

**“THE IMPORTANCE OF OBJECTIVE ANALYSIS” ON GAYS IN THE  
MILITARY: A RESPONSE TO ELAINE DONNELLY’S *CONSTRUCTING THE  
CO-ED MILITARY*<sup>1</sup>**

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On February 28, 2007, former Rep. Martin Meehan (D-MA) and a bipartisan group of co-sponsors reintroduced the Military Readiness Enhancement Act in the House of Representatives to amend title 10 United States Code § 654 (“Policy Concerning Homosexuality in the Armed Forces”) to enhance the readiness of the Armed Forces by replacing the current “don’t ask, don’t tell” policy with a policy of nondiscrimination on the basis of sexual orientation. In the recent DUKE JOURNAL OF GENDER LAW AND POLICY article, “Constructing the Co-Ed Military,” Elaine Donnelly, president of the Center for Military Readiness, asserts that “nothing has changed that would justify the turmoil that would occur in and outside of Congress if Meehan’s legislation were seriously considered or passed.”<sup>2</sup> But on what evidence is she basing her claims that turmoil would ensue if 10 U.S.C § 654, the ban on openly gay service members, were repealed?

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1. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL’Y 815, 816 (2007) [hereinafter Donnelly]. The title of the first subsection of Elaine Donnelly’s article is “The Importance of Objective Analysis.” In the following response we address Donnelly on precisely this point.

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2. *Id.* at 915.

The outcomes of repeal are exactly the points that an informed public conversation about the “don’t ask, don’t tell” policy should be engaging, but in a serious, evidence-based debate. And the focus of that debate should be not on fears of what would “occur in and outside of Congress,” but on the impact of any legislation on military readiness. Signed into law in November of 1993 by President Clinton, the Defense Department issued the first set of comprehensive regulations in February of 1994. The “don’t ask, don’t tell” policy, once considered an interim measure by policy makers, has remained in force, relatively unchanged, for over fourteen years.<sup>3</sup>

Contrary to Donnelly’s assertion, however, much has changed in the military, political, and cultural landscape since 1993. Military opinion and public opinion have experienced dramatic shifts, which have been well documented by scholarly research and in the media. The most recent evidence of these shifts, and perhaps the most telling, was a statement released by a group of twenty-eight retired U.S. generals and admirals urging Congress to repeal the current ban on openly gay, lesbian, and bisexual troops.<sup>4</sup> The support of such a large number of senior military officers for an end to the so-called gay ban reflects nothing less than a sea change in military opinion on the issue. In 1993, when the current policy was formulated, some surveys found that 97 percent of generals and admirals opposed lifting the ban.<sup>5</sup> When General John Shalikashvili, who served as Chairman of the Joint Chiefs of Staff from 1993 through 1997, published an op-ed in *The New York Times* on January 2, 2007 calling for the end of “don’t ask, don’t tell,” he cited polls showing that a large number of younger enlisted personnel also favor letting openly gay soldiers serve.<sup>6</sup> That poll of 545 troops who served in Afghanistan and Iraq by Zogby International, found that 72 percent of service members are personally comfortable interacting with gays and lesbians.<sup>7</sup> Public opinion polls show similarly strong indicators of change. Furthermore, data indicate that the policy is now harming the military’s reputation because it is out of step with public opinion.<sup>8</sup>

Donnelly contests all of this evidence. She says that the research supporting the claim that discrimination undermines the military, and that

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3. “I would not say that the policy that we are implementing here today is the policy that will be forever,” or also, “I would not say that this is gonna be it forever.” Secretary of Defense Les Aspin, News Conference with Jamie Gorelick, General Counsel, Department of Defense, Regarding the Regulations on Homosexual Conduct in the Military (Dec. 22, 1993).

4. Thom Shanker and Patrick Healy, *A New Push to Roll Back ‘Don’t Ask, Don’t Tell,’* N.Y. TIMES, Nov. 29, 2007.

5. Press Release, The Palm Center, *Twenty-Eight Generals and Admirals Call for End to Military’s Gay Ban* (Nov. 29, 2007), [http://www.palmcenter.org/press/dadt/releases/twenty\\_eight\\_generals\\_and\\_admirals\\_call\\_for\\_end\\_to\\_militarys\\_gay\\_ban\\_0](http://www.palmcenter.org/press/dadt/releases/twenty_eight_generals_and_admirals_call_for_end_to_militarys_gay_ban_0).

6. John M. Shalikashvili, Editorial, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, §A, at 17.

7. Sam Rodgers, *Opinions of Military Personnel on Sexual Minorities in the Military*, Zogby International, Dec. 2006. Zogby reported both 72% and 73% at different times. The discrepancy is attributable to the use of two different rounding methods, both of which are considered legitimate ways of deriving final figures from raw numbers.

8. See Aaron Belkin, “*Don’t Ask, Don’t Tell*” *Does the Gay Ban Undermine the Military’s Reputation?*, 34 ARMED FORCES & SOC’Y 276 (2008) [hereinafter Belkin, *Don’t Ask*].

integration would enhance military effectiveness, is not compelling. And she suggests that, "A closer look at materials produced by the activist groups usually reveals questionable methodology and unsupported conclusions."<sup>9</sup> The Palm Center, a research institute at the University of California, Santa Barbara, stands at the core of her offensive against full integration of openly gay and lesbian service members. She repeatedly attempts to dismiss the credibility of the Palm Center's research by labeling our data the product of "social engineers" and "activists."<sup>10</sup>

In the following pages, we respond to the substance of Donnelly's critique, addressing the factual errors in her analysis, addressing her unsupported assertions about the quality and integrity of research in this area, in particular by the Palm Center, and commenting on the stakes raised by the rhetoric Donnelly chooses to deploy in presenting her position in lieu of evidence to support that position.<sup>11</sup> An analysis of the substance of her complaints shows that her critique is without merit, that the methodologies behind the studies she cites are in fact sound, and that the data show that discrimination compromises military effectiveness, while integration enhances it. We agree with one aspect of Donnelly's argument: when lives and national security are at risk, basic assumptions must be challenged and objective analysis is at a premium. And that is the place from which the Palm Center approaches our research.

#### THE CENSUS KNOWS: ESTIMATING THE NUMBER OF GAY AND LESBIAN SERVICE MEMBERS

One of the basic questions that inform public conversation about "don't ask, don't tell" involves the number of gays and lesbians serving in the armed forces. Some commentators have suggested that ten percent of the American public is gay or lesbian<sup>12</sup>, and have applied this figure to the military, suggesting that ten percent of the armed forces, or 250,000 troops, may be gay. Unfortunately, the "don't ask, don't tell" policy itself precludes conducting a survey of active-duty military personnel that asks respondents about their sexual orientation or behavior. As a result, scholars have had to consider other approaches and methods to try to identify this otherwise hidden population of lesbians, gay men, and bisexuals serving in the United States armed forces. In 2004, Dr. Gary Gates of the Urban Institute published a study which found that approximately 65,000 currently-serving troops are gay.<sup>13</sup> Donnelly attacks Gates' study, which she says amounts to "urban legend" rather than "a serious

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9. Donnelly, *supra* note 1, at 916.

10. Donnelly, *supra* note 1, at 918, 938.

11. "We" refers to the authors, three of whom (Belkin, Frank, and Scheper) are Palm Center staff and one of whom (Gates) is affiliated with the Williams Institute at the University of California, Los Angeles School of Law and is also the author of research critiqued in Donnelly's article.

12. ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (W.B. Saunders Co. 1949) (1948).

13. Gary J. Gates, *Gay Men and Lesbians in the U.S. Military: Estimates from Census 2000*, THE URBAN INSTITUTE, Sep. 28 2004, at 4, [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf).

piece of scholarship,"<sup>14</sup> but virtually every assertion Donnelly makes in describing the study is incorrect.

Donnelly's first incorrect assertion is that the Urban Institute analysis includes a "speculative claim" that in the U.S. four percent of men and three percent of women are lesbian or gay.<sup>15</sup> In fact, findings from a study published after the Urban Institute study suggest that these figures actually underestimate the fraction of lesbian, gay, and bisexual identified men and women in the United States.<sup>16</sup> A federally-funded nationally representative survey of men and women aged 18-44 found that 4.1 percent of both men and women self-identified as either "homosexual" or "bisexual."<sup>17</sup> This suggests that the Urban Institute study likely underestimates the size of the lesbian, gay, and bisexual population.

Donnelly continues with a claim that the study "speculated that household-mates of the same-sex are homosexual."<sup>18</sup> The fact that same-sex "unmarried partners" identified in the U.S. Census are likely lesbian and gay couples is not speculation. To begin with, the same-sex couples identified in the U.S. Census are not simply "household-mates"<sup>19</sup> as the author suggests. Rather, they are same-sex couples in which one partner is explicitly identified as either the "husband/wife" or "unmarried partner" of the other partner.<sup>20</sup> Therefore, those identified as "roommates," "boarders," and "unrelated adults" are not included among these couples. Nor are any same-sex couples with blood relationships such as siblings, cousins, or children. Social scientists and government officials have closely considered this question of categorization and are in broad agreement that same-sex "unmarried partner" couples identified in the Census are indeed lesbian and gay couples.<sup>21</sup>

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14. Donnelly, *supra* note 1, at 924.

15. *Id.*

16. William D. Mosher et al., 2005. *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002* 362. ADVANCE DATA FROM VITAL AND HEALTH STATISTICS 1. (U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, 2005) [hereinafter Mosher et al.].

17. *Id.* at 3.

18. Donnelly, *supra* note 1, at 924.

19. *Id.*

20. U.S. Census 2000 Long Form D-2, U.S. Department of Commerce, Bureau of the Census, <http://www.census.gov/dmd/www/pdf/d02p.pdf>.

21. See Marieka M. Klawitter & Victor Flatt, *The Effects of State and Local Antidiscrimination Policies on Earnings for Gays and Lesbians*, 17 J. OF POL'Y ANALYS. AND MGMT. 658-86 (1998) [hereinafter Klawitter & Flatt]; Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 DEMOGRAPHY 139-54 (2000) [hereinafter Black]; Sylvia A. Allegretto & Michelle M. Arthur, *An Empirical Analysis of Homosexual/Heterosexual Male Earnings Differentials: Unmarried and Unequal?* 54 INDUS. & LAB.REL. REV. 631-46 (2001) [hereinafter Allegretto & Arthur]; Lisa K. Jepsen & Christopher A. Jepsen, *An Empirical Analysis of the Matching Patterns of Same-Sex and Opposite-Sex Couples*, 39 DEMOGRAPHY 435-53 (2002) [hereinafter Jepsen & Jepsen]; Dan Black; Gary Gates; Seth Sanders; Lowell Taylor, *Why Do Gay Men Live in San Francisco?*, 51 JOURNAL OF URBAN ECONOMICS, (2002) 54-76; Gary J. Gates & Jason Ost, *THE GAY AND LESBIAN ATLAS*, (Urban Institute Press, 2004); *THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES* (Congressional Budget Office 2004); Gary J. Gates & Randall L. Sell, *Measuring Gay and Lesbian Couples*, in *THE HANDBOOK OF MEASUREMENT ISSUES IN FAMILY RESEARCH* (Sandra L. Hofferth & Lynne M. Casper eds., Erlbaum Associates, Inc., 2006) [hereinafter Gates & Sell]; Patrick

In the specific case of military service, same-sex couples appear to be a reasonable proxy for the broader lesbian, gay, and bisexual population. Black and colleagues compare military service rates among same-sex couples in the Census to men and women in the General Social Survey (a nationally representative sample of adults) who indicate that they have had exclusively same-sex sexual partners in the last five years.<sup>22</sup> The estimates, it turns out, are virtually the same.

Donnelly incorrectly states that the analyses are based on the fraction of individuals in same-sex couples who identify as “veterans.”<sup>23</sup> In fact, the estimates for the number of lesbians, gay men, and bisexuals in the military are based on the fraction of individuals in same-sex couples who indicate that they are on active duty in the military and, separately, on those who indicate that they are in the ready reserve forces (National Guard and Reserve). The report uses these figures to estimate the number of lesbian, gay men, and bisexuals on active duty and in the ready reserve. The analyses also separately consider the number of lesbian, gay, and bisexuals who are veterans using only those in same-sex couples who state that they have prior military service.

Finally, Donnelly claims that the Urban Institute report uses “questionable methodology.”<sup>24</sup> In fact, the report uses well-known statistical procedures and conservative assumptions to reach its conclusions. The primary statistical analyses use Bayes’ Rule, a common procedure frequently used by statisticians. To estimate the size of the lesbian, gay, and bisexual population currently serving in the military using Bayes’ Rule, the analyses rely on two key assumptions, both of which err on the side of a conservative estimate:

1. Four percent of men and three percent of women in the U.S. population are lesbian, gay, or bisexual. As already stated, Mosher et al. (2005) find that 4.1 percent of both men and women identify as such.<sup>25</sup>
2. The fraction of individuals in same-sex couples who report being on active duty or in the ready reserve is the same as the fraction of all lesbian, gay men, and bisexuals serving in the military. As the report clearly states, this likely underestimates the latter as it seems reasonable to believe that single lesbians, gay men, and bisexuals can more easily serve and hide their sexual orientation (as the “don’t ask, don’t tell” policy dictates) than can their coupled counterparts. As such, the statistic derived from same-sex couples likely underestimates the real fraction of lesbians, gay men, and bisexuals presently serving in the military.

Far from “urban legend,” the Urban Institute study is based on high-quality data, sound statistical techniques, and conservative assumptions. The

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Festy, *Enumerating Same-Sex Couples in Censuses and Population Registers*, 17.12 DEMOGRAPHIC RESEARCH, 339–68 (2007); Lisa K. Jepsen, *Comparing the Earnings of Cohabiting Lesbians, Cohabiting Heterosexual Women, and Married Women: Evidence from the 2000 Census*, 46 INDUS. REL. 699–727 (2007) [hereinafter Jepsen]; Dan Black, Seth Sanders, Lowell Taylor, *The Economics of Lesbian and Gay Families* 21 JOURNAL OF ECONOMIC PERSPECTIVES 53–70 (2007).

22. Black, *supra* note 21.

23. Donnelly, *supra* note 1, at 924.

24. *Id.* at 923.

25. Mosher et al., *supra* note 16.

report offers a credible estimate for the size of the lesbian, gay, and bisexual population serving in the U.S. military: an estimated 65,000 active and reserve military members are currently serving.<sup>26</sup>

#### THE COST OF FIRING GAYS AND LESBIANS

What is the financial cost of firing gays and lesbians from the military? In February 2005, the Government Accountability Office (GAO) released a report that found that during its first ten years, the “don’t ask, don’t tell” policy cost \$190.5 million to implement.<sup>27</sup> The Palm Center organized a Blue Ribbon Commission to study the GAO’s report, and the Commission included distinguished experts including professors at military universities, a retired U.S. Army Colonel with a Ph.D. in economics, and a former Secretary of Defense. The Commission’s work was vetted by an accounting professor from the Naval Postgraduate School.

The Commission found that the GAO’s findings were based on questionable data and methodology, and determined that the GAO’s errors led to both over- and under-estimations of the total cost of implementing “don’t ask, don’t tell.” When the over- and under-estimations were reconciled, it was determined that the GAO’s overall estimate was 91 percent too low, and that the “don’t ask, don’t tell” policy cost the Pentagon at least \$363.8 million to implement during its first ten years.<sup>28</sup> Because the Commission used conservative assumptions, it argued that its finding should be seen as a lower-bound estimate.<sup>29</sup>

Donnelly questions the Commission’s findings on two grounds. First, she says, the issue is not the cost of implementing “don’t ask, don’t tell.” Rather, she claims, “It is the cost of recruiting and training individuals who are not eligible to serve in the military because they are homosexual.”<sup>30</sup> She argues, “losses related to the homosexual conduct law, whatever it is, could be reduced to near-zero if all potential recruits were fully and accurately notified that the 1993 law means that homosexuals are not eligible to serve.”<sup>31</sup> The flaw in Donnelly’s reasoning, however, is that even if “don’t ask, don’t tell” were interpreted, as she would have it, to prohibit all gays and lesbians from serving (which we show below it does not), the financial cost of the policy would still be large. From the 1940s until 1993, gays and lesbians were prohibited from serving as a result of a complete and outright ban, and during this time the military fired

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26. On social science estimates and methods for analyzing gay and lesbian populations, see Allegretto & Arthur, *supra* note 21; Dan A. Black et al., *The Economics of Lesbian and Gay Families*, 21 J. OF ECON. PERSP. 53 (2007); Dan A. Black et al., *Why Do Gay Men Live in San Francisco?* 51 J. OF URB. ECON. 54 (2007). *Enumerating Same-Sex Couples in Censuses and Population Registers*, 17 DEMOG. RES. 339; Gates & Ost, *supra* note 21; Gates & Sell, *supra* note 21; Jepsen & Jepsen, *supra* note 21; Jepsen, *supra* note 21; Klawitter & Flatt, *supra* note 21; Mosher et al., *supra* note 16.

27. Josh White, *‘Don’t Ask’ Costs More Than Expected*, WASHINGTON Post, Feb. 14, 2006, at A04.

28. *Id.* at, at 8.

29. Memorandum from Aaron Belkin, to Sen. Edward M. Kennedy, *Differing Results of GAO and Blue Ribbon Commission Studies* (Sept. 25, 2006) available at [http://www.palmcenter.org/files/active/0/20060925\\_ReplyGAOCritique.pdf](http://www.palmcenter.org/files/active/0/20060925_ReplyGAOCritique.pdf).

30. Donnelly, *supra* note 1, at 920.

31. *Id.*

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approximately 2,000 people each year for being gay.<sup>32</sup> (Approximately 1,000 per year have been fired under “don’t ask, don’t tell.”)<sup>33</sup> Hence, even under a complete and total ban, the financial cost of firing gays and lesbians would be as high or higher than it is under “don’t ask, don’t tell.”

Second, Donnelly questions the Blue Ribbon Commission’s findings and defends the GAO’s original report by noting that the GAO “stood by” its original analysis even after the Blue Ribbon Commission had critiqued it.<sup>34</sup> It is correct that the GAO “stood by” its original report, but this does not mean that its original report was sound. As the Blue Ribbon Commission first explained in its report, and then reiterated in an analysis of the GAO’s defense by Blue Ribbon Commission Chair Aaron Belkin, the GAO misrepresented a critical piece of cost-of-training data that led to a \$150 million dollar error.<sup>35</sup> In previous GAO studies, and as is widely reported throughout the military manpower / personnel literature, the cost to train one enlisted service member, conservatively, was approximately \$25,000 to \$30,000 in the 1990s.<sup>36</sup> In its original report, however, the GAO contradicted its own prior studies and reported that it cost only \$6,400 for the Army to train one soldier.<sup>37</sup> By using inaccurate data to estimate the cost of training enlisted personnel who were subsequently fired for being gay or lesbian, the GAO missed approximately \$150 million of costs. Donnelly and the GAO can only stand behind the original GAO study if they believe that it cost \$6,400 to train one soldier in the 1990s. This figure, however, is not supported in the literature, and seems particularly off-target when one considers, as the Commission found, that service members fired for being gay received, on average, *more* initial skill and mid-career training than other members of the military.

## WEIGHING THE EVIDENCE FROM FOREIGN MILITARIES

One central question in the U.S. debate over gays and lesbians in the military is whether cohesion, readiness, morale, and recruiting have suffered in foreign military forces that have lifted their gay bans. According to some social scientists, foreign military experiences provide an opportunity for assessing the plausibility of the claim that if the American ban were to be lifted, the effectiveness of the U.S. armed forces would decline. If military effectiveness declined as a result of foreign military decisions to lift gay bans, then that might suggest that a similar result could ensue if U.S. law and policy shifted. If military effectiveness either increased or remained the same after foreign military forces decided to allow gays and lesbians to serve openly, that might

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32. The discharge rates fluctuated considerably; in the late 1980s and early 1990s, they dipped below 1,000 per year, but on average during the Cold War, the annual discharge rate was about 2,000. See DoD’s *Policy on Homosexuality: Report to Congressional Requesters*, 8 GENERAL ACCOUNTING OFFICE (1992). See Rhonda L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 LAW AND SEXUALITY 113 (2002).

33. *Id.*

34. Donnelly, *supra* note 1.

35. Belkin, *supra* note 29.

36. *Id.* at 3.

37. *Id.*

cast doubt on the plausibility of disastrous predictions about a policy change in the U.S.

Numerous social scientific studies have found that despite occasional and isolated problems of adjustment, foreign militaries that have lifted their gay bans have not suffered any overall decrease in cohesion, readiness, morale, or recruiting as a result of their policy transitions.<sup>38</sup> Indeed, in the more than thirty years since the Dutch military became the first to lift its gay ban,<sup>39</sup> there has not been a single study documenting any decline in cohesion, readiness, recruiting, or morale as a result of a decision to lift a gay ban in any of the twenty-four foreign forces which have done so since that time. Despite the complete absence of studies to bolster their claims, Donnelly and other opponents of integration have continued to assert and then repeat several distinct claims about foreign

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38. See Aaron Belkin and Jason McNichol, *Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence* (The Center for the Study of Sexual Minorities in the Military [CSSMM] 2000); see also Aaron Belkin & Melissa Levitt, *The Effects of Including Gay and Lesbian Soldiers in the Israeli Defense Forces: Appraising the Evidence* (CSSMM 2000); see also Aaron Belkin & Jason McNichol, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence* (CSSMM 2000); see also Aaron Belkin & R. L. Evans, *The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence* (CSSMM 2000) (all of these studies are available at <http://www.palmcenter.org/publications/dadt>). See also RAND's National Defense Research Institute Report. RAND researchers conducted interviews with Canadian military personnel several months after the removal of the ban on gay and lesbian soldiers. They found no evidence that the policy change had had any appreciable effect on any aspect of military life or performance. (RAND's report was begun at the request of U.S. Secretary of Defense Les Aspin sometime after January 29, 1993 and completed before July 19, 1993.); see also U.S. GEN. ACCOUNTING OFFICE, *HOMOSEXUALS IN THE MILITARY: POLICIES AND PRACTICES OF FOREIGN COUNTRIES* (1993) [hereinafter GAO 1993] (A U.S. General Accounting Office (GAO) analysis of the first six months of Canada's new policy also found no problems associated with the change. In their interviews with members of Parliament, gay advocacy groups, a veterans' umbrella group, the Canadian Human Rights Commission, the Department of National Defence, and the Department of Justice, the researchers could find no one who had received any reports of resignations, lower recruitment, morale or cohesiveness problems, or gay-bashing incidents. In addition, the GAO found no reports of open displays of homosexual behavior). In June 1993, seven months after the Australian ban on homosexual service was lifted, the General Accounting Office of the United States conducted interviews with ADF officials to document early outcomes associated with the change (GAO 1993). The short overview of the policy change concludes with a summary statement based on comments from an "Australian official," who stated that: "Although it is too early to assess the results of the revised policy, no reported changes have occurred in the number of persons declaring his or her sexual preference or the number of recruits being inducted. Effects on unit cohesiveness have not yet been fully determined. However, early indications are that the new policy has had little or no adverse impact." (GAO 1993 at 19); see also U.S. ARMY RESEARCH INSTITUTE RESEARCH REPORT AT THE REQUEST OF THE DEPUTY CHIEF OF STAFF OF THE U.S. ARMY. The U.S. Army Research Institute for the Behavioral and Social Sciences issued a report in January of 1994 authored by an outside consultant evaluating early outcomes of the lifting of the ban in Canada. The report surveyed all publicly available literature to describe the original impetus to lift the ban as well as the consequences of the 1992 policy change on a broad array of performance outcomes in the Canadian Forces. In its summary of findings, the report states: "The impact of the policy change has been minimal. Negative consequences predicted in the areas of recruitment, employment, attrition, retention, and cohesion and morale have not occurred in the 6-month period since revocation of the exclusionary policy." (Pinch 1994: vii-viii). See also F.C. Pinch, 1994. *Perspectives on Organizational Change in the Canadian Forces* (U.S. Army Research Institute for the Behavioral and Social Sciences, 1994).

39. GREGORY HEREK ET AL., *OUT IN FORCE* 114 (University of Chicago Press 1996).



militaries, each of which are untrue or misleading. Here, we address each claim in turn.

To begin, Donnelly posits that the studies that document the successful experiences of foreign militaries that lifted their bans are based “on anecdotal information and opinion, largely gathered from like-minded sources.”<sup>40</sup> Her evidence? She reprints several sections of a previously published critique of a Palm Center study. The original study, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?* was published by PARAMETERS, the official journal of the Army War College, and found that Britain, Canada, Israel, and Australia successfully lifted their bans, with no detriment to military effectiveness.<sup>41</sup> In a subsequent 2004 issue, PARAMETERS published a critique of Belkin's study, as well as Belkin's reply to that assessment. Here is the 2004 passage that Donnelly re-prints:

Belkin's article is entirely anecdotal. It is nothing more than selected quotes from supposed experts who claim that homosexual integration has had no impact on unit cohesion or military readiness. A quick review of the author's endnotes, cross-checked with an internet search, reveals the questionable credentials and political leanings of most of these experts. At one point, Belkin refers to a 1995 Canadian government report, which supposedly indicates that lifting the ban on gays in the military had 'no effect.' However, his endnote does not cite the report but a 'personal communication with Karol Wenek.'<sup>42</sup>

The passage which Donnelly found wanting in Belkin's article read: “A 1995 internal report from the Canadian government on the lifting of the ban concluded, ‘Despite all the anxiety that existed through the late 80s into the early 90s about the change in policy, here's what the indicators show—no effect.’”<sup>43</sup> The supporting footnote cites the source of the quote: “Personal communication with Karol Wenek, Directorate of Policy Analysis and Development, Canadian Forces, 20 January, 2000.”<sup>44</sup> As Belkin explained in his 2004 response, there was a straightforward reason why he cited a personal communication with Wenek rather than the document itself (titled “Briefing Note for Director of Public Policy,” Ottawa, Canadian Forces, 25 August 1995): the quote was intended to represent Wenek's description of the report's conclusion, and hence sufficed to summarize its findings. The Palm Center posted the original report on its web site four years ago, and it remains there to this day.

As Belkin also explained in his 2004 reply, his research is anything but anecdotal. His published work on foreign militaries is based on reviews of hundreds of printed sources including government documents. And as the studies explain in detail, Belkin and his colleagues used standard social scientific practices to ensure that their search for documents and experts was thorough. Anyone interested in the source lists can consult the extensive reference sections

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40. Donnelly, *supra* note 1, at 927.

41. Aaron Belkin, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?* 33 PARAMETERS 111 (2003).

42. Donnelly, *supra* note 1.

43. Belkin, *supra* note 41, at 118.

44. Donnelly, *supra* note 1.

of studies listed in endnote 6 of the *Parameters* article.<sup>45</sup> The interview subjects cited in the *Parameters* article included officers and enlisted personnel, ministry representatives, academics, veterans, politicians, and nongovernmental observers, including every identifiable expert in Israel, Canada, Britain, and Australia on gays in the military. In other words, Belkin and his colleagues interviewed the universe of experts, a standard far exceeding the acceptable research practice of interviewing a representative sample of experts. They included and interviewed every identifiable expert who had opposed allowing gays to serve openly in these four militaries. One of Belkin's interview subjects, for example, was Professor Christopher Dandeker, former Chair of War Studies at Kings College London and perhaps the most distinguished scholar of the British military. In 1999, Dandeker wrote that if Britain lifted its ban, readiness would deteriorate.<sup>46</sup> After British policy changed, Dandeker concluded that his prediction had been incorrect.<sup>47</sup> When the totality of experts on a particular military, including those who had predicted disaster, testifies that there is no indication that lifting a ban undermined military effectiveness that does not amount to anecdotal evidence.

In addition to claiming that studies which document foreign military successes are based on anecdotes, Donnelly says that foreign militaries that have lifted their bans have suffered as a result. "Contrary to the notion that all has gone well," she notes, "European newspapers have reported recruiting and disciplinary problems in the British military."<sup>48</sup> She cites five newspaper and radio stories<sup>49</sup> to support her assertion. The question of consequence, however, is not whether "all has gone well," as scholars of gays and lesbians in foreign militaries acknowledge quite candidly that isolated adjustment problems have occurred in some units following the lifting of gay bans. Rather, the question is whether *overall* military effectiveness has increased, decreased, or remained the same as a result of the lifting of gay bans. Neither Donnelly nor anyone else has presented a shred of evidence of an overall decline in any country that has lifted its ban. Indeed, none of the five media stories that Donnelly cites shows or even suggests that the lifting of a gay ban undermined the overall readiness of any foreign military.<sup>50</sup> One of those stories, for example, is headlined, *War Blamed as 6,000 Quit Territorial Army*.<sup>51</sup> Is Donnelly insinuating that the lifting of the gay ban is to blame? Can this be the best evidence to show that the lifting of the

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45. The studies cited in endnote 6 of the original article, Belkin, *supra* note 41, at 118.

46. See Tarak Barkawi & Christopher Dandeker, *Rights and Fights: Sexual Orientation and Military Effectiveness*, 24 INTERNATIONAL SECURITY 186 (1999).

47. AARON BELKIN & GEOFFREY BATEMAN, DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 132-34 (Lynne Rienner, 2003).

48. Donnelly, *supra* note 1, at 926.

49. *Id.* at n. 545.

50. *Id.* at n. 545.

51. Michael Smith, *War Blamed as 6,000 Quit Territorial Army*, SUNDAY TIMES (LONDON), Oct. 30, 2005, at News 2. This article makes no mention of gay service. Only one of her five citations mentions gay service, and that article refers to Navy efforts in the U.K. to recruit gay sailors, Nicholas Hellen, *Navy Signals for Help to Recruit Gay Sailors*, TIMESONLINE (London), Feb. 20, 2005, available at <http://www.timesonline.co.uk/tol/news/uk/article516647.ece>.

British ban has undermined military effectiveness? The article itself makes no reference to the lifting of the ban or to gays and lesbians in the military.

Meanwhile, the British Ministry of Defence itself has completed several in-depth, service-wide assessments, which concluded that the decision to allow gays and lesbians to serve openly did not have any *overall* negative effect on cohesion, morale, readiness, or recruiting, despite a few isolated problems in some units.<sup>52</sup> Rather than citing five media articles, which report on unrelated problems the British military was facing, we wonder why Donnelly and the Center for Military Readiness do not conduct an actual study of the effects of decisions to lift gay bans in foreign militaries. As noted before, it has been over thirty years since the Dutch military became the first to lift its ban,<sup>53</sup> yet in that time not a single study has documented a decrease in military effectiveness that resulted from the lifting of a ban. Another challenge not met by Donnelly is identification of a single expert, anywhere in the world, who believes that any of the 24 foreign militaries that have lifted their gay bans have suffered an overall decrease in cohesion, readiness, morale, or recruiting as a result. In our studies, we have identified over one hundred who believe the opposite to be the case.

By way of dismissing wholesale the value of comparative analysis, Donnelly notes that perhaps these lessons from foreign militaries are of limited value, as some of the countries that have lifted their bans “have cultures quite different from the United States.”<sup>54</sup> It is certainly the case—and it is regularly acknowledged by supporters of eliminating “don’t ask, don’t tell”—that important differences distinguish the U.S. military from other armed forces. But we suggest that the relevant question is not whether differences exist, but whether they render foreign military experiences irrelevant for determining whether military effectiveness would decline if gays and lesbians were allowed to serve openly in the U.S. Indeed, as the Palm Center has shown elsewhere, cultural differences do not diminish the usefulness of examining the experience of foreign militaries to draw lessons by analogy.<sup>55</sup> In their 2001 study published by the journal *ARMED FORCES AND SOCIETY*, Belkin and Levitt argue that American public and military culture are more tolerant of homosexuality than the cultures of foreign countries which have lifted their bans.<sup>56</sup> Moreover, they show that tolerant national climates are not necessary for maintaining cohesion, readiness, morale, and performance after the integration of a minority group into the military. Among the 24 nations that allow gays and lesbians to serve in the military, many include powerful social and political groups that oppose gay rights.<sup>57</sup> Similarly, it would not be possible for the numerous U.S. police and fire departments that allow gays and lesbians to serve openly to continue to function

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52. E.g., *Tri-Service Review of the Armed Forces Policy on Homosexuality and Code of Social Conduct* (2000); *A Review of the Armed Forces Policy on Homosexuality* (2000).

53. HEREK, *supra* note 39.

54. Donnelly, *supra* note 1, at 927.

55. See Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces; Did Lifting the Gay Ban Undermine Military Performance?* 27 *ARMED FORCES AND SOCIETY* 1 (2001).

56. *Id.* at 20–21.

57. *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS; NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* (Barry Adam, Jan Willem Duyvendak & André Krouwel, eds., Temple University Press 1999).

smoothly if a fully tolerant national climate were necessary for the maintenance of organizational effectiveness. While cautioning against unilaterally equating the experience of racial integration with the integration of openly gay people, it is nonetheless noteworthy that the U.S. military was ordered to allow African-American soldiers to serve on an equal basis at a time when 63 percent of the American public opposed integration.<sup>58</sup> The example of racial integration does demonstrate that tolerant cultural and institutional climates are not necessary for maintaining organizational effectiveness when minority groups are integrated into the military. Twenty-four countries have successfully integrated gays and lesbians into their military forces, and each of these nations has a unique culture. Clearly, countries representing a broad spectrum of cultural differences have successfully lifted their bans. And experience shows that nations can apply, and have applied, the successes of one nation to the prospects of another.

Opponents of gays in the military have not responded to this evidence that successful integration is possible, even at a time or in a place where a fully tolerant culture does not exist. Nor have they acknowledged that some of the evidence for this point comes from the U.S. example.<sup>59</sup> Rather, they simply and systematically repeat the assertion that U.S. culture is different. Instead of engaging with the scholarly arguments, which have been part of the landscape of the gays-in-the-military debate for years, Donnelly simply iterates the point that American culture is unique; and she presumes that this declaration of uniqueness and exceptionalism in and of itself represents the obstruction to the successful lifting of the ban, when data show that in fact it does not.

Finally, Donnelly states that according to an expert, "nations without official restrictions on gays in the military are also very restrictive in actual practice."<sup>60</sup> She then cites a 1993 newspaper article to support her contention that in Israel, gay soldiers are barred from elite combat positions.<sup>61</sup> This ignores the Palm Center's 2001 survey of 136 combat soldiers in the Israel Defense Forces, 17 percent of whom said that they know a gay soldier in their unit. (23 percent said 'maybe' and 60 percent said 'no.')<sup>62</sup> Donnelly is correct in noting that the reality on the ground does not always line up with policy after a country decides to lift its gay ban. Again, however, the significant question is not whether policy and practice are consistent, but whether the decision to lift a gay ban undermines military effectiveness. The evidence shows that it does not.

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58. Barkawi & Dandeker, *supra* note 46, at 195.

59. See Evans, *supra* note 50.

60. Donnelly, *supra* note 1, at 927 (explaining that Prof. Charles Moskos asserts this point.).

61. *Id.* at n.548 (citing Tom Philpott, *In Israel: The Hard Reality - Gays Are Allowed to Serve in the Military but They Are Not Fully Accepted*, ARMY TIMES, Jan. 11, 1993, at 11); Tom Philpott, *Gay Israelis Avoid Ridicule, Get Ahead by Staying in Closet*, ARMY TIMES, Jan. 11, 1993, at 13; Charles Moskos, *Services Will Suffer If Used for Social Experiments*, RICHMOND-TIMES DISPATCH, Feb. 28, 1993, at F1.

62. Aaron Belkin and Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?* 27 ARMED FORCES AND SOCIETY 541 (2001), available at <http://afs.sagepub.com/content/vol27/issue4/> and at [http://www.palmcenter.org/publications/dadt/homosexuality\\_and\\_the\\_israel\\_defense\\_forces](http://www.palmcenter.org/publications/dadt/homosexuality_and_the_israel_defense_forces).

## GAYS, LESBIANS, AND U.S. WARTIME SERVICE

The “don’t ask, don’t tell” policy is often defended with the claim that heterosexuals cannot form bonds of trust with gays and lesbians, and that to force gays and straights to serve together would thus erode the unit cohesion that is essential to fighting effectiveness. In light of this claim, it is perhaps ironic that, as scholars have noticed, the Pentagon fires *fewer* gays and lesbians during wartime, when cohesion matters most. Scholars have suggested that if gays and lesbians truly undermined cohesion, perhaps it would make more sense to increase discharges during times of combat.

Donnelly disputes the data showing that fewer gays and lesbians are fired during wartime, but her claims are without merit, as the evidence shows that the military delays and neglects gay discharges during war. For example, the Congressional Research Service (CRS) has acknowledged that suspected gays and lesbians have been sent to war, noting that,

as a result of these policies and laws, the situation that arises during a time of deployment place[s] homosexuals in a no-win situation. They are allowed or ordered to serve at the risk of their own lives with the probability of forced discharge when hostilities end if their sexuality becomes an issue. By deploying suspected homosexuals with their units, the services bring into question their own argument that the presence of homosexuals seriously impairs the accomplishment of the military mission.<sup>63</sup>

Oddly, Donnelly cites a later version of this very same CRS report to bolster her argument, but this version edits out the admission that gays and lesbians are sometimes knowingly “ordered to serve at the risk of their own lives with the probability of forced discharge when hostilities end.”<sup>64</sup>

Other data confirms CRS’s conclusion. The journalist Randy Shilts interviewed scores of service members from the first Gulf War and documented a pattern of retaining gays during war, and then discharging them once peace returns.<sup>65</sup> A number of press reports describe the practice of letting known gays serve during wartime, including more than one article in *THE WALL STREET JOURNAL* about troops who revealed their sexual orientation and were knowingly sent to war.<sup>66</sup> In 2006 and 2007, the Navy twice deployed a gay sailor

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63. *Policy Concerning Homosexuality in the Armed Services: Hearings Before the Senate Armed Services Comm.*, 103d Cong. 17–18 (Mar. 29, 1993) (testimony of David F. Burrelli, Analyst in National Defense, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress).

64. Donnelly, *supra* note 1, at 921, n.515.

65. The Shilts tapes are stored in the Randy Shilts Papers at the San Francisco Public Library. For published articles, see Randy Shilts, *Military May Defer Discharge of Gays*, S.F. CHRON., Jan. 11, 1991; Randy Shilts, *Army Discharges Lesbian Who Challenged Ban*, S.F. CHRON., Jan. 19, 1991; Randy Shilts, *Gay Troops in the Gulf War Can’t Come Out*, S.F. CHRON., Feb. 18, 1991; Randy Shilts, *In Wake of War, Military Again Targets Gays*, S.F. CHRON., Aug 5, 1991; also see RANDY SHILTS, *CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY* (Columbine-Fawcett 1993).

66. See Wade Lambert, *Gay GI’s Told, Serve Now, Face Discharge Later* WALL ST. J., Jan. 24, 1991, at B1; Wade Lambert & Stephanie Simon, *U.S. Military Moves to Discharge Some Gay Veterans of Gulf War*, WALL ST. J., July 30, 1991, at B6; Doug Grow, *Captain Did her Duty, Despite Military’s Mixed Messages*, MINN. STAR TRIB., March 16, 1993, at 3B; David Kirby, *Think Before You Tell*, THE ADVOCATE, Dec. 4, 2001.

to duty despite his public acknowledgement that he was gay.<sup>67</sup> His dismissal form was marked “completion of service” rather than homosexual conduct, thus allowing the Navy to re-deploy him in the future.<sup>68</sup> Only after the sailor became the subject of an article in STARS AND STRIPES, a military newspaper, did the Navy finally and swiftly discharge him for homosexual conduct.<sup>69</sup>

In 2005, the Palm Center publicized additional data showing this same pattern of retaining known gay and lesbian troops during the recent wars in Afghanistan and Iraq, notwithstanding the “don’t ask, don’t tell” policy. The evidence the Palm Center supplied began with an Army Commander’s Handbook obtained in 2005 entitled, “Regulation 500-3-3 Volume III, Reserve Component Unit Commanders Handbook.” In Table 2.1 on “Personnel Actions during the Mobilization Process,” it says under the criterion of “homosexuality”: “if discharge is not requested prior to the unit’s receipt of alert notification, discharge isn’t authorized. Member will enter AD [active duty] with the unit.”<sup>70</sup> As we reported, the intent of this document—to reduce the loss of personnel during mobilization—was corroborated by Kim Waldron, spokesperson at the U.S. Army Forces Command at Fort McPherson, who acknowledged publicly that the Pentagon was sending openly gay service members into combat in Iraq: “The bottom line is some people are using sexual orientation to avoid deployment,” she said. “So in this case, with the Reserve and Guard forces, if a soldier ‘tells,’ they still have to go to war and the homosexual issue is postponed until they return to the U.S. and the unit is demobilized.”<sup>71</sup>

Donnelly disputes our interpretation of the regulation, but her sole evidence for doing so is a personal email she received from a military spokesperson, which Donnelly declares “countered that argument with a clarification.”<sup>72</sup> The email itself, however, offers no evidence or explanation for why the earlier official Pentagon statement given might be wrong, but is simply a re-statement of policy, saying that if a soldier declares himself or herself to be gay or lesbian, “the review process continues while the unit is deployed and there is no delay in resolving the matter or discharging the Soldier if that is the resolution.”<sup>73</sup> The email is non-responsive to the question of whether gays are, in fact, discharged when they make statements, since it effectively cancels itself out by ending with the phrase “if that is the resolution.”

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67. See Joseph Giordano, *Discharged Gay Sailor is Called Back to Active Duty*, STARS AND STRIPES, May 6, 2007, available at <http://www.stripes.com/article.asp?section=104&articles=54151&article=true>; Joseph Giordano, *Discharge Papers ‘Don’t Tell’ Sailor is Gay*, STARS AND STRIPES, May 7, 2007, available at <http://www.stripes.com/article.asp?section=104&article=54054&archive=true>; Joseph Giordano, *Navy Bars Outed Gay Sailor From Return to Service*, STARS AND STRIPES, June 10, 2007, available at <http://www.stripes.com/article.asp?section=104&article=54151&archive=true> [hereinafter Giordano, *Navy Bars*].

68. Giordano, *Navy Bars*, *supra* note 57.

69. *Id.*

70. FORSCOM REGULATION 500-3-3 VOLUME III, RESERVE COMPONENT UNIT COMMANDERS HANDBOOK (1990) since updated.

71. Waldron’s statements were reported in the WASHINGTON BLADE: Lou Chibbaro Jr., *Out Gay Soldiers Sent to Iraq, Regulation Keeps Straights from “Playing Gay” to Avoid War*, WASHINGTON BLADE, Sept. 23, 2005, available at <http://www.washblade.com/2005/9-23/news/national/outiraq.cfm>.

72. Donnelly, *supra* note 1, at 921.

73. *Id.* at 921, n.517.

The Palm Center received a nearly identical “personal” email from the Pentagon seeking to reverse Waldron’s statement, in response to our own effort to corroborate the Pentagon practice of retaining known gays.<sup>74</sup> The only difference is that the email to Donnelly references the Pentagon’s earlier statement as coming from a “spokesman” while the email to us uses the word, “spokesperson” since it is in response to the statement of a woman, Kim Waldron.<sup>75</sup> This means that, apparently, Waldron was not the only person to have acknowledged, in an official capacity, that during mobilization, homosexual discharge proceedings are postponed until the service member returns home.

Donnelly posits that it is a “contradictory claim” to argue both that the military is losing too many gay and lesbian troops and also that discharge figures have declined since the United States went to war.<sup>76</sup> There is, of course, no contradiction: one can simultaneously point to how any gay discharge undermines military readiness, while noting a downturn in discharge figures. And the discharge downturns since the U.S. mobilized for war in 2001 are undisputed: those figures declined every year but one since 2002, echoing a clear historical pattern in which gay and lesbian discharges decrease in all wars and military conflicts.<sup>77</sup> The reader can weigh the evidence against the veracity of the claims made by Donnelly and decide which is more persuasive. The Congressional Research Service, the Palm Center, and the other sources noted above have made the evidence available to the public.

#### A SEA CHANGE IN MILITARY OPINION

“Don’t ask, don’t tell” is designed to address heterosexual discomfort with serving alongside known gays and lesbians, and it is certainly the case that prejudice, intolerance, and discomfort remain a part of the American cultural landscape. While it is true that many different kinds of Americans work together, play together, and live together, it is no doubt also the case that racism, sexism, and religious intolerance exist. In none of these cases, however, does the government take polls of service members in order to formulate military personnel policy that caters to whether one group likes or dislikes another group. In the case of “don’t ask, don’t tell,” however, Donnelly believes that unless and until heterosexual service members say that gays and lesbians should be allowed to serve openly, then law, regulation, and policy should continue to discriminate.<sup>78</sup> And she selectively cites from unreliable polls to support her claim that integration would fail.<sup>79</sup> While service members’ attitudes about serving alongside gays and lesbians cannot be assessed with 100 percent accuracy, some compelling data are nonetheless available, and those data suggest that significant shifts have taken place.

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74. Chibbaro, *supra* note 71.

75. *Id.*

76. Donnelly, *supra* note 1, at 920.

77. *See* Evans, *supra* note 32.

78. Donnelly, *supra* note 1.

79. *Id.* at 917–19.

Before documenting those shifts, however, it is important to explain why the polling results must be interpreted with caution, and why the polls that Donnelly cites are among the least reliable. The Pentagon has, for years, rejected repeated requests to study “don’t ask, don’t tell” and this has posed a serious obstacle to those who want to understand attitudes of active duty service members. Without the Pentagon’s cooperation, it is impossible to obtain a truly random sample of military personnel. And random sampling is the gold standard of surveying techniques. When a scholar wants to know about the attitudes of a population of people, usually it is necessary to take a poll of one sample of respondents drawn from the overall population in which the scholar is interested. For example, to determine whether Americans believe that the President is doing a good job, it is too expensive to survey every single U.S. citizen, and it is not possible to force universal participation. So, pollsters isolate a sample, usually about 1,000 people, and then report the attitudes of people in that sample as *if* they represented the same attitudes as the entire American public. They use statistical techniques to create a model sample that best reflects the whole.

Donnelly calls for “an objective poll of identified military personnel”<sup>80</sup> and complains that available polling data are not based on random sampling.<sup>81</sup> But without the Pentagon’s cooperation, no scholar can draw a random sample of military personnel. Hence, scholars must develop techniques and sampling strategies to assemble respondents who will answer their surveys and will best reflect the population they wish to study. Such statistical data are universally considered a valid method of data collection and widely used. In fact, virtually no polling is done using truly random sampling techniques. Almost all survey results including publicly released U.S. Census data and virtually every data product produced by the U.S. government uses statistical weighting. Indeed, it should be noted that polls that Donnelly and her allies have cited over the past 14 years to show that the troops dislike gays use just such approaches rather than random sampling, yet Donnelly never objects to the validity of polls that ostensibly support her case. In fact, Donnelly cites selectively from polls based on the least reliable methodologies.

One poll which Donnelly cites, for example, is administered to *Military Times* readers every year.<sup>82</sup> The December 2003 *Military Times* poll of 933 active duty subscribers found that only 24.6 percent of respondents believe that gays and lesbians should be allowed to serve openly, with 63.2 percent opposing and 12.2 percent expressing no opinion.<sup>83</sup> While it is interesting and instructive to survey MILITARY TIMES readers, this group does not represent overall military opinion because it is not truly representative of the full military population. Unlike the overall military, the pool of MILITARY TIMES survey respondents was split about evenly in composition between officers and enlisted personnel, and included only nine individuals ranked E-3 or below, and only 41 individuals

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80. Donnelly, *supra* note 1, at 918 n.502.

81. *Id.*

82. See the MILITARY TIMES Poll 200, [http://www.militarycity.com/polls/2003\\_chart2.php#2](http://www.militarycity.com/polls/2003_chart2.php#2) (raw data from the *Military Times* on file with author).

83. *Id.*



aged 24 or below. As both the Annenberg poll (discussed below) and MILITARY TIMES data show, support for allowing gays and lesbians to serve openly decreases as rank increases, and both the MILITARY TIMES and Gallup data show that support decreases as age rises. Hence, the *Military Times* results probably under-estimated overall military support for integration.

By contrast, Donnelly complains about a 2006 poll designed by Dr. Laura Miller, a military expert, along with scholars at the Palm Center, and administered by Zogby to 545 troops who served in Afghanistan or Iraq.<sup>84</sup> Donnelly says that the “absence of random access undermines the credibility of the poll,” but fails to acknowledge that statistical weights were used to approximate a representative sample of military respondents; in other words, mostly male, mostly conservative, and mostly enlisted. Using statistical weights to approximate a randomly drawn sample is less compelling than random sampling itself, but it is, again, a commonly-used technique when random access is not available. Statistical weighting is a much more scientific approach than that used by the *Military Times* poll which Donnelly praises; yet Donnelly makes no mention of this fact. Donnelly complains that the poll was administered to a sample drawn “from a purchased list of U.S. Military Personnel” and wrongly assumes this cannot be true because “the U.S. military does not sell or provide access to personnel lists.”<sup>85</sup> The list, however, was not purchased or obtained *from* the military (nor did we ever make such a claim), but was obtained from vendors who compile such lists. Again, this approach is not as solid as random sampling, but in the absence of Pentagon cooperation, there can be no random sampling. Rather than bemoaning the lack of random sampling by researchers, Donnelly should call on the Pentagon to cooperate with researchers to obtain the needed data, or offer a better scientific approach than the methods outlined here for tapping into military opinion.

What do the most well-designed polls say about military opinion? In 1993, two different surveys found that only 16 percent of male service members believed that gays and lesbians should be allowed to serve.<sup>86</sup> Since that time, however, shifts have occurred in two distinct areas: whether service members are personally comfortable around gays and lesbians, and whether they believe that gays and lesbians should be allowed to serve openly. On both counts, military opinion has shifted dramatically and there are a number of ways that this has been documented.<sup>87</sup>

First consider the question of personal comfort. The 2006 Zogby poll of 545 troops who had fought in Iraq and Afghanistan found that 72 percent are personally comfortable interacting with gays, and that of the 20 percent who are uncomfortable, 15 percent are “somewhat” uncomfortable and only five percent

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84. *Opinions of Military Personnel on Sexual Minorities in the Military*, Zogby International, Dec. 2006.

85. Donnelly, *supra* note 1, at 918.

86. Melissa Healy, *The Times Poll: 74% of Military Enlistees Oppose Lifting Gay Ban*, LOS ANGELES TIMES, Feb. 28, 1993, at A1 [hereinafter Healy]; Laura L. Miller, *Fighting for a Just Cause: Soldiers' Views on Gays in the Military*, in GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS AND CONTRASTS 70 (Wilbur J. Scott & Sandra Carson Stanley, eds., Aldine de Bruyter 1994) [hereinafter Miller].

87. Belkin, *Don't Ask*, *supra* note 8.

are “very” uncomfortable.<sup>88</sup> A March 2000 study by Major John W. Bicknell of the Naval Postgraduate School found that between 1994 and 1999, the percentage of U.S. Navy officers who “feel uncomfortable in the presence of homosexuals” decreased from 57.8 percent to 36.4 percent.<sup>89</sup> General Wesley Clark confirmed in 2003 that the “temperature of the issue has changed over the decade. People were much more irate about this issue in the early ‘90s than I found in the late ‘90s, for whatever reason, younger people coming in [to the military]. It just didn’t seem to be the same emotional hot button issue by ‘98, ‘99, that it had been in ‘92, ‘93.”<sup>90</sup> The data suggest that the majority of service members feel comfortable around gays and lesbians, and that for most of those who do not feel comfortable, the issue has become less emotionally intense in recent years.

What about service members’ policy preferences? We noted above that in the early 1990s, only a small minority of male service members favored allowing gays to serve openly.<sup>91</sup> An October 2004 poll by the Annenberg National Election Survey provides one window into service members’ current thinking.<sup>92</sup> According to Annenberg, 42 percent of service members believe that gays and lesbians should be allowed to serve openly. Somewhat surprising is that a slim *majority* of 50 percent of junior enlisted service members (versus 43 percent opposed) believes that gays and lesbians should serve openly.<sup>93</sup> (Officers and NCOs, by contrast, remain opposed.)<sup>94</sup> This finding is potentially significant not only because it represents a shift from the 1993 polls, but because junior enlisted service members are those individuals whose supposed inability to develop bonds of trust with openly gay peers is the stated rationale for “don’t ask, don’t tell.”

Unlike many other polls of military attitudes, Annenberg obtained a sample that was roughly representative of the entire military by using a scientific procedure in which phone numbers were “randomly selected by a computer from a complete list of thousands of active residential exchanges across the country.”<sup>95</sup> Of the many thousands of individuals contacted by Annenberg, 655 respondents indicated that they or a household member had served in the military between February and October 2004.<sup>96</sup> The responses from those military households were isolated from civilian households and analyzed separately to generate the findings of the poll.<sup>97</sup> For those service members deployed abroad or unavailable to complete the survey, a household family

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88. Zogby, *supra* note 7.

89. John W. Bicknell, Jr., *Study of Naval Officers’ Attitudes Toward Homosexuals in the Military* (submitted for the degree of Master of Science in Management, Naval Postgraduate School, Monterey, California, Mar. 2000).

90. *Meet the Press* transcript (NBC television broadcast June 15, 2003).

91. Healy, *supra* note 84; Miller, *supra* note 86.

92. See NAES 04, *National Annenberg Election Survey*, available at [http://www.annenbergpublicpolicycenter.org/naes/2004\\_03\\_2military-data\\_10-16\\_pr.pdf](http://www.annenbergpublicpolicycenter.org/naes/2004_03_2military-data_10-16_pr.pdf) [hereinafter NAES 04].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

member was queried as a proxy.<sup>98</sup> One potential bias of this methodology is that if a family member holds views that are inconsistent with those of the service member, the polling results may not reflect the same findings of a purely random approach. That said, some research demonstrates a degree of political similarity among husbands and wives.<sup>99</sup> In addition, considering that service members are deployed throughout the world in so many different locales, Annenberg's methodology appears to come much closer to approximating a representative, randomly drawn sample than other non-random methods for surveying military opinion.

Finally, Donnelly says of the Zogby poll that "the twenty-six percent of respondents who wanted the law repealed could not compete with the combined sixty-nine percent of people who were opposed to or neutral on repeal."<sup>100</sup> Given that 32 percent of respondents were neutral, however, another way of reporting the data is that the 37 percent who disagree with allowing gays and lesbians to serve openly could not compete with the 58 percent who favor repeal or who are neutral. Perhaps this is the point at which to remember that the rationale that Congress articulated for firing gays and lesbians is that heterosexuals could not work with gays and lesbians and develop bonds of trust with them, and that unit cohesion would therefore deteriorate following the lifting of the ban. The question, in other words, is not whether the troops want the ban to be lifted, but whether they can work with gays and lesbians. And on this point, as described above, the data are, in fact, decisive: a continuously shrinking minority of service members expresses adamant opposition to working with gays and lesbians.

To return to a question raised at the beginning of this section, how relevant are the troops' attitudes, especially when it comes to whether or not they say they can work with gays and lesbians? In both Britain and Canada, prior to the lifting of gay bans, about two-thirds of troops said that they could not work with gays and lesbians. But when policies changed in both countries, there were but a handful of resignations, and no overall decrease in cohesion. If the Pentagon is ordered to allow gays and lesbians to serve openly, military leaders will find ways to ensure that the policy transition is a non-event, as it was in every other country that lifted its ban. That is what matters.

#### LOSS OF CRITICAL SPECIALISTS, INCLUDING ARABIC LINGUISTS

In November 2002, the Palm Center's Dr. Nathaniel Frank reported in the *NEW REPUBLIC* that the military had fired seven Arabic linguists for being gay.<sup>101</sup> The news made international headlines and struck a chord among the public at large. Prior reports had indicated that intercepted intelligence cables warning of the attacks of September 11<sup>th</sup> had never been translated due to the government's shortage of Arabic linguists, and the public was surprised that translators were

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98. *Id.*

99. M. Kent Jennings and Laura Stoker, *Political Similarity and Influence Among Husbands and Wives* (Institute of Governmental Studies, Working Paper 2001-14, 2001).

100. Donnelly, *supra* note 1, at 917.

101. Nathaniel Frank, *Perverse: The Gay Ban vs. the War on Terrorism*, *NEW REPUBLIC* (Nov. 18, 2002).

being purged under the “don’t ask, don’t tell” policy. Since the story first broke more than five years ago, additional evidence has come to light. In 2005, for example, the Government Accountability Office reported that the military had fired 322 linguists with skills in important foreign languages during the first decade of “don’t ask, don’t tell,” and in 2007, the Associated Press reported that the military had fired a total of 58 Arabic linguists for being gay during the first fourteen years of the policy.<sup>102</sup> The Palm Center was responsible for bringing some of these data to the public’s attention, and Donnelly writes that there are “several disparities” in the linguist data reported by Palm researchers.<sup>103</sup>

Donnelly tries to cast doubt over the data by suggesting that because some of the linguists who were discharged had not completed advanced training, they cannot reasonably be called “linguists,” and she minimizes the significance of another report of fired linguists by saying their “type and level of proficiency. . . varied considerably.”<sup>104</sup> In yet another instance, Donnelly suggests that the Palm Center (formerly named the CSSMM) published a misleading report about linguists who were fired for being gay. Here is what she says:

In July 1994 [*sic*], the Center for the Study of Sexual Minorities in the Military (CSSMM) claimed the military was discharging valuable personnel in important military specialties. These included, for example, “49 nuclear, biological, and chemical warfare specialists; 212 medical-care workers; 90 nuclear power engineers; 52 missile guidance and control operators; 10 rocket, missile and other artillery specialists; 340 infantrymen; 88 linguists; and 163 law-enforcement specialists.” . . . As for the eighty-eight discharged linguists, the list of “Primary DoD Occupation Code” titles includes, at number 241, “Language interrogation,” an occupation from which a total of fifteen persons were separated due to homosexuality. But that is seventy-three persons short of the number of discharged “linguists” cited. How to account for the discrepancy? A Duty Base Facility Identifier Table, also provided by the DMDC, indicates that a total of seventy-three persons were separated from the Presidio of Monterey, where the Defense Language Institute is located. It is not clear how the CSSMM came up with the claim that “eighty-eight linguists” were discharged due to the “Don’t Ask, Don’t Tell” policy. Fifteen plus seventy-three, coincidentally, equals eighty-eight.<sup>105</sup>

If the reader of Donnelly’s accusation came away with the false impression that the Palm Center had tried to “pull a fast one,” we would not be surprised. What does surprise us, however, is that Donnelly ignores the qualifications that the Palm Center published when it first released the original data. In the same press release that Donnelly cites above, and in which we reported the discharge of linguists, we noted that “with regard to foreign language specialists, the military discharged 73 service members from the Presidio of Monterey, home of the Defense Language Institute (DLI), and 15 specialists in language

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102. See GAO, Defense Force Management, DOD’s Policy on Homosexuality, Report to Congressional Requesters, *GAO/NSIAD-92-98*, June, 1992, Ex.PX-5. Lolita C. Baldor, *Military discharges gay Arabic linguists: congress members seek hearing*, ASSOCIATED PRESS, May 23, 2007.

103. Donnelly, *supra* note 1, at 922.

104. *Id.* at 923.

105. *Id.* at 922–23.

interrogation, for an *apparent* total of 88 linguists between 1998-2003.”<sup>106</sup> Further, we stated that we proactively sought further data to confirm these figures, noting that “the CSSMM has submitted a second FOIA request to determine the specific language expertise of the discharged linguists, and to determine whether all of those discharged from the DLI were linguists.”<sup>107</sup> We carefully qualified our interpretation, in other words, and we published all original data on our web site for readers to verify our claims. And when we obtained the results of our second data request, we published those data on our web site as well. Our conclusions remained the same. The Pentagon has released data about discharged linguists in fits and starts, and often in confusing formats. The Palm Center has published all the original data that we have obtained so that readers can form their own conclusions.

THE LOWEST COMMON DENOMINATOR: NAME-CALLING THAT PASSES FOR  
SCHOLARLY ANALYSIS

What to do when all the evidence stacks up against the position you favor? In 2005, a cadet at West Point named Alexander Raggio wrote a senior thesis entitled “Don’t Ask, Don’t Tell, Don’t Be: A Philosophical Analysis of the Gay Ban in the U.S. Military,” in which he argued that the ban should be scrapped because it is inconsistent with military values.<sup>108</sup> West Point’s English Department then honored Raggio with the Brigadier General Carroll E. Adams Award for best thesis, an award that is presented each May to the West Point Cadet who writes the best thesis in Art, Philosophy, or Literature. The study also earned special recognition from the Vice Dean for education. Elaine Donnelly’s Center for Military Readiness, in turn, nominated West Point for its so-called “Patsy Award” for having given the Brigadier General Carroll E. Adams Award to Raggio.<sup>109</sup> The name of the award is based on the following sham definition of a “patsy,” which, according to Donnelly, is engraved on the award plaque: “An Official Whom Feminists Have Used to Impose Their Policies on the Men and Women of the Military.”<sup>110</sup> The award appears designed to scold officials for what Donnelly refers to elsewhere as “fem fear,” which she defines as “an emotion that grips the hearts of men who are terrified

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106. Palm Center Press Release, *Mission-Critical Specialists Discharged For Homosexuality: New Data Reveal Extensive Talent Loss Under ‘Don’t Ask, Don’t Tell.’* June 21, 2004, available at [http://www.palmcenter.org/press/dadt/releases/mission\\_critical\\_specialists\\_discharged\\_for\\_homosexuality\\_new\\_data\\_reveal\\_extensive\\_talent\\_loss\\_under\\_dont\\_a](http://www.palmcenter.org/press/dadt/releases/mission_critical_specialists_discharged_for_homosexuality_new_data_reveal_extensive_talent_loss_under_dont_a) (emphasis added).

107. *Id.*

108. Lt. Alexander H. Raggio, “Don’t Ask, Don’t Tell, Don’t Be: A Philosophical Analysis of the Gay Ban in the U.S. Military,” Senior Thesis, United States Military Academy at West Point, Apr. 29, 2005.

109. See *CMR Announces Inaugural ‘Patsy’ Award*, (Oct. 17, 2006), available at <http://www.cmrlink.org/PeopleintheNews.asp?docID=280> [hereinafter *CMR*].

110. See *CMR*, *supra* note 109. According to the Oxford English Dictionary the definition of “patsy” is “a person who is ridiculed, deceived, blamed, or victimized,” 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2125 (Clarendon Press, 1993). On the etymology of the term as racist slang and “an example of racial cliché, in this case Irish Stupidity,” see Louis Phillips, *On the Origin of Patsy* 65 AMERICAN SPEECH 193 (1990).

that feminists—including women on the Armed Services Committees—might get angry at them.”<sup>111</sup>

Donnelly argues that “Raggio had every right to express his opinions, but the paper was thinly sourced and did not even cite or accurately describe the text of the 1993 law.”<sup>112</sup> As to the veracity and substance of Donnelly’s critique of Raggio’s work: Raggio offers twelve footnotes to support approximately eighteen pages of text, but Donnelly offers no evidence about the relevant standard, in other words the average or expected number of citations in a West Point undergraduate thesis. As to his reading of the law, Donnelly offers no elaboration as to why she thinks it is incorrect, and no analysis of Raggio’s central argument. If Donnelly wants to engage in a serious discussion about the quality of Raggio’s work, then she is of course welcome to do so. While we are always glad to engage in an honest conversation about the quality of research related to gays and lesbians in the military, we are concerned when participants in the debate resort to name-calling in lieu of scholarly analysis.

#### SHOOTING THE MESSENGER

Donnelly refers repeatedly to the Palm Center as an activist group.<sup>113</sup> In an online article describing the awarding of CMR’s inaugural “Patsy Award,” the Palm Center (formerly the CSSMM, but wrongly identified by Donnelly as Berkeley-based), is accused of misrepresenting our research and mission. The web site states: “The Berkley-based [*sic*] CSSMM presents itself as an objective source, but it is actually an activist group that relentlessly pushes for homosexuals in the military,” and continues by claiming that “The CSSMM has offered honoraria to individuals who write papers or schedule college campus events promoting that cause, and routinely releases contrived ‘studies,’ based on faux data, to promote their doctrinaire agenda.”<sup>114</sup> She writes,

The only thing that has changed since 1993 is an illusion of momentum for repeal of the law created by a skilled and persistent public relations campaign that began in 2003, the tenth anniversary of passage of the law. . . . The public relations campaign has been advanced most often by periodic releases of various ‘studies,’ reports, or polls produced, sponsored, or influenced by the University of California, Berkeley-based [*sic*] Center for the Study of Sexual Minorities in the Military (CSSMM), now called the Michael D. Palmer [*sic*] Center, and like-minded groups. A closer look at materials produced by the activist groups usually reveals questionable methodology and unsupported conclusions.<sup>115</sup>

The CMR web site states that the Palm Center is “an activist group that has promoted homosexuals in the military for years—usually by releasing or

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111. Donnelly, *supra* note 1, at 940.

112. *Id.* at 916.

113. Donnelly, *supra* note 1, at 918.

114. *See* CMR, *supra* note 109.

115. Donnelly, *supra* note 1, at 915–16.

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promoting various faux 'studies' that cannot withstand close scrutiny."<sup>116</sup> Donnelly again refers to the Palm Center as "activist" in a reprint of a WASHINGTON TIMES piece from March 18, 2007: "In December 2006, for example, Zogby International released a poll that was commissioned by the Center for the Study of Sexual Minorities in the Military, a gay activist group now called the Michael D. Palm Center."<sup>117</sup>

Her strategy echoes other critiques of the Palm Center's research. For example, and as previously mentioned, in 2004, PARAMETERS, the official journal of the U.S. Army War College, published a critique of the Center's integrity by Major Joseph A. Craft of the U.S. Marines.<sup>118</sup> Craft characterized the Palm Center as "a homosexual activist group spreading pure propaganda poorly disguised as legitimate research."<sup>119</sup> He added that the Center is "engaged in an intense information campaign to market, normalize, and legitimize the homosexual political agenda."<sup>120</sup> These repeated characterizations and labeling of the Palm Center's work as "activist" are designed to negate its scholarly status by implying to readers that the work of the Palm Center is biased, that its studies are matters of foregone conclusion, and that its mission is influenced by a political agenda to the point of lacking any objectivity or integrity.

The Palm Center is not an activist organization. Unlike activist groups, the Palm Center publishes *all* data it finds, whether or not those data support one particular policy or another. Indeed, Donnelly's DUKE article includes evidence that we published in the Zogby poll, evidence which she believes bolsters her case. Even Charles Moskos, the principal architect of the "don't ask, don't tell" policy, said that the Palm Center's scholarship is "reflective of integrity and honesty" and that he found the Palm Center's reporting of facts regardless of whether they support integration to be "remarkable and rare."<sup>121</sup>

As Belkin explained in his original reply to Maj. Craft, the Palm Center's research conclusions follow from the data, not from personal beliefs: "While my passion for research derives in part from a desire to hold experts who fail to tell the truth accountable," Belkin wrote, "my research conclusions follow from evidence, not from personal beliefs. If Craft or others can identify foreign militaries whose effectiveness deteriorated or whose health care systems were overwhelmed as a result of eliminating a ban, I will modify my views

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116. *Zogby Poll Spins Push for Gays in the Military*, CENTER FOR MILITARY READINESS, Feb. 28, 2007, <http://www.cmrlink.org/HMilitary.asp?docID=287>.

117. Elaine Donnelly, *General Pace and the PC Police*, WASH. TIMES, Mar. 26, 2007, available at <http://www.cmrlink.org/HMilitary.asp?docID=289>.

118. Maj. Joseph A. Craft, *Legitimate Debate, or Gay Propaganda?* 34 PARAMETERS 132 (2004), available at <http://www.carlisle.army.mil/usawc/Parameters/04summer/contents.htm> [hereinafter Craft].

119. *Id.*

120. *Id.* at 133.

121. Email from Charles Moskos to Aaron Belkin (Feb. 13, 2004 and Mar. 22, 2004) (on file with author). Also cited in Craft, *supra* note 118.

accordingly. (My institute will entertain fellowship applications for this research, as always, in good faith.)<sup>122</sup> That offer, of course, still stands.

Perhaps most importantly, there is nothing radical and very little that is unique in the Palm Center's research. Many other scholars who are not affiliated with the Palm Center, including military scholars as well as scholars affiliated with the military and military organizations, have reached the same conclusion that some of the Palm Center's studies reach: allowing gays and lesbians to serve openly would not harm the armed forces.<sup>123</sup> Experts agree that a growing body of evidence demonstrates that there is no negative impact on military effectiveness when gays and lesbians serve openly. This is not to say that there are no unanswered questions or a clear path to policy change, but the basic facts remain: public and military opinions have changed since 1993, and the evidence has amassed from both U.S. and foreign militaries that firing people who say that they are gay is not necessary for the preservation of military readiness. Donnelly is free, of course, to continue to pass judgment on the Palm Center's integrity. But even if the Palm Center's research magically disappeared, the remaining majority of scholarly evidence would still show that integration would not harm the military. For those who wish to argue that integration would harm the military, the empirical evidence so far simply is not there.

#### A FINAL RED HERRING

Donnelly argues that the "don't ask, don't tell" policy is a misnomer because, contrary to what was widely reported in the press, Congress overrode Clinton's effort to liberalize the policy and simply codified the ban that was previously in place. "Congress rejected President Clinton's 'Don't Ask, Don't Tell' proposal with overwhelming, veto-proof bipartisan majorities," she writes.<sup>124</sup> "Instead, Congress passed a law that continued the pre-Clinton (1981) policy of excluding homosexuals from the military."<sup>125</sup> Donnelly repeats this claim in several different ways, saying that "there is no way that bipartisan, veto-proof majorities would have passed a law making it 'easier' for homosexuals to serve."<sup>126</sup> She claims that Congress adopted "unambiguous statements" banning homosexuals from military service,<sup>127</sup> but that the Clinton administration "disregard[ed] the legal mandate" of the statute<sup>128</sup> and that to

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122. Aaron Belkin, *Legitimate Debate, or Gay Propaganda? The Author Replies*, 34.2 PARAMETERS: US ARMY WAR COLLEGE QUARTERLY 137 (2004), available at <http://www.carlisle.army.mil/usawc/Parameters/04summer/contents.htm>.

123. See *National Defense Research Institute, Sexual Orientation and U.S. Military Policy: Options and Assessment* (RAND 1993); Sarbin et al., *Nonconforming Sexual Orientations and Military Suitability* (Defense Personnel Security Research and Education Center, PERS-TR-89-002), in *GAYS IN UNIFORM: THE PENTAGON SECRET REPORTS* (Kate Dyer, ed., Alyson Publications 1988); Elizabeth Kier, *Rights and Fights: Sexual Orientation and Military Effectiveness*, 24 INT'L SECURITY 196 (1999).

124. Donnelly, *supra* note 1, at 905.

125. *Id.*

126. *Id.* at 905-06.

127. *Id.* at 906.

128. *Id.* at 907.



describe the policy as “don’t ask, don’t tell” “effectively slanders the statute.”<sup>129</sup> The only concession made by Congress to the spirit of the Clinton proposal, she writes, “was omission [*sic*] of ‘the question’ about homosexuality” at accession. She claims, however, that “Congress nevertheless authorized restoration of routine inquiries about homosexuality by a future Secretary of Defense” if deemed necessary.<sup>130</sup>

Donnelly is wrong on two counts. First, she misreads the law. The section of 10 U.S.C § 654 that addresses the matter of asking recruits if they are gay or lesbian does not have the force of law, but is contained in a “Sense of Congress” which is non-binding and which does not “authorize” anything at all, but merely states that “it is the sense of Congress that... the suspension of questioning concerning homosexuality” that was begun under Clinton’s interim policy in January 1993 should continue.<sup>131</sup> Likewise, the section suggesting that a Defense Secretary “may reinstate that questioning” is also only a “Sense of Congress,” and is hence non-binding. Thus the law neither bans nor authorizes asking, but remains silent on the point, leading to Donnelly’s second fundamental mistake: there is no basis from which to conclude that the policy is “inconsistent with the law,” since the policy does nothing that is forbidden by the law, and there is nothing it fails to do that is mandated by the law. It is equally unfounded to claim that Congress never would have passed a law making it easier for gays and lesbians to serve, notwithstanding the “restoration” clause suggested in the “Sense of Congress.” After all, Congress would not have suggested continuing the suspension of asking about homosexuality if a majority of its members wished otherwise.<sup>132</sup> And so, in the absence of any statutory requirement to ask recruits if they are gay or lesbian, the Pentagon—quite legally—issued regulations that forbid the military from forcing service members to reveal their sexual orientation: “Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual.”<sup>133</sup>

Donnelly’s objective is to cast the military policy as one that, by law, deems homosexuals “ineligible” to serve in uniform, and she even takes the liberty of re-naming the statute the “Military Personnel Eligibility Act.”<sup>134</sup> Having (incorrectly) deemed the policy one of “ineligibility,” she then launches a consequently misguided attack on several developments relating to the rules governing homosexuality in the military. Upset that gays and lesbians are entering the military at all, she blames the Pentagon for failing “to comply with the legal requirement that entering service members should be informed of the

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129. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL’Y 815, 912 (2007).

130. *Id.* at 907.

131. 10 U.S.C. § 654 (1993).

132. Case in point, Duncan Hunter proposed an Amendment to revert back to asking people if they are homosexual before accession (H.AMDT.317), which failed 144-291. See Martin Kasindorf, *Gay Rights Lose in Military Bill*, NEWSDAY, Sept. 29 1993.

133. *Enlisted Administrative Separations, Department of Defense Directive Number 1332.14, and Enclosures 1-4* (Dec. 21, 1993), incorporating changes from Mar. 4, 1994, certified current as of Nov. 21, 2003 [hereinafter Directive 1332.14].

134. Donnelly, *supra* note 1, at 913, 915.

law, 10 U.S.C. § 654, which excludes homosexuals from the military.”<sup>135</sup> If they were told they were ineligible, she reasons, they would not enter in the first place, and waste taxpayer money when they are discharged. She then challenges the validity of polling data showing growing acceptance of gay service, based on the principle that respondents are more likely to support existing policy than to challenge it. “Incorrect assertions that ‘homosexuals can serve in the military provided that they do not say that they are gay’ are probably skewing polls of civilians,” she concludes, “who mistakenly believe that homosexuals are already eligible to serve.”<sup>136</sup> The Pentagon policy, in her view, “misinforms potential recruits about the conditions of eligibility.”<sup>137</sup> As we have argued throughout this paper, her critiques are based on flawed logic and empirical distortions. Yet another, independent reason why her critiques fall away is the mistaken foundation on which many of her arguments rely—her assertion that the Pentagon policy is an incorrect and unlawful implementation of the statute.

We would like to be clear: the fact that service members who refrain from homosexual conduct and conceal their homosexual identity remain technically eligible for service does not mean that the “don’t ask, don’t tell” policy successfully distinguishes between conduct and status—punishing the former while protecting the latter. This is because the policy defines “conduct” to include statements of status, and defines “statement” to include any action or inaction that fails to conceal one’s status from commanders.<sup>138</sup> Thus we agree with Donnelly that the policy has the effect of banning homosexuals from military service whenever they are unsuccessful at concealing who they are, but not that the policy makes homosexuals, per se, “ineligible.” While the Pentagon has spent fifteen years failing to enforce the law properly, it is not the case that its original 1994 implementing regulations were “inconsistent with the law.” Indeed, the entire question of compliance and whether or not the law is consistent with the policy serves as a diversion away from the only relevant question, which is whether or not the service of open gays undermines military effectiveness. And on that question, the evidence is clear.

#### THE IMPORTANCE OF OBJECTIVE ANALYSIS

Is military effectiveness really what Elaine Donnelly cares about? Donnelly accuses advocates of gays in the military of prioritizing “equal opportunity” considerations above “the needs of the military,” herself adopting a political rhetoric that, without any empirical evidence, posits a false tension between the rights of gays and the effectiveness of the military.<sup>139</sup> Ironically, it is Donnelly who elevates political and moral considerations above what is best for the military.

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135. *Id.* at 911.

136. *Id.* at 917.

137. *Id.* at 920.

138. Directive 1332.14, *supra* note 133.

139. Donnelly, *supra* note 1, at 929.

Donnelly would have her readers believe that the military is strong and hard, while she traffics in fears of its softness and vulnerability. In the opening of her article, *Constructing the Co-Ed Military*, Donnelly worries about an impending “disaster” akin to a fiery rocket explosion that threatens death and destruction in a time of national security crisis.<sup>140</sup> The “armed forces” she warns, “are a prime venue for social engineering”<sup>141</sup> and vulnerable to implosion from within. She paints a picture of a dangerous cohort of civilian “social engineers” who, she counsels, plan to test theories of “social construction” on unwitting patriots.<sup>142</sup> Invoking the 1967 Apollo 1 explosion as her disaster narrative analogy, she holds up NASA’s mechanical engineers as noble examples of “The Importance of Objective Analysis,”<sup>143</sup> who after initially ignoring early warning signs (“communication problems, a ‘sour smell’ in the spacesuit loop, and a sudden, unexplained rise in oxygen flow”) went on to challenge and objectively reevaluate their basic assumptions leading to mission success with Apollo 8.<sup>144</sup> She suggests that, in contrast, irresponsible social engineers exercise “theoretical hubris”<sup>145</sup> and “stifle objective analysis.”<sup>146</sup>

Though she attempts to galvanize her readers on the strength of their citizenship duty to become guardians of the military institution, military effectiveness is not really at the heart of what has Donnelly, the President of the Center for Military Readiness, worried. For Donnelly, the military as an institution is the guardian of society’s traditional male/female gender roles. Women’s integration into the military appears to be the “sour smell” in her disaster analogy, the early warning sign that signals gender trouble ahead, opening the flood gates to what will destroy the military as a bastion of masculinity and its attendant chivalric values: integration of gays in the military. In the company of other social conservatives who echo these same fears often verbatim,<sup>147</sup> Donnelly believes the military should be a place that upholds what she calls “civilized cultural values” and “Western cultural values and civilization,”<sup>148</sup> and by which she means a place where “good men protect and

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140. *Id.* at 816–17.

141. *Id.* at 821.

142. *Id.* Donnelly uses the term “social engineers” throughout the essay. She invokes patriotism in the first sentence in describing military culture: “All branches and communities have proud histories, cultural traditions, and members motivated by patriotism as well as personal career goals,” at 816.

143. *Id.*

144. *Id.* at 817.

145. *Id.*

146. *Id.* at 818.

147. R. Claire Snyder, “Patriarchal Militarism” at 266 (in *Masters of War: Militarism and Blowback in the Era of American Empire*, edited by Carl Boggs [New York: Routledge, 2003]), cites Michell Easton, president of the Clair Booth Luce Policy Institute warning of the dangers of the “feminization of the military”: “If we continue to allow the social engineers, the feminists, and the politicians to experiment with women in the military, our nation will not have the security and preparation that it needs for the future” and WASHINGTON TIMES columnist Mona Charen similarly warns, “The United States military exists to win wars, not to serve as the tool of a bunch of feminists.”

148. Donnelly, *supra* note 1, at 930.

defend women” and where “traditional chivalry” is not dead.<sup>149</sup> King Arthur’s legendary court of Camelot was the seat of the most chivalrous knights in the land and regarded as the pinnacle of civilized and chivalrous life. By invoking chivalric values, Donnelly is participating in a neo-medieval mythology that bemoans the passing of a by-gone era that never really existed anywhere except in fable. Of course, Donnelly disregards the reality that the United Kingdom, arguably once the seat of “Western Civilization” under the British Empire, has adopted a policy of non-discrimination and allows gays and lesbians to serve openly, in civilized co-existence.

Cloaking her essay and her Center in the trappings of concern for military readiness, Donnelly presents a treatise against women’s civil equality and a platform for advocating patriarchal values such as the gendered division of labor and the protection of women. Donnelly hinges her arguments about the co-ed military on her opposition to women, and especially mothers, in combat roles. Her vehicle is the military, but her ultimate concern is society and the construction of a so-called “family values” platform. It is in fact Donnelly herself who appears to view the military as a site for social engineering, and she worries that that project is failing.

In brief, she concedes that women have served effectively in support roles,<sup>150</sup> but maintains such situations, and the inescapable sexual tension of co-ed environments, present a danger to women as well as to men in combat.<sup>151</sup> She relies on arguments from women’s physical inability to perform (“physical burdens that lie beyond the capabilities of most women”<sup>152</sup>) to the class-based argument that elite, career-oriented military women (a “few ambitious female officers”<sup>153</sup>) seek combat roles to further advance their careers at the expense of working-class enlisted women.<sup>154</sup> She further collapses violence against women in the military (rape, sexual assault, and specifically the infamous Tailhook scandal) with the threat of mortal combat all soldiers face by viewing the pursuit of the right of women to fight in the military as the promotion of “violence against women.”<sup>155</sup> Meanwhile, Donnelly tends to dismiss the validity of claims of rape and sexual assault in the military by consistently putting the qualifier “alleged” in front of references to “abuse” or “victims of sexual assault.”<sup>156</sup> She then labels policies that provide legal remedies for sex discrimination in the workplace “double standards”<sup>157</sup> that should be eliminated along with “quotas.” For established scholars of women in the workplace, these are familiar code

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149. *Id.* at 929–30.

150. *Id.* at 822.

151. Donnelly, *supra* note 1.

152. *Id.* at 835.

153. *Id.* at 854.

154. *Id.* at 853. Like Donnelly, Sandy Rios, the president of the Christian right group Concerned Women for America, appeals to the stereotype of an elite core of ambitious career women willing to place other women in danger for their own selfish gain: “This is no longer a power game where ambitious female officers try to advance their careers. This is a matter of life and death.” Quoted in R. Claire Snyder, *Patriarchal Militarism* at 266.

155. Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL’Y 815 (2007)

156. *Id.* at 931.

157. *Id.* at 822.

words that dismiss the existence of discriminatory practices, which such policies are designed to address. Donnelly's arguments involving the co-ed military, her approach to gender equity, sexual harassment, workplace discrimination, gender violence, and rape all have a greater societal resonance, just as she intends.

Women will be our weak link, she argues, speculating that "terrorists who are determined to create anarchy in Iraq by various means, including disruption of the Iraqi/American Training Teams, could easily use cultural prejudice against women and western culture to alienate male trainees who abjure obedience to women."<sup>158</sup> Or again, "International scandals involving sexual harassment, misconduct, or allegations of sexual assault between male Iraqi trainees and American women could be set off by provocative photos or interviews broadcast worldwide."<sup>159</sup> What is to blame for uniformed misconduct at Abu Ghraib? Women in the military, she says, for in her eyes, they are responsible for disrupting an otherwise professional environment, all the while ignoring documented cases of abuse and misconduct that occur in presumably all-male units.<sup>160</sup> Fallacies, such as the idea that women are inherently disruptive of standards of military conduct, and that men are incapable of complying with standards of conduct in the presence of women, are what Donnelly considers the social costs of a co-ed military.

Among the other costs of a co-ed military that Donnelly points to are the creation of separate accommodations for women<sup>161</sup> and the formulating of special concessions.<sup>162</sup> Submarines are her case-in-point as she summons a vision of the special medical dangers inherent in women's bodies. She imagines what she calls "gynecological emergencies,"<sup>163</sup> that "could endanger crew members and undermine undersea missions. The only female sailors who could safely be assigned to submarines," she argues, "would be women without the physical capability to have children."<sup>164</sup> She worries about the possibility of "birth defects to unborn fetus 'passengers' who accompany their mothers to work on the sub." In such baroque moments, Donnelly's alliances are transparent, relying as she does on the rhetoric of fetal iconicity used by groups that oppose reproductive rights and women's equality.

In general, her analysis of women, gender, and the military deserves continued scrutiny as part of a larger discourse on women, the law, and society, which is beyond the scope of the present essay. While the present essay focuses on her critiques of the "don't ask, don't tell" policy and the research that shows that gays and lesbians do not negatively impact military effectiveness, nonetheless, it should be noted that her own prevailing fears of how women's

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158. *Id.* at 852.

159. *Id.* at 853.

160. See, for example, the Toledo *Blade's* Pulitzer Prize reporting from 2003 on Vietnam era atrocities by the Tiger Force soldiers: <http://www.toledoblade.com/apps/pbcs.dll/section?Category=SRTIGERFORCE>.

161. Donnelly, *supra* note 1 at 860.

162. *Id.* at 872.

163. *Id.* at 863.

164. *Id.* at 863.

bodies may disrupt the delicate functioning of the military as a preserve of traditional masculinity, are not unrelated to her anxiety about homosexuality and homosexuals in the military. There is much more to be said about the linkages between disaster narratives regarding women (and women's bodies) and anxiety over homosexuality (and especially male homosexual bodies) in Donnelly's rhetoric. Fear and regulation of female sexuality and homosexuality operate as twin forces for the preservation and production of masculinity and patriarchal values in military and civic life. And the specter of these twin dangers are necessary for Donnelly to circumscribe women, restricting their social roles to reproduction and limited forms of civic engagement. Donnelly's writing therefore weds "noisy homosexuals and feminist activists" as "social engineers" of a cultural collapse figured by their perceived shared refusal of reproductive norms.<sup>165</sup> In this, she sounds not unlike her nineteenth century Victorian predecessors. Fearing the changes that women's suffrage, the split skirt, and the reform of marriage and property law would bring, they hailed the New Woman along with the decadent homosexual as "twin apostles of social apocalypse."<sup>166</sup>

There is little new or surprising in Donnelly's thinking as a self-described member of a cohort of conservative women who came of age under the tutelage of Phyllis Schlafly. Donnelly romantically describes hanging a framed memento, a presidential campaign placard inscribed "Women for Reagan," in her home every Valentines Day.<sup>167</sup> Galvanized by their alienation from the burgeoning women's movement, Schlafly inspired this cohort to form an opposition movement. The historic 1977 National Women's Conference held in Houston (the first and only national women's conference to be sponsored by the federal government), celebrating International Women's Year, also marked a watershed moment for anti-ERA counter-organizing. Feminist historians have documented how specifically the idea of the conscription of women was used to mobilize opposition to the Equal Rights Amendment and ultimately secure its defeat.<sup>168</sup> What is surprising is that since then Donnelly has been able to craft herself as an expert in all matters related to gender and the military and that she is able to publish and disseminate unsubstantiated critiques of scholarly work.

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165. Donnelly, *Military Voters Due an Agenda for Change*, WASH. TIMES, Feb. 4, 2001.

166. Dowling, *The Decadent and the New Woman in the 1890's*, 33 NINETEENTH-CENTURY FICTION 434, 447 (1979).

167. Donnelly, *What Women Wanted*, NAT'L REV ONLINE, June 7, 2004, <http://www.nationalreview.com/comment/donnelly200406070944.asp>

168. See ILENE ROSE FEINMAN, *CITIZENSHIP RITES: FEMINIST SOLDIERS & FEMINIST ANTIMILITARISTS* (New York University Press 2000).