

UNFINISHED BUSINESS: A DISCUSSION OF REMEDIES FOR VICTIMS OF INVOLUNTARY DISMISSAL UNDER DON'T ASK, DON'T TELL AND ITS PREDECESSOR, TOWARD A TRUE RECONCILIATION

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I. INTRODUCTION

The recent decision by Congress and the Obama administration to end Don't Ask, Don't Tell (DADT) in the United States Military was celebrated not only within the gay and lesbian community, but also throughout much of American society.¹ While the decision to overturn DADT represents a significant step forward in the struggle for equality, the consequences of decades of exclusion, maltreatment, and discrimination against one of the most vulnerable segments of the U.S. population cannot be ignored.

While purporting to protect the military's readiness and combat effectiveness, DADT and the exclusionary policy that preceded it

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¹ Kori Schulman, *The President on the Don't Ask, Don't Tell Repeal Act of 2010: "An Historic Step,"* The White House Blog (May 27, 2010, 10:31 AM), <http://www.whitehouse.gov/blog/2010/12/18/president-dont-ask-dont-tell-repeal-act-2010-historic-step>.

destroyed many lives and caused great harm to many others.² The victims of these policies experienced and continue to experience the effects of the denial of opportunity to serve their country and, in many cases, devastating economic, physical, emotional, and mental injuries. Evidence discovered during the repeal investigation revealed that despite the resources invested in defending the policy, even the advocates of DADT did not believe that the policy served the purposes they were defending.³ Instead, the policy represented both a capitulation to an antiquated and irrational form of prejudice belonging to a shrinking minority and to the demonization of a socially unpopular group. As with other dark chapters in the history of the United States, weak political leadership acquiesced and enabled the implementation and defense of the exclusionary policies.⁴

The courts, including the Supreme Court, enabled this discrimination by laying out the legal basis for these policies by reinforcing the idea that personhood could not be separated from conduct—leading to devastating consequences for gays and lesbians in uniform.⁵ While the repeal of these exclusionary policies is the most important step, it alone cannot fully heal the damage caused by decades of injustice and discrimination. Involuntary separations caused heavy losses of critical personnel, opportunities, and dreams, in addition to the heavy psychological harm of those affected.⁶ Thus, a mutually beneficial reconciliation is necessary for a military and a country that seeks to move forward.

By examining another dark chapter in American history—the internment of Japanese Americans during World War II—this Article makes a moral and legal case for a more complete resolution of harms to victims of anti-gay military discrimination. The successful reparations campaign waged by Japanese Americans who were interned during World War II has provided both inspiration and a helpful blueprint for reparation movements worldwide.⁷ This article seeks to show that by observing the

² See discussion *infra* Part III.

³ See discussion *infra* Part VI.D.

⁴ See discussion *infra* Part VI.C.

⁵ See discussion *infra* Part VI.A.

⁶ See *infra* notes 47–58.

⁷ See, e.g., Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 6 n.8 (2009) [hereinafter Yamamoto, *Reframing Redress*] (detailing how numerous reparations movements have drawn their inspiration from the Japanese American reparations experience).

parallels between these two dark periods, it is clear that DADT's historical chapter cannot be closed until reparations are paid to those who were victimized by the policies of exclusion. I argue that any acceptable remedy must include: a public apology that can help vindicate those who have been harmed by the discriminatory policy; a process of reinstatement for those who wish to continue serving; upgrades to the discharge status for those who were undeserving of a less than honorable discharge; a reinstatement of benefits resulting from a change of status; a reinstatement of educational and pension benefits to those who unjustly lost them; and other remedies commensurate with the harm experienced.

II. PRESIDENT OBAMA'S OFFICIAL STATEMENT ON THE REPEAL OF DON'T ASK, DON'T TELL

In his official statement after the Senate voted to repeal DADT, President Obama praised the efforts of all political and military leaders involved. He noted that the end of the exclusionary policy meant that "no longer would our nation be denied the service of thousands of patriotic Americans forced to leave the military, despite years of exemplary performance, because they happen to be gay. And no longer will many thousands more be asked to live a lie in order to serve the country they love."⁸ As the policy was being dismantled, President Obama urged the country to recognize that "[s]acrifice, valor and integrity are no more defined by sexual orientation than they are by race or gender, religion or creed"⁹

President Obama's recognition of the sacrifice and valor of gay service persons helps to frame the discussion for a possible reconciliation in several important ways. First, the timing of Obama's message provides an opportunity to reconcile because the harm experienced by the victims of DADT is recent, and therefore the damages can be more easily quantified.¹⁰ Though some victims are no longer alive, many other

⁸ Kori Schulman, *The President on the Don't Ask, Don't Tell Repeal Act of 2010: "An Historic Step,"* THE WHITE HOUSE BLOG (May. 27, 2010, 10:31 AM), <http://www.whitehouse.gov/blog/2010/12/18/president-dont-ask-dont-tell-repeal-act-2010-historic-step>.

⁹ *Id.*

¹⁰ See Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 291-93 (detailing criticism of the African American reparation claims by prominent scholars such as Yale Law Professor Boris Bittker in the 1970s, and more recently, David Horowitz, who argued against reparations for descendants of African

individuals who were subjected to the effects of the discriminatory policy can be identified and provided a remedy commensurate with their suffering. Additionally, Obama facilitated the start of a healing process. Obama's words revealed that for gay military personnel, the choice to serve in the military took a different kind of courage and sacrifice. Although military service requires a great deal of sacrifice from all who serve, it required gay military personnel to consciously decide to serve in silence while being exposed to discrimination, possible harassment, and potential danger from commanders and peers.

Obama's acknowledgement that integrity and valor are no more defined by sexual orientation than by race, gender, religion or creed also did several important things. It exonerated gay military personnel from the accusation that they were somehow morally inferior to those with whom they served. It expelled the notion that they were guilty of violating the rights of their bigoted counterparts and superiors. Further, it did away with the notion that gay military personnel were the cause of their own maltreatment. In addition, the president's acknowledgement attempted to restore the dignity and personhood of the individual by finally separating military performance from sexual orientation, thereby acknowledging that the military can no longer use a person's sexual identity as a misguided proxy for that person's ability to contribute to the Nation's security.

Most important, however, was that President Obama's statements promised a better future for those in uniform, and a more just and effective military for America. Nonetheless, these statements alone are not enough to remedy the problems caused by DADT. The wounds left behind by the devastating consequences of the policy require more than presidential acknowledgments to heal.

III. HARMS CAUSED BY DON'T ASK, DON'T TELL

Although it is impossible to fully quantify the economic and personal harm caused by DADT and its predecessor, these policies have led to the creation of a vulnerable underclass and the devastation of many lives. Throughout U.S. history, gays and lesbians have served America's military with distinction, honor, and valor. They have given their lives and exposed themselves to danger in every war. They have performed their duties while knowing that disclosing their true identity, even to their most

American slaves because of the passage of time and the difficulty of identifying actual victims of slavery).

trusted counselors, could lead to their dismissal, as well as irreparable damage to others. The following stories represent only a small percentage of the military's repression and maltreatment of gay personnel and demonstrate the need for a more thoughtful and complete reconciliation.

MAJOR MICHAEL D. ALMY

The story of Michael D. Almy, a former Major in the U.S. Air Force, is representative of many others whose accomplishments went unrecognized and whose dreams were shattered by DADT. Speaking as a witness before the Senate Committee on Armed Services, Major Almy testified about his experience under DADT.¹¹ Major Almy came from a family with a rich history of military service.¹² His father, a West Point graduate, retired from the Air Force after serving in Vietnam.¹³ Two of his uncles served tours of duty in World War II, Korea, and Vietnam, one retiring from the Marines and the other from the Army.¹⁴

In addition to having a rich military background, Major Almy was also very distinguished. He graduated from Reserve Officers' Training Corps in the top ten percent of all graduates nationally.¹⁵ In 1993, he was named the top officer in his unit, which consisted of about 1,000 people.¹⁶ During his career, Major Almy was deployed to the Middle East four times.¹⁷ Toward the end of his deployment, he was named one of the top officers of his career field within the entire Air Force.¹⁸

However, neither his background nor his accolades could shield him from the effects of DADT. While Major Almy was in Iraq, someone discovered personal e-mails written to his family and friends.¹⁹ During the height of the insurgency in Iraq, Major Almy's commander ordered a search of Major Almy's personal e-mails solely to determine whether he

¹¹ *Testimony Relating to the "Don't Ask, Don't Tell" Policy: Hearing Before the Comm. on Armed Servs.*, 111th Cong. 9–13 (2010) (statement of Michael D. Almy, Former Major, U.S. Air Force).

¹² *Id.* at 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 9–10.

had violated DADT.²⁰ After refusing to comment on the e-mails because they were personal, Major Almy was relieved of his command of nearly 200 airmen, his security clearance was terminated, and his pay was partially cut.²¹ Major Almy's commander noted that the suspension was not related to his performance or abilities as an officer.²² Despite letters written by a commander and several members of his unit that urged for his reinstatement, Major Almy was discharged under DADT after sixteen years of service.²³ Furthermore, he received only half the severance pay that he would have normally received had he been discharged for any other reason.²⁴ As a final insult, Major Almy was escorted off of the base by military police, as if he posed a threat to the military.²⁵

After expulsion, Major Almy had a difficult time establishing himself in life outside of the military.²⁶ Any time he applied for federal employment, Major Almy was forced to reveal aspects of his personal life because his discharge documents branded him as having been separated for "homosexual admission."²⁷ This created a distinct disadvantage when he applied for new positions.²⁸

Major Almy ended his presentation to the subcommittee by stating:

I only recently decided to come forward with my story as an example of a career of service to our country cut short by this discriminatory law. Multiply my story by nearly 14,000, and you begin to understand the magnitude of this law. . . . My greatest desire now is to return to the Air Force as an officer and a leader, protecting the freedoms of a Nation that I love, freedoms that I myself was not allowed to enjoy while I was serving in the military.²⁹

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 10–11.

²⁷ *Id.*

²⁸ *Id.* at 11.

²⁹ *Id.*

CORPORAL JUAN PEREZORTIZ

After immigrating to the United States, Corporal Juan Perezortiz enlisted in the Marine Corps as a way to thank his new country for the opportunities it had afforded him and his family.³⁰ While the beginning of his career blossomed with promotions and praise from his superiors, his rise was short lived.³¹ The arrival of a new sergeant brought turmoil and fear to Corporal Perezortiz's daily life.³² The sergeant became suspicious of Corporal Perezortiz and often expressed his belief that Corporal Perezortiz was a "faggot."³³ Soon after the sergeant made this belief known to Corporal Perezortiz's unit, Corporal Perezortiz's evaluation scores dropped from a 4.9 out of 5 to a 1.0.³⁴ Corporal Perezortiz learned that favorable evaluations by other superiors were routinely replaced by his sergeant's lower scores.³⁵ On many occasions Corporal Perezortiz requested to be transferred out of his unit.³⁶ After numerous letters of recommendation, the request was finally granted.³⁷ Unfortunately, he was ordered back to his former unit a few months before his six-year contract expired.³⁸ Corporal Perezortiz characterized these last few months as being a "living nightmare," in which he lived in physical fear of his sergeant.³⁹ After serving in the Marines for eight years, he chose not to re-enlist due to fear of DADT.⁴⁰ To this day, Corporal Perezortiz continues to express interest in re-enlisting.⁴¹

Retelling stories of service people whose lives were damaged by

³⁰ See Letter from Juan C. Perezortiz to President Barack Obama, in *Stories from the Frontline: Letters to President Barack Obama*, SERVICEMEMBERS LEGAL DEFENSE NETWORK (Jul. 1, 2011, 9:20 PM), <http://www.sldn.org/blog/archives/stories-from-the-frontlines-former-marine-corps-corporal-juan-c.-perez/>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

DADT and its predecessor is crucial to the success of any movement or legal challenge designed to seek a remedy for decades of discrimination. Storytelling can recapture the moral high ground of this issue by showing not only the discrimination suffered by gays and lesbians in uniform, but also their valor and sacrifice which, contrary to the crude stereotypes used in defense of exclusion, stand second to none. Major Almy's assessment that nearly 14,000 others had been similarly harmed is well short of the actual number.⁴² Recent figures suggest that the total number of active gay military personnel is well over 60,000.⁴³ These individuals continue to serve in secrecy under a threat of separation even though the policy has been repealed.⁴⁴ In addition, thousands of others experienced similar treatment under the former ban. Such stories include tales of harassment,⁴⁵ intimidation,⁴⁶ witch hunts,⁴⁷ false accusations,⁴⁸ physical violence,⁴⁹

⁴² See *Testimony Relating to the "Don't Ask, Don't Tell" Policy: Hearing Before the S. Comm. on Armed Servs.*, *supra* note 11.

⁴³ David Wiegand, 'Strange History of Don't Ask, Don't Tell' Review, S.F. GATE (Sept. 17, 2011), <http://www.sfgate.com/tv/article/Strange-History-of-Don-t-Ask-Don-t-Tell-review-2309721.php>.

⁴⁴ *Id.*

⁴⁵ After midshipman Robert Gaige wore a ribbon supporting AIDS victims, his instructor not only harassed him, but also encouraged others to do the same until Gaige finally disclosed his sexual orientation and was discharged. See NATHANIEL FRANK, *DON'T ASK, DON'T TELL: DETAILING THE DAMAGE 9* (Palm Center ed., Aug. 2010).

⁴⁶ After repeated harassment, such as receiving notes inscribed "Die fag," and, "You can't hide, fag," Airman Sean Ficci feared for his safety and reported the actions. The investigation yielded no punishment because Ficci was unable to proffer evidence of his homosexuality. See *id.* at 10.

⁴⁷ See Fiona Morgan, *Inside a Lesbian "Witch Hunt,"* SALON (Jun. 7, 2000, 9:00 PM), http://www.salon.com/2000/06/08/lesbians_2/.

⁴⁸ After being accused of homosexual activity by an adverse party to a money dispute, the military discharged Airman Sonya Harden under "Don't Ask, Don't Tell" even though she offered facts of her heterosexuality, including testimony by ex-boyfriends, her former accuser, and her own statements. FRANK, *supra* note 45, at 9.

⁴⁹ Examples of violence include a military commander who relentlessly harassed a female soldier after men who had assaulted and threatened to rape the soldier told her commander that she was a lesbian. The threats of imprisonment did not stop even after a military court dismissed the charges. See *id.* at 9. In another encounter, a commander decided to investigate an airman for being gay—which led to her discharge—instead of disciplining two women who attacked her with punches while screaming, "You sick fucking dyke." *Id.* A third case includes a soldier who was forced to sleep in his drill sergeant's office because he was beaten and threatened with a knife when a friend mentioned he might be gay. See Matt Comer, *Beaten and Harassed Gay Soldier Now Discharged from Army*, INTERSTATEQ (Jan. 6, 2006), <http://www.interstateq.com/archives/524>.

privacy violations,⁵⁰ torture,⁵¹ and murder.⁵² These stories also include accounts of enormous emotional harm to families,⁵³ loss of salary,⁵⁴ the stigmatizing effects of a less-than-honorable discharge,⁵⁵ and the loss of benefits, such as educational benefits, pensions, and health and disability insurance.⁵⁶

⁵⁰ An Arabic linguist and language graduate, Bleu Copas, was outed and discharged after anonymous emails from a suspected jealous lover surfaced. FRANK, *supra* note 45, at 10. Military investigators retrieved information from a military person's private America Online account to confirm the testimony of another shipmate's spouse reported as gay language. *See id.* at 9. Local police outed a married lesbian military person after they found her marriage certificate during an investigation of her spouse for a criminal act. The soldier had not come out to anyone in the military. *See id.* at 11.

⁵¹ Ronald Chapman endured severe beatings from fellow soldiers who suspected he was homosexual. When he finally reported the abuse, he was discharged even though being a soldier was his "dream [his] entire life." David Kirby, *Another Soldier's Story*, THE ADVOCATE, May 8, 2001, at 27, available at <http://goo.gl/EhjWx>.

⁵² Many soldiers have died because of their perceived homosexuality, including August Provost (shot then set on fire), Michael Goucher (ambushed near his home), Alan Shindler (beaten to death in a public restroom), and Barry Winchell (beaten to death by a baseball bat on base). *See Repeal and Remembrance: Gay Military Martyrs and the End of DADT*, UNFINISHED LIVES BLOG (Dec. 19, 2010), <http://www.unfinishedlivesblog.com/2010/12/19/repeal-and-remembrance-gay-military-martyrs-and-the-end-of-DADT>.

⁵³ *See Stories from the Frontlines: A Mother in the Closet*, SERVICE MEMBERS LEGAL DEFENSE NETWORK, <http://www.sldn.org/blog/archives/stories-from-the-frontlines-a-mother-in-the-closet/> (last visited Feb. 16, 2013).

⁵⁴ Lt. Col. Steve Loomis never told the army about his homosexuality, simply because they never asked. Loomis saved his unit from gunfire when they were ambushed in Vietnam. He was awarded two bronze stars and also received a prestigious purple heart after he was wounded in battle. Yet, eight days before reaching eligibility for his pension, he was discharged. *See* Rebecca Leung, *They Didn't Ask; He Didn't Tell*, 60 MINUTES (Jul. 9, 2011, 3:36 PM), <http://www.cbsnews.com/stories/2003/11/14/60minutes.html>.

⁵⁵ When her partner was diagnosed with lung cancer, Captain Monica Hill explained the least amount of details of her predicament necessary to request a deferred report date. The air force investigated her sexual orientation and discharged her a year after her partner died, while also trying to force Hill to pay back the cost of her medical school scholarship. *See Hill, Monica: Former Captain, U.S. Air Force (1994-2002)*, SERVICEMEMBERS LEGAL DEFENSE NETWORK, <http://www.sldn.org/pages/hill-monica> (last visited Feb. 16, 2013). Amy Brian, a National Guard specialist, lost her educational benefits when she was discharged under DADT. *See* Malcolm McClatchy, *Woman's Discharge Heightens Debate About Don't Ask, Don't Tell*, PANTAGRAPH (Feb. 22, 2009), http://www.pantagraph.com/news/article_61015d70-bbd4-52ee-a594-6181970cfd59.html.

⁵⁶ In a letter to President Obama urging him to repeal the law, a mother who referred to herself as a "mother in the closet" stated that she shared her son's fears of being discovered and being forced to forfeit a successful military career. In her words: "'Don't Ask, Don't Tell' throws more than just service people into the closet, it throws moms, dads, siblings, grandparents, friends and loved ones in there as well." The mother did not sign the letter to President Obama because she was afraid her son would be identified. Letter from A Mother in

IV. JAPANESE AMERICAN REPARATIONS AS A BLUEPRINT FOR OTHER MOVEMENTS

Japanese Americans faced a long history of discrimination in America⁵⁷ which peaked after the Japanese attack on Pearl Harbor.⁵⁸ At that point, negative attitudes against Japanese Americans throughout American society cemented the view that, as a group, they threatened national security.⁵⁹ As a consequence, the government established a removal and internment policy that imprisoned over 120,000 Japanese Americans.⁶⁰ Internment brought about devastating consequences including many individuals losing their homes, businesses, communities, and health.⁶¹ The economic greed of some non-Japanese American competitors facilitated the demonization of anyone of Japanese ancestry by labeling Japanese people as foreigners without a right to prosper in the United States, even if they were citizens.⁶² Discrimination was also made possible by the United States military's conscious decision to conceal vast amounts of information that disproved the belief that Japanese Americans posed a threat to national security.⁶³

The Japanese American internment program was the result of deep rooted prejudices, war hysteria, economic self-interest, weak political leadership and deference to uninformed military judgment.⁶⁴ The courts also aided these developments by deferring to military judgment regarding military necessity.⁶⁵ Despite the lack of evidence of disloyalty to the United States, and despite the existence of information to the contrary, Japanese Americans were collectively determined guilty simply due to their race, while the government addressed German and Italian national

the Closet to President Barack Obama, *Stories From The Frontlines: Letters To President Barack Obama*, SERVICEMEMBERS LEGAL DEFENSE NETWORK (Jun. 12, 2011, 4:00 PM), <http://www.sldn.org/blog/archives/stories-from-the-frontlines-a-mother-in-the-closet/>.

⁵⁷ See Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 601–02 (2003).

⁵⁸ *Id.*

⁵⁹ See *id.* See also Yamamoto, *Reframing Redress*, *supra* note 7, at 10 n.29.

⁶⁰ See Bryan, *supra* note 57, at 602. See also Yamamoto, *Reframing Redress*, *supra* note 7, at 10 n.29 (referring to the 120,000 Japanese Americans interned during WWII).

⁶¹ Yamamoto, *Reframing Redress*, *supra* note 7, at 10 n.29.

⁶² See Bryan, *supra* note 57, at 601.

⁶³ *Id.*

⁶⁴ See Yamamoto, *Reframing Redress*, *supra* note 7, at 1–6.

⁶⁵ *Id.* at 12.

security concerns on the individual level.⁶⁶ Lieutenant General John L. DeWitt, head of the Western Defense Command and one of the architects of the internment initiative, best summarized the visceral racism against the Japanese at the time:

I have little confidence that the enemy aliens are law abiding and loyal in any sense of the word. Some of them yes; many, no. Particularly the Japanese, I have no confidence in their loyalty whatsoever. I am speaking now of the native born Japanese,—117,000—and 42,000 in California alone. In the war in which we are now engaged, racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship have become “Americanized” the racial strains are undiluted. . . . You needn’t worry about the Italians at all except in certain cases. Also, the same for the Germans, except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area—problems which I don’t want to worry about.⁶⁷

Professor Eric Yamamoto and other prominent scholars extensively chronicled the Japanese American Reparations movement.⁶⁸ The movement began in the late 1960s when Japanese Americans launched a multilayered campaign of public education and legislative initiatives.⁶⁹ Ethnic studies programs that taught the story of the Japanese American experience and support from other ethnic and religious groups greatly benefited the movement.⁷⁰ However, the movement also found a formidable obstacle in Supreme Court precedents that essentially foreclosed a litigation-based remedy.⁷¹

In 1943, the U.S. Supreme Court ruled in *Hirabayashi v. United States* that the curfew and exclusion orders imposed on Japanese Americans were constitutional.⁷² The Court based its ruling on national security and military necessity, deferring to military judgment that

⁶⁶ See Yamamoto, *Reframing Redress*, *supra* note 7, at 10 n.29.

⁶⁷ ERIC YAMAMOTO & LIANN EBESUGAWA, *A Report on Redress: The Japanese American Internment*, in *The Handbook of Reparations* 257, 261 (Pablo De Greiff ed., 2006) [hereinafter Yamamoto, *Report on Redress*] (quoting testimony of Lieutenant General John De Witt).

⁶⁸ See generally Yamamoto, *Reframing Redress*, *supra* note 7.

⁶⁹ *Id.* at 12.

⁷⁰ *Id.*

⁷¹ See *id.* at 20.

⁷² *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943).

Japanese Americans constituted a threat to national security.⁷³ The following year, in *Korematsu v. United States*,⁷⁴ the Court again ruled to deprive Japanese Americans of their rights, once again finding that the internment program was constitutional due to national security and military necessity.

According to Professor Yamamoto and others who have chronicled the Japanese American reparations movement, the movement did not gain a firm foothold until the Supreme Court vindicated the petitioners' names in the *Korematsu* and *Hirabayashi* cases.⁷⁵ Those two cases finally established that the government had manufactured the justification for the internment program, and allowed both sides to begin the process of forgiveness and reconciliation.⁷⁶ Legislative initiatives kept the issue before Congress,⁷⁷ and in 1988, President Reagan signed into law the Civil Liberties Act of 1988.⁷⁸ The new law required a formal apology by the United States government and provided a financial remedy of \$20,000 to each living Japanese American who was interned during World War II.⁷⁹

The 1988 Civil Liberties Act was unprecedented in American History. The Act officially recognized the breakdown of democratic ideals and near-blind deference to the military in a time of crisis, resulting in an incalculable loss of property, jobs, and community.⁸⁰ It was also the vehicle by which the government attempted to repair the devastating effect of racism and war hysteria on a vulnerable racial group that was aggressively cast as foreign and disloyal during World War II.⁸¹ The Act symbolized the institutional restructuring that both cemented the gains of the movement and made it more difficult to repeat the reprehensible

⁷³ *Id.*

⁷⁴ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁷⁵ See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 489–90 (1998) (This article discusses the importance of the *Korematsu* and *Hirabayashi* cases. Yamamoto focuses on the fact that federal courts, after the internment of Japanese Americans, acknowledged that both the Justice and War departments were involved in destroying key evidence and “lied to the Supreme Court about the military necessity for the internment.”).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Bryan, *supra* note 57, at 602–03.

⁷⁹ See Yamamoto, *Reframing Redress*, *supra* note 7, at 16–17.

⁸⁰ See Yamamoto, *Reframing Redress*, *supra* note 7, at 10 n.29 (a detailed discussion of the various components of the Japanese American internment episode).

⁸¹ *Id.* at 14.

conduct.⁸² The government also demonstrated through the Act its willingness to finally recognize the magnitude of harm caused by its discriminatory policies, as well as its ability to accept responsibility to repair the personal, economic, and psychological damages suffered by its victims.⁸³ Perhaps most importantly, the Act represented the government's recognition of the inherent value of restoring the human dignity of a group that was brutalized, stigmatized, and vilified by the government's discriminatory policies.⁸⁴

V. PARALLELS BETWEEN INTERNMENT POLICY AND DON'T ASK, DON'T TELL

In an earlier article, I examined the history of DADT to determine the policy's defensibility in light of the legal, social, political, and military context under which it was enacted.⁸⁵ I concluded that the many justifications offered for its passage did little to mask the true motivation behind the exclusionary policy.⁸⁶ Indeed, the new law was carefully crafted to leave the former ban untouched and in fact made things even worse for gays in uniform.⁸⁷ My study of the legislative history of DADT revealed that, as was the case with the Japanese American internment, the impetus behind the policy was a high level of deference to the judgment of military leaders.⁸⁸ These leaders packaged their disapproval of gays in uniform in the form of deference to the sensibilities of a small number of individuals who objected to the presence of known gays and lesbians amongst them.⁸⁹ Military leaders themselves confirmed these findings in discussions and subsequent public statements that lead to the repeal of DADT.⁹⁰

⁸² See generally Yamamoto, *Reframing Redress*, *supra* note 7.

⁸³ *Id.* at 34.

⁸⁴ *Id.* at 37 n.193.

⁸⁵ Robert Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 415–16 (2008) [hereinafter Correales, *Don't Ask, Don't Tell*].

⁸⁶ *Id.* at 460.

⁸⁷ *Id.* at 419.

⁸⁸ *Id.* at 414. See also *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (explaining the court's reasoning for its deference to military leaders in permitting the internment of Japanese Americans during World War II, *superseded by statute*, Pub. L. 100-383, § 2(a), 102 Stat. 903 (arguing the appropriateness of deference to military judgment in the face of a perceived immediate threat to national security)).

⁸⁹ Correales, *Don't Ask, Don't Tell*, *supra* note 85, at 414.

⁹⁰ See Nathaniel Frank, *What was the Role of Moral Opposition to Homosexuality in the*

The legislative discussions and subsequent court decisions upholding DADT parallel the events of the Japanese curfew, forced removal, and internment during World War II.⁹¹ In each case, the government faced the task of defending a discriminatory policy that affected deeply, and in many cases devastatingly, the lives of countless people. The government chose to ignore significant evidence pointing to the indefensibility of proposed policies, as well as overlook and sometimes hide evidence that would undermine the discriminatory policy.⁹² However, in each case, the government was able to right its course and reverse itself. In the case of Japanese Americans who were harmed by government removal policies, the government made an effort to provide at least a partial remedy for these harms.⁹³

According to President Clinton, DADT represented a reasonable compromise between those who supported an outright ban of gays and lesbians in the military and those who advocated for integration.⁹⁴ However, careful analysis of the political and military context at the time reveals that the policy was merely a capitulation to the uninformed, intolerant opinions and political muscle of a stubborn military that refused to change.⁹⁵ Not surprisingly, the new policy changed virtually nothing.⁹⁶ In place of an outright ban, military and political leaders replaced a bad law with a legal fiction in which gays and lesbians would no longer be barred from service because of their sexual orientation, but would be barred if they engaged in homosexual conduct.⁹⁷

Debate over "Don't Ask, Don't Tell"?, UNFRIENDLY FIRE/PALM CENTER RESEARCH PORTAL, <http://www.unfriendlyfire.org/research/q7.htm> (last visited Feb. 16, 2013); see also DEMOCRATIC POLICY COMMITTEE, PENTAGON REPORT: REPEAL OF "DON'T ASK, DON'T TELL" CAN BE ACCOMPLISHED SUCCESSFULLY, INITIATED IMMEDIATELY (Dec. 1, 2010), available at <http://dpc.senate.gov/docs/sr-111-2-174.pdf>.

⁹¹ See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1382–83 (2009).

⁹² See *Children of the Camps: Internment History*, PBS, <http://www.pbs.org/childofcamp/history/index.html> (last visited Feb. 16, 2013); see Nathaniel Frank, *What Damage is Caused by "Don't Ask, Don't Tell"?*, UNFRIENDLY FIRE/PALM CENTER RESEARCH PORTAL, <http://www.unfriendlyfire.org/research/q4.htm> (last visited Jan. 31, 2013).

⁹³ See *Children of the Camps: Internment History*, *supra* note 92.

⁹⁴ BILL CLINTON, MY LIFE 485 (2004).

⁹⁵ See BILL CLINTON, MY LIFE 483–86 (2004) (President Clinton explains the overwhelming opposition from the Joint Chiefs of Staff, a veto-proof resolution in the House opposing repeal of the ban, and similar opposition in the Senate, causing him to fall well short of lifting the ban.).

⁹⁶ *Id.* at 485.

⁹⁷ See 10 U.S.C. § 654 (2006).

Homosexual conduct was broadly defined in DADT to include many actions that indicated a person's sexual orientation as gay or lesbian.⁹⁸ To eliminate the threat to military readiness due to homosexual conduct, the policy provided that a service member could be removed for: (1) homosexual acts; (2) marrying or attempting to marry a person of the same sex, or; (3) for stating one's sexual orientation to be homosexual.⁹⁹ In fact, the revelation of a person's sexual orientation raised a rebuttable presumption that the person was a homosexual, which, unless rebutted, led to their discharge from the military.¹⁰⁰ Under the policy, "homosexual" was defined as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. . . ."¹⁰¹ The law was thus cleverly designed to create a trap in which a person's sexual identity personified the individual, thereby perpetuating the outright ban, while purporting to allow homosexuals to serve in the military.

VI. THE MISGUIDED JUSTIFICATIONS OF THE COURTS, CONGRESS, AND MILITARY

A. LEGAL IMPEDIMENTS TO JUSTICE: JUDICIAL APPROVAL OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

The conflation of homosexual identity and sexual conduct that could be criminalized received Supreme Court approval in *Bowers v. Hardwick*, in which the Court considered an appeal by the state of Georgia of a facial challenge to a statute that criminalized sodomy.¹⁰² In many ways, *Hardwick* was to the gay community what *Korematsu* was to Japanese Americans.¹⁰³ Revealing its animus and disdain toward same-sex relationships, the Court ignored the fact that both heterosexual and homosexual couples could be prosecuted under the Georgia statute

⁹⁸ See *id.*

⁹⁹ *Id.* § 654(b)(1)–(3).

¹⁰⁰ See *Thomasson v. Perry*, 80 F.3d 915, 937 (4th Cir. 1996) (Luttig, J., concurring).

¹⁰¹ 10 U.S.C. § 654(f)(1) (2005).

¹⁰² *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰³ Lawrence Kent Mendenhall, Note, *Misters Korematsu and Steffan: The Japanese Internment and the Military's Ban on Gays in the Armed Forces*, 70 N.Y.U. L. REV. 196, 225–26 (1995).

(indeed, a heterosexual couple, John and Mary Doe, had joined Michael Hardwick, a gay man, in challenging the statute).¹⁰⁴ The court instead focused on homosexual sexual conduct, framing the issue as whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . .”¹⁰⁵

While sidestepping the issue of decisional privacy,¹⁰⁶ the Court justified its decision to allow states to criminalize homosexual conduct by comparing gays and lesbians to criminals who commit adultery, incest, and other sexual crimes.¹⁰⁷ Adding to the brutal debasement of gays and lesbians in the majority opinion, Justice Burger’s concurring opinion continued to frame the issue before the Court as one involving criminal conduct of the worst kind.¹⁰⁸ Relying on a gratuitous reference to Blackstone, which had described “‘the infamous crime against nature’ as an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’” Justice Burger further demonized those who engage in same-sex relationships as the moral equivalents of criminals of the most reprehensible type, for example adulterers, incestuous relatives, and rapists.¹⁰⁹

Following *Hardwick*, moral condemnation of gay relationships in the military enjoyed early judicial support in the lower courts and in case after case. In *Dronenburg v. Zech*, Judge Robert Bork rejected privacy and equal protection arguments in the case of a highly decorated gay officer who had been discharged from the Navy under the former ban.¹¹⁰ In a manner similar to *Hardwick*, Bork drew a comparison between same-sex consensual sexual conduct and all other types of sexual conduct, presumably even rape and pedophilia, when he stated: “[w]e would find it impossible to conclude that a right to homosexual conduct is ‘fundamental’ or ‘implicit in the concept of ordered liberty’ unless *any and all* private sexual behavior falls within those categories, a conclusion we are unwilling to draw.”¹¹¹ In *Stephan v. Cheney*, Judge Gasch rejected a challenge to the former ban, finding that regulations regarding forced

¹⁰⁴ *Hardwick*, 478 U.S. at 188.

¹⁰⁵ *Id.* at 190.

¹⁰⁶ *Id.* at 190–91.

¹⁰⁷ *Id.* at 195–96.

¹⁰⁸ *Id.* at 197 (Burger, J., concurring).

¹⁰⁹ *Id.*

¹¹⁰ *Dronenburg v. Zech*, 741 F.2d 1388, 1395–96 (D.C. Cir. 1984).

¹¹¹ *Id.* at 1396 (emphasis added).

separation of homosexuals were rationally related to the military's interest in protecting soldiers and sailors from AIDS, a position that had not been advanced by the military in that case.¹¹² In *Schowengerdt v. United States*, another case arising under the former ban, the Ninth Circuit declared that *Hardwick* foreclosed a substantive due process challenge to the policy.¹¹³

Similarly, in *Woodward v. United States*, the Federal Circuit denied claims of violation of equal protection and due process based on *Hardwick*, stating: "[w]e agree with the court in *Padula v. Webster* that 'there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.'"¹¹⁴ The Seventh Circuit reached a similar result in *Ben-Shalom v. Marsh*, a case challenging the former ban, in which the court relied on *Hardwick* to declare that the class of homosexual persons could not invoke heightened scrutiny when the conduct defining the class could be constitutionally criminalized.¹¹⁵ Furthermore, in *Pruitt v. Cheney*, the Ninth Circuit struck down a challenge to the old ban on similar grounds.¹¹⁶

B. CONGRESSIONAL AND MILITARY ANIMUS

The collapse of gay and lesbian personhood into sexual conduct that could be criminalized, which was devised by the lower courts and ratified in *Hardwick*, was reflected in the legal and moral arguments made by supporters of a gay ban during Congressional deliberations. In an exchange with Senator John Kerry, who supported lifting the ban, Senator Strom Thurmond stated, "[h]omosexuals practice sodomy. The Uniform Code of Military Justice and many states have provisions against sodomy. How would you reconcile the situation with homosexuals in the military?"¹¹⁷ Senator Kerry responded, "[m]ake it consistent for heterosexuals and homosexuals. Whatever the standard is going to be, and apply it appropriately."¹¹⁸ To which Thurmond replied, "[h]eterosexuals

¹¹² *Stephen v. Cheney*, 780 F. Supp. 1, 13–16 (D.D.C. 1991), *rev'd sub nom. Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *aff'd on reh'g en banc sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994).

¹¹³ *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991).

¹¹⁴ *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

¹¹⁵ *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989).

¹¹⁶ *Pruitt v. Cheney*, 963 F.2d 1160, 1166 n.5 (9th Cir. 1991).

¹¹⁷ *Policy Concerning Homosexuality in the Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 103rd Cong. 493 (1993) (statement of Sen. Strom Thurmond).

¹¹⁸ *Id.* (statement of Sen. John Kerry, Member, S. Comm. on Armed Servs.).

do not admit they practice sodomy. . . . Homosexuals do.”¹¹⁹

Anti-gay animus that focused exclusively on threats to what Professor Kenneth Karst once described as “the pursuit of manhood” fueled opposition to gay and lesbian open service.¹²⁰ Curiously, several members of Congress focused on a fear of AIDS to condemn open service by gays and lesbians, ignoring the fact that lesbians are the lowest risk group for that disease, and that the military has a stringent program of medical screening for people in uniform. Speaking in opposition to the new policy, Senator Robert Smith stated, “[p]romiscuity, already a major health problem in the homosexual community, will likely increase in on-base clubs, local nightclubs, and throughout forces deployed worldwide. While some may dismiss this threat as exaggerated, the reality is that such promiscuity could have a very direct impact on the incidence of sexually transmitted diseases within the Armed forces.”¹²¹ Similarly, Senator Frank Murkowski insisted that the decision to open doors to gays and lesbians “will not be a free one. That decision will be paid for in increased funding for VA, or by the veterans VA must turn away in order to care for the new AIDS cases the decision will bring.”¹²² Other members of Congress framed their intolerance of gays and lesbians in religious and moral terms. Representative Floyd Spence characterized “the homosexual lifestyle” as “unnatural and immoral.”¹²³ Representative Duncan Hunter said the policy was “necessary” because “we had homosexual activities with nonconsenting young people in the military go up at a rapid rate.”¹²⁴ He warned that the real reason for his amendment, which would have codified the practice of inquiring about the sexual orientation of military members, was Congress’ duty to their constituents to protect their children in uniform.¹²⁵

The disdain expressed by Congressional leaders was in many ways exceeded by military leaders who spoke candidly about their contempt for gays and lesbians. General Norman Schwarzkopf stated that lifting the ban

¹¹⁹ *Id.* (statement of Sen. Thurmond).

¹²⁰ See Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 U.C.L.A. L. REV. 499, 500–01, 545–47 (1991).

¹²¹ 139 CONG. REC. 2169 (1993) (statement of Sen. Robert Smith).

¹²² *Id.* at 2175 (statement of Sen. Frank Murkowski).

¹²³ *Id.* at 22,724 (statement of Rep. Floyd Spence).

¹²⁴ *Id.* at 22,743 (statement of Rep. Duncan Hunter).

¹²⁵ *Id.*

would simply “destroy the military.”¹²⁶ Admiral Thomas Moorer, a former Chairman of the Joint Chiefs of Staff, saw military service by gays and lesbians as an affront to middle-American values that he believed drove the military to success.¹²⁷ In a statement revealing the enormity of his ignorance, Moorer argued that service by gay personnel would downgrade the moral fiber of the military because their uncontrollable sexual urges and unmistakable effeminate characteristics would render them ineffective as soldiers or military leaders.¹²⁸ He added that excluding gays and lesbians from service was essential to protecting the sensibilities and morale of military wives, as well as to protecting the military from carriers of the most reprehensible type of natural punishment for an immoral lifestyle.¹²⁹

The candid and open disclosure of negative political and military attitudes toward gays and lesbians in uniform was not surprising, given the leverage enjoyed by those leaders who supported DADT during Clinton’s presidency. Partially motivated by the death of U.S. Navy Seaman Allen Shindler, who was murdered because of his sexual orientation, Clinton had promised to lift the ban if elected.¹³⁰ However, the public hostility and political bullying that followed after the election undermined his ability to govern, not only in military affairs, but in all areas of politics.¹³¹ Clinton was faced with a threat from the Joint Chiefs of Staff to resign *en masse* if he persisted on eliminating the ban via an executive order.¹³² He was also portrayed as a draft dodger with no standing to dictate policy to the

¹²⁶ 139 CONG. REC. 2170 (1993) (statement of Sen. Robert Smith, quoting Gen. Norman Schwarzkopf).

¹²⁷ *Proposal to End the Ban on Gays in the Military: Hearing of the Republican Research Committee’s Task Force on Military Personnel* (Feb. 4, 1993) (statement of Admiral Thomas Moorer), available at <http://dont.law.stanford.edu/wp-content/uploads/2010/11/RRCTFOMP-appendixH.pdf>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ About “Don’t Ask Don’t Tell,” SERVICEMEMBERS LEGAL DEFENSE NETWORK, <http://www.sldn.org/pages/about-dadt> (last visited Feb. 16, 2013).

¹³¹ See *The Clinton Years*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/clinton/chapters/3.html> (last visited Feb. 16, 2013).

¹³² See *Gays and the Military*, NEWSWEEK MAG., Jan. 31, 1993, available at <http://www.thedailybeast.com/newsweek/1993/01/31/gays-and-the-military.html>; James Kirchick, *Colin Powell’s Cowardly ‘Evolution’ on Gay Marriage*, N.Y. DAILY NEWS (May 31, 2012), <http://www.nydailynews.com/opinion/colin-powell-convenient-cowardly-evolution-gay-marriage-article-1.1087411>.

nation's honorable military leadership.¹³³ Not surprisingly, Clinton's "compromise" changed essentially nothing.¹³⁴

C. EVIDENCE IGNORED

Concerned about the one-sided political bullying and lack of objectivity during the Congressional debate over the policy, Senator Ted Kennedy filed a separate statement to preserve a record of the hearings in some detail.¹³⁵ Importantly, Kennedy pointed out that the Senate Armed Services Committee had called on experts who relied on anecdotal evidence while ignoring primary research on both the constitutional and practical implications of the issue.¹³⁶ Though the committee had conducted some discussion of the constitutional issues related to the policy, Kennedy pointed out that the committee failed to discuss the key Supreme Court cases relevant to this issue.¹³⁷ With a great deal of dismay, Kennedy also noted that the committee had never called the authors of two studies commissioned by the Department of Defense to give them an opportunity to testify.¹³⁸ Both studies, relying on data from other countries and from the experiences of other paramilitary organizations in the United States, had concluded that gays and lesbians could serve openly without negative consequences to others in uniform.¹³⁹ Lastly, and perhaps most importantly, Kennedy also revealed that he had received over 100 testimonials from heterosexual and homosexual individuals, all of whom were affiliated with Norfolk Naval Base.¹⁴⁰ All 100 individuals opposed the ban, but feared persecution if their names were revealed.¹⁴¹ According to Kennedy, many of those individuals recounted in detail the atmosphere of fear and coercion that existed on military bases while the lifting the ban was being considered, thus precluding an open discussion of issues related

¹³³ *Proposal to End the Ban on Gays in the Military: Hearing of the Republican Research Committee's Task Force on Military Personnel* (Feb. 4, 1993) (statement of Rear Admiral Robert Spiro, Jr., United States Naval Reserve), available at <http://dont.law.stanford.edu/wp-content/uploads/2010/11/RRCTFOMP-appendixH.pdf>.

¹³⁴ BILL CLINTON, MY LIFE 486 (2004).

¹³⁵ 139 CONG. REC. 20,622 (1993).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 20,625.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 20,626.

¹⁴¹ *Id.*

to the ban.¹⁴²

D. NEWLY DISCOVERED EVIDENCE CONFIRMS DISCRIMINATORY
ANIMUS BEHIND THE BAN

Nathaniel Frank, a Senior Research Fellow at the Palm Center, has researched the issue of open service by gays in the military.¹⁴³ Frank's research for his book *Unfriendly Fire* included recent interviews of the architects of DADT.¹⁴⁴ Speaking to members and advisors of the Military Working Group (MWG), which crafted the policy, Frank learned about the intellectual dishonesty that defined the exercise.¹⁴⁵ Minter Alexander, the general who initially headed the MWG admitted that the group did not fully understand the meaning of "sexual orientation."¹⁴⁶ He also admitted that the group "did not have any empirical data" so the conclusions they reached were purely subjective.¹⁴⁷ One group staffer, who had supplied a wealth of research to the MWG said his data was never considered, and that the policy was created behind closed doors by people who were opposed to lifting the ban.¹⁴⁸ Frank also reports that Senator Sam Nunn, the Congressional architect of the ban, manipulated the hearings by removing two witnesses who he knew were opposed to the ban: retired Colonel Lucian Truscott and former Senator Barry Goldwater, who once famously said: "I don't care whether my fellow soldiers are straight or gay, I only care that they shoot straight."¹⁴⁹ Senator Nunn then replaced them with a general who was known as a virulent homophobe.¹⁵⁰

In addition, Frank reports that in an interview with Rear Admiral John Hutson, a former Judge Advocate of the Navy who participated in discussions about whether to lift the ban, he learned that the assessment of

¹⁴² *Id.*

¹⁴³ NATHANIEL FRANK, *UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA* 115–16 (2009).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 116.

¹⁴⁶ *Id.* at 115.

¹⁴⁷ *Id.* at 116.

¹⁴⁸ *Id.* at 115.

¹⁴⁹ Adam Clymer, *Barry Goldwater is Dead at 89; Conservatives' Standardbearer*, N.Y. TIMES, May 30, 1998 at A1, available at <http://www.nytimes.com/1998/05/30/us/barry-goldwater-is-dead-at-89-conservatives-standardbearer.html>. See also BILL CLINTON, MY LIFE 485 (2004).

¹⁵⁰ See FRANK, *supra* note 143, at 104.

gay service was “based on nothing. It wasn’t empirical, it wasn’t studied, it was completely visceral, intuitive.”¹⁵¹ According to Frank, Hutson concluded that the policy was rooted “in our own prejudices and our own fears.”¹⁵² Lastly, Frank reports that Lieutenant Colonel Robert McGinnis, a deeply homophobic evangelical who went on to become vice-president of the Family Research Council, worked hard to couch the discussion in secular terms because he knew that this approach would be more effective than biblical arguments against equal treatment for gays.¹⁵³

VII. IS THERE A LEGAL BASIS FOR REMEDIES FOR HARMS SUFFERED UNDER DON’T ASK, DON’T TELL?

In a 1998 article on reparations, Professor Eric K. Yamamoto noted that one of the major impediments to reparations in the case of Japanese Americans was the lack of a traditional legal principle upon which to base the claims.¹⁵⁴ According to Professor Yamamoto, “despite hindsight recognition of historical injustice, government actors opposed to reparations cited the Supreme Court’s constitutional validation of the internment in *Korematsu v. United States*.”¹⁵⁵ Indeed, Yamamoto observed that it was not until the Supreme Court decided *Korematsu* and *Hirabayashi* that the redress movement regained its political momentum.¹⁵⁶

Fortunately for victims of DADT, the most recent trend in the law favors legal redress for harms inflicted under the policy. In *A Dying Policy* I argued that the policy could be challenged under a “searching rational basis” test.¹⁵⁷ I based my argument on the Supreme Court’s decisions in *United States Dept. of Agriculture v. Moreno*,¹⁵⁸ *City of Cleburne v. Cleburne Living Center*,¹⁵⁹ *Romer v. Evans*,¹⁶⁰ and the Court’s more recent

¹⁵¹ *Id.* at 123.

¹⁵² *Id.*

¹⁵³ *Id.* at 38.

¹⁵⁴ See Yamamoto, *Racial Reparations*, *supra* note 75, at 490.

¹⁵⁵ *Id.* at 489.

¹⁵⁶ *Id.*

¹⁵⁷ Correales, *Don’t Ask, Don’t Tell*, *supra* note 85, at 442–47.

¹⁵⁸ *United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973).

¹⁵⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

¹⁶⁰ *Romer v. Evans*, 517 U.S. 620 (1996).

decision in *Lawrence v. Texas*.¹⁶¹

I argued that a legal challenge to the policy would present a prototypical case of animus-based discrimination.¹⁶² Continued trends in the lower courts, and a recent decision by the Obama Justice Department not to defend challenges to the federal Defense of Marriage Act reinforce the idea that a remedy for real-world effects of the policy may now be available through the courts. The emerging jurisprudence on animus-based discrimination and the new position of the Obama Justice Department represents a changing view of discrimination against politically unpopular groups, and may portend a nascent trend in which courts will begin applying a heightened level of scrutiny to classifications based on sexual orientation. Below, I recount some of the analysis from *A Dying Policy* as a predicate for this possible emerging trend.

In *Moreno*, the Court struck down legislation that was intended to discriminate against hippies, despite the fact it was facially nondiscriminatory.¹⁶³ In amending the Food Stamp Act of 1964:

Congress chose to exclude from the food stamp program any household containing unrelated individuals. Applying a “searching” rational basis test, the Court determined that whether a person is related to other members of a household was clearly irrelevant, and indeed ran contrary to the policies behind the statute. Relying on a Conference Report and a statement on the floor of the Senate, the Court concluded that the purpose of the 1971 amendment to the Food Stamp Act was to exclude “hippies” and “hippie communes” from the food stamp program. The Court then declared that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.”¹⁶⁴

Next, the Court in *Cleburne* rejected a zoning ordinance that required group homes for the mentally ill to get a special use permit while others could operate freely.¹⁶⁵ The Court ruled that the mentally ill “were protected from this type of invidious discrimination. Invoking . . . *Moreno*, the Court held that “[t]he state may not rely on a classification whose relationship to its asserted goal is so attenuated as to render the distinction

¹⁶¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶² See Correales, *Don't Ask, Don't Tell*, *supra* note 85.

¹⁶³ See U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973).

¹⁶⁴ Correales, *Don't Ask, Don't Tell*, *supra* note 85, at 442–43 (citing *Moreno*, 413 U.S. at 529, 534).

¹⁶⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

arbitrary or irrational.”¹⁶⁶ Moreover, the rationale for requiring special use permits stemmed, the Court acknowledged, from “stereotypes of people with mental retardation and paternalism toward that group.”¹⁶⁷ Regardless of the motivation, the Court concluded that “such negative attitudes and fears do not provide legitimate reasons for discrimination, [and therefore] . . . the ordinance violated equal protection, even under the rational basis test.”¹⁶⁸

Justice Marshall, concurring in part and dissenting in part, “reminded the Court that its rational basis analysis was ‘most assuredly not the rational basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*’ Instead, it was a much more searching inquiry into the legitimacy of the justifications given by the state for its classifications.”¹⁶⁹

Nearly a decade after *Cleburne*, the Court in *Romer*¹⁷⁰ held that a Colorado state referendum which barred state and local governments from prohibiting discrimination based on sexual orientation—known as Amendment 2—violated the equal protection clause.¹⁷¹ Colorado claimed Amendment 2 “was merely designed to place gays and lesbians in the same position as all other persons, by denying homosexuals special rights.”¹⁷² However, the Court found such a reading implausible, and pointed out Amendment 2’s sweeping nature.¹⁷³ “The Amendment was not only intended to nullify specific legal protections, but was also designed to forbid reinstatement of those laws and policies, putting gays and lesbians in a solitary class.”¹⁷⁴ The Court:

[R]ecognized the modern trend in anti-discrimination laws that were designed to remedy Congress’ inability to protect individuals against some types of discrimination. . . . [T]he Court stressed that Amendment 2 not only barred homosexuals from securing protection under the public accommodation laws, but also “nullified specific legal protections for

¹⁶⁶ Correales, *Don’t Ask, Don’t Tell*, *supra* note 85, at 443 (quoting *Cleburne*, 473 U.S. at 446).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 444.

¹⁶⁹ *Id.* at 444 (quoting *Cleburne*, 473 U.S. at 458 (Marshall, J. concurring in part, dissenting in part)).

¹⁷⁰ See *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁷¹ Correales, *Don’t Ask, Don’t Tell*, *supra* note 85, at 444–45 (citing *Romer*, 517 U.S. at 623–26, 635).

¹⁷² Correales, *Don’t Ask, Don’t Tell*, *supra* note 85, at 445 (citing *Romer*, 517 U.S. at 626).

¹⁷³ *Id.* (citing *Romer*, 517 U.S. 626–27).

¹⁷⁴ *Id.*

this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”

... Rejecting the state's position that the law did nothing more than deny homosexuals “special rights,” the Court found nothing “special” in the rights denied by the Amendment. Instead, the Court pointed out that Amendment 2 denied homosexuals basic protections taken for granted by most people. The Amendment thus created a class of outsiders, with few basic protections.

The Court [thus] concluded that Amendment 2 did not satisfy rational basis analysis because the Amendment imposed a “broad and undifferentiated disability on a single named group.”...

....

... [T]he Court concluded that Amendment 2, and laws like it, “raise the inevitable inference that the disadvantage imposed is borne of animosity toward the class of persons affected.”¹⁷⁵

In *A Dying Policy* I concluded that:

Moreno, *Cleburne*, and *Romer* illustrate attempts to legislate against a perceived moral or character flaw that does not generally exist in the realm of “traditional” (but uninformed) societal values. In each of those cases the Court rejected unsupported justifications for the discriminatory state action. A mere religious objection to homosexuals in *Romer* could not justify invidious discrimination against that group. The fear of people with mental illness did not support state discrimination in *Cleburne*. And the image of the moral superiority of a nuclear family could not support denying a most basic public benefit in the form of food stamps in *Moreno*.

In each of those cases, the invidiousness of the discrimination and the magnitude of the harm on a politically unpopular group moved the Court to reject the unsupported justifications offered by the state. In those cases the court found that if the statute is “a status-based enactment divorced from any factual context from which [courts] could discern a relationship to legitimate state interest,” the statute must be found to violate the rationality test under equal protection. Significantly, those cases have generated a growing array of lower court decisions consistent with those principles.

[Despite the court’s findings in *Moreno*, *Cleburne*, and *Romer*], courts have stressed that, absent a suspect class or a fundamental right, the

¹⁷⁵ *Id.* at 445–46 (citing *Romer*, 517 U.S. 629–34).

proper constitutional test continues to be traditional rational basis analysis. Ironically, to make that point, courts responding to challenges to Don't Ask, Don't Tell have relied on cases that stand for exceptions to traditional rational basis review such as *Cleburne* and *Romer*. Applying a run-of-the-mill rational basis test those courts concluded that heightened judicial scrutiny did not apply to constitutional challenges to the policy.¹⁷⁶

However, things may be about to change.

VIII. RECENT TRENDS IN THE LAW TEND TO FAVOR LEGAL REDRESS FOR THE HARMS CAUSED BY DON'T ASK, DON'T TELL

In addition to the Supreme Court's overruling of *Hardwick* in *Lawrence v. Texas*,¹⁷⁷ a recent development in the Obama Justice Department provides insight into a legal trend and a new government approach to cases involving discrimination based on DADT. In a letter to Congress dated February 23, 2011, Attorney General Eric H. Holder, Jr. announced that the U.S. Justice Department will no longer be defending cases brought by legally-married same-sex couples¹⁷⁸ challenging the constitutionality of section 3 of the Defense of Marriage Act.¹⁷⁹ According to Holder, the administration defended DOMA in jurisdictions that applied rational basis review to matters involving sexual orientation.¹⁸⁰ But, based on an analysis of relevant Supreme Court cases, Holder and Obama concluded that "classifications based on sexual orientation warrant heightened scrutiny."¹⁸¹ Justice Marshall's observation in *Cleburne* that the Supreme Court was really applying heightened scrutiny¹⁸² may prove prophetic, as Holder agreed that "the Supreme Court has yet to rule on the appropriate level of scrutiny for classifications based on sexual

¹⁷⁶ Correales, *supra* note 85, at 442–50 (footnotes omitted) (citations omitted).

¹⁷⁷ See *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

¹⁷⁸ See Letter from Eric Holder, Att'y Gen., to John Boehner, Speaker of the U.S. House of Rep. on Litig. Involving the Def. of Marriage Act (Feb. 23, 2011), in U.S. JUST. DEP'T, *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

¹⁷⁹ Defense of Marriage Act, 1 U.S.C. § 7 (1996).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 456 (Marshall, J. concurring in part, dissenting in part).

orientation.”¹⁸³

According to Holder, the proper standard for cases involving sexual orientation requires courts to consider: (1) whether the group in question has suffered a history of discrimination; (2) whether individuals “exhibit obvious, immutable, or distinguishable characteristics that define them as a discrete group”; (3) whether the group is a minority or is politically powerless; (4) and whether the characteristics distinguishing the group have little relationship to legitimate policy objectives or to individuals’ “ability to perform or contribute to society.”¹⁸⁴

Each of those factors, Holder stated, counsels for suspiciousness of classifications based on sexual orientation: (1) the government’s significant history of intentional discrimination against gay and lesbian people by the government and private entities “based on prejudice and stereotypes that continue to have ramifications today”;¹⁸⁵ (2) a growing scientific consensus accepts the immutability of sexual orientation,¹⁸⁶ “so it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination”;¹⁸⁷ (3) “the adoption of laws like those at issue in *Romer* . . . and *Lawrence*, the longstanding ban on gays and lesbians in the military, and the absence of a federal law for employment protection for sexual orientation show the group to have limited political power,”¹⁸⁸ and; (4) “there is a growing acknowledgement that sexual orientation “bears no relation to ability to perform or contribute to society.”¹⁸⁹ Holder concluded that “recent evolutions in legislation (including the pending repeal of DADT), in community practices and attitudes, in case law (including the Supreme Court’s holdings in *Lawrence* and *Romer*) and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”¹⁹⁰ Holder’s analysis of the proper

¹⁸³ Letter from Eric Holder, *supra* note 178.

¹⁸⁴ *Id.* (citing *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987), and *Cleburne*, 473 U.S. at 441–42 (1985)).

¹⁸⁵ *Id.* (“Indeed, until very recently, states have “demean[ed] the[] existence” of gays and lesbians “by making their private sexual conduct a crime.”) (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

¹⁸⁶ *Id.* (citing RICHARD A. POSNER, *SEX AND REASON* 101 (1992)).

¹⁸⁷ *Id.* (citing Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111–321, 124 Stat. 3515 (2010)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality)).

¹⁹⁰ *Id.*

standard for discriminatory classifications based on sexual orientation was adopted by the Ninth Circuit in *Log Cabin Republicans v. United States*,¹⁹¹ in which the court allowed the policy to remain but enjoined further discharges pending repeal.¹⁹²

IX. A TRUE RECONCILIATION STRATEGY AFTER REPEAL OF DON'T ASK, DON'T TELL?

Though it may be somewhat optimistic and premature, gays, lesbians, and the military may be in a more favorable position at present to begin a process of reconciliation than the Japanese Americans were in their campaign for reparations in the 1960s. The repeal of DADT followed a sequence of changes in public opinion,¹⁹³ attitudes,¹⁹⁴ and law that coalesced to make the change all but inevitable. Japanese Americans did not reach a similar stage until the 1980s, when the legal landscape was changed by the U.S. Supreme Court in the *Korematsu* and *Hirabayashi* cases.

However, while many cases challenging discrimination under DADT will benefit from *Lawrence* and the Holder-Obama interpretation of the proper analysis of laws that discriminate on the basis of sexual orientation, the strategy of litigation as the sole means of obtaining group remedies would still encounter a significant number of obstacles. By necessity, litigation would focus strongly on tangible remedies, such as monetary damages, benefits, or individual reinstatements. Though individual claims may provide the quickest resolution in many cases, they would be a costly, inefficient, and unpredictable way to obtain a group remedy. More problematic is that a strategy involving a large number of individual lawsuits would risk being characterized as an opportunistic drain on public resources at a time of economic uncertainty, and may turn public opinion against reparations or a reconciliation movement.

As they attempt to move forward with their lives and professional

¹⁹¹ See *Log Cabin Republicans v. United States*, 658 F.3d 1162 (2011).

¹⁹² *Id.* at 1165.

¹⁹³ See ABC News, *Same-Sex Marriage*, POLLINGREPORT.COM (Jun. 27, 2011, 2:12 PM), www.pollingreport.com/civil.htm. (According to a poll conducted by ABC News and the Washington post, 83% of the participants voted that homosexuals in the military who publically disclose their sexual orientation should be allowed to serve in the military).

¹⁹⁴ *Generals and Admirals Who Have Signed a Statement Calling for the Repeal of "Don't Ask, Don't Tell,"* PALM CENTER, <http://palmcenter.org/research/Generals-and-Admirals> (last visited Feb. 16, 2013).

relationships, mass litigation strategy focused strictly on tangible harms may also make it more difficult, if not impossible, to heal the minds and spirits of the victims of discrimination under the policy. It may also create a backlash from resentful political and military opponents. Though a party may win in litigation, a victory in the American adversarial system can generate animosities that cannot be easily overcome. For example, a reinstatement obtained through a court order is not a guarantee that the individual will be welcomed back to his or her old post. In fact, in many work-related cases, a forced reinstatement only means the individual will face other types of discrimination, this time from a more sophisticated and prepared adversary, rendering the reinstatement an empty remedy. Moreover, though the social and legal landscapes appear favorable, a number of factors caution against expectations of early success.

The 1988 Civil Rights Act was passed with overwhelming support in both houses of Congress. In contrast, DADT was repealed during a lame-duck session in which President Obama secured the necessary votes by compromising on the extension of unpopular tax cuts that were set to expire.¹⁹⁵ Since then, Republicans, who overwhelmingly voted against the repeal, managed to capture the House of Representatives and make enough gains in the Senate so as to deny Democrats the ability to block a filibuster. Moreover, despite the passage of the repeal law, the U.S. Justice Department has continued to defend the policy, though not as aggressively as before.¹⁹⁶

In an article entitled *Race Apologies*, Professor Yamamoto suggested a multilayered approach to racial healing that could also be applied to cases of other subordinated groups.¹⁹⁷ Yamamoto's approach draws upon concepts of healing from disciplines such as law, theology, social psychology, and political theory.¹⁹⁸ His approach is not a universal theory of justice, but a way to inquire and act upon real-life intergroup tensions marked by hostility, in which participants at some deep level desire to work to restore "broken relationships."¹⁹⁹ According to Yamamoto, in some cases, "acknowledgement of responsibilities for a

¹⁹⁵ Paul J. Richards, *Lame-Duck Lessons, Don't Ask Repeal Makes History*, USA TODAY (Dec. 20, 2012, 9:56 PM), http://usatoday30.usatoday.com/news/opinion/editorials/2010-12-21-editorial21_ST_N.htm.

¹⁹⁶ See *Log Cabin Republicans*, 658 F.3d 1162; see also *Cook v. Gates*, 528 F.3d 42 (2008).

¹⁹⁷ See Eric K. Yamamoto, *Race Apologies*, J. GENDER RACE & JUST. 47, 52 (1997).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

racial group's historical wounds may itself be enough to foster healing."²⁰⁰ In other cases, "something more may be needed, because 'repentance without restitution is empty.'"²⁰¹ In Yamamoto's view, this approach requires a dual performance.²⁰² The oppressor offers an apology and reparations, and the victim endeavors to forgive.²⁰³

As Professor Yamamoto and others have suggested, especially given the favorable state of the law, litigation can and must play a central role in a campaign for reconciliation. But reconciliation requires more than a simple declaration of a winner and a loser. It also requires a two-sided commitment to a healing process. Reconciliation requires that both sides work to find a remedy while minimizing differences and mending relationships. As the history of prior successful reparations campaigns show, this process does not happen very quickly.²⁰⁴

In an article examining litigation as a vehicle for reparations for African Americans, Professor Charles J. Ogletree suggested that litigation strategies are a useful first step toward insuring justice for those seeking reparations.²⁰⁵ Ogletree also suggested that advocates for people seeking reparations should begin to promote the convergence of interests between themselves and the reluctant majority.²⁰⁶ Ogletree relied on Professor Derrick Bell's influential work on "interest convergence," which, in the context of race relations, provides that: "the interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."²⁰⁷ Bell's analysis established that the issue of school desegregation was not new in the 1950s when *Brown v. Board of Education* was decided, because the African American community had been attacking those policies for over 100 years.²⁰⁸ According to Bell, the success of *Brown* is best understood by looking at the gains white

²⁰⁰ *Id.* at 54.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* (It took over forty years for Japanese Americans to receive reparations, and other reparations have also taken a significant amount of time.).

²⁰⁵ See Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivor's Story*, 24 B.C. THIRD WORLD L.J. 13 (2004).

²⁰⁶ *Id.* at 15.

²⁰⁷ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

²⁰⁸ *Id.* at 524.

policymakers stood to make if they dismantled segregation laws.²⁰⁹ Those gains included instant credibility against a growing communist movement abroad, improved race relations with returning black war veterans, and enabling the industrialization of the South, which was hampered by racial segregation.²¹⁰ Ogletree's and Bell's approaches fit neatly into Yamamoto's multilayer design.

Applying Bell's "interest convergence" principle, a reparations campaign for the victims of DADT and its predecessor may be offered as an opportune, mutually beneficial next step, from which both sides can emerge in substantially better positions. The repeal of DADT came only after all other industrialized nations had repealed their own gay bans. Indeed, much of the criticism of the U.S. military came in the form of comparisons with other similarly-situated countries.²¹¹ Those comparisons damaged the reputation of the military domestically and abroad by making the military appear out-of-touch and behind the times. As Dr. Aaron Belkin has pointed out, a good reputation is critical to a military that is stretched to the maximum, especially during unpopular wars.²¹² Though the U.S. military enjoys a great deal of support among the American public for the difficult job it must perform, Belkin showed that DADT damaged the reputation of the military in several ways: it was inconsistent with public opinion;²¹³ media coverage of the policy had been overwhelmingly negative;²¹⁴ the policy served as a rallying point for antimilitary activists;²¹⁵ and service members themselves opposed the policy.²¹⁶

As it moves forward, the military must repair the damage to its reputation caused by political and military leaders who insisted on implementing a discriminatory policy when the interests of the nation called for the deployment of all the talent it could muster. A true reconciliation between the military and gays in uniform can only benefit a

²⁰⁹ *Id.*

²¹⁰ *Id.* at 524–25.

²¹¹ Aaron Belkin, "Don't Ask, Don't Tell" Does the Gay Ban Undermine the Military's Reputation?, 34:2 ARMED FORCES & SOCIETY 276, 282 (2008), available at <http://palmcenter.org/files/active/0/DADTandMilitaryRepPalm.pdf>.

²¹² *Id.*

²¹³ *Id.* at 278–80.

²¹⁴ *Id.* at 280–83.

²¹⁵ *Id.* at 283–84.

²¹⁶ *Id.* at 283–87.

military seeking a more favorable public image.

A true reconciliation in this case may also be made possible by a pragmatic remedy that can benefit both sides and lead to enduring changes. In the eighteen years that the policy was effective, the military discharged over 14,000 gay personnel. Of that number, numerous discharges involved personnel with critical skills, such as language specialists (at least seventy of whom spoke Arabic); nuclear, chemical, and biological warfare specialists; medical specialists, infantry specialists, and intelligence analysts. Those discharges were hugely unpopular because they reflected a triumph of bigotry over military wisdom. Discharges of personnel in less crucial occupations were equally unpopular when it was revealed that the military lowered its recruitment standards because of the shortage in personnel. Importantly, many of the individuals discharged expressed a willingness to continue their careers if DADT were to be repealed.²¹⁷ Reinstatement of discharged service members not only serves the interest of justice, it also enables the military to redeploy a wealth of talent and experience. It may also enable the military to avoid litigation for reinstatement, or litigation over benefits that were denied as a result of discharges pursuant to the policy, enhancing its public image. In addition to reinstating those who wish to continue serving, military and political leaders must also consider a remedy for those who were harmed by the policy. In the same manner that the Japanese American victims of internment could not have been made whole without a monetary remedy, the real-world harms caused by DADT and its predecessor cannot be erased by simply repealing the discriminatory law.

Perhaps most important of all, a public apology will finally put to rest the idea that gay military personnel were somehow lesser than those with whom they served. A public apology will begin to restore the dignity and personhood that gays in uniform were denied under the policy and its predecessor. It will also enable the military to begin atoning for decades of emotional and psychological harm caused by its discriminatory policies. A public apology will enable the implementation of the new policy, help create a new commitment to fairness and justice, and help smooth out the restructuring of the institution as it lays a firm foundation for the new changes.

²¹⁷ See Letter from Juan C. Perezortiz to President Barack Obama, *supra* note 30.

X. CONCLUSION

The repeal of Don't Ask, Don't Tell represents an important step in the evolution of this country into a fair and just society. However, repeal is not enough to completely heal the devastating wounds caused by the discriminatory policy. The effects of discrimination, harassment, abuse and maltreatment continue to be felt throughout American society. It is therefore appropriate to begin considering a make-whole remedy that will finally end one of the truly dark chapters in American history. That remedy should vindicate the names of those who did not live to see the repeal of the policy, apologize for harm caused, honor the names of all who served, and endeavor to make whole those who lost opportunities and benefits of service for simply being homosexual. The military often says that waging successful war campaigns first requires that the military win the hearts and minds of those that it seeks to protect. It can also be said that waging successful military campaigns requires that the military win the hearts and minds of the American public. A true reconciliation with its many gay military heroes will help it do both.