

2001

Europe Enters a New Millennium with Gays in the Military while the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights

Scott Morris

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Constitutional Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Morris, Scott. "Europe Enters a New Millennium with Gays in the Military while the United States Drowns in Don't Ask, Don't Tell: Twin Decisions by the European Court of Human Rights." *American University Journal of Gender Social Policy and Law* 9, no. 2 (2001): 423-449.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

EUROPE ENTERS A NEW MILLENNIUM WITH GAYS IN THE MILITARY WHILE THE UNITED STATES DROWNS IN DON'T ASK, DON'T TELL: TWIN DECISIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS

SCOTT MORRIS*

I.	INTRODUCTION.....	424
II.	BACKGROUND	429
	A. <i>History of Don't Ask, Don't Tell</i>	431
	B. Overview of Europe's Treatment of Gays in the Military	433
III.	THE FAILURE OF DON'T ASK, DON'T TELL TO PROVIDE A HARASSMENT-FREE WORK ENVIRONMENT FOR THOSE WHO MAINTAIN SECRECY OVER THEIR HOMOSEXUAL OR BISEXUAL ORIENTATION	435
IV.	DECLARING BRITAIN'S BAN ON GAYS IN THE MILITARY A VIOLATION OF HUMAN RIGHTS: TWIN DECISIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS.....	438
	A. <i>Lustig-Prean and Beckett v. The United Kingdom</i>	438
	1. The Nature of the Applicants' Claims	438
	2. The Ruling by the ECHR on the Applicants' Claims.....	438
	B. <i>Smith v. United Kingdom</i>	441
	1. The Nature of the Applicants' Claims	441
	2. The Ruling of the ECHR on the Applicants' Claims	441
	C. Comparison Between the Reasoning of the European Court of Human Rights and the United States Circuit Courts of Appeal	443
V.	RECOMMENDATIONS.....	444
VI.	CONCLUSION	448

* J.D., American University, Washington College of Law, 2001; B.A. The author wishes to thank Servicemembers Legal Defense Network and Stacey Sobel, its legal director, for helping him select the topic of this piece and for providing the statistical information necessary to defend his assertions. Special thanks also to Letitia Volpp and the late Professor Peter M. Cicchino for their valuable insight and suggestions. Finally, the author expresses his deepest gratitude for the support of his loving parents, Terri and Tom Morris, and brother Grant.

This piece is dedicated in memory of Private First Class Barry L. Winchell, who devoted his short life to the defense of this country, only to have it taken by his fellow soldiers as he slept in his barracks at Fort Campbell on the Fourth of July, 1999.

I. INTRODUCTION

In the early morning hours of July 5, 1999, Private First Class Barry L. Winchell¹ (“PFC Winchell”) died after an attack² as he slept in his barracks at Fort Campbell, Kentucky.³ PFC Winchell’s homosexual orientation became a central issue in the crime, as rumors spread that other soldiers and officers at the base knew or suspected that PFC Winchell was gay.⁴ Private Calvin Glover (“Glover”) killed⁵ PFC Winchell after losing a fight to him two days earlier and facing harassment by PFC Winchell’s roommate, Specialist Justin R. Fisher⁶ (“Fisher”), and others for “letting a ‘faggot’ beat him up.”⁷ Both

1. PFC Winchell was a 21-year-old, heavy anti-armor weapon operator with Company D, 2nd Battalion, 502nd Infantry Regiment. See Jane McHugh, *Slain Soldier May Have Been Victim of a Hate Crime*, ARMY TIMES, July 26, 1999, at 12 (describing the victim and the circumstances around his murder, which point to the conclusion that the killing was motivated by anti-Gay sentiment).

2. See Philip Shenon, *Pentagon Moving to End Abuses of ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, Aug. 13, 1999, at A1 (reporting that a fellow soldier allegedly beat PFC Winchell with a baseball bat). PFC Winchell died of head injuries on the morning of July 6, at Vanderbilt University Medical Center. See Jane McHugh, *Second Soldier Implicated in Possible Hate Crime*, ARMY TIMES, Aug. 2, 1999, at 1.

3. Fort Campbell, which sprawls across the Kentucky-Tennessee border, is home of the Army’s elite 101st Airborne Division, the Screaming Eagles. See Sue Anne Pressley, *Hate May Have Triggered Fatal Barracks Beating*, WASH. POST, Aug. 11, 1999, at A1.

4. See *id.* (quoting Sgt. Michael Kleifgen, PFC Winchell’s section leader, as testifying that “Pretty much everybody in the company called him derogatory names . . . [b]asically, they called him a ‘faggot’ . . . I would say on a daily basis . . .”); see also Chris Poynter, *Slain Soldier Had Found His Niche*, COURIER (LOUISVILLE, KY.), Aug. 8, 1999, at A1 (quoting PFC Winchell’s boyfriend as saying that fellow soldiers asked Winchell, “Is it true you are Gay? Is it true you are going to that queer club?”).

5. See Poynter, *supra* note 4, at A1 (noting Glover faced a charge of premeditated murder). Premeditated murder is a violation of Article 118 of the Uniform Code of Military Justice. Private Kenneth Buckler, who was in a holding cell next to Glover on the night of his arrest, testified that Glover confessed to killing PFC Winchell. See James Prichard, *Soldier Recounts Accused Killer’s Confession*, A.P. NEWSWIRE, Sept. 1, 1999 (quoting Buckler revealing Glover’s confession: “He got around eventually to where he said, ‘I did kill that guy.’ I said, ‘Excuse me?’ And he said, ‘I killed him.’”). In addition, servicemen testified at Glover’s Article 32 hearing (the military’s equivalent of a civilian grand jury investigation) that Glover is an aggressive type who has told others that he hates blacks and “faggots.” See Monica Whitaker, *Revenge May Have Killed Soldier, Servicemen Say*, TENNESSEAN, Aug. 10, 1999, at A1 (reporting that servicemen described Glover as a “boastful drunk who picks fights and once told acquaintances he hated blacks and ‘faggots’”).

6. See Sue Anne Pressley, *Hate May Have Triggered Fatal Barracks Beating*, WASH. POST, Aug. 11, 1999, at A1 (identifying Fisher as PFC Winchell’s roommate).

7. See *TODAY Show: Questions Emerging About Why Soldier Was Beaten to Death in Kentucky*; Michelle Benecke, *Servicemembers Legal Defense Network (“SLDN”), Discusses Murder of Soldier* (hereinafter, *TODAY Show*) (NBC television broadcast, Aug. 11, 1999) (transcript available online); see also Chris Poynter, *Army Says Suspect’s Comments Anti-Gay*, COURIER (LOUISVILLE, KY.), Aug. 11, 1999, at A1 (summarizing a presentation made by Capt. Gregg Engler, the prosecuting attorney in Glover’s Article 32 hearing, in court, including statements that Glover made to Army investigators, such as “I won’t let a faggot kick my ass.”).

Glover and Fisher faced charges in the crime.⁸ Glover was convicted of premeditated murder and received a life sentence.⁹ Fisher pleaded guilty to the reduced charges of lying to military investigators and obstructing the investigation, for which he was sentenced to twelve and a half years in prison.¹⁰

The case has attracted national media attention,¹¹ reigniting public debate over the controversial 1993 compromise¹² reached between President Clinton,¹³ the Pentagon,¹⁴ and Congress¹⁵ regarding Gays in the military, commonly referred to as the Don't Ask, Don't Tell, Don't Pursue Policy ("Don't Ask, Don't Tell"). Members of the Gay¹⁶ legal community,¹⁷ as well as the Gay community at large,¹⁸ became

8. See Jane McHugh, *Second Soldier Implicated in Possible Hate Crime*, ARMY TIMES, Aug. 2, 1999, at A1 (listing the charges brought against Fisher).

9. See *Soldier's Sentence Allows Parole*, WASH. POST, Dec. 10, 1999, at A20 (reporting the conviction of Calvin Glover, for which he will receive life imprisonment, with the possibility of parole, along with a reduction in rank and a dishonorable discharge).

10. See *Soldier Pleads Guilty in Barracks Killing*, WASH. POST, Jan. 9, 2000, at A19 (commenting that, because Fisher plead guilty, the Army dropped the charge of participating as a principal to premeditated murder).

11. See, e.g., Interview by Matt Lauer, host of the *TODAY Show*, with Michelle Benecke, Co-Executive Director, SLDN (NBC television broadcast, Aug. 11, 1999) (discussing the murder of PFC Winchell and events unfolding at Glover's Article 32 hearing); Interview by Diane Dimond, Co-anchor of *Upfront Tonight*, with Stacey Sobel, Senior Staff Attorney, SLDN (CNBC television broadcast, Aug. 9, 1999) (discussing the Army's investigation into the murder of PFC Winchell and the testimony of 11 witnesses questioned during Glover's Article 32 hearing).

12. See 10 U.S.C. § 654 (Supp. V 1993) (entitled "Policy Concerning Homosexuality in the Armed Forces").

13. See *1993 Key Senate Vote 7: Gays in the Military*, 51 CONG. Q. WKLY. REP. 50, at 3454 (Dec. 18, 1993) (identifying President Clinton as "the first major party presidential candidate to openly seek Gay support"). Part of the President's initiative in the area of Gay rights was to impose a blanket moratorium on the ban against Gays in the military. See *id.* (noting Clinton's pledge to lift the ban on Gays serving in the military).

14. See *id.* (discussing the staunch opposition by senior military personnel, including Gen. Colin Powell, Chairman of the Joint Chiefs of Staff, against the President's initiative to lift the Gay ban).

15. See Kitty Cunningham, *The Senate's Last Word on Gays*, 51 CONG. Q. WKLY. REP. 36, at 2401 (Sept. 11, 1993) (describing the opposition of Sen. Nunn to Clinton's initiative to allow Gays to serve openly, and reporting the defeat of Sen. Barbara Boxer's amendment, which attempted to strike anti-Gay provisions made by Sen. Nunn to a defense authorization bill); see also *1993 Key Senate Vote 7: Gays in the Military*, *supra* note 13 (quoting language added to defense authorization bill, S. 1298 - PL 103 - 160, that finds homosexuality to be "an unacceptable risk' to morale, order and discipline in the armed forces").

16. The term "Gay" was selected by the author for the sake of simplicity, and is to mean all individuals who are gay, lesbian, bisexual, transgendered, or transsexual, except when discussing topics pertaining to only one of these identities, in which case the proper terminology for such group is used. The word "Gay" is capitalized to further clarify when the author is discussing all of the above identities collectively.

17. See Chris Poynter, *Suspect, Victim Fought Days Before Killing, Army Says; Outside Groups Continue to Look Into the Slaying*, COURIER (LOUISVILLE, KY.), July 14, 1999, at 1B (reporting that PFC Winchell's death is being investigated by SLDN); see also *TODAY Show*, *supra* note 7 (discussing the reasons for SLDN's interest in investigating the murder of PFC Winchell, which include the need to determine whether the murder was also a hate crime, doubts about the

enraged at the apparent failure of Don't Ask, Don't Tell to protect PFC Winchell and other Gay service members.¹⁹ Moreover, allegations of abuse of Don't Ask, Don't Tell by Private Winchell's sergeants and superior officers prompted the Pentagon to issue a new set of guidelines intended to provide commanders with a better understanding of how to execute the policy on their bases.²⁰ The new guidelines still do not permit openly Gay individuals to serve in the Armed Forces,²¹ but are intended only to alleviate some of the worst abuses of Don't Ask, Don't Tell by military personnel.²²

As the American military seeks a way to keep Don't Ask, Don't Tell intact while still prohibiting openly Gay service members from serving, the nations of Europe are progressing towards allowing openly Gay individuals to serve in their militaries.²³ In particular, the European Court of Human Rights²⁴ ("ECHR") decided a case in

Army's ability to investigate hate crimes, and concerns that the Army may try to conceal information).

18. See Poynter, *supra* note 16, at 1B (reporting that soldiers approached the Tennessee chapter of the Lesbian and Gay Coalition with information about PFC Winchell's murder); see also Monica Whitaker, *Soldier's Death May Be Hate Crime; Legal Group Says Rumors Flew That Beating Victim Was Gay*, TENNESSEAN, July 13, 1999, at 1A (indicating that Bill Turner, Co-Chairman of the Lesbian and Gay Coalition for Justice, disbelieves the Army's characterization of the murder simply as an "altercation between two soldiers").

19. See McHugh, *supra* note 1, at 12 (reporting the murder of PFC Winchell by a fellow soldier who believed Winchell to be Gay and that the soldier killed him because of his sexual orientation); see also CONDUCT UNBECOMING, *infra* note 34, at 74 (depicting the murder of Navy shipman Allen Schindler as a hate-motivated crime, in which two fellow shipmates beat him beyond recognition).

20. See Shenon, *supra* note 2, at A1 (explaining that the new guidelines issued by the Department of Defense are intended to require that all troops receive anti-Gay harassment training throughout their military careers, beginning in boot camp and that upon opening an investigation into a soldier's sexual orientation, that the inquiry be conducted at a senior level of the military's justice system). In addition, past abuses of Don't Ask, Don't Tell were attributed to "low-level, poorly trained investigators who have turned their investigations into virtual witch hunts for homosexuals in uniform." *Id.* Further, the Pentagon expressed an urgent need to announce the new guidelines largely because of the public outcry over the murder of PFC Winchell. *Id.*

21. See Shenon, *supra* note 2, at A12; see also Editorials: *Refined Gay Policy is Not Enough*, *infra* note 138.

22. See Shenon, *supra* note 2, at A12 (stating that the purpose of the new guidelines is to ensure that investigations into the private lives of service members suspected of being Gay are handled by well-trained investigators responding to solid evidence, in an effort to prevent past abuses such as commanders pursuing investigations of their troops based on mere suspicion or rumor from occurring in the future).

23. See *British Army Ban on Gays Unlawful*, A.P. ONLINE, 1999 WL 28121931 (Sept. 27, 1999) (reporting the recent decision of the European Court of Human Rights that effectively defeats the British ban against Gay and Lesbian service members).

24. The European Court of Human Rights was established in 1959 to uphold the commitments made by the member-states that were a party to the European Convention on Human Rights. See J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS I* (1993) (providing a brief description of the purpose of the formation of the European Court of Human Rights); The European Convention on Human Rights grew out of the Council of Europe, which was established May 5, 1949, for the purposes

which four British service members²⁵ successfully challenged that country's ban on Gay service members on the grounds that it violated provisions of the European Human Rights Convention ("The Convention").²⁶ Great Britain is the only country in Europe that expressly prohibits Gays from serving in its armed forces.²⁷ The ruling by the ECHR, however, effectively prohibits any member state from implementing such bans and also strikes down laws that only allow Gays to serve if they keep their sexual orientation private.²⁸

Part I of this Comment first analyzes the five-year legal history of Don't Ask, Don't Tell.²⁹ In particular, the implementation and codification³⁰ of the policy is summarized, followed by a brief review

of promoting European unity in the aftermath of World War II, and currently consists of 31 member states. See LUKE CLEMENTS, EUROPEAN RIGHTS: TAKING A CASE UNDER THE CONVENTION 2-3 (1994) (providing a history of the formation and objective of the Council of Europe, and listing the 31 current countries who are parties to the Council, which include the following: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, the Slovak Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, San Marino, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom). The European Convention on Human Rights created the Statute of the Council of Europe, which was signed in Rome on November 4, 1950, by the then 15 member states, and came into force on September 3, 1953. *Id.* at 3 (defining the meaning of the Convention and explaining the Statute that it created, which now directly affects approximately 450 million people).

25. See Paul Eastham, *Blair May Give MPs Free Vote on Forces' Gays: Tory Fury at Labour's Move Over Ban on Homosexuals*, DAILY MAIL, Sept. 3, 1999, at 41 (identifying the four British service members in the case as: Jeanette Smith, former Royal Air Force nurse; John Beckett, naval rating; Duncan Lustig-Prean, former lieutenant-commander in the Royal Navy; and Graeme Grady, a Royal Air Force administrator).

26. See *British Army Ban on Gays Unlawful*, *supra* note 22, (citing a European Court of Human Rights finding that the British policy of discriminating against its Gay military service members violated Article 8 of the European Convention on Human Rights, which provides a right to private and family life). The European Court of Human Rights also found the investigations into the personal lives of service members, especially the interviews of the applicants concerning their sexual lives, to be "exceptionally intrusive." *Id.* Moreover, the court attacked an internal report by the Ministry of Defense on homosexuality for the pervasively biased views of heterosexual military personnel towards service members of homosexual orientation. *Id.*

27. See Norton-Taylor and Dyer, *infra* note 46 (excluding Great Britain and the United States from the rest of the Western nations that lifted their bans on Gays in the military); see also *Gay Sackings Out*, ABIX, Sept. 29, 1999, at 12 (revealing that out of all the NATO powers, only Great Britain and Turkey have bans against Gays serving in their militaries).

28. See *Judgments in the Cases of Lustig-Prean and Beckett v. The United Kingdom and Smith and Grady v. The United Kingdom*, Registrar of the European Court of Human Rights, (page unavailable online), at <<http://www.dhcour.coe.fr>> Sept. 27, 1999 [hereinafter *Judgments*] (declaring that even a military policy that permits homosexuals to serve as long as they remain silent about their sexual orientation violates the Convention).

29. See Shenon, *supra* note 2 (explaining that, while Congress codified "Don't Ask, Don't Tell" in 1993, the Department of Defense did not implement the policy until 1994).

30. Congress enacted "Don't Ask, Don't Tell" in 1993. See 10 U.S.C. § 654(b) (Supp. V 1993) (codifying "Don't Ask, Don't Tell" on November 30, 1993); see Department of Defense Directive 1332.30 (1994).

of federal appellate decisions³¹ that have consistently upheld the constitutionality of Don't Ask, Don't Tell.³² Next, the current state of Don't Ask, Don't Tell is scrutinized in light of the recent murder of PFC Winchell³³ and the Pentagon's new guidelines issued in response to that crime are discussed.³⁴

Part II discusses whether Don't Ask, Don't Tell fails to meet its intended goal of affording Gay service members the right to serve free from harassment³⁵ so long as they remain silent about their sexual orientation.

Part III contrasts Don't Ask, Don't Tell with the laws of European states.³⁶ The comparison includes a discussion of the cases decided by the ECHR, as well as efforts underway in the British Parliament to lift the ban against Gay service members.³⁷ Part IV comments on the need of American lawmakers to repeal Don't Ask, Don't Tell. This section recommends the total repeal of Don't Ask, Don't Tell, in order to stop the harassment of Gay service members, end the intrusive investigations into their personal lives, and advance the civil rights of Gays in the American Armed Forces to the level that is now enjoyed by Gays throughout other Western nations.

31. See, e.g., Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991); Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).

32. See generally *infra* note 81 and accompanying text (providing examples of decisions made by the Federal Circuit Courts of Appeal affirming the Naval Academy's dismissal of a Gay cadet in *Steffan*, and upholding the constitutionality of the Don't Ask, Don't Tell Policy in *Meinhold*, *Thomasson*, and *Able*).

33. See Shenon, *supra* note 2 (reporting the beating death of PFC Winchell on July 5, 1999).

34. See Shenon, *supra* note 2 (explaining the new Defense Department guidelines as a response to the murder of PFC Winchell, requiring anti-Gay harassment training throughout the careers of service members and senior level management of investigations into the sexual orientation of service members who are suspected of being Gay).

35. See C. Dixon Osburn and Michelle M. Benecke, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE," at 91 (Servicemembers Legal Defense Network 1999) (hereinafter CONDUCT UNBECOMING) (citing Department of Defense statistics regarding the combined number of reported violations of the "Don't Harass" portion of "Don't Ask, Don't Tell" by all branches of the Armed Forces, including the Coast Guard: 62 in 1994, 127 in 1995, 132 in 1996, 182 in 1997, and 400 in 1998).

36. See CLEMENTS, *supra* note 23, at 2-3 (providing a list of nations that were members of the Council of Europe, for which the ECHR is one of its main tribunals, as of 1994, as well as those nations that had applications pending for membership in the Council).

37. See Helen Branswell, *U.K.'s Ban on Gays in Army Discrimination*, TORONTO STAR, Sept. 28, 1999, (page unavailable online) available at 1999 WL 23995291 (reporting the British government's announcement that a free vote on the issue of Gays in the military is to be held in Parliament in 2001, and that all disciplinary actions against Gays in the military are suspended until the Defense Minister and service chiefs complete their study of the ruling made by the ECHR).

II. BACKGROUND

The United States has maintained a history of anti-Gay laws and policies.³⁸ The Supreme Court, for instance, declared that Gays do not have the right to engage in private, consensual sex.³⁹ The High Court declared, however, that Gays cannot be denied the most basic of civil rights, such as the right to access the political system.⁴⁰ Most nations in Europe, including Great Britain, progressed more rapidly in their elimination of ancient laws governing homosexual relations.⁴¹

Jurisdictions in the United States have been slower than their European counterparts in eliminating anti-Gay laws, such as those prohibiting sodomy.⁴² United States military law treats Gays far more harshly than its civilian counterpart.⁴³ For instance, American military laws regulating homosexuality are construed in such a manner that even acts such as handholding and kissing may result in imprisonment.⁴⁴ Don't Ask, Don't Tell is the nation's only federal law

38. See *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (finding that the common law, as well as each of the original thirteen States, considered sodomy to be a criminal offense, and that at the time of this opinion, 24 of the 50 States and the District of Columbia still provided criminal penalties for sodomy, even if performed between consenting adults in a private residence).

39. See *id.* at 190-91 (declaring that the Court is "quite unwilling" to declare that a fundamental right to commit sodomy exists). In addition, the *Bowers* Court compared homosexuality to "adultery, incest, and other sexual crimes." See *id.* at 196.

40. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a Colorado amendment to its state constitution violates the Equal Protection Clause of the United States Constitution because it makes a class of people, homosexuals, unequal to all other classes, and renders the class a "stranger" to the state's laws).

41. See *A Battle Belatedly Won: the Services Must Move With the Times*, GUARDIAN, Sept. 28, 1999 available at 1999 WL 25733454 (showing that Britain abolished its laws prohibiting private, homosexual acts between consenting adults in 1967); see also *Britain Moves to Accept Gays in Army After Court Condemnation*, AGENCE FRANCE-PRESSE, Sept. 27, 1999, available at 1999 WL 25113799 (revealing that Britain's Gay community enjoyed a victory in 1998 when Parliament voted to reduce the age of consent between Gays from 21 to 16, which is the age of consent for heterosexuals).

42. Compare *Bowers v. Hardwick*, 478 U.S. 186, 190-93 (1986) (finding that no constitutional right exists to commit acts of sodomy and stating that, at the time of the opinion, 24 of the 50 states and the District of Columbia provided criminal penalties for sodomy committed in private by consenting adults), with *A Battle Belatedly Won*, *infra* note 68 (showing that Britain decriminalized homosexual acts between consenting adults in 1967).

43. See, e.g., *infra* notes 61-3 (listing the provisions of 10 U.S.C. § 654(b)(1)-(3), which allow for the discharge of service members found to engage in homosexual acts, state that they engage in homosexual acts, or marry or attempt to marry persons known to be of the same biological sex); MICHELLE BENECKE, C. DIXON OSBURN & KATHY GILBERD, SURVIVAL GUIDE: HOW TO SURVIVE UNDER "DON'T ASK, DON'T TELL, DON'T PURSUE" (3d ed.) 24-8 (Servicemembers Legal Defense Network 1997) (hereinafter *Survival Guide*) (describing the nature of the inquiries, inspections, and investigations that are possible in cases of service members suspected by the military of being Gay).

44. See *Survival Guide*, *supra* note 42, at 22 (warning that hand-holding, kissing, and other such physical contact with a person of the same sex may constitute homosexual acts for purposes of the military's prohibition against homosexual conduct and may result in administrative discharge or court-martial, albeit under rare circumstances).

that expressly permits discrimination against Gays in employment, and continues the tradition of excluding Gays from service,⁴⁵ despite its policy of not inquiring into the sexual orientation of prospective recruits and preventing undue harassment of Gay service members.⁴⁶

By contrast, the rest of the Western World no longer bans Gays from serving in their armed forces.⁴⁷ In fact, Great Britain is the only nation alongside the United States that at the time actively prohibited Gays from serving in their military.⁴⁸ The British ban, however, is greatly compromised by the Human Rights Court's recent ruling.⁴⁹ Moreover, many British leaders are expressing a desire to comply with the ruling of the ECHR.⁵⁰ In particular, the British Parliament is considering legislation that will officially end the ban against Gays in the year 2001.⁵¹ This legislation is almost certain to be enacted

45. See CONDUCT UNBECOMING, *supra* note 34, at 87 (providing statistics on the number of service member discharges for homosexual conduct since the implementation of Don't Ask, Don't Tell in 1994, which continues to increase each year).

46. See, e.g., *Survival Guide*, *supra* note 42, at 8 (quoting the Inquiry Guidelines of the Department of Defense as requiring that "[c]ommanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation").

47. See, e.g., Richard Norton-Taylor and Clare Dyer, *Historic Ruling Ends Service's Gay Ban*, GUARDIAN, Sept. 28, 1999, available at 1999 WL 25733433 [hereinafter *Historic Ruling*] (describing the policies taken by other Western World countries with regards to Gays in the military: France "tolerates" homosexuality; Italy has a ban, but it is not strongly enforced; the Netherlands eliminated its ban in 1972 and now actively supports the integration of Gays into its armed forces; Denmark removed its ban in 1979; 1992 saw the elimination of bans in Australia, New Zealand, and Canada; Israel followed suit in 1993; and Germany, Ireland, and even Russia has no ban); Associated Press, *Most of West Permits Gays to Serve in Military*, THE DES MOINES REG., Jan. 13, 2000, available at 2000 WL 4941253 [hereinafter *Most of West*] (detailing NATO nations policies on homosexual service members).

48. Compare *Historic Ruling*, *supra* note 46 (listing Italy as the only country in this article as having a ban, other than the United States and Great Britain, but noting that the ban is not strongly enforced), with *Most of West*, *supra* note 46 (stating that Italy has no official policy on Gays in the military), and Ray Moseley, *Britain Told to Let Gays in Military: European Court Rules that Ban is "Grave" Intrusion on Private Lives*, CHI. TRIB., Sept. 28, 1999, available at 1999 WL 2916342 (remarking that Italy's ban is "not fully enforced"); see also T.R. Reid, *Britain Ends its Curb on Gays in Military*, WASH. POST, Jan. 13, 2000, at A13 (recounting that after Britain lifted its ban in January 2000, the United States and Turkey became the only NATO members banning Gays from military service).

49. See *British Ban on Gays Unlawful*, *supra* note 22 (stating that the Human Rights Court's verdict cannot force Britain to change its laws, but also reporting that George Robertson, British Defense Secretary, said that all cases involving homosexuals will be stalled while the government reviews the ruling); see also *Historic Ruling*, *supra* note 46 (explaining that, while any decision to completely lift the ban must await the next armed forces bill debate in 2001, a new code outlawing dismissal based solely on sexual orientation can be introduced without legislative action).

50. See *Historic Ruling*, *supra* note 46 (quoting the Liberal Democrats' spokesperson for foreign affairs and defense as saying, "Good people have been humiliated and driven out of the services for no good reason. It is time to put this right."). But see *id.* (quoting the Tory defense spokesperson as saying, "The armed forces made it quite clear that in their judgment [the ruling] will have an adverse effect on morale, it will affect operational effectiveness").

51. See Helen Branswell, *U.K.'s Ban on Gays in Army Discriminatory*, TORONTO STAR, Sept. 28, 1999, available at 1999 WL 2399529 (reporting that the British Government announced that

because of the pressure from the decision of the ECHR,⁵² which effectively rendered Britain's ban on Gays a violation of the European Convention on Human Rights.⁵³ Finally, the British government may be required to pay a large sum of damages to the plaintiffs involved in the *Lustig-Prean and Beckett*⁵⁴ and *Smith and Grady*⁵⁵ cases, and to other Gays who were wrongfully discharged because of their sexual orientation.⁵⁶

A. History of Don't Ask, Don't Tell

One of President Clinton's 1992 campaign promises was to eliminate the ban on Gays in the military,⁵⁷ which existed in varying forms in the American military since the end of World War II.⁵⁸ When he took office in 1993, however, the President found staunch opposition from high-ranking Pentagon officials and members of Congress against his move to lift the service ban.⁵⁹ The President and

Parliament will hold a free vote on the issue of Gays in the military in 2001, as part of the vote on the Armed Forces Bill). The British Parliament reviewed the issue of Gays in the military in 1996, but a large majority favored the ban. *See id.*

52. *See* Kevin Cullen, *British Bristling at Reach of European Court of Human Rights: Obliging English Law to Fall Into Line*, BOSTON GLOBE, Oct. 13, 1999, available at 1999 WL 6084536 (describing a 1998 British Parliament law requiring domestic laws to incorporate ECHR decisions).

53. *See British Army Ban on Gays Unlawful*, *supra* note 22 (explaining that the European Court of Human Rights found the British ban on Gay service members to be in violation of Article 8 of the European Convention on Human Rights). The motivation behind the European Convention on Human Rights was to prevent repetition of the atrocious violations of human rights which occurred in World War II. *See* SUE FARRAN, *THE UK BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS I* (1996) (discussing the historical context in which the Contracting States drafted the European Convention on Human Rights). Great Britain became a signatory to the Convention in 1950, three years before the Convention came into force in 1953. *See id.*

54. *See Judgments*, *supra* note 27.

55. *See Judgments*, *supra* note 27.

56. *See Judgments*, *supra* note 27 (suggesting that the Human Rights Court's decision means that the British Ministry of Defense faces the possibility of paying hundreds of thousands of pounds to Gays and Lesbians in compensation for forcing them out of the military because of their sexual orientation).

57. *See 1993 Key Senate Vote 7: Gays in the Military*, *supra* note 13, at 3454 (recounting a pledge to lift the ban against Gays in the military as one of President Clinton's campaign initiatives to garner the support of the Gay community).

58. *See* C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays, and Bisexuals*, 64 UMKC L. REV. 199, 203-04 (1995) (noting that no official policy on homosexuals existed in the United States military from 1776-1945, and providing a history of the ban against Gays in the military since the end of World War II). During World War II, the United States government argued that homosexuals were "mentally ill, security risks, and unfit" for military service, abandoning those theories when they were found to lack any factual basis. *Id.* The government instead adopted the position that Gays "are more likely than heterosexual service members to engage in sexual misconduct and to disrupt unit cohesion"). *Id.*

59. *See supra* notes 13 - 15 (providing examples of the staunch opposition President Clinton faced with members of the Defense Department and Congress when he attempted to remove the ban against openly Gay service members).

his opponents reached a compromise known as Don't Ask, Don't Tell, which was intended to create something of a "live and let live" policy.⁶⁰ In reality, Don't Ask, Don't Tell relieves Gay service members of little, if any, of the burdens of a complete ban.⁶¹ The primary reason for this result is the structure of the policy, which prohibits Gay service members not only from engaging in sexual acts with a person of the same sex,⁶² but also from making statements to the effect that one is Gay,⁶³ or marrying, attempting to marry, or engaging in a civil ceremony with a person known to be of the same sex.⁶⁴ Therefore, sexual acts, marriages or attempted marriages, and statements to the effect that one is Gay are all included in the military's definition of homosexual conduct for purposes of discharging service members.⁶⁵ The prohibitions are so extensive that even some conservative opponents of Gays in the military acknowledged the policy's exceedingly broad scope and expressed doubt as to the ability of Don't Ask, Don't Tell to survive a constitutional challenge in court.⁶⁶

60. See Pat Towell, *The Fine Points of Compromise*, 51 CONG. Q. WEEKLY REP. 30, July 24, 1993, at 1967 (describing President Clinton's compromise policy as one in which the military must not "ask" or "hunt," and in which Gay service members must not "tell" or "touch").

61. See 10 U.S.C. § 654(b)(1-3) (1994) (providing for the discharge of service members who engage in, or attempt to engage in, homosexual acts; make statements to the effect that they are gay, lesbian, or bisexual or marry, or attempt to marry, persons of the same sex).

62. See *id.* at § 654(b)(1) (providing for the discharge of service members who engage attempt to, or solicit other to engage in homosexual activity, unless the service member demonstrates that such conduct is a departure from their normal behavior, will likely not recur, and was not accomplished forcibly or coercively; that the service member's presence in the service is consistent with the military's interest in maintaining good order, morale, and discipline; and that the service member does not have "a propensity or intent to engage in homosexual acts").

63. See *id.* § 654(b)(2) (providing for the discharge of service members who state that they are homosexual or bisexual, or any statements to that effect, unless they can demonstrate in accordance with procedures established through the administrative regulations that they do not engage, attempt, or intend to engage in homosexual acts).

64. See *id.* § 654(b)(3) (providing for the discharge of service members who marry or attempt to marry persons of the same biological sex).

65. See *Survival Guide*, *supra* note 42, at 5 (explaining the military's definition of "homosexual conduct" to include "(1) a statement that one is gay, (2) a homosexual act, attempted act or solicitation of an act, and (3) a marriage or attempted marriage to someone of the same gender.>").

66. See *Months of Hope, Anger, and Anguish Produce Policy Few Admire*, 51 CONG. Q. WEEKLY REP. 30, July 24, 1993 (page unavailable online) [hereinafter *Months of Hope*] (stating that Senator Daniel R. Coats, a staunch opponent of Gays in the military, expressed doubts about the new policy when he reasoned, "We're saying you can be a homosexual, but you can't act like a homosexual"); see also *id.* at 1971 (quoting Senator John McCain, member of the Senate Armed Services Committee, as saying, "I can't imagine a court upholding this policy on constitutional grounds").

B. Overview of Europe's Treatment of Gays in the Military

In general, the nations of Europe,⁶⁷ and other parts of the industrialized world,⁶⁸ have a more progressive attitude than the United States toward integrating Gays into their military ranks.⁶⁹ The Netherlands, in particular, actively integrates openly Gay service members into its military.⁷⁰ A lawsuit filed by a Gay German soldier, moreover, is currently pending in the German Constitutional Court⁷¹ and causing conflict between the Defense Ministry and the current, center-left coalition in the German government.⁷² The case might have received an expedited appellate decision, but the high court postponed its ruling until after a full hearing takes place, because the plaintiff in the case received reassignment and is participating in a special training program of the military.⁷³ Thus, unlike the American military's treatment of its Gay service members,⁷⁴ when a German

67. See, e.g., *Historic Ruling*, *supra* note 46 (listing France, the Netherlands, Denmark, Ireland, and Germany as the countries of Europe that specifically allow Gays in their militaries, and stating that while Italy technically has a ban, it is not enforced with any vigor); John Omicinski, *'Don't Ask' Not Copied; Other Nations Differ on Gays in Military*, CINCINNATI ENQUIRER, Dec. 15, 1999, available at 1999 WL 9462591 (adding Norway, France, and Austria to the list of European countries accepting Gays into their militaries, but noting that bans in Luxembourg, Greece, and Portugal still exist).

68. See *Historic Ruling*, *supra* note 46 (listing Canada, Australia, and New Zealand as additional, Western World countries that eliminated their bans in 1992, and noting that even some countries outside the West do not have bans, including Israel and Russia).

69. See *A Battle Belatedly Won: The Services Must Move with the Times*, GUARDIAN, Sept. 28, 1999 available at 1999 WL 25733454 [hereinafter *A Battle Belatedly Won*] (referring to a four-year-old opinion poll that showed that, while sexual activity between persons of the same sex was viewed as wrong by a majority of those polled, support for the right of homosexuals to serve in the armed forces, and other institutions, was nevertheless widespread).

70. See *Historic Ruling*, *supra* note 46 (reporting that the Netherlands eliminated its ban on Gays in the military in 1972 and now actively pursues the integration of Gays into its armed forces).

71. See *Gay German Officer's Suit Will Wait*, A. P. ONLINE, Aug. 31, 1999, available at 1999 WL 22039338 (describing a suit in the German Constitutional Court brought by a Gay soldier against the German military for allegedly removing him from his original command position because he is Gay); *Gay German Soldier Seeks Chancellor's Support for Promotion Refiling to Clarify Identities*, DEUTSCHE PRESSE-AGENTUR, Aug. 17, 1999, Euronews database, 8/17/99 DCHPA 12:29:00 (noting the Gay soldier was transferred to a desk job against his desire).

72. See *id.* (explaining the conflict the case is causing in the cabinet of Chancellor Gerhard Schroeder, where Defense Minister Rudolf Scharping is quoted as saying that "homosexuality is cause for considerable doubt of suitability and shuts out employment in such functions as leading, education and training in connection with soldiers[,] " to which Greens Environment Minister Juergen Trittin responded that Scharping's comments are "out of touch with real life."); see also *Gay German Soldier Asks Chancellor's Support in Bid for Promotion*, DEUTSCHE PRESSE-AGENTUR, Aug. 17, 1999 (page unavailable online) (reporting that Gay rights are part of the party platform of the Green Party, a group of junior members in the left-leaning coalition of German government that is headed by the Social Democrats).

73. See *Gay German Officer's Suit Will Wait*, *supra* note 70 (reporting that the German Constitutional Court denied an expedited decision).

74. See *supra* note 61-3 (indicating that 10 U.S.C. § 654(b)(1)-(3) provides that service members in the American military may be discharged for homosexual conduct, including

soldier's sexuality conflicts with heterosexual service members, the conflict is resolved by reassigning the Gay member to a job where no clash between homosexual and heterosexual service members is likely to occur.⁷⁵

In addition, middle England appears to be moving towards accepting openly Gay service members in its military, according to public opinion polls.⁷⁶ New legislation, soon to be brought before Parliament, offers further evidence of the direction of British views on this topic.⁷⁷ The British Government recently issued an order allowing soldiers who undergo sex-change therapy and surgery to remain in the service.⁷⁸

European views on the issue of Gays in the military are progressing toward full acceptance at a quicker pace than appears to be the case in the United States, where Don't Ask, Don't Tell appears to be a permanent fixture in the American military establishment.⁷⁹ The widening gap between civil rights for Gays in the United States versus other countries of the Western World poses potential problems for the United States. For instance, given the United States' history of using allegations of human rights abuses by Communist and Third World countries in negotiating economic and political agreements, laws such as Don't Ask, Don't Tell put American foreign policy at risk for chastisement by the international community as being hypocritical.⁸⁰ Perhaps more fundamentally threatening to the

sexual acts, making statements to the effect that one is Gay or bisexual, or marrying or attempting to marry a person known to be of the same biological sex); *see also* CONDUCT UNBECOMING, *supra* note 34, at 87 (detailing the specific number of discharges for homosexual conduct in each branch of the service, including the Coast Guard, for the five-year period from 1994 through 1998).

75. *See Gay German Officer's Suit Will Wait*, *supra* note 70 (quoting a German Lieutenant Colonel on the German military's policy of transferring known homosexual service members to a new post or quarters to avoid conflict, rather than discharging Gays from the military).

76. *See A Battle Belatedly Won*, *supra* note 68 (referring to a 1995 British public opinion poll that showed a majority of middle Englanders favoring the right of Gays to serve in the military, despite their unease with the idea of same sex relationships).

77. *See* Branswell, *supra* note 50 (repeating an announcement made by government officials that Parliament will hold a free vote to determine whether to take legislative action to lift the ban on Gays in the military, as part of a larger vote on the 2001 Armed Forces Bill).

78. *See Sex-Change Soldiers Can Stay in Army*, DAILY MAIL, Aug. 2, 1999, at 15 available at 1999 WL 21591644 (reporting that the order follows a European Court of Justice decision holding discrimination against Trans-sexuals to be illegal). The order protects transsexuals who continue to be able to physically perform "military tasks," and military officials emphasize that the sex change policy is a "medical issue." *Id.*

79. *See Months of Hope*, *supra* note 65 (quoting Senator Strom Thurmond, ranking Republican on the Senate Armed Services Committee, as saying, "One advantage . . . is that some future President won't be tempted to try to lift the ban").

80. *See* Moseley, *supra* note 47 (recounting a spokesperson from a civil rights organization, Liberty, as saying in response to the ECHR's *Lustig-Prean* decision: "It's not just European countries which will be affected by this decision. There are already questions being asked as to

United States is the fact that the European frontier of civil liberties may be advancing more quickly than that of the United States, a nation that prides itself on being the leader of the free world.⁸¹

III. THE FAILURE OF DON'T ASK, DON'T TELL TO PROVIDE A HARASSMENT-FREE WORK ENVIRONMENT FOR THOSE WHO MAINTAIN SECRECY OVER THEIR HOMOSEXUAL OR BISEXUAL ORIENTATION

The Don't Ask, Don't Tell policy resulted in a greater number of discharges of Gay service members from the Armed Forces than before its implementation,⁸² maintaining a staggering annual increase in discharges for homosexual conduct between 1994 and 1998.⁸³ Additionally, Don't Ask, Don't Tell adversely affects women at rates greatly disproportionate to their representation in the Armed Forces.⁸⁴ Despite the failures of the policy, Don't Ask, Don't Tell is now codified in the federal statutes.⁸⁵ Moreover, while several federal Courts of Appeals have overturned district court decisions that

whether the ban in the United States should similarly be lifted.”).

81. See Editorial Desk, *Gay Troops in Europe*, N.Y. TIMES, Jan. 15, 2000 at A16 (stating that the United States armed forces is “nearly alone among Western nations” in having an “official policy of discrimination.”); see also *French Army Welcomes Homosexuals*, AGENCE FRANCE-PRESSE, May 3, 2000, available at 2000 WL 2785826 (sharply distinguishing the lack of anti-Gay sentiment in the French military with that in the “Anglo-Saxon countries” of the United States and Britain).

82. See *Pentagon Clarifies Policy on Gays in Military*, AGENCE FRANCE-PRESSE, Aug. 14, 1999, available at 1999 WL 2654418 (showing that, despite the introduction of President Clinton's policy in 1994, Pentagon statistics reveal that more individuals are expelled now for homosexual conduct than were expelled before the introduction of “Don't Ask, Don't Tell”). The number of discharges in 1997 reflected a 67% increase over the number discharged in 1994. *Id.*

83. See CONDUCT UNBECOMING, *supra* note 34, at 87 (citing Department of Defense statistics regarding the overall increase in discharges of Gays by the combined Armed Forces, including the Coast Guard: 617 discharges in 1994, 772 discharges in 1995, 870 discharges in 1996, 1007 discharges in 1997, and 1163 discharges in 1998). Department of Defense statistics show that discharges have increased 86% under “Don't Ask, Don't Tell,” and that the 4,378 discharges under the policy between 1994 and 1998 occurred during a particularly difficult time for the military, given that recruiting and retention rates are at a severe low. *Id.* at 15.

84. See *id.* at 95 (citing Department of Defense statistics that compare the number of discharges of women for homosexual conduct and the percentage of service members who are women: in 1994, women comprised 12% of the armed services, but represented 26% of those who were discharged for homosexual conduct; in years 1995-1998, discharge for lesbian behavior continued to occur at a rate approximately twice that of female representation in the military); *id.* at 10 (describing the experience of Naval women who, according to sworn affidavits, were directly questioned about their sexual orientation and threatened with prison if they did not “confess” to being lesbians or accuse others in the Navy of being lesbians); see also Christin M. Damiano, Comment, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under “Don't Ask, Don't Tell, Don't Pursue*, 7 AM. U.J. GENDER & L. 499, 519 (1999) (warning that servicemen can use the Don't Ask, Don't Tell policy to coerce women into sexual relationships or stereotypical gender roles).

85. See 10 U.S.C. § 654(b)(1)-(3) (Supp. V 1993).

436 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

declared Don't Ask, Don't Tell to be unconstitutional,⁸⁶ the United States Supreme Court has repeatedly declined to grant certiorari on these cases.

Numerous violations of Don't Ask, Don't Tell by commanders and other military personnel occurred from the time the policy began in 1994 to the present,⁸⁷ and violations continue to be reported. One of the more recent high-profile cases, *McVeigh v. Cohen*,⁸⁸ involved a Navy man who faced an investigation into his personal life⁸⁹ and eventual discharge proceedings, due to information inappropriately obtained by Navy investigators from an online service provider.⁹⁰ The District Court for the District of Columbia held that the Navy violated federal law, and described the service's actions as being tantamount to a "search and destroy mission."⁹¹

Violations of Don't Ask, Don't Tell by military investigators, however, are rarely documented, much less reprimanded.⁹² A recent

86. See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 933 (4th Cir. 1996) (affirming the district court's decision that "Don't Ask, Don't Tell" passes rational basis review, that the First Amendment was not violated by the prohibition against making a statement that one is Gay, and that no fundamental right exists for a service member to engage in homosexual acts, but that the military's interest in preventing such acts is legitimate); *Able v. United States*, 88 F.3d 1280, 1300 (2d Cir. 1996) (reversing the district court's decision that the prohibition against making a statement that one is Gay violates the Equal Protection Clause); *Steffan v. Perry*, 41 F.3d 677, 698 (D.C. Cir. 1994) (affirming the district court's decision that Naval Academy regulations and Department of Defense Directives barring homosexuals from attending Academy or serving in the Navy do not violate Equal Protection); *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (reversing the district court's finding that Navy is estopped from discharging plaintiff based solely on his sexual orientation).

87. See CONDUCT UNBECOMING, *supra* note 34, at 89 (reporting violations of "Don't Ask," "Don't Pursue," and "Don't Harass" compiled by Servicemembers Legal Defense Network: between 1994 and 1998, violations of "Don't Ask" totaled 488, violations of "Don't Pursue" totaled 982, and violations of "Don't Harass" totaled 903; by contrast, violations of "Don't Tell" totaled a mere 112 over the same 5-year period (reporting a total of 112 violations of "Don't Tell" between 1994 and 1998)).

88. See 983 F. Supp. 215 (D.D.C. 1998).

89. See *id.* at 217 (stating that the ship's legal advisor requested a paralegal to contact America Online ("AOL") to obtain information to connect Senior Chief Petty Officer McVeigh ("SCPO McVeigh") to the screen name of a suspected homosexual, and that the paralegal obtained the information over the phone, using a false identity, and providing a false reason for requesting the information).

90. See *id.* at 219-20 (describing the improper actions taken by the Navy during its investigation into the private life of SCPO McVeigh).

91. See *id.* at 219 (finding that the actions taken by the Navy in confirming the identity of SCPO McVeigh through AOL "violated the very essence of 'Don't Ask, Don't Tell, Don't Pursue,' by launching a search and destroy mission," and was "likely illegal under the Electronic Communications and Privacy Act of 1986").

92. See, e.g., CONDUCT UNBECOMING, *supra* note 34, at 73 (telling the story of an Army recruiter who reported his boss to the command for subjecting him to constant harassment because of his perceived sexual orientation:

Staff Sergeant Ron Schumann, an Army recruiter, came out after more than thirteen years of dedicated service because he could no longer ignore the anti-Gay harassment or stress from living under 'Don't Ask, Don't Tell, Don't Pursue.' Schumann reports

study revealed that harassment of Gay service members is widely tolerated on American military bases around the world.⁹³ The study, conducted by the Pentagon Inspector General in January and February of 2000, consisted of a 33-item questionnaire, given to 71,500 personnel from 38 military installations and 11 ships.⁹⁴ Eighty percent of all respondents reported hearing homophobic comments about Gay service members in the last year, and eighty-five percent believed that such verbal abuse within the ranks was tolerated by commands.⁹⁵ Thus, the military's policy fails to meet its objectives of ending harassment of Gay service members who are quiet about their sexual orientation, as Gay service members are frequently harassed by peers and superiors alike.⁹⁶

he endured anti-Gay and 'faggot' comments by his coworkers. Although he suffered the comments in silence, in an effort to comply with 'Don't Tell,' speculation about his sexual orientation surfaced nonetheless.

One day, in front of a potential recruit's family, Sergeant First Class Michael Miller told him, 'We have not ever seen your girlfriend, you're Gay and you are probably going to hang out at the Gay 90's,' a local Gay bar (Exhibit 55). After Schumann reported Miller's actions, *the command promoted Miller without reprimanding him.* (emphasis added)

93. See Roberto Suro, *Harassment of Gay GIs Tolerated, Study Finds*, WASH. POST, Mar. 25, 2000, at A1 (reporting the findings of a recent Pentagon survey of American military personnel, which discovered pervasive harassment of Gay service members on bases around the world).

94. See *id.* at A1, A22 (describing the contents and method of the survey).

95. See *id.* at A1 (revealing the overwhelming number of respondents who witnessed verbal abuse of Gay service members and who believed such harassment to be tolerated within the ranks).

96. See CONDUCT UNBECOMING, *supra* note 34, at 77 (documenting harassment endured by a service member, including remarks by fellow service members such as "Kill all fags," and "I hope they all die of AIDS"); *id.* at 69 (describing the harassment experienced by two midshipmen in a Navy ROTC program, including being told by an enlisted crewman, "You'd better not be queer because in the Navy we kill our fags"); *id.* at 70 (quoting a military recruiter as saying to a new recruit, "Because of President Clinton's new policy, I can't ask you if you're a fag. But I can ask you, do you suck cock?"); *id.* at 74 (illustrating the harassment faced by a Naval Lieutenant who was warned by another service member that "[t]here's nothing to do in Sasebo [Japan] unless you are a homo killer," referring to the 1992 beating death of Seaman Allen Schindler, who was murdered by two of his fellow shipmates); *id.* at 29 (providing examples of inappropriate questions asked of a Lieutenant by an Air Force investigator during an inquiry into the service member's sexual orientation:

when [was] the last time you had a girlfriend and what [was] her name; what he thought of homosexuals; if he thought homosexuals belonged in the military; if he had ever had any kind of homosexual contact with anybody at anytime in his life; and if he had ever thought about it or otherwise had any desire to ever engage in homosexual acts.

IV. DECLARING BRITAIN'S BAN ON GAYS IN THE MILITARY A VIOLATION OF HUMAN RIGHTS: TWIN DECISIONS BY THE EUROPEAN COURT OF HUMAN RIGHTS

A. *Lustig-Prean and Beckett v. The United Kingdom*

1. The Nature of the Applicants' Claims

The case of *Lustig-Prean and Beckett v. The United Kingdom* was decided by the European Court of Human Rights the same day as another, related case, *Smith and Grady v. The United Kingdom*.⁹⁷ All four applicants in the two cases were members of the armed forces of the United Kingdom.⁹⁸ The applicants were the subjects of investigations by the military police into their sexual orientations.⁹⁹ In addition, each applicant admitted that he or she was homosexual and was administratively discharged between July 1993 and January 1995, in accordance with Ministry of Defense policy.¹⁰⁰

Mr. Lustig-Prean and Mr. Beckett complained in their applications that the investigations concerning their sexual orientation and their subsequent discharges constituted a violation of their right to private lives, guaranteed by Article 8 of the Convention on Human Rights.¹⁰¹ Additionally, both applicants argued that they had been the subjects of discrimination, contrary to Article 14 of the Convention.¹⁰²

2. The Ruling by the ECHR on the Applicants' Claims

In response to the question whether the Ministry of Defense breached applicants' rights under Article 8, the Court found the investigations into the personal lives of the applicants, especially the

97. See *Judgments, supra* note 27, at 3 (explaining that, on February 23, 1998, the Court joined Mr. Lustig-Prean and Mr. Beckett's applications and joined Ms. Smith's and Mr. Grady's applications).

98. See *Judgments, supra* note 27, at 3 (describing all four applicants as British nationals who were members of the armed forces of the United Kingdom).

99. See *Judgments, supra* note 27, at 3 (stating that all four applicants admitted their homosexuality, upon investigation into their private lives, and received administrative discharges in accordance with Ministry of Defense policy).

100. See *Judgments, supra* note 27, at 3 (noting that Lustig-Prean, Beckett, Smith, and Grady received discharges in January 1995, July 1993, November 1994, and December 1994, respectively).

101. See *Lustig-Prean and Beckett v. United Kingdom*, 29 E.H.R.R. 548 (1999) (listing applicants' allegation of an Article 8 violation to the right to respect for their private lives as their principal claim).

102. See *id.* (noting that the applicants also stated a claim under Article 14 for discrimination).

interviews of the applicants, to be “exceptionally intrusive.”¹⁰³ The Court focused much of its holding on the investigations into the applicants’ personal lives because the investigations ensued even after the applicants admitted their sexual orientation.¹⁰⁴ The Government explained its reasoning for continuing the investigations because of an alleged need to verify admissions of homosexuality to prevent false claims by those who are seeking an easy way to be administratively discharged from the armed forces.¹⁰⁵ Nevertheless, this argument received a sound rejection by the Court since both applicants wished to remain in the service.¹⁰⁶ Furthermore, the Court believed the administrative discharges of the applicants, which were the direct result of the investigations, profoundly affected their careers and future prospects for employment.¹⁰⁷ The Court was especially struck by the absolute nature of the policy against Gays, which allowed for no exceptions to the policy of discharging service members found to be homosexuals.¹⁰⁸

After finding that the applicants’ personal lives suffered grave interference from the Defense Ministry’s ban, the Court next addressed the core argument proffered by the British Government, specifically, that the presence of Gays in the armed forces has substantial, negative impact on morale, fighting power, and operational effectiveness.¹⁰⁹ The Court found that this argument, which was based on the military’s Homosexuality Policy Assessment Team, rested “solely upon the negative attitudes of heterosexual

103. *See id.* at 581 (expressing the Court’s reaction to the investigations into the private lives of the applicants, and finding the tactics used to be “exceptionally intrusive”).

104. *See id.* at 574 (finding the fact that the investigations ensued beyond the point at which the applicants “admitted” their homosexuality to be a particularly odious fact in these cases).

105. *See id.* at 587 (denying the credibility of the Government’s assertion that the pursuit of the investigations after the applicants revealed their sexual orientation was for the purpose of ensuring that the applicants were in fact homosexuals and not simply trying to receive quick discharges from the armed forces).

106. *See id.* (dismissing the Government’s argument pertaining to the usefulness of investigations into service members’ sexuality in order to prevent false claims for purposes of discharge, because all four applicants in these two cases wished to remain in the armed forces).

107. *See Lustig-Prean and Beckett v. United Kingdom*, 29 E.H.R.R. 548, 573 (1999) (stating that the applicants in these cases suffered harm beyond that done to their military careers, because the circumstances under which the Government discharged them is likely to have a lasting, negative effect on their future career prospects).

108. *See id.* at 548 (finding the Government’s ban against Gays especially troublesome because of the absence of any provision for exceptions to the rule of investigating service members suspected of being Gay, and invariably discharging them upon confirmation of their alleged status as members of a sexual minority).

109. *See id.* (shifting analysis towards the Government’s central argument that the presence of Gays in the armed forces poses a unique threat to morale, fighting ability, and overall “operational effectiveness”), available at <http://www.dhcour.coe.int/eng.htm>.

440 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

personnel towards those of homosexual orientation.”¹¹⁰ The Court noted, moreover, that the Gay ban had no particular, moral critique of homosexuality and that the work performance of the applicants was never the subject of doubt by this policy of the Ministry of Defense.¹¹¹ The Court concluded that the negative attitudes towards persons of a different sexual orientation justified the interference with the applicants’ personal lives no more than similar attitudes justify discrimination against persons of a different race or origin.¹¹²

The Court accepted the Government’s argument that certain difficulties awaited a change in policy concerning the acceptance of Gay service members into the ranks.¹¹³ The Court reasoned, however, that current codes of conduct are sufficient to address any conceivable behavioral problems.¹¹⁴ However, the Court did not accept the Government’s argument that the current codes of conduct would not effectively manage the challenges posed by the integration of Gay service members, which would be of a type and to a degree not caused by the integration of racial minorities and women.¹¹⁵

Finally, the Court weighed the widespread trend developing among the Contracting States to the Human Rights Convention that supports the admission of Gays into the armed forces of those States.¹¹⁶ Accordingly, the Government failed to provide convincing reasons to justify its policy of investigating and discharging service members based on their sexual orientation.¹¹⁷ The Court found the Government violated Article 8 of the Convention when it investigated and discharged the applicants on the basis of their sexual

110. *See id.* at 583 (finding that although the negative sentiments may be “sincerely felt by those who expressed them,” such attitudes are an insufficient justification for government interference with personal lives).

111. *See id.* (noting the Government’s acceptance of the fact that the Gay ban policy does not critique the abilities, courage, or conduct of either the applicants in particular or homosexual service members in a larger sense).

112. *See id.*; *see also id.* at 584 (equating discrimination based on sexual orientation with discrimination, harassment, and “bullying” based on sex or race).

113. *See Lustig-Prean and Beckett v. United Kingdom*, 29 E.H.R.R. 548, 584 (1999) (making an analogy to similar difficulties the government faced and resolved regarding integration of racial minority and female service members).

114. *See id.* at 584-85 (reasoning that current rules, codes of conduct and educational techniques in the British armed forces for racial and sexual discrimination and harassment can reasonably be extended to matters concerning sexuality).

115. *See id.* (concluding that, even if it were possible to assume that problems surrounding sexual orientation would be of a greater magnitude than those concerning sex and race, current codes and rules could adequately handle any resulting disturbances).

116. *See id.* at 585 (considering this uniform trend among the Contracting States to the Convention a factor in its conclusion that the Government failed to provide “convincing and weighty reasons” for both the Gay ban and discharging the two applicants).

117. *See id.* at 585-86.

orientation.¹¹⁸ However, the Court decided that the applicants' complaint under Article 14 provided no separate issue from that already addressed under the Article 8 complaint.¹¹⁹ In addition, the Court declined to rule on the issue of just satisfaction under Article 41, reserving the question for a later judgment.¹²⁰

B. *Smith v. United Kingdom*

1. The Nature of the Applicants' Claims

Ms. Smith and Mr. Beckett made essentially the same complaints under Articles 8 and 14 as the applicants above.¹²¹ However, the applicants in this case asserted violations of three additional Articles. First, the applicants complained that the Defense Ministry's policy contradicted Article 3, which prohibits inhuman or "degrading treatment or punishment."¹²² Second, the applicants argued that Article 10, which provides for freedom of expression, was violated because the ban against Gay service members limited "their right to give expression to their sexual identity."¹²³ The third violation came under Article 13, which requires that a Contracting State provide "an effective remedy before a national assembly" for the applicants' complaints.¹²⁴

2. The Ruling of the ECHR on the Applicants' Claims

The Court employed the same reasoning and drew the same conclusion regarding the applicants' complaints under Articles 8 and 14 as it did in the *Lustig-Prean* case.¹²⁵ The decision reached by the *Smith* Court pertaining to the Article 8 complaint addressed the grave

118. *See id.* at 587.

119. *See Lustig-Prean and Beckett v. United Kingdom*, 29 E.H.R.R. 548, 587 (1999).

120. *See id.* at 588 (granting additional time to the parties with the possibility of the parties coming to an agreement).

121. *Compare* *Smith and Grady v. United Kingdom*, 29 E.H.R.R. 493 (1999) (describing applicants' claim of Articles 8 and 14 violations), *with Lustig-Prean*, 29 E.H.R.R. at 548 (summarizing the allegations of Articles 8 and 14 violations).

122. *See Smith*, 29 E.H.R.R. at 537 (discussing the applicants' complaint under Article 3, which alleged that the treatment given to the applicants during the investigations into their private lives was tantamount to the kind of inhuman and degrading treatment that the Article prohibits).

123. *See id.* at 539.

124. *See id.* at 540 (listing as the applicants' final complaint an Article 13 submission for failure of the domestic judicial system to afford an adequate remedy for applicants' grievances).

125. *Compare id.* at 537 (finding a violation of the Convention's Article 8 and determining no separate issue under Article 14), *with Lustig-Prean* at 535-36 (stating the same finding as *Smith*).

intrusiveness that the Court found the applicants in both cases suffered.¹²⁶ Additionally, the Court made the same finding with regards to Article 41 as it did in the *Lustig-Prean and Beckett* case, that the time was not ripe for deciding the issue of just satisfaction, and reserved that question for separate judgment.¹²⁷

The Court then considered the Article 3 complaint, both alone and in conjunction with the Article 14 complaint of discrimination.¹²⁸ The Court had no difficulty in believing that the kind of distress and humiliation suffered by the applicants in this case, as a result of the investigations made by the Government, might constitute a violation of Article 3.¹²⁹ However, the Court surmised that the facts of this particular case failed to reach the minimum level of severity required for an Article 3 claim.¹³⁰ Thus, no Article 3 violation occurred, either alone or in conjunction with Article 14, according to the Court.¹³¹

The Court turned next to the applicants' complaint under Article 10, for violation of the freedom of expression provision.¹³² Any violation under this Article, the Court determined, was a subsidiary of their right to respect for their private lives, under Article 8.¹³³ Consequently, no examination of the Article 10 complaint was necessary, either alone or in conjunction with Article 14.¹³⁴

Finding no violation of Article 3, and determining that the claim under Article 10 was superfluous to the Article 8 claim, the Court then reviewed the Article 13 claim for insufficient remedy in the judicial system of the United Kingdom.¹³⁵ The sole issue to be taken up by the domestic courts of review was whether the Ministry of Defense's policy passed a test of rationality.¹³⁶ The rationality test

126. See *Smith* at 530-32 (describing the "exceptionally intrusive" character of the investigation, the severe impact of the discharge on their future careers, and the broadness of the Gay ban).

127. Compare *id.* at 544 (deferring a decision on this question), with *Lustig-Prean* at 588 (describing the same postponement).

128. See *id.* at 537-39.

129. See *id.* at 538-39 (stating that the negative treatment the applicants experienced during the investigation and discharge was alarming but still must be sufficiently severe to constitute an Article 3 violation).

130. See *id.* at 539.

131. See *id.*

132. See *Smith* at 539 (describing the applicants' claim of undue restriction on the expression of their sexuality).

133. See *id.* at 540 (conceding that the silence and secrecy required by the policy administered by the Ministry of Defense could constitute a violation of Article 3).

134. See *id.*

135. See *id.* at 540-44.

136. See *id.* at 541-42 (noting the confinement of the domestic courts to determining whether the applicants successfully met the high showing of the irrationality of the blanket Gay

expounded by the High Court and Court of Appeals meant that a court was unable to compromise “administrative discretion on substantive grounds,” the only exception being when the decision made was outside the scope of choices available to a “reasonable decision-maker.”¹³⁷ In fact, the Court found the minimum threshold of the rationality test in domestic courts to be so high as to effectively deprive the domestic courts of the opportunity to consider whether the investigations and subsequent discharges of the applicants served the “national security and public order” claims of the Government.¹³⁸ Thus, resolving these questions of national security which the domestic courts were unable to consider, were at the heart of the Court’s Article 8 analysis in these cases.¹³⁹

C. Comparison Between the Reasoning of the European Court of Human Rights and the United States Circuit Courts of Appeal

The reasoning of the Court of Human Rights in *Lustig-Prean* and *Smith* differs from that used by the United States Circuit Courts of Appeal in addressing the issue of bans against Gays in the armed forces in two important respects. First, whereas the American judicial system employs a rational basis standard when reviewing laws that limit the freedoms of, or otherwise discriminate against, individuals based on their sexual orientation,¹⁴⁰ the Court of Human Rights, in

ban).

137. See *Smith* at 542-43 (adding that with inquiries regarding human rights, the court could request increased justification for alleged violations of increased severity).

138. See *id.* at 543-44 (finding that this “rationality test” provides an insufficient remedy to the plaintiffs because it effectively bars the domestic courts in Britain from addressing claims made by those discriminated against under the military’s Gay ban).

139. See *id.*; see also *id.* at 532-33 (discussing the Government’s alleged concern for national security and the morale of the armed forces).

140. See, e.g., *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996) (upholding the prohibition against making a statement that one is Gay and relying on the rational relationship between declarations of homosexuality and the likelihood of engaging in homosexual conduct); *Steffan v. Perry*, 41 F.3d 677, 685-86 (D.C. Cir. 1994) (holding that the rational basis standard of review, which requires that a governmental practice need only have some rational reason in order to survive constitutional muster, is the standard by which the Court must review the actions of the Naval Academy in dismissing a homosexual from the institution). Furthermore the court held that in addition to the policy of banning from military academies people who engage in homosexual conduct, it is also rational to assume that a person who merely states that he or she is Gay is also inclined to engage in, or actually does in engage in, homosexual acts). *Id.* at 686. But see *Thomasson v. Perry*, 80 F.3d 915, 954 (4th Cir. 1994) (Hall, J., dissenting) (arguing that admission that one is homosexual is not the equivalent of stating that one engages in homosexual acts, and declaring that:

Suppressing speech is ‘grave and most delicate stuff.’ The military has a broader power to control speech than a civilian government . . . but even there the power is exceedingly narrow: speech may be suppressed only if it is likely to interfere with vital prerequisites to military effectiveness The ‘vital prerequisite’ here is, I suppose, the accommodation of the prejudices of heterosexual servicemen. I very much doubt

444 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

the *Smith* case, flatly dismissed the British courts' use of such a standard.¹⁴¹ The Court of Human Rights found that the threshold was so high in the domestic court's rationality test that it was unable to provide an adequate remedy for the applicants because it could not address their complaints.¹⁴² Thus, the rejection of the rationality test in *Smith* suggests that the European equivalent of a rational basis standard of review is now in jeopardy in domestic judicial systems throughout Europe.

The other significant difference between the reasoning of the ECHR and the American courts is the disagreement with the British Government's argument, in *Lustig-Prean*, that the presence of Gays in the ranks threatens the morale, operational efficiency, and fighting power of the armed forces.¹⁴³ This argument is virtually identical to the argument that the United States Government made in defending Don't Ask, Don't Tell, but unlike the ECHR, the American courts consistently accept this argument as valid.¹⁴⁴ Whereas the ECHR looks to the lack of facts substantiating the Government's claim, the United States automatically defers to the military without making a fact-intensive analysis.

V. RECOMMENDATIONS

In light of the fundamental shift that is currently underway in Europe toward allowing openly Gay men and women to serve in the

that such accommodation—never a legitimate legislative end—can ever be a 'vital prerequisite' to the military's mission. In any event, Lt. Thomasson has proved beyond any doubt that his speech had no deleterious impact at all, let alone to some 'vital prerequisite' to military effectiveness. If anything, the expulsion of a fine officer in retaliation for his speech will ultimately prove worse for the Navy.

141. See *Smith*, *supra* note 123 (explaining the reasoning behind the ECHR's decision to overturn the rationality test of the British domestic courts).

142. See *id.* (overturning the rationality test for failure to provide an adequate remedy in the British court system).

143. See *Lustig-Prean* at 582-83 (finding that the government's argument that the presence of homosexuality in the armed forces undermines the military's interests of morale, fighting ability, and overall operating effectiveness, is unfounded and based on nothing more than the negative attitudes of heterosexual military personnel towards those of homosexual orientation).

144. See *Thomasson v. Perry*, 80 F.3d 915, 929 (4th Cir. 1996) (finding valid Congress' decision to proscribe homosexual conduct in the military because "[t]he 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") (citing 10 U.S.C. § 654(a)(15)); see also *Able v. United States*, 88 F.3d 1280, 1299-1300 (2d Cir. 1996) (holding that the military's policy of discharging service members who engage in homosexual conduct, and merely stating that one is Gay, does not violate the First Amendment because the policy reasonably balances the competing interests of free speech and the elimination of homosexual conduct from the military environment, and does not restrict speech any more than is necessary for the military to accomplish its mission).

armed forces,¹⁴⁵ as well as the failure of Don't Ask, Don't Tell to achieve its objectives,¹⁴⁶ both Houses of Congress should introduce legislation to repeal the Don't Ask, Don't Tell Policy.¹⁴⁷ In the interim, the President should issue an Executive Order suspending all investigations and inquiries into the private lives of service members and end all current and pending administrative discharge proceedings involving service members accused of engaging in homosexual conduct.¹⁴⁸ Moreover, The Pentagon must stop investigating and discharging service members it suspects of being Gay in cases where the evidence upon which the investigation is grounded consists of nothing more than rumor or mere suspicion.¹⁴⁹ These recommended actions are imperative if the United States is to remain on the frontier of civil liberties.

These recommendations are made for several reasons. First, the elimination throughout the industrialized world of virtually all bans against Gays in the military¹⁵⁰ leaves the United States as the only

145. See, e.g., *Gay German Officer's Suit Will Wait*, *supra* note 70 (reporting the decision of a German civil court that a service member cannot be denied a promotion based on his or her sexual orientation); Norton-Taylor and Dyer, *supra* note 46 (providing a list of European countries that allow Gays to serve in their militaries, including France, Germany, Ireland, Denmark, and the Netherlands); *A Battle Belatedly Won: the Services Must Move With the Times*, *supra* note 40 (reciting the findings of a 1995 opinion poll in which support among the general British population for the right of Gays to serve in the military was widespread).

146. See, e.g., CONDUCT UNBECOMING, *supra* note 34, at 89 (reporting hundreds of violations of "Don't Ask," "Don't Pursue," and "Don't Harass" by military commands between 1994 and 1998, documented by SLDN); Shenon, *supra* note 2, at A1 (revealing the motivation behind the Pentagon's issuance of new guidelines to help military base commanders properly investigate allegations of homosexual conduct as being the record of abuses under the policy by military investigators and the uproar created by the beating death of PFC Barry L. Winchell in his barracks at Fort Campbell, Kentucky).

147. See 10 U.S.C. § 654(b) (requiring that a member of the armed forces shall be discharged if "the member has stated that he or she is a homosexual, or words to that effect," unless there is a further finding that the member has demonstrated that he or she is not homosexual or bisexual).

148. See CONDUCT UNBECOMING, *supra* note 34, at 19 (listing the number of service members discharged for homosexual conduct each year since the policy took effect, and showing a steady overall increase in the total number of discharges for all four branches of the service and the Coast Guard).

149. See Osburn, Benecke & Gilberd, *supra* note 42, at 15 (quoting the Department of Defense Inquiry Guidelines' definition of "credible evidence," in part, as a "determination based on articulable facts, not just a belief or suspicion," and noting that "credible evidence" is the standard used to determine whether an inquiry or investigation into the private life of a service member is appropriate); see also Shenon, *supra* note 2, at A12 (noting that the frequent abuse that occurs under Don't Ask, Don't Tell often originates when commanders initiate investigations into the private lives of subordinates based on mere suspicion or rumor about their homosexual orientation or conduct).

150. See Norton-Taylor and Dyer, *supra* note 46 (listing Denmark, France, Germany, Ireland, the Netherlands, Canada, Australia, New Zealand, and Israel among the nations of the industrialized world that do not have bans against Gays serving the military, and stating that Italy's ban is not enforced rigorously).

446 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

Western nation that still enforces the policy,¹⁵¹ and with particular vigor.¹⁵² In other words, Gays enjoy more freedom in other Western countries. The repeal of Don't Ask, Don't Tell, accompanied by the acceptance and integration of openly Gay men and women into the ranks, will help prevent the United States from falling behind the rest of the West in the area of Gay rights.

Second, the proven failure of Don't Ask, Don't Tell to protect Private Winchell¹⁵³ and other Gay service members¹⁵⁴ is, in and of itself, ample reason to depart from the current policy. The Armed Forces of the United States is not supposed to tolerate harassment of any kind against its men and women in uniform, for any reason,¹⁵⁵ much less the murder of its service members. The termination of Don't Ask, Don't Tell would make openly Gay service members more acceptable in the eyes of heterosexual service members, rather than promote the idea of incompatibility between homosexuality and military service, which the current policy explicitly does.

Third, Don't Ask, Don't Tell not only fails to protect those it is supposed to, but it also harms those it is not supposed to affect at all. The foremost example of a group other than Gay service members

151. See CONDUCT UNBECOMING, *supra* note 34, at 19 (providing statistics on the number of service members the United States Defense Department discharges for homosexual conduct, which currently totals more than 1100 annually); see also *Pentagon Clarifies Policy on Gays in Military*, *supra* note 77 (reporting that the Defense Department discharges more service members based on their sexual orientation today than before Don't Ask, Don't Tell became law, and that the number of such discharges increased 67% from 1994-1997).

152. See, e.g., *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D.D.C. 1998) (describing the invasive tactics used by Naval investigators to research the sexual orientation of a sailor, including contacting America Online to illegally obtain the identity of the service member whose "screen name" contained a user profile with information suggesting that he was gay); CONDUCT UNBECOMING, *supra* note 34, at 11-13 (reflecting that military commanders widely abuse the limitations imposed on investigations into the private lives of their troops).

153. See *McHugh*, *supra* note 1, at 12 (describing Private Winchell as the victim of a murder motivated by anti-Gay hatred); see also *Pressley*, *supra* note 3, at A1 (reporting that while Private Winchell's sergeant knew that fellow service members taunted him daily due to his perceived sexual orientation throughout the last several months of his life, the base command took no action to stop the harassment).

154. See CONDUCT UNBECOMING, *supra* note 34, at 74 (recounting the murder of Petty Officer Allen Schindler, who was beaten savagely by two of his fellow shipmates while on active duty in Sasebo, Japan in 1992); see also *Editorials: Refined Gay Policy is Not Enough*, ATLANTA CONST., Sept. 8, 1999, at A14 (arguing that, more often than not, Gay service members who report anti-Gay harassment become targets of investigations and discharge, while those engaging in the harassment are not punished).

155. See *Benecke, Osburn & Gilberd*, *supra* note 42, at 22 (quoting Department of Defense Directive 1304.26, which states, "[t]he Armed Forces do not tolerate harassment or violence against any servicemember, for any reason," and noting that this is merely one of several laws and regulations that prohibit harassment against military personnel). *But see* CONDUCT UNBECOMING, *supra* note 34, at 65 (showing that violations of "Don't Harass" occurred in every branch of the service, including the Coast Guard, in 1998, totaling 400 for the year, and reflecting more than a six-fold increase since the implementation of Don't Ask, Don't Tell in 1994).

that is adversely affected is heterosexual women who report sexual harassment by heterosexual men to their commands and are accused of being lesbians in return. This “lesbian-baiting” results in a disproportionate number of women being discharged for homosexual conduct.¹⁵⁶ The Pentagon, therefore, should rigorously enforce its prohibitions against sexual harassment and reprimand commanders who launch investigations against women in retaliation for reporting incidents of sexual harassment.

Finally, apart from a strictly civil rights perspective, Don’t Ask, Don’t Tell should be abolished because discharges of service members cost American taxpayers tens of millions of dollars each year.¹⁵⁷ These staggering costs are necessary because each discharged service member must be replaced. This process includes the costs of recruiting and training new service members to replace discharged service members for whom such costs were already incurred.¹⁵⁸

In essence, every time a service member is discharged and replaced, the American taxpayer is paying twice for the same service, only the replacement is newer and therefore less experienced at the job. When the military does not replace the service members it discharges, obviously, the size of the Armed Forces shrinks. In fact, three of the four branches of the Armed Forces of the United States are severely understaffed,¹⁵⁹ which posed a variety of problems¹⁶⁰ for

156. See CONDUCT UNBECOMING, *supra* note 34, at 95 (graphing the number of women discharged for homosexual conduct each year since the implementation of Don’t Ask, Don’t Tell, along with the percentage of the Armed Forces that was comprised of women for that year, and finding that, for the year 1998, women received Gay discharges at a percentage twice that of their representation in the military).

157. See CONDUCT UNBECOMING, *supra* note 34, at 91 (tracking the amount of money spent on replacing service members who were discharged each year for homosexual conduct since Don’t Ask, Don’t Tell began in 1994, reporting a total of \$130,510,140 for the period 1994-98).

158. See CONDUCT UNBECOMING, *supra* note 34, at 87 (providing statistics on the number of service members discharged for homosexual conduct that the American taxpayer must replace, which was 1163 for 1998 alone).

159. See Stephanie Gutmann, *Men, Women and War*, WALL ST. J., March 24, 1999, at A26 (explaining that, despite relaxed recruiting standards, a more generous GI Bill, and more appealing ad campaigns, every service branch except the Marines fell thousands short of their recruitment goals in 1998, marking the worst shortage of military personnel since the end of the Vietnam War); see also *Military Troop Shortage Starts Talk of a Draft*, S.F. CHRON., Aug. 22, 1999, at 6 (noting that, while the Department of Defense needs 365,000 volunteers annually to maintain a total active force of 1.4 million, the Army, Navy, and Air Force experienced a combined shortage of 43,000, and the Army lowered its mental and physical standards in an effort to recover its deficit).

160. See, e.g., Richard J. Newman, *Hey There Fella, Have I Got a Foxhole for You: The Army May Hire Professional Pitchmen to Boost its Failing Recruitment Efforts*, U.S. NEWS & WORLD REP., Aug. 2, 1999, at 33 (predicting that the Army’s standards for new recruits will drop as a result of its inability to meet its yearly quota, and quoting a Pentagon report that stated understaffing is already causing “weakness in readiness”); Knight Ridder Newspapers, *Air Force to Block Discharges for Some Shortages, Air War Prompt the Move*, KAN. CITY STAR, May 15, 1999, at A9 (reporting that the need for air personnel in Yugoslavia prompted the Air Force to issue a “Stop Loss” order to

448 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:2

the Armed Forces, and ignited a debate over whether to reinstate the Selective Service.¹⁶¹

This situation, taken with the effects of Don't Ask, Don't Tell discussed above, begs the question of what benefit the United States receives in discharging service members based on their sexual orientation when the nation is in need of military personnel. The policy defies the laws of common sense. Don't Ask, Don't Tell is unjustifiable from the standpoint of any rational person, regardless of whether he or she is Gay or straight, and regardless of whether he or she is an economist, a simple taxpayer, or even a military commander.

VI. CONCLUSION

The decisions by the European Court of Human Rights found the tactics used by the British Ministry of Defense, which parallel those of the Pentagon, to violate basic human dignity. The violations committed under Don't Ask, Don't Tell, and the recent murder of PFC Winchell, far surpass those made in the *Lustig-Prean* and *Smith* cases. The current U.S. military ban on Gays goes beyond requiring Gay service members to remain silent about their sexual orientation in the barracks. Gays in the American military are not allowed to tell anyone, at any time or in any place, that they are Gay. They may not engage in any sexual activity with a person of the same sex, at any time or in any place. They may not even kiss a person of the same sex, even on the cheek, or hold hands with that person. They may not write love letters to, or receive them from, any person of the same sex. Any of these acts may result in an intrusive investigation into the private lives of Gay service members, the loss of their military careers, court-martial, and imprisonment. The military indeed takes many of these actions on a regular basis. The only thing that Gays in the military are permitted to do under Don't Ask, Don't Tell is to share a homosexual thought with themselves or to silently admire the way a person of the same sex looks (provided they do not stare too long). Stated plainly, it is impossible to serve lawfully in the American military and to be Gay by any rational definition of the word. There is no 14th Amendment privacy right for Gays under Don't Ask, Don't Tell, nor is there even a 1st Amendment right to merely state that

prevent some service members from being discharged, but that the order may result in a mass exodus of disgruntled personnel once it is lifted).

161. See *Military Troop Shortage Starts Talk of a Draft*, *supra* note 158 at 6 (reporting the possible revival of the draft in response to a chronic shortage of military personnel in the Army, Navy, and Air Force).

2001] EUROPE ENTERS A NEW MILLENNIUM 449

one is Gay, even in the context of “coming out” to one’s family. This is not liberty, this is not equality, and this is not American.