support the proposition that Congress and the Department of Defense had "engaged in an exhaus-

strate, conducting the most rigorous and relevant studies proves futile if decisionmakers refuse to accept the results.

Also problematic, courts lack standardized criteria for deciding which evidence to accept. As a result, judicial decisions weighing conflicting evidence often consist of little more than looking through the crowd to pick out friends. In *Thomasson v. Perry*,[185] an early challenge to DADT and a paradigmatic example of this problem, an en banc Fourth Circuit panel fractured into majority and dissenting opinions that took wildly different views of the same evidence. The nine-judge majority was impressed by the "sustained and delicate negotiations" that had occurred in the executive and legislative branches.[186] It noted that the House and Senate Armed Services Committees had held a total of fourteen days of hearings and heard testimony from dozens of witnesses.[187] By contrast, the four dissenting judges dismissed much of this testimony as evincing "a desire to accommodate prejudice against homosexuals,"[188] and they emphasized statements made by the few witnesses who had criticized the unit cohesion rationale.[189] The majority merely mentioned the RAND study,[190] while the dissent emphasized that the study "reported no serious problems resulting from the presence of open homosexuals."[191] Additionally, the six-judge concurring opinion discussed reports and memoranda produced by the Military Working Group,[192] while the dissent discounted that material as based on "personal views . . . rather than hard facts."[193] As *Thomasson* suggests, evidence resides in a necessary-but-not-sufficient purgatory: litigants need solid evidence to enter the race, but even the best evidence will not carry challengers across the finish line.

The fact that evidence can be ignored suggests, at most, that research may not always be worth the cost. Some commentators, however, have noted more fundamental flaws in the evidence-based approach. As Professor Libby Adler has argued, presenting generalizations about LGB persons as scientifically validated facts leads to problematic contradictions that could add to the arsenals of gay rights opponents.[194] In adoption and marriage cases, for instance, plaintiffs have argued both

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tive policy review," *id.* at 58); Philips v. Perry, 106 F.3d 1420, 1435 n.6 (9th Cir. 1997) (Fletcher, J., dissenting) (analyzing the RAND study, although it was not mentioned in the majority opinion).

185 80 F.3d 915 (4th Cir. 1996) (en banc).

186 *Id.* at 921.

187 *Id.* at 922.

188 *Id.* at 951 (Hall, J., dissenting).

189 *Id.* at 951–52.

190 *See id.* at 922 (majority opinion).

191 *Id.* at 952 (Hall, J., dissenting).

192 *See id.* at 935–36 (Luttig, J., concurring).

193 *Id.* at 952 (Hall, J., dissenting).

194 *See generally* Libby Adler, *Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation*, 7 UNBOUND: HARV. J. LEGAL LEFT 1 (2011).

that "gay and lesbian people are equally likely to be good parents and that many gay and lesbian people have suffered emotionally the consequences of discrimination and stigma."[195] In other words, LGB persons are "sometimes psychologically injured, sometimes fit to produce well-adjusted children."[196] Such contradictions can undermine credibility and diminish the chances of prevailing in court (including the court of public opinion).

In addition to creating opportunities for embarrassing cross-examinations, some of these positions are harmful on their own terms. In the DADT context, plaintiffs often presented evidence to prove that LGB persons are the same as heterosexual persons. For instance, from the 250-page Pentagon report, one quotation reportedly stood out as President Obama's favorite: "We have a gay guy [in the unit]. He's big, he's mean, and he kills lots of bad guys. No one cared that he was gay."[197] It is easy to see what is appealing about this statement: it shows that gay soldiers are just as capable as straight soldiers. At the same time, however, the sentiment is disturbing: obtaining equality by proving that LGB soldiers are just as mean and can kill other people just as well as heterosexual soldiers uncritically accepts a particular vision of hypermasculinity as a military ideal, leaving no room for diversity derived from sex or sexual orientation. Focused on the goal of repealing DADT, advocates marshaled all the evidence they could and did not always think critically about whether the image projected was consistent with the objectives and identities of all LGB persons.

Not all evidence-based arguments create these problems. For example, advocates argued that ending DADT would save money, an argument that presumably did not undermine or disregard anyone's identity or experience. Further, Adler does not suggest abandoning the evidence-based approach because of the problems it causes in some circumstances.[198] Instead, she argues that "we should bring our critical faculties along for each and every ride," especially "when deliberating on the best course of law reform for the benefit of persons living on the margins of sexuality."[199] Thus, though the evidence-based strategy has limitations, it remains a potent tool for advocates.

3. Benefits of a Collaborative Approach. — Professor Belkin asserts that "[t]he Palm Center's model can debunk causal claims, but not

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[195] *Id.* at 39.

[196] *Id.* at 40.

[197] Johnson, *supra* note 82, at 415 (alteration in original) (quoting U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 126 (2010)) (internal quotation marks omitted).

[198] Adler, *supra* note 194, at 54.

[199] *Id.* at 53–54.

values-based claims."[200] It may be true that when voters and legislators engage in "morality politics,"[201] adhering to views grounded in religion or other moral codes instead of falsifiable premises, no amount of data can guarantee a desired outcome. But Belkin's acknowledgment of the limitations of his model gives his own work too little credit. By investing in outreach, education, and dialogue, Belkin and his team increased support for DADT repeal among military leaders and members of the public. This increased support was a necessary prerequisite to change through any means.

The first step was to shift away from the values debate. While litigation pitted equality for LGB persons against unit cohesion, Belkin's nonadversarial strategy accepted military preparedness as a shared goal.[202] This approach narrowed the terms of the debate and facilitated a focus on empirical claims: Advocates no longer needed to prove that equality was a worthwhile goal, or that equality was more important than other values; they needed to prove only that allowing LGB individuals to serve openly would have a neutral or positive impact on the military. These conversations rested on facts and avoided emotional appeals to rights or religion, to progress or tradition.

Once the terms of the discussion had been set, advocates strove to work with military leaders instead of against them.[203] Part of the strategy involved building on the "coming-out phenomenon." As Professor Michael Klarman explains, coming out allows LGB persons to "refute prevalent stereotypes by demonstrating that they [are] ordinary people."[204] As they "seem less unusual," tolerance will grow.[205] Indeed, statistical evidence has confirmed that as an increasing number of people have reported having openly gay family members, friends, and co-workers, support for gay rights has grown.[206] Advocates understood this reality and sought to put LGB servicemembers "front and center," making it "all the more difficult to deny their humanity and to define them solely in terms of the most pernicious stereotypes about gays and lesbians."[207] Simultaneously, advocates prioritized outreach and dialogue. Proponents of DADT repeal had numerous meet-

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200 BELKIN, *supra* note 50, at 88.

201 *See* ANDERSEN, *supra* note 17, at 154.

202 *See* BELKIN, *supra* note 50, at 30.

203 *See, e.g.*, *id.* at 32.

204 MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 18 (2013).

205 *Id.*

206 *Id.* at 197–98.

207 Benecke, *supra* note 33, at 41; *see also id.* at 43 ("In the course of fighting against DADT, servicemembers would stay on duty for longer periods of time, some even for full careers. Their presence would bring about a sea change in attitudes within the military as their leaders and fellow servicemembers came to know gay people, many for the first time.").

ings with prominent leader General Shalikashvili;[208] Belkin spoke at military academies dozens of times;[209] and Belkin's staff reached out individually to thousands of retired officers.[210]

These personal, deliberative interactions produced tangible results: From the beginning, LGB advocates gained insider information[211] and contacts.[212] They drew out supportive military officers and turned some would-be opponents into supporters.[213] In the first year of operations alone, Belkin's staff persuaded 104 retired generals and admirals to sign a petition supporting repeal.[214] Further, the nonadversarial approach generated investment in the cause, a result unlikely to stem from litigation or political maneuvering. Military leaders began to make influential public statements. For instance, General Shalikashvili wrote an op-ed published in the *New York Times*,[215] and Charles Mokos, the architect of the DADT policy, signed on to an amicus brief in a case challenging the UCMJ ban on consensual sodomy.[216] The authority inherent in these insiders' statements shifted public opinion and made it more acceptable for other members of the military to speak out.[217] Additionally, given general societal deference to the military, seeing military leaders change their minds was influential.[218] When DADT was enacted in 1993, less than half of the American population believed that LGB persons should be allowed to serve openly.[219] Fifteen years later, two-thirds to three-fourths of Americans supported repealing the ban.[220] These dramatic shifts in military support and public opinion allowed Congress to repeal DADT and encouraged leaders to quickly certify the legislature's decision.

D. Conclusion

Twenty-five years ago, the *Harvard Law Review* published its first *Developments in the Law* issue about sexual orientation and the law.[221]

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[208] *See* BELKIN, *supra* note 50, at 31–32.
[209] *See id.* at 39.
[210] *See id.* at 34.
[211] *See id.* at 44.
[212] *See id.* at 34.
[213] *See id.* at 40.
[214] *Id.* at 34.
[215] John M. Shalikashvili, Op-Ed., *Second Thoughts on Gays in the Military*, N.Y. TIMES (Jan. 2, 2007), http://www.nytimes.com/2007/01/02/opinion/02shalikashvili.html.
[216] BELKIN, *supra* note 50, at 36–37.
[217] *See id.* at 32.
[218] *See id.*; Johnson, *supra* note 82, at 414–15.
[219] Emily B. Guskin, *Attitudes Toward 'Don't Ask, Don't Tell' Policy Radically Change*, ABC NEWS (July 19, 2008), http://abcnews.go.com/PollingUnit/Politics/story?id=5387980.
[220] *See id.*; Lymari Morales, *In U.S., 67% Support Repealing "Don't Ask, Don't Tell,"* GALLUP POL. (Dec. 9, 2010), http://www.gallup.com/poll/145130/support-repealing-dont-ask-dont-tell.aspx.
[221] *See Developments*, *supra* note 13.

The story of DADT illustrates how much has changed since then: More than twenty years ago, a sitting president promised to repeal the ban on military service by LGB persons. Congress responded with DADT, which reflected little change from the outright ban, but courts eventually began questioning the constitutionality of that policy and finding for LGB plaintiffs. Congress ultimately repealed the discriminatory policy, and the military supported that decision. Perhaps most remarkable, litigation, evidence, and grassroots activism inspired millions of individuals to change their minds about LGB soldiers.

A strategy based on litigation, evidence, and outreach could generate progress on a wide range of issues that stretch far beyond the military context. Though the LGBT rights movement has not typically employed grassroots activism, Belkin and his team demonstrated that a small number of people can generate an impressive amount of progress. Indeed, his strategy could advance each of the issues discussed in the other *Developments in the Law* Chapters. HIV criminalization laws are particularly ripe for evidence-based attacks: as Chapter IV discusses, many state laws prohibit conduct that has virtually no chance of transmitting the virus,[222] and such laws may create a perverse incentive to avoid HIV testing.[223] The growing body of research addressing these issues could be persuasive in statehouses and courtrooms alike. Likewise, sound evidence could refute assertions about the likelihood of harm arising from transgender individuals and cisgender individuals sharing bathrooms[224] or prison cells,[225] and it could ground debates about sex-segregated sports teams.[226] Even more doctrinal issues like student speech could benefit from an infusion of objective, high-quality data: for instance, does pro-LGBT speech, like that expressed during Day of Silence events, cause a substantial disruption in most or any schools?[227]

In any of these contexts, evidence likely will not be dispositive or sufficient. At a minimum, though, it will counter evidence presented by the opposition and provide a basis for productive discourse. Education efforts and conversations grounded in strong supporting evidence can reveal the animus underlying policies that harm LGBT individuals, help shift public opinion, and accelerate the speed at which the arc of the moral universe bends toward justice.

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[222] *See supra* pp. 1777–78.
[223] *See supra* pp. 1781–82.
[224] *See supra* p. 1729.
[225] *See supra* p. 1756.
[226] *See supra* pp. 1737–38.
[227] *See supra* p. 1706 (explaining the Day of Silence tradition); p. 1708 (discussing evidence that would demonstrate substantial disruption).